JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	:	SLATER -v- STRAWBERRY JOHN PTY LTD [2002] WASC 204
CORAM	:	HASLUCK J
HEARD	:	6-9 & 24 MAY 2002
DELIVERED	:	27 AUGUST 2002
FILE NO/S	:	CIV 1922 of 1996
BETWEEN	:	WILLIAM DIARMID SLATER Plaintiff AND STRAWBERRY JOHN PTY LTD Defendant
FILE NO/S	:	CIV 2298 of 1995
BETWEEN	:	STRAWBERRY JOHN PTY LTD Plaintiff AND WILLIAM DIARMID SLATER First Defendant REGISTRAR OF TITLES Second Defendant

Catchwords:

Constructive trust - Property acquired at auction pursuant to informal bidding arrangement - Benefit of auction contract assigned to defendant company - Role of agent in effecting the assignment - Fraud alleged - Whether defendant company took with knowledge of agent's conduct - Role of company directors - Plaintiff's claim to enforce constructive trust - Defendant company bound by constructive trust

Legislation:

Property Law Act 1969, s 34(1), s 34(2)
Transfer of Land Act 1893, s 68, s 134

Result:

Judgment for the plaintiff

Category: B

Representation:

CIV 1922 of 1996

Counsel:

Plaintiff	:	Mr C L Zelestis QC & Mr M J Feutrill
Defendant	:	Ms N Johnson QC & Ms J M Tavelli

Solicitors:

Plaintiff	:	Butcher Paull & Calder
Defendant	:	Blakiston & Crabb

CIV 2298 of 1995

Counsel:

Plaintiff	:	Ms N Johnson QC & Ms J M Tavelli
First Defendant	:	Mr C L Zelestis QC & Mr M J Feutrill
Second Defendant	:	No appearance

Solicitors:

Plaintiff	:	Blakiston & Crabb
First Defendant	:	Butcher Paull & Calder
Second Defendant	:	No appearance

Case(s) referred to in judgment(s):

Australian Broadcasting Corp v XIV Commonwealth Games Ltd (1988) 18 NSWLR 540
Avondale Printers & Stationers Ltd v Haggie [1979] 2 NZLR 124
Bahr v Nicolay (No 2) (1988) 164 CLR 604
Beach Petroleum NL and Claremont Petroleum NL v Johnson & Ors (1993) 115 ALR 411
Breskvar v Wall (1971) 126 CLR 376
Briginshaw v Briginshaw (1938) 60 CLR 336
Frazer v Walker [1967] 1 AC 569
Giumelli v Giumelli (1996) 17 WAR 159
Giumelli v Giumelli (1999) 196 CLR 101
Koorootang Nominees Pty Ltd v ANZ Banking Group [1998] 3 VR 16
LHK Nominees Pty Ltd v Kenworthy [2001] WASC 205
Muschinski v Dodds (1985) 160 CLR 583
Ninety Five Pty Ltd (In Liq) v Banque Nationale de Paris [1988] WAR 132
Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd (1984) 157 CLR 149
Posgold (Big Bell) Pty Ltd v Placer (WA) Pty Ltd (1999) 21 WAR 350
Royal Botanic Gardens and Domain Trust v South Sydney Council (2002) 186 ALR 289
Stowe & Anor v Stowe (1995) 15 WAR 363
Taylor v Johnson (1983) 151 CLR 422
The Hancock Family Memorial Foundation Ltd & Anor v Porteous (1999) 151 FLR 191
Walden Properties Ltd v Beaver Properties Pty Ltd [1973] 2 NSWLR 815
ZBB (Australia) Ltd v Allen (1991) 4 ACSR 495

Case(s) also cited:

Barnes v Addy (1874) 9 Ch App 244
Blomley v Ryan (1956) 99 CLR 362
Boulas v Angelopoulos (1991) 5 BPR 11,477

Chan v Zacharia (1984) 154 CLR 178
Clegg v Edmondson (1857) 44 ER 593
Comalco Aluminium Ltd v Garraway Metals Pty Ltd No V6463 of 1992 FED No 903 Trade Practices - Contract - Federal Court of Australia; 8 December 1993
Farley (Aust) Pty Ltd v J R Alexander & Sons (Qld) Pty Ltd (1946) 75 CLR 487
Green v Nixon (1857) 23 Beav 530; 53 ER 208
Homeward Bound Gold Mining Co NL v McPherson (1896) 17 LR (NSW) Eq 281
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
In re Jarvis (dec) [1958] 1 WLR 815
Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liq) (1965) 113 CLR 265
Mair v Rio Grande Rubber Estates Ltd [1913] AC 853
New Brunswick & Canada Railway Co v Conybeare (1862) 11 ER 907
Warman International Ltd v Dwyer (1995) 182 CLR 544
Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd [1995] QB 174

1 **HASLUCK J**: The plaintiff, William Diarmid Slater, seeks a declaration that the defendant company holds a piece of land at West Swan upon constructive trust in his favour.

2 The subject land, known in these proceedings as Lot 16, was the former residence of the plaintiff and his family, but was then offered for sale at a public auction when default was made under a bank loan secured by a mortgage over the land. The plaintiff claims that prior to the auction a verbal arrangement was made whereby a third party would bid for and acquire the land on his behalf. He says further that as a consequence of fraudulent conduct after the auction the land was vested in the defendant company in circumstances which would make it inequitable for the company to retain the same.

3 There was comparatively little disagreement between the parties about the principles bearing upon the creation of constructive trusts. It was a matter of acute controversy between the parties as to whether the acts and matters relied upon by the plaintiff took place and, in particular, as to whether the defendant company can be said to have acquired the land with knowledge of what is said to have occurred. It therefore becomes necessary to look closely at the relevant events with a view to evaluating the cases of the respective parties and the credibility of their witnesses.

The Subject Land

4 The plaintiff was associated with a riding school which had to be closed when the land on which it traded was resumed for the Perth International Airport. In order to relocate the riding school two adjacent lots comprising approximately 20 hectares were purchased in the name of Casula Nominees Pty Ltd as trustee for a family trust known as the Summerfield Trust. The two adjacent lots, 15 and 16, together known as "Sweetwater", were situated in Woollcott Avenue, West Swan. The riding school and a residence for the Slater family was established on Lot 16. It seems that Lot 15 was essentially unimproved land which was originally zoned as "rural" under the Metropolitan Region Scheme and as "general rural" under the Shire of Swan Town Planning Scheme No 9. Development under that zoning was restricted to rural pursuits.

5 In the course of relocating the riding school, Casula obtained $300,000 by way of bridging finance from the R&I Bank (which was destined to become Bankwest). This money was to be repaid out of the anticipated proceeds from the resumption of the former riding school.

However, due to an error in the calculation of the amount to be received, there were insufficient funds available to repay the loan and the Bank took steps to recover the debt. Casula was eventually placed in liquidation.

6 Security for the loan to the Bank was in the form of a mortgage which related only to Lot 16, being the lot on which the family home and other improvements were situated. Lot 15 was entirely unencumbered.

7 The demand for payment from the Bank prompted the plaintiff to take various steps to alleviate his predicament. He commenced proceedings against Casula in respect of the amount he had spent effecting the improvements on Lot 16 and obtained a judgment in default of appearance against the company on 3 June 1994 for the sum of $436,800 together with interest. On 5 August 1994 he lodged a caveat over Lot 16 claiming an interest in fee simple as a life tenant pursuant to an order of the Family Court of Western Australia. A few days later he caused another caveat to be lodged over the same land by which he claimed an interest in the land as a tenant pursuant to a deed made 21 October 1993 between Casula and himself.

8 In addition, in August 1994, prior to Casula going into liquidation, Mr Slater arranged for Casula to transfer its interest in Lot 15 to a company controlled by him called Kingswood Nominees Pty Ltd.

9 It was against this background that the plaintiff, essentially on behalf of Kingswood Nominees, set about trying to sell a half interest in Lot 15 in order to raise sufficient money to pay out the Bank and discharge the mortgage affecting Lot 16.

10 The plaintiff agreed under cross-examination that he did not at any stage invite offers for the land by advertisement but he did participate in private negotiations. At that time he was pre-training a horse for a man named Barry McColl whom he had met some two to three years earlier through their mutual involvement in the horse racing industry. He informed McColl of the difficulties that he was having with the Bank with the result that he was looking to sell half of Lot 15. This led to some discussion taking place in or about October 1994 with Mr McColl and his business partner Mr Campbell Smith about the Slater proposal to sell a half share of Lot 15. At that time Mr McColl and Mr Smith were running a car sales business known as Motor Easy at premises on Albany Highway. They were sympathetic, but nothing eventuated.

11 The plaintiff also had some discussions with the Willcocks family, and these discussions looked more promising.

12 In the plaintiff's opinion a half share in Lot 15 was worth approximately $1,000,000. He had bought the land on the basis that it was earmarked as a special rural zone which would allow sub-division into five acre lots. Amendments to the Metropolitan Region Scheme in 1994 whereby the land was rezoned to "urban deferred" had a bearing upon this issue. It was not entirely clear as at late 1994 what form of development represented the most fruitful use of the land but it seems that various alternatives were available which were likely to make the land attractive to prospective purchasers.

13 On 21 January 1995 a Heads of Agreement was signed with the Willcocks family to purchase half of Lot 15 for $750,000. A deposit of $50,000 had been paid into the trust account of the law firm, Lawton Gillon Tydde, together with another $18,515.95 being an agreed commission. Settlement was scheduled for 21 April 1995 but the Willcocks family defaulted and the sale did not proceed. Under cross-examination the plaintiff said that this was due to the conduct of the plaintiff's business and legal adviser, Mr Michael Adams, although the exact nature of the conduct causing concern was not made clear.

14 This default left the plaintiff in a predicament, for arrangements had been made by the Bank to proceed with a sale of Lot 16 by public auction through the agency of the auctioneer John Garland. The auction was fixed for Saturday, 6 May 1995, on the property at 11.00 am.

The April Events

15 According to the plaintiff, on Saturday 22 April 1995, that is to say, a fortnight before the auction date, he met with Mr McColl at the Motor Easy business premises on Albany Highway and asked whether Mr McColl and his business partner Mr Smith were still interested in purchasing a half share of Lot 15. The plaintiff said in his evidence in chief that Mr Smith was on the premises and attended the meeting, but was called away from time to time to attend to customers. Nonetheless, throughout the meeting Mr Smith dropped in to see how things were going. He was kept advised of the progress of the discussion between the plaintiff and Mr McColl.

16 On that day, according to the plaintiff, he agreed with Mr McColl that the latter would borrow the sum of $1,000,000 of which $250,000 would be used to meet stamp duty and expenses associated with the transfer of a half share in Lot 15 to Mr McColl and Mr Smith. Casula, which was in liquidation by this time, would satisfy its debt to the R&I

Bank so that Lot 16 would be withdrawn from auction. Any balance remaining after discharge of the debt would be placed into a joint interest bearing account in the names of the plaintiff, McColl and Smith and be used to service the net borrowings. Kingswood would allow Lot 15 to be used as security for any borrowings. A half interest in Lot 15 would be transferred to McColl and Smith in equal shares as tenants in common.

17 The plaintiff said in evidence that the relevant parts of this agreement were reduced to writing and signed by the plaintiff and McColl so that the latter could produce the agreement to his bank. In addition, brief notes setting out the main points of the original agreement were typed out and photocopied. The original agreement was not available at the trial of the action but the typed notes were received into evidence. They read as follows:

> "NOTES ON ORIGINAL
>
> (1) The proposal is for B. McC to borrow 1,000,000 for the purchase of 1/2 Lot 15.
>
> (2) 2 year term interest only. No principle.
>
> (3) $750,000 to Slater.
>
> (4) $250,000 into joint account.. $50,000 for transfer and Stamp Duty.
>
> (5) You and I agree that we are 50/50 partners in Lot 15.
>
> (6) Sell the property after we split the resumption money. Pay the principle. Split the profit.
>
> WDS BMcC"

18 For ease of reference, I will henceforth refer to the evidence given by the plaintiff concerning this transaction as the "alleged agreement of 22 April".

19 The plaintiff said in evidence that he gave Mr McColl a copy of a sworn valuation which he had previously obtained from a valuer named Terry Dix disclosing a value for Lot 15 of $2,000,000. Mr McColl was at liberty to use this document in seeking to borrow funds. The plaintiff was encouraged by Mr McColl's positive attitude at the meeting and was left with the impression that Mr McColl, because of his good relationship with

his bank manager, would have no difficulty in arranging finance through the Challenge Bank.

20 I digress briefly to note that the Dix' valuation is dated 10 April 1995 and is directed to the Directors of Kingswood Nominees. The valuation is in a conventional form. It runs for thirteen pages and is directed to zoning and other matters bearing upon the value of Lot 15. I emphasize that it was not received into evidence for the purpose of establishing value but in order to explain certain steps taken by those with an interest in Lots 15 and 16.

21 It seems that on 30 December 1994 an amendment to the Metropolitan Region Scheme was gazetted to give effect to the structure plan for the north east corridor of the metropolitan region. The consequence was that the land was rezoned under that scheme to "urban deferred" with the possibility that it would be rezoned to "urban" at a later stage. Nonetheless, as the Municipal Town Planning Scheme allowed for "special rural" development within the existing framework Mr Dix undertook a valuation of the land based upon a scenario of that kind. As appears from his report dated 10 April 1995, he concluded that the value of the land prior to the rezoning was of the order of $1,170,000. The current market value, with the benefit of the rezoning, was of the order of $2,000,000.

22 The plaintiff said in evidence that a few days after his meeting with Mr McColl on 22 April 1995, Mr McColl contacted him to say that his application to the Challenge Bank had been refused. However, he had secured an alternative source of finance from Motor Easy's landlord, Sam Rando. He asked for permission to take Mr Rando to the site and the plaintiff agreed to this request.

23 According to the plaintiff, he then met with Mr Rando at McColl's office. The plaintiff was accompanied by Mr Adams. The others present at the meeting were Mr McColl, Mr Smith and Mr Rando. During the course of the meeting Mr Rando touched upon the possibility of simply buying Lot 16 at the forthcoming auction rather than buying a share of Lot 15. The plaintiff said in evidence that he was quick to negate this notion. He pointed out that he had caveats over Lot 16 and the sale at the auction would be subject to removal of the same, and this would be resisted by the plaintiff. The plaintiff said in evidence that Mr Rando seemed to lose interest in providing finance as a consequence of these remarks and the meeting did not lead to any clear outcome.

24 In the meantime, it seemed that another avenue of assistance was opening up for Mr Slater. He had been discussing his difficulties with a long standing friend, Mr Hare, and an arrangement had been discussed whereby Mr Hare would make an application for finance with a view to acquiring a half share of Lot 15 so that the plaintiff and Mr Hare could develop Lot 15 jointly. Mr Hare had submitted an application for finance to a company called Asset Backed Securities Ltd and supported the application with a copy of the Dix valuation. By letter dated 27 April 1995 ABS had written to Mr Hare making what was described as a conditional offer to lend $980,000 on the security of Lot 15 subject to approval by the mortgagee and a number of other terms and conditions set out in the letter. Mr Hare conveyed this news to the plaintiff.

25 The plaintiff said in evidence that the news concerning the ABS approval came as a great relief to him. There was now a prospect that he could either persuade the R&I Bank not to proceed with the auction of Lot 16 or, if necessary, he could bid for the lot at the auction.

26 I pause to note that under cross-examination Mr Hare acknowledged that some weeks would be involved in preparing the documents required to carry the ABS offer of finance into effect. However, he maintained that if the plaintiff was able to raise funds for a deposit from some other source, it would be open to either the plaintiff or Mr Hare to bid for Lot 16 at the auction upon the basis that the price for Lot 16 could be financed by the borrowed funds obtained by Mr Hare pursuant to the ABS offer.

27 The evidence led at trial indicated that the plaintiff continued to negotiate with Mr McColl but without any assurance as to whether Mr Rando would provide finance or as to how exactly the matter should proceed. It seems that the question of whether it would be more attractive to purchase Lot 16 than to acquire Lot 15 remained unresolved. The plaintiff acknowledged in his evidence that Mr McColl was trying to get the price for a half share in Lot 15 reduced and was generally, as the plaintiff described it in his evidence, trying to "crunch" the plaintiff.

The 5 May Events

28 On Friday, 5 May 1995, according to the plaintiff, he and his adviser Mr Adams brought the negotiations with Mr McColl to a close when Mr Adams asked Mr McColl to return all the documents which had been provided to him during the course of the negotiations including the Dix valuation and letters confirming governmental plans for the area. At

about midday McColl was told that the plaintiff was going to finalise arrangements with Mr Hare in respect of the auction which was due to take place the following day. The tenor of the plaintiff's evidence at the trial was that the proposal being negotiated with Mr McColl was more attractive if it could be brought to fruition because, unlike the Hare proposal, it involved an outright sale of a half share in Lot 15 which would permit the plaintiff to discharge his liability to the bank. The Hare proposal would commit the plaintiff to what was essentially a joint venture to develop the subject land. Nonetheless, it seemed that the plaintiff was left with no alternative but to follow the route opened up by Mr Hare.

29 The plaintiff said in evidence that he and Mr Adams drove immediately to Mr Hare's office on Canning Highway and advised him that the negotiations with Mr McColl and Mr Smith had fallen over. The plaintiff then agreed with Mr Hare that the latter would go ahead and borrow the sum of $980,000 using Lot 15 as security in the manner envisaged by the ABS offer of finance. Both men were conscious that if the Bank could not be persuaded to withdraw Lot 16 and a need arose to bid at the auction the Bank's auctioneer might not be willing to accept a bid from the plaintiff.

30 The question of how exactly to proceed was referred to an accountant friend of Mr Hare, Mr John Arndell, who advised that an approach be made to the Bank prior to the auction. Mr Arndell agreed to come to the auction with a view to making representations to the Bank concerning the proper course to be followed where a debtor company such as Casula was in liquidation.

31 The plaintiff's attempt to communicate with the R&I Bank's legal officer pursuant to the Arndell advice were unsuccessful. The plaintiff and Mr Hare then returned to the plaintiff's house at Albert Road in Middle Swan where Mr Hare drafted a letter to Mr George Prokojes, a senior financial officer at the Bank. The plaintiff contacted Mr Prokojes at home and was told that the latter would be going straight to the auction in the morning. The plaintiff said in evidence that he therefore decided not to fax the letter but to hand it to Mr Prokojes at the auction the next day. A factor in his decision was that the Dix valuation was referred to in the Hare letter and it would be difficult to fax a document of that length to Mr Prokojes.

32 The Hare letter to Mr Prokojes did not make any explicit reference to the ABS offer. The thrust of the letter was that the reasoning reflected in

the Dix valuation concerning Lot 15 was applicable to Lot 16 with the result that the Bank could be at risk in proceeding with a mortgagee's sale that did not produce a price conforming to the true value of the land. The letter signed by Mr Hare reads in part as follows:

> "I urge you to meet with Bill and myself prior to tomorrow's scheduled auction and review this new evidence which demonstrates both that the banks exposure is secure and that the valuations on which we understand you have relied on are seriously flawed.
>
> At that time I will demonstrate and confirm my intentions to enter into a joint venture with Mr Slater by purchasing Lot 15, which will provide him with sufficient funds to pay out the bank."

33 Mr Hare's letter concluded as follows:

> "While I am not able to provide the funds for Mr Slater to settle with your bank tomorrow, I believe from my experience that the evidence of my intentions to purchase Lot 15 and the evidence and rationale above about the inappropriateness of proceeding to auction of Lot 16 will provide the bank with sufficient justification to withdraw the property from the market.
>
> I have an offer of finance on conditions which are acceptable to me and to Mr Slater as guarantor and will provide you with a copy of the relevant letter of offer prior to the scheduled time of auction."

The Auction Day Events

34 The events on the day of the auction were a matter of acute controversy between the parties at the trial of the action. For the sake of an orderly narrative, I will begin by referring to the plaintiff's version of the relevant events. However, in doing so, I emphasise that my account should be regarded simply as narrative. I will return to the question of what findings of fact are to be made later.

35 The plaintiff said in evidence that early on the morning of Saturday, 6 May 1995 he received a telephone call from Mr McColl to the effect that Mr Rando had come good with the money and was prepared to proceed with the purchase of a half share of Lot 15 provided the price was not more than $800,000. Mr McColl allegedly said: "If you'll accept

$800,000 we'll do the deal." The plaintiff understood this to be a reference to Mr McColl, Mr Smith and Mr Rando being willing to do the deal.

36 Mr McColl said further that he had $80,000 which could be used as a deposit if the plaintiff needed to secure Lot 16 at the auction. According to the plaintiff this telephone call took place while he was in his car on the way to the property so he told Mr McColl to meet him there as quickly as he could.

37 I note in passing that in his evidence at the trial Mr McColl initially denied that he had made a telephone call of any kind to Mr Slater on the morning of the auction. However, when his attention was drawn to an Optus telephone account relating to a telephone call of about one minute at 10.25 am on that day, he agreed under cross-examination that he must have contacted Mr Slater. Mr McColl said in evidence that he could not recall what they talked about. He denied that the subject matter of the call was as alleged by Mr Slater.

38 The plaintiff said in evidence that when Mr McColl arrived at the Sweetwater Property the plaintiff was talking with his two friends, Mr Lazenby and Mr Hare, and with Mr Hare's accountant, Mr Arndell. He told Mr McColl in the presence of Mr Hare, Mr Arndell and Mr Lazenby that he was only prepared to sell half of Lot 15 if he was successful in getting Lot 16 back. Mr Hare was conscious that the deal with Mr McColl was a better deal for the plaintiff because the Hare arrangement involved the servicing of a large loan. Mr Hare agreed that he was prepared to step aside.

39 The plaintiff went on to say that prior to the commencement of the auction he was approached by the late Michael Scaffidi who was a real estate and settlement agent who was known to the plaintiff. Mr Scaffidi and his business associate, Mr Garry Brown-Neaves were interested in the land and this conversation led the plaintiff to believe that the auctioneer's reserve price for Lot 16 was $750,000 which appeared to be well below the true value of the land having regard to the Dix valuation of Lot 15 at $2,000,000. It seemed to the plaintiff that it was now critical that Lot 16 be withdrawn from auction and he therefore proceeded to seek out Mr Prokojes who was present with some other Bank employees.

40 The plaintiff showed Mr Prokojes the Hare letter, the ABS letter and the Dix valuation of Lot 15 but was unable to persuade Mr Prokojes to withdraw Lot 16 from auction. According to the plaintiff, he then went

back to his group of supporters and told Mr McColl that the Bank would not withdraw Lot 16 and if Mr McColl and his backers wanted a half share of Lot 15 then Mr McColl would have to bid for Lot 16 on behalf of the plaintiff. The plaintiff said in evidence that Mr McColl agreed to this arrangement but said he only had access to $80,000 to meet whatever deposit might be required.

41 For ease of reference, I will henceforth refer to these and related verbal exchanges, which were central to the plaintiff's case, as the "alleged Slater/McColl bidding arrangement".

42 The plaintiff's evidence was that in the presence of Mr Lazenby, Mr Adams, Mr Hare and Mr Arndell, he told Mr McColl not to stand too close to the group during the auction so that the Bank would not make any association between Mr McColl and the group. Mr McColl was to keep his eyes on the plaintiff if the bidding went above $850,000 so that a signal could be sent as to whether he should keep bidding or pull out. In essence, on the plaintiff's case, Mr McColl was to act as the plaintiff's agent in bidding for Lot 16 at the auction.

43 I digress briefly to say that on the defendant's case no such agreement or arrangement was made. As I have already indicated, Mr McColl accepted that he spoke to the plaintiff by telephone prior to arriving at the auction site but denied that he made any promise of financial support to Mr Slater. He said he did not have anything much for Mr Slater. His witness statement included this passage:

> "I attended the auction on the morning of 6 May 1995. Slater was standing with a group of people whom I did not know. He appeared to me to be very emotional. He came over to me. I said words to the effect that I hoped things worked out for him and that I had raised a deposit and was able to go to $80,000, but that I did not know the future intentions of the buyers if they were successful. I did not say that I was bidding for Slater or that I would hold the property for him if I bought it. I made it clear that I was there representing others who had come up with a deposit of some $80,000 and of whose future intentions I was unsure. I said that I would rather not bid and go back to work. Slater then walked away and I thought that was the end of it. He did not say anything more to me at the auction."

44 Mr McColl went on to say in his evidence in chief that as a result of a conversation he had about 20 minutes later with Mr Slater's friend and

adviser, Mr Adams, he understood that Mr Slater accepted that he had lost Lot 16 and that Mr McColl was free to bid for Lot 16 on behalf of the group he represented.

45 In order to understand Mr McColl's evidence that he was representing others and felt free to bid for Lot 16 on behalf of the group he represented, it becomes necessary to review some evidence provided by Mr McColl and other witnesses for the defendant concerning the period leading up to the auction.

46 Mr Rando had made it clear that he was simply not interested in becoming involved in a plan to purchase a half share of Lot 15. However, according to evidence given by Mr McColl, in the period prior to the auction Mr Rando agreed that if Lot 16 could be purchased for a reasonable price it would be a good buy. Mr McColl said in evidence that he understood from this that Mr Rando would provide the deposit money if Mr McColl was able to purchase Lot 16 for a reasonable price.

47 Mr McColl was of the view that if Lot 16 could be bought for less than $1,000,000 it would be a bargain. His conversations with other prospective investors led him to believe that if Mr Rando covered the deposit the balance of the purchase price could be raised by borrowings and from the investors. The thrust of his evidence was that he went to the auction and was ready to act if an opportunity arose.

48 I will return to the particularity of Mr McColl's evidence in due course and to the question of to what extent he was in a position to meet a substantial purchase price for Lot 16 if he decided to bid. Suffice it to say for the moment, however, that the evidence given by Mr Rando and by Mr Smith directed to this point was somewhat inconsistent with the evidence of Mr McColl. According to Mr Rando, a day or so before the auction he spoke to Mr Smith and Mr McColl about the matter and an agreement was reached that Mr McColl would bid on behalf of Mr Smith, Mr McColl and Mr Rando to a maximum of $650,000. However, at no time prior to the auction did Mr Rando offer to provide a deposit of $80,000 or to finance the purchase of Lot 15 or Lot 16 for any amount. Mr Smith said that he was aware that Mr McColl had had discussions with Mr Rando but was not aware of any agreement reached between them. He did not know that Mr McColl was going to bid at the auction. There is therefore a difficult evidentiary issue to be resolved at a later stage as to what exactly Mr McColl meant by his assertion that he was "representing others", if it be found that he uttered words to that effect.

49 I must now return to the task in hand, that is to say, of providing an overview of events on the day of the auction. This brings me to the commencement of the bidding.

The Bidding and Related Events

50 It was common ground at the trial that Mr Brown-Neaves participated in the bidding to begin with but dropped out. According to Mr McColl, when the bidding reached $800,000 he stopped bidding as that was his limit. However, Mr Adams, who was standing behind him, urged him to continue, and he understood this to mean that Mr Adams would cover any extra deposit that might be required. Shortly afterwards, the auctioneer's hammer fell in favour of Mr McColl at a price of $840,000. According to Mr McColl, without further ado, and without speaking to Mr Slater, he went inside the house with the auctioneer and the Bankwest representatives in order to sign the contract.

51 According to Mr McColl, he told the agent and Bankwest people that he was buying for a group of people and it was likely the land would go to a nominee company. As it happened, his own name was placed on the relevant document as purchaser (without any reference to a nominee) because the Bankwest lawyer said that the name of the actual buyer could be sorted out subsequently. Mr McColl said in his evidence in chief that he did not at any time agree to bid at the auction on behalf of Mr Slater and nor did he agree to assign the benefit of the contract to purchase Lot 16 to Mr Slater or his nominee.

52 The contract signed by Mr McColl provided for the deposit to be paid within two business days from the fall of the hammer, that is to say, by Tuesday, 9 May 1995. The settlement date prescribed for payment of the balance of the purchase price was a month after the auction, on 7 June 1995.

53 Mr Slater provided a different account of what took place. He said that immediately following the fall of the hammer he spoke to Mr McColl and thanked him. He told Mr McColl that he should put his (McColl's) own name and/or nominee on the contract for sale. When Mr McColl came out of the house after signing the documents the plaintiff asked him back to his house in Albert Road for lunch and to discuss what was going to happen in relation to Lot 15.

54 According to the plaintiff, Mr Lazenby, Mr Hare, Mr Arndell and Mr Adams were present at the lunch on which occasion the events of the

auction were discussed freely as was the fact that Mr McColl had bought half of Lot 15 and had been bidding at the auction of Lot 16 on behalf of the plaintiff. The plaintiff's evidence to this effect was confirmed by Mr Lazenby and Mr Hare and to some extent by Mr Arndell, although the latter was less precise in his evidence.

55 Mr McColl agreed in the course of his evidence that he did go back to Mr Slater's house. He was there for about 30 minutes. He denied that any discussion took place to the effect that he had been bidding on behalf of Mr Slater or that he conceded he had been acting in that role. He was concerned by the fact that Mr Slater kept saying how Lot 16 was in friendly hands and seemed to think that he (Slater) still had some control over what happened to Lot 16. The situation made him feel uncomfortable. He left without debating the point because he thought that Mr Slater might become angry.

56 Mr McColl said that he went to his place of work and told Mr Smith that he had bought Lot 16 for $840,000. Mr Smith was annoyed by this initially but eventually agreed to help find investors to assist in the purchase of Lot 16. Mr Rando was also annoyed by what had happened. The tenor of Mr McColl's evidence was that as at Monday, 8 May 1995, being the first working day after the auction, it was not clear whether he could raise the price due on settlement or even pay the deposit of $84,000 prescribed by the contract he had signed.

The First Week After the Auction

57 The plaintiff said in evidence that on Monday, 8 May 1995 he was contacted by Mr McColl and this led to a meeting at the plaintiff's house. Mr McColl said that Mr Rando had backed out of the arrangement and because he (McColl) now had no way of paying the deposit the deal was off. The plaintiff tried to contact Mr Lazenby by telephone to see whether he could advance the necessary funds but he had gone to the North-West and could not be reached. Mr Hare was travelling in the South-West and could not be contacted. The plaintiff then got through to Mr Scaffidi and was led to believe that Mr Brown-Neaves might be prepared to do a deal concerning Lot 15.

58 The plaintiff said in evidence that it was against this background that he and his adviser, Mr Adams, drove to McColl's business premises on Monday, 8 May 1995 and met with Mr McColl and Mr Smith. He acquainted Mr Smith with the alleged Slater/McColl bidding arrangement whereby Mr McColl had agreed to buy Lot 16 for the plaintiff on the basis

that the proposed deal with Lot 15 would proceed. Rando's change of heart meant that some other way had to be found of coming up with the deposit and purchase price for Lot 16.

59 According to the plaintiff, Mr Smith, initially, wanted nothing to do with the matter, on the basis that it was up to Mr McColl to get out of the predicament he had created for himself. However, upon hearing of the Scaffidi and Brown-Neaves interest in Lot 15, Mr Smith agreed to arrange to advance the deposit via a company known as Port Franklin Pty Ltd. When Mr Smith asked what he would be getting out of the deal other than a "warm fuzzy feeling" a proposal was canvassed, and then agreed to, that Mr Smith would be paid a fee for his trouble. Mr Smith asked for $100,000 but a fee of $10,000 was eventually agreed upon. Mr Smith made it clear to Mr McColl that the latter had to provide security for the funds to be advanced by Port Franklin by charging his home in Maida Vale.

60 On the plaintiff's evidence it was then agreed between those present that the plaintiff would finalise arrangements with Mr Scaffidi and Mr Brown-Neaves to settle the price due on Lot 16 within the 30 day period prescribed by the contract whereupon the $84,000 deposit would be reimbursed to Port Franklin and the $10,000 fee paid to Mr Smith. I note in passing that Mr McColl subsequently executed a deed dated 9 May 1995 charging his residence in favour of Port Franklin with repayment of the sum of $84,000.

61 The defendant's case contested this version of events. However, Mr McColl seemed to accept under cross-examination that there was a meeting at his business premises on Monday, 8 May 1995 attended by his colleague Mr Smith and by the plaintiff and Mr Adams. On his account, Mr Slater and Mr Adams carried on as though they were entitled to determine what should happen concerning completion of the contract of sale in relation to Lot 16. However, in essence, the purpose of their visit was to arrange for the benefit of the contract to be assigned to the plaintiff.

62 It was put to Mr McColl in cross-examination that the purpose of the meeting was to resolve a mutual problem, that is to say, how the purchase price for Lot 16 which Mr McColl had bought on the plaintiff's behalf would be raised, but Mr McColl refuted this suggestion. He insisted that Mr Slater, in effect, was trying to buy the property off him.

63 The following passages of Mr McColl's cross-examination have a bearing upon these issues. Having dealt with events at the lunch at the plaintiff's house immediately after the auction, the cross-examination proceeded to subsequent events:

> "After the auction and later in that day you told Mr Smith that you had been the successful bidder at 840,000? --- Yes.
>
> And you later spoke to Mr Rando? --- Yes.
>
> He declined to fund the deposit? --- He was quite annoyed. He didn't think that I would go ahead because he didn't like the whole overall scene, but he was happy to accept that he'd made a commitment to me and he put an offer in writing to us from his solicitor.
>
> But his first reaction was that he wouldn't fund a deposit wasn't it? --- No.
>
> And wasn't the position on the following Monday, the 8th, that you had no-one prepared to fund the deposit? --- No, that's not correct.
>
> And you then spoke to Mr Slater on Monday the 8th? --- I'm not aware of it.
>
> And there was a meeting at your office on Monday the 8th as well. Do you recall that? --- There were several meetings afterwards but, yes, that's possible.
>
> And Mr Adams and Mr Slater came to your premises? --- Yes.
>
> And Mr Smith was there? --- Yes.
>
> And the subject of discussion was that you didn't have funding any longer for the deposit from Rando, wasn't it? --- No, but he'd never declined to help. He was disappointed that I'd gone ahead."

64 The cross-examiner continued to press Mr McColl about these matters:

> "On Monday the 8th you had no funding for the deposit, did you? --- Yes, we had funding from our business.

Before Mr Slater arrived, Mr Smith had not agreed to use the business funds to pay for the deposit, had he? --- He hadn't refused, no.

He hadn't refused, he hadn't agreed, had he? --- No.

And the subject matter of the discussion with Slater and Adams on that Monday was, 'How is the deposit going to be financed?' Isn't that so? --- There was discussion about it but we hadn't had time to do anything and we didn't - they come down to tell us what they would like.

And you were there to discuss it with them because it was a mutual problem, wasn't it? --- No, we were there to listen to the - what they wanted us for.

And Slater urged Smith to provide the deposit, didn't he? --- He could've.

And in the course of that discussion Smith eventually said, 'If I do, what am I going to get out of this? A warm, fuzzy feeling'? --- I remember that, yes.

And the upshot of that was that Slater offered Smith $10,000 as the price for funding the deposit of 84,000. Isn't that so? --- No. My recollection was that Smith said 'We have had costs of around 35,000. We would need a hundred,' and Adams and Slater offered us 10.

At all events, in the end it was settled upon $10,000 as the reward for Smith agreeing to fund the deposit? --- Definitely not.

Do you say that wasn't the upshot of the arrangement on that day? --- No, it wasn't.

It was on that day in that discussion that Smith agreed to fund the deposit, wasn't it? --- No, I don't recall that he did."

65 Some additional questions from the cross-examiner proceeded from the premise that there was a meeting on 8 May as alleged by the plaintiff and this was not refuted by Mr McColl:

"At all events for the moment you agree that at this meeting on Monday the 8th, Slater was urging Smith to fund the

deposit? --- I can't see that he would because he knew that we had purchased the property and unless we were to get a substantial reward plus our costs there was nothing to discuss.

What did you understand Slater was doing at your premises on that day, Mr McColl? --- He was trying to secure his property back.

Trying to buy it back from you? --- Well, that appears what he was trying to do.

Tell us what he said that gave you that impression, Mr McColl? --- If you come to someone's office and make them an offer to buy a property, you'd normally want to buy it.

What did he say to you, Mr McColl? --- We were talking about funding the deposit which was our obvious problem at that stage and we wanted to know how much money he could come up with or Michael or whatever, I presume. We spoke about that. We would have spoke about seeing Rando. We would have spoke about how much Campbell and I could take out of our business to fund it. I do remember then things got a bit heated and they could see that there was going to be a problem on all sides and that's when the trouble started."

66 Mr McColl clearly recognised that he had a problem in regard to coming up with the deposit but on his evidence this was a problem to be addressed by he and his prospective investors because he had bought the property for himself and a company to be formed. He agreed that he personally was in no position to meet the purchase price of $840,000 but he believed the amount in question could be raised because he had spoken to various investors prior to the auction.

67 I pause to note that in the course of cross-examination Mr McColl was pressed strongly to identify the prospective investors he claimed to have approached. Some names were provided by him. He said that he personally had spoken to eight of the persons concerned prior to the auction. He agreed that none of these persons had been shown the property prior to the auction or had authorised him to bid for Lot 16. He agreed that he made no attempt to contact these persons on Monday, 8 May 1995 to report to them on the outcome of the auction. He agreed that Mr Rando had not given any firm commitment before the auction to contribute to the price. Nonetheless, at the time Mr McColl attended the

auction he was of the view that the raising of a price for Lot 16 was "achievable".

68 The general thrust of the evidence given by Mr McColl was that if a meeting with the plaintiff and Mr Adams was held on Monday, 8 May 1995 as alleged by the plaintiff, there was no clear outcome. Mr McColl was prepared to acknowledge that there was some discussion about a proposed fee of $10,000 to cover the time and expense of Mr Smith and Mr McColl and that Mr Smith did say he wanted something more than to be left simply with a "warm fuzzy feeling."

69 It will be apparent by now that the principal witnesses for the respective parties provided completely different accounts of what took place in the days and weeks following the auction and as to the motivation underlying various steps. An overview of the situation can only be effectively provided by looking at the case presented by each party in turn. However, in doing so, I remind myself that there were a number of undisputed facts and events which at least provide a framework within which the actions of the key players can be considered.

Undisputed Facts

70 I mentioned previously that the deposit was payable within two business days of the auction, that is to say on Tuesday, 9 May 1995. It seems that the deposit of $84,000 was in fact paid to Bankwest on Thursday, 11 May 1995. The relevant payment is evidenced by a letter from John Garland International to Mr McColl dated 11 May 1995 enclosing a receipt which speaks of the amount in question having been "received from Barry McColl (Challenge Bank cheque)".

71 It was common ground at the hearing that the deposit payment was made from the account of Port Franklin Pty Ltd with the Challenge Bank, this being the company that was operating the Motor Easy business. As I have already noted, on Tuesday, 9 May - two days before the deposit was paid - Mr McColl executed a deed charging his residence in favour of Port Franklin with repayment of the whole of the deposit amount, namely, $84,000. This fact suggests that Mr McColl was thought to be principally responsible for the problem confronting the two partners in Motor Easy, namely, that a deposit had to be paid pursuant to the contract entered into by Mr McColl on the fall of the auctioneer's hammer.

72 The original settlement date for Lot 16 prescribed by the contract documents completed by Mr McColl at the auction was 7 June 1995. It

was an undisputed fact at the trial that the Bank agreed to an extension of time. On 12 June 1995 the defendant company Strawberry John Pty Ltd resolved to accept an offer of finance in the sum of $595,000 from the National Bank for the purpose of purchasing Lot 16. Some days later Bankwest agreed that the original contract in which Mr McColl was named as purchaser should be put to one side and it was then agreed that Strawberry John Pty Ltd would purchase Lot 16 for the previously agreed price of $840,000. The written agreement evidencing the substituted contract is dated 19 June 1995.

73 It is apparent from the documents adduced in evidence at trial that Mr McColl played a part in persuading the Bank in bringing about a situation in which Lot 16 would be vested in Strawberry John Pty Ltd. By letter dated 6 June 1995 he wrote to Mr Frank Romanin of the Bank of Western Australia Ltd concerning "Purchase of 16 Patridge Street, Henley Brook" in these terms:

> "As discussed with yourself by telephone on Thursday 1st June 1995 we have been experiencing delays in the finalisation of our finance facility for the purchase of the abovementioned property.
>
> As a consequence of these unforeseen delays we ask for an extension of Settlement Date for ten (10) working days to the 20th June 1995.
>
> As a gesture of good faith and commitment, upon acceptance by yourself of the extension of Settlement Date to the 20th June 1995 we will pay to Bank West $20,000 as part payment of the outstanding Settlement Balance.
>
> Yours faithfully
>
> Barry McColl
> on behalf of
> Strawberry John Pty Ltd"

74 Further, it is apparent from the documentary evidence that at some stage prior to settlement Mr Slater signed withdrawal of caveat forms in respect of the two Slater caveats affecting Lot 16. These documents purport to have been signed on 19 June 1995.

75 The evidentiary materials establish also that at the time of the auction the defendant company was a dormant company under the control of a

man with no significant involvement in these proceedings, Mr John "Strawberry" O'Brien. It seems that subsequent to the auction his accountant, Lena Hilton was instrumental in arranging for the company to be sold. A company search shows that as from 9 June 1995 the directors of the defendant company were Mr Smith, Robert Charles Allen and Gwendoline Mae Allen. Thereafter, 70 fully paid ordinary shares were held by Allen Group Pty Ltd, 15 shares were held by a company on behalf of Mr Smith and a further 15 shares were held by the McColl Family Trust.

76 It was common ground at the trial that on 19 June 1995 the defendant, Strawberry John, paid the balance of the purchase price outstanding and Lot 16 was thereupon transferred into the name of the defendant company. From that date, the land was subject to a mortgage to National Australia Bank to secure the advance of $595,000 to Strawberry John mentioned earlier.

77 It is clear that one month after settlement, on 21 July 1995, Mr Slater lodged a caveat against Lot 16 claiming an estate in fee simple in the subject land as beneficial owner pursuant to "An Agreement between the Caveator and the Registered Proprietor as detailed in a Statutory Declaration of the Caveator dated 18 July 1995." The relevant statutory declaration (omitting the formal parts) reads as follows:

> "1. I am a beneficiary of the Summerfield Trust.
>
> 2. The Summerfield Trust was the beneficial owner of Lot 16 the subject of Diagram 59865 formerly the whole of the land contained in Certificate of Title Volume 1587 Folio 807 now the whole of the land contained in Certificate of Title Volume 2045 Folio 259 ('Land').
>
> 3. The Land was sold at public auction on 6 May 1995 ('Auction') by the Mortgagee, Bank of Western Australia (A.C.N. 050 494 454) ('Bankwest').
>
> 4. Prior to the Auction on 6 May 1995, I entered into an oral agreement with BARRY DONALD McCOLL ('McColl') ('Agreement') whereby he agreed to:
>
> (a) bid at the Auction for the Land;

(b) if he was the successful purchaser of the Land at the Auction, to enter into a contract to purchase the Land from Bankwest; and

(c) to assign the benefit of that contract to me or my nominee.

5. McColl was, on 6 May 1995, the successful purchaser of the Land at the Auction.

6. After the conclusion of the Auction, McColl entered into a contract for the purchase of the Land from Bankwest but then subsequently, contrary to the Agreement, McColl assigned the benefit of that contract to Strawberry John Pty Ltd (A.C.N. 008 908 594).

7. McColl is a director and shareholder of Strawberry John Pty Ltd.

8. In accordance with the contract for the purchase of the Land which was assigned to Strawberry John Pty Ltd, Bankwest transferred the Land to Strawberry John Pty Ltd.

9. Strawberry John Pty Ltd has refused to transfer the Land to me or my nominee.

10. By virtue of the above facts, Strawberry John Pty Ltd holds the Land on trust for me or my nominee."

78 At a later stage, Strawberry John commenced legal proceedings by way of originating summons for removal of the Slater caveat but those proceedings remained in abeyance after an order was made requiring Mr Slater to commence an action to substantiate his claim. Various affidavits were filed in relation to the originating summons proceedings (being CIV 2298 of 1995), and a number of these affidavits were referred to in the course of cross-examination at the trial.

79 Of particular significance is an affidavit sworn by Mr Smith on 19 December 1995 in support of Strawberry John's originating summons. That affidavit describes the relevant events in summary form. Mr Smith affirmed that he was a director of the plaintiff company and authorised to swear the affidavit on its behalf. He said that on 6 May 1995 Bankwest sold Lot 16 as mortgagee in possession. Paragraph 3 of the affidavit

includes this passage: "On 6 May 1995, Barry McColl on behalf of a corporate entity which had not at that time been incorporated, purchased the Land for $840,000."

80 Mr Smith went on to say in his affidavit that on 19 June 1995, Strawberry John, Bankwest and Barry McColl entered into a formal contract of sale of the land. He referred to the fact that two days later Mr Slater lodged caveat F934145 against the subject land claiming an interest as beneficial owner pursuant to an alleged agreement between the plaintiff company and himself. It was said further that Mr Slater "…has no legal or beneficial interest in the Land."

81 Against the background of these undisputed facts, let me now return to the respective cases presented at the trial.

The Plaintiff's Case

82 The plaintiff's case was that on Monday, 8 May 1995 Mr McColl telephoned him to say that Mr Rando no longer wished to finance the deposit or become involved in the transaction at all. This led to a meeting at the Motor Easy premises attended by Mr Slater, Mr Adams, Mr McColl and Mr Smith. There was a discussion about the predicament facing them all as a consequence of Mr Rando's refusal to proceed. Mr Smith was somewhat unsympathetic to begin with, but he was eventually persuaded to provide the deposit of $84,000 via Port Franklin Pty Ltd in return for a fee of $10,000 and Mr Slater's promise to repay the deposit within 30 days. In addition, as I have noted, Mr McColl agreed to charge his own residence with repayment of the amount being outlaid by Port Franklin to cover the deposit. The understanding was that Mr Slater would now find the balance of the purchase price in order to complete the purchase of Lot 16, bearing in mind that (on the plaintiff's case) the subject land had been purchased by Mr McColl on his behalf.

83 According to the plaintiff, he immediately set about making arrangements to raise the necessary money, assisted by his adviser, Mr Adams and by his friend, Mr Lazenby. This led to discussions with Mr Scaffidi and Mr Brown-Neaves in view of the fact that they had expressed interest in Lot 16 at the auction. In the meantime, according to the evidence given by Mr Slater at trial, Mr McColl contacted Mr Slater to say that the Bank officers' were pressing for payment of the deposit and were troubled by a suspicion that Mr McColl was tied up with a former owner of the land. This led to arrangements being negotiated with Mr Brown-Neaves and his partners whereby a new company called

Amber Oak Developments Pty Ltd, financed by Mr Brown-Neaves, would supply the purchase price for Lot 16.

84 Mr Slater said in evidence that his negotiations with Mr Brown-Neaves consisted largely of meetings with his adviser, Mr Adams and Mr Brown-Neaves' agent, Scaffidi, at the latter's business premises, that is to say, the offices of Hector Realty in Osborne Park. The negotiations were complicated by the fact that the liquidator of Casula had lodged a caveat over Lot 15 because of the transfer of that property from Casula to Kingswood. This meant that the plaintiff could not do a deal with Mr Brown-Neaves and his partners until the Bank was paid out.

85 In the end, a restructured deal was agreed whereby Mr Brown-Neaves and his partners would repay Mr McColl the $84,000 deposit and then pay the Bank the balance of the purchase price being $756,000. Mr McColl would nominate Amber Oak as his nominee under the contract of sale. Amber Oak would give Mr Slater an option to buy back Lot 16 in six months at a price of $1,200,000 and also enter into a residential tenancy agreement for a period of six months to enable his former wife and her mother to remain living in the home. The plaintiff would pay Mr Smith the previously agreed fee of $10,000.

86 It seems that these events prompted Mr Slater, assisted by his advisor, Mr Adams, to write to Mr McColl summarising the state of play. The letter in question, dated 22 May 1995, concerns "'Sweetwater' Partridge Street, Whiteman" and reads as follows:

> "I confirm our conversations and business arrangements regarding the above property, based upon our friendship of some time, during which we've raced thoroughbreds together, I've agisted your former Grand National Winner on my property and you have assisted me regarding the trading of vehicles, not to mention our families' mutual visits to each other's homes.
>
> As you know my property and home 'Sweetwater' was auctioned by BankWest on Saturday 6 May 1995 through the services of the agents John Garland International.
>
> You were kind enough to show concern on my behalf and involved yourself, as I did, in attempting to find sources of money to prevent the property from being auctioned on the due date. Alas, this did not eventuate.

As it turned out, following intense discussions the previous day about the situation, you came to the auction telling me that you were now willing to bid for the property up to $800,000, stating that your friend Sam Rondo had agreed to cover the 10% deposit. That being the case, I said that the period for settlement 30 days later would give me and my contacts sufficient time to organise the balance of the purchase price.

At the auction you joined in the bidding and in fact secured the property for $840,000. I said that if necessary, I was prepared to add the extra $4,000.00 to the deposit and you will recall too that Michael Adams said he would cover it, if required.

Unhappily, by Monday 8 May 1995, your friend Sam Rondo withdrew his consent to cover the $84,000 and you were left in a quandary as to how to meet the demand by 4pm Tuesday 9 May, that being the time and day for payment of the deposit pursuant to the terms and conditions of the auction contract. Thereafter, you turned to your business partner, Campbell Smith, who with a considerable degree of reluctance, arranged the deposit and caused it to be paid to John Garland International to satisfy the situation at that point.

After you had effectively paid the deposit, I immediately set about arranging the entire sum of $840,000 for settlement on 5 June 1995. This sum, of course, includes the repayment to you of $84,000.00. Campbell, in a conversation - one on one - with Michael Adams said that he needed to know by Friday 19 May that the total funds had been secured, otherwise he had to enter into alternative arrangements to secure availability of the balance of the proceeds in time for settlement. Michael and Campbell eventually agreed upon 4pm Wednesday 24 May as the day and time by which my side was to secure the entire funding.

Barry, I am pleased to be able to write, that I have now secured the necessary funds, including the repayment of the deposit plus an extra $10,000.00 (I know that you didn't ask for a fee at the beginning) in payment of your services and those of Campbell. I tried for more than that amount but in all of the circumstances this was not possible.

> In accordance with our agreement therefore I proposed delivering to you on Tuesday 23 May the name of the Company which the auction documents should nominate as the purchaser. Upon your kind signature and in return for the papers, I shall hand you the 'thank you' fee. Thereafter the formalities will be attended to by Hector Settlement Services of 165 Main Street, Osborne Park WA 6017."

87 I have set out this letter in its entirety because it represents a contemporaneous account of how Mr Slater viewed the situation two weeks after the auction. The letter was obviously prepared with some care and the tenor of the letter suggests that an attempt was being made to provide a full account of what had happened.

88 It is significant that Mr Slater does not refer to the alleged agreement of 22 April concerning the sale of a half share of Lot 15 nor does he say explicitly in the letter that at the auction Mr McColl agreed to bid for Lot 16 on Mr Slater's behalf, and, in effect, as his agent. The letter refers only to Mr Slater being told by Mr McColl "that you were now willing to bid for the property" and that Mr McColl joined in the bidding with the result that the property was secured for $840,000. On the other hand, the letter arguably suggests, by implication, that Mr Slater saw himself as the person ultimately responsible for payment of the purchase price, although it is pertinent to note that in par 6 of the letter concerning Mr Rando's withdrawal of support the letter speaks of "you" (McColl) being left in a quandary.

89 There was no response to this letter, although the plaintiff remained willing to proceed as proposed. According to the plaintiff, it was at about this time that Mr McColl contacted him to say that Mr Smith now wanted a fee of $100,000 and not $10,000. The plaintiff refused to co-operate and this created what he called in his witness statement a "Mexican stand-off" because he could not pay that amount and Mr Brown-Neaves would not. It is not entirely clear from the plaintiff's evidence whether he viewed this impasse as one that could be resolved by further discussions. However, he went on to say that on or about 1 June 1995 Mr McColl rang him to say that he would go ahead and tell the Bank that the contract of sale was being transferred to a new entity called Amber Oak.

90 It was at about this time on the plaintiff's case that the plaintiff wrote a letter to Mr McColl dated 31 May 1995 reflecting the negotiations with Mr Brown-Neaves. The letter reads as follows:

> "I confirm that settlement of your purchase of the above property is due to take place on Tuesday 6 June 1995.
>
> I confirm too that I am still prepared to meet the full purchase price, at settlement including the return to you of the deposit paid together with associated costs and an additional fee of $10,000 for your acquiring the property on my behalf.
>
> My funders have advised me that the Company they would now be nominating as purchaser is: AMBER OAK DEVELOPMENTS PTY LTD. A.C.N. 069 451 538 this is a new company which has been acquired specially for the purchase.
>
> Please advise me urgently that this matter can proceed."

91 According to the plaintiff, as all the relevant requirements seemed to be in place, he signed the forms necessary to withdraw his caveats over Lot 16 at Mr Adam's suggestion and left the forms with him. Mr Adams then sent the forms direct to the Bank.

92 A short time later information reached the plaintiff that Mr McColl could not be relied upon to proceed with the proposed arrangements. The plaintiff discovered that another company called Strawberry John was being proposed by Mr McColl as the purchaser of the land and that a man named Robert Allen might be taking an interest in the company. When Mr McColl was pressed about these matters he eventually conceded that Mr Allen was involved. Mr McColl said he did not know Mr Allen, but understood that Mr Allen's son was a friend of Mr Smith. He said that Mr Allen owned 70 per cent of the shares in Strawberry John and he and Mr Smith had 15 per cent each.

93 I digress briefly to observe, as appears from my summary of the undisputed facts, that by letter dated 6 June 1995 Mr McColl had written to the Bank on behalf of Strawberry John with a view to extending the original settlement date and making provision for Lot 16 to be vested in the defendant company. The letter indicates that Mr McColl had been pursuing this course since at least 1 June 1995.

94 On the plaintiff's case, this was evidence of Mr McColl's duplicity in that at the same time as he was leading the plaintiff to believe that the plaintiff's Amber Oak proposal could proceed (with the result that the plaintiff signed and delivered withdrawals of the caveats on Lot 16 so that a transfer to a nominee company could be effected) Mr McColl was

taking steps to ensure that the land was actually vested in Strawberry John.

95 In any event, it was at about this time, on the plaintiff's case, after the withdrawals of caveat had been signed and delivered, and before the eventual settlement on 19 June 1995 in favour of Strawberry John had been effected, that Mr Slater tried to telephone Mr Allen at his office at Parkland Mazda with a view to requesting a meeting. He was told that Mr Allen was in Queensland. Mr Slater said in evidence that he got hold of Mr Allen by telephone after several attempts and told Mr Allen of his agreement with Mr McColl. According to the plaintiff, Mr Allen told Mr Slater that he knew who Mr Slater was, that he had heard of the arrangement, but did not believe it. He said: "We've had legal advice. There's no deal there. You've got nothing on paper." He refused to see Mr Slater until after settlement.

96 On 27 June 1995, being eight days after settlement, Mr Slater rang Mr Allen to see if the settlement had occurred and to ask whether Mr Allen would now meet with him. Mr Allen agreed to meet but not at his office and arrangements were therefore made to meet at Mr Lazenby's office. Mr Slater ascertained at the meeting that Strawberry John was now the owner of Lot 16 and the discussion became rather heated.

97 Mr Slater said in evidence that during the course of the various exchanges he asked Mr Allen whether Mr McColl had spoken to him about "warehousing" the property for Mr Slater. Mr Allen responded that he did not know what was meant by warehousing. When Mr Slater provided an explanation by reference to the proposed arrangements with Mr Brown-Neaves whereby the purchaser from the Bank would on-sell the subject land to Mr Slater in due course at a price of $1,200,000, Mr Allen said he was not interested. Mr Allen insisted that the plaintiff remove his possessions from the property within 30 days and the meeting ended on that note.

98 It was against that background, on the plaintiff's case, that the plaintiff instructed his solicitors, Lawton Gillon Tydde, to lodge a caveat over Lot 16, being the caveat lodged against the land on 21 July 1995. As I have indicated, it was this caveat that became the subject of an originating summons for removal of the caveat by Strawberry John. The presence of the caveat has prevented any dealing with the land by the defendant pending resolution of the dispute.

99 The position of the plaintiff at trial was that the defendant company holds Lot 16 upon a constructive trust for the plaintiff on terms that the plaintiff is entitled to take a transfer of the land free of encumbrances in exchange for payment of the price and the costs of purchase (including stamp duty and other reasonable costs). To that end, the plaintiff adduced evidence from a Mr Greg Simpson that he is able and willing to advance to the plaintiff on commercial terms sufficient funds to meet the price and related outgoings. The plaintiff says also that there should be an account in relation to the expenses and benefits incurred or obtained by the defendant in the course of holding the land. Any profit earned should be restored to the plaintiff.

The Defendant's Case

100 The defendant's case concerning the post auction events presents an entirely different picture. I have already summarised to some extent the nature of the evidence given by Mr McColl and Mr Rando. I remind myself that the tenor of Mr McColl's evidence was that he made no agreement to bid for Mr Slater as alleged. At the time he was bidding he had reason to believe that Mr Rando and other prospective investors would provide sufficient financial support to enable him to cover the deposit and raise the balance of the purchase price in due course. However, when it became apparent that Mr Rando was annoyed by what had occurred, Mr McColl looked principally to Mr Smith for assistance in resolving the predicament because his partner Mr Smith was the one who usually attended to financial matters. It will therefore be useful to look now at the evidence given by Mr Smith at the trial of the action.

101 Mr Smith said in evidence that some time during the afternoon of Saturday, 6 May 1995 Mr McColl came into the Motor Easy yard and said that he had been to the auction of Lot 16. He said that he had purchased the property for $840,000 which was a matter of surprise and annoyance to Mr Smith because Mr Smith had not been a party to any serious discussions concerning a proposal to purchase Lot 16 at the auction. Nonetheless, he immediately started thinking about what could be done because Mr McColl was his partner in Motor Easy.

102 Under cross-examination Mr Smith strenuously denied that he participated in a meeting with Mr Slater, Mr Adams and Mr McColl at the Motor Easy premises on Monday, 8 May 1995 as alleged by the plaintiff. According to Mr Smith, he and Mr McColl talked about ways and means of raising the deposit on the Monday and arrangements were eventually made for Mr Rando to advance $40,000 to Port Franklin with provision

for repayment and interest to the intent that Port Franklin would make up the balance of the required amount of $84,000.

103 In the course of cross-examination Mr Smith said that in order to carry these arrangements into effect Mr Rando's solicitors prepared a deed of loan evidencing the amount of his advance. Mr Smith then proceeded to draw upon, or virtually copy the document provided by Mr Rando, in order to evidence the arrangements made between Port Franklin and Mr McColl. It was in these circumstances that the deed of loan and charge of property dated 9 May 1995 entered into by Port Franklin as lender and Mr McColl as borrower was brought into existence, having been typed up at the premises of Motor Easy.

104 Under cross-examination Mr Smith said that the first thing he asked Mr McColl upon being informed of the purchase of Lot 16 was why he had bought the property and how he was going to fund the purchase. Mr McColl had said in reply: "I'm sure you'll find a way." This exchange brought home to Mr Smith that the problem to be addressed was essentially a problem created by Mr McColl and it was for that reason that Mr Smith required, by cl 5 of the deed of loan and charge of property document, that Mr McColl charge his residential property at 6 West Terrace, Maida Vale with repayment to Port Franklin as lender of the sum of $84,000.

105 Mr Smith's stance at the trial was that a meeting did take place at the Motor Easy premises with Mr Slater and Mr Adams concerning the future of Lot 16 but not on Monday, 8 May 1995 as alleged by Mr Slater. The meeting in fact took place on or about Wednesday, 10 May 1995 by which time the arrangements I have just described had already been made for Port Franklin to pay the deposit.

106 Under cross-examination, Mr Smith had this to say about that aspect of the matter:

> "On the Monday was there some discussion between you and McColl over how the deposit would be paid? --- I'm sure there was, yes. I don't recall the specifics of it but I'm sure we talked about it.
>
> Do you recall that Rando's name was mentioned? --- I don't recall the specific conversations but Rando was obviously mentioned because we spoke to him about participating in buying the property which he said no and then we said would he provide some money towards a deposit which he agreed to.

He didn't say that on the Monday, that he would agree to it, did he? --- I don't remember when we spoke to him. It was early in the week. It was probably Monday but I don't remember the specific date.

On the Monday after Rando departed you had no funding for the deposit, did you? --- I don't remember specifically speaking to Rando on the Monday so I can't answer that question.

Slater came to visit you and McColl on the Monday after the auction, didn't he? --- I don't believe so. I believe he came to see us on the Wednesday.

Why do you think it was the Wednesday? --- I think it's the Wednesday because back in 96 or 97 I prepared a bit of - what would you call it - chronology of events for our solicitors and in that I wrote that it was the Wednesday that he came to see us and that's my best recollection."

107 According to Mr Smith, discussion at the meeting was not concerned with solving a problem shared by Mr Slater and Mr McColl as the two persons (on the plaintiff's case) who had combined at the auction to purchase Lot 16. On the contrary, by Wednesday, 10 May 1995 arrangements had been put in place to enable Mr McColl as purchaser of Lot 16 in his own right to pay the deposit. The arrangements were, as I indicated earlier, that Mr Rando would advance $40,000 to Port Franklin. The Smith/McColl trading company would then pay the deposit due under the contract on Mr McColl's behalf, subject to Mr McColl charging his residence by way of security for the loan.

108 There was a further issue to be addressed at the meeting as to how Mr McColl, with Mr Smith's support, was to raise the balance of the purchase price. It was for that reason that Mr Smith was prepared to listen to a proposal by Mr Slater to have the contract with the Bank transferred to him. It was against this background that Mr Slater was given the opportunity for a period of seven days to arrange the necessary finance including a fee of $10,000 for Mr Smith to compensate him for his trouble. Mr Smith emphasised that he required from Mr Slater within the seven day period a bank cheque for $94,000 and written confirmation from Bankwest of their acceptance of the contract being taken over.

109 Mr Smith said in evidence that on Thursday, 11 May 1995 payment of the deposit was made by Port Franklin and he (Mr Smith) started ringing around to try and find funding for the balance of the purchase

price. He prepared a document called "Property Syndicate Proposal" which included some of the information he had on Lot 16. When Mr Adams rang late afternoon on 17 May 1995 to seek an extension of time, the request was refused, although Mr Smith went on to say that if Mr Slater came up with the money at some time in the future and a deal had not been done with someone else, then it might be possible to proceed. Mr Smith acknowledged that he subsequently saw various letters and "self serving" faxes addressed to Mr McColl concerning the purchase of Lot 16, but he simply ignored them. In this part of his evidence I took him to be referring to the letters from Mr Slater to Mr McColl of 22 and 31 May 1995.

110 Under cross-examination Mr Smith agreed that soon after the auction, as he and Mr McColl reviewed the problems created by Mr McColl's decision to buy Lot 16, a decision was made to obtain some legal advice. It was in the context of that line of questioning that Mr Smith was confronted with an undated memorandum reflecting the notes he had made at this time. The relevant document reads as follows:

> "Deposit -
>
> (i) Default?
>
> (ii) Security for P/F - caveats) P/F → Bn
>
> - deed of loans)
>
> Or Nominee ?
>
> Can the sale/settlement be stopped by W.S. Caveat. If so what recourse is available against B/West?
>
> Is the deal with W.S. illegal in any way?
>
> Medically unfit, Power of Attorney etc."

111 For ease of reference, I will call this the "Smith handwritten memorandum". It was put to Mr Smith in the course of cross-examination about this document that the passage "Is the deal with W.S. illegal in any way?" was a reference to the alleged Slater/McColl bidding arrangement. Mr Smith denied the allegation and said that the sentence in question was simply a reference to what had been discussed on Wednesday, 10 May 1995 (on Smith's evidence), that is to say, an arrangement that Mr Slater be allowed seven days to arrange finance with a view to taking over or being substituted for Mr McColl as the purchaser of the subject land.

When he was pressed as to why he might have thought such an arrangement could be illegal he referred to the fact that a fee of $10,000 had been mentioned and he wondered whether this might be characterised as a secret commission.

112 Mr Smith denied a suggestion put to him in cross-examination that although he was annoyed initially at Mr McColl's decision to purchase Lot 16 for $840,000, his attitude changed when the merits of a purchase at that price became apparent to him, and it was only then that a decision was made by he and Mr McColl to ignore the alleged Slater/McColl bidding arrangement and to proceed upon the basis that Mr McColl had simply purchased the land on his own behalf.

113 Mr Smith conceded that the assertion contained in par 3 of his affidavit sworn 19 December 1995 that Mr McColl had purchased the land "on behalf of a corporate entity which had not at that time been incorporated" was not strictly accurate. However, he said that this was a sentence drafted by the solicitors and seemed to him to be simply a technicality. It was a reference to the fact that the identity of Strawberry John as the ultimate purchaser was not known at the time Mr McColl attended the auction.

114 Mr Smith went on to say that he eventually found his way to Mr Allen as a prospective investor and arranged to meet him at midday on Friday, 2 June 1995 at the premises of Lance Gibbons Holden. They drove out to the "Sweetwater" property on that day and Mr Allen expressed interest subject to resolving some matters of concern to him relating to rezoning and water. According to Mr Smith, he explained to Mr Allen that his business partner Mr McColl had bought the property at auction for $840,000 which he could not afford. Special arrangements had been made to cover the deposit but there was a risk of losing the property at settlement.

115 According to Mr Smith, on the following Monday, Mr Allen contacted him to say that he was interested in acquiring Lot 16 and that Mr Smith should liaise with his accountant Mr Donald Trew, as Mr Allen had to go interstate. It was against this background that an application for finance was made to the National Bank. Once the finance was approved, Mr Smith was instrumental in arranging for a company incorporated prior to the auction to be found and made available to the group consisting of Mr Allen, Mr Smith and Mr McColl upon the basis that Mr Allen would control 70 per cent of the company. Mr Smith was also instrumental in arranging for the company in question, namely, Strawberry John Pty Ltd

to be substituted as the purchaser of Lot 16 and for the settlement date to be extended to 19 June 1995.

Mr Allen's Role

116 Mr Allen said in evidence that he knew Mr Smith as one of his son's friends. A preliminary meeting led to Mr Allen being taken to the "Sweetwater" property and to an expression of interest in the property subject to some enquiries about rezoning. By the time he had confirmed his interest in the property it was very close to the original settlement date but Mr Smith said he would speak to Bankwest to see if the settlement could be delayed. Arrangements were then made for Mr Allen to provide about $196,000 from his own resources upon the basis that financing of at least $595,000 would be provided by the National Australia Bank. Once the finance was in place he left it to Mr Smith to finalise the settlement and make any necessary arrangements with Bankwest.

117 Mr Allen said in his witness statement that he had no discussions with Mr McColl or Mr Slater prior to the auction on 6 May 1995 or settlement of Lot 16 on 19 June 1995. However, in the course of cross-examination, he was referred to evidence given by Mr McColl at an earlier stage of the trial that he (Allen) and Mr McColl had met prior to settlement. Mr Allen said that this was a brief encounter, being a chance meeting, probably at the Motor Easy premises, and nothing of any significance was discussed concerning the purchase of Lot 16 or the acquisition of Strawberry John as a company in which he was to hold a 70 per cent interest with Mr Smith and Mr McColl having a 15 per cent interest each.

118 Mr Allen was pressed but continued to deny that he spoke to Mr Slater by telephone prior to settlement on 19 June 1995 as alleged by Mr Slater. He said that he was in Queensland at a conference during the week 6 June to 11 June 1995 but at no time prior to settlement did he have any conversation with Mr Slater. In essence, Mr Allen's position was that he had no knowledge whatsoever prior to the settlement of the alleged Slater/McColl bidding arrangement or that Mr Slater claimed to have an interest in Lot 16 as a consequence of his prior dealings with either Mr Smith or Mr McColl.

119 Mr Allen said that his first and only contact with Mr Slater prior to the commencement of legal proceedings was at premises known as Frank Lazenby's Truck and Machinery, 165 Beechboro Road, Bayswater at

10.30 am on 27 June 1995. He was able to confirm the date, time and location from extracts from his diary of that day.

120 Mr Allen said that this meeting was arranged by either Mr Lazenby or Mr Slater by telephone a couple of days prior to 27 June 1995. However, under cross-examination, when referred to certain telephone records, he accepted, that it must have been Mr Slater who spoke to him with a view to arranging the meeting and that the relevant telephone call took place on the morning of 27 June 1995, being the day of the meeting. When it was put to him that it seemed unlikely he would be willing to travel some distance in order to attend a meeting with a man with whom he had had no prior contact, he disagreed, and said that he was minded to meet as proposed in order to satisfy his curiosity. He did not know exactly what was to be the subject matter of the discussion.

121 He formed an impression at the meeting that Mr Slater had an intense emotional attachment to the property. He was asked if he was prepared to "warehouse" the property for Mr Slater but he had to seek an explanation as to what this meant. When told it involved holding the property for a period of 12 to 24 months so that Mr Slater could raise a purchase price of $1,000,000 he said that he had not bought the property to resell it quickly. It was a long term investment and in any event, he would not sell at that price. This led to an argument about the circumstances in which the property had been acquired by Strawberry John and it was at that point the meeting ended abruptly.

122 Mr Allen confirmed that he and his wife and Mr Smith became directors of Strawberry John upon acquisition of the company. It was put to him that a decision was taken not to have Mr McColl as a director because the knowledge Mr McColl had as to what happened at the auction could be a source of difficulty for the company. Mr Allen disagreed with this proposition. Mr Allen became aware in due course that Mr Slater had lodged a caveat against the property.

123 On the defendant's case Mr Slater may have referred to the possibility of the purchase price being provided through a company known as Amber Oak but the fact is that at no time prior to settlement did he come up with the money or any firm proposal from him or any other party to take over the contract to purchase Lot 16. The directors of Strawberry John, namely, Mr Allen and his wife, and Mr Smith, had no knowledge prior to settlement of the alleged bidding arrangement. According to Mr Allen, the first he heard of this was after settlement at the meeting in Mr Lazenby's office on 27 June 1995. According to

Mr Smith he was told about it for the first time by Mr Allen after settlement.

124 In essence, the defendant's case was fought on the basis that there was no Slater/McColl bidding arrangement of the kind alleged. Even if it be found that Mr McColl was party to such an arrangement, his knowledge of the arrangement could not be attributed to Strawberry John because Mr McColl was only a shareholder. He had no obligation to transmit his knowledge (if any) to the directors of the company and, in any event, did not do so. Mr Allen and Mr Smith had no knowledge of the alleged bidding arrangement or any similar arrangement prior to settlement on 19 June 1995.

The Pleadings

125 The plaintiff's amended statement of claim commences by describing the role of Casula Pty Ltd (in liquidation) as the registered proprietor of the subject land. The plaintiff pleads in par 4 that on 6 May 1995 he and Mr McColl entered into an oral agreement whereby:

> "(a) The said McColl agreed to bid at the auction of Lot 16 due on that day and hold the benefit of the agreement to purchase Lot 16 entered into subsequent to the auction for and on behalf of the plaintiff.
>
> (b) The said McColl further agreed to hold the benefit of the said agreement to purchase Lot 16 for and on behalf of the plaintiff to be transferred to the plaintiff or his nominee at settlement free of any encumbrance.
>
> (c) The plaintiff agreed to refrain from bidding at the said auction."

126 It is then said in par 5 that pursuant to the alleged oral agreement the plaintiff refrained from bidding and Mr McColl bid successfully. Thereupon, on behalf of the plaintiff, Mr McColl entered into an agreement for the purchase of Lot 16 from Casula for $840,000.

127 I pause at this point to say that counsel for the plaintiff opened upon the basis that the oral agreement of 6 May 1995 was constituted by the alleged telephone discussion between Mr Slater and Mr McColl and by subsequent exchanges between Mr Slater and Mr McColl at the auction site. Counsel for the plaintiff put the matter in this way:

"In effect the terms reached in this telephone discussion were that Mr McColl would act on behalf of Mr Slater to bid for and hopefully contract to buy lot 16 at auction for up to $800,000, expecting that a deposit of 10 per cent would be required, being $80,000, which he said he had secured from Mr Rando. Mr McColl would acquire a half interest in lot 15 for $800,000. Mr McColl through Rando would supply the deposit of $80,000 and through Rando the balance of the purchase price and that would enable Slater or his nominee to purchase lot 16, in effect through McColl.

The money that was being put up for lot 15 would discharge Slater's obligation to the bank, so in effect there would be a payment, cutting through the companies, to Slater for a half interest in lot 15 and Slater would use the money to pay off the bank on lot 16. The final term was that McColl would, if successful at the auction, contract to buy lot 16 in his name and would later transfer the contract or the land to Slater or his nominee.

A little later on the morning of 6 May Mr McColl went to the property. The auction was being held at lot 16 and he met Mr Slater there. In the presence of others, including persons with whom Slater had also been negotiating some such arrangement, namely Messrs Hare, Lazenby, Arndell and Adams, Messrs Slater and McColl went over the terms that had been discussed and agreed on the telephone earlier that morning and Mr McColl confirmed that he would proceed on those terms.

A man named Scaffidi, who has since died, also participated in some of those discussions at the property on the morning. In one of those discussions before the auction at which Messrs McColl and Slater were present, Scaffidi said that he had spoken to Garland, the auctioneer, and had understood that the reserve price was $750,000. Slater and McColl then agreed that if necessary McColl would bid up to $850,000 to succeed at the auction and Mr Slater said that he would supply the deposit over and above $80,000 and any purchase price over and above $800,000, leaving the core of the original agreement with Mr McColl intact."

128 The plaintiff went on in his statement of claim to plead in par 7 that Mr Smith knew and told the plaintiff that he knew Mr McColl had been bidding at the auction on behalf of the plaintiff. It is said in par 8 that the plaintiff instructed Mr McColl to attend at settlement to assign the benefit of the agreement to purchase Lot 16 to Amber Oak to enable Amber Oak to take the transfer of Lot 16 for and on behalf of the plaintiff. The plaintiff says in par 9 that he orally advised Mr Smith of his said instruction to Mr McColl prior to the settlement date. It is said further in par 10 that at the time of settlement the plaintiff withdrew caveats lodged on or about 27 June 1994 over Lot 16 to allow settlement to proceed pursuant to the plaintiff's instructions to Mr McColl pleaded in par 8.

129 The plaintiff pleads in par 12 that at settlement, without notice to the plaintiff and contrary to his instruction, Mr McColl fraudulently caused the said agreement to purchase Lot 16 to be avoided to enable to defendant, as it did, to purchase Lot 16 and take the transfer of Lot 16 reserving for Mr McColl and Mr Smith a portion of the ownership of the defendant, to the exclusion of the plaintiff. Mr Smith knew the defendant took the transfer of Lot 16 at settlement contrary to the instructions to Mr McColl.

130 The plaintiff goes on to allege in par 14 that Mr McColl was a shareholder and Mr Smith was a director and shareholder of the defendant and thereby and by virtue of the matters pleaded in par 14A the defendant had constructive knowledge that the said purchase of Lot 16 by the defendant was pursuant to the alleged fraud.

131 Paragraph 14A of the claim is pleaded in these terms:

> "(a) As from about 9 June 1995, there were 3 directors of the defendant, namely Robert Charles Allen, his wife Gwendoline Mae Allen and Smith.
>
> (b) As from about 9 June 1995, the shareholders of the defendant were Allen Group Pty Ltd, a company of which Mr and Mrs Allen were the only directors and shareholders, Gocom Pty Ltd, a company of which Smith and his wife Carolyn Anne Smith were the only directors and shareholders, and the trustee of the McColl Family Trust, a trust associated with McColl.
>
> (c) In or about early June 1995, the plaintiff spoke by telephone with Mr Allen and informed him, in effect, of the matters pleaded in paragraphs 4 and 5.

(d) After the auction pleaded above and before 9 June 1995, Smith and McColl orally invited Mr Allen to join them in purchasing the land and Smith, McColl and Mr Allen then orally agreed that the shareholders pleaded in sub-paragraph (b) above would acquire the defendant, the directors pleaded in sub-paragraph (b) above would become directors of the defendant and the defendant would purchase Lot 16 by McColl procuring the Bank of Western Australia Ltd to sell the land to the defendant in lieu of McColl.

(e) At all material times from 9 June 1995, the directors of the defendant allowed McColl to act and he acted for and on behalf of the defendant in relation to the purchase of the land and the settlement of that purchase, including obtaining the consent of the Bank of Western Australia Ltd to the avoidance of the contract to sell the land to McColl and the substitution and completion of a contract to sell the land to the defendant.

(f) By undated deed executed in June 1995, Smith and McColl and Mr Allen guaranteed to the Bank of Western Australia Ltd the payment by the defendant of the purchase price for the land."

132 The plaintiff pleads in par 15 that in the premises the defendant holds Lot 16 for and on behalf of the plaintiff. The defendant has refused and continues to refuse to acknowledge any entitlement of the plaintiff to Lot 16. Reference is made in the pleading to the plaintiff suffering loss and damage but I was told expressly at the trial that this claim was abandoned. Thus, effectively, the relief sought by the plaintiff against the defendant is a declaration that the defendant holds Lot 16 upon a constructive trust for the plaintiff on terms that the plaintiff is entitled to take a transfer of the lot. As I mentioned earlier, the plaintiff is prepared to pay the auction price plus the costs of purchase but says that there should be an account in relation to the expenses and benefits of holding the land.

133 The plaintiff's answers to a request for particulars of the amended statement of claim were directed to various matters. The plaintiff pleaded in response to a request concerning par 7 that Mr Smith's knowledge of the alleged bidding arrangement or oral agreement came from discussions with Mr McColl, both before and after the auction. In relation to

postponement of the date for settlement, Mr Smith's knowledge arose from his discussions with Bankwest officers and Mr McColl. In addition, it came from a conversation on 8 May 1995 at the offices of Motor Easy between Mr McColl, Mr Smith, Mr Slater and Mr Adams.

134 In response to a request concerning par 9 and the question of when and where the plaintiff orally advised Mr Smith of the plaintiff's instructions to Mr McColl it was said that the plaintiff relies upon the conversation on 8 May 1995 and the letter dated 31 May 1995 and Mr Smith's confirmation of its receipt.

135 In response to a request concerning par 12 the allegation that Mr McColl fraudulently caused the said agreement to purchase Lot 16 to be avoided to enable the defendant to purchase Lot 16, the plaintiff pleaded reliance upon the following matters:

> "5.1 McColl's refusal to perform the agreement with the plaintiff and his conduct in passing the benefit of the purchase contract to the defendant, a company owned by interests associated with McColl, Smith and Allen, was wilful and dishonest.
>
> There was a deliberate and dishonest appropriation to McColl, Smith and Allen (through the defendant) of the very thing which McColl had agreed to do for, and pass the benefit of to, the plaintiff.
>
> McColl was duty bound to pass the benefit of the purchase contract to the plaintiff. Instead he deliberately caused it to go to the defendant, for the benefit of McColl, Smith and Allen.
>
> 5.2 15% of the shares in the defendant to each of McColl and Smith, McColl through the McColl Family Trust and Smith through Gocom Pty Ltd."

136 The defendant, by its amended statement of defence and counterclaim, admitted that on 6 May 1995 Mr McColl successfully bid for the purchase of Lot 16 for $840,000 but otherwise denied each and every allegation made in par 5 of the statement of claim. The defendant did not admit that the plaintiff withdrew any caveats and denied that the plaintiff had any caveatable interest in Lot 16. The defendant admitted that Mr McColl was a shareholder of the company and Mr Smith was a director and shareholder.

137 In essence, as appears from the defendant's written outline of submissions, the stance of the defendant at trial was that on 6 May 1995 Mr McColl successfully bid for Lot 16 for $840,000. At the time he was acting on his own behalf although with the intention that the contract for sale would be between Bankwest as mortgagee in possession and a nominee company. At no time did Mr McColl agree to bid for, contract to purchase, or otherwise act as the agent of the plaintiff in relation to the acquisition of Lot 16.

138 The defendant went on to say in its outline of submissions that a fiduciary relationship was neither created nor breached and no fraud on the plaintiff occurred which would constitute grounds for imposing a constructive trust in relation to Lot 16 or which would entitle the plaintiff to any of the relief sought.

The Issues

139 The first question to be addressed is whether the alleged Slater/McColl bidding arrangement was entered into on the morning of the auction as alleged by the plaintiff. The burden of proof, according to the civil standard, lies upon the plaintiff in regard to this and the following issues. Where fraud is alleged the ordinary standard of proof in civil matters is subject to the rule of prudence that the tribunal must act with much care and caution before finding that such a serious allegation is established. ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 at 347.

140 If the plaintiff cannot satisfy the Court on the balance of probabilities that the bidding arrangement was made as alleged, his claim will fail, and the other issues need not be considered further.

141 I note in passing that it might have been open to the plaintiff to allege that Mr McColl and/or Mr Smith were subject to fiduciary duties or obligations arising under a joint venture or similar agreement constituted by the alleged 22 April agreement or from events subsequent to the auction but such a case was not pleaded and therefore need not be investigated. I note also that it might have been open to the defendant to plead that it was a *bona fide* purchaser for value without notice of any prior claim to or unregistered interest affecting the land but an issue of this kind was not raised by the statement of defence.

142 Put shortly, then, the first and central issue in the case was whether the bidding arrangement was made as alleged. I will call this the "bidding arrangement" issue.

143 I must then determine whether the bidding arrangement, if found to exist, gave rise to any enforceable contractual or property rights in favour of the plaintiff. It is alleged in par 12 of the statement of claim that Mr McColl fraudulently caused the agreement to purchase Lot 16 to be avoided to enable the defendant to purchase Lot 16. This assumes that Mr McColl was duty bound to comply with the bidding arrangement. It therefore becomes necessary to explore the implications of the bidding arrangement. I will call this the "effect of the bidding arrangement" issue.

144 The next question is whether the bidding arrangement remained in force at all material times prior to the defendant acquiring Lot 16 at settlement on 19 June 1995. If it be held that Mr Slater was simply not in a position to complete the purchase of Lot 16 in the manner contemplated by the bidding arrangement, and allowed Mr McColl to make other arrangements, the issue raised by those passages of the plaintiff's statement of claim in which it is asserted that the benefit of the agreement to purchase Lot 16 was to be assigned to Amber Oak will have to be resolved in favour of the defendant. I will call this the "performance of the bidding arrangement issue".

145 If the preceding issues are resolved in favour of the plaintiff, I must then proceed to the question of whether the defendant can be said to be holding Lot 16 upon a constructive trust. It will be necessary to determine the involvement and degree of knowledge possessed by those associated with the defendant company and to determine whether such knowledge, if any, can be attributed to the company. I will call this the "constructive trust issue".

146 I have previously noted that there is a wide divergence between the parties as to various factual matters. I have foreshadowed that in attempting to resolve the issues it will be useful to view the actions of the parties and their supporters within a framework of undisputed facts, for in many respects it is difficult to discern a clear pattern in the events. This is probably due to the speed with which events unfolded and the haste with which decisions had to be made. Nonetheless, the presence of various puzzling features of the transactions before me, although not uncommon in a rapidly evolving commercial situation, affirms the importance of paying close attention to the undisputed facts.

147 With that thought in mind, I feel obliged to notice at the outset that the plaintiff and Mr McColl were undoubtedly together at the Sweetwater site shortly before the auction commenced. They both accepted that they were involved in at least a brief verbal exchange at that time. There was a

degree of controversy as to whether the verbal exchange at the site had been preceded by a telephone call on that morning, but under cross-examination Mr McColl accepted that such a call was made. It follows from this that it is open to me to find that the Slater/McColl bidding arrangement was made as alleged. Whether such a finding can be made depends largely upon the credibility of the two principal witnesses and other witnesses on either side, for it is common ground that there is no document in existence directly evidencing the bidding arrangement contended for by the plaintiff.

148 Hence, before addressing the issues mentioned earlier, it will be useful to look at a number of matters bearing upon the credibility of the principal witnesses.

Credibility

149 Mr Slater gave evidence at the trial in a forthright manner and was not flustered to any significant degree throughout a long and detailed cross-examination. I was impressed by the fact that when he was confronted by awkward facts or inconsistencies between his evidence at trial and his affidavit evidence in the related proceedings, he did not prevaricate or try to come up with glib or plausible explanations. He conceded error when it was necessary and on other occasions was prepared to acknowledge that certain points of his story might seem strange or unconvincing to an outsider. On some occasions he attributed this to the pressure of events and as to some matters he referred to the intervention of his adviser Mr Adams. However, overall, it seemed to me that his evidence was generally consistent with his pleaded case and he did not make any crucial or especially damaging admissions.

150 Nonetheless, some of the matters put to him require careful assessment. He conceded that in his affidavit sworn 28 June 1996 he incorrectly spoke of having attended two meetings at Mr McColl's house. In his affidavit he referred to an agreement in April 1995 whereby Mr McColl alone would take a half interest in Lot 15, although this did not sit squarely with his evidence at trial. He said that this was due to his assumption that a reference to Mr McColl could be taken as a reference to the partnership of Mr McColl and Mr Smith. He conceded that there was no reference to Mr Smith in the typed notes which were said to reflect the 22 April agreement.

151 More importantly, Mr Slater conceded that in his affidavit he referred to a telephone conversation with Mr Smith, not Mr McColl on the

morning of the auction before both parties had arrived at the site. He said in evidence at the trial that upon reflection he was in error in that regard, and stood by his witness statement in which it is said that he spoke to Mr McColl by telephone about the matters that became the subject of the bidding arrangement. I have already noted that the telephone conversation between Mr McColl and Mr Slater on that morning at 10.25 am, initiated by Mr McColl and lasting a minute, is corroborated by a telephone company account and was conceded by Mr McColl under cross-examination.

152 When Mr Slater was asked about the lack of any explicit reference to the alleged 22 April agreement (concerning the sale of a half share of Lot 15) and to the bidding arrangement in his summary letter to Mr McColl dated 22 May 1995 he could provide no compelling answer to this line of questioning other than to say that this and the subsequent letter dated 31 May 1995 had been prepared on his behalf by his legal adviser, Mr Adams.

153 I also have to take account of a factor put to me strongly by counsel for the defendant in closing submissions that the plaintiff had a strong emotional attachment to the family home upon Lot 16. Thus, it was argued, without necessarily being consciously untruthful, Mr Slater's evidence might be coloured by a tendency to reconstruct the events at the auction and to believe what he wanted to believe, blocking out of the story any inconvenient facts.

154 It was also put against the plaintiff that there was an air of unreality about his version of the bidding arrangement, bearing in mind especially that Mr Slater himself had acknowledged in his evidence at trial that Mr Rando had expressed scant interest in acquiring a half interest in Lot 15. This made it unlikely, counsel submitted, that Mr McColl would have conveyed to the plaintiff before the bidding commenced that an agreement of the kind envisaged by the 22 April agreement could be carried into effect with Mr Rando's backing. Further, counsel contended, this made it unlikely that a few words from Mr McColl, either on the telephone or at the auction site, would be enough to convince the plaintiff that sufficient funds to pay out the Bank were available from Mr Rando with the result that the plaintiff could safely instruct, and did instruct, Mr McColl to bid on his behalf at the auction for Lot 16.

155 Issues of this kind were raised with the plaintiff in cross-examination. He seemed to acknowledge that the events could be looked at in such a light but continued to affirm his evidence in chief to

the effect that it was conveyed to him by Mr McColl on the morning of the auction that Mr Rando was willing to proceed in the manner previously discussed and it was upon that basis that the bidding arrangement was agreed upon as alleged.

156 It was put to me also in closing submissions that the plaintiff may indeed have been active in the days and weeks following the auction, but this was not in an attempt to carry into effect the bidding arrangement by other means (once it was known that Mr Rando had withdrawn his support); rather it was to persuade Mr McColl and Mr Smith to assign to the plaintiff the benefit of the contract that Mr McColl had entered into with the Bank as a consequence of being the successful bidder at the auction.

157 These were telling points, and I must keep them in mind before proceeding to a finding. However, they were ameliorated to some extent by a body of evidence that the plaintiff was determined to try and retain his home on Lot 16. On this view of the matter, it should not be thought surprising that the plaintiff might make a sudden and not fully thought out decision to instruct Mr McColl in the terms of the bidding arrangement, even though the information before him as to how the purchase price for Lot 16 was to be raised was somewhat scant.

158 In my estimation Mr Slater was not a particularly sophisticated witness, and I do not find it especially surprising that he may have made an instinctive decision without weighing up all the pros and cons in the more cautious manner of an accountant or a banker. He had come to the auction determined to make a last ditch attempt to save the land by negotiating with the Bank in terms of the Hare proposal. It seems to me that by nature he was a man of action rather than a man given to introspection. He acknowledged that Mr McColl had been trying to "crunch" him in earlier negotiations, and it might therefore be thought surprising that at the auction he should then trust Mr McColl to act as his agent. However, against this, I must keep in mind that there was a need for the plaintiff to distance himself from the bidding and from those close to hand such as Mr Lazenby, Mr Hare and Mr Arndell. Mr McColl, had the advantage of being in a relationship of sorts with the plaintiff (on the plaintiff's case) as a consequence of the 22 April agreement and following events.

159 On the whole, then, notwithstanding some of the inconsistencies and oddities associated with the plaintiff's evidence at the trial, I am of the view that considerable weight should be given to his testimony. As I have

already noted, these inconsistencies and oddities, must be viewed in the context of the vagaries inherent in a rapidly evolving situation. The various participants, at all stages of the matter, were under financial pressure and did not have time for clear thinking.

160 Mr McColl was generally a less impressive witness. His witness statement commenced with an assertion that 1995 was a difficult year for him due to a cancerous growth that had affected his sinuses. He went on to say that as a result he suffered from blackouts and some memory problems. He said further that he was presently taking medication for a medical condition affecting his kidneys and that this could effect his thought processes and was inclined to make him tired and unable to concentrate for extended periods of time. These considerations may have had an effect upon his testimony but, for whatever reason, on many occasions it seemed that he was not able to give clear explanations for what had occurred prior to and after the auction.

161 Mr McColl acknowledged freely that as at May 1995 he was accustomed to leaving financial matters to Mr Smith. Mr Smith was a younger man but I had little difficulty in concluding that he was the dominant figure in the partnership. The answers given by Mr McColl to many questions in the course of cross-examination suggested that he was a somewhat compliant figure in the partnership when it came to dealing with Mr Smith. I found it difficult to accept that Mr McColl might have taken decisive action without reference to Mr Smith.

162 The question of Mr McColl's compliancy can be illustrated by reference to his own account of what took place immediately after the auction. He agreed that he did go back to the plaintiff's house after the auction and was there for 30 minutes or so as discussion took place around him concerning the events at the auction. On his version of the events he had acted decisively on his own account in bidding not for Mr Slater but on behalf of a prospective group of investors or company to be formed, even though he had no clear assurance that the purchase price for Lot 16 could be raised. Nonetheless, on his own admission, he became embarrassed by the conversation going on around him to the effect that Lot 16 was now in friendly hands. It seems he could not summon up the fortitude to say directly to the plaintiff that the position was not as the plaintiff seemed to think. He slipped away without debating the issue although it must have been clear to him that those remaining were labouring under a misapprehension as to what had occurred. A question therefore arises as to whether Mr McColl made his

position clear when he was involved in certain verbal exchanges with the plaintiff immediately before the auction.

163 Mr McColl was subjected to a lengthy and detailed cross-examination. It was put to him in various ways that on his account he was "representing others" in bidding at the auction but he could give no clear picture as to who exactly comprised this group. When he was pressed strongly as to who exactly he had spoken to before the auction he wrote down a list of names, at the invitation of counsel, but his answers about that matter were not convincing. It is material, as I have already noted, that in the days following the auction he apparently made no attempt to contact these people. He was obliged to fall back on the notion that in bidding at the auction he had some assurance of support from Mr Rando, *albeit*, not for the full amount.

164 Mr Smith said in evidence that he had no prior knowledge of Mr McColl's intention to bid at the auction. As I have already noted, the fact that Mr McColl was compelled to charge his residential land in favour of Port Franklin with repayment of the deposit strongly suggests that, as between Mr McColl and Mr Smith, the predicament created by events at the auction was thought to have been created by McColl alone.

165 The lack of any clear explanation by Mr McColl as to what exactly his purpose was in going to the auction and what he hoped to achieve, bearing in mind that, even on his own account, he had no clear backing or instructions from either Mr Smith or Mr Rando, raised a question mark that hovered over his evidence generally. It is difficult for me to say positively that Mr McColl was not a truthful witness because it seems to me quite possible that the inadequacies in his evidence were due to an underlying confusion of mind both then, and perhaps even now, as to what he intended to do at the auction, and as to what he actually did. This confusion is evident in the passages from the cross-examination of Mr McColl I have cited during the course of this judgment, especially as to the meeting that is said to have occurred (on the plaintiff's case) at the premises of Motor Easy on 8 May 1995.

166 All this is to say that I viewed Mr McColl's testimony with great caution, and this simply underlines, again, the need to keep in mind the framework of undisputed facts. In that regard, I have already noted that at about the same time as the plaintiff was communicating with Mr McColl about the proposed Amber Oak arrangement, Mr McColl, without bothering to respond to the plaintiff's letters, wrote to the Bank on behalf of Strawberry John with a view to ensuring that the land was ultimately

vested in the defendant company. Mr McColl's failure or refusal to acquaint the plaintiff with what he was doing in a forthright manner is a further reason for viewing Mr McColl's version of events with caution.

167 Mr Smith was younger than Mr Slater and Mr McColl but quite clearly a far more articulate and sophisticated witness. He was not flustered by any of the questions that were put to him and had a ready answer for various matters that were put to him, including some supposed inconsistencies between what he had said in his earlier affidavit and his evidence at trial. Notwithstanding a long cross-examination, he did not depart from his evidence in chief to any significant extent and did not make any damaging admissions. It was difficult to imagine him putting a foot wrong. I was inclined to accept his evidence that it came as a surprise to him at midday on Saturday, 6 May when Mr McColl returned to the Motor Easy premises and revealed that he had just signed a contract for the purchase of Lot 16.

168 It was put to Mr Smith that he was initially annoyed by the notion that his business partner, Mr McColl, had committed himself to purchase Lot 16 for the sum of $840,000 but changed his attitude in subsequent days when it gradually dawned upon him that the land was a good bargain at such a price. Mr Smith disputed this line of questioning with apparent ease but he nonetheless found it somewhat difficult to explain the circumstances in which he came to insist upon a fee of $10,000 for his trouble in helping to sort out the situation.

169 Mr Smith denied that any meeting had taken place at the Motor Easy premises on Monday, 8 May as alleged by the plaintiff and placed the meeting in question after the deposit had been paid. By that time it could arguably be said that the rights under the contract were vested in Mr McColl alone. However, I was not convinced that Mr Smith was being entirely truthful about this aspect of the matter. At best, his evidence concerning the date of the meeting was somewhat equivocal. His belief was that Slater "came to see us on the Wednesday" because "back in 96 or 97" he had prepared a chronology. "I wrote that it was the Wednesday that he came to see us and that's my best recollection."

170 I will turn to the credibility of the other witnesses such as Mr Lazenby, Mr Hare and Mr Arndell for the plaintiff and Mr Allen for the defendant as the need arises to assess their role in the context of the discrete issues I have already identified. I remind myself that Mr Rando's evidence for the defendant was inconsistent with the evidence of Mr McColl and Mr Smith in two significant respects. Mr Rando said at

trial that shortly before the auction it was agreed that Mr McColl would bid for Lot 16 on behalf of Mr Smith, Mr McColl and himself to a maximum of $650,000. He said further that at no time prior to the auction did he agree to provide a deposit of $80,000. As to the first matter, both Mr McColl and Mr Smith denied that Mr Smith was party to such an agreement. As to the second matter, Mr McColl's evidence was that Mr Rando had agreed to provide an amount for the deposit.

171 Before proceeding to the various issues, it will be useful at this point to look at some of the legal principles bearing upon those issues, and especially the equitable rules concerning constructive trusts. This is a case in which the title to Lot 16 is now vested in the defendant as registered proprietor of the same and it is therefore necessary to ascertain at the outset whether a declaration of constructive trust of the kind sought by the plaintiff can be made.

Legal Principles

172 The concept of indefeasibility of title whereby the estate of the registered proprietor is to be regarded as paramount finds expression in s 68 and s 134 of the *Transfer of Land Act (1893)*. The registered proprietor holds the relevant estate subject only to such encumbrances as may be notified on the certificate of title except in case of fraud.

173 The decided cases make it clear that the indefeasibility provisions do not preclude a claim to an estate or interest in land against a registered proprietor arising out of the acts of a registered proprietor himself: ***Breskvar v Wall*** (1971) 126 CLR 376 at 384. Further, the Privy Council in ***Frazer v Walker*** [1967] 1 AC 569 at 585 made it clear that the principle of indefeasibility "in no way denies the right of a plaintiff to bring against a registered proprietor a claim in *personam*, founded in law or in equity, for such relief as a court acting in *personam* may grant." See also ***Koorootang Nominees Pty Ltd v ANZ Banking Group*** [1998] 3 VR 16. It follows that where the plaintiff has been found to be entitled to relief in equity as a consequence of fraud or unconscionable conduct on the part of the registered proprietor in the course of his dealing with or connection to the plaintiff, the rules concerning indefeasibility do not preclude relief.

174 Section 34(1) of the *Property Law Act (1969)* provides that no interest in land is capable of being created or disposed of except by writing signed by the person creating or conveying the interest, or by his agent thereunto lawfully authorised in writing or by operation of law.

Section 34(2) provides that this section does not affect the creation or operation of resulting, implied or constructive trusts.

175 A constructive trust has been described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principles. It is said to prevent a person from asserting a legal right in circumstances where such an assertion would constitute unconscionable conduct.

176 In ***Muschinski v Dodds*** (1985) 160 CLR 583 Deane J noted at 616 that the principle operation of the constructive trust doctrine has been in the area of breach of fiduciary duty, but it can arise in other circumstances.

177 I note also that in ***Giumelli v Giumelli*** (1996) 17 WAR 159, Ipp J of the Full Court in this State proceeded on the basis at 175 that unconscionability was the critical issue. Where unconscionability has been established and the circumstances otherwise justify the declaration of a constructive trust, non-compliance with statutory requirements will not prevent equity from imposing such a trust. See ***Muschinski v Dodds*** (*supra*); ***Stowe & Anor v Stowe*** (1995) 15 WAR 363. This view of the matter was affirmed by the High Court in ***Giumelli v Giumelli*** (1999) 196 CLR 101, although an appeal against the decision of the Full Court succeeded as to the extent of the relief granted to the plaintiff in that case. The High Court indicated that if the plaintiff is entitled to equitable relief it is for the Court to determine the appropriate way to satisfy the equity and, in doing so, it must considered all the circumstances of the case.

178 One finds an extensive discussion of the nature of fraud in equity in Meagher, Gummow & Lehane, Equity: Doctrines and Remedies (3rd ed) at pars 1201 to 1211. The authors note that one must never lose sight of the evolution of various equitable principles such as part performance and relief against penalties from a general concept of fraud as abhorrent to good conscience. The authors note at par 1210 that examples of fraud in equity include matters such as the pursuit of interest in conflict with duty arising from a fiduciary relationship, the use of power over another in the procurement of a bargain, improper reliance upon legal rights and the constructive trust, viewed as a remedial device, where it would be a fraud for the person on whom the court imposes the trust to assert beneficial ownership. The variety of these disparate circumstances has led many equity judges to eschew any definition of fraud as difficult and dangerous.

The authors suggest that the various categories are fairly settled instances of appeals to the conscience of the court.

179 In ***Avondale Printers & Stationers Ltd v Haggie*** [1979] 2 NZLR 124 McMahon J suggested at 164 that where property is conveyed or proprietary rights released in consideration of an oral promise by the transferee that the transferor will retain or later acquire a beneficial interest in the property in question, and where retraction of the promise amounts to a fraud upon the transferor, then the transferee will be held a constructive trustee for the benefit of the transferor of either the whole property or of the relevant interest therein. The key to this type of inquiry lies in the question whether the transferor would have parted with his property but for the oral undertaking of the transferee. It must be kept in mind that the holder of the legal title to property will not in all cases be constituted a constructive trustee merely by reason of the fact that he has been shown to be in breach of an oral agreement affecting that property and made between himself and the plaintiff. The circumstances must show that reliance upon the legal title in that particular situation amounts to a fraud upon the plaintiff.

180 In ***Bahr v Nicolay (No 2)*** (1988) 164 CLR 604, for example, the High Court held that where a registered proprietor took a transfer or obtained title to the subject land knowing of and accepting an obligation to carry into effect an earlier contractual arrangement affecting the land, the registered proprietor took the land subject to a constructive trust in favour of the party entitled under the earlier arrangement.

181 Mason CJ and Dawson J noted that pursuant to s 68 and s 134 of the *Transfer of Land Act* "fraud" is an exception to indefeasibility. They were of the view that in regard to this exception to indefeasibility, there was no difference between a false undertaking which included the execution of a transfer and an undertaking honestly given which induced the execution of a transfer and was subsequently repudiated for the purpose of defeating a prior interest. Repudiation was fraudulent because it had the object of destroying the unregistered interest notwithstanding that its preservation was the foundation or assumption underlying the execution of the transfer.

182 In the context of the present case, these principles suggest that an agent who, on behalf of his principal, contracts to purchase land but then takes the conveyance in his own name and claims to be the owner of the land has acted unconscionably and may be said to have committed fraud. However, it is apparent from the circumstances of the present case, that the alleged Slater/McColl bidding arrangement relied upon by the plaintiff

was at best an informal agreement made orally at short notice. Further, a question may arise as to whether the agreement, if any, was supported by consideration. It seems that no fee was agreed with Mr McColl to act as agent and, on one view of the matter, the arrangements envisaged by the 22 April agreement or any subsequent variation thereof, might be thought to be too indirect or uncertain to be regarded as a benefit to be conferred upon Mr McColl.

183 The general position concerning agency is set out in Halsbury's Laws of England, 4th ed, Vol 1 (2) Reissue par 1:

> "The terms 'agency' and 'agent' have in popular use a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called 'the agent', has authority to act on behalf of another, called 'the principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen. Conversely the relation of agency may arise despite a provision in the agreement that it shall not."

184 In the circumstances of the present case it becomes necessary to look briefly at the rules concerning non-contractual agencies. It seems that there is a consistent judicial recognition that there is no necessity as such for a contract to exist in order to create an agency. It is sufficient if there is consent by the principal to the exercise by the agent of authority and consent by the agent to his exercising such authority on behalf of the principal. An agent can be appointed by an agreement that is unenforceable as a contract for lack of consideration but which nonetheless shows that the parties intended to create an agency agreement. Dal Pont, Law of Agency par 4.10 and par 4.11. See also ***Walden Properties Ltd v Beaver Properties Pty Ltd*** [1973] 2 NSWLR 815 at 841 per Hutley JA.

185 There may be cases in which one party has simply held itself as willing to perform a service for another, there being no evidence of any contract to that effect, and the relationship created can be characterised as one of agency. For example, in ***Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd*** (1984) 157 CLR 149 the High Court of Australia found a relationship of agency to be created between a member of a co-operative and the co-operative itself where the latter had held itself out as being prepared to arrange insurance for the member, even though there was no enforceable agreement between the parties requiring the co-operative to obtain the insurance. In such cases it is common for the agent to have acted gratuitously.

186 I have already noted that the defendant does not plead that it was a *bona fide* purchaser for value without notice of the plaintiff's alleged interest in the land. However, it is clear from the decided cases that a third party such as the defendant company in the present case that was not directly involved in or a party to the bidding arrangement can only be liable as a constructive trustee if it receives for its own benefit trust property with notice that it has been transferred to that party in breach of trust. ***Ninety Five Pty Ltd (In Liq) v Banque Nationale de Paris*** [1988] WAR 132.

187 The plaintiff's case was that because Mr McColl was acting as Mr Slater's agent pursuant to the bidding arrangement, Mr McColl's equitable interest as purchaser, under the sale contract effected at the auction, was held on trust for the plaintiff. Mr McColl's conduct in refusing to perform the arrangement made with the plaintiff and in passing the benefit of the contract to the company amounted to fraud sufficient to vitiate the latter transaction in circumstances where the company was essentially a party to the fraud. Further, and in any event, where the company took with knowledge that the land was subject to a prior beneficial interest it held the land on constructive trust.

188 In ***The Hancock Family Memorial Foundation Ltd & Anor v Porteous*** (1999) 151 FLR 191 at [79], Anderson J said:

> "Recipient liability may be established if the defendant had actual or constructive knowledge at the time he received the relevant property that (a) it was trust property and (b) it was being misapplied. The defendant will be taken to have constructive knowledge if it is proved that he wilfully shut his eyes to the obvious; that he wilfully and recklessly failed to make such inquiries as an honest and reasonable man would

> make in the circumstances; and that he knew of circumstances which would indicate the true facts to an honest and reasonable man. If all that is proved is that the defendant had knowledge of circumstances which would put an honest and reasonable man on inquiry, that is not enough: see *Koorootang* at 85 and 105."

189 I will return to the vexed issue of what knowledge can be attributed to a company in due course. However, for the time being, I note that the plaintiff relied upon the proposition that knowledge acquired by an officer or representative of a company, other than in that capacity, is attributable to the company where the person concerned had a duty to report the knowledge to the company. ***ZBB (Australia) Ltd v Allen*** (1991) 4 ACSR 495 at 506.

190 The defendant contended that the knowledge of a company can only be the knowledge of persons who are entitled to represent the company. Knowledge acquired by a person is only attributable to a company if the person is an officer of the company under a duty to report the knowledge to the company: ***Beach Petroleum NL and Claremont Petroleum NL v Johnson & Ors*** (1993) 115 ALR 411 at 568. Also see ***LHK Nominees Pty Ltd v Kenworthy*** [2001] WASC 205 at pars 68 to 72.

191 Let me now return to the issues I mentioned earlier.

The Bidding Arrangement Issue

192 In dealing with this issue I must begin by returning to what I have called the alleged agreement of 22 April whereby the plaintiff was to sell a half share in Lot 15 as a means of discharging his liability to the Bank. If there is no substance in the plaintiff's case concerning this aspect of the dispute then it will be difficult to accept his account of what took place on the morning of the auction.

193 I have already indicated that, in my view, the plaintiff should generally be regarded as a reliable witness. His account of the relevant negotiations leading up to and comprising the alleged 22 April agreement was not seriously disputed by Mr McColl and the plaintiff's evidence is corroborated to some extent by the document headed "Notes on Original". I am satisfied that Mr Smith was on the Motor Easy premises when the agreement was concluded and was generally conversant with the terms of the relevant discussion, *albeit*, not having been present throughout the negotiations. His evidence did not detract from the plaintiff's account to

any significant extent. I am therefore prepared to accept that the agreement was made as alleged and that for a period of two weeks or so leading up to the auction serious consideration was being given to the notion that a half share in Lot 15 might be sold as an avenue by which the plaintiff could retrieve Lot 16. I accept that Mr McColl was unable to finance such a proposal via his own bank and that this led, to the plaintiff's knowledge, to an inspection of the Sweetwater Property by Mr Rando as a prospective financial backer for the proposal concerning Lot 15.

194 I doubt that Mr Rando was in fact interested in acquiring an interest in Lot 15 as a consequence of his inspection. However, the intensity of the negotiations and exchanges between the plaintiff and Mr McColl were probably sufficient to convince the plaintiff, as late as the day before the auction, that there was still some prospect, for one reason or another, that the proposed transaction might proceed. I am satisfied that the plaintiff had made it quite clear to all concerned that he was simply not prepared to sell Lot 16 or enter into any arrangement concerning the same and had indicated that the presence of his caveats could represent an impediment to the acquisition of Lot 16. He assumed that he had made his position clear in that regard with the result that Lot 16 was not on the agenda.

195 I therefore find that the plaintiff entertained a belief as at the day of the auction that, even at the eleventh hour, something might come of the Lot 15 proposal. With the benefit of hindsight, having regard to Mr Rando's greater interest in Lot 16, the plaintiff was probably over-optimistic in harbouring such a belief, but I am satisfied that his belief was genuine and that this influenced his conduct on the day of the auction. The presence of the Dix valuation attributing a sizeable value to Lot 15 is another factor weighing in favour of a finding that the plaintiff entertained such a belief.

196 I am satisfied that the plaintiff's account of his negotiations with Mr Hare should be accepted. His account was not seriously disputed and it was supported by Mr Hare whom I generally regarded as a reliable witness. It follows from this that I am able to find that on the morning of the auction, prior to the commencement of the bidding, the plaintiff's state of mind remained positive. He had not simply resigned himself to the loss of Lot 16. He did not simply stand by despairingly waiting for the bidding to commence. He came to the site ready to negotiate with the Bank in regard to the Hare proposal and was on the look out for any other opportunity that might arise. This view of the matter is corroborated by the evidence of Mr Hare, Mr Lazenby and Mr Arndell and by their presence at the auction site.

197 When I turn to Mr McColl's evidence and to his account of what brought him to the site, I am immediately faced with various difficulties. Mr McColl spoke of having approached investors beforehand but his evidence in that respect was vague and unconvincing. Notwithstanding the prior discussions concerning the alleged 22 April agreement, Mr McColl did not assert in his evidence that as at 6 May he had the support of Mr Smith for any proposal concerning either Lot 15 or Lot 16, and this was affirmed by the evidence of Mr Smith. The latter said in evidence that he was not aware that Mr McColl had in mind to go to or bid at the auction. At best, Mr McColl could point only to a faint expression of interest by some prospective investors and a promise of limited support from Mr Rando to bid for Lot 16 up to $650,000. Mr Rando said in evidence that he did not agree to cover the payment of any deposit that might be required and his subsequent actions suggest that this was so. According to Mr McColl, he had an expectation that Mr Rando would assist him with the deposit up to $80,000 if he was the successful bidder and managed to obtain the property at a good price.

198 If the defendant had mounted a convincing case that Mr McColl was a bold and decisive individual who had come to the auction with a strong promise of financial support and a clear plan of action to acquire Lot 16 either on behalf of a triumvirate of Rando, Smith and McColl as a precursor to a company to be formed or, alternatively, on behalf of a syndicate to be formed of prospective investors, then evidence to this effect would have weighed heavily against the plaintiff's testimony concerning the making of the bidding arrangement on the morning of the auction. Such a case would have served to explain the undisputed fact that Mr McColl was the successful bidder at the auction, and would stand in clear contrast to the plaintiff's account of what occurred on the day in question. But no such case emerged from the evidence. Mr McColl's account of his conduct was somewhat equivocal, inconsistent with the evidence of Mr Smith and Mr Rando, and, ultimately, unconvincing.

199 I have previously indicated that, for the reasons previously given, I do not regard Mr McColl as a reliable witness. I will not revisit the factors bearing upon that perception save to remind myself that Mr Smith was generally the one who attended to financial matters. I consider that Mr McColl was inclined to be compliant and was not sufficiently bold to make a sizeable bid and commit himself to a contract to purchase the land entirely off his own bat and with no clear promise of support or encouragement.

200 I consider that Mr McColl came to the auction site principally out of curiosity and with a vague sense that if some opportunity arose to acquire Lot 16 he might take advantage of it bearing in mind that Mr Rando was interested in the Sweetwater property to some extent and could be persuaded to provide financial support if a chance arose to acquire Lot 16 at a bargain price. When one looks closely at the extensive cross-examination of Mr McColl one finds various passages which appear to underline such a view. For present purposes, one example will suffice. When Mr McColl was asked about his discussions with Mr Rando prior to the auction and the issue of the deposit, the following exchanges occurred:

> "So, what, you are saying before the auction he hadn't really given you a commitment to cover it? --- No, not really.
>
> What were you doing telling Slater that you had $80,000? --- Well, I knew we would find it somehow, that - to try and do something with Mr Slater. That was all I knew. I believed in the whole project, somehow I would do it, and it was achievable. It wasn't a major problem that I could see."

201 I find that Mr McColl initiated a telephone call to the plaintiff while on his way to the auction site at 10.25 am and the call lasted for a minute or so. Mr McColl spoke to the plaintiff again at the auction site before the bidding commenced. It follows from this that there was an opportunity for the bidding arrangement to have been made as alleged by the plaintiff. The crucial question is whether the bidding arrangement contended for by the plaintiff was actually brought into being as a result of these exchanges.

202 In approaching that question, for the reasons I have previously given, I accord greater weight to the plaintiff's version of what was said than to Mr McColl's denial. I take account also of the undisputed fact that Mr McColl proceeded to bid at the auction, and of my conclusion that he did so without any clear source of encouragement outside the alleged Slater/McColl bidding arrangement, and to a level that, even on his own account, exceeded anything he had discussed with Mr Rando. I am not persuaded that Mr McColl would have bid in that manner without encouragement. In the absence of clear support from any other quarter, the plaintiff was the most proximate and most likely source of encouragement, having regard to the previous negotiations and a degree of prior friendship between the parties. I must take this factor into account in weighing up the evidence. I also give some weight to the evidence of Mr Lazenby and Mr Hare as to what was said in their presence before the bidding commenced, such evidence being generally supportive of the

plaintiff's case. It appeared from the evidence at trial that Mr Brown-Neaves, the other party bidding at the auction, was under the impression that Mr McColl was bidding on behalf of the plaintiff and that the plaintiff had been the successful bidder at the auction. Mr Brown-Neaves said under cross-examination that he pulled out of the bidding because the former owner wanted the property "more than we did." He spoke to Mr Slater afterwards and told him that he thought he (Slater) had picked the property up cheap.

203 To my mind, the plaintiff's case concerning the bidding arrangement issue is also supported by subsequent events. It is significant that in signing the contract documents at the auction Mr McColl did not identify himself as the representative of any third party or group of investors. I find that at the lunch after the auction at the plaintiff's house there was some discussion in the presence of Mr McColl to the effect that the property had been acquired on behalf of the plaintiff. Mr McColl himself concedes that he did not refute any such suggestion and I find his account of why he remained silent to be somewhat unconvincing. It would have been an easy matter for him to have said plainly and simply that as far as he was concerned he had bought the property on behalf of himself or on behalf of some group other than the plaintiff but he failed to do so.

204 It is significant also that when Mr Smith and Mr Rando were informed that Mr McColl was the successful bidder and had contracted to purchase the land they both took the view that this was a predicament created by Mr McColl alone and for which he was responsible. Such a view is confirmed by the undisputed fact that Mr McColl was required to charge his own residential property in favour of Port Franklin with repayment of the deposit. These events are not decisive factors of themselves but taken together they tend to confirm that some arrangement was made between the plaintiff and Mr McColl on the morning of the auction which was thought to favour the plaintiff and which came as a matter of surprise to Mr Smith. I have already observed that the plaintiff attended the auction site in a positive frame of mind and was on the look out for opportunities if they arose. This too is consistent with the plaintiff's account of the bidding arrangement, bearing in mind the prior course of negotiations between the parties concerning the alleged 22 April agreement.

205 It emerges from previous discussion, however, that there are some matters weighing against the plaintiff's account of the bidding arrangement which have to be addressed. It is a central feature of the plaintiff's account that Mr McColl said in the telephone call to the

plaintiff, and subsequently, words to the effect that Rando had come good with the money. He was prepared to do the deal but would not pay more than $800,000 for half of Lot 15. In other words, it was because of this representation that the alleged 22 April agreement (or some variation of it) had been revived that the plaintiff then instructed Mr McColl to act on his behalf in bidding for Lot 16. The difficulty is that, notwithstanding all the doubts I have expressed concerning the evidence of Mr McColl and his associates, there is very little in the evidence as a whole to suggest that Mr Rando was interested in acquiring a half share of Lot 15. This bears upon the question of whether, on the morning of the auction, Mr McColl said that Mr Rando was willing to do the deal concerning Lot 15 as alleged by the plaintiff.

206 As I ponder this puzzling feature of the plaintiff's case, which sits uncomfortably with the various matters I have identified as weighing in his favour, I feel compelled to keep in mind another point of difficulty I have previously touched upon, namely, that there was no explicit reference to the acquisition of a half share in Lot 15 or to the bidding arrangement in the summary letter that Mr Adams composed on behalf of the plaintiff dated 22 May 1995 and which was then sent to Mr McColl some weeks after the auction.

207 However, in order to place these considerations in their proper context, I am obliged to note that Mr McColl and his associates did not answer the letter of 22 May, or the subsequent letter of 31 May in which it was asserted, in general terms, that Mr McColl had acquired Lot 16 on behalf of the plaintiff. I am obliged to take account also of the conduct of the respective parties in the week following the auction. I will turn to the plaintiff's account of what took place on 8 May in more detail in a moment. There is much to suggest, however, that the plaintiff's account is correct, namely, that at a meeting on that day Mr Slater and Mr McColl were principally concerned to find ways and means of carrying the alleged Slater/McColl bidding arrangement into effect following Mr Rando's refusal of support. The question of whether post contract conduct is admissible as an aid to interpretation has not been finally resolved in Australia. ***Royal Botanic Gardens and Domain Trust v South Sydney Council*** (2002) 186 ALR 289. But such a rule does not exclude evidence as to the subject matter of an agreement or the making of a new agreement: ***Posgold (Big Bell) Pty Ltd v Placer (WA) Pty Ltd*** (1999) 21 WAR 350.

208 At the end of the day, I have come to the conclusion, bearing in mind the observations I have already made about Mr McColl as a witness, that

Mr McColl probably expressed himself rather clumsily on the morning of the auction pursuant to an ill-defined plan to secure Lot 16 for a bargain price if the chance arose. In my view, Mr McColl conveyed to the plaintiff in general terms that he, McColl, had a strong expectation that one way or another Mr Rando could be relied upon to proceed with the proposal concerning Sweetwater at a figure of $800,000 so that the plaintiff could achieve his avowed objective of paying out the Bank and retrieving Lot 16. The speed with which matters were unfolding meant that the plaintiff did not press Mr McColl for details, save to establish that Mr McColl had access to a deposit of $80,000. The plaintiff assumed that the negotiations arising out of the alleged agreement of 22 April (which had been under discussion on the day before the auction) had been revived and that Mr Rando was now willing to proceed with the purchase of a half share in Lot 15. He then instructed Mr McColl to bid for Lot 16 in terms of the alleged Slater/McColl bidding arrangement, whereupon, compliantly, and without trying to clarify the implications of the situation, Mr McColl agreed to proceed as instructed.

209 There may have been a degree of misunderstanding between the parties as to what would be the long term implications of the bidding arrangement, but I proceed from the premise that the making of the arrangement must be determined by an objective appraisal of the evidence. I am satisfied that Mr McColl made no attempt outwardly to correct or qualify the bidding arrangement proposed to him by the plaintiff. This meant that the immediate and specific objective of the bidding arrangement was that Mr McColl was to bid for Lot 16 in accordance with the plaintiff's instructions as to price and with a view to holding the benefit of the contract on behalf of the plaintiff.

210 In arriving at this conclusion, I apply the rule that in a contractual or quasi-contractual situation, the law is concerned, not with the real intentions of the parties, but with the outward manifestation of those intentions. ***Taylor v Johnson*** (1983) 151 CLR 422 at 428. I note that in ***Australian Broadcasting Corp v XIV Commonwealth Games Ltd*** (1988) 18 NSWLR 540 at 549 Gleeson CJ indicated that the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. With the benefit of hindsight, I recognise that on the morning of the auction Mr McColl may well have been serving some purpose other than to assist the plaintiff to acquire Lot 16. However, having regard to the outward expressions of intention as manifested by

what the parties said and did, I find that Mr McColl agreed to bid for the plaintiff. The plaintiff refrained from bidding, or from making any alternative arrangement upon that basis.

211 Put shortly, then, for these reasons, keeping in mind the haste with which the bidding arrangement was negotiated, and the exigencies of the occasion, I am satisfied according to the civil standard of proof that the bidding arrangement was made in the manner contended for by the plaintiff, that is to say, the plaintiff and Mr McColl on 6 May 1995 entered into an oral agreement in the terms pleaded in par 4 of the amended statement of claim. Mr McColl further agreed that the land was to be transferred to the plaintiff or his nominee at settlement free of any encumbrance.

The Effect of the Bidding Arrangement Issue

212 It is alleged in par 12 of the statement of claim that Mr McColl's fraud caused the agreement to purchase Lot 16 to be avoided to enable the defendant to purchase Lot 16. This assumes that Mr McColl was duty bound to comply with the bidding arrangement that I have found was entered into by Mr Slater and Mr McColl. It therefore becomes necessary to explore the implications of the oral agreement comprising the bidding arrangement.

213 In the course of earlier discussion I noted that by s 34(1) of the *Property Law Act* no interest in land is capable of being created except by writing signed by the person creating the interest or by an agent thereunto lawfully authorised in writing or by operation of law. The oral agreement comprising the bidding arrangement was not made or evidenced in writing and it is therefore questionable whether the plaintiff was in a position immediately following the auction to require that Mr McColl convey the benefit of the relevant contract to him as a matter of law. However, the plaintiff's case was that upon Mr McColl signing a contract to purchase Lot 16 at the auction site he (McColl) acquired a beneficial interest in the land and held the same in trust for the plaintiff or, putting it another way, the circumstances were capable of giving rise to a constructive trust.

214 In other words, as I noted in my review of the decided cases such as ***Frazer v Walker*** (*supra*) and ***Bahr v Nicolay*** (*supra*), if Mr McColl (or a third party with knowledge of Mr McColl's conduct) acted in a manner amounting to fraud in equity by repudiating an enforceable contract or by setting up the registered title as a means of defeating the benefit of a prior agreement then it would be open to the Court to hold that the land was

held subject to a constructive trust in favour of the intended beneficiary under the prior agreement.

215 At a first glance, it might seem that in the circumstances of the present case the oral agreement comprising the bidding arrangement did not amount to an enforceable agreement, and if that were so, in the absence of a fiduciary relationship between the parties, Mr McColl could not be said to be acting unconscionably if, having bid successfully for Lot 16 at the auction, he decided to ignore the oral agreement comprising the bidding arrangement and followed some other course.

216 It was with such a thought in mind that I canvassed issues of this kind with counsel at some length in the course of closing addresses. I pointed out that even if it be held that Mr McColl and the plaintiff had made the alleged 22 April agreement, important as that might be in serving to explain what the parties did at the auction site, the indications were that the agreement had been put to one side or abandoned prior to the auction. In any event, the alleged 22 April agreement was not pleaded by the plaintiff in par 4 of the claim as an ingredient of the oral agreement comprising the bidding arrangement. This would suggest that the bidding arrangement was arguably not supported by consideration and could not be characterised as an enforceable agreement, with the result that Mr McColl was not duty bound in the eyes of the law to hold the benefit of the contract of sale concerning Lot 16 for and on behalf of the plaintiff. Further, the plaintiff did not allege in his pleading that the circumstances gave rise to an *estoppel* in that the plaintiff refrained from bidding on the assumption that Mr McColl was bidding on his behalf.

217 It was in the context of this discussion that I was referred to certain authorities concerning the law of agency, being the authorities I mentioned in the course of reviewing the relevant legal principles. These cases establish that an agent can be appointed by an agreement that is unenforceable for lack of consideration but which nonetheless shows that the parties intended to create an agency agreement. Accordingly, I am satisfied that there is no necessity as such for a contract to exist in order to create an agency.

218 It is against this background that I find in the circumstances of the present case that the effect of the oral agreement comprising the bidding arrangement was to constitute Mr McColl as the plaintiff's agent with the result that Mr McColl held the benefit of the agreement to purchase Lot 16 on behalf of the plaintiff in the manner pleaded in par 4 of the statement of claim. The oral agreement may not have been sufficient in

law for the plaintiff to obtain an interest in the subject land but the presence of the agency constituted by the bidding arrangement is material in determining whether the plaintiff is entitled to relief in equity.

The Performance of the Bidding Arrangement Issue

219 The next question is whether the bidding arrangement remained in force at all material times prior to the defendant company acquiring Lot 16 at settlement on 19 June 1995. If it be held that the plaintiff was simply not in a position to complete the purchase of Lot 16 in the manner contemplated by the bidding arrangement, and allowed Mr McColl to make other arrangements, the issue raised by those passages in the plaintiff's statement of claim in which it is asserted that the benefit of Lot 16 was to be assigned to Amber Oak will have to be resolved in favour of the defendant.

220 I will not revisit the factors bearing upon the credibility of the various witnesses at length. For the reasons I have previously given, I attach more weight to the testimony of Mr Slater than to the evidence provided at trial by Mr McColl. I am satisfied that on Monday, 8 August Mr McColl informed the plaintiff that in fact no financial support would be forthcoming from Mr Rando and that this led to a meeting on that day at the Motor Easy premises attended by the plaintiff, Mr Adams, Mr McColl and Mr Smith.

221 The plaintiff's evidence was to that effect. I have previously noted that both Mr McColl and Mr Smith were somewhat equivocal about that aspect of the matter. Further, and in any event, having found that the bidding arrangement was made as alleged, it is consistent with such a finding that on Monday, 8 May, being a day or so before the deposit was due, that the plaintiff and Mr McColl should get together promptly to decide upon the next step and to determine what was to be done in light of Mr Rando's stance.

222 It seems likely, on my view of the evidence, that prior to the meeting Mr McColl conveyed to both Mr Rando and Mr Smith that he had bid for and contracted to purchase Lot 16 pursuant to the bidding arrangement and had discovered that his business colleagues were displeased by what had occurred. There are various indications in the evidence to that effect including the Port Franklin charge upon Mr McColl's land for repayment of the deposit. This strongly suggests that Mr McColl's colleagues saw him as someone who had exceeded his instructions and created a

predicament for those who saw some development potential in the Sweetwater property.

223 In any event, I am satisfied, and so find, that at the meeting at Motor Easy on 8 May the plaintiff informed Mr Smith about the bidding arrangement. The plaintiff made it clear that in his view Mr McColl was holding the benefit of the contract to purchase Lot 16 on behalf of the plaintiff and in the light of Mr Rando's refusal to be further involved the immediate matter of concern was to fund the deposit and raise the balance of the purchase price from some other source. I am satisfied that Mr McColl did not dispute the plaintiff's account of what took place at the auction. I infer, and so find, that on or about 8 May Mr McColl told Mr Smith about the Slater/McColl bidding arrangement and that he was a party to it. Mr Smith acknowledged his awareness of the bidding arrangement at the meeting on 8 May at the Motor Easy premises.

224 I find that Mr McColl and Mr Smith agreed to proceed as the plaintiff proposed and it was in that context that Mr Smith negotiated a fee of $10,000 to act as proposed and as something more tangible than simply a "warm fuzzy feeling", being the words he uttered at the meeting on 8 May.

225 To my mind, there is confirmation for this finding in the notes subsequently made by Mr Smith at a later stage before meeting with his solicitor. These notes were made after the auction. Mr Smith had jotted down the matters on which advice was required. His note reads "Is the deal with WS illegal in any way?" Mr Smith said that this phrase was a reference to the so-called deal concerning the fee for $10,000 and the possibility that such a fee might be characterised as a secret commission. The fact is, however, that at the time the notes were made the $10,000 fee for services was no longer a significant issue. As the notes made by Mr Smith reveal, the crucial question was whether the plaintiff could be said to have an interest in the land. It therefore seems to me far more likely that the relevant passage is an oblique reference to the Slater/McColl bidding arrangement. This not only adds further support to my earlier finding that the bidding arrangement was made as alleged but also tends to confirm that prior to the settlement in favour of the defendant company, Mr Smith was conversant with the bidding arrangement.

226 It is an undisputed fact that the deposit was paid on 11 May with the result that the McColl contract with the Bank remained in force. I find that in the period following payment of the deposit the plaintiff managed to negotiate an arrangement whereby Mr Brown-Neaves would provide

the balance of the purchase price to the intent that McColl's contract with the Bank would be replaced by a contract between the Bank as vendor and Mr Brown-Neaves' company Amber Oak. The plaintiff was to have an option to acquire the land from Amber Oak at a higher price in due course.

227 I find that throughout this period Mr McColl acted in a manner which led the plaintiff to believe that the oral agreement comprising the bidding arrangement would be honoured. It was upon that basis and pursuant to representations to that effect made by Mr McColl to the plaintiff that the plaintiff acted to his detriment in arranging for withdrawals of his original caveats to be signed and delivered to the Bank.

228 I find support for such a finding in the evidence of the plaintiff, Mr Lazenby and Mr Brown-Neaves. It is further supported by the plaintiff's letters of 22 and 31 May which, although silent as to the alleged 22 April agreement and the terms of the bidding arrangement, contained an assertion that the plaintiff was to have the benefit of the contract allegedly acquired on his behalf by Mr McColl. These letters were never answered or refuted.

229 Having regard to the plaintiff's emotional attachment to Lot 16, I cannot believe that he would have signed and delivered withdrawals of the caveats affecting the subject land unless Mr McColl had given him reason to believe that the bidding arrangement would be carried into effect via the proposed Amber Oak transaction. The delivery of the withdrawals of caveat is an undisputed fact and weighs in favour of the plaintiff's case.

230 To my mind, it seems likely that subsequent to the meeting of 8 May, and probably about the time the deposit was paid, it dawned on Mr Smith that, perhaps unwittingly, Mr McColl may have secured a bargain in bidding for and obtaining Lot 16 for a price of $840,000. However, there is no need for me to make a specific finding to that effect. It is quite clear that after the deposit was paid Mr Smith was instrumental in getting Mr Allen interested in Lot 16 and in setting up the defendant company as the body to which the land was to be transferred as a nominated or substituted purchaser with the Bank's consent.

231 If Mr McColl and Mr Smith were in fact firmly of the belief that there was no bidding arrangement and that Mr McColl was free to deal with the benefit of the contract as he wished, it seems strange and unconvincing that this was never clearly articulated by or on behalf of Mr McColl, or at least not in written form, especially in answer to the

plaintiff's letters of 22 and 31 May. I consider that the plaintiff's execution and delivery of the withdrawals of caveat could only have been obtained by a degree of duplicity on Mr McColl's part. Further, it is apparent from Mr McColl's letter to the Bank of 6 June 1995 written by him on behalf of Strawberry John that at much the same time as Mr McColl was purporting to carry into effect the bidding arrangement via the proposed Amber Oak transaction he was actually working in concert with Mr Smith and Mr Allen to have the land vested in Strawberry John.

232 All this is to say that, in my view, the plaintiff did not at any time prior to settlement on 19 June 1995 depart from the bidding arrangement or indicate that Mr McColl was free to deal elsewhere. The plaintiff was in fact, ready willing and able to act in compliance with the bidding arrangement but in the event was prevented from doing so by the activities of Mr McColl and Mr Smith and the intervention of the defendant company.

233 I find that Mr McColl deliberately and rather surreptitiously, in conjunction with Mr Smith, decided to put aside the obligations imposed upon him as the plaintiff's agent under the bidding arrangement and to vest the benefit of the contract in the defendant company, Strawberry John. Since that time the company has relied upon its position as registered proprietor as a means of defeating the plaintiff's claim to an interest in the land. To my mind Mr McColl's conduct was both dishonest and unconscionable and amounted to fraud in equity, and to fraud within the meaning of s 68 of the *Transfer of Land Act*. It follows from my finding as to the meeting of 8 May that Mr Smith willingly participated in the relevant conduct and therefore was a party to the fraud.

The Constructive Trust Issue

234 It follows from earlier discussion that if Lot 16 had simply been vested in either Mr McColl or Mr Smith, or both, as parties to the fraudulent conduct, then it would be open to me to hold that the land was held by them on constructive trust for the plaintiff or otherwise to provide relief in equity. In such a case it could be said that they had acquired the land with full knowledge of the fraudulent conduct and the presence in s 68 of the *Transfer of Land Act* of fraud as an exception to indefeasibility would not bar the plaintiff from obtaining relief.

235 However, in the present case, it was a fiercely contested issue at the trial as to whether this approach could be applied in circumstances where

the land was transferred to a company. The defendant's case proceeded from the premise that the directors of the defendant company, and especially Mr Smith and Mr Allen, had no knowledge of the bidding arrangement or any breach of the same prior to settlement on 19 June. Thus, even if it be held that Mr McColl had acted in an untoward or dishonest manner, his knowledge could not be attributed to the company, for he was only a shareholder. This meant that there was a considerable degree of controversy at the trial as to Mr Allen's state of knowledge, and especially as to whether the plaintiff informed him of the bidding arrangement in a phone call made before settlement as alleged by the plaintiff.

236 In my view, having regard to my earlier findings, this earlier issue falls away. I have found that Mr Smith was a witting party to the fraudulent conduct and had full knowledge of all the relevant circumstances. He was informed of the bidding arrangement by the plaintiff at the meeting on 8 May 1995 and the making of the arrangement was not denied and apparently conceded by Mr McColl. In my view, because he was a director of the company at all material times, Mr Smith's knowledge can be attributed to the company: ***ZBB (Australia) Ltd v Allen*** (*supra*); ***Beach Petroleum NL and Claremont Petroleum NL v Johnson & Ors*** (*supra*). It follows from this that the defendant, as the recipient company, had sufficient knowledge to be bound by a constructive trust of the kind contended for by the plaintiff and such a trust should be imposed in these circumstances: ***The Hancock Family Memorial Foundation*** case (*supra*).

237 Further, and in any event, I am of the view that as Mr McColl acted as the company's agent in persuading the Bank to transfer the land to the defendant company, as demonstrated by Mr McColl's influential letter to the Bank dated 6 June 1995, the company is bound by his conduct and state of knowledge also in that he was acting as the company's agent to obtain an estate in the land. The fact that Mr McColl was not made a director of the company suggests that both Campbell Smith and Mr Allen were conscious of the dangers of allowing him to act as a director given his state of mind and knowledge. Cross-examination of Mr McColl directed to this point gave rise to the following exchanges with the plaintiff's counsel:

> "Was there a discussion about whether you would be a director of the company to be formed or acquired? --- Campbell discussed --- he said, 'Would you like to be a director?' and I says, 'Not really. It doesn't worry me' and he said, 'Well, it may

> pay for you keep out of it because obviously there's going to be problems,' and I says, 'Really, I don't really care.'
>
> It would pay you keep out because there was going to be problems? --- Yes.
>
> Problems with Slater, weren't there? --- Yes.
>
> Because of the original deal with Slater? --- No, not the original deal, the supposed original deal.
>
> The supposed original deal was that you had bought on behalf of Slater wasn't it? --- No, it was - it wasn't an issue. I didn't - I don't get involved in administration or things like that. It just - it didn't even appeal to me to be ---.
>
> But it was Smith's idea that you not be a director? --- That's right, yes.
>
> Because of the problems? --- Yes, yes.
>
> Because of the potential Slater problems? --- I believe so, yes."

238 These exchanges are not conclusive but, to my mind, they tend to confirm that steps were taken to ensure that Mr McColl's state of knowledge as to what had occurred could not be attributed to the defendant company.

239 For the sake of completeness, and in case I be wrong in the findings I have just made, I have to say that, in any event, I am satisfied on the balance of probabilities that the plaintiff did speak to Mr Allen about the bidding arrangement as alleged prior to settlement. Mr Allen denied the telephone call in question was made but I found his denial somewhat unconvincing. He agreed that after settlement in response to a comparatively brief call from the plaintiff he agreed to meet with the plaintiff at Mr Lazenby's office and immediately made his way to that destination. It seems unlikely that Mr Allen would have acted in that manner unless there had been some prior contact between the two men.

240 Further, Mr Allen's evidence was equivocal as to whether he had met or talked to Mr McColl about the subject property before settlement. This equivocation tendered to diminish Mr Allen's credibility. While he was under cross-examination, these exchanges occurred concerning the day Mr Allen and Mr Smith went to inspect the subject property:

"And the two of you went to the property? --- Yes, we did.

And what did you do after that? --- We spent some time at the property. Then we went back either to my place of employment or where Campbell was working and then I told him I would let him know.

You could have gone back to Motor Easy? --- Possibly, yes.

And met Mr McColl? --- I have only --- I can't say I didn't. I have met Mr McColl once before the settlement and once directly after the settlement.

You met him once before the settlement for sure, didn't you? --- Yes, I did; yes.

And it could have been on the occasion we have just been discussing after the property visit? --- It would more likely have been before because I seem to remember when I met him. It was at Motor Easy. I believe I had an appointment to meet Campbell and it was either - I think I was waiting for Campbell. Either I was early or Campbell was late. I think I was waiting to visit with Campbell.

And when you saw McColl on this occasion before settlement you had a discussion with him? --- I passed the time of day with him, yes."

241 Counsel for the plaintiff pressed Mr Allen, but the latter stoutly affirmed that he did not talk about anything of consequence with Mr McColl, although he knew that Mr McColl had contracted to buy the property. I was not convinced by his evidence on this point. I formed a view that Mr Allen's evidence had to be treated with caution.

Relief

242 It follows from these findings that the plaintiff is entitled to relief in equity. I have noted in earlier discussion, having regard to the decision of the High Court in the ***Giumelli*** case (*supra*), that the form of equitable relief in circumstances of this kind must be proportionate to the alleged loss and must be moulded to fit the needs of the occasion, especially in a case of the present kind where the subject land has been occupied by the unsuccessful party for some years during the course of lengthy litigation.

243 In the present case, however, I conclude that the plaintiff should obtain relief of the kind contended for, that is to say, a declaration that the defendant holds Lot 16 upon a constructive trust for the plaintiff on terms that the plaintiff is entitled to take a transfer of the lot subject to payment of the previously established purchase price of $840,000 as adjusted for expenses and outgoings. There is a need for an account and for an assessment directed to profits and expenses. I will hear from the parties as to the appropriate form of orders and directions.

244 For the sake of completeness, I must also note that the ruling in this action determines the outcome of the related proceedings CIV 2298/95 which brought into issue the status of the plaintiff's caveat against the subject land. The effect of my finding is to establish that the plaintiff has a caveatable interest in the land. I will hear from the parties as to what are the appropriate orders in that matter.