FEDERAL COURT OF AUSTRALIA

Ozmen Entertainment Pty Ltd v Neptune Hospitality Pty Ltd [2019] FCA 721

File number:	NSD 1424 of 2017
Judge:	**RARES J**
Date of judgment:	3 April 2019
Catchwords:	**ADMIRALTY** – demise charter – construction – nature of demise charter – warranty that vessel would be classed and surveyed to carry 800 passengers – where vessel had not been classed or surveyed at time of entry into charterparty – whether survey for maximum of 450 passengers breach of warranty **CONTRACTS** – notice to remedy breach –where notice conveys clear intention to terminate agreement if breaches of continuing obligations not remedied within specified time – where impossible to remedy past breaches – whether possible for party to remedy past breaches by acting "to put things right for the future" **CONTRACTS** – termination under contract or at common law – where multiple breaches of obligations and duties under joint venture agreement – where one party required to provide fortnightly financial reports and information to other – duties of trust and good faith and of making decisions jointly – duty not to unilaterally incur debts – duty to comply with taxation obligations – conditions, warranties and innominate terms – whether unremedied breach of innominate terms sufficiently serious to justify termination – whether multiple breaches by party evinced intention not to be bound **EQUITY** – joint venture – fiduciary duty – where party obliged to obtain survey and classification of vessel to carry 800 passengers informs other party that surveyor will only issue for lesser number and parties should do work later to bring vessel to standard for 800 passengers – where consequence is other party would lose guaranteed net profit entitlement under joint venture agreement – whether one party had fiduciary duty to inform other of potential loss of guarantee in advising course of action – whether conflict between interests of joint venturers – whether duty to inform of conflict of interests –whether party to joint venture agreement deemed to know its provisions

Legislation:	*A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 9-5, 9-40
	Evidence Act 1995 (Cth) s 136
Cases cited:	*Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd* (2009) 178 FCR 57
	Ankar Pty Limited v National Westminster Finance (Australia) Limited (1987) 162 CLR 549
	Australian Securities and Investments Commission v Hellicar (2012) 247 CLR 345
	Batson v De Carvalho (1948) 48 SR(NSW) 417
	BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) (The "Seaflower") [2001] 1 Lloyd's Rep 341
	Burger King Corporation v Hungry Jack's Pty Limited (2001) 69 NSWLR 558
	Carr v JA Berriman Pty Limited (1953) 89 CLR 327
	Commissioner for Main Roads v Reed & Stuart Pty Limited (1974) 131 CLR 378
	Commonwealth Bank v Smith (1991) 42 FCR 390
	Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640
	Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
	Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
	John Alexander's Clubs Pty Limited v White City Tennis Club Limited (2010) 241 CLR 1
	Jones v Dunkel (1959) 101 CLR 298
	Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited (2007) 233 CLR 115
	Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361
	L Schuler AG v Wickman Machine Tool Sales Limited [1974] AC 235
	L'Estrange v F. Graucob Ltd [1946] 2 KB 394
	Laurinda Pty Limited v Capalaba Park Shopping Centre Pty Limited (1989) 166 CLR 623
	Maguire v Makaronis (1997) 188 CLR 449
	Pilmer v Duke Group Limited (in liq) (2001) 207 CLR 165
	Queensland Mines Ltd v Hudson (1978) 18 ALR 1
	Sargent v ASL Developments Ltd (1974) 131 CLR 634
	Silverburn Shipping (10M) v Ark Shipping Company LLC (the "Arctic") [2019] EWHC 376 (Comm)
	Stirling v Maitland (1864) 5 B&S 840

	Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 *Tricontinental Corporation Limited v HDFI Ltd* (1990) 21 NSWLR 689 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530
Date of hearing:	4-8, 11-15, 22, 26 March 2019
Registry:	New South Wales
Division:	General Division
National Practice Area:	Admiralty and Maritime
Category:	Catchwords
Number of paragraphs:	304
Counsel for the Applicants:	Mr T Castle with Ms E Kovacs
Solicitor for the Applicants:	Holman Webb Lawyers
Counsel for the Respondent:	Mr E Cox SC with Ms C Gleeson and Mr J Tryon
Solicitor for the Respondent:	Barringer Leather Lawyers

ORDERS

NSD 1424 of 2017

BETWEEN:	**OZMEN ENTERTAINMENT PTY LTD** First Applicant
	KANKI SEA TOURISM HOSPITALITY & ENTERTAINMENT PTY LTD Second Applicant
AND:	**NEPTUNE HOSPITALITY PTY LTD** Respondent
JUDGE:	**RARES J**
DATE OF ORDER:	**3 APRIL 2019**

THE COURT ORDERS THAT:

1. The parties provide agreed orders to give effect to the reasons delivered orally today on or before 17 April 2019, and, in default of agreement, each party file and serve the draft orders it proposes be made together with written submissions limited to two pages on or before 15 April 2019.

2. The proceeding be listed for case management at 9.30am on 17 April 2019.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RARES J:

1 Mert **Ozmen** is a Turkish businessman. In about August 2014, Mr Ozmen negotiated a loose arrangement with three Australian businessmen, Gavin **Douchkov**, Mel **Como** and Scott **Robertson**, with a view to the Australians paying a hire premium for a new build 42.55 metre LOA motor yacht, *Seadeck* (formerly named *Vanga*), to sail from Turkey to Sydney, Australia. Around this time, Mr Ozmen caused the incorporation of Ozmen **Entertainment** Pty Ltd to hold his interest in *Seadeck*, and Messrs Douchkov and Como caused the incorporation of **Neptune** Hospitality Pty Ltd to hold their interest in the negotiated arrangement. In November 2014, Mr Ozmen caused **Kanki** Sea Tourism Hospitality & Entertainment Pty Ltd to be incorporated.

2 The plan was that the parties would enter into a charterparty or other dealing in which they would use *Seadeck* to offer luxury day or night cruises on Sydney Harbour for 800 or more passengers, and generate very large net profits. Those rosy expectations did not come to fruition.

3 On 6 January 2016, Entertainment demise chartered *Seadeck* to Kanki and Neptune jointly for the purpose of the charterers employing her under a joint venture agreement (**JVA**) of the same date between Kanki and Neptune.

4 The delay in the parties entering into these two contracts occurred through a series of setbacks, including the lengthy detention of the ship in Port Said, Egypt, shortly after she left Turkey. Neptune, through the support of Mr Douchkov and Mr Como, incurred all the expenses of getting *Seadeck* to Sydney where she finally arrived in November 2015.

5 The parties had planned on the Australian authorities granting a liquor licence for *Seadeck* to carry 800 passengers. They projected that the joint venture would earn a net profit of over $10 million per annum and, on that basis, Neptune guaranteed that Kanki would be paid no less than $5 million net profit annually for the term of the JVA.

6 However, on 25 October 2016 when the liquor licence was granted, it permitted the ship to carry only a maximum 450 passengers in accordance with a survey that Neptune obtained.

7 As might be expected, not only in part as a result of the reduced capacity, the operation of the joint venture has resulted in significantly less returns to the already financially stressed participants. That was a recipe for not only discord but distrust. On 26 September 2018, Burley J appointed Brian Silvia and Ian Currie as **receivers** and managers of the joint venture.

The issues

8 Kanki claims that the JVA automatically terminated or that Kanki, itself, terminated the JVA, as at 25 July 2017 based on Neptune's failure to remedy breaches of the JVA specified in Kanki's solicitors' notice to Neptune dated 11 July 2017 (**the Kanki notice**). In addition, Entertainment claims validly to have terminated the charterparty by notice on 4 August 2017 (**the Entertainment notice**) because, upon the termination of the JVA, the purpose for which Entertainment demised the ship to Neptune and Kanki jointly had failed.

9 Alternatively, Kanki seeks to have the joint venture wound up because:

- Neptune acted in breach of its fiduciary duty under the JVA and in equity by failing to advise Mr Ozmen that Neptune was in a conflict of interest and duty in early March 2016 leading to his agreement that Neptune seek the issue of a survey certificate for 450, instead of 800, passengers in circumstances where a survey for the lesser number of passengers would also restrict a liquor licence to that number and this would excuse Neptune from having to meet its contractual guarantee to pay Kanki a minimum annual net profit of $5 million;
- the substratum (that Neptune would pay Kanki a minimum annual net profit of $5 million), on which the parties contracted, failed because the limited survey and liquor licence capacity of 450, in lieu of 800, passengers caused a substantial reduction in the vessel's and business' earning capacity;
- there has been a breakdown in trust and confidence between the parties, in particular because of Neptune's conduct of the financial affairs of the joint venture, its continuing failures to provide Kanki with financial information, including in respect of the catering arrangements for *Seadeck*, and its exclusion of Kanki from decision-making; and
- Neptune made a unilateral decision, over Kanki's objection, to take *Seadeck* to Brisbane in late June 2017.

10 Neptune contends that none of the matters raised by Kanki and Entertainment has substance, or that they are entitled to any relief. Neptune argues that each of Kanki and

Entertainment cannot obtain any equitable relief because each has unclean hands on the basis that:

- from November 2016, when the joint venture began trading, Mr Ozmen made frequent demands for money to which Kanki was not entitled, and that Neptune met those demands for a period until about 2 February 2017;
- Mr Ozmen threatened to undermine the business if he did not get his demands met;
- from about late January 2017, Kanki contrived to raise unjustified disputes including in relation to the provision of accounting information and *Seadeck*'s relocation to Brisbane; and
- from about May 2017, Kanki and Entertainment agreed with **Culture Map** Pty Limited that Culture Map would assist them to terminate the joint venture and that, subsequently, they would all enter into a new joint venture to conduct a business employing *Seadeck*.

11 In addition, if Kanki and Entertainment's claims for relief are successful, Neptune seeks relief in its amended cross-claim by way of a declaration that the ship is an asset of the joint venture, an account of profits and recoupment of the unpaid amounts of shared costs that the JVA provided would be met by Kanki, on the basis of a quantum meruit and a lien over *Seadeck* to secure any amount Neptune is owed pending its ascertainment and payment.

12 The parties relied on a considerable body of oral and written evidence about their relationship. I have considered all of that evidence, including documents, the use of some of which I limited under s 136 of the *Evidence Act 1995* (Cth) in arriving at the findings below. Those findings necessarily summarise the key features of the whole of that material, but are not exhaustive. Thus, I may not have stated explicitly that any particular document was admitted as, for example, an assertion by its author, and was not evidence of the truth of the assertion. However, I have only relied on the documents as evidence consistently with any limitation on its use.

13 The parties agreed that the ascertainment of what may be due to one side or the other will occur, probably by the appointment of a referee, once I have decided the substantive issues.

The voyage to Australia

14 In 2014, an associate of Mr Douchkov informed him of an opportunity to participate in a venture to manage and operate a hospitality vessel of about 140 to 150 feet that was then in Turkey. He understood that her owners were looking to move her to a new market. Following further discussions about the proposed venture, Mr Douchkov and Mr Como entered into a loose arrangement with Mr Ozmen in August 2014 in which they would pay USD400,000 for the ship to be delivered, in working order and in class, from Turkey to Australia, so that Mr Douchkov and Mr Como would own a half share in a hospitality business using the ship in the Australian market.

15 Mr Douchkov said that on the basis of the arrangement, the ship sailed from Turkey for Australia on about 14 August 2014. However, soon after *Seadeck* left Turkey, disaster struck and she and her crew were detained by Egyptian authorities at Port Said. It took eight months for Neptune to procure the ship's release, and another four months to get her crew freed. As soon as she was released, Neptune, with Mr Ozmen's consent, arranged for *Seadeck* to sail to **Batam**, Indonesia to undergo repairs for hull damage and to correct the warping of her timber decks caused by her being neglected while in detention, as well as preparation work to fit out her to trade on Sydney Harbour.

16 Mr Ozmen had made clear at the outset of the negotiation that he had no available financial resources to contribute to getting *Seadeck* to Australia or into a condition where she would be fitted out so as to be in class and in survey to carry 800 or so passengers on cruises here, although she had been constructed so that, with proper preparatory work, she could be surveyed and classified to do so. This meant that the financial burden of procuring the release of the ship and her crew and the work to have *Seadeck* put into a condition to be classified so as to be capable of being licensed to carry 800 passengers and crew on cruises in Sydney Harbour fell entirely on Neptune. Mr Douchkov and Mr Como provided Neptune with the funds to do so.

17 Following a sea trial on 16 October 2015 conducted after completion of the works in Batam, **RINA**, a ship survey and classification society, issued a light ship survey for *Seadeck*. That survey indicated that she would be capable of being classified later to carry 800 passengers and she sailed for Sydney on about 17 October 2015.

18 On 23 October 2015, Mr Ozmen and some of his associates, including Gunay **Koyunoglu**, and one of his nephews, Kartal **Altikulacoglu**, met at the Melbourne office of

his solicitors with Messrs Douchkov, Robertson and others to discuss the formalisation of the loose arrangement negotiated in August 2014. The Neptune side made clear that they had incurred very significant unanticipated costs due to the detention of the ship and the crew, consequent repair work in Indonesia, and holding costs in Sydney, including for a mooring.

19 That led to Mr Robertson sending Mr Ozmen's solicitors an email on 27 October 2015 confirming what the total known extra costs were, as at 21 October 2015, so that the proposed contracts could deal with any entitlement of Neptune to recoup some or all of them.

20 In his 27 October 2015 email, Mr Robertson said that Mr Ozmen had come to Sydney shortly after *Seadeck*'s detention occurred and informed the Neptune side that he was not in a financial position to help in the resolution of the problems in Egypt, and asked if they would pay a sum in US dollars equivalent to AUD250,850.38 to do so. Mr Robertson said that Neptune agreed to lend that sum and paid it in good faith on that basis. He said that Neptune could provide "full details of the breakdown of" each of the following five categories of costs it had incurred, namely:

(1) the legal and further transportation costs to get the vessel to Batam;

(2) the cost of new upholstery;

(3) the costs incurred by Neptune paying for a berth in Sydney whilst *Seadeck* was detained in Egypt, and undergoing repairs and refitting in Batam;

(4) the costs of Mr Robertson and David **Auld**, a contractor that Neptune had engaged in project managing delivery of the vessel between Egypt and Sydney; and

(5) the cost of the Batam repairs and maintenance together with the survey costs to get the vessel from Batam to Sydney.

21 In November 2015, the Neptune side sought advice on the proposed contracts from Mr Douchkov's solicitor, Gregory **Leather**.

The JVA and charterparty

22 In the end, on 6 January 2016, the parties entered into two contracts at the heart of this proceeding, namely, a demise charter to Kanki and Neptune, as charterers, of *Seadeck* by Entertainment, as her legal and beneficial owner, for three years, with two options of three years each for the total hire of $1 (**the charterparty**), and the JVA also with a three-year term and two three-year options. Recitals to the charterparty recorded that Entertainment had

agreed to demise charter *Seadeck* to Kanki and Neptune "**[f]or the purpose of**" the JVA, "to operate the Business more properly defined in the [JVA] in Annexure A".

23 Both the charterparty and the JVA contemplated that Neptune would have responsibilities to perform substantial tasks on behalf of the charterers as the joint venturers. Those responsibilities included Neptune obtaining surveys for, and classification of, *Seadeck* to carry 800 passengers, as well as managing the proposed luxury cruise business and preparing fortnightly, and annual, profit and loss statements and accounts for the trading of the business. The JVA included, as annexure 1, weekly and yearly profit and loss projections that indicated that the business to be conducted in the joint venture would achieve a yearly net profit of over $10.225 million. Annexure 1 also recorded percentage values against each of the line items in the projections.

24 Importantly, in cl 10(n) of the JVA, Neptune guaranteed that, *first*, Kanki's share of the net profit at the end of the first full season of trading ending 30 September 2017 would be at least $5 million and every season thereafter, while the JVA was in force, and, *secondly*, if Kanki had received a lesser annual total of fortnightly payments as its share of net profit, Neptune would pay Kanki the difference between $5 million and what it had received (**the $5 million guarantee**). However, the $5 million guarantee was subject to conditions, including that *Seadeck* was fully licensed by the Independent Liquor and Gaming Authority of New South Wales (**the ILGA**) "with a Legal Capacity of 800pax" (*scil*: passengers).

25 Importantly, the JVA provided that the parties, *first*, had to ensure that at all times they acted in the best interests of the business and in good faith (cl 6(b)(iii)), and, *secondly*, owed each other a duty of trust and had immediately to inform the other of any conflict of interest (cl 6(d)).

26 The JVA also provided that:

- each party had to nominate a firm of accountants and a person to sign all cheques on its behalf (cl 2(b) and (c));
- each party had to appoint a representative to manage on its behalf the affairs of the joint venture (and that the initial nominees were Mr Altikulacoglu for Kanki and Mr Robertson for Neptune), each of whom was to be an onboard employee of *Seadeck* and to occupy a full-time related role in the day-to-day running of the **business** (being defined in cl

1(c) as the hospitality, entertainment or other business as the parties might conduct jointly on or from *Seadeck* "from time to time whether in Australian waters" [sic]) (cl 3);

- the joint venture proposed to operate the business under the business name "Seadeck", and that name would remain the shared property of the parties after the JVA came to an end or was otherwise terminated (cll 4 and 9);

- Kanki and Neptune "are equally responsible for the day-to-day running of the Business" (cl 6(a));

- the parties had to ensure that they:

(a) did "everything possible to warrant that decisions are made promptly and that full cooperation is given so that the Business is successfully managed **and profitable**" (cl 6(b)(i));

(b) at all times acted in the best interests of the business in good faith (cl 6(b)(iii));

(c) could not be "directly or indirectly involved in any undertaking or venture, joint or otherwise, that might compete with that of the Business on Sydney Harbour" (cl 6(b)(iv)); and

(d) complied with all applicable laws relating to the business and its assets (cl 6(b)(vi)),

- the only relationship between Kanki and Neptune was that of joint venturers to the JVA (cl 6(c));

- each party owed the other a duty of trust and "must immediately inform the other of any conflict of interest, must not profit separately from the Business unless otherwise agreed to by the other party" (cl 6(d));

- Neptune had reasonably to keep Kanki informed of all corporate and private bookings, pricing for general admission, and "the quality of beverages and food served on [Seadeck]", and "**Both parties will jointly operate and manage the business**". "These arrangements are to be constantly discussed and finalised by both parties **so that all decisions are made jointly**" (cl 6(e));

- neither party "may unilaterally incur debts or commit another party to liabilities" (cl 6(f));

- if *Seadeck* required maintenance or repair, Neptune had to notify Kanki, which could request Neptune to obtain a minimum of three written quotations for the work that Kanki had to consider, and if it could provide a comparable quotation for the same work and quality, it

had the discretion to select that provider "in the interest of saving the expenses incurred by the Business" (cl 6(g));

- the parties had to ensure that "the joint venture has sufficient working capital to conduct the Business at all times" (cl 7); and
- the business and its assets would be the shared property of the parties except that *Seadeck*, including all fixtures and attachments listed in an attachment (that was not in evidence) to schedule 3 of the JVA, remained the property of Entertainment (cl 9(b)).

27 Importantly, in cl 9 of the JVA, Kanki acknowledged that Neptune had paid both the hire premium of $442,900 (that was not to be repaid) and 100% of the **shared costs**, being those defined in schedule 1 of the JVA, of which Kanki would repay 50% plus interest. In addition, each party agreed to pay 50% of the cost of an awning that would be constructed in Sydney over the ship's deck areas. Some of the shared costs, including for new generators, the RINA survey fee and the awning were reparable over 36 months from when the vessel began trading with interest calculated from the date when the relevant shared cost was incurred.

28 The shared costs were:

- an initial loan by Neptune of $250,850.38 to meet the unexpected operation costs associated with the ship's journey to New South Wales (being the loan to which Mr Robertson referred in his email of 27 October 2015) (see [20] above); and
- four categories of costs as incurred to 22 October 2015 (being four of the specific categories that Mr Robertson had listed in his 27 October 2015 email, but with actual amounts for each category specified in schedule 1, however the shared costs specified in schedule 1 of the JVA did not include any costs of the repairs and maintenance in Batam), together with any further expenditure by Neptune up to the date of the JVA for which it had not yet sought Kanki's prior consent, that the parties would evaluate as to whether they would be shared under cl 10(k) in respect of:

(a) legal costs and vessel transportation costs (Egypt to Batam) of $437,298.39;

(b) the cost of new upholstery for *Seadeck* of $39,921.57;

(c) the cost of Neptune providing staff to project manage delivery of the vessel of $105,500; and

(d) the cost of paying for a berth in Sydney while *Seadeck* was both detained in Egypt and, later, underwent repairs and refitting in Batam of $104,902.31.

29 However, schedule 1 stipulated that Kanki was not obliged to contribute to the shared costs unless proof of payment and an itemised bill were provided for the same. The total of shared costs to 22 October 2015 set out in schedule 1 of the JVA was $938,472.65, or about $470,000 for each party. Obviously, the berthing costs in Sydney after 22 October 2015 would increase and be an ongoing joint venture expense that had to be shared.

30 Clause 10 dealt in detail with ascertainment and payment of the net profit share, including the $5 million guarantee. Clause 1(k) and (l) defined the expressions "Net Profit" and "Net Loss" to mean revenue less expenses before taxation if, respectively, a positive or a negative amount.

31 Clause 10 provided that Neptune "agrees to pay [Kanki] 50% of the Net Profit of the Business (**such amount plus any GST payable**)" (cl 10(a)), and in the event that there was a loss, Neptune "will bear the said Net Loss of the Business (**such amount plus any GST payable**)" (cl 10(b)). Under cl 10(c), within five business days of each fortnight throughout the term of the JVA, Neptune had to:

> calculate the Net Profit of the Business for the preceding fortnight, and provide **all related details** to [Kanki] regarding:
>
> (1) A calculation of the Net Profit and/or Net Loss; and
>
> (2) The share of the Net Profit payable to [Kanki] and [Neptune].

32 Kanki had three business days in which to give Neptune written notice whether or not it accepted the calculations. If it did not give notice, cl 10(d) deemed that Kanki had accepted them. Kanki's accountants were to review the accounts of the business and figures that Neptune presented and would do so each month "for the purpose of taxation and to comply with any Australian Taxation Office obligations", and they could also review accounting materials on the vessel, after giving Neptune three business days' notice of their intention to do so (cl 10(e)).

33 Relevantly, cl 10(i) provided:

> The fortnightly payments, as per the calculations described in Clause 10(c) above, will be based on the management of the accounts [*scil*: management accounts] of the business and the review of said accounts by the accountant for [Kanki].

34 If Kanki disputed any of Neptune's fortnightly calculations under cl 10(c), the parties agreed promptly to attempt to resolve the dispute, and, if they could not, cl 10(g) provided they would engage the services of an independent accountant agreed to by the parties, or, in default of agreement, appointed by the president of Chartered Accountants Australia and New Zealand, to reach a resolution.

35 Neptune had to pay Kanki its 50% of share of net profit for the relevant fortnight within one business day of either confirmation of Kanki's acceptance, or the accountant's resolution under cl 10(g), of the amount, subject to Neptune receiving from Kanki a valid tax invoice that complied with Australian taxation law (cl 10(h)).

36 Kanki had, and could not unreasonably refuse, to approve and consent to any expenditure by Neptune for the operation of the business (cl 10(j)).

37 As soon as practicable after the finalisation of the accounts of the business for each financial year during the JVA's term, Neptune had to provide Kanki with calculations of the net profit for that financial year (or the relevant part, if it extended beyond the term of the JVA) with details of the calculation of net profit under cl 10(c), Kanki's 50% share of net profit and any reconciliation required on account of the fortnightly payments made during the year (or period). Kanki had 10 business days to give Neptune written notice whether or not it accepted the calculation based on the key performance indicators in annexure 1 (which are not in evidence, unless they are the percentage values in the profit and loss projections included in that annexure), and, if it did not give notice, Kanki was deemed to have accepted them. Clause 10(g) would apply if Kanki disputed the calculations (cl 10(l)(iv)). Within five business days of either Kanki's acceptance or the decision of the independent accountant, the party that owed the other money had to pay what was due (cl 10(m)).

38 The JVA also provided, in cl 13(a), that a party defaulted if, relevantly:

- it failed, *first*, to make a payment owed to the other party under the JVA on the prescribed date, and, *secondly*, to remedy that failure within seven days written notice by the other party (cl 13(a)(ii));
- it continued to breach any obligation under the JVA after receiving 14 days notice to remedy the breach (cl 13(a)(iii)); or
- it breached any fiduciary duty it owed under the JVA to the other party (cl 13(a)(vi)).

39 If a default by a party under cl 13(a) occurred, cl 13(b) provided that, *first*, the JVA was terminated and, *secondly*, the original fixtures on *Seadeck* noted in schedule 3 (the attachment to which is not in evidence) could not be removed.

40 Importantly, cl 16 of the JVA provided that the parties intended that the JVA would be legally binding and constituted "the entire Agreement and any arrangement between the parties in respect of its subject matter. **Any former Agreements or Arrangements are negatived and of no force or effect**".

41 The charterparty provided that:

- during its term, *Seadeck* "shall be in the full possession of [Kanki] and [Neptune] and under their complete control" and they would, at their cost and risk, crew, manage, maintain, navigate and operate *Seadeck* (cl 1(a)(i) and (ii));
- Neptune "will carry out the daily operation of the Vessel" (cl 1(c));
- the charterers could not make any additions or alterations to the ship without Entertainment's consent (cl 1 (d));
- Entertainment warranted in cl 7(a) that the ship "will need to be fully classed and surveyed for a vessel of its type, allowing the Vessel to be used for the purpose of the Business [i.e. is the subject of the JVA] and to carry up to 813 passengers", and Entertainment agreed that any permits, licences, certificates, registrations or permissions that cl 7(a) required would be taken out in Neptune's name;
- Neptune had to do all things necessary throughout its term "to ensure the vessel is 'in class', 'in survey', and to maintain any other relevant licences, certificates, registrations or permissions" (cl 7(b)); and
- Entertainment was and would remain throughout its term the ship's legal beneficial owner (cl 7(c)).

The 1 March 2016 Sydney survey

42 Under cl 3(b) of the JVA, Mr Robertson was Neptune's appointed representative to manage the affairs of the joint venture on its behalf.

43 On 1 March 2016, from about noon, Mr Robertson was onboard *Seadeck* with RINA's Australian surveyor, Anoop **Nair**, on Sydney Harbour while the ship was undergoing her final sea trial necessary for RINA to issue a survey classifying her and specifying the

maximum number of passengers she could carry. Mr Robertson was communicating with Mr Ozmen, who was in Turkey, by WhatsApp messages during that sea trial.

44 At some point during the sea trial, Mr Nair told Mr Robertson that, because of Australian fire regulations, he was only prepared to issue a survey certificate that would specify that the maximum capacity of *Seadeck* was 450 passengers. This news was like a bolt from the blue to Mr Robertson. He communicated the news first to Mr Douchkov, and later, at about 2.40 pm, Mr Robertson exchanged messages with Mr Ozmen, telling him that in order to get a greater approved passenger capacity, the ship needed work to satisfy lots of fire requirements under regulations or guidelines issued by the Australian Maritime Safety Authority (**AMSA**) and NSCV.

45 At this stage, on 1 March 2016, Mr Robertson and Neptune were placed in a position in which their own interests conflicted with its duties to, and the interests of, Kanki. However, having seen and heard him giving evidence, I am satisfied Mr Robertson did not appreciate this. The conflict was that, while a survey allowing *Seadeck* to carry 800 passengers had financial benefits for both Neptune and Kanki, it also had the consequence that, come what may, if the joint venture made any net profit less than $10 million in a season, Neptune had to pay the difference between 50% of the profit made and $5 million guaranteed to Kanki. However, if *Seadeck* were only able to be surveyed to carry 450 passengers, cl 10(n)(i) of the JVA operated to relieve it of the risk of having to meet the $5 million guarantee, and, correspondingly, Kanki would lose the benefit of receiving the guaranteed income. Because he did not appreciate the conflict, Mr Robertson encouraged Mr Ozmen, on 1 March 2016, to accept a survey for a capacity of 450 passengers, that RINA later would issue.

46 Following the sea trial, at 7.25 pm on 1 March 2016, Mr Robertson messaged with Mr Ozmen as follows (Mr Ozmen's messages are likely to have been corrupted by either his imperfect English or, more likely, an autocorrection function programmed for his more usual communications in Turkish rather than English on his mobile phone):

> *Mr Robertson*: For class no problem with capacity but for Australian survey we only meet 450 capacity fire regulation. We can accept this now and then do the work required and increase capacity later. At 450 we can still take her out 2 and 3 times in the same day.
> And will be easier to get Liquor Licence approved initially.
>
> *Mr Ozmen*: Ok Good Nexs years We make 850 capacity

Mr Robertson: Yea next year we can increase
Focus on doing good job this year and keeping police on side
So they see how we operate

Mr Ozmen: New fire plan

47 Of course, the ILGA still had to issue a liquor licence to enable *Seadeck* to trade that also specified the maximum number of passengers she could carry, and the ILGA would do so only if the ship were in class and in survey.

48 On 3 March 2016, RINA Istanbul issued an intact **stability booklet** that certified *Seadeck*'s general particulars as including "No. of Passengers: 800". The stability booklet also indicated that, on 18 November 2015, RINA Turkey Engineering Centre had approved a RINA lightship survey dated 17 October 2015 based on tests done in Indonesia immediately before the vessel sailed for Sydney.

49 On 4 March 2016, RINA issued a short term certificate of class and record of equipment that certified the maximum number of passengers for *Seadeck* was 450. The certificate of class was valid to 4 August 2016, and the record of equipment to 3 March 2017.

50 In July 2016, Mr Douchkov claimed to the ILGA that by July 2015 (i.e. the previous year), he had invested over $2.8 million and Mr Como claimed that he had invested $1.35 million.

51 As events unfolded, on 1 October 2016, RINA issued a certificate of survey and operation certifying *Seadeck* to carry a maximum 450 passengers, and on 25 October 2016, the ILGA issued a liquor licence limiting the ship to carrying that maximum number of passengers. By the time that the liquor licence finally issued, both Neptune and Kanki as well as Entertainment had received no income from the moneys each side had invested in the ship and venture over the previous two years or more, and their respective principals were in financially straightened, if not desperate, circumstances.

The parties' submissions on breach of fiduciary duty and the construction of the JVA and charterparty

52 Neptune argued that cl 7(a) of the charterparty was a warranty by Entertainment that *Seadeck* would be able to operate with 813 passengers in respect of it being both classed and surveyed to do so. It contended that cl 7(b) only required Neptune to maintain whatever the vessel's class and survey, in fact, was. It submitted that cl 7(b) did not extend to requiring

Neptune to remedy any earlier breach by Entertainment of its warranty in cl 7(a) by reason of the ship's deficient fire rating at the time that it gave that warranty on 6 January 2016. Neptune argued that a term could not be implied that any permit, licence, certificate, registration or permission the subject of cl 7(a) and (b) were to be for a legal capacity of 800 passengers, as Entertainment and Kanki had pleaded, because such an implication would be inconsistent with the express terms of cl 7(a).

53 Neptune also contended that the parties contemplated in cl 10(n)(i) of the JVA that *Seadeck* might be registered for less than 800 passengers so that it could not be said that the $5 million guarantee was a fundamental term of their dealings. Neptune submitted that in obtaining the survey and registration for 450 passengers, it did nothing to breach its contractual obligations under cl 7(b) of the charterparty. It argued that, on 2 November 2015, it had applied for a survey approving capacity of 800 passengers and liquor licence for 813 passengers. It submitted that there was no evidence to suggest that it could, or should, have done more or that, if it had, a liquor licence would have been issued for that number of passengers. Next, Neptune argued that, because Entertainment and Kanki had not alleged any breach of contract on the ground that it had failed to obtain a survey certificate or liquor licence for 800 until pleading it in 2018, they could not rely on such a failure to support termination of the JVA or charterparty under the Kanki and Entertainment notices.

54 Neptune argued that the power of a party to give a notice of termination under cl 13(a)(iii) of the JVA had to be exercised reasonably and in good faith in respect of a substantive breach of an operational provision, and not capriciously for some extraneous purpose, relying on *Burger King Corporation v Hungry Jack's Pty Limited* (2001) 69 NSWLR 558 at 571-572 [176]-[177], 573 [183]. It contended that Kanki had not alleged any breaches justifying termination. Rather, it submitted that Kanki had alleged breaches of the general obligations of the parties in cl 6 of the JVA and that the ascertainment of any breach of that character involved Kanki's subjective evaluative judgments as to the existence and nature of any breach.

55 Neptune also argued that for a breach and a valid notice of default to remedy it to fall within cl 13(a)(iii) of the JVA, the breach, in fact, had to be capable of remedy. Neptune said that its decision in mid-2017 to relocate *Seadeck* to Brisbane did not require Kanki's consent under either the JVA (in contrast to the particular matters for which cl 1(c) (which defined the business to include Australian waters), or cll 6(e), (f), 9(d), 10(a) and (b) provided), or the

charterparty, which allowed the vessel to operate worldwide. Neptune admitted that it had breached cl 6(g) of the JVA by altering the mast of *Seadeck* and, I infer, cl 1(d) of the charterparty.

56 Entertainment and Kanki argued that Neptune, through Mr Robertson, was acting in a fiduciary capacity when he was pursuing the issue of a survey certificate. They contended that, as soon as Mr Nair advised him onboard *Seadeck* on 1 March 2016 that he would only issue a survey certifying a carrying capacity of 450 passengers, Mr Robertson had a duty, because of Neptune's position as a fiduciary, to inform Mr Ozmen fully as to Neptune's and his conflicted positions. They submitted that Mr Robertson's duty on behalf of Neptune at that moment was to tell Mr Ozmen to go to someone else for advice as to the course to be taken with RINA and Mr Nair. Entertainment and Kanki relied on what Davies, Sheppard and Gummow JJ had said in *Commonwealth Bank v Smith* (1991) 42 FCR 390 at 393 to support their claim that by reason of the breach of Neptune's fiduciary duty, it should be found liable on the $5 million guarantee.

Consideration – construction

57 In *BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) (The "Seaflower")* [2001] 1 Lloyd's Rep 341 at 351 [63], Rix LJ (with whose reasons Jonathon Parker LJ agreed at 353 [80]) said:

> A statement as to a vessel's class does not involve a promise that she will remain in class throughout the charter period.

58 A vessel's class is a matter of status: *Silverburn Shipping (10M) v Ark Shipping Company LLC (the "Arctic")* [2019] EWHC 376 (Comm) at [41] per Carr J; *The Seaflower* [2001] 1 Lloyd's Rep at 351 [64].

59 The warranty in cl 7(a) operated in circumstances, known to the parties at the time that the charterparty was entered into on 6 January 2016, that *Seadeck* had not been issued with an Australian survey or certificate of class permitting her to carry 800 or 813 passengers (the difference between the two numbers is immaterial and I will refer below to 800 only for the sake of simplicity). Indeed, they knew at that time that she had no Australian issued survey or class certificate. It follows that the parties contemplated, when contracting, that any survey for Australia would have to be undertaken after they had entered into the

charterparty on execution of which Entertainment delivered possession of *Seadeck* to the demise charterers, Kanki and Neptune.

60 Thus, the charterparty transferred possession and control of the ship to the charterers in a state where she had not yet been surveyed or put in class (to carry 800 passengers), and required, as the parties knew, the charterers, who were now in possession and control of her (to the exclusion of Entertainment), to do considerable further work before she would be ready for survey and classification in Sydney to meet Australian standards.

61 Importantly, the charterparty allocated contractual responsibility to one of the charterers, namely, Neptune, to do all things necessary to ensure that the vessel was both in class and in survey throughout the term.

62 In my opinion, the parties knew at the time that they entered into the charterparty that Entertainment and Kanki either had no funds to, or would not, pay for the work the ship needed to get her into a condition (including being in class and in survey) to pursue the aim of the joint venture. As recital A to the charterparty stated, Entertainment agreed to demise *Seadeck* for the purpose of the JVA to operate a business as defined in the JVA, and on the common assumption that Neptune would be successful in obtaining a liquor licence authorising *Seadeck* to carry 800 passengers.

63 I reject Kanki's argument that there was an implied term of the charterparty derived from cl 7(a) and or (b) that any permit, licence, certificate or registration or permission referred to therein was to be for a legal capacity for the vessel of 800 passengers. In my opinion, it is not necessary to imply such a term. That is because cl 7(b) of the charterparty created an express obligation on Neptune to do all things necessary throughout the term to ensure that *Seadeck* was in class and in survey for her to carry 800 passengers.

64 When they made the charterparty and JVA on 6 January 2016, the parties also knew that further work still had to be done before the vessel could be ready to be surveyed for a certificate of survey for a new commercial vessel in class 1E for which Neptune had applied on 2 November 2015. They allocated responsibility, in cl 7(b) of the charterparty, to Neptune to have that work done to "ensure that the vessel was in class and in survey" to carry 800 passengers. The parties believed that RINA would certify *Seadeck* to carry 800 passengers until Mr Nair's "bolt from the blue" when he told Mr Robertson on 1 March 2016 that he would certify for only 450 passengers in the vessel's then condition.

65 Thus, when Mr Robertson exchanged messages with Mr Ozmen about this development on 1 March 2016, both were grappling with an unexpected development. Nonetheless, cl 7(b) of the charterparty created a contractual obligation for Neptune to do all things necessary throughout the term to ensure that *Seadeck* was in class and in survey in the sense that the parties had envisaged, in cl 7(a), would occur only after they had entered into the charter. Mr Robertson and Mr Ozmen continued to discuss a way forward over the following days on the footing that they both wanted to get an approval to use the ship commercially sooner rather than later. And, as Mr Robertson suggested to Mr Ozmen on 1 March 2016, they could do the further work needed to obtain, at a later time, a survey approving her capacity to carry 800 passengers. Mr Ozmen understood and agreed with that course on 1 March 2016, saying, "Ok Good N years We make 850 capacity" [sic]: by which I infer he intended to convey that in the next year the parties would do the work needed for a survey for 800 passengers.

66 Moreover, when they entered into the charterparty and JVA on 6 January 2016, the parties knew that the satisfaction of any conditions and classifications necessary to obtain a survey certificate were matters for third parties to decide. And, even if a survey approving *Seadeck* as having a capacity to carry 800 passengers were obtained, that did not oblige the ILGA to approve a liquor licence for that number of persons.

67 The position of the parties in being reliant on independent decisions of the surveyor and statutory regulator is a commonplace in the law of contract and the applicable principles are well established. *First*, as Stephen J with whom McTiernan J agreed, held in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 645, a party to a contract "is deemed to know the terms of his contract and the rights it confers, at all events he cannot take advantage of his own ignorance (*L'Estrange v F. Graucob Ltd* [1946] 2 KB 394 at 403, 406)"; see too *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 181-183 [46]-[49] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. *Secondly*, as Cockburn CJ said in *Stirling v Maitland* (1864) 5 B&S 840 at 852, if a party enters into a contract that "can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative".

68 I reject the argument of Entertainment and Kanki that Neptune was in breach of the second of these principles. That is because, on 1 March 2016, the parties were not in an

existing state of circumstances in which they had a survey and liquor licence authorising *Seadeck* to trade with 800 passengers. Rather, they hoped, expected and, indeed, contracted that, after 6 January 2016, Neptune would obtain such a survey and licence on behalf of the joint venture, and that, if and when it did, they would be able to operate a business that could generate net profits to support the $5 million guarantee. But, in March 2016, Neptune had not then put an end to any such state of circumstances. It and Mr Ozmen, as the controlling mind of Entertainment and Kanki, were confronted with a development that their contracts contemplated and both agreed to Mr Robertson's suggestion of a way forward that involved a temporary change of course.

69 No doubt Mr Ozmen had second thoughts and, by 17 March 2016, he was agitating for a different outcome, including a change to the contracts to provide for the new position and to reinstate the $5 million guarantee. But on 25 March 2016, Mr Robertson and he exchanged the following messages.

> *Mr Robertson*: RINA emailed me last night and I will respond to them today
>
> *Mr Ozmen*: Please chenk How much money need 800 capacity.
>
> Because 800 is not no capacity this contract is valid all the ingredients that made connecting to each other because **I talked to the lawyer contract valid as legal capacity of 800 people wanted me to know it**
> I just wanted you to know, **you can ask your own lawyer**
>
> *Mr Robertson*: Brother we did not choose the numbers. We were originally told boat would be approved for 1,200. **Our contract is binding and we are in this together**. We want increased numbers just as much as you do and will do everything we can to get it increased. **I will speak to Anoop again so we know exactly what needs to be done to increase numbers after first season**
>
> *Mr Ozmen*: **I believe You dont fourget** (Ex D/141) (bold emphasis added)

70 And there the position crystallised. The parties agreed to proceed with a survey capacity of 450 passengers for the time being, and to do what was needed to increase capacity to 800 after the first season. In other words, Mr Ozmen, on behalf of Kanki and Entertainment, waived Neptune's need to comply fully with cl 7(b) of the charterparty until the end of the first season.

71 Entertainment and Kanki did not include a ground in the Kanki or Entertainment notices that Neptune had breached either the charterparty or the JVA by not obtaining a survey or liquor licence for *Seadeck* to carry 800 passengers. Instead of relying on a breach of that nature, in this proceeding they contended that Neptune, through Mr Robertson as its

authorised representative, had acted in breach of its fiduciary duty in advising Mr Ozmen on 1 March 2016 to accept a survey with a capacity of only 450 passengers.

72 I reject that argument. Mr Robertson acted, as I find (and as Entertainment and Kanki submitted), honestly in his dealings with Mr Ozmen in March 2016 and, indeed, throughout their relationship. Both men were discussing the same subject matter as joint venturers faced with a common dilemma.

73 The sufficiency of any disclosure by a fiduciary can depend, as Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ held in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 139 [107], "on the sophistication and intelligence of the persons to whom disclosure must be made". In *Maguire v Makaronis* (1997) 188 CLR 449 at 466, Brennan CJ, Gaudron, McHugh and Gummow JJ said (citing *Smith* 42 FCR at 393, approved in *Farah* 230 CLR at 139 [107]) that there is no precise formula which will determine in all cases whether a person to whom a fiduciary duty has owned has given fully informed consent. Rather, their Honours held that this was a question of fact in all the circumstances of the case. In *Smith* 48 FCR at 392, Davies, Sheppard and Gummow JJ said that this question was whether the person had been fully informed of his rights "and of all the material facts and circumstances of the case. The circumstances of the case **may include** [as they do here] the importance of obtaining independent and skilled advice from other parties" (emphasis added).

74 Crucially, here, by 17 March 2016, Mr Ozmen had taken legal advice when he told Mr Robertson that the survey for a capacity of less than 800 passengers would deprive Kanki of the benefit of the $5 million guarantee, and that he wanted to have the JVA amended to restore it. The short term certificate of class and record of equipment issued on 4 March 2016 was not a final certification. There was nothing to preclude Neptune making another application and obtaining a greater passenger capacity for the ship.

75 Entertainment and Kanki relied on a documentary case. Mr Ozmen did not give evidence and there was no explanation for his absence. That has the consequences that, *first*, I can infer that his evidence would not have assisted their case: *Jones v Dunkel* (1959) 101 CLR 298; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 384-385 [63] per Heydon, Crennan and Bell JJ, and, *secondly*, any inference favourable to Neptune (as the opposing party) for which there is ground in the evidence "might more confidently be drawn when a person presumably able to put the true complexion on the facts relied on as the

ground for the inference has not been called as a witness by [Entertainment and Kanki] and the evidence provides no sufficient explanation of his absence": *Jones v Dunkel* 101 CLR at 308; applied in *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 412-413 [167], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

76 Mr Ozmen could have given evidence that, on 1 March 2016, he was not conscious of the $5 million guarantee, or that he had treated what Mr Robertson was saying as advice, ignorant of the now asserted benefit to Neptune, namely, that if the parties proceeded with the survey of 450 persons, it would not be burdened by the $5 million guarantee. Absent evidence from Mr Ozmen, I am not prepared to infer that he was not fully aware of those matters at all times when discussing the new developments with Mr Robertson on and after 1 March 2016. After all, the survey to be obtained from the sea trial on 1 March 2016 was essential to the further progress of the joint venture and the $5 million guarantee was self-evidently of great importance to Mr Ozmen at this time.

77 A fiduciary is under an obligation, without informed consent, not to promote the fiduciary's interests by making or pursuing a gain in circumstances in which there is "a conflict or a real or substantial possibility of conflict" between the fiduciary's personal interests or duty and those of the person to whom the duty is owed: *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165 at 199 [78] per McHugh, Gummow, Hayne and Callinan JJ. They said (at 199 [79]):

> The division in the House of Lords in *Phipps v Boardman* [[1967] 2 AC 46] respecting the application of principles to the facts in that case indicates that different minds may reach different conclusions as to the presence or absence of a real or substantial possibility of conflict between duty and interest or between duty and duty. However, in *Hospital Products*, Mason J quoted [156 CLR 41 at 104] with approval a statement by Judge Learned Hand in *Phelan v Middle States Oil Corporation* [(1955) 220 F (2d) 593 at 602-603]. That statement included the following:
>
> > **[I]f the doctrine be inexorably applied and without regard to the particular circumstances of the situation, every transaction will be condemned once it be shown that the fiduciary had such a hope or expectation, however unlikely to be realised it may be, and however trifling an inducement it will be, if it is realised**…We have found no decisions that have applied this rule inflexibly to every occasion in which the fiduciary has been shown to have had a personal interest that might in fact have conflicted with his loyalty. On the contrary in a number of situations courts have held that the rule does not apply, not only when the putative interest, though in itself strong enough to be an inducement, was too remote, but also when, though not too remote, it was too feeble an inducement to be a determining motive.

78 In the discussions with Mr Robertson on 1 March 2016 and later, I infer that Mr Ozmen knew or was fully informed (even if the presumption of law of such knowledge somehow did not apply: *cf*: *Sargent* 131 CLR at 645) that the $5 million guarantee was dependent on the obtaining of both a survey and a liquor licence authorising *Seadeck* to carry 800 passengers. In those discussions, he knew and was fully informed that he was agreeing to a delay in Neptune doing work to secure a survey for 800 passengers and that this was necessary to entitle Kanki to the benefit of the $5 million guarantee. But, in any event, by 25 March 2016, Mr Ozmen knew that Neptune was not going to agree to any change of the contracts that would reinstate or address the loss of the $5 million guarantee in light of the survey for 450 passengers. In those circumstances, he chose, fully informed as to the impact on the $5 million guarantee, to proceed with Neptune continuing to seek the grant of a liquor licence authorising *Seadeck* to trade with only 450 passengers.

79 In analogous circumstances, the Privy Council found in *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 at 8-10, that a company's board had assented, by its conduct, to its managing director holding or pursuing a venture that had come to him in the course of executing his office, because the board had full information as to the subject matter of his conflict of interest and duty. Thus, by 25 March 2016, Mr Ozmen was fully informed, even if (which I have rejected) he was not so on 1 March 2016, that with a survey for *Seadeck* to carry only 450 passengers, Kanki had lost the $5 million guarantee for the moment (or for the first season). He could have insisted, on 25 March 2016, that Neptune do the work necessary to obtain a survey for 800 passengers immediately but, instead, with full information about all material facts, he told Mr Robertson not to forget to speak to Mr Nair to find out how the joint venture might achieve a survey or classification to enable the ship to carry the higher number of passengers after the first season.

80 In those circumstances, even if contrary to my finding that Neptune, through Mr Robertson, had acted on 1 March 2016 in breach of its fiduciary duty or obligation, by 25 March 2016 Mr Ozmen, on behalf of Entertainment and Kanki, had given fully informed consent to Neptune proceeding for the first season with a survey capacity of 450 passengers.

81 In a contractual setting, in order to characterise an obligation of a party to a contract as fiduciary in nature, the person must have undertaken to act for, or on behalf of, or in the interest of, the other party in the exercise of a power or discretion which will affect the legal interests of that other party in a legal or practical sense. If the person has such a discretion or

power, he or she or it will have a duty to exercise it in the interests of the other party to whom it is owed: *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1 at 34–35 [87] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ applying what Mason J had said in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97. The court assesses, in a strict sense, whether or not to characterise the relationship as one in which the person (being the putative fiduciary) has undertaken to act for or on behalf of the other party, lest the criterion becomes circular. In explaining why that is so, French CJ, Gummow, Hayne, Heydon and Kiefel JJ relied on what the late John Lehane had written before his appointment to this Court (Lehane, "Fiduciaries in a Commercial Context" in Finn (ed), *Essays in Equity* 95 at 101, see *John Alexander's* 241 CLR at 34–36 [87]-[92]). They adopted what Mason J had said of a case where a contract provides the foundation for an actual claim of fiduciary relationship, namely (241 CLR at 36 [91] citing *Hospital Products* 156 CLR at 97):

> In these situations **it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties**. The fiduciary relationship, if it is to exist at all, **must accommodate itself to the terms of the contract** so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction. (emphasis added)

82 Importantly, cl 7(b) did not impose the obligation on Neptune to act **solely** for or on behalf of Kanki or Entertainment to ensure that it obtained a survey for 800 passengers. Rather, Neptune had a contractual obligation under cl 7(b). That contractual obligation defined what Neptune had to do. If Neptune breached cl 7(b), each of Entertainment and Kanki had a right to take proceedings against Neptune for relief based on that breach, which relief could include a claim for specific performance or damages. Moreover, the contractual allocation to Neptune of responsibility to obtain a survey of a specific kind did not solely benefit Entertainment and or Kanki. That was because, as a joint venturer, Neptune also required a valid survey for it personally to have the benefit of the charterparty and the ability to participate in the activities of the joint venture using *Seadeck*.

83 When Mr Robertson was occupied on 1 March 2016 in discussing the capacity issue with Mr Ozmen and Mr Nair, he was carrying out Neptune's contractual obligation under cl 7(b) to do all things necessary to ensure that the survey would certify that the ship had the capacity to carry 813 or 800 passengers. Neptune's contractual duty did not require it to act

as Entertainment's or Kanki's agent or fiduciary in obtaining the survey that cl 7(b) required Neptune to obtain. Rather, Neptune's contractual duty, under cl 7(b), was to do all things necessary to ensure that the vessel was in survey and in class so that she had the capacity to carry at least 800 passengers.

84 In passing on to Mr Ozmen Mr Nair's unforeshadowed view that *Seadeck* was, at that time, in a condition to carry no more than 450 passengers, Mr Robertson conveyed a fact about Neptune's likely breach of cl 7(b) (if Mr Nair did not change his mind). And, if Mr Nair did issue such a survey, as he suggested he would, Neptune would be in breach of its contractual obligation under cl 7(b). That was the legal framework in which Mr Ozmen and Mr Robertson were interacting. Namely, that Neptune would be likely to be in breach of cl 7(b) of the charterparty if Mr Nair would not certify that *Seadeck* could carry at least 800 passengers. Of course, such a breach would also have a materially adverse effect on Kanki because of its loss of the $5 million guarantee.

85 Entertainment and Kanki, however, argued that Neptune, through Mr Robertson, had a fiduciary duty to advise Mr Ozmen that Neptune could not keep acting for Entertainment and Kanki, after Mr Nair revealed his unforeshadowed view on 1 March 2016, in seeking to obtain the survey and could not discuss a way forward with Mr Ozmen, unless and until Mr Ozmen sought and obtained independent advice or gave his fully informed consent.

86 The problem with this argument is that Neptune was acting for itself and not for Entertainment or Kanki in performing Neptune's contractual obligation that cl 7(b) imposed on it.

87 Kanki and Neptune had also agreed in cl 6(b)(iii) and (d) of the JVA that each would act in the best interests of the business and in good faith in accordance with a duty of trust and would inform the other immediately of any conflict of interest. The duty to act in the best interests of the business in good faith under the JVA was not the same duty as a duty to act solely in Kanki's best interests.

88 There is no doubt that Neptune, through Mr Robertson, was acting in good faith. Both Mr Ozmen (at all times on and from 1 March 2016) and Neptune were aware (and fully informed) that a survey certifying a carrying capacity of 450 passengers would render the $5 million guarantee inoperative.

89 For the above reasons, I reject Entertainment and Kanki's argument that Neptune breached any fiduciary duty in obtaining the survey for 450 passengers.

Did Neptune breach the JVA?

90 The next issue is whether either Kanki and or Entertainment was entitled to issue the Kanki and or Entertainment notices on 11 July 2017. The determinative question for this issue is whether Neptune was in breach of the JVA on 11 July 2017. If it was and such a breach entitled Kanki to issue the Kanki notice, then if Neptune left the breaches unremedied, cl 13(b) of the JVA operated to terminate the JVA on 25 July 2017. Alternatively, Kanki claimed that it was entitled, on 25 July 2017, to treat Neptune as having evinced an intention not to be bound by the JVA and that it (Kanki) accepted that conduct as a repudiation of the JVA. There was no real dispute that if the JVA were terminated, then Entertainment could rely on its termination of the charterparty by its solicitors' letter dated 4 August 2017.

91 During the hearing, Kanki (and Entertainment) relied on each of three substantial matters as breaches of the JVA by Neptune that supported its termination either under cl 13(b) (because Neptune had not remedied them within 14 days of receiving the Kanki notice) or at common law. The three matters that Kanki alleged were that:

(1) Neptune had failed to provide Kanki with financial information as to the operation of the joint venture business, compliance with taxation obligations and the profitability of the business (**the financial information issue**);

(2) Neptune had failed to provide Kanki with information about the catering pricing and supply of food to *Seadeck* as part of the joint venture business (**the catering issue**); and

(3) between May and June 2017, Neptune had decided unilaterally to relocate, and then moved, *Seadeck* and the joint venture business to Brisbane knowing that Kanki and Entertainment did not agree to that occurring (**the relocation issue**).

92 Kanki asserted that each of those three matters was the subject of the Kanki notice.

93 Relevantly, the Kanki notice complained that Neptune had taken the sole conduct of the business since the entry into the JVA, including the day-to-day operations, financial management, relocation of *Seadeck* to Brisbane and making repairs, alterations and modifications to her. The Kanki notice required Neptune to remedy, among others, the following breaches of the JVA by:

(1) providing Kanki with copies of documents concerning the operation of the business including:

(a) financial information comprising calculations of net profit, all expenditure and outgoings (including the cost of the awning, RINA survey, generators, fit out and installation of all equipment), incurred losses, debts and liabilities;

(b) "Business Activity Statements [**BAS**] submitted to the Australian Taxation Office"; and

(c) the quality and pricing of food on the vessel,

(2) causing *Seadeck* to return from Brisbane to Sydney;

(3) rectifying (unspecified) modifications to *Seadeck* at Neptune's cost.

94 I will deal in turn with the three matters below, together with Neptune's challenges to the validity of the Kanki notice.

(a) The financial information issue

95 The only consistent return for Kanki from the joint venture was that, until July 2017, Mr Ozmen was paid, or credited in Neptune's accounts with, a full-time fortnightly wage of $10,528.84. From about December 2016, Mr Ozmen began making demands for payment of money as his (in the guise of Kanki's) share of the net profits from what, on its face, appeared to have been *Seadeck*'s success in trading.

96 The JVA required each party to nominate a firm of accountants (cl 2(b)), and cl 10 imposed an obligation on Neptune to calculate the net profit or net loss of the joint venture on both a fortnightly and annual basis. Neptune was responsible for paying Kanki its share of the joint venture net profits within one day of settlement of the fortnightly profit and loss statement, and within five days of settlement of the annual profit and loss statement.

97 Initially, Neptune nominated Peter **Konnaris** to carry out accounting for itself under the joint venture. In the period from the grant of the liquor licence on 25 October 2016 until mid-February 2016, Neptune and Mr Konnaris did not produce any fortnightly profit and loss statements or provide Kanki with any meaningful accounting reports of the joint venture's trading results other than, possibly, two confusing documents for the trading over New Year's Eve and New Year's Day.

98 Accordingly, over the period until mid-February 2017, Neptune never calculated whether the joint venture had made a fortnightly net profit or loss and Kanki did not receive

any payment of net profit as such. But, over that period, Mr Ozmen and his associates had observed that *Seadeck* was trading, and, from time to time, they appear to have attended on her during cruises, including on New Years' Eve, when they noticed or learnt of the numerous problems with the quality of service and security on the vessel, including a major issue that the bar ran out of ice by 10.30pm.

99 Since Neptune had not produced any fortnightly or other accounts to explain the financial position of the joint venture, it was not in a sound position to calculate what, if anything, was due to Kanki as net profit during this period. In response to Mr Ozmen's requests, Mr Douchkov caused or made several payments to Mr Ozmen and his associates, some consisting of cash withdrawals from Neptune's bank accounts of $20,000 a time up to late January 2017.

100 Obviously, such an *ad hoc* process of Neptune providing some financial return to Kanki without proper accounting information was bound to lead to trouble…and it did.

101 Mr Douchkov considered, in January 2017, that Mr Ozmen was being unreasonable. By then, Mr Douchkov thought that Mr Ozmen was a very difficult person who had made a good job of making his (Mr Douchkov's) life pretty well impossible and "very stressful". He claimed in evidence that "I actually felt sorry for [Mr Ozmen] because I thought he had had mental issues and I wanted to reach out" and that Mr Ozmen was "unhinged".

102 On 13 January 2017, Mr Koyunoglu, who was then a director of both Kanki and Entertainment, wrote to Messrs Douchkov, Como, Robertson and Auld, summarising a large number of concerns that Kanki and Entertainment had raised earlier about the operation of *Seadeck*. The concerns included the cleanliness of the vessel, quality of the customer service and the music, as well as concerns about security and marketing. He noted that the ship was only working about 10 hours a week, in contrast to what he said were discussions before she left Turkey that she be operated full time for 11 months per annum, and wanted to know when the operating hours would be increased. He also wrote:

> Expenditure on a number of items has been outrageous. There has been no consultation about these and no explanation as to why this is occurring have been provided despite these concerns being raised with you.

103 Mr Koyunoglu wrote that the concerns were critical to the ongoing success of *Seadeck* and that he did not understand why they were not being addressed. He said he was happy to discuss matters with the letter's addressees.

104 Mr Douchkov responded late that evening, acknowledging that Mr Koyunoglu had raised some very valid points "that I have always agreed upon and will need to be addressed". Mr Douchkov wrote that he had a great deal of respect for Mr Koyunoglu and apologised if he had not been polite in their last conversation, explaining that "I have been pushed in every direction from all parties as being one of the controllers of the accounts and accused of everything. I have lost everything to make this survive. Why would I put that at risk by being dishonest?" He said that he would "like to discuss with you the genuine situation of the company", concluding:

> As you know, this whole venture evolved from a simple, lets get the boat here and make some money, to a truly drawn out and traumatic episode for all concerned.

105 Mr Douchkov gave evasive answers in cross examination when asked about his understanding of why Mr Ozmen was asking for money at this time. Implausibly, he did not agree that this might be because the ship had not earned any money for the years 2014 to early 2016 and people in Turkey might be dependent on Mr Ozmen to earn money from the ship. He denied there was any legitimacy in Mr Ozmen's requests or demands for money. Kanki's counsel and I sought to clarify Mr Douchkov's evasive answers in the following evidence (that I do not believe):

> HIS HONOUR: But what was your understanding of Mr Ozmen's position? Did you understand him to be disappointed that the 800 passengers weren't in the survey or the license, and therefore he wouldn't be getting a guaranteed $5 million, or not?--- To be honest, it was a very confusing situation, to understand what he wanted, or what he was upset with. He was not rational about most of the things he was saying, so **I didn't perceive directly what he was actually upset about**, in any particular thing, because it was everything.
>
> MR CASTLE: You see, he was unhinged, to use your terminology, as you perceived it, because he hadn't got his expected return from the vessel when it finally started trading; that's so, isn't it? --- **I disagree**.
>
> He was beside himself with stress and concern because his vessel had been contributed to a joint venture in the hope or expectation of earning $5 million a year, and no money of that order was being paid to him; what do you say about that?---I disagree again. (emphasis added)

106 On 16 January 2017, Mr Douchkov paid $5,000 to Mr Ozmen and $7,500 to Mr Altikulacoglu, who was then Kanki's representative under cl 3(a) of the JVA.

107 On 18 January 2017, Mr Ozmen and Mr Douchkov met at a café in Double Bay. When Mr Ozmen asked for $60,000 to save his mother's house, Mr Douchkov replied there was no way he could raise such a sum. He said that $20,000 was the maximum he could give Mr Ozmen. On 18 January 2017, Mr Douchkov withdrew $20,000 in cash and gave it to Mr Ozmen or Mr Altikulacoglu. The next day, Mr Douchkov withdrew two separate amounts of $20,000 in cash and gave them to Mr Altikulacoglu.

108 On 25 January 2017, Mr Como wrote a detailed reply to Mr Koyunoglu's 13 January 2017 letter, accepting that Neptune had to take action to address many of the concerns, and explaining what it had done. Mr Como said that the vessel had traded for about 35 of the 75 days since it began operating under the liquor licence. He said it was not easy to trade for 11 months of the year because of the climate issues and the lack of weather protection for the ship. He wrote that, "We are investigating QLD licence and logistic issues to see if we have opportunities for the vessel there" and sought Kanki's assistance. Mr Como also wrote that "almost all expenditure to date had been from loan funds advanced by [Mr Douchkov] and [himself]…[and] that, despite the insistence on dividends being paid from the outset," which he asserted was contrary to the terms of the JVA, "no repayments have yet been made or even scheduled in respect of those funds". He assumed that Mr Koyunoglu's reference to outrageous expenditure was to an invoice of "A2B" that Neptune did not accept, and was negotiating, adding, "[w]e have been at pains to consult with you on all items of expenditure, in accordance with [Neptune's] obligations under the [JVA]".

109 On 27 January 2017, Mr Douchkov emailed to Messrs Ozmen, Koyunoglu and Kyle **Clarke** (an accountant acting for Kanki) an unreconciled spreadsheet of trading figures for the week ending 22 January 2017.

110 Mr Douchkov said that in about late January 2017 or on 1 or 2 February 2017 he had his last meeting with Mr Ozmen. The meeting was at Mr Douchkov's office in Double Bay. Tempers became frayed as Mr Ozmen aggressively demanded money so that he and others could go to Turkey. Mr Douchkov said that Neptune was not in a position to pay, and offered to show Mr Ozmen the accounts (which I infer meant Neptune's bank statements). Mr Douchkov said, "We don't have that money in the accounts. You've taken it all". He said that Mr Ozmen became very agitated and demanded that, "You have to give me this money

somehow." Mr Douchkov then asked Mr Auld to come into the office, and told Mr Auld that he felt a bit threatened, and that Mr Auld should explain to Mr Ozmen that Neptune really did not have the money to pay. Mr Ozmen demanded of Mr Douchkov:

> You show me your account – personal account…You show me Mel's account. You show me Short Street account. You've got money. You've been stealing money….Well, f… you, Gavin. F… your businesses. I will f… your businesses for you and I will f… everything.

111 At this point Mr Ozmen had moved so close to Mr Douchkov that the men's faces were about 15 centimetres (or 6 inches) apart. Mr Douchkov told Mr Ozmen that he should not behave like that, and Mr Ozmen retorted that he did not like the way Mr Douchkov was running the business.

112 It is apparent from what I have set out that Neptune was in breach of its obligation to provide fortnightly profit and loss statements under cl 10(c) of the JVA. That breach (which by then had persisted for 3 months) caused disputes about what, if anything, Kanki was entitled to receive in light of the significant amounts in gross income that Neptune had earned through the trading under the liquor licence for *Seadeck* over the 13 weeks between 1 November 2016 and 31 January 2017. No doubt Mr Douchkov was reluctant to pay Mr Ozmen more and more on demand, as it were. But Kanki had a genuine reason to dispute what Neptune was doing, namely, obtaining, and controlling the disposition of, the income while breaching its obligation to provide basic financial information so that its joint venture partner could have any understanding of the operation and profitability of the business.

113 Accordingly, I find that by late January 2017 there was a significant, serious and ongoing breach by Neptune of its obligations under cl 10(c) of the JVA.

114 Neptune's argument that Kanki contrived disputes about the joint venture's accounting position is specious. Neptune no doubt felt that it had to pay something to Kanki, or Mr Ozmen as its principal, when it could not, and did not, do what the JVA required, namely, prepare in a timely way fortnightly profit and loss statements. Neptune's persistent series of breaches of cl 10(c) explained why, at this stage, Neptune made *ad hoc* payments to Mr Ozmen and his associates.

115 On 2 February 2017, Neptune paid $15,700 to Mr Ozmen. That occurred after Mr Douchkov emailed Mr Ozmen and Mr Ozer setting out a "pure estimate, not a P&L" for 26,

28 and 29 January 2019. The email noted that, after deducting a $40,000 "advance" to Mr Ozmen, Kanki's share of that estimate was $15,726, being reflected in the contemporaneous payment of $15,700. Mr Douchkov wrote that, previously, Mr Ozmen had promised that he would not take any money from the business for the fortnight ended 27 January 2017, but had broken his word, and was demanding more and more money. Mr Douchkov remonstrated against this conduct, writing "the business can't support this". He recounted threats to the business from Neptune's suppliers of champagne and generators over unpaid accounts.

116 Also on 2 February 2017, Mr Douchkov emailed a letter to Mr Altikulacoglu, Mr Koyunoglu and Kaan **Ozer**, another of Mr Ozmen's associates (**the 2 February letter**). The letter reflected legal and accounting advice that Mr Douchkov had received about Neptune's position. It referred to the requirement in cl 7 of the JVA that the parties ensure the joint venture have enough working capital to conduct the business at all times. The letter noted that the JVA did not require the parties to provide working capital. It asserted that while the exact amounts were still being calculated, Mr Douchkov had contributed $3,161,559 and Mr Como, $1,904,989, and they had borrowed short-term loans for three years with interest at 12%. The letter said there were no existing arrangements under the JVA for repayment of those sums, and then set out cll 9(c), (d) and (e) of the JVA (that dealt with the shared costs).

117 The 2 February letter also asserted that the lack of arrangements for repayment of those asserted costs had "become an unreasonable financial burden" on Neptune, Mr Douchkov and Mr Como. It continued:

> As a result of the considerable pressure brought to bear by Mert Ozmen directly, the calculation of Net Profits pursuant to Clause 10 of the JVA has not accounted for repayments in accordance with Clause 9. While Neptune has accepted this to date, it can no longer do so. Accordingly, the calculation of net profits will henceforth be made strictly in accordance with clauses 9 & 10 of the JVA.

118 The 2 February letter also explained that this meant that the fortnightly profit calculation under cl 10(c) would take into account repayments under cl 9. It said that any future payment of net profit share would only be made to Kanki against a valid tax invoice, and not to Mr Ozmen, and that Kanki needed to obtain an **ABN** (Australian Business Number) and register for GST. Of course, to this point, Neptune had not provided any fortnightly calculation of net profit under cl 10(c).

119 Next, on 14 February 2017, Mr Konnaris wrote a "report to affairs" for Neptune, trading as *Seadeck* (**the Konnaris report**).

120 On 16 February 2017, Mr Douchkov emailed the Konnaris report to Messrs Ozer, Koyunoglu, Clarke and Altikulacoglu, together with Neptune's balance sheet, a monthly report for January 2017, and a report for New Year's Eve and New Year's Day. The Konnaris report contained asserted profit and loss statements for two periods: *viz*: the 7 months 1 July 2016 to 31 January 2017, and corresponding figures for the 3 months 1 November 2016 to 31 January 2017.

121 The January 2017 monthly profit and loss statement attached to Mr Douchkov's 16 February 2017 email recorded that sales of food generated $69,706.31, while the catering costs were $118,065.61. The Konnaris report recorded statements that:

- the figures in it were not true reflections of normal trading conditions;
- Mr Ozmen had been paid more than $280,000;
- Messrs Douchkov and Como had borrowed over $5 million at 12% repayable over three years that the business had to repay monthly in the amounts of $105,009 and $63,273 respectively (totalling $168,282); and
- no more payments would be made to Kanki until Messrs Douchkov's and Como's loans had been repaid within those loans' three year terms.

122 The Konnaris report also showed, in the seven months and three months columns, entries that appeared below the operating profit line under the heading "Paying Off Old Debts". Those entries suggested payments, including interest, to Messrs Douchkov and Como of $606,699, and $295,356 for the seven and three month periods, respectively. The bottom lines for those columns after the "Paying Off Old Debts" entries recorded, respectively, a resulting net loss for the seven months of $115,962, and a net profit for the last three months of $457,180. The operating profit entries above those calculations recorded net profits of $190,737 for the seven months and $452,536 for the three months.

123 The three month figures showed total catering expenses of about $344,850 while sales of food generated $192,235, from total revenue of about $2.2 million. The total catering expenses represented about 15.76% of total revenue, in stark contrast with the 3.38% for expenses for cost of goods sold for food in the projections annexed to the JVA.

124 In my opinion, the 2 February letter and the Konnaris report reflected that, by then, Mr Douchkov and Mr Como had come to realise that the limit of 450, rather than the planned 800, passengers, had had a profound effect on their (and Neptune's) financial positions and the ability to recoup their investment. Mr Douchkov accepted in evidence that there were "no guarantees in business. It's always a risk involved" and that where very considerable returns are held out, they come with, what he said were, "potentially" very significant risks. In his experience as a property developer, if one went into a project with a plan to develop a particular number of home units and received development approval for only half, that "changes the bottom line of the project" very considerably. He gave the following evidence:

> Once the vessel was rated for 450 people – not 800 people – the financial returns that were available from this vessel evaporated as far as you were concerned?---No, not at all. **I thought we could still make a successful business out of it.** And we have.
>
> …when you say a successful business, do you mean a successful business in terms of its appeal to the public and its patronage?---**No, I would say that its ability to make a profit is pretty obvious**.
>
> But not a profit anywhere near the sort of numbers that were being projected back in December 2015 by Mr Robertson?---**Of course**. (emphasis added)

125 The 2 February letter and the Konnaris report sought to characterise the pre-JVA investments by Messrs Douchkov and Como, that they claimed had exceeded $5 million, as loans or costs that both Neptune and Kanki had to share under the rubric of shared costs under cl 9 of the JVA or in some other way. That characterisation was new so far, at least, as Kanki was concerned.

126 When the parties entered into the JVA, they expected that *Seadeck* would trade at the capacity of 800 passengers and would generate net profits exceeding $10 million per annum as the projections annexed to the JVA and the $5 million guaranteed reflected. Such a level of profit over the six year initial term and option periods would have enabled Mr Douchkov and Mr Como to recoup the moneys that they had invested, to the extent they were not a part of the shared costs, from Neptune's anticipated yearly share of net profit of at least $5 million. As Mr Douchkov said in his statutory declaration made on 28 September 2016 for the ILGA, with a capacity of 800, those projections showed that "it was commercially highly feasible and realistic to expect an annual profit of $10 million".

127 But the reality must have dawned on Mr Douchkov and Mr Como by early February 2017 that *Seadeck* was not producing, and could not be expected to produce in the future,

sufficient net profit to service or repay what borrowings or investments they had failed to agree with Kanki would be included as part of the shared costs when negotiating the JVA. Before signing the JVA they knew the size of their investments to date. And, if what they each told the ILGA in their statutory declarations of 24 July 2016 was correct, as at July 2015, Mr Douchkov had invested or borrowed over $2.8 million, and Mr Como $1.35 million.

128 Mr Douchkov said in his statutory declaration of 28 September 2016 that, on a plain reading of the JVA, "it is clear that the promise to pay the owners a minimum $5 million profit **does not now apply**, because the underlying precondition (namely a legal capacity of 800) **will not be met**" (emphasis added) and that "Kanki's entitlement will be to receive 50% of the profits of the enterprise (whatever they might be)". He also said the vessel's owners "took advantage" of their negotiating position in October 2015 "to bring about a situation where they would only be liable for half of the additional costs of bringing the Seadeck to Australia, **rather than reimbursing us for all of those costs**" (emphasis added).

129 Mr Douchkov said in cross-examination that about 10% of the $5 million (or about $500,000), for which Neptune, he and Mr Como claimed reimbursement from the joint venture's revenues, had been incurred in the period after July 2015. However, under the JVA, Neptune was only entitled to reimbursement of half of the shared costs in schedule 1 being, as at 22 October 2015, about $470,000, together with expenses such as half of the subsequently incurred mooring fees. Yet the 2 February letter and the Konnaris report sought to inflate the shared costs to over $5 million and require that these much greater sums be reimbursed to Neptune (or Messrs Douchkov and Como) out of the joint venture's revenue.

130 I am of opinion that this asserted claim had and has no justification. Further, Neptune's subsequent accounting manipulations to enforce it, that appear to have occurred after the date of the Kanki notice, by Neptune deducting substantial sums in the fortnightly profit and loss statements for depreciation and amortisation, amounted to a breach of its obligation to prepare accounting documents in accordance with cl 10(c) and (l) of the JVA. Thus, while Neptune was asserting such a claim before the Kanki notice, it did not act in breach of the JVA by enforcing it until after the Kanki notice.

131 The parties had negotiated over what expenditures made before 22 October 2015, by Neptune, or on its behalf by Messrs Douchkov and Como were to be paid out of the joint venture as the shared costs. In his statutory declaration, 4 July 2016, Mr Robertson said that

he was "particularly concerned to hold the meeting [of 23 October 2015] because Neptune had spent a very large sum of money in getting the Seadeck to Sydney but we still had no binding agreement to lease her". He said that at the meeting "we outlined generally the amount of those costs to the Seadeck's owners". In the statutory declaration he then set out and quantified each of the items comprising the shared costs and the hire premium in the amounts at which they were quantified in schedule 1 of the JVA, adding, "in addition, there were other costs" consistently with what he had written in his 27 October 2015 email to the solicitors for Entertainment and Kanki.

132 There is no suggestion in the evidence about the pre-contractual context that the shared costs were agreed at about only 20% of the amount that Neptune was then asserting that it could claim. Instead, cl 16 of the JVA recorded that the JVA was the entire agreement and understanding of the parties and excluded any prior arrangement from having any force or effect. Of course, cl 10(k) and the express terms of schedule 1 to the JVA contemplated that the *values* (but not the subject matters) of the shared costs were capable of being increased, but only with Kanki's approval under cl 10(k). Kanki did not give any such approval, and Neptune did not specify to Kanki what it claimed as further shared costs at any time prior to its solicitors' letter, dated 22 November 2017.

133 By two letters, dated 16 February 2017, Kanki appointed Mr Clarke as its accountant under cl 2(b), and Mr Ozer as its representative under cl 3(a) of the JVA, and gave Neptune notice under cl 10(d) that Kanki did not accept the net profit calculations in the Konnaris report or the document that Mr Douchkov had sent with his email earlier on 16 February 2017.

134 On 21 February 2017, Messrs Como, Douchkov, Ozer, Konnaris and Clarke attended a meeting at Double Bay. The minutes of the meeting recorded that Mr Clarke made numerous requests and comments about Neptune's presentation of accounting information. Importantly, Mr Clarke reiterated that Neptune had an obligation to provide fortnightly profit and loss reports under the JVA, and this would enable each of the parties to access its share of net profits. He said that he had applied for an ABN for Kanki, and for it to be registered for GST. I infer that this occurred and there is no evidence that it did not.

135 The minutes also recorded that Mr Konnaris said that fortnightly and annual profit sharing "will create many problems and disputes". Mr Clarke said there was no agreement that entitled Neptune's directors to receive the interest charged and it should not be claimed.

He reiterated that fortnightly reports were required. He also asked that a joint venture bank account be opened, to which both parties were signatories. The minutes recorded that Mr Douchkov said that he and his partners had had to provide capital at considerable cost to ensure *Seadeck* was put in a serviceable condition because it had not been delivered in the agreed condition. Mr Clarke said (correctly, in my opinion) that those costs were not covered by the JVA, and were the sole responsibility of Neptune. Mr Douchkov signed the minutes as chairman.

136 On 22 February 2017, Mr Clarke emailed Messrs Como, Douchkov, Konnaris and Robertson, thanking them for their time at the meeting. He said that, as discussed, his accounting firm would be conducting a review and audit of the joint venture accounts, and requested numerous documents, including, relevantly, copies of any agreements entered into on behalf of the joint venture, and copies of all BAS and tax returns lodged to date, as well as access to Neptune's **Xero** accounting system. Soon after that email Mr Clarke was given read only access to the Xero information.

137 On 23 February 2017, Mr Clarke emailed Neptune's directors and reiterated that JVA required fortnightly accounts, and that Kanki would be requesting its 50% share of net profits for each fortnight. Moreover, he stated that Kanki did not accept the figures so far provided.

138 On 1 March 2017, Mr Clarke emailed Mr Douchkov and asked, "what the deal is with the food on the boat?"

139 On 6 March 2017, Mr Clarke emailed Mr Douchkov, Como and Robertson, reminding them of Kanki's requests for financial information made on 22 February 2017. He stated that Neptune had not complied fully with those requests, and, in particular, in respect of providing bank statements, supplier invoices and other source documents. He emphasised that in order to prevent Kanki referring the dispute to mediation (under cl 12 of the JVA) Neptune had to provide the outstanding documents within 48 hours.

140 Mr Douchkov replied about an hour later, advising Mr Clarke that Neptune had more information, which would be available later that day. He asked Mr Clarke to understand that Neptune was extremely time pressed, and that, while they were collecting documents for Kanki, it would take a little more time to put them together.

141 Mr Douchkov said in evidence that, as he understood it from about this time, issues about accounting documentation became an ongoing dialogue between Mr Clarke and Terry **Borella**, who, I find, had taken Mr Konnaris' place as Neptune's accountant.

142 On 14 March 2017, Mr Clarke wrote to both Kanki and Neptune, offering that his firm provide bookkeeping and accounting services for the joint venture. The letter referred to a discussion at the previous week's joint venture meeting, at which there was criticism of the shortcomings of Neptune's accounting and its (asserted) failure to provide the joint venture "with any meaningful information", in breach of the JVA. The offer was not accepted.

143 On about 14 March 2017, Mr Borella met with and, I find, was retained by Neptune. Mr Borella had claimed that he understood that both parties retained him and that after meeting with Mr Clarke on 16 March 2017 Mr Borella said that, "so far as I was concerned, I was involved as the joint venture accountant". He gave evidence that he had continued to hold that role thenceforth, even when he was giving evidence. However, Mr Borella gave no evidence that at the meeting with Mr Clarke on 16 March 2017, or on any other occasion, Mr Clarke or anyone on behalf of Kanki said or did anything to indicate that Kanki was retaining him or agreeing to his retainer to act for the joint venture. I will explain below why I have rejected Mr Borella's assertions that he was somehow the "independent" accountant for the joint venture. I should add that senior counsel for Neptune accepted in final address that Mr Borella had acted only as Neptune's accountant at all times.

144 By 16 March 2017, Mr Borella had engaged Dave **Gorter** to do the bookkeeping for Neptune. Mr Borella instructed Mr Gorter to create three separate ledgers, one for the joint venture itself, and one for each of Neptune and Kanki. He told Mr Gorter the principal reason for this was that, in accordance with the JVA, Neptune had "incurred/funded a significant layer of costs in relation to the JV operation (primarily in the nature of quasi-establishment costs)", with Kanki liable to pay Neptune a half share, with interest, of those costs over 36 months. Mr Borella wrote that he had spoken to Mr Douchkov about the need for the joint venture to provide in its books for depreciation and amortisation of those costs.

145 In his email of 23 March 2017 to Mr Clarke, which attached his email to Mr Gorter of 16 March 2017, Mr Borella referred to the past experience of "under scoping" of the accounting framework of the business and the joint venture (being, I find, a reference to Mr Konnaris and his earlier work). He wrote that "[t]he Neptune Hospitality people are well aware that this issue **has been the source of justifiable concern on the part of your client**"

(emphasis added). He then described Kanki as being involved in a role that was more of being passive, rather than active, in the joint venture. He then wrote:

> The **Neptune** Hospitality people have clearly sought to demonstrably address the concerns of your client in this regard by **the appointment of my firm as the accountants to the Joint Venture**. (emphasis added)

146 He also wrote that when his role in making accounting decisions as to the treatment of any items, "I act for the interests of both Joint Venture participants".

147 However, Mr Borella agreed in cross examination that (quite apart from what he asserted that he did as "joint venture accountant") at all times he had acted for, and knew that, he was retained by Neptune, yet he denied that he had any conflict of interest. He said that he never told Mr Clarke that he acted for Neptune, and Kanki never appointed him to act for the joint venture, or was involved in a decision to do so.

148 On 27 March 2017, Mr Borella emailed Mr Clarke and others. He wrote that he anticipated getting "on top of the profits reporting" within the immediate future.

149 On 3 April 2017, Mr Clarke sent an email to Neptune's directors and Mr Borella complaining of the lack of any payments to Kanki or information and inquiring whether there were monthly BAS (or instalment activity statements) in respect of significant statutory liabilities namely, superannuation, PAYG and GST.

150 Late on 4 April 2017, Mr Clarke sent a follow-up email that stated that Kanki was "deadly [sic] concerned over the management of the Joint Venture. We have sent numerous emails regarding the business, its accounts, allocation of expenses and the state of affairs. To date we have not had any response from you". He wrote that fortnightly profit and loss statements should be provided within five days of the end of the fortnight, but that the one then due had not been received.

151 On 4 April 2017, at night, Mr Borella replied advising that it was common ground that the previous accountants did not appropriately "grasp" the requirements of the JVA. He pointed out, among other matters, that Kanki was "required, in accordance with the [JVA], to progressively make good to [Neptune] over specified period of time, a designated share of such expenditures", being, "matters [sic] for the [JVA] that have been wholly funded by [Neptune]". His email asserted that while Kanki could ask questions, the mere fact that there was "an as yet unexplained debit entry on what is effectively the proprietor account of your

client with the Joint Venture does not, of itself, manifest itself in an immediate contention that your client has been short-changed funds to which they would have otherwise been due…". The email also evaded providing any substantive answers to Mr Clarke's questions, including when the fortnightly profit and loss statements, then overdue, would be provided or how Neptune had dealt with the statutory obligations in respect of GST and PAYG.

152 I observed Mr Borella giving evidence over more than two days. He was loquacious by nature and he was evasive in cross-examination, just as, I find, he was in his dealings with Kanki and Mr Clarke. I had to direct him on a number of occasions to answer questions that he was evading answering directly. I found it difficult to assess whether Mr Borella was wilfully or otherwise blind in his denials of being in a position of conflict. Three instances of this stood out: *first*, his recognition, around the time of the inception of his retainer, that he could not give Neptune's BAS documents to Mr Clarke in response to the latter's request on 3 April 2017; *secondly*, his failure to provide any information about the GST position to Kanki until October 2017, despite Mr Clarke's numerous requests; and, *thirdly*, his decision not ever to render an account to Neptune for the considerable work he had done over two years on its behalf, while he rendered significant accounts, for which he received payment, to Neptune to pay as joint venture expenses, which Mr Douchkov authorised and paid.

153 When cross-examined about his failure to respond to Mr Clarke's request for, among other matters, information concerning taxation liabilities in his 3 April 2017 email, by providing the BAS documents, Mr Borella said that although Mr Clarke could look at the entries in the Xero accounting system:

> Well, I think the limitation on his position is that he – he didn't have access to the Business Activity Statements that were lodged on behalf of Neptune.
>
> Well, why didn't you provide them to him?---Because **I reasoned that is discrete to Neptune**. You see if, for example, it had been possible, which I believe it is not, for the joint venture to have its own ABN and its ability to file its own Business Activity Statement, of course that would have been provided to him immediately. **But the issue here is that the obligations really arose on the – on the part of Neptune and I didn't think it was appropriate because I did act for Neptune and I also acted for the joint venture.** I didn't think it was appropriate that I gave details of a client's integrated client account from the Tax Office and the – and the relevant filings, which would incorporate some of their own activity to another party. **I believe that's a breach of my professional obligations**. (emphasis added)

154 Mr Borella had no conception (as his evidence above demonstrated) that if, as he incorrectly thought, he was acting on behalf of the joint venture for both Neptune and Kanki,

he would have been in a position of having conflicting duties to each of them. However, in his evidence, Mr Borella was unshakable in his belief that he was acting for both Neptune and Kanki while also separately retained by Neptune, and was not in a position in which his duties to Neptune and to the joint venturers conflicted, or might possibly conflict, or that if he were to act on behalf of both joint venturers, he needed to make any, let alone a full and frank, disclosure of the conflict to Kanki and receive its fully informed consent to his doing so.

155 After the receivers' appointment on 26 September 2018, Mr Borella caused Mr Douchkov to authorise, as joint venture expenses, invoices that he had rendered for his services. Mr Borella then submitted those invoices to the receivers and he received payments from them in December 2018 of $36,600; January 2019, $54,900; and February 2019, $24,152. Mr Borella said that the payments related to work done prior to the appointment of the receivers. Mr Borella never sought Kanki's authority to incur the liabilities involved in those invoices or to cause the joint venture's money to be used to pay his invoices. The receivers' February 2019 report described Mr Borella as "the accountant appointed under the Joint Venture Agreement terms", a description consistent with what Mr Borella used in evidence to describe himself (and, I infer, that he gave to the receivers). That description was misleading, since I have found that he was Neptune's accountant and was never acting or authorised to act for Kanki and Neptune together.

156 Mr Borella said that he sent his invoices to Mr Douchkov who approved them for payment. Normally, Mr Borella charged $1,500 per fortnight to oversee the preparation of fortnightly profit and loss statements and billed separately for other work. He said that he tried to issue invoices for his accounting services once a month and had "only ever issued invoices to the joint venture because I have not endeavoured to do any invoices for work that we've carried out for Neptune". He denied that he had included in the joint venture invoices fees for work he had done for Neptune. He said:

> I've done work for Neptune and it's all on a separate billing system, and **at this point in time, I have elected not to charge for it**. (emphasis added)

157 This conduct, again, suggested that Mr Borella was treating Neptune differently to Kanki as the other party to the joint venture, in circumstances where he knew that Neptune controlled the joint venture accounts and was the source of a regular cash flow for his remuneration.

158 On Saturday, 8 April 2017, Mr Clarke sent an email to Messrs Douchkov, Como, Robertson and Borella, headed, "Material Breach of the Joint Venture Agreement". The email referred to Neptune's obligation under cl 10(c) of the JVA and its failure to provide a net profit calculation for the previous fortnight. The email stated this was not the first time that Neptune had not complied with cl 10(c). Mr Clarke said that Kanki had no option but to engage lawyers and prepare a formal notice of breach. Indeed, at that time, Neptune had never provided a fortnightly profit and loss statement under cl 10(c), and the last financial information as to the trading performance of the joint venture that it had provided to Kanki had occurred on 16 February 2017, when Mr Douchkov provided Kanki with the Konnaris report and associated documents. Neptune had not (and has never subsequently) provided any profit and loss statements to Kanki for any of the trading during February and before 15 March 2017.

159 Late on 9 April 2017, Mr Borella replied to Mr Clarke's email of 8 April 2017, saying he had been discussing aspects of the joint venture at length over the weekend with Mr Auld, "with a view to generating the first fortnightly net profit calculation" and anticipated having a first draft ready the following morning, so that Kanki would receive the statement on the Tuesday (11 April 2017). He foreshadowed that the statement would include "an applicable amount of depreciation and interest if applicable [sic]". He also asserted again that he acted for both joint venturers.

160 On 11 April 2017, Mr Gorter emailed to, among others, Mr Clarke, a profit and loss statement for the fortnight ended 28 March 2017. The document also incorporated in a parallel column incomplete figures (that Mr Gorter said were not yet accurate) for the fortnight ended 14 March 2017. As I will explain in more detail in dealing with the catering issue below, soon after this Mr Borella and Mr Clarke engaged in an exchange of emails about why the joint venture was losing money on catering.

161 On 13 April 2017, Mr Borella replied to an email from Mr Clarke, querying matters in the profit and loss statement for the fortnight ended 28 March 2017, saying that he had dealt partly with catering costs in an email the previous day. However, Mr Borella asserted that while he was "welcoming of your questions", he thought "it incumbent upon you to indicate the basis upon which those concerns are founded".

162 On 13 April 2017, Mr Clarke did so when he emailed a response to Mr Borella, saying:

> We are struggling to understand how food can be running at break even and/or a loss. Our understanding is the catering contract (to [sic] **which we have never seen**) is the JV is entitled to 50% of the profit. (emphasis added)

163 Mr Clarke inquired whether Mr Borella had seen the catering agreement. He noted that Mr Douchkov was a director and shareholder of the catering company, **Short St** Kitchen Catering and Events Pty Ltd and asserted this was a conflict of interest that breached the JVA. The email led to Mr Borella's response on 13 April 2017 that he agreed that the joint venture should be making a 50% gross profit for catering and that he would do "a bit more digging for you" (see [198] below).

164 On 1 May 2017, Mr Clarke emailed, among others, Messrs Douchkov, Como, Robertson, Gorter and Borella, suggesting they hold a regular meeting "to go through the numbers, start planning for the future etc". He also noted that the profit and loss statements were issued on Tuesdays and, in order to allow some time for questions, he wrote that he was open to when such meetings ought to occur. Mr Borella gave evidence that a meeting occurred around the time of this email involving Mr Clarke, but that Neptune, whilst acknowledging that Mr Clarke was Kanki's accountant, considered that Mr Clarke was not Kanki's authorised representative under the JVA.

165 On 15 May 2017, Mr Ozmen wrote to Mr Auld in connection with Neptune's decision to relocate *Seadeck* to Brisbane (that I discuss further below when dealing with the relocation issue: see [214] below) noting that Mr Clarke had been asking Neptune to meet with Kanki "but your group has not answered". And, on 16 May 2017, Mr Clarke emailed Messrs Como, Douchkov, Robertson, Gorter and Borella (and copying in Messrs Ozmen and Koyunoglu) saying "[t]his is now our third request for a meeting with you to discuss the business". Mr Borella said (and I accept) that no regular meetings occurred after 1 May 2017 that he had attended. I infer that there were no regular meetings of the joint venturers after 1 May 2017.

166 On 1 June 2017, Kanki gave notice to Neptune that it had appointed Mr Clarke and his firm as its authorised representative under cl 3(a) of the JVA. Also on 1 June 2017, Mr Clarke asked Mr Borella to provide him with copies of the BAS statements for the 2016/17 year. Mr Clarke had first asked for BAS statements on 3 April 2017 (see [149] above).

167 Mr Clarke followed this request up with Mr Gorter and Mr Borella on 14 June 2017, asking whether (the lack of response was because) the BAS for prior periods were not correct or had not been completed. Soon after, on 14 June 2017, Mr Borella replied to Mr Clarke,

saying that he had been "reluctant to submit BAS returns until such time as we were confident that there was an appropriate balancing of them with the system". In cross-examination, Mr Borella acknowledged that he had not given Mr Clarke any BAS statements to this point. Mr Borella also wrote that he was then concentrating on completing comprehensive financial statements for the joint venture up to 30 April 2017 for the primary purpose of securing funding for the joint venture going forward (which he had noted at the last meeting). Mr Borella wrote that the statements he was compiling were "an amalgam of the respective financial positions of the two parties to the Joint Venture" and would show that Kanki had "overdrawn" its account and was "indebted to [Neptune] for contributions to working capital".

168 Mr Borella gave evidence that he prepared 10 month financial statements to 30 April 2017 for Neptune as it was seeking some finance. Those statements, which were unsigned, recorded the joint venture had a total comprehensive net income of $323,721 for the 10 months, and a corresponding net loss of $236,006 for the financial year ended 30 June 2016. The statement of financial position recorded intangible assets of $1.88 million in both periods comprising (as note 1(k) explained) "*Seadeck* commissioning and procurement costs" and property, plant and equipment as $1,844,815 for 2016 and $1,733,344 for the ten months to 30 April 2017, the difference being the reductions caused by accumulated depreciation. The vessel's fitout ("at cost") was recorded as $1,225,844 for the 10 month period. In the 10 month trading profit and loss account, food sales were recorded as $446,330 with the cost of catering as $486,463, or a loss of $40,133.

169 Mr Borella gave evidence that he and Mr Gorter had done some "digging" about the catering costs, as he had written they would in his email of 13 April 2017, "but we didn't report it to Mr Clarke" (see [163] above). Mr Borella denied this was because he had a conflict between his duties owed to Neptune and those owed to Kanki. I find that Mr Borella did not report whatever he found out about the catering costs because he was acting as Neptune's accountant and could not make any such report without its authority, which I find was never given. Nor did he give any evidence about what the "digging" may have revealed.

170 Although this post-dated the events leading to late July 2017, I am fortified in my assessment that Neptune and Mr Borella did not give Kanki adequate or full information about the operation of the joint venture and its financial performance in accordance with Neptune's obligations under cll 6 and 10 of the JVA by the conclusion of the referee,

Christian **Sprowles**, whom Burley J appointed on 19 December 2017. Mr Sprowles had to inquire into and report to the Court by 30 January 2018 on all disputes between Kanki and Neptune about the operating profit of the business for each fortnightly period from 26 September 2017 to 19 December 2017. Mr Sprowles found in his report that "many of the disputed line items could have been resolved by [Neptune] providing documents to substantiate the P&L Statements prior to the Court Order on 19 December 2017". He apportioned 80% of the liability to pay his costs to Neptune. He found (and I agree) that:

> should [Kanki] have received supporting documentation for many of the disputed line items, [Kanki] may have been in a better position to be more amenable to accepting the methodology of accounting treatment used, and the profit reported on a fortnightly basis. **The lack of transparency regarding operating expenses is evident in the email correspondence** attached to the Dispute Notification" (emphasis added).

171 On 11 July 2017, Mark **Sheller** of Kanki's solicitors, **Holman Webb**, sent the Kanki notice, as a letter, to Neptune. That gave Neptune notice under cl 13(a)(iii) to remedy breaches of the JVA (see [90]-[93] above). The Kanki notice asserted that Neptune had conducted the business at a loss. It required Neptune to provide Kanki with copies of all financial documents, including BAS submitted to the Australian Taxation Office, and documents as to the quality and pricing of the beverages and food served on *Seadeck* (*cf.* cl 6(e) of the JVA). I will discuss the Kanki notice in more detail in dealing with the termination issue below.

172 On 14 July 2017, Mr Leather, then a partner at **Omniwealth** Legal, replied on behalf of Neptune. Neptune denied, in that letter, all of the breaches alleged in the Kanki notice and, in particular, Omniwealth wrote that:

> **It is completely false that the business had been operated at a loss**…**All financial information pertaining to the Business has been and remains available to your client [and] [a]ll quality and pricing information related to food and beverage service has also always been available to your client**. The relevant obligation is to keep your client reasonably informed. Our client has done so. (emphasis added)

173 I find that, as at 14 July 2017, Neptune knew that the assertions just quoted from Omniwealth's letter of 14 July 2017 in relation to the provision to Kanki of "all financial information", such as BAS lodged with the Australian Taxation Office and the position with the quality and pricing of food served on *Seadeck*, were false (I do not suggest, and there is no evidence, that Mr Leather or Omniwealth had any such knowledge, or were doing

anything other than honestly conveying the instructions that Neptune had given). The falsity of Omniwealth's instructions appeared from the following.

174 *First*, the fortnightly Xero based summary of profit and loss statements for the 100 week period 1 March 2017 to 29 January 2019 that are in evidence show that, other than a net profit of $9,042.25 for the fortnight 15 to 28 March 2017, the joint venture recorded, in the Xero system, a net loss in every fortnight between 1 to 14 March 2017 and 5 to 18 July 2017. The quanta of the net losses varied between about $10,000 and $60,000 and totalled $372,042.82. If the fortnightly wages paid or payable to Mr Ozmen, of $10,528.84, are excluded for the whole of this period and the one fortnightly profit is included, the overall net loss between 1 March 2017 and 18 July 2017 was $228,412.18. As I have mentioned, Neptune has never produced separate accounts for February 2017. The upshot is that the business was trading consistently at a loss since at least March 2017, albeit it had been profitable for a period beforehand. *Secondly*, Neptune's integrated client account with the Australian Taxation Office, as at 14 September 2017, showed that on 16 December 2016, 31 January 2017 and 27 February 2017, Neptune lodged self-assessments which, I infer, were monthly BAS, respectively, for the months November 2016, December 2016 and January 2017, that had generated debit entries in that account. The integrated client account subsequently had no record of BAS or similar lodgments for GST. A notice which the Australian Taxation Office gave to Neptune on 17 August 2017 at Mr Borella's address, stated that Neptune's BAS returns remained overdue "…despite our attempts to assist you to lodge".

175 Therefore, as Mr Borella's evidence also confirmed, Neptune only had lodged three BAS relating to the affairs of the joint venture prior to the Kanki notice, even if they also included other matters that solely concerned Neptune. But Neptune never provided or made available to Kanki any BAS that it had lodged in respect of the joint venture and did not inform Kanki of its failure to lodge any BAS for the months after January 2017. The 17 August 2017 Australian Taxation Office notice warned Neptune that it had to lodge the outstanding BAS immediately to avoid penalties and audit. Mr Borella knew that Neptune had not lodged BAS for some time. He also knew that Neptune had access to the funds that ought to have been used to pay GST while it remained in default of lodging BAS and paying the GST due, whether directly to the Australian Taxation Office or to Kanki (or account to it) for any share of GST due by Kanki that Neptune asserted was owing by it so that Kanki could

pay that GST. He said that he had refrained from preparing and lodging BAS for Neptune "until such time as we did the relevant calculations".

176 And, of course, as Neptune's agent or even, in his misguided view, the joint venture accountant, he gave none of this information to Kanki despite Kanki's and Mr Clarke's continuing requests. He gave this evidence:

> Did you do this because you felt it was in Neptune's interest to keep the cash that should have been remitted to the ATO in its bank account? --- No. My primary motivation, even in cases with clients who lodged late returns, **is primarily to make sure that you don't put in an inaccurate return. So I took sufficient steps and considerable work to make sure that the BAS returns that were duly lodged with the ATO were in fact correct.** (emphasis added)

177 Given what Mr Borella described as the "complexity" of the task, Neptune had an obligation to provide, timeously and at all events before the expiry of the Kanki notice on 25 July 2017, proper information about the GST position to Kanki to enable it to comply with whatever taxation obligations it had or may have had. Neptune's long delay in lodging BAS was a breach of its obligations under cl 6(b)(vi) of the JVA to comply with all applicable laws, namely, *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**the GST Act**), that, clearly enough, was applicable to the business. That breach existed at the time of the issue of the Kanki notice.

178 *Thirdly*, prior to 25 July 2017, Neptune had not provided Kanki with a copy of the catering agreement and did not do so until after this proceeding commenced (as explained below), and it had not given any pricing information to Kanki to explain why the provision of catering to *Seadeck* was operating at a loss.

(b) The catering issue

179 On 28 December 2015, the New South Wales **Police** Force Marine Area Command wrote a letter to the ILGA objecting to the grant to Neptune of a liquor licence for 800 passengers on *Seadeck* for which Mr Douchkov had applied on 2 November 2015. The ILGA then entered into what transpired to be a protracted process of consideration of Neptune's application. One reason for the length of the process was the ILGA's discovery in mid-2016 that Kanki had an interest in the liquor licence that Neptune had failed to disclose. It took some time for Neptune to explain that this nondisclosure was accidental and did not warrant a conclusion that it was not a fit and proper person to hold a liquor licence.

Ultimately, the liquor licence was issued on 25 October 2016 with effect from 12 October 2016.

180 In the meantime, Neptune took steps to prepare for *Seadeck* to trade.

181 On 24 March 2016, Mr Douchkov caused Short St to be incorporated. He and Drew **Bolton** were equal shareholders and its directors from then until Mr Douchkov resigned in June 2017. Mr Bolton was an executive chef, including at a restaurant called Vine, Double Bay in which Mr Douchkov also held an ownership interest.

182 On 15 April 2016, Mr Douchkov and Mr Como wrote to Mr Koyunoglu saying that Neptune had by then prepared *Seadeck* to trade on Sydney Harbour and was offering "five star food service". They wrote that, "as part of conducting functions we require a reliable and **controllable** caterer to manage the vessel's kitchen and carry out food production and supply service labour and kitchen staff" (emphasis added). The letter asserted that this would allow the joint venture to "**keep** the food quality at a premium, **the price structure set, the profit margins controllable**…" (emphasis added). Mr Douchkov revealed in the letter that he was a shareholder in Short St which, he said, was to assist it in gaining credit from suppliers and funding for its operation. The letter asked Kanki to consider and agree to the arrangement by signing and returning a copy.

183 On 26 May 2016, after Kanki had not replied to the 15 April 2016 letter, Mr Douchkov sent another copy of it with a reminder email asking for a response. Once again, Kanki did not respond.

184 On 10 June 2016, Mr Como, on behalf of Neptune, and Mr Bolton, on behalf of Short St, executed an exclusive **catering** service **agreement**. The catering agreement was expressed to commence on 1 September 2016 and terminate three years later on 31 August 2019, with Short St having an option for a further three year term. Kanki never consented to Neptune entering into the catering agreement.

185 The catering agreement required Neptune to use Short St exclusively to provide catering services for all food on *Seadeck* at initial costs to Neptune set out in a pricing schedule. However, cl 5.2 provided:

> The Company [*viz*: Short St] shall have the right, as frequently as it so chooses, to change any or all of its costs for the Services. The Company shall give Neptune written notice of any changes to its costs at least thirty (30) days in advance of the effective date of the change.

186 Moreover, cl 15.2 provided that the only bases for termination of the catering agreement were if a party became insolvent or by notice from one party that the other had failed to remedy a breach within 30 days of receiving written notice to do so. Thus, absent insolvency or breach, Neptune, *first*, could not terminate the catering agreement and, *secondly*, if the option were exercised, could be locked into a further three year term, even if Short St charged uncommercial or excessively high prices under its unconstrained power to do so in cl 5.2. When cross-examined about this feature of the catering agreement, Mr Douchkov gave this evidence that I do not believe:

> MR CASTLE: But, you see, if you look at clause 5.2, the right to dictate the price was a right that was held by the company.
>
> HIS HONOUR: Being Short St.
>
> MR CASTLE: Being Short St?---They have always delivered at that price that we've asked for and there has never been a change on the basis of their vary – varying – varying – varying the price, because we do agree that that is the way it was going to work.
>
> And…the reason that Short St did that is that this was not a genuine arm's length arrangement between two commercial parties each looking after their own interest?---No, because we had a provision to provide catering at a certain cost and that's what they provided. It's simple.
>
> Mr Douchkov, I will put it to you directly: **this agreement was a very bad deal**…**for Neptune, was it not**?**---No, I disagree entirely**. (emphasis added)

187 Mr Douchkov gave this evidence in the context that he was aware that from early 2017 Kanki was asking questions of Neptune about why the cost of catering was higher than the revenue that Neptune reported for the sales of food. And, in the period up to 25 July 2017, Kanki repeatedly sought information from Neptune as to what the catering arrangements were, but to no avail.

188 On 9 January 2017, Mr Altikulacoglu emailed Mr Douchkov asking for $12,000 so that he could travel to Turkey. Mr Douchkov replied on 10 January 2017 saying that Neptune was in the process of creating weekly profit and loss accounts as requested, but asserted that an accurate profit and loss statement:

> is virtually impossible to create [sic] as there were many unfixed monthly costs and a weeks costs can't simply be closed off… If you have any questions of accounts etc please forward them so they can be addressed.

He continued, saying that there was about $30,000 in the accounts, but Kanki's then accountant (a predecessor of Mr Clarke) had not yet logged in to access the Xero electronic accounting system. He said that Neptune was under pressure from managing and setting up the business, together with the issues concerning the trading and maintenance of the ship.

189 Mr Altikulacoglu responded on 10 January 2017 that his side (Kanki) was also under pressure. He said that he would come to the office to look at the accounts in the following days, but Mr Altikulacoglu wanted invoices and detail of receipts and expenses for the period between October 2016 and December 2016. He asked for access credentials to log on, and for information, as an example, on the catering costs of $100,000 which were not further itemised in the two day New Year figures. He wrote, "We have 600.000 $ total income we gave 100.000 catering eho [sic] believes that?" Mr Douchkov and Neptune never answered that question.

190 On 24 January 2017, Mr Douchkov emailed Mr Altikulacoglu with a "NYE/NYD Profit and Loss". The report comprised two pages, each of which appeared to set out figures for the same revenue and expense items, but the figures for the same item differed on each sheet. Thus, each page recorded, relevantly, as the totals for the two days of trading the following entries (among many others):

Item	**First page**	**Second page**
Food revenue	$3,568.00	$52,971.61
Food COGS [cost of goods sold]	$44,742.22	$82,091.48
Ticket sales	$129,339.83	$38,209.77 (Both pages had notes against the item for ticket sales ("This Revenue includes an $80.00 p/head food (500 pax) and 3hr beverage pack (525 pax))
Total revenue	$291,771.33	$158,914.82
Total direct costs	$95,057.85	$116,734.33
Total expenses	$65,234.67	$19,766.35
(Net profit being the final but undescribed figure in totals column)	$19,419.40	$17,227.75

191 The entries on the two pages were not reconciled or otherwise explained. What they revealed about the trading results for the two days remained obscure. The sum of the total revenues and food COGS (*scil*: cost of goods sold) entries that appeared on both pages produce the following amounts:

Total revenue	$450,686.15
Food COGS	$126,833.70
(Net profit)	$36,647.15

192 Thus, the cost of the food was about 28% of the total revenue, while net profit was about 8% based on about 500 passengers. The gross wages cost on each page was $19,315. These results were a far cry from the projected profit and loss accounts annexed to the JVA, albeit that those were based on *Seadeck* having a capacity of 800 passengers. There, food COGS was projected at 3.38% of gross revenue, and food sales as 5.64% (i.e. showing a *prima facie* gross profit on food sales).

193 On 3 February 2017, Mr Douchkov emailed Mr Ozer seeking to organise a meeting with Mr Bolton to discuss catering arrangements. He wrote:

> I would like you to see all the breakdowns of costs and how they were derived **and the profit margins to Seadeck.**
>
> Drew [Bolton] will be available to go through all the packages and give you a brief on how Short St catering have run and supplied the events food, labour, transport, etc and see if we need to adjust anything or you can offer any improvements. (emphasis added)

194 Mr Ozer and Mr Douchkov appear to have arranged a partners (or joint venturers') meeting on 15 February 2017. There is no evidence about any discussions that may have eventuated at that meeting as contemplated by Mr Douchkov's 3 February 2017 email to Mr Ozer. However, that email is notable for its failure to disclose or discuss what profit Short St made from the catering arrangement, or if or how the joint venture would receive any part of it.

195 On 7 March 2017, Mr Douchkov caused Mr Bolton to write to Mr Clarke, with the following explanation of "the deal". Mr Bolton asserted that Short St:

> would carry all of the risk and front up for the staffing and cost of goods. At the end

> of the weekend, [Short St] prepares a Profit & Loss which shows how profitable we are. **Short St** invoices neptune [sic] for the full value of the sales and **then pays back the profit margin owned [sic] to Seadeck [being Neptune's trading name]. Profits are shared 50:50**. (emphasis added)

196 However, whatever Neptune did with any such distribution of profits never appeared in any accounts in evidence, or in any attempt by it to answer Kanki's complaints that the catering should not run at a loss.

197 On 11 April 2017, Mr Borella and Mr Gorter produced Neptune's first fortnightly profit and loss statement for the purpose of cl 10(c) of the JVA for the fortnight ended 28 March 2017 (see [160] above). That showed sales of food of $19,650 and catering costs of $28,917. There were cost entries recorded for the not yet complete figures for the fortnight ending 14 March 2017, of food sales of $11,022 and catering costs of $11,844.

198 In an email dated 13 April 2017, Mr Borella agreed with Mr Clarke that "we should be making a 50% gross profit margin on catering". Mr Borella said that he and Mr Gorter, would do "a bit more digging for you on this one" (see [162]-[163] above). Mr Borella asserted that he had done some digging, but he never revealed to Mr Clarke or anyone on Kanki's side what he had found, as I noted in [169] above.

199 On 17 April 2017, Mr Clarke emailed Mr Borella, saying "[w]e have a big issue with the catering, Gavin and his team are taking us for ride." He attached a copy of Mr Bolton's 7 March 2017 email. I infer, from Neptune's failure to disclose the catering agreement to Kanki before this litigation began and the absence of any accounting entries in evidence to support Mr Bolton's reference (in his 7 March 2017) email to profits being shared 50:50, that any profit sharing by Short St was with its shareholder, Mr Douchkov, or with Neptune, but outside the joint venture accounts.

200 Neptune's conduct in entering into and performing the catering agreement was a breach of, *first*, its obligations to act in the best interests of the business of the joint venture and in good faith under cl 6(b)(iii) of the JVA, *secondly*, its duty of trust under cl 6(d), and, *thirdly*, its obligation not to incur, unilaterally, debts or commit Kanki to liabilities (as a party entitled to share in the net profits of the business and the joint venture) (cl 6(f)). That is because the catering agreement allowed Short St, as the person with the exclusive rights to provide catering services to *Seadeck*, to charge any prices it liked over the three year term and the option term, and obliged Neptune, on behalf of the joint venture, to pay those prices

without any reasonable ability to terminate the contract or dispute the prices. I asked Mr Douchkov why he disputed the cross-examiner's proposition that cl 5.2 of the catering agreement was not a genuine commercial arrangement between the two parties at arm's length, and he gave this evidence:

> HIS HONOUR: But you couldn't control the price, because---?---Well---
>
> ---Short St had the right to charge what it liked. Is that not right?---Well, we've – we've always controlled the---
>
> Is that right?---**Well, it says they control the price**, but in – in – in essence it – **it isn't the arrangement we had**.
>
> Are you telling me as a businessman that you regard a contract that gives one party the right to charge whatever it likes over the whole of the term of the contract a good deal for the other party?---**I'm not sure how – how – how to answer that**, because it was never, ever in my conversations or discussion with anybody in the business that it was any other way than we had to set it for a certain price and you couldn't do that ..... So that was – that was the problem. Now, this is – in here as a – what do you call it – an entry, and **it has never had any issue or bearing on the way we've run the vessel**. And I do agree it says it there. (emphasis added)

201 I do not believe that evidence. The reason that Mr Douchkov did not know how to answer the last question above was because he was acutely aware, not only when giving evidence, but from when Neptune began operating under the catering agreement, that it committed the joint venture to paying Short St for its catering at uncommercial prices, on a basis that Neptune was never prepared to or did explain to Kanki, as its joint venture partner or in evidence in the trial.

(c) Relocation to Brisbane

202 On 25 November 2016 and 3 December 2016, Mr Ozmen and Mr Robertson exchanged Whatsapp messages in which Mr Ozmen suggested that *Seadeck* might trade in Thailand between June and September, and Mr Robertson said he would speak to her master and Mr Nair. Mr Robertson understood that Mr Ozmen thought, as did he, that trading in winter in Sydney would not be profitable because of the difficulty of trading the vessel because her main deck was exposed to the elements. Mr Douchkov recalled this suggestion and that Mr Ozmen had also raised with him the idea that the vessel might go to Bali, Indonesia, to trade and possibly elsewhere. Mr Douchkov recalled that there was an issue about whether the vessel could sail outside of Australian waters with her then class classification. He said, and I accept, that he and others in Neptune had the view that if *Seadeck* were to go anywhere in the Sydney winter, Queensland was a much better option.

203 After Mr Ozmen's confrontation with Mr Douchkov in about late January 2017, Mr Auld became the principal person on Neptune's side dealing directly, including face to face, with Mr Ozmen, even though Mr Auld had no financial interest in Neptune and was a paid consultant to it. At a dinner in Sydney in January 2017, Mr Auld and Mr Ozmen discussed at length taking *Seadeck* north in the winter. Mr Auld raised that subject because they could not enclose the open areas of the main deck of the vessel for the winter, as they had originally intended, by reason of limitations consequent on the terms of her stability certificate.

204 Around a week later, Mr Auld received a picture from Mr Ozmen with a suggestion that both of them and Mr Auld's wife should take a road trip for two weeks to explore the suitability, as a winter base, of all ports between Sydney and Cairns.

205 On 25 January 2017, in Mr Como's letter, Neptune informed Kanki that it was investigating obtaining a Queensland licence for *Seadeck* and logistic issues, to see if there were opportunities for her there. Neptune sought Kanki's assistance in planning such a use of the vessel (see [108] above).

206 In the event, Mr Ozmen and Mr Auld (on behalf of Neptune) agreed that *Seadeck* would trade in the Whitsunday Islands, off the Queensland coast, during the winter months. Mr Auld ascertained that AMSA and Maritime Safety Queensland (**MSQ**) considered that the survey permitted the ship to do this.

207 However, in March 2017 a cyclone caused extensive damage to the marina that Mr Auld had selected in the Whitsundays and he informed Mr Ozmen of this development. They then discussed Mr Auld's suggestion of trading the vessel from a location further south, namely on the Gold Coast. But Mr Ozmen was against doing so because he was concerned that a lot of gangs, including bikies, operated there and the potential customers, to use Mr Auld's turn of phrase, "wouldn't be the correct crowd".

208 Mr Ozmen did not have any new suggestions. Accordingly, Mr Auld began making some inquiries in April 2017 about what he said was the only place "we [*scil*: Neptune] could see that…would be sustainable…the Brisbane river". He told Mr Ozmen that he "**was making inquiries into Brisbane and** [Mr Ozmen] **said okay. And that's the extent of it**" (emphasis added). I accept Mr Auld's evidence.

209 On 6 April 2017 Mr Douchkov, on behalf of Neptune, completed an application to AMSA for temporary operations in respect of *Seadeck* in which he wrote:

> We will be transiting the vessel from Sydney to the Brisbane River to trade in Qld til [sic] the first week of October 2018 [*scil*: 2017].

210 Mr Douchkov said that when he made that application no signed arrangements with persons in Brisbane that "locked in" Neptune existed.

211 Mr Douchkov asserted in his evidence that Mr Ozmen had given "in principle" agreement to *Seadeck* relocating to Brisbane before Neptune wrote the 25 January 2017 letter. I do not believe that evidence. It is inconsistent with, *first*, the terms of the letter, itself, that referred to Queensland, generally as opposed to Brisbane, specifically, *secondly*, Mr Auld's evidence, that I find was generally accurate, as to the much later time of about April 2017 at which the parties discussed Brisbane, and, *thirdly*, Mr Douchkov's own application to AMSA for temporary operations that he completed only on 6 April 2017.

212 After the conversation in which he told Mr Ozmen that he was "making inquiries into Brisbane", Mr Auld then went about making inquiries as well as arrangements for the vessel to trade in Brisbane. He did not recall reporting to, or having any conversations with, Mr Ozmen at any time in April and May 2017, after that conversation (i.e. the one described in [209] above), prior to sending the following email to Mr Ozmen on 15 May 2017:

> Hi all
>
> So **I have been working over the past few months on locking us in a birth and a detonation for us to trade during the off season.**
>
> First I had locked in the Whitsundays but after the cyclone wiped the area out this become impossible.
>
> I then explored the idea of going to the Gold Coast but this quickly became not an option due to pick up points and the depth of majority of their water ways.
>
> I then spoke to my friend Simon about Brisbane and he managed to connect with me with the boss of Rivergate Marina. I contacted them and they got back to me with a proposal for us to be berthed at their marina.
>
> **Once I locked in the marina** we spoke to Scott's [Robertson] contacts in Brisbane, these contacts have both the promotion side and the corporate side of hospitality business in Brisbane covered. They will also allow us to utilise their licence whilst we are there, for this they have requested we allow them to have 3 events during the estimated 10 week period for which we will be trading.
>
> We have a conference call with them this week to get the application lodged which is a 28 day process and to finalise the commercial agreement.
>
> The goal is to trade the vessel Fri, Sat and Sun and hopefully some corporate events on the other days. This will allow us to cover the ongoing costs in Sydney and also cover the cost of trading and transporting to Brisbane and back.

> Also the Marina is attached to a shipyard and the work is half the price of what it cost in Sydney so I will be able to get the boat looking absolutely beautiful for its return to Sydney ready for our next season.
>
> At this moment I am taking 2 full time crew and 2 full time staff up to assist me in running the business. All other employees will be hired up there with the assistance of the company for which we are utilising their licence. The extra crew will also be hired up there.
>
> I am personally re locating to Brisbane for 10 weeks to run the business and ensure we make as much money as possible and everything runs smooth.
>
> All partners are more than welcome to come up whenever they are free to assist with everything.
>
> **If we were not to trade during this period we would go into next season another $650k behind, so this is the best option.**
>
> I will update everyone again later this week with dates and more details. (emphasis added)

213 The above email reads like a full report to explain the history of what Mr Auld and Mr Robertson (who was Neptune's authorised representative) had done about relocating *Seadeck* to Brisbane and to provide a rationale for doing it. Had Mr Ozmen already agreed to the proposal, there would have been no need to explain that, on Mr Auld's view, the joint venture would lose $650,000 if it were not to trade in the winter months. Thus, in the email, Mr Auld justified his actions immediately after referring to the $650,000 loss, by saying "so this is the best option". Mr Auld inserted his reference to forestalling a loss of $650,000 if the vessel were not to trade, because, as I explain below, he already knew of Mr Ozmen's objection or concern about relocating *Seadeck* to Brisbane.

214 Mr Ozmen replied a little over an hour later on 15 May 2017:

> **Your group can not make these decisions on your own. They must be joint decisions with us.** Our accountant has been asking you to attend a meeting with Kanki group but your group has not answered. **We now require a meeting with Neptune by the end of this week**. (emphasis added)

215 In response, Mr Auld wrote about 25 minutes later on 15 May 2017:

> **As previously discussed with you I only locked things in last week and I informed you that I would send an email today informing everyone of the plan as I did.**
>
> We have a Rina annual inspection in a couple of weeks and have a lot of work to do to ensure the vessel is compliant so we are busy but **I do appreciate the fact that we are in a JV** so **let me know** a time and day that suits you and your side and **we will**

> **meet** to discuss everything moving forward. (emphasis added)

216 It is likely that Mr Auld had a discussion with Mr Ozmen shortly or immediately before sending his long email of 15 May 2017. That is because in the opening lines of his second email of 15 May 2017, Mr Auld referred to having informed Mr Ozmen **after** locking in arrangements for Brisbane. Mr Auld's evidence was that he thought (and I find), that what prompted him to write that email was that he had had a communication with Mr Ozmen "along the lines that he wasn't happy with going to Brisbane".

217 Since Mr Ozmen was also able to respond on 15 May 2017 with good English as quickly as he did, it is likely he discussed his response with others in Entertainment's and Kanki's camp in advance of receiving Mr Auld's explanation, so that he could object promptly and ask again on Kanki's behalf for a meeting. Perhaps coincidentally, in Mr Clarke's email to Messrs Douchkov, Como, Robertson, Borella and Gorter on 16 May 2017, he recorded that this was his third request seeking a meeting (see [167] above). However, Mr Auld was not an addressee of that email.

218 There is no evidence that a meeting between the joint venturers occurred in respect of either Mr Ozmen's or Mr Clarke's requests for one of 15 and 16 May 2017. At that time, neither Mr Auld nor Mr Clarke had any formal status in the joint venture entitling them to call a meeting. However, it is safe to infer that each of them was acting on the instructions of, and reported to, the principals on each side.

219 Neptune continued to proceed with implementing the relocation of *Seadeck* to Brisbane for winter trading, despite knowing that Mr Ozmen and Kanki had disagreed with that course. Mr Douchkov gave this evidence:

> You, as a director of Neptune, understood on 15 May that Kanki's agreement to Brisbane could not be taken for granted, could it?--- I didn't know what to think of that, to be honest, because it was something that came out of left field completely and it looked like someone had been setting up this intentionally as an intentional barrier for us rather than a business decision or cooperating in and making sense, because he had said a lot of things before and changed his mind and his – but **this one because of the way it was written we're going, well, this was intentionally set up to blockade us.** (emphasis added)

220 I do not believe that evidence. Mr Douchkov and Neptune had decided already to go ahead with the relocation to Brisbane regardless of Kanki's wishes. Soon after in his

evidence, he said that around this time he and Neptune had consulted a lawyer and accountant before making that decision, saying, "there was no option but to take up… the move to Brisbane". He gave this evidence:

> **So there was, in your view, no option other than to go to Brisbane whether Kanki liked it or not?--- Unfortunately, at that point, yes.** We had no other options to operate the vessel in Sydney as a viable concern. (emphasis added)

221 The question of what discussions Mr Auld had with Mr Ozmen about relocating *Seadeck* to Brisbane in the period preceding 15 May 2017 was significant to Neptune contemporaneously as a potential source of a serious contractual dispute. Mr Douchkov and Neptune recognised this because they had consulted a lawyer about the decision before causing Neptune to sail to Brisbane. There is no contemporaneous written evidence of a specific occasion on which Mr Ozmen allegedly agreed to relocate the vessel to Brisbane before or during the period between 15 May 2017 and mid-June 2017, when the dispute flared up again in email exchanges.

222 In this context, Mr Auld's evidence that he did not recall any discussion with Mr Ozmen conveying his approval or attitude to the relocation to Brisbane other than that (shortly before Mr Auld wrote his long email of 15 May 2017) in which Mr Ozmen conveyed to Mr Auld that he was not happy with *Seadeck* going to Brisbane, supports the inference, that I draw, that there was no such discussion. I find that all that Mr Ozmen had agreed to was that Mr Auld could investigate the proposal of the vessel going to Brisbane for the winter and report back on the result of the investigation so that Kanki and Neptune could make a decision about it together. However, by 15 May 2017, Neptune was presenting Kanki with a *fait accompli* that *Seadeck* would relocate to Brisbane. I find that Neptune made a decision if not before, then certainly on, or during, 15 May 2017 that, regardless of Kanki's objection or wishes, it would relocate *Seadeck* to Brisbane for winter trading.

223 In my opinion, that conduct was a breach of cl 6(b), (e) and (f) of the JVA. That is because cl 6(e) required that both parties "jointly operate and manage the business" and that "all decisions are made jointly", and cl 6(f) prohibited each party from incurring debts unilaterally. However, Neptune had decided by this time that it would take *Seadeck* to Brisbane regardless of the views of Kanki. And that is exactly what Neptune did.

224 Next, by 15 June 2017, Neptune appears to have placed advertisements for tickets to sail on *Seadeck* in Brisbane on the weekend of 1 and 2 July 2017, as appears in Mr Koyunoglu's email to Mr Douchkov of 15 June 2017, which read:

> The partners and owner of the 50% Joint Venture have previously raised that **we do not agree with SEADECK being taken up north or approve of any decisions until we have at least have had a chance to review the business proposal.**
>
> To date we have yet to receive confirmation of your proposal and the intention to conduct interstate business on the SEADECK in the offseason.
>
> We are seriously concern that you have proceed to promote publicly that SEADECK will now be operating in Brisbane and notice only today, 15th June that you have proceeded to start selling ticket.
>
> **Kanki is formally extremely our disapproved** [sic] **on this decision and reiterate that at no time, an official proposal was present to our group for review, and we again take this opportunity to highlight your breach of our agreement should you proceed to relocate SEADECK without the Joint Venture's approval.**
>
> **As the SEADECK owner and 50% Joint Venture partner, we are advising you that we do not provide you with authorisation to relocate the vessel.**
>
> **Pease provide us with some availabilities as to when your group is all available to attend an emergency meeting to discuss this issue.** We ask that you stop any sales of tickets or promotion that SEADECK is going to operate in Brisbane until we have all agreed on the business venture.
>
> Any costs raised and is associated with your lone decision on this venture will not be accepted by Kanki. We will now proceed to engaging in our accountant and legal representatives to advise us of our position as a result of this action by Neptune Hospitality. (emphasis added)

225 Mr Douchkov responded to Mr Koyunoglu later on 15 June 2017 with a dismissive single line: "Email has been noted and referred to [T]erry". Mr Borella had no apparent responsibility for Neptune's operational decision to ignore Kanki's wishes to proceed in the manner of which Mr Koyunoglu's email complained. There was no evidence of any response by Mr Borella, and in his evidence he said he did not understand why Mr Douchkov forwarded Mr Koyunoglu's email to him. Needless to say, Neptune did not provide Kanki with any information as to when a meeting might occur.

226 On 17 June 2017, Mr Ozmen, on behalf of Entertainment wrote to Mr Auld. Mr Ozmen referred to his earlier email of 15 May 2017 and insisted that any repairs to his ship be carried out only by experts of whom he approved. He insisted that the ship could not be taken to Brisbane and repaired, as foreshadowed in Mr Auld's 15 May 2017 email, without his approving of the shipyard that would carry out the repairs.

227 On 17 June 2017, Mr Auld replied as follows:

> **I have spoken to you on numerous occasions about the ship going to Brisbane and you had no problem with this!**
>
> The shipyard in Brisbane is one of the best in Australia so no need to be concerned about the quality of work!
>
> In regards to previous works the Vessel was in such disrepair by the time WE [sic] got it out of Egypt we had no choice but to stop in Indonesia and carry out the necessary works. These works were carried out by ASL shipyard which a Singapore owned company and the most professional in Indonesia!
>
> We have constantly maintained the Vessel at a very high cost!
>
> The ship was built in Turkey and did not comply with Australian standards so we had to completely overhaul the Vessel and as you are aware spend an enormous amount of funds to do so including getting the ship in survey with a legitimate company that is recognised internationally!
>
> Your guarantee to deliver a ship that was ready for trading certainly did not transpire!
>
> We have contracts in Brisbane and it is the only way this business will continue!
>
> **I don't feel after everything we have done you have the right to stop us from making money which is in the best interest of all parties!**
>
> [If] you stop the business from making money please inform us on how you propose to cover the losses!
>
> I look forward to your urgent reply. (emphasis added)

228 The third last paragraph (that I have emphasised) encapsulated Neptune's attitude, formed around 15 May 2017, as to the contractual rights of Entertainment and Kanki in decision-making that Mr Douchkov expressed in his evidence, namely, that regardless of Kanki's views, Neptune was acting on the basis that it could decide that there was no option other than to relocate *Seadeck* to Brisbane. Moreover, despite Mr Ozmen wanting information about the shipyard, Mr Auld's email on 17 June 2017 gave him no information beyond asserting that the unnamed yard was one of the best in Australia and Mr Ozmen had no need for concern.

229 And despite Mr Auld's opening paragraph's assertion of having had "numerous" discussions with Mr Ozmen about the vessel going to Brisbane, and that "you had no problem with this", he only gave evidence about two discussions, as I have found, namely, *first*, Mr Ozmen's initial agreement that Mr Auld could investigate that possibility, and *secondly*, Mr Auld informing Mr Ozmen of the decision shortly before he sent his long email, where Mr Ozmen certainly did have problems with the proposal.

230 Some other exchanges (about which there is no direct evidence) may have occurred between Mr Ozmen and Mr Auld before Mr Auld emailed him on 18 June 2017 as follows:

> We can honestly go on for days arguing about who's responsible for what but this will not get us anywhere!
>
> You and I have spoken about Brisbane on numerous occasions and it is the only way to continue making money!

231 Given that Kanki was not receiving any money, or any fortnightly profit and loss statements that revealed that the joint venture was making net profits, there was nothing unreasonable in Mr Ozmen insisting on Kanki being involved in making the important decisions about where and when *Seadeck* would trade and being able to see a business plan that made good Mr Auld's assertions. In coming to this conclusion I have taken into account that Mr Ozmen did not give evidence. However, because Neptune asserted that he and Kanki were being unreasonable, Neptune had the onus of establishing that Mr Ozmen's state of mind in relation to the consideration of relocating *Seadeck* to Brisbane was unreasonable. He does not appear to me to have been acting unreasonably in insisting that he and Kanki had a real say in a decision as to where and for how long and on the basis of what commercial or business plan the vessel should be deployed or repaired. On the evidence, Mr Ozmen and Kanki had a legitimate contractual right under both the JVA and charterparty to object to Neptune's conduct in arranging the relocation to Brisbane and choosing a repairer regardless of Kanki's wishes.

232 On about 28 June 2018, without any agreement or subsequent input from Kanki or Entertainment, Neptune caused *Seadeck* to sail from Sydney for Brisbane.

233 On 1 and 2 July 2017, *Seadeck* had its Brisbane season launch weekend. Mr Auld drove up to Brisbane to meet *Seadeck* there. He was in transit when he authorised work to be done to remove the top section, of about 30 centimetres, from *Seadeck*'s mast very soon after her arrival in Brisbane so that she could pass safely under a bridge on the Brisbane River. He said that "that work had to be done for us to trade". It is common ground that the removal of that section of the mast was done without the knowledge or consent of Kanki (*cf*: cl 6(g) of the JVA) and in breach of cl 1(d) of the charterparty.

234 The Entertainment notice (being the notice Holman Webb sent to the charterers on 11 July 2017) required Neptune to rectify the breaches of the charterparty specified in the notice,

failing which it would regard both charterers to be in breach and would exercise its right to terminate the charterparty without further notice. However, at that stage no communication from either Kanki or Entertainment indicated that either knew of the alteration to the mast or identified that as a breach of either the JVA or charterparty.

235 Omniwealth's response of 14 July 2017 to the Kanki notice stated:

> The statement that the decision to trade in Brisbane in the off-season was not a decision made jointly by Kanki and Neptune is **misguided. There is no obligation set out in the JVA for decisions to be made jointly.** (emphasis added)

236 Also, Omniwealth did not advert in that letter to the Entertainment notice. But, Omniwealth did complain there (accurately) that the demand to rectify modifications and alterations to the vessel in the Kanki notice had not specified any particular modification or alteration, which was a legitimate observation.

237 Needless to say, Neptune did not comply with any of the requirements of the Kanki notice or the Entertainment notice.

238 On 24 July 2017, Holman Webb wrote to Omniwealth, reminding it that the Kanki notice would expire the next day and if the breaches alleged were not remedied, cl 15 of the JVA operated automatically to terminate the JVA.

239 Omniwealth replied on 25 July 2017, reiterating that its client, Neptune, was not in breach.

240 On 4 August 2017, Holman Webb wrote to Neptune and Kanki as charterers, referring to the Entertainment notice and noting that Omniwealth had not responded to it. Holman Webb asserted that because Neptune had not remedied the breaches of the JVA the subject of the Kanki notice, the JVA was terminated and, accordingly, *Seadeck* was no longer under the joint control of the joint venturers. The letter asserted that the purpose of the charterparty was to provide for *Seadeck* to be demised to Neptune and Kanki in support of the now terminated JVA and that the unremedied breaches of the JVA were fundamental breaches of the charterparty. Accordingly, the letter asserted that Entertainment terminated the charterparty and demanded immediate delivery up of *Seadeck*.

241 On 7 August 2017, **Gillard** Consulting Lawyers wrote to Holman Webb, advising they had taken carriage of Neptune's representation with respect to the JVA and charterparty

disputes. Gillard observed that, at the end of its 14 July 2017 letter, Omniwealth had inquired whether Holman Webb also acted for Entertainment, but in their reply of 24 July 2017, Holman Webb had remained silent as to whether they did act for Entertainment. Gillard asserted that it should have been apparent to Holman Webb that Neptune had not received the Entertainment notice. Gillard asked for an extension of time of two days in which they could respond to the Entertainment notice. Holman Webb and Gillard exchanged letters on 8 and 10 August 2017, but the upshot was that Kanki and Entertainment continued to rely on the Kanki and Entertainment notices and Neptune's failures to remedy any breaches as the basis for asserting that, by 4 August 2017, both the JVA and charterparty had been terminated and that Entertainment was entitled to possession of *Seadeck*.

The position of Culture Map

242 The first evidence of Mr Ozmen interacting with John **Le** of Culture Map consisted of WhatsApp messages between them, beginning on 2 May 2017 with exchanges of images. Next, the pair exchanged image messages on 30 and 31 May 2017 until Mr Le said, on 30 May 2017, that he would "come to talk to u". They arranged to meet at Mr Le's home after dinner on 31 May 2017. That meeting is the first occasion in evidence on which Mr Ozmen had discussions of substance with any of Culture Map's principals. This was about a fortnight after Mr Ozmen learned of Neptune's decision to relocate *Seadeck* to Brisbane.

243 In cross-examination, Mr Douchkov said that when he learned, at around 15 May 2017, that Mr Ozmen and Kanki opposed relocating the vessel to Brisbane, he thought "they had an ulterior motive, and we've since found out that people have told us that there was". He expanded this theory as follows:

> And you say the ulterior motive was, what, Culture Map? Is this what you're going to say?--- I believe so, and I believe that there was a whole backstory to this that hasn't been revealed.
>
> And you say it had nothing to do – it never occurred to you that the reason they wanted to block you making decisions such as the Brisbane decision had nothing to do with the net profit issue or the payment of profits to Kanki?--- **As far as I knew, that was being resolved in a manner that was professional and with open dialogue, and I wouldn't have thought that there would have been a big problem based on the fact that they were given financial ideas of where the books stood** and where the projections of profit would be approximately and that that would be shown to be correct in the financials that they were given. (emphasis added)

244 I do not believe that, in May 2017, Mr Douchkov considered that the issues about Kanki being given information about the net profit and paid its share were not "a big problem". He knew that the catering agreement was a big problem and that Kanki was not being given information that Kanki considered was adequate about, *first*, why the joint venture appeared to be losing money or just breaking even on catering and, *secondly*, the financial performance of the joint venture, including about the lack of any BAS, being provided to Kanki. Mr Douchkov is likely to have known, and Mr Borella certainly did, that payment of GST was not occurring.

245 On 17 August 2017, Entertainment and Kanki commenced this proceeding.

246 On 7 September 2017, Entertainment entered into a **management agreement** with Eric **Woo** and Culture Map. The management agreement recited that Entertainment carried on the business of operating a luxury vessel (*Seadeck*), and wished to engage Culture Map, through Mr Woo, to conduct and manage the business with Mr Woo acting under an executive employment contract (that is not in evidence) as managing director of Entertainment. Entertainment granted Mr Woo the right to give all necessary instructions to Holman Webb in respect of this proceeding. The management agreement provided that Culture Map would prosecute and defend this proceeding and, among other obligations, pay operating expenses associated with the conduct of *Seadeck*'s business. Culture Map could terminate the management agreement on three months' notice if Entertainment, *first*, failed to remedy a breach, or, *secondly*, was the subject of insolvency events. The parties recorded their commitment to proceed to assessing whether they wished to enter into a joint venture to operate *Seadeck*.

247 Subsequently, Mr Ozmen, Kanki and Entertainment appear to have fallen out with Culture Map. On 31 December 2018, they commenced a proceeding in this Court seeking relief against Culture Map and Messrs Woo and Le. The statement of claim in that proceeding alleged that:

- in about January 2017, Entertainment [sic] entered into a dispute with Neptune concerning the parties' rights and obligations under the JVA; and
- during the course of a meeting in or about May 2017 at Mr Le's home, Culture Map agreed to assist Entertainment in respect of its dispute with Neptune in consideration of Entertainment and Kanki entering into a joint venture with Culture Map for the management of the operations of *Seadeck* once the JVA was terminated.

248 As I have found in [242] above, the meeting at Mr Le's house only occurred on 31 May 2017, well after Kanki and Entertainment had found themselves involved in the disputes with Neptune about accounting matters commencing in January 2017, and the further disputes concerning catering and the relocation to Brisbane that I have described earlier in these reasons.

Other matters

249 By 25 March 2016, Mr Ozmen had waived, as I found above, Neptune's compliance, for the first season, with the requirements of cl 7(b) of the charterparty that it obtain a survey authorising *Seadeck* to carry 800 passengers. Mr Robertson admitted that he had never asked Mr Nair about the work necessary to be done to obtain a survey certificate authorising *Seadeck* to carry 800 passengers. Thus, by the end of the first season of operation under the JVA, on 30 September 2017 or, perhaps, (if it were necessary for a year's operations to occur) 31 October 2017, Neptune would have been in breach of its obligation to obtain such a survey or to find out what it had to do to obtain one, if (contrary to my findings below) the JVA and charterparty were still on foot.

The termination issue – Neptune's submissions

250 In considering the construction of the JVA and charterparty above, I briefly summarised some of the parties' submissions that were relevant to the termination issue. In addition to those, Neptune argued that the Kanki notice particularised breaches of general obligations that the parties owed under the JVA, rather than breaches of any of its specific operational provisions. It contended that the alleged breaches of cl 6 required an evaluative determination of the nature of each particular breach and whether it in fact amounted to a breach of an obligation that could be remedied within 14 days within the meaning of cl 13(a)(iii), relying on authorities such as *Batson v De Carvalho* (1948) 48 SR(NSW) 417 and *Tricontinental Corporation Limited v HDFI Ltd* (1990) 21 NSWLR 689.

251 Neptune argued that cl 13(a)(iii) and (b) did not operate automatically to terminate the JVA 14 days from the receipt of the Kanki notice. It contended that none of the breaches particularised in the Kanki notice was a breach "under the JVA" as required by cl 13(a)(iii), and therefore the notice was invalid in both form and substance. It also submitted that each of the Kanki notice and the asserted termination was capricious, unreasonable and in breach of Kanki's obligations, under the JVA, of cooperation and good faith. Neptune also argued that Kanki had not acted reasonably or in good faith in threatening to issue a notice of breach

on 8 April 2017 in respect of Neptune's failure to provide profit and loss statements. Neptune also argued that Kanki could not give the Kanki notice because Kanki had breached the JVA by manufacturing a series of small disputes with a view to escaping from the JVA for reasons extraneous to the business. It contended Mr Ozmen had made this decision, as exemplified by his engagement with Culture Map, in breach of Kanki's obligation under cl 6(b)(iii) to act in the best interests of the business and in good faith at all times.

252 Neptune argued that Kanki's case broke down when one examined Kanki's conduct in mid-June 2017 in opposing the relocation of *Seadeck* to Brisbane. It contended that the charterparty did not limit the geographical areas to which *Seadeck* could be deployed, but rather cl 5 allowed it to operate worldwide and that cl 1(c) of the JVA defined "the Business" to include Australian waters. Neptune submitted that no clause in the JVA required Kanki's consent or a joint venture decision to change *Seadeck*'s location. Rather, it argued the JVA only required joint decisions under cl 6(e) (in relation to bookings, pricing, food and beverages), and under cll 6(g) and 9(d) (for maintenance, repair and installation of plant and equipment). And, it argued, cl 10(n)(i)(6) contemplated that Kanki could make a decision itself that adversely impacted on net profits so as to reduce its entitlement to the $5 million guarantee. Neptune argued that Kanki's insistence in mid-June 2017 that it was entitled unilaterally to make a decision countermanding Neptune's decision to relocate *Seadeck* to Brisbane demonstrated the fallacy in Kanki's case. Neptune said that, at this point, Kanki had not suggested any alternative business proposal as to how the ship was to operate in the Sydney winter to justify her remaining or returning there. It pointed to Kanki's subsequent agreement in 2018 for the ship to return to Brisbane for the winter season as exemplifying the unreasonableness of Kanki's stance in May and June 2017.

253 Neptune conceded that the alteration of the mast was a breach of cl 6(g) of the JVA but noted (correctly) that Kanki had not pleaded that Neptune was in breach of the Kanki or Entertainment notices by failing to restore the top section of the mast. It relied on Mr Auld's evidence that the alteration was necessary to enable *Seadeck* to pass under a bridge, had no impact on the seaworthiness or operation of the ship and that the removed section was purely aesthetic, not functional. It submitted that Neptune had offered to restore the top section of the mast but Entertainment and Kanki had refused to allow this to occur. It argued that the only consequence of the breach of cl 6(g) was Kanki's loss of opportunity to obtain a more economic quotation for the removal work.

Consideration

254 I reject Neptune's arguments that Kanki was in breach of the JVA by failing to act in the best interests of the business and in good faith so as to be precluded from issuing the Kanki notice, had manufactured disputes and had engaged with Culture Map in breach of cl 6(b)(iii). Kanki had legitimate grounds of complaint about Neptune's conduct from January 2017 onwards. Those grounds were not manufactured. Rather, they arose because Neptune was in breach of its obligations in substantive respects, as I have explained. In any event, on the evidence, Mr Ozmen had not engaged with Culture Map in a substantial way until, at the earliest, when he met Mr Le after dinner on 31 May 2017, well after Kanki had raised the disputes about the lack of financial information, including as to the position in respect of BAS and GST, the catering issues and the relocation decision. And Mr Douchkov's evidence put beyond doubt that, by 15 May 2017, the die had been cast in respect of Neptune's unilateral decision to relocate *Seadeck* to Brisbane.

255 Mr Ozmen had told Mr Robertson and Mr Douchkov from the inception of their relationship in 2014 that he, Mr Ozmen, had no money, and the Australians would have to pay all expenses in getting *Seadeck* to Sydney and getting her ready for the joint venture business. In those circumstances, it is safe to infer that, when he engaged with Culture Map, Mr Ozmen needed financial resources in order to assert and protect Kanki's and Entertainment's rights under the JVA and the charterparty in circumstances where Kanki had not received any substantial funds from net profit or otherwise since late January 2017 or early February 2017.

256 Moreover, Kanki had a right to give the Kanki notice under cl 13(a)(iii), even if it were in breach of the JVA. That is because the JVA did not preclude it from doing so: *Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd* (2009) 178 FCR 57 at 69 [55]–[57] per Perram J, with whom Goldberg and Jacobson JJ agreed on this point at 58 [1].

257 The principles governing the construction of a contract are well settled. The rights and liabilities of the parties to a contract are to be ascertained objectively. As French CJ, Hayne, Crennan and Kiefel JJ said in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35]:

> **The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean** [*McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 [22] per Gleeson CJ; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22] per

> Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ; see further *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11] per Gleeson CJ, Gummow and Hayne JJ, citing *Investors Compensation Scheme Ltd v West Bromwich Building Society [No 1]* [1998] 1 WLR 896 at 912; [1998] 1 All ER 98 at 114. See also *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 737 [10] per Lord Bingham of Cornhill]. That approach is not unfamiliar [See, eg, *Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500 at 504 per Lord Esher MR; *Bergl (Australia) Ltd v Moxon Lighterage Co Ltd* (1920) 28 CLR 194 at 199 per Knox CJ, Isaacs and Gavan Duffy JJ; see generally Lord Bingham of Cornhill, "A New Thing Under the Sun? The Interpretation of Contract and the ICS Decision", *Edinburgh Law Review*, vol 12 (2008) 374]. As reaffirmed, it will require consideration of the language used by the parties, **the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract** [*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ; at 174 [53] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Byrnes v Kendle* (2011) 243 CLR 253 at 284 [98] per Heydon and Crennan JJ. See also *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 326, 350; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at 2906-2907 [14]; [2012] 1 All ER 1137 at 1144]. **Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating"** [*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350 per Mason J, citing *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574. See also *Zhu v Treasurer (NSW)* (2004) 218 CLR 530 at 559 [82] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ]. As Arden LJ observed in *Re Golden Key Ltd* [[2009] EWCA Civ 636 at [28]], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience" [*Zhu v Treasurer (NSW)* (2004) 218 CLR 530 at 559 [82] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ. See also *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 464]. (emphasis added)

258 Kanki and Neptune agreed in cl 13(a)(iii) and (b) that if one of them continued to breach *any* obligation under the JVA after receiving 14 days' notice to remedy the breach, then a default occurred under the JVA in consequence of which the JVA was terminated. At the time that they entered into the JVA both parties knew that the other, or in Kanki's case its related company, Entertainment, had invested considerable amounts in anticipation of conducting a long-term trading relationship in which they each expected to earn net profits of over $5 million per annum over a three year term with options for two further three year terms.

259 The JVA also required both parties to do everything possible to give each other full cooperation (cl 6(b)(i)), and to act in the best interests of the joint venture's business in good faith (cl 6(b)(iii)), to owe each other a duty of trust (cl 6(d)), jointly operate and manage the business (cl 6(e)), not unilaterally to incur debts or commit the other party to liabilities (cl 6(f)), and to ensure that the joint venture had sufficient working capital to conduct the business at all times (cl 7). These obligations could only be discharged if both parties worked cooperatively with each other.

260 The express duties of trust and to act in good faith operated to govern a decision of a party to invoke the provisions of cl 13(a)(iii) by giving a notice, such as the Kanki notice. Obviously, the parties contemplated, when they included cl 13(a)(iii), that there could come a point in their relationship when a breach was of such a character that one party, in good faith, could require the other party to remedy that breach within 14 days, failing which the JVA would terminate.

261 In other words, not every breach of the JVA would be capable of founding the right to give a notice to remedy under cl 13(a)(iii). For example, if the parties disagreed on which of two brands of French champagne of similar price or quality should be offered to guests on board *Seadeck*, the fact that Neptune chose one rather than that which Kanki preferred would not be sufficient to justify a notice under cl 13(a)(iii). As Mason ACJ, Wilson, Brennan and Dawson JJ said in *Ankar Pty Limited v National Westminster Finance (Australia) Limited* (1987) 162 CLR 549 at 561-562:

> Since the judgment of Diplock LJ in *Hongkong Fir* [[1962] 2 QB 26] it has been recognized in England that a term in a contract may stand somewhere between a condition and a warranty. Such an intermediate or innominate term, it has been held, is capable of operating, according to the gravity of the breach, as either a condition or a warranty. In *Hongkong Fir* the obligation of seaworthiness was readily classified as innominate because a breach of the obligation might be trivial, making damages an adequate remedy, or grave, in which event it should have effect as a breach of condition. The innominate term brings a greater flexibility to the law of contract, as Lord Wilberforce has remarked on more than one occasion: *Reardon Smith Line Ltd. v. Hansen-Tangen* [[1976] 1 WLR, at 998; [1976] 3 All ER, at 576-577]; *Bunge Corporation* [[1981] 1 WLR, at 715-716; [1981] 2 All ER, at 541-542]. Although **nothing less than a serious breach of an innominate term entitles the innocent party to treat the contract as at an end**, the breaches of cll. 8 and 9 merit this description. (emphasis added)

262 Although that case involved a suretyship contract, the principle that a breach of an innominate term can operate as sufficiently serious to warrant a party terminating the contract

is of general application. The question is whether the breach goes to the root of the contract so as to entitle the party not in breach to terminate: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115 at 139-140 [51]-[56] per Gleeson CJ and Gummow, Heydon and Crennan JJ.

263 I reject Neptune's argument that the three breaches that I have found the subject of the Kanki notice were not capable of remedy within 14 days as to all matters to be put right for the future.

264 The House of Lords rejected a similar argument in *L Schuler AG v Wickman Machine Tool Sales Limited* [1974] AC 235. The parties there had entered into a long-term distributorship agreement under which the distributor had to carry out visits to solicit orders to six named firms at least once a week. The contract gave each party the right to terminate where one had committed a material breach of its obligations under the contract by giving the other 60 days' notice within which to remedy the breach. Lord Reid said ([1974] AC at 249H-250B and see too at 264A-B per Lord Simon of Glaisdale; at 271G-H per Lord Kilbrandon); and Sugerman J in *Batson* 48 SR (NSW) at 427 and Waddell A-JA in *Tricontinental* 21 NSWLR at 722C-723D applied the same reasoning:

> It appears to me that clause 11 (a) (i) is intended to apply to all material breaches of the agreement which are capable of being remedied. The question then is what is meant in this context by the word "remedy." It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. **And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause.** On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again. (emphasis added)

265 Here, the Kanki notice, relevantly, required Neptune within 14 days to remedy its past conduct in breaching continuing positive obligations by putting things right for the future. It was possible for Neptune, within 14 days, *first*, to return *Seadeck* to Sydney, *secondly*, to provide Kanki with a copy of the catering agreement and explain, if it could, the pricing of

the food served on the vessel and why the cost of providing the food appeared to be greater than the revenue it earned, *thirdly*, to provide Kanki with BAS documents submitted to the Australian Taxation Office and information about Neptune's subsequent non-payment of GST from February 2017 onwards and, *fourthly*, to provide Kanki with the financial information it had requested and Neptune's outstanding calculations of net profit over the life to date of the joint venture. Incidentally, Neptune could have also restored the mast, although its failure to do so is not a reason, by itself, that would have supported Kanki's termination arguments.

266 I reject Neptune's argument that cl 6(e) was limited by its first sentence to require joint management decision-making only with respect to the subject matters of corporate and private bookings, pricing for general admission, and the quality of beverages and food served on the vessel. Such a restrained construction pays no regard to the subsequent sentences of cl 6(e) which impose general obligations consistently with those in cll 6(a), (b), (d), (f), (g) and 7. Since cl 6(a) recorded the agreement of Neptune and Kanki that they were "equally responsible for the day-to-day running of the Business", it would be commercially nonsensical to deprive the second, third and fourth sentences of cl 6(e) of any work except in relation to bookings, pricing and the quality of victualling: *Schuler* [1974] AC at 251E-F; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 559 [82] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ.

267 A reasonable person in the position of the parties would have understood that decisions about commercially significant matters (such as when, how often and where *Seadeck* would offer its services to the public, how it would be fitted out, when and what repairs or maintenance would be needed, and how much working capital was necessary) were matters for both parties, that the clauses I have identified required both of them to decide together, not unilaterally.

268 Moreover, Kanki's complaints about accounting matters and the catering agreement, the setting of prices bearing on the profitability of catering for the vessel, the timeousness and adequacy of Neptune's provision of net profit calculations, BAS lodgements, and Neptune's and Kanki's compliance with taxation law, were not contrived or captious. They reflected genuine concerns as to matters fundamental to the running of the business and a proper understanding of its financial position.

269 Neptune could hardly complain that Kanki (or Mr Ozmen) was asking for money as profit distributions prior to April 2017, or not entitled later to receive profit distributions, on the basis asserted by Neptune from 2 February 2017 (*viz*: that this money was needed as working capital) without providing Kanki with a detailed set of management accounts showing (at least with management account levels of approximate accuracy) what the operations, cash flow and balance sheet of the joint venture were. Yet, as at July 2017, Neptune's financial reporting to Kanki indicated that the business in the preceding four months had been consistently loss-making.

270 It is no answer that (as Neptune contended) Mr Clarke, as a professional accountant, could look at entries in the Xero system. It took Mr Borella and Mr Gorter about four weeks and Kanki's threat, on 8 April 2017, to issue a notice of breach, to produce the first fortnightly profit and loss statement, and then it was only for the fortnight ended 28 March 2017. Unlike Mr Clarke and Kanki, they had access to information that Neptune and Mr Borella were not prepared, ever, to provide to Kanki about the terms and operation of the catering agreement and the discharge of the joint venture business' liabilities in respect of GST or, as it transpired, the failure of Neptune to lodge BAS and so meet the joint venture's GST obligations.

271 Neptune issued tax invoices for the sale of tickets and provided services, including beverages and food, in connection with the operation of the vessel. It (and not Kanki) made taxable supplies of those services within the meaning of s 9-5 of the GST Act which, relevantly, provided that "You make a taxable supply if (a) you make the supply for consideration", and s 9-40 provided "You must pay the GST payable on any taxable supply that you make". The GST Act imposed, *prima facie*, an obligation under s 9-40 of the GST Act on Neptune to pay all GST on taxable supplies that it made, and that Act was an applicable law relating to the business (within the meaning of cl 6(b)(vi) of the JVA). Nonetheless, each of Neptune and Kanki, as joint venturers in the business, had its own liabilities under taxation laws, including the GST Act.

272 The JVA provided for each party to have many joint responsibilities. Importantly, the structure of cl 10 and the first sentence of cl 6(e) allocated responsibility for collection of all revenue and the payment of day-to-day expenses to Neptune. That is why cl 10 required Neptune either to pay Kanki 50% of the revenue less expenses before taxation (being defined

as "Net Profit"), **plus any GST payable**, or for Neptune to bear, itself, as between the parties, both any net loss *and* the amount of any GST payable.

273 Hence, it was essential for Neptune to create fortnightly profit and loss statements and to make all GST payments, including any for which Kanki were liable if there were to be a net loss in any fortnight or, if there were a net profit, to pay Kanki 50% of its share **plus the amount of Kanki's GST liability** or account to Kanki in respect of GST.

274 It is not necessary to determine, in these reasons, the taxation issue as to the liabilities of each of Neptune and Kanki for GST under the GST Act. Suffice to say, as noted above, the JVA required that, regardless of whether there were a fortnightly net profit or loss, Neptune had to pay any amount of GST for which Kanki was liable in that fortnight either to Kanki or on its behalf. The initial calculation of the amount of GST was Neptune's responsibility, under cl 10(a), (b) and (c). Kanki was entitled to check the calculation of any net profit or loss and to require any appropriate correction. Of course, any actual liability to pay required Kanki to accept Neptune's calculations, but under cl 10(c), Neptune had to "provide all details to [Kanki] regarding" the calculation of net profit.

275 It follows that the JVA entitled Kanki to be given full information by Neptune about, among other financial information, GST and any BAS that Neptune had lodged. Throughout the relationship of the parties, Neptune failed continuously, *first*, to pay any sum directly to Kanki for GST either under cl 10(a) or (b) and, *secondly*, to give to Kanki any information about what it, Neptune, had done in respect of its obligation to pay any GST to Kanki or, on its behalf, that was payable as those clauses required.

276 The Xero system recorded data entries from primary documents such as tax invoices. There is no evidence that access to it enabled Kanki or Mr Clarke to calculate its GST liability after netting off of any input tax credits from joint venture expenditure. Only on 13 October 2017 did Mr Borella provide, for the first time, his explanation as to why he reasoned that Kanki had to pay half of the GST on all of the taxable supplies that Neptune made in the course of running the day-to-day business on *Seadeck*. This explanation occurred well after the expiry of the Kanki and Entertainment notices.

277 Later, on 31 May 2018, the Australian Taxation Office gave a non-binding general advice to Mr Clarke that the JVA did not amount to a joint venture for the purposes of the

GST Act and that, accordingly, Neptune had the only liability under the GST Act, as between it and Kanki, to pay GST in respect of the operation of the joint venture business.

278 As I have said, it is not necessary to decide which view is correct. On either view, Neptune was in breach of its obligations at the time of the issue of the Kanki notice under cl 6(b)(i), (iii), (vi) and (e) and cl 10(a) and (b).

279 Neptune was not entitled to ignore its obligation under cl 6(e) constantly to discuss and finalise arrangements for the operation and management of the joint venture business. Nor was Neptune entitled to eschew its obligation to make decisions jointly when it contemplated relocating *Seadeck* to Brisbane. The relocation was a major decision that affected the overall operation of the business. Neptune and Kanki jointly (as opposed to Neptune solely) had possession and control of *Seadeck* under the charterparty. The purpose of the JVA, expressed in cl 4(a), was to operate the business from the vessel. Neither party could operate the business to the exclusion of the other, yet, effectively, that is what Neptune did when it decided on about 15 May 2017 to take *Seadeck* to Brisbane without, and regardless of whether it had, Kanki's consent. As Mr Douchkov said, by then this was the only option, whether Kanki liked it or not, or as Mr Auld put it in his email of 17 June 2017, Kanki or Mr Ozmen did not "have the right to stop us from making money".

280 In my opinion, the Kanki notice was valid. No doubt, it could have been better expressed in parts, but it identified, and Neptune (or a reasonable person in its position would have) understood from it, the critical obligations on Neptune's part that required remedy, namely, the return of *Seadeck* to Sydney, the provision to Kanki of the catering agreement and information as to the pricing of the food, financial information and the position with BAS and GST.

281 Lord Reid explained in *Schuler* [1974] AC at 249H–250B that what is sufficient to put things right for the future depends on the nature of the breach. Here, Neptune could have offered to meet or to provide Kanki with a clear, detailed and open financial justification for relocation of the ship that might have satisfied Kanki that she should stay in Brisbane. Instead, Omniwealth's 14 July 2017 response affirmed Neptune's breaches and evinced an intention that Neptune would not be bound by its obligations to make any relocation decision jointly and to provide Kanki with any further financial information including about GST or the catering issues. That letter, effectively, confined Kanki to the role of a passive investor with no say over a major decision, namely where the ship, of which it was supposedly in joint

possession and control under the charterparty, would be or trade and no right to any more information about the joint venture or its business (including that GST was not being paid) than Neptune had chosen to give it to that time or might choose to give it in the future.

282 In *Carr v JA Berriman Pty Limited* (1953) 89 CLR 327 at 351-352, Fullagar J, with whom Dixon CJ, Williams, Webb and Kitto JJ agreed, discussed the situation where a building owner took a number of decisions inconsistent with his building contract (see too, *Commissioner for Main Roads v Reed & Stuart Pty Limited* (1974) 131 CLR 378 at 384 per Stephen J, with whom Gibbs and Mason JJ agreed). Fullagar J explained how a party can commit more than one breach of a contract to the point where, although an individual breach, taken by itself, may not have justified the innocent party exercising a right to terminate, cumulatively the totality of the conduct of the party in breach did justify it doing so. He said:

> A reasonable man could hardly draw any other inference than that the building owner **does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him. The intention must be judged from acts**: *Robert A. Munro & Co., Ltd. v. Meyer* [[1930] 2 KB 312, at 331]. **The intention "evinced" here is an intention not to be bound by the contract**. **When such an intention is shown, the other party is entitled to rescind the contract**. Mr. Berriman thought that such an intention had been shown, and he acted accordingly. In my opinion, he was justified in the view which he took, and acted as he was legally entitled to act. (emphasis added)

283 Another illustration of the principle occurred in *Laurinda Pty Limited v Capalaba Park Shopping Centre Pty Limited* (1989) 166 CLR 623 (applying *Carr* 89 CLR at 351-352: see per Mason CJ at 633, Brennan J at 644, Deane and Dawson JJ at 658). There, a lessor's persistent failure to deliver a registrable lease to a lessee amounted to a repudiation of the contract for lease entitling the lessee to treat the contract for lease as at an end because that conduct evinced an intention not to be bound. Mason CJ said that a notice requiring performance within a specified (reasonable) time did not need to state that the party giving it would treat the contract as at an end if there were non-compliance but, his Honour added (166 CLR at 638, see too per Deane and Dawson JJ at 653 with whom Brennan J agreed on this point at 646 who expressed a similar view, and see also per Gaudron J at 664):

> … **the notice must convey a definite and specific intent to require strict compliance with the terms of the contract within a reasonable time**, so that the recipient will be made aware that the party giving the notice may elect to treat the contract as at an end at the conclusion of such reasonable time unless compliance is forthcoming. (emphasis added)

284 Here, even if the Kanki notice was ineffective as a notice under cl 13(a)(iii) to bring about automatic termination of the JVA under cl 13(b), I am of opinion that it was effective to enable Kanki to treat the JVA as at an end when, on 14 July 2017, Neptune refused to comply with any of its requirements, including remedying the relocation of the ship in the respects I have found. In essence, Omniwealth's statement in its letter of 14 July 2017 that "[t]here is no obligation set out in the JVA for decisions to be made jointly" reaffirmed Neptune's communicated position that it could act in the conduct of the joint venture's affairs as it chose regardless of Kanki's wishes. A reasonable person in Kanki's position would have understood from Neptune's behaviour in persisting with arranging the relocation, after the parties' exchange of emails in mid-May 2017 (as well as from Mr Douchkov's dismissive email of 15 June 2017 in response to Mr Koyunoglu's email of the same day (see [225] above)), that Neptune did not take the JVA seriously and was only prepared to carry out its part of the JVA if and when that course suited it. Thus, Kanki only found out in mid-June 2017 that Neptune was proceeding with the relocation, despite its opposition in mid-May 2017, when it became aware of an advertisement on the internet advertising *Seadeck* ticket sales in Brisbane on the weekend of 1 and 2 July 2017.

285 I am of opinion that a reasonable person in Kanki's and Entertainment's positions would have understood, correctly, by the time of the issue of the Kanki and Entertainment notices on 11 July 2017, that Neptune did not, and did not intend to, take the JVA seriously, and was only prepared to carry out its part of the JVA if and when it suited Neptune: *Carr* 89 CLR at 351-2; *Laurinda* 166 CLR at 633, 644, 658. That conduct evinced an intention on Neptune's part not to be bound by the JVA. The same position applied to the charterparty that demised *Seadeck* to Kanki and Neptune and placed her "under their complete control" (cl 1(a)(i)), not under the control of only one of them), although Neptune would carry out the daily operation of the vessel under cl 1(c).

286 The Kanki notice made plain that, if Neptune failed to remedy the breaches alleged, Kanki would treat the JVA as at an end. Even though the Kanki notice expressly relied on cl 13 of the JVA, it also sufficed as a notice to remedy one or more breaches at common law to entitle Kanki to treat the JVA as terminated once Neptune did nothing to remedy any of its breaches and persisted in its denial of Kanki's right to make important decisions jointly.

Conclusion

287 I am of opinion that Kanki validly invoked cl 13(a)(iii) in giving Neptune the Kanki notice and that Neptune's failure to remedy any of the breaches that I have discussed brought about the automatic termination of the JVA pursuant to the operation of cl 13(b). Alternatively, if, contrary to this finding, the Kanki notice were defective as one given for the purposes of cl 13(a)(iii), I am of opinion that Kanki validly terminated the JVA at common law. Kanki is entitled to a declaration that the JVA was terminated on 25 July 2017.

288 It follows that once the JVA was terminated, the express purpose of the charterparty, namely, for the charterers to operate *Seadeck* for the purpose of the JVA, which was annexed to the charterparty, also ceased. Since it was a condition of the charter that *Seadeck* be demised to Neptune and Kanki jointly and be "under their complete control" (cl 1(a)(i)), when Neptune effectively took her into its control, if not possession, and denied Kanki the right to make joint decisions, in particular, the relocation decision, the charterers evinced, to Entertainment, an intention not to be bound. Accordingly, the Entertainment notice was valid: *Laurinda* 166 CLR at 638, 646, 653. Therefore, Entertainment's solicitors' letter of 4 August 2017 was effective to terminate the charterparty.

289 Entertainment is entitled to an order for possession and delivery up of *Seadeck* and a declaration that the charterparty was terminated on 4 August 2017. However, as is common ground, the state of accounts between Kanki and Neptune requires considerable investigation, based on my findings as to the correct construction of the JVA and its allocation of financial obligations, to ascertain how the income and expenses of the joint venture and account of profits during the operation of the JVA up to 25 July 2017 should be allocated. In addition, Neptune will have to pay Entertainment damages or account to it for the use of the vessel after the date of termination of the charter on 4 August 2017 and Kanki may have a claim against Neptune for damages (including for expectation loss) for breach of the JVA or an account of profits.

290 One aspect on which Kanki may be able to claim damages is its expectation loss after the cessation of the waiver that Entertainment and Kanki gave for the season (to 30 September 2017 or 31 October 2017) of Neptune's obligation under cl 7(b) of the charterparty to obtain a survey and liquor licence authorising *Seadeck* to carry at least 800 passengers. That breach might entitle Kanki to expectation damages based on the $5 million

guarantee for the balance of the term of the JVA (but I make no decision about that matter, since this scenario has not been the subject of submissions).

Entertainment's and Kanki's alternative claim that the joint venture be wound up

291 If I were wrong in my conclusion that Entertainment and Kanki are entitled to terminate the JVA and charterparty on 25 July 2017 and 4 August 2017 respectively, the question would have arisen whether the relationship of the parties currently is such that it would be just and equitable to wind up the joint venture. Obviously, if the JVA and charterparty were found on appeal to be still on foot, my reasoning above will be flawed. That makes it difficult for me to address the just and equitable issue at this stage.

292 However, in my opinion, on the whole of the evidence and the parties' conduct of the proceeding, it is plain beyond argument that they do not, and cannot, get on with each other to enable them to cooperate and jointly decide how the joint venture business should be conducted. The cause of this impasse is the overarching financial pressure that has been, and is still, affecting each of them. That pressure was evident as soon as *Seadeck* was detained in Port Said in 2014 and, *first*, Mr Ozmen could not, or did not, pay for her's and the crew's release, and, *secondly*, Neptune and or Messrs Douchkov and Como began incurring considerable expense in bringing *Seadeck* to Sydney, paying for her to be surveyed and classed to carry out the joint venture business. This financial consequence was exacerbated by Neptune's initial inability to obtain a liquor licence for 800 persons. And, as Mr Douchkov acknowledged, Neptune's high risk, high reward scenario altered radically on 1 March 2016, when RINA classified the ship to carry only 450, instead of 800, passengers.

293 The parties began the proposed joint venture in 2014. They either expended significant sums of money or committed the income-earning chattel, *Seadeck*, to about two years of inactivity as a working ship in the period between commencing her journey from Turkey to the grant of the liquor licence. Mr Ozmen or Entertainment had invested in building or acquiring *Seadeck* based on the perceived ability to obtain a liquor licence for 800 passengers. Not only did the anticipated annual net profit before taxation of over $5 million to each party not eventuate, but the actual earnings and apparent net profits were radically less. That circumstance made recoupment of each party's investment much more difficult than if the joint venture had generated net profits of $10 million or more annually, as the parties intended.

294 And, it is a further feature of ordinary experience that if parties in a commercial (or other) relationship find themselves in straightened circumstances or suffer from a financial disappointment or stress caused by a lack of income or profit, each one tends, as here, to act for itself rather than jointly or cooperatively, unless such a course suits his, her or its ends. The entry into the catering agreement and Neptune's substantial deductions for amortisation and depreciation (totalling almost $1.1 million since July 2017 to date, even though none of those appear to have been agreed by Kanki or to be in respect of shared costs within the meaning of cl 9 of the JVA) reduced the gross profits that Neptune has given accounts for, and provided instances of it acting for itself, as did the decision to relocate *Seadeck* to Brisbane in 2017. Similarly, Mr Ozmen's earlier demands for money, once *Seadeck* began trading, was another instance of the discord caused by the financial pressure each side of the joint venture faced.

295 Neptune pleaded that, by involving Culture Map in assisting them, Kanki and Entertainment acted with unclean hands so as to disentitle them to relief. If there were any basis for that allegation (which I have not found was established on the evidence), then the relationship would have been poisoned. The fact that Neptune made that allegation (which I accept, was done with an honest but mistaken belief as to when Culture Map first became involved) was also indicative that the parties should not be required to remain any longer in a deeply dysfunctional relationship.

296 It follows that the cross-claim must be dismissed. As Neptune has failed in its defence and its cross-claim, Neptune should pay the costs of the proceeding including the cross-claim.

Concluding observations

297 Both sides have been unfortunate victims of events generally beyond their control, starting from the detention of *Seadeck* and her crew at Port Said and extending to the delays in obtaining the liquor licence because of Neptune's unintended or careless (I do not make findings as to which) nondisclosure of Kanki's interest in the liquor licence.

298 In my opinion, the evidence shows that the parties do not trust each other and, as the examples of the disputes over the relocation decision, catering agreement and the financial information illustrate, Neptune has not acted in the best interests of the joint venture or in good faith. Therefore, if it had been necessary to make a decision on the just and equitable ground, I would have wound up the joint venture now.

299 Because of the urgency of giving a decision on the termination issue promptly, lest the term of the JVA and charterparty expire and Neptune exercise the first option under each to extend it for three more years, I have had to prepare these reasons in much less time than I would have liked, given the complexity of the issues and the facts. The parties will need time to address the issue of what precise orders should be made, so that the parties can address those in light of these reasons.

300 One important reason the parties needed a prompt decision, which I had to give orally on 3 April 2019 (although I have subsequently revised the expression of these reasons, but not my essential reasoning), is that, as Mr Auld said in his evidence, Neptune had not locked in any arrangements for *Seadeck* to trade in Brisbane for the 2019 winter season and the time to plan for the winter this year is nigh.

301 A second reason is, given the firm conclusion to which I have come, it would not be just to delay giving effect to it while I wrote a reserved judgment over a more lengthy period when time permitted, particularly having regard to my already scheduled Court hearings and other judicial commitments in the foreseeable future.

302 The first three year term of each of the JVA and charterparty would have come to an end in late October 2019. If Entertainment is entitled to return *Seadeck*, that should happen sooner rather than later. Damages may not be an adequate remedy, especially if, as the evidence suggests (based on the statutory declarations that Mr Douchkov and Mr Como gave to the ILGA), Neptune will not be able to pay them. That suggestion is supported because Neptune has financed over $400,000 of its legal costs in this proceeding from the joint venture's accounts.

303 In my opinion, Entertainment will have to give a ship's mortgage over *Seadeck* or some other security to secure any obligation that it or Kanki may have to Neptune after the assessment of damages and the taking of accounts has occurred. The receivers will also need to be discharged.

304 I will order (as the parties jointly sought today (3 April 2019)) that the proceeding stand over to 17 April 2019 and that on or before 17 April 2019, in default of agreement, each party file and serve the draft orders that that it proposes be made, together with written submissions limited to two pages in support of those orders on or before 15 April 2019. I will provisionally list the matter for case management at 9.30am on 17 April 2019.

I certify that the preceding three hundred and four (304) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 3 April 2019