SUPREME COURT OF QUEENSLAND

CITATION:	*Allen v G Developments Pty Ltd & Ors* [2019] QSC 107
PARTIES:	**JOHN ALLEN (as Trustee of the Bundamba Trust)** (plaintiff) **v** **G DEVELOPMENTS PTY LTD** **ACN 116 332 220** (first defendant) **GARRICK GRAHAME BULL** (second defendant) **RICHARD JAMES GARNER** (third defendant) **ALEXANDER SCOTT HAGAN** (fourth defendant) **DALIBOR STEVANOVIC** (fifth defendant) **and** **STOJAN STEVANOVIC AND SLAVICA STEVANOVIC** (first defendant by counterclaim) **CARL JAMES THOMPSON AS TRUSTEE FOR THE THOMPSON FAMILY SUPER FUND** (third defendant by counterclaim) **ALLEGRO BEACH PTY LTD ACN 136 535 790 AS TRUSTEE FOR THE ALLEN FAMILY TRUST** (fourth defendant by counterclaim) **ANNJAC PTY LTD ACN 101 188 407 AS TRUSTEE FOR THE SILVERWOOD SUPERANNUATION FUND** (fifth defendant by counterclaim)
FILE NO:	SC No 11245 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29, 30 and 31 January and 5 February 2019
JUDGE:	Bradley J
ORDERS:	**1. The plaintiff has leave to amend his claim to seek interest pursuant to s 58(3) of the *Civil Proceedings Act* 2011 (Qld).** **2. Judgment for the plaintiff against the first and**

second defendants in the amount of $88,867.39, being interest payable pursuant to s 58(3) of the *Civil Proceedings Act* 2011 (Qld) on the outstanding balance of $1,000,000 owed by the first defendant to the plaintiff during the period from 31 October 2016 to judgment.

3. **The plaintiff's claim is otherwise dismissed.**
4. **The first and second defendants' counterclaim is dismissed.**
5. **The claim of the third, fourth and fifth defendants by counterclaim for rectification of the investor contracts and for alternative declaratory relief and equitable damages is dismissed.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTEREST – AGREEMENTS TO PAY INTEREST – RECOVERABILITY OF INTEREST – where the plaintiff, as a trustee, agreed to lend the first defendant a principal sum of $1 million pursuant to a deed of loan, for the purpose of funding the acquisition of land for a development project – where by the deed of loan the first defendant covenanted to repay the principal sum plus interest at the rate of 25 per cent per annum within one year – where no repayments were made prior to the commencement of proceedings, more than five years after the loan debt was due – where the plaintiff contends that the deed of loan bound the first defendant to pay interest at the rate of 25 per cent per annum on the outstanding loan amount, comprising the principal sum and accrued interest, until all monies were repaid – whether, on its proper construction, the deed of loan provided for the payment of interest at the rate of 25 per cent per annum on the outstanding amount beyond the end of the one year term – whether, in the alternative, interest should be awarded on the outstanding balance from time to time pursuant to s 58(3) of the *Civil Proceedings Act* 2011 (Qld) and, if so, the date from which it should be awarded

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – EQUITY – EQUITABLE REMEDIES – where the plaintiff as trustee, the first defendant and the defendants by counterclaim, as unitholders in the unit trust, discussed an arrangement whereby each unitholder would receive two lots

in the completed development in exchange for the plaintiff's release of the outstanding loan debt and interest owed by the first defendant to the plaintiff – where a special condition drafted for each sale contract stated that the deposit and balance purchase price were deemed to be paid in full by application of the loan funds – where clause 2.1 of the special condition stated that the condition would only apply if eight sale contracts were executed and completed simultaneously and a deed of release was fully executed in respect of the deed of loan – where only seven of the eight sale contracts were executed, none of the contracts completed and the deed of release was not fully executed – where the first defendant demanded payment of the deposit amount for each contract – where, upon failure to pay the deposit, the first defendant purported to terminate the contracts – where the defendants by counterclaim accepted the first defendant's purported termination as repudiatory and purported to terminate the contracts – whether, on the proper construction of the special condition, the first defendant was entitled to demand payment of the deposit and whether the unpaid deposits and associated monies are recoverable by the first defendant from the defendants by counterclaim – alternatively, whether the first defendant's conduct was repudiatory and whether the termination by the defendants by counterclaim was lawful – where the third, fourth and fifth defendants by counterclaim seek rectification of the sale contracts or alternative declaratory or equitable relief – whether there is any utility in granting such relief

Civil Proceedings Act 2011 (Qld), s 58(3)

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited
Bennett v Jones [1977] 2 NSWLR 355, cited
El Khoury v Harsany [2018] NSWSC 1774, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, applied
FA Pidgeon & Son Pty Ltd v Danehurst Investments Pty Ltd [1986] 1 Qd R 448, applied
In re Marquis of Anglesey; sub nom Willmot v Gardner [1901] 2 Ch 548, applied
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
Nelson v Dahl (1879) 12 Ch D 568, cited
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537; [1982] HCA 29, considered
Re Metway Bank Limited [1991] 1 Qd R 120, cited
Re Zurich Australian Insurance Ltd [1999] 2 Qd R 203, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited

Waldron v Bird [1974] VR 497, applied

COUNSEL:	M Ambrose QC with S McNeil for the plaintiff and third, fourth and fifth defendants by counterclaim M D Martin QC with P J Jeffery for the first and second defendants
SOLICITORS:	HWL Ebsworth for the plaintiff and third, fourth and fifth defendants by counterclaim Evans Lawyers for the first and second defendants

[1] This proceeding concerns disputes between a building company that developed a strata title project at Bundamba, the trustee of a unit trust who funded the acquisition of the land for the development, the directors who guaranteed the borrowing, and the investors in the unit trust who contracted to purchase lots in the development.

The builder, the land and the directors

[2] The first defendant G Developments Pty Ltd is part of a group of companies involved in the building of residential development projects. From its incorporation in 2005, the second defendant Garrick Grahame Bull has been the sole director.

[3] Since 12 January 2006, G Developments has held a licence in the class Builder – Low Rise issued under the *Queensland Building and Construction Commission Act 1991* (Qld). In that period, it has undertaken 1,466 residential construction jobs, with a total value over $334 million. There are no conditions on its licence. It has not been the subject of any tribunal direction orders, disciplinary action or orders, recorded convictions, exclusions, bans, disqualifications, infringement notices or demerit points. It has received two directions to rectify structural work. It has complied with each.

[4] On 15 May 2009, G Developments entered into a written contract to purchase land at 10 Creek Street, Bundamba.[1] The land was considered a potential development site, suitable for the construction of 20 strata title units. The contract specified a purchase price of $1,050,000, and was subject to finance.

[5] Between 15 May 2009 and early January 2010, G Developments was unable to obtain finance to complete the purchase of the land. Over that period, G Developments paid deposits totalling $80,000 to the seller and, it appears, the purchase price was adjusted by agreement to become $1.07 million.

[6] In early 2010, Mr Bull approached the third defendant Richard James Garner about arranging funding for the land purchase and also for the associated development project. At the time Mr Garner was a finance broker and property marketer, with experience in sourcing funds for projects like that proposed for the Bundamba land.

[7] On 14 January 2010, Radical Developments Pty Ltd was incorporated, with Mr Garner, the fourth defendant Alexander Scott Hagan, and the fifth defendant Dalibor Stevanovic

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[1] The seller was Woodfield Developments Pty Ltd. The contract was in the form of the sixth edition of the standard contract for houses and residential land approved by the Real Estate Institute of Queensland and the Queensland Law Society. The real property description was Lots 4-6 on B7005, County of Stanley, Parish of Goodna.

as its directors. Mr Garner and Mr Stevanovic each held 50 ordinary shares and Mr Hagan held 33 ordinary shares in the company.

[8] Also on 14 January 2010, G Developments and Radical Developments "agreed to subscribe to interests in a joint venture in relation to the development, management and operation" of the project for the Bundamba land. The two companies entered into a written joint venture agreement dated 14 January 2010 to "record the nature of their relationship, rights and obligations."

[9] By the joint venture agreement, G Developments and Radical Developments agreed to cause to be advanced "all moneys required to establish the Project, estimated at $1,100,000", which approximated the balance purchase price and associated settlement costs; and to "jointly seek funding on behalf of the venture in the sum of $3,600,000", the then estimated cost of developing the project. No fee was to be charged by either joint venturer for any services rendered to the project, unless mutually agreed. G Developments was appointed the "Project Manager."

[10] Mr Bull's evidence, which was not contested, is that: the contribution to the project by Radical Developments and its directors was to comprise sourcing the funding to complete the purchase of the land, organising construction funding, and selling the units in the project; and G Developments' contribution was to be organising the sub-division of the land and building the units.

The trustee

[11] On about 20 January 2010, the plaintiff John Allen loaned $1 million to Radical Developments and G Developments. According to Mr Bull, whose evidence I accept in this respect, Mr Garner had arranged the loan from Mr Allen.

[12] Mr Allen drew the loan money from funds he held as trustee of the Bundamba Trust. The Bundamba Trust is a unit trust governed by a deed made on 15 January 2010, the day after Radical Developments was incorporated and the joint venture agreement was signed.

The unit holders

[13] Mr Allen had received the trust funds as contributions from the unit holders in the trust. There were one million ordinary units in the trust, each issued at a par value of $1 and each fully paid. It is common ground that the unit holders were as follows:

Unit holder	**No of units**
Stojan Stevanovic and Slavica Stevanovic (the first defendants by counterclaim) (the **Stevanovics**)	250,000
Philip Quinton Edwin Southwell and Carl James Thompson as trustee for the Thompson Family Super Fund (the third defendant by counterclaim)	250,000
Allegro Beach Pty Ltd as trustee for the Allen Family Trust (the fourth defendant by counterclaim)	150,000

Mr Allen and Georgia Tsongas as trustee for the Allen Family Super Fund	100,000
Annjac Pty Ltd as trustee for the Silverwood Superannuation Fund (the fifth defendant by counterclaim)	125,000
Philip Jackson Rodger and Moira Ann Rodger (the **Rodgers**)	125,000

The Loan Deed

[14] The terms of Mr Allen's loan to G Developments were recorded in a deed dated 20 January 2010 (the **Loan Deed**). The parties to the Loan Deed are Mr Allen as trustee of the Bundamba Trust (described as "the Lender"), Radical Developments and G Developments (described as "the Borrower"), and six companies and persons collectively described as "the Guarantors", namely Radical Developments, G Developments, Mr Bull, Mr Garner, Mr Hagan and Mr Stevanovic.

[15] The Loan Deed was prepared by the lawyers and accountants based in the Australian Capital Territory, who were advising Mr Allen. In it the parties recite that the Lender has agreed to lend money to the Borrower "in the manner and upon and subject to the covenants, agreements and provisions" set forth in the Deed "to enable the Borrower to complete the purchase and or development" of the Bundamba land.

[16] At trial, the parties identified the relevant operative provisions of the Loan Deed as follows:

> **1. DEFINITIONS**
>
> In this Deed unless contrary intention appears:
>
> (a) **"Event of Default"** means any of the events set out in Clause 5(b).
>
> (b) **"Principal Sum"** means in relation to any day, the difference between the total of all amounts which have been lent by the Lender to the Borrower pursuant to Clause 3 hereof as at 5:00pm on that day and the total of all amounts which have been repaid by the Borrower to the Lender hereunder as at 5:00pm on that day.
>
> (c) **"Secured Monies"** means all monies which are or which hereafter may become owing or payable by the Borrower to the Lender or under or pursuant to this Deed.
>
> (d) **"Securities"** means the mortgage specified in Item 9 of the Schedule given by the Borrower and any mortgage, pledge, lien, hypothecation, security interest or other encumbrance now or in the future given by the Borrower or any guarantor in favour of the Lender to secure the obligations of the Borrower under this Deed and includes any guarantee executed by any guarantor.
>
> **2. INTERPRETATIONS**
>
> **2.1 General**
>
> In this Deed unless the context otherwise requires:
>
> (a) …
>
> (b) the singular includes the plural and vice versa;
>
> …

(f) a Recital, Schedule or description of the Parties forms part of this Deed;

…

(i) where an expression is defined anywhere in this Deed it has the same meaning throughout;

…

2.2 Headings

In this Deed headings are for convenience of reference only and do not affect interpretation.

3. LOAN

The lender will lend to the Borrower subject to the provisions hereof the amount referred to in Item 4 of the Schedule (hereinafter called **"the Loan Amount"**).

4. INTEREST

(a) The Borrower covenants that the Borrower will pay interest on the Secured Monies computed at the rate of twenty five percent per annum and payable on the date referred to in Item 8 of the Schedule being on one year from the date of drawdown or project completion whichever is earlier (hereinafter called **"the due date"**) (hereinafter called **"the date of first payment"**) at the fixed rate namely the rate referred to in Item 5 of the Schedule (hereinafter called **"the fixed rate"**).

(b) The parties further agree if the Secured Monies is repaid at any time prior to the first anniversary date of the initial drawdown, a minimum payment of twenty-five percent of the loan amount is payable as interest. The parties agree that the total payment incorporates a penalty amount in compensation for the opportunity costs of the lenders entering into this agreement and is fair and reasonable in the circumstances.

(c) At the expiration of the period referred to in Item 6 of the Schedule (hereinafter called **"the minimum period"**) the Lender may at its discretion at any time and from time to time thereafter give notice in writing to the Borrower varying the rates of interest payable hereunder and may in such notice prescribe a new rate. The new rate of interest so prescribed shall become effective from the date of the notice and thereupon the Borrower shall be liable under the covenants to pay interest at the new rate and this Deed shall be deemed to be varied accordingly.

5. REPAYMENTS

(a) The Borrower covenants that the Borrower will repay the Loan Amount and any other monies owing to the Lender pursuant to the provisions hereof on or before the date referred to in Item 7 of the Schedule (hereinafter called **"the repayment date"**).

(b) The Borrower further covenants that the Borrower will repay the Principal Sum forthwith upon written demand being made at any time after the happening of any of the following events:

(i) Default being made by the Borrower in the due or punctual payment of any monies which comprise part of the secured monies or in the due or punctual observance or performance of any other obligation on the part of the Borrower under this Deed;

(ii) Default being made by the Borrower or any other person in the due or punctual observance or performance of any obligation under any of the Securities;

…

(c) It is hereby agreed and declared that all monies received by the Lender in reduction of the secured monies shall be applied by the Lender firstly in

reduction of any interest due but unpaid and secondly in reduction of the remainder of the secured monies.

…

8. GUARANTEE

(a) The Guarantors hereby jointly and severally guarantee the due performance by the Borrower of the Borrower's obligations hereunder.

(b) The Guarantors Acknowledge:

(i) That the guarantee shall be a continuing guarantee AND shall be a principal obligation between the Guarantors and the Lender (to the intent that any limitation on the liability of any of the Guarantors which would otherwise arise by reason of the Guarantor's status as a Guarantor or Co-Guarantor is hereby negatived) AND shall not be affected by any claim which the Borrower may have or claim to have against the Lender on any account whatsoever.

(ii) That the liability of the Guarantors shall not be impaired:

A. By the Lender's granting time or other indulgence to or making any composition with the Borrower or any of the Guarantors;

B. …

C. By the Lender's forbearing or neglecting to exercise any remedy or right it may have at the time in the future against the Borrower or against any of the Guarantors;

D. …

E. By the absence of any notice to any of the Guarantors of default by the Borrower;

F. …

G. By the Lender waiving any breach or default by the Borrower or any of the Guarantors;

H. …

I. By the absence of notice to any of the Guarantors of or consent by any of the Guarantors to … any other transaction whatsoever between the Lender an [sic] the Borrower including any release or compromise of any of the obligations or the entire or partial discharge of the securities or any of them only;

…

11. GENERAL

11.1 Amendment

This Deed may only be amended or supplemented in writing, signed by the parties.

11.2 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of any power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the party to be bound by the waiver.

11.3 Joint & Several

The Borrower and Guarantors shall be jointly and severally liable and responsible for all obligations and covenants under this Deed.

11.4 Entire Agreement

This Deed is the entire agreement of the parties on the subject matter. The only enforceable obligations and liabilities of the parties in relation to the subject matter are those that arise out of the provisions contained in this Deed. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this Deed.

12.1 Governing Law

This Deed is governed by the law in force in the Australian Capital Territory.

[17] The schedule to the Loan Deed includes the following items:

ITEM 3:	**THE DATE OF FIRST REPAYMENT** day of 2011 or date of practical completion of project whichever is earlier
ITEM 4:	**THE LOAN AMOUNT** One million dollars ($1,000,00.00)
ITEM 5:	**THE FIXED RATE** Twenty five percent (25% per annum) with a minimum payment of 25% of the loan amount if the loan amount is paid back within 365 days.
ITEM 6:	**THE MINIMUM PERIOD** One year or project completion date whichever is earlier
ITEM 7:	**THE REPAYMENT DATE** 20th day of January 2011
ITEM 8:	**THE MONTHLY INSTALMENT** NIL
ITEM 9:	**THE SECURITIES** C. Mortgage dated in respect of Property Number: 225494 Lot RPD: Lot 4 B 7005 PAR GOODNA, Lot 5 B 7005 PAR GOODNA, Lot 6 B 7005 PAR GOODNA Land Number(s): 97572, 97573, 97574 Division 4

[18] The obligations of G Developments (as one of the two companies that comprise the Borrower)[2] and of Mr Bull (as one of the Guarantors) under the Loan Deed are in issue.

Construing the Loan Deed – presence of parties before the court

[19] All of the parties to the Loan Deed are parties to the proceeding, save for Radical Developments, which was deregistered as a company on 8 June 2014. Mr Garner, Mr Hagan and Mr Stevanovic have not been served, appeared or filed any pleading in the proceeding.

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[2] The obligations of the Borrower under the Loan Deed are joint and several. Radical Developments has been deregistered and is not a party to the proceeding. From this point onwards, merely for convenience, these reasons refer only to the rights and obligations of G Developments under the Loan Deed, rather than to those of both entities that comprise the Borrower.

[20] On 10 August 2018, the Court directed Mr Allen, Mr Thompson, Allegro Beach, Annjac, G Developments and Mr Bull to take all reasonable steps to notify the parties who had not appeared that the matter was proceeding to trial, and if they did not participate in subsequent review hearings and appear at trial, orders and judgments may be made in their absence. On 31 August 2018, the solicitors for Mr Allen, Mr Thompson, Allegro Beach and Annjac wrote to each of Mr Garner, Mr Hagan and Mr Stevanovic notifying him as the direction required and enclosing a copy of the Order containing that direction. On 18 December 2018, the solicitors wrote again to each of Mr Garner, Mr Hagan and Mr Stevanovic notifying him that the matter would be proceeding to trial and had been set down for a 7-day trial beginning on 29 January 2019.

[21] At the commencement of the trial Mr Garner, Mr Hagan and Mr Stevanovic were called. They did not appear. Mr Garner was aware of the trial, as he was subpoenaed to appear as a witness and gave oral evidence on the last day of the trial.

[22] No submission was put that the Court should decline to construe the Loan Deed to resolve the dispute between Mr Allen (on the one hand) and G Developments and Mr Bull (on the other) as to its true meaning and effect. No other relief was sought by any party against Mr Garner, Mr Hagan or Mr Stevanovic.

Approach to construing the Loan Deed

[23] Although it was recorded in the form of a deed, in the Loan Deed the parties recite that the transaction proceeds by way of agreement. It follows that the approach to construing the Loan Deed will be the same, in principle, as it would have been if the parties had recorded their respective rights and obligations in the form of a simple contract.

[24] There was no controversy at the trial that the rights and liabilities of parties to a contract are determined objectively so that the "meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean."[3] As the High Court has explained:

> Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.[4]

[25] The transaction between the parties to the Loan Deed was commercial in nature. It follows that: the terms of the Loan Deed are to be understood as a reasonable business person would have understood them; the commercial purpose or objects to be achieved are to inform such an understanding; an appreciation of the purpose or objects is facilitated by understanding the genesis of the transaction, the background, the context and the market in which the parties are operating; and the court is entitled to assume the parties intended to produce a commercial result which makes commercial sense.[5]

[26] The recitals in the Loan Deed identify the commercial purpose of the transaction:

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3 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40].

4 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [48], citing *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

5 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-7 [35].

> A. The Lender has agreed to lend money to the Borrower in the manner and upon and subject to the covenants, agreements and provisions hereinafter set forth to enable the Borrower to complete the purchase and or development of property known as [reference identifying the land].
>
> B. The Borrower has asked the Lender to lend money to the Borrower on the terms set out in this Deed and the Lender has agreed to make the Loan on the terms set out in this Deed.

[27] The only other evidence of the circumstances surrounding the Loan Deed is that noted in paragraphs [1] to [12] above.

[28] It is common ground that no repayments of the loan or of any interest were made by G Developments to Mr Allen before this proceeding was commenced on 31 October 2016.

[29] Between 27 September 2017 and 5 February 2019, G Developments paid $1.25 million to Mr Allen by six payments, including $62,500 paid on the last day of the trial.

[30] The issue between Mr Allen, on the one hand, and G Developments and Mr Bull (the **GD parties**), on the other, is whether any additional amount is due from G Developments to Mr Allen pursuant to the Loan Deed.

Contentions about the Loan Deed

[31] For Mr Allen it was contended that the effect of cl 4(a) of the Loan Deed was to bind G Developments to pay interest at the rate of 25 per cent per annum on the Secured Monies[6] from the date the loan was advanced until all the Secured Monies were repaid. Calculating interest at that rate, and applying G Developments' payments firstly to accrued interest and secondly to principal, Mr Allen claimed to be owed $709,327.98 in principal and $1,206,482.05 in interest as at 6 February 2019, after the sixth payment was made.

[32] For the GD parties it was contended that the total amount payable under the Loan Deed was $1.25 million, because no interest was payable pursuant to the Loan Deed after 20 January 2011.

Consideration of the parties' contentions about the Loan Deed

[33] At common law the general rule is that interest is not payable on a debt or a loan in the absence of express agreement or some course of dealing or custom to that effect.[7]

[34] There are four basic elements of an agreement to pay interest: first, the agreement that interest will accrue on the principal sum advanced; second, the rate at which the interest is to be calculated; third, the rests at which the interest is to accrue; and finally, the date(s) on which the accrued interest is to be paid.[8]

[35] As noted above, cl 4(a) is a covenant by G Developments in these terms:

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6 Comprising both the principal amount of the $1 million loan and interest accrued on it: see cl 1(c).

7 *Page v Newman* (1829) 9 B&C 378 at 380-1; *FA Pidgeon & Son Pty Ltd v Danehurst Investments Pty Ltd* [1986] 1 Qd R 448 at 451.

8 Of course, parties may agree on other matters, such as whether interest is to compound, whether and how the rate of interest is to vary and what will occur if there is default in repayment of the principal sum or interest.

> The Borrower covenants that the Borrower will pay interest on the Secured Monies computed at the rate of twenty five percent per annum and payable on the date referred to in Item 8 of the Schedule being on one year from the date of drawdown or project completion whichever is earlier (hereinafter called **"the due date"**) (hereinafter called **"the date of first payment"**) at the fixed rate namely the rate referred to in Item 5 of the Schedule (hereinafter called **"the fixed rate"**).

[36] Item 8 has no date; it reads "NIL". The definitions in cl 4(a) do not assist, as none of the Items in the Schedule is entitled "the due date" or "the date of first payment". The nearest possible intended references are Item 3 "the date of first repayment" and Item 7 "the repayment date".

[37] If the cross-reference is an error, it is not of any significance. The parties described the relevant date expressly in cl 4(a) as "one year from the date of drawdown or project completion whichever is earlier". It follows that G Development's obligation to pay interest at the agreed rate was to be performed one year from the drawdown date or on project completion, if that occurred before the one year period elapsed.

[38] As for the rate of interest, the express terms of the clause specify both a rate of 25 per cent per annum and "the fixed rate", which is the rate referred to in Item 5 of the Schedule. Item 5 references both the 25 per cent per annum rate and a "minimum payment of 25% of the loan amount, if the loan amount is paid back within 365 days."

[39] The express agreement in cl 4(a) of the Loan Deed is that G Developments will pay interest on the Secured Monies[9] at the rate of 25 per cent per annum on the date that was one year from the date of drawdown or project completion, whichever is the earlier date. This date for payment is defined as both "the date of first repayment" and "the due date". There are no specified rests at which the interest is to accrue, so that the agreement appears to be for simple interest on the amount outstanding at the 25 per cent per annum rate calculated to the date of first repayment (which is also the due date).[10]

[40] By cl 5(a), G Developments covenants to repay both the Loan Amount and "any other monies owing" to Mr Allen pursuant to the provisions of the Loan Deed on or before the repayment date in Item 7, namely 20 January 2011. By cl 5(b), G Developments covenants to repay "the Principal Sum" forthwith on written demand made after the happening of any of the enumerated events in sub-paragraphs (i) to (v).

[41] As is clear from the above brief examination, the parties chose different mechanisms to determine the date for the repayment of the Loan Amount and the date for the payment of the agreed interest. The Loan Amount is repayable on or before a set date, 20 January 2011.[11] The interest is payable on the date that is one year from the date of drawdown.[12] It follows that, if the loan were to be drawn down after 20 January 2010, say on 27 January 2010, then the principal would be repayable on 20 January 2011 and the interest would not be payable until 27 January 2011.

[42] The parties dealt with the possibility of complexity, if at all, in cl 4(b) and cl 4(c) of the Loan Deed. It is convenient to consider each in turn.

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9 i.e. "all monies which are or which hereafter may become owing or payable by the Borrower to the Lender or under or pursuant to this Deed."

10 *El Khoury v Harsany* [2018] NSWSC 1774 at [48]-[49].

11 cl 5(a), Item 7.

12 cl 4(a). This assumes the project completion date does not occur before that anniversary date.

[43] As noted above, cl 4(b) is as follows:

> The parties further agree if the Secured Monies is repaid at any time prior to the first anniversary date of the initial drawdown, a minimum payment of twenty-five percent of the loan amount is payable as interest. The parties agree that the total payment incorporates a penalty amount in compensation for the opportunity costs of the lenders entering into this agreement and is fair and reasonable in the circumstances.

[44] By this clause, the parties expressly contemplate that the Secured Monies might be repaid by G Developments within one year (i.e. "prior to the first anniversary date of the initial drawdown"). They agreed that, if this were to occur – whether because drawdown of the loan occurs after 20 January 2010 or because the project is completed before 20 January 2011 –then G Developments would make "a minimum payment of twenty-five percent of the loan amount … as interest."

[45] It follows that the parties agreed that if, for example, G Developments completed the project in six months from 20 January 2010 or, due to some delay, did not drawdown the loan until 20 July 2010, G Developments would pay fixed interest of 25 per cent of the $1 million loan amount. In either example, the actual interest rate would be 50 per cent per annum.

[46] In the Loan Deed, the parties explain that this higher rate "incorporates a penalty amount in compensation for the opportunity of the lenders entering into this agreement and is fair and reasonable in the circumstances." The explanation is opaque. No information permits an understanding of why "the lenders" should be compensated for the "opportunity" of entering into the Loan Deed, rather than for some other foregone opportunity. It is possible the provision was intended to take account of some fixed costs incurred by "the lenders", e.g. due diligence investigations about the project. Nothing in the Loan Deed assists in understanding the minimum 25 per cent return.[13]

[47] In any event, nothing in cl 4(b) alters the date for payment of interest, which remains that specified in cl 4(a).

[48] The loan was not repaid before the one year period expired. Mr Allen makes no claim for any payment of interest as a penalty under cl 4(b).

[49] The other provision dealing with interest on the Secured Monies is found in cl 4(c):

> At the expiration of the period referred to in Item 6 of the Schedule (hereinafter called "**the minimum period**") the Lender may at its discretion at any time and from time to time thereafter give notice in writing to the Borrower varying the rates of interest payable hereunder and may in such notice prescribe a new rate. The new rate of interest so prescribed shall become effective from the date of the notice and thereupon the Borrower shall be liable under the covenants to pay interest at the new rate and this Deed shall be deemed to be varied accordingly.

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[13] The reference to "the lenders" rather than "the Lender" might be a reference to the subscribers to the unit trust. Of course the unit holders are not parties to the Deed. Mr Allen, as the trustee, is the only party on their side of the transaction.

[50] The trial proceeded on the common basis that Mr Allen did not exercise the discretion conferred by cl 4(c) to give a notice.[14] Mr Allen does not claim interest pursuant to any written notice given to G Developments under that provision.

[51] For Mr Allen it is contended that the parties' reference in cl 4(c) to a notice "varying the rates of interest payable hereunder" infers that the parties agreed by cl 4(a) that, in the absence of such a notice, G Developments would pay interest on any part of the loan outstanding after 20 January 2011 at the rate of 25 per cent per annum. It is said that the language in cl 4(c) cannot be given any sensible operation unless another provision (inferentially cl 4(a)) operates to make interest payable at 25 per cent per annum after 20 January 2011 in the absence of a notice under cl 4(c).

[52] This contention requires careful consideration of cl 4(c) in the context of cl 4(a) and cl 4(b) and the repayment provisions in cl 5.

[53] Clause 4(c) provides that a notice may be given at "the expiration of the period referred to in Item 6 of the Schedule". That is the expiration of the period of "One year or project completion date whichever is earlier". As the Loan Deed is dated 20 January 2010, it may be assumed that the "One year" in Item 6 is one year from that date.[15]

[54] The final sentence in cl 4(c) makes it clear that in respect of the covenants in the Loan Deed: the rate of interest is varied by the notice; the date for payment of interest is not varied; no additional date for payment of interest is agreed; and the liability to pay interest remains that "under the covenants" elsewhere in the Loan Deed. The only specific covenant to pay interest is that in cl 4(a), which fixes on the earlier of the anniversary of the loan drawdown date and the project completion date as the date the interest payment must be made.

[55] If the project completion date were to occur before 20 January 2011, say on 20 July 2010, then the fixed interest ($250,000) would be payable on that date, pursuant to cl 4(a). However, the loan amount ($1 million) would not be repayable until 20 January 2011 pursuant to cl 5(a). Clause 4(c) would permit Mr Allen to give a notice varying the interest rate for the outstanding loan amount at any time after the project completion date. If no such notice were given, the interest rate would remain at 25 per cent per annum. However, the obligation to pay $250,000 (including the "penalty" for early repayment) in any event, would mean that G Developments could retain the $1 million loan amount for a further six months and pay no more in interest. In that event, by written notice pursuant to cl 4(c), Mr Allen could set an interest rate above 25 per cent. This would give G Developments an incentive to repay the $1 million loan amount sooner, rather than delay doing so until 20 January 2011 and incurring additional interest.

[56] If such a notice were to be given, then the question would arise as to when that additional sum for interest would be payable. The answer appears to be that any further interest would be "other monies owing" to Mr Allen pursuant to the Loan Deed, which, by cl 5(a), G Developments covenants to repay on or before 20 January 2011. Although

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[14] There was evidence of an attempt to give notice pursuant to cl 4(c) varying the rate of interest to 35% per annum from 1 September 2016. However, counsel informed the court that Mr Allen did not rely on the purported notice and it was the common position of the parties that the notice should be disregarded for all purposes.

[15] An alternative, that it means one year from the loan drawdown date, is considered below.

it would be more usual for such a provision to expressly refer to interest, construing "other monies owing" as including interest is consistent with the terms of cl 5(c), which anticipates that interest might be owing on 20 January 2011.[16]

[57] It follows that the language in cl 4(c) may be given sensible effect without any additional interest accruing at 25 per cent per annum after the repayment date of 20 January 2011.

[58] The Loan Deed includes a number of provisions, definitions and items that are not necessary for the transaction it records. These appear to be the ghosts of a different transaction – one that included the payment of a "monthly instalment" from a specified "date of first repayment" with a "fixed rate" of interest for "the minimum period" and a mechanism to vary "the fixed rate" after the expiry of "the minimum period".

[59] For such a transaction: cl 4(a) could have provided for a monthly payment of interest until the loan was repaid in full; cl 4(b) would have provided for a minimum amount of interest, in the event of early repayment; and cl 4(c) would have provided for the fixed rate of interest to be varied by notice at the end of the minimum period.

[60] The parties could have quite easily adapted cl 4(a) and item 8 to provide for interest to continue to accrue at "the fixed rate" and to be paid at regular specified dates after 20 January 2011. Similarly, a provision could have been included in cl 5 to provide for a specific rate of interest to apply in the event of default. That such courses were not taken supports a conclusion that the parties did not agree for interest to be paid after the anniversary of the drawdown (or project completion, if that occurred earlier) at the 25 per cent per annum rate or at any agreed rate.

[61] The parties' use of the words "being one year from the date of drawdown or project completion whichever is earlier (hereinafter called "the due date")" in cl 4(a) and the nomination of "NIL" for "the monthly instalment" dates in item 8 are consistent with each other. They manifest an intention that, for the present loan transaction, there would be only a single payment date in cl 4(a), rather than the series of monthly dates that might have been nominated in item 8.

[62] The absence of a provision for the calculation or payment of interest after 20 January 2011, even in the event of default,[17] also tells against the submissions on behalf of Mr Allen that cl 4(a) should be construed to impose on G Developments an obligation to pay interest at 25 per cent per annum after that date.

[63] No case was made that cl 4(a) and item 8 were affected by mistake. No claim was brought for rectification of the Loan Deed. No evidence was led of any relevant fact, matter or circumstance known to all parties at the time the Loan Deed was made or in the course of its negotiation, that provided a particular context in which the Loan Deed was to be construed, save for those mentioned at [26] and [27] above.

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[16] cl 5(c) provides for monies received by Mr Allen on 20 January 2011 to be applied: firstly, in reduction of any interest due and unpaid; and, secondly, in reduction of the remainder of monies owing or payable to him under or pursuant to the Loan Deed.

[17] In the event of default or other circumstance in cl 5(b)(i) to (v), G Developments covenants to repay on demand only the Principal Sum, which is the amount of the loan advanced by Mr Allen, less all amounts repaid.

[64] Mr Allen did not assert that any term should be implied providing for the payment of interest after 20 January 2011. This is understandable, as the criteria for implication of such a term would seem unlikely to be able to be satisfied.

[65] The Loan Deed was prepared by the solicitors for Mr Allen. It recorded the terms on which Mr Allen advanced the loan. Clause 4(a) is a covenant by G Developments in favour of Mr Allen. In the circumstances, I do not propose to construe the clause, the item or the Loan Deed against the interests of either principal party.[18]

[66] There is no evidence of any course of dealing between Mr Allen and G Developments from which it might be inferred that interest would continue to accrue at a particular rate after the date for repayment fixed by agreement.[19]

[67] No evidence was led of any relevant trade usage to that effect.[20]

[68] The express terms of the Loan Deed show the parties expected the project to be financed, built, sold and completed in 12 months or earlier. Such optimism is neither unusual nor unlikely at the commencement of a commercial property development. The rate of interest fixed in the Loan Deed is higher than the rate charged by banks or other mainstream lenders at the time the Loan Deed was executed. From the lender's perspective, the higher rate may reflect a higher risk attached to the lending. From the borrower's perspective, it may reflect the short-term nature of the borrowing and the inability to obtain funds elsewhere. These circumstances are not determinative, but they also reinforce a conclusion that by the Loan Deed the parties agreed that G Developments would pay Mr Allen interest at 25 per cent for a maximum fixed period of borrowing; and they did not agree that interest would be paid at that rate indefinitely.

Conclusion on interest payable pursuant to the Loan Deed

[69] On its proper construction, cl 4(a) is a covenant by G Developments to pay Mr Allen interest on all monies payable under the Loan Deed on the first anniversary of the drawdown date (or on earlier project completion) at the rate of 25 per cent per annum. It is not a covenant to pay interest (at any rate) on any outstanding sum on any other date.

[70] It follows that pursuant to the Loan Deed, G Developments was obliged to pay Mr Allen a total of $1.25 million on or before 20 January 2011. Its failure to do so entitled Mr Allen to pursue legal remedies against G Developments for its breach of covenant, as he does in this proceeding.

[71] By the conclusion of the trial, G Developments had addressed its breaches and paid a total of $1.25 million to Mr Allen.

[72] The GD parties conceded that Mr Allen could claim interest on the debt pursuant to s 58(3) of the *Civil Proceedings Act 2011* (Qld), but had not done so in respect of the loan

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[18] By reference to the maxim *verba chartarum fortius accipiuntur contra proferentem.*

[19] *In re Marquis of Anglesey; sub nom Willmot v Gardner* [1901] 2 Ch 548 at 551-2. There could be no course of dealing with the other "Borrower" Radical Developments, as it had been incorporated only shortly before the transaction. No evidence of earlier dealings between Mr Garner and Mr Allen was adduced.

[20] *Nelson v Dahl* (1879) 12 Ch D 568 at 575 (Jessel MR), 591 (Brett LJ), 604 (James LJ); *Re Metway Bank Limited* [1991] 1 Qd R 120 at 124, citing *Ikin v Bradley* (1818) 5 Price 536.

amount. In the course of closing submissions, Mr Allen sought leave to further amend his process to claim interest on $1.25 million (being the "loan amount" and the "minimum payment" of interest under the Loan Deed) from 20 January 2011 pursuant to s 58(3). No prejudice was identified as flowing from a late amendment to this effect and there is no other reason to decline leave. I propose to grant leave.

[73] Given the further dealings between the parties, which are the subject of the matters in dispute considered below, it is appropriate to defer a determination of whether Mr Allen should recover any statutory interest until after those dealings have been considered and those disputes have been determined.

Events between 20 January 2011 and 12 March 2013

[74] As noted above, the loan amount and the agreed interest were not repaid on 20 January 2011. Ongoing discussions ensued between Mr Allen and Mr Garner about the non-payment and the difficulties being faced by G Developments in obtaining construction finance as a result of the continuing effects of the Global Financial Crisis and the January 2011 floods in South-East Queensland.

[75] In about September 2011, claiming to have the consent of Mr Allen, Mr Rodger and Mr Thompson, Mr Bull decided to "take control of this development" out of the hands of Mr Garner (and presumably Radical Developments).[21]

[76] On 7 October 2011, Mr Allen sent a notice of default to G Developments, requiring payment within 14 days.[22] On 18 October 2011, Mr Bull replied to Mr Allen suggesting as a "basic proposal" a partial repayment of $200,000 when construction finance was obtained and payment of the balance when construction was finalised.

[77] At about this time, Mr Garner and Mr Bull started discussing the idea of Mr Allen, as trustee, or the unitholders in the Bundamba Trust (**investors**) or their related entities, taking Lots in the development in lieu of the amount due under the Loan Deed. During 2012, Mr Allen had discussions with Mr Garner and Mr Bull, and communications with Mr Stevanovic, Mr Thompson and Mr Rodger about Mr Garner's idea.

[78] On 5 July 2012, Mr Allen wrote to Mr Stevanovic, Mr Garner, Mr Thompson and Mr Rodger. After referring to earlier discussions and concerns, Mr Allen reported:

> **What has been put to me as Trustee – I need clarification on in writing**
>
> I have been told that as we don't have all the sales required to be able to start construction that a couple of the investors buy units that will get us over the line towards financing, which I am happy to look at all options at this point (including each of the investors taking two units each as payment in full for their original investment) but before this happens the following needs to happen.
>
> 1. I want to see audited details of the existing exchanged sales including the following (sales price, deposit paid, unit number, sunset clause expiry date). This will allow me to make an informed decision.
>
> 2. Number of remaining units and unit numbers attached.

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[21] Mr Hagan ceased to be a director of Radical Developments on 30 June 2011.

[22] The notice stated, "The Trustee has graciously extended the time required to discharge the obligations under the facility in accordance with clause 4(c)". Nothing turns on the apparently mistaken reference to that clause of the Deed.

3. Details as to how contracts will be written up for the unit sales to investors if and when the investors decide to take up the offer that has been put to them.

4. The timeframe that this will happen so we are able to finalise which will allow all sides to move forward.

5. I expect that Radical Developments along with G Developments to sort this [sic] as both parties entered into the agreement. The investors have been very patient to date and want some closure on this as I am sure all parties involved do.

6. I understand that the new valuation is being done and a lot hangs on that, however I don't see how that could prevent everything else being sorted subject to that being received.

7. Once I have all the information I will then put it to the investors.

[79] On 19 July 2012, Mr Allen sent an email to Mr Stevanovic, Mr Garner and Mr Bull, copied to others including Mr Rodger and Mr Thompson, which included the following:

As trustee of the Bundamba Trust I have spoken with all the investors involved and all have agreed that are are [sic] willing to take two each of the remaining units in the completed development at Creek Street, Bundamba. This will resolve the issue of sales needed to get the finance required to complete the construction.

This will be done with the following conditions.

1. That the development is to start with in 3 months from the date of agreement and be completed and ready for settlement within 1 year from the date today being the 19th of July 2012.

2. This deal replaces the existing deal whereby the investors receive 25% return on their investment up until all monies have been returned to all investors.

3. Each of the investors will be responsible for all of their own Stamp duty costs and associated legal fees in relation to the purchase of the respective properties.

4. The investors will have the right to either sell or hold the properties if they choose.

5. There will need to be an annexure attached to the back of the contract stating that payment has been made in full and no further payment is required at settlement. (This needs to be done by the lawyers acting for the development)

6. If this situation has not been resolved and finalised by the start date earlier in this email the deal reverts back to the original deal where by all the investors are to receive the monies stated in the original contract if this is not done then the trust will be looking at what other avenues it has to recoup monies owed.

7. We get it done so we can move on.

The unit holders entities that the contract need to be done in

RODGER

1st unit in the name of ANNJAC PTY LTD A.C.N. 101 188 407 as trustee for The Silverwood Superannuation Fund

2nd unit in the name of Philip Jackson Rodger and Moira Ann Rodger

STEVANOVIC

2 units in the name of Stojan Stevanovic And Slavica Stevanovic

THOMPSON

2 units in the name of Carl James Thompson as trustee for the Thompson Family Trust

ALLEN

1st unit in the name John Thomas Allen

2nd unit in the name of John Thomas Allen as trustee for The Allen Family Super Fund.

[80] Draft contracts of sale for Lots in the development were provided to Mr Allen on 30 July and in August 2012 and the proposed special condition for the draft sale contracts was circulated to the unitholders by Mr Garner on 27 August 2012. The parties continued to exchange emails about the proposed contracts for the sale of Lots to the investors through to 12 March 2013.

[81] The draft special condition had been prepared for G Developments by its solicitors Minter Ellison. It was in this form:

> **Special Condition**
>
> 1. Definitions
>
> 1.1 In this special condition:
>
> (a) Financier Contracts means each of the contracts between the Seller and the eight beneficiaries under the Bundamba Trust for the purchase of Lots in the Scheme.
>
> (b) Deed of Release means the Deed of Release between the Seller and other parties and John Allen as Financier dated on or about the date of this contract.
>
> 2. Consideration for Sale
>
> 2.1 This special condition applies if:
>
> (a) The Financier Contracts are all executed;
>
> (b) The Financier Contracts all complete simultaneously; and
>
> (c) The Deed of Release is fully executed.
>
> 2.2 In consideration of the Deed or [sic] Release and the Settlement of the Financier Contracts, the Seller agrees that the Purchase Price will be fully satisfied by the discharge of all liabilities owed by the Seller to the Financier by way of the Deed of Release.

[82] On 19 February 2013, Mr Allen (as trustee of the Bundamba Trust) obtained brief written legal advice on the draft Deed of Release and the draft contracts of sale (including the draft special condition) from AFL Partners, the firm which had drawn the Loan Deed. The solicitors gave advice that "the documents accurately reflect the intended commercial compromise". The solicitors suggested it would be prudent for Mr Allen "to obtain the informed consent of the unitholders to the agreement with the borrowers." They enclosed a draft deed for that purpose.[23]

[83] On 25 February 2013, Mr Allen forwarded his solicitors' advice to Mr Rodger, Mr Thompson and Mr Stevanovic, copied to Mr Garner, under cover of this email:

> Finally I think that we have a way forward with the attached, please find a copy of correspondence from AFL Partners re the deed of release from Minter Ellison.
>
> **What needs to happen from here to finally get the project moving forward is:**
>
> 1. Upon receiving, the investors will need to sign the word document if in the case where there is money put in by both yourself and your SMSF you will need to sign in two spots, one for yourself and also one for you as trustee of the SMSF.
>
> 2. Initials required on each page of the document also.

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[23] The solicitors enclosed, with their written advice, a draft deed of settlement and release to be executed by each of the unitholders and by Mr Allen as trustee.

> 3. A scanned copy will need to be sent back to myself and the original will need to be sent to me at the address listed below.
>
> 4. Upon myself receiving the signed and dated copies of the word document, I as trustee of the Bundamba trust will sign the deed of release for Minter Ellison and return.
>
> 5. Then each of you have the contracts for the two units each they can be signed and returned to G Developments, from here there is no reason that they cannot start construction immediately.
>
> 6. The deed of release from Minter Ellison is for your information only I am the only one that needs to sign that document.
>
> Lets get this sorted asap so we can get this out of our heads and under construction where it should have been over two years ago.
>
> Also when people have signed their building contracts could you let me know so I can follow up with G Developments.
>
> If you have any questions please feel free to contact me on the mobile.

[84] Notwithstanding the solicitors' advice to Mr Allen, the position with respect to the draft special condition remained unresolved, at least with some of the investors. This led to a meeting being arranged on 12 March 2013 at the office of G Developments.

12 March 2013 meeting

[85] In Mr Allen's electronic diary, the meeting was scheduled for 12:00 pm on 12 March 2013. Mr Bull was there. According to Mr Rodger, Mr Allen had invited all the "Participants" to attend the meeting, but he was the only one who did so. The Participants were "the unitholders in the Bundamba Trust or their nominated entities."

[86] Mr Allen and Mr Rodger arrived and spoke with Mr Bull. Mr Garner arrived about 10 minutes late. On his arrival, Mr Bull told Mr Garner, "It's now all sorted. The participants of the trust will now receive eight units in exchange for their principal and interest." Mr Garner was also told by Mr Bull, "stamp duties would be paid by the participants of the trust for their – the taking of their dwellings."

[87] Mr Garner also recalled Mr Allen telling him that he was "happy with the arrangement" and "willing to accept this as a compromise." Mr Garner recalled Mr Rodger said "it was an acceptable end state or outcome, or something."

[88] For Mr Allen, Mr Thompson, Allegro Beach and Annjac, it was contended at the trial that a legally binding agreement between G Developments and the investors for the sale of the Lots in the development was reached at this meeting. That submission must be rejected.

[89] No one who gave evidence of what occurred at the meeting regarded themselves (or their relevant entity) as legally bound to proceed with a conveyance at the end of the meeting. All the witnesses said that by the end of the meeting they expected to receive a revised version of the draft special condition to consider.

[90] No one present at the meeting was able to bind the Stevanovics or Mr Thompson. Mr Allen did not give evidence that he could bind Allegro Beach. Mr Rodger did not give evidence that he was able to bind Mrs Rodger or Annjac.

[91] Although the parties had taken legal advice and the subject matter of the alleged agreement was the conveyance of an estate or interest in real property, no document was signed by G Developments, as the party said to have agreed to be bound to convey the estate or interest.

The amended special condition in each of the investor contracts

[92] At 4:19 pm on 12 March 2013, Mr Stevens of Minter Ellison sent Mr Bull an email attaching another version of the special condition. In his covering email, Mr Stevens advised:

> Amended Special Conditions attached. This page can simply be inserted in the Contracts. The Deed of Release can simply be exchanged with the Contracts. That is, Seller signs one set of contracts and the buyer signs another set together with the Deed of Release. The contracts and deed are then exchanged at a meeting thereby forming a binding agreement.

[93] At 4:53 pm on 12 March 2013, Mr Bull forwarded the email from Mr Stevens and its attachment to Mr Allen and Mr Garner. Mr Bull's covering email was in these terms:

> Good afternoon guys – as promised please find the attached and below.
>
> Please let me know thoughts.

[94] At 9:38 pm that day, Mr Garner circulated to Mr Thompson, Mr Stevanovic and Mr Rodger the proposed amended special condition by forwarding to each of them the email chain, including the email from Mr Bull and that from Mr Steven with the condition attached. Mr Garner's covering text described it as, "Re word of the special conditions after the meeting today between myself, Garrick, Phil Rodger and John."

[95] The proposed amended special condition was in the form below (the **amended special condition**), but I have added underlining to identify the changes from the draft special condition circulated by Mr Garner on 27 August 2012:

> **Special Condition**
>
> 1. Definitions
>
> 1.1 In this special condition:
>
> (a) Financier Contracts means each of the contracts between the Seller and the eight beneficiaries under the Bundamba Trust for the purchase of Lots in the Scheme.
>
> (b) Deed of Release means the Deed of Release between the Seller and other parties and John Allen as Financier dated on or about the date of this contract.
>
> 2. Consideration for Sale
>
> 2.1 This special condition applies if:
>
> (a) The Financier Contracts are all executed;
>
> (b) The Financier Contracts all complete simultaneously; and
>
> (c) The Deed of Release is fully executed.
>
> 2.2 In consideration of the Deed of Release and the Settlement of the Financier Contracts, the Seller agrees that the Purchase Price will be fully satisfied by the discharge of all liabilities owed by the Seller to the Financier by way of the Deed

of Release. The Balance Purchase Price is deemed to be paid in full by application of The Loan Funds.

2.3 If this contract does not complete due to the default of the Seller, the Loan Funds are still owing.

3. Deposit

3.1 The Buyer is deemed to have satisfied clause 4 of the contract by way of crediting an equivalent amount of the Loan Funds.

[96] At 6:30 pm on 13 March 2013, Mr Thompson replied by email to Mr Garner, "I am happy with this, if Phil is also satisfied (having received his own independent advice) and Yoga's assurances as well …". In oral evidence, Mr Thompson explained that "Yoga" was Yoga Nathan a solicitor from AFL Partners, the firm advising Mr Allen.

[97] Between 19 and 28 March 2013, the following seven contracts of sale, each including a special condition in the form of the amended special condition, (the **investor contracts**) were signed by the investors (or their nominees):

a. On 19 March 2013, Mr Thompson as trustee for the Thompson Family Super Fund signed investor contracts for Lots 6 and 16, and Allegro Beach signed an investor contract for Lot 5.

b. On 26 March 2013, the Rodgers signed an investor contract for Lot 19 and Annjac as trustee for the Silverwood Superannuation Fund signed an investor contract for Lot 10.

c. On 28 March 2013, the Stevanovics signed investor contracts for Lots 1 and 17.

[98] On 8 May 2013, G Developments (as Seller), by its attorney, signed each of the above seven investor contracts and dated each that date.

[99] Each of the investor contracts included the following agreed terms:

1. Defined terms & interpretation

1.1 Defined terms

In this Contract:

…

Balance Purchase Price means the amount equal to the Purchase Price less the Deposit, subject to any adjustments under clause 12.

Contract means this contract including the Items Schedule and any other agreement expressed to be supplemental to this contract and all amendments to any of those documents.

Items Schedule means the part of this Contract described as 'Items Schedule'.

Special Conditions means the special conditions (if any) contained in item N.

1.2 Interpretation

(a) Terms in the Items Schedule have the meanings shown opposite them unless the context requires otherwise.

(b) Words denoting the singular number only, include the plural number and vice versa. …

(e) The headings in this Contract are included for convenience only and do not affect the construction of this Contract.

3. Purchase Price

The Purchase Price must be paid by the Buyer to the Seller as follows:

(a) the Deposit must be paid in accordance with clause 4(a); and

(b) the Balance Purchase Price must be paid on the Completion Date.

4. Deposit

(a) The Buyer must pay the Deposit to the Stakeholder at the times shown in Item L of the Items Schedule.

(b) The Stakeholder will hold the Deposit until a party becomes entitled to it.
…

(e) The party entitled to receive the Deposit and any interest on the Deposit is as follows:

(i) if the Contract settles – the Seller is entitled to the Deposit and any interest in full;

(ii) if the Contract is terminated without default by the Buyer – the Buyer is entitled to the Deposit and any interest in full; or

(iii) if the Contract is terminated owing to the Buyer's default – the Seller is entitled to the Deposit and any interest in full.

…

(g) If this Contract is terminated, the Buyer has no further claim once it receives the Deposit and interest, unless termination is due to the Seller's default.

(h) The Buyer is in default if it:

(i) does not pay the Deposit when required and in the form required by the Seller as set out in this Contract;

(ii) pays the Deposit by post dated cheque; or

(iii) pays the Deposit by cheque which is dishonoured on presentation.

…

13. Default

(a) If the Buyer fails to comply with any of the terms of this Contract then in addition to any other remedy available to the Seller either at law or in equity the Seller may:

(i) affirm this Contract and sue the Buyer for:

(A) damages; or

(B) specific performance; or

(C) damages and specific performance; or

(ii) terminate this Contract, and:

(A) Resume possession of the Lot;

(B) forfeit the Deposit;

(C) sue the Buyer for damages; and

(D) resell the Lot.

(b) …

14. Interest on default

If the Buyer defaults in payment of any money the Buyer must pay to the Seller on demand interest on the unpaid moneys at the Default Interest Rate, to be calculated from the due date for payment to the date of payment. This clause does not prejudice any other rights of the Seller. Any judgment for unpaid moneys will bear interest at the same rate from the date of judgment until the date of payment.

20. Entire agreement

The Buyer acknowledges that:

(a) except as expressly provided in this Contract, the Buyer has not relied on any representations whether express or implied by the Seller or its agent or any other person in entering into this Contract; and

(b) the conditions and stipulations of this Contract and the Disclosure Statement contain the entire agreement between the Seller and the Buyer despite anything contained in any brochure or report prepared by or on behalf of the Seller or its agent, any model, display suite or finishes board shown to the Buyer or any representation (verbal or otherwise) made by or on behalf of the Seller which is not set out in this Contract.

29. Time

Excluding the time for Completion on the Completion Date nominated by the Seller under clause 5(c), time is in all cases and in every respect of the essence of this Contract.

41. Guarantee

(a) If the Buyer is a company, unless all the directors and principal shareholders of the Buyer sign this Contract as Guarantors before the Seller signs this Contract, the Seller may at any time until Completion terminate this Contract by notice to the Buyer. On such termination all money paid must be refunded in full without deduction together with any interest earned on it and no party will have any claim against the other.

[100] Each of the investor contracts also included the following in the Items Schedule

(N.B. Each Item in the Items Schedule must be completed by Buyer except Contract Date)

…

K. Purchase Price $325,000.00

L. Deposit

Deposit: $32,500.00

Stakeholder: Minter Ellison Trust Account

A possible eighth investor contract

[101] As noted above, Mr Allen's email of 19 July 2012, the discussions leading to the 12 March 2013 meeting, and the discussion at the meeting itself anticipated that the investors or their nominees would enter into a total of eight contracts to purchase Lots in the development. Only seven investor contracts were made by 8 May 2013.

[102] At trial, Mr Allen gave evidence that he had selected Lots 5 and 7 to be purchased by him (or his nominee). On about 19 March 2013, when Mr Allen caused Allegro Beach to enter into an investor contract for Lot 5, he discussed with Mr Bull that at a future time an investor contract would be signed for Lot 7. He recalled Mr Bull saying words to the effect, "That's fine mate. It's sitting here when you want it."

[103] In about August 2015, Mr Allen says he discussed with Mr Bull nominating an entity to purchase Lot 7 under an investor contract. Mr Allen's evidence was that Mr Bull said words to the effect, "It's your unit, John. You can do what you like with it."

[104] On 13 August 2015, Mr Allen sent an email to Mr Bull nominating Footz Pty Ltd as trustee for Shephard Superannuation Fund as the purchaser of Lot 5 under an investor contract. Mr Allen says this was a mistake, which he corrected in a telephone conversation with Mr Bull, as he intended to nominate Footz to purchase Lot 7. However, Mr Allen's later email of 30 November 2015 also refers to "5/10 Creek Street Bundamba" being sold to "Footz Pty Ltd ATF Shephard Superannuation Fund". Mr Allen gave evidence that he offered unit 7 to Mr Shephard of Footz in settlement of an unrelated dispute, but that the contract to purchase it did not proceed and the unrelated dispute was not settled in that manner.

[105] Mr Bull recalled a request from Mr Allen for G Developments to provide an investor contract to Mr Shephard (of Footz). He also recalled Mr Allen telling him that he was "holding off" signing a second investor contract due to some other court proceeding.

[106] It is common ground that only seven investor contracts were executed. However, it appears also to have been accepted that at least until the parties fell into serious dispute in early 2017, Mr Allen could have proceeded with an investor contract for Lot 7 in his own name or in the name of any person he nominated. The absence of an executed eighth investor contract was not regarded by any of the parties as an impediment to the compromise to be effected by the seven executed investor contracts and the Deed of Release.

The Deed of Rescission and the new contract of sale for Lot 19

[107] On 29 May 2015, the Rodgers and G Developments entered into a Deed of Rescission in respect of the investor contract for Lot 19. It provided for G Developments (as Seller) and the Rodgers (as Buyer) to rescind the investor contract for Lot 19, conditional upon and not becoming effective until four matters occurred.

[108] The first of these was that G Developments and Annjac (as "New Buyer") enter into the "New Sale Contract" (defined as a sale contract for Lot 19 on terms satisfactory to G Developments "at its absolute discretion").[24] The second was that the New Sale Contract be "on terms and conditions identical to the Sale Contract".[25] The "Sale Contract" was not defined, but "Contract" meant the investor contract between G Developments and the Rodgers dated 25 March 2013.[26] The third was that Annjac "has paid the full Deposit payable under" the New Sale Contract.[27] The fourth was that Annjac provide "a letter waiving its Cooling Off."[28]

[109] The Deed of Rescission also included the following provisions:

> 2.4 The Buyer acknowledges and agrees that the Seller may terminate this Deed and the Buyer will remain fully liable under the Sale Contract if any of the

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[24] cl 2.3(a), sch 1 part 1 Definitions.
[25] cl 2.3(b).
[26] sch 1 part 1 Definitions.
[27] cl 2.3(c).
[28] cl 2.3(d).

Conditions Precedent are not satisfied within five (5) days after the date of this Deed.

3. DEPOSIT

3.1 The Buyer and Seller acknowledge that the Buyer has paid a Deposit to the Deposit Holder in accordance with the Sale Contract and that a written direction by the Buyer to the Deposit Holder to transfer the benefit of the Deposit to the New Buyer under the New Sale Contract will be sufficient to satisfy the condition precedent contained at clause 2.3(c).

5.3 WAIVER AND VARIATION

a) A party's failure or delay to exercise a power, right or remedy pursuant to this Deed does not operate as a waiver of that power, right or remedy.

b) …

c) A provision of or a right created under this Deed may not be:

i) Waived except in writing signed by the party granting the waiver; or

ii) Varied except in writing signed by the parties.

d) The waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

5.4 FURTHER ASSURANCES

Each party must do everything and sign all documents necessary or desirable to give full effect to this Deed although not specifically provided for.

[110] G Developments (as Seller) and Annjac (as Buyer) entered into a contract of sale for Lot 19 (the **new Annjac contract**) dated 3 June 2015.[29] The new Annjac contract included the amended special condition.

[111] Annjac contended at trial that the new Annjac contract is of no effect and does not bind Annjac, because it is not on terms and conditions identical to the investor contract with the Rodgers. This was a confusing proposition.

[112] The parties to the new Annjac contract did not, in the instrument itself, express any intention that it would not be binding on them if it was not identical to the Rodgers' investor contract. The identified differences were present when the contract was made.

[113] The Deed of Rescission was conditional upon a new contract being in identical "terms and conditions". However, the Deed of Rescission did not purport to prevent the parties contracting on a different basis. In fact, the deed anticipated that G Developments and Annjac would contract on terms satisfactory to G Developments "at its absolute discretion".[30]

[114] In Item L, the parties specified that the Deposit was payable "on signing of Contract" and nominated "Evans Lawyers Law Practice Trust Account" as the Stakeholder. The investor contract with the Rodgers for Lot 19 had not specified a date for payment of the Deposit and had nominated "Minter Ellison Trust Account" as the Stakeholder. At

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[29] The contract may have been executed on 29 May 2015 with the Deed of Rescission, but it was dated 3 June 2015.

[30] cl 2.3(a), sch 1 part 1 Definitions.

the trial, Annjac relied on no other difference between the new Annjac contract and the former investor contract for Lot 19.[31]

[115] The differences in Item L of the Items Schedule are not in the part of the new Annjac contract entitled "Agreed Terms" or "Special Conditions". If Annjac contends that, by some implied term or enforceable common assumption, the Items in the Items Schedule had to be identical to those in the investor contract with the Rodgers, then the new Annjac contract would have had to be dated 8 May 2013 at Item A and to specify the Buyer as the Rodgers at Item E. A reasonable business person in the position of the parties to the new Annjac contract would not have had that intention.

[116] It follows that any requirement that the new Annjac contract be "on terms and conditions identical to" those in the investor contract, if it were to be implied, would be limited to the terms and conditions set out under the headings "Agreed Terms" and "Special Conditions" and would not include the matters set out in the ordinary Items of the Items Schedule.

[117] If the condition precedent to the Deed of Rescission was not met by the new Annjac contract, then the original investor contract with the Rodgers for Lot 19 may have remained on foot. This matters not, because neither party seeks to enforce the original investor contract; and both parties have acted on the common footing that it has been rescinded and does not bind them. G Developments purported to terminate the new Annjac contract for non-payment of the Deposit, plainly acting on the basis that the original investor contract had been rescinded. The Rodgers purported to terminate the original investor contract for Lot 19 in reliance on the purported termination of the new Annjac contract by G Developments.

Sale of the other Lots

[118] G Developments received an offer of finance for the construction of the development on 17 February 2014, which it accepted on 3 March 2014. In about July 2014, construction of the development commenced. It was completed in or about August 2015.

[119] The formal subdivision of the land into Lots 1 to 20 was effected, and the community title scheme was registered in about January 2016.

[120] Between 17 December 2015 and August 2016, G Developments entered into contracts with other persons to sell Lots 2, 3, 4, 8, 11, 12, 13, 14, 15, 18 and 20. It appears that all but two of the contracts for the sale of these Lots were completed by 28 April 2016.[32]

[121] At some point in time, Annjac agreed to allow G Developments to sell Lot 10 to a purchaser, provided Annjac received a net return of $250,000. On 25 May 2016, assuming Lot 10 had been "resold" by G Developments, Annjac offered to "take unit #14 off your hands in lieu of the $250k cash settlement for the sale of unit #10 should it fall through again". On 26 May 2016, Mr Bull advised that both Lots 10 and 14 were under contract, but had not settled.

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[31] Neither party sought to rectify the date for payment of the Deposit or the nominated Stakeholder.

[32] Lots 14 and 20 remained to be completed.

[122] It is clear from these and other communications passing between G Developments and the Buyers under the investor contacts that all were proceeding on the basis that the contracts with other persons for the sale of units in the development were to be completed before the investor contracts. This staging of completion was to allow the proceeds from the completion of the other contracts to be applied to discharge the debt owed by G Developments to the provider of construction funding. G Developments would then be freed from any security interest that might interfere with completion of the investor contracts, under each of which a Lot would be transferred without the payment of any balance purchase price.

Disputes arise about the Deposits

[123] On 16 August 2016, the solicitors for G Developments wrote separately to the solicitor for Mr Thompson and to the solicitors for Annjac. The letters raised a number of contentions about their respective investor contracts for Lots 6, 16 and 19, and concluded by stating that the Deposit under each of the investor contracts must be paid to the Stakeholder within a reasonable time (stated to be seven days). They advised that G Developments would be in a position to tender for settlement within fourteen days of payment of the Deposit, and reserved G Developments' right to terminate the investor contracts for substantial breach if the respective Buyers failed to pay the Deposit.

[124] On 6 September 2016, the solicitors for G Developments wrote: to the solicitors for Mr Thompson, giving notice of termination of the investor contracts for Lots 6 and 16; and to the solicitors for Annjac, giving notice of the termination of the investor contract for Lot 19.

[125] On 31 January 2017, the solicitors for G Developments wrote to Allegro Beach, to Annjac, and to the Stevanovics, demanding payment of the Deposit under their respective investor contracts for Lots 5, 10 and 1 and 17.

[126] On 20 February 2017, the solicitors for G Developments wrote to the solicitors for Allegro Beach, to the solicitors for Annjac, and to the solicitors for the Stevanovics, giving notice of termination of their respective investor contracts for Lots 1, 5, 10 and 17.

[127] On 17 July 2017, the solicitors then acting for Allegro Beach, Annjac, the Rodgers and Mr Thompson wrote to the solicitors for G Developments, giving notice that their clients accepted the conduct of G Developments (in purporting to terminate each of their investor contracts) as a repudiation of the respective investor contracts for Lots 5, 6, 10, 16 and 19, and electing to terminate each investor contract on that basis.

[128] Subsequently, G Developments entered into contracts and sold Lots 1, 5, 6, 10, 16 and 19 to other persons. It also entered into a contract to sell Lot 17, but the Buyer failed to complete.

[129] It follows that G Developments, Mr Thompson, the Rodgers, Allegro and Annjac are united in contending that their respective investor contracts have been terminated. However, they have quite different views about their respective legal rights. There is also some dispute about the same matters in respect of the investor contract with the Rodgers for Lot 19 and the new Annjac contract, also for Lot 19.

The GD parties' contentions about the investor contracts

[130] At the trial, the contentions put on behalf of the GD parties were as follows:

a. The amended special condition in each of the investor contracts applied only if all of the events listed in paragraphs 2.1(a), (b) and (c) of the amended special condition occur;

b. The events listed in those paragraphs did not all occur, as: contracts were not executed with eight beneficiaries under the Bundamba Trust; the seven contracts that were executed did not all complete simultaneously (or at all); and the Deed of Release was not fully executed;

c. It follows that the amended special condition did not apply;

d. By cl 4(a) of the standard conditions in each of the investor contracts, the Buyer was obliged to pay the Deposit by the time specified in item L;

e. No date or time was included in item L;

f. Accordingly, the Buyer was obliged to pay the Deposit paid within a reasonable time: a contention relying on the reasoning in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 545;

g. By cl 4(h)(i) and cl 13(a)(ii)(B) of the standard conditions, the parties had agreed that failure to pay the Deposit entitles the Seller to terminate the contract and forfeit the Deposit;

h. Demands for payment of the Deposit were made in August 2016 or in January 2017;

i. No Deposit was paid to the Stakeholder; and

j. G Developments was entitled to terminate each of the investor contracts.

[131] The submissions put for Mr Thompson, the Rodgers, Allegro and Annjac were as follows:

a. The terms of each of the investor contracts, properly construed, did not require the Buyer to pay a deposit on or by the dates demanded by G Developments or at all; and

b. By paragraph 3 of the special condition, the investors were not required to pay any sum at all to G Developments in respect of the Deposit, because the payment was satisfied by a credit of the deposit sum ($32,500) to the loan funds outstanding to Mr Allen.

[132] The controversy raised by the parties' respective submissions turns on whether paragraph 3 of the amended special condition operated from the time each of the investor contracts was executed; i.e. whether it operated before the events in paragraph 2.1(a) to (c) occurred or were expected to occur.

Construing the amended special condition in each investor contract

[133] Each of the investor contracts is a commercial agreement to be construed in accordance with the approach identified at [24] and [25] above.

[134] G Developments contends that cl 3 of the special condition, more particularly cl 3.1, would only apply if all the events listed in cl 2.1 had occurred. Until that time, it contends, none of the clauses under the heading "Special Condition" have any operation. This contention relies upon the reference to "This special condition" in the introductory words of cl 2.1 as meaning all the clauses under the heading "Special Condition" and fact that the title of the "Special Condition" is expressed in the singular. Given the effect of the standard interpretation conditions 1.2 (b) and (c), the title of the "Special Condition" would not seem to be of any importance in this part of the case.

[135] I reject the contention that the introductory words in cl 2.1 limit the operation of cl 3.

[136] Clause 3.1 had to operate from the time the Deposit would otherwise have become payable. If it did not operate until the conditions in cl 2.1 were met, then it could have no relevant operation at all, because the Buyer would have had to pay the Deposit to the Stakeholder before completion of the contract and the deeming effect of cl 3.1 could not operate until after completion. A reasonable business person would have understood the clause to operate by the time the Deposit was to be paid.

[137] If cl 3.1 operated as G Developments contends, then, once an investor contract completed, G Developments would have the benefit of a credit of the amount of the Deposit against the Loan Funds, by cl 3.1, as well as being entitled to the Deposit held by the Stakeholder, by standard condition 4(e)(i); while the Buyer would receive credit for only the single Deposit amount in the calculation of the Balance Purchase Price (as defined in standard condition 1.1). Being commercial agreements, the investor contracts should not be construed in a way that leads to this absurd or unjust result.[33]

[138] The ordinary meaning of cl 3.1 is that from the entry into each investor contract, the Buyer is deemed to have satisfied the obligation to pay the $32,500 Deposit to the Stakeholder by Mr Allen crediting an equivalent amount to the Loan Funds. Although the "Loan Funds" is not a defined expression in the investor contracts, any ambiguity as to its meaning can be resolved by reference to the evidence that at the time each investor contract was made, the parties to each contract understood the Loan Funds to mean the outstanding balance of the funds loaned by Mr Allen to G Developments under the Loan Deed. The meaning was so obvious that the parties appear to have assumed it went without saying.

[139] It follows that no further amount was payable by any Buyer under the investor contracts to satisfy the standard conditions about the Deposit. The demands on behalf of G Developments for the payment of a Deposit were erroneous. The failure of the Buyers to pay a Deposit to the stakeholder was not a breach of their respective investor contracts. G Developments was not entitled to terminate each of the investor contracts in reliance upon the alleged breach. The purported termination of each investor contract

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[33] *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109-110 (Gibbs J); *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203 at 208 [28].

was wrongful. Each Buyer was entitled to accept the conduct as a repudiation of the investor contract and to bring the contract to an end.

[140] The meaning of cl 3.1 of the special condition in the new Annjac contract is the same. The consequences are also the same.

[141] It follows that G Developments' counterclaim — to recover the amount of the Deposit under each contract, its costs of entering into and completing contracts for the sale of the relevant Lots to other persons, and interest on each amount — fails.

Rectification of the investor contracts

[142] Mr Thompson, Allegro Beach and Annjac seek rectification of the investor contracts to which they are parties. The proposed rectified terms would make each of the contracts unenforceable until and unless all the investor contracts were completed, or alternatively, voidable at the election of either party at any time before completion.

[143] It seems unlikely that a reasonable business person in the position of the parties would understand the terms of the investor contracts to operate in that manner. However, it is not necessary to reach any concluded view in that respect.

[144] Each of the investor contracts has been terminated lawfully by the relevant Buyer. G Developments' claim to recover the deposit amounts fails. None of the Buyers maintains a claim for damages for breach of contract. None has proved any equitable damages. No party is bound to render any further performance of any of their primary obligations under the investor contracts. The alterations sought would not make lawful any conduct by Mr Thompson, Allegro Beach or Annjac that, unrectified, would be unlawful. This is not an instance where the question of whether or not the investor contracts have been repudiated (and by whom) cannot be decided until the correct form of the agreements has been established.[34]

[145] In the circumstances, no legitimate purpose or object would be served by rectification. It follows that there is no utility in making any orders to rectify the now terminated contracts. It also does not appear that any purpose would be served by the alternative declarations sought about the rescission of the investor contracts.

[146] The claim by Mr Thompson, Allegro Beach and Annjac for rectification of their investor contracts and for alternative declaratory relief and equitable damages is dismissed.

The Deed of Release

[147] Mr Allen executed the Deed of Release and provided it to Mr Bull. In doing so Mr Allen signed, sealed and delivered the deed. It does not appear that any other party has executed the Deed of Release.

[148] The copy of the Deed of Release produced by Mr Bull is undated. He did not recall when the copy executed by Mr Allen was provided to him. I infer from the surrounding evidence that the executed Deed of Release was provided to G Developments between

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[34] cf the circumstances in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 346F-G.

19 March 2013, when Mr Allen signed the investor contract for Allegro Beach, and 8 May 2013, when Mr Steven executed the investor contracts as attorney for G Developments.

[149] By cl 2.1 of the Deed of Release, it was agreed that the release "takes effect on satisfactory completion of the last of the Sale Contracts." The "Sale Contracts" were defined as:

> the Contracts of Sale and associated documents between various entities and G Developments Pty Ltd for the transfer of 8 Lots in the proposed Bundamba Heights Community Titles Scheme dated on or about the date of this document.

[150] By cl 2.2, Mr Allen released and discharged each of Radical Developments, G Developments, Mr Bull, Mr Garner, Mr Hagan and Mr Stevanovic.

[151] By cl 5.1, the parties agreed that the Deed of Release was "enforceable against each party signing it even if one or more persons named as a Released Party does not execute this document" and, by cl 5.4, also agreed that:

> A party who has executed a counterpart of this document may exchange it with another party by faxing, or by emailing a pdf (portable document format) copy of, the executed counterpart to that other party, and if requested by that other party, will promptly deliver the original by hand or post. Failure to make that delivery will not affect the validity of this document.

[152] It follows that the Deed of Release was delivered and is enforceable against Mr Allen in accordance with its terms and condition, even if it has not been executed by any of the other parties.

[153] None of the investor contracts was completed. It follows that the release and discharge in cl 2.2 of the Deed of Release has not taken effect pursuant to cl 2.1. The Lots that were to be transferred by the investor contracts, save for Lot 17, have now been transferred to other persons. All the other Lots in the development have been transferred. G Developments cannot now bring about the circumstances in which the release and discharge would take effect. The obligations of G Developments under the Loan Deed, and of Mr Bull as a guarantor, remained unreleased and undischarged, until the whole of the loan amount and the agreed interest was paid on 5 February 2019.

Mr Allen's Caveats

[154] In July 2016, new solicitors for G Developments contacted Mr Allen seeking a copy of the Bundamba Trust deed, which Mr Allen provided.

[155] On 3 August 2016, Mr Allen had a telephone conversation with a solicitor for G Developments. Mr Allen's uncontradicted evidence was that the solicitor told him: settlement of the investor contracts "was not going to happen" as it was "unconscionable"; and G Developments would offer each investor one unit and $50,000 in cash, with no interest, instead of settling the investor contracts. Mr Allen responded, "Forget it, I need another unit like a hole in the head. Mate, we only did this because your client offered this to us as a way of getting a return for our investment."

[156] Mr Allen gave instructions to his solicitors to lodge caveats over lots 1, 5, 6, 7, 10, 16, 17 and 19. They did so on 15 August 2016, claiming "an equitable share or interest as

mortgagee of an estate in fee simple" arising from the Loan Deed. The Loan Deed contains a promise by G Developments to repay the loan amount, but it does not contain any transfer or assignment of any interest in the land as security for the repayment.[35] It refers to a mortgage, as a separate instrument, to be provided as security. It may be assumed that Mr Allen claims there is an unfulfilled promise to grant a legal mortgage that created an equitable interest in the Lots as mortgagee. As the parties' entitlements under the Loan Deed have been determined, and the amount owed to Mr Allen has been repaid, there would not appear to be any remaining security interest under the Loan Deed. No relief is sought as to the remaining caveat over Lot 17; so it is not necessary to make any finding in that respect.

Statutory interest

[157] By the series of six instalments, G Developments has now repaid the loan amount advanced by Mr Allen and the agreed interest on that amount. Only Mr Allen's claim for interest pursuant to s 58(3) of the *Civil Proceedings Act* remains to be determined.

[158] An award of statutory interest is discretionary.[36] In commercial transactions interest is commonly awarded to compensate a party who has been kept out of its money. Such interest is normally calculated from the date the relevant cause of action accrued until judgment or earlier payment. The statutory discretion to award interest does not authorise the giving of interest on interest, so that it will not be awarded on the $250,000 interest component of the debt owed by G Developments to Mr Allen.

[159] From 20 January 2011, when G Developments (and Radical Developments) defaulted on its covenant to repay the Loan Amount and the agreed interest, Mr Allen could have sued to recover those outstanding amounts and claimed statutory interest, at least on the principal sum.

[160] On 7 October 2011, he made a formal demand requiring payment by 21 October 2011, stating otherwise legal proceedings would be commenced. No proceeding was commenced at that time. Instead, the parties engaged in discussions and exchanges, which culminated in the Deed of Release and the investor contracts. While those elements of the compromise persisted, Mr Allen was, no doubt, justified in refraining from commencing a proceeding against G Developments and the guarantors. Had the investor contracts completed (including the foreshadowed eighth contract with Mr Allen), the investors in the Bundamba Trust may have had reason to be satisfied with their individual returns. Similarly, during this period, G Developments and Mr Bull were entitled to conduct themselves on the basis that Mr Allen's claim under the Loan Deed had been compromised, albeit conditionally, by the Deed of Release and the investor contracts.

[161] On 23 August 2016, Mr Allen again made a demand for payment of outstanding principal and interest under the Loan Deed, which he calculated (erroneously) to be $2,647,260.27.

[162] On 6 September 2016, G Developments purported to terminate the investor contracts with Annjac (for Lot 19) and with Mr Thompson (for Lots 6 and 16).

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[35] *Waldron v Bird* [1974] VR 497 at 501.
[36] *Bennett v Jones* [1977] 2 NSWLR 355 at 375.

[163] On 31 October 2016, Mr Allen commenced this proceeding claiming repayment of the principal of the loan and interest. At that time, at least the four investor contracts with Annjac (for Lot 10), Allegro Beach (for Lot 5) and with the Stevanovics (for Lots 1 and 17) were still on foot.

[164] On 20 February 2017, G Developments purported to terminate these remaining four investor contracts.

[165] When completion of the investor contracts became complicated, most particularly by G Developments' purported terminations, the investors could have sought specific performance. It was reasonable for them to take some time to consider their positions. The investor contracts with Allegro Beach, Annjac, the Rodgers and Mr Thompson remained on foot until 17 July 2017, when they were terminated by each of the Buyers accepting G Development's repudiatory conduct. Until that time, it was possible that G Developments might extinguish its debt to Mr Allen by completing the investor contracts (whether voluntarily or by being compelled to do so).

[166] It does not appear that the Stevanovics took any positive step to either affirm or terminate the investor contracts for Lots 1 and 17. Given their failure to act to enforce their investor contracts, even in this proceeding, it is appropriate to treat them as having accepted that the contracts have been terminated with effect from 17 July 2017. By that time the other investors had been able to elect a course and it was reasonable for the Stevanovics to have done so by that date.[37]

[167] The delay by Mr Allen in commencing proceedings, the long negotiation and eventual agreement to compromise his rights against G Developments, the persistence of the investor contracts (as a product of that compromise) until after the proceeding was commenced, and the failure of Mr Allen to claim statutory interest until the last day of the trial are important considerations in the exercise of discretion to award any statutory interest. These operate on the fundamental premise that Mr Allen has been held out of his money and G Developments has had the use of that money beyond the agreed date for repayment.

[168] In the circumstances, I propose to award Mr Allen interest at the relevant statutory rate on the outstanding balance from time to time of the $1 million in principal owed by G Developments, to be calculated from the commencement of the proceeding on 31 October 2016 until the final instalment was paid and became accessible to Mr Allen.

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[37] G Developments entered into contracts to sell Lots 1 and 17 to third parties; the sale of Lot 1 has been completed; and G Developments is considering a remedy against the Buyer of Lot 17 who failed to complete.