SUPREME COURT OF QUEENSLAND

CITATION:	*MSD Securities Pty Ltd & ors v MFB Properties (NQ) Pty Ltd & ors (No 2)* [2017] QSC 168
PARTIES:	**MSD SECURITIES PTY LTD AS TRUSTEE FOR THE BRUNSWICK STREET TRUST** ACN 160 362 345 (first applicant) **PK'S RESORT PTY LTD** ACN 168 348 730 (second applicant) **MARK LEONARD SEABROOK** (third applicant) **DAVID BRUCESMITH** (fourth applicant) **v** **MFB PROPERTIES (NQ) PTY LTD** ACN 101 980 303 (first respondent) **THE JUNGLE VILLAGE PTY LTD** ACN 098 067 077 (second respondent) **ASHLEE JANE PIPER** (third respondent) **MARK FREDERICK DAVID BIANCOTTI** (fourth respondent)
FILE NO/S:	SC No 13256 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	18 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 and 7 March 2017
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **[1] Orders 2 – 4 of the judgment of Flanagan J dated 28 November 2016 are vacated.** **[2] It is declared that:** **(a) by its notice to the First Respondent dated 13 December 2016, the First Applicant validly terminated the contract of sale between MFB**

Properties (NQ) Pty Ltd and MSD Securities Pty Ltd dated 13 March 2014 for Lots 1, 2 and 4 on SP219085 pursuant to s. 73 of the Property Law Act 1974;

(b) the contract of sale of land between Ashlee Jane Piper and MSD Securities Pty Ltd dated 17 March 2014 for Lot 3 on SP219085 was at an end as at 13 December 2016;

(c) the contract of sale of a business between Jungle Village Pty Ltd and PK's Resort Pty Ltd dated 13 March 2014 was at an end as at 13 December 2016;

(d) the Applicants are entitled to be repaid by the Respondents the sum of $2,000,000 paid by the Applicants pursuant to the contracts referred to in sub-paragraphs 1(a) to 1(c) hereof and the transaction deed between MFB Properties (NQ) Pty Ltd, Jungle Village Pty Ltd, Ashlee Jane Piper, Mark Frederick David Biancotti, MSD Securities Pty Ltd as trustee for the Brunswick Street Trust, PK's Resort Pty Ltd, Mark Leonard Seabrook and David Bruce Smith;

(e) the First Applicant has the benefit of an equitable lien over the estate in fee simple in respect of lots 1, 2, 3 and 4 on SP210985 to secure payment of all money referred to in this judgment.

[3] The matter be referred to the Registrar to inquire and determine or assess:

(a) the amount payable by the First Applicant and the Second Applicant as a reasonable occupational rental during the period they were in possession of the land and business the subject of the Contracts; and

(b) the amount paid by the First Applicant and the Second Applicant in respect of the registered mortgage over the Resort Land being Lot 4 on SP219085.

[4] The Registrar determine the amount that is owed by the Respondents, or any of them, to the Applicants, or any of them, or by the Applicants to the Respondents as a result of such inquiry.

[5] The balance so found be paid by the Respondents to the Applicants, or by the Applicants to the Respondents, as the case may be.

[6] There will be liberty to apply.

CATCHWORDS: CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – where the applicants agreed to purchase several lots of real property from the respondents for $4 million – where settlement did not occur and the contracts were varied – where performance of the contracts as varied led to part payment of $2 million – where title to the lots would not be conveyed until a subsequent payment was made – whether the contract was an instalment contract within the meaning of s 73 of the *Property Law Act* 1974 (Qld)

CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – where the applicants agreed to purchase several lots of real property from the respondents for $4 million – where s 73 of the *Property Law Act* 1974 (Qld) provides that a purchaser under an instalment contract may avoid the contract if the vendor, without the consent of the purchaser, mortgages the land the subject of the contract – where the vendors mortgaged one of the lots of real property – where the vendors allege that a conversation occurred more than a year earlier in which the purchasers consented to the mortgage – whether the conversation occurred – whether the conversation amounted to consent within s 73

EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – GENERALLY – where the applicants agreed to purchase several lots of real property from the respondents for $4 million – where the purchasers sought and obtained an order for specific performance of the contract – where the purchasers subsequently became aware of facts which entitled them to avoid the contract pursuant to s 73 of the *Property Law Act* 1974 (Qld) – where the purchasers purported to exercise the right – whether the order for specific performance affected the purported exercise of the statutory right to avoid the contract

CIVIL PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – GENERAL PRINCIPLES – where the applicants agreed to purchase several lots of real property from the respondents for $4 million – where the purchasers sought and obtained an order for specific performance of the contract – where r 667(2)(f) of the *Uniform Civil Procedure Rules* 1999 (Qld) allows for the setting aside of an order for specific performance where the court considers it appropriate for reasons that have arisen since the order was made – where the purchasers subsequently exercised their right to avoid the contract pursuant to s 73 of the *Property Law Act* 1974 (Qld) – whether the purchasers should be relieved of their obligation to complete

RESTITUTION – CLAIMS ARISING OUT OF

INEFFECTIVE CONTRACTS – UNENFORCEABLE OR VOID CONTRACT – VOID CONTRACT – GENERALLY – where the applicants agreed to purchase several lots of real property from the respondents for $4 million – where settlement did not occur and the contracts were varied – where performance of the contracts as varied led to part payment of $2 million – where title to the lots would not be conveyed until a subsequent payment was made, but the purchasers were permitted to enter into possession – where the purchasers subsequently exercised their right to avoid the contract pursuant to s 73 of the *Property Law Act* 1974 (Qld) – whether the purchasers have a right of recovery at law of the $2 million part payment

EQUITY – EQUITABLE REMEDIES – OTHER REMEDIES – where the applicants agreed to purchase several lots of real property from the respondents for $4 million – where settlement did not occur and the contracts were varied – where performance of the contracts as varied led to part payment of $2 million – where title to the lots would not be conveyed until a subsequent payment was made, but the purchasers were permitted to enter into possession – where the purchasers subsequently exercised their right to avoid the contract pursuant to s 73 of the *Property Law Act* 1974 (Qld) – whether, if the purchasers do not have a right of recovery at law, they are entitled in equity to relief against forfeiture of the instalments – whether the purchasers have a right of recovery in equity of the $2 million part payment

Uniform Civil Procedure Rules 1999 (Qld), r 667, r 668
Property Law Act 1974 (Qld), s 64, s 71, s 73

Baltic Shipping Co v Dillon (1993) 176 CLR 344, applied
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353, cited
Dies v British and International Mining and Finance Co Ltd [1939] 1 KB 724, cited
Dunworth v Mirvac Queensland Pty Ltd [2012] 1 Qd R 207, cited
Ellison v Lutre Pty Ltd (1999) 88 FCR 116, cited
Facey v Rawsthorne (1925) 35 CLR 566, cited
Geeveekay v Director of Consumer Affairs Victoria [2008] VSC 50, cited
Hewett v Court (1983) 149 CLR 639, cited
Landers v Schmidt [1983] 1 Qd R 188, not followed
Legione v Hateley (1983) 152 CLR 406, cited
Lexane Pty Ltd v Highfern Pty Ltd [1985] 1 Qd R 446, applied
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457, applied
MSD Securities Pty Ltd v MFB Properties (NQ) Pty Ltd [2016] QSC 261, related
Mulkearns v Chandos (No 3) [2005] NSWSC 504, cited

O'Connor v S P Bray Ltd (1936) 36 SR (NSW) 248, cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634, cited
Sibbles v Highfern Pty Ltd (1987) 164 CLR 214, cited
Singh (Sudagar) v Nazeer [1979] Ch 474, cited
Stern v McArthur (1988) 165 CLR 489, cited
Sunbird Plaza Pty Ltd v Maloney (1989) 166 CLR 245, cited
Wacal Developments Pty Ltd v Realty Developments Pty Ltd (1978) 140 CLR 503, cited

COUNSEL: K N Wilson QC, with D J Pyle, for the applicants
M A Jonsson QC, with M Ballans, for the respondents

SOLICITORS: Dowd & Company for the applicants
Preston Law for the respondents

Introduction

[1] In October 2016, Flanagan J conducted a trial of a dispute between the present applicants (**the purchasers**) and the present respondents (**the vendors**) in relation to a suite of contracts by which, for a consideration of $4 million, the purchasers sought to acquire land and an associated resort business in North Queensland. The land was more particularly described as Lots 1, 2, 3 and 4 on SP219085. The resort business was conducted on Lot 4.

[2] Both the purchasers and the vendors sought specific performance of the relevant contracts. The dispute concerned the amount which the purchasers should be required to pay to the vendors upon completion. The reasons for judgment of Flanagan J published on 15 November 2016[1] resolved that dispute. Flanagan J then heard the parties as to further orders, directions and costs.

[3] In a judgment published on 28 November 2016, Flanagan J set out the orders he made. Relevantly the orders were as follows:

(a) The Court declared that so far as the relevant contracts had not already been performed, they ought to be specifically performed and carried into execution and the Court ordered and adjudged accordingly.

(b) In performance and execution of the contracts, the purchasers were required to pay to the vendors on or before 19 December 2016, the amount of $1,988,412.82 calculated in the manner set out in a table in the judgment.

(c) In exchange for the payment, the vendors were required to deliver up to the purchasers:

(i) such transfer or transfers under the *Land Title Act* 1994 (Qld) as were necessary to transfer title in Lots 1, 2, 3 and 4 to the purchasers under and in accordance with the relevant contracts, capable of immediate registration after stamping;

(ii) releases in respect of three separate and specified mortgages in respect of Lots 2, 3 and 4; and

(iii) a release of a specified statutory charge in respect of Lots 1, 2 and 4.

[4] On 19 December 2016 and upon the purchasers, by their Counsel, offering the usual undertakings as to damages, I ordered that the relevant parts of the judgment of Flanagan J be stayed pending the hearing and determination of an originating application filed by the purchasers.

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[1] *MSD Securities Pty Ltd v MFB Properties (NQ) Pty Ltd* [2016] QSC 261.

[5] By their originating application (as amended), the purchasers sought orders pursuant to rr 667(2)(f) and 668 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**), the effect of which would be to release them from their obligations to complete the purchase as required by the judgment of Flanagan J. They also sought consequential orders for repayment of the part payments already made and for associated adjustments and allowances.

[6] The purchasers' contentions were as follows.

[7] First, on 21 September 2016 the vendor named in the contract in respect of Lots 1, 2 and 4 had, without the consent of the purchaser concerned, mortgaged Lot 1.

[8] Second, the purchasers had not known of that fact at any time before Flanagan J gave judgment. [2] Indeed, they found out about it for the first time on 6 December 2016 consequent upon the mortgagee having lodged a caveat on 30 November 2016.

[9] Third, the contract in respect of Lots 1, 2 and 4 was an instalment contract within the meaning of s 73 of the *Property Law Act* 1974 (Qld). Accordingly, the consequence of the vendor having mortgaged Lot 1 without the purchaser's consent was that, pursuant to s 73(2), the contract was voidable by the purchaser at any time before completion.

[10] Fourth, on 13 December 2016 the purchaser exercised its right to avoid the contract in respect of Lots 1, 2 and 4. Because the remaining contracts in the suite of contracts concerned were all expressly interdependent with that contract and with each other, the termination of the contract in respect of Lots 1, 2 and 4 permitted the purchasers to terminate all other contracts. They duly did so, also on 13 December 2016.

[11] Fifth, that termination was a sufficient basis to justify orders pursuant to rr 667(2)(f) and 668 of the UCPR, the effect of which would be to release the purchasers from their obligations to complete the purchase of the land and the resort business as required by the judgment of Flanagan J.

[12] Sixth, it was appropriate then to make consequential orders for repayment of the $2 million part-payments already made and for associated adjustments and allowances.

[13] For their part, the vendors opposed the orders sought by the purchasers. They pointed out that they in fact obtained the release of the mortgage over Lot 1 on 16 December 2016. The vendors suggested, and the purchasers did not dispute, that the vendors could have complied with the specific performance orders. They contended that the application should be dismissed and the purchasers required to complete the purchase.

[14] Alternatively, the vendors submitted that, if the orders were set aside, there should be no orders for repayment of the $2 million which had already been made towards the $4 million purchase price.

[15] Before embarking on a consideration of the issues which arise for determination, it is appropriate to set out the facts in more detail.

The facts

The relevant contracts and their variations

[16] The purchasers comprised:

(a) MSD Securities Pty Ltd (**MSD Securities**);

(b) PK's Resort Pty Ltd (**PK's Resort**);

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[2] The mortgage over Lot 1 was not one of the mortgages mentioned on the face of the specific performance order. Of course, that is not to say that the vendors could have complied with the order without delivering a release of the mortgage. The contracts which were ordered to be specifically performed contained terms requiring the transfer of unencumbered title.

(c) Mr Mark Leonard Seabrook; and

(d) Mr David Brucesmith.

[17] The vendors comprised:

(a) MFB Properties (NQ) Pty Ltd as trustee for the MFB Property Trust (**MFB Properties**);

(b) The Jungle Village Pty Ltd (**Jungle Village**);

(c) Ms Ashlee Jane Piper; and

(d) Mr Mark Frederick David Biancotti, who was the sole director of MFB Properties and Jungle Village and the de facto partner of Ms Piper.

[18] The transaction between the purchasers and the vendors was documented by a suite of seven contracts all entered into on 13 March 2014. First, there was a transaction deed to which all four purchasers and all four vendors were party. Then there were six underlying contracts, namely:

(a) a contract between MSD Securities and MFB Properties by which MSD Securities agreed to purchase Lots 1, 2 and 4 from MFB Properties for $3.3 million;[3]

(b) a contract between MSD Securities and Ms Piper by which MSD Securities agreed to purchase lot 3 from Ms Piper for $300,000.00;[4]

(c) a contract between PK's Resort and Jungle Village by which PK's Resort agreed to purchase from Jungle Village the resort business conducted on lot 4 for $400,000.00; [5]

(d) a contract between Mr Seabrook and Mr Biancotti by which Mr Biancotti agreed to purchase a 72 foot motor cruiser (**the vessel**) from Mr Seabrook "for an amount of $1,500,000";[6]

(e) a contract between Mr Brucesmith and Mr Biancotti by which Mr Biancotti agreed to purchase the Gold Coast home unit from Mr Brucesmith "for an amount of $250,000";[7] and

(f) a contract between Mr Brucesmith and Mr Biancotti by which Mr Biancotti agreed to purchase the Gold Coast house from Mr Brucesmith "for an amount of $250,000".[8]

[19] The transaction deed was the contract referring to the six underlying contracts which tied them together and explained how they were to be performed. To the extent of any inconsistency, the terms of the transaction deed prevailed over the terms of the underlying contracts. The basic elements of the transaction so revealed were:

(a) MSD Securities would purchase:

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[3] The contract was in standard REIQ form which required settlement on or before 1 May 2014, a deposit of $1.00 and payment of the balance purchase price by bank cheque on settlement.

[4] The contract was in standard REIQ form which required settlement on or before 1 May 2014, a deposit of $1.00 and payment of the balance purchase price by bank cheque on settlement.

[5] The contract was in standard REIQ form which required completion on or before 1 May 2014 and payment of the purchase price by cash or bank cheque on completion.

[6] The contract required settlement on or before 1 May 2014 and payment of the purchase price on settlement.

[7] The contract was in standard REIQ form which required settlement on or before 1 May 2014 and payment of the purchase price by bank cheque on settlement.

[8] The contract was in standard REIQ form which required settlement on or before 1 May 2014 and payment of the purchase price by bank cheque on settlement.

(i) Lots 1, 2 and 4 from MFB Properties for $3.3 million;[9] and

(ii) Lot 3 from Ms Piper for $300,000;[10]

(b) PK's Resort would purchase from Jungle Village the resort business conducted on Lot 4 for $400,000.00.[11]

(c) However, the $4 million total consideration would not be paid by those specific purchasers to those specific vendors in that way. Rather, the three vendors concerned (namely MFB Properties, Jungle Village and Ms Piper) together agreed "… to transfer [Lots 1, 2, 3 and 4 and the resort business conducted on Lot 4] to [MSD Securities and PK's Resort] for [$4 million]".[12] They then agreed[13] that the total purchase consideration of $4 million owed to them by MSD Securities and PK's Resort would be paid at settlement by:

(i) Mr Seabrook transferring the vessel to Mr Biancotti "for an amount of $1,500,000";[14]

(ii) Mr Brucesmith transferring the Gold Coast home unit to Mr Biancotti "for an amount of $250,000";[15]

(iii) Mr Brucesmith transferring the Gold Coast house to Mr Biancotti "for an amount of $250,000";[16] and

(iv) a cash payment of $2,000,000 by MSD Securities and PK's Resort for the balance in accordance with agreed apportionments and any adjustments.[17]

(d) The six underlying contracts were subject to contemporaneous settlement with each other.[18] Settlement was initially to occur on 1 May 2014. Settlement could be extended, but if not settled within the extended time and if any one contract was terminated, all other contracts would be automatically terminated.[19]

(e) It was expressly agreed that the intention of the transaction deed was to tie in all of the contracts and, should any one contract be terminated, the deed could be relied upon by a party to terminate others.[20]

[20] It seems to be common ground between the parties that it was never contemplated that Mr Biancotti would actually pay at settlement the cash consideration referred to in the contracts referred to at [18](d), [18](e) and [18](f). Rather the contemplation seems to have been that the terms in those contracts and the transaction deed which on their face contemplated actual payment by Mr Biancotti were to be regarded as a device by which agreed value was attributed to what was to be paid by the purchasers' side of the transaction to the vendors' side of the transaction.

[21] To a real extent this flies in the face of the some of the wording of both the transaction deed and the underlying contracts concerned. That is so because (i) the transaction deed records each of the transferring parties in the underlying contracts agreeing to transfer the

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[9] Clause 3 of the transaction deed.
[10] Clause 4 of the transaction deed.
[11] Clause 5 of the transaction deed.
[12] Clause 9.1 of the transaction deed.
[13] Clause 9.2 of the transaction deed.
[14] Clause 9.2(c) of the transaction deed.
[15] Clause 9.2(a) of the transaction deed.
[16] Clause 9.2(b) of the transaction deed.
[17] Clause 9.2(d) of the transaction deed.
[18] Clause 11.1 of the transaction deed.
[19] Clause 11.2 of the transaction deed.
[20] Clause 11.5 of the transaction deed.

assets the subject of the underlying contract, pursuant to the terms of the underlying contract, and (ii) in the usual way, the terms of the underlying contract require the transferee party to pay the purchase price. Literally, this would require Mr Biancotti to pay $500,000 to Mr Brucesmith and $1.5 million to Mr Seabrook by bank cheque on settlement. It would mean that the vendors' side of the transaction only received a net consideration of $2 million, not $4 million.

[22] I will not explore that construction further because it was not advanced by any party in either the trial before Flanagan J or the trial before me, and it is the sort of construction of ambiguous terms which, if advanced, could well have been influenced by extrinsic evidence. It seems to me that where the transaction deed referred to payment of the $4 million consideration partially by transfer of the Gold Coast properties and the vessel, "for" the amounts specified (as I have recorded at [19](c)(i), [19](c)(ii) and [19](c)(iii) above), it should be taken to mean "at the agreed value of" those amounts.

[23] For present purposes, the significance of the point I have made is that at one stage in the argument before me Senior Counsel for the vendors had contended that the transaction deed merely created the possibility of an alternative performance regime where payment might be made in the way I have described at [19](c), but that it did not extinguish or otherwise abrogate the possibility of performance of the underlying contracts individually in accordance with their terms. When I pointed out that performing all of the underlying contracts individually in accordance with their terms would have required Mr Biancotti to pay $2 million, that argument was abandoned. That is the explanation for the conclusion I have expressed at [19](c) above, which does not describe the regime for payment as an optional alternative.

[24] Settlement did not occur on 1 May 2014 as had been contemplated. However, no party terminated any of the contracts concerned. Rather, on 29 May 2014 the parties agreed to vary the transaction deed and related contracts, including the settlement date as set out in an email of the same date from the purchasers' solicitors to the vendors' solicitors (**the May variation**) as follows:[21]

> I note there has been a volley of emails regarding the proposed terms of an early of what has been termed 'Partial Settlement'.
>
> I understand the agreed position is as follows:
>
> 1. Settlement of all contract [sic] between our respective clients will take place 2 June 2014 (**Settlement Date**);
>
> 2. On the Settlement Date, Mark and David will transfer the Gold Coast House, the Gold Coast Unit and the Vessel to Biancotti pursuant to the terms of [the contracts referred to at [19](c)(i), [19](c)(ii) and [19](c)(iii)];
>
> 3. The parties acknowledge that upon the transfers referred to in Item 2, consideration of $2,000,000.00 will have been paid being a part payment under the Transaction Deed and that a balance amount of $2,000,000.00 remains to be paid under the Transaction Deed;
>
> 4. On the Settlement Date, MSD and PK's will take possession of [Lots 1, 2, 3 and 4 and the resort business conducted on Lot 4] and will assume operation of the Business and be responsible for all outgoings and entitled to all income of the Business, [and Lots 1, 2, 3 and 4] from the Settlement Date;
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> 5. MSD, PK's, Mark and David confirm they have received finance approval for the acquisition of [Lots 1, 2 and 3] and that MSD and PK's will pay to MFB, Jungle Village and Ashlee the sum of $625,000.00 in exchange for the unencumbered title to those properties and the Business within 30 days of the Settlement Date;

[21] Fact found by Flanagan J: see reasons at [13].

6. The parties acknowledge that upon the transfers referred to in Item 2 and 5, consideration of $2,650,000.00 will have been paid under the Transaction Deed and that a balance amount of $1,350,000.00 remains to be paid under the Transaction Deed and that MFB will remain the registered owner of [Lot 4][22];

7. MFB discloses that it has a registered mortgage over [Lot 4] and that it is making monthly repayments against this property;

8. MSD and PK's agrees to make the monthly repayments referred to in Item 7 above on behalf of MFB and the parties agree that part of the payment made is interest and part is principal;

9. MSD must pay MFB the sum of $1,375,00.00 less any principal payments made under the terms of Item 8 above, within 12 months of the Settlement Date in exchange for the unencumbered title to [Lot 4];

10. Despite and [sic] provision to the contrary above, MFB and Biancotti agree to "vendor finance" the maximum sum of $400,000.00 should MSD or PK's request when the final payment under Item 9 is required;

11. Each party is responsible for all costs of each property and are entitled to all income of each property (including the Vessel) from the Settlement Date.

[25] At the settlement date on 2 June 2014, Mr Brucesmith transferred the Gold Coast house and the Gold Coast home unit to Mr Biancotti and Mr Seabrook transferred the vessel to Mr Biancotti.[23] It is common ground before me that,[24] consistently with the observations I have made at [20] to [23] above, this occurred without Mr Biancotti paying anything to either Mr Brucesmith or Mr Seabrook. MFB Properties, Jungle Village and Ms Piper gave possession of Lots 1, 2, 3 and 4 and the resort business conducted on Lot 4 to MSD Securities and PK's Resort. It seems that MSD Securities and PK's Resort commenced making the monthly payments of MFB's mortgage over Lot 4.[25]

[26] The purchasers MSD Securities and PK's Resort were, however, unable to and did not pay to the vendors MFB Properties, Jungle Village and Ms Piper the sum of $625,000 by 2 July 2014 as had been contemplated by the May agreement.[26] Accordingly, there was no transfer to them of the unencumbered title to Lots 1, 2 and 3 and the resort business.[27]

[27] The parties made a further agreement with respect to performance of the transaction deed and the related contracts which is recorded in an email dated 31 July 2014 from the purchasers' solicitors to the vendors' solicitors (**the July variation**) as follows:[28]

> My client continues to work with financiers to arrange settlement but in reality it will not happen today.
>
> I note that the agreement reached was for interest on the $625,000 amount would be charged at 12%pa from 1 August if that portion was not settled by today.
>
> I understand the agreement reached is as follows:
>
> 1. The contracts and arrangements contained in the Transaction Deed are on foot with settlement having been effected on 2 June 2014 based on the [sic] those contracts and the terms of my email dated 29 May 2014;
>
> 2. The parties have agreed to further amend in the terms of Point 1 above as follows;

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[22] There is a discrepancy between the figures in on the one hand, paragraphs 5 and 9, and on the other hand, paragraph 6. That discrepancy was in the original document. No submission was made that it matters for present purposes.
[23] Fact found by Flanagan J: see reasons at [14].
[24] Transcript, p 2-1 to p 2-2.
[25] Fact found by Flanagan J: see reasons at [13].
[26] Fact found by Flanagan J: see reasons at [14].
[27] Fact found by Flanagan J: see reasons at [16].
[28] Fact found by Flanagan J: see reasons at [15].

3. MSD, PK's, Mark and David would try to make payment of the sum of $625,000 by 31 July 2014 to comply with Item 5 of my email of 29 May 2014;

4. Should payment contemplated in Point 3 above not be made by 31 July 2014, interest would accrue to Biancotti at the rate of 12%pa on the amount of $625,000 from 2 June 2014 until payment is made;

5. For clarification purposes, my client is entitled to all rents and income generated from the Business, Cape Land and the Round House from 2 June 2014 and is responsible for all outgoings and expenses associated with the Business [and Lots 1, 2, 3 and 4] from that date;

6. My client must make the payments contemplated by Items 7, 8 and 9 of my email of 29 May 2014 as required by their due date;

7. Rent and other income has been received by your client which rent and income is to be either repaid to my client of [sic] offset against any payment made or to be made by my client for the purposes of Point 6 above;

8. Adjustments effective 2 June 2014 need to be made in relation to telephone expenses and costs as between my client and your client, with either party producing invoices and receipts to quantify claims being made; and

9. Adjustments for prepaid accommodation packages are to be made as is an adjustment for fuel on the Vessel. …

[28] By virtue of the May variation, as subsequently varied by the July variation, the parties agreed that the amount of $2,000,000.00 was to be taken to have been paid under the transaction deed and an amount of $2,000,000.00 was to be deemed still outstanding. Whilst the purchasers were granted possession of Lots 1, 2, 3 and 4 and of the resort business conducted on Lot 4, the registered owners of Lots 1, 2, 3 and 4 remained unchanged.[29]

[29] MSD Securities and PK's Resort were again unable to complete settlement on 31 July 2014. This was because MSD Securities and PK's Resort could not obtain finance to complete the transaction deed and the contracts. In spite of the purchasers' failure to complete, the vendors agreed to keep the contracts on foot. Similarly, the purchasers, who had the benefit of finance clauses, also did not exercise their right to terminate. The purchasers did not obtain finance until a temporary offer of finance from the Commonwealth Bank on 22 December 2015. There was a plan to settle on 3 March 2016 but that came to nothing.[30]

Events leading up to the 21 September 2016 mortgage over Lot 1

[30] It is alleged by the vendors that the delay in settlement of the overall transaction meant that they had to use the equity in the properties the subject of the sale as security for borrowing monies from their financier, Bendigo and Adelaide Bank Limited (**the Bank**), in order to be able to carry out an unrelated property development transaction. The vendors contended that Mr Biancotti raised this in a conversation with Mr Brucesmith in January or February 2015 and that the nature of Mr Brucesmith's response must be taken to amount to MSD Securities having consented to the mortgage subsequently granted by MFB Properties on 21 September 2016, with the result that no right to avoid pursuant to s 73 was ever created. It is a matter of controversy between the parties whether the conversation occurred as alleged, and, if it did, it had the effect as alleged.

[31] I will come back to the findings I make as to whether the conversation occurred as alleged, and whether a conversation in the beginning of 2015 could be regarded as amounting to a grant of consent to a mortgage which was in fact granted on 21 September 2016. But before doing so, it is appropriate at this stage to record the relevant dealings which Mr

[29] The facts referred to in this paragraph were found by Flanagan J: see reasons at [16].
[30] The facts referred to in this paragraph were found by Flanagan J: see reasons at [17].

Biancotti and the entities associated with him had with the Bank in connection with the development of a commercial property in Abbot Street in Cairns.

[32] The parties connected with that development were:

(a) 63 Abbott Street Pty Ltd as trustee for the 63 Abbott Street Unit Trust (**63 Abbott Street**), which was the corporate entity responsible for the development of the Abbott Street property; and

(b) four corporate entities which were unit holders in that unit trust: Ledamark Pty Ltd as trustee for the Biancotti Family Trust (**Ledamark**), a company controlled by Mr Biancotti, and three other corporate entities, each of which were acting as a trustees of other family trusts. The Bank referred to these four entities as the Abbott Street Group.[31]

[33] In March 2015, Ledamark accepted the Bank's offer to vary the terms of existing facilities extended to Ledamark, thereby extending the total facilities extended. One of the conditions of the offer was that MFB Properties would provide a first mortgage security over Lot 1. It was contemplated that the overall security position for the Bank would then include:

(a) an unlimited guarantee from 63 Abbott Street and mortgage security over property owned by that company;

(b) mortgage security over Lot 1 of which MFB Properties was the registered proprietor; and

(c) a deed of cross-collateralization to which 63 Abbott Street, Ledamark, the other three members of the Abbott Street Group, and MFB Properties, would be parties.[32]

[34] In fact neither the mortgage over Lot 1 nor the deed of cross-collateralization was entered into in March 2015.

[35] Rather on 1 June 2015, Ledamark accepted a further offer by the Bank to vary the terms of existing facilities extended to Ledamark and on 5 June 2015 63 Abbott Street accepted an offer from the Bank for the provision of a loan facility of $650,000 for a term of 6 months for the purpose of assisting with the refurbishment of the Abbott Street development.[33]

[36] The Bank's offer to 63 Abbott Street did not refer to any security being provided by MFB Properties. However, its offer to Ledamark:

(a) erroneously assumed there was an existing mortgage over Lot 1 which had been granted by MFB Properties; and

(b) contemplated that there would be a new first mortgage over Lot 2 granted by MFB Properties and a new deed of cross-collateralization.[34]

[37] The evidence is that MFB Properties:

(a) did enter into a mortgage in registrable form over Lot 2 in favour of the Bank securing "All money owing by the Mortgagor to the Mortgagee now or in the future

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[31] Affidavit of David Pollock sworn 5 March 2017 at [4].

[32] Affidavit of David Pollock sworn 5 March 2017 at [8]-[9] and DJP-3-DJP-4 at pp6-14 (offer letter and acceptance).

[33] Affidavit of David Pollock sworn 5 March 2017 at [11]-[13], DJP-5-DJP-6 at pp15-29 (63 Abbott Street offer letter and acceptance), and DJP-7-DJP-8 at pp30-47 (Ledamark offer letter and acceptance).

[34] Affidavit of David Pollock sworn 5 March 2017 at DJP-5 at pp15-26 (63 Abbott Street offer letter) and DJP-7 at pp30-31 (Ledamark offer letter).

under the Mortgage, Agreement, or Collateral Security and including the Money hereby Secured" and that mortgage was registered on 16 June 2015;[35] and

(b) did on 1 June 2015 enter into a deed of cross-collateralization to which 63 Abbott Street, Ledamark and the other three members of the Abbott Street Group were also parties. The deed of cross-collateralization did contain a specific acknowledgement by MFB Properties (amongst other parties) of the existence of such a mortgage (amongst a long list of other securities).[36]

[38] The erroneous assumption by the Bank and Mr Biancotti and related entities that MFB Properties had already granted a mortgage over Lot 1 is apparent from the face of an email sent by the Bank's representative to Mr Biancotti on 10 June 2015, as follows:

> Just a quick clarification about your security properties being [Lots 1 and 2]
>
> These properties are only held to support advances to your entity [Ledamark] & also the entity [63 Abbott Street]. They are not linked to the other entities/families in the Abbott Street Group …
>
> In terms of our approval conditions [Lot 2] will be released when the $650 k loan to [63 Abbott Street] is repaid.
>
> I can also confirm that if $300 k was reduced to your loans to [Ledamark] we would release the mortgage over [Lot 1]. This is on the basis that the loan is not in arrears at the time of the reduction. [37]

[39] I observe that there is no evidence to suggest that the purchasers knew at any time before the orders of 28 November 2016 of the transactions in June 2015 between the Bank and Ledamark or the fact and terms of the deed of cross-collateralisation signed by MFB Properties on 1 June 2015. There is evidence that they were told in general terms that lots had been mortgaged for $650,000. Thus, correspondence by Mr Mellick, then solicitor for Mr Biancotti on 30 June 2015 stated:

> I confirm that my Client has mortgaged the Two (2) shops for $650,000.00. It was necessary for my Client to do this as a consequence of your Client's inability to effect settlement.
>
> There are no difficulties with my Client being able to discharge all mortgages following settlement.

[40] On 12 July 2016 the Bank conditionally approved extending the term of its funding to the Abbott Street Group. Amongst other conditions, the Bank mentioned the need for certain reductions in relevant loan to valuation ratios and also "Mark Biancotti's 2 properties remain linked into his debts and 1 property is linked to the 63 Abbott Street entity $650k debt and the revaluation will help in terms of getting these released". It is evident that the reference to two properties was a reference to Lot 1 and Lot 2 and the reference to the one property linked to the 63 Abbott Street entity $650k debt was a reference to Lot 2.[38]

[41] It is also evident from an email which the Bank sent to members of the Abbott Street Group on 16 August 2016 that it was in the context of finalizing the securitization of the extension of the loan facilities that the Bank realized that it had problems in relation to the securities which supported its lending to the Abbott Street Group. The Bank noted the existence of caveats which had been lodged over Lots 1 and 2. (I infer that these were caveats claimed by MSD Securities). The Bank also noted that it had erroneously

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[35] Affidavit of Mark Biancotti sworn 16 December 2016 at MFDB-4 at p56 (mortgage). The standard terms document referred to in the mortgage appeared as exhibit DJP-17 to the affidavit of David Pollock sworn 5 March 2017 and defined the money secured by the mortgage in very broad terms.

[36] See clause 1 and item 19 of the schedule to the deed of cross-collateralization (exhibit DJP-7 at pp37 and 39 of the affidavit of David Pollock sworn 5 March 2017).

[37] Affidavit of David Pollock sworn 5 March 2017 at [14] and DJP-9 at pp48-49 (email from Mr Pollock to Mr Biancotti).

[38] Affidavit of David Pollock sworn 5 March 2017 at [16] and DJP-10 at pp51-54 (email from Mr Pollock to Mr Biancotti and other representatives of 63 Abbott Street Group).

permitted the situation to exist that it had no mortgage in place over Lot 1. The Bank noted that the situation was messy and would be addressed by re-documenting relevant securities and that it would be necessary to issue a new letter of offer for all entities in the group for all loans.[39]

[42] This was the explanation for new letters of offer which the Bank sent to Ledamark and to 63 Abbott Street on 2 September 2016. In relation to Ledamark, the offer described the purpose of the variations as extending the term of an existing facility of $2,753,000 and varying security held by the Bank. In relation to 63 Abbott Street the offer described the purpose of the variations as extending the term of an existing facility of $650,000, changing the facility from interest only to principal and interest, and varying security held by the Bank. In each case the offer required (amongst other things):

(a) a new registered all monies mortgage over Lot 1 from MFB Properties;

(b) a new guarantee and indemnity from MFB Properties to secure the facilities; and

(c) a new deed of cross-collateralization to which 63 Abbott Street, Ledamark, the other three members of the Abbott Street Group, and MFB Properties, would all be parties.[40]

[43] These offers were accepted and relevant documents executed including the new mortgage over Lot 1 from MFB Properties dated 21 September 2016 and the new deed of cross-collateralization dated 28 September 2016 to which (amongst others) 63 Abbott Street, Ledamark, the other three members of the Abbott Street Group, and MFB Properties, were all parties.[41] Two observations may be made about the mortgage in respect of Lot 1. First, the debt secured by the mortgage was "all money owing by [MFB Properties as trustee] to [the Bank] now or in the future under the Mortgage, Agreement, or Collateral Security and including the Money hereby Secured".[42] Second, given the breadth of that language, the terms of the deed of cross-collateralization, and the fact that MFB Properties as trustee had given unlimited guarantees and indemnities to the Bank to secure the facilities which the Bank had advanced to 63 Abbott Street and to Ledamark, the mortgage dated 21 September 2016 had the effect of encumbering Lot 1 with a total indebtedness of at least $3.4 million.[43]

Events after the 21 September 2016 mortgage over Lot 1

[44] The trial before Flanagan J in which each side sought specific performance took place on 17 and 18 October 2016, and further submissions were received on 25 October 2016. Reasons for judgment were published on 15 November 2016, and orders were formalized on 28 November 2016.

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[39] Affidavit of David Pollock sworn 5 March 2017 at [17] and DJP-11 at pp55-58 (email from Mr Pollock to Mr Biancotti and other representatives of the 63 Abbott Street Group).

[40] Affidavit of David Pollock sworn 5 March 2017 at [19], DJP-12 at pp59-72 (Ledamark offer letter), DJP-14 at pp77-94 (63 Abbott Street offer letter), and DJP-15 at pp95-103 (deed of cross-collateralisation).

[41] Affidavit of David Pollock sworn 5 March 2017 at [19]-[26], DJP-12 at pp59-72 (Ledamark offer letter), DJP-13 at pp73-76 (acceptance of Ledamark offer), DJP-14 at pp77-94 (63 Abbott Street offer letter and acceptance), DJP-15 at pp95-103 (deed of cross-collateralisation), DJP-16 at p104 (mortgage).

[42] Affidavit of David Pollock sworn 5 March 2017 at DJP-16 at p104 (mortgage).

[43] The evidence suggests that the Bank was owed $2.753m from Ledamark and $650,000 from 63 Abbott Street (see affidavit of Mr Biancotti sworn 28 February 2017 at p. 68). However, the guarantees recited by the Deed of Cross-Collateralization were not in evidence before me. It may be, for example, depending on the terms of the guarantees and related securities, that the debt owed to the Bank by the other 3 members of the Abbott Street Group was encompassed, which would make the total encumbrance of the order of $10.7 million.

[45] On 30 November 2016, the Bank lodged a caveat over Lot 1,[44] claiming:

> An equitable mortgage constituted by a mortgage in registrable form between the registered owners as mortgagor and the caveator as mortgagee over [Lot 1] and dated 21 September 2016 whereby the registered owners' estate in fee simple in the Land is charged with the payment of moneys owing to the caveator.[45]

[46] As I have mentioned, it was the lodgment of that caveat which led to the mortgage over Lot 1 coming to the attention of the purchasers, the purchasers purporting to terminate the relevant contracts as described at [10] above, and the purchasers bringing the present application.

[47] In a passage in his affidavit on which he was not challenged, Mr Seabrook on behalf of MSD Securities deposed that:

> I first became aware that Mark Biancotti had mortgaged Lots 1 and 2 to Bendigo Adelaide Bank in September 2016 on 7 December 2016 when my solicitor telephoned me and said that his office had received notice from the Titles Office that caveats had been lodged by the bank to register this mortgage interest. I did not consent to this mortgage. If I had become aware of this mortgage in September 2016, I would have taken advice and taken immediate steps to rescind the contract for the purchase of lots Lot 1 and 2 and to bring the other contracts to an end.[46]

[48] It is difficult to accept that passage at face value in relation to Lot 2 and the knowledge which MSD Securities must have had. In the first place there was no mortgage of Lot 2 in September 2016 because that had occurred in June 2015. Second, at the trial before Flanagan J the purchasers must have known of the mortgage which had been granted in respect of Lot 2 and determined to proceed regardless. That is an inference which must be drawn from the fact that the mortgage was registered and capable of being observed by title search,[47] the fact that documents which were in evidence before Flanagan J which noted the existence of the mortgage,[48] and the fact that the order made by Flanagan J specifically provided for releases in respect of that mortgage.

[49] But the same cannot be said in relation to Mr Seabrook's observations in the first two sentences concerning Lot 1. I note that the purchasers rest their case as to avoidance of the contract for Lots 1, 2 and 4 and subsequent termination of the other contracts, solely on the grant of the mortgage in respect of Lot 1 on 21 September 2016.[49] There is no evidence to suggest that the purchasers knew at any time before the orders of 28 November 2016 of:

(a) the transactions in September 2016 between the Bank and Ledamark and the Bank and 63 Abbott Street;

(b) the mortgage which was executed by MFB Properties with respect to Lot 1 on 21 September 2016;

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[44] The Bank did not register the new mortgage over lot 1 granted on 28 September 2018. It may be that that was because of the caveat which had been lodged by MSD Securities in March 2016.

[45] Affidavit of Mark Biancotti sworn 28 February 2017 at MFDB23 at p99 (caveat).

[46] Affidavit of Mark Seabrook sworn 5 March 2017 at [8].

[47] Affidavit of Mark Biancotti sworn 16 December 2016 at MFDB-4 at p56 (mortgage).

[48] Affidavit of Habib Mellick sworn 1 March 2017 at HAM4 at p15 (email from Mr Mellick to Mr Tosoni), HAM5 at pp17-18 (email from Mr Mellick to Mr Tosoni), HAM10 at p43 (settlement sheet), HAM11 at p 46 (amended settlement sheet), HAM12 at p49 (amended settlement sheet), HAM13 at p53 (settlement sheet), HAM16 at p64 (amended settlement sheet); affidavit of Mark Biancotti sworn 28 February 2017 at MFDB19 at pp77-80 (email from Mr Pollock to 63 Abbott Street Group representatives) and MFDB20 at p83 (offer letter); affidavit of Mark Biancotti sworn 16 December 2016 at MFDB5 at p58 (email from Mr Mellick to Mr Tosoni), MFDB6 at p60 (email from Mr Mellick to Mr Tosoni) and MFDB7 at pp61-63 (email from Mr Pollock to 63 Abbott Street Group representatives); affidavit of David Pollock sworn 5 March 2017 at DJP-11 at pp55-57 (email from Mr Pollock to 63 Abbott Street Group representatives), DJP-12 at p61 (offer letter), and DJP-14 at p79 (offer letter).

[49] Applicants' submissions at [16]; transcript, p 2-60.

(c) the deed of cross-collateralisation dated 28 September 2016 to which 63 Abbott Street, Ledamark, the other three members of the Abbott Street Group, and MFB Properties, would all be parties; or

(d) the quantum of the monies which those security instruments had secured,

and I find that the purchasers neither knew of those facts nor the existence of rights which might be exercisable pursuant to s 73(2) arising therefrom at any time before the orders were made by Flanagan J.

[50] One might well be sceptical of Mr Seabrook's evidence in the final sentence in relation to Lot 1, given that it advances a counterfactual after the event, which seems to support the case he seeks to advance. On the other hand, the complexion of the transaction from the point of view of a purchaser deciding whether to continue to pursue specific performance litigation which also sought reduction of the purchase price, when apprised of the true nature of the securitization which had been undertaken by the vendor in September 2016 without its knowledge, would have undoubtedly been vastly different if the facts had been known before trial. So the notion of the counterfactual Mr Seabrook advances does not strike me as inherently unlikely. Having regard also to the fact that his evidence in this regard was not challenged, there is no reason not to accept it, insofar as it relates to Lot 1.

The issues

[51] The principal issues are these:

(a) First, was the contract in respect of Lots 1, 2 and 4 an instalment contract within the meaning of s 73 of the *Property Law Act*?

(b) Second, if so, did the contract become voidable by the purchaser when MFB Properties granted a mortgage over Lot 1 on 21 September 2016?

(c) Third, what is the impact on the right to avoid of the order of specific performance?

(d) Fourth, should an order now be made to relieve the purchasers of their obligation to complete?

(e) Finally, if so, what consequential orders should be made?

[52] I will deal with them under separate headings below. In the course of so doing, I will address the material subsidiary issues which have been raised in submissions.

Was the contract in respect of Lots 1, 2 and 4 an instalment contract within the meaning of s 73 of the *Property Law Act*?

[53] Section 73 is in these terms:

> **73 Land not to be mortgaged by vendor**
>
> (1) A vendor under an instalment contract shall not without the consent of the purchaser sell or mortgage the land the subject of the contract.
>
> (2) Where land is mortgaged in contravention of this section—
>
> (a) the instalment contract shall be voidable by the purchaser at any time before completion of the contract; and
>
> (b) the vendor shall be guilty of an offence against this Act.
>
> Maximum penalty—9 penalty units.
>
> (3) Nothing in this section affects—
>
> (a) the rights of any bona fide purchaser from the vendor for value and without notice of the instalment contract; or
>
> (b) the *Land Title Act* 1994.

[54] The following terms are defined in s 71:

(a) instalment contract means an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments.

(b) mortgage includes any encumbrance or charge other than a charge attaching by the operation of any statutory enactment.

(c) purchaser includes any person from time to time deriving an interest under an instalment contract from the original purchaser under the contract.

(d) vendor includes any person to whom the rights of a vendor under an instalment contract have been assigned.

[55] Relying on the judgment of Gibbs J (as he then was) in *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, the purchasers argued that the contract between MSD Securities and MFB Property for the sale of Lots 1, 2 and 4 was an instalment contract because the contract was executory, MSD Securities became bound to pay (and did pay) $2 million as a result of the May and July variations, and that payment did not entitle MSD Securities to receive a transfer of any of Lots 1, 2 or 4. Alternatively, the purchasers submitted that the May and July variations resulted in MSD Securities becoming bound to pay the monthly repayments for the mortgage over Lot 4 without being entitled to receive conveyance in exchange, and in the circumstances the contract became an instalment contract.

[56] For their part, the vendors submitted that, as it originally stood, the contract required payment of $3.3 million at settlement in exchange for conveyance of the subject lots, and therefore could not be an instalment contract. They further submitted that the May and July variations operated only to vary the transaction deed, and not the underlying contracts. They contended that the transaction deed merely provided for an "alternative performance regime". As I have noted above, the vendors eventually abandoned that argument. The vendors further submitted that the definition of instalment contract should be read as referring to monetary payments by the purchaser to the vendor. On that definition, the contract could not be an instalment contract because it required the transfer of assets *in specie* to Mr Biancotti (in circumstances where MSD Securities was the purchaser), and the payment of mortgage repayments and outgoings to third parties.

[57] By way of reply, the purchasers abandoned any argument that the contract, as originally executed, was an instalment contract. They contended that the May and July variations varied the underlying contracts so as to require an agreed part payment of the purchase price to be effected without an entitlement to a conveyance of title. They submitted that the definition of instalment contract encompassed non-monetary payments.

[58] I conclude that the vendors' arguments must be rejected. Once the May variation occurred, the contract became an instalment contract. One cannot regard the transaction deed as anything other than an essential component of the contract. The vendors provided no authority in support of their contention that the definition of instalment contract should be read as referring only to monetary payments by the purchaser to the vendor and not non-monetary payments by way of transfer of assets or other aspects of monies worth. They advanced no reason why that conclusion suited the policy of the statute. It seems to me that there is no reason in principle to deny the protection of the Act to purchasers who make their additional payments in a non-monetary way. Nor does the language used by the Act compel that outcome. The ordinary and natural meaning of payment is sufficiently broad to encompass payments of the nature of those dealt with in this case.

[59] Further, although the payment by transferring the property to Mr Biancotti was not a payment which was made directly to the person responsible for conveying the land to the purchasers, it was a payment which had the effect of partially discharging the obligation to pay the purchase price to that person. By the terms of the contract (including the transaction deed), the vendor regarded the payment to Mr Biancotti as, relevantly, a payment to the vendor. Accordingly, it must be regarded as a payment to the vendor within the meaning of the definition of instalment contract.

[60] The contract in respect of Lots 1, 2 and 4 was an instalment contract once it was varied by the May and July variations.

Did the contract in respect of Lots 1, 2 and 4 become voidable by the purchaser when MFB Properties granted a mortgage over Lot 1 on 21 September 2016?

Introduction

[61] The right to avoid pursuant to s 73 of the *Property Law Act* only exists if a vendor under an instalment contract mortgages the land the subject of the contract without the consent of the purchaser.

[62] The vendors' submission was that a conversation between Mr Biancotti and Mr Brucesmith which, on their case, took place in January or February 2015, should be regarded as evidencing consent to the grant of the mortgage over Lot 1 on 21 September 2016. They submitted that the word 'consent' in s 73 should be construed as requiring only "assent, acquiescence, or permission, which might be constituted by a prospective authorisation given in general terms".

[63] The purchasers made three submissions. First, they denied that the alleged conversation ever occurred. Second, they submitted that Mr Brucesmith did not have authority to consent on behalf of MSD Securities. Third, and critically, the alleged conversation was, in any event, insufficient to constitute consent to the mortgage granted over Lot 1 on 21 September 2016. They submitted that 'consent' for the purposes of s 73 would have required "knowledge of the material facts on which the [mortgage] was based and some affirmative act of consent, whether by representation or otherwise". They contended that mere acquiescence was insufficient. Therefore, even if the conversation did take place and Mr Brucesmith had authority, the statements ascribed to him were insufficient to constitute consent.

Did the alleged conversation occur?

[64] Mr Biancotti deposed:

> 7. In about January or February 2015, in the presence of Graham Norman Williams I had a conversation with [Mr Brucesmith] at the Pantry Café, Palm Cove, during which:
>
> (a) I explained to [Mr Brucesmith] that I needed the money from a delayed settlement to invest in another project, so I'd have to borrow some money against the equity in the shops at Cape Tribulation; and
>
> (b) [Mr Brucesmith] said there was no problem with me doing that and he never expressed any concern about me doing that whatsoever.

[65] Mr Williams deposed to an account of the conversation is in terms similar to that of Mr Biancotti:

> 2. In about February 2015 Mark Biancotti and David Brucesmith were sitting down and having a coffee together at the Pantry Café. At times while they were conversing and having a coffee I sat down and conversed with them.
>
> 3. During the conversation, Mr Biancotti was asking Mr Brucesmith about when the Plaintiffs would be settling the purchase of the PK's Jungle Village properties. I can't recall exactly how Mr

Brucesmith responded, but he never provided any direct answer as to when the settlement might take place.

4. Mr Biancotti said that he was carrying out some renovation at another property of his, and needed funds to pay for the costs of the renovation. He said further that if he couldn't get funds soon from the sale proceeds of the PK's Jungle Village properties, then he would need to borrow funds against my shops at PK's Jungle Village.

5. Mr Brucesmith responded with words to the effect that that was not a problem and that it was okay for Mr Biancotti to do that.

[66] Each of Mr Biancotti and Mr Williams elaborated further on the conversation in a second affidavit.

[67] For his part, Mr Brucesmith deposed that no such conversation occurred. His evidence was that the conversation could not have occurred in January or February 2015. He was in Cape Tribulation running the resort until 22 January 2015, travelled to Cairns on that date but did not visit Palm Cove (where the conversation is alleged to have occurred), left Cairns on 23 January 2015 to travel overseas, returned to Cairns on 25 February 2015 and returned to the resort on 27 February 2015. He said he had no contact with Mr Biancotti during this period. His evidence concerning the timing of his trip was corroborated by extracts from his passport.

[68] Mr Brucesmith did depose to having a conversation with Mr Biancotti in June 2015 in which the question of borrowing was raised by Mr Biancotti. Mr Brucesmith deposed:

9. I recall having had a discussion with Mr Biancotti in about June 2015 where he mentioned to me something about a mortgage of the shops at PK's. Having refreshed my memory from a note of a conversation on 17 June 2015 with Mr Biancotti I now recall that the substance and effect of that conversation was that Mr Biancotti had to borrow an extra $950,000.00 from the IGA to cover the Great Northern Expenses. I understood the words "IGA" to be a reference to the shops at PK's and the "Great Northern Expenses" to refer to borrowing undertaken by Mr Biancotti. I did not understand Mr Biancotti to be asking me a question. I thought he was telling me what he had done. Now produced and shown to me and marked "DB-2" [sic] is a copy of the relevant extracts from the book kept by me and checked by me at the relevant time.

10. Following this conversation I recall that I spoke to Mr Seabrook and told him what Mr Biancotti had said. Mr Seabrook responded to me by saying that "he can't". By this I understood him to mean that Mr Biancotti could not mortgage the relevant land.

11. I had no further conversations with Mr Biancotti about these matters. The reason for this was I did not understand that he was asking me a question but, rather, he was describing to me what he had already done.

[69] Mr Brucesmith's contemporaneous note which was exhibit DBS-2 was in these terms:

Spoke with Mark Biancotti re electing [Shane Mullins, an agent to market the property]. He said he was paying insurance on the IGA, 3900 +. He also had to pay land tax and he had to borrow an extra 950K from the IGA to cover the Great Northern expenses.

[70] Mr Seabrook's evidence was that he and Mr Brucesmith had an arrangement in which Mr Brucesmith knew that he was not authorized to make decisions in relation to the assets of PK's Resort without first informing Mr Seabrook and obtaining his consent, and he was not authorized to make decisions on behalf of MSD Securities. Mr Brucesmith agreed with that proposition. Mr Seabrook also deposed that at no time during January or February 2015 did Mr Brucesmith raise with him any such conversation or any requirement that Mr Biancotti had to borrow funds against any part of the resort land and buildings. That was in contradistinction to what happened in June 2015, when Mr Brucesmith did relay to him, but as a *fait accomplit*, that Mr Biancotti had borrowed $950,000 against the equity in the land.

[71] I formed the following views of the evidence.

[72] The alleged conversation could not have taken place between about 22 January 2015 to 25 February 2015 because Mr Brucesmith was away overseas. Mr Brucesmith's evidence, corroborated by his passport, was reliable and should be accepted.

[73] Mr Brucesmith's evidence negating the opportunity for any contact with Mr Biancotti in January and February 2015 before or after his trip was reliable and should be accepted.

[74] Mr Brucesmith's evidence of the fact and terms of the conversation in June 2015, which was a memory refreshed by reference to a contemporaneous note, was reliable and should be accepted, with one caveat. His note and recollection that the amount mentioned was $950,000 may have been in error, because other evidence suggests that the amount of the offer by the Bank in June 2015 was $650,000 at about this time and it seems unlikely that Mr Biancotti would have been talking about any other figure. The $650,000 figure would also be consistent with the solicitor's communication referred to at [39] above.

[75] I did not form such a favourable view of the reliability of the evidence of either Mr Biancotti or Mr Williams. Both Mr Biancotti and Mr Williams frankly conceded in cross-examination that:

(a) the first time they were asked to remember the alleged conversation which occurred in early 2015 was in December 2016; and

(b) before they swore their respective affidavits, they had discussions with each other about the conversation in order to check their recollections about the date.

[76] I did not form the view that Mr Biancotti and Mr Williams were giving dishonest evidence. Their collaboration with each other was unfortunate, but innocent. However to my mind the fact of the collaboration did reduce the reliability of their evidence as to the timing of the conversation and also reduced the weight I might otherwise give to the consistency between their evidence. I think it is very likely that it led to a high degree of reconstruction in their evidence.

[77] It is possible that they were referring to the same conversation as was Mr Brucesmith. Against that possibility is Mr Brucesmith's evidence that he did not recall Mr Williams being present, but that evidence was scarcely a strong negation of Mr William's presence (given that Mr Williams version of events had him witnessing rather than participating in the conversation). What is more significant, however, is whether I am prepared to accept their evidence that that Mr Brucesmith positively consented to whatever Mr Biancotti told him about borrowing money.

[78] I am not prepared to make that finding.

[79] In the first place, Mr Biancotti conceded in cross-examination that at the time of the conversation to which his evidence referred, he did not know that consent was needed to grant a mortgage over either Lots 1 or 2. He was not seeking to obtain any form of consent from Mr Brucesmith. On his evidence the nature of the conversation with Mr Brucesmith was simply a casual get-together. But, second, both witnesses were first asked to recall the conversation at a time when at least Mr Biancotti must have realized it would be significant to prove consent if he could. I think the evidence on that topic is likely to be a reconstruction based on Mr Brucesmith not expressing concern to the information which had been conveyed to him.

[80] The only conversation the occurrence of which I am positively persuaded to find is that described by Mr Brucesmith. I accept his evidence as to the timing of that conversation and of its content.

Was there a consent to the 21 September 2016 mortgage over Lot 1?

[81] Because I am not prepared to accept the evidence of either Mr Williams or Mr Biancotti upon which the vendors rely to demonstrate consent, it follows that my finding is that there was no consent to the 21 September 2016 mortgage over Lot 1. It is unnecessary to deal with the question of the authority of Mr Brucesmith.

[82] I should observe that even if I had found that the conversation occurred as they related, I would not have concluded that such a conversation could give rise to a finding that there was consent, within the meaning of s 73, to the 21 September 2016 mortgage.

[83] In this regard, it is necessary only to record the following passages of the cross-examination:

(a) As to Mr Williams:

> Well, how did Mr Biancotti raise that topic? Because he needed funds to carry out works and he was relying on the settlement to assist with what his expenses would be of the Great Northern.
>
> Well, could that have been part of the discussion they were having about settlement, that the reason he needed the thing to settle was he had another use for the money? I believe so.
>
> Well, do you recall? Well, that's what the conversation was about, "Well, when's settlement going to happen because I'm needing some funds for the Great Northern Hotel, and if settlement isn't going to come through in the near future I will need to borrow some funds."
>
> And it was for the refurbishment of the hotel? Yes.
>
> You clearly remember that? Yes.
>
> Thank you. And during that conversation did Mr Biancotti to your recollection mention anything about a loan that was held by Leadermark Propriety Limited with the Bendigo and Adelaide Bank? At that time?
>
> Yes? Not that I recall.
>
> Or a deed of cross-collaterisation? Not that I recall.
>
> No. So it was as general as, "I'm doing some refurbishment of the Great Northern and I need some money"? "I'm doing a refurbishment of the Great Northern and, if settlement isn't going to occur shortly, I will need to borrow some money against the IGA at Cape Trib," and – and – yeah, asking would that be a problem.
>
> And Mr Brucesmith said that he wouldn't have a problem? That's correct.
>
> Was there any mention about an amount of money? No.
>
> Was there any ? Not that I recall, no.
>
> Was there any mention about the terms of any borrowing? Not that I recall, no.
>
> Was there any mention about who the borrower would be? Not that I recall, no. Not at that time, no.[50]

(b) As to Mr Biancotti:

> ---The gist of my conversation with David Bruce was that if he didn't know when settlement was going to occur for the sale of the resort, if – if we didn't have a – a date, which it was all wishy-washy, I was going to have to use some equity or borrow some funds from the – from the resort.
>
> And is that language you used? Very casual, yes.
>
> Very casual? Yes.
>
> And did you ask for either his permission to do that or for the permission of MSD? Well, I was
>
> Well, did you say ? talking to David
>
> I'm sorry, or did you just ? Sorry.

[50] Transcript, p 1-64 to p 1-65.

> say, "This is what I am going to do"? Yes. I said this is what I – I need to do if I can't borrow the funds, and David said, "I don't have a problem with that."
>
> Now, did you specify how much money? No.
>
> The lender? No.
>
> The term of any borrowing? No.
>
> Who the borrowing people were going to be? No.[51]

[84] I have described, at [42] and [43] above, what actually happened in September 2016. I do not think that this evidence calls for any examination of the limits of what might constitute "consent" for the purpose of s 73. Connolly J stated in *Landers v Schmidt* [1983] 1 Qd R 188 at 194, "[t]he mischief at which the provision is aimed is the risk to the purchaser under a terms contract which arises where the mortgagee is in competition with him". Thus there is good reason to think that the elements which must be known and assented to must at least include the amount of the borrowing. It is simply impossible to construe the conversations described by these two witnesses as having occurred in early 2015 as giving consent to the grant of a mortgage more than a year later and which secured a far greater indebtedness than Mr Biancotti or his solicitor was prepared to mention to Mr Brucesmith in June 2015. The conduct the witnesses describe is far too general and imprecise to be construed as giving consent to the 21 September 2016 mortgage.

Conclusion

[85] Nothing Mr Brucesmith said could be regarded as consenting to the grant of the mortgage over Lot 1 on 21 September 2016. The consequence of the grant of the mortgage was that the contract for the purchase of Lots 1, 2 and 4 became voidable at the option of MSD Securities at any time before completion.

What is the impact on the right to avoid of the order of specific performance?

[86] If MSD Securities did have a private right to avoid the contract conferred on it by the statute after MFB Properties granted the mortgage, of what, if any, significance is the fact that between the time the right came into existence and the time MSD Securities purported to exercise it, MSD Securities and the other purchasers had a trial in which they pursued and ultimately obtained an order for specific performance in respect of the contract?

[87] First, the contract for the sale of land is regarded as having continued to exist and is not regarded as having merged in the judgment for specific performance: see *Singh (Sudagar) v Nazeer* [1979] Ch 474 per Sir Robert Megarry V-C at 480D-E; *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 Qd R 207 per de Jersey CJ (with whom Dalton J agreed) at [21]. It follows that a contractual right of rescission is capable of being exercised after a judgment for specific performance.[52]

[88] Second, a private right conferred by statute to avoid a contract for the sale of land can come into existence after an order for specific performance in relation to the contract the subject of the order. Thus in *Dunworth v Mirvac Queensland Pty Ltd* the Court of Appeal recognized the existence of a statutory right to rescind on destruction of or damage to a dwelling house pursuant to s 64 of the *Property Law Act*, consequent upon flood damage occurring after the order had been made but before the date for completion fixed by the order. There is no relevant distinction between the right conferred by s 64 and a right conferred by s 73(2) of the Act.

[89] Third, the right to terminate in this case came into existence for the first time when MFB Properties granted the mortgage over Lot 1 on 21 September 2016. On different facts there

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[51] Transcript, p 1-79 to p 1-80.

[52] As to whether it is necessary first to vacate the order for specific performance, see the comments at [90].

might have been a nice question as to whether MSD Securities had, by its conduct in pursuing and obtaining the orders which were obtained before Flanagan J, made an election inconsistent with the subsequent exercise of the private right conferred by the statute.[53] But where, as I have found, MSD Securities did not know at any time before the judgment of either the facts which gave it the right to avoid which it now seeks to exercise, or of the right itself, no case for election could be made out.[54] Absent election, there is no reason why the right conferred by s 73(2) would not be capable of being exercised after the judgment for specific performance.

[90] Fourth, absent a case for election, the significance of the fact that the order for specific performance had been made prior to the purported exercise of the statutory right to avoid, lies in the form of the order which should be granted by me. There is a line of authority which suggests that termination after an order for specific performance might first require vacation of the order by the court.[55] Unless the question whether the contracts are discharged as at the date of the order I make, or as at the purported termination by the purchasers on 13 December 2016 has some significance (and no such submission was advanced before me), if I was otherwise persuaded that the statutory right of avoidance had been duly effected, it would be appropriate to take the same course as was taken in in *Dunworth v Mirvac Queensland Pty Ltd*. In that case the Court of Appeal (having been persuaded that otherwise a statutory right to rescind had been duly effected) took the approach of vacating the specific performance order, and declaring retrospectively the validity of the rescission.

Should an order now be made to relieve the purchasers of their obligation to complete?

[91] In this case, I have been persuaded that the statutory right to avoid existed. There is no doubt that the purchasers have purported to exercise it. Is there any reason why the specific performance order should not be vacated?

[92] Rules 667 and 668 of the UCPR are in the following terms:

> **667 Setting aside**
>
> (1) The court may vary or set aside an order before the earlier of the following—
>
> (a) the filing of the order;
>
> (b) the end of 7 days after the making of the order.
>
> (2) The court may set aside an order at any time if—
>
> (a) the order was made in the absence of a party; or
>
> (b) the order was obtained by fraud; or
>
> (c) the order is for an injunction or the appointment of a receiver; or
>
> (d) the order does not reflect the court's intention at the time the order was made; or
>
> (e) the party who has the benefit of the order consents; or

---

[53] A decision to pursue specific performance is certainly capable of being inconsistent with the continued availability of contractual remedies which would have been available if specific performance had not been sought: see *Singh (Sudagar) v Nazeer* [1979] Ch 474 per Sir Robert Megarry V-C at 480F-G; *Sunbird Plaza Pty Ltd v Maloney* (1989) 166 CLR 245 at 259-260; *Facey v Rawsthorne* (1925) 35 CLR 566 at 588.

[54] Accordingly, it is not necessary to consider the controversy discussed in some cases as to the nature of the knowledge which is necessary to found such election cf *Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248; *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116.

[55] The line of authorities is referred to in *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 260 per Mason CJ with whom Deane, Dawson and Toohey JJ agreed; but cf *Dunworth v Mirvac Queensland Pty Ltd* per McMurdo J at [57] (with whom Dalton J agreed) where his Honour observed that an order of the court was unnecessary for the contracting party to terminate the contract.

(f) for a judgment for specific performance, the court considers it appropriate for reasons that have arisen since the order was made.

(3) This rule does not apply to a default judgment.

Note—

For a default judgment, see rule 290.

668 Matters arising after order

(1) This rule applies if—

(a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or

(b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.

(2) On application by the person mentioned in subrule (1), the court may stay enforcement of the order against the person or give other appropriate relief.

(3) Without limiting subrule (2), the court may do one or more of the following—

(a) direct the proceedings to be taken, and the questions or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;

(b) set aside or vary the order;

(c) make an order directing entry of satisfaction of the judgment to be made.

[93] The purchasers relied on rr 667(2)(f) and 668 and submitted that, in circumstances where they subsequently became aware of the mortgage over Lot 1 and validly brought the contracts to an end, the court should set aside the orders made by Flanagan J. The vendors submitted that the purchasers had not advanced reasons justifying their release from the orders for specific performance which have arisen *since the order was made*. Specifically, they said that there was a common understanding at or before the trial before Flanagan J that Lot 1 was subject to a mortgage.

[94] The evidence to which the vendors referred at its highest justified the proposition that the purchasers may have understood there to have been a mortgage granted over Lot 1 in 2015 for $650,000. But it did not support the notion that there was any common understanding as to the existence of the mortgage which was in fact granted in respect of Lot 1 on 21 September 2016.

[95] In my view it was sufficient for the purchasers to prove, as they did, that the purchasers did not know at any time before the judgment of either the facts which gave them the right to avoid which they now seek to exercise, or of the right itself. That proof, coupled with proof of the exercise of the right to avoid on 13 December 2016, was a sufficient basis to justify orders pursuant to UCPR rr 667(2)(f) and 668, the effect of which would be to release the purchasers from their obligations to complete the purchase of the land and the resort business, as required by the judgment of Flanagan J. The evidence of the counterfactual advanced by Mr Seabrook discussed at [50] above, provides further support for this conclusion.

[96] It follows that an order should now be made which vacates the relevant paragraphs of the specific performance order made by Flanagan J.

Finally, if specific performance orders are vacated, what consequential orders should be made?

Introduction

[97] The purchasers submitted that consequential orders should be made ordering the repayment of the value of the properties transferred *in specie* pursuant to the transaction deed (that is, $2 million) with other ancillary adjustments in the following terms:

> 1. It is declared that:
>
> (a) by its notice to [MFB Properties] dated 13 December 2016, [MSD Securities] has validly terminated the contract of sale between [MFB Properties] and [MSD Securities] dated 13 March 2014 for Lots 1, 2 and 4 on SP219085 pursuant to s. 73 of the *Property Law Act* 1974;
>
> (b) the contract of sale of land between [Ms Piper] and [MSD Securities] dated 17 March 2014 for Lot 3 on SP219085 is at an end by reason of special condition 3 thereof;
>
> (c) the contract of sale of a business between [Jungle Village] and [PK's Resort] dated 13 March 2014 is at an end by reason of special condition 3.3 thereof;
>
> (d) that the [purchasers] are entitled to be repaid by the [vendors] the sum of $2,000,000 paid by the [purchasers] pursuant to the contracts referred to in sub-paragraphs 1(a) to 1(c) hereof, in exchange for the surrender by the [purchasers] of their possession of the land and business the subject of the contracts of sale;
>
> (e) [MSD Securities] has the benefit of an equitable interest pursuant to a lien over the estate in fee simple in respect of lots 1, 2, 3 and 4 on SP210985 to secure payment of all money referred to in this judgment.
>
> 2. It is ordered that the matter be referred to the Registrar to inquire and determine or assess:
>
> (a) the amount, if any, incurred by the [purchasers], or any of them, in conducting improvements on the land and buildings the subject of the contracts referred to in paragraph 1 hereof;
>
> (b) the amount payable by [MSD Securities and PK's Resort] as a reasonable occupational rental during the period they were in possession of the land and business the subject of the Contracts;
>
> (c) the amount paid by [MSD Securities and PK's Resort] in respect of the registered mortgage over the Resort Land being Lot 4 on SP219085;
>
> 3. Further order that the Registrar determine the amount that is owed by the [vendors], or any of them, to the [purchasers], or any of them, or by the [purchasers] to the [vendors] as a result of such inquiry.
>
> 4. Further order that the balance so found be paid by the [vendors] to the [purchasers], or by the [purchasers] to the [vendors], as the case may be.
>
> 5 There will be liberty to apply.

[98] The purchasers submitted that if they established an entitlement to have the specific performance orders vacated on the grounds for which they had contended, the case law recognised that they had a right of recovery of the $2 million part-payment, although they conceded that the precise nature of the right was uncertain. They relied primarily on the decision of the High Court in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 and the decision of McPherson J (as he then was) in *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446 to justify the proposition that they had a right of recovery at law or in equity which would justify the orders proposed. They developed an argument that no view of the law would countenance the outcome for which the vendors contended.

[99] For their part the vendors contended that there was no equity which would justify any equitable recovery in respect of the part-payments and that, on the authority of the decision of *Landers v Schmidt*, there could be no right of recovery at law because the consideration for the part-payments had not totally failed. Ultimately they contended that if the specific

performance orders were vacated, they should be permitted to retain both the land the subject of the contracts which the purchasers had avoided and the part-payments which had been made. If there was an obligation to repay the part-payments, the vendors opposed the orders in [1](d), [1](e), [2](a), and [2](b).

[100] As a general proposition, I agree that if (as I have concluded they have) the purchasers have lawfully avoided the contracts, the vendors cannot be permitted to retain both what they sought to sell and the 50% part-payment which they received. Indeed, once one puts the proposition in those terms, it becomes obvious that it would be an extraordinarily unjust outcome if the law permitted that to occur. For reasons which I develop below, it does not.

Recovery of $2 million part-payments

Recovery at law

[101] It is appropriate first to examine the possibility of recovery at law of an amount reflecting the agreed value of the part-payment which was made. If a right of recovery exists, then the question will arise as to what is the appropriate order which should be made to vindicate that right.

[102] The seminal statement regarding the recovery of payments in this manner is that of Dixon J (with whom Rich and McTiernan JJ agreed) in *McDonald v Dennys Lascelles*. He said (at 477-478, emphasis added):

> **When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor** is entitled to enforce payment before the time has arrived for conveying the land; yet his **title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract**. "The very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser" (*Palmer v. Temple*[56]). In *Laird v. Pim*[57], Parke B. says: "It is clear he cannot have the land and its value too"; the case, however, was one in which conveyance and payment were contemporaneous conditions (see *Laird v. Pim*[58]). It is now beyond question that instalments already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract (*Mayson v. Clouet*[59]). **Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved** … However, these cases establish the purchaser's right to recover the instalments, other than the deposit, although the contract is not carried into execution … **[W]here there is no express agreement excluding the implication made at law, by which the instalments become repayable upon the discharge of the obligation to convey and the purchaser has a legal right to the return of the purchase money already paid which makes it needless to resort to equity and submit to equity as a condition of obtaining relief**, the vendor appears to be unable to deduct from the amount of the instalments the amount of his loss occasioned by the purchaser's abandonment of the contract. A vendor may, of course, counterclaim for damages in the action in which the purchaser seeks to recover the instalments.
>
> In the present case, the contract of resale contains no provision for the retention or forfeiture of the instalments. If, therefore, the instalment originally due on 24th January 1930 had been paid by the purchasers to the vendors, they would, in my opinion, have been entitled to recover it from the vendors. **The right so to recover it is legal and not equitable. It arises out of the nature of the contract itself**. This would be so even if the second contract was rescinded by the vendors upon the purchasers' default. **If in the present case the purchasers' claim to rescind this contract were justified, an instalment already paid would have been recoverable as on an ordinary failure of consideration.** …

[103] The conditional payment analysis of Dixon J in *McDonald v Dennys Lascelles* was considered by the High Court in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. The Court denied a passenger on a cruise ship recovery of the fare paid when the vessel later

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[56] (1839) 9 Ad. & E. at pp. 520, 521; 112 E.R., at p. 1309.
[57] (1841) 7 M. & W., at p. 478; 151 E.R., at p. 854.
[58] (1841) 7 M. & W., at p. 480; 151 E.R., at p. 855.
[59] (1924) A.C. 980.

sank. Although the Court denied recovery on the basis that there was not a total failure of consideration, three of the judgments (those of Mason CJ and Gaudron and McHugh JJ) also considered the question whether the payment of the fare was conditional on performance by the shipowner of its obligations.[60]

[104] All three judgments interpreted Dixon J's "implication made at law" as a reference to a condition arising from the proper construction of the particular contract under consideration.

[105] Mason CJ (with whom Brennan and Toohey JJ agreed), said that a claim to recover a payment made under a discharged contract could succeed on either of two bases: the intention of the parties, or failure of consideration. Of the former, he said (at 351):

> An alternative basis for the recovery of money paid in advance pursuant to a contract in expectation of the receipt of the consideration to be provided by the defendant may arise when the defendant's right to retain the payment is conditional upon performance of his or her obligations under the contract. ….

[106] Mason CJ then referred to *Dies v British and International Mining and Finance Co Ltd* [1939] 1 KB 724, in which Stable J took an approach similar to that taken by Dixon J in *McDonald v Dennys Lascelles*. Mason CJ continued (at 352-353, emphasis added):

> **The question whether an advance payment, not being a deposit or earnest of performance, is absolute or conditional is one of construction. In determining that question it is material to ascertain whether the payee is required by the contract to perform work and incur expense before completing this performance of his or her obligations under the contract**. If the payee is so required then, unless the contract manifests a contrary intention, it would be unreasonable to hold that the payee's right to retain the payment is conditional upon performance of the contractual obligations[61].

[107] Mason CJ found that the passenger was not entitled to recover the advance payment on the basis discussed because the payee had been required to perform obligations under the contract before completing. His Honour observed (at 353, emphasis added):

> Nor is there any acceptable foundation for holding that the advance payment of the cruise fare created in the appellant no more than a right to retain the payment conditional upon its complete performance of its entire obligations under the contract. As the contract called for performance by the appellant of its contractual obligations from the very commencement of the voyage and continuously thereafter**, the advance payment should be regarded as the provision of consideration for each and every substantial benefit expected under the contract**. It would not be reasonable to treat the appellant's right to retain the fare as conditional upon complete performance when the appellant is under a liability to provide substantial benefits to the respondent during the course of the voyage.

[108] Gaudron J spoke in similar terms (at 385-386, emphasis added):

> **Quite apart from entire contracts, the parties may provide, expressly or impliedly, that the obligation to pay or the right to retain moneys paid in advance is conditional upon completion of the contract.** Thus, in *McDonald v. Dennys Lascelles Ltd*., Dixon J. explained that under a contract for sale of land involving prepayment of some part of the purchase price, the vendor's "title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract"[62]. And the contract considered in *Dies v. British and International Mining and Finance Corporation Ltd*.[63] seems to have involved a condition of a similar kind[64].

[109] Her Honour expressed agreement with the approach of Mason CJ on the question whether the contract should be regarded as containing a term that the fare would be refunded in the event that the cruise ended prematurely.

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[60] Deane and Dawson JJ did not consider the matter.

[61] See *Hyundai Shipbuilding and Heavy Industries Co. Ltd. v. Pournaras*, [1978] 2 Lloyd's Rep. 502; *Hyundai Heavy Industries Co. Ltd . v. Papadopoulos*, [1980] 1 W.L.R. 1129; [1980] 2 All E.R. 29; and the discussion in Beatson, op cit., pp 56-57.

[62] (1933) 48 C.L.R. 457, at p. 477.

[63] [1939] 1 K.B. 724.

[64] See the analysis by Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp 54-55.

[110] McHugh J acknowledged the possibility of a relief based on a failure of contractual condition. His Honour observed (at 389, emphasis added):

> **When a contractual payment is made conditionally upon the performance of a promise by the payee, the right to retain the moneys after discharge of the contract is dependent upon whether the promise has been performed. If the promise has not been performed, there has been a total failure of consideration by reason of the nonfulfilment of the condition, and the money is recoverable as money had and received to the use of the payer[65]. In this context, consideration is not necessarily the same concept as the consideration which supported the formation of the contract. In a case where a promise and not an act or forbearance is the consideration for the contract, it is the performance of the promise which constitutes the consideration for the purpose of the law of restitution[66]**. As Birks[67] says:
>
> > "Failure of the consideration for a payment ... means that the state of affairs contemplated as the basis or reason for the payment has failed to materialize or, if it did exist, has failed to sustain itself."
>
> Furthermore, where the condition upon which the money was paid has failed, the payer is entitled to the return of the money advanced, even though that person has obtained some benefit from the contract.

[111] His Honour's analysis of the contractual condition was consistent with the analysis of Mason CJ and Gaudron J (at 391, emphasis added):

> **Whether or not a payment is the subject of a condition at the time a contract is discharged depends upon the express and implied terms of the contract. As a general rule, however, absent an indication to the contrary, a payment, made otherwise than to obtain the title to land or goods, should be regarded as having been made unconditionally, or no longer the subject of a condition, if the payee has performed work or services or incurred expense prior to the completion of the contract. If the payment has been made before the work has been performed or expense incurred, it should be regarded as becoming unconditional once work is performed or expense incurred.** In that situation, the advance payment is ordinarily made in order to provide a fund from which the payee can meet the cost of performing the work or services or meeting the expenditure incurred or to be incurred before the completion of the contract.

[112] Like Mason CJ and Gaudron J, McHugh J concluded that the fact that the payee had performed work or provided services prior to completion was dispositive of the possibility of construing the contract so as to regard the payment as conditional upon complete performance of the contract.

[113] The proper application of these principles gives rise to the following conclusions.

[114] The question whether the $2 million part-payment, not being a deposit or earnest of performance, was absolute or conditional is one of construction. The law would ordinarily regard such a payment as conditional, but express terms or other indications as to the proper construction might negate that outcome.

[115] The fact that the May variation called the date on which the $2 million was paid "the Settlement date" and left the date on which title would be transferred to some of the land as the date (within 30 days) on which the purchasers managed to pay $625,000, is some indication that the intention was that that the payment would be absolute. But it is impossible to imagine that an objective third party standing in the shoes of the parties at the time of the May variation would have answered in the affirmative the question whether the $2 million would stay in the vendors' hands if the contracts nevertheless went off.

[116] In my view the intention of the parties, objectively construed, was not that the part-payment was made absolutely. It was made conditionally on performance by the vendors of their promise to convey property at the contemplated settlement.

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[65] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] AC 32, at p. 65.

[66] ibid., at p. 48; *Rover International Ltd. v. Cannon Film Ltd.*, [1989] 1 W.L.R. 912, at pp. 923-924; [1989] 3 All E.R 423, at pp. 433-434.

[67] *An Introduction to the Law of Restitution*, (1985), p. 223.

[117] That condition having failed, the payment is recoverable, as Dixon J observed in *McDonald v Dennys Lascelles*, "as on an ordinary failure of consideration".

[118] In this context, the judgment of McHugh J in *Baltic Shipping* is instructive. Consideration is not necessarily the same concept as the consideration which supported the formation of the contract (or of the variation for that matter). It is the performance of the promise on which the payment was conditioned which constituted the consideration for the purpose of the law of restitution. Failure of consideration exists where, to use Birks' words approved by McHugh J in *Baltic Shipping*, "the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself."

[119] The result is that I think that there is a legal right to recovery of the part-payment.

[120] I have not overlooked the fact that the vendors were required by the contract to permit the purchasers to enter into possession of the property and to permit them to run the resort business at their own expense and for their own benefit. But it does not seem to me that this is an indication that the part-payment was not intended to be conditional.

[121] To the contrary, I think that the parties must be taken to have intended that the entitlement of the purchasers to receive the benefit of performance of that obligation without having to pay for it was also conditional and not absolute. The condition in that case would be performance by the purchasers of their promise to acquire property within the timeframe specified by the variations to the contractual arrangements. That condition having failed, the vendors must be regarded as legally entitled to recover the value of the benefit conferred on the purchasers. (And it is not controversial that an order should be framed in a way which will do so.)

[122] The same analysis applies to the payments which the MSD Securities agreed to make in respect of MFB Properties' mortgage payments in respect of Lot 4.

[123] The foregoing analysis of legal rights, founded as it is on High Court authority, is also consistent with the analysis of McPherson J (as he then was) in *Lexane Pty Ltd v Highfern Pty Ltd*. His Honour said (at 454-455):

> The fundamental principle applicable to a vendor who rescinds for breach after receiving payment, wholly or in part, on account of the price is that "he cannot have the land and its value too": *Laird v. Pim* (1841) 7 M. & W. 474, 478; 151 E.R. 852, 854, per Parke B. Hence money so paid by the purchaser is recoverable from the vendor. At law it is recoverable as money had and received upon a total failure of consideration where the consideration for which it was paid is the conveyance or transfer that has not taken place: *McDonald v. Dennys Lascelles Ltd*. (1933) 48 C.L.R. 457, 477–478, per Dixon J.; in equity it is recoverable by proceedings for restitution: ibid; see also 48 C.L.R. 457, 470, per Starke J. Equity relieves against a contractual provision purporting to entitle the vendor in the event of default to retain money so paid: ibid. A deposit properly so called falls outside the scope of this right to relief because it is paid as security for completion of the contract: *McDonald v. Dennys Lascelles Ltd*. (supra), at p. 470. Equity has never intervened to relieve against forfeiture of a deposit that is reasonable in amount, and a deposit of no more than 10 per cent of a purchase price is prima facie reasonable: see *Mehmet v. Benson* (1963) 81 W.N. (Pt. 1) (N.S.W.) 188, 191, per Jacobs J. (revd. on other grounds: see 113 C.L.R. 295). Section 71(2)(a)(i) of the Act also appears to assume that 10 per cent is a proper deposit. A vendor is therefore entitled to retain such a sum: *Mayson v. Clovet* [1924] A.C. 980; *McDonald v. Dennys Lascelles Ltd*.(supra); *Pitt v. Curotta* (1931) 31 S.R. (N.S.W.) 477, 483; *Chard v. Willett* [1933] St. R. Qd. 182, 188; although credit must be given, for the deposit in assessing any claim by the vendor for damages for breach of contract: *Cowan v. Stanhill Estates Pty. Ltd*. (No. 2) [1967] V.R. 641.

[124] An obstacle to the notion that there is a legal right to recovery might be found in the analysis of Connolly J in *Landers v Schmidt*.

[125] That case concerned an instalment contract within the meaning of the *Property Law Act* in which vendors agreed to sell land to purchasers. At the time of the contract the land was subject to a mortgage securing a debt of $6,000. Without the knowledge of the purchasers, the vendors obtained a further advance from the mortgagee increasing the mortgage debt to

$12,000. The purchasers failed to complete the contract and the vendors, having terminated the contract, resold the land at a deficiency. The purchasers then terminated the contract, alleging such resale to be a repudiation of the contract by the vendors. The vendors claimed damages against the purchasers. The Court concluded that the purchasers had been entitled to avoid the contract pursuant to s 73, at any time before completion. Accordingly the vendors' damages claim failed.

[126] The purchasers sought to recover the amount paid by way of deposit and the amount paid in part-payment. Connolly J, with whom Lucas SPJ agreed, observed (at 197-198):

> There remain the two payments of $1,500 and $5,000. As to the deposit the contract provided that if a sale not be completed for any reason other than the default of the purchaser the deposit should be refunded. As the respondents successfully justify their refusal to complete it follows, in my opinion that non-completion cannot be attributed to their default. But, by the same token, I do not think that they can be heard to justify on the ground that they were entitled to avoid ab initio and in the same breath set up the contract as their title to recover the deposit. **If they are to recover either of these sums it must be on the footing that there has been a total failure of consideration. At this point, they are met by the principle that a purchaser of land who has paid a deposit and gone into possession must be able to show a total failure of consideration if he is to recover moneys paid under the contract. The respondents here show no equity and there is thus no question of the exercise of the powers of a Court of Equity to bring about restitution**.

[127] His Honour's conclusion that the fact that the purchasers were let into possession was fatal to the proposition that there had been a total failure of consideration is not consonant with the approach subsequently taken to that question in the High Court in *Baltic Shipping*, or, for that matter, in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 381-383. On that basis I would decline to follow *Landers v Schmidt*. See also the observations by Young CJ in Eq in *Mulkearns v Chandos (No 3)* [2005] NSWSC 504 at [31].

[128] I conclude that the purchasers have a legal right to recover the $2 million part payment from the vendors.[68]

Recovery in equity

[129] On Dixon J's analysis in *McDonald v Dennys Lascelles*, equity's role is limited to circumstances where relief at law is barred because of the existence of relevant contractual terms. On the application of his Honour's analysis (and as further explained by the High Court in *Baltic Shipping*), if the proper construction of the contract was that the parties should be taken to have agreed that the vendors' right to retain the part-payments of the purchase price was not conditional, such that the vendors had an absolute right to retain them in the event of the contract going off, then equity would grant relief against forfeiture.[69] The following observation made by Dixon J would apply:

> Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved.

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[68] No submission was made to me that the orders should differentiate between the individual purchasers or the individual vendors. Like the transaction deed itself, the question of division of responsibility (both in relation to rights and liabilities) between the persons on each side of the transaction was left as a matter for them to work out. This is consistent with the approach which was taken to the orders made by Flanagan J which simply ordered the plaintiffs (i.e. the purchasers) to pay, and the defendants (i.e. the vendors) to deliver up transfers and other conveyancing documents.

[69] The relief against forfeiture in this case ought properly to be regarded as an exercise of the equitable jurisdiction to relieve against penalties: see *Legione v Hateley* (1983) 152 CLR 406 per Mason and Deane JJ at 445 and per Brennan J at 456; *Stern v McArthur* (1988) 165 CLR 489 per Deane and Dawson JJ at 524; *Geeveekay v Director of Consumer Affairs Victoria* [2008] VSC 50 per Bell J at [127].

[130] Starke J, who concurred in the result in *McDonald v Dennys Lascelles*, did not think that a right of recovery in equity would exist only if a right of recovery at law was prevented. He thought the remedy existed either in equity or at law. He said (at 470, emphasis added):

> … [A]part from any special stipulations of the contract, I apprehend that **a purchaser who is not himself in default is discharged from further performance of the contract and is entitled to recover any money paid or property transferred by him thereunder; he is entitled to take proceedings in equity to assert his right and secure restitution, or to sue at law** (*Palmer v. Temple*[70]; *Mayson v. Clouet*[71]; *Williams on Vendor and Purchaser*, 3rd ed. (1923), vol. 2, pp. 1012, 1013). On the other hand, a vendor who is not himself in default is discharged from further performance of the contract, and is entitled to the return of his land the subject matter of the contract, or his interest therein, but is bound to restore any moneys paid or property transferred to him thereunder: the vendor cannot have the land and its value too (*Laird v. Pim*[72]; *Williams on Vendor and Purchaser*, 3rd ed., vol. 2, p. 1013). **A deposit paid as security for the completion of the contract stands perhaps in an exceptional position, because the intent of the parties is that, if the contract goes off by default of the purchaser, the vendor shall retain it** (*Howe v. Smith*[73]). **On the other hand, stipulations providing for forfeiture of instalments of purchase money in case of default have been treated as in the nature of a penalty and relief given against them** (*In re Dagenham (Thames) Dock Co.*; *Ex parte Hulse*[74]; *Kilmer v. British Columbia Orchard Lands Ltd.*[75]; and cf. *Palmer v. Moore*[76]). Relief against forfeiture is no doubt an equitable remedy. **But, in the case of a rescission of a contract of sale of land by a vendor, moneys paid under the contract by a purchaser in default that are not forfeited can be recovered at law. That is recognized, I think, in *Palmer v. Temple*[77] and in *Ockenden v. Henly*[78]; and, if it be not a legal remedy, still the equitable remedy is clear and well established**.

[131] The vendors sought to persuade me that Dixon and Starke JJ did not mean what they said, when they referred to rights of recovery in equity. But I think what they said is clear. So did McPherson J in *Lexane Pty Ltd v Highfern Pty Ltd*. I will follow his Honour's approach and regard *McDonald v Dennys Lascelles* as authority for the recognition of a right to recover in equity. It is unnecessary to determine whether the equitable right is to be regarded as an alternative remedy or is something which only exists if I am wrong in my view about the availability of a common law right.

[132] I do not see anything in the judgment of Connolly J in *Landers v Schmidt* which is inconsistent with that analysis. His Honour merely observed that the purchasers before him showed no equity. The report does not reveal that the argument for relief against forfeiture was put. But if *Landers v Schmidt* was to be taken to be inconsistent, I would be obliged to follow the High Court in *McDonald v Dennys Lascelles*.

[133] Support for taking that approach may also be found in the dissenting judgment of Brennan J in *Sibbles v Highfern Pty Ltd* (1987) 164 CLR 214. The majority (Mason CJ, Dawson, Toohey and Gaudron JJ) held that the vendor in that case had not contravened s 73 of the *Property Law Act*. Only Brennan J in dissent held that there was a contravention, and therefore considered the remedies available to the purchaser. His Honour held (at 232, emphasis added):

> In *Landers v. Schmidt*, the purchasers' claim to recover the amounts they had paid towards the purchase price was rejected on the ground that, as they had been given possession before conveyance, they could not show a total failure of consideration. This led the Court to hold that the purchaser could not recover what he had paid on a common money count. **For a reason which does not appear, the Court did not consider the relief to which a purchaser is entitled in equity when a contract for the sale of land goes off before**

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[70] (1839) 9 Ad. & E. 508; 112 E.R. 1304.
[71] (1924) A.C. 980.
[72] (1841) 7 M. & W. 474, at p. 478, per Parke B.; 151 E.R. 852, at p. 854.
[73] (1884) 27 Ch. D. 89.
[74] (1873) L.R. 8 Ch. 1022.
[75] (1913) A.C. 319.
[76] (1900) A.C. 293.
[77] (1839) 9 Ad. & E. 508; 112 E.R. 1304.
[78] (1858) E.B. & E. 485; 120 E.R. 590.

conveyance: see p 198. If *Landers v. Schmidt* were correct in refusing a purchaser any relief by way of return of the purchase price once the purchaser has been in possession, the protection which s.73 confers on a purchaser would often be illusory: the consequence of exercising the right of avoidance which s.73 confers in order to protect the purchaser's interest would be the loss of both the interest and the payments made towards the purchase price. In respect of the purchaser's right to return of the purchase price, *Landers v. Schmidt* cannot be supported. In my opinion, the appellants were entitled to equitable relief in respect of what they had paid under the contract.

[134] Of course it would be necessary for any person recovering part-payments in equity, to do equity.[79] The purchasers propose to do that by acknowledging the obligation to pay value to the vendors for their occupation of the properties. That is appropriate.

[135] The equitable remedy would permit the recovery of the agreed value of the properties transferred by way of payments of the instalment of the contract price. The equitable remedy would be conditioned on the purchasers doing equity by giving credit for the value of the advantage conferred on them by being allowed into possession early.

The orders which should be made to vindicate recovery rights

[136] I identify in the table below the order sought, the submissions made on aspects of controversy in relation to the order proposed by the purchasers, and the conclusion which I reach.

Order proposed by purchaser	**Submissions**	**Conclusion**
It is declared that by its notice to [MFB Properties] dated 13 December 2016, [MSD Securities] has validly terminated the contract of sale between [MFB Properties] and [MSD Securities] dated 13 March 2014 for Lots 1, 2 and 4 on SP219085 pursuant to s. 73 of the *Property Law Act* 1974.	In the event that their submissions on the merits were not accepted, the vendors did not oppose the declaration.	In light of my conclusion on the merits, the declaration should be made.
It is declared that the contract of sale of land between [Ms Piper] and [MSD Securities] dated 17 March 2014 for Lot 3 on SP219085 is at an end by reason of special condition 3 thereof.	In the event that their submissions on the merits were not accepted, the vendors did not oppose the declaration.	In light of my conclusion on the merits, the declaration should be made. For the reasons identified at [10] and [90] above, it should be made clear that the contract ended as at 13 December 2016.
It is declared that the contract of sale of a business between [Jungle Village] and [PK's Resort] dated 13 March 2014 is at an end by reason of special condition 3 thereof.	In the event that their submissions on the merits were not accepted, the vendors did not oppose the declaration.	In light of my conclusion on the merits, the declaration should be made. For the reasons identified at [10] and [90] above, it should be made clear that the contract ended as at 13 December 2016.
It is declared that the [purchasers] are entitled to be repaid by the [vendors] the sum of $2,000,000 paid by the [purchasers] pursuant to the contracts referred to in sub-paragraphs 1(a) to 1(c) hereof, in exchange for the surrender by the [purchasers] of their possession of the land and business the subject of the contracts of sale.	The vendors opposed an order for repayment on the grounds that there was no right of recovery at law or in equity. The only other submissions in opposition to the form of the order was that the amount should be reduced to take account of the fact that after the monies were paid Mr Biancotti sold the vessel and the two	In light of my conclusion that there is a right of recovery either at law or in equity, the order should, in principle, be made. I reject the vendors' submissions. The best indication of the market value of the benefit conferred on the applicants by the making of the part-payments is the value which was agreed by them for the purpose of

[79] See the cases cited in *QNI Resources Pty Ltd v Park* [2016] QSC 222 at [75] - [76]

Order proposed by purchaser	Submissions	Conclusion
	properties for a total of $1,437,500 less $3,509 in expenses, and that that figure should represent the true market value.	selling their own assets, namely the $2 million figure. The evidence of Mr Biancotti of the mere fact of subsequent sales for less than that amount did not demonstrate that the market value was less than the agreed value. The declaration should be made, save that the contracts referenced should include the transaction deed. However, in light of my conclusion below in relation to the equitable lien order, I see no need to add reference to the payment being in exchange for the surrender of possession.
It is declared that [MSD Securities] has the benefit of an equitable interest pursuant to a lien over the estate in fee simple in respect of lots 1, 2, 3 and 4 on SP 210985 to secure payment of all money referred to in this judgment.	The vendors opposed the equitable lien on the grounds that although the purchaser was ultimately able to avoid the contract in reliance on s 73, the purchaser had for years been in default under the contract. They relied on *Ridout v Fowler* [1904] 1 Ch 658 at 663. The purchasers relied on the cases which support the proposition that a purchaser has an equitable lien for the deposit and part payment if the contract goes off otherwise than through the purchasers' default: *Ex part Lord* [1985] 2 Qd R 198.	But for my conclusion that the purchasers were entitled to avoid the contract pursuant to s 73, the contract would not have gone off and the specific performance orders would not have been vacated. For purposes of the operation of the law in relation to equitable liens, the contract should be regarded as having gone off otherwise than through the purchasers default. Given that the foundation for the imposition of such liens is founded on solid and substantial justice,[80] it is appropriate that an equitable lien should be recognized. The declaration should be made, modified simply to state that MSD Securities has the benefit of an equitable lien.
It is ordered that the matter be referred to the Registrar to inquire and determine or assess the amount, if any, incurred by the [purchasers], or any of them, in conducting improvements on the land and buildings the subject of the contracts referred to in paragraph 1 hereof.	The first ground of opposition was that there was no evidence that any improvements had been made. The purchasers' response was that there was no need for evidence: that was the point of the reference to the Registrar. The second ground of opposition was that if any improvements had been made, they must have been made in breach of the contractual obligation that if possession is given before settlement the purchaser "must maintain the Property in substantially its condition at the date of possession, fair wear and tear	I agree with the vendors' first point. I would not refer a matter to the Registrar absent evidence of a need so to do. The time to justify the making of an order was the trial before me. I also agree with the vendors' second point. The clause compels maintenance substantially in the condition it was at a particular time. There is good reason for a vendor to want to ensure that the property is not altered during the period a purchaser is let into possession before settlement. I would construe the clause as requiring the

[80] See *Hewett v Court* (1983) 149 CLR 639 per Gibbs CJ at 645.

Order proposed by purchaser	Submissions	Conclusion
	excepted". The purchasers' response was that the clause should not be interpreted as addressing improvements. The second ground of opposition was the contention that equity would not account for improvements without evidence of the vendors' consent, acquiescence or encouragement of the making of the improvements, relying on *Sunstar Fruit Pty Ltd v Cosmo* [1995] 2 Qd R 214, 225. The purchasers' response was to contend that the vendors' misconstrued the case and that the notion of equitable adjustment was necessary to avoid the vendors being unjustly enriched.	purchasers not to make improvements (at least to the extent that the Property could not be described as substantially in the same condition as at the date of possession). The foregoing are sufficient reasons not to make this order.
It is ordered that the matter be referred to the Registrar to inquire and determine or assess the amount payable by [MSD Securities and PK's Resort] as a reasonable occupational rental during the period they were in possession of the land and business the subject of the Contracts.	The vendors suggested that there should be an adjustment for profits arising from the purchasers' possession of the relevant premises. The purchasers contended that the conceded obligation to pay an occupation rent was sufficient adjustment and also relied on the terms of the May variation in support of the notion that it was specifically agreed that the purchasers had the benefit and burden of possession in terms of income and expenses.	I agree with the purchasers. An obligation to pay a reasonable occupation rent is sufficient. I also agree with their submissions concerning the import of the term of the May variation. The order should be made.
It is ordered that the matter be referred to the Registrar to inquire and determine or assess the amount paid by [MSD Securities and PK's Resort] in respect of the registered mortgage over the Resort Land being Lot 4 on SP219085.	The vendors did not advance submissions opposing this order.	The order should be made.
Further order that the Registrar determine the amount that is owed by the [vendors], or any of them, to the [purchasers], or any of them, or by the [purchasers] to the [vendors] as a result of such inquiry.	The vendors did not advance submissions opposing this order.	The order should be made.
Further order that the balance so found be paid by the [vendors] to the [purchasers], or by the [purchasers] to the [vendors], as the case may be.	The vendors did not advance submissions opposing this order.	The order should be made.

Conclusion

[137] I order as follows:

1. Orders 2 – 4 of the judgment of Flanagan J dated 28 November 2016 are vacated.

2. It is declared that:

   (a) by its notice to the First Respondent dated 13 December 2016, the First Applicant validly terminated the contract of sale between MFB Properties (NQ) Pty Ltd and MSD Securities Pty Ltd dated 13 March 2014 for Lots 1, 2 and 4 on SP219085 pursuant to s. 73 of the *Property Law Act* 1974;

   (b) the contract of sale of land between Ashlee Jane Piper and MSD Securities Pty Ltd dated 17 March 2014 for Lot 3 on SP219085 was at an end as at 13 December 2016;

   (c) the contract of sale of a business between Jungle Village Pty Ltd and PK's Resort Pty Ltd dated 13 March 2014 was at an end as at 13 December 2016;

   (d) the Applicants are entitled to be repaid by the Respondents the sum of $2,000,000 paid by the Applicants pursuant to the contracts referred to in sub-paragraphs 1(a) to 1(c) hereof and the transaction deed between MFB Properties (NQ) Pty Ltd, Jungle Village Pty Ltd, Ashlee Jane Piper, Mark Frederick David Biancotti, MSD Securities Pty Ltd as trustee for the Brunswick Street Trust, PK's Resort Pty Ltd, Mark Leonard Seabrook and David Bruce Smith;

   (e) the First Applicant has the benefit of an equitable lien over the estate in fee simple in respect of lots 1, 2, 3 and 4 on SP210985 to secure payment of all money referred to in this judgment.

3. The matter be referred to the Registrar to inquire and determine or assess:

   (a) the amount payable by the First Applicant and the Second Applicant as a reasonable occupational rental during the period they were in possession of the land and business the subject of the Contracts; and

   (b) the amount paid by the First Applicant and the Second Applicant in respect of the registered mortgage over the Resort Land being Lot 4 on SP219085.

4. The Registrar determine the amount that is owed by the Respondents, or any of them, to the Applicants, or any of them, or by the Applicants to the Respondents as a result of such inquiry.

5. The balance so found be paid by the Respondents to the Applicants, or by the Applicants to the Respondents, as the case may be.

6. There will be liberty to apply.