IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

Not Restricted

LIST C
S CI 2011 5977

SUNLAND WATERFRONT (BVI) LTD	First Plaintiff
SUNLAND GROUP LIMITED (ACN 063 429 532)	Second Plaintiff
v	
PRUDENTIA INVESTMENTS PTY LTD (ACN 091 390 742)	First Defendant
HANLEY INVESTMENTS PTY LTD	Second Defendant
ANGUS JOHN LUXMOORE REED	Third Defendant
MATTHEW JAMES JOYCE	Fourth Defendant

JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATES OF HEARING:	25, 28 - 30 November; 1, 5 – 8 and 12 December 2011; 27, 30 and 31 January; 1 and 2 February; and 7 March 2012 (by final written reply submissions);
DATE OF JUDGMENT:	8 June 2012
CASE MAY BE CITED AS:	Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)
MEDIUM NEUTRAL CITATION:	[2012] VSC 239

TRADE PRACTICES – Misleading or deceptive conduct – whether any representations were made by the Defendants in respect to the status, purchase and development of land in Dubai – execution of contract and payment of a fee by the Plaintiff – whether any conduct of, including any representations, of the Defendants was misleading or deceptive or otherwise in breach of statutory prohibitions - whether the Plaintiff relied on any conduct including misrepresentations to its detriment – causal connection between the conduct of the Defendants and the misapprehension of the Plaintiff – no reliance by the Plaintiffs on the alleged misrepresentations – whether First to Third Defendants a 'person involved' in a contravention for the purposes of accessorial liability – failure of Plaintiffs to establish loss or damage – *Gould v Vaggelas* (1985) 157 CLR 215; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 – *Trade Practices Act 1974* (Cth) ss 5(1), 6(2), 52, 53, 53A, 75B, 82 – *Fair Trading Act 1999* (Vic) ss 9, 12, 158, 159.

TORTS – Deceit – jurisdiction and choice of law - whether alleged representations were fraudulent – whether elements of deceit established - no evidence to support claim of deceit

– *Magill v Magill* (2006) 226 CLR 551 – United Arab Emirates Civil Code (Law No. 5 of 1985).

CORPORATIONS – Corporate governance – Plaintiff's announcements to Australian Stock Exchange ("ASX") – Plaintiff's failure to disclose market sensitive information in announcements to ASX – Board reporting.

EVIDENCE – Reliability of Plaintiffs' witnesses – application of *Jones v Dunkel* (1959) 101 CLR 298 – application of *Browne v Dunn* (1893) 6 R 67 (HL) – *Evidence Act 2008* (Vic) s 140.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr G.A. Thompson SC with Dr S. Monks	Thomsons Lawyers
For the First, Second and Third Defendants	Mr J.T. Rush QC with Mr H.R. Carmichael	Freehills
For the Fourth Defendant	Mr P.W. Collinson SC with Mr N.D. Hopkins	Norton Rose

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HIS HONOUR:

Background

1 This proceeding was cross-vested to the Supreme Court of Victoria from the Federal Court of Australia where it was being managed in that Court by Logan J in Brisbane. During the course of its management by the Federal Court of Australia, a variety of applications were made to and determined by Logan J and, in one instance, on appeal to the Full Court of the Federal Court of Australia. It is not necessary now to say more about the nature of these applications and their resolution as they did not leave any live issues before this Court on the cross-vesting of the proceeding. The trial in this proceeding was conducted in this Court, following cross-vesting. There were some preliminary applications prior to the commencement of the trial and some further applications made during the course of the trial - with respect to discovery, the adequacy of discovery and the production of documents (in redacted or non-redacted form) and some pleadings issues. During the course of the trial, an application was made by the first, third and fourth defendants, Prudentia Investments Pty Ltd ("Prudentia"), Mr Angus Reed ("Reed") and Mr Matthew Joyce ("Joyce"), respectively to restrain the second plaintiff, Sunland Group Limited ("Sunland") from taking any steps to prosecute the civil claim for compensation or civil remedy commenced by notice filed by Sunland in Dubai criminal proceedings number 2130/2009 against Reed and Joyce and from taking any steps to join Prudentia as a party to these civil proceedings. This application, which was made by two separate summonses, was heard on 19 December 2011 and judgment delivered on 25 January 2012.[1] The applications were successful and the anti suit injunctions, as sought, were granted.

2 These proceedings relate to a piece of land situated in Dubai in the United Arab Emirates ("UAE"). This land, known as "Plot D17", is a lot in a land development site known as "the Dubai Waterfront". At the time Plot D17 was being created in the planning and development of the Dubai Waterfront, the Dubai property market was,

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1 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 1)* [2012] VSC 1.

as it was said, very "hot" and there was a great deal of speculation in land with plots being bought and sold with significant financial gains being made by buyers and sellers, whether or not the plot had actually been developed or was to be developed by a particular buyer or subsequent purchaser. The Dubai authorities were, it seems, somewhat concerned at the degree of land speculation, both generally and insofar as it may have inhibited the process of actual land development and building on these plots. Plot D17 remains a piece of sand near the shore of The Gulf.

3 Nakheel PJSC ("Nakheel"), is one of the major Dubai government development entities and the creator of several large scale projects, including the Palm Islands, the Dubai Waterfront and the World Islands. For each project Nakheel establishes a master developer entity which owns the land and arranges plot sales and infrastructure installation. Nakheel's corporate entity for the project known as "The Dubai Waterfront" was Dubai Waterfront LLC ("DWF"). Joyce was the managing director of DWF in 2007. Other individuals with whom the Sunland entities dealt were Mr Jeff Austin ("Austin"), who was, in 2007, the Director – Project Control of DWF, Mr Anthony Brearley ("Brearley"), who, in 2007, was Senior Legal Counsel of DWF and Mr Marcus Lee ("Lee"), who, in 2007, was the Director Commercial Operations of DWF. Both Joyce and Lee are currently the subject of criminal proceedings in Dubai. Reed was, in 2007, the Managing Director of Prudentia and also a director of Hanley Investments Pte Ltd ("Hanley"). Reed is also currently the subject of criminal proceedings in Dubai. For convenience Prudentia and Hanley are referred to from time to time as "the Prudentia parties".

4 The plaintiffs, the Sunland parties, are, with respect to the first plaintiff, Sunland Waterfront (BVI) Ltd ("SWB"), a company incorporated in the British Virgin Islands and owned by the second plaintiff, Sunland. Sunland is a public company which is listed on the Australian Stock Exchange ("ASX"). Mr Soheil Abedian ("Abedian") is currently the Chairman of Sunland. In 2006, he moved to Dubai and took up the position of Managing Director of Sunland Group (Dubai branch), but was, in any event, employed by Sunland Group Limited. He is also a director of SWB.

Mr David Brown ("Brown") arrived in Dubai in March 2006 to establish a Sunland branch in the Emirate, in the role, of "International Design Director". Brown continued in that role and became the Chief Operating Officer for Sunland Group (Dubai branch) on 13 September 2007. His main area of work and responsibility was the studying of the viability of projects. Brown worked closely with and reported to Abedian, who confirmed in evidence that "...almost everything that [Brown] did that involved significant events or decision making, he would always check with [Abedian]".[2] The documentary evidence, particularly emails, supports this position. The Sunland parties plead that SWB was introduced by Sunland into the transaction for the purchase of Plot D17 on 14 September 2007,[3] though it is said that it was actually introduced on the preceding day.[4] In any event, SWB had no role prior to that date. Even after its introduction, SWB was treated as a wholly owned corporate vehicle of Sunland's and it had no independent existence in the present context in any real sense. Consequently, and against this background, I have, unless indicated to the contrary, referred to the relevant Sunland party or parties simply as "Sunland". Also, the word "it" where used with reference to Sunland connotes the singular or plural in such references, as appropriate.

5 In more recent years, the Dubai authorities became concerned about, what may be termed, the "propriety" of a number of land and associated transactions, particularly involving Dubai government entities such as Nakheel and DWF. As a result, investigations were commenced by Dubai authorities in relation to allegations of bribery in or associated with these transactions. As Logan J found in the course of these proceedings before the Federal Court, the Sunland entities were themselves under investigation by Dubai authorities in this context,[5] a position which was reinforced by the evidence before this Court, in the course of the trial.

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2 Transcript, p 300.33 - .35.
3 Second Further Amended Statement of Claim, paragraph 26.
4 Court Book, SUN.001.001.0280; cf Transcript, p 190.39 - .40.
5 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* [2010] FCA 312, at [39].

Evidence before the Court

6 The case was conducted on the basis of documentary and oral evidence. The documentary evidence is contained in an extensive electronic court book and includes various witness statements, letters, emails and other documents. The oral evidence is that solely of Sunland witnesses as the defendants chose to proceed immediately to closing addresses having heard the Sunland case. The defendants did, however, tender documents in the course of the Sunland case and rely upon various documents in the court book.

7 It was made clear at the commencement of the trial, and re-affirmed on a number of occasions during the trial, that the documents contained in the court book would stand as evidence in the case without the need to undertake any formal, specific, tender process but that I would have no regard to any documents contained in the court book unless they were referred to and relied upon, specifically, in the closing submissions of one or more of the parties. It was made clear that this arrangement was subject to the right of any party to object to any particular document or documents being treated as being part of the evidence on this basis. The arrangement did not preclude the tender of further documents and the objection to parts of witness statements sought to be relied upon – both of which occurred during the trial.

8 In the course of the closing submissions stage of the trial, Sunland submitted that this arrangement was not the basis upon which documents were to be brought into evidence and objected to the defendants relying upon documents the authenticity of which was not strictly proved.[6] In this respect, Sunland made particular reference to the list of documents Sunland claimed to be false.[7] Sunland also provided lists of various documents which it says it tendered at various times, also acknowledging the tender of documents on behalf of Joyce and the tender of documents during the

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6 See *Plaintiffs' Address* (1 February 2012), paragraphs 7, 8 and 12; and see paragraph 14 as to the statements of witnesses which were tendered by Sunland but not challenged by cross-examination.

7 *Plaintiffs Reply to the Supplementary Written Submissions of the Defendants*, Annexure A – Sunland submitted that the documents highlighted in green were false documents; also see Exh A.

course of cross-examination of the Sunland witnesses.[8]

9 As I said in the course of discussion of the state of the evidence in the closing stages of the trial, I understood the provision of these lists of documents by Sunland to be consistent with the evidentiary arrangements – being convenient lists of documents upon which it intended to rely and which would be referred to and relied upon in its closing submissions in accordance with the arrangements indicated previously. It was clear from these discussions that the defendants were of the same view. In any event, the question whether there are other documents in evidence and to be considered for the purpose of these reasons for judgment does not arise as a result of the position I have reached in relation to this case. This is because any documents referred to in these reasons that Sunland disputes and says "have not been proved or tested in cross-examination"[9] have not been relied upon to support any critical findings. In other words, excluding such documents from the evidence would not have affected the findings below. Similarly, no reliance has been placed in these reasons for judgment, on any basis, upon any document that Sunland alleges is false or a forgery and, in any event, excluding such documents from the evidence would not have affected the findings below.

Sunland's misrepresentation claims

10 In general terms, Sunland alleges that during 2007, Reed, a director of Prudentia and Hanley, and Joyce, the managing director of DWF, either as principal or as a "party involved", made various representations concerning Plot D17. In reliance on the representations, it is alleged that SWB entered into an agreement with Prudentia which materially provided for the payment of a "consultancy fee" of AED44 million in consideration for which Prudentia agreed to transfer its right to negotiate and enter into a plot sale and purchase agreement with DWF for the acquisition of Plot D17 ("the Prudentia Agreement"). Some time later, following a decision by Prudentia to incorporate a subsidiary, Hanley, "as part of expanding its business into

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8 See *Plaintiffs' Address* (1 February 2012), paragraphs 6 to 8.

9 *Plaintiffs Reply to the Supplementary Written Submissions of the Defendants*, paragraph 6.

Asia", SWB came to discharge its agreement with Prudentia and enter into a fresh agreement with Hanley ("the Hanley Agreement"). On 26 September 2007, SWB signed a sale and purchase agreement with DWF for the purchase of Plot D17 for a price of AED 120 per square foot. On 1 October 2007, Sunland authorised the release of a cheque payable to Hanley in the sum of AED 44,105,780 which Hanley then negotiated to its credit. Reed is alleged to have been an agent of Hanley, who was seized with the knowledge of the representations and their falsity.

11 More particularly, the basis of the claim by Sunland in this proceeding is that representations were made to Sunland concerning the status of Plot D17 and that those representations were false and misleading. As indicated previously, SWB was introduced into the impugned transaction on 13 or 14 September 2007.[10]

12 With respect to the claims against Reed, Sunland pleads that he made representations to Brown on two occasions. The first occasion was a telephone call on 16 August 2007[11] during which Reed is alleged to have told Brown words to the effect that:

(a) Reed was in Melbourne and would be flying to Dubai on Sunday;

(b) Prudentia was Reed's company;

(c) through Prudentia I have the right over or I control Plot D17; and

(d) he would be willing to negotiate with Brown about undertaking a joint venture with Sunland for the development of Plot D17.

The second occasion was a meeting in Brown's office in Dubai on 19 August 2007 when Reed is alleged to have told Brown words to the effect that:

(a) the price in the area in which Plot D17 is located is as high as AED 175 per sq ft;[12]

(b) I can obtain a price of AED 135 per sq ft from Dubai Waterfront;[13]

(c) I want compensation of AED 40 per sq ft as part of the terms of a joint

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10 See above, paragraph 4.

11 Second Further Amended Statement of Claim, paragraph 13.

12 Second Further Amended Statement of Claim, paragraph 15.1.

13 Second Further Amended Statement of Claim, paragraph 15.2.

venture;[14]

(d) It would be more tax effective for the compensation to be paid as a fee to Prudentia for consultancy services;[15] and

(e) the payment terms on which Reed was acquiring Plot D17, terms which were exactly the same as those that Joyce told Brown on 15 August 2007.[16]

It was also alleged by Sunland that at the 19 August 2007 meeting, Reed showed Brown exactly the same draft plan for the re-configuration of the land containing Plot D17 that Austin had shown Brown in their meeting on 15 August 2007.[17]

13 Sunland claims that these representations were false and that it relied upon them in taking a number of steps in relation to the purchase of Plot D17. On this basis, Sunland claims that the making of the alleged representations constituted a breach of s 52 of the *Trade Practices Act* 1974 (Cth) ("TPA") and a breach of s 9 of the *Fair Trading Act* 1999 (Vic) ("FTA"). Sunland also claimed that tortious liability in deceit flowed from such representations.

14 Additionally, Sunland claims that Reed made the representations as agent for Prudentia, and later Hanley, or as a *person involved in* the contraventions by Prudentia and Hanley under s 75B of the TPA. In relation to the alleged deceit, Reed is said to be liable to Sunland as a joint tortfeasor with Joyce. By reason of the conduct pleaded in the Second Further Amended Statement of Claim, Reed is also said to have engaged in conduct in breach of ss 53(aa), 53(g) and 53A of the TPA and also ss 9, 12(b), 12(k) and 12(n) of the FTA.

15 The first date upon which it is claimed that there was material reliance on the alleged representations by SWB, following the introduction of that company by Sunland Group Limited into the impugned transaction on 13 September 2007, is 18 September 2007.[18]

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14 Second Further Amended Statement of Claim, paragraph 15.3.
15 Second Further Amended Statement of Claim, paragraph 15.4.
16 Second Further Amended Statement of Claim, paragraphs 16.1 to 16.2.
17 Second Further Amended Statement of Claim, paragraph 16.3.
18 Second Further Amended Statement of Claim, paragraph 29.

16 Sunland claims that each of Prudentia and Hanley breached s 52 of the TPA by reason of the alleged making of representations by Reed. Prudentia and Hanley are also alleged to have breached ss 53(aa), 53(g) and 53A of the TPA. Hanley is said to be a "person involved in" Prudentia's contraventions under s 75B of the TPA.[19] Prudentia and Hanley are also said to be vicariously liable for Reed's alleged deceit. Further, by reason of the conduct pleaded in the Second Further Amended Statement of Claim, Sunland claims that each of Prudentia and Hanley engaged in conduct in breach of ss 9, 12(b), 12(k) and 12(n) of the FTA.[20] By reason of the conduct pleaded against Joyce,[21] Sunland claims that Joyce contravened ss 52, 53(aa) 53(g) and 53A of the TPA. In relation to the alleged deceit, Joyce is said to be liable to Sunland as a joint tortfeasor with Reed. No claims were made against Joyce under the FTA.

17 Insofar as the pleaded conduct, the misrepresentations and related matters, may have occurred outside Australia, Sunland relies on ss 5(1), 6(2)(a)(i) and 6(3) of the TPA.[22]

18 The allegations against Joyce, with respect to these statutory "misrepresentation" provisions and with respect to the claim in deceit turn on four communications alleged to have occurred between Joyce and Brown, as follows:

(a) Between March and July 2007 Joyce said to Brown and Abedian with words to the effect that: 'there is no beachfront land left, it has all been sold to secondary developers';[23]

(b) On 15 August 2007 Joyce telephoned Brown and said words to the effect that:[24]

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19 See below, paragraphs 371 and 372.

20 See below, paragraphs 369 and 370; and paragraphs 408 to 414.

21 See below, paragraphs 18.

22 See below, paragraphs 373 to 407.

23 Second Further Amended Statement of Claim, paragraph 9. It was submitted on behalf of Joyce that it is unclear why this allegation is pleaded, as the statement was true and Sunland has never sought to prove to the contrary. In fact, Brown gave evidence that the statement was correct. (See Transcript, p 249.45- 249.46). Plot D17 is not beachfront land.

24 Second Further Amended Statement of Claim, paragraph12.

(i) 'a man named Reed is the contact for Plot D17';[25]

(ii) 'although I will need to check this with Anthony Brearley, Reed's company will be paying DWF AED 135 per sq ft to purchase Plot D17';[26]

(iii) 'the terms of payment are more favourable than the standard terms, being 5% on execution of the contract, 10% at handover which is scheduled to take place in about 6 months, 10% at 6 months after handover, 20% at 12 months after handover, 20% at 18 months after handover, 20% at 24 months after handover, and 15% at 36 months after handover'; and[27]

(iv) 'a property speculator would be likely to pay about AED 175 per sq ft to purchase Plot D17'.[28]

(c) On 16 August 2007 Joyce replied to an email from Brown in which Joyce said in part:[29] 'Anyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us'.

(d) On 29 August 2007, Joyce telephoned Brown and said words to the effect that:[30] 'Sunland should come to an agreement with Reed as soon as possible because there were other buyers around including Russians who might offer Reed AED 220 per sq ft or more for the land'.

19 Sunland pleads that these communications made by Joyce, and those made by Reed referred to above,[31] conveyed three representations, namely that:[32]

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25 Second Further Amended Statement of Claim, paragraph 12.1.
26 Second Further Amended Statement of Claim, paragraph 12.2..
27 Second Further Amended Statement of Claim, paragraph 12.3.
28 Second Further Amended Statement of Claim, paragraph 12.4.
29 Second Further Amended Statement of Claim, paragraph 14.2.2.
30 Second Further Amended Statement of Claim, paragraph 18.
31 See above, paragraph 12.
32 Second Further Amended Statement of Claim, paragraph 19.

(a) Reed or Prudentia or both of them had a right to acquire Plot D17 or the land on which Plot D17 was located;[33]

(b) DWF could not, without the agreement of Reed or Prudentia or both of them, sell Plot D17 or the land on which Plot D17 was located, or any rights in connection with the development thereof to Sunland;[34] and

(c) If Sunland wished to purchase Plot D17 or the land over which Plot D17 was located, or acquire any rights in connection with the development of Plot D17 it had to negotiate and make a contract with Reed or Prudentia or both of them.[35]

These representations as pleaded by Sunland are referred to as "the Representations".

20 Sunland then alleges that the Representations as pleaded were false 'in that':[36]

(a) the Representations were untrue;[37] and

(b) statements were made to Brown by Mr Mohammed Mustafa Hussein Mohammed Kamel ('Mustafa') of the Dubai Financial Audit Department[38] and Mr Khalifa Mohammad ('Khalifa') of the Dubai Police[39] to the effect that Reed *did not own* Plot D17 and that there was "no record of Reed or his entity having any right over the plot"[40].

It was submitted on behalf of Joyce that it is unclear why statements made by Mustafa and Khalifa are pleaded other than because of Sunland's ongoing desire to "keep in" with the Dubai authorities.

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33. Second Further Amended Statement of Claim, paragraph 19.1.
34 Second Further Amended Statement of Claim, paragraph 19.2.
35 Second Further Amended Statement of Claim, paragraph 19.3.
36 Second Further Amended Statement of Claim, paragraph 21.
37 Second Further Amended Statement of Claim, paragraphs 21.1, 21.2 and 21.3.
38 Second Further Amended Statement of Claim, paragraph 21.4 and 21.6.
39 Second Further Amended Statement of Claim, paragraph, 21.5.
40 Second Further Amended Statement of Claim, paragraph 21.4.

21 A number of criticisms were made of the pleaded claim against Joyce, particularly focusing on an argument that the Representations as pleaded are capable of a number of meanings. For example, with respect to the second of the Representations, it was said that if Sunland and Prudentia had entered into a joint venture arrangement, and this was known to DWF, it would not have been misleading for DWF to point out that it could not sell Plot D17 or the land on which Plot D17 was located, or any rights in connection with the development thereof, to Sunland without the agreement of Reed or Prudentia. Such a statement would have been unsurprising, it was submitted, as DWF would have wanted to ensure that it did not embroil itself in any dispute between Prudentia and Sunland. It is only if the second of the Representations[41] meant that DWF could not sell the land at all to Sunland (or to any other party) without Prudentia's approval, that it would have been misleading or deceptive. Additionally, a distinction would have to be made between any representation by DWF that it would not, as opposed to could not, sell Plot D17 to Sunland. If DWF had formed the view that it wanted to sell Plot D17 to Prudentia and not to Sunland then, as owner of Plot D17, that was its prerogative. It was submitted that similar points can be made about the third of the pleaded representations. For example, if Sunland wished to purchase Plot D17 or the land over which Plot D17 was located as part of a joint venture with Prudentia, then there was a need to negotiate and make a contract with Reed or Prudentia or both of them.

22 Further, despite these problems, it was submitted on behalf of Joyce, that it is apparent that the plea of falsity set out in paragraph 21 of the Second Further Amended Statement of Claim[42] and the evidence of Brown and Abedian indicates that the case put by Sunland is that Joyce represented that Reed or Prudentia had some sort of legal interest in, or right to, Plot D17 and it was on that basis that Sunland paid the fee of AED 44,105,780 to Hanley. The same applies to the manner in which the claims by Sunland are pleaded against Reed.

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41 Second Further Amended Statement of Claim, paragraph 19.2.

42 And the same follows from the pleading of the representations in paragraph 19 of the Second Further Amended Statement of Claim.

23 Sunland confirmed in its written and oral closing submissions that its case was put on the basis that Reed and the Prudentia parties (at least in the earlier stages of the Plot D17 transaction, Reed and Prudentia) and Joyce misrepresented that there was "an agreement which conferred upon Prudentia a 'right' [to Plot D17] which was capable of transfer to Sunland".[43] Consistently with this position Sunland submitted:[44]

> "... Your Honour will see the written representations relied upon do go that far and so we can put our case on the basis that the representation did involve a representation to the effect that there existed as pleaded a contractual right to acquire Plot D17 as alleged in Sub-paragraph A of the pleading - as summarised in Sub-paragraph A of our Paragraph 39, Your Honour" [emphasis added in paragraph 1, *Reply Submissions of the Fourth Defendant (Joyce)*].

24 On this basis it, was submitted on behalf of Joyce that in order to succeed in this case Sunland must establish against some or all of these parties that:[45]

(a) there were representations to the effect that Reed or Prudentia had a contractual right to acquire Plot D17;

(b) the representations were false because neither Reed nor Prudentia held a

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43 Closing submissions of Sunland *Plaintiffs' Address* (1 February 2012), paragraph 40. In any event this follows from the pleading of falsity in the particulars to the Second Further Amended Statement of Claim, paragraph 21. Those particulars allege in substance that the representations were false because Reed did not "own" Plot D17 or have any "right" over Plot D17. See also Joyce's Defence to the Further Amended Statement of Claim (8 April 2010), paragraph 21, and see, below, paragraphs 232 to 246.

44 Sunland's oral closing submissions: Transcript, p 925.20 -.27. The point was made by Sunland in its *Plaintiffs Reply to the Supplementary Written Submissions of the Defendants*, paragraph 11 that the passage quoted from the Sunland oral closing submissions omitted some prefatory words which changed the sense of the quoted material. In order to make the position clear, I now set out the two paragraphs from the transcript of these closing submissions which put the quoted material set out above in its context (Transcript, p 925.12 - .27):

> *"Paragraphs 12 to 19 are the paragraphs which plead the representations. Our learned friends have made a submission - that is Mr Collinson has pleaded it would be necessary for Your Honour to find that there was a formally binding contract entitling Reed or Prudentia to the plot or that that was the subject matter of the representation.*
> *We submit it's not necessary for Your Honour to go that far. But in any event as* Your Honour will see the written representations relied upon do go that far and so we can put our case on the basis that the representation did involve a representation to the effect that there existed as pleaded a contractual right to acquire Plot D17 as alleged in Sub-paragraph A of the pleading - as summarised in Sub-paragraph A of our Paragraph 39, Your Honour." [emphasis with respect to the transcript material not set out in the above quote, at paragraph 23]."

45 *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 2.

contractual right to acquire Plot D17; and

(c) Sunland had a state of mind, induced by those representations, that Reed or Prudentia had a contractual right to acquire Plot D17.

25 It was submitted against Sunland that on the case as pleaded it could not, on the evidence, possibly succeed. Thus it was submitted:[46]

> "3. ... The relevant admissions by Brown are contained in a number of places. However, most strikingly he said the following:[47]
>
> > 'HIS HONOUR: Are you saying that the hold is contractual? ... I don't know what the hold was. We weren't told what type of hold it was, but there was a hold.'
>
> 4. It is of signal importance to observe that the plaintiffs' case was <u>not</u> the following:
>
> > (a) Joyce (and/or the other defendants) represented that Reed or Prudentia had a 'hold' or 'control' over D17;
> >
> > (b) the representations were false because neither Reed nor Prudentia had a 'hold' or 'control' over D17;
> >
> > (c) the plaintiffs had a state of mind, induced by those representations, that Reed or Prudentia had a 'hold' or 'control' over D17.
>
> 5. This latter case was:
>
> > (a) not pleaded;
> >
> > (b) not proved because the plaintiffs never sought to establish that the representations in those terms were false – in other words, that Reed or Prudentia did not have a 'hold' or 'control' over D17 <u>by a means other than a legal right</u> (for example, that there was no political control as a result of contacts between (1) Och- Ziff or the Prudentia parties and (2) DWF or other political authorities in Dubai).[48]
>
> 6. The plaintiffs' witnesses confused the pleaded case with the unpleaded case by mixing up evidence about a state of belief as to a 'hold' or 'control' over D17 with a case concerned only with an alleged state of belief that the Prudentia parties held a contractual right to acquire D17.[49]

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46 *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraphs 3 to 8.

47 Transcript, p 192.23.

48 *Witness Statement of David Scott Brown* (6 August 2010), paragraph 142.

49 *Witness Statement of David Scott Brown* (6 August 2010): DB1[81] ("Reed had a 'hold' on the land"); DB1[84] ("Indicated that there was some sort of contract in existence"); DB1[92] ("He said to me words to the effect of either 'we have the rights over that land' or that 'Prudentia controlled that land' "); DB1[92] ("I understood them to mean that Prudentia had control over Plot D17"); DB1[121]

> 7. The plaintiffs' closing submissions add to the confusion. Evidence relating to a 'hold' or 'control' is cited as if it supported the pleaded case concerning "contractual right to acquire".[50] Submissions are advanced which elide the distinction between 'control' and 'a legal right to acquire'. Thus, it is said to be inherently unlikely that Brown would say 'we wish you all the best with this site' if he did not believe at the time that Reed/Prudentia had some control or right over the site.[51] In the context of this proceeding there is a world of difference between 'control' and a 'right'. Elsewhere in the oral and written submissions there is reference to an 'impediment'.[52] An impediment might derive from a legal right to acquire D17 – equally it might derive from something else.
>
> 8. Overwhelmingly, at its highest the evidence established that Brown's state of mind was that an entity (Och-Ziff certainly not Reed or Prudentia) might have had some kind of inchoate standing or relationship with DWF or other political authorities in Dubai in respect of D17 which was less than a contractual right to acquire D17.[53] The pleaded case must fail. The unpleaded case need not be considered."

26 Sunland responded, submitting that none of the Representations which it alleged[54] require Sunland to show that the representations by Reed or Prudentia or Joyce were to the effect that Reed or Prudentia had a "contractual right". Further, it submitted that the representations pleaded in paragraphs 19.2 and 19.3 of the Second Further Amended Statement of Claim were made out by the email from Joyce on 16 August 2007, pleaded as a representation in paragraph 14.2 of the Second Further Amended

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("Prudentia had the right over or controlled Plot D17"); DB1[142] ("Reed probably had a contact high-up in Nakheel and that it was through this contact that Reed had obtained control of Plot D17"); DB1[185] ("I also did not know how long Reed's control over the property would last for"); DB1[274] ("I believed Prudentia...had control and rights over Plot D17"); DB1[279.4] ("At all times I believed that Prudentia had control or rights over Plot D17"); Reply witness statement of David Scott Brown (27 June 2011): DB2[24] ("As I had been told by Joyce and by Austin that Prudentia had control of the land").
Witness statement of Soheil Abedian (6 August 2010): SA[45] ("I was informed by Brown and believed that he had been told that a block of land behind D5B was controlled by an Australian individual named Reed"); SA[50] ("My understanding of the email was quite clear: Reed had control over the plot"); SA[61] ("I understood this to mean exactly what it says, that Prudentia had come to an agreement with the master developer and that it was in control of the property"); SA[84] ("However we did not know the precise terms of that control by Prudentia and Reed"); SA[116] ("There is no reason why Sunland would pay any premium or consultancy fee to a party that had no control over that plot"). Prior to giving his oral evidence Abedian must have realised that it was insufficient for Sunland to establish a belief that the Prudentia parties merely "controlled" D17. He altered his evidence to contend that references to "control" meant "rights under a reservation agreement": Transcript, p 318.36; Transcript, p 335.14.

50 *Plaintiffs' Address* (1 February 2012), paragraphs 80, 87, 89, 99, 101, 122 and 149.

51 *Plaintiffs' Address* (1 February 2012), paragraph122.

52 *Plaintiffs' Address* (1 February 2012), paragraph126; Transcript, p 1058.25.

53 *Closing Submissions of Fourth Defendant* (27 January 2012), Section G.

54 Second Further Amended Statement of Claim, paragraph 19; and see, above, paragraph 19.

Statement of Claim,[55] which included the words: "Anyway, the issue for us is that you can come to an arrangement with them that allows you to deal directly with us". It was said that this email should also be read in context with the statements which Joyce made earlier on 15 August 2007, the telephone conversation with Brown where it is alleged, *inter alia*, that Joyce used words to the effect that: "A man named Reed is the contact for Plot D17".[56] Further, it was submitted that the submissions on behalf of Joyce misstated Sunland's pleading.[57] Further, Sunland submitted that, contrary to the submission made on behalf of Joyce:[58]

> "... in the language of non-lawyers in a practical commercial context there is not 'a world of difference' between the expressions 'right' and 'control', or the expressions 'hold on' or 'hold over'. The common or ordinary meaning of the word as appearing in the Oxford English Dictionary is: Control – *'4. To exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, or command'*."[59]

Reference was also made by Sunland to an email communication between Reed and Mr Alexis Waller, a solicitor employed by Klein and Co, the Dubai legal advisers to Prudentia in 2007.[60] There is no evidence that Sunland was privy to this

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55 See below, paragraph 72.

56 Second Further Amended Statement of Claim, paragraph 12.1. This conversation and the events surrounding it are discussed further below, see particularly, paragraph 51.

57 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 16; referring to paragraphs 4 and 5 of the *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), which are set out above, paragraph 25:

> "(a) SOC paragraph 13.3 pleads that Reed represented: *'I have the right over'* or *'I control'* Plot D17;
> (b) SOC paragraph 12.2, pleads Joyce said words to the effect: 'Reed's company will be paying Dubai Waterfront AED135 sq/ft to purchase Plot D17';
> (c) SOC paragraph in 14.2 pleads the email from Joyce stating: 'Anyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us'.
> (d) SOC paragraph 18 pleads Joyce said words to the effect: *'Sunland should come to an agreement with Reed as soon as possible because there were other buyers around including Russians who might offer Reed AED220 sq/ft or more for the land'*."

Further, it was submitted that paragraph 5(b) of the submissions on behalf of Joyce that Sunland never sought to establish that the representations in the terms in which they were put by Sunland were false ignores admissions made by the defendants (see *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 18-20. For the reasons indicated below, I do not accept that this is the case (see below, paragraphs 234-239).

58 *Reply Submissions of Fourth Defendant (Joyce)* (21 February 2012), paragraph 7; set out above, paragraph 25.

59 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 21.

60 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 22; the email being an email from Reed to Alexis Waller, date 13 August 2007 (Court Book, PRU.001.007.0005) ; see below, paragraph 55.

communication prior to any payment pursuant to the Hanley Agreement. [61]

27 For the reasons which follow, I am of the opinion that the submissions on the part of Joyce that it was necessary for Sunland to establish representations with respect to a legally enforceable right, "contractual" or otherwise, correctly state the position; but, in the present circumstances, the issue is not, in my view, critical because Sunland's case evidences no misrepresentation with respect to something less than an enforceable right, "contractual" or otherwise.

28 Sunland pleads that it relied upon the Representations to:

(a) negotiate with Reed about a joint venture;[62] and

(b) later – after other communications were made to it by Lee and Brearley[63] - execute an agreement with Prudentia;[64] and

(c) later – after further misrepresentations were made to it by Reed, Prudentia and Hanley[65] - execute an agreement with Hanley and pay it the sum of AED 44,105,780.

29 The nature and effect of the Representations alleged by Sunland must be viewed in the context of the circumstances in which they are alleged to have been made including – particularly – in the context of land dealings and land information available in Dubai at the relevant time or times.[66]

30 Sunland alleges that the Representations were made in "trade or commerce" and that the result was misleading or deceptive conduct in breach of s 52 of the TPA.[67] Sunland also pleads a multitude of alternate claims under the TPA against Joyce arising from the same facts,[68] as well as a claim in deceit as a joint tortfeasor with

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61 As to the irrelevance of communications with third parties to which Sunland was not privy at any relevant time, see below, paragraphs 445 - 446.

62 Second Further Amended Statement of Claim, paragraph 22.

63 Second Further Amended Statement of Claim, paragraph 24.

64 Second Further Amended Statement of Claim, paragraph 30.

65 Second Further Amended Statement of Claim, paragraph 33.

66 See below, paragraph 33 to 44.

67 Second Further Amended Statement of Claim, paragraph 41.

68 Second Further Amended Statement of Claim, paragraph 57.

Reed.[69] It was submitted on behalf of Joyce that it is clear that Sunland alleges that a fraud was perpetrated against it.

31 In relation to the joint tortfeasor's claim, it is alleged by Sunland that Reed and Joyce acted in concert, an allegation based on the alleged knowledge by each of Reed and Joyce that representations had been made (as alleged) and of their "joint purpose".[70] Sunland also relies, in this context, on matters such as the attendance of Reed and Joyce at the same school, Geelong Grammar, their failure to disclose this to Brown and the "coincidence" of the representations which are alleged to have been made separately.

32 Sunland seeks damages equal to AED 44,105,780 and also damages for "loss of reputation".[71]

The D17 transaction

Land dealings and land information in Dubai

33 The D17 transaction involves the purchase of Plot D17 which, in turn, raises issues in relation to the law of real property and conveyancing in Dubai. In this context, care must be taken to avoid the temptation of drawing analogies, unquestioningly, with the law of real property and conveyancing in Victoria and Australia more generally. There are, however, some general analogies which might usefully be drawn. First, it is clear that a distinction is drawn in Dubai law between contractual and proprietary rights in relation to real property and that before any piece of real property can be dealt with it must, in both jurisdictions, be created and defined as a separate parcel of land which can be dealt with as such. Secondly, the property development process appears not too dissimilar in that plots or parcels of land are, in the course of the development process, created and defined within a larger development area. Once they are created and defined in Dubai, they may be purchased from the "master developer", the entity undertaking the development project and in which

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69 Second Further Amended Statement of Claim, paragraph 47.
70 Second Further Amended Statement of Claim, paragraph 46.
71 See below, paragraph 425 to 442.

the defined or subdivided plots or parcels are vested in, what may be described, as fee simple ownership. A purchaser of one of these plots or parcels must enter into a "sale and purchase agreement" (commonly referred to as a "SPA") which will, as would a contract for the sale of land in Victoria, lead to a conveyance of the "fee simple" ownership in the plot to the purchaser upon payment of the purchase price in accordance with the provisions of the SPA. Although an intending purchase may proceed straight to a SPA with the master developer of the relevant project, an alternative course in Dubai is to enter into a "reservation agreement" with respect to a particular plot of land which has the effect of conferring something in the nature of an option to purchase on the intending purchaser which is exercisable during, and only during, the term of the reservation agreement. As with options to purchase in Victoria, a fee would be payable in consideration for this right, a fee which may or may not be payable in addition to the purchase price if a SPA is subsequently entered into. In Victoria, one would expect an optionee, properly advised, to lodge a caveat under the *Transfer of Land Act* 1958 where the land was subject to the Torrens system as established by that legislation. Here, a difference lies with respect to the D17 transaction because the area of Dubai in which that plot is situated is not subject to any Torrens system type of land registration scheme. This means that a person intending to deal with a plot or parcel of land in that general area is not able to search any public land ownership register, as is generally possible where Torrens registration systems are applicable.

34 More specifically, with respect to Dubai and the circumstances of this case, it was uncontroversial that:

(a) the register of land titles held at the Dubai Land Department is not, and at all material times was not, capable of being searched by the general public, including companies such as Sunland, or lawyers acting on their behalf;

(b) until 31 August 2008, records of all off-the-plan sales of land in master communities were kept by the master developer for that master community,

not by the Dubai Land Department; and

(c) records kept by master developers of land sales and land titles are not, and at all material times were not, capable of being searched by the general public, including companies such as Sunland, or lawyers acting on their behalf.[72]

35 As in Victoria, land subject to a contract to purchase may be on-sold by the original purchaser, or, for that matter, a subsequent purchaser to a further subsequent purchaser. In Victoria, the evils of "chains" of terms purchase contracts became clear in the land speculation days of the 1950s and 1960s where land in broadacre subdivisions of outer suburban land in Melbourne was on-sold by speculators. As a result, the process was prevented in favour of a sale and mortgage back process under the *Sale of Land Act* 1962. The Victorian experience was, of course, not unique to Victoria. In the Australian context, and similar issues arose in other States, particularly New South Wales and Queensland. Dubai, apparently in a massive land development phase, recognised these potential problems and addressed them by requiring a purchaser under a SPA who wished to on-sell to obtain the consent of the master developer, that purchaser's vendor, by entering into a cancellation agreement with respect to that SPA in consideration of the payment to it by the further purchaser of a sum of money, which may be the difference between its purchase price and the on-selling purchase price; with the further purchaser entering into a new SPA directly with the master developer. Thus, it is possible to buy on "terms" and re-sell on "terms", but without the evils of a chain of terms contracts or SPAs, in the case of Dubai, because the original vendor (the master developer) and the actual purchase maintain a direct contractual relationship at all times.

36 The absence of any public land register in Dubai for the area in which Plot D17 is situated was relied upon by Sunland in support of its case. In particular, Sunland submitted on the basis of the expert evidence of Mr Duane Keighran ("Keighran"), a

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72 *Plaintiffs' Address* (1 February 2012), paragraph 35.

senior lawyer in the firm of Simmons & Simmons Middle East LLP that:[73]

> "... the unchallenged expert evidence of Mr Keighran (who was not cross-examined) was that the plaintiffs had no alternative but to rely on what they were told by Joyce (or other officers of Dubai Waterfront) as to who owned, or had rights over, plot D17".

37 It is, nevertheless, clear that the expert evidence of Keighran relied upon by Sunland in this respect is directed to a situation in which a prospective purchaser is "dealing directly with a master developer".[74] The Sunland case in this proceeding is, however, that it could not, and consequently did not, deal directly with DWF, until it came to an arrangement with Prudentia. Instead, the Sunland case is that it negotiated with Reed and the Prudentia parties to obtain a transfer of a right to acquire Plot D17.[75] The expert evidence of Keighran does, however, deal with the situation of a purchaser dealing with a seller who is not the master developer of the subject land in circumstances where there is no public land register available.

38 Keighran's expert evidence in relation to the purchase of land from a seller which is not the master developer of that land requires careful consideration in the context of the Plot D17 transaction. Addressing the process in general terms, Keighran said:[76]

> "It is necessary to check that the entity the purchaser is negotiating with had the Contractual Right (as I noted above, the contractual right to purchase the land from the master developer). If not, purchasers may run the risk of inadvertently dealing with fraudulent parties. In order to prove that the Seller had the Contractual Right, I would usually request (or advise the purchaser to request) a copy of the SPA (or a reservation contract) and any relevant correspondence from the master developer. I would also usually make an appointment (or more often, the purchaser would do this directly) with the Seller to attend the master developer's offices to check the Contractual Right details registered with the master developer's internal registry."

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73 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran (8 August 2010), paragraph 41.5).

74 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran (8 August 2010), paragraph 41).

75 See *Plaintiffs' Address* (1 February 2012), paragraph 40; and Transcript, p 925.19.

76 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran(8 August 2010), paragraph 42.2), .

Continuing, Keighran said:[77]

> "Due to the fact that it can be very difficult to confirm the Contractual Right, there is a risk that that you could be negotiating with a party that does not actually possess the Contractual Right. Such a party may demand some sort of payment (such as an 'introduction fee') before the transaction is finalised. Some of these 'introducers' act essentially as brokers and had no intention of ever holding the Contractual Right themselves. For example, I advised a Western client who was attempting to purchase a plot at the Palm Jebel Ali. My client was attempting to contract with a Seller who was a speculative investor who was a number of contracting parties removed from the master developer. The person who brought the deal to my client would not allow my client to deal directly with the person who allegedly held the Contractual Right. However, the Seller could not provide any evidence that he had the Contractual Right to the plot, other than producing some plot drawings of the plot that the Seller possessed. As I discuss below, this is not sufficient. Therefore, I advised the client not to proceed without establishing further evidence."

39 Sunland submitted that Joyce had misstated the effect of Keighran's expert evidence and that the quoting from his witness statement was selective. In particular, Sunland submitted that paragraph 42.3 of that witness statement was omitted and that in that paragraph, Keighran deals with the situation where a potential purchaser is dealing with a secondary seller, that is not the master developer, and attempting to confirm that seller's status with the master developer. Paragraph 42.3 of the Keighran witness statement is as follows:

> *"It is possible that the purchaser may not necessarily be provided with any documentary proof of the Seller's Contractual Right prior to attending the meeting to transfer the Contractual Right. As there is no prescriptive way for undertaking such transactions in Dubai and each master developer has different procedures, it is indeed possible that neither the master developer nor the Seller would ever provide any documentary evidence of the Seller's Contractual Right for a particular transaction to the purchaser in which case the only assurance that the purchaser would have as to the Seller's Contractual Right would be the participation of the master developer in the transaction."* [underlining added by Sunland]

Sunland noted that paragraph 42.4 of Keighran's witness statement had been quoted by Joyce in which Keighran gave an example of advising a client where a broker or introducer of land "would not allow my client to deal directly with the person who allegedly held the Contractual Right". Sunland submitted that:

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77 *Plaintiffs' Address* (1 February 2012), paragraph 209 (apparently a reference to the witness statement of Duane Keighran (8 August 2010), paragraph42.4).

> "The equivalent scenario would be a broker/introducer acting on behalf of Reed not permitting Brown to deal with Reed. Keighran advised his client not to proceed without obtaining further evidence of who in fact had the right to the land. In that example, clearly the best evidence would have been confirmation from the master developer - which is exactly what Brown obtained from Joyce, and Clyde-Smith obtained from Brearley (Brown paragraph 126)".[78]

40 In my opinion, paragraph 42.3 of Keighran's witness statement does not stand alone, but needs to be read with paragraph 42.4; though, having said that, I do not regard paragraph 42.4 as in any way unhelpful or misleading if read on its own as, if anything, it emphasises the need for a seller in the circumstances postulated to obtain evidence from the seller of a contractual right to sell the particular plot, even if that were, as indicated in paragraph 42.3, the assurance in this respect from the master developer in the transaction. In the present circumstances, Sunland's submissions and reference to these parts of the Keighran witness statement serve to emphasise, in my view, the importance of it establishing a "contractual right" for the purposes of its case[79] and the need for the basis of that right to be clearly stated. Keighran's advice is, without that evidence, that the potential seller ought not to proceed. It was submitted that such evidence was obtained by Sunland, with reference to paragraph 126 of Brown's witness statement.[80] In my view, as indicated in these reasons, exactly what Sunland did not obtain was confirmation from the master developer DWF as to the "Seller's Contractual Right", or any other right which Sunland was able to articulate with any precision.[81]

41 Sunland also relied upon Keighran's expert evidence for the proposition that he was not aware of any "policy or practice" whereby master developers tried to avoid

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78 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 88.

79 See above, paragraphs 25-27.

80 *Witness Statement of David Scott Brown* (6 August 2010), paragraph 126, which reads:

> "I was informed by Stringer [ie Clyde-Smith] and believe that she phoned Brearley to confirm that Prudentia had development rights over Plot D17, which Brearley confirmed."

81 See, particularly, below, paragraphs 240 to 246; and noting that the reference to paragraph 126 of the Witness Statement of David Scott Brown (6 August 2010) is but one example of the confusion in this respect, noting that the reference at this point was to Prudentia having "development rights" over Plot D17.

engaging in or the appearance of engaging in gazumping purchasers.[82] In my view, this submission by Sunland is not supported by Keighran's evidence. First, in the last paragraph of point 3.1 in the letter from Hadef & Partners DLA Phillips Fox on behalf of to Sunland, which is annexed to Keighran's expert witness statement and with which he apparently agreed,[83] it is written that:[84]

> "It is our experience that master developers did try to avoid the appearance of 'gazumping' and they would generally try to negotiate with an interested party where the party was an experienced developer that the master developer wanted in the project or where deposits or security payments had been paid. It is important to note that master developers sometimes distinguished between experienced developers who build versus speculators looking to on-sell at a profit, and this might influence any decision to keep negotiating".

Secondly, Keighran also said:[85]

> "As a matter of commerciality, it may be that the master developer may elect not to negotiate with another party. However, in my experience, in that situation the master developer would require a security deposit to be paid for the plot".

Thirdly, in point 3.4 of the same letter from Hadef & Partners, it is also written that:

> "... Our experience is that security cheques (which may be refundable) are usually required in order to get negotiations started with the master developer. The situation might be different where the person looking to buy was of particular interest to the master developer. It is our experience that the master developers were not in the business of conducting extensive negotiations with potential buyers without the buyer having something on the table to lose if they did not proceed or without the buyer being a serious developer of interest to the master developer. At the time in question (August – September 2007) the market was very hot and there were a huge number of speculators in the market and therefore master developers (whilst always being polite and entertaining some discussion) didn't have the resources to negotiate with every person that expressed an interest in a plot".

Thus, the evidence establishes that a master developer, such as DWF, might well choose not to negotiate with every person who expressed an interest in a particular

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82 *Plaintiffs' Address* (1 February 2012), paragraph 212.

83 Witness Statement of Duane Keighran (8 August 2010), paragraph 96 (with one proviso not presently relevant).

84 Witness Statement of Duane Keighran (8 August 2010), Annexure DK-1 (pp 52 – 58) (Letter Hadef & Partners (Dubai) to DLA Phillips Fox (Brisbane).

85 Witness Statement of Duane Keighran (8 August 2010), paragraph 94.

piece of land and might generally try to negotiate instead with an interested party, such as Prudentia, if that party was an experienced developer which the master developer wanted in the project.

42 Sunland submitted that there was no evidence about whether DWF had any practice in relation to gazumping and that Keighran's evidence was that he was not aware of any master developer, including DWF, that had any policy or practice about gazumping.[86] Sunland continued:[87]

> "Keighran went on to say (paragraph 94) that a master developer may elect not to negotiate with another prospective purchaser, but that *'in my experience, in that situation the master developer would require a security deposit to be paid for the plot'*. In other words the first purchaser would be required to put a hold on the lot, or take control of the lot, or acquire a contractual right against Dubai Waterfront (Keighran paragraphs 24-25, 82-83 and 94-95)."

In my view, this does not detract from my conclusion on the evidence as stated at the end of the preceding paragraph and, rather, tends to detract from Sunland's case in that it emphasises the need for a purchaser to obtain some definite right with respect to land which was to be purchase.

43 It is against this general backdrop that the dealings between the Sunland, DWF and its officers and Reed must be viewed. In this respect it should also be kept in mind that it has not been suggested that Sunland as a sophisticated property developer, itself and through its entities in Australia and Dubai, would not be, or is not, aware of these type of general issues and the manner in which they are addressed in Australian jurisdictions, with which it must be taken to be very familiar. The position is similar in Dubai where Sunland apparently had a significant presence and was the recipient of advice from Ms Julianne Clyde-Smith (nee Stringer) ("Clyde-Smith") who was General Counsel of the Dubai branch of Sunland in 2007 and is currently employed in the Dubai law firm, Clyde and Co, which was retained by Sunland as its legal advisers.

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86 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 90, referring to Witness Statement of Duane Keighran (8 August 2010), paragraph 93.

87 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraph 90.

44 In this respect, it should also be kept in mind that, at least from November 2006 to August 2007, Brown had been involved in negotiating the acquisition of another plot in the Waterfront Project on behalf of Sunland, namely Plot D5B. He had also been involved in unsuccessful negotiations for the purchase of Plots A10C and A3B in the Waterfront Project. In my opinion, it would be absurd to suggest that Sunland, Brown or Abedian, were not sophisticated participants in property development in Dubai or that they were unfamiliar with the process of development and purchase of development plots. Additionally, there is nothing in the evidence to suggest that legal advice of a well-informed and sophisticated kind was not available to them, whether from Sunland's corporate counsel or private law firms in Dubai – or Australia for that matter, depending upon relevant expertise. There is also nothing in the evidence to indicate that Sunland, through its officers and legal advisers, was in any way precluded from making inquiries of senior officials of Nakheel or DWF. In fact, as is discussed in more detail below, the evidence is that there were a number of discussions, and, by inference, ample opportunity for discussions, with senior legal and other officers of these entities who would be in a position to provide detailed information as to the state of proprietorship and contractual arrangements (if any) with respect to Plot D17.

15 August 2007

45 Brown, together with Mr Carl Bennett (then Sunland's project manager in Dubai), met with Austin at the Sunland office in Dubai in connection with Plot D5B. It appears that prior to this meeting, Brearley had sent Reed a draft SPA for Plot D17.[88] In relation to this meeting, Sunland pleads that, amongst other things, Austin showed Brown a draft plan for the reconfiguration of an existing plot (known as D8B) in the Dubai Waterfront Project that would lead to the creation of a new plot that would have beach views and which could be named Plot D17.[89] Sunland further pleads that Austin told Brown no title plan had been prepared for Plot D17 because

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88 Transcript, p 194.35 - .45; Court Book, MJJ.009.001.0092.

89 Second Further Amended Statement of Claim, paragraph 11.1.

the redesign of the existing plot had not then been completed.[90]

46 The evidence indicates that it was at the end of the meeting that Austin showed Brown plans for a reconfiguration of some of the plots behind D5B and asked for his opinion.[91] Brown said in his oral evidence that he understood the plans to be confidential as "nobody had seen them"[92] and that "D17 was being created as a different format from a series of other plots that existed there"[93] and "wasn't created" in August 2007.[94] Further, Brown's evidence was that Austin indicated that the redesign of the existing plan was not yet officially complete.[95] Brown understood that the plans had been shown to him because "we'd just finished a design exercise for him on the foreshore and he admired our design ability and when he showed us this plan, one of his first questions was, 'What do you think of it?'".[96] Brown said that the plans gave a fairly good indication of the potential nature of the D17 plot[97] and he agreed that the FAR (Floor Area Ratio) at 9.5 was a good number for a developer.[98]

47 Brown said in his oral evidence that Austin "was the first person who told me about [D17]".[99] Brown expressed interest in Plot D17, particularly it seems because it lay immediately behind Plot D5B, which Sunland owned. He said that Austin may have said words to the effect that "Reed had a hold on D17"; and Austin also gave him Reed's name and telephone number.[100] Brown had also said that Austin had told

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90 Second Further Amended Statement of Claim, paragraph 11.2.

91 Witness statement of David Scott Brown (6 August 2010), paragraphs 76 and 77.

92 Transcript, p 34.04.

93 Transcript, p 23.01 - .02.

94 Transcript, p 23.10; see also witness statement of David Scott Brown (6 August 2010), paragraphs 76 and 77.

95 Reply witness statement of David Scott Brown (27 June 2011), paragraph 17.

96 Transcript, p 34.12 - .15

97 Transcript, p 34.23 - .24; and see Court Book SUN.002.008.0006.

98 Transcript, p 34.34.

99 Transcript, p 37.32 - .33.

100 Transcript, p 35.20 - .23 ; and see the other references to Brown saying that Austin said Reed had a "hold" on the land in *Plaintiffs' Address* (1 February 2012), paragraph 76. Reference was also made in Sunland's submissions to emails of 20 and 22 August 2007 from Lee to Joyce and from Joyce to Austin, respectively, as follows (*Plaintiffs' Address* (1 February 2012), paragraphs 123 and 124):

> "MJJ.008.001.0066 ... is an email dated 20 August 2007 from Lee to Joyce that refers to putting *'pressure'* on Brown, stating *'...Omniyat was also in the running but I am not sure what they will be able to do'*. Omniyat owned a plot which also adjoined plot D17.

him "... that Plot D17 was already taken", and that Austin said that Reed was the person who had "taken it".[101] This oral evidence of Brown contradicted statements and sworn testimony which he had given to the Dubai authorities in the course of an investigation into the acquisition of Plot D17 in December 2008 and through to 2009.[102]

48 Brown's evidence was also that Austin told him, when showing him the new plans on 15 August 2007, "that Plot D17 was already taken by a person called 'Andrew Angus Reed' ... who was an international developer" and that Austin gave him Reed's mobile phone number.[103] Brown also confirmed that Austin was the first person to give him this name and that Austin told him "[i]f you are interested in contacting the fellow that's got the hold on this plot, here is his phone number.[104] Brown agreed that he left the meeting with the impression that Austin had been talking to Reed and agreed that "the first thing you did when the clock, the 24-hour clock went around, was to ring Andrew Angus Reed".[105] Brown also agreed that "[f]undamental, ... in relation to the discourse concerning D17, is the introduction to D17 by Mr Austin, [although] it was only a very brief introduction.[106]

49 The meeting between Brown and Austin is recorded in Brown's notebook.[107] Brown's notebook entries need to be viewed from the perspective of Brown's use of

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> In response Joyce instructs Austin: *'Jeff, these plots are not for sale, so I suggest you do not refer customers to our sales department as it will confuse everybody'* (MJJ.008.001.0023) ....

These are, however, communications internal to DWF, communications to which Sunland was not a party. Consequently, they do not assist Sunland's statutory and tortious "misrepresentation" claims. If Sunland had been a party, I am of the view that their contents would not assist Sunland's case as they, in effect, confirm Austin's statements to Brown and are consistent with the Prudentia parties', including Reed, being in negotiations with DWF for the purpose of Plot D17, but having no better position than that. The same applies to the communications referred to in the *Plaintiffs' Address* (paragraphs 56 to 72; *Reply Submissions of the First to Third Defendants to the Closing Submissions of the Plaintiffs* (22 February 2012), paragraphs 8 and 16; and see the responsive submissions set out in *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraphs 86 to 96.

101 Transcript, p 35.07 to .15.

102 See below, paragraphs 304to 320.

103 Witness statement of David Scott Brown (6 August 2010), paragraph 81.

104 Transcript, p 35.22 - .23.

105 Transcript, p 35.30 - .31.

106 Transcript, p 38.4 - .07.

107 Court Book SUN.002.007.0096 (Notebook page 112); and see Transcript, p 36.31 - .32.

his notebook. In this respect, he said that he used his notebook "[t]o record conversations and meetings, to have to-do-lists so I wouldn't forget things, so I could plan my day"[108] and agreed that generally he "made the notes in [his] workbook contemporaneously [and] normally during a meeting or on a phone call, I'd be writing down at the same time".[109] Brown agreed that the general purpose of his notebook was to record important matters concerning meetings or phone calls or the like.[110] In relation to the note of the meeting with Austin, it is significant that Brown does not record that Austin used the words "Plot D17 is already taken by Angus Reed" as alleged by Sunland in paragraph 11.3 of the Second Further Amended Statement of Claim, where the allegation with respect to this aspect of the meeting alleges these words but qualifies them with the allegation that they were "words to the effect that". Consequently, given the lack of any unequivocal reference to or recording of words used by Austin in these terms, and Brown's oral evidence that Austin may have said words to the effect that "Reed had a hold on D17", the probability is, in my view, that Austin and Brown had a discussion in relation to the likely creation and possible development of Plot D17 and that Austin, in effect, informed Brown that Reed or Prudentia had expressed an interest in the Plot to DWF – which was concerned to see the plot sold to a desirable developer; a position consistent with the manner in which master developers of land in Dubai sought to achieve land development, rather than land speculation.[111] In any event, given the nature of Brown's conversation with Austin and his version of that conversation, one might have expected him to have asked Austin what he meant by "a hold on the plot". In cross-examination, Brown admitted that he had not asked Austin this question,[112] but sought to explain the position as follows:[113]

"So you accepted that there was a hold on the plot and then the next day rang

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108 Transcript, p 36.04 - .06.

109 Transcript, p 44.41 - .46.

110 Transcript, p 36.04 - .05 . Brown said that he kept his notebooks in a drawer behind his desk in his office in Dubai (Transcript, p 143.35 - .40); thus, as was not denied, the notebooks were readily accessible to him at all relevant times.

111 A position consistent with the expert evidence of Keighran, referred to above, paragraphs 36 to 42.

112 Transcript, p 39.35.

113 Transcript, p 39.41 - .46.

> Mr Reed?---I accepted that Austin knew that Angus Reed had a hold on this plot, yes; he was the government, he was the City Relations manager, he would know.
>
> He would know, a hold on the plot?---He would know. He was dealing with clients every day."

This answer raises further doubts. As discussed below in relation to other discussions between Brown and senior officers of DWF, there is no evidence of any embarrassment on the part of Sunland in asking senior officers, such as Austin, for further details and information in relation to the rights that any other individual or entity might have held with respect to Plot D 17 at any time. In this answer, Brown confirms that Austin would have known the position and there is no suggestion that, if asked, Austin would not have provided sufficient information and details at that time. In this respect, it should also be noted that Austin was, according to Brown, reliable and was not criticised or questioned by Sunland in these proceedings.

50 In the course of this conversation, Brown did, however, understand that Plot D17 did not then exist and, consequently, DWF or Nakheel still owned the land in question.[114] For the same reason, Brown knew that Reed (or Prudentia) had no legal right to Plot D17, which is probably why he did not ask Austin what "a hold" meant. Nevertheless, it was clear to Brown from this meeting that Austin had already been talking to Reed about Plot D17[115] and that this meant that Prudentia was in a better commercial position than Sunland to acquire Plot D17. The negotiating position of Reed on behalf of Prudentia was important and of great value to Sunland.[116] Consequently, Brown was keen to explore the purchase of Plot D17 in a joint venture with Reed on behalf of Prudentia.[117]

51 On 15 August 2007, after his meeting with Austin, Brown and Joyce had a telephone conversation. Sunland pleaded that during this conversation Joyce said words to the effect that:

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114 Transcript, p 23.04 - .28.
115 Transcript, p 35.25 - .26.
116 Transcript, p 86.39 - .42.
117 Transcript, p 86.01, p 128.15 - .16 ; see Court Book SUN.009.007.5554.

(i) 'a man named Reed is the contact for Plot D17';[118]

(ii) 'although I will need to check this with Anthony Brearley, Reed's company will be paying DWF AED 135 per sq ft to purchase Plot D17';[119]

(iii) 'the terms of payment are more favourable than the standard terms, being 5% on execution of the contract, 10% at handover which is scheduled to take place in about 6 months, 10% at 6 months after handover, 20% at 12 months after handover, 20% at 18 months after handover, 20% at 24 months after handover, and 15% at 36 months after handover'; and[120]

(iv) 'a property speculator would be likely to pay about AED 175 per sq ft to purchase Plot D17'.[121]

52 Brown had not had many discussions with Joyce since June 2007 when Joyce had complained to Brown that Sunland had, in the context of prospective joint venture between DWF and Sunland, misused confidential information about Plot A10C or that Sunland; to use Brown's words, had "betrayed their [DWF] confidences".[122] Nevertheless, Joyce gave Brown some information about the terms on which Plot D17 might sell, including at a price of AED 135 per square foot, but said that he would need to check the terms with Brearley. Joyce left Brown with the clear understanding that Prudentia had no signed SPA in respect of Plot D17,[123] nor that it had paid any deposit.[124]

53 Issues arose as to the veracity of the claims of Sunland and Brown's evidence in relation to this conversation with Joyce. Sunland pleaded that after the meeting

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118 Second Further Amended Statement of Claim, paragraph 12.1.
119 Second Further Amended Statement of Claim, paragraph 12.2..
120 Second Further Amended Statement of Claim, paragraph 12.3.
121 Second Further Amended Statement of Claim, paragraph 12.4.
122 Transcript, p 205.46.
123 Transcript, p 32.07 - .08 and p 198.01 - .12.
124 Transcript, p 32.10 - .11.

between Austin, Brown and Bennett on 15 August 2007, Joyce called Brown.[125] Brown's oral evidence was that there was a telephone conversation with Joyce on the afternoon of 15 August 2007, but contrary to Sunland's pleading, Brown says in his written statement that he cannot recall who called whom.[126] In cross-examination, Brown's evidence was that it was more likely that he called Joyce.[127] It was submitted on behalf of Joyce that at the time the pleading was drafted, Brown was maintaining the façade, with Sunland's lawyers, that it was Joyce who instigated the telephone call. It was submitted on behalf of Prudentia, Hanley and Reed that Brown's evidence of what Joyce said in this conversation was both uncertain and unreliable. Brown, in his witness statement, said that Joyce told him that a "man named Andrew Reed was the contact for Plot D17 and that Reed's company was partners with Och-Ziff",[128] but in cross-examination, Brown's evidence on this point was as follows:[129]

> "Mr Brown, you realise it is fundamental in this proceeding what words were spoken to you by Mr Reed and Mr Joyce on critical occasions?---Yes.
>
> And one of the conversations that's pleaded in the statement of claim in this proceeding occurred on 15 August 2007?---Yes.
>
> You understand that, don't you?---Yes, I do.
>
> Are you now saying to his Honour that Mr Joyce said more than that a man called Andrew Reed was the contact for D17, in your conversation with him on 15 August?---The notes that were taken in my notebook don't obviously cover everything that was discussed that day, but Joyce did confirm what Austin had told me and that was that Reed had the plot behind D5B and that he was the contact for that plot.
>
> So your recollection to his Honour now is, is it, that Mr Joyce said to you on 15 August that Mr Reed was the person who had plot D17, used that expression?---Words to that effect.
>
> Well, why didn't you say so in paragraph 82?---I think sometimes when you're describing something, you don't necessarily put all the words in there, but that was the gist of what he was telling me.
>
> When you use the word 'gist', it immediately becomes ambiguous,

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125 Second Further Amended Statement of Claim, paragraph 12.
126 Witness statement of David Scott Brown (6 August 2010), paragraph 82.
127 Transcript, p 174.36 - .39.
128 Witness statement of David Scott Brown (6 August 2010), paragraph 82.
129 Transcript, p 175.26 - .47 – 176.06 - .10. .

> Mr Brown. What do you recollect Mr Joyce actually said to you about the relationship between Mr Reed and D17 on 15 August?---That he had a plot behind D5B, that he had serious partners in the States, Och-Ziff, and talked about - - -
>
> No, I don't need to hear any more. You say to his Honour, do you, that he said that Mr Reed had plot D17?---Well, he identified the plot that Mr Reed controlled, yes. He confirmed what Austin had told me the same day.
>
> You're just making it up, aren't you?---No, I'm not; it's my recollection."

Concluding these submissions, it was said that Brown's "best shot" at what Joyce said was that there was a plot behind Plot D5B and that Reed was the "contact" for that plot.[130] On the evidence, I am satisfied that Joyce said no more than this and, in particular, did not say or imply that Reed (or Prudentia) "controlled" Plot D17 or was the beneficiary (or were the beneficiaries) of "some sort of contract" with respect to the plot.[131]

54 It is fair to say, as submitted on behalf of Joyce, that Brown's evidence about this conversation and, particularly, the way Joyce described Reed, waxed and waned in the course of his oral evidence; but Brown went back to and reaffirmed his witness statement, being that Joyce described Reed as "the contact" for Plot D17.[132] In this respect, I also note the observation contained in the submissions on behalf of Joyce that the fact that Brown was so uncertain as to what Joyce said during this conversation creates a difficulty for Sunland given the allegations of fraud and misrepresentation where precision is necessarily expected.[133] Further, it was submitted that in the context of Brown discussing a potential joint venture between Sunland and Prudentia, at its highest Joyce may have said that Reed was the "contact" for Plot D17,[134] which was obviously true for any joint venture with Prudentia and true anyway, given that Reed had already been sent a draft SPA by

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130 Transcript, p 176.18 - .21.

131 And see *Plaintiffs' Address* (1 February 2012), paragraphs 85 to 91; and particularly, as to paragraph 88, with respect to Austin (cf paragraphs 48 - 50, above).

132 Transcript, p 174.25 – 176.25; cf Witness Statement of David Scott Brown (6 August 2010), paragraph 82.

133 See *Closing Submission of Fourth Defendant* (27 January 2012), paragraph 60; and see below, paragraphs 422- 424.

134 Transcript, p 176.

Brearley. What is clear is that Joyce did not say that Reed had a "hold" on Plot D17, that Reed "controlled" Plot D17, that Reed had a "right" to Plot D17[135] or that Reed had "reserve[ed]" Plot D17.[136]

55 Brown's oral evidence was that Joyce told him that Plot D17 had "favourable payment terms spread over 30 months and that the 'contract price is AED 135/ft² but that he would check this with Brearley" and that Brown made a note of these terms.[137] However, in the course of cross-examination, Brown admitted that Joyce "never deviated from [a price of AED 135/ft²]" during his discussions with Brown.[138] Brown also said that he knew there was no signed SPA, but that he had not been privy to an email from Brearley to Alexis Waller the previous day enclosing a draft SPA (for Reed).[139] Further, it was submitted that the unreliability of Brown's evidence is demonstrated by his answer to a question whether he was drawing from his notebook that he "thought Mr Joyce was saying to you that a contract price had already been agreed with Mr Reed of 135 dirhams/ft²", to which Brown replied "[t]hat's what we were being told, yes. It reflected there was an agreement between Prudentia and DWF on price and payment terms".[140] Subsequently, Brown admitted that Joyce did not tell him a price "in an unqualified way; ... the fact that he would check it with Brearley meant that Brearley would know what it was and therefore there was some agreement in existence".[141] It was submitted that a further aspect of unreliability related to Brown's evidence was that Joyce told him Reed was likely to sell to another speculator at AED 175 per sq ft which "reaffirmed to me that Reed controlled the land".[142] Nevertheless, in cross-examination, Brown admitted that a typed up version of his notebook which was prepared for the Dubai prosecutor in January 2009[143] records that Joyce told Brown that "the site was likely to sell

135 Transcript, p 176.
136 Transcript, p 112.46 - .47.
137 Witness statement of David Scott Brown (6 August 2010), paragraph 83.
138 Transcript, p 63.31 - .33.
139 Transcript, p 195.42 - .43.
140 Transcript, p 196.03 - .06.
141 Transcript, p 200.20 - .23.
142 Witness statement of David Scott Brown (6 August 2010), paragraph 85.
143 Transcript, p 37.11 - .14.

[emphasis added] to a speculative investor, around 175/ft² if it was on the open market".[144]

56 I accept that it seems possible, as suggested on behalf of Joyce, that, having been told by Brown of Sunland's interest in "doing" a joint venture with Prudentia on Plot D17, Joyce may have told Brown that Reed was the person to contact; but Brown's file note of the conversation in his notebook makes no reference to Joyce saying words to the effect that Reed was the contact for the plot. Furthermore, given the handwritten note recording that Joyce would need to check the details with "Anthony" (i.e. Brearley), I accept that it seems more likely than not that Joyce simply told Brown that the asking price for Plot D17 was likely to be AED 135 per sq ft.[145]

57 Brown did make a note of this discussion with Joyce in his notebook[146] and said that this was the only record of the conversation with Joyce on 15 August 2007.[147] The additional information which Brown had, however, recorded in his notebook about the discussions with Joyce on 15 August 2007 was omitted from his statement:[148]

> "'Likely to sell to another speculator that we've spoken to at 175.' Then you've written, 'Side deal 65 mill up-front. Hand over contract to purchaser. Enter into consultancy to avoid transfer fee and stamp duty. Agreement with Nakheel.' Where do you refer to that in your statement, that entry? ---Those last few lines?"

It was submitted that Brown's witness statements in this proceeding contain no reference to that part of his note that records details of a "side deal". In relation to this issue, he was cross-examined by Mr Collinson:[149]

> "MR COLLINSON: Why haven't you mentioned in your statement matters that were discussed arising out of the final section of your note of 15 August, commencing with the words 'side deal'?---Because I didn't fully understand

144 Transcript, p 44.08 - 09 (emphasis added in *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.4.7); Court Book, SUN.004.001.0053, at 0053.

145 Transcript, p 200.17 – 201.18.

146 Witness statement of David Scott Brown (6 August 2010), paragraph 82; transcript, p 63.28 - .29; Court Book SUN.002.007.0001 at 0097.

147 Transcript, p 177.15; Court Book, SUN.002.007.0001, at 0097.

148 Transcript, p 63.35 - .38.

149 Transcript, p 198.42 – 199.32.

> what it meant. It seemed like it was talking about some sort of fee payment of 65 million, but because Joyce had directed us to Reed, I wanted to talk to him about that, whatever that meant.
>
> So is your evidence to his Honour that Mr Joyce raised the issue of a side deal?---Well, I certainly didn't.
>
> That would be very important evidence to give in this proceeding, wouldn't it, Mr Brown, if Mr Joyce at such an early stage was suggesting the payment of a fee by Sunland?---Not fully understanding what it meant, I wasn't sure what I could actually say about it ...
>
> But you understand that Sunland's case in this court is that Mr Reed and Mr Joyce were acting in league with each other?---That's what we believe now, yes.
>
> Surely, I suggest, it would be important to mention that in the very first conversation you had with Mr Joyce, he proposed that a fee of 65 million dirhams be paid?---To an extent, I would be speculating what that meant because I didn't fully understand it, and so I wasn't comfortable putting it in my statement.
>
> You were happy to speculate, I suggest, in other parts of your typed note, weren't you? Look at the second-last dot point, which says, 'He said the site is likely to sell to a speculative investor'?---Yes."

It was submitted that Brown's evidence was not credible and that his omission of any discussion of this part of his file note makes it clear that during this conversation with Joyce, Brown had a thought about a side deal whereby Sunland would make a payment up front to Reed in order to step into his shoes. This, it was submitted, was supported by Brown's own admission to Mr Mustafa of the Dubai authorities that no-one at Nakheel or DWF ever asked him to pay a commission or premium.[150] It is unclear whether Brown made this offer to Joyce or whether Brown merely noted it down in his notebook. It was submitted that Brown's failure to disclose this in his witness statements and his denial of it in cross-examination wholly undermines his evidence regarding this conversation. Brown's evidence was that he did not refer to this in his statement because "I didn't fully understand what was meant by those words and I presumed that it was related to a premium figure, but it was all the very first conversation and so he didn't elaborate on that".[151] Brown denied that he had

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150 Transcript p 201.44 - .46.

151 Transcript, p 64.14 - .17, p 64.38 - .40; see also Transcript, p 198.42 - .46 and p 198.01 - .07.

deliberately chosen not to include this material in his statement,[152] but did admit that he had also not mentioned any "side deal" to the Dubai prosecutor.[153]

58 As noted previously, it is clear from Brown's oral evidence that the contents of his notebook, which generally bears notes under dates appearing sequentially, included both a record of conversations, meetings and "to do" lists, so he would not forget things and could plan his day.[154] Brown agreed that he generally made notes "in [his] workbook contemporaneously and normally during a meeting or on a phone call, I'd be writing down at the same time".[155] He agreed that the purpose of his notebooks was to record important matters concerning meetings or phone calls or the like.[156] In any event, at this time, Sunland was keen to be involved in the purchase of Plot D17 in a joint venture and not as a purchaser in its own right.[157]

59 Sunland submitted that the cross-examination of Brown about the precise words said to have been spoken by Joyce amounted to no more than a "semantic quibble".[158] It was, however, submitted on behalf of Joyce that the determination of the actual words alleged to have been spoken by Joyce is crucial because for the conduct to be misleading or deceptive, the question is what the reasonable person in the position of Brown would have understood by Joyce's conduct, and not Brown's subjective understanding of the "gist" of conversations.[159] In any event, even if one were to be more inclined to have regard to the "gist" of conversations such as this, it would need to be viewed in the context of other conversations, events and circumstances alleged to establish Sunland's causes of action in this respect.

60 In response to the submission on behalf of Joyce, Sunland submitted as follows:[160]

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152 Transcript, p 64.22 - .23.
153 Transcript, p 64.46 - .47.
154 Transcript, p 36.4 - .06.
155 Transcript, p 44.41 - .46.
156 Transcript, p 36.05 - .06.
157 Transcript, p 86.01, p 128.15; Court Book, SUN.009.007.5554.
158 *Plaintiffs' Address* (1 February 2012), paragraphs 29 and 275(i).
159 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [10]; *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262 at [45] – [48]; and see below paragraph 351 and following.
160 *Plaintiffs' Reply to the Supplementary Written Submissions of the Defendants*, paragraphs 34-38.

"34. Joyce submissions paragraph 20: The paragraph cited (paragraph [10]) from *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 does not support the submission. Butcher was concerned with the liability of an agent for merely passing on information from a vendor. What the majority in *Butcher*[161] did materially say was as follows:

> 36. The relevant class addressed. Questions of allegedly misleading conduct, including questions as to what the conduct was, can be analysed from two points of view. One is employed in relation to "members of a class to which the conduct in question [is] directed in a general sense". The other, urged by the purchasers here, is employed where the objects of the conduct are "identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld"; they are considered quite apart from any class into which they fall. Adoption of the former point of view requires isolation by some criterion or criteria of a representative member of the class. To some extent the trial judge adopted the former approach, pointing out that the class - potential home buyers for Pittwater properties in a price range exceeding $1 million - was small (as suggested by the fact that only 100 brochures were printed), and its members could be expected to have access to legal advice.
>
> The former approach is common when remedies other than those conferred by s 82 (or s 87) of the Act are under consideration. But the former approach is inappropriate, and the latter is inevitable, in cases like the present, where monetary relief is sought by a plaintiff who alleges that a particular misrepresentation was made to identified persons, of whom the plaintiff was one. The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known... [footnotes omitted]

35. Similarly, in the present case it is necessary to consider the character of the conduct of Joyce in relation to Brown, bearing in mind what matters of fact each knew or which each may be taken to have known. It is important that Joyce's conduct be viewed as a whole, and not in isolated parts.

36. In *Butcher*, McHugh J (although dissenting in the result), cited with approval the passage from the judgment of Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments)* (1993) 42 FCR 470 at 504: 'it is necessary to keep steadily in mind when dealing with [the Act and, in particular, s 52] that 'representation' is not co-extensive with 'conduct'.' In proscribing conduct that is misleading or deceptive or that is likely to mislead or deceive, s 52 operates notwithstanding that the conduct may or

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161 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [36] - [37] per Gleeson CJ, Hayne and Heydon JJ.

> may not amount to a representation as the term is understood in the general law.
>
> 37 His Honour went on to observe that the compound conception of conduct that is misleading or deceptive or likely to be so is not confined to conduct that involves representations, referring to the statement of Lockhart J in *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* that whether s 52 'has been contravened depends upon an analysis of the conduct of the alleged contravener viewed in the light of all the relevant circumstances constituted by acts, omissions, statements or silence.'
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> 38. In *North East Equity Pty Ltd (ACN 009 248 819) v Proud Nominees Pty Ltd (ACN 074 270 938)* [2010] FCAFC 60, a case also cited in the Joyce submission, the Full Federal Court (Sundberg, Siopis and Greenwood JJ) observed at [45]: *'In determining or "construing" the content of a representation, and whether a party has engaged in misleading or deceptive conduct, all of the surrounding circumstances must be taken into account, not just the terms of the representations standing alone.' ..."*

On this basis, Sunland submitted that the telephone conversation of 15 August 2007 referred to in the submissions on behalf of Joyce[162] should not be considered in isolation. In broad terms, I accept Sunland's general proposition on the basis of the authorities cited that particular statements or conduct do need to be viewed in context.[163] Nevertheless, the conversation of 15 August 2007 is a particularly important conversation in the context of the Plot D17 transaction and is itself an important part of the context of the communications between the parties, written and oral upon which Sunland has relied. For the reasons indicated, I am of the opinion that it is consistent with the broader context of the conduct of the parties and their communications and that this context supports the submissions on behalf of Joyce in relation to its significance.

61 Sunland also responded to the submissions on behalf of Joyce on the basis that they proceeded upon the basis that the Sunland case is based upon the misrepresentation being confined to Reed or Prudentia having a "contractual right" to acquire Plot D17. This issue is discussed elsewhere,[164] as is the further submission against Sunland that, whether or not the right is contractual or something else, Sunland has been

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162 See *Reply Submissions of the Fourth Defendant (Joyce)*, paragraph 21.

163 And see below, paragraphs 352 and following.

164 See above, paragraphs 25 - 27.

unable to establish either the nature of the right which it says was subject to the representations or that, if any right were established as the subject of the representations, the representations were, with respect to that right, false.[165] Finally, I reject Sunland's submission that the admissions made by Brown under cross-examination which were identified in the submissions on behalf of Joyce[166] were explicable on the basis that they were simply accepted as "possible scenarios put to him in cross-examination". Viewed overall, Brown's evidence simply does not support this assertion and, rather, indicates Sunland's confusion in relation to what it says was being represented to it with respect to Reed or Prudentia's "right", contractual or otherwise, in relation to Plot D17; a position which is then exacerbated by the evidence of Abedian.[167]

62 Sunland does not allege that either Austin or Joyce represented that Reed or Prudentia had "control" over Plot D17 by expressly using the word "control". Brown's evidence as to what Austin and Joyce said to him is imprecise.[168] The conversation Brown had with Austin on 15 August 2007 has already been discussed.[169] In relation to his conversation with Joyce, his evidence, which was given in the context of questions about a Summary of Key Events attached to an email from Brown to Abedian on 11 July 2010,[170] was that:

> "[...]---[Joyce] told us Reed was the contact for the plot.
>
> That's different to saying that Mr Reed controls the property, isn't it?---It's different wording, yes.
>
> And a different meaning I suggest. Yes?---In conjunction with what Austin had told us, I think it's the same. It delivers the same message."[171]

The entries for 15 August 2007 in Brown's notebook do not make any reference to "control" or, for that matter, any synonym of the word "control".[172] When it was put

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165 See above, paragraphs 25 – 27 and paragraph 40; and, below, paragraphs 232-239.
166 *Reply Submissions of the Fourth Defendant (Joyce)*, paragraph 22.
167 See, further, below, paragraphs 321-332.
168 See *Plaintiffs' Address* (1 February 2012), paragraphs 85 to 91.
169 See above, paragraphs 46 – 50.
170 Court Book, SUN.015.002.0407.
171 Transcript, p 252.19 - .25.
172 Court Book, SUN.002.007.001, at .0096 - .0097.

to Brown that Joyce did not say that Reed controlled the site behind Plot D5B, Brown responded "I can't recall exactly".[173] Brown confirmed in cross examination that as at 15 August 2007 he was aware that there was no signed SPA for Plot D17.[174]

63 The evidence indicates that Sunland had very significant interest in purchasing Plot D17, particularly having regard to the fact that it was immediately behind Plot D5B, which one of the Sunland entities already owned. Brown discussed his conversation with Joyce with Abedian later on 15 August 2007 and the latter was "quite interested in the possibility of a new project".[175] Continuing, Brown's evidence was that Abedian suggested that he prepare a draft feasibility for the plot because "we wanted to understand whether the plot would be an appropriate one for Sunland to pursue".[176] Brown's evidence was that Sunland generally looks for a return on development costs of 20% or more.[177] Feasibility revision three, dated 15 August 2007[178] discloses a 29.26% return on development cost. Sunland's interest was also demonstrated by its production of a series of design sketches which were shown to Austin a few days later, together with a new proposal which increased the three plots behind Plot D17 to five plots.[179] The evidence of Brown indicated that this involved a series of design proposals that would improve the efficiency of land used by deleting the road and increasing the size of the park areas. The result would be that the net built up area ("BUA") of the new plots behind Plot D17 would increase by 12% and each plot would have a park frontage, thereby improving their value. He said that this represented a monetary increase of some 12% for the additional plots created and added around AED 10 million to the land values. Later, in August 2007, Brown said that he and Mr Cameron McLeod (then a member of the Sunland

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173 Transcript, p 176.34 - .35.
174 Transcript, p 195.36.
175 Witness statement of David Scott Brown (6 August 2010), paragraph 88.
176 Witness statement of David Scott Brown (6 August 2010), paragraph 88.
177 Witness statement of David Scott Brown (6 August 2010), paragraph 91; and reply witness statement of David Scott Brown (27 June 2011), paragraph 19.
178 Court Book, SUN 002.009.0064.
179 Witness statement of David Scott Brown (6 August 2010), paragraphs 78.

design team) met with Austin to discuss their further design ideas.[180]

16 – 20 August 2007

64 Sunland pleads that Brown telephoned Reed on Reed's Australian mobile number on 16 August 2007 and during that conversation Reed said to Brown words to the effect that:

(a) 'I am in Melbourne and will be flying into Dubai on Sunday'[181];

(b) Prudentia was his company[182];

(c) through Prudentia 'I have the right over' or 'I control' D17[183]; and

(d) he would be willing to negotiate with Brown about undertaking a joint venture with Sunland for the development of D17[184].

Brown's evidence was that he called Reed and told Reed that he got Reed's information from either Austin or Joyce.[185] He said that during that telephone conversation, Reed introduced himself and suggested that Brown and Reed meet on Sunday.[186]

65 During cross-examination, Brown admitted that contrary to the evidence in his witness statement in this proceeding, he had told the Dubai prosecutor in an email dated 3 December 2008 that "[w]e were initially contacted by Angus Reed",[187] and this was Brown's "memory at the time".[188] Brown's witness statement is also inconsistent with the agreed transcript of his interview, conducted under oath, with the Dubai prosecutors on 16 February 2009[189] where Brown is recorded as giving

180 Witness statement of David Scott Brown (6 August 2010), paragraph 79.
181 Second Further Amended Statement of Claim, paragraph 13.1.
182 Second Further Amended Statement of Claim, paragraph 13.2.
183 Second Further Amended Statement of Claim, paragraph 13.3.
184 Second Further Amended Statement of Claim, paragraph 13.4.
185 Witness statement of David Scott Brown (6 August 2010), paragraph 92.
186 Witness statement of David Scott Brown (6 August 2010), paragraph 92.
187 Transcript, p 41.6 - .12.
188 Transcript, p 42.7.
189 Court Book, SUN.014.001.0032, at .0033. The authenticity of this document was challenged by Sunland on the basis that it had not been formally proved or tested in cross examination. The primary objection made was to the accuracy of translation, a matter which could be said to have been

evidence to the prosecutor that "in August 2007 I received a call from the accused Matthew Joyce, who told me an Australian called Angus Reed has relations with Och-Ziff and will discuss with me land lot on the Waterfront Project".[190]

66 As submitted against Sunland, Brown's recollection of what Reed told him was again unclear. In particular, his accounts of the conversation as to the use of the word "control" varied. Brown said that Reed told him that either "[w]e have the rights over that land" or "Prudentia controlled that land" and that Brown understood the words to mean that Prudentia had control over Plot D17.[191] Brown said that he recorded the discussion in his notebook[192] and that although he could not recall the exact words, it "tied in with what Joyce had told me the day before"[193] and was "entirely consistent with what Austin and Joyce had told me".[194] On the other hand, Brown could not recall whether Reed told him that "he had a hold on the land", but said that "he controlled the plot with a very important partner from the US, Och-Ziff" and that Reed's words were consistent with what Austin had said which was Reed "had a hold on the land".[195]

67 Brown was questioned whether he asked Reed during this telephone conversation "[a]re you the purchaser of Dubai Waterfront plot D17".[196] Brown said "I didn't ask him if he was the purchaser, no",[197] but instead "I asked him to confirm what I'd been told by Austin and Joyce the day before and that was 'Did he control plot D17'".[198] It was put to Brown that his evidence that he had asked Reed to confirm Joyce's statements had not been said anywhere before Brown gave evidence in these

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addressed in part as a result of the cross examination of Brown in relation to its contents. In any event, though referred to in support of the defendants' case it is not relied upon in any way for the purpose of these reasons for judgment.

190 Brown did not make enquiries which he had made in relation to other sites, see above, paragraphs 43 and 44.

191 Witness statement of David Scott Brown (6 August 2010), paragraph 92.

192 Witness statement of David Scott Brown (6 August 2010), paragraph 92; and see Court Book, SUN.002.007.0001, at .0099.

193 Witness statement of David Scott Brown (6 August 2010), paragraph 92.

194 Transcript, p 32.26 - .28.

195 Transcript, p 32.30 - .39; and see above, paragraph 49.

196 Transcript, p 21.05 - .06.

197 Transcript, p 21.10 - .11; reply witness statement of David Scott Brown (27 June 2011), paragraph 7.

198 Transcript, p 21.15 - .16.

proceedings. Brown's response was that "I can't recall whether I've said it anywhere before, but it confirms that he controlled the plot, had a hold on the plot, they were the tones of his words".[199]

68 Nevertheless, Brown did admit under cross-examination that he knew that Reed did not hold a SPA in relation to Plot D17 at the time of the meeting on 19 August 2007,[200] having said that a SPA is "the final ownership document for a property",[201] and that neither Prudentia or Reed had paid a deposit.[202] Consequently, the fact that Reed or Prudentia may then have been negotiating with DWF for the purchase of Plot D17 does not affect the position.[203] In response to the question whether Brown knew that Prudentia did not own Plot D17, he replied "[y]es we did".[204] Also importantly, Brown also confirmed under cross-examination that he "didn't ask" [Reed] "whether he had or how he came to have an entitlement to the plot", but that "he explained about Och-Ziff, though, as his partner".[205] Brown added that "[k]nowing that the land was being created, no, we didn't" ask Reed for a document or piece of paper to indicate his hold on the land.[206]

69 It was quite clear from Brown's evidence that he knew that neither Prudentia nor Reed owned Plot D17, as the following exchanges in the course of his cross-examination indicate:[207]

> "Who did you understand owned D17?---We understood, from Austin and

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199 Transcript, p 48.31 - .35 (emphasis added in the *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.8.5).

200 Transcript, p 32.07 - .08; see also Transcript, p 195.36; see also Transcript, p 205.27.

201 Transcript, p 30.44 - .45.

202 Transcript, p 32.10 - .11.

203 See *Plaintiffs' Address* (1 February 2012), paragraph 95. Indeed, for the reasons discussed further below, it would be implausible to suggest that Sunland did not think this was the position as it paid the fee to the Prudentia parties to step into these "negotiating shoes" (see below, paragraphs 163 to 166; and see paragraph 222). The position is not changed by reference to internal communications between the Prudentia parties, even assuming that they were unequivocally in support of Sunland's position, which I do not accept (see *Plaintiffs' Address*, paragraph 99 (and as to paragraph 99(e), see below, paragraph 57 and see *Plaintiffs' Address*, paragraphs 103 to 107 and 137 to 140).

204 Transcript, p 32.13.

205 Transcript, p 49.5 - .09.

206 Transcript, p 33.1 - .03.

207 Transcript, p 23.04. - .24.

[Joyce[208]] that Prudentia controlled that plot.

'Controlled', what do you mean by controlled?---If there is no title plan, and in Dubai a title plan is an affection plan existing, then the plot can't be owned.

So the plot wasn't owned?---Well, it wasn't created.

What was the DWF or Nakheel entitlement to the plot?---They owned the plots that were existing prior to the reconfiguration.

So do you say the reconfiguration changed the nature of ownership of the plot?---No, I'm saying that the D17 didn't exist at the time we were talking to Mr Reed, in the sense of it having a title plan, a formal title plan.

So at the time you were talking to Mr Reed, you say D17 didn't exist?---No, I'm saying it didn't exist as a title plan, yes.

It didn't exist as a title plan?---As a registered title plan, yes.

So who owned it?---It was being reformatted from a series of other plots."

70 Brown's evidence was that Reed asked him whether Sunland was interested in a joint venture in Dubai and that Brown said "that it would be interested".[209] This was confirmed in his cross-examination, where Brown gave evidence that Sunland was "very keen to do a joint venture, yes"[210] and agreed that Sunland "didn't need any encouragement to purchase [D17]".[211] Reed told Brown that Prudentia would put the land into a joint venture for AED 175/sqft and "would be looking for a consultancy fee of AED 60M" which, according to Brown's evidence, surprised him because it was higher than the price "Joyce had mentioned".[212] Brown said that Reed told him during the telephone call that he had a "leisure lifestyle vehicle in Australia and was partners with a large American hedge fund".[213] Brown's evidence was that he understood this to be a reference to Och-Ziff because of what Joyce had told Brown on 15 August 2007.[214]

71 Brown's evidence was that he had formed the impression, although he could not

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208 Note that the transcript says Aidarous, but clearly Aidarous was not involved.
209 Witness statement of David Scott Brown (6 August 2010), paragraph 93.
210 Transcript, p 128.15 - .16.
211 Transcript, p 128.18.
212 Witness statement of David Scott Brown (6 August 2010), paragraph 93.
213 Witness statement of David Scott Brown (6 August 2010), paragraph 94.
214 Witness statement of David Scott Brown (6 August 2010), paragraph 94.

remember the exact words that were used, that Reed had high level connections within Nakheel.[215] As to who told Brown this, he said "[i]nitially, Joyce and then Reed himself".[216] However, this evidence was later contradicted, which, as was submitted against Sunland, pointed to the "utter unreliability of Brown's evidence on these critical points".[217] This is illustrated by Brown's evidence in cross-examination as to the basis of this "impression":[218]

> "Did anyone else tell you that Prudentia had such high-level connections? ---No.
>
> No? I suggest that you've told the court that, in fact, Reed and others told you that they had high-level connections with Nakheel?---Well, the words spoken by Joyce and Reed indicated that Och-Ziff was an extremely important player in this transaction and that that relationship was crucial to the deal.
>
> What you have said here to your director and chair of the audit committee, 'Reed told us he had connections, high-level connections, with Nakheel, enabling them to reserve this site.' On your evidence in court this morning, that is incorrect?---I don't agree with that because he referred to Och-Ziff for the very reason to show how important they were in the transaction, that they had this very powerful partner.
>
> Do you have your statement in front of you, Mr Brown, the first statement at SUN.013.001.0358?---Yes.
>
> I would ask you to turn to paragraph 142. You say there, do you not, 'During my negotiations with Reed, I formed the view that Reed probably had a contact high up in Nakheel and that it was through this contact that Reed had obtained control of plot D17'? Just stopping there, is that correct? ---Yes, through what he had told me.
>
> 'It seemed a reasonable guess that it was someone high up in Och-Ziff who was Reed's connection to the contact in Nakheel.' Is that correct?---Yes.
>
> 'I thought it was possible that the contact could even have been Sultan Ahmed bin Sulayem himself, as I knew that the sultan made substantial investments around the world.' Is that correct?---It is because we Googled - - -
>
> I didn't ask - is it correct?---Yes.
>
> 'I cannot remember when I first formed this view, but comments such as these by Joyce supported it.' So based on comments by Joyce, you formed

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215 Transcript, p 113.6 - .10.

216 Transcript, p 75.01.

217 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.8.11.

218 Transcript, p 113.25 - .47 and p 114.01 - .09; see also Transcript, p 74.41 - .45.

the conclusions that you set out in that paragraph; is that right?---Comments by Joyce and Reed, yes."

72 Sunland pleads that Brown and Joyce exchanged emails on 16 August 2007 after Brown had spoken with Reed[219] and that an email in reply from Joyce that:

(a) was sent to Brown's email address 'dbrown@sunlandgroup.com';[220]

(b) included the words "[a]nyway the issue for us is that you can come to an arrangement with them that allows you to deal directly with us";[221] and

(c) was, in the course of being sent from Joyce's computer to Brown's computer, transmitted through a server in Australia.[222]

73 Brown sent an email to Joyce on 16 August 2007 telling him that " [i]t was a very positive discussion".[223] Brown's evidence is that Joyce's email referred to in these pleadings was sent to Brown in response[224] and that he understood the message from Joyce to mean that Sunland "would have to come to an arrangement with Reed before it could deal with Dubai Waterfront".[225] The email from Joyce must, however, be read in the context of the circumstances at that time. These circumstances, which were known to Brown and Abedian, included that:

(a) Brown had already spoken briefly to Reed by telephone;

(b) Brown had made the call to Reed in pursuit of a joint venture with Reed;

(c) Brown indicated that his discussions with Reed would continue "on Sunday"; and

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219 Second Further Amended Statement of Claim, paragraph 14.2..1.

220 Second Further Amended Statement of Claim, paragraph 14.1.1.

221 Second Further Amended Statement of Claim, paragraph 14.2.2; and see *Plaintiffs' Address* (1 February 2012), paragraph 91.

222 Second Further Amended Statement of Claim, paragraph 14.2.3.

223 Witness statement of David Scott Brown (6 August 2010), paragraph 97; Court Book SUN.001.005.0002.

224 Witness statement of David Scott Brown (6 August 2010), paragraph 98; Court Book SUN.001.005.0002.

225 Witness statement of David Scott Brown (6 August 2010), paragraph 100.

(d) from Joyce's perspective (at least), Sunland had acted in an improper manner in an earlier prospective joint venture between Sunland and DWF in connection with Plot A10C.[226]

74 Thus, it was submitted against Sunland, that the 16 August 2007 emails speaks for itself and that the "arrangement"[227] to which Joyce was referring in his email on 16 August 2007 was one by which Brown and Reed would agree that Sunland would be responsible for speaking to DWF about Plot D17 on behalf of the proposed joint venture and that there should be a single point of contact with whom DWF could deal in connection with Plot D17.

75 Joyce, as recently as late June 2007, was "unhappy" with Sunland to use Brown's words,[228] concerning Sunland's attempts to acquire Plot A10C on its own account soon after discussions between DWF and Sunland about potential joint ventures involving various plots. In an email to Brown, Joyce said that the circumstance "has caused us major embarrassment".[229] Joyce had complained that Sunland had acted improperly when it attempted to acquire Plot A10C on Sunland's own account and Brown agreed that there had been "something of a falling out with Mr Joyce".[230] It was submitted that it is apparent from the email dated 16 August 2007 that there were negotiations underway with Reed in relation to Plot D17 and that Joyce did not want Sunland to go behind Reed's back - as Joyce believed that Brown had done to DWF in connection with Plot A10C. In my view, there is considerable force in these submissions which do, I think, encapsulate the likely position consistently with the evidence which Brown ultimately gave.

76 This is supported by Brown's "clear statement" which he prepared on 22 January 2009.[231] Thus, the general tenor of the then prevailing circumstances was that there

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226 Transcript, p 205.40 - 47.
227 Second Further Amended Statement of Claim, paragraph 14.2.2; Court Book SUN.001.005.0002.
228 Witness statement of David Scott Brown (6 August 2010), paragraph 57.
229 Court Book, MJJ.002.002.0675.
230 Transcript, p 205.29 - .38.
231 Court Book, SUN.004.002.0036, at .0037: "We understood from Nakheel that we had to have an arrangement with Angus Reed to be able to develop the plot <u>together</u>". (emphasis added)

had been a "positive" discussion between Reed and Brown about a future joint venture development and in this context the message from Joyce contained in the email pleaded by Sunland is therefore no more than invitational in that it suggests to Sunland an opportunity for it and Reed and Prudentia to work out themselves which party will negotiate with DWF on behalf of the proposed joint venture. In other words, if Sunland wants to take the negotiating seat, then they can come to some arrangement with the future joint venture partner to that effect. The evidence indicates that this is, in fact, how Brown read the email at the time he received it. In Brown's email to Austin on 19 August 2007, he confirmed that the discussions he had with Reed on that day were in furtherance of the joint venture on Plot D17.[232] In Brown's email to Sahba Abedian (the Managing Director of Sunland Group Limited) (with Soheil Abedian copied in), the very next day, 20 August 2007, Brown wrote:[233]

> "Angus has his **foot on the site [emphasis added]** behind our Waterfront Plot, and we are negotiating a potential JV with him. We will have a Draft MOU from Freehills in the next 2 days, which we will respond to. The deal would be they would put in the land, Sunland pay the Deposit on the land, (about AED 12m) and the JV fund the Soft Costs through to Financing or Escrow operation. 50/50 Profit Share, and we get our Fees paid through the job."

Sunland relied on this email in support of its submission that Reed said to Brown words to the effect that he had a 'hold' on the Plot or that he 'controlled the plot'.[234] In the context of this email, it was submitted against Sunland that the meaning of the idiom to "put one's foot on" something meant to *lay claim* to it and, as such, Brown's choice of words in this email goes against Sunland.[235] Brown gave evidence in cross-examination, in respect of the 12 September 2007 "put your foot on the plot" email, that he thought that to "put our foot on the plot to secure it" meant to sign a SPA.[236] However, I accept that the submission that Brown used the phrase in the same way in his 20 August 2007 email to Sahba Abedian is not open to Sunland, given Brown's

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232 Court Book, SUN.001.005.0004; and see Witness statement of David Scott Brown (6 August 2010), paragraph 123.

233 Court Book, SUN.009.003.4477.

234 See, for example, *Plaintiffs' Address* (1 February 2012), paragraph 99(e).

235 See *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 114.

236 Transcript, p 186.30 - .34.

admission that he knew when he sent this email,[237] that there was no signed SPA in favour of Reed, or the Prudentia parties.[238] Accordingly, it follows in my view that Brown's reference to Reed having his "foot on the site" on 20 August 2007 must be understood according to the conventional meaning of that idiom, which does not generally connote something in the nature of a legal entitlement.[239] Sunland, in its responsive submissions, emphasised the use of the word "has" with respect to Angus and his foot having some significance in relation to these idiomatic uses by reference to the difference in expression in this respect in the "put your foot on it" email.[240] In my view, this is merely a semantic distinction and does not affect the sense conveyed in the 20 August 2007 email, as indicated. Neither do I think Sunland's position is aided in this respect by the reference to another email sent by Brown to Reed on the same day: "Unfortunately we cannot proceed on a Joint Venture based on the terms outlined in your email. We wish you all the best with this ...".[241]

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237 Court Book, SUN.009.003.4477.

238 Transcript, p 32.07 - 08 and p 198.01 - .12.

239 In this respect, the following entry for the word "foot" (noun) appearing in the *Oxford English Dictionary* is noted:

> "**33.** ***under foot:*** (sometimes written as one word.) **a.** beneath one's feet; often ***to trample or tread under foot (also feet)***, in lit. sense, also *fig.* to oppress, outrage, condemn. ***To bring, have under foot:*** to bring into, hold in subjection. ***To cast under foot:*** to ruin.

The expression is, however, clearly used more idiomatically. The closest formal references to similar idiomatic use appear in the following reference works; the first in the *Oxford Dictionary of English Idioms* and the second in *Webster's New World American Idioms Handbook*:

> **have (*or* get) a foot in the door** have (*or* gain) a first introduction to a profession or organization.
>
> **get one's foot in the door**
>
> to succeed in the first small step toward a larger opportunity or success; often used in a business context. Alludes to a door-to-door salesman putting his foot in the doorway to prevent the door from being closed before he or she can make a sales pitch. ♦ *He's tried three times to meet with the director, but hasn't* gotten his foot in the door *yet.* ♦ *The only way to* get your foot in the door *with that company is to know someone who works there.*

Clearly idiomatic expressions must, when used, derive particular meaning from the context of their usage. Nevertheless these "definitions" emphasise a common thread, namely that the use of these and similar expressions do not generally connote any "right" or "entitlement".

240 *Plaintiff's Reply to the Supplementary Written Submissions of the Defendants*, paragraph 106; and see below, paragraphs 128 and following.

241 *Plaintiff's Reply to the Supplementary Written Submissions of the Defendants*, paragraph 107; referring to the email contained in Court Book, SUN.009.003.4440.

77 There was some controversy as to whether Joyce's email was in fact copied to Abedian. Abedian's evidence was that even though this email chain was not forwarded to him, he nonetheless saw it because Brown brought in a hard copy of that email for him to see and that this occurred on 16 or 17 August 2007.[242] Brown's evidence in cross-examination was that he had no recollection of sending the email to Abedian and he agreed that there is no evidence that the email had been shown to Abedian.[243]

78 Sunland said that submissions against it regarding its non-reliance on the 16 August 2007 email are undermined because the Financial Audit Report discloses that Brown provided the email to the Dubai investigator on 25 February 2009.[244] Nevertheless, the date of 25 February 2009 post-dates a variety of events, referred to in submissions against Sunland, during which Brown did not refer to the 16 August 2007 email in circumstances where that would have been expected if Sunland had relied upon it:[245]

(a) Brown's emails with Mr Mustafa of the Dubai Financial Audit Department in December 2008;[246]

(b) Brown's interview with the Dubai authorities on 21 January 2009;[247]

(c) Brown's signed "clear statement" of events prepared on 22 January 2009;[248]

(d) Brown's Brief to the Dubai Prosecutor document dated 15 February 2009;[249]

(e) Brown's interview with the Dubai authorities on 16 February 2009;[250]

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242 Transcript, p 388.11 - .12; .25 - .26; and .34 - .35.

243 Transcript, p 260.09 - .13.

244 See *Plaintiffs' Address* (1 February 2012), paragraphs 110 to 112, 213 and 318(a), and *Closing Submissions of Fourth Defendant* (27 January 2012), paragraphs 369 to 380.

245 See *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 123.

246 Court Books, SUN.003.005.0015, SUN.003.005.0006, SUN.003.005.0019.

247 Court Book, SUN.014.001.0045. As to the status of this document, the authenticity of which is challenged by Sunland, see above footnote 189.

248 Court Book, SUN.004.002.0036.

249 Court Book, SUN.004.002.0075.

250 Court Books, SUN.014.001.0005, SUN.014.001.0032. As to the status of this document, the authenticity of which is challenged by Sunland, see above footnote 189.

(f) Brown's typed "Plot D17, Diary Notes".[251]

Additionally, Brown's evidence was that he could not recall whether he had any specific recollection of the 16 August 2007 email when he began dealing with the Dubai authorities in December 2008.[252] Additionally, Abedian admitted that no reference to this email was made in the course of preparing Brown's report to the Sunland Board, dated 1 February 2009, nor could he explain why, if it was so important to Sunland, it was not mentioned.[253]

79 In spite of Brown's evidence, Abedian maintained his claim that a hard copy of the Joyce email was handed to him by Brown.[254] According to Abedian, this email was of such importance to him that he kept it in his office drawer.[255] Indeed, his evidence was that it was so important that from time to time he "showed [it] to some people that it was important to me".[256] In spite of its claimed importance, Abedian's evidence was that he no longer has a copy of this email, having disposed of it[257] in an office move around December 2006, September to December 2006, at the end of 2006.[258] This, of course, could not have occurred, as the email was not in existence at this time, being an email in August 2007. As submitted against Sunland, I must conclude that Abedian's evidence of keeping this email was a complete fabrication, as is clear from the following part of his evidence in cross-examination:[259]

> "If you were showing this email to people like Mrs Joyce and Mr Bin Haider in early 2009, how could you have disposed of the email as part of an office move in December 2006? The email didn't even exist in 2006?---No, the move, we made it in the end of 2007, 2007.
>
> I see, before Christmas?---I think so. I could not give you exact date about the move of the office.

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251 Court Book, SUN.004.001.0053. It is unclear when Brown prepared them, however the content suggests it was after 16 February 2009, as they are consistent with the new version of events he began telling the Dubai authorities from that point.

252 Transcript, p 275.22 - .24.

253 Transcript, p 402.40 to 403.40.

254 Transcript, p 388.28 - .29.

255 Transcript, p 389.01 - .05.

256 Transcript, p 389.13 - .14.

257 Transcript, p 389.14 - .15.

258 Transcript, p 391.45 - .46.

259 Transcript, p 392.03 - .33.

> Well, if it was before Christmas, then you didn't have that email at the time Mr Joyce was arrested, did you?---No, I had because I can vividly remember that David gave me the email, that is why I am telling you, when he was arrested. Shortly after, I showed it to Angela.
>
> Your evidence is you disposed of the email, the hard copy you kept in your drawer, at the time of the office move; correct?---That's correct.
>
> Your office move was at the end of 2007?---I don't know exactly the time. I can find out and let you know.
>
> It was well prior to the arrest of Mr Joyce?---It was, correct.
>
> Yes, so when you have your meeting with Mrs Joyce, you don't have that original email, do you?---With Mrs Joyce?
>
> Yes?---No, I had in my hand, I showed it to her.
>
> How could you have the original email that you kept in your drawer if you disposed of it at the end of 2007 as part of an office move?---Maybe it wasn't disposed, maybe I kept it, maybe I asked David to give me another copy. It was always there for me to access it. I didn't need to keep anything. I could have had a hundred copies of that."

On the basis of the evidence of Brown and Abedian it is clear, in my view, that Abedian never saw a copy of the Joyce email of 16 August 2007.[260]

80 Even assuming that Abedian did see a copy of this Joyce email at any relevant time, his evidence in relation to his understanding of it is similarly unbelievable. He said that he understood from reading the email that Reed had control over Plot D17 and that like any other transaction in Dubai to purchase off-plan land, if a property is in control of a person you need to come to an arrangement to pay this person a premium before you can enter into an agreement with the government entity to purchase the land.[261] A plain reading of the email does not support Abedian's contention in his evidence that this document is to be read as expressing such a condition. As a matter of plain English, the email message is simply that Reed and Brown, as representatives of a potential joint venture, must sort out between themselves who will negotiate with the vendor of Plot D17 before DWF will start dealing in respect of the site. Sunland's evidence at trial in relation to this email

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260 And see below, paragraphs 269 to 270.

261 Witness statement of Soheil Abedian (6 August 2010), paragraph 50.

contorts its clear language and plain meaning and is inconsistent with the contemporaneous transactional evidence and also inconsistent with Sunland's interpretation of the document in communication with the Dubai prosecutors.[262] In view of all these factors and considerations, one would have to conclude that the evidence of Abedian in this respect is that of a person concerned only to advance his interests, and those of Sunland, as he perceived them to be.

81 Sunland pleads that Brown and Reed met at Brown's office on 19 August 2007 and that Reed said to Brown words to the effect that:

(a) "the price in the area in which Plot D17 is located is as high as AED 175 per sq ft"[263];

(b) "I can obtain a price of AED 135 per sq ft from Dubai Waterfront";[264]

(c) "I want compensation of AED 40 per sq ft as part of the terms of a joint venture";[265] and

(d) "it would be more tax effective for the compensation to be paid as a fee to Prudentia for consultancy services".[266]

82 Sunland also pleads, further, that:

(a) "Reed told Brown the payment terms on which Reed was acquiring D17";[267]

(b) "the payment terms that Reed told Brown were exactly the same as those that Joyce told Brown on 15 August 2007";[268] and

(c) "Reed showed Brown exactly the same draft plan for the re-configuration of the land containing Plot D17 that Austin had shown Brown in their meeting on 15 August 2007".[269]

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262 Court Book, SUN.004.002.0036.
263 Second Further Amended Statement of Claim, paragraph 15.1.
264 Second Further Amended Statement of Claim, paragraph 15.2.
265 Second Further Amended Statement of Claim, paragraph 15.3.
266 Second Further Amended Statement of Claim, paragraph 15.4.
267 Second Further Amended Statement of Claim, paragraph 16.1.
268 Second Further Amended Statement of Claim, paragraph 16.2.
269 Second Further Amended Statement of Claim, paragraph 16.3.

83 Brown's evidence was that he sent several emails to Reed on 17 August 2007 "regarding the arrangements for our meeting on 19 August 2007",[270] including one email advising that he would have an offer ready when Reed arrived on Sunday.[271] Brown said in his witness statement that he was told by Abedian before the 19 August 2007 meeting that Omniyat [Properties] was negotiating to purchase a plot, which was likely to be Plot D17[272] and that he and Abedian concluded that Reed must have contacted Omniyat.[273] Abedian's evidence was that, after he learned that Reed or Prudentia were interested in Plot D17, he spoke to Mr Ahmed Afiffi, who owned a real estate agency in Dubai and then learned that Plot D17 had already been offered to another developer named Omniyat Properties ("Omniyat") – which was well known in Dubai – and concluded that Reed's objective was to find a locally based developer who could participate in a joint venture over Plot D17 or, alternatively, to on-sell the plot for a profit.[274] Brown also says in his evidence that he had discussions with Abedian based on the feasibilities which Brown had prepared and the early design concept and that Abedian wanted to ensure that Sunland would control the design, project management, construction and marketing and receive a fee for those services.[275]

84 Abedian did not attend the meeting with Reed.[276] Nevertheless, Abedian's evidence was that he was informed by Brown of the discussions Brown had with Reed following the meeting [277].

85 According to Brown's evidence, Reed told him at the meeting that he had been to see Nakheel prior to their meeting.[278] Brown said in oral evidence that he did not ask

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270 Witness statement of David Scott Brown (6 August 2010), paragraph 102.
271 Court Book, SUN.001.006.0001.
272 Witness statement of David Scott Brown (6 August 2010), paragraph 103; see also reply witness statement of David Scott Brown (27 June 2011), paragraph 31.
273 Witness statement of David Scott Brown (6 August 2010), paragraph 103.
274 Witness statement of Soheil Abedian (6 August 2010), paragraph 46.
275 Witness statement of David Scott Brown (6 August 2010), paragraph 104.
276 Witness statement of David Scott Brown (6 August 2010), paragraph 106; see also Court Book SUN.002.007.0001 at .0101.
277 Witness statement of Soheil Abedian (6 August 2010), paragraph 52.
278 Witness statement of David Scott Brown (6 August 2010), paragraph 106 - 107.

Reed for "a document or piece of paper to indicate his hold on the land".[279] This was, he said, due to his "knowing that the land was being created".[280] Brown could not recall for certain, but believed that he would have told Reed that Sunland had purchased Plot D5B nearby because it would have made sense to tell Reed of this.[281] Telling Reed about Plot D5B would have enabled Brown to explain to Reed the advantages for building on Plot D17 if the buildings on Plot D17 and Plot D5B (which was a beachfront lot) could be designed together and sold with a common or staged marketing plan.[282] Brown's evidence was that Reed "came across as a serious JV partner, looking for a premium on the land. This was not unlike Sunland, which would normally charge a JV partner a fee for Sunland securing a site and producing a concept design which optimised the site yield".[283] Brown admitted during cross-examination that Sunland was "keen to be involved, yes, as a joint venture partner" [for D17].[284] Brown also said that Reed confirmed at the meeting that "his American partners were Och-Ziff" and that he also mentioned Zoltan being "his contact in Hong Kong".[285]

86 In his initial witness statement, Brown said that Reed showed him the same plan for Plot D17 as Austin had shown to Brown.[286] Brown's evidence was that Reed informed him:

(a) the land price in this area of Waterfront would be as high as AED 175 per sq ft but he could obtain a price of AED 135 per sq ft from DWF. Based on this saving, he wanted a fee of AED 40 per sq ft x the total BUA on the site (which was AED 1,607,052), which was approximately AED 65M;[287]

(b) Reed said that the fee could be paid either by Sunland paying to have equity

279 Transcript, p 33.01 - .03.
280 Transcript, p 33.03.
281 Reply witness statement of David Scott Brown (27 June 2011), paragraph 28.
282 Reply witness statement of David Scott Brown (27 June 2011), paragraph 28.
283 Witness statement of David Scott Brown (6 August 2010), paragraph 119.
284 Transcript, p 86.01 - .02.
285 Witness statement of David Scott Brown (6 August 2010), paragraph 108.
286 Witness statement of David Scott Brown (6 August 2010), paragraph 118.
287 Witness statement of David Scott Brown (6 August 2010), paragraph 109.

in the deal, or Sunland alternatively could contribute to the soft costs and land payments to the joint venture up to this value;[288] and

(c) that Prudentia's fee would be AED 65 million which was a figure calculated by taking the difference between a price per square foot of AED 175 (the price the land would be put into the joint venture) and AED 135 (the price it would cost from DWF) (ie AED 40 multiplied by the BUA of 1,607,052 ft² = AED 64.3 million).[289]

87 In cross examination, Brown admitted that "[t]he intent from our side" was that "any premium coming out of a joint venture arrangement [would come] out at the tail end",[290] the premium which would go to Prudentia, if Sunland had entered a joint venture agreement, was to come out at the end.[291] The payment of a premium into the joint venture was in fact agreed "upfront" between Reed and Brown, as was the formula for calculating the premium:[292]

> "The very first thing that you agreed on with Mr Reed on 19 August was for a premium in the joint venture agreement?---Is that a statement?
>
> Sorry?---Is that a statement?
>
> Yes, I'm putting that to you: the very first thing you agreed upon at the meeting with Reed on 19 August was the payment of a premium?---We discussed a premium, certainly. He talked about having a premium of 40 dirhams a foot."

88 Brown's evidence was also that he told Reed at this first meeting that he would provide Reed with a copy of the Sunland feasibility study which would have the basic data such as land price, BUA, net saleable area and the like.[293] In cross-examination, Brown admitted that Sunland had commenced working on feasibility prior to meeting with Reed and that as of 19 August 2007, Sunland was motivated

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288 Witness statement of David Scott Brown (6 August 2010), paragraph 110.
289 Reply witness statement of David Scott Brown (27 June 2011), paragraph 27.
290 Transcript, p 53.18 - .23.
291 Transcript, p 54.10 - .12.
292 Transcript, p 54.22 - .29.
293 Reply witness statement of David Scott Brown (27 June 2011), paragraph 29.

towards the potential of a joint venture arrangement with Prudentia.[294] Brown's evidence was that by the time he first met Reed , he was up to the fifth revision of the feasibility, which was showing a project profit of 26%.[295]

89 Brown's evidence was that Och-Ziff was mentioned at the first meeting between Brown and Reed on 19 August 2007[296] and also by Joyce in discussions with Brown.[297] In February 2009, when Brown prepared reports for Mr Ron Eames, a director of Sunland Group Limited and Chairman of the Audit Committee, and partner of law firm DLA Phillips Fox ("Eames"),[298] about the investigation by the Dubai authorities,[299] he reported that:

> "Reed told us that he had connections in Hong Kong and the USA, and the US group 'Och-Ziff', a strong Investment Group, had high level connections with Nakheel, enabling them to 'reserve' this site."

I also asked Brown for clarification of his statement:[300]

> "Indeed, the paragraph numbered 2 at the foot of 0065 refers to this introduction and consultancy fee. No suggestion of any legal entitlement by Prudentia to purchase the land, is there?---It talks about enabling them to reserve the site.
>
> HIS HONOUR: Sorry, where does it say that?---The second paragraph, are we still on 0065?
>
> But grammatically 'them to reserve' is a reference back to Och-Ziff, isn't it? Are you saying that paragraph is not to be read grammatically?---In my mind, the 'them' is Reed and Och-Ziff.
>
> It doesn't say that?---It doesn't say it exactly - - -
>
> But that's what you say it should have said?---Should have said."

Despite prevarication and denials, Brown speculated that Och-Ziff, through a high level arrangement with Nakheel, may hold the development rights to D17:[301]

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294 Transcript, p 52.38 - .46 and p 53.1 - .04.
295 Reply witness statement of David Scott Brown (27 June 2011), paragraph 21.
296 Witness statement of David Scott Brown (6 August 2010), paragraph 108.
297 Witness statement of David Scott Brown (6 August 2010), paragraph 82.
298 Transcript, p 231.03 - .05; see SUN.004.002.0063 - .066.
299 Court Book, SUN.004.002.0063.
300 Transcript, p 233.44 - .46 and p 234.01 - .10.
301 Transcript, p 114.11 - .22.

"HIS HONOUR: Mr Brown, just going back to your detailed summary, I'm a little unclear as to whether you're saying Och-Ziff was in a position to reserve the site or Reed was in a position to reserve the site?---I think Reed was the person on the ground in Dubai, by his visits. Och-Ziff were offshore in America, but they obviously had a partnership because Reed and Joyce both referred to them in association with Prudentia.

That doesn't clarify what I asked. Who are you saying was in a position to reserve the site?---Prudentia, through Reed.

Not Och-Ziff?---They were a partnership. That's how it was presented to me from Joyce and from Reed."

90 Brown admitted that his report in relation to the Plot D17 transaction in the investigation by the Dubai authorities which was prepared for the Board of Sunland Group Ltd in February 2009 did not say anywhere in it that Prudentia had a legal entitlement to Plot D17.[302] The report prepared for the Board was not the only formal document that referred to Och-Ziff as having rights over Plot D17. Earlier in December 2008, in communications with the Dubai authorities, Brown told Mr Mustafa in an email[303] that:

"Angus mentioned that his company (Prudentia) had a connection with a company called 'Oxiff', and that Oxiff was based in the USA. We understood that this company may have had a high level arrangement with Nakheel for the development rights on the plot."

In cross-examination, Brown was questioned in relation to this statement:[304]

"In the last sentence where you say, 'this company', you're referring to Och-Ziff, aren't you?---Yes.

So your recollection in this first communication to Mr Mustafa is that if any entity had some kind of an arrangement relating to D17, it was Och-Ziff?---No, that's not right. Austin told us Reed had a hold on the plot and Joyce told us Reed was the contact and mentioned Prudentia and their partners, Och-Ziff.

Yes. But you thought at the relevant time that Mr Reed was representing Och-Ziff, didn't you?---I knew that he had a partner called Och-Ziff and that they'd done projects together.

You knew that he was representing Och-Ziff, that's what you understood from Mr Reed?---Yes, representing Och-Ziff and Prudentia.

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302 Transcript, p 233.41 - .42.

303 Court Book, SUN.003.005.0016.

304 Transcript, p 210.41 - .47 and p 211.1 - .10.

> When you told Mr Mustafa, 'We understood that this company may have had a high-level arrangement with Nakheel for the development rights on the plot,' you were referring to Och-Ziff, not Prudentia?---Yes."

In relation to the possible involvement of Och-Ziff, it must be observed that if Sunland were relying on any representation with respect to the involvement of Och-Ziff in the Plot D17 transaction it did not establish that there was any misleading or deceptive conduct or that the representation was false – assuming for the moment that Sunland identified any representation in this respect or that it relied upon such a representation. Rather, the effect of Sunland's evidence with respect to Och Ziff goes more to indicating some "involvement" of that entity with Plot D17 which tends to negate Sunland's case, both as to the Representations and also reliance (assuming the Representations were established).[305]

91 A variety of communications followed the first meeting between Brown and Reed which took place in Dubai on 19 August 2007. In an email from Brown to Reed sent on 19 August 2007, the contents of which had been checked by Brown with Abedian, Brown said that "[w]e have no issue with your Premium of AED 40 /Ft2 of BUA for the land".[306] The email also set out the Sunland model for a joint venture. Brown was also very clear in his oral evidence that there was no issue from the perspective of Sunland in relation to payment of a premium. In cross-examination he said:[307]

> "I beg your pardon, 40 dirham per square foot. Correct?---In principle, we had no problem with the premium calculation.
>
> What had he suggested to you the premium would be?---He said it would be, by his calculation, 40 dirhams per square foot times 1,607,052 square feet, which was the built-up area on the land, and that equated to about 65 million.
>
> So you had no problem, on the basis of this discussion, you are saying to him, about a premium of about 60 million dirham?---Provided he accepted the other terms listed there.
>
> They are the traditional Sunland terms for a Sunland model for a joint venture?---Yes, but these sorts of discussions go through until you sign a

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305 See below, paragraph 226 and following (as to the significance of Sunland's knowledge of the Och-Ziff involvement).

306 Court Book, SUN.009.003.4429; and see PRU.001.007.0176.

307 Transcript, p 54.40 - .47 and p 55.01 - .06.

joint venture agreement. They are our terms."

Brown also sent an email to Austin "to let him know that I had met with Reed and put forward a JV proposal".[308] At this time, Sunland had not had any dealings with either Lee or Brearley in relation to Plot D17.[309] On 20 August 2007, Reed replied to Brown's email of 19 August 2007.[310] Of relevance in the present context was Reed's reply that:[311]

> "Firstly thank you for your proposal my intial [sic] comments is that a JV on these terms would hold little appeal as the money would be all be being provided by our side the basic approach I was proposing was that you valued the land as proposed below [in Brown's email] plus the 40 upliift [sic] and that this formed the equity amount for our side and that you put forward an equal amount of equity this covering the soft cost and land purchacse [sic] until the project pre sales reach an acceptable level for funding to be put in place and then if further equity is required beyond this to deliver the project then both parties contribute 50/50." [emphasis added in the *Closing Submissions of the First to Third Defendants*]

Reed sent a further email to Brown adding, amongst other things, that he was talking to another party, but that this was not his "preferred approach" and that he would defer any further discussions with the other party until after Reed and Brown had met on 21 August 2007.[312]

92 Following receipt of Reed's emails, Brown emailed Abedian with the comment that "[h]e wants us to put in 65m".[313] Both Brown and Abedian gave evidence that they had a discussion about Reed's email[314] and that it was Abedian's opinion that the terms proposed by Reed were unacceptable to Sunland. Abedian's evidence was that the terms did not fit the Sunland joint venture model.[315] Brown's evidence was that Abedian "instructed me to respond to Prudentia that we could not proceed with

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308 Witness statement of David Scott Brown (6 August 2010), paragraph 123; Court Book, SUN.001.005.0004.

309 Witness statement of David Scott Brown (6 August 2010), paragraph 128.14.

310 See Court Book, SUN.009.003.2274 (which is a chain of emails containing this email).

311 Emphasis added in the *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.14.1.

312 Court Book, SUN.009.007.6582.

313 Court Book, SUN.009.003.2274.

314 Witness statement of David Scott Brown (6 August 2010), paragraph 129; Witness statement of Soheil Abedian (6 August 2010), paragraph 56.

315 Witness statement of Soheil Abedian, paragraph 56.

the JV and to wish them luck" and that Brown respond to Reed to this effect.[316] Brown did, as instructed by Abedian, send Reed an email to tell him that "[u]nfortunately we cannot proceed on a Joint Venture based on the terms outlined in your email".[317] Brown also sent an email to Abedian noting that "[w]e will need to let Matt [Joyce] know tomorrow".[318] Reed responded to Brown's email indicating that he still wanted to meet and adding that his "clear preference having slept on it is to find an approach that can work with Sunland".[319] Brown's evidence was that after receiving this email he had a conversation with Reed and during this conversation, Reed offered to move towards the Sunland proposal and that they discussed "high level" joint venture terms.[320] Later, on 20 August 2007, at 3.13pm, Brown sent a further email to Reed referring to a call earlier in the day.[321] The email "confirmed" a "JV proposal" involving the transfer of Plot D17 to a special purpose vehicle and advised Reed that if the terms in the email were "acceptable", then Brown could meet Reed at 10.00am "and show you the Feasibility". Brown's evidence was that he sent this email after discussing the details with Abedian[322] and that at this point in the joint venture negotiations, "Soheil and I were prepared to show Reed our preliminary thoughts as to the feasibility studies but were not prepared to show him any design drawings".[323]. Brown's evidence was that the reason for this view was that "I knew he was talking to other parties and I was concerned that he may show those drawings to them".[324]

93 Brown met Reed in Sunland's Dubai office later in the day on 20 August 2007. At that meeting, Reed said that he would like to conclude this JV agreement by late September 2007. Brown said that he recalled Reed saying to him that he was

316 Witness statement of David Scott Brown (6 August 2010), paragraph 130; Court Book, SUN.009.003.4440.
317 Court Book, PRU.001.005.0567.
318 Court Book, SUN.009.007.6582.
319 Witness statement of David Scott Brown (6 August 2010), paragraph 132; Court Book, SUN.001.006.0010.
320 Witness statement of David Scott Brown (6 August 2010), paragraph 133.
321 Court Book, SUN.001.001.0005; Court Book, PRU.001.007.0590.
322 Witness statement of David Scott Brown (6 August 2010), paragraph 134.
323 Witness statement of David Scott Brown (6 August 2010), paragraph 135.
324 Witness statement of David Scott Brown (6 August 2010), paragraph 135.

heading back to Australia in a couple of days and wanted to agree the basic terms.[325] Brown's evidence was that he agreed with Reed that the program for the proposed joint venture for the three to five weeks following 20 August 2007 would be as follows:[326]

> "137.1 The parties would agree to joint venture headlines and prepare a MOU;
>
> 137.2 There would be a due diligence period including planning and design discussions with Dubai Waterfront;
>
> 137.3 Subject to finalising the MOU, Sunland would become the negotiating party with Nakheel;
>
> 137.4 If Prudentia and Sunland could not agree to a joint venture agreement then Sunland could step into Prudentia's shoes and buy the site at the pre-agreed rate of AED 135/sqft;
>
> 137.5 The target date for signing a joint venture agreement would be 30 September 2007;
>
> 137.6 Achieve site handover between 31 January 2008 and 31 March 2008;
>
> 137.7 Commence construction work within 12 months of site handover."

The evidence that "Subject to finalising an agreement, Sunland would become the negotiating party with Nakheel"[327] is consistent with the arrangement referred to by Joyce on 16 August 2007 as being one by which Sunland would be authorised to speak to DWF on behalf of the joint venture.

94 Brown confirmed in cross-examination that he had a feasibility "on the table and we discussed it and [Reed] wrote down the notes".[328] Brown also gave evidence that "[a]part from the one on 19 August, no other feasibility study done by Sunland over the period that [they] were trying to set up a joint venture was given to Prudentia or Reed.[329]

95 Brown also said that at this second meeting on 20 August 2007 with Reed, it was

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325 Witness statement of David Scott Brown (6 August 2010), paragraph 136.
326 Witness statement of David Scott Brown (6 August 2010), paragraph 137.
327 Court Book, SUN.004.001.0053, at .0054.
328 Transcript, p 53.47 and p 54.01.
329 Transcript, p 54.6 - .08.

agreed that Brown would negotiate with Austin on technical planning and design matters relating to Plot D17 and that Clyde-Smith (then General Counsel of the Dubai branch of Sunland) would negotiate the final terms of the SPA with Brearley (then the Senior Legal Counsel for DWF). Brown said that Sunland was to have no role in relation to the actual purchase and the price (including the amount and timing of instalments) as Brown understood that Reed and Prudentia controlled the land, that the price was AED 135 per square foot and that the instalment schedule had already been agreed.[330] This evidence is inconsistent with his earlier evidence that Sunland would conduct negotiations with Nakheel and is also inconsistent with his dealings with Brearley and Lee on 12 September where a price of AED 120 per square foot was discussed with respect to Plot D17. Brown also gave evidence that he sent an email to Mr Sahba Abedian (Managing Director of Sunland Group) after this meeting with Reed saying "Angus has his foot on the site behind our Waterfront Plot, and we are negotiating a potential JV with him"[331] and prepared further feasibilities.[332]

Late August and early September 2007

96 Sunland pleads an email from Reed to Brown on 23 August 2007 attaching a draft document prepared by Freehills on behalf of Prudentia and entitled "Implementation Agreement" (or "MOU").[333] In this email, Reed said that he thought "it reflects our understanding". Brown said in his witness statement:[334]

> "In paragraph 1 of the 'Background' the draft agreement [referring to the Implementation Agreement] stated '*Prudentia has reached agreement with the Seller to acquire and develop the Property*'. I understood this to mean that Prudentia had a right to acquire and develop Plot D17, which further reinforced Joyce, Austin and Reed's comments that Prudentia controlled the plot".

It was, however, a further term of this first draft of the Implementation Agreement,

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330 Reply witness statement of David Scott Brown (27 June 2011), paragraph 35.

331 Witness statement of David Scott Brown (6 August 2010), paragraph 139; Court Book, SUN.009.003.4477.

332 Witness statement of David Scott Brown (6 August 2010), paragraph 140.

333 Second Further Amended Statement of Claim, paragraph 17; Court Book, SUN.001.006.0037; and see Witness statement of David Scott Brown (6 August 2010), paragraph 145.

334 Witness statement of David Scott Brown (6 August 2010), paragraph 145.

or MOU, that Sunland would hold, exclusively, the right to negotiate the terms of a SPA.

97 This draft Implementation Agreement or MOU was sent to Clyde-Smith, who marked up proposed changes and discussed it with Abedian.[335] Brown sent the marked up draft Implementation Agreement or MOU back to Reed on 30 August 2007 with a covering email which stated, relevantly, that:[336]

> "[t]he revisions reflect the terms of our email to you of 19 August, and are based on the Standard Sunland JV model which has been successful for Joint Venture partners in the past. If we can reach agreement on this basis, we can move forward and commence discussions with DWF, and add value to this Project."

In cross-examination, Brown agreed that this draft contained changes that were made to the agreement by Sunland through himself, Abedian and Clyde-Smith, which included the deletion of Sunland as a covenantor.[337] Nevertheless, the payment of a premium or consultancy fee was not an issue, as was confirmed by Brown in his evidence:[338]

> "At all times, I suggest, from the outset of your initial email to Mr Reed, through all the implementation agreements, the payment of 64 million dirham was never crossed out, never an issue?---It was one of many terms we had to agree to, and it was dependent on the other terms of the agreement as to whether it would be okay."

Brown said that the one of the references to a "consulting fee" in the MOU was inserted by Sunland, saying that Reed suggested it would be a consulting fee and it did not really matter to Sunland.[339]

98 In spite of the provision of paragraph 1 of the recitals, or background, to the draft Implementation Agreement or MOU, Brown did confirm in his evidence[340] that the

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335 Transcript, p 148.24; SUN.001.001.0033; and witness statement of Soheil Abedian (6 August 2010), paragraph 62.
336 Court Book, SUN.001.001.0115 and attachment (SUN.001.001.0116).
337 Transcript, p 150.9 - .14.
338 Transcript, p 149.8 - .11.
339 Transcript, p 150.27 - .35.
340 Transcript, p 148.36 - .43.

draft provided for Sunland to negotiate the SPA for Plot D17:[341]

"

2. General Principles

The Parties agree that:

(a) Prudentia will *allow* [emphasis added] Sunland to negotiate to negotiate [sic] the plot sale and purchase agreement for the acquisition of the Property;

(b) the Parties will act reasonably and in good faith in an endeavour to negotiate and agree upon the form of a joint venture agreement in respect to the development f the Property;

(c) in the event that the parties are unable to negotiate and agree on the form of a joint venture agreement in respect to the development of the Property and if Sunland or a Related Party of Sunland enters into a plot sale and purchase agreement, contract of sale or other form of agreement for the acquisition of an interest in the Property, then Sunland has agreed to pay Prudentia a consulting fee being the sum of AED 64,282,080.

~~(d) the Covenator has agreed to guarantee to Prudentia the payment of the consulting fee by Sunland,~~

~~Subject to, and in accordance with, the terms and conditions set out in this agreement.~~"

The draft contains marked up amendments to clause 3, clause 3(a) clearly indicating that Sunland will negotiate the SPA:[342]

"Prudentia agrees to introduce Sunland to the Master Developer ~~Seller~~ and *allow* [emphasis added] Sunland to negotiate the plot sale and purchase agreement for the acquisition of the Property."

Clause 3(b) of the draft Implementation Agreement or MOU provided that:

"Prudentia is entitled to receive full details of all relevant information obtained by Sunland in the course of its negotiations with the Master Developer. ~~Seller~~"

Clause 7 of the draft Implementation Agreement or MOU provided that:

"(a) In consideration of Prudentia *permitting* [emphasis added] Sunland to negotiate with the Seller for the plot sale and purchase agreement for the acquisition of the Property, Sunland agrees that if Sunland or a Related Party

341 SUN 001.001.0116.

342 SUN 001.001.0116. The emphasis is contained in para 132-134 of *Plaintiffs' Address* (1 February 2012), paragraph 41.

of Sunland enters into a plot sale and purchase agreement, ~~contract of sale~~ or other form of agreement for the acquisition of an interest in the Property with the Seller (Plot Sale and Purchase ~~Acquisition~~ Agreement) and the Parties have not entered into the Formal Agreement, Sunland must, at the election of Prudentia:

(1) pay to Prudentia the sum of AED 64,282,080; or

(2) provide Prudentia with a credit note in the sum of AED 64,282,080,

on the date that Sunland enters into the Plot Sale and Purchase ~~Acquisition~~ Agreement as a consultancy fee for services provided by Prudentia to Sunland in introducing Sunland to the ~~Seller~~ Master Developer and assisting in negotiations between the ~~Seller~~ Master Developer and Sunland. If Sunland or a related Party of Sunland does not enter into a P~~p~~lot S~~s~~ale and P~~p~~urchase A~~a~~greement, then Sunland has no payment obligation whatsoever to Prudentia"

Schedule 5 of the draft described the payment to Prudentia as a "premium".

99 Sunland submitted that paragraph 1 of the recitals (the "background") to the draft Implementation Agreement or MOU constituted an unambiguous representation that Prudentia had reached a clear agreement with the seller of Plot D17 and that it was an agreement to acquire and develop the property.[343] It was also submitted that those parts of the draft which are set out above and marked in italics, together with the description of "premium" in Schedule 5 of the draft, in effect, reinforced or exacerbated the representation.[344] For the reasons discussed further below, I reject this submission because, first, the provisions of the draft must be read in the context of the whole document and, secondly, in the context of the then circumstances.[345] Briefly, as to the first, other provisions of the draft make it clear, in my view, that the agreement is merely the transfer of something in the nature of an opportunity to negotiate with DWF in Prudentia's shoes (with the ultimate agreement in this form as executed with Hanley absent the assignment of any right from Prudentia confirming this[346]) and secondly, subsequent events, communications and Sunland's understanding of the nature of the position of the Prudentia parties with respect to

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343 See *Plaintiffs' Address* (1 February 2012), paragraph 130.

344 As to the meaning of the word "premium" in the context of the D17 transaction; see below, paragraphs 205 - 211.

345 See below, paragraphs 291- 292.

346 See below, paragraphs 291- 292.

Plot D17 support the position that there was no misrepresentation inherent in this draft or, to the extent there may have been, there was no reliance on Sunland's part.[347]

100 The discussion of the significance of the provisions of the draft Implementation Agreement or MOU must be considered having regard to the time during the sequence of negotiations between the parties at which the particular draft provisions appeared. Sunland's reliance upon paragraph 1 of the recitals does not take account of this and, in effect, conflates the draft 23 August 2007 agreement with an executed agreement on 19 September 2007 ("the Prudentia Agreement") and the re-executed agreement of 26 September 2007 ("the Hanley Agreement") as if the factual background for each was the same. The facts and background to the Prudentia agreement and the substituted Hanley agreement were an effective rejection of the main object of Prudentia and, presumably, Sunland as at 20 August 2007, which was, as Brown recorded in his notebook,[348] that over the next three to five weeks, Sunland would work to agree a joint venture with Prudentia. This position was confirmed by Reed's entry in his notebook concerning this meeting[349] that they "will both work in good faith to facilitate entering into a JV ...". The submissions of Reed and the Prudentia parties demonstrated that Brown knew that any agreement as had been reached between Prudentia or Reed and the master developer was limited.[350] Brown was in fact entrusted to act on behalf of Prudentia and Sunland to negotiate the final terms of the SPA with DWF and also technical and planning issues. The agreement reached on 20 August 2007 between Brown and Reed permitted Brown to exercise negotiating rights with DWF to secure the development opportunity for the proposed joint venture.

101 The effect of clauses 2 and 3 of the draft Implementation Agreement or MOU was to oblige Prudentia to "introduce" Sunland to DWF so that Sunland would be in a

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347 See below, paragraphs 240 to 246.
348 Court Book, SUN.004.001.0043 at .46.
349 Court Book, PRU.004.001.0011 at .13
350 See *Closing Submissions First to Third Defendants* (31 January 2012), paragraphs 4.21.6 to 4.21.7.

position to negotiate the acquisition of Plot D17 on behalf of the joint venture. These draft clauses are consistent with the arrangement referred to by Joyce as being an arrangement whereby Sunland would be authorised to speak to DWF about Plot D17 on behalf of the joint venture. Equally, these clauses demonstrate that all parties understood that Prudentia had not acquired Plot D17. The right to negotiate to which Clause 2 refers was not a "right" brought into existence by an enforceable agreement between Prudentia and DWF. The draft implementation agreements, the MOU agreements, brought into existence the agreed disposition of responsibilities as between the proposed joint venturers whereby Sunland was to negotiate on behalf of the joint venturers. Contrary to Sunland's submissions, there was no transfer of a "right" in the terms now contended for by Sunland when it was agreed that Sunland would exercise a "right" of negotiation on behalf of the joint venturers. The source of Sunland's ability to negotiate was the agreement in principle of 20 August 2007 supported by protection of an exclusive dealing clause.

102 In relation to sub-clause, clause 3(a), Brown's evidence was that:[351]

> "And that was consistent with your assertion at the beginning that Sunland would have control of the negotiations?---As I said yesterday, on the legal terms, the technical and design issues, not the price."

It was submitted on behalf of Reed and the Prudentia parties that there was good reason why Brown, at trial, would allege that Sunland did not negotiate a SPA as it concerned the price of Plot D17.[352] Brown would have recognised, it was submitted, that there was a breach of good faith obligations in his neglecting to inform Reed of his discussions with Brearley or Lee where he was informed Plot D17 could be obtained by Sunland at AED 120 per square foot BUA. The following part of the transcript is relevant in this respect:[353]

> "Tell me, Mr Brown, you gave evidence yesterday - remember you were asked a question why didn't you tell Reed of the 120 dirham per square foot discussion on 12 September between Lee and Brearley. That evidence, just so it's entirely correct, is at page 66 of the transcript. You were asked this

351 Transcript, p 150.42 - .44..
352 *Closing Submissions of the First to Third Defendants*, paragraph 4.16.11.
353 Transcript, p 100.15 - .40.

question at line 5, and this was your answer, "Why didn't you tell Reed in that email that, 'I've spoken with Marcus and Anthony, they tell us we can get it at 120, we should put our foot on it.' Why didn't you say that?" You said, "I think Lee had really wanted Och-Ziff to step aside," and my question was, "Why didn't you say it in the email?" Your answer, "Because he was in charge of the negotiations with Nakheel, not me." Do you stand by that answer?---That Reed was in charge?

'That he was in charge of the negotiations with Nakheel and not me'?---In the price of the land, yes, he was.

Is that truly reflective of the negotiations towards a SPA agreement?---No, that's different because the negotiations in a SPA have three components, price - - -

Is there anything else you want to add?--- - - - price, legal terminology and technical issues.

From the very outset, Sunland and you, Brown, were to be in charge of the negotiations concerning D17?---Only in terms of legal terminology, technical and design issues.

You, I suggest, insisted on being in charge of the entirety of the negotiations?---No, that's not correct."

103 Brown also said in his evidence that the draft Implementation Agreement or MOU contained an exclusivity clause in clause 9 (but that provision would only apply if and when the parties signed the Implementation Agreement or MOU), and that the exclusivity provision was consistent with clause 2 of the Implementation Agreement or MOU.[354] In the course of cross-examination as to his understanding of the good faith obligations referred to in the Implementation Agreement, the MOU, Brown said:[355]

"If you look over the page at 0123, 4(a), 'The parties must act, and must procure that their lawyers act, reasonably and in good faith in an endeavour to negotiate and agree upon the form of a joint venture or other form of agreement.' You read that, no doubt?---Yes.

So you had an understanding, from your experience and what we've discussed, of what acting in good faith meant?---Yes.

Then under Provision of Information at 5(a), some changes made by Sunland, 'Within 10 business days of the execution date of this agreement, Sunland must at its cost provide Prudentia with the following information concerning development, a description of Sunland's design concept for the

354 Reply witness statement of David Scott Brown (27 June 2011), paragraph 6.

355 Transcript, p 150.46 - .47 and p 151.1 - .32.

development of the property, with the design drawings made available if the joint venture agreement is signed by both parties'?---Yes.

'A budget of soft costs to enable the parties to launch the development and a full feasibility for the development of the property,' combined with the detailed cash flow, all that to be provided?---Within 10 days of execution, yes.

Then at 0126, there is a term in relation to exclusivity, 'The parties agree that, except as expressly contemplated in this agreement, they will not either alone or with any other entity, participate or be involved in the acquisition or development of the property,' and no doubt you read that, Mr Brown?---Yes.

That was to last, as the duration says, I think, for three years; correct?---To last three years from the execution date?

Yes?---Of a document that was never executed?

That's right?---Yes.

Are you saying because the document wasn't executed, that that in some way relieves you of your good faith obligations?---No, I'm not saying that. I'm just saying that this document in this form was never executed."

104 Clause 7(a) of the draft Implementation Agreement or MOU recognised that it was possible that Sunland might acquire Plot D17 on behalf of the joint venture; but also that Sunland and Prudentia might ultimately be unable to agree on joint venture terms. If this latter event were to happen, Prudentia would be entitled to receive the "Consultancy Fee" set out in clause 7(a) and, presumably, Sunland would retain the land. The Consultancy Fee set out in that clause was not a fee that Sunland would have to pay before commencing negotiations with DWF, but rather, as indicated by the plain words of the draft clause, it was a fee payable if joint venture terms could not be agreed and Sunland went on to purchase the land. Clearly, the joint venture was the principal object of this agreement.

105 Sunland's payment to Prudentia to "walk away" from the negotiation, to "relinquish" rights in the negotiation involves wholly different facts from those in operation when Sunland was undertaking a negotiation to secure the terms of acquisition and development of an asset in a joint venture. This new circumstance did not involve a "transfer" of rights as a matter of legal conveyance or as a matter of fact, since Sunland was then undertaking the negotiations. Nevertheless, Sunland

did require authorisation by Prudentia to negotiate acquisition and development in its exclusive self-interest capacity and to be released from any continuing obligation of exclusive dealing with Prudentia when Sunland did insist upon amendments to the 18 September 2007 draft Implementation Agreement or MOU. This is the significance of the release expressed in the underlined amendment to clause 5 of the draft, which inserted by Sunland "notwithstanding this clause...", which was adopted in the executed Prudentia agreement[356] and the executed Hanley agreement.[357]

106 The Sunland submissions with respect to paragraph 1 of the recitals, or background, to the draft Implementation Agreement or MOU or their final executed emanations in the form of the Prudentia agreement or the Hanley agreement are inconsistent with the express and unambiguous operative terms of the agreement and also inconsistent with the admissible surrounding circumstances known and understood by Brown and Abedian on 30 August 2007 when Brown returned the draft Implementation Agreement the MOU with marked up changes to Reed; when Sunland procured Prudentia's agreement to stand in the shoes of both Prudentia and Sunland to secure Plot D17 for their proposed joint venture; and in the particular circumstances leading to the offer and acceptance of a "walk away" fee which was proposed, unilaterally, by Abedian in terms which cut across entirely and unexpectedly the then agreed progress of the parties' towards a joint venture. In any event, the significance which Sunland sought to accord to paragraph 1 of the recitals is inconsistent with longstanding authority which is to the effect that if there is any ambiguity in a recital to an agreement and its operative clauses are clear and unambiguous, then the latter, the operative clauses, prevail in the construction of the agreement or instrument.[358]

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356 Court Book, SUN.001.006.0215.

357 Court Book, SUN.004.002.0274.

358 *O'Loughlin and Ors v Mount Isa and Anor* (1998) 71 SASR 206 and *Chacmol Holdings Pty Ltd v Handberg* [2005] FCAFC 40 where Tamberlin J, at [44] quoted with approval the judgment of Lander J, at 218-219 in *O'Loughlin;* North and Dowsett JJ concurring. See also *Franklands Pty Ltd v Metcash Trading Limited* [2009] NSWCA 407 at [379] – [390] per Campbell JA with whom Allsop P at [29] and see Giles

107 Sunland, on the other hand, submitted that the authorities with respect to ambiguity in a recital, such as *O'Loughlin v Mount Isa Mines*[359] and *Chacmol Holdings Pty Ltd v Handberg*,[360] are not on point. It submitted that those cases are only concerned with construing the operative provisions of a deed where there is a manifest inconsistency with recitals. Sunland submitted there is no such inconsistency here because the recital unambiguously states:

(a) Prudentia has reached agreement with the seller; and

(b) the agreement is an agreement to acquire and develop the property.

108 It was said that the recital is consistent with the representations in the operative part of the various implementation agreements: for example, "Prudentia will *allow* Sunland to negotiate to negotiate [sic] the acquisition of the Property."[361] Nevertheless, in my view, this submission merely serves to highlight the clear inconsistency between the first paragraph of the recitals and the operative parts of the deed, as discussed previously.

109 In this context, it is helpful to consider the nature of recitals in some further detail. In broad terms, in the words of Sir Kim Lewison "[t]he function of recitals is to narrate the history leading up to the making of the agreement in question or to express in general terms the intention with which the agreement was made".[362] More particularly, Lewison continues:[363]

JA at [49], [63]. *Norton on Deeds* (2nd ed by Robert F. Norton QC, Sweet and Maxwell, London 1928) states the principle very clearly (at p 197, with examples from the cases, pp 197-201):

> "If both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.
> 'If the recitals are ambiguous and the operative part is clear, the operative part must prevail': *per* Lord Esher, M.R., *Ex p. Dawes* (1886), 17 Q.B.D. 275, at p. 286.
> It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the operative part will not be controlled by a general description, or a general or ambiguous statement, contained in the recitals."

359 (1998) 71 SASR 206.

360 [2005] FCAFC 40.

361 Court Book, SUN 001.001.0116 at clause 2 (a).

362 Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 4th ed, 2007), 395, [10.10].

363 *op. cit.* 395-6, [10.10].

"In *Inland Revenue Council v Raphael,*[364] Lord Wright said:

> 'The nature of recitals as statements of fact which are in the contemplation of the parties, is illustrated by the Scotch term "narrative".'

In other cases recitals perform the function of:

> '...a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made'.[365]

Where the recitals purport to record the intention of the parties to the document (or, more frequently, the settler of a settlement), the court is wary of attributing much weight to such a statement. In *Mackenzie v Duke of Devonshire,*[366] Lord Watson said:

> 'I think that it is a very dangerous canon of construction to admit what may be a very partial statement of intention, quite consistent with other objects, to control the whole of the other language of the deed with the effect of striking out beneficiaries whom the truster may have intended to benefit. The narrative words come to no more than this: "My intention is to do" so and so, and you may add this, "and I have accomplished that purpose by the provisions which follow." In such a case the safer and only legitimate course is to look at the provisions which follow, and to read them according to their natural and just construction.'

In describing a recital as an expression of the intention of the parties to the deed, it should not be overlooked that the word intention may have different connotations in different circumstances. This was pointed out in *Inland Revenue Council v Raphael*[367] by Lord Warrington of Clyffe who said:

> 'The fact is that the narrative and operative parts of a deed perform quite different functions, and "intention" in reference to the narrative and the same word in reference to the operative parts respectively bear quite different significations. As appearing in the narrative part it means "purpose". In considering the intention of operative part the word means significance or import – "The way in which anything is to be understood" (*Oxford English Dictionary*) supported by the illustration: "The intention of the passage was sufficiently clear".'

In *Moon Ex p. Dawes, Re,*[368] Lopes LJ said:

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364 [1935] AC 96 at p 144..

365 *Mackenzie v Duke of Devonshire* [1896] AC 400 *per* Lord Halsbury LC at p 406.

366 [1896] AC 400 at p 407.

367 [1935] AC 96 at p 135.

368 (1886)LR 17 QBD 275, at p 289 followed in *T&N Ltd (In administration) v Royal & Sun Alliance Plc* [2003] 2 All ER (Comm) 939.

> 'There are several well-established rules applicable to the construction of deeds. One is this, that if the operative part of a deed is clear, and the recitals are not clear the operative part must prevail. Again, if the recitals are clear, but the operative part is ambiguous, the recitals control the operative part. If, again, the operative part and the recitals are both clear, but one is inconsistent with the other, the operative part must prevail.'"

Additionally, reference is made to the words of Lord Macnaughten in *Orr v Mitchell*[369] where His Lordship says:

> "When the words in the dispositive or operative part of a deed of conveyance are clear and unambiguous they cannot be corrected by reference to other parts of the instrument. ..."

110 Having regard to the authorities and the operative parts of the draft Implementation Agreement or MOU I am strengthened in my view that paragraph 1 of the recitals, as relied upon by Sunland, cannot be regarded as governing or affecting the operative parts of the agreement. Further, insofar as the draft agreement or the Prudentia Agreement or the Hanley Agreement as finally executed, are said by Sunland to amount to a representation of the kind alleged, or as part of the context for those allegations, I am of the view that this proposition must be rejected. Such a proposition amounts to taking the provisions of a document selectively for the purpose of ascribing to them a meaning which is not sustainable when viewed in the context of the whole document on any reasonable basis.

111 Sunland pleads that Joyce telephoned Brown on 29 August 2007 and during that telephone conversation made statements to the effect that:[370]

> "Sunland should come to an agreement with Reed as soon as possible because there were other buyers around including Russians who might offer Reed AED 220 sq/ft or more for the land."

Brown's account of this conversation continued:[371]

> "Joyce mentioned the name of a group called 'Patalli', who he said were a Russian group, and said words to the effect of *'they have been pressing Dubai*

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369 [1893] AC 238 at p 254.

370 Second Further Amended Statement of Claim, paragraph 18; Witness Statement of David Scott Brown (6 August 2010), paragraph 152.

371 Witness Statement of David Scott Brown (6 August 2010), paragraph 152.

> *Waterfront for Reed/Prudentia's names. They only need to go to the sales department and will get his name and talk to him'*. This indicated to me that the sales team were keen to have a SPA finalised and signed on this plot and if they could introduce one of the Russian buyers to Reed/Prudentia who could be Reed/Prudentia's JV partner the transaction could be concluded faster. My concern was that this could make Reed keener to work with a group like Patalli rather than Sunland as he may be able to obtain a higher premium from that group."

112 Brown gave contradictory evidence about this telephone conversation. His evidence went no further than to say that Joyce encouraged him to finalise his joint venture negotiations with Reed. Significantly, on the basis of Brown's evidence, it must be concluded that Joyce did not say during this telephone conversation that Reed had any right over Plot D17, that Reed "controlled" Plot D17 or any other statement to similar effect.[372] Brown also made a note of this telephone conversation in his notebook,[373] but these notes do not take matters any further in this respect than Brown's other evidence.

113 As is the case with each of Brown's handwritten notes in his notebook, it is not apparent on the face of the notes of the alleged conversation on 29 August 2007 whether the words that appear on the page were words spoken by Joyce or by Brown, or whether they are simply a record of thoughts that came to Brown at or about the time of the conversation. Brown did in fact concede in his evidence that his notebook also consisted of "things to do" and other matters and thoughts which he was seeking to record, rather than something in the nature of a verbatim record of conversations.[374] It was submitted on behalf of Joyce that Brown's self-serving explanations of these notebook entries ought to be treated with suspicion, given the unreliability of his evidence generally and his approach to preparing the typed "Plot D17, Diary Notes".[375] In any event, even on Brown's account of the conversation on 29 August 2007, the words said to have been spoken by Joyce do not convey a representation that Reed or Prudentia had some legal or other right to Plot D17. The

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372 Witness statement of David Scott Brown (6 August 2010), paragraphs 152, 153.
373 Court Book, SUN.002.007.01001 at .0109.
374 See above, paragraph 49.
375 See below, paragraph 308.

words attributed to Joyce are wholly consistent with Reed simply being in negotiations with DWF in respect of plot D17.[376] As was submitted on behalf of Joyce, there is no doubt, as Sunland knew from experience, that there were a huge number of property speculators, as opposed to the proven developers Joyce was most interested in getting involved in the Waterfront project,[377] doing business in Dubai who might be interested in offering DWF larger sums of money for Plot D17. According to Brown, Lee and Joyce were keen to get proven developers in to actually build on the land in Precinct D, rather than perpetuate the speculative cycle of plot "flipping".[378] Accordingly, it was submitted on behalf of Joyce that the statements attributed by Sunland to Joyce were neither misleading nor deceptive. Indeed, it was submitted, they were exactly what one might have expected from someone of Joyce's seniority. On the basis of these submissions and the evidence already considered in relation to the Plot D17 transaction, I am of the view that this is entirely correct, both in terms of Joyce's statements being neither misleading nor deceptive and also that, in the circumstances, they were the sort of statements one would have expected from a senior officer of DWF, such as Joyce. Finally, I also accept that, in any event, whatever transpired during this conversation, it was entirely superseded by the advice given to Brown in his telephone conversation with Lee and Brearley on 12 September 2007 in which they told Brown that Sunland and Prudentia had better "put their foot on" Plot D17 to secure it. For reasons indicated in more detail elsewhere,[379] I regard that conversation and the emails and other events which flowed from that as making it absolutely clear, if it was not already clear, that no representations were being made by Joyce, Reed or the Prudentia parties which were misleading or deceptive or, in terms of the tort of deceit, fraudulent.

114 I accept as apposite the comment or observation made in the submissions of the

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376 Witness statement of David Scott Brown (6 August 2010), paragraph 152.

377 Witness statement of David Scott Brown (6 August 2010), paragraph 84.

378 A term which described the ongoing process of speculation on land in Dubai; as distinct from its actual development.

379 See below, paragraph 122 and following.

Reed and the Prudentia parties:[380]

> "It is not clear what Sunland wished to make of this. There is no suggestion the contents of the email are untrue insofar as the contents relate to *Russians* or other buyers. Insofar as Brown indicated in his evidence, Joyce mentioned the Russian group were not proven developers and are likely speculators [381], it could be inferred Joyce was indicating a preference that DWF be dealing with proven developers. Significantly any *premium* with the joint venture would not be payable for years. There is no evidence by which it could be inferred this email was written by Joyce in an effort to obtain a benefit from a premium for the Joint Venture."

115 In my opinion, the Sunland evidence in relation to this 29 August 2007 conversation does not assist Sunland's case. It is equivocal in critical respects and, further, is, in my view, quite consistent with Joyce simply urging Sunland to "get on with" its joint venture arrangements in relation to Plot D17. In my view, the same applies to the internal communications between Reed and the Prudentia parties (to which Sunland was not a party) which Sunland seeks to rely upon.[382] For reasons indicated elsewhere, I do not regard such communications as relevant to Sunland's claims, it not having been privy to them at any relevant time.[383]

116 Although it would be another month until Sunland would sign the Implementation Agreement or MOU, with Hanley, sign the SPA for Plot D17 with DWF and pay the Consultancy Fee, this alleged conversation between Brown and Joyce on 29 August 2007 was the last communication by Joyce relied upon by Sunland to establish the Representations.

117 Brown sent a second email to Reed on 31 August 2007 after despatch of the marked up Implementation Agreement or MOU.[384] The email, according to Brown's evidence, re-sent his email of 19 August 2007 which set out Sunland's proposed joint venture terms. He said, "this is the style of JV we would be happy to proceed with you on". Brown's evidence was that he re-sent this email to clarify the proposed

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380 *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraph 4.17.3.

381 Witness statement of David Scott Brown (6 August 2010) , paragraph 153.

382 See *Plaintiffs' Address* (1 February 2012), paragraphs 146 to 149.

383 See below, paragraphs 445 - 446.

384 Court Book, SUN.001.006.0062; and see Witness statement of David Scott Brown (6 August 2010), paragraph 164.

terms, adding some additional points, such as the 2% finance fee, Sunland paying the deposit and the basis on which Sunland would pay the fee if it decided to buy the site in its own right. Brown added, that the "key reason was also to try and conclude the JV after we heard that other buyers may contact Reed".[385] Brown's evidence was also that he did not think he was making some sort of agreement by sending the email to Reed.[386] The email was, however, entirely consistent with the parties securing the site and developing it in a joint venture. During cross-examination, Brown was asked about the calculation of the "40 AED premium" referred to in that email and described as being payable "if the terms of the JV aren't agreed, however if we do wish to buy the site" (emphasis reflecting the discovered document in its native format). Brown agreed that the AED 40 was the difference between AED 135 and AED 175 per square foot and that to reach the calculation, which is AED 60 million, Sunland multiplied the 40 by 1.6 million BUA.[387] Brown was asked whether, if the BUA were 1.8 million, Sunland would multiply 1.8 by 40.[388] Brown's response was that "[t]he 1.8 came up after we'd reached agreement with him, so it didn't factor into the equation".[389]

118 During cross examination, Brown recalled, prompted by a copy of an email from Mr John Roysmith (Director and Secretary of Prudentia) to Reed and other directors of Prudentia on 31 August 2007,[390] although he was unsure of the exact date, that there was a telephone "hook up" between Reed, Roysmith, Clyde-Smith, Abedian and Brown "concerning the terms of the proposed joint venture".[391] Brown also recalled that one issue raised during the call was the removal of Sunland as a covenantor for the agreement and that Abedian "got upset on the phone"[392] and walked out of the meeting. Brown agreed that an email dated 4 September 2007 sent

385 Witness statement of David Scott Brown (6 August 2010), paragraph 164.
386 Reply witness statement of David Scott Brown (27 June 2011), paragraph 39.
387 Transcript, p 151.39 - .42 and 152.09 - .15.
388 Transcript, p 152.17 - .18.
389 Transcript, p 152.18 - .19.
390 Court Book, PRU.001.005.1450.
391 Transcript, p 152.30 - .31.
392 Transcript, p 152.38 - .47 and p 153.01 - .02.

by Reed after the phone hook up was "confirmation that Prudentia wanted to try and do something to continue JV discussions".[393]

119 Brown also sent an email to Mr Sahba Abedian (Managing Director of Sunland Group) after the conference call stating, amongst other things, that "we are only interested in this Site as a JV" confirming Sunland's commitment to the joint venture proposal[394] and contrary to Sunland's allegation that Joyce was acting complicitly with Reed or Prudentia to obtain payment of the consultancy fee as a precondition to Sunland's direct negotiation with DWF.

120 The 4 September 2007 email sent from Reed to Brown after the phone hook up said, amongst other things:[395]

> "Sorry to have been slow to reply to your email we have been weighing up the right next step's [sic] on the site
>
> First a clarification it was never my intent / understanding that you would be obligated to buy the land if the J/V did not proceed rather that this was a necessary option to enable you to proceed."
>
> Having spoken to our fund partners the fundamental questions I see is as follows: we would like to make a relationship work with Sunland and we would like to develop this site with you but feel that the J/V structure as put forward by you to us does not we believe lead to a formula that fully aligns the interest of the fund with Sunland. There are two alternate structures we have considered to address this issue.
>
> The main issue is you are obtaining your return of 50 % of the profit no matter how the project performs. Would you consider a set of criteria which means you get your return on a performance criteria e.g. if the project meets all kpi's then after construction debt is repaid and land money repaid you get your profit share via a formula
>
> ...
>
> Alternatively, the fund is putting forward the capital for the Project(less the 5% from Sunland on land deposit) therefore I would like to see that we can maybe come up with a formula that pays the fund a return of say 10% on the land as quasi interest charge which comes out first. We can call it a" preferred return " but this would be an important recognition of the money we are putting up.

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393 Court Book, SUN.009.003.1885; Transcript, p 158.34 - .39.

394 Court Book, SUN.009.007.5554; Witness statement of David Scott Brown (6 August 2010), paragraph 165.

395 Both emails are contained in a chain in Court Book, SUN.009.003.1885.

...

> Bottom line I understand your comments in the email below but just wonted [sic] to be very clear that I did not expect you to step up if the JV did not happen and rather that it was an option to protect SUNLAND."

Brown's evidence was that he spoke with Abedian by phone on 9 September 2007 and that Abedian was not keen to have Sunland's profit share linked to achieving numbers shown on the feasibility, but was more comfortable with paying interest on the land funding costs.[396] Abedian's evidence was that he had told Brown that Sunland should compromise and instead of giving 10% internal rate of return, Sunland would suggest the 7.5% capitalised interest.[397] Brown agreed that his email to Reed, dated 9 September 2007, demonstrated agreement to Reed's proposal for an interest charge. In the email Brown suggested a capitalised interest charge of 7.5% on Prudentia and Sunland's respective land instalment payments[398].

121 It is of some significance that on 11 September 2007, and prior to the discussion Brown had with Lee and Brearley on 12 September 2007, that Brown sent an email to Lee "informing Marcus Lee by [sic] Waterfront, Nakheel, however you want to refer to them, that the headline issues of the joint venture had been agreed".[399] On the same day, Brown received an email from Reed advising that Prudentia's Australian lawyers would prepare a revised draft Implementation Agreement or MOU.[400]

12 September 2007

122 A very significant telephone conversation occurred on 12 September 2007 between Brown and Lee and Brearley, a record of which appears in Brown's notebook.[401] In the course of that conversation, Brown learned that DWF's asking price for Plot D17 would be AED 120 per square foot and not AED 135 per square foot, as had earlier

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396 Witness statement of David Scott Brown (6 August 2010), paragraph 175; see also Witness statement of Soheil Abedian (6 August 2010), paragraph 79.

397 Witness statement of Soheil Abedian (6 August 2010), paragraph 77.

398 Transcript, p 159.03 - .08; Court Book, SUN.001.006.0077; Witness statement of David Scott Brown (6 August 2010), paragraph 176.

399 Transcript, p 159.18 - .20; and see Court Book, SUN.001.005.0009.

400 Court Book, SUN.001.006.0083

401 Transcript, p 264.14 - .16; and Court Book, SUN.002.007.0001 at .0122.

been indicated to him by Reed.[402] Brown's evidence was that Brearley and Lee told him that it would be a lot easier if Och-Ziff did not want to proceed with the site and Sunland could buy the site itself for AED 120 per square foot.[403] Brown gave further evidence in relation to this conversation in cross examination:[404]

> "You have said in your witness statement that you think one of them said, 'It would be a lot easier if Och-Ziff didn't want to proceed with the sale. We can buy at 120 per square foot'?---Yes.
>
> I want to suggest to you that that's not a correct interpretation of your handwritten note. If that had been what one of those gentlemen said, I suggest to you you would have continued the words, after 'a lot easier', you would have continued the words 'if Och-Ziff didn't want to proceed', et cetera, on the same line. Do you follow what I'm putting to you?---Yes."

And:[405]

> "They must have said something, I suggest, to the effect that, 'If Och-Ziff didn't want to proceed with the sale, Sunland could buy at 120 per square foot.' Do you accept that?---Words to that effect."

123 Brown's notes of this conversation, as they appear in his notebook, are to this effect; though clarifying that the AED 120 per square foot is per square foot of BUA. The only entry in Brown's notebook which appears to go to this reduced price for Plot D17 is an entry dated 12 September 2007 "120ft²/ BUA".[406] This entry is under the heading, or subheading to the 12 September 2007 material, "ANTHONY/MARCUS:" In any event, Brown identified this entry as "a price"[407] and continued:[408]

> "A price?---Yes.
>
> For what?---For the land.
>
> For the land? What land?---D17.
>
> D17. So what had previously been known to you as 135, Brearley and Lee indicate to you is 120?---It may be 120.

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402 Transcript, p 67.24; p 265.47 and p 266.01.
403 Witness statement of David Scott Brown (6 August 2010), paragraph 181.
404 Transcript, p 264.18 - .26.
405 Transcript, p 264.41 - .43.
406 Court Book, SUN.002.007.0323.
407 Transcript, p 60.17.
408 Transcript, p 60.19 - .28.

It may be 120?---(witness nods)."

Brown was then asked about a reference to the price of Plot D17 in his report, dated 2 February 2009, prepared for a Sunland Group Board Meeting in Dubai:[409]

> "Then if we can look at the next paragraph, 'We agreed with Reed on a fee of 20 mill Dirham plus an additional 24 which was calculated by multiplying 1.6 BUA by the difference between 135 square foot and 120 square foot, which was the price of the land. The price of 120 square foot must have been negotiated by Reed with Nakheel, as we were told this would be the land price if we reached agreement with Angus.' Is that right? Is that consistent with your evidence yesterday?---It's summarising the - - -
>
> So you already knew, according to your note here, that if you reached an agreement with Reed, the price of the land would be 120 Dirham a square foot. That's what you've written there, isn't it, Mr Brown?---Negotiated by Reed, yes.
>
> No, no, you already knew that if you reached an agreement with Angus, the cost of the land would be 120 Dirham a square foot?---We were told by Lee and Brearley that if Och-Ziff would step aside, the price could be 120, but it didn't mean anything because we knew Reed had to negotiate the final figure.
>
> What you have written there in plain and direct English, I suggest, Mr Brown, is that you knew that the land, if you reached agreement with Angus, would be 120 Dirham a square foot. Is that not what is written there?---That is written there.
>
> That, I suggest, on 2 February was the absolute truth?---They were summarising the status as I recall it, yes.
>
> What it makes is your evidence to this court untrue. You have told us that 120 square foot would potentially be for you, Sunland, if you did the deal?---The 120 a foot was the figure Reed told us we could buy the plot for once we reached agreement to pay him out.
>
> What you have said, and I'm not going to go over it again much more, 'As we were told, this would be the land price if we reached an agreement with Angus,' what I suggest you are trying to avoid, Mr Brown, is your direct obligation to have informed your potential joint venture partner of what you knew the cost of the land would be?---We were told by Lee and Brearley that figure and Reed later came back and told us that would be the figure.

HIS HONOUR: That is not quite what that sentence says, is it? The first part is conclusionary, it appears to indicate you have been told by someone else and you've inferred that that must have been the price which Reed negotiated. Is that right?---Yes."

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409 Court Book, SUN.004.002.0063; Transcript, p 116.33 - .47 and p 117.1 - .25.

Abedian's evidence was that Brown told him about the call with Lee and Brearley on 12 September 2007[410] so that as from that date he knew "that this plot could be purchased by Sunland at 120 dirham a square foot".[411] Brown's evidence was that although his notebook records a conversation with Reed later on 12 September 2007,[412] he "didn't say to Mr Reed anything at all about this discussion about 120 per square foot that you had with Mr Lee and Mr Brearley".[413] Brown agreed in cross-examination that it might have been useful for Reed to know that Lee and Brearley had mentioned AED 120 per square foot.[414]

124 The Prudentia parties submitted that the failure of Sunland to inform its potential joint venturer of DWF's likely asking price for Plot D17 was a breach of fiduciary duty on Sunland's part.[415] In response Sunland submitted that this is not a breach of fiduciary duty case against Sunland.[416] In any event, the excuse offered by Sunland for the failure to advise Reed and the Prudentia parties was that it cannot be assumed that Reed had not been told by Lee or Joyce of this price. Sunland submitted that Reed knew from at least 20 August 2007 that the price could be AED 120 per sq ft:[417]

> ***"Reed knew the price was AED120 sqlft***
>
> 108. Reed's notebook discloses that he was aware on 20 August 2007 that the price of the land is AED120 per sq ft.: PRU.004.003.0055 at 0060 [**Tab 29**]. His note contains a costing which includes a land price of 'AED281,234,100.00 – 90,000,000.00' The subtraction of AED90,000,000.00 produces the land price of AED120 per sq ft.
>
> 109. This notebook entry renders all the more irrelevant[418] the extensive cross-

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410 Transcript, p 329.28.

411 Transcript, p 329.30 - .32; see also Transcript, p 464.45 - .47 and p 465.01 where Abedian confirmed that Lee and Brearley told Brown that "there was an opportunity, if Och-Ziff did not proceed with the sale, for Sunland to buy it at 120 per square foot".

412 Transcript, p 266.39 - .46; Court Book, SUN.002.007.0001, at .0122.

413 Transcript, p 267.12 - .13.

414 Transcript, p 267.22 - .25.

415 See *United Dominions Corporations Ltd v Brian Pty Ltd* (1985) 157 CLR 1; Duncan, *Joint Ventures Law in Australia* (Federation Press, 2nd ed, 2005), ; and see *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraphs 7.1 to 7.7.

416 See *United Dominions Corporations Ltd v Brian Pty Ltd* (1985) 157 CLR 1; Duncan, *Joint Ventures Law in Australia* (Federation Press, 2nd ed, 2005); and see *Closing Submissions of the First to Third Defendants* (31 January 2012), paragraphs 7.1 to 7.7.

417 *Plaintiff's Address* (1 February 2012), paragraphs 108 – 109.

418 None of the parties' pleaded cases before this Court raise any allegation that Sunland breached any

examination of Brown about whether he informed Reed in September 2007 that the plot could be purchased for AED120 sq/ft, and the assertion put in cross-examination that Sunland had breached some asserted obligation of good faith owed to Reed and Prudentia.[419] Clearly Reed knew that AED120 was the price from at least 20 August and had probably discussed that price with Joyce earlier than that date. The notebook entry is consistent with paragraph 15.2 of the first to third respondents' defences which admits that 'at the first meeting Reed is likely to have said words to the effect that Dubai Waterfront had informed him that the price range would be AED 110 per square foot to AED 135 per square foot'; whether or not Reed did in fact tell Brown this, that pleading is a clear admission that by then Reed had already been told that the price would be between AED110 and AED135."

Nevertheless, in September 2007, Brown had no basis to assume that Lee or Joyce had informed Reed of a price of AED 120 per square foot for Plot D17. It is mere speculation on Sunland's part to suppose that the position might have been otherwise. The failure of Brown to disclose the price to Prudentia, no less than whilst entrusted to secure the asset of their proposed joint venture when authorised by Prudentia to negotiate in their common interest, is a demonstration, to say the least, of the unreliability of Brown.[420] This position is reinforced by other evidence which indicates that Sunland was wrong in its submission that Reed's notebook disclosed that he was aware that Plot D17 could be obtained for this lower price on 20 August 2007:[421]

(a) the figure of 90 million in Reed's notebook is a conversion of the price of the land (at AED 135 per sq/ft) into Australian dollars;[422]

(b) the Business Case[423] indicates that the price for Plot D17 at AED 120 per sq/ft was set by DWF in early-to-mid September 2007. This is corroborated by the

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obligation owed to the Prudentia parties in the course of their negotiations.

419 The basis of any such obligation between parties negotiating at arms' length was not explored. Brown and Abedian are architects and property developers. They are not lawyers, and have no legal training. Any responses they gave to questions put to them about obligations of good faith between joint venturers are irrelevant to the legal question of what obligations, if any, Sunland owed to Prudentia.

420 As to issues in relation to the reliability of Brown and Abedian as witnesses, see below, paragraphs 304 to 332.

421 See *Plaintiff's Address* (1 February 2012), paragraph 108; and see Court Book PRU.004.003.0055, at .0060.

422 Cf the submissions of Sunland's counsel, at transcript, p 975.07.

423 Court Book, MJJ.008.001.0002; although Sunland initially objected to the Business Case being received as evidence this objection was not ultimately maintained (see Transcript, pp 909.14, 915.14 and 916.16 -.19). In any event, even if the objection were maintained the proposition for which it was relied upon by the defendants is not in any way critical to these reasons for judgment.

fact that Brown admitted that he was told about the AED 120 per sq/ft price by Lee and Brearley on 12 September 2007;[424] and

(c) Reed's file note of his conversation with Austin on 9 August 2007 contains "RECKON BASED ON SUB PLAN CAN GET $120 - $135 AT CLOSE". If Reed had done the numbers on a land price of AED 120 per sq/ft in August 2007 then it would have been more likely to have been a projection on the basis of his meeting with Austin.

125 Thus far, the 12 September 2007 conversation with Lee and Brearley is significant in two respects. First, it proceeds on the assumption that no price for Plot D17 had been fixed and agreed in any binding way with any other entity. Secondly, and this is significant in light of the subsequent conversation with Reed on that day, neither Brown nor anyone else on behalf of Sunland then informed its potential joint venture partner that DWF was prepared to sell Plot D17 for AED 120 per square foot, rather than AED 135 per square foot. If Reed did possess this knowledge, other issues in this respect may have arisen – with different consequences for the parties. It is not, however, a matter relevant to Sunland's claims as to statutory and tortious "misrepresentation". The first point is a matter to which I will now direct further attention in light of events and communications on and in relation to those of 12 September 2007.

126 Sunland pleads that on 12 September 2007, Lee and Brearley called Brown during the course of which:

(a) one or both of them (Brown cannot now recall which) said to Brown words to the effect that they had attended a meeting on the evening of Tuesday 11 September 2007 with DWF's marketing department;[425]

(b) one or both of them (Brown cannot now recall which) said to Brown words to the effect that "I am concerned that the marketing people will try to sell Plot

424 Transcript, pp 65.23, 67.18 to 68.03.
425 Second Further Amended Statement of Claim, paragraph 24.1.

D17 and we will have no control over this";[426] and

(c) one or both of them (Brown cannot now recall which) said to Brown words to the effect that "you should immediately put your foot on the plot".[427]

127 Brown's evidence was that he received a call from Brearley and Lee on 12 September 2007 and that the notes of this phone call are recorded in his notebook.[428] Again, Brown's evidence lacked certainty as his typed notes of notebook entries say that this was a meeting but, after further consideration, he said that he believed it was a telephone call.[429] Brown admitted during cross-examination that his notebook contains a note of only one call with Brearley and Lee for 12 September 2007,[430] but did not admit that the telephone call recorded in his notebook was the call which led to the "put your foot on it" email to Reed on 12 September 2007. His evidence was that "[i]t may be. I can't be sure whether there was one or two phone calls".[431] Brown elaborated in cross-examination:[432]

> "When you did your statement, you had confirmed in your mind that it was a telephone call; correct? You want to change that?---No, in relation to the email, it was a telephone call.
>
> So there was another telephone call on 12 September, was there?---I can't be sure.
>
> In the email that we've been to, it referred to a sales meeting on the Tuesday night. Can you think of any reason why Brearley and Lee wouldn't tell you about it in a telephone conversation and then ring you back when you're talking about D17 and then ring you back with another bit of information about it?---It may have happened that way, I don't know.
>
> It wouldn't sort of make sense that way, though, would it?---It may have happened that way, I don't know."

Brown's explanation of why his notebook appeared to have no record of the call with

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426 Second Further Amended Statement of Claim, paragraph 24.2.
427 Second Further Amended Statement of Claim, paragraph 24.3.
428 Transcript, p 61.42 – 62.01; and see Court Book, SUN.002.007.0001 at .0122 .
429 Witness statement of David Scott Brown (6 August 2010), paragraph 180; and see Transcript, p 62.15 - .18.
430 Transcript, p 61.42 - .46 and Transcript, p 62.1; and Court Book, SUN.002.007.0001 at .0122.
431 Transcript, p 62.20 - .21.
432 Transcript, p 62.23 - .36.

Lee and Brearley was that "I may have just gone straight to an email".[433]

128 Whether or not there was one or two telephone conversations between Brown and Lee and Brearley, Brown's evidence was that during conversations by telephone, Brearley or Lee said to him that they had attended a meeting on the evening of 11 September 2007 with the marketing department of DWF and that they had concerns that the marketing people would try to sell Plot D17 and that they would have no control over it and that "you should immediately put your foot on the plot".[434] Brown's evidence was that he sent an email to Clyde-Smith after the call with a draft email to Reed in effect recording and also discussing the call with Brearley and Lee.[435] In view of the importance of this email, it is helpful to set out its contents in full (omitting formal parts, but noting that it is an email from Brown to Ms Julianne Stringer (i.e. Clyde-Smith), in her capacity as General Counsel of Sunland's Dubai branch, which was sent Wednesday 12 September 2007 at 11.35pm, the subject being "Waterfront site D-17"):

> "DRAFT For REVIEW
>
> Angus,
>
> Looking forward to receiving the MOU tomorrow, but heard some news today which I felt I needed to pass on to you.
>
> I received a call from Marcus Lee (Matt Joyce's No. 2) and Anthony Brearley (the DWF Lawyer) regarding Plot D-17. They were at a Marketing meeting on Tuesday night and the rearrangement of the Plot was shown and discussed. Marcus and Anthony are now concerned that the Marketing people are likely to try to sell the Plot, and they will have no control over this.
>
> They suggest we immediately "**put our foot on the Plot**" to secure it.
>
> To do this, we need to sign a Sale and Purchase Agreement (SPA)
>
> This Agreement will spell out the Price and Payment Plan, which you have advised me is around 130-135AED/Ft2 over 36 months, with 5% Deposit.
>
> Can I recommend a way to proceed with this as follows-

---

433 Transcript, p 60.05 - .07.

434 Witness statement of David Scott Brown (6 August 2010), paragraph 183.

435 Transcript, p 186.6 - .11; and see Court Book, SUN.001.001.0137 which contains the email between David Brown and Ms Clyde-Smith (nee Stringer) dated 12 September 2007.

- Sunland meet immediately with DWF lawyers to draft the SPA
- The Purchaser can be in the name of **Sunland JV Development (BVI) Ltd** which we have in place already.
- We can agree with Nakheel that the plot will be transferred to Newco when it is established, for a fee of 5,000 AED.
- This can occur within 24 hours, and secure the Plot at the terms and Conditions you have already agreed.
- We will sign the MOU which will note the agreement to transfer the Land to the newco when it is ready.

If you have an alternative (quick) solution which is better, please let me know.

A day in Dubai is like 6 months anywhere else."

This email was, graphically, referred to as the "put your foot on it" email (or similarly) during the course of the trial – and, for convenience, is referred to as such in these reasons for judgment.

129 In the course of cross-examination, it was suggested to Brown that if he were to write to Reed saying "[t]hey suggest we immediately put our foot on the plot to secure it, it follows, doesn't it, that at that time you don't have your foot on the plot".[436] Brown would not accept this obvious interpretation of the email.[437] Brown also said that "[w]e were taking advice from Marcus and Anthony about what to do",[438] but never asked the nature of the Prudentia or Reed "hold" on Plot D17. Brown also said that he was "not sure what DWF told the marketing people about Reed's rights to the plot",[439] but sought, unjustifiably in my view, to implicate Joyce in these events:[440]

> "there was a conversation with Joyce at the same time, who also referred to the marketing people and said the price could affect the price to Sunland and that all they had to do was to find Reed and potentially introduce somebody else who could pay more. That's in my notes."

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436 Transcript, p 186.36 - .38.

437 Transcript, p 186.38 - 39.

438 Transcript, p 57.305 - .36.

439 Transcript, p 187.02 - .03; see also Abedian's evidence at Transcript p 453.12 - .13 where he says that the marketing people had never been in control and that the *marketing section is a different entity altogether* to the development section.

440 Transcript, p 187.07 - .10.

Brown was challenged on that evidence:[441]

> "What, a conversation with Mr Joyce, did you say?---Yes, it's in my notebook.
>
> What date?---I don't have it in front of me.
>
> Don't you recall this conversation? It would be quite important, I suggest?---I do recall the conversation.
>
> You don't recall when it occurred?---Around the same time.
>
> Do you mean a conversation in September 2007?---Yes.
>
> You've got your witness statement there, haven't you?---No.
>
> Could the witness be shown his witness statements, please. September 2007, in your witness statements, begins around paragraph 165. Do you see that?---Yes.
>
> I don't see in your witness statement any conversation you depose to with Mr Joyce in September 2007. Can you find one, Mr Brown?---Well, if I can direct you to 183 and 185.
>
> Yes?---183 refers to the conversation you're talking about.
>
> Yes?---185 refers to a conversation I had with Joyce, which was actually earlier, the end of August, and he said, "Prudentia could be introduced to someone else by the Nakheel sales and marketing department who could potentially pay Prudentia a higher premium. I thought that this could be someone like the Patalli group that Joyce mentioned to me in the conversation on 29 August."
>
> Yes, but that conversation with Mr Joyce that you depose to occurred on 29 August; correct?---Correct.
>
> This is a discussion on 13 September, which is two weeks later?---Yes, but the tone of the conversations was remarkably similar and if you see the diary note or notebook note, you'll see there is more information actually there ..."

130 Brown was asked further questions in cross-examination in relation to Reed's "entitlement" to Plot D17 in light of the "put your foot on it" email:[442]

> "That's not quite my question. If the marketing people could sell the plot, what sort of entitlement to the plot – when you were told this – did you believe Reed or Prudentia had? --- I believed Reed and Prudentia still had an agreement with Nakheel on the plot and that the marketing people perhaps weren't in the loop on that."

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441 Transcript, p 187.12 - .45.

442 Transcript, p 57.19 - .22.

Again Brown affirmed that he did not ask Lee or Brearley as to the nature of the "hold" of Prudentia or Reed Plot D17:[443]

> "Because of the background? This didn't cause you any concern? You said it did cause you concern. So even though it caused you concern, you didn't ask Lee or Brearley, who you dealt with, what the nature of the hold on the plot was?---No, we didn't.
>
> When you wrote "Put our foot on the plot to secure it," what did you mean by the words "secure it"?---To sign a sale and purchase agreement.
>
> I couldn't hear that?---To sign a sale and purchase agreement.
>
> And why did you need to do that?---Because that was the final event in owning a plot of land.
>
> To tell someone you've got to put your foot on the block to secure it, I suggest to you, Mr Brown, is words from a state of mind that knows that the block is not secured until you put your foot on it?---No, what they were trying to do was to take it to the next step - - -
>
> No, just answer the question please, Mr Brown. It's a pretty straightforward question. To say that in the terms you did, to say it needs to be secured, comes from a person that was of the state of mind that knew until you put your foot on it, it wasn't secure?---No, I don't agree. That was an arrangement between Prudentia and Nakheel on this point."

131 In relation to the text of the email, Sunland submitted that significance should be attached to the latter part of the second last dot point in the "put your foot on it" email, "... at the terms and Conditions you have already agreed". In this vein, Sunland argued:[444]

> "152. This email is described by the fourth defendant as the main 'plank' in its submission that the plaintiffs did not rely upon the representations. The email is addressed in more detail under the section of these submissions dealing with reliance. It is relevant here to note, however, the second last bullet point in the email in reference to execution of a SPA within 24 hours which is stated to be to '*secure the Plot at the terms and conditions you have already agreed*'. That statement is only consistent with Brown believing that there is some agreement in existence which has been made by Reed and which specified the terms and conditions upon which Reed or Prudentia have agreed to acquire the plot.
>
> 153. SUN.001.001.0202 **[Tab 61]** is an email from Brown to [Lee and Brearley] sent on 13 September 2007 which materially stated:

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443 Transcript, p 58.39 - .47 and p 59.01 - .13; see also Transcript, p 190.16 - .22, Transcript p 190.42 - .47 and p 191.1.

444 *Plaintiffs' Address* (1 February 2012), paragraphs 152 to 155.

> 'Angus has agreed in principle that Sunland can enter into a Sale and Purchase Agreement with DWF using 'Sunland JV Development (BVI) Ltd', and that we will transfer the land to the Joint Venture Company at a later date. Julianne can provide you with the documents on the Sunland Entity now.
>
> Angus has **prepared** a detailed advice document for you Anthony, which he will forward in the next day or so. Please prepare the SPA Documents, in anticipation of receiving his confirmation....' [emphasis added]
>
> 154. The emphasised words in this email identify that even if the Court was to construe the words 'put our foot on the plot' in the earlier email as some recognition that there may not be a binding agreement in existence in respect of plot D17, Brown still believed that Reed's consent was necessary for Sunland to enter into an SPA.
>
> 155. On 13 September, Reed sends an email to Sinn instructing him to 'include in the agreement for them to be able to enter into the agreement': PRU.002.015.1244 [Tab 64]. This statement is consistent with Reed persisting in the representation that he or Prudentia have some control over or right to plot D17."

132 It was submitted against Sunland that its response to the "put your foot on it" email advanced a contrived construction of that email that dictates that one consider only a fraction of its text, ignore the balance, and ignore the plain meaning of what the email was conveying to Reed and arguing that whatever the email says, Brown still held the belief that Reed or Prudentia had a contractual or other "right" to acquire Plot D17.[445]

133 As to the first matter, the construction which focuses on the words "secure the Plot at the terms and conditions you have already agreed", when read as a whole, the email plainly discloses Brown's belief that at that time neither Reed nor Prudentia held a contractual right to acquire Plot D17. The email records that the price is "*around* 130-135 AED/ft 2 over 36 months, with 5% deposit" (emphasis added). Although Brown may have believed that some terms and conditions had been informally "agreed", if the price had not then been settled, he could not have held the belief that a contractual right to acquire Plot D 17 had yet arisen. The further email from Brown to Lee dated 13 September 2007 upon which the plaintiffs' rely[446] draws attention to

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445 See *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 135.

446 Court Book, SUN.001.001.0202; and see *Plaintiffs' Address* (1 February 2012), paragraphs 153 and 154.

the misconceptions attending Sunland's case. The words "in anticipation of receiving his confirmation" which appear in the 13 September 2007 email refer to confirmation from Reed that Sunland may enter into a SPA with DWF. I accept that whilst this might support a belief by Brown that Reed or Prudentia had some kind of non-legal influence with respect to Plot D17, this falls far short of any basis for believing that Reed or Prudentia had any legal or other right with respect to the land; hence has nothing to do with Sunland's case in this proceeding.[447]

134 The Sunland submission in relation to the "put your foot on it" email also ignores the fact that the dot points in the email set out various steps that must be taken in order to secure the plot for Sunland and Prudentia.[448] Sunland's submissions fail to engage with Brown's email to Reed that he sent following the "put our foot on it" email (being Thursday 13 September 2007 at 10:27pm, the subject entitled "Waterfront Site D-17"), which included the following:[449]

> "Based on the above, Sunland can advise DWF that Sunland will enter into a SPA and will transfer the Plot into a JV company at a later date.
>
> Hopefully this will secure the site." [emphasis added]

135 In oral submissions, following my question enquiring why Sunland did not just go directly to the DWF "marketing people" following the telephone call that Brown had with Lee and Brearley on 12 September 2007, the following submission was made:[450]

> "MR THOMPSON: What was it that Prudentia, as Mr Reed has said were walking away from? And why didn't Prudentia - why didn't Sunland go straight to the sales and marketing people as postulated by Your Honour, and say, 'OK. Forget about Mr Reed. He'll pay this and what's more we don't have to pay' - they were effectively paying 175 dirhams a square foot

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447 Cf *Reply Submissions of the Fourth Defendant (Joyce)* (21 February 2012), paragraph 137.

448 As to this, the following exchange is noted (Transcript, p 990.07 - .17):

> "HIS HONOUR: Isn't that a sequence of events? MR THOMPSON: Yes but we emphasise the - the words, 'and secure the plot at terms and conditions you have already agreed', and that doesn't follow the sequence. HIS HONOUR: Well surely you've got to read that in context of the whole email which is being debated extensively. What do you say it means if it doesn't mean what's been submitted that it means? MR THOMPSON: Well what we say is Your Honour, yes, he's saying that he's been told that it's necessary to put our foot on the plot by the execution of an SPA".

449 Court Book, SUN.001.001.0183 .

450 Transcript, p 1050.08 - .24.

> knowing that they could buy it for 120 if they went to the marketing people. And that was Mr Brown's knowledge on the case that was put to him.
>
> HIS HONOUR: I was hoping you were going to tell me.
>
> MR THOMPSON: But it's only consistent, Your Honour, with a belief in Brown that there is still some reason why he has to pay Prudentia because they have something which when we come and - I won't take Your Honour back to the Hanley agreement for the moment because there were some other things to look at. And in fact perhaps I'll do that now."

A very similar question was put to Abedian in cross-examination. His answer was that Sunland did not directly approach the marketing people, despite his belief that a Reed or Prudentia reservation agreement would shortly expire, because "we are very ethical people".[451] Abedian's evidence in relation to the suggestion of a "reservation agreement" is discussed elsewhere and, for the reasons indicated, was not credible.[452]

136 In my opinion, the position argued for by Sunland is, in the context of the evidence in relation to the 12 September 2007 conversation between Brown and Lee and Brearley and the "put your foot on it" email, simply implausible in all the circumstances. Additionally, the text of the email is Brown's and it is entirely possible that the latter part of the second dot point is either his assumption or a general reference to the previous discussions he had had in relation to the likely price per square foot that DWF would accept for Plot D17. There is no evidence that Lee or Brearley used these words and, even if they did, this explanation for these words still holds good. As to the 13 September 2007 email from Brown to Reed and the email to Mr David Sinn (in his capacity as a partner of Freehills, the Australian legal advisers to Prudentia) ("Sinn") of the same date, I am of the view that, in the circumstances of the communications between the parties at that time, they are consistent with Reed or Prudentia having agreed that, in the context of proposed joint venture arrangements, Sunland would take over negotiations for a SPA with

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451 Transcript, p 337.33.

452 See , for example, below, paragraph 323 and following.

DWF and that this was in train.[453]

137 At this point it should be observed that there is no evidence that Brown, Abedian or Sunland had any reason to feel embarrassed or inhibited from making inquiries of DWF in relation to the obligations or arrangements that DWF may have entered into with respect to Plot D17. Indeed, the evidence of discussions and communications between, for example, Brown and Austin or Lee or Brearley at various times indicates the contrary. In this context, and absent evidence of this kind, it seems extraordinary that the opportunity of discussions with the Director of Commercial Operations (Lee) and the Senior Legal Counsel (Brearley) of DWF on 12 September 2007 would not have provided such an opportunity. This is particularly the case given the nature of the discussions which Brown's evidence and the "put your foot on it" email indicate took place.

138 In any event, returning to the evidence, Brown's evidence as contained in his 6 August 2010 witness statement,[454] was that as a result of the "put your foot on it" email, Brown thought "Prudentia could be introduced to someone else by the Nakheel sales and marketing department, who could potentially pay Prudentia a higher premium". Presumably, this was an allusion to the practice in Dubai of entities purchasing plots of land from another entity which had entered into a SPA with the master developer for that plot by paying a premium to the then existing purchaser and obtaining a SPA themselves, having obtained the consent and agreement from the master developer, which would be a party to the new SPA. The previous SPA would, in the course of this transaction, be cancelled and released by agreement with the then existing purchaser and the master developer. Brown was cross-examined in relation to his written statement:[455]

> "My point is the inconsistency, Mr Brown. In your oral evidence in response to questions from Mr Rush you said, 'Oh, well, the email might reflect the

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453 The same applies with respect to the development of the draft Implementation Agreement, the MOU, and the 16 September 2007 conversation between Brown and Reed for the reasons discussed elsewhere (see *Plaintiffs' Address* (1 February 2012), paragraphs 156 to 160.

454 Witness statement David Scott Brown (6 August 2010), paragraph 185.

455 Transcript, p 189.8 - .14.

fact that the marketing people weren't in the loop.' Do you understand that answer?---Yes.

Whereas in paragraph 185 [of your witness statement], you said the belief you had was that they could introduce Prudentia to another buyer. They're different answers, aren't they?---They are different scenarios, yes."

Brown also gave evidence in response to my questions on this issue:[456]

"HIS HONOUR: Mr Brown, it says, 'I suggest we immediately put our foot on the plot to secure it.' We've debated what you think that means. But in the preceding sentence, 'Marcus and Anthony are now concerned that the marketing people are likely to try to sell the plot and they will have no control over this.' On a plain reading, it seems to indicate that that plot is up for grabs at that stage by whoever comes along and negotiates with the marketing people. Can you explain to me why that is not a fair reading of that document and if there is some control over the plot that you assert, explain to me exactly what it is?---I know it sounds like that, your Honour, but I mean at the time I felt that the marketing people just weren't in the loop on what arrangement Prudentia had.

What control was there over the plot?---There was clearly an arrangement between Prudentia and DWF because we were told by a number of different people.

That is the explanation for the control, is it?---Yes, yes. I mean, Austin started by telling us they had a hold; Joyce told us he was the contact for that plot; later said to us an email that we had to reach agreement with Prudentia before we could deal with Nakheel; the Prudentia documents all referred to that they had reached agreement with the master developer to acquire and develop the plot; and then it was confirmed by Brearley as well. So there was a series of events that linked all this together for us.

Are you saying the hold is contractual?---I don't know what the hold was. We weren't told what type of hold it was, but there was a hold.

So you don't know the nature of the hold and you don't know whether it's contractual?---No, but I mean we're not talking about real estate activities in Australia, we're talking about real estate activities in Dubai, which are quite different.

I appreciate that, but I would have thought there is still an explanation on the basis of accepted legal concepts?---I think our impression was we were talking to very high level in the government, we'd been given quite clear, distinct information about it, and we relied on that and that's the basis for our actions."

Brown added that he did not ask anyone about the nature of the entitlement that Prudentia or Reed had over Plot D17 because "[w]e were already told they

456 Transcript, p 192.01 - .33.

controlled the plot; we didn't need to ask".[457] In view of the contents of the "put your foot on the plot" email and Brown's statement in that email that "we need to sign a Sale of Purchase Agreement (SPA)", and for the reasons already expressed, one would have to be very sceptical of this evidence – in fact, so sceptical as to regard it as somewhere between an attempt to rationalise these events *ex post facto* in support of Sunland's case and a fabrication, an untruth. On the basis of these and other inconsistencies and contradictions in Brown's evidence, and with other evidence (documentary and otherwise),[458] Brown cannot, in my view, be regarded as a reliable or truthful witness with respect to critical matters. Additionally, it is clear that, at various times, Brown's personal interests (including the fear of remaining the subject of investigation for bribery by the Dubai authorities), together with his and Sunland's commercial interests, coloured his statements and communications at various times.[459] This view, both generally and in relation to these events, is reinforced by the further evidence of Brown and Abedian to which I now turn; and also having regard to the lack of any evidence that Clyde-Smith was at all surprised by the "put your foot on it" email or Brown's inclusion of the comment as to the need to sign a SPA.

139 In his witness statement of 6 August 2010, Abedian sets out[460] the text of the "put your foot on it" email which was sent by Brown to Reed, with a copy to Abedian.[461] The text of this email is in the same form as the draft of this email which was forwarded to Clyde-Smith by Brown for her approval.[462] Having set out the text of this email, Abedian set out the following comments in his witness statement:[463]

> "84. Brown discussed this email, and his telephone call from Brearley and Lee with me. The position in my mind was clear. Prudentia always had the control of the plot of land and Reed had always been looking for other JV partners in the market. However, we did not know the precise terms of that control by Prudentia and Reed.

457 Transcript, p 57.38 - .40.
458 And see below, paragraphs 304 to 332.
459 And see below, paragraphs 304 to 332.
460 Witness statement of Soheil Abedian (6 August 2010), paragraph 83.
461 Court Book, SUN.001.006.0100 ; cf SUN.001.001.0137.
462 See above, paragraph 128.
463 Witness statement of Soheil Abedian (6 August 2010), paragraphs 84 – 87.

> 85. I understood the reference in the telephone call from Brearley and Lee to the 'Marketing people' to mean the Dubai Waterfront sales team, and concluded that there was a risk to Sunland. The Dubai Waterfront sales team might introduce Reed to another possible JV partner or purchaser. I believed that Reed had always been considering other possible JV partners or purchasers for Prudentia because Reed had confirmed in his email of 20 August 2007 that he had been speaking with a local party, which is now shown to me [SUN.009.003.2278], and because Ahmed Afiffi had told me that Omniyat was interested in the same plot.
>
> 86. There was also some risk that the control by Prudentia and Reed might be coming to an end. In any event, it appeared that Dubai Waterfront was pressing for an SPA. I thought that pressure might be coming from the management of Dubai Waterfront (including Joyce), and not just from the sales team.
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> 87. At the time the property market was strong and before any end user settled on a property, on average the property would change hands many times (seven times, according to public reports). To control a property and request a premium from a subsequent purchaser was a standard transaction that many businesses were involved in. An example of that is plot D5B that Sunland bought through the Dubai Waterfront sales team but the plot belonged to Al Burj."

In light of the evidence the reference in paragraph 87 of Abedian's witness statement to control of a property in the context of transactions with subsequent purchasers is, particularly having regard to the reference to Plot D5B, clearly a reference to the process described previously where a purchaser who had entered into a SPA with the master developer would on-sell at a premium, cancel and release that SPA in an agreement with a subsequent purchaser who would enter into a fresh SPA with the master developer. Indeed, this was the process which Sunland was involved in in its purchase, as a subsequent purchaser, of Plot D5B. In any event, I am of the view that in all the circumstances it is extraordinary that Abedian's reaction to the "put your foot on it" email was merely to speculate as to the "control" he thought Prudentia or Reed may have over Plot D17 without making inquiries. His further evidence in cross-examination merely serves to emphasise this, as is illustrated vividly by the evidence matters to which I now turn.

140 Abedian's evidence was that Brown discussed with him the call from Lee and Brearley, but that they "did not know the precise terms of" Prudentia or Reed's

"control".[464] Abedian did, however, agree that "it would have been a comparatively simple thing to do" [to ask for evidence of Prudentia's control over Plot D17] if he had the uncertainty as expressed in his witness statement.[465]

141 Abedian's evidence was that "put your foot on it"' means buy it[466] or control it[467] or reserve it.[468] His evidence was that in Dubai there are two different kinds of control. One it is a reservation agreement, and the other one is a SPA.[469] His evidence was that the reason Sunland needed to "put its foot" on Plot D17 was because if you have a reservation agreement in Dubai, the reservation agreement usually is only for a period of time, and is not "never-ending".[470] If, prior to completion of a sale, the reservation agreement may finish, this would mean that control will be lost.[471] Abedian confirmed that it was his evidence that "[he] contemplated there was a reservation agreement between Prudentia and DWF",[472] but said further that this was not included in his witness statement because there was "[n]o need"[473] and agreed that it was also not referred to in a memorandum subsequently prepared by Eames for the Dubai authorities.[474] Abedian also confirmed that he could have asked Clyde-Smith whether there was a reservation agreement, but he did not do that.[475] Furthermore, he confirmed that he "didn't get anyone at Sunland to ask any questions as to whether one existed" as "[a]ll the executive[s] of Nakheel told us that they are in control, which it means they have some document".[476]

142 Abedian denied that the "reservation agreement" was a recent invention,[477] but

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464 Witness statement of Soheil Abedian (6 August 2010), paragraph 84.
465 Transcript, p 354.10.
466 Transcript, p 333.34.
467 Transcript, p 333.36.
468 Transcript, p 333.38.
469 Transcript, p 333.36 - 334.10.
470 Transcript, p 334.08.
471 Transcript, p 334.06 - .10.
472 Transcript, p 334.21 -.22; confirmed at Transcript, p 395.25 - .26, p 397.01 - .03.
473 Transcript, p 334.40.
474 Transcript, p 440.42 - .45; see paragraph, 324.
475 Transcript, p 335.43 - .47; see also Transcript, p 46.09 - .14 where Abedian's evidence is that he did not ask Clyde-Smith how long any reservation agreement over Plot D17 had to run.
476 Transcript, p 336.38 - .40.
477 Transcript p 337.01.