JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	ARWON FINANCE PTY LTD -v- SMITH [No 2] [2020] WASC 56
CORAM	**:**	KENNETH MARTIN J
HEARD	**:**	5 & 6 NOVEMBER 2019
DELIVERED	**:**	27 FEBRUARY 2020
FILE NO/S	**:**	CIV 2226 of 2017
BETWEEN	**:**	ARWON FINANCE PTY LTD Plaintiff AND TRAVIS ROYCE SMITH Defendant
FILE NO/S	**:**	CIV 1827 of 2018
BETWEEN	**:**	ARWON FINANCE PTY LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) Plaintiff AND TRAVIS ROYCE SMITH in his own right and as trustee for the SMITH INVESTMENT TRUST Defendant

Catchwords:

Loan - Recovery and enforcement action - Assertions of promissory estoppel - Pleaded (mis)representation as to investor's future right to sell back acquired plantation assets at SGARA values - Pleaded further (mis)representation as to inhibition of personal recourse to borrower without first foreclosing on assets to reduce debt - Express terms of loan agreement to the contrary of both representatives - Representations not established - No position of reliance or detriment established in any event

Legislation:

Nil

Result:

Judgment for the plaintiff

Category: B

Representation:

CIV 2226 of 2017

Counsel:

Plaintiff : Mr S K Dharmananda SC & Mr V N Ghosh
Defendant : Mr M Douglas

Solicitors:

Plaintiff : Allens
Defendant : Tottle Partners

CIV 1827 of 2018

Counsel:

Plaintiff : Mr S K Dharmananda SC & Mr V N Ghosh
Defendant : Mr M Douglas

Solicitors:

Plaintiff : Allens
Defendant : Tottle Partners

Case(s) referred to in decision(s):

Arwon Finance Pty Ltd v Smith [2019] WASC 245
Arwon Finance Pty Ltd v Wilson [2019] WASC 244
Bell Group Ltd (in liquidation) v Westpac Banking Group [No 9] [2008] WASC 239; (2008) 39 WAR 1
Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd [2016] HCA 26; (2016) 260 CLR 1
Jones v Dunkel (1959) 101 CLR 298
Low v Bouverie [1891] 3 Ch 82

KENNETH MARTIN J:

Introduction

History of proceedings

1 This decision is the sequel to my earlier preliminary issue determination concerning the defendant's (Mr Smith's) counterclaim, as negatively evaluated under my reasons: ***Arwon Finance Pty Ltd v Smith*** [2019] WASC 245 delivered 5 July 2019 (***Arwon v Smith***). As I had explained under [4] - [9] of those reasons, the full trial which had been set down to commence in early May 2019 could not for various reasons proceed at that time. However, I was able to proceed then to finally resolve whether a deed of company arrangement (DOCA) of 29 June 2019, which followed upon the plaintiff (Arwon) being placed into administration, along with receivers and managers appointed in January 2018, effectively barred the attempted counterclaim of Mr Smith.

2 In the end, I concluded it did and so, Mr Smith's counterclaim was then dismissed.

3 The balance of the litigation, however, was not then concluded and so, required future resolution. Hence, the trial that followed.

The debts

4 On 6 May 2019, to the end of resolving all the remaining trial issues, the parties agreed to consent orders in respect of Arwon's remaining unresolved debt and interest claims pending as against Mr Smith. At that time, I ordered:

> 1. Save for the adjudication of the issues, facts and matter alleged by the defendant's amended consolidated defence and counterclaim, as at 6 May 2019:
>
> (a) Mr Travis Smith owes the Plaintiff the amount of $881,500.00 pursuant to Loan Agreement A3713/A3711 executed on 30 June 2016;
>
> (b) interest accrues on the sum of $881,500.00 until the date of payment at the rate of 12.95% per annum;
>
> (c) Mr Travis Smith as trustee of the Smith Investment Trust owes the Plaintiff the amount of $1,341,202.66

pursuant to Loan Agreement A3396 executed on 30 June 2015;

(d) interest accrues on the sum of $1,341,202.66 until the date of payment at the rate of 10.5% per annum per annum;

(e) Mr Travis Smith owes the Plaintiff the amount of $1,739,100.00 pursuant to Loan Agreement A3389 executed on 30 June 2015;

(f) interest accrues on the sum of $1,739.100.00 until the date of payment at the rate of 12.50% per annum;

(g) Mr Travis Smith as trustee for the Smith Investment Trust owes the Plaintiff the amount of $1,065,900.00 pursuant to Loan Agreement A3393 executed on 30 June 2015; and

(h) interest accrues on the sum of $1,065,900.00 until the date of payment at the rate of 12.50% per annum.

2. If the defendant's Amended Consolidated Defence and Counterclaim is dismissed, the plaintiff is entitled to judgment for the debts and interest amounts identified in Order 1.

5 As regards order 2 above, it follows in the wake of my preliminary issue determination reasons given in ***Arwon v Smith***, concluding that Mr Smith's counterclaim was, indeed, barred by the terms of the DOCA, that the debts and interest amounts as are identified under order 1, above are now established.

6 As regards order 1 of the 6 May 2019 orders, there will be noted the chapeaux qualification reference to the unresolved pending 'issues, facts and matter' as alleged by the defendant's (ie, Mr Smith's) amended consolidated defence and counterclaim, as at 6 May 2019. It is necessary to appreciate that subsequent to May 2019, Mr Smith, through his legal advisers, filed a re-amended consolidated defence of 16 September 2019 (the REACD). That pleading should be referred to in lieu of the predecessor pleading as regards the agreed application of the Order 1 chapeaux.

7 Mr Smith's REACD introduces some small but forensically significant amendments to the previous defence and counterclaim pleading, in respects I will explain shortly.

Issues remaining to be determined

8 Of course, Mr Smith's counterclaim pleading now stands as wholly dismissed. Therefore, the required adjudication of issues, facts and matters alleged, by reference to order 1, is now confined to the current defence pleas as advanced by Mr Smith. No issue was taken at the trial over the terms of the orders of 6 May 2019, strictly speaking, not being engaged as regards Mr Smith's subsequent defence pleading as revised after 6 May 2019. I proceed on that basis.

9 As such, the only residual defence issues left for me to determine are whether Mr Smith can make good any of the defences in his REACD to prevent judgment being entered for the plaintiff. The trial proceeded accordingly on that basis.

The four loan agreements

10 In overview, the position reached at commencement of the trial in November 2019 concerned four wholly written loan agreements, all entered into as between Arwon and Mr Smith and chronologically as follows:

(a) written loan agreement A3396, executed on 30 June 2014, subsequently varied in immaterial respects in 2015 (note a typographical error in order 1(c) of the orders of 6 May 2019 above, in reference to the date which should be 30 June 2014, not 30 June 2015, as seen. Nothing turns on that acknowledged error.) The debt repayment claim in respect of loan agreement A3396 by Arwon is as against Mr Smith, in his capacity as the trustee of the Smith Investment Trust;

(b) two written loan agreements executed on 30 June 2015, namely:

(i) agreement A3389 and entered into by Mr Smith personally, on 30 June 2015; and

(ii) agreement A3393, executed by Mr Smith on 30 June 2015, in the capacity as trustee of the Smith Investment Trust; and

(c) written loan agreement A3711/A3713 entered into by Mr Smith personally with Arwon on 30 June 2016.

For convenience, I will refer to the four loan agreements above as the 'Arwon loan agreements'.

11 Hence, Arwon's debt recovery claims are seen to be pursued against Mr Smith personally, but also in his capacity as the trustee of the Smith Investment Trust. By reason of the 6 May 2019 consent orders those claims are now otherwise established, subject only to the required evaluation of Mr Smith's defences as seen raised under his REACD.

Mr Smith's defences

12 In essence, Mr Smith's current defences are grounded upon his contentions as to a promissory estoppel raised against Arwon, favouring Mr Smith both personally, as well as in his capacity as the trustee of the Smith Investment Trust.

13 Consequently, in those circumstances where the debts are all essentially proved as due, subject only to Mr Smith making good his defences, the trial proceeded on the basis of Mr Smith by counsel going first, opening on his defence case and advancing the dual promissory estoppel defences put against the plaintiff's debt repayment claims.

14 Under Mr Smith's now pleaded REACD, two estoppel pleas are raised. Each plea is made towards the showing of a promissory estoppel by representation, effectively blocking Arwon's debt recovery action, as defences contended for on Mr Smith's behalf.

The promissory estoppel claims (defences) of Mr Smith

The SGARA representation

15 The first of the estoppel contentions is found at par 12 of the REACD. Briefly described, this plea seeks to advance on behalf of Mr Smith, a position to the effect that, the true debt repayment obligation position, as between Mr Smith and Arwon, is contrary than as stated by all the written agreements. Those four agreements, essentially entered into at 30 June on successive years (2014 - 2016), display written terms which outline in explicit terms that if Mr Smith ever fell into arrears and defaulted in respect of his scheduled repayments of promised loan instalment, or his interest repayments to Arwon on his loans, that he was then fully exposed, as borrower, to the multiple debt recovery options as were stated to be held by Arwon, as lender. By the agreement terms, Mr Smith, in default, was exposed to Arwon selecting whatever course of debt recovery action it saw fit to follow. Arwon's options for recovery included proceeding to enforce the mortgage security it held over Mr Smith's leased sandalwood tree

plantation properties, or otherwise proceeding against Mr Smith personally as Arwon saw fit.

16 But by the alleged estoppel contended as arising from the so-called SGARA representation by Arwon, Mr Smith says that it had been represented to him by various representatives of Arwon (and as well by Arwon's parent corporation, which was then called TFS Corporation Ltd, but subsequently became Quintis Ltd (subject to deed of company arrangement)), that, broadly speaking, Mr Smith was led to believe that he enjoyed a right, something in the nature of a de facto put option. By this option Mr Smith says he was led to believe that he could require Arwon's parent corporation (ie, Quintis Ltd), to purchase from him any one or other of his as acquired sandalwood plantations **and** to do so at a purchase price that was to be determined by an application of an accounting valuation formula for assets like plantations, known as SGARA (or SGARA value). If Mr Smith did choose to invoke the option-like right he says he held, the consequences were said also to thereby release Mr Smith from his investment management agreements (IMAs) and from his lease agreements with Quintis entities.

17 Critically also, the as realised proceeds of any sale of Mr Smith's leased sandalwood plantations to Quintis Ltd would then be used by Mr Smith to pay back his loans from Arwon.

SGARA

18 The term 'SGARA' is a reference to a valuation methodology for a species of biological asset - a methodology said to be commonly used by accountants and others. The acronym SGARA stands for 'Self-Generating and Regenerating Assets'. Paragraph 14 of Mr Smith's REACD, which is admitted by Arwon, pleads that SGARA is an accepted accounting method of valuing biological assets based on 'the heartwood yield per tree, a price of oil and a discount rate and calculated as income less costs to complete'.

19 The tenor of the evidence at the trial adduced on behalf of Mr Smith, [which apart from five volumes of the agreed trial bundle (which in its entirety was exhibit 1) comprised Mr Smith's own witness statement (exhibit 4) and a witness statement of Mr Smith's accountant, Mr Michael McLean], was to the effect (putting aside adverse natural catastrophes of mother nature such as say, fire, flood, storm or insect plagues) that, generally speaking, the value of a SGARA asset should increase year by year - as the age and maturity of, for instance, a young

sandalwood tree, would develop over time to mature eventually into a valuable and exploitable agricultural resource.

The derived SGARA representation

20 Mr Smith's pleaded SGARA representation is that he was led to believe that, notwithstanding what were the contrary express terms of the Arwon loan agreements, that he could at any future time (ie, effectively in perpetuity) elect to sell back some or all of his tree assets. Thereby, Mr Smith would realise for himself funds based on the SGARA value of the tree assets at the time, if and when he ever needed funds to repay his loan debt to Arwon.

21 It is necessary then to carefully examine the terms of par 12 of Mr Smith's pleaded REACD to evaluate precisely how this contended SGARA representation is alleged to be derived.

The first element

22 As will be seen, Mr Smith's SGARA representation, as it is pleaded by his par 12, is supported by 16 discrete so-called particulars. In truth, the particulars are all material facts relied upon by Mr Smith to **derive** the SGARA representation and so, thereby, to begin to establish the first element of his promissory estoppel (ie the representation) as it is erected against Arwon's debt recovery action. By subsequently seen pleas in the REACD, Mr Smith further contends, in effect, that this SGARA representation led him to act under an assumption that he enjoyed such right as was promised to him.

The second and third elements

23 As to the second and third elements, Mr Smith contends subsequently as to both his asserted reliance and then, to his detriment, upon Arwon taking steps to make demand(s) on him for the repayment of his loans, and then for Arwon to directly seek to enforce those debt claims against him, both personally and as trustee (for each of the Arwon loan agreements).

24 Mr Smith's SGARA representation estoppel argument is that Arwon has not engaged with him in terms of Quintis Ltd acquiring some or all of his sandalwood tree plantations, which he still holds personally or as trustee.

25 A contended element of detriment, as Mr Smith's trial counsel explained, arises because of the very nature of such sandalwood tree

plantations - as being illiquid assets, in terms of an unlikelihood of a swift realisation of their proceeds to other persons (other than Quintis Ltd) as being problematic.

26 Notwithstanding that issue, these sandalwood plantations of Mr Smith, are said to still be valuable assets for him, applying a SGARA valuation approach. Nevertheless, the attributed SGARA value appears as some way out of contended alignment to a stand-alone commercial marketplace value that is realisable for such tree plantation assets -which look to be planted and growing at some remote Australian rural locations, including at places in the Northern Territory.

The default representation ('trees first')

27 The second of Mr Smith's defences is another contended promissory estoppel by representation. This plea is also invoked by Mr Smith in refutation against all his Arwon debt exposures under the Arwon loan agreements. The plea is found at par 16 of his REACD. This discrete estoppel plea is referred to as Arwon's 'default representation' as made to Mr Smith: see par 16.

28 During the course of the trial, this pleaded estoppel representation was also referred to sometimes by the alternative nomenclature, as the 'trees first' representation.

29 During the trial in closing submissions, counsel for Mr Smith referred to these two representations contended for (the SGARA representation and default representation) as both separately founding a promissory estoppel against Arwon, but also as being, essentially related, with one, in effect, he suggested, as the reverse side of the other.

30 The pleaded substance of the contended default representation is that if Mr Smith, as a borrower from Arwon (in whatever capacity), ever did default in terms of the non-repayment of his loans, or by not meeting the interest accruing thereon, that Arwon had told him, in effect, that even so it would not pursue Mr Smith for the loan money then due. That is, Arwon would first take realisation steps under the mortgage security it held from Mr Smith to repossess and to forfeit Mr Smith's sandalwood plantation which secured Arwon's loans and would then credit Mr Smith with proceeds as were realised by that prior security enforcement action.

31 Further, this default representation is said to contain an important proviso, to the effect that Arwon would only pursue Mr Smith personally for the balance of any unrepaid loan money under its loan, if there turned out to be a shortfall due following the application of the SGARA asset value methodology for the as forfeited plantation applied against Mr Smith's loan.

32 The default representation estoppel contention is that Mr Smith was led to believe by this representation and so, duly assumed that Arwon would only pursue him as a debtor for the shortfall of his loan debts - after first having taken recourse against the sandalwood tree plantation security that Arwon held over Mr Smith's sandalwood plantations.

33 Once again, this default representation as is pleaded is not a standalone statement or event. Rather, it is also to be **derived**. The derivation process is made via some eight discrete particulars that are provided to par 16 of the REACD (under (a) through (h)). In truth, these particulars again are in the nature of material facts, all raised and relied upon by Mr Smith to **derive** his contended for default representation. I also set out later in the reasons the precise formulation of this par 16 REACD contended estoppel founding representation, along with all the supporting derivation particulars.

Common features of the representations

34 It is convenient to presently note on a preliminary basis some common features towards each of these two key estoppel representations, being now the only defence issues raised by Mr Smith at the trial and relied upon respectively by pars 12 and 16 of the REACD. I refer to these features:

(a) neither of the contended representations are direct representations that are contended to be a subject of one explicit statement made by any particular Arwon person to Mr Smith, at any particular time. Rather, each is pleaded to be '**derived**' from a series of supporting 'particulars'. To that end, a number of 'ingredients' all need to be combined together and assembled, in order to derive each of the emerged contended estoppel representations;

(b) both of the as contended representations manifest as being directly contrary to an express term, or terms, found within the written Arwon loan agreements. Such agreements as were

signed by Mr Smith either personally, or as trustee of the Smith Investment Trust - at the time each of these successive 30 June (2014 - 2016) borrowing transactions was committed to by Mr Smith with Arwon, usually upon the last day of a particular financial year;

(c) neither of the as contended for representations are said to bear any precise date at which either was made, or took on its final form. As will be seen, the so-called SGARA representation might span much of the as particularised alleged conduct extending across 16 assembled particulars ((a) through (p)), over a period from May 2013 through to 30 June 2016. Hence, if the ultimately derived SGARA representation was only putative and was still developing to full maturity prior to 30 June 2016, then it is impossible to see how it might any earlier subsist to thereby causatively bear upon Mr Smith's entry into the Arwon loan agreements of 30 June 2014, then of 30 June 2015, respectively. That also is the case temporally, for the default representation, which across its eight given particulars as seen under (a) through (h), ranges over time across its various ingredients for a period as between 18 September 2013 to 23 November 2016;

(d) by some contrast to the observations made upon an estoppel defence, which I earlier rendered in ***Arwon v Smith*** at [25] -[29] and [30] - [32] (in a context then of Mr Smith's earlier pleaded defence and counterclaim), an evolved par 16 REACD plea concerning the contended default representation has over time altered in its content. The key change in this estoppel plea as it has now evolved for the trial was, in effect, foreshadowed under correspondence received by my chambers passing between the lawyers for the respective parties, only one day after the hearing of the separate issues trial. As to what happened then, see [29] - [30] of my reasons in ***Arwon v Smith***, in the following terms:

> 29. That so-called default representation contention by Arwon meant Mr Smith's maximum loan default exposure was to the loss of his sandalwood tree holdings by way of their foreclosure and repossession to Arwon. In effect then, Mr Smith contends under this defence for what is very plainly a non-recourse, or limited recourse loan agreement with Arwon. His counsel confirmed that to be so when I posed that question to him during oral argument (see ts 33).

...

> 30. However, the day after the hearing of the trial of separate issues was completed with judgment then reserved, my Associate was advised by letter sent from Mr Smith's lawyers that his defence needed to be clarified to say that Mr Smith would still remain liable personally for any shortfall on his loans to Arwon if that were the result of the foreclosure against his plantation assets. However, the lawyers for Arwon then wrote to object. They said Arwon opposed any leave for Mr Smith to so amend his defence or to withdraw from what his counsel had confirmed in open court as being his instructions from Mr Smith during the hearing. For present purposes, it is not necessary to resolve that side issue.

and

(e) nevertheless, the November 2019 trial ultimately has proceeded on the basis of the default representation in the evolved form, as it is now contended by Mr Smith under his REACD of 16 September 2019. He contends now that the former non-recourse loan nature of his earlier plea (carrying potential adverse taxation consequences in terms of a reassessed non-deductibility of the loans by Mr Smith), is adjusted. When I come to set out the full content of REACD par 16 (see [70]), I will show all the excisions and augmentations, seen essentially at the concluding six lines of REACD par 16 (significantly by the defence estoppel plea representation ultimately contending that Mr Smith, in effect, can only be pursued personally for loan money after a repossession, and only then, 'if there was a shortfall between the SGARA value of the forfeited plantation and the balance of the loan, if any').

35 Before proceeding too much further, I need to collect and assemble the agreed trial dramatis personae and then a series of what were uncontroversial facts all agreed as between the parties, at the trial. These may be usefully extracted from the plaintiff's dramatis personae and from the submitted and exchanged chronologies before the trial (exhibit 8). I note that there has been no expressed dissent by Mr Smith or his legal representatives against any of the key events as seen collected by Arwon's exchanged chronology.

36 I move to address those uncontroversial matters.

Dramatis personae

37 From the plaintiff's dramatis personae and submitted chronology for trial of 26 April 2019, the following persons or entities and their respective roles as are all identified:

Name	Role
Arwon Finance Pty Ltd	Plaintiff. A wholly-owned subsidiary of Quintis Australia (formerly a wholly-owned subsidiary of Quintis Ltd).
Travis Smith	Defendant. Corporate travel specialist, business owner, and the sole director and secretary of Traveltree Australasia Pty Ltd. Sole Trustee of the Smith Investment Fund.
Alistair Stevens	Chief Financial Officer, Quintis Australia. Formerly Chief Financial Officer, Quintis Ltd.
Frank Wilson	Founder, former CEO and managing director of Quintis Ltd. Former Chairman of Quintis. Former director of each Quintis group subsidiary (including Arwon). Major investor in Sandalwood projects and major shareholder in Quintis Ltd.
Grant Walsh	Head of Corporate Finance and Treasury, Quintis Australia. Formerly the Head of Corporate Finance and Treasury, Quintis Ltd.
Ian Thompson	Head of Plantation Sales, Quintis Ltd (2007 to 2014).
Quentin Megson	Former Co-Company Secretary (January 2006 to February 2018) and former Chief Financial Officer (until November 2012), Quintis Ltd.
Matthew McLean	Mr Smith's accountant since about 2006. Undertook tax planning for Mr Smith, provided advice in relation to investments in Quintis Ltd products, and negotiated with Quintis Ltd on behalf of Mr Smith.

	Mr McLean was a witness called by Mr Smith at the trial. However, his evidence was largely inconsequential in my view.
Quintis (Australia) Pty Limited	New parent company of the Quintis Group with effect from 31 October 2018, pursuant to the Deeds of Company Arrangement (DOCA) that restructured the Quintis group of companies.
Quintis Ltd (subject to Deed of Company Arrangement)	Former parent company of the Quintis group of companies. Formerly known as TFS Corporation Ltd (***TFS***) until March 2017. Quintis Ltd was listed on the Australian Securities Exchange and is also subject to a Deed of Company Arrangement.
Richard Tucker, Scott Langdon, and John Bumbak (together the ***Administrators***)	Administrators appointed to Quintis Ltd and to its Australian subsidiary corporations on 20 January 2018.
Robert Brauer, Shaun Fraser and Jason Preston (together the ***Receivers and Managers***)	Receivers and Managers appointed by the secured bondholders to Quintis Ltd and its Australian subsidiaries, on 23 January 2018.
TFS Properties Ltd	A subsidiary of Quintis Ltd (and now a subsidiary of Quintis Australia) that held land for the group. Subsequently renamed Sandalwood Properties Ltd.

38 To the above I would only add a reference to a business entity associated with Mr Smith, namely, Travel Tree Australasia Pty Ltd (Travel Tree) which Mr Smith elaborates upon at pars 2 and 10 of his witness statement.

Chronology of agreed key events in uncontroversial areas

39 The table below essentially collects most of the key facts as were assembled by the plaintiff under its submitted trial chronology of 26 April 2019. Most of the facts as assembled may be seen to be sourced by reference either to facts emerging from agreed trial bundle documents, or from uncontroversial facts which are taken from Mr Smith's tendered witness statement.

40 References below to the witness statement of Mr Travis Smith are to exhibit 4 of the trial. References to tab numbers are to the individual documents located within the five volumes of agreed trial bundle documents.

41 Strictly, the tendered documents found at tabs 7, 9, 57 and 58 of the trial bundle are, respectively, sub-exhibits 1.7, 1.9, 1.57 and 1.58 - in illustration of the assembly of the trial bundle as tendered exhibits at the trial.

42 I have also supplemented that submitted chronology by adding a reference to the deed poll Mr Smith executed during June 2015 (exhibit 6).

43 From out of all those uncontroversial documents and from the facts as disclosed in the exchanged chronology between the parties for the purpose of the trial, the following mostly uncontroversial facts emerge and are collected and recorded below as findings of fact made in the trial:

Date	**Event**	**Trial bundle reference**
	Generally	
1999	Mr Travis Smith meets Mr Frank Wilson. Travel Tree begins providing corporate travel services to the Quintis group.	Witness statement of Travis Smith dated 22 January 2019 (***Smith Statement***), [9] - [10].
2000-2016	Mr Smith invests in various Quintis Sandalwood projects.	Tab 7 (SMI.003.001.0644) Tab 9 (SMI.003.001.0469) Tab 57 (ARW.700.001.0024) Tab 58 (SMI.003.001.0575) Tab 155 (ARW.700.001.0116) Tab 157 (ARW.700.001.0182) Tab 170 (ARW.700.002.0090) Tab 171 (ARW.700.002.0091) Tab 178 (ARW.700.001.0239)
	Calendar year 2013	
8 May 2013	Mr Smith sends an email to Mr Ian Thompson stating that he wants to invest in 20 hectares of plantations prior to 30 June 2013.	Tab 2 (ARW.500.007.0157)

25 June - 27 June 2013	Mr Smith's accountant, Mr Matthew McLean, advises Mr Smith about a 2013 investment.	Tab 4 (SMI.003.001.0178) Tab 5 (SMI.003.001.0208)
30 June 2013	Mr Smith invests in 12 hectares of Sandalwood plantations with Quintis Ltd in his own right and in 15 hectares as trustee for the Smith Investment Trust - in a high net worth/sophisticated product offering. Mr Smith borrows the money for each investment from Arwon pursuant to Loan Agreements A2918 ($990,000, to Mr Smith as Trustee) and by A2920 ($792,000, to Mr Smith in his own right). (***2013 Loan Agreements***).	Tab 7 (SMI.003.001.0644) Tab 9 (SMI.003.001.0469) Tab 10 (SMI.003.001.0557) Tab 264 (ARW.700.004.0001 and ARW.700.004.0025)
1 July 2013	Mr Wilson and some other investors sell their MIS (Managed Investment Scheme) Investments back to Quintis Ltd, in exchange for now investing in the 2013 high net worth/sophisticated product offering. However, Mr Smith declines to sell his MIS Investments back at this time.	Tab 12 (ARW.600.001.0062) Tab 13 (ARW.600.001.0064) Tab 14 (ARW.600.001.0066) Smith Statement, [70]
August 2013	Mr Smith and Mr Thompson attempt to negotiate a put option with Quintis Ltd. This ultimately did not proceed.	Tab 15 (ARW.500.007.0041) Tab 16 (ARW.500.007.0241) Tab 17 (AWR.500.002.2928) Tab 18 (ARW.500.007.0035) Tab 19 (ARW.500.007.0237) Tab 22 (ARW.600.001.0108) Tab 25 (ARW.500.001.3241) Tab 26 (ARW.500.001.3236) Tab 264 (ARW.700.004.0001 and ARW.700.004.0025)
19 December 2013	Mr Smith as trustee and in his own right applies to the Australian Taxation Office (***ATO***) for private rulings in relation to the 2013	Tab 29 (ARW.700.002.0001) Tab 30 (ARW.700.002.0024) Tab 249 (SMI.004.001.0001)

	Investment.	Tab 250 (SMI.004.001.0119)
Calendar year 2014		
May/June 2014; April/May 2015	Mr Smith introduces potential investors to Quintis Ltd.	Tab 21 (SMI.001.001.0085) Tab 31 (SMI.001.001.0092) Tab 32 (ARW.500.001.4275) Tab 34 (ARW.500.004.0093) Tab 35 (ARW.500.004.1408) Tab 36 (ARW.500.004.0042) Tab 37 (ARW.500.004.0015) Tab 38 (ARW.500.004.0007) Tab 39 (SMI.001.001.0101) Tab 43 (ARW.600.001.0700)
26 May 2014	The ATO issues private tax rulings (authorisation numbers 1012633948880 and 1012633838541) allowing Mr Smith to claim significant income tax deductions in relation to his 2013 investments.	Tab 29 (ARW.700.002.0001) Tab 30 (ARW.700.002.0024)
16 June 2014	Mr Smith emails Mr Alistair Stevens requesting copies of the draft loan agreements and Investment Management Agreements in respect of a potential 2014 investment.	Tab 35 (ARW.500.004.1408) Tab 36 (ARW.500.004.0042) Tab 37 (ARW.500.004.0015)
30 June 2014	Mr Smith invests in 4 hectares of Sandalwood plantations with Quintis Ltd in his own right and in 30 hectares as Trustee by executing Investment Management Agreements (IMAs) on 30 June 2014. Mr Smith as Trustee for the Smith Investment Trust borrows the money for the investment from Arwon through a written Loan Agreement dated 30 June 2014 (***2014 Loan Agreement***). Mr Smith also borrows the money from Arwon to invest in his own	Tab 56 (ARW.700.001.0001) Tab 57 (ARW.700.001.0024) Tab 58 (SMI.003.001.0575)

	right. That loan was paid out in full as part of a 'Make Good Deal' (explained below).	
30 June 2014	Mr Smith claims a tax deduction in the amount of $263,904 for his investments in the Quintis Forestry Scheme in 2014, in his own right. Mr Smith claims a tax deduction for primary production expenditure in the amount of $1,825,796, as Trustee for the Smith Investment Trust.	Tab 53 (SMI.001.001.0135) Tab 54 (SMI.001.001.0162)
30 June 2014	Mr Wilson now proposes what will become the 'Make Good Deal' to Mr Smith.	Smith statement [96] and following Tab 46 (ARW.400.001.2688)
17 November 2014	Quintis Ltd decides that put options will not be offered to investors after 2014.	Tab 60 (ARW.700.002.0050)
Calendar year 2015		
April 2015 - June 2015	Emails exchanged between Mr Smith, Mr McLean and representatives of Quintis Ltd about a 'Make Good Deal'.	Tab 73 (ARW.500.001.1835) Tab 75 (ARW.500.001.4832) Tab 76 (SMI.003.001.0126) Tab 77 (SMI.003.001.0160) Tab 78 (ARW.500.006.0159) Tab 88 (ARW.500.004.1391) Tab 89 (ARW.500.010.2087) Tab 91 (ARW.500.004.0895) Tab 92 (ARW.500.006.0873) Tab 93 (ARW.500.004.0898) Tab 94 (ARW.500.004.2044) Tab 95 (ARW.500.004.1388) Tab 96 (ARW.500.004.1383) Tab 97 (ARW.500.006.0155) Tab 98 (ARW.500.006.0202) Tab 100 (ARW.500.006.0196) Tab 102 (ARW.500.004.1376)

		Tab 104 (ARW.500.006.0187) Tab 105 (ARW.500.006.0856) Tab 106 (ARW.500.004.0887) Tab 107 (ARW.500.004.1365) Tab 108 (ARW.500.004.1360) Tab 111 (ARW.500.004.0879) Tab 112 (ARW.500.004.1354) Tab 113 (SMI.001.001.0211) Tab 115 (ARW.500.004.1346) Tab 117 (ARW.500.010.1954) Tab 119 (ARW.500.004.1327) Tab 130 (ARW.600.001.0604) Tab 131 (ARW.500.004.1279)
16 April 2015; 11 May 2015	Mr Smith is provided with an Information Memorandum for the 2015 High Net Worth Statements.	Tabs 72 and 85 (ARW.700.003.0068)
6 June 2015; 26 June 2015	Mr Wilson emails Mr Smith to offer him a 2015 FY investment, but at the 2014 price. Mr Smith accepts.	Tab 101 (SMI.001.001.0203) Tab 130 (ARW.600.001.0604)
26 June 2015	Mr Stevens tells Mr Smith that there was no contractual commitment to buy back trees and no put option included in Mr Smith's 2015 investment.	Tab 129 (ARW.600.001.0569)
28 June 2015	'Make Good Deal' agreed, with the terms recorded in an email from Mr McLean to Mr Stevens.	Tab 133 (ARW.500.004.0868) Tab 134 (SMI.001.001.0228)
30 June 2015	Mr Smith executes deeds of variation to the 2014 Loan Agreement and the 2014 Investment Management Agreement.	Tab 63 (ARW.500.001.1956) Tab 64 (SMI.003.001.0124) Tab 152 (ARW.700.001.0078) Tab 153 (ARW.700.001.0086)
30 June 2015	Mr Smith invests in 31 hectares of Sandalwood plantations with Quintis Ltd in his own right and 19 hectares as Trustee. Mr Smith borrows the money for	Tab 154 (ARW.700.001.0093) Tab 155 (ARW.700.001.0116) Tab 156 (ARW.700.001.0158)

	the investments in his own right and in his capacity as Trustee from Arwon. Loan Agreement dated 30 June 2015 is for Mr Smith in his own right in the amount of $1,913,010 (A3389). Loan Agreement dated 30 June 2015 is for the Smith Investment Trust in the amount of $1,172,490 (A3393) (together, ***2015 Loan Agreements***).	Tab 157 (ARW.700.001.0182)
30 June 2015	Mr Smith claims a tax deduction of $1,820,033 in respect of his Quintis investment.	Tab 149 (SMI.001.001.0242)
30 June 2015	Mr Smith executes a deed poll of 30 June 2015.	Exhibit 6
Calendar year 2016		
1 January 2016	Quintis issues TFS Sandalwood Investment 2016 - Sophisticated Investment Offer.	Tab 172 (ARW.700.003.0262) Tab 174 (ARW.700.003.0163)
30 June 2016	Mr Smith invests in 10 hectares of Sandalwood plantations with Quintis Ltd. The investment is financed under a Loan Agreement with Arwon for the sum of $881,500 (A3711/A3713) (***2016 Loan Agreement***).	Tab 177 (ARW.700.001.0224) Tab 178 (ARW.700.001.0239)
30 June 2016	Mr Smith claims a tax deduction in the amount of $348,183 for his investment in the 2016 plantations.	Tab 176 (SMI.001.001.0293)
Calendar year 2017		
7 June 2017	Arwon issues Mr Smith with a notice of demand under the 2016 Loan Agreement.	Tab 183 (ARW.700.001.0266)
26 June 2017	Mr Smith sends an email to Arwon offering to transfer his MIS Investments to Arwon by way of	Tab 186 (SMI.001.001.0388)

	repayment. The offer is rejected.	
18 July 2017	Arwon issues Mr Smith with a notice of debt immediately due and payable under the 2016 Loan Agreement.	Tab 194 (ARW.700.001.0268)
24 July 2017	Arwon commences this action, CIV 2226 of 2017, to recover amounts owing under the 2016 Loan Agreement.	Writ of Summons
Calendar year 2018		
20 January 2018	Administrators appointed over Quintis Ltd and its Australian subsidiaries.	Administrators Report 31 May 2018
23 January 2018	Receivers appointed over Quintis Ltd and its Australian subsidiaries.	Administrators Report 31 May 2018
1 March 2018	Arwon issues Mr Smith with notices of demand in respect of the 2014 Loan Agreements and the 2015 Loan Agreements.	Tab 207 (ARW.700.001.0273) Tab 208 (ARW.700.001.0275) Tab 209 (ARW.700.001.0277)
27 March 2018	Arwon issues Mr Smith with notices of default in respect of the 2014 Loan Agreements and the 2015 Loan Agreements.	Tab 210 (ARW.700.001.0279) Tab 211 (ARW.700.001.0282) Tab 212 (ARW.700.001.0285)
14 May 2018	Arwon commences action CIV 1827 of 2018 to recover the amounts owing under the 2014 Loan Agreements and the 2015 Loan Agreements.	Writ of Summons
21 June 2018	Action CIV 1827 of 2018 is consolidated with CIV 2226 of 2017.	Orders made by Justice Kenneth Martin on 21 June 2018
29 June 2018	Deed of Company Arrangement ('DOCA') executed.	Tab 216 (SMI.003.001.0211)
19 October 2018	Completion of the DOCA.	Release to the ASX dated 22 October 2018
30 October 2018	Termination of the DOCA.	Release to the ASX dated 30 October 2018

Promissory estoppel principles and *Arwon Finance v Wilson*

44 In ***Arwon Finance Pty Ltd v Wilson*** [2019] WASC 244 (***Arwon v Wilson***) I discussed some of the relevant promissory estoppel legal principles commencing at [84]. See generally my observations as to the law, found at between [84] and [102], which I reference again now, but do not repeat verbatim. As will come to be explained, that trial which saw Arwon claim against Mr Frank Wilson bore many similarities to the current trial. Mr Wilson's trial was heard by me directly before Mr Smith's trial of separate issues conducted in May 2019.

45 For the purposes of the present trial Mr Smith filed two sets of written submissions. First, was his revised outline of opening submissions, of 4 October 2019.

46 There followed his further written submissions prior to trial, of 25 October 2019.

47 Mr Smith identifies the relevant criteria of a promissory estoppel at par 10 of his 4 October 2019 submissions by reference to par [85] of my reasons in ***Arwon v Wilson***.

48 The six key equitable estoppel principles as collected at [85] of ***Arwon v Wilson*** (and there, by reference to earlier observations of Owen J made in ***Bell Group Ltd (in liquidation) v Westpac Banking Group [No 9]*** [2008] WASC 239; (2008) 39 WAR 1) are as follows:

> 1. The plaintiff has assumed that a particular legal relationship then existed between the plaintiff and the defendant or has expected that a particular relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship.
>
> 2. The defendant has induced the plaintiff to adopt that assumption or expectation.
>
> 3. The plaintiff has acted or abstained from acting in reliance on the assumption or expectation.
>
> 4. The defendant knew or intended him to do so.
>
> 5. The plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.
>
> 6. The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

A clear and unambiguous representation

49 Fundamental to the current promissory estoppel evaluations now undertaken at the behest of Mr Smith by his defence, is the principle that for estoppels founded upon representations 'the representation must be clear and unambiguous': see [90] of ***Arwon v Wilson***. See also the authority found cited there for what is a well settled proposition which became the subject of a direct application by the High Court of Australia in ***Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*** [2016] HCA 26; (2016) 260 CLR 1. See there the reasons of Keane J (who with French CJ, Kiefel, Bell and Nettle JJ who formed part of the plurality) from [133] and in particular [142] - [159]. In ***Crown***, a statement made to tenants to the effect that they would be 'looked after at renewal time', was evaluated as not being sufficiently clear, certain or unambiguous - in order for a promissory estoppel by representation to be found in the tenants' favour. Referring to the venerable authority of ***Low v Bouverie*** [1891] 3 Ch 82, 106, the plurality observed at [35]:

> The statement that the tenants would be 'looked after at renewal time' is not capable of conveying to a reasonable person that the tenants would be offered a further lease.

Note also the observations by Keane J, again referring to ***Low v Bouverie*** at [151] of ***Crown***.

Mr Smith's (and Mr Wilson's) contended arguments

50 It may also be usefully identified that the two (SGARA and default) representations, as they are presently invoked by Mr Smith in the current litigation, display something of a parallel to the so-called 'recoverability assumption', as ultimately and then, unsuccessfully invoked by Mr Wilson in that litigation: see [27] - [28], [30] and [69] of ***Arwon v Wilson***. That recoverability assumption was also in the nature of a 'trees first' recovery policy asserted against Arwon.

51 Nevertheless, it is also clear that, as regards the attempted showing of a promissory estoppel, Mr Smith's and Mr Frank Wilson's contended estoppel arguments, are different.

52 As seen in ***Arwon v Wilson*** at [36] - [44] and [68], there Mr Wilson was the senior insider within the Quintis group, effectively, as its founder and longstanding CEO. Mr Wilson was also a board member of the related Quintis subsidiary lending corporation, Arwon. By some factual contrast, Mr Smith's position is that of being an

outsider to the Quintis group, albeit enjoying a relationship between himself and Mr Wilson which had extended beyond the parameters of a strict business interrelationship, to be one of regular social intercourse and of friendship. Indeed, Mr Smith admitted that he had sat through Mr Wilson's 2019 civil trial, as it was conducted before me in April 2019. He also frankly admitted under cross-examination that he had discussed his present litigation against Arwon with Mr Wilson: see ts 167 and 170 - 171.

Mr Smith's two contended representations

53 These reasons will now turn to more closely assess each of the previously outlined dual REACD contended representations, which are said by Mr Smith to found a promissory estoppel 'road block' against Arwon's present debt recovery action against him.

54 I reiterate that the trial proceeded on a basis of Arwon essentially going second, and then responding, where thought necessary, to Mr Smith's defence efforts to establish a promissory estoppel in his favour.

55 I ought also observe that Arwon's loan agreement documentation as entered with Mr Smith (in either capacity personally or as trustee) in respect of each of the 2014 - 2016 financial years was, with some slight annual variations to terms, very similarly constructed to Mr Wilson's loan documentation as seen and discussed in the ***Arwon v Wilson*** reasons. So seen, Mr Smith's loan agreements are largely equivalent in their boilerplate contents to the Arwon loan agreements as came to be completed between Arwon and Mr Wilson (albeit with the necessarily different dates, loan amounts and borrowers, etc).

56 Nevertheless, the general structure of the terms of the pro forma Wilson and Smith Arwon loan agreements as regards the advances of funds, repayment terms, security, borrower's covenants, lender's powers, events of default, exercise of rights, borrower's representations and warranties, general provisions, guarantee and schedule contents are common. These reflect the essentially boilerplate lending terms of Arwon to its borrowers, include by the entire agreement clauses seen in these documents.

57 Critically, these written lending agreements by Arwon with borrowers invariably display wholly unconstrained lender recovery rights as afforded to the lender (Arwon), which all manifest negatively here against Mr Smith's contrary positions as, indeed, they did towards

Mr Wilson. The express repayment and recovery terms do not need to be repeated. There is no real disputation over this. Rather, the trial dispute is over whether, in effect, the as contended promissory estoppel(s) by representation said to favour Mr Smith can be found and, if so, can interrupt the unfettered recourse of those written borrowing terms by Arwon in seeking recovery of its loans made to Mr Smith.

58 The basal promissory estoppel defence contention of Mr Smith is to the effect that such Arwon written loan agreement terms are to be interrupted against him in their impact by reason of the estoppels. Theoretically, of course, it is fully possible, as a matter of pure equitable principle, for such an outcome to emerge, by reason of the intervention of an equitable estoppel, if shown.

59 The first question, of course, is whether from all the underlying circumstances within the relevant contractual borrowing relationship(s) subsisting as between Arwon and Mr Smith across 2014 – 2016, the promissory estoppel(s) for which Mr Smith now contends can be established by him as a matter of fact and law.

60 To that end, I turn to scrutinise more closely the two contended (SGARA and default) estoppel founding representations. I will next evaluate each in turn in some detail.

The SGARA representation

61 By the REACD at par 12 thereof, Mr Smith's there seen derived SGARA representation is pleaded in the following terms (followed by its 16 accompanying particulars):

> 12. In order to induce the defendant to acquire sandalwood plantations from Quintis, and to enter into loan agreements with the plaintiff and investment management agreements with respect to the sandalwood plantations, the plaintiff and Quintis represented to the defendant, alternatively the plaintiff and Quintis led the defendant to believe that the defendant could at any time resell his sandalwood plantations to Quintis at a sum determined by application of a formula referred to as 'SGARA' and would thereby be released from the investment management agreement and the lease agreement with respect to the sandalwood plantations resold to Quintis Limited and could use the proceeds of sale to pay out the loan agreement (**SGARA representation**).
>
> PARTICULARS

(a) In the course of a discussion with Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) in or around May 2013 at the Young George Bar & Kitchen in Fremantle, Mr Wilson informed the defendant that he (Mr Wilson) and others were selling their sandalwood plantations to Quintis at their 'SGARA' value in order to buy new trees on or before 30 June 2013 and recommended the defendant do likewise.

(b) In about June 2013 the defendant received a telephone call from Ian Thompson (then a former director of the plaintiff and Quintis, and an employee [of] Quintis) who was aware of the matters pleaded in particular 12(a), during which Mr Thompson suggested that the defendant would be better to wait until the new SGARA values came out the next financial year as they should be higher, and to do a SGARA resale the following year.

(c) As a result of the matters referred to in particular 12(b), by email dated 16 August 2013 the defendant received from Quentin Megson (the General Manager Human Resources and Communications of Quintis) a draft loan agreement and a draft put option:

(i) the draft loan agreement provided for the principal sum and interest to be repaid within 10 years by SGARA Repayment and/or cash, where SGARA Repayment was defined to mean the ability of the defendant to dispose of any interest he had in any Quintis sandalwood plantations to the plaintiff, or to any related party to the plaintiff, [f]or their SGARA value, and any proceeds received by the defendant from the plaintiff resulting from the sale to be offset against the principal sum and any interest outstanding under the loan agreement;

(ii) the draft put option would give the defendant the right, within 10 years, to sell any of his Quintis sandalwood plantations to Quintis for their SGARA value, as that expression was defined in clause 1.1.14 of the draft put options, which included greater yield assumptions and therefore a higher sales value than would have applied under Quintis' SGARA value.

(d) In the course of discussions with Frank Wilson and Frank Romano (investors in Quintis sandalwood plantations) on or about 18 September 2013 each confirmed that they and others had, on or about 30 June 2013, sold sandalwood plantations to Quintis at their SGARA value in order to purchase more sandalwood plantations on or about 30 June 2013.

(e) In the course of telephone conversations between the defendant and Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) during February 2014, Mr Wilson assured the defendant that if he sent an email to Mr Wilson in which the defendant confirmed he did not have any agreement with Quintis with respect to the defendant's 2013 sandalwood investments with Quintis (other than the loan agreement and investment management agreement for the defendant's 2013 sandalwood investments) and that he was not proceeding with the yield protection arrangement he had with Quintis then Mr Wilson would ensure Quintis 'made good' the opportunity the defendant lost to sell his sandalwood plantations to Quintis as referred to in particulars 12(a) and 12(b).

(f) By mid-2014 the defendant was aware that many sandalwood investors had resolved their sandalwood plantations to Quintis, including:

(i) Frank Wilson;

(ii) Frank Romano;

(iii) Luc Blomme;

(iv) Ian Thompson;

(v) Daryl Watts;

(vi) Jim Tsagalis.

(g) In the course of a telephone discussion between the defendant and Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) on or about 30 June 2014 in relation to what sandalwood plantation investment the defendant might make in 2014:

(i) the defendant told Mr Wilson that he could not invest in more than 17 hectares of sandalwood plantation;

(ii) Mr Wilson encouraged the defendant to invest in more than 17 hectares of sandalwood plantation and confirmed the defendant could resell his sandalwood plantations to Quintis at their 'SGARA' value.

(h) In the course of a series of telephone conversations on or about 30 June 2014 between Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) and the defendant, during which Mr Wilson requested the defendant to invest in sandalwood plantations for 2014, the defendant said to Mr Wilson (on a number of occasions during the conversations) in effect that he could not invest in more sandalwood trees that year unless he knew he could resell the trees back to Quintis at their SGARA value. Mr Wilson responded that that was fine and to send him an email to that effect with the defendant's proposal to acquire further sandalwood plantations.

(i) By an exchange of email between the defendant and Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) dated 30 June 2014:

(i) the defendant sought to invest in 90 hectares of sandalwood plantation in 2014 on the basis of being able (until 2020) to resell his MIS, 2013 and 2014 plantations to Quintis at SGARA value;

(ii) Mr Wilson confirmed the defendant could acquire 34 hectares of sandalwood plantation in 2014 and 56 hectares of sandalwood plantation in 2015.

(j) The defendant was copied into an exchange of email communication between Quentin Megson (the General Manager Human Resources and Communication of Quintis) and Frank Wilson (then a director of the plaintiff, and the Chief Executive Officer of Quintis) dated 20 October 2014, in which it was agreed that an investor in sandalwood plantations, Luc Blomme, would receive an offer for his plantations at their SGARA value.

(k) Upon receiving Management Investment Agreement A3396 and Loan Agreement A3396 for his 2014 sandalwood plantation investment (referred to in particular 12(i) above) the defendant was concerned the

inclusion of a put option was proposed in place of the agreed SGARA sale, which led to the following exchange of email on 29 January 2015:

(i) Email [from] from defendant to Frank Wilson 29 January 2015 @ 4:55pm: *'I just want to make sure I can still trade trees at sgara and reduce / eliminate debt?*

This clause seems to wipe that out and force me to trade at the crappy 9.5% put'.

(ii) Email defendant to Frank Wilson 29 January @ 5:02pm: *'I just want to make sure that I can sell trees back to TFS at Sgara to reduce debt.*

All of my forward planning has been made on that basis so I will be stuffed if this is taken off the table.

My intention was to take another big whack this year and then use my 2011/2012/2013 trees to reduce the debt down to $0 in the coming years.'

(iii) Email from Frank Wilson to the defendant 29 January 2015 @ 5:20pm - *'Yes sales at Sgara are still on the table ... [it is] a separate matter to the put option in the private ruling.'*

(l) On or about 1 May 2015 the defendant met with Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) and discussed the options and financial position of the defendant on the assumption the defendant sold some of his sandalwood plantations to Quintis at their SGARA value.

(m) On or about 28 June 2015 following negotiation between the defendant and his accountant (Matthew McLean), and Alistair Stevens (Chief Financial Officer of Quintis) and Morne Wagener (Financial Controller of Quintis), the plaintiff, the defendant and Quintis agreed terms by which the defendant would sell his 2000 to 2011 sandalwood plantations (being the defendant's MIS plantations) to Quintis at their SGARA value.

(n) On or about 18 May 2016 the defendant met with Alistair Stevens (Chief Financial Officer of Quintis) at

> Steve's Hotel to discuss the defendant's financing with the plaintiff and the plaintiff's intention to sell its loan book to a third party. The defendant expressed his concern that this could impact on his ability to sell his sandalwood plantations back to Quintis or that he could subsequently be burdened with early break fees in 2017 when he sold his 2013 trees back to Quintis. Mr Stevens said that the sale by the plaintiff of the defendant's loan to a third party would not jeopardise the defendant as there were mechanisms in place to take care of that.
>
> (o) On or about 30 June 2016, at the defendant's office in West Leederville in the course of discussion with Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) regarding a potential investment by the defendant in the 2016 sandalwood plantations, the defendant said that he already had too many sandalwood trees and needed to reduce debt rather than take on new sandalwood plantations. Mr Wilson suggested the defendant exercise his right to sell his 2013 sandalwood planation back at the SGARA valuation. As that could not be done then without adverse taxation consequences it was agreed the defendant would defer the sale of those sandalwood plantations until at least July 2017;
>
> (p) By about 30 June 2016 the defendant was aware that many sandalwood investors had resold their sandalwood plantations to Quintis, including:
>
> (i) Frank Wilson;
>
> (ii) Frank Romano
>
> (iii) Luc Blomme;
>
> (iv) Ian Thompson;
>
> (v) Daryl Watts;
>
> (vi) Jim Tsagalis.

62 As regards all the above particulars, I will from here proceed on the basis that is the most favourable to Mr Smith, namely, that factually they can be and have been established by Mr Smith at this trial.

63 So evaluating them at their highest factually not only favours Mr Smith, it also removes the need to evaluate Mr Smith's attempted invocation through counsel of ***Jones v Dunkel*** (1959) 101 CLR 298

towards the trial circumstances, where Arwon called no witnesses at all. Essentially, the trial evidence from Arwon was exclusively documentary, through the agreed trial bundle documents and also, through what emerged at the trial during the cross-examinations of Mr Smith and of his accountant, Mr McLean.

64 As regards the contended SGARA representation evaluated without particulars, I have already made the general observation concerning its lack of any suggested date of origin - in a temporal sense. I also mentioned that the SGARA representation as pleaded, is seen as being derived out of the ensuing 16 subparagraphs of particulars (a) through (p), evaluated either alone or in aggregate. But now seen, essentially, none of the 16 particulars, taken alone, can sustain this SGARA representation. Some aggregated components, albeit not necessarily all of the 16 particularised events or conduct as identified, need to be established in some sort of a combination to effect he derivation of the representation contended for.

65 I also highlight the following unique features observed from Mr Smith's pleaded formulation of the SGARA representation as contended, namely:

(a) the SGARA representation is said to have been jointly made, by 'the plaintiff and Quintis';

(b) the as contended assumption by Mr Smith is that he was 'led' 'to believe', was that '[he] could at any time resell his sandalwood plantations'. So formulated, the SGARA representation is formulated to be unlimited, essentially, in terms of its potential temporal extension and application into the infinite future, as regards affording Mr Smith the right to resell his sandalwood plantations to Quintis into the future;

(c) any resale of Mr Smith's sandalwood plantations was to be to 'Quintis' (not to Arwon), thus distinguishing that new obligee, under what looks to be a contended de facto put option as afforded by Arwon which, of course, was always the lender corporation to Mr Smith. Hence, the SGARA representation seeks to align Arwon, as the only relevant lending corporation, to its parent corporation Quintis entity. This is so, notwithstanding a necessary recognition by the plea that the transaction investment arrangements, as entered by Mr Smith, had involved a series of distinct written agreements made with,

as then, the then distinct Quintis entities. This regime of agreements had included his Arwon loan agreements and his sandalwood plantation purchases under IMAs as then entered not with Arwon, but with Quintis;

(d) a resale amount for Mr Smith to be paid by Quintis, and to be determined by applying the SGARA formula;

(e) Mr Smith's ensuing release from his IMAs with Quintis Ltd, as well as from his lease agreements with Quintis Properties;

(f) the resale of Mr Smith's sandalwood plantations to Quintis Ltd (not to Arwon); and

(g) what is the tied utilisation of the resale funds by Mr Smith (presumably the funds obtained from Quintis Ltd), applied to pay out his loan agreement debts with Arwon.

66 So formulated, it is something of an understatement to observe that the contended SGARA representation is multifaceted in its many component dimensions.

The default representation

67 Next I set out the default representation that is to be found pleaded under REACD par 16, with its particularised components.

68 So seen, the default representation is also to be derived - but this time only by reference to eight supporting particulars (in truth, material facts).

69 As mentioned earlier, the pleaded default representation evolved over the life of this action. Changes are seen highlighted below.

70 Paragraph 16 of the REACD now reads:

> 16. Further, in order to induce the defendant to acquire sandalwood plantations from Quintis, and to enter into loan agreements with the plaintiff and investment management agreements with respect to the sandalwood plantations, the plaintiff and Quintis represented to the defendant, alternatively the plaintiff and Quintis led the defendant to believe, that if the defendant committed an event of default under a loan agreement with the plaintiff and did not remedy the default, then the plaintiff would not sue the defendant for the money due under the loan agreement; ~~but rather would~~ until after it had first repossessed and forfeited the defendant's sandalwood plantation which was

security for the loan agreement, and would only pursue the defendant if there was a shortfall between the SGARA value of the forfeited plantation and the balance of the loan (if any) (**default representation**).

PARTICULARS

(a) On or about 18 September 2013 during the return flight from a tour of the operations of Quintis in the Kimberley and at Katherine the defendant spoke with Ian Thompson (who had been a director of each of the plaintiff and Quintis from 27 February 2006 and 12 July 2012, and was then involved in sales and client relations at Quintis):

(i) the defendant said to Mr Thompson that he may not be in a position to purchase further sandalwood plantations in the coming years as he (the defendant) was concerned with his ability to fund additional purchases of sandalwood plantations because his income was generated as a travel agent and he was worried about the anticipated downturn in the travel industry because of online sales;

(ii) Mr Thompson said the defendant should not be concerned because if he did default the worst case scenario was that the plaintiff/Quintis would take his sandalwood plantation back. Mr Thompson said Quintis viewed this as a win for Quintis as it was able to get the sandalwood plantation back at a much lower cost than its value.

(b) The defendant attended a lunch with, inter alia, Frank Wilson (then a director of the plaintiff, and of Quintis, and the CEO of Quintis) at Print Hall Restaurant in Perth in or about ~~2014~~ 2016, in the course of which either Mr Wilson or Mr Paul Daffornsmith (and neither contradicted the other) said the plaintiff had recently taken ownership of sandalwood plantations from an ex-director of Quintis because the ex-director had defaulted on his loan to the plaintiff, and that Quintis had been able to obtain the sandalwood plantations at a significant discount to their SGARA value.

(c) Alistair Stevens (then the Chief Financial Officer of Quintis):

(i) by an email from Mr Stevens dated 19 June 2014 to, inter alia, the defendant, Mr Stevens said a loan by the plaintiff would be:

'secured against the [plantation itself] and then full recourse to the investor' and 'no additional collateral [is] required other than the trees (and associated contracts)';

(ii) and by email from Mr Stevens dated 12 June 2014 and copied to the defendant, Mr Stevens said a loan by the plaintiff:

'is secured against the [plantation] but there is full recourse to the investor. This is a fundamental point for the ATO';

(iii) in the context the emails meant and were intended to convey to the defendant that the plaintiff would, in the event of a default under a loan agreement, first have recourse to the sandalwood plantation which was security for the loan agreement and only have recourse to the defendant personally in the event of a shortfall.

(d) During a meeting held on or about 12 April 2016 at 3 Rosslyn Street, Leederville between, inter alia, Craig Peden (General Manager Corporate Sales of Quintis) and Kylie Smith (Sophisticated Investor Relations of Quintis) and the defendant, the prospect of the defendant acquiring existing sandalwood trees from existing investors on a secondary market was discussed. Mr Peden said that in the event of default by investors under their loan agreement with the plaintiff, the plaintiff's practice was to forfeit the investor's sandalwood plantation in satisfaction of the loan agreement, management investment agreement and lease agreement, as this was a 'bonus' to Quintis as it enabled Quintis to obtain more sandalwood trees cheaply.

(e) During a telephone conversation in or about April 2016 between Quentin Megson (the company secretary of the plaintiff and of Quintis) and the defendant discussing the secondary market for sandalwood trees, Mr Megson told the defendant that in the event of a default under a loan agreement Quintis would take over ownership of the sandalwood plantation the subject of the loan agreement. He referred to an investor who objected to

his sandalwood plantation being repossessed by the plaintiff for the balance then owing under his loan agreement with the plaintiff, when his sandalwood plantation was worth much more than that sum.

(f) On or about 3 June 2016 the defendant attended a lunch at Chez Pierre with, inter alia, Frank Wilson (then a director of the plaintiff and of Quintis, and the CEO of Quintis) and Keith Sheppard (a business associate of Dalton Gooding, who was then a director of the plaintiff and of Quintis, and the chairman of Quintis) in the course of which the sandalwood plantation investment that a German institutional investor had made with Quintis was discussed and Mr Shepherd [sic] said that he and Mr Gooding were looking (through a company owned by them) to buy from the plaintiff the debt owed to it by the German institutional investor as they believed the investment had no downside because the terms of the loan were good and there would be a massive windfall if the investor defaulted as they would then take the sandalwood trees back and make a significant profit. He said that he and Mr Gooding hoped the investor did default.

(g) During a meeting at Steve's Hotel in Nedlands on or about 23 November 2016 between, inter alia, Frank Wilson (then a director of the plaintiff and of Quintis, and the CEO of Quintis) and the defendant in the course of a discussion concerning the secondary market for sandalwood trees, Mr Wilson told the defendant that it was the practice of the plaintiff and Quintis to take back ownership of the sandalwood plantations the subject of loan agreements in the event of default in order to increase Quintis' sandalwood tree holding, and at the 'discounted' cost of the balance owing under the loan agreements.

(h) The default representation was made in writing in the annual reports released by Quintis in or about:

(i) September 2013 for the financial year ended 30 June 2013; and

(ii) August 2014 for the financial year ended 30 June 2014 which the defendant read.

Mr Smith as a witness

71 As mentioned, I will be evaluating Mr Smith's SGARA and default representation estoppel arguments, essentially at their factually

highest potential levels, as regards his foundational representation contentions made under REACD pars 12 and 16. Even so, the two representations contended to be derived, are not, in the end, able to be made out, as these reasons will show. On that basis, Mr Smith's defence case must fail, even upon its highest founding factual premises.

72 But were it ever necessary for a view of Mr Smith's credibility as a trial witness to be made, for the purposes of any extra fact finding, then I would record that my assessment is that a very cautious view ought be taken of any controversial further facts where sought to be proved on the uncorroborated verbal evidence of Mr Smith alone. There are various reasons for that caution that I will briefly record for the future if required.

73 First, and most obviously, is the opportunistic self-interest of Mr Smith under the present litigation, by seeking to inhibit Arwon's debt recovery action against him. That self-serving interest of itself should be cautionary, although far from conclusive.

74 Second, I globally assessed Mr Smith at trial to be a rather unreliable witness under cross-examination. I assessed him as someone willing to say whatever he believed he needed to say to advance his case. Mr Smith's cross-examination did not begin well for him when he asserted, disingenuously, I assessed, that he did not understand what was being put to him by senior counsel for Arwon as to him (Mr Smith) being an 'experienced businessman' (see ts 168). Matters did not improve from there for Mr Smith.

75 Third, I also thought Mr Smith's evidence about carefully reading the Quintis Group financial statements and particularly the notes to those accounts was not convincing - even though I do evaluate the particulars as relied on for his default representation in his favour to that effect. Mr Smith's trial evidence about that issue however was exposed during his cross-examination, as wholly unconvincing (see ts 165 - 204).

76 In the end, however, my assessment of the overall unreliability of Mr Smith's otherwise uncorroborated trial evidence in areas that matter is not necessary for the end conclusions that I reach in this trial.

Evaluation of the derivation of the SGARA representation

77 I will approach the task by turning to scrutinise conceptually, from a founding estoppel perspective, each of the particulars as are now seen

provided under REACD par 12, to support Mr Smith's attempted derivation of that SGARA representation.

Particular 12(a)

78 For convenience, I will set out par 12(a) of the REACD again below:

> (a) In the course of a discussion with Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) in or around May 2013 at the Young George Bar & Kitchen in Fremantle, Mr Wilson informed the defendant that he (Mr Wilson) and others were selling their sandalwood plantations to Quintis at their 'SGARA' value in order to buy new trees on or before 30 June 2013 and recommended the defendant do likewise.

79 I note first the above discussion with Mr Wilson of or around May 2013, at the Young George Bar and Kitchen, in Fremantle. By the plea, the discussion concerned Mr Wilson and others and telling Mr Smith they were selling their (I assume as earlier purchased) sandalwood plantations to Quintis at SGARA value, in order to then buy new trees at, on, or before, 30 June 2013 and, further, recommended Mr Smith do likewise.

80 As mentioned, I am assuming that this provided summary of a discussion, generalised as it is, is established as a matter of evidence, in Mr Smith's favour. Even so, by itself it goes absolutely nowhere, in terms of possibly establishing a de facto put option for Mr Smith as regards any future resale of his earlier acquired and owned sandalwood plantations, as a matter of his right.

81 The fact, if it happened, that Mr Wilson as CEO of Quintis, in May 2013, then related to Mr Smith what Mr Wilson himself then said what he proposed to do, along with some others, is irrelevant as regards someone else like Mr Smith. It is a matter neither here nor there for Mr Smith himself in terms of what he might or might not ever do for himself.

82 The 12(a) plea, at highest, only provides some possible background to the so-called 'make good deal', as will be seen was concluded a lot later in time for Mr Smith, ultimately in June 2015. But an eventual 2015 deal was the end result of a long-term personal negotiation conducted with Quintis officers and for Mr Smith with his accountant, Mr McLean.

83 A 2015 end consummation of a 'make good deal' itself tends against, rather than supports there being in 2013 some unilateral right ever held by Mr Smith to offer his as held sandalwood plantations, or some of them, to Quintis so as to be necessarily then acquired by Quintis at SGARA value. The position appears to be that in 2013, Quintis (not Arwon) whilst under the executive management of Mr Wilson, at various times would negotiate with borrowers/investors, like Mr Smith, so as to thereby reach agreement then to acquire from them on negotiated purchase terms, and grant Quintis direct ownership of sandalwood plantations. However, the as negotiated purchase price when realised and received from Quintis would usually be reinvested in the acquisition of a new offering of Quintis trees, or be used to pay off old debt to Arwon.

84 Like observations of complete irrelevance can also be directed towards a number of the ensuing particulars seen provided under REACD par 12, particularly towards particulars 12(c), (d), (f), (j), and (m). The eventual consummation in 2015 of the so-called 'make good agreement' for an acquisition by Quintis of Mr Smith's 2000 to 2011 sandalwood plantations at SGARA values is accepted. But that negotiated deal, perfected at then, essentially proves nothing as to showing the SGARA representation as it is sought to be supported. Likewise for particular 12(o) and to a suggested 2016 awareness about what other persons/investors had done by (p).

Particular 12(b)

85 Next, I address particular 12(b), which I will repeat is in the following terms:

> (b) In about June 2013 the defendant received a telephone call from Ian Thompson (then a former director of the plaintiff and Quintis, and an employee [of] Quintis) who was aware of the matters pleaded in particular 12(a), during which Mr Thompson suggested that the defendant would be better to wait until the new SGARA values came out the next financial year as they should be higher, and to do a SGARA resale the following year.

86 The factual events as described by particular (b) again, may all be assumed as established (at) in or about June 2013, as regards Mr Thompson. So seen, he is said to have '**suggested**' that Mr Smith would be better off to wait until new SGARA values came out in the next financial year.

87 But again, a 'suggestion' by a Quintis representative to Mr Smith to wait, on a hypothesis that SGARA resale values might be higher in the next financial year (not pleaded or proven to be wrong), does not help to establish the SGARA estoppel representation, as contended for.

88 To the contrary, a 'suggestion' is perfectly consistent with Quintis Ltd, under 2013 prevailing economic market conditions, simply following its then articulated business policy of pursuing the economic amenability to it of acquiring direct ownerships of various investors' sandalwood plantations. But that is not to the present point.

89 Particular 12(b) provides no basis at all for generating any reasonable assumption in Mr Smith of an amenability, let alone obligation, in Quintis to buying any of his sandalwood plantations under arrangements that would continue on in perpetuity, or conferring on him some perpetual right to so sell on such terms for Mr Smith. Contrast that position to the mere potentiality of a future agreed sale as the possible product of a future sale negotiation, which negotiation would take place at some possible time in the future. In other words, a generalised acquisition amenability, viewed as against a contractual resale commitment, are very different legal concepts.

Particular 12(c)

90 Next, I turn to particular (c), which says:

> (c) As a result of the matters referred to in particular 12(b), by email dated 16 August 2013 the defendant received from Quentin Megson (the General Manager Human Resources and Communications of Quintis) a draft loan agreement and a draft put option:
>
> (i) the draft loan agreement provided for the principal sum and interest to be repaid within 10 years by SGARA Repayment and/or cash, where SGARA Repayment was defined to mean the ability of the defendant to dispose of any interest he had in any Quintis sandalwood plantations to the plaintiff, or to any related party to the plaintiff, or their SGARA value, and any proceeds received by the defendant from the plaintiff resulting from the sale to be offset against the principal sum and any interest outstanding under the loan agreement;
>
> (ii) the draft put option would give the defendant the right, within 10 years, to sell any of his Quintis sandalwood plantations to Quintis for their SGARA value, as that

> expression was defined in clause 1.1.14 of the draft put options, which included greater yield assumptions and therefore a higher sales value than would have applied under Quintis' SGARA value.

91 So seen, particular 12(c) refers to an email of 16 August 2013 (see trial bundle, tab 15). However, the references to a draft loan agreement and a draft put option, ultimately also go nowhere.

92 The 'draft' documents as referred to were never consummated. The reason for that was not really explained by the trial evidence. Taken at the highest, a provision of such draft documents might suggest a general amenability on the part of Mr Megson on behalf of Quintis at that time, to negotiate a purchase on such draft terms.

93 Otherwise, Mr Smith's receipt of incomplete draft documents goes nowhere to assist in the showing or deriving of the SGARA representation, even assuming these matters are added to a global mix of facts at or around August 2013, as an emerging background.

Particular 12(d)

94 Next, I turn to examine par 12(d), providing:

> (d) In the course of discussions with Frank Wilson and Frank Romano (investors in Quintis sandalwood plantations) on or about 18 September 2013 each confirmed that they and others had, on or about 30 June 2013, sold sandalwood plantations to Quintis at their SGARA value in order to purchase more sandalwood plantations on or about 30 June 2013.

I would repeat again my remarks earlier made in regard to the irrelevance of particular 12(a), towards deriving a SGARA representation and thereby, the estoppel.

95 Any such discussions by Mr Smith with Messrs Wilson and Romano at September 2013, merely convey information of the fact of what two other persons as investors had completed for themselves - as regards selling their own sandalwood plantations at SGARA value, at that time. Messrs Wilson and Romano had, it is put, continued to explain to Mr Smith what they had done with the derived proceeds as regards them purchasing for themselves even more sandalwood plantations. But the fact as negotiated deals were then done by Messrs Wilson and Romano with Quintis in 2013 can provide no support or foundation for the SGARA representation under REACD par 12 to prove what is contended effectively as a de facto perpetual put option

right held by Mr Smith against Quintis. That is particularly so once Mr Smith's own 30 June 2013, written loan agreement as perfected, made with Arwon is examined. So seen, that is a comprehensive loan document which is expressly described as an entire agreement and signed off by Mr Smith. Its terms contain nothing relevant or supportive as regards conferring a perpetual put option to Mr Wilson to enable him to choose to sell his plantations at SGARA value to Quintis and require Quintis to purchase on that basis.

Particular 12(e)

96 Next, by particular 12(e) it is put:

> (e) In the course of telephone conversations between the defendant and Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) during February 2014, Mr Wilson assured the defendant that if he sent an email to Mr Wilson in which the defendant confirmed he did not have any agreement with Quintis with respect to the defendant's 2013 sandalwood investments with Quintis (other than the loan agreement and investment management agreement for the defendant's 2013 sandalwood investments) and that he was not proceeding with the yield protection arrangement he had with Quintis then Mr Wilson would ensure Quintis 'made good' the opportunity the defendant lost to sell his sandalwood plantations to Quintis as referred to in particulars 12(a) and 12(b).

97 As seen, the contended events have now moved on - to February 2014 - and now to telephone conversations conducted between Mr Smith and Mr Wilson. The nature of the first conversation appears to be a reference back to an express term of Mr Smith's written 2013 loan agreement with Arwon - which agreement had, in fact, contained what is now referred to as a 'reinvestment' provision.

98 Mr Smith gave some evidence about this term at the trial. The evidence was to the effect that the content of the emails that he was then sending to Quintis, were actually then being dictated to him by Mr Wilson, now acting, as Mr Smith related matters, as something of a 'double agent' (see ts 197 - 198 and 205). Again assuming in Mr Smith's favour that to be so, it still all goes absolutely nowhere - as regards supporting or establishing the as contended SGARA representation. The particular 12(e) concluding words as attributed to Mr Wilson are also revealing, with Mr Wilson saying he would 'ensure' Quintis 'made good' an opportunity (Mr Smith) had earlier rejected but

had lost, to sell back his as acquired sandalwood plantations to Quintis, as referred to in particulars 12(a) and 12(b).

99 Again, these as related conversations, rather than supporting the as contended SGARA representation, address a different topic altogether. On such facts, the two men were then canvassing a sale opportunity which Mr Smith deliberately did not take up at or around May 2013 and so, had then lost. This was about a further opportunity of the same ilk. That all unfolded following Mr Wilson's initial recommendation, but had stopped on Mr Thompson's suggestion of June 2013 to Mr Smith, essentially to wait until the next financial year to sell.

100 Fundamentally, however, these facts as are now assumed for Mr Smith under his particular 12(e), are facts irreconcilable to a conclusion that at this time (ie, February 2014) Mr Smith could have reasonably then assumed that he held any sort of de facto (and perpetual) put option right, as regards his selling off to Quintis and obliging Quintis to take and pay for his acquired sandalwood plantations at SGARA values.

101 If that were the case, why then would Mr Smith's opportunity to dispose of and to have resold his plantations at SGARA value, have been 'lost'? The loss, in the context of the attempted 'make good' negotiation is wholly irreconcilable with Mr Smith assuming he then held an enforceable put option right against Quintis by reason of the alleged SGARA representation. If that were so, there would be no need for the negotiation.

Particular 12(f)

102 Next, by particular 12(f) it is pleaded:

> (f) By mid-2014 the defendant was aware that many sandalwood investors had resolved their sandalwood plantations to Quintis, including:
>
> (i) Frank Wilson;
>
> (ii) Frank Romano;
>
> (iii) Luc Blomme;
>
> (iv) Ian Thompson;
>
> (v) Daryl Watts;
>
> (vi) Jim Tsagalis.

103 But why is any of that possibly relevant? This awareness contention made by Mr Smith under particular 12(f) displays the same conceptual deficiency as particular 12(a). It relates, if at all, to something else altogether than the SGARA representation. The event of six named other individuals reselling their individual plantations on (wholly unexplained) purchase terms to Quintis, which terms are not otherwise elaborated as regard to each such acquisition, essentially conveys nothing relevant or persuasive at all, as regards proving or deriving the SGARA representation as contended for.

104 But this plea appears related to the eventual 'make good deal' made by Mr Smith which, by reference to particular 12(m), as it is later known to have been finally consummated, at on or about 28 June 2015. But that 2015 as then negotiated purchase upon the negotiated terms by Quintis, is something else completely to the SGARA representation.

105 Nor does particular 12(f), as related, provide any support at all by reason of resales by those six named persons - to prove acquisitions by Quintis then at SGARA values, even assuming all other facts as contended for under particular 12(f).

Particulars 12(g) - (i)

106 Next, I move to evaluate particulars 12(g), (h) and (i) together. It will be remembered that they say for Mr Smith:

> (g) In the course of a telephone discussion between the defendant and Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) on or about 30 June 2014 in relation to what sandalwood plantation investment the defendant might make in 2014:
>
> (i) the defendant told Mr Wilson that he could not invest in more than 17 hectares of sandalwood plantation;
>
> (ii) Mr Wilson encouraged the defendant to invest in more than 17 hectares of sandalwood plantation and confirmed the defendant could resell his sandalwood plantations to Quintis at their 'SGARA' value.
>
> (h) In the course of a series of telephone conversations on or about 30 June 2014 between Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) and the defendant, during which Mr Wilson requested the defendant to invest in sandalwood plantations for 2014, the defendant said to Mr Wilson (on a number of occasions during the conversations) in effect that he could not invest in more

> sandalwood trees that year unless he knew he could resell the trees back to Quintis at their SGARA value. Mr Wilson responded that that was fine and to send him an email to that effect with the defendant's proposal to acquire further sandalwood plantations.
>
> (i) By an exchange of email between the defendant and Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) dated 30 June 2014:
>
> (i) the defendant sought to invest in 90 hectares of sandalwood plantation in 2014 on the basis of being able (until 2020) to resell his MIS, 2013 and 2014 plantations to Quintis at SGARA value;
>
> (ii) Mr Wilson confirmed the defendant could acquire 34 hectares of sandalwood plantation in 2014 and 56 hectares of sandalwood plantation in 2015.

107 So seen, events have now moved to on or about 30 June 2014 - the day on which it is known that Mr Smith entered into further investment management agreements (IMAs) with Quintis personally and more loan agreements with Arwon.

108 What appears to be being related under particulars (g), (h) and (i) in their respective time frames, describes something in the nature of a 'back door' double dealing by Mr Wilson - with Mr Smith being talked into asking (for show) to purchase even greater hectares of sandalwood plantations than he actually then wanted to assist Mr Wilson in marketing efforts for sandalwood plantations, to other investors (ie, presumably to artificially inflate an ostensible level of wider demand for such products at the time than there was).

109 It will have been noticed that by particular 12(g)(ii), it is said that on or about 30 June 2014, by that telephone discussion, Mr Wilson 'confirmed' that Mr Smith 'could resell his sandalwood plantations to Quintis at their SGARA value'.

110 The verbal terms of Mr Wilson's 'confirmation' are lacking. There is nothing more to expand upon this.

111 Reference to Mr Smith's final witness statement and his evidence at trial whilst under cross-examination did not elaborate on this 'confirmation' - which is essentially Mr Smith's subjective conclusion - as applied to whatever Mr Wilson's words were as said to him at the time.

112 Nevertheless, the essence of a 'back door' deal as discussed at this time, looks to surround to-ing and fro-ing going on then between Mr Wilson and Mr Smith, with the latter indicating he could not then afford to invest in more than 17 hectares of sandalwood plantations. Yet Mr Wilson, as related, encouraged him to publicly ask for more hectares - namely, for 90 hectares. The related charade would occur on a basis that Mr Smith would then be refused that much but be told then that he could have 34 hectares (only) in 2014. The attached palliative was of his later receiving 56 hectares in 2015, but on 2014 terms (as related by Mr Smith's witness statement at par 124).

113 At the end of particular 12(h), it is seen said that in the series of telephone conversations of, on or about 30 June 2014, Mr Smith at then told Mr Wilson that he **could not afford** to invest in more sandalwood trees that (financial) year 'unless [Mr Smith] knew he could resell the trees back to Quintis at their SGARA value'. That, as related, led to Mr Wilson responding, '**that was fine**', and for Mr Smith to send Mr Wilson an email to that effect continuing Mr Smith's proposal to acquire the further sandalwood plantations.

114 The particular 12(h) plea is a lead-in to particular 12(i), as regards a request to invest in 90 hectares of sandalwood plantations in 2014, by reference to Mr Smith reselling his Managed Investment Scheme (MIS) 2013 and his 2014 (acquired) sandalwood plantations to Quintis at SGARA value. However, when the underlying email exchanges are reviewed (see trial bundle, tabs 15 - 27, 40 - 64, 74 - 133) there is nothing to suggest Quintis confirmed such a commitment (until 2015) for the 2013 and 2014 plantations of Mr Smith.

115 As regards Mr Smith seeking a commitment from Quintis via this email (not Arwon) that his 2013 and 2014 sandalwood plantations could be sold to Quintis at SGARA values **until 2020**, such terms are actually inconsistent with the SGARA representation as it is contended for under particular 12. Particular 12(i) does not refer to all of Mr Smith's then owned sandalwood plantations, only to his 2013 and 2014 plantations.

116 Further, there is an (inconsistent) express term in Mr Smith's Arwon loan agreement of 2014, exhibiting a less expansive option - under which Mr Smith's 2014 as acquired sandalwood plantation may be sold off under that limited put option, at a 9.5% return.

117 That 2014 limited put arrangement also stands as inconsistent measured against what is contended for as a more expansive SGARA representation. I see as well that there was no email response from Quintis or from Mr Wilson, in response to Mr Smith's email, confirming repurchase option arrangements until 2020 at SGARA values for Mr Smith's 2013 and 2014 plantations.

Particular 12(j)

118 Next, by particular 12(j) it is said:

> (j) The defendant was copied into an exchange of email communication between Quentin Megson (the General Manager Human Resources and Communication of Quintis) and Frank Wilson (then a director of the plaintiff, and the Chief Executive Officer of Quintis) dated 20 October 2014, in which it was agreed that an investor in sandalwood plantations, Luc Blomme, would receive an offer for his plantations at their SGARA value.

119 The related events have now moved to 20 October 2014 (in the 2014/15 financial year), and address what looks to be a negotiated agreement concerning the re-purchase of the sandalwood plantation of a Mr Luc Blomme. The purchase negotiation with Mr Blomme by Quintis (not Arwon) was the subject of more evidence at the trial (ts 206 – 209). See also the documents concerning what appear to be different arrangements under and following which Mr Blomme sold off his plantations at SGARA value under and following a negotiation with Quintis. However, that was under circumstances where it emerges Mr Blomme had not borrowed any purchase funds from Arwon, in order to fund his acquisition of a Quintis sandalwood plantation. Mr Blomme had completed that 2014 sale to Quintis under some adverse personal circumstances - where he needed money then. So be it. That was obviously a negotiation outcome and Quintis re-purchased his shares in 2014. But there is no hint of a right held by Mr Blomme to compel Quintis to act that way. Presumably, that is why there was a need for a negotiation. This again all goes nowhere to assist deriving the SGARA representation. Such facts with Mr Blomme do not assist or support deriving Mr Smith's SGARA representation.

Particular 12(k)

120 Next, by particular 12(k) it is said by Mr Smith:

> (k) Upon receiving Management Investment Agreement A3396 and Loan Agreement A3396 for his 2014 sandalwood plantation investment (referred to in particular 12(i) above) the defendant

was concerned the inclusion of a put option was proposed in place of the agreed SGARA sale, which led to the following exchange of email on 29 January 2015:

(i) Email from defendant to Frank Wilson 29 January 2015 @ 4:55pm: *'I just want to make sure I can still trade trees at sgara and reduce / eliminate debt?*

This clause seems to wipe that out and force me to trade at the crappy 9.5% put'.

(ii) Email [from] defendant to Frank Wilson 29 January @ 5:02pm: *'I just want to make sure that I can sell trees back to TFS at Sgara to reduce debt.*

All of my forward planning has been made on that basis so I will be stuffed if this is taken off the table.

My intention was to take another big whack this year and then use my 2011/2012/2013 trees to reduce the debt down to $0 in the coming years.'

(iii) Email from Frank Wilson to the defendant 29 January 2015 @ 5:20pm - '*Yes sales at Sgara are still on the table ... [it is] a separate matter to the put option in the private ruling.*'

121 The emails as relied upon by Mr Smith are his exchanges with Mr Wilson at 29 January 2015 between 4.55 pm and 5.20 pm. The documents themselves may be found in the trial bundle, tab 62.

122 The topic of discussion appears directed at the written terms of Mr Smith's 30 June 2014 IMA and his loan agreement A3396. Mr Smith duly observes on the limited express put option term that by particular 12(k), 'was proposed in place of the agreed SGARA sale'.

123 However, the particular 12(k) plea only serves to betray Mr Smith's underlying recognition at then, that the 2014 documentation he had committed to at 30 June 2014 had contained a put option term in terms wholly inconsistent with the contended SGARA representation. This is evident by noting Mr Smith's own reference to 'the crappy 9.5% put' (the inference being Mr Smith thought then that a SGARA value acquisition would see the resale to Quintis from him at an even more profitable return for him, at above 9.5%). No basis for any elevated SGARA profit expectation has emerged at the trial.

124 Mr Smith's second email of 5.02 pm refers to his being 'stuffed if this is taken off the table'.

125 The reference to SGARA being 'taken off the table', whilst revealing, is also ultimately unhelpful to Mr Smith. On my view, it portrays the necessarily held insight by Mr Smith then, towards the essential character of his annual arrangements with Quintis. The arrangements, as regards resales, were plainly not as of any right then held by him. Rather, a resale might occur from time to time in the future, as the outcome of a negotiation and as a consequence of Quintis following its publicly stated policy of acquiring greater direct ownerships of more sandalwood plantations - then perceived as a positive outcome for the Quintis balance sheet.

126 Mr Wilson's email response to Mr Smith towards a SGARA purchase being a separate matter to the put option in the private ruling, is a reference to the ATO's private ruling concerning the allowed tax deductibility of these plantation interest acquisition investments at the time.

127 Nevertheless, the nature of something being 'still on the table' must carry along with it a necessary insight towards a longer term commercial potentiality of the subject matter (ie, resales) being one day taken 'off the table' in future. Acting reasonably, that should have been obvious enough for Mr Smith at the time.

Particular 12(l)

128 Next, particular 12(l) says:

> (l) On or about 1 May 2015 the defendant met with Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) and discussed the options and financial position of the defendant on the assumption the defendant sold some of his sandalwood plantations to Quintis at their SGARA value.

129 Details of the contended discussions with Mr Wilson of 1 May 2015 are not otherwise elaborated upon. See also trial bundle, tab 81. However, a discussion of such 'options' and of Mr Smith's financial position by reference to an assumption about him selling some of his sandalwood plantations to Quintis at SGARA value is once again ultimately unhelpful for him, as it is neither here nor there. Assuming in May 2015 Mr Wilson and Quintis were generally amenable to an acquisition at that time, a negotiation about that issue unfolded. That event provides absolutely no support for a contention that Mr Smith held at then a de facto, contended put option right, to sell his

sandalwood plantations to Quintis at SGARA value as and when he saw fit, at any time into the future.

Particular 12(m)

130 Next, by particular 12(m) it will be recalled Mr Wilson says:

> (m) On or about 28 June 2015 following negotiation between the defendant and his accountant (Matthew McLean), and Alistair Stevens (Chief Financial Officer of Quintis) and Morne Wagener (Financial Controller of Quintis), the plaintiff, the defendant and Quintis agreed terms by which the defendant would sell his 2000 to 2011 sandalwood plantations (being the defendant's MIS plantations) to Quintis at their SGARA value.

131 That plea refers to the long-term eventual consummation in 2015 of the so-called 'make good deal'. As now seen, Mr Smith had not sold his plantations to Quintis in 2013. Later, he regretted missing out on that opportunity which he had then 'lost'. Consequently, he and his accountant, Mr McLean, sought to get a fresh equivalent opportunity over the ensuing next two years. Ultimately, they did in 2015. As a result, Mr Smith gained some $2 million as sale proceeds, which as Mr McLean explained at trial, was then received back by Quintis, to be deployed in various ways (see ts 139).

132 Nevertheless, the very nature of such drawn-out 'make good' deal negotiations, together with the fact it was necessary to pursue a lost sale opportunity to Quintis at 2013, 'lost', by Mr Smith by not selling in 2013, presents as wholly against Mr Smith nevertheless holding across some time frame a de facto put option to **compel** a sale of his plantations to Quintis, as and when he alone chose into the future, and at SGARA values as Mr Smith contends under par 12 as his SGARA representation.

Particular 12(n)

133 Next, by particular 12(n), Mr Smith raises further facts, namely:

> (n) On or about 18 May 2016 the defendant met with Alistair Stevens (Chief Financial Officer of Quintis) at Steve's Hotel to discuss the defendant's financing with the plaintiff and the plaintiff's intention to sell its loan book to a third party. The defendant expressed his concern that this could impact on his ability to sell his sandalwood plantations back to Quintis or that he could subsequently be burdened with early break fees in 2017 when he sold his 2013 trees back to Quintis. Mr Stevens said that the sale by the plaintiff of the defendant's loan to a third

> party would not jeopardise the defendant as there were mechanisms in place to take care of that.

134 Events have now moved to 18 May 2016, in a lead-up to the looming end of the 30 June 2016 financial year, in the usual annual context of a possible further investment by Mr Smith by an IMA, a purchase to be funded by an invariable Arwon loan to Mr Smith, to gain funds to invest, yet again.

135 Nonetheless, Mr Smith's related discussion at Steve's Hotel with Mr Stevens (CFO of Quintis) over the possible sale of Arwon's loan book to a third party, and a following expression of concern by Mr Smith towards his future ability to sell his sandalwood plantations to Quintis, or by Mr Smith being burdened by early break fees if he sold his 2013 trees back is, yet again, not to the SGARA point as sought to be supported.

136 The eventual position was that Arwon did, in fact, sell (ie, assign) some of its loans to third parties. However, it would appear Arwon did not sell any of Mr Smith's loans.

137 Hence, the fatuous statement as to (wholly unspecified) 'mechanisms in place', as is attributed to Mr Stevens to 'take care of that', (which again, in Mr Smith's favour, I am assuming was so uttered then) is not to the SGARA representation point and so is, ultimately, irrelevant. Mr Smith's loans from Arwon were never sold sold off.

Particular 12(o)

138 Next, by particular 12(o) it is said:

> (o) On or about 30 June 2016, at the defendant's office in West Leederville in the course of discussion with Frank Wilson (then a director of the plaintiff, and a director and the Chief Executive Officer of Quintis) regarding a potential investment by the defendant in the 2016 sandalwood plantations, the defendant said that he already had too many sandalwood trees and needed to reduce debt rather than take on new sandalwood plantations. Mr Wilson suggested the defendant exercise his right to sell his 2013 sandalwood planation back at the SGARA valuation. As that could not be done then without adverse taxation consequences it was agreed the defendant would defer the sale of those sandalwood plantations until at least July 2017;

139 This series of statements is said to have occurred at Mr Smith's then office premises in West Leederville (and referred to later, see

particular 16(d), as 3 Rosslyn Street, Leederville). However, it is negatively insightful for Mr Smith. Given a fresh 2016 IMA entered with Quintis and a loan agreement completed with Arwon, once again entered on this day at the end of the 2016 financial year by Mr Smith, a discussion with Mr Wilson regarding another potential sandalwood plantation investment does not help. Mr Wilson's related suggestion to him about selling his 2013 sandalwood plantation holding at SGARA valuation (assumed as to Quintis as purchaser - inferentially, it must be said) was duly rejected by Mr Smith. Assuming, as I do, that Mr Wilson was genuine then about that opportunity for Mr Smith to sell to Quintis the 2013 plantation of Mr Smith at SGARA value, Mr Smith might well then have availed himself of that disposal opportunity. But by his as stated choice, Mr Smith did not.

140 Prior reference was that the immediate sale of the 2013 plantation 'could not be done then without adverse taxation consequences'.

141 This tax deductibility aspect of Mr Smith's evidence was explored somewhat during Mr Smith's cross-examination. The reference to 'adverse taxation consequences' appears to be to a term of the ATO's private tax ruling, essentially to the effect that the feature of income tax deductibility for the sandalwood plantation investment, was dependent on that investment being held for a minimum period of years. Four years needed to elapse to sustain the income tax deductibility of the investment.

142 Such events are all perfectly consistent with Quintis' CEO of the day, Mr Wilson, suggesting the amenability of Quintis then to acquire at SGARA value. But Mr Smith was not interested, given his as then perceived adverse taxation (deductibility) consequences. So be it. But such events are not at all supportive of showing some open ended, perpetually enduring de facto put option was then held by Mr Smith as against Quintis at SGARA purchase value, under par 12 of the REACD.

Particular 12(p)

143 Finally, as regards the last of the ingredients for the contended SGARA representation, under particular 12(p), Mr Smith contends:

> (p) By about 30 June 2016 the defendant was aware that many sandalwood investors had resold their sandalwood plantations to Quintis, including:
>
> (i) Frank Wilson;

(ii) Frank Romano

(iii) Luc Blomme;

(iv) Ian Thompson;

(v) Daryl Watts;

(vi) Jim Tsagalis.

144 At about 30 June 2016, it is suggested Mr Smith became aware of the sales by the six named individuals of their sandalwood plantations by way of resale back to Quintis. These are the same six individuals as were referred to by particular 12(f). So seen, the actual terms of the acquisitions by Quintis are not given.

145 Accepting, as I do, that Mr Smith did became aware (in some unexplained way) of such sales by others, his then state of awareness of the mere event of those sales in 2016 is again wholly irrelevant to establishing the par 12 SGARA representation.

146 Based on the matters contended for earlier under particular 12(o), by mid 2016 Mr Smith might also have availed himself at then of an opportunity to resell his 2013 sandalwood plantation, given Mr Wilson's suggestion. Mr Smith says he decided against that given perceived adverse taxation consequences. So be it. That six other sandalwood plantation investors as identified under particular 12(p), did then effect Quintis sales, on unstated terms, is an event of third party sale awareness in Mr Smith that ultimately goes nowhere as well towards supporting his SGARA representation.

Paragraph 12 - conclusions

147 Having thus now assessed and evaluated all sixteen (16) of the individual ingredients by which Mr Smith's SGARA representation is to be derived, ultimately, it can be safely concluded that none evaluated alone, or in the aggregate, is enough to meet its par 12 representation derivation objective. It may be put for Mr Smith that the sum of aggregate components, albeit individually not enough, creates together something better. I have not overlooked that theoretical 'sum of the parts' being greater possibility. But here, looking back holistically at everything as is relied upon for Mr Smith by the par 12 particulars, the representation derivation objective is still very far from met. The SGARA representation is thus, not to be derived at the civil standard. It fails as a basis for this as contended estoppel plea.

Evaluation of the default representation

148 Next I turn to REACD par 16 and to the so-called default representation as it has now evolved to secondarily found a further promissory estoppel defence for Mr Smith.

149 Again, I will proceed shortly to individually scrutinise the eight supporting particulars to this estoppel plea (material facts) - all of which are relied upon by Mr Smith collectively or individually to once again derive this contended representation as the founding basis of his estoppel.

150 Of course, this representation is also directly contrary to the written terms of each of Mr Smith's relevant Arwon loan agreements, as entered respectively on 30 June 2014, 2015 and 2016 by Mr Smith either personally or as trustee.

Particular 16(a)

151 I turn to particular 16(a), as follows.

> (a) On or about 18 September 2013 during the return flight from a tour of the operations of Quintis in the Kimberley and at Katherine the defendant spoke with Ian Thompson (who had been a director of each of the plaintiff and Quintis from 27 February 2006 and 12 July 2012, and was then involved in sales and client relations at Quintis):
>
> (i) the defendant said to Mr Thompson that he may not be in a position to purchase further sandalwood plantations in the coming years as he (the defendant) was concerned with his ability to fund additional purchases of sandalwood plantations because his income was generated as a travel agent and he was worried about the anticipated downturn in the travel industry because of online sales;
>
> (ii) Mr Thompson said the defendant should not be concerned because if he did default the worst case scenario was that the plaintiff/Quintis would take his sandalwood plantation back. Mr Thompson said Quintis viewed this as a win for Quintis as it was able to get the sandalwood plantation back at a much lower cost than its value.

152 Particular 16(a) directs attention to the words uttered on an airline flight of 18 September 2013, namely, Mr Smith's conversation during the flight with Mr Ian Thompson, a former director of Arwon and

Quintis. Mr Thompson was said then to be 'then involved in sales and client relations at Quintis'.

153 In the first place, the so-called 'worst case scenario' attributed as then being uttered by Mr Thompson during the flight in a conversation with Mr Smith, does not support the par 16 default representation in its final terms.

154 Now seen, particular 16(a) says nothing at all of the situation of shortfall as between SGARA value and the balance of Mr Smith's loan(s). It is also, as related, a summary of the conversation, without giving the precise words as articulated by Mr Thompson at the time. What is attributed to Mr Thompson accords with Quintis' then stated policy favouring a grower plantation forfeitures as regards defaulting borrowers, given the as perceived fiscal benefits for Quintis at the time by seizing and forfeiting defaulting investor plantations to take direct ownership of them. The expressed Quintis policy may well then have been perceived as a balance sheet win for Quintis at the time. Indeed, there appears to be further support for that debt recovery by forfeiture policy as then followed by Quintis in the notes to the Quintis group's financial accounts as identified under particular 16(h) and subsequently referred in the 30 June 2013 and 30 June 2014 financial reports of Quintis.

155 But a Quintis policy at the time is just that, a policy. There ought to have been no reasonable expectation in Mr Smith that a Quintis debt recovery policy of the day of forfeiture against plantations would last forever. That is particularly so for circumstances where the chapter and verse, under the fine print as signed up to by Mr Smith under his annual written loan arrangements with Arwon said something very different.

156 There is a key distinction of force, as between the legalities of the contractual fine print of an agreement voluntarily entered and a Quintis lay representative's remarks to an adjacently seated passenger during a plane flight.

157 It would be wrong to attribute to a 2013 remark made during a flight about a so-called worst case scenario as remaining applicable in perpetuity to all of Mr Smith's loans from Arwon, including future loans taken by reference to the specific terms of a written loan agreement.

158 If that was the perception obtained and maintained by Mr Smith arising out of that conversation during a flight, then this was not a

reasonable position for Mr Smith to take, at least without getting something more from Arwon in black and white in the terms he now contends for. That did not happen.

Particular 16(b)

159 Next, by particular 16(b) it is put:

> (b) The defendant attended a lunch with, inter alia, Frank Wilson (then a director of the plaintiff, and of Quintis, and the CEO of Quintis) at Print Hall Restaurant in Perth in or about ~~2014~~ 2016, in the course of which either Mr Wilson or Mr Paul Daffornsmith (and neither contradicted the other) said the plaintiff had recently taken ownership of sandalwood plantations from an ex-director of Quintis because the ex-director had defaulted on his loan to the plaintiff, and that Quintis had been able to obtain the sandalwood plantations at a significant discount to their SGARA value.

160 Events have moved to 2016 at some time otherwise unstated and to a lunch at Print Hall Restaurant in Perth involving Mr Wilson, Mr Smith and a Mr Paul Daffornsmith. However, the verbal remark made then over that lunch about Quintis obtaining sandalwood plantations at a significant discount to their SGARA value from an ex-director of Quintis who had defaulted on his loan, is valueless for Mr Smith as regards potentially establishing his par 16 contended default representation.

161 Again, assuming in Mr Smith's favour that the particular 16(b) statement was so made at the lunch, such words do not provide any basis for Mr Smith to reasonably assume that for himself that in the years to come this would remain the position for Quintis, as regards Arwon's defaulting debtors. Nor does the attributed statement concerning the acquisition at a significant discount convey anything relevant to the topic of there being no personal recourse taken against that ex-director. Of course, if this lunch was at a time after 30 June 2016, then its relevance is also questionable, given that Mr Smith's loan agreements with Arwon the subject of this action had all been entered by then.

Particular 16(c)

162 Next, by particular 16(c) Mr Smith relies on further 2014 matters:

> (c) Alistair Stevens (then the Chief Financial Officer of Quintis):

(i) by an email from Mr Stevens dated 19 June 2014 to, inter alia, the defendant, Mr Stevens said a loan by the plaintiff would be:

'secured against the [plantation itself] and then full recourse to the investor' and 'no additional collateral [is] required other than the trees (and associated contracts)';

(ii) and by email from Mr Stevens dated 12 June 2014 and copied to the defendant, Mr Stevens said a loan by the plaintiff:

'is secured against the [plantation] but there is full recourse to the investor. This is a fundamental point for the ATO';

(iii) in the context the emails meant and were intended to convey to the defendant that the plaintiff would, in the event of a default under a loan agreement, first have recourse to the sandalwood plantation which was security for the loan agreement and only have recourse to the defendant personally in the event of a shortfall.

163 The above plea by reference to the two emails from Mr Alistair Stevens, CFO of Quintis, at 19 June 2014 as regards security against the plantation, with full recourse to the investor with no additional collateral being required, if anything, are destructive to Mr Smith's contended position, as regards showing the par 16 default representation. Full recourse means full recourse, not 'no recourse', or 'limited recourse'. That is the fundamental point. Full recourse means an unfettered recourse against the debtor. The attempted deconstruction of the emails as seen under particular 16(c)(iii), on my assessment, is an untenable exercise based essentially on wishful thinking, rather than upon the grammar, or upon any sensible interpretive process of logic. These two emails by their express terms undermine, rather than support, Mr Smith's contended default representation.

Particular 16(d)

164 Next, by particular 16(d) Mr Smith relies on this series of facts:

(d) During a meeting held on or about 12 April 2016 at 3 Rosslyn Street, Leederville between, inter alia, Craig Peden (General Manager Corporate Sales of Quintis) and Kylie Smith (Sophisticated Investor Relations of Quintis) and the defendant, the prospect of the defendant acquiring existing sandalwood

> trees from existing investors on a secondary market was discussed. Mr Peden said that in the event of default by investors under their loan agreement with the plaintiff, the plaintiff's practice was to forfeit the investor's sandalwood plantation in satisfaction of the loan agreement, management investment agreement and lease agreement, as this was a 'bonus' to Quintis as it enabled Quintis to obtain more sandalwood trees cheaply.

165 The as related events above concern a meeting on 12 April 2016 with a Mr Craig Peden, Ms Kylie Smith and the defendant. The context of this conversation appears to be as reference to a secondary market for sandalwood plantations at the time. So be it but, again, that is wholly irrelevant to par 16. Mr Peden's assumed reference to forfeiting of the investor's sandalwood plantation in satisfaction of the investor's loan agreement, MIA and lease agreement as being a 'bonus to Quintis' can again be fully accepted as having been said by him at the time. Again that statement is consistent with what Quintis had been saying for some time about the balance sheet fiscal advantages that Quintis executives of the day had perceived. This perceived benefit would arise from Quintis acquiring greater direct ownership of additional sandalwood plantations for itself by using recovery arrangements for the forfeiture of a plantation upon a borrower's loan repayment default. However, that policy position, consistent with what is to be found in the Quintis group financial statements (see particular 16(h)), was a corporate policy that could not sensibly or reasonably be expected to remain static forever. Again, the reasonable borrower from Arwon would look to the fine print of their personal loan agreements extend each year, rather than rely on casual verbal statements about debt recovery policies of the day.

Particular 16(e)

166 By particular 16(e), Mr Smith also relies on the following matters towards his par 16 default representation:

> (e) During a telephone conversation in or about April 2016 between Quentin Megson (the company secretary of the plaintiff and of Quintis) and the defendant discussing the secondary market for sandalwood trees, Mr Megson told the defendant that in the event of a default under a loan agreement Quintis would take over ownership of the sandalwood plantation the subject of the loan agreement. He referred to an investor who objected to his sandalwood plantation being repossessed by the plaintiff for the balance then owing under his loan agreement with the plaintiff,

> when his sandalwood plantation was worth much more than that sum.

167 The above statement would appear to be another reference to a then secondary market for sandalwood trees, made on this occasion by Mr Megson, in April 2016. Mr Megson's observation is again seen as directed at a debt recovery practice as followed by Quintis then as to what would happen in the event of a default under a loan agreement. But again the same response must be made. Market conditions change. Corporate recovery policies change. Debts can get sold in the marketplace. Membership of corporate boards change. A debt recovery policy practice as implemented by Quintis at April 2016, towards loan recovery is one thing. However, whether that practice would be unfailingly implemented forever into the future, when the explicit written terms of the defendant's own loan agreement as entered with the borrower towards his loan say otherwise, and set down unfettered and explicit recovery options for the lender in the event of a future repayment default, is something else altogether. To assume that a particular debt recovery practice would continue on into the future, when his Arwon loan agreement said directly otherwise, was essentially a large gamble by Mr Smith about the future. As seen, the gamble has proven problematic for him with Quintis post administration under new management.

Particular 16(f)

168 Next, by his particular 16(f) Mr Smith relies on this:

> (f) On or about 3 June 2016 the defendant attended a lunch at Chez Pierre with, inter alia, Frank Wilson (then a director of the plaintiff and of Quintis, and the CEO of Quintis) and Keith Sheppard (a business associate of Dalton Gooding, who was then a director of the plaintiff and of Quintis, and the chairman of Quintis) in the course of which the sandalwood plantation investment that a German institutional investor had made with Quintis was discussed and Mr Shepherd [sic] said that he and Mr Gooding were looking (through a company owned by them) to buy from the plaintiff the debt owed to it by the German institutional investor as they believed the investment had no downside because the terms of the loan were good and there would be a massive windfall if the investor defaulted as they would then take the sandalwood trees back and make a significant profit. He said that he and Mr Gooding hoped the investor did default.

169 Events have now moved to some more words uttered to Mr Smith at a lunch of 3 June 2016, at the Chez Pierre restaurant attended with Mr Wilson and Mr Keith Sheppard.

170 In the first place, it might be questioned how statements over a June 2016 lunch at a celebrated French restaurant might relevantly bear on the existence of a default representation sought to be derived and argued as being applicable to Mr Smith's legal repayment obligations under his loan agreements with Arwon that were entered years earlier, at 30 June 2014 and 2015. A fine lunch in 2016 at a Nedlands restaurant is one thing. But travelling back in time is quite another.

171 In any event, what a so-called business associate, Mr Sheppard, uttered over the lunch on 3 June 2016 at Chez Pierre concerning then a perceived future business opportunity by him, as regards buying a sandalwood plantation off a German institutional investor and the associated acquisition of its debt (presumably also the security for the debt as well), can relevantly reflect only the as then expressed perception by Mr Sheppard over lunch at the time as regards a possible future significant profit being made for him. But such conversation at lunch is wholly irrelevant towards generating Mr Smith's reasonably held assumptions in 2016 concerning his legal exposures under a fresh loan agreement that he was soon to commit to with Arwon at 30 June 2016. Again, the 2016 written loan agreement as between Mr Smith and Arwon contained explicit written terms which, had he cared to read them, would have conveyed to Mr Smith that his repayment exposure was not at all limited and that the multiple debt recovery options as afforded to Arwon by the loan agreement with him were at large and were wholly unconstrained.

Particular 16(g)

172 Next, by his particular 16(g) Mr Smith relies on this:

> (g) During a meeting at Steve's Hotel in Nedlands on or about 23 November 2016 between, inter alia, Frank Wilson (then a director of the plaintiff and of Quintis, and the CEO of Quintis) and the defendant in the course of a discussion concerning the secondary market for sandalwood trees, Mr Wilson told the defendant that it was the practice of the plaintiff and Quintis to take back ownership of the sandalwood plantations the subject of loan agreements in the event of default in order to increase Quintis' sandalwood tree holding, and at the 'discounted' cost of the balance owing under the loan agreements.

173 The as contended events have now moved (and thus irrelevantly so, in any causative way) to 23 November 2016 - well after the last 30 June 2016 IMA and loan agreement with Arwon were entered into by Mr Smith. Hence, the capacity for anything said at Steve's Hotel in November 2016 to causally influence anything done five months beforehand, is more than improbable. At best the event might be relied on to suggest that it is consistent with or reinforces the making of the as alleged default representation at an earlier and more relevant time. I evaluate it accordingly.

174 But again a Steve's Hotel conversation as is relied upon, is only said to concern a 'secondary market'. In that context, what Mr Wilson said then about then practices of Arwon and Quintis in terms of taking ownership as regards secondary market sandalwood plantations, is only to traverse the same old irrelevant ground. Mr Frank Wilson, for Quintis, may be assumed to have articulated that economic policy benefit perception as so expressed at the time. Again, it seems to have been repeated that Quintis acquiring sandalwood plantation trees at their discounted cost against the balance of the loans was good business for Quintis, economically. However, that as articulated Quintis policy perception by Mr Wilson, as so expressed, could convey nothing reliable to Mr Smith of any level of debtor comfort about the future which, as things eventually turned out for Quintis, was not rosy and led it to take a different and possibly more robust debt recovery policy with its borrowers in default. That was always the risk.

Particular 16(h)

175 By particular 16(h) Mr Smith relies on further facts to derive the par 16 default representation:

> (h) The default representation was made in writing in the annual reports released by Quintis in or about:
>
> (i) September 2013 for the financial year ended 30 June 2013; and
>
> (ii) August 2014 for the financial year ended 30 June 2014, which the defendant read.

176 Mr Smith at trial gave some shaky evidence at the trial whilst under cross-examination concerning these Quintis Group end of financial year reports, directed at the relevant financial statements and the notes to the accounts in each (see ts 172 - 176 and 195).

177 This evidence stands in some contrast to Mr Smith's other evidence about how it had been his practice to never read the terms of his annually signed IMAs and Arwon loan agreements - which he invariably signed up to over many financial years. Yet Mr Smith's evidence under cross-examination was, in effect, that he very carefully read the Quintis Group financial reports for these two financial years as regards a 'policy' of Quintis expressed therein, including the notes to the accounts. An inconsistency in Mr Smith's documentary review diligence practices is apparent, as regards the suggested careful review of Quintis' financial statements. Nevertheless, the actual terms of the notes to the Quintis Group accounts as referred to do not, in the end, assist his cause.

178 In fact, they are revealing to the contrary. I refer to trial bundle tab references, to which Mr Smith was taken during cross-examination at trial as regards these notes to accounts (tabs 20, 27, 36 - 37, 40, 48, 50, 57, 59, 62, 101 and 142).

179 So seen, each refers to a policy applicable at the time(s) for which these final accounts were drawn for the Quintis Group - as to the then, as expressed, to the perceived monetary benefits for Quintis of direct ownership of sandalwood plantations, acquired from defaulting borrowers.

180 But the notes to annual financial accounts are only explanations of those accounts for the respective financial years ending 30 June 2013 and 30 June 2014. Accounting policy statements found in the notes to annual accounts do not speak in any temporal sense to beyond those financial years addressed by each set of accounts. They are necessarily observations directed to the time of each financial report, ie, looking back as at September 2013 or August 2014 to a then concluded financial year ending on the 30 June beforehand and then explaining the accounts.

181 To contend that he carefully read the notes to these annual financial accounts towards assisting his making of an assumption based on a par 16 default representation to him is still of little help to Mr Smith, even if I accept that evidence. A reading that the express written terms of his Arwon loan agreement as regards his personal exposure as a debtor to Arwon was fettered should he ever default would not be a reasonable interpretation to extract from the notes to the accounts. That is so even making the favourable assumption to

Mr Smith that he had read these accounts and their notes at then, with the level of diligence he asserts.

Paragraph 16 - conclusions

182 The derived representation as seen contended for by par 16 and its particulars, once evaluated, either alone or in aggregate, cannot even arguably provide a basis to derive the default representation that Mr Smith needs to establish as the foundation of a further estoppel. Again, the sum of these inadequate individual parts, viewed together and holistically, is also inadequate to that end, on my assessment.

Summation as to the failure of the SGARA and default representations

183 Consequently then, for the reasons as now given, I am of the end view that neither the contended par 12 SGARA representation, nor the par 16 default representation has been established by Mr Smith. His attempts to 'derive' these as contended for representations out of a mishmash of assembled diverse facts, fails upon their discrete, and then again on their globally assembled, evaluations.

184 Furthermore, for the reasons as explained by the plurality and then further, by Keane and Nettle J in ***Crown***, both the par 12 and par 16 as contended for representations are insufficiently clear or certain enough (assuming further that they might somehow be derived) to undermine, or negatively impact against the clarity of the contrary written Arwon loan agreement express terms found in each of Mr Smith's Arwon loan agreements as entered respectively by him (either personally or as trustee) for the 30 June 2014, 2015 and 2016 financial years.

185 Since neither of Mr Smith's as contended dual representations relied upon by him as the foundation for the promissory estoppels are established, the result is that neither of the as contended estoppels themselves can be proved.

186 Hence, the dual estoppel defence obstacles as sought to be erected by Mr Smith to interrupt the force of the debt recovery action taken against him by Arwon both fail. There is nothing else relevantly raised against his debt obligations to Arwon.

Reliance and detriment

187 As regards Mr Smith's further pleaded contentions of reliance on both representations and his following detriment to found the estoppels, I will further observe, necessarily briefly, that I was left equally

unpersuaded at the trial as to the proof of those further and essential ingredients of any promissory estoppel.

188 In the first place, there would need to be shown a 'reasonable' reliance by Mr Smith on such representations, assuming they could be derived and established. But in the circumstances where Mr Smith, annually, for the 30 June 2013, 2014 and 2015 financial years signed up to fresh loan agreements with Arwon and to fresh IMAs with Quintis Ltd (yet says that he did not even read the terms of those agreement documents), that negative feature must bear adversely upon the reasonableness of Mr Smith's as contended reasonable reliance as regards such derived promissory representations.

189 The fact that at trial Mr Smith was never able to obtain or produce anything more formal and in writing along the lines of either his contended SGARA representation, or his default representation, also tends to suggest that it was not reasonable for him to act upon any contended assumptions resulting, assuming for the moment that he ever did.

190 As regards his contended detriment, the position at the trial would appear to be that Mr Smith still contends that SGARA values of his sandalwood plantations substantially exceed the amounts of his unrepaid loans to Arwon even with the accruing interest he owes to Arwon on the unrepaid loan debts. The detriment that he contends for, he says, is that his plantation assets are illiquid and so, there appears to be no-one willing to buy them from him in the marketplace at those SGARA values or, indeed, at all.

191 But if, indeed, that is assumed as the case, Mr Smith seems also to contend that his plantations of sandalwood trees are worth more than the debt he otherwise currently owes to Arwon. So it is difficult to see how his profitable end position equates to a detriment for him. Were Mr Smith to contend his plantation investments were now wholly worthless, then that might be another thing. But on the case as he has presented at his trial for contended detriment, I do not find that to be established.

Final orders

192 In all the circumstances, Mr Smith's promissory estoppel contentions completely fail. Consequently, there should in the wake of my adverse adjudication against Mr Smith as defendant, now be

judgment in accordance with par 1 of the consent orders of 6 May 2019, seen in par [4] of these reasons, favouring Arwon.

193 Prima facie, costs should also follow that event, as regards the result.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

DW
Associate to the Honourable Justice Martin

27 FEBRUARY 2020