SUPREME COURT OF QUEENSLAND

CITATION:	*FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd & Anor* [2017] QSC 322
PARTIES:	**FKP COMMERCIAL DEVELOPMENTS PTY LTD ACN 010 750 964** (plaintiff) **v** **ALBION MILL FCP PTY LTD ACN 166 552 996** (first defendant) **PAUL FRIDMAN** (second defendant)
FILE NO/S:	Brisbane No 3662 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial of claim and counterclaim
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	20 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13-15 November 2017
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. The defendants pay the plaintiff the sum of $5,459,640.41 including $209,640.41 by way of interest under s 58 of the *Civil Proceedings Act* 2011;** **2. The first defendant's counterclaim is dismissed;** **3. The defendants pay the plaintiff's costs of the proceeding.**
CATCHWORDS:	CONTRACTS – VENDOR AND PURCHASER – DISCLOSURE OF MATERIAL FACTS – IDENTITY OF PARTIES – where the plaintiff entered into a contract to sell 12 lots of land to the defendant – where three of the lots were contaminated land that was included in the environmental management register as sites that had been subject to a notifiable activity pursuant to section 375 of the *Environmental Protection Act* 1994 (Qld) – where section 421 of the *Environmental Protection Act* 1994 (Qld) required a vendor of land recorded in the environmental management register to give written notice to the potential buyer of the particulars of the land recorded in the register and details of any site management plan prior to agreeing to dispose of the land – where prior to entering into the contract with the first

defendant the plaintiff had been negotiating the sale of the land with a related company – where an employee of that company was provided with a link to a data room which contained searches for each of the contaminated lots and included the details of the contamination and the site management plans for each of the lots – where the employee, or someone using the employee's access account, downloaded the documents dealing with the contamination of the lots – where the first defendant was nominated by the related company to be the buyer of the land – where all the shares in the first defendant were held by the same individual who held all the shares in the related company - where the sole director of the first defendant was the related company's employee who had been given access to the data room and – whether the first defendant was entitled to rescind the contract by reason of a failure by the plaintiff to give the first defendant the notice required by section 421 of the *Environmental Protection Act* 1994 (Qld)

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – GENERAL – where the first defendant as buyer purported to rescind a contract for the sale of land in breach of the contract – where the plaintiff claimed damages for loss of the bargain upon the contract of sale of the land – where the land has not been resold – where the contract was terminated four months before the date when performance would have become due under the contract – where the plaintiff claimed damages measured by the difference between the contract price and the value of the land at the time when performance was due under the contract – where the defendants contend that damages should be measured by the difference between the contract price and the value of the land at the date of termination – whether the plaintiff is entitled to damages on the basis of the difference between the contract price and the value of the land at the time when performance would have been due

Acts Interpretation Act 1954 (Qld), s 14A, s 36, schedule 1
Acts Interpretation Act 1954 (Qld), s 20
Civil Proceedings Act 2011 (Qld), s 15, s 58
Electronic Transactions Act 2001 (Qld), s 10, s 11, schedule 2
Environmental Protection Act 1994 (Qld), s 408, s 421
Uniform Civil Procedure Rules 1999 (Qld), r 681(1)

Blackburn, Low & Co v Vigors (1887) 12 App Cas 531, cited
Burns v MAN Automotive (Aust) Pty Ltd (1986) 161 CLR 653, cited
Capper v Thorpe (1998) 194 CLR 342, applied
Castle Constructions Pty Ltd v Fekala Pty Ltd (2006) 65 NSWLR 648, discussed

Clark v Macourt (2013) 253 CLR 1, distinguished
Commonwealth v Cornwell (2007) 229 CLR 519, cited
Conveyer & General Engineering Pty Ltd v Basetec Services Pty Ltd [2015] 1 Qd R 265, distinguished
Duffy v The Minister for Planning [2003] WASCA 294, discussed
European Bank Ltd v Evans (2010) 240 CLR 432, cited
Hamilton v Whitehead (1988) 166 CLR 121, cited
Hoffman v Cali [1985] 1 Qd R 253, discussed
JC Houghton and Co v Nothard, Lowes and Wills Ltd [1928] AC 1, cited
Jessett Properties Ltd v UDC Finance Ltd [1992] 1 NZLR 138, discussed
NG and anor v Filmlock Pty Ltd and ors (2014) 88 NSWLR 146, discussed
Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444, cited
Re Rossfield Group Operations Pty Ltd & Morton Holdings (ACT) Pty Ltd [1981] Qd R 372, cited
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272, cited
Victorian Economic Development Corp v Clovervale [1992] 1 VR 596, cited
Wardley Australia Ltd v State of Western Australia (1992) 175 CLR 514, cited
Western Australian Planning Commission v Arcus Shopfitters Pty Ltd [2003] WASCA 295, discussed

COUNSEL: M Martin QC and C Jennings for the plaintiff
S Couper QC and M Evans for the defendants

SOLICITORS: Mills Oakley for the plaintiff
Hopgood Ganim for the defendants

[1] The plaintiff is the registered owner of 12 lots of land[1] situated at 60 Hudson Street, Albion described as "the Albion Mills site".

[2] The plaintiff's claim against the first defendant is for either $6.25 million or $5.25 million as damages for breach of a contract in the form of a put and call option for the sale of the Albion Mills site and against the second defendant is for the same amounts under a guarantee. The first defendant's counterclaim is to recover $2.75 million paid under the contract before it was rescinded.

Fridcorp negotiations

[3] Before the contract between the plaintiff and the first defendant was entered into, the plaintiff had negotiated with Fridcorp Projects Pty Ltd ("Fridcorp").

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1 All the lots were in the County of Stanley, Parish of Enoggera. The particular lots were Lots 1 and 2 on RP 59681, Lot 3 on RP 59681, Lots 129, 130, 131, 134, 135 and 136 on RP 19036, Lots 1 and 2 on RP 48402 and Lot 132 on RP 48402.

[4] On 8 May 2015, the plaintiff entered into a Heads of Agreement in relation to the possible sale and purchase of the Albion Mills site but its particular terms are not significant to the issues to be decided, except that it provided for a due diligence process and that the purchaser if the sale proceeded was to be Fridcorp or a wholly owned subsidiary of Fridcorp.

[5] Relevantly, Paul Fridman was a director and Chris Roche was an employee (whose position was styled "Development Director") of Fridcorp.

[6] The plaintiff's officers and agents dealt with Mr Roche and Mr Fridman in the negotiations and dealings before the contract between the plaintiff and the defendant was made.

[7] The plaintiff engaged Maddocks Lawyers as their solicitors and Fridcorp engaged Hopgood Ganim Lawyers as their solicitors to settle the terms of the contract to be entered into.

[8] As will appear later, the first defendant was nominated by Hopgood Ganim to be the purchaser as the "Fridcorp entity", only a few days before the contract was entered into.

[9] As it happened, the first defendant was not a wholly owned subsidiary of Fridcorp. Instead, the same individual held all the shares in both Fridcorp and the first defendant.

Contamination disclosure

[10] Three of the 12 lots comprising the Albion Mills site were contaminated lots.[2]

[11] On 11 May 2015, Mr Roche sent an email to Andrew Hall of the plaintiff requesting that Mr Hall send data to enable Fridcorp to conduct due diligence, specifically including environmental contamination reports. Mr Roche suggested a data room/drop box or file share mechanism would be the best method for him to obtain the files.

[12] Before 11 May 2015, the plaintiff had established an electronic data room with an organisation named Ansarada Pty Ltd.

[13] On 11 and 12 May 2015, Mr Hall and others collated electronic documents in folders relating to the Albion Mills site and Mr Hall arranged for them to be uploaded to the data room.

[14] As part of that process, Mr Hall created a folder named "Land Contamination" and copied various files into the folder that were uploaded into the data room.

[15] On 11 May 2015, an email was sent to Mr Roche providing him with a hyperlink to the data room.

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[2] Lot 134 on RP 19036, Lot 1 on RP 59681 and Lot 2 on RP 48402.

[16] Mr Roche accessed the data room and created a password for his access.

[17] On 12 May 2015, Mr Roche sent an email to Mr Hall notifying that he had access to the folders and files in the data room.

[18] On 12 May 2015, Mr Hall responded to Mr Roche's request for information with specific comments as to the status of each request. As to the requested environmental contamination reports, he responded that Mr Roche should refer to the Land Contamination folder. A copy of that email was sent to Mr Fridman at the same time that it was sent to Mr Roche.

[19] On 13 May 2015, a bulk download of electronic documents relating to the Albion Mills site, including the documents in the Land Contamination folder, was made by someone using Mr Roche's access. It does not appear to be in dispute that someone under Mr Roche's supervision or enabled by him downloaded the relevant documents.

[20] The files in the Land Contamination folder included a copy of a separate search response dated 21 January 2010 for each of the contaminated lots. The search response stated that the site was included in the environmental management register as a site that had been subject to a notifiable activity pursuant to s 374 of the *Environmental Protection Act* 1994 (Qld) ("EPA") because the site had been subject to a hazardous contaminant. The hazardous contaminant or contaminants:

(a) for Lot 134, was lead up to 626 parts per million;
(b) for Lot 1, were copper up to 458 parts per million, lead up to 11,800 parts per million and zinc up to 4,620 parts per million; and
(c) for Lot 2, were copper up to 260 parts per million and lead up to 700 parts per million.

[21] For each of the contaminated lots, the search response included a copy of a separate approved site management plan as Annexure 1.

Introduction of the first defendant as buyer

[22] On 10 July 2015, Mr Roche was appointed as the sole director of the first defendant.

[23] On 15 July 2015, Fridcorp's lawyers nominated the first defendant to be the buyer under the contract.

[24] On 17 July 2015, the plaintiff as "vendor" and the first defendant as "purchaser" entered into the contract styled "Put and Call Option Deed" ("the contract").

[25] The contract envisaged that the plaintiff would pursue a preliminary development approval application for the Albion Mills site,[3] after which the first defendant might make an application or applications for development approval.[4] The proposed

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3 Clause 6.
4 Clause 8.

development was a high density residential development of the land, including the contaminated lots.

Guarantee and variation

[26] On 3 August 2016, the plaintiff as "vendor", the first defendant as "purchaser" and the second defendant as "guarantor" entered into a second contract, styled "Deed of Variation of Put and Call Option Deed" ("the guarantee and variation").

[27] Under clause 2.1.11 of the guarantee and variation, the first defendant was to pay the sum of $1,112,500 to the plaintiff, described as "the interest amount", on 1 November 2016.

Rescission or termination

[28] The first defendant defaulted in payment of the interest amount.

[29] On 2 November 2016, the plaintiff's solicitors gave a default notice under clause 17 of the contract to the first defendant, requiring that the default be remedied by paying the interest amount of $1,112,500 and interest on that amount, to a nominated account. They further stated that if the material default was not remedied in that manner within 30 days the plaintiff would immediately terminate the contract. The notice was also addressed to Mr Fridman.

[30] On 1 December 2016, the first defendant's solicitors responded by alleging that the plaintiff had failed to give written notice to the first defendant under s 421 of the EPA prior to the parties entering into the contract. The first defendant said it was rescinding the contract under s 421(3) (or s 408(3)).

[31] On 5 December 2016, the plaintiff's lawyers replied rejecting the first defendant's rescission of the contract as having no effect and terminating the contract for the first defendant's failure to rectify the default in payment of the interest amount of $1,112,500 and interest.

Written notice to the buyer

[32] The primary question is whether the plaintiff as owner gave written notice to the first defendant as buyer in compliance with s 421(2) of the EPA before the plaintiff agreed to dispose of the contaminated lots to the first defendant under the contract.

[33] On 17 July 2015, s 421 of the EPA provided:

> "**421 Notice to be given to proposed purchaser of land**
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> (1) This section applies to the owner of land if—
>
> (a) particulars of the land are recorded in the environmental management register or contaminated land register; or

(b) the land is the subject of—
  (i) a notice under section 373 informing the owner that the administering authority believes the land has been, or is being, used for a notifiable activity or is contaminated land; or
  (ii) a notice to conduct or commission a site investigation; or
  (iii) a remediation notice; or
  (iv) a notice that the administering authority is preparing, or requiring someone else to prepare, a site management plan for the land; or
(c) the land is the subject of an order under section 458.

(2) If the owner proposes to dispose of the land to someone else (the ***buyer***), the owner must, before agreeing to dispose of the land, give written notice to the buyer—
(a) if particulars of the land are recorded in the environmental management register or contaminated land register—that the particulars have been recorded in the register and, if the land is subject to a site management plan, details of the plan; or
(b) if the owner has been given a notice under this part—that the owner has been given a notice under this part and particulars about the notice; or
(c) if the land is the subject of an order under section 458—that the land is the subject of the order and particulars about the order.
Maximum penalty—50 penalty units.

(3) If the owner does not comply with subsection (2), the buyer may rescind the agreement by written notice given to the owner before the completion of the agreement or possession under the agreement, whichever is the earlier.

(4) On rescission of the agreement under subsection (3)—
(a) a person who was paid amounts by the buyer under the agreement must refund the amounts to the buyer; and
(b) the buyer must return to the owner any documents about the disposal (other than the buyer's copy of the agreement).

(5) Subsections (3) and (4) apply despite anything to the contrary in the agreement."

[34] Effective 30 September 2015, s 135 of the *Environmental Protection and Other Legislation Amendment Act* 2014 (Qld) omitted s 421 and replaced it with s 408 of the EPA. Section 408 is in similar but not identical terms to s 421.

[35] In those circumstances, despite repeal, the operation of s 421(3) to confer a right to rescind an agreement was preserved as a "right… accrued… under [s 421]" by s 20(2)(c) of the *Acts Interpretation Act* 1954 (Qld). Accordingly, the provisions of s 421 regulate the rights of the parties in the present case, as if the repeal of s 421 had not occurred.

[36] Summarising, the defendants raise five grounds or aspects of failure to give written notice in compliance with s 421(2)(a):

(a) first, that providing the relevant documents electronically by uploading them to the data room was not giving written notice;
(b) second, that providing the search responses for the contaminated lots among other information on a variety of other subject matters was non-compliant;
(c) third, that providing access to the search responses for the contaminated lots without specifying that doing so constituted giving written notice under s 421 was non-compliant;
(d) fourth, that because the plaintiff later stated that the due diligence material should not be relied, any notice otherwise given was non-compliant; and
(e) fifth, any notice that was otherwise compliant was given to Fridcorp, not to the first defendant.

The mischief section 421 is intended to remedy and its purposes

[37] A number of these points turn upon the proper construction to be given to s 421. Accordingly, it is appropriate before considering the individual point to consider the mischief s 421 is intended to remedy and the purposes of s 421 by reference to the text, context and operation of the section.

[38] The specific consequences of non-compliance with the requirement to give written notice under s 421(2) are both criminal and civil. First, it is an offence punishable by a maximum penalty of 50 penalty units. Second, the buyer under the agreement to dispose of the land is given a right to rescind the agreement and to be refunded any amounts paid under the agreement.

[39] One clear purpose of s 421 is to protect the buyer. That is readily understandable. On acquisition of land on the environmental land register or the contaminated land register, a buyer will become the owner subject to the statutory environmental obligations in respect of the land. They are onerous. By requiring that written notice be given of the land's inclusion on either of the registers, and of the details of any existing site management plan, the buyer is to be afforded the opportunity to make an informed choice whether to proceed with the proposed purchase. Another possible purpose concerns the risk that a buyer who acquires the land without being informed may unwittingly cause further environmental harm.

[40] In either case, the mischief to which s 421 is directed is to prevent a buyer from acquiring land on either register without first being informed of the land's status.

[41] In construing s 421(2) and the extent of the requirement to give written notice, it is relevant to have regard to the mischief,[5] and to the purposes identified, so that an interpretation that will best achieve the purpose of the section is to be preferred to any other interpretation.[6]

Giving written notice electronically

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5 *Re Heydon's Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637, 638.
6 *Acts Interpretation Act* 1954 (Qld), s 14A(1).

[42] Section 36 and Schedule 1 of the *Acts Interpretation Act* 1954 (Qld) have the effect of assigning meaning to commonly used words used in an Act, such as the EPA. They define "writing", as follows:

> ***"writing*** includes any mode of representing or reproducing words in a visible form."

[43] Chapter 2, pt 2 div 1 of the *Electronic Transactions Act* 2001 (Qld) ("ETA") applies, by s 9 of the ETA, to a requirement or permission under an Act to give information, whether the expression give, send or serve, or another expression, is used. By s 10(c) of the ETA, in that division, "give information" includes to give a notification.

[44] Section 11 of the ETA provides:

> "(1) If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).
>
> (2) The circumstances are that—
> (a) at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and
> (b) the person to whom the information is required to be given consents to the information being given by electronic communication."

[45] The Dictionary in Schedule 2 defines a number of relevant terms, including "electronic communication", "information" and "State law", but it is unnecessary to dilate upon them, other than to set out the definition of "electronic communication":

> "***electronic communication*** means—
> (a) a communication of information in the form of data, text or images by guided or unguided electromagnetic energy; or
> (b) a communication of information in the form of sound by guided or unguided electromagnetic energy, if the sound is processed at its destination by an automated voice recognition system."

[46] In my view, the requirement to give notice under s 421(2)(a) of the EPA was a requirement under a State law to give information in writing.

[47] Second, in my view, the process of uploading data to a server, described as a data room, in the form of text files able to be viewed and/or down-loaded by a specific intended recipient may constitute giving information by an electronic communication.

[48] A contrary argument was put by the defendant, relying upon *Conveyer & General Engineering Pty Ltd v Basetec Services Pty Ltd*,[7] where P McMurdo J said:

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[7] [2015] 1 Qd R 265.

> "In the present case, s 11 of the ETA did not authorise the service of the adjudication application, *inclusive of the material within the Dropbox*, for two reasons. The first is that the present applicant had not agreed to be electronically served. The second is that the material within the Dropbox was not part of an electronic communication as defined. None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in other words communicated "by guided or unguided electromagnetic energy". Rather, there was an electronic communication of the *means* by which other information in electronic form could be found, read and downloaded at and from the Dropbox website."[8]

[49] I respectfully agree with P McMurdo J's conclusion and what I think to be the essential reasoning in that passage. However, in my view, uploading a document to a designated server may be an electronic communication, no less than depositing a letter in a postbox may be a physical communication. In my view, where, as required under s 11(2)(b), the person to whom the information is permitted to be given consents to the information being given by uploading it to a server to which the person has access, that is capable of constituting giving the information by an electronic communication.

[50] If Mr Roche had nominated a post office box to receive the relevant documents, posting them to that post office box from which Mr Roche obtained them, whether or not he personally retrieved them from the box, would have constituted giving written notice within the meaning of s 421(2). Here Mr Roche's request was unambiguous. He requested that the information comprising "Environmental Contamination reports" be made available by a data room, Dropbox or file sharing mechanism as the best mechanism for him to obtain the files. That was no less a request that he be given the information by a particular means than if he had asked that they be posted to a nominated post office box.

[51] Accordingly, in my view, s 11 of the ETA permitted the plaintiff to give the information by an electronic communication in the manner that it did.

Giving written notice among other information

[52] This ground could be described as an objection to the form of giving written notice under s 421(2). But, in my view, there is an anterior point, namely whether the notice must come to the attention of the buyer before notice is given within the meaning of s 421(2).

[53] That question is one of construction of the sub-section. The meaning of a statutory requirement to give notice in various contexts is a well worked field of legal discourse. Depending on that context, it may be that the person to be given notice ("recipient") must be made aware of the matter, or the attention of the recipient must be drawn to documents containing the matter, whether or not they become aware of the matter, or acts calculated to draw the attention of the recipient to the matter or documents containing the matter may be enough.

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8 [2015] 1 Qd R 265, 270 [28].

[54] In *Capper v Thorpe,*[9] the High Court said:

> "Where a statutory provision, such as s 6, requires a document to be 'served', the statutory command is ordinarily perceived as requiring the contents of the document to be delivered to the person to be served. However, unless the statute says so, a document may be 'served' although it is not personally served. Thus, it may be served by posting it to the person required to be served. In many statutory contexts, a document may also be 'served' when it is brought to the notice of the person who has to be served. At all events, it will be 'served' in such contexts if the efforts of the person who is required to serve the document have resulted in the person to be served becoming aware of the contents of the document."[10] (footnotes omitted)

[55] Also depending on the context, the awareness or knowledge of the recipient may be relevant. The acts relied upon as giving notice may have made the recipient aware of the matter, or brought the documents containing the matter to the attention of the recipient, or the recipient may become aware of the matter but not by the acts relied upon as giving notice. Yet at other times, it may not be known whether or not the recipient became aware of the matter.

[56] In the present context, an important point is that although written notice of the specified matters is required, there is no other requirement as to the form that the notice must take.

[57] The objection to giving written notice by uploading the relevant documents to the data room with other documents should be seen in the context of three further facts. First, although there were a large number of documents on many varied topics that were uploaded to the data room, the relevant documents were clearly separated from the general body of documents by their inclusion in a separate folder marked "Land Contamination". Second, as will appear below, in my view, the first defendant did access the disclosed information and was aware of it when it entered into the contract. This is not a case where the means of giving written notice missed the target. It is not a case, in my view, where the means of giving notice was so obscure that it did not amount to giving notice at all.

[58] In my view, this ground of objection to the written notice given by the plaintiff should not be sustained.

Notice not expressly given under s 421(2)

[59] There is no express requirement that written notice that complies with the requirements of s 421(2) must expressly be given under s 421.

[60] The defendants did not articulate any principle according to which the section should be construed as impliedly requiring an express statement that it is given under s 421. An

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9 (1998) 194 CLR 342.

10 (1998) 194 CLR 342, 352 [21].

important point, in my view, is that because written notice must be given before the seller has agreed to dispose of the affected land and before the buyer has agreed to purchase the land, the buyer does not need to be apprised of any right to avoid the transaction. The buyer may simply choose not to enter into the agreement to purchase the land.

[61] In my view, there is no reasonable basis for construing s 421 as impliedly requiring that notice under s 421(2) must be expressly given under s 421.

Search response provided was too old

[62] There is no express requirement that the written notice under s 421(2) may not be given by providing a copy of a search response and a copy of the relevant approved site management plan, as the plaintiff did.

[63] However, the defendants submit that each of the search responses in the present case was too old, because it was dated 21 January 2010.

[64] It is not in dispute that the documents provided did in fact state (at the date of the search response) that the land was on the environmental register and did give details of the approved site management plan (as at the date of the search response) and those documents were provided in response to a request made on 11 May 2015 for environmental contamination reports. It is also not in dispute that those matters had not changed at the date when the documents were provided. The context in which the documents were provided suggested that they were documents relevant as at 11 May 2015 and in fact they were accurate statements of the required matters as at the dates when they were provided.

[65] In my view, there is no reason why the date of the search responses invalidated the provision of those documents as written notice that complied with s 421(2).

Plaintiff's alleged statement that the due diligence material was not to be relied upon

[66] As part of the process of negotiating the terms of the contract, the solicitors for Fridcorp sought a contractual warranty for the benefit of the putative buyer as to the accuracy of information provided in the data room during the due diligence process. The plaintiff declined to promise the accuracy of the information.

[67] In a way that was not explained, the defendants submit that the refusal to give the warranty rendered the communication that was otherwise made in accordance with the requirements of s 421(2) non-compliant with the requirement to give written notice under the sub-section.

[68] In my view, the submission should be rejected. If the information that was communicated was accurate and otherwise complied with the requirement to give written notice of the specified matters under s 421(2), and thereby gave the intended

recipient the opportunity not to become the buyer of the land, I do not understand why the plaintiff's failure to contractually promise that all the information in the due diligence disclosure was accurate has anything to do with compliance with s 421(2).

Was notice given to the first defendant as buyer?

[69] On the assumption that the notice given by the plaintiff might otherwise have constituted giving written notice under s 421(2) to Fridcorp, the first defendant submits that it was not notice given to the first defendant as buyer.

[70] The plaintiff meets this contention in two ways. First, it submits that Fridcorp is to be treated as the buyer for the purposes of s 421(2). In my view, this is not an open construction of s 421. There is no obligation to give any notice until the point is reached of "agreeing to dispose of the land", meaning making an agreement of that kind with "someone else", who is designated the "buyer". The right to rescind is given to the buyer, no-one else. It is a right to rescind the "agreement".

[71] That is to say, s 421 operates when a contract is entered into that is an agreement between the owner and the buyer to dispose of the land. It is a failure to give the buyer written notice under s 421(2) before that point in time that is an offence and gives the right to the buyer to rescind the agreement. It would be inconsistent with the text of s 421(2) to construe it to permit written notice to be given to another person (except on behalf of the buyer) and it would be inconsistent with the text of s 421(3) for a person who is not a party to the agreement to dispose of the land to have the right to rescind the agreement as buyer.

[72] Second, the plaintiff submits that the written notice given to Fridcorp through Mr Roche was also given to the first defendant upon the introduction of the first defendant as buyer, in circumstances where:

(a) Mr Roche was the sole director of the first defendant at that time;
(b) the first defendant had the benefit of and received the disclosure provided by the plaintiff through the data room and the documents downloaded therefrom;[11] and
(c) before entering into the contract the first defendant had access to the search responses.[12]

[73] The defendants submit those facts only amount to proof that the first defendant had the ability to access to the relevant information not that it did access it. There are two difficulties with that submission. First, it is not usual to say that a person had access to information, if the intention is to limit the meaning to whether the person had the ability to access the information. Second, if that is the intention, it seems odd to say also that the person received the disclosure of the information through documents downloaded from a data room.

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11 Amended rejoinder, paragraph 4(a).
12 Amended rejoinder, paragraph 4(b).

[74] On 2 July 2015, Mr Roche sent an email to David McLaren on the subject of remediation of the Albion Mills site, stating that:

> "Butler and partners completed an Environmental Site Assessment on Albion Mills in 2007. A Remediation Action Plan has also been prepared for the site."

[75] Those were references to documents that had been included by the plaintiff in the Contaminated Land folder. In the balance of the email Mr Roche analysed the extent of the contamination and the likely costs of removing the contaminated soil or fill, demonstrating his awareness of the extent of the contamination issues.

[76] In my view, it should be accepted that the first defendant did access the disclosed information and was aware of it when it entered into the contract. On that footing, the remaining question is whether, nevertheless, the plaintiff did not give written notice to the first defendant as buyer because at the time the notice was given the first defendant had not been introduced as the putative buyer under any agreement to be made.

[77] The question of what constitutes giving written notice under s 421(2) is affected by the considerations previously mentioned, including the requirement to give written notice before the agreement is made. It is recognisable as belonging to the class of pre-contractual disclosure obligations that serve the purpose of consumer protection. The obligation to give written notice is intended to protect the buyer, and serve the purposes described previously.

[78] Nowadays, there are a number of statutory pre-contractual disclosure obligation upon the sale of land. Perhaps their existence emerged from other contexts. For example, there used to be pre-contractual disclosure obligations for financial transactions in the form of moneylending[13] and hire-purchase.[14] In the context of a sale of land, an early example of a pre-contractual disclosure provision in this State related to the sale of a home unit.[15] Under current law, there are several pre-contractual disclosure requirements for a sale of land, depending on the context.[16]

[79] Throughout the due diligence process in the present case, Mr Roche was acting for Fridcorp and on the basis that if the transaction proceeded to a contract to buy the land including the contaminated lots, the buyer would be Fridcorp or a subsidiary of Fridcorp. As it turned out, the buyer was not a subsidiary of Fridcorp, but it was a related company of Fridcorp, functionally equivalent to a related body corporate, because all the shares in the defendant were held by the same individual who held all the shares in Fridcorp.

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13 *Moneylenders Act* 1927 (Eng), s 6.

14 *Hire Purchase Act* 1959 (Qld), s 3.

15 *Building Units and Group Title Act* 1980 (Qld), s 49.

16 For example, the *Body Corporate and Community Management Act* 1997 (Qld), ss 206 and 213; *Coastal Protection and Management Act* 1995 (Qld), s 65; *Environmental Protection Act* 1994 (Qld), ss 347 and 408; *Land Sales Act* 1984 (Qld), s 10; *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Qld), s 83; and *Queensland Building and Construction Commission Act* 1991 (Qld), s 47.

[80] From 10 July 2015, Mr Roche was the sole director of the defendant. Five days later, the defendant was nominated by Fridcorp's lawyers to be the buyer. Two days after that, the contract was entered into.

[81] As a matter of company law, Mr Roche was the directing mind of the defendant before the agreement to dispose of the Albion Mills site including the contaminated lots was made between the plaintiff and the defendant.[17] As a matter of fact, and attribution in company law, as the sole director, Mr Roche's knowledge was the knowledge of the defendant.[18]

[82] The question becomes, therefore, whether the giving of written notice to Mr Roche on behalf of Fridcorp, when the parties were proceeding expressly on the basis that a related body corporate, constituting a subsidiary of Fridcorp, would become the buyer, followed by the nomination of another related company by Fridcorp (although not a subsidiary) of which Mr Roche was the directing mind and possessed the buyer's knowledge, constituted giving written notice to the defendant?

[83] If the answer to that question is "no", then the plaintiff was required to give a fresh notice to the defendant before it was permitted to agree to dispose the land to the defendant, under s 421(2) of the EPA. If that was required in the circumstances of this case it may be thought that the statute elevates form over substance. It is not out of the question that a statute may do so. The now-repealed provisions relating to warning statements for contracts under the *Property Agents and Motor Dealers Act* 2000 (Qld), ss 366 and 377, are an example. It was of no consequence that buyers relied on non-compliance with the strict formal requirements of the sections to escape contracts that were no longer desirable to them, irrespective of whether they were aware of the matters to which the warning statement was to direct them.

[84] Although the evidence does not demonstrate that Mr Roche was acting as the defendant's agent before his appointment as sole director on 10 July 2015, some insight as to the objective circumstances that should inform the proper construction of s 421 in the present case may be obtained by acknowledging the legal principles relating to a principal's imputed notice of notice given to an agent. There is no suggestion that the written notice required to be given under s 421(2) may not be given to an agent for the buyer.

[85] Dal Pont,[19] suggests that in this field of agency law courts use knowledge and notice indiscriminately. On the other hand, both Bowstead and Reynolds[20] and Fridman[21] give notice or notification a separate treatment. The latter opines that:

> "If notification is in question, notification to the agent is only notification to the principal if the agent had authority to receive the notice and at the time

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17 *Hamilton v Whitehead* (1988) 166 CLR 121, 127.

18 *Re Rossfield Group Operations Pty Ltd & Morton Holdings (ACT) Pty Ltd* [1981] Qd R 372, 377; *JC Houghton and Co v Nothard, Lowes and Wills Ltd* [1928] AC 1, 18-19.

19 Dal Pont, *Law of Agency*, 3 ed, p 557 [22.49].

20 *Bowstead and Reynolds on Agency,* 20 ed, pp 536-540, Art 94.

21 GHL Fridman, *The Law of Agency*, 7 ed, pp 348-352.

> of its receipt was acting as agent, and the notice related to something material to the transaction performed by the agent."[22]

[86] One of the relevant principles in agency notice cases is that the agent must be given the notice in question in the course of his or her employment. That would suggest that if the agent of a company is given notice of a fact but not while acting for the company the notice will not affect the company and, in particular, if the agent was given notice before the agency began, the principal will not be bound. However, Fridman says there are exceptions, referring to the classic case of *Blackburn, Low & Co v Vigors*.[23] A helpful, if somewhat lengthy analysis, appears in the reasons of the Court of Appeal of New Zealand in *Jessett Properties Ltd v UDC Finance Ltd*: [24]

> "The general principle that notice given to or knowledge acquired by an agent is imputed to his principal only if the agent was at the time employed on the principal's behalf is recognised in the texts and the cases…
>
> This accords with good sense and justice. Thus if notice is given to an agent in reliance on his ostensible authority to receive it, the principal will be estopped from denying receipt of the notice… But there is no reason to prevent the principal from denying receipt in the absence of such reliance. Apart from this kind of case, the reason for imputing to the principal knowledge which the agent has acquired has been variously explained. Bowstead… puts it in terms of a presumption that the knowledge will have been passed on, either because it was acquired in respect of a matter where the agent has power to bind the principal, or because he has a duty to inform the principal.
>
> Fridman's explanation is that the facts are materially connected with the performance of the undertaking, so that the proper exercise of the agent's authority will be affected by his knowledge. *In Taylor v Yorkshire Insurance Co Ltd* at p 20, Palles CB considered it no more than a consequence of the familiar principle qui facit per alium facit per se. Whichever be the true basis, it is apparent that knowledge acquired before the agency began, or probably even during its currency but outside the scope of the engagement, should not in general be imputed to the principal.
>
> In the *Taylor* case, Palles CB noted two exceptions: one where the principal 'purchases the previously obtained knowledge of the agent' in relation to the particular subject-matter; the other where the agent is 'an agent to know'. The latter expression comes from the judgment of Lord Halsbury LC in *Blackburn, Low & Co v Thomas Vigors*… where his Lordship pointed out that the somewhat vague use of the word 'agent' leads to confusion, and added:

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22 GHL Fridman, *The Law of Agency*, 7 ed, p 349.
23 (1887) 12 App Cas 531.
24 [1992] 1 NZLR 138, 143.

> ‘Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.’
>
> All turns on the nature of the agent's engagement.”

[87] I do not forget, however, that the question in the present case is ultimately one of construction of s 421(2), not the scope of the principles of agency law governing when notice to an agent is imputed to a principal.

[88] In the present case, there is no suggestion that the notice given to Mr Roche on behalf of Fridcorp was not communicated to the defendant in the sense that from the time when Mr Roche became the sole director of the defendant he full well knew what had been brought to the attention of Fridcorp by the plaintiff giving written notice to Fridcorp. Second, in this case, although the separate legal personalities of Fridcorp and the defendant go without saying, the authority of Mr Roche as sole director of the defendant springs from his employment by Fridcorp and Fridcorp’s control of the identity of the buyer, as a related corporation, under the contract to be made.

[89] In my view, on the facts of this case, it should be held that the plaintiff did give written notice to the defendant in compliance with s 421(2) of the EPA by reason of the notice that was given to Mr Roche on behalf of Fridcorp.

Damages – date of assessment

[90] The plaintiff claims damages for breach of contract comprising loss of bargain damages upon the contract of sale of the land.

[91] The plaintiff has not resold the land. Accordingly, it claims damages measured by the difference between the contract price and the value of the land, either at the date on which the contract would have been performed, or as at the date of termination, after giving credit for sums already paid on account of the purchase price under the contract. Because the contract was terminated for breach before the time for performance by completion of the sale of the land had arrived, there is a period of approximately four months between the alternative dates for assessing the value of the land.

[92] The plaintiff’s case is that over those four months there was a fall in market values. Accordingly, damages calculated at the time when performance would have been due under the contract are claimed in a greater amount than at the date of termination, leaving aside questions of interest or the time value of money. The defendants submit that the correct date is the date of termination of the contract. Surprisingly, there is authority that supports both contentions, which it will be necessary to consider.

[93] The starting point must be however, that damages for breach of contract are compensatory, and to be assessed on the principle that the object is to place the plaintiff in the equivalent financial position as if the contract had been performed, according to its terms.[25] Second, it is generally accepted that damages are to be assessed once and for all, so that at the time of assessment future losses are taken into account and are merged in the judgment that results from the assessment.[26] Third, the loss for which damages are recovered are those flowing from, meaning caused by, the breach including, in a case like the present, loss of the benefit of the guilty party's performance of the contract, described as loss of bargain damages.[27] Fourth, in a vendor's claim for loss of bargain damages, the vendor may re-sell the property and seek to recover any deficiency on re-sale as the damages for loss of bargain.[28] Fifth, in re-selling the property the vendor is under a duty to mitigate the loss suffered and will not be able to recover loss suffered by reason of breach of the duty to mitigate.[29] Sixth, the vendor is not obliged to re-sell and may recover loss on the basis of the difference between the contract price and value.[30]

[94] It is against the background of these accepted principles that the question arises whether the damages should be assessed at the date of termination or the date when the contract would have been performed in the present case.

[95] The plaintiff relies on *Hoffman v Cali*[31] and *Castle Constructions Pty Ltd v Fekala Pty Ltd*[32] as supporting the choice of the date for performance of the contract as the date of assessment. Both cases do support the date of performance as the relevant date in a case of termination for breach occurring before the date for performance has arrived and, to the extent that the point was ratio, would be binding precedent. However, each of those cases was a buyer's claim for damages for loss of bargain where the seller had breached the contract. The buyer did not have the property to re-sell. A seller's claim for damages for loss of bargain was *NG and anor v Filmlock Pty Ltd and ors*,[33] but in that case a date later than the time for performance was relied on by the seller.

[96] Carter, Peden and Tolhurst, say:

> "Cases where the contract states a time for performance are relatively straightforward. Assume, for example, that a buyer wrongfully repudiates its obligations prior to the time for performance, and the seller terminates performance prior to the date for payment. Damages are assessed on the basis of market values existing when the performance would have been due. Thus the earlier date – the date of termination – is rejected. If the case

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25 *European Bank Ltd v Evans* (2010) 240 CLR 432, 438 [11]; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 [13].

26 *Commonwealth v Cornwell* (2007) 229 CLR 519, 536-537 [57]; *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 530.

27 *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, 450.

28 *NG and anor v Filmlock Pty Ltd and ors* (2014) 88 NSWLR 146.

29 *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 658-659.

30 *Victorian Economic Development Corp v Clovervale* [1992] 1 VR 596, 604.

31 [1985] 1 Qd R 253.

32 (2006) 65 NSWLR 648, 651 [11].

33 (2014) 88 NSWLR 146.

> happens to come to trial before the contractual date, the court must determine the market price 'as best it can'."[34]

[97] In my view, although the cases relied upon by the authors are not strong supporting authority, this statement of principle may be accepted, generally speaking, subject to qualifications. Assume, for example, on a falling market, that the seller re-sells promptly after termination but the market falls between the date of re-sale and the date when performance would have been due. In my view, the seller should not be able to leave the re-sale out of account, so as to claim the greater difference between contract price and market value at the date when performance would have been due. Conversely assume, on a rising market, that a seller re-sells shortly after termination but the market rises between the date of the resale and the date when performance would have been due. In my view, the seller should not be required to leave the re-sale out of account, so as to be limited to a smaller difference between the contract price and the market value at the date when performance would have been due. As well, where there is a very thin market, a seller who acting reasonably is unable to resell until after the time for performance and suffers additional loss thereby, compared to the hypothetical market value at the time for performance, should not be disadvantaged.[35]

[98] I do not consider that these conclusions are inconsistent with the statements of principle made by Keane J in *Clark v Macourt*[36] as to the integral aspects of principle according to which damages for breach of contract are assessed as at the date of the breach. In *Clark* there was no material difference between the date of the breach and the date for performance. In a case like the present, where the claim is for loss of bargain damages where the contract is terminated months in advance of the date for performance, there may be a difference between the damages measured on the date of termination and the date for performance.

Damages - value

[99] The plaintiff alleges that the value of the Albion Mills site at the date for completion of the contract (31 March 2017) was $15.75 million. In support of that allegation it relies on a valuation report by Troy Linnane. The valuation report appears to be undated but says that a date of inspection was 3 August 2017 and it attaches a contaminated land search site management plan printed on 1 August 2017.

[100] Mr Linnane's August report was carried out using the direct comparison method, by reference to 5 "comparable" sales of land that constituted high density residential development sites. However, as a result of objection to the absence of proof of the facts relating to two of those sales, Mr Linnane's opinions were ultimately supported by only three of the original five sales, being:

Date	Address	Area (sq m)	Sale price

34 Carter, Peden and Tolhurst, *Contract Law in Australia*, 5 ed, [36-04].
35 Compare *NG and anor v Filmlock Pty Ltd and ors* (2014) 88 NSWLR 146.
36 (2013) 253 CLR 1, 31-32 [109]-[110].

Aug 2016	66-98 Montpelier Rd, Bowen Hills	15,617	$22,000,000
Nov 2016	78-80 Tribune St, South Brisbane	1,763	$11,000,000
Aug 2016	11 Breakfast Creek Rd, Newstead	3,254	$16,500,000

[101] On the basis of those sales, Mr Linnane reasoned to the opinion that the value of the Albion Mills site was $17,000,000 at 5 December 2016.

[102] From that point, Mr Linnane reasoned to the final opinion that the value of the Albion Mills site had decreased between 5 December 2016 and 31 March 2017 to $15,750,000.

[103] The decrease was approximately 7.4 per cent over the almost four month period.

[104] The basis of the decrease lay in Mr Linnane's opinion that there had been a fall in market value over the relevant period. He supported that opinion by a bar graph and a table.

[105] The bar graph showed the sales by number of sales and their total gross sale value for each of the 2015, 2016 and 2017 years. Representing the data in a table, it was:

Year	No of sales	Gross value
2015	57	$800 million plus
2016	20	$200 million plus
2017	4	$100 million or less

[106] On cross-examination a number of points emerged about the sales data underlying the bar graph. First, it seemed that the number and value of the 2015 sales was overstated, being only 44 sales totalling $597 million. Second, it seemed that the number and value of the 2016 sales were understated, being 24 sales totalling over $300 million. Third, the sales data encompassed properties other than high density residential development sites.

[107] The table was of three development sites that had been sold and resold for a lower value during the period between 2014 and 2017 as follows:

Address	Original sale date	Original sale price	Resale date	Resale price	% Discount

13-17 Manning St, South Brisbane	Feb 2015	$20.9 m	May 17	$13 m	38
66-98 Montpelier Rd, Bowen Hills	Aug 2014	$25 m	Aug 16	$22 m	12
421 Brunswick St, Fortitude Valley	Jul 2014	$35.05 m	Dec 15	$30 m	14

[108] On cross-examination, a number of points were revealed about this table. First, it was not comprehensive. For example, the Tribune St property included in the comparable sales discussed in the report was sold and re-sold in the relevant period but at a higher price on re-sale. Second, each of the re-sales in the table was made by the same seller. That seller had unsuccessfully attempted to raise capital by a public share float in 2015.

[109] As well, the stated percentage decreases were over periods in excess of and not related in any particular way to the four month period over which Mr Linnane had reduced the value of the Albion Mills site by 7.4 per cent.

[110] Even more significantly, cross-examination revealed that Mr Linnane had previously valued the Albion Mills site and produced a valuation report. The valuation report was a joint valuation with Amy Bowater of Mr Linnane's office. It too appears to be undated but states that the date of inspection of the site was 26 April 2017 and it attaches a contaminated land search dated 24 April 2017.

[111] Mr Linnane and Ms Bowater's April 2017 report valued the Albion Mills site as at 31 March 2017 at $17 million. It is directly in conflict with the result of Mr Linnane's August report, where he valued the site at $15.75 million on the same date.

[112] Surprisingly, when Mr Linnane was asked whether he had valued the site before his August report, Mr Linnane did not even recall that he had previously done so. When he was shown the April report, he acknowledged that he and Ms Bowater had done so.

[113] Even more surprisingly as to the value as at 31 March 2017, there was no explanation from Mr Linnane for the contradictory results as between the April report and the August report. The plaintiff submits, in effect, that the explanation lies in the reasoning by which Mr Linnane reduced the value of $17 million at 5 December 2016 to $15.75 million as at 31 March 2017 in his August report. However, that is not something Mr Linnane said. He was not asked to explain the inconsistency.

[114] The explanation proffered by the plaintiff seems unsatisfactory. First, the April report and the August report use the same comparable sales to arrive at value by the direct comparison method. Second, as the April report was produced after 31 March 2017, any significant market movement in the previous four months should have been observable at that time. Third, two of the three re-sales relied on by Mr Linnane to demonstrate the reduction in value of development sites, so as to reduce the value over

the four months from 5 December 2016 to 31 March 2017, had occurred before April 2017. Fourth, the drop in sales numbers and volumes from 2015 to 2016 relied on by Mr Linnane in his graph of annual sales by number and volume were readily apparent before April 2017.

[115] In my view, these factors powerfully combine with the earlier questions raised about the basis of the reduction in value to the extent that I reject Mr Linnane's reduction of value of the Albion Mills site from $17 million at 5 December 2016 to $15.75 million at 1 March 2017.

[116] The defendants submit that I should go further and reject all of Mr Linnane's evidence of opinion of value as wholly unreliable. They raise a number of points as to his credibility and reliability including those I have already mentioned. Whilst I accept that Mr Linnane's answers in a number of respects were inaccurate, and that he did not satisfactorily explain the inconsistent valuation results he had arrived at in the April and August reports, I did not conclude that he lacked all credibility or reliability because of those answers, as the defendants submit.

[117] However, the defendants submit that there are further grounds why Mr Linnane's opinion as to value based on the direct comparison method should be wholly rejected. They submit that the process of reasoning in reaching the valuation result is not exposed to the degree that I should completely reject the evidence of value.

[118] The plaintiff sought to rely on the absence of any contrary report to the value arrived at by Mr Linnane as in some way supporting his opinion evidence of value. In particular, the plaintiff tendered a letter from the defendants' lawyers to the plainitff's lawyers advising that the defendants had engaged a valuer to respond to Mr Linnane's report. I consider those facts not to be relevant upon the question of whether Mr Linnane's report should be rejected on the grounds raised by the defendants.

[119] There are many cases that consider the requirements to prove the value of land by an expert opinion based on the direct comparison method. Two of them are *Duffy v The Minister for Planning*[37] and *Western Australian Planning Commission v Arcus Shopfitters Pty Ltd*.[38] McLure J considered what sales are relevant in *Duffy*:

> "The test of market value is what in all the relevant circumstances would be the price that a willing purchaser would have to pay a vendor willing but not anxious to sell in order to obtain the land...
>
> One method of ascertaining market value is the comparable sales method. That method requires that the sales evidence relied on be relevant and sufficient in volume...
>
> There is no hard and fast rule by which a valuer can draw the line that clearly separates sales that are comparable from those that are not. It is a matter of

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37 [2003] WASCA 294.
38 [2003] WASCA 295.

> degree. Some adjustment is always necessary but too much adjustment may render it unsafe to use a sale. Where the line is to be drawn is a matter for the expert valuer to determine. Further, just because a sale is excluded from use in the comparable sales reasoning process does not necessarily mean that it is irrelevant…"[39] (citations omitted)

[120] McClure J also considered the degree to which a valuer must expose the process of reasoning:

> "Further, the process of inference that leads to the opinions of the valuer must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about their reliability. If not, the opinion can carry no weight…
>
> The expert must fully expose the reasoning relied on in reaching his or her opinion and the opinion must be rationally based…
>
> However, those principles have to be applied in the context of the valuers 'art'. The established principles were stated in *Spencer v Commonwealth* (above) where Isaacs J quoted with approval the following passage in *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co*…:
>
> > It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at.
>
> An illustration of the practical application of the principles is seen in *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd*… In that case the subject land to be valued was a container terminal site. It was common ground that that was the best and highest use for the land. Notwithstanding that there was no sales evidence of container terminals, one expert used the comparable sales method and the basic sale he relied on was of industrial land with no water frontage. The valuer added between $100,000 – $120,000 per hectare as an adjustment for the subject land's water frontage. It was common cause that the expert did not have any sales evidence on which to rely for his quantification of the water frontage adjustment and he said it was fixed as a matter of judgment. The appellant in that case submitted that while judgment based on experience is a permissible method of making adjustments in the course of valuing, the selection of a figure based on nothing could not alter its character as in essence a guess or an arbitrary figure. The Court held that the need to make adjustments to values to arrive at the true

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[39] [2003] WASCA 294, [22]-[25].

valuation of subject land does not preclude the valuer or the Court who has the task of valuing the land from making adjustments which may be nothing more than the best guess that can be made in the circumstances. The Court also rejected an argument that a judgment of that nature was not valid unless there was evidence to establish the upper and lower limits within which the judgment must operate.

An opinion that is not based on sales or other empirical evidence is often referred to as a judgment, usually said to be based on skill and experience. Sometimes it may be difficult to draw the line between judgment and mere speculation. A rule of thumb is that a judgment formed without some disclosed rational basis will be speculation to which little, if any, weight should be given. However, generalised statements of principle are best avoided because whether and if so what weight should be accorded to a valuer's opinion will depend on the facts and circumstances of each case.

As to what is required disclosure, the appellant relies on a statement by Pullin J in *Arcus* (above) (at [78]) that:

> It is not satisfactory, in my opinion, for a valuer who values land using the comparable sales method, to list a number of comparable sales, each one suggesting a different value for the subject land and each of which requires some adjustment, and then simply to state an opinion about the value of the subject land. Such an opinion will only have any value if the valuer explains which is the most important of the comparable sales, why that is so, and what adjustments have been made to reach a conclusion about the value of the subject land.

The first sentence is uncontentious. The second sentence is not. Insofar as it is contended that the second sentence states an absolute requirement with automatic consequences as to weight, that cannot be so. The formation of an opinion on value has been likened, correctly in my view, to the exercise of judicial discretion. Rules affecting weight must be sufficiently generalised to allow for different methodologies and circumstances."[40] (citations omitted)

[121] McLure J further considered the comparable sales methodology and what sales are comparable in *Arcus*:

> "The High Court in *Maurici v Chief Commissioner of State Revenue*… described the comparable sales method in the following terms:
>
> > The traditional, and usually unexceptional method [of valuing land] is to seek out relatively contemporaneous sales of comparable properties between parties at arm's length, unaffected by special circumstances, such as, for example, a strong desire by a purchaser to buy an adjoining property, and to use those sales as a yardstick for the valuation of the relevant land.

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40 [2003] WASCA 294, [27]-[33].

The appellant in that case was the owner of improved land in a Sydney suburb. The respondent was required to make an assessment of land tax on the basis of the unimproved value of the land. The respondent used the comparable sales method in valuing the land and the only sales relied on were of vacant land. However, vacant land in the relevant suburb was scarce and as a result it was, or may have been, inflated by a premium on account of its scarcity. The High Court held that the respondent was unreasonably selective in ultimately confining himself to two sales of scarce vacant land for the purposes of comparison. The Court said of the comparable sales method that the sales evidence must be both relevant and sufficient in volume and concluded that the valuer in that case had not proceeded rationally because he was unreasonably selective.

A helpful description of what the comparable sales method involves was given by Wells J in *Brewarrana*…:

> It is general valuation practice for sales characterized as comparable sales to be used as bases for the valuation of lands said to be similar. But allowances must always be made before such sales can be so used. No two parcels of land are identical in all respects: the sale price of any given piece of land is not necessarily the price at which it ought to have been sold, or the same thing as its true value. Before using any allegedly comparable sale, therefore, the valuer must consider whether, having regard to the circumstances ... appertaining to the parcel of land in question, and to the transaction of sale, there are sufficient similarities to the circumstances appertaining to the subject land and to the notional sale presupposed by the test formulated in Spencer v The Commonwealth of Australia ... to warrant a court's reasoning from the sale price paid under the allegedly comparable sale, with or without other evidence, to a value for the subject land. Adjustments must, of course, be made every time reasoning of that kind is undertaken. For example, in relation to the land itself and the circumstances appertaining to it, it may be necessary to consider such matters as topography, location, size, shape ... land use (actual and potential), scope for, and difficulties of, development, ... ; and in relation to the transaction of sale, the valuer must weigh such things as the character, business and relationships of the parties, their motives, the terms and conditions in their contract of sale, and any other special considerations that induced or may have induced them to conclude the contract at the selling price agreed, as well as the dates when the contract of sale and the transfer were concluded or effected.

There is no hard and fast rule by which a valuer can draw the line that clearly separates sales that are comparable from those that are not. It is a matter of degree. Some adjustment is always necessary but too much adjustment may render it unsafe to use a sale. Where the line is to be drawn is a matter for the expert valuer to determine..."[41] (citations omitted)

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41 [2003] WASCA 295, [47]-[50].

[122] The defendants submit that Mr Linnane effectively discarded the 74, 78-80 Tribune Street sale as irrelevant without explanation. I consider that submission is overstated. At page 26 of the August report, Mr Linnane said that he had most regard to the 66-98 Montpelier Road and 11 Breakfast Creek Road sales and in cross-examination when asked to identify the sites among those set out in his report under the heading "Development Site Sales Evidence" that he did not consider to be directly comparable, Mr Linnane said they were 117 Victoria Street, West End (which ultimately he did not rely upon) and 74, 78-80 Tribune Street. As McLure J says in the passages extracted above, that a sale is not directly comparable does not make it irrelevant.

[123] The defendants submit that Mr Linnane's report, at pages 26 and 29 to 30, sets out the bases of his opinion as to the rate per square metre and the rate per unit for the Albion Mills site and is expressed at such a high level generality that it does not disclose any true process of reasoning. In my view, that submission is also overstated, to a degree. In addition to the pages referred to by the defendants, Mr Linnane set out comparison comments in respect of each of the sales on which he relied in support of his opinion of market value. Thus, for 74, 78-80 Tribune Street he said:

> "Smaller sized sites. Located in a superior fringe CBD location.
>
> Purchase with development approval. Inferior 'approved' high parameters to 14 storeys. Smaller scale proposed development given the smaller site area and inferior building allowances. Inferior development potential.
>
> The improvements present in good condition. Purchased with holding income.
>
> Overall inferior."

[124] It is true, however, that Mr Linnane's opinions are expressed briefly, even sparely. But there is a point reached in direct comparison valuation methodology where the valuer must reason from physical characteristics, potentials and risks to a dollar amount. That judgment is the province of the expert valuer.

[125] The defendants submit that any comparison with the 66-98 Montpelier Road sale suffers from the difficulty that the price achieved on the sale was questionable as market value because of the circumstances surrounding the vendor and its failed float. Whilst those considerations were raised in cross-examination with Mr Linnane, I do not accept that the defendant established that the sale was not a sale at market value.

[126] The defendants also submit that the 66-98 Montpelier Road site is one that is larger than the 111 Victoria Street site that Mr Linnane treated as not directly comparable because of its size. However, this question was not raised in cross-examination with Mr Linnane. I am not prepared to conclude that the 66-98 Montpelier Road sale was not a directly comparable sale in those circumstances.

[127] Mr Linnane's assessed dollar value per square metre for the Albion Mills site was $3,058 per square metre. That compared to $1,409 per square metre for the 66-98 Montpelier Road sale. However, his assessed land value per unit for the Albion Mills

site was $26,856 per unit whereas that for the 66-98 Montpelier Road site was $43,307 per unit.

[128] The defendants submit that the reason Mr Linnane attributed a lower rate per unit to the Albion Mills site was that Bowen Hills is a better location than Albion because people would prefer to live there. The defendants further submit that Mr Linnane performed no analysis of unit sales data or any other data to support that opinion and that I should treat that opinion as being a subjective opinion of no weight.

[129] In my view, this submission is overstated. The 66-98 Montpelier Road site is located at the south-eastern end of Bowen Hills and is not far from areas in Newstead, including the Newstead Gasworks Plaza site and other nearby sites, where significant high density residential development has taken place in the last few years. I see no reason to reject Mr Linnane's opinion that the 66-98 Montpelier Road site is a much better location than the Albion Mills site. I also see no reason why it is necessary for a valuer in Mr Linnane' position to perform comparative analysis of the level of values of unit sales in the two suburbs or areas in order to be able to form the opinion that one site is better than another in terms of location. In my view, that is not required in every valuation of this kind.

[130] Mr Linnane assessed the other site to which he had most regard, namely 11 Breakfast Creek Road, as being overall inferior to the Albion Mills site. Nonetheless, the 11 Breakfast Creek Road site analysed to a rate of $5,071 per square metre whereas his opinion of value of the Albion Mills site analysed to the rate of $3,058 per square metre. The 11 Breakfast Creek Road site was not comparable on a per unit basis because it was purchased with development approval for a commercial scheme. Mr Linnane explained the differences in assessed value per square metre on the basis that the 11 Breakfast Creek Road site was much smaller but seemed unable to say why that consideration was important. However, as well, he explained that the 11 Breakfast Creek Road site was in a better position. For the same reasons as applied to the 66-98 Montpelier Road site, in my view, that is a relevant factor.

[131] Nevertheless, the defendants submit that there is no adequate explanation why the 11 Breakfast Creek Road site that was overall considered inferior should result in a valuation of the Albion Mills site that analyses to a lower rate of dollars per square metre than for the inferior site. There is some force in that submission, in my view.

[132] Even so, taking these considerations into account, overall, in my view they do not amount to a sufficient basis to wholly reject Mr Linnane's opinion as to value of the Albion Mills site at 31 March 2017 in the amount of $17 million. Notwithstanding the difficulties, I accept that his opinion does amount to admissible evidence of value in that sum as at the relevant date. In the absence of other evidence to the contrary, in my view, it should be found that the value of the Albion Mills site at the time of performance of the contract was $17 million.

Conclusions

[133] The difference between the purchase price payable under the contract, $25 million and the value of the Albion Mills site at the date of performance of the contract, $17 million, is $8 million. From that sum, the amount of $2.75 million paid under the contract before termination must be deducted. The result is that damages should be assessed in the sum of $5.25 million.

[134] The plaintiff is entitled to judgment against the first defendant in the sum of $5.25 million for damages for breach of contract. The plaintiff is also entitled to interest on that sum calculated from 31 March 2017 to the date of judgment under s 58 of the *Civil Proceedings Act* 2011 (Qld). The amount is $209,640.41.

[135] There is no issue raised as to the second defendant's liability on the guarantee on the findings I have made. The plaintiff is entitled to judgment in the same amounts against the second defendant.

[136] The plaintiff additionally claims a declaration that the deposit paid under the contract of $2.75 million is forfeited. It is unnecessary to make the declaration in the circumstance that judgment is given in favour of the plaintiff for damages for breach of contract on the basis set out above.

[137] The plaintiff has succeeded on the claim and counterclaim. Unless the parties wish to make further submissions, the defendants should be ordered to pay the plaintiff's costs of the proceeding, on the basis that costs should follow the event.[42]

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[42] *Civil Proceedings Act* 2011 (Qld), s 15; *Uniform Civil Procedure Rules* 1999 (Qld), r 681(1).