MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*RNL Sons Pty Ltd (as trustee for the ZNX Family Trust) v TMDF Pty Ltd* [2024] QMC 4
PARTIES:	RNL Sons Pty Ltd (as trustee for the ZNX Family Trust) (Plaintiff) **v** TMDF Pty Ltd (Defendant)
FILE NO/S:	M 354/22
DIVISION:	Magistrates Courts
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane Magistrates Court
DELIVERED ON:	27/02/24
DELIVERED AT:	Brisbane Magistrates Court
HEARING DATE:	15/03/2023
MAGISTRATE:	Pinder
ORDER:	I give judgement for the defendant against the plaintiff
CATCHWORDS:	Contract Law – General contractual principles – Formation of contractual relations – Whether there is a breach of contract – Where there is a payment of deposit where contract is terminated – Where there is rescission or termination for payment of the deposit
AUTHORITES:	*Uniform Civil Procedure Rules* *Rymark Australia Development Consultants Pty Ltd v Draper* [1977] Qd R 336 *Brien v Dwyer* (1978) 141 CLR 378 *Sargent v ASL Developments Pty Ltd* (1974) 131 CLR 634.
COUNSEL:	PG Jeffery for the plaintiff RW Tooth for the defendant
SOLICITORS:	P Porta Lawyers for the plaintiff Bennett Caroll Solicitors for the defendant

Introduction

[1] The defendant was the owner of a post office business at Redcliffe. The parties, the defendant (as seller) and the plaintiff (as buyer), agreed to the sale of the business at a purchase price of $560,000 plus stock. A deposit of $56,000 was payable and was paid by the plaintiff (as buyer) to the defendant (as seller) to be held by the deposit holder, Bennett Carroll Holdings Pty Ltd, the solicitors for the defendant/seller.

[2] Subsequently the defendant/seller purportedly terminated the contract and forfeited the deposit which it has retained.

[3] The plaintiff brings suit as against the defendant claiming the following relief:

1) Damages for breach of contract in the sum of $56,000.
2) Interest on damages in accordance with s 58 of the *Civil Proceedings Act 2011* (Qld).
3) Costs.

[4] The defendant contests the claim and the plaintiff's entitlement to damages and contends that the proceeding ought be dismissed.

Mode of trial

[5] The claim was listed for hearing on 15 March 2023.

[6] Following the commencement of the hearing the parties conferred, after indicating that there were no facts in dispute and the claim could be determined by reference to the terms of a contract for sale.

[7] Counsel for both parties proposed to proceed upon the basis that the parties would file a statement of agreed facts and bundle of agreed documents and both counsels' submissions would be contained in written outlines of argument.

[8] Directions orders were made by consent that, with an agreed timeframe contained in the directions orders,

- The parties were to prepare and file an agreed statement of facts and a bundle of agreed documents.
- The plaintiff was to file and serve a written outline of argument.
- The defendant was to file and serve a written outline of argument.
- The trial was to be determined on the papers without oral hearing unless the court directs otherwise.

The parties' material

[9] The trial, and the issues on the pleadings are to be determined on the papers with reference to the following agreed material:

Pleadings

- Claim and statement of claim filed 1 March 2022.
- Notice of intention to defend and defence filed 1 April 2022.
- Reply to the defence filed 19 April 2022.

Evidentiary material

- Agreed statement of facts and bundle of agreed documents attached to statement and paginated 1-176.

Parties outline of arguments

- Plaintiff's counsel's outline of argument filed 20 March 2023.
- Defendant's counsel's outline of argument filed 23 March 2023.

The pleadings

[10] The defendant admits the allegations in paragraphs 1, 2, 3, 4, 5(b), 5(c), 6, 7, 8, 9, 14, and 17 of the statement of claim.

[11] The defendant does not plead in its defence to the allegations contained in paragraph 10 of the statement of claim, and the defendant is therefore taken to have admitted those allegations (a deemed admission) pursuant to r 166(1) of the *Uniform Civil Procedure Rules* **(UCPR)**.

[12] The allegation deemed to be admitted by the defendant arising from that paragraph is:

> *"The bank account details of the deposit holder were provided by the plaintiff's solicitors to the plaintiff by email on or about the 5th of May 2021."*

[13] It appears little turns on that deemed admission as the outlines of neither the plaintiff nor defendant directed the courts attention to those admitted facts.

[14] The allegations denied in respect of paragraph 5(a) of the statement of claim were resolved with a subsequent admission as to that allegation in the defence in the plaintiff's reply.

[15] The defendant denies the allegations contained in paragraphs 5(d), 11, 12, 13, 15, 16, and 18 of the statement of claim.

[16] The plaintiff's reply purports to rely on a deemed admission contained arising from the defence in respect of paragraph 7 of the defence. That paragraph pleads in response to the allegations in paragraph 15(d)(II) of the statement of claim –

"II) the defendant was not, by any minor delay, substantially deprived of the benefit of the deposit."

[17] Again, neither of the outlines of the plaintiff or defendant raised that issue, as presumably nothing turned upon it for the parties, but in any event having regard to the pleaded paragraph and the requirements of r 165 and r 166(4) UCPR this is not a deemed admission.

[18] The allegations denied in respect of paragraph 5(d) of the statement of claim were similarly not addressed at all in the parties' outlines of argument and are clearly not relevant to the issues for determination and therefore require no further consideration.

Issues to be determined

[19] The parties' outlines of argument are at odds as to the issues to be determined in these proceedings following the trial and use slightly different language and nomenclature to articulate their respective positions.

[20] The defendant's counsel's outline contends that there are only three issues for determination, namely:

- Issue 1 – whether the defendant's termination was unlawful because the plaintiff paid the deposit at the *"earliest practical time"* after communication of acceptance of the contract by the defendant.
- Issue 2 – whether payment of the deposit was a fundamental term of the contract such that a failure to strictly comply with it allowed the defendant to terminate the contract.
- Issue 3 – whether the defendant affirmed the contract.[1]

[21] The plaintiff's counsel contends that there is a further issue for determination, namely *"when was the contract formed?"*[2]

When was the contract formed?

[22] The plaintiff contends that the contract was not formed until 5 May 2021.[3]

[23] The plaintiff's position is that there was an agreement by the parties to amend the description of the buyer (to note RNL Sons Pty Ltd as trustee for the ZNX Family Trust) and the effect of this agreement changed the date on which the parties entered into the contract and the date on which the contract was formed. The plaintiff pleads particulars in respect of the contract for sale at paragraphs 4, 5, and 6 of the statement of claim.

[24] The plaintiff pleads the allegations in respect of the amendment of the contract at paragraphs 7 and 8 of the statement of claim. Somewhat oddly, the plaintiff's pleaded position in respect of the contract for sale, which is admitted by the

[1] Defendant's outline at paragraph 8.
[2] Plaintiff's outline at paras 18 & 19.
[3] Plaintiff's outline at para 18.

defendant in the defence except for the allegations contained in paragraphs 5(a) and 5(d) of the statement of claim, pleads that:

- The plaintiff (as buyer) and the defendant (as seller) entered into a contract for the sale of a post office business *"**On or about 4 May 2021**."*
- The contract had been signed by the plaintiff and the defendant on 4 May 2021.

[25] The plaintiff's pleaded position, in paragraphs 7 and 8 of the statement of claim, whilst pleading allegations of the amendment to include a description of the buyer as *"as trustee for ZNX Family Trust"* **does not plead that as a consequence the contract was not formed or was not entered into by the parties on 5 May 2021**.

[26] Likewise, the defendant in its defence has admitted the factual allegations contained in paragraph 7 and 8 of the statement of claim.

[27] The plaintiff's outline does not advance any authority for the proposition that as a consequence of the amendment to the description of the buyer, the date the contract was entered into or formed by the parties became 5 May 2021 and not 4 May 2021 as pleaded in paragraphs 4 and 6 of the statement of claim.

[28] The defendant's outline contends that the contract was formed on 4 May 2021.[4]

[29] The defendant's outline further continues to contend that the amendment of the description of the buyer to include *"as trustee for ZNX Family Trust"* ought properly be regarded simply as a correction of an error in respect of the buyers description.[5]

[30] The defendant relies on the authority of *Rymark Australia Development Consultants Pty Ltd v Draper*.[6]

[31] In that decision, considering a sellers attempt to effectively recant from a contract for the sale of land, WB Campbell J said at page 354:

> *"In the circumstances I am satisfied that after the defendants signed the contract, their acceptance of the offer was communicated to Reichstein at the Crest Hotel Conference on July 14 and also that such acceptance was communicated by Mr Milne, their duly authorised agent."*

[32] And continued:

> *"The absence of instruction accompanying the contracts which were sent back to Mr Milne by the first defendant strongly corroborates the fact that the defendants had told Mr Reichstein at the Crest Hotel that they had signed the contract in circumstances which would lead Reichstein to conclude that a concluded agreement had then been made."*

[33] Uncontroversially on the agreed facts, the parties signed the contract:

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[4] Defendant's outline at para 14.
[5] Defendant's outline at paras 46 – 51.
[6] *Rymark Australia Development Consultants Pty Ltd v Draper* [1977] Qd R 336.

- The plaintiff as buyer on 30 April 2021.
- The defendant as seller on 4 May 2021.

[34] The defendant's acceptance of the contract by delivery of a signed copy was affected on 4 May 2021.[7] The agreement to amend the identity of the buyer, which agreement occurred on 4 May 2021,[8] did not constitute an amendment to the contract for sale, but rather an agreement to correct an error in respect of the description of the buyer (which the parties agree at all times was RNL Sons Pty Ltd acting in it's capacity as trustee for the ZNX Family Trust),[9] **and therefore the contract was entered into and formed on 4 May 2021**.

[35] That position is consistent with the plaintiff's pleaded case (admitted in the defence) although oddly neither party's outline of argument deal with the pleadings issue on this point.

When was the deposit required to be paid?

[36] The contract for sale was entered into by the parties on 4 May 2021.[10]

Was the Defendant's termination of the contract lawful or unlawful

[37] As noted in relation to the issues for determination in the action, the parties positions are somewhat at odds as is the description and the nomenclature used to define the issues.

[38] The defendant's counsels outline describes the issues be determined as:

- Whether the defendant's termination was unlawful – because the plaintiff paid the deposit at the earliest practical time
- Whether payment of the deposit was a fundamental term of the contract, such that a failure to strictly comply with it, allowed the defendant to terminate.

[39] The plaintiff's counsels outline raises what are effective similar considerations but describing it relevantly as:

- No breach of contract by the plaintiff.

[40] A consideration of the question as to whether the defendant's termination of the contract was lawful or unlawful distils into four separate questions, namely:

1) When was the deposit required to be paid
2) When was the deposit actually paid
3) Was the payment of the deposit a fundamental term of the contract

[7] Statement of Agreed Facts (S.A.F).
[8] S.A.F at 7, 8, & 9.
[9] S.A.F at 2.
[10] See para 33 of The Reasons.

4) If the payment was a fundamental term of the contract, did a failure to strictly comply with it allow the defendant to lawfully terminate the contract.

1. When was the deposit required to be paid?

[41] The contract for sale was entered into it by the parties on 4 May 2021.

[42] The statement of the agreed facts and bundle of agreed documents include a copy of the contract for sale entered into between the parties.

[43] The parties submissions accept that the terms of the contract for sale are encompassed entirely within that document.

[44] Relevant to the issue of when the deposit was required to be paid the terms of the contract and in particular the "items schedule" provide: -

a) Date of contract item A – date of contract
b) Item L(b) deposit
c) Item I – deposit holder.

[45] In respect of those items from the "item schedule":

(a) Item A – date of the contract

[46] The document (indeed both copies of the document of the contract of sale contained in the agreed bundle of documents) is incomplete as to the date of the contract. Both documents simply provide:

- *"The day of April month 2021 year"*

[47] The document appears to not have been completed by the parties by insertion of a date.

[48] The date of the contract is however, as articulated in paragraph 33 of these reasons, deemed determined to be 4 May 2021.

The item L(b) the deposit

[49] The standard conditions of sale (forming part of the contract of sale and acknowledged by the parties in the agreed bundle of documents) provide:

Clause 1.1

"deposit" means the sum stated in Item L(b)

[50] The deposit payable pursuant to the contract is therefore ascertained by reference to the items schedule – Item L(b) and is the sum of $56,000.

Item I – the deposit holder

[51] Again, the standards conditions of sale of the contract provide:

- Clause 1.1

"Deposit holder – means the person named in Item I"

[52] Item I from the items schedule names the deposit holder "Bennett Carroll Holdings Pty Ltd Law Practice Trust Account".

The terms of the contract – the payment of the deposit

[53] The standard conditions of sale provide for the payment of the deposit at clause 5.1.

[54] Clause 5.1 provides as follows:

> 5. Deposit
>
> 5.1 The buyer must pay the deposit to the deposit holder upon the signing of this contract. If the buyer:
>
> (a) fails to pay the deposit as provided by clause 5.1
>
> (b) pays the deposit by post-dated cheque or
>
> (c) pays the deposit by cheque which is not honoured on presentation, it will be in substantial breach of those contract and the seller (in addition to any rights at law or in equity) may exercise its rights under clause 29.

[55] There is considerable controversy as between the parties positions in relation to the interpretation of clause 5.1 of the standard conditions of sale in the contract.

The plaintiff's contentions – when the deposit was required to be paid

[56] The plaintiffs counsel outline of argument contends[11] that the correct interpretation of clause 5.1 in respect of the timing of the payment of the deposit is that the deposit was required to be paid "as soon as reasonably practicable" or "…to be made at the earliest practical time after acceptance". The plaintiffs outline presses three authorities that the plaintiff contends support its interpretation of clause 5.1 namely:

- *Brien v Dwyer* (1978) 141 CLR 378 – a decision of the High Court of Australia
- *Hill v Sidney* (1991) 2 Qd R 547 – a decision of the Full Court of Queensland
- *Long v Hijazi* (2017) QDC 187 – a decision of the District Court of Queensland – (Dick SC DCJ)

[57] The plaintiffs counsels outline[12] citing *Brien v Dwyer* (ibid) as supporting its proposition says:

> *"In Brien v Dwyer Gibbs J said:*

[11] Plaintiff's outline at paras 26 – 32.
[12] Plaintiff's outline at para 26.

> *The contract should be construed in light of what is likely to be the practice usually followed, so as to render its operation practicable and convenient"*

[58] A proper and complete consideration of the decision in *Brien v Dwyer* does not support the conclusion that it is authority for the plaintiff's proposition

[59] Gibbs J continued immediately following the statement cited and relied upon the plaintiff, in these terms[13]:

> *"I therefore think that what is meant is that the deposit should be paid by the purchaser when he signs the contract, although it will no doubt be sufficient from a practical point of view if the deposit has been paid before the contracts are exchanged"*

The High Court in *Brien v Dwyer* was considering a New South Wales contract for the sale of land, which in that state involved the exchange of contracts as opposed to the contract for sale in Queensland under present consideration.

[60] The principles for interpretation of a clause for payment of a deposit "upon the signing of this agreement" however are identical to the current circumstances.

[61] Adopting the plaintiff's contentions that *Brien v Dwyer,* and in particular the reasons of Gibbs J, provide binding authority for the correct interpretation in relation to clause 5.1 of the contract of sale the entirety of His Honour's reasons are required to be considered. The contract for sale under consideration by the Court in *Brien v Dwyer* provided for the payment of the deposit in these terms:[14]

> *"The purchaser shall upon the signing of this agreement pay as a deposit to the vendors agent herein named as stakeholder the sum of..."*

In relation to the interpretation of that clause and the timing of the payment of the deposit Gibbs J said[15]:

> *"The phrase 'upon the signing of this agreement' contains two possible sources of ambiguity. It is a question whether 'the signing' referred to is the signing by the purchaser, or whether what is meant is that the deposit is not payable until both parties to the contract have signed it. If it were intended that both parties should sign the contract at the one time the difficulty would not arise. However the usual practice in New South Wales is for parties intending to enter a contract for the sale of land to exchange counterparts, and this was done in the present case."*

[62] His Honour continued[16]:

> *"It is also clear that whatever the proper construction of the contract, the vendor can insist that the deposit be paid before he signs the contract or exchanges counterparts, because until those things have been done the*

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[13] *Brien v Dwyer* (1978) 141 CLR 378 at 393.
[14] At page 381.
[15] At pages 390 & 391.
[16] At page 391.

> *matter remains in the realm of negotiation. For these reasons it may not matter, from a practical point of view, whether the deposit is intended to be paid upon the signing of the purchaser, or upon the signing by both parties. The critical question is whether the use of the word 'upon' has the effect that the obligation to pay the deposit is postponed until a reasonable time after both parties have signed. Since the word is used in a clause which provides for the payment of the deposit, in deciding which of its possible meanings it is intended to bear it is necessary to keep in mind the function which a deposit forms.*
>
> *The nature of a deposit is well understood. In the Soper v Arnold Lord MacNaghten said:*
>
> *"The deposit serves two purposes – if the purchase is carried out it goes against the purchase money – but its primary purpose is this, it is a guarantee that the purchaser means business…"*
>
> *In the same case Lord Hershell said:*
>
> *"The deposit is given as a security of the performance of the contract. The primary purpose of the deposit would not be served unless the deposit were paid at the very time when the purchaser assumed his obligations under the contract.""*

[63] Gibbs J continued:

> *"These considerations strongly support that "upon" in clause 1 does not mean "after", but "immediately after" or to use the language of REG v Humphrey, "upon the occasion of or at the time of".*

[64] He continued:

> *"It is not, of course, intended that the payment of the deposit and the signing of the agreement should be strictly simultaneous, because that would be absurd. What is meant is that the deposit shall be paid on the occasion where the contract is signed."*

[65] Gibbs J's reasons are in accord with the decision of the majority Barwick CJ and Aikin J, Jacobs J and Stephens J having a dissenting view[17] - saying "in my opinion the words on the signing mean at the earliest practicable time after signing".

[66] In *Brien v Dwyer* the balance of the majority (Barwick CJ and Aitken J) similarly held that the contract required the deposit to be paid *"at the time the purchaser signed"* or *"at least on or before the exchange of counterparts."*

[67] Barwick CJ[18] said:

> *"In my opinion, although Clause 1 speaks of "the" signing of the agreement, it clearly means, in my opinion, that the deposit is to be made by the purchaser on signing of the document by the purchaser. In using the word "agreement",*

[17] At page 402.
[18] At pages 394 & 395.

the clause, in my opinion does not refer to the time when the parties have already become contractually bound to each other, but to some anterior point of time."

[68] His Honour continued,

"Thus, in my opinion in the context of Clause 1, and being mindful of the function of a deposit in a transaction of the present kind, the word "upon" means, in my opinion, "at the time of" and relates to the time of signature by the purchaser of the form of agreement for transmission or presentation to the vendor for his signature."

[69] Continuing,

"There is no room, in my opinion, for construing the Clause as meaning within a reasonable time after signature, whether it be a signature by the purchaser or by both parties. Such a construction denies to the payment of a deposit, a character of an earnest of performance and raises almost an insoluble question as to what is a reasonable time. ...for there can be no norm by reference to which a judgment as to what is a reasonable time can be made. It is important it seems to me, not to apply doctrines equitably devised in relief of purchases in the performance of a contract to the formation of the contract itself."

[70] In further support of this proposition Barwick J concluded:[19]

"In my opinion, these decisions, in so far as they decide that under a clause in terms of Clause 1 a deposit is not payable at the time the purchaser signs the form of a contract but a reasonable thereafter, that time is not of the essence in that respect and that a vendor may not rescind out of hand for failure to pay the deposit as and when stipulated by Clause 1, insupportable and ought be overruled".

[71] In further support of this proposition, Aitken J held:[20]

"I agree that there is no warrant for qualifying the words in Clause 1 by such expressions as "or within reasonable time thereafter" or for reading "upon" as meaning "on or after". The words are "upon the signing of this agreement", but the obligation which they impose must be effectively discharged by the purchaser making payment to the estate agent before the counterparts are exchanged, or when both parties sign the one document contemporaneously".

[72] **Therefore, upon a careful and complete analysis of the decision of the High Court in *Brien v Dwyer*, it is not an authority (from the Commonwealth, Australia's Highest Court) for the proposition contended for by the Plaintiff.**

[73] **To the contrary, the decision of the majority is in respect of a clause in a contract requiring the purchaser *"upon the signing of this agreement pay as a deposit to the vendors agent"* (a clause expressed in identical terms to Clause 5.1**

[19] At page 399.
[20] At page 406.

in the subject contract which provides *"the buyer must pay the deposit to the deposit holder upon the signing of this contract"*) that the deposit is payable on the day the contract is formed 4 May 2021.

[74] The decision is certainly not authority for the Plaintiff's proposition that Clause 5.1 means that the deposit may be paid *"as soon as reasonably practicable"* or *"at the earliest practicable time after acceptance"*.

[75] The plaintiff has sought to rely on two authorities that it asserts support its contention as to the interpretation of Clause 5.1.

[76] In *Hill v Sydney* (ibid) the Court of Appeal was required to consider a clause in a contract which provided that *"the deposit shall be paid by the purchaser to the stakeholder forthwith upon the execution hereof by the purchaser"*. Again, the plaintiff's submissions in respect of the application of the decision in *Hill v Sydney* are not supported by a careful consideration of that decision. It involved a wholly different category of contract and considered a grant of an option to purchase the leased property by the plaintiff from the defendants.

[77] De Jersey J, upon whose reasons the plaintiffs rely, said:[21]

> *"All that was required was the appending of signatures of the respondent's and their payment of the deposit monies. Judicial exposition of the meaning of the term "forthwith" supports the view that it generally means "as soon as reasonably practicable".*

[78] However, Macrossan CJ in distinguishing the decision in *Brien v Dwyer* said:[22]

> *"Although Brien v Dwyer contains much helpful discussion upon the nature of a deposit payable by a purchaser and the usual function of such a deposit, the case itself was fundamentally one of construction of the words which had been used in that case. The present case is different because while I have concluded that some contractual obligation arose between the parties at the moment when option was exercised the parties had not provided that the deposit would be paid at that time but only when the contract of sale, which they were obliged to execute, should have been so executed by the purchasers. The purchasers in terms of their obligation were not contractually obliged to execute before the vendors-both, without distinction, were obliged to execute forthwith".*

[79] *Hill v Sydney* considered a wholly different set of circumstances and a different clause in respect of the requirement for the payment of the deposit.

[80] It is not authority for the proposition advanced by the plaintiff as to the interpretation Clause 5.1 of the current contract.

[81] The plaintiff also seeks to rely on the decision of Her Honour, Judge Dick SC DCJ in *Long v Hijazi [2017] QDC 187*. Again, in that decision the contract provided for a wholly different term in respect of the fixing of the time for the payment of the deposit. There the contract required the deposit to be paid by the buyer:

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[21] At page 567.
[22] At page 553.

> *"On the day the buyer signs this contract unless another time is specified below".*

[82] In *Long v Hijazi* the contract was effectively entered into on 19 October 2016 at 2:08pm, when acceptance was communicated to the plaintiff by the defendant's real estate agent and the deposit was paid by electronic transfer to the nominated Trust account at 8:30pm on 19 October 2016 and receipted into the real estate agents Trust account the following business day (20 October 2016). Her Honour in respect of the interpretation of that clause and referring to the decision of Brien and Dwyer said at 14:

> *"Therefor the better view is similar to the one espoused by Jacobs J and Stephens J in Brien v Dwyer and that is that the requirement meant for the payment to be made at the earliest practicable time after acceptance."*

[83] With respect to those comments:

- *(a)* They are contrary to the decided position of the majority in Brien v Dwyer Barwick CJ, Gibbs J and Aitken J.
- *(b)* Jacobs J was dissenting and in the minority of the court in respect of that interpretation.
- *(c)* Stephen J said, *"the different shades of meaning to which have been assigned to this expression by those before whom this case has come, demonstrate how uncertain is the language. Joining, as I must the ranks of those who essay its interpretation, I would adopt the meaning attributed to it in the reasons for the judgment of Jacobs J and I do so for the reasons there expressed."*

[84] Again, Stephens J is in the minority with Jacobs J in respect of the court's determination of the interpretation of the meaning of the relevant clause in the contract.

[85] It would appear that the decision in *Long v Hijazi* relied on the minority of the view of the interpretation of this clause in the decision of the High Court in *Brien v Dwyer* and not the binding view of the majority.

[86] To that extent the decision of *Long v Hijazi* is distinguishable from the current circumstances and in any event considered a term in the contract expressed in completely different terms to the current Clause 5.1.

[87] Support for the correctness of the proposition contended for by the defendant's is gained from the recent decision of Bradley J in *D and N Holdings Queensland Pty Ltd v 2620 Ipswich Road Pty Ltd & Ors [2021] QSC 308*.

[88] Again, the term for payment of the deposit was expressed in different terms in *D and N Holdings Queensland Pty Ltd v 2620 Ipswich Road Pty Ltd*. There the contract provided for the deposit that the deposit was:

> *"Payable on the day the buyer signs this contract unless another time is specified below".*[23]

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[23] At para 4.

[89] In considering the time for payment of the deposit Bradley J said:[24]

> *"For the first and second respondent's it is contended that in order to exercise the option under the deed, it was necessary for the applicant to pay the deposit not only to comply with Clause 2.1 of the deed but also to comply with Clause 3.1 of the contract, and it was said that in order to comply with Clause 3.1, the applicant had to pay the deposit on the day the applicant signed the contract.*
>
> *As authority for this, the principal submissions were based upon the decision in Brien v Dwyer, and the court has been taken to a number of passages in the various judgment delivered by the High Court in that case. The position prevailing there, and the contract concerns there were, of course, different to the particular circumstances here. But the approach the members of the court adopted in that case are of relevance. They explain, for example, the purpose of a deposit and its significance, and why a requirement that the deposit be paid before, or upon signing the contract has importance for the parties to it, most significantly for the vendor.*
>
> *The different views expressed by the members of the High Court have been variously considered subsequently. It seems to me for present purposes, so far as it matters for today, that the views expressed are consistent with the proposition that by the time the purchaser provides the signed contract to the vendor, whether by the New South Wales practice of exchange or otherwise, the terms of the standard contract there provided that the deposit had to be paid".*

[90] *D and N Holdings Queensland Pty Ltd v 2620 Ipswich Road Pty Ltd & Ors* is authority for the proposition contended for by the defendant.

[91] Similarly, the decision of the High Court in *Brien v Dwyer,* (followed by Bradley J in *D and N Holdings Queensland Pty Ltd v 2620 Ipswich Road*) completely supports the defendants' contentions.

[92] **The effect of those authorities, binding on this court, are that the correct interpretation of Clause 5.1 of the contract for sale required the plaintiff (as buyer) to pay the deposit (upon signing of the contract), meaning at the very latest upon receiving confirmation that the seller had signed it at 11:18am on 4 May 2021**.

When was the deposit actually paid

[93] The plaintiffs correctly contend that the parties contemplated the availability of the use of electronic bank transfer for the payment of the deposit.[25]

[94] The defendant does not challenge that assertion. Indeed, the contract by reference to items schedule Item I deposit holder and the statement of agreed facts acknowledge that the defendant as seller accepted that payment of the deposit could be by electronic funds transfer.[26]

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[24] At paras 11, 12, & 13.
[25] Plaintiff's outline at para 22.
[26] S.A.F at para 6.

[95] It is uncontroversial and consistent with the statement of agreed facts that the plaintiff (as buyer) paid the deposit by electronic funds transfer to the defendant (as seller) as follows:[27]

- $40,000 at or after 5:55pm on 5 May 2021.
- $16,000 at or after 6:38am on 6 May 2021.

[96] **The deposit was actually paid, in full, on the 6th May 2021**.

Was the payment of the deposit a fundamental term of the contract?

[97] Clause 5.1 of the contract provides as follows:

"If the buyer

a) Fails to pay the deposit as required by 5.1… clause 5.1.

c) … it will be in substantial breach of this contract and the seller (in addition to any rights at law or in equity) may exercise its rights under clause 29."

[98] Clause 29 provides: -

"If the buyer (b) fails to comply with the terms or conditions of this contract, then the seller may…"

(d) terminate this contract.

[99] The terms of the contract for sale itself provide unequivocally that:

- If the buyer fails to pay the deposit.
- The buyer will be in substantial breach of this contract.
- The seller may exercise a right to terminate this contract."

[100] Brien v Dwyer found that the failure to pay the deposit as required by a similar clause in the contract entitled was breach of a fundamental term and entitled the seller to terminate the contract.[28]

[101] The plaintiffs outline of argument does not press at all a contrary contention that failure to pay the deposit as required by clause 5.1 was not a fundamental term of the contract.

[102] **The payment of the deposit as required by clause 5.1 of the contract was a fundamental term of the contract**.

If the payment was a fundamental term, did a failure to strictly comply with it allow the defendant to lawfully terminate the contract.

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[27] S.A.F at paras 14 & 15.

[28] *Brien v Dwyer* (1978) 141 CLR at page 388.

[103] The terms of the contract specifically and precisely provide that a failure by the buyer (the plaintiff) to pay the deposit means that the buyer will be in substantial breach of the contract and the seller may terminate the contract.[29]

[104] This position is consistent with the decision of the High Court in Brien v Dwyer[30]

Did the defendant affirm the contract prior to termination.

[105] The plaintiff (as buyer) breached the contract for sale by failing to pay the deposit as required. The final issue for consideration in respect of the defendant (as seller) lawfully terminating the contract and retaining the deposit is – did the defendant affirm the contract prior to termination.

[106] The plaintiff's pleaded position in respect of this allegation is contained in paragraph 13 of the statement of claim.

[107] The plaintiff pleads as follows:

> *"Further or alternatively, the defendant (by its solicitors) nonetheless accepted the instalment payments of the deposit and, by it's conduct, thereby:*
>
> *(a) Continued to act as though the contract was proceeding.*
> *(b) Elected not to exercise any right it had to terminate the contract at that time and:*
> *(c) Affirmed the contract."*

[108] The plaintiff asserts that the defendant affirmed the contract.[31] The plaintiff argues that:

> *"Despite the required timing of the payment of the deposit, the defendant (by its solicitors) continued to act as though the contract was proceeding by:*
>
> *(a) Providing the plaintiff's solicitors with the back details of the deposit holder on 5 May 2021, a day after the contract date.*
> *(b) Demanding, albeit mistakenly, the payment of the deposit on 11 May 2021, and again on 14 May 2021.*
> *(c) Not exercising any right it had to terminate the contract between 4 May 2021 and 17 May 2021 (13 days).*
> *(d) Accepting payment of the deposit instalments on 5 and 6 May 2021."*[32]

[109] The plaintiff contends that conduct by the defendant, either alone or in combination, amounted to an affirmation of the contract by the defendant prior to termination. The plaintiff advances four propositions to support its contention that the defendant's conduct amounted to an affirmation of the contract, namely:

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[29] Clause 5.1 & 29 of the Contract for Sale.
[30] *Brien v Dwyer* (1978) 141 CLR at page 388.
[31] Plaintiff's outline at paras 33 – 40.
[32] Plaintiff's outline at para 34.

(1) Acts done by a party in, or for the purpose of, performance of the contract after breach or non-fulfillment of a condition by the other party normally constitute affirmation.

(2) A demand after breach that the contract be performed normally constitutes affirmation.

(3) Inaction in exercising a right to terminate amounts to affirmation.

(4) Acceptance of late payment normally implies abandonment of any right to terminate for that particular failure to pay on time.

[110] The plaintiff cites specific authorities, which it contends support each of those four propositions advanced.

(1) – Acts done by a party in, or for the purpose of, performance of the contract after breach or non-fulfilment of a condition by the other party normally constitute affirmation.

[111] The plaintiff contends that a decision of the High Court in *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327 supports that proposition. In particular, the plaintiff contends that statement for that principle is found at page 349 of the judgement in *Carr v Berriman* (ibid).

[112] *Carr v Berriman* involved a wholly different set of circumstances and required consideration of conditions in a building contract. It considered non-performance by the building owners of certain obligations, and the effect of the builders' election not to rescind the contract upon such breach. Nowhere on page 349 of the judgement (of Fullagar J) are the use of the words as articulated in the plaintiff's outline of argument, or indeed any support for the proposition contended for by the plaintiff.

[113] Fullagar J said:

"For the company after 29 May did acts which seem consistent only with the continued existence of the contract after that date… it cannot in my opinion be maintained that the right to rescind for breach of that promise as such had not been lost."

[114] This decision involved wholly different considerations as to the conduct of the party entitled to rescind than the present circumstances. A careful examination of the agreed facts as to the defendant's conduct is required.

[115] The plaintiff contends that the acts done by the defendant… *"In, or for the purpose of, performance of the contract after breach…"* are:

- Providing the plaintiff's solicitors with the bank account details of the deposit holder on 5 May 2021, a day after the contract was made.

[116] The agreed facts inform that:

- *"4 May 2021 – two minutes later (after signature and delivery of contract by email) … the defendant's solicitor provided trust account details by email.*

- *5 May 2021 – at 3:57pm the plaintiff's solicitor (by email) asked for trust account details so the plaintiff could organise payment of the deposit.*

- *5 May 2021 – at 4:51pm the defendant's solicitor responded saying "provided yesterday and attaching trust account details."*

[117] Uncontroversially, on the day the contract for sale was entered into by the parties, 4 May 2021, the defendant's solicitor as deposit holder provided the details of the trust account for payment of the deposit. Nothing in the brief email exchange between the plaintiff's solicitor (as buyer) and defendant's solicitor (as seller) on 5 May 2021 were acts done by the defendant for purposes of performance of the contract after breach or non-fulfilment. It is substantially different conduct than that considered by the court in *Carr v Berriman* (ibid).

A demand after breach that the contract be performed normally constitutes affirmation.

[118] The plaintiff contends that the defendant by:

> *"Demanding, albeit mistakenly, payment of the deposit on 11 May 2021 and again on 14 May 2021,"* was conduct within this category.

[119] The plaintiff contends that the decision of the High Court in *Turner v Labofox International Pty Ltd* (1974) 131 CLR 660 supports that contention.

[120] Again, in *Turner v Labofox* the court was considering a wholly different set of circumstances. There, a contract for the sale of land had been entered into between the parties that contained a clause that provided that should it be established that the property was affected by any provision of the planning scheme, the purchaser should be entitled to rescind the agreement. The purchaser and his solicitor were aware at the day of the contract, that the land was affected by a planning scheme, but the purchaser's solicitor insisted that particulars of the title be delivered in accordance with the provisions of the contract. The court held that the conduct of the purchaser's solicitor constituted a binding elected to affirm the contract so as to preclude the exercise of the right of rescission.

[121] The plaintiff's outline specifically asserts *"as does a demand after breach that the contract be performed."*

[122] Nowhere at page 670 of the decision are those words articulated.[33]

[123] Mason J said:

> *"The issue for decision is whether the appellant, in light of the knowledge which he had of the facts giving rise to a right of rescission, was precluded by the subsequent acts of his solicitor from exercising that right.*
>
> *In Sargent v ASL Developments Pty Ltd I have expressed the view that a binding election to affirm a contract may be made by a person who then has knowledge of the facts giving rise to the right of rescission, though unaware of the existence of the right of rescission, and that unequivocable conduct affirming the contract will*

[33] Plaintiff's outline at para 36.

in such circumstances preclude the exercise of the right of rescission. There is no need to repeat what was then said.

It is enough to say that here the evidence clearly reveals a positive affirmation of the contract by the appellant's solicitor on 15 February in his conversation with Mr Jarvis. As he admitted in cross-examination, he insisted upon fulfillment of the contract and the furnishing of particulars of the title required by clause 3. In so doing he was acting within the scope of his authority for the appellant. What he did was averse to the respondent and was justifiable only on the footing that the contract was subsisting. It was, therefore, subject only to the question of knowledge, and unequivocal affirmation of the contract and therefore binding on the appellant."

[124] Here the conduct by the defendant (as seller) that the plaintiff (as buyer) contends constituting *"a demand after breach that the contract be performed"* are the two emails from the plaintiff's solicitor of 11 May 2021 and 14 May 2021.

[125] That correspondence is contained in the statement of agreed facts at items 17 and 18.

[126] Item 17, the email of 11 May 2021, is in these terms:

"I have not been notified by the accounts team that the deposit had been paid.

Please send a receipt evidencing payment of the deposit so we can trace."

[127] Item 18, the email of 14 May 2021, is in these terms:

"The $56,000 deposit has not been paid. It is 10 days overdue.

Pursuant to clause 5.1, the buyer is in breach of an essential term of the contract.

The seller irrevocably reserves its' rights against the buyer and the guarantors under clauses 5.1 and 29."

[128] Clearly, neither of the communications of 11 May 2021 nor 14 May 2021 constitute a demand by the defendant (as seller) to the plaintiff (as buyer).

[129] The communication of 11 May 2021 simply observes that there has been no notification that the deposit has been paid and inviting production of evidence of payment.

[130] The email of 14 May 2021 notes the $56,000 deposit has not been paid, refers the buyer to clause 5.1 of the contract and reserves the seller's rights under the terms of the contract.

[131] **Nothing in the conduct of the defendant in the two communications of 11 May 2021 and 14 May 2021 rise to conduct, which the court in *Turner v Labofox International Pty Ltd* (ibid) determined was sufficient to constitute *"an unequivocable affirmation of the contract."***

(2) – Inaction in exercising a right to terminate amounts to affirmation.

[132] The plaintiff contends that the defendant by:

> *"Not exercising any right it had to terminate the contract between 4 May 2021 and 17 May 2021 (13 days) had, through it's inaction in exercising that right to terminate, affirmed the contract.*

[133] The defendant contends that there are two authorities supporting that proposition, namely, *O'Conner v SP Bray Ltd* (1936) 36 SR (MSW) 248 and a decision of the High Court in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.

[134] In *Perri v Coolangatta Investments,* the High Court was considering an unusual contract for the sale of land where it fixed no time for completion, but rather a special condition provided that the contract was subject to the purchase completing the sale of another property. The vendor gave a notice requiring the purchase to complete by a nominated date, and after they did not do so, the vendor gave notice rescinding the contract.

[135] In addition to the quoted paragraph from Gibbs CJ,[34] His Honour continued at page 545:

> *"Sutter v Gundowda Pty Ltd and Gang v Sullivan are consistent with Aberfoyle Plantations Ltd v Cheng and support the view that where a conditional contract fixes the date by which the condition is to be fulfilled, the contract may be terminated if the condition has not been fulfilled when the date arrives and that it is unnecessary to give any prior notice to the other party."*

[136] He continued:

> *"The doctrines of equity enable a party to a contract to obtain specific performance notwithstanding his failure to carry out his obligations within a stipulated time, when that time is not of the essence of the contract. The party not in default has a corresponding power to limit a particular time within which the other contracting party is to be perform its obligations."*

[137] **This decision is not authority for the proposition contended that here the defendant having a right to terminate for failure of the plaintiff to pay the deposit as required by the contract, through inaction in not exercising that right to terminate had affirmed the contract.**

Acceptance of late payment normally implies abandonment of any right to terminate for that particular failure to pay on time.

[138] The plaintiff contends that the defendant:

- *"By accepting payment of deposition instalments on 5 and 6 May 2021" *

Abandoned any right to terminate for failure to pay on time.

[139] The plaintiff relies on the decision of the High Court in *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41. The court there was considering a contract for the sale

[34] Plaintiff's outline at para 37.

of land where the purchaser had taken possession and payments were to be made by instalments. The vendor had in fact agreed to an extension of the time for payment, and had further accepted payments of interest after late payment by the purchaser. The majority of the court ultimately held:

(1) That acceptance by the vendor of late payments of the earlier instalments did not preclude the vendor from insisting that time should continue to be of the essence.

(2) That the vendor by granting of the extension of time did not constitute an election by the vendor to affirm the contract but was the announcement of an intention to refrain from electing either way.

(3) That by accepting payment of interest in respect of a completed period of possession, the vendor had not elected against rescinding the contract.

[140] The plaintiff relies on the reasons of Kitto J at paragraph 52 to support its contention that acceptance of late payment normally implies abandonment of any right to terminate. The plaintiff quotes from Kitto J as follows:

"Each acceptance of a late payment operated, of course, as an election by the appellant not to rescind the contract for non-payment of the relevant amount on its due date."

[141] However, Kitto J continued in the same paragraph:

"... but to read into the acceptances, considered either separately or as a whole, something promissory or some inducement to a belief in relation to future payments is, I think, to take an unwarranted step."

[142] He continued:

"But it is not a valid general proposition that wherever some instalments are accepted late without demur the party accepting them is precluded in respect of later instalments from insisting upon the agreement that time shall be of the essence. In the present case there is nothing to support the conclusion unless that general proposition be correct."

[143] The decision is not authority for the proposition advanced by the plaintiff (even if the factual basis is accepted as correct) that acceptance of late payment normally implies abandonment of any right to terminate.

[144] The payment of the deposit instalments on 5 and 6 May 2021 were made uncontroversially on the agreed facts by electronic transfer.

[145] The defendant's solicitors were in no position to accept or reject the payments, they were simply made by the plaintiff on those dates by electronic transfer.

[146] There is nothing in the conduct of the defendant (as seller) by which payment by the plaintiff (as buyer) by instalments of the payments of $40,000 on 5 May 2021 and $16,000 on 6 May 2021 constituted accepting payment by the defendant (as seller).

The defendant's contentions – The defendant did not affirm the contract prior to termination.

[147] The defendant contends[35] legal principles regarding election/affirmation of the contract for sale. The defendant, correctly, contends that the High Court in *Sargent v ASL Developments Pty Ltd*[36] settled the legal principles regarding election and affirmation.

[148] Those principles relevantly include the following:

> *(a)* The words or conduct required to constitute an election must be unequivocal in the sense that they are only consistent with the exercise of one of the two sets of rights and are inconsistent with the exercise of the other.
> *(b)* A person confronted with a choice between the exercise of alternate and inconsistent rights is not bound to elect at once. They may keep the question open, so long as they do not affirm the contract and so long as the delay does not prejudice the other side.
> *(c)* Once an election is made it cannot be retracted.
> *(d)* Words or conduct which do not constitute the exercise of a right by or under a contract, and merely involve recognition of a contract, may not amount to an election to affirm the contract.
> *(e)* The touchstone of determining what is required for there to be an exercise of a right by or under a contract, such that the court will treat the party as still bound by the contract, is the exercise of rights adverse to the other party.

[149] The test as to whether the defendant's contract amounted to an election or affirmation of the contract is, on that basis, a relatively high one. Applying the test to what the plaintiff asserts is the defendant's conduct (even taken at its highest), does not satisfy those principles that the defendant has elected or affirmed the contract.

[150] The decision in *Sargent v ASL Developments Pty Ltd* was followed by the New South Wales Court of Appeal in *Proton Investments Pty Ltd v Vahekin Pty Ltd* (1988) 4 BPR 9544 where the court held that a vendor's enquiry as to the status of the deposit with knowledge that it was overdue were not sufficient to amount to an election.

[151] *Champtaloup v Thomas* (1976) 2 NSLR 264 is authority for the proposition that a right of termination need not be exercised immediately but remains open unless and until the contract is affirmed or the breaching party is prejudiced by the delay in terminating.

[152] Upon the basis of the agreed facts contained in the statement of agreed facts, and even taking those from the plaintiff's perspective at their highest:

> (1) There was no election/affirmation by the defendant by acceptance of the deposit payments – as they were made electronically and there was

[35] Defendant's outline at paras 59 – 62.
[36] *Sargent v ASL Developments Pty Ltd* (1974) 131 CLR 634.

no overt act of acceptance per se by the defendant or the defendant's solicitors as stakeholder.

(2) A failure to refund the deposit was not an election/affirmation by the defendant, indeed, the defendant having terminated the contract upon notice, it is consistent with that position, that forfeited the deposit and withheld it

(3) Enquiries as to the payment of the deposit were not an election/affirmation – the emails on 11 May 2021 and 14 May 2021 were not a demand for payment and that conduct by the defendant could not and did not amount to an affirmation of the contract.

(4) Provision of trust account details was not an election/affirmation – the defendant's solicitor as stakeholder was obliged to provide details of the trust account for the payment of the deposit to them as stakeholders and the confirmation of those details on 5 May 2021 constituted no election or affirmation of the contract.

[153] **The entirety of the defendant's conduct, subsequent to the contract for sale being entered into between the plaintiff (as buyer) and the defendant (as seller) on 4 May 2021 did not constitute conduct which was an affirmation or election of the contract by the defendant, subsequent to the breach by the plaintiff of clause 5.1 of the contract in respect of payment of the deposit.**

[154] **The defendant is therefore not disentitled from terminating the contract as it did on 17 May 2021.**

Disposition

[155] **The plaintiff (as buyer) was in breach of a fundamental term of the contract for sale by its failure to pay the deposit as required by clause 5.1 of the contract for sale on 4 May 2021. That breach by the plaintiff (as buyer) entitled the defendant (as seller) to terminate the contract for sale pursuant to clause 29 of the contract and to elect, pursuant to clause 29.4, to forfeit the deposit. The defendant's conduct, subsequent to the plaintiff's breach, did not amount to an affirmation of the contract or an election by the defendant to keep the contract on foot and therefore did not disentitle the defendant from forfeiting and withholding the deposit.**

[156] **The plaintiff's action against the defendant fails.**

[157] **I give judgement for the defendant against the plaintiff.**

Costs

[158] In the event that costs are not agreed, I direct the parties to file and serve written submissions to be no more than five typed A4 pages in respect to costs within 10 days.

Magistrate J N L Pinder

27/02/24