

SUPREME COURT OF QUEENSLAND

CITATION: *Hemjum Pty Ltd v Osachy* [2019] QSC 262

PARTIES: **HEMJUM PTY LTD as trustee for THE PARK RIDGE
NO 1 UNIT TRUST**
ACN 606 975 740
(plaintiff)
v
WALLY OSACHY
(defendant)

FILE NO: BS 11498 of 2016

DIVISION: Trial

PROCEEDING: Trial

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 29 October 2019

DELIVERED AT: Brisbane

HEARING DATE: 4 – 6 June 2019

JUDGE: Bradley J

ORDER: **I will hear the parties on the form of judgment or final
order, including as to costs.**

CATCHWORDS: ESTOPPEL – ESTOPPEL BY CONDUCT – CAUSATION -
– DETRIMENT – EQUITY – GENERAL PRINCIPLES –
UNCONSCIONABILITY, UNCONSCIONABLE
DEALINGS AND OTHER FORMS OF EQUITABLE
FRAUD – CONTRACTS – GENERAL CONTRACTUAL
PRINCIPLES – CONSTRUCTION AND
INTERPRETATION OF CONTRACTS – IMPLIED
TERMS – where the plaintiff and the defendant entered into a
contract for the sale of a parcel of land owned by the
defendant – where the contract of sale failed to settle and was
terminated by the defendant because the plaintiff failed to pay
the balance of the purchase price – where the plaintiff seeks
specific performance of the contract and contends that the
failure to complete was caused by its reliance on
representations made by the defendant that he would provide
vendor finance and agree to extend the completion date –
whether the defendant represented to the plaintiff that he
would provide vendor finance to complete the contract –
whether the plaintiff did not obtain alternative finance in
reliance on the defendant’s alleged representations – whether
the defendant was estopped from asserting his right to

terminate the contract because of the alleged representations -
 – whether the defendant breached an implied contractual obligation to cooperate with the plaintiff – whether the termination of the contract was unconscientious or unlawful – whether the defendant agreed to extend the completion date and thereby waived his right to insist on the contractual completion date

Foran v Wight (1989) 168 CLR 385, cited
Tanwar Enterprises Pty Ltd v Cauchi (2013) 217 CLR 315,
 followed

COUNSEL: H Blattman for the plaintiff
 N Ferrett QC, with P Travers, for the defendant

SOLICITORS: Enyo Lawyers for the plaintiff
 Gopal Lawyers for the defendant

- [1] In this proceeding, the plaintiff, Hemjum Pty Ltd, sought specific performance of a contract (**Contract**) with the defendant, Wally Osachy, for the sale and purchase of a parcel of land at 193-205 Green Road, Park Ridge (the **Land**).¹ The defendant opposed that relief on the basis he lawfully terminated the Contract on 18 August 2016, after the plaintiff failed to tender payment of the balance of the purchase price.

Matters in issue and legal contentions

- [2] There were three principal factual matters in dispute:
- (a) whether, by conduct between 2 and 6 August 2016, the defendant represented to the plaintiff that he would provide vendor finance to complete the Contract;
 - (b) whether the plaintiff put itself in the position of not having finance to complete the Contract because of an expectation that the defendant would provide vendor finance; and
 - (c) whether, by conduct on 17 August 2016, the defendant agreed to extend the date for completion to 28 February 2017.
- [3] The plaintiff advanced four legal contentions, based on (hoped for) positive answers to the three disputed factual matters.
- (a) The first was a contention that the defendant was estopped from asserting his right to terminate the Contract. It was put on this basis. The plaintiff expected the defendant would provide vendor finance sufficient to complete the Contract, because of the defendant’s representation to that effect. Due to that expectation, the plaintiff did not act to obtain finance to complete the Contract, as the defendant knew or intended. The plaintiff acted to its detriment by putting itself in the position of not having such finance, and the defendant failed to act to avoid the detriment by either providing vendor finance or extending the time to allow the plaintiff to obtain finance to complete.

¹ Lot 5 on Registered Plan 80184, County of Stanley, Parish of Mitchell, title reference 13393081.

- (b) The second contention was that the defendant induced the plaintiff to believe he would provide vendor finance until it was too late for the plaintiff to obtain other finance, and so caused the plaintiff's failure to complete the Contract. By this conduct, it was contended, the defendant breached an implied contractual obligation to cooperate with the plaintiff to give effect to the Contract.
- (c) The third contention was that the defendant's termination of the Contract would be unconscionable and unlawful. The basis was that the defendant contributed significantly to the plaintiff's failure to complete the Contract, by being a cause of the plaintiff's belief vendor finance would be provided, and so took the plaintiff by surprise in refusing vendor finance.
- (d) The fourth contention was that the defendant waived his right to insist the plaintiff complete the Contract on 18 August 2016, because, the day before, the defendant agreed to extend the date for completion to 28 February 2017.

The plaintiff

- [4] The plaintiff is a proprietary company, limited by shares. It was registered in Queensland on 9 July 2015. It has paid up capital of \$5.00, comprised of five ordinary shares held by JKHD Holdings Pty Ltd as a trustee. The plaintiff sued in its capacity as trustee for the Park Ridge No 1 Unit Trust.²
- [5] Jumshied Kashkari and Hemaka Bandara Dissanayake are the two directors of the plaintiff. Mr Kashkari was born in Srinagar, India. He was aged in his mid-50's at the time of the events the subject of dispute. He gave evidence at the trial. Mr Dissanayake was born in Kandy, Sri Lanka. He was aged in his early 40's at the relevant time. He played no significant role in the events and was not called as a witness.

The defendant

- [6] The defendant is a man in his senior years. He came to Australia in his youth. At that time he could not speak English. His surname was Osadchay. He found that people in this country could not pronounce it correctly. When he was 19 or 20 years of age, he changed his surname by deed poll to Osad, as he said, for an "easier life." He is commonly known as Osachy, a phonetic approximation of his original surname.
- [7] He has hearing difficulties, which affected his ability to listen to questions in court. With technological assistance and some effort on the part of counsel, he gave evidence in chief, was cross-examined and then re-examined. He was a fluent English speaker, but his vocabulary was somewhat limited. A feature of his evidence was an adherence to certain words and phrases, such as "dumb-founded". Perhaps as a result of his hearing disability, the defendant presented as an attentive listener and not a verbose speaker. His answers were short and direct.
- [8] At the time these events occurred, the defendant was affected by health conditions, some continuing. His brother was also unwell. He was reliant upon the assistance of

² There was no evidence about the trust on which JKHD Holdings held the shares or the Park Ridge No 1 Unit Trust. The case proceeded on the basis that such matters were not of any importance.

others. Perhaps due to his age, health and large land-holding, often there were people willing to assist with the introduction of business proposals and the engagement of advisers.

- [9] The defendant seemed to have conducted his business dealings on the basis of personal relationships, in the sense that his confidence in dealing with another party was directly related to how long he had known the individual with whom he was dealing or the person who had introduced the individual to him. Once confident in dealing with an individual, he seemed to have paid less attention to the detail of the dealing and to have been content with an explanation of the main features.
- [10] Throughout his evidence, the defendant displayed a consistent disposition. He was open to listening to new or interesting proposals about the Land. Equally, he was not inclined to agree to any proposal on the spot, but would consider it for a period, make enquiries and ask questions, before accepting or rejecting it.
- [11] His affability towards an individual with whom he was dealing, combined with his openness to consider new proposals, might easily have been confused with an agreeability to whatever the individual was proposing. It might also have been mistaken for a trusting simple-mindedness.
- [12] The defendant frankly acknowledged the uncertainties that attend recalling events three and four years ago. Where a contemporary document differed from his recollection, he was willing to consider it. However, he was careful to circumscribe the limits of any concession. When he did not recall something, for example, he would distinguish between instances where it may have occurred and he simply did not recall it and where he was sure, because he did not recall it, that it did not occur. In this way, he took some care in the evidence he gave to the court.

The Land

- [13] The defendant acquired the Land in about May 1982. It was a reasonably large parcel, considered by some – evidently including the plaintiff – to be suitable for sub-division and development.
- [14] There was interest in the Land. In some periods, the defendant had received up to three offers a day to purchase the Land. He gave evidence of occasions when proposals were put to him: he listened; he went away and thought about them; and then he concluded he was not interested. He frankly accepted he had misunderstood some of the proposals put to him at times about the Land. He was not without experience in the sale of land. He had owned another significant property, which he sold before these events.

The Option

- [15] The origin of the dealings between the plaintiff and the defendant lay in an approach by a man named Harry, who told the defendant he had a buyer for the Land. This was likely in early 2015. According to the defendant, Harry said the buyer was “rich” and would pay a \$1 million deposit and the balance in 30 days. The defendant thought “that sounded very good.” Harry introduced the defendant to Vince Zaccardi. The defendant quickly discovered that Mr Zaccardi was not the buyer. However, sometime later, Mr Zaccardi told the defendant he had a buyer for the Land.

- [16] I accept the evidence of the defendant that Mr Zaccardi organised a meeting with the defendant and Mr Kashkari at the Buranda Village shopping centre. Over ice cream, they discussed the sale of the Land to Mr Kashkari. First, they discussed price. From the defendant's opening offer of \$4.5 million, the price was haggled down to about \$3.3 million. At that point, Mr Kashkari said he wanted a "long-term settlement" of 14 months. The defendant did not like this idea, but he was willing to consider it. At the time he was planning to use the proceeds of the sale of the Land for another purpose, perhaps purchasing a 72 foot fishing trawler. Finally, they discussed a deposit, which Mr Kashkari proposed would be paid in stages. The defendant said he recorded the meeting in his notebook with a date of 11 May 2015. The defendant said at the time he thought Mr Kashkari and Mr Zaccardi were partners interested in purchasing and developing the Land. That was not the case.
- [17] A few days later, likely on 15 May 2015, Mr Kashkari picked up the defendant and drove him to the Brisbane CBD where they attended the office of the solicitors firm Creevey Russell. The firm was acting as solicitors for HDK Capital Property Development Pty Ltd (**HDK**), another company of which Mr Kashkari was a director. There, the defendant was presented with a written Put and Call Option agreement (the **Option**). By the Option, it was proposed that the defendant would grant HDK the right to call for the defendant to transfer the Land to HDK or its nominee.³
- [18] The defendant briefly looked through the Option. He told Mr Kashkari it was not what they had discussed. I accept his evidence that there had been no discussion of a put and call option at the meeting over ice cream. The defendant said all he wanted to do was sell the Land, get the money, and for the parties to go their separate ways. He did not read the document in detail. He was told the Option provided for him to sell the Land, get the purchase price and that the other things in the document "were not terribly critically important." Accepting this, he signed the Option. His signature was witnessed by Stuart O'Neill, who was acting as a solicitor for HDK. The defendant did not have any independent legal advice on the Option, nor the opportunity to obtain any such advice.
- [19] Mr Kashkari gave a different version of how the Option came to be signed. He recalled meeting with the defendant and Mr Zaccardi in April 2015 at the Annerley shopping centre and that "the terms and conditions of the contract" were discussed. He confirmed that the defendant "had a notebook there". Mr Kashkari said the defendant told him "that he doesn't [want] any lawyers to be involved." Contrary to what he said was the defendant's express desire, Mr Kashkari said he had his solicitors Creevey Russell prepare the Option, and gave it to the defendant, saying "go and get you a legal advice".
- [20] Mr Kashkari said the defendant "kept" the Option "for a few days" before the two met at the Easts Leagues Club on 11 May 2015. He said, at the club, the defendant asked him some questions. Mr Kashkari said he told the defendant "I don't know anything about the put and call option", notwithstanding he had had his solicitors prepare it. He said he suggested they go to see his lawyer, Mr O'Neill, which they did. He said: the defendant asked Mr O'Neill questions; Mr O'Neill answered them; and the defendant signed the Option.

³ There was also a "put" option, but it has no relevance to the proceeding.

- [21] Mr Kashkari did not proffer any detailed evidence on this subject when examined in chief. It was only in cross-examination that this evidence emerged. He seemed to anticipate evidence that the defendant might give. Perhaps for that reason, his evidence appeared somewhat rehearsed and not to emerge naturally in response to questions. Mr O'Neill was not called. I prefer the defendant's evidence of the circumstances leading to the execution of the Option.
- [22] The Option is dated 11 May 2015. Accepting the defendant's evidence, I find this was about the day the defendant, Mr Zaccardi and Mr Kashkari discussed the main commercial terms of a contract of sale at the Buranda Village shopping centre.⁴ Nothing turns on the Option being dated some days before the date it was actually executed.
- [23] The Option was executed by HDK by its directors Mr Kashkari and Mr Dissanayake. Each of the directors held 50 of the 100 issued ordinary shares in HDK. These shares were not beneficially held by either director. The beneficial ownership and any relationship between HDK and the plaintiff were not the subject of any evidence.
- [24] By the Option, the defendant granted HDK an irrevocable option for HDK or its nominee to purchase the Land on the terms of an annexed contract,⁵ by giving a notice at any time before 5:00 pm on 20 July 2016.⁶ The annexed contract terms would require the balance of the purchase price (\$3.16 million) to be paid on the Date for Completion. The "Date for Completion" would be 30 days from the contract date.
- [25] Between 27 July 2015 and 4 July 2016, HDK made payments for rates levied on the Land by the Logan City Council and for land tax on the Land. These payments were made in accordance with HDK's obligation under the Option to be "liable to pay all rates, taxes (including land tax) and other outgoings with respect to" the Land on and from 11 May 2015.
- [26] Between 1 June 2015 and 4 July 2016, HDK made other payments to its professional advisers for site concept designs, sketch plan development, attending pre-development meetings, preparing documents for and attending pre-lodgement meetings, ecological assessments, odour assessments, bush fire risk assessments, surveying, preparing development applications, traffic engineering assessments, and payments to the Logan City Council for development approvals. Under the Option, HDK was "responsible for all costs of and related to" the application for development approval for the Land.
- [27] At the time the Option was executed, the plaintiff had not yet been incorporated.

The plaintiff is introduced

- [28] On 27 August 2015, HDK gave a notice to the defendant that the plaintiff was its nominee under the Option. The notice was dated 19 August 2015 and was given under cover of a rather confusing letter from HDK's solicitors.

⁴ i.e. the purchase price, the deposit and the period until settlement.

⁵ This was a standard REIQ contract for the sale of commercial property.

⁶ The "Agreement Date" was 11 May 2015; the "Due Diligence Date" was 40 days after the Agreement Date, i.e. 20 June 2015; and the "Call Option Expiry Date" was 13 months after the Due Diligence Date, i.e. 20 July 2016. The call option would lapse if not exercised by 5:00 pm on the Call Option Expiry Date.

- [29] The defendant was surprised by the notice. He queried it. Mr Kashkari told him the plaintiff was the corporate vehicle Mr Kashkari and his partner intended to use to develop the Land.⁷ The defendant was somewhat put off by this, as he had not heard of or met the partner. However, he accepted what Mr Kashkari said about the nomination being permitted by the Option.

Whether the plaintiff would have secured finance to complete the Contract

- [30] The plaintiff pleaded that it “commenced seeking finance from a number of financiers to complete the Contract” in or around “June 2016”.⁸ It also pleaded that, but for the alleged representation about vendor finance, the plaintiff “would have secured finance and attended to settlement of the Contract on 18 August 2016.” It was for the plaintiff to prove these allegations on the balance of probabilities.⁹

Evidence of the plaintiff seeking finance to complete

- [31] At the trial, it was common ground that between 15 May 2015, when the Option was executed, and about 23 June 2016, nothing was done by HDK or the plaintiff to arrange finance for settlement of the transaction contemplated by the Option.
- [32] There was no evidence that, at any time, the plaintiff sought finance from any financier to complete the Contract. The evidence of what occurred may be briefly summarised.
- [33] On or about 23 June 2016, Mr Kashkari spoke with Paul Maraia, a RAMS Home Loans franchisee. Mr Maraia organised for Mr Kashkari to meet with Daniel Dumble of Arete Finance at a café on 27 June 2016. Neither Mr Maraia nor Mr Dumble nor either of their companies was a financier. Each was an authorised credit representative of a finance broker with an Australian credit licence.
- [34] On 28 June 2016, Mr Dumble sent a lengthy, and appropriate, request to Mr Kashkari, seeking information “to assist with an application for subdivision finance.” Mr Dumble said shortly after that date, he “established that there was no way we could get development finance approved with such a short time frame.” He said the focus changed from a development finance application to finance for funds “to secure the site.”
- [35] On 5 July 2016, the plaintiff’s accountant sent Mr Dumble a diagram of the companies in the group that included the plaintiff.¹⁰

⁷ Both HDK and the plaintiff were owned 50:50 by Mr Kashkari and Mr Dissanayake and the two were the only directors of each company. Any difference may lie in the beneficial ownership of HDK or of the plaintiff or of The Park Ridge No 1 Unit Trust, none of which was the subject of evidence.

⁸ Until an amendment made by leave on the first day of the trial, the plaintiff’s case had been that it commenced seeking finance “in or around late July” 2016.

⁹ At the conclusion of the trial, it was submitted for the plaintiff that there was “no evidence that the Plaintiff could not or would not have obtained finance”. If, by this submission, the plaintiff contended there was a presumption the plaintiff could and would have obtained finance or that the defendant bore an onus to disprove the plaintiff’s ability to secure finance, it was in error.

¹⁰ The diagram was not tendered.

- [36] On 11 July 2016, Mr Dumble warned Mr Kashkari and his accountant by email, “We’re fast running out of time to arrange the finance for the purchase”. Nothing appears to have been done about progressing a finance application over the following two weeks.¹¹
- [37] On Wednesday 27 July 2016, Mr Dumble met with the plaintiff’s accountant and Mr Kashkari, presumably in an attempt to obtain information required to prepare a finance application.
- [38] On Thursday 28 July 2016, at 10:45 am, Mr Dumble sent Mr Kashkari an email titled “Information – Required Urgently” requesting details of personal assets and liabilities of Mr Kashkari and Mr Dissanayake, and management accounts and ATO running balances for “all entities”. Mr Dumble advised he “may have a couple of options to raise the \$3.35m needed to purchase Green Rd, Park Ridge”, but he needed the requested information “urgently if we’re to meet the settlement deadline”.
- [39] At 11:33 am, Mr Kashkari sent Mr Dumble a list of assets: a property in the name of a “family trust” in Auckland, a house in his wife’s name in Srinagar and two pieces of land in Mr Kashkari’s name also in Srinagar. He gave his own estimates of the value of these and also for his furniture and chattels. So far as liquid assets were concerned, he identified \$10,000 as “cash in hand”.
- [40] At 8:05 pm that evening, Mr Kashkari forwarded to Mr Dumble an email chain that passed on Mr Maraia’s advice (dated 7 July 2016) that he did not maintain asset and liability information, other than the application details Mr Kashkari and Mr Dissanayake had given him for a home loan to finance a house at Corinda. Mr Dumble replied to Mr Kashkari’s email list of assets, explaining that he needed “more information than this.”
- [41] At 8:28 pm, Mr Kashkari responded, confirming that the Auckland house was held in trust for Wasiq and Hannan Kashkari, and that the bank account with a credit balance, his mortgage and his credit card liabilities were with Westpac NZ.
- [42] On Friday 29 July 2016, at 10:31 am, Mr Kashkari sent an email to Mr Dumble, passing on Mr Dissanayake’s estimates of the approximate values of three properties in Kandy, described as the “overseas assets of Hemaka”.
- [43] On Saturday 30 July 2016 at 1:08 pm, Mr Dissanayake updated for Mr Dumble some information on his assets and liabilities, including that he owned a unit at Clayfield and a property at Corinda, each of which was financed from borrowed funds, and that he had savings of \$190,000.00.
- [44] On Tuesday 2 August 2016, at 11:03 am, Mr Dumble sent Mr Kashkari the proposed engagement agreement, noting in the covering email the charges that would apply. These were a non-refundable appraisal fee of \$3,500 for him to put together “an urgent loan application”, a monthly fee of \$1,500 until the loan was settled, and an arrangement fee of 3% of the loan facility limit, which could be included in the loan amount and paid at settlement.¹² If the engagement agreement had been accepted, the amount payable to Arete Finance to arrange a proposed \$3.35 million loan to complete

¹¹ In the interim, on 19 July 2016, the plaintiff exercised the Option, triggering a Contract with a date for completion of 18 August 2016.

¹² GST was to be added to each of these charges.

the Contract would have been \$104,000.00 plus GST, and any monthly fees until settlement of the Contract.¹³

- [45] Mr Dumble also set out in the draft agreement the “Security to be offered” to a lender. In addition to a registered first mortgage over the Land, the security included registered first or second mortgages over three properties¹⁴ in Brisbane, personal guarantees from Mr Kashkari and Mr Dissanayake, a general security agreement over the plaintiff and the guarantors, cross guarantees from other “Group entities (where required)” and “Any other security as required by the Lender.”
- [46] The agreement proffered by Mr Dumble was never signed. The management accounts and ATO running balances for “all entities”, which Mr Dumble had requested on 28 July 2016, were never provided to him.
- [47] There was no evidence that the plaintiff engaged any person or firm to attempt to arrange finance to complete the Contract. There was no evidence of any offer of finance, even an offer of a conditional nature.
- [48] There was no evidence that either Mr Kashkari or Mr Dissanayake was prepared to provide a personal guarantee, that the owners of the three residential properties were prepared to provide the registered mortgages, or that the other companies in the “Group” were prepared to provide the cross-guarantees Mr Dumble had proposed be offered to a potential financier.
- [49] There was a more recent example of the gap between the defendant’s view of its position with respect to finance and its true position. Mr Kashkari said he had “a finance approval” to complete the purchase if an order for specific performance were to be made by the court after the trial. He identified the finance approval as a letter from Ajuda Capital Pty Ltd dated 3 June 2019.¹⁵ Despite Mr Kashkari’s description of it, the disclaimer in the letter explained:

“This letter outlines the terms on which we will endeavour to arrange finance for you. It is not an offer of finance.”

A problem in New Zealand

- [50] In 2016, Mr Kashkari was involved in litigation arising from a failed business venture in New Zealand.
- [51] On 26 September 2014, Kiwi Best Realty Limited (**KBRL**) had been placed in liquidation on the petition of the New Zealand Commissioner of Inland Revenue (**IRD**) with creditors of \$664,504.74. KBRL had been incorporated in August 2007 with Mr Kashkari as a director and shareholder. KBRL held a franchise from REMAX Property Group. From early in its history, KBRL was unable to pay its debts as they became due in the normal course of business. The “core” debts of KBRL were owed for periods between 2009 and 2013. They were for PAYE (\$141,724.99), income tax

¹³ The “Client” in the proposed engagement agreement comprised the plaintiff, HDK, two other corporations, Mr Kashkari and Mr Dissanayake.

¹⁴ One at Corinda appeared to be the property identified by Mr Dissanayake in his email of 30 July 2016. The other two were at Indooroopilly, and the owner(s) of those properties remained unknown.

¹⁵ The “indicative” terms included an obligation for the plaintiff to pay on settlement \$219,000.00 as pre-paid interest, \$80,300.00 as an establishment fee, and \$5,500.00 for a lender’s legal fees.

(\$137,063.00) and GST (\$66,005.96). Mr Kashkari borrowed various sums from KBRL over this period. When it was liquidated, his outstanding debt to KBRL was \$111,728.00.¹⁶

- [52] Following the liquidation, Mr Kashkari was pursued for breaches of director's duties. On 15 November 2016, the New Zealand High Court ordered Mr Kashkari to compensate the company for 75% of the total debt incurred by KBRL from 31 December 2009.¹⁷ Reasons were published by Muir J in which his Honour found KBRL had been insolvent from at least 31 December 2009, and Mr Kashkari had continued to operate the company allowing it to trade while insolvent.¹⁸
- [53] The plaintiff submitted that publication of the reasons in *Kiwi Best* "could not possibly have influenced a prospective lender" because publication did not occur until November 2016, some months after "the time when finance was being sought". If any prospective lender had investigated the New Zealand assets Mr Kashkari identified to Mr Dumble,¹⁹ it would likely have identified the pending High Court proceeding in which the company and its liquidators sought to recover more than NZ\$660,000.00 from him. The pending claim would have been a consideration for a prospective lender, had any been approached and apprised of the identified New Zealand assets.

The financial position of the plaintiff's directors and associates

- [54] Leaving to one side the position of Mr Kashkari in New Zealand, on the information Mr Kashkari and Mr Dissanayake provided to Mr Dumble, the plaintiff, its directors and their families and related entities could not have funded settlement of the Contract without external finance. There was no evidence of their ability to service such finance. The plaintiff led no evidence that it had access to other assets or cash-flow.
- [55] The most valuable assets of the directors and their families were in New Zealand, India and Sri Lanka. Any decision to advance funds to the plaintiff would depend principally on a potential lender's view of the value of the Land. There was no evidence that a valuation of the Land was obtained at the time. At the trial, no evidence was adduced of the value of the Land – or of any of the other assets or property that might have been offered as security for a loan.
- [56] In short, there was no evidence to establish, or from which the court could infer, that the plaintiff had sought finance from any financier to complete the Contract, or that the plaintiff had any real chance of securing funds to complete the Contract in 2016.

Exercise of the Option and the defendant's first response

- [57] On Wednesday 20 July 2016, the plaintiff's solicitors gave a notice by email to the defendant exercising the Option, advising that "our client has delivered a hard copy to your mail box." The hard copy of the notice was dated 19 July 2016.
- [58] When the Option was exercised, the defendant was disappointed to learn he would have to wait another 30 days receive the balance of the purchase price. This may explain

¹⁶ There was evidence he discharged this debt by paying \$120,000 to the IRD.

¹⁷ Less a small adjustment for the \$8,272.00 overpayment by Mr Kashkari to IRD.

¹⁸ *Kiwi Best Realty Limited (In Liquidation) v Kashkari* [2016] NZHC 2738 at [28]-[32] (*Kiwi Best*).

¹⁹ The most valuable asset Mr Kashkari had identified to Mr Dumble was an Auckland house (to which Mr Kashkari attributed a value of \$1.4 million, with an associated liability of \$500,000.00).

why, on Monday 25 July 2016, the defendant's solicitors conveyed to the plaintiff's solicitors an offer to repay the security deposit given for the Option and release the plaintiff from the obligation to purchase the Land.²⁰

- [59] The plaintiff contended this letter signalled that the defendant wanted to terminate the Contract and sell the Land to another purchaser for a higher price. Whether this was the case matters less than the logical assumption that the defendant wanted to get out of the Contract. This provides part of the background to the evidence given and the documents tendered about events between that date and the contractual date for completion, which was 18 August 2016.

Evidence of the events of 2 August 2016

- [60] On Tuesday 2 August 2016, Mr Kashkari went to the Easts Leagues Club at Coorparoo and spoke with the defendant.²¹ For more than 30 years, the defendant has been a member of the club. He described himself as a regular at the club, often going there for a meal and conversation.

The defendant's evidence

- [61] According to the defendant, Mr Kashkari said he needed a loan to complete the purchase of the Land. He asked the defendant whether he would be willing to provide vendor finance. The idea was new to the defendant and, as was his general disposition, he was interested to consider it. Mr Kashkari told the defendant he would be prepared to offer interest of 5% per annum. The defendant told Mr Kashkari he would think about it, but did not want to go any deeper into discussion about it that day.

Mr Kashkari's evidence

- [62] Mr Kashkari's recollection of the meeting at the club was quite different. He said the defendant called him and asked for a meeting. He said, when they met at the club, the defendant asked whether he was getting finance for the purchase. Mr Kashkari said he answered, "Yes." He said the defendant then asked Mr Kashkari, "Why don't you give the money which you are giving to the bank to me? I will give you the vendor finance." Mr Kashkari said he responded, "I don't have any problem. We can make the money instead of the bank."

- [63] When asked if the conversation went any further, Mr Kashkari's evidence was:

"so he said he will give me the finance and I wrote it on the piece of paper and I asked him what sort of interest he will be looking for. He said one per cent below the bank rate and I said it's about five per cent, you know..."

- [64] Mr Kashkari was asked whether he recalled that anything else was said in relation to proposed vendor finance. He said that the defendant said "he wants to check that everything is okay with him. The interest rate he wants to check with the bank."

²⁰ The letter also advised that the solicitors were acting for the defendant as seller under the Contract and that they calculated settlement was due on Thursday 18 August 2016.

²¹ This was the same day Mr Dumble had set out the \$104,000 in fees and commissions that would be payable if finance could be arranged for the Contract.

[65] Mr Kashkari produced an undated note in his own handwriting, which he said he made while speaking with the defendant that day. The note is as follows:

- “* 5% Interest
- * Mortgage land
- * Approximately \$14,000 (Approximately)
- * half payable every month
ie \$7000 payable
into Wally nominated
account
- * and half to be capitalized ie \$7000
maximum period 12 months”.

Consideration of the evidence about 2 August 2016

[66] If Mr Kashkari’s account of the discussion was accurate, then he falsely answered “Yes” to the defendant’s question about whether the plaintiff was getting finance. He also allowed the defendant to assume, uncorrected, that the finance was coming from a bank. In fact, the plaintiff was not “getting finance” from any source. None had been sought and none had been secured.

[67] Only eight days earlier, the defendant had offered to terminate the Contract, by agreement, when he learned there would be a 30 day delay between exercise of the Option and payment of the balance purchase price. The defendant was unlikely to have proposed delaying receipt of those funds for another 12 months, as well as deferring half the interest in the interim.

[68] As noted above, Mr Kashkari’s evidence was that, at the end of the exchange, the defendant had said “he wants to check that everything is okay with him”. This is an unlikely stance for a person who, according to Mr Kashkari, had initiated the meeting and sought to persuade him to accept vendor finance.

[69] If, as his note stated, the monthly interest was approximately \$14,000 at 5% per annum, then the principal to be borrowed was approximately \$3.36 million. This exceeded the balance due at settlement (as well as the total purchase price). Mr Kashkari is more likely than the defendant to have known that the plaintiff would require funds in excess of the balance of the purchase price. He is more likely to have made an estimate of that amount. He had had exchanges with Mr Dumble about a finance facility with a limit that exceeded the balance of the purchase price. It was likely a figure Mr Kashkari based on the balance purchase price (\$3.16 million), transfer duty (\$173,150), transfer registration fees (\$10,636), and an estimate of legal costs.

[70] The plaintiff tendered Mr Kashkari’s Optus mobile telephone account. It is a small detail, but the Optus account records a three minute call from Mr Kashkari’s mobile telephone to the defendant’s home telephone number at 7:31 am that day. This is consistent with Mr Kashkari initiating the meeting, as the defendant recalled.

[71] The Optus account also records a six minute call from Mr Kashkari’s mobile to the plaintiff’s solicitor’s office at 4:11 pm on 2 August 2016. If there had been a discussion of vendor finance in the terms recalled by Mr Kashkari, it would be

remarkable that he did not mention it to the plaintiff's solicitors in the call that afternoon. The evidence was that his first mention of vendor finance to the solicitors was not until nine days later, on 11 August 2016.

- [72] On balance, I prefer the defendant's recollection of the discussion that day. I reject Mr Kashkari's version of the meeting, where it departs from the defendant's recollection.
- [73] The Optus account records a 10 minute call from Mr Kashkari's mobile to Mr Dumble's mobile on 4 August 2016 at 6:36 pm. When cross-examined about this, Mr Kashkari said Mr Dumble had left a few messages asking why he was not "signing the contract". There are no other calls to Mr Dumble's mobile on the Optus account and the only voicemail retrievals were at 2:30 pm and 2:36 pm on 2 August 2016.
- [74] On Mr Kashkari's version of the meeting, there was only a prospect that vendor finance might be provided, subject to the defendant checking "everything is okay", the parties reaching agreement on terms, including the sum to be borrowed and the interest rate, and the execution of the legal documents setting out the parties' respective rights. Until documents were prepared, agreed and executed, the terms of any finance offer by the defendant would not be clear. If the plaintiff had had any other prospect of finance and gave it up at this time, it would have been acting unwisely. If that had happened, then the plaintiff would have left itself with no choice but to take the defendant's offer, if it were to be made, whatever that offer might be. In fact, there was no other offer of finance.
- [75] It is likely the lack of diligence about securing finance, which the plaintiff had demonstrated up to 2 August 2016, continued after that date. At some point, perhaps in the long telephone call to Mr Dumble on 4 August 2016, Mr Kashkari may have realised that the plaintiff had left it too late to secure external finance to complete the purchase on 18 August 2016.

Evidence of the events of 6 August 2016

The defendant's evidence

- [76] The defendant said Mr Kashkari contacted him on Saturday 6 August 2016 and asked to meet at the club. According to the defendant, on this occasion Mr Kashkari offered to pay interest at 5.25% on any vendor finance. The defendant said the two "didn't go that far deep into it", so that, according to the defendant, the discussion remained at the same superficial level as the discussion on 2 August 2016.
- [77] Mr Kashkari then asked the defendant to go with him so he could show him something. Mr Kashkari said he would drive the defendant there and drive him back. This turned out to be a visit to the studio apartment occupied by Mr and Mrs Kashkari in Costin Street, Fortitude Valley. Given the defendant's state of hearing, it is possible that Mr Kashkari explained more about the nature of the trip than the defendant understood.
- [78] The apartment was small with a single open plan room that included the kitchen, the dining and living area and a bed. Mrs Kashkari described it as a "really small, small apartment", "not really an apartment", and "little - like a bigger room". When the defendant arrived, Mr Kashkari introduced him to Mrs Kashkari, who was there. The defendant recalled Mr Kashkari cooked a meal of rice, beans and fish. Mr Kashkari thought his wife cooked the meal. The defendant said he felt uncomfortable being in

the small apartment, unexpectedly, with the two residents, and so he did not say much. He thought he was there about 45 minutes, before Mr Kashkari drove him back to Coorparoo. He recalled Mrs Kashkari asked him something about a loan and that he told her, Mr Kashkari was “asking for 5.25 percent”.

Mrs Kashkari’s evidence

- [79] In giving her evidence, Mrs Kashkari made it clear that she did not have “any discussion officially” with the defendant, because her husband was “dealing with it.” She said she “had unofficially asked him about some things about the interest rates he was going to give us”. Mrs Kashkari was not asked and did not explain what she intended to convey by characterising her discussion as “unofficial”. In the context of her evidence and her manner of speaking, I took it to mean that the discussion was an informal or casual conversation and (on her part) was not intended to be of any importance or legal effect.
- [80] Mrs Kashkari, when pressed about what she asked the defendant, said it was, “What interest rates will you give us?” Mrs Kashkari did not remember exactly what the defendant said in response. She thought he said “5 percent less than the banks or something”. She was sure the defendant had said it was “less than the banks”, but unsure of any figure. Mrs Kashkari made it clear that her recollection was poor, as the conversation had happened “a long, long time ago”.

Mr Kashkari’s evidence

- [81] Mr Kashkari said he called the defendant on the morning of 6 August 2016 and arranged to meet him at the club. They met after midday. Mr Kashkari gave the following evidence of the meeting:

“He carried a bundle – he – he had something – papers in his hand. He said he got that from the bank. That’s the interest – interest, and it’s quite – he said to me it’s quite substantial.

... The interest, what he would will getting is quite substantial. That’s what he said to me.

... Yeah. So he said he got it from the bank, the interest. Here’s some – you know, I didn’t see it fully, but he had some – he showed me. He said to me, “These are the interest rates – current interest rates.”

- [82] Asked by the plaintiff’s counsel whether the defendant said anything else, he answered:

“No, he said to me he – you know, he’s – he’s – he will – he’s happy with 5.25 interest rate.

...

Then I said to him, “We have to make the documentation.” He said let – let – let him and me make the documentation. Let us make the documentation between myself. I said, “We can’t do it. It’s a mortgage documents.” He said because he doesn’t want to pay the lawyers. I said, “Okay. Is it – I will.” He asked me to get the documentation made to my lawyer, and I said, “Okay I will make it for my lawyer and I will

give you the money to seek the legal advice.” I said, “You need to seek the legal advice.””

[83] Mr Kashkari was then asked “what were the other terms?” He answered:

“Other terms were 12 months and, you know, he will get whatever interest; half of the interest he will get a month and half will be capitalised.”

[84] When asked “how is that agreed? Who said what?”, he was unable to provide a responsive answer. There followed the following exchange with the plaintiff’s counsel:

“And when was that? --- That was in that – that was also in the first meeting as well as in the second meeting.

In both? --- Both meetings.

And how did that meeting on the 6th of August conclude? --- So once we shook hand at everything, so I took him home. ...”

[85] Mr Kashkari also gave evidence about a discussion at the Costin Street apartment. His evidence was that in the presence of the defendant, he said to his wife, “We’ve got this – Wally is giving me vendor finance.” When asked again what occurred, his evidence was that he said:

“Wally is giving me vendor finance and Wally – the term is 12 months and 5.25 interest rates and – and I’m going to – I’m going to, you know, instruct my lawyer to make the documents.”

[86] Mr Kashkari also said that, in response, the defendant had volunteered, “Yes, go ahead.”

Consideration of the evidence of 6 August 2016

[87] The defendant’s evidence departed from that opened and pleaded on his behalf, but it was given as a frank account and where it departed from his case, it was to his own disadvantage.

[88] Mrs Kashkari’s recollection was similar to, but in important respects not the same as, that pleaded by the plaintiff in paragraph 17A of the second further amended statement of claim:

“While at Kashkari’s house, and in Kashkari’s presence, Kashkari’s wife, Nilofar Kashkari, asked the Defendant what interest rate **he had agreed** to give the Plaintiff, and the Defendant stated in response that it was ‘less than the bank rates’.”²² [emphasis added]

[89] This allegation was introduced by an amended pleading, filed by leave on the first day of the trial. It explains why Mrs Kashkari was called as a witness.

[90] Given the caveats she placed on her recollection, I prefer the defendant’s evidence of what occurred to that given by Mrs Kashkari.

²² Second further amended statement of claim, [17A](b).

- [91] Mr Kashkari's evidence of what occurred at Costin Street was oddly specific and oddly different from what he had instructed the plaintiff's solicitors to plead earlier the same day, as the trial began. It was entirely different to the exchange recalled by Mrs Kashkari in which she *asked* the defendant about the interest rate.
- [92] There are other oddities about Mr Kashkari's evidence of the events of 6 August 2016.
- [93] First, it is inconsistent with the balance of his own evidence. Shortly after he recalled saying, "Wally is giving me vendor finance", Mr Kashkari gave evidence that he told his accountant, "Wally has called me. He's offering me the vendor finance" and that his accountant said to him, "Just go for it. It's – it's much – you know – economical." At one moment, Mr Kashkari's evidence was that a deal on vendor finance had been reached at the club on Saturday 6 August 2016, before the visit to Costin Street – so that by the time he introduced the defendant to his wife, the matter had been concluded – and, a moment later, his evidence was that an offer of vendor finance was made by the defendant in a telephone call and he was getting advice from his accountant about whether or not to accept it.
- [94] There was a similar confusion on Mr Kashkari's part during cross-examination, when he said:
- "... I started getting the finance and as soon as I started getting the finance sorted out, Wally called me and he said, he – he will give me the finance. That's what he said to me in – in the meeting."
- [95] Secondly, his evidence was inconsistent with unchallenged near contemporaneous documents.
- [96] On Tuesday 9 August 2016 at 8:53 am, three days after the alleged agreement to provide vendor finance, Mr Kashkari sent the defendant a message on WhatsApp:
- "Wally Good Morning
See you in the club at 11am. Thanks
Cheers Jumshied".
- [97] At 10:25 am, the defendant sent an email to Mr Kashkari:
- "Hi Jumshied, Sorry I cant [sic] make it to the club at 11:00 am today, but could you please email to me, as to what you offer, and I will talk to you later."
- [98] No responding email was put in evidence. However, the Optus account records a six minute call from Mr Kashkari's mobile to the defendant's home telephone at 10:34 am, i.e. about nine minutes after the email was sent.
- [99] At 11:55 am the same day, the plaintiff's solicitors wrote to the defendant's solicitors, enclosing the statutory forms for the transfer of the Land to be signed by the defendant in anticipation of settlement. They also reserved the plaintiff's right to effect settlement at any time up to 4:00 pm on the agreed date for completion, 18 August 2016. The solicitors' letter made no mention of vendor finance. This may be explained by the third oddity.

- [100] Thirdly, Mr Kashkari did not tell his solicitors about vendor finance until the afternoon of Thursday 11 August 2016, i.e. nine days after he said the defendant proposed vendor finance, five days after he alleged the defendant agreed to provide it, and only seven days before the date for completion. This delay was not explained. If terms for vendor finance had been offered, represented or agreed on Saturday 6 August 2016, it seems very unusual that Mr Kashkari would not call his solicitors about it on the following Monday, Tuesday or Wednesday. Given the short time remaining until settlement and the need for legal documents to be prepared, considered, agreed and executed, the delay is quite unusual.
- [101] The plaintiff tendered a file-note of a telephone conversation between Mr Kashkari and Daniel Birch, the plaintiff's solicitor, dated Thursday 11 August 2016 at 3:22 pm. The note begins "p/o Jumshied", which appears to indicate a 'phone call "out" to Mr Kashkari at that time. Mr Kashkari recalled that it was Mr Birch who called him. The file-note reads, "Wally said will do vendor finance". It also records that Mr Kashkari gave Mr Birch instructions about vendor finance, including the term, the interest rate, the capitalisation of interest and the monthly repayment amount.
- [102] Mr Kashkari's Optus account records no calls to the plaintiff's solicitors between a call at 4:11 pm on 2 August 2016 and the next at 12:59 pm on Thursday 11 August 2016. A call to the plaintiff's solicitors' office at 3:26 pm that day roughly aligns with the file-note.²³ That was the fourth call from Mr Kashkari's mobile to the plaintiff's solicitors' office that day; the earlier calls were at 12:59 pm, 2:41 pm, and 2:59 pm.²⁴ It is also unusual that, having waited five or nine days to inform the solicitors, he would not mention it until about the time of his fourth call to the solicitors on that day. However, Mr Kashkari said he tried to call Mr Birch on 11 August 2016, so these earlier calls may have been unsuccessful attempts to contact him.²⁵
- [103] In the solicitor's note of the 11 August 2016 call, three additional terms are mentioned:
- "1 month early can payout.
1 month notice before taking action to enforce mtge.
No event of default if 2nd mortgage."
- [104] There was no evidence that any of these terms had been discussed with the defendant. They are likely to have been raised by the solicitor in the course of the telephone conversation with Mr Kashkari. The note includes an instruction to "give doc's to Jumshied". I take this to record Mr Kashkari's instruction for the solicitor *not* to send the proposed mortgage documents to the defendant's solicitor. This is contrary to what one might expect in conventional conveyancing practice.
- [105] In the circumstances, I prefer the evidence of the defendant as to the events of 6 August 2016: that a further general discussion of vendor finance took place in which Mr Kashkari said he would be prepared to pay interest at 5.25% per annum. Mr Kashkari may also have proposed capitalising half the interest and a 12 month term for the loan.

²³ Mr Kashkari's Optus account records a one minute call to the plaintiff's solicitors' office at 3:26 pm, which roughly aligns with this file-note, but may have been Mr Kashkari conveying an additional thought or an accidental re-dial. No file-note was produced for any later call.

²⁴ Each was of one minute duration.

²⁵ No records or other evidence was adduced of Mr Kashkari's incoming calls over this period.

Evidence of the events of 12 – 15 August 2016

- [106] On Friday 12 August 2016 at 2:43 pm, the plaintiff’s solicitors sent Mr Kashkari a draft mortgage “which also includes the loan terms.”²⁶ They asked him to call when he had had an opportunity to review it. This ought to have made clear to Mr Kashkari there were matters to be considered which, if included in the draft, would have to be agreed with the defendant before the draft mortgage could be finalised.²⁷
- [107] On Saturday 13 August 2016 at 1:47pm, Mr Kashkari sent the defendant a message on WhatsApp, “Hi Wally/ Hopefully you are well and wish you a speedy recovery/ Jumshied”.
- [108] The message showed Mr Kashkari was able to contact the defendant using WhatsApp. I infer he had not been in contact with the defendant by this means since the telephone call on the morning of 9 August 2016,²⁸ shortly after the defendant had cancelled the meeting at the club and had asked Mr Kashkari to explain by email “what you offer”.
- [109] There was no evidence of any relevant communication on Sunday 14 August 2016.²⁹
- [110] On Monday 15 August 2016 at 11:13 am, the Optus account records a seven minute call from Mr Kashkari’s mobile to the defendant’s home telephone.
- [111] At 11:30 am, Mr Kashkari sent an email to Mr Birch asking him to “put the amount figure in the contract and email me that page.” Mr Kashkari continued, “I just spoke to Wally he wants that there.”
- [112] Later on 15 August 2016, at 4:32 pm, the plaintiff’s solicitors sent Mr Kashkari an amended draft mortgage, specifying the Principal Sum to be \$3,178,311.00. The solicitors asked Mr Kashkari to provide \$173,150.00 for stamping of the transfer “as soon as possible”. They also attached a draft settlement statement “for your review.”
- [113] The plaintiff did not provide funds to its solicitors to pay the transfer duty. When asked about this, Mr Kashkari said “we had our own funds” and “I didn’t pay him because ... Wally was supposed to give me the vendor finance. Then I had a few days to pay it.” The plaintiff’s solicitors’ letter was correct, as far as they understood the position. The plaintiff did not have a few days after settlement to pay the transfer duty, because a stamped transfer would be required to register the proposed mortgage to the defendant and so the transfer duty funds were required as soon as possible. If the plaintiff had \$173,150.00 in funds, it had not disclosed that fact to Mr Dumble about a fortnight

²⁶ The draft was of the Form 2 Mortgage and the Form 20 Schedule. The Schedule provided for all amounts advanced by the defendant to the plaintiff “in the purchase” of the Land (an unspecified sum) to be secured by the mortgage and to be repaid in full on a date 12 months from the date the plaintiff becomes the registered proprietor of the Land. Interest was to be at 5.25%. \$7,000 of the interest was to be paid monthly in arrears and the balance was to be “capitalised” and to form part of the principal, presumably then accruing interest, from the monthly repayment date.

²⁷ This may have been clear already from the additional terms raised in his telephone conversation with Mr Birch three days before.

²⁸ The plaintiff tendered only two extracts of WhatsApp. This page, recording exchanges on 9 and 13 August 2016, and an earlier page with exchanges on 2 July 2016 about the weather and swimming.

²⁹ The defendant said he saw Mr and Mrs Kashkari at a farmers market on the Sunday, where Mr Kashkari asked “How about that loan?” and the defendant replied, “I don’t want to talk about this now. I don’t want to talk about it.” The Optus account recorded a three minute call from Mr Kashkari’s mobile to the defendant’s phone on 14 August 2016 at 9:25 am. No evidence was adduced about that call.

earlier. Mr Kashkari did not have that amount. Mr Dissanayake was not called to give evidence about whether he could or would have provided the funds.

- [114] The plaintiff's solicitors also advised Mr Kashkari they had sought a two week settlement extension "as instructed" and were awaiting a response.³⁰ Mr Kashkari said it was the plaintiff's solicitor, Mr Birch, who raised an extension of time:

"He said that it's becoming very tight, can we seek an extension, so that we can sort all these things out. That's one – I said – I said to him, "That's okay," you know, so ---".

- [115] Mr Kashkari's Optus account records two calls to the plaintiff's solicitors' office that day, at 11:07 am and at 11:27 am, each of one minute's duration. Mr Birch was not asked about any telephone attendances on that day. One of these is likely the occasion on which Mr Kashkari gave instructions to seek an extension of the date for completion.
- [116] Two letters from the plaintiff's solicitors to the defendant's solicitors dated 15 August 2016 were tendered. They are similar in text, but in an important respect not the same. Only the second had the attached "draft settlement statement" described in the text of the letter. I infer that it was the version actually sent. That version qualified the draft settlement statement as subject to the plaintiff's instructions, which were still being sought.
- [117] The draft settlement statement included an amount of \$3,178,311.00 described as a cheque to be "drawn at settlement" by the defendant and "to be provided by way of vendor finance". In this way, the plaintiff's solicitors proposed that the defendant would finance not only the balance of the purchase price (\$3.16 million), but also the transfer fees (\$10,636.00) and the \$175.00 registration fee for the mortgage. This letter, three days before the date for completion, was the first communication between the parties' respective solicitors about vendor finance.

Mr Kashkari's evidence

- [118] Mr Kashkari evidence unfolded in this way. He was taken by the plaintiff's counsel to the solicitors' 12 August 2016 email to him attaching the draft mortgage documents and asked, "And what did you do when you received those documents from your lawyer?" He answered:

"I had – I had a – you know, I printed that and then I called – I called Wally. I said, "Wally, the mortgage documents are ready. Can I come and see you to sign?" He said, "Okay. Tell me what are the terms in it." He asked me what are the terms, so I said to him that the terms is 12 months, interest rate is – he asked me for the interest rate, 5.25, and then the loan amount. I couldn't see the loan amount. I said there is no loan amount there written in the first document.

...

³⁰ This letter was not put into evidence, but it is referred to below in the defendant's solicitors' reply of 16 August 2016.

He said to me that, “No, can you ask – can you get the – can you please get – can you get the – your lawyer to put the loan amount there.””

The defendant’s evidence

[119] The defendant did not recall the telephone conversation on 15 August 2016. He was very clear that, “We did not have a conversation that I can recall regarding him receiving any documents on mortgage. ... That day or any other day.” On this basis, the detail of the conversation, as recalled by Mr Kashkari, was not put to the defendant in cross-examination.

Consideration of the evidence

[120] The following aspects of Mr Kashkari’s evidence are troubling.

[121] First, he had received the draft mortgage documents from his solicitors by email on 12 August 2016 at 2:43 pm, three days before he called the defendant. In this evidence, he said he received them, printed them and made the telephone call to the defendant. If that was his recollection, it was incorrect. If, as I think more likely, he was attempting to reconstruct what occurred, his evidence was not reliable. When the plaintiff’s counsel pointed out this inconsistency, Mr Kashkari apologised, “Sorry, I got nervous or I just forgot when exactly it is.” He then accepted counsel’s suggestion that the call was on the Monday.

[122] Second, he said that, in the 15 August 2016 telephone call, the defendant asked about the terms of the mortgage, and about the period of the loan, the interest rate and the loan amount. His earlier evidence was that those terms had been agreed at the club nine days before on 6 August 2016 – or even earlier on 2 August 2016.

[123] In his 11:30 am email to Mr Birch, Mr Kashkari does not tell the solicitor the loan amount to insert in the mortgage. He writes only “please put the amount figure in the contract”. At 4:32 pm that day, Mr Birch sent Mr Kashkari the amended draft mortgage into which he had inserted \$3,178,311.00 as the “Principal Sum”. Mr Birch had calculated that figure by adding to the balance purchase price (\$3.16 million) “buyer allowances” for “Removal of Shed” (\$7,500.00), the transfer fees (\$10,636.00) and the fee for registration of the mortgage (\$175.00). It is unlikely that Mr Kashkari was able to tell the defendant this “loan amount” in the morning’s telephone conversation. Mr Kashkari’s evidence of the conversation is consistent with him being unable to do so. As he described the conversation, there was no discussion of the actual amount or of the defendant advancing money to pay the buyer allowances.

[124] Third, the period of the loan, the interest rate and the loan amount are the key components of a vendor finance proposal. The questions Mr Kashkari says the defendant asked indicate that the defendant was not aware of these key elements of a vendor finance proposal.

[125] A number of times, the defendant said that, sometime after his initial interest in hearing Mr Kashkari’s vendor finance proposal, he decided he was not interested in pursuing it. On 9 August 2016, the defendant had asked Mr Kashkari to “email to me as to what you offer, and I will talk to you later.” There had been no email proposal, nor any other communication of an offer since then.

[126] The next day the defendant appears to have discussed with his solicitors a desire to terminate the Contract if the plaintiff failed to complete, telling them there would be no vendor finance.

[127] When cross-examined about his attitude to vendor finance, the defendant said:

“Vendor finance, first I thought and then, no, I don’t want to talk about vendor’s finance. The first time it was the news. You know, it was exciting to hear, to know. Afterwards, not at all. Not if I’ve got to wait another 12 months or so forth. I didn’t want to go – I’m not a lending company and I didn’t want to go into it.”

[128] Considering all these matters, it is likely that the 15 August 2016 telephone conversation was the occasion when Mr Kashkari told the defendant what the plaintiff was offering in terms of a vendor finance proposal. It may have been the occasion when the defendant told Mr Kashkari he was not interested.

Evidence of the events on the morning of 16 August 2016

[129] On Tuesday 16 August 2016, at 10:38 am, Mr Kashkari’s Optus account records a six minute call from his mobile to the mobile telephone of the solicitor Mr Birch. No file-note related to the call was produced. Following the call, at 10:49 am, the plaintiff’s solicitors sent Mr Kashkari an “updated mortgage” by email. It specified the “Principal Sum” as \$3.6 million. The email advised that a “letter to provide to wally will follow shortly.”³¹

[130] At 10:58 am, the defendant’s solicitors replied to the plaintiff’s solicitors’ correspondence of the previous day. Relevantly, they asked for the basis of the “presumption” that the defendant would be providing vendor finance. They advised the request for an extension of settlement to 1 September 2016 was not agreed. Instead, the defendant’s solicitors advised, “Please note that settlement is to take place on Thursday 18 August 2016 without Vendor Finance at our offices at Forest Lake.” They also asked the plaintiff’s solicitors to “resubmit transfer documents with the correct name, Wally Osad indicated as Transferor.”³²

[131] At 11:49 am, the plaintiff’s solicitors replied, attaching an updated transfer “reflecting your client’s correct name.” There was no immediate response or explanation from the plaintiff’s solicitors about the vendor finance “presumption”. The plaintiff’s solicitors did not refer to or attach a copy of the mortgage documents they had prepared and provided to Mr Kashkari that morning.

[132] At some time on the morning of 16 August 2016, Mr Kashkari went to the defendant’s house with the draft mortgage documents and \$1,500 in cash in an envelope. He handed them to the defendant. I infer this occurred after 10:49 am, when the plaintiff’s solicitors sent the draft mortgage to Mr Kashkari.

Mr Kashkari’s evidence

³¹ I take this to mean that the plaintiff’s solicitors had been instructed to prepare a letter that Mr Kashkari could provide directly to the defendant. No later email or any draft (or final) letter to the defendant was tendered at the trial.

³² The Form 1 Transfer submitted on 8 August 2016 had named the transferor as “Wally Osachy”. The registered proprietor was “Wally Osad”, the defendant’s legal name.

[133] Mr Kashkari's recollection of his interaction with the defendant was somewhat confused. At first, in his evidence in chief, he said he was taken to a room where the defendant was and asked him, "Wally, why you are ... Why your lawyer has written that". He then apologised to the plaintiff's counsel, saying, "Sorry – I don't remember what I did, you know." When the question was put again, he said, "Sorry – I got a little bit confused. Can I just – just ... think on it again, you know." After a pause, he continued:

"So, basically – yes basically, I went to his house and there was a cancelling – you know, they said they won't give us the mortgage. I said to Wally, what is your lawyer writing that he won't give a mortgage to me – you know, the Chin – the lady – the Chinese lady took me to him - his room. So he said to me, don't worry about him. He – he is doing – my lawyer is – is doing it without my instructions. He's doing it of his own without my instructions. And that was his words. And I said to him, okay, these are the mortgage documents and this is \$1500 cash. Please see – go to see the lawyer. He said to me, yes, give me these. I will read – I will have a read of them and also, I will take the – I will take the documents to – I will – I will take – I will see the lawyer too. So he – you know, the money was in envelope but it was not sealed – it was not sealed. So he opened it and he saw the money there."

The defendant's evidence

[134] The defendant's evidence of his interaction with Mr Kashkari on the morning of 16 August 2016 was:

"I was all prepared. It was pre-arranged that I go and see the lawyer, but I had to produce my deeds, any information for the property for the lawyer [to] arrange for the transaction. I get the money. He gets the change of ownership papers. He goes his way; I go my way. Anyway, because I was prepared, I had the suitcase. I left the house. I was between my front door of the house and the gate. Jumshied pulls up. ...

He pulls up, walk up to me and he gave me some papers. I was dumbfounded sort of thing. Some papers and an envelope. I don't like to say the word now, but I said something, "Hey. What's this?" By then, I had arranged a lift. I had documents in hand. I walked out. I got bundle – quite a few pages, an envelope. I walked out. He – he just walked in, gave it to me and says, "Give this to your lawyer.""

Consideration of the evidence

[135] I prefer the defendant's evidence of this interaction to that provided by Mr Kashkari. The defendant appeared to be drawing on an actual memory. Whereas Mr Kashkari appeared to be attempting to deliver a partially memorised text, correcting himself when he used a word that departed from the one he had rehearsed. Mr Kashkari's evidence appeared to be framed by a careful reading of the defendant's solicitors' letter of 10:58 am that day, from which he had drawn an inference that the solicitors did not have instructions from the defendant about vendor finance.

[136] Having listened to the defendant give evidence for some time, I am satisfied that he was quite unlikely to use the expression "without my instructions". When he was cross-

examined about the passage “We have been instructed by our client ...” in another of his solicitors’ letters,³³ he did not understand the meaning of that expression in terms of dealings of solicitors with their clients. On that topic, he is more likely to have said his lawyer “does his own thing” or “What he does, he does”, as he said on the later occasion.

[137] Another oddity relates to the cash.

[138] Mr Kashkari had the plaintiff’s solicitors prepare the draft mortgage documents and, it appears, a covering letter. He knew solicitors were acting for the defendant. Mr Kashkari took the unusual step of obtaining the documents from the plaintiff’s solicitors and delivering them personally to the defendant. In this way, the defendant received the papers directly, without the filter or immediate assistance of the defendant’s own legal advisers. This was contrary to the defendant’s wishes, as confirmed by the following letter requiring that all communications be through his solicitors.

[139] Mr Kashkari had given evidence that on 15 August 2016 he had called the defendant and asked to meet him to sign the mortgage documents. I do not accept that evidence as accurate, but in giving it Mr Kashkari indicated he had in mind that he might be able to persuade the defendant to sign the mortgage without any legal advice.³⁴

[140] If Mr Kashkari intended the cash and documents be provided to the defendant’s solicitors, it is odd that he chose a scheme of delivery that deliberately circumvented the defendant’s solicitors. Mr Kashkari must have known that this would delay the defendant obtaining independent legal advice on the draft mortgage documents. Given the very limited time before settlement, any delay would be of significance.

Evidence of the events later on 16 August 2016

[141] On 16 August 2016, following the interaction with Mr Kashkari at his home, the defendant met with his solicitor. He handed over the certificate of title for the Land and other papers. He also gave his solicitor the mortgage papers and the envelope containing the \$1500 in cash. He told his solicitor he was not interested in providing vendor finance.

[142] By a second letter to the plaintiff’s solicitors, sent by email at 3:11 pm that day, the defendant’s solicitors confirmed that “there are no terms as to Vendor Finance.” The second letter recorded that Mr Kashkari had come to the defendant’s home with mortgage documents that morning. The defendant’s solicitors asked that all communications concerning the transaction be through their office “without exception.” They sent a copy of this letter to the defendant at 3:14 pm, describing it as “setting out your instructions apropos our meeting earlier today.”

[143] In the second letter, the defendant’s solicitors also stated that the defendant had told Mr Kashkari “there was going to be no Vendor Finance provisions” and that the defendant had said he would not agree to vendor finance. In his evidence at the trial, the defendant did not recall having such an exchange with Mr Kashkari during the

³³ The letter was sent at 3:11 pm on 16 August 2016, and is dealt with below.

³⁴ Mr Kashkari explained that the defendant did not sign the mortgage because he wanted the amount of the advance to be stated in the document.

encounter that morning. He did recall telling his solicitor that he was not interested in vendor finance. I infer that the solicitor misunderstood the defendant's instructions.

Evidence of the events of 17 August 2016

[144] There was no evidence of any written communications between the parties on Wednesday 17 August 2016. The Optus account records no calls to the defendant from Mr Kashkari's mobile telephone that day.

Mr Kashkari's evidence

[145] Mr Kashkari gave evidence that he again visited the defendant's home, late in the morning of 17 August 2016. If this occurred, it was directly counter to the instruction conveyed by the defendant's solicitor in the letter sent at 3:11 pm the previous, day. Mr Kashkari said he asked the defendant "why – your lawyer is trying to – you know, she – she doesn't want to give vendor finance and she's asking me not to see you." According to Mr Kashkari, the defendant responded, "don't worry about her – about him, he's doing without – without my instructions, and he's a shark – he's a shark."

[146] Mr Kashkari's account continued with the defendant telling him "the documents are no good". I understood this to be a reference to the draft mortgage documents. Mr Kashkari said he responded, "I'm now confused. ... The – my – and my lawyer – you know, I'm now confused – so can we do an extension?" He said, the defendant replied, "Yes." Mr Kashkari's evidence was that he then asked, "How much extension – can you give me for six months?" And that the defendant said, "Yes."

[147] Mr Kashkari's evidence was that he, Mr Kashkari, then said, "I can give you the interest for that." The defendant is supposed to have responded, "Don't give me the interest because if I – if you give me the interest, I have – I have to pay the tax" or said, "Can you bump up the price ... instead of giving me the interest?" Mr Kashkari gave his explanation that the defendant suggested he "bump up the price" because the Land had been purchased before the capital gains tax came into force. Mr Kashkari said he offered to "bump up" the price by \$100,000.00 and the defendant said, "Go and make the documents."

[148] Mr Kashkari said he went home and "got the document ready". Mr Kashkari said he called the defendant when the document was ready, which he said was at 3 o'clock or thereabouts.³⁵ Mr Kashkari said the defendant told him he was going for a swim at the Colmslie public swimming pool and proposed that the two meet there. He said the defendant told him he would call him back with a time. This evidence corresponded to another amendment to the pleading made by the plaintiff on the first day of the trial.

[149] Mr Kashkari said the defendant called him and told him to meet at the pool at about 5:30 pm. He said he went to the pool with the purpose of getting the defendant to sign the document and gave the following evidence of what happened:

"I gave him the document and also, we had a – a swim together, and we – we were there – I don't remember the exact time but quite a long time, maybe an hour – maybe less or plus, you know."

³⁵ The Optus account records a two minute call from Mr Kashkari's mobile to the defendant's mobile at 3:50 pm.

- [150] The plaintiff's counsel asked him whether there was any discussion of the document. Mr Kashkari answered:

“He said to me he's going to – he's going to take it home and sign it and email it to me.”

- [151] Mr Kashkari identified the “document” as one page with the following typed text:

“RE: HEMJUM PTY LTD as TRUSTEE PURCHASE FROM WALLY OSACHY

PRPROPERTY: 193 - 205 GREEN ROAD, PARK RIDGE

Both Parties agree for the extension of settlement and the new settlement date shall be on or before 28th of February 2017

Both parties agree that the Purchase price shall be \$3,450,000.00 (Three Million Four hundred and fifty thousand Dollars) and not \$3,350,000.00

.....

Wally Osachy

Dated: 18/8/2016

.....

HEMJUM PTY LTD AS TRUSTEE

Dated: 18/8/2016

Jumshied Kashkari

Director”.

- [152] Under cross-examination, Mr Kashkari accepted he had previously said he gave this “extension document” to the defendant on the following day, 18 August 2016.³⁶ He said that was an error on his part. He described the two dates in the document “18/8/2016” as “a human error” and a “typing error” on his part. Until the amendment of the statement of claim, the plaintiff's case had been that Mr Kashkari and the defendant met at the pool on 18 August 2016.³⁷

The defendant's evidence

- [153] The defendant gave evidence that he did not see Mr Kashkari on 17 August 2016 and did not have any conversation with him. He accepted that Mr Kashkari had mentioned increasing the purchase price by \$100,000.00, but, he said, that was “quite some time ago but never on the 17th.” The defendant said he did not want to talk with Mr Kashkari, “I did enough with him. I didn't want to continue with him anymore.”
- [154] The defendant did recall seeing Mr Kashkari at the pool, but was unclear as to the date. He said it was before 16 August 2016, because he did not recall seeing Mr Kashkari between the encounter outside his house on 16 August 2016 and the termination of the

³⁶ Initially, the plaintiff pleaded that this occurred on 18 August 2016. That was admitted by the defendant. The plaintiff then withdrew that allegation, to assert the meeting was at the pool on 17 August 2016. The defendant denied that allegation.

³⁷ The plea that they met on 18 August 2016 had been maintained from the commencement of the proceeding, in November 2016, until the beginning of the trial on 4 June 2019.

Contract on 18 August 2016. The defendant described the occasion in this way. While the defendant was doing laps in the pool, Mr Kashkari started to walk beside him and wanted to talk about the purchase. The defendant said he told Mr Kashkari, “Hey, I’m here not for that. I’m here for my exercise. I don’t want to start business now.” And, “I don’t want to talk about it.” The defendant was adamant that he did not see Mr Kashkari at the pool on 17 August 2016, because he said he did not go to the pool that day.

Consideration of the evidence

- [155] There were a number of aspects of Mr Kashkari’s evidence of his first discussion with the defendant on 17 August 2016 that make it an inherently unlikely account of anything that actually occurred.
- [156] First, the defendant is unlikely to have used the expression “without my instructions” because, as noted above, he was not familiar with it.
- [157] Second, only the day before, the defendant had refused in writing a request for an extension of two weeks. Yet Mr Kashkari says the defendant agreed immediately to a six month extension, apparently on the basis that Mr Kashkari said he was “confused”.
- [158] Third, only the day before the defendant had been to see his solicitor and the afternoon before had received a copy of his solicitors’ letter sent after that meeting. So, Mr Kashkari’s evidence amounts to an allegation that the defendant lied to him about an important matter.
- [159] Fourth, the defendant is said to have agreed to this lengthy extension for no consideration. Then Mr Kashkari – for the plaintiff – is said to have volunteered to pay the defendant interest and as an alternative offered a \$100,000.00 increase in the purchase price. There was no haggling about the change of purchase price. There was no evidence of any communication with the plaintiff’s other director, Mr Dissanayake, about these changes to the transaction. Each of these things is unlikely to have occurred as Mr Kashkari recounted them.
- [160] Finally, the defendant was evidently sensitive about people coming to his house, particularly when not invited.³⁸ An unheralded visit, such as that recounted by Mr Kashkari, was unlikely to have resulted in the “very friendly” reception Mr Kashkari recalled.
- [161] The plaintiff sought to support Mr Kashkari’s evidence of a meeting at the Colmslie pool by reference to a letter from the defendant’s solicitors sent by fax at 1:07 pm on 18 August 2016. I agree with the defendant’s submission that the most likely explanation is that the letter, which referred to alleged harassment at the defendant’s “residence” as well as at “a public swimming pool”, was citing earlier examples of Mr Kashkari’s conduct as a reason for referring any recurrence to the police. I accept the defendant’s evidence that he did not meet or speak with his solicitors about any encounter at the pool that day. During this period, the defendant’s solicitors appear to have received information from Zaffir Khan. He was a more recent acquaintance of the defendant,

³⁸ He expressed his objection to Mr Kashkari doing so the day before and he recalled another occasion when Mr Kashkari came to the house, albeit in the evening, and walked through to find the defendant dressed for bed.

who was also interested in acquiring the Land. If Mr Khan gave a second-hand account of an encounter at the pool, then that may explain the vagueness in the solicitors' letter.

[162] The plaintiff also placed some emphasis on two documents, each described as a "screenshot" dated 19 August 2016. The surrounding information appears to record that both documents were printed on 28 August 2016.

[163] One bears a title line "Screenshot_2016-08-19-10-50" and appears to show three calls "Today" to "Wolly" at the defendant's home telephone number. At the foot of the document is the heading for "Yesterday", but no further pages of the "screenshot" or of the source material was produced. This was surprising, as any communications between Mr Kashkari and the defendant on 17 and 18 August 2016 were plainly in contest.

[164] The other document is titled "Screenshot_2016-08-19-10-51" and appears to show seven "Received calls" from various numbers on 17 and 18 August 2016. It appears to show that a call was received at 4:54 pm on 17 August 2016 from "Wolly" at the defendant's home telephone number. The screen shot also records two incoming calls from Mr Birch's mobile telephone, the second at 11:44 am on 18 August 2016 and a call from the plaintiff's solicitors' office number at 1:33 pm that day. Like the first screenshot, this document is cut off at the foot, indicating that the record of calls continued.

[165] In summary, the two screenshots record the following relevant calls:

Date	Time	Call
17 Aug 2016	04:54 pm	From defendant's home
18 Aug 2016	11:44 am	From solicitor's mobile (2)
	01:33 pm	From solicitors' office
19 Aug 2016	09:06 am	To defendant's home
	09:32 am	To defendant's home
	10:18 am	To defendant's home

[166] None of the out-going calls shown on the screenshot documents appears on Mr Kashkari's Optus account. It may be that the screenshots are from a different mobile telephone. No evidence assisted in this regard. There was no information about the duration of any of the calls, but the plaintiff's counsel put to the defendant that the call from his home number at 4:54 pm on 17 August 2016 was 34 seconds long. Given the defendant's slow pace of speech, this seems a short time in which to exchange the usual greetings and then arrange a time for a meeting at the swimming pool.

[167] Given the uncertain aspects of the screenshot documents, I place no weight on them as evidence of any actual communications on the dates they record.

[168] The extension document prepared by Mr Kashkari is inconsistent with his account of his discussion with the defendant on the morning of 17 August 2016. It does not record a

six month extension to a new fixed settlement date, which would have been 18 February 2017. Instead, it leaves the new settlement date unspecified, save that it is to be no later than 28 February 2017. If there had been an agreement that morning on the terms in Mr Kashkari's oral evidence, then the presentation of the "extension document" would have been a proposal by the plaintiff to agree on different terms. Mr Kashkari gave no evidence that the defendant read the "extension document" at the pool. If Mr Kashkari's evidence were to be accepted, then the defendant was unaware that Mr Kashkari had changed the deal. Mr Kashkari cannot reasonably have thought the defendant had agreed to something he had not read, which had not been explained to him and which differed materially from what Mr Kashkari said was discussed and agreed earlier that day.

- [169] The Optus account records no calls from Mr Kashkari's mobile to the plaintiff's solicitors on 17 August 2016. If he did have discussions with the defendant and prepared the document that day, it appears he did so without assistance from or communications to the solicitors. In contrast, the Optus account records four calls to the plaintiff's solicitors between 11:24 am and 12:29 pm the following day.
- [170] It is also curious that Mr Kashkari would have prepared a document that he was to execute on behalf of the plaintiff, and taken it the defendant to sign, but did not sign it himself.
- [171] The dates "18/8/2016" on Mr Kashkari's document, and his earlier recollection that the meeting was on that later day, tend against accepting his apparently very recent recollection that the two met on 17 August 2016.
- [172] Considering all of these matters, I conclude it is more likely Mr Kashkari prepared the "extension document" on 18 August 2016, hopeful he could persuade the defendant to sign it, but he did not manage to give it to the defendant.
- [173] I am doubtful that the defendant's recollection of his activities on 17 August 2016 is reliable. However, I accept his recollection of what occurred on the occasion when he saw Mr Kashkari at the pool, i.e. that he rebuffed Mr Kashkari's attempt to discuss "business". That is more likely than Mr Kashkari's evidence that, while at the pool, the defendant agreed to take a document home, sign it and send it to Mr Kashkari. It is doubtful the defendant had the technical knowledge to be able to send a signed document by email.

Evidence of the events of 18 August 2016

- [174] On Thursday 18 August 2016 at 10:12 am, the defendant's solicitors sent a letter by email to the plaintiff's solicitors asking that the plaintiff tender at settlement a "bank cheque for the whole of the proceeds of settlement"³⁹ in favour of the solicitors' trust account. The letter also advised that the solicitors would tender at settlement the transfer forms, the original certificate of title for the Land and an envelope with \$1,500 in cash Mr Kashkari had left with the defendant.
- [175] The Optus account records a six minute telephone call from Mr Kashkari's mobile to the defendant's home telephone at 11:26 am on 18 August 2016. Mr Kashkari said this

³⁹ I infer that this was intended and understood as a reference to the balance payable by the plaintiff to the defendant at settlement.

was his call to the defendant. He gave the evidence about the call in the following exchange with the plaintiff's counsel:

“And what – what was said? --- He said to me that he is – are you relaxed – you know, and all that. And I ask him – I said, I haven't received it yet. He said – the signed – he said he's going to send me the document.

And did he say anything else? --- No – he – he – he said to me, you know, that he is going to send the signed document to me, and how I'm feeling now.

And what did you say to him – do you remember? --- I said I'm a – I'm a bit relaxed, you know, and can you please send me the doc – can – you know, can you email it to me as soon as possible ... before the expiry – before the – before the – you know, before the deadline.”

[176] Shortly afterwards, there were three calls from Mr Kashkari's mobile to Mr Birch's mobile and to the plaintiff's solicitors' office. The calls to Mr Birch's mobile were at 11:38 am and 11:47 am, each of one minute's duration. In between, there was a four minute call to the solicitors' office number.

[177] At 12:26 pm, the plaintiff's solicitors replied to the defendant's solicitors' 10:12 am email and letter, advising they were seeking instructions on the email and would respond shortly.⁴⁰ However, the email continued:

“Please note that we are instructed that your client has made verbal representations over the last 3 weeks that it will provide vendor finance to our client, and in reliance of such, our client withdrew its commercial lending application. Additionally representations were made by your client to our client that the requested extension would be granted. Such representations were made as late as yesterday.”

[178] The Optus account records a four minute call from Mr Kashkari's mobile to Mr Birch's mobile telephone at 12:29 pm, shortly after the “seeking instructions” email from the plaintiff's solicitors. There was no evidence of any further communication from the plaintiff's solicitors to the defendant's solicitors before the time for settlement passed.

[179] The plaintiff did not attend the place for settlement or attempt to effect settlement on 18 August 2016. At 4:35pm that day, the defendant's solicitors sent a letter by email to the plaintiff's solicitors giving notice that the defendant had elected to terminate the Contract.

Consideration of the evidence

[180] I do not accept Mr Kashkari's evidence of his 11:26 am telephone conversation with the defendant. Having concluded that he did not give the “extension document” to the

⁴⁰ The Optus account records calls from Mr Kashkari's mobile to the mobile of Mr Birch (of the plaintiff's solicitors) or to the solicitors' office number at 11:24 am (one minute), 11:38 am (one minute), 11:42 am (four minutes), 11:47 am (one minute), and 12:29 pm (four minutes). In between these calls, there was a six minute call to the defendant's home number at 11:26 am. Mr Kashkari gave no evidence about these calls.

defendant the day before, it follows that the defendant could not have said on 18 August 2016 that he would sign and send that document back to Mr Kashkari.

- [181] As well, there is no reference to the conversation in the plaintiff's solicitors' email of 12:26 pm. That email was sent after the three calls from Mr Kashkari's mobile to the solicitors. If a conversation had occurred in the terms recalled by Mr Kashkari, it is highly improbable that Mr Kashkari would have omitted to inform the plaintiff's solicitors about it in the calls he made in the 20 or so minutes immediately following the call. It is similarly highly improbable that the solicitors would have omitted any reference to a conversation in those terms, if Mr Kashkari had communicated it to them. Their letter refers to representations about granting an extension "made as late as yesterday." This is inconsistent with any discussion about signing an extension document that morning.
- [182] There is another aspect of the plaintiff's solicitors' email that undermines the credibility of Mr Kashkari. The statement that "our client withdrew its commercial lending application" was untrue. The plaintiff never made a commercial lending application, and so had never withdrawn one. At this critical time, on the date fixed for settlement, Mr Kashkari was prepared to give false instructions to his solicitors in the hope of advancing the plaintiff's position.

Findings

- [183] It follows from the observations above that I found the defendant was a truthful witness. Where his recollection was not consistent with an otherwise reliable contemporaneous record, I qualified my consideration of it. Otherwise, I accepted his evidence of the events that occurred and rejected the contrary evidence given by Mr Kashkari and, so far as is relevant, Mrs Kashkari.
- [184] My related factual findings may be briefly stated.
- [185] The plaintiff did not have funds to pay the balance of the purchase price on 18 August 2016 and had not obtained finance to discharge that obligation.
- [186] The plaintiff failed to prove it could have completed its obligations under the Contract at a settlement on 18 August 2016, but for the exchanges between Mr Kashkari and the defendant about vendor finance, which started on 2 August 2016.
- [187] The plaintiff did not alter its position, to its detriment, in reliance on an expectation that vendor finance would be provided. The true position was that at no time between the exercise of the option to purchase, on 19 July 2016, and the date for completion, 18 August 2016, was the plaintiff able to perform its contractual obligation to complete the Contract on the date for completion. By 2 August 2016, the plaintiff had no realistic prospect of obtaining finance to complete the Contract.
- [188] Mr Kashkari's approach to the Contract was consonant with that found by Muir J in respect of the business of KBRL. It was "a triumph of hope over reality" in which "he never undertook the objective assessment required, preferring instead to live in hope that things would turn around and a compromise struck".
- [189] In May 2015, Mr Kashkari had persuaded the defendant to enter into the Option within a few days, without reading it in detail, and without any independent legal advice. In

August 2016, Mr Kashkari sought to replicate that strategy with a view to obtaining vendor finance.

- [190] The decision of the plaintiff to put all its eggs in the basket of Mr Kashkari persuading the defendant to provide vendor finance may appear reckless. However, the plaintiff was risking little, because it was unable to complete the Contract by any other means.
- [191] Mr Kashkari raised the idea of vendor finance with the defendant on 2 August 2016. He did not tell the defendant that, by then, the plaintiff had not applied for, and had no realistic prospect of obtaining, finance to complete on 18 August 2016. The defendant did not know that to be the plaintiff's position. I accept the defendant's evidence that he assumed the plaintiff would not have exercised the Option if it did not then have access to funds to complete the transaction, whether from its own resources or from identified lenders.
- [192] Mr Kashkari having raised it, the topic was discussed with the defendant again on 6 August 2016. Accepting, as I do, the evidence of the defendant in the respects noted above, and rejecting the evidence of Mr Kashkari and Mrs Kashkari in those respects, I find that the defendant did not represent to the plaintiff that he would provide the plaintiff with vendor finance to complete the Contract.
- [193] The defendant's conduct, in entertaining the discussion of providing vendor finance ("email me with what you offer") did not justify an assumption or naturally lead the plaintiff to the impression that vendor finance would be provided. The defendant did not promise to provide vendor finance. There was no agreement, commitment or representation by the defendant that he had offered or would offer vendor finance.
- [194] At least until 9 August 2016, the defendant remained open to entertaining a proposal from the plaintiff about vendor finance. The key details (but not the amount) were disclosed in a telephone call on 15 August 2016. The full proposal was not provided until Mr Kashkari handed the draft mortgage document to the defendant on the morning of 16 August 2016. In this way, Mr Kashkari minimised the time for the defendant to obtain independent legal advice and make due diligence inquiries about vendor finance.
- [195] Having observed Mr Kashkari give evidence, I have no doubt that he was confident he could persuade the defendant to provide vendor finance. His confidence was misplaced.
- [196] Given these findings and the uncontested circumstances, the plaintiff could not reasonably have assumed at any point in time that vendor finance would be provided.
- [197] The relevant uncontested circumstances included the size and nature of the transaction, Mr Kashkari's experience in land transactions, including in securing finance for land acquired for development, his knowledge of the information requests from Mr Dumble, Mr Kashkari's failure to provide any information to the defendant about the financial position of the plaintiff, its sources of funds, and its ability to pay interest and repay principal, the plaintiff's direction to its solicitors **not to** send vendor finance documents to the defendant's solicitors, the limited time remaining before settlement, the absence of any written loan agreement or heads of agreement, and the defendant's age and abilities.
- [198] Mr Kashkari may have been genuinely surprised he could not persuade the defendant to agree to provide vendor finance between 2 and 18 August 2016. If so, his surprise

would have been due to an over-estimate of his ability to influence the defendant. Whatever the explanation, he failed to face the realities of the plaintiff's financial and legal position.

- [199] The defendant did not induce the plaintiff to adopt an expectation or assumption that he would provide vendor finance. Nor did the defendant lull the plaintiff into a false sense of security that vendor finance would be provided or that an extension of the date for completion would be granted. It was not alleged and the evidence did not establish that the defendant was under a duty to inform the plaintiff that any assumption or expectation that the defendant would provide vendor finance was wrong.
- [200] The plaintiff had engaged solicitors to act for it in the transaction, including the settlement of the Contract. The plaintiff instructed the same solicitors to prepare the draft mortgage. Those terms were not prepared, even in draft, until 12 August 2016. They were not finalised, from the plaintiff's side, until the morning of 16 August 2016. It was only after this time that they were given to the defendant. Through its solicitors, the plaintiff must have known that the defendant could not be bound to provide vendor finance until the terms of the proposed mortgage were settled and agreed. The defendant did not cause the plaintiff "to be shut out from any contrary knowledge" of its solicitors.
- [201] It follows that I am not satisfied that the defendant contributed, even innocently, to the plaintiff being unable to complete the Contract on the date for completion.
- [202] The plaintiff did not contend that any discussions between Mr Kashkari and the defendant resulted in a variation to the Contract. Rather, the plaintiff's submission was that, by his conduct on 17 August 2016, the defendant waived his right to insist on settlement on 18 August 2016, so that time ceased to be of the essence of the Contract.
- [203] If the defendant had intimated to the plaintiff he would not insist on completion happening on 18 August 2016, but only at some later time, then the plaintiff would have been "dispensed from performance only until" the defendant gave reasonable notice that he was ready, willing and able to perform his obligation. If the plaintiff had acted to its detriment on that intimation, by not paying the balance of the purchase price on 18 August 2016, then the defendant would be estopped from asserting a right to terminate the Contract by reason of the plaintiff's default.⁴¹
- [204] I have rejected Mr Kashkari's evidence about an encounter at the Colmslie swimming pool on 17 August 2016. It follows that I am not persuaded that the defendant agreed to extend the settlement date or intimated he would not insist on completion on the due date. I am not satisfied that there was any conduct on the part of the defendant by which he waived his right to insist on settlement on 18 August 2016 or by reason of which he is estopped from asserting his rights.

The defendant's right to terminate the Contract

- [205] The defendant's obligation to deliver title to the Land and the plaintiff's obligation to pay the balance of the purchase price were concurrent and mutually dependent

⁴¹ *Foran v Wight* (1989) 168 CLR 385 at 409-411 (Mason CJ), at 421-422 (Brennan J), at 434 (Deane J) and at 448-449 (Dawson J).

obligations. Each was to be performed in exchange for the other. Under the Contract, time was of the essence and 18 August 2016 was the agreed date for completion.

- [206] The plaintiff's failure to tender the balance of the purchase price on the date for settlement was not a trivial or slight breach of its obligations under the Contract. Nor was it inadvertent. It was entirely the result of the failure of the plaintiff to secure sufficient funds to complete the Contract.
- [207] Absent any other impediment, the failure of the plaintiff to perform its obligation enabled the defendant to rescind the Contract for breach.

Equitable relief for unconscientious gain

- [208] Given the findings made above, the plaintiff cannot "point to conduct of the vendor as having in some significant respect caused or contributed to the breach of the essential time stipulation" and so cannot show that it is "against conscience" for the defendant to rely on the termination of the contract.⁴²
- [209] The plaintiff contended that the defendant ought not to be heard to assert his legal right to terminate the Contract in answer to the plaintiff's claim for specific performance. Equitable relief of that kind has been held appropriate where a defendant obtained something that "ought not, in conscience" be allowed as between the parties.⁴³
- [210] This calls for a consideration of whether, and to what extent, the defendant might have obtained any benefit. The plaintiff pointed to two things; first, the sum of \$190,000.00, which had been paid to the defendant and was noted as the Deposit under the Contract; and second, payments, totalling about \$175,000.00, made during the period of the Option in respect of the Land.

The deposit

- [211] HDK had paid \$190,000 to the defendant, by instalments, in accordance with its contractual obligation under the Option. By the Option HDK and the defendant had agreed the sum was a "non-refundable amount" to be released to the defendant "immediately upon receipt" from HDK. They had also agreed that the defendant was entitled to retain the sum in any event, even if the Option was not exercised.
- [212] HDK and the defendant agreed that, if the Option was exercised, the sum would be deemed to have been paid as a deposit under the Contract. When the Contract arose, the plaintiff and the defendant agreed, by a special condition, that the deposit was "non-refundable and has been or, if not, shall be released to the Vendor prior to Settlement." They also agreed that, where there was any discrepancy or inconsistency, the special conditions had precedence over all other parts of the Contract.
- [213] The Option was prepared by the solicitors acting for HDK on the instructions of Mr Kashkari. It included the terms of the Contract. The Option and the terms of the Contract were accepted by the defendant in April 2015, without the independent legal advice.

⁴² *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 335 [58] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

⁴³ (2013) 217 CLR 315 at 324-325 [21]-[22] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

- [214] By the terms of the Option, the defendant had the \$190,000.00 and was entitled to retain it before the Contract was made. By the terms of the Contract, the defendant had and was entitled to retain the \$190,000.00. It follows that the defendant did not obtain that sum by the termination of the Contract.

Payments in respect of the Land

- [215] Between 27 July 2015 and 4 July 2016 HDK made payments for rates levied on the Land by the Logan City Council and for land tax on the Land. These payments were made in accordance with HDK's obligation under the Option to be "liable for rates, taxes and outgoings with respect to" the Land on and from 11 May 2015.
- [216] HDK made other payments in that period to its professional advisers for site concept designs, sketch plan development, attending pre-development meetings, preparing documents for and attending pre-lodgement meetings, ecological assessments, odour assessments, bush fire risk assessments, surveying, preparing development applications, traffic engineering assessments, and payments to the Logan City Council for development approvals. Under the Option, HDK was "responsible for all costs of and related to" the application for development approval for the Land.
- [217] All these HDK payments were made before the plaintiff exercised the Option, and before the Contract came into existence. None of these payments was made by the plaintiff.
- [218] No evidence was adduced that the value of the Land was affected by any of the payments.
- [219] In short, there was no evidence from which to conclude the defendant obtained anything by the termination of the Contract – save that he was then free to deal with the Land.
- [220] If the Land had a value of more than \$3.16 million, then the defendant might have obtained a benefit in not having to part with the Land in exchange for a price less than its value. No evidence was adduced of the value of the Land at the date for completion or at any subsequent time. So no such benefit was proved.
- [221] In the circumstances, there was no basis to conclude that it would be unconscionable to allow the defendant to assert his right to terminate the Contract for the plaintiff's breach.

Disposition

- [222] The parts of the plaintiff's claim based on estoppel, breach of an implied term, and unconscionable conduct must each fail. The parts alleging that the defendant waived his right to insist on settlement on 18 August 2016, or agreed to extend the settlement date, must also fail.
- [223] It follows that there should be judgment for the defendant on the plaintiff's claim. I will hear the parties on the form of judgment or final order, including as to costs.