Supreme Court of Victoria - Court of Appeal

White v Timbercorp Finance Pty Ltd (in liq); Collins v Timbercorp Finance Pty Ltd (in liq) [2017] VSCA 361 (8 December 2017)

Last Updated: 8 December 2017

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2017 0033

PETER JOHN WHITE — Applica

v

TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) (ACN 054 581 190) — First Respond

and

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469) — Second Respond

S APCI 2017 0035

DOUGLAS JAMES COLLINS — First Applica

and

JANET ANN COLLINS — Second Applica

v

TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) (ACN 054 581 190) — First Respond

and

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469) — Second Respond

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JUDGES:	FERGUSON CJ, SANTAMARIA and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	14 September 2017
DATE OF JUDGMENT:	8 December 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 361
JUDGMENT APPEALED FROM:	(2016) 119 ACSR 478; [2016] VSC 776 (Judd J)

CORPORATIONS – Managed investment schemes – Acquisition of scheme interests – Where investors paid deposits and borrowed loan amount under loan agreements with financier to fund balance of application moneys – Where financier agreed to lend loan amount by paying it to responsible entity on behalf of investors – Where journal entries in books of financier and responsible entity purported to make payment of loan amount – Where both companies in liquidation – Where financier commenced recovery proceedings against defaulting investors under loan agreements – *Corporations Act 2001* (Cth) ch 5C.

CONTRACT – Construction of loan agreement – Loan agreements between company and investors – Where company agreed to lend loan amount by paying it to another company – Where journal entries in books of both companies purported to make payment of loan amount – Whether payment under loan agreement may be made by journal entry – Whether payment by journal entry supported by evidence – Whether payment must have been made to other company in its capacity as responsible entity of managed investment schemes – Effect of scheme constitutions and taxation product rulings – *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471 and *Re York Street Mezzanine Pty Ltd* [2007] FCA 922; (2007) 162 FCR 358 applied – *Rocky Castle Finance Pty Ltd v Taylor* (2014) 118 SASR 349 distinguished.

CONTRACT – Formation – Whether inferred agreement exists between companies permitting payment to be made by journal entry – Where companies in same corporate group with common directors and single operating bank account – Where financial statements of companies subject to annual directors' declarations and independent audit report – *P'Auer AG v Polybuild Technologies International Pty Ltd* [2015] VSCA 42 and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 applied.

UNJUST ENRICHMENT – Whether unjust for investors to avoid loan obligations to financier – Where investors had no knowledge of loan and scheme implementation – Where trial judge found that investors claimed tax deductions – Whether investors precluded from denying payment of application moneys by subsequent conduct – Whether requisite knowledge amounting to ratification – Whether analogy to agency law apposite – *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558; (2000) 107 FCR 270 discussed.

COSTS – Where defendant joined to proceeding by plaintiff in response to allegations made by other defendants at trial – Where other defendants unsuccessful and ordered to pay costs of successful defendant – Whether costs order in favour of successful defendant should stand.

WORDS AND PHRASES – 'payment' – 'consideration' – 'application money' – 'in its capacity as responsible entity' – 'journal entry' – 'book entry' – 'discharge of liability' – 'inferred agreement' – 'ratification'.

APPEARANCES:	Counsel	Solicitors
For the Applicant in S APCI 2017 0033 and the Applicants in S APCI 2017 0035	Mr M D Wyles QC with Mr D J Fahey	Macpherson Kelley Lawyers
For the First Respondent in each proceeding	Mr P H Solomon QC with Dr C O Parkinson	Mills Oakley
For the Second Respondent in each proceeding	Dr O Bigos	Arnold Bloch Leibler

FERGUSON CJ

SANTAMARIA JA

McLEISH JA:

Introduction

1 The applicants were investors in three managed investment schemes registered under ch 5C of the *Corporations Act 2001* (Cth) ('the Act'). The applicants had sought to borrow money from **Timbercorp** Finance Pty Ltd ('**Timbercorp** Finance') in order to acquire interests in the schemes. In doing so, they entered into a loan agreement with **Timbercorp** Finance to be satisfied by **Timbercorp** Finance making payment to **Timbercorp** Securities Ltd ('**Timbercorp** Securities'), which was the responsible entity of each scheme. **Timbercorp** Finance purported to make payment to **Timbercorp** Securities by the making of journal entries in each company's books of account.

2 In April 2009, administrators were appointed to **Timbercorp** Ltd and 40 of its wholly-owned subsidiaries, including **Timbercorp** Finance and **Timbercorp** Securities. In June 2009, the creditors of the **Timbercorp** Group resolved to wind up the companies, and the administrators were appointed liquidators. Following the appointment of administrators, borrowers under more than 8,000 **Timbercorp** Finance loan agreements failed to meet their loan repayment obligations. **Timbercorp** Finance commenced recovery proceedings against 20 defaulting borrowers. In each proceeding, **Timbercorp** Finance claimed the unpaid balance of a loan with interest and costs.

3 On 27 October 2009, investors in the managed investment schemes commenced a group proceeding under pt 4A of the *Supreme Court Act 1986* against **Timbercorp** Securities, three of its directors and **Timbercorp** Finance. The applicants were group members in the group proceeding. The group proceeding had the effect of 'pausing' the recovery proceedings and deferring the initiation of further recovery proceedings pending the outcome of the group proceeding.

4 The group proceeding was unsuccessful both at trial[1] and on appeal.[2] Subsequently, **Timbercorp** Finance revived extant recovery proceedings and brought a large number of new recovery proceedings against defaulting borrowers, including the present applicants. The applicants resisted those proceedings and, in doing so, relied upon several defences that had not been raised in the group proceeding. **Timbercorp** Finance contended that it was not open to the applicants to rely upon those defences in so far as those defences could have been run during the group proceeding. Eventually, it was decided that the applicants were not estopped from relying upon those defences in the recovery proceedings.[3]

5 At the trial of the present proceedings, the applicants contended, in simple terms, that the relevant loan agreement between themselves and **Timbercorp** Finance required **Timbercorp** Finance to make a payment of money to **Timbercorp** Securities and that the making of journal entries in the books of account of those companies did not amount to performance of the loan agreement as it did not involve the payment of money. They further contended that, even if payment under the loan agreement could be made by journal entry, the journal entries in question were not effective as there had been no agreement between **Timbercorp** Finance and **Timbercorp** Securities that **Timbercorp** Finance could make a payment to **Timbercorp** Securities by way of journal entry in fulfilment of **Timbercorp** Finance's obligations under the loan agreement. Further, the applicants contended that **Timbercorp** Finance had failed to prove the existence of any such journal entries.

6 The trial judge rejected each of the defences and entered judgment in favour of **Timbercorp** Finance.[4] In particular, the trial judge held that, in making journal entries in its accounts whereby it purported to debit its accounts and credit those of **Timbercorp** Securities, **Timbercorp** Finance had made payment to **Timbercorp** Securities on behalf of the applicants pursuant to the loan agreement between **Timbercorp** Finance and the applicants. In the event, the applicants were liable for the unpaid balance of each loan as alleged, together with interest.[5] The applicants now seek leave to appeal from that judgment.

7 For the reasons that follow, the applications for leave to appeal should be granted, but the appeals must be dismissed.[6]

Factual background

8 **Timbercorp** Finance and **Timbercorp** Securities were wholly-owned subsidiaries of **Timbercorp** Ltd. The primary business activity of the **Timbercorp** Group was the establishment, development, marketing, and management of primary industry-based managed investment schemes. The business involved the acquisition of land, water rights and infrastructure and the provision of finance to investors (also known as 'growers'). Between 1992 and 2009, the **Timbercorp** group invested more than $2 billion in agribusiness schemes on behalf of around 18,500 growers. Most investors, including the applicants, borrowed moneys from **Timbercorp** Finance to finance their application money, being the money to be paid in order to acquire an interest in a scheme. Some invested in multiple schemes and had multiple loans; others had multiple loans in respect of a single scheme.

Timbercorp Securities was the responsible entity for the three managed investment schemes that are relevant to these proceedings: the 2007/2008 Single Payment Timberlot Project ('the Timberlot Scheme'); the 2007 Almond Project ('the Almond Scheme'); and the 2008 Olive Project ('the Olive Scheme'). The documentary framework for each of the three schemes included: (a) a product disclosure statement ('PDS'); (b) a constitution; (c) a management agreement; (d) a custody agreement; (e) lease or licence agreements; (e) an Australian Taxation Office ('ATO') Product Ruling; and (f) a compliance plan.

10 The only company in the **Timbercorp** Group that had an operating bank account was the holding company, **Timbercorp** Ltd.

The process of acquiring lots in the schemes

11 This section of the reasons will be devoted to explaining the process by which a prospective investor ('a scheme applicant') could acquire an interest (known as a 'lot') in a scheme and the powers of the responsible entity, **Timbercorp** Securities, in relation to dealing with application money. It will be necessary to set out relevant provisions of the Act and, in particular, ch 5C. Reference will also be made to parts of the constitutions, PDSs, loan explanation and loan terms and a Request for Product Ruling by **Timbercorp** Securities to the ATO dated 1 August 2006.

Chapter 5C

12 The schemes within the **Timbercorp** Group were registered under ch 5C of the Act. Chapter 5C is entitled 'Managed investment schemes'. The term 'managed investment scheme' is defined in s 9 of the Act as follows:

> '***managed investment scheme***' means:
> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
>
> (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or
>
> (b) a time-sharing scheme ...

13 We pause here to make two observations. First, one of the fundamental features of a scheme under ch 5C is that it involves a person contributing 'money or money's worth as consideration to acquire rights (interests) to

benefits produced by the scheme'. The word 'consideration' is not defined anywhere in the Act. However, s 601GA (entitled 'Contents of the constitution') sets out certain matters which a scheme constitution must specify or for which adequate provision must be made. Section 601GA(1)(a), in particular, provides that a scheme constitution 'must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme'. It is necessary, therefore, to turn to the provisions of the scheme constitution to identify the 'consideration'. The relevant provisions of the constitutions of the schemes in question will be considered below.

14 Secondly, another fundamental feature of a scheme under ch 5C is that any 'contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property' for scheme members. The concept of 'pooling' contributions is not elaborated anywhere in ch 5C. Yet, it is clear that contributions 'are to be pooled, or used in a common enterprise'. There are a number of authorities that shed light on the meaning of this phrase.[7] For present purposes, it will suffice to note that ch 5C does not set out exhaustively the powers of a responsible entity in relation to dealing with contributions. Section 601GA(1)(a), however, provides that a scheme constitution 'must make adequate provision for the powers of the responsible entity in relation to making investments of, or otherwise dealing with, *scheme property*' (emphasis added). 'Scheme property' is defined in s 9 to mean, among other things, 'contributions of money or money's worth to the scheme'. Plainly, scheme property includes application money, which is paid by a scheme applicant in order to acquire an interest in a scheme. Accordingly, in order to ascertain the powers of the responsible entity vis-à-vis the scheme property, it is necessary again to turn to the provisions of the scheme constitution.

The constitutions

15 The constitutions of the schemes in question, in so far as they relate to how a scheme applicant was to acquire an interest in a scheme, did not differ from one another in any material respect.

16 In order to apply for a lot in a particular scheme, a scheme applicant first completed a **Timbercorp** Multichoice lot application form in which the applicant specified the number of lots for each of the schemes of which he or she sought to become a member ('lot application form'). Clause 5 of the constitution was entitled 'Application Procedure'. Relevantly, cl 5.3 read as follows:

> **How to Apply**
> Every Applicant must deliver the following to the Responsible Entity or to the duly authorised lawful agents of the Responsible Entity at the place set out in the PDS or any other place or places as the Responsible Entity may from time to time determine:
>
> (a) an Application for Timberlots, incorporating an offer to become a Grower under this Deed, being in the form attached to the PDS, and signed or executed by the Applicant;
>
> (b) a Power of Attorney, being in the form attached to the PDS, signed or executed by the Applicant, appointing the Responsible Entity to be the Applicant's attorney and, on the Applicant's behalf as the case may require, to execute the Grower Agreements and any other documents which are ancillary or related to the Grower Agreements, or contemplated by the provisions of the Grower Agreements; and
>
> (c) ... a cheque for the Application Moneys for each Timberlot being the amount set out in the First Schedule.

17 The amount of the deposit payable by a scheme applicant for each lot in a scheme was set out in the 'First Schedule' of the scheme constitution. In the case of the Timberlot Scheme, the required deposit was $3,080. In the case of the Almond Scheme, the required deposit was $9,000. In the case of the Olive Scheme, the required deposit was $5,700.

18 Broadly speaking, in order to acquire an interest in a scheme, the scheme applicant had to agree to pay the application money in respect of each specified lot. Clause 5.4(a) of each constitution allowed a scheme applicant

to pay the application money in full or by instalments. Clause 5.5 made provision for the acceptance of a scheme applicant's application on condition that a person — in the present case, **Timbercorp** Finance — had agreed to lend that amount to the scheme applicant. Clause 6.1 provided that **Timbercorp** Securities could in its absolute discretion give notice in writing to any scheme applicant to the effect that its application had been refused. Each of these provisions, in relevant part, read as follows:

> **5.4 Payment in Full or by Instalments**
> (a) Subject to clauses 5.5 and 6.1 and subject to the Responsible Entity electing to make available to Applicants a facility to pay the Application Moneys by instalments, at the option of any Applicant, the Application Moneys for each Timberlot may be payable in full at the time of application or may be payable by instalments. If the Applicant elects to pay the Application Moneys by instalments, the Applicant must pay at the time of delivering of the Application the amount shown in the application as the 'DEPOSIT', and the balance of the Application Moneys must be paid by the Applicant (or Grower, if that Applicant has become a Grower[8] in accordance with the provisions of this Deed), to the Responsible Entity by the date specified in the Application (if any) and if no such date is specified, by such date as the Responsible Entity may, in its absolute discretion, determine, provided that in its absolute discretion, the Responsible Entity may extend that date to such later day as the Responsible Entity determines.
>
> ...
>
> **5.5 Condition as to Finance**
>
> If an amount is shown in an Application against the words 'Amount subject to finance' (if those words appear in the Application), the Application will only be accepted by the Responsible Entity on condition that a person (which person may include the Responsible Entity) has agreed to lend that amount to the Applicant. The Responsible Entity does not warrant, undertake, covenant or agree that such finance will be provided or procured.
>
> ...
>
> **6.1 Refusal of Application**
>
> The Responsible Entity may in its absolute discretion give notice in writing to any Applicant to the effect that its Application has been refused.

19 In the present case, the payment of the application money comprised: (a) a deposit; and (b) the balance of the application money.[9] The deposit was paid upon completion of the lot application form, and provision was made for the amount of the balance of the application money to be lent to the scheme applicant.[10] If the scheme applicant wished to borrow such an amount, he or she applied to **Timbercorp** Finance by completing a loan application form.

20 Once the scheme applicant had completed his or her lot application form and the loan application form, it appears to have been the practice of **Timbercorp** Securities to issue to the scheme applicant a document entitled 'Confirmation Notice/Tax Invoice' confirming acceptance of the scheme applicant's application for lots in the relevant schemes and the date of the acquisition of each lot for which the scheme applicant applied. In the present case, the applicants had received such a document.

21 Clause 4.2 of the constitution referred to a special trust account to be maintained by **Timbercorp** Securities. It read as follows:

> **Special Trust Account**

> Any amounts paid by any Applicant in accordance with clauses 5.3 and 5.4 must be accounted for by the Responsible Entity in a special trust account and such amounts must be placed in one or more bank accounts kept solely for the purpose of depositing Application Moneys in relation to the PDS.

22 Clause 4.3 authorised **Timbercorp** Securities to pool any amounts paid by any scheme applicant with any amounts paid by any other scheme applicant.

23 Clause 9.3 provided for the release or refund of the application money, as the case may be. Relevantly, cl 9.3 read as follows:

> **(a) Release of Application Moneys**
> In relation to each Application which is either expressed to be not subject to finance or (if subject to finance) is unconditional because finance has been approved, the Responsible Entity must within 2 Business Days of the Responsible Entity being satisfied of the matters specified in clause 9.2,[11] release the Application Moneys and apply it in payment of the fees payable under the Sub-lease and the Management Agreement provided that where a deposit has been paid ... the balance of the Application Moneys must be paid to the Responsible Entity ...
>
> **(b) Refund of Application Moneys**
>
> Where the Responsible Entity does not issue a Timberlot to an Applicant within the time required by the Corporations Act, the Responsible Entity must refund to the Applicant the relevant Application Money paid with any interest earned in relation to that Application Money ...[12]

24 For the purpose of understanding a submission advanced by the applicants, which will be summarised below, it is also necessary to consider certain aspects of the PDS for each scheme, the loan explanation and loan terms to which the applicants agreed to be bound and Requests for Product Ruling made by **Timbercorp** Securities to the ATO.

The product disclosure statements

25 The PDS for each scheme contained, among other documents, a lot application form. Part 1 of the lot application form in respect of the Almond Scheme provides, in relevant part, as follows:

> **YOUR ALMONDLOTS AND PAYMENT DETAILS**

Unless otherwise agreed by us, you must apply for a minimum of two Almondlots.
If you are accepted into the Project as an Early Grower on or before 15 June 2007, your Application Moneys per Almondlot are $7,000 (which includes $636.36 GST).
If you are accepted into the Project as a Post 30 June Grower between 1 July 2007 and 15 June 2008 while the Offer Period remains open, your Application Moneys per Almondlot are $9,000 (which includes $818.18 GST).
If you fill in the item 'Amount subject to finance', your application will only be accepted on receipt of the whole of the Application Moneys in relation to the Almondlots. We do not warrant or undertake that finance will be provided or procured.

> **METHOD OF PAYMENT**
> (a) You may pay by cheque made payable to '**Timbercorp** - 2007 Projects; and crossed 'Not Negotiable'; or
>
> (b) alternatively, you may pay by credit card by completing your credit card details in the space provided ...[13]

26 It is to be observed that the PDS and, in particular, the lot application form above provide that the application of a scheme applicant who fills in the item 'Amount subject to finance' will only be accepted 'on receipt of the whole of the Application Moneys in relation to the Almondlots'.

Loan explanation and loan terms

27 After a scheme applicant had completed his or her loan application form and **Timbercorp** Finance decided that the scheme applicant could successfully obtain finance for the balance of the scheme applicant's application money, it also appears to have been the practice of **Timbercorp** Finance to send a letter to the scheme applicant confirming that his or her application for finance had been accepted and attaching loan terms which had been executed by **Timbercorp** Finance ('the Loan Agreement'), including on behalf of the scheme applicant under power of attorney. Again, in the present case, the applicants had received such a document.

28 For present purposes, the critical clause of each Loan Agreement is cl 1, which reads as follows:

> **1. What we lend and when**
> We agree to lend you the *loan amount* by paying it to **Timbercorp** Securities Limited AFSL 235653 (or as it directs) as payment of the balance of your application money for *lots* and the *loan application fee* as described in the *application form*. However, we only have to lend you the loan amount if:
>
> (a) we have received all documents (including securities) and information we require, in a form satisfactory to us; and
>
> (b) neither you nor a guarantor is in default under this agreement or a security.

29 The 'loan amount' under the Loan Agreement in respect of Mr White was stipulated to be $205,756. The 'loan application fee' was defined as 'a fee of $250 comprising part of the *loan amount*'. 'Lot' was defined, relevantly, as 'each almondlot ... timberlot [or] grovelot (as the case may be) allotted, or to be allotted, to you under a PDS in respect of the projects'.

The custody agreements

30 **Timbercorp** Securities entered into various custody agreements with Trust Company of Australia Limited ('Trust Company' or 'the custodian').[14]

31 It is unnecessary to set out the provisions of the custody agreements, save to say that, under those agreements, Trust Company was appointed by **Timbercorp** Securities as custodian to receive and hold application moneys — namely, the moneys paid by scheme applicants in order to acquire interests in lots under the scheme — and to release those moneys on **Timbercorp** Securities' instructions.[15]

Request for Product Ruling

32 In its Request for Product Ruling to the ATO dated 1 August 2006 in relation to the Timberlot Scheme,[16] **Timbercorp** Securities described the flow of funds between investors, **Timbercorp** Securities and other companies in receipt of the funds in two situations: (a) where the investor does not borrow any funds; and (b) where the investor borrows funds from **Timbercorp** Finance. It did so in the following terms:

> A description of the arrangement follows for a Pre 30 June Grower:
> (a) A Pre 30 June Grower who applies for Timberlots either:
>
> (i) pays the application moneys of $3,080 per Timberlot to the Custodian; or
>
> (ii) pays a deposit of $308 (10% of the GST inclusive application moneys - rounded down to the nearest dollar) to the Custodian and applies to **Timbercorp** Finance

to lend him or her the balance.

(b) If the borrower applies to borrow money, **Timbercorp** Finance may, if the loan application is approved, advance the moneys (out of its own funds and before any Timberlots are allotted) by paying them direct to the Custodian.

(c) On receipt of the full application moneys, [**Timbercorp** Securities] accepts the application and allots Timberlots to the Pre 30 June Grower. The Custodian then applies the application moneys by paying out the initial application fees in accordance with the agreements.

...

A further diagram representing the inter-relationship between the relevant **Timbercorp** entities and participants in the Project is also enclosed [Enclosure 23].

33 It is to be observed that, in both situations, the Request for Product Ruling provided that investors were to pay their application money direct to the custodian and that, upon receipt of the full application money, **Timbercorp** Securities would accept the application and allot Timberlots to the investor. The custodian would then apply the application money by paying out management fees in accordance with the applicable management agreement.

34 The Request for Product Ruling depicted the above arrangement in a diagram entitled '2007/2008 **Timbercorp** (Single Payment) Timberlot Project Enclosure 22 - Pre 30 June Grower Borrowings from **Timbercorp** Finance Pty Ltd', which appears as follows:

2007/2008 Timbercorp (Single Payment)

Timberlot Project

Enclosure 22 — Pre 30 June Grower

Borrowings from Timbercorp Finance Pty Ltd

Timbercorp

Finance Pty Ltd

(Lender)

Grower

(Borrower)

$308 $2,772

Trust Company of Australia Limited

(Custodian)

After Timberlots are allocated $3,080

and agreements are entered into

Timbercorp Securities Limited

(Project Manager

ATO

Notes

1. The sum of $3,080 per Timberlot is represented by a physical flow of funds ie by bank cheque or by telegraphic transfer of funds from **Timbercorp** Finance Pty Ltd into the applications account held by Permanent Trustee Company Limited.

2. The loan of $2,772 is repaid over the term of the loan.
3. Similar flow of funds occur for Post 30 June Growers.

35 The Request for Product Ruling and, in particular, the above diagram appear to contemplate that, where an investor chooses to borrow from **Timbercorp** Finance, **Timbercorp** Finance will make a payment direct to the custodian. As it transpired, **Timbercorp** Finance did not itself have a bank account that would permit it to make any payment by cheque or telegraphic transfer. The only company in the **Timbercorp** Group with an operating bank account was **Timbercorp** Ltd. In the event, **Timbercorp** Ltd made payments to the custodian on behalf of other companies in the **Timbercorp** Group, including **Timbercorp** Finance. Evidence was given that **Timbercorp** Ltd used its bank account with the ANZ Bank to remit to the custodian an amount equivalent to the balance of the application money and then debited its intercompany account with **Timbercorp** Finance. This circumstance gave rise to part of the cross-examination of officers within the **Timbercorp** Group, which is set out below, and to submissions that were made in this Court.

Application by Mr White for lots

36 On or about 2 June 2008, Mr White applied to **Timbercorp** Securities for:

(a) 23 timberlots in the Timberlot Scheme as a post-30 June Grower, at a

total cost of $70,840 in accordance with the terms of the PDS for the Timberlot Scheme;

(b) eight almondlots in the Almond Scheme as a post-30 June Grower, at a cost

of $72,000 in accordance with the terms of the PDS for the Almond Scheme; and

(c) 15 olive grovelots in the Olive Scheme, at a cost of $85,500 in

accordance with the terms of the PDS for the Olive Scheme.

37. Along with his lot application, on 2 June 2008, Mr White paid a deposit of $22,834 to **Timbercorp** Securities for the lots for which he applied. The deposit was the sum of the deposits required for each of the schemes of which he sought to become a member: (a) $7,200 for the Almond Scheme; (b) $8,550 for the Olive Scheme; and (c) $7,084 for the Timberlot Scheme. The lot application form specified the balances of $63,756 for the Timberlot Scheme,

$64,800 for the Almond Scheme and $76,950 for the Olive Scheme (a total sum of $205,506) to be 'subject to finance'.

Application by Mr White for finance of balance of application money

38 As recounted above, **Timbercorp** Finance provided loans to investors in the schemes to fund the balance of the investors' application moneys, that balance being the application moneys due from the investors less the deposits that had been paid.

39 On or about 2 June 2008, Mr White applied to **Timbercorp** Finance for a loan of $205,756. This amount represented the sum of the balance of the application money due to **Timbercorp** Securities for the lots for which he had applied under the schemes ($205,506) and a $250 loan application fee payable to **Timbercorp** Finance. Mr White also provided **Timbercorp** Finance with a power of attorney for the purpose of executing the Loan Agreement.

40 On 13 June 2008, **Timbercorp** Securities issued Mr White a 'Confirmation Notice/Tax Invoice' for $228,340, confirming acceptance of his application.[17]

41 On 13 June 2008, **Timbercorp** Ltd sent a letter to Trust Company that enclosed Mr White's application to **Timbercorp** Securities for lots dated 2 June 2008, made reference to Mr White's application for eight almondlots in the Almond Scheme and 15 grovelots in the Olive Scheme and stated that 'A **Timbercorp** Finance Pty Ltd cheque of $141,750.04 will be forwarded in due course'. The sum of $141,750.04 was the sum of the balance of Mr White's application moneys in respect of the Almond Scheme and the Olive Scheme. A letter to the same effect in respect of the Timberlot Scheme was sent to Trust Company on 30 June 2008.[18]

The relevant journal entries

42 On 13 and 14 June 2008, a number of journal entries were recorded in the general ledgers of **Timbercorp** Securities and **Timbercorp** Finance. The purported effect of these journal entries was that: (a) Mr White's liability to **Timbercorp** Securities was discharged by entries that reflected a transfer of funds from **Timbercorp** Finance to **Timbercorp** Securities; and (b) Mr White's indebtedness to **Timbercorp** Securities was replaced by an indebtedness to **Timbercorp** Finance.

43 Before setting out the relevant journal entries, it is convenient at this point to describe the accounting system used by the **Timbercorp** Group. At trial, **Timbercorp** Finance relied on a witness statement of Owain Rhys Stone dated 1 July 2016. Mr Stone is a partner of KordaMentha with over 30 years' experience in forensic accounting projects. In his witness statement, Mr Stone described the **Timbercorp** Group accounting system as follows:

> The main accounting package used by the **Timbercorp** Group was Great Plains. The transactions for each company within the **Timbercorp** Group were identified by different company numbers. For example, all transactions to [**Timbercorp** Ltd] used the company number '11', those for [**Timbercorp** Securities] used the company number '12', and those for [**Timbercorp** Finance] used '51' ... **Timbercorp** Information Management System (TIMS) was a system (separate from the Great Plains package) that recorded, among other things, individual loan and receipting transactions and details pertaining thereto. The same transactions were recorded in journal vouchers in the Great Plains system; sometimes with batches of transactions being recorded in a single voucher.

44 In **Timbercorp** Ltd's books of account, journal entry (no. 504452) dated 13 June 2008 recorded the following entries in the **Timbercorp** Securities Great Plains general ledger:

(a) a debit entry to a **Timbercorp** Securities account named 'Suspense New Loans Advanced' in the sum of $205,506; and

(b) a credit entry to a **Timbercorp** Securities account named 'New Sales Control' in the sum of $205,506.[19]

45 In **Timbercorp** Ltd's books of account, journal entry (no. 504786) dated 14 June 2008 recorded the following in:

(a) the **Timbercorp** Finance Great Plains general ledger:

*(i) a debit (increase) entry in a **Timbercorp** Finance account named 'Loan Control Account' in the sum of $4,473,412.00; and*

*(ii) a credit entry (increase) in a **Timbercorp** Finance account named 'Loan – **Timbercorp** Securities Ltd' account (a liability to **Timbercorp** Securities) in the sum of $4,473,412.00,*

(b) the **Timbercorp** Securities Great Plains general ledger:

*(i) a debit entry (increase) in a **Timbercorp** Securities account named 'Loan – **Timbercorp** Finance Pty Ltd' (a receivable due from **Timbercorp** Finance) in the sum of $4,473,412.00; and*

*(ii) a credit entry (decrease) in a **Timbercorp** Securities account named 'Suspense – New Loans Advanced' in the sum of $4,473,412.00.*

We will refer to this journal entry as 'the 14 June 2008 journal entry'.

Transfers of application moneys to the custodian

46 On 18 June 2008, **Timbercorp** Ltd transferred $5,498,398.74 from its operating account to Trust Company's 'application account'. This transfer purported to include the balance of Mr White's application money, along with the balance of application moneys for other applicants, for the Almond Scheme. That same day, **Timbercorp** Securities wrote to Trust Company stating, 'We advise that **Timbercorp** Finance Pty Ltd has instructed ANZ Bank to telegraphically transfer $5,498,398.74 into your almond application account ... being finance for investors as set out in the attached schedule' and directed Trust Company to electronically transfer $6,300,000.00 to 'our **Timbercorp** Ltd account at ANZ'. Trust Company thereupon transferred the sum of $6,300,000 back to **Timbercorp** Ltd's operating account. **Timbercorp** Ltd recorded the transfers of funds in its books of account.

47. On 19 June 2008, **Timbercorp** Ltd transferred $16,516,865.98 from its operating account to Trust Company's 'application account'. This transfer purported to include the balance of Mr White's application money, along with the balance of application moneys for other applicants, for the Olive Scheme. That same day, **Timbercorp** Securities wrote to Trust Company stating, 'We advise that **Timbercorp** Finance Pty Ltd has instructed ANZ Bank to telegraphically transfer $16,516,865.98 into your application account ... being finance for investors as set out in the schedule' and directed Trust Company to electronically transfer $18,741,600.00 to 'our **Timbercorp** Ltd account at ANZ'.

Trust Company thereupon transferred the sum of $18,741,600 back to **Timbercorp** Ltd's operating account. **Timbercorp** Ltd recorded the transfers of funds in its books of account.

On 25 June 2008, **Timbercorp** Ltd transferred $10,056,080.88 from its operating account to Trust Company's 'application account'. This transfer purported to include the deposit and balance of Mr White's application money, along with the deposits and balance of application moneys for other applicants, for the Timberlot Scheme. That same day, **Timbercorp** Securities wrote to Trust Company stating, 'We advise that **Timbercorp** Finance Pty Ltd has instructed ANZ Bank to telegraphically transfer $10,191,720.00 into your application account ... being application deposits and finance for investors as set out in the schedule' and directed Trust Company to electronically transfer $10,191,720.00 to 'our **Timbercorp** Ltd account at ANZ'. Trust Company thereupon transferred the sum of $10,191,720 back to **Timbercorp** Ltd's operating account. **Timbercorp** Ltd recorded the transfers of funds in its books of account.

The loan account

49 On or about 30 June 2008, **Timbercorp** Finance sent a letter to Mr White confirming that his application for finance had been accepted. It attached the Loan Agreement, which had been executed by **Timbercorp** Finance on 30 June 2008. The loan account in respect of Mr White was designated 'Loan No 0025841'.

50 On 30 June 2008, **Timbercorp** sent a letter to Trust Company that enclosed Mr White's application to **Timbercorp** Securities dated 2 June 2008, made reference to Mr White's application for 23 timberlots in the Timberlot Scheme and recorded that 'A **Timbercorp** Finance Pty Ltd cheque of $63,755.96 will be forwarded in due course'. The amount of $63,755.96 was the same amount as the balance of Mr White's

application money in respect of the Timberlot Scheme.[20] No such cheque was forwarded. **Timbercorp** Finance did not have a cheque account or any other bank account. Instead, the telegraphic transfers described above had already taken place.

Insolvency of Timbercorp Group

51 On 23 April 2009, Mr Mark Korda and Ms Leanne Chesser were appointed as the administrators of **Timbercorp** Ltd and **Timbercorp** Securities, and Mr Mark Korda and Mr Craig Shepard were appointed as the administrators of **Timbercorp** Finance. On 29 June 2009, the creditors of the **Timbercorp** Group resolved to wind up the companies, and the administrators became joint and several liquidators.

52 The insolvency of the **Timbercorp** Group set in train the defaults of borrowers under more than 8,000 loan agreements and the ensuing litigation described above.

The proceedings below

53 In his reasons, the trial judge referred to the various pleadings that the parties served before trial. It is unnecessary to review these pleadings other than to explain the circumstances in which **Timbercorp** Securities became a party to the present proceeding and how each of the parties finally put its case.

54 On 4 November 2014, **Timbercorp** Finance commenced a proceeding against Mr White to recover $371,097.58 as the balance due under a loan from **Timbercorp** Finance to assist Mr White to fund his investments in the Timberlot Scheme, the Almond Scheme and the Olive Scheme. Interest is claimed at $134.21 per day from 1 April 2014.

55 On 22 December 2014, Mr White filed his first defence. In summary, he alleged that, by reason of various 'relevant facts', no loan had been made to him because **Timbercorp** Finance had not paid anything to **Timbercorp** Securities from the funds drawn down from **Timbercorp** Ltd's account with the ANZ Bank. In the alternative, and based on the same facts, Mr White alleged that **Timbercorp** Finance had made neither an advance or loan to him within the terms of the Loan Agreement nor a payment for his benefit. Mr White further alleged a duty of care owed to him by **Timbercorp** Finance to protect him against the failure of **Timbercorp** Securities to hold and retain the loan amount until such time as valid sub-leases or licences had been granted or timberlots established. He alleged that the loan amount had not been deployed for the various schemes and was not available to repay him.

56 On 20 November 2015, **Timbercorp** Finance delivered an amended statement of claim in which it joined **Timbercorp** Securities as second defendant to meet the 'no loan' defence, based upon the alleged failure by **Timbercorp** Securities to satisfy itself that the necessary preconditions for use of Mr White's application money were in place. In other words, if **Timbercorp** Securities had deployed the application money in breach of the preconditions for release under cl 9.3 of the constitution, and Mr White was thereby relieved of his obligation to repay his loan, **Timbercorp** Finance had suffered loss and damage.[21]

57 On 11 December 2015, **Timbercorp** Securities delivered its defence, in which it alleged compliance, sufficient compliance or a common assumption of compliance with the various provisions of the constitution.

58 At the same time, **Timbercorp** Finance filed a reply in which it alleged that Mr White was precluded by the group proceeding from advancing the various defences in his defence.

59 On 17 June 2016, Mr White filed a defence to the amended statement of claim.[22] In part, that pleading responded to the contingent claims made by **Timbercorp** Finance against **Timbercorp** Securities. It also elaborated the 'no loan' defence that had been adumbrated in the earlier defence. It alleged that: (a) **Timbercorp** Finance had not made a payment in accordance with the terms of the Loan Agreement because it was **Timbercorp** Ltd, not **Timbercorp** Finance, that made the transfer to the relevant Trust Company account; (b) Mr White's money was not used for the acquisition of lots in a scheme, but was used by

Timbercorp ‘in the course of the conduct of its business’; (c) the preconditions required under the constitution for the release of the application money under cl 9.3 of the constitution had not been satisfied;[23] (d) by reason of the failure to satisfy those preconditions, the group structure, the common knowledge of group companies including **Timbercorp** Finance, and the purpose of the loan (to pay ‘for *lots* and the *loan application fee* as described in the *application form*’), there was no payment in accordance with the terms of the Loan Agreement; (e) if **Timbercorp** Finance had made a payment or payments pursuant to the Loan Agreement, those payments ‘were made at a time when the Loan Agreement was not extant’;[24] (f) Mr White did not have allotted to him any almondlots, grovelots or timberlots because there was no valid sub-lease or because such sub-leases as there were failed to comply with the requirements of the relevant constitution; (g) due to the absence of valid sub-leases, and the terms of the relevant Product Rulings issued by the ATO in relation to the schemes, **Timbercorp** Finance had not made a payment for the benefit of Mr White; and (h) as a consequence, **Timbercorp** Finance had not made a loan to Mr White.

Further amended statement of claim: the journal entry case

60 On 22 June 2016, **Timbercorp** Finance further amended its statement of claim.[25] In paragraph 10 of its further amended statement of claim, **Timbercorp** Finance alleged:

> The Plaintiff paid the L0025841 Loan Amount to TSL (or as it directed) as payment of the balance for the First Defendant’s lots and his loan application fee, by:
> (a) the following:
>
> > (i) a debit entry of $4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of the Plaintiff named ‘Loan Control Account’ and numbered 51-1221, by way of a journal voucher numbered 504786 entered in the Great Plains accounting software maintained by the Plaintiff and TSL;
> > (ii) a credit entry of $4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of the Plaintiff named ‘Loan — **Timbercorp** Securities Ltd’ and numbered 51-1208, by way of the same journal voucher;
> >
> > (iii) a debit entry of $4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of TSL named ‘Loan — **Timbercorp** Finance Pty Ltd’ and numbered 12-1200 by way of the same journal voucher;
> >
> > (iv) a credit entry of $4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of TSL named ‘Suspense New Loans Advanced’ and numbered 12-7234, by way of the same journal voucher;
> >
> > (v) TSL recording in its ‘**Timbercorp** Information Management System’, on 13 June 2008, the settlement of the First Defendant’s balance liabilities to TSL (following payment of his deposit) recorded in invoices 2256378 ... issued 13 June 2008; or
>
> ~~(b) on or about 19, 20 and 25 June 2008, the L0025841 Loan Amount [was] paid to Trust Company of Australia Limited as custodian and agent for TSL; or~~
> ~~(c) both (a) and (b)~~
>
> and thereby loaned it to the First Defendant in accordance with the terms of the Loan Agreement L0025841.[26]

Amended reply: the ratification point

61 At the same time, **Timbercorp** Finance delivered an amended reply, responding to the 'no loan' allegations in the amended defence dated 17 June 2016. **Timbercorp** Finance alleged that Mr White had authorised it to satisfy his liability to **Timbercorp** Securities for application money and that it had satisfied Mr White's liability to **Timbercorp** Securities by making the payment recorded by the journal entries alleged in paragraph 10 of the further amended statement of claim. Alternatively, **Timbercorp** Finance alleged that Mr White had acted on the basis that **Timbercorp** Finance had discharged his liability to **Timbercorp** Securities, and thus *ratified* the transaction, making him liable to **Timbercorp** Finance under the Loan Agreement.

62 **Timbercorp** Finance pleaded its ratification case as follows:

...

> (c) further or alternatively ... the First Defendant ratified the Plaintiff's satisfaction of the First Defendant's liability to TSL for fees payable by him to it, in the amount of $63,755.96, on the terms contained in Loan Agreement L0025841; and
> **Particulars**
>
> The First Defendant's ratification of the Plaintiff's satisfaction of the First Defendant's liability to TSL for fees payable, in the amount of $63,755.96, on the terms contained in Loan Agreement L0025841, is implied by the following matters:
>
> (a) Receipt by the First Defendant of a letter from Robert Hance on behalf of the Plaintiff to the First Defendant dated 30 June 2008 stating that the First Defendant's application for finance to invest in the 2008 **Timbercorp** Multichoice had been accepted on the terms attached to the letter, and that payments upon those terms were thereafter due and owing on the last business day of each month.
>
> The letter is in writing and a copy is available for inspection at the offices of the Plaintiff's solicitors.
>
> (b) Between 31 July 2008 and 30 April 2009, the First Defendant paid instalments to the Plaintiff due and owing under Loan Agreement L0025841.
>
> (c) The First Defendant instructed his accountant to claim tax deductions in the amount of $61 for interest paid to the Plaintiff due and owing under Loan Agreement L0025841.
>
> (d) The First Defendant instructed his accountant to claim tax deductions in the amount of $64,400 for fees paid to TSL, in circumstances where part of those deductions was premised upon the Plaintiff having discharged the First Defendant's liability to TSL under the 2007/2008 **Timbercorp** (Single Payment) Timberlot Project Management Agreement [Post 30 June Growers] (**Timberlot Management Agreement**).
>
> The First Defendant's tax deductions are recorded in the document titled 'Income Tax Return 2008 - Peter John White', a copy of which is available from the offices of the Plaintiff's solicitors.
>
> (d) in the premises, the First Defendant became and remains liable to the Plaintiff for the payment of $63,755.96, on the terms contained in Loan Agreement L0025841.[27]

63 On 13 July 2016, Mr White delivered a further amended defence to the further amended statement of claim dated 22 June 2016. Mr White alleged that: (a) **Timbercorp** Finance had not made any loan to him; (b)

Timbercorp Finance had not made any payment to **Timbercorp** Securities for his benefit; and (c) if a payment had been made to **Timbercorp** Securities, it was not in payment of the balance of Mr White's application money.

64 On 31 August 2016, **Timbercorp** Securities served its defence and counterclaim to the further amended statement of claim.

Pleadings after commencement of trial

65 After the trial commenced, there were further amendments to the various pleadings. In the event, **Timbercorp** Finance narrowed its case to rely upon the transactions recorded in journal entries to evidence the advance under the Loan Agreement.

66 During the trial, Mr White abandoned any reliance upon the absence of preconditions for the release of application moneys. By his further amended defence filed on 30 August 2016, after the conclusion of evidence, he deleted those paragraphs in which he had alleged his 'no loan' defence.

67 In the event, Mr White focussed upon the entries recorded in journal voucher 504786, alleging that the entries 'do not and cannot constitute the payment required' under the terms of the Loan Agreement. The basis of that allegation, as pleaded, was that journal voucher 504786 'records a present obligation by [**Timbercorp** Finance] to make a payment to [**Timbercorp** Securities] at a future date'.

68 Mr White further alleged that, even if there had been a payment, the payment could not properly be construed as a payment of the balance of *application money* on behalf of Mr White to **Timbercorp** Securities *in its capacity as responsible entity*. He further alleged that the journal entries could not, of themselves, constitute a payment in the absence of an agreement between the respective companies to that effect. The trial judge explained what he took to be the contentions now being advanced by the applicants as follows:

> as a matter of construction, cl 1 of the loan agreement required the advance to be made in bankable form, but if [**Timbercorp** Finance] was permitted to rely on the efficacy of journal entries to support a payment between related entities, it was necessary for [**Timbercorp** Finance] to allege an agreement between the entities to the effect that such transactions, or the particular transactions, may be validly effected by journal entry rather than the transfer of bankable funds. [The applicants] complained that no such agreement had been pleaded by **Timbercorp** Finance, and insofar as [**Timbercorp** Finance] relied upon the inference of an agreement, any such inference ought to be rejected. Accordingly, [the applicants] alleged, the journal entries did not constitute evidence of the transactions which they purported to record.[28]

The expert evidence and the joint experts report

69 As mentioned above, at trial, **Timbercorp** Finance relied upon a witness statement of Mr Stone dated 1 July 2016. Mr White relied upon a witness statement of Dawna Wright dated 6 July 2017. Ms Wright is also an experienced forensic accountant. Subsequently, **Timbercorp** Finance relied upon a witness statement of Brendan Halligan dated 1 August 2016.

70 On 3 August 2016, the trial judge ordered Ms Wright and Mr Halligan to confer and to provide to the Court and the parties a joint report. The Court directed the experts to give their opinion on whether the journal entries contained in journal voucher 504786, taking into account whatever matters that Mr Halligan and Ms White consider relevant, recorded a payment by **Timbercorp** Finance to **Timbercorp** Securities on account of discharging Mr White's liabilities to **Timbercorp** Securities.

71 On 15 August 2016, Ms Wright and Mr Halligan prepared their joint report.

Evidence on the journal entries

Journal vouchers 504451 and 504452

72 In their joint report, the experts agreed that the figure of $205,506 'is equal to the balance of the amount due by Mr White for invoice 2256378'. They agreed that that balance arose when Mr White paid the deposit of $22,834. [29] When Mr White paid $22,834, the amount that he owed to **Timbercorp** Securities was reduced from $228,340 to $205,506.

73 The Great Plains general ledger includes journal voucher 504451 dated 13 June 2008. The experts agreed that that journal voucher is for $250 and relates to Mr White. Mr Halligan said that '[t]he effect of journal entry 504451 is to take the receivable of $250 due from Mr White and "park" it temporarily in a suspense account pending some further accounting'.

74 The Great Plains general ledger includes journal voucher 504452 dated 13 June 2008.[30] The experts agreed that:

> the first part of journal entry 504452 is an increase (i.e. a debit) of $205,506 in a suspense account and the second part is a reduction (i.e. a credit) of the same amount in the receivable from Mr White. The figure of $205,506 is equal to the balance of the amount due by Mr White for invoice 2256378 (i.e. $228,340 less the payments totalling $22,834 that are recorded by journal entries 505116 to 505118). The experts agree that journal entry 504452 appears to take the receivable of $205,506 due from Mr White and 'park' it temporarily in a suspense account pending some further accounting.

75 As **Timbercorp** Ltd was the only company in the **Timbercorp** Group that maintained an operating bank account, the accounts of the **Timbercorp** Group did not record actual 'money' payment (in the sense of cash, cheque or electronic funds transfer) from **Timbercorp** Finance to **Timbercorp** Securities. Instead, the payment from **Timbercorp** Finance to **Timbercorp** Securities on account of discharging an investor's liability to **Timbercorp** Securities was recorded by way of journal entries in the general ledgers of **Timbercorp** Finance and **Timbercorp** Securities. Those entries showed: (a) a discharge of the investor's liability to **Timbercorp** Securities; (b) a liability owed by the investor to **Timbercorp** Finance equal to the amount of the investor's discharged liability to **Timbercorp** Securities; and (c) a liability owed by **Timbercorp** Finance to **Timbercorp** Securities equal to the amount of the investor's discharged liability to **Timbercorp** Securities.

76 In his witness statement, Mr Stone said that these transactions were recorded in the **Timbercorp** Group's Great Plains general ledgers. In the event that an investor owed **Timbercorp** Securities $100, and took out a loan from **Timbercorp** Finance for 90 per cent of that liability, then, as a result of the relevant journal entries, the position is that:

(a) **Timbercorp** Securities would record revenue of $100;

(b) the investor would be recorded as:

(i) having paid $10 to ***Timbercorp*** *Securities as a deposit from the investor;*

(ii) owing $90 to ***Timbercorp*** *Finance (as an asset of* ***Timbercorp*** *Finance); and*

(iii) having no residual liability to ***Timbercorp*** *Securities;*

(c) **Timbercorp** Finance would be recorded as owing **Timbercorp** Securities $90 (which would be reflected as a liability in **Timbercorp** Finance's general ledger and an asset in **Timbercorp** Securities' general ledger); and

(d) funds would be transferred by **Timbercorp** Ltd to the relevant Trust Company trust account on behalf of **Timbercorp** Securities, with **Timbercorp** Securities owing **Timbercorp** Ltd for the amount of funds transferred.

77 In other words, (1) **Timbercorp** Securities would record revenue amounting to the whole of the application money; (2) the investor would be recorded as having no residual liability to **Timbercorp** Securities; (3) **Timbercorp** Finance would be recorded as owing **Timbercorp** Securities the amount equivalent to the amount of the investor's discharged liability to **Timbercorp** Securities, which amount would be reflected as a liability in **Timbercorp** Finance's general ledger and an asset in **Timbercorp** Securities' general ledger; (4) **Timbercorp** Ltd would transfer funds to the custodian on behalf of **Timbercorp** Securities; and (5) **Timbercorp** Securities would be recorded as owing **Timbercorp** Ltd the amount of the funds transferred to the custodian.

Journal voucher 504786

78 In their joint report, the experts gave evidence as to the meaning of what was contained in journal voucher 504786.[31] They dealt with it, first, from the perspective of **Timbercorp** Securities and, then, from that of **Timbercorp** Finance. As was to be expected, their opinions expressed from the perspective of **Timbercorp** Securities were reflected in their opinions expressed from the perspective of **Timbercorp** Finance.

79 The experts agreed that the effect of journal voucher 504786 was that: (a) **Timbercorp** Finance had discharged the liability of Mr White to **Timbercorp** Securities; and (b) **Timbercorp** Finance had assumed a corresponding liability to **Timbercorp** Securities.

80 However, the experts were not agreed on whether journal voucher 504786 was evidence that **Timbercorp** Finance had made a payment to **Timbercorp** Securities. Mr Halligan said:

> In Halligan's opinion, **Timbercorp** Finance's journal entry 504786 relevantly records that a payment of $205,756 has been made to **Timbercorp** Securities (i.e. a resource embodying future economic benefits of that amount, being a bundle of legal rights under a loan agreement, has been given to **Timbercorp** Securities), on behalf of Mr White and that Mr White is now indebted to **Timbercorp** Finance for that amount.
> In Mr Halligan's opinion, **Timbercorp** Securities and **Timbercorp** Finance's journal entries 504786:
>
> (a) record a payment by **Timbercorp** Finance to **Timbercorp** Securities of $205,756 on account of discharging Mr White's liability to **Timbercorp** Securities;
>
> (b) that was effected by **Timbercorp** Finance recording an increase in a loan payable to **Timbercorp** Securities of $205,756 and by **Timbercorp** Securities recording a loan receivable from **Timbercorp** Finance of the same amount.

81 On the contrary, Ms Wright said:

> (a) Even though **Timbercorp** Securities may have discharged Mr White's liability, **Timbercorp** Finance has not yet made a payment. **Timbercorp** Securities has transferred the receivable from Mr White to **Timbercorp** Finance, and **Timbercorp** Finance has recorded the corresponding obligation to **Timbercorp** Securities.

(b) The recording of a loan payable to **Timbercorp** Securities in the accounts of **Timbercorp** Finance does not represent a 'payment' by **Timbercorp** Finance. A loan payable represents an obligation for **Timbercorp** Finance to pay **Timbercorp** Securities at some point in the future in the amount of Mr White's loan and Application Fee.

(c) A payment from **Timbercorp** Finance to **Timbercorp** Securities will be made when the liability from **Timbercorp** Finance to **Timbercorp** Securities is extinguished.

(d) **Timbercorp** Finance journal entry 504786 records that a right to a future benefit of $205,756 has been given to **Timbercorp** Securities on behalf of Mr White and that Mr White is now indebted to **Timbercorp** Finance for that amount. This opinion is different to that stated by Mr Halligan below as he states that journal entry 504786 records a benefit of $205,756 has been given to **Timbercorp** Securities.

(e) **Timbercorp** Finance journal entry 504786 did not record a reduction in a loan receivable from **Timbercorp** Securities; accordingly, a payment by **Timbercorp** Finance to **Timbercorp** Securities was not effected by recording a reduction in a loan receivable from **Timbercorp** Securities (even if it was a reduction in a loan receivable Ms Wright would not consider this a payment).

(f) If Mr White's liability to **Timbercorp** Securities is considered discharged, it is because of being replaced with a liability from **Timbercorp** Finance to **Timbercorp** Securities. Although the replacement of one obligation with another may settle Mr White's obligation to **Timbercorp** Securities, it does not constitute a 'payment' from **Timbercorp** Finance to **Timbercorp** Securities. The recording of the obligation from **Timbercorp** Finance to **Timbercorp** Securities, whilst it may discharge Mr White's liability, represents an obligation of **Timbercorp** Finance for a future payment to **Timbercorp** Securities.

For the reasons set out above, Ms Wright is of the opinion that there has not been a payment from **Timbercorp** Finance to **Timbercorp** Securities on account of discharging Mr White's liability to **Timbercorp** Securities.

82 At trial, Mr Stone gave evidence with respect to the identification of the journal entries recording Mr White's payment of a deposit to **Timbercorp** Securities and his loan from **Timbercorp** Finance. Having examined the Great Plains general ledger and confirmed its contents in the **Timbercorp** Information Management System, Mr Stone said:

(e) Only one journal voucher was listed. Journal voucher 504786, dated 14 June 2008, made the following entries:
(i) in the TSL Great Plains general ledger:

(A) a debit entry of $4,473,412 (including the Loan L0025841 amount of $205,756) in the TSL Loan Owed by TFPL Account, with account number 12-1200;

(B) a credit entry of $4,473,412 in the TSL Loan Suspense Account, with account number 12-7234;

(ii) in the TFPL Great Plains general ledger:

(A) a debit entry of $4,473,412 in the TFPL Grower Loan Account with account number 51-1221; and

(B) a credit entry of $4,473,412 in the TFPL Loan Owed to TSL Account, with account number 51-1208.

(f) ...

83 The actual voucher (journal voucher 504786) was as follows:

	Transaction Entry Zoom			— ⧈
Journal Entry	504,786	Audit Trail Code	GLTRN00048743	
Transaction Date	14/062008	Batch ID	IBSGJ	
Source Document	GJ	Reference	Batch 21884	

Currency ID ÷

Account		Debit	Credit			»
Distribution Reference			Exchange Rate			«
12 – 1200-ZZZZ - ZZ		$4,473,412.00				$0.
Batch 21884			0.0000000			
12 – 7234-ZZZZ - ZZ		$0.00				$4,473,412.
Batch 21888			0.0000000			
51 – 1208-ZZZZ - ZZ		$0.00				$45,473.412.
Batch 21884			0.0000000			
51 – 1221-ZZZZ - ZZ		$4,473,412.00				$0.
Batch 21884			0.0000000			
	Total	$8,946.824.00				$8,946,824.
Difference						$0.

Intercompany

Intercompany
OK

84 In the ⇦ **Timbercorp** ⇨ Securities ledger, there was a debit entry in the ⇦ **Timbercorp** ⇨ Finance account and a credit entry in a loan suspense account in the ⇦ **Timbercorp** ⇨ Finance general ledger. There was a debit entry in the grower loan account and a credit entry in the loan to the ⇦ **Timbercorp** ⇨ Securities account.

85 At trial, the experts agreed that the batch of growers to which that journal voucher related included Mr White. As a matter of accounting, the effect of the entry was to reduce to nil the amount in the books of **Timbercorp** Securities owing to it by Mr White.

The reasons of the trial judge

86 Before the trial judge, Mr White had contended that the objective purpose of the loan was to provide him with finance for the sole purpose of him investing in three managed investment schemes of which **Timbercorp** Securities was the responsible entity.[32] He contended that cl 1 of the Loan Agreement should be construed against the legislative framework found in ch 5C of the Act, which involved a pooling of contributions.[33] As a consequence, he said, **Timbercorp** Securities was not entitled to pool the balance of his application money with contributions made in respect of other schemes. Furthermore, as the application money had not been paid in full to **Timbercorp** Securities in its capacity as responsible entity, in bankable form, it could not be dealt with as contemplated in the Product Rulings, compliance plans, or as required under the scheme constitutions.[34] The failure of **Timbercorp** Finance to make a 'payment' meant that it had never made a loan to or on behalf of Mr White.

87 The trial judge held that the flow of funds between Trust Company and the operating account of **Timbercorp** Ltd amounted to substantive compliance with the transaction as contemplated in the Product Rulings.[35] He was not persuaded that cl 1 of the Loan Agreement required that the loan amount be paid in bankable form in discharge of the balance of Mr White's liability for application money. The critical step was the discharge of each investor's liability for management fees to be accompanied by a payment in cash — real money in bankable form — and this occurred.

88 **Timbercorp** Finance had relied upon the entries in journal voucher 504786 as evidence of the payment of the loan amount.[36] It said that these entries had the effect of discharging Mr White's liability for the balance of his application money. For his part, Mr White contended that the journal entry merely recorded a promise by **Timbercorp** Finance to make a payment to **Timbercorp** Securities in the future and did not show that the payment was in fact ever made.[37]

89 Whilst accepting that the journal entries, of themselves, were not transactions, the trial judge held that they constituted evidence of a transaction.[38] In both cases, he found that **Timbercorp** Finance had made a payment of the balance of the obligations of both Mr White and Mr and Mrs Collins to pay the application money to **Timbercorp** Securities, by increasing its loan account with **Timbercorp** Securities, which, in turn, had the effect of discharging each of Mr White and Mr and Mrs Collins' anterior obligations to make the payment to **Timbercorp** Securities.

90 The trial judge accepted the argument that Mr White had ratified the Loan Agreement by servicing his loan obligation.[39] The trial judge noted that Mr White had been notified that: (a) his loan application had been accepted; (b) management fees had been paid to **Timbercorp** Securities; and (c) lots had been allocated to him. Mr White also had his accountant prepare an income tax return in which management fees and other related costs were claimed as a deduction. The trial judge held that, by his conduct, Mr White had ratified any irregularity in the payment of the loan account. He said:

> If the defendants are found to be correct in their contention that performance by the plaintiff under the loan agreement is to be ascertained on the narrow basis that there was no payment of the balance of Mr White's obligation to **Timbercorp** Securities for Application Money, I find that by accepting a discharge of the balance of his liability to **Timbercorp** Securities for Management Fees and other scheme related costs, Mr White derived a benefit equal to the loan amount. Mr White treated

> that benefit as a loan from the plaintiff and, acting on that basis, claimed a full tax deduction and paid instalments ...[40]

91 However, the trial judge held that it was too late for Mr White to resile from the position that he had been a 'Participant Grower' in each of the Timberlot Scheme, the Almond Scheme and the Olive Scheme.[41] His status as a Participant Grower had been acted upon by **Timbercorp** Securities, **Timbercorp** Finance and their liquidators.[42] The trial judge continued:

> It would be unjust to permit Mr White to now avoid his obligation to the plaintiff as part of the price to be paid for the benefits he has already received as a Participant Grower.[43]

92 Further, the trial judge said that, by reason of Mr White's participation in litigation arising from the collapse of the **Timbercorp** Group, he was bound by a representative order which precluded him by issue estoppel from contending that he did not hold lots in the schemes wound up with the aid of such an order.[44] He concluded that the applicants' participation in the schemes, as Participant Growers, bound by an order based upon their participation, would make it manifestly unjust to **Timbercorp** Finance if they could avoid their loan obligations merely because the loan funds had been applied in reduction of a liability to pay management fees rather than application money, or because they were not paid in bankable funds to **Timbercorp** Securities.[45]

93 In the event, the trial judge entered judgment in favour of **Timbercorp** Finance against each of Mr White and Mr and Mrs Collins for the unpaid balance of each loan, together with interest.

Proposed grounds of appeal

94 The applicants seek leave to appeal on the following two grounds:

> (a) the primary judge erred in finding that by **Timbercorp** Finance making the 14 June 2008 Journal Entry it had made a payment to **Timbercorp** Securities of the balance of Mr White's application money; and
> (b) the primary judge erred in finding that it would be unjust if Mr White were not precluded from avoiding his loan obligations.[46]

Overview of the applicants' contentions

95 The written and oral submissions of the applicants and **Timbercorp** Finance were, for the most part, confined to the first proposed ground of appeal — namely, whether the trial judge had erred in finding that the 14 June 2008 journal entry (no. 504786) amounted to a payment to **Timbercorp** Securities of the balance of Mr White's application money pursuant to the Loan Agreement.

96 As is plain, the outcome of the first proposed ground of appeal hinges on the proper construction of cl 1 of the Loan Agreement. The contentions of the applicants in respect of the proper construction of cl 1 embraced several dimensions. Those contentions may be summarised as follows:

(a) payment of the balance of the application money under cl 1 had to be made to **Timbercorp** Securities *in its capacity as responsible entity* of the relevant schemes such that it could comply with the provisions of ch 5C;

(b) such payment also had to be made in bankable form and could not be effected by journal entry as **Timbercorp** Securities had to hold the application money on trust in accordance with its obligations under ch 5C;

(c) the 'loan amount' paid by **Timbercorp** Finance to **Timbercorp** Securities under cl 1 had to possess the character of 'application money' at the time of payment; and

(d) even if 'payment' under cl 1 could be made by journal entry, there was no evidence of any agreement between **Timbercorp** Finance and **Timbercorp** Securities that allowed **Timbercorp** Finance to effect such payment by way of journal entry.

97 In relation to the second proposed ground of appeal, the applicants contended that **Timbercorp** Finance, not ever having made a payment on Mr White's behalf, sought to enrich itself unjustly by having Mr White pay to its liquidators both the amount that **Timbercorp** Finance did not pay, plus interest.

The applicants' contentions in detail

98 As a starting point, the applicants drew attention to the fact that the present case was a debt recovery proceeding. Thus, it said, the onus was on **Timbercorp** Finance to prove that the applicants were indebted to it. In order to do so, **Timbercorp** Finance had to establish that it had complied with cl 1 of the Loan Agreement. The critical words in that clause were 'by paying [the *loan amount*] to **Timbercorp** Securities Limited AFSL 235653' and 'as payment of the balance of your application moneys for *lots'*. The clause had to be read in its context, which included ch 5C of the Act; the relevant scheme constitutions; the PDSs, which included the individual loan applications; and the Product Rulings.[47] The applicants argued that the payment had to be effected in such a manner as to permit **Timbercorp** Securities, as the responsible entity of the schemes, to comply with the provisions of ch 5C, which requires the application money to be pooled with the application moneys of other investors, held in trust until the decision to proceed with the schemes had been made, and remitted to the custodian. In essence, the applicants urged that, on a proper construction of cl 1, the loan was to be effected by paying *the balance of the application money* to **Timbercorp** Securities *in its capacity as responsible entity*.

99 The applicants contended that, in the present case, the journal entries did not establish that the money received was 'application money' or that what was being received by **Timbercorp** Securities in its capacity as the responsible entity was money that could be dealt with in accordance with ch 5C. Further, the journal entries did not reflect that what was to be transferred to the custodian was application money.

100 The applicants accepted that, under Australian law, payment in discharge of liabilities could be made by journal entry provided that there was an agreement between the parties authorising that mode of payment. It was necessary that there be precision about the content of the agreement. The applicants said that there was no evidence of any agreement between **Timbercorp** Finance and **Timbercorp** Securities that payment to **Timbercorp** Securities, in its capacity as the responsible entity of the various schemes, *of the balance of the application moneys*, could be effected by journal entry. The Product Ruling required payment of the whole of the application money before an investor could receive a tax deduction. The applicants pointed to the trial judge's findings that: (a) the purpose of the scheme documents was to convert the application money into management fees payable to **Timbercorp** Securities; and (b) that purpose had been achieved. The applicants said that these factors could not inform the construction of cl 1. Moreover, the Request for Product Ruling disclosed that payment from **Timbercorp** Finance on behalf of **Timbercorp** Securities would be effected to the custodian by cheque or by telegraphic transfer. The fact that the application moneys were transferred to the custodian was said to be inconsistent with the existence of an inferred agreement between **Timbercorp** Finance and **Timbercorp** Securities. The applicants argued that, although the **Timbercorp** Group had a single operating account, it was necessary for **Timbercorp** Ltd (which held the operating account) to make a payment in bankable form (i.e. by drawing a cheque or by making a telegraphic transfer) as agent for **Timbercorp** Finance in favour of **Timbercorp** Securities such that **Timbercorp** Securities could comply with its obligations under ch 5C.

The first respondent's contentions

101 For its part, **Timbercorp** Finance contended that the liability of the applicants to it under cl 1 of the Loan Agreement did not depend upon any particular mode of performance with respect to payment under that clause. It

further contended that, provided that there was the necessary agreement between it and **Timbercorp** Securities, performance by way of making journal entries in each company's books of account was sufficient. It said that the necessary agreement could and should be inferred. Finally, **Timbercorp** Finance said that, in the event that cl 1 mandated that the balance of the application money had to be paid as *application money* to **Timbercorp** Securities *in its capacity as responsible entity* and there had been a failure in either of those respects, the applicants had ratified the mode of performance.[48]

102 At the hearing of the application for leave to appeal, senior counsel for **Timbercorp** Finance said that, in respect of its contention that it had paid **Timbercorp** Securities, it relied solely upon the 13 and 14 June 2008 journal entry case and the associated inferred agreement between **Timbercorp** Finance and **Timbercorp** Securities authorising payment in that form. He pointed to the fact that paragraphs (b) and (c) of paragraph 10 of the further amended statement of claim had been deleted with the result that no part of its case relied upon the journal entries of 18, 19 and 25 June 2008.

The proper construction of cl 1 of the Loan Agreement

103 The principles governing the construction of a commercial contract are not in dispute. It is necessary to construe cl 1 of the Loan Agreement objectively, by reference to its text, context and purpose.[49] It is necessary to ask what a reasonable businessperson in the position of the parties would have understood the terms of that clause to mean.[50] Regard must be had to the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.[51]

104 Before addressing the contentions advanced by the applicants, it is convenient again to set out cl 1 in its entirety:

> **1. What we lend and when**
> We agree to lend you the *loan amount* by paying it to **Timbercorp** Securities Limited AFSL 235653 (or as it directs) as payment of the balance of your application money for *lots* and the *loan application fee* as described in the *application form*. However, we only have to lend you the loan amount if:
>
> (a) we have received all documents (including securities) and information we require, in a form satisfactory to us; and
>
> (b) neither you nor a guarantor is in default under this agreement or a security.

105 It will be recalled that the 'loan amount' under the Loan Agreement was stipulated to be $205,756. The 'loan application fee' was defined as 'a fee of $250 comprising part of the *loan amount*'. 'Lot' was defined, relevantly, as 'each almondlot ... timberlot [or] grovelot (as the case may be) allotted, or to be allotted, to you under a PDS in respect of the projects'. It is to be observed that the definition of 'lot' refers to the PDSs for the relevant schemes.

106 To recap, the applicants contended that **Timbercorp** Finance had not discharged the onus of proving that the applicants were indebted to it under the Loan Agreement unless it established that: (a) it had paid an amount to **Timbercorp** Securities; (b) the amount had the character of the balance of *application moneys*; and (c) the payment was made to **Timbercorp** Securities *in its capacity as responsible entity* of the relevant schemes. In so contending, the applicants placed particular emphasis on the reference to the Australian Financial Services Licence ('AFSL') of **Timbercorp** Securities in cl 1 of the Loan Agreement.[52]

107 For its part, **Timbercorp** Finance contended that, in order to establish Mr White's liability under cl 1, it needed to prove that it had paid to **Timbercorp** Securities an amount that was equal to the amount that was the balance of the amount owing by Mr White to **Timbercorp** Securities; it did not have to prove that what it paid — when it paid it — had the character of application money, and it did not have to prove that, when it paid the money to **Timbercorp** Securities, it paid that money to it in its capacity as responsible entity.

108 In our opinion, the construction proposed by the applicants should be rejected. The expression ‘agree to lend you the *loan amount* by paying it to **Timbercorp** Securities Limited AFSL 235653 (or as it directs) as payment of the balance of your application money for *lots* and the *loan application fee* as described in the *application form*’ is a description of the *amount* that **Timbercorp** Finance agreed to lend and the circumstances in which it was prepared to lend that amount.

109 The construction that the applicants would place on the words in cl 1 is both unnecessary and complex. The expression does not convey that the amount to be lent must be pressed with a certain character at the time when it is paid or that it is to be paid to **Timbercorp** Securities strictly in its capacity as responsible entity. The applicants contend that the latter requirement is apparent from: (a) the reference to the AFSL that appears after the name of **Timbercorp** Securities; and (b) the obligations imposed by ch 5C which, so the applicants submitted, required the payment of the balance of the application moneys in a manner that allowed them to be held in trust by **Timbercorp** Securities. As we see it, on a plain reading of cl 1, these features say nothing about the capacity in which **Timbercorp** Securities is to receive the loan amount.

110 Further, the construction proposed by the applicants is at odds with the law’s understanding as to the making of payments. Although one is accustomed to the term ‘trust money’, the expression ‘trust’ does not itself describe the character of the money. Rather, it is a conventional term used to describe the various duties, in respect of the money, owed by the person who has custody of the money. When an investor chooses to spend his or her money to acquire an interest in a managed investment scheme — whether that money comes from the investor’s own resources or from borrowings — that money has no particular character in the hands of the investor (or anyone else) before it is paid to the responsible entity. When it is paid, the responsible entity will come under the duties in respect of that money that are provided for in the constitution of the scheme, ch 5C and the general law. The constitution may provide that the responsible entity is to have fiduciary duties in respect of that money pending the performance of further steps contemplated either by ch 5C or the constitution.

111 It is true that cl 4.2 of the constitution of each scheme required **Timbercorp** Securities to hold any amounts, which were paid by scheme applicants in order to acquire an interest in a scheme, on trust. Further, cl 4.3 authorised **Timbercorp** Securities to pool any amounts paid by any scheme applicant with any amounts paid by any other scheme applicant. However, these features of the constitution, or ch 5C for that matter, do not tell in favour of construing cl 1 such that the moneys had to have a particular character, or that **Timbercorp** Securities had to receive such moneys in a particular capacity, *at the time when those moneys were paid*.

112 Moreover, the applicants’ reliance upon the Requests for Product Ruling is unavailing. It is true that the Requests for Product Ruling disclosed that payment from **Timbercorp** Finance on behalf of **Timbercorp** Securities would be effected to the custodian by cheque or by telegraphic transfer. However, this fact can have no bearing on the construction of cl 1, which is concerned only with **Timbercorp** Finance lending the loan amount to a scheme applicant by paying that amount to **Timbercorp** Securities. At any rate, as explained above, the reality was that **Timbercorp** Finance did not itself have a bank account that would permit it to make any payment by cheque or telegraphic transfer. And so it was that **Timbercorp** Ltd, the only company in the **Timbercorp** Group with an operating bank account, made payments to the custodian on behalf of other companies in the **Timbercorp** Group, including **Timbercorp** Finance.

*How the payment was recorded in the accounts of **Timbercorp** Securities*

113 The present case concerns the liability of the applicants to **Timbercorp** Finance. To that extent, it concerns the compliance by **Timbercorp** Finance with the obligations that it had assumed to the applicants. It does not concern the conduct of **Timbercorp** Securities. That said, during oral argument, senior counsel for the applicants suggested that payment of the balance of the application funds could not be effected by journal entry as **Timbercorp** Securities had to hold the application moneys on trust and ‘that could not be by book entry’; there would have to be something ‘like a declaration of trust’.

114 The applicants said that there was simply no evidence as to how **Timbercorp** Securities treated what it had received from **Timbercorp** Finance. Nor, said the applicants, was there any evidence that it had recorded the receipt of a payment of application money and that it had done so as responsible entity.

115 We understand this observation to be made in support of a contention of the applicants that, as part of the obligations it assumed under the Loan Agreement, **Timbercorp** Finance had agreed to procure **Timbercorp** Securities to treat the moneys advanced to it by **Timbercorp** Finance as 'payment of the balance of [a scheme applicant's] application money'. We reject this contention. The evidence was that **Timbercorp** Securities recorded in its accounts the moneys that it received directly from investors (by way of deposit) or from **Timbercorp** Finance (by way of discharging the investors' liability for the balance of the application moneys) as 'application money'.

116 On 26 September 2008, Mr White was provided with the Directors' Report, Directors' Declaration and financial statements, together with the Auditor's Report in respect of the '2008 **Timbercorp** financial year 2007/2008 Timberlot – Post-30 June'.[53] The Directors' Report related to the Timberlot Scheme. It contained the Cash Flow Statement for the year ended 30 June 2008. Under the entry 'Cash flow from operating activities', **Timbercorp** Securities recorded $56,628,880 under the rubric 'Receipts from growers'. The accounts then recorded that an identical amount was paid out as management and other fees.

117 The notes to the Financial Statements for the year ended 30 June 2008 also confirm that **Timbercorp** Securities treated the funds advanced to it as the balance of the application money payable by a borrower. Under the rubric of 'Significant accounting policies', the notes contained the following text: 'Revenue recognition: Revenue from subscription money is brought to account when the applications are accepted by the Responsible Entity'.

118 The accounts were subject to a directors' declaration and an independent audit opinion. They recorded full receipt of the application money. There was no suggestion that the accounts were a sham or fraud.

119 The journal entries are themselves evidence that the money was received by **Timbercorp** Securities and treated by it as application money in accordance with the requirements in the constitution.

120 Accordingly, if the obligation placed on **Timbercorp** Finance under the Loan Agreement was to procure that **Timbercorp** Securities treated the funds advanced to it as the balance of the application money payable by the borrower, it established that it had complied with that obligation.

Mode of performance of cl 1 of the Loan Agreement

121 The applicants then contended that, for liability to arise under cl 1 of the Loan Agreement, **Timbercorp** Finance had to establish that it had paid the relevant amount to **Timbercorp** Securities 'in bankable form'.[54] For it to be a 'payment', said senior counsel for the applicants during oral argument, the advance had to be made in cash '[as] long as cash is understood ... as cheque or telegraphic transfer'. In other words, it was not sufficient for **Timbercorp** Finance simply to refer to journal entries between it and **Timbercorp** Securities.

122 At trial, there appears to have been disagreement between the parties as to whether, as a general proposition, payment could be made by journal entry. At the hearing of the present applications, the applicants conceded that payment could be made by journal entry provided that there was an agreement between the parties to that effect. The applicants contended that, in the present case, there was no evidence of any underlying agreement to support the use of the journal entries to make a payment. In particular, the applicants contended that **Timbercorp** Finance had to establish that there was an agreement between it and **Timbercorp** Securities that the payment of the balance of the application money could be made by book entry.[55] Moreover, the applicants contended that any such agreement was inconsistent with the constitution of each scheme and the evidence of two of its former officers, Mr Sholom Rabinowicz and Mr Andrew Hance. Mr Rabinowicz had been the

chief executive officer of the **Timbercorp** group since 1 July 2008. Mr Hance was the former chairman of the **Timbercorp** Group and a director of both **Timbercorp** Finance and **Timbercorp** Securities.

123 The first thing to notice about cl 1 is that it makes no reference to payment having to be made either by cash, cheque or telegraphic transfer.[56]

124 The concession that payments can be made by journal entry was properly made.[57] Provided that there is an agreement to that effect between the parties to a financial transaction, payment may be made by book or journal entry.

125 In *Manzi v Smith*,[58] the High Court held that entries in a company's books of account purporting to evidence payments to shareholders were not evidence of the discharge or reduction of any obligations to those shareholders as the shareholders were not parties to the entries and had no knowledge of them.[59]

126 In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*,[60] the High Court held that payment could be made by journal or book entry, provided that there was an agreement to that effect between the relevant parties. That case concerned a limited liability partnership which was formed to develop and operate an aquaculture project. Investors who proposed to acquire units in the partnership entered into a written loan agreement to borrow the whole of the purchase price of the units from a lender, Rural Finance Pty Ltd. On 30 June 1989, a series of transactions took place in the offices of the Melbourne branch of Westpac Banking Corporation. On their face, those transactions appeared to have intended to constitute a payment from Rural Finance of each investor's investment to Eagle Star Trustees Ltd, the representative of the investors, followed by payment of those amounts by Eagle Star to Forestall Securities (Australia) Ltd, the general partner that had the authority to manage the partnership project. The transactions were effected by the debiting of Rural Finance's account with Westpac and the corresponding crediting of Eagle Star's account with the same bank. Westpac recorded these transactions in debit and credit notes. Thereafter, cheques were drawn by Eagle Star on its account in favour of Forestall and paid to its credit. Forestall then drew cheques in favour of the manager of the scheme (JFM) and the lessor of ponds (FJA) that were to be deployed as part of the scheme. It appears that it was proposed that JFM and FJA would then deposit the funds that they had received with Rural Finance into interest bearing deposits. The case proceeded on the assumption that that had occurred.

127 The aquaculture project failed. Rural Finance assigned the loans to Equuscorp Pty Ltd, which sought to enforce the written loan agreements. Investors resisted payment on various grounds, including that there had been no loan to them and, thus, no effective assignment to Equuscorp. At trial, the investors succeeded. The trial judge held that the transactions at the offices of Westpac were 'book entries' made to create an 'audit trail' and that each of the transactions was 'a complete artifice or façade' and a 'charade'.[61] The Queensland Court of Appeal dismissed an appeal. Williams JA, who delivered the leading judgment, said that 'it was fundamental to the performance of the various agreements associated with the venture that real money flow from [the borrowers] to those entities responsible for conducting the enterprise'.[62] The High Court granted special leave to appeal and unanimously allowed the appeal.

128 Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ held that the transactions described above were 'legally effective'; none could be said to be a sham. They said that the primary judge was wrong to characterise them — as he did by his references to 'artifice', 'façade' and 'charade' — as shams.[63] The Court continued:

> 'Sham' is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences. In this case, debts were created and satisfied at all points in the chain until, at its end, Rural Finance owed JFM and FJA certain sums, and the respondents owed Rural Finance certain sums. And of most particular relevance to the present matters, in accordance with its obligations under the written loan agreements, Rural Finance had applied the money it lent in

> payment of the application moneys due from the respondents for the units being bought.[64]

129 The next case that falls for consideration is *Rocky Castle Finance Pty Ltd v Taylor*.[65] In their written and oral submissions, the applicants placed considerable emphasis on the result in that case. They contended that journal entry 504786 did no more than evidence 'an indeterminate promise on the part of **Timbercorp** Finance to make a payment to **Timbercorp** Securities' and that there was 'no sensible basis upon which the conclusions in *Rocky Castle Finance* can be distinguished'. [66]

130 In *Rocky Castle Finance*, the appellant ('Rocky Castle') agreed to lend money to investors (known as 'Participants') in a managed investment scheme pursuant to a Loan Deed between it and each Participant. Relevantly, cl 2.1 of the Loan Deed provided:

> The Lender hereby agrees to advance the Principal to the Borrower or as he may direct, and the Borrower hereby authorises and directs the Lender to so advance the Principal as follows:
> (a) no later than the Settlement Date to the Manager the sum of $8,000.00 per Participation in part payment of the first year's Annual Management Fee payable by the Borrower as a Farmer under the terms of the Joint Venture Agreement;
>
> ...[67]

Section B cl 2 of the loan application form contained an irrevocable authority and direction by the borrower to the lender 'to apply the proceeds of the loan to be advanced to you to payment of the Management Fees for each such Participation'.[68]

131 The terms of the relevant application form contained an irrevocable authority and direction by the borrower to the lender in the following terms:

> B. Loan Application [optional]
> If you have decided to take up the Loan Option by not deleting paragraph 2 of Section E herein then by completing and signing this form you:

1. Apply for a loan from Rocky Castle Finance Pty Ltd ... ['the Lender'] to fund the payment of your Management Fees for each Participation in the Project in the Coonawarra Winegrape Project Prospectus; and
2. Irrevocably Authorise and Direct the Lender to apply the proceeds of the loan to be advanced to you to payment of the Management Fees for each such Participation.

132 In the event, Rocky Castle issued a series of promissory notes in favour of the manager of the scheme (AHM), which, in turn, indorsed them in favour of a subcontractor ('Koonara'). Koonara then indorsed the notes in favour of Rocky Castle. AHM issued tax invoices to each of the investors for the relevant fees, in each case deducting as paid an amount shown as having been financed by Rocky Castle. Rocky Castle brought proceedings against the investors in the Magistrates' Court for moneys lent. The principal issue was whether the provision by Rocky Castle of the promissory notes constituted payment for the purposes of the loans for which the investors had applied. The Magistrate upheld the claim. An appeal to a single judge of the Supreme Court of South Australia was allowed. Rocky Castle appealed to the Full Court. It contended, among other things, that the reasoning of the High Court in *Equuscorp* applied to round robin transactions effected by the issue, acceptance and indorsement of promissory notes. The investors contended that, on its proper construction, cl 2.1 of the Loan Deed required a 'payment' to be made in a form that was capable of being, and was, banked into an account of AHM.

133 The Full Court dismissed the appeal. Vanstone J said that, whilst the Loan Deed did not specify the form in which the advance was to be made, it did not 'purport to redefine the words advance or payment in such a way as to rob the words of their usual meaning'.[69] She continued:

> The Loan Deed required no less than a payment. While [AHM's] acknowledgment that the obligation had been met might affect legal relations between [AHM] and the investors, it could not affect the question whether or not an advance of the balance of the management fee had been made, which is a question of fact.[70]

134 Vanstone J held that the delivery of a promissory note was not equivalent to payment. It was 'instructive', she said, '[t]hat a promissory note is regarded as a conditional payment, having the effect of suspending the cause of action, but not discharging the original debt'.[71] Vanstone J distinguished *Equuscorp* on the basis that, in that case, the Court 'treated the bank account entries as evidence of debts being created and satisfied'; there had been 'an assumption throughout the proceedings that the cheques had been met and the transfer from JFM and FJA to Rural Finance had taken place'.[72] In the present case, she said, there was a lack of evidence that there was ever any payment on the note. Rocky Castle had made no legally effective payment; it had merely made 'a promise to pay which was not performed'.[73]

135 Blue J (with whom Stanley J agreed) identified the issue as follows:

> The authority and direction contained in the Loan Deed, and the irrevocable authority and direction contained in the Application Form, comprised a mandate by the Borrower to Rocky Castle to make the contractual advance in a specific manner and form.
> If Rocky Castle effected payments in accordance with the terms of the mandate by the delivery and acceptance of each Promissory Note, Rocky Castle made the advances contemplated and authorised by each Loan Deed and Application Form and is entitled to repayment of principal and interest thereon. Conversely, if Rocky Castle did not act in accordance with the mandate from the Borrower, the delivery and acceptance of each Promissory Note did not constitute an advance within the meaning of the Loan Deeds and Rocky Castle is not entitled to payment of principal or interest.[74]

Blue J pointed out that it was 'common ground that it is appropriate to refer to the Joint Venture Agreement and the Constitution in construing the Loan Deed and Application Form'.[75] It was also appropriate, he said, to refer to the terms of the prospectus.[76] Having considered the reference to the payment of application moneys into the scheme bank account as provided for in the constitution and to the parts of the prospectus that referred to the adequacy of funds necessary for the scheme, Blue J said:

> Those sections explicitly contemplate that AHM will utilise the funds received by way of Participation Fees to pay the viticulture, establishment and maintenance expenses and lease rent. They contemplate that the Participants have an interest in AHM having adequate funds to meet those expenses and completing the tasks required of it. The Other Undertakings section discloses that AHM was the manager of two other managed investment schemes. The Participants had an interest in AHM keeping its activities and funds for their Joint Venture separate from its other activities.
> The delivery and acceptance of each Promissory Note was not in accordance with, and was contrary to, the mandate by the Borrowers to Rocky Castle contained in clause 2.1 of the Loan Deed and section B clause 2 of the Application Form. It did not comprise a 'payment' within the meaning of clause 2.1(a)-(e) or form part of an 'advance' within the meaning of clause 2.1 of the Loan Deed.
>
> It follows that the High Court's decision in *Equuscorp* has no application. In that case, the amounts of the loans were deposited into the bank account of the Manager and there was no basis upon which it could be contended that this was outside the mandate conferred by the Borrowers.[77]

136 Whether it was necessary to the reasons of Blue J that documents other than the Loan Deed had to be considered in the construction of that Deed need not be addressed here. What seems clear is that the Loan Deed itself was specific in respect of how the loan funds were to be advanced: 'the sum of $8,000.00 per Participation in part payment of the first year's Annual Management Fee payable by the Borrower as a Farmer under the terms of the Joint Venture Agreement'.[78]

137 The basis upon which Blue J distinguished *Equuscorp* is unavailable in the present case. It will be recalled that, in *Equuscorp*, the Court referred to the facts that 'debts were created and satisfied at all points in the chain' and that, 'of most particular relevance to the present matters, in accordance with its obligations under the written loan agreements, Rural Finance had applied the money it lent in payment of the application moneys due from the respondents for the units being bought'.[79] Similarly, in the present case, the evidence established that **Timbercorp** Finance had advanced moneys and that those moneys had been applied in payment of the application moneys.[80]

138 It follows that, subject to there being an agreement between **Timbercorp** Securities and **Timbercorp** Finance that payment could be made by journal entry, a payment by that means satisfied cl 1 of the Loan Agreement.

Was there an agreement between Timbercorp Securities and Timbercorp Finance that Timbercorp Finance could make a payment to Timbercorp Securities by journal entry?

139 Where there is an agreement that payment may be made by journal entry, payment in legal tender, or by the transfer of a money fund, is unnecessary. In *Re York Street Mezzanine Pty Ltd*,[81] the issue before Finkelstein J was whether obligations to meet one promissory note had been discharged by its replacement with another promissory note.[82] Finkelstein J said:

> The ordinary rule is that to discharge a bill of exchange, and so to discharge a promissory note, the issuer is required to make a payment in money to the payee or bearer ... In other words the payment must be in legal tender (money) or by the transfer of a money fund.
> This method of payment is highly inconvenient, especially where large sums are involved. It is not uncommon, therefore, to find that parties to a bill of exchange agree that payment can be made by some other means which is commercially acceptable, such as by the delivery of a bankers cheque. Not surprisingly, it has been held that parties to a note may agree that the note can be satisfied otherwise than by the transfer of legal tender (money). In that way (that is by the agreement of the parties) the law relating to bills of exchange (including promissory notes) is brought in line with the law relating to contracts generally ... The result is that, by agreement, payment of money due under a bill of exchange can be made by set off, by the delivery of goods, by a bond, by cheque or bankers draft or even by book entry ...
>
> There is every reason to permit a payment to be made by a book entry. Often it is simply a short-hand for money or a cheque being handed across the table and money or a cheque being handed back. It would be entirely inconsistent with modern commercial life if a payment due by one person to another could not be effected in this manner. At any rate, that is how the law has progressed. See, for example *Manzi v Smith* [1975] HCA 35; (1975) 132 CLR 671; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471. All that is required is an actual agreement by the relevant parties that payment be made by means of entries in books of account ... The agreement may be express or it may be inferred. In the case of a bill of exchange, however, in the absence of an express agreement the court will not readily

> infer an agreement that the payment, which must otherwise be in money, may be made by some other means.[83]

140 To the same effect, in *Brookton Co-operative Society Ltd v Commissioner of Taxation*,[84] Mason J said:

> Payment of a dividend may occur in a variety of ways not involving payment in cash or by bill of exchange, as, for example, by an agreed set-off, account stated or an agreement which acknowledges that the amount of the dividend is to be lent by the shareholder to the company and is to be repaid to the shareholder in accordance with the terms of that agreement. It is, however, well settled that the making of a mere entry in the books of a company *without the assent of the shareholder* does not establish a payment to the shareholder: see *Manzi v Smith*.[85]

141 Thus, payment may be made by legal tender or by any other means that is agreed between the parties.

142 Assuming that payment may be lawfully made by journal entry, the applicants contended that **Timbercorp** Finance had failed to establish the existence of any agreement between **Timbercorp** Finance and **Timbercorp** Securities that permitted payments between them to be made by journal entry.

143 In the present case, the trial judge held that the journal entries evidenced payment as there was an agreement to that effect between the companies within the **Timbercorp** Group.[86] He held that such an agreement should be inferred. In doing so, he pointed to the various features common to intercompany transactions between members of a corporate group.[87]

144 The applicants said that **Timbercorp** Finance had produced no evidence of any transaction with **Timbercorp** Securities anterior to the making of the 14 June 2008 journal entry. They said that there was no evidence that the making of the journal entry by **Timbercorp** Finance gave rise to a chose in action enforceable by **Timbercorp** Securities against **Timbercorp** Finance. They also said that any inference as to the existence of any such 'necessary anterior agreement' could not be reconciled with: (a) the evidence of Mr Rabinowicz and Mr Hance to the effect that the payment of application moneys was always to be by the payment of money, not journal entry; (b) the contemporaneous evidence of the flow of funds for each scheme, (c) the ATO Product Rulings; (d) the constitutions; and (e) ch 5C.

Inferring an agreement between companies in a corporate group

145 In *P'Auer AG v Polybuild Technologies International Pty Ltd*,[88] Whelan JA (with whom Ferguson and Kaye JJA agreed) explained the circumstances in which the law will infer the existence of a contract in the absence of clear offer and acceptance:[89]

> The relevant starting point in a case of this kind is the principle that a contractual obligation cannot be imposed by an offeror upon an offeree merely by reason of a failure to reject an offer made. Silence, in itself, cannot constitute acceptance.[90] Nevertheless, leaving to one side cases of estoppel,[91] cases where there is an historic relevant course of dealing,[92] and cases where the events are so obscure or so far in the past that direct evidence is not available,[93] there are circumstances where acceptance of an offer can be inferred in the absence of express consent. This will be the case if an objective bystander would conclude from the offeree's conduct, including his silence, that the offeree has accepted the offer and has signalled that acceptance to the offeror.[94]
>
> Further, and more generally, it is now accepted that the existence of a contract can be established or inferred where a manifestation of mutual assent must be implied from

the circumstances.[95]

It is important to emphasise that the circumstances in which a contract will be inferred, otherwise than by the traditional analysis of offer and acceptance, will be rare. It seems to me that the position was well summarised by Sundberg J in *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* when he said:

A contract may in certain circumstances be inferred from conduct, even where no offer and acceptance can be identified ... However the existence or otherwise of an enforceable agreement depends ultimately on the manifest intention of the parties, objectively ascertained ... Where mutual promises are sought to be inferred, the conduct relied upon must, on an objective assessment, evince a tacit agreement with sufficiently clear terms. It is not enough that the conduct is *consistent* with what are alleged to be the terms of a binding agreement. The evidence must positively indicate that both parties considered themselves bound by that agreement ...[96]

In determining if an agreement has been made in this way regard must be had to the entirety of the relevant conduct.[97] The precise point in time at which the agreement comes into existence may not be clear, and the relationship between the parties themselves may be dynamic in such a way that the terms of the agreement might be added to or superseded over time.[98]

In this context the absence of non-essential terms, or a lack of agreement on non-essential terms, will not invalidate the existence or effective operation of a binding contract.[99]

146 In *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*,[100] Allsop J (with whom Drummond and Mansfield JJ agreed) illustrated precisely why the formation of contracts need not conform to ‘mechanical notions of offer and acceptance’:

There was in fact a clear point of crystallisation of contractual intent. The contract arose from the prior conduct and communications of the parties, in particular around mid-December. Mr Campbell QC called this a ‘springing contract’ and something not known to the law. On the contrary, a number of authorities discuss the need not to constrict one’s thinking in the formation of contract to mechanical notions of offer and acceptance. Contracts often, and perhaps generally do, arise in that way. They can also arise when business people speak and act and order their affairs in a way without necessarily stopping for the formalities of dotting ‘i’s and crossing ‘t’s or where they think they have done so. Here, the ‘i’s were not dotted and the ‘t’s were not crossed because of Mr Graham’s conduct. Sometimes this failure occurs because, having discussed the commercial essentials and having put in place necessary structural matters, the parties go about their commercial business on the clear basis of some manifested mutual assent, without ensuring the exhaustive completeness of documentation. In such circumstances, even in the absence of clear offer and acceptance, and even without being able (as one can here) to identify precisely when a contract arose, if it can be stated with confidence that by a certain point the parties mutually assented to a sufficiently clear regime which must, in the circumstances, have been intended to be binding, the court will recognise the existence of a contract. Sometimes this is said to be a process of inference or implication. For my part, I would see it as the inferring of a real intention expressed through, or to be found in, a body of conduct, including, sometimes, communications, even if it be the case that the parties did not consciously advert to, or discuss, some aspect of the relationship and say: ‘and

> we hereby agree to be bound' in this or that respect. The essential question in such cases is whether the parties' conduct, including what was said and not said and including the evident commercial aims and expectations of the parties, reveals an understanding or agreement or, as sometimes expressed, a manifestation of mutual assent, which bespeaks an intention to be legally bound to the essential elements of a contract.[101]

147 In his reasons, the trial judge outlined the bases upon which he was prepared to find that an agreement between **Timbercorp** Finance and **Timbercorp** Securities that payment could be made by journal entry should be inferred.[102] It is unnecessary to repeat these matters. What is critical is that the two companies were wholly-owned subsidiaries of **Timbercorp** Ltd. They had the same directors. The group had only one operating bank account. It was in the name of **Timbercorp** Ltd. Each year, the financial accounts of the companies were the subject of directors' declarations that they gave a true and fair view of the company's financial position. Specifically, the directors declared that, in accordance with a directors' resolution pursuant to s 295(5) of the Act, various financial statements (and notes thereto) of each of the companies: (a) complied with accounting standards; (b) gave a true and fair view of the financial position and performance of the company and the consolidated entity; and (c) were, in the opinion of the directors, in accordance with the Act (or its predecessor, as the case may be), in addition to a declaration that the companies were solvent. The financial accounts were also the subject of an independent audit report pursuant to div 3 of pt 2M.3 of the Act substantially to the same effect. Corresponding declarations and reports were made in respect of **Timbercorp** Ltd. Absent some special feature, an agreement that intercompany transactions may be evidenced by journal entry must be inferred in this case. Any contrary conclusion defies commercial sense.

148 The evidence of the flow of funds for each scheme does not stand in the way of such an inference. The applicants placed much emphasis upon the fact that **Timbercorp** Ltd, using its bank account with the ANZ Bank, had transferred to Trust Company an amount equivalent to the balance of the application money. They argued that this transaction could not be reconciled with the existence of an inferred agreement between **Timbercorp** Finance and **Timbercorp** Securities as to the mode of performance of cl 1 of the Loan Agreement. It need hardly be repeated that the transaction involving **Timbercorp** Ltd and Trust Company reflected the fact that **Timbercorp** Ltd was the only company in the **Timbercorp** Group with an operating bank account. In any event, to use the words of Allsop J, contractual intent giving rise to the inferred agreement between **Timbercorp** Finance and **Timbercorp** Securities had already crystallised by the time that that transaction took place.

149 The applicants also contended that any inferred agreement between **Timbercorp** Finance and **Timbercorp** Securities could not be reconciled with the Request for Product Rulings, the constitutions and ch 5C.

150 We have already addressed the applicants' contentions with respect to the effect of the Request for Product Rulings on the proper construction of cl 1 of the Loan Agreement.[103] Our analysis of that matter applies with equal force here. The disclosure in the Requests for Product Ruling that payment from **Timbercorp** Finance on behalf of **Timbercorp** Securities would be effected to the custodian by cheque or by telegraphic transfer is of no moment when one considers how payment was effected in reality. The Requests for Product Ruling did not bind **Timbercorp** Securities and **Timbercorp** Finance to a defined state of commercial affairs; they were a means of **Timbercorp** Securities' disclosing certain information and describing the operation of the various schemes with a view to receiving an opinion from the ATO in respect of the tax consequences for investors in those schemes. Any departure from what was contained in the Requests for Product Ruling may have had consequences for **Timbercorp** Securities vis-à-vis the ATO, but in no way could it stand in the way of inferring an agreement between **Timbercorp** Finance and **Timbercorp** Securities as to the mode of

performance of cl 1, a fortiori where the parties implicated in that departure are the same parties to the inferred agreement.

151 The same applies with respect to the effect of the constitutions and ch 5C. The applicants did not advance any cogent submission as to how the constitution of each scheme or ch 5C weighed against the inference of the requisite agreement. In our opinion, as regards the mode of performance of cl 1, none of the matters relied upon by the applicants weighs against the agreement that is to be inferred from the relationship between the two companies as wholly-owned subsidiaries in a corporate group with only one operating bank account.

152 As indicated above, the submissions of the applicants were equivocal as to who the necessary parties to any inferred agreement had to be. Sometimes they identified the necessary parties as simply **Timbercorp** Finance and **Timbercorp** Securities; at other times, they submitted that the investors were also necessary parties to the relevant agreement.

153 In our opinion, the conclusion that payment could be made by journal entry depended solely upon the existence of an agreement between **Timbercorp** Finance and **Timbercorp** Securities to that effect. However, absent any evidence of an express agreement, such an agreement must depend upon inferences. In determining whether the necessary inference could be made, it is appropriate to examine the whole context, which includes the agreements collateral to the postulated agreement. Given that **Timbercorp** Securities was entitled to be paid money by the investors, it would not readily be inferred, in arm's length circumstances, that **Timbercorp** Securities would accept nothing but a journal entry in discharge of its entitlement to receive money from the investors. But the circumstances here were not at arm's length. **Timbercorp** Finance and **Timbercorp** Securities were wholly-owned subsidiaries of **Timbercorp** Ltd. Neither subsidiary had its own bank account. Provision had been made for **Timbercorp** Ltd to draw down on its facility with the ANZ Bank an amount equal to the amount of the application money that **Timbercorp** Finance was transferring to **Timbercorp** Securities: 'a manifestation of mutual assent must be implied from the circumstances'.[104]

154 There was no requirement that Mr White be a party to any such agreement between **Timbercorp** Finance and **Timbercorp** Securities.[105] In *Rocky Castle Finance*, Blue J accepted that Rocky Castle and AHM could agree that payment could be made by promissory note. However, he was not prepared to infer such an agreement in that case because of the collateral entitlements of the Participants under their loan agreements with Rocky Castle and the circumstances surrounding the payment by Rocky Castle to AHM.[106] Apart from anything else, AHM had to be put in funds in order to make payments to Koonara.

155 Similarly, in the present case, the principal question is whether **Timbercorp** Finance complied with cl 1 of the Loan Agreement. That was the relevant agreement between **Timbercorp** Finance and Mr White. Mr White was entitled to be lent the 'loan amount' by **Timbercorp** Finance 'paying it to **Timbercorp** Securities ... as payment of the balance of [his] application money'. In deciding whether an agreement between **Timbercorp** Finance and **Timbercorp** Securities that payment of the application money could be made by journal entry should be inferred, the obligations of **Timbercorp** Finance to Mr White would not be irrelevant. If the journal entries were simply notional, there might not have been performance under cl 1 of the Loan Agreement; that circumstance would tell against inferring the necessary agreement. But the journal entries were not simply notional. They were accompanied by payment by **Timbercorp** Finance to the custodian (by **Timbercorp** Ltd on behalf of **Timbercorp** Finance). As set out above, in *Equuscorp*,[107] the High Court spoke of debts that 'were created *and satisfied* at all points in the chain' and that, 'of most particular relevance to the present matters, in accordance with its obligations under the written loan agreements, Rural Finance *had applied the money* it lent in payment of the application moneys due from the respondents for the units being bought'.[108]

The evidence of Mr Rabinowicz and Mr Hance

156 As indicated in [122] and [144] above, the applicants said that the inferring of an agreement that payment could be made by journal entry cannot be reconciled with the evidence of Mr Rabinowicz and Mr Hance that the payment of application money was always to be by actual payment of money, not journal entry.

157 In order to understand these contentions, it is necessary to consider the material before the trial judge and the cross-examination of Mr Rabinowicz and Mr Hance. As explained above, Mr Rabinowicz had been the chief executive officer of the **Timbercorp** group since 1 July 2008, while Mr Hance was the former chairman of the **Timbercorp** Group and a director of both **Timbercorp** Finance and **Timbercorp** Securities.

158 During his cross-examination, Mr Rabinowicz was shown the Request for a Product Ruling in respect of the Timberlot Scheme. His attention was drawn to the diagram extracted at [34] above. The transcript reads as follows:

> Counsel: And you will see, if I take you first to point 3, right at the bottom of the page?
> Rabinowicz: Yes.
>
> Counsel: That the Tax Office was told that this applied equally to post-30 June growers?
>
> Rabinowicz: Yes.
>
> Counsel: And they were the people who made application to **Timbercorp** Securities for interests in schemes after 1 July 2007; that's correct?
>
> Rabinowicz: Yes.
>
> Counsel: It says that – this is dealing with timberlots in note 1 – the sum of 3,080 per lot is represented by a physical flow of funds; do you see that?
>
> Rabinowicz: Yes.
>
> Counsel: By bank cheque or telegraphic transfer of funds from **Timbercorp** Finance into the applications account held by Permanent Trustee Co Ltd; that's correct?
>
> Rabinowicz: Yes.
>
> Counsel: And that was the process that was adopted?
>
> Rabinowicz: Yes.
>
> ...
>
> Counsel: And Mr Meltzer has made that declaration at 2492; do you see that?
>
> Rabinowicz: Yes.
>
> Counsel: I take it that you are familiar with obtaining these tax rulings?
>
> Rabinowicz: Generally familiar, yes.
>
> Counsel: And without taking you to the tax ruling did you understand that the tax ruling that issued in response to this particular application made it clear that the procedures which had been explained to the Tax Office had to be adhered to for that tax ruling to apply?
>
> Rabinowicz: I can't recall whether it was substantially adhered to. But I think it was substantially adhered to.

Counsel: To the best of your knowledge, was the process of a telegraphic transfer of funds from **Timbercorp** Finance into the applications account ever abandoned?

Rabinowicz: No.

159 During his cross-examination, Mr Hance was similarly taken to the diagram extracted at [34] above. The transcript reads as follows:

Counsel: Could I please ask you to turn to page 2385. You should have a diagram there that's headed '2007/2008 **Timbercorp** (single payment)'?
Hance: Yes.

Counsel: If you go not quite to the bottom of the page but towards the bottom you will find a point 3 that says, 'Similar flow of funds occurred for post 30 June growers'?

Hance: Yes.

Counsel: So this in note 1 refers to the example of $3,080 per timberlot?

Hance: Yes.

Counsel: And it shows the physical flow of funds that would come from the grower borrower to the Trust Company would be $308?

Hance: Yes.

Counsel: And **Timbercorp** Finance, $2,772?

Hance: Yes.

Counsel: Then the timberlots would be allocated?

Hance: Yes.

Counsel: And then the 3,080 would then be paid out to **Timbercorp** Securities Limited as the project manager?

Hance: Yes.

Counsel: And it would pay GST to the ATO?

Hance: Right.

Counsel: One of the debates we are having in this matter, Mr Hance, if you are wondering why you are here, is about the funds going from **Timbercorp** Finance to **Timbercorp** Securities?

Hance: Right.

Counsel: Do you understand that?

Hance: I understand that.

Counsel: What this tells the Tax Office in note 1 is that there will be a bank cheque or telegraphic transfer of funds from **Timbercorp** Finance into the applications account?

Hance: Yes.

Counsel: Is that what happened?

Hance: To be honest, I don't know. That was what was – that's what used to happen back in the days of prospectuses. But this all got beyond me, I must say, at my stage and I wasn't close to it and it was done by computers and what have you, all of which was agreed to by the auditors. They could follow the flow of these funds. But I didn't have any – I wasn't on hands with this. Certainly in the old days this is exactly what happened, single cheques drawn, going to the trustee, coming back to the manager.

Counsel: Yes. Just taking you back to 2007 and 2008?

Hance: Yes.

Counsel: Were the people close to it then, was that Mr Murray?

Hance: Sorry?

Counsel: Mr Murray, the chief financial officer?

Hance: John Murray, yes.

Counsel: And can you recall did anybody ever say to you, 'We are no longer paying cheques or transferring money'?

Hance: I understood it was all done by transfer, but that was just my understanding of it.

Counsel: So when you say 'by transfer', by transfer of funds from one account to another account?

Hance: No, I don't know that. It was – money was moved around by transfer.

Counsel: But real money?

Hance: Certainly – well, as I would understand it real money. The money was genuine money.

Counsel: So can I put this to you. From your point of view you didn't have any doubt that going to Trust Company, if we look at this diagram, going to the custodian was a total amount of money of $3,080?

Hance: Well, I understand it from this diagram, and the auditors always signed off on the fact that we were adhering to what we were supposed to and the money was going to the places it should have been going to.

Counsel: From your point of view as a director you could be satisfied that there was $3,080 going to Trust Company of Australia?

Hance: Yes, either that or it might have been done in bulk. It might have been a whole lot of it.

Counsel: Sure, yes?

Hance: Yes.

Counsel: A whole lot of 3,080s?

Hance: A whole lot of 3,080s, yes.

160 We reject the contention that the inferring of the necessary agreement cannot be reconciled with the evidence of Mr Rabinowicz and Mr Hance. As the extracts from the transcript show, the evidence did not address the issue whether an agreement could be inferred that payment between ⬅ **Timbercorp** ➡ Finance and ⬅ **Timbercorp**

Securities could be by journal entry. It is true that: (a) the Requests for Product Ruling contain a description of the 'flow of funds' between an investor and **Timbercorp** Securities, which is illustrated by a diagram;[109] and (b) a note to the diagram reads: 'The sum of $3,080 per Timberlot is represented by a physical flow of funds i.e. by bank cheque or telegraphic transfer of funds from **Timbercorp** Finance Pty Ltd into the application account held by Permanent Trustee Company Limited'. However, none of that is inconsistent with the postulated agreement. In the event, there was a telegraphic transfer of moneys to and from the custodian. The ANZ Bank made the transfers at the direction of **Timbercorp** Ltd, acting on behalf of its subsidiaries.

161 In so far as the contentions of the applicants are concerned, the evidence given in cross-examination is of practically no weight. At no stage were the witnesses warned of the use to which the applicants proposed to put their answers. Each of the witnesses can be understood as agreeing that the application moneys were 'real moneys' and that they were transferred to the custodian. The witnesses were not asked to address the existence, much less the significance, of the fact that payments were being made *within the group* by journal entry. The distinctions between 'cheques or telegraphic transfer' and 'book entries' and between 'actual payment of money' and 'book entry'[110] were plainly absent from the minds of the witnesses when they gave their evidence.

162 In our opinion, the trial judge made no error in finding that the 14 June 2008 entry constituted 'payment' to **Timbercorp** Securities 'of the balance of [Mr White's] application money for *lots* and the *loan application fee* as described in the *application form*' within the meaning of cl 1 of the Loan Agreement.

163 The first proposed ground of appeal must fail.

Unjust enrichment and ratification

164 By their second proposed ground of appeal, the applicants contended that the trial judge erred in finding that it would be unjust if they were not precluded from avoiding their loan obligations. They submitted, in short, that it would be unjust for them to have to pay **Timbercorp** Finance moneys with which it did not part. The conclusions that we have already reached apply to this argument with equal force. By the journal entries, **Timbercorp** Finance did part with the relevant moneys.

165 Moreover, **Timbercorp** Finance also contended that, in the event that it failed on the construction of cl 1 of the Loan Agreement and that it had not established that Mr White was liable under that clause, properly construed, Mr White had nonetheless ratified the loan payment by servicing his loan obligations.

166 In addressing the question of ratification, the trial judge said:

> The plaintiff alleged that Mr White ratified the loan payment by servicing his loan obligation. He had been invoiced for Management Fees, paid a deposit and completed a loan application. Mr White received notification that his loan application had been accepted, Management Fees paid and lots allocated to him. He also instructed his accountant to prepare an income tax return in which Management Fees and other related costs were claimed as a tax deduction. If the defendants are found to be correct in their contention that performance by the plaintiff under the loan agreement is to be ascertained on the narrow basis that there was no payment of the balance of Mr White's obligation to **Timbercorp** Securities for Application Money, I find that by accepting a discharge of the balance of his liability to **Timbercorp** Securities for Management Fees and other scheme related costs, Mr White derived a benefit equal to the loan amount. Mr White treated that benefit as a loan from the plaintiff and, acting on that basis, claimed a full tax deduction and paid instalments. By his conduct, he ratified any irregularity in the payment of the loan amount.[111]

167 **Timbercorp** Finance submitted that this finding is a further answer to the applicants' case about the mode of payment. It will be recalled that this argument goes not to the fact of payment but to the questions

whether the balance of the application money had to be paid 'as application money' to **Timbercorp** Securities, and in its capacity as 'responsible entity'

168 In response to **Timbercorp** Finance's ratification argument, Mr White pointed to the fact that he had no knowledge as to how the loans and the schemes were implemented. He said that there was no evidence that he had obtained any tax benefit. Finally, he said that he could not have ratified or induced **Timbercorp** Finance's conduct in any way or caused it to labour under a mistaken assumption. He said that the trial judge 'ought properly to have found that there was no evidence of Mr White having caused any detriment to **Timbercorp** Finance'. On the assumption that **Timbercorp** Finance had not made any relevant payment, he said, it would be unjust to require him to pay **Timbercorp** Finance any money.

169 **Timbercorp** Finance relied in this context upon *NMFM Property Pty Ltd v Citibank Ltd (No 10)*.[112] In that case, Lindgren J outlined three essential elements of ratification of an agent's tortious conduct: 'first, the act must have been done on behalf of the ratifier; secondly, the principal must have had sufficient knowledge of the act; thirdly, the principal's act of ratification must have been of an appropriate kind.'[113] As to the second element, the ratifier must have had 'full knowledge of all the essential facts'.[114] The extent of the requisite knowledge depends upon the circumstances of the case and should be enough for one to decide whether to adopt the unauthorised act.[115]

170 The analysis applicable to the tortious acts of an agent is arguably not apposite to the present case. The judge did not approach the case by determining whether the applicants were bound by acts done by **Timbercorp** Finance as their agent. In effect, his finding was that, even if **Timbercorp** Finance had departed from the Loan Agreement in the manner in which it paid **Timbercorp** Securities, the applicants had nonetheless ratified that departure and thereby affirmed the Loan Agreement. They did that by accepting the loans in discharge of their obligations to **Timbercorp** Securities and thereafter making payments and claiming deductions in respect of their loans.

171 Given the conclusion that we have reached on the first proposed ground of appeal, it is strictly unnecessary to decide the second proposed ground of appeal. Nonetheless, we would make two points with respect to this ground.

172 First, the challenge to the finding that Mr White had obtained a tax benefit from the schemes should be rejected. Mr White had instructed his accountant to prepare an income tax return in which management fees and other scheme related amounts which he had owed **Timbercorp** Securities were claimed as a deduction.[116] Mr White treated that benefit as a loan from **Timbercorp** Finance and thereby claimed a full tax deduction and paid instalments.[117] These findings are not the subject of any proposed ground of appeal. They have not been seriously impeached.[118]

173 Secondly, even on the analysis based on agency law, the applicants' submissions should be rejected. In our opinion, the mode of payment under cl 1 of the Loan Agreement was not an essential fact of which Mr White had to have full knowledge before he could be said to have ratified the payment thereunder. The payment itself was legally effective to discharge Mr White's liability to **Timbercorp** Securities and, as the trial judge found, to confer the promised tax deductions. That Mr White had no knowledge of the way in which the relevant schemes operated, and the flow of funds between the companies involved in the schemes, is not to the point.

174 The correct analysis, as is implicit in the reasons of the trial judge,[119] is that the essential fact of which Mr White had to have full knowledge before he could be said to have ratified the payment under cl 1 was that he had acquired an interest in the schemes, giving rise to a claim for tax deductions. It will be recalled that, once Mr White completed his lot application form and loan application form, **Timbercorp** Securities issued to him a document entitled 'Confirmation Notice/Tax Invoice' confirming acceptance of his application for lots in the relevant schemes and the date of the acquisition of each lot for which he had applied.[120] The requisite knowledge in these

circumstances arose upon Mr White's receipt from **Timbercorp** Securities of the Confirmation Notice/Tax Invoice, which permitted the claim for tax deductions in relation to **Timbercorp** Finance's payment to **Timbercorp** Securities on Mr White's behalf. It follows that, by his conduct, Mr White ratified any irregularity in the manner in which the loan amount under cl 1 was paid.

175 The second proposed ground of appeal must fail.

Costs orders in favour of Timbercorp Securities

176 On 28 February 2017, the trial judge delivered a separate judgment on the question of costs.[121]

177 On 7 March 2017, the trial judge made final orders in each proceeding. Paragraph 4 of the orders provided that the applicant (or, in the case of the Collins proceeding, the applicants) pay **Timbercorp** Securities' costs of and incidental to the proceeding, including reserved costs, on a standard basis.[122]

178 By their applications for leave to appeal, the applicants sought to set aside the orders that they pay **Timbercorp** Securities' costs. **Timbercorp** Securities appeared at the hearing before this Court. It contended that, even if the appeals were allowed, the costs orders made in its favour should not be disturbed.

179 Given that the appeals will be dismissed, the orders that the applicants pay **Timbercorp** Securities' costs will stand.

180 Even if the appeals had been allowed, no order should be made setting aside the order that the applicants pay **Timbercorp** Securities' costs. At trial, the applicants challenged the enforceability of the Loan Agreements on the basis that **Timbercorp** Securities had no right to apply application moneys to the relevant schemes because certain preconditions to the valid exercise of power under the scheme constitutions allegedly did not exist and, thus, **Timbercorp** Securities was in breach of its duties and responsibilities under the scheme documents.[123] In the event, **Timbercorp** Finance made a contingent claim against **Timbercorp** Securities, thereby joining it as a defendant in both proceedings. By the end of the trial, the applicants had abandoned those defences but pressed certain allegations in their amended defences against **Timbercorp** Securities, necessitating its continued participation in the proceedings.[124] **Timbercorp** Securities contended that it was entitled to be represented at trial for so long as it remained a party with unresolved issues between it and one or more other parties. We agree.

181 On the question of **Timbercorp** Securities' costs, the trial judge concluded:

> **Timbercorp** Securities was joined by the plaintiff in response to the defendants' allegations that it had applied Application Money in breach of certain preconditions. Once those allegations were abandoned, as they were at the end of the trial, and reflected in formal amendments made to the pleadings following the conclusion of submissions, the contingent case against **Timbercorp** Securities fell away, and it is entitled to an order that the proceeding as against it, brought by the plaintiff, be dismissed. With the abandonment by the defendants of their allegations of breach by **Timbercorp** Securities, the basis for its counterclaim also fell away, and the counterclaim ought to be dismissed. **Timbercorp** Securities was reasonably joined by the plaintiff, and its counterclaim reasonably advanced. It is entitled to its costs of the counterclaim. The appropriate order is that the defendants must pay **Timbercorp** Securities' costs of and incidental to the proceeding, including reserve costs, such costs to include its defence and counterclaim. The costs of **Timbercorp** Securities are to be paid on the standard basis.[125]

182 At the hearing of the applications for leave to appeal, the applicants did not advance any basis for setting aside the costs orders made in favour of **Timbercorp** Securities. Further, the substance of their applications

did not seek to impeach those costs orders.

183 The orders that the applicants pay **Timbercorp** Securities' costs will stand.

Conclusion

184 In the result, both applications for leave to appeal should be granted. The appeals must be dismissed.

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[1] *Woodcroft-Brown v* ***Timbercorp*** *Securities Ltd* [2011] VSC 526; (2011) 253 FLR 240 (Judd J).

[2] *Woodcroft-Brown v* ***Timbercorp*** *Securities Ltd* [2013] VSCA 284; (2013) 96 ACSR 307.

[3] ***Timbercorp*** *Finance Pty Ltd (In Liq) v Collins* [2015] VSC 461 (Robson J); ***Timbercorp*** *Finance Pty Ltd v Collins and Tomes* [2016] VSCA 128; ***Timbercorp*** *Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212.

[4] ***Timbercorp*** *Finance Pty Ltd v Collins* [2016] VSC 776; (2016) 119 ACSR 478 ('Reasons').

[5] The Court also ordered, relevantly, that the applicants pay the costs of **Timbercorp** Securities. By way of background, **Timbercorp** Finance had joined **Timbercorp** Securities as a defendant in the current proceedings and made a contingent claim against it in response to allegations made by the applicants that **Timbercorp** Securities had applied application moneys in breach of certain pre-conditions to their proper appropriation. At the end of the trial, the applicants abandoned those allegations against **Timbercorp** Securities, which entitled **Timbercorp** Securities to judgment on the contingent claim. This formed the basis of the costs order in its favour. In the present applications for leave to appeal, **Timbercorp** Securities contended that, even if the appeals were allowed, the costs orders made in its favour should not be disturbed. This issue is addressed at [176]–[183] below.

[6] Consistent with the manner in which the trial was run, the applicants in both proceedings rely upon substantially the same proposed grounds of appeal and submissions. The case of Mr Peter White has been taken as typical of the case for Mr Douglas James Collins and Ms Janet Ann Collins. Except where it is necessary to do so, these reasons do not draw a distinction between the applicants in both proceedings.

[7] The authorities are usefully set out in LexisNexis, *Ford, Austin and Ramsay's Principles of Corporations Law* [22.490.15].

[8] In the case of the Timberlot Scheme constitution, 'Grower' or 'Participant Grower' is defined, relevantly, as 'each several person ... who becomes a party to this Deed (as a Grower) as a result of either (a) the allotment of Timberlots pursuant to an Application in the PDS whether to a Pre 30 June Grower or a Post 30 June Grower; or (b) a transmission, transfer, mortgage, assignment or other disposal ... and who remains registered under this Deed as the holder for the time being of any Timberlots; and the expression 'all Growers' means all persons who have so become a party to this Deed as a Grower and remain the registered holder for the time being of the relevant Timberlots.'

[9] Where an investor chose to invest in several schemes, the deposit amount would be the sum of the individual deposit amounts in respect of each scheme.

[10] The application form provided that the payment of the balance of the application money was the 'Amount subject to finance'.

[11] The equivalent clause in the Timberlot Scheme constitution is cl 8.2. In respect of the Olive Scheme constitution, cl 9.2, by way of example, provides: 'Before the release of moneys referred to in clause 9.3, the Responsible Entity must be reasonably satisfied that: (a) the Licence Agreements and Grovelot Management

Agreement are in the form required by this Deed and have been duly entered into by all parties; (b) **Timbercorp** Securities has the capacity to grant the Licence Agreements; (c) all necessary condition precedents to the grant of the Licence Agreements and entry into the Licence Agreements and Grovelot Management Agreement have been, or will be, satisfied; (d) all necessary consents to the grant of the Licence Agreements and entry into the Licence Agreements and Grovelot Management Agreement have been, or will be, obtained; (e) the Land the subject of the Licence Agreements is not subject to any encumbrance or restriction which detrimentally affects the interests of the Applicant; (f) any other matter required to be attended to, which is necessary for the creation of the Licence Agreements and the effective vesting in the Participant Grower of its Licence Agreements and Grovelot Management Agreement, whether by reason of this Deed or otherwise, has been, or will be, attended to; and (g) there are no outstanding material breaches of any of the provisions of this Deed which are detrimental to the interests of the Participant Growers whose Application Moneys is to be released pursuant to clause 9.3.'

[12] The equivalent clause in the Timberlot Scheme constitution is cl 8.3. According to the relevant PDS, the application amount paid by the scheme applicant covered the management fee (and, in some cases, rent) payable to **Timbercorp** Securities from the date that the investor's application is accepted until the following 30 June.

[13] The same information is contained, mutatis mutandis, in the PDSs for the other schemes.

[14] The constitutions make no provision for the custody agreements. Reference to the custody agreements is made in the Request for Product Ruling by **Timbercorp** Securities: 'The Applicant will engage an approved trustee company to act as custodian under the Project. It will be responsible to: (a) receive all subscription moneys and apply those moneys in payment of Licence Fee and management fees under the agreements; and (b) if requested by the Applicant, enter into the Licence and Grovelot Management Agreement as attorney for each several Grower.'

[15] In the relevant PDS for the Almond Scheme, by way of example, the role of the custodian is described as follows: '**Timbercorp** Securities appoints Trust Company as custodian to receive and hold the Scheme Assets and all income accruing in respect of them and any document of title to them in safe custody. "Scheme Assets" is defined as Application Moneys, until they are expended, and Proceeds, until they are distributed, in accordance with the proper instructions of **Timbercorp** Securities.'

[16] Corresponding Requests for Product Ruling were in evidence and contained substantially the same information in respect of the schemes to which they applied.

[17] See [20] above.

[18] See [50] below.

[19] The general ledger also includes journal voucher 504451 dated 13 June 2008. At trial, two experts gave evidence that this amount, which relates to Mr White, represents the loan application fee payable to **Timbercorp** Finance. See [73] below.

[20] This Court did not receive a copy of any letters of this kind that made reference to lots in the Almond Scheme or the Olive Scheme.

[21] For cl 9.3 see [23] above.

[22] On 22 December 2014, Mr White had filed an amended defence.

[23] In summary, the defence alleged that **Timbercorp** Securities had no right to apply application moneys to the relevant schemes because certain preconditions to the valid exercise of power under the scheme constitutions

allegedly did not exist and, thus, **Timbercorp** Securities was in breach of its duties and responsibilities under the scheme documents. This allegation was later abandoned.

[24] This allegation appeared to depend upon the date of the Loan Agreement, which seemed to post-date the release of funds.

[25] On 29 August 2016, it delivered a second further amended statement of claim.

[26] Evidently, **Timbercorp** Finance deleted sub-paras (b) and (c) in the second further statement of claim.

[27] The pleading in respect of Mr and Mrs Collins, whose loan account was designated 'Loan No 0026087', is substantially the same. In its amended reply, **Timbercorp** Finance also responded to the 'no loan' defence (which was to be abandoned at trial) and also said that, given the benefits obtained by Mr White, it would be unconscionable for him to retain the benefit of the moneys advanced without paying a reasonable sum in return.

[28] Reasons 524 [203].

[29] The experts said that the payments totalling $22,834 are recorded by journal entries 505116 to 505118. Evidence of those journal entries was not before the Court. In the Reasons, the trial judge said (at 528 [226]): 'Mr Stone explained that on 13 June 2008 the deposit money paid by Mr White was allocated to the three schemes in which he invested. Journal voucher 505116 allocated $7,084.14 to the "Timberlot application trust account"; journal voucher 505117 allocated $8,550.02 to the "new sales application account – olives"; and journal voucher 505118 allocated $7,199.94 to the "new sales application account – almonds". In each case there was a corresponding credit entry in each relevant "new sales control account"'.

[30] See [44] above.

[31] See [45] above.

[32] Reasons 533 [250].

[33] Ibid 533–4 [251]–[252].

[34] Ibid 535 [254]–[255].

[35] Ibid 538 [265].

[36] Ibid 539 [274].

[37] Ibid 539–40 [275].

[38] Ibid 546 [306].

[39] Ibid 547–8 [312].

[40] Ibid 548 [312].

[41] Ibid 548 [314]. In respect of the Almond Scheme, the trial judge found (at [315]) that Mr White was bound by a decision of the Court approving a compromise in relation to the distribution of the proceeds from the sale of almond scheme assets (citing *Re* ***Timbercorp*** *Securities Ltd* [2012] VSC 590). He made the same finding in respect of the Olive Scheme.

[42] Reasons 548 [314].

[43] Ibid.

[44] See fn 41 above.

[45] Reasons 548–9 [315].

[46] It became clear during the hearing of the present application that the proposed grounds of appeal were highly compressed and unsatisfactory in that they gave little, if any, indication of what the applicants intended to argue. The burden of the applicants' case was disclosed in written submissions, to an extent. Prior to the hearing, the Registrar of the Court of Appeal wrote to the applicants asking that they provide a short outline of the argument that they proposed to advance at the hearing. In the event, senior counsel for the applicants made his oral submissions by reference to the propositions contained in the applicants' short outline.

[47] At various times the applicants also referred to the Requests for Product Ruling.

[48] At the hearing of the present application, **Timbercorp** Finance conceded that the ratification point did not assist it if it had not been entitled to make payment to **Timbercorp** Securities by journal entry.

[49] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46] (French CJ, Nettle and Gordon JJ).

[50] Ibid 116 [47] (French CJ, Nettle and Gordon JJ); *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451, 461–2 [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 343 ALR 58, 77–8 [73] (Nettle J dissenting).

[51] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [47], citing *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640, 656–7 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

[52] See [28], [98] above.

[53] On the same day, Mr White was provided with the corresponding reports in respect of the Olive Scheme.

[54] The contention took various forms. At times, the applicants emphasised the word 'paid' as if the use of that word excluded the possibility of payment by journal entry. But that assertion begged the question with respect to construction. At other times, the applicants seemed to be saying that, in so far as what was being paid was the balance of application moneys (moneys that were trust funds), there had to be something palpable that could be pressed with trust obligations and not inchoate such as a journal entry.

[55] In oral submissions, the applicants said that the relevant agreement had to be one between **Timbercorp** Finance and **Timbercorp** Securities. Senior counsel for the applicants said: 'But what his Honour had to consider – what we urged upon his Honour, was that he had to consider – "Can I infer an agreement in the circumstances before me that **Timbercorp** Finance and **Timbercorp** Securities actually agreed – particularly **Timbercorp** Securities as a responsible entity" – although his Honour says nothing turned on that – "would accept payment of the balance of these application moneys by way of a book entry?"' On the contrary, in their written submissions, the applicants contended that they must have been a party to any inferred agreement between **Timbercorp** Finance and **Timbercorp** Securities that payment could be made by journal entry. In support of this proposition, they also referred to *Osric Investments Pty Ltd v Woburn Downs Pastoral Pty Ltd* [2002] WASC 121; (2001) 48 ATR 184, 216 [114] (Drummond J), which is addressed at fn 105 below.

[56] Elsewhere in the Loan Agreement, express provision is made with respect to the mode of performance. See, for example, the definition of 'security interest', which means, relevantly, any security for the *payment of money* or performance of obligations. See *Hudson Investment Group Ltd v Atanaskovic* [2014] NSWCA 255; (2014) 311 ALR 290. In that case, Sackville AJA (with whom Beazley P and Ward JA agreed) was considering a contention that

the language of an entitlement deed required that a deposit be paid in cash and could not be satisfied by payment by way of journal entry. He said (at 309 [95]): 'Mr Jackson submitted, correctly in my view, that cl 2(a) of the entitlement deed did not require Hardboards to pay the deposit in cash. Clause 2(a) merely says that on signing the deed "Hardboards must pay the Deposit to Hudson". It does not state that the deposit must be paid in cash. This contrasts with cl 5(b) of the entitlement deed which prevents Hardboards undertaking a Disposal unless, relevantly, the "consideration to be received is cash payable as at the date of the Disposal" (emphasis added). The contrast in language in the same document is significant.'

[57] *Hudson Investment Group Ltd v Atanaskovic* [2014] NSWCA 255; (2014) 311 ALR 290, 309 [96].

[58] [1975] HCA 35; (1975) 132 CLR 671.

[59] The liquidator of the company had contended that the book entries showing payments to the shareholders were preferences.

[60] [2004] HCA 55; (2004) 218 CLR 471 ('*Equuscorp*').

[61] Ibid 478 [12].

[62] Ibid 478 [13], quoting *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2002] QCA 380 [111].

[63] Ibid 486 [46].

[64] Ibid 486–7 [46] (citations omitted).

[65] (2014) 118 SASR 349 ('*Rocky Castle Finance*').

[66] As will appear, the applicants relied upon *Rocky Castle Finance* in support of several distinct arguments, including that: (a) the journal entries did not evidence payment but only 'an indeterminate promise to pay'; (b) the Loan Agreement contained a definite mandate that **Timbercorp** Finance would procure **Timbercorp** Securities to treat the moneys advanced in a particular way; (c) there was no agreement that payment could be made by journal entry; and (d) even if there was such an agreement, Mr White had to be a party to it.

[67] *Rocky Castle Finance* (2014) 118 SASR 349, 351–2 [4].

[68] Ibid 368 [101].

[69] Ibid 354 [15].

[70] Ibid.

[71] Ibid 354 [18].

[72] Ibid 355 [21].

[73] Ibid 355 [20].

[74] Ibid 368–9 [104]–[105].

[75] Ibid 369 [107].

[76] Ibid 369 [108].

[77] Ibid 371–2 [118]–[120] (citation omitted).

[78] See [130] above.

[79] *Equuscorp* [2004] HCA 55; (2004) 218 CLR 471, 486 [46] (citations omitted) (emphasis added).

[80] As explained at [46] to [48] above, **Timbercorp** Ltd was the party that advanced moneys to the custodian. It did so on behalf of **Timbercorp** Finance. The advance was made at the direction of **Timbercorp** Ltd from the account that it held with the ANZ Bank. Thus, **Timbercorp** Ltd transferred a sum of money, which purported to include the deposit and the balance of the application money, to an 'application account' held by Trust Company. An intercompany loan was then recorded in the general ledgers of **Timbercorp** Securities and **Timbercorp** Ltd as owing by **Timbercorp** Securities to **Timbercorp** Ltd in the sum of an amount equal to the balance of the application money.

[81] [2007] FCA 922; (2007) 162 FCR 358.

[82] The first promissory note represented an investment by a financier in one building development. The investor agreed to roll his investment into a second building development. In effect, he agreed that the obligations of the borrower on the first note would be discharged by the issue of the second note.

[83] *Re York Street Mezzanine Pty Ltd* [2007] FCA 922; (2007) 162 FCR 358, 366 [24]–[26] (citations omitted). See also *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 338–9 [69] (Lord Hoffmann).

[84] [1981] HCA 28; (1981) 147 CLR 441.

[85] Ibid 455 (emphasis added).

[86] Reasons 544–5 [295]–[297].

[87] Ibid 545 [298].

[88] [2015] VSCA 42.

[89] Ibid [8]–[14].

[90] *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523, 527 (Kirby P), 534 (McHugh JA with whom Samuels JA agreed) ('*Empirnall*').

[91] Ibid 528 (Kirby P).

[92] Ibid.

[93] *Vroon v Foster's Brewing Group Ltd* [1994] VicRp 53; [1994] 2 VR 32, 80 (Ormiston J) ('*Vroon*').

[94] *Empirnall* (1988) 14 NSWLR 523, 528–9 (Kirby P) and 534–5 (McHugh JA with whom Samuels JA agreed), citing and relying in particular upon *Rust v Abbey Life Assurance Co Ltd* [1979] 2 Lloyd's Rep 334, 340. Ashley JA (with whom Maxwell P and Nettle JA agreed) adopted the same approach in *PRA Electrical v Perseverance Corporation Pty Ltd* [2007] VSCA 310; (2007) 20 VR 487, 502–505 [59]–[66] ('*PRA*'), citing and relying upon *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666, 682, 686 (Lord Hatherley) and 693 (Lord Blackburn) ('*Brogden*'). Similar reliance was placed on *Brogden* by Ormiston J in *Vroon* [1994] VicRp 53; [1994] 2 VR 32, 79–80.

[95] *Vroon* [1994] VicRp 53; [1994] 2 VR 32, 81–3 and *PRA* [2007] VSCA 310; (2007) 20 VR 487, 489 (Nettle JA).

[96] [2009] FCA 499 [39] (citations omitted) (emphasis added).

[97] *PRA* [2007] VSCA 310; (2007) 20 VR 487, 503–505 [64], [66] (Ashley JA), citing the reasoning of Kirby P in *Empirnall* (1988) 14 NSWLR 523, 530 and again in *Geebung Investments Pty Ltd v Varga Group Investments (No 8) Pty Ltd* (1995) 7 BPR 14,551, 14,569–70.

[98] *PRA* [2007] VSCA 310; (2007) 20 VR 487, 489 [5], quoting with approval McHugh JA in *Integrated Computer Services Pty Ltd v Dynamic Equipment (Aust) Pty Ltd* (1988) 5 BPR 11,110, 11,117–8 and further citing the reasoning

of Heydon JA in *Brambles Holdings Pty Ltd v Bathurst City Council* [2001] NSWCA 61; (2001) 53 NSWLR 153, 176–80 [71]–[82].

[99] *Empirnall* (1988) 14 NSWLR 523, 530 (Kirby P), citing *Brogden* (1877) 2 App Cas 666, 674.

[100] [2001] FCA 1833; (2001) 117 FCR 424.

[101] Ibid 525 [369].

[102] Reasons 545 [298]. The applicants contended that 'the "facts" recited by his Honour at [298] give rise at best to mere conjecture that there might have been an agreement'. This contention misunderstands the nature of an inferred agreement. In holding that an agreement should be inferred, a court is not conjecturing that there must have been, at some point in time, physical 'offer' and 'acceptance'.

[103] See [112] above.

[104] See *P'Auer AG v Polybuild Technologies International Pty Ltd* [2015] VSCA 42, citing *Vroon* [1994] VicRp 53; [1994] 2 VR 32, 81–3 and *PRA* [2007] VSCA 310; (2007) 20 VR 487, 489.

[105] In their written submissions, the applicants cited a passage from the judgment of Drummond J in *Osric Investments Pty Ltd v Woburn Downs Pastoral Pty Ltd* [2002] WASC 121; (2001) 48 ATR 184 in support of their contention that Mr White must have been a party to any inferred agreement involving **Timbercorp** Finance and **Timbercorp** Securities that payment could be made by journal entry. That case concerned a stud cattle breeding scheme in which an investor entered into several agreements, including a Management Agreement with the scheme manager and a Lease and Breeding Agreement with a pastoral company. Those agreements required the investor to make upfront payments, '*in cash or by bank cheque*', of $40,000 to the pastoral company and $80,000 to the manager by the date of execution of the respective agreements. The investor paid a deposit of $14,000 in cash and entered into a loan agreement with a financier, which lent the balance of the moneys owing ($106,000). In the event, the financier never advanced any cash to the pastoral company and the management company as required by the relevant agreements; rather, it made journal entries in its books 'purporting to evidence its assumption of an obligation to make these advances' (at 216 [113]). The scheme failed and the investor issued proceedings. Drummond J said (at 215–6 [112]): 'Only by disbursing cash could [the financier] ensure that [the investor's] obligations to each of [the pastoral company] and [the manager] were satisfied. [The financier] never performed this fundamental obligation resting on it under each of the Loan Agreements.' He also said (at 216 [114]) that the journal entries 'made without any knowledge at all on the part of [investor] cannot affect the enforceability by [the investor], as against [the financier], of the latter's promise to advance those moneys in cash to [the pastoral company and the manager] on the date of execution of the relevant Agreements.' These conclusions have no application to the present case as the relevant agreements in that case provided expressly for payment to be made 'in cash or by bank cheque'; this is to be contrasted to the language of cl 1 of the Loan Agreement, which uses the words 'payment' without explicitly providing for the mode of payment.

[106] *Rocky Castle Finance* (2014) 118 SASR 349, 373 [126]–[127]. In particular, Blue J said that there was no direct evidence of such an agreement; and no such agreement could be inferred. In the absence of direct evidence, one could not infer such an agreement as AHM had payment obligations to the sub-contractor, Koonara, and it could not be assumed that Koonara would have agreed with AHM to accept the delivery of a promissory note as payment for its services. Accordingly, in the absence of any agreement between AHM and Koonara that Koonara would accept a promissory note in discharge of the payment to which it was entitled, one could not infer that AHM would have agreed with Rocky Castle that the discharge by Rocky Castle of its obligations to AHM could be satisfied by the delivery of a promissory note.

[107] [2004] HCA 55; (2004) 218 CLR 471.

[108] Ibid 486 [46] (citations omitted) (emphasis added).

[109] See [34] above.

[110] In one of the footnotes to their submissions, the applicants said: 'See also other drawdown notices and bank statements that reveal that the practice was *real money transfer, not journal entry*' (emphasis added). The applicants then referred to three notices in which the custodian is informed that **Timbercorp** Finance has instructed the ANZ Bank to transfer telegraphically application moneys to the custodian. In each case, the notice is on a **Timbercorp** Ltd letterhead and continues with a direction that, as per the custody agreement between the custodian and **Timbercorp** Securities, the custodian is to telegraphically transfer or 'electronically' transfer a dollar sum 'to our **Timbercorp** Ltd account at ANZ Bank', and the account number is given. The drawdown notices show that the only **Timbercorp** Group participant in an actual telegraphic transfer or electronic transfer was **Timbercorp** Ltd, not **Timbercorp** Finance or **Timbercorp** Securities.

[111] Reasons 547–8 [312].

[112] [2000] FCA 1558; (2000) 107 FCR 270.

[113] Ibid 542 [1199].

[114] *Eastern Construction Co Ltd v National Trust Co Ltd* [1914] AC 197, 213; *Taylor v Smith* [1926] HCA 16; (1926) 38 CLR 48, 59 (Higgins J).

[115] *Leybourne v Permanent Custodians Ltd* [2010] NSWCA 78 [134] (Giles and Tobias JJA and Sackville AJA).

[116] Reasons 548 [312].

[117] Ibid.

[118] During oral argument, senior counsel for the applicants said that Mr White 'had not put in a return and that evidence was never controverted. So that never became an issue in the trial as to whether or not Mr White had a benefit or did not have a benefit'. However, as set out above, the trial judge found that Mr White had instructed his accountant to prepare a tax return and that he claimed payments 'as a tax deduction' (Reasons 548 [312]).

[119] Reasons 547–8 [312].

[120] See [20], [40] above.

[121] ***Timbercorp*** *Finance Pty Ltd v Collins (No 2)* [2017] VSC 65 ('Costs reasons').

[122] The trial judge acceded to an application by **Timbercorp** Securities that, in each proceeding, the unsuccessful party pay its costs of defending the claim made by **Timbercorp** Finance 'through a *Bullock* or *Sanderson* order', which are references to the cases of *Bullock v The London General Omnibus Company* [1907] 1 KB 264 and *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

[123] See especially Reasons 517–24 [172]–[205].

[124] Costs reasons [25]–[26].

[125] Ibid [29].