NEW SOUTH WALES SUPREME COURT

CITATION:
Brand v Monks [2009] NSWSC 1454
This decision has been amended. Please see the end of the judgment for a list of the amendments.

JURISDICTION:
Equity Division

FILE NUMBER(S):
2660/07

HEARING DATE(S):
29 and 30 September 2009 and 1, 2, 12 and 13 October 2009

JUDGMENT DATE:
21 December 2009

PARTIES:
George Charles Brand (First Plaintiff)
Tosca Brand (Second Plaintiff)
Helen Monks (Defendant)

JUDGMENT OF:
Ward J

LOWER COURT JURISDICTION:
Not Applicable

LOWER COURT FILE NUMBER(S):
Not Applicable

LOWER COURT JUDICIAL OFFICER:
Not Applicable

COUNSEL:
M S Jacobs QC with him D Fitzgibbon and P Bambagiotti (Plaintiffs)
I Faulkner SC with him L Chan (Defendant)

SOLICITORS:
Daphne Kennedy (Plaintiffs)
Kennedys Lawyers (Defendant)

CATCHWORDS:
CONTRACTS - general contractual principles - discharge, breach and defences to action for breach - defendant contracted to prepare development application for subdivision of

plaintiffs' land - defendant agreed to keep confidential information obtained by her in providing commissioned services - defendant reported clearing activity on land to council - whether plaintiff breached confidentiality clause of contract - whether public interest in defendant's disclosure to council - held that information disclosed to council not confidential and not within ambit of clause - public interest in disclosure not established
CONTRACTS - general contractual principles - construction and interpretation of contracts - implied terms - whether implied term that defendant, if she formed view that development application would not succeed, would disclose that view to plaintiffs - whether defendant breached implied term - held that no implied term and, in any event, had such a term been implied, no evidence of breach
EQUITY - general principles - fiduciary obligations - whether defendant owed fiduciary obligation to council - relationship not within recognised categories of fiduciary relationships - held that no fiduciary obligations existed
TRADE AND COMMERCE - Trade Practices Act 1974 (Cth) and related legislation - consumer protection - unconscionable conduct - whether defendant engaged in unconscionable conduct in breach of s 43 of the Fair Trading Act 1987 (NSW) by making disclosures to council - held that defendant did not engage in unconscionable conduct as pleaded
PROCEDURE - pleading - particulars - in earlier version of statement of claim, plaintiffs had pleaded as material facts of unconscionable conduct claim, the defendant's non-disclosure to plaintiffs of communications with council and continued receipt of fees thereafter - as a result of amendment, those facts no longer pleaded in final statement of claim, but appear in particulars - had those facts been pleaded, plaintiffs' claim may have been established, subject to whatever evidence defendant might have adduced - defendant made clear that only responding to case as pleaded - consideration of role of particulars - held that plaintiffs not able to succeed on ground of non-disclosure as material facts not pleaded.

LEGISLATION CITED:
Environmental Planning and Assessment Act (NSW) 1979
Fair Trading Act 1987
Miscellaneous Acts (Planning) Repeal and Amendment Act 1979
Trade Practices Act 1974 (Cth)

CATEGORY:
Principal judgment

CASES CITED:
A v Hayden (1984) 156 CLR 532
AFL v The Age Company Pty Limited (2006) 15 VR 419
AG Australia Holdings Limited v Burton (2002) 58 NSWLR 464
Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia (1977-78) 139 CLR 54
Artedomus v Del Casale [2006] NSWSC 146
ASIC v National Exchange Pty Limited [2005] FCAFC 226
ASIC v Rich (2005) 54 ACSR 326
Attorney-General v Observer Newspapers [1990] 1 AC 109
Attorney-General (NSW) v World Best Holdings Pty Limited [2005] NSWCA 261
Attorney-General v Guardian Newspapers Ltd [No 2] [1990] 1 AC 109
Banque Commerciale SA (in liq) v Akhil Holdings Ltd (1990) 169 CLR 279
Black Uhlans Inc v NSW Crime Commission & Ors [2002] NSWSC 1060

Blatch v Archer (1774) 1 Cowp 63, 98 ER 969
Breen v Williams (1996) 186 CLR 71
Browne v Dunn (1893) 6 R 67; (1893) 6 R 67 HL
Bruce v Odhams Press Limited [1936] 1 KB 697
Cameron v Qantas Airways Limited (1994) 55 FCR 147
Canon Australia Pty Limited v Patton (2007) ATPR 42-183
Carantinos v Magafas [2008] NSWCA 304
Chapple v Electrical Trades Union [1961] 3 All ER 612
City of Subiaco v Heytesbury Properties Pty Limited [2001] WASCA 140
Coastal Estates v Bass Shire Council [1993] 2 VR 566
Collings Construction Co Pty Limited v ACCC [1988] NSWSC 32
Commonwealth of Australia v John Fairfax & Sons Limited (1980) 32 ALR 485
Coulthard v State of South Australia (1995) 63 SASR 531
Council of the Shire of Eurobodalla v Caldak Pty Limited and Towrang Park Pty Limited (1980) NSWLEC 14
Elspan v Eurocopter [1999] NSWSC 555
Financial Times Limited & Ors v Interbrew SA [2002] EWCA Civ 274
G v Day [1982] 1 NSWLR 24
Gibson Motorsport Merchandise Pty Limited v Forbes (2006) 149 FCR 569
Goldsmith v Sandilands (2002) 190 ALR 370
Gosford City Council v Brand [2006] NSWLEC 422
H 1976 Nominees Pty Limited v Galli (1979) 30 ALR 181
Harris v Digital Pulse Pty Limited (2003) 56 NSWLR 298
Heddin v Deli Gas Pipeline Co 522 SW 2d 888 (1975) (Tex)
Henderson v Merrett Syndicates Limited [1995] 2 AC 145
Henville v Walker (2001) 206 CLR 459
Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41
Ingot Capital Investments Pty Limited v Macquarie Equity Capital Markets Limited [2008] NSWCA 206
Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales [1975] 2 NSWLR 104
ISPT Pty Limited v Melbourne City Council (2008) 20 VR 447
Jackson Nominees Pty Limited v Hanson Building Products Pty Limited [2006] QCA 126
Johns v Australian Securities Commission (1993) 178 CLR 408
Jones v Dunkel (1959) 101 CLR 298
Kation Pty Limited v Lamru Pty Limited [2009] 257 ALR 336
Kenny & Good Pty Limited v MGICA (1992) Limited (1999) 199 CLR 413
Kowalczuk v Accom Finance (2008) 252 ALR 55
Mackay v Dick (1881) 6 App Cas 251
Maggbury Pty Limited v Hafele Australia Pty Limited 210 CLR 181
March v Stramare (E & MH) Pty Limited (1991) 171 CLR 506
McFadzean v CFMEU [2004] VSC 289
Medlin v State Government Insurance Commission (1995) 182 CLR 1
Michael Wilson & Partners Limited v Robert Colin Nicholls [2009] NSWSC 721
Milbank v Milbank [1900] 1 Ch 376
Morison v Commonwealth (1972) 34 LGRA 273
Musca v Astle Corporation Pty Limited (1988) 80 ALR 251
Norbeg v Wynrib [1992] 2 SCR 226
Parramatta City Council v Brickworks Limited (1982) 128 CLR 1
Permanent Building Society (in liq) v Wheeler (1994) 11 WAR 187

Pilmer v Duke Group Limited (in liq) (2001) 207 CLR 165
Pinson v Lloyds and National Provincial Foreign Bank Limited [1941] 2 KB 72
Placer (Granny Smith) Pty Limited v Thiess Contractors Pty Limited (2003) 77 ALJR 768
Port Stephens Council v SS and LM Johnston Pty Ltd [2007] NSWLEC 30
Port Stephens Shire Council v Tellamist Pty Limited [2004] NSWCA 353
Rawley Pty Limited v Bell (No 2) (2007) 61 ACSR 648
Rubenstein v Truth and Sportsman Limited [1960] VR 473
Shanmugaratnam v Strasburger Enterprises (Properties) Pty Ltd [2004] NSWCA 229
Southern Cross Exploration NL v All Risks Insurance Co Limited (1985) 2 NSWLR 340
Spencer v the Commonwealth (1907) 5 CLR 418
Travel Compensation Fund v Blair [2003] NSWSC 720
Tyco Australia Pty Limited v Optus Networks Pty Limited [2004] NSWLR 333
Vetter v Lake Macquarie City Council (2001) 202 CLR 439
Vines v ASIC (2007) 62 ACSR 1
White City Tennis Club Limited v John Alexander's Clubs Pty Limited [2009] NSWCA 114

TEXTS CITED:
Cross, The Law of Intellectual Property: Copyright, Designs and Confidential Information
Jacobs, Commercial Damages, Lawbook Co 2008

DECISION:
Plaintiff claim dismissed with costs.

JUDGMENT:



**IN THE SUPREME COURT**

**OF NEW SOUTH WALES**

**EQUITY DIVISION**

**WARD J**

**MONDAY 21 DECEMBER 2009**

**2660/07 GEORGE CHARLES BRAND V HELEN MONKS**

**JUDGMENT**

1 Mr and Mrs Brand are the registered proprietors of 44 hectares of land situated in Copacabana, New South Wales. The land is zoned 7(a) Conservation Scenic Protection (Conservation) under a Gosford City Council Planning Scheme Ordinance. The land forms part of the Merchants Creek catchment area and is of some ecological significance.

2 In mid-2003, Mr Brand engaged Dr Monks, a certified environmental practitioner with expertise in town planning and regional development, trading as Highlight Consulting, to prepare and submit to Gosford City Council a development application for subdivision of the land (on which there is one existing dwelling

occupied by Mr and Mrs Brand's daughter and her family) into ten parcels of land including the existing dwelling.

3 Dr Monks prepared the subdivision application and provided it, with accompanying expert reports, to Mr Brand in December 2004. However, Mr Brand decided not to proceed with the development application at that stage as, in the meantime, the Council had resolved to commence proceedings against Mr Brand in the Land and Environment Court for both a restoration order and penalty for alleged unauthorised clearing and underscrubbing of the land. (Those proceedings were ultimately withdrawn by consent between the parties in 2006, after Talbot J had refused leave sought by the prosecution to amend the charge particularised in the summons.)

4 Mr Brand's complaint in these proceedings relates to actions taken by Dr Monks (and/or expert consultants retained by her, namely Mr Clarke and Mr Payne) prior to the finalisation of the development application (broadly speaking, comprising the disclosure to the Council in or about May 2004 of matters relating to the clearing of the land which Mr Brand says Dr Monks and her consultants were obliged to keep confidential), which Mr Brand says caused the Council to prosecute him and as a result of which he says he suffered financial and other loss.

5 Senior Counsel for Mr and Mrs Brand, Mr Jacobs QC, characterised this as a case posing the question as to the extent to which a professional person holding herself out as an expert and adviser "who accepts an engagement to advise and represent, which has in it contractual duties of confidentiality [can] decide at will to turn on her principal, … deliberately disregard the relationship and obligations of confidence, and … use her relationship and the advantages placed in her hands by virtue of that relationship, to the disadvantage of her principal by inciting and urging his prosecution by local authorities" (para 1, written Opening Address).

6 Stripped of the rhetoric, in essence this is a case in which it is alleged that Dr Monks (herself or through her consultants), in making disclosures to the Council, acted in breach of an express contractual obligation of confidence and/or of fiduciary obligations allegedly owed by her to Mr and Mrs Brand. That same conduct is alleged to amount to unconscionable conduct in breach of s 43 of the *Fair Trading Act* 1987. (A claim is also made that Dr Monks breached an implied contractual obligation to advise Mr Brand if she came to the view that there was little or no prospect of the subdivision application succeeding.)

7 Having regard to Mr Brand's evidence in the witness box (T 55.17; T56.38) (and to the tenor of some of the submissions made on behalf of the plaintiffs to which I refer later), it seems fair to say that, although the claim as pleaded turns on the disclosure to the Council of what was alleged to be information confidential to Mr Brand, at the heart of Mr Brand's complaint is the fact that Dr Monks (while retained by and working for him) had approached and discussed his affairs with the Council at all (irrespective of whether any confidential information had been passed on to the Council). However, a claim based simply on that conduct was not pleaded.

8 The relief sought by Mr and Mrs Brand includes damages to compensate for the financial loss said to have been suffered as a consequence of the disclosures (identified initially as the costs of defending the Land and Environment Court proceedings, the loss of a chance to secure the subdivision and sale of the land in 2004, the "wasted" fees paid to Dr Monks, and unquantified damage to the goodwill of Mr Brand's real estate business), as well as the broad spectrum of general, aggravated and exemplary damages.

9 Dr Monks denies any liability. Dr Monks accepts that she owed a contractual obligation of confidence but denies any breach of that obligation. She denies that she owed any fiduciary duty to the Brands. In relation to any breach of confidence which may be established, Dr Monks relies, among other things, on a public interest defence – namely, that it was reasonable for her to reveal to the Council that a serious offence had been committed. In broad terms, that offence is pleaded as the mechanical clearing (or underscrubbing) of weeds and native vegetation on the land for the purposes of agriculture or subdivision, without the Council's consent. (Dr Monks explained these terms as being that "underscrubbing" refers to the removal of all flora, save for tall established trees and grass roots; whereas "clearing" leaves the land clear of any vegetation possibly excepting grass roots.)

10 Dr Monks also invokes the doctrine of unclean hands as disentitling Mr and Mrs Brand from any equitable relief (on the basis that the alleged crime has an immediate and necessary relation to, and must be relied upon in order to establish, the claim for breach of fiduciary duty and the loss claimed to have been suffered as a result of that breach).

**Issues**

11 The following issues arise for determination in these proceedings:

***(1) Breach of Contract***

· *Contractual confidentiality obligation*

(i) What is the scope of the contractual obligation of confidentiality owed by Dr Monks? In particular,

(a) does the obligation extend to information communicated *by* Dr Monks (or her consultants) *to* Mr and Mrs Brand (or opinions held by Dr Monks or her consultants about their activities)?

(b) does the obligation extend to information obtained by the expert consultants (Mr Clarke and Mr Payne) retained by Dr Monks to prepare various reports for the development application?

(c) does the obligation extend to information which is not confidential in nature or which, though once confidential in nature, has passed into the public domain?

(d) was the information which was disclosed to the Council information which would necessarily have had to be disclosed for the purposes of rendering the services to be provided under the contract (and, if so, was it information excluded from the contractual confidentiality obligation owed by Dr Monks by reference to the proviso contained in the relevant clause of the contract)?

(e) is Dr Monks contractually liable for any disclosure of confidential information by Mr Clarke or Mr Payne?

(ii) Having regard to the findings in (i) above, was there a breach of the contractual obligation of confidentiality by the making of any of the relevant disclosures? (For this purpose it is necessary to identify with particularity the information which Mr and Mrs Brand say was confidential to them and was disclosed to the Council in breach of Dr Monks' obligations.)

(iii) If any one or more of the relevant disclosures was in breach of the contractual confidentiality obligation owed by Dr Monks, is Dr Monks able to rely upon a public interest defence?

· *Implied obligation to notify Mr Brand as to prospects?*

(iv) Was there an implied contractual term obliging Dr Monks, if she formed the view that the development application would not be likely to succeed, to disclose that view to Mr and Mrs Brand; and, if so, was Dr Monks in breach of that term?

***(2) Fiduciary duty***

(v) Did Dr Monks owe fiduciary obligations to Mr and Mrs Brand arising out of their contractual relationship (or otherwise) and, if so, did she breach those obligations by making the relevant disclosure(s)?

(vi) Are Mr and Mrs Brand precluded, by operation of the doctrine of unclean hands, from obtaining equitable relief for any breach of fiduciary duty?

***(3) Fair Trading Act***

(vii) Did Dr Monks engage in unconscionable conduct in breach of s 43 of the *Fair Trading Act* as pleaded, namely by the making of the relevant disclosures to the Council alleging criminal conduct and urging it to prosecute Mr Brand?

***(4) Relief***

(viii) What loss or damage, if any, have Mr and Mrs Brand suffered as a result of any breach of contract, breach of fiduciary duty or breach of the *Fair Trading Act* established on the part of Dr Monks?

**Summary**

12 In summary, for the reasons set out below I have concluded that:

(i) the contractual obligation of confidentiality, as a matter of construction of the contract entered into between Dr Monks and Mr and Mrs Brand:

(a) *does not* extend to information communicated *by* Dr Monks (or, for that matter, her consultants) *to* Mr and Mrs Brand (nor does it extend to views or opinions formed or held by Dr Monks or her consultants);

(b) *does* extend to information obtained by Dr Monks from the expert consultants (Mr Clarke and Mr Payne) retained by Dr Monks to prepare various reports for the development application, provided that it was passed on by them to Dr Monks for the purpose or in the course of the provision of the commissioned services; and

(c) *does not*, in the absence of an express provision to that effect, extend to information which is not confidential in nature or which at the time of disclosure had lost its confidential quality, having entered into the public domain;

and that

(d) of the information disclosed to the Council, it is *not* the case that all such information would necessarily have had to be disclosed for the purposes of rendering the services to be provided under the contract so as to be excluded from the operation of the confidentiality clause by the proviso thereto;

(e) Dr Monks is *not* contractually liable for any disclosure of confidential information by Mr Clarke or Mr Payne otherwise than in the performance by them of their retainer with Dr Monks (and hence there is no liability on the part of Dr Monks for the disclosures made by Mr Clarke of which Mr and Mrs Brand complain).

(ii) There was no breach of the contractual obligation of confidentiality by reason of the making of the particular disclosures of which complaint is made in these proceedings.

(iii) Had there been a breach of the contractual confidentiality obligation by reason of the disclosure of matters relating to the fact or extent of the clearing activities, such that the public interest defence fell to be determined, I would not have been satisfied that Dr Monks had established a prima facie case that there was a reasonably tenable charge of a crime committed in relation to the clearing activities carried out on the land (although I accept that she believed in good faith that a serious environmental offence was being committed). Had I been so satisfied then I would have held that this justified no more than the minimum disclosure necessary to alert the Council to the fact that Mr Brand was engaging in the said clearing activities and that, beyond disclosure of the fact of clearing, various of the disclosures made to the Council by Dr Monks went beyond what would have been necessary for the purpose of disclosure of any offence constituted by those activities of the kind alleged.

(iv) No term of the kind pleaded is to be implied into the contract. In any event, even if there was an implied term of the kind pleaded, in the absence of any evidence that Dr Monks had ever formed the view on which the alleged obligation to notify was predicated, no breach of any such obligation would have been established on the evidence before me.

(v) The relationship between Dr Monks and Mr and Mrs Brand was not fiduciary in nature and Dr Monks did not owe to Mr and Mrs Brand fiduciary obligations of the kind pleaded. (Had I found that there was any fiduciary relationship between the parties it would not have extended to impose a positive duty of the kind pleaded in paragraph 7(a)(i) of the pleading but would,

relevantly, have given rise to a duty to avoid a real and sensible possibility of conflict between Dr Monks' personal interests and her duties to her client or between Dr Monks' duty of disclosure in the public interest of any serious environmental offence and her duty to her clients.)

(vi) Had I found that Dr Monks owed to Mr and Mrs Brand a fiduciary duty of the kind referred to above and that this had been breached by Dr Monks' failure to disclose to them (either in advance or afterwards) of the fact of her disclosures to the Council, in light of my finding as to the alleged offence I would not have found that Mr and Mrs Brand were precluded, by operation of the doctrine of unclean hands, from obtaining equitable compensation from Dr Monks. For the reasons set out below, any such compensation would have been limited to the recovery of the fees paid to Dr Monks for work carried out after 20 May 2004 (less, perhaps, any amount which might be said to have represented the benefit Mr Brand has obtained from the provision of the relevant reports).

(vii) Dr Monks did not engage in unconscionable conduct in breach of s 43 of the *Fair Trading Act*, **as pleaded**, by reason of any of the disclosures to the Council which alleged criminal conduct on Mr Brand's part. (Insofar as the pleaded conduct extended to alleged disclosures urging a criminal prosecution, I find as a matter of fact that no such conduct was made out.)

(I should note that I would have been inclined to find that there was unconscionable conduct in breach of the Act by reason of the fact that Dr Monks did not disclose to Mr Brand the disclosure(s) she had made to Council *and* continued to perform services for which she charged Mr Brand since, by so doing, she deprived Mr Brand of an opportunity to consider not only whether he wished to continue with the project at all at that stage but also whether he wished to continue to retain her services in relation to the project. However, that claim was not pleaded. I accept that Dr Monks' defence was conducted expressly on the basis that no such claim was pleaded and, as a matter of procedural fairness, I make no findings in relation thereto.)

(viii) As I have not found for the plaintiffs on any of their various claims, the question of relief does not arise.

Had the issue of relief arisen for determination on my findings as to liability, I would have found that none of the disclosures made by Dr Monks to the Council was the (or a) material cause of the prosecution of Mr Brand, so as to have been capable of giving rise to a claim for damages or equitable compensation based on the alleged diminution in the value of the land by reason of the prosecution or for the costs of the prosecution.

Had I found that Dr Monks was in breach of fiduciary obligations owed to Mr and Mrs Brand or otherwise liable for unconscionable conduct, in either case by having failed to disclose to them the fact of her disclosures to the Council (or her intention to make those disclosures and thereafter continuing to accept fees from Mr Brand, Dr Monks), the appropriate relief would in my view have been an order for recovery by Mr and Mrs Brand of the fees paid for work carried out from 20 May 2004 onwards (less, perhaps, an account for any benefit Mr and Mrs Brand have obtained thereby in terms of the production of reports which they may be able later to use if they do wish to proceed with a development application in relation to the land).

As to the claims for general/aggravated damages for hurt and distress and exemplary damages, the latter was not pressed before me and, while I accept that Mrs Brand suffered health problems as a result of the stress caused by the prosecution of her husband I do not consider that this was loss caused by Dr Monks' disclosure as such but rather by the prosecution itself and I would have made no such award. It is not therefore necessary for me to decide whether aggravated damages would as a matter of principle be available on such a claim.

**Conduct of the Proceedings**

13 Before summarising the factual background to this matter, it is necessary to outline the manner in which the case proceeded up to and during the hearing, as this of relevance when considering the ambit of the claims (and particularly the *Fair Trading Act* claim) as pleaded. Senior Counsel for Dr Monks, Mr Faulkner SC, made it clear a number of times during the hearing that the defendant was conducting her defence of this case as pleaded against her, and no other. There was no demur to this proposition from Mr Jacobs.

14 Mr and Mrs Brand commenced these proceedings by Statement of Claim in May 2007. Their claim was then one for breach of contract and breach of s 42 of the *Fair Trading Act*.

15 As to the breach of contract, it was alleged that Dr Monks (together with persons employed and instructed by her) had made disclosures to the Council and taken certain actions including supplying documents and evidence to the Council, and had done so negligently and with reckless disregard, thereby causing serious financial damage to Mr and Mrs Brand and their reputations.

16 As to the alleged breach of s 42 of the *Fair Trading Act*, what was initially pleaded was misleading and deceptive conduct having occurred by the "deliberate failure" of Dr Monks to inform Mr and Mrs Brand of her actions in complaining to the Council on about 20 May 204 "and her subsequent actions after the complaint" (para 43).

17 An Amended Statement of Claim was subsequently filed on 24 July 2007. By this pleading, the allegation that the alleged breaches of contract and actions were made or done by Dr Monks acting "negligently and with reckless disregard" was deleted and there was pleaded for the first time (para 30) an "express duty of care" not to disclose confidential or other material relating to the plaintiffs' affairs and a breach by Dr Monks of "this express duty of care".

18 At that time, the *Fair Trading Act* claim was amended to include (as well as the alleged breach of s 42) an allegation of breach of s 43 of the Act. The manner in which this was done in terms of the drafting of the pleading was somewhat circuitous. Paragraph 4 continued to plead an allegation of conduct in trade and commerce that was misleading and deceptive or likely to mislead and deceive within s 42 of the Act. Paragraphs 45-47 were newly inserted under a heading "Particulars of breach of Fair Trading Act 1987 (ss 42 and 43)"; those particulars, in summary, being entry into a contract in relation to the performance of work of a

professional nature (para 45); the payment to Dr Monks of a sum in excess of $30,000 "prior to the … unconscionable conduct in relation to her disclosure to the … Council of confidential and other information relating to the Plaintiffs' affairs" (para 46); *and* that Dr Monks had by "*refraining from notifying*" the plaintiffs of her disclosure to the Council and her subsequent acceptance of payments totalling $58,000, Dr Monks *"refused to do an act including refraining (otherwise than inadvertently) from doing the act"* and that such conduct constituted unconscionable conduct within s 43 of the *Fair Trading Act* "in that unfair tactics were used against the Plaintiffs"( para 47). Paragraph 50 continued to plead the "deliberate failure" to inform, this time as a breach of both s 42 and s 43 of the Act.

19 Up to this point, therefore, Dr Monks' non-disclosure to Mr and Mrs Brand of the fact of her communications to the Council in relation to their affairs (together with her "subsequent actions", presumably the particularised acceptance of fees from Mr and Mrs Brand) was clearly pleaded as being part of the misleading and deceptive or, alternatively, unconscionable conduct allegedly engaged in by Dr Monks.

20 Particulars of the alleged unconscionable conduct were provided by letter dated 8 October 2007 from the plaintiffs' solicitors as:

> 88. The Defendant's unconscionable conduct consisted of the fact that she continued to undertake work for the Plaintiff, to advise him in relation to the work, to charge him for her work and accept payment for this work while at the same time having made the instant complaint to the Council and disclosing further material relating to the Plaintiff to the Council."

21 In answer to a request for particulars of the "unfair tactics" pleaded on the part of Dr Monks, the response (paragraph 92) was to refer back to the provisions of s 41 and s 43 of the Act.

22 By her Defence filed 2 November 2007, Dr Monks pleaded, in answer to the entire Amended Statement of Claim, that the information contained in her 20 May 2004 letter was not confidential information in that it was in the public domain or, alternatively, that there was no confidence in an iniquity (para 49). It was alleged that the letter disclosed the existence, or real likelihood of the existence, of an iniquity - that being a crime in contravention of s 127 of the *Environmental Planning and Assessment Act* (NSW) 1979 (to which I will refer as the EPA Act) and that the crime was of a character of public importance. In the alternative, it was pleaded that the confidentiality clause was unenforceable (by reason of the public interest in disclosure of the crime, which it was alleged outweighed the public interest in the preservation of private and confidential information) (para 52).

23 Paragraph 53 pleaded further that any loss or damage was caused "by the unlawful activities of the Plaintiffs themselves in undertaking mechanical clearing of weeds and native vegetation on the Property without the approval of Gosford City Council" (para 53(a)). (Although it was contended by Mr Jacobs, in his submissions made at the outset of the hearing, that the question of clearing by mechanical means was a new allegation, the reference to mechanical clearing in this paragraph of the 2007 Defence in my view makes it clear that this was not a new allegation. Further, I note that paragraph 36(a) of that Defence had also made reference to the mechanical clearing of weeds and native vegetation on the land.)

24 A Reply was filed on 31 January 2008 on behalf Mr and Mrs Brand, largely restating and repeating (or otherwise noting) various matters and the plaintiffs' reliance on specified paragraphs of their Amended Statement of Claim. (On its face, this appears to be no more than a verified draft pleading, since it still contains an annotation (in paragraph 50(b) presumably intended for the draftsperson, to check a particular finding.)

25 The matter was listed for hearing before me commencing in May 2009. However, on 9 April 2009, an application to vacate the hearing date was made due to the need for Mr Brand to undergo spinal surgery. That adjournment application was not opposed but Ms Chan, Counsel appearing for the defendant, not unreasonably pressed for the earliest possible future hearing dates (and Senior Counsel then appearing for the Brands accepted that this was appropriate). The matter was re-listed for hearing commencing on 28 September 2009 for four days. Although the amended hearing dates were listed well in advance, it appears there was some misunderstanding within the plaintiffs' camp as to the availability of Senior Counsel then briefed for the hearing, who confirmed only some time later that he was not available to appear.

26 It was not until 27 August 2009 that the matter was again listed before me, this time on the plaintiffs' application to vacate the first day of the re-scheduled hearing dates in order to accommodate Mr Jacobs, who had then only recently been briefed in the matter. Mr Jacobs gave his assurance that if I acceded to this adjournment application the matter could be heard within three days (notwithstanding that it had been listed for four) and that he would assist the court in ensuring that this would be achieved. To that end, he proposed the preparation of a written opening address in lieu of an oral opening and was prepared to accede to limits on the duration of cross-examination, as necessary. (I note this simply to explain the course I subsequently took during the hearing of asking Mr Jacobs to provide an indicative timetable for the completion of cross-examination, when it became apparent that the three and a half days by then listed for the hearing would be woefully inadequate to complete the hearing.)

27 It was on 27 August 2009 that an application further to amend the Amended Statement of Claim was first foreshadowed by Mr Jacobs, that amendment being described generally as attaching "new labels" to causes of action the facts of which had already been pleaded. The plaintiffs' amendment application was heard by me on 3 September 2009. I acceded to the application, but only in part, for the reasons set out in my judgment on 4 September 2009. Broadly speaking, what I did not allow were the proposed new pleas of conspiracy and malicious prosecution, but I did allow the pleading to be amended to include a claim for breach of fiduciary duty and, relevantly, to confine the *Fair Trading Act* claim to the proposed newly pleaded claim under s 43 of the *Fair Trading Act*.

28 As amended pursuant to the leave so granted, the claims which had to date been made in the pleading for breach of s 42 and s 43 of that Act (including the "unfair tactics" claim to which I adverted earlier in these reasons) were deleted and the *Fair Trading Act* claim was repleaded and confined to a claim for breach of s 43 of the Act on the basis of an allegation of unconscionable conduct "as set out in" paragraphs 3.1 and 3.2 of the Further Amended Statement of Claim, that conduct being pleaded as disclosures in breach of the confidentiality obligation alleging criminal conduct on the part of Mr Brand and urging the Council to prosecute Mr Brand. No longer pleaded as part of the unconscionable conduct claim (though referred to directly or indirectly in various particulars to other parts of the pleading, such as the particulars to paragraph 3.2(k) of the material allegedly provided by Mr Clarke to the Council), was the allegation that Dr Monks had deliberately failed to notify, or refrained from notifying, Mr and Mrs Brand of the fact that she had made the disclosures in question to the Council. This becomes significant when I come to consider in due course whether the *Fair Trading Act* claim has been established.

29 I note that although the Further Amended Statement of Claim continued to specify the relief claimed (on page 2) as compensatory damages, paragraph 1 of the orders sought in the amended pleading was an order for exemplary damages. Ultimately, the claim for exemplary damages was not pressed before me (having regard to what was said in *Harris v Digital Pulse Pty Limited* (2003) 56 NSWLR 298), although Mr Jacobs expressly reserved the plaintiffs' position in that regard, should the matter "go further".

30 Dr Monks filed her Defence to the Further Amended Statement of Claim on 16 September 2009. A reply (labelled an "Amended Reply") to that Defence was filed in court on behalf of Mr and Mrs Brand on 29 September 2009.

31 At the commencement of the hearing on 29 September 2009, Mr Faulkner sought confirmation from Mr Jacobs that the plaintiffs' case was solely that which had been pleaded. That confirmation was readily given by Mr Jacobs. It was on the basis of that confirmation that Mr Faulkner then indicated that Dr Monks would not press paragraphs 8.4(a)(i) and (ii), 12(b)(A) and (B), and 17 (i) and (ii), respectively, of her Defence. An Amended Defence was filed in court on 30 September 2009 reflecting the abandonment of those particular allegations. (The paragraphs which were not pressed related to an alleged contravention of a Gosford City Council Tree Preservation Order, whether of itself or having regard to s 76A(1) of the EPA Act.)

32 Thus, at the hearing, the only crime alleged to have been committed by Mr Brand was that pleaded in 8.4(a)(iii) of the Amended Defence, namely "the mechanical clearing of weeds and native vegetation" on the land without consent, in alleged contravention of clause 5(2) of Interim Development Order (IDO) No 122, and thus in breach of s 76A(1) of the EPA Act, rendering Mr Brand liable for prosecution pursuant to ss 125 to 127 of the EPA Act. It was said that under IDO No 122 any "development" (including the clearing and underscrubbing, cutting down, removing, injuring and wilfully destroying trees and rainforest vegetation) *for the*

*purposes of agriculture or of subdivision* required Council's consent, which it was alleged Mr and Mrs Brand did not have.

33 In Reply, Mr and Mrs Brand say that should the mechanical clearing of weeds and native vegetation constitute a "development" of the land (which they do not admit) and should this require a development consent, then there was at all material times a development consent in effect which did not preclude the use of mechanical means to undertake the removal of weeds and/or native vegetation. In this regard they rely on one or more of the following: a consent said to have been given by the Council in or about 1980 (a copy of which was not in evidence) for the purpose of the undertaking of agricultural activity on the land; a development consent (No 22846/99) given by the Council on 29 November 1999 for the existing residential dwelling on the land; and a "consent" of the Council to underscrubbing given in around 1985 by a Council officer (Mr Cecil Rose), who was identified (during the course of evidence from Mr Gary Chestnut of the Council) as a then Council tree preservation officer.

34 In his submissions in reply to the defendants closing submissions, for example, Mr Jacobs identified the content of the information that was of a confidential nature in an overarching fashion as being "inter alia" what Dr Monks and what Mr Brand discussed and what it was that she told him, including statements about his intentions and beliefs as well as his other various activities "that were put into a particular context" by virtue of Dr Monks' engagement.

35 After the close of the hearing (and in light of an exchange with Mr Jacobs during closing oral submissions – T 449 - in which I had asked him to specify with some precision what confidential information it was that the plaintiffs contended had been conveyed by Dr Monks in breach of any obligation(s) owed by her), Mr Faulkner sought (and Mr Jacobs agreed to provide) further detailed particulars as to each communication of information alleged to have been made in breach of confidence (stating the specific words relied on; whether it was only the fact of communication of those words which was relied upon and, if more than the fact of communication was relied upon, what facts were implied in that communication but did not occur; alternatively for each communication each fact which the plaintiffs said did occur and was communicated as information), as well as notification of any particulars which were no longer pressed. Mr Jacobs, in turn, sought (and Mr Faulkner agreed to provide) further written particulars to be provided by the defendant in relation to the offence or crime alleged to have been committed by Mr Brand.

36 I considered orders of this kind to be appropriate, having regard to the need for clarity on the face of the pleading as to the Brands' claim; it not being clear to me, from the pleading alone, precisely what was the information (or confidential information) said to have been disclosed by Dr Monks in respect of which complaint was ultimately made by Mr and Mrs Brand and there having been what I can only describe as some fluidity in this regard during the course of submissions.

37 It did not seem to me to be appropriate (having already, albeit perhaps without success, sought to clarify this during the course of closing submissions) for that to be left in any way uncertain.

38 After the conclusion of the hearing, I received, in accordance with the above directions, Mr Jacobs' Reply, dated 22 October 2009, to the request for particulars; Mr Faulkner's Response, dated 26 October 2009, to those particulars; Mr Faulkner's Summary, dated 22 October 2009, of the Offence by Mr Brand; and Mr Jacobs' Response thereto dated 27 October 2009. I have dealt with the case as pleaded, having regard to those final particulars.

**Factual Background**

39 Mr and Mrs Brand purchased the land in about 1979/80. It had for some years before then been used for farming. According to Mr Brand (and another witness Mr John Eardley Blair, who was not required for cross-examination on his affidavit of 29 September 2009), the land had earlier been used for logging. Mr Brand said that a number of large stumps had been left on the site and identified one such stump by reference to photographs tendered in evidence, as having been on the site from the time he purchased the land.

40 Mr Brand says that shortly after acquiring the land he sought and obtained permission for use of the land for agricultural purposes. I accept that Mr Brand has sought, but been unable to obtain from the Council, a copy of any document recording this consent. Assuming, as the Council appears to have accepted, there was an early consent to agricultural use, it would seem that the explanation for the lack of documentation is either that it was a formal consent which was not properly recorded or archived when the Council later changed its records to an electronic data storage system (which Mr Chestnut considered unlikely, in light of the statutory obligation of the Council to maintain records, but could not wholly discount due to the possibility of human error) or else it was not of a formal kind (perhaps akin to the later approval from Mr Rose on which Mr Brand relies in relation to the underscrubbing but which, again according to Mr Chestnut, is not a formal Council approval as such).

41 In 1999 Mr Brand obtained a formal development consent for the construction of a dwelling on the land. That consent required compliance with a specified Bushland Management Plan, which, in its terms, strongly recommended against mechanical clearing of the land.

42 For some time prior to the events in question part of the property had been used, without the Brands' consent, as a dumping ground for rubbish – including old car bodies, tyres and an old housing frame – and for trail bike riding. (Reference to such usage was included in the development application later prepared by Dr Monks, she relying at least to some extent on Mr Brand's information in that regard. Nothing seems to turn on this.)

43 In July 2003, Mr Brand contacted Dr Monks about a proposed subdivision application for the land. Dr Monks had from 1994-8 been the Project Manager (Development and Building) for the Council (a fact of which Mr Brand says he was unaware at the relevant time, though his ignorance in this regard again seems to me to be of no relevance to the issues in dispute before me).

44 By letter dated 7 July 2003, Dr Monks wrote to Mr Brand to confirm her understanding of his requirements and to confirm her "trading terms". These terms were accepted by Mr and Mrs Brand, by signing on 21 July 2003 and returning to Dr Monks a copy of the letter. Those terms

included, relevantly, the following:

> **Confidentiality and Legal Relationship**
>
> Highlight Consulting agrees to keep confidential any information relating to your affairs that is obtained by us in providing the commissioned services, unless this clause prohibits us from rendering those services.
>
> We confirm that the services provided to you are by way of providing advice and in no way are they to be construed as Highlight Consulting taking part in the management of your affairs.
>
> Highlight Consulting retains copyright over its intellectual property.

45 The word "us", where used in this clause, must mean Dr Monks trading as Highlight Consulting, since no other party was named a party to, or expressly agreed by, this contract to provide the "commissioned services". Throughout the letter there are instances where "we" and "us" appear to relate only to Dr Monks. So, for example, the reference to "us" where this appears in the context of working on an hourly rate or to "our" hourly charge clearly relates only to Dr Monks' work. There is separate provision for the cost of any contractors engaged by Highlight Consulting, (which work, it was said, "may or may not be the subject of a fixed price offer or an estimate prior to commencement of work, for your consideration and agreement").

46 What were the "commissioned services"? According to the 7 July 2003 letter, they were "to prepare and submit to Council a Development Application for subdivision, without any attempt at rezoning". Dr Monks' estimate of fees referred to the "preparation and facilitation [of the Development Application] until

determined by Council". The letter contemplated that responses might be required from organisations such as Council or the State government, though did not indicate to what such responses might relate. (Dr Monks' "job planning" draft of 14 January 2004 (Exhibit E p 16) contemplated that a 'pre-DA' meeting with Council and sub committees might be required ("as needed") prior to submission of the development application.) The scope of the commissioned services is relevant when considering the fiduciary duty claim and I will consider this further in that context later in these reasons.

47 It was clear that Dr Monks was, under the contract, reserving the right to provide part or all of the services through contractors engaged directly by her. The evidence from both Mr Brand and Mr Clarke was that Dr Monks wished all communications between her contractors and her clients to be made through her (although as it transpired it seems that there were occasions on which Mr Clarke communicated directly with Mr Brand, such as the letter he sent to Mr Brand in early May 2004).

48 The 7 July 2003 letter stated, in relation to contractors:

> **Contractors to Highlight Consulting**
>
> From time to time, contractors may be engaged by Highlight Consulting to undertake work to fulfil the requirements that you have of Highlight Consulting. The choice of such contractors may or may not be discussed with you. In any case, Highlight Consulting is responsible for their work and for all communications with them in relation to the work. In order to protect any negotiations and to ensure quality and efficiency in overall administration of your work, all contact between and any such contractors shall be through Highlight Consulting.

(The clause went on to contain the provisions as to the costing for such work which I have earlier noted.)

49 Dr Monks commenced work on the matter on 24 July 2003, when she met with Mr Brand's surveyor, Mr Cahill, on the land. In due course, Dr Monks retained Mr Robert Payne to carry out a flora/fauna study (which included what was referred to as an eight part impact test, relating to the identification of threatened species) and Mr Michael Clarke to prepare a bushland management plan. Also required were geotechnical, flooding, access, stormwater, services, and bushfire protection studies or plans, as evident from the description of work for which Dr Monks invoiced Mr Brand in December 2003 by way of a 50% deposit (Exhibit E p 14).

50 In late 2003, Mr Brand and Mr Clarke met on the land and there was a discussion between them as to how to remove weeds. It does not seem to be disputed that certain areas of the land were populated by weeds (particularly lantana and blackberry), nor that those weeds were regarded as noxious weeds. Mr Clarke's own bush management plan, prepared for the purposes of the proposed development application, makes this clear. Where there was an issue was as to how those weeds should be removed in accordance with what were perceived to be proper bush management processes (and whether their removal by way of mechanical clearing was unlawful without express consent from the Council thereto). Mr Clarke advised Mr Brand at this time that along the edges and within the "good bush" there had to be hand weeding and that this would take a long time; that blackberries had to be scraped and painted but that continuing to slash open areas away from the creeks was "fine". On 26 September 2003, Dr Monks provided Mr Brand with a handwritten quote for removal of lantana including slashing of "setbacks".

51 On 19 November 2003, a Council officer, Mr Jonathan Scorgie, visited the property and spoke with Mr Brand. He did so, according to Mr Chestnut, following the receipt of a complaint at that time about Mr Brand's clearing of the land (T 205.39). There was on that occasion a discussion about previous clearance of the land. Mr Scorgie says that he advised Mr Brand that he was required to cease all machine work and to erect adequate sediment controls (paragraph 4 of Mr Scorgie's affidavit of 23 May 2008). Mr Scorgie suggested that a hazard reduction certificate from the Rural Fire Service might be an alternative to Mr Brand having to obtain Council permission to remove vegetation on the land (thus perhaps impliedly advising of the need to have consent of some kind to do so).

52 At that stage, therefore, Mr Brand seems to have turned his mind to the possibility that there might be a need for approval to be obtained for the removal of vegetation on the land. Further, the Council was aware by that stage (if it had not been before), through Mr Scorgie, that there had been some clearance on the land at a previous time. Also, according to Mr Chestnut, he understood that Mr Scorgie had explained to Mr Brand the requirements of clearing/underscrubbing at that time – T206 (something relevant when considering the significance sought to be attributed to Dr Monks' May communication to the Council to the effect that there had been an explanation given to Mr Brand by her and her consultants of the relevant requirements).

53 Mr Scorgie gave evidence as to his observations of the site from his inspection in November 2003. He said that the soil had been churned up and made unconsolidated (or loose), which is what caused him to require the erection of erosion sediment controls (T 240). From this churning, he was of the view that machinery had been used to underscrub the land (hence his advice that all machine work should stop).

54 Mr Scorgie confirmed that when he inspected the land in November 2003 the only recently cleared area was along one street frontage of the property and that Mr Brand told him he had taken away debris, rubbish, lantana and weeds. (Mr Scorgie said that when he next visited the land in May 2004 he observed that vegetation along the paddock boundaries, which had been intact in November, had been removed – T 236.43).

55 Dr Monks' 14 January 2004 "job-planning" document noted that "Slashing for bushfire protection and blackberry cane removal (the latter with follow-up poison spraying by the owner) will be commissioned by the owner within the next month". Mr Jacobs relies on this document (and the September 2003 quotation) as evidencing that there was no objection in principle by Dr Monks to the slashing of weeds on the land. (In that regard, the evidence of Dr Monks and Mr Clarke seems to have been consistent in that some slashing of weeds was regarded as acceptable and in accordance with proper bush regeneration techniques, but not the extensive slashing carried out in mid 2004 along the gully in particular.)

56 On 14 January 2004, Dr Monks sent an email to Mr Payne (Exhibit E p 18) referring to a conversation with Mr Brand, from which it seems that Mr Brand had advised Dr Monks (or at least she had concluded from what he had said to her) that "he's finished pulling out the car bodies, clearing, filling etc" and that he had applied to the local rural fire service for permission to slash for bushfire purposes. It is clear from that email that Dr Monks was aware there were at the time horses on the site, as she says, "the horses will go within a fortnight". (Reliance is placed by the Brands on the presence of horses, and earlier cows, on the land as evidence of its agricultural use and that there was apparently no objection thereto by the Council.)

57 Relevantly, Dr Monks says in that email that she had pointed out to Mr Brand "we needed a stable 'bottom line' for our reports". This suggests that what Dr Monks had in mind in January 2004 was the need for the extent of the clearing on the land to be known, or finite, so that there would be a 'bottom line' to permit appropriate reports for the development application to be finalised. There was again a reference to blackberry clearing and a comment that all blackberries should have been 'slashed' within about a month. Mr Jacobs drew my attention to this email as suggesting that Dr Monks was looking out for her own interests (as I understand it, in relation to any fees which might be recoverable for the hand weeding). Mr Jacobs emphasised that there was evidence that at a meeting in early 2004 on the site a discussion had taken place in relation to the hand slashing of weeds, during which Mr Clarke had suggested that Mr Brand "invest" in hand weeding and that Dr Monks had said she could provide qualified and experienced people to do that. However, there is no evidence that Dr Monks would personally have received any fees for hand weeding, even if she had been asked to arrange for qualified people to carry out that task, nor was there any allegation in the pleading that Dr Monks had acted improperly or in breach of any obligation owed to Mr and Mrs Brand in recommending hand weeding as the appropriate means of weed control in the relevant area.

58 Dr Monks stated in that letter that she wanted "to establish some long-term boundaries for hand work versus slashing, to protect the edges of areas that need long-term protection." While it is possible that this was simply in the interests of bush protection and not necessary for the development application per se, on the face of the email it seems to me that what Dr Monks was considering was what might be necessary in this regard in order to improve the prospects for approval of the development application; and that it was in this context that she was seeking Mr Payne's recommendation as to whether any bush regeneration work should be commenced or whether it should be left to be dealt with as part of an approved bush management plan. If so, then I would read this statement as evidencing the proper consideration by Dr Monks as to how to improve for the benefit of her clients the prospects of approval of the development application (which would surely be seen as within Mr

Brand's interests) by putting in place in advance measures which might satisfy any environmental concerns on the part of the Council.

59 On 8 April 2004, Dr Monks noted in an email to Mr Payne that Mr Brand was "turning it into parkland around each building envelope". This seems to be a reference to the clearing of the areas around the designated lots under the plans for the proposed subdivision. Dr Monks continued:

> He knows he should have permission but says a lot of the trees are "just regrowth". He is clearing the lantana and will treat the blackberry (he spoke with Michael about how). I've asked him to remove the sand up top ("due to pennywort coming through") and to avoid scarfing the turp [turpentine trees] up there.

60 Up to this point, therefore, Dr Monks was clearly aware that some clearing had been undertaken. It seems she believed that Mr Brand had been given (and had understood) the advice given to him from Mr Clarke (correct or otherwise) on how to clear the blackberry.

61 According to her affidavit, it was at about this time that Dr Monks became concerned at the continuing extent and level of vegetation clearing. Dr Monks says that she raised her concerns with Mr Brand and that his response was that he was "getting it ready to put on the market" and he asked her to give him "another couple of weeks". (In cross-examination, Mr Brand could not recall, but did not deny, saying this to Dr Monks.) The suggestion that Mr Brand may have been contemplating marketing the land for sale *prior* to obtaining an approval for subdivision does not accord with the pleaded claim for damages, which refers to the loss of the ability to subdivide *and* sell the land in 2004-2006. That said, it is conceivable that Mr Brand may have been intending to market the land for sale at the same time as he was pursuing the development application. Ultimately, the point at which Mr Brand had intended (but for the ensuing Council prosecution) to sell the land, a matter seemingly highly relevant to the quantification of damage referable to the alleged loss of the chance to subdivide and sell the land, was not made wholly clear.

62 By 21 April 2004, it seems that Mr Clarke had also raised with Dr Monks a concern about potential habitat removal as a result of the ongoing clearing, since by email of that date (Exhibit E p 29), Dr Monks wrote to Mr Clarke:

> I agree re potential habitat removal – but we'd have to decide how to stop it. He doesn't respond very well – we'd have to be formal about it, I suspect.

63 What Dr Monks seems, by the comment extracted above, to have recognised was the likely negative reaction from Mr Brand to any suggestion that he stop clearing (or mechanical clearing).

64 (There was also a concern raised by Mr Clarke in about March/April 2004 as to whether there were any trees of potential Aboriginal significance on the land. This does not seem relevant to the issues in the present proceedings. However, Mr Jacobs' chronology, rhetorically, asks "One wonders, … exactly what interests that the defendant is protecting or advancing" in her discussion in relation to the identification of any trees requiring protection. Reading the 21 April 2004 email as a whole, it seems to me that what Dr Monks was mainly expressing concern about was the likely delay which would be encountered to the development application process if there were to be significant archaeological/historical research into what were described as "uncertain" trees, hence her stated desire to avoid the use (in the reports) of terms such as "needs further investigation". I would have thought that endeavouring to frame the necessary reports in a way which might avoid or minimise the likelihood of significant ongoing delays of this kind could only have been in Mr Brand's interests (if I may in this instance be permitted to answer Mr Jacobs' rhetorical question).)

65 This email seems to mark the point of time at or about which Dr Monks, in consultation with Mr Clarke and Mr Payne, formed the view that it would be necessary to take steps to ensure that Mr Brand was "formally" made aware of the issues they had with clearing on land.

66 Mr Clarke emailed Dr Monks on 22 April 2004 (Exhibit E p 31) as to his observations while doing field work at Copacabana on 20 April. He observed "the amount of understorey being cleared" and requested that she "please stop any future clearing for the moment". Mr Clarke seems to have assumed that Dr Monks had some ability to direct what was or was not done by Mr Brand in relation to the clearing. He noted that survey information was still being gathered to formulate planning of the site, and that it was possible for some areas still to be cleared, but emphasised that it was necessary for this to be planned first.

67 Dr Monks' response to those comments was to note that Mr Brand had "agreed not to go back into the vegetation … just the edges", but that if they wanted to develop written guidelines it would be necessary to think it through "and preferably have a legislative basis for the bad news we'll be delivering to him". Again, it seems to me that this communication is expressing Dr Monks' opinion that Mr Brand would not welcome interference in his activities on the land and that, for Mr Brand to be persuaded to cease clearing (at least the extent or level of the clearing which was causing Mr Clarke concern), then he would have to be pointed to a statutory prohibition on clearing. In other words, Dr Monks seems to have believed that a general appeal to Mr Brand on the basis of bush regeneration policy or the desirability of preserving native habitat would be unlikely to meet with a favourable response (a not unwarranted conclusion in my opinion, having regard to some of Mr Brand's responses in cross-examination).

68 I say this without intending any particular criticism of Mr Brand. If he was, or had been, entitled to remove the vegetation in the manner in which he was doing, then the fact that his neighbours or Dr Monks' consultants (or indeed any of the local bushcare organisations) may not have approved of his actions is surely not to the point.

69 However, nor do I see Dr Monks' response at this stage as meriting criticism – she had been made aware that understorey clearing was going on in areas which were characterised by her ecological consultant as being bushland; her expert consultant had suggested that native plants had been bulldozed and, in circumstances where survey information was still being gathered for the purposes of the development application (and where this presumably would be rendered of less or no utility if clearing continued), had requested that further clearing be stopped. Dr Monks' response, in effect, seemed simply to be to express the (perhaps not unreasonable) opinion that Mr Brand would be likely to accede to a request to stop clearing only if there were to be a legislative imperative for him to do so.

70 It was Mr Payne (not Dr Monks, as was suggested at one stage during submissions) who raised a concern as to the implications that the ("unauthorised") clearing might have for him from a professional point of view (namely as to any adverse consequence for the maintenance of his s 132 licence, a licence which is apparently necessary to conduct eight part threatened species testing) if, as he believed, approval was necessary for the understorey clearing which Mr Brand was doing (Exhibit E p 32). There is nothing to suggest that Dr Monks had any similar concerns as to any negative impact on her professional qualifications as a result of the clearing activities being undertaken by Mr Brand at that stage, although she seems later to have become concerned as to how to protect her own personal reputation when faced with complaints from community residents.

71 Dr Monks' concern, at least as at April 2004, therefore seems to have been related to whether what Mr Brand was doing would have an impact on the cost of preparation or outcome of the development application (and perhaps, as I would infer from her 30 April communication with Mr Clarke and Mr Payne, as to how to address the concerns being expressed to her by the consultants on whom she was relying to have the necessary reports finalised for the development application, in order to enable the project to be completed).

72 There seems to have been no particular urgency perceived by Dr Monks about stopping the clearing at this stage. Dr Monks apparently spoke with Mr Brand on about 30 April 2004 but it seems that all she did then was to raise a query in relation to the clearing. By email on 30 April 2004 to Mr Clarke (copied to Mr Payne), Dr Monks reported on a telephone conversation with Mr Brand, and said: "He has approval to clear 6m from his fencelines (I think from RFS at Copa). He's aware of the difference between tree removal (which he denies) and underscrubbing (which he considers he can do without approval because he's 'only pulling out lantana')." Dr Monks reported to her contractors that she had reinforced that the Bushland Management Plan (which was then being proposed in connection with the subdivision, ie which was only a prospective plan) would say

"How" to do long term bushland management and that Mr Brand had acknowledged he was taking a short term approach (Exhibit E p 35).

73 By letter dated 4 May 2004, (Exhibit E p 40) Dr Monks wrote to Mr Brand in relation to "Reported Removal of Vegetation". This letter referred to a telephone discussion the previous week and stated that:

> It appears that vegetation is being removed from the property that we are preparing for community title subdivision to an extent that may be contrary to various legislative or Council standards".

The concern there expressed thus appears to relate to the extent of the removal of vegetation, not the means of removal as such, although conceivably the extent of the clearing (about which Dr Monks was concerned) may only have been made possible by reason of the use of mechanical means to clear the land.

74 In her letter, Dr Monks set out what she said were three Council policies which applied - the Tree Management Policy (in relation to tree removal); the Interim Development Order No 122 (in relation to clearing/underscrubbing); and a Rainforest Policy and Creek Setback Policy. She referred to the bushland management plan that was in the process of preparation and said that it would not only specify weeds to be removed on a long term programme of works, but also specify how they were to be removed. The letter stated:

> We have discussed the amount work that you wish to undertake to prepare the property for market. You have said that you will pull out lantana from old fence lines and from the edge of denser vegetation. You have also pulled out and are disposing of farm and urban rubbish, including old fencing material, iron and wire, and old vehicle bodies. What may now be occurring is that vegetation additional to lantana is being affected by all these activities and therefore deleterious effects are occurring to both the value of the bushland and the habitat of the fauna that live there permanently or when migrating.

75 The letter went on to explain that some areas (including lantana and weed thickets) provided habitat for legally protected fauna of a kind which the ecological and bushland management work had foreshadowed as existing on the property. The letter described issues which might arise in relation to the proposed planting of seedlings on the site. A meeting was arranged to 'talk through' the practical aspects of the legal requirements there might be, having regard to what Dr Monks understood to be an existing Rural Fire Service approval and any other rights Mr Brand might have. (In fact, it seems that the approval which Dr Monks understood was in place was not as extensive as Mr Brand had indicated, a matter I consider later in these reasons.)

76 It would seem to me that this letter affords an example of what was contemplated by Dr Monks' 21 April email as to being "formal" with Mr Brand about how to stop potential habitat removal and setting out the legislative basis for the stoppage of clearing. However, this letter did not in its terms contain any request or demand that Mr Brand stop clearing, nor did it intimate that if he were to continue to carry on the clearing activities Dr Monks might feel compelled to take any particular action (whether that be disclosure to the Council or cessation of her work on the project, those being the two alternatives which Dr Monks seems to have had in mind at least by late May 2004). I suspect that the more likely characterisation to be placed on this communication was that it may have been a means of protecting Dr Monks' position against any later criticism that she had permitted unlawful clearing to continue, rather than any direction (which she was not in a position to give) for Mr Brand to stop clearing.

77 The letter was copied to Mr Clarke. He then wrote the following day to Mr Brand and Dr Monks advising in some detail as to the legislation, policies and regulatory issues applying to clearing and/or underscrubbing of vegetation. He concluded with the (rather optimistic, in my view) hope that this clarified any "discrepancies" regarding clearing and/or underscrubbing of the Land (optimistic, since the letter was quite technical in its description and did not seem clearly to identify the "discrepancies" therein sought to be clarified) and went on to state that "until the assessment and planning stages are completed, there should be no further

clearing or underscrubbing of vegetation growing underneath native trees" (Exhibit E p 43). Relevantly, the need for the cessation of the underscrubbing/clearing activities was attributed to the difficulty they were causing in relation to the assessment and planning required for the proposed development application – a matter which presumably would have affected the timing and cost of the finalisation of the application. Thus it was being communicated to Mr Brand that the clearing was not in the best interests of timely (and cost effective) completion of the development application.

78 Dr Monks (in somewhat of an exaggeration to my mind) described this correspondence as reading "the riot act" to Mr Brand (Exhibit E p 51). Further, insofar as she expressed the opinion to Mr Payne that "He seemed to agree to stop working with equipment" (Exhibit E p 51), it seems that by then Dr Monks was focussing not simply on the amount of clearing but also on the means being used for clearing.

79 One significance of the clearing activities which were being undertaken during early 2004 was that Mr Payne apparently felt he was unable to complete his report (see email dated 18 May 2004 from Dr Monks to Mr Clarke (Exhibit E p 53). Similarly, Mr Clarke apparently needed to re-map the condition of bushland and bushland boundaries for submission of the bushland management plan (Exhibit E p 55).

80 Set in this context, the step subsequently taken by Dr Monks on 20 May 2004 in contacting and then preparing a letter to the Council (the letter not actually being sent through to the Council until it was faxed on 24 May 2004) might seem surprising.

81 Dr Monks had already been told of concerns by her consultants in relation to the extent of clearing (and that it had been or may have been carried out by mechanical means) in April 2004; she had raised this with Mr Brand and had written to him expressing her concerns or at least advising him in relation to the need to cease clearing activities to permit a 'bottom line' position to be reached for the preparation of reports (it seems to me to be immaterial in this regard whether this was to protect her own position and that of her consultants from any later suggestion that this work was being undertaken at her direction or with her approval, as might be inferred from some of the correspondence between Dr Monks and her consultants; or whether this was simply intended to encourage Mr Brand to stop further clearing so as to permit the plans necessary to accompany his development application to be finalised so that the development application could be submitted, which was on its face a reason why it may have been in Mr Brand's interests for clearing to stop; or whether this was in the interests of what Dr Monks and her consultants saw as proper bushcare management in relation to the stoppage of further clearing); and, as at 6 May 2004, Dr Monks understood (correctly or otherwise) that Mr Brand had agreed to stop working with equipment.

82 Yet, on 20 May 2004, Dr Monks prepared a letter to the Council informing it of various matters relating to clearing activities being undertaken by Mr Brand on the land and formally requesting that the Council "take action to prevent further clearing/underscrubbing contrary to the law".

83 Why then the perceived need on Dr Monks' part on 20 May 2004 to draw the clearing activities to Council's attention (and what was the public interest, if any, in so doing)? The precipitating factor seems to be that during mid-May 2004 Dr Monks became aware that (contrary to what she appears to have understood to be the situation in early May) the land clearing activities by Mr Brand were continuing.

84 Dr Monks says that she received telephone calls in about April or May from various persons, including two residents, Mr Rowan Hayes and Mr Bruce Spence, each of whom had an interest in bush management, in relation to land clearing. Each of those gentlemen gave evidence. Though they deny having had conversations to the effect deposed to by Dr Monks at that time (and, in particular, deny that they asked her to report the matter), both say that around 18/20 May 2004 they had observed clearing and/or burning activities on Mr Brand's land and both were concerned that the activities should not continue.

85 Mr Hayes, who made the first complaint to Council of the clearing around this time, gave evidence that on 18 May 2004 he had observed a bulldozer (though he accepted in cross-examination that it could have been a bobcat or excavator) on the slope and the flat of Mr Brand's land, pushing vegetation, timber and shrubbery into piles.

86 Mr Spence visited the property on about 19 May 2004 (a date he fixed by reference to his recollection that it was a day or two before the fires on the Brands' property) (T 181). He saw that vegetation was being cleared and observed particular species of native vegetation in the piles which had been cleared. He said that there was then some discussion with others in the local community (at the local shop) as to the clearing which was occurring (indicating that it was to that extent a matter of common knowledge).

87 Although Mr Spence and Mr Hayes were both cross-examined as to what they had seen and their recollection of events at that time, it is not suggested that underscrubbing or clearing of the land did not take place in April/May 2004 (and, indeed, Mr Jacobs ultimately said that his client frankly conceded that there had been extensive clearing of the land for some time).

88 Dr Monks says that on 20 May 2004 she received a telephone call saying that the clearing had continued. She does not remember from whom she received the call. However, it seems clear that someone must have passed this information on to her as there is no evidence that Dr Monks was on the property at that particular time and hence would not have been able to observe anything first hand to give her the impression that land clearing was continuing (and it cannot have been a coincidence that the time at which she chose to write to the Council saying that land clearing was continuing was precisely the time at which various of the local residents had observed the clearing and were very concerned about it).

89 It seems to me likely that it was the resumption of the clearing (perhaps coupled with a recognition of the growing community concern as to the clearing) which prompted Dr Monks to take more formal steps to stop the clearing beyond those which she had already taken in raising her concerns with Mr Brand privately. Mr Jacobs' thesis seems to be that what had motivated Dr Monks was a desire to protect her "public image" as a consultant. Certainly, insofar as Dr Monks appears to have borne the brunt of at least some of the community disapproval of Mr Brand's activities at about this time (for example, I suspect that Dr Monks was told in no uncertain terms of Mr Spence's views when he contacted her about the matter - T 377), there could well have been a desire on Dr Monks' part to distance herself from what was occurring on the land. However, if so, Dr Monks seems to have resisted any temptation to do so publicly, since she refused to confirm to Mr Spence, for example, what her role was in relation to, or otherwise comment on, the matter and she made her complaint to the Council in a private fashion.

90 Therefore, although some sensitivity on Dr Monks' part to criticism in this regard seems to be discernible from the (arguably unnecessary) notation on her 16 July 2004 invoice (Exhibit E p 110) that "the time recorded excludes response to people complaining about clearing, querying my role", I do not consider that the evidence establishes that Dr Monks reported Mr Brand's clearing activities to the Council in order to protect her public image rather than, as she said, to request it to intervene to stop further clearing.

91 Dr Monks says that once she received the telephone call that clearing was continuing she immediately rang the Council to request intervention and left a message. In her affidavit, Dr Monks says she spoke with a secretary (Rebecca O'Shea) and said words to the effect "I have a problem with a client who is removing vegetation contrary to my advice and in advance of a DA for subdivision."

92 Dr Monks then prepared her 20 May letter to the Council. Dr Monks says she only forwarded the one letter to the Council. As there is no evidence of more than one letter having been faxed to the Council, the Council's internal emails appear to record only the one such communication (Exhibit E p 62/63), and the facsimile imprint on the top of the copy letter in evidence before me indicates that transmission was on 24 May 2004 (though the number to which it was transmitted has not been identified), I accept (and find as a fact) that the letter dated 20 May 2004 was not actually forwarded to the Council until it was sent by facsimile on 24 May 2004. (Hence Mr Jacobs' submission in his opening address that "Obviously, the letter was the triggering factor" for the Council's investigation which he says commenced on *21* May 2004, cannot be sustained.)

93 Dr Monks' 20 May 2004 letter makes a number of disclosures on which the Brands relied in their pleadings:

· that Highlight Consulting was preparing a development application for community title subdivision on the land owned by Mr Brand;

· that on 5 May, following earlier discussions [not said with whom] verbal reports from others [not identified] and on-site inspection concerning vegetation removal [thereby implying that removal had already occurred by then], Dr Monks and a consulting team member had met Mr Brand; had provided him with correspondence listing bushland protection requirements; had showed him correct bush regeneration techniques and examples of where lantana removal had damaged or removed indigenous vegetation (thereby implying such damage had occurred); and had emphasised Mr Brand's legal responsibilities;

· that Mr Brand had been removing rubbish and evidence of former farming activity, including fences and old vehicle bodies;

· that during the site inspection Mr Brand had repeatedly assured them that he had stopped removing vegetation *other* than under a local bushfire brigade approval to clear six metres each side of his fences;

· that prior to the site visit a meeting had been arranged with a representative to continue the educational process "with the owner and his operators" but this had been postponed by the representative and not rescheduled;

· that Dr Monks understood others had reported the matter to Council as a compliance matter during the past few weeks;

· that Dr Monks understood that no action had been taken by Council in relation to the site;

· that Dr Monks had received a telephone call that morning "saying that clearing has continued and is likely to continue;" and

· that Dr Monks formally requested Council to "take action to prevent further clearing/underscrubbing contrary to the law".

94 On the same day that the 20 May 2004 letter was prepared (though some 4 days before the letter was faxed to the Council), Dr Monks prepared a meeting agenda for the team of consultants on the projects in which she noted:

> … clearing has continued despite written advice as to legal responsibility – Council is involved

and that the "Draft Bushland Management Plan may have to be largely re-written, pending Council's decision about clearing and therefore possible requirement to back-plant" (Exhibit E p 58/59). Dr Monks' reference to the involvement of Council at that stage can only be a reference to her telephone conversation with Ms O'Shea, since there is no suggestion that Dr Monks was aware of any "involvement" of Council at that stage other than as the recipient of her initial telephone advice. Even if the 20 May letter had been received by the Council at that point (which I find was not the case), there is no suggestion that any Council officer had taken any steps to liaise with Dr Monks or her consultants at that stage. Indeed, the evidence is that on 24 May 2004 Dr Monks made two telephone calls to chase up the Council on this issue, something which would not have been necessary had she had the discussions as to the substance of her concerns with a Council officer on 20 May 2004.

95 Mr Spence (who I was encouraged by Mr Jacobs to accept as a witness of truth) says that he had a telephone conversation with Mr Brand on about 24 May 2004 in which Mr Brand agreed that what he was burning on the land were the vegetation piles which Mr Spence had observed some day or two before (and in which Mr Spence says he had noted that there was some native vegetation). Mr Spence not only gave evidence of his observations of clearing on the land and discussions with other local residents as to the clearing but he also gave evidence that, in this discussion with Mr Brand, Mr Brand told him "I know what I am doing Bruce

and I am within my rights to do it." This is consistent with Mr Brand's assertion to various other people (which he also maintained in the witness box) that he was entitled to carry out the clearing in question.

96 In addition, two members of the rural fire service, Mr Owen and Mr Poole, visited the land on 24 May 2004 (and informed Mr Brand that he did not have permission to burn off, as he was doing, on the property). They observed on that occasion piles of vegetation which were burning on the property and later recorded their observation (incorrect as Mr Brand says it was) that on leaving they observed him to proceed to set another pile of vegetation alight (notwithstanding their advice to him). Later on 24 May 2004, at around 6pm, the local fire brigade responded (as it had done on at least three prior occasions in 2004) to calls in relation to fires on the land (this clearly being after the 20 May letter had been faxed through to the Council).

97 Relevantly, in terms of the breach of confidence claims, it seems that at or around the time Dr Monks faxed her 20 May letter to the Council (which seems from the fax transmission header to have been at 10.12 am on 24 May) a number of other complaints were made to the Council:

· Mr Hayes gave evidence that on 19 May 2004 he reported to Ms Leah Wheatley of the Council his observations (on 18 May 2004 and again on 19 May 2004) of trees having been felled and scraped into piles and the clearing activities in the catchment area. He says that Ms Wheatley told him that she would get Mr Scorgie (the officer who had inspected the land in November 2003) to investigate.

> [It therefore seems that it was Mr Hayes' complaint, not that of Dr Monks, which triggered the first step by the Council towards investigation of Mr Brand's activities. Mr Chestnut confirmed in the witness box that the Council investigation had commenced prior to the receipt of any information from Dr Monks and said that her information was just "added to" the enquiry then being undertaken – T 212.]

· An email was sent from a Ms Barbara Wills on 24 May 2004 at 10.21 am, apparently forwarding photos of clearing around Merchants Creek and reporting "there are literally acres of bare earth with top soil waiting to be washed into Merchants Creek" (Exhibit E p 64).

> [This was forwarded by Mr Chestnut to Ms Wheatley at 11.59 am with a request that she investigate and take appropriate action. Ms Wheatley's response to Mr Chestnut indicates that, as Ms Wheatley told Mr Hayes would be the case, Mr Scorgie was already aware of the issue, since Ms Wheatley says he was "looking for you [Mr Chestnut] earlier to discuss with you" (Exhibit E p 64). This seems to have led to the letter which is Exhibit E p 43. As it seems that it was only later on that day (1.20 pm) that Mr Chestnut forwarded to Mr Scorgie by email the facsimile transmission from Dr Monks, asking him to consider that information in his assessment of the alleged unauthorised land clearing (Exhibit E p 67), the impetus for Mr Scorgie's investigation (something that he was already looking at before he received Dr Monk's communication) must therefore have been a complaint other (and earlier) than that of Dr Monks – namely that of Mr Hayes.]

· A communication was sent on 25 May 2004 from Mr Clarke to Mr Scorgie at the Council, forwarding an extract of Mr Clarke's letter of 5 May to Mr Brand (which Mr Clarke said had been handed to Mr Brand) and asserting that Mr Brand had "tried to burn the cleared vegetation cleared last night, 24 May 2004". This communication rather emotively described the site as "a crime-scene under investigation", giving a clear indication of the strength of Mr Clarke's feelings on that point.

· As Exhibit 3 reveals, there was then a succession of correspondence and communications to the Council from May 2004 through to June 2004, showing that a number of local residents and members of local bushcare groups (such as the Cockrone Lagoon Management Committee) had also observed and reported to the Council their concerns about the clearing activities.

98 I do not consider that there is any doubt that the Council's investigation in May 2004 commenced following the initial complaint on 19 May 2004 by Mr Hayes and that, from the Council's point of view, the matter was already underway when Mr Chestnut forwarded to Mr Scorgie the email containing Dr Monks'

facsimile transmission with the comment was made that "the alleged unauthorised land clearing on the subject properties is significant".

99 Dr Monks accepts that she followed up her 24 May 2004 facsimile transmission to the Council with two telephone calls to the Council on that day. It was suggested that this indicated she was anxious about the matter. Although Dr Monks denied this, the chase-up calls do in my view indicate that Dr Monks wanted prompt confirmation from the Council as to what it intended to do in relation to the matter which she had reported to it. The reason for this seems to be apparent from the content of her reported telephone conversation on 25 May 2004 with Mr Chestnut.

100 It is not disputed that Dr Monks had a telephone conversation with Mr Chestnut on 25 May 2004 and that in that conversation she sought clarification as to the action the Council might take. Mr Chestnut recorded that "… she needs to determine her future client relationship" and that she had requested a formal response to her fax "so she may determine what course of action she intends to take with Mr Brand" (Exhibit E p 77). In the witness box, Mr Chestnut's recollection of the conversation was that Dr Monks had indicated her concern as to how the works might impact on her professional standing within the local area as there was an allegation that the works were being undertaken on the site (T 219). Mr Chestnut said that he would have responded that the Council was undertaking its own independent investigation to make a determination (apparently on the basis of what was the normal Council procedure in that regard) (T 215). Mr Chestnut did not regard the request for a formal response to be unusual (T 215).

101 Dr Monks' evidence was consistent with this. She accepted that she told Mr Chestnut that she wanted a written response "so I can decide what to do with this project" (T 325). She seems to have had in mind that she might have to make a decision whether to continue with the project (not that the project itself might not be able to be continued). Dr Monks' evidence was that at this point her relationship with the client was 'turbulent' (T 327.28).

102 According to Dr Monks' email to Mr Clarke (Exhibit E p 79), Mr Chestnut had acknowledged in his telephone conversation with her that Council had had verbal advice from "the public" but had told her that her letter appeared to be the first written advice, and Dr Monks' email added that "An 'investigation' may follow. We MAY be asked for affadavits [sic] if Council decides to prosecute, according to Gary" (Exhibit E p 79).

103 Mr Chestnut denied that he had given any indication to Dr Monks as to the receipt of any other complaint from the public – T 219. In that regard, he said that it was not his practice to inform complainants what, if any, other complaints had been received. This seems to me to be a curious aspect of the matter, since it is difficult to see what reason Dr Monks would have had to make up something of this kind if it had not been indicated to her. It may be that while Mr Chestnut's standard practice, which he explained at T 221, was not to disclose any information of this kind to members of the public, he was more open with a previous Council officer or else that Dr Monks simply inferred that this was the position having regard to whatever comment he had in fact made. However, the evidence does not permit me to make any finding in that regard and nothing turns on it.

104 Mr Chestnut emphasised that a number of people had been contacting the Council at the time (T 216) and that all concerns would have been treated with equal weight (T 216.24). He made it very clear, and I accept his evidence, that the Council had been alerted as at May 2004 to concerns about a potential breach of the EPA Act but that it was not until the Council officers and conducted their own investigation and made their own determination that any view would be formed by Council as to whether a breach had occurred – T 223 – and hence that it was not until then that any decision could be made as to what steps should be taken in relation to the matter.

105 I accept that the position of the Council officer (Mr Chestnut, with input from Ms Wheatley and/or Mr Scorgie) responsible for the making of a recommendation as to prosecution was as stated by Mr Chestnut at T223.21, namely that:

> With all due respect to Dr Monks – and I appreciate that she is a doctor in her field – but I would rely more upon the information of the officers that I supervise to form that view [that there had prima facie been an offence committed]

a position which in my view deprives of any real force the submission by Mr Jacobs that there was a particular significance to be attached to the fact that the disclosure in question came from Dr Monks (notwithstanding that this was a matter to which brief reference was made in the conclusion section of the report which ultimately recommended that the Council prosecute Mr Brand – Exhibit M).

106 Mr Chestnut was asked whether he would deny having said to Dr Monks "If a prosecution follows we are going to ask you for an affidavit or we may ask you for an affidavit". His response was "May ask for an affidavit, yes" (T 222.25), an answer which I understood to mean that he would not deny that he *may* have said something as to the possibility of asking for an affidavit if there were to be a prosecution or if the matter were to be taken further but not that he actually recalled doing so.

107 If he had raised the matter, this would in my view be consistent with Mr Chestnut simply alerting a potential witness that she might in due course be asked to give evidence, which seems to me to be the flavour of Dr Monks' comment to Mr Clarke (as indicated perhaps by the capitalisation of the word "MAY") in her email, rather than there being any decision at that point (as there logically could not have been in the absence of a concluded investigation) as to what steps might be taken or what evidence might be required. Nor do I see this as reflecting any agreement between Mr Chestnut and Dr Monks that such evidence would be provided. (I am informed that Dr Monks, in fact, did not give any evidence in the Land and Environment Court proceedings other than under the compulsion of a subpoena.) I consider that the tentative expression of this comment in Dr Monks' email does not permit the more sinister interpretation sought to be placed on this conversation by Mr Jacobs.

108 Meanwhile, Dr Monks continued to progress the finalisation of the development application. On 26 May 2004, she emailed Mr Payne with June dates for various tasks and stated:

> **However**, you and Michael are in a difficult position, *as George has cleared much of the site*. Council has been informed in writing (by me): others have phoned in but no site inspection has taken place. *I advised Michael to finish off his draft as if it was Feb 04 and add an appendix saying clearing has occurred since the report's preparation. This leaves the door open for Council to force restitution, if they prosecute and the owner would pay for a new BMP. It also leaves Michael able to finish his report within budget.* What do you think about how to handle yours? (Exhibit E p 80). (My emphasis)

109 Much weight was placed by Mr Jacobs (as evidencing a breach of fiduciary duty) on Dr Monks' email of 26 May 2004 to Mr Clarke in which she directs Mr Clarke to prepare his report "as if it was Feb 04" with the comment "this leaves the door open for council to force restitution, if they prosecute and the owner would pay for a new BMP".

110 It is submitted by Mr Jacobs that this was urging Mr Clarke to falsify (by backdating) his reports. Without the comment which followed it, I would have read the direction to finalise the report as at February 2004 in the present context as no more than a direction to Mr Clarke to report as to his observations as at February 2004 and then to update, by way of appendix, the situation as at May 2004. This would seem to have been a sensible way to avoid the cost of redoing the report to take into account the changes to the topography which had occurred in the interim. There was already correspondence to Mr Brand pointing to the need to have a settled state of affairs for the reports to be finalised and correspondence between Dr Monks and her consultants in which the latter had complained of the changing scenarios.

111 Looked at from a more suspicious or cynical frame of mind and with the flavour given by the phrase "this leaves the door open … to force restitution", it could be open to the conclusion that a report so drafted (ie as at February but with update) was intended to facilitate the establishment of evidence from which an

assessment of the extent of clearing could be ascertained in due course if there were to be a prosecution. It would more readily have provided a basis from which Council could assess and compare the extent of the clearing by reference to the areas as they were at February 2004 (and presumably, provide an ascertainable baseline from which it could "force" restitution if it sought to do so) than if the report simply spoke to the condition of the land as at May 2004. However, if so it was a somewhat heavy handed approach, since the consultants' data as to the condition of the land in February could presumably have been obtained by the Council on subpoena had it been relevant evidence in due course and the Council was already aware, through Mr Scorgie, that there had been some earlier clearing.

112 Framing the report in this way was, as explained by Dr Monks, a means of minimising costs in the face of a (literally) constantly changing landscape. Dr Monks' assessment of the situation, made with some emphasis in the witness box, was that "the data was disappearing underneath us" (T 328.42). Does the comment as to the door being open to Council to force restitution compel a different conclusion? I think not. Not only was Dr Monks' explanation of this quite logical to my mind, but there is also the possibility (when considering the correspondence which had passed between them) that this was no more than an attempt by Dr Monks to placate Mr Clarke (who seems to have been more emotional about the matter throughout) or to persuade him that there was a legitimate basis for him to finish his report notwithstanding the concerns he had expressed at what was occurring and about which he clearly had strong feelings (Mr Clarke being the author of the "crime scene under investigation" label).

113 Even so, if that is the explanation for the comment that it may open the door to restitution of the land, it leaves unexplained the observation that "the owner would pay for a new BMP" (Bushland Management Plan). Mr Jacobs submitted (para 4.3.7 closing submissions) that "Clearly having raised the mischief, [Dr Monks] sought to profit from it" by way of fees from any new bush management plan required by the Council. However, there could have been no certainty that in such a situation Mr Brand would have chosen (or needed) to retain Dr Monks' further services and, more relevantly, there was no evidence that Dr Monks thought this was a likely result (nor did she accept that this would have been the case when the matter was put to her). Accepting that, at that stage, Dr Monks was still apparently unsure as to whether her relationship with Mr Brand would continue, I think it is more likely that the reference to the potential cost of a new bush management plan was in the nature of a comment to Mr Clarke that Mr Brand might have to bear the consequences of his own actions, rather than any indication that Dr Monks was seeking to profit from that potential situation.

114 Ultimately, I do not believe it is necessary to come to a view on this issue, since whatever Dr Monks' motivation in directing Mr Clarke to prepare his report "as if it was Feb 04", it cannot in my view be said that a report is falsified if the body of the report makes it clear that as at a later date it was disclosing the situation as it had been in February 2004 and then updated that position by reference to later observations. The appendix makes it clear that what Mr Clarke was <u>not</u> doing was signing in May (ie backdating) a report purporting to be a report signed in February 2004. Dr Monks' explanation of this in the witness box was both logical and persuasive and there is nothing to suggest that this was a step intended to duplicate or increase the costs of the process at the expense of Mr Brand or to benefit Dr Monks.

115 On 27 May 2004, there was a Council inspection of the land. On 28 May 2004, Ms Wheatley, issued a direction on behalf of the Council to Mr Brand to take clean-up action by way of installation and maintenance of erosion and sedimentation measures regarding the clearing in Merchants' Gully and installation of sediment fences and other measures regarding the clearing in the southwest corner of the land.

116 By letter dated 9 June 2004, a formal warning was issued by the Council in relation to a contravention of the Protection of the Environment Operations (Control of Burning) Regulation 2000 in respect of unauthorised burning on the property. According to that letter, it was the view of the Council's Environmental Health Officer that open burning was not permitted by the Bushfire Hazard Reduction Certificate which had been issued by the Rural Fire Service.

117 On 23 June 2004, a recommendation was made by Mr Chestnut that Council initiate proceedings in the Land and Environment Court against the property owner for both a restoration order and penalty for alleged unauthorised clearing and underscrubbing. That recommendation was prepared by Ms Wheatley and settled by Mr Chestnut, to whom she reported (Exhibit E p 93).

118 News of the recommendation that Mr Brand be prosecuted was published in the Daily Telegraph on 5 July 2004 and in a local paper around that time (Exhibit E pp 98/99).

119 Mr Brand wrote directly to the Mayor of the Council on 6 July 2004, in effect putting his side of the story in relation to the matter in response to the press reports and asking that his letter be put before Council on its consideration of the matter. In that letter (Exhibit J), Mr Brand asserted that "I have only cleared up land that was previously pasture or gardens" (a statement that seems inconsistent with the evidence given by Mr Scorgie as to the land having been cleared along the edge of the paddocks – see also T 115). Mr Jacobs submits that when Mr Brand wrote to the Mayor on 6 July 2004 he was recording something that was correct (unless Mr Brand was either bereft of his senses or had a fanciful imagination). However, on the evidence before me it appears that Mr Brand has from time to time made a number of assertions as to his rights (which have not always proved correct) such as having permission to burn off or the scope of the permission contained in a hazard reduction certificate. In those circumstances, it is difficult for me to place much weight on assertions by Mr Brand in his letter to the Mayor as to the extent of previous clearing (or, for that matter, as to the content of previous consents as to which there is no independent evidence).

120 The Council met in confidence on 6 July 2004 and resolved to commence proceedings (as had been recommended), subject to the addition of a resolution that Council seek legal advice as to the avenues available to require the owner to undertake additional planting of native species and to request the landowner either to purchase or embellish conservation land in the coastal precinct to a monetary value.

121 As noted above, Mr Jacobs places considerable weight on Exhibit M (the report made to the Council by Ms Wheatley and Mr Scorgie, which was settled by Mr Chestnut and which was before the Council for consideration when it resolved to adopt the recommendation for Mr Brand's prosecution) insofar as it revealed that reliance was placed by the Council officers in making their recommendation on the fact that Mr Brand had been notified previously by Dr Monks of the need for consent for his clearing activities.

122 In the report, the author noted that:

> The staff [of Highlight Consulting] preparing the environmental reports for this development application spoke to Mr Brand and provided him with information about what he can and cannot do without development consent. The staff member of the business [Dr Monks] then reported the issue to Council when they were aware that clearing has continued."

123 Exhibit M included the statement that "Large areas of significant vegetation have been lost *due to clearing without consent*, on land zoned for conservation, *by an individual who appears to have known* that he *required development consent before the works could be carried out*" (My emphasis)

124 The report concluded:

> Due to the seriousness of the matter *and the apparent knowledge of the offender* that the actions he undertook required consent, *acknowledging both his private consultant and a council officer both informed him that consent was required* prior to the majority of the works being undertaken, it is recommended that Council commence proceeding … seeking a restoration order and penalty" (My emphasis)

125 It is relevant to note, however, that the report had not only drawn attention to the fact that Mr Brand's private consultant had provided him with advice about the requirement for consent from the Council to the clearing activities, but also that the Council officer (Mr Scorgie) there referred to had also done so. It might perhaps be inferred that Council would take a dim view of someone disregarding its own officers' advice, whatever the position of that person's own consultant. Certainly, that would be the inference I would draw from the evidence given by Mr Chestnut.

126 Ms Wheatley and Mr Chestnut spoke with Mr Clarke on 15 July 2004, who was described in the Exhibit M report as a witness "who would prefer to remain anonymous at this stage". It was noted that he had been a sub-consultant for Dr Monks, preparing a bushland management plan for the property. The report said:

> Michael is happy to help as long as he can remain anonymous for as long as possible to finish his work with Highlight Consulting (Helen Monks) (Exhibit E p 108),

a comment which might well suggest that Mr Clarke had been concerned at that stage not to prejudice his involvement in the project or his ability to recover his fees in relation to the project, or at least that he was not free to comment openly on the matters under investigation.

127 On 20 December 2004, Dr Monks provided the completed development application, with the respective consultants' reports, to Mr Brand. (In total, Dr Monks invoiced the sum of $97,683.92 for the period from September 2003 to October 2004, of which $61,350 was paid with $36,333.92 outstanding, as per Exhibit E p 101. There may be some dispute as to the precise amount paid but it is not disputed that a substantial portion of the fees invoiced to Mr Brand were paid by him.)

128 Mr Brand says he informed Dr Monks at that stage that he did not wish to proceed with the development application due to the "business" with Council. I note that Mr Brand had been aware of the Council's investigation since at least June 2004 and its decision to prosecute from July 2004 but had apparently not considered this a reason to stop work on the project at that stage. This might be consistent with Mr Brand being of the view that the documentation then being prepared could ultimately be of assistance to him after the "business" with the Council was resolved or simply that, having expended a certain amount on the project, it was worth taking it to the point of completion of the documents in question. There is no evidence as to Mr Brand's reasons for not stopping the project earlier. The significance of this goes to the question of Mr Brand's claimed losses insofar as it suggests that the earliest he may have sold the land (irrespective of the Council prosecution) was the end of 2004/early 2005.

129 There is a dispute as to whether Mr Brand asked Dr Monks at around that time if she was responsible for notifying the Council. Mr Brand says he did so in the context of a discussion as to her fees. Dr Monks denies that he put any such question to her. From my observation of the careful and precise manner in which Dr Monks gave her evidence, and accepting that she seems to have earlier given thought to whether her principles would allow her to continue the project in light of Mr Brand's conduct, my impression is that had Dr Monks been asked a direct question of that kind by Mr Brand she would have answered it (however unpalatable she believed that answer may have been to Mr Brand and whatever the effect that might have had on their working relationship). (Dr Monks says she had repeatedly told Mr Brand that he was committing a serious offence and she seems to have believed that she had given him warning that she could not act for him if he continued, although the evidence does not indicate that she drew his attention to this in such precise terms so he may well not have appreciated this to be the case (T 313.40).) However, it may be that she did not perceive that she was being asked a direct question at that point, in which case there may well be a simple explanation for this seeming conflict in their respective accounts of this conversation.

130 By letter dated 16 February 2005, Ms Kennedy, writing as solicitor for Mr and Mrs Brand, provided the following information to the Council, apparently in the context of certain orders that had been, or were proposed to be, made (though the letter of 25 January 2005 in response to which this letter was sent was not in evidence). Ms Kennedy noted her instructions that:

· her clients had purchased the property in July 1980 and had immediately lodged a development application with Council for use of the property for agriculture and to run stock. It was asserted that this was approved with a request that the property be fenced and that this request was complied with;

· a later development application was lodged for construction of a dam which was approved;

· in approximately 1985, her clients had made application to underscrub a large section of the farm in order to remove lantana and scrub from major trees to allow pasture to grow (and that approval was granted by

Mr Cecil Rose). [I interpose to note that if the first development application had expressly covered the underscrubbing of pasture this subsequent application would presumably not have been necessary]; and

· the fencing was to restrict cattle from damaging banks and the underscrubbing had beautified the property.

131 Ms Kennedy referred in that letter to the ecological report prepared by Mr Payne of October 2004 (and provided to Mr Brand in the context of the completed development application) as indicating the presence of a number of native flora and fauna on the property.

132 Mr Jacobs relies on this letter (to which he says there was no dissent from the Council) as evidence supporting his clients' assertion as to the existence of the approvals referred to therein. At best the letter seems to me to represent Ms Kennedy's understanding of her clients' instructions, which themselves may or may not have been correct. I do not think that much weight can be placed on the apparent lack of dissent from the Council in respect of the assertions contained in the letter, particularly when I do not know to what this particular letter was responding in the first place and what response might have been called for from the Council.

133 A summons was issued against Mr Brand in May 2005. The offence particularised therein was that, without obtaining development consent, and contrary to the provision of the Council's Tree Preservation Order made pursuant to clause 35 of the Gosford Interim Development Order No 122 Mr Brand did "*carry on development, to wit the cutting down, removal, injury and wilful destruction of trees and rainforest vegetation, which development under clause 35 of the PSO could not be carried out without consent, in breach of s 76A of the Act.*" Nothing in the particulars of the offence referred to the fact of underscrubbing per se.

134 As noted earlier, the Land and Environment Court proceedings were ultimately withdrawn by consent after Talbot J had refused an application for leave to amend the prosecutor's summons, in effect to remove references in the charge to the Tree Preservation Order and to introduce (by way of amended particulars of the development allegedly carried out without consent) the allegation that Mr Brand had committed an offence by carrying out "*development for the purposes of agriculture or of subdivision contrary to the provisions of cl 5(2) and zone 7(a) Conservation and Scenic Protection (Conservation) of the IDO [Interim Development Order]*" (that being, broadly, the offence contended for in these proceedings albeit without reference to the manner of the clearing activities said to constitute the development).

135 In his reasons for judgment on the unsuccessful amendment application, Talbot J (*Gosford City Council v Brand* [2006] NSWLEC 422) observed that the charge could not be sustained in its then present form. While his Honour did not suggest that the proposed amended charge was one which would not have been maintainable as a matter of law (which would, had this been the case, have provided very a simple basis on which to refuse the application without further ado), I do not think that much can be drawn from this, as I do not know whether an argument of the kind made in these proceedings had been raised on the amendment application. His Honour held that the defects in the summons were not within his power to amend and refused leave to amend.

136 A settlement was subsequently reached between Mr Brand and the Council, formally documented in a Deed (Exhibit E p 171) pursuant to which, without admission, Mr Brand agreed to take certain steps in relation to the preparation of and compliance with a plan of management in substitution for the existing bush management plans (and that this would involve rehabilitation of specified areas of the land and identification of those areas requiring active rehabilitation and regeneration and those requiring passive rehabilitation and regeneration).

137 In summary, therefore, the allegation is that Mr Brand removed weeds and native vegetation from his property by mechanical means without consent from the Council (which it is said was required under the relevant environmental planning instrument). Whether by way of bulldozer or, as I consider the evidence established as being more likely, by use of a mechanical slasher, it is clear that Mr Brand did (himself, or through his "operators") remove weeds and native vegetation from his property. Mr Brand certainly concedes both underscrubbing and clearing; and that from time to time this was extensive. He agreed that it was true to say (as one resident had complained to the Council – Exhibit 1, p34) that he had "totally scalped the creek bed,

removing all vegetation save a couple of eucalyptus" (T87.44) and that he had carried out the burning off. The two areas that he says he cleared were on either side of Merchants Creek and one area on the southwestern corner of the property where there was a fence line – T115.) To the extent that Mr Brand denies that he removed native bushland, that seems to be based on his own perception of what was constituted by that term (he does not regard weeds, for example, as being covered by that term). He complains as to the disclosures made in that regard by Dr Monks to the Council; she says that even if these were confidential matters it was in the public interest for them to be disclosed.

**Issues**

***(1) Breach of contract claims***

138 Before turning to the particular legal issues arising in respect of the allegation that there has been a breach of the contractual obligation of confidence, it is necessary to identify with particularity what information it is which Mr and Mrs Brand allege was disclosed in breach of that obligation.

139 This became a somewhat vexed issue after the hearing was concluded, as alluded to earlier, when concerns were expressed by Mr Faulkner as to the need for procedural fairness arising from the lack of particularity with which the disclosures had been identified in the pleading (Mr Faulkner submitting that it should not be left for me to determine what information it was which was the subject of the plaintiffs' complaint but, rather, should be identified by the plaintiffs). Mr Jacobs then objected to the communication by Mr Faulkner seeking for the matter to be relisted to address those concerns. In fairness, I considered that where considerable latitude had been shown to the plaintiffs in relation to their late amendments to the pleadings and yet there remained any room for doubt as to the ambit of the plaintiffs' claim, it was not inappropriate for Mr Faulkner formally to seek clarification of the issue, and that this be done by re-listing the matter for directions in that regard shortly after the close of the hearing. (The fact that the matter was relisted at short notice for that purpose was to meet my own convenience.)

140 The disclosures said to have been made in breach of confidence were pleaded at the outset at a broad level of generality and there seemed then to follow a process of refinement throughout the various submissions as to what in fact was said wrongfully to have been disclosed. It came as some surprise to me, for example, (as I think from the reaction of the defendants' Counsel at the bar table it did also to the defence) to be told on 13 October 2009, day six of the hearing, during submissions – T 448/449 - that the plaintiffs did not complain as to the disclosure of the fact that clearing was taking place on the land (the principal piece of information, one might think, conveyed to the Council by Dr Monks in her letter of 20 May 2004); the clearing activities being a matter which Mr Jacobs accepted was 'obvious'. Hence, I accepted that there was a need for further particulars to be provided after the hearing had concluded in order to clarify that issue.

141 As noted earlier, the disclosures which it was alleged were made in breach of the contractual obligation of confidence (and which formed the basis of the allegation in paragraph 7.2 of breach of fiduciary duties and the allegation in paragraph 11.2 of unconscionable conduct) are pleaded broadly in paragraphs 3.1 and 3.2 of the Further Amended Statement of Claim.

*Paragraphs 3.1/3.2*

142 Paragraph 3.1 pleads that in or about April/May 2004 Dr Monks "together with persons employed and instructed by her accordingly, *made disclosures*" to the Council, its corporate directors, executives and officers (my emphasis).

143 Paragraph 3.2 pleads the "*said* disclosures" as *including* conduct by which Dr Monks (together with persons employed and instructed by her) sent documents created or received in the course of the Consultancy Agreement, and sent emails and made telephone calls, to the Council, its corporate directors and executive staff *alleging criminal conduct on the part of Mr Brand and urging his prosecution* (my emphasis).

144 The particulars to paragraph 3.2 of the Further Amended Statement of Claim then broadly identify:

(a) Dr Monks' 20 May 2004 letter (in which, among other things, the fact of the clearing activities was notified to the Council – although that fact is not ultimately said to have been confidential information disclosed in breach of the contract);

(b) Mr Clarke's 25 May 2004 email (in which he supplied information as to the clearing activities and described the area as being a crime scene under investigation);

(c) Dr Monks' discussions with Council officers "at about this time" (which, on the evidence would seem to be limited to her telephone call to Ms O'Shea on 20 May and her follow-up calls to Council on 24 and 25 May – in the last of which she advised of the clearing, expressed concerns as to the project and requested follow-up and a written response);

(i) Dr Monks' discussions with Ms Wheatley in about June 2004 [as to which there was no evidence; indeed it was not put to Dr Monks that she had had any contact with the Council other than as outlined in paragraphs 46 – 49 of her 24 September 2009 affidavit];

(j) a letter in June 2004 from Dr Monks to Ms Wheatley [not identified so far as I am aware]; and

(k) Mr Clarke's actions on 15 July 2004 and subsequently in providing material to the Council.

145 The last of those particulars (paragraph 3.2(k)) was itself seemingly further particularised by reference to "inferences" to be drawn from a bundle of communications between Mr Clarke and Dr Monks, Dr Monks and Mr Brand, and Dr Monks and Mr Payne, as well as Council documents; the supply of photographs, reports and other material by Mr Clarke and Mr Payne to the Council.

146 In answer to a request of 8 August 2007 for further particulars of the disclosures, the plaintiffs' solicitors had simply referred to the emails and other documents to be provided in the discovery (ultimately contained in Exhibit E).

147 When pressed, in oral closing submissions, to identify precisely what it was said had been communicated in breach of an obligation of confidence, Mr Jacobs referred to the statements in para 8.5.5 (a) – (d) of his written submissions and thus identified the alleged confidential information as being that:

(a) Dr Monks and Mr Brand had met on site and she had given him information;

(b) Dr Monks and Mr Brand had had conversations;

(c) Mr Brand had repeatedly assured Dr Monks that he had stopped removing vegetation other than under a local bushfire brigade approval to clear 6m each side of his fences (said to imply an admission that he had previously removed other vegetation, something of which the Council was already aware from its own enquiries through Mr Scorgie);

(d) Dr Monks had received a call that morning (ie 20 May) that clearing had continued and was likely to continue (to which, in oral submissions, Mr Jacobs added the fact that Dr Monks had told him not to do so).

148 In para 4.3.3 of his written closing submissions, Mr Jacobs had also referred to the statement made in the 20 May 2004 letter that Dr Monks had previously given advice to Mr Brand and admonished Mr Brand in relation to the underscrubbing. (By reference to the conclusion recorded in Exhibit M, it is said that this was a matter of significance to the Council in respect of its ultimate decision to prosecute Mr Brand – a factor, according to Mr Jacobs, "that inflamed the Council to the action it ultimately and ineffectively pursued".)

149 In response to this it was submitted by Mr Faulkner that it was not until the plaintiffs' written submissions (para 8.5.5) that it had been articulated that the "information" which was the subject of the complained breach of confidence was comprised of the "activities" conducted on the property (something on which he then relied for an argument that the plaintiffs could not, in effect, deny the activities and at the same time rely thereon for their present claim). Mr Jacobs' response was that there had been a fundamental misconception by the defence of the breach of confidence claim. Seemingly, therefore, at this point any suggestion that at least the current "activities" on the property were confidential "information" had been disavowed by Mr Brand's Senior Counsel.

150 In Mr Jacobs' submissions in reply to those of the defendant in oral submissions, there was, yet again, an itemisation of the confidential information which it was contended that Dr Monks had wrongfully disclosed to the Council. This time, it was said to comprise the following information which it was submitted had all been obtained by Dr Monks or which "arose by reason of" Dr Monks being Mr Brand's consultant:

(a) that Dr Monks met Mr Brand on 5 May 2004, prior to him commencing the clearing, and provided him with correspondence that listed a number of statutory and policy requirements concerning bushland protection;

(b) that on walking over the site Dr Monks and Mr Clarke showed Mr Brand "the correct bush regeneration techniques" particularly for lantana removal both manual and mechanical;

(c) [that Dr Monks and Mr Clarke] showed examples where lantana removal had also damaged or removed indigenous vegetation;

(d) [that Dr Monks and Mr Clarke] advised Mr Brand of his legal responsibilities;

(e) that Mr Brand had repeatedly assured them that he had stopped removing vegetation (other than what could be approved under a local Rural Bush Fire Service) approval to clear from each side of the fences);

(f) that Dr Monks understood that others had reported the matter to the Council;

(g) that Dr Monks had received a call "this morning" (ie 20 May to say that Mr Brand had continued and was likely to continue his activities (Mr Jacobs' emphasis);

[In this regard, I observe that it was not clarified with Dr Monks whether it was the unidentified telephone caller who had expressed the view that Mr Brand's activities were likely to continue or whether that reference in the letter was to a view which she personally held. Mr Jacobs seems to have read this as a reference to what Mr Brand had told Dr Monks that he was intending to do, but this cannot be the case if the likelihood of continuation was something discussed in the telephone conversation in question and the only conversation between Dr Monks and Mr Brand as to the clearing seems to have led to the opposite conclusion, namely he was assuring her that the clearing would not continue.]

(h) "the other matters recorded in Exhibit M, viz that [Mr Brand] had been warned by her as his consultant prior to him undertaking the work of clearing, that that work was illegal."

151 It is fair to say that there is a substantial overlap in the way that the confidential information was identified up to this point but, nevertheless, it was not consistently identified in the various submissions nor was it on all fours with the claim as pleaded.

152 The identification of the disclosures of which complaint is made was of particular relevance to the submission put by Mr Faulkner to the effect that it is not open to Mr and Mrs Brand, on the facts as they assert them to be, to maintain a claim that there has been any breach of confidence. This submission was put on the basis that if the "activities" on the property (ie the clearing of weeds and native vegetation as disclosed in Dr Monks' 20 May 2004 letter) are equated to "information", then on the plaintiffs' own case those activities were

limited to the removal of weeds by underscrubbing and slashing (by mechanical means) in part of one corner of a paddock only (and that no trees greater than 3 metres were intentionally taken down – at most there perhaps being one turpentine tree knocked down by mistake); and there was no prosecution in regard to that limited conduct.

153 Hence, as I understand it, it was submitted for Dr Monks that, in order to maintain the claim for damages which the plaintiffs assert, it would be necessary for them to admit the extensive clearing activities which were the subject of the prosecution (something they had not done and which it was not now open to them on the pleadings to assert).

154 For Dr Monks to have conveyed confidential information in the form of her observations of what was occurring on the site, it was submitted by Mr Faulkner, there must be consistency between what it is said was the information and what was observed on the site. Thus, if Dr Monks had mistakenly thought that something was occurring and conveyed that false or incorrect information to the Council, logically she could not have been conveying any "information" obtained by her from Mr Brand or as a result of her work on the site – in those circumstances, what she could have been conveying could have been no more than misinformation or a mistaken belief. It was said by Mr Faulkner that for Mr Brand to rely on what Dr Monks conveyed to Council as a breach of confidence it was necessary for him to concede (which he did not) that the extent of the activities being carried on by him was such as to give rise to a serious offence.

155 Mr Jacobs suggested that this was splitting hairs. I disagree. It surely can be tested in this way – if an employee who was subject to a confidentiality obligation disclosed his or her employer's secret formula but got it wrong in a material way, there surely could be no breach of confidentiality by reason on the disclosure of what was never the employer's formula in the first place. There might, as Mr Faulkner conceded, be other causes of action against Dr Monks (or in my example the employee) in those circumstances but there cannot seriously be suggested that any confidential information, as such, has been disclosed. In any event, this issue seems to fall away if, as Mr Jacobs confirmed, the plaintiffs did not actually complain about the disclosure of the fact of the clearing activities themselves.

156 I have treated the particulars provided on 22 October 2009 as now defining the ambit of what it was said was disclosed in breach of confidence. I have set the disclosures out in full later in these reasons when considering whether, having regard to the proper construction of the contract, there has been any breach of the contractual obligation of confidentiality. By way of introduction at this stage, those disclosures can I think broadly be summarised as being:

· disclosures made by Dr Monks as to what advice had been given to Mr Brand in relation to the clearing of weeds/vegetation; what his response thereto had been; that it was her view that Mr Brand was engaging in unlawful clearing activities, which the Council had the power to restrain; and that she had concerns (or a decision to make) about continuing to act for Mr Brand in relation to his proposed development application; and

· disclosures made by Mr Clarke as to the advice given in his May 2004 letter to Mr Brand; photographs and other material provided by Mr Clarke to the Council; and that he would be prepared to assist the Council in providing evidence in relation to the prosecution of Mr Brand.

*(i) Scope of the contractual obligation of confidence*

157 The first issue raised by the defence in relation to the breach of confidence claim is whether what was disclosed falls within the clause. It is not denied that Dr Monks had assumed an obligation to keep certain information confidential. Under the contract, this information was identified as "any information relating to your affairs that is obtained by us in providing the commissioned services, unless this claim prohibits us from rendering those services".

158 First, therefore, the information must relate to Mr and Mrs Brand's affairs. Secondly, it must have been "obtained" by "us" (Dr Monks) in "providing the commissioned services" (those being the services, said to be by way of the provision of advice, for the preparation and submission of the development application). If there is information which satisfies those two broad requirements, then it will fall within the contractual

obligation to keep it confidential *unless* to do so would prohibit Dr Monks from rendering the services in question.

159 Insofar as the plaintiffs rely upon what are said to be false implied statements (or implied statements as to matters which the plaintiffs contend are false), it seems to me that there is a logical difficulty in treating a misapprehension as to the facts as being "information" in any real sense. Mr Jacobs contends that the attempt to differentiate, in the context of the breach of confidence claim, between statements which were true and statements which are false is "an attempt to split hairs" and without substance. I disagree. It might be tested in this way: if, for the sake of argument, Dr Monks had mistakenly thought there were bodies (rather than discarded car parts) buried under the native vegetation which had been removed (a misapprehension which had resulted from her inspection of the property for the purposes of providing the commissioned services) could this misapprehension be said to be "information" which she was contractually obliged not to disclose? I cannot accept that this could be the case. Such a misapprehension does not readily fall within the concept of "information", which to my mind connotes a known fact.

160 I turn then to the particular issues raised as to the construction of the confidentiality obligation:

*(a) Does the obligation extend to information communicated by Dr Monks (or her consultants) to Mr and Mrs Brand (or opinions held by Dr Monks or her consultants about their activities)?*

161 It is submitted by Mr Faulkner that information passing from Dr Monks to Mr Brand (such as her advice to him that he needed Council consent for his activities or her admonition of his clearing activities) does not fall within the contract and hence its disclosure to the Council cannot be in breach of the contractual obligation of confidence. Similarly, there is an issue as to whether Dr Monks was precluded by this clause from passing on to others opinions held privately by her.

162 Testing that against the two elements required to be satisfied for information to be within the relevant clause, the fact that Dr Monks had or may have formed the view (rightly or wrongly) that Mr Brand required development consent for his activities (para 4.3.4 plaintiffs' submissions), or that she had told him he needed Council consent, or that she had admonished him (para 4.3.3 plaintiffs' submissions), in one sense is a matter which broadly relates to Mr Brand's affairs.

163 However, it is difficult to characterise any of those facts as information "obtained" by Dr Monks in providing the services. The opinions or views Dr Monks might form over the course of the project as to Mr Brand or his project do not seem to me to fall readily within the concept of "information obtained" by her. Nor does it seem to me that the fact that she had told Mr Brand certain things (or what it was that she had told him) would amount to information "obtained" by her.

164 It seems to me that the concept of the "obtaining" of information is one which connotes that the recipient of the information has become aware of or acquired it from some external source, rather than that the person has formed subjective views or opinions (whether or not those views or opinions be about matters relating to the Brands' affairs). Nor does the fact that someone has in the past conveyed particular information to another person seem to me readily to fall within the concept of information "obtained". Therefore, I do not accept that passing on to the Council any matters of that kind would constitute a breach of the confidentiality obligation contained in the contract as properly construed.

*(b) Does the obligation extend to information obtained by the expert consultants (Mr Clarke and Mr Payne) retained by Dr Monks to prepare various reports for the development application?*

165 Mr Faulkner submits that none of the information gained by Mr Clarke and Mr Payne, including their extensive observations, photographs and mapping, was within the confidentiality clause because "it was not obtained by" Dr Monks. However, I see no reason for reading down the contractual obligation in this regard. Dr Monks may have obtained information from a variety of sources (not just Mr and Mrs Brand) in the performance of her contractual obligations. If the information so obtained was confidential information

otherwise encompassed within the contract, then in my view the contract required her to keep that information confidential.

166 In *AG v Observer Newspapers* [1990] 1 AC 109 at 176 it was clear that a duty of confidentiality can arise expressly out of a contract whereby one party undertakes that he or she will maintain the confidentiality of information directly or indirectly made available to him or her by the person to whom the obligation is owed or acquired by him or her in a particular situation.

167 If so, the obligation owed by Dr Monks could extend to information passed on to her by, or obtained by her from, a third party (such as one of her consultants), even though this could not be said to have been information held by Mr Brand himself at that stage, provided of course that this was information acquired by Dr Monks in providing the commissioned services.

168 Therefore, I consider that the contractual obligation of confidence does extend to any confidential information in relation to the Brands' affairs which was passed on to Dr Monks by the expert consultants retained by her for the purpose of providing the commissioned services.

*(c) Does the obligation extend to information which is not confidential in nature or which has, though once confidential in nature, passed into the public domain?*

169 Much of the information obtained by Dr Monks in providing the commissioned services would not, in any sense, have been confidential – such as, presumably, information which could be gleaned by access to public documents (such as flood flows or accessibility of the site) or which was plain to the world (such as the presence of horses in plain view in the paddocks). Other information, such as the outcome of specific archaeological or threatened species assessments carried out on the site, could presumably be obtained only by having access to the site itself and to that extent might be said to be information confidential to the owners of the site. So, too, would be information gleaned from the owners as to their confidential plans or intentions in relation to the site.

170 There seems little doubt that at or around the time Dr Monks made her initial complaint to the Council, the fact that clearing was occurring at the property was no secret to local residents. Mr Brand had himself admitted to Mr Spence that he was burning some vegetation cleared on the site. Some clearing had earlier been observed by a Council officer (Mr Scorgie) and the events occurring in May 2004 were observed by a number of rural fire brigade officers. The clearing was hardly being carried out in a confidential or secretive way, given that it seems Mr Brand (or his operator) was seen by various people sitting astride some kind of machinery, piles of rubbish/vegetation were apparently in plain view, and a number of fires had been lit to burn off some part at least of the cleared materials – giving rise to the rural bushfire brigade's visit to the property on 24 May 2004, which was graphically recounted in the witness box by Mr Hayes, and at least two or three earlier such visits to the property that year.

171 There seem to me to be two issues here. Does the contractual obligation expressly or impliedly extend to information which is not confidential in nature? And is the contractual obligation extinguished once the information passes into the public domain? The argument before me as to whether the information had passed into the public domain (and hence was no longer protected by any obligation of confidence) focussed on the latter question, insofar as it seemed to be predicated on the assumption that the information was confidential in the first place.

172 Mr Brand conceded in the witness box that he did not regard the clearing of weeds, lantana or blackberries as confidential (T 53-55) and that he did not understand that to tell Council about this would be a breach of the confidentiality clause (T 56.50); and Mr Jacobs confirmed that Mr and Mrs Brand did not complain about the disclosure of any non-confidential material (T 449.31). Hence the first of these issues may not in a practical sense arise in this case. Nevertheless, in case I have misunderstood him in this regard, I should say that, as a matter of contract, there seems no reason why a person could not expressly bind himself or herself to treat as confidential information which was already in the public domain or a matter of common knowledge (even though it is clear that in such circumstances in the absence of any express obligation an equitable duty of

confidence would not be implied – *AG v Guardian Newspapers (No 2)*; *AFL v The Age Co Limited* (2006) 15 VR 419 at 427).

173 Of course it would be difficult in those circumstances to see how any relief, injunctive or otherwise, could be sought in relation to a breach or threatened breach of such an obligation, since it is hard to see what damage would be suffered by the disclosure of something already public knowledge.

174 When considering whether this particular contract extended the confidentiality obligation to non-confidential information, I note that (absent an express provision to the contrary) a contractual confidentiality provision will generally be construed as pertaining only to information which is of a confidential character. In *Maggbury Pty Limited v Hafele Australia Pty Limited* 210 CLR 181 at 198-201 [45]-[48], Gleeson CJ, Gummow and Hayne JJ said:

> Ordinarily, the obligations relating to the use and disclosure of the Information would be construed as limited to subject matter which retained the quality of confidentiality at the time of breach or threatened breach of those obligations. *An expression of a contrary intent should, as Judge Learned Hand put it in Picard v United Aircraft Corporation (1942) 128 F 2d 632, be explicit*. [my emphasis] This is because (*Picard* (1942) 128 F 2d 632 at 637):
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> > "the applicant is proposing to broadcast the invention to the world at large, reserving as his protection only the claims which he may secure; and there is ordinarily no reason to suppose that he means to exact any greater protection against the promisor than he will have against others. At any rate, if he does, he should say so."
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> The same judge later expressed the point slightly differently in *Conmar Products Corporation v Universal Slide Fastener Co* (1949) 172 F 2d 150. Speaking of the relationship between employer and employee, his Honour said (*Conmar Products* (1949) 172 F 2d 150 at 156):
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> > "Conceivably an employer might exact from his employees a contract not to disclose the information even after the patent issued. Of what possible value such a contract could be, we find it hard to conceive; but, if an employer did exact it, others would perhaps be obliged to turn to the specifications, if they would use the information. Be that as it may, we should not so construe any secrecy contract unless the intent were put in the most inescapable terms; and the plaintiff's contract had none such."
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> Similar reasoning may be discerned in the litigation which in 1928 reached the House of Lords as *O Mustad & Son v Dosen* [1964] 1 WLR 109 (n); [1963] 3 All ER 416; [1963] RPC 41 but which was not reported until 1963. The House of Lords dismissed the appeal from the English Court of Appeal. The judgments in the Court of Appeal are not reported but extracts, particularly from the judgment of Atkin LJ, are set out in the judgment of Roskill J in *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 WLR 1293 at 1314-1315; [1964] 3 All ER 289 at 298-299. Dosen, as Roskill J put it (*Cranleigh* [1965] 1 WLR 1293 at 1314; [1964] 3 All ER 289 at 298): "had entered into a written agreement under which he expressly agreed that he would not disclose information of which he might get an insight in consequence of his work." …. In the Court of Appeal, Atkin LJ construed the contractual obligation as one "not to acquaint strangers with [the employer's] trade secrets" (*Cranleigh* [1965] 1 WLR 1293 at 1315; [1964] 3 All ER 289 at 299). His Lordship concluded (*Cranleigh* [1965] 1 WLR 1293 at 1315; [1964] 3 All ER 289 at 299):
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> > "It seems to me, therefore, that there was a complete publication to the public of the construction and operation of the machine, the construction and operation of which was alleged in the proceedings to be a trade secret, and from that moment it appears to me quite plain that that which before might have been a trade secret, was a trade secret no longer. Now, what is the result of that? It appears to me that the result is that there is no longer any subject matter upon which the agreement could operate."

175 Here, the contractual obligation is not, in its terms, confined to information relating to Mr Brand's affairs which by its nature is confidential. It does not in its terms provide, for example, that Dr Monks agrees to keep confidential certain information which is defined or described as being confidential.

176 As a matter of construction the use of the verb "keep" seems to me to import the notion of maintaining as confidential something which was itself confidential in the first place. However, even had I not been of that view by reference to the verb used in the contract, I would have found (following the reasoning in *Maggbury*) that in the absence of an express term to that effect the contract should not be construed as extending the obligation of confidentiality to information not in its nature confidential.

177 I find that the clause bound Dr Monks to keep confidential only such information otherwise falling within the description contained in the contract which could be said to have the quality of confidence (ie not something which was at all times a matter of public or common knowledge).

178 What then of any information which was initially confidential (and hence within the contractual obligation) but which, by the time of the disclosure or shortly thereafter, had separately passed into the public domain? This is the second of the two questions posed by me above in relation to the "public domain" issue (issue (c)).

179 Mr Jacobs argues that a breach of confidence cannot necessarily be justified on the basis that the information is already in the public domain, noting the reference by Burchett AJ in *Artedomus v Del Casale* [2006] NSWSC 146, to the statement in *Cross, The Law of Intellectual Property: Copyright, Designs and Confidential Information* Vol 2 section 25-85, that a claim for breach of confidence "is not to be defeated simply by proving that there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them".

180 Whether information has entered the public domain to such an extent as to permit its disclosure in the face of a contractual prohibition against disclosure is a question of fact and degree, taking into account the circumstances and the extent of any existing publication of the information. If only limited publication has occurred, and if relative secrecy remains, then the information may well retain its confidential character.

181 Reference was made to *Maggbury Pty Limited*, where Gleeson CJ, Gummow and Hayne JJ, in holding that the confidentiality of certain information had been lost by public disclosure, referred to "the quantum and significance of the public disclosure". There, their Honours noted what was said in *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 285 by Lord Goff of Chieveley and appeared to accept that there was no general principle as to the disclosure by a third party operating to release a confidant from the duty of confidence.

182 In *Johns v ASC* (1992) 178 CLR 408, the concept of confidential information entering the "public domain" was discussed by Gaudron J said (at 460-462) in the context of the question whether there is or should be a duty of confidence imposed on third parties (a question which her Honour considered must depend, at least in part, on the extent to which the information in question is generally known or available). Her Honour said:

> The term "public domain", in relation to the law of confidence, is of comparatively recent origin. (It appears the term was first relevantly used in patent cases; see, eg, *Fomento (Sterling Area) Ltd v Selsdon Fountain Pen Co Ltd*, [1958] 1 WLR 45; [1958] 1 All ER 11; *Seager v Copydex Ltd*, [1967] 1 WLR 923; [1967] 2 All ER 415; *Coco v A N Clark (Engineers) Ltd*, [1969] RPC 41). It has come into common usage since the report of the Law Commission (UK), Breach of Confidence ((1981), Cmnd 8388; see particularly at pars 4.15-4.31 and 6.67). It is not an expression with a constant meaning. For present purposes, it is sufficient to note that the concept of "public domain" has two distinct aspects: the first is concerned with the question whether any duty of confidence arises; the second is concerned with whether a duty of confidence has come to an end.
>
> The primary significance of the notion of "public domain" lies in the fact that no obligation of confidence [here, referring not to the present situation where there is a contractual obligation of confidence but to the situation where an equitable obligation of confidence might arise]

and, hence, no right to confidence can come into existence unless the information involved has "the necessary quality of confidence" (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948), 65 RPC 203, at p 215. See also *The Commonwealth v John Fairfax & Sons Ltd* (1980), 147 CLR 39, at p 51; *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984), 156 CLR, at p 438). Thus, it has been said that no obligation attaches to "trivial tittle-tattle" (*Coco v A N Clark (Engineers) Ltd*, [1969] RPC, at p 48) or to information "which is public property and public knowledge" (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948), 65 RPC, at p 215). Information which lacks "the necessary quality of confidence" because it is "public property and public knowledge" (6) or "common knowledge" (*Mustad & Son v Dosen*, [1964] 1 WLR 109, at p 111; [1963] 3 All ER 416, at p 418. Note, although reported in 1964, this case was decided in 1928.) is often said to be in the public domain. In that context, the question whether information is in the public domain is largely one of fact. That is not to say that questions of law may not arise because, for example, the material has been used in a particular way or in a particular forum.

It may be that information has ceased to be confidential, in the sense that a duty of confidence has come to an end. When that happens it is sometimes said that the information has passed into the public domain. This may happen if, for example, the information is published "by or with the consent of ... the person to whom the obligation is owed", in which event the person who was previously under a duty of confidence "is released from that duty" and, thus, has "the same rights as every other member of the public" (*Speed Seal Products v Paddington*, [1986] 1 All ER 91, at p 94). In this context, the question whether information is in the public domain is a question of law, although, necessarily, that question involves a consideration of factual matters.

There is a question whether an obligation of confidence is extinguished because of subsequent publication to the world at large by third parties or, even, by the person who owed the duty in the first place. Again in that situation, it is sometimes said that the information has passed into the public domain. *The question that then arises is, in essence, whether the information has lost its confidential quality. And as already pointed out, that is largely a question of fact.* (my emphasis)

183 Brennan J, with whom Dawson J agreed, said in *Johns v ASC*:

A defendant who, having received information in circumstances which impose a duty of confidence, makes a limited publication in breach of that duty, can be restrained from further breaching the duty by making a wider publication. But that is not the present case. … When the proceedings of a court, tribunal or commission created by statute or in exercise of the prerogative are open to the public and a fair report of the proceedings can lawfully be published generally, it is not possible to regard information published in those proceedings as outside the public domain (*Home Office v Harman*, [1983] AC 280, at pp 303, 312). Information published in those circumstances enters the public domain by a lawful gate. Once in the public domain, it can be freely used or disseminated. Information obtained by the media in this way is not "imparted so as to import an obligation of confidence": *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR, at p 51, per Mason J. In such a case, the public domain is not measured by the extent of media reporting. If media reporting were the measure of the public domain in relation to information published in such proceedings, the defamation laws would have to be reformulated. It is unnecessary to consider the question whether a defendant to whom information was imparted in circumstances which imposed an obligation of confidence can, by a wide publication of the information in breach of that obligation, avail himself of a defence that the information is thereafter in the public domain (*Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987), 8 NSWLR, at p 374; *Attorney-General v Guardian Newspapers Ltd [No 2]*, [1990] 1 AC, at pp 271, 286-288, 293). This case concerns information which was already in the public domain at the time when HWT and the ABC acquired it.

In *Marcel v Commissioner of Police of the Metropolis*, Browne-Wilkinson V-C said ([1992] Ch, at p 237; see also *Attorney-General v Guardian Newspapers Ltd* [No 2], [1990] 1 AC, at pp 215, 268, 282):

> "there can be no breach of the duty of confidence once the information or documents are in the public domain and the confidentiality has therefore disappeared. In the case of the ... documents which have been read in open court, they have now lost their confidentiality by disclosure in open court."

184 Whether something has entered the public domain is a question of fact and will often be a matter of degree. I am not aware of a definitive test as to when it may be said that information is sufficiently accessible or so widely known as to be regarded as being in the public domain. If relative secrecy remains, notwithstanding a limited publication of the information, then it seems likely that the information in question will not have lost the necessary quality of confidence in order to preclude a duty of confidence arising in equity.

185 Kellam J in *AFL v The Age Company Pty Limited* (2006) 15 VR 419 at 428-430 noted that:

> [39] In the *Spycatcher* case Lord Goff described the expression "public domain" as meaning (*Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 282):
>
> > … no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential.
>
> [40] A number of considerations have been regarded by the courts as being relevant to the question of whether information has entered the public domain. In determining whether the information should be regarded as being confidential the degree of accessibility has been seen to be an important factor. In *Franchi v Franchi* [1967] RPC 149 at 152–3, Cross J said:
>
> > Clearly a claim that the disclosure of some information would be a breach of confidence is not to be defeated simply by proving that there are other people in the world who know the facts in question besides the man as to whom it is said that his disclosure would be a breach of confidence and those to whom he has disclosed them.
>
> [41] In that case, Cross J was dealing with a trade secret, but he used the following phrase which appears to me to be of general application (at 153):
>
> > … It must be a question of degree depending on the particular case, but if relative secrecy remains, the plaintiff can still succeed.

186 In *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104 at 118-119, Bowen CJ in Eq drew an analogy with the old cases dealing with copyright in unpublished works:

> The law relating to confidentiality of communications appears to me to be based upon different principles — the long-standing equitable principles relating to fair-dealing with the work of another. It is closer to the law relating to copyright in unpublished works than to the law of patents. The authorities indicate that even though secrecy may be imperfect in relation to communication which is given in confidence, that communication may still be protected by the principles of confidentiality. The matter was discussed by Sir J L Knight-Bruce V-C in *Prince Albert v Strange* (1848) 2 DeG & Sm 652; 64 ER 293 affirmed on appeal (1849) 1 H & Tw 1; 47 ER 1302. The learned Vice-Chancellor ((1848) 2 DeG & Sm, at p 692) said:
>
> > "Nor is this right to prevent 'innocent' writings from being published without the consent of the proprietor, the author, confined to those instances where he has kept them in a state of entire privacy and secrecy before the invasion complained of. The right is not lost by partial and limited communication, not made with a view to general publication, as is shown by several cases, that on Lord Clarendon's History, and others."
>
> …

> Any disclosure suggested in the present case falls far short of the disclosure to the world, which was held to destroy confidentiality in *Mustad v Dosen*.

187 In *G v Day* [1982] 1 NSWLR 24 at 40-41, Yeldham J quoted this passage and the judgment of Mason J in *Commonwealth of Australia v John Fairfax & Sons Limited* (1980) 32 ALR 485, before stating:

> Hence, at least in cases not concerning trade secrets where full disclosure is made, the mere fact that some publication has occurred is not in itself a reason for declining to protect the plaintiff's right to confidentiality.
>
> …
>
> Where, as here, there has been a limited publication of the plaintiff's name without his knowledge or approval, where he is entitled, to the knowledge of a newspaper publisher, to expect anonymity, and where any unauthorized publication of his identity will probably be to his detriment, I do not consider that the court should be astute to deprive him of relief merely by reason of that limited publication.

188 In terms of the quantum and significance of disclosure in this case, there was a certain amount of information well and truly in the public domain as to Mr Brand's clearing activities on the land prior to Dr Monks making any contact at all with the Council (whether by telephone on 20 May or by letter faxed on 24 May). Furthermore, the Council itself was well aware, through its officers, of the fact of the past clearing activities and that Mr Brand had been advised in relation to them.

189 Mr Jacobs submits, however, that there is significance to be placed on the fact that disclosure by Dr Monks (as Mr Brand's consultant) carried more weight to the complaint. This suggests that, when assessing whether information has passed into the public domain, the significance of the particular disclosure of which complaint is made is something to be tested by reference to the weight it would carry when coming from the person who is alleged to be in breach of the obligation of confidence, not (as I read the above authorities) to the significance of any *prior* disclosure in determining whether the information remained of a confidential nature so as to give rise to a breach in the present instance.

190 Mr Chestnut was, in effect, asked to concede that there was significance attached to the fact that the complaint came from Dr Monks and that this was what merited an immediate or urgent response. He explained, cogently in my view, that the immediacy of the response by Council in matters such as this depended on the existence or otherwise of a perceived threat of harm to the environment. He did not suggest that the source of the complaint was the determining factor in this regard. While he accepted that he was left with the impression from his discussion with Dr Monks that there was an illegal operation being undertaken on Mr Brand's property, it was something which had to be addressed only "as soon as practical" along with other priorities. (T222).

191 In the present case, prior disclosure of the fact of the clearing activities was significant in my view in diminishing the impact of Dr Monks' later disclosure as to those activities, in the sense that the earlier disclosure had already led to the Council putting in train steps for an investigation. Therefore, had the complaint been as to the disclosure of the fact of clearing simpliciter, I would have had no hesitation in holding that by 24 May 2004 this was information in the public domain (and of which the Council was already aware) and no longer within the confidentiality obligation.

192 However, at least some of the matters disclosed in Dr Monks' 20 May letter (about which complaint is made) were not in my view relevantly in the public domain (such as the fact that Dr Monks had previously admonished Mr Brand or that he had assured her that he would stop the clearing activities in question), though known to a limited number of other persons (such as Mr Clarke, for example). Had the question arisen whether any confidentiality which may have reposed in such information had been lost, to such an extent that Dr Monks was no longer bound by her contractual obligation not to disclose that information, then I would have found that this was not the case.

*(d)* *Was the information which was disclosed to the Council information which would necessarily have had to be disclosed for the purposes of rendering the services to be provided under the contract (and, if so, was it information excluded from the contractual confidentiality obligation owed by Dr Monks by reference to the proviso contained in the relevant clause of the contract)?*

193 Mr Faulkner submits that (apart from the fact that neither Mr Clarke nor Mr Payne was bound by the confidentiality clause), knowledge gained by Mr Clarke and Mr Payne while performing services in relation to the property was not confidential information within the relevant clause of the contract as it was necessarily excluded by the "unless" proviso to the clause.

194 As I read the contract, the phrase commencing with the word "unless" qualifies the agreement to keep information confidential. If, therefore, the maintenance of confidentiality would prohibit Dr Monks from rendering the services required in the preparation and submission of the development application, then there is no obligation on her part to keep the relevant information confidential.

195 My attention was drawn to the observations of Talbot J in the Land and Environment Court proceedings, namely that it was reasonable to accept the inevitability that there would be disclosure of any clearing as a consequence of the assessment of the state of vegetation and general condition of the land at any relevant time [para 75]. Clearly, to the extent that confidential information obtained by Dr Monks (or her consultants) of that kind would need to be disclosed for the purposes of the development application, then the contract does not restrain that disclosure.

196 I have considered whether there might be a temporal issue here – namely, that the clause might operate so as to oblige Dr Monks to keep any such information confidential until such point at which she needed to disclose it for the purposes of the development application. However, that would involve reading "unless" as "until" (and, furthermore, this construction was not one which was argued before me).

197 I consider that the word "unless" should be given its ordinary meaning. Therefore, if disclosure of any information was or would reasonably be required in order to prepare and/or submit the development application, then that information is excluded from the scope of the confidentiality obligation.

198 However, that does not mean that all of the disclosures of which complaint was made were necessary for the purposes of the subdivision application. There is, for example, a real question in my mind as to whether it could be said to have been necessary, in the context of the proposed development application, for the Council to be told anything more than the state or condition of the property as at the time the application was made (ie not what clearing had taken place prior thereto). This issue would need to be tested by what information the Council would ordinarily require to determine a subdivision application of this kind. There was no evidence to enable me to form a concluded view on this aspect of the matter, but from a common sense point of view it seems to me unlikely that much of the information as to the disclosure of which complaint was ultimately made would be said to have been necessary to disclose for the purposes of the development application.

*(e)* *Is Dr Monks contractually liable for any disclosure of confidential information by Mr Clarke or Mr Payne?*

199 It seems that there was some disjunct between the respective parties' submissions in this regard as to the position of information obtained by Dr Monks' consultants.

200 I have considered above whether information passed on by them to Dr Monks in the course of Dr Monks providing services under the contract may fall within her confidentiality obligations; and am of the view that it could do so. However, that does not mean that Dr Monks was contractually liable for any disclosure made by her consultants of information which she, herself, may have been bound not to disclose.

201 In Mr Faulkner's opening written contentions of law, it was submitted that a confidee (here, Dr Monks) is not responsible for the disclosure of confidential information by its independent contractors (who are not employees), citing *Coulthard v State of South Australia* (1995) 63 SASR 531). In his closing written submissions, Mr Faulkner notes that Mr Clarke was not bound by the confidentiality clause and that his (and Mr Payne's) knowledge was further lawful publication of matters complained of by Mr Brand. Mr Jacobs, in his speaking note for oral closing submissions, submits that this is a "shameful" attempt on the part of Dr Monks to abdicate from responsibility for her contractors. Mr Jacobs submits that it would make a mockery of the confidentiality clause if a contractor bound thereby (Dr Monks) could side step it merely by engaging a sub-contractor or even an employee.

202 There are, it seems to me, two issues bound up in this exchange of submissions.

203 First, was either Mr Clarke or Mr Payne himself bound by a confidentiality obligation? There is no privity of contract between either of the consultants and Mr and Mrs Brand. Dr Monks was entitled under the contract to retain or engage consultants to assist in the preparation of necessary reports (and Mr and Mrs Brand bound themselves to pay the fees rendered by such consultants). However, the direct contractual relationship in that event was between Dr Monks and the Brands on the one hand and between Dr Monks and the consultants she chose to retain on the other hand. It is not a situation where Dr Monks seems to have retained the consultants acting in a capacity as agent for the Brands so as to give rise to a contract between the Brands, as principal, and the consultants. It seems, rather, that she retained the consultants directly (and so would have presumably remained liable for their fees had the Brands not paid Dr Monks' invoiced accounts in respect of those fees). This is consistent with the control she is said to have exercised over communications between her clients and her consultants.

204 It is submitted Mr Jacobs that where a contractor bound by a confidentiality clause engages a sub-contractor, then that sub-contractor is governed by the limitations prescriptions and proscriptions of the head contract. With respect, I do not see, as a matter of contract law, how that is so. Dr Monks entered into a contract with Mr Brand which imposed confidentiality obligations on her. Those obligations would extend, in my view, to an obligation to keep confidential information obtained by Dr Monks through her sub-contractors in relation to Mr Brand's affairs. However, nothing in the contract obliged Dr Monks to procure similar confidentiality undertakings from her sub-contractors (as, for example, is commonly found in confidentiality undertakings proffered to the court – such as an undertaking that if there is disclosure made within a permitted exception to a third party there will first be obtained a mirror undertaking from that party) nor did she represent that Dr Monks had done so.

205 Secondly, is Dr Monks liable for the disclosure by her subcontractors of information which (had she disclosed that information) would have amounted to a breach of her confidentiality undertaking? Under the contract, Dr Monks acknowledged that Highlight Consulting (ie, she) was "responsible" for the work of contractors engaged by it. Whether or not Dr Monks would otherwise have been vicariously liable for acts of her sub-contractors in performing the services, she appears contractually to have accepted responsibility for their work. Does that extend to disclosures made by those contractors outside their performance of the work? That cannot in my view be the case. What it must logically mean is that if, for example, the sub-contractors are negligent in the preparation of their reports, then Dr Monks takes responsibility therefor (those reports having, in effect, been carried out by them as her agent). However, that does not make Dr Monks contractually responsible for any conduct of Mr Clarke (or Mr Payne) outside the course of his performance of work for her.

206 There may well have been other causes of action against Dr Monks (or, for that matter, the consultant in question) if a consultant, having been privy to confidential information in his or her role in providing services to Dr Monks, proceeded to publicise that information, but unless (which I do not consider is the case here) it can be said that the consultant did so as *Dr Monks'* agent or that it was otherwise in the course of the consultant's work for Dr Monks (such that viz a viz the Brands she had accepted contractual responsibility therefor), I do not consider that Dr Monks is liable under her contract with Mr Brand for breach of her confidentiality obligation because of a disclosure independently made by a consultant retained by her.

*(ii) Was there a breach of the contractual obligation of confidentiality by the making of any of the relevant disclosures?*

207 Having regard to my findings as to the scope of the confidentiality obligation contained in the contract, was there a breach of that obligation by the disclosure of any of the information now particularised as having been communicated?

208 The disclosures, ultimately identified by Mr Jacobs as being in breach of confidence are as follows and I consider each in turn:

**(a) The statements in Dr Monks' letter of 20 May 2004 (Document 37 Exhibit A(1)) that**

> **On May 5, following earlier discussions, verbal reports from others and on-site inspection concerning vegetation removal, a consulting team member and I met the owner and provided him with correspondence which listed a number of statutory and policy requirements concerning bushland protection. On walking over the site, we showed him correct bush regeneration techniques (particularly for lantana removal, both mechanical and manual) and showed examples of where lantana removal has also damaged or removed indigenous vegetation. Specific species, vegetation communities and fauna habitat were discussed at various locations around the property, while we stressed not only the environmental reasons for appropriate bushland management but also his legal responsibilities. [of which the second and third sentences are said incorrectly to imply that Mr Brand was and had been acting incorrectly] (paragraph 2 of the letter)**

209 In my view none of the information conveyed in the above paragraph, (namely that Dr Monks and her consultant had met with Mr Brand on site, had discussed bushland protection requirements; had shown him "correct" bush regeneration techniques; had shown him "examples" of damage to vegetation (which, simply by reference to the statement in the letter, could well have occurred at a much earlier time and which does not in my view necessarily imply that Mr Brand was responsible for any such earlier damage); had discussed species, vegetation and habitat around the property; and had informed Mr Brand of what Dr Monks or her "team member" considered were his legal responsibilities) is information "obtained" by Dr Monks within the meaning of the contractual obligation. It seems to me to be a mixture of Dr Monks' personal opinions and information as to the topics (not content) of the discussion on that occasion with Mr Brand, not any information she had herself obtained.

210 Moreover, I have difficulty seeing how reference to a topic of discussion, as opposed to what was said in that discussion, would amount to disclosure of information of a confidential nature at least in this particular case. (One cannot possibly know from this letter, for example, what Mr Brand was told his "legal responsibilities" were.)

> **During the site inspection, Mr Brand repeatedly assured us that he had stopped removing vegetation, other than under a local bushfire brigade approval to clear 6m each side of his fences. (paragraph 3 of the letter)**

211 The fact that Mr Brand had given such assurances could in my view potentially amount to information "obtained" by Dr Monks in the course of providing her services but it seems to me that this could hardly be seen as confidential in nature when Mr Brand seems to have made similar statements to various others (Mr Scorgie, Messrs Owen/Poole, Mr Clarke) and when the information was so general in content. It is not as if this was a communication of confidential future plans or intentions of Mr Brand relating to the development of his property (which might have been of a sensitive nature). Nor does it necessarily carry with it any admission by Mr Brand as to any wrongdoing since, for all one knows, he could have been removing vegetation other than under the said local bushfire approval but yet in accordance with a different consent (such as the missing consent for agricultural use).

**Prior to that site visit, we had also organised for a CCCEN representative to visit the site a week later to continue the education process with the owner and his operators however that representative postponed the meeting and has not rescheduled. (paragraph 4 of the letter)**

212 A statement as to what Dr Monks had done in this regard, and the fact that this meeting had been postponed does not seem to me to be information "obtained" in the course of providing services, nor is it likely to be confidential in nature. (For that matter, I find it difficult to see what could possibly be said to have flowed to the detriment of Mr Brand from this disclosure at least in terms of the decision of the Council to prosecute him. What relevance, it might be thought, does the postponement of an educative meeting have to the matters presently in issue?)

**This letter provides a formal request to Council to take action to prevent further clearing/ underscrubbing contrary to the law. [which it is said falsely implies that Mr Brand was and had been acting unlawfully; that Dr Monks knew the Brands did not have consent to do underscrubbing and that the Council would be lawfully entitled to take action against Mr Brand in respect of "unlawful clearing"] (paragraph 6 of the letter).**

213 As to the (false) implied statement said to be implied in this sentence (namely, that Mr Brand was and had been acting unlawfully), whether true or not that can be no more than a statement of Dr Monks' opinion and hence not within the clause; similarly, any belief held by Dr Monks that Council was lawfully entitled to take action.

214 As to the alleged implication that Dr Monks "knew" Mr and Mrs Brand did not have consent, this is (of course) contrary to the case the plaintiffs seek to maintain (namely that they did have consent) and in any event I do not see that such a statement would necessarily be implied from what was said in the letter itself. At its highest, it seems to me that the sentence in question conveys the belief of Dr Monks that clearing or underscrubbing (or "further" clearing or underscrubbing) would be contrary to the law. That might have been the case for any number of reasons. I do not think it can be said that a reader of this sentence (without having had the benefit of a detailed exposition, or their own knowledge, of the relevant provisions of the environmental planning legislation) would consider this meant there was no actual consent for the clearing/underscrubbing. (I also note that if the submissions pressed upon me by the plaintiffs in relation to the public interest defence are accepted on this point then no consent was required as a matter of law for the clearing/underscrubbing in any event.)

215 Mr Faulkner submits that, insofar as the Brands contend for false implied statements arising out of the above communication, these are not capable of being confidential information (on the basis that something which never existed cannot be "information") and notes the acceptance by Mr and Mrs Brand in their evidence that Mr Brand was in fact carrying out underscrubbing and clearing. There is, in my view, considerable force in that submission.

216 Mr Faulkner submits that what Mr Brand says he did (the minor activities) are altogether different to the activities the Council was considering when it decided to prosecute (extended activities). On the plaintiffs' case, activities he did not do cannot amount to "information" because, ex hypothesi, they were not carried out. Thus it is said that it cannot be any part of the plaintiffs' case that disclosure or reporting of the extended activities (which they deny) could have been a disclosure of "information" per se. In other words the plaintiffs cannot sue for disclosure (in alleged breach of a confidentiality clause) of an activity which they deny occurred (because if there was no such activity then as a matter of logic there was no "information" to be revealed). Mr Faulkner concedes that disclosure of a state of affairs which, on Mr Brand's case, never existed could give rise to other complaints, but submits it could not found a claim for breach of the confidentiality obligation because or Mr Brand's case there was never any such information able to have been obtained.

217 In other words a non-existent state of affairs cannot be "information". (Of course any disclosure of the extended activities must in one sense necessarily have encompassed a disclosure of that minor activities and if that was confidential information then that could be capable of being a breach, but that would run into difficulties on the causation part of the case on the diminution in value of the land by reason of breach of any

relevant EPI. In that regard, the elements of the crime as pleaded included the manner in which the clearing activities were undertaken (ie by mechanical means).)

218 I note in that regard that in *Financial Times Limited & Ors v Interbrew SA* [2002] EWCA Civ 274 at [27], Sedley LJ, with whom Longmore and Ward LJJ agreed, said that "there can be no confidentiality in false information". Therefore, had the allegedly false implied statements otherwise been capable of falling within the contractual prohibition on disclosure I would have held that there was no disclosure of any confidential information.

219 In any event, I find none of the statements in this part of the letter identified by Mr Jacobs is information falling with the contractual prohibition on disclosure.

**(b) The whole of Mr Clarke's letter of 25 May 2004 to the Council [Document 47, Exhibit AC 1], including the text of Dr Monks' letter of 5 May 2004 to Mr Brand, revealing what information/advice was given to Mr Brand, was highlighted, was acknowledged by him and was stated by him about reading it.**

220 In their response to the further request for particulars, the plaintiffs' solicitors have advised that the Brands do not rely only on the fact of this communication, but they do not specify any facts implied in that communication which did not occur (nor do they specify any facts which it is said had occurred and were communicated as information).

221 Mr Jacobs did not extract any particular statements in this eight page letter which he says amounted to confidential information which Mr Clarke (and hence Dr Monks) was under a contractual obligation not to disclose. I do not propose to set out the text of this eight page letter in full. It listed various statutory provisions and policies (none of which could be said to be remotely confidential, they all being matters of public record) and commented on their relevance to the site described (in various places in a general manner, which presumably could have applied to any area of bushland "containing remnant trees with weedy understorey").

222 I can only assume that the confidential "information" said to have been disclosed by the provision by Mr Clarke of this letter to the Council was the fact that there had been some clearing or underscrubbing of vegetation (as to the disclosure of which Mr Brand does not complain, as was made abundantly clear by Mr Jacobs) and that Mr Brand had been advised by Mr Clarke of the various matters contained therein.

223 The letter contains various assertions about matters said to be of national or state significance, and as to what is not permitted or what may need to be addressed having regard to those matters, but does not contain any assertion that Mr Brand had done anything in breach of any of the Acts or guidelines therein summarised. The highest this letter can be taken is that it expressed Mr Clarke's opinion (strongly held, as it transpired from the force of his evidence in the witness box) that clearing or underscrubbing should not occur until habitat for migratory, terrestrial or vulnerable fauna and flora species occurring on the site had been identified (p 2) and that "until the assessment and planning stages are completed, there should be no further clearing or underscrubbing of vegetation growing underneath native trees" (page 8).

224 The fact that there <u>had</u> been clearing or underscrubbing was already known to the Council (from at least November 2003 when Mr Scorgie visited the site), it was a matter of public knowledge and Mr Brand has conceded it was not information he regarded as confidential.

225 Mr Clarke's opinion as to the impact of legislative/regulatory policies seems unlikely to be confidential. It is advice I assume he gives all his clients.

226 The fact that Mr Clarke held the opinions expressed in the letter is not information directly within the clause. Insofar as it was passed on to Dr Monks and might be said to be information "obtained" by her within the clause, she did not disclose it to the Council.

227 Even if the fact that Mr Clarke had given particular advice was confidential, as I have found both that Mr Clarke is not bound by the confidentiality clause and that Dr Monks is not responsible under the contract for a disclosure of this kind by him (clearly made outside the performance of his contractual duties) there is, therefore, no breach of the contract by Dr Monks by reason of this disclosure.

**(c) The fact recorded in an email of 25 May 2004 (Document 48 Exhibit A(1) to Leah Wheatley (of the Council) from Mr Gary Chestnut (of the Council) that Dr Monks had communicated to him "her concerns about continuing to act for [Mr Brand]".**

228 This communication is relied upon for the implication that Mr Brand was acting unlawfully and, according to paragraph 4.2.2(b) of the submissions, that in the light of those activities Dr Monks' relationship with Mr Brand would be affected by what the Council did.

229 The plaintiffs' lawyers again did not specify any fact that they contended had occurred and was communicated as information by the words recorded in the email nor did they specify any facts which it was said had occurred and were communicated as information.

230 The relevant part of this short email seems to be the last paragraph "Ms Monks has sought clarification in the action Council may take as she needs to determine her future client relationship. Ms Monks has request [sic] a formal response to her fax so she may determine what course of action she intends to take with Mr Brand."

231 I fail to see how it can seriously be suggested that a communication of Dr Monks' personal concerns or an intimation that she might need to determine the future course, if any, her client relationship should take amounts to information "obtained" by Dr Monks in the course of providing her services. Dr Monks' thought processes and opinions (while presumably confidential to her until she chose to disclose them publicly - she might, for example, have wished confidentially to disclose to someone that she was considering terminating her client relationship) cannot in my view be seen as "information" which she had contractually promised Mr Brand that she would keep confidential.

**(d) The disclosures, said to be evidenced by the email of 25 May 2004 from Dr Monks to Mr Clarke (Document 50 Exhibit A(1)), made by Dr Monks to Mr Chestnut during the four telephone conversations referred to in the said email.**

232 It is asserted that during these telephone conversations Dr Monks informed Mr Chestnut that Mr Brand had committed, was continuing to commit and would continue to commit various serious environmental offences on the Land; that the Council should take action to prevent/stop this activity and that she and Mr Clarke had information which could be placed in affidavit form and used by the Council in any such action. It appears that the Brands also rely upon this email as evidencing a discussion by Dr Monks of "her engagement [by the Brands] and the concerns that she had with that engagement and the need for her to know the Council's proposals in order for her to decide what to do with the engagement."

233 I note that the evidence suggests that only one of the four telephone calls made to or by Dr Monks on 24/25 May 2004 to the Council involved any communication with Mr Chestnut himself.

234 According to the plaintiffs' solicitors, the Brands rely upon these (unparticularised) words or communication for more than the fact of the communications themselves but, if I understand Mr Jacobs' 22 October response to the request for particulars correctly, no facts are said to be falsely implied in that communication nor are any facts specified which the Brands say had occurred and were communicated as information.

235 The evidence as to what was said by Dr Monks to Mr Clarke in the one telephone conversation she seems actually to have had with Mr Chestnut (as opposed to her first conversation with Ms O'Shea and her two chase up telephone calls), seemed to go little further, if at all, than that which is in the subject of (c) above, namely that Dr Monks needed to determine her future client relationship and wanted a written response from the Council so she could decide what to do with the project.

236 For the reasons set out above, the communication of Dr Monks' internal thought processes does not disclose any information falling within the contractual prohibition on disclosure.

**(e) The communications by Mr Clarke (evidenced, it is said, by Ms Wheatley's 15 July 2004 file note – Document 72, Exhibit A(1)) that he had more than one conversation with Mr Brand to explain that what Mr Brand was doing was illegal; that Mr Clarke had the documents enumerated in the 5th paragraph of the file note and these would assist the Council in any prosecution; and that he (Mr Clarke) had had a conversation with another (unidentified) person who had spoken with Mr Brand and to whom Mr Brand had acknowledged the significance of the property (and that because of its significance he could never develop it).**

237 Again, according to the plaintiffs' solicitors, the Brands rely upon the above communications for more than the facts of the communications themselves but do not plead any falsely implied statements nor do they specify any facts which they contend had occurred and were communicated as information.

238 I note that Ms Wheatley's file note in fact uses the words "Michael has had more than one conversation with Mr Brand to explain that what he was doing was *wrong*" (my emphasis) but, coupled with reference to the provision to Mr Brand of information about "all the relevant legislation", it may be that the inference can legitimately be drawn from what Ms Wheatley said that what Mr Clarke had told her was that he had had conversations with Mr Brand to the effect that what he was doing was in breach of the legislation (and hence illegal).

239 Even so, all of the matters communicated by Mr Clarke are in my view outside the scope of Dr Monks' confidentiality obligation. Whether Mr Clarke behaved appropriately in providing this information to the Council at a time when he was retained by Dr Monks to provide services in relation to Mr Brand's proposed subdivision is not a matter in issue before me. Mr Clarke's apparent wish for anonymity at the time suggests that he may have considered such conduct inconsistent with his role under the retainer by Dr Monks but, again, that matter is not before me.

*Conclusion as to issue (ii)*

240 Accordingly, having regard to my findings set out earlier on the scope of the confidentiality obligation, I find that there has been no breach by Dr Monks of her contractual obligation of confidentiality by reason of any of the disclosures particularised by the plaintiffs as being in breach of the contract.

*(iii) If any of the relevant disclosures was in breach of the contractual confidentiality obligation owed by Dr Monks, is Dr Monks able to rely upon a public interest defence?*

241 In light of my findings above, this issue does not strictly arise. However, having been argued in some detail before me, it is appropriate that I set out my views on this issue.

242 Dr Monks accepts that the burden is upon her to establish the facts upon which she relies to be relieved of her contractual obligation of confidence. In *A v Hayden* (1984) 156 CLR 532 at 545, Gibbs CJ at [14] said

> It is clear that a person who owes a duty to maintain confidentiality will not be allowed to escape from his obligation simply because he alleges that crimes have been committed and that it is in the public interest that he should disclose information relating to them. He bears the burden of establishing the facts upon which he relies to relieve him of the obligation.

243 Further, as the claim against Dr Monks is for breach of an express contractual obligation, it is accepted by Mr Faulkner that this is not a situation in which the principle that there is "no confidence in an iniquity" applies (*AG Australia Holdings Limited v Burton* (2002) 58 NSWLR 464 at 512-3 per Campbell J).

244 Rather, Dr Monks must show that there is some public policy which precludes the enforcement of her contractual duty of confidence or relieves against that obligation. It is not suggested that this is a case where the contractual duty of confidence would interfere with the administration of the criminal law, but it is nevertheless said to be contrary to public policy. The competing public interests, it is said, are between honouring one's contractual obligations and insisting upon compliance with the objectives of the relevant IDO.

245 What must be shown is a prima facie case that a serious offence was committed (*AG Australia v Burton* at 521 [202]). In *A v Hayden*, Gibbs CJ further said at [14]:

> … the defendants must establish, **at least prima facie**, that the failure to disclose the information would tend to obstruct the course of justice and would be contrary to the public interest. … at least what has to be shown prima facie is that there is "a bona fide and reasonably tenable charge of crime". (my emphasis)

246 Insofar as it is the case that Dr Monks must also show that the iniquity was disclosed by the communication (*Burton* at [206]), it is submitted by Mr Faulkner that it was.

247 Mr Jacobs submitted that the *Briginshaw* standard applies here and that therefore clear evidence is required before findings which would have serious consequences or serve to brand a party with moral turpitude or infamy are to be made, notwithstanding that the test set out in the authorities is for the establishment of a prima facie case. That said, it seems clear that it is not necessary, for the purposes of the public interest defence, for me to find that any crime has been committed. Rather, what must be established, is prima facie evidence of a bona fide and reasonably tenable charge that a crime has been committed.

*Alleged offence*

248 Issue was taken by Mr Jacobs as to what he saw to be the inconsistency with which the alleged offence had been identified, pointing to the following:

· in the Points of Defence of 2 November 2007 the 'iniquity' was pleaded as "a crime that the plaintiffs were committing in contravention of s 127" of the EPA;

· in Dr Monks' 22 May 2008 affidavit, it was identified as "breach of the Tree Preservation Order and thereby s 76A" of the EPA;

· in Dr Monks' 20 May 2004 letter to Council, the reference was to "clearing/underscrubbing contrary to the law".

· the particulars of paragraph 8.4(a)(iii) of the Defence which were (voluntarily) further provided by the defendant's solicitors by letter dated 23 September 2009, though pointed to be Mr Jacobs in this context, seem to me to go not to the identification of the offence as such but to the particulars of the pleaded fact that the clearing activities were for the *purpose* of subdivision and/or agriculture).

249 By reference to the further particulars of the alleged offence, provided after the conclusion of the hearing at Mr Jacobs' request, in summary it is contended (as, with respect, I thought had been made clear

during I Faulkner's submissions at the hearing) that the activities comprised by the mechanical clearing of weeds and native vegetation on the Land in April and May 2004 constituted a "development" for the purpose of agriculture and/or subdivision and, as such, required Council consent (in that they were an act, matter or thing were *referred to* in s 26 of the EPA Act and *controlled by* an environmental planning instrument, IDO No 122 – Zone 7(a)) and that they were carried out without the consent of the Council in breach of s76A(1) and (2)(a) of the EPA Act.

250 It is submitted by Mr Faulkner that, at the very least, the statement in IDO No 122 of the objectives of the protection and preservation of trees and vegetation, when read with clause 5 of IDO No 122, amounts to a provision in IDO No 122 with respect to or concerning the protection and preservation of trees and vegetation; hence IDO No 122 is an environmental planning instrument controlling the clearing and underscrubbing.

251 Accordingly, the alleged offence (said to arise by reference to clause 5(2) of Interim Development Order No 122 – Gosford, a deemed environment planning instrument) is the mechanical clearing by Mr Brand of weeds and native vegetation on the property without the consent of Gosford City Council.

252 Section 76A of the EPA Act provides that if an environmental planning instrument provides that specified development may not be carried out except with development consent, then a person must not carry the development out on land to which the provision applies unless (a) such consent has been obtained and is in force and (b) the development is carried out in accordance with the consent and the instrument.

253 Breach of s 76A is an offence under s 125(1) of the EPA Act (the maximum penalty for which under s 126 is $1.1 million, an indication of the gravity with which the legislature sees the offence).

254 Section 54 of the EPA Act defines an environmental planning instrument to include a deemed environmental planning instrument. IDO 122 is a deemed EPI (being an interim development order in force as at the relevant date of commencement of the EPA Act, 1 September 1980) (by reference to the definition in s 4 of the EPA Act and clauses 1 and 2 of Schedule 3 to the *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979). (IDO 122 was gazetted as an interim development order on 30 March 1979.)

255 In essence the real issue between the parties in this respect turns on the meaning of "development" in clause 5(2) of the relevant IDO (although Mr Jacobs raised numerous other factual issues in the course of the hearing in relation to the alleged offence).

256 "Development" is defined in s 4 of the EPA Act, relevantly to mean "(f)" "any other act, matter or thing referred to in section 26 *that is controlled by* an environmental planning instrument". (my emphasis).

257 Section 26 of the EPA Act refers to various matters for or with respect to which an environmental planning instrument may make provision and includes, relevantly:

> (a) protecting, improving or utilising to the best advantage, the environment [defined in s 4];
>
> (e) protecting and preserving trees or vegetation; and

*(f)* *controlling* any act, matter or thing for or with respect to which provision may be made under paragraph (a) or (e). (my emphasis)

258 Accordingly, s 26 of the EPA Act provides that an environmental planning instrument may make provision for the control of matters falling, inter alia, within s 26(1)(a) and (e).

259 The relevant environmental planning instrument is IDO 122. Clause 5(2) of IDO 122 provides that, in relation to land within a zone, the development that needs consent is specified in the relevant table. For Zone 7(a) Conservation and Scenic Protection (Conservation), development requiring consent appears at p 34 of the IDO and is described simply as "Development (other than exempt development) for the purpose of …

subdivision". (This also applies to development for the purposes of agriculture. However, although this was included as a particular of the offence, no real reliance seemed to be placed on this matter during the hearing and I did not understand it ultimately to be contended, that the offence related to a development without consent for the purpose of agriculture.)

260 The objectives of Zone 7 (a) specified in IDO 122 include (c) the provision and retention of suitable habitats for flora and fauna and "the prohibition of development in or with proximity to significant ecosystems, including rainforest and estuarine wetlands."

261 Mr Jacobs submits that there is no "development" for the purposes of s 76A of the EPA Act. He says that weeding, (whether by mechanical means or otherwise) does not fit within the definition of "development". Section 26, it is said, does no more than indicate the matters that can be taken into account in either granting or refusing consent. As elaborated upon by one of the two junior Counsel assisting Mr Jacobs throughout the trial (Mr Bambagiotti), the flaw in the defendant's argument is said to be that the definition of development includes an activity that can be identified as being referred to (and, as I understand it, capable of being controlled by) an environmental planning instrument as opposed to being something which is in fact controlled in an environmental planning instrument).

262 Mr Bambagiotti accepts that the relevant definition of "development" in s 4 of the Act includes the items listed in (f), which in turn refers to s 26 (anything referred to in s 26 that is "controlled" by an environmental planning instrument). However, Mr Bambagiotti says that all s 26 does is to identify what kinds of activities an environmental planning instrument can control; it does not itself control, nor is it the "font" of the prohibition of, anything. Accordingly, it is submitted that all s 26 does is to say that an environmental planning instrument can include matters of the kind in s 26; it does not of itself import those matters into the prohibition. I agree.

263 To find an offence in respect of s 76A one must look to the environmental planning instrument itself. Here what the environmental planning instrument (in somewhat circular fashion, I accept) prohibits (without consent) is, relevantly, development for the purposes of agriculture or subdivision. That necessarily takes the reader back to the definition of development. Once the word "development" (expanded by reference to its statutory definition) is read into the environmental planning instrument it is clear that what is being stated as requiring consent is, relevantly, "[*Any act matter or thing referred to in s 26* ***that is controlled by*** *an environmental planning instrument*] (other than exempt development) for the purpose of … subdivision".

264 When reference is had to what is "referred to" in s 26, one is brought back to the list of acts or things that may be controlled in respect of, inter alia, the protection or preservation of trees or vegetation but what is lacking here is any activity of the kind complained of which is both referred to in s 26 *and controlled by* an environmental planning instrument.

265 Mr Bambagiotti submits that all s 26 relevantly does is to enable the Council to select what conduct is to be regulated and to include it in an environmental planning instrument. Hence, as I understand the plaintiffs' submission, for the clearing (by mechanical means or otherwise) of weeds and native vegetation to be a "development" requiring the consent of the Council, it would be necessary for words to the effect "activities for the [mechanical] clearing of weeds and native vegetation" to appear in the second part of the table on page 34 of IDO No 122.

266 "Development … for the purposes of subdivision" cannot simply mean the act of subdivision since, if so, there would be no need to include the words "for the purpose of". However, simply because the clearing of weeds or native vegetation (by mechanical means or otherwise) is an activity on the land which could be controlled (and hence which could be prohibited without development consent) (arguably whether or not it is for the purpose of subdivision), does not import those words into the definition of "development" if, in fact, that activity is not controlled by the IDO.

267 The definition of "control" in s 4, provides that:

> control, in relation to development or any other act, matter or thing, means:

(a) consent to, permit, regulate, restrict or prohibit that development or that other act, matter or thing, either unconditionally or subject to conditions, or
(b) confer or impose on a consent authority functions with respect to consenting to, permitting, regulating, restricting or prohibiting that development or that other act, matter or thing, either unconditionally or subject to conditions.

268 Jagot J in *Port Stephens Council v SS and LM Johnston Pty Ltd* [2007] NSWLEC 30 held that the LEP there in question controlled "clearing". Her Honour referred to the fact that the LEP did more than define "clearing"", it manifested an intention to "control" it and the manner in which it exercised that control was dependent on the facts associated with the clearing. Her Honour said:

> [9] The Council submitted that the activity carried out by Johnston on the land at Veterans' direction was both the carrying out of a work (subpara (d) of the definition of "development") and the doing of an act, matter or thing referred to in s 26 that was controlled by an environmental planning instrument (subpara (f) of the definition).
>
> Can clearing be development?
> [63] The defendants submitted that the mere definition of a term in the LEP 2000 does not make an act, matter or thing "development" and that the activity carried out by Johnston was not "a work" within the meaning of that definition.
>
> [64] I accept that the mere definition of a term in an instrument does not make an act, matter or thing "development". The LEP 2000 contains many defined terms that are not development (for example, community land, flood prone land, gross floor area, heritage item and the like). The LEP 2000 does not merely define "clearing", however. Construed as a whole, the LEP 2000 discloses a clear intention to control the act of clearing. It does so by the conventional method.
>
> [65] The provisions of the LEP "control" the act of clearing land zoned 2(a) in various ways. *For example, the particular act of clearing might be exempt development within item (3) depending on the facts associated with the clearing*. Exemption is a form of control as defined. Another act of clearing might be development for a prohibited purpose in item (5). Or an act of clearing might be development not included in items (3) or (5) and thus permissible only with consent. In all cases, the LEP 2000 controls the act and thereby engages subpara (f) of the definition of "development". Thus, the issue is not any absence of control in the LEP 2000, but the manner of control in the particular case — which depends on the facts.
>
> [66] Given these conclusions and the form of the 2(a) zoning table, it follows that I do not need to determine whether the particular acts carried out also engaged sub-para (d) of the definition of "development" (the carrying out of a work). (my emphasis)

269 There is little doubt that "clearing and underscrubbing" can meet the description of an act, matter or thing referred to in s 26. (Indeed, a broad range of activities could do so, given the general terms in which the section is cast, as Mr Bambagiotti seemed to acknowledge in proffering by way of example the activity of picking apples.) Accordingly, if "controlled" by an environmental planning instrument, clearing and underscrubbing would constitute development, as Jagot J's decision in the *Port Stephens Council* case seems to bear out.

270 The issue in the present case, however, turns on whether or not clearing and underscrubbing are acts which are "controlled" by the IDO.

271 The defendants seem to say that the activity of "clearing and underscrubbing" is a development by pointing to the objectives of Zone 7(a) and saying that "each are 'controlled' by that planning instrument" (Outline Defendant's Submissions 12 October 2009 para 43). The words "clearing and underscrubbing" do not appear within the objectives (Exhibit A, p 34), though the objectives do include "the conservation and rehabilitation of areas of high environmental value", among other relevant principles.

272 There is nothing within the IDO which suggests that the objectives are matters which are "controlled" as the defendant contends. Clause 5 of the IDO only requires the Council to take into consideration the objectives of a Zone before granting consent to development on land within that zone. If one were to assume that the identified objectives (which the Council must take into consideration when granting consent to a development) fit within the description of an act, a matter or a thing, this would logically mean that requiring that something be taken into account amounts to consenting to, permitting, regulating, restricting or prohibiting that very thing. This would seem to stretch the meaning of those words in a way that could lead to absurd results. For example, one of the objectives of the Zone is the "retention of suitable habitats for flora and fauna". According to the defendant's argument, that objective would be a thing "controlled" by the IDO. It would also be a thing referred to in s 26 (see s 26(a) or (e)). Thus, as a development defined in s 4, then whether it required consent or was prohibited outright would seem to depend solely on the purpose for which it was done. It seems to me that the better view is that the objectives specified in s 26 are not matters controlled by the IDO.

273 In this regard, I note that in the Land and Environment Court proceedings, though it was not necessary for his Honour's purposes to consider the argument now raised (and there is no suggestion it was put to him in this way), Talbot J considered whether the factual ingredients sought to be added to the particulars of the charge were properly legal elements of the charge. His Honour, who addressed in detail the legal elements of the then existing charge and the essential factual ingredients of the amended charge, formed the view that the proposed reference to the purpose of agriculture or subdivision fundamentally changed the nature of the charge that development was carried out without relevant consent. His Honour did not suggest that there was a more fundamental problem in the activities of that clearing and underscrubbing, cutting down, removing, injuring and wilfully destroying trees and rainforest vegetation for the purpose of agriculture or of subdivision could not, as a matter of statutory construction, constitute "development" within clause 5(2) of the IDO because they were not activities expressly identified therein. However, I doubt that much can be read into the fact that his Honour raised no such issue, given that it does not appear from his reasons for judgment that this argument was raised before him. (I note also, in passing, that his Honour further noted that the alleged actions related to the clearing of vegetation (and that the offence was a serious one judged against the maximum penalty) [at 73].)

274 Accordingly, I accept the plaintiffs' submission that the clearing or underscrubbing of weeds/vegetation (by mechanical means or otherwise) was not a "development" (whether or not for the purposes of a subdivision) falling within the relevant environmental planning instrument.

275 Has Dr Monks established a bona fide and reasonably tenable charge of crime? Given the view I have reached above, the answer to this question must be "No" and the public interest defence (had it fallen for determination) would have failed. That disposes of the issue before me. However, as a number of further arguments were raised in this regard, I comment briefly on them, in no particular order, as follows:

276 First, in addition to the argument considered above, Mr Jacobs submitted that, to amount to a "development", it is necessary that the "work" be "to" as opposed to "on" the land (relying on *Parramatta City Council v Brickworks Limited* (1982) 128 CLR 1), an enquiry which he submitted raises an analysis of the significance of what was done in qualitative and quantitative terms. It was submitted that nothing of "significance" was done in this case; rather all that was done was "some weeding", which could not be "work" to the land in the relevant sense and could not be a "development".

277 Apart from the fact that the offence here alleged by the defendant is not one which turns on the carriage of "work" on or to the property, there seems no doubt that in this case the removal of vegetation was extensive (see maps MC 18 and MC 25 to Mr Clarke's report). Where what is done involves what seems to have been the large scale removal of rainforest vegetation or habitat, I doubt that it is an answer to say (as submitted by Mr Jacobs) that this is simply "some weeding" and that the vegetation could simply grow back and thus the land was not in any way changed. Furthermore, the Council's issue of a notice in relation to sedimentation measures and concerns as to this leading to a pollution event suggests that there was a significant and qualitative change to part of the land. In any event, nothing turns on this submission.

278 Secondly, it was submitted by Mr Jacobs that there was no evidence that the IDO applied to the property (Mr Scorgie having admitted he had not checked to see if the land was part of the excluded areas specified on p 2-7 of the IDO). (In that regard, a review of the land described in clause 2A shows that the only land expressly excluded by DP reference in Copacabana is an area forming part of a different deposited plan

than that referable to Mr Brand's land. A parcel of land at Cullens Road Kincumber is excluded but again that has a different DP reference. Had the answer to the prosecution of Mr Brand been that the IDO did not apply to this land, I find it hard to believe that it would not have been raised when the matter was before Talbot J. It seems it was not.) I note that Mr Chestnut, now the acting director of environment and planning at the Council and then the Council's principal environmental officer, who might be considered to be in a position to offer a considered opinion on such a matter, was of the firm view that the land was within the zone 7(a) zoning under IDO 122. Prima facie that seems to be the case.

279 Thirdly, while much debate centred on whether the vegetation had been removed by a bulldozer (as various of the witnesses had either observed or inferred from the shape of the piled vegetation for burning or from track marks on the land) or by other mechanical means, Mr Jacobs asserts that it matters not how the vegetation was removed (a contention with which Dr Monks seemed to agree – T 340). IDO 122 says nothing in its terms about the means of removal.

280 It is conceded that Mr Brand had used a mechanical slasher on the land (see closing submissions para 5.8.4). Mr Brand's evidence was that the only other machinery used on the land was an excavator. To the extent that other witnesses ascribed their observation of tracks on the property, or the manner in which the piles were formed, or the extent of the clearing, to the use of a bulldozer (rather than, say, a bobcat or excavator) this seems to me to be immaterial. Both surely fall within the concept of "mechanical" means of clearing and Mr Brand accepted that machinery of some kind had been used in the clearing of the areas in question.

281 However, I cannot see that anything turns, for the purposes of the alleged offence, on how the vegetation was removed. Had this been a prohibited development (which would involve a determination as to whether it was for the purpose of agriculture or subdivision), the only questions would have been as to the fact of its removal and whether that was without consent. The alleged offence is the carrying out an activity without the requisite development consent in breach of the IDO.

282 The only potential relevance of the mechanical nature of the clearing, it seems to me, is that, to the extent that the 1999 development consent for the existing dwelling on the property required adherence to the Bushland Management Plan, and that plan contained within it a recommendation not under any circumstances to use mechanical means, then insofar as Mr Brand sought to rely on the 1999 development consent to satisfy any requirement for consent, there might be a question as to whether he could do so. However, the point was made by Mr Jacobs that this plan did not in terms prohibit mechanical clearing – it simply recommended against it. Failure to comply with the recommendation contained in that consent, while perhaps a matter for criticism, would not amount to a breach of the EPA Act.

283 Would it have mattered that Dr Monks may have believed there was an offence but not have been aware of the precise formulation of the offence or any charge which might be brought in relation to the offence?

284 I raised this question during exchanges with Counsel, namely whether, when making the disclosure(s) in question, Dr Monks must have had in mind a specific offence which might be constituted by the activities or simply that the activities amounted to a crime.

285 Mr Jacobs submitted that Dr Monks bore the onus of establishing that an iniquity has occurred and that she could not simply rely on a random allegation. It was said that Dr Monks had to have known of the relevant offence (and hence her justification for disclosure) at the time the disclosure was made.

286 In response to that, however, Mr Faulkner pointed to the fact that what Dr Monks was disclosing was her observation of the activities on the land. If those activities amounted to conduct which would support a reasonably tenable charge for a serious offence then the fact that Dr Monks might not have had in mind the particular instrument under which such an offence would lie, would not be the same as the making of a "roving" or "random" allegation of iniquity (of the kind which is insufficient to attract the public interest defence). I accept the force of Mr Faulkner's submission in this regard.

287 As I understand it, what Mr Jacobs was submitting, in effect, was that if Dr Monks formed a view that the activities were a particular offence (say the breach of a Tree Preservation Order) but technically she was

wrong and this amounted in law to a different offence (say breach of the IDO), then she must nevertheless lose on her iniquity/public interest defence; in other words that she must have had in mind a basis for a particular offence the subject of her report to the Council. I do not accept that contention. It does not seem to me that this is a case akin to a "roving allegation of fraud".

288 Dr Monks reported certain activities that she believed (genuinely and not unreasonably in my view, particularly when it transpires that her belief was shared by the Council officers who investigated and obtained legal advice on the matter) amounted to an offence against a number of statutory provisions. I very much doubt that in order to rely upon the public interest defence it would have been necessary for Dr Monks, as a lay person, to have been able to identify with particularity the very sections of the legislation of which such conduct would be in breach. Mr Jacobs readily conceded that if the elements of the offence were there at the time, and Dr Monks believed they constituted an offence, then quoting the wrong legislative section would matter not (391 at 13.2). Dr Monks letter in my view fairly disclosed the elements which she believed gave rise to an offence – the clearing and underscrubbing – and that would seem to me to have sufficed in order to enable the defence to be attracted.

289 Fourthly, Mr Jacobs submitted that it is not correct to say that, *because* the Brands deny they have committed an offence (whether as pleaded or otherwise), Dr Monks could not have disclosed confidential information. With respect, it does not seem to me that this was the thrust of Mr Faulkner's submissions on the illegality issue. I did not understand there to be a submission that there is no confidentiality in the information *unless* Mr Brand admitted to the extent of the activities then being carried out (para 1.9.1). Rather, what seemed to me to be put was that, on Mr Brand's own case, what was disclosed was not "information" and that, in order to amount to "information", Mr Brand would necessarily have to accept that he had engaged in the very activity which it was alleged amounted to an offence (hence giving rise to the public interest/unclean hands defences).

290 Fifthly, Mr Jacobs' submissions made the point that vegetation must be "alive" when removed, arguing that removal of a dead log could not be a removal of vegetation. In that regard, in terms of preservation of native habitat, as I understand it from Mr Clarke's evidence the latter might well be an issue (in that the removal of dead logs/vegetation might still require consent). In any event, there does not seem any real dispute that part of what was cleared from the land was comprised in part of live weeds and native vegetation (see, for example, Mr Spence's evidence of the vegetation he had observed and the evidence of Dr Monks as to the "sappy" branches of trees which were on the land).

291 Sixthly, there was raised a question as to the "purpose" of the clearing activities. At this point there seemed to be some internal contradiction in the submissions put for Mr Brand. In his closing written submissions, Mr Jacobs accepted that it was a fundamental part of the *actus reus* of the alleged offence that the removal of vegetation be for the "purposes" of agriculture or subdivision. In his oral submissions, if I understood them correctly, it was submitted that Mr Brand's purpose was irrelevant as the offence was one involving no *mens rea*. Mr Jacobs submitted that, insofar as the defence pleaded that removal of trees and rainforest vegetation for the purpose of agriculture (or presumably subdivision) that would formerly have been demurrable as the purpose was "quite irrelevant".

292 It seems clear that, in order to constitute the offence alleged, the "development" said to have been carried out without consent (here, said to be the removal of weeds and vegetation) must be "for the purposes of", relevantly, either agriculture or subdivision. Mr Brand's intention to do that act might not be in issue but the purpose of the act is a necessary ingredient of the offence. In any event, Mr Faulkner accepted that the obligation was for the defence to show the state of mind of the plaintiffs, insofar as it must be shown that the "development" was for the purpose of a subdivision so that it is not necessary for me to determine whether an objective purpose would suffice.

293 For Dr Monks, it is said the inference should be drawn that the purpose of the clearing was for subdivision, having regard to the retainer of Dr Monks, the admission by Mr Brand that he was clearing the land to get it ready to put "on the market", and various matters contained in the affidavit evidence of Mr Hayes, Mr Spence and Mr Scorgie. (There seems also to be a tacit admission, by reference to the pleading, insofar as the damages sought are for loss of a chance to subdivide and sell, since had there been no such intention there could logically have been no damage as claimed.) Hence, perhaps, the alacrity with which Mr Faulkner adopted the oral submission by Mr Jacobs that clearing was absolutely necessary if the property were to be subdivided.

294 A comparison between Exhibit 8 (the July 2004 plan) and Map 7 annexed to Mr Clarke's affidavit (the changed bushland boundaries in May 2004) reveals the extent of the clearing. It is difficult to resist the conclusion that, in the circumstances, this clearing was for the purpose of the planned subdivision (the preparation for which was proceeding at the very same time).

295 Further as to the "purpose" of the subdivision, the submission in due course put for the Brands seemed to be that unless, by the weed removal, there was a division of the land into two or more parcels (or the weed removal was necessary to facilitate this), then there was no relevant "purpose". It seems implicitly to be conceded that the weed removal was or may have been for the purposes of sale of the land (para 6.3 submissions in reply) but it is said that is not the same as being for the purposes of subdivision, even though it seems clear that the contemplated sale was of the site with the benefit of an approved subdivision application.

296 Mr Brand was adamant in his denial that the land clearing activities were in an attempt to increase the number of lots in the subdivision or with a view to putting the land on the market for subdivision (T 108.44). He said that he did not recall saying he was getting it ready to put on the market and that he was "merely trying to clear this property up at that time because it was – it had truckloads of rubbish all over it" - T 109. Mrs Brand, however, accepted in cross-examination, that what was occurring was that the land was being prepared for the purposes of subdivision and sale.

297 Having regard to the urgency inherent in Mr Brand's apparent unwillingness to accede to his consultants' request in early 2004 that he stop clearing in order to allow the reports to be finalised (whether or not he was then looking to put the property then on the market), notwithstanding the advice by Dr Monks that this was going to delay and potentially add to the cost of the preparation of the subdivision application, it defies belief that the rubbish and weeds, which it seems had been left on the property for some time, were suddenly being removed in May 2004 simply for agricultural purposes or by way of some form of belated or overdue maintenance of the farm.

298 Mr Jacobs placed some weight on the fact that Mr Clarke, in the witness box, said that he could not understand and had never understood why Mr Brand would be clearing the vegetation on the site or how "taking trees down" would assist the subdivision. In the context of his answer (from T263) Mr Clarke seemed to be referring to what would assist the prospect of obtaining approval for the subdivision. Mr Clarke seems to have been of the view, given his general comments about the bush regeneration, that the value of the land as subdivided or the prospect of approval would be enhanced by compliance with bush management policies. In that context his statement that he could not see how removal of the vegetation would assist those prospects is readily explicable. In any event, I fail to see how Mr Clarke's opinion as to whether this activity was for the purpose of subdivision assists me in determining the issue.

299 I find it difficult to accept Mr Brand's evidence that the proposed subdivision simply did not enter his mind (T111.50) when he was carrying out the extensive clearing activities at the same time as his surveyor was drawing up plans for subdivision and his town planning consultants were mapping the area for the purpose of lodging in due course a development application for subdivision of the (on this hypothesis fortuitously cleared) land.

300 Mr Jacobs himself seemed to accept that some measure of clearance of the land would be necessary for subdivision. He posed the rhetorical question "How are they going to divide this into blocks without clearing it?" (T396.15). If so, then whatever the subjective purpose of so doing, surely the objective purpose of the activity in question must be seen to be that of preparing the land for subdivision and sale.

301 The real point of contention seems to have been whether the immediate purpose of the clearing was for subdivision or whether the fact that the land had been cleared may have been of benefit to a subsequent subdivision is at all relevant. While it was conceded (at T396.20) that what Mr Brand was doing was clearing the site and that he intended if he obtained development consent to subdivide it "one day", nevertheless it was said that this was not development for the purpose of subdivision because this was not a subdivision. The evidence as to when Mr Brand intended to market the land was not clear. His pleaded claim was for loss of the opportunity to subdivide and sell in 2004-2006, ie for sale with the benefit (or so he presumably assumed) of an

approval for subdivision. If so, then I find it hard to see how the clearing activities could not be said to be for the purpose of subdivision.

302 Had the removal of vegetation/weeds constituted "development" within the meaning of clause 5(2) of IDO 122, I would have been satisfied that it was carried out in this case for the purposes of the proposed subdivision of the land.

303 Seventhly, a more difficult question raised by Mr Jacobs was whether the defendant had established a prima face case that any weeding/vegetation removal (assuming it was a "development" which required consent) was carried out without consent.

304 Mr Brand relied on various consents, the first of which was a consent to use the land for agricultural purposes said to have been obtained in about 1980 after he acquired the land. Mr Chestnut gave evidence that he had searched the Council's records but had been unable to find a record of consent to underscrubbing (T196). He confirmed that it was not the Council's policy to give oral consents (T195).

305 It was submitted that Mr Brand had rights of existing use for the purposes of agriculture and that there was no evidence that these had been altered. It was further submitted by Mr Jacobs that use for agriculture "obviously embraced" the elimination of weeds by mechanical means. In any event it was submitted that it was for the defendant to prove that the existing use for agriculture *precluded* weed removal, underscrubbing or slashing of weeds by mechanical means.

306 Mr Jacobs submitted that the defence bore the onus of showing that what was done was outside the parameters of the consent (or existing use rights) which Mr Brand says he had for the use of the land for agriculture. There was no apparent dispute by Mr Scorgie T 241 that mechanical clearing would be acceptable on historically cleared paddocks. However, what Mr Scorgie did not suggest was that clearing otherwise than on historically cleared paddocks was permissible T 244.32/33). It was noted that sections 106 and 107 of the EPA Act preserved historical use rights.

307 *Council of the Shire of Eurobodalla v Caldak Pty Limited and Towrang Park Pty Limited* (1990) NSWLEC 14 was relied upon for the presumption that, if consent was granted for agricultural purposes, that consent would apply to the whole of the property and extend to all activities that were part and parcel of agricultural use. In that case the allegation was that certain development (road works) were carried out without consent. There, development consent had been given for subdivision. The conditions of development consent made it clear that the subdivision would require construction of road works. Bignold J found as a fact and held as a matter of construction that Council had granted development consent for the carrying out of the subdivision including the roadworks and construed that development consent as being for subdivision of land including creation of new roads. It was not construed as grant of development consent subject to grant of a further development consent re roads.

308 In reliance on that authority, it was said that for Dr Monks to rely upon some qualification or restriction in the agricultural use consent to make weeding unlawful, she must prove that there was such a restriction and that she did not do so.

309 It seems to me that, rather, the question is whether an approval for agricultural use would encompass activity of this kind in areas not required for agriculture use (such as the area extending into the gully). There was some evidence of the Council's understanding of the position from Mr Chestnut and Mr Scorgie.

310 As I understand it, Mr Jacobs submits that what was removed was vegetation "around the edges" of one of the paddocks and, perhaps, going into the gully; not removal of vegetation in and on the paddocks. Mr Jacobs relied on *Eurobodalla* for the proposition that a separate consent is not necessary for works encompassed within a development consent. However, it is by no means clear to me that such removal would be an obvious incident of the use of the land for agriculture (since the area so cleared would seem to be on the edge of any pasture). There was no evidence that a consent to carry on agriculture on the property would carry with it by necessary implication a consent to the removal of weeds/native vegetation (particularly not those directly affecting the paddocks to be used for agriculture, as it seems the areas near the gully would not be).

311 It seemed to be suggested that because of existing rights of agricultural use and whatever may have been contained in the missing development consent for farming purposes, Mr Brand had permission to do whatever he liked on the land as long as it could be suggested that this was for agricultural use or was an activity that a farmer would undertake in the context of operating a farm. I have reservations about this.

312 Surely, if the clearing/underscrubbing activity was not directly related to agricultural use, then the absence of any actual consent for such an activity (ie the weed/vegetation removal or clearing/underscrubbing) would, prima facie, mean that the activity was without consent.

313 That seemed to be Mr Scorgie's understanding. He gave evidence that a farming approval could operate without extending to the removal of native vegetation (T245.25). He said that his understanding of the Bushland Management Plan (compliance with which was required under the existing dwelling consent) was that it allowed Mr Brand to continue existing agricultural use in the historically cleared paddocks but that the areas that had contained native vegetation were to be allowed to re-establish themselves (T241). His recollection of the area cleared in November 2003 was that it was not an area of native vegetation along the paddock boundaries (T247). (That also seems to be the explanation for what Mr Jacobs suggested was an inconsistency in the position adopted by Mr Clarke and Dr Monks in that they did not seem at first to take issue with at least some degree of mechanical clearing or slashing of weeds.)

314 In the absence of a written document recording development consent for agriculture, I cannot be certain what was or was not expressly permitted by any such approval.

315 There are, however, two matters which lead me to doubt that the removal in question was permitted by any agricultural use consent.

316 First, I consider it relevant that Mr Brand himself seems to have considered it necessary to obtain such consent when he approached Mr Rose in around 1985 seeking consent to clear the undergrowth and later, when Dr Monks and Mr Clarke raised this issue with Mr Brand, he did not suggest that he had approval to remove the vegetation as an incident of his approval for agricultural use (or that he did not require such approval because of that earlier consent). I approach with caution Mr Brand's assertions as to the fact of approval, given the alacrity with which he seems to have overstated the scope of the later bush hazard reduction certificate. In other words, I cannot place weight on Mr Brand's assertions as to the content or ambit of the historical approval for agricultural use given his tendency to overstate the import of later approvals which were in evidence.

317 Secondly, whatever the agricultural use approval may have permitted (or at least not expressly excluded), the subsequent consent in 1999 in relation to the dwelling required compliance with a Bushland Management Plan which in its terms appeared to recommend strongly against mechanical clearing. Mr Brand accepted that he had been aware of the development consent and that it had conditions of consent since 1999 but said that he had never had to have regard to those conditions (T 83).

318 A copy of that development consent was in evidence. Clause 19 provided that "the approved Bushland Management Plan and any ongoing maintenance and management works identified therein, must be adhered to at all times" and that, under the heading "use of machinery", there was a recommendation that machinery not be used. Mr Jacobs stresses that this was not, in its terms a prohibition on mechanical clearance. Nevertheless, when one notes that the terms of the consent required adherence *at all times* to a plan that stated "The use of machinery is not recommended *under any circumstances*" (my emphasis) it seems to me there is a reasonable argument that the development consent required that such a recommendation be observed. Mr Brand conceded that he had completely ignored this recommendation (T 86.36). He accepted that he had not taken any steps to ensure adherence to the relevant parts of the plan (T84.36). In particular, he had not allowed the regeneration of grass paddocks to native bushland and had removed dead trees from the property (T 85).

319 Mr Chestnut considered that the existence of a development consent for agricultural use would have to be read together with other consents (T200/201). Thus, a consent for farming would not of itself permit native vegetation clearance. (Insofar as reliance was sought to be placed on an approval from Mr Rose for

underscrubbing) Mr Chestnut said that Mr Rose was not in a position to give a formal development consent (T203).

320 Mr Scorgie's position was that Mr Brand would have needed to have a consent both for farming (which it seems accepted that he did) and for removal of native vegetation.

321 Had the activity in question required consent, while the terms of the agricultural use consent were not in evidence, I would have considered that Dr Monks had established a prima face case of lack of consent for the clearing activities which were occurring not in the historically cleared paddocks.

322 Finally, Mr Jacobs raised issues as to the extent of the disclosure and whether it was necessary in the public interest (given the level of public awareness of the activities in question). Had there been a prima facie case that there was a reasonably tenable charge for breach of the EPA Act, then to disclosure to the Council of that perceived offence would, in my view, have been justified in circumstances where there were clearly reasonable grounds for Dr Monks to believe that if she said nothing to alert the Council to the perceived offence (and if no action were taken by the Council) it would be likely to continue. In *A v Hayden* it was recognised that the public interest does not in every case require the disclosure of the fact that a criminal offence has been committed, but here the perceived offence could not have been dismissed as trivial, in light of the potential penalty attaching thereto; and (if the clearing was illegal) there must have been a clear public interest in alerting the relevant authority with power to stop that offence.

323 On the public interest aspect, it is said that if the matter was already in the public domain then the defence of justification for disclosure of an iniquity does not lie. With respect, however, the fact that other locals might know about what was occurring would not in my view detract from Dr Monks' disclosure to the Council being in the public interest.

324 Dr Monks' letter to the Council clearly identified the activity being that of clearing or removal of vegetation. She excepts from that any clearing under what she had (apparently incorrectly) been told by Mr Brand was a local bushfire approval to clear from each side of his fences. Dr Monks had been advised by an ecological consultant, Mr Clarke, as to the restrictions he thought were applicable to the area, she had also been advised by Mr Payne that he had concerns as to there being a contravention. She had attempted to draw these to Mr Brand's attention and to secure his cooperation to stop clearing. Against that background, her initial letter of complaint of 20 May 2004 requesting that the Council take action to stop further clearing, seems to me to be a disclosure made in the public interest.

325 What is a more difficult question on this point is whether, in balancing the competing public interests, there was a public interest in Dr Monks disclosing the same conduct (in breach of any confidentiality obligation) when Dr Monks seems to have been aware that others had already reported the matter to Council. On balance, I would have answered this in the affirmative in that Dr Monks would seem to have been unclear as to what precisely had been communicated by others to the Council.

326 It is submitted by Mr Jacobs that even if public interest compelled some disclosure, all that could be justified (having regard to the covenant for confidentiality) would be the minimum disclosure – not the lengths to which it is said Dr Monks went in "urging and feeding" the prosecution. I think there is force in that submission (although I do not accept that it has been established that Dr Monks "urged" of "fed" the prosecution in the sense in which Mr Jacobs seems to have used those terms of inciting the prosecution. It appears to me that she did no more than make the initial report and then follow it up for a response).

327 Insofar as there was a public interest in disclosure, it can only have extended to disclosure of the facts comprising the perceived offence (not background matters and the like). In making her disclosure to the Council, it seems to me that Dr Monks went into some detail of the history of the matter which was not in my view, strictly necessary for a disclosure of the perceived offence (such as the fact that discussions had taken place on 5 May 2004 as to correct bush regeneration techniques or that Mr Brand had removed rubbish from the site or that he had made assurances to her in relation to the cessation of clearing activities). Surely, all that it was necessary for Dr Monks to say, consistent with the public interest, was that there was clearing of a nature which she considered to be in breach of the Act.

328 Therefore, had I been satisfied first that there was a breach of the obligation of confidentiality and secondly that Dr Monks could rely on a public interest defence (on neither of which I was in fact satisfied), I would have considered that this defence would apply only for such minimum disclosures as were necessary for the purpose of alerting the Council to her belief that a serious offence was being committed.

329 It would then have been necessary to ascertain whether any disclosure beyond that was of confidential information and, to the extent that there was such disclosure, then the public interest defence would not lie. That would potentially have given rise to different issues as to causation of damage (which were not argued before me). However, as it turns out, those issues do not arise.

*(v) Implied term*

330 Paragraph 2.2.2 of the Further Amended Statement of Claim pleads that it was an implied term of the Consultancy Agreement that if, during the course of Dr Monks' work, she came to the conclusion that the report that was in the course of preparation to support an application for a subdivision would serve no purpose "in that there was little or no prospect of any application to the Gosford City Council for permission to subdivide … being successful" she would make that fact clear to the Brands and only proceed if so instructed.

331 In Mr Jacobs' closing address, he relies upon the kind of terms as to cooperation commonly implied into contracts.

332 First, there is an implied term of co-operation of the kind recognised in *Mackay v Dick* (1881) 6 App Cas 251 at 263 that where parties to a contract have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to what is necessary to be done on its part for the doing of what the contract said had to be done.

333 Secondly, there is an implied term of the kind referred to in *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia* (1977-78) 139 CLR 54 at 61, per Barwick CJ that "a party to a contract made on the footing of the continuance of a state of things may not by any act within its power or control do anything to destroy or relevantly to diminish that situation". (I note that in *Southern Foundries (1926) Limited v Shirlaw* [1940] AC 701 at 717, Lord Atkin considered this to be not so much an instance of reliance on an implied term but on a positive rule of the law of contract that conduct which of the party's own motion brings about the impossibility of performance is in itself a breach.)

334 As noted by Mr Jacobs, in *Jackson Nominees Pty Limited v Hanson Building Products Pty Limited* [2006] QCA 126, McMurdo JA and Jerrard JA reached the same conclusion following different approaches by reference to the different kinds of implied term. Similarly, in *City of Subiaco v Heytesbury Properties Pty Limited* [2001] WASCA 140, Ipp JA accepted that both positive and negative terms were implied into the lease – that the lessor would at all times do all things necessary to enable the lessee to have the benefit of the lease and would not impair its rights under the lease.

335 However, it is also clear from those cases that some precision needs to be applied in determining what is comprised by any implied duty of cooperation and/or the obligations said to have become impossible to perform by the conduct in question.

336 I am not aware of a case where an implied term of the kind pleaded has been found to arise, nor was one drawn to my attention by Counsel. This is not a case where a step necessary to be fulfilled before a mutually agreed endeavour could be achieved. Dr Monks was engaged to prepare and submit a development application for subdivision. Dr Monks was consulted at the outset. Had subdivision been in her view physically or legally impossible to achieve, it might be thought that Dr Monks would have advised Mr Brand before accepting a retainer to prepare documents for that purpose. Dr Monks having accepted the retainer, I can envisage circumstances (such as where a change in town planning regulations made any future subdivision in the area impossible) in which it might be said that Dr Monks would have had an implied obligation to advise Mr Brand that any subdivision application was now futile. However, I think that such an obligation would be more

likely to be based in a duty of good faith, than an implied duty of cooperation of the kind pleaded. In any event, there is no evidence that such a situation had arisen.

337 Even if such a term were to be implied in the contract, there is no evidence that Dr Monks ever formed the view that the subdivision application had little or no prospect of success. I was taken to Dr Monks' emails to Mr Clarke, from which it appears that Dr Monks had in mind the possibility of a prosecution and of remedial or restoration orders of some kind, but there is nothing to suggest that she believed a subdivision application could not in due course have been successful.

338 Rather, this consequence seems to have been one which was assumed by the Brands, and that assumption is reflected in a plethora of assertions to that effect in the submissions: the suggestion (unsupported by any evidence) that Dr Monks "continued to 'work' and to take money for a subdivision application that she had doomed by her own hand", (opening address para 6.4(e) closing address para 10.6); that "she knew that the subdivision would be frustrated", that she prepared "for a development application that she had scuttled" (opening address para 6.4(f); and that her letter of 20 May had "cast a pall over the development application for subdivision" (opening address para 6.2(r)).

339 As for any implied duty not (by her own motion) to render impossible or impair the prospects of subdivision, not only was none pleaded but also I am by no means satisfied that the facts establish that this subdivision application was doomed to failure whether in 2004 or later (let alone that it was doomed to failure by anything beyond Mr Brand's own conduct). Mr Brand seems to have formed the view that this was the case and chose not to submit the development application in late 2004. No one was called from the Council to give evidence as to the prospects of approval still being available (subject to the rectification or restoration of aspects of the land).

340 I am not satisfied that the term pleaded in clause 2.2 is one which meets the business efficacy test or which should otherwise be implied into the contract.

341 Accordingly, the claim based on an implied term fails both for the reason that I do not consider that any such term should be implied into the contract, and because I do not consider that, even if there were such a term, the evidence establishes any breach. I note that Dr Monks was not cross-examined as to the views, if any, she had formed about the prospects of the subdivision at the relevant time.

*(vi) Fiduciary obligations*

342 Mr and Mrs Brand contend that Dr Monks owed fiduciary obligations to them, arising out of her relationship with them as their adviser and, for the purposes of the lodgement of the proposed subdivision application which was to be in her name, their representative or agent. It is submitted that, by virtue of her engagement, Dr Monks "was, and was to be in the context of the application to the Council, the Plaintiffs' agent" (opening address para 11.3) and, in the particulars to paragraph 72 it is said that Dr Monks "represented them to the world in respect of [town planning] issues.

343 When making application to amend to include this claim, Mr Jacobs, perhaps tellingly, submitted that it was the existence of the confidentiality provision that elevated whatever the relationship was into a relationship that gave rise to a fiduciary obligation (T 35). If that were to be the basis on which a fiduciary relationship was pressed, then I would have had no hesitation in rejecting the submission. The mere fact that a person assumes a contractual obligation of confidentiality could not suffice to render that person a fiduciary (with the onerous obligations such a position would entail). If that were to be the case then a mediator agreeing to keep confidential the discussions within a mediation would automatically find himself or herself elevated to the position of fiduciary; a result which would be surprising to say the least. That cannot be so.

344 The more substantial basis on which Mr Jacobs submits that there was a fiduciary relationship is that he says that here there was a relationship of of trust and confidence or "confidential relationship" in the sense referred to by Mason P in *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41. Weight is placed on the fact that Dr Monks, it was said, was in a position of special power or opportunity

(having access that others would not both to the Brands' land and to private confidences on the part of Mr Brand as to his intentions, views, agreements and plans) as opposed to the asserted vulnerability of the plaintiffs (that being described as a vulnerability to "unfair dealings" or "traitorous conduct" on the part of Dr Monks).

345 Again, however, if access to personal or private information, which the recipient might be in a position to exploit for his or her own purposes is sufficient to establish a fiduciary relationship, then any person in a professional capacity providing advice to a client (and being privy to the client's private utterances) would seemingly be in a fiduciary relationship, since in all such cases it might be said that there was both access to private thoughts and some vulnerability to unfair dealing. This does not seem to me to be supported by the weight of authority. If it were the case, then it is hard to see why, for example, persons carrying on business as accountants or architects would not fall within the description of fiduciaries and yet historically that has not been the case. I see no basis for suggesting that Dr Monks became a fiduciary by reason of the engagement to prepare a subdivision application simply because, in so doing, she became privy to information in relation to Mr Brand's personal confidences. That must be the case in many a professional, but not fiduciary, context.

346 In Mr Jacobs' earlier submissions, handed up in the context of the amendment application (to which Mr Jacobs pressed me to have regard on the ultimate hearing), and in both his written opening address and his closing submissions, there appears the submission that, in writing to the Council, Dr Monks was not writing as a disinterested member of the public but "in her status as the [Brands'] adviser and representative" and that she was "effectively seeking to dob them in to the Council with the accusation being made from within the [Brands]' own fold, as it were". However, being "in the fold" (or "on the team") would not make Dr Monks a fiduciary any more than it would have made Messrs Clarke or Payne (or for that matter Mr Cahill, the surveyor retained to prepare the plans for the subdivision).

347 Mr Jacobs in at least three separate sets of submissions has contended that "It was in that status and relationship and the use of it, that the fiduciary character, *and its breach*, becomes clear and evident". If, thereby, it is suggested that whether there is a fiduciary relationship is to be tested by reference to the circumstances in which it is alleged it has been breached then that appears to me to be putting the cart before the horse. The fact that conduct might amount to a breach of fiduciary duty, if such a duty were to be owed, does not assist in determining the existence of the very fiduciary duty upon which the plaintiff relies for an allegation of breach.

348 The critical feature of a fiduciary relationship as recognised in *Hospital Products* was the undertaking or agreement to act on behalf of or in the best interests of another person in the exercise of a power or discretion which would affect in a legal or practical sense the interests of the other person.

349 Turning to the characteristics of the relationship between the parties in this case, reliance is placed by Mr Jacobs on the statement of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Limited* [1995] 2 AC 145 at 206 that:

> The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source) …

350 Macfarlan JA in *White City Tennis Club Limited v John Alexander's Clubs Pty Limited* [2009] NSWCA 114 at [86] said:

> It has rightly been said that "evaluation of contract terms between the parties is still the primary consideration in determining whether a relation is fiduciary. If there is a contract, and the contract allocates rights and duties between its parties, then fiduciary characterisation may be simple" (Glover J, *Commercial Equity: Fiduciary Relationships,* (1995) Butterworths, at [3.26]).

351 His Honour cited Mason P in *Hospital Products* as noting that in many situations it is the contract which is the basic foundation on which the fiduciary relationship is erected - "In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties".

352 In *White City*, however, the court was considering a situation where there were two joint venturers and the nature of the obligations which arose if an option was exercised. Here, the retainer of Dr Monks was first to prepare and then to submit (in Mr Brand's name) a subdivision application. Insofar as the latter task is concerned, I accept that Dr Monks would be acting on Mr Brand's behalf, and as his agent for a limited purpose and I will come back to that aspect of the relationship shortly. In relation to the former task, it is difficult to see how it could be said that she was acting in any way as a fiduciary.

353 The present relationship is not one which falls within the traditionally recognised categories of fiduciary relationship, nor was it in my view one characterised by a sufficient relationship of trust or confidence so as to give rise to any fiduciary obligations. Dr Monks had an implied obligation to use her professional skills in the interests of her clients but this was not a relationship where Dr Monks had assumed an overriding loyalty to her clients or obligation to act in her clients' best interests over and above her duties as a professional town planning consultant. It was not established, for example, that Dr Monks had any power or discretion vested in her which she was able to exercise without reference to Mr and Mrs Brand. It was not suggested that Dr Monks was in a position to commit Mr and Mrs Brand to any financial obligations to the Council in relation to matters relating to the subdivision or to amend the substance of the plans for subdivision (as opposed to, say, the payment of consultants' fees retained by her on their behalf or the like - as to which she, perhaps surprisingly, seems to have indicated that at best she might consult with Mr Brand).

354 It was submitted that Dr Monks had an obligation to act in the best interests of Mr Brand; to keep his affairs confidential (something already covered by the contract between them and not suggestive of any overriding fiduciary duty) and not to allow her interests to conflict therewith (the latter seeming to assume the nature of the very relationship which is in issue). Mr Brand, however, seemed to recognise and sum up neatly the scope of Dr Monks' involvement in a far more limited way – he said that she was there to prepare a plan of subdivision for him (T 55.17) and not to go anywhere near the Council except as a last resort (T 56.38).

355 In *Michael Wilson & Partners Limited v Robert Colin Nicholls* [2009] NSWSC 721, Einstein J noted not simply that contractual and fiduciary relationships may co-exist but that "in such a case the fiduciary relationship must conform to the contract". His Honour noted that in such a case the fiduciary relationship "owes its existence to the relationship of trust and confidence that exists between the parties so as to attract a reasonable expectation of loyalty: *Gibson Motorsport Merchandise Pty Limited v Forbes* (2006) 149 FCR 569 at 574-575, per Finn J; *Rawley Pty Limited v Bell (No 2)* (2007) 61 ACSR 648 at 710-711 [261]". Here, I am not satisfied that there is such a relationship of trust and confidence as to attract any loyalty over and above that arising as an incident of the contractual relationship.

356 In *Breen v Williams* (1996) 186 CLR 71 at 94-5 Dawson and Toohey JJ said that a fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction. There, a duty to exercise reasonable care and skill in the provision of professional advice was recognised as being not the same as a general duty to act with utmost good faith and loyalty; thus the court considered that the imposition of a fiduciary duty always to act in the client's best interests was one which would conflict with the narrower and tortious duty which the defendant doctor in that case had undertaken.

357 Ms Chan, whose submissions on this issue both on the amendment application and at the hearing I considered had considerable force, submitted that this was not a case in which Dr Monks had pledged herself to act in the best interests of the owner (as was seen to be the essence of a fiduciary relationship in *Norbeg v Wynrib* [1992] 2 SCR 226 at 272 approved in *Pilmer v Duke Group Limited (in Liq)* (2001) 207 CLR 165 at 197). It seems to me that this is correct. A consideration of the contractual terms does not suggest that Dr Monks was assuming an overriding duty to act in the best interests of Mr and Mrs Brand. She was retained to prepare a subdivision application. Clearly she had a duty to act in their interests in a professional sense (and to exercise her skills in their best interests in carrying out her tasks) but only consistent with her own professional duties (analogous to the situation in *Breen*). Dr Monks, I would have thought, would be expected to advise Mr Brand as to the way in which his development application should be prepared in order to have the best prospect of success, but I cannot see that she had any overriding duty of loyalty or that she was in a position to exercise any power or discretion on his behalf.

358 To test the proposition, it would surely not be suggested that the surveyor retained by Mr Brand owed him fiduciary obligations in the preparation of the survey plans. Yet he, too, would have been expected to act with Mr Brand's interests or best interests in mind when preparing those plans, consistent with his own professional obligations and duties. Both Dr Monks and Mr Cahill would presumably have considered themselves free, nevertheless, to prepare development applications or survey plans for one or more of Mr Brand's neighbours which he might not consider to be in his best interests and they surely could not have been restrained from so doing absent some clear basis in the contract for that to be the case.

359 Accordingly, I can see no basis for the suggestion that in the performance of her tasks as a town planning consultant in the preparation of the development application Dr Monks owed any fiduciary obligations to Mr Brand. This was no more and no less than a contract to provide professional consultancy services.

360 I have considered whether the fact that Dr Monks' retainer extended to the formal submission or lodgement in due course of the development application (and potentially any facilitation or negotiation in relation thereto, as adverted to in the fee quotation prepared by Dr Monks) would of itself give rise to fiduciary obligations. Certainly, Mr Brand would at that stage be reposing trust and confidence in Dr Monks' professional ability to present his application in the best possible light and to exercise her skills on his behalf and in the best interests of his application succeeding. It is by no means clear, however, that in so doing Dr Monks would have been able to commit Mr Brand to any particular obligation or outcome viz-a-viz the Council (as opposed to putting his case for the application and then conveying to him any amendments sought by the Council or the like).

361 Again I find it difficult to see that there is anything in this relationship even by the time it reached a presentation to the Council which would go beyond the situation where a level of trust and confidence would ordinarily be reposed in, say, a professional surveyor or architect to perform his or her contracted services in a competent manner with a view to securing the best outcome for the client on the basis of the client's instructions and consistent with his or her ethical and professional obligations. If I were to be wrong on this then any fiduciary obligation so arising would in my view have to be one of an extremely limited nature by reference to the contractual task Dr Monks was retained to perform. Therefore, but for the fact that the contract provided for the development application to be submitted in Dr Monks' name I would have found no basis for concluding there was any fiduciary relationship. As it is, I consider that remains the position even though it was contemplated that Dr Monks would lodge the development application in her name (and thus act as Mr and Mrs Brand's agent for the purpose of the formal submission and any presentation to the Council of their application). Any conceivable fiduciary obligation owed as such an agent would be very limited and must be construed in conformity with the overall contract.

362 Further, any fiduciary relationship arising as an incident of that limited agency, or founded on that aspect of the contractual relationship, would in my view be temporal insofar as it would arise only in connection with the submission of the development application.

363 Here, no development application was ever submitted. Dr Monks is in the position of someone who might have been required at some future time to act as an agent and for a limited purpose. Until the agency commenced, I do not consider that Dr Monks would have owed any fiduciary obligations to the Brands in relation to its operation. If I be wrong in this, and the fiduciary obligation arose at the outset of the contract (even though no steps were taken or required to be taken at that stage as the Brands' agent for the submission of the development application) any fiduciary obligation so arising is not one which would give rise to an overriding duty positively to act in the best interests of Mr Brand; relevantly, it could be no more than a duty to avoid a conflict or potential conflict of interest and duty. (A duty not to make any unauthorised profits is not relevant in the circumstances of this case as it is not suggested that any was made.)

364 The fiduciary duties alleged in the pleading (para 7.1) were:

(a) not to exercise, utilise, or otherwise enjoy any power or other opportunity that arose from or in connection with the Defendant's engagement by the Plaintiffs that would go to:

(i) the Plaintiffs' detriment or affect the Plaintiffs' interest in any way other than a positive way;

(ii) the advantage of the Defendant or any other person.

365 In *Pilmer v Duke*, however, it was said that fiduciary obligations are proscriptive rather than prescriptive in nature, not imposing on a fiduciary a quasi-tortious duty to act solely in the best interests of the principal.

366 Had I found there was a fiduciary relationship, therefore, it would have been one limited to the implied agency arising at the time of, and solely in connection with, the proposed lodgement and presentation of the development application by Dr Monks on Mr and Mrs Brand's behalf and in their name. (However, I do note that any such role seemed to be disclaimed by Mr Brand or at least inconsistent with the role Mr Brand saw Dr Monks as having – that being just one to prepare the development application. While Mr Brand's view does not determine as a matter of law the characterisation of their legal relationship, it does indicate very starkly that the level of trust and confidence recognised as being the hallmark of a fiduciary relationship is noticeably lacking in this case.)

367 I therefore find that there was no fiduciary obligation owed to Mr and Mrs Brand.

368 I should note that, had there been a fiduciary relationship between the parties, then the issue as to whether there was a real or sensible possibility of a conflict of duty and interest (or between duty and duty) would have arisen for consideration. In this respect, while not expressly pleaded in such terms it seems that what was asserted was that Dr Monks had a duty to avoid a conflict between her interests and those of Mr and Mrs Brand. The content of any personal interest which may have come into conflict with her duties to her client was a matter as to which there was some imprecision.

369 It was initially submitted by Mr Jacobs that the relevant conflict was either one between Dr Monks' personal interests in the area of bush preservation and her duties to Mr and Mrs Brand or one between her duties to the Brands and her personal interest in obtaining more fees from Mr and Mrs Brand (either to complete the project or perhaps to earn future fees by way of the provision of any services required by Mr Brand if the Council ordered him to take restitutionary measures).

370 As to the first, Mr Jacobs formally withdrew the allegation that Dr Monks had breached her fiduciary duties by urging the prosecution of Mr Brand "for the advancement of the Lobster Bay Bushland Society of which she was a member." However, what remained pleaded was the allegation that she did so (ie urged the prosecution of Mr Brand) "to enhance the goodwill of her business in general and the enhancement of her relationship with [the Gosford City] Council" (paragraph 7.4).

371 There was no evidence to sustain the allegation that Dr Monks had urged the Council to prosecute. The evidence went only so far as her asking Council to take action to prevent further clearing. That could presumably have been done by a notice of the kind issued in June 2004 in relation to the sedimentation measures.

372 Nor was there any evidence that action of this kind was done in order to enhance the goodwill of Dr Monks' business or her relationship with the Council or indeed that such action had the potential to do either.

373 As to any personal interest Dr Monks may have had in relation to earning further fees, while there are some troublesome aspects of what occurred in relation to the issue of fees (insofar as the correspondence suggested that Dr Monks might have chosen to disclose nothing of her actions viz a viz the Council in order not to jeopardise her ability to recover fees) nothing was pleaded to this effect. Mr Jacobs pointed to the correspondence in which Dr Monks encouraged her subcontractors (at around the same time as she was contacting the Council request it to take action for the clearing to stop) to render their accounts, pressed ahead for the finalisation of reports and foreshadowed the possibility of future fees in the event that the Council

required restitution of the land. I consider this in more detail when considering the allegations of unconscionable conduct.

374 In the context of the alleged fiduciary duties, on one view there is inevitably a potential conflict of interest where a professional is in a position to recommend that steps be taken at the client's cost in circumstances where those fees will be to the professional's personal benefit. The fact that Dr Monks may have anticipated that in some circumstances (such as if the Council took action and if the Council required restoration and if Mr Brand chose to retain her to provide whatever services were necessary to effect the restoration) then she might perhaps personally profit therefrom does not lead me to conclude that there was a real and sensible possibility of conflict or that Dr Monks contacted the Council in order to procure that hypothetical end result.

375 It was submitted that Dr Monks had nominated or proposed to nominate for any hand weeding people who had similar philosophies to her as contractors, which her relationship with Mr Brand gave her an opportunity to do (see para 13.1(d) submissions) and that Dr Monks exploited this opportunity or her status as Mr Brand's adviser and representative in making the complaint and in her telephone calls with Mr Hayes and Mr Spence. How that is said to have occurred is not apparent to me. There is nothing to suggest that Dr Monks conducted herself viz a viz the Council or those who rang her to complain of the clearing in any way to further her own position.

376 It is submitted that Dr Monks' engagement gave her and her subconsultants the opportunity to "craft" and make out a case against Mr Brand for the prosecution authorities, even to the extent of specifically drawing a report to "advance a punitive restitutionary claim" that Dr Monks imagined would be made against Mr Brand. I do not accept that such a claim is made out.

377 Assuming for the sake of argument that a fiduciary duty had arisen, in conformity with the contract on the part of Dr Monks to avoid conflicts of duty/interest and duty/duty, the point at which such a duty arose must in my view have been when Dr Monks formed the view that as a matter of public duty she was obliged to report the clearing activities to the Council. In *Pilmer* it was said that there must be a real and sensible possibility of a conflict in this case; the test of the existence of such a conflict being objective.

378 If, as on Dr Monks' case they must surely be, the duties were inconsistent or irreconcilable, then as a fiduciary what would she be required to do? In *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187) it was said that what action, if any, a fiduciary must taken *beyond disclosure* (ie to the beneficiary) will vary depending on the circumstances of the case. At the very least, if there had been a fiduciary duty, I would have thought that Dr Monks should have disclosed to Mr Brand that she intended to notify the Council of his actions and to lodge a formal request for intervention by the Council. If, in the need for urgency, such disclosure could not take place before notification to Council then it should have taken place immediately thereafter (but, here, given that Dr Monks waited over the weekend before faxing the letter to the Council there would have been ample time for her to contact Mr Brand to warn him of what step she was proposing and felt duty bound to take).

379 Dr Monks' response in the witness box was, in effect, that she had alerted Mr Brand to the difficulty in which his conduct was placing her (T 313.40) but it is by no means apparent that this was squarely brought to his attention.

380 It therefore seems to me that if there had been a fiduciary duty to avoid a conflict of interest it would not have been the disclosure to Council per se which would have constituted breach of any fiduciary duty owed to the Brands, but rather the failure to disclose the making of that disclosure to Mr Brand (and the continued provision of services thereafter) in circumstances where there would then seem to have been a real and sensible possibility that the proper exercise of Dr Monks' duties to her client would require her to alert him to what she had done – and thus put him on notice of facts from which he could form a view as to the prospect, that further work on the development application might prove futile).

381 At that stage I think it could have been said that insofar as Dr Monks' personal interest in obtaining payment for her and her sub-contractors (for whose fees I would infer she would have been directly liable

having regard to the terms of her contract with Mr Brand) both for work to that date and thereafter would have placed her in a position of potential conflict with her duty to the client.

382 Nevertheless, for the reasons above I find that the fiduciary duty claim fails.

*(vi) Unclean hands*

383 Any equitable compensation for the breach arising out of a failure to disclose to Mr Brand her conduct viz-a-viz Council must, in my view, be limited to any loss suffered by Mr Brand as a consequence of him not being aware at that stage of the report to the Council, not as a result of the report having been made to Council.

384 In further answer to the entire Further Amended Statement of Claim, Dr Monks relies on a defence of unclean hands (paragraph 11.1). It is alleged further that Mr and Mrs Brand are not entitled to any of the relief claimed in these proceedings by reason of the doctrine of illegality – namely that to establish the alleged breaches of contract, breaches of fiduciary duty are contravention of s 43 of the *Fair Trading Act*, Mr and Mrs Brand have to rely upon the crime (paragraph 17).

385 It is submitted that here the alleged crime has an immediate and necessary relation to the equity sued for, reliance being placed on *Black Uhlans Inc v NSW Crime Commission & Ors* [2002] NSWSC 1060; *Carantinos v Magafas* [2008] NSWCA 304; *Kation Pty Limited v Lamru Pty Limited* [2009] 257 ALR 336.

386 Here, what is the equity which (absent clean hands) the court would be prepared to uphold? Had there been a fiduciary obligation owed, then the answer would be that what the court would not permit would be a claim for equitable compensation for breach of that fiduciary duty (here, the breach being said to be the disclosure of conduct amounting to a serious environmental offence) if to do so would permit the plaintiffs to benefit from their conduct in that very offence.

387 Hodgson JA in *Carantinos* confirmed that there are strong policy reasons why courts should not assist anyone to benefit from illegal conduct.

388 In this case, therefore, if there had been illegal conduct in the clearing of Mr Brand's land which resulted in his prosecution and the value of his land was thereby diminished, then to allow Mr Brand to claim equitable compensation by reference to the cost of the prosecution or the diminution in land value would be in effect to allow him to make good the losses suffered from (if not in financial terms profit from) his unlawful conduct . To allow his claim does not further the illegal purpose but in effect it would shield him from the consequences of that unlawful conduct.

389 It was suggested (para 1.10) that Dr Monks was inviting the court to hold that there cannot be a breach of confidentiality unless the complaining party admits the correctness of the information disclosed. That is not, as I understand it, the thrust of the submissions made by Mr Faulkner in relation to illegality. Rather it is said that if, in order to sustain a claim to damages in reliance on the "extended" activities observed by Dr Monks (and those prima face amount to a serious offence) then the doctrine of unclean hands would preclude Mr Brand making any claim for equitable relief in relation to the disclosure and there is a public interest defence in respect of any breach of confidence comprised by the disclosure.

390 However, in circumstances where I have not found that there was a reasonably tenable charge of crime, the mere fact that Mr Brand may have acted otherwise than in accordance with best practice bush regeneration policy would not enliven a clean hands defence.

391 Had I found there was a fiduciary duty which had been breached by non-disclosure by Dr Monks of her report to Council, I would have held that equitable compensation be paid in the sum equivalent to the fees paid for work rendered after 20 May 2004, when Dr Monks first made contact with the Council.

(viii) Fair Trading Act claim

392 In the alternative to their claims for breach of contract and breach of fiduciary duty, the Brands allege a breach of s 43 of the *Fair Trading Act*, on the basis of the contention that Dr Monks has (in trade or commerce and in connection with the supply of goods or services to a consumer) engaged in conduct that is in all the circumstances unconscionable.

393 When considering the notion of unconscionability under s 43, regard can be had to those cases where a breach of s 51AC is considered – per Campbell JA in *Kowalczuk v Accom Finance* (2008) 252 ALR 55. Section 43 parallels the former s 41A of the *Trade Practices Act* 1974 (Cth) (which was later replaced by provisions including s 51AC which is addressed to unconscionability in the context of business transactions).

394 By analogy with s 51AC, it is suggested by Mr Jacobs that s 43 unconscionability involves broader concepts from those derived from the general law, reference being made to *ASIC v National Exchange Pty Limited* [2005] FCAFC 226; *AG (NSW) v World Best Holdings Pty Limited* [2005] NSWCA 261. In *World Best*, Spigelman CJ, said that "Unconscionability is a concept which requires a high level of moral obloquy", suggesting that it was not equivalent to conduct that was fair or just.

395 In *Canon Australia Pty Limited v Patton* (2007) ATPR 42-183 Campbell JA considering s 51AC said that for conduct to be regarded as serious misconduct "something *clearly unfair or unreasonable* must be demonstrated" – *Cameron v Qantas Airways Limited* (1994) 55 FCR 147 at 179" (my emphasis). His Honour referred to the dictionary definition of "unconscionable" as "showing no regard for conscience" or "irreconcilable with what is right and wrong".

396 What is the alleged unconscionability in this case?

397 In Mr Jacobs' closing submissions (which mirror his opening address in this regard) it is submitted that it is the "exploitation" of the opportunities given to Dr Monks and her sub-consultants and paid for by Mr and Mrs Brand "to make out the case against [Mr Brand] for the prosecution authorities". It is submitted that Mr and Mrs Brand "armed [Dr Monks] with the means to cause them trouble, and to cause the Council to pursue them with a vigour which was, on context, little more than an environmental crusade on the part of [Dr Monks] and her advisers in pursuit of their own philosophies"; which it was said left Mr and Mrs Brand vulnerable to exploitation.

398 Leaving aside Mr Jacobs' rhetorical flourish, the complaint made by Mr and Mrs Brand is that Dr Monks (having accepted the engagement, having undertaken an obligation of confidentiality, and having "offered to him a relationship of confidence") should not have used that information for any other purpose than for the benefit of Mr and Mrs Brand and the fulfilment of her retainer (see para 13.4 opening address/closing address).

399 Significantly, however, the conduct allegedly giving rise to the contravention of s 43 is pleaded in the Further Amended Statement of Claim in paragraphs 3.1 and 3.2 (namely the disclosures to the Council and conduct related thereto alleged criminal conduct and urging the Council to prosecute Mr Brand). Nowhere in the pleading which was ultimately before me is the unconscionable conduct *pleaded* by reference to the fact that those disclosures were made "behind Mr Brand's back" (although this was a common refrain in oral submissions) nor is it any part of the unconscionable conduct *as pleaded* that Dr Monks continued to accept fees without having told Mr Brand what she (and/or her consultants) had done viz-a-viz the Council.

400 The particulars said to have been provided to paragraph 8.1 (which pleads loss of a chance to subdivide and make substantial profits) but which, it would seem, were intended to be particulars of the loss pleaded in paragraph 8.2, include the statement in (e) that: "It will be submitted that the Defendant's conduct was highhanded and deceitful in reporting [Mr Brand] behind his back, and continuing to take fees from him for the proposed subdivision, and was further reckless in the sense that with her qualifications she must have known that no offences had been committed by either Plaintiff".

401 This statement seemingly recognises the matters so particularised as having the status of a submission not being implicitly pleaded by way of a material fact.

402 Similarly, in a section headed "Particulars of the material provided", which contained the original particulars to paragraph 3.2 (k) of the pleading, it is said, inter alia, that:

> (ff) In that manner Mr Clarke, with the knowledge connivance and consent of [Dr Monks] would be able to finalise his work for the Brands, earn fees, and make serious complaints and assist in the prosecution of [Mr Brand] behind his back.
>
> (hh) Neither [Dr Monks], Mr Clarke, nor Dr Payne informed [Mr and Mrs Brand] of their conduct in supplying of documents or emails and communications to Gosford City Council, its officers, executives or solicitors at any time, and in urging the Council to prosecute [Mr Brand].
>
> (ii) Nor did [Dr Monks] Mr Clarke or Dr Payne inform [Mr and Mrs Brand] of the matters set out in sub-paragraphs 3.1 and 3.2 above.

403 It is submitted that "the continuation to act and accept fees, and all this without telling [Mr Brand] that he has, so to speak, been "dobbed in", *merely accentuated the unconscionable conduct of [Dr Monks] in disclosing false information concerning [Mr Brand]"*.

404 I note that it was also submitted by Mr Jacobs (though not pleaded) that the unconscionable conduct included Dr Monks lying to Mr Brand about her involvement with the Council when it intervened. Mr Jacobs submitted that Dr Monks "to serve her own interests, and continue to take substantial fees from him, whilst scuttling the very project in which she was engaged, blatantly and unashamedly lied" (Closing paragraph 13.6.3). However, Dr Monks denied the conversation in which Mr Brand said she had told him she had nothing to do with it, and was not cross-examined on that denial. In the circumstances, I cannot find that Dr Monks lied to Mr Brand about having had any communication with the Council.

405 Mr Jacobs, in the context of the plaintiffs' application to amend on 3 September 2009, urged upon me that particulars are not pleadings (by reference to the commentary in para 15.1.55 of *Ritchie's).* I accept that submission.

406 Scott LJ said the following of the role of particulars in *Bruce v Odhams Press Limited* [1936] 1 KB 697 at 712-713:

> The cardinal provision in r. 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" fact is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under Order XXV, r. 4: see Philipps *v. Philipps* 4 QBD 127; or "a further and better statement of claim" may be ordered under Order XIX, r. 7.
>
> The function of "particulars" under r. 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim - gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between a "material fact" and a "particular" piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence in the nature of things there is often overlapping. And the practice of sometimes putting particulars into the statement of claim and sometimes delivering them afterwards either voluntarily, or upon request or order, without any reflection as to the true legal ground

upon which they are to be given has become so common that it has tended to obscure the very real distinction between them.

407 Scott LJ returned to the subject of particulars in *Pinson v Lloyds and National Provincial Foreign Bank Limited* [1941] 2 KB 72 at 75-76:

> It is a well-recognized canon of pleading that the defendant need not, and, indeed, ought not to, plead to "particulars," whether contained in or delivered with the statement of claim. The reason for that canon is plain. All the material facts constituting the cause of action ought already to have been plainly stated in the pleading itself, as required by Order XIX, r. 4, the plainest and most fundamental of all the rules of pleading. The proper function of particulars is not to state the material facts omitted from the statement of claim in order, by filling the gaps, to make good an inherently bad pleading, however common that pernicious practice may have become. On this topic I made some observations in *Bruce v. Odhams Press Ltd*, and will not repeat them beyond saying that I still hold the opinion that it is not the function of particulars to take the place of necessary averments in the pleading. Their function is to put the opposite party on his guard and prevent him being taken by surprise at the trial of an action, the "material facts" of which should have been already averred. Nor have mere statements of evidence as such a place in particulars, any more than in the pleading, although the dividing line between statements which contain sufficient indication to prepare the opponent's mind for what he will have to meet at the trial and mere statements of evidence is sometimes hard to draw and should not invite meticulous criticism. The essential rules of modern pleading embody a common-sense view of litigation, and, if complied with substantially and in accordance with their real intention, are well calculated to keep the cost of litigation down. No doubt, it is often a question of degree and convenience whether details of material facts should be put into the body of the pleading or reserved for particulars, and this latitude is both preserved and limited by rr. 6 and 7 of Order XIX. Insufficient instructions are no excuse for bad pleading.

408 The principle that a defendant ought not plead to particulars was repeated by Pennycuick J in *Chapple v Electrical Trades Union* [1961] 3 All ER 612 at 614 in the context of an argument as to whether the defendant should have responded to matters contained in particulars which it was said could have been pleaded as material facts:

> The only safe course, it seems to me, apart perhaps from exceptional cases, is to adhere to the well-established rule which I have read out. It seems to me that a defendant should not be required to plead to particulars merely because, on analysis, it turns out that the particulars could equally or more appropriately have been included in the body of the statement of claim.

409 The distinction between the material facts of the case as pleaded and the particulars provided of those pleaded facts may be material in determining how to deal with deficiencies in pleading as recognised in *Rubenstein v Truth and Sportsman Limited* [1960] VR 473 at 476, while Adam J stated:

> Where, as in the present case, there has been a clear infringement of the rule as to stating all material facts and not merely a failure to give sufficient particulars of facts which have been pleaded (a distinction made clear by Scott, LJ, in *Bruce v Odhams Press Ltd*, [1936] 1 KB 697, at pp. 712-13; [1936] 1 All ER 287) the preferable course, I consider, in the interests of proper pleading is to strike out the offending pleading, with liberty to amend, rather than to order particulars. As Scott, LJ, said, at p. 713 of the judgment, the whole of which will repay study in this age of lax pleadings, 'in strictness, particulars cannot cure a bad statement of claim'.

410 More recently, in *Goldsmith v Sandilands* (2002) 190 ALR 370 at 371 [2],

Gleeson CJ stated:

> The facts in issue in a civil action case emerge from the pleadings, which, in turn, are framed in the light of the legal principles governing the case. Facts relevant to facts in issue emerge from the particulars and the evidence. The function of particulars is not to expand the issues defined by the pleadings, but "to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial".

411 In some cases, particulars which contain matters which ought properly to have been pleaded or which go beyond the scope of the pleading to which they refer may be treated, in effect, as amending the pleading and so expanding the range of matters on which the case may be decided. However, strictly speaking, particulars do not amend or expand the pleadings and it appears that when they have been allowed in effect to expand the scope of the case this is an application of the principle that are not strictly amendments or expansions of the pleadings, and whether they are allowed to expand the scope of the case itself will depend upon the general principles relating to circumstances in which the pleaded case is departed from, disregarded or enlarged.

412 In *H 1976 Nominees Pty Limited v Galli* (1979) 30 ALR 181, Northrop J, on a motion to strike out misleading an deceptive conduct allegations in a pleading, adopted the distinction drawn by Scott LJ and held that the particulars in questions could not cure the defects contained in the statement of claim:

> I reject the argument that the particulars given to para 17 of the statement of claim [by reference to three pages annexed to the pleading] should be treated as statements of material facts for the purpose of the Federal Court Rules. In themselves they are prolix and cannot be said to comply with O 11, r 3. They are confusing. It cannot be said that in themselves they contain statements of material facts which show the nature of the applicant's claim based on s 52 of the Act. If the particulars were allowed to perform that function, they would have a tendency to cause prejudice, embarrassment or delay in the proceeding and would constitute an abuse of the process of the court.

413 In *Southern Cross Exploration NL v All Risks Insurance Co Limited* (1985) 2 NSWLR 340 at 351, Waddell J considered a submission, based on a comment by Vaughan Williams LJ in *Milbank v Milbank* [1900] 1 Ch 376 at 385 that particulars under the Judicature Act are merely supplemental to the pleadings and are "in fact amendments of the pleadings", was authority for the proposition that the particulars in the case before him might validly have enlarged the allegations made by the statement of claim. His Honour noted that in his view *Milbank* was an instance of the distinction between particulars and statement of material facts in a pleading being blurred for practical reasons and said:

> In my opinion the authorities cited make it clear that a party is not entitled, in effect, to amend a pleading by giving particulars of further material facts. To permit a party to do so would be to allow amendment contrary to the rules which require, in various circumstances, the filing of an amended pleading, the consent of other parties, or the leave of the court. But it is possible that particulars in effect amending a pleading might be accepted by the opposite party and a proceeding might be conducted on that basis. In *Bruce v Odhams Press Ltd* and *Milbank* the parties seeking the particulars ordered could hardly afterwards complain of a deficiency in the pleading. Similarly, a party to whom particulars have been given which, in effect, amended a pleading, might have so conducted himself as to represent to the party giving the particulars that no objection would be taken to the case being conducted on the basis of them even though, strictly speaking, there should have been an amendment. In such circumstances any objection taken later might be cured by the granting of the necessary amendment.

414 Einstein J in *Travel Compensation Fund v Blair* [2003] NSWSC 720 at [29]-[30] said:

> Of course an applicant for leave to amend must satisfy the court that an arguable case has been properly pleaded. It may be taken as a given that "the plainest and most fundamental of all the rules of pleading" is that "all the material facts constituting the cause of action ought already to have been plainly stated in the pleading itself". [*Pinson v Lloyds and National Provincial Foreign Bank Limited* [1941] 2 KB 72 at 75; see also *H 1976 Nominees Pty Limited v Galli* (1979) 40 FLR 242 at 246-7]

> Further, whereas the object of particulars is to prevent the opposite party being taken by surprise at the trial of an action and to identify the issues of fact to be investigated at the hearing, it is simply not the function of particulars to take the place of necessary averments in the pleading of the material facts.

415 In *McFadzean v CFMEU* [2004] VSC 289 at [2607] (per Ashley J) and in *Shanmugaratnam v Strasburger Enterprises (Properties) Pty Ltd* [2004] NSWCA 229 (per Mason P, with whom Santow JA and Cripps AJA agreed) it was accepted that it is not for particulars to expand a pleading. Mason P in the latter case said:

> As a matter of strict pleading, particulars cannot enlarge a pleaded cause of action.

416 In *Ingot Capital Investments Pty Limited v Macquarie Equity Capital Markets Limited* [2008] NSWCA 206 at first instance McDougall J implicitly recognised that in some circumstances the parties might, by their conduct of the case, acquiesce in the widening of the pleaded case. There, however, various of the counsel for the various defendants had repeatedly stated that they were responding to the plaintiff's pleaded case from which the plaintiff ought not be allowed to depart.

417 So, for example, in the judgment at first instance, McDougall J said that "[i]n the present case, there can be no suggestion that the Macquarie parties, or for that matter any of the defendants who appeared during the hearing, acquiesced either expressly or by inference in any widening of the pleaded case against them. This was made clear on a number of occasions."

418 On appeal, Ipp JA considered the authorities and principles relevant to whether a party would be allowed at trial to depart from its pleaded case, nothing that:

> At trial, there may be a departure from the pleadings where adherence to them would be unjust or unfair. In *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279; 92 ALR 53; [1990] HCA 11 (*Banque Commerciale*) Mason CJ and Gaudron J said (at CLR 286–7; ALR 58–9):
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> > The function of pleadings is to state with sufficient clarity the case that must be met: In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities.
> >
> > Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference.
>
> Dawson J (at CLR 293; ALR 63) quoted the following statement by Isaacs and Rich JJ in *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517; [1916] HCA 81:
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> > But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.
>
> And observed: (at CLR 296–7; ALR 66):

> But modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon a basis which does not embrace the real controversy between the parties. Special procedures apart, cases are determined on the evidence, not the pleadings.

419 Ipp JA extracted the following propositions may be extracted from the authorities referred to above:

> (a) The rule that, in general, relief is confined to that available on the pleadings secures a party's right to a basic requirement of procedural fairness.
>
> (b) Apart from cases where the parties choose to disregard the pleadings and to fight the case on additional issues chosen at the trial, the relief that may be granted to a party must be founded on the pleadings.
>
> (c) It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground an inference that the parties have chosen a different basis to the pleaded issues for the determination of their respective rights and liabilities.
>
> (d) Acquiescence giving rise to a departure from the pleadings may arise from a failure to object to evidence that raises fresh issues — it is in this sense that "cases are determined on the evidence, not the pleadings".
>
> (e) While cases are to be decided upon a basis that embraces the "real controversy" between the parties, the real controversy has to be determined in accordance with the principles stated.

420 Ipp JA went on later to consider the factors which would have weighed on the making of a discretionary decision whether to allow the plaintiffs to depart from their case as pleaded. Included amongst those factors were that the appellants, in opening their case, had asserted that they proposed to establish a case based on the "smoothing over" argument, that several parties had adduced evidence directly relevant to that argument, that there was much cross-examination on this evidence, the appellants in closing had presented lengthy submissions based on the smoothing over argument and that the respondents, generally, had responded in their closing submissions to the merits of that argument. His Honour then said:

> The principal factors contrary to such a decision included that the appellants had not, as required, pleaded the elements of the particular argument either expressly or impliedly. The respondents did not know that that evidence was being adduced in connection with the argument, that there was no agreement to amend and [relevantly for the present case], *the respondents did not agree to or acquiesce in the appellants advancing that argument*. His Honour considered that had the smoothing cover argument been pleaded, the case for the respondents may have been conducted in a different way. (My emphasis)

421 In the present case, while it is by no means clear that the same degree of prejudice as that contemplated in *Ingot* would be suffered by Dr Monks if Mr and Mrs Brand were to be allowed to depart from the pleaded case, it is relevant to note that Mr Faulkner made it very clear on a number of occasions that the defendant did not consent to or acquiesce in departure from the pleaded case. The authorities to which Ipp JA referred suggest that the defendant's consent or acquiescence (whether express or implied) is necessary before a plaintiff can be allowed to depart from its pleaded case. In *Vines v ASIC* (2007) 62 ACSR 1 at 17 [57], Spigelman CJ stated the test as being whether the parties "have chosen to fight the case on a different basis" (applying what had been said by Mason CJ and Gaudron J in *Banque Commerciale SA En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 at 286).

422 True it is that the non-disclosure to Mr Brand of the fact that Dr Monks had alerted the Council to the matters in her 20 May 2004 letter is a matter referred to in the various self-described particulars and was a matter raised more than once in oral submissions by Mr Jacobs. However, I think it is fair to say that the plaintiffs' conduct of the case involved a variety of allegations put with rhetorical flourish, not all of which

could be linked back to any claim as pleaded such, as (for example) the assertion that Dr Monks connived with one or more of her consultants in relation to the conduct of which complaint was made; and various assertions as to Dr Monks' motivations of which there was no evidence and which were not put to her such as the suggestion that she had collated material to put to the Council or had acted to "craft" a punitive restitutionary claim against Mr Brand.

423 It seems to me clear that Mr Brand harbours grave suspicions as to Dr Monks' conduct and was quick to attribute ulterior motives to Dr Monks wherever possible. However, time and again what seems to have happened is that the submissions put for the plaintiffs ascribed a sinister connotation to conduct which is open to an innocent interpretation. To be unconscionable conduct, more is required than that there has been conduct unfavourable to one's commercial or other interests or that is perceived as having had an adverse effect.

424 Relevant, in my view, is the fact that, in the course of oral closing submissions I raised directly with Ms Chan the argument that the conduct of Dr Monks in not informing Mr Brand as to what she had done vis-à-vis the Council might amount to unconscionable conduct (whether or not Dr Monks owed any fiduciary duty). Counsel for Dr Monks responded immediately to note there was no such pleaded claim. There was no demur from the defendant's representatives to that proposition nor did they did not seek leave to amend their claim in this regard (ironically, perhaps, having applied for leave inter alia to delete just such a claim only a month before).

425 If the pleaded case rests (as I consider it does) simply on the allegation that Dr Monks has engaged in unconscionable conduct in making the disclosures to Council that it is said that she did, alleging criminal conduct and urging prosecution, then I find that no breach of s 43 has been committed.

426 I cannot accept that it is unconscionable conduct for a person in Dr Monks' position, having (as I accept she did) genuinely formed the view that an offence was being committed, to report those activities. (In *AG Australia Holdings Limited v Burton*, Campbell J referred to the entitlement of a person receiving information in appropriate circumstances to say "I am not, in conscience, obliged to keep quiet about that" (at 519 [194]). There is force in the submissions by Mr Faulkner that Mr Brand's actions were "wicked" in the sense expressed in *AG Australia Holdings Limited v Burton* (at 518-519 [193]-[196]). Moreover, I do not find that Dr Monks urged any such prosecution by the Council. What Dr Monks did was to request the Council to take action to prevent further clearing. Dr Monks clearly understood that prosecution was a possibility and, from her own contemporaneous notes, was aware that Council might ask for affidavits from her or her sub-consultants for use in any proceedings or prosecution of Mr Brand. (Dr Monks' denial that this possibility was discussed with Mr Chestnut seems not consistent with the email of 26 May 2004.) Nevertheless, Dr Monks' communications with the Council were couched in relative un-emotive terms (unlike Mr Clarke's "crime scene" communication) and there is no evidence of her inciting any prosecution by the Council.

427 Had the pleaded case remained that Dr Monks had engaged in unconscionable conduct in not informing Mr Brand that she was going to disclose (or, later, that she had made the disclosures of 20/24/25 May 2004) the matters she disclosed to the Council, and in allowing him to proceed with preparation of the development application and to pay fees in relation thereto in ignorance of the report which had been made, then I would have been inclined to the view (subject to any evidence which might have been adduced in response to that claim) that Dr Monks had engaged in unconscionable conduct by depriving Mr Brand of an opportunity at the very least to suspend the project or to give consideration it is suspension while the unauthorised clearing issue was to be determined (if not, indeed, to terminate it altogether).

428 In essence, I think there is considerable force in Mr Jacobs' submission that if Dr Monks was uncomfortable with what Mr Brand was doing she should have told him and (if not immediately, as Mr Jacobs suggests, then if not satisfied with Mr Brand's response at that stage) either withdrawn from the matter or indicated that she would refer the matter to Council; not, as she in fact did, in continuing to act for him having (unbeknownst to him) already referred the matter to Council. While I have real reservations as to the conduct of Dr Monks in this regard (as Mr Faulkner conceded one might well have, though emphasising that no such claim was made against his client and that Dr Monks was not a fiduciary of whom the standards expected of fiduciary would necessarily apply to her), I note that Dr Monks was of the view (rightly or wrongly) that she had in fact made known to Mr Brand her concerns and that she could not continue to work for him if he continued to do

what he was doing (which in her view amounted to a serious environmental offence) –T328. I accept that it was Dr Monks' understanding that Mr Brand was well aware of the difficulty she had with his position.

429 The fact that Dr Monks' position viz a viz Mr Brand was not fully tested with him in cross-examination is perhaps a function of the fact that the defendants proceeded as they said they did on the basis of the claim as pleaded – which did not include a claim based on failure to notify Mr Brand of the disclosure to Council or Dr Monks' conduct in continuing to work for Mr Brand after that disclosure had been made.

430 What could Mr Brand have done had Dr Monks forewarned him? He could have attempted to persuade Dr Monks (yet again) that he was acting in an unauthorised fashion or to give him just a bit more time to complete the clearing (it seems fanciful, however, to think that by 24 May Dr Monks would have been so placated); he could have sought to restrain the disclosure (but that would probably have engendered the very publicity he sought to avoid); or, which seems the most likely, he could have formed a view at that stage as to whether he should proceed with the project or, in effect, put it on hold (as he did later albeit some time after he had become aware of "this business with Council" and Dr Monks took no issue with this).

431 It was submitted by Mr Faulkner that this was not a situation where Mr Brand would have been entitled to terminate the contract (as Dr Monks' activities would not amount to a fundamental breach or repudiation of the contract) but it must surely have been open for Mr Brand to exercise some control over the timing of delivery of the development application. If he had said to Dr Monks – we will have to suspend the project until the issue with Council has been resolved - could she really have insisted in those circumstances on completion of the contract over Mr Brand's objections? I think not. Indeed, Mr Brand might well at that stage have had an argument that the contract's purpose had been frustrated. In any event, Dr Monks presumably would have had no incentive to continue to perform work for which she might not be able to procure payment.

432 It therefore may well be that Mr Brand would have had no grounds as a matter of contract law at that stage to terminate the contract but it is difficult to believe that Dr Monks could, or would, have insisted on continued performance of contract in May 2004 or objected to it then being put on hold if Mr Brand had contended that the purpose of the contract had then been, in effect, frustrated or had been put in doubt by the events which had arisen or had lost confidence in her services (particularly in circumstances where Dr Monks herself seems to have considered that it would have been open for her at that stage unilaterally to withdraw her own services).

433 At the very least, therefore, Mr Brand lost the opportunity to consider this position and perhaps to stop incurring further fees on the project. (Fees for work already rendered is another matter – whether Dr Monks could recover those at that stage would depend on whether, under the contract, Mr and Mrs Brand were liable to pay fees rendered or whether the fees became payable only on completion of the whole task.) Hence, I would have considered the recovery of fees paid after 20 May 2004 to be the appropriate form of relief had the unconscionable conduct claim been so pleaded and made out on the evidence then before the court.

434 However, in circumstances where it appears that the defendant's Counsel took a considered forensic decision to prepare and conduct the case at hearing on the pleadings (and not on the basis that they had to meet a claim which had formerly been pleaded, but had since been deleted and now appeared if at all only in remnant fashion as part of various particulars to other paragraphs of the pleading – albeit seemingly unrelated to the thing they were said to particularise, namely the "material provided") **and** had made that very clear; and particularly in light of the fact that I had raised during submissions the question whether such a claim might lie irrespective of the position in relation to the fiduciary duty claim but the plaintiffs did not demur from the immediate response by Counsel for the defendant that this was not a matter which had been pleaded; as a matter of procedural fairness I cannot make any finding adverse to Dr Monks on this issue.

**Credit**

435 It was submitted by both sides in the case that I should form adverse views of the credibility of the principal witness for the other. In the main, I have not done so. I therefore comment below on my observations of the main witnesses.

*Mr Brand*

436 Mr Brand was forthright in his views and plainly spoken. He did not shy away from the fact that he had cleared areas of land and, in fact, he conceded that he had cleared extensive areas of land (T 87.44; T102), cavilling only with the suggestion that he did so by mechanical clearing in the form of a bulldozer or that it was "native" bushland (T 102), a comment perhaps indicative of the value he placed on the quality of the bushland in question (ie the fact that it was largely overgrown with weeds). Nor did he shy away from the fact that he was made aware of his consultants' disapproval of that course of action. He asserted a "natural" or inherent right (as a farmer) to burn off branches falling from trees on his rural property (T 88.35), although that would seem inconsistent with my reading of the recommendations under the relevant Bushland Management Plan or under various approvals even where later he had to concede (at least in relation to the hazard reduction certificates) that they gave him no such general right (see eg T 91/92).

437 Mr Brand expressed his views in the witness box in relation to matters such as the value of bush habitat (T 105.36/106.9) and as to the usefulness of native wattles (T108.15) in a forthright manner consistent with the tenor of his responses in the conversations with him to which others in their affidavits have deposed (see, for example, paragraphs28 of Mr Clarke's 24 September 2008 affidavit deposing to the response given by Mr Brand to Mr Clarke's comments about the value of the bush habitat, namely that the animals could go elsewhere, which Mr Brand said he had a "feeling" that he did say). I note this not as suggesting that it leads to any overall view against Mr Brand's credit – whatever his ecological stance, it is a matter for him - but because it seems to me to support the view apparently formed by Dr Monks and Mr Clarke as to the need to take formal steps if the clearing was to be stopped. It seems to me quite credible that Dr Monks would have formed the view that Mr Brand was not particularly sensitive to the bush environment and was unlikely to desist from the clearing activities he was undertaking unless compelled to do so.

438 Mr Faulkner submitted that in two respects Mr Brand had been untruthful – first, in asserting that he had permission to clear parts of the land and, secondly, in asserting that he had permission to burn off on the land.

439 As to the first, Mr Clarke and Dr Monks each depose to Mr Brand having said to them words to the effect that he had rural fire service permission to clear 6 metres around the fence lines (see paragraph 30 of Mr Clarke's affidavit of 24 September 2008; paragraph 33 of Dr Monks' affidavit of 22 May 2008). Mr Brand accepted that he had told Mr Clarke this (T 106.30) and says this was what he had been told (T54.18). However, the letter from the Rural Fire Service (Exhibit 3 p 41) of 24 May 2004 was for hazard reduction in respect of the existing dwelling and was limited to an area 20m x 50m. Mr Brand accepted that he was aware of those conditions (T 91.15; T 91.47) but when so pressed he seemed then to fall back on the assertion that it was his natural right to conduct such an activity (T 88.35; T106.32).

440 Mr Brand did not deny that he may have taken what seems to me would have been a fairly high handed approach to what he could or could not do with his land insofar as he conceded that he may have said (though he did not recall saying) to one of the Council officers (Ms Wheatley) that he would do as he wants with the land. However, if so, such an approach would seem to be inconsistent with the way in which he seems to have dealt with Mr Scorgie or the rural fire service officers themselves. Therefore I place no weight on this.

441 As to burning off, Mr Brand agreed that he had lit a number of fires on the property (T 92) and that he had told the Rural Fire Service officers who visited the property in April/May that he had permission to burn (T 50.47), while acknowledging in the witness box that he did not have such permission (T 88.15) and believed it was his 'natural right' to do so (T 88.36).

442 Mr Brand accepted that he was under no illusion when the rural fire service officers left the site on 24 May 2004 that burning off of vegetation and rubbish was not permitted (T95), yet he seemed to accept that when they left the property he may have been seen proceeding to 'push up' one of the piles of burning vegetation (even if he did not accept that he had lit a new pile as such). He admitted to Mr Spence that he was burning off the piles of vegetation that had been cleared (and in which Mr Spence said he had previously observed endangered rainforest species, a fact to which he said he had drawn Mr Brand's attention).

443 Mr Jacobs characterises the "burning off" evidence as no more than a red herring. That submission, as I understand it, is on the basis that it could not be said that Mr Brand did not have a belief (whether correct or not) that he was entitled to burn off. He seemed, however, to concede in the witness box that the permission he had relied on in his response to the rural fire officers did not cover his activities (T 50.47; T88.15).

444 It seems to me that Mr Brand's explanation as to his belief in a natural right to burn off (much as his explanation as to the right to clear 6m from his fence lines seemed to be) is likely to have been a product of Mr Brand's belief that he could (or should as a farmer) be able to manage his land as he wished and that what he was doing in response to queries raised of him was to put forward whatever justification he thought might be acceptable to them (much as he did in the role play he carried out with Mr Clarke), without it necessarily being the case that there was a clear basis in fact for that explanation.

445 Mr Brand may well have been frustrated at not being able to obtain a direct answer to the enquiries he said that he had been making as to his rights (T 111.20-26) but his response to that seems to have been to have proceeded without any formal determination of those rights and despite advice from Mr Scorgie, Mr Clarke, Dr Monks and the rural fire service officers (Mr Owen and Mr Poole) that he was not entitled to do so. Granted, the advice they gave to him may have been incorrect. However, what seems to me to be telling is that Mr Brand (without, it would seem, having been able authoritatively to confirm whether it was correct) was prepared to proceed anyway.

446 I do not express any adverse view on Mr Brand's overall credit. Nevertheless, it seemed to me that he did exhibit a tendency to assert to others, such as to Mr Clarke, and in the witness box matters favourable to his perception of his position as to his rights without having ascertained that there was support for that position. That does not mean he was acting dishonestly but it does, to my mind, impact on the weight I can attribute to the assertions made by him (and by Ms Kennedy on his instructions in her February 2005 correspondence with the Council) as to the ambit of any approvals (such as the agricultural use approval) which were not in evidence before me.

*Dr Monks*

447 As for Dr Monks, it was suggested that she was on an "environmental crusade". Her correspondence and communications do not in my view support this characterisation. Unlike that of Mr Clarke, her communication with the Council was measured in tone and it seems that it was very much as a last resort that Dr Monks approached the Council.

448 Mr Jacobs submitted that Dr Monks was a very uncomfortable and sometimes evasive witness. That was not my impression of the manner in which Dr Monks gave her evidence. She presented as a careful (and at times pedantic, such as in her response to the question as to whether others had dumped rubbish on the property - T 309) witness, focussing closely on the questions asked, clarifying them where she felt necessary (such as at T 308.20, T 308.49, T 309.11, 311, 326.24), and answering them by reference to her areas of technical competence and expertise without seeking to venture into areas beyond those of which she had personal knowledge.

449 I did not consider Dr Monks to be evasive in the way in which she answered questions in the witness box. It seemed to me that, on occasion, what happened was that where she considered that a question had been answered or matter already dealt with in her oral evidence, she did not always respond (or respond without prompting) to a further question or comment on that matter. She gave the appearance on those occasions that she was simply waiting for the next question to be asked, either having nothing further to add to what she had already said or regarding Mr Jacobs' questions insofar as they were expressed as comments as being just that, commentary. In fairness to Dr Monks, there also appeared to me to be occasions on which Mr Jacobs may have posed a further question to Dr Monks before she had completed her previous answer (see, for example, at T 312, T 318.28-33; T320.9-11).

450 There were, as Mr Jacobs pointed out, some areas in which her evidence conflicted with that of other witnesses, such as in the conversations she attributed to Mr Hayes and Mr Spence (para 38 affidavit) to the

effect that they had asked her to report to the Council and her conversation with Mr Chestnut in relation to the possibility of providing an affidavit for the Council in any prosecution of Mr Brand.

451 As to the former, it seemed to me quite possible that in the heat of his evident feelings about the clearing and burning off occurring, Mr Spence may not have paid too much attention to what he had said to Dr Monks when he contacted her (as he admits he did around that time) to ascertain her role. I considered that Dr Monks' evidence that Mr Spence had called and verbally abused her - T377 – seemed consistent with his evidence that he had contacted Dr Monks to express his disappointment that she was involved in this conduct other than the timing of the relevant conversation. I can see no reason for Dr Monks to have fabricated an account of that conversation, since it does not seem to me that it furthers her case. For that matter, Dr Monks' attitude that she would not speak to Mr Spence, suggests that she was well conscious of an obligation of confidentiality to Mr Brand and that she did not lightly decide to contact the Council. I accept that, for her, this was a "turbulent time", deciding from her perspective, whether to continue working for him. It seems to me that Dr Monks was occupied in an internal struggle with her conscience as to whether she could or should properly continue to work on the project.

452 Dr Monks thought she had secured Mr Brand's agreement in relation to clearing (and certainly Mr Clarke appears to have thought that, by explaining the obligations, and being satisfied that Mr Brand understood them, this would translate into no more mechanical clearing) and the impression I have is that when reports of further clearing came to her that was the last straw for Dr Monks and she formed the view then that nothing would stop Mr Brand short of intervention by the Council. In that context it may well be that Dr Monks interpreted Mr Spence's irate phone call to her as urging her to do something (even if, as he says, he did not say that to her).

453 Whatever be the case in that regard (and accepting that Mr Spence was adamant that he did not have the conversation with Dr Monks in the words deposed to by Dr Monks), I think it is clear that Dr Monks was concerned by that stage at the integrity of her own position, as Mr Brand's town planning consultant, if she stood back and allowed what she regarded as a serious offence to continue. I do not consider that accepting Mr Spence's version of the conversations compels a finding of dishonesty on Dr Monk's part.

454 I consider it more likely that when Dr Monks came to prepare her affidavit in these proceedings she had confused the effect of Mr Spence's phone call with what had prompted her to do what she did. I see no reason for Dr Monks to have deliberately conjured up such a communication from Mr Spence, in circumstances where any public interest duty she had would be consistent with whatever others such as Mr Spence may have at the same time urged her to do.

455 Mr Jacobs submitted that Dr Monks had not told Mr Spence that she had reported or was going to report Mr Brand to the Council because she did not want Mr Spence to disclose that to Mr Brand. As Mr Spence only went to the property once (on 19 May) he could only have rung Dr Monks after that visit – either that day or in the following days. Yet on Mr Spence's version of the conversation (which Mr Jacobs says I must accept) there is no discussion as to Dr Monks' position and Mr Spence does not urge her to report Mr Brand or to "stop him". Why would Dr Monks (who was, accordingly to Mr Spence, not prepared to say anything about the matter) have volunteered anything about reporting Mr Brand to the Council? That seems to me to make no logical sense. Mr Jacobs cannot consistently argue it both ways – either there was a discussion about what Dr Monks was going to do (in which case he makes the submission that there is some sinister conclusion to be drawn from the fact that she did not say she was going to report him) or there was no such discussion (in which case it would make no sense for Dr Monks to discuss anything about a possible report to Council).

456 Nor do I think that the differing versions of the conversation between Dr Monks and Mr Spence is something which should incline me to believe Mr Brand's version of the conversation in which he asked if she had had any involvement with the Council in the face of Dr Monks' denial of that conversation. Dr Monks did not shy away in the witness box from admitting that she had not disclosed to Mr Brand the fact she had reported him to the Council or that she was apprised of the possibility he might be prosecuted or, indeed, that she had not given consideration to the ramifications this might have on his subdivision application (matters which might be thought to reflect poorly on her as his consultant and which it was at one stage alleged amounted to unconscionable conduct) nor does she attempt to justify that conduct other than by reference to her view that the contract was a commission to provide services from which neither party had withdrawn (T 322). Yet, she

appears to have considered it open to her, had she so decided, to withdraw from the commission and, from that, she must surely have accepted that it would have been open to Mr Brand to do so.

457 As to the divergence between Dr Monks' evidence and that of Mr Chestnut, a statement that affidavit evidence might be called for if the matter were to proceed to a prosecution does not seem to me to be an unlikely topic to have been raised by someone in Mr Chestnut's position when the issue was posed as to what action the Council might take in relation to the complaint of unauthorised clearing. Again, it seems to me more likely that Dr Monks' recollection is the accurate one in this regard.

*Mr Clarke*

458 As to Mr Clarke, criticism was made by Mr Jacobs that he was an effusive witness who gave long rambling and non-responsive answers. I thought there was some force to the comment in relation to the length of his responses but considered that in general Mr Clarke was attempting to give a response to the question – it seemed, to me that he considered a detailed response necessary in order to explain his position rather than that he was seeking to avoid responding to the question. (Mr Brand, for that matter, seemed to become more expansive in re-examination than he had been in cross-examination – see T112, there openly conceding that he had probably pushed a few natives over at the time he cleared the property.)

459 As to Mr Clarke's account of the role play he carried out with Mr Brand, this seemed to me to highlight not so much a tendency for Mr Clarke to see himself as a policeman (para 9.2.1(a) submissions), though he clearly was adopting a moralistic stance with regard to matters of bush management, but as indicating Mr Brand's apparent preparedness to proffer excuses (such as that the operator must have made a mistake) for the clearing activities whether or not he had any personal knowledge that that was the case (as was also evident in his insistence, which he later accepted was incorrect, on a right to clear in accordance with bush fire brigade approval).

460 Mr Jacobs criticised Mr Clarke's account of the bush fire brigade's attendance at the property on about 24 May 2004 as not having been recorded elsewhere in his affidavits beforehand and, in any event, as going nowhere (which might explain why it had not featured in any earlier affidavit). It is described as a salacious story, said to emphasis the general confusion in Dr Monks' case as to the wrongdoing alleged against the Brands. With respect, it seems to me that this account was proffered by the witness in the box in answer to questions requiring Mr Clarke to explain or to pinpoint the time at which he had observed events on the property and the criticisms made of this part of the evidence were unfounded.

*Mr Hayes/Mr Spence*

461 Mr Jacobs' submission was that the affidavit evidence of Mr Hayes and Mr Spence is suspect as they could not possibly have seen what was claimed to have been seen through the dense rainforest, yet I am also urged by Mr Jacobs to accept Mr Spence (at least) as a witness of truth.

462 Mr Spence gave evidence by video link from New Zealand. He holds qualifications in horticulture and landscape design. He was confident in his evidence as to the description of the native vegetation he had observed in the cleared piles on Mr Brand's land. He made certain assumptions as to the use of a bulldozer or other mechanical means of clearance on the property due to his observation of the tracks on the land and the lack of selectivity in the clearance of the land (T 186, 187), which seemed to me to be reasonable, but accepted that it might have been a 20 tonne excavator. It is said that Mr Hayes accepted that he did not know what was in the piles of vegetation being burnt by Mr Brand. Mr Spence, however, was very clear on the flora he had observed.

463 Where Mr Spence's recollection diverges from that of Dr Monks is that he denies having asked her to report Mr Brand (T 189.20) and was confident that he would have remembered if he had. Mr Spence was very

frank that he was disappointed in Dr Monks because he thought she was "doing Mr Brand's work for him" and thought she should be doing something (T 191). In fact, Dr Monks' refusal to communicate with him (T 189.30) seemed to me consistent with Dr Monks' understanding of her obligations of confidentiality (and reinforces my view that her complaint to Council was motivated by public interest).

464 I accept in general the evidence of Messrs Spence and Hayes where their evidence differs from Dr Monks. I think it is likely to be the product of genuine misunderstanding or misrecollection on one or other's part.

*Other issues in relation to the witnesses' evidence*

In considering the witnesses, I should note that the evidence of Mr Clarke and Mr Payne came before the court in a rather circuitous route and, insofar as it led to an interlocutory ruling as to the cross-examination of Mr Clarke, for which I gave only ex tempore oral reasons at the time, I set out below what occurred.

465 Initially, the particulars provided by Mr Brand's solicitors in October 2007 of the claim then pleaded relied upon the affidavits of each of the consultants in the Land and Environment Court proceedings. No separate or fresh affidavit of either of those consultants was served by the plaintiffs.

466 On 27 August 2009, Mr Jacobs informed me that the plaintiffs "substantially adopted the facts in these affidavits and had said they would reply on some of the affidavit material (T 3.31). On the application for amendment of the Amended Statement of Claim, Mr Jacobs asserted forcefully that the plaintiffs were relying on that evidence, would tender those affidavits and would call them as witnesses or make them available for cross-examination by the defence if required. (At T 31.19 he said he was committed to putting their affidavits in evidence and he further accepted that if he wished to rely on the previous affidavit of Messrs Clarke and Payne he would have to call them.) Indeed, this was something he was prepared to shout from the rooftops on that occasion – T 43.5). It was said that all that Counsel for the defence had to do was to ask them a few question (T 37).

467 When no affidavits from the consultants were served in the interim by the plaintiffs, the defendant obtained fresh affidavits from each of them (largely mirroring what had been said in their earlier affidavits in the Land and Environment Court).

468 When the hearing commenced, Mr Faulkner called on the plaintiffs to produce the affidavits of Messrs Clarke and Payne on which Mr Jacobs had so adamantly indicated the plaintiffs were relying.

469 Mr Faulkner's submission was that when the plaintiffs sought leave to amend their pleading on 3 September 2009 an undertaking was given through Counsel that the plaintiffs' case would include the affidavits of Messrs Clarke and Payne. (In fact, by reference to the transcript, the commitment shouted from the rooftops ultimately seemed to be that they would be available for cross-examination if required for that purpose.) Mr Faulkner relied on the principle accepted in *Elspan v Eurocopter* [1999] NSWSC 555 that, having allowed the interlocutory application to be determined in circumstances where Senior Counsel had undertaken that the case which the defendant was to be required to meet was one in which the plaintiffs were relying on the affidavits of Messrs Clarke and Payne in the Land and Environment Court proceedings, they should not now be permitted to resile from that undertaking. It was submitted that this had two effects: first that the defendant could call for the Land and Environment Court affidavits and, if produced, tender them if the plaintiffs did not and, secondly, that these affidavits should be dealt with as part of the plaintiffs' case and hence no objection thereto could be made by the plaintiffs.

470 Mr Jacobs accepted that and said he had no problem with that. He formally withdrew his objections to the fresh affidavits which had been served by the defendant from Mr Clarke and Mr Payne. In due course he produced copies of the Land and Environment Court affidavits. It was not until midway through the second day

of the hearing (after being pressed by Mr Faulkner) that Mr Jacobs advised that he did not propose to call either Mr Clarke and Mr Payne.

471 On 2 October 2009, Mr Jacobs then said that he did not propose tendering the affidavits of Mr Clarke and Mr Payne (contrary to his earlier assurances) but that the particulars referring to those affidavits would remain part of his "pleaded case" (T 250). There was debate about this course, following which Mr Jacobs said that to save further debate he would tender them. Mr Clarke's Land and Environment Court affidavit became Exhibit L; Mr Payne's earlier affidavit (tendered during the midst of Mr Jacobs' later cross-examination of Mr Clarke) became Exhibit N in due course.

472 After the plaintiffs' case was formally closed, Mr Faulkner read the new affidavits of each of Mr Clarke and Mr Payne. Mr Clarke was then called in the defendant's case and Mr Jacobs cross-examined him. From that cross-examination, it seemed clear that Mr Clarke's involvement as a witness in the Land and Environment Court proceedings, far from being part of any conspiracy between Mr Clarke and Dr Monks, arose from Mr Clarke's firm belief that he had been a witness to a "direct breach of multiple environmental legislative acts" (T 254.17, T 263) and as such that he was happy to provide Council with information and had spoken with Ms Wheatley and the Council's lawyers directly about that, unconcerned as to what "implications" might result from that discussion (T 254.17-254.36; T 255/256/257). Far from collusion with Dr Monks, it was his recollection that Dr Monks had said "she was going to take the line that she probably would not provide evidence" (T 253.33). There seemed no suggestion that Dr Monks had encouraged him to take the opposite course or that he needed any such encouragement.

473 Objection was taken to Mr Jacobs cross-examining Mr Clarke only when Mr Jacobs sought to put to Mr Clarke the conflicting versions of conversations to which Mr Brand had attested. Mr Jacobs said he wished to put each of those paragraphs of Mr Brand's affidavit to Mr Clarke, so that no *Jones v Dunkel* (1959) 101 CLR 298 inference could be drawn against him. Mr Faulkner contended that he could not do so. In particular, Mr Faulkner submitted that Mr Jacobs could not cross-examine Mr Clarke in an attempt to procure his agreement to what Mr Brand had said, on the basis that paragraph 21 of Mr Clarke's earlier affidavit in its entirety formed part of Mr Jacobs' case in its present form. Mr Faulkner submitted that if Mr Jacobs had wanted to address the difference between the two witnesses' versions he would have had to adduce evidence in chief but, not having done so, he could not then contradict his own case. Mr Faulkner submitted that the affidavit evidence had been put in unconditionally and could not be read down in some other way. Mr Jacobs' response was that he proposed at the end of the case to make the submission that Mr Brand's evidence was correct and that Mr Clarke was mistaken. Therefore, he said that procedure fairness required him to put Mr Brand's evidence to Mr Clarke. Mr Faulkner submitted (and I accept) that no *Browne v Dunn* (1893) 6 R 67; (1893) 6 R 67 HL issue could arise in relation to evidence which was entirely Mr Jacobs' evidence.

474 After considering oral submissions on this point I disallowed that line of cross-examination but gave leave for Mr Jacobs to re-open his case and call such evidence in chief from Mr Clarke. He chose not to do so. In subsequent submissions he suggested that Mr Clarke had been forced on him as his witness. With respect, I disagree. Mr Clarke was not "his" witness at all – not having been called by Mr Jacobs - nor was Mr Clarke "forced" upon him. What Mr Jacobs was called upon to do was to do what he had shouted from the rooftops he would do, namely to tender the affidavit evidence which had been particularised as part of his case. What he then did not do (which he had said he would) was to call Mr Clarke (and Mr Payne) if the defence wished to cross-examination him on the affidavit evidence so tendered.

475 In any event, I do not see that anything turns on the matters where the affidavit evidence of Mr Clarke is contradicted by Mr Brand and I draw no inference adverse to Mr Brand in relation to those matters. The question is what Dr Monks did (herself or through her agents or consultants). Areas where Mr Clarke's evidence has diverged from Mr Brand (on matters such as the conversation in which Mr Clarke says Mr Brand had said he was scared the Council would stop his subdivision and Mr Brand denies that was the case) I am prepared to assume for the purpose of the present case that Mr Brand's version sets out his truthful recollection of events, albeit one differing from that of Mr Clarke.

476 In relation to Mr Payne, it should be noted that Mr Jacobs had indicated he did not intend to cross-examine Mr Payne even before the objection was taken to Mr Jacobs putting to Mr Clarke in cross-examination that Mr Brand's version of events was correct and Mr Clarke's was wrong (T 282).

*(viii) Relief*

477 In light of my findings, no entitlement to relief has been made out. However, I comment generally on the following issues.

· *Exemplary Damages*

478 The claims for exemplary damages for breach of contract and breach of a fiduciary obligation were not pressed at first instance. Had they been, I would have been bound (and would in any event have considered it correct) to follow *Harris v Digital Pulse* and would have held that no such damages were available. Mr Jacobs quite properly conceded that I am bound by *Harris v Digital Pulse* (as I had indicated in my judgment on the amendment application on 8 September 2009) and hence the claim for damages was not pressed in this context. Whether the plaintiffs still pressed for such damages for breach of the *Fair Trading Act* was less clear. In that regard I note that in *Musca v Astle Corporation Pty Limited* (1988) 80 ALR 251, it was suggested by French J (as his Honour then was) that exemplary damages would not be available for breach of the *Trade Practices Act*.

· *Aggravated Damages*

479 The claim for aggravated damages was pressed for the *Fair Trading Act* claim, by reference to *Collings Construction Co Pty Limited v ACCC* [1988] NSWSC 32. There, Cole JA saw no reason in principle why aggravated damages should not be recoverable under s 87 of that Act. There is no need for me to express an opinion on the availability of such damages because the claim is not made out. Suffice to say that I would not have considered them warranted in the circumstances of this case.

480 There was evidence from Mrs Brand as to the heart problems from which she suffered and which were exacerbated by the stress arising from her husband's prosecution, necessitating her being placed on stronger medication until approximately June this year. While I fully accept Mrs Brand's evidence as to the distress caused by the publicity over the prosecution and have considerable sympathy for her position, it seems to me that the stress was caused by the prosecution itself; not by Dr Monks' complaint to the Council nor by the fact that Dr Monks had not forewarned the Brands of her intention to speak to the Council or, later, disclosed that she had done so.

· *Particular heads of loss claimed*

481 Turning to the particular heads of damage claimed for breach of contract (and unconscionable conduct) and the equitable compensation sought for breach of fiduciary duty, the losses were said to fall within the following heads: legal costs of the Land and Environment Court prosecution ($103,547.00); loss of opportunity to secure subdivision and sell the property in 2004 – 2006; and "wasted fees" paid to Dr Monks in the sum of $ 87,350.00. (No evidence was adduced at the hearing for the claimed loss of goodwill to the value of the Brands' real estate business which had initially also been claimed and I did not understand it to be pressed before me.)

482 At least the first two heads of loss turn squarely on the proposition that the Council prosecution of Mr Brand was caused by the disclosure made by Dr Monks (this having led to the need for Mr and Mrs Brand to incur the costs of defending those proceedings and to the publicity which it is said would have impacted adversely on the price which a purchaser would have paid for the land had it been put on the market at that time).

483 It was initially submitted by Mr Jacobs that the Council action was at the instance of Dr Monks (para 6.4(e) opening address). For this, he relied upon the assertion that Dr Monks "was preparing the case for the Council and was even contemplating affidavit evidence in the prosecution of [Mr Brand]". It does not seem to

me that the evidence goes anywhere near that far. Dr Monks certainly requested that the Council intervene or take action to stop further clearing. Arguably, it might have done so simply by issuing a direction to Mr Brand to stop clearing and/or to remedy what he had done but taking no steps to prosecute. The fact that Dr Monks had adverted, in her correspondence with Mr Clarke, to the possibility that affidavit evidence might be required (presumably for any prosecution) hardly demonstrates that Dr Monks was "preparing" the case for the Council. Rather, Dr Monks' note suggests that it was the Council's officer who raised that issue with her. There is no evidence that Dr Monks did more in relation to the Council's case than comply with subpoenas served on her to give evidence and produce documents in those proceedings.

484 An investigation was already underway by the time Dr Monks made her report to the Council requesting that it take action to stop the clearing activities (since by then Mr Scorgie had been asked to investigate the complaint raised by Mr Hayes). As further complaints were made, it seems the response of the Council was to refer each of those complaints to an appropriate officer for investigation. The individuals who *were* pressing (see the correspondence in Exhibit 1) the Council to prosecute were individuals other than Dr Monks.

485 As far as causation is concerned, Mr Faulkner submits that there is no evidence to support the claim for damages as particularised and that the "but for" test (described by Mason CJ in *March v Stramare (E & MH) Pty Limited* (1991) 171 CLR 506 as a negative criterion for causation), though not itself determinative is one without which causation is not satisfied and that it has not been satisfied in this case.

486 In particular, it is submitted by Mr Faulkner that it could not be said that "but for" Dr Monks' communications with the Council it would not have proceeded with the investigation and prosecution of Mr Brand. I agree. It is impossible on the evidence to know what aspects of the Council's internal report (Exhibit M) were relied upon by the Council in reaching its July 2004 resolution. The Council might in fact have placed significant or no weight on this aspect of the report, when reaching its decision to prosecute.

487 There was no evidence as to the particular matters on which reliance was placed by the Council in deciding to prosecute Mr Brand. The disclosure by Dr Monks was clearly one of a number of matters which caused the Council to investigate Mr Brand's conduct. However, I am not satisfied that it was a sufficiently proximate cause of the prosecution. In my view, it is clear that the prosecution was the result of the Council's opinion based on its own investigations. Though the material before it contained reference to some of Dr Monks' communications to the Council it is impossible to conclude that this information was a cause of the decision made by the Council in its confidential session. No records or minutes of the relevant Council meeting were in evidence, simply a redacted copy of the report to the Council and the resolution itself; no councillor was called to give evidence of the meeting.

488 I cannot be satisfied that the prosecution was in any material sense "caused" by Dr Monks' disclosures of 20/24 May 2004, as opposed to the prosecution which followed.

489 Mr Faulkner further submits that there are no facts linking any misconduct of Dr Monks to a diminished prospect of approval of subdivision and no evidence as to the likelihood or otherwise of Council approving or refusing consent. This is fundamental to the claim for loss of the chance to subdivide and sell the land.

490 Mr Jacobs relied on *Henville v Walker* (2001) 206 CLR 459 for the proposition that where there two causes of a loss they could together satisfy the "but for" test even though but for the occurrence of either of the steps the loss would not have been sustained. Neither could there be said to be the single cause of the total loss. Hayne J described the "but for" first as a test of necessity; took both causes through the "but for" test – and concluded that each was a cause for the purpose of assessing damages for breach of s 52 of the *Trade Practices Act* 1974.

491 Mr Jacobs submits, in effect, that where there are two or more causes, each of which would alone be sufficient to bring about the loss, then the test of causation is satisfied. That assumes that Dr Monks' disclosure was a (even though perhaps one of many) cause of the decision by Council to prosecute. I think, in answering

this question in a common sense way, a distinction has to be drawn between a decision by Council to investigate the allegation of unlawful clearing activities and its decision to prosecute.

492 I note that in *Henville v Walker*, McHugh J noted what was said in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 by Deane, Dawson, Toohey and Gaudron JJ, in a case where an intervening act was being considered:

> The ultimate question must, however, always be whether notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission, is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage.

493 There is no doubt that Dr Monks' complaint, in isolation, would have triggered an investigation. However, at the time her complaint was made the investigation was already underway. Therefore, in a very real sense it was not even a cause of the investigation because, once commenced an investigation would surely not restart every time a fresh complaint was received. However, even if it was a cause of the investigation it certainly was not the triggering factor. Mr Scorgie had already been asked to investigate the events in question by the time Dr Monks' report was received by the Council. Dr Monks' report was, it seems, treated with some significance by Council (whether that be due to the fact that she was preparing the development application for Mr Brand or because she had suggested he was aware of the need for development consent and proceeding regardless or because he had previously assured her he would stop clearing and had not done so or even perhaps because of her professional qualifications, seems to me irrelevant, since I can only assume that Council would have treated any investigation of this nature seriously).

494 In that sense, each complaint which was registered as requiring investigation might be said to have been *a* cause of the Council's decision to investigate. What I do not accept is that this (or any particular) disclosure was singly or in combination with others the *cause* of the Council's decision to prosecute. If that were to be the case there would have been no need for an investigation at all. Instead, Mr Chestnut made it clear that when complaints are received it is a matter for the Council to investigate and the report which is forwarded to the Council provides the basis for the Council's consideration. Mr Chestnut, while acknowledging in the witness box Dr Monks' expertise, made it abundantly clear that what he was relying on was the report ultimately obtained from his own officers. What the Councillors relied upon is unknown – their deliberations were confidential and no evidence was called by any of them.

495 Therefore, I do not accept that losses flowing from the fact of the prosecution would have been recoverable even had I found there to have been either a breach of contract or unconscionable conduct as pleaded. Nor do I consider that such losses would appropriately have been the subject of an order for equitable compensation had there been a breach of fiduciary duty as alleged. Rather I think the only relief which would have been recoverable for the latter (or for unconscionable conduct) would have been measured by reference to the consequences of Dr Monks not having informed Mr and Mrs Brand of her disclosures to the Council – in other words, the so-called "wasted fees" incurred for work after 20 May 2004 less any deduction which would have been required to account for any residual benefit from the completion of the documents required for the development application.

· *Cost of defending Land and Environment Court proceedings*

496 It was suggested by Mr Faulkner that if the legal costs of the defence to the Land and Environment Court prosecution were otherwise recoverable, then the quantum of those costs had not been proved because there had been no assessment of reasonableness. Had costs of this kind been recoverable then it seems to me this could have been dealt with on a costs assessment procedure.

· *Loss of value in relation to land*

497 As to the value of the loss of opportunity claim, expert valuation evidence was adduced, by my leave, very close to the commencement of the hearing by the plaintiffs and responded to by the defendant. Some of the perceived deficiencies in the respective expert evidence may well have derived from the fact that, up until about

a month before the hearing, it would seem the plaintiffs had given no attention to how any loss of value/loss of a chance was to be established. Certainly, the first suggestion before me that the plaintiffs would be seeking to adduce evidence from a valuer came on 3 September 2009.

· *Valuers' evidence*

498 In considering the valuers' evidence, it is necessary to keep in mind what loss the plaintiffs allege they have suffered in this regard.

499 Paragraph 8.1 of the Further Amended Statement of Claim pleads that, as a direct result of Dr Monks' actions "as set out in paragraph 3" (ie the disclosures alleging criminal conduct and urging prosecution), Mr and Mrs Brand "*lost a chance they might otherwise have had to subdivide their property at in or about 2004-2006, and so make substantial profits*". Paragraph 8.2(b) pleads as part of the damages allegedly suffered as a consequence of the said breach of her fiduciary duty "*the value of a loss of a chance to obtain Development Consent for the subdivision of the said property, in an amount still to be determined*". The sale contemplated, therefore, from which the substantial profits were said to have been made, was of the land with the benefit of an approved subdivision application.

500 Two consequences flow from that. First, the earliest time at which any such opportunity or chance was lost can only have been after the development application had been lodged and determined (whether predicated on the assumption that it would have been successful or otherwise) and, secondly, the hypothetical purchaser is one who would be buying a property with the benefit of a subdivision approval – hence the so-called 'fear factor' (the fear that with the publicity of the prosecution the development application would be unsuccessful) could not logically arise. Insofar as the assumptions on which the plaintiffs' valuer gave his evidence are inconsistent with at least the second of those matters, this casts doubt on the utility of the whole of the valuation evidence.

501 Further, I note that the evidence shows that no decision was made by Mr Brand not to pursue the development application during 2004. That decision was not apparently made by him until the development application and accompanying reports were provided to him by Dr Monks in December 2004, even though by then he had been on notice of the potential difficulties which might be caused by the Council's attention to his clearing activities since at least July 2004.

502 There is no evidence that Mr and Mrs Brand intended themselves to develop the land and then sell the completed lots. Therefore, it seems realistic to assume that the earliest any loss of the kind pleaded was suffered was at some point during 2005, assuming a determination by the Council within a reasonable time after lodgement and with the possibility of an appeal against any deemed refusal if it did not give a determination within the statutory time period or against any actual refusal. As noted by Mr Faulkner, there was no evidence as to any diminished prospect of approval of the development application let alone a diminution caused by any misconduct on the part of Dr Monks. Mr Faulkner suggests (correctly in my view) that the plaintiffs' valuer seems to have assumed that *if* the land was able to be subdivided in 2004 then consent would have been obtained but that because of the prosecution consent was not obtained or the chance to obtain such consent was lost. There was no evidence of this.

503 Of course, as Mr and Mrs Brand still own the land it has remained open for them to seek development consent at any time since December 2004, including after the settlement and withdrawal of the Land and Environment Court prosecution in mid-2006. Therefore, logically, any damages or compensation for the loss of a chance to subdivide and sell the property would have to address the time at which realistically the property could first have been sold with the benefit of a subdivision approval compared with the position in which Mr and Mrs Brand would have been had they sold the property with a subdivision approval once the spectre of the prosecution had passed. There was little evidence to assist me in making such an assessment.

504 In that regard, what Mr Jacobs submits, in effect, is that where the plaintiff has proved that an actual loss of some sort has been suffered and the plaintiff has done its best to prove the quantum of that loss, then difficulties in estimating that loss do not defeat the remedy provided for breach of contract *(Tyco Australia Pty Limited v Optus Networks Pty Limited* [2004] NSWLR 333) and that where the plaintiff propounds a

methodology for quantification of damages then a defendant must show a cogent reason why the methodology propounded is insufficient (*Placer (Granny Smith) Pty Limited v Thiess Contractors Pty Limited (*2003) 77 ALJR 768 at [39]ff).

505 Mr Jacobs, in his submissions, extracted lengthy passages from *Commercial Damages*, (Sydney Jacobs, Lawbook Co 2008) including reference to the statement by Lord Mansfield in *Blatch v Archer* (1774) 1 Cowp 63, 98 ER 969 at 65 (Cowp), 970 (ER), as cited in *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 and referred to by Callinan J in *Placer (Granny Smith) Pty Limited v Thiess Contractors Pty Limited*, to the effect that all evidence is to be weighed according to the proof which it is in the power of one side to have produced and the power of the other to have contradicted. (In that regard, I think criticism can as equally, if not more, be made of the plaintiffs here as of the defendant and that any deficiencies in the defendant's expert evidence might well have been the product of the haste with which they were put to the obtaining of such evidence due to the lateness of the plaintiffs' attention to this issue.)

506 In all, I considered the valuation evidence to be relatively unhelpful.

*Valuation Principles*

507 In *Spencer v the Commonwealth* (1907) 5 CLR 418, the market value of land was said to be the point at which a desirous purchaser and not unwilling vendor would come together. This remains the touchstone for assessing market value of land.

508 In *Port Stephens Shire Council v Tellamist Pty Limited* [2004] NSWCA 353, there a case of assessing damages for trespass, where the land was not developed to its highest and best use, diminution of value was assessed using an "hypothetical development model". The Court of Appeal proceeded on the basis that the hypothetical parties would be aware of all relevant information about which a prudent purchaser would enquire (differing only as to whether in assessing this it was to be assumed that a true answer would have been given to any enquiry).

509 In *Kenny & Good Pty Limited v MGICA (1992) Limited* (1999) 199 CLR 413 at 436 McHugh J said that the market for property is assumed to be an efficient machine in which buyers and sellers have access to all currently available information that affects the property.

510 *ISPT Pty Limited v Melbourne City Council* (2008) 20 VR 447 was relied upon by Mr Jacobs as establishing that the first task of the valuer is to determine the highest and best use of the land. Although Mr Faulkner pointed out that this was a case involving the *Valuation of Land Act* 1960 (Vic) (which required regard to be had to the highest and best use and on the basis that there were no improvements), nevertheless both valuers (albeit somewhat grudgingly on the part of the defendant's valuer) accepted that the first matter to ascertain was the highest and best use of the land. In this case, the plaintiffs' valuer said that was as a subdivision; the defendant's valuer, who was forced in the witness box to concede that he had not carried out that exercise, says that the prospect of subdivision was too hypothetical and he therefore seems to have valued on a comparable sales methodology.

511 Mr Faulkner relied on *Coastal Estates v Bass Shire Council* [1993] 2 VR 566 where Gobbo J considered that in a case where there was a hypothetical valuation regard could properly be had to comparable sales as a check method. It was suggested that comparable sales would have a comparable highest and best use (which may, from a factual point of view, be correct and thus render the hypothetical subdivision exercise unnecessary).

*Plaintiffs' valuation evidence – Mr Hadley*

512 For the plaintiffs, reliance was placed on the expert evidence of a property valuer, experienced in the area in which the land is located, Mr Todd Hadley. Mr Hadley proceeded on the basis of estimating the gross realisable value for the land in 2004, if subdivided, at $8.125 million then applied a development margin of 40%

to assess the current market value prior to prosecution (at $3.1 million). (Mr Stamoulis' assessment was that highest and best use may be a subdivision but he regarded that as so uncertain as not to have any reasonable prospect.)

513 Mr Hadley then referred to the diminution in the value of the property occasioned because of the impact on the mind of the hypothetical purchaser of the prosecution, its publicity and the "fear" that this might impact negatively on any development application. (The publicity which surrounded the prosecution was evidenced by two newspaper articles; and there was also evidence given as to the impact of that publicity by Mr and Mrs Brand.) Mr Hadley thus applied a 10% further deduction to the sale price by way of a 'fear factor' to reflect what he saw as the increased risk that subdivision would not be approved. The immediate difficulty with Mr Hadley's approach, as already identified, was that the plaintiffs' claim is that they lost the opportunity to sell with the benefit of a subdivision approval – hence by then the fear factor ex hypothesi will have evaporated.

514 Reliance was placed by Mr Jacobs on *Morison v Commonwealth* (1972) 34 LGRA 273 and *Heddin v Deli Gas Pipeline Co* 522 SW 2d 888 (1975) (Tex) for the application of an additional discount to reflect a 'fear factor'. In *Morrison*, the facts supporting the conclusion of a fear factor were in evidence before the court. In *Heddin*, they were not. It was said that "*to establish that there is a basis in reason or experience for the fear, it is incumbent upon the landowners to show either an actual danger forming the basis of such fear or that the fear is reasonable, whether or not based upon actual experience. Reduction in market value due to fear of an unfounded danger is not recoverable*". (There, the question had arisen in determining compensation for land "condemned" by a pipeline company for the purpose of laying a gas transmission pipeline on the property. Evidence of a rupture in another gas transmission pipeline eight months after the date the land was condemned was not admissible generally as a factor affecting market value.)

515 Mr Hadley concluded that in 2004 there was a diminution in value of at least $1 million. Mr Hadley's valuation seemed to be predicated on the sale of the land in 2004 without the subdivision having been approved) to a purchaser who would purchase with a view to a future subdivision and would be concerned as to the impact of the Council's (likely to be heightened) attention to the application for approval by reason of Mr Brand's prosecution, not to the sale of the land in or around 2004 on the assumption that the development application had in fact already been pursued and the land subdivided. As noted, this is inconsistent with the pleading insofar as that postulated loss of a chance to subdivide and (then) sell it. Mr Hadley projected that loss forward for a number of years.

516 Objection was made to much of Mr Hadley's evidence; in particular those parts of his report which estimated the costs of subdivision for the purposes of assessing the profit margin a hypothetical developer purchasing the site would make. (Objection was also made to the basis on which he had applied the discounted "fear factor" on the basis that it was mere speculation – an objection that I considered had merit given the total lack of any reasoning on which that figure could be said to have been based.)

517 Mr Hadley was firmly of the view that the highest and best use of the property was for subdivision, and I accept that evidence, but he was not in a position to do more than estimate the likely cost of such a subdivision. His attempt to do so was contained in Section 13 of his report headed "Construction Costs". It purports to set out various matters as facts not assumptions.

518 Mr Jacobs sought to justify Mr Hadley's evidence on the basis of permissible generalisations based on his experience as a valuer of 20 years' standing in the area. As to section 13, it was submitted by Mr Faulkner that even if this part was read as a series of assumptions that the valuer had been instructed to make, the opinion should not be admitted if it is not part of the plaintiffs' case that those matters will be proved, because it cannot then have any weight. I considered there to be considerable force in Mr Faulkner's submissions on these points.

519 I rejected those parts of Mr Hadley's report which related to his assessment of construction costs for a proposed subdivision. I did so on the basis that Mr Hadley was not qualified as an expert in the area of estimation of project construction costs of this kind. There were a number of further affidavits of Mr Hadley filed in court during the course of the actual hearing in an attempt to qualify Mr Hadley as having sufficient expertise to give that evidence. Nonetheless, even with that additional material, I was not satisfied that Mr Hadley could be put forward as an expert in that area. His professed expertise lies in property valuation, not quantity surveying. The fact that Mr Hadley says that he has project managed a number of projects, and in that

capacity has reviewed and checked costs estimates or construction costs (and thus expressed himself as having the expertise to comment on "all aspects" of infrastructure for a subdivision of the proposed kind) did not persuade me that he was qualified as an expert in that regard.

520 Mr Jacobs argued that Mr Hadley could speak in general terms of his expertise and suggested that, as it would then be open to Mr Faulkner to cross-examine him as he wished on that expertise, I should admit Mr Hadley's evidence for whatever weight it might bear at the end of the day.

521 However, given the very general way in which the evidence was presented I was not satisfied that any weight could be reliably placed on the figures as estimated by Mr Hadley even on that basis. Accordingly, I rejected that evidence.

522 An affidavit of Mr Colin Brian Cahill, a surveyor, was then tendered on 29 September 2009. Mr Cahill's firm had been engaged to provide surveying work in relation to the proposed subdivision. He expressed an opinion as to the cost of a subdivision of the land. No reasoning process for this was provided. The figure was based on his "*experience in respect of the costs of civil works with subdivisions*" not all of which were identified. He listed various general factors that he said had influenced his estimation of costs, without explaining how or on the basis of what documents. The absence of any reasoning process in relation to the costings was exacerbated by the lack of evidence to support the assumptions.

523 A further affidavit of Mr Cahill sworn 30 September 2009 (though dated variously 27 and 30 September) was then tendered. Mr Cahill is a qualified land surveyor, not a quantity surveyor, but said he had 14 years' experience on subdivision sites and in the design, supervision and costings of subdivisions, work which involved assessing tenders and advising clients on the most economical solutions. He referred to his intimate knowledge or the costs of construction in residential and rural subdivisions in the Gosford shire and that he had found a computer disc of some engineering plans for use in the proposed subdivision. He appears to have based his estimates on these engineering plans produced to him (the provenance of which was unclear). Mr Cahill had already emphasised in his earlier affidavit the difficulty caused by the absence of engineering plans. His third affidavit again seemed to list various factors said to have influenced his estimates of costs without explaining how they had so influenced his estimate.

524 Mr Faulkner submitted that all the material on which Mr Cahill relied in this third affidavit was specific to Mr Cahill; that there was no general information of the kind a valuer might be able to rely upon as part of his expertise; and that if specific instances were to be relied upon they would have to be proved, not simply listed. He submitted that he could only cross-examine if he sought to do the plaintiffs' case and bring out evidence in chief. It seemed to me that there was great difficulty attributing any weight to the general assertions in the affidavit and it was not to the point to suggest that this could be clarified in cross-examination. I was not satisfied that Mr Cahill was qualified as an expert to provide estimates of construction costs of a project of this kind.

525 I considered whether it would be appropriate to admit his evidence subject to relevance and weight but since none of the evidence to prove anything in relation to Mr Cahill's listed projects was before the court and the evidence had been put forward too late for the defendant's Counsel properly to deal with it, I did not consider that to be the appropriate course. I thus rejected Mr Cahill's affidavit on the basis that other than in very broad terms the underlying facts on which his opinion was based or the process by reasoning was not set out.

526 The other main objection to Mr Hadley's report had been to section 15 in which various factors were set out (see 15.5.1) to which he said a hypothetical purchaser would have regard when considering the impact of the publicity to the prosecution, including that "development outcome may be compromised", delays in development consent, potential for more onerous conditions contributing to an increase in construction costs and a longer development period. His assessment in paragraph 15.5.3 was seemingly based on those factors, but without any explanation of his reasoning process. The way in which he had formed his opinion or judgment was not exposed. In *ASIC v Rich* (2005) 54 ACSR 326, Spigelman CJ referred to the need to expose the process of reasoning by which the valuer has formed the opinion that he expressed. I did not have the benefit of any such reasoning in section 15. I provisionally allowed paragraphs 15.3 and 15.5.3 of the report with leave to adduce further evidence as to the reasoning contained therein.

527 It seems to me that the question as to what Mr and Mrs Brand had intended to do with this property (highly relevant when considering the value of any lost opportunity (as pleaded) in relation to the subdivision and sale) was not adequately dealt with in the valuation evidence.

528 If, as pleaded, Mr and Mrs Brand's loss relates to the loss of an opportunity to subdivide and then sell the land, at most what they would seem to have suffered was a delay in their plans (albeit one that may have had financial consequences in light of the softening in property values over that period). This is because they would not have been in a position to lodge any development application until December 2004 at the earliest (when the application and accompanying reports were finally prepared and available for lodgement) and there was no evidence as to how long such a process might take and as to the prospects of success of such an application. At most, therefore, the lodgement of their development application was delayed for a period of time from December 2004 while they considered the impact of the prosecution on their development plans. This was not the basis on which the valuation evidence seems to have been predicated.

529 As noted, Mr Hadley's opinion (based he said on the studies contained in Dr Monks' report) was that the highest and best use of the land was for a subdivision to create an additional 9 building lots within the subject property (ie 10 building sites in all, once the existing dwelling was included). Mr Hadley said he had regard to market evidence of 3 en globo sales (in Picketts Valley, Erina and MacMasters Beach), vacant site sales in a number of locations including two at MacMasters Beach and three improved sales at Matcham and Wamberal.

530 Mr Hadley's conclusion was that the gross realisable value for the proposed allotments was $8.125m. His assessment of what a fully informed purchaser would pay for the land (knowing Dr Monks' studies and the publicity of the prosecution of Mr Brand 'or its impact on the outcome of any development application' was $3.1m GST exclusive less the further 10% discount. Mr Hadley based those assessments on the hypothetical feasibility assessments and on the assumption (unsupported by evidence) that total construction costs would be $1,494,390. Applying the 40& profit and risk factor he reached $3.1m value without the impact of the prosecution and $2.82m GST exclusive with the impact of the prosecution. The diminution in value was therefore $280,000.

531 I accept that it may be appropriate to take into account a fear factor in particular cases but in my view any such factor in this case would be non-existent if the assumption inherent in the claim for damages is accepted – ie if the land had been sold with the benefit of a subdivision approval. Accepting, for the sake of argument, that the assessment was to be on the assumption that what Mr and Mrs Brand was deprived of was the ability to sell as is (ie without a development application) then it still seems to me that the fear factor in 2004 would be relatively low – since it seems to me difficult to argue that there would be a rational basis for a purchaser to assume that simply because the vendor had in the past committed a breach (or been prosecuted for a breach) of the EPA Act, any subsequent development application by the purchaser in relation to the land in respect of which the alleged breach had occurred would be prejudiced. That submission requires the court to assume that the Council would disregard its duties when considering such an application. I accept the contrary opinion expressed by Mr Stamoulis (the defendant's expert valuer) in that regard.

532 Furthermore, over time such a factor must surely dissipate, as Mr Jacobs appeared readily to concede. Mr Hadley attributed a 10% fear factor discount. I would have allowed no more than a nominal discount in 2004 but over time I would have assumed that this would greatly dissipate (particularly if the prosecution were not to succeed, as was the case here) and since the delay would not have become operative till sometime in 2005 at the earliest, the fear factor would surely not be as immediate at that stage.

533 Interestingly, Mr Hadley also assessed other factors, such as what he described as a softening in the property market of 20% to 25% (interesting because it suggests that the real loss (if any) which may have been caused would have been in the delay in sale of the property ie loss of the opportunity to sell at a time when in hindsight the property values were higher) and an increase in construction costs of approximately 15% to arrive at a current market value in 2009 of $1.7m GST exclusive. However, his financial feasibility model provided no evidence for the numbers inserted in the model (and, somewhat surprisingly, is headed "after conviction" suggesting that the fear factor assumption was based on the assumption that the prosecution was successful, inconsistently with the actual assumptions he seems to have been asked to make, though nothing turns on this).

534 A later affidavit of Mr Hadley was tendered in which he opined that, whatever the construction costs, the diminution in value would be precisely the same. If that is correct, then I would understand him to be saying that whether or not the construction costs are capable of estimation they will increase constantly over a relevant period and the diminution in value because of the fear factor will remain constant – based on a 50% overall reduction from the assumed sale price of the proposed allotments. As I understand his affidavit evidence, the costs of undertaking a rural subdivision will not affect sale prices for the subdivision lots but will affect the profitability of the development in the hands of the developer. If so, one would assume that the developer would be seeking a higher sale price or a lower construction price in order to maintain a satisfactory return, but that is an assumption on my part.

535 In assessing the value of a property based on the highest and best use being a subdivision I would have thought that a fully informed purchaser (who on this assumption will be a developer) would look carefully at the ultimate profitability of the development when assessing how much the purchaser was prepared to pay to acquire the land. Nevertheless, Mr Hadley asserted that the value of the land would not be affected by any variation to the civil costs level.

*Defendant's valuation evidence – Mr Stamoulis*

536 There were a number of criticisms made of the defendant's valuer (Mr Theo Stamoulis).

537 First, he was criticised for not having experience in valuations in the Gosford area. Mr Stamoulis is, however, a registered valuer and there is nothing to suggest to me that valuation principles would be different when applied to properties in the Gosford area as opposed to the application of those principles elsewhere. I accept that Mr Hadley had greater familiarity with local properties, since he practised in the area, but I am not persuaded that there was necessarily any greater weight to be placed on the evidence which he gave as to comparables, in circumstances where Mr Stamoulis had taken steps to familiarise himself with the area, had inspected the location and viewed the properties externally and had had regard to valuation information about sales in the areas. He had also previously carried out some valuations in or around that area. Therefore, while Mr Stamoulis' local experience was not as extensive as that of Mr Hadley, this does not of itself mean that he should be rejected as not being able to comment as a qualified expert for this purpose.

538 A second criticism made of Mr Stamoulis was as to the basis of his inspection of the property. Mr Stamoulis was cross-examined as to this issue; in particular whether he had (as he said) driven onto the access road to the property up to a gate indicated by him on a map. I accept his evidence that he did drive up the access road and obtained a view of at least the general nature of the property.

539 Further criticisms were contained in a schedule, said to have been prepared by Mr Hadley, by way of a critique of Mr Stamoulis' report. This was handed up to me as an aide memoire. It has no status as evidence and was read by me (as requested) solely as a submission put by Mr Jacobs. It may be summarised as a criticism by Mr Jacobs of the Stamoulis report on the following bases:

· that as he had not carried out a full inspection of the property (which Mr Stamoulis concedes) the Professional Practice Guidelines of the Australian Property Institute (which were not in evidence before me) prohibited him from providing a current market value assessment of the property and that he could not provide a restricted valuation assessment having regard to the "attributes" of the property;

· that there were errors in certain of the title descriptions, dates of sales, descriptions of improvements, zoning details or the like and there was a failure to mention availability of sewers to the proposed lots 1-7, as well as the incorrect attributes or descriptions of properties (including an assertion that certain properties were said not to be "en globo" sites);

· that he did not establish the construction costs from the subject property or comparable properties;

· that the comparable sales method was an unacceptable method of valuation for this type of property unless the components of value for the properties (including estimated levels of gross realisable values, GST

liability, development potential, estimated development costs, appropriate profit margin and rate of return, total development period, sales rate, yield) were comparable;

and criticism was made as to the equivalence of the comparables.

540 The substantive criticism of Mr Stamoulis' falls in two parts: first, that Mr Stamoulis failed at the outset to determine the highest and best use of the subject land, and, secondly, that he failed to make (or, perhaps more precisely, to explain how he had made) adjustments to the comparables.

541 As to the first, I consider this criticism to be warranted. Ultimately, after resisting this proposition on the basis that it was too speculative or subjective and exercise, Mr Stamoulis conceded that the best use of the property would be as a subdivision. He did not assess this. His mantra seemed to be that it was too speculative. While he conceded it could be done in certain context (such as mortgage valuation) he was apparently very conscious in such cases of protecting his professional indemnity insurance premiums. I see no reason why an hypothetical assessment could not have been made based on appropriate assumptions and with necessary qualifications.

542 Nevertheless he said that a hypothetical purchaser looking at a property the highest and best use for which would be subdivision, would (if he or she was concerned that the Council might take a dim view of any potential subdivision or was concerned at the impact of the prosecution) make enquiries from the Council. While Mr Stamoulis accepted that Councils as a matter of practice never bind themselves, his experience was that they would be able to give guidance to developers (T 360). He was adamant that the Council does not 'prosecute the land' and did not believe it would take out their wrath (against Mr Brand, say) on an incoming third party purchaser. That surely must be the case unless one is to proceed on an assumption that local Councils are likely to disregard the proper exercise of their duties when exercising a power to approve development applications of this kind.

543 As to the second, Mr Stamoulis accepted that comparable sales needed to be adjusted for various matters (T 361.21). He says that paragraph 34 of his report shows those adjustments. Having reference to his report, I was not persuaded that Mr Stamoulis had failed to make relevant adjustments, although I accept he did not explain that process as clearly as could have bee done.

544 Mr Jacobs submits that the Stamoulis report should be rejected or given no weight and that, in the absence of an alternative method of determining damages, Mr Hadley's approach should be adopted.

*Summary*

545 In summary, Mr Stamoulis ultimately accepted that subdivision was the highest and best use but was not in a position to make an assessment as to likely development costs due to what he saw as the highly subjective nature of the exercise. Accordingly, he proceeded to adjust what he regarded as comparable sales and discounted Mr Hadley's report as being based on not appropriate comparables (most being out of the Kincumber area). He also seems to have conceded that a 40% profit/risk factor would be appropriate for a developer but that any discount for the fear factor would be minimal.

546 Mr Hadley on the other hand, says the property should be valued for its subdivision potential and that, whatever the construction costs, the impact on the assessment of profit/risk for the development would affect the value by an additional discount of 10% above the standard 40% discount factor.

547 Mr Hadley puts the value of the lost chance to subdivide and sell in 2004 at $1.1 million. Mr Stamoulis says the land can only have been valued en globo and the value he placed on it as at July 2004 was $3.45 million and at September 2009 $2.76 million, a difference over the period of around $690,000.

548 In neither case do I consider that the valuers have addressed the appropriate question. If I had been required to value the lost chance to sell the property with the benefit of a subdivision application (assuming that

chance had been lost by reason of Dr Monks' misconduct), I would have needed to assess the likely time the Council would have taken to consider the development application once lodged (which could not have been until after 20 December 2004 at the earliest, as that was when the papers were ready), the possibility that the application would not have been successful and that it might have been necessary to consider an appeal against rejection, and the likely value that a willing but not anxious purchaser would have paid for the property having regard to its highest and best use at that point. That suggests a hypothetical sale perhaps some time in 2005, with a property market softening at some time over the period.

549 As the property remains in their hands and it remains open to them now to pursue the subdivision application, the figure derived from a hypothetical sale in say 2005 would surely need to be compared with the value of the property at the point at which the impact of Dr Monks' misconduct might be said to have dissipated – in other words, the measure of the lost chance would have to be assessed by what Mr and Mrs Brand could have sold the property for at the time they could reasonably be expected to have sold after the prosecution, not necessarily as at today's date with an overall discount perhaps to reflect the possibility that they would not have chosen to proceed in any event depending on what happened with the initial development application. I simply do not have sufficient information to carry out that exercise so it is perhaps fortunate that it does not arise for determination in light of my findings on liability.

550 If it had been necessary to determine the loss I think that Mr Stamoulis' comparable sales figures in that regard would seem more likely to produce a more realistic assessment of the value of the lost chance insofar as they look at lost profits from comparable sales at different points in time without reference to the fear factor which I think has not been established as applicable in this case. That would suggest a much lower sum than that for which the plaintiffs have contended.

· *Wasted fees paid to Dr Monks*

551 In relation to the s 43 *Fair Trading Act* claim, the only potential unconscionable conduct (not pleaded as such) which I consider might have been able to be established was in relation to the failure of Dr Monks to put Mr Brand on notice of the disclosures which she had made to Council (or of Dr Monks' intention to make such disclosures)

552 The losses itemised in the first two heads of damages could not be said to have been caused by that conduct. Nor is any distress and hurt suffered by Mr and Mrs Brand (since this resulted from the publicity relating to the prosecution and not, in my view, Dr Monks' failure to tell them what she had done or proposed to do).

553 The damages referable to this claim would in my view have been limited to any costs incurred by Mr and Mrs Brand for work done in relation to the development application after 20 May 2004 (that being the date on which Dr Monks first contacted the Council by telephone). I would in that regard have considered submissions as to whether any residual benefit had been obtained by reason of the completion of the reports, for which Mr and Mrs Brand should account in some way. In any event, in light of my findings on liability, this issue does not arise.

**Conclusion**

554 For the reasons set out above, I find that the plaintiffs have not established their claims against Dr Monks. I find for the defendant. I dismiss the proceedings with costs. I will hear any submissions as to the basis on which the costs order should be granted at a time convenient to counsel.

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AMENDMENTS:

17/02/2010 - - Paragraph(s)

LAST UPDATED:
17 February 2010