SUPREME COURT OF QUEENSLAND

CITATION:	*MFB Properties (NQ) Pty Ltd & Ors v MSD Securities Pty Ltd & Ors* [2018] QCA 259
PARTIES:	**MFB PROPERTIES (NQ) PTY LTD** **ACN 101 980 303** **(first appellant/first cross-respondent)** **THE JUNGLE VILLAGE PTY LTD** **ACN 098 067 077** **(second appellant/second cross-respondent)** **ASHLEE JANE PIPER** **(third appellant/third cross-respondent)** **MARK FREDERICK DAVID BIANCOTTI** **(fourth appellant/fourth cross-respondent)** **v** **MSD SECURITIES PTY LTD AS TRUSTEE FOR THE BRUNSWICK STREET TRUST** **ACN 160 362 345** (first respondent/first cross-appellant) **PK'S RESORT PTY LTD** ACN 168 348 730 (second respondent/second cross-appellant) **MARK LEONARD SEABROOK** (third respondent/third cross-appellant) **DAVID BRUCESMITH** (fourth respondent/fourth cross-appellant)
FILE NO/S:	Appeal No 9085 of 2017 SC No 13256 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 168 (Bond J)
DELIVERED ON:	9 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2018
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDERS:	**1. The appeal is allowed.** **2. The orders made on 18 August 2017 are set aside.** **3. The respondents are to pay the appellants' costs of the appeal to be assessed on the standard basis.** **4. The orders for costs made on 28 November 2017 are set aside and in lieu thereof the respondents to the appeal**

are to pay the appellants' costs of and incidental to proceeding No. 13256 of 2016, including reserved costs if any, to be assessed on the standard basis.

5. **The cross-appeal is dismissed.**

6. **The cross-appellants are to pay the cross-respondents' costs of the cross-appeal to be assessed on the standard basis.**

7. **Orders 1, 5, 6 and 7 made on 11 December 2017 are set aside.**

8. **Orders 3 and 4 made on 11 December 2017 are set aside and in lieu thereof the respondents are to pay the appellants' costs of the applications filed on 1 September 2017 and 22 September 2017, to be assessed on the standard basis.**

9. **The matter is remitted to the Trial Division to permit implementation and enforcement of the orders made by Flanagan J in proceeding No. 2575 of 2016 on 28 November 2016.**

CATCHWORDS: CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – INSTALMENT CONTRACTS – STATUTORY RESTRICTIONS ON RESCISSION OR TERMINATION OF INSTALMENT CONTRACT OR FORFEITURE OF INSTALMENTS OF PURCHASE PRICE – where the appellants and respondents were parties to a number of agreements, the purpose of which was to sell four parcels of land (Lots 1, 2, 3 and 4) and a resort business conducted on those parcels from the first, second and third appellants to the first and second respondents – where the four appellants and four respondents all entered into a deed – where the four appellants and four respondents were variously parties to six contracts of sale and purchase – where the parcels of land and business were to be purchased for a total consideration of $4 million – where the parties varied their agreement, the effect of which was that the transfer of a house, unit and vessel from the third and fourth respondents to the fourth appellant was deemed to amount to payment of $2 million, meaning that $2 million remained to be paid for the purchase of the lots and business under the deed – where the third and fourth respondents were not party to the REIQ contracts concerning the land on which the resort business was conducted – where the a mortgage was taken out by the first appellant over Lot 1 prior to conveyance of title to the first respondent – where the respondents submitted that the contract of sale for Lots 1, 2 and 4 was an instalment contract by virtue of the variation and that the contract was therefore voidable by the purchaser any time before completion, per s 73 *Property Law Act* 1974 (Qld), because of Lot 1's encumbrance by a mortgage – where the third and fourth

respondents, who had transferred property in purported consideration for the transfer of Lot 1, *inter alia*, were not the purchasers of Lot 1, 2 and 4 under the REIQ contract – where the third and fourth respondents did not stand to gain any interest in the land comprising Lot 1 – whether the contract for the sale of Lots 1, 2 and 4 was an instalment contract within the meaning of s 73 *Property Law Act* 1974 (Qld)

Property Law Act 1974 (Qld), s 71, s 73

Bunny Industries Limited v F.S.W. Enterprises Pty Ltd [1982] Qd R 712, cited
Fairweather v Fairweather (1944) 69 CLR 121; [1944] HCA 11, cited
Haque v Haque and Ors [No 2] (1965) 114 CLR 98; [1965] HCA 38, cited
Hewett v Court (1983) 149 CLR 639; [1983] HCA 7, cited
Road Australia Pty Ltd v Commissioner of Stamp Duties [2001] 1 Qd R 327; [1999] QCA 328, cited
Rose v Watson (1864) 10 HLC 672; [1864] EngR 300, cited
Stern v McArthur (1988) 165 CLR 489; [1988] HCA 51, cited
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57, cited

COUNSEL: P Dunning QC, with M Jonsson QC, for the appellants/cross-respondents
K N Wilson QC, with D Pyle, for the respondents/cross-appellants

SOLICITORS: Preston Law for the appellants/cross-respondents
Dowd & Company for the respondents/cross-appellants

[1] **SOFRONOFF P:** This appeal turns upon the construction of a series of peculiar and unusual instruments evidencing a transaction or transactions between the appellants and the respondents. The question is whether one of the contracts, or perhaps whether the transaction as a whole evidenced by all of the contracts, is an "instalment contract" within the meaning of s 73 of the *Property Law Act* 1974.

[2] On 13 March 2014 the four appellants and the four respondents entered into six contracts and executed a deed. Not all of the parties were parties to each of the contracts but they were all parties to the deed. For ease of reference I will refer to the parties to this proceeding by the names they adopted in each of the instruments. The six contracts were as follows:

(a) The Cape Land Contract pursuant to which MSD agreed to purchase Lots 1, 2 and 4 on SP 219085 (the "Cape Land") from MFB for $3.3 million;

(b) The Round House Contract pursuant to which MSD agreed to purchase Lot 3 on SP 219085 (the "Round House") from Ashlee for $300,000.00;

(c) The Business Contract pursuant to which PK's agreed to purchase from Jungle Village a "Business" for an "estimated" price of $400,000.00;

(d) The Vessel Contract pursuant to which Biancotti agreed to purchase from Mark a 72ft vessel for $1.5 million;

(e) The Gold Coast Home Unit pursuant to which Biancotti agreed to purchase from Brucesmith a Gold Coast home unit for $250,000.00;

(f) The Gold Coast House Contract pursuant to which Biancotti agreed to purchase from Brucesmith a Gold Coast house for $250,000.00.

[3] All of these parties also executed a deed, styled "Transaction Deed".

[4] The Cape Land Contract, the Round House Contract, the Gold Coast Unit Contract and the Gold Coast House Contract were all in standard REIQ form. The contract for the purchase of the Business was also in standard REIQ form. The Cape Land Contract and the Round House Contract each provided for settlement on or before 1 May 2014, for the payment of a deposit of $1 and payment of the balance purchase price by bank cheque on settlement. The Gold Coast Unit Contract and the Gold Coast House Contract provided for no deposit and for payment of the purchase price in full on settlement also on 1 May 2014. The Business Contract provided for a "total estimated price" of $400,000 and for settlement on the same date. The Vessel Contract, executed as a deed, required payment in full of the sum of $1.5 million on settlement which was on or before 1 May 2014.

[5] As to the deed, after defining "Consideration" in clause 1 to mean the sum of $4,000,000, clause 9 provided:

> "9. Consideration
>
> 9.1 MFB, Jungle Village and Ashlee agree to transfer the Cape Land, Business and the Round House to MSD and PK's for the Consideration. The parties agree that the amount of the Consideration will be apportioned by agreement during the due diligence period which is contained in each of the Cape Land contract, Round House contract and Business contract.
>
> 9.2 MFB, Jungle Village and Ashlee agree to accept payment of the Consideration from MSD and PK's as follows:
>
> (a) A transfer of the Gold Coast Unit by David (Brucesmith) to Biancotti for an amount of $250,000.00;
>
> (b) A transfer of the Gold Coast House by David to Biancotti for an amount of $250,000.00;
>
> (c) A transfer of the vessel by Mark to Biancotti for an amount of $1,500,000.00;
>
> (d) A cash payment of $2,000,000.00 by MSD and PK's for the balance to MFB, Jungle Village and Ashlee in accordance with the agreed apportionments and any adjustments."

[6] Clause 11 provided:

"11. Contemporaneous Settlement

11.1 The parties agree and acknowledge that the:

(a) Cape Land Contract;

(b) Round House Contract;

(c) Business Contract;

(d) Gold Coast Unit Contract;

(e) Gold Coast House Contract; and

(f) Vessel Contract;

are all subject to contemporaneous settlement with each other and that if any contract does not settle contemporaneously with the others any party may be [*sic*] written notice to all of the parties, extend the settlement date by a maximum period of 14 days in which event the settlement date for all of the contracts will be extended by the same period. Time will continue to be of the essence for all of the contracts.

11.2 Should settlement not be effected on the settlement date or any extended period, any party not in default may by written notice to the other parties, terminate their respective contract in which event all of the contracts will also be automatically terminated and the parties acknowledge they will not have further rights under the respective contracts other than a right to specifically enforce the applicable contract but only on the basis that all contracts referred to in clause 11.1 are settled contemporaneously.

11.3 The parties agree and acknowledge that the:

(a) Cape Land Contract;

(b) Round House Contract;

(c) Business Contract;

(d) Gold Coast Unit Contract;

(e) Gold Coast House Contract;

(f) Vessel Contract;

Are all subject to being entered into contemporaneously and if they are not entered into contemporaneously, then any party may by written notice to the others terminate their respective contract in which event all of the contracts will also be automatically terminated and the parties acknowledge they will not have further rights against the others.

11.4 The parties agree and acknowledge that the:

(a) Cape Land Contract;

(b) Round House Contract;

(c) Business Contract;

Are subject to preconditions namely, due diligence and satisfactory finance and that should MSD or PK's not satisfy or waive those pre conditions, those contracts will be at an end and in which event all of the contracts will also be automatically terminated and the parties acknowledge they will not have further rights against the others.

11.5 The parties agree and acknowledge that the intention of this Deed is to tie in all of the contracts between the parties and that this Deed may be relied upon by a party to terminate their respective contract should any contract be terminated pursuant to the terms of the relevant contract or this Deed."

[7] Settlement did not take place on 1 May 2014 but the parties kept the contracts and the deed on foot. On 29 May 2014 the parties agreed to vary their agreement in terms expressed in an email from the respondents' solicitors to the appellants' solicitors ("the May Variation") as follows:

> "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 above];
>
> 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;
>
> 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;

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);

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."

[8] No point was taken about the variation of a deed by an instrument other than a deed.

[9] In accordance with the varied arrangement, Brucesmith transferred the Gold Coast House and the Home Unit to Biancotti. Mark transferred the vessel to Biancotti. MFB, Jungle Village and Ashlee gave possession of, but not title to, Lots 1, 2, 3 and 4 and the Business (which was conducted on Lot 4) to MSD and PK's. MSD and PK's began and continued making the monthly payments of MFB's mortgage over Lot 4.

[10] But no money changed hands. MSD did not pay $625,000.00 that was due under clause 5 of the May Variation as payment in exchange for title to Lots 1, 2 and 3. So there was no transfer to MSD of title to Lots 1, 2 or 3.

[11] The parties kept the transaction on foot and entered into a further variation, "the July Variation", by email from the respondents to the appellants:

> "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;

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. ..."

[12] Whether or not "MSD, PK's Mark and David" did "try to make the payment of the sum of $625,000.00 by 31 July 2014", that payment was never made. Nevertheless, the parties still elected to keep the contract on foot. And there matters remained for over two years.

[13] Biancotti was a property developer who was developing a site in Cairns. In connection with this development Ledamark Pty Ltd, a company controlled by him, accepted an offer of finance from Bendigo and Adelaide Bank Ltd in March 2015. One of the bank's conditions was that MFB would grant the bank a first mortgage over Lot 1 that had been sold to the MSD. That condition was accepted but, by an oversight, no mortgage was then granted.

[14] In June 2015, Ledamark accepted another offer of finance from the bank in an amount of $650,000.00. Ledamark and the bank assumed that there was already a mortgage over Lot 1 and proceeded upon the basis that a further mortgage, over Lot 2 that had been sold to MSD, would now be granted. Such a mortgage was indeed registered on 16 June 2015. It is common ground that the respondents

became aware of this particular mortgage but did not purport to avoid the contracts in reliance upon that fact. Lot 1 remained unencumbered.

[15] A year later, on 12 July 2016, the bank conditionally approved an extension to that loan. During the course of attending to the paperwork for that extension, the bank noticed that there was no mortgage over Lot 1. As a result, the extension of the loan was made conditional upon the grant by MFB of a mortgage over Lot 1 and on 21 September 2016 such a mortgage was granted.

[16] This mortgage had the effect that Lot 1 became encumbered with a debt of at least $3.4 million. However, it was not controversial at trial that MFB was ready, willing and able to give clear title over Lot 1 upon settlement of the sale to MSD.

[17] In October 2016 the appellants and the respondents were minded, yet again, to attempt to finalise their transaction and each sought orders for specific performance against each other. This curious litigation arose because there was a dispute between the parties about the precise sum of money that had to be paid on settlement. On 15 November 2016 Flanagan J made orders for specific performance.

[18] On 30 November 2016, before those orders had been performed, the bank lodged a caveat over Lot 1 claiming an interest pursuant to the mortgage that had been granted on 21 September 2016. On 7 December 2016, having learned of the caveat, the respondents avoided the contracts in reliance upon s 73(2)(a) of the *Property Law Act* 1974.

[19] Sections 71 and 73 of the *Property Law Act* provide, relevantly, as follows:

> "**71 Definitions for div 4**
>
> In this division—
>
> ***deposit*** means a sum—
>
> (a) not exceeding the prescribed percentage of the purchase price payable under an instalment contract; and
>
> (b) paid or payable in 1 or more amounts; and
>
> (c) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser.
>
> ***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.
>
> ***mortgage*** includes any encumbrance or charge other than a charge attaching by the operation of any statutory enactment.
>
> ***prescribed percentage*** means—
>
> (a) for a contract for the sale of a proposed lot—20%; or
>
> (b) otherwise—10%.
>
> …

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

sale includes an agreement for sale and an enforceable option for sale.

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

"**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*."

[20] By an originating application, the respondents sought a declaration that MSD had validly avoided "the contract of sale of land between MFB Properties (NQ) Pty Ltd and MSD Securities Pty Ltd". They contended at trial that the May Variation had changed the Cape Land Contract into an instalment contract. The respondents also sought declarations that the Round House Contract and the Business Contract had been validly terminated in reliance upon the clause in each of those contracts that each was conditional upon completion of the Cape Land Contract. They sought recovery of the property that had been transferred to Biancotti.

[21] At trial, Bond J held that:

(a) The contract for the sale of Lots 1, 2 and 4 was an instalment contract;

(b) The mortgage granted on 21 September 2016 engaged s 73(2)(a) and conferred on MSD an entitlement to avoid the contract;

(c) The contract was validly avoided on that ground;

(d) The remaining contracts had been conditional upon completion of the contract for the sale of Lots 1, 2 and 4;

(e) That condition had failed;

(f) The transfers of the Vessel, the Gold Coast House and the Gold Coast Unit had been conditional upon completion of the avoided contract;

(g) That condition had failed;

(h) The respondents were, therefore, entitled to an order vacating the orders of Flanagan J;

(i) The respondents were entitled to consequential orders for re-transfer of the Vessel and reconveyance of the Gold Coast House and the Gold Coast Unit.

[22] The appellants now challenge the correctness of Bond J's conclusions.

[23] The appellants submitted that his Honour was in error in concluding that the contract for the sale of Lots 1, 2 and 4 was an instalment contract. Second, they submitted that his Honour should have concluded that MSD had first acquired a right to terminate the contracts in reliance upon s 73 on 16 June 2016, when the first of the mortgages in favour of the bank over any of the land that had been sold had been granted. Having elected to pursue specific performance, they submitted, MSD had thereby elected to affirm the contract. It was submitted that an election to affirm the contract after knowledge of one mortgage had the effect of denying the respondents any right to avoid upon the basis of any further mortgage of the contract land. Third, it was submitted that, in any event, the respondents knew about the second mortgage and had, nevertheless, sought specific performance, thereby electing to affirm the contracts. This ground attacked a credit finding and was not pressed on appeal. Fourth, it was submitted that, if there was a right to avoid the contracts and that right had been validly exercised, nevertheless there was no right in the respondents to recover any of the property that had been transferred.

[24] In order to determine whether s 73 had been engaged by the May Variation it is necessary to identify the relevant contract to which the statutory provisions might apply.

[25] The literal effect of the six discrete contracts was that, on settlement, each of the parties to these contracts was bound to make payments of sums of money to their corresponding counterparties. Such payments, if made, would have had the effect that the appellants as a group would have received net consideration of only $2 million in return for transferring property valued by the parties at $4 million. However, as the deed makes clear, the parties had no intention that that should happen. Rather, their intention was expressed in clause 9.1 of the deed, namely that "MFB, Jungle Village and Ashlee agree to transfer the Cape Land, Business and the Round House to MSD and PK's for the Consideration" and the "Consideration" meant the amount of $4 million. That is to say, the net commercial effect of the transaction was that the parties represented by the respondents would obtain land and a business valued by them at $4 million and would, in return, pay money and transfer property to their counterparties valued by the parties at $4 million. It was never intended by the parties that Biancotti would actually pay the prices specified in those contracts to which he was a party. In terms of clause 9.2 of the deed, MFB, Jungle Village and Ashlee agreed to accept payment of the consideration of $4 million due to them as a group by a money payment of $2 million to MFB, Ashlee and Jungle Village directly and otherwise by a transfer to Biancotti of the Gold Coast Unit, Gold Coast House and the Vessel. The prices were stated in the six contracts, it seems, to explain the quantification of the total consideration of $4 million flowing in one direction.

[26] The appellants' counsel had submitted at trial that the relevant contract for consideration in terms of s 73 was the Cape Land Contract and that became common ground. However, the appellants supported that conclusion by arguing that clause 9.2 merely provided for an alternative method of satisfaction of the obligation to pay $4 million. It was possible, so the argument ran, for the appellants to insist upon performance of each of the six contracts according to their strict terms for the terms of the Cape Land Contract had been left unaffected by any of the variations. There remained a contract obliging MSD to pay the sum stated in it as the price of the land.

[27] That argument was untenable. It was put forward because the appellants did not appreciate, until Bond J pointed it out, that settlement of the six contracts literally according to their terms would have resulted in the appellants being out of pocket by $2 million. Once that proposition was understood, the appellants abandoned the argument. They nevertheless maintained that the Cape Land Contract was the contract for the sale of land that engages s 73 and they repeat that argument in this appeal. For their part, the respondents also submit that the Cape Land Contract is the relevant contract to consider. They submit that under that contract MSD was obliged to pay MFB the sum of $3.3 million for the Cape Land which was, they submitted, "the majority of the total $4 million consideration to be paid under the suite of contracts in question". They point to the acknowledgement contained in clause 3 of the May Variation that the transfers were "a part payment under the Transaction Deed".

[28] There are three problems with that proposition. First, the major premise of that argument is that the transfers by Mark and Brucesmith constituted "payment" by MSD because MSD was bound to procure Mark and Brucesmith to make their respective transfers. That premise is inconsistent with the respondents' submission that the Cape Land Contract is the relevant contract to consider, for that contract does not, in any sense, oblige MSD to procure the performance by Mark and Brucesmith of their obligations. Second, the deed does not expressly impose such an obligation either and there was no submission that such a term could be implied. Third, the acknowledgement relied upon in the May Variation refers not to the transfers constituting the payment of consideration under the Cape Land Contract or the Round House Contract, but to the transfers constituting "payment under the Deed". This correctly draws attention to the deed as the pivotal instrument that records the substance of the transaction.

[29] The seven instruments must be read together for any of them to make sense. In my respectful opinion, it is only by having regard to the deed, the six contracts and the two variations together as constituting the whole contract between the parties that effect can be given to the parties' intentions. It is not possible to take each of the six contracts individually in order to determine the parties' obligations for, if each was performed according to its literal terms, the parties' intentions would be frustrated. The "Consideration" would no longer be $4 million but only $2 million. It is not possible, for the same reasons, to confine the examination of the effect of s 73 to a single instrument.

[30] The effect of the instruments when they are read together is that, before the May Variation:

1. MSD was the purchaser of Lots 1, 2, 3 and 4;

2. PK's was the purchaser of a business;

3. MSD and PK's were, together, obliged to make a money payment of $2 million to MFB, Jungle Village and Ashlee, to be apportioned by the latter as they saw fit;

4. Mark was obliged to transfer ownership of his vessel to Biancotti for no consideration moving back and notwithstanding the express terms of the contract in respect of that vessel;

5. Brucesmith was obliged to transfer to Biancotti title to the Gold Coast Unit and the Gold Coast House for no consideration moving back and notwithstanding the express terms of the contracts relating to them;

6. Each of these obligations was conditional upon the performance of the other obligations owed by the parties;

7. All of the obligations were to be performed contemporaneously.

[31] The May Variation then had the effect that the parties were bound as follows:

1. Brucesmith became bound to transfer title to his unit and house to Biancotti on a specified date;

2. Mark became bound to transfer title to his vessel to Biancotti on the same date;

3. MFB and Ashlee became bound to give MSD possession of Lots 1, 2 and 3;

4. Jungle Village became bound to permit PK's to operate the Business and to keep its profits;

5. MSD became bound to meet MFB's mortgage payments in respect of Lot 2;

6. MSD and PK's remained bound to pay to MFB, Jungle Village and Ashlee the sum of $2 million but now in two instalments:

   i $625,000.00 on 2 July in exchange for a conveyance of Lots 1, 2 and 3 and the ownership of the business;

   ii $1.375 million (less an adjustment) on or before 2 June 2015 in exchange for title to Lot 4.

[32] The question then becomes whether this variation rendered the contract between the parties, evidenced by the deed and the six discrete contracts read together, into:

> "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**."[1]
>
> (Emphasis added)

[33] Insofar as the "payment" is said to be the fulfilment by Mark and Brucesmith of their obligations, the answer is plainly in the negative. No express term of the

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1 *Property Law Act* 1974 (Qld) s 71

contract obliged MSD, the purchaser of land, to cause Mark or Brucesmith to perform those obligations. If MSD were implicitly so obliged, it would be difficult not to conclude that, similarly, Mark and Brucesmith were obliged to see that MSD paid their $2 million and that they would be personally liable to MFB, Ashlee and Jungle Village if that sum was not paid. The respondents point to nothing in any of the instruments that could have that effect and, as I have said, it was never suggested, rightly, that such a term could be implied. MFB's protection against being obliged to transfer land to MSD despite Mark's or Brucesmith's failure to perform was not a promise by MSD to make them perform. It was that the performance by MFB of its obligation to convey was conditional upon performance by all parties of all obligations. MFB's remedy in case of Mark's or Brucesmith's failure to perform was not to sue MSD; it was to terminate the contracts. Biancotti might also be at liberty to sue Mark and Brucesmith, as might MFB, but that is not to the point. MSD was not liable.

[34] The May Variation broke the condition of contemporaneity of performance of all the discrete contracts but it did not break their mutual conditionality. It bound Mark and Brucesmith to perform their respective obligations under the deed on 2 June 2014 before MSD had performed its own obligation to pay and before MFB or Ashlee had performed their obligations to convey any part of the land. MSD remained obliged as it always had been to pay $2 million but now it had to do so by two successive payments rather than by a single payment. The first payment was in the sum of $625,000.00 on 2 July 2014 in exchange for title to Lots 1, 2 and 3 (although not Lot 4). The respondents did not argue below or on appeal that was a promise that, in terms of s 71, bound MSD to make a payment other than a deposit without becoming entitled to receive a conveyance in exchange. Such an argument would, among other things, have had to address whether the expression "a conveyance in exchange for the payment" was apt to include a conveyance of part of the land in exchange for a part payment. No argument was raised at trial or on appeal about such matters and it is too late to consider them now. Otherwise, the May Variation obliged MSD to pay an additional sum of $1.375 million to MFB on or before 2 June 2015 in exchange for a transfer of Lot 4 in full satisfaction of MSD's obligations.

[35] It may be, as the appellants contend, that the expression "a payment or payments" cannot, as a matter of statutory construction, include the transfer of consideration *in specie*. The appellants point to the many places in the *Property Law Act* in which the term "payment" is used – always in a context in which the transfer of title to property *in specie* is evidently inapplicable. The appellants argue that the term should be interpreted consistently throughout the Act. There is force in that submission but it is not necessary to determine that question in order to determine this appeal.

[36] The respondents submit that the Cape Land Contract, to which they tendentiously refer in submissions as the "Main Contract", was "tied together with the suite of other contracts made contemporaneously" and that "all of the parties acknowledged" that the transfers of the boat, unit and the house were "a part payment under the Transactions". It submits that those matters establish that MSD became bound to make, or became bound to procure, Mark and Brucesmith to make the transfers.

[37] That submission must be rejected. It is true, as the respondents submit, that the parties regarded the various payments and transfers as combining in their effect to meet the commercial requirement of the vendors of the land and the business that they, or their ultimate owner Biancotti, should receive the benefit of a net consideration to the value of $4 million. For that reason, among others, the deed stipulated the mutual contemporaneity and conditionality of the individual parties' obligations. But that did not mean that MSD became "bound to make a payment or payments (other than a deposit)" because Mark and Brucesmith became bound to transfer property *in specie* to Biancotti without MSD receiving any conveyance in exchange. Although the overall commercial intent of the parties was indeed to effect a transfer of cash and property from the respondents to the appellants in exchange for the appellants' land and business, the deed sought to achieve that end by obliging each party to the deed to perform particular obligations. The deed does not, expressly or implicitly, impose any obligation upon MSD to ensure the transfers by Mark and Brucesmith. In any event, an obligation on the part of MSD to cause Mark and Brucesmith to transfer their property would not constitute an obligation on its part to make a payment. It would be an obligation to cause another person to do an act, namely to transfer property.

[38] This conclusion accords with the evident intent of s 73.

[39] A long-standing view of the vendor-purchaser relationship is that a purchaser who pays money to a vendor gains an equitable interest in the land by making that payment.[2] The vendor becomes a trustee of the land.[3] The characterisation of a vendor as a trustee impliedly casts the subject land as trust property, which carries with it concomitant duties on the part of the vendor as trustee. The vendor is therefore precluded from dealing with the land in a way that is inconsistent with the purchaser's ownership. This notion is one that has been described as being one of the "landmarks of the Court",[4] that is "as old as the law of trusts".[5] In more recent times, some doubt has been cast on the extent to which the relationship between vendor and purchaser can be rightly characterised as that between a trustee and beneficiary.[6] Indeed, it has long been acknowledged that any such trusteeship is limited.[7] The purchaser only has an equitable interest in the land commensurate with the amount that they have paid to the vendor and,[8] as stated by Connolly J in *Bunny Industries Limited v F.S.W. Enterprises Pty Limited*,[9] quoting Kitto J in *Haque v Haque and Ors [No 2]*,[10] "[t]he incidents of trusteeship exist only if and so far as a Court of Equity would in all circumstances of the case grant specific performance of the contract".[11]

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2 See *Hewett v Court* (1983) 149 CLR 639, 653 quoting *Rose v Watson* (1864) 10 HLC 672 at 683-684.

3 *Fairweather v Fairweather* (1944) 69 CLR 121 at 154.

4 *Bunny Industries Limited v F.S.W. Enterprises Pty Limited* [1982] Qd R 712 at 714, quoting *Shaw v Foster* (1872) LR 5 HL 321 at 349.

5 D W M Waters, *The Constructive Trust* (The Athlone Press, 1964) at 74.

6 See, eg, *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; *Stern v McArthur* (1988) 165 CLR 489 at 522.

7 See *Road Australia Pty Ltd v Commissioner of Stamp Duties* [2001] 1 Qd R 327 at 341-342.

8 *Rose v Watson* (1864) 10 HLC 672, 684 (per Lord Cranworth).

9 [1982] Qd R 712.

10 (1965) 114 CLR 98.

11 Supra at 715.

[40] It is not necessary, for present purposes, to map the precise contours by which such a trusteeship could arise. This characterisation is demonstrative of the long-held recognition of the significance of land in the relationship between vendor and purchaser.

[41] And so too does s 73 recognise that the relationship between a vendor and purchaser under an instalment contract has, as its central feature, the land the subject of the contract. To take the view of a vendor as trustee, a vendor who mortgages land without the purchaser's consent is a trustee who puts the trust property at risk for personal benefit. Section 73 applies a similar logic in conferring protection on purchasers who have paid the vendor part of the purchase price. The protection is extended to the purchaser alone, because the land is to be conveyed to the purchaser alone.

[42] Section 73 is reflective of the fact that the relationship between a vendor and purchaser is not merely one of debtor and creditor. And so the position of Mark and Brucesmith can be distinguished from that of a purchaser of land. Mark and Brucesmith had no relationship with the land. A third party who pays a sum to a vendor under a contract that does not result in the third party's gaining any interest in the land only risks losing money, not land. It follows that Mark and Brucesmith could not be legally affected by any mortgage of the land.

[43] For these reasons it is not necessary to consider the other grounds of appeal.

[44] Accordingly, I would allow the appeal, set aside the orders of Bond J made on 18 August 2017 and remit the matter to the Trial Division to allow implementation and enforcement of the orders made by Flanagan J in proceeding number BS2575 of 2016 on 28 November 2016.

[45] Subject to one matter the costs should follow the event. There are two orders that need be specifically mentioned.

[46] Orders 3 and 4 made on 11 December 2017 concerned applications brought after the principal judgment. Order 3 deals with an application brought by the respondents. It had no basis once it is seen that the principal judgment is reversed. The respondents should pay the costs of that application.

[47] Order 4 concerned an unsuccessful application brought by the appellants. The respondents submit that regardless of the appeal being allowed the appellants should pay the costs of that failed application. However, the costs of that further hearing were the result of the outcome in the principal judgment, for which the respondents contended but which has ultimately been reversed on the appeal. The respondents, therefore, should pay the costs of that application.

[48] The orders are:

1. The appeal is allowed.

2. The orders made on 18 August 2017 are set aside.

3. The respondents are to pay the appellants' costs of the appeal to be assessed on the standard basis.

4. The orders for costs made on 28 November 2017 are set aside and in lieu thereof the respondents to the appeal are to pay the appellants' costs of and incidental to proceeding No. 13256 of 2016, including reserved costs if any, to be assessed on the standard basis.

5. The cross-appeal is dismissed.

6. The cross-appellants are to pay the cross-respondents' costs of the cross-appeal to be assessed on the standard basis.

7. Orders 1, 5, 6 and 7 made on 11 December 2017 are set aside.

8. Orders 3 and 4 made on 11 December 2017 are set aside and in lieu thereof the respondents are to pay the appellants' costs of the applications filed on 1 September 2017 and 22 September 2017, to be assessed on the standard basis.

9. The matter is remitted to the Trial Division to permit implementation and enforcement of the orders made by Flanagan J in proceeding No. 2575 of 2016 on 28 November 2016.

[49] **MORRISON JA:** I agree with the reasons of Sofronoff P and the orders his Honour proposes.

[50] **McMURDO JA:** I agree with Sofronoff P.