SUPREME COURT OF QUEENSLAND

CITATION:	*Bellevue Station Pty Ltd v Consolidated Pastoral Company Pty Ltd & Anor* [2024] QCA 47
PARTIES:	**BELLEVUE STATION PTY LTD** ACN 653 783 094 (appellant) **v** **CONSOLIDATED PASTORAL COMPANY PTY LTD** ACN 010 080 654 (respondent) **v** **NBT PTY LTD AS TRUSTEE FOR THE ASTOR SUPERANNUATION TRUST** ACN 001 945 446 (second respondent)
FILE NO/S:	Appeal No 12177 of 2023 SC No 76 of 2023 SC No 16291 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2023] QSC 202 (Brown J)
DELIVERED ON:	3 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2024
JUDGES:	Mullins P and Dalton JA and Applegarth J
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the first respondent and the second respondent entered into an agreement whereby both parties were able to use part of each other's land to avoid the cost of constructing a fence along the boundary of their adjoining pastoral properties (the 2009 agreement) – where clause 6 of the 2009 agreement stated that in the event either party disposed of its land, it will have the incoming purchaser enter into a similar agreement with the continuing party – where the second respondent sold its land to the appellant and the contract for the sale of the land obliged the appellant to enter into a similar agreement with the first respondent – where the appellant presented the first respondent with a written document in identical terms to the

2009 agreement – where the first respondent refused to sign the proposed new agreement and gave notice to the appellant that it intended to construct a boundary fence – whether there is an implied obligation imposed on the first respondent to enter into the proposed new agreement by virtue of clause 6 of the 2009 agreement

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – MATTERS NOT GIVING RISE TO A BINDING CONTRACT – VAGUENESS AND UNCERTAINTY – AGREEMENT SUBJECT TO FURTHER AGREEMENT OR ARRANGEMENT – whether the promise in clause 6 is an agreement to agree in terms which are not certain, so that it would not be enforced by the law, but considered to be void for uncertainty

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – PARTIES – RIGHTS AND LIABILITIES OF THIRD PARTIES – where the appellant relied on s 55 of the *Property Law Act 1974* (Qld) to argue it was the beneficiary of a promise made by the first respondent and to overcome the difficulty that it is not in privity of contract with the first respondent – whether the promise is for the benefit of the appellant within the meaning of s 55

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – ASSIGNMENT – where the appellant took a purported assignment of the second respondent's rights under the 2009 agreement, after the second respondent sold its land – whether the rights under the 2009 agreement were capable of assignment – whether, even if they were, by the time of the assignment, the second respondent had nothing to assign to the appellant which would assist it to compel the first respondent to enter into the proposed new agreement or allow it to exercise the rights of the second respondent under the 2009 agreement

REAL PROPERTY – RESTRICTIVE COVENANTS – ANNEXATION OF COVENANTS TO LAND – GENERAL PRINCIPLES – whether the first respondent's promise in the 2009 agreement to let the second respondent use part of its land was a promise relating to the promisee's land within the meaning of s 53 of the *Property Law Act 1974* (Qld) – whether, by virtue of the 2009 agreement, the first respondent entered into a covenant which touched and concerned the land

Conveyancing Act 1881 (Imp), s 58
Property Law Act 1974 (Qld), s 53, s 55
Law of Property Act 1925 (Imp), s 78, s 79

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1981 – 1982) 149 CLR 337; [1982] HCA 24, cited

Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594; [1979] EWCA Civ 3, considered
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
Northern Sandblasting Pty Ltd v Harris (1996 – 1997) 188 CLR 313; [1997] HCA 39, considered
Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd (2006) 149 FCR 395; [2006] FCAFC 40, cited
Peabody (Wilkie Creek) Pty Ltd v Queensland Bulk Handling Pty Ltd [2015] QCA 202, distinguished
P & A Swift Investments (a firm) v Combined English Stores Group Plc [1989] AC 632; [1988] UKHL 3, considered
Re Davies [1989] 1 Qd R 48, considered
Rhone v Stephens [1994] 2 AC 310; [1994] UKHL 3, considered
Scammell (G) and Nephew Ltd v HC and JG Ouston [1941] AC 251, cited
Tulk v Moxhay (1848) 41 ER 1143, cited
Westralian Farmers Co-operative Ltd v Southern Meat Packers Ltd & Anor [1981 – 1982] WAR 241; [1981] WASC 156, considered
WorldAudio v GB Radio [2003] NSWSC 855, distinguished

COUNSEL: P R Franco KC, with D V Ferraro, for the appellant
D P de Jersey KC, with J P Pemberton, for the first respondent

SOLICITORS: O'Shea & Partners for the appellant
Hamilton Locke for the first respondent

[1] **MULLINS P:** I agree with Dalton JA.

[2] **DALTON JA:** This appeal concerns adjoining pastoral properties, Wrotham Park and Bellevue Station. Both are held on Crown leases and comprise many thousands of acres. They are situated in North Queensland.

[3] While map makers and Lands Departments tend to draw straight lines as marking boundaries, it is often difficult to fence exactly on the boundary. There is rugged terrain between Bellevue Station and Wrotham Park. Historically the two stations operated on the basis of informal give and take agreements; the current manager of Bellevue swears that he was aware of agreements as far back as 1980. It is likely that similar arrangements were in place before that. By 2006, when Wrotham Park was owned by Great Southern Cattle Holdings Pty Ltd, and Bellevue Station was owned by the second respondent (NBT), these two companies entered into a short written give and take agreement, which does not seem to have been drafted by lawyers. The first respondent (Consolidated) bought Wrotham Park in 2009. The contract under which it purchased, compelled it to enter into a give and take agreement with NBT in similar terms to the 2006 agreement between NBT and Great Southern. For this reason it did so in 2009.

[4] The 2009 agreement between NBT and Consolidated reads as follows:

"Party A: NBT Pty Ltd ACN 010 945 446 as trustee for The Astor Superannuation Trust of 'Hillgrove', Boorowa, New South Wales

Party B: Consolidated Pastoral Company Pty Ltd ACN 010 080 654 of c/- Newcastle Waters Station, Newcastle Waters, Northern Territory 0862

1. Party A owns 'Bellevue'. Party B owns 'Wrotham Park'.

2. The terrain separating 'Bellevue' and 'Wrotham Park' is such that the parties have agreed that Party A is to have the use of the area of 'Wrotham Park' which is identified on the attached sketch (AWP Use Land). Party B is to have the use of the area of 'Bellevue' which his identified on the attached sketch (BB Use Land).

3. This Agreement does not amount to a surrender of title but simply an arrangement between neighbours under which both parties will benefit from the cost savings associated with the construction and maintenance of a 'boundary' fence that follows a less rugged course than that of the legal boundary between 'Bellevue' and 'Wrotham Park'.

4. This Agreement may be terminated by either party upon the expiry of the current or any renewed term of:

   (a) the Crown lease of 'Bellevue'; or

   (b) the Crown lease of 'Wrotham Park'.

   In such event, 12 months' notice would be given by either party prior to the lease renewal date.

5. This Agreement may also be terminated by either Party A or Party B by giving 12 months' notice in writing if the other party does not contribute equally to the costs of maintaining the fence referred to in Introduction 3.

6. In the event that either party disposes of its land, it will draw the attention of the incoming purchaser to this Agreement and have them enter into a similar arrangement with the continuing party.

7. Party A indemnifies Party B for any loss, liability or expense that Party B may incur as a result of the use of the AWP Use Land by Party A and its employees, agents, invitees or livestock in accordance with the agreement.

8. Party B indemnifies Party A for any loss, liability or expense that Party A may incur as a result of the use of the BB Use Land by Party B and its employees, agents, invitees or livestock in accordance with the agreement."

[5] In September 2021 NBT sold Bellevue Station to the appellant (Bellevue). In accordance with cl 6 of the 2009 agreement, NBT disclosed the give and take

agreement, and the contract by which it sold Bellevue Station obliged Bellevue to enter into a similar arrangement with Consolidated. The material does not show when the sale settled; it was registered on 24 March 2022. On 21 March 2022, Bellevue's solicitors tendered to Consolidated a written document in identical terms to the 2009 agreement, except that Bellevue was shown as a party, instead of NBT. Consolidated refused to sign the proposed new agreement and a month later, on 20 April 2022, gave notice to Bellevue that it intended to construct a fence along the actual boundary of the two properties. The notice stated that Consolidated did not ask Bellevue to contribute to the cost of the new fence. After the passage of eight months during which lawyers' letters were exchanged, Bellevue took an assignment of NBT's rights under the 2009 agreement.

[6] Two proceedings were begun in this Court (BS16291/22 and BS76/23). Essentially the parties sought contrary declarations as to whether or not Consolidated was obliged to sign the proposed new agreement. NBT was party to 16291/22, but not the other proceeding. It played no role in the litigation. Both the proceedings came on for final determination together on a one day hearing before Brown J. She made orders in favour of Consolidated on its application and dismissed Bellevue's application. Bellevue appeals, contending the result ought to have been to the opposite effect.

Framework for Analysis

[7] There is an obvious difficulty for Bellevue in asserting rights against Consolidated. Bellevue seeks to overcome this difficulty by asserting:

(a) **personal claims** based on an implied promise by Consolidated to enter into the proposed new agreement. It says that it is entitled to enforce the implied promise either because (i) it took an assignment of rights under the 2009 agreement from NBT, or (ii) it is assisted by s 55 of the *Property Law Act 1974* (Qld). Alternatively, it says that by reason of the assignment, it can enforce the rights under the 2009 agreement against Consolidated, as if it were NBT.

(b) **a proprietary claim** that by the 2009 agreement, Consolidated entered into a covenant which ran with the land. In this respect Bellevue relies upon s 53 of the *Property Law Act*.

[8] Although there was argument on most of these issues below, they were not so clearly framed in the trial division, and the grounds of appeal and written outlines of argument on appeal reflect that. At the beginning of the hearing in this Court it was made plain to the parties that notwithstanding this history, this Court would consider and determine the legal issues which did arise on the uncontentious facts.[1] At the end of the oral argument on appeal, the appellant was given leave to file supplementary written submissions and the respondent was given leave to make a written response.

Conclusions

[9] In my view, this appeal should be dismissed. The orders made by the primary judge were correct, although I differ as to some reasoning.

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1 There were no findings of fact or contested factual issues below.

[10] Like the primary judge, I do not think there is an implied obligation imposed on Consolidated by virtue of cl 6 of the 2009 agreement. Even if there were, the promise is an agreement to agree in terms which are not certain, so that it would not be enforced by the law, but considered to be void for uncertainty. It follows that there is no enforceable promise within the meaning of s 55 of the *Property Law Act*.

[11] There must be doubt as to whether rights under the 2009 agreement were capable of assignment. Even if they were, by the time of the assignment, NBT had nothing to assign to Bellevue which would assist it to (a) compel Consolidated to enter into the proposed new agreement, or (b) allow it to exercise the rights of NBT under the 2009 agreement.

[12] As to the proprietary claim, analysis of the language used in the 2009 agreement shows that the promises made by NBT did not touch and concern the land. The inclusion of cl 6 in the 2009 agreement is, of itself, almost conclusive. The fact that there was an earlier agreement between the parties' predecessors is an admissible extrinsic fact that reinforces that interpretation. The personal obligations in the 2009 agreement and the fact that each party to it assumed burdens as well as gaining benefits are also against the covenants being construed as touching and concerning the land. Therefore, s 53 of the *Property Law Act* does not apply.

[13] I now give detailed reasons for my conclusions.

Personal Claims

No Implied Promise by Consolidated

[14] As to cl 6 of the 2009 agreement, at [98] of the judgment below, the primary judge recognised that there was no express promise by "the continuing party" to enter into an agreement with an incoming purchaser. That must be accepted, and it was accepted by the appellant. Its argument was that there was an implied obligation imposed on the continuing party because the party disposing of its land was not only obliged to draw the attention of the incoming purchaser to the 2009 agreement, but to have that party "enter into a similar arrangement with the continuing party". In my view, this argument cannot succeed.

[15] At the time the 2009 agreement was made, the objective intention of the parties must be taken to have been that both parties considered that there was a benefit in not constructing and maintaining a fence on the actual boundary between Bellevue Station and Wrotham Park.[2] Being of that view, it makes commercial sense that they each saw the agreement as something valuable to their farming operations which they did not wish to lose if their neighbour sold its property. Against this background, the plain words of cl 6 demonstrate a concern to preserve this benefit for the continuing party in the event of a sale. Thus, each party to the 2009 agreement promises that should it sell its land, it will cause the incoming purchaser to enter into a give and take agreement so that the continuing owner does not lose the benefit given to it under the 2009 agreement. That is, cl 6 evinces an intention to provide a benefit to the continuing party: either a new agreement with the

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[2] I see that material was filed below as to the subjective intention of Consolidated in this regard, but when the Court is looking to find the intention of the parties evidenced by an agreement, that cannot be relevant.

incoming purchaser, or a right to sue its departing neighbour for failing to procure that new agreement.

[16] However, neither this purpose, nor the language of cl 6 impliedly casts an obligation on the continuing party to enter into a give and take agreement with the incoming purchaser. Such an implied promise would not be of benefit to the other party to the 2009 agreement, ie., the party which has disposed of its land; that party would have no continuing interest in whether or not the give and take agreement was put into place between the new neighbours. Secondly, as the Judge below recognised, it cannot be assumed that the continuing party would wish to enter into a give and take agreement with the incoming purchaser. The pastoral leases over both stations were for terms stretching many decades into the future; views as to the relative benefits and burdens of the give and take agreement might change. Additionally, while the 2009 agreement was relatively simple, it was an agreement: (i) between neighbours, (ii) which contemplated that they would contribute equally to maintaining the give and take fencing, and (iii) which obliged them to provide indemnities for loss which might occur as the result of using each other's land. Having regard to these matters, the personality and financial capability of the incoming purchaser might mean that the continuing party no longer wished to be bound to a give and take agreement.

[17] My conclusion then, is that an implied promise by the continuing party to contract with the incoming purchaser was not necessary to achieve business efficacy or the commercial purpose of the 2009 agreement.[3] In fact, there were foreseeable circumstances in which the continuing party might not even find it commercially desirable. Nor is the promise sought to be implied so obvious that it goes without saying.[4] I do not think that both parties to the 2009 agreement would have replied, "Of course",[5] had they been asked at the time of contracting whether or not the continuing party would be obliged to contract with the incoming purchaser. They may well have replied that it would depend who the incoming purchaser was, and what their business plans for the station were at that point.

Uncertainty: No Enforceable Promise

[18] Independently, in my view the phrase "enter into a similar arrangement" in cl 6 of the 2009 agreement was too uncertain to be enforceable. No one could say at the time of the contract what the terms of the new give and take agreement were to be.[6] Had the parties used the words "enter into this same agreement", my view would be different. I do not think that the words used in the 2009 agreement can be saved by a beneficial construction in accordance with authorities like *Mount Bruce*,[7] which provide that where parties draft their own agreement the Court should not take technical points, but try to give it a commercial meaning. The difficulty is that, where the pastoral leases endured for decades, and where significant financial indemnities were given under the 2009 agreement, it cannot be assumed that the words "a similar arrangement" meant "this same agreement". The passage of time;

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3 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981 – 1982) 149 CLR 337, 347.

4 *Codelfa* (above) p 347.

5 MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, cited in many subsequent judgments including *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20, 26 and *Codelfa* (above), p 347.

6 *Scammell (G) and Nephew Ltd v HC and JG Ouston* [1941] AC 251, 261; *Whitlock v Brew* (1968) 118 CLR 445.

7 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104.

changes in the business operation of the two stations, together with factors peculiar to the identity of an incoming purchaser may well have meant that exactly the same arrangement was unsuitable at the time an arrangement came to be made with an incoming purchaser. There is no reason to think that the parties did not recognise this and thus deliberately chose the word "similar".

[19] A promise to contract on similar terms is an agreement to agree and not enforceable.[8] The appellant relied upon a single judge decision from New South Wales, *WorldAudio v GB Radio*,[9] where the parties had promised to "enter into a Programming Supply Agreement". The judge in that case found that the promise was presently binding because the clause went on to specify who the parties to the agreement would be; the price of the agreement; what the subject matter of the agreement would be, and "the obligations of each of the parties in respect of that subject matter" – [91]. He thought it was within the class of case where the parties had agreed upon everything essential to be agreed and intended the agreement to be immediately binding.[10] That case is simply not applicable on the facts here.

[20] The appellant also relied upon the authority of *Peabody (Wilkie Creek) Pty Ltd v Queensland Bulk Handling Pty Ltd*.[11] The contractual obligation in that case is set out in detail at [5] of the Court of Appeal judgment. It is most unlike the clause in the current case. It is very complex, and was construed to mean that at least 18 months before the end of a user agreement between a miner and a port owner, the parties had to choose whether to contractually bind themselves to a new term of agreement. This involved agreement on many crucial terms which were set out in the contractual clause under consideration. If and only if the parties agreed in a contractually binding way to all those things, it was held, they were obliged then to enter into another term "on substantially the same terms as this Agreement". The Court held that the parties had agreed in a binding way to certain core terms of the renewed agreement. While the contract acknowledged that they might agree on further terms, "the trial judge [and the Court of Appeal] regarded this as an example of a contract under which 'the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms.'" – [12]. Again, that is not this case.

[21] The appellant tried to overcome these problems by relying upon authorities such as *Mackay v Dick*.[12] It was said that cl 6 contemplated that there would be a new agreement between the continuing party and the incoming purchaser, and that the continuing party was obliged therefore to do all that was reasonably necessary to bring that about. Here that was said to mean that Consolidated was obliged to execute the agreement which had been tendered to it. Reliance was placed on the statement of Griffith CJ in *Butt v M'Donald*: "It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract."[13]

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8 *Scammell v Ousten* (above), p 269; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 604 – 605; *Baldwin & Anor v Icon Energy Ltd & Anor* [2015] QSC 12.

9 [2003] NSWSC 855.

10 *Masters v Cameron* (1954) 91 CLR 353; *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, 635, [97], per McHugh JA.

11 [2015] QCA 202.

12 (1881) 6 App Cas 251, 263; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607.

13 (1896) 7 QLJ 68, 70 – 71, cited in *Secured Income* (above), p 607.

[22] These arguments are misconceived and must be rejected. First, as explained, cl 6 does not contemplate that there will inevitably be a new agreement entered into between the incoming purchaser and the continuing party. Secondly, if there were any *Mackay v Dick* obligation owed, it could only be an obligation owed by the continuing party to the disposing party. Contracting with the incoming purchaser is not something which the continuing party needs to do in order to give the disposing party the benefit of the give and take agreement.

[23] The appellant placed reliance on some dicta from *WorldAudio* (above) concerning a *Mackay v Dick* obligation to negotiate honestly and in good faith to bring about a future agreement – see [98] *WorldAudio*. I am not convinced that the obiter views expressed there are correct. Unless there is a concluded contract, the parties can have no *Mackay v Dick* obligations. In any case, *WorldAudio* concerned the two parties to an agreement. There is no rule that a party to a contract owes a *Mackay v Dick* type of obligation to a stranger to that contract.

Section 55 of the *Property Law Act*

[24] The appellant sought to rely on s 55 to overcome the difficulty that it wishes to enforce a promise against Consolidated when it is not in privity of contract with Consolidated. In its supplementary written submissions filed after the hearing of this appeal it abandoned this part of its case. In my view it could not have succeeded.

[25] Section 55 of the *Property Law Act* provides as follows:

> "(1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.
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> …
>
> (3) Upon acceptance—
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> (a) the beneficiary shall be entitled in the beneficiary's own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor, …
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> …
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> (4) Subject to subsection (1), any matter which would in proceedings not brought in reliance on this section render a promise void, voidable or unenforceable, whether wholly or in part, or which in proceedings (not brought in reliance on this section) to enforce a promissory duty arising from a promise is available by way of defence shall, in like manner and to the like extent, render void, voidable or unenforceable or be available by way of defence in proceedings for the enforcement of a duty to which this section gives effect.
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> …

(6) In this section—

acceptance means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on the promisor's behalf, in the manner (if any), and within the time, specified in the promise or, if no time is specified, within a reasonable time of the promise coming to the notice of the beneficiary.

beneficiary means a person other than the promisor or promisee, and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified or in existence at the time when the promise was given.

promise means a promise—

(a) which is or appears to be intended to be legally binding; and

(b) which creates or appears to be intended to create a duty enforceable by a beneficiary;

…"

[26] My view that there is no implied promise by the continuing owner to contract with the incoming purchaser means that s 55 cannot assist the appellant. Independently, so does my view that even if such an implied promise were made by Consolidated, that promise was one which the law would regard as uncertain and unenforceable – see s 55(4).

[27] Independently again, I cannot see that s 55 applies here because, even if there is an implied promise, I cannot see that it is a promise "to do or to refrain from doing an act or acts for the benefit of" the appellant within the meaning of s 55(1). There is little law on the meaning of this phrase, but such indications as there are, are against the appellant. In *Northern Sandblasting Pty Ltd v Harris*,[14] Brennan CJ said:

> "… There must be a promise 'to do ... an act ... for the benefit of a beneficiary'. The phrase 'for the benefit of a beneficiary' is descriptive of the promised act. … The beneficiary is not any person who, in the event, would have been benefited had the promise been fulfilled. …"

[28] On the appellant's case, the promised act is to enter into a give and take agreement with an incoming purchaser. Here, no doubt Bellevue sees that as something to its benefit; that is, it sees itself as someone who would be benefited if the promise were fulfilled, to use the above words from *Harris.* However, entry into a give and take agreement which imposes obligations as well as granting rights is not an act which is necessarily for the benefit of the incoming purchaser. Here, Consolidated swears that it only entered into the 2009 agreement because it was obliged to do so pursuant to the contract by which it purchased Wrotham Park. It did not believe that entering into the 2009 agreement was a benefit to it and it would not have done so voluntarily. That illustrates the point that entry into the Wrotham Park/Bellevue

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14 (1996 – 1997) 188 CLR 313, 329.

Station give and take agreement is not an unequivocal benefit; benefit is something in the eye of the beholder, something that may change over time, or may depend upon whether the continuing party is Wrotham Park or Bellevue Station. It might only be of benefit to the continuing party.

[29] By way of contrast, *Re Davies*[15] provides an example of a promise which could be so characterised. The promise in that case was made by the purchaser of land subject to an unregistered lease. At the seller's (landlord's) request, it promised the seller of the freehold to recognise the options in that lease, when they otherwise would have been lost for want of registration. The nature of the act promised was one which could be judged at the time the promise was made as unequivocally being for the benefit of the unregistered tenant; it granted something of value to the tenant, but imposed no obligations on the tenant. *Westralian Farmers Co-operative Ltd v Southern Meat Packers Ltd & Anor*[16] is another such example. There the purchase price under a contract of sale was expressed to be payable to a stranger to the contract and recoverable by that stranger alone. It was held that the promise did confer a benefit on the stranger and that the Western Australian analogue to s 55 of the *Property Law Act* applied.

Assignment of Rights Under the 2009 Agreement

[30] It was September 2021 when NBT sold Bellevue Station to Bellevue. The material does not show the date of settlement. On 21 March 2022 the solicitors for Bellevue sent the proposed new agreement to Consolidated. It was in the same terms as the 2009 agreement and was executed by Bellevue. On 24 March 2022 the transfer to Bellevue was registered. Perhaps settlement occurred on 21 March. In any event, after 21 March, correspondence ensued between solicitors acting for Bellevue and solicitors acting for Consolidated; Consolidated refused to sign the proposed new agreement.

[31] In December 2022, presumably in an attempt to shore up their client's ability to force Consolidated to sign the proposed new agreement, solicitors for Bellevue drafted a Deed of Assignment between NBT and Bellevue. The assignment was executed as a deed dated 9 December 2022. Its operative provision was: "NBT transfers and assigns to Bellevue, from the Assignment Date, the right, title, estate and interest of NBT in, to and under the Agreement". Underneath this clause was another, "Bellevue accepts the assignment from NBT". The Agreement was defined to mean the 2009 agreement. The Assignment Date was defined as 7 March 2022, a date after the contract to sell Bellevue Station was signed, but before registration, and probably settlement, of that sale. There was no material as to why 7 March was chosen as the Assignment Date.

[32] A copy of the Deed of Assignment was sent to solicitors acting for Consolidated under cover of a letter which purported to give express notice of the assignment pursuant to s 199 of the *Property Law Act*. It was not in dispute between the parties that the formal requirements of s 199 had been met.

[33] It appears from the judgment below that the only point litigated by the parties in relation to the assignment was whether or not the subject matter assigned consisted of "personal rights" and therefore could not be assigned without consent, [109]

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15 [1989] 1 Qd R 48.

16 [1981 – 1982] WAR 241, 244 – 245, cited in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 122.

below. There are three points. First, "personal rights" may be a convenient shorthand, but it is somewhat inaccurate. The question in any case will be whether the contract was within that class of cases where "the materiality of the identity of the obligee to the contractual relationship or to the obligor's performance" made assignment impossible.[17] Secondly, if a contract is within that class it is not assignable. To say that a contract is assignable only by consent is to say that it is not assignable.[18] Most importantly however, there is an anterior point in this case which does not seem to have been raised by the parties below, but which was raised with them on appeal: by 9 December 2022 NBT had nothing to assign to Bellevue which could assist it in achieving a give and take arrangement with Consolidated.

[34] It was not entirely clear what effect the appellant said the Deed of Assignment had. If and insofar as it is relied upon as a transfer of the right to seek specific performance of an obligation in the 2009 agreement to enter into a new give and take agreement, the assignment could not assist the appellant unless the appellant succeeded in relation to its argument that there was an implied term of the 2009 agreement that Consolidated would enter into a new agreement with the incoming purchaser and that promise was not void for uncertainty. I have dealt with those points.

[35] It seems, however, that the appellant relied upon the Deed of Assignment to say that, after assignment, it had the rights which NBT had under the 2009 Agreement, namely the right to run cattle on that part of Wrotham Park referred to as the AWP Use Land. That being the argument, there is a very simple answer to it. At the time the Deed of Assignment was made, NBT had no right to run cattle on the AWP Use Land. The clause in the Deed of Assignment which deemed it to take effect from 7 March 2022 could not affect the reality of the situation – *nemo dat quod non habet*.

[36] Counsel for the appellant argued that even after completion of the sale by NBT to Bellevue, NBT still had a right under the 2009 agreement to graze cattle on the AWP Use Land. This was said to be because there was no express term of the 2009 agreement which said that it was at an end if one of the parties disposed of their land. This argument must fail. In my opinion, it is necessarily implied in the 2009 agreement that if one or other of the parties to that agreement sells its pastoral leases, that party loses its rights to allow cattle to graze on the give and take land identified in the 2009 agreement. In that respect, cl 1 of the 2009 agreement is telling. So is the physical situation of the AWP Use Land and the BB Use Land referred to in cl 2 of the 2009 agreement. Those parcels of land are landlocked to all the world but the owners of Bellevue Station and Wrotham Park. Someone who did not own one of those stations would have no means of accessing these areas of give and take land, and no means of using the give and take land except in conjunction with the land and improvements on the station to which it was adjacent. The appellant's contention is contrary to the commercial purpose of the 2009 agreement, which is set out at cl 3 of the 2009 agreement: to save the adjoining

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17 *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 408, [43]. In *CB Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576, pp 581 – 582, the New Zealand Court of Appeal said: "Doubtless, there are what are loosely called 'personal' contracts which are not assignable either at law or in equity. But those are contracts where the obligations are so obviously personal in character that it must be concluded that the common intention of the parties was that the obligations could be discharged only by the specific individuals between whom the contract was made."

18 *CB Peacocke Land Co Ltd* (above), pp 581 – 582.

owners the cost of constructing and maintaining a fence, they are able to use part of each other's land in the course of conducting their pastoral activities on their own stations. That commercial purpose can have no independent existence once one of the parties to the 2009 agreement sells its pastoral leases. Lastly, it is a necessary implication from cl 6 of the 2009 agreement that if either party disposes of its land, the agreement will cease to have effect, subject to the obligations of the departing party to effect a similar agreement with the continuing party (overlooking questions of uncertainty for present purposes).

Proprietary Claim

Covenants Touching and Concerning the Land

[37] In modern times these questions seem to be less litigated than they were. It might be helpful to set out some of the basic common law from an old edition of Megarry and Wade:

> "A covenant is a promise under seal, *i.e.*, contained in a deed. Such a promise is enforceable, according to the ordinary law of contract, between the persons who are parties to it or their personal representatives. But certain kinds of covenants are so much part of the system of transactions in land that they are enforceable in cases which the law of contract does not cover: they partake, so to speak, of the nature of the estates in connection with which they are made, so that like those estates they may benefit and bind third parties. Therefore they belong to the category of interests in land as well as to the law of contract, and two sets of rules have to be considered together. ...
>
> The primary question is, how far are covenants made in connection with transactions in land enforceable outside the law of contract. The fundamental principles are as follows:
>
> 1. If there is privity of contract, all covenants are enforceable.
>
> …
>
> 2. If there is privity of estate, but not privity of contract, only covenants which touch and concern the land are enforceable.
>
> …
>
> 3. If there is privity neither of contract nor of estate, then with two exceptions, no covenants are enforceable.
>
> …
>
> These three principles should always be … applied in the given order: if there is privity of contract, there is no need to look further; and if there is privity of estate, there is no need to consider whether the covenant is restrictive. …"[19]

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19 *The Law of Real Property*, R E Megarry QC and H W R Wade, Stevens & Sons Limited, London, 2nd ed, 1959, pp 696 – 699.

[38] Questions as to privity of contract have already been considered. The second rule is limited to cases of leases and tenancies, where there is tenure between the parties. The question for consideration at this part of my judgment is whether or not the third rule applies. The quotation above refers to "two exceptions". At that time, in certain circumstances, the common law recognised that the benefit of a covenant passed with the transfer of land. In addition, equity recognised the transmission of negative, or restrictive, covenants with the land from the time of the decision in *Tulk v Moxhay*.[20]

[39] This history is important because, while there has been statutory reform both in the UK and in the Australian States, the common law history shaped the provisions of the relevant statutes. In England, the *Conveyancing Act 1881* (Imp) included s 58(2) which provided:

> "A covenant relating to land … shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators and assigns were expressed."

[40] This legislative change dealt only with the common law position, ie., the passing of the benefit of covenants. It was designed to clarify uncertainties and doubts as to the common law rule and meant that covenants could be worded in a shorter way because of the deeming provision.[21] The *Law of Property Act 1925* (Imp) replaced the 1881 provision and introduced two provisions:

> "78(1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.
>
> …
>
> 79(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.
>
> …"

[41] Like the 1881 provision, s 78 can be seen to deal with the old common law rule about the passing of benefits, while s 79 can be seen to deal with passing of the burden of covenants.

[42] Notwithstanding the lack of limiting words in s 79, it has been interpreted restrictively. In *Rhone v Stephens*[22] the House of Lords held that, "s 79 does not cause the burden of a positive covenant to run with the land".[23] That is, the House

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20 (1848) 41 ER 1143; (1848) 18 LJ Ch 83 Ch D.

21 Megarry & Wade, *The Law of Real Property*, Bridge, S Cooke, E and Dixon, M, Sweet & Maxwell, 9th ed, 2019, [31-014].

22 [1994] 2 AC 310, 322.

23 Megarry & Wade, 9th ed, [31-016].

of Lords in *Rhone v Stephens* refused to overrule the case of *Austerberry v Oldham Corporation*,[24] which established that even in equity, a covenant which imposed a positive burden (as opposed to a negative or restrictive covenant), did not run with the land. This was a more restrictive interpretation of s 79 than had been given to s 78.[25] Yet the House of Lords expressly acknowledged that the limits it imposed on s 79 did not cast any doubt on those earlier decisions concerning s 78. It also cited *Federated Homes Ltd v Mill Lodge Properties Ltd*[26] as authority for the proposition that the interpretation of s 78 and s 79 involved "quite different considerations". I think the explanation for the different ways the sections have been interpreted is the history of the rules which applied before there was legislation.

[43] In Queensland there is only one section of the *Property Law Act* which deals with the subject matter of the UK sections 78 and 79:

> "**53 Benefit and burden of covenants relating to land**
>
> (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and the covenantee's successors in title and the persons deriving title under the covenantee or the covenantee's successors in title, and shall have effect as if such successors and other persons were expressed.
>
> (2) A covenant relating to any land of a covenantor or capable of being bound by the covenantor, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of the covenantor, the covenantor's successors in title and the persons deriving title under the covenantor or the covenantor's successors in title, and, shall have effect as if such successors and other persons were expressed.
>
> …"

[44] The appellant says that Consolidated's promise to let NBT have the use of the AWP Use Land, without fencing the true boundary, is a promise "relating" to Bellevue Station within the meaning of s 53(1). Further, that the effect of s 53(1) is therefore that the promise runs with the land comprising Bellevue Station, so that it passed automatically on conveyance from NBT to Bellevue without express mention because that right was annexed to Bellevue Station. In framing the appellant's argument this way, I am drawing on the language of Brightman LJ in *Federated Homes v Mill Lodge Properties* (above), "An express assignment of the benefit of a covenant is not necessary if the benefit of the covenant is annexed to the land. In that event, the benefit will pass automatically on a conveyance of the land, without express mention, because it is annexed to the land and runs with it." – p 603 (dealing with s 78 of the UK Act).

[45] The first question to be determined in relation to the application of s 53(1) is whether or not the promise relied upon by the appellant can be characterised as a

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24 29 Ch D 750.

25 *Smith & Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500; *Williams v Unit Construction Co Limited* (1951) 19 Conv (NS) 262.

26 [1980] 1 WLR 594, per Brightman LJ.

covenant. The 2009 agreement was not a deed. The primary judge cited a text for the proposition that, "Strictly defined, a covenant is a promise made in a deed",[27] however, did not decide the case on that basis. Despite taking the opportunity to provide further written submissions on this matter, I am not sure that the appellant provided any authority for the proposition that the word "covenant" in s 53(1) should not be read as limited to a promise made in a deed. Nonetheless, the issue need not trouble this Court as, in responsive supplementary submissions, the first respondent conceded the point. This Court need not determine whether s 53 applies in circumstances where the promise relied upon is not contained in a deed.

[46] The question then is whether the 2009 agreement, or alternatively, some of the promises made in it, are covenants which can be characterised as "relating to any land of" Bellevue. It seems to me that the covenant which the appellant relies upon concerns the AWP Use Land, and that land belongs to Consolidated not Bellevue. The appellant must fail for this reason.[28] As this point was not argued, I will continue to deal with and dispose of the case on the basis of the points which were argued.

[47] In *Simmons v Lee*[29] McPherson JA followed the English law to the effect that, in construing s 53(1), "relating to" meant "touching and concerning" the land. There is no reason to doubt that.[30]

[48] The primary judge held that the promise contained at cl 2 of the 2009 agreement was not a covenant "relating to" Bellevue Station. I think that conclusion is correct. As McPherson JA remarked in *Simmons v Lee* (above), the criteria for deciding whether or not a covenant touches and concerns land are not capable of exhaustive or exclusive definition. What is regarded as touching and concerning the land in any one case may give rise to reasons which are not easily transposed to another case. Nonetheless, there are some criteria which I think are essential to be established in any case if the covenant is to be regarded as touching and concerning the land. One is that, "The covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a specific tenant)".[31] In *Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Ltd & Ors*,[32] in a judgment of the whole Court, the High Court adopted this passage from *Swift Investments* saying that the criteria from that case were not in dispute and that they "have been much applied in Australia" – [74]. A personal covenant will be made for the benefit of the particular covenantee only. One which touches and concerns the land will be made "for the benefit of land owned by the covenantee … in the sense that it is designed to benefit both [him or her] and [their] successors in title".[33]

[49] Whether a covenant is personal, or made for the benefit of the land owned by the covenantee is a question of construction. Here, there are the clearest indications from the 2009 agreement that it is not one which is annexed to the land. If promises made under the 2009 agreement related to the land, touched and concerned the land,

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27 *Real Property Law in Queensland*, McDonald C, McCrimmon L and Wallace A, Thomson Reuters, 4th ed, 2015, [17.20] and the authorities cited there.

28 *Rhone v Stephens* (above), p 315 at point C on that page.

29 [1998] 2 Qd R 671, 674.

30 Report No 16 of the Queensland Law Reform Commission, February 1973, p 35.

31 *P & A Swift Investments (a firm) v Combined English Stores Group Plc* [1989] AC 632, 642.

32 (2008) 234 CLR 237, 264 – 265.

33 Megarry & Wade, 9th ed, [31-013], citing, *inter alia*, *Rogers v Hosegood* [1900] 2 Ch 388, 395.

or were annexed to the land, express assignment of them would not be necessary; they would be treated as part of the land and pass automatically on conveyance.[34] Clause 6 of the 2009 agreement is utterly antithetical to such a notion. The agreement contemplates that promises under the 2009 agreement will not pass automatically with the land, they will be binding on an incoming purchaser only if a similar arrangement is reached with that purchaser.

[50] Further, the fact that under the 2009 agreement, (a) both the parties assume burdens as well as take benefits, and (b) there are financial obligations to maintain fencing and give indemnities which must attach personally to the particular contracting party (rather than to the land), are other clear indications. So in my view is cl 5, which enables the 2009 agreement to be terminated if one party does not contribute equally to the costs of maintaining the give and take fencing.

[51] To the knowledge of the parties to the 2009 agreement, obligations under it had not passed automatically when they bought their respective stations. To the contrary. This is relevant knowledge to the construction question.

[52] The appellant says that the contrary conclusion ought to be reached because s 53(1) of the *Property Law Act* compels the 2009 agreement to be read as if made on behalf of NBT Pty Ltd and its successors in title, and Consolidated Pastoral Company Pty Ltd and its successors in title. The short answer to this argument is that s 53(1) does not compel such a reading because it does not apply to the 2009 agreement. Therefore the 2009 agreement, and the promises contained in it, did not fall within the remedial effect of s 53(1) of the *Property Law Act*; the subsection simply did not apply because, as explained, there was no covenant relating to any land.

[53] I think this analysis is better than ignoring the intention to be found in the document in question initially; finding that s 53(1) applies, and then construing s 53(1) as impliedly excluding covenants where it is clear that the parties did not intend the covenant to run with the land; cf *Forestview Nominees Pty Ltd v Perpetual Trustees (WA) Ltd*[35] and *Crest Nicholson Residential (South) Ltd v McAllister.*[36] Even so, an analysis in terms of *Forestview* arrives at the same conclusion, for the same reasons. I would add in this regard, that I cannot see that s 49 of the *Property Law Act* could have the operation ascribed to it in *Cape Flattery Silica Mines Pty Ltd v Hope Vale Aboriginal Shire Council.*[37]

[54] In my view the appeal should be dismissed with costs.

[55] **APPLEGARTH J:** I gratefully adopt the statement of the facts and the framework for analysis developed by Dalton JA. I agree that the appeal should be dismissed with costs.

[56] I agree with Dalton JA that the agreement did not cast an obligation on the continuing party to enter into a similar arrangement with the incoming purchaser. Therefore, it is not necessary to reach a conclusion about whether the phrase "enter

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34 *Federated Homes* (above), p 603.
35 (1996) 70 FCR 328, 343 – 344.
36 [2004] 1 WLR 2409, [39] – [44]. See also *Re Royal Victoria Pavilion, Ramsgate* [1961] Ch 581, 589, per Pennycuick J.
37 [2012] QSC 381.

into a similar arrangement" is too uncertain to be enforceable. I prefer not to decide the uncertainty point because it was not relied upon by the first respondent at first instance or in its written submissions on the appeal.

[57] Senior Counsel for the appellant accepted that an implied term that the continuing party was obliged to enter into a "similar arrangement" with the incoming purchaser was indispensable to the appellant's personal claims. For the reasons that follow, the appellant failed to establish that the 2009 agreement contained that implied term. In addition, the absence of a term that the continuing party was under such an obligation effectively precludes the conclusion that the relevant covenants "ran with the land" at law and in equity, aided by the operation of s 53(1) of the *Property Law Act 1974* (Qld) ("*PLA*").

The point of construction

[58] The threshold issue may be framed as a question of construction of the agreement. Should clause 6 be construed as if it went on to read "and the continuing party will enter into that arrangement"? Is such an obligation on the continuing party implied as a matter of necessity?

[59] In my view, those questions should be answered in the negative, essentially for the reasons given by Dalton JA. I would add the following.

[60] The appellant's argument about the proper interpretation of the 2009 agreement is that:

(a) clause 6 contemplates that a new agreement will be entered into between the incoming purchaser and the continuing party;

(b) this cannot effectually occur unless both the incoming purchaser and the continuing party concur in doing it; and

(c) the agreement should be interpreted in accordance with the general rule that each party agrees to do all that is necessary to be done on its part to give effect to the new contract, though there may be no express words to that effect.

[61] The appellant cited *Mackay v Dick*[38] and *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[39] as authority for a general rule of construction. In *Secured Income* Mason J (with whom Gibbs, Stephen and Aickin JJ agreed) referred to "an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract".

[62] At its simplest, the appellant's argument is that clause 6 has the effect of obliging the incoming purchaser to enter into a similar arrangement with the continuing party, and the incoming purchaser cannot do so unless the continuing party is likewise obliged to enter into the new agreement. On this basis, such an obligation should be implied as a matter of necessity to secure the performance of the 2009 agreement.

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38 (1881) 6 App Cas 251 at 263.

39 (1979) 144 CLR 596 at 607 ("*Secured Income*").

[63] I am unpersuaded by this argument. The essential point of reference is the words the parties chose in clause 6 and their omission of any express obligation to that effect.

[64] The parties provided a mechanism in clause 6 for the incoming purchaser to be obliged to enter into a similar agreement with the continuing party. The parties went no further. Rather than impose an obligation, they left the continuing party with the choice to enter a "similar arrangement".

[65] There are apparently sound reasons why the parties to the 2009 agreement would wish the "continuing party" (whoever that may be) at an uncertain date in the future to have a choice, rather than be obliged, to enter into such a new agreement. Those reasons would apply even if clause 6 used the words "the same arrangement" rather than "a similar arrangement". However, the use of the words "a similar arrangement" is an additional reason to not imply in clause 6 the words which the appellant seeks to imply. If the appellant's implied term argument is accepted, the continuing party would be obliged to enter into an agreement, the precise terms of which were not settled. If the incoming purchaser proposed a "similar arrangement", the continuing party would be bound to agree to it.

[66] A key reason why the parties would give the continuing party a choice in the matter, rather than impose an obligation, is identified by Dalton JA at [16]: a change in circumstances.

[67] One should not assume that the 2009 agreement (or a similar arrangement) always would be for the benefit of the continuing party or always would be perceived by the continuing party to be for its benefit. Decades later, views as to the relative benefits and burdens of the give and take agreement might change. The operation of the two stations might change. The circumstances of use, the cost of fencing, or other changed circumstances decades later might call for a different assessment of whether the arrangement was for the benefit of both parties. The continuing party might decide that the balance of benefit and burden had shifted. It may perceive the benefit to it from using its neighbour's land was outweighed by the loss of use of its land, even after accounting for savings on fencing maintenance.

[68] If, decades after 2009, one party perceived the arrangement to be to its overall disadvantage, and thereby diminished the value of its land, then it would not wish to be obliged to enter the same or a similar arrangement with an incoming purchaser.

[69] If the continuing party was obliged to enter into a similar arrangement with the incoming purchaser, then the party disposing of its land might benefit from the enhanced price for which it might dispose of its land to a purchaser who was assured that the continuing party was obliged to enter into such an arrangement. But that benefit might be reflected in a diminution in the value of the land owned by the continuing party by the extent to which the other party's benefit was a burden to it.

[70] In some circumstances and at some times the 2009 contractual agreement might benefit both parties such that a continuing party would wish to enter the same or a similar agreement at the time the other party disposed of its land. The terms of clause 6 give it the opportunity to do so if it decides that such an arrangement is to

its benefit. At other times, however, one party may perceive the agreement to be one which does not advantage it.

[71] In 2009 neither party was to know which of them would be the "continuing party" and what the balance of benefit and burden would be for each party at the time one of them decided to dispose of its land. Not knowing that the 2009 agreement would always be to their mutual benefit, the parties to it did not use words in clause 6 that were apt to give a party disposing of its land an ability to assure a potential purchaser that it would gain a benefit because the continuing party was contractually bound to enter a new agreement that would be to the net benefit of the purchaser.

[72] A continuing party may not wish to enter the *same* arrangement with the incoming purchaser for a variety of reasons.

[73] Against that background, it is difficult to conclude that it is necessary to secure performance of the 2009 agreement to imply an obligation to enter into the same agreement, let alone a *similar* arrangement. A "similar arrangement" might be an arrangement that contained fewer or more covenants or made different arrangements about matters such as the scope of the indemnities provided by clauses 7 and 8. Provided the new agreement qualified as a "similar arrangement", the continuing party would be obliged to enter into it despite having no ability to insist on what its terms should be or to insist that it should be on the same terms as the 2009 agreement.

[74] The 2009 agreement should be construed in accordance with the general rule that each party to it agrees to do all that is necessary to be done on its part for the carrying out of the agreement. But what did the parties agree should be done which makes it necessary for the continuing party to be obliged to enter into a similar arrangement in order to secure performance of their agreement?

[75] Such an obligation does not need to be implied to ensure that the use of the lands identified in clause 2 continues until one or other of the Crown leases comes to an end. The parties contemplated that the 2009 agreement about use might come to an end before that date, namely if one of them disposed of its land. In that event, clause 6 governed whether a new agreement would come into existence.

[76] The implied obligation contended for by the appellant is not necessary to secure the performance of the 2009 agreement. The omitted words do not need to be implied into clause 6 for the 2009 agreement to be performed, and for the parties to do all that is necessary to be done for the carrying out of the things that they agreed would be done under that agreement.[40] The performance of the 2009 agreement is secured by an interpretation that allows the continuing party to choose whether or not to agree to similar terms.

[77] The appellant contends that the interpretation of the 2009 agreement adopted by the primary judge leads to the anomalous position that 12 months' notice of termination is required under clauses 4 and 5, where a lease expires or when one party does not contribute equally to the costs of maintaining the fence, but no notice is required where a lease is transferred. In my view, the absence of a similar notice period in

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40 *Mackay v Dick* at 263.

clause 6 is not an anomaly or a matter that should lead to the interpretation contended for by the appellant. One might think it invidious to have a 12-month or similar notice requirement in the event a party decides to dispose of its land to an incoming purchaser who will become the lessee. Where a party disposes of its land, possibly out of necessity in times of economic hardship or to seize upon a good offer from a purchaser, it must draw the attention of the incoming purchaser to the agreement and have it agree to enter a similar arrangement with the continuing party.

[78] Clauses 4 and 5 address the termination of the agreement in circumstances where neither party disposes of its land. Clause 6 addresses the different circumstance, namely where a party disposes of its land. A requirement for notice of its intention to do so is unnecessary and may be impractical. In such a case, the incoming purchaser is made aware of the agreement and is obliged, if the continuing party wishes to enter into a similar arrangement, to enter into that arrangement. Clause 6 contemplates that if a party disposes of its land, then the agreement will cease to operate, but may be replaced by a similar arrangement that the incoming purchaser is obliged to enter and which the continuing party may choose to enter.

[79] The appellant does not contend that an obligation on the continuing party to enter into such an arrangement is implied as a matter of fact. Instead, it relies upon a rule of construction derived from *Mackay v Dick*.

[80] The implied duty to cooperate so as to give the other party the benefit of the contract was stated by Griffith CJ in *Butt v M'Donald*.[41] The High Court in *Byrne v Australian Airlines Ltd*[42] and in *Commonwealth Bank of Australia v Barker*[43] has emphasised that the implied duty rests on necessity. Necessity will support a term implied by law where, absent the implication, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined.[44] In *Barker*[45] the court observed that implications "which might be thought reasonable are not, on that account only, necessary."

[81] The duty to cooperate is not a duty to cooperate in bringing about something that is desirable but which the contract does not require.[46] A contract may contemplate many benefits for the respective parties, but each "can only call on the other to provide, or co-operate in the providing of, benefits promised by that party".[47]

[82] In my view, the implied term to cooperate does not assist the appellant to establish an obligation on the continuing party to enter into a similar arrangement with the incoming purchaser. The implied term contended for by the appellant requires identification of the benefit that was conferred by its terms. The parties did not define the benefit as being the use of the areas described in clause 2 for an indefinite period for the benefit of the land and to thereby enhance its value. The parties provided that either party might dispose of its land and, in that event, any entitlement by an incoming purchaser to use part of the continuing party's land and any right of the continuing party to use part of the incoming purchaser's land,

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41 (1896) 7 QLJ 68 at 70-71.
42 (1995) 185 CLR 410 at 450.
43 (2014) 253 CLR 169 at 189 [29] ("*Barker*").
44 Ibid.
45 Ibid.
46 *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 at 124.
47 At 125.

depended upon a similar arrangement being entered into between the incoming purchaser and the continuing party. Expressed differently, the benefit that clause 6 provided to the continuing party was the opportunity to enter a similar arrangement with the incoming purchaser, which would be obliged to enter into that arrangement if the continuing party wished it to do so.

[83] The 2009 agreement did not give a party that decided to dispose of its land the benefit of being able to assure an incoming purchaser that the arrangement or a similar arrangement would continue.

Conclusion on the point of construction

[84] Neither the terms of the agreement nor any admissible extrinsic evidence establish that the mutual intention of the parties in 2009 was that at some distant time, and in potentially very different circumstances, when one party disposed of its land, the other party would be obliged to enter into an agreement on the same terms, let alone on similar terms with an incoming purchaser.

[85] The omission of the words that the appellant seeks to imply as a matter of necessity are explicable. The terms of clause 6 are apt to give the continuing party a choice whether to enter a "similar arrangement". The agreement should not be construed so that it deprives the continuing party of a choice in that regard. Clause 6 should not be construed as if it went on to read "and the continuing party will enter into that arrangement".

[86] If the parties had intended to confer such a benefit on the party disposing of its land and to impose an obligation on the continuing party, then clause 6 might simply have added the additional words "and the continuing party will enter into that arrangement". The omission of those words cannot be treated as an oversight by parties who lacked access to legal advice or assistance. Their omission and the terms of clause 6 are consistent with a mutual intention that the continuing party should have the opportunity, but not an obligation, to enter into the same or a similar arrangement.

The proprietary claim

[87] The point of construction effectively resolves the proprietary claim. Upon the proper construction of clause 6, the continuing party was not obliged to enter into the same or a similar arrangement with the incoming purchaser. If it did not enter a new arrangement, there would be no arrangement about use by a neighbour of the AWP Use Land or the BB Use Land.

[88] If one reaches that conclusion as a result of the proper interpretation of the agreement, one cannot then say that the benefit of clauses 2 and 6, and possibly other clauses, "ran with the land", at law and in equity, aided by the operation of s 53(1) of the *PLA*. The use of the land allowed by clause 2 was for the benefit of the parties to the 2009 agreement, not for the benefit of the land owned by a covenantee.

[89] I should mention one argument that was advanced against the contention that the 2009 agreement ran with the land. It is to the effect that if the relevant covenants ran with the land, then clause 6 would be unnecessary since the covenants would be

treated as part of the land and pass automatically on conveyance. This argument is not compelling. If covenants run with the land, then the parties might still include an additional provision to confirm that fact out of caution and to avoid disputes in the distant future about whether the covenants run with the land.

[90] The appellant's problem is not the *existence* of a clause that confirms that a covenant runs with the land. It is that no such clause exists. The agreement does not manifest a mutual intention that covenants such as clause 2 should "run with the land" or benefit the land owned by the covenantee.

[91] I agree with Dalton JA that the agreement contemplates that promises under the 2009 agreement will not pass automatically with the land. They will be binding on an incoming purchaser only if an arrangement is reached by the continuing party with that purchaser.

Section 55 of the *Property Law Act*

[92] The appellant, in ground 6 of its notice of appeal and in its original submissions, sought to rely upon s 55(1) of the *PLA*. Its supplementary submissions no longer pressed that ground. Dalton JA explains why the implied promise contended for might not be one to which s 55(1) applies. However, in circumstances in which the appellant no longer relies upon s 55, it is unnecessary for me to reach a conclusion on that point.