SUPREME COURT OF QUEENSLAND

CITATION:	*Sentinel Citilink Pty Ltd v PS Citilink Pty Ltd* [2018] QSC 239
PARTIES:	**SENTINEL CITILINK PTY LTD ACN 602 638 013 AS TRUSTEE OF THE SENTINEL CITILINK TRUST** (plaintiff) **v** **PS CITILINK PTY LTD ACN 623 164 312 AS TRUSTEE OF THE CITILINK PROPERTY TRUST (ABN 94 215 640 602)** (defendant)
FILE NO/S:	SC No 1823 of 2018
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	19 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30-31 August 2018
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. It is declared that the contract dated 20 December 2017 between the plaintiff, as seller, and the defendant, as buyer, for the sale and purchase of real property located at 153 Campbell Street, Bowen Hills, Queensland and described as Lot 1 on SP193899, title reference 50628055 ("the contract") was not lawfully terminated by the plaintiff on 22 January 2018.** **2. The parties will be heard further as to the form of any order for specific performance of the contract.** **3. The parties will be heard further as to the amount of the compensation order which should be made.** **4. The plaintiff must pay the defendant's costs of the proceeding to be assessed.**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – TRANSFERS – OTHER MATTERS – where the seller and the buyer entered into a contract for the sale of certain commercial property – where the contract was a standard REIQ contract for the sale of commercial property with additional special conditions – where the contract recorded a purchase price of $81,200,000 – where the buyer paid a deposit pursuant to the contract – where the buyer was obliged to pay "the balance of the

Purchase Price" on the settlement date – where a special condition provided that the seller must pay to the buyer, by way of an adjustment to "the balance Purchase Price payable on settlement", an amount equivalent to the value of extant incentive arrangements affecting leases on the property – where the value of outstanding incentives was $2,037,364.45 as at the date of contract and $2,003,050.67 as at the date of settlement – where the adjustment resulted in an amount of $79,196,949.34 required to be transferred at settlement – where the seller and the buyer disagreed on the amount of consideration to be shown on the relevant transfer forms (form 1 and form 24) – where the parties have an obligation to complete the forms in accordance with the applicable instructions and otherwise consistently with the law – where the parties each produced different versions of form 1 and form 24 displaying different amounts for consideration – where the contract failed to settle – whether the seller was correct in insisting upon completion of a form 1 and a form 24 which recorded consideration of $81,200,000, not the adjusted figure of $79,196,949.34 – whether the seller breached its obligation under the contract to do all acts and execute all documents necessary for the purpose of completing the sale

Land Title Act 1994 (Qld) s 9A, s 10

COUNSEL: G Gibson QC, with S Russell, for the plaintiff
L Kelly QC, with C Johnstone and B Kabel, for the defendant

SOLICITORS: Russells Lawyers for the plaintiff
Clayton Utz for the defendant

The issues before the Court

[1] The plaintiff (**the seller**) and the defendant (**the buyer**) entered into a contract dated 20 December 2017 pursuant to which the buyer agreed to purchase from the seller certain commercial property in Bowen Hills.

[2] The contract was a standard REIQ contract for the sale of commercial property with additional special conditions. It recorded a purchase price of $81,200,000. A deposit of $4,060,000 was payable by the buyer as at the date of the contract and was paid. The buyer was obliged to pay "the balance of the Purchase Price" on the settlement date.

[3] The commercial property the subject of the sale was subject to various extant leases specified in a schedule to the contract. The seller was obliged not to vary or to terminate the leases without the buyer's consent. It was a fact known to both parties as at the date of the contract that there were extant incentive arrangements affecting the leases, including rent concessions in respect of rent to be paid from time to time over the life of the leases. A special condition to the contract provided that at settlement, the seller must pay to the buyer, by way of an adjustment to "the balance Purchase Price payable on settlement", an amount equivalent to the value of any outstanding incentives.[1] It was a fact known to both

[1] A particular incentive was excluded, but that may be ignored for present purposes.

parties as at the date of the contract that the value of the outstanding incentives as at the date of the contract was $2,037,364.45.

[4] Under the contract, the settlement date was to be fixed as the date which was 5 business days after notification that a particular certification had been obtained. It was common ground that the date and time for settlement was ultimately validly fixed for 19 January 2018 at 4.45pm. By 16 January 2018, the parties had also agreed that the value of outstanding incentives as at the date of settlement was $2,003,050.67.

[5] The contract did not settle as at the agreed date and time. The buyer contends that occurred because the seller refused to execute the transfer forms which had been provided to it by the buyer on 16 January 2018 (i.e. forms 1 and 24 under the *Land Title Act* 1994 (Qld)) and, instead, on the morning of settlement on 19 January 2018, the seller made it plain that it would only execute transfer forms in the form which it provided to the buyer.

[6] The difference between the two versions of the forms was whether the "consideration" in the forms 1 and 24 should be recorded as –

(a) the $79,196,949.34 amount, which was the amount obtained after deduction of the agreed value of the outstanding incentives from the original purchase price, as the buyer's transfer forms had recorded; or

(b) the $81,200,000 amount, which was the amount of the original purchase price with no deduction, as the seller's transfer forms had recorded.

[7] This dispute did not affect the calculation of the payments which the buyer was obliged to make to the seller at settlement. Indeed, there was no dispute between the parties as to the amounts which the contract required the buyer to provide to the seller at settlement either at the time of settlement or before me.

[8] Why then was there a problem?

[9] The seller had indicated that it was concerned not to be seen to execute documents which misrepresented the true position to the authorities administering the *Duties Act* 2001 (Qld) and the Land Title Act, namely the Office of State Revenue and the Registrar of Titles. It took the view that the true position was that there was a cash consideration of $81,200,000.

[10] The buyer had also acknowledged the need not to misrepresent anything but said that the consideration which it was paying was $79,196,949.34 (and, bearing in mind the value of the outstanding incentives as at the date of contract, the amount it was going to pay was never going to be $81,200,000). It was also faced with the more immediate issue of having to pay duty under the Duties Act and to put itself in the position of registering the transfer under the Land Title Act and so perfect its purchase. In particular, the buyer was concerned as to the implications which execution of the seller's transfer forms might have for the amount of duty it would have to pay to put itself in the position of immediate registration. Although the buyer had sufficient funds at settlement to cover the payments required to be made to the seller and to pay transfer duty if assessed on $79,196,949.34, the buyer did not have sufficient funds to cover the payments required to be made to the seller **and** to pay transfer duty if assessed on $81,200,000.

[11] The seller took the position that the failure to settle on 19 January 2018 was due to a failure by the buyer to tender the purchase price, in breach of contract. The seller reserved its rights on that day, but on 22 January 2018 terminated in reliance on that alleged breach, purporting to be able to forfeit the deposit to itself. For its part, the buyer alleged that it was at all times ready, willing and able to settle and that it was prevented from so doing by the seller's conduct in relation to the transfer forms, which the buyer characterized as a breach of the seller's contractual obligation under cl 10 of the standard terms of the

contract to do all acts and execute all documents necessary for the purpose of completing the sale. The buyer wanted to have the contract performed.

[12] The seller's argument before me (disputed by the buyer) was that the buyer's transfer forms did not satisfy the requirements of cl 10.1 because –

(a) the buyer's transfer documents identified the consideration as $79,196,949.34 not $81,200,000 and did not disclose any adjustments where provision was made for that purpose, and could not be regarded as the transfer documents and declarations required to procure stamping and registration of the transfer of the property; and

(b) the operation of the Duties Act (particularly s 502 and s 12) was such that the consideration for the purposes of the Duties Act was $81,200,000.

[13] The buyer's argument before me (disputed by the seller) was as follows.

[14] First, the effect of the seller's transfer forms, if executed, would have been –

(a) to misrepresent to the State of Queensland acting through:

(i) the Office of State Revenue, the true consideration payable under the contract, and therefore the dutiable value, contrary to the requirements of ss 11(7) and 19(3) of the Duties Act and s 122 of the *Tax Administration Act* 2001 (Qld); and

(ii) the Registrar of Titles, the true consideration payable under the contract, contrary to the requirements of ss 10 and 61 of the Land Title Act; and

(b) to require the defendant to incur incorrectly a liability of $4,649,525 on account of stamp duty in excess of the amount for which it was actually liable, being $4,534,352.50.

[15] Second, the seller's insistence on the seller's transfer forms was wrong in fact and law, the proper dutiable value under the Duties Act being the $79,196,949.34 amount obtained after deduction of the agreed value of the outstanding incentives from the original purchase price.[2]

[16] Third, the effect of the seller's insistence on the seller's transfer forms was to convey to the buyer that the seller would not complete the contract in accordance with its terms, and amounted to a refusal to do all acts and execute all documents necessary for the purpose of completing the sale of the property in accordance with cl 10.1 of the contract.

[17] It will appear that I regard the focus of both sides on what might be the proper dutiable value under the Duties Act to be a red herring.

[18] The seller sought declaratory relief as to the validity of its termination of the contract and its entitlement to retain the deposit. It sought an order removing a caveat lodged by the buyer. If the seller established its entitlement to terminate, then there was no dispute that those orders should be made.

[19] For its part, the buyer sought a declaration that the contract had not been validly terminated and sought an order for specific performance of the contract. Critically, the seller conceded that if it was wrong to insist on its version of the transfer forms, then it did not lawfully terminate the contract. (This concession was important because it meant it was unnecessary to consider whether, even if the seller was not entitled to take the position it

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[2] The buyer sought to argue that the seller ought not be permitted to advance any argument based on s 12 of the Duties Act, there being no reference to that section in its pleading. The latter proposition was true, but given the generality of the buyer's proposition about proper dutiable value, which was disputed by the seller, I would not accept that the seller's argument could fairly be limited in this way. As will appear, I do not find it necessary to resolve what might be the proper dutiable value under the Duties Act.

did in relation to transfer forms, that conduct truly operated to prevent the buyer from settling.) If the seller did not lawfully terminate the contract, the seller did not seek to persuade me that there was any reason why the buyer should not have specific performance. Accordingly, if I concluded that the seller was wrong to insist on its version of the transfer forms, it would follow that the declaration sought by the buyer should be made and that the buyer would be entitled to an order that the contract be specifically performed.

[20] The buyer also sought damages by way of compensation and the seller did not present a case disputing the buyer's entitlement to compensation if the seller did not lawfully terminate the contract. Nor did it adduce any evidence on the quantum of that entitlement. It was common ground that if the buyer was entitled to an order that the contract be specifically performed, I should hear the parties further as to the amount of the compensation order which should be made.

[21] It follows that the critical question at this trial is whether the seller was contractually entitled to insist on its version of the transfer forms.

[22] For reasons which will appear, I conclude that the seller was not so entitled. On the proper construction of the contract as entered into, the maximum amount which could be payable by the buyer under the contract was not $81,200,000. Rather it was $81,200,000 less the rental incentive deduction. Accordingly it was wrong for the seller to insist on completion of the forms in a way which involved the seller declaring (and the buyer agreeing) that $81,200,000 was the full amount paid by the buyer for the transfer of the land. The seller could have dealt with its stated concerns about misrepresentation by filling out the forms in such a way as to provide further detail about the manner of calculation of consideration payable under the contract. The Land Title Practice Manual provides instructions as to the completion of the forms by the provision of additional detail via a form 20 "enlarged panel" where further detail is thought necessary. However, the seller did not take that course.

The terms of the contract

[23] The standard commercial terms relevantly provided (emphasis added):

(a) by cl 1.1(x) and Item N of the Reference Schedule, the "Purchase Price" was $81,200,000;

(b) by cl 1.1(h) and Item O of the Reference Schedule, the "Deposit" was the sum of $4,060,000;

(c) by cl 1.1(t), "Lease" meant the leases identified in the Lease Schedule set out in Annexure B to the contract;

(d) by cl 1.1(cc) and Item Q of the Reference Schedule, the "Settlement Date" was the date fixed pursuant to special condition 16;

(e) by cl 1.7, the contract would be governed by the laws of Queensland;

(f) by cl. 3.1 and Item O of the Reference Schedule, the buyer was obliged to pay the $4,060,000 deposit amount to the deposit holder on the day the buyer signed the contract;

(g) by cl 4.1:

> **The balance of the Purchase Price shall be paid on the Settlement Date** as the Seller or the Seller's Solicitor directs in exchange for:
>
> (a) possession of the Property (such possession to be vacant except for any Lease);
>
> (b) **a properly executed transfer for the Land in favour of the Buyer capable of immediate registration (after stamping)** in the appropriate office free from

Encumbrances (other than those set out in Item L) and title to the Property (other than the Land) free from Encumbrances (other than those set out in Item L) but subject to the conditions of this Contract;

(c) any declaration required, by the *Duties Act 2001* to be furnished to procure the stamping of the transfer;

(d) **such other instruments or declarations as are required by law to be signed by the Seller to procure the stamping and/or registration of the transfer**;

(e) except as otherwise provided in this Contract, any instrument of title for the Land required to register the transfer;

…

(h) by cl 10:

10.1 Subject to compliance by the Buyer with the Buyer's obligations under or by virtue of this Contract **the Seller shall as required do all acts and execute all documents necessary for the purpose of completing the sale and ensuring that the Buyer obtains a good and valid title to the Property but all transfer documents, any declaration required pursuant to clause 4(c), and all instruments or declarations required pursuant to clause 4(d) shall be prepared by and at the expense of the Buyer and delivered to the Seller** within a reasonable time prior to the Settlement Date.

10.2 If so requested by the Buyer, the Seller shall deliver to the Buyer, prior to the Settlement Date, photocopies of the documents executed by the Seller.

10.3 After execution of the transfer, if so requested by the Buyer and upon payment of the usual production fee by the Buyer, the Seller shall cause the transfer to be tendered to the Office of State Revenue for stamping, together with any declaration referred to in clause 4(c) and thereupon the Seller shall be deemed to have complied with the Seller's obligations under clause 4(c).

…

(i) by cl 13, the seller was given the right to terminate the contract and to declare the deposit forfeited if the buyer failed to pay the "balance of the Purchase Price" as provided in cl 4;

(j) by cll 14 and 15, provision was made for the apportionment of responsibility as between the seller and the buyer of rates, taxes (including land tax) and other outgoings;

(k) by cl 23, all stamp duty on the contract and any duty in respect of the conveyance by the seller to the buyer must be paid by the buyer, and if not paid by the buyer may be paid by the seller and recovered from the buyer as a liquidated debt.

[24] The special conditions relevantly provided (emphasis added):

(a) by SC1.1, the following defined terms:

Incentive means **any incentive such as a rent concession,** fit out contribution, works or other inducement the Seller (or its predecessors in title) have agreed to provide to or perform for a Tenant or any person associated with a Tenant pursuant to an agreement between the Seller (or its predecessors in title) and a Tenant, **whether the agreement is made before or after the Contract Date**.

…

Lease Documents means the documents in respect of the Leases that have been made available to the Buyer by the Seller, including any agreement in relation to an Incentive and any agreement for lease or offer to lease.

…

Tenant means a tenant under a Lease (and includes a licensee under a licence).

(b) by SC5:

5.1 **The Buyer acknowledges that**:

(a) **the Property is sold subject to the Leases** and the Buyer will accept title to the Property subject to the Leases, **and any matter relating to the Leases that has been disclosed to the Buyer prior to the Contract Date**; and

(b) subject to the terms and conditions of this Contract, it has inspected and has satisfied itself in all respects about the Lease Documents.

...

5.4 **With effect from the Settlement Date, the Seller transfers to the Buyer all of the rights and obligations of the Seller under the Leases**, whether or not those terms touch and concern or run with the Land (subject to special condition 11.12).

5.5 **The Buyer must comply with the obligations of the lessor under the Leases on and from settlement of this Contract**, whether or not those obligations touch and concern or run with the Land.

5.6 **If the Seller requests the Buyer to do so, the Buyer must execute and deliver to the Seller, at least 5 Business Days prior to the Settlement Date, deeds of covenant**, in a form reasonably required by the Seller and acceptable to the Buyer, acting reasonably, to give effect to the provisions of this Special Condition, provided the deeds of covenant are delivered to the Buyer at least 10 Business Days prior to the Settlement Date.

5.7 **The Seller must not between the date of this Contract and settlement**:

(a) grant a new Lease (excluding a Lease arising from the exercise of an option to renew a Lease);

(b) **vary a Lease**;

(c) consent, withhold consent or conditionally grant consent to a transfer or assignment;

(d) consent, withhold consent or conditionally grant consent to a subtenancy;

(e) **terminate a Lease**;

(f) accept a surrender of Lease; or

(g) negotiate or carry out a rent review for a lease, including determining or agreeing the current market rent in relation to any lease,

unless the Seller first obtains the Buyer's prior written consent (which must not be unreasonably withheld) except where:

(h) the Seller is obliged to do that thing by the relevant Lease (including but not limited to, the granting of a new lease pursuant to a valid exercise of an option, but excluding terminating a Lease) or otherwise by law; or

(i) the Seller's intention of doing that thing is disclosed in this Contract,

in which case the Seller may do such things without the Buyer's consent.

5.8 **The Seller warrants that as at the Contract Date, to the best of its knowledge**:

(a) the particulars of the Leases in the Lease Schedule in Annexure B are in all material respects true and correct;

…

(f) the responses given by or on behalf of the Seller to requests for information (whether in relation to Leases or any other matter) issued by or on behalf of the Buyer were true, accurate and not misleading;

(g) except as otherwise disclosed to the Buyer:

(i) the documents for the Leases disclosed to the Buyer are true and complete copies and constitute the entire agreement between the Seller and the Tenant and there is no written, oral or other agreement or understanding between the Seller and the Tenant other than any agreements disclosed to the Buyer;

(ii) there are no persons entitled to occupy the Property both as at the Contract Date and as at settlement other than the Tenant; and

(iii) the Seller is not aware of any current, pending or threatened proceeding in relation to the Leases or any other disputes in connection with the Leases of which the Seller has received notice;

(iv) all amounts under the Leases due up to and including settlement have been paid and there has been no advance payments made under a Lease or a commutation of future rents agreed by the Seller, unless disclosed to the Buyer prior to settlement;

(v) the Seller has not waived any requirement to pay a material amount under the Leases (or bond or guarantee) after settlement or any material obligations under the Leases;

(h) **there are no tenancy incentives (including any inducement, incentive or concession of any nature) for which the Buyer will be responsible and any incentives due to the date of this Contract have been paid, other than as disclosed to the Buyer to be adjusted in accordance with the terms of this Contract**; and

(i) **the Seller has disclosed all relevant facts and documents in relation to the Leases to the Buyer**.

…

(c) by SC7, up to settlement, the seller was obliged both to enforce and to comply with the leases in accordance with usual practice, and to manage the property consistently with reasonable property management practice;

(d) by SC10, if the seller failed to comply with the terms and conditions of the contract then the buyer could affirm the contract and sue for damages for breach or for specific performance and damages in addition to or instead of damages for breach;

(e) by SC11.12:

11.12 **At settlement, the Seller must pay to the Buyer, by way of an adjustment to the balance Purchase Price payable on settlement of this Contract, an amount equivalent to the value of any outstanding Incentives**, excluding the Siemens Incentive. The Buyer acknowledges that no adjustment will be made for the Siemens Incentive.

(f) by SC13, the seller was obliged to direct the buyer at settlement to draw a bank cheque in favour of the buyer's solicitor for a Retention Sum, that sum to be kept and dealt with as a guarantee for rent to be received from specified premises for a defined guarantee period;

(g) by SC16:

16.1 Settlement is conditional on the Seller registering a Building Energy Efficiency Certificate (**BEEC**) for the Property in accordance with the *Building Energy Efficiency Disclosure Act 2010* (Cth).

16.2 The Seller must:

(a) use its best endeavours to comply with special condition 16.1 as soon as possible; and

(b) give written notice to the Buyer immediately on registration of the BEEC.

16.3 The Settlement Date is 5 Business Days after the Buyer receives notice under special condition 16.2(b) that the condition in special condition 16.1 is satisfied.

16.4 If the condition in special condition 16.1 is not satisfied by 5:00pm on the date 60 days from the Contract Date, either party may terminate this contract by written notice to the other, in which case the Deposit must be refunded to the Buyer in full and neither party owes any further obligation to the other (other than in relation to subsisting breaches of the contract or terms of the contract that survive termination).

The dispute regarding the transfer forms and how it impacted settlement

[25] As I have already recorded, by 16 January 2018, the parties were agreed that the total incentive amount under SC11.12 was $2,003,050.67. The effect of SC11.12 was that a purchase price of only $79,196,949.34 was actually required to be transferred by the buyer to the seller under the contract.

[26] On 16 January 2018, the buyer's solicitor sent by email a copy of the draft transfer forms to the seller's solicitor. The adjusted purchase price of $79,196,949.34 appeared at Item 4 "Consideration" in form 1 and as the total cash figure in Part B, Panel 4 "Details of Sale Price" in form 24.

[27] The buyer's transfer forms, if executed by both parties, would have recorded the following propositions:

(a) The seller transfers the fee simple to the buyer for the monetary consideration of $79,196,949.34.

(b) The seller acknowledges the receipt of the monetary consideration of $79,196,949.34.

(c) The seller declares, amongst other things, the truth and correctness of the following information:

Details of sale price		
Cash		$79,196,949.34
Vendor terms		$
Assumption of liabilities		$
		$
Other (specify above)		
	Total	$79,196,949.34

(d) The buyer states, amongst other things, the truth and correctness of that same information.

[28] The seller's solicitor responded by email on 16 January 2018 at 4.51pm, suggesting that the full purchase price of $81,200,000 should be displayed on the forms and that duty should be payable on that full purchase price:

> Thanks for sending through the transfer and form 24.
>
> I note you have shown the consideration on the transfer as $79,196,949.34. The difference is $2,003,050.66, being the outstanding incentive amount.
>
> Special condition 11.12 says that the adjustment to the balance purchase price payable on settlement is to be an amount equivalent to the outstanding incentives.
>
> A Senior assessor from OSR (Dallas) has informed me that there may be a case for the duty to be reduced however the transfer must reflect the purchase price in the contract and duty should initially be payable on the purchase price on the contract. The buyer should then put in an application for a refund. This is the magnitude of transaction that could attract an audit.
>
> Whilst we agree that there is good reason for the reduced duty apply, this is a discussion you should have with the OSR rather than simply showing the lower amount on the transfer and form 24, which the seller is also certifying as correct.

[29] The buyer's solicitor responded by email on 17 January 2018 at 10.00am by attaching a Queensland Law Society practice note which appeared in Proctor (December 2009). He maintained that the adjusted purchase price of $79,196,949.34 should appear on the forms. Relevantly, the practice note reminded practitioners that inadequate completion of the forms could give rise to professional disciplinary and even criminal consequences. It also provided (emphasis added):

> …

The accuracy of the information recorded in the Form 1 Transfer and accompanying Form 24 Property Information (Transfer) as to the sale price is important for the integrity of the land data system and practitioners are under an obligation to provide information which is true and correct.

Rebating, discounting or such other mechanisms if not reported correctly can distort information that is relevant to valuations and future buyers of property or comparable property.

After discussions it has been agreed by the Titles Registry, the State Valuations Service and the Society that conveyancing transactions with a rebate, discount or cash-back on settlement should be reported in the following way:

Form 24 Property Information (Transfer)	In Part B, Panel 4 where details of the Sale Price are recorded: • the sub-category "Cash" be noted as the sale price on the contract • the sub-category "Other" record the rebate allowed (as a negative figure), and • "Total" show the rebated sale price.
Form 1 Transfer	Record the rebated sale price as the "Consideration" in Item 4.

The Office of State Revenue has confirmed that, regardless of the amount reported in the Form 24 and Form 1, a rebate does not reduce the dutiable value of the transaction under the *Duties Act 2001*. Therefore the full amount must still be recorded in the relevant Office of State Revenue forms for the purpose of calculation of transfer duty.

Worked example
Dido entered into a contract with Happy Greenacres Developments Pty Ltd for the sale of a new house for $500,000, which included a condition that if she was to settle within 28 days Happy Greenacres would give her a rebate at settlement of $30,000. The sale price of $500,000 is to be recorded as the consideration for the transaction in the forms lodged with OSR and used for the purpose of calculating transfer duty.
The relevant Land Titles forms should provide:

Form 1 Transfer

4. Consideration
$470,000

Form 24 Property Information (Transfer)

4. Details of Sale Price	
(a) Property excluding water allocation	
Cash	$ 500,000.00
Vendor terms	$
Assumption of liabilities	$
Rebate	$ -$30,000.000
Other (specify above)	
Total	**$ 470,000.000**

[30] The seller's solicitor responded by email on 17 January 2018 at 10.22am, denying that the incentive adjustment pursuant to SC11.12 amounted to a rebate, discount or cash-back and asserting that it was "a normal settlement adjustment". The seller's solicitor further asserted that because the transfer duty was calculated on the full purchase price of $81,200,000, the full purchase price should appear on the forms.

[31] The buyer's solicitor responded by email on 17 January 2018 at 12.30pm in the following terms (emphasis added):

> We are obviously happy to accurately reflect the facts in the form 24, but we do not consider that the cash purchase price is actually $81,200,000. **The cash that the buyer has agreed to pay (and will in fact pay) is $79,196,949.34, being $81,200,000 less the incentive adjustment.** That amount is ascertainable based on the agreed settlement date and should be recorded as the cash component of the purchase price. We consider that it would be misleading to include $81,200,000 as the cash purchase price because under the terms of the contract, there are no circumstances under which $81,200,000 could be payable. This can be contrasted with the worked example in the practice note … where the cash purchase price payable by the buyer is in fact $500,000, with a rebate of $30,000 payable by the seller to the buyer of $30,000 in certain circumstances. We agree that in those circumstances the rebate does not reduce the purchase price or the

dutiable value for stamping purposes (but would need to be disclosed on the form 24), but that example is quite different to the circumstances we are dealing with here.

We have considered the duty position in detail and note that duty will be payable on the higher of the consideration for, or the unencumbered value of, the property. **The consideration is the value agreed to be given by the buyer to the seller that moves the transfer. At no time did the buyer agree to pay $81,200,000. The buyer agreed to pay an amount calculated by reference to a formula, that amount being $79,196,949.34. Given the unencumbered value is determined by reference to the amount that an arm's length party will pay, it is also clear that the unencumbered value of the property in the current circumstances is $79,196,949.34, being the consideration actually payable.**

In any event, the duty is payable by the buyer under the contract and is a matter for the buyer.

[32] The seller's solicitor responded by email on 17 January 2018 at 12.36pm that he did not understand whether the buyer's solicitor was saying the QLS practice note did or did not apply. The buyer's solicitor clarified their position was as set out in his email of 17 January 2018 at 12.30pm (extracted at [31] above).

[33] The buyer's solicitor later suggested by email on 17 January 2018 at 3.35pm, conditional on settlement occurring on 19 January 2018 as arranged, amending the contract to delete SC11.12 and amend the purchase price to be $79,196,949.34. It is alleged that this solution was initially suggested by the seller's solicitor pending instructions. Ultimately the seller's solicitor did not agree to a variation of the contract, responding in the following terms by email on 18 January 2018 at 12.16pm:

We are instructed after considering the matter carefully that Sentinel will not agree to a variation of the contract.

The settlement statement, transfer and form 24 signed by Sentinel will show the consideration/contract price of $81,200,000.

It is our clients view (as well as our view and the OSR) that the adjustment of the unpaid incentives is a normal settlement adjustment in the same way as any other outgoing.

Of course, it is still open to you to make representations directly to the OSR.

[34] An email from the buyer's solicitors on 19 January 2018 at 4.12pm suggested that the parties had had further discussions in search for an authority for the proposition that it was appropriate for $79,196,949.34 to appear on the transfer form (emphasis added):

Following on from our phone discussion, we understand that you are looking for authority that it is appropriate to insert the net price after adjustment on the Form 1 Transfer.

Paragraph [1-2040] of the Land Title Practice Manual (for completion of Item 4 of the Transfer) states:

> 'The consideration is the full amount paid or the terms agreed by the transferee and the transferor for the transfer of the interest. The consideration must be shown inclusive of the amount of any Goods and Services Tax (GST) payable. Where a sale price comprises an adjustment due to a rebate, discount or cash back on settlement the amount shown in this item must be the net amount after adjustment'.

We acknowledge that this refers to 'adjustment due to a rebate, discount or cash back' which we do not have in the current circumstances, and therefore the question is whether the same principle applies where the reduction in purchase price arises from some other form of adjustment (such as for rental incentives).

For guidance on this point we note that the QLS practice note (copy attached) specifically provides that 'Rebating, discounting or such other mechanisms if not reported correctly can distort information that is relevant to valuations and future buyers of property or comparable property'. This clearly indicates that this principle also applies to other mechanisms that reduce the purchase price (not just rebates). The example that follows simply uses a rebate as an example but makes no comment on other mechanisms.

Overall, the whole point of the QLS practice note is that the Form 1 Transfer should reflect the amount actually paid (in this case $79,196,949.34), and to do otherwise would be misleading.

That said, we are prepared to include in the Form 24 a reference to cash consideration of $81,200,000 with the adjustment shown as a negative number in the 'other' space. The adjustment should be noted as

'reduction in purchase price'. Although we note that $81,200,000 cash is not in fact payable, we do not think it is misleading to record it in this way given the way the purchase price is recorded in the contract.

[35] The buyer's final position on 18 January 2018 was that the form 1 should show $79,196,949.34, being the amount actually paid, but that they were prepared to include in form 24 a reference to cash consideration of $81,200,000 with the incentive amount shown as an adjustment by way of a reduction in purchase price.

[36] The seller's final position on the morning of 19 January 2018 was that both forms should show $81,200,000. The seller's solicitor sent an email on 19 January 2018 at 8.49am in these terms:

> I have firm instructions from Sentinel that the transfer and form 24 must reflect the sale price of $81,200,000.
>
> Section 61(1) of the Land Title Act says the transfer must
>
> > "include an acknowledgement of the amount paid or details of other consideration".
>
> Paragraph [1-2040] of the Land Title Practice Manual provides that –
>
> > "The consideration is the full amount paid or the terms agreed by the transferee and the transferor for the transfer of the interest. The consideration must be shown inclusive of the amount of any Goods and Services Tax (GST) payable. Where a sale price comprises an adjustment due to a rebate, discount or cash back on settlement the amount shown in this item must be the net amount after adjustment."
>
> Both our settlement figures start with the sale price of $81,200,000. That is a clearly ascertainable, prima facie amount (subject to adjustments) within the terms of Independent Television Authority v IRC [1961] AC 427.
>
> We are all agreed that –
>
> (a) special condition 11.2 provides for an adjustment to the balance purchase price for an amount equivalent to the value of any outstanding incentives; and
>
> (b) the above does not constitute a "rebate, discount or cash back on settlement" such as would trigger either the QLS Practice Note or LTPM paragraph [1-2040]
>
> As we have previously indicated, the calculation of duty and / or lodgement fees is a matter for the OSR and the Department of Natural Resources and Mines who will no doubt look at the substance of the transaction and your representations to them when making a determination.

[37] Later that morning, at about 9.00am, the seller delivered to the buyer a form 1 Transfer and form 24 executed by the seller with the amount of consideration shown as $81,200,000.

[38] The conduct recorded in the previous two paragraphs amounted to the seller insisting that the relevant transfer forms be filled out and executed such that they would record the following propositions:

(a) The seller transfers the fee simple to the buyer for the monetary consideration of $81,200,000;

(b) The seller acknowledges the receipt of the monetary consideration of $81,200,000.

(c) The seller declares, amongst other things, the truth and correctness of the following information:

Details of sale price	
Cash	$81,200,000.00
Vendor terms	$
Assumption of liabilities	$
	$
Other (specify above)	
Total	$81,200,000.00

(d) The buyer states, amongst other things, the truth and correctness of that same information.

[39] Based on the buyer's transfer forms sent to the seller's solicitor on 16 January 2018 (containing the adjusted purchase price: see [26] above), the buyer's solicitor had calculated the amount of transfer duty payable as $4,532,352.50.

[40] On or about 8.30am on 19 January 2018, the buyer's solicitors received an inward remittance advising that the required settlement funds had been transferred into their trust account, in an amount which included the $4,532,352.50 duty amount and a $20,000 contingency amount.

[41] Sometime after 9.00am that same day, the buyer's solicitor received the seller's executed form 1 and form 24 (as mentioned at [37] above). Consequently, the buyer's solicitor calculated the transfer duty payable based on the recorded full purchase price of $81,200,000. The transfer duty payable on this higher consideration amount was $4,649,525.00, an increase of $115,172.50. The contingency amount already transferred into their trust account would not be sufficient to cover the increase in transfer duty. Their client was unable to procure the transfer of additional funds to cover the increase in transfer duty in time for settlement on that day. The earliest the transfer of additional funds could clear was 22 January 2018.

[42] Because of the matters raised at [19] above, the recitation of the chronology of events could stop here. However, to make narrative sense of how the settlement still failed to complete, I will record what happened next.

[43] At 10.27am on 19 January 2018, the seller's solicitor sent an email to the buyer's solicitor with the following cheque instructions:

Queensland Urban Utilities (to 24/11/2017)	$25,347.61
McCullough Robertson Trust Account (retention for lease 4B/1D)	$325,960.00
CBRE (C) Pty Ltd	$452,102.75
Sentinel Property Group Pty Ltd	$1,469,003.00
Commonwealth Bank of Australia cr/acc Sentinel Citilink Pty Ltd	$36,086,608.46
Sentinel Citilink Pty Ltd as trustee for the Sentinel Citilink Trust	$36,754,506.38
Cheques – settlement figure	**$75,113,528.20**

[44] It will be recalled that pursuant to SC13 the seller was obliged to direct the buyer at settlement to draw a bank cheque in favour of the buyer's solicitor for the Retention Sum, that sum to be kept and dealt with as a guarantee for rent to be received from specified premises for a defined guarantee period. The second item mentioned in the previous paragraph was the amount so directed. As will appear, failed attempts were made to reach an agreement as to the terms by which the payment which had to be made at settlement pursuant to SC13 could be altered.

[45] By about 1.45pm, the buyer thought it had reached such an alternative settlement solution with the seller, namely that there would be a temporary reduction in the amount of funds to be paid from settlement funds into the McCullough Robertson rental guarantee trust account which would allow funds to be freed up to pay the increased transfer duty, and the difference of $115,172.50 would be transferred into the rental guarantee trust account on 22 January 2018.

[46] At 1.46pm, the buyer's solicitor sent an email to the seller's solicitor setting out the amended cheque directions consistent with such an alternative settlement solution. The buyer's solicitor requested confirmation of the amended directions as follows (changes from previous instructions underlined):

Queensland Urban Utilities (to 24/11/2017)	$25,347.61
<u>McCullough Robertson Trust Account (retention for lease 4B/1D)</u>	<u>$210,787.50</u>
<u>*[Payment by transfer by Buyer to McCullough Robertson Trust Account not required at settlement]*</u>	<u>*$115,172.50*</u>
CBRE (C) Pty Ltd	$452,102.75
Sentinel Property Group Pty Ltd	$1,469,003.00

Commonwealth Bank of Australia cr/acc Sentinel Citilink Pty Ltd	$36,086,608.46
Sentinel Citilink Pty Ltd as trustee for the Sentinel Citilink Trust	$36,754,506.38
Cheques – settlement figure	**$75,113,528.20**

[47] The buyer's solicitor then prepared cheques in accordance to the amended directions suggested in their email and arranged for the signing of a new Office of State Revenue Form D2.2 recording a consideration figure of $81,200,000.

[48] At 2.26pm, the seller's solicitor advised by phone that no agreement had been reached as to the alternative solution but he would seek instructions. At 3.00pm, the seller's solicitor confirmed by email that the buyer's solicitors proposed amended cheque directions had not been agreed.

[49] As at 3.59pm on 19 January 2018, after a series of phone calls between the buyer's solicitor and seller's solicitor, the alternative settlement solution apparently had not been agreed to by the seller. The seller's solicitor suggested an alternative proposal whereby the reduced rental guarantee payment could be held in the seller's solicitors' trust account and if the extra $115,172.50 did not arrive on 22 January 2018, then the amount which had been placed in the trust account would be refunded to the seller and the rental guarantee would be reduced to the $115,172.50 figure. The buyer's solicitor advised he would seek instructions.

[50] At 4.37pm, the seller's solicitor provided the following further amended cheque instructions (changes from previous instructions underlined):

Queensland Urban Utilities (to 24/11/2017)		$25,347.61
Russells Law Practice Trust Account (retention for lease 4B/1D)		$210,787.50
Sentinel Citilink Pty Ltd as trustee for the Sentinel Citilink Trust	to be paid 22/1/18	$115,172.50
CBRE (C) Pty Ltd		$452,102.75
Sentinel Property Group Pty Ltd		$1,469,003.00
Commonwealth Bank of Australia cr/acc Sentinel Citilink Pty Ltd		$36,086,608.46
Sentinel Citilink Pty Ltd as trustee for the Sentinel Citilink Trust		$36,754,506.38
Cheques – settlement figure		**$75,113,528.20**

[51] The parties did not reach an agreement on the alternative settlement solution before attending settlement scheduled at 4.45pm on 19 January 2018 at the offices of SAI Global, the settlement agent for the outgoing mortgagee.

[52] The persons who attended settlement were:

(a) Ms Erika-Jane Wilson, McCullough Robertson (buyer)

(b) Mr Timothy Dangerfield, McCullough Robertson (buyer)

(c) Mr Lachlan Jolly, Minter Ellison (NAB, the incoming financier)

(d) Ms Chloe Bingley, Sentinel Law (seller)

(e) Mr Cameron Scott, Sentinel Law (seller)

[53] At about 4.30pm, Ms Wilson left McCullough Robertson with various settlement documents and cheques. Mr Dangerfield arrived at SAI Global at 4.44pm after collecting a further cheque. Ms Bingley and Mr Scott arrived at about 4.50pm.

[54] Ms Wilson and Mr Dangerfield had with them two forms 1, three forms 24, and two OSR D2.2 Forms. The variations of the forms were as follows:

(a) One form 1 and one form 24 showing $81,200,000 consideration, as delivered by the seller's solicitors that morning (see [37] above);

(b) One form 1 and two forms 24 showing $79,196,949.34 consideration, as prepared by the buyer's solicitors (see [26] above); and

(c) Two OSR D2.2 forms showing the amount of duty payable on each set of transfer forms.

[55] Both transfer forms had a duty stamp affixed with the client and transaction number completed. Ms Wilson and Mr Dangerfield had been authorised to sign and complete the amount of transfer duty on one transfer form, depending on which form was agreed to be used.

[56] Mr Scott asked how the buyer proposed to stamp the transfer. Ms Wilson advised that she was authorised to stamp the transfer if it is agreed the settlement can go ahead and that she had instructions to execute the transfer on behalf of the buyer.

[57] Mr Dangerfield advised he would need to obtain instructions before they settle. Ms Bingley advised she needed to do the same.

[58] At 5.15pm, an officer of SAI Global enquired whether settlement was still occurring because their offices would close shortly and they would not be able to receive the cheques after their courier arrives. Ms Bingley advised she was still waiting on instructions. Mr Dangerfield asked Ms Bingley and Mr Scott whether they could seek instructions to extend settlement to Monday 22 January 2018. Mr Scott replied with words to the effect that if they did not settle, he expected their instructions would be to hold the buyer in default.

[59] At about 5.20pm, an officer of SAI Global advised the parties that they had missed the cut-off for banking cheques. Ms Bingley said words to the effect that "We reserve our client's rights in relation to your client's default". Mr Dangerfield replied with words to the effect that "We disagree. We reserve the buyer's rights". All parties left the venue.

[60] At 5.22pm, the seller's solicitor sent a letter by facsimile and email to the buyer's solicitor in the following terms:

> We refer to settlement of this matter which was due to take place today.
>
> Settlement has been unable to be effected as the buyer did not provide all the funds required for settlement.
>
> The buyer is in breach of the contract.
>
> The seller reserves all of its rights.

[61] On the morning of 22 January 2018, the buyer's solicitor was instructed that the seller and buyer had agreed on a proposal for settlement to occur on 22 January 2018 on the basis that the transfer forms would be stamped at the higher figure of $81,200,000.

[62] Later that morning, the buyer's solicitor and seller's solicitor had a telephone conversation. The buyer's solicitor advised that the buyer was ready to settle and the additional funds had been transferred and was expected in their trust account today. The seller's solicitor advised he would seek instructions.

[63] At 12.57pm, the buyer's solicitor advised the seller's solicitor that the additional $115,172.50 had been received in their trust account for settlement that afternoon. The buyer's solicitor requested confirmation of a time and place after 3.00pm that afternoon for settlement.

[64] At 2.36pm, the seller's solicitor advised he was still awaiting instructions on settlement. At 4.32pm, the buyer's solicitor requested an update on whether instructions had been received. No response to that email was received.

[65] At 5.05pm, the buyer's solicitor sent a further email and letter to the seller's solicitor advising the buyer was ready to settle at any time the following day prior to 4.00pm. At 5.18pm, the buyer's solicitor sent a further email confirming the buyer was ready to settle. In both emails, the buyer's solicitor maintained that while $81,200,000 is not the correct

consideration figure that should appear on the transfer forms, they are willing to settle on the transfer forms the seller's solicitor provided.

[66] At 7.53pm, the seller's solicitor provided a response, purporting to terminate the contract. He maintained that the buyer was in breach by not tendering the full amount of the balance purchase price payable on completion at settlement on 19 January 2018, having a shortfall of $115,172.50. He maintained that there was no such agreement that the purchase price could be short paid. He further advised that at settlement, there was a bank cheque for $210,787.50 made out to McCullough Robertson Trust Account which should have been addressed to Russells Law Practice Trust Account (see [50] above). Ultimately, the seller's position was that as the buyer failed to tender the purchase price on settlement, they were in breach of a fundamental term, which entitled the seller to terminate the contract. The seller advised that it terminated the contract, and gave notice that the buyer forfeits the deposit and reserve its rights to sue for damages for breach of contract.

[67] On 23 January 2018 at 9.03am, the buyer's solicitor disputed that the contract was validly terminated and advised the seller's solicitor was not authorised to release the deposit to the seller. Later, at 3.17pm, the buyer's solicitor confirmed that the buyer did not accept the seller's termination of the contract and considered it remains on foot.

[68] On or about 4.07pm on 23 January 2018, the buyer's solicitor lodged a caveat on the property in favour of the buyer.

[69] In a further email on 24 January 2018, the buyer's solicitor requested confirmation that the deposit would not be released; the seller would not enter into any agreement for the marketing or sale of the property; and the seller would not sell the property to a third party without giving 7 business days' notice to the buyer. The seller's solicitor responded by advising that the seller would be reconsidering the sale of the property and identified Pt 3.3 Div 2A of the *Legal Profession Act* 2007 (Qld) which prevents the seller's solicitor from releasing the deposit until at least 60 days after their having given notice that they consider the seller is entitled to the deposit.

Was the seller entitled to insist upon its version of the transfer forms?

[70] Before seeking to resolve whether the seller was contractually entitled to take the stance it took, it is appropriate to analyse –

(a) the relevant content of the buyer's contractual promise to pay; and

(b) the relevant content of the contractual obligations concerning transfer forms.

The buyer's promise to pay under the contract

[71] The contract did not anywhere in terms oblige the buyer to pay $81,200,000 to the seller.

[72] The contract obliged the buyer to pay a $4,060,000 deposit as at the date the buyer signed the contract (see cl 3.1) but otherwise the buyer's obligation was that set out in cl 4.1, namely to pay "the balance of the Purchase Price" on the settlement date as the seller directed.

[73] What was intended by the phrase "the balance of the Purchase Price"?

[74] The seller's argument would, presumably, note that "Purchase Price" was defined as a reference to $81,200,000 and then contend that cl 4.1 should be regarded as a promise to pay the balance of the $81,200,000, obtained by deducting the deposit in recognition of the obligation in cl 3 for the deposit holder to pay the deposit at settlement. Read together, cl 3.1 and cl 4.1 would amount to promises to pay amounts totaling $81,200,000.

[75] That would be too narrow a construction of the contract.

[76] The promise to pay "the balance of the Purchase Price" must, sensibly, be construed as contemplating the deduction of something from the Purchase Price. That which is deducted must at least be the deposit, because that is the evident contractual contemplation if the deposit had been paid as required. But for present purposes what is important is that to get to that outcome, one has undergone a process of construing the promise to pay a "balance" in the context of the existence of clauses which the parties must have contemplated would affect the calculation of the "balance". Obviously one such group of clauses was the group of clauses governing the deposit. But the words used in the contract reveal that the deduction of the deposit was not the limit of the contractual contemplation concerning the matters which would necessarily (or might possibly) affect the calculation of "the balance of the Purchase Price". Reference to that "balance" appears only in the following clauses of the contract:

(a) cl 4.1 as already referenced;

(b) cl 13.1 in the context of identifying the type of failure by the buyer which might permit the seller to terminate, namely a failure to pay "the balance of the Purchase Price" as provided in cl 4;

(c) cl 15.6 in the context of permitting the buyer to deduct land tax from "the balance of the Purchase Price" at settlement, in certain circumstances; and

(d) SC11.12 in the context of obliging the seller to allow an adjustment to "the balance Purchase Price payable on settlement" of an amount equivalent to the value of outstanding incentives.

[77] In my view the promise to pay "the balance of the Purchase Price" must be construed by reference to all those clauses.

[78] It would follow that the promise to pay "the balance of the Purchase Price" expressed in cl 4.1 was a promise to pay the amount obtained after –

(a) deducting the deposit which the parties contemplated would be paid on the date the buyer signed the contract and would be paid to the seller at settlement by the deposit holder; and

(b) deducting the adjustment contemplated by SC11.12 (and cl 15.6 in circumstances where that applied).

[79] The seller had two arguments against that outcome, with which I should deal.

[80] First, it contended that the SC11.12 was merely an adjustment which took place at settlement which should be regarded as equivalent to the usual apportionments for rates and outgoings, and not affecting the assessment of "the balance of the Purchase Price". I reject that contention. The adjustment contemplated by SC11.12 was of a different character to the sort of apportionments for rates and outgoings contemplated by the operation of cll 14 and 15 (with the possible exception of land tax in the discrete circumstances provided for in cl 15.6). That must be so because the contract did not simply oblige the seller to pay the amount of the outstanding incentives or to indemnify the buyer in respect of them (which language might have justified the usual apportionment which takes place on settlement). Rather, it used language specifically referring to "the balance Purchase Price payable on settlement".

[81] Second, the seller contended that on the proper construction of the contract it would not necessarily follow that there would be a deduction dictated by SC11.12. The seller might, it contended, at least in theory, have already paid the incentives to the relevant lessees with the result that there would be no adjustment under SC11.12. As to this:

(a) The nature of the promise must be construed with the facts known to both parties as at the time they entered into the contract. Those facts are relevantly demonstrable as a result of disclosures made before contract (and to which contractual consequence was given: see SC5.8).

(b) A few days before the contract was entered into, the seller provided the buyer with a schedule which communicated to the buyer that the amount of the outstanding incentives as at the date of the contract was $2,037,364.45, assessed, with one exception, by reference to periods commencing on 1 January 2018.

(c) That communication revealed that the incentives were mostly comprised of monthly rental abatements calculated by reference to a percentage of the total rent for relevant leases and requiring the abatements to take effect on a month by month basis over the periods of relevant leases. The periods differed. One lease dealt with monthly abatements up until April 2024. Others for periods ending in December 2021; October 2021; November 2020; December 2019; May 2019; and February 2018.

(d) In theory, a lessor with such agreements with its lessees could make an agreement with the lessees to terminate all the incentive agreements with them by paying the lessees (rather than the buyer) the value of the incentives, leaving the lessees to pay the unabated face rent of the lease, with the result that there would be nothing for SC11.12 to do, as between the seller and the buyer. But this particular lessor (namely the seller) had promised the person who was buying the whole building from it, that from the date of the contract and up to settlement it would not vary or terminate the leases without its consent (see SC5.7) and that it would manage the property consistently with reasonable property management practice (see SC7.1(b)). In the present context I would construe the latter promise as a promise to maintain the status quo in relation to the incentive arrangements.

(e) Some further support for this is found in SC5.8(h) which records a warranty made by the seller, but also evidences a contemplation that the tenancy incentives had been "disclosed to the Buyer **to be adjusted** in accordance with the terms of this Contract". SC11.12 provides the mechanism for that adjustment. The contemplation was for more than a mere possibility of adjustment.

(f) The buyer sought to vindicate the proposition that the substance of the contract was a promise to pay a sum which would inevitably be substantially less than the "Purchase Price" by reference to evidence which had been admitted without dispute (and in a form with which the seller expressly did not cavil) that at the time of the contract both parties anticipated that the $2,037,364.45 value of incentives outstanding as at the date of contract was subject to change on the basis that some of the rental reduction incentives would continue to be paid to the tenants leading up to settlement (by reducing the rent received in the time between contract and settlement), but it was not anticipated that additional incentives would be granted or that the nature of those incentives would otherwise change. Certainly this material does support the construction I have reached. No argument was advanced before me that the evidence was not admissible in aid of construction. If it had been, I might have had to resolve whether the evidence could be regarded as (1) evidence of context or of the commercial goal of the transaction[3], or (2) evidence of a concurrent mutual intention admissible to negative what might otherwise be an inference from surrounding

[3] As to the first point, see *Victoria v Tatts Group Limited* (2016) 328 ALR 564 at [51] (French CJ, Kiefel, Bell, Keane and Gordon JJ), citing with approval *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 325 ALR 188 at [46]–[51] .

circumstances.[4] But given the attitude of the seller taken in argument before me it is not necessary to resolve those questions, and it is permissible to have regard to that evidence.

(g) Accordingly, in my view it is contrary both to the contemplation of the parties as at the time the contract was entered into and to the language of the contract, for the seller to contend that the contract admitted of the possibility that, in order to discharge its contractual promise to pay "the balance of the Purchase Price", the buyer might have had to pay the amount which, when added to the $4,060,000 deposit, would have resulted in $81,200,000. To the contrary, it was an inevitability (and not just a possibility) that the amount paid by the buyer would be a lesser amount, because it was an inevitability (and not just a possibility) that there would be an adjustment required by operation of SC11.12 if the contract was to proceed to settlement, and the seller was to have complied with its obligations in relation to the extant leases and the extant incentive arrangements.

[82] The foregoing contractual analysis suggests that on the proper construction of the contract and viewed as at the date of the contract, the buyer had promised to pay the following amounts to the seller:

(a) (as at the date the buyer signed the contract), the $4,060,000 deposit; and

(b) (as at the date ultimately set for settlement, if one was set pursuant to SC16) the amount obtained after deducting from the $81,200,000 Purchase Price –

(i) the deposit; and

(ii) the adjustment to be made under SC11.12.

[83] As at the date of the contract, the maximum amount which could be payable under the contract was $81,200,000 less the SC11.12 deduction. This strongly suggests the illegitimacy of the seller's conduct in insisting that the forms be filled out to identify a cash consideration of $81,200,000. However a principled analysis requires a focused consideration on the content of the seller's contractual obligations concerning the forms concerned, and it is to that topic that I now turn.

<u>The relevant content of the contractual obligations concerning transfer forms</u>

[84] By cl 10, the buyer's obligation was to prepare and to deliver to the seller within a reasonable time prior to the settlement date all transfer documents and the requisite declaration required under the Duties Act and any other instruments or declarations required by law by the seller to procure the stamping and/or registration of the transfer. Obviously this would encompass the preparation of forms 1 and 24 under the Land Title Act.

[85] By cl 10 read with cl 4, the seller's obligation was to do all acts and to execute the requisite documents necessary for the purpose of completing the sale and ensuring the buyer obtains a good and valid title, that obligation necessarily encompassed an obligation to execute properly a transfer for the land so that it could be exchanged for the balance of the Purchase Price on the date of settlement. Again, this would encompass the execution of forms 1 and 24 under the Land Title Act.

[86] In essence, the contract required the buyer to prepare transfers capable of being properly executed and required the seller in its turn to execute the transfer properly.

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[4] As to the second point, see *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352-353 (Mason J). On that argument, the inference to be negatived would be the inference that it was open to the seller to make an arrangement with the lessees the subject of the extant incentives that they would no longer be the subject of the incentives, such that there would be no SC11.12 Purchase Price adjustment as between seller and buyer.

[87] What was required for –

(a) (so far as the buyer was concerned) proper preparation of documents for execution?

(b) (so far as the seller was concerned) proper execution of the transfer documents?

[88] If the documents to be provided and then executed are the documents required by law to procure stamping and/or registration, then what is required is that they be prepared and executed as required by law.

[89] In this case the documents concerned were forms 1 and 24 under the Land Title Act. What was required by the law in relation to the preparation and execution of those documents?

[90] **The first part of the answer** is to be found in the document to which, as has been apparent, the solicitors for each party actually had recourse, namely the Land Title Practice Manual. As to this document I make the following observations:

(a) Section 10 of the Land Title Act provides that instruments lodged with the registry must be in the appropriate form and comply with the directions of the registrar about how the appropriate form must be completed and how information to be included in or given with the instrument must be included or given.

(b) Section 9A of the Land Title Act gives statutory recognition to the Land Title Practice Manual. It is a document for the information and guidance of persons dealing with the land registry and may include directions of the type referred to in s 10.

(c) The manual is divided into parts, which are generally numbered according to the relevant registry form.

(d) The part dealing with the form 1 Transfer provides a general guide to completing the form, together with cross-references to relevant other parts of the manual. As to this:

(i) Paragraph [1-2040] contains the guide to completing the part of the form dealing with consideration, in the following terms (emphasis added):

> **Item 4 Consideration [1-2040]**
>
> **The consideration is the full amount paid or the terms agreed by the transferee and the transferor for the transfer of the interest**. The consideration must be shown inclusive of the amount of any Goods and Services Tax (GST) payable. **Where a sale price comprises an adjustment due to a rebate, discount or cash back on settlement the amount shown in this item must be the net amount after adjustment.**
>
> Monetary consideration must be shown in Australian dollars and can be expressed in words or figures.
>
> …
>
> If the basis of the transfer is other than monetary, this should be fully expressed, e.g. 'pursuant to the terms of will dated [date] deposited with instrument No [number] or document No [number]' or 'pursuant to deed of retirement and appointment dated [date]'.
>
> **The consideration may be expressed in part as being, e.g. 'pursuant to an agreement dated [date]' or 'pursuant to the terms of a contract of sale dated [date]' however, the consideration must be fully set out by including the monetary amount or other value exchanged**.
>
> **Where the consideration in a transfer of the fee simple makes reference to the terms of an agreement, deed etc, a copy of the agreement or deed must be deposited to assess any additional lodgement fees based on the consideration.**
>
> For information about options for the deposit of evidence, refer to [60-1030].
>
> …

> In general terms, an interest in land, which is to be effective at law, must be created in writing. Exceptions to this requirement appear in s. 10(2) of the *Property Law Act 1974*. A transfer may be executed pursuant to an oral agreement; however, the transfer is then the contract in writing signed by the parties and is also the document that transfers the interest in the land (s. 11 of the Property Law Act). Such a transfer is acceptable for registration without further evidence provided the full terms of the oral agreement are set out, e.g. 'pursuant to an oral agreement which includes the payment of $…' or 'pursuant to an oral agreement to within land for Lot 123 on Registered Plan 456789'.

(ii) Paragraph [1-2070] provides that a form 24 Property Information (Transfer) must be lodged with the form 1 where the title being transferred is a fee simple.

(iii) Paragraph [1-4000] provides that "for general requirements for completion of forms see part 59 – Forms".

(iv) Amongst other things, part 59, at paragraph [59-2010], provides that where there is insufficient space to include the necessary information in any item in any form, a form 20 "enlarged panel" may be used. Cross-reference is given to Part 20. Part 20 at paragraph [20-2020] provides, amongst other things:

> A Form 20 may also be required in order to include all of the information required in another panel. For example, Item 2 of a *Form 1 – Transfer,* the description of the land or water allocation, may not provide sufficient space to insert all of the descriptions of the lots involved, so on the Form 1, Item 2 would be completed with 'see Enlarged Panel'. The *Form 20 – Enlarged Panel* would then contain the relevant panel heading of the Form 1 and set out the descriptions of the lots involved.

(e) Similarly, the part dealing with the form 24 Transfer form provides a general guide to completing the form, together with cross-references to relevant other parts of the manual. As to this:

(i) Paragraph [24-0000] provides:

> Form 24 – Property Information (Transfer) and Form 24A Property Information (Transmission Application) are common forms deposited with the Titles Registry to collect information on behalf of government agencies other than the Titles Registry.
>
> The information is required by the following agencies and for the purposes stated:
>
> - Office of State Revenue – to assist with statutory obligations for the administration and collection of land tax and duty on land
>
> …
>
> - State Valuation Service (Department of Natural Resources and Mines) – to update information held on the valuation and sales database
>
> …
>
> - Local governments – to assist with the updating of local government rates records and water.

(ii) Paragraph [24-4000] provides that "for general requirements for completion of forms see part 59 – Forms". The paragraph thereby makes relevant the provisions of part 59 to which reference has already been made. It then sets out an exemplar of a completed form 24. That form contains a further specific indication that "where insufficient space in an item, use Form 20 (Enlarged Panel)".

(iii) Paragraph [24-4010] provides, consistently with paragraph [24-0000] that the "information on the Form 24 is required for the Office of State Revenue … and to update information held on the valuation and sales database and water management systems (Department of Natural Resources and Mines), and local authority rate records. Each agency is provided only with information relevant to their area of responsibility." It goes on to provide that there are both

electronic and hard copy versions of the form available. Importantly it too states specifically:

> If insufficient space for any item, complete and attach a Titles Registry Form 20 – Enlarged Panel.
>
> – In the relevant item of the Form 24, insert the words 'See Enlarged Panel' only.
>
> …

(iv) Paragraph [24-4050] provides the instruction as to how to complete item 4 of the form, concerning details of sale price as follows (emphasis added):

> • Complete the details of the sales price in the field/s provided.
>
> • **'Details of sale price' refers to the actual terms of the transfer of the property, ie what was given for the property mentioned in the transfer or what actions or events had to be carried out.** Goods and Services Tax (GST) must be included as part of the sales price if applicable. Do not separate the GST component of the sale price (if any).
>
> • **The field 'Cash' refers to any exchanging of money for the property,** whether under a contact of sale or deed; or any form of other written or verbal agreement/arrangement.
>
> • Where details of sale price is other than cash (see point above), vendor terms or assumption of liabilities use the field 'Other' and complete the applicable terms of the transfer.
>
> • In the 'Other' field do not insert 'contract of sale', 'agreement' or 'verbal agreement' etc where the terms of the sale include the exchange of cash (see definition above).
>
> • For convenience, listed below are abbreviations that may be used in lieu of terms of the transfer to be inserted in the 'Other' field where cash, the assumption of liabilities or vendor terms does not apply.
>
> …
>
> • Where a sale price comprises an adjustment due to special conditions or side agreement which stipulates a significant rebate, discount or cash back on settlement, the following must be shown:
>
> | | |
> |---|---|
> | Cash ..... | $ [*sale price on the contract*] |
> | Vendor terms ..... | $ ..... |
> | Assumption of liabilities ..... | $ ..... |
> | [*Rebate, discount or cash back*] | $ [*rebate or other as a negative figure*] |
> | Other (specify above) | |
> | Total | $ [*net sale price*] |

[91] **The second part of the answer** is to be found in the unsurprising fact that the law contains various prohibitions against recording false or misleading information in the abovementioned forms. Without being exhaustive:

(a) Section 194 of the *Criminal Code* 1899 (Qld) provides that it is a misdemeanor to make a declaration that the person knows is false in a material particular to a person authorised to take or receive declarations. A "declaration" includes a statement and an affidavit. The maximum penalty is 3 years imprisonment.

(b) Section 239 of the *Land Valuation Act* 2010 (Qld) provides that a person must not give an authorised person information, or a document containing information, that the person knows is false or misleading in a material particular. The maximum penalty is 50 penalty units.

(c) The Australian Solicitors Conduct Rules 2012 provides the following:

(i) Rule 22.1 provides that a solicitor must not knowingly make a false statement to an opponent in relation to the case.

(ii) Rule 22.2 makes it incumbent on the solicitor to take all necessary steps to correct any false statement they have made as soon as possible after he or she becomes aware that the statement was false.

(iii) Rule 5.1 provides that a solicitor must not engage in dishonest conduct.

(iv) Rule 2.3 provides that a breach of the Rules is capable of constituting unsatisfactory professional conduct or professional misconduct and may give rise to disciplinary action.

(d) Section 122 of the *Taxation Administration Act* 2001 (Qld) provides that a person must not give to the commissioner a document containing information that the person knows, or should reasonably know, is false or misleading in a material particular. The maximum penalty is 100 penalty units.

[92] One is left with the hardly surprising proposition that the obligation on the parties was that they would fill the forms out in accordance with the applicable instructions and otherwise ensure that they did so in a way consistently with the law.

Was the seller's insistence that it would only execute the transfer documents in a particular way, a breach of its contractual obligations?

[93] As I have made clear, the seller insisted that form 1 and form 24 be completed with the amount of consideration shown as $81,200,000. That meant that the forms would record the following propositions:

(a) The seller transfers the fee simple to the buyer for the monetary consideration of $81,200,000;

(b) The seller acknowledges the receipt of the monetary consideration of $81,200,000.

(c) The seller declares, amongst other things, the truth and correctness of the following information:

Details of sale price		
Cash		$81,200,000.00
Vendor terms		$
Assumption of liabilities		$
		$
Other (specify above)		
	Total	$81,200,000.00

(d) The buyer states, amongst other things, the truth and correctness of that same information.

[94] In the first place, I have explained that on the proper construction of the contract as entered into, the maximum amount which could be payable under the contract was not $81,200,000. Rather it was $81,200,000 less the rental incentive deduction in SC11.12. At the time of the contract, any objective assessment of the revealed intention of the parties would conclude that neither party thought that the seller was going to receive $81,200,000 and that position remained the same as at the time the forms were being completed. It follows that each of the propositions inherent in the way the seller insisted the forms be completed was factually inaccurate.

[95] Second, there was nothing in the Land Title Practice Manual which required completion of the forms in the way insisted upon by the seller. As to this:

(a) The instructions concerning item 4 in form 1 are recorded at [90](d)(i) above. There was no view of reality in which $81,200,000 was the full amount paid by the buyer for the transfer of the interest.

(b) The instructions concerning item 4 in form 24 are recorded at [90](e)(iv) above. The instructions there are a little more ambiguous than those in respect of the corresponding item in form 1, but are still not consistent with the form which the seller insisted upon. First, the reference to "cash" was to be any exchange of money for the property, and there was never going to be $81,200,000 paid for the property. Second, where a sale price was the subject of adjustment, the instructions suggested the adjustment be specified.

(c) Third, in the event that the seller was concerned as to the potential for misrepresentation by simply putting in a figure in either form, without more, the Land Title Practice Manual contained multiple directions about the provision of additional detail via a form 20 "enlarged panel": see at [90](d)(iv) and [90](e)(ii) above.

[96] The result was that I find that the way in which the seller insisted upon completion of the forms 1 and 24 did not involve filling the forms out in accordance with the applicable instructions and otherwise ensuring that the forms were completed consistently with the law. In my view the seller's conduct was in breach of its contractual obligations.

[97] It would follow that the buyer is entitled to the relief it seeks.

[98] It will be apparent that I have not determined whether the dutiable value of the transaction for the purposes of the Duties Act was the $79,196,949.34 amount obtained after deduction of the agreed value of the outstanding incentives from the original purchase price, or the $81,200,000 contract price.

[99] The reason I have not done so is that I do not think that it is necessary to resolve that issue in order to determine whether the seller was contractually entitled to take the course it did.

[100] It is true that the instructions applicable to the completion of the forms expressed in the Land Title Practice Manual reveals that the information contained in the forms will be provided to multiple recipients, including the Office of State Revenue. Proper completion of the forms 1 and 24 under the Land Title Act requires the correct provision of the factual information called for by the forms when read with the Land Title Practice Manual. And, as both (1) the practice note which was discussed as between the parties recognized (see [29] above), and (2) the law (see [91] above) recognise, persons completing and executing the forms must be conscious of the need for accuracy and of the need to discharge their professional duties.

[101] But neither the contract nor the forms 1 and 24 themselves require that the person completing the Land Title Act forms comes to the right answer on what might be a difficult legal question concerning the application of the Duties Act. They require the provision of correct factual information.

[102] Situations might arise when a person filling out one of the forms has concerns as to whether, by executing the forms in a way which another party requests they do, they might become complicit in misleading either the Office of State Revenue or someone else. Such circumstances might well call for completion of the forms by the provision of greater factual detail than simply the insertion of a number. That is one reason why the instructions for completion of the forms provide for the provision of additional detail via a form 20 "enlarged panel". But the seller did not insist upon the insertion of any additional information via such a mechanism.

Conclusion

[103] The buyer is entitled to a declaration that the contract had not been validly terminated by the seller. The contract should be performed. I will hear the parties further as to the form of any order for specific performance of the contract. I will hear the parties further as to

the amount of the compensation order which should be made. Costs should follow the event.