MARONIS HOLDINGS LTD and Another v NIPPON CREDIT AUSTRALIA PTY LTD and Others

SUPREME COURT OF NEW SOUTH WALES — EQUITY DIVISION

BRYSON J

10 July–8 September, 9–19, 30 October–1 November 2000, 7 June 2001 — Sydney

[2001] NSWSC 448

Directors — Directors' duties — Exercise of powers — Principal asset used to secure loan to related company — Whether director clothed with authority as attorney — Whether transaction for proper purpose — Whether transaction ultra vires the company — Whether parent company's director also director of subsidiary — Consideration of res judicata and ashun estoppel — (NZ) Companies Act 1993 ss 2(1), 18(1)(a), 18(1)(c).

Solicitors — Duties to third parties — Whether retainer by estoppel — Whether bound to advise on wisdom of transaction — Whether put upon enquiry as to directors' breaches of duty.

Financial institution — Whether put upon enquiry as to directors' breaches of duty — Whether constructive notice of breaches — Whether owed duty of care to party providing security.

Girvan Australia Ltd was a member of the Girvan group of companies that included Girvan Corp (NZ) Ltd. Girvan Australia's directors included Petersen, Duncan and Ambler, the latter two being also the only directors of Girvan NZ. The directors all lived in Australia, although they visited New Zealand from time to time. Through a chain of subsidiaries, Girvan NZ indirectly controlled one its subsidiaries, Maronis Holdings Ltd. Girvan Australia controlled 74% of the shares in Maronis, the remaining 26% of the shares being held by members of the New Zealand public. Maronis' principal asset was the Liverpool truckstop site in New South Wales, which the group intended to develop as a transport terminal.

In 1989 Duncan and Ambler caused Maronis to mortgage the site to Nippon Credit Australia Ltd to secure a loan of A$15m to Girvan Australia. Maronis had no business or affairs other than ownership of the site, had no revenue and no capacity itself to service the borrowings. The directors did not consider giving security or protection to Maronis or Girvan NZ against the risk of Girvan Australia defaulting. Girvan NZ additionally executed a deed of guarantee and indemnity. The guarantee document was incorrectly signed and imperfectly sealed, there was no quorum at the relevant meeting and no notice was given to the other directors. Duncan asserted that he had been appointed under a power of attorney allowing him to execute the guarantee.

At the time of executing the securities the directors of Maronis were aware that Girvan Australia was experiencing serious cash flow problems, and that there was a real possibility it might not be able to discharge the proposed loan. Clayton Utz, solicitors for Girvan Australia, acted for Girvan Australia in handling various related matters including the loan transaction. Clayton Utz did not have instructions from Maronis, but the firm did correspond with the Land Titles Office as if it acted for Maronis.

In 1990 Maronis lodged a caveat against dealing with the truckstop site, claiming an estate in fee simple unencumbered by the mortgage. The same day Maronis issued a summons claiming a declaration that the mortgage was void or unenforcable. Nippon Credit filed a cross-claim seeking an order for removal of the caveat.

The court disposed of the proceedings by ordering that the summons be dismissed and the caveat removed. Subsequently, Maronis issued the present proceedings seeking equitable remedies against the directors, solicitors and Nippon Credit.

Held, judgment for the plaintiff against the directors, but otherwise judgment for the defendants:

Execution of the guarantee

(i) Girvan NZ did not impliedly assert that Duncan was the company's attorney, and irregularities in the guarantee document told against this implication.

(ii) Nonetheless, in terms of s 18(1)(c) of the Companies Act 1993 (NZ) Nippon Credit should have made some investigation into the existence and terms of the power of attorney. Nippon Credit's and Girvan Australia's solicitors communicated on many points of detail. In that context it was not proper that the apparent irregularity in the purported execution of the guarantee was not considered. The most rudimentary investigation would have revealed the anomaly that Ambler's name was given but he did not sign; that Duncan signed but there was no evidence of a power of attorney; and the inconsistency of the alleged execution under power of attorney with the decision in the company minutes to execute the document under seal. The transaction was large, the form of execution was irregular on its face and it was accompanied by minutes purporting to show a resolution to execute the guarantee in a different way. The circumstances called for inspection of or enquiry about the document which created the power of attorney. Girvan NZ did not incur any liability to Nippon Credit under the guarantee.

> *Bank of New Zealand v Fiberi Pty Ltd* (1994) 14 ACSR 736; 12 ACLC 48; *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722, applied.
>
> *Equiticorp Industries Group v R* [1998] 2 NZLR 481; *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279; (1991) 6 ACSR 464, considered.

Directors — breach of duties

(iii) It was normal commercial practice within the group to use mortgage finance to fund development projects, and to maximise borrowing ability when doing so. It was unremarkable that available credit was at times fully extended, followed by large falls in credit as projects were sold. It was in the nature of the group's development business that some repayment date was always looming and that new financing arrangements needed to be negotiated. These were not in themselves indications of crisis.

(iv) The established legal test asks whether the directors acted honestly in the discharge of their powers in the interests of the company; if they acted for any other reason this constitutes an abuse of the power conferred upon them as directors. The preferable view is that the breach has no consequence if the transaction was, viewed objectively, in the interests of the company. If directors take a company into a transaction in the interests of a group of which the company was part, or of a parent company, or of a subsidiary company, and what they did was objectively in the interests of the company, they incur no liability.

> *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, distinguished.
>
> *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, followed.

(v) Where directors make a decision with a view to the interest of some related or other company the exercise of their powers may be open to question. But paying regard to the advantage to flow to another company is not necessarily an indication of abuse of power. The duty to act for a proper purpose does not preclude exercise of a power with a view to benefiting another company if the transaction is one for the benefit of the company entering into it. The benefit need not be direct and immediate, but may arise indirectly.

> *Advance Bank of Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464; 12 ACLR 118, applied.

(vi) Girvan Australia was economically interested in Maronis and Girvan NZ identically, although the economic interest was traced through several intermediate companies. That they were all in the same group does not dispense with the need to consider the interests of the particular company which entered into the transaction. Although Girvan Australia and Maronis were members of the same group, they had no identity of economic interest; 26% of the Girvan NZ shareholders had no direct economic interest in Girvan Australia. Girvan NZ had a number of economic ties and contractual relationships with Girvan Australia that Maronis did not have. There was a real possibility that Girvan Australia would be unable to discharge the Nippon Credit loan when it fell due. No reasonable person in the position of a director of Maronis would have committed A$15m on an unsecured basis without any kind of protection.

> *Walker v Wimbourne* (1976) 137 CLR 1; 3 ACLR 529; *Nicholson v Permakraft Ltd* (1985) 3 ACLC 453, considered.

(vii) In acting as a director of Maronis, and in purporting to act as a director of Girvan NZ, Ambler did not apply his mind as he should have to how his powers to commit those companies to the proposed transactions ought to be exercised. He did not consider where the companies' interests lay or how they should be served. He simply carried out indications given to him by Duncan or by company officers as to what decision was required, and signed documents without making any decisions of his own. He failed in his duty to exercise his powers in good faith in what he considered were the interests of the company, and acted for a collateral purpose.

(viii) To put the affairs of Maronis wholly in the hands of Girvan Australia was to entirely disregard their separate corporate personalities and the separate ownership interests represented by the minority shareholding in Maronis. It was wrong and unreasonable to adopt a point of view in which the two companies' interests were equated; they were plainly different at that time, and there was an obvious prospect that further differences might arise through changes in ownership or different commercial outcomes for the different companies. The transactions were plainly not in the interests of Maronis, which obtained no tangible advantage from Girvan Australia or from any other source by giving the security. The mortgaged land was Maronis' only asset. The amount borrowed was large. The works were to occur in a different country. And 26% of the shares in Maronis represented money invested by unrelated persons. It was beyond the range of judgment of any reasonable director of Maronis to decide to grant a mortgage without obtaining protection of any kind, and to simply trust that Girvan Australia would handle matters so as to produce a good outcome.

Directors — meaning of "director"

(ix) Petersen was the leading figure in the Girvan group, and the major shareholder in Girvan Australia, but was not a director of Maronis. Petersen had extensive influence over the affairs of Girvan Australia and Girvan NZ. But there was insufficient evidence that Petersen exercised sufficient control and influence over the affairs of Maronis to identify him as a director under s 2(1) of the Companies Act 1993 (NZ). Although he had the opportunity and motivation to control these events, the evidence did not show that he did so.

(x) Obiter: It would not be correct to introduce common law duties of care into the field of responsibility of directors for the affairs of associated companies of which they are not directors.

Directors — ultra vires

(xi) No question of whether the mortgage was ultra vires Maronis arose in this case. Maronis' powers were not limited to those enumerated in a memorandum of association. The effect of s 18(1)(a) of the Companies Act 1993 (NZ) was to make it impossible (save for the exceptions stated therein) to attack Maronis' transactions on the ground that they were ultra vires.

Solicitors — duty of care

(xii) Clayton Utz did not act for Maronis, and did not charge fees to it. There was no contractual retainer nor could a retainer be implied from the circumstances. To the extent that Clayton Utz mistakenly wrote letters purporting to act for Maronis, and attempting to carry out instructions received from Girvan Australia, Clayton Utz had a duty in tort to exercise reasonable care in the business to which the representations related.

(xiii) Clayton Utz owed no duty to Maronis to advise on the wisdom of entering into the mortgage. It was plain that the interests of Maronis and Girvan Australia were different, so obviously so that it would not have occurred to a solicitor that this needed to be pointed out to the company directors. There are clients who suffer from social, intellectual or other personal disadvantages such as would prompt a solicitor to explain matters of this kind. Only in the strangest of circumstances would directors of public companies and their subsidiaries be in that position.

(xiv) Clayton Utz were not responsible for Duncan and Ambler's breaches of duty. Clayton Utz had no contact with those directors personally, and no need or reason to consider how Maronis made its decisions and what considerations led to the making of the decision to provide the mortgage. There was nothing in the circumstances to put Clayton Utz upon inquiry that the directors were breaching their fiduciary duties. It was unremarkable that a company should give mortgage to support borrowings by a related company. The decision to do so is not a signal for suspicion or enquiry, or for particular attention by anyone other than those who made the decision to give the mortgage. It would be necessary to establish that Clayton Utz knowingly assisted in those breaches of duty in circumstances which were objectively dishonest.

Financial institution — breach fiduciary duties

(xv) No financier dealing with Maronis had any realistic means of finding out what the directors' considerations were and evaluating their quality. There was no inquiry which could have been made into what was truly moving the directors of Maronis, further than the steps which were taken. Maronis' decision was a board decision, all the directors took part in it, and the resolutions expressed appropriate conclusions as to Maronis' interests. Those conclusions were not on their face doubtful or suspicious, but were in favour of a transaction of a kind which it is ordinary and unremarkable for a company to enter into, according to the company's own judgment of its interests. It was not Nippon Credit's business to look after Maronis' interests; that was the business of Maronis and its directors.

> *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; 93 ALR 385; 2 ACSR 161, distinguished.

(xvi) Nippon Credit did not have constructive notice of the directors' breaches of duty. Constructive notice requires that there be facts which to a reasonable man would demand inquiry. This is a test which cannot be fulfilled lightly, and is not far removed from want of probity or dishonesty. In its dealings with Girvan Australia and Maronis there were not facts which would lead a reasonable person in Nippon Credit's position to demand further inquiry of the directors of Maronis.

Financial institution — duty of care

(xvii) There was nothing in the nature of the dealings between the parties, or any special aspect of the facts which might establish dependency, reliance, undertaking of responsibility or any other element such as might give rise to a duty of care. All concerned were commercial organisations; the relationship between them had a solely commercial character; and dealings took place on the basis that each party was pursuing its own interests and was the custodian of its own interests.

> *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606, distinguished.

Res judicata

(xviii) The dismissal of the caveat proceedings did not have the effect of adjudicating any claim that the mortgage was valid, nor that Nippon Credit was liable to make good

any loss to Maronis. The present proceedings were quite unlike the earlier proceedings adjudicated upon, and were not an attempt to obtain a different remedy for substantially the same cause of action.

Anshun estoppel

(xix) A claim that a mortgage has no effect for legal reasons, and a claim that equitable remedies arise out of its operation and effect, are discrete claims. Maronis could have brought in the earlier proceedings the claims made in the present proceedings. But the test is whether the present claims were so relevant to the subject matter of the first proceedings that it was unreasonable of Maronis not to then rely upon them. Maronis acted reasonably in dealing with the claims separately.

Port of Melbourne Authority v Anshun Pty Ltd (1980) 147 CLR 589; 36 ALR 3, applied.

Claim

The plaintiff company applied for orders against the defendant directors, solicitors and financiers as set out in the judgment. There were various cross-claims.

B W Rayment QC, J E Marshall and *G R Kennett* instructed by *Henry Davis York* for the first and second plaintiffs.

F M Douglas QC and *T G R Parker* instructed by *Allen Allen & Hemsley* for the first defendant.

R K Rasmussen instructed by *English Kearns* for the second defendant.

G E Underwood and *T Thawley* instructed by *P W Hopkins* for the third defendant.

A McGrath instructed by *Thompson Eslick* for the fourth defendant.

C McCulloch, fifth defendant, appeared in person.

R Darke instructed by *Greaves Wannan & Williams* for the sixth defendant.

R Macfarlan QC and *J P A Durack* instructed by *Minter Ellison* for the seventh defendant.

J B Simpkins SC instructed by *Phillips Fox* for the cross-defendants to first cross-claim.

[1] Bryson J.

Index

The Girvan Group and the takeover

[2] This complex litigation arises out of the affairs of companies associated with Girvan Corp Ltd, referred to in these proceedings as Girvan Australia, and Girvan Corp (New Zealand) Ltd, referred to as Girvan NZ; and to proposed development of land at Crossroads, near Liverpool, New South Wales, as a transport terminal. The pleadings are very complex and obscure. There were lengthy interlocutory proceedings before trial. Amendments produced the fourth further amended statement of claim (FFASC).

[3] Building and development enterprises bearing the name Girvan existed for many years before 1987. In 1987 Sift Ltd obtained control of companies of that name and changed its name to Girvan Corp Ltd, and was listed on the Australian Stock Exchange as a public company in September 1987. Mr Paul Petersen the second defendant was a director and a leading figure in its affairs throughout the relevant events. The third defendant Mr Warren Duncan and the fourth defendant Mr Alan Ambler were directors at the time of listing, as were others; and they remained directors throughout the relevant events.

[4] Girvan Australia had many subsidiaries. Their relationship to Girvan Australia sometimes descended through chains of subsidiaries. Presently significant subsidiaries included Loc-Tex Holdings Pty Ltd and its subsidiary

Loc-Tex International Pty Ltd; these companies were concerned with property development business. Another was Girvan NSW Pty Ltd, which carried on construction business.

[5] The Liverpool Truckstop Site (LTS) is a generally triangular site which about 1987 could be recognised as bounded generally on the north and north-west by the road then called the Hume Hwy, now called Camden Valley Way, on the south-east by Campbelltown Rd, at that time the access road between the Hume Hwy and the South Western Fwy, and the planned northern extension of the South Western Fwy, since constructed so as to carry the South Western Fwy, now known as the Hume Hwy, north and east towards Liverpool and intersect with the M5 motorway. The state of the property at the opening of events is generally illustrated by the photograph at Ex 37 p 1.3 [not reproduced in this report].

[6] The extension of the freeway completed the definition of a triangle each side of which was to be a major road, and increased the prospects for development related to road usage. In the triangle there were a hotel site in the north-eastern apex and 11 smaller parcels of land in various ownerships used for rural purposes. All 11 parcels of land had rural zonings, with small variations in their terms. In 1987 and 1988 Loc-Tex International accumulated options to acquire these 11 parcels. Loc-Tex and Loc-Tex International also investigated the feasibility of developing the LTS as a large comprehensive transport terminal. The investigation was extensive and included obtaining costings dated 19 February 1988 prepared by Exley & Associates for work to be done on the site, preparing architects' drawings, making rezoning applications, drafting tender submissions, preparing feasibility studies and approaching potential investors. Loc-Tex International commissioned Don Fox Planning Pty Ltd to prepare an environmental planning study for the purpose of a rezoning application. A rezoning application was made to Liverpool Council in January 1988, leading to extended consideration by Liverpool Council, preparation and advertisement of a Draft Local Environmental Plan, consideration of submissions and the gazettal of Liverpool Local Environmental Plan No 182 on 4 November 1988. The effect of LEP182 was to enable approval be given for development as a transport terminal, while leaving the previous zoning instruments to operate otherwise. The Liverpool Development Control Plan No 5, which was approved by Liverpool City Council on 20 December 1988 and came into force on 8 February 1989, contemplates development of the whole site as a transport terminal.

[7] In 1988 arrangements were made for Loc-Tex International to transfer the benefit of the options to Oxford House Ltd. Oxford House was a New Zealand company then controlled by interests associated with Girvan Australia. These arrangements first took the form of an agreement in writing dated 29 June 1988 which was markedly defective. The agreement was rectified by an agreement made on 31 August 1988 to which Loc-Tex International, Loc-Tex and Oxford House were parties.

[8] From June–September 1988 Girvan Australia acquired a majority interest in Girvan NZ, the second plaintiff, by a series of events. At that time the company which became Girvan NZ was named St Martins Properties Ltd. It was formed in New Zealand, carried on construction and development business, and did not have any operations in Australia. Its shares were listed on the New Zealand Stock Exchange. Seventy-four per cent of its shares were owned by Unigroup Pacific

Ltd and 26% of its shares were owned by others, mostly members of the New Zealand public. Atwood Holdings Ltd, which was wholly owned by Girvan Australia, made a share sale and purchase agreement with Unigroup (the Atwood agreement) on 29 July 1988 for the purchase of 74% of the shares in St Martin Properties Ltd for NZ$59,180,360.

[9] Also on 29 July 1988 Girvan Australia entered into an agreement to sell to St Martins Properties all the shares in Dextran Investments (New Zealand) Ltd. This is referred to in the evidence as the Dextran agreement. The Dextran agreement brought about transfer to St Martins Properties of economic control of assets in a settlement balance sheet, with warranties which affected the values of some assets. The parties included two private companies which held the minority shares in Dextran, and also Mr Petersen, Mr O'Neill and Mr Duncan. The Dextran agreement was interdependent with the Atwood agreement so that they were to be settled contemporaneously (as they later were). St Martins Properties was to purchase the shares in Dextran for a price to be calculated which later proved to be NZ$46.55m. With control of Dextran would pass control of its subsidiaries, one of which was Oxford House Ltd and another, described as "Buddle Findlay Shelf Co (name to be advised)", later proved to be the first plaintiff Maronis, which had been formed on 13 June 1988. The assets of Dextran and its subsidiaries were to include the LTS, which for the purposes of the settlement balance sheet was valued at NZ$29m; they also included a freehold property at Nielson St, Onehunga, Auckland, subject to mortgages, which was leased to Transpac Holdings Ltd, and a leasehold property at Toop St and Port Rd, Seaview, Wellington, also mortgaged and leased in part to Transpac Holdings Ltd. St Martins Properties was to retain from the purchase price funds required to pay out the options over the LTS, and pay them out progressively as required.

[10] In cl 8 of the Dextran agreement Girvan Australia gave St Martins Properties covenants relating to these properties. Clause 8.1 gave St Martins Properties a put option to sell the Wellington property to Girvan Australia on stated terms by giving notice in writing within 12 months following the settlement date. The covenant in cl 8.2(a) is:

> (a) The Sydney Property will be re-zoned to permit its development as a comprehensive transport terminal in accordance with the proposal therefor prepared by Girvan (details of which have been delivered to the Purchaser prior to his execution hereof) . . .

[11] Clause 8.2(b) provides for the exercise of the options.

[12] Clause 8.3–8.5 read:

> 8.3 Girvan further covenants and agrees with the Purchaser in respect of the Sydney Property that:
>
> (a) Girvan will spend the first A$8 million in establishing the required infrastructure works provided that such expenditure is first certified as being due and payable by an independent registered quantity surveyor approved by the parties;
> (b) the cost of completing the infrastructure works will not exceed A$15 million;
> (c) the infrastructure works will be completed within twelve (12) months following the Settlement Date.
>
> 8.4 For the purposes of Clause 8.3 the term "infrastructure works" shall have the same meaning ascribed to that term in the development proposal referred to in Clause 8.2(a).

8.5 The Purchaser covenants and agrees with Girvan that from the proceeds received from the sale of parcels of the Sydney Property it will progressively refund to Girvan the A$8 million referred to in Clause 8.3(a) *PROVIDED THAT*:

(a) the prices paid to the Purchaser or the Company on the sale of such parcels shall be at an average of not less than A$9.00 per square foot as determined by the actual sale contract or, where the sales of the parcels are not negotiated on an arm's length basis, as determined by independent valuation;

(b) the average sale price determined as aforesaid shall be calculated on a continuing basis following every sale by dividing the total prices at which the parcels are sold by the number of sales made;

(c) the Purchaser will in any event refund the said A$8 million in full to Girvan on the first business day following that on which the said infrastructure works are certified by an independent engineer approved by the parties as having reached the stage of practical completion;

(d) the Purchaser shall use its best endeavours to bring the infrastructure works to the stage of practical completion.

[13] Clause 8.6 provided for Oxford House to be given shares of project management fees and management agreement fees to be earned by Girvan and not to be less than A$1.25m. This was referred to in evidence as the profit share agreement.

[14] In 1989 Mr Boscawen and Mr McCulloch, who were the persons most concerned with managing Girvan NZ's affairs day to day, were unable to locate any documents which showed details of the proposal referred to in cl 8.2(a), or which defined the required infrastructure works referred to in cl 8.3 and 8.4. However, there is no issue in this case which requires it to be established what in detail were the required infrastructure works referred to in these clauses. It is completely clear that far less than A$8m was spent on infrastructure works, and that infrastructure works were not completed within 12 months following settlement date.

[15] The covenants in cl 8 were given to St Martins Properties, now Girvan NZ. Maronis was not entitled to enforce the covenants, although the covenants related to zoning of and improvements on land which Maronis later came to own. The contemplation of the parties to the Dextran agreement was that the LTS would be an asset of a subsidiary of Girvan NZ, not that it would be an asset of or beneficially owned by Girvan NZ. Nothing happened which conferred on Girvan NZ any beneficial interest in the LTS, which was to be transferred to Oxford House or its nominee by Loc-Tex International. Oxford House or its nominee was to be purchaser under the options pursuant to the agreement of 29 June 1988 and rectifying agreement of 31 August 1988. It has never been contended that Maronis, to which Oxford House in some way passed its interest, was not the beneficial owner of the LTS.

[16] As between Girvan Australia and Girvan NZ including its controlling shareholder Unigroup Pacific, the Atwood agreement and the Dextran agreement were arm's-length transactions; the boards of the two companies considered the two agreements independently and made their own decisions to commit their companies and subsidiaries to them. The then directors of St Martins Properties formed a favourable view of the LTS project, and expressed that view in their minutes after an investigation which included their visiting the site.

[17] On 1 September 1988 an extraordinary general meeting of the shareholders of St Martins Properties resolved to approve the proposal set out in an explanatory statement circulated with notice of the meeting: Ex A, pp 220–49.

The purchase of the shares in Dextran Investments, and the Dextran agreement, were approved. This resolution fulfilled a condition for the operation of the Atwood agreement and the acquisition by Girvan Australia of 74% of the shares in Girvan NZ. The approval also brought the Dextran agreement into operation.

[18] There had been some dealings relating to Maronis before 1 September 1988. In some way Maronis became identified as one of the subsidiaries referred to in the Dextran agreement. Mr Ramsay, who was already secretary of Girvan Australia, became secretary of Maronis on 18 August 1988 and Mr O'Neill, who was one of the parties associated with Girvan Australia in the Dextran agreement, became a director of Maronis. The Foreign Investments Review Board (FIRB) granted Maronis approval to acquire the Crossroads property on 22 August 1988. This approval was granted ". . . on condition that development of the property commences within 12 months", that is, within 12 months of the approval or by 22 August 1989. On 29 August 1988 the 10 issued shares in Maronis were transferred, nine to Oxford House and one to Mr Barraket as trustee. Also on 29 August 1988 Mr Hopkins and the defendants Mr Duncan and Mr Ambler became directors of Maronis. On 31 August 1988 the correct parties made the rectifying agreement by which Oxford House became entitled to be the nominee of the options to purchase. In some way which has not been established Oxford House passed the benefit of these nominations to Maronis. Maronis later effectually exercised all the options, completed the contracts, became the owner of the 11 parcels, consolidated them and eventually became the registered proprietor of the consolidated parcel.

[19] On 31 August 1988 a profit sharing agreement was made between Girvan Australia and Oxford House; this fulfilled the contemplation of cl 8.6 in the Dextran agreement. To be effectual it was necessary that there should later be a project management agreement and a property management agreement and that Girvan Australia should earn net profits in respect of them. The arrangements would have had to be accommodated to the facts that it was Maronis and not Oxford House which became the owner of the land, and that it was Loc-Tex International and not Girvan Australia which earned the management agreement fees. Some steps were taken towards the preparation of a project management agreement, but no written agreement of that kind was prepared or executed. At one time Clayton Utz were given instructions to draft an agreement but later these instructions were deferred. Loc-Tex International in fact acted as project manager of the development in 1988 and 1989 (and Girvan Australia did not so act). Loc-Tex International did not act under any written agreement or any other agreement the terms of which can be seen from evidence. As no development took place there was no occasion for a property management agreement. Oxford House, which is not a party to this litigation, is the only person which could have any entitlement to a profit share. There is no sign that any of the persons concerned departed from the assumption that there would be entitlements to shares of profits broadly in accordance with the Dextran agreement.

[20] There were other elements of the proposal presented to and approved by St Martins Properties' extraordinary general meeting. St Martins Properties was to obtain assets including cash receivable and construction plant and equipment to which the value of NZ$4m was attributed. St Martins Properties was also to obtain the right to conduct all existing and future Girvan business activity in New Zealand, a royalty-free and exclusive licence to use specialist intelligent building technology known as Total Asset Protection in New Zealand for 15 years and the

exclusive right to the use of the "Girvan" name in New Zealand. Girvan Australia gave St Martins Properties a guarantee of payment of the rent of the warehouse and distribution centres in Neilsen St, Auckland and Seaview, Wellington for 5 years: Ex A, p 358. Messrs Duncan, O'Neill and Petersen personally gave a profit guarantee: they agreed to underwrite any shortfall below NZ$9m in St Martins Properties' pre-tax profits for its financial period ending 30 June 1989 (Ex A, p 360), and also to underwrite any shortfall below NZ$27m in the aggregate of the company's pre-tax profits for its three financial periods to the end of 30 June 1991. There was to be a special interim dividend of 7c per share. Unigroup, the vendor of the 74% shareholding, was to buy back from St Martins Properties two commercial properties for NZ$10.9m, with a profit share arrangement for any subsequent resale. Directors of St Martins Properties appointed by Unigroup were to resign and be replaced by Girvan-appointed directors.

[21] The Atwood agreement and the Dextran agreement were contemporaneously settled on 2 September 1988. From then on Girvan Australia, which beneficially owned 100% of the shares in Atwood Holdings, controlled 74% of the shareholding in Girvan NZ. All previous directors of St Martins Properties resigned on 1 or 2 September 1988, and on 1 September Mr Petersen became managing director and Mr Duncan, Mr Ambler, Mr Hopkins and Mr O'Neill became directors. On 12 September 1988 Mr Boscawen became secretary of Girvan NZ. The same directors were elected at the annual general meeting on 14 October 1988. At that AGM it was resolved that the name of the company be changed to Girvan Corp (New Zealand) Ltd. Girvan NZ is the second plaintiff.

[22] Girvan NZ controlled Maronis through a chain of subsidiaries; Girvan NZ beneficially owned all the shares in Dextran, Dextran beneficially owned all the shares in Oxford Holdings and Oxford Holdings beneficially owned all the shares in Maronis. Mr Barraket, an in-house lawyer of Girvan Australia, was the registered owner of one share in each of Atwood, Oxford House and Maronis, and two shares in Dextran, on trust for the beneficial owners, which were the registered holders of all other shares.

[23] The LTS project is referred to in minutes of meeting between Mr Petersen, Mr O'Neill and Mr Boscawen on 26 October 1988 which record (Ex A, p 457):

> Girvan NZ as owner of the Liverpool Development Site is forecasting a profit of NZ$10.4m (A$8.0m) for the period ended June 1989. This comprises more than 50 per cent of the profit for Girvan NZ and it is absolutely essential that this be achieved. The profit is to be achieved by a partial sell down of the 108 acre development.

Girvan NZ, development of the LTS and related financial arrangements

[24] Mr Young of Loc-Tex International undertook work related to development of the Crossroads property. He engaged Capital Management Realty Ltd, a licensed real estate agent controlled by Girvan Australia, for work relating to leasing and leasing strategies. He engaged Peddle Thorpe & Walker Architects to do master planning and concept design works. Loc-Tex International, in the person of Mr Young, also managed the acquisition by Maronis of the 11 parcels of land; the options were exercised and settlements occurred over the period from 28 November 1988–7 April 1989. The work and expenditure on acquisition and development were appropriate for serious commitment to the project.

[25] Changes in the management structure of Girvan Australia took place in

January 1989. Mr Petersen became executive chairman and his duties were to include overseeing Girvan NZ. In this structure Mr Duncan was managing director, Mr Stephen Bartrop was director group marketing, Mr Bruce Hill was director group investments, Mr D Collis was director group construction and Mr Ambler was director group development. Mr McCulloch was responsible for corporate strategy as part of group advisory service.

[26] Mr Hopkins resigned as a director of Girvan NZ and Maronis on 23 January 1989 and Mr O'Neill resigned on 19 April 1989. They do not have significant parts in the later events. Mr McCulloch was referred to as acting managing director or as managing director of Girvan NZ, and acted appropriately from January 1989 onwards, although he was not appointed as a director until 19 April 1989. Apart from some company officers who were board members for several days, all directors were resident in Australia; they attended New Zealand from time to time but Mr McCulloch was by far the most active. From 19 April 1989 onwards the directors of Girvan NZ were Mr Petersen, Mr Duncan, Mr Ambler, Mr McCulloch and Mr Kanas. Mr Kanas lived in Chelmer, Queensland.

[27] Mr McCulloch prepared a document "Girvan NZ Position Paper (Draft 17th February 1989)". He did this when directed by Mr Duncan to prepare a strategic review of the operations of Girvan NZ. There are several different forms of this paper in evidence, all marked draft, and the document at Ex A, p 590 is probably the last form. Mr Coleman and Mr Boscawen took part in preparing this document.

[28] This paper is of very qualified significance because it was not finalised, it was not signed, and it is not referred to in minutes as having been presented at any board meeting or adopted. Mr Duncan saw one or more forms of it. An idea which was not directly expressed in the position paper but soon came to the surface was that Girvan Australia should support Girvan NZ's need for money for its cash flow in some way such as by guaranteeing borrowings by Girvan NZ.

[29] A draft of the position paper was before the Girvan Australia executive board strategy meeting, referred to in Mr McCulloch's diary notes of 20 January 1989: Ex A, p 526. The diary note shows that the expected profit from the LTS was regarded as critical to "final commitment", which I take to refer to the profit guarantee.

[30] In what is apparently the last form it shows contemplation of these things about the position of Girvan NZ:

(1) There was to be estimated expenditure of NZ$4.4m on the LTS to June 1989, and this was to be funded by Girvan Australia under the Dextran agreement.
(2) There could be requirements for progress claims on a project called the Wanganui site, for which a construction loan was being negotiated.
(3) Girvan NZ required payments from Girvan Australia under rental guarantees relating to the properties in Auckland and Wellington.
(4) It was expected that there would be sufficient profit in the year ended 30 June 1989 to obviate recourse to the profit guarantee (which guaranteed NZ$9m).
(5) Girvan NZ was to make a claim under the Dextran agreement for over NZ$4m under a warranty relating to the net asset position.
(6) Planning the layout of the LTS site was in the final stages and work on roadways was to begin in March 1989. It was expected that A$3m would be spent on site works prior to 30 June 1989 and a further A$12m between 1 July and 31 December 1989.

(7) Girvan Australia was to fund the first A$8m of development expenditure and "It would appear that these funds can be raised against the Liverpool Site asset but be serviced by Girvan Australia": Ex A2/597. There were currently no borrowings against the Liverpool asset.
(8) Girvan NZ would require approximately NZ$3.3m to fund its operation to June 1989. This did not include expenditure which would fall into the first A$8m on the LTS site, or additional progress claims on Girvan NZ's Wanganui project.
(9) Project and design management fees had been budgeted "and agreed" and set out A$600,000 as the fees to 31 December 1988, and A$4.2m as the fees chargeable at A$100,000 per month (suggesting that they would be chargeable for 3½ years). Shares of fees were referred to as income to Girvan NZ.

[31] This is the first recorded expression of contemplation that the LTS might be mortgaged to raise funds for the first A$8m of development expenditure. The plaintiffs' case involves several strong themes about funding raised by mortgaging the LTS site. One is that Girvan Australia was in a very poor financial position throughout the first half of 1989, to the extent that it was not capable of doing what was necessary to carry out the LTS development, either by bearing the first A$8m of development costs or otherwise by carrying on the enterprise. Related to this is a theme that, at 1 June 1989, there was no intention to use the funds borrowed from Nippon Credit to carry out any work on the LTS site and the real purpose of borrowing was to reduce the overdraft of Girvan Australia and enable its operations to continue. Related to this were contentions that on 1 June it was not possible to carry on with the LTS development, and that there was no intention on the part of the directors to do so.

[32] On 17 and 20 February 1989 a Girvan Australia directors' meeting considered Girvan Australia's cash position.

[33] At a meeting on 23 February 1989 between Mr Ambler, Mr McCulloch and Mr Hill, after discussion of a request by AGC for Girvan Australia to guarantee construction finance to be given to Girvan NZ or a subsidiary to pay for construction at Wanganui, Mr Hill said to the effect that giving guarantees was a real problem because many Girvan Australia loan facilities contained negative pledges and restrictions on the ability of Girvan Australia to give guarantees. Giving guarantees for Girvan NZ impacted on capacity to borrow. The issue of Girvan Australia giving guarantees should be avoided when approaching borrowing for future Girvan NZ projects, especially the LTS.

[34] On 13 March 1989 all members of the boards of Girvan Australia, Girvan NZ and Maronis were present at a meeting in the boardroom of Girvan Australia in Walker St, North Sydney. Mr McCulloch, Mr Ambler, Mr Petersen and Mr Duncan were present, as were Messrs O'Neill, Bartrop, Hill, Young and so was Mr Brian Downes of Capital Management Ltd. This was not treated as a board meeting of any company; no minutes were kept and no resolutions were passed. Mr McCulloch and Mr Duncan made notes which are no more than odd jottings. Matters discussed included Girvan NZ's needs for Girvan Australia guarantees (referred to by Mr McCulloch): the impact of guarantees on security ratio obligations and the perception that guarantee liabilities appeared twice, in the accounts of the guarantor and in the accounts of the debtor (referred to by Mr Hill); Girvan Australia's commitment to fund A$8m of infrastructure works (by Mr McCulloch); the need for Girvan New South Wales to be satisfied that Girvan NZ could pay for all the works when required to do so and the need to have facilities for A$15m prior to the works commencing (by Mr Petersen).

[35] The meeting ended inconclusively with a statement by Mr Petersen to the

effect that Mr Hill and Mr McCulloch needed to investigate further an acceptable solution to have the funding in place and available prior to commencement of the LTS works. There was general acceptance that borrowing funds by Girvan Australia on the security of the LTS site was appropriate to be considered as means of raising funds for Girvan Australia's A$8m obligation and also for Girvan NZ's obligation for the balance, and was worthy of being investigated further. The direction taken from then on was influenced by this acceptance.

[36] The 13 March 1989 meeting exposed difficulties and did not resolve any. Girvan NZ needed financing for its operations to 30 June 1989. It had entitlements and claims against Girvan Australia which had not been resolved. Financiers sought guarantees from Girvan Australia if they were to finance Girvan NZ projects but there were factors which limited Girvan Australia's readiness to give guarantees. Girvan Australia was obliged to finance the first A$8m of the LTS development costs but Girvan NZ was obliged to pay the remaining A$7m and to repay the A$8m on practical completion; and Girvan Australia and its subsidiary Girvan NSW reasonably required to be satisfied that Girvan NZ had funding arrangement to meet payments totalling A$15m as and when required. Much money and effort had been spent on acquiring the LTS and preparing for development, and works were expected to start soon. Time constraints arose out of the FIRB approval and the profit guarantee, cl 8.3(c) of the Dextran agreement and the nature of development business. The financing requirements could conceivably be changed by joint venture arrangements with others or by selling the whole project. It would be a disaster for Girvan NZ and Girvan Australia if A$8m was expended on the work and then Girvan NZ could not pay for the work to continue. Girvan NZ was not in a good position to borrow A$7m for the work, or A$15m to be paid on practical completion, because it did not have the income or the means to service the borrowing; to borrow sums like that Girvan NZ needed Girvan Australia's guarantee, and it had used up all the support of that kind which Girvan Australia was willing to give when the Wanganui financing was obtained. It would not have been responsible or realistic for Girvan NZ to say that it insisted on Girvan Australia seeing to it that the work began and the first A$8m of work was paid for, leaving the means for raising money to meet Girvan NZ's obligations to be worked out in the future, possibly by some pre-sale of part of the development or joint venture arrangement, but also possibly without any solution emerging. Girvan Australia did not have a right under the Dextran agreement or otherwise to raise money on the security of the LTS site, but to contemplate that happening was not to desert Girvan NZ's interests.

[37] On 14 March 1989 Mr Petersen gave Mr McCulloch, and Mr McCulloch gave Mr Young a program of work on the LTS site which Girvan NZ required Mr Young and Loc-Tex International to follow. This required stage 1 internal site works, drainage, sewerage, water and electricity to pass through design and documentation in March and April, contracts to be let in April and May, and construction to proceed from May–September, with landscaping. The program also provided for stage 2 bridge work and loop road outside the site to pass through design and documentation by the end of June with construction to follow.

[38] In March 1989 Mr McCulloch and Mr Hill had further discussions as contemplated on 13 March. These probably occurred before 17 March. Mr Hill raised some concerns which had been voiced on 13 March: that Girvan NSW would not be able to start work until it was assured that funds to cover the full

costs were in place; that Girvan NZ had to repay the first A$8m and the remainder of the costs; that there was a need for funding for A$15m to be in place from commencement, that Girvan NZ could not demonstrate a capacity to service a loan of that magnitude without pre-sales and would probably require a Girvan Australia guarantee which it would be difficult to give. Mr Hill said "Maybe the third party mortgage/pre-paid contract idea is the way to go". Mr Hill referred to a Westpac indicative offer. This appears also to be referred to in the letter of 17 March 1989, but whatever might have been expected, Westpac did not make an offer of financing for the LTS. Mr McCulloch said "This would mean Girvan NZ would have to make the Liverpool land security available to Girvan Australia to raise funds for the LTS development". He spoke further but made no commitment.

[39] This conversation appears to be the first articulation of the concept that Girvan Australia would borrow funds, that Girvan NZ would provide the LTS land as security for the borrowing, and that the borrowed funds (or possibly A$8m of them) would be paid to Girvan Australia as a pre-paid contract for the work. The concept was unclear in detail and there was no commitment to it on either side at that time.

[40] On 17 March 1989 Mr Hill as director of Girvan Australia wrote a letter (Ex A, p 673) in formal terms to the directors of Girvan NZ which included the following:

> Girvan Corporation is about to commence the infrastructure works at the Liverpool Transport Centre and wish to ensure sufficient funds are available to meet the initial expenditure of A$15m.
>
> Girvan Corporation are required to spend the first $8m in development costs with Girvan New Zealand providing the balance. In order to fund the development costs Girvan Corp recommend that Girvan New Zealand make available the Liverpool site as security.
>
> Assuming the Liverpool site is available as security, Westpac are prepared to lend up to 70% of the current valuation of $27 million — namely A$19M. The first $8 million would be paid to Girvan to meet the initial development costs.

[41] Copies were sent to each director of Girvan NZ. Mr Petersen noted on a copy "Ask Chris to organise a board meeting to discuss" (referring to Mr McCulloch).

[42] Though Mr Hill's letter of 17 March 1989 is not completely explicit it referred to Girvan NZ making the LTS site available as security for a borrowing by Girvan Australia. Westpac was at that time considering an application to increase credit to Girvan Australia by A$30m on security over property at a loan to security ratio of 17%; the proposed borrowing credit was for A$30m. Westpac declined this proposal on or by 22 March. Although Mr Hill's letter said "the first $8 million would be paid to Girvan to meet the initial development costs", there was no restriction of this kind in the dealings then taking place with Westpac, in which all money advanced on the LTS site as security was to be advanced to Girvan Australia. Mr Hill did not propose any machinery which would restrict use of the funds, or any advantage or protection for Girvan NZ or Maronis of any kind.

Mr McCulloch's memorandum of 28 March 1989

[43] A memorandum by Mr McCulloch dated 28 March 1989 dealt with the matters raised by Mr Hill's letter of 17 March 1989. This memorandum was circulated to the directors of Girvan NZ namely Messrs Duncan, O'Neill,

Petersen and Ambler and also to Mr Boscawen and Mr Hill. The memorandum was probably circulated on 3 April 1989. Copies are at several places in evidence: Ex A, p 748, Ex A, p 754 and Ex 20, p 108A (which has most of the annexed schedules with it). Mr McCulloch opened the memorandum by restating the letter of 17 March 1989:

> As you are aware, the Board has been approached by Girvan Corp Ltd (GVN/A) to give consideration to:
>
> (a) giving a third party mortgage over the Liverpool Truck Stop (LTS) in favour of GVN/A;
>
> (b) GVN/A borrowing A$19m against the Liverpool site as part of a working capital facility;
>
> (c) GVN/A borrowing A$19m or 70% of the security value of A$27m.
>
> . . .
>
> it is my recommendation that the Board of GVN/NZ approves a borrowing by GVN/A against the (LTS) security in line with signed contracts for work on the site which are fixed in terms of price, time to complete and other loan settlement conditions which are discussed later.

[44] The memorandum went on to set out passages from the Dextran agreement and to say:

> In summary it is my contention that GVN/A has, via the Dextran Agreement, committed to:
>
> (a) completing the defined "infrastructure works" for a maximum of A$15m by 1st September 1989, ie which is twelve months from the date of the Dextran Agreement;
>
> (b) GVN/A must fund (without access to the LTS security) the first A$8m [see Clause 8.3(a)] with repayment as per Clause 8.5 . . .

[45] The memorandum went on to discuss the infrastructure works and the basis for the figure of A$15m. The memorandum contended that the covenant and agreements in cl 8.3 of the Dextran agreement were substantially unfulfilled in that:

> (i) no real work has commenced;
>
> (ii) the contract price of A$15m as per the Dextran Agreement has not been locked in to date and GVN/A faces quotes in excess of that figure even allowing for a variation imposed by the Department of Main Roads (DMR) in respect to the loop entry onto the site and other matters;
>
> (iii) GVN/A is now asking for access to the security to fund the initial A$8m instead of internally funding that amount with repayment via the process outlined in Clause 8.5 . . .

[46] The memorandum then referred to a re-estimate made in September 1988 by Exley & Associates of the costs of the works at A$16.3m, as a result of conditions imposed on rezoning after making the estimate on which A$15m referred to in the Dextran agreement was based.

[47] The memorandum made the following recommendation:

> Although I expressed in paragraph 3 of this memo a preparedness to recommend a GVN/A borrowing I cannot recommend the GVN/NZ Board approves a loan in excess of A$16.3m and can only recommend that level of borrowing if GVN/A commits to the fulfilment of its obligations under Clause 8.3 of the Dextran Agreement with the variations as discussed above.
>
> Given the above, I propose the following motion be put to the GVN/NZ Board for approval:
>
> (a) GVN/A is allowed to draw down A$16.3m against the Liverpool Truck Stop security on the following conditions:

(i) if GVN/A signs a new contract to complete the "infrastructure works" as defined, including consultants' charges, for a fixed price not exceeding A$16.3m to be completed in a negotiated time frame not exceeding 18 months;
(ii) if GVN/A agrees to be responsible for all financing charges on the first A$8m and any repayment or excusing of this interest liability would occur in accordance with Clause 8.5 of the Dextran Agreement;
(iii) if GVN/A immediately on draw down repays from the borrowed funds all moneys outstanding to GVN/NZ as at March 31, 1989 on its own behalf and on behalf of Oxford House Pty Ltd . . .
(iv) that GVN/A agrees that the current costings prepared by GVN/A (via Girvan NSW Pty Ltd) on which progress claims to date are being based are withdrawn as irrelevant given the existing commitment of GVN/A at a lower price (see Schedule G);
(v) a performance or insurance bond to cover GVN/A's cost to complete the service works;
(vi) if GVN/A pays a 2% facility fee to GVN/NZ for the use of the security (ie 2% of $16.3m or $326,000);
(vii) GVN/A agrees to discharge the borrowing against the LTS security on demand of GVN/NZ to enable it to joint venture the LTS project.

[48] The total of Girvan NZ's claims against Girvan Australia was given as NZ$7m.

[49] The memorandum and recommendations set out in it were discussed between Mr McCulloch and Mr Duncan and also between Mr McCulloch and Mr Boscawen while the memorandum was being prepared up to 3 April 1989. After copies of the memorandum were distributed there was no meeting, formal or informal, of the directors of Girvan NZ in which the memorandum or the recommendations were discussed, accepted, rejected, or any decision was taken on them. There was no such event either before 19 April 1989 when Mr McCulloch was acting as and was reputed to be the managing director, or on or after 19 April when he was appointed to the board of Girvan NZ. Mr Ambler recollects a meeting or meetings at which the memorandum was discussed in the presence of Duncan, Petersen, McCulloch and Hill, but he is unable to give any matter of detail and does not say that any decision was taken.

[50] On 12 April 1989 Mr Downes told Mr McCulloch that the Westpac facility fell through, that Girvan Australia was now making arrangements with Custom Credit and/or Nippon Credit and that he would keep Mr McCulloch advised.

[51] On 14 April 1989 Mr McCulloch sent Mr Ambler and Mr Young a memorandum emphasising that A$16.3m for infrastructure works was the ceiling figure and included items priced in a schedule by Exley & Associates in September 1988, with deductions if any of these items were deleted. He said that the detailed estimates by Exley & Associates must be treated as "the Bible".

[52] Mr Boscawen prepared a summary statement of claims by Girvan NZ against Girvan Australia and related parties and sent it to Mr McCulloch with his memorandum of 17 April 1989: Ex A3/795. This represented the result of some months' work, involving employment of a consultant accountant, on claims arising out of the settlement of the Atwood agreement and arrangements relating to the takeover. Mr Boscawen reported that there was a variance from the settlement statement of NZ$8,570,332, and after adjusting amounts payable to or receivable from various members of the Girvan Group he reported that the final amount due to Girvan NZ was NZ$5,368,586, although he recognised that various details within the claim would need to be discussed.

[53] On 24 April 1989 Liverpool Council informed Loc-Tex International that the development application for the LTS had been approved on 18 April 1989, subject to conditions. On 1 May 1989, the development consent was given, on conditions set out in it.

[54] Minutes of the Girvan NZ Executive Committee Meeting of 27 April 1989 attended by Mr McCulloch Mr Boscawen Mr Hoskins and Mr Fielding do not deal with the subjects in the memorandum dated 28 March 1989. (I do not suggest that they ought to have done so.) Item 23 is:

> *LIVERPOOL*
>
> 23.1 Girvan NZ about to sign a contract for earth works.
> 23.2 Girvan Corporation propose joint venture with Petro Limited for the joint operation of the truck stop at Liverpool.
> 23.3 Possible joint venture partners include IEL and AEL.

[55] Minutes of the executive committee meeting of Girvan NZ of 11 May 1989 attended by Mr Boscawen, Mr Fielding, Mr Hoskins contained an identical item 23: Ex A, p 877.

[56] On 10 May 1989 Girvan NSW sent Loc-Tex International a budget estimate of $24,256,774 for the site works for the LTS project: Ex A3/870. Girvan NSW contemplated a target construction start date of 3 July 1989 to meet which there were a number of requirements including:

1. No amendments to current design brief (by Loc-Tex).
2. Written approval for the availability of funds by 16/6/89 (by Loc-Tex).
3. Evidence of lodgement of the consolidation plan by 23/6/89 (by Loc-Tex).
4. Submission of DA application for loop road and bridge by 16/6/89 (by Loc-Tex).
5. Execution of contracts for the site works and Project Management by 16/6/89.
6. Outstanding authority approvals anticipated by 2/6/89.

Girvan NSW also stated ". . . as per our programme we are calling tenders for the site works on the 17/5/89".

[57] On 3 May 1989, according to Mr Duncan's evidence, he met Mr McCulloch and there were discussions about the Liverpool Truckstop, settling the outstanding balance of the Dextran agreement, the funding of the commencement of the infrastructure works on LTS and other topics: transcript p 1463. Mr McCulloch informed Mr Duncan that there had been a finalisation of the arrangements for funding for the commencement of the infrastructure works on the Liverpool site: transcript p 1476. These passages in evidence do not mean that Mr McCulloch withdrew or modified the conditions in his memorandum of 28 March 1989. If the evidence had that meaning, I would not accept that such an agreement was reached. In any event, Mr McCulloch's recommendation and conditions were not something which Mr McCulloch and Mr Duncan could arrange between them.

[58] In a memorandum of 12 May 1989 from Mr McCulloch to Messrs Duncan, Ambler and Petersen relating to ". . . the request by Girvan Corp Ltd for working capital advance . . .", it was reported that there was "agreement with Girvan NSW Ltd/Rose Church NSW Ltd for the agreed scope of works as outlined in the Girvan NSW Cost Plan 2 dated 10th May 1989 and supporting schedules to be completed for A$19.425m . . .". Figures and reasons were set out for this:

Original Exley Price	9966[1]	
Escalation	1300[2]	
Agreed Variation	7756[3]	
Less Exley Fees +		
Contingency	(1100)	
Water Construction	(803)	
Sewer Construction	(1056)	
		16063[4]
Capital cost of site office	225	
Consultants fees (incl long service leave contribution)	1700[5]	
Preliminaries	337	
Contingency	800[6]	
Profit/Project Man	900	
Less fees paid by Loc-Tex (12 × 50)	(600)	
		19425

[59] In a memorandum also of 12 May 1989, from Mr McCulloch and Mr Young to Mr Payne with a copy to Mr Ambler, Mr McCulloch said:

> Regarding the site works at Liverpool for A$19.425m.
>
> It has been agreed that Girvan NZ allow Girvan NSW to finalise the previously contracted Earthworks by:
>
> (1) Borrowing $15m from Nippon Bank under a working capital facility which is supported by the Liverpool Truck Stop land (held by Maronis Holdings Pty Limited).
>
> (2) Financing the balance from internal resources ie $4.425m.

[60] He also said:

> It has been agreed that the contract will be open in every respect and if tender prices are favourable there will be an equal sharing of that benefit between both sides.
>
> The other conditions that require agreement are:
>
> (i) A performance guarantee to cover Girvan Australia's cost of A$19.425m to complete the job.
>
> (ii) Girvan Australia recovers the outstanding progress claims for fees from the job.
>
> (iii) If Girvan Australia immediately on draw down repays from the borrowed funds all moneys outstanding to Girvan NZ as at April 30, 1989 on its own behalf and on behalf of Oxford House Pty Limited. The call on Girvan Australia in regard to Oxford House Pty Limited is subject to conditions in Clause 7 in conjunction with Schedule C of the Dextran Agreement. This amounts to $NZ60 approximately.
>
> (iv) If Girvan Australia pays a 2% facility fee to Girvan NZ for the use of the security (ie 2% of $150m or $300,000).
>
> (v) Girvan Australia agrees to discharge the borrowing at its own cost against the LTS security on demand of Girvan NZ to enable it to joint venture the LTS project.

[61] (The reference in para (iii) to NZ$60 was intended to refer to NZ$6m: see transcript p 2379.)

[62] In this memorandum Mr McCulloch sought to have some important conditions referred to in his memorandum of 28 March 1989 incorporated in the contract for performing the infrastructure works. Statements in this memorandum imply that Mr McCulloch would have accepted a decision to borrow A$19.425m on the security of the LTS.

[63] On 15 May 1989 Mr Duncan and Mr Ambler are recorded in a minute of the directors of Maronis Holdings Ltd as conducting a directors' meeting and approving entry into the Nippon Credit transaction. Also on 15 May 1989 Mr Hill and Mr Petersen as directors of Girvan Australia resolved to approve the Nippon letter of offer relating to A$15m advance. The amended letter of offer from Nippon dated 17 May 1989 was also signed by Mr Hill, Mr Petersen, Mr Duncan and Mr Ambler, without further directors' meetings.

[64] On 29 May 1989 Mr Duncan met Mr Petersen and Mr Hill and discussed settlement of the Nippon loan and the conditions sought by Mr McCulloch. The fact that they discussed the conditions sought by Mr McCulloch confirms that no decision had then been taken accepting or rejecting Mr McCulloch's proposed conditions for giving security over the LTS site to support financing for Girvan Australia. This is so whether the conditions required by Mr McCulloch are those set out in the memorandum of 28 March 1989 or were modified by the memorandum from Mr McCulloch and Mr Young to Mr Duncan, Mr Ambler, and Mr Petersen of 12 May 1989.

[65] There is evidence, which is disputed, that in the course of the discussions Mr Hill said "I should be able to get the bond but I will not be able to do so by completion". Mr Petersen said "[w]e've been talking about this re-financing long enough. Everyone has agreed on the terms."

[66] "The project is important for both companies. So long as Bruce thinks he can get the bond to satisfy Chris, go ahead and do it."

[67] The consolidating deposited plan 788987 was registered in May 1989 and folio identifier 102/788987 was issued on 30 May 1989 for lot 102, which is the LTS site.

[68] On 1 June 1989 Mr Ambler and Mr Duncan are recorded in a minute of Maronis as having resolved to enter the mortgage and the guarantee and indemnity and to seal those documents.

Consideration of the funding arrangements

[69] Mr Petersen voiced a requirement on 13 March 1989 that funding for A$15m be in place at the commencement of work. It was only realistic to require that there be clear and reliable arrangements for funding, such as a commitment by a financial institution, before Girvan NSW did work for which Girvan NZ would be obliged to pay A$15m in total by or at practical completion. By voicing this concern Mr Petersen did not indicate a repudiation of or serious departure from the commitment in the Dextran agreement that Girvan NZ fund the first A$8m; the commitment only meant that payment of that A$8m was deferred until practical completion, which did nothing to reduce the importance of ascertaining Girvan NZ's capacity to pay it. The need to have funding in place could not realistically have been met unless the LTS land was mortgaged to raise A$15m. However, it could have been met without paying the money borrowed to Girvan Australia, and it could have been met by obtaining a commitment from a financier to advance money from time to time to make payments as work progressed and the claims for payment exceeded A$8m, and then to pay the balance of A$15m on practical completion. There was no actual need to satisfy Mr Petersen's concern by borrowing the whole A$15m in one advance and doing so before any work was commenced; but if that were done, there was no need for the money to leave the control of Maronis, or perhaps of Girvan NZ, before Girvan NSW became contractually entitled to some payment.

[70] Maronis was in no position to obtain finance of that kind, as it had no business or affairs except to own the LTS land, no revenue and no capacity to service borrowings. If Girvan NZ guaranteed borrowings by Maronis, the borrowings would have to be supported by the capacity to repay and the financial position generally of Girvan NZ. Girvan NZ had difficulty in obtaining construction finance for large sums, and this was exemplified by experience in raising construction finance for the Wanganui project, which Girvan NZ could not obtain without guarantee support by Girvan Australia. Girvan NZ's borrowing capacity was limited by the Equity-to-Tangible-Assets ratio conditions of its existing financing from the Bank of New Zealand and the ANZ Bank; further borrowing might water down the equity and reduce the ratio below BNZ's requirements. Any other financier would probably have treated the ratio as important. Mr McCulloch commented on the impact of the ratio on borrowing capacity in one of the drafts for the position paper (see Ex A/2 p 534) and Mr Boscawen took part in preparing this document. On behalf of Girvan Australia difficulties were perceived and expressed by Mr Hill against giving further guarantees to support borrowings by Girvan NZ.

[71] Clause 8.5 in the Dextran agreement shows contemplation that there might be sales of parcels of land forming parts of the LTS which would produce proceeds before practical completion of the infrastructure works. This could not have happened in the project which was under consideration in 1989 for which development consent was obtained on 1 May 1989. The development consent was not a consent to subdivision and expressly made no commitment to council's giving consent to a subdivision, and according to ordinary conveyancing practices no proceeds of sales could be available unless first there were a subdivision and a registered plan of subdivision. However, in the development industry there may be feasible transactions in which joint venture interests or other interests raise proceeds before practical completion. Unless some such arrangement was made, or the whole project was onsold before practical completion, the prospects appear to have been that Maronis would have to find at least A$7m to pay for works while the works were proceeding and pay the balance of A$8m at practical completion, without assistance from proceeds of sales in the meantime.

[72] In the circumstances I regard it as unremarkable that arrangements for raising finance for carrying out work on the LTS took a form in which Girvan Australia was the borrower, Maronis gave security over the LTS land and both Maronis and Girvan NZ were to incur guarantee liability. However, the elements in the situation which suggested that the financing arrangement should take this form did not carry with them any requirement that any funds, or that the whole of the funds raised be paid over to Girvan Australia immediately. There was obvious room for concern and arrangements about the protection of the interest of Maronis as owner of the land, and about regulating access by Girvan Australia to the funds.

The outcome of the memorandum dated 28 March 1989

[73] The memorandum from Mr McCulloch to the directors of Girvan NZ dated 28 March 1989 was a realistic presentation of the interests and point of view of Girvan NZ (and also of Maronis) raised for consideration by the letter from Mr Hill of 17 March. It brought forward and set out Girvan NZ's entitlements under the Dextran agreement and emphasised those which had not been fulfilled. It made recommendations which would have protected Girvan

Australia (and also Girvan NZ) and then set out in detail his proposed resolution for Girvan NZ's board in which safeguards were spelt out. It would have been appropriate for the same matters to have been considered by the Maronis board; Mr McCulloch did not point that out expressly, but that should have been obvious to Mr Duncan and Mr Ambler, who in fact were the directors of Maronis and both saw the memorandum dated 28 March, if they had given any consideration to Maronis' position.

[74] Mr McCulloch's memorandum also raised for consideration other matters less elementally obvious than the needs to have the works contract, and to have a performance bond or other security for development being carried out, which a director who acted reasonably could not fail to consider once Mr McCulloch had brought them forward for attention. Mr McCulloch proposed that a motion be put before the Girvan NZ board in which approval of the mortgage and all the related conditions were set out together in one resolution. They were the kinds of considerations which would present themselves to directors of Maronis who were considering the protection of Maronis' interests. No position was taken on these conditions at the meetings of the directors of Girvan NZ and of Maronis on 1 June, nor on any earlier occasion. In any address to the interests of Girvan NZ and of Maronis which was based in reality, these factors would have to be considered and a position taken on them; whether accepted or rejected, they could not be ignored. What Mr McCulloch proposed would not state exhaustively the agenda for consideration and the directors were not bound to agree with Mr McCulloch.

[75] Condition (i) was particularly important; this required Girvan Australia to sign a new contract, define the works, fix the price and set the time for completion as contractual obligations. So was condition (ii) which would establish responsibility for financing charges in accordance with the Dextran agreement. Asking for a condition that Girvan Australia was to be responsible for financing charges on the first A$8m carried the implication that Girvan NZ was to bear the financing charges on the rest of the funds, and illustrates the underlying assumption that the rest of the funds were to be provided by Girvan Australia after Girvan Australia drew down A$16.3m for working capital. Condition (v) dealt with securing Maronis against the possibility that Girvan Australia would not complete the infrastructure works. A performance or insurance bond was one of many conceivable forms which security could take. Condition (v) shows an assumption that Girvan Australia would pay out not just A$8m as contemplated by the Dextran agreement but the whole of the moneys required to complete the infrastructure works. Girvan NZ, after allowing the LTS land to be used as security for A$16.3m could not also find and pay over A$7m for the infrastructure work; its capacity to borrow to do so would have been largely lost. Condition (vii), requiring agreement to discharge the borrowing on demand to enable a joint venture of the LTS project, had a strong claim to attention. Without this commitment Girvan NZ and Maronis would be unable to dispose of the LTS land or use it for financing or other commercial arrangements.

[76] The concept under consideration was that the borrowing by Girvan Australia was to be a working capital facility for Girvan Australia. The memorandum did not recommend that the money borrowed would be set aside and only available for the LTS development. The memorandum appears to assume that Girvan Australia would carry the burden of financing the work as contemplated in the Dextran agreement, and would be able to do so. The

conditions proposed would have tended to maintain pressures on Girvan Australia to attend fully to financing needs.

[77] The approach by Girvan Australia was probably Mr Hill's letter of 17 March 1989. Mr McCulloch's reference to A$16.3m was derived from the Exley quotation of September 1988. It seems that by 28 March 1989 there no longer were prospects of Girvan Australia obtaining financing from Westpac. Financing by Nippon Australia was not mentioned. Important provisions of the Dextran agreement were mentioned and the important commitments of Girvan Australia were restated, as was the lack of fulfilment of cl 8.3. Mr McCulloch was proposing that Girvan NZ depart from the terms of the Dextran agreement, that is, make a concession to Girvan Australia, but do so on a set of conditions so as to produce advantages for Girvan NZ or work for its protection.

[78] Mr McCulloch's memorandum of 12 May was not carefully drafted and was not always grammatical. It referred to there being "agreement with Girvan NSW Ltd/Rosechurch NSW Ltd for the agreed scope of works as outline in the Girvan NSW cost plan 2 dated 10th May 1989 and supporting schedules to be completed for A$19.425m . . ." and gave the costing basis for the agreement referred to. This did not say that a new contract to complete the infrastructure works had been signed; the identity of the building company was left in doubt, let alone the terms of the building contract, while the scope of works was identified only by an outline. Mr McCulloch went on to set out seven points which had a bearing on the amount payable and spoke about the contract in terms which showed that the contract was still to come — "It has been agreed that the contract will be open in every respect . . .". Mr McCulloch set out "the other conditions that require agreement . . ." in terms which indicated five of the conditions of his proposed motion in the memorandum dated 28 March.

[79] Earlier condition (iii) about payment of moneys due to Girvan NZ is represented by later condition (iii) which said (correcting a typographical mistake) that the amount to be paid was approximately NZ$6m. Earlier condition (iv) is represented by later condition (ii) which accepted the outstanding progress claims, apparently because the agreed costing would justify them. Earlier condition (v) relating to the performance or insurance bond is represented by later condition (i) "a performance guarantee to cover Girvan Australia cost of A$19.425m to complete the job". This was not a substantial change from the earlier condition and it was not a resolution of unresolved aspects of the earlier condition. Earlier condition (vi) is represented by later condition (iv) and there was a modification to require a facility fee of 2% of A$15m. Earlier condition (vii) is represented by later condition (v) in almost the same language. The only condition missing is earlier condition (ii); responsibility for financing charges was not mentioned in the memorandum of 12 May.

[80] The state of compliance on 1 June 1989 with the conditions proposed by Mr McCulloch on 28 March was as follows:

(i) Girvan Australia had not signed a contract to complete the infrastructure works, nor had its subsidiary Girvan NSW or any other company. Agreement on a price had been reached between Mr McCulloch and Mr Collis, but this had not been endorsed by the directors on either side, and was far short of settling the terms of a new contract or making a new written contract. It would not be realistic to think that a contract to spend A$19.425m on a building project could be made orally and would work out satisfactorily, or that work was likely to begin until there was a written contract.

(ii) Girvan Australia had not agreed to be responsible for financing charges either on the first A$8m or on any money and there was no express arrangement about financing the then estimated cost of A$19.425m which assured Girvan NZ or Maronis that Girvan Australia would attend to financing all of it, although their capacity to borrow was diminished by the Nippon Mortgage. Although the provisions of the Dextran agreement about financing and the cost of infrastructure works were not being carried out no new arrangements were recorded or established.

(iii) Although there was no express arrangement for Girvan Australia to repay Girvan NZ all moneys outstanding relating to the Dextran agreement and other claims, they were in fact paid out of the advance.

(iv) Mr McCulloch had expressed satisfaction with costings which produced A$19.425m, although Girvan Australia had not agreed to that.

(v) The condition relating to a performance or insurance bond had not been satisfied; the bond had not been defined, and on 1 June Girvan Australia gave a vague assurance about another kind of bond. The risks against which the bond was to give protection were in full effect.

(vi) A smaller facility fee of A$200,000 was paid out of the advance.

(vii) Girvan Australia had not made any agreement about the circumstances in which it would discharge its borrowing.

[81] Mr McCulloch's proposal, with qualifications produced by his commentary of 12 May 1989, did not support what was done on 1 June. The conditions he proposed were unfulfilled in several respects which were obviously basic.

[82] Some conditions which Mr McCulloch had proposed were reflected in a payment made to Girvan NZ on June 1989 out of the funds advanced. On 1 June 1989 NZ$6.5m was telegraphically transferred to Girvan NZ by Nippon Credit at the direction of Girvan Australia. The cost of A$5,076,142.13 was paid out of the advance to Girvan Australia as were other deductions see Ex A5/1377, and A$9,831,927.35 was deposited in Girvan Australia's bank account: see Ex A5/1382. The money paid to Girvan NZ included moneys claimed by Girvan NZ arising out of the settlement of the Dextran agreement and of rental guarantees. The payment also included A$200,000 as a facility fee for the use of the security. Mr McCulloch had recommended a 2% facility fee which, applied to A$15m, produced A$300,000; the decision to pay a facility fee, the decision that its amount should be A$200,000, and the decision to pay Girvan NZ's outstanding claims are unexplained. Those decisions were not made at recorded meetings on 1 June and they were not conditions imposed on giving the mortgage. It was an advantage of a kind for Girvan NZ that its adjustment claims should be paid to it, but that advantage could have had very little weight in consideration by directors of Girvan NZ of whether or not security should be given, because Girvan Australia was not in a position where it was otherwise doubtful that it could meet the obligation, and because Girvan Australia had not given any commitment to meet the obligation out of the advance. However that may be, there is no basis for finding that Mr Duncan or Mr Ambler considered this advantage.

The insurance bond as a condition of giving the mortgage

[83] According to Mr Duncan's evidence (first affidavit, sworn 3 September 1999, [43]) Mr Hill told Mr Duncan at or just prior to the meeting of 13 March 1989 that Cigna Insurance was keen to do business and that Mr Hill was sure they would provide an insurance bond for the LTS project. This was the origin of references to an insurance bond, and Mr Duncan several times told

Mr McCulloch that an insurance bond could be put in place, that Mr Hill was sure of that and was dealing with it. Mr Duncan's further evidence (second affidavit, sworn 25 July 2000, [103]) was that at his meeting with Mr Petersen and Mr Hill on 29 May 1989 Mr Hill said, when the conditions sought by Mr McCulloch were discussed, "I should be able to get the bond but will not be able to do so by completion".

[84] Mr Hill was not called at any point to give evidence. Mr Duncan was in a position to call Mr Hill, as were the plaintiffs or any other party. The evidence does not show any association between Mr Hill and Mr Duncan which would make applicable the reasoning associated with *Jones v Dunkel* (1959) 101 CLR 298; [1959] ALR 367 or any comment adverse to Mr Duncan. Plaintiffs' counsel submitted that it should be found that in reality Mr Duncan did not ever obtain any assurance from Mr Hill about the bond. I am not able to make that finding. I do not regard this issue as important because the assurances which Mr Duncan says Mr Hill gave him were completely lacking in detail, did not bear any concrete relation to some obligation the performance of which was to be guaranteed, such as a building contract, and could not be relied on by any reasonable person considering the protection of the interests of the plaintiffs.

[85] A bond to protect against an obligation of A$15m was of a size which it would have been unlikely that Cigna Australia would provide. It was far larger than performance bonds usually obtained by Girvan Australia from Cigna and would have almost exhausted the standing arrangements with Cigna Australia. Mr Fear, then employed by Sedgwick Ltd, the insurance brokers through which Girvan Australia dealt with Cigna Australia, handled business in which bonds were obtained to secure performance of building contracts and other business of similar kinds. He made an approach to Cigna Australia for an insurance bond to secure a loan of A$15m. This approach was probably made about mid-July 1989, and was responded to by a letter, sent for the attention of Mr Hill at Girvan Australia, from Cigna Australia's bond underwriting manager on 21 July 1989. The underwriting manager Mr O'Reilly wrote:

> You are advised that Cigna Insurance Australia Ltd is not permitted to write such guarantees as they are of a pure financial nature. The Guarantees Cigna write relate only to construction, manufacturing and supply contracts only.

[86] The bond contemplated by Mr McCulloch, as described in his memorandum of 28 March 1989, was "a performance or insurance bond to cover GVN/A's cost to complete the service works". This is only a general indication of what such a bond would provide for, but it does show what was under discussion between Mr McCulloch and Mr Duncan. The bond mentioned in Girvan Australia's minute of 1 June 1989 was "to provide Girvan Corporation (New Zealand) Ltd with an insurance bond as security against its guarantee". A bond which met that description would have been of a completely different type to a performance bond covering the cost of completion of works under a construction contract. The approach made to Cigna Australia in mid-July which was decisively rejected related to a guarantee to support a loan of A$15m; it did not relate to what Mr McCulloch had sought.

[87] Girvan Australia's minutes shows that Mr Hill was present at meetings of directors on 1 June 1989, as was Mr Duncan. In the circumstances I regard it as extremely improbable that on 1 June Mr Duncan was acting on the basis of an indication or assurance by Mr Hill that a bond of the kind required by Mr McCulloch would be or could be obtained. The reference in the minutes of

Girvan Australia to reasonable endeavours to provide an altogether different sort of bond is an indication that Mr Hill was not giving such an assurance. In my finding Mr Duncan did not have and did not act on any relevant assurances from Mr Hill about the availability of a performance bond relating to the infrastructure works such as Mr McCulloch recommended.

[88] It would be difficult to determine what was required by an undertaking to use "all reasonable endeavours" to provide the insurance bond referred to. No contract was made between Girvan Australia and Girvan NZ by which Girvan Australia was obliged to use all reasonable endeavours; the resolution has the force of a unilateral decision by the directors of Girvan Australia to do so. It had no real force as a protection for Girvan NZ, and still less as a protection for Maronis. Unless an insurance bond as described in the resolution was available from some source (and Cigna Australia was emphatically unwilling to furnish one) failure to obtain one would not be a failure to use all reasonable endeavours.

[89] In at least one, possibly several, conversations between Mr McCulloch and Mr Duncan the provision of a performance or insurance bond as part of the arrangements to provide security over the LTS land was discussed. The references in Mr McCulloch's memoranda, particularly the memorandum of 28 March 1989 (Ex A, pp 757–8) were not the only ways in which he brought this proposed condition to Mr Duncan's attention. According to Mr McCulloch's evidence (first affidavit sworn 13 August 1999, [88]) he discussed with Mr Duncan the question of security for Girvan NZ and incorporating adequate protection for Girvan NZ by way of some security. Mr Duncan told him that Mr Hill had said he could get an insurance bond to secure the completion of the works. Mr McCulloch also said that at a meeting with Mr Duncan on 31 March 1989 Mr Duncan told him that the bond would be put in place. Mr Duncan's evidence (transcript p 1775–6) tends to confirm that Mr McCulloch indicated before June that he expected the bond to be in place before the advance was drawn. Mr Duncan did not accept that the memorandum of 28 March 1989 proposed that the mortgage would be granted only on the precondition that the bond would be in place being fulfilled. The memorandum may not strictly mean that, but it must have been clear to Mr Duncan that Mr McCulloch's wishes and the commercial purpose of protecting Girvan NZ and Maronis required that they be fully protected before or at the same time as their credit was being used to advance a large sum to Girvan Australia. This would have been obvious even if Mr McCulloch had not pointed it out, but Mr McCulloch did point it out, clearly, repeatedly and in several ways. The arrangements which were made, as recorded in the Girvan Australia minutes of 1 June 1989 show that there was an awareness that protection was required, but it was utterly inadequate to act on an assurance of best endeavours, or to furnish the mortgage without first or at the same time obtaining the protection. A further dimension of inadequacy is that the contemplated protection could not be obtained, for reasons which any serious consideration or inquiry would have revealed.

[90] In my finding it is clear that Mr Duncan did not give any consideration to security or protection for Girvan NZ or Maronis against the risk created by allowing Girvan Australia to receive the whole advance on 1 June. If any consideration had been directed to Mr McCulloch's recommendation it would have been seen that at the barest minimum there had to be a contract for the performance of the works, which defined the works, the costs and the time of the performance and of payment. The terms of the performance bond would have to

be known, at least in a broad way, and could not be addressed unless there was a contract for the works the performance of which was to be assured.

[91] I accept Mr McCulloch's evidence that Mr Duncan assured him that a bond was to be put in place. About 5 or 6 June, when Mr McCulloch was still in United States, Mr Duncan proceeded to give him, as was appropriate, an explanation for there not having been a bond on 1 June when he said words to the effect:

> I know I had told you that the bond was to be put in place but Hill is still of the opinion that the bond can be secured. Hill is still trying to secure the bond and I will speak to you with regard to his progress on your return.

Form of the guarantee and mortgage documents

[92] The only document under which Girvan NZ can have incurred liability to Nippon Credit is the deed of guarantee and indemnity dated 1 June 1989. The manner in which this document was executed or purportedly executed was strange and unclear, and there is no explanation from any of the persons involved of how this came about. The plaintiffs contended that this document was not executed as a deed either by Girvan NZ or by any attorney under power for Girvan NZ. Among the claims made by the plaintiffs in FFASC against Nippon are:

> 49. . . .
> (g) a declaration that the Joint Guarantee is invalid and unenforceable.
> (h) an order that the Joint Guarantee be rescinded or set aside.

These claims had many bases elsewhere in FFASC, and the many allegations in para 32AA include allegations to the effect that the guarantee was not executed under seal of Girvan NZ, that a form of seal was crossed out and its affixation was not witnessed, that it purported to have been executed by Mr Duncan under a power of attorney but there was no power of attorney; further there was no registration of the power of attorney under s 163 of the Conveyancing Act 1919 (NSW).

[93] Maronis was also a guarantor; the guarantee and indemnity was sealed by Maronis, with words of attestation referring to the common seal, a stamped seal and signatures of Mr Duncan as director and Mr Ramsay as secretary. If the guarantee and indemnity is binding on Maronis it does not increase or alter the obligations which Maronis undertook under the mortgage. The validity of the mortgage cannot be attacked because its validity was res judicata in earlier proceedings between Maronis and Nippon Credit in 1990, and the plaintiffs have been prevented from raising validity again by an interlocutory order of the Court of Appeal in these proceedings.

[94] Girvan NZ has been in liquidation in New Zealand since 1991. Except for its interest in the LTS development through its indirect shareholding in Maronis, Girvan NZ did not ever have any business, affairs or assets in Australia; enforcement of any claims against it could only be effected in the New Zealand liquidation. Nippon Credit has not made any cross-claim against Girvan NZ in these proceedings and has not proceeded in any other way to attempt to enforce Girvan NZ's supposed guarantee liability. In these circumstances the question whether Girvan NZ in fact has a guarantee liability may be of little importance.

[95] The guarantee and indemnity was purportedly executed in (at least) two counterparts, and they do not correspond exactly. One counterpart (Ex A,

pp 1258–73.1) was produced on discovery by Nippon Credit, and I infer that it was sent to Nippon Credit soon after 1 June 1989 by Messrs Gadens who were then solicitors for Nippon Credit, who must have received it from Messrs Clayton Utz on the afternoon of 1 June in some way which has not been exactly established. The guarantee and indemnity is expressed to be a deed in its title, its opening words and many internal references. At the conclusion of its text words of execution by Girvan NZ were typed as follows:

> *THE PARTIES* signed seal and deliver this document as their Deed.
>
> *SIGNED* for and on behalf of)
> *GIRVAN CORPORATION (NZ) LIMITED*)
> by its attorney in the presence of:)
> . . .

[96] The form of execution by Girvan NZ was completed with handwriting. Someone who has not been identified wrote in the name "Alan Ambler" at the blank space for the name of the attorney. Mr Ambler did not sign as attorney; he did not sign the guarantee at any place. Mr Duncan signed at the point appropriate for the signature of the attorney and Mr Ramsay signed at the place indicated for the signature of the witness. He identified himself with the letters JP; he was a Justice of the Peace. He was not the secretary of Girvan NZ and gave no indication on the document that he was.

[97] By contrast on the following page the words of execution by Maronis provided for affixation of Maronis' seal, and Maronis executed the document by the impression of a seal, the signature of Mr Duncan as director and the signature of Mr Ramsay as secretary.

[98] A counterpart was purportedly executed by Girvan NZ on 1 June 1989. A copy of the counterpart appears in Ex AL at p 38. In the words of execution on that copy a rubber stamp impression of Girvan NZ's common seal was made and crossed through with two lines. Otherwise it is executed in the same form as the other version, with the name of Mr Ambler, the signature of Mr Duncan and the signature of Mr Ramsay. Messrs Gadens must have received this counterpart also, as they used it when compiling a bundle of transaction documents; they made several copies of this bundle, apparently for the use of various persons interested in the transaction, and sent one bundle to Messrs Clayton Utz for the information of the plaintiffs. Their choice of the counterpart with the apparently cancelled form of common seal as the one to copy and circulate is unexplained.

[99] To my mind this choice indicates, as a matter of probability, that it was regarded as appropriate by Gadens that the impression of the common seal on the counterpart had been cancelled. There is no explanation in evidence of how or by whom the impression of the common seal was placed there, or cancelled. If the intention was that the document be executed by an attorney, the impression of the common seal can only have been placed there by mistake and it was appropriate to cancel it. If it was intended that the impression of the common seal should have effect as the seal of Girvan NZ the other counterpart, which does not bear an impression of the common seal, cancelled or not, would not have been used; it would not have been passed on to Nippon Credit, but would have been rejected. I infer these things from the form of the documents; there is no explanation in evidence by any witness of the events. My inference and conclusion are that whoever it was who put the impression of the common seal of Girvan NZ on one

of the counterparts did not intend by so doing to seal the document on behalf of Girvan NZ; and that Mr Duncan and Mr Ramsay did not intend to attest the seal of Girvan NZ.

Conferral of power of attorney

[100] Mr Duncan and Mr Ambler were not aware of the existence of any document which conferred power of attorney on Mr Duncan. There is no reference in the correspondence leading to the events of 1 June to the supposed existence of a power of attorney, and there is no explanation of the form in which the guarantee and indemnity was drafted and the implied expectation of Gadens that it would be executed under power of attorney and not under Girvan NZ's seal.

[101] No power of attorney had been registered under s 163 of the Conveyancing Act 1919 (NSW); however, the lack of registration is not conclusive against the existence of a document, as it has been the practice to register powers of attorney only when they are required for dealing with interests in land. There is no trace of any document conferring power of attorney on Mr Duncan, either in writing or to the knowledge of the persons who would know of it if there had been one. It is highly probable that there was none, and I so find.

[102] Although the question cannot be regarded as clear, the better view is that s 163 is only intended to refer to powers of attorney which relate to dealing in interests in land. *Williams v Marac Australia Ltd* (1985) 5 NSWLR 529; 3 BPR 9638 is not to the contrary. In *Williams v Marac Australia Ltd* (unreported, SC(NSW), Hodgson J, Nos 3902/84, 4768/84, 4769/84, 6 May 1985, BC8500846), at an earlier stage of proceedings than the reported judgment, his Honour at 6–7 reviewed a submission that "deed" in s 163 should be read ejusdem generis with "conveyance". His Honour observed there to be "some substance in these submissions" but did not express a concluded view, and made an interlocutory order on the basis of there being a prima facie case for the opposite view. It remains open for consideration whether a similar decision should be reached on s 163 as was reached on earlier legislation in *Stacpoole v Glass* (1870) 1 VLR (L) 195. The practice to which I referred is probably based on similar reasoning. As it should be found in this case that there was no power of attorney I need not take the matter further.

[103] The first and only minute of directors of Girvan NZ purportedly authorising entry into the guarantee and indemnity is dated 1 June 1989: Ex A, p 1327. There are many shortcomings of this document; they include that the persons recorded as present were Mr Ambler and Mr Duncan, but Mr Ambler had resigned as a director of Girvan NZ on 18 April 1989. Although Mr Ambler has said to the effect that he was informed that he had been put back on the board, no event had happened on or before 1 June 1989 which could possibly have had that effect, and no event had happened which a reasonable person could have supposed could have had that effect.

[104] Mr Duncan was the only director of Girvan NZ who was present, and he could not constitute a meeting of the board on his own. No notice of the meeting had been given to any other director. Mr Petersen and Mr Kanas were also directors, and the evidence is that they were both in Australia; Mr Petersen was at Broome. Mr McCulloch was a director and he was in New York; for that reason it was not necessary to give him notice of the meeting having regard to Art 110, but he was readily contactable by telephone and it is surprising that he was not given notice. Article 111 fixes the quorum at three; the directors may vary the

quorum but I infer that they had not varied the quorum by 1 June 1989 from the fact that later in 1989 attempts were made to create a minute of a meeting recording such a decision and to attribute to it on earlier date, demonstrating that it is very probable that there had not been such a decision. On no view could Mr Duncan on his own constitute a quorum.

[105] Mr Ambler's name is recorded as among those present as chairman, and he signed the minute as chairman. The business recorded is as follows:

QUORUM:	The Chairman noted that a quorum was present at the meeting comprising directors entitled to vote on the proposed resolutions and noted that each director disclosed his interest, if any, in the subjects of the proposed resolutions including his directorship, if any, in every other company concerned in or by the subject matter of the proposed resolutions.
DOCUMENTS:	The Chairman reported to the meeting that the Company proposes to enter into a transaction involving a Guarantee and Indemnity by the Company to Nippon Credit Australia Ltd ("Nippon") in respect of the obligations of Girvan Corp Ltd ("Girvan") pursuant to a Facility Agreement between Nippon and Girvan to be evidenced by a Deed of Guarantee and Indemnity between Nippon and the Company ("The Guarantee and Indemnity").
. . .	
APPROVAL OF ACCOMMODATION:	The directors noted that the entry into the transaction evidenced by the Guarantee and Indemnity should be approved by the Company.
APPROVAL OF EXECUTION:	RESOLVED THAT the Company affix the common seal and deliver the Guarantee and Indemnity in such form as any duly appointed Representative of the Company attesting the affixing of the common seal shall approve.
APPOINTMENT OF AUTHORISED REPRESENTATIVES:	RESOLVED THAT each of Alan Ambler and Warren Duncan be appointed severally the authorised representatives (each referred to as a "Representative") of the Company to: (a) make amendments to the Guarantee and Indemnity (whether or not material and whether or not involving changes to parties); and

	(b) do any other act, matter or thing in the opinion of the Representative necessary, advisable or incidental in connection with any transaction contemplated by the Guarantee and Indemnity or the Mortgage or the effective exercise of any power listed above.
AUTHORISED OFFICERS:	RESOLVED THAT Alan Ambler and Warren Duncan and each director and secretary of the Company be appointed as an Authorised Officer of the Company and be severally authorised to execute and deliver for and on behalf of the Company all such documents, notes, instruments, certificates and communications necessary or desirable to be executed and delivered by and on behalf of the Company pursuant to and in accordance with the Guarantee and Indemnity.
FURTHER ASSURANCES:	RESOLVED THAT each Representative and Authorised Officer of the Company be severally authorised to do any act, matter of thing and to execute and deliver any other document as it may deem necessary, advisable or incidental in connection with the preceding resolutions or the Guarantee and Indemnity and to perform the obligations of the Company under the Guarantee and Indemnity.
CLOSURE:	There being further business the Chairman declared the meeting closed.

[106] The terms of the resolution "APPROVAL OF EXECUTION" show unequivocally a decision that execution should take the form of affixing the common seal and delivering the guarantee and indemnity. The resolutions taken together are altogether inconsistent with approving or creating authority for execution by an attorney. The acts authorised by the resolution "APPOINTMENT OF AUTHORISED REPRESENTATIVE" do not extend to execution of the document itself. The acts authorised under the resolutions "AUTHORISED OFFICERS" and "FURTHER ASSURANCES" do not, according to the terms of those resolutions, include the execution of the guarantee and indemnity itself.

[107] The terms of the resolutions did not, even in purport, confer on Mr Duncan any power or authority to sign or execute the guarantee and indemnity on behalf of Girvan NZ. They purported to confer authority to affix the seal, but that authority was not acted on.

[108] My conclusion is that Girvan NZ did not itself or by its attorney execute the guarantee and indemnity as its deed.

[109] A notable shortcoming of the minute dated 1 June 1989 as a purported decision of Girvan NZ is that Mr Ambler was not a director of Girvan NZ on that day; he had resigned on 19 April 1989. On behalf of Nippon Credit it has been submitted that there is no evidence that formal steps necessary for an effective

resignation took place. The method of resignation referred to in Art 100 of the articles of association of Girvan NZ is (Ex A, p 1354):

> The office of a director shall be vacated if the director:
>
> . . .
>
> (d) resigns his office by notice in writing to the Company . . .

[110] No decision of the directors is necessary for the efficacy of a resignation. The minute book of Girvan NZ was not put in evidence; its absence was not satisfactorily explained, although Mr Boscawen said that it had "gone missing".

[111] Mr Ambler's retirement on 19 April 1989 is entered in the register of directors (Ex D) although the date of making the entry is not given. His resignation is recorded in a return of particulars to the New Zealand companies registry dated 15 May 1989, signed by Mr Boscawen and lodged in the registry on 29 May 1989 (Ex A3, p 825), apparently too late to be found on the search which Messrs Gadens had had made on that same day (see Ex A, p 1049). It is highly probable that there had been an effective resignation, and I find that Mr Ambler was not a director of Girvan NZ on 1 June 1989.

[112] There simply was no meeting of the directors of Girvan NZ on 1 June 1989. This simple negative can be expanded to state that, from the company's point of view and considering its affairs from within:

(1) one of the two persons present was not a director;
(2) Art 111 fixed the quorum for a meeting of directors at three, and one or two persons could not be a quorum, even if they were directors. The assertion about the quorum in the minutes was wrong; and
(3) four directors had not been given notice of the meeting, and three should have been given notice; the fourth was within an exception in Art 110.

[113] Nippon Credit sought to rely on s 18C(1) of the Companies Act 1955 (NZ) which is in the following terms:

> A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with any person who has acquired any property, rights, or interests from the company that:
>
> (a) The memorandum or articles of the company have not been complied with.
> (b) A person named in the particulars sent to the Registrar under section 200 of this Act as a director or secretary of the company:
>
> (i) Is not a director or secretary of the company, as the case may be; or
> (ii) Has not been duly appointed; or
> (iii) Does not have authority to exercise a power which a director or secretary of a company carrying on business of the kind carried on by the company customarily has authority to exercise.
>
> (c) A person held out by the company as an officer or agent of the company:
>
> (i) Has not been duly appointed; or
> (ii) Does not have authority to exercise a power which an officer or agent of a company carrying on business of the kind carried on by the company customarily has authority to exercise.
>
> (d) A person held out by the company as an officer or agent of the company with authority to exercise a power which an officer or agent of a company carrying on business of the kind carried on by the company does not customarily have authority to exercise, does not have authority to exercise that power.
> (e) An officer or agent of the company who has authority to issue a document on behalf of the company does not have authority to warrant that the document is genuine.

> (f) An officer or agent of the company who has authority to issue a certified copy of a document on behalf of the company or otherwise certify on behalf of the company does not have authority to warrant that the copy is a true copy or to so certify:
>
> unless that person knows or by reason of his position with or relationship to the company ought to know of the matter referred to in paragraphs (a), (b), (c), (d), (e), or (f), as the case may be, of this subsection.

[114] There is no doubt that within the meaning of s 18C(1) Nippon Credit was "a person dealing with the company" in the events of 1 June 1989 in relation to Girvan NZ. This brings with it the application of subpara (a) and the protection against any assertion attacking the efficacy of the resolutions in the minutes on the grounds of lack of a quorum and of lack of notice to directors. Mr Ambler was held out to Nippon Credit by Girvan NZ as a director in that Mr Duncan who was a director participated in the events which led to the production of the minutes of the purported directors meeting of 1 June 1989 and to delivery of a certified copy of the minutes to the solicitors for Nippon Credit, and he made a statutory declaration which stated that Mr Ambler was a director and was also delivered to them. This gives Nippon Credit the protection of para (c) in respect of Mr Ambler's being a director on 1 June.

[115] There is no corresponding conduct which should be attributed to Girvan NZ by which the company held out Mr Duncan as its attorney under power so as to prevent Girvan NZ from making the assertions referred to in paras (c) and (d). Mr Duncan, who was a director, signed in the place indicated for the signature of an attorney. The document was delivered to Messrs Gadens in a factual context which contained strong indications that Mr Duncan was not the company's attorney to execute the guarantee, and that his purportedly doing so was irregular. The certified copy of the minutes, which Nippon Credit's solicitors requested and obtained, showed that Girvan NZ was to execute the document under seal: the minutes did not hold out that Mr Duncan was attorney, but contradicted that he was, and regardless of whether or not he was, indicated a decision to execute the document in a different way. The name of the attorney was given in the attestation as Mr Ambler, but the signature was that of Mr Duncan. If Mr Duncan's signature impliedly asserted that he was the attorney it was contradicted expressly by the statement that Mr Ambler was the attorney. Neither was, but the irregularity tells strongly against attributing the implied assertion to the company. In this galaxy of anomalies the fact that Mr Duncan's signature was identified as Mr Ambler's seems quite minor, but it is important none the less.

[116] It should not be found that Mr Duncan was held out as an agent of Girvan NZ, or as an agent with the authority of an attorney under power to execute the guarantee, and Nippon Credit does not have the protection of paras (c) or (d).

[117] If contrary to my opinion paras (c) and (d) applied, Nippon Credit would be defeated by the proviso to s 18C(1) in that by reason of Nippon Credit's relationship to Girvan NZ as the profferor of a document in a form to be executed by an attorney it ought to have made some investigation into the existence and terms of any power of attorney.

[118] The earlier steps in Nippon Credit's relationship with Girvan NZ were these. The first letter of offer from Nippon Credit to Girvan Australia dated 11 May 1989 (Ex B, p 87), referred to Girvan NZ; Girvan NZ was to grant security and furnish a certified copy of the resolution of its directors authorising acceptance. Acceptance was given on behalf of Girvan Australia and Maronis, not of Girvan NZ (see Ex B, pp 93, 95), and Girvan NZ did not furnish a

resolution of directors authorising entry into the mortgage: see minutes of Girvan Australia (Ex B, p 96) and Maronis (Ex B, p 98). Nippon Credit's second letter of offer dated 17 May 1989 (Ex B, p 101) required security to be given by Maronis and indicated that Nippon Credit's solicitors would consider whether Girvan NZ (and others) should be party to the guarantee and indemnity agreement. Messrs Gadens indicated the outcome by including Girvan NZ as a guarantor in the first and later drafts of the facility agreement.

[119] In this case the relationship grew out of the requirement in the letter of offer of 11 May, and had been the subject of consideration and various communications since then. The context of the relationship included a proposal that Girvan NZ incur liability under a guarantee for a large sum which was to be lent to another company. Both Nippon Credit and Girvan Australia were represented by solicitors who considered and communicated on many matters of detail before completion of the transaction. The context further included the apparent irregularity of the purported execution. In that context I do not find it possible to understand how the basis for an assumption or implied assertion that a power of attorney existed was not considered. The basis for that assumption was something which a person in Nippon Credit's position ought to have known. The most rudimentary investigation or even the most rudimentary consideration such as it was appropriate for an intending mortgagee represented by a solicitor to undertake before relying on the guarantee would have revealed the anomaly that Mr Ambler's name was given but he did not sign whereas Mr Duncan did, the non-existence of any written power of attorney and the inconsistency of execution under power of attorney with the decision recorded in the minutes to execute the document under seal.

[120] I apply the observations of Priestley and Clarke JJA in *Bank of New Zealand v Fiberi Pty Ltd* (1994) 14 ACSR 736 at 750; 12 ACLC 48 at 59–60:

> . . . the person in question would reasonably be expected, in the particular circumstances of that person in relation to the assumption being made, to know the true position about the matter assumed.

Those observations were made in the application of s 68A of the Companies (NSW) Code. (A different rule now has effect under s 128(4) of the Corporations Law which was explained in an explanatory memorandum to the Company Law Review Bill 1997 as intended to make it clear that the Common Law "put upon inquiry" test has no application to the statutory provisions.) In my respectful view their Honours' opinion is quite consistent with the observations of Gleeson CJ in *Story v Advance Bank Australia Ltd* (1993) 31 NSWLR 722 at 735 in the course of which the Chief Justice said:

> It may well be that, in certain circumstances, the connection or relationship that ought to give knowledge of the relevant irregularity can arise out of the very dealing which is putatively affected by the irregularity.

[121] In *Equiticorp Industries Group Ltd v R* [1998] 2 NZLR 481 at 724–5 Smellie J, when reviewing Australian authorities which applied s 68A, did not follow the view of Priestley and Clarke JJA in *Bank of New Zealand v Fiberi*; Smellie J saw their view as continuing unaltered the concept of being put on inquiry which was part of the common law before the enactment of s 68A. His Honour preferred a view that something more than the common law concept of being put on inquiry was required, a view which he saw as based on observations in the Victorian Court of Appeal in *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279 at 359; (1991) 6 ACSR 464. If something

more than circumstances which under the previous common law put a person dealing with a company on inquiry is required, in my opinion that something more was present here. The transaction was very large, the form of execution was quite irregular even on its face and it was accompanied by minutes which purported to show that Girvan NZ had resolved to execute the guarantee in a different way. In my opinion the circumstances cried out for inspection of or some inquiry about the document which created power of attorney.

[122] In my opinion Girvan NZ did not incur any liability to Nippon Credit under the guarantee and indemnity.

Officers of Maronis Holdings Ltd

[123] There is no contention about who held office as directors of Maronis until 19 April 1989 nor about who held office as secretary of Maronis.

[124] Maronis was formed as a shelf company on 13 June 1988 and on formation Mr D K Clifford and Mr H A Smith, both solicitors of Wellington, became directors and Mr Clifford also became secretary. Mr Clifford resigned as director and secretary on 18 August 1988. On 29 August 1988 the defendants Mr Duncan and Mr Ambler became directors, as also did Mr B H Hopkins, and Mr H A Smith resigned. On 18 October 1988 Mr C W O'Neill became a director of Maronis, and Mr R V Ramsay the sixth defendant became secretary. There were then four directors: Mr O'Neill, Mr Hopkins, Mr Duncan and Mr Ambler. Mr Hopkins resigned on 23 January 1989. Mr O'Neill resigned on 19 April 1989. Events thus far are not contentious, although some do not correspond exactly with entries in the minute book.

[125] The only minutes of directors' meetings of Maronis up to and including 1 June 1989 relate to meetings on 18 August 1988 (appointment of Mr O'Neill and Mr Ramsay), 29 August 1988 (appointment of Mr Hopkins, Mr Duncan and Mr Ambler, share transfers), and 15 May 1989 and 1 June 1989 (which did not deal with appointment of directors). There is no minute relating to the appointment of directors on 19 April 1989 and no record of a decision made in any other way to appoint directors on that day. There is no minute of a decision of Maronis' members or directors relating to the number of directors who could hold office.

[126] In the register of directors and secretaries (Ex E) there are entries relating to each of Mr Boscawen, Mr McCulloch, Mr Kanas, Mr Fielding and Hoskins, showing in each case the date of appointment as at 19 April 1989. (From the way the pages are set out it must be understood that the entries refer to appointment as director, although that is not expressly stated.) The entries relating to Messrs Boscawen, McCulloch and Kanas have been altered with whiteout and overwritten in circumstances which are not explained. The references to these appointments in the minute book, the register of directors and the return of particulars are not apparently regular. In the minute book there are two forms of consent to act as directors, dated 19 April 1989 and bearing signatures or facsimile signatures of each of those five persons. It is very improbable that they were all present together and signed on the same occasion, or that each of them signed on 19 April 1989.

[127] Oral evidence of Mr Boscawen suggested that the appointments may have been effected under a provision of New Zealand law which enables majority shareholders to make effectual decisions by entries in the minute book of a company. The reference must be to s 362(1) of the Companies Act 1955 (NZ) in these terms:

> Anything that may be done by a company registered under Part II of this Act by resolution, special resolution, or extraordinary resolution passed at a meeting of the company may, subject to any special provisions in that behalf in the articles of the company, be done by a private company in the same manner or by resolution passed, without a meeting or any previous notice being required, by means of an entry in its minute book signed by at least three-fourths of the members having the right to vote on that resolution, holding in the aggregate at least three-fourths in nominal value of the shares giving that right.

[128] On 19 April 1989, as appears by entries in the register of shareholders (also in Ex E) there were two members of Maronis namely Oxford House (a reference to Oxford House Ltd) which held nine shares and Mr R J Barraket who held one share; and it was recorded that he held his share in trust for Oxford House Ltd. A declaration of trust of that share dated 29 August 1988 is entered in the Maronis minute book. The declaration of trust includes cl 1.4, an agreement to vote and to sign any resolution to be passed by entry in the minute book in accordance with the directions of Oxford House Ltd and cl 2, an appointment of Oxford House Ltd as agent and attorney in relation of the share.

[129] The contents of the minute book of Oxford House were not proved and it is not known whether they included any decision relating to appointing directors of Maronis on 19 April 1989, under s 362(2) or in any other way. Mr Boscawen indicated the terms of the minute which he suggested was or would have been executed by Oxford House by referring to a minute in the minute book of Gretton Investments Ltd (Ex 51) by which Rockford Properties International Pty Ltd purportedly appointed Messrs McCulloch, Kanas, Fielding and Hoskins as directors of Gretton Investments on 19 April 1989. This memorandum states that Rockford ". . . being the holder of the majority of the shares in the capital of the company hereby appoints . . . [Mr McCulloch, Mr Kanas, Mr Fielding and Mr Hoskins] . . . as directors of the company". Mr Boscawen was able to produce the minute book of Gretton Investments because, he said, that company had later passed into his control. (Exhibit 51 contains no minutes reflecting any passage of control, and no minutes after the memorandum of 19 April 1989.)

[130] If Oxford House did execute a memorandum in a generally similar form to the memorandum relating to Gretton Investments which was executed by Rockford Properties International, that would not constitute an effectual appointment under s 362(2) because Oxford House was one of two members and did not constitute three-fourths in number of the members, and because the memorandum was not entered in Maronis' minute book. Each of these matters is essential to the procedure and outcome indicated by the subsection. A memorandum in the form used by Gretton Investments would not purportedly exercise the powers conferred on Oxford House by Mr Barraket's declaration of trust, and would not purport to be a memorandum by both members.

[131] A "return of particulars of directors and secretaries or of any changes to them" relating to Maronis was lodged in the New Zealand companies registry. This document bears date 15 May 1989. It was lodged on 1 September 1989. (The date of lodgment appears from an official imprint: Ex A, p 825.2. I find the imprint difficult to read, even with a mirror, but it was accepted at the hearing that it shows that lodgment date.) This document was signed by Mr Boscawen as secretary; but it must be read with care, as its terms show that Mr Ramsay continued to be secretary, and the document although it related to Maronis stated that it was presented to the registry by Girvan NZ. The careful reading is that Girvan NZ filed the document in the registry and Mr Boscawen was secretary of

Girvan NZ. On a fair reading of s 200(4) of the New Zealand Companies Code, and of the relevant form 7, the particulars are to be signed by a director or secretary of the company subject to the return; it was irregular that Mr Boscawen signed as secretary. Form 7 shows that particulars of directors are to include de facto directors as well as persons who have been formally appointed. Mr Ramsay, the secretary of Maronis, had no involvement whatever in any purported appointments or in this return. No evidence establishes when the document was sent to the registry or explains the discrepancy between the date on it (15 May) and the date of receipt (1 September); Mr Boscawen raised the possibility, which is no more than speculation, that it may have been lodged in the registry in one place and forwarded on to another place where Maronis' records were kept. It is very irregular because it was not signed by an officer of Maronis and was lodged very late, when controversy about the events of 1 June was beginning. It has no weight as evidence of what it asserts.

[132] If Oxford House had executed a memorandum under s 362(2) or any other document on that subject it is highly likely that the document would have been entered in Maronis' minute book. That is what subs (2) requires. Mr Boscawen's evidence about the appointment was lacking in detail and circumstances and there are no records or any other corroborating material, and his evidence was not, to my observation, expressed with any apparent confidence on his own part that the underlying facts had occurred. In my finding it has not been established as a matter of probability that Oxford House did anything which was or could be an appointment of directors of Maronis. Overall, it has not been established that any particular event happened which constituted an appointment of these five persons and it is very improbable that there was any such event. I find that there was no appointment of Mr McCulloch, Mr Kanas, Mr Boscawen, Mr Fielding and Mr Hoskins as directors of Maronis on 18 April 1989.

[133] Plaintiff's counsel relied on the common law principle under which unanimous decisions of all members of a corporation, even if informal, are accorded effect. Oxford House was in a position to proceed in that way but there is no evidence that it did; if it used a form similar to the Gretton Investments form, to which Mr Boscawen referred in illustration, that would not purport to be a unanimous decision of the members.

[134] If a decision to appoint five further directors was purportedly made it would not in my opinion have been effectual as it would not have conformed with Maronis' Art 21 which replaced cl 75 of table A, and in part provided:

> (b) Unless and until otherwise determined by the company in general meeting there shall be not less than two (2) nor more than five (5) directors.

Conceivable outcomes include that the two existing directors were impliedly dismissed, that the first three new directors took office, that the last three took office, and that the members impliedly varied the limit in Art 21. General invalidity of the whole decision is more likely to be the correct conclusion. If the terms of any decision had been established these possibilities could be examined further.

[135] Plaintiffs' counsel contended that Mr Kanas, Mr Fielding and Mr Hoskins were to be treated as directors based on their conduct. However, apart from their signing consent forms bearing date 18 April 1989 there is no substantial basis for a finding that they acted in the character of directors of Maronis between 18 April and 1 June 1989, or at any other time earlier or later. Mr McCulloch and Mr Boscawen addressed interests and affairs of Maronis in the course of their

activities generally directed to the interests and affairs of Girvan NZ, but in my finding there is no conduct of either of them which can be specifically identified as conduct as a director of Maronis so as in some way to make either of them a de facto director of that company on 1 June 1989.

[136] The plaintiffs' counsel submitted that Messrs Hoskins, Fielding, Kanas, McCulloch and Boscawen were directors of Maronis on 1 June, whether or not they had been formally appointed as directors, because they fell within the definition of "director" in s 2(1) of the Companies Act 1955 (NZ).

[137] This definition is inclusive and applies unless the context otherwise requires. It is in these terms:

> 2(1) In this Act, unless the context otherwise requires:
> . . .
> "Director" includes:
> (a) Any person occupying the position of director by whatever name called; and
> (b) A person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act . . .

[138] Table A in the third schedule to the Companies Act 1955 contains the following provision:

> (1) In these regulations, unless the context otherwise requires:
> . . .
> words or expressions contained in these regulations bear the same meaning as in the Act or any statutory modification thereof in force at the date of which these regulations become binding on the company.

[139] The first clause of the articles of association of Maronis includes the following:

> 5. THE regulations contained in Table A in the Third Schedule to the Companies Act 1955, ("Table A"), including the interpretation provisions in Clause 1 shall except so far as they are excluded or modified by these Articles apply to the company and with the following articles shall constitute the company's Articles of Association.

According to its terms this clause applies the interpretation provisions in reg 1 of table A to the regulations contained in table A which apply to the company, that is to all the regulations in table A except so far as they are excluded or modified. (It is strangely unclear whether the interpretation provisions in reg 1 apply to the "following articles" meaning the articles which are not contained in table A.)

[140] Regulation 98, which is not modified by the articles, contains provisions relating to proceedings of directors and concludes:

> A director may, and the secretary on the requisition of a director shall, at any time summon a meeting of the director. It shall not be necessary to give notice of a meeting of directors to any director for the time being absent from New Zealand.

The application of the provision about notice where the meeting itself is not held in New Zealand seems doubtful.

[141] This provision by implication entitles each director to receive a summons to any meeting called by a director or secretary; and apart from this due notice of a meeting to the persons entitled to attend it is inherent in the concept of a meeting of directors. In my view there is nothing in the context which requires otherwise than that persons included as directors by the definition in s 2(1) should receive a summons or notice of meeting of directors.

[142] On 1 June 1989 Mr McCulloch was in New York and Mr Kanas was in Brisbane; that is, they were both absent from New Zealand; but Mr Hoskins,

Mr Fielding and Mr Boscawen were in New Zealand, and if they were directors they were not excepted from the requirement of notice by the last sentence in reg 98.

[143] There is no basis in the evidence for finding that any of Mr Hoskins, Mr Fielding and Mr Boscawen was a person in accordance with whose directions or instructions other directors of Maronis were accustomed to act. There is no evidence that any of them gave any direction or instruction which might be relevant.

[144] Nor is there any evidence that any of them occupied the position of director of Maronis. They signed the consent to act as directors of Maronis which bears date 19 April 1989. Otherwise none of them did anything which can be identified as an act in occupying the position of a director of Maronis. From 19 April–1 June Maronis is only recorded as having held one director's meeting and none of these three persons was present at it. Maronis had no transactions or correspondence during that interval in which any of these three persons took part. They were not involved in the meeting of 1 June, and not involved in any other way in the process of determining that Maronis would give the guarantee and mortgage, although that was the most momentous decision, and almost the only business decision, that Maronis ever made. It was attributed to them that they were directors in the return of particulars dated 15 May 1989 but lodged on 1 September, and in the information on which Mr Duncan's statutory declaration of 1 June was based and in the statutory declaration. None of these events constituted occupation of the position of director by any of these three persons. It is to be noted that in the return of particulars lodged, Mr Boscawen signed as secretary although the companies regulations contemplate that either a director or a secretary may sign: see Companies Regulations 1956 (NZ) Sch form 7. If the reference was (and I think otherwise) to his being secretary of Maronis, which he was not, this would be an anomaly, because if he was a director of Maronis he fell within the regulation and could sign the return as director.

[145] Counsel referred me to observations of Mason J in *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 at 242; 22 ALR 161; 3 ACLR 760 in which Mason J pointed to a contrast between occupying the position of director, the expression used in the definition in s 2(1)(a), and holding the position of director and said:

> To say that a person occupies a position or office is to say something more than that he holds the position or office. The first statement denotes one who acts in the position, with or without lawful authority; the second denotes one who is the lawful holder of the office.

[146] Applying these observations to the position of Mr Hoskins, Mr Fielding and Mr Boscawen, they fall within para (a) of the definition if they acted in the position of directors, and if they did they fall within that definition notwithstanding that I have decided that they were not lawfully appointed. In relation to each of them there is no substantial evidence of having acted in the position of a director of Maronis, nor of doing any act in that position. The absence of notice to them of the meeting of 1 June 1989 has no effect.

[147] Mr McCulloch acted as and was treated as being first acting managing director then managing director of Girvan NZ from January 1989 onwards, and regarded the affairs and interests of Maronis as falling within his responsibility. His written material shows that he gave attention to the protection and advancement of Maronis' interests. Apart from signing a consent to act as a

director of Maronis, there is no evidence that he did anything in the character of a director of Maronis. He should not be regarded as a person falling within the definition of "director" in s 21 of the New Zealand Companies Act 1955; he did no act which constituted occupying the position of director, and it cannot be said that any other persons were accustomed to act in accordance with his directions or instructions in relation to the affairs of Maronis.

[148] My conclusion is that the only directors of Maronis who in truth were in office on 1 June 1989 were Mr Duncan and Mr Ambler.

Financial position of Girvan Australia

[149] The plaintiffs put forward the financial circumstances of Girvan Australia as important context for understanding the transactions of 1 June 1989 and the conduct of the persons involved. In paragraph 20(i) of FFASC it is alleged that Mr Duncan and Mr Ambler were as at 1 June 1989 aware that Girvan Australia was experiencing serious cash flow problems and that there was a real possibility that Girvan Australia would be unable to discharge the proposed loan. Inferentially it is alleged that those were facts. There are other reflections of the plaintiffs' taking this position elsewhere in FFASC including at paragraph 44(d) relating to the case against Clayton Utz. To paraphrase counsel's oral submissions (at p 3706), the financial circumstances of Girvan Australia were well known to the directors; Girvan Australia was significantly short of cash at all times in 1989, spending about A$5m per week above its receipts from March 1989 onwards; Girvan Australia gave constant updates to its principal banker Commonwealth Bank of Australia (CBA) about the cash position, including indications of when money to be borrowed on the LTS land would be received and would contribute to the cash position, originally envisaged for April, later for 26 May and finally received on 1 June. It was contended that by 1 June Girvan Australia was critically short of cash. It had made a public borrowing some 18 months before and was not able to go back to the market for another public borrowing. Substantial projects which it had on foot were significantly under-funded and it had reached the limit of its borrowing capacity, demonstrated by the difficulty it experienced in borrowing funds from Nippon Credit. The LTS site was either the only or almost the only unsecured piece of real property that Girvan Australia controlled. Borrowing funds for the needs of Girvan Australia was the object of the borrowing and no genuine consideration was given to interests of the plaintiffs.

[150] In support of this case the plaintiffs' counsel pointed to many references in documents to Girvan Australia's directors' consideration of the need for financing, and communications with banks, as well as to circumstances closely associated with borrowing from Nippon Credit. Mr Duncan as managing director was, of all people, in the best position to know objectively Girvan Australia's financial position and his evidence and opinions have wider significance than simply for the claim against him, and there was extensive cross-examination of Mr Duncan on the subject. There was also lengthy cross-examination of Mr McMahon; the significance of information and knowledge available to him is limited to the claim against Clayton Utz.

[151] There was a wide gulf between indications given by the commitments of Girvan Australia in the Dextran agreement, and performance and events in the first half of 1989. There was a specific covenant in the Dextran agreement that Girvan Australia would spend the first A$8m in establishing the required infrastructure works; these would be completed within 12 months following the

settlement date and the A$8m would be refunded to Girvan Australia on practical completion of the infrastructure works (with the possibility of earlier repayment out of proceeds of sale). There is no indication of any consideration being given on behalf of Girvan Australia and its directors in the first half of 1989 to fulfilling the covenant by actually providing A$8m, and the contrast is very marked between the terms of the commitment in the Dextran agreement and all consideration and preparations in 1989. Far from it being the case that Girvan Australia provided A$8m and embarked on the infrastructure works, presenting Girvan NZ with the commercial problem of finding the means to repay that amount on practical completion, financing was addressed on the basis that Girvan NZ was expected to enable Girvan Australia to raise money for the financing works by pledging Maronis' assets, and for a much greater sum than A$8m. The interpretation is readily available that by 1989 Girvan Australia was not in the position to deploy funds which it had earlier expected to be in.

[152] In early February 1989 Girvan Australia faced serious difficulties in its dealings with CBA, and there was a crisis on 7 February 1989 when it was found that its account was overdrawn A$76,087,052.76 although a direction had been given that CBA would not under any circumstances allow debts to go above A$75m. The bank threatened to return cheques "Present again" if the excess was not reduced in the course of the day, there were some communications between bank officers and Mr Hill and Mr Duncan, dishonour notices were prepared but not issued and the crisis was averted in some way: Ex A2/571. A memorandum by Mr Hill the financial controller dated 22 February 1989 (Ex A2/636 stated "The corporation is currently undergoing a temporary period of cash shortage" and detailed procedures to be followed during what it called "this challenging period").

[153] An internal memorandum of the bank (Ex A3/677) of 21 March 1989 shows an altogether different picture and deals with an application for temporary increase of accommodation. The bank had received A$128.41m on 17 March out of the proceeds of sale of Girvan Australia's Walker St North Sydney building, which was the headquarters of its operations, and the overdraft was A$22m. Girvan Australia had requested CBA's continued support and a temporary increase until the end of June. After an extensive review CBA's general manager Mr Sim recommended approval of facilities totalling A$48.9m subject to conditions. The review included projections of cash flow one item of which was the receipt in the week ending 7 April 1989 of "Liverpool funding" of A$8m as "Loan approved by Westpac/documentation proceeding". At some unknown time a bank officer made a side note "Now 26/5" indicating that the receipt came to be expected on 26 May. Whatever underlay this note, no Westpac approval of that kind had been given. Mr Hill's letter of 17 March 1989 sought Girvan NZ's agreement to making the LTS land available for security for financing from Westpac, but Westpac's consideration (which related to an application for A$30m secured on the LTS land) closed on 22 March 1989 with a decision that the business should be allowed to pass.

[154] A Girvan Treasury report for March 1989 Ex A3/719 gives an account of the overdraft during March in which the overdraft was repaid on 17 March out of the proceeds of sale of the North Sydney property, and had then risen by the end of the month to A$42m. It was said ". . . our cash position must still be considered tight and must continue to be carefully monitored".

[155] On 3 April 1989 CBA gave Girvan Australia a temporary increase in the

Girvan Australia Groups' credit line to A$48.9m. This was described as "Increased temporary accommodation pending finalisation of the GCL groups on-going funding facilities." Full clearance was required by 30 June 1989, and the temporary nature of the facilities was made clear by saying that approving the temporary line of credit was not an expression of interest in arranging the group's longer term financing needs: Ex A3/729.

[156] Mr Hill of Girvan Australia sent CBA a large volume of material as a draft strategic plan on 26 April 1989 in support of obtaining funding for Girvan Australia over a longer term through syndication. The LTS was listed among major projects where the areas of most concern for short-term funding were selling down and funding major projects: Ex A3/829.

[157] When the Nippon Credit loan and mortgage were settled and the balance of the proceeds was deposited in the CBA its immediate effect was to reduce the overdraft balance. As the arrangements in hand with CBA required full reduction by 30 June, getting money out again for the LTS infrastructure development would involve making further financing arrangements.

[158] Through the first months of 1989 and up to the time of the mortgage the business of Girvan Australia and its group continued to be conducted on a basis which shows that it was assumed and expected that the group would be in business for a long time; projects were carried on, commitments were made and liabilities were incurred in planning and preparation for future projects, including liabilities relating to the LTS site, particularly completing purchases of the land. Financing for the group and of particular projects continuingly demanded attention, but the way in which business was conducted supports the conclusion that there was a continuing assumption by the directors that problems of financing could be and would be overcome. A status report Ex A3/862 was prepared for the meeting of the directors of 5 May 1989. It is not known who prepared this report; it was tabled at the meeting and was known to Mr Duncan. It opens its dealing with funding by saying "The corporation's current liquidity difficulties are seriously impairing normal business operations in all construction companies" and goes on to state various adverse consequences including that commitments on major projects were being restricted to those essential to maintain agreed program timing. Six projects were listed on which there were large funding shortfalls. The directors' minutes of 5 May 1989 show that there was consideration of project funding, but do not express any sense of crisis.

[159] Girvan Australia and its associated companies did not pay fees due to Clayton Utz promptly, a fairly large account built up and was the subject of gentle pressure from that firm.

[160] In the Bolfox Transactions Loc-Tex International Pty Ltd purchased a property at Port Botany from Port Botany Development Corp Ltd and settled the purchase for A$11.4m on 8 May 1989, after incurring additional considerations for extension of the contractual purchase date: see documents at Ex N Tab 2. The delay in completing the purchase arose from difficulty in obtaining a mortgage advance, and an advance from National Mutual Royal Bank was arranged very late in the purchase transaction. Completion of the purchase generated an obligation to pay a consultancy fee of A$2m to Bolfox Pty Ltd on 1 December 1989 and to furnish a bank guarantee to secure the payment. However, a bank guarantee was not produced when the obligation arose, and there was delay, in the face of demands and threats of action on behalf of Bolfox Pty Ltd until Cigna Insurance Australia gave a security deposit guarantee on 27 June 1989. From this

delay it should be inferred that Loc-Tex International and Girvan Australia had difficulty in obtaining an appropriate guarantee and meeting the obligation. Loc-Tex International was exposed to the risk that in default of providing a guarantee A$2m would be payable forthwith and not on 1 December 1989. Until the guarantee was provided Loc-Tex International was exposed to considerable risk of acceleration of its obligation, although it is to be observed that this risk was averted.

[161] Obtaining development approval and the Nippon Credit loan were circumstances which seem strongly to have favoured an immediate start on infrastructure development on the LTS site, particularly in view of the money and effort which had been spent on preparations, projections of profits for the site even for the year ended 30 June 1989, the FIRB approval and many expressions of the importance of the project. In May 1989 site clearing work for surveying purposes was carried out. However, infrastructure work did not start, and what was on its face an approval of 16 June 1989 for expenditure of funds was not acted on. Mr McCulloch pressed hard for a commencement of work. However, nothing significant was done, except that a small amount of site clearing work was undertaken in January 1990. It should be remembered that the development consent was conditional and it was necessary to obtain or to see that a public authority obtained a parcel of land, referred to as the Army land, for the construction of loop road access into the site; this land did not become available until September 1989. Until it was available there were considerations adverse to embarking on the infrastructure works without being certain that the condition could be fulfilled and the development consent could be availed of.

[162] On 7 September 1989 the Roads and Traffic Authority reached agreement, in principle and without exchange of contracts, to purchase the land from the Commonwealth, and informed Loc-Tex International to the effect that the acquisition would go further on Loc-Tex International accepting responsibility for all costs associated with the acquisition by executing a deed to that effect and paying A$1.8m into a bank account out of which the costs of acquisition were to be paid. It seems that the project went no further; in any event the payment was not made.

[163] Mr Duncan said (transcript p 1461) that he was comfortable with the financial position of Girvan Australia in May and on 1 June 1989. He continued to be comfortable with its financial position until it went into receivership at the end of January 1990. Girvan Australia had continuous support of its bankers; cash was tight: transcript p 1751. In his understanding Girvan NZ was experiencing cash shortages and required financial support from Girvan Australia, which it was given. Because he felt comfortable with the financial position of Girvan Australia he did not consider that there was a risk to Girvan NZ or to Maronis that the Liverpool property might be lost as a result of the borrowing (transcript p 1479) and he was comfortable in the belief that Girvan Australia had sufficient financial ability to be able to spend the funds required to develop its component of the Liverpool Truck Stop.

[164] In cross-examination Mr Duncan said to the effect that late in January 1989, within about 2 weeks after he became managing director, he had a meeting with the Commonwealth Bank and he was advised about the overdraft position. Cash was a major consideration for the group. He knew that there was an overdraft limit and that the bank expected Girvan Australia to operate within the limit. Mr Duncan said that Girvan Australia was in funds after mid-March when

it had sold the Walker St North Sydney building and paid back A$142m of debt. Mr Duncan's position was tested by questions relating to there being no decision on behalf of Girvan NZ to exercise a put option arising under the takeover arrangements which would have required Girvan Australia to pay Girvan NZ A$6m, and also on Girvan Australia's not taking up consideration of the prospects of buying out the minority shareholdings in Girvan NZ, which it was suggested would have cost A$5m or A$6m.

[165] Although Mr Duncan was cross-examined at length about Girvan Australia's communications with CBA and Westpac in March, April and May 1989 the material elicited did not to my mind establish that there were in some way a crisis in Girvan Australia's banking arrangements and the credit available during that period, or that borrowing from Nippon Credit was a resort in a state of emergency to borrowing on Maronis' credit as the means available to meet the needs of Girvan Australia for short term liquidity. No doubt it did contribute to Girvan Australia's short term liquidity, but it was not, in my finding, an extemporisation for that purpose; and the intention of Mr Duncan and generally of those in control of Girvan Australia's affairs was that the LTS project should be proceeded with and that the borrowing would enable it to do so. In my finding Mr Duncan did not act in response to a perception of crisis in the availability of money or credit when he participated in the borrowing from Nippon Credit and the giving of security. In Mr Duncan's mind there was not a risk that Girvan Australia might be unable to repay the borrowing: transcript pp 1771–2.

[166] The cash position of Girvan Australia and its associated Girvan Group was obviously tight in the period from 1 March–30 June 1989 but the group could not be fairly said to have been experiencing serious financial difficulties such as a reasonable director would have concluded that there was a real prospect of the Girvan Group collapsing and being unable to meet its liabilities as they fell due.

[167] Mr Duncan in his second and third affidavits dealt with the projects which were spoken of as major concerns in the status report and showed that the projects were sold and disposed of at various time later in 1989. He also gave an account of joint ventures and negotiations which were carried on in 1988 and 1989 for the sale or takeover of the whole of Girvan Australia's enterprises and various of its projects; these included extended negotiations with Beazer for more than a year, and negotiations with Chase Corp in June 1989 for the sale of the LTS project, which came to an end at some time in July. It was his evidence that he was working towards and expected to sell in whole or in part the listed projects and thereby generate cash returns which could be used for other developments. He said (third affidavit, para 5) "It was in this context that I had no concern about Girvan Australia's capacity to ultimately fund the LTS project and the mortgage funds being paid into group treasury. I thought that even if some of the expected sales did not take place there would be sufficient funds in group treasury to ensure that the LTS project proceeded when all necessary preparations and approvals have been obtained. For this reason I had no concern about authorising expenditure of the funds necessary for the LTS project on 16 June 1989."

[168] Mr Duncan owned shares in Girvan Australia and did not sell them; and advised his parents to purchase shares. It was his evidence that Mr Petersen purchased more shares at the end of June 1989. Girvan Australia did not have the experience of having any of its cheques dishonoured. There was an unqualified audit report dated 18 October 1989.

[169] In my finding Mr Duncan's expressed comfort with the financial position of Girvan Australia truly indicates his state of mind at the time of negotiation of the Nippon Credit loan.

[170] Mr A G Sherlock, chartered accountant, was called by Clayton Utz and gave expert evidence on the financial position of the Girvan Group, meaning Girvan Australia and its related corporations and associated entities. Mr Sherlock is a chartered accountant prominent in that profession and well qualified by experience, including experience as a former partner of Coopers & Lybrand in the credit risk management division. In addition he has what for the present purpose is the considerable advantage that he was appointed receiver manager of Girvan Australia and five of its subsidiaries in January 1990 and continued as receiver manager throughout 1990 supervising the realisation of the assets of the companies. His views were expressed on the basis of a comprehensive analysis of documents and with the advantage of his earlier participation in Girvan Australia's affairs. Mr Sherlock reported that the annual report of Girvan Corp Ltd and its subsidiaries for the period to 30 June 1989 showed gross assets in excess of A$780m, an annual turnover in excess of A$570m, and reduction in loans and decrease in working capital of about A$534m, implying a net inflow of funds of about A$36m. He addressed the question "Were there serious financial difficulties being experienced by the Girvan Group in the period from 1 March to 30 June 1989" and dealt with it comprehensively. He observed that there was no qualification in the audit report accompanying the financial statements for the year to 30 June 1989, prepared by KPMG, relating to the position of the Girvan Group as a going concern. He reported on the basis of documents that there was pressure on the liquidity of the group during this period, and there was a requirement for cash to be monitored and allocated within the group in accordance with need. In the passage in his report showing Mr Sherlock's opinion the following appear:

> During the months of May and June [1989] there was quite significant "head room" under the CBA overdraft facility . . . In the six months to June 1989 the balance sheet analysis showed an improvement in current assets and an increase in loans as a result of the cash management programs and the negotiations with the Group's bankers . . . [additional banking facilities were] . . . made available to the group as part of its working capital needs, reflected both a positive view of the Girvan Group and the initiatives it was taking to reduce its reliance on debt finance. The liquidity issues confronting the Girvan Group were not unusual for a diverse building and development group at the time in question.

[171] Cross-examination established that according to financial statements the operating profit for the year to 30 June 1989 was about A$4m whereas in a previous financial year it had been A$72m. Borrowings had increased during the year by more than A$40m. There was a shift in the balance of long term and short term liabilities, as the balance sheet at 30 June 1989 showed that non-current liabilities had been A$325m at 30 June 1988 and were A$124m at 30 June 1989; by contrast current liabilities had been A$141m but had become A$417m. To my mind this contrast points with emphasis to the continuing importance of the function of arranging and maintaining financing, but is not an indication that the outcome was not likely to be successful. When this contrast was drawn to his attention Mr Sherlock said:

> A. What one has to understand is that this company was a dynamic one, that is, there was a constant state of change with various lenders being approached to provide first mortgage moneys with security and very often they were changed — the identity

> changed because there was a new joint venture partner. In fact, the Commonwealth Bank went on and lent — continued to lend money to the group on an overdraft basis with an equitable charge right through until December. There was always negotiation going on between the company and its lenders — whether they be through overdraft or through first mortgage.

I regard this as the realistic view.

[172] I accept Mr Sherlock's views. In my finding it was normal commercial practice in the Girvan Group to use mortgage finance to fund development projects and to maximise borrowing ability when doing so. In the nature of its business large amounts of money would be required to carry out development projects and take them to the stage where they could be sold or some interest in them could be sold, so it is not remarkable that there were periods when the credit available was fully extended followed by large falls in credit employed as projects were sold. Negotiating for credit and employing it fully on specific projects to which credit related were the ordinary course of business, obtaining funding for particular development projects was an ever-present need, and firm expressions and close supervision by financiers are unremarkable. It was in the nature of development business that some repayment date was always looming up, and that some large financing arrangements were required to be negotiated. Obtaining bank credit required continuing attention; CBA behaved circumspectly and carefully avoided giving long-term commitments, and actively maintained controls on observance of overdraft limits; such events are fairly normal for a company which is using bank finance for its operations, and they are not indications of crisis. Girvan Australia was not in any serious sense financially unstable in May and June 1989.

Charterbridge and fiduciary duty of directors

[173] The observations of Pennycuick J in *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74 were not directed to the liability of directors, or to their fiduciary or other duties. It was not alleged in *Charterbridge* that the directors had incurred any liability, and they were not parties to proceedings. The claim made by the plaintiff was a claim for a declaration that a legal charge granted to the bank by the second defendant, a company referred to as Castleford, was void as being outside the powers of Castleford. When considering the law Pennycuick J said (at 68–9):

> It will be borne in mind that the present action is based exclusively upon the contention that it was ultra vires Castleford, ie outside its corporate powers, to give the guarantee and legal charge. On this footing the guarantee and legal charge were a nullity.

[174] Findings of fact established that in deciding to enter into the guarantee the directors looked at the interests of the group of companies as a whole, and did not take into consideration the interests of Castleford separately from that of the group: see at 67. To summarise the principal ground of decision, Pennycuick J tested the question of ultra vires by establishing that granting the charge fell within the scope of a power expressed in the memorandum of association, and was of the view that (at 74):

> In my judgment, the state of mind of the directors of Castleford and of the bank's officers is irrelevant upon this issue of ultra vires.

[175] His Lordship's further observations at 74 were also directed to the claim that the charge was ultra vires. They were not the basis on which Pennycuick J

founded his decision, and they were directed to a view of the law which his Lordship did not uphold, in which it had been submitted (see argument of Goulding QC at 64) that the question of power of the company required the answer to questions including "(iii) is it done for the benefit and to promote the prosperity of the company . . .". Pennycuick J said:

> That is sufficient to dispose of the action; but in case I am wrong on my view of the law, I must proceed to express a conclusion upon the contention that in creating the guarantee and legal charge, the directors were not acting with a view to the benefit of Castleford. That is a question of fact, and the burden of proof lies on the plaintiff company. As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Mr Goulding contended that in the absence of separate consideration, they must, ipso facto, be treated as not having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, ie, unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be ultra vires and void, notwithstanding that the transaction might be beneficial to the company. Mr Bagnall for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company. If that is the proper test, I am satisfied that the answer here is in the affirmative.

[176] In this passage Pennycuick J continued, as before, to address the question of ultra vires.

[177] No question whether the mortgage was ultra vires of Maronis arose in this case, and no such question could arise because the powers of Maronis are not limited to powers enumerated in its memorandum of association. The effect of s 18A of the Companies Act 1955 (NZ) (with the exceptions there stated) is to make it impossible to attack Maronis' transactions on the ground that they are ultra vires. Pennycuick J adopted what he referred to as the proper test after rejecting the contention that in the absence of separate consideration the directors must be treated as not having acted with a view to the benefit of the company because of the absurdity of the result that the transaction would be void whether or not it was adverse to or beneficial to the company. There is no corresponding absurdity which would restrain the adoption of the view that, if directors do not give separate consideration to the benefit of the company which they decide should enter into a transaction, they are in breach of their fiduciary duty to that company; if the transaction is beneficial to the company there will be no loss and any theoretical breach of duty by directors will never leave the realm of theory.

[178] What Pennycuick J referred to as the proper test has been applied in cases where directors do not give separate consideration to the interest of the company, in contexts altogether different to that in which Pennycuick J adopted his test. The application of that test in another context derives no authority from the decision in *Charterbridge*, and although it can be seen as an acknowledgment of his Lordship's facility of expression, it does not owe anything else to Pennycuick J.

[179] *Charterbridge* and particularly the test adopted by Pennycuick J (at 74)

have come under consideration as part of the law of New South Wales relating to the fiduciary duty of directors by a circuitous route. In *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 the facts and issues were complex and included a claim described in this way by Giles J at first instance (1992) 29 NSWLR 260 at 301:

> The case put against Bank of New Zealand was that those responsible for the application of the liquidity reserve towards discharge of the Uruz Pty Ltd debt were in breach of fiduciary duty in so doing, and that Bank of New Zealand was liable as constructive trustee because it had received trust property or otherwise participated with actual or constructive knowledge of the breach. There was a contest over both whether there was any breach of fiduciary duty and whether Bank of New Zealand had the knowledge or notice necessary to make it liable.

[180] The proof of the bank's alleged knowledge of breach of fiduciary duty by officers of the Equiticorp Finance companies involved resort to Pennycuick J's test in the means of proving that no consideration was given to the interest of the Equiticorp Finance companies; a finding that an intelligent and honest man in the position the director could not in the circumstances have reasonably believed that the transaction was for the benefit of those companies would lead to finding that consideration had not been given to the interest of the Equiticorp Finance companies, and to a further finding that the bank had actual or constructive knowledge of that fact. Giles J's findings were adverse to the application of Pennycuick J's test: see at 307.

[181] In the Court of Appeal (1993) 32 NSWLR 50 Clarke and Cripps JJA in the majority addressed the issue of breach of fiduciary duty at 138–49. Their Honours set out at length the passages in the judgment of Giles J which explained how the issue had come to be disposed of as it was (at 139–44) and declined to have the issue widened on appeal (at 144–7). Their Honours then proceeded (at 146–9) to address the challenge on appeal to Giles J's conclusion, which they eventually upheld. In doing this they applied the test from *Charterbridge*, but they did so with observations which show that they did so because all parties advised the court that the same test should be applied on the appeal, and which also showed that their Honours had considerable reservations about adopting it, and said (at 147):

> Although we are content to deal with the issues in the case upon the basis put by counsel we should indicate that we have reservations about the test proposed by Pennycuick J. The directors are bound to exercise their powers, bona fide, in what they consider is in the interest of the company and not for any collateral purpose. Whether they did so or not is a question of fact.

The last two sentences are an epitome of the law relating to the duties of directors to their company when they exercise their powers.

[182] Their Honours referred (at 147–8) to several authorities, including as follows:

> The traditional approach of the courts to this question is best explained by Viscount Finlay's statement in *Hindle v John Cotton Ltd* (1919) 56 Sc LR 625 at 630–631 which was cited in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 NSWLR 68 at 77:
>
> > "Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly

> acting in discharge of their powers in the interests of the company or were acting from some bye motive, possibly of personal advantage, or for any other reason."

[183] At 148, their Honours said:

> A preferable view may be that where the directors have failed to consider the interests of the relevant company they should be found to have committed a breach of duty. If, however, the transaction was, objectively viewed, in the interests of the company, then no consequences would flow from the breach. Such an inquiry would not require the court to consider how the hypothetical honest and intelligent director would have acted. On the contrary it would accept that a finding of breach of duty flows from a failure to consider the interests of the company and would then direct attention at the consequences of the breach. However the approach adopted by the parties in this case both before Giles J and this Court requires that the *Charterbridge* test be applied and absolves the Court form further considering this tantalising question.

[184] Their Honours also said, in expressing their conclusions:

> For these reasons and the more detailed reasons of Giles J we agree, on the application of the objective test, with the answer given by the learned trial judge. If we posed the straightforward factual question, to which we earlier adverted, we would reach the same conclusion.

[185] In my opinion the majority judgment in *Equiticorp Finance* is not authority for using the test in *Charterbridge* to establish whether directors incur liability for breach of duty where they have failed to consider the interests of the company for which they are making the decision, and have made the decision in the interest of another company, or of a group. *Charterbridge* relates to a different subject, and on that subject did not adopt that test. The test came under consideration in *Equiticorp Finance* because the plaintiffs chose to present their proofs by seeking to establish a limit situation; that the bank knew that there must have been a breach of fiduciary duty because the decision of which the bank knew could not have been reached by a decision, within power, in which the interest of the company had been regarded. *Charterbridge* is a useful illustration of legal reasoning applied to a decision of directors taken without addressing their minds specifically to the interest of the company. Except for its utility as an illustration from a different field it does not bear on the liability of directors for breach of fiduciary duty. The legal test which is established by authority is the judicial approach approved in *Howard Smith* and cited by the majority in *Equiticorp Finance*, in which the question is the state of mind of the directors and whether they acted honestly in the discharge of their powers in the interests of the company; if they acted for any other reason this constituted an abuse of the power conferred on them as directors. In my opinion the preferable view referred to by Clarke and Cripps JJA at 148 is the correct view, and the breach has no consequences if the transaction was, objectively viewed, in the interests of the company. In my opinion this is what principle requires. If directors take a company into a transaction in the interests of a group of which it was part, or of a parent company, or of a subsidiary company and what they did was, objectively viewed, in the interests of the company, they incurred no liability.

[186] In *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465 the Court of Appeal again applied the *Charterbridge* test, for reasons appearing in the judgment of Giles JA at 471–3. In *Linton* a finding of a director's liability for breach of fiduciary duty in deciding to make an application of the company's money was set aside on appeal as it was based on an erroneous factual finding: see at 471. The Court of Appeal was asked to address and uphold a basis for finding that there had been a breach of fiduciary duty on grounds which had not been relied on at first

instance; the Court of Appeal did not allow an amendment which would have raised that basis for the decision. That being so Giles JA's observations on the *Charterbridge* test do not have the authority of views on which a decision of the Court of Appeal has been based, although they should have my respectful consideration. In *Linton* the respondent's submissions supported the *Charterbridge* test; the appellant's submissions did not present detailed argument. Giles JA said at 472:

> In the circumstances, where the *Charterbridge* test has been applied many times (eg *Reid Murray Holdings Ltd (in liq) v David Murray Holdings Pty Ltd* (1972) 5 SASR 386; *Australian National Industries Ltd v Greater Pacific Investments Pty Ltd (in liq) (No 3)* (1992) 7 ACSR 176), and Telnet did not seek to depart from its approach but adopted it, I consider that the present case should be decided by the application of the *Charterbridge* test.

[187] In my respectful view these observations illustrate that in *Linton* the Court of Appeal did not lend its authority to the *Charterbridge* test. The *Charterbridge* test has been accepted with reservations, or has been applied as the result of a concession, in other cases: see *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* [1999] 1 VR 584 (Hansen J). In my view a distinction should be drawn in the many applications of the *Charterbridge* test between applications to ultra vires cases, as in *Charterbridge* itself, and applications in contexts in which Pennycuick J did not speak. *Reid Murray Holdings* is an ultra vires case. To my reading the *Australian National Industries* case did not refer to the *Charterbridge* test.

[188] As Clarke and Cripps JJA pointed out in *Equiticorp Finance* at 148, there are difficulties in substituting an objective test — how would an intelligent and honest man have acted? — for an examination of the state of mind of the director in question, when considering whether there has been an abuse of powers by a director. As is shown by *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; [1974] 1 NSWLR 68; 3 ALR 448 and *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; 70 ALR 251; 11 ACLR 715 the purpose for which powers are exercised may sometimes be such as to demonstrate that the decision was not within the power, even though the directors honestly believed that it was, or believed that the decision was in the overall interest of the company. (In my opinion *Shuttleworth v Cox Bros & Co* [1927] 2 KB 9 at 18, to which I was referred, is not in point as it does not relate to the exercise of the powers of directors.) In principle, the test in *Charterbridge* at 74 should only be applicable in the course of considering whether, as a question of fact, the directors were abusing their powers, and whether the claim to have had the interests of the company in view should, as a matter of fact, be accepted.

[189] Where directors make a decision with a view to the interest of some related or other company the exercise of their powers may be open to question. Paying regard to an advantage to flow to another company is not necessarily an indication of abuse of power. The essential principle was stated by Mahoney JA (in a dissenting judgment) in *Advance Bank of Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464 at 493; 12 ACLR 118:

> The essential principle is that the powers, and the funds, of a company may be used only for the purposes of the company. This is the effect of the principles discussed in cases such as *Mills v Mills* (1938) 60 CLR 150 and *Ngurli Ltd v McCann* (1953) 90 CLR 425. In the end, the question will be whether what is done is done for the purposes of the company as a whole and each act is . . . to be judged according to whether it is done for this purpose.

(Mahoney JA stated some exceptions not presently relevant.)

[190] This essential principle does not preclude exercise of a power with a view to an advantage to be received by another company if the transaction is one for the benefit of a company entering into it. The benefit foreseen need not be direct and immediate; it may arise indirectly. The concept of benefit for a group of companies often claims consideration, but is difficult to use in a clear way because many different relationships among companies may be thought to make it appropriate to speak of them as a group. In economic interest ownership of Maronis and of Girvan NZ was identical, but the economic interest was traced through several intermediate companies; it is easy to say that they were in the same group, but that does not make the essential principle inapplicable or dispense with the need to consider the interest of the particular company which entered into the transaction. Girvan Australia and Maronis might often be spoken of as members of a group, but there is no identity of economic interest; 26% of the shareholders in Girvan NZ do not have a direct economic interest in Girvan Australia. There may be yet some sense in which advantages for Girvan Australia can bring advantages for Girvan NZ and its subsidiaries, whether or not under contractual dealings between them.

[191] *Walker v Wimborne* (1976) 137 CLR 1; 3 ACLR 529 related to companies referred to as a group in which there were no common or interlocking shareholdings; what they had in common appears to have been the leading personalities managing their affairs. A decision at first instance which was influenced by a transaction having been undertaken for the benefit of the group or another company in the group was varied on appeal. In my view the observations of Mason J in the majority at CLR 6 and 7 do not establish that a purpose of obtaining an advantage for a related company vitiates an exercise of directors' power. Mason J stated (at CLR 6–7):

> Indeed, the emphasis is given by the primary judge to the circumstance that the group derived a benefit from the transaction tended to obscure the fundamental principles that each of the companies was a separate and independent legal entity, and that it was the duty of the directors of Asiatic to consult its interest and its interest alone in deciding whether payment should be made to other companies.

The principle so stated leaves open the possibility that a benefit might be derived from the transaction by both companies, or by the company entering the transaction indirectly from some benefit derived by the other. Regard for group interest is not a vitiating element and in my understanding it has not been judicially so treated; what would vitiate is lack of regard for the interest of the company entering the transaction.

[192] Observations of Cooke J in *Nicholson v Permakraft Ltd* (1985) 3 ACLC 453 at 460 confirm that the interest of a group as a whole are not necessarily to be ignored. Consideration must be accommodated to the need to understand the relationship among the companies in question and the advantages which the transaction was seen as bringing. In *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NZLR 50 Clarke and Cripps JJA also recognised that an approach in which the interest of another group company was considered is not inconsistent with validity. A similar view was recognised in the *Linton v Telnet Pty Ltd*: see at ACSR 472.

The pleaded charges against Mr Duncan and Mr Ambler

[193] The fundamental basis of the plaintiffs' claim against Mr Duncan and Mr Ambler, as also against Mr Petersen and Mr McCulloch, is that they gave no

genuine or real consideration to the interests of the plaintiff companies in determining that the transactions of guarantee and mortgage go ahead. This charge is expressed in paragraph 20(e) of FFASC in these terms:

> Neither Duncan nor Ambler had any sufficient or proper regard to the interests of Maronis and Girvan NZ. Instead they acted solely in the interests of Girvan Australia in order to facilitate the loan which was to be used for Girvan Australia's own purposes . . .
>
> The making of the loan and the giving of the Securities were of no commercial benefit to Maronis and Girvan NZ and were likely to deplete their capital. No intelligent and honest person in the position of a director of Maronis and Girvan NZ could have reasonably believed as at 1 June 1989 that the giving of the Securities was for the benefit of those companies and Duncan and Ambler did not so believe.

[194] There are many other charges against Mr Duncan and Mr Ambler in para 20. The opening words of para 20 allege that Mr Duncan and Mr Ambler committed a series of acts fraudulently and or in breach of fiduciary duty and obligations to the plaintiffs. The conduct referred to is holding the meetings of 1 June, execution of a number of documents on that day and causing them to be delivered to Gadens the solicitors for Nippon. The plaintiffs' counsel explained the allegations that these things were done fraudulently in submissions (transcript p 4282) by alleging that there were conscious breaches of fiduciary duty:

> They knew that they, as directors, were obliged to exercise their powers for the purposes of advancing the interests of the plaintiff and they knew, in my submission, they were not doing so. Instead, they knew that the immediate object of the advance was to reduce the overdraft to Girvan Australia, and for that purpose we submit they consciously subordinated the interests of the plaintiff companies to that financial need.

It was not contended in submissions that the directors entered into the transaction with no intention of actually carrying out the LTS development.

[195] In paragraphs 16B and 16C of FFASC there are allegations that there never were meetings of Girvan NZ and Maronis on 1 June 1989 such as the minutes purport to record. However, it is clear as a matter of fact that Mr Duncan and Mr Ambler did meet and that they did adopt the minutes. The alternative allegation in para 17 that the meetings were held and the resolutions were passed was admitted by Mr Duncan and supported by his evidence, and I accept it, without at this point dealing with the effect of those events. In dealing with the allegations in para 18 that the deed of guarantee and indemnity was signed by Girvan NZ, and that the seal of Maronis was affixed to that deed and the mortgage, Mr Duncan took the position that he did not purport to execute the deed as attorney but purported to do so as a director. It appears on the face of the document that this contention is quite wrong.

[196] Mr Duncan admits, and his evidence confirms, allegations in para 18B relating to his signing three statutory declarations witnessed by Mr Ramsay and witnessing the sealing of two authorities and directions.

[197] Mr Duncan did not admit the allegations in para 18C that he caused or permitted the securities to be delivered to Clayton Utz on the understanding that they would be delivered to Nippon; his counsel contended that these actions were to be performed by Mr Hill and Mr Bartrop. Whoever else took part it is clear that these were events which Mr Duncan authorised and caused to happen.

[198] Paragraph 19 sets out alleged duties and para 20 charges Mr Duncan with many breaches.

[199] Paragraph 20(aa) charges that Mr Duncan was aware of many matters referred to elsewhere in FFASC. The first group, a series of basic facts relating to the constitution, shareholding and office holding in the plaintiff companies, are not contentious. A second group relate to the course of negotiations with Nippon and the terms of the facility agreement and the mortgage. While Mr Duncan did not himself conduct negotiations with Nippon Credit he did sign, on behalf of Maronis as guarantor, acceptance of a letter of offer from Nippon Credit dated 11 May 1989, in which the purpose of the loan was stated prominently on the first page as "General Working Capital"; he saw an accompanying letter dated 15 May 1989 which made a number of clarifications, but did not comment on the stated purpose of the loan; he signed minutes of a meeting of Maronis directors of 15 May 1989 in which he is recorded as having identified the proposed transaction by reference to that letter; and he signed the acceptance of a further letter of offer dated 17 May 1989, also stating the purpose as "General Working Capital". He also signed a drawing notice (Ex A, p 1310) by which Girvan Australia required the advance of A$15m to be made on 1 June 1989. Mr Duncan has denied that it was Girvan Australia's intention to apply the loan for its own purposes as general working capital, and denied that he was aware of that intention. It was his evidence in chief (transcript p 1463) that in his understanding the purpose of raising funds against the LTS site was to commence the construction of the LTS site. I do not accept that Mr Duncan was unaware that the purpose nominated by Nippon Credit for the loan was general working capital; notwithstanding his evidence on the subject, that statement appeared in several documents which he signed and, in relation to a transaction of this size, the statements cannot fail to have come to his attention. There is no sign anywhere of any arrangement, or of any basis for Mr Duncan to believe that there was some arrangement under which moneys to be borrowed and paid to Girvan Australia would in some way be designated as or kept aside for use only for the LTS development.

[200] Mr Duncan as managing director knew of Girvan Australia's Central Treasury and its bank overdraft, which greatly exceeded A$15m. He must have known the grossly obvious fact that the advance would go to reduce Girvan Australia's overdraft, and form part of its general working capital. This was not inconsistent with an intention to use money out of Girvan Australia's general working capital as augmented by the loan for the LTS development as and when needed, and I accept that on 1 June Mr Duncan intended and foresaw that in due time Girvan Australia would use money that way. I do not accept Mr Duncan's evidence which at a number of places disputed knowledge of the terms and purpose of the loan; in my finding he knew on 1 June that the loan moneys would be applied, as they were, for Girvan Australia's own purposes as general working capital.

[201] Mr Duncan disputed that he was aware, on 1 June 1989, of the directorships of Maronis as they are alleged. The allegation is that Mr Duncan, Mr Ambler, Mr McCulloch, Mr Kanas, Mr Boscawen, Mr Hoskins and Mr Fielding were then directors of Maronis; as I have found elsewhere only Mr Duncan and Mr Ambler were then directors of Maronis. Mr Duncan said in evidence he had no knowledge that Hoskins and Fielding were directors. In my finding the statutory declaration which Mr Duncan made on 1 June 1989, in which all seven were named as directors, is a reliable indication of what he then believed about the directorships, and his evidence and recollections now are not.

[202] Paragraph 20(aa) of FFASC alleged facts relating to Mr Duncan's knowledge whether Mr Ambler was a director of Girvan NZ, and whether notice had been given to directors of the meeting of Girvan NZ. I do not regard allegations relating to notice of the meeting of Maronis to other supposed directors as important. Whether Mr Ambler was a director of Girvan NZ is considered elsewhere.

[203] Paragraph 20(ab) alleges awareness of the terms of relevant articles of the plaintiff companies and of fiduciary duties. The plaintiffs' counsel contended that Art 28 of Maronis' articles of association, which provided that cl 79 of table A should not apply and should be replaced with an article there set out, had the effect that the directors of Maronis did not have power to give security in support of borrowing by a third party. This contention was based on the consideration that Art 79 in table A expressly conferred, among many other powers, the power to mortgage property as security for a debt of a third party. Article 28 refers only to a power to borrow and give security; it does not, unlike Art 79, expressly confer power to give security for the borrowings of another. Article 28 does not exclude the power to give security for the borrowings of another and does not deal in any way with borrowings except for borrowings by the company. Giving security for the borrowings of another is, in my opinion, a power arising under the directors' general power of management conferred by Art 80 in table A, which provides to the effect that the business of the company shall be managed by the directors, and that they may exercise all such powers as are not required to be exercised by the company in general meeting. The directors' power to give security is not the subject of any express limitation, and is not the subject of any limiting implication arising out of the fact that Art 28 does not in terms deal with it, or arising out of the fact that Art 79, which never applied to Maronis but was expressly made not to apply, would have conferred power to give security. The situation is not like one in which, say, Art 79 had once applied but Art 28 was substituted for it; conceivably in that situation some limiting implication could be appropriate. I see no room for a limiting implication to arise from the entire exclusion of a provision to a different effect to that which was adopted.

[204] Paragraph 20(ac) of FFASC alleges against Mr Duncan and Mr Ambler that by their conduct they asserted there had been valid meetings of the directors of each of Girvan NZ and Maronis held on 1 June 1989 when knowledge of both parties was to the contrary.

[205] Paragraph 20(a) is an alternative allegation that the meetings were conducted without notice to the directors of Maronis not absent from New Zealand, who would be entitled to notice under Art 98 of Maronis' articles of association, and without notice to the directors of Girvan not absent from their country of normal residency, who would be entitled to notice under Art 110.

[206] My decisions elsewhere that Mr Duncan and Mr Ambler were the only directors of Maronis and that Girvan NZ is not bound by the deed of guarantee make it unnecessary to address these allegations further.

[207] Paragraph 20(b) alleges that Mr Duncan and Mr Ambler knew that Mr Ambler was not a director of Girvan NZ and that even if he was, a quorum was not present at the meeting of 1 June 1989 in breach of Art 111. In my finding neither had any rational ground for thinking that Mr Ambler was a director of Girvan NZ as neither took part in or was told of any event which could have had that effect on 1 June after he resigned on 19 April. To my mind their evidence on this matter confirms that they had no rational basis for thinking that Mr Ambler

had become a director, by some process which necessarily they had not themselves participated in. According to Mr Duncan's first affidavit the information available to him about Mr Ambler's directorship was given in conversations on 1 June 1989 as follows:

> DUNCAN: Are Alan and I directors of each of these companies and are these draft minutes in order?
>
> MS HOOPER: Yes. We checked everything with John Boscawen in Auckland this morning. Alan had resigned from [Girvan NZ]. John Boscawen wants Alan to go back on the Board to enable the loan to proceed. He has arranged to reappoint him.
>
> MR AMBLER: I have signed a consent to act this morning and it has been sent to John Boscawen. Is this ok?
>
> DUNCAN: That is fine. This meeting is just a formality.

[208] When he returned to the subject at para 108 of his second affidavit he attributed to Ms Hooper:

> I have phoned Boscawen in NZ and he has confirmed (or made) arrangements for Ambler to become a director.

[209] Mr Duncan also deposed:

> I assumed that our solicitors and company secretary and staff had properly carried out the mechanics of the transactions.

[210] Section 183 of the Companies Act 1955 (NZ) provided:

> The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualifications.

This provision has no relation to Mr Ambler's acts purportedly as a director as at 1 June 1989 because there was no purported appointment of Mr Ambler as a director, and there was no defect discovered in any appointment after the appointment had been made. The difficulty was simply that there was no appointment, and this was obvious to Mr Ambler and to Mr Duncan on 1 June 1989 as neither of them was told of any facts or circumstances which could have constituted an appointment and neither of them had participated in any event which could have done so.

[211] Counsel for Mr Duncan referred to evidence in which the claim was made that he relied upon administration staff to ensure that all directors were correctly appointed and that the formalities of convening directors' meetings were complied with. Counsel referred to evidence of things conveyed by Ms Hooper which Mr Boscawen was supposed to have said about the matter. It was then submitted that he was entitled to rely on the company's administration for those matters, and counsel referred to the observations of Romer J in *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 at 429:

> In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified entrusting the official to perform such duties honestly.

[212] Counsel also referred me to *Dovey v Cory* [1901] AC 477; *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 868 and *Daniels v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607 at 665–6.

[213] The appointment of directors out of a general meeting is provided for by Art 107 of the articles of association of Girvan NZ (Ex A, p 1356); the power is given to the directors, an appointment of a director is not a matter which

Mr Boscawen could possibly have arranged himself without a meeting of directors, and there can have been no appointment. The absence of an appointment is not a defect within the meaning of s 183.

[214] It was also contended that Mr Duncan believed that Mr Ambler was a person occupying the position of a director of Girvan NZ so that he fell within the definition of inclusion in s 2(1) of the Companies Act 1955 (NZ). There was no basis for that view because since 19 April 1989 Mr Ambler had done nothing which could constitute occupying the position of director, and it was not known or believed by Mr Duncan that Mr Ambler had done anything.

[215] So far as appears in evidence no return of particulars relating to Girvan NZ was ever lodged in the companies registry so as to record that Mr Ambler became a director on 1 June 1989. There was no evidence of any decision by members or directors of Girvan NZ or of any event by which he became or could have become a director. Mr Duncan was a chartered accountant and had much experience in company business and could not possibly have believed that Mr Boscawen could arrange to re-appoint Mr Ambler and bring it about in the course of a morning in New Zealand to prepare for a directors' meeting to be held in Australia, and he could not have believed that any solicitor, company secretary or staff could properly have carried out the mechanics of such an event. I do not accept the claim that Mr Duncan believed that Mr Ambler was a director of Girvan NZ at the time of the meeting on 1 June 1989. His claim to have acted on information of the kind he claims to have had, and his attempts to maintain the position in his evidence are injurious to his credit generally. It is probable that no participant in the events of that day adverted to Art 107 at the time. The issues raised by para 20(b) are not dispositive of the proceedings.

[216] Paragraph 20(c) alleges a failure by Mr Duncan and Mr Ambler to declare their interests in order to properly convene a directors' meeting. For Girvan NZ any such failure cannot affect the outcome. For Maronis both directors present must have known anything relating to the interests of the other which ought to have been disclosed. The minute of the meeting (Ex A, p 1325) records a disclosure of interests, although in inadequate terms. In my view there was no breach of fiduciary duty and no breach of the duty of disclosure imposed by s 199 of the Companies Act 1955 (NZ) in this respect. If disclosure had been made in more ample terms than that recorded in the minutes there could not have been any different outcome.

[217] Paragraph 20(d) alleges that Mr Duncan purported to execute the guarantee as attorney for Girvan NZ when he did not hold any power of attorney. In his second affidavit he says that he signed as director an execution under seal, and that he does not know who placed the cross through the seal and does not recall seeing Mr Ambler's name. His explanation is inadequate, as he signed another form which had no seal, and the explanation is contradicted by the words of attestation to which he set his signature. However, the lack of effect of the purported execution means that the breach of duty alleged in para 20(d) does not lead to disposition of any claim against Mr Duncan.

[218] Issues in para 20(e), (f) and (h) should be taken together. They assert:

> (e) Neither Duncan nor Ambler had any sufficient or proper regard to the interests of Maronis and Girvan NZ. Instead they acted solely in the interests of Girvan Australia in order to facilitate the Loan which was to be used for Girvan Australia's own purposes;
>
> (f) The making of the Loan and the giving of the Securities were of no commercial benefit to Maronis and Girvan NZ and were likely to deplete their capital. No

intelligent and honest person in the position of a director of Maronis and Girvan NZ could have reasonably believed as at 1 June 1989 that the giving of the Securities was for the benefit of those companies and Duncan and Ambler did not so believe . . .

. . .

(h) The making of the Loan and the giving of Securities were not for the proper or legitimate purposes of Maronis and Girvan NZ or either of them . . .

[219] These issues are at the heart of the proceedings and in particular of the plaintiff's claim against Mr Duncan and Mr Ambler.

[220] Paragraph 20(g) alleges that Mr Duncan and Mr Ambler knew they had no legitimate authority to act as they did. In the case of Maronis they did have such authority as they were the only directors, whereas for Girvan NZ the allegation is obviously correct, but produces no outcome.

[221] Girvan NZ can be left out of account in addressing the central issues. Although the ultimate economic interests in the proprietorship of those two companies is the same, the position of a director in giving separate consideration to the interests of each of them is not the same, because Girvan NZ had a number of economic ties and contractual relationships with Girvan Australia and interests associated with it and had the benefit of covenants in the Dextran agreement. The interest of Maronis in assisting Girvan Australia in the transaction had a stark simplicity which the interest of Girvan NZ did not have. Business judgment exercised in the interests of Girvan NZ might open consideration of concessions, compromises and economic support with a view to the best outcome from a whole pattern of dealings. For Maronis there were no contractual relationships with Girvan Australia or any of its subsidiaries. Apart from the LTS site and the prospects of developing it Maronis had no assets, no plans for business and no liabilities; it had nothing to do but turn the LTS land to account in some way.

[222] Paragraph 20(i) of FFASC alleges that Mr Duncan and Mr Ambler were aware that Girvan Australia was experiencing serious cash flow problems by reason of there being a real possibility that Girvan Australia would be unable to discharge those loans. As appears elsewhere I do not accept that Girvan Australia's cash flow position on 1 June 1989 should have given rise to unusual concern or special caution, but that does not dispose of the possibility that Girvan Australia would be unable to discharge the Nippon Credit loan when it fell due, in 12 months' time or otherwise. The possibility was real so that a director considering the interests of Maronis could not fail to recognise it, even though it was not immediate or pressing. Girvan Australia was not a corporation to whom a reasonable person would commit A$15m on an unsecured basis without any kind of protection. Very few corporations are; banks, and the treasuries of governments may be; otherwise nobody acting reasonably could entrust to a corporation A$15m unsecured without some arrangement, certainly not a corporation engaged in construction and development business. That is not a card on which Maronis' only asset and its whole fortunes could be staked. The facility agreement provided for repayment of the loan of A$15m on 1 June 1990 (unless earlier agreed) and Girvan Australia's current cash flow position, like any other information about Girvan Australia's current position, was of only limited value in predicting a year in advance whether that would be complied with. In my finding any reasonable person in the position of a director of Maronis must have been aware that there was a real possibility that Girvan Australia would be unable to discharge the Nippon Credit loan.

[223] As pleaded the case against all four of Mr Duncan, Mr Ambler,

Mr Petersen and Mr McCulloch was based on breach of fiduciary duty; and in addition the case against Mr Petersen and Mr McCulloch was based on alleged negligence. The claim of the plaintiffs against Mr Duncan is not based on breach of any duty imposed by statute or the law of tort.

[224] Submissions by Mr Duncan's counsel dealt in detail with the allegation of fraud against Mr Duncan. Matters for consideration are considerably simplified by plaintiffs' counsel's exposition of the fraud allegations (transcript p 4282) as an allegation of conscious breaches of fiduciary duty, that is that the directors knew that they were obliged to exercise their powers for the purposes of advancing the interest of Maronis, and knew that they were not doing so; and that they consciously subordinated the interests of Maronis to the financial need to reduce the overdraft of Girvan Australia. The allegation of fraud is not an allegation of dishonesty except in the sense supported by this explanation, and it does not relate to any ground of legal liability except fiduciary duty in the exercise of directors' powers.

[225] Consideration given by Mr Duncan and Mr Ambler as the Maronis board on 1 June 1989 was of the very briefest kind, consisting of no more than looking at the prepared minutes and accepting them. There was not then and there had never been any occasion when there had been consideration evaluation or discussion of the interest of Maronis in giving the mortgage, either by the true board consisting of Mr Duncan and Mr Ambler, or by any other group of persons thought to be its board. Mr Duncan's counsel submitted "It is clear from the evidence of each director that the decision to proceed with the transaction of this nature was made on 13 March 1989." Whatever else the meeting and discussion on that day may have been, they cannot possibly be seen as a meeting of the board of Maronis, or as an address to the transaction of granting a mortgage to support a borrowing by Girvan Australia from the point of view of the interest of Maronis.

[226] The borrowing and the mortgage in support of it grew out of discussion and a consensus which emerged at the meeting of 13 March, and this is a basis for a view, which Mr Duncan claims to have had, that the borrowing was in some way for the purposes of or otherwise associated with the LTS infrastructure works. The events demonstrate that there was not some corrupt scheme of borrowing the money without any intention to use it for the LTS site. No decision to give the mortgage was ever taken by directors of Maronis on the basis of an address to or consideration of Maronis' interests. At the two Maronis board meetings where the subject had any consideration, on 15 May and 1 June, consideration was routine and perfunctory, the interests of Maronis were not addressed, and if they had been, the results which emerged could not possibly have emerged.

[227] The events which followed 1 June 1989, the vicissitudes and downfall of Girvan Australia do not have a direct bearing on the claim of breach of fiduciary duty. They serve to illustrate the kind of outcomes which could reasonably be foreseen, but only if Mr Duncan actually foresaw them, or some of them, do they bear directly on whether he acted in abuse of his powers as a director on 1 June 1989.

The position of Mr Ambler

[228] The plaintiffs make claims against Mr Ambler based on allegations of fraud and breach of fiduciary duties to the respective plaintiffs as a director. No claims against him are based on negligence or breach of any statutory duty.

Girvan NZ has incurred no liability or loss and only the claim of Maronis Holdings Ltd requires adjudication. Mr Ambler is also a party to several cross-claims; the fourth cross-claim by Mr Ambler against Clayton Utz, the second cross-claim by Messrs Gadens against Mr Ambler, the third cross-claim by Messrs Clayton Utz against Mr Ambler and the sixth cross-claim by Nippon Credit against Mr Ambler. Considering Mr Ambler's position makes it necessary to revisit events I have already mentioned.

[229] Mr Ambler had a long career as an engineer and executive of Tubemakers Ltd. In August 1986 he was employed by Girvan Holdings Pty Ltd working in manufacturing and technology. He became a director of Girvan Holdings in 1987 and he also became managing director of Loc-Tex Holdings Pty Ltd, a wholly-owned subsidiary of Girvan Holdings which developed and made house frames from steel strip with a patented process. Loc-Tex Holdings had a wholly-owned property development subsidiary called Loc-Tex International Pty Ltd. Before his employment with Girvan Holdings Mr Ambler had not been a director of any company. Mr Ambler became a director of Girvan Australia in September 1987, when Girvan Australia was listed on the Australian Stock Exchange, after transactions in which Girvan Holdings became wholly owned by Girvan Australia. Mr Petersen, the majority shareholder, managing director and principal figure in Girvan Australia, is Mr Ambler's nephew. Mr Ambler became involved in property development through his work in the Girvan Group and particularly through his responsibility for Loc-Tex International; and he came to know of proposals for a truck stop development at the Liverpool site in 1987. In 1987 and 1988 Loc-Tex International obtained options from their respective owners to acquire the 11 parcels which made up the LTS site. Mr Geoff Young, who was employed as a development manager, was active in acquiring the options and in detailed work relating to the development; he reported to Mr Ambler. Work relating to the LTS project proceeded actively in 1988 and 1989, and was in the area of Mr Ambler's responsibility. The need to obtain a rezoning decision was a limiting factor in other preparations and expenditure.

[230] In June 1988 Mr Young prepared a feasibility study which showed an anticipated return of A$37.6m on the LTS development (with a range for better and worse outcomes). The LTS development project was treated as valuable in the arrangements for Girvan Australia to take over majority shareholding in St Martins Properties; and was investigated by the then directors of St Martins Properties. Mr Ambler played no more than a very small part in the arrangements which led to the takeover, but was aware of them, and was broadly aware of the provisions of the Dextran agreement. On behalf of Loc-Tex Mr Ambler signed an agreement dated 29 June 1988 under which Oxford House was to be nominated by Loc-Tex as purchaser under the options. (This agreement was defective in form and was later rectified. As rectified it was an important part of the machinery under which the LTS project passed to a subsidiary of Girvan NZ.) The project was treated in the takeover arrangements as worth NZ$29m. Mr Ambler was aware of the attribution of value to the LTS site. He was aware that Foreign Investments Review Board approval was obtained and that it required development to commence by 22 August 1989.

[231] After the partial takeover of Girvan NZ Loc-Tex International continued to act as project manager of the development. Clause 8.6 of the Dextran agreement contained provisions which required that Oxford House would enter into a contract with Girvan Australia relating to shares in project management

agreement fees and by Girvan Australia. No written agreements which would have covered these matters were prepared. In fact Loc-Tex International continued to act as project manager and was treated as doing so in the interests of Girvan NZ.

[232] Mr Ambler became a director of Maronis on 29 August 1988. Mr Ambler became a director of Girvan NZ on 1 September 1988 and continued to be a director until 19 April 1989, when he resigned. In a management restructure of Girvan Australia which took place in January 1989, attributed to 1 January, Mr Ambler was designated group development director for Girvan Australia.

[233] The outcome of the rezoning application, after attention and consideration from time to time throughout 1988, was that LEP 182 gazetted on 4 November 1988 amended the interim development orders so as to add "Transport Terminal" to the permitted uses. Other work preliminary to development of the LTS site was undertaken in 1988 and continued in 1989. This included engagement of Capital Management Realty Ltd to develop, implement and co ordinate leasing strategies and to assist on design and lay-out issues, and engagement of Peddle Thorpe and Walker architects in November 1988 to work on master planning and concept design and other planning works. Mr Young managed and largely conducted this work on behalf of Loc-Tex International and Mr Ambler knew of his work and activity. Title to the 11 parcels of land was acquired.

[234] Mr McCulloch and two other persons in Girvan NZ's organisation, Mr Coleman and Mr Boscawen, prepared a position paper dated 17 February 1989; Mr Ambler probably saw it soon afterwards. There are several versions of this position paper, all marked "Draft". The paper was not circulated in a final form, and was not adopted or rejected in a formal way by the Girvan NZ Board. It was a statement of the position of Girvan NZ as the persons in New Zealand most active in that company's affairs then understood it. It shows that the LTS development was regarded as an active development project. The version of the position paper which Mr Ambler probably saw said that there were currently no borrowings against the Liverpool assets; this was the true position.

[235] The position paper is significant in that it illustrates that the LTS project was reported on to Mr Ambler as a continuing large project for which significant project management fees had already been incurred, on which work and large expenditures were expected to continue, with work on roadways to begin in March 1989.

[236] Mr Ambler attended the Girvan Australia board meeting on 17 and 20 February 1989. Statements in the minutes relating to Girvan Australia's cash position are consistent with Mr Ambler's statements in evidence to the effect that for Girvan Australia funding was tight at various times during the early part of 1989 but Girvan Australia was being adequately supported by its funds; and that funding had to be properly managed, which it was. Mr Ambler does not attribute this view to information gained at that meeting but that could, in part, be a source of his understanding of the funding position. Mr Ambler was present at a meeting with Mr McCulloch and Mr Hill on 23 February 1989. This was not a board meeting and was not minuted. There were some discussions about a requirement of Girvan NZ for a guarantee by Girvan Australia to enable Girvan NZ to borrow funds for its Wanganui project. Mr Hill said to the effect that the need for the guarantee was a real problem for the group in that a lot of Girvan Australia loan facilities contained negative pledges and there were restrictions on the ability of

Girvan Australia to give guarantees, which impacted on the available security for other borrowings; and that borrowings for Girvan NZ projects including the LTS should be looked on in that light.

[237] Mr McCulloch distributed an agenda dated 7 March 1989 for a meeting to be held on 13 March 1989 dealing with the LTS project. Mr Ambler's evidence of events at a meeting at about this time (which should be taken to be the meeting of 13 March 1989) include that Mr McCulloch said to the effect that Girvan NZ had difficulties obtaining funds for the Wanganui development, and could not borrow them without Girvan Australia providing a guarantee. A further statement, which on the probabilities was made by Mr McCulloch, was to the effect that Girvan NZ would have difficulty raising funds for its share of the LTS development cost without a guarantee from Girvan Australia. The response, probably given by Mr Hill, was to the effect that Girvan Australia could not provide guarantees and "If Girvan Corporation is to support Girvan NZ in raising money, it seems the way forward is for the development funding to be raised by the Group using the land as security and co-ordinated centrally." I take this to mean that Mr Hill suggested a borrowing in which Girvan Australia was the borrower and received and controlled the funds borrowed. Mr Ambler also gave evidence of a discussion of an offer from Westpac to Girvan Australia to lend funds to start work on the LTS development on the security of the land; Mr Petersen said that Mr Hill and Mr McCulloch should meet to investigate acceptable solutions for having funding in place and available prior to commencement of work on the development.

[238] In my finding, according to Mr Ambler's understanding on 13 March the LTS project was being actively pursued, the other directing minds in the affairs of Girvan Australia and Girvan NZ including Mr Petersen, Mr Duncan and Mr McCulloch intended to carry on the project and start work as soon as it was practical to do so, and the practicalities included the need to obtain funds to do so. Mr Ambler had reason to believe these things, and they represented the true position. It was not the understanding of Mr Ambler, and it was not the true position that consideration of the possibility of Girvan Australia raising money on the security of the LTS site was in any sense a device to shore up Girvan Australia with funds irrespective of whether the LTS project went ahead or not.

[239] Work relating to the LTS project continued actively during February, March and April 1989 including work by landscape architects, architects, civil engineers, land development managers, geotechnical engineers, consulting engineers and others, and costs in excess of $700,000 were attributed to the development work. Exercise of options and completions of purchases also continued. Mr Ambler was aware that work of this nature was occurring. Communications dated 14 March from Mr McCulloch to Mr Young and from Mr Petersen to Mr McCulloch confirm that preparations for work on the LTS project were then very active. This also is borne out by a Girvan NSW budget submission also dated 14 March.

[240] Mr Ambler was told by someone in mid-March to the effect that Girvan NSW (a building-contracting subsidiary of Girvan Australia) was not willing to start work on the development until it was assured that the funds for the full works were in place. Mr Ambler's recollection probably represents something stated by Mr Petersen at the meeting of 13 March. It expresses a realistic consideration.

[241] Mr Ambler also heard of other possible means of funding the

development being joint venture finance from outside parties and approaches to lenders other than Westpac. In or about March 1989 Mr Ambler was informed by Mr McCulloch and Mr Young that there were several parties interested in a joint venture in the LTS project, including AGC and IEL. Mr Young and Mr McCulloch were aware of an expression of interest made by Petro Inc in a letter of 20 March 1989 and they may well have told Mr Ambler of Petro Inc's interest.

[242] Mr Ambler's evidence is to the effect that at some time in February or March 1989 he said to others concerned "We should check if it is okay to do a third party mortgage" and that either Mr Hill or Mr Bartrop replied "We will check that with our lawyers." Mr Ambler says that later Mr Foy, managing director of Trans Australian Securities Pty Ltd, one of the Girvan Group companies told him "Bruce Hill and Stephen Bartrop have spoken to the lawyers and have confirmed that it is in order for the third party mortgage to be given." Mr Ambler thought that Mr Foy may also have referred to Mr McCulloch as having spoken to the lawyers. Mr Ambler did not give a date for this statement except that it took place prior to 15 May 1989. When cross-examined about this episode Mr Ambler was not able to give any circumstances or details of any value. Mr Ambler does not claim ever to have seen the lawyers' advice or to have known in detail what it was. Mr McCulloch's evidence does not bear out that he spoke to any lawyers and Mr Hill, Mr Bartrop and Mr Foy did not bear it out either as they did not give evidence. Nor did any lawyer give evidence of having given advice of that kind. In my opinion it is extremely unlikely that advice was given in any such brief terms; what advice was given would depend on the terms in which advice was asked for and the persons whose interests were to be dealt with in the advice; advice to a company that some transaction was within its powers might be given to in very different terms to advice to a director on whether he should exercise the power. There is so little of circumstance about the advice, who may have given it and what it may have been, and what Mr Ambler says he was told about it is so terse and so likely, if he had had a report in those terms, to have provoked more inquiry, that I am unable to feel confidence in his evidence. I do not accept that it has been established that any report about legal advice was made to him. If a report had been made to him in the terms he narrates it would have told him next to nothing, and all it could have brought about was a call for a proper report of what the advice was, or for clear advice.

[243] The Westpac proposal mentioned in Mr Hill's letter of 17 March 1989 goes further than borrowing A$15m for the LTS site as it contemplates a loan to Girvan Australia of up to A$19m. Mr Ambler probably saw this about the date it bears.

[244] Mr Ambler received a copy of the memorandum dated 28 March 1989 by Mr McCulloch. Mr Ambler probably saw the last form, which bears the date 28 March 1989 but was sent by Mr McCulloch to Mr Duncan on 3 April 1989; this is Ex A3/748. Mr Ambler probably received a copy about 3 April or soon afterwards. It was addressed to the directors of Girvan NZ, who were named, with copies to Mr Boscawen and Mr Hill. Mr McCulloch was acting sincerely in what he saw as the interests of Girvan NZ in proposing a motion to be put to the Girvan NZ board for approval of the financing on conditions. Mr Ambler had no reason not to take full notice of it.

[245] The motion which Mr McCulloch proposed and the conditions which he recommended did not ever come before a board meeting of Girvan NZ at which

Mr Ambler was present, or any informal meeting of the persons who were Girvan NZ directors, before Mr Ambler ceased to be a Girvan NZ director on 19 April 1989. Nor was it ever discussed in detail in any meeting at which Mr Ambler was present at any later time.

[246] Mr Ambler spoke in evidence of being present at discussions in which some of the considerations raised by Mr McCulloch's memorandum appeared to have been considered; he said to the effect that the memorandum was discussed early in April, at a meeting of the members of the board to consider the memorandum, but not at a formal board meeting. It was Mr Ambler's recollection that the meeting ended with somebody saying to the effect that Mr Hill and Mr McCulloch would need to meet and agree the finer details of the arrangements to allow the funding to go forward. It was at this inconclusive point that Mr Ambler left the board.

[247] Mr Ambler said in evidence to the effect that he considered Mr McCulloch's memorandum from the point of view of Girvan NZ and Maronis and in the light of the Dextran agreement, that he agreed with its recommendations and believed that it contained a reasonable proposal. I accept this evidence. In cross-examination he said that he understood the seven conditions and the conditions under which the money was borrowed but "I didn't necessarily understand them to be conditions to be complied with at settlement of the loan." He said to the effect that in his belief that the directors had to be satisfied at the time the loan was made that the conditions would be complied with, but not necessarily that they had been complied with at the time of payment.

[248] In a memorandum of 14 April 1989 directed to Mr Ambler and Mr Young, Mr McCulloch stated emphatically his view that "the [A]$16.3m for infrastructure works is the ceiling figure and any quote will be subject obviously to the scrutiny of Loc-Tex on behalf of (Girvan NZ) before agreement". He also related the infrastructure works to the Exley & Associates quotation of September 1988 and said that their detailed estimates must be treated as "the Bible". Mr Ambler did not deal in evidence with this memorandum but it probably came to his notice. It seems to indicate that there had not by 14 April 1989 been a decision on Mr McCulloch's proposal in his memorandum of 28 March 1989, and it also confirms the importance Mr McCulloch attached to defining the maximum expenditure on the infrastructure works.

[249] Although work by and under the supervision of Mr Boscawen was progressing towards defining Girvan NZ's claim against Girvan Australia, and Mr Ambler was aware that work was progressing, he was not involved in the process of defining the claim.

[250] After he resigned as a director of Girvan NZ on 19 April 1989 Mr Ambler remained involved in the LTS project through his responsibilities for Loc-Tex International, as well as his continuing directorship of Maronis. He was informed of a very large difference between the estimated cost of the first phase of the project as estimated by Girvan Construction Group and the Exley estimate by a memorandum of 20 April 1989 from Mr Collis of Girvan Construction Group.

[251] Mr Ambler was present at a board meeting of Girvan Australia on 5 May 1989. It was in issue whether a document Ex A3/860–864 headed "Status Report to Board of Directors Meeting, Friday May 5, 1989" was before the meeting. In my finding it was, but there is no substantial evidence that Mr Ambler saw the

status report or knew its contents, either at the meeting or otherwise. It says very little about the LTS project and nothing about financing the project.

[252] At some time which has not been well established Mr Duncan told Mr Ambler to the effect that "Chris and Bruce have met and everything is okay for work to start on the Liverpool Truck Stop". "Chris and Bruce" refers to Mr McCulloch and Mr Hill. Mr Ambler attributes this conversation to "sometime prior to May 1989" while Mr Duncan gives evidence of a generally similar event which he attributes to 3 May; he does not give a clear account of what was said. In my finding Mr Ambler was not told by Mr Duncan on this occasion to the effect that a decision had been made by anyone adopting Mr McCulloch's proposal or any further definition of it.

[253] On 8 May 1989 Exley & Associates produced and sent to Mr Young of Loc-Tex International a cost comparison between their original cost estimate dated 8 September 1988 and "The cost estimate currently being prepared for site works, drainage and servicing for the above-mentioned project." The earlier cost estimate had been A$16.288m; this appears to have been based on an old layout plan and may have covered a wider area or different works. Exley & Associates gave the value of work to create major roads, drainage, access and servicing, made various adjustments and stated "the expected cost of site works based on current design criteria and information from authorities" at A$14.5m. There were some works excepted from this estimate. On 10 May 1989 Girvan NSW sent Mr Young a budget estimate for the site works at A$24,256,774. Girvan NSW also set out a target construction start date of 3 July 1989 on a number of assumptions about the state of progress before then. These two documents were before a meeting held on 11 May 1989 attended by Mr Ambler, Mr McCulloch, Mr Young, Mr Collis, Mr Andrejas and possibly others at which participants went through the Exley costings of September 1988 and these two documents, and a comparison document was prepared. In Mr Ambler's understanding this led to an arrangement in which the infrastructure works or site works for the first stage would be completed by Girvan NZ as construction manager at a total cost of A$19.425m, that if they were savings they would be shared but that if this figure was exceeded the excess would be borne by Girvan NSW. (This overtook A$16.3m earlier spoken of as "the Bible".)

[254] Agreement or concurrence between Mr McCulloch and Mr Collis on the price of the infrastructure works and entitlements for savings did not and could not reasonably have been regarded as satisfying Mr McCulloch's condition (i) relating to signing a new contract to complete the infrastructure works for a fixed price, or his condition (iv) about the costings on which progress claims were being based. Girvan NSW's letter of 10 May 1989 listed execution of contracts for the site works and project management by 16 June 1989 as a point on which the target construction date depended; that is, apart from considering the price for the works, the preparation and execution of the contracts as well as a number of other requirements remained outstanding.

[255] By 11 May 1989 Mr Ambler had come to understand that the cost of the site works was to be funded from Girvan Australia through its central treasury function. His evidence does not show clearly what this understanding was based on, but in my finding it was not based on any decision by directors of Girvan Australia, or by Mr Duncan or by anyone else who might thought to have authority to bind Girvan Australia, committing Girvan Australia to fund all the site works through its central treasury function, by any commitment which it

could be enforced or even clearly identified, or could be quoted against Girvan Australia in any future controversy. I attribute Mr Ambler's understanding to an assumption which seemed at the time obviously to underlie the continuing consideration which the LTS infrastructure works and Mr McCulloch's proposal were receiving.

[256] On 12 May 1989 Mr McCulloch sent a memorandum to Mr Ambler, Mr Duncan and Mr Petersen dealing with the request by Girvan Australia for a working capital advance.

[257] Another memorandum of 12 May which Mr McCulloch and Mr Young sent to Mr Payne (with a copy to Mr Ambler) stated (Ex A3/891):

> It has been agreed that Girvan NZ allow Girvan NSW to finalise the previously contracted Earthworks by:
>
> (1) Borrowing [A]$15.0m from Nippon Bank under a working capital facility which is supported by the Liverpool Truck Stop land (held by Moranis Holdings Pty Ltd).
> (2) Financing the balance from internal resources ie [A]$4.425m.

[258] This states much the same facts as Mr Ambler assumed on that subject. It speaks of Girvan NSW, but this must be wrong as it was only Girvan Australia which was ever considered as the borrower from Nippon and only Girvan Australia, not the building company, which could finance A$4.425m from internal resources. It has not been established when, how or by whom any such agreement was made or whether it was in truth made or simply assumed among those most concerned with the affairs of Girvan NZ. The underlying assumption about providing finance was well based in an assessment of what would probably happen if all went well, but had no basis in any form of commitment by Girvan Australia.

[259] Mr McCulloch's reference to A$15m indicates that by 12 May he had the proposal to borrow that amount from Nippon Credit in his view. This proposal was probably known to Mr Ambler by that time.

[260] On behalf of Mr Ambler counsel made a submission which as I understand it meant that, from Mr Ambler's point of view, Mr McCulloch's memorandum of 12 May 1989 meant that there was now no need for a signed work contract as Mr McCulloch had suggested in his earlier condition (i) because the essential terms had been agreed. I do not accept this submission; Mr McCulloch's memorandum did not mean, to a reasonable person in Mr Ambler's position, that the recommendation about a signed work contract had been withdrawn, and (irrespective of what Mr McCulloch intended or recommended) Mr McCulloch did not report anything which would make obtaining a signed work contract any less important. Counsel also submitted that it can be (meaning that it should be) inferred that earlier condition (ii) about responsibility for financing charges had been dropped because there was agreement on it. In my opinion the omission of condition (ii) is not a basis of any kind for finding that there was an agreement about responsibility for financing charges. Nor is it a basis for finding, or for thinking that Mr McCulloch reported that there had been express agreement on the assumption underlying condition (ii) that Girvan Australia would attend to financing of all the infrastructure work. The disappearance of earlier condition (ii) from Mr McCulloch's list of conditions which required agreement was not a basis for me to infer that an overall commitment on making finance available for the project had been

reached, nor would it have been a reasonable basis for Mr Ambler or anyone else, in May 1989, to conclude that Girvan Australia had given some commitment about financing the LTS project.

[261] Mr Ambler's counsel made the following submission on the basis of Mr McCulloch's memorandum to Mr Payne of 12 May 1989: "167. By the . . . memo it could also be taken that Girvan NZ and Girvan Aust had agreed to a borrowing of A$15m from Nippon supported by security over the Cross Roads property from Maronis, with the balance to be financed internally by Girvan Australia. (The reference to Girvan NSW must be mistaken as at no time was it proposed that it would be the borrower or that it would finance the balance.)" In my finding the memorandum could not be a basis for Mr Ambler to come to a view that Girvan NZ and Girvan Australia had made an agreement in those terms. The memorandum does not say who had agreed that Girvan NZ would allow Girvan NSW to act as stated, and Mr Ambler as a director of Girvan Australia (which Mr McCulloch was not) was in a position to know that Girvan Australia had not made any agreement on the subject of how it would finalise the earthworks and finance the balance not to be borrowed from Nippon. I reject submission 167.

[262] A minute of a meeting of directors of Maronis Holdings Ltd Ex B, p 98 shows that a meeting attended by Mr Duncan and Mr Ambler took place on Monday 15 May 1989 at 1 pm. This is the third recorded meeting of directors of Maronis and the first recorded meeting since control passed to Girvan NZ and Oxford House Ltd on 29 August 1988. Mr Ambler does not remember the meeting. It is not part of Maronis' pleaded case to allege that there was no such meeting. The minutes record that the chairman Mr Duncan reported that the company (Maronis) proposed to enter into a transaction evidenced by a letter of offer dated 11 May 1989. The letter of offer referred to was the letter from Nippon Credit to Girvan Corps Ltd setting out terms on which a facility of A$15m would be made available by way of cash advance. That letter had provided among many other things that security was to be granted by Girvan NZ over "the subject property" (not identified in the letter) and there was provision for a confirmation of acceptability to be signed on a copy of the letter on behalf of Girvan Australia and also Girvan NZ.

[263] The minutes record these decisions: "*Approval of accommodation*. The directors noted that the entry into the transactions evidenced by the letter of offer is in the best interest of the company. Resolved that the company execute the letter of offer. *Appointment of authorised representatives*. Resolved that each of Warren Duncan and Alan Ambler be appointed separately the authorised representatives of the company to sign the letter of offer."

[264] The form for confirmation of acceptability in the letter of offer was altered by crossing out the reference to Girvan NZ and writing in "Maronis Holdings Ltd", and Mr Ambler and Mr Duncan signed the letter. On 17 May 1989 Nippon Credit forwarded a fresh letter of offer referring to Maronis Holdings Ltd as provider of security, with a form of confirmation of acceptability to be signed on behalf of Maronis Holdings; Mr Duncan and Mr Ambler signed the confirmation on 17 May 1989, without a further directors' meeting. Mr Ambler did not recall attending the meeting or signing the two confirmations. His signature appears at one point on the minute. In view of the lapse of time it is not surprising that he does not recall these events. In cross-examination Mr Ambler said to the effect that he believed that there had been a decision of the

directors of Girvan NZ on the subject with which the letter of offer dealt in the time leading up to 15 May, and that Mr Duncan told him on 15 May to the effect that the arrangements in the letter had been approved; Mr Ambler also said that he was of the belief that the board of Girvan NZ had already given their acceptance. I find that he participated in the events as the documents show. The minute was probably prepared before the meeting took place so that the actual events at the meeting followed the course it indicated.

[265] The only decision which might have been the basis for Mr Duncan telling Mr Ambler that there had been an approval of the matters decided at the Maronis meeting of 15 May 1989 is recorded in minutes also dated 15 May 1989 in minutes of a meeting of directors of Girvan Australia attended by Mr Petersen and Mr Hill; this meeting is also recorded as occurring at 1 pm. That was no more than a decision that Girvan Australia should obtain financial accommodation from Nippon Credit; it did not deal with what Girvan NZ or Maronis should do. It was not and did not purport to be a decision, direction or requirement that Girvan NZ or Maronis were to make any particular decision about providing security.

[266] In relation to the documents of 15 and 17 May 1989 Mr Ambler said in his affidavit, para 70(b) "I have remained a director of Maronis Holdings for the purposes of signing documents in Australia relating to the LTS development and this was something I had been asked to do by the other directors of Girvan NZ. In that regard I refer to matters referred to earlier in this affidavit at para 16 . . .".

[267] In dealing in his affidavit with his resignation from the board of Girvan NZ Mr Ambler said (affidavit, para 16(c)) to the effect that in or about April 1989 Mr Ramsay, the company secretary of Maronis, who had many other secretarial duties in Girvan companies, said to him to this effect: "We are restructuring the NZ company. We will have you resign from Girvan NZ as you are fully involved in development in Australia. They, however, want you to stay on the Maronis Board as it may be necessary for you to sign documents in Australia." The statement attributed to Mr Ramsay does not fully explain itself as it leaves unstated who made the request to resign and who wished Mr Ambler to stay on the Maronis board. Mr Ambler went on in his affidavit to say "I understood the reference to 'signing documents' to be a reference to signing documents relevant to the development of the Liverpool Truck Stop . . . site as this was Maronis' only project (to my knowledge) in Australia. I also understood the reference to 'they' to be a reference to the other directors of Girvan NZ."

[268] In cross-examination Mr Ambler agreed that on 15 May he saw himself as exercising the signing role of which he had been informed by Mr Ramsay. He said that essentially he saw himself as performing the same signing role on 1 June. Evidence continued (transcript p 2058, l/16–l.31):

> Q — So that his Honour may have clear the evidence that you give about the matter, is what you say that you yourself did not decide to enter into the transactions of 15 May or 1 June, but, rather, sign documents on the basis that someone else had already decided that those transactions should go ahead — is that right? A — I participated in meetings with Mr Duncan and discussed those matters, but I was of the belief that the board of Girvan New Zealand had already given their acceptance of those matters.
>
> Q — And it was on the basis of that belief, was it, that you say you did what you did on 15 May and 1 June? A — Yes, it was.

[269] In my finding, in participating in the decisions in the minutes of 15 May 1989, in signing the acceptances of the two letters of offer, and in deciding to do

those things as a director of Maronis Holdings Ltd Mr Ambler did not exercise any judgment or make any decision on his own, except that he heard from Mr Duncan to the effect that the board of Girvan NZ had already given their acceptance to the arrangement, he believed Mr Duncan, he accepted what was indicated to him by the form of the minutes which had already been prepared and he decided to fulfil what he regarded as a signing role in which he was not making a decision on the business in hand but carrying out a decision which had already been made by others. It was in this signing role that he accepted and joined in the resolutions of 15 May expressing approval and saying that entry into the transactions was in the best interest of Maronis, and resolving to execute the letter of offer, and in the resolutions of 1 June.

[270] On 29 May 1989 Mr Duncan, Mr Petersen and Mr Hill met and discussed the settlement of the Nippon loan and the conditions sought by Mr McCulloch. This meeting and discussion are quite important at other parts of my decision, but there is no evidence that Mr Ambler was present.

[271] Girvan NSW prepared a document dated 31 May 1989 headed "Tender Submission" (Ex 20, p 163) which was to be used by contractors submitting tenders to Girvan NSW for the civil and bridge works associated with the LTS site. Mr Ambler knew, over the period 15–31 May 1989, that documents of this kind were being prepared, and in view of his responsibilities for the development he probably saw this document at about the time it was prepared; it is not clear whether he saw it before the events of 1 June 1989. The preparation of this document and also its terms support belief that active and serious preparations for work to commence in the near future were continuing; the date for tenders was 19 June 1989 and the construction schedule provided for some work to be carried out in July 1989. Significant work by consultants continued in May and a small amount of site clearing work to facilitate survey was carried out on the site by a contractor in May. Mr Ambler was aware that this work was proceeding.

Events and meetings on 1 June 1989

[272] Minutes in evidence show, according to their terms, that on 1 June 1989 there were meetings of directors of Girvan Australia at 12.30 pm and at 12.35 pm, of Maronis at 12.30 pm and of Girvan NZ at 12.30 pm. Although there were challenges in evidence to whether these meetings or all of them actually took place, to the times at which they took place, and to the presence of persons recorded as being present and also of officers, no clear factual position has been established which displaces the prima facie indication given by the minutes that there were meetings as recorded. The times given for the meetings cannot be completely accurate.

[273] The first of the 2 minutes relating to Girvan Australia records a meeting held at 12.30 pm attended by Mr Hill as chairman and Mr Bartrop. The minute bears Mr Hill's signature as chairman certifying "signed as a correct record" with the date 1/6/89. Its terms are appropriate for a minute prepared pro forma before the meeting for the purpose of approving and demonstrating to Nippon Credit and its solicitors that there had been approval of the transaction by the board of Girvan Australia. According to these minutes the facility agreement, the mortgage and the deed of guarantee and indemnity were reported to the meeting and the directors made a resolution approving financial accommodation under the facility agreement and a further resolution that the company execute it. There are

a series of resolutions authorising Mr Hill and Mr Bartrop to execute documents. The copy minute in evidence bears the certificate by Mr Ramsay the secretary that it is a true copy.

[274] The second minute relating to Girvan Australia gives the time of the meeting as 12.35 pm and the persons present as Mr Duncan and Mr Ambler as well as Mr Hill and Mr Bartrop. It is recorded that Mr Duncan was elected as chairman. The substantial business recorded is as follows, Ex A5/1224:

> LIVERPOOL TRUCK STOP FACILITY: The Chairman reported to the meeting that Girvan Corporation (New Zealand) Limited had provided a guarantee in relation to a facility of $15m from Nippon Credit Limited secured over Liverpool Truck Stop site.
>
> IT WAS RESOLVED that Girvan Corporation Ltd would use all reasonable endeavours to provide Girvan Corporation (New Zealand) Limited with an insurance bond as security against its guarantee.
>
> IT WAS FURTHER RESOLVED that Girvan Corporation Ltd would indemnify Girvan Corporation (New Zealand) Limited against any losses incurred as a result of the Guarantee.

The minute bears a certificate "signed as a correct record" signed by Mr Duncan as chairman.

[275] Mr Ambler when dealing in his affidavit with this meeting (para 88(a)) said "At this meeting there was discussion concerning the performance bond and to the best of my recollection Bruce Hill made a statement to the effect: 'We need to deal with the performance bond. It has not been put in place but it will be. The minute needs to be prepared so that a bond will be put in place and Girvan will give an indemnity to New Zealand. Is that agreed?'". He also said to the effect that the resolution as recorded relating to reasonable endeavours was not his recollection of the terms of the resolution. In oral evidence Mr Ambler said (transcript pp 1976–7) to the effect that each director present said that they agreed with Mr Hill's statement and Mr Hill said he would arrange to get a suitable minute put in place.

[276] It is anomalous that this evidence shows four directors present discussing the implications of business recorded as established at a meeting of Mr Hill and Mr Bartrop 5 minutes earlier, and that the question of the bond rose out of discussion of business recorded as happening at the Hill-and-Bartrop meeting. Another anomaly is that from what Mr Ambler said the terms of the resolution were left to be established later by Mr Hill — "Bruce Hill said he would arrange to get a suitable minute put in place."

[277] Mr Duncan in evidence also said that the reference to reasonable endeavours was a mistake, and that the minutes were prepared after the meeting and presented to him by Mr Hill for signature, that he spoke to Mr Hill about the difference between what had been said at the meeting and what was contained in the minutes and Mr Hill said "On reflection, I don't consider it that easy to get the bond." Then Mr Duncan signed the minutes. He did not recall whether he had told Mr Ambler about his conversation with Mr Hill.

[278] Mr Hill did not give evidence. The minutes were prepared and were certified by Mr Duncan soon after the event; there is no record of their ever being corrected or reconsidered or discussed among all four persons recorded as present. It is a matter of duty that there should be minutes and that they should be accurate. It was the available record on which the company's directors and officers and others were to act. I have more confidence in the substantially contemporaneous record than I have in Mr Ambler's statement that it is not his

recollection of the terms of the resolution, or Mr Duncan's evidence following and adopting Mr Ambler's evidence. In my finding the minutes are a substantially accurate record of what was decided about the provision of an insurance bond.

[279] The qualification relating to using all reasonable endeavours made any protection offered by the resolution very difficult to make real. There was no definition and not even any consideration of what the terms of the bond would be, or of the circumstances in which it would operate or who would give it. "An insurance bond as security against its guarantee" would be quite different from "a performance or insurance bond to cover GVN/A's cost to complete the service works" which Mr McCulloch had first brought under consideration; or it could be, depending on what the terms of the bonds referred to were to be. Covering the cost to complete the works and providing security against liability under the guarantee are, to my mind, entirely different concepts. The resolution has no more standing than a statement of intention by Girvan Australia; there is no corresponding decision of Girvan NZ or of Maronis requiring that Girvan Australia fulfil any condition or make any agreement or give any security or other protection, and there was no inter-partes agreement. The second part of the resolution relating to indemnity resolved to do no more than was Girvan Australia's obligation under the general law. The resolution did not refer to Maronis or to the mortgage, and gave no protection to Maronis. The resolution is completely lacking in any effect because Girvan NZ did not in fact incur any liability under the guarantee. It is striking that no other of the considerations raised by Mr McCulloch was the subject of recorded discussion or decision by the directors of Girvan NZ or of Maronis, or of Girvan Australia, when the decisions of 1 June 1989 were made.

[280] The minutes of the meeting purportedly of directors of Girvan NZ, also attributed to 12.30 pm, records Mr Ambler and Mr Duncan as present, and Mr Ambler as chairman. These minutes were apparently on their face prepared in advance of the meeting so as to deal and deal only with matters which might show authority to Nippon Credit and its solicitors; there are a resolution approving sealing the guarantee and indemnity, and resolutions about authority given to Mr Ambler, Mr Duncan and officers. Mr Ambler signed it as a correct record. Evidence of Mr Ambler shows that an officer, either Mr Ramsay, Ms Hooper or both, was at the meeting; Mr Duncan confirms this but neither officer can recall the event. Mr Ambler gave evidence and Mr Duncan confirmed that Mr Duncan asked the officer whether the minutes had been checked and were appropriate, to which the officer responded that they had been reviewed by Clayton Utz and were all in order. The resolution was then passed.

[281] In the factual context, the report that Clayton Utz had reviewed the minutes and found them in order could have related and could only have been understood to have related to the minutes being in order so as to enable the contemplated transaction with Nippon Credit to take place. Clayton Utz's views about what was in order could not reasonably have been understood to relate to whether the directors should decide to enter into the transaction. The minutes are remarkable for their entire lack of reference to discussion or decision on whether the transaction should proceed or on any arrangements which should be made about the conditions brought under consideration by Mr McCulloch. The only reference in the minutes to any such matter is a statement "*Approval of accommodation*: the directors noted that the entry into the transaction evidenced by the Guarantee and Indemnity should be approved by the Company." There is

no record of any consideration or decision relating to making arrangements or obtaining commitments from Girvan Australia, or from any building company or other subsidiary of Girvan Australia, or on any subject. There is no reference to the position of Maronis and no direction to Maronis or its directors to take any action.

[282] A very striking anomaly is the treatment of Mr Ambler by himself and Mr Duncan as a director. Mr Ambler's evidence is to the effect that before the meetings he was asked by Ms Hooper to attend meetings that day as a director of Maronis and Girvan NZ and that in response he told her that he had resigned as a director of Girvan NZ. He says that he told her that he could not attend meetings and sign documents for Girvan NZ; showing that he well knew that he could not. Ms Hooper told him "I would have to go and see what is required to cover that" and later he was told by an officer, possibly Ms Hooper "We have talked to New Zealand and they want you to go on the Board to allow the loan to proceed." He was also told that the documents would come over for him to sign, and later Ms Lesley Robinson brought in documents and said "I have a document from Girvan NZ requesting you to go on to the board. This will allow you to sign documents today. You have to sign these documents." He then signed documents; he cannot exactly recall what they were; he believed that they had come from John Boscawen, who was responsible for secretarial matters in New Zealand. To the best of his recollection one was a form of consent to be appointed to the board and the other was a letter of resignation.

[283] Ms Lesley Robinson worked in the Sydney office of the Girvan Group as Mr McCulloch's secretary. She gave evidence to the effect that she obtained Mr Ambler's signature on documents for him to go back on the board of Girvan NZ for 1 day on 1 June 1989. Her evidence did not otherwise identify the documents. I accept that Mr Ambler signed some document or documents dealing with the subject on 1 June 1989, but it is not established what they were.

[284] The view that Mr Ambler was a director of Girvan NZ must have been held by someone in the company's New Zealand office because he was stated to be such in a form of statutory declaration sent to Ms Hooper from the Auckland office that day; Mr Duncan later made a declaration in those terms. In my finding it must have been and it was known and obvious to Mr Ambler and to Mr Duncan, at the time of the purported meeting of directors of Girvan NZ, that no event had happened in New Zealand or anywhere else that day which had made Mr Ambler a director; in all reason there could not have been a decision of directors in New Zealand or any other event which had brought that about that day.

[285] Mr Ambler said in cross-examination (transcript p 2084) to the effect that he was aware there had been no contact with any other director about a proposal for putting him on the board apart from Mr Duncan and Mr Boscawen the company secretary, but that he understood that the process which had been gone through was sufficient to allow him to go on the board. I do not believe that he understood that any such process had been gone through, because a man with his experience of life must have known that he could not be spirited onto the board of a public company without involving other directors, no matter what staff or company officers indicated to him. Documents such as he says he signed on 1 June have not been produced, but with the lapse of time and the intervening events their absence is not remarkable.

[286] Documents produced through the evidence of Mr Boscawen (Ex W)

show that it was clearly understood by Mr Boscawen that Mr Ambler was not a director but had resigned. Mr Boscawen produced a copy of a document dated 17 August 1989 by which Mr Boscawen sent to Lesley Robinson in Girvan's Sydney office documents for execution, including a certificate to be signed by any two directors in a list which did not include Mr Ambler, a consent by Mr Ambler to act as a director and a resignation; in his message Mr Boscawen said "Alan executed documents in June in respect of the Nippon Credit facility over the Liverpool Truck Stop." That is to say, Mr Boscawen's message shows that on 17 August he did not have a consent by Mr Ambler to act as a director or a resignation. Mr Boscawen also produced an undated form of consent by Mr Ambler to act as director, and a resignation bearing date 14 June 1989. These documents were probably prepared, and probably signed by Mr Ambler in or after August 1989, and they are adverse to Mr Ambler's credit. Also adverse to his credit is a document sent with the same message on 17 August 1989, described by Mr Boscawen as "The directors' resolution of St Martins Properties Ltd (dated September 5th, 1988) confirming the quorum of the company as to director. This document should be signed by Messrs Petersen, Duncan and Ambler." The resolution (also in Ex W) purports to record a minute of a meeting of 5 September 1988 resolving that any two directors should constitute a quorum, and signed by Mr Petersen, Mr Duncan and Mr Ambler. I regard it as obvious that this document, prepared long after the event which it purports to record (if indeed there was such an event) was prepared to establish the efficacy of the purported directors' meeting of Mr Ambler and Mr Duncan for Girvan NZ of 1 June 1989. It shows either that they conducted themselves irresponsibly as directors in treating two directors as a quorum when an earlier decision establishing that was not properly minuted; or if there had not actually been a meeting and resolution on 5 September 1988 (which is quite possible) that they participated in a false record. Either possibility is adverse to the credit of Mr Duncan and Mr Ambler.

[287] Mr Ambler's readiness to be treated as having gone on the board of Girvan NZ to participate in one meeting and join in making what he must have known was a momentous decision in the company's affairs, and then go off the board is a powerful illustration of the signing role which he saw himself as occupying.

[288] The minute of a meeting of directors of Maronis held on 1 June 1989 also gives the time as 12.30 pm; this was attended by Mr Ambler and Mr Duncan, who as I decided elsewhere were Maronis' only directors. This too is a pro forma minute prepared in advance for the purposes of carrying out the contemplated arrangements with Nippon Credit. Apart from the statement "*Approval of accommodation*. The directors noted that the entry into the transaction evidenced by the Guarantee and Indemnity and the mortgage should be approved by the company" there is no record of any consideration of the circumstances in which Maronis was to execute the guarantee and indemnity and the mortgage. There is no record of terms or conditions or any protections or arrangements for the benefit of Maronis; no record of any arrangement made with Girvan Australia or any of its subsidiaries, and no record of consideration of the conditions raised by Mr McCulloch, or of any other circumstances attending the decision. In these last respects the minute represents what in truth happened; Maronis did not have the benefit of any agreement or arrangement with Girvan Australia establishing in any way the basis on which it was to give the mortgage, or stipulating for any protections or advantages in the transaction, and there was no address to

considerations for the protection of Maronis raised by Mr McCulloch or to any other considerations for its protection. By the mortgage Maronis simply handed over its asset and with it all its affairs and its commercial destiny, for Girvan Australia to use as a pledge, without obtaining any advantage under any contractual arrangement or less formal arrangement.

Conclusions on breaches of fiduciary duty

[289] In his first affidavit Mr Duncan said (para 49):

> I was of the view that the funding arrangements were in the best interests of Maronis and Girvan NZ because I considered that it was in their best interests for the project to proceed as soon as possible and that this was unlikely to occur without the support of the parent company well beyond its Dextran Agreement commitment for the $8.0m.

[290] As explanation for this he referred to information and expressions in support of proceeding with the LTS project which had been directed to him since early in 1989. He referred to communications from Mr Don Collis managing director of Girvan NSW, Mr Ambler, Mr McCulloch, Mr Hill, Mr Petersen and to many records and said (first affidavit, para 41):

> In 1989 I considered the key issues which arose in respect of the LTS project to be:
>
> (a) what was the scope of the Parent Company's infrastructure works obligations under the Dextran Agreement?
>
> (b) could the $15m figure for these works be varied and if so by how much and who would share savings or pay for the overruns?
>
> (c) there was a need to clarify the inter company debt position under the Dextran Agreement in view of rental guarantee obligations owed to Girvan NZ by the Parent Company following from the collapse of the Transpac Group, a major tenant of Dextran properties, plus certain accounting adjustments.

[291] In his second affidavit (para 50) Mr Duncan spoke of his forming "the view that this proposal to raise funds against the LTS site was in the interest of Girvan Australia and Girvan NZ" as something which happened at or as a result of the meeting and discussion of 13 March 1989. He also said (second affidavit, para 92) that it was his view that accepting Nippon Credit's offer, which required security to be supplied by Maronis, was in the interest of Girvan NZ and Maronis "because that was the only solution for the development to proceed". He also said (para 119):

> As at 1 June 1989 I was of the opinion that entering into the Nippon Loan transaction was in the best interest of Maronis and Girvan NZ. The development was, in my opinion, likely to achieve substantial profits to both of these companies . . .
>
> I held the view that construction and development of the LTS site would only be able to continue if the Nippon (or some other similar) loan transaction was entered into. It was my belief and understanding that Girvan NSW was not prepared to continue until it was sure that Girvan NZ was in a position to fund the cost. I knew that Girvan NZ had cash flow problems and was not able to raise the construction costs on its own behalf.

[292] It was reasonable to consider how to make the project proceed, and to consider whether Girvan NZ and Maronis should support Girvan Australia in obtaining finance for the purpose; insisting on exact performance of financing arrangements in the Dextran agreement, or attempting to raise the necessary finance without the support of Girvan Australia did not have much in their favour. However, none of the advice given to Mr Duncan and none of what he spoke of as key issues gave any support for giving the mortgage without any countervailing contractual protection or security, and Mr McCulloch advised in clear terms that protection should be obtained.

[293] In oral evidence Mr Duncan confirmed that in May and June 1989 he was firmly of the view that it was in the best interest of Maronis to provide the necessary security for Girvan Australia to obtain the proposed A$15m facility with Nippon Credit: transcript p 1568. The only sign in Mr Duncan's evidence of consideration being given to how in particular the fund should be handled when advanced was his evidence (first affidavit, para 42(i)) that on 13 March Mr Hill "proposed that the funds be managed in group treasury in the usual way". I conclude that he did not address whether there should be any special arrangements for depositing funds, earmarking them or limiting their use.

[294] Mr Duncan's consideration of security or protection for Maronis in the form of a performance or insurance bond began, in his evidence, with Mr Hill telling him on about 13 March 1989 (first affidavit, para 42):

> I'm sure they will provide an insurance bond for the Liverpool Truck Stop project.

[295] Mr Duncan also said he was informed by Mr McCulloch that an insurance bond could be put in place and that Mr Hill was sure of that and was dealing with it. I am not prepared to accept that Mr Hill gave any assurance, in any terms on which any decision could be based, that an insurance bond would be available. Mr Hill was not in a position to talk about obtaining a bond in any but the most general and unuseful of terms. The "reasonable endeavours" resolution on 1 June 1989 shows that there was no sense of assurance that a bond would be obtained. An assurance of the kind Mr Duncan said Mr Hill gave him could not be a reasonable basis for a decision to proceed, as there was no definition of the performance or insurance bond which was to be relied on and no knowledge of its terms apart from the general description in two or three words. It would be elementary to ascertain whether it met Mr McCulloch's ideas of what was appropriate. It would be necessary, if some such assurance was to be relied on for protection of Maronis' interests, that it should exist before or at the time that Maronis incurred the risk. From Maronis' point of view there was no element of urgency of a scale which would have had any impact on getting the bond in place. Clearly Mr Duncan knew that there was no other arrangement for securing Maronis' position against claims under the mortgage. This was well beyond the range of risk to which any rational adult would expose a sum as large as A$15m, whether incurring the risk personally or incurring it for any other persons for whom he was responsible.

[296] Mr Duncan's position was that he agreed with the conditions proposed by Mr McCulloch, and that he believed they had been satisfied, or gave directions for others to see that they were. He said in evidence that he thought a construction contract was in place. However, he did not have any reasonable basis for so thinking; in fact there was no contract, so of course he had not seen one, and reports given to him by Mr McCulloch, in writing and orally, can only have referred to negotiations between Mr McCulloch and Mr Collis of Girvan NSW and to what Mr McCulloch expected to emerge. A belief that there had been an agreement in principle is different, in the circumstances utterly different to a belief that a contract for performance of the works had been entered into, involved in which would be definitions of cost, time and the scope of works, none of which had been established in a binding way.

[297] In my finding Mr Duncan was aware on 1 June that Maronis did not have the protection of a contract (and in such a matter only a written contract could be acceptable) which protected Maronis' interest by imposing on Girvan NSW a contractual obligation to carry out the infrastructure works, defined the works to

be carried out and established contractually how much was to be paid for them and within what time the works were to be completed.

[298] Submissions of Mr Duncan's counsel referred to the operation of the Girvan Group Treasury and the practice of pooling funds for common use with the maintenance of separate accounts for each company in the group. Mr Duncan described the Girvan Group Treasury Operation as he knew it to operate. He said to the effect that it was established in 1988 in consultation with auditors by Girvan Australia, that it was consistent with normal commercial practice he had observed in accounting practice, that it proved to be a highly effective and profitable operation for the benefit of all members of the group. He described the operation, and said:

> Group Treasury operated as a service to each company in the Girvan Group and for the benefit of the Girvan Group as a whole. Each Girvan Group entity was required to transfer available funds to Group Treasury on an unsecured basis and will be provided with funds as needed from Group Treasury.

The transfers were duly recorded and often took place as book entries. There were benefits which included management of cash resources to gain economies of scale, group expertise and efficiency including obtaining better interest rates, borrowing at lower funds and more expertly managing funds. Other advantages were greater facility with financial information, central administration of finance and security documents and provision of risk management services against adverse currency and interest rate movements. Mr Hill, a director of Girvan Australia, initiated Group Treasury and coordinated its management. It had been initiated in or before July 1988, before the interest in Girvan NZ was acquired.

[299] Mr Duncan's affidavit does not mention, as an ordinary part of the Group Treasury Operations, the mechanism adopted here in which Maronis did not deposit funds in Group Treasury and draw them as required, but provided security for Girvan Australia to borrow funds. Essentially, to seek an expression of the benefit which might be conceived to flow to Maronis, it was a benefit consisting of Girvan Australia having A$15m in its Group Treasury out of which it might from time to time advance money for Maronis business or undertake work which would benefit Maronis business, although there was no contractual or other commitment to do so.

[300] I am satisfied that Mr Ambler in acting as a director of Maronis and in purporting to act as a director of Girvan NZ did not apply his mind to what he should do or make any decision about how directors' powers to commit those companies to the proposed transactions ought to be exercised; he did not consider where the companies' interests lay or how they should be served; he simply carried out indications given to him, principally by Mr Duncan but also in a subsidiary way by acts of preparation by company officers, about what decision was required, and carried out what he saw as his signing role without making any decision of his own. The same is true of his participation in the Maronis meeting of 15 May 1989.

[301] When Mr Ambler acted in the state of mind which I have found he had and fulfilled a signing role when it was indicated to him that he should, he was failing in his duty to exercise his power in good faith in what he considered was the interests of the company, and he was acting for what is relevantly a collateral purpose (in the words of Clarke and Cripps JJA) or was acting from some bye motive, or for some other reason than honestly acting in discharge of his powers (to adapt the words of Viscount Finlay). To exercise the power because someone

else has said it was appropriate to do so is altogether different to an exercise of powers in good faith in what one considers is the interests of the company. Doing what Mr Duncan indicated was appropriate, or doing what Mr Duncan indicated was fulfilment of something that had already been decided in some way by Girvan NZ, was acting for a purpose which was collateral to discharge of Mr Ambler's own duties as a director.

[302] Mr Ambler's counsel submitted that he gave proper consideration to the interests of Maronis and honestly believed that he was acting in the interests of Maronis at all relevant times. It was submitted that "If it be the case that it is found that Ambler did not give such separate consideration, then it is necessary to objectively determine whether an intelligent and honest man in Ambler's position could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company." This submission was based on the passage in *Charterbridge* to which I have referred elsewhere. It was applied in the *Equiticorp Finance* case because all parties accepted in the Court of Appeal that it should be: see Clarke and Cripps JJA at 147. Their Honours expressed reservations about the test on the ground of its not being consistent with the traditional approach based on the examination of the director's own state of mind.

[303] To put the affairs of Maronis wholly in the hands of Girvan Australia was entirely to disregard their separate corporate personalities and the separate ownership interests represented by the minority shareholding. It was simply and obviously wrong and unreasonable to adopt a point of view in which the interests of Maronis and the interests of Girvan Australia were equated; they were obviously different at that time, and there was the obvious prospect that further differences might arise through further changes in ownership interests, or different commercial outcomes for the different companies.

[304] Other considerations could well have claimed the attention of directors of Girvan NZ and Maronis who were genuinely giving consideration to their interests. The expectation that Girvan Australia would meet its repayment obligations to Nippon Credit in 12 months' time was obviously involved. Directors could have considered whether there should be a working capital advance in one lump sum to Girvan Australia, or whether the advance or part of it should be set aside in a fund available only for use on the LTS site, or whether to seek a financing arrangement in which Nippon Credit paid the advance or part of it by instalments on certificates showing that work had been carried out. What could be considered could take many forms and produce many conceivable outcomes; but measures to protect Maronis could not reasonably be wholly disregarded. They were wholly disregarded, and this goes far beyond an indication that a piece of business was poorly managed; it establishes that the business was not considered at all.

[305] In my respectful view the reservations expressed in *Equiticorp* were well based, the test drawn from *Charterbridge* and applied in *Equiticorp* (although not adopted by their Honours) is inconsistent with the traditional approach and its reference to the state of mind of the director, and is not based on *Charterbridge*, in which Pennycuick J dealt with an altogether different subject. However, if the test stated by Pennycuick J and cited by Clarke and Cripps JJA at 147 is applied, I am of the view that intelligent and honest men in the positions of Mr Duncan and Mr Ambler could not in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of Maronis. There

was an entire absence of any commitment by Girvan Australia to do anything for the benefit of Maronis. Maronis obtained no tangible advantage from Girvan Australia or from any other source by giving the mortgage. There was only hope and confidence that Girvan Australia would in some way bring about a good outcome. Many transactions can reasonably be undertaken on the basis that risks about outcomes depending on hope and confidence are worth taking: a company's only large asset and commercial destiny cannot reasonably be risked on that basis. You have to get something tangible for A$15m. Intelligent and honest directors could not in the circumstances have reasonably believed that the transaction was for the benefit of Maronis.

[306] Any real consideration of the interest of the plaintiffs in the grant of the mortgage would have directed Mr Duncan and Mr Ambler to the need for attention of the whole board of Girvan NZ to the question and to Mr McCulloch's recommendations. The considerations presented by Mr McCulloch had not been met; they had not been fully addressed; token measures had been taken towards satisfying some of them. The decision involved all Maronis' assets and a significant proportion of the total interests of Girvan NZ. It was not a matter which could be dealt with informally or under assumed authority, or for which it was appropriate to assume that there could be no debate or that ratification would be automatic. Most of the directors of Girvan NZ were not present on 1 June and had not been involved in any consideration of the proposed mortgage or given their approval of it. Mr Duncan had not canvassed persons whom he believed to be directors in order to obtain their concurrence. Proceeding in the absence of and without consulting persons whom Mr Duncan was at the same time naming as directors in the statutory declaration is itself a demonstration that he did not give any real consideration to the matters under decision. He had the concurrence of Mr Petersen but he did not have the concurrence of Mr McCulloch. Mr Duncan had not discussed the subject with Mr Fielding or Mr Hoskins, whom he believed to be directors of Maronis, nor with Mr Kanas whom he believed to be a director of both companies. He had not discussed the subject with Mr Boscawen. (I accept Mr Kanas' evidence that he did not know of the matter, notwithstanding Mr Duncan's suggestion that he may have spoken about it with Mr Kanas in Brisbane.) If Mr Duncan or Mr Ambler had given any real consideration to the interests of Girvan NZ and Maronis in making the decisions recorded on 1 June it would have been apparent that everyone whom he believed to be a director should have an opportunity to take part. This is so irrespective of any formality such as the entitlement of those absent to notice of a meeting on a strict reading of the articles.

[307] Reasonable directors would have defined for themselves what advantages could flow from granting mortgage security to Nippon Credit to secure a loan by Nippon Credit to Girvan Australia. Maronis, with a large asset, no funds, no cash flow, no organisation and no contractual rights, under the Dextran agreement or elsewhere, was a helpless creature and was hardly in a position to accomplish anything except in some transaction which conferred benefits on someone else; and there was no one but other Girvan companies at hand, unless perhaps the entire LTS project could be on-sold without doing any work on it. It could not be expected that there would be any advantage unless granting the mortgage caused Girvan Australia, by itself or some entity which it controlled, actually to carry out development of the LTS land, to carry out infrastructure works, to arrange financing and pay the costs, and to move Maronis to the position of owning the

land with developed infrastructure. No contractual commitment was given by Girvan Australia or by any subsidiary to Maronis that any of these things would be done. There was no contractual commitment by Girvan Australia to Maronis that the funds borrowed or any funds would be available for financing the infrastructure works. There was nothing. Mr Duncan and Mr Ambler did not have, and did not ask for or look for an express decision or commitment by Girvan Australia to do anything for Maronis. There was no contractual arrangement and no express arrangement to settle Girvan NZ's claims and pay the facility fee out of the advance, and they were not paid to Maronis. Obtaining payment of Girvan NZ's entitlement was an advantage, though not a significant advantage as it was an entitlement and Girvan Australia was able to meet its obligations.

[308] Consequences of giving the mortgage which a reasonable director of Maronis could possibly have hoped for can be divided into expectations that Girvan Australia would meet its obligations to Nippon Credit and that there would be no recourse to the mortgage, and expectations that Nippon Credit through some subsidiary or other entity would carry out the infrastructure works, finance them and give Maronis the benefits of a completed development. Expectations of the first kind would not on their own move any reasonable director to grant the security. Expectations of the second kind would lead a reasonable director to review what means Maronis had of seeing that they were fulfilled. Some conceivable protections were brought to attention by Mr McCulloch's review and recommendations in the memorandum dated 28 March 1989. Mr McCulloch referred again, in different terms, to four of these conditions in his memorandum of 12 May 1989. This emphasised the need to attend to the conditions he referred to, but did not relieve directors from concern with all of Mr McCulloch's proposal.

[309] No person, acting in his own interest or acting as a director of a company and considering its interests, could reasonably regard it as appropriate to proceed with no security of any kind, or decide to do so. The land mortgaged was Maronis' only asset; its value and the amounts borrowed were large. The works were to take place in a different country to where Maronis was formed and had its office. Although, in terms of economic interest, 74% of the ownership of Maronis could be attributed to Girvan Australia, the other 26% represented investments of some millions of dollars held by other unrelated persons. It was beyond the range of the judgment of any reasonable director of Maronis to decide to grant a mortgage without obtaining protection of any kind, and simply trust that Girvan Australia would handle matters in some way which produced a good outcome.

[310] Obtaining money to assist the operation of Girvan Australia's Group Treasury was not the purpose of the transaction put forward by Mr Duncan in his evidence. His position was that he understood that the purpose of the loan was for its use in the LTS infrastructure works. However, as the matter was dealt with in submissions, I should state my conclusion that it would not be an exercise of the powers of directors of Maronis for the purpose for which those powers were conferred to decide to grant the mortgage for the purpose of securing money for Girvan Australia or for facilitating the Group Treasury Operation. On any rational appraisal, the possibility that Girvan Australia might later use money to Maronis' advantage could not justify a decision to mortgage Maronis' only substantial asset.

[311] In my finding directors who were rational adults and who gave any consideration whatever to the interest of Maronis in entering into the transaction could not have decided to give the mortgage. The transaction was momentous for Maronis, and reasonable directors had to address the interest of Maronis in some way which involved reviewing the operation of the transaction on Maronis, addressing conditions such as those Mr McCulloch had proposed, or some other array of considerations, and obtaining some recorded commitment by Girvan Australia which could in some way operate for Maronis' protection. In the due exercise of their powers as directors of Maronis there is a very wide range of considerations which Mr Ambler and Mr Duncan could have had regard to and of judgments which they could have formed about what was appropriate; but in no actual address to how they should exercise their powers could they decide to do nothing.

[312] On 1 June 1989 Maronis had had dealings only with persons associated with Girvan Australia and its subsidiaries, and only in connection with preparations for the development of the LTS land and on no other business. It is doubtful whether Maronis had incurred any liability to either the Loc-Tex companies or Girvan NSW for work in preparation for the development; so far as appears, the claims for payment were made against Girvan NZ. Granting the mortgage and making credit available to Girvan Australia would not have been injurious to those creditors. Consideration of the interests of creditors is not relevant to the claim for breach of fiduciary duty as directors of Maronis against Mr Duncan and Mr Ambler: see *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465 at 473 and 474 where Giles JA stated considerations relating to the question whether directors should have paid attention to the interests of creditors.

[313] For these reasons I find that the allegations in FFASC paragraph 20(e) and (f) have been proved and that Mr Duncan and Mr Ambler acted in breach of their duty as directors in their decisions which committed Maronis to giving the mortgage.

Claims against Mr Petersen

[314] Mr Petersen was the leading figure in Girvan affairs. He was a director of Girvan Australia throughout the relevant events and became a director of Girvan NZ on the takeover and so remained. He was himself the majority shareholder in Girvan Australia. He was not ever a director of Maronis. The plaintiffs submitted that Mr Petersen owed duties to Maronis equivalent to those of a director of Maronis and that he fell within para (b) of the definition of "director" in s 2(1) of the Companies Act 1955 (NZ):

> *Director includes*:
>
> (a) Any person occupying the position of director by whatever name called; and
> (b) A person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act . . .

[315] There is no evidence of Mr Petersen making directions or instructions with which other persons occupying the position of directors of Maronis were accustomed to act. Obviously he was in a position to exert influence over directors of Maronis, but the proposition that in fact he and they acted as stated in para (b) of the definition is to be established, if at all, by factual inferences from his opportunities to act in that way.

[316] Evidence of Mr Duncan establishes that Mr Petersen's influence on the affairs of Girvan Australia was extensive. He brought about the appointments of

Mr Duncan and Mr Ambler as directors of Girvan Australia and its subsidiaries. His opinions on matters for decision necessarily carried great weight. This I find was true for Girvan NZ as well as for Girvan Australia. The plaintiff submitted that if Mr Petersen had expressed opposition to the mortgage transaction it would not have gone ahead. This is probably correct, but it does not establish that he bears any responsibility.

[317] Mr Petersen took part in the chain of events which led to Girvan Australia obtaining the advance from Nippon Credit. He was present at the informal meeting of 13 March 1989 and must have seen the agenda document Ex A3/655 and heard and participated in the discussion among the persons present. He was aware of or participated in the initiation of consideration of using the LTS site as security for a working capital advance. He wrote a memorandum to Mr McCulloch on 14 March 1989 (Ex A, p 661) which shows his involvement in the planning for the development and his anticipation of early commencement, with the contract for site works to be let about the end of April and construction to begin about the end of May. He saw Mr Hill's formal letter to the directors of Girvan NZ dated 17 March 1989 and took action to organise a meeting to discuss it. Mr McCulloch's memorandum dated 28 March 1989 with his proposals was circulated to Mr Petersen. He attended the meeting of Girvan Australia on 15 May 1989 which approved the Nippon Letter of Offer and signed both forms of acceptance. It is probable that he kept himself informed in other ways about progress with the financing arrangements and with preparation for work on the LTS site. Mr Petersen had much involvement and strong motivation to be interested and informed. He had been a leading figure in the takeover and in the Dextran agreement and he personally was a profit warrantor. He had responsibilities as chairman of Girvan Australia which he could not discharge unless he kept himself fully informed.

[318] Mr Duncan's evidence establishes (affidavit 28/7/00, para 103, transcript p 1795) that Mr Duncan met Mr Petersen and Mr Hill on 29 May 1989. The meeting dealt with settlement of the Nippon loan and the conditions sought by Mr McCulloch. Mr Duncan said in his affidavit "I recall Hill saying 'I should be able to get the bond but will not be able to do so by completion.' I recall Petersen instructing Hill and myself in words to the following effect: 'We've been talking about this (LTS) refinancing long enough. Everyone has agreed on the terms. This project is important for both companies. So long as Bruce thinks he can get the bond to satisfy Chris, go ahead and do it.'"

[319] In cross-examination Mr Duncan was asked whether he took this as Mr Petersen's instructions and replied "More agreement, I think — agreement to go ahead with the transaction."

[320] In my understanding of the words used taken with Mr Duncan's answer, Mr Petersen in this conversation indicated his agreement to complete the transaction; what he said had a strong tone of endorsement or encouragement but did not mean that Mr Petersen commanded or directed Mr Duncan or Mr Hill that the project must be completed. Mr Duncan did not understand that what Mr Petersen said to him took away Mr Duncan's responsibilities or opportunity for decision. To say "Everyone has agreed on the terms" was not correct in view of the state of communication with Mr McCulloch; the terms of the loan between Nippon Credit and Girvan Australia had been agreed, but it was not correct that Girvan NZ or Maronis had agreed on the terms between them and Girvan Australia. The qualification "so long as Bruce (Hill) thinks he can get the bond

to satisfy Chris (McCulloch)" was a large qualification in view of the facts that the bond had not been defined, Mr Hill was not speaking in categorical terms about his being able to get the bond or what the bond would provide for, and it was not known whether what he proved able to get would satisfy Mr McCulloch, who was overseas. In my finding Mr Petersen did not, by what he said on 29 May 1989, bring about Maronis' participation in the transaction by an exercise of control or direction over Mr Duncan and Mr Ambler.

[321] The plaintiffs referred to participation of Mr Petersen in events relating to management of the LTS project and its financing after settlement in June 1989. In my view these events do not have any real bearing on his participation in the events of 1 June.

[322] In my view there is no substantial evidence, and it should not be found, that Mr Petersen occupied any position of power or control in the affairs of Maronis and the events of 1 June 1989 which imposed on him a fiduciary duty of the kind incurred by its directors. He has not been shown to have exercised sufficient control or influence, or participation at all in the affairs of Maronis to justify attributing any such duty to him. The circumstances show that he had opportunity and motivation to control those events in detail, but the evidence does not show that he did so, or that he had any real participation in the events by which Maronis became bound to the mortgage. Mr Petersen himself did not give evidence, and this may assist a decision to draw factual inferences adverse to him if the inferences are available. However, reasoning of this kind cannot supply the general lack of evidence of Mr Petersen's participation in the most significant events.

[323] The statement of claim in section (v) para 20A and following alleges a number of matters which give colour but not substance to a conclusion that Mr Petersen controlled the events. He was as alleged in a position to control the composition of boards of directors, he had brought about the appointment of Mr Duncan and Mr Ambler to the board of Girvan Australia, and he was Mr Ambler's nephew. As a practical matter he could have caused them to be removed from their directorships and from their employment. These circumstances show what opportunities he had, but they do not show that he took the opportunities. It is also alleged in paras 24M and 24N that Mr Petersen had the opportunity to dissuade Mr Duncan and Mr Ambler from entering into the transactions, and to bring about other outcomes, but did not take any steps to do so. It is then alleged that he expressly or impliedly approved of their conduct and took no steps on or after 1 June 1989 to overcome its effect. All these circumstances then are alleged to have imposed on him duties of care and fiduciary duties to the New Zealand companies.

[324] There were no substantial submissions upholding the allegations in the statement of claim which, as I understand them, set up duties of care under the common law owed by Mr Petersen to the New Zealand companies. In the circumstances the proposition does not require adjudication, but I am of opinion that it would not be correct to introduce common law duties of care into the field of the responsibility of directors for the affairs of associated companies of which they are not directors; their liability is defined by law in other ways. The proposition that Mr Petersen came under fiduciary duties must, in my understanding, be made good by establishing that in substance he occupied the position of a director, or of all the directors of Maronis in the control of its affairs;

if he had done so I would think that he incurred a fiduciary duty in any exercises of that control; but it should not be found that he did so.

[325] In my opinion I should give judgment for Mr Petersen.

Claims against Mr McCulloch

[326] Mr McCulloch was, from the beginning of 1989 and throughout the relevant events, the leading figure in practical management of the affairs of Girvan NZ and its subsidiaries. Although his principal office was in Sydney, he travelled to New Zealand frequently, usually fortnightly, spent significant time there, and was in ready communication with Mr Boscawen and other persons concerned with affairs in New Zealand at all times. Mr McCulloch is a man of high ability with professional training and significant experience in business administration, and he had deep involvement in and a full grasp of the complex affairs and difficulties of carrying on the business in New Zealand. He was at first referred to as acting managing director of Girvan NZ, later as managing director; how he came to be appointed in those ways is not clear but the descriptions fit what he was doing. He took an appropriately independent stance in upholding the interests of Girvan NZ in dealings with Girvan Australia.

[327] Documents which Mr McCulloch prepared or participated in show that he supported Maronis making the LTS land available as security for a borrowing by Girvan Australia in circumstances and on conditions which he recorded. The nature of the conditions which he proposed shows that he gave careful and detailed consideration to the protection of the interests of Maronis and of Girvan NZ, and if the transaction had gone ahead on the basis of a decision to adopt his recommendations in one form or another it could not be found that he was in breach of the fiduciary duty of a director. His recommendations required compliance with various conditions which were not fulfilled. Nor could it be concluded that he was otherwise in breach of his duty of care, however arising, as a director. His views did not prevail; the persons who effectively made a decision on behalf of Maronis disregarded his recommendations.

[328] It was not finally contended that Mr McCulloch was in breach of any fiduciary duty, but that he was in breach of a duty of care. One matter in relation to which this was contended was in the formulation of the proposal for providing security for what he knew was to be working capital advanced to Girvan Australia. In connection with this contention it was suggested that Mr McCulloch had no actual belief that an insurance bond could be obtained, and that he should have known that Girvan Australia was facing a cash shortage and that his proposal was likely to be used by other directors of Girvan NZ as a means of obtaining funds for Girvan Australia. I do not accept that Mr McCulloch did not believe that an insurance bond could be obtained. It was Mr McCulloch's evidence that he was assured by Mr Duncan that an insurance bond would be obtained, and I accept this evidence. Mr McCulloch did understand that Maronis was to provide security to obtain a working capital advance to Girvan Australia, but he proposed that should happen under conditions. He did not propose that there be a working capital advance to Girvan Australia in the circumstances as they transpired, and he cannot be regarded as having created the opportunity for or brought about the transaction in the form it actually took, because he strongly counselled that conditions should be imposed on the transaction. His advice was disregarded. If there had been an attempt to follow his advice there would not have been a transaction, as the insurance bond for which he counselled could not have been obtained; and for other reasons.

[329] It was also said that Mr McCulloch was negligent in that he failed to ensure that independent legal advice was obtained for the boards of Girvan NZ and Maronis. I do not regard it as having been Mr McCulloch's duty to ensure that independent legal advice was obtained, and I do not regard it as having been established that any such failure, if there was such a failure, caused Girvan NZ and Maronis to enter into the transaction. It was also said that Mr McCulloch was negligent in that "having been alerted by Boscawen to the fact that the transaction was about to be entered into, and having no reason to think that a bond or contract for the works was in place, he made no attempt to ascertain the true position from Duncan or to prevent the transaction going ahead". On the view of the facts most adverse to Mr McCulloch in this respect, he was in New York when he was told by Mr Boscawen by telephone several hours before the documents were executed about how transaction was to be settled that day. In all practicality he had no opportunity to intervene in or control or significantly to influence events in Sydney; he had made his position known, in writing and also by speaking to Mr Duncan, and it should not be regarded as negligent of him that he did not make a further attempt to intervene in the last few hours when his position was already known and recorded. Mr McCulloch's role in relation to the transaction in the form in which it proceeded was that his expressed stance was adverse to it and that he had assurances from Mr Duncan about how transaction would occur which were not fulfilled. Mr McCulloch was not a participant in the decision to cause Girvan NZ and Maronis to enter into the transaction. Whether or not there was any shortcoming in Mr McCulloch's conduct, it is plain that nothing Mr McCulloch did caused Maronis to enter into the transaction.

[330] Mr McCulloch is not exposed to any liability for considering a course which differed from contractual rights under the Dextran agreement, and which accepted that they might be departed from if the advantages of a different position could be achieved. The same should be said of Mr McCulloch's preparedness to depart from A$15m as the contemplated expenditure.

[331] Mr McCulloch was associated from the beginning in March with consideration of making the LTS site available as security for Girvan Australia to borrow working capital. With hindsight after a decade for reflection, ways can be observed in which his handling of affairs could have been different or better. There is no doubt of the sincerity of his attention to the interests of Girvan NZ and its subsidiary. The motion which he proposed in his memorandum of 28 March 1989 and the conditions on which he proposed it could have been better framed if they had in some way restricted dealing with the money advanced so that it would be more certainly available for expenditure on the LTS site; it would have been as well to address in more detail what the arrangements were for financing the project when the arrangements in the Dextran agreement were superseded. It would have been as well to seek to obtain clearly expressed commitments in writing from Girvan Australia about providing the financing. In retrospect his readiness to countenance a performance or insurance bond as the security for Girvan Australia's achieving the contemplated outcome and being protected against default by Girvan Australia could be improved on. Notwithstanding what hindsight can suggest in these and other ways, there is in my view no doubt that his proposal represented his sincere views on what should be done in the interests of Girvan NZ and its subsidiary. He was in a better position when immersed in the affairs of Girvan NZ in 1989 to come to a conclusion about how matters should be handled and to reconcile the

considerations and pressures of the time than any person now can be with hindsight. In particular he was in a position to appraise the capacity of Girvan NZ to raise finance in any other way and to undertake the development in any other circumstances; he had been through the difficulties of negotiating finance for the Wanganui project and obtaining support from Girvan Australia for that.

[332] Mr McCulloch did not bear the burden of responsibility for deciding what Girvan NZ and its subsidiary should do; he put his proposed motion to the board of Girvan NZ, the whole board. He was entitled to expect and to have consideration, contributions and the judgment of others.

[333] Mr McCulloch continued to bear the main responsibility for day-to-day conduct of Girvan NZ's business and brought his proposals to the state recorded in his memoranda of 12 May 1989. He did not participate in the decisions of 15 May. He does not in any sense bear responsibility for the outcome and for the decisions made on 1 June 1989 by Mr Duncan and Mr Ambler.

[334] Mr McCulloch was very concerned to get the work started as he regarded this as important for the interests of the New Zealand company and the survival of Girvan NZ. He did not in any way doubt that Girvan Australia would be in a position to finance the infrastructure works and, when the need arose, to discharge the borrowing. I am satisfied that his evidence about his belief on these matters was true and that his belief was sincerely held at the time. His attitude when he found, after the transactions, that the performance bond had not been obtained was an attitude of disappointment rather than outrage, and in his evidence he expressed recognition that it was the right of the board to decide not to take account of his recommendation.

[335] In conversations by telephone with Mr Duncan shortly before and about the time of settlement he kept the requirement for a bond before Mr Duncan; he never abandoned it, and it was never overtaken by a better idea for providing security. On a realistic view of what caused Maronis to enter into the mortgage, Mr McCulloch's conduct, if it should be said that he acted in breach of fiduciary duty, did not cause the outcome. In my judgment, however, he did not act in breach of the fiduciary duty of a director of Maronis or of Girvan NZ.

[336] I propose to give judgment for Mr McCulloch.

Claims against Clayton Utz

[337] The seventh defendants Mr Brian Wilson and 46 others are the principals of the law firm Clayton Utz. The claims against them relate to acts and conduct of Mr P C McMahon, solicitor who became a partner in December 1988 and remains a partner. Claims against Clayton Utz are set out in section IX paragraphs 33–47 of FFASC. I will set out the effect of the pleaded allegations against Clayton Utz.

[338] The first group of allegations is in paragraphs 34–37 of FFASC. The introductory allegation in paragraph 33 is "Clayton Utz acted as solicitors for Girvan Australia in relation to the Facility Agreement, the Loan and the securities . . .". This introductory allegation is of considerable importance because when addressing whether facts and circumstances imposed a duty of any kind on Clayton Utz towards Maronis the duties owed by Clayton Utz to Girvan Australia as their client are a prominent consideration adverse to a conclusion that a duty was incurred to any other person which was in conflict with or in any way inconsistent with the full performance of professional duties owed to Girvan Australia. On the predominance of a solicitor's duty of care to his own client: see

Hill v Van Erp (1997) 188 CLR 159; 142 ALR 687 at CLR 167(Brennan CJ) and at CLR 196–7 (Gaudron J). The business in hand for Girvan Australia was managing the facility agreement and bringing it to a point where the loan could take place, and it was necessary to take steps towards the grant of the mortgage by Maronis to bring that about. It was Mr McMahon's professional duty to serve the interests of Girvan Australia in this respect, as in other respects.

[339] Paragraph 34 alleges to the effect that in the course of acting for Girvan Australia when they knew that no other solicitor was acting on behalf of Maronis, Clayton Utz did a number of things which forwarded obtaining the mortgage from Maronis. There are lengthy particulars of para 34.

[340] Paragraph 35 alleges to the effect that Clayton Utz knew or ought to have known that the interest of Girvan Australia and the interest of Maronis were in actual or potential conflict such that Clayton Utz could not act for both and properly discharge their duties as solicitors to each. Again there are lengthy particulars, which must be addressed.

[341] Paragraph 36 alleges to the effect that Clayton Utz owed to Maronis a duty of care and/or fiduciary duty not to act as solicitors for Maronis nor to purport to act for them without first obtaining Maronis' instructions based on informed consent. It is also alleged that Clayton Utz owed Maronis a duty of care and a fiduciary duty to make it clear that they were not acting for Maronis. In para 37 it is alleged to the effect that there were breaches of those duties.

[342] Particulars (aa), (ab) and (a)–(d) of para 34 allege that Clayton Utz handled and knew the contents of a number of documents which were involved in the loan transaction including the Nippon facility letter dated 11 May 1989, drafts of the facility agreement and drafts of the securities; that Clayton Utz prepared minutes including minutes of Maronis, and arranged for their execution, and that Clayton Utz received documents which were completed on 1 June including the minutes, the security documents and authorities to deal with the certificate of title, Mr Duncan's statutory declarations and other documents. It is then alleged that Clayton Utz acted on and participated in settlement of the loan transaction by delivering the documents to Gadens. These allegations are correct except that it is alleged that Clayton Utz arranged for execution of the minutes whereas Mr McMahon did no more than send them to Ms Hooper.

[343] Particular (e) alleges that Clayton Utz received the form of authority and direction by Maronis which refers to the firm as "our solicitors", forwarded it to Ms Hooper, received it back when executed and passed it on, all without demurring to its terms. Particular (f) alleges that Clayton Utz acted and/or purported to act for Maronis in relation to the securities. There are many particulars in support of this allegation. Among them it is alleged correctly that Clayton Utz purported to act for Maronis in the letter to Messrs McCormacks dated 22 May 1989 and in the letter to the Land Titles Office dated 31 May 1989. Many other acts which are referred to in support of the allegation do not in my finding make out the allegation. These include the terms of a number of written and oral communications between Mr McMahon and Ms Lighezzolo of Gadens, none of which as established in evidence contained or implied any assertion that Mr McMahon represented Maronis. There is a similar allegation about communications between Mr McMahon and Mr Downes, none of which bear out the allegation. There is a similar allegation relating to communications between Mr McMahon and Ms Hooper, none of which bear out the allegation. There are also more general allegations which have not been made out, and an allegation

relating to a letter of 18 August 1989 from Clayton Utz to Foreign Investment Review Board dealing with extension of the conditions of approval; this letter does not relate to the loan and mortgage, it was not written at a relevant time and was written on instructions obtained from Mr Young of Loc-Tex International Pty Ltd. There was no contractual retainer by Maronis of Mr McMahon or his firm to act as solicitors for Maronis in relation to the mortgage, or for any legal business connected with the Nippon loan. Clayton Utz did not charge any professional fees to Maronis, its memorandum of fees Ex A5/1387 was directed to Capital Management in terms which show that the client was seen as Girvan Australia; no charge was made to anyone on the footing that work was done for Maronis. Although paragraph 43 of FFASC refers to a retainer in an alternative allegation, it was not Maronis' case at the hearing that there was a contractual retainer. It is clear from the evidence that there were no communications which brought a contractual retainer into existence, and no circumstances in which an agreement of that kind should be implied. Mr McMahon received his instructions to act from Mr Downes, who then was the managing director of Capital Management Ltd, a mortgage broking company which was wholly owned by Girvan Australia. It was Mr McMahon's evidence that his communications with Mr Downes began with Mr Downes saying: "Girvan Australia wants you to review the loan documentation for the Nippon Loan transaction." Mr Downes presented the subject to Mr McMahon as business which was being undertaken for Girvan Australia, in generally these terms.

[345] Capital Management arranged financing facilities for various groups including the Girvan Group. Mr Downes described himself as a loan facilitator. Capital Management charged Girvan Australia a fee of A$100,000 for Mr Downes' services. Mr Downes had no instructions from or communication with Maronis or anyone purporting to represent Maronis, and saw himself, in my finding clearly correctly, as acting for and in the interests of Girvan Australia. There is no basis for seeing Mr Downes as representing Maronis in any capacity. Mr Downes had no contact with the New Zealand companies and had no authority to give instructions on behalf of them and it is very improbable that he purported to do so. Maronis did not make any decision of its directors to retain Mr McMahon or his firm to anything, or to confer any authority on Capital Management, on Mr Downes or on anyone which might have extended to retaining Mr McMahon, and the persons who might conceivably have had ostensible authority to retain Mr McMahon namely Mr Duncan, Mr Ambler, Mr McCulloch and Mr Boscawen did not communicate with him.

[346] Mr McMahon communicated with Mrs Pauline Hooper of Girvan Australia on several occasions. Mrs Hooper, a chartered accountant, was in May and June 1989 the treasurer of Girvan Australia and worked under the supervision of Mr Hill whom she referred to as the finance director. There was no event which conferred or could be thought to have conferred authority on Mrs Hooper to give Mr McMahon any instructions on behalf of Maronis or to deal with him in any way on behalf of Maronis. Her evidence was that "Whenever I gave Peter McMahon instructions it was only on behalf of Girvan Australia." I accept that this was her understanding of the position and it is highly probable that the terms in which she spoke to Mr McMahon reflected this. There were several communications between them late in May and on 1 June 1989 dealing with the terms of the facility agreement and the deed of guarantee, including whether Girvan NZ was to be a guarantor. Mr McMahon referred to

Mrs Hooper for instructions on answers to requisitions made by Gadens relating to the LTS land. His belief was that these instructions came from Girvan Australia. On the terms of Gadens' letter the requisitions were made to Girvan Australia. Mr McMahon did not represent to Gadens that he was acting for Maronis. It was in the interest of Girvan Australia for Mr McMahon to answer Gadens' requisitions about the mortgage, as Girvan Australia's interests required that the mortgage should be given. Mr McMahon forwarded the draft minutes of all three companies to Mrs Hooper on or about 1 June 1989. There was nothing in their communications which could be a request for Clayton Utz to advise Maronis.

[347] Clayton Utz are referred to as "our solicitors" in the authority and direction executed under seal by all three companies including Maronis on 1 June 1989 and delivered to Gadens, with other documents, by way of completion of the transaction on that date. The authority and direction had been prepared by Gadens and it was a requirement by Gadens that it be executed and delivered on settlement. The document was part of loan documentation prepared by Gadens, delivered to Clayton Utz and reviewed by Mr McMahon, and forwarded on by him to Mrs Hooper for completion. Mr McMahon said in evidence "I did not pay particular attention to the form of authority which had been prepared by Gadens. I do not recall noticing the reference to Clayton Utz as 'our solicitors'". The reference to "our solicitors" was incidental to what the document authorised, and I accept that this evidence was true. The authority and direction was addressed to Clayton Utz and to Gadens and gave them authority to complete and date documents and to attend to any requisitions, and also an authority to pay in these terms: "To pay the amount of the initial advance to Gadens, solicitor or as they direct, and thereafter as our solicitors Clayton Utz direct Gadens." As this authority was given by all three companies, including Girvan Australia which was the borrower and the only company entitled to direct payment of the amount of the advance, the literal extension of the words used to a conferral of authority by Maronis and of the reference to "our solicitors" to solicitors for Maronis had no actual effect, and made no claim on Mr McMahon's attention. There is no claim that Mr McMahon was in breach of duty to Maronis in any action under the authority and direction, or in respect of any advice that might have related to the authority and direction.

[348] In two letters signed by Mr McMahon Clayton Utz were referred to as solicitors acting for Maronis. Mr McMahon signed and it is probable that he wrote a letter dated 22 May 1989 from Clayton Utz to Messrs McCormacks, solicitors. At that time Messrs McCormacks acted for Maronis, on instructions communicated through Loc-Tex International, in the exercise of the options, completion of the purchases of the 11 parcels of land comprising the LTS site, and consolidation of their titles in a new deposited plan. In his letter Mr McMahon said among other things "As you are aware, we are acting for Maronis Holdings Pty Ltd on a mortgage being given over the 'Cross Roads' site." He went on to refer to Messrs McCormacks' statutory inquiries when acting on the purchases and asked for the originals. McCormacks responded by letter of 22 May forwarding 11 bundles of inquiries and Mr McMahon replied on 23 May acknowledging receipt. Messrs McCormack's legal business for Maronis had no relation to the loan transaction or the mortgage. Messrs McCormack's beliefs and

understandings about Clayton Utz' authority to receive the bundles of inquiries could have had no influence on what if anything Maronis expected of Clayton Utz in relation to the mortgage.

[349] A letter of 31 May 1989 from Clayton Utz to the Director, Land Titles Office, written and signed by Mr McMahon, said "We act for Maronis Holdings Pty Ltd" and went on to direct the Land Titles Office to deliver certificate of title folio identifier 102/788987 to Messrs Gadens. That was the consolidated certificate of title to be issued on registration of deposited plan 788987. This letter was probably handed or sent to Messrs Gadens with the settlement documents on 1 June 1989, not directly sent by Clayton Utz to the Land Titles Office. Accompanying it were two other directions; one from McCormacks to Gadens dated 31 May 1989 undertaking to forward the certificate of title should it be delivered to McCormacks by the Land Titles Office, and another from McCormacks to the director of the Land Titles Office also dated 31 May 1989, which said "As the lodging party of deposited plan 788987 we hereby authorise and direct you to hand the title deed . . . to Messrs Gadens . . .". Although the evidence does not clearly show this, it is probable that on 1 June 1989 the certificate of title, which bore date 31 May, had not been handed out by the Land Titles Office to the lodging party after registration of the deposited plan. In my understanding the practice of the Land Titles Office would require the authority of the lodging party if a certificate of title which had not yet been delivered was to be used for registration of a mortgage in the same way as a duplicate certificate of title produced with a mortgage for registration. The direction by Clayton Utz to the Land Titles Office was not necessary or effective whereas the direction by McCormacks was. There cannot have been any real difficulty for the Land Titles Office as the mortgage was registered on 7 July.

[350] The statements in these letters are admissions and evidence that Clayton Utz acted for Maronis at the time of the letters, in the business with which the letters dealt; but that evidence cannot be relied on to infer that there was a contractual retainer or a retainer implied from circumstances to act for Maronis on the mortgage, because it is clear from the evidence overall that there was not. Further, they would not support a finding that any retainer extended to giving advice about the decision to grant a mortgage in the first place.

[351] Mr McMahon dealt with these letters at several points in his evidence. In his first affidavit he said of the letter to McCormacks "I do not know why I stated the role of Clayton Utz as I did in that letter. At no time did I consider Clayton Utz was acting for Maronis." Of the letter to the Land Titles Office he said "I have no recollection as to why I stated the role of Clayton Utz as I did in that letter. At no time did I consider Clayton Utz was acting for Maronis." In his third affidavit about 6 weeks after the hearing commenced he said that he had given further and earnest consideration to the letters and concluded that he ". . . must have believed in May 1989 that in some limited capacity, necessary to progress the mechanics of this transaction, the firm acted for Maronis." While he was being re-examined he returned with leave to evidence in chief and made some speculations about what may have been the basis of his making the statements in the letters; this evidence was no more than speculations about what Mr Downes may have told him, not based on any recollection, and at transcript p 3018 I stated my view that there was no substantial basis in that evidence for finding that Mr Downes purportedly conferred any authority to act for Maronis on Mr McMahon, or that Mr Downes could do so.

[352] On 26 March 1990 after changes in the control of the affairs and directorships of Girvan NZ Mr Clive Currie who had become a director wrote to Clayton Utz (Ex A6/18198) and directed the firm to deliver to Messrs Freehill Hollingdale & Page ". . . all files and documents held by you pertaining to the affairs of this company or its wholly-owned subsidiary, Maronis Holdings Ltd." Mr McMahon for Clayton Utz sent a reply on 30 March 1990 (Ex A6/1832) in which he said "We do not act for, nor have we ever acted for GNZ or Maronis nor do we hold any documents belonging to those companies. Consequently, we have no documents that we can surrender to your solicitors." Mr Duncan had approved the terms of the letter of 30 March 1990 before it was sent. The suggestion that Clayton Utz had acted or had purported to act for Maronis was not clearly made in this correspondence. It was first made in the statement of claim filed on 7 April 1994, in which it was a subsidiary alternative allegation.

[353] In my finding Mr McMahon did not have authority to write in the terms of the letters of 22 and 31 May or to state that Clayton Utz acted for Maronis. The statements were simply wrong. They were made while acting for Girvan Australia and in accordance with the interests of Girvan Australia; they were directed towards carrying out instructions to act for Girvan Australia and bring about an effective transaction, for which it was necessary that Nippon should obtain an effective mortgage. By representing to McCormacks that he did act for Maronis and inducing McCormacks, who acted for Maronis, to act on it, Mr McMahon incurred a duty in tort law to take reasonable care in the business to which the representation related, that is obtaining the bundles of inquiries and using them in dealings with Gadens in support of the mortgage. There is, however, no allegation and no indication that there was any negligence in doing those things, or that doing them caused any loss to Maronis. By writing and handing on the letter to the Land Titles Office Mr McMahon incurred a duty of care in the business which it dealt with, although there is no reason to think that the Land Titles Office acted on it. While these misrepresentations are not creditable to Mr McMahon and show him behaving with less than appropriate responsibility, I am not engaged in a punitive exercise, and I see no basis in them for any view that by making them and in the case of McCormacks obtaining action on them Mr McMahon or his firm incurred general responsibility to Maronis for the overall conduct of legal business related to the mortgage, or for any other matter.

[354] The statements in these letters do not indicate that Clayton Utz undertook the conduct generally of Maronis' legal business relating to the mortgage, or undertook to give Maronis advice on the commercial wisdom of giving the mortgage, or on any other matter. There is no indication in the evidence that any director or officer Maronis believed that Clayton Utz was doing any of those things, or relied on Clayton Utz to do any of those things. An undertaking to act in a particular way, and reliance on the undertaking or action of another person are common elements in situations in which a duty of care is imposed by tort law, and neither of those elements exists in this case. Other elements are that the party said to be subject to a duty embarked on performance of some task in relation to which the duty would arise, or assumed responsibility for the task; these are not part of the present facts.

[355] Except in relation to the two letters of 22 and 31 May, my finding is that Clayton Utz did not act or purport to act for Maronis in any relevant way.

[356] In support of a submission that Clayton Utz put itself forward to Gadens,

Nippon, Land Titles Office and McCormacks as the solicitors for Maronis and Girvan, Maronis' counsel pointed to a number of pieces of correspondence in which there were references to Maronis. Apart from the two letters I have mentioned none of these states that Clayton Utz acted for Maronis, and the way in which they deal with the proposed mortgage to be given by Maronis is consistent throughout with the true position in which Clayton Utz acted for Girvan Australia in relation to the loan agreement, and in doing so attended to things which it was necessary for Girvan NZ and Maronis to do if the loan was to proceed in the interests of Girvan Australia. The correspondence dealt with matters which obviously affected the interests of Girvan NZ and Maronis, but attending to those matters was not a representation that Clayton Utz was acting as solicitors for those companies. Referring to Maronis Holdings and to the proposed mortgage as the subject matter at the head of a letter, as happened a number of times, was not an indication of anything other than the subject matter of the letter; it was not an assertion that Maronis Holdings was the writer's client.

[357] Maronis' counsel also pointed to a letter of 10 April 1989 (Ex A3/785) from Clayton Utz to Mr Downes of Capital Management which referred to an intention to mortgage the LTS properties pursuant to a new loan facility with Westpac and asked for an opportunity to review any documentation relating to a loan facility with Westpac in the interest of expedition and also "so that we can consider whether there is any stamp duty effective structure that would be appropriate for Maronis Holdings . . . as borrower". This is not an indication that Clayton Utz acted for Maronis Holdings in any way.

[358] The allegation that Clayton Utz knew that no other solicitor was acting on behalf of Maronis in relation to the transaction is made out in as much as Mr McMahon was not told of and did not encounter any other solicitor acting in relation to the mortgagor or the loan in the interest of Maronis. This, however, relates to completion of the documentation and the events of 1 June 1989; Mr McMahon had no reason to know or consider whether or not Maronis had obtained advice from another lawyer in relation to the transaction.

[359] The allegation in para 35 that Clayton Utz knew or ought to have known that the interests of Girvan Australia and of Maronis were in actual or potential conflict such that Clayton Utz could not act for both and properly discharge their duties as solicitors to each directs attention to what would have been required for the proper discharge of duties as solicitor to each, and this in turn directs attention to what were or should be supposed to have been the terms of any retainer or the scope of the work which it was the solicitor's duty to do, and whether it was a duty of the solicitor to advise on whether the transaction should be entered into at all. It was plain that the interests of Maronis and the interests of Girvan Australia in the transaction were different, and this was so obviously so that I cannot understand that it would occur to a solicitor that this needed to be pointed out to company directors, especially to persons such as Mr Ambler and Mr Duncan who were directors of a public company with a very large business and who were working as executives in that business. There are clients, no doubt, who suffer from some social, intellectual or other personal disadvantage which would prompt a solicitor to explain so primary a matter, but only in the strangest of circumstances would directors of public companies and their subsidiaries be in that position. If Maronis wished for advice about whether it should enter into the transaction and retained a solicitor to give that advice the solicitor would be in a position where his duties to different clients conflicted if he also acted for

Girvan Australia. If Maronis made its own decision about entering into the transaction, a solicitor who acted for Maronis in accordance with that decision, as well as acting for Girvan Australia would not, in my opinion, be in a position where there was a conflict in his duties to different clients, unless and until the clients fell into dispute. (Mr McMahon's position was quite different.)

[360] In para 36 it is alleged that Clayton Utz owed to Maronis a duty of care or a fiduciary duty not to act for Maronis and not to purport to act for Maronis without first obtaining actual instructions based on informed consent. I hold that there was no such duty because Clayton Utz did not act or purport to act for Maronis, and also because there were no circumstances in which there was a conflict of duties if Clayton Utz had acted for Maronis. It is also alleged in para 36 to the effect that Clayton Utz owed Maronis a duty to make it clear (if it were the case) that Clayton Utz were not acting for Maronis. I do not uphold this because Clayton Utz did not purport to act for Maronis and there was no reliance by Maronis on Clayton Utz acting in any respect as Maronis' solicitors.

[361] Maronis' counsel submitted that one instance of negligence consisted in the failure of Clayton Utz to confirm directly with Maronis that Clayton Utz had instructions to act. If a solicitor without instructions set about conducting some professional business on behalf of a supposed client as if he did have instructions, I would think that the solicitor would incur a duty of care in tort and that it would be a breach of that duty not to take reasonable steps to ascertain what the supposed client in fact wished the solicitor to do and in what way the supposed client wished the business to be conducted. Expert evidence naturally tended to confirm the need for a solicitor to refer to a client for instructions, which are not usually accepted through the agency of a finance broker. Submissions on this subject were developed at great length, but shortly they were to the effect that if Mr McMahon had attempted to obtain instructions from Maronis he would and should have referred to the company's office in New Zealand, and that if he had done so the proposal to grant the mortgage would probably have come to the notice of Mr Boscawen and Mr McCulloch; and that if they had known of what was proposed it was likely that there would have been a different outcome. It was also submitted that it was probable that if there had been any attempt to obtain confirming instructions from Mr Boscawen, Mr McMahon would have learnt that there were directors or supposed directors who had not been consulted, and would and should have advised that the transaction had to be considered by a properly constituted board meeting of which all directors were notified.

[362] Maronis' counsel in submission erected a large structure of outcomes on the contention that Mr McMahon ought to have spoken to Mr Boscawen to obtain instructions confirming that Mr McMahon was to act for Maronis. This failed of effect because Mr McMahon did not act for Maronis in the transaction, and because Mr Boscawen was not an appropriate source of instructions as he was not an officer of Maronis. The structure of consequences built on this supposed failure was that if Mr Boscawen had known that the transaction was to be settled without first obtaining a bond he would in some way have brought it about that it would not have proceeded. This is quite a wrong view of Mr Boscawen's position, in which he did not have control or a great deal of influence over Maronis' affairs or the decisions made by its directors; he certainly had less influence than Mr McCulloch who had pointed out his own views in a clear way and without effect.

[363] If there was a need for Mr McMahon to obtain confirmation of the

authority which he incorrectly professed to have with respect to obtaining the bundles of inquiries, or directing delivery of certificate of title, the correct development of the probabilities about how he would have gone about it is that he would have sought to communicate with Maronis through to Mr Downes, or Mrs Hooper, or Mr Ramsay who was Maronis' secretary and was located in Sydney, or through Mr Duncan. As Mr McMahon never perceived any need to communicate directly with Maronis it is not possible to go beyond speculation as to how he would have done so; but it is very improbable that he would have referred to Mr Boscawen in New Zealand.

[364] Elaborate chains of possibilities could be conjectured on what may have followed if Mr McMahon had referred directly to Maronis' office in New Zealand. It has to be remembered that Mr Ramsay in Sydney and not Mr Boscawen was the secretary of Maronis. Whatever Mr Boscawen may have believed and whatever information he may have given, Maronis in fact had only two directors namely Mr Ambler and Mr Duncan, and Maronis entering into the mortgage was in accordance with their wishes and authority expressed in board minutes. As Clayton Utz did not act or purport to act for Maronis on the grant of the mortgage, consideration of this line of submissions cannot really begin, but if it had begun, the authority and approval given to granting the mortgage by the actual members of the board appear to me to remove from significance any consideration about what might have happened if other persons who in reality were not members of the board had been involved. If all the persons of whom Mr Boscawen spoke as board members and also Mr McCulloch had considered what should be done they are unlikely to have approved of the transaction without adopting some or all of the conditions proposed by Mr McCulloch, but Mr McCulloch's recommendations were known to Mr Duncan and Mr Ambler, and even if it had been Mr McMahon's duty to seek some express instructions and to resort to Mr Boscawen or Mr McCulloch to do so, it would not be a correct view of causation, in terms of the realities of the situation, to attribute causation of the decisions of Mr Duncan and Mr Ambler and their execution of the mortgage to his failure to do so.

[365] It was also submitted that it was negligence that Clayton Utz failed to take steps to be satisfied that Maronis was aware of the transaction and its salient features and of the fiduciary and legal duties of its own directors and officers in relation to the transaction. This was supported by passages in the expert evidence of Mr West, particularly by reference to paras 30–33 of his report of 25 November 1998. Mr West's view was to the effect that, from the documents which became available to Mr McMahon on 1 June, a reasonably prudent solicitor would have seen that the directors of Maronis who participated in the directors' meeting were also directors of borrower, and a reasonably prudent solicitor would have considered that a breach of directors' duties was likely occurring, and would not have facilitated completion of the transaction until he had obtained instructions from the directors of Maronis other than Mr Duncan and Mr Ambler that it was in order to proceed to settlement. Again consideration of this submission is brought to an end because Maronis in fact had no other directors than Mr Duncan and Mr Ambler. It would be very difficult to establish that a solicitor's duty of care ever required the solicitor to divide the board of a client company into groups and direct advice to only one group and not to others, and it would also be very difficult to establish that it was ever the duty of a solicitor to take steps to be satisfied that directors of a company were aware of

a transaction of a company and of its salient features, or of the duties of directors in relation to the transaction. Only in markedly unusual circumstances would a solicitor or other person dealing with a company be obliged, by a duty of care, to set about instructing directors in their duties and the company's interests; adopting corporate personality for carrying on business is itself an indication that there is no need for explanations on many basic matters. Action by some directors which a solicitor knew to be intentionally hostile to the company's interest might, I suppose, in some circumstances lead to the existence of some such duty, but it cannot in my view be regarded as an ordinary part of a solicitor's business to weigh up and come to a view about whether particular directors or officers of a company ought to be participating in a decision having regard to offices they hold in some other company. I reject this submission.

[366] It was further submitted by Maronis' counsel that Clayton Utz was negligent in respect of failure to advise that independent legal advice be given to Maronis as a condition of the transaction proceeding. Again this submission depended on the view that Clayton Utz undertook to act for Maronis in respect of the mortgage transaction, and on a further assumption that by doing so Clayton Utz incurred some responsibility not only for legal professional work relating to carrying out and completing the transaction but also for advice in relation to the decision to enter into it. In my view there is nothing in the circumstances which should be regarded as making it Clayton Utz' responsibility to address the decision whether Maronis should have entered into the transaction, or to address any aspect of Maronis' affairs which might be related to that, such as whether Maronis should obtain independent legal advice about the decision to enter into the transaction, or independent legal advice about the conduct of legal professional business under the transaction. Nor is there anything which made it Clayton Utz' responsibility to address whether Maronis consented to Clayton Utz acting for Maronis as well as for Girvan Australia or whether Maronis was in a position to give informed consent to Clayton Utz so doing.

[367] If it had been established that Mr McMahon should have given some advice to Maronis it is improbable that any advice he gave would have altered the readiness of Mr Duncan and Mr Ambler to grant the mortgage. If advice had been in terms of legal advice pointing out the directors' duty and the kind of consideration the directors were obliged to give to their decision in *Howard Smith* terms Mr Duncan would have reached the same conclusion as he actually did; Mr Duncan was already, from his professional qualifications and experience, in a good position to understand generally the duties of a director, while Mr Ambler, exercising what he perceived as his signing role, would have followed Mr Duncan. If it should be supposed that Mr McMahon ought to have given some more concrete advice appraising the commercial aspects of the proposed transaction it is very improbable that he would have made any impression on Mr Duncan's mind, as Mr Duncan, with his professional and commercial experience and actual involvement in Girvan affairs was obviously in a far better position to appraise the commercial implications than Mr McMahon; so too was Mr Ambler, although he probably would have followed Mr Duncan. Mr Duncan and Mr Ambler already had Mr McCulloch's careful written appraisal of the conditions which should be imposed, and although Mr McCulloch was a professional manager deeply involved in the affairs of the New Zealand companies his advice was not adopted. Treating Mr McMahon as in a position to influence the course of events by advice would not accord with

the realities of the conduct of affairs of the New Zealand companies, in which Girvan Australia had practical control; Mr Boscawen and Mr McCulloch recognised that this was so, and in my view they were recognising realities: see transcript pp 311.6 and 2406.22. The influence of hypothetical advice by Mr McMahon on the minds of Mr Boscawen or of Mr McCulloch or of persons who were incorrectly treated as directors of Maronis is not what requires consideration, as those persons were not directors nor directing minds of Maronis.

[368] It was further submitted that there was negligence if what Clayton Utz knew of the financial affairs of Girvan Australia was such as to raise doubt about its stability. Mr McMahon was cross-examined at some length (transcript pp 2859–907) with a view to showing that he had a degree of concern about the financial viability of Girvan Australia by 1 June, and he denied that proposition (transcript p 2908 l.18). This passage of cross-examination included putting before Mr McMahon some circumstances about payment of legal bills to Clayton Utz, requests for payment and the times during which payment was outstanding; the material elicited did not really indicate anything which could be the basis of a general view about the financial viability of Girvan Australia. Cross-examination also dealt with transactions and professional attendances relating to dealings of Girvan Australia with a company called Highminster, and with Bolfox Pty Ltd; these were inconclusive. Cross-examination returned repeatedly and inconclusively to the Bolfox transaction. As a general indication of the financial viability of Girvan Australia it has no real force. It is unremarkable that a company which has many projects should not carry one out fully. Mr McMahon gave evidence which I accept that he did not at the time see the outcome of the Bolfox transaction as a crisis. He attempted a further explanation in re-examination (transcript p 3008) but that explanation was a retrospective reconstruction and has no force. However, the cross-examination dealing with Bolfox really created no difficulty for Mr McMahon. Cross-examination also dealt with the Studio City Project, which did not proceed.

[369] It was suggested that the circumstance that Clayton Utz' fees in respect of the transaction were paid at the time of and apparently out of the proceeds of the advance to Girvan Australia was in some way an unsatisfactory circumstance. Mr McMahon's evidence was to the effect that he had no concern about this subject and I do not see any reason why he should have. I see it as a normal event that fees in relation to a loan transaction be paid out of or at the same time as making the advance.

[370] It was also as I understand the cross-examination suggested that there were some deep significance in the choice, in drafting company minutes, between drafting a resolution in terms of the transaction being in the best interests of the company and drafting the resolution in terms of its being a transaction which should be approved. I see little to choose between these formulations and do not regard the choice of one or the other as an indication of Mr McMahon's beliefs or knowledge about the financial responsibility of Girvan Australia.

[371] Of greater importance than the cross-examination, which established no substantial grounds for concern, is the finding I have made elsewhere that Girvan Australia was not in any serious sense financially unstable in May and June 1989.

[372] Paragraph 37 of FFASC alleges that a number of matters were breaches of duties which I have held were not duties of Clayton Utz. These allegations are consequential on para 36 and fall with it.

[373] Paragraphs 38–41 form another group and arise out of allegations that there was fraud or breach of fiduciary duty on the part of Mr Duncan and Mr Ambler in taking Maronis into the transaction and that Clayton Utz are responsible, in various ways, for that fraud and breach of fiduciary duty. In support of this it is alleged that Mr McMahon knew of all matters alleged against Mr Duncan and Mr Ambler in respect of fraud and breach of fiduciary duty. As I have found elsewhere, Mr Duncan and Mr Ambler were in breach of their fiduciary duty as directors in that they failed to consider the interests of Maronis and in that they came to conclusions which it would not be possible to reach if they had done so. It is hardly possible to address the allegations against Mr McMahon because of his lack of association of any kind with the consideration given by Mr Duncan and Mr Ambler as directors of Maronis to what Maronis should do; Mr McMahon had no contact or communication with them and no need or reason to consider or ascertain how Maronis made its decisions. This group of allegations loses much or perhaps all of its force because it has been established elsewhere that the loan transaction was not entered into by Mr Duncan and Mr Ambler without any intention that the LTS project should proceed, but that their intentions were that it should proceed. The loan transaction was not entered into as a measure to relieve Girvan Australia from some severe financial strait irrespective of whether the LTS project proceeded; Mr McMahon did not know (and it was not the case) that Girvan Australia was in a severe financial strait and he had no reason to concern himself with ascertaining whether or not it was.

[374] The allegations in para 41 are as complex as allegations in a pleading could be, to the point of incoherence, but at their centre it is alleged to the effect that Mr McMahon knowingly assisted in fraud and breach of fiduciary duty on the part of Mr Duncan and Mr Ambler. This allegation is disposed of by the conclusion that Mr McMahon did not know of the breach of fiduciary duty which existed and did not know and had no concern to ascertain what considerations led the directors of Maronis to their decisions.

[375] Alternatively to the allegation in paragraph 41 of FFASC it is alleged in paragraph 38 that Clayton Utz were put on inquiry as to whether entry into the securities would be a result of a breach of fiduciary duty. I do not see anything in the circumstances which would put Clayton Utz on inquiry or make it their duty to ascertain whether there had been a breach of fiduciary duty by Mr Duncan and Mr Ambler, but in the principles derived from *Barnes v Addy* liability of a person knowingly assisting in a breach of fiduciary duty depends on dishonesty, and there was nothing in the circumstances which could lead to Mr McMahon's conduct being regarded as dishonest. Paragraphs 36, 39, 40 and 40A developed or turned on allegations that Clayton Utz acted or purported to act for Maronis in the transaction, and these have not been made out in fact.

[376] Paragraphs 43 and 44 make alternative allegations on the footing that Clayton Utz were retained to act for Maronis, that there were implied terms requiring care and skill, diligence and judgment, and many breaches. As I have found, there was no such retainer. If there had been, few if any of the matters put forward as alleged breaches could call for consideration; but in the absence of any factual findings defining a supposed retainer, this consideration cannot begin. Paragraphs 45 and 46 parallel paras 43 and 44 by making similar allegations in terms of a duty of care in tort law. In my opinion Clayton Utz incurred no such

duty and there was no negligence in respect of any dealings with Maronis. Paragraphs 47A and 47B allege damages and need not be addressed in relation to Clayton Utz.

[377] There was a body of submissions which suggested that an adverse view should be taken of Mr McMahon's credibility. I do not take an adverse view of Mr McMahon's credibility. He was cross-examined about a great many subjects, and at great length, including not only subjects which plainly were important for the issues in the litigation but also a number, to which considerable time was devoted, which were peripheral at best and could well have generated impatience on his part. In the circumstances his calm and control, and his care in his replies bore out, in my interpretation, his careful and conscientious approach to his evidence, in which I am satisfied that he was sincere. There were embarrassments for him in some aspects of his conduct, but those aspects must have seemed peripheral then and appear to me to be peripheral now to the claims against him. In several matters his evidence on events from many years ago came to seem to me to be reconstruction rather than a true exercise of recollection, and on one occasion I made a comment on this. In view of the very lengthy delays both in commencing the proceedings and in bringing them on for hearing, difficulties of recollection, and his resort to reasoning of that kind are not remarkable or adverse to credibility, although I cannot act on such reconstructions.

[378] Maronis called the expert evidence of Mr West, a solicitor of considerable commercial experience. Counsel for Clayton Utz submitted that no weight should be given to Mr West's evidence because it was not evidence of the existence of any relevant practices. In his report of 25 November 1998 under "Scope of this opinion" Mr West stated that he had been asked to report as to:

> (a) What the common practice of solicitors was at the relevant times . . . and
> (b) What a reasonably prudent solicitor would have done in the relevant circumstances.

[379] The report does not deal with what the common practice of solicitors was by establishing any instances of relevant practices. In para 10 the report states Mr West's opinion about a number of matters which a reasonably prudent solicitor would know and at para 14 gives an opinion about the conduct of a reasonably prudent solicitor. The report goes on to speak at a number of points in terms of giving Mr West's opinion about what the conduct of a reasonably prudent solicitor would be in relation to a number of matters.

[380] It is well established that evidence of the existence of relevant practices among solicitors of good repute is admissible and can be established by expert knowledge, but that the expert's evidence of what he himself would have done is not admissible. See *Permanent Trustee Australia Ltd v Boulton* (1994) 33 NSWLR 735 at 738 (Young J), and his Honour's reference as Young AJA, to *Permanent Trustee Australia Ltd v Boulton* and other authorities in the Court of Appeal in *MacIndoe v Parbery* (1994) Aust Torts Reports 61,534 at 61,543. Priestley JA concurred in these reasons: see 61,535. In my view this does not exhaust the scope of expert evidence which may be given about solicitors' practice; Young AJA did not express the view that the means that were referred to were exhaustive. In *MB v Protective Commissioner* [2000] NSWSC 718; BC200004097, in a ruling on the admissibility of evidence, Hodgson CJ in Eq referred to his Honour's holding in *Rabelais Pty Ltd v Cameron* (unreported, SC(NSW), Hodgson J, No 3168/91, 8 February 1993, BC9302077), that evidence could be admitted of opinion as to what a reasonably careful and competent

solicitor would or should do in specified circumstances. His Honour referred to *Permanent Trustee Australia Ltd v Boulton* and to *O'Brien v Gillespie* (1996) 41 NSWLR 549 but adhered to his earlier view. In paras 4–10 his Honour reviewed the forms of evidence which might be offered, but concluded at para 10:

> . . . I do remain of the view that, so long as the evidence is not directed at the legal standard to be applied, so long as it is based on fully stated hypothetical facts, and so long as the witness is properly qualified, then an opinion can be given as to what a competent and careful professional would do in those stated hypothetical circumstances.

[381] I admitted the significant passages in Mr West's evidence over objection because I am of the same view as Hodgson CJ in Eq. The exception to the hearsay rule stated in s 79 of the Evidence Act 1995 (NSW) indicates the limited circumstances in which expert evidence is admissible; but if those circumstances are made out, there is in my opinion no reason why specialised knowledge based on the witness's training study or experience should not equip the witness to have a view about what a competent and careful professional person would do in stated hypothetical circumstances. An expert witness is not in a position to present as an expert view a conclusion which involves the application of the legal standard or test. I understand that in *O'Brien v Gillespie* (1996) 41 NSWLR 549 at 557–8 Levine J acted on the view that s 80 of the Evidence Act did not authorise admissibility of expert evidence about the application of legal tests; I am of the same view. Mr West did not speak in such terms. I admitted the evidence because I was of the view that Mr West was shown to have specialised knowledge based on training and experience about the subjects to which his opinions related. However, the evidence when admitted remains subject to my consideration of its weight, and the absence of proof of practical instances where solicitors have conducted business in a way which contributed to the basis of Mr West's opinion is a factor in appraising its weight.

[382] Counsel for Clayton Utz contended that Mr West had insufficient time in relevant practice prior to 1989 to qualify as an expert as to whether there were any relevant general practices. I do not accept this because Mr West had had general banking and finance and commercial experience in legal practice from 1984, including work for different classes of clients at different times, at one period for a single major bank, at an earlier period only for borrowers. It was also pointed out that in 1989 Mr West was only about 30 years of age and had not yet become a partner in a large firm. It is true that Mr West was relatively junior in the profession in 1989, and this had some influence on my approach to his views. I regard Mr West as having had significant relevant experience giving him a basis for having specialised knowledge of the practice of solicitors acting in generally similar situations to the transaction now in question. It is right to generalise to some degree: I would not desert experience in favour of logic, and I would not reason every expert witness out of court with narrow definitions. At the heart of my reason for not finding Mr West's evidence persuasive is that he did not give what I regard as adequate weight to the consideration that a solicitor's duties to the client are limited in relation to the professional work the solicitor has been retained to do. In my understanding Mr West made a different approach, which may indeed be the approach taken by some commercial solicitors to their clients' affairs, in which if the client has a problem it is the solicitor's problem and the solicitor should make a contribution to it, whether it is related to the performance of the legal work which the solicitor is retained to do or related to the client's commercial interests and affairs. It is also significant that he took a more adverse

view of the significance of the file note of 15 May 1989 than I regard as appropriate, and he made an assumption that "Clayton Utz had been advised that commencement of development was to be deferred" which is incorrect; this assumption was inappropriately based on correspondence at Exs A4/907 and 4/951 which does not bear it out.

[383] In para 15 of his report Mr West said to the effect that a reasonably prudent solicitor in the position of Clayton Utz would consider that the solicitor was acting for Maronis, given that Clayton Utz negotiated the terms of the security documents, drafted the resolution of Maronis' directors and drafted replies to requisitions on title. I do not accept this view because it does not pay appropriate regard to the fact that Clayton Utz was acting for Girvan Australia in the loan transaction; all the business spoken of in para 15 was business which Girvan Australia's interest required its solicitor to carry out. Nor does it adequately reflect the commitment to Girvan Australia's interests which followed from accepting a retainer for Girvan Australia and the force of that commitment as a factor against there being some conclusion from circumstances that the responsibilities of a solicitor had been incurred to someone else.

[384] In para 16 of his report Mr West expressed the view that if Clayton Utz did not consider that the firm was acting for Maronis a reasonably prudent solicitor in the firm's circumstances would have notified Maronis that Clayton Utz did not act for Maronis and that Maronis should not rely on the documents without first obtaining independent legal advice. I do not accept this for similar reasons as I have expressed in relation to para 15 and further because it is my view quite outside the responsibility of the solicitor to reason out whether some company for which he is not acting has a need for legal advice; leaving to one side persons under social, intellectual or other disadvantages which a public company and its subsidiaries are most unlikely to have, a solicitor acting reasonably leaves decisions about whether to seek legal advice which are to be made by people for whom he does not act to those persons to address themselves.

[385] In para 20 of his report Mr West, when referring to a cumulation of circumstances relating to the different ultimate shareholding interests in Girvan Australia and the New Zealand companies and to differences in their interests in the transaction, expressed a view to the effect that a prudent solicitor would not have continued to act for all, or would have given them advice to obtain independent advice before he would continue to act. I do not accept this opinion because it lacks a basis in that Clayton Utz did not act for Maronis, and further it lacks a basis in any relevant conflict between what Girvan Australia and Maronis were trying to achieve by the transactions.

[386] In paras 21, 22, 23, 27 and 28 of his report Mr West expresses opinions consequential on para 20; I do not accept those opinions which in view of earlier holdings would not show any duty or breach of duty.

[387] In para 21 Mr West identifies the advice which Clayton Utz should have given Maronis as advice ". . . as to the risk of entering into the mortgage transaction, and to advise them as to the means by which they might protect their respective interest . . .". The subject is clearly the commercial risk of the transaction, an obvious matter which the directors of Maronis were in at least as good a position as Mr McMahon to understand, and it was actually dealt with in Mr McCulloch's memoranda; so they had that opportunity to consider it. In my view they would have learnt nothing from advice from a solicitor which was not

already known and obvious to them. In substance Mr West accepted that this was so in evidence at transcript p 195 as follows:

> Q — You would hardly have to tell a commercial person involved in this transaction that that was a corollary of the arrangements of which the solicitor was aware? A — I think the problem with your statement though, is who is he going to tell?

[388] On a solicitor's responsibility for advising on the wisdom of a transaction see *Beach Petroleum NL v Abbot Tout Russell Kennedy* (1999) 48 NSWLR 1 at 45–6; 33 ACSR 1: and the references there *Clark Boyce v Mouat* [1994] 1 AC 428 at 437 and to *Haira v Burbery Mortgage Finance & Savings* [1995] 3 NZLR 396 at 406 on a solicitor's involvement in advising on the wisdom of the transaction. To the same effect is the observation of Hope JA in *Hogan v Howard Finance Ltd* (1987) ASC 55-594 at 57-539:

> A solicitor is not responsible for advising a client about his investments except to the extent that he is retained to carry out that task.

See too *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at 412.

[389] The relation between a solicitor's responsibilities and the terms of his retainer has long been established: see eg *Midland Bank v Hett Stubbs and Kemp* [1979] Ch 384 at 402–3 (Oliver J):

> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors — or upon professional men in other spheres — duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172; *Griffiths v Evans* [1953] 1 WLR 1424 and *Hall v Meyrick* [1957] 2 QB 455 demonstrate that the duty is directly related to the confines of the retainer.

[390] In para 24 of his report Mr West expresses a view about the conduct of a reasonably prudent solicitor acting for a third party security provider and preparing draft minutes. Mr West's view was that the reasonably prudent solicitor ". . . would include in the draft minutes a clear statement as to commercial benefit, both to focus the directors' minds on the issue and so that the solicitor could ensure that the solicitor was not inadvertently assisting a breach of directors' duties". Mr McMahon and his firm were not in the position with which para 24 of the report deals. Mr West's evidence was that minutes containing statements about considering the interest of the company were not always obtained, although he spoke of this as a usual practice or a common practice. There was evidence about the practice of solicitors acting for lenders in what they require the minutes of the borrower to show, and that evidence established that there was not any settled practice, that solicitors of good reputation in 1989 adopted several different and not altogether consistent practices about whether they wished to see minutes, or extracts from minutes, of decisions to enter into guarantees and third party mortgages, and as to what requirements they had for expressions in the minutes. These practices grew out of concern that lenders might be affected by constructive notice of some breach of duty by the directors of a guarantor or provider of third party security. These practices were diverse because it is not possible to predict what circumstances might, in some future

litigation, come to seem to support a case that the lender had notice or constructive notice of some breach of directors' duty. Different people made different interpretations of what might happen.

[391] If there were any indication that the lender knew that the directors were behaving improperly or closed his eyes to indications that they might be, what appeared in the minutes and knowledge of their contents would be of small importance. Solicitors acting for lenders came under practical pressures to devise some course which could be followed as a matter of routine in transactions generally, and different solicitors produced different answers. From the point of view of a solicitor acting for the guarantor or provider of third party security the form of the minutes is the solicitor's responsibility only if his retainer extends to responsibility for drafting the form of the minutes, and the object which drafting of minutes is to achieve is to satisfy whatever requirement is imposed by the lender and his solicitor, if a requirement is made. If the guarantor's solicitor is aware of any breach of duty by directors what he puts in the minutes will be of little moment for his responsibility; if he is not aware of any breach he has no reasonable occasion to embark on instructing the directors in their duties unless he has been asked and has agreed to advise on that subject.

[392] Some of Mr West's opinions were affected by the view, which it was reasonable for him to hold, that it was or might be doubtful who in fact were the directors of the New Zealand companies. I do not need to address all these contingencies, as in the case of Maronis it has been established that Mr Duncan and Mr Ambler who purported to act as directors in fact were the only directors. In my opinion a solicitor's duty could require him to only deal with those who in fact were directors, and if he did this he would not be in breach of duty whether or not he believed or had grounds to believe that others also were directors or might be; his duty is to be tested against reality, and a failure, for whatever reason, to consult someone who in fact had no standing to be consulted could not be a breach of duty. Mr West's opinion in para 30 of his report cannot be upheld for this reason; the fact that only Mr Duncan and Mr Ambler functioned as the directors of Maronis was not an indication that a breach of duty was likely occurring. Similarly for paras 31, 32 and 33 there was no occasion to consult any others.

[393] Messrs Clayton Utz called the expert evidence of Mr Dixon-Smith. Mr Dixon-Smith had some advantages over Mr West in terms of the body of experience available to him in 1989. His report largely took the form of adopting factual assumptions made by Mr West and expressing his own opinion in relation to them. Thus in paras 10 and 11 of his report he dealt with the question whether a solicitor would consider whether there was a conflict of interest on the assumption that Clayton Utz was acting for Maronis as well as Girvan Australia, and in paras 12 and 13 he gave his view about whether on that assumption a reasonably prudent solicitor would have regarded it as his duty to advise Maronis as to the risk of entering into the transaction. Although assumptions underlying his opinions do not appear to me to have been made out, his answer is of some assistance in reaching a conclusion as to what should be regarded as falling within the scope of a retainer. He went on to deal in paras 16–21 with the involvement of a solicitor acting for a guarantor in appraisal of the corporate benefit of the transaction and in tendering advice to directors about their duties. Again the assumptions affect the answers but on those assumptions, which in the circumstances were unduly adverse to Clayton Utz, Mr Dixon-Smith said

"20. However, I do not consider it to be the duty of a solicitor to satisfy himself as to corporate benefit where there are no circumstances indicating to the solicitor that there may be an absence of corporate benefit." In my view this is correct and obviously so. Mr Dixon-Smith went on to express a view, again on assumptions unduly adverse to Clayton Utz, that there was nothing in circumstances assumed which should have alerted the solicitor to a breach of the directors' duties with respect to disclosure of interests and said "25. In my view a reasonably prudent solicitor would have thought that Maronis, Girvan NZ and Girvan Corp Ltd appeared to have a common interest in the transaction." On the adverse assumptions put forward, and also on the actual state of affairs before Mr McMahon, I regard this as a correct view.

[394] A solicitor acting for a client either under a retainer or by assuming the position of solicitor to the client without a retainer is a ready example of a fiduciary, but resort to fiduciary duty as a ground for remedy usually occurs where the solicitor has in some way handled or exercised power over property of the client for the benefit of the solicitor or of another client, or of some other person. Unless the solicitor in some way dealt with the property of the client there would not usually be any occasion for analysing the claim in terms of fiduciary duty or for addressing equitable remedies. Consideration of submissions relating to fiduciary duty is difficult to take further after concluding that Clayton Utz was not retained and did not undertake to be involved in Maronis' consideration of whether to be involved in the transaction, or in other business on behalf of Maronis, with the minimal exception relating to the bundle of inquiries. Identifying the relationship as a fiduciary relationship is no more than the beginning of an exposition of what the fiduciary was called upon to do, which depends, for solicitors as for fiduciaries generally, on an address to the facts and circumstances of the particular case: see *Beach Petroleum NL v Abbot Tout Russell Kennedy* (1999) 48 NSWLR 1 at 45–6; 33 ACSR 1.

[395] Maronis' case based on principles related to *Barnes v Addy* must be related to breaches of duty of Mr Duncan and Mr Ambler which have been established. Elsewhere I have shown my view that it is necessary to establish that Mr McMahon knowingly assisted in those breaches of duty in circumstances which objectively were dishonest. The claim cannot succeed because Mr McMahon had no knowledge or means of knowledge of or interest or concern in what considerations moved Mr Duncan and Mr Ambler to make their board decisions of 15 May and 1 June. Indeed there was no case and no evidence that he did know those matters, so there could be no conclusion that he knowingly assisted in their breaches of duty. I see no indication anywhere in the evidence, in my understanding, that Mr McMahon's conduct was in any way dishonest, or that whether or not it was honest in any way open to consideration. Mr McMahon's case was to the effect that he believed the borrowing transaction was in the best interest of Maronis on the ground that it would permit the building of the infrastructure work to take place. I find that he did in fact hold that belief, and that he was not aware of any intention or fraudulent scheme on the part of anybody that the money should be borrowed yet the infrastructure work should not take place; and on my findings there was no such intention or scheme.

[396] I would not regard as an indication of dishonesty information given to Mr McMahon or knowledge or belief of his that the money to be borrowed by Girvan Australia was to be used as general working capital for Girvan Australia, in a borrowing supported by Maronis without any particular relation to Maronis'

interest or the LTS site. It is not unusual or remarkable that a company should give a mortgage to support a borrowing by a related company and a decision to do so is not a signal for suspicion or inquiry, or for particular attention by anyone other than those who make the decision to give the mortgage.

[397] In the file note which records the first communication to Mr McMahon recognisably connected with the ultimate borrowing there is no indication that the financing then contemplated was to be applied to work on the LTS site. The file note dated 22 February 1989 (Ex A2/640) said:

> Brian Downes (Girvan) Advised that we to be instructed to act re new security of "Liverpool truckstop" being offered to Custom Credit on release of Stanton Rd security.

This suggests that the purpose was to support existing financing from Custom Credit. The file note went on:

> Maronis Holdings as reg*d* prop*r* — quare ownership: Downes needs to know so that he can disclose to financiers re prop*r* guarantees — ultimately owned by Girvan Corp New Zealand (formerly St Martins Prop)?? I said that we would supply info. Known to us but certain things happened in NZ that we not aware of — he should speak to Charles O'Neil or Bob Barraket.

Plainly Mr Downes was not purporting to speak on behalf of Girvan NZ or Maronis: he did not have much information about their affairs.

[398] Mr McCulloch's memorandum of 28 March 1989 which spoke of the borrowing as for general working capital and did not particularly tie it to infrastructure work, did not come to Mr McMahons' knowledge. When the Nippon letter of approval dated 11 May 1989 did come to Mr McMahon's knowledge, the fact that the purpose of the loan was general working capital and the implication that the money borrowed might not be used on the LTS site claimed Mr McMahon's attention, suggesting that before then he thought otherwise. In his evidence he does not give clear origins for his believing that the funds were to be used for the LTS site. However, he knew from some source that the money borrowed was to be used for that purpose; the evidence does not establish in any exact way when, by whom and in what terms he was told this. At a number of points in his evidence he confirmed that he expected that the money would enable work on the LTS site to proceed. The fact that he did think so is borne out by the consideration which he gave to the stamp duty possibilities associated with Maronis being the borrower of the funds. It is also borne out by his raising the question of Maronis being the borrower with Mr Downes as recorded in the file note dated 12 May 1989 (Ex A3/883) of his telephone attendance with Mr Brian Downes which includes the note "Girvan Corp will be borrower! He to arrange for Maronis Holdings to be borrower." It is also reflected in his file note of 15 May 1989 (Ex A4/906) of a conversation with Mr Downes on 15 May; the file note includes:

> Re Nippon Letter of Offer
>
> > Girvan Corp to borrow funds which may not be for Cross Roads develop. Maronis Holdings PL to provide security
>
> He wants us to review Letter of Offer.

[399] There is no evidence establishing that Mr McMahon was in any clear way ever informed, on any occasion which can be identified, that the money borrowed would enable work on the LTS site to proceed, and also no evidence that he was in any clear way informed that it would not be so used other than the reference to working capital in the Nippon letter of offer dated 11 May 1989. The

only likely source of any information one way or the other to Mr McMahon was Mr Downes, whose evidence was very firmly that he thought that the money was for the LTS site; and I accept that this was correct. In view of Mr Downes' understanding and of Mr McMahon's having no communication with anyone else it is probable and seems clear that his views were formed by something that Mr Downes told him.

[400] In speaking of his file note of 12 May Mr McMahon said to the effect that at that time he would have thought that Maronis would be the borrower. This confirmed that he then thought that the borrowing was for the LTS site. This is further confirmed by his advice to Mr Downes to arrange for Maronis Holdings to be the borrower. The fact that Mr Downes' principal Girvan Australia did not take up this advice but continued with arrangements for the principal to be the borrower was not, on any rational basis, an indication to Mr McMahon that the borrowing was not to be used for the LTS site. Mr McMahon's advice and views led to no change in events. There is simply no support in these circumstances for the pleading in which dishonesty is alleged against him.

[401] The connection between borrowing money and work on the LTS site could take various forms, all indirect in some way unless Maronis was the borrower and the advance was made in progress payments after work had been performed. So far as any contractual undertaking to Nippon Credit went, the reference to general working capital in the letter of offer meant that Girvan Australia was not obliged to Nippon Credit to use the money borrowed for the LTS infrastructure works. The absence of any contractual obligation to Nippon Credit on that subject could not establish, or in any real way indicate what was the proposed use of the borrowed funds. There was no indication to Mr McMahon from any source that the LTS development was not going to proceed.

[402] The file note of 15 May 1989 contains very little information; what it says is only an outline of something, and it is not possible to understand from it what the terms of the conversation really were, nor is it possible to understand whether the reference to what the funds might not be used for was a reference to something said in a conversation or, as Mr McMahon's evidence shows was possible, a reference in a note made before the conversation to something which he was to raise with Mr Downes.

[403] In my view it is more probable that Mr McMahon's file note of 15 May reflects something he noticed when he saw the Nippon letter of offer about what the letter of offer would permit than that it reflects some statement made to him by Mr Downes about the intended use of the funds. Only if Mr McMahon thought that the money advanced was to be used for the LTS development would the amplitude of what the terms in the letter of offer permitted claim his attention. It was submitted on behalf of Maronis that the file note of 15 May 1989 is a record of a conversation in which Mr McMahon was informed by Mr Downes that the reason why Girvan was the borrower and was to remain the borrower was that the money might not be used by the LTS property. The evidence of both Mr McMahon and Mr Downes does not support a finding that there was a statement in their conversation to that effect, and such a finding would not be supported by their evidence about their own beliefs and understandings either. Mr Downes' evidence was that he was only involved because the LTS project had to start. In my finding Mr Downes only knew of the proposal to borrow money from the Nippon Credit in the context of and as means of raising money for the

LTS project. For this reason it is very unlikely, indeed hardly possible that he told Mr McMahon that the Nippon loan was not or was not necessarily for the purposes of the LTS project. The submission put forward a possible reading of the file note, but it is not the only reading of which it is capable and is not the reading put forward by Mr McMahon.

[404] There were submissions to the effect that information so given by Mr Downes on 15 May would explain a careful choice of language in the draft minutes so as not to refer to "best interests" in relation to Maronis and Girvan NZ; it was submitted that Mr McMahon's omission to include reference to best interests stemmed from an appreciation that the transaction could not be so described. I do not accept this submission, which I regard as fanciful.

[405] It was put forward as an anomaly in Mr McMahon's position that he knew of the Dextran agreement and of the obligation of Girvan Australia under that agreement to fund the first A$8m of the cost of infrastructure works. When Mr McMahon learnt of the Dextran agreement he was acting in the interests of Girvan Australia and not of the New Zealand companies. In my view Mr McMahon had no occasion to test what he was told was proposed in and before May 1989 against the provisions of the Dextran agreement or other documents which he had seen the previous year in relation to the takeover. In his circumstances it was not a remarkable matter and did not call for close consideration that there was a difference between the arrangements contemplated in 1989 and those which the Dextran agreement provided for in 1988. Mr McMahon had no occasion to adopt a suspicious or investigative approach to the affairs of Girvan Australia or of Maronis.

[406] It was also submitted, in relation to *Barnes v Addy* doctrine, that Mr McMahon had behaved with moral obtuseness, an echo of a passage in the judgment of Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 398; 5 ALR 231. In my view there was no basis for this observation.

[407] Counsel referred me to the consideration given to the relation between solicitor's duty at common law and his fiduciary duty in the judgment of Cole JA (with whom Abadee AJA concurred) in *Macedone v Collins* (1996) 7 BPR 15,127 at 15,129–30 and Cole JA's citations from *Breen v Williams* (1996) 186 CLR 71; 138 ALR 259; *Birtchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384; [1929] ALR 273 and the judgment of Millett LJ (incorrectly attributed to Staughton LJ) in *Bristol and West Building Society v Mothew* [1998] Ch 1. Part of the passage from the judgment of Millett LJ has been cited with approval by the Privy Council in *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 599–600, but their Lordships did not set out this important passage at 18 cited by Cole JA:

> The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[408] Clayton Utz' counsel referred to several other judicial observations to similar effect, notably in *Beach Petroleum NL v Abbot Tout Russell Kennedy* (1999) 48 NSWLR 1 at 45 [188] and at 89 [452]; 33 ACSR 1.

[409] On the findings I have made Mr McMahon and his firm did not enter into any relationship with Maronis, or act in its affairs in any way in which Clayton

Utz incurred fiduciary obligations to Maronis. If Clayton Utz had done so, there are in my opinion no circumstances which bring under consideration any question of breach of fiduciary duty. Acting in the character of solicitor for both Girvan Australia and Maronis (if Clayton Utz had done so) would have involved Clayton Utz in fiduciary duties of loyalty and fidelity to the interests of both, but there would have been no breach unless their interests were in conflict and Clayton Utz did something which served the interest of one and not the other; both wished the transaction to proceed, neither involved Clayton Utz in advising whether the transaction should be embarked on and no conflict of duties ever emerged. There is nothing in the circumstances which brings any conduct of Clayton Utz within the connotation of disloyalty or infidelity which surrounds the concept of breach of fiduciary obligation.

[410] Maronis alleged that Clayton Utz were estopped from denying that Clayton Utz acted and/or purported to act for Maronis in relation to the Securities. This was raised by para 1 of the reply filed on 18 July 2000, which alleged that the estoppel arose out of written and oral communications between Mr McMahon and McCormacks and others, including the letter of 22 May, the letter of 31 May to the Land Titles Office, reliance on those representations by McCormacks as agents for Maronis and a number of events in which Mr McMahon is alleged to have purported to act for Maronis. Apart from the letter of 22 May there is no evidence which establishes that the terms of any written or oral communication between Mr McMahon and McCormacks included a representation that Clayton Utz acted for Maronis; Mr McCormack, the principal of Messrs McCormacks did not give evidence and did not establish what was communicated to him, what effect if any the statement in the letter of 22 May had on his conduct and whether he had any instructions which authorised him to forward the bundles of inquiries to Clayton Utz. There was no evidence that the conduct of Mr McMahon referred to in the reply conveyed any representation to Mr McCormack's mind. At the highest the evidence furnishes a basis, subject to whatever instructions Mr McCormack may have had, for a finding that a representation by Mr McMahon was relied on for the purpose of forwarding the bundles of inquiries.

[411] It is not possible to see furnishing the bundles of inquiry documents to Clayton Utz, or authorising the use of the certificate of title to register the mortgage as harmful to the interests of Maronis as then understood by the directors in charge of the company's affairs; their minuted decisions of 15 May and 1 June bear out fully that they wished the mortgage transaction to be forwarded, and that they wished the mortgage to be registered, so as to make their decisions effective, and when their wishes and intentions are attributed to the company as they should be, making the bundles of inquiries and the certificate of title available were no detriment to Maronis and caused no loss. If on 1 June Mr Duncan and Mr Ambler had been asked to give express authority for the certificate of title to be made available for registration of the mortgage it is certain that they would have done so. What they did do on that day impliedly but clearly authorised dealing with the certificate of title so that the mortgage would be registered.

[412] In my view there is no basis for an estoppel which would prevent Clayton Utz from disputing that they acted or purported to act for Maronis; the estoppel is not made out in a clear way even for delivering the bundles of inquiries, and would have no significant effect if made out for them. The supposed estoppel and

the matter pleaded in support of it could have no bearing on whether Clayton Utz was retained to advise Maronis on whether Maronis should enter into the transaction or grant the mortgage.

[413] Mr Duncan and Mr Ambler claimed that they knew of some legal advice which related to whether Maronis could grant a third party mortgage. No truly reliable information about this advice was given in evidence; it was not established exactly who consulted a lawyer, who the lawyer was, what exactly were the terms in which advice was sought, and what advice was given. It is, however, clear that this advice was not sought from Clayton Utz, and that there are other lawyers, both in New Zealand and Australia, who may have been consulted, while Girvan Australia had an in-house solicitor, Mr Barraket, who was a possible source of advice of that kind.

[414] It was contended that Clayton Utz owed Maronis a duty of care under the general law of negligence, and was in breach of it. In my understanding there are no tests for the existence of a duty of care to prevent economic loss which have been established by authority, and analyses in terms of relationship of proximity are no longer clearly supported by opinion in the High Court: see *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606. I do not find it possible to develop the basis for the view that there was no duty of care beyond saying that none of the elements which, in cases with any apparent factual analogies with the present, have been treated as elements in the basis on which the duty of care has been discerned are present here. In *Beach Petroleum NL v Abbot Tout Russell Kennedy* (1999) 48 NSWLR 1 at 78; 33 ACSR 1 the Court of Appeal, noting the decision of *Perre v Apand*, which had been given while *Beach Petroleum NL v Abbot Tout Russell Kennedy* was under reserved judgment, and noting the rejection by the majority of the view that proximity can be a touchstone of a duty of care, continued at [359]–[361], to address the solicitors' alleged duty in proximity terms and said, at [359]–[360]:

> In order to show that advice or the failure to give advice or warn amounted to a breach of a duty of care owed by Abbott Tout to it, for reasons which the High Court restated in *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241; 142 ALR 750, Beach had to establish that a relationship of proximity between the parties existed, that is to say had to identify a factor or factors of special significance in addition to the foreseeability of harm, when Abbott Tout acted or failed to act in the manner alleged. Foreseeability of harm alone was not enough to give rise to the necessary assumption of responsibility by Abbott Tout.
>
> To do this, in the context of this case, Beach had to show that Abbott Tout gave advice or failed to give advice or warn in circumstances where Abbott Tout realised or ought to have realised that they were being trusted to give their advice as a basis for action on the part of Beach: *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 572.

[415] In my understanding of *Perre v Apand* the process of reviewing factors of special significance before concluding that a duty of care to prevent foreseeable economic loss exists should still be undertaken by the court, notwithstanding that analysis in terms of proximity is no longer regarded as appropriate. In my opinion there are no factors which give any real support to such a conclusion. In particular, not only was there no element of Clayton Utz realising that they were being trusted to give advice as a basis for action on the part of Maronis: on the contrary it is clear that Clayton Utz was not being trusted to act in that way and the directing minds of Maronis did not rely on Clayton Utz for any advice or action in Maronis' affairs.

[416] In my opinion Clayton Utz did not owe Maronis a duty of care under the Common Law. There is no ground on which the plaintiffs are entitled to any remedy against Clayton Utz.

Claims against Nippon Credit

[417] Nippon Credit Australia Ltd (now Pty Ltd) (Nippon Credit) carried on banking business in Sydney in 1989. Nippon Credit was a subsidiary of Nippon Bank and its operations were supervised closely by divisions in Tokyo: International Research and Credit Analysis Division (IRCAD) and International Business Planning Division (IBPD). Nippon Credit functioned with a board of directors in Australia, its chairman was Sir Robert Norman and its managing director was Mr Y Fukushima until 1 May 1989, then Mr C Suzuki. Sir Robert Norman had formerly been chief general manager of the Bank of New South Wales. Mr S J Lesser was general manager corporate and Mr Chris Walker was senior manager corporate under Mr Lesser's supervision.

[418] Operations were carried on in a highly systematic way. A written submission collecting information on a loan application and making a recommendation was called a consultation. At an early stage in dealings with Girvan Australia a consultation about an unsecured loan of A$10m was put before Sir Robert Norman who advised against the proposal in its then form. Later after approval of the application for a secured loan of A$15m by the credit committee a consultation signed by the managing director Mr Fukushima was sent to Tokyo and considered by IRCAD and IBPD. The divisions in Tokyo initiated inquiries in answer to which Nippon Credit sent further information to Tokyo. Approval by a division in Tokyo was treated as completing the approval process so that Nippon Credit could enter into a transaction.

[419] Dealings between Nippon Credit and Girvan Australia were initiated when Mr Walker wrote to Mr Bartrop on 24 February 1989. There was no previous business association between Nippon Credit and Girvan Australia, and Mr Bartrop was known to Mr Walker through a favourable association when Mr Walker worked in another financial organisation. Mr Walker's opening letter was not highly specific but indicated that Nippon Credit had a favourable disposition towards property-related transactions.

[420] This letter was followed by a meeting between Mr Downes and Mr Walker on 8 March 1989. Mr Downes told Mr Walker to the effect that Capital Management Ltd (CML) was not interested in project funding arrangements for Girvan Australia, and was winding project-by-project funding arrangements down with a view to going to the financial market for a major syndicated financing of up to A$400m. He asked that Nippon Credit provide an A$10m cash advance facility supported by Girvan's guarantee to assist in general funding for existing projects. That is to say, from the beginning what was put before Nippon Credit was general funding for Girvan Australia, not funding specifically for the purposes of any particular project. Throughout the dealings Nippon Credit's documents do not record any consideration of project financing for the LTS project or any detailed address to the LTS project. This is a true reflection of Nippon Credit's viewpoint; nothing was suppressed or deliberately omitted from the written records.

[421] On 9 March 1989 Mr Lesser and Mr Walker sent a memorandum to Mr Kato of IRCAD in Tokyo attaching financing information ". . . so that you may become familiar with the organisation prior to receiving our consultation".

The matter under consideration was "We have been requested by Girvan to provide A$10m cash advance facility for a 12 month period." Mr Walker made a presentation of a proposed A$10m facility on an unsecured basis to a credit committee meeting on 21 March. The proposal was approved on conditions including obtaining cross-guarantees from companies controlled by Girvan. However in the next few days a consultation was put before Sir Robert Norman, who advised that Nippon should not proceed because no security was being provided and Girvan Australia's gearing ratio was excessive. Mr Walker forwarded further information to the credit committee on 23 March for discussion at a future meeting.

[422] On 11 April 1989 Mr Downes wrote to Mr Walker under the heading "Re Facility $15M" and put forward some details including that there was to be a fully drawn cash advance and the purpose was "to assist in development of the Liverpool Truck Stop". He gave the title references to the LTS land and enclosed a valuation and a design and construction management plan. Although there were references to the project, what was proposed was a fully drawn cash advance, not project finance. The enclosed valuation for A$27m was heavily dependent on the prospects of developing the LTS site. However, the proposal for one fully drawn cash advance was inconsistent with the financing being tied to development of the LTS site or made against stages in the development work and corresponding accretions in value. At no stage was lending put forward by Mr Downes or considered by Nippon Credit as project financing. An aspect of this is that it was never proposed or considered that repayment would be related to realisation of a project. The general nature of the LTS project was such that it was obvious that its whole development would take years and would cost far more than A$15m. A lengthy consultation dated 19 April 1989 prepared by Mr Walker for Mr Yamashita the general manager of IBPD and Mr Kato, general manager of IRCAD, stated "This short-term funded facility is required for general working capital purposes."

[423] Mr Downes' letter of 11 April did not change the subject under consideration into an application for project finance, did not invite Nippon Credit to take an interest in or supervise allocation of money to the LTS project, and did not have the effect of directing Nippon Credit's interest towards doing so. A proposed short-term loan of A$15m could not have been a means of funding a development with an estimated cost of $A160m. Mr Walker's evidence, which I accept, was that he always understood the purpose of the advance was general working capital for Girvan Australia and the group of which it was parent. A factor in my acceptance of his evidence on this is that the application was never presented by Mr Downes, in his letter of 11 April or in any other way, as an application for Nippon Credit to make any arrangement in which it would supervise or be concerned in the allocation of payments for development. Internal consideration within Nippon Credit continued, appropriately, on the basis that Girvan Group was dismantling project-by-project funding arrangements with a view to arranging a major syndicated debt facility, and continued to address an application for short-term funding for general working capital purposes.

[424] The credit committee considered Mr Walker's consultation and approved it on 19 April 1989. The consultation and minutes do not refer to Maronis, and do not show advertence to the fact that Girvan Australia was not the proprietor of the land which was to be security. Maronis was not involved in the transaction

and there was no occasion to consider its relation with Girvan Australia until it introduced itself in response to Nippon Credit's letter of offer in May 1989.

[425] Some communications between Mr Walker and Mr Kato in Tokyo followed and Mr Walker answered some inquiries. This led to Mr Kato asking on 1 May whether Girvan Australia or a subsidiary was the owner of the land and Mr Walker reported in reply that the land was owned by Girvan NZ (which he misnamed). To a further inquiry from Mr Kato, Mr Walker explained Girvan NZ's being the owner by referring to the takeover in 1988. IBPD sent a message of approval on 8 May 1989.

[426] Nippon Credit sent Girvan Australia a letter of offer on 11 May 1989 offering a loan of A$15m to Girvan Australia for the purpose of general working capital and specifying for first mortgage security to be granted by Girvan NZ, again misnamed, and for a Guarantee and Indemnity. The letter of offer called for written acceptances by Girvan Australia and Girvan NZ, endorsed on a copy of the letter of offer and supported by certified copies of resolutions of their boards and other material. On 15 May 1989 Girvan Australia and Maronis' boards of directors each passed resolutions for acceptance of the offer. In reply and also on 15 May Girvan Australia sent to Mr Lesser of Nippon Credit a letter accepting the letter of offer and stating that the security would not be supplied by Girvan NZ but by Maronis. Copies of the resolutions of both Girvan Australia and Maronis were enclosed. The reference in the acceptance endorsed on the letter of offer to Girvan NZ had been altered and the acceptance was signed on behalf of Maronis. An amended letter of offer of 17 May 1989 referring to Maronis was again accepted. In this way Maronis introduced itself into the dealings with Nippon Credit and at the point of introducing itself passed and furnished to Nippon Credit a resolution of its directors resolving (and thereby asserting to Nippon Credit) that the transaction was in the best interests of Maronis. By expressing its approval of Nippon Credit's proposal Maronis expressed approval of the purpose of the loan being for general working capital of Girvan Australia, as stated in the letter of offer.

[427] In my view it is very unlikely that a reasonable person or any person in Nippon Credit's position would have questioned this resolution and what it conveyed, and if such a person had known, as was the fact (although it was not easy to ascertain) that all directors of Maronis had joined in the resolution, it is in my view impossible to suppose that it would have been questioned.

[428] Mr Walker gave Nippon Credit's solicitors Messrs Gadens instructions to act in relation to the transaction on 17 May 1989. Messrs Gadens included a guarantee by Girvan NZ in their drafts; Nippon Credit's revised letter of offer of 17 May had indicated that this might happen. When seeking approval of the terms of the documents from a division in Tokyo on or about 26 May 1989 Nippon Credit reported "Maronis has been included as a guarantor because it has title to the land offered as security for the facility. The guarantee of Girvan Corporation (NZ) Ltd will also be provided as it owns Maronis (ie Maronis is a 100 percent wholly owned subsidiary)". In some way the division in Tokyo gave approval on or by 30 May 1989.

[429] Mr Walker's evidence was that throughout the transaction and on 1 June 1989 he was unaware that Maronis was not a 100% owned subsidiary of Girvan Australia. Clearly, if he had questioned this belief, material was readily available, including material actually in Nippon Credit's hands, which would have shown that Girvan NZ had a 74% interest. I do not regard this as an important matter.

To an outsider dealing with the companies, a 74% interest with a 26% minority in public ownership was not a signal for vigilance or for inquiry.

[430] On 30 May Mr Walker specifically asked Messrs Gadens "Aside from resolutions of the board of the guarantors should there be any representations by the guarantors that they understand and are aware of their obligations under the Deed of Guarantee and Indemnity." The advice on 31 May in reply was "The guarantors are companies. It has been our experience with the Girvan Group that they will not have executed and completed certificates of independent legal advice or similar certificates." The advice meant that certificates were not necessary for companies and could not be expected. Mr Lesser appears to have accepted this (less than comprehensive) advice at the time. He was in a position to control events on 31 May and 1 June, but he did not maintain a requirement for certificates of independent advice, and what he said in evidence was good practice was not followed by him on this occasion.

[431] On 30 May 1989 Mr Walker told Mr Downes by letter of a number of requirements to be attended to on settlement, including board resolutions accepting the facility agreement and the guarantee and indemnity. The resolutions of 1 June satisfied these requirements, as well as dealing with other things. There was a flurry of activity, inquiries and consideration on 30 and 31 May. On behalf of Girvan NZ Messrs Clayton Utz tried on 31 May 1989 to have the requirement for a guarantee by Girvan NZ removed and this was firmly rejected. Neither Mr Walker nor Messrs Gadens adverted to the facts that Maronis was not under ultimate 100% ownership of Girvan Australia or that neither Messrs Clayton Utz nor any other solicitor was conducting the business on behalf of Maronis. Both these matters are a little surprising but I am unable to see them as important, and in my opinion they are not adverse to Nippon Credit's position. When settlement proceeded on 1 June Nippon Credit and its solicitors had required and were provided with an array of information, not at all internally consistent, about the affairs of the companies they were dealing with. Internal inconsistencies, particularly as to the manner of execution of documents and the particulars given in Mr Duncan's statutory declaration of the board members of Maronis, could well have prompted further inquiry in the interests of Nippon Credit, but in my opinion lack of attention to these matters was not in any way a failure of responsibility towards Maronis.

[432] The claims against Nippon Credit are in sections VII and VIII of FFASC. The plaintiffs expressed their allegations, more sua, in very elaborate terms. It is alleged in para 28A that by virtue of matters alleged at great length in para 28 Nippon Credit knew or ought to have known that Mr Duncan and Mr Ambler held the meetings of 1 June 1989, passed the resolutions and executed the joint guarantee fraudulently and/or in breach of their fiduciary duties. Paragraph 28 alleges a great many matters which Nippon Credit knew or ought to have known at the time of taking the mortgage. These include (aa) the general history of the earlier negotiations leading to the loan including particular references in correspondence to the purpose of the loan, the absence of any term requiring the money lent to be used for purposes of Maronis or applied towards the LTS development, and Girvan Australia's intention to apply the loan for its own purposes as general working capital. It is then alleged that Nippon knew: (a) that Girvan NZ was a publicly listed company in New Zealand; (b) that Maronis was its wholly owned subsidiary; (c) the nature of the transaction; (d) the purpose of the loan not being for the business of Maronis or Girvan NZ; and (e) that their

business was not ordinarily the giving of securities for liabilities of others. The allegation that it was known that the mortgage was not given for the benefit of Maronis was put in a number of different forms: (f) and (fa). It is alleged that Nippon Credit knew: (g) that the persons acting as directors of Maronis were also directors of Girvan Australia and were in a position of conflict; and (h) that there were anomalies in the treatment of declarations of interest. In (i) and (ia) allegations were made relating to the non-involvement of independent directors of Maronis; but as I have found there were none. It is also alleged: (j) that Nippon Credit knew that Maronis did not have legal representation independent of legal representation of Girvan Australia. There are also particulars of knowledge of matters relating to the terms of the articles and the affairs of Girvan NZ which are no longer relevant. It is alleged: (r) that the possibility of conflict of interest was seen from a number of circumstances by Mr Lesser. Particular (s) refers to Nippon Credit's knowledge of its own decision not to lend A$10m unsecured. Particulars (t), (u) and (v) allege that Nippon Credit had knowledge of the difference between the basis on which the loan was being made and the basis on which it had been put forward on 11 April 1989 and that the change was disadvantageous to Maronis. Particular (w) alleges that it was known that Maronis was in a position of special vulnerability.

[433] All these matters of knowledge then are alleged by para 28A to show that Nippon knew or ought to have known that Mr Duncan and Mr Ambler acted fraudulently or in breach of their fiduciary duties, by para 28B to show that Nippon Credit failed to act as an honest person would in the circumstances and by para 28C to show that Nippon Credit was put on inquiry as to whether there was fraud or breach of fiduciary duty. Paragraph 28D puts forward the matters alleged in para 28 with an allegation that Nippon owed Maronis a duty of care and was in breach of it. Paragraph 29 raises matters under the principles related to *Barnes v Addy* and alleges knowing assistance in fraud, knowing receipt of a benefit from participation in fraud or breach of fiduciary duty and consequent liability in equity as an accessory.

[434] Paragraph 30 puts forward the matters theretofore alleged to show that it is unconscionable for Nippon to make a claim under the guarantee. In paras 31, 32 and 32AA there are a number of allegations relating to the guarantee. Paragraphs 32B–32G recast the same allegations in shorter terms specifically relating to Maronis.

[435] In final submissions against Nippon Credit Maronis' counsel sought decision on the liability of Maronis under the joint guarantee. Elsewhere I have held that Girvan NZ is not liable under the joint guarantee. Nippon Credit has thus far relied on the mortgage and not on the joint guarantee when seeking to enforce rights; it sold the LTS land under its powers in the mortgage and in the eighth cross-claim sued Maronis to enforce the personal covenant under the mortgage and did not rely on the guarantee. Girvan NZ has been in liquidation in New Zealand since 1990, and Nippon Credit has not brought any proceedings against Girvan NZ, by cross-claim in these proceedings or otherwise. Although the evidence does not deal with Maronis' affairs comprehensively there is no reason to suppose that it ever had any other substantial asset apart from the land, so any other liabilities may not be of much importance. Some matters of defence which may affect the mortgage have no application to the guarantee. For most purposes it is enough to address in detail Maronis' claim to set aside the mortgage. During the hearing Maronis invited Nippon Credit to give assurances

that it would not bring future proceedings based on the guarantee and indemnity, and no assurance was given. The events and the passage of time seem to have ended the practical significance of the guarantee and indemnity.

[436] In final submissions Maronis' claim was put forward as based on the first limb of *Barnes v Addy* relating to recipient liability, and on the law of tort for negligence due to the special vulnerability of Maronis and to Nippon Credit's knowledge of the special vulnerability. I was told that both bases of claim assume a breach of fiduciary duty by Mr Duncan and Mr Ambler, and I have found elsewhere that Mr Duncan and Mr Ambler acted in breach of fiduciary duty. Consideration of what breaches of fiduciary duty Nippon Credit had notice of must be confined to the breaches which the directors actually committed.

[437] In its claim of recipient liability Maronis contended for the conclusion that all Maronis must show is a breach of fiduciary duty by its directors, receipt and retention by Nippon Credit of property or its proceeds transferred in breach of fiduciary duty and the inability of Nippon Credit to establish the defence of bona fide purchaser for value without notice; and that notice includes constructive notice. Counsel put forward five propositions:

> Proposition 1. The law protects property rights.
>
> Proposition 2(a). Equity provides proprietary remedies against a defendant who is a recipient of trust property who cannot establish that he was a bona fide purchaser for value without notice.
>
> Proposition 2(b). The proprietary remedies will be available if the property remains in the hands of a recipient or if traceable proceeds of the property are in the hands of a recipient.
>
> Proposition 2(c). In the same circumstances Equity also has available personal remedies such as account, equitable compensation and equitable damages if, for some reason, a proprietary remedy is not appropriate.
>
> Proposition 3. Each of Propositions 2(a), 2(b) and 2(c) applies equally where the trust property consists of the property of a company transferred to the recipient by the directors in breach of their fiduciary duties.
>
> Proposition 4. There is no difference between (1) the claim against the recipient of trust property for a proprietary remedy when the recipient cannot prove bona fide purchase without notice and (2) the claim against such a recipient for a personal remedy under the first limb of *Barnes v Addy* in the situation where the recipient still holds the trust property or its proceeds.
>
> Proposition 5. By virtue of Proposition 4, that degree of knowledge or notice necessary to make good the claim is such notice as would be sufficient to defeat the defence of bona fide purchaser without notice. That includes constructive notice.

[438] The effect of these propositions is that Maronis did not put its case as one in which it accepted and discharged the burden of showing some positive ground on which it was inequitable for Nippon Credit to have and retain the benefit of the mortgage. It was quite important for Maronis to argue for a legal position in which Nippon Credit bears the burden of discharging itself, because to my observation there was no positive basis on which Maronis could show that it was entitled in equity to have the mortgage set aside or entitled on some restitution principle to have the mortgage and what Nippon Credit has taken under it restored. There was no positive case that Nippon Credit had behaved unconscionably in any relevant way so as to expose itself to an equitable remedy, and in my understanding there was no basis for any such case. There is no element of fraud, reliance on accident, breach of confidence, no element of intended harm and no other positive basis for finding that there was unconscionable conduct.

[439] In its written submissions Maronis put the following epitome of the case against Nippon:

(a) The mortgage and the Guarantee granted by Maronis were gratuitous, to the advantage of Girvan Australia and to the disadvantage of Maronis;
(b) The mortgage and the Guarantee were granted to assist Girvan Australia;
(c) The matters in (a) and (b) are what made the actions of Duncan and Ambler a breach of their fiduciary duties;
(d) So far as Nippon could see the Guarantee and mortgage were gratuitous and for the purpose of assisting Girvan Australia; they appeared to be to the disadvantage of Maronis (as indeed they were);
(e) Therefore Nippon did know all the matters which demonstrated breach of duty;
(f) To the above can be added the following:
    (i) Nippon knew Girvan Australia was seeking working capital facility for itself;
    (ii) Nippon had declined the general capital facility for Girvan Australia on an unsecured basis and had told Girvan Australia that was its reason;
    (iii) When a proposal came forward by the 11 April 1989 letter Nippon converted that into a general working capital facility being a loan to Girvan Australia supported by a mortgage by Girvan Australia's subsidiary;
    (iv) Nippon made the funds available on that secured basis;
    (v) Therefore Nippon procured the grant to it of the mortgage;
    (vi) Nippon did not perceive any benefit in the transaction for Maronis and in truth there was none.

[440] In my view the breach of fiduciary duty by Mr Duncan and Mr Ambler is not in a useful way epitomised by paras (a), (b) or (c). It was not ex facie a breach of fiduciary duties for directors of Maronis to grant the mortgage and guarantee gratuitously, to the advantage of Girvan Australia and the disadvantage of Maronis and to do so to assist Girvan Australia. Granting the mortgage and guarantee to assist Girvan Australia was within the powers of directors of Maronis, and was only a breach of fiduciary duty if they did not exercise those powers in good faith for the purpose of advancing the interests of Maronis. If the directors applied their minds properly to the interests of Maronis as they perceived them, and in the circumstances as they believed them, there was no breach of fiduciary duty. The directors of Maronis were in a position to see and appraise circumstances affecting Maronis' interest, its relationship and dealings with Girvan Australia and the expected advantages, and no financier dealing with them had any realistic means of finding out what the directors' considerations were and evaluating their quality. In practicality there was no inquiry which could have been made into what was truly moving the directors of Maronis, further than the steps which were actually taken, in which Nippon Credit saw the terms of the resolution of 15 May 1989, and on settlement its solicitors were given the terms of the resolution of 1 June 1989.

[441] I do not accept that an intending mortgagee or a solicitor acting for an intending mortgagee would reasonably have pressed inquiries into the decision of Maronis to mortgage its land for a borrowing by Girvan Australia further than seeing those resolutions. They truly were directors' resolutions, all the directors took part in them, and they expressed appropriate conclusions as to Maronis' interests. Those conclusions were not on their face doubtful or suspicious. They were conclusions in favour of a transaction of a kind which it is ordinary and unremarkable for a company or other person in commerce to enter into, according to the company's own judgment of its interests. There was a shared

economic interest in that Girvan Australia controlled a majority shareholding in Girvan NZ and (traced through several subsidiaries) in Maronis. Whether the interest was a 100% interest, as Mr Walker and Nippon Credit's solicitors wrongly believed, or a 74% interest, as they could with means available to them have found out if it had been important to pursue the subject, the shared interest made the transaction even more ordinary and unremarkable.

[442] Deploying a company's economic power by giving a guarantee or security over its assets is no more remarkable than entering into any other commitment of its property; it is often done in commerce every day. Looking at the minutes was as far into the directors' considerations and intentions as it was reasonable or feasible to inquire. There was no inquiry, search or consideration which was practicable but was not made. The state of the directors' minds and the consideration they had given to Maronis' interest was not information accessible to Nippon Credit by any other inquiry; they could not examine Mr Duncan and Mr Ambler viva voce, or search their hearts and assess the quality of their considerations. For all Nippon Credit knew or could find out, Mr Duncan and Mr Ambler had some plans in mind which would give Maronis comprehensive protection or large countervailing advantages: they might have carefully weighed up what Maronis' interest required and made an actual evaluation that those interests were served by making credit available for Girvan Australia: they might have had a comprehensive scheme of written contractual commitments for building work, finance and so forth. They might have done all the things that Mr McCulloch proposed. If Nippon Credit had got itself a mass of information about the inner workings of Maronis' business Nippon Credit would have been hard pressed to know what the information implied. The directors of Maronis resolved on 15 May that the arrangements were in the best interest of the company. Nippon Credit knew that and saw the minutes. The directors resolved on 1 June that the mortgage should be entered into: Nippon Credit's lawyers received those minutes. There was no more in all practicality that they could do. Calling for evidence of independent advice, which as I understand it Mr West advocated, would have added nothing; the independent advice of a lawyer could relate only, in all prudence, to the directors' powers; surely no lawyer would be so unwise as to attempt to give a certificate that directors had properly considered the application of their powers.

[443] The circumstances in para (f) of the epitome do not demonstrate either bad faith on the part of Nippon Credit, or breach of fiduciary duty on the part of the directors. They are acts in the conduct of Nippon Credit's business in its own interests. It was Nippon Credit's business to lend money, and to earn interest by doing so, and to attend to the risks of doing so. It was not Nippon Credit's business to look after Maronis' interests; that was the business of Maronis and its directors. There is in my opinion nothing to prompt further inquiry, or to form any basis for constructive notice of wrongdoing, about a financier's declining a loan unsecured, but deciding to make a loan when the intending borrower brings forward security from a business associate, not an individual suffering from some social or intellectual disadvantage, but a commercial organisation operating as a subsidiary of a company listed on a Stock Exchange. People dealing honestly with such organisations can take exercises of their powers at face value. Dealing with an uncomprehending child is different.

[444] It is not correct to see the transaction between Maronis and Nippon Credit as one in which Maronis was a volunteer and received no consideration.

On any perception of the transaction which has regard to its substance, Maronis had the benefit of being able to direct the Nippon Credit advance to its ultimate majority shareholder Girvan Australia. The value of that benefit was for Maronis to perceive. Without Maronis' participation there would have been no advance to Girvan Australia; and this was plain to Maronis in that Nippon Credit's first letter of offer did not refer to Maronis but to Girvan NZ, and Maronis introduced itself into the negotiations for a loan to Girvan Australia by altering the terms of the acceptance to substitute Maronis for Girvan NZ; and adhered to this position throughout the transaction. That is to say, Maronis took positive steps to involve Maronis and to see to it that the loan was made to Girvan Australia. This makes it wrong in substance to impose an interpretation that Maronis was a volunteer; in its dealings with Nippon Credit Maronis received the advantage of directing A$15m to Girvan Australia. Even more directly the transaction brought about, under some arrangement which evidence does not fully explain, the payment of A$5,076,142.13 to Girvan NZ out of the advance; Maronis' participation brought about this advantage for its 100% parent. This included A$200,000 as a premium for giving the security. The advantage was in the difference between having a claim against Girvan Australia and actually receiving payment; but it was an advantage. The remittance was actually made by Nippon Credit at the direction of Girvan Australia and Maronis. To treat Maronis as a volunteer in its dealings with Nippon Credit would ignore the substance of the events and depart from the basis on which equitable remedies are given.

[445] Counsel for Maronis placed much reliance on statements in *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; 93 ALR 385; 2 ACSR 161 about circumstances in which an intending mortgagee, who is to lend money to a third party supported by a mortgage given by a company without any indication that the mortgage or advance was for the purpose of the company's business, is put upon inquiry as to the authority of the directors of the mortgagee company to give the mortgage. *Northside Developments* related to the operation of the indoor management rule, and it was claimed that the company was bound by a mortgage which was given in its name but was forged, the application of the seal to which did not take place in accordance with the articles. Only one of several directors was involved in producing the forged mortgage; the loan which it secured was made for his benefit, and the other directors made no decision to grant the mortgage and were unaware of it. The mortgage bore the impression of the company's seal, the signature of one director and the signature of another person who purported to be the secretary, but was not in fact the secretary. *Northside Developments* did not relate to a mortgage resolved on by all directors where the seal was attested by a director and a secretary, and did not relate to a case where the directors exercised a power conferred on them and acted in accordance with the constitution of the company, but did so in breach of fiduciary duty by failing to act in good faith for the purpose for which their powers were conferred. Everything said in the judgments should be understood in the context of the case which the High Court decided. References in the judgments in *Northside Developments* to constructive trust liability are incidental to the matter there under consideration. The subject of inquiry and of being put upon inquiry which the judges contemplated was inquiry into whether the mortgage actually was executed by the company in accordance with its constitution. In the present case any inquiry into that matter would only have

confirmed regularity of execution, and there is no need to address the indoor management rule or the concept of being put on inquiry which was dealt with in *Northside Developments*.

[446] When illustrating the rule in *Turquand's* case or the indoor management rule, Mason CJ at CLR 154–5 cited the following passage from the speech of Lord Simonds in *Morris v Kanssen* [1946] AC 459 at 475:

> It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

This citation illustrates that the subject under consideration was whether the person purportedly representing the company has the authority which he claims. If he actually does, there is no subject for inquiry. There was no issue in which it was significant to establish whether a mortgagee was affected with notice of a breach of fiduciary duty.

[447] After extensively reviewing case law on the rule in *Turquand's* case, Mason CJ at CLR 160–1 made the following observations, on which the plaintiffs' counsel relied:

> However, there is no reason why a third party should be entitled to rely on the formal validity of the instrument and to assume that the seal has been regularly affixed if the very nature of the transaction is such as to put him upon inquiry. If the nature of the transaction is such as to excite a reasonable apprehension that the transaction is entered into for purposes apparently unrelated to the company's business, it will put the person dealing with the company upon inquiry. It is one thing to assume that the common seal has been regularly affixed to an instrument apparently executed for the purposes of the company's business; it is quite another thing to assume that the seal has been regularly affixed when the transaction is apparently entered into otherwise than for those purposes.

[448] At CLR 161 Mason CJ went on to give examples from case law relating to putting an outsider dealing with a company on inquiry as to the existence of authority to affix its seal and to take the company into a transaction.

[449] The nature of the transaction as it appeared to Nippon Credit and its solicitors was not in my opinion such as to excite a reasonable apprehension that the transaction was entered into for purposes apparently unrelated to Maronis' business; it was entered into, according to the terms on which Maronis was dealing with Nippon Credit, for the purpose of providing working capital to Girvan Australia, which was a company related to Maronis as its ultimate majority shareholder. Providing working capital was not apparently unrelated to Maronis' business; and the transaction was not a transaction apparently entered into otherwise than for the purposes of Maronis' business. There were circumstances which if known enhanced the appearance of purposes related to Maronis' business, as Maronis and its New Zealand parent had expectations and had gone some distance with arrangements for development work on the LTS site to be carried out with finance to be made available by Girvan Australia, and for other subsidiaries of Girvan Australia to provide services including construction services. The more inquiries had been pressed, the more confirmation of relation of the transaction with the business of Maronis would have been forthcoming; but it was not practically possible that any feasible line of inquiry would have put

Nippon Credit in a position to evaluate the decisions of the directors of Maronis for conformity with their fiduciary duty.

[450] Mason CJ's conclusions on the content of the rule appear in the following passage at CLR 164–5 on which again much reliance was placed by Maronis' counsel:

> What is important is that the principle and the criterion which the rule in *Turquand's* case presents for application give sufficient protection to innocent lenders and other persons dealing with companies, thereby promoting business convenience and leading to just outcomes. The precise formulation and application of that rule call for a fine balance between competing interests. On the one hand, the rule has been developed to protect and promote business convenience which would be at hazard if persons dealing with companies were under the necessity of investigating their internal proceedings in order to satisfy themselves about the actual authority of officers and the validity of instruments. On the other hand, an overextensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf of companies. Agency principles aside, to hold that a person dealing with a company is put upon inquiry when that company enters into a transaction which appears to be unrelated to the purposes of its business and from which it appears to gain no benefit is, in my opinion, to strike a fair balance between the competing interests. Indeed, there is much to be said for the view that the adoption of such a principle will compel lending institutions to act prudently and by so doing enhance the integrity of commercial transactions and commercial morality.
>
> It is not possible to give specific guidance as to the circumstances in which the nature of a transaction will be such as to put a person dealing with a company upon inquiry. So much depends upon the circumstances of the particular case, notably the powers of the company (if relevant), the nature of its business, the apparent relationship of the transaction to that business and the actual or apparent authority of those acting or purporting to act on behalf of the company. Much will also depend upon representations about the transaction made by such persons, for the party dealing with the company may often find protection in the principles of agency or the doctrine of estoppel. In this respect, I should indicate my general agreement with the comments made by Brennan J in his judgment, which I have had the advantage of reading since preparing these reasons, concerning the position of a creditor who takes a company's guarantee for another's debt.

[451] At the centre of his Honour's formulation of the circumstances in which the person dealing with the company is put upon inquiry is that the transaction appears to be unrelated to the purposes of the company's business and that it is a transaction from which it appears to gain no benefit. Neither of these was true of Maronis' mortgage as it reasonably should have appeared to Nippon Credit when it was given.

[452] At CLR 166 Mason CJ said:

> The result would have been different if Barclays had had a legitimate basis for thinking that the appellant had an interest in the borrowing companies and that they were associated with the appellant, one having an interest in the other: see *In re Hapytoz Pty Ltd (in liq)* [1937] VLR 40. The participation of the Sturgesses in the affairs of the companies and the common registered office was not an adequate foundation for that belief; nor did it amount to a representation by the appellant that it had an interest in any of the borrowing companies.

[453] This passage confirms that an inquiry of the kind contemplated by Mason CJ would have produced an early conclusion favourable to taking the mortgage.

[454] The reference to the judgment of Brennan J appears to be to this passage at CLR 182–3:

> A creditor will ordinarily be put on inquiry when his debtor offers as security a guarantee given by a third party company whose business is not ordinarily the giving of guarantees, for the execution of guarantees and supporting securities for another's liabilities, not being for the purposes of a company's business nor otherwise for its benefit, is not ordinarily within the authority of the officers or agents of the company. Of course, the circumstances may show that the giving of such a guarantee and supporting security (hereafter indifferently described as "guarantee") is for the company's benefit. For example, it may be for the benefit of solvent companies within a group to guarantee the liabilities of a holding company in order to benefit the guarantor companies as well as other members of the group. In such a case, provided the creditor has been satisfied that it is such a case, the apparently regular execution of a guarantee and supporting security may be relied on pursuant to the indoor management rule. Of course, the only but important consequence of a creditor being put on inquiry is that, in the event that an apparently regular guarantee turns out not to have been authorised by the guarantor company, the guarantor company may show that it is not bound.

[455] Brennan J's consideration was directed to the same context of inquiry as to authority to execute the deed, and his Honour referred to *Morris v Kanssen* and to *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 in this context.

[456] The passage at CLR 182–3 shows that the matter under Brennan J's consideration was the rule in *Turquand's* case and the authority of officers and agents, quite different to what is under consideration now. On the facts of this case it was not Girvan Australia or Mr Downes representing Capital Management Ltd or officers or agents who offered Maronis' mortgage as security; Maronis introduced itself into the events with the altered acceptance to the letter of offer accompanied by a copy of the minutes of the resolution of its directors recording that the transaction was in its best interests. Girvan Australia was (as Nippon Credit's officers believed) the ultimate owner of 100% of the shareholding of Maronis or (as they could have found with very little effort) of 74%; neither state of affairs would indicate that the mortgage was not being offered for the purposes of Maronis' business and was not otherwise for its benefit.

[457] *Re Hapytoz* to which Mason CJ referred at CLR 166 and Brennan J at CLR 183–4 was a case where the guarantee supported credit to another company which had common shareholders and carried on a similar business; it appears that Mason CJ chose this as an illustration of a legitimate basis for thinking that the mortgagor had an interest in the borrowing company; and Brennan J did the same, although he saw the facts as putting the creditor on inquiry. *Re Hapytoz* seems to have been referred to as an illustration only, as there was no decision on the point in that case. Consideration of *Rolled Steel* led Brennan J to observe at CLR 188 that it was unnecessary to consider a question arising where a party is on notice that the directors were in breach of their fiduciary duty. Dawson J at CLR 205–6 and Gaudron J at CLR 212–16 dealt with the concept of putting a person on inquiry in the context of inquiry as to authority of persons purporting to act for a company.

[458] In my respectful view the subject of decision in *Northside Developments* has no connection with Maronis' situation, in which the whole board of two members made a minuted decision that the mortgage be sealed; the deed actually was Maronis' deed and did not depend on any officers' authority, the

circumstances in which a person is put on inquiry as established by *Northside Developments* do not exist and if inquiries of that kind had been initiated they would have confirmed the regularity of the transaction. Their Honours' considerations, particularly Mason J at CLR 166 and his reference and apparent approval of in *Re Hapytoz* show that an association of the kind which existed here would allay inquiry.

[459] In the judgment of Mason CJ there are oblique and incidental references to the position of persons dealing with a company in business in which directors act in abuse of powers. When referring to *Rolled Steel* at CLR 162–3 Mason CJ cited a passage from the judgment of Browne-Wilkinson LJ at [1986] Ch 246 at 306–7 in which his Lordship referred, in giving propositions which summarised his conclusions, to the position of the third party who has notice that a transaction although intra vires the company was entered into in abuse of the powers of the company; and Mason CJ also referred to in *Re David Payne & Co Ltd* [1904] 2 Ch 608. The passages there referred to are significant at another part of the plaintiffs' argument.

[460] In the five propositions for which Maronis' counsel contended the onus is on the recipient to establish that he was a bona fide purchaser for value without notice. This would assimilate remedies where property has been transferred in breach of fiduciary duty with remedies where property has been transferred in breach of trust. That is a large claim. The field under consideration is extremely wide and involves proceeding from remedies available in respect of trusts which have an identifiable constitution, a trustee, a beneficial owner, trust property and clear means of inquiry to identify whether a transaction is in breach of trust to situations of breach of fiduciary duty which do not have all those characteristics and for which recognition that there was a breach of fiduciary duty might involve elaborate analysis of extensive information not likely to exist in an objective form, and also might involve knowledge and evaluation of the reasoning processes of a fiduciary.

[461] The force of proposition 2(a) is that it attributes to the recipient of trust property the burden of establishing that he was a bona fide purchaser for value without notice. The application of this proposition to trust property can be left on one side; it is one of the more obscure questions in equity whether the onus is on the plaintiff claiming to recover trust property to show that the defendant was not a bona fide purchaser for value without notice or whether the onus is on the defendant and whether the position truly is, as it is usually spoken of, that the matter to be proved is a defence. The principles that equity is directed to the conscience of the defendant and that persons are left to their legal rights unless there are grounds for equity to intervene seem to require that the onus be on the plaintiff. My attention is directed to the narrower subject of equitable remedies where property has been alienated as a result of breach of fiduciary duty. The question of onus is not usually a prominent consideration, and it is unlikely ever to have seemed prominent because procedures of interrogatories and discovery which have long been followed in Equity make it unusual for the evidence of a recipient not to be available. The usual position is that the facts have emerged.

[462] Maronis' counsel referred in support of proposition 2(a) to *Nelson v Larholt* [1948] 1 KB 339 at 342–3. In that case Denning J, while giving judgment ex tempore and speaking with great amplitude without identifying legislation or more than one of the authorities of which he spoke, did not address in a

considered way the question which party bore the onus and spoke in terms which to my reading appear to show his acceptance that the plaintiff had the onus (at 342):

> If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless if he had notice — that is, if he knew of the want of authority or is to be taken to have known of it — he must repay.

This did not express the idea that any onus was on the defendants. The question of onus cannot have been important in that case, as each side gave evidence and Denning J regarded it as an irresistible inference on the facts that the defendant knew or ought to have known that the purported agent had no authority to do what he was doing: see [1948] 1 KB 339 at 344.

[463] The plaintiffs' counsel also referred to a passage in *Re Diplock* [1948] 1 Ch 465 at 535 where when making observations on the primary judge's treatment of a passage from Lord Parker in *Sinclair v Brougham* [1914] AC 398 at 442–3, the Court of Appeal said:

> Returning to the passage quoted, we desire to call attention to some of its features. First, the right of the owner of the money is treated as equivalent to a right of property which, in the view of equity, can only be taken away by means of a purchase for value without notice.

[464] In my opinion this observation was not directed at identifying the party bearing the onus, nor was the passage from *Sinclair v Brougham* which was under consideration. When at 535–7 the Court of Appeal called attention to some features of the passage in Lord Parker's speech their Lordships did not call attention to any question relating to the onus of showing whether or not the recipient was a purchaser for value without notice, notwithstanding that Lord Parker had spoken of that subject as something for the third party to plead. The plaintiffs' counsel also referred to a passage from *Banque Belge Pour L'Etranger v Hambrouck* [1921] 1 KB 321 at 328. This passage too does not in my opinion deal with the question of onus.

[465] A rule of law so striking as that any recipient of property which has been dealt with in a transaction affected by breach of fiduciary duty must return it unless he establishes the circumstances in which he received it so as to clear himself would have left a very large mark on the law and there would be clear authority for it. It is commonplace to refer to the subject in ways which do not notice such a striking aspect of it. To take examples drawn from citations made by Mason CJ in *Northside Developments* at CLR 163, Browne-Wilkinson LJ in the passage from *Rolled Steel* refers incidentally to a transfer after an abuse of powers, while directing himself to a transfer after an excess of powers:

> A third party who has notice — actual or constructive — that a transaction, although intra vires the company, was entered into in excess or abuse of the powers of the company cannot enforce such transaction against the company and will be accountable as constructive trustee for any money or property of the company received by the third party . . .

Mason CJ also referred to *Re David Payne & Co Ltd* [1904] 2 Ch 608 for the proposition "The lender is protected unless he has knowledge that the borrowing is not for an authorised purpose . . .": at CLR 163. *Re David Payne* appears to

have been regarded as a case of abuse of power not of excess of power; to my reading this appears from the passage to which Mason CJ referred. There was no expression in these passages of any concept that the onus was on the recipient.

[466] Plaintiffs' counsel referred to a number of other authorities which to my reading are neutral with respect to the onus. Counsel referred to *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405 and consideration of that passage by Slade LJ in *Rolled Steel* at 297–8. Counsel also referred to the summary of conclusions of Browne-Wilkinson LJ in *Rolled Steel* at 306–7; but that summary does not to my reading bear out the proposition and his Lordship's proposition 6 tends, if anything, against it; this proposition is part of the passage cited by Mason CJ in *Northside Developments*. Counsel also referred to a short passage in the judgment of Millett J in *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 290–1 which does not support the proposition.

[467] Plaintiffs' counsel referred to a number of other authorities and some extrajudicial writings in support of proposition 3, but in my view none of them gave the support contended for.

[468] Whatever may have been intended by proposition 4, when proposition 4 and 5 are taken together they seem to mean that it was contended that recipient liability is incurred if the recipient had constructive notice of a breach of fiduciary duty; it is not essential that he should have had actual notice of the breach. Again a number of authorities was referred to to support this proposition, and in my opinion, the high point was the passage in the judgment of Buckley LJ in *Belmont Finance* at 405 and the citation of that passage as authoritative by Slade LJ in *Rolled Steel* at 297–8. Aspects of the passage in *Belmont* make it appear an unfortunate source for any authoritative statement. One aspect is the transition from the opening statement that a limited company is not a trustee of its own funds to the closing treatment of the money of the company as a trust fund, with no exposition of the transition except the statement that the directors are treated as if they were trustees of those funds. The assimilation of the recipient of funds of the company to the position of the recipient of trust funds takes place without any real exposition of why persons dealing with a company through its directors, that is, in practically the only possible manner, are assimilated with persons dealing with trustees; the sheer impracticality of the imposed uncertainties on dealings with companies is not addressed, although they are almost the universal vehicles of commerce and can only function through their directors. Buckley LJ dealt with constructive knowledge of a breach of fiduciary duty by directors by a brief parenthetical expression in the sentence (at 298):

> So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity.

There is a great distance between constructive notice in carrying on dealings in real property with trustees, in which the concept of constructive notice and the inquiries which reasonably ought to be made can be applied fairly clearly, and introduction of constructive notice into the operations of the directors of companies, where there are not and cannot be any well-established or clear lines of inquiry which it is reasonable to make into whether directors of companies have decided to enter into a particular transaction in good faith for the purposes

of the company's business. With respect, constructive notice cannot be dealt with in a persuasive way by a brief parenthetical reference. *Belmont Finance* appears to have been a case of actual notice.

[469] There is a significant body of judicial authority and opinion which supports the view that notice, including constructive notice of a breach of fiduciary duty will establish recipient liability. Significant authorities were included in the tabulation made by Smith J in *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* [1988] WAR 132 at 174–6. As my earlier observations show, some of the materials to which his Honour referred do not appear to me to have much force. "Constructive notice" as an expression conveys very little by which to understand in what circumstances a person who does not have actual knowledge of a breach of fiduciary duty is in a position in conscience where he should be treated as if he had. Of the materials known to me, the clearest exposition is found in the judgment of the Court of Appeal in *United States Surgical Corp v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 258; 55 ALR 417; 4 IPR 291. Notwithstanding that this decision was reversed on appeal (1984) 156 CLR 41, it appears to me to have considerable claims to respect for its treatment of the question of constructive notice in recipient liability, in view of its reasoning and the personal authority of judges who participated.

[470] The Court of Appeal (Moffitt P, Hope and Samuels JJA) said at 258–9:

> We have indicated, although in summary, the whole of the material which relates to the take over. There is no evidence that the directors of Aquila made any inquiries of any kind after the service of the statement of claim, and either before or after the extraordinary general meeting, for the purpose of investigating the allegations it contained. HPL (as Aquila had by then become) filed its defence well after the reverse take over had been completed. The question thus arises whether USSC carried the onus of proving that no such inquiries were made, or HPL of establishing that they were. The point did not arise in *Consul*, and we are not aware of any case which distinctly decides it.
>
> Some analogical assistance may be derived from the weight of authority in support of the view that the onus lies upon the holder of a legal estate to plead and prove a defence of bona fide purchase for value without notice: *Attorney-General v Biphosphated Guana Co Ltd* (1879) LR 11 Ch D 327; *Mills v Renwick* (1901) 1 SR (NSW) 173; 18 WN 213; *Wilkes v Spooner* [1911] 2 KB 473 at 486, per Farwell LJ; *G L Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216; [1958] 3 All ER 540, and the other cases mentioned in Meagher, Gummow & Lehane, Equity (1975), para 859, at 224, 225. *Corser v Cartwright* (1875) LR 7 HL 731 and *Burkinshaw v Nicolls* (1878) 3 App Cas 1004 are to the contrary effect.
>
> However, the doctrine of bona fide purchase for value without notice had no direct application to a case such as the present where, as we have at least assumed, the party sought to be made accountable did not take trust property in the strict sense. Here, the plaintiff seeking to make good an equitable right must, in our opinion, prove that the adversary acquired the property in suit with knowledge of that right. As we have endeavoured to show, this requirement may be satisfied if the evidence establishes facts which, to a reasonable man, would demand inquiry, and the absence of that inquiry. We do not doubt that the plaintiff must prove those facts by leading the necessary evidence; and must, at the end of the day be able to point to the absence of inquiry. But we consider that once the plaintiff has led that evidence, an evidentiary onus falls upon the defendant to prove inquiry if he can; and thus to rebut, by means which lie in his hands rather than the plaintiff's, the inference which the facts, unanswered and unexplained, would readily permit. In the present case HPL made no attempt to discharge that burden. In the absence of evidence from the quarter from which, if available, it should

> have come, we conclude that HPL made no inquiries, and that this omission was deliberate and prompted by the conviction that inquiries would reveal the truth of what USSC alleged. For these reasons, we are of the opinion that HPL acquired the assets it took in the take over with knowledge that rendered it accountable to USSC as a constructive trustee.
>
> We have considered this question of notice or knowledge on the footing that it was an issue at the trial. But examination of the evidence, and appreciation of its sparseness in a case not distinguished by testimonial self denial on either side, has served to reinforce our earlier opinion that HPL conceded the notice or knowledge necessary to make it accountable to USSC; and that, in the alternative, USSC made good that ingredient of its case.

[471] The concluding sentences show that the court's view was that in that case necessary notice or knowledge had been conceded; hence the observations on knowledge were obiter dicta. Their Honours did express a view on the question of onus in relation to transfers of trust property, with references to authority which showed the difficulties of the question. Their Honours also expressed a clear view that the plaintiff must prove that the adversary acquired the property in suit with knowledge of the plaintiffs' right. To my mind it is significant that their Honours did not use the expression "constructive notice" in their exposition of the proof of knowledge and of the shifting evidentiary onus. Their Honours referred instead to facts which to a reasonable man would demand inquiry, and the absence of inquiry. Their Honours' observations on the question of onus illustrates its considerable difficulties, which were further reviewed in R P Meagher, W M C Gummow and J R F Lehane, *Equity Doctrines and Remedies*, 3rd ed, Butterworths, Sydney, 1992, at para [860]. Constructive trust liability for knowing receipt has received extensive consideration since *United States Surgical* was in the Court of Appeal in 1983, but not, in my opinion, any real further clarification: see Tadgell JA in *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133 at 155–6. Later developments and literature do not diminish the persuasive power of the passage from *United States Surgical* which I have set out, and they do not furnish any grounds for regarding constructive knowledge, or constructive notice, as clear and satisfactory grounds for decision of cases where there has been a breach of fiduciary duty. The rule of decision adopted should apply the underlying principle that persons are left to rely on their legal rights except where it is unconscionable to do so. Unconscionability cannot be fictionalised, and the grounds on which constructive trust liability is imposed should be real and substantial.

[472] There are similarities to the views expressed in *United States Surgical* in observations about what is involved in constructive notice in the judgment of Lawson J in *International Sales and Agencies Ltd v Marcus* [1982] 3 All ER 551 at 557–8. After referring to a number of authorities leading to the *Belmont Finance* case his Lordship said at 558:

> . . . in my judgment, the knowing recipient of trust property for his own purposes will become a constructive trustee of what he receives if either he was in fact aware at the time that his receipt was affected by a breach of trust, or if he deliberately shut his eyes to the real nature of the transfer to him (this could be called "imputed notice"), or if an ordinary reasonable man in his position and with his attributes ought to have known of the relevant breach. This I equate with constructive notice. Such a position would arise where such a person would have been put on inquiry as to the probability of a breach of trust.

His Lordship's reference to "the knowing recipient of trust property" in context is a reference to the recipient of funds which a director had appropriated from the company to settle a deceased director's personal debt; that is, to property transferred in breach of fiduciary duty.

[473] In my respectful view the judgments in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; 5 ALR 231 do not establish authoritatively the Australian law on constructive notice in relation to accessary liability. There was no clear majority view.

[474] In my understanding Stephen J at CLR 407–14 treated the test for liability as actual knowledge or calculated abstension from inquiry. Barwick CJ concurred with Stephen J at CLR 376–7 and Gibbs J assumed without deciding that the formulation in *Selangor United Rubber Estates v Craddock* [1968] 1 WLR 1555 was correct and decided the appeal on the basis that if it was correct the facts of *Consul Development* did not meet it: see CLR 398. McTiernan J dissented and was ready to accept extensions of the doctrine in *Selangor United Rubber Estates* and in *Karak Rubber Co v Burden* [1972] 1 WLR 602: see CLR 386. *Consul Development* cannot be said to be a binding High Court authority for lack of a majority opinion.

[475] The formulation in *United States Surgical* ". . . facts which, to a reasonable man would demand inquiry" states a test which could not be fulfilled lightly and is not far removed from a test of want of probity or of dishonesty. When I apply that test to the situation in which Nippon Credit stood, in its dealings with Girvan Australia and Maronis, my judgment is that the facts would not to a reasonable man demand further inquiry of the directors of Maronis about what it was that moved them to put Maronis forward in the place of Girvan NZ as the provider for security, to resolve that doing so was in the best interest of Maronis and to proceed to carry that course through.

[476] The claim of Maronis against Nippon Credit cannot be clearly identified as solely a claim based on recipient liability. Tested by the claims for remedies in paragraph 48 of FFASC, it is not a claim to make Nippon Credit liable only in respect of receipt of the property mortgaged and its traceable proceeds, and it is not limited to restitution for that property; there is also a claim for a declaration that Nippon Credit is liable in equity to make good the loss arising as a result of taking and accepting the mortgage, and a claim for equitable compensation and/or damages in equity. However, it is the claim based on restitution principles which calls for the most attention, as there is no serious basis for any view that there was dishonesty or a want of probity on Nippon Credit's part or for any claim to a remedy which was not restitution based, meaning restitution of the proceeds of the sale by Nippon Credit of the LTS site in exercise of its powers as mortgagee.

[477] Plaintiff's counsel directed some argument to setting on one side observations of Megarry VC in *Re Montagu's Settlement* [1987] Ch 264 which may have been treated as supporting the view that dishonesty or want of probity is necessary for restitution. It is not clear to me that Megarry VC's views have been so regarded, but his Lordship's observations at 276 appear to me to show clearly that he did not express that view. I do not accept counsel's observations to the effect that in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 3 WLR 1423 (*BCCI*) Nourse LJ did not demonstrate that he appreciated Sir Robert Megarry's views. To my mind the *BCCI* decision demonstrates a clear view in England that liability for knowing receipt does not

depend on dishonesty or want of probity, but does depend on knowledge; there seems to be little room in the state of opinion in England for associating constructive notice with recipient liability. The difficulties of applying to constructive trusts the concept of constructive notice taken from the law relating to equitable interests in land titles were observed on by Megarry VC at 271.

[478] On the facts of this case the situation of Nippon Credit is quite remote from the situation of a person who might incur recipient liability. It is clear that Nippon Credit, its officers and solicitors did not know of the breach of fiduciary duty committed by Maronis' directors and the most they could possibly have done to find out about the subject was to find what the terms of the directors' resolutions were. Nippon Credit gave value in its dealings with Maronis as with Girvan Australia, as it was an object of Maronis and its directors to make the loan to Girvan Australia possible, and Maronis joined in the direction for payment of the advanced. The consideration that I have given to this part of the case should not disguise the simple grounds for its disposition.

[479] There is no basis for deciding that Nippon Credit has incurred liability on the basis of knowing assistance in a breach of fiduciary duty. Actual knowledge of breach of fiduciary duty of directors could not on the evidence be found, nor could it be found that there were any circumstances of dishonesty or want of probity. Cross-examination of officers of Nippon Credit and its solicitors did not lay the basis for such findings.

[480] In my opinion Maronis is not entitled to any equitable remedy against Nippon Credit.

Duty of care and negligence of financiers

[481] Of course, Maronis' counsel did not refer to any authority which establishes that a financier proposing to lend money on third party security owes a duty of care in negligence with respect to economic loss to be incurred by a third party providing mortgage security. When all concerned are commercial organisations and the relationship among them has a commercial character and no other character all dealings take place on the basis that each party is pursuing its own interests and is the custodian of its own interests and is not the custodian of the interests of any other party; and in this case there is nothing in the nature of the dealings among the parties, or any special aspect of the facts which might establish dependency, reliance, any undertaking of responsibility or any other element which might bring a duty of care under consideration. The action of each was visible to the other so that each party must have been conscious of the prospect of loss for itself from the commercial activities of the other party. Contentions that there is a duty of care in this case were related to what was said to be the special vulnerability of Maronis to loss and knowledge of Nippon Credit of this special vulnerability.

[482] The facts in *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 164 ALR 606 are so remote from the present case that it is difficult to know how to undertake any consideration of analogies or any comparison of the reasoning which, in the judgments in that case, led to the conclusion that there was a duty of care with any reasoning which could be applicable in the present case. The element of vulnerability in *Perre v Apand* was very striking, as members of the class to which the applicants belonged were very readily, although not very directly, affected by the conduct of the respondent in introducing disease; they had no practical means of protecting themselves against the event or even of learning of it. Their vulnerability to loss was a result of the law of another state relating to

the importation of product which operated irrespective of there being no impact of plant disease on their product, or on their farms.

[483] Vulnerability was said to be supported by referring to Nippon Credit's interest in doing business with Girvan Australia and insisting upon security over real property, its receiving Mr Downes' letter of 11 April 1989 with its reference to the purpose of the loan as ". . . assist in development of the Liverpool truckstop" taken with treatment of the proposal earlier and later (by Maronis among others) as for general working capital; and by referring to Nippon Credit's wish to do this rather than become engaged in project finance. It was said to be an obvious foreseeable consequence that Maronis while providing real estate security would not stand to benefit in the transaction and would suffer loss if Girvan Australia defaulted and its ability to deal with its property would be hampered. Counsel referred to Nippon Credit's wish for protection by security over real property, and to Nippon Credit's knowledge that Girvan NZ was Maronis' parent, and said that Nippon Credit ought to have known that Girvan NZ was owned to the extent of 74% only by Girvan Australia. Counsel referred to common directorships between Girvan Australia and Maronis, to what was said to be no apparent benefit to Maronis, and to consideration by Nippon Credit and its solicitors of whether certificates of independent legal advice for Maronis should be required.

[484] The factors which were said to show vulnerability in Maronis' case were numerous but they were not in any way in which I can discern analogous to *Perre v Apand*. Most strikingly, the operations of Nippon Credit and Maronis were fully known to each other, the commercial motivations of Nippon Credit were obvious and were the basis of its existence and activity, and the need of Maronis to consider and secure its own interests without any contribution of any kind from Nippon Credit was also very obvious. I see nothing of vulnerability in any sense which can be related to *Perre v Apand* in Maronis' situation.

[485] The manner in which Maronis introduced itself into the negotiations with Nippon Credit shows that there was no reliance by Maronis on Nippon Credit. Commercial negotiation usually takes place in circumstances which demonstrate that reliance on the other side would not be reasonable; pursuit of advantage is obvious, participation by the other party in the negotiation conveys no assurance that the outcome will be in one's interest, and apart from contractual stipulation, reliance could only be based on representations which were expressed or clearly conveyed by circumstances. Utmost good faith and full disclosure of relevant facts are not required, obviously not. The concept of vulnerability referred to in judgments in *Perre v Apand* is not discussed in that case in the context of negotiations and seems difficult to relate to proximity in negotiations unless there are representations: see Gleeson CJ at [10]–[11].

[486] The concept of vulnerability as perceived by McHugh J seems not to extend to cases where it was reasonably open to the plaintiff to take steps to protect itself: see [118] and its concluding sentence:

> If the plaintiff has taken, or could have taken steps to protect itself from the defendants' conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.

In McHugh J's discussion of the concept of vulnerability and its relation to reliance at [124]–[129] I do not see anything which could associate Maronis with that concept in its dealings with Nippon Credit. Gaudron J did not deal with the

concept of vulnerability. I note her Honour's observations at [33] upon the legitimate pursuit of personal advantage in a competitive commercial environment. Gummow J did not refer in terms of vulnerability, although [216] appears to treat vulnerability as one of the characteristics which gave rise to a duty of care. Kirby J made reference to vulnerability in his consideration of proximity and of policy: see CLR 285 [286], 289 [286] and 290 [298]. Vulnerability was an important part of the basis for Kirby J's decision. A similar concept appears to underlie CLR 308 [353] in the judgment of Hayne J.

[487] Maronis went where its own directors took it, with nothing from Nippon Credit on which to rely and nothing which could be an assumption of responsibility. Its vulnerability was vulnerability to the quality of its own directors' management and decisions. In the context of negligence law the identification between Maronis and its own directors must be complete. I see nothing of vulnerability in Maronis' situation in any sense at all; the companies in negotiation were in charge of and responsible for their own destinies, under the control of the persons whom their constitutions put in control, acting in pursuit of their own concepts of their interests, and free to serve their own interests if they did so without dishonesty. In my opinion there is no basis for attributing a duty of care to Nippon Credit.

[488] Further, there is no basis for seeing Nippon Credit's conduct as negligent. A particular matter complained of was that Nippon Credit did not insist upon Maronis obtaining a certificate of independent legal advice. Nippon Credit's consideration of whether it should require such a certificate was exclusively directed to the protection of Nippon Credit's interests; whether Maronis should obtain legal advice was a question for consideration by Maronis, not by Nippon Credit, and it appears that its directors did obtain some legal advice; what that advice was is not clear but it should be understood that they obtained advice on the subject on which they wished to obtain advice. Unless Nippon Credit altogether refrained from doing business with Maronis, or in some way involved itself in managing Maronis' business, there is nothing Nippon Credit could have done that was not done. In my judgment Nippon Credit incurred no liability in negligence.

[489] Notwithstanding Mr West's evidence I do not find that it was the practice of financiers or of lawyers acting for financiers in 1989 to obtain evidence of the commercial benefit to a guarantor company, or to obtain evidence that the guarantor company had received legal advice independent of the borrower about the effect of the proposed guarantee. Some financiers and their lawyers took steps of that kind; the steps taken were not uniform, and some prudent persons did not take any such steps. When they were taken, it cannot be supposed that they were taken to protect the interests of the intending guarantor, and they must have been taken to protect the interests of the financier by minimising the possibility of later challenge. In the circumstances of Nippon Credit and Maronis there was in my opinion no good reason for Nippon Credit and those advising Nippon Credit to concern themselves with these matters. There might well in 1989 have been some concern to establish the actual authority of persons purportedly executing on behalf of the company notwithstanding the decision of the Court of Appeal in *Northside Developments* on 1 November 1988: see (1988) 14 NSWLR 571; but inquiries directed to that matter are not in point as Maronis' proceedings were formally regular. Concerns arising from limitations of the powers of companies or their directors to particular purposes had become obsolete with legislation

assimilating the powers of companies to those of natural persons. Maronis was not a person under a social or intellectual disadvantage who might need independent legal advice and might need to be prompted by somebody else to get it; it is hardly possible that a public company or its subsidiaries could be. The concerns expressed by Mr West were in my opinion superfluous to any reasonable requirement of Nippon Credit and its legal advisers. Documents available on settlement did not in any way indicate that it was possible that there had been a breach of duty of Maronis' directors. The statutory declaration was misleading because it indicated that some persons were directors although they were not, but the minutes strongly confirmed that the actual directors had given proper consideration to what they were doing.

[490] The evidence of Mr Dixon-Smith shows that there was in 1989 no uniform settled practice about inquiring into decisions of mortgagees or lenders, and he said that the view of practitioners was that lenders should be advised not to take steps to investigate whether directors had exercised their powers bona fide in the interest of the company, because they might be put on notice of things. Notwithstanding the considerations against exposing oneself to notice, it was common but not universal to get extracts or certified copies of minutes, and by 1989 to try to include a statement of best-interests in the minutes; but not all directors were prepared to include a best-interests statement. *Belmont Finance* could well have directed or redirected attention to this area but that was not a case of imputed notice from oblique circumstances; it was a conspiracy. *Rolled Steel* in 1986 was a case of actual knowledge of breach of directors' duties. It would be a reasonable response to these decisions to adopt practices which avoided or severely limited investigation of how directors reached their decisions.

[491] Mr Lesser's evidence about banking practice was directed in my understanding to his own opinion of what steps Nippon Credit could take to minimise the possibility of later complaint or challenge. Mr Lesser was of the view and on 31 May 1989 recorded the view that it was necessary to obtain certificates of independent legal advice. This view was known to Messrs Gadens, they did not adopt it and in my opinion they were correct. Mr Lesser appears to have accepted their advice at the time.

Res judicata

[492] Nippon Credit pleaded res judicata to Maronis' claim. This pleading now appears in paras 11–17 of the second further amended defence of the first defendant to the fourth further amended statement of claim filed on 31 October 2000. The basis of this plea is the disposition by final orders made on 25 May 1990 of proceedings No 2023 of 1990 brought by Maronis against Nippon Credit. The contention is that the claims in paragraph 48 of the FFASC are res judicata and barred. Those are claims for a declaration that Nippon Credit is liable to Maronis as if it were a trustee of the land and mortgage, a declaration that Nippon Credit is liable in equity to make good the loss arising as a result of taking and accepting the mortgage, equitable compensation and/or damages in equity, a declaration that it would be unconscionable to claim any sum owing pursuant to the mortgage and an injunction restraining any such claim, damages and interest.

[493] Maronis lodged a caveat against dealings with the LTS land on 29 March 1990. The caveat claimed an estate in fee simple unencumbered by the mortgage. The summons in proceedings No 2023 of 1990 was issued on the same day and claimed a declaration that the mortgage was void, alternatively a declaration that the appointment of a receiver to Girvan Australia was not a breach of covenant

by Maronis. The amended summons on 21 May 1990 amended the claim that the mortgage was void by adding the words "or unenforceable" and made further claims for declarations that notices under s 57(2)(b) of the Real Property Act 1900 (NSW) dated 18 and 19 April 1990 were not valid and effectual, a declaration that Nippon Credit had no power to sell the land pursuant to either of the notices, and an injunction restraining exercise of power of sale. In both forms the summons also claimed costs and further or other orders. On 7 May 1990 Nippon Credit filed a cross-claim seeking an order for removal of the caveat. Also on 7 May 1990 Nippon Credit filed a notice of motion claiming an order for a separate hearing of a question which was stated in a difficult way but which appears to be whether the mortgage was void because it was given by Maronis while Maronis was in breach of legislation requiring registration of foreign companies.

[494] The notice of motion came before McLelland J on 11, 14 and 21 May. On 21 May 1990 McLelland J made an order by consent pursuant to Pt 31 that there be a separate hearing on assumed and agreed facts. The terms of the order were as follows:

> BY CONSENT
>
> 1. The Court orders that there be a separate hearing of the following questions based on the Assumed and Agreed Facts filed herewith (the "Agreed Facts") (it being noted that items 1–7 of the Agreed Facts are assumed solely for the purposes of such hearing):
>
> (a) Whether the mortgage dated 1 June 1989 between the plaintiff and the defendant (the "Mortgage") is void or unenforceable.
>
> (b) Whether:
>
> (1) the notice dated 17 April 1990, a copy of which is annexed to the Agreed Facts and marked "K", is a valid and effectual notice under Section 57(2)(b) of the Real Property Act 1900 (NSW) ("the Act");
>
> (2) the notice dated 18 April 1990, a copy of which is annexed to the Agreed Facts and marked "L", is a valid and effectual notice under Section 57(2)(b) of the Act;
>
> (3) if the answers to 1(b)(1) and (2) are in the negative, the defendant otherwise has the power to sell the land which is the subject of the Mortgage.
>
> 2. The court notes that if the answer to paragraph 1(a) is in the negative, the parties agree that the relief sought in paragraph 1 of the summons should be dismissed and the defendant's cross claim should succeed.

[495] The assumed and agreed facts were as follows:

> 1. the plaintiff has at all times both prior to and after 1 June 1989 been a foreign corporation and has at all such times:
>
> (a) not been registered under Division 5 Part XIII of the Companies (NSW) Code;
>
> (b) not been a recognised foreign company;
>
> (c) carried on business within New South Wales;
>
> 2. the plaintiff established a place of business in New South Wales;
>
> 3. the execution by the plaintiff of:
>
> (a) the mortgage registered no Y434669 at the Land Titles Office ("the Mortgage") (a copy of which is annexed hereto and marked "C"); and
>
> (b) the guarantee between the plaintiff, the defendant and Girvan Corporation (New Zealand) Ltd ("Girvan (NZ)") dated 1 June 1989 ("the Guarantee") (a copy of which is annexed hereto and marked "B") constituted acts of carrying on business in New South Wales;
>
> 4. the Mortgage and the Guarantee were executed by the plaintiff in New South Wales;

5. it was intended that part of the monies advanced to Girvan Corporation Ltd ("Girvan") pursuant to the Facility Agreement between it and the defendant dated 1 June 1989 (the "Facility Agreement") (a copy of which is annexed hereto and marked "A") was to be used by the plaintiff for the development by the plaintiff of the property the subject of the Mortgage (the "Property") and was so used;

6. the defendant knew the facts set out in paragraphs 1, 2, 3, 4 and 5 above at the time the mortgage and guarantee were executed;

7. Girvan, Girvan (NZ) and the plaintiff are not related corporations within the meaning of that term used in the Mortgage or the Memorandum filed in the Land Titles Office as No X539219 and deemed to be incorporated therein (a copy of which is annexed hereto and marked "D");

8. on 24 November 1989, Girvan sent by facsimile to the defendant a "Selection Notice" a copy of which is annexed hereto and marked "E";

9. on 28 November 1989, the defendant sent to Girvan a letter, a copy of which is annexed hereto and marked "F";

10. on 31 January 1990 a receiver was appointed to Girvan;

11. on 31 January 1990 the notice a copy of which is annexed hereto and marked "G" was served on Girvan;

12. on 14 February 1990 the plaintiff received the notice, a copy of which is annexed hereto and marked "H";

13. on 17 April 1990 the notice, a copy of which is annexed hereto and marked "I", was sent to Girvan by registered post;

14. on 30 April 1990 Girvan (NZ) received the notice a copy of which is annexed hereto and marked "J";

15. on 30 April 1990 the plaintiff received the notice, a copy of which is annexed hereto and marked "K";

16. on 30 April 1990 the plaintiff received the notice, a copy of which is annexed hereto and marked "L";

17. no payment was made by Girvan or the plaintiff of the principal or interest referred to in annexures "K" and "L".

[496] The documents referred to were annexed to the statement. The separate hearing took place before Rogers CJ Comm D also on 21 May 1990 and his Honour gave judgment on 23 May 1990, answered both questions adversely to the plaintiff and published reasons.

[497] On 25 May 1990 the court (Young J) made orders that the summons be dismissed and that the caveat be removed, and also dealt with costs. In doing this the court carried out the agreed course noted in para 2 of McLelland's J order. The orders were expressed to be made by consent, but they carried out a course to which the parties were already committed.

[498] In this way all the claims in the amended summons were dealt with in substance other than the claim for further or other orders; this claim was not adjudicated on and was never further defined; for that reason it cannot be identified with any claim by Maronis in paragraph 48 of FFASC.

[499] In the present proceedings Windeyer J on the application of Nippon Credit made an interlocutory order of 6 October 1994, for reasons then published, that there be a permanent stay of that part of Maronis' claim as related to the Cross Roads mortgage. On appeal the Court of Appeal on 21 February 1996 substituted an order that "as between the first plaintiff and the first defendant the proceedings be permanently stayed in so far as they concern the validity of the Cross Roads mortgage (as that term is defined in para 18(b) in the statement of claim) . . .".

[500] By some accident a defective form of the amended summons was put before Windeyer J and the Court of Appeal. I am unable to see any way in which this can have had a significant effect.

[501] In my opinion the dismissal of the 1990 proceedings and the claim for further or other orders did not have the effect of adjudicating any claim which had been left undefined; in point of fact, the court only adjudicated on the claims which had been articulated in the amended summons and the separate questions. In the reasons of Rogers CJ Comm D there was no adjudication on any claim to the effect that the mortgage was valid but that Nippon was liable to Maronis as if it were trustee of the mortgage, that Nippon was liable in equity to make good loss arising as a result of taking and accepting the mortgage, that any conduct of Nippon was or would be unconscionable, or for relief arising out of those matters. The claims made by Maronis against Nippon Credit in these proceedings which survived the permanent stay ordered by the Court of Appeal are quite unlike the claims which were adjudicated on in 1990 in that they assume and accept that the mortgage is not void but has effect, and seek equitable remedies which could not be granted but would be superfluous if the mortgage was void and did not have effect. Although there were no pleadings in 1990 the claim and the issues brought forward and adjudicated on can be seen quite clearly and they did not include any claims like those in paragraph 48 of FFASC.

[502] It was contended that the claim now made for equitable compensation or damages in equity is an attempt to obtain a different remedy for substantially the same cause of action as was then litigated. This is not so; the causes of action or grounds of suit are entirely distinct, and the remedies claimed are also entirely distinct. If the res judicata defence had been material I would not have upheld it.

Anshun estoppel

[503] In para 18 of its second further amended defence Nippon Credit pleads that the claims in para 48 are so closely related to the subject matter of the 1990 proceedings that it was unreasonable for Maronis not to raise them in those proceedings.

[504] To my mind a claim that a mortgage has no effect for legal reasons, and a claim that equitable remedies arise out of its effect and operation are quite discrete; if the first is correct, the second is superfluous. The *Anshun* principle requires consideration of the practicalities. This appears from the statement of the principle in *Port of Melbourne Authority v Anshun Pty Ltd* (1980) 147 CLR 589 at 602–3; 36 ALR 3. Their Honours said:

> In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. See the illustrations given in *Cromwell v County of Sac* (94 US (1876)).

[505] Although some of these observations refer to the conduct of a defendant,

they are applicable both to plaintiffs and defendants; this appears from the context including the preceding paragraph and the reference to *Cromwell v County of Sac*.

[506] The illustrations given in *Cromwell v County of Sac* 94 US 351 (1876) at 356 were:

> Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction.

[507] Maronis could have brought forward in the 1990 proceedings all the claims made in the present proceedings if Maronis had chosen to do so; considerations of convenience supporting the choice not to do so but to make the claims separately are ready to hand, pressing and obvious. In my understanding the test given by the High Court in *Anshun* is a test whether the claims in the second proceedings were so relevant to the subject matter of the first proceedings that it would have been unreasonable not to rely on them. In my finding it was altogether reasonable to seek, at an early stage, to obtain a decision on a confined part of the controversy, open to relatively ready and brief definition and open to adjudication within 2 months, in litigation to which only the immediate parties to the mortgage were parties.

[508] The course of the present proceedings provides many illustrations of the reasonableness of dealing with the claims in the 1990 proceedings separately. There were many parties to the present proceedings, there are many claims and a tangling web of cross-claims, and all parties whose interests and claims are in any way related to the claim for equitable relief have been joined. About 6 years passed from the commencement of the proceedings to the commencement of the hearing, the hearing occupied 57 days and the transcript extended for thousands of pages. Even the most general foresight that complexities like these were involved would, in my view, have dictated, to a reasonable litigant in Maronis' position, that if there was a short point it should be brought forward and resolved straight away. It was said that Maronis had not given evidence explicitly explaining its decision to take this procedural course. The question relates to what it was reasonable to do, the answer in the circumstances is obvious, and the lack of any evidence of that kind from Maronis is not significant. It should not be found that the claims made in the present proceedings were claims which it was unreasonable on the part of Maronis not to have raised in the 1990 proceedings. If the *Anshun* defence had been material I would not have upheld it.

[509] The assumed and agreed facts were introduced by the statement "For the purposes solely of the hearing referred to in the Short Minutes of Order filed herewith, the plaintiff and the defendant agree . . .". Among them was para 5 to the effect that it was intended that part of the moneys advanced was to be used for the development by Maronis of the LTS site and that part in fact was so used. Presumably this was part of the basis of the claim that Maronis was carrying on business as a foreign company without registration. It was submitted of this that "there was an element of election in the course adopted by Maronis". The agreed fact was strikingly inconsistent with Maronis' case before me; it was agreed for

a limited purpose and joined in by both parties. It must have been intended to enhance the claim that Maronis was carrying on business, but that did not influence the outcome, in which it was held that the illegality did not have any effect on the mortgage. Unfortunate as this paragraph of the agreed facts was, it cannot be seen in any way as an election against bringing some other proceedings.

[510] At a late point in argument Nippon Credit's counsel contended that the characterisation in fact of what was litigated in 1990 was established by references in judgments in the Court of Appeal to the decision of 1990 as a decision on the validity of the mortgage. Their Honours' references to the validity of the mortgage as the issue were directed to the purpose in hand and were carried through to the terms of their order which permanently stayed the proceedings ". . . in so far as they concerned the validity of the Cross Roads mortgage". If anything the words "validity of the mortgage" show their Honours' intention to leave some claims relating to the mortgage to be litigated; their order varied the decision of Windeyer J at first instance which would have prevented this. Nothing the Court of Appeal said precludes examination of what actually took place in 1990 or qualifies the obvious conclusion that there was no adjudication on any claim for equitable relief against the operation of the mortgage.

Real Property Act 1900 (NSW) s 42

[511] Nippon Credit in paras 10A, 10B and 10C of its second further amended defence contended that the principal claims by Maronis were barred by the operation of s 42 of the Real Property Act. This defence does not require adjudication. Whether a registered proprietor is liable in respect of an equitable claim cannot be considered without examining the facts on which the equitable claim is based. It seems open to question whether s 42 has any application as its terms appear to be directed to protection of an estate or interest in land, but Nippon Credit's interest has ended with its transfer of the land to a purchaser, and s 42 may not protect a former registered proprietor against a remedy which does not affect an estate or interest in land and operates in personam. There is no liability in personam in this case and the question falls.

Terms

[512] Some submissions dealt briefly with the terms of relief against Nippon Credit and whether any equitable remedies granted to Maronis against Nippon Credit should be granted on terms which required that some amount be paid by Maronis to Nippon Credit as a condition of relief, payment to take place either at or before the time of the order or its enforcement, or by set-off against any sums recovered. See the dictum of Kirby J in *Maguire v Makaronis* (1997) 188 CLR 449 at 496–7; 144 ALR 729 including: ". . . ordering as a condition of rescission of a contract flawed by breach of fiduciary duty that the party seeking relief should restore to the other what was secured under the contract, is neither new nor surprising": see too the leading judgment at CLR 475. Whether any such terms should be required and what sum would be appropriate cannot be addressed in the abstract but must be considered in association with the remedy awarded to Maronis and the grounds of the remedy; and there are none. As Maronis made the transaction possible and directed payment of A$15m, including A$5,076,142.13 to Girvan NZ of which A$200,000 was a guarantee fee closely related to the mortgage, there would be much to consider.

Decision in favour of Nippon Credit

[513] I propose to give judgment for Nippon Credit upon the plaintiffs' claim, and to give judgment for Nippon Credit against Maronis for A$27,674,040.28 on the eighth cross-claim. The quantification of the amount due under the mortgage appears by Ex 9. Before judgment is entered I will allow a brief opportunity to establish the amount of further interest.

Equitable compensation and land value

[514] Maronis is entitled to equitable remedies against Mr Duncan and Mr Ambler in respect of their breaches of fiduciary duty when deciding that Maronis should enter into the mortgage and entering into it. The only equitable remedy which could meet the circumstances is an award of equitable compensation. The principles for the assessment of equitable compensation were discussed in the context of improper dealing by directors with company assets in *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; 29 ACSR 148; see Spigelman CJ at NSWLR 273–8. The loss and its relation to the breaches of duty can be seen clearly; Maronis incurred liability under the covenants in the mortgage, and lost the LTS land. The compensation to which Maronis is entitled is the sum of the value of the LTS site when it was lost in 1990 with interest which I propose to award at the rates usually allowed on judgments until the date of this judgment, together with the amount of Maronis' liability to Nippon Credit. That amount is shown by Ex 9 at A$27,674,040.28 but before the order is entered I will allow a short opportunity for Maronis to obtain reconsideration of the amount and of further interest accrued since the calculation in Ex 9. There is no clear point of time to commence allowing interest on the value of the LTS land but I adopt 25 May 1990, when the first proceedings were dismissed.

[515] In my view the LTS site was lost to Maronis through a series of events which occurred in the first half of 1990. The cumulative effect of these events was that the prospect that Girvan Australia would ever repay the loan so that the mortgage could be discharged and Maronis would hold its land free of mortgage passed out of the realm of possibility. So long as Girvan Australia's operations continued there was a real possibility that Girvan Australia would make some deal or arrange its affairs so that Girvan Australia would pay its debt and in some form or other Maronis could realise the value of its land. When Girvan Australia went into receivership on 31 January 1990, the receiver took no action to redeem the mortgage or carry on the LTS project, Nippon Credit made demands and otherwise initiated action to exert its rights as mortgagee against Maronis as well as against Girvan Australia, and litigation seeking to establish that the mortgage was invalid was dismissed on 25 May 1990, it ceased to be possible that the mortgage would ever be redeemed and that the land would ever be released from the mortgagee's control. I do not attribute to a precise date of the loss, or to the date as at which compensation falls to be assessed, but the loss fell in this period.

[516] The difficulties and uncertainties of processes of valuation present themselves with unusual strength in the present case.

[517] Mr J A Fernandes, a developer by occupation who was a director of Chandonelle Pty Ltd, gave evidence relating to some offers and proposals for Chandonelle to purchase the land. The dealings with Chandonelle Pty Ltd opened with a letter from its solicitors to the Girvan Group of 19 December 1989 (Ex A6/1905) which made several offers for the LTS land, and one was to purchase the site for A$16m with a further A$20m payable if Girvan completed

subdivision work and registered a plan of subdivision. Some alternative proposals were put in that letter and the reply and negotiations proceeded and interacted with an expression of interest by BP Australia in purchasing 2 ha of the site. On 1 February 1990 Chandonelle's solicitors conveyed an offer to purchase the site for A$17.5m on stated conditions and on 5 February further offers including an offer to purchase the site for A$18m: see Exs A6/1763 and 1764. These were succeeded by a proposal on 9 February (Ex A6/1768) to purchase the site for A$20m on conditions including a guaranteed sale to BP through a put and call option of about 2 ha for A$3.95m. Messrs McCormacks, solicitors, prepared forms of contract on this basis but no contract was exchanged. Negotiations were still continuing in May 1990.

[518] Mr Fernandes' evidence shows that the purchase would have been much larger than any previous project of his, and that if he were to proceed he would have had to involve another company which he did not control. He was also contemplating obtaining bank finance or finance through a broker. In oral evidence Mr Fernandes said to the effect that from his point of view the pre-sales and pre-leases that were already in place were an important part of the deal and he was interested in the land because there were end-takers. Provisions of the draft contract relating to obtaining participation of BP Australia in a put and call contract for about 2 ha appear to reflect this. Mr Fernandes said "I doubt I would have proceeded with the purchase of the property unless I had some end-takers, pre-sales, pre-leasing."

[519] Mr Fernandes' proposals, which did not come to anything, and the prices spoken of in his proposals, were related to requirements for conditions of various kinds including guarantees or other arrangements under which development would be carried out and commitments from persons who were to purchase or lease or take leases of parts of the development. No transaction resulted. Mr Fernandes did not ever apply to any bank or financier. There was little prospect of any vendor's guarantee being accepted after Girvan Australia went into receivership. The negotiations involving Chandonelle and Mr Fernandes are not, in my finding, in any way an indication of the value of the LTS site.

[520] Mr Valuer Blakeley prepared a valuation for Girvan Australia by Jones Lang Wootten by whom he was then employed on 13 March 1989, and valued the LTS land at A$27m. In substance this repeated an earlier valuation which he made in August 1988, and he did not refer to any further sales when he gave his valuation in March 1989. There is no reflection in the March 1989 report of changes in the level of the market which Mr Blakeley's evidence would show had taken place. In view of the nature of the LTS site it is not to be expected that there would be any closely comparable sales and Mr Blakeley did not identify any; the few transactions he did refer to had only the most general element of comparability and Mr Blakeley did not and was unable to articulate any well-explained process of reasoning by which he proceeded from value shown by sales evidence to his conclusion. The critique given in evidence by Mr Valuer McRae of Mr Blakeley's references to sales showed, in my finding, that Mr Blakeley's valuation cannot be supported as a valuation based on comparable sales by reference to correct principle. Mr Blakeley's then current experience as a valuer with Jones Lang Wootten practising in the western Sydney region with particular emphasis on commercial and industrial properties and sites with potential for development, as he had been since 1986, had a very large effect on his conclusion. It is appropriate for a valuer to express an opinion based on

general experience and sense of the state of the market, but I cannot treat such an opinion as persuasive without exposure of some line of reasoning which can be identified and appraised. Answers in cross-examination have led me to take a cautious approach to reliance on his opinion generally, except in so far as it is supported by articulated reasoning.

[521] The date as of which Mr Blakeley's valuation speaks in March 1989 is about 10 or 12 months earlier than what I regard as the relevant time which is the first half of 1990. Mr Blakeley was able to give very few particulars of the transactions he had in mind. I did not form a good impression from Mr Blakeley's dealing in cross-examination with the implications of sales of commercial land and industrial land in Campbelltown, the manner in which he prepared his report in August 1988 and pressures he was under, the progression from the 1988 report to the 1989 report, the range of value for the LTS property and the use which he made of a Travis Morgan report on demand for the facility and an appreciation made by another JLW Officer about the Travis Morgan report. Mr Blakeley's valuations were made before development approval was available and the conditions in it were known and he did not make appropriate allowances for what from later material can be seen was involved in complying with conditions of development approval. Mr Blakeley did not make allowance for the cost of acquiring land to provide the loop road access, which was required as a condition of development consent. This illustrates forcefully that there were significant changes in circumstances between Mr Blakeley's valuation in March 1989 and the relevant period early in 1990. As he said, he was very enthusiastic about the development at the time; I find that this had an undue influence on his opinion. In his report and in Ex 37 Sch 1.8 Mr McRae gave a critique of Mr Blakeley's valuation and of the sales to which Mr Blakeley referred; Mr McRae's critique was effective and there was little endeavour to challenge this part of Mr McRae's evidence. I am unable to rely on Mr Blakeley's valuation.

[522] The development application as lodged by Loc-Tex International on 21 March 1989 incorporated access by a loop road from the freeway. The proposal was described as "Site works in preparation of the proposed transport terminal". The application accorded with the Liverpool City Council Development Control Plan which required vehicular access by the loop road to be available prior to occupation of the site. Before 24 April 1989 Loc-Tex International had withdrawn the loop road component of the development application, as the owner's consent for the use of the land required for the loop road had not been given. The land was then owned by the Commonwealth and it is referred to as the Army land. When the town clerk advised Loc-Tex International on 24 April 1989 of council's resolution to approve the application he referred to the terms of the development control plan and to council's concern that it should be complied with. When the formal notice of determination was issued on 1 May 1989 its first condition required development in accordance with the development application received on 21 March 1989, that is, the whole application including the loop road.

[523] Condition 8.12 of the development approval 1 May 1989 also required consultation of the Roads and Traffic Authority on location of layout of intersections and submission of Roads and Traffic Authority approvals before commencement of reconstruction. This requirement extended to the loop road.

[524] The development consent was not a consent to any future subdivision of the land to be developed, or to the use of part only of the site as a transport

terminal or for any purpose: see Ex 45 documents M and N. As stated by Mr Grech (transcript p 3508) "The approval in 1989 was for the whole of the site to be developed as an integrated complex by one owner." Subdivision of the land was not something that Liverpool City Council ever considered, as its attention was directed, in relation to changes in town planning controls, and by the development application, to the development of a comprehensive and integrated transport terminal. Council had power to approve subdivisions with, for almost all the land, a 2 ha minimum which remained in effect from earlier zoning controls, but in my finding it was likely that on any application for subdivision council would treat maintaining a comprehensive and integrated development as a transport terminal as important. Council would have to consider internal access and ownership and dedication of the internal roads, which could involve council accepting responsibilities. Alternative means of creating street access might have been considered, such as subdivision by strata plan, or by using mechanism under the Community Land Management Act 1989 (NSW); no means of any kind had been addressed.

[525] Mr John Crawford, a town and country planner who gave evidence, was employed by Liverpool City Council from about 1958–August 1993. From 1961 he was the chief town planner and later director of development and health. He had long involvement in council's considerations of planning questions affecting the LTS site. Truck traffic and services for trucks and truck drivers was and by 1990 had long been a concern of Liverpool City Council and had had much study and consideration. At some time council had considered a proposal for development as a truck stop of the Cross Roads Hotel and land nearby which was part of what later became the LTS site; council favoured this development and attempted to promote it, without result, several years before Loc-Tex International became interested in 1987. Loc-Tex International obtained a report (Ex AB) by Don Fox Planning dealing with development of a transport terminal or truck stop on a much larger scale than had earlier been considered. In his affidavit Mr Crawford contemplated a hypothetical application made about 1990 for council to approve development of a truck stop on the LTS site, scaled down so as to develop part of the property for general industrial purposes; if there had been such an application Mr Crawford's department would have had the responsibility to prepare a report to the council's planning committee on the rezoning which that would have involved. There were factors adverse to rezoning and factors favouring it, and Mr Crawford's view was that it would have been possible for such a rezoning to have been achieved and that a proposal of that kind could well have been successful over a period of 18 months from early 1990. He also said to the effect that it was possible that rezoning of the whole site for general industrial purposes might have been approved.

[526] There were in my finding significant adverse factors to rezoning all or part of the LTS site for general industrial purposes; such rezoning was not in accordance with the Sydney Region Outline Plan dealing with the staging of release of other land for rezoning, and significant areas of land elsewhere in the Liverpool Local Government Area had already been rezoned for general industrial purposes but had not all been so developed. There was a particular concern against allowing bulky goods retailing and retail warehousing except in the area which had already been rezoned general industrial. In the consideration which led to the rezoning in 1988, slightly modified in 1989, general industrial

use was not considered for the LTS site, was not dealt with as an aspect of the transport terminal, was not recommended by council officers and was not permitted by the rezoning.

[527] Mr Crawford agreed when cross-examined that the reasons which were operative in 1988 for exclusion of non transport-related activities from the rezoning were still applicable up to 1993, from the point of view of council officers, but he said there may well have been a change of attitude by council. His evidence showed that concerns which would motivate council to accept some zoning which led to the development of a truck terminal might have moved council to approve other general industrial zoning for part of the site.

[528] Mr Paul Grech, town planner, also gave evidence. Mr Grech is a director of Don Fox Planning Pty Ltd, and worked on preparation of a rezoning application for the LTS site when Loc-Tex International Pty Ltd engaged Don Fox Planning in October 1997. Mr Grech's rezoning application ultimately led to the site-specific planning instruments relating to the LTS site; he left Don Fox Planning after preparing it but returned later in 1988 and has worked in Don Fox Planning ever since. Mr Grech gave a history of later consideration of town planning relating to the LTS site. An application was made by Exley & Associates, perhaps on behalf of Nippon Credit although this does not clearly appear, on 12 November 1992 for amendment of environmental planning instruments to permit subdivision. This led to extensive reconsideration of zoning and a favourable outcome with gazettal of a local environmental plan on 23 September 1994 and adoption of a development control plan in December 1994. In the meantime on another initiative council embarked on a comprehensive local environmental plan for the whole of its local government area, and exhibited a draft in 1994 in which the LTS site was to be zoned for a general industrial. This initiative was directed to general rationalisation of planning control documents for Liverpool. When the Liverpool LEP 1997 was gazetted on 29 August 1997 the LTS site was zoned general industrial.

[529] Mr Grech's opinion based on the information available as at 1990 was that it would have been highly unlikely for Liverpool Council to support a rezoning of the subject site for general industrial purposes at about February 1990; he would have told a client that the rezoning would take forever and would advise against making an application. It was his view that before 1994 it was highly unlikely that council would have supported a rezoning of the subject site.

[530] The most important difference between the views of Mr Crawford and those of Mr Grech is in an assessment of the likelihood of Liverpool City Council supporting rezoning if rezoning had been applied for in 1990. In summary Mr Grech's position was that rezoning was not impossible but so unlikely that it was not worth making an application whereas Mr Crawford's view was that, with a long period of consideration, there could well have been an approval of rezoning of part of the land for general industrial purposes, although zoning of sufficient of the land to provide a transport terminal was necessary.

[531] My finding is that a developer who brought forward a proposal, in 1990, for a rezoning of the LTS site would probably have obtained a rezoning decision which allowed some of the site to be available for general industrial uses, but only as part of arrangements which did bring about a development of a large transport terminal occupying a significant part of the site, in the order of a third or half the site. A purchaser contemplating purchasing the site in 1990 could reasonably have regard to the prospects of obtaining a rezoning allowing general

industrial uses only if he also had regard and brought into account the lack of certainty about a favourable outcome and about the proportion of the area which would be available for general industrial uses, and the indefinite nature of the period of time required for obtaining an outcome.

[532] There could be no certainty in the view of a hypothetical purchaser addressing purchase of the land in 1990. Rezoning would be the outcome of political and administrative processes, not only of the Liverpool City Council but also of the State Government, and there could be no certain prediction of the outcome. Mr Crawford was in a good position to gauge what might be the outcome of consideration by aldermen and the hypothetical reasonable purchaser was not, and would probably have been guided by advice from a town planner such as Mr Grech on the prospects of obtaining a rezoning. The existing zoning and the availability of redevelopment as a transport terminal would have been the principal use in the view of a hypothetical reasonable purchaser, the prospects of obtaining a favourable redevelopment would also have been considered but would be a relatively small influence.

[533] Mr Valuer Retallick, whose evidence was called by the plaintiffs, had regard to a number of sales of land for which zoning permitted industrial use and the land was available for development. In his report, Ex L, Mr Retallick said to the effect that while the LTS site was ideally located for use as a transport terminal, the commercial viability of the project as at February 1990 was questionable and might not represent highest and best use at that time. The size of the site and the magnitude of the project might well exceed the requirements for a transport terminal complex; the economic climate would lead to deferment of large scale property development projects. In valuing the property he had regard to alternative uses of the whole of the land or use of part of the land as a scaled down transport terminal with consideration given to subdivision and alternative uses of the balance of the site. He regarded the zoning for transport terminal as intrinsically an industrial use. When proceeding from a value per hectare derived from comparable sales he made discounts so as to allow for the larger area of the subject land than the area in any comparable sale, and a further discount to allow for a period of 10 months during which time an amended zoning might be expected to be achieved to allow uses of a more generalised industrial nature.

[534] In my finding Mr Retallick did not make sufficient allowance for the restrictive nature of the zoning. He assumed that an amendment to the zoning would be available in 10 months; that in my view is much too short a time for the processes involved. Mr Retallick assumed that a rezoning to general industrial uses or general industrial uses combined with use of part for a transport terminal would be available; but in fact a favourable outcome was uncertain, there were significant prospects that change of the zoning would not be available and that the existing zoning would remain for some years, and zoning permitting subdivision was not readily available. In my judgment to accommodate all these uncertainties by simply discounting the present value for 12 months at 12% per annum was altogether inadequate. Uncertainties particularly as to subdivision meant that Mr Retallick's hypothetical development approach based on subdivision of the land into eight large area parcels of which seven could be utilised for general industrial purposes was unreliable in my view. There is no town planning evidence establishing that there were prospects of obtaining subdivision into eight large area parcels, or dealing with the possibility at all. The

inherent unreliabilities of hypothetical development exercises were compounded by the contingencies of rezoning and in particular of obtaining subdivision approval, so much so that the hypothetical development exercise was not useful.

[535] The nature of the LTS site and the difficulty of finding comparable sales led Mr Retallick to have regard to sales of industrial land at ranges of value much further from the value attributable to the LTS site than he ordinarily would. In dealing with comparable sales Mr Retallick did not have regard to sales in Campbelltown. While comparability is very difficult to perceive because of the size of the LTS land and its site-specific zoning, I am of the view that it is an unsatisfactory feature of Mr Retallick's valuation that he did not look at sales in Campbelltown and did not allow those sales to have some influence on his thinking. His approach may be contrasted with the position taken by Mr Valuer McRae, who attributed great significance to sales near Campbelltown.

[536] Mr McRae also had regard to sales of land with general industrial zoning, and saw the zoning of the LTS site as a restriction to a particular type of industrial undertaking. In my view it was a correct method to have regard to sales of land zoned for general industrial use; there is no other method of identifying comparable sales or material for comparison, as there is no more closely analogous zoning classification and the valuers did not know of any sale of land with site specific zoning as a transport terminal.

[537] In principle it was less than ideal to refer to such sales, having regard to the site-specific zoning and the difficulty and delay which stood between a purchaser and obtaining some modification of the zoning which would permit industrial development other than as a transport terminal for part of the land. Purchasers who might be interested in the LTS site can be taken to be equipped with information and advice about the uncertainties involved in rezoning. In my judgment a hypothetical purchaser in 1990 would have in view the opportunity to develop a transport terminal on the site, by the purchaser or by someone else, as the highest and best use and the most significant advantage of ownership, but would also treat the prospect of obtaining a rezoning to develop part of the site for general industrial purposes as important. The location and advantages of the LTS site for a transport terminal were very great, as it was located at the southern gateway to the Sydney metropolitan area and could be made directly accessible from the freeway. No other land in any sale put forward by Mr Retallick or Mr McRae had comparable advantages for a transport terminal. A further large difficulty for comparability was the size of the LTS site at 45.88 ha. Most of the sales referred to by Mr McRae and Mr Retallick were of sites less than half this area, usually far less.

[538] Mr McRae's approach involved drawing heavily on the influence of general movements in the economy as well as on matters particular to land sales and comparable sales. In his report he said "From mid-1989 vendors were still seeking maximum prices but purchasers were becoming exceedingly cautious." From this passage and from other treatment in his evidence I understand his position to be that in the first half of 1990 sales were few, not that the prices at which sales were effected had fallen below the previous year.

[539] In Mr McRae's schedule of comparison sales (which should be distinguished from comparable sales), Ex 37 Sch 1.12, sale 4 was the sale of a transport terminal of 27.7 ha at Minto completed on 13 November 1996. The property did not have the same locational advantages as the LTS site and the sale was more than 6 years removed from the relevant date. Mr McRae's sale 7, a

transport terminal at Ingleburn of 22.04 ha completed on 30 November 1996, was also far removed in time and different in locational advantages. Mr McRae derived an average of $219,097 per hectare from 12 sales in his Sch 1.12; these sales range in completion date from 3 June 1987–1 December 1997, in size from 2.02 ha to 27.7 ha and in analysed price per hectare from A$78,253 to A$340,000. What they had in common was relative proximity to the LTS site; they were all generally located near Campbelltown in the south-western approaches to the metropolitan area, principally at Minto and Ingleburn. I see no validity in averaging these sales as a valuing method. The result of the averaging process was adopted by Mr McRae and is supported by the weight of his opinion, which is very considerable in view of his decades of experience as a valuer and also as an agent for buyers and seller of industrial land; his opinion is of more importance than the arithmetical process.

[540] Mr McRae identified three of the comparable sales referred to by Mr Retallick of which he said "There are only three properties to which Mr Retallick refers which, I believe, could be considered to be anywhere near comparable." Using the references in Mr McRae's Sch 1.10 to Ex 37 these were sale 6 at Huntingwood, sale 11 at Mt Druitt and sale 14 at Smithfield. All these three transactions took place in 1989 or 1990; this has some advantages as a claim to attention. Sale 6 was a sale of 8.94 ha at Huntingwood in October 1990 at a price which yielded a rate per hectare of $460,000. Mr McRae regarded this as a comparable property although of course he observed on the locational differences and what he said were established differences in the market levels of industrial land values to the west of Sydney from values to the south-west. Mr McRae commented "The parent company in the UK was flush with money and wanted to build a large new head office, bottling plant and distribution facility." I do not regard this comment, which was based on Mr McRae's knowledge as an agent in the sale, as seriously qualifying the utility of the sale in a valuing exercise; the comment did not indicate that the purchaser was under any compulsion or circumstances of stress, and purchasers usually have good reason to buy land and enough money, but stay rational. Sale 11 at Mt Druitt in November 1989 of 10.78 ha at a price which yielded $525,000 per hectare was regarded by Mr McRae as a comparable property but a superior site. In my view, for reasons given by Mr McRae it plainly was a superior site in respect of location for an industrial development, and its advantages included access to transport and facilities which would influence an industrialist with a large staff. Sale 14 related to a site at Smithfield, and the sale in April 1990 of 12.46 ha at a price which yielded $350,000 per hectare. Mr McRae regarded this as a comparable property having some bearing on comparative value.

[541] While Mr McRae's views have had a large influence on my findings having regard to his experience in valuing and his immersion in the market for industrial land, I conclude that overall he has been unduly influenced by sales at too great a distance in time from the first half of 1990 and by sales of industrial land, including land with uses for transport terminal or transport support, in the south-western approaches to Sydney which were much smaller in area and had far less inherent locational advantages than the LTS site. Direct and convenient access for large trucks from the freeway and enough room to provide a wide range of facilities in support of motor transport, including transport of persons as well as of goods, cumulatively represent a difference in kind to much smaller properties away from the freeway and used as transport terminals or facilities.

[542] In cross-examination it was put to Mr McRae that the sum of the costs of acquisition of the LTS land represented a minimum for the value which should be attributed to this; Mr McRae rejected this reasoning, and in doing so he was correct in principle, as there is no necessary relation between the cost of aggregation and the value of the land aggregated.

[543] As recurringly happens in the assessment of damages or compensation, a conclusion must be reached even though the evidentiary material does not point in any well-defined way to some particular conclusion. The valuation of land is an inherently difficult process and for the LTS site the difficulties of addressing the subject with any precision are unusually large. In my view the value of $219,097 per hectare which was the basis of Mr McRae's conclusion about the open market value was insufficient. I am also of the view that the two adjustments he made of the value of access to the Orbital Route Transport System and the value of what he called the signature address, totalling A$1m, did not represent a sufficient allowance for these factors. These adjustments are more than usually imponderable, but my view is that the adjustments made by Mr McRae were inadequate, and his valuation at A$9.5m is much too low. I regard Mr Retallick's conclusion and professional opinion as entitled to respect and as having some weight in my findings. In my view the value of the LTS land was in the order of A$300,000 per hectare.

[544] In my finding the value of the LTS site when it was lost to Maronis was A$13.75m.

[545] When the preparation of my reasons had reached this point and judgment had been reserved for 7 months, I was informed that agreement had been reached between the plaintiffs and the first defendant Nippon Credit for disposal of the proceedings as between them, both on the plaintiffs' claim and on the cross-claim against Maronis. This will have a chain of consequences for other cross-claims. No liability will fall on Maronis under the personal covenant in the mortgage, or under the guarantee and indemnity. Equitable compensation will be assessed on the loss of the LTS land and interest since the loss.

[546] During the hearing I said that I would defer consideration of cross-claims, other than Nippon Credit's cross-claim against Maronis, until I had come to conclusions on the principal claims. Disposition of cross-claims will be considerably simplified, but there are some matters remaining to be considered and I will leave it to the parties to bring forward drafts of what they assert are the proper orders after I publish these reasons.

[547] During the hearing an agreement between the plaintiffs and the sixth defendant Mr Ramsay, and a ruling which I gave on a cross-claim against Mr Ramsay, had the effect that he was dismissed from the proceedings.

[548] I have not yet considered any question of costs.

[549] Interest at the rates usually allowed on judgment debts from 25 May 1990 to today 7 June 2001 is A$17,921,429.79.

Order

[550] The orders which I am now in a position to make for the reasons which I have stated are as follows:

(1) Upon the plaintiffs' claim against the second defendant Mr Petersen, give judgment for the second defendant.

(2) Upon the claim of the first plaintiff Maronis Holdings Ltd against the third defendant Mr Duncan and the fourth defendant Mr Ambler give judgment for the first plaintiff for A$31,671,429.79.

(3) On the claim of Girvan Corp (NZ) Ltd (in liq) against the third defendant Mr Duncan and the fourth defendant Mr Ambler give judgment for the third and fourth defendants.

(4) Upon the plaintiffs' claim against the fifth defendant Mr McCulloch give judgment for the fifth defendant.

(5) Upon the plaintiffs' claim against the seventh defendants Mr Wilson and others practising as Clayton Utz give judgment for the seventh defendants.

(6) Reserve liberty to apply with respect to cross-claims and with respect to costs.

[551] By consent I make the orders in the short minutes and note as in para (6).

[552] I publish the reasons and I ask the parties to please bring in their drafts about disposition of cross-claims and take up any questions of costs on Thursday next 14 June 2001.

MARY-ANNE BORROWDALE
SOLICITOR