SUPREME COURT OF QUEENSLAND

CITATION:	*McPhee v Zarb & Others* [2002] QSC 004
PARTIES:	**MALCOLM MCPHEE** (plaintiff) v **SYLVIA ZARB** (first defendant) **LBS HOLDINGS PTY LTD** (second defendant) **AUSTRALASIAN THEATRICAL INVESTMENTS PTY LTD** (third defendant)
FILE NO:	S 6277 of 2001
DIVISION:	Trial Division
PROCEEDING:	Application by plaintiff for summary judgment Cross-application by second and third defendants for summary judgment on plaintiff's claim and on counter-claim
DELIVERED ON:	8 January 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2001
JUDGE:	Wilson J
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – VENDOR AND PURCHASER – where vendor and purchaser agreed to extend time for settlement – whether time remained of the essence – where vendor failed to settle on due date – whether purchaser entitled to rescind contract - where purchaser bought property from mortgagee exercising power of sale – whether purchaser's purported rescission was wrongful repudiation – whether vendor entitled to retain deposit paid by purchaser CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – BREACH OF CONTRACT – where vendor and purchaser agreed to extend time for settlement – whether time remained of the essence – where vendor failed to settle on due date – whether purchaser entitled to rescind contract - where purchaser bought property from mortgagee exercising

power of sale – whether purchaser's purported rescission was wrongful repudiation – whether vendor entitled to keep deposit paid by vendor

CONVEYANCING – LAND TITLES UNDER THE TORRENS SYSTEM – MORTGAGES, CHARGES AND ENCUMBRANCES –where mortgagor tendered payment of amount requested by mortgagee but reserved rights – where mortgagee refused to release mortgage – where mortgagee sold mortgaged property to third party in exercise of power of sale – whether mortgagor entitled to have transfer from mortgagee to third party purchaser set aside

MORTGAGES – MORTGAGES AND CHARGES GENERALLY – RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE – where mortgagor tendered payment of amount requested by mortgagee but reserved rights – whether mortgagee entitled to refuse to release mortgage

Land Title Act 1994 (Qld), s 185(1)
Property Law Act 1974 (Qld), s 84, s 87, s 347(1A)
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 292, r 293

Aqua-Max Pty Ltd v MT Associates Pty Ltd [2001] VSCA 104; No 5966 of 1994 and No 8017 of 1994, 19 July 2001, considered.
Australian Stratacore Holdings Ltd (in liq) v Sanwa Australian Securities Ltd, unreported, NSW CA No 40691 of 1993, 16 March 1994 and 27 May 1994, considered.
Champtaloup v Thomas [1976] 2 NSWLR 264, followed.
Ellison v Lutre Pty Ltd (1999) 88 FCR 116, followed.
Foodco Management Pty Ltd v Go My Travel Pty Ltd [2001] QSC 291; SC No 3549 of 2001, 10 August 2001, applied.
Inglis v Commonwealth Trading Bank of Australia (1971) 46 ALJR 48, applied.
Sargent v A S L Developments Limited (1974) 131 CLR 634 at 656-658, followed.
Stephens v Coorey [1996] ANZ Conv R 194, followed.
Swain v Hillman [2001] 1 All ER 91 at 92, applied.
Tropical Traders Limited v Goonan (1964) 111 CLR 41, distinguished.

COUNSEL: PW Hackett for the plaintiff
RW Taylor for the first defendant
MP Amerena for the second and third defendants

SOLICITORS: Robinson & Robinson for the plaintiff
Gadens Lawyers Gold Coast for the first defendant
John J Evans for the second and third defendants

[1] **WILSON J:** The plaintiff has applied for summary judgment against the first, second and third defendants, and the second and third defendants have cross-applied for judgment against the plaintiff on the plaintiff's claim and on their counterclaim.

[2] The plaintiff was the registered proprietor of restaurant premises at Surfers Paradise described as lot 1 on BUP 1922. He had purchased the property for $76,000.00 pursuant to a contract made in December 2000 and settled in March 2001. The first defendant advanced the purchase moneys on the security of a registered mortgage over the property. Under the bill of mortgage the plaintiff undertook to repay the principal sum of $76,000.00 on the date 30 days after it was advanced, and to pay interest at 15% per annum monthly in advance.

[3] By a contract in standard REIQ/Queensland Law Society (3rd ed) form dated 23 April 2001, the plaintiff agreed to sell the property to the second and third defendants for $120,000.00 ("the contract"). There were also chattels to be conveyed for $30,000.00. The contract provided for a deposit of $15,000.00 "to be released unconditionally to the seller". The total purchase price ($150,000.00) was payable on settlement. The settlement date was stated to be "on or before 31/5/2001". The second and third defendants went into possession pending settlement.

[4] I shall refer to the plaintiff as "the vendor", the first defendant as "the mortgagee" and the second and third defendants as "the purchasers".

[5] The vendor defaulted in the payment of principal and interest under the mortgage, and the mortgagee gave him a notice of exercise of power of sale. The notice was dated 23 May 2001 and posted on that day. The default was particularised as –

> "(a) Principal in an amount of SEVENTY SIX THOUSAND DOLLARS ($76,000.00) then due and owing was not paid on the 23rd day of April 2001;
>
> (b) Interest from 23 April 2001 in an amount of NINE HUNDRED AND SIXTY-EIGHT DOLLARS and THIRTEEN CENTS ($968.13) is now due and owing and is accruing daily at a rate of $31.23 per day."

The notice continued –

> "AND further take notice that, unless within 30 days of service upon you of this notice the said default is remedied, the undermentioned mortgagee may proceed to sell the land and exercise all or any of the other powers conferred by the mortgage and by the Property Law Act 1974.
>
> AND further take notice that the undermentioned Mortgagee requires you within thirty (30) days of service upon you of this Notice to pay Messrs Parker Simmonds the sum of NINE-HUNDRED AND THIRTY-FIVE DOLLARS ($935.00) being the undermentioned Mortgagee's Solicitors costs incurred in relation to your default under the said Mortgage."

[6] Settlement of the contract was not effected on 31 May 2001 or at all.

[7] On 27 June 2001 the mortgagee transferred the property to the purchasers for a consideration of $105,000.00 in purported exercise of her power of sale, and they became registered as proprietors.

[8] The purchasers purported to terminate the contract on 28 June 2001, and the next day the vendor purported to do so.

Relief claimed by the plaintiff (the vendor)

[9] The plaintiff (the vendor) seeks:

(a) an order that the transfer from the first defendant (the mortgagee) to the second and third defendants (the purchasers) be set aside and the property reconveyed to him;

(b) an order that the first defendant (the mortgagee) release the mortgage upon the vendor tendering all moneys owing under it; and

(c) as against the mortgagee and the purchasers, damages for breach of contract.

Relief claimed by the second and third defendants (the purchasers)

[10] The second and third defendants (the purchasers) seek -

(a) on the plaintiff (vendor)'s claim, judgment in their favour; and

(b) on their counterclaim, an order directing the plaintiff (the vendor) to repay the deposit of $15,000.00 together with interest (at the Contract Rate published by the Queensland Law Society Inc) from 28 June 2001 until judgment.

Non-release of the mortgage

[11] On 31 May 2001 the solicitors for the mortgagee sent a facsimile transmission to the solicitors for the vendor setting out the amount the mortgagee would require if she were to release the mortgage. It was –

Repayment of Principal			$ 76,000.00
Plus	Legal fees	$ 935.00	
	Interest (to 31 May 2001)	$ 1,217.97	
	Bank Charges	$ 722.00	
	Agreed Settlement Sum	$15,000.00	$ 17,874.97
			$ 93,874.97

Mr Robinson and Mr Fawkes (of the solicitors for the vendor) and Mr Evans (the solicitor for the purchasers) attended at the offices of the solicitors for the mortgagee later that day. Mr Parker of the solicitors for the mortgagee refused to accept the cheque tendered because it did not include the "agreed settlement sum" or premium of $15,000.00. He did not have a signed release of mortgage available.

[12] The vendor and the mortgagee proceeded on the basis that the settlement date under the contract was extended to 21 June 2001. By facsimile transmission sent on 15 June 2001 the solicitors for the mortgagee advised that the mortgagee would require payment as follows -

Interest	$ 1,873.80
Bank fees	$ 722.00
Legal fees	$ 1,435.00
Principal sum	$76,000.00
	$80,030.80

The premium of $15,000.00 was no longer demanded, but the amount claimed for legal fees had been increased by $500.00 and the interest claimed had been increased by $655.83.

[13] By letter dated 21 June 2001 the solicitors for the vendor informed the solicitors for the mortgagee that their client would pay the amount demanded "under protest and under duress". The letter went on -

> "Our client takes issue with not only the quantum of the principal sum but also the interest, bank fees and legal fees being charged against our client on the basis that this is the only amount which your client will accept in order to settle the transaction.

> Please also advise your client that our client does not waiver [sic] any rights for damages both nominal and punitive which will be sought against your client and your firm as a result of settlement not proceeding on the 31 May, 2001.
>
> All rights accruing to our client Mortgagor are not to be taken as merged upon payment to your client today of the total sum of $80,030.80."

On 21 June 2001 Mr Robinson (of the vendor's solicitors) tendered the amount demanded. The mortgagee's solicitor had a release of mortgage available, but he refused to settle because of the vendor's purported reservation of rights.

[14] Later that day the solicitors then acting for the mortgagee wrote to the solicitors for the vendor –

> "We refer to the above and to your attendance at our office on 21 June 2001. We confirm that our client had instructed us previous to your attendance to withdraw the offer to settle dated 15 June 2001. We are no longer taking instructions from Mrs Sylvia Zarb [the mortgagee]. We suggest that all future correspondence be forwarded directly to her, or alternatively to her new legal representative."

[15] The next day the solicitors for the vendor responded –

> "We are instructed to advise that our client reserves his rights against your firm and Mrs Zarb for any damages which will flow as a result of the Release of Mortgage documents not being handed to Mr Tony Robinson at the settlement at your office on the 21st instant."

[16] The solicitors for the vendor wrote directly to the mortgagee on 22 June 2001 –

> "The purpose of this letter is to put you on formal notice that Court proceedings will be undertaken forthwith to seek Declarations and/or damages against you personally and [your former solicitors] in respect of the refusal to settle on two (2) occasions."

Non-settlement of the contract of sale

[17] On 31 May 2001 the solicitor for the purchasers wrote to the solicitors for the vendor –

> "I note that we attended settlement of this matter at 3.00 pm on the 31st May, 2001 at Parker Simmonds [the mortgagee's solicitors] office and note that we tendered the cheques required by you as per your letter of the 31st May, 2001 however your client was in default of the contract and unable to settle in that your client was unable to produce a Release of Mortgage No 704697872 from Sylvia Zarb.
>
> I advise that my clients reserve their rights in relation to the matter."

[18] On 5 June 2001 the solicitor for the purchasers wrote to the solicitors for the vendor –

> "I refer to your Tony Robinson phoning this morning in regard to this matter. It appears that your client contacted my client direct on the day of the settlement namely 31st May last and requested an extension of 21 days and I refer to your facsimile of that date. My client agreed to accept the request and the funds have been deposited with their Bank for the 21 days and will be available for settlement on the 21st June next."

Later that day he wrote again to the solicitors for the vendor –

> "I refer to my letter of the 5th June, 2001 and I have again spoken to my client and I have been instructed that their funds which were to be used for the settlement of the matter last Thursday the 31st May, 2001 will definitely be available for the settlement on the 22nd June, 2001 by 4:00 p.m. I request that you confirm that the cheques to be drawn that day will be the same as set out in your letter of the 31st May, 2001 subject to any minor adjustment for rates etc."

[19] On 15 June 2001 the solicitors for the vendor wrote to the solicitor for the purchasers –

> "We note that settlement of this matter has been extended to 21 June, 2001. We advise that out client will be ready, willing and able to settle on that date.
>
> We will forward cheque details to you shortly."

[20] On 16 June 2001 the solicitors for the vendor wrote to the solicitor for the purchasers –

> "We refer to the above matter and our facsimile of 15 June and your subsequent correspondence on that date, in relation to the undertaking.
>
> As yet, your client has not confirmed that it will be settling on 21 June 2001, although all correspondence indicates your client will be in a position to settle. Please confirm the position, after which we will take our client's instructions."

[21] On 19 June 2001 the solicitor for the purchasers wrote to the solicitors for the vendor –

> "I acknowledge receipt of your letter dated 16th June, 2001. I refer to our second letter to you on the 5th June, 2001 and ask you to note that our clients invested their monies for 21 days from the original settlement date and the funds would be available at the earliest for settlement on the 22nd June, 2001 by 4:00 p.m.
>
> Please advise if the Commonwealth Bank exercised the margin scheme when selling the property to your client."

[22] The purchasers did not tender for settlement on 21 or 22 June 2001.

[23] The solicitor for the purchasers wrote to the solicitors for the vendor on 25 June 2001 –

> "I note that despite my written and verbal request for cheque details for settlement on Friday the 22nd June, 2001 you have not been forthcoming with the same.
>
> As your client continues to be either refusing or unable to settlement [sic] with my client I am now seeking my clients instructions in relation to taking action against your client under the contract."

[24] Apparently unbeknown to the vendor, the property was transferred from the mortgagee to the purchasers in exercise of the mortgagee's power of sale on 27 June 2001.

[25] On 28 June 2001 the solicitor for the purchasers wrote to the solicitors for the vendor –

> "I wish to advise that my client hereby terminates the contract based on your client's breach of contract in failing to settle on the 31st May, 2001. My client holds your client liable for the return of the deposit monies of $15,000.00 paid to him under the contract and for damages for breach of contract which will be quantified in due course.
>
> In the meantime I request that the deposit monies of $15,000.00 be refunded forthwith."

[26] On 29 June 2001 the vendor's solicitors responded to the solicitor for the purchasers in these terms –

> "It is clear from the correspondence and the conduct of the parties and further the conduct and correspondence between our respective firms that time has ceased to be the essence of the contract.

> Our clients instructions are that your client is held in breach of the Contract and furthermore our client has instructed us to accept your letter of the 28th June 2001 as constituting notice of termination as being wrongful repudiation and without limitation of our client rights reserves all actions in law and equity for damages against your client."

[27] When a plaintiff seeks summary judgment on a claim, the Court must determine whether the defendant has any real prospect of defending the claim in whole or in part. Similarly, when a defendant seeks summary judgment on a plaintiff's claim, the Court must determine whether the plaintiff has any real prospect of succeeding on all or part of the claim.[1] These rules apply mutatis mutandis to counterclaims. They are not simply a reformulation of the test which applied to a plaintiff's application for summary judgment under the former *Supreme Court Rules* - namely, whether the defendant had raised a triable issue. The new tests (which apply to both a plaintiff's application and a defendant's application) call for a more robust approach by the Court, consistent with the overriding purpose of the *UCPR* which is –

> "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense"[2].

The Court should give summary judgment if (according to whether it is an application by a plaintiff or one by a defendant) the prospects of defending the claim or succeeding on it are so slim as to be fanciful.[3]

The vendor's claim against the mortgagee

[28] The vendor claims -

(a) damages against the mortgagee on the basis that the mortgagee breached her obligations under the mortgage by refusing to accept his tenders, thereby causing the vendor to breach his contract with the purchasers, and to suffer consequential loss; and

(b) that the transfer from the mortgagee to the purchasers should be set aside because the power of sale was wrongfully exercised in that -

(i) 30 days had not elapsed since the service of the statutory notice; and

(ii) the vendor was not in default.

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1 See *Uniform Civil Procedure Rules* rr 292 and 293.

2 *UCPR* r 5.

3 *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2001] QSC 291; SC No 3549 of 2001, 10 August 2001; *Swain v Hillman* [2001] 1 All ER 91 at 92.

[29] Even though the vendor was in default under the mortgage, the mortgagee was obliged to release the mortgage upon payment all moneys secured by it.[4]

[30] On 31 May 2001 the mortgagee demanded an "agreed settlement sum" of $15,000.00 and legal fees, interest and bank charges in addition to the principal of $76,000.00. Although the mortgage contained an all moneys clause (clause 17.2), no basis has ever been established for the demand for $15,000.00. The mortgagee alleged in her counterclaim that there was an oral agreement made on or about 20 February 2001 by which the vendor promised to pay the mortgagee $10,000.00 in consideration for the advance of $76,000.00. However, no evidence of any such agreement was put before the Court, other than a statement by the mortgagee's present solicitor that he believes the facts pleaded in his client's defence and counterclaim accurately reflect her instructions: affidavit of Justin Maxwell Geldard sworn 4 October 2001 paragraph 4. Moreover, the alleged agreement was for the payment of a lesser sum than that demanded on 31 May. On 4 June the mortgagee offered to release the mortgage on payment of what were the amounts claimed in its solicitors' letter of 31 May other than the "agreed settlement sum" - a total of $78,874.97. No "agreed settlement sum" was demanded on 21 June. I conclude that the amount demanded by the mortgagee on 31 May 2001 was in excess of that secured by the mortgage.

[31] Mr Geldard, the solicitor for the mortgagee, swore that the vendor had never particularised the amounts he had tendered. I do not accept that this is so. On 28 September 2001 the vendor responded to the mortgagee's request for further and better particulars of the statement of claim. Paragraph 13 of the statement of claim relates to what happened on 21 June. In paragraph 2 of the further and better particulars of the statement of claim filed 1 October 2001 ("the particulars") it is said that $78,874.97 was tendered on that day. Then in paragraph 3 of the particulars it is said that there was a further attempt to tender all moneys due under the mortgage on 21 June, and that $80,030.80 was tendered on that occasion. It is tolerably clear that there was an error in responding to the request for particulars, and when the whole of paragraph 2 of the response is read in context with paragraph 3, it is clear that the vendor intended to say that $78,874.97 was tendered on 31 May and that $80,030.80 was tendered on 21 June. Further I am prepared to conclude from the affidavits placed before me that such sums were tendered on those occasions.

[32] Counsel for the mortgagee submitted those amounts were less than what the vendor was obliged to pay under the mortgage in two respects -

(a) they did not include the $10,000.00 which the vendor had promised to pay and which was secured by the mortgage; and

(b) the amounts referable to interest were less than the interest actually owing.

[33] An affidavit used in support of a summary judgment application or in response to such an application may contain statements of information and belief if the person making the affidavit states the sources of the information and the reasons for the

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[4] See generally Sykes & Walker, *The Law of Securities*, 5th ed., pp 239-246.

belief.[5] Of course, the weight to be attached to such statements is for the Court to determine. In circumstances where the respondent to such an application chooses not to go on oath and so subject herself to the risk of cross-examination, and the only evidence put before the Court is an affidavit by her solicitor in which he deposes to believing that her pleading reflects her instructions, I would not regard her as having any real prospect of defending the claim on the basis that the vendor did not tender all moneys due under the mortgage because he omitted the $10,000.00.

[34] Under the mortgage interest was payable monthly in advance at the rate of 15% pa (clause 2). As was stated in the notice of exercise of power of sale, it accrued at the rate of $31.23 per day. Assuming that $968.13 was owing for interest as at 23 April 2001 (the date of the default on which the notice was based), which has not been challenged, the amounts claimed for interest in the mortgagee's solicitors' facsimile transmissions of 31 May 2001 and 15 June 2001 seem to be correct, and the calculations put forward by counsel for the mortgagee in an endeavour to show that the mortgagee had claimed too little seem to be incorrect. However, it is not necessary for me to make findings as to which calculations were correct. Even if the correct amounts were tendered, and even if the mortgagee breached her obligations under the mortgage by refusing to accept the tenders, neither of those breaches has been shown to have caused the vendor any compensable loss. This is because, as I explain below, the purchasers elected to keep the contract on foot after the vendor's failure to complete on the first occasion, and they were not entitled to rescind for the vendor's failure to complete on the second occasion.

[35] The mortgagee refused to accept the tender on 21 June because it was not unconditional. I doubt that she was entitled to do so. Even if the vendor's computation of the amount owing under the mortgage was wrong (and what that computation was has not been put into evidence), the position he adopted really amounted to this: he contended that he was obliged to pay only X, but he was nonetheless willing to pay whatever was properly owing, and if that was as much as the mortgagee demanded, he would pay it. See the discussion of cases upon whether an insistence upon a mistaken construction of a contract will amount to repudiation in *Australian Stratacore Holdings Ltd (in liquidation) v Sanwa Australian Securities Ltd*[6]. Even though the vendor had defaulted under the mortgage, in the circumstances he could have obtained an injunction restraining the exercise of the power of sale upon paying the amount claimed by the mortgagee into Court.[7]

[36] It is not necessary for me finally to determine this question for the reasons given in the preceding paragraph.

[37] By s 84 of the *Property Law Act* 1974 the mortgagee's power of sale was not exercisable until 30 days after service of a relevant notice. Such a notice was posted by the mortgagee's solicitor (who practised at Broadbeach) to the vendor at an

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5 *UCPR* r 295.

6 Unreported, NSW CA 40691 of 1993, 16 March 1994 and 27 May 1994, per Mahoney JA.

7 *Inglis v Commonwealth Trading Bank of Australia* (1971) 46 ALJR 48.

address in Surfers Paradise (being the address last known to the mortgagee) on (Wednesday) 23 May 2001. By s 347(1A) of the *Property Law Act* it is deemed to have been served when it would have been delivered by the ordinary course of the post, unless the contrary is shown. Counsel for the vendor asserted that service was effected on (Monday) 28 May 2001, because that was when it was received. If that were so, then the requisite 30 days had not elapsed when the power of sale was exercised on 27 June 2001.

[38] I am not satisfied that the notice was not received until 28 May 2001. The passage in the affidavit of the vendor sworn on 5 October 2001 on which his counsel relied for this is nonsensical. It reads –

> "3. I received the Notice of Exercise of Power of Sale dated 31 May 2001 by post from Parker Simmonds[8] on Tuesday 28 May 2001."

In the ordinary course of the post the notice would have been received before 28 May 2001.

[39] Even if the power of sale was wrongfully exercised, the Court could not set aside the transfer to the purchasers and order that the property be reconveyed to the vendor. This is not a case of fraud. The purchasers' title would be protected by s 87(1) of the *Property Law Act*, which provides –

> "**Protection of purchasers**
>
> **87.(1)** Where a conveyance is made in exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground—
>
> (a) that no case had arisen to authorise the sale; or
>
> (b) that due notice was not given; or
>
> (c) that leave of the court, when so required, was not obtained; or
>
> (d) whether the mortgage was made before or after the commencement of this Act, that the power was otherwise improperly or irregularly exercised;
>
> and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given or the power is otherwise properly and regularly exercised, but any person damnified by an unauthorised, or improper, or irregular exercise of power shall have a remedy in damages against the person exercising the power."

[40] Counsel for the vendor submitted that the transfer by the mortgagee should be set aside because one or more of the statutory exceptions to the indefeasibility of the purchasers' title applies. In particular he relied on the following provisions in the *Land Title Act* 1994 -

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[8] The mortgagee's solicitors

s 185(1)(a) - an equity arising from the act of the registered proprietor. However, any equity arises not from the act of the registered proprietor (the purchasers) but from the act of the mortgagee.

s 185(1)(e) - a valid claim under an earlier existing indefeasible title. However, the purchasers took in circumstances where they were protected by s 87 of the *Property Law Act*.

s 185 (1) (f) - an inconsistency between two indefeasible titles through the failure to cancel the indefeasible title of the first registered owner. However, this is clearly not applicable to the present case.

[41] In summary I consider that the mortgagee's failure to release the mortgage was probably wrongful. However, the vendor has not shown that he suffered any compensable loss in consequence of any such default by the mortgagee, and he is not entitled to have the transfer from the mortgagee to the purchasers set aside. The vendor's application for summary judgment against the mortgagee should be dismissed.

The claims between the vendor and the purchasers

[42] The vendor was unable to complete the contract on 31 May 2001 because he could not produce a release of the mortgage. Two further events of significance took place on that day - an oral agreement between the vendor and the purchasers to extend the time for settlement by 21 days and the sending of a letter by the purchasers' solicitor to the vendor's solicitors reserving their clients' rights (exhibit B to the affidavit of Anthony Gerard Robinson sworn 11 July 2001). That letter was addressed to a post office box, and bears a handwritten notation "Rec 1/6/00 [sic] - 1.30 pm". I conclude that the agreement to extend time was made before the vendor's solicitors received notice of the purported reservation of the rights of the purchasers.

[43] Whether or not they knew of their right to rescind, the purchasers knew of the facts giving rise to that right. Thus they could elect to rescind or to keep the contract on foot. They were not obliged to elect immediately, but once they did some act consistent only with the continuance of the contract, they made their election.[9] By agreeing unreservedly to extend the time for completion, the purchasers elected not to rescind the contract for the vendor's breach on 31 May 2001. This case is to be distinguished from *Tropical Traders Limited v Goonan*[10], where the innocent party told the parties in default that it would not rescind before a certain date and that they would have to pay an additional sum to cover interest, costs and expenses - conduct amounting to a mere limitation upon the exercise of a consequential power

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9 *Sargent v A S L Developments Limited* (1974) 131 CLR 634 at 656 - 658; *Champtaloup v Thomas* [1976] 2 NSWLR 264; *Stephens v Coorey* [1996] ANZ Conv R 194; *Ellison v Lutre Pty Ltd* (1999) 88 FCR 116.

10 (1964) 111 CLR 41

of rescission rather than a stipulation postponing the time for completion generally.[11]

[44] Under the contract time was of the essence (clause 6.1). It ceased to be of the essence when the purchasers elected not to rescind but failed expressly to remake it of the essence. The obligation of the parties was then to complete within a reasonable time. See *Stephens v Coorey* per McPherson JA at 197 and per Williams J at 198.

[45] Accordingly, when the vendor failed again to complete on 21 or 22 June, the purchasers could not rescind for that failure. The contract was still on foot when the purchasers took a transfer from the mortgagee. In so doing they committed a breach of contract which gave the vendor the right to rescind.

[46] The purchasers' purported rescission on 28 June 2001 was itself a wrongful repudiation of the contract, and gave the vendor a further right to rescind.

[47] The vendor's rescission on 29 June 2001 was effectual.

[48] The vendor is entitled to the deposit paid by the purchasers: contract clause 2.4.

[49] For the reasons set out above, the vendor is not entitled to have the transfer from the mortgagee to the purchasers set aside and the property reconveyed to it.

[50] The vendor claims damages against the purchasers being -

loss of bargain ($150,000 minus $ 76,000)	$ 74,000.00
additional rates	$ 468.32
additional body corporate levies	$ 305.52
additional legal fees	$ 7,500.00
	$ 82,273.84.

He is entitled to damages in consequence of the purchasers' repudiation, and the damages appear to have been claimed under proper heads. I will hear counsel further on the precise quantification, particularly of the amounts for additional rates, body corporate levies and legal fees.

[51] In the proceeding as between the vendor and the purchasers -

(a) the vendor should have summary judgment on his claim for damages for breach of contract;
(b) the purchasers' cross application for summary judgment on the vendor's claim should be dismissed;
(c) the purchasers' application for summary judgment on their counterclaim should be dismissed.

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[11] See also *Aqua-Max Pty Ltd v MT Associates Pty Ltd* [2001] VSCA 104; No 5966 of 1993 and No 8017 of 1994, 19 July 2001.