SUPREME COURT OF QUEENSLAND

CITATION:	*Jason H Pty Ltd as trustee for the Jason H Family Trust v Habchi* [2026] QCA 172
PARTIES:	**JASON H PTY LTD** ACN 658 016 418 **AS TRUSTEE FOR THE JASON H FAMILY TRUST** (first appellant) **JASON HABCHI** (second appellant) **JAYHAB DEVELOPMENTS PTY LTD** ACN 142 479 570 (third appellant) **v** **HABIB PETER HABCHI** (first respondent) **HABIB HABCHI PTY LTD** ACN 625 469 972 (second respondent) **MONI SALIM HABCHI** (third respondent) **HABCHI TRADING PTY LTD** ACN 660 439 403 (fourth respondent)
FILE NO/S:	Appeal No 5729 of 2025 SC No 9265 of 2022 SC No 1372 of 2024 SC No 3450 of 2024 SC No 11432 of 2024
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2025] QSC 305 (Freeburn J)
DELIVERED ON:	11 September 2026
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2026
JUDGES:	Brown JA, Bradley JA, Doyle JA
ORDERS:	**1. The answer given to Question 3 in paragraph (b)(ii) of the Orders made 14 November 2025 is varied so as to read: the exception is that Jason Habchi has failed to perform his obligations to provide Habib Habchi true accounts and full information of all things affecting the profit earned or losses sustained from three property**

developments being the Indooroopilly, Stones Corner and The Gap developments.

2. **The answer given to Question 5A is set aside.**

3. **Otherwise the appeal is dismissed.**

4. **Each of the parties has leave to file and serve submissions on the costs of the appeal, not to exceed 3 pages, within 7 days of the delivery of the orders.**

5. **The court will determine the costs without further oral hearing.**

CATCHWORDS: PARTNERSHIP – RELATIONSHIP BETWEEN PARTNERS – FIDUCIARY RELATIONSHIP – DUTY TO ACCOUNT – where parties entered into a family agreement – where the primary judge characterised the arrangement as a partnership – where one party received profits through associated entities – whether the party was obliged to account for profits from certain development – whether the family agreement was breached

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where separate questions concerned the respondents' entitlement to an interest in property – where the primary judge determined that entitlement by reference to a separate agreement – where the respondent had not pressed a case based on that agreement – whether the appellants had been given the opportunity to meet the case – whether the appellants were denied procedural fairness

Partnership Act 1891 (Qld), s 22, s 31, s 32, s 42

Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, applied
Gould v Mount Oxide Mines Ltd (In Liq) (1916) 22 CLR 490; [1916] HCA 81, applied
Hays Specialist Recruitment (Australia) Pty Ltd v Carey-Schofield [2025] QCA 161, cited
HT v The Queen (2019) 269 CLR 403; [2019] HCA 40, cited
Nathanson v Minister for Home Affairs (2022) 276 CLR 80; [2022] HCA 26, applied
Nobarani v Mariconte (2018) 265 CLR 236; [2018] HCA 36, applied
Queensland Trustees Limited v Fawckner [1964] Qd R 153, cited
Sim v Howat [2012] CSOH 171, cited
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, cited

COUNSEL: A I O'Brien KC, with C J Stackpoole, for the appellants
B W J Kidston for the respondents

SOLICITORS: Bartley Cohen for the appellants
Enyo Lawyers for the respondents

[1] **BROWN JA:** I agree that for the reasons set out by Doyle JA the appeal be allowed in part and otherwise dismissed. I also agree with the commensurate orders proposed by Doyle JA.

[2] **BRADLEY JA:** I agree with the reasons of Doyle JA and with the orders proposed by his Honour.

[3] **DOYLE JA:** After a seven day trial the primary judge decided three questions which had emerged for separate determination in the course of a long-standing dispute between two brothers and their associated parties.[1] The brothers are Habib Habchi and Jason Habchi (in these reasons, and the reasons of the primary judge, referred to by their first names).

[4] Without particular regard to the entities which were registered as owners of various properties, Habib and Jason entered into the "Family Agreement" on 30 September 2014. That agreement, somewhat ironically, was described as one "to provide clarity" for their future business relationship.

The Three Questions

[5] The questions which the primary judge was to consider were as follows:

> "**Question 2**: What is the proper construction of the Family Agreement?
>
> **Question 3**: Having regard to the answer to the question above:
>
> (i) was the Family Agreement breached by anyone?
>
> (ii) further or alternatively, was the Family Agreement terminated by anyone?
>
> (iii) further or alternatively, is anyone now entitled to terminate the Family Agreement?
>
> **Question 4**: Is any party estopped from asserting or maintaining any position with respect to the proper construction of the Family Agreement?
>
> **Question 5:** Having regard to the answers to the questions in paragraphs [2 and 4] above, other than in relation to the Mine Street Properties, what relief, if any, are:
>
> (i) the Habib Habchi Parties (or any of them) entitled to?
>
> (ii) the Jason Habchi Parties (or any of them) entitled to?
>
> **Question 5A**: Are the Habib Habchi Parties (or any of them) entitled to any and, if so, what, relief in relation to the real property located at and known as 2 City Road, Beenleigh in the State of Queensland (Lot 2 on Survey Plan 145262)?

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1 *Habchi v Jason H Pty Ltd* [2025] QSC 395 (Reasons or R).

> **Question 6:** Are there grounds for the making of an order under s 233 of the *Corporations Act 2001* (Cth) in relation to Jayhab Developments Pty Ltd, as provided for by s 232 of that Act?
>
> **Question 7:** Having regard to the answers to the questions in paragraphs [2 to 6] above, what orders or directions are necessary or appropriate to determine or facilitate the determination of any remaining questions in the Proceedings, including relief?"

[6] By Order made 19 September 2025 (on the fifth day of the trial) the issues to be determined by the primary judge were limited to Questions 2, 3 and 5A.

The Primary Judge's Answers

[7] In answering Question 2, the primary judge reasoned:

(a) That clause 6 of the Family Agreement was to be given its ordinary grammatical meaning and not "read as qualified or limited to property developments that use the 'family properties', or the 10 properties specified": R [77].

(b) That the Family Agreement created a partnership between the two brothers: R [115].

[8] Neither of these conclusions is the subject of this appeal. The form of answer given to Question 2 mirrored this reasoning: Order 14 November 2025.

[9] As to Question 3 the primary judge reasoned:

(a) that with one exception he was unable to determine whether either party had breached the Family Agreement: R [147].

(b) the one exception was his Honour's conclusion at R [156] that "The partnership has been breached in that Jason has failed to properly account to Habib for the profit earned by Jason on each of" three property developments. Those developments were identified as the Indooroopilly, Stones Corner and The Gap developments.

(c) The partnership was terminated on 21 September 2017.

[10] As to Question 3, the primary judge's answer was:

> "(b) The answer … is:
>
> (i) with one exception, the court is unable to say whether either party has breached the agreement;
>
> (ii) the exception is that Jason Habchi failed to account to Habib Peter Habchi for the profit (or loss) earned on three property developments;
>
> (iii) the partnership was terminated on 21 September 2017."

[11] As to Question 5A, his Honour reasoned:

(a) that an agreement was reached between the brothers: R [201].

(b) that pursuant to that agreement, Habib "was and is entitled to 50% of the net proceeds of City Road after payment of any legitimate costs": R [228]

[12] As to Question 5A his Honour's answer was expressed as: "yes, Habib is entitled to 50% of the net proceeds of 2 City Road, Beenleigh."

Grounds of Appeal

[13] The Notice of Appeal contains 23 grounds, some expressed on alternative bases. In the end and in light of concessions made by Habib, it is unnecessary to consider some of those grounds. The remaining grounds may be dealt with as falling within two broad topics:

(a) Grounds concerning Question 3 (specifically the one exception identified in the answer at (b)(ii)); namely the finding of breach of the Family Agreement by Jason's failure to provide information and financial accounting.

(b) Grounds concerning Question 5A: namely the proper scope of question 5A and the alleged errors made by the primary judge in concluding Habib had an interest in the proceeds of sale of the City Road property.

The Background

[14] The Family Agreement was entered into between Jason and Habib on 30 September 2014. The primary judge set out its terms, and in doing so conveniently imposed on the document as executed, paragraph numbering and also numbers to identify the various accumulated properties. Accordingly (with those additions in bold) the Family Agreement provides:

> "[18] The Family Agreement is in these terms:
>
> "THIS AGREEMENT IS BETWEEN:
>
> Habib Peter HABCHI (hereinafter referred to as HPH)
>
> and
>
> Jason HABCHI (hereinafter referred to as JH)
>
> This Agreement is to provide clarity for future business relationship as follows …:
>
> **[1]** HPH has accumulated property assets since 1999 and since 2008 a tax dispute has been ongoing. During this period JH has expended personal Cash to cover expenses related to the ongoing tax dispute. On 29 September 2014 a Deed was executed for settlement in the total amount of $1,257,775.00 to be paid within 21 days of execution $400,000 following 12 months further $400,000 following 6 months balance $457,775.00.
>
> **[2]** HPH Properties Accumulated:
>
> **1.** 61 Cook Street, **2.** 63 Cook Street, **3**. 47 Ellen Street, **4.** 115 Main Greenswamp Road, **5.** 13 Quarry Road, **6.** 538 Sherwood Road, **7**. 35 Strauss Place, **8.** 64 Tarragindi Road, **9.** 7 Mine Street, **10.** 9 Mine Street.

> **[3]** JH cash paid approximately $700,000 (JH to confirm this amount) plus further $400,000 within 21 days for Deed executed total $1,1000,000.00.
>
> **[4]** On execution of this Agreement HPH will give full control of all assets and income from all the above assets to JH.
>
> **[5]** JH is to offset $1,1000,000 at his discretion against Bank value for above properties.
>
> **[6]** In exchange JH will make HPH a partner 50-50 for any development or property purchase from the date this agreement is executed, including the property at Stanley Street, Indooroopilly development.
>
> **[7]** For any personal Cash JH expends he can at his discretion either offset against Bank value of above properties or recover and deduct cash at end of development before distribution.
>
> **[8]** On completion of any development JH can distribute at his discretion."

[15] The primary judge also noted that the accumulated properties were registered (at the time of the Family Agreement) in a variety of names, being:

> "[25] The 10 properties listed as 'Accumulated' … were, at the time of the Family Agreement, in various names associated with the family, namely:
>
> (a) Property 1 (61 Cook Street) – Habib Habchi;
>
> (b) Property 2 (63 Cook Street) – Rania Habchi (later part of her estate);
>
> (c) Property 3 (47 Ellen Street) – Jason Habchi;
>
> (d) Property 4 (115 Main Greenswamp Road) – Moni Habchi;
>
> (e) Property 5 (13 Quarry Road) – Moni Habchi;
>
> (f) Property 6 (538 Sherwood Road) – Habchi Holdings Pty Ltd;
>
> (g) Property 7 (35 Strauss Place) – Habib and Moni Habchi as tenants in common in equal shares;
>
> (h) Property 8 (64 Tarragindi Road) – Jason Habchi (until 2021);
>
> (i) Property 9 (7 Mine Street) – Habib and Jason Habchi as tenants in common in equal shares;
>
> (j) Property 10 (9 Mine Street) – Habib and Jason as tenants in common in equal shares." (footnotes omitted)

[16] As already mentioned, the primary judge found that the Family Agreement (and in particular clause 6) gave rise to a partnership between Jason and Habib: R [115].

Having regard to his Honour's construction of clause 6, the partnership did not encompass all the accumulated properties but only those which were thereafter developed (see R [135]), and any new property purchased, but also the Indooroopilly property. The precise working of this partnership (given the entities holding the properties and developing them) was not considered, beyond it being determined there was an equal partnership between the brothers.

[17] The primary judge found the partnership was terminated on 21 September 2017: R [174]. His Honour observed that "What remained was a proper separation of their affairs and a reconciliation": R [174]. This did not take place and has been the source of a degree of dispute thereafter.

The Three Developed Properties

[18] The Indooroopilly property was acquired by Lantona Pty Ltd, a company owned by Jason and Andrew Hanna. It developed the site with a 22-unit residential complex with funds contributed by them equally. The development was completed in 2017 and was profitable, though the primary judge notes the extent of the profits was unclear.[2] Despite this no profits were distributed (in the sense of paid out) but rather were used for Lantona's future developments: R [136]-[137]. Some of these funds were used towards acquiring the Stones Corner property. Another related company, K J Lantona Pty Ltd (as to 60 per cent owned by Lantona Pty Ltd) acquired a property at The Gap: R [140]. It is unclear if money from the Indooroopilly development was employed in The Gap development.

[19] However, it was accepted on appeal that the partnership also extended to the development of the Stones Corner and The Gap properties as identified in the Reasons: see R [90], R [117c] and R [196].

[20] These other sites were later developed and the profits distributed to Jason, who has not accounted to Habib for any part of them: R [141].

[21] It is Jason's failure to account to Habib particularly in connection with the Indooroopilly, Stones Corner and The Gap properties that is the subject of the answer given to Question 3.

2 City Road Beenleigh

[22] Habib identified this as an investment opportunity. He approached Jason to acquire it with him and initially Jason expressed his disinterest.

[23] Ultimately the primary judge found that:

> "[201] I accept that the brothers agreed that they were going to share 50:50 in the expenses and potential profit arising from the acquisition of City Road. There is other evidence that supports that finding. For example, there are later emails of 1 June 2017 which speak of the property being purchased in the name of Jayhab but on the basis that Habib was a 50% shareholder in that company. That Habib was entitled to a 50% interest in City Road was not really in dispute."

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[2] R [137] and footnote 90.

[24] A contract was initially made naming Habib's wife (Moni) or nominee as purchaser. At Jason's urgings that contract was replaced with one identifying the purchaser as Jayhab Developments Pty Ltd (Jayhab). Jayhab was a trustee of a family discretionary trust associated with Jason. The shares in that company were held 50 per cent by each brother. Some months later the trust deed was varied to name Habib as a beneficiary. It will be necessary to return to some of these events.

[25] The purchase proceeded:

(a) with Jason paying the deposit of $20,400: R [227]

(b) the balance of the price being funded by NAB with that facility guaranteed by Habib, Moni and their associated company: R [208];

(c) with settlement occurring on 4 July 2017.

[26] Some months later, the trust deed was varied to include Habib as a beneficiary. The primary judge found this was "pursuant to the arrangement" that the brothers split the investment 50:50: R [207]. Precisely how this was to occur was not explained.

[27] Some 5 years later, in May 2022 the property was transferred into the name of a new trustee of the trust, Jason H Pty Ltd, which had replaced Jayhab a month earlier. This occurred without Habib's knowledge. This company was associated with Jason and Habib had no interest in it. In August 2023 that entity sold the property to a third party for $2.2m with the NAB being paid out $1.77m: R [205], [206]. As to this Jason's evidence was that "*No proceeds from the sale were distributed to Habib because he did not, despite our agreement, contribute to the purchase price or other costs of 2 City Road. In my mind, Habib had no entitlement to any share of the proceeds.*"

Issues concerning the exception identified in the answer to Question 3(i)

[28] The primary judge held that Jason had breached the Family Agreement by failing to account to Habib for the profit (or loss) earned on three property developments. This is challenged by Jason on a number of bases.

[29] *First*, it is said that the primary judge based his analysis upon the obligation to account, contained in the *Partnership Act*, and that that obligation had not been pleaded by Habib against Jason.

[30] I do not accept this submission. The substitute Statement of Claim of Habib pleaded the terms of the "Family Agreement". It is then pleaded:

> "72. In the premises of the Family Agreement …[Jason] had since 30 September 2014 (the Relevant Date), and continues to have obligations to [Habib] to:
>
> (a) to act in the interests of [Habib] in respect [Jason's] acquiring of real property and undertaking of property developments as and from the Relevant Date;
>
> (b) not to acquire, or alternatively cause to be acquired, real property for his own benefit otherwise than on the terms of the Family Agreement and on the basis of [Habib] holding a 50% beneficial interest in such property;

> (c) to render true accounts and full information of all matters pertaining to financial affairs in relation to real property acquired or property developments undertaken by [Jason] as and from the Relevant Date; and
>
> (d) account to [Habib] for 50% of the profits generated from real property acquired or property developments undertaken by [Jason] as and from the Relevant Date."

[31] Habib did not explicitly plead that a partnership existed between his brother and himself. Whether or not there was such a partnership however was clearly something about which competing contentions were advanced at the trial. The conclusion that a partnership exists is a characterisation of the relationship which arises from the facts which were pleaded and proved. Whilst in the usual case progressed by pleadings it would be preferable to have explicitly pleaded that those facts gave rise to a partnership, the failure to do so does not preclude the grant of relief based upon the view that a partnership was formed having regard to the facts as pleaded. This is especially where both parties have joined issue at the trial on that question: *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286–7.

[32] The substitute Statement of Claim alleges that Jason had obligations to render true accounts and to account for the 50 percent share of the profits. The source of these and the other pleaded obligations is not explicitly referred to. But a partnership having been established, the obligations arise at least from the terms of the *Partnership Act 1891* (Qld) s 31, and s 32. In particular the Act provides:

> "31(1) Partners in a firm, other than an incorporated limited partnership, are bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives.
>
> …
>
> 32(1) Every partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership, or from any use by the partner of the partnership property…"

[33] These obligations are not expressed so as to expire upon one partner giving notification to terminate the partnership but continue so as to facilitate the winding up and distribution of the partnership assets.[3] Each partner is entitled on the dissolution of the partnership to have the property of the partnership applied to meet partnership debts and the surplus distributed: s 42.

[34] The case was not argued below on the basis of an express or implied term of the Family Agreement imposing the obligations on Jason. Accordingly, the finding of the primary judge should be understood as a finding that by reason of the established relationship of partnership between the brothers, Jason became subject to the obligations in the *Partnership Act 1891*, they not having been varied or displaced by anything in the Family Agreement: see s 22 of the *Partnership Act 1891*.

[35] The terms of Question 3(i) are directed to whether there had been any breach of the Family Agreement. The primary judge answered that there had been such a breach

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[3] See *Queensland Trustees Limited v Fawckner* [1964] Qd R 153 at 159.

by Jason by reason of his failure to properly account to Habib for the profits (or loss) made on these three developments.

[36] His Honour cannot be understood as referring to an obligation by Jason to account for those profits in the sense of pay them to Habib. The obligation in s 32(1) of the *Partnership Act* is to account to the firm (the partnership) for benefits and says nothing about losses. On the other hand s 31(1) refers to the rendering of true accounts and full information. I would understand his Honour's reasoning and his answer to be referring to Jason's failure to perform that obligation; viz to render true accounts and full information as to the profits or losses from the three developments. Further, I do not read his Honour's answer as suggesting that otherwise Jason has not failed to provide true accounts and full information as to other matters affecting the partnership. Indeed that is clear from paragraph (i) of the answer his Honour gave to question 3 as set out above.

[37] To clarify this, if otherwise the appeal in relation to Question 3 does not succeed, paragraph (b)(ii) of the answer to Question 3 in my view should be varied so as to read in substance that: the exception is that Jason has failed to perform his obligations to provide to Habib true accounts and full information of all things affecting the profit earned or losses sustained from three property developments being the Indooroopilly, Stones Corner and The Gap developments.

[38] *Second* it is said that no obligation to account could arise until Jason had exhausted his entitlement to refund of the sums to which he was entitled, and the primary judge did not make a finding that those entitlements had been exhausted. It was submitted that there had to be a finding by the primary judge that Jason had been fully satisfied before the obligations in s 31 and s 32 could arise, or at least be said not to have been performed.

[39] The primary judge identified amounts or property that Jason had taken on account of his payments to the ATO pursuant to clause 5 of the Family Agreement, and also pursuant to clause 7 on account of personal cash payments he had made. The sums involved are not stated precisely and seem to be in the order of slightly less than $1,517,000 and a property with a face value of $625,000: R [126]–[127]. But in Jason's case these did not fully satisfy his claimed entitlements.[4] The primary judge did not determine those aspects of Jason's claims.

[40] But Jason's submission cannot be accepted.

(a) The utility of the separate questions seemingly was to allow some issues to be decided without having to resolve more complex factual disputes. None of the stated questions sought to identify the meaning of the expression "any personal Cash JH expends" in clause 7 of the Family Agreement (and how that is to be understood having regard to the similar expression in clause 1). Nor did any of the stated questions examine the actual state of the accounts between the parties.

(b) The obligation imposed by s 31 of the *Partnership Act* includes to "render true accounts and full information of all things affecting the partnership". Whilst it may be that the performance of the obligation only arises if triggered by some relevant matter, including where some request is made,[5] performance of this

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4 Jason's Third Affidavit paragraphs [309]-[340].

5 *Sim v Howat* [2012] CSOH 171 at [40].

obligation is not subject to a condition that it first be established that the party seeking the information can establish the other partner has been repaid an assumed priority entitlement to sums expended by him or her. Indeed to limit the obligation in that way would thwart the ability of someone like Habib to be able to obtain any accounting for want of the information sufficient to overcome that asserted threshold hurdle.

(c) While in part Habib's requests were framed in terms of seeking payment of his entitlements (which presupposes an entitlement above the sums Jason was entitled to priority for his personal cash payments) and at times asserting that the partnership property included assets other than those determined by the primary judge as being within the scope of the partnership, it is clear he was seeking information including accounts and they were not provided. The primary judge found that Habib had been seeking but Jason had failed to provide him with information as to the assets and affairs of the partnership: R [150]–[155].

[41] *Third*, the primary judge determined that the partnership had been terminated on 21 September 2017. Accordingly, Jason contended that any profits derived from developments conducted later, could not form part of the partnership property and accordingly, could not form part of any obligation to provide accounts. This submission is made particularly with respect to the developments at Stones Corner and The Gap. This submission is not readily reconciled with those matters recorded by the primary judge at R [90], R [117c] and R [196] that it was common ground that Habib had a partnership interest in these properties. But even if that is to be understood as merely recognising that those properties were in part acquired or developed with partnership funds (so as to prima facie be partnership property: s 24 of the *Partnership Act*) the requirement to provide information and accounts has not been performed as to the Indooroopilly development or of the deployment of its proceeds towards the Stones Corner and The Gap properties. The gravamen of the matter the subject of the answer to Question 3 is not affected.

[42] *Finally*, but to similar effect, the submission was made on Jason's behalf that "if" the proceeds of the Indooroopilly development were employed in those later developments of Stones Corner and The Gap, whilst that may give rise to an obligation for Jason to account for profits it could not give rise to an obligation which affects these developments, they being conducted by two other companies. But once again this is a question that will bear on the ultimate accounting between the partners and does not affect Jason's obligation as to his profits or proceeds from partnership property, to comply with his obligations to provide the required information and accounting to Habib.

[43] For these reasons the grounds of appeal affecting the exception identified in the answer to Question 3 fail.

Grounds concerning question 5A

[44] This ground concerns the City Road property. In substance Jason contends:

(a) The primary judge erred in not affording him procedural fairness to meet the case that Habib had any entitlement to the City Road property based on a separate agreement.

(b) Alternatively, while on the facts some agreement was made:

(i) there is a challenge to the primary judge's findings as to its terms; and

(ii) in any event Habib's entitlement under the separate agreement was conditional upon his contributing 50 per cent of the costs which has not occurred.

(c) Finally, it is urged that the sole remedy ought to have been damages for Jason's possible breach of the separate agreement and not the relief identified of an entitlement to 50 per cent of the net proceeds after payment of any legitimate costs.

[45] As to the third of these contentions (remedy of damages only):

(a) The primary judge's answer to Question 5A did not specifically identify the relief said to follow from the finding of that separate agreement; whether it was damages, specific performance, or declaration of a constructive trust. That said, his Honour did state that "Habib is entitled to 50% of the net proceeds of 2 City Road, Beenleigh." This might be said to identify relief other than damages.

(b) The primary judge did not make a finding as to the existence of what he had contended was a common intention constructive trust, and there is no challenge made to the primary judge's conclusion that there was no resulting trust in favour of Habib as he had alleged, arising from the payment of the deposit (which his Honour found was paid by Jason).

(c) No attempt was made on appeal to address whether the form of the answer given by the primary judge reflected a determination by the primary judge that, arising from that separate agreement, as a contractual remedy or consequent upon the relationship amounting to a further partnership, or otherwise, Habib was entitled to relief in the form of a declaration of the kind made by the answer, or an account for 50 per cent of the profits of the sale of City Road.

(d) In the end it became unnecessary to deal with the third contention. The parties both urged on the court that, if otherwise this court does not disturb the primary judge's finding as to the existence and terms of the separate agreement between Jason and Habib, the 'remedy' available to Habib for its non-performance or otherwise to give effect to the separate agreement should be dealt with by the primary judge. This, as it turns out, is consistent with the position for the partnership property where question 5 was deferred.

[46] For my part I am content, therefore, to act in accordance with this stated preference of the parties and to confine this alternative aspect of the appeal to the challenges to the findings as to the terms or otherwise the conditional nature of the separate agreement.

The Separate Agreement

[47] The primary judge made the finding at R [201] which I have extracted above. It refers to Habib's entitlement to 50 per cent of the potential profits from City Road arising from the agreement the brothers made to share the expenses and potential profits equally.

[48] The primary judge also reasoned that by the time of settlement of the purchase (which was to be in the name of Jayhab) the arrangement meant Habib and Jason were to be 50 per cent shareholders in Jayhab: R [204]. This is readily seen as the means of carrying out their agreement.

[49] So much at least is not controversial:

(a) At the trial Jason agreed that he and Habib had reached an arrangement that Habib share 50 per cent in the City Road property. The reason he gave for not having provided Habib a share was not because there was no such arrangement, but "*because he did not, despite our agreement, contribute to the purchase price or other costs of 2 City Road.*" (emphasis added)

(b) Counsel for Jason (in the course of addressing the resulting trust aspect of Habib's case) at trial submitted that "your Honour would accede to our submission that they'd agreed…to proceed on an arrangement outside of that family agreement, namely that there would be in fact a 50/50 contribution".[6]

[50] Having regard to these matters, no error is shown in the primary judge's finding that an agreement was reached between the two brothers and to the effect that they would share equally the expenses and profits of the acquisition of the property. All else being equal, it would be a breach of that for Jason to obtain all of the profits for his own benefit or at his direction.

[51] His Honour then discussed how despite this arrangement, Jason set out to acquire the benefits of City Road for himself: R [206].

(a) The first step in this process was that Jayhab was purchaser. That, the primary judge records, was on the basis that the two brothers would have a 50 per cent interest "both legally and beneficially": R [207]. On the face of it, however, the legal interest of the City Road property would be held by the company even if beneficially for the brothers. I would read this as a finding that the agreement was that they have a 50 per cent interest legally and beneficially, but that the step of purchasing the site in the corporate name with each being a 50 per cent shareholder was consistent with that separate agreement.

(b) The primary judge also records that Jayhab acquired the property as trustee of the Jason H Family Trust: R [206a]. This seems to have been identified by the primary judge as a departure from the agreement made between the brothers. It is clear from the terms of the documents that it is a discretionary trust with a broad class of beneficiaries and not a trust for the benefit of the brothers equally.

(c) In November 2017 Habib was made a beneficiary of the Jason H Family Trust: R [207].

(d) The next step in Jason's acquisition of the benefits for himself was, as the primary judge notes, that some years later the trustee was replaced for an entity in which Habib had no interest.

[52] These matters at least are relevant to whether Jason has breached the separate agreement and so the relief to which Habib might be entitled. But these facts might also be relied on as some evidence of a variation of the separate agreement, or bear some other characterisation which affects the relief. This, in my view, bears upon the procedural fairness issue and will be discussed below in that context.

Condition Precedent

[53] Alternatively, Jason contends that the primary judge ought to have held, that any interest which Habib held was subject to the condition precedent he contribute 50 per

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6 T7-61 lines 1 to 4.

cent of the purchase price (or perhaps a condition effecting some forfeiture by him if he failed to do so).

[54] There is no finding which would support that construction and the primary judge rejected Jason's evidence led to attempt to support that.

[55] The primary judge found at R [204]:

> "The evidence is clear that Habib and Jason were to have a 50:50 interest in the City Road property. By the time of settlement that 50:50 arrangement meant that Habib and Jason were to be 50% shareholders in the purchaser, Jayhab."

[56] Ahead of this finding the primary judge referred to and then rejected the evidence of Jason. This appears in the following passages of his Honour's reasons:

> "[200] Jason says that what then happened is that he had a conversation with Habib as follows:
>
> 'Habib: *I changed the name on the contract for Beenleigh to Moni's name.*
>
> [Jason]: *I think you will need to change the name so it's an entity as you won't be able to get finance on an individual name. We can put it in Jayhab.*
>
> Habib: *Ok sounds good but I want to be included in it.*
>
> [Jason]: *You can be included as a beneficiary in Jayhab, but only on the basis that we split the acquisition, and you contribute equally with me for it and all expenses.*
>
> Habib: *I agree*.'
>
> [201] I accept that the brothers agreed that they were going to share 50:50 in the expenses and potential profit arising from the acquisition of City Road. There is other evidence that supports that finding. For example, there are later emails of 1 June 2017 which speak of the property being purchased in the name of Jayhab but on the basis that Habib was a 50% shareholder in that company. That Habib was entitled to a 50% interest in City Road was not really in dispute.
>
> [202] However, I do not accept that the conversation occurred as portrayed by Jason. His version has an air of unreality and has a rather myopic element to it. The conversation reads as if Jason was providing his brother with financial advice and somewhat generously providing his brother with an opportunity to be included. That is quite incongruous with the actual situation – which was that this was a project embarked on by Habib. Jason had not been interested until then." (footnotes omitted)

[57] In the events, the purchase price was funded, apart from the deposit of $20,400, from borrowing from the NAB with Habib, his wife and associated company becoming guarantors. If the separate agreement was to bear some condition of the kind urged by Jason, there would remain an issue whether Habib had complied or whether any

inadequacy in his performance as to the deposit had been waived or by conduct the arrangement varied in some way. It is unnecessary to further consider this possibility.

The Procedural Fairness Contention

[58] It is however necessary to consider the primary issue raised, namely that it was not open to the primary judge to make a finding that Habib had any entitlement to the City Road property based on a separate agreement. Jason put it on the basis that the way in which the case proceeded meant he was denied procedural fairness because a case for an entitlement under a separate agreement was not opened, pleaded, or asked for by Habib.

[59] In summary, as explained below, in my view:

(a) Having regard to the terms of the substituted Statement of Claim, the directions for the filing of all relevant affidavit material and the breadth of the language of Question 5A (but putting aside later events) Jason was on notice of a possible contention that Habib claimed an entitlement to 50 per cent of the benefits of the City Road property pursuant to some agreement separate from the Family Agreement. Accordingly Jason could have put on evidence and submissions directed to any aspect of that case which he sought to advance.

(b) However, thereafter the course the trial took and in particular the course adopted by Habib was such that he did not urge such a contention. The primary judge ought not to have decided the question on a basis not pressed by Habib at least without affording the parties, and in particular Jason, an opportunity to be heard.

(c) The circumstance that, prior to the commencement of the trial, the terms of the substituted statement of claim, the material and the breadth of the language of Question 5A were sufficient to put Jason on notice of a contention that Habib claimed an entitlement to 50 per cent of the benefits of the City Road property pursuant to some separate agreement, provides a strong basis for contending that Jason has not suffered any practical prejudice from the departure made by Habib in the course of the trial.

(d) Notwithstanding that, however, it cannot be concluded that Jason has not demonstrated a reasonable conjecture that if afforded the opportunity to be heard (or adduce further evidence) on that separate agreement issue he had the possibility of obtaining a successful outcome.

The Pleadings, Question, Evidence and Submissions

[60] The substituted Statement of Claim seeks to make out Habib's entitlement to a share of the proceeds of the City Road property as a result of a constructive trust said to have arisen from, inter alia, the common intention between the brothers that the property would be purchased by a company (Jayhab Developments Pty Ltd) but that company would hold 50 per cent of the beneficial interest for Habib. Alternatively, a resulting trust is said to have arisen from Habib having paid the deposit.

[61] No claim is expressed on the basis of a contractual remedy. That said, the pleading asserts that the common intention was held by each of Jason, Habib and the corporate entity (Jayhab Developments Pty Ltd): [54]. That common intention is "to be inferred" from facts pleaded in [34] to [49] of the Statement of Claim. Those facts included [40] which provides as follows:

> "40. On a date in the period between 1 December 2016 and 17 June 2017:
>
> (a) the Second Defendant informed the First Plaintiff, verbally, that the Second Defendant wished to purchase 2 City Road in the name of the Third Defendant;
>
> (b) the First Plaintiff and Second Defendant agreed, verbally, that 2 City Road should be purchased in the name of the Third Defendant and that the First Plaintiff and Second Defendant would hold the beneficial interest in equal shares."

[62] Accordingly, some notice is given in paragraph 40(b) of a contention that there was an agreement reached affecting the brothers' entitlements to 2 City Road. In any case, the parameters of the issues to be determined were not in this case defined by the pleadings which largely seem to have been overtaken by directions made. Rather, specific questions were identified to be answered. All affidavit material to be relied on in relation to them was filed. After this had been done, Jason asked that Question 5A be added. This was formulated at a time when Jason had put on all of the evidence he wished to advance, which included that establishing the arrangement he and Habib had reached.

[63] Question 5A is expressed in unlimited terms. It is not, as it might have been, limited to an issue of Habib's interest in City Road under the Family Agreement, a constructive trust or resulting trust. It invites an answer to the question what, if any, entitlement Habib has (not what interest he might in the past have had) in relation to the City Road property. Question 5A cannot be read down so as to not extend to the issue of Habib's entitlement under the separate agreement his Honour identified.

[64] Accordingly, Jason was on notice of the need to adduce any facts that he wished to rely upon relevant to: the agreement pleaded in paragraph [40(b)] of the substitute statement of claim; whether the City Road property was partnership property within the family agreement; or whether the City Road property was the subject of some other joint venture; or whether there was a common intention that City Road being owned 50 per cent by each brother; or whether any event had occurred subsequently which affected any of these possibilities which could be said to bear upon whether at the date of trial Habib has any entitlement in or to City Road or its proceeds.

Course Taken of Trial

[65] However, there is a further dimension to be considered beyond the terms of the substitute statement of claim and the form of Question 5A.

[66] Written opening submissions and closing submissions were provided by each party and filed at various dates in September 2025.

[67] Jason's opening submissions were first. They were filed 12 September 2025 and include, as an attachment, a draft of what became Question 5A. The submissions merely contend (seemingly on the construction of the Family Agreement) that Habib is not entitled to any relief in respect of City Road.[7]

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7 Jason's Opening Submissions at [12c].

[68] Habib's written opening, filed 15 September 2025, adverts to an agreement that City Road would be jointly owned.[8] This opaque reference in the chronology in the opening to the agreement to jointly own City Road is not sufficient to identify a claim for relief on the basis as a separate agreement rather than under the Family Agreement, or the claimed common intention constructive trust. The opening treats the City Road property as arguably partnership property (but even this is expressed in a qualified way).[9] This contention would appear to be based on the construction urged for Habib of the Family Agreement. Neither opening addressed question 5A directly (it being added only later).

[69] No oral opening was made of Habib's case. No mention was made of a separate agreement concerning City Road in the oral opening for Jason.

[70] The closing written submissions (filed 23 September 2025) on behalf of Habib repeat the contention that the City Road property was partnership property.[10] The submission goes on specifically when dealing with Question 5A to contend City Road is within the scope of the Partnership or Joint Venture (both being a reference to the relationship under the Family Agreement)[11] but alternatively to assert Habib's entitlement to a declaration of constructive trust or resulting trust based upon the common intention or the payment of the deposit. It does not assert a contract or partnership claim based on some separate agreement nor seek any relief based on the existence or breach of any such separate agreement.[12]

[71] The written closing submissions on behalf of Jason (also dated 23 September 2025) submitted the Family Agreement did not give rise to a partnership and that the City Road property could not be partnership property because it was acquired by a corporation as trustee.[13] Beyond that, the closing submissions in relation to City Road addressed the claim for a resulting trust arising from the contention that Habib paid the deposit. This is based upon a statement made in those submissions that "outside the Family Agreement the Jason Habchi parties do not understand Habib to assert an interest in 2 City Road other than on the basis of a purchase money resulting trust."[14] It is difficult to accept that is a fair summary of the basis upon which Habib's common intention constructive trust was advanced.

[72] Little further was submitted orally in closing submissions. As already mentioned, Counsel for Jason accepted the parties "agreed… to proceed on an arrangement outside of that family agreement, namely that there would be in fact a 50/50 contribution."[15]

[73] Despite the breadth of the form of Question 5A and the material which had been adduced, Habib did not explicitly open the case on the basis that he was seeking, nor in submissions address that the primary judge ought to make, a finding that Habib had an entitlement to an interest in the proceeds of the City Road property pursuant to a separate agreement of the kind now the basis of the answer to question 5A. Nor

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8 Habib's Written Opening at [8e].

9 Habib's Written Opening at [18]. It relies on Jason's failure to recognise it as partnership property 'if it be such'.

10 That is 'if it be such'. Closing submissions for Habib at [36].

11 Closing submissions for Habib at [44], and [35].

12 Closing submissions for Habib at [45]-[47].

13 Closing submissions for Jason at [158].

14 Closing submissions for Jason at [212].

15 T7-61 lines 1 to 4.

did Jason invite the primary judge in submissions to make a finding about the non-existence of that separate agreement or the nature of Habib's entitlement under it. Accordingly, it is submitted on appeal that the primary judge should not have made any finding on that basis without notice to the parties (in particular Jason) inviting further submissions and, within limits, further evidence.

[74] Courts are obliged to afford procedural fairness to the parties: *HT v The Queen* (2019) 269 CLR 403 at [17]–[18]. The content of that obligation is to afford the party a reasonable opportunity of being heard. This necessarily involves them being put on notice so as to be able to respond to the case they have to meet. Typically this function is fulfilled by the pleadings but not necessarily so nor exclusively so.

[75] In *Water Board v Moustakas* (1988) 180 CLR 491 a somewhat similar issue arose. A workman was injured by being struck by a bus while working near an excavation in a city street. The pleaded case (of negligent failure to provide a safe system of work) relied on a particular which, arguably, would have allowed the plaintiff to have contended the employer's breach was its failure to erect barriers to prevent traffic crossing into the lane where the employee was working; or to contend the employer's breach was its failure to erect barriers to prevent the employee crossing into the lane where traffic was flowing. The case in fact urged at trial by the employee was only the former, and the trial judge found the plaintiff failed as the accident occurred when the plaintiff strayed into the trafficked lane. The Court of Appeal took a different view of what case was open to the plaintiff at trial, namely that it was wider and encompassed both contentions. As to that, and in overturning the Court of Appeal's decision, the plurality at 497–8 stated:

> "It is necessary to **look to the actual conduct of the proceedings to see whether a point was or was not taken at trial**, especially where a particular is equivocal…..The relevant particular, because of its breadth, would have allowed such a case to be put. But it was not put. The plaintiff presented his case solely on the basis that he remained in the first lane and the imprecision of the relevant particular cannot be the means of attributing to the plaintiff a case which he did not make … The employer was never required to meet [the alternative] case and it was entitled in conducting its defence to rely upon the case which was actually put." (emphasis added)

[76] While ordinarily the pleadings define the scope of the issues, in the present case the pleadings were not the exhaustive means of doing so. The parties proceeded on the basis of the evidence filed, and the questions posed for answer. However, in the course of the hearing they further defined the issues. In doing so neither identified a claim for Habib to an interest in the City Road property pursuant to a separate agreement or its breach. In those circumstances it is "impossible for either of them to hark back to the pleadings and treat them as governing the area of contest": *Gould v Mount Oxide Mines Ltd (In Liq)* (1916) 22 CLR 490 at 517; because the "parties have deliberately chosen some different basis [from the pleadings] for the determination of their respective rights and liabilities": *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 287. The reasoning in these passages (referring to pleadings) applies equally to deliberate departures from the scope of issues otherwise potentially open in respect of the agreed questions or on the exchanged evidence. The parties may disregard the pleadings and the like "either confining or enlarging the issues" to be fought at trial: see *Hays Specialist Recruitment (Australia) Pty Ltd v Carey-Schofield* [2025] QCA 161 at [107].

[77] In my view, in light of the way the case was argued by Habib and Jason it did not extend to whether the court should find there was a separate agreement pursuant to which Habib had a right to a share of the City Road sale proceeds. It would have been appropriate for the primary judge to have given some notice to the parties that he would be assisted by submissions directed to that separate agreement issue before answering Question 5A, or otherwise to decline to answer it. That did not occur.

[78] In those circumstances, the burden on Jason on appeal is undemanding, but nonetheless he has to show a reasonable conjecture that if afforded the opportunity to be heard (or adduce further evidence) on that separate agreement issue he had the possibility of obtaining a successful outcome: *Nobarani v Mariconte* (2018) 265 CLR 236 at [38], *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at [34]–[35], [46]–[47].

[79] The contentions which it is argued might have been advanced were that Jason might be able to contend:

(a) the separate agreement had been terminated by Jason for Habib's breach.

(b) the separate agreement had been terminated by Jason prior to the sale and thus prior to any interest of Habib crystallising.

(c) he had a claim against Habib for losses which he could claim against Habib or seek to set off against any amount payable to Habib in respect of his interest in the City Road property.

(d) perhaps that the separate agreement was varied such that Habib's interest was limited to that of a discretionary beneficiary in a trust.

[80] As already mentioned, all of the evidence in chief about these issues could have been included in the filed material, and Jason's opening address could have dealt with these issues. Jason's written opening did not advert to any fact or submission which impacted on the relief available to Habib (other than those issues in fact argued later by it). There was no contention (or evidence) that the separate agreement had been rescinded or terminated before Habib acquired any interest, or of Jason suffering a loss from Habib's contravention of that separate agreement so as to entitle Jason to a set off against Habib's claimed entitlements under the separate agreement. That goes some way to concluding there was nothing Jason could have said about these matters and accordingly he has suffered no practical prejudice in the circumstances.

[81] On the other hand, there are matters which, in my view persuasively, weigh against concluding that no practical prejudice has been caused to Jason.

(a) It cannot be dismissed that the course of Jason's cross examination of Habib might have been affected by the limitation of the way the case was opened by Habib.

(b) Counsel for Jason could have sought leave to lead evidence, and indeed to reopen his case if needs be, to lead evidence directed to those topics if Habib had, in his submissions, sought to make out the separate agreement. The possibility of that course being permitted cannot be dismissed as fanciful.

(c) In particular it was suggested on appeal that there was evidence, not relied on by Jason at the trial, which would have been relevant to the existence of a case that Habib was liable to Jason for breaches of that separate agreement. Senior

Counsel referred to affidavit material filed in support of an application made for an interlocutory injunction against Habib which injunction was granted on 16 August 2022. The supporting material included an affidavit by Jason contending that Habib had caused damage to the property at City Road. Leave might have been sought to rely on that had Habib opened or submitted that he had an entitlement to relief based on the separate agreement.

(d) Of course, the form of Question 5A does not explicitly seek to invite the court to consider Jason's rights at all. Answering it would not preclude any counterclaim Jason might have for Habib's breach of the separate agreement. But it might affect a claim for set off. It invites an answer to the question of what relief the Habib entities are entitled to. A set off in favour of Jason for Habib's possible breaches of a separate agreement might affect the relief (even if not to the point of exhausting any relief). The form of the answer given, namely that Habib "was and is entitled to 50% of the net proceeds of City Road after payment of any legitimate costs" could be understood as having the effect of disposing of any set off. To maintain this answer is inconsistent (or potentially so) with it being now accepted (as discussed above) that the question of Habib's relief is to be remitted to the primary judge.

(e) Further, were the case being advanced of an entitlement pursuant to a separate agreement of the nature found by the primary judge, it is possible the submissions to be made for Jason would more directly focus on the effect of: (i) the property being acquired by a corporate trustee of a discretionary trust; (ii) whether the separate agreement had been varied by conduct or otherwise; and (iii) in particular whether Habib's claims under that separate agreement had potentially been satisfied with his benefit being that of a discretionary beneficiary.

Summary

[82] The result in my view is that the primary judge ought not to have proceeded to decide Question 5A on a foundation not argued for by either party in the actual conduct of the trial without first affording the parties an opportunity to be heard on it. In my view, albeit with reservations, the course adopted is one which had potentially caused practical injustice to Jason.

[83] For these reasons the answer to Question 5A should be set aside and the matter remitted to the primary judge to deal with as may be appropriate.

Conclusion

[84] For these reasons in my view the appeal should be allowed to set aside the answer to Question 5A and to vary question 3 in the manner discussed above.

[85] In the circumstances where the appeal has succeeded in part only, directions should be made for the parties to make further submissions on costs.

[86] Accordingly, in my view, the appropriate Orders are:

1. The answer given to Question 3 in paragraph (b)(ii) of the Orders made 14 November 2025 is varied so as to read: the exception is that Jason Habchi has failed to perform his obligations to provide Habib Habchi true accounts and

full information of all things affecting the profit earned or losses sustained from three property developments being the Indooroopilly, Stones Corner and The Gap developments.

2. The answer given to Question 5A is set aside.

3. Otherwise the appeal is dismissed.

4. Each of the parties has leave to file and serve submissions on the costs of the appeal, not to exceed 3 pages, within 7 days of the delivery of the orders.

5. The court will determine the costs without further oral hearing.