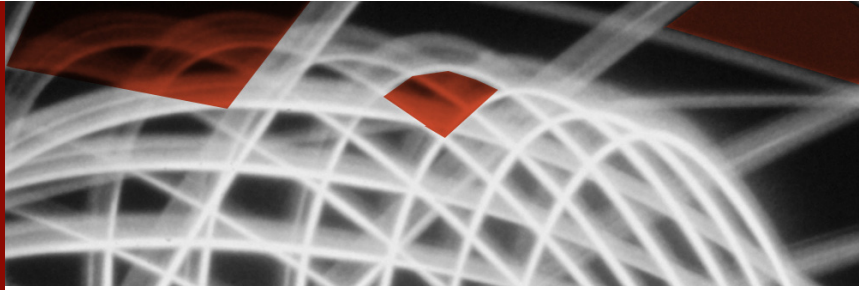


## News Alert

### The Basis for a Constructive Trust - The White City Case

June 2009



White City Tennis Club Limited ("WCTC"), represented by Kemp Strang, has scored an historic victory in the Court of Appeal which will see WCTC obtain title to the White City Site in the Eastern Suburbs of Sydney, its home since 1948.

#### The Facts

In June 2005, Sydney Grammar School ("SGS") and Sydney Maccabi Tennis Club ("Maccabi") acquired the White City Site from The NSW Tennis Association.

In a written agreement, known as the White City Agreement, SGS and Maccabi granted a first option to purchase part of the site to John Alexander's Clubs Pty Limited ("JACS") a company controlled by former tennis professional, John Alexander. SGS and Maccabi also granted a second option to WCTC, to be exercised in the event that JACS was unable or failed to exercise the first option.

In June 2007 JACS, through its nominee Poplar Holdings Pty Limited ("Poplar"), exercised the option and acquired the land.

#### The Basis of Claim

Following the exercise by Poplar of the option, WCTC commenced proceedings in the Equity Division of the Supreme Court of NSW seeking a declaration that Poplar held the land on constructive trust for WCTC and an order that Poplar transfer the land to WCTC upon WCTC paying to it the option price.

The basis of WCTC's claim was that JACS had acquired the land in breach of a fiduciary duty owed to WCTC to only exercise the option for the purposes set out in a Memorandum of Understanding ("MOU") that JACS and WCTC entered into 5 months prior to the White City Agreement.

The MOU provided that JACS would negotiate to obtain an option to be exercised by it on behalf of a special purpose company. The members of WCTC would be invited to subscribe for shares in the special purpose company. In return, the special purpose company would offer Mr Alexander a long term lease of the site to develop a "world class" sporting facility.

WCTC claimed that by failing to exercise the option for the purposes of the MOU, Poplar held the land on constructive trust for WCTC.

JACS and Poplar argued that there was no obligation to exercise the option in accordance with the MOU as the MOU had had been terminated by JACS prior to the exercise of the option.

#### The Trial

The trial judge, Young CJ in Equity as he then was, dismissed WCTC's claim. His Honour found that there was no basis for finding that a fiduciary duty existed and no basis for declaring a constructive trust.

His Honour concluded that the only obligation owed by JACS (and Poplar) to WCTC was a contractual duty which ceased upon the termination of the MOU.

#### On Appeal

In a decision delivered by Macfarlan JA, with whom Basten JA and Giles JA agreed, the Court of Appeal overturned the trial judge's decision and found that:

1. Poplar did owe WCTC a fiduciary duty;
2. in any event, the existence of a fiduciary relationship was not a pre-condition to the finding of a constructive trust;
3. the Court could find a constructive trust if, in all the circumstances, it would be unconscionable for Poplar to retain beneficial ownership of the land; and
4. in the circumstances in which the option was granted, it was unconscionable for Poplar to retain beneficial ownership of the land.

The Court ordered that upon WCTC paying to Poplar \$6.73 million (which was the option amount specified in the White City Agreement) within 3 months from the date of judgment, Poplar must transfer the land to WCTC.

The decision provides a good summary of the current law of fiduciary duties and the matters to be taken into account by the Court in declaring a constructive trust.

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