Mattila v Gardner and Anor [2012] NTSC 76

PARTIES:	MATTILA, Allan Michael Jorma By his litigation guardian TERESA LATZER v GARDNER, Kelvin AND GARDNER, Hydee Elanore
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	106 of 2010 (21032189)
DELIVERED:	28 September 2012
HEARING DATES:	23 to 29 February and 1 & 2 March 2012
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

BREACH OF TRUSTEE AND FIDUCIARY DUTIES – Power of attorney – plaintiff mentally retarded – first defendant sole signatory of cheque account – inadequate accounting – failure to keep records and provide proper accounts – order for account.

POWERS OF ATTORNEY ACT (NT) – Order for true and accurate records – plaintiff has right to an account – order for account.

LEASE AGREEMENT VOID FOR UNCERTAINTY AND IS UNENFORCEABLE – No term for payment or determination of rent – omission of essential term without any mechanism for determining the terms of the lease – essential terms of an agreement to lease usually are the parties, the premises, the term and the rent.

CLAIM OF UNDUE INFLUENCE IN SALE OF LAND – Relationship of trust and confidence – conflict of interest – plaintiff has cognitive difficulties – sum paid was manifestly inadequate consideration for the land – second defendant received very substantial benefit – failure to rebut presumption of undue influence – second defendant knew of relationship, plaintiff's cognitive difficulties and sale manifestly to her advantage – no endeavour to ensure plaintiff received independent advice, second defendant fixed with notice of undue influence – claim of undue influence established – plaintiff did not exercise free will in transaction with second defendant.

NEGLIGENT SALE OF LAND – Plaintiff could not read or write, had no business experience and relied on first defendant for such dealings – defendant voluntarily assumed responsibility to sell the land – sale of land without valuation – reasonable standard of care would involve an analysis of recent comparative sales or obtaining advice from appropriately experienced and qualified real estate agent or valuer – negligence in sale of land resulting in loss sustained by plaintiff.

AGREEMENT TO LEASE UNENFORCEABLE – No evidence to establish the agreement to lease was partly written and partly oral – defendant indicated the written lease agreement contained all terms of the agreement – no evidence of oral discussions regarding repairs – as lease agreement void for uncertainty and is unenforceable, defendant's claim for damages for future economic loss must fail.

CLAIM FOR *QUANTUM MERUIT* – Common ground between parties that work was undertaken and completed – work done at plaintiff's request in anticipation of lease – no lease granted and lease agreement unenforceable – plaintiff benefitted as a result – defendant entitled to reasonable remuneration.

Powers of Attorney Act (NT) s 11

Booker Industries Pty Ltd v Wilson Park (Qld) Pty Ltd (1982) 149 CLR 600; *Bridgewater v Leahy* (1998) 194 CLR 457; *Copperart Pty Ltd v Bayside Developments Pty Ltd* (1996) 16 WAR 396; *Foote & Ors v Acceler8 Technologies*

Pty Ltd and Ors [2012] NSWSC 635; *Harvey v Pratt* [1965] 1 WLR 1025; *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235; *May & Butcher Ltd v R* [1934] 2 KB 17; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*(1992) 110 ALR 449; *NZI Insurance Limited v Baryzcka* (2003) 85 SASR 497; *Pagan Spa v Feed Products Ltd* [1987] 2 Lloyd's Rep 601; *Powell v Powell* [1900] 1 Ch 243; *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 72 NSWLR 880; *Thorby v Goldberg* (1964) 112 CLR 597; *Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106; *Tufton v Sperni* [1952] 2 TLR 516; *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32

John W Carter, Elisabeth Peden & Greg J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007)

REPRESENTATION:

Counsel:

Plaintiff:	A Young
Defendant:	A Wrenn

Solicitors:

Plaintiff:	Bradley Solicitors
Defendant:	Direct brief to counsel

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mattila v Gardner and Anor [2012] NTSC 76
No. 106 of 2010 (21032189)

BETWEEN:

ALLAN MICHAEL JORMA MATTILA
by his litigation guardian
TERESA LATZER
Plaintiff

AND:

KELVIN GARDNER
First Defendant

AND:

HYDEE ELANORE GARDNER
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 28 September 2012)

Introduction

[1] Mr Mattila is the only child of Allan Jorma Mattila, the deceased, who died intestate on 17 September 2005. The deceased's estate consisted of seven parcels of land respectively located at 60 Oxford Road, 100 Oxford Road, 110 Oxford Road, 115 Oxford Road, 120 Oxford Road, 111 Finn Road and 125 Finn Road, Berry Springs in the Northern Territory, some cash in the ANZ Bank, Life Insurance Policies and other items. Mr Mattila was entitled to inherit the entirety of his father's estate and he did so in early 2006.

[2] After Mr Mattila inherited his father's estate he and Mr Gardner, the first defendant, made an agreement to develop a takeaway store and caravan park on the land at 115 Oxford Road. The agreement made between Mr Mattila and Mr Gardner was recorded in a document headed "Lease Agreement". The development was financed by the sale of five parcels of land that Mr Mattila inherited from his father's estate and was supervised and largely undertaken by Mr Gardner with the assistance of Mr Mattila. Four of the parcels of land were sold by Mr Gardner with the use of the power of attorney granted to him by Mr Mattila. The fifth parcel of land was sold to Mr Gardner's daughter, Ms Hydee Gardner, who is the second defendant. The money from the sale of the parcels of land was deposited in a building account which was operated by Mr Gardner under a power of attorney granted to him by Mr Mattila and a large portion of the money was spent on the development of the takeaway store and caravan park. After the development of the takeaway store and caravan park was completed Mr Gardner went into occupation of the takeaway store and caravan park and Mr Mattila was to lease the land to Mr Gardner at a rent which was to be negotiated upon the completion of the development. However, no lease was entered into.

[3] As is often the case when friends undertake commercial projects without obtaining appropriate advice and assistance, Mr Mattila and Mr Gardner have had a falling out. This proceeding involves claims and counterclaims about the sale of three of the parcels of land that were inherited by

Mr Mattila, Mr Gardner's administration of the building account into which the net proceeds of sale the blocks of land were placed, Mr Gardner's supervision and conduct of the building and construction of the takeaway store and caravan park, and the Lease Agreement under which it was proposed Mr Mattila was to pay for the development works and Mr Gardner was to lease the takeaway store and caravan park from Mr Mattila.

Chronology of events

[4] A chronological outline of the relevant events and transactions is as follows.

[5] Mr Mattila is 37 years of age and is employed as a storeman in the Naiyu Store at Daly River. He went to school at Berry Springs Primary School from year one to year seven and for a short period of time in year eight he went to St John's College, Darwin. Mr Mattila is a chronic alcoholic who started drinking alcohol when he was 13 or 14 years of age. A psychological assessment conducted on 5 July 2011 by a clinical psychologist, Ms Vidula Garde, found him to have a low IQ suggestive of a diagnosis of mental retardation. He has very limited literacy and numeracy skills.

[6] Mr Gardner is 56 years of age. He attended school until he was 14 years of age. He has worked as a pet meat shooter, brickies labourer, commercial barramundi fisherman, plant operator and earth mover. His main occupation has been as a plant operator and earth mover specialising in clearing

properties and the installation of roads and house pads. Mr Gardner is married with children.

[7] Mr Mattila and Mr Gardner were friends. Mr Mattila grew up knowing Mr Gardner, his two brothers and his sister. He spent a lot of time at the Gardner house, he ate meals there and he was treated like one of the family by Mr Gardner's parents.

[8] On 1 February 2006 Mr Mattila was granted administration of his father's estate. He did not seek any legal assistance with this application but was assisted by Mr Gardner and his wife, Mrs Donna Gardner. She typed the necessary documents.

[9] Early in 2006 Mr Mattila and Mr Gardner had a number of discussions about converting the existing store on the land at 115 Oxford Road, Berry Springs into a takeaway store and a caravan park. There is disagreement about who initiated these discussions. However, the discussions culminated in a document entitled "Lease Agreement" which the parties executed on 13 March 2006.

[10] The Lease Agreement states:

> I Michael Mattila of 115 Oxford Road Berry Springs agree to lease to Kelvin Gardner the whole of the property known as Berry Springs Store and Berry Springs caravan Park, including all contents fixtures and machinery on the said property. The property comprises all of the land known as 115 Oxford Road, Berry Springs, section 1809 Hundred of Ayers.

> The lease to be for 10 years from the date of signing with a 10 year option.
>
> The rent is to be negotiated upon completion of shop, ablution block and surrounding land.
>
> I Michael Mattila agree that I will pay for all repairs, improvements and building on section 1809 Hundred of Ayers.

[11] There is a dispute between Mr Mattila and Mr Gardner about whether the Lease Agreement is void for uncertainty because it does not contain a term providing for the payment of rent or for determining rent.

[12] On 14 March 2006, the day after the Lease Agreement was signed, Mr Mattila gave Mr Gardner an enduring power of attorney that was registered on 16 March 2006. Mr Gardner's evidence as to why he was granted the power of attorney, which I accept, was that, prior to departing for Broome with his girlfriend, Mr Mattila found two insurance policies which the deceased had held and he asked Mr Gardner to cash them in while Mr Mattila was in Broome. Mr Gardner believed that he could not do so without appropriate authority and he suggested that Mr Mattila grant him a power of attorney.

[13] On 20 March 2006 Mr Mattila and his girlfriend, Ms Veronica Mackie, travelled to Broome in Western Australia. Between 7 February 2006 and 29 March 2006 Mr Mattila spent $37,000.00 which he inherited from the deceased. On 28 June 2006 Mr Mattila returned to the Northern Territory.

He asked Mr Gardner to pay for his return bus ticket as he did not have access to enough money to pay for his return from Broome.

[14] On 29 April 2006, while he was still in Broome, Mr Mattila asked Mr Gardner to open a building account at the Palmerston Branch of the ANZ Bank so that he could keep his money away from Ms Mackie. Mr Mattila was concerned that if the monies obtained from the deceased's insurance policies were paid into his key card account they would be accessed by Ms Mackie. On 4 May 2006 Mr Gardner opened an account which was styled "AMJ Mattila – Building Account" at the Palmerston branch office of the ANZ Bank. It was a cheque account and Mr Gardner was the sole signatory. Mr Mattila did not have a cheque book and he did not write any cheques on the account.

[15] On 11 July 2006 $41,741.39 of MLC insurance moneys from the deceased's estate was paid into the AMJ Mattila – Building Account. On 13 July 2006 $16,807.00 of ING insurance moneys from the deceased's estate was paid into the AMJ Mattila – Building Account.

[16] In August 2006 Mr Gardiner, using the power of attorney granted to him by Mr Mattila, entered into contracts of sale of land at 60 Oxford Road and 125 Finn Road, Berry Springs, for sale prices of $155,000.00 and $75,000.00 respectively. The two properties were inherited by Mr Mattila from the deceased. On 15 December 2006 the sales were completed and the properties were transferred to the purchasers. At no time prior to the sales

did Mr Gardner obtain valuations of the two properties. The net proceeds of sale of the two properties of $204,000.00 were paid into the AMJ Mattila – Building Account. One of the reasons for the sale of the two properties was to obtain funds to pay outstanding accounts of the Power and Water Authority and the Bush Fire Council so that the caveats they had placed on five of the parcels of land in the deceased's estate could be removed and the titles to the parcels of land could be transferred to Mr Mattila.

[17] There is a dispute between Mr Mattila and Mr Gardner as to whether Mr Gardner negligently sold the land at 60 Oxford Road and the land at 125 Finn Road at prices which were significantly less than their true value. However, counsel for Mr Mattila largely concedes that the claim in relation to 125 Finn Road is not a strong claim. On 8 May 2007 the purchasers of the land at 60 Oxford Road sold the land to another party for $250,000.00. It was the opinion of a valuer who was called to give evidence on behalf of Mr Mattila that the properties were worth $245,000.00 and $95,000.00 respectively at the time of sale. The difference between the two sale prices and the expert's valuations was $110,000.00.

[18] On 15 September 2006 Mr Mattila gave Mr Gardner a second power of attorney that was registered on that day. The second power of attorney was provided in order to overcome some confusion between Mr Mattila's name and his deceased father's name. The second power of attorney shows Mr Mattila's full name as Allan Michael Jorma Mattila.

[19] On 23 March 2007 Mr Gardner sold 111 Finn Road for the price of $145,000.00 using his power of attorney. No claim is made by Mr Mattila in relation to the sale of this parcel of land.

[20] On 24 September 2007 Mr Gardner applied to Indigenous Business Australia for a loan to purchase half an interest in 115 Oxford Road, Berry Springs. Ultimately this loan was not taken up and Mr Gardner never purchased an interest in the land at 115 Oxford Road.

[21] On 14 December 2007 Mr Gardner sold 100 Oxford Road for the price of $260,000.00 using his power of attorney. This property was also a property that Mr Mattila had inherited from the deceased. No claim is made by Mr Mattila in relation to the sale of this parcel of land.

[22] On 7 August 2008 Mr Gardner entered into a Destination Development Funding Agreement for $33,000.00 with Tourism NT to construct an ablution block at on the land at 115 Oxford Road, Berry Springs. On 9 September 2008 Mr Gardner received the funding which was the subject of the agreement.

[23] On 28 December 2008 Mr Mattila signed a form of transfer of a half interest in 115 Oxford Road to Mr Gardner for a price of $300,000.00. However, Mr Gardner was not able to obtain funding for the transfer of a half interest in the land and the transfer did not proceed.

[24] On 7 January 2009 a contract for the sale of the land at 120 Oxford Road, Berry Springs for $160,000.00 was entered into between Mr Mattila and Ms Gardner. On 6 February 2009 the contract was completed and the land was transferred to Ms Gardner. This property was also a property that Mr Mattila had inherited from his deceased father's estate.

[25] There is a dispute between the parties about the sale of the land at 120 Oxford Road. Mr Mattila claims he sold the land to Ms Gardner at less than its true value due to the undue influence of Mr Gardner. According to the valuation report that was tendered on behalf of Mr Mattila the land at 120 Oxford Road was valued at $260,000.00 at time it was transferred to Ms Gardner. This parcel of land has since been sold by Ms Gardner for $273,000.00 or thereabouts and the amount of $113,301.98 has been paid into court pending the resolution of this proceeding.

[26] The total proceeds of sale of the five properties sold was $795,000.00. The sum of $769,259.03, being the net proceeds of sale of the properties, was paid into the AMJ Mattila – Building Account as the sale of each parcel of land was completed. The difference between the two sums is explained by the fact that it was necessary to pay some of the monies received from the sale of the parcels of land to the Power and Water Authority and the Bush Fire Council to release caveats over two of the parcels of land.

[27] On 16 September 2009 Mr Gardner closed the AMJ Mattila – Building Account and paid the remaining balance of that account of $38,732.05, into

the Berry Springs Caravan Park and Takeaway Account. A total of $132,732.05 was withdrawn by Mr Gardner from the AMJ Mattila – Building Account and paid into the Berry Springs Caravan Park and Takeaway Account by Mr Gardner. This sum was mixed with other money paid into the Berry Springs Caravan Park and Takeaway Account by Mr Gardner and Mrs Donna Gardner including grant money that was obtained from Tourism NT. It is unclear how the money in the Berry Springs Caravan Park and Takeaway Account was spent. The accounting provided by Ms Donna Gardner is inadequate. The amounts withdrawn from the Berry Springs Caravan Park and Takeaway Account after these deposits appear to have expended on a mixture of items including the fit out of the takeaway store, equipment for the takeaway store and the personal and business expenditure of Mr and Mrs Gardner.

[28] In December 2009 Mr Mattila claims that he was assaulted by Mr Gardner and his son, Mr Naaman Gardner. It is unnecessary to resolve this issue in this proceeding but it is clear that since about December 2009 there has been a falling out between Mr Mattila and Mr Gardner.

[29] Between 4 May 2006 and 16 September 2009 a total sum of $868,433.78 was paid into and withdrawn from the AMJ Mattila – Building Account. $827,807.42 of that amount was from the deceased's estate which was inherited by Mr Mattila. With the exception of $2,500.00, the money in the AMJ Mattila – Building Account was withdrawn by cheques signed by Mr Gardner.

[30] The following monies were paid into the AMJ Mattila – Building Account.

1. MLC Insurance money	$ 41,741.39
2. ING Insurance money	$ 16,807.00
3. Net proceeds of the sale of land	$ 769,259.03
4. Loan from Trevor McMahon	$ 20,000.00
5. Mr Gardner's money	$ 14,893.85
6. Proceeds from scrap metal	$ 1,007.50
7. Naaman Gardner's money	$ 4,725.00
TOTAL	$868,433.78

[31] According to Schedule 1 of Mr Gardner's Further Amended Defence and Amended Counterclaim, the money paid into the AMJ Mattila – Building Account was expended in the following way.

Mr Mattila's expenditure on repairs, improvements and building	$453,256.06
Mr Mattila's personal withdrawals	$232,381.00
Mr Gardner's deposits into his own account, the Berry Springs Caravan Park and Takeaway Account	$132,232.05
Amounts of cash taken by Mr Mattila during transfers to the Berry Springs Caravan Park and Takeaway Account	$8,500.00
Naaman Gardner tax refund payment	$4,725.00
Loan to Mr Gardner	$37,339.67
Total	$868,433.78

[32] The figure of $132,232.05 should be $132,732.05.

[33] There is a dispute between Mr Mattila and Mr Gardner about how the money paid out of the AMJ Mattila – Building Account was disbursed by Mr Gardner. The dispute arises in part because of Mr Gardner's failure to keep records and provide proper accounts and complete discovery of all primary accounting documents. It is not possible to verify Mr Gardner's assertions about the first two amounts listed in par [31] above by reference to invoices, receipts, vouchers, bank statements or other conventional records of expenditure because of the limited and incomplete discovery provided by Mr Gardner. The total value of the receipts, invoices and statements discovered by Mr Gardner is $83,746.76, $295,285.80 and $107,523.06 respectively. $98,977.00 of the total invoices is referable to statements from the Berry Springs Caltex Service Station where Mr Gardner and his wife operated an account. Further, apart from some small amounts, the statements from the Berry Springs Caltex Service Station do not enable identification of the precise nature of the expenditure referred to in those statements.

[34] Mr Gardner supervised the building and construction work at 115 Oxford Road which was undertaken over a period from mid 2006 to mid 2010. It is common ground between Mr Mattila and Mr Gardner that the following works were completed on the land at 115 Oxford Road: (a) an ablution block with a total area of 63 square metres, comprising eight toilets and eight showers and two enclosed laundries; (b) extensive renovations to the

takeaway store; (c) bore repairs; (d) land clearing and rubbish removal; (e) extensive landscaping and fencing; (f) a new entrance road and internal access road; (g) a new water tank; (h) a new power connection for the caravan park and ablution block; (i) underground electricity for 20 powered caravan sites; (j) electrical and plumbing compliance for the takeaway store, caravan sites and ablution block; (k) national accreditation for the caravan park; (l) the supply and delivery of approximately 400 cubic metres of road base gravel; (m) the supply and installation of solar hot water systems to the takeaway store and ablution block; (n) installation of underground irrigation to the caravan park; (o) installation of underground water pipes to the takeaway store; (p) the supply and installation of a commercial pressure pump; (q) the supply and installation of all signage to the takeaway store, caravan park and entrance to the premises; (r) the supply and installation of a 19 square metre fixed sail canopy for the takeaway store; (s) the installation of 61 square metres of concrete veranda around the takeaway store; and (t) upgrading a masonry block structure situated on the southern corner of the property into a two bedroom accommodation unit for Mr Mattila's accommodation.

[35] On 21 January 2010 the power of attorney granted to Mr Gardner was revoked.

[36] In July 2010 Mr Gardner began trading as the "Berry Springs Store and Caravan Park" on the parcel of land at 115 Oxford Road, Berry Springs. He

ceased trading in October 2010. He has not paid any rent to Mr Mattila for the period of time that the store and caravan park operated, or at all.

[37] On 20 August 2010 Mr Mattila's solicitor, Mr John Bradley, sent a letter to Mr Gardner asking for true and accurate records of Mr Gardner's dealing with Mr Mattila's assets under s 11 of the *Power of Attorney Act* (NT). The request was ignored by Mr Gardner and, after this proceeding was filed in the Court, Riley CJ ordered Mr Gardner to provide true and accurate records of his dealings with Mr Mattila's assets. A document was subsequently provided to Mr Bradley but Mr Mattila disputes the truth and accuracy of the document.

[38] On 1 October 2010 this proceeding was filed in the Court. Mr Gardner claims that the cheque butts for the AMJ Mattila – Building Account were destroyed in February 2011. It was not possible to identify the payees of those cheques from the subpoenaed ANZ Bank documents.

Mr Mattila's claims against Mr Gardner

[39] In his Further Amended Statement of Claim Mr Mattila pleads six causes of action or suits against Mr Gardner. First, there is a claim for undue influence as to the sale of 120 Oxford Road, Berry Springs. The claim is a claim against Ms Hydee Gardner but, in accordance with the principles

enunciated in such cases as *Powell v Powell*,[1] Mr Mattila alleges that the undue influence emanated from Mr Gardner.

[40] Secondly, there is a claim for conflict of interest and breach of trust. Mr Matilla alleges that the creation of the AMJ Mattila – Building Account and Mr Gardner's expenditure of the money in that account, by virtue of the power of attorney granted to him by Mr Mattila, and by virtue of him being sole signatory for the building account, made him a trustee for that money once it came into his possession as cash or cheque. Alternatively, as attorney, Mr Gardner owed fiduciary duties analogous to those of a trustee. Mr Gardner owed Mr Mattila a duty to act in his best interests and to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons. In breach of these duties Mr Gardner did not seek advice as to the advisability of the takeaway store and caravan park project and did not prepare budgets or business plans for the development of the store and caravan park. He pursued his own interest, was self-dealing and he wasted Mr Mattila's money.

[41] Thirdly, in the alternative, there is a claim that Mr Gardner breached his trustee and fiduciary obligations by using the money from the AMJ Mattila – Building Account for his own use. Mr Mattila claims all those disbursements from the building account which are unexplained by Mr and Mrs Gardner and are identified in the analysis of payments document which

[1] [1900] 1 Ch 243.

forms part of the Further Amended Statement of Claim were for Mr Gardner's own benefit.

[42] Fourthly, in the event that Mr Mattila's claim for damages or equitable compensation for breach of trust or fiduciary duty fails, there is a claim for an account or, alternatively, its statutory equivalent under s 11 of the *Powers of Attorney Act*. Mr Mattila does not accept that documents provided by Mr Gardner following the order made by Riley CJ on 24 September 2011 constitute a true, accurate and complete account.

[43] Fifthly, there is a claim for negligence for the economic loss suffered by Mr Mattila as a result of Mr Gardner's failure to take reasonable care to ensure that the parcels of land at 125 Finn Road and 60 Oxford Road were sold for their true value. The amount claimed is $110,000.00.

[44] Sixthly, there is a claim for a declaration that the Lease Agreement is void for uncertainty.

Mr Mattila's claim for undue influence

[45] In paragraph 4 of the Further Amended Statement of Claim it is pleaded that on 14 May 2006 Mr Mattila gave Mr Gardner an enduring power of attorney. Paragraph 5 pleads that on 15 September 2006 Mr Mattila gave Mr Gardner a further power of attorney. Paragraph 7 pleads that on 6 February 2009 Mr Mattila transferred the land at 120 Oxford Road to Ms Gardner for $160,000.00. Elsewhere in the Further Amended Statement of Claim it is pleaded that Mr Gardner was attorney and trustee for Mr Mattila.

[46] In paragraph 12 of the Further Amended Statement of Claim it is pleaded that at all material times Mr Gardner exerted undue influence over Mr Mattila by reason of the following matters:

1. Mr Mattila was illiterate and a chronic alcoholic with learning or cognitive difficulties.

2. Mr Mattila was inexperienced and naïve in business and financial matters.

3. Mr Gardner had been a friend of the deceased and of Mr Mattila for many years.

4. Mr Mattila reposed trust and confidence in Mr Gardner in relation to his financial affairs.

5. Mr Mattila did not obtain independent competent advice and Mr Gardner did not advise him to seek independent competent advice about any of the pleaded transactions.

6. Mr Mattila was unlikely to be able to seek independent competent advice without outside encouragement, aid or assistance.

7. Mr Gardner was the donee of the power of attorney.

[47] Paragraph 13 of the Further Amended Statement of Claim pleads that at the time Mr Mattila executed the transfer of 120 Oxford Road to Ms Gardner he was subject to the influence of Mr Gardner who used that influence to procure that transfer to Ms Gardner.

[48] Paragraph 14 of the Further Amended Statement of Claim pleads that Ms Gardner was present at the time that Mr Mattila executed the transfer of 120 Oxford Road to her and she knew or ought to have known the following. (1) Each of the matters pleaded in paragraph 12 of the Further Amended

Statement of Claim. (2) That those matters were likely to operate to her advantage. (3) The transfer of the land was for a price much less than the true value of the land which was around $260,000.00. (4) The transfer of the land was manifestly to her advantage and to the disadvantage of Mr Mattila.

[49] In his Further Amended Defence to the Further Amended Statement of Claim Mr Gardner makes the following admissions. (1) Mr Mattila granted him a power of attorney. (2) Mr Mattila transferred the land at 120 Oxford Road to Ms Gardner for $160,000.00. (3) Mr Mattila sold the parcel of land at 120 Oxford Road to Ms Gardner for $160,000.00. (4) Mr Gardner had been a friend of Mr Mattila and his father for many years. (5) Mr Mattila reposed trust and confidence in Mr Gardner in relation to his financial affairs.

[50] In paragraph 13(d) of his Further Amended Defence Mr Gardner states that as trustee during the material times he continued acting in pursuance of the Lease Agreement and did not breach any duty that he owed to Mr Mattila.

[51] In his Amended Defence Mr Gardner makes the following denials. (1) He denies that he exerted any undue influence over Mr Mattila. (2) He denies that Mr Mattila had any learning or cognitive difficulties other than those of illiteracy. (3) He denies that Mr Mattila was inexperienced and naïve in business and financial matters. (4) He denies that Mr Mattila was unlikely to be able to seek independent competent advice without outside

encouragement, aid or assistance. (5) He used his influence to procure the transfer of the land at 120 Oxford Road to Ms Gardner. (6) He was present when Mr Mattila executed the transfer of the land at 120 Oxford Road to Ms Gardner.

[52] In paragraph 9(g) of his Further Amended Defence Mr Gardner pleads that he cannot say whether Mr Mattila did or did not obtain independent advice but did whenever privy to and asked for advice about any transactions referred to in the Further Amended Statement of Claim, Mr Gardner advised the plaintiff to seek independent competent advice. In my opinion this pleading is tangential and therefore defective. Mr Gardner does not plead that he advised Mr Mattila to get independent and competent advice about whether the consideration that Ms Gardner offered for the land at 120 Oxford Road was adequate nor was there any evidence to this effect.

[53] In paragraph 10(c) of his Further Amended Defence Mr Gardner pleads that Mr Mattila understood the nature of the transaction constituted by the transfer of the land at 120 Oxford Road. However, this pleading misses the point. The question is not whether Mr Mattila understood that by executing the transfer of the land he was transferring the land at 120 Oxford Road to Ms Gardner for $160,000.00. The question is whether the transaction was

the result of free will,[2] and it is influence, not complete domination, which is necessary.[3]

[54] In her Further Amended Notice of Defence Ms Gardner makes the following admissions. (1) Mr Mattila gave Mr Gardner an enduring power of attorney. (2) Mr Mattila transferred the land at 120 Oxford Road to her for $160,000.00. (3) She was present when Mr Mattila executed the transfer of the land at 120 Oxford Road to her.

[55] Ms Gardner does not admit the matters pleaded in paragraph 12 of the Further Amended Statement of Claim and she denies the matters pleaded in paragraph 13 of the Further Amended Statement of Claim. She states that Mr Mattila: (1) was in the presence of Ms Julie Taylor JP when he executed the transfer; (2) fully understood the nature of the transaction; (3) was not to her knowledge subject to any undue influence by Mr Gardner; and (4) to her knowledge Mr Gardner did not use any undue influence to procure the transfer of the land to her.

[56] In paragraph 8 of her Further Amended Notice of Defence Ms Gardner further pleads that she had no knowledge that the matters pleaded in paragraph 12 of the Further Amended Statement of Claim were likely to operate to her advantage and to the disadvantage of Mr Mattila. Nor did she have any knowledge that the value of the land at 120 Oxford Road was

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2 *Ademan v Buise* [1984] WAR 61 approved in *Bridgewater v Leahy* (1998) 194 CLR 457 at 477 referred to in JW Carter, Elisabeth Peden GJ Tolhurst, Contract Law in Australia 5th ed LexisNexis Butterworths at [23-04].

3 *Tufton v Sperni* [1952] 2 TLR 516 at 519 - 25 referred to in JW Carter, Elisabeth Peden GJ Tolhurst, Contract Law in Australia 5th ed LexisNexis Butterworths at [23-04].

likely to be around $260,000.00, and that the transfer of the land was manifestly to her advantage.

[57] Having considered the whole evidence of Mr Mattila, Mr Gardner and Mrs Donna Gardner, and taken into account the admission that Mr Gardner has made to the effect that Mr Mattila reposed trust and confidence in Mr Gardner in relation to his financial affairs, I find that the relationship between Mr Mattila and Mr Gardner falls within the classes of relationship that may give rise to a presumption of undue influence. I also find that the sum of $160,000.00 which was paid for the land at 120 Oxford Road was manifestly inadequate consideration for the land. Mr Linkson valued the land at $260,000 as at 6 February 2009. The relationship between Mr Mattila and Mr Gardner and the inadequate consideration paid for the land, which gave Ms Gardner a very substantial benefit, gives rise to a presumption of undue influence in relation to this transaction. There is a presumption that the sale of the land at 120 Oxford Road was not a free exercise of Mr Mattila's will. Mr Mattila clearly had a limited cognitive capacity. Mr Mattila sought Mr Gardner's assistance so that he could protect his inheritance from others. Mr Gardner obtained a power of attorney and largely took over the management of Mr Mattila's affairs. Mr Gardner was the only signatory to the bank account which contained virtually all of Mr Mattila's funds. He managed the sale of the properties that Mr Mattila had inherited from his father and he supervised and managed the development works that were undertaken in relation to the takeaway

store and caravan park. He provided Mr Mattila with the money that he used to maintain himself.

[58] The evidence from Ms Vidula Garde, a clinical psychologist, about Mr Mattila's mental capacity was not contradicted. Her evidence was that the findings of neuropsychological assessment of Mr Mattila in conjunction with the available historical information are suggestive of mental retardation possibly related to prenatal exposure to alcohol. Given the global nature of the deficit, the impact on his life is likely to be pervasive and generalised. It is also possible, given the nature of deficits observed, that Mr Mattila could be more than normally susceptible to influence by individuals in whom he reposes a degree of confidence. It is likely that he lacks the capacity to consider the long term consequences of his actions and it is possible that he might not understand the implication of transactions involving large sums of money or appreciate the fair value of goods and services.

[59] Mr Mattila's evidence about this particular transaction was as follows. He remembers that Mr Gardner said that he would look after him financially and he would give him $500 a week as "pocket money" from the estate. Mr Mattila stated that he did not negotiate any of the sales of land. Mr Gardner did so on his behalf. He states he does not know if the prices were fair or not. He trusted Mr Gardner to get the best price for each parcel of land that was sold. Sometime before Mr Mattila sold 120 Oxford Road to Ms Gardner, Mr Gardner told him that he needed to sell the land because he

had no money. He told Mr Mattila that if the land did not sell quickly Ms Gardner would buy it at a cheap price. Mr Gardner suggested a price of $160,000.00. Mr Mattila agreed to sell the land to Ms Gardner because she was Mr Gardner's daughter and he felt that they were all expecting him to sell the land to her. Mr Mattila did not get any advice about the value of the land that was sold. He did not think of that.

[60] During his cross examination Mr Mattila gave the following evidence. At the time he spoke to Ms Gardner about the sale of the land at 120 Oxford Road, the land had been on the market for six to eight months. He did not know if the land had been advertised for $280,000.00. Mr Mattila told Mr Gardner just to get a good deal. He said make sure it was a good price, otherwise he would not sell. As the land had not sold, there were less and less funds in The AMJ Mattila – Building Account. Ms Gardner agreed with her parents that she would take the land at a cheap price. Mr Gardner told Mr Mattila that he was selling the land at a cheap price to his daughter. Mr Mattila "got stuck up" the Gardner's block. Ms Gardner told him that she had been to the bank and the most the bank would give her was $160,000.00.

[61] Mr Mattila was asked by counsel for Mr Gardner if he agreed to sell the land at 120 Oxford Road to Ms Gardner and he answered, "Because they pressured me and pressured me. Yeah, of course I said yes." He said, "Let sister have the block." Counsel for Mr Gardner then suggested that the Gardners did not actually put pressure on him themselves. Mr Mattila

answered, “No, no. It was just come on – look, I am there by myself. You had Hydee, you have got young Kelvin and you have other family, you know and I am there by myself. I am there by myself. I have no family. What family have I got? I would not call them family if they are going to start doing this to me.”

[62] As the presumption of undue influence has arisen the burden of rebutting the presumption falls on Mr Gardner and Ms Gardner. Mr Gardner’s evidence about this transaction was that from in or about May 2008 until February 2009 the parcel of land at 120 Oxford Road, Berry Springs, was advertised for sale in the NT News and on the internet at Owner.com for the price of $280,000.00. Mr Gardner received some enquiries about the advertised sale but no firm offers for the property. He believes there was a lack of interest in the sale of the property at that price because there was a large amount of rubbish on the property. As a result of the lack of interest in the property Mr Mattila decided to sell the property to Ms Gardner. He personally handled the negotiations for the sale of the property. Mr Gardner was not involved in the discussions about the price, the signing of the transfer or the completion of the sale. Mr Mattila said to Mr Gardner, “Let sister-girl have the block”.

[63] On 2 February 2009 Mr Mattila transferred 120 Oxford Road to Ms Gardner. The transfer was signed by both Mr Mattila and Ms Gardner at the home of Ms Julie Taylor JP. Mr Mattila was sober when he signed the transfer. This is confirmed by an affidavit of Ms Taylor. Mr Mattila did not drink any

alcohol on the day that the transfer was signed. Mr Gardner stated that this was the usual arrangement for any important matter.

[64] Mr Gardner was not cross examined about this evidence. However, I do not accept Mr Gardner's evidence that, as a result of the lack of interest in the property, Mr Mattila decided to sell the property to Ms Gardner and Mr Mattila personally handled the negotiations for the sale of the property. Nor do I accept Mr Gardner's evidence that he was not involved in the discussions about the price. It lacks the ring of truth and reality and does not make sense, as there was an established pattern of Mr Gardner being the person responsible for the sale of Mr Mattila's land. All of the other transfers of land had been completed by Mr Gardner with the use of the power of attorney. I prefer the evidence of Mr Mattila. Mr Gardner was integrally involved in the sale of all the parcels of land inherited by Mr Mattila. The proceeds of the sale of land were placed in the AMJ Mattila – Building Account and were used, among other things, for the building work that was being undertaken in relation to the takeaway store and caravan park on the land at 115 Oxford Road. One week after the land at 120 Oxford Road was sold to Ms Gardner, $10,000.00 of the proceeds of the sale of that land were transferred from the AMJ Mattila – Building Account to the Gardner's bank account which was entitled Berry Springs Caravan Park and Takeaway Account and by 16 September 2009 a large proportion of the proceeds of the sale of 120 Oxford Road were transferred from the AMJ Mattila – Building account to the Berry Springs Caravan Park

and Takeaway Account, which was Mr & Mrs Gardner's account for operating the store. I also note that in her affidavit Ms Hydee Gardner states, "Mr Mattila told my Dad [Mr Gardner], 'let Sister Girl have the block'".

[65] Mrs Donna Gardner also gave evidence about this transaction. Her evidence in her affidavit sworn on 20 February 2012 was as follows. The land at 120 Oxford Road was advertised in the NT News for approximately eight months at the price of $280,000.00. I interpose here to note that the advertisement placed in the newspaper was a very small advertisement which was placed in the classified section under the column headed land for sale. Mrs Donna Gardner further says that Mr Mattila decided to sell 120 Oxford Road. She prepared the contract of sale and read it to Mr Mattila. The transfer document was signed at the residence of Ms Julie Taylor JP. To her knowledge there was no discussion between Mr Gardner and Mr Mattila about the sale price of the property. She (Mrs Donna Gardner) was involved in the negotiation of the price for the land because the sale of the land was to her daughter. Ms Julie Taylor JP was involved because things of importance were done in the presence of a third party in order that there was an independent person present to protect their interests as well as Mr Mattila's interests.

[66] As with Mr Gardner's evidence, I do not accept Mrs Donna Gardner's evidence to the effect that Mr Gardner was not involved in this transaction. The evidence is contrived. The reason Ms Julie Taylor JP was involved was

because the signatures on the land transfer document must be witnessed by a Justice of the Peace or a Commissioner of Oaths. Ms Taylor did not give any independent advice to Mr Mattila.

[67] During her cross examination, Mrs Donna Gardner gave the following evidence relevant to this topic. She was aware that Mr Mattila did not go past year eight at school. They talked about getting him a tutor. She knew that he could not read or write. She was aware that Mr Mattila had learning difficulties because she has a son with the same learning difficulties. However, she believed that he was of average intelligence. She does not believe that Mr Mattila is easily influenced. There is a risk that he may be taken advantage of by certain people. In order to avoid being taken advantage of Mr Mattila went to live with the Gardners. He would have difficulty understanding complex commercial transactions if they were not explained to him properly. As to complex commercial transactions, Mr Mattila would be entirely dependent on an explanation being given to him.

[68] Further during her cross examination, Mrs Gardner said that “we”, I infer Mr Gardner and her, thought that the land at 120 Oxford Road was worth $280,000.00. The block of land next door sold for $260,000.00 before the land at 120 Oxford Road was put on the market. “We” spoke to Mr Mattila and he agreed to the land being put on the market for $280,000.00. “We” decided to advertise the land for sale for a price of $280,000.00. However, the price of the land could be negotiated. They were prepared to go as low

as $250,000.00, maybe less. Having said this, Mrs Donna Gardner then said that so far as she was concerned the true value of this block of land was its unimproved capital value which was then about $179,000.00. I do not accept her evidence to that effect. It is contrived. The evidence is totally inconsistent with the price that they asked for the land and the price of the adjacent block of land which was sold for $260,000.00 to her knowledge.

[69] Mrs Gardner also gave evidence that she did not consider listing the land with a real estate agent. She gave no explanation for this decision despite the fact that they received no offers for the land. She also could give no reason as to why they did not advertise the land for a price less than $280,000.00. She was present when her daughter, Ms Gardner, offered to purchase the land from Mr Mattila. Her daughter was 19 years of age at the time. She was present for her daughter's interests and for Mr Mattila's interests. She was asked how she was protecting Mr Mattila's interests in this transaction and she said, "He had the opportunity of saying no." Mrs Donna Gardner was asked by counsel for Mr Mattila if Mr Mattila ever said no to her and Mr Gardner and she answered that on several occasions he refused to go to work or to stop drinking or to stop spending his money. Mrs Gardner was again asked how she protected Mr Mattila's interests in this transaction and she answered, "Michael was given the choice whether to sell it to Hydee. There was the $280,000.00 asking price. If he was prepared to wait and wait, fine, we would wait. That was the way it is. He said to me, 'Let sister girl have it'. That is what he called her."

[70] In my opinion, the passage of Mrs Donna Garner's evidence that I have referred to in par [69] above encapsulates Mr and Mrs Gardner's position and demonstrates the extent of the influence that they had over Mr Mattila. Mrs Donna Gardner was, in effect, the agent of both Mr Gardner and her daughter. Mr Mattila was told more money was needed and he was given a misleading alternative and effectively encouraged to sell to Ms Hydee Gardner. He was, in effect, told that he may continue to try and sell the land for more than it is worth (a fact unknown to Mr Mattila), which had proven to be unsuccessful, or he could accept Ms Hydee Gardner's offer and the transaction could be completed promptly. Further, the conversation appears to have taken place in the presence of Ms Hydee Gardner. It is apparent to any educated or experienced person that there were a range of other options available to Mr Mattila. The land could have been advertised for a different price and larger advertisements could have been placed in the newspaper or the land could have been listed with a real estate agent.

[71] None of the above evidence rebuts the presumption which has arisen in this case. However, before any liability can be sheeted home to Ms Hydee Gardner and the transfer of land impugned, the evidence must also establish that Ms Hydee Gardner had notice or constructive notice of the circumstances from which the presumption of undue influence is said to arise.

[72] Ms Hydee Gardner's evidence was as follows. In the affidavit she swore on 12 February 2012 Ms Gardner deposes that she lives at 45 Stockwell Road

which is the home of her parents and the home in which Mr Mattila was living at the time. At various times from about mid 2006 to 2010 she worked on Mr Mattila's property at 115 Oxford Road after school and on weekends, and later on her days off work. She was not paid for the work that she did. She acknowledges that she has read Mr Mattila's affidavit before she affirmed her affidavit. In this context she further stated that after Christmas 2008, Mr Mattila and she spoke about 120 Oxford Road, which she knew had been for sale for a while. She spoke to Mr Mattila about purchasing the land. She made enquiries at the ANZ Bank in Palmerston and she found out that she could borrow up to $160,000.00. She told Mr Mattila that the bank would lend her $160,000.00 and he agreed to the price and the sale of the land to her. She spoke to Mr Mattila first then she told Mr and Mrs Gardner. She recalls that Mr Mattila told her father that she may have the land. On 7 January 2006 Mr Mattila signed the contract. Mrs Donna Gardner read the contract to him before he signed it. Both Ms Gardner and Mr Mattila signed the contract in the presence of Ms Julie Taylor JP. Mr Mattila was sober and clean when he signed the contract. That was standard practice in the Gardner household. If there were people to see and papers to sign, Mr Gardner always told Mr Mattila that he had to be clean and sober. Ms Gardner did not witness any coercion, threat, promise or inducement by Mr Gardner towards Mr Mattila to take part in or complete the transfer of the land at 120 Oxford Road.

[73] Significantly, having read the affidavit of Mr Mattila, Ms Gardner does not state that she was not aware of the nature of the relationship between Mr Mattila and Mr Gardner. Nor does she state that she was unaware of the level of Mr Mattila's limited mental capacity. Given the fact that Ms Gardner was residing in the same house as Mr Mattila and her parents and she had worked extensively on the land at 115 Oxford Road, she must have been aware of the nature of the relationship between her father and Mr Mattila and the extent to which Mr Mattila depended and trusted on her father. She must also have been aware of Mr Mattila's cognitive difficulties.

[74] Further, during her cross examination, Ms Gardner gave the following evidence. She knew that $160,000.00 was not the true price of the land. However, that was the only amount that she could get. She did not suggest to Mr Mattila that he should get some independent advice before he sold the land to her.

[75] I find that Ms Gardner must have known that the sale of the land at a price of $160,000.00 was manifestly to her advantage and that in all of the circumstances, she had notice of the facts from which the presumption of undue influence arises in this case. Further, as she did not endeavour to ensure that Mr Mattila received independent advice so that he could exercise independent judgment, she is fixed with the notice of undue influence and the claim against her for undue influence is established on the evidence in

this case. Mr Mattila did not exercise free will in relation to this transaction.

[76] As the land has been sold and as the proceeds of the sale less the amount of $160,000.00, which was distributed to Ms Gardner, has been paid into Court, Mr Mattila is entitled to the monies that have been paid into court.

Mr Mattila's claim for breach of trust and/or fiduciary duty

[77] As to the claim for breach of trust and/or fiduciary duty, Mr Mattila pleads the following in paragraphs 4, 5, 9, 11, 15 and 16 of the Further Amended Statement of Claim. Mr Mattila gave Mr Gardner an enduring power of attorney. On 4 May 2006 Mr Gardner arranged for a bank account to be opened in the name of AMJ Mattila – Building Account. Mr Gardner operated this account pursuant to the power of attorney. Between 4 May 2006 and 16 September 2009, when the building account was closed with a nil balance, the sum of $868,433.78 was paid into and withdrawn from the bank account by Mr Gardner pursuant to the power of attorney. By reason of Mr Gardner withdrawing this sum from the bank account for and on behalf of Mr Mattila, Mr Gardner became trustee for this sum for Mr Mattila. Further, by reason of Mr Gardner's position as attorney and trustee for Mr Mattila, Mr Gardner owed Mr Mattila fiduciary duties including a duty to avoid conflict of interest between his own interest and the interest of Mr Mattila and a duty to prudently invest or use Mr Mattila's money which was subject to the trust. In breach of his duty to avoid a conflict of interest and in breach of his prudential duty, on 13 March 2006

Mr Gardner entered into the Lease Agreement with Mr Mattila and at all material times he continued to act in pursuance of the agreement. He did so in circumstances where the agreement was imprudent, ill-advised, risky and uncommercial and likely to (and did) result in a loss.

[78] In par 16 of the Further Amended Statement of Claim the particulars of these conflicts of interest and breaches of trust were pleaded as follows.

1. The Lease Agreement was uncertain and unenforceable because it did not provide for the payment of an agreed rent.

2. The Lease Agreement was manifestly to the advantage of Mr Gardner and to the disadvantage of Mr Mattila because in reliance on it Mr Gardner has occupied the takeaway store and caravan park without paying rent to Mr Mattila.

3. The Lease Agreement required Mr Mattila to expend capital for all repairs, improvements and building at 115 Oxford Road but did not provide for any return on that capital.

4. The proposed further construction and development [at 115 Oxford Road] is inconsistent with the zoning of the land and is prohibited. The land is zoned R2 under the Planning Act.

5. The access road to the parcel of land at 115 Oxford Road is considered unsafe and a new access road is required. Mr Mattila does not have the funds to construct a new access road.

6. The amount of money spent on the takeaway store and caravan park at 115 Oxford Road resulted in a gross overcapitalisation of the land with the total value of the improvements being only $150,000 after Mr Gardner had spent an indeterminate amount of Mr Mattila's money, but in excess of $500,000, on the improvements.

7. Further, the reasonable cost of repairs, improvements and building at 115 Oxford Road was $214,400 and no building permit or certificate of occupancy required under the *Building Act* was obtained by Mr Gardner.

[79] In effect, Mr Mattila claims that in breach of trust and in breach of his fiduciary duties Mr Gardner pursued his own interests and wasted Mr Mattila's money on an uncommercial project.

[80] In my opinion, this claim is misconceived and cannot succeed. Mr Mattila and Mr Gardner entered into the Lease Agreement prior to any trust or fiduciary obligations arising. Mr Mattila voluntarily entered into this agreement. He understood the nature of this agreement and at the time that the Lease Agreement was made Mr Gardner was not in a position of trust. Nor did he owe Mr Mattila any fiduciary duties.

[81] During his cross examination Mr Mattila gave the following evidence. Before Mr Mattila went to Broome he and Mr Gardner started talking about the old park that Mr Mattila's deceased father had operated. It was known as the Berry Springs Caravan Park and Store. Mr Mattila knew that his father wanted to improve the land and turn it into a nice caravan park and store. Mr Mattila wanted to do it too, to make his father happy. The idea continued with Mr Mattila after his father passed away. He had the desire to fix the caravan park up. He discussed this with Mr Gardner and between the two of them they came to the idea that they could fix the property, renovate it, make some improvements and reopen it. However, Mr Mattila did not want to run the caravan park and store himself and Mr Gardner said that he did not have to work after he had developed the park. He was also relying on Mr Gardner to do the renovation work. Mr Gardner said that he would do it and Mr Mattila would not have to work again. Once the caravan park and

store were reopened Mr Gardner would pay him rent and run the premises. The first part of the agreement was that Mr Mattila would undertake the repairs and renovations so that the caravan park and store could be reopened. Once it was ready Mr Gardner would then lease the premises from him. If Mr Gardner took up occupancy and started running the premises he would pay Mr Mattila rent and he would be given a lease.

[82] I find that the terms of the agreement made by Mr Mattila and Mr Gardner are set out in the Lease Agreement which contains all of the agreed terms, save that it was also agreed between Mr Mattila and Mr Gardner that Mr Gardner would supervise all of the necessary works. The Lease Agreement was in the nature of a joint venture. I also find that after the Lease Agreement was made between Mr Mattila and Mr Gardner, a number of things happened which resulted in Mr Gardner becoming a trustee and incurring fiduciary obligations towards Mr Mattila. Firstly, Mr Mattila gave Mr Gardner a power of attorney. The primary reason why Mr Gardner was granted the power of attorney was so that he could obtain the proceeds of two insurance policies that were held by the deceased for Mr Mattila. However, the power of attorney was never revoked until the parties fell out and Mr Gardner used the power of attorney to conduct Mr Mattila's affairs. Secondly, Mr Gardner opened the AMJ Mattila – Building Account and he was the only signatory for the building account. Thirdly, it was decided that in order to finance the development of the caravan park and takeaway store certain blocks of land would be sold. The proceeds of those sales would be

paid into the building account and used to pay for the repairs, renovations and improvements to the store and caravan park. Fourthly, Mr Gardner assumed the responsibility of operating the building account in this way. Fifthly, Mr Gardner supervised the development works.

[83] In the circumstances, Mr Gardner assumed the following duties. (1) To distribute the money in the AMJ Mattila – Building Account for Mr Mattila's benefit and/or at his direction. (2) To reasonably apply the funds for the development of the caravan park and store in accordance with the Lease Agreement. (3) To account to Mr Mattila for the disbursement of the funds in the building account. (4) To keep proper records of all transactions.

[84] Contrary to what is pleaded in paragraph 15 of the Further Amended Statement of Claim, Mr Gardner did not breach his fiduciary duties by pursuing the development of the caravan park and takeaway store. Nor did that pursuit give rise to a conflict of interest between his interest and the interests of Mr Mattila. Further, contrary to what is pleaded in paragraph 16 of the Further Amended Statement of Claim, Mr Gardner did not breach any trust or fiduciary duty by entering into the Lease Agreement. The Lease Agreement was entered into before any trust or fiduciary duties arose. Nor does the fact that the Lease Agreement may have been risky, or uncommercial or unprofitable give rise to a breach of trust or breach of fiduciary duty. Many commercial ventures fail. That is not to say they were not undertaken bona fide. Mr Gardner also stood to lose if the venture

ultimately failed. It was not pleaded that Mr Gardner was negligent in the manner that he conducted the development works.

Mr Mattila's claim for wrongful use of his money

[85] In paragraph 17A of the Further Amended Statement of Claim Mr Mattila pleads that, in breach of trust, Mr Gardner spent large sums of Mr Mattila's money, which Mr Gardner withdrew from the AMJ Mattila – Building Account, for Mr Gardner's benefit. Mr Mattila is not able to provide complete particulars of these sums because Mr Gardner, in breach of his duty as attorney and trustee, failed to keep and render accounts. Amounts have been spent on mechanical equipment, cars and car parts and maintenance, council rates, power bills, Telstra bills and other personal expenditure. The particulars are as set out in an Excel spreadsheet that was filed with the Further Amended Statement of Claim. The amount claimed is $382,857.00.

[86] In paragraph 15 of his Further Amended Defence Mr Gardner denies the claim pleaded in paragraph 17A of the Further Amended Statement of Claim. Mr Gardner says that he has not spent large sums of Mr Mattila's money for his own benefit. Mr Mattila withdrew his own money from the building account, either personally, or by asking Mr Gardner to make out and sign cash cheques, make payments on necessary expenditure for repairs, improvements and building at the land at 115 Oxford Road, or make any other payment that he directed to be paid on his behalf. Mr Gardner kept and rendered full accounts for the building account.

[87] Mr Mattila seeks to prove this claim by relying on the inadequate discovery provided by Mr Gardner; and by identifying a large number of disbursements that are not explained or adequately specified and documented in the accounting provided by Mrs Donna Gardner.

[88] The accounting provided by Mrs Donna Gardner is summarised in par [31] above. Counsel for Mr Mattila, Mr Young, correctly submitted that it is not possible to substantiate either the amount of $453,256.06 that Mrs Donna Gardner identifies as being spent on repairs, improvements and buildings, or the amount of $232,381.00 that she identifies as Mr Mattila's personal withdrawals by reference to receipts, vouchers or other conventional records of expenditure. This is because the total value of the receipts discovered by Mr Gardner is only $83,746.76. The total value of the discovered invoices is $295,285.80. The total value of the discovered statements is $107,523.06, with $98,977.00 of that amount referable to statements from the Berry Springs Caltex Service Station where Mr and Mrs Gardner operated an account. The statements from the Berry Springs Caltex Service Station do not, apart from small amounts, allow any identification of the precise nature of the expenditure.

[89] Mr Young further submitted that Mr Gardner made extensive use of cash cheques to withdraw money from the AMJ Mattila – Building Account. An amount of $435,680.00 was withdrawn from the building account by cash cheques signed by Mr Gardner. There were about 199 cash cheques.

[90] Of this amount and these cheques, 10 cheques were drawn by Mr Gardner between 11 February 2009 and 16 September 2009 and part of the cash was paid into the Berry Springs Caravan Park and Takeaway Account which was an account owned and operated by Mr and Mrs Gardner. The total of the cash cheques was $115,000.00 but only $94,000.00 was paid into the Berry Springs Caravan Park and Takeaway Account. Mr Gardner asserts that $8,500.00 of the balance of $21,000.00 was given to Mr Mattila still leaving $12,500.00 unexplained. In addition, on 16 September 2009 Mr Gardner closed the AMJ Mattila – Building Account and paid the remaining balance of the account of $38,732.05 into his Berry Springs Caravan Park and Takeaway Account. This gives a total of $132,732.05 that was taken out of the AMJ Mattila – Building Account and placed in the Berry Springs Caravan Park and Takeaway Account.

[91] The sum of $132,732.05 was mixed with other moneys that were paid into the Berry Springs Caravan Park and Takeaway Account including loan monies that were obtained by Mr and Mrs Gardner. The amounts then withdrawn from the Berry Springs Caravan Park and Takeaway Account appear to have been spent in a variety of ways including fittings and equipment for the takeaway store, lawn mowers used for grounds maintenance and personal and business expenditure of Mr and Mrs Gardner.

[92] Mr Gardner has not supplied receipts or other primary evidence that permits a complete identification of how the balance of the cash cheques of $320,680.00 was spent. Some correlation between individual cash cheque

numbers is possible because some of the invoices and receipts have the number of the cash cheque written on them by Mrs Gardner. However, these account for a very small amount of the total. The "Analysis of Payments from Michael Mattila Building Account" page in the spread sheet which forms part of the Further Amended Statement of Claim shows these correlations. Mr Young submitted that, if the cash cheque withdrawals intended for the Berry Springs Caravan Park and Takeaway Account are ignored, $122,667.00 remains unaccounted for on the basis of the spread sheet prepared by Mrs Donna Gardner. I accept his submission.

[93] During her cross examination, in attempt to explain what had happened to the cash, Mrs Donna Gardner said for the first time that all amounts of unspent cash cheques were returned to Mr Mattila as "change". Mr Gardner gave no such evidence. He said that he did not know what happened to the money. Mr Young submits that Mrs Gardner's evidence should not be accepted and it should be inferred that at least the $21,000.00, which is unexplained and was not placed in the Berry Springs Caravan Park and Takeaway Account, and the amount $122,667.00 were kept by Mr and Mrs Gardner and used for their own purposes.

[94] Mr Young further submitted that the balance of the expenditure of Mr Mattila's money from the AMJ Mattila – Building Account less the final transfer to the Berry Springs Caravan Park and Takeaway Account of $38,732.05 being an amount of $354,402.00 was withdrawn by cheques which were made out to nominated payees and signed by Mr Gardner. I

accept his submission. According to Mr Gardner, all the cheque butts identifying these payees were destroyed by water when heavy rains caused the roof of the takeaway store to collapse in February 2011, which is after Mr Gardner was ordered by Riley CJ to provide an account. Nevertheless, Mr Gardner, with the assistance of Mrs Donna Gardner, has been able to identify some of the payees and the purpose of some of the payments. That information has again been incorporated in the spread sheet which forms part of the Further Amended Statement of Claim. These amounts have been further identified in nine summary documents that were provided to the Court by Mr Young during his final address. The documents accurately summarise Mrs Donna Gardner's evidence in this regard.

[95] From the information contained in annexure DG1 to the affidavit of Mrs Donna Gardner sworn on 20 February 2012, and the summary documents provided by Mr Young, the expenditure of some of the cash cheques may be identified and summarised as follows:

Wages	$23,000.00
Equipment (plant)	$60,133.00
Hire of equipment	$ 2,636.00
Fittings	$ 5,935.00
Parts and repairs	$ 9,330.00
Miscellaneous	$ 4,332.00
Contractors	$35,993.00
Chattels	$ 3,798.00

Building materials	$49,961.00
	$195,118.00

[96] To which must be added $31,000.00 in cash which was given to Mr Mattila. Further, between July 2006 and May 2008 cheques with a total value of about $110,686.00 were drawn by Mr Gardner on the AMJ Mattila – Building Account and made payable to the Litchfield Tavern. This leaves an unexplained amount of $128,304.00 which Mr Young again submits was kept by Mr and Mrs Gardner and used for their own purposes.

[97] As to the cheques drawn on the Litchfield Tavern, Mr Gardner gave evidence during his cross examination that the cheques cashed at the Litchfield Tavern were made out to the Litchfield Tavern. He does not think that the Litchfield Tavern took cash cheques. Normally his wife would write out the cheque and he would sign it. He was taken to a number of these cheques and to the explanation provided by Mrs Donna Gardner about what happened to the money that was received in return for the cheques. He agreed that some of the explanations stated that the proceeds were split 50/50 between him and Mr Mattila. If that occurred, it was probably because Mr Mattila gave the money to him. Mr Mattila's favourite saying was, "Let's go to the pub, uncle, and have a bet and a beer and I will shout". So that is what they did most times. If Mr Gardner was given $250 by Mr Mattila he took it. He said at the time he was on sickness benefits and he was only receiving between $350 and $400 per week. He remained on sickness benefits between 2005 and July 2010 when the store started

operating. Most of the time they were at the Litchfield Tavern, Mr Mattila "shouted" Mr Gardner. Mr Gardner did not have any money to spend at the Litchfield Tavern. He was dependent upon Mr Mattila. Mr Gardner gambled at the Litchfield Tavern. He gambled up to $1000 on any such occasion. He gambled whatever amount he received after a cheque was cashed. He said Mr Mattila gambled as well. They both gambled. They went to the Litchfield Tavern to drink and gamble. He does not know how much of Mr Mattila's money he would have gambled over the period that they attended the Litchfield Tavern. Mr Mattila never said stop doing this, uncle, we're going home. Mr Mattila was the one who wanted to be there half the time. Mr Gardner accepted that between the two of them no-one was going to protect Mr Mattila's interest. He admitted spending Mr Mattila's money on gambling. However, his evidence was that he did it with the consent of Mr Mattila.

[98] Mr Gardner said that each time one of the cheques was cashed at the Litchfield Tavern he was present with Mr Mattila. He signed the cheque. He said that often his wife would cash the cheque after he had signed it. When she was not there, he would cash the cheque. The money on each occasion was put on the table in front of Mr Mattila and him. Sometimes there might be as much as $1000 sitting on the table. They sat at one of the tables near the TAB so that they could follow the races on the television screen. After a race they would go up and collect their winnings or make another bet as the case may be.

[99] Mr Gardner also gave evidence that there were many occasions when cheques of more than $1000 were cashed at the Litchfield Tavern. For example, on 15 June 2007 there was a cheque for $500 cashed, then a cheque for $1000 cashed. On 23 June 2007, there was a cheque for $2000 cashed and then another cheque for $2000 cashed. Mr Gardner said he remembered occasions when such things happened. Cashing cheques of $2000, or $3000 or $4000 a session was not unusual.

[100] As a result, Mr Young submits that the amount spent at the Litchfield Tavern, or a good proportion of that amount, should be taken into account under this claim. This gives a total claim of $382,857.00 made up as follows:

Unexplained cash disbursement	$ 21,000.00
Unexplained cash cheques disbursement	$122,667.00
Unexplained payee cheques disbursement	$128,304.00
Litchfield Tavern cheques disbursement	$110,886.00

[101] I do not accept Mr Gardner's evidence that Mr Mattila consented to him gambling with Mr Mattila's money at the Litchfield Tavern. I find that Mr Mattila did not consent to Mr Gardner gambling Mr Mattila's money at the Litchfield Tavern and, in any event, any consent would be uninformed consent. Mr Gardner had control of the cheque book and he signed the cheques. He seems to have simply drawn cheques made out to the Litchfield Tavern for whatever amount he deemed appropriate. I accept Mr Mattila's

evidence that he did not see and did not know what account the cheques were drawn on. In any event, Mr Mattila could not have known how much money had been withdrawn and would not have been in a fit state to grant consent when he was at the Litchfield Tavern as he had a problem with the misuse of alcohol. The reason Mr Mattila had sought Mr Gardner's assistance in the first place and why, in part, he had given him the power of attorney and control over his bank account was to avoid people taking advantage of him in such circumstances. I find that Mr Gardner misappropriated a significant amount of Mr Mattila's money while they were at the Litchfield Tavern. However, it is also apparent that Mr Mattila did spend some of his own money while he was at the Litchfield Tavern.

[102] There is considerable force in this claim. It is within Mr Gardner's power to explain what happened to the funds that were withdrawn from the AMJ Mattila – Building Account. He was the only signatory on the building account, he supervised the development works. He or Mrs Gardner made most of the purchases necessary for conducting the repairs, improvements and building of the caravan park and takeaway store. Under s 11 of the *Powers of Attorney Act*, the donee of a power of attorney shall keep, and furnish to the donor at the donor's request and expense, a true and accurate record of any transaction entered into by him as donee of the power charging or otherwise disposing of, whether for valuable consideration or otherwise, any of the assets of the donor of the power.

[103] However, the allegations contained in paragraph 17A of the Further Amended Statement of Claim must be clearly proved. It is one of the most serious allegations capable of being made. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*[4] Mason CJ, Brennan, Deane and Gaudron JJ stated:

> The ordinary standard of proof required of a party who bears the onus of proof in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

[104] Mr Young submits that in this case Mrs Donna Gardner told a clear lie about the gambling at the Litchfield Tavern. She said that Mr Gardner had his own money and did not drink and gamble with the plaintiff's money. This was contradicted by Mr Gardner. Mr Young said that she also told a lie about giving "change" to Mr Mattila. That assertion was made for the first time while she was under cross examination and was not supported by Mr Gardner. He also said that they both told a lie in saying that they did not know what happened to a significant amount of the $21,000.00 that was not

[4] (1992) 110 ALR 449 at 449 – 450.

transferred to the Berry Springs Caravan Park and Takeaway Account during the period in which the balance of the AMJ Mattila – Building Account was transferred to that account. Their evidence about this simply beggars belief. I accept Mr Young's submission in this regard.

[105] However, Mr Young frankly conceded that the difficulty is whether demonstrated dishonesty in relation to an explanation about the distribution of some part or parts of Mr Mattila's money, and a complete failure to explain the distribution of a significant amount of Mr Mattila's money, leads to a clear and cogent inference that all of the unexplained money was misappropriated. The situation here is complicated by the fact Mr Mattila does not have a detailed recall of what moneys he received. Further, he made random purchases of various items and he did consent from time to time to Mr and Mrs Gardner using his money for their purposes.

[106] While I am satisfied that Mr Gardner did misappropriate some of Mr Mattila's money, I think that rather than endeavouring to come to a somewhat rough and ready estimation about how much money was misappropriated on the evidence before me, the best course is to order that Mr Gardner account to Mr Mattila and further order that Mr Gardner is to pay to Mr Mattila the amount found payable by him following the account. This will enable a full inquiry to be made into how Mr Mattila's money was distributed and what assets in the hands of Mr Gardner represent any such misappropriations.

Mr Mattila's claim for an account

[107] As to the order that Mr Gardner account to Mr Mattila, I make the following findings in addition to the findings that I have already made:

1. Mr Matilla has a right to an account from Mr Gardner. Mr Gardner was in the position of a trustee and attorney in relation to Mr Mattila's money that was in the AMJ Mattila – Building Account. He was under a duty to render proper accounts to Mr Mattila. Mr Mattila also has a right to an account under s 11 of the *Powers of Attorney Act*.

2. Mr Gardner has failed in his duty as trustee and attorney by not rendering proper accounts. The accounts produced by Mrs Donna Gardner following the order made by Riley CJ are inadequate and are not proper accounts.

3. Mr Gardner has misappropriated some of Mr Mattila's money. However, without an account, it is not possible to say that Mr Gardner has misappropriated all of the amount of $382,857.00 which is unexplained at this stage.

4. Mr Gardner has misappropriated a good proportion of the money that he obtained by cashing cheques drawn on the AMJ Mattila – Building Account at the Litchfield Tavern. I would estimate that at least 80 per cent of the cheques cashed at the Litchfield Tavern were misappropriated by Mr Gardner.

5. Mr Gardner has misappropriated at least $11,000.00 of the $21,000.00 that was not banked into the Berry Springs Caravan Park and Takeaway Account.

6. Mr Gardner has misappropriated some of the $132,732.05 that was transferred from the AMJ Mattila – Building Account to the Berry Springs Caravan Park and Takeaway Account.

7. Mrs Donna Gardner told a lie to the Court when she said the "change" was given to Mr Mattila.

8. Shop fittings and equipment do not fall within the meaning of the words "repairs, improvements and building" which are used in the Lease Agreement. The ordinary meaning of those words is confined to the landscaping, infrastructure, buildings, other installations and fixtures on the land at 115 Oxford Road, Berry Springs.

Mr Mattila's claim for negligence for the sale of 60 Oxford Road

[108] In paragraph 18 of the Further Amended Statement of Claim Mr Mattila pleads that, by reason of Mr Gardner's position as attorney, he owed Mr Mattila a duty to take reasonable care to ensure that the four properties which were sold by him were transferred for prices properly reflecting their value. In paragraph 19 of the Further Amended Statement of Claim Mr Mattila pleads, among other things, that in breach of his duty of care on or about 15 December 2006 Mr Gardner sold and/or transferred the land at

125 Finn Road and the land at 60 Oxford Road for prices which did not properly reflect their true value. The land at 125 Finn Road was sold for $75,000.00 when its true value was $95,000.00. The land at 60 Oxford Road was sold for $155,000.00 when its true value was $245,000.00.

Mr Bill Linkson, a qualified valuer, gave evidence that the land was sold less than five months later for $250,000.00.

[109] Mr Gardner admits that he owed Mr Mattila the duty of care that is pleaded in paragraph 18 of the Further Amended Statement of Claim. His admission is consistent with authority. An agent's duty is that which is reasonably expected of him in all the circumstances.[5] The standard of care is determined by factors such as whether the agent was paid and, if so, whether he exercises any trade, profession or calling, and where he is unpaid, the skill and experience he represents himself as having. In this case it is relevant to note that Mr Mattila could not read or write, he had no business experience and, to Mr Gardner's knowledge, Mr Mattila relied on him in such dealings, and he and Mr Gardner had embarked on a business venture which would be financed by the sale of a number of the parcels of land that Mr Mattila had inherited. In the circumstances a reasonable standard of care would involve Mr Gardner either making an analysis of recent comparative sales or obtaining advice about land prices from an appropriately experienced and qualified real estate agent or valuer.

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5 *Chaudry v Prabakhar* [1989] 1 WLR 29.

[110] Mr Gardner denies the allegations pleaded in paragraph 19 of the Further Amended Statement of Claim. He says that Mr Gardner was involved in full and comprehensive discussions involving the asking prices and he nominated the asking price for each property and sold the parcels of land for the nominated price. Further, Mr Gardner says that he made reasonable enquiries, sought competent advice and tested the market over a period of time relying on his own experience in purchasing and selling land in the Berry Springs and Cox Peninsula areas.

[111] Mr Young, in substance, conceded and I find that the claim in relation to the transfer of the land at 125 Finn Road is not made out. The price obtained for the sale of that block was within a reasonable range of what was said to be the true value of the land if an appropriate allowance is made for the usual vicissitudes of the market and the necessity to sell that block in a reasonably timely manner so that caveats could be removed on four of the parcels of land that Mr Mattila inherited.

[112] However, I find that the claim in relation to the sale of the land at 60 Oxford Road is made out.

[113] Mr Mattila's evidence was that after he returned from Broome, Mr Gardner wanted to sell 125 Finn Road. Mr Gardner negotiated the price with the buyers and Mr Mattila accepted the price that he negotiated. Mr Mattila did not have any knowledge of land values and he did not ask for or receive any

advice about land values. He accepted that Mr Gardner knew what he was doing. Mr Gardner signed all the paper work.

[114] In his affidavit evidence, Mr Gardner stated that on 14 December 2006 the parcels of land at 125 Finn Road and 60 Oxford Road, Berry Springs, were sold. 125 Finn Road was transferred to MH and AD Berends for $75,000.00 and 60 Oxford Road was transferred to W Herliey and D Dobie for $155,000.00. As per the agreement reached with the Power and Water Authority $25,000.00 from the proceeds of sale of 125 Finn Road was paid to the Power and Water Authority. The net proceeds from the sale of the two parcels of land of $204,601.97 were paid into the AMJ Mattila – Building Account on the same day. Initially Mr Mattila was going to give 125 Finn Road to his half sister, Ms Michelle Salzgeber, but he changed his mind when the Berends asked to purchase the land. He met and spoke to the purchasers in Mr Gardner's presence. Mr Gardner made no statement in his affidavit evidence about obtaining any advice about what was the value of the two parcels of land.

[115] During his cross examination Mr Gardner said that 60 Oxford Road was sold by word of mouth. Someone from the area came to see Mr Mattila about the block of land. They had let people know that it was for sale. Mr Gardner and Mr Mattila discussed the price after people approached them. As to the price of 60 Oxford Road, Mr Gardner said that he arrived at the price of $155,000.00 following a discussion that he had with Mr David Booth who is an experienced real estate agent. Mr Gardner said that he rang Mr Booth

and spoke to him about the price and Mr Booth told him that they should be able to get around $110,000.00 or $120,000.00 for the block of land. When asked if Mr Booth was available to give evidence, Mr Gardner stated that he was unavailable. However, he had contacted Mr Booth who had told him that he was unable to remember such a telephone conversation with Mr Gardner.

[116] Mr Gardner conceded during his cross examination that there had been no reference to the telephone conversation he had with Mr Booth in any of his affidavits. He also agreed that the first time he mentioned Mr Booth was during his evidence before the Court. However, Mr Gardner denied he had made up the telephone conversation with Mr Booth. He acknowledged that the block of land had been sold for $250,000.00 five months after they sold it. Mr Gardner said this happened because there had been a spike in the market at the time of the further sale. However, he conceded that the valuer had said nothing about a spike in the market at that particular time. I do not accept Mr Gardner's evidence in this regard. It smacked of recent invention.

[117] Mr Gardner agreed that there was nothing in Mr Mattila's background or experience that would qualify him to judge the value of the land at 60 Oxford Road. He accepted that Mr Mattila had been reliant upon him and his judgment of the value of the block. Mr Gardner considered that he was competent to assess the value of the block.

[118] Mr Bill Linkson, a qualified valuer, gave evidence that the land at 60 Oxford Road was valued at $245,000.00 as at 15 December 2006. In his report he stated that sales of comparable blocks in the area in 2005, 2006 and 2007 ranged between $189,000.00 and $285,000.00. He stated that the subject property sold for $250,000.00 on 8 May 2007. However, he considered the property was in a virgin state and its market value was slightly less in December 2006.

[119] I find that Mr Gardner was negligent in respect of the sale of the land at 60 Oxford Road and that his negligence resulted in Mr Mattila sustaining a loss of $90,000.00. Mr Gardner did not adequately review recent sales of equivalent blocks and he did not obtain appropriate advice about the value of the land.

Mr Mattila's claim for a declaration that the Lease Agreement was void for uncertainty

[120] In paragraph 21 of the Further Amended Statement of Claim Mr Mattila pleads that on or about 13 March 2006 Mr Mattila and Mr Gardner entered into a purported lease agreement in respect of the takeaway store and caravan park at 115 Oxford Road. He claims a declaration that the agreement is void for uncertainty in that it does not contain any term providing for payment of rent or for determining a rent.

[121] In paragraph 19 of his Further Amended Defence Mr Gardner admits that he and Mr Mattila entered into a lease agreement but says that the lease agreement is not void for uncertainty for the following reasons.

(1) Mr Mattila entered the lease agreement with Mr Gardner. (2) Mr Mattila signed the lease agreement in the presence of an independent third party. (3) Mr Mattila had a full understanding of the document and rent was to be negotiated on opening of the shop and caravan park. (4) Mr Gardner did not have the power of attorney at the time the lease agreement was made. (5) Once Mr Mattila had completed the improvements and opened the shop and caravan park on the premises he would receive a constant stream of income from the rental and would retain the value of his expenditure in the unencumbered equity in the premises. (6) The agreement that rental payments would be calculated and made when the lease began and the premises were occupied, logically allowed for the rent to be properly quantified after the years of development, infrastructure and repairs had been completed, and the potential income from occupancy and shop trade could be properly assessed.

[122] The defence to this claim has no merit. The omission of an essential term, without any means of curing the omission except by the further agreement of the parties, will be fatal to the validity and enforceability of an agreement[6]. The essential terms that require the parties' agreement will vary depending on the nature of the particular agreement.[7] In the case of a lease or *an*

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[6] *Thorby v Goldberg* (1964) 112 CLR 597 at 607 per Menzies J; *Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005] NSWCA 235 at [85] – [95] per Young CJ in Equity; *May & Butcher Ltd v R* [1934] 2 KB 17n at 20 per Lord Buckmaster; *Foote & Ors v Acceler8 Technologies Pty Ltd and Ors* [2012] NSWSC 635 at [20].

[7] *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 68; *Pagan Spa v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619; *Foote & Ors v Acceler8 Technologies Pty Ltd and Ors* [2012] NSWSC 635 at [21].

agreement to lease [emphasis added], the essential terms will usually be the parties, the premises, the term and the rent.[8]

[123] There is a well recognised exception to the requirement for an agreement on all essential terms. That is, where the agreement provides a mechanism for the determination of the omitted matter and the operation of that mechanism does not require the further agreement of the parties.[9] In this case there was neither an agreed rent nor an agreed mechanism for determining the rent. I have come to the conclusion that the Lease Agreement is void for uncertainty and is unenforceable.

Mr Gardner's counterclaims

[124] In his Amended Counterclaim Mr Gardner pleads seven causes of action or suits against Mr Mattila. First, there is a claim for breach of contract. Mr Gardner claims that Mr Mattila breached the Lease Agreement by abandoning the land at 115 Oxford Road, failing to complete the renovations and infrastructure to the property, and failing to provide a lease to Mr Gardner. Secondly, there is a claim for *quantum meruit* for the work that Mr Gardner performed exclusively for the betterment of Mr Mattila's land at 115 Oxford Road from March 2006 to 30 June 2010. Thirdly, there is a claim for a constructive trust for money that Mr Gardner claims he spent on

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8 *NZI Insurance Limited v Baryzcka* (2003) 85 SASR 497 at 506*; Harvey v Pratt* [1965] 1 WLR 1025 at 1026-1027; *Copperart Pty Ltd v Bayside Developments Pty Ltd* (1996) 16 WAR 396 at 408; *Foote & Ors v Acceler8 Technologies Pty Ltd and Ors* [2012] NSWSC 635 at [21].

9 *Booker Industries Pty Ltd v Wilson Park (Qld) Pty Ltd* (1982) 149 CLR 600; *Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd* [1994] 2 VR 106 at 202; *Foote & Ors v Acceler8 Technologies Pty Ltd and Ors* [2012] NSWSC 635 at [22].

the works that were undertaken on the land at 115 Oxford Road, Berry Springs.

Mr Gardner's claim for breach of contract

[125] In paragraph 2 of his Amended Counterclaim Mr Gardner pleads that on 13 March 2006 he and Mr Mattila entered into an agreement to lease. The terms of the agreement were partly verbal and partly written. The verbal terms of the agreement were: (a) Mr Mattila would complete the repairs, renovations and infrastructure required to reopen the store and caravan park which would then be made available to Mr Gardner for his occupancy under a lease; (b) Mr Mattila would, upon completion of the renovations and infrastructure required to reopen the store and caravan park, give Mr Gardner a registrable lease; (c) Mr Gardner would pay rent to Mr Mattila upon his occupancy of the premises and the granting of the lease; (d) in consideration of the above terms Mr Gardner would, until the repairs, improvements and buildings on the property were completed, assist Mr Mattila whenever necessary by providing his labour, funding Mr Mattila's cost of repairs, improvements and buildings on the property, providing his own management, consultation and supervision to complete the repairs, improvements and building on the property, providing and operating machinery, and delivering and forming road base for the main driveway; and (e) the funding provided by Mr Gardner for the repairs, improvements and buildings on the property would be owed to Mr Gardner. The written terms of the agreement to lease were: (a) the proposed lease

would be for 10 years from the date of signing with a 10 year option; (b) the rent would be negotiated upon completion of the shop, ablution block and caravan park on the surrounding land; and (c) Mr Mattila would pay for all repairs, improvements and buildings on the property.

[126] In paragraph 4 of his Amended Counterclaim Mr Gardner pleads that between 13 March 2006 and 30 June 2010 he completed the works that are referred to in par [34] above. There is no dispute between the parties that he did complete those works. In paragraph 5 he pleads that between 13 March 2006 and 30 June 2010 he provided funding in the amount of $115,902.81 to Mr Mattila for repairs, improvements and building.

[127] In paragraph 6 of his Amended Counterclaim Mr Gardner pleads that Mr Mattila breached the agreement to lease by: (a) abandoning the property on or about 2 September 2009; (b) failing to complete the renovations and infrastructure to the property as required under the terms of the lease agreement; and (c) failing to provide Mr Gardner with a lease. In paragraph 7 Mr Gardner claims loss and damages being the sum of $115,902.81 and the cost of his labour and $2,200,000.00 future economic loss of opportunity to obtain a lease and trade as the Berry Springs Caravan Park and Takeaway Store.

[128] The manner in which the sum of $115,902.81 is calculated is set out in Schedule 1 to Mr Gardner's Amended Counterclaim and is as follows.

> At the time the [AMJ Mattila] Building Account was closed on 16 September 2009 Mr Gardner had operated the account for 12 months and although owing $37,339.67 to Mr Gardner in the building account only. Mr Mattila was indebted to Mr Gardner $14,893.85 for cash input to the Building account prior to its closing and he also owed $22,000 to Trevor McMahon.

Mr Mattila deposited from the Building Account	$132,232.05
Mr Gardner owed Mr Mattila	$ 37,339.67
TOTAL	**$169,571.72**
Mr Gardner repaid Mr McMahon his loan	$ 22,000.00
Mr Gardner gave cash advances to Mr Mattila	$ 23,573.50
Mr Gardner retrieved his cash input	$ 14,893.85
Mr Gardner spent on repairs, improvements etc	$225,007.18
TOTAL	**$285,474.53**
TOTAL outstanding to Mr Gardner	**$115,902.81**

[129] In my opinion this claim is misconceived and cannot succeed for the following reasons. First, Mr Gardner's evidence does not establish that the agreement to lease was partly verbal and partly oral. During his cross examination Mr Gardner stated the Lease Agreement, being exhibit D1, was typed by Mrs Donna Gardner. It was typed by her following discussions between Mr Gardner and Mr Mattila. The discussions between the three of them were about what they had agreed. Mrs Donna Gardner created the Lease Agreement document to record what had been agreed. Mr Gardner accepted that there was nothing in the Lease Agreement about Mr Gardner

putting money into the caravan tourist park project himself. He said it was for Mr Mattila to pay for all the repairs and improvements on the section of land which was to become the caravan park. He accepted that it was unnecessary for the Lease Agreement to state anything about what would happen if he put money into the project. They did not discuss him putting any money into the project. What had been agreed is contained in the Lease Agreement. Mr Young then raised with Mr Gardner his counterclaim which pleads that the terms of the Lease Agreement made on 13 March 2006 were partly in writing and partly oral. Mr Gardner was asked what parts of the agreement were not written down. He answered, "No, well, it is written down there. That was the agreement there". He indicated that the written Lease Agreement contained all of the terms of their agreement. The written Lease Agreement represents the agreement that was made on 13 March 2006.

[130] Indeed there is no evidence that Mr Gardner had any discussions with Mr Mattila about Mr Gardner contributing any money towards the repairs, improvements and building on the land at 115 Oxford Road or that he agreed to loan Mr Mattila any money for these purposes.

[131] Secondly, both Mr and Mrs Gardner's evidence about them contributing money towards the repairs, improvements and building on the land at 115 Oxford Road is utterly unconvincing and is largely assertion. Although it does appear that some of their money may have been spent on fittings and equipment for the takeaway store and for ground maintenance which do not

fall within the meaning of “repairs, improvements and building” in the Lease Agreement.

[132] During her cross examination Mrs Donna Gardner gave the following evidence about the sum of $225,007.18 which Mr Gardner claims he spent on the repairs, improvements and building on the land at 115 Oxford Road. Mr Young firstly asked her how the sum was calculated. She stated that the sum included a business loan from the ANZ Bank of $80,000.00, two $34,000.00 top ups of that loan (taking the amount to $148,000.00) and a grant from Tourism NT of $60,000.00 which had to be spent on the property at 115 Oxford Road. That gave a total of $208,000.00. She was then unable to say what made up the difference of $17,077.18. She proffered gravel money from Coleman’s Contracting and money from some other small jobs that were undertaken by Mr Gardner but she really appeared to be either guessing or reconstructing when she gave that evidence. The grant moneys are not moneys in respect of which Mr Gardner can maintain a claim. If the money was not acquitted for the purpose for which they were obtained the money would have to be repaid to Tourism NT.

[133] As to the money that Mr and Mrs Gardner borrowed from the ANZ Bank, Mrs Gardner gave the following evidence. None of the sum of $148,000.00 went into the AMJ Mattila – Building Account. The building account was closed by the time that the money was obtained. While Mrs Gardner maintained that she and Mr Gardner told the ANZ Bank that the $80,000.00 was going to be used for refurbishing the store and fixing up the caravan

park, she conceded that the top up to that loan of $34,000.00 which was obtained on 15 July 2010 was for the running costs of the shop and for continuing maintenance. They had bought a lawn mower with some of the money that they borrowed from the bank. At no stage during her evidence was she able to give a detailed account of what repairs, improvements and building any of the money was spent on in circumstances where she and Mr Gardner had full knowledge of all such matters. Nor did she give any evidence that either she or Mr Gardner had any discussions with Mr Mattila about what the money was to be spent on. In my opinion the only reasonable inference is that the loan money that Mr and Mrs Gardner obtained from the ANZ Bank was spent on themselves, the running cost of the takeaway store and on some of the equipment that was purchased for the store.

[134] Thirdly, the lease agreement is void for uncertainty and is unenforceable. As a result, Mr Mattila's claim for damages of $2,200,000.00 must also fail.

Mr Gardner's claim for *quantum meruit*

[135] In paragraph 9 of his Amended Counterclaim Mr Gardner pleads that he claims *quantum meruit* for work he performed between March 2006 and 30 June 2010 exclusively for the betterment of Mr Mattila's property at 115 Oxford Road. He claims an entitlement to such on the basis that the labour was performed in reliance upon the Lease Agreement. The claim is based on $30 per hour, or $1200 for a 40 hour week, for the work completed

during the period of four years and three months between 13 March 2006 and 30 June 2010. The work undertaken was that set out in par [34] above.

[136] There is some force in this claim. It is common ground between Mr Mattila and Mr Gardner that the work referred to in par [34] above was undertaken and completed. The work was done, in effect, at Mr Mattila's request, in reliance on the Lease Agreement and in anticipation of being granted a lease to the land at 115 Oxford Road. However, Mr Gardner was not granted a lease and the Lease Agreement has been held to be unenforceable. Mr Mattila has benefitted as a result of the work being completed. In the circumstances Mr Gardner is entitled to reasonable remuneration.[10]

[137] Neither Mr Gardner nor Mr Mattila gave any detailed evidence about the periods of time that they spent working on the block or how long each stage of the work took. Mr Brears, a registered builder, who was called by Mr Mattila, gave evidence that he estimated that the value of undertaking and completing the work which was done at 115 Oxford Road was $214,400.00 if the work was done by qualified builders and subcontractors. He gave no breakdown of the labour costs involved. He estimated that the work would have taken six months to complete if it was undertaken by qualified tradesmen. Mr Bamber, a Quantity Surveyor, who was called by Mr Gardner, gave evidence that the works undertaken on the land at 115 Oxford Road could have cost as much as $858,518.00. He estimated

[10] *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 72 NSWLR 880.

total labour costs to be $189,705.00.[11] He also stated in his report that in this particular project several difficulties resulted in much higher preliminaries and site clearing costs. The preliminaries covered a period of four years, but he made allowances for the wet season and reduced his estimate of the construction period to an effective two years (six months during the wet season per year being treated as non-productive) to allow for this.

[138] In my opinion, Mr Bamber's assessment that there would have been a construction period of two years is a fair assessment. I also think that the rate claimed by Mr Gardner of $30 per hour, given his work experience, is a fair rate. In the circumstances, I find that Mr Gardner is entitled to an amount of $124,000.00 for the work that he performed on the land at 115 Oxford Road.

Mr Gardner's claim for a constructive trust

[139] In paragraph 8 of his Amended Counterclaim Mr Gardner claims and equitable interest under a constructive trust for $115,902.81 being an amount that Mr Gardner provided to Mr Mattila by paying for loans, repairs, improvements and building on the land at 115 Oxford Road in reliance on the Lease Agreement. This claim fails for the reasons set out in par [129] to par [133]. Mr Gardner failed to prove that he contributed the sum of

[11] To arrive at this figure I have added up the costs indentified as labour costs in the schedule to Mr Bamber's report.

$225,007.18 towards the repairs, improvements and building that was undertaken on the land at 115 Oxford Road.

Conclusion

[140] I make the following orders:

1. Judgment for Mr Mattila against Ms Hydee Gardner.

2. The sum of $113,301.98 and any interest thereon is to be paid out of Court and to Mr Mattila.

3. Mr Mattila's claim for breach of trust and/or breach of fiduciary duty which is pleaded in paragraphs 4, 5, 9, 11, 15 and 16 of the Further Amended Statement of Claim is dismissed.

4. Mr Gardner is to account to Mr Mattilla about the disbursement of funds from the AMJ Mattila – Building Account and he is to pay to Mr Mattila any amount which is found to have been misappropriated or wrongly disbursed following the account.

5. Judgment for Mr Mattila against Mr Gardner in the sum of $90,000.00 for the negligent sale of the land at 60 Oxford Road, Berry Springs.

6. I declare that the Lease Agreement is void for uncertainty and is unenforceable.

7. Mr Gardner's claim for breach of contract is dismissed.

8. Judgment for Mr Gardner against Mr Mattila for $124,000.00 for *quantum meruit*.

9. Mr Gardner's claim for a constructive trust is dismissed.

[141] I will hear the parties further about:

1. Any ancillary orders in relation to the order that Mr Gardner account to Mr Mattila;

2. The interlocutory injunction;

3. Any caveats that have been placed on Mr Mattila's land by Mr Gardner; and

4. Costs.
