SUPREME COURT OF QUEENSLAND

CITATION:	*Q M Properties Pty Ltd v Belscorp Pty Ltd* [2019] QCA 138
PARTIES:	**Q M PROPERTIES PTY LTD** ACN 010 716 935 (appellant) **v** **BELSCORP PTY LTD** ACN 053 831 806 (respondent)
FILE NO/S:	Appeal No 8956 of 2018 SC No 3340 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 158 (Dalton J)
DELIVERED ON:	16 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2019
JUDGES:	Sofronoff P and Morrison JA and Brown J
ORDERS:	**1. The appeal is dismissed.** **2. The appellant is to pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – DESCRIPTION OF PROPERTY AND SUBJECT MATTER OF SALE – FALSE REPRESENTATIONS OF PROPERTY – where both the appellant and respondent were property developers in the Brisbane area – where the respondent owned property in Albany Creek which it sold to the appellant for $3.835 million under a contract – where the respondent made a number of representations about the property prior to the execution of the contract between the appellant and respondent – where the learned trial judge found that the representations made by the respondent were false and were for the purpose of inducing the appellant to sign the contract – where the appellant sought to terminate the contract and brought proceedings against the respondent alleging breaches of s 52 and s 53A of the *Trade Practices Act* – whether the contract should have been terminated for the alleged breaches APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL

LIES – OTHER CASES – where the learned trial judge found that the representations made by the respondent were false and were for the purpose of inducing the appellant to sign the contract – where it was also found by the learned trial judge that none of the appellant's relevant representatives relied upon what was said by the respondent – where the learned trial judge was not satisfied that the director of the appellant relied on what the respondent had said as directions were given to carry out their own enquiries and satisfy themselves as to whether or not what the respondent said was true – where the learned trial judge found that there was no causal link between the false representations made by the respondent and the execution of the contract – where the appellant contends that the learned trial judge erred in her decision – whether the learned trial judge erred in her determination of the matter below

Boland v Yates Property Corporation Pty Ltd (1999) 74 ALJR 209; [1999] HCA 64, cited
Carlton & United Breweries Ltd v Tooth & Co Ltd (1986) 7 IPR 581, cited
Challenger Property Asset Management Pty Ltd v Stonnington City Council (2011) 34 VR 445; [2011] VSC 184, cited
Doherty v Commissioner of Highways (1974) 7 SASR 57, cited
Duffy v The Minister for Planning (2003) 129 LGERA 271; [2003] WASCA 294, cited
FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd [2018] 3 Qd R 258; [2017] QSC 322, cited
G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltd [2007] VSCA 4, cited
Millstream Pty Ltd v Schultz [1980] 1 NSWLR 547, cited
Spencer v The Commonwealth (1907) 5 CLR 418; [1907] HCA 82, cited

COUNSEL: R A Perry QC, with C Jennings, for the appellant
D A Kelly QC, with J J Baartz, for the respondent

SOLICITORS: HWL Ebsworth for the appellant
Burns & Associates for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and the orders his Honour proposes.

[2] **MORRISON JA:** The appellant (**QM**) and the respondent (**Belscorp**) were both property developers in the Brisbane area in 2007. Belscorp owned property at Albany Creek which it sold to QM for $3.835 million under a contract executed on 14 September 2007.

[3] As the learned trial judge found, Belscorp represented a number of things about the property, prior to the contract being executed. They were:

(a) that the property could be subdivided into 28 residential lots as depicted in a particular plan (DSC Plan B);

(b) the matters identified in an Information Request from the local council had been sufficiently addressed so that the development application may be approved, allowing subdivision in accordance with DSC Plan B;

(c) that the Information Request had been adequately responded to and that it was ready to be submitted to council; and

(d) that the project was running along smoothly.

[4] The learned trial judge found those representations were false, and that they were made for the purpose of inducing QM to sign the contract.

[5] However, the learned trial judge found that none of the relevant representatives of QM relied upon what was said by Belscorp. To the contrary, the learned trial judge was not satisfied that either of the directors of QM relied upon what Belscorp said, as directions were given to carry out their own enquiries and satisfy themselves as to whether or not what Belscorp had said was true.

[6] Ultimately, QM sought to terminate the contract and brought proceedings alleging breaches of s 52 and s 53A of the *Trade Practices Act*. That claim was dismissed and Belscorp recovered damages for QM's failure to complete the contract.

[7] QM challenges the conclusion that there was no reliance upon what Belscorp had said, and as part of that attack, challenges the finding by the learned trial judge that a particular admission made in the pleadings was not binding because it had been "opened up in evidence sufficiently" to permit the learned trial judge to consider the entirety of the evidence on that issue. Associated challenges are made as to the learned trial judge's finding that there was no causal link between the false representations and the execution of the contract. Finally, on Belscorp's counterclaim, QM challenges the finding that the value of the land was $700,000, contending that to do so provided a windfall benefit for Belscorp, as the land remained a development prospect worth much more than $700,000.

Background to the parties

[8] In the learned trial judge's decision[1] the nature of the parties was identified. Salient features of that are set out below.[2]

[9] QM was one of the largest privately owned property development companies in Queensland. It was of a size where it competed directly with publicly listed property developers. It had two offices, one in Brisbane city, as well as one at Burpengary. It had about 100 employees and in the financial year ending 2007, made a profit of about $25 million.

[10] The head of QM was Haseler, who had been a property developer since 1974, and had operated QM since 1987.

[11] Haseler's general manager was Ian Russell who had been a property developer himself since 1981. The development manager for QM was a Mike Russell[3] who

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1 *QM Properties Pty Ltd v Belscorp Pty Ltd* [2018] QSC 158 (**Reasons below**).

2 Without intending any disrespect I will refer to individuals by surname only, unless some distinction is required.

3 No relation to Ian Russell.

had worked at QM since 1984. Working directly below him in the hierarchy were three project managers, one of whom was Mackney. He had been a project manager with QM for over 20 years.

[12] Belscorp was quite different from QM. It was controlled by Murphy. There were only five members of staff and an office at Kallangur. The staff included a Van der Meer, who was employed as a project manager. Lord kept the office running, and occasionally performed the duties of project manager when it became necessary to do so. Also on the payroll were a salesman, bookkeeper and a gardener.

Relevant credit findings

[13] The learned trial judge made a number of credit findings, both in a general sense and on specific issues. Her Honour recorded that they were "largely based on the substance of the evidence given", which meant that they could not be conveniently collected in one place in the reasons below. Her Honour described them, however, as being "integrally bound up in my discussions of the evidence in this very fact-rich case".[4]

[14] The general finding was that her Honour accepted the evidence of Mackney where referred to in the Reasons below, unless stated otherwise.

[15] In terms of adverse credit findings, her Honour rejected the evidence of Ian Russell unless it was corroborated, or against QM's interests.[5] Her Honour's findings were not timid in nature. His evidence was considered as being "dishonest" and "given to advance QM's position". Her Honour was at pains to point out that whilst Ian Russell's demeanour in the witness box contributed to her conclusions, they were based to a more significant extent on the substance of his evidence.

[16] As to Van der Meer, the learned trial judge expressed "very significant reservations" about the reliability of his evidence. Because his evidence is central to the resolution of the issues on appeal, her Honour's findings in respect of him bear repeating:[6]

> "No doubt as a result of the passage of time, but I think more significantly as a result of his minimal active intellectual involvement or interest in his work as project manager, Mr Van der Meer had little real recollection of any of the matters at issue in this case. As well as that, I think he was fairly inarticulate and struggled with the process of giving evidence. Mr Van der Meer agreed with many leading questions in cross-examination when in fact I very much doubt he really knew what he was being asked and positively assented to it. I suspect that he understood less of the questioning process than he made apparent and for this reason I am slow to draw an inference that he was dishonest at times, although the suspicion was squarely raised in my mind."

[17] As to Mike Russell, the learned trial judge had reservations about his evidence. Her Honour described his evidence as being given in a "rather subdued or constrained way", and that he was "defensive and struggled to be honest about his interactions

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4 Reasons below at [6].
5 Reasons below at [8].
6 Reasons below at [9] (internal citations omitted).

with Mr Van der Meer and his work in reviewing the Albany Creek property for contract".[7]

[18] Finally, the learned trial judge noted that all of the lay witnesses had some degree of motivation to give evidence that supported the case of the party calling them. Her Honour noted that the facts as to which they were testifying had occurred more than 10 years previously, and there were few contemporary documents which bore upon the representations said to have been made. Consequently, her Honour accepted that there was a need to be very cautious in her findings about representations made.

The features of the land

[19] The learned trial judge summarised the essential features of the Albany Creek land and their impact upon its potential for development.[8] The first problem was that the majority of the land was prone to flooding. It was bounded on its northern side by the South Pine River, and on the eastern side by Albany Creek. The second problem was that a set of high voltage power lines ran through the middle of the land. The council had prohibited development within a certain distance of the power lines. The third problem was the council's policy to preserve vegetation along waterways, by setting development back from those waterways. That had a particular impact on the higher land on the northern side of the Albany Creek land, where it was bounded by the South Pine River. Because it was bounded by a flood plain on one side and the river on the other, that area of land was referred to by the council's planner as an island.

Belscorp's development application

[20] Belscorp had made two development applications for the Albany Creek land, the first in 2003[9] and the second in 2005. It was the 2005 application that proposed 28 lots in a subdivision. The council had issued an Information Request and Belscorp had not adequately responded to it at the time of the contract.

[21] As for the development application itself, the engineers and planners would have required an electrical engineer's report showing them all residential dwellings were outside the relevant lines applicable to the power lines, but that had not been done. Similarly, Belscorp had not completed a proper flood study which was required by the council, nor dealt with other matters upon which the council required advice. One of those matters concerned the extent of a set-back to the land between the South Pine River and the boundary of the lots on the northern island. Belscorp had allowed less than the council desired.

[22] The learned trial judge's conclusion was that at the time of the contract Belscorp's response was "inadequate and incomplete".[10]

Progression of the contractual negotiations.

[23] The following synopsis is taken from the findings by the learned trial judge.[11]

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7 Reasons below at [10].
8 Reasons below at [12]-[13].
9 That application lapsed.
10 Reasons below at [29].
11 Reasons below at [39]-[73].

[24] The negotiations were sparked initially by a conversation by Murphy and Haseler. There had been some negotiations between them in January 2007 for the sale of a piece of land at Delaneys Creek. Those negotiations did not result in a contract. Subsequently, in September 2007 Haseler asked again if Murphy would sell the Delaneys Creek land. By then Murphy had decided he would quit the property development business and sell all his stock of land. As a consequence Van der Meer telephoned Mackney and told him that Murphy wanted to sell "… a line of developments at different stages of approval". The invitation was to sell all lots, and no less than all lots. Mackney was told that Murphy wanted contracts in place by the following Friday or the properties would be put on the open market where every developer could seek to purchase them.

[25] The following day (Tuesday, 11 September) it was arranged that Van der Meer would meet Haseler, Mike Russell and Mackney, at a golf club. At that meeting Van der Meer handed over a one page summary of the properties which Belscorp wished to sell, which listed six separate projects including one under the heading "Albany Creek". The offer was communicated as one to take all six projects or none, and that contracts had to be signed by Friday.

[26] At the conclusion of the golf club meeting Van der Meer, together with Mike Russell and Mackney set off to inspect the various blocks of land for sale. They attended the Albany Creek property in that process. During that inspection Mackney noticed the power lines and the presence of the South Pine River. The learned trial judge found that having regard to the experience of Mike Russell and Mackney, and having regard to photographs taken of that inspection, it must have occurred to both of them that the high voltage power lines, low lying nature of the majority of the land and the land's proximity to both the South Pine River and Albany Creek, would be very significant constraints on any development. Questions were asked by them about the flooding issues and vegetation management issues, and they were told by Van der Meer that the consultants had sorted those issues out. That response matched what was said in the project summary.

[27] Later that day Van der Meer attended QM's offices, and delivered the project files for each of the six development projects. These were Van der Meer's original working files. Van der Meer gave prices per potential subdivided lot in relation to each parcel and after that meeting, and before he separately met Haseler, Mike Russell calculated the asking prices for each of the six parcels of land in accordance with that information, and noted it on his copy of the project summary. Mackney left the meeting early in order to get on with the task of viewing the project files he had been allocated.

[28] The files were divided up between the staff at QM, with Mackney being given the files for Delaneys Creek and another property, and Mike Russell being given the Albany Creek project file. Haseler left the meeting before it was complete, because he was going on holidays the next day and had other tasks to attend to.

The admission in the pleadings

[29] The statement of claim as at the trial pleaded two representations by Van der Meer at the 11 September meeting, as follows:[12]

> "6.5.1 All issues raised by the Council in respect of the property (including flooding, vegetation and the high voltage power transmission line) had been addressed by the various project consultants engaged by Belscorp; and
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> 6.5.2 The response to the Information Request was ready to be submitted to Council."

[30] In its defence, Belscorp admitted that the statements alleged at paragraphs 6.5.1 and 6.5.2. There was no application to withdraw that admission. However, the learned trial judge found that QM "chose to open the issue in evidence".[13] The learned trial judge then gave the basis for that finding:

> "At t 5-43 the plaintiff's counsel elicited that Mr Haseler could not recall representations in terms of what was admitted. It was led from Mr Mackney that he could not remember being at the meeting, and my finding is that he was not. Further, the plaintiff's counsel put the admitted conversation to Mr Mackney as having occurred at the inspection; Mr Mackney said he could not recall that being said – tt 4-18-19. Lastly, Mr Mike Russell was asked about the matter. He said that Mr Van der Meer did make a statement in terms of the agreed fact, although he was led at this part of his evidence:
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> > 'It is agreed between the parties, Mr Russell, that Mr Van der Meer said at that meeting that all issues raised by the council in respect of the property, including flooding, vegetation, and the high voltage transmission line had been addressed by the various project consultants engaged by Belscorp. Do you recall that or not?--- Yes, that led to the discussion about things running smoothly and council being in a position to approve once the information request response had been lodged.' – t 6-54"

[31] The learned trial judge found that the topic dealt with by the admission in the pleading was "opened up in evidence sufficiently to allow me to consider the entirety of the evidence bearing on this matter". Her Honour cited *Holdway v Arcuri Lawyers*[14] and *Kennedy v Queensland Alumina Ltd*,[15] as authority for taking that course. Her Honour then went on to make findings about the topic dealt with by the admission.

[32] I will return to this issue in due course.

Relevant findings as to the meeting on 11 September 2007

[33] The learned trial judge made a number of findings, relevant to the resolution of the issues on the appeal, as to what occurred at the meeting on 11 September 2007 at

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12 This was the final form of the pleading. As her Honour detailed, there had been a number of amendments to get to that point, commencing in 2008: Reasons below [75]-[78].

13 Reasons below at [79].

14 [2009] 2 Qd R 18, at [64].

15 [2016] QCA 159 at [13].

QM's offices. Those to which I will refer are relevant because they touch upon questions of reliance and causation.

[34] The learned trial judge was not prepared to find that Van der Meer showed DSC Plan B to Mike Russell and Haseler, or pointed out various aspects to them.[16] Van der Meer gave prices per potential subdivided lot in relation to each parcel and after the meeting with Van der Meer, and before a separate meeting with Haseler, Mike Russell calculated the asking prices for each of the six parcels of land in accordance with that information, and noted it on his copy of the project summary.[17]

[35] Mackney left the meeting early and then spent a large part of the night reviewing the project files which had been allocated to him.[18] Ian Russell was not at the meeting.[19]

[36] Van der Meer was a simple, uneducated man, well out of his depth in the company he found himself that afternoon.[20]

[37] At the golf club meeting Haseler asked Murphy to make his project files available so that QM could assess the properties quickly in preparation for potential contracts that Friday. That was the reason Van der Meer had come to QM's office and everyone in the room knew it.[21]

[38] Van der Meer was not capable of saying anything about the consultants or the issues they were addressing which would impress any experienced property developer. He took no interest in the substance of the issues raised by council or by the experts, he did not read the reports because he could not understand them.[22]

[39] After Van der Meer left the meeting Haseler had two meetings, the first with Mike Russell and the second with Ian Russell. At those two meetings Haseler made arrangements for what work was to be done in relation to the Belscorp offer while he was away.[23] First, Mike Russell was delegated the task of looking at Belscorp project files and making an assessment of what Haseler called "the technical side" of things. Haseler told Mike Russell to "check the files and make sure that what we'd been represented was the case". Secondly, Haseler delegated to Ian Russell the task of instructing solicitors to prepare contracts for QM to purchase the land that Friday should he (Haseler) decide to buy that land.[24]

Findings as to the representations

[40] The pleaded representations were that:

(a) the Albany Creek property was able to be subdivided into 28 residential housing lots in the way shown in DSC Plan B;

(b) the high bank-line was accurately shown in DSC Plan B;

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16 Reasons below at [84].
17 Reasons below at [72] and [88]-[89].
18 Reasons below at [73].
19 Reasons below at [86] and [91]-[100].
20 Reasons below at [94].
21 Reasons below at [95].
22 Reasons below at [99].
23 Haseler left Brisbane very early in the morning of 12 September 2007 for holidays.
24 Reasons below at [101]-[102].

(c) the northern lots could be developed as shown in DSC Plan B, notwithstanding the location of the high bank-line and the council's requirements for conservation and buffer zones;

(d) the Information Request issued by the council had been fully and adequately responded to;

(e) the matters identified in the Information Request had been sufficiently addressed so that the development application would be approved allowing subdivision into 28 individual lots in accordance with DSC Plan B;

(f) there was nothing which would prevent or substantially impede the approval of the development applications; and

(g) Belscorp had, in the week prior to contract, provided its complete project file as to the subdivision of the Albany Creek property to QM.

[41] The learned trial judge's summary as to the representations found to be made were:[25]

(a) the council had issued an Information Request in relation to the development application, and Belscorp was almost ready to respond to that request, having engaged consultants and sorted out the issues raised in the request; this was a general representation that all issues had been sorted out;[26]

(b) the council's requirements raised in the Information Request had been sorted out and the only reason that Belscorp had not obtained an approval was that it had not actively pursued that approval; there were issues with flooding, but these were being dealt with through various consultants, as were vegetation management issues;[27] and

(c) Belscorp was ready to lodge the reply to the Information Request and in that context the project was running along smoothly.[28]

[42] As a consequence the learned trial judge found that almost the entirety of the representation set out at paragraphs [40](a) and [40](e) were made. The one caveat was that everybody understood that it could not be guaranteed that the council would approve the application. Further, her Honour held that the representation at paragraph [40](d) was partly proved, in that it was represented that there had been an adequate response to the information request gathered by Belscorp and it had reached the point that it was ready to be submitted to council.[29]

Findings relevant to reliance and causation

[43] There are a number of findings made by the learned trial judge that are relevant to the questions of reliance and causation, and which are either unchallenged or unchallengeable.

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25 Reasons below [130]-[135].
26 Reasons below at [130].
27 Reasons below at [131].
28 Reasons below at [132].
29 Reasons below at [134]-[135].

[44] Mike Russell understood his task was to review the files handed over by Van der Meer, in conjunction with the project managers, and to proceed with the preparation of contracts with QM's solicitors.[30] Haseler delegated to Mike Russell the task of looking at Belscorp's project files and making an assessment of what Haseler called "the technical side" of things. He told Mike Russell to "check the files and make sure that what we'd been represented was the case".[31]

[45] On 12 September (the day after the project files were handed over by Van der Meer) Ian Russell sent an email to Mike Russell and Mackney at 7.23 am. In that email he told them that Haseler was "keen to go to contract at the earliest opportunity (hopefully today) in relation to the various parcels which we discussed yesterday". In fact, Haseler had given no such instructions to Ian Russell.[32] Haseler wanted to take advantage of any terms he was offered, including not going to contract until Friday.[33] Ian Russell's email dishonestly relayed purported instructions from Haseler.[34]

[46] The effect of the email was not to motivate Mike Russell. The assessment of the projects offered for sale by Belscorp was a big task, even split between the managers at QM. When Mike Russell arrived at work on 12 September 2007, expecting to begin the task of assessing the projects, he discovered that Haseler had gone on holidays without informing him of his intention to do so. Further, he discovered that Ian Russell had been given instructions that Haseler wanted to purchase the properties as soon as possible.[35]

[47] Despite holding no hope of settling the contracts on Thursday, 13 September 2007, Ian Russell sent an email to the chief financial officer of QM, saying he hoped to settle that day.[36]

[48] Mike Russell knew when he looked at the Albany Creek project file prior to contract that it was not complete. He admitted as much in evidence.[37] The development application, together with all supporting documents for Belscorp's proposal for the land, were not on the file. The Information Request from the council was on the file, but no response, whether draft or otherwise, was on the file. Further, there was a reference in the file to a report by certain engineers on flooding issues, but no such report actually on the file. There was correspondence on the file from the council concerning an electro-magnetic field report, but no such report on the file itself.[38]

[49] There were various steps which could have been, but were not, taken by Mike Russell when reviewing the Albany Creek project file. They included contacting any of Belscorp's consultants, logging onto the council website where major documents were shown, or contacting the council by telephone.[39] Though Mike Russell could have prepared a feasibility analysis for the Albany Creek land, he did not do so.

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30 Reasons below at [102].
31 Reasons below at [101]; t6-34.
32 Reasons below at [103]-[105].
33 Reasons below at [105].
34 Reasons below at [106].
35 Reasons below at [108].
36 Reasons below at [107], footnote 41.
37 Reasons below at [111].
38 Reasons below at [111].
39 Reasons below at [112].

Nor did he conduct any internet search to reveal historical prices for vacant land in the vicinity of the Albany Creek land.[40]

[50] Mike Russell read the Albany Creek file in a half-hearted way, with little application and making almost no analysis. He did not review the Albany Creek file in accordance with the instructions from Haseler on 11 September 2007, namely to see whether the development was in accordance with what Van der Meer had said about it. In circumstances where the file did not show that the project was in accordance with the representations made by Van der Meer, Mike Russell either did not analyse it sufficiently to come to that conclusion or, if he did, made no efforts to supplement the information in the file.[41]

[51] The review of the Albany Creek project file before contract was Mike Russell's responsibility.[42]

Specific findings on the issue of reliance

[52] In a section of the learned trial judge's Reasons, headed "Reliance", her Honour dealt with specific findings on that issue.

[53] On Friday morning, 14 September 2007, Haseler gave Ian Russell authority to sign the contracts. He did so because he had not heard anything from Ian Russell to indicate that his review of the "'technical aspects of the proposal' would cause him to think the contract should not go ahead".[43] The contracts were only signed on the express authority of Haseler. That was consistent with arrangements he made before he left on 12 September, and consistent with his general practice, in that it was Haseler who decided in every case whether or not land was acquired.[44] For that reason it was Haseler's decision processes which were relevant in terms of considering the question of reliance.

[54] Belscorp had imposed a deadline for contract of Friday, 14 September 2007.[45]

[55] Mackney put in a night's work assessing the Belscorp project files allocated to him, on 11 September 2007.[46] There was urgency on the part of both QM and Belscorp to inspect the land on offer, review the project files and enter into the contracts. Both parties were working towards 14 September 2007 as the date when the contracts would be signed if QM decided to purchase.[47]

[56] QM did not have a due diligence clause in the contracts. This was because Ian Russell falsely told QM's solicitor that Belscorp would not accept a due diligence clause.[48] Therefore QM contracted on the basis that there would be no due diligence period allowed under the contracts. QM was an experienced property developer and familiar with the land offered for sale. A due diligence process could not have occurred between 11 and 14 September 2007, and Haseler knew that.

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40 Reasons below at [113].
41 Reasons below at [115].
42 Reasons below at [118].
43 Reasons below at [138].
44 Reasons below at [139].
45 Reasons below at [140]-[144].
46 Reasons below at [143].
47 Reasons below at [144].
48 Reasons below at [145].

However, Haseler was happy to contract if his experienced staff could confirm that the representations made to QM Properties were true.[49]

[57] QM's attitude to Belscorp's offer was one of high interest. At that time the supply of land available for property development was limited, and demand was high. QM needed land and, though it was not desperate for stock, the offer of several properties suitable for development and not on the open market was attractive to QM.[50]

[58] Haseler was particularly keen on the Albany Creek block both because of his knowledge of the area and the nature of the development on it.[51] The Delaneys Creek land was attractive to Haseler because it was across the road from a large development that QM had already undertaken, and profitably so.[52]

[59] On 12 September 2007 Mackney rang Van der Meer and told him that it looked like "the deal was on" and that QM had engaged solicitors to draw contracts. The following day Mackney reassured Belscorp that they would be paying Murphy's asking price. At that point Mackney was "keen to see the deal proceed".[53]

[60] The Belscorp properties were in locations with which QM was familiar, because it operated in those areas. That was part of the attraction of Belscorp's stock of land. It also meant that QM had, quite apart from its general depth of property development experience, specific knowledge on which to base opinions about the value of the land which Belscorp was offering for sale.[54]

[61] Haseler's evidence, accepted by the learned trial judge, was that reflected in the following two passages of evidence:[55]

> "Well I, knew that three days was quite unreasonable to assess, you know, half a dozen properties. We had a good feel for what the properties were and where they were, from the point of view of location, you know, sales prices that might be achievable in those areas. But we just needed to make sure that everything was as – as it was put to us.
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> … I was very interested in all the blocks … I believed that if we could, in those three days, ensure that the properties were as they were represented to us, then we would proceed, unless something unforeseen came up."

[62] Haseler's familiarity with the Delaneys Creek property and the Ningi property had some influence in his decision to buy. Mackney and Mike Russell did not inspect Delaneys Creek with Van der Meer on 11 September 2007 as they were very familiar with that land.[56] As to the value of the land, the extent of QM's familiarity with the market generally, and with the land on offer, was shown in the discussions between Haseler and Mike Russell on the evening of 11 September 2007. They

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49 Reasons below at [146].
50 Reasons below at [147].
51 Reasons below at [148].
52 Reasons below at [149].
53 Reasons below at [152].
54 Reasons below at [153].
55 Reasons below at [154]-[155].
56 Reasons below at [156]-[157].

discussed the "rough values we thought we could apply to the properties", and came to an assessment of a total value of $22.1 million. That was only $100,000 different from the price calculated using Belscorp's figures. Haseler and Mike Russell did not rely on Belscorp's assessment of value.[57]

[63] Though Haseler gave evidence that he accepted Van der Meer at his word, the explanation for that was that there was no reason not to, because Van der Meer was "quite affable, easy to get on with … quite likeable".[58]

[64] The learned trial judge considered it significant that Haseler did not say that he thought Van der Meer was competent, reliable or in any way impressive. He had not met Van der Meer prior to the meeting at the golf club and did not know of him.[59]

[65] Mike Russell had never met Van der Meer before 9 September 2007 and had no basis to form an understanding that Van der Meer was an experienced property developer.[60] QM's witnesses were "very experienced property developers who were obviously men of some considerable sophistication".[61] By contrast, the learned trial judge found that Van der Meer was "at the other end of the spectrum". Her Honour expressly recorded that it was not only Van der Meer's demeanour in the witness box, but the substance of his evidence which was significant in forming the view of him. That view was explained in the following passage:[62]

> "Mr Van der Meer gave evidence both in chief and in cross-examination that he did almost nothing of substance in his role as project manager … In summary, he did what the town planner retained by Belscorp told him to do. He regarded the town planner as having primary carriage of the development, in fact, he regarded the town planner as the applicant. If the town planner instructed him to engage a particular engineer or other consultant, he did so. When he received reports, his evidence was that he 'would not know' what he was looking at; he just passed them on to the town planner. He explained that he did not read consultant's reports – if I don't understand them there is no point me going through them' … He said he did not even read letters sent to him as project manager except 'to see who they're from and then pass them on' … Mr Murphy said that he considered Paul Van der Meer as being experienced in the engineering requirements of councils. However that may be, he did not appear competent to me. When it came to his comprehension of the contents of reports commissioned by Belscorp for the Albany Creek site as at September 2007, he said he would have 'no idea – I had an idea there was contents, but ---' … As extreme as this sounds, I do accept that Mr Van der Meer was being truthful in giving this evidence. As noted above, apart from working as Mr Murphy's project manager, he had been a bricklayer, earthmover and gardener."

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57 Reasons below at [158]-[160].
58 Reasons below at [162].
59 Reasons below at [162].
60 Reasons below at [163].
61 Reasons below at [164].
62 Reasons below at [165] (internal citations omitted).

[66] The learned trial judge then turned to the question of whether Haseler or Mike Russell relied on what Van der Meer said. Her Honour found that Van der Meer would not have been able to provide them with any substantive information as to any aspect of any of the projects.[63] All he could say was that consultants had been engaged to deal with the issues raised by the council, but he would not have been able to give any details which would elucidate the type of problems raised, or the type of solutions proposed.[64]

[67] Haseler, a highly intelligent man with considerable experience in property development, "must have understood Van der Meer was not a competent property developer". Similarly, the learned trial judge rejected the implication in Mike Russell's evidence, that his dealings with Van der Meer gave him any comfort that he was a competent property developer who had a reliable, substantive understanding of the issues affecting the development of any of the six projects. Van der Meer must have appeared unable to give details of any substance, and Mike Russell had the project file, which was lacking in several very fundamental respects.[65]

[68] Further, the representations made by Van der Meer were of the most general nature. There was nothing the substance of those representations which would have made an experienced property developer think that they were soundly based.[66]

[69] Significantly, the learned trial judge found that Haseler did not rely upon Van der Meer, but "made it perfectly clear that he required his staff to ascertain from the project files whether or not the state of the projects was as Mr Van der Meer had represented them".[67] The learned trial judge referred to specific passages of evidence from Haseler in this respect:[68]

> "So when you say you delegated the technical investigation to Mr Mike Russell, what were your instructions to him? As best you can recall, what did you say to him?--- Mike has worked for me, this year, 40 years bar seven or eight, as I've mentioned before. He was very capable. He was a surveyor by profession, and had worked as a project manager for many, many years. He's very, very capable, very conservative, and I felt fully confident that Mike would assess the properties properly. He basically – some of the properties were being developed at the time, so I know that that was one area we'd touched on, that he needed to make sure he got the full information on the properties that were being developed. And with the other properties, he just needed to check the files, and make sure that what we'd been represented was the case.
>
> So when you said to him – I take it Albany Creek was in the latter group?--- Yes.
>
> So when you said to him, 'Check the files,' … what did you mean read the files?--- Whatever was involved with that. Between him and Greg Mackney, I would imagine that they would go over those files

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63 Reasons below at [166].
64 Reasons below at [166].
65 Reasons below at [167].
66 Reasons below at [168].
67 Reasons below at [169].
68 Reasons below at [170].

> and assess them according to, you know, what had been represented to us.
>
> From a – from a technical aspect?--- Yeah, remember we only had three days.
>
> Yeah?--- So, you know, it was a – you had to focus on the critical – critical issues on each one of those projects.
>
> So it's the case, isn't it, from what you've said, that you weren't prepared to proceed on the basis of what had been said to you by Mr Van der Meer. What you wanted was for Mr Mike Russell to study the files to investigate the technical aspects of the developments to see whether what had been said to you was correct?--- Yes, we – the – the deal that had been put to us by Mr Van der Meer was, in general terms, agreeable to us, subject to us checking what was said in actual – the fact.
>
> Yes?--- And so that's what Mike's, you know, responsibility was.
>
> Yes, and my point to you is that you, as the owner, you weren't – when you left on holidays, you weren't prepared to enter into a signed contract simply on the basis of what Mr Van der Meer had said to you?--- No.

[70] The learned trial judge held that Mike Russell did not do the job which was asked of him by Haseler. When he found respects in which the project file for Albany Creek did not support he representations made by Van der Meer, he made no further enquiries of them because he relied on what he had been told.[69] The learned trial judge considered Mike Russell's answer to the following question revealing, on the question of reliance:[70]

> "But if that was the basis upon which you were proceeding, why were you reading the project file at all?--- It was to see what was, obviously, in it and to try and pick up where the status of the, you know, the project was. We, at that time, were – saw this property as a good opportunity and we were keen to get on and get moving with it. So, obviously, that was the first part of the process as well as, you know, going through it prior to the contract signing."

[71] Ultimately, the learned trial judge found that Haseler did not rely upon what Van der Meer said. His reliance was upon Mike Russell's performing an assessment of the files.[71] Further, her Honour found that Mike Russell did not rely upon Van der Meer himself. There were several reasons for that: (i) Mike Russell was a property developer of 40 years' experience with all the resources of QM at his disposal, and Van der Meer could not have impressed him as competent either in person or by reference to his file; (ii) the Albany Creek lands issues were obvious to Mike Russell when he inspected, and the Belscorp file lacked basic information about those issues; yet Mike Russell did not investigate them; (iii) despite the deficiencies in the files Mike Russell did not do the job which Haseler asked of him.[72]

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69 Reasons below at [171].
70 Reasons below at [172].
71 Reasons below at [175].
72 Reasons below at [176].

Opening up the admission in paragraphs 6.5.1 and 6.5.2

[72] As set out in paragraph [29] above, the pleading admitted two representations, which were essentially:

(a) all issues raised by the council had been addressed by the various projects consultants engaged by Belscorp; and

(b) the response to the council's information request was ready to be submitted to the council.

[73] QM devoted a deal of time in the written outlines and in oral address, attacking the learned trial judge's approach which was to permit the admitted representations to be opened up. That finding and the basis for it are set out in paragraph [30] above.

[74] In my view, the issue is a red herring. That is because the representations in the admitted part of the pleading were, in fact, found to have been made. The learned trial judge's findings were that, with an irrelevant caveat, the representations set out at paragraphs [40](a) and [40](e) above, were made out. That is to say, it was held that Belscorp represented that the Albany Creek property was able to be subdivided into 28 lots in the way shown in DSC Plan B, and that the council's Information Request had been adequately responded to by Belscorp's consultants and sufficiently addressed to the point that Belscorp was ready to lodge the reply. That is the substance of the two representations admitted on the pleading.

[75] Therefore, the withdrawal of the admission had no impact upon the findings made as to the representations. Further, even if the admissions had been allowed to stand they would have had no discernible impact on other questions critical to QM's success at the trial, namely the issues of reliance and causation, which I will shortly address.

[76] There is therefore no need to resolve the issue as to whether the learned trial judge's approach to opening up the admission was correct. That said, had it been necessary to resolve the matter I would have been inclined to find that her Honour was correct to take the approach she did. The statements the subject of paragraphs 6.5.1 and 6.5.2 of the pleading were said to have been made to Mike Russell and Mackney. However, the finding was that Mackney was not at the relevant meeting, and as for Mike Russell, he was asked in evidence as to whether or not he recalled the statement being made, a question of no relevance if the admission stood. Further, Counsel for QM put to Mackney that the conversation happened at a different meeting,[73] and Van der Meer was asked about the subject of the admission, without objection from QM. In those circumstances it is understandable that her Honour reached the conclusion she did.

Reliance and causation

[77] It is convenient to deal with these issues together, as the evidence of Haseler is critical to both. The findings on the issue of reliance are set out above at paragraphs [43] to [71].

[78] The appellant's challenge to the findings on reliance involved contending that:

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[73] At the inspection on the land, rather than at the meeting later.

(a) the representation made by Van der Meer that the consultants had sorted out the issues raised by council demonstrated an involvement and understanding of issues concerning the development consistent with Van der Meer acting as an informed project manager;

(b) Van der Meer's evidence was consistent with his knowing the significance of lot yields and issues affecting development potential, which did not support the findings by the learned primary judge of his incompetence and inexperience;

(c) the fact that Mike Russell was tasked to undertake a technical assessment concerning what Van der Meer had told them does not, of itself, exclude his reliance on the earlier representations; a party who was given an opportunity to check the accuracy of a representation, but who either fails to do so or fails to uncover the falsity of it, is not thereby denied relief on the issue of reliance;[74]

(d) the representations which were found to be false went to the very core of a decision whether or not to purchase the property; those representations were detailed in nature and were intended to induce the purchase;

(e) in reliance upon them, Haseler was particularly keen to purchase, unless the review to be undertaken raised sufficient negatives to persuade him otherwise; and

(f) in those circumstances the representations were still an inducement to enter into the contract, and materially influenced Haseler's decision to do so.

[79] There is no challenge to the finding by the learned trial judge that the relevant guiding mind of QM was that of Haseler and therefore it was his evidence on that topic that was critical. It is to that evidence that I now turn.

[80] In his evidence in chief Haseler said that he was quite happy to go along with the proposal that it was an all or nothing deal,[75] but that the three days between 11 and 14 September was "quite unreasonable to assess … half a dozen properties".[76] Haseler told Van der Meer that if QM "were going to have a chance of making a decision to go to contract … on Friday, we had to have all the information that they had in their files".[77] When asked why it was that he raised that point with Van der Meer, Haseler responded:[78]

> "Well, I knew that three days was quite unreasonable to assess … half a dozen properties. We had a good feel for what the properties were and where they were, from the point of view of location, … sales prices that might be able to be achieved in those areas. But we just needed to make sure that everything was … as it was put to us."

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74 Referring to *Donaldson v Freeson* (1929) 29 SR(NSW) 113, *Sagar v Closer Settlement Ltd* (1929) 29 SR(NSW) 199 and *Nocton v Lord Ashburton* [1914] AC 932, 962.

75 AB 1718 line 31; AB 1720 line 40.

76 AB 1718 line 46.

77 AB 1718 line 41.

78 AB 1718 line 46 to AB 1719 line 3.

[81] It was subsequently, but on the same day, that it was agreed that Van der Meer would "go straightaway with Mike Russell and Greg Mackney to inspect the properties, and that we would get together later that day, where he would bring us … the files and the rest of the information".[79] Van der Meer returned later that day with the files.

[82] Shortly thereafter, Haseler was asked for his response to the all or nothing arrangement. He said that he accepted it: "I was quite happy to go along with that if we could satisfy ourself".[80]

[83] Haseler said that QM was interested in the properties on offer because from a developer's point of view there was a challenge to get in stock and this was an opportunity to get a variety of stock "to fill in holes in our own stock thing". It was a case where there was "an opportunity to supplement our existing stock levels at a time where … supply was limited, demand was high, and getting acquisitions was difficult".[81]

[84] At the end of that meeting Haseler said that his own state of mind was that he was very interested in all the blocks:[82]

> "Yes, I was very interested in all the blocks. I'd accepted that the deal, as it was put to us, was the six properties, all or none, and the contracts had to be signed by Friday. So based on what the properties were, they were in our area … of operations, I believed that if we could, in those three days, ensure that the properties were as they were represented to us, then we would proceed, unless something unforeseen came up. With respect to Albany Creek, I was particularly keen on that property."

[85] Haseler was intending to go on holidays the following day, and did so. However, before he left he gave a task to Mike Russell and Ian Russell, as identified in this passage of his evidence in chief:[83]

> "Did you task anyone within your organisation to have a look at the totality of the proposals---?--- Yes.
>
> ---before you left?--- Yes.
>
> And who was that?--- Mike, on the technical side, who was our development manager at the time. And Ian, who at the time was our general manager, to oversee the contractual situation, as well as overseeing what Mike was doing with respect to the technical … side".

[86] Haseler then gave evidence of his knowledge of Van der Meer and whether he accepted him at his word. Once again, his answers were reflected in a passage in his evidence in chief:[84]

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79 AB 1719 lines 25-27.
80 AB 1720 line 40.
81 AB 1721 lines 1-6.
82 AB 1731 lines 22-29.
83 AB 1733 lines 16-28.
84 AB 1734 lines 18-29.

> "Now, in terms of what Mr [V]an der Meer had said to you on that day, did you accept him at his word as to what he had said?--- Yes, absolutely. There was no reason not to. He … was quite affable, easy to get on with. You know, quite likeable.
>
> Was he, to your knowledge, a person who'd been in the industry?--- I believe he had been, but I didn't know him.
>
> Not personally?--- Not personally.
>
> But you knew of him?--- No, I didn't know of him until … he was introduced to me."

[87] Haseler left the next morning to go on holidays. His next contact in respect of the property deal occurred on Friday morning when he spoke to Ian Russell. He said Ian Russell updated him about the progress of the matters and "as a result of that … I authorised him to go ahead with signing the contracts".[85] He said that neither Mike Russell or Ian Russell had raised any issue which caused him to pause about whether or not to purchase the properties.

[88] In cross-examination Haseler said that as at the time of his conversation with Van der Meer he already had a good feel for what sale prices might be able to be achieved in the areas in which the properties were, including Albany Creek.[86] Further, he confirmed that at the time he met Van der Meer he neither knew him nor knew of him and knew nothing of him in terms of his reputation in business.[87]

[89] Haseler was asked about whether, at the meeting with Van der Meer at the golf club, he had quibbled about the proposed $22 million figure. He said: "No, but in any negotiation you don't, … until you … do your homework and … depending on what comes up".[88]

[90] Haseler was asked what instructions he gave Mike Russell when he was delegated with the technical investigation. He responded:[89]

> "Mike has worked for me, this year, 40 years bar seven or eight, as I've mentioned before. He was very capable. He was a surveyor by profession, and had worked as a project manager for many, many years. He's very, very capable, very conservative, and I felt fully confident that Mike would assess the properties properly. … [S]ome of the properties were being developed at the time, so I knew that that was one area that we'd touched on, that he needed to make sure he got the full information on the properties that were being developed. And with the other properties, he just needed to check the files, make sure that what we'd been represented was the case."

[91] Haseler then explained that when he said "check the files" what he meant was that Mike Russell and Greg Mackney "would go over those files and assess them according to … what had been represented to us".[90]

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85 AB 1734 line 42.
86 AB 1741 lines 13-27.
87 AB 1741 line 37 to AB 1742 line 7.
88 AB 1751 line 17.
89 AB 1759 lines 29-37.
90 AB 1759 line 43.

[92] He then clarified his position, saying that "the deal that had been put to us by Mr [Van der Meer] was, in general terms, agreeable to us, subject to us checking that what was said was … the fact".[91] Haseler then agreed that, as the owner, when he left on holidays he was not prepared to enter into a signed contract simply on the basis of what Van der Meer had said.[92]

[93] Haseler explained that he had delegated the task of the contractual process to Ian Russell, and that his own instructions were in this context: "I, to the best of my recollection, would think that what I was saying to him was, subject to Mike checking, giving the tick to the various properties, that he would organise contracts, prepare contracts for the Friday".[93]

[94] Shortly thereafter, but still in cross-examination, Haseler explained that the prospect of being outbid for the properties if they were put on the open market was something that did not enter his head, because "all activity was geared to doing work on the properties in the three days".[94] He was then taxed about the fact that he gave no instructions to Ian Russell to ensure that what Van der Meer had said was included in the contracts as warranties. He agreed that he gave no such instructions. Then this exchange occurred:[95]

> "And the reason why you didn't do that was because what [Van der Meer] had said to you was of no significance to you in terms of a decision to enter into the contract?--- No, that's not right.
>
> If it---?--- I relied on everything that he said to me."

[95] Finally, in re-examination Haseler said, relating to his instructions to Mike Russell to deal with the technical aspects of the proposal, that he did not hear anything back from him in a negative sense. The exchange was:[96]

> "You didn't hear anything from Mr Russell in the negative sense?--- No, I didn't.
>
> No. Absent any indication from Mr Russell of any issue, what was your position with respect to completing the purchase?--- With no issues coming back from Mike on the technical side, without assessment I was happy to proceed to contract."

Discussion on reliance

[96] When the evidence of Haseler is reviewed, the findings made by the learned trial judge become compelling. Even if one ignores her Honour's conclusions about the limited competence of Van der Meer the unchallenged findings otherwise and Haseler's evidence establish these matters:

(a) the proposal to buy the six properties, on an all or nothing basis, was put to Haseler by Van der Meer at the golf club meeting;

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91 AB 1760 line 8.
92 AB 1760 lines 13-15.
93 AB 1761 lines 41-44.
94 AB 1763 line 18.
95 AB 1764 lines 4-8.
96 AB 1771 lines 31-35.

(b) at that point Haseler knew nothing of Van der Meer, had never heard of him, and knew nothing of his reputation in the industry; the best that Haseler could say about him was that he was an affable and likeable person;

(c) within his own organisation Haseler had the services of Mike Russell, Ian Russell and Mackney, all of whom had vast experience and known talents in the area of property development;

(d) it was agreed that Van der Meer would bring all of his files to QM's office so that they could be looked at by Haseler's staff; Haseler knew that he was not going to undertake that task as he was flying out early on the morning of 12 September; instead, he had delegated the checking of the files to Mike Russell and Mackney, and the task of preparing contracts if the proposal was to go ahead, to Ian Russell;

(e) Haseler repeatedly described the process as being that QM had to have all of the information which Belscorp had in their files so that they could be sure that everything was as it had been put to them, and that they could satisfy themselves that the properties were as they had been represented to them;

(f) that approach matched Haseler's experience, in that the price was not something to be haggled about "until you do your homework";

(g) as things stood when he left for holidays, Haseler was not prepared to enter into a signed contract simply on the basis of what Van der Meer had said; and

(h) Mike Russell was to check the properties for the purpose of making sure that they were as represented, and he had to give the tick to the various properties.

[97] In those circumstances, Haseler's response in paragraph [94] above could not overwhelm his evidence otherwise.

[98] More particularly, the logic of total reliance or even substantive reliance on what Van der Meer had said is indefensible. Van der Meer was a person of whom Haseler knew nothing, either personally or within the industry or by reputation. It beggars belief that he would place reliance upon what Van der Meer said, as opposed to what was discovered by his own experienced and knowledgeable team of employees, upon their examination of the original files for each property. The very purpose of that examination was, as Haseler said, to satisfy themselves that the properties were as they were represented. If that state of satisfaction could not be reached, then there was to be no contract based upon simply what Van der Meer had said.

[99] Had Mike Russell not been diverted from his task by the lies told by Ian Russell, and had he looked properly at the Albany Creek file, the discrepancies between what was in the file and what had been said by Van der Meer would have been obvious. That might explain why there was no negative response given by Mike Russell (through Ian Russell) to Haseler in the days leading up to the contract. However, that cannot be laid at the feet of Belscorp. That situation was engineered by the dishonest conduct of Ian Russell, one of QM's senior staff. The findings made by the learned trial judge as to the dishonest nature of that conduct and its

impact have not been challenged. In my respectful view, the evidence supporting the finding by the learned trial judge, that Haseler did not rely upon what had been represented by Van der Meer, was overwhelming. The challenge to those findings cannot succeed.

Causation

[100] The learned trial judge's finding was that Belscorp's offer was on an all or nothing basis. In making that finding her Honour accepted the evidence of Murphy and Van der Meer. Haseler's evidence was that he assessed the proposed deal on that basis. A deal being on that basis was consistent with the calculation by Haseler and Mike Russell of their estimate of the value of the total pool of properties.[97]

[101] Consequently, the finding that had QM refused to sign the Albany Creek contract Belscorp would have refused contracts on any of the blocks of land, was not only open but inevitable. In fact, her Honour's acceptance of the evidence of Murphy and Van der Meer, as to what they said in that respect, justified the finding that QM understood that it was an all or nothing deal, and that if the contract on Albany Creek did not proceed then none would.[98]

[102] The only witness who gave evidence that a failure of the Albany Creek contract would have led to QM walking away from the whole deal, was Ian Russell. His evidence was rejected, not only because of the adverse credit findings made against him, but he had no authority to make that decision. The decision to do so lay with Haseler, who was not asked what he would have done had he known the truth about the Albany Creek land.[99]

[103] The appellant contended that even if Ian Russell was rejected by the learned trial judge in terms of his evidence, nonetheless his evidence should be accepted on this point. The contention was that Haseler said he was prepared to enter into the contracts for sale unless he was advised to the contrary by Ian Russell or by Mike Russell. The significance of Ian Russell's evidence on this issue was put this way: it is not what he would have done but what he would have advised Haseler to do. He would have advised Haseler not to enter into any part of the overall deal, but to walk away.[100]

[104] The submission cannot be accepted. The learned trial judge made serious adverse findings as to the evidence given by Ian Russell. Not only did her Honour find that he was dishonest in his dealings in the lead-up to the contracts being signed, but that he was dishonest in his evidence. Specifically, the learned trial judge declined to act on the faith of Ian Russell's evidence on this particular issue, namely that had he known the truth about the power line and set back issues, and the proximity to the South Pine River, he would have walked away from the whole deal.[101] Her Honour's refusal to act on that evidence is, in reality, a rejection that Ian Russell would have taken that course, or (inferentially) advised Haseler to do so. There is good reason for that conclusion, quite apart from the adverse credit findings. Ian Russell's steps after the 11 September meeting consisted of hurrying the other staff to the point of contract, lying about Haseler's attitude and instructions, and making

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97 Reasons below at [178]-[179].
98 Reasons below at [179].
99 Reasons below at [180].
100 Appellant's amended outline para 70.
101 Reasons below at [180].

efforts to get to the point of execution of contracts earlier than the stipulated deadline. None of that supports the notion that Ian Russell would have stepped away from the whole deal or advised Haseler to do so. Moreover, it provides no support for the likelihood of Ian Russell giving that sort of advice.

[105] In my respectful view, the learned trial judge's findings on the issue of causation were not only open but inevitable.

[106] The onus was on QM to prove the causal link. No evidence was led from the relevant decision maker, Haseler, as to what he would have done had he known the truth about the misrepresentations. In those circumstances, in my respectful view, the learned trial judge correctly concluded that causation had not been proven.

[107] The grounds of appeal challenging the findings on reliance and causation fail.

Valuation of the land

[108] On the issue of the market value of the Albany Creek land two expert valuers gave evidence.[102]

[109] Iveson (called by Belscorp) ascribed a value of $1,860,000, using the direct comparison method as at September 2007 and November 2007. The essential basis of the valuation was the sale of the Albany Creek land without any proposed development in place, but on the basis that it was generally developable with the constraints identified in DSC Plan B.[103]

[110] Slater (called by QM) valued the land at $500,000, on the basis that its highest and best use was as for a rural residence, because it was not economically feasible to develop it. Further, there was only one truly comparable sale which confirmed that approach, and because of access and proximity issues the two lots[104] would only be saleable as one, and therefore should be valued that way.

[111] The learned trial judge preferred the evidence of Slater.[105]

Submissions

[112] Senior Counsel for QM Properties submitted that on this issue the learned trial judge erred in these respects:[106]

(a) paragraph 3.1 of Iveson's report identified that his "englobo" approach assumed DSC Plan B "show[s] the likely development constraints and developable foot-prints that would have been considered by a purchaser without adopting any particular lay-out"; thus the conclusion at [206] of the Reasons below was in error;

(b) inappropriate weight was given to Iveson's evidence; his analysis of comparable sales and the extent to which adjustments were permissible and necessary to allow for differences between lots;[107]

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102 Again, without intending any disrespect I shall use surnames.
103 AB 1243-1293.
104 The subject land was Lot 2 and Lot 1 (a much smaller lot) was landlocked within it.
105 Reasons below [196]-[197], [234].
106 Appellant's amended outline, paragraph 81-82.
107 Reliance was placed upon *FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd* [2017] QSC 322 at [102], and *Duffy v Minister for Planning* [2003] WASCA 294.

(c) insufficient weight was given to the evidence of market value at trial, in particular the uncontradicted evidence from Murphy, to the effect that the southern lots on that land were of an equivalent value to the northern lots, as depicted on DSC Plan B,[108] and from Haseler and Mike Russell, who, as sophisticated and experienced property developers, formed a view that the land was valued at about $3 million based on a 28-lot development or between $130,000 and $140,000 per lot; that evidence suggested a value, based on 15 lots, of about $2 million, close to the value assessed by Iveson; and

(d) insufficient weight was given to Iveson's valuation based on the land's potential for development in circumstances where, in light of the weight of evidence, it was capable of yielding a reasonable result.[109]

[113] It was contended that the finding that the Albany Creek land had a market value of only $700,000 was, in all the circumstances, glaringly improbable and against the weight of uncontradicted evidence at trial. In that respect reference was made to the following:

(a) Haseler considered that land an attractive prospect[110] and was willing to acquire it for $3.835 million based on DSC Plan B; and

(b) Murphy considered the southern proposed lots (being the only seemingly available lots for development) were the "better blocks" on DSC Plan B because they were freehold and required less construction costs.[111]

[114] Further, it was contended that the approach taken has the consequence of a windfall accruing to Belscorp in that it retains a block which, upon the uncontradicted evidence, has a market value of about $2 million and yet receives compensation for breach reflective of a block with little demonstrable development potential.[112]

[115] Senior Counsel for Belscorp contended that the contract between QM and Belscorp was not acceptable evidence of value because:[113]

(a) QM did not actually complete the contract to purchase the property for the contract price, so the contract price cannot be regarded as a price obtained on an arms' length sale; and

(b) the normal principle is that the best evidence of value is the price obtained on an arms' length sale at a time close to the date of valuation where no material change in circumstances has occurred;[114] that was inapplicable here because there were special circumstances: QM had a strong desire to acquire other properties which were part of Belscorp's "package deal"; of the six properties offered, while not always immediately adjacent, three of those properties were in close proximity to QM's existing developments (Delaneys Creek, Ocean View and Ningi); in assessing the "package deal", QM considered that it was acquiring a number of the relevant properties below their market value.[115]

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108 AB 2098.
109 Reliance was placed upon *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209, 268 [283].
110 AB 1731.
111 AB 2108.
112 Appellant's amended outline, paragraph 84.
113 Respondent's amended outline, paragraphs 49-52.
114 Referring to *Franke v CIC General Insurance Ltd* (1994) 33 NSWLR 373 at 376-377.
115 Reasons below [159].

[116] It was further contended that there was no error by the learned trial Judge in finding that Iveson's englobo valuation was not based upon any particular type of development or the specific constraints disclosed by DSC Plan B, because:[116]

(a) if the englobo valuation was based upon an assessment of the value of the property in accordance with the development set out in DSC Plan B, then it would be indistinguishable from the second valuation that Iveson was instructed to prepare, namely "on the assumption that it was capable of being developed with 28 lots as specified in DSC Plan B and C";[117] and

(b) QM's submission in that regard was inconsistent with Iveson's own description of the englobo valuation methodology, namely "the valuation of englobo development land by direct comparison does not necessitate defining any specific development outcome with precision ... The valuation of englobo land by direct comparison considers the general attributes of the land, including zoning and constraints, and determines the value";[118] further, Iveson described the englobo valuation as the "Market value assuming the land was an englobo development site with the development constraints generally identified in DSC Plans B and C".[119]

[117] Further, it was contended that the learned trial judge was correct to reject Iveson's evidence as to comparable sales, because: (i) they were too different and required too much adjustment to be informative as to value;[120] (ii) the only truly comparable sale was one not used by Iveson;[121] (iii) once the learned trial judge accepted that the hypothetical development valuation methodology was the preferred approach,[122] the relevance of comparable sales, and the lay evidence such as from Haseler and Murphy, was significantly diminished; the hypothetical development valuation methodology was a "proper and prudent" methodology where comparable sales are lacking, and it is the primary approach used by valuers when assessing the value of land suitable for subdivision.[123] The same applied to the lay evidence as to value.[124] Whilst lay evidence and common sense should not be disregarded in assessing the expert evidence as to value,[125] where the lay evidence is "the intuitive impression ... founded upon consideration of transient, and selective, circumstances – rather than upon all the circumstances which bore upon the market value of the premises", the principled valuation methodology should be preferred.[126]

[118] Finally, it was submitted that the learned trial judge was right to reject Iveson's evidence for four reasons:[127]

(a) the comparable sales identified by him were not reasonably comparable;

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116 Respondent's amended outline, paragraphs 53-57.
117 Iveson's report, page 10.
118 Experts' Joint Report, paragraph 5.2.2; AB 1318.
119 Iveson's report at paragraph 14.3; AB 1272.
120 Respondent's amended outline paragraphs 58-61; referring to *Duffy v Minister for Planning* [2003] WASCA 294 at [25] (cited in *Albion Mill FCP Pty Ltd v FKP Commercial Developments Pty Ltd* [2018] QCA 229 at [104].
121 Reasons below [231].
122 Reasons below [197].
123 Referring to *Waalt Homes Pty Ltd v Road Construction Authority* (1987) 64 LGRA 346 at 354.
124 From Haseler, Mike Russell and Murphy.
125 Referring to *G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltd* [2007] VSCA 4 at [50] and [51].
126 Referring to *G & A Lanteri Nominees Pty Ltd* at [22], [44], [47], [50] and [51].
127 Respondent's amended outline, paragraphs 63-64.

(b) his methodology made an unsafe assumption that the purchaser of the land in each comparator sale intended to obtain the approximate number of lots ultimately obtained on subdivision;

(c) he based his opinion on a comparison between the prices achieved for subdivided lots which sold well after November 2007 and extrapolating a value per hypothetical subdivided lot at the subject property; and

(d) he rejected the hypothetical development methodology, the approach which the learned Trial Judge considered to be the correct approach in this particular case.[128]

Approach of the learned trial judge

[119] The learned trial judge commenced by examining the economic feasibility of developing the Albany Creek land.[129] Her Honour's finding was expressed thus:[130]

> "On the evidence before me, on the balance of probabilities, even if the Council had allowed the 28 block subdivision shown in DSC Plan B, it would not have been economically feasible, having regard to the purchase price which QM paid for the Albany Creek land. Mr Murphy had paid $1,045,000 for the land in 2003. While not conclusive, the evidence tends to suggest that even at that price, the land could not be economically developed, either by way of a 28 lot subdivision, or a 14 lot subdivision."

[120] There is no challenge to that finding.

[121] The learned trial judge then turned to the valuation evidence.

[122] In the course of considering the valuation evidence the learned trial judge made a number of findings, which are not the subject of challenge on this appeal. The first concerns the use that might be made of the contract between QM and Belscorp for the Albany Creek land. Her Honour found that it was not evidence of value because it was part of a larger transaction where several properties were purchased for the price of $22 million, and in any event, the transaction did not complete, nor was there a claim for specific performance.[131] In this respect, her Honour accepted the evidence of Iveson who said it would be the evidence of market value at the relevant date but for the fact that there were more sales involved in an all-up consideration, and it was not a settled sale.[132]

[123] That finding assumes some significance because, as will become apparent, some of the arguments advanced by QM sought to bring that contract price in, as it were, by a side-wind. I will return to that later.

[124] The next finding was that the power lines on the Albany Creek land would not have prevented the development of two lots on the south western side of the block.[133] That led to the finding that a 16 lot development would be profitable if a purchase

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128 Referring to Reasons below [234] and the Experts' Joint Report, paragraph 4.8.2.
129 Reasons below [184]-[191].
130 Reasons below [191].
131 Reasons below at [193].
132 AB 2177 lines 15-26.
133 Reasons below at [196].

price of $700,000 was assumed. The basis for that was an acceptance of the evidence of Slater, to the effect that a 14 lot development would be profitable if the land was acquired for less than $500,000. Dealing with what she called "rather unsatisfactory evidence" from Slater about the impact on the value of the extra two lots that would be achievable if the power lines were rephrased, her Honour said:[134]

> "Given that a 14 lot development would be feasible assuming a purchase price of $500,000 for the land, I find that the assumed purchase price would increase if a 16 lot development were under consideration. It seems that it would not increase by $375,000. Doing the best I can, I find that a 16 lot development would be profitable if a purchase price of $700,000 is assumed. I have regard to the evidence in [200] below as some assistance in fixing this figure."

[125] The reference to evidence at paragraph [200] of the Reasons below was to a comparable sale at 4 Stewart Road, Albany Creek. That was a sale which Slater said was a reliable comparator, once adjustments were made for the fact that it was smaller, had a brick house on it, and did not suffer because of the flood channel and power lines which were through the Albany Creek land. That sale was at $620,000.

[126] The next finding was that the council was unlikely to grant approval which allowed development of the subdivision as shown in DSC Plan B.[135] Further, her Honour held that the economic feasibility of the development shown in that plan was so poor that it was unlikely that a developer would have spent time and money briefing the experts necessary to attempt to convince the council to change its approach. That might only be done by a developer who had bought the land "very cheaply".

[127] In the course of discussing Iveson's evidence concerning his valuations on the assumption that there might be a development, and the fact that he did not attempt an analysis of the geographic or economic feasibility of such a development because he did not have evidence of the cost of development, her Honour made an additional finding. It was that there was no objection to a valuer using information from a past time and reconstructing a retrospective costing analysis in respect of potential development.[136] In other words, Iveson was criticised for not having adopted, as Slater did, costings provided subsequently. Her Honour found that the failure to do so meant that Iveson "has not made any independent assessment of, or conclusion as to, the highest and best use of the land".[137]

[128] In the course of considering the comparator sales put forward by Iveson, the learned trial judge made a number of findings in respect of each, which led her Honour to disregard them for valuation purposes.[138] None of the findings criticising those sales from the point of view of comparability are the subject of challenge. That being so, there is no real challenge to the finding made by her Honour, that Iveson's consideration of a value based on the 28 lot development shown in DSC Plan B

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134 Reasons below at [197].
135 Reasons below at [204].
136 Reasons below at [203].
137 Reasons below at [203].
138 Reasons below at [212]-[217].

should be rejected because it was an exercise "not in reality based on any comparable data".[139]

[129] As with that exercise, the learned trial judge made a number of findings about Iveson's comparable sales, used by him for his valuation of the land simply as a rural residence.[140] Those findings are the subject of challenge but no attempt was made either in the written outline or orally to justify those sales.

[130] When considering the alternative valuations based upon use of the Albany Creek land for a rural residence, the learned trial judge made two relevant findings. The first was that her Honour accepted the difficulties with shared access and lack of privacy and amenity which had been identified by Slater in relation to using the Albany Creek land as two separate residential lots.[141] In essence, Slater said that a purchaser for lot 2 would have little option but to build close to a house situation on lot 1, and share a driveway of considerable length with the owner of lot 1. In his view, those aspects presented considerable difficulties with amenity and access, virtually compelling the sale of both lots as one sale.

[131] The second finding was that the comparison sale used by Slater was "more comparable than those used by Mr Iveson".[142] That referred to the use, as a comparable sale, of the land at 4 Stewart Road, Albany Creek, sold for $620,000 in November 2007.

[132] Having made those findings in the course of expressing views upon the acceptability or otherwise of Iveson's valuations, the learned trial judge commenced a more detailed analysis of his evidence. Her Honour rejected Iveson's evidence of a valuation based on a 28 lot development. One of the central reasons for that was that there were flaws in his comparison with other sales listed in his report. As to those sales her Honour made findings as to why the central ones, sales 18, 21 and 20, ought to be disregarded,[143] and findings rejecting the comparability of the other four.[144] Whilst it seems those findings are challenged, nothing was put forward as justifying the adoption of those sales, or attacking Slater's criticisms of them. On the appeal no-one suggested that the valuation for a 28 lot development was supportable.

[133] Iveson's second alternative basis for valuation, namely an englobo development with the constraints generally identified in DSC Plan B, was also rejected. The central basis for that was the same as the first, namely the inappropriate use of the seven sales as comparative sites.[145] The second difficulty with that approach was that DSC Plan B did not show accurately the constraint imposed by the council's requirements for buffer zones along the South Pine River. Her Honour found that Iveson had assumed a much larger area of land than was available.[146] Further, her Honour observed that there was nothing in Iveson's report to indicate that he understood that a major constraint on the development of the northern island lots was the requirement to have roadway access to them. As mentioned, nothing was

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139 Reasons below at [218].
140 Reasons below at [227]-[232].
141 Reasons below at [233].
142 Reasons below at [233].
143 Reasons below [212].
144 Reasons below [213]-[217].
145 Reasons below at [222].
146 Reasons below at [221].

put forward as justifying the adoption of those sales, or attacking Slater's criticisms of them.

[134] For the reasons outlined above, the lack of true comparability with the sales selected by Iveson presents an insuperable barrier to challenging her Honour's rejection of that valuation approach.

[135] The learned trial judge then turned to Iveson's evidence as to his third basis for valuation, that is as a rural residence. Her Honour preferred Slater's opinion on that issue to that of Iveson, identifying these features:

(a) Iveson had not considered the impact on the value of lot 2, of the access issues and the need to build a house very close to the house on lot 1;[147]

(b) her Honour made findings about the four sales that Iveson had used as being relevant to the value of lot 2, rejecting them as truly comparable.[148]

[136] Whilst there is a challenge to those findings, no submissions was made as to why they should be adopted contrary to Slater's reasons for their rejection. That creates a considerable difficulty in urging the acceptance of Iveson's report on this issue. Her Honour expressed her conclusion in these terms:[149]

> "As noted, I am not prepared to act on the basis of Mr Iveson's second and third alternative bases for valuation. I accept that the difficulties with shared access and lack of privacy and amenity identified by Mr Slater in relation to the idea of using the Albany Creek land as two separate residential lots are valid. I prefer his valuation of the Albany Creek land as a single rural residence to the first of Mr Iveson's alternative valuations because Mr Slater takes account of these difficulties with access and amenities and Mr Iveson does not. Further, I think Mr Slater's comparison sale is more comparable than those used by Mr Iveson."

Discussion

[137] QM's first attack on the learned trial judge's findings was that there was an error in her Honour's treatment of the valuation by Iveson which was based upon an englobo development site with the development constraints generally identified in DSC Plans B and C.[150] In paragraph 3.1 of his report,[151] Iveson recorded his assumption that "DSC Plans B & C show the likely development constraints and developable foot-prints that would have been considered by a purchaser on an englobo basis without adopting the 28 lot layout." The learned trial judge identified a number of problems confronting acceptance of that alternative valuation.[152] They were:

(a) the nature of the exercise was "altogether too vague to produce any convincing valuation opinion in circumstances where (i) the development constraints he identifies from DSC Plan B are nowhere defined with any

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147 Reasons below at [226].
148 Reasons below at [227]-[231].
149 Reasons below at [233].
150 Appellant's amended outline, paragraphs 80-81.
151 AB 1247.
152 Reasons below at [206].

precision, and (ii) the development hypothesised this by definition different to that in DSC Plan B, but in some unspecified way";

(b) the fact that neither Belscorp nor QM has ever put forward any better alternative to the development proposed in DSC Plan B made it unlikely that Iveson had anything specific in mind; and

(c) if Iveson meant to say that purchasers would buy the land for development in ignorance of geographical or financial constraints, that was an inappropriate basis for valuation on the test set out in *Spencer v The Commonwealth*.[153]

[138] Her Honour's comments were part of what she described as "preliminary concerns" with Iveson's opinion.[154] The contention on the part of QM is that what Iveson said in paragraph 3.1 demonstrated that he assumed that DSC Plan B showed the development constraints and developable footprints that **would** have been considered by a purchaser, and her Honour was in error in concluding that the valuation exercise was inappropriate.

[139] DSC Plan B identifies various features of the land such as the easement for power lines, the flooded areas that would result from Q20, Q50 and Q100 floods, the South Pine River and Albany Creek, and the overland flow path in the various places across the property.[155]

[140] Insofar as Iveson's report referred to constraints on the land, it was by reference to flood risk, flooding, overland flow, riparian buffers and high voltage power lines.[156] Iveson said as to this method of valuation that he did not assume "any particular development outcome or lot yield", but assessed the market on an englobo rate per m^2 of land. As to the costs of development, which had been included in the report of Slater, Iveson said this:[157]

> "At Point 19.1 and 19.2 Mr Slater refers to specific external and on-site development costs. I have been instructed that the development cost information set out in Mr Slater's report was not available at the date of valuation and therefore I have not accounted for specific development costs, because at September and November 2007 these were not known and I do not consider it appropriate to take them into account."

[141] The learned trial judge was, in my respectful view, correct to conclude that Iveson did not define what the development constraints were, other than referring to DSC Plan B. Further, it was right to say that the development hypothesised by that approach was, by definition, different to that in DSC Plan B, but in an unspecified way. Reference to the letter of instructions given to Iveson does not take the matter any further.[158]

[142] In my respectful view the criticism of her Honour's reasons in paragraph [138] above is misplaced. All her Honour was saying was that **if** Iveson's opinion went so far as to suggest that a purchaser would ignore geographical or financial constraints, that approach would not fit with in *Spencer v The Commonwealth*. That is undoubtedly correct, in my respectful view, because *Spencer* sets as part of the test

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153 (1907) 5 CLR 418, at 441 per Isaacs J.
154 Reasons below at [207].
155 AB 2420.
156 Paragraphs 10.0 and 11.1, AB 1251 and 1254.
157 AB 1273 paragraph 15.
158 AB 1288.

that the purchaser would not "overlook any ordinary business consideration", would be "perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially".[159] There was no challenge to the finding by the learned trial judge that the proper valuation exercise should take into account the development costs identified by Slater's report. That is so even if they were not known at the time. Once reference is had to those costs it becomes apparent, as the learned trial judge found, that the viability of the development was uncertain to say the least. In fact, the finding was that the 28 lot development was not economically feasible; neither was a 14 lot development. In those circumstances, it was understandable that an approach which was so uncertain as to suggest some unspecified development, contemplated in ignorance of the development costs applicable to that development, and thus in ignorance of the financial constraints, did not established a value upon which one could rely.

[143] This attack on her Honour's approach should be rejected.

[144] The second attack was that the learned trial judge failed to accept or give proper weight to Iveson's expert opinion and his analysis of comparable sales, and the extent to which adjustments were permissible and necessary to allow for differences between lots.[160]

[145] In *Duffy v The Minister for Planning*[161] McLure J referred to the classic test of market value, and the method of comparable sales in that process:

> "One method of ascertaining market value is the comparable sales method. That method requires that sales evidence relied on be relevant and sufficient in volume …
>
> There is no hard and fast rule by which a valuer can draw the line that clearly separates sales that are comparable from those that are not. It is a matter of degree. Some adjustment is always necessary but too much adjustment may render it unsafe to use a sale. Where the line is to be drawn is a matter for the expert valuer to determine. Further, just because a sale is excluded from use in the comparable sales reasoning process does not necessarily mean that it is irrelevant …"[162]

[146] In *FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd*[163] Jackson J adopted a passage from the reasons of McLure J in *Duffy v Minister for Planning*:

> "Further, the process of inference that leads to the opinions of the valuer must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about their reliability. If not, the opinions can carry no weight …
>
> The expert must fully expose the reasoning relied on in reaching his or her opinion and the opinion must be rationally based …
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> However, those principles have to be applied in the context of the valuer's 'art'. The established principles were stated in *Spencer v*

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159 *Spencer v The Commonwealth* at 441.
160 Appellant's amended outline, paragraph 82(a).
161 [2003] WASCA 294.
162 *Duffy* at [22]-[25].
163 [2018] 3 Qd R 258, at [120].

The Commonwealth (above) where Isaacs J quoted with approval the following passage in *Secretary of State for Foreign Affairs v Charlesworth*, *Pilling & Co* …

> 'It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at.'

…

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

[147] The learned trial judge referred to the comparative sales selected by Iveson. They were sales 18-24.[164] The learned trial judge referred to each of them and gave reasons why they were not useful in the valuation exercise:

(a) sale 18 – this land was the immediately adjoining land at 4 Stewart Road, Albany Creek; it had been described by Iveson himself as: (i) a considerably smaller lot (just 3.2 per cent of the size of the subject land); (ii) a far inferior property by comparison due to its size alone; and (iii) the subject land contained a developable area (outside of the constraints) significantly larger than sale 18;[165] the learned trial judge noted that it had been intended to develop the land into five sites, but that did not proceed and the land was not comparable because of its small size, the small size of the proposed development and the fact that the development never went ahead;[166]

(b) sale 19 – this sale was included by Iveson[167] but was the subject of criticism by Slater as to its comparability; the distinguishing features according to Slater were that it was in a superior environment, mostly well elevated, and did not bear the extraordinary costs that went with the development of the Albany Creek land; the learned trial judge noted that Slater was not cross-examined

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164 Iveson's report, paragraph 12.1.3 and following, AB 1262 and following.
165 AB 1262.
166 Reasons below at [212].
167 AB 1271.

about his views of that property, and his criticisms "seemed valid at a factual level";[168]

(c) sale 20 – this sale was referred to by Iveson as "an apparently uncomplicated development site with few constraints providing superior evidence at $93,333 per lot yield";[169] as the learned trial judge noted, this sale set the upper limit for Iveson's valuation exercise; her Honour concluded that Iveson's characterisation of it meant that it was not comparable for the purpose of the exercise being undertaken, and it ought to be disregarded;[170]

(d) sale 21 – this was a block that had waterway and flood overlay constraints, as well as an environmental overlay; it had been subsequently approved for a 21 lot development, revealing a lot yield of $136,363; as that sale produced a lot yield well in excess of the maximum lot yield proposed by Iveson,[171] the learned trial judge concluded that Iveson must have excluded it;[172] that conclusion seems to be right, as Iveson not only adopted a lower maximum lot yield than sale 21 demonstrated, but he observed of it that the "rate per lot analysis is complicated by the inclusion of a large rear lot retained by the developer";[173]

(e) sale 22 – this was a block of land at Bray Park; it was described by Iveson as being in an inferior location and severed by a water course, requiring substantial development costs of constructing a drain and bridging the road over the waterway; further Iveson said it was inferior land overall by comparison due to its location and size of the development;[174] Slater's evidence was noted by the learned trial judge, namely that sale 22 had nothing in common with the Albany Creek land, and that the costs of installing the drainage system would be spread over 103 lots, distinguishing it from the extraordinary development costs on the Albany Creek land;[175] once again her Honour noted that Slater was not cross-examined about this comparative sale, and his criticism seemed valid at a factual level;

(f) sales 23 and 24 – these two sales were at Kedron and were subsequent to the valuation date;[176] they bore significant waterway constraints, high voltage power lines and a requirement to bridge the internal road over the waterway, as noted by Iveson;[177] the learned trial judge noted Slater's criticism that those two sales were in Brisbane city, 15 kilometres from the subject land and a completely different environment; again her Honour noted the lack of cross-examination about Slater's view, and her acceptance that his criticisms were valid at a factual level.

[148] Having dealt with all of the sales from 18-24, the learned trial judge concluded that they were not comparable data.[178] A close reading of the descriptions,

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168 Reasons below at [217].
169 AB 1271.
170 Reasons below at [212].
171 AB 1271.
172 Reasons below at [212].
173 AB 1271.
174 AB 1271.
175 Reasons below at [214].
176 Reasons below at [213].
177 AB 1271.
178 Reasons below at [218].

characteristics and limitations of the lots the subject of those sales[179] suggests that Slater, and in turn the learned trial judge, were right to take the view that they were not comparable.

[149] In light of that analysis it is, in my view, not possible to maintain that inappropriate weight was given to Iveson's opinion and his analysis of the comparable sales. Bearing in mind the passages from *Duffy v Minister for Planning* and *FKP Commercial Developments*, referred to above, and the fact that the learned trial judge accepted Slater's evidence in preference to that of Iveson in terms of the criticisms of the so-called comparable sales, I am unable to reach the conclusion that improper weight was given to Iveson's evidence. To the contrary, his evidence was weighed in the balance, and found wanting. No compelling reason has been advanced as to why the exercise performed by the learned trial judge miscarried.

[150] When Iveson advanced a valuation based on use of lots 1 and 2 as a rural residence, he listed four sales as being relevant to the value of lot 2. The learned trial judge analysed each in turn, taking into account the evidence given by Slater. Thus:

(a) sale 1 – this was the sale of a large, prestigious rural residential home site in Bridgeman Downs; Iveson noted that it was about half the size of the Albany Creek land, but traversed by the same power line easement, and was affected by flooding issues;[180] the improvements were substantial in size (a seven bedroom, five bathroom and three kitchen home), and was incapable of further development due to its zoning; the learned trial judge accepted Slater's evidence that this sale was not truly comparable because the difference between the two suburbs was very marked, a large proportion of the land was above the flood plain and yielded a large home site unaffected by either the power lines or flooding, and the sale was affected by the large and prestigious home on it;[181]

(b) sale 2 – this was another property in Bridgeman Downs and her Honour concluded that the same remarks should be applied to it as were applicable to sale 1;[182] her Honour apparently accepted Slater's evidence that it contained a "vastly superior home site", a considerably superior environment, was situated within Brisbane City Council rather than Pine River Shire, and simply not comparable; this sale also did not suffer from overhead power lines, and only one small part was affected by a waterway;

(c) sale 3 – this was described by the learned trial judge as "an unusual sale";[183] that description was justified in light of Iveson's own recording of its characteristics;[184] the land was low lying and 100 per cent within a flood overlay, constrained by power line easements in the north, and understood to have been purchased by the local council in lieu of compulsory acquisition; though Iveson noted that it had "superior improvements" in the form of a brick and tile home, no allowance was made for those in his valuation; those features led her Honour to describe the sale as "unusual", a sufficient indicator that it was not comparable; and

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179 The sales all appear in Iveson's report, AB 1262-1267.
180 AB 1258.
181 Reasons below at [227].
182 Reasons below at [228].
183 Reasons below at [229].
184 AB 1259.

(d) sale 4 – this was another Bridgeman Downs property; though Iveson noted that it contained a highset brick dwelling, Slater gave evidence that it was a four bedroom, two bathroom home with "extensive nursery improvements including a line marked car park";[185] her Honour noted the fact that this sale was in Bridgeman Downs, a prestigious suburb when compared to that of Albany Creek.[186]

[151] Slater's evidence in his responsive report discounted each of sales 1-4 for reasons which he set out at paragraphs 3.1-3.4.[187] It is apparent that the learned trial judge accepted his evidence in preference to that of Iveson. Further, her Honour expressed her inability to accept the evidence of Iveson on the comparable sales, in this fashion:[188]

> "I find it odd that although Mr Iveson first uses, and then apparently discards, the sale at 4 Stewart Road, Albany Creek (his sale 18) for comparison as a development site, he does not use the sale as a comparator for a rural residence. Whatever he may have been told about the purchaser's plans to subdivide this lot, it was sold as (and continues to be used as) a rural residence. It is true that 4 Stewart Road is a much smaller block than the Albany Creek land, but so are his sales 2 and 4. It does rather undermine my confidence in his comparative exercise that he chooses three blocks of land in Brisbane City, in the prestigious suburb of Bridgeman Downs as comparators, when there was an obvious comparator, of which he was aware, in Albany Creek, very close to the subject site."

[152] The foregoing demonstrates that the learned trial judge did have regard to and give weight to Iveson's opinion and his analysis of comparable sales, but rejected them as lacking the comparability that permits their use in assessing the value of the land. QM did not advance any compelling reason as to why her Honour was wrong in that analysis, and wrong to prefer the evidence of Slater. This attack on her Honour's reasons should be rejected.

[153] The third attack was that greater weight should have been given to the lay evidence from Murphy, Haseler and Mike Russell as to the inherent value of the land.[189] Reference was made to the fact that Murphy's evidence was that the southern lots on the Albany Creek land were of an equivalent value to the northern lots, and the evidence from Haseler and Mike Russell, who formed the view that the land was valued at about $3 million based on a 28-lot development, or between $130,000 and $140,000 per lot. It is contended that the evidence suggested a market value based on 15 lots of about $2 million, in the range of that assessed by Iveson.

[154] In considering this issue it is as well to bear in mind some matters established by the authorities. The determination of value is a question of fact, to be decided upon the evidence of experts conversant with the subject matter.[190] Lay evidence or common

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185 Reasons below at [230].
186 Reasons below at [231].
187 AB 1296.
188 Reasons below at [231].
189 Appellant's amended outline, paragraph 82(b).
190 *Spencer v The Commonwealth* at 432; *G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltd* [2007] VSCA 4 at [22].

sense[191] does not have to be disregarded in deciding whether to accept (wholly or in part) the competing assessments of the experts.[192] An intuitive impression as to value may, on analysis, be seen to be founded upon consideration of transient, selective circumstances, rather than upon all the circumstances which bear upon the market value.[193] In my view, the same may be said of the quality of lay evidence and how it might be used in the valuation exercise.

[155] The learned trial judge was not bound to accept either side's expert valuation evidence.[194] Even so, the court may not "piece together a valuation of [its] own".[195]

[156] There are a number of reasons why I consider this attack should be rejected. First, the lay evidence is not from disinterested parties. Murphy was trying to sell the land and Haseler and Mike Russell were eager to buy but under pressure to negotiate a contract within a few days, well short of the period reasonably necessary to conduct a due diligence. No doubt their evidence was based on their experience, but insofar as Haseler and Mike Russell are concerned, it could not be said to have been based otherwise than on a consideration of transient and selective circumstances, and not upon all of the circumstances bearing on value.

[157] Secondly, a factor related to the first is that once the truth about the Albany Creek land was known, QM did not proceed with the purchase. In other words, QM decided the value was not there to warrant proceeding with the contract. The fact that the contract was rejected, and the reasons why it was rejected (misleading statements), emphasised the fact that any views formed and reflected in their lay evidence were not useful in the valuation exercise.

[158] Thirdly, neither of the valuers considered it appropriate to use the evidence of the sale contract in the assessment of value. Essentially that was because the sale was not independent of other sales in the one proposal and the sale did not proceed. If the concluded contract was irrelevant to the valuers' considerations, the views expressed prior to its execution could hardly be elevated to a higher plane.

[159] Fourthly, the learned trial judge concluded that valuation as a single rural residence was no longer the highest and best use of the land because it was "marginally more valuable to a developer considering a 16-lot subdivision on the southwest part of the land", and therefore the appropriate approach to valuation was the hypothetical development approach adopted by Slater for the 14-lot development, but adjusted for the two extra lots available on the repositioning of the power lines.[196] Once a hypothetical development approach to valuation was adopted, the lay evidence ceased to be of value.

[160] For the same reasons the additional point made by QM, that the valuation at $700,000 was, in all the circumstances, glaringly improbable and against the weight of the lay evidence, should also be rejected.

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191 As to which see *The Commonwealth v Milledge* (1953) 90 CLR 157 at 162; *Holtman v Sampson* [1985] 2 Qd R 472 at 474; *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 221 [54].

192 *G & A Lanteri Nominees* at [44].

193 *G & A Lanteri Nominees* at [51].

194 *Doherty v Commissioner of Highways* (1974) 7 SASR 57 at 83.

195 *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445 at 453.

196 Reasons below at [194]-[197], and [234].

[161] The last point advanced was that the learned trial judge erred in giving little or no weight to Iveson's valuation where, in light of the weight of the evidence, it was capable of yielding a reasonable result. In that regard reliance was placed upon the following passage in *Boland v Yates Property Corporation Pty Ltd*:[197]

> "Wells J recognised the availability of different methods of valuation in *Bronzel v State Planning Authority*:
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> > '… I am not disposed to reject any method of valuation adopted by either valuer on the ground that it is not worth considering; it seems to me that if *Spencer's* case … is to keep its practical worth in this jurisdiction, this Court should be slow to reject any method that, in expert hands, is capable of yielding a result within bounds that are not unreasonable. The limitations of every method must, of course, always be kept clearly in mind. I am of the opinion that the approach likely to result in the most direct and reliable resolution of the outstanding differences between the valuations is to consider the particular features of each valuation that are capable of yielding to adverse criticism.'"

[162] This point should be rejected. It relies for its foundation upon the lay evidence, as to which the reasons above show it should not be relied upon. Further, Iveson did not advance a novel method in any of his three approaches, the first two being to value on the hypothetical development basis,[198] and the last being a classic valuation on comparable sales. However, as referred to above, there were serious deficiencies in each of those approaches. The first (the 28-lot development) suffered particularly because such a development was not likely to be approved and Iveson had not taken into account actual development costs which rendered that proposal uneconomic. As to the second, the approach was too vague to give certainty, and in any event failed to take into account development costs. The third suffered because the comparable sales were inapplicable. Comparisons between Iveson's result in each case, and the lay evidence, does not advance the matter.

[163] Furthermore, the learned trial judge rejected the direct comparison method based upon one rural residence, finding that Slater's hypothetical development approach was applicable, provided that it was 16 lots, and not 14. For the reasons mentioned above Iveson did not value the land on that basis, and his alternatives were rendered of little help by the fact that he did not take development costs into account.

[164] In my respectful view, no basis has been shown to find that her Honour's conclusions on the valuation case were in error. To the contrary, it is more than a little curious that QM's own expert, Slater, was the one who advanced the low valuation (at least, in comparison to that of Iveson) which was ultimately accepted. Added to that is the other curiosity that cross-examination of Iveson was essentially confined to trying to establish that the contract between QM and Belscorp should be taken to be the best evidence of market value, a proposition rejected by Iveson.

Award of interest on damages

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197 (1999) 74 ALJR 209, 268 [283].

198 The first being based upon the 28-lot development in DCP Plan D, and the second being on no particular development but subject to the general constraints in that plan.

[165] The learned trial judge gave leave to amend the counterclaim on 2 March 2018. Prior to that time Belscorp had pleaded that QM's purported determination of the contract amounted to a breach, and a repudiation which was not accepted by it. The primary claim for relief was for specific performance, namely an order that QM pay the purchase price together with interest at the contractual rate. Alternative relief was sought, pleaded in paragraphs 130 and 131 of the relevant pleading. Paragraph 130 claimed that "further and alternatively", because of QM's breach of contract, Belscorp had suffered loss and damage pleaded as being the difference between the contract price and the value of the property "at the date of the plaintiff's breach of contract". Paragraph 131 pleaded an alternative claim to the claim for specific performance, namely "damages in lieu of the claim for specific performance as a result of the plaintiff's breach and repudiation of the contract".

[166] The leave to amend granted on 2 March 2018 was the consequence of an election made on Belscorp's behalf, on 26 February 2018, in the written opening of the case on damages. That signified an election to seek damages rather than specific performance.

[167] The consequence of the amendment was that QM pleaded that the amendments on 2 March 2018 were the first time a claim for damages for breach of contract had been advanced, such that any award of interest should only be from 2 March 2018. QM's contention before the learned trial judge was that the common law claim for damages did not accrue until 2 March 2018.

[168] The learned trial judge rejected that claim, finding that the claim for common law damages accrued when QM breached the contract.[199] Her Honour regarded the date of breach as 13 November 2007 when QM did not settle on the Albany Creek land. QM contended that the learned trial judge erred in finding that the alternative counterclaim for "damages in lieu of specific performance" was a claim for damages at common law.[200] It was contended that such a claim was for equitable damages, which are generally assessed at judgment or when the principle equitable relief is refused. It was further contended that the right to claim damages did not accrue until Belscorp made a decision to terminate the contract for repudiation. That did not occur until 26 February 2018, or 2 March 2018 when the amendment occurred. It was therefore said to be an error to award interest from 13 November 2007.

[169] Belscorp submitted that the cause of action for breach of contract accrued on the date of breach.[201] Secondly, it was submitted that breach of contract was always pleaded and therefore it was irrelevant whether the pleading contained a claim for common law damages. Even if common law damages were not sought until the amendments were made, the court still had the power to award common law damages.[202] Finally, it was submitted that the learned trial judge was correct in interpreting the original prayer for relief as potentially capturing both common law

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199 Reasons below at [240].

200 Appellant's amended outline, paragraph 87.

201 Reliance was placed on *Cork v AAL Aviation Ltd* [2014] FCA 1085 at [41]; *McQueen v Mt Isa Mines Ltd* [2017] QCA 259 at [66]; *Millstream Pty Ltd v Schultz* [1980] 1 NSWLR 547; *Galafassi v Kelley* [2014] 87 NSWLR 119 at 154 [179]; *Jampco Pty Ltd v Cameron (No 2)* [1985] 3 NSWLR 391 at 395.

202 Reliance was placed on *Absolute Analog Inc v Sundance Resources Ltd (No 3)* [2014] WASC 283 at [110]-[115].

and equitable damages. That was signified by the words "damages in addition to or in lieu of specific performance of the Contract".

Discussion

[170] In my view, this ground of appeal must be rejected. There are a number of reasons for that conclusion.

[171] First, insofar as it contends that the cause of action for breach of contract did not accrue until Belscorp elected to terminate the contract on either 26 February or 2 March 2018, that confuses the date of accrual of a cause of action, with the date on which that cause of action is pleaded or asserted. In *Millstream Pty Ltd v Schultz*[203] this issue was addressed in a case where there was a breach of contract and the other party sought specific performance. By the time of hearing it was apparent that the party in breach could no longer perform, at which point the other party abandoned the claim for specific performance and sought, inter alia, damages for non-delivery. McLelland J addressed the question of common law damages:[204]

> "(14) I turn to the question of common law damages. It was submitted on behalf of the defendant that the plaintiff is not entitled in these proceedings to recover common law damages, because no cause of action for such damages had accrued at the time of commencement of the proceedings. It was argued that any entitlement of the plaintiff to damages for loss of bargain was conditional upon the plaintiffs having elected to terminate the contract for the defendant's breach or repudiation, and that the plaintiffs having commenced proceedings for specific performance (and, a fortiori, having obtained an interlocutory injunction in support of that remedy) was inconsistent with any such election. It was argued that the contract was not terminated until, at earliest, … the second day of the hearing, when the plaintiff announced its intention not to seek specific performance.
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> (15) In my opinion, there is a fallacy in this argument, and it lies in confusing the accrual of a cause of action for breach of contract with the measure of damages recoverable for such a breach. One frequently finds used in this context the expression 'damages for loss of bargain', as if 'loss of bargain' were a cause of action. In truth the relevant cause of action is the breach of the contract and that cause of action accrues upon the occurrence of the breach: *East India Co v Oditchurn Paul*. The subsequent accrual of special damage, in consequence of a breach of contract, does not postpone the accrual of the cause of action upon which that special damage may be recovered to the time when the special damage accrues: *Battley v Fawkner*; *Howell v Young*. Where an actual (as distinct from an 'anticipatory') breach of contract is of such a nature as to entitle the innocent party to terminate the contract, his election instead to affirm it does not destroy the cause of action constituted by that breach, although it may influence the

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203 [1980] 1 NSWLR 547, at 553.

204 *Millstream* at pages 553-554, [14]-[16]; internal references omitted.

> quantum of the damages recoverable in respect thereof, because, until the contract is terminated, it cannot always be predicated that the party in breach will not remedy the breach by a delayed performance of the relevant obligation; and, furthermore, the deleterious consequences of the breach may be avoided by subsequent events … But if, ultimately, the contract is terminated, so that thereafter the breach is incapable of being remedied by performance of the relevant obligation, then damages may be assessed on that basis; but the cause of action still remains the same breach. …
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> (16) With one qualification, I respectfully adopt the following (obiter) statement by Barwick CJ in *Ogle v Comboyuro Investments Pty Ltd*: 'Where a promisor has failed to perform his promise, he may without more, be sued for such damages as flow from the breach. Where the promise which is not performed is the promise to complete a purchase, the damages will include the loss of the benefit of the performance of that promise, properly referred to as damages for loss of bargain. There is no need first to rescind the contract in order to recover damages in that case, which is a case of actual, as distinct from anticipatory, breach or repudiation. In the latter case, there must, of course be an acceptance of the anticipatory breach or repudiation and thus a termination of the contract, as from that time. But it is otherwise in the case of an actual breach.'"

[172] That passage has been said to "represent the general law",[205] and has been adopted or approved a number of times.[206] In *Carlton & United Breweries Ltd v Tooth & Co Ltd*[207] the question of when cause of action accrues for breach of contract was dealt with by Young J, who adopted the passage from *Millstream Pty Ltd* cited above, saying:

> "I have been assisted in my thinking on breach of contract by the cases dealing with when a cause of action for breach of contract arises. These show that the cause of action is complete as soon as the first breaking of the contract takes place, and that anything further that happens is usually merely a matter of aggravation of damages." [His Honour then quoted the passage from *Millstream*].

[173] Here the breach occurred on 13 November 2007 when QM failed to settle. Thereafter until 19 December 2016 Belscorp sought specific performance and interest. On 19 December 2016 the pleadings were amended so that the counterclaim sought, as an alternative form of relief to specific performance, "damages in lieu … as a result of the plaintiff's breach and repudiation of the contract".[208] The counterclaim also sought, in the prayer for relief, "damages in addition to or in lieu of specific performance".[209]

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205 *Intag Microelectronics Pty Ltd v AWA Ltd* (1995) 18 ACSR 284 at 288.

206 *Socratous v Koo* (1994) ANZ Conv R 208 at 210; *Edwards v Attorney-General* [2004] NSWCA 272 at [134]; *Barker v The Duke Group Ltd (in liq)* [2005] SASC 81 at [168] and *Security Retirement Pty Limited v Twibill Architects Pty Limited* [2005] NSWCA 325 at [47].

207 (1986) 7 IPR 581, at 622-623.

208 AB 497, paragraph 131.

209 AB 497, paragraph 132(d).

[174] That was the state of the pleadings until acceptance of the repudiation and termination of the contract on 26 February 2018, and the consequent amendment on 2 March 2018.

[175] The cause of action for breach of the contract accrued on 13 November 2007. That breach, and the accrual of a cause of action upon it, remained intact. It is true to say that by seeking specific performance Belscorp affirmed the contract. But that is to say only that Belscorp could not, itself, terminate the contract for that breach. The ongoing refusal of QM to settle, commencing with the initial date of 13 November 2007, constituted a repudiation which was eventually accepted. But that does not displace the fact that the cause of action for breach of contract accrued on 13 November 2007.

[176] Secondly, by the time the amendment was sought, an alternative claim for damages in lieu of specific performance had been pleaded for some time. That this comprehended common law damages was conceded by QM at the trial, when its written address at the end of the trial accepted that there was an extant claim for damages for breach of contract at the time of the amendment.[210] However, that such a claim was made in the pleading is strictly irrelevant to the point, which is that breach of contract was always pleaded, and the accrual of the cause of action on that breach dated from 13 November 2007.

[177] Thirdly, there is no reasonable basis upon which a prayer for relief claiming damages "in addition to or in lieu of specific performance" could be understood as being restricted to equitable damages only. The words "in addition to or" plainly seek damages on a different basis from those which might be awarded in the event that specific performance was refused.

[178] In my respectful view, the learned trial judge's conclusion as to when interest hold run was correct.

Conclusion

[179] As all grounds of the appeal have failed, the appeal should be dismissed, with costs. I propose the following orders:

1. The appeal is dismissed.

2. The appellant is to pay the respondent's costs of and incidental to the appeal.

[180] **BROWN J:** I agree with the reasons of Morrison JA and the orders his Honour proposes.

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210 Reasons below at [237] and [239] and Footnote 72.