SUPREME COURT OF QUEENSLAND

CITATION:	*HIS v Hodul* [2002] QSC 011
PARTIES:	**HIS PROPERTIES PTY LTD ACN 066 327 311** (plaintiff/first defendant by counterclaim) **v** **PETER HODUL** (first defendant/plaintiff by counterclaim) AND **KIM SPENCER** (second defendant by counterclaim)
FILE NO:	S 11330/99
DIVISION:	Civil
DELIVERED ON:	29 January 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26, 27, 28, 29, 30 November, 3, 4, 5 December 2001
JUDGE:	White J
ORDER:	1. Declare that HIS Properties Pty Ltd validly terminated the contract(s) dated 26 May 1999 on 2 November 1999. 2. HIS Properties is entitled to unconditional possession of Lot 113 on BUP 105721 and is released from its undertakings given to the court on 2 July 2001. 3. The caveat with dealing number 705 006 023 registered over Lot 113 on BUP 105721 be removed. 4. Peter Hodul to pay occupation rent to HIS Properties Pty Ltd in the sum of $40,500 together with interest thereon at five per cent per annum from 2 November 1999. 5. The sum of $2,250 paid into the trust account of Hynes Lawyers pursuant to the order of Atkinson J of 2 July 2001 be released to HIS Properties Pty Ltd. 6. The counterclaim be dismissed. 7. Peter Hodul pay HIS Properties Pty Ltd's costs of and incidental to the claim and the counterclaim and Kim Spencer's costs of and incidental to the counterclaim including reserved costs to be assessed on the standard basis.
CATCHWORDS:	CONTRACT – Sale of residential unit – Termination – PERSONAL INJURIES – Assault – TRESPASS TO LAND – Damage – DEFAMATION – Qualified privilege – Defamatory statements – COSTS – Indemnity costs
	Defamation Act 1989 ss16(1)(h), 20

Property Law Act 1974 ss71, 72
Uniform Civil Procedure Rules rr189, 704
Ashdown v Kirk [1999] 2 Qd R 1
Colgate Palmolive Co v Cussons Pty Ltd (1993) 188 ALR 248
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchant Pty Ltd (1988) 81 ALR 397
Freedom v AHR Constructions Pty Ltd [1987] 1 Qd R 59
Mehmet v Benson (1963) 81 WN (Pt 1) NSW 188

COUNSEL: Mr P Roney for the plaintiff and second defendant by counterclaim
The first defendant appeared on his own behalf

SOLICITORS: Hynes Lawyers for the plaintiff and second defendant by counterclaim
The first defendant appeared on his own behalf

[1] **WHITE J:** The plaintiff ("HIS Properties") is the registered proprietor of Lot 113 on BUP 105721 located in a multi-unit complex known as "Neptune Resort" at Broadbeach, Queensland. HIS Properties contracted to sell Lot 113 to the defendant ("Mr Hodul") on 26 May 1999 and sought to terminate the agreement on 2 November 1999 for failure to pay the deposit in accordance with the terms of the contract. HIS Properties unsuccessfully sought to recover possession on that day from Mr Hodul who had entered into possession of Lot 113 by leave of HIS Properties in January 1999.

[2] Mr Hodul remained in possession until 20 August 2001 after which HIS Properties retook possession subject to undertakings given to the court, *inter alia*, not to dispose of the property. Mr Hodul lodged a caveat over the property on 30 August 2001 on the ground that he was the purchaser under the contract of sale.

[3] Mr Hodul seeks specific performance of the contract and counterclaims for damages for defamation and trespass arising out of the attempted repossession of Lot 113 on 2 November 1999.

Progress of the action and trial

[4] It is necessary to say something about the chronology of the action and the trial hearing. The claim was issued on 21 December 1999. HIS Properties sought a summary order for possession of Lot 113 and mesne profits and other relief from Mr Hodul on 24 March 2000. Justice Holmes dismissed the application and the action proceeded to trial.

[5] On 21 June 2000 Muir J ordered that Mauro Cozzolino be joined as second defendant to the claim. He was the principal of Orchid (or Orchid Hills) Realty, the stakeholder in respect of the contract of sale. HIS Properties discontinued against him on 13 November 2000 without any participation by him in this action. I was

informed by Mr Roney, who appeared for HIS Properties, that Mr Cozzolino was not to be found.

[6] The action was set down for trial on 4 and 5 July 2001. On 2 July Mr Hodul, represented by senior counsel, successfully sought an adjournment of the trial on the basis that he wished to amend his defence and counterclaim to seek damages for breach of an alleged joint venture – marketing agreement in respect of Neptune Resort between HIS Properties and Coralmere Pty Ltd, a company controlled by him. By order of Atkinson J he was required to serve an amended pleading by 9 July 2001. She further ordered that any application to join Coralmere Pty Ltd and/or to amend the defence and counterclaim was to be filed by 10 July 2001 and the action be placed on the Supervised Case List.

[7] Mr Hodul was required to make payment of $450 per week into HIS Properties' solicitor's trust account from 9 July 2001 in respect of occupational rent, such sum to be held on trust to abide the outcome of the trial. In default of making any of the payments Mr Hodul was obliged to deliver up possession of Lot 113 to HIS Properties failing which HIS Properties would be at liberty to retake possession on its undertaking not to dispose of the freehold.

[8] Mr Hodul did not deliver an amended defence or make application within the time stipulated by the orders and on 27 July 2001 Moynihan SJA at the Supervised Case List review extended time to deliver an amended defence and counterclaim to 10 August and to file an application for leave to amend to 17 August 2001. Mr Hodul appeared for himself at the review (as he has done since) by telephone conference link. Until then he had been represented by solicitors and counsel.

[9] The next review was set for 7 September 2001. No amended pleading was delivered and no application for leave to amend was brought within the time ordered. However, on 27 August 2001 Mr Hodul filed an application returnable the following day seeking orders that he retain possession of Lot 113, a declaration that the subject contract for the sale of Lot 113 was an instalment contract with a right to require conveyance and "further or alternatively" that HIS Properties pay to him agents' fees associated with the sale of two units in Neptune Resort which he had allegedly procured.

[10] Justice Moynihan dismissed Mr Hodul's application. No application was made to extend time further to deliver an amended defence and counterclaim to allege the joint venture and damages for its breach. Mr Hodul did not appear at the next review hearing on 7 September 2001 but shortly after, if not on that day, he became aware of what had transpired and probably had seen the transcript of proceedings. Justice Moynihan noted that the time in which to deliver an amended pleading and an application seeking leave to amend had expired and ordered that the action be restored to the call-over list with priority for the allocation of trial dates.

[11] The next civil call-over of actions was on 21 September 2001 at which Mr Tomasoni, solicitor for HIS Properties, appeared but Mr Hodul did not. Justice Moynihan allocated 26 to 29 November 2001 for the trial requiring Mr Tomasoni to notify Mr Hodul.

[12] On Monday 26 November, the first day of the trial, Mr Hodul sought a further adjournment on the grounds that he did not understand that the trial was to

commence that week but that future trial dates would be allocated. Mr Hodul also complained of late receipt of evidence being a video taken during the attempted repossession of Lot 113 on 2 November 1999, a further amended statement of claim, a recent notice to admit facts, a recent letter seeking further disclosure and a request for particulars of Mr Hodul's damages claim.

[13] Because there was a conflict between what HIS Properties understood the position to be about the allocation of trial dates and Mr Hodul's assertions, it was necessary for evidence to be given.

[14] Mr Tomasoni said that he had attended the call-over at which the dates were allocated, was on his way to counsel's chambers thereafter and was contacted by telephone by Mr Hodul. Mr Tomasoni told Mr Hodul that he had just attended the call-over and that the matter had been set down for the week commencing 26 November. Mr Hodul asked him for how many days and he was told four days. He asked on what day the trial would start in that week and Mr Tomasoni told him that it would start on 26 November, a Monday. Mr Tomasoni made a diary note of the conversation when he returned to his office to that effect. He had received no communication from Mr Hodul since.

[15] Mr Hodul accepted that he had telephoned Mr Tomasoni although from his perspective the main thrust of the conversation, he said, was to discuss settlement. He said that Mr Tomasoni did not tell him that the trial proper was to start on 26 November. Mr Hodul suggested that he had a copy of the court calendar which did not show his case as being listed. What he produced was the six-monthly calendar, which he had printed from the Court's web page, allocating the judges of the Supreme Court to various jurisdictions, e.g., civil, crime, Court of Appeal, for each week. In some cases where a specific trial had been allocated to a particular judge, that trial was listed. I did not conclude that Mr Hodul had been misled by this document.

[16] I accepted Mr Tomasoni's evidence and concluded that Mr Hodul was aware from 21 September that this trial would commence on 26 November.

[17] There had been difficulties in communicating with Mr Hodul. He had been required to provide a reliable postal address and also gave a facsimile transmission number. Unknown to the solicitors for HIS Properties, Mr Hodul had taken up residence in country New South Wales and the forwarding arrangements for his mail from a post office box address at Broadbeach appear to have been unreliable. He said that he received the late material from the solicitors towards the end of the week preceding the trial.

[18] The amendments to the claim did no more than bring matters up to date, including the conditional repossession by HIS Properties of Lot 113 on 20 August 2001, the lodging of the caveat by Mr Hodul subsequently and sought additional consequential relief, none of which were of surprise to Mr Hodul.

[19] The notice to admit facts was served less than fourteen days before the commencement of the trial so that r 189 *Uniform Civil Procedure Rules* has no effect. Mr Roney did not seek to pursue further discovery or particulars of damages if the consequences would be the adjournment of the trial. It was, however, noted that contrary to the rules no particulars of damages sought in the counterclaim had

ever been provided, and indeed, it was only with the greatest difficulty that Mr Hodul was persuaded to quantify his claim in his case in the course of the trial.

[20] The video, according to Mr Roney, was found during preparation for trial and a copy made and sent to Mr Hodul. It is not long and is a record made by an independent operator of the removalists' and others' activities at Lot 113 on 2 November 1999 including the arrival of Mr Hodul and his friends and his interaction with Ms Kim Spencer, the second defendant by counterclaim, who then worked for HIS Properties.

[21] I refused the application for adjournment for the reasons set out at T. 31-34.

[22] Mr Hodul initially conveyed helplessness about court procedures, expressions such as "pleadings" and puzzlement at what was expected of him. From time to time he appeared agitated and hyperactive but he was always articulate and alert. I concluded that his ignorance was more than a little disingenuous. In the course of his own evidence he revealed that he had received a Batchelor of Commerce and had embarked on some units in a Masters of Property Management postgraduate degree in the University of Queensland, which would suggest that he is capable of organising and mastering material and understanding concepts. He indicated that he had been and was involved in extensive litigation in Queensland and in New South Wales.

[23] It was difficult to get Mr Hodul to put his case to the witnesses called on behalf of HIS Properties. He had sworn a lengthy and, apparently, comprehensive affidavit in opposition to the summary judgment application and it might have been expected that this would form the basis of a coherent cross-examination. However Mr Yoshio Hayashi, the principal witness for HIS Properties, who had travelled from Japan to give evidence, had to be recalled so that Mr Hodul could more completely put to him assertions about their dealings which he proposed to give himself in evidence.

[24] Having done nothing to advance his alleged claim of a joint venture – marketing agreement between Coralmere Pty Ltd and HIS Properties for the exclusive right to market the remaining units in Neptune Resort, Mr Hodul found it difficult to focus on the contract for the sale of Lot 113, the subject of the present litigation, without being distracted by and seeking to articulate the joint venture issues. To some extent it was necessary to know about these negotiations between the parties in order to put the relationship between them in better context and, indeed, an alternative basis alleged by HIS Properties for terminating the contract was unconscionable conduct in the form of undue influence by Mr Hodul over Mr Hayashi in the context of these and other negotiations.

[25] It became apparent some time after the trial commenced that Mr Hodul was commuting between Brisbane and an address in northern New South Wales some hours distant. As a consequence, he was sometimes a little late for court, sometimes delays of some hours occurred and, I inferred, left himself little time to attend to those myriad details which occupy litigants before and after the actual hearing in court.

[26] On the morning of the third day, 28 November, Mr Hodul sought and was granted an adjournment to seek medical advice because he was having difficulty sleeping

and felt unable to continue. The medical practitioner, who was previously unknown to Mr Hodul, reported that Mr Hodul complained of confusion, loss of sleep and panic symptoms associated with some stressful recent business events and court proceedings. He was prescribed some short term medication. In the event, the trial resumed the following day on 29 November.

[27] Mr Hodul indicated that he wished to have certain witnesses subpoenaed to give evidence including Mr Hynes, the principal of the solicitors for HIS Properties, who was not instructing in the trial, and whose office was at Surfers Paradise. He had made no arrangements to have subpoenas issued and I suggested that Mr Hodul might conclude his cross-examination of Mr Takamizawa, whose evidence had been suspended whilst other witnesses' evidence was heard, on the following day which would then close HIS Properties' case. Mr Hodul would then have had the remainder of the day and Monday as well as the weekend to arrange his witnesses and prepare his case. He seemed to agree to that course. It was made abundantly plain to Mr Hodul that Mr Roney was, under no reasonable circumstances, available on the following Thursday or Friday. I was listed to hear other civil trials commencing on the Monday but the Tuesday had sufficient settlements for the resumption of the trial on that day to be possible. This was a trial, if competently conducted, could have been concluded as to evidence in three days.

[28] Mr Hodul did not appear in court on Friday 30 November. By telephone from New South Wales he indicated that he was unwell in as much as he felt confused and stressed and was seeking further medical advice. The conversation with Mr Hodul was relayed by conference telephone in the court room and, as on the previous occasion, transcribed. Mr Hodul, in effect, declined to complete the cross-examination of Mr Takamizawa that afternoon in person or by telephone. He declined to identify the witnesses whom he proposed to call or wished to call on the unsubstantiated and scandalous ground that the solicitors for HIS Properties would seek to prevent their appearance. He also declined to identify the further documents which he said HIS Properties' solicitors had in their possession but had not disclosed and which he wanted. He alleged conspiracy between those solicitors and a person named Tosswill with whom he was in litigation in both Queensland and New South Wales but would elaborate no further. He also suggested that his defence and counterclaim would need to be amended but declined to indicate in what respect.

[29] In the quite lengthy exchange with Mr Hodul, from my perception, there were few signs of genuine distress or confusion. He is an articulate young man whose intelligence and capacity to arrange his thoughts was well demonstrated in his cross-examination of Mr R Allsop, a valuer called by HIS Properties the previous day.

[30] There was a real concern that the defence and counterclaim evidence would not conclude if Mr Hodul were given the whole of Monday to prepare. The state of the civil list on that day meant that by Friday I knew that I was now available to continue the trial on Monday. Accordingly, I ruled that Mr Hodul should attend at 2.00 pm the following Monday, 3 December to complete his cross-examination of Mr Takamizawa and to open and commence the evidence in his case.

[31] On Tuesday when Mr Hodul was to open his case, having taken the whole of Monday afternoon to complete his cross-examination of Mr Takamizawa, he did not attend until after 2.15 pm. His explanation, as he had communicated during the

morning, was the failure of his motor vehicle. He telephoned messages to Mr Roney and to the court from time to time during the morning promising arrival within an hour or two but then changing his instructions.

[32] Mr Hodul was the only witness in the defence case. He said he would have liked to call other witnesses given more time. Other court commitments made it difficult for me to sit greatly extended hours but the evidence concluded about 5.45 pm on Wednesday 5 December with submissions to be provided in writing – Mr Roney's by 4.00 pm 12 December 2001, Mr Hodul's by 4.00 pm 13 December and the reply by 4.00 pm 14 December.

[33] Mr Hodul sought an extension of time to 17 December to produce his submissions which was not opposed by Mr Roney. In that event my associate indicated to the parties that judgment would not be handed down before Christmas, as had been earlier indicated, but would on the first day after the summer vacation. On 21 December Mr Hodul indicated that he was experiencing computer problems "I have reconstituted my submissions, however links and notes have either been scrambled or lost and the current format is in disarray". He said he expected to provide the submissions by 2 January 2002 or earlier. No further communication has been received from Mr Hodul. It was made clear on 5 December 2001 that judgment would be delivered even if no submissions were made.

Background

[34] HIS Properties is one of a group of companies controlled by a Mr Sawada, a Japanese national, who resides in Japan and appears from the evidence to keep fairly close control over his companies' activities. In 1994 Mr Yoshio Hayashi came to Australia as a resident director of HIS Properties and was involved in the development of Neptune Resort and the Watermark Hotel in Surfers Paradise as well, it would seem, as being involved in other commercial projects. He oversaw buying the land and the construction of the high rise development on each site. He returned to Japan regularly to consult with Mr Sawada but completed his Australian tour of duty on 26 June 1999. On that date he ceased to be a director of HIS Properties. He was succeeded by Mr Max Takamizawa who was already in Australia working for HIS Properties and had his office at the Watermark Hotel. He became a director of HIS Properties on Mr Hayashi's departure. Ms Kim Spencer, during the relevant time, was Mr Hayashi's personal assistant and continued to work with Mr Takamizawa when Mr Hayashi returned to Japan.

[35] Neptune Resort comprised 116 units over 10 levels with a basement car park. It was built about 1997. The units were to be strata titled with all to be sold. Initially Mr Sawada had intended to retain the penthouse apartment but decided to sell it. Lot 113 was described as the penthouse apartment although it was not a true penthouse and was located on the 9th and 10th levels of the building formed from the union of two units. It consists of two bedrooms and three bathrooms with balconies on two sides and enjoys ocean views. The living areas are two floors in height with windows of corresponding height. The owners of units do not own carparks but have exclusive use of designated spaces.

[36] During the first five or six months the units sold briskly but by December 1998 sales had almost completely dried up. Mr Hodul met Mr Hayashi socially at the Watermark Hotel in December 1998. Although Mr Hodul conveyed a much closer

and longer business relationship than Mr Hayashi's evidence would suggest, this was not put to Mr Hayashi. Mr Hodul discussed his interest in and activities concerning the real property market and his various development projects with Mr Hayashi. He told him that he could introduce potential buyers for Neptune Resort units on the understanding that he would be paid a fee. Neither Mr Hodul nor any of his companies held a relevant real estate agent's licence at any material time, nor at all. Mr Hodul maintains that he never held himself or his companies out as holding such a licence and indeed decried the notion that he might be described as a salesman. However, Mr Hayashi thought that he did.

[37] Mr Hodul and Mr Hayashi discussed and entered into negotiations about an exclusive marketing arrangement whereby one of Mr Hodul's companies would market the remaining units in Neptune Resort. Mr Hodul contemplated that Orchid Hills Realty, a business operated by Mauro Cozzolino, would be the real estate agent (and perhaps one other) for the unit sales. Mr Hodul and Mr Cozzolino had had quite extensive joint commercial dealings in the recent past but, according to Mr Hodul, had a significant falling out in the latter part of 1999 which has resulted in litigation. Mr Cozzolino did not give evidence.

[38] Mr Hayashi believed that Orchid Realty (or Orchid Hills Realty, as it became) to whom real estate agent's commission was paid, was Mr Hodul's company. HIS Properties had not previously done any business with Orchid Realty.

[39] Mr Hayashi was very pleased at the number of people Mr Hodul was sending to Neptune Resort after the recent non-performance by a number of real estate agents and was anxious to retain his efforts. Mr Hodul was paid a fee in respect of the sale of Lot 103 introduced by him probably towards the end of 1998.

The contract of 22 December 1998

[40] As a consequence of his interest in marketing Neptune Resort, Mr Hodul inspected the units and was given access to "inhouse" material by Mr Hayashi. Mr Hodul expressed an interest in purchasing Lot 113 for himself. The price first quoted to him by Mr Hayashi was $277,200 which Mr Hayashi took from an internal schedule of prices. It was clear that Mr Hayashi was not usually engaged in sales activities with respect to HIS Properties' stock. Mr Hodul agreed to purchase at that price but shortly afterwards he was informed by Mr Hayashi that an error had been made since the price was based on a miscalculation of the floor area and the proper price was $330,990. Mr Hayashi offered to let Mr Hodul withdraw from the purchase but although Mr Hodul complained about the new price he said that in the intervening days he had made personal arrangements including for his partner to join him from Sydney and live in the unit and he wanted that particular unit. Mr Hodul said that he expected that the increase in price would be absorbed in other commercial arrangements between himself and HIS Properties.

[41] There were ongoing negotiations about benefits which might "sweeten" Mr Hodul's unhappiness with the price including discussions about some vendor finance and a long settlement period in the vicinity of six months.

[42] Mr Cozzolino drew up a contract for the purchase of Lot 113 using a standard REIQ contract for home units (2nd ed) produced for execution by Mr Hodul. The contract is dated 22 December 1998. Mr Hodul nominated Orchid Realty as the agent and

Sciaccia & Sciaccia as the buyer's solicitors. Under the section concerning price the deposit-holder is described as Orchid Realty, the purchase price as $420,000 which Mr Hayashi described as "the list price", the deposit is $42,000 "payable when Buyer signs this contract". The solicitors for HIS Properties on the conveyance were Corrs Chambers Westgarth. The sale was not subject to finance. The settlement date was 22 March 1999. Finally, Orchid Realty is again described as the deposit holder "who acknowledges having received part of the deposit payable when the buyer signs this contract".

[43] On the same date the parties entered into a "side" agreement also drawn up by Mr Cozzolino whereby HIS Properties agreed to transfer title for an amount of $330,990 less settlement day adjustments. The parties agreed in cl 2 that Mr Hodul would be entitled to possession from 15 January 1999 until settlement. They agreed in cl 3 that if the contract was terminated by either party the deposit would be refunded to the purchaser. The parties otherwise confirmed all the terms and conditions of the REIQ contract signed contemporaneously. In the course of the trial Mr Hodul said that the standard form printed conditions of the REIQ contract were not attached to the contracts of either 22 December 1998 or 26 May 1999 which he and Mr Hayashi executed but I did not discern him to argue that those terms were not included in the contracts. His apparent familiarity with such contracts would preclude such an assertion without some evidence expressly excluding them. HIS Properties maintains that they were included in the contract.

[44] Mr Hodul added a further term in his handwriting to the "side" agreement that HIS Properties would provide two exclusive use car parks to the purchaser before settlement.

[45] Mr Hodul went into possession of Lot 113 about mid to late January 1999. Mr Hayashi was of the view that since the contract had been executed and the deposit paid this would be a satisfactory arrangement. Mr Hayashi regarded Mr Hodul as a trustworthy person with whom to do business. Although he did not ask Mr Hayashi about it in cross-examination, Mr Hodul said that at this time Mr Hayashi was keen to keep on foot a number of other commercial arrangements in which Mr Hodul was involved with HIS Properties. Mr Hodul dealt only with Mr Hayashi in respect of HIS Properties negotiations until he departed except for minor encounters with Ms Spencer and Ms S Prinz, the manager at Neptune Resort.

[46] Mr Hodul said that he gave the deposit for the sale of Lot 113 in the form of a cheque for $42,000 drawn on Stratlaw Pty Ltd, a company controlled by him, to Mr Hayashi made out to HIS Properties to be held by him and not banked without notice to Mr Hodul. Mr Hayashi completely rejected this when Mr Hodul put it to him in cross-examination. Mr Hayashi said that because he did not know Mr Hodul well, unless the deposit was in the bank, he would not have contemplated letting Mr Hodul into Lot 113. No contemporaneous documents or conduct support Mr Hodul's account except for the index page from Stratlaw's cheque account with ANZ Bank which suggests that a cheque for $42,000 was written in favour of HIS Properties on 22 December 1998.

[47] Corrs Chambers Westgarth corresponded with Sciaccia & Sciaccia about the car parking entitlement during February. By letter dated 15 February 1999 to Corrs Chambers Westgarth, Orchid Realty, under the hand of Mauro Cozzolino wrote in respect of the contract:

> "This is to confirm that Orchid Realty is holding $42,000 deposit in respect of the above contract.
>
> Should you have any queries in this regard, please do not hesitate to contact us."

[48] Mr Hodul asserted that Sciaccia & Sciaccia was merely a name on the contract and had no involvement in the settlement of it and/or acted positively against his interests and that Cozzolino changed from being a colleague in various commercial ventures to someone who meddled maliciously, unknown to Mr Hodul, in his affairs to cause him damage. Without distancing himself from them, correspondence written by them, ostensibly on Mr Hodul's behalf, is in conflict with his account of what occurred about the deposit. The letters positively support HIS Properties' position. Many of the letters passing between Corrs Chambers Westgarth and Orchid Realty and Sciaccia & Sciaccia were produced on disclosure by Mr Hodul's former solicitors which further discounts his contention that these letters were written without his instructions or knowledge.

[49] By letter dated 22 March 1999 Corrs Chambers Westgarth wrote to Sciaccia & Sciaccia nominating settlement at their offices on 26 March with a copy to Ms Spencer, Minter Ellison who were the mortgagee's solicitors, and Orchid Realty. The enclosed settlement statement was, as to purchase price:

"Purchase Price	$420,000.00
LESS Agreed Discount	(89,010.00)
	$330,990.00
LESS Deposit	(42,000.00)
	$288,990.00"

The end note at the foot of the document stated:

> "The agent (Orchid Realty) is to make a cheque payable to BankWest Credit Account HIS Properties Pty Ltd on account of the balance deposit available at settlement."

[50] A settlement statement amended in a minor way was sent again the following day with copies to the relevant parties. Mr Hodul did not settle on the appointed day. Mr Hayashi became aware of this about a week later and when he raised it with Mr Hodul, Mr Hodul referred to a number of problems including leaking in the roof which Multiplex, the builder, was to fix (it was still under warranty), and his desire to have two adjacent car parks. He also complained that the body corporate levy was too high and he wanted this adjusted. Once those matters were resolved Mr Hodul told Mr Hayashi that he would settle.

[51] Corrs Chambers Westgarth wrote to Sciaccia & Sciaccia extending the settlement date to 9 April 1999 with time remaining of the essence. A further extension on the same terms was granted to 14 May 1999.

[52] During this period Mr Hayashi and Mr Hodul continued to discuss Mr Hodul or his company obtaining an exclusive agency to market the remaining stock in

Neptune Resort. Mr Hayashi made it clear to Mr Hodul that any decision would be Mr Sawada's and he put proposals to him in Japan.

[53] On 28 April 1999 Mr Hodul sent by facsimile a draft agreement to Mr R Hynes of Hynes Hartnett which was described as a "Joint Venture Agreement" between HIS Properties and Coralmere Pty Ltd, one of Mr Hodul's companies. Mr Hodul made constant reference at the trial to which of Corrs Chambers Westgarth or Hynes Hartnett was handling the joint venture agreement in his cross-examination and generally. He saw some conspiracy to deprive him of the agreement after Mr Hayashi finally left Australia which, in some unspecified way, involved Hynes Hartnett and Mr Hynes in particular.

[54] No witness was very clear as to why two firms of solicitors were acting for HIS Properties. Corrs Chambers Westgarth were the solicitors on all the conveyancing work at the time and it seems likely that other matters were beginning to be directed to Hynes Hartnett. In due course, for reasons of economy and by direction from Japan, the latter firm came to handle all of HIS Properties' work.

[55] For some months prior to May 1999 Mr Hodul sought to have Mr Hayashi reduce the price of Lot 113. The increase from the original $277,200 was a continuing source of grievance to him and he suggested in evidence that Mr Hayashi had "lost face" over his error and was trying to be accommodating to Mr Hodul. In order to persuade Mr Hayashi to reduce the price Mr Hodul showed him a number of newspaper articles and advertisements which suggested that because of the economic downturn in Japan, Japanese owners of property at the Gold Coast were liquidating their assets and prices were consequently dropping.

[56] Mr Hodul also obtained a valuation of the unit from the Gold Coast office of Herron Todd White which nominated a value for Lot 113 "in the order of $290,000". Mr Hodul showed this to Mr Hayashi and the deduction of selling agent's commission which would reduce the return to HIS Properties to $269,000. Mr Hayashi said that he eventually agreed to a much reduced price of $280,990 to take account of problems with the leaking roof, the car parking and Mr Hodul's complaint that the fees for Lot 113 were far too high.

[57] Mr Hayashi agreed that HIS Properties would enter into a fresh contract with Mr Hodul for Lot 113 because he did not want to break the relationship with him. As Mr Hayashi saw it, HIS Properties was expecting Mr Hodul to sell the rest of the units in Neptune Resort expeditiously and the reduction in price would, in effect, be absorbed.

[58] At least up until 6 May 1999 Sciaccia & Sciaccia understood that the December 1998 contract with the extended settlement date to 14 May 1999 was still on foot and wrote on that date to Mr Hodul enclosing an amendment settlement statement. His solicitors asked him to "advise who is providing the finance . . . also advise whether you have executed mortgage documents".

[59] Neither Mr Hayashi nor Mr Hodul informed their respective solicitors that settlement would not proceed on 14 May. In the meantime Hynes Hartnett were trying to obtain a further draft joint venture agreement from Mr Hodul for perusal.

[60] On 17 May 1999 Corrs Chambers Westgarth wrote to Sciaccia & Sciaccia noting that Mr Hodul had failed to settle, was therefore in breach of the contract and noted that he was in possession of the premises.

The contract of 26 May 1999

[61] Mr Hayashi was to leave for a work related visit to Japan on 26 May 1999. Mr Hodul produced a new contract for the purchase of Lot 113, again drawn by Mr Cozzolino, which Mr Hayashi probably executed very early in the morning prior to his departure for the Brisbane airport. As previously, it was a standard REIQ contract with the same information as to buyer and seller and solicitors. Orchid Hills Realty was the agent and deposit holder. The purchase price was now described as $450,000. The deposit of $45,000 was payable on execution of the contract by the buyer. The settlement date was designated as "on or before 24 June 1999". The contract was not subject to finance.

[62] Again, the parties entered into a "side" agreement bearing the same date of 26 May 1999 in which they agreed that the vendor would transfer title for a total price of $280,990. The "side" agreement initially mistakenly showed the purchase price at $330,990, the same as the price on the 22 December 1998 contract, but Mr Hodul corrected the amount and made other minor adjustments to that clause which he and Mr Hayashi initialled.

[63] Additional clauses to those in the earlier "side" agreement were included, namely, cl 3 which warranted two adjacent car spaces and cl 4 which dealt with lot entitlements. It provided:

> "The Vendor warrants that in the event it is unable to reduce total contributions in respect of Lot 113 for body corporate levies including sinking fund to an amount of no more than $55 per week by 4 June 1999, that it will formalise before settlement a redistribution of lot entitlements in respect of interest and contribution between Lot 113 and those Lots that the Vendor owns as at that date such that the lot entitlements for contributions in respect of Lot 113 shall be reduced to $200."

Mr Hodul added in his handwriting at a later date:

> "Purchaser to attend at its expense adjustments to the redistribution".

[64] There were differences about what this entailed. Mr Hayashi's evidence was as Mr Hodul explained it

> "Well, lot entitlement, the – bit confused if it is a lot entitlement fee or body corporate fee, whichever it was, because the penthouse was two unit together, so the fee was little bit more expensive than the other units. So he wanted to reduce the fee or body corporate fee or entitlement fee, whichever, and then he explained to me that since we had, like, 25 or 26 units, we can divide his extra, you know, fee to those units, and those unit is going to only pay one or two dollar

> only, so there will be no significant change to other properties. So it will be done very easily, and he also said he would do everything because, you know, I don't know how to do it, so he said he will do everything and we don't need any permission from anybody. As long as I sign it, it will be done.
>
> So as far as you understood it, that it was going to fix up his complaint about the levies being too high for that unit? Yes."
> T. 58-59.

[65] Mr Hodul suggested that no-one at Corrs Chambers Westgarth handling the conveyance could understand what was involved whereas he did. Mr Hodul obtained Mr Hayashi's consent as the authorised officer of HIS Properties (exhibit 11) which Mr Hodul sent to Mr Beikoff at Corrs Chambers Westgarth on 29 June 1999. Mr Beikoff said in evidence that in the absence of instructions from the client he would not act on receipt of such an informal communication from the "other side" and the redistribution of lot entitlements remained a continuing issue.

[66] Mr Hayashi said that there was no discussion about the deposit of $45,000 at the time the contract was signed. He expected that it would be paid to the real estate agent as the contract provided. It was not something which he concerned himself with when units were sold. The defence alleges in para 8(c) that the deposit of $45,000 was paid because Mr Hodul provided Orchid Hills Realty with a cheque in that amount on or about 26 May 1999 which was payment of the deposit. Mr Hodul changed his position without seeking leave to amend. Mr Roney contended that he ought to be held to his pleading. Were his explanation given in evidence compelling I should have encouraged him to seek leave to amend. It was not. He said that because Mr Hayashi still had the deposit cheque for $42,000 from the December 1998 contract, which he did not return, it was agreed between them that the deposit for $45,000 would be paid by cheque made out to Orchid Realty. It was, he said, drawn on Stratlaw Pty Ltd's account. Mr Hodul said that he gave the cheque to Mr Hayashi along with the REIQ contract and the "side" agreement. Giving him the cheque would really only be explicable if it was made out to HIS Properties as Mr Hodul seemed to suggest it was in his opening at T. 419 and following. Mr Cozzolino was not present when the contract was executed and Mr Hayashi was about to depart for Japan.

[67] In the course of cross-examination Mr Hodul admitted that no moneys went out of the account of Stratlaw Pty Ltd in respect of the deposit cheque alleged to have been drawn.

[68] Mr Hayashi gave no instructions about the new contract to Corrs Chambers Westgarth before he left and understood that Mr Hodul would take HIS Properties' copy of the contract to the solicitors or give it to Ms Spencer.

[69] Mr Hodul denied that he had the duplicate copy of the contract and what happened to it was not revealed by the evidence but a letter from Orchid Hills Realty under

the hand of Mauro Cozzolino dated 5 July 1999 to Corrs Chambers Westgarth stated:

> "The Purchaser has requested that I forward you a copy of the current contract of sale dated 26 May 1999, copy of which follows.
>
> We confirm that Orchid Realty is holding $45,000 deposit in respect of the above contract.
>
> We note that the car parking and lot entitlement adjustments are yet to be finalised and this has caused delays in settlement."

[70] By letter dated 7 July 1999 Corrs Chambers Westgarth responded, it might be inferred, in some agitation:

> "We refer to your letter dated 5 July 1999 enclosing contract dated 26 May 1999. We are greatly concerned by the fact that this is the first time we have viewed the new contract of sale and note that the specified settlement date has already past. Please advise the reasons why a copy of the contract was not forwarded to our office at an earlier date (ie immediately following execution) together with advice that the previous contract of sale had been terminated by the parties. We also look forward to receiving our client's original copy of the contract.
>
> The contract is on different terms to the contract of sale you originally forwarded to us in December 1998. Please confirm whether you are holding the deposit of $42,000 as advised in your letter dated 15 February 1999.
>
> We note your advice that you are now holding the sum of $45,000 on account of the deposit paid by the purchaser under the second contract. Please provide a copy of your trust account receipt."

[71] By this time Mr Takamizawa had taken over Mr Hayashi's position in Australia and he was concerned about the several contract for the sale of Lot 113, whether the deposit had been paid and the status of the exclusive marketing agreement in respect of which there was no draft. He noted that the facsimile transmission number used by Mr Hodul was the same as that on Orchid Hills Realty's letterhead. He attended at the address on the letterhead – Level 3 Niecon Tower, Broadbeach, with Ms Spencer but was unable to find Orchid Hill Realty's office or anyone who knew of it in the building. After speaking with Mr Beikoff of Corrs Chambers Westgarth, about the existence of the office it might be inferred, a letter on Orchid Hills Realty's letterhead ostensibly signed by Mauro Cozzolino was received by the solicitors indicating that the business was relocating to Level 5 Niecon Tower and would be reopen on 12 July 1999 and regretted the inconvenience to Mr Takamizawa. A trust account receipt was included stating that $45,000 was received from Peter Hodul on 25 May 1999 as a deposit for Lot 113.

[72] Mr Takamizawa attempted to find Orchid Hills Realty's office after 12 July, again unsuccessfully. He noted a solicitors' office on Level 5. Mr Hodul seemed to

suggest that the solicitors' office was the office of Orchid Hill Realty at that time although Mr Takamizawa said that he inquired there without success.

[73] Mr Takamizawa continued to be uneasy about the deposit and letters were sent by Corrs Chambers Westgarth dated 13 July and, subsequently, 23 August 1999 requesting copies of the trust account receipt for $42,000 in respect of the December 1998 contract and details as to how those moneys were dealt with following the purported termination of that contract as well as requesting an official bank statement which confirmed that the deposit of $45,000 was banked into the trust account of Orchid Hills Realty on or before the contract was formed. There was no response to the latter request.

[74] Corrs Chambers Westgarth wrote to Orchid Hills Realty on 13 July 1999 that it was not to take any instructions from Mr Hodul in relation to properties owned by HIS Properties until further notice. The solicitors also wrote to Mr Hodul seeking a copy of an executed written agreement relating to "the real estate agent/marketing agent relationship" with HIS Properties noting that they had no supporting documentation for any such agreement.

[75] Having reviewed the draft joint venture agreement which had been provided to them, Corrs Chambers Westgarth notified Mr Hodul that HIS Properties did not intend to proceed with the proposed arrangement in any form nor did it require him or any of his companies to carry out any promotions in respect of sales of units in Neptune Resort and did not intend to accept any offer to purchase a unit received from a purchaser already introduced by him.

Meetings of 29 June/14 July 1999

[76] There was some uncertainty about what meetings were held with Mr Hodul after Mr Hayashi's final departure. Mr Beikoff had not worked for Corrs Chambers Westgarth since August 1999 and Ms Spencer had left the employ of HIS Properties some time previously. Their recollection of dates and numbers of meetings was not clear. I had no doubt that they were honest witnesses doing their best to recall events of no interest to themselves years later. As far as the topics under discussion were concerned and particularly what Mr Hodul had to say about the deposit I considered them reliable. Mr Takamizawa had difficulty recalling the number of meetings but was prepared to make concessions to Mr Hodul when his memory was refreshed. I had no doubt that his recollection about the things which were important to him then – whether the deposit had been paid and the redistribution of the lot entitlements – was reasonably accurate. Some of his evidence differed slightly from that of Mr Beikoff and Ms Spencer but not in material details and none of them supported Mr Hodul's account.

[77] Mr Hodul produced correspondence, not disclosed and not put to HIS Properties' witnesses which suggested that there was a meeting involving at least Mr Hodul and Mr Takamizawa on 29 June at which the exclusive marketing agreement was discussed. There was a further meeting on 14 July 1999, apparently at Mr Hodul's request, at the offices of Corrs Chambers Westgarth attended by Mr Hodul, Mr

Takamizawa, Ms Spencer, Mr Beikoff, Ms Annette Greenhow a solicitor with Corrs Chambers Westgarth, and Mr Hodul's solicitor Mr Peter Muller from Quinn and Box. There is no doubt that Mr Hodul's focus was on the marketing agreement which he clearly wished to salvage and which he saw as the purpose of the meeting while Mr Takamizawa was more concerned with the settlement of Lot 113 and whether or not a deposit had been paid. Mr Hodul said it was something of a trick to raise the issue of the settlement and deposit in respect of Lot 113 at this meeting and after his solicitor was required to leave when he was only there to discuss the marketing agreement.

[78] Mr Hodul said that he had tabled two signed contracts (purchaser undisclosed) for the sale of units in Neptune Resort at this meeting, which he expected to settle, probably to show HIS Properties that it was worthwhile to continue to negotiate with him. Subsequently those units were sold in November 1999 to that purchaser for which Mr Hodul received no fee and in respect of which he has a sense of grievance. The HIS Properties' witnesses had little, if any recollection of the tabling of these contracts which probably is a reflection of their major interest in Lot 113.

[79] In cross-examination Mr Hodul put to Mr Beikoff that there was no discussion about the deposit; to Mr Takamizawa that he raised cl 5 and the irrelevance of the deposit as well as explaining that he had given a cheque for $42,000 to Mr Hayashi not to be banked without notice in respect of the December 1998 contract; he did not seek to contradict Ms Spencer's evidence that he told them that the deposit had been paid to the agent.

[80] Mr Takamizawa said that a further meeting was arranged after 14 July but that Mr Hodul did not attend. His solicitor's letter of the following day suggested that the failure by HIS Properties to process the two sale contracts was a determining factor. The clear impression which I had was that the joint venture – marketing agreement and the settlement of Lot 113 were matters which stood or fell together so far as Mr Hodul was concerned.

[81] All of the witnesses agreed that the question of the redistribution of Lot entitlements was discussed at the 14 July meeting. Mr Hodul thought it was a very simple exercise – just a matter of reorganising the numbers amongst the units still held by HIS Properties as he had indicated in his schedule (exhibit 8) which he had made available. Mr Beikoff and Ms Spencer were of the opinion that it would not be so easy to achieve, particularly as there were issues of parity with other unit owners. As far as HIS Properties' witnesses were concerned, the circumstances did not suggest that this was pressing as there was no satisfaction that the deposit had been paid in respect of the purchase of Lot 113, no indication that Mr Hodul was in any position to tender the purchase price and that he had been in possession for six months.

Termination of the contract of 26 May 1999

[82] By letter dated 2 November 1999 sent by facsimile transmission to Mr Hodul care of Sciaccia & Sciaccia, HIS Properties through its solicitors Hynes Hartnett purported to terminate the contract for the sale of Lot 113. A copy was left for Mr Hodul with the receptionist at Neptune Resort under cover of a letter explaining the repossession and where he could collect his goods. HIS Properties had arranged a month's storage at its cost (exhibit 27).

Events of 2 November 1999

[83] Ms Spencer accompanied by a solicitor from Hynes Hartnett, who was to take an inventory of what was packed and removed, affected entry to Lot 113 about 1.00 pm on Tuesday 2 November 1999. Mr Hodul was not in residence and a locksmith enabled them to enter the unit. Removalists were engaged as was an independent cameraman to record on audio/video what occurred and what was said. In the course of packing items in the kitchen the removalists noted and drew the solicitor's attention to some implements and substance associated with illegal drug consumption. The solicitor drew Ms Spencer's attention to these items. The removalists indicated that they could not store perishable items since they would attract vermin and asked for instructions about the implements and substance. Ms Spencer indicated that they should be packed with the perishables and available for collection at reception by Mr Hodul should he so choose. The implement, which was a "bong" with some residue, and dried leafy material were put on the bench in the kitchen.

[84] Shortly afterwards Mr Hodul arrived accompanied by several male friends and indicated that the police were on their way. He was, not surprisingly, upset and apparently agitated. He is shown on the video walking about vigorously and speaking into his mobile phone. Ms Spencer's evidence was that he was pacing backwards and forwards speaking into his telephone and at the time was apparently not aware of where people were standing. After Mr Hodul arrived Ms Spencer drew to his attention the bong and drugs. They went onto the balcony to speak. Ms Spencer said she felt intimidated by Mr Hodul's demeanour and by what he said. He asked her what she proposed to do about the bong. She said that they were available for collection with his perishables. Ms Spencer said that Mr Hodul commented to her that she was suggesting that if he left he could take them with him and that would be the end of it. Her evidence was that it was not any of her business as to what happened to the drugs. Mr Hodul had said that the fact that they were found in the apartment did not mean that they were his since many people passed through that apartment and stayed with him.

[85] Mr Hodul believed that Ms Spencer was threatening him – if he left quietly she would not report the drugs to the police, if not, she would. After viewing the video and hearing and seeing Ms Spencer give evidence I was not persuaded that she had made any threats to Mr Hodul. His conduct towards those engaged in carrying out HIS Properties' instructions could be characterised as intimidatory.

[86] Ms Spencer was in a confined space near the stairs where a number of boxes were stacked. She said that Mr Hodul turned around while pacing up and down and

"crashed straight into" her. She said that she put her hands up to push his body weight off her and that was the only incident where they had made contact, T. 259.

[87] Mr Hodul said Ms Spencer had attempted to push him out of the door of the unit and in the course of doing so tore his shirt. Such an incident is not recorded on the video or anything resembling it. Nor are any recriminations heard from Mr Hodul about it on the tape. Mr Hodul did not retain the shirt although he produced at the trial a previously undisclosed photograph showing a tear on the inner sleeve of the shirt. When shown to Ms Spencer she suggested that it was a worn cotton shirt and the tear was likely to have occurred because of the agitated way in which Mr Hodul was flinging himself about. Mr Hodul was seen removing and packing or unpacking files with sharp corners. The photograph, no doubt by oversight, was not formally tendered and is exhibit B for identification.

[88] When the police arrived Ms Spencer spoke to them in the corridor and told them that some drugs and implements not thought to be lawful had been found and were on the kitchen bench. She made no reference to Mr Hodul in the context of the drugs. She said she told the police about them because she was concerned that Mr Hodul might suggest that she had planted them in the unit. No action was taken by the police in respect of the drugs. At the suggestion of the police HIS Properties through Ms Spencer abandoned its attempt to retake possession of Lot 113.

[89] Mr Hodul claimed that certain chattels belonging to him had been damaged by the removalists. It was not until he was giving evidence-in-chief that he produced a schedule of damages (exhibit 26) which is a list of a small number of items which he has not replaced. They are a glass vase which he valued at $90; four crystal glasses, three broken and one chipped which he valued at $100; a coffee heater and pot, the pot of which was broken which he valued at $110; the leg of a tallboy was allegedly split so that a portion of it was broken off which has not been repaired which he estimated would cost $160; the business shirt allegedly torn by Ms Spencer he valued at $120; three missing CD's he valued at $100; damage to the glass in a large bevelled mirror he valued at $350. Mr Hodul claimed the cost of cleaning the unit at $100 (no receipt); the cost of cleaning the lounge covers because of scuffing allegedly caused by the removalists at $60 (no receipt). Mr Hodul claimed an item of $165 for removals but was unable to recall to what that referred since he had not employed any removalist. The boxes packed by the removalists were taken from their truck and left in the basement of Neptune Resort. His friends assisted him to carry the goods back into the unit. Mr Hodul claims an item of $1,000 for lost income but he was unable to explain at all how he arrived at this figure. He had the locks restored and an extra lock fitted at a cost of $140 (receipt).

Findings about the payment of the deposit

[90] I accepted Mr Hayashi's evidence that so far as he was concerned the written contracts recorded that a deposit was payable and that he expected and believed that the deposit was paid to the stakeholder in accordance with the terms of the agreement both in December 1998 and in May 1999. I do not accept Mr Hodul's evidence that a cheque was made out to HIS Properties in respect of the December

1998 contract and given to Mr Hayashi to be banked either absolutely or on notice. Neither do I accept his evidence that a cheque made out to Orchid Hills Realty was handed to Mr Hayashi in respect of the deposit for the contract on 26 May 1999.

[91] In para 8(d) of the defence and counterclaim it is contended that HIS Properties by conduct waived the requirement for payment of a deposit as an alternative to the allegation that the deposit had in fact been paid to Orchid Hills Realty. There was no conduct on the part of HIS Properties and in particular Mr Hayashi which would support any suggestion of waiver of Mr Hodul's obligation to pay a deposit. Mr Hayashi was clear that in December 1998 it was an important "earnest" of Mr Hodul's bona fides as a purchaser and continued to be so. The correspondence emanating from Scaccia & Sciacca and Orchid Hills Realty confirms that Mr Hodul was under no misapprehension that he was relieved from his obligation to pay the deposit. I find that Mr Hodul either wrote or caused to be written the correspondence sent on Orchid Hills Realty's letterhead and the correspondence from Sciacca & Sciacca was written within the ambit of his instructions.

[92] I infer that Mr Hodul procured Mr Cozzolino to write out trust account receipts which conveyed the impression that the deposit cheque had been negotiated into Orchid Hills Realty's trust account. If, as Mr Hodul asserted, he was not required to pay a deposit to the stakeholder but had left the cheque with Mr Hayashi for later negotiation there was no basis or reason for the second receipt to come into existence.

[93] The financial statements produced by Mr Hodul do not indicate that as at 26 May 1999 or about that time Stratlaw had funds even approaching the amount of $45,000, although his personal account had funds of $35,000.

[94] Clause 2.1 of the standard terms obliges the buyer to pay the deposit to the deposit holder at the time shown in the contract which is then held until a party becomes entitled to it. The buyer will be in default if he does not pay the deposit when required. By cl 9.1 if the buyer fails to comply with any provision of the contract, the seller may terminate the contract. By cl 6 of the "side" agreement the parties confirmed that all terms and conditions of the (REIQ) contract remained unaffected by the "side" agreement save where expressly provided. Accordingly, Mr Hodul was in breach of the contract of 26 May 1999 in that he did not pay as required the deposit of $45,000 or any sum. HIS Properties was, therefore, entitled to terminate the agreement – although two other matters need to be considered which may affect this conclusion.

The redistribution of lot entitlements

[95] By cl 4 of the "side" agreement HIS Properties warranted that it would formalise before settlement a redistribution of the lot entitlements in respect of interest and contribution which Mr Hodul would attend to at his expense. This was a matter of great importance to Mr Hodul. He represented to Mr Hayashi that it was a very simple matter and that he knew what had to be done. Mr Hayashi expected Mr Hodul to be responsible for bringing this about. Mr Hodul procured the

resolution by HIS Properties authorising the redistribution of lots to allow the body corporate committee to stamp a new community management scheme and to be lodged with the Department of Natural Resources. In the period immediately following the execution of the contract on 26 May 1999 Mr Hodul did not complain that Corrs Chambers Westgarth were not undertaking the redistribution, if it was his understanding that HIS Properties was responsible.

[96] Mr Hodul produced two letters at the trial ostensibly written by his then solicitors Quinn & Box to Corrs Chambers Westgarth on 15 and 30 July respectively (exhibit 23). They were not disclosed, neither were their contents put to Mr Beikoff, and it is not accepted by HIS Properties that they were ever received. They may have been drafts sent to Mr Hodul for his approval since they bear his facsimile number. The letter of 30 July 1999 called upon HIS Properties to attend to the lot redistribution and nominated 30 August 1999 as the completion date of the contract. No further action was taken.

[97] Whether or not there was an obligation on the part of HIS Properties to effect the lot redistribution, which does not seem to have been the common understanding of the parties at the time, the failure to do so cannot affect HIS Properties' entitlement to terminate the contract for failure to pay the deposit.

Was the contract an instalment contract?

[98] The defence does not allege that the contract was an instalment contract although the application made by Mr Hodul for summary judgment on 28 August 2001 did seek a declaration to that effect. Of relevance is the question of notice. Pursuant to s 72 of the *Property Law Act* 1974 an instalment contract is not determinable because of default on the part of the purchaser in payment of any instalment *other than a deposit or any part of a deposit* due and payable under the contract until the expiration of 30 days after service of a notice in the approved form.

[99] An instalment contract, by s 71, means a contract for the sale of land in terms of which the purchaser is bound to make a payment or payments other than a deposit without becoming entitled to receive a conveyance in exchange for the payment or payments. For the purpose of an instalment contract a deposit is defined as a sum not exceeding 10 per cent of the purchase price payable under an instalment contract paid in one or more amounts and liable to be forfeited and retained by the vendor in the event of a breach of the contract by the purchaser.

[100] The arrangement between the parties was for the two contracts to be read together. The "side" agreement entitled the purchaser to a conveyance if a discounted amount were paid. It was nonetheless the intention of the parties that the $45,000 stipulated as the deposit was the deposit and other benefits flowed to the purchaser from the payment of the reduced price.

[101] Since the requirement to give notice under s 72 only arises if there is a default on the part of the purchaser in paying any sum other than a deposit the obligation will not apply here.

Entitlement to the deposit

[102] HIS Properties seeks an order for the payment of the deposit. By cl 9.1 of the (REIQ) contract the seller may affirm the contract or terminate if the buyer fails to comply with any provisions of the contract. By cl 9.3 if the seller terminates the contract the seller is entitled to do all or any of a number of things – to resume possession of the property, forfeit the deposit and interest earned on its investment, sue the buyer for damages and resell the property. But these provisions must be read with cl 5 of the "side" agreement. Clause 5 provides "in the event the contract is terminated by either party, the deposit shall be refunded to the Purchaser in full and neither of the Parties shall have any further claim". On its proper construction cl 5 does not seek to negate or exclude the terms of cl 2.1 of the REIQ contract which provides that the buyer will be in default if the deposit is not paid. The question is whether it excludes the provisions of cl 9.3 which entitles the seller to forfeit the deposit for breach. Clause 2.3 deals with the entitlement to the depost and provides, relevantly,

> "(b) if this contract is terminated without default by the Buyer: the Buyer; and
> (c) if this contract is terminated owing to the Buyer's default: the Seller.
> (3) If this contract is terminated, the Buyer has no further claims once it receives the Deposit and interest, unless the termination is due to the Seller's default or breach of warranty."

[103] Mr Roney submitted that cl 5 of the "side" agreement provides for refunding the deposit under circumstances such as mutual mistake or frustration but not for termination for breach. But cl 2.3 provides for that situation by making forfeiture of the deposit by the buyer dependant on fault but on termination without fault toe deposit is to be returned to the buyer. The only reason for including cl 5 would be to exclude the provisions of cl 2.3(1)(c). I have little doubt that this would not have been Mr Hayashi's wanted outcome and had he taken the "side" agreement to his solicitors before execution for advice he may not have agreed to its inclusion. However, this is mere speculation and there is no allegation that he executed the "side" agreement without knowledge or understanding of its terms. Mr Roney submitted that there is no pleading seeking relief against forfeiture on this ground. By expressly pleading cl 5 in the defence that, in my view, is sufficient. HIS Properties is precluded on the proper construction of cl 5 from an order for the payment of the deposit.

[104] At common law a seller has an independent right to recover an unpaid deposit after termination, *Ashdown v Kirk* [1999] 2 Qd R 1 per McPherson JA at 8, but that cannot operated against the terms of the contract.

[105] For completeness, one further matter should be considered. The nominated deposit of $45,000 was 10 per cent of the contract price appearing on the REIQ contract but 16 per cent of the reduced price under the "side" agreement. The defence does not seek relief from forfeiture of the deposit on the ground that it constitutes a penalty. Whether or not the payment of a deposit may be retained by the seller will depend on whether it is reasonable in amount and a deposit of no more than 10 per cent of the purchase price has prima facie been held to be reasonable, *Mehmet v Benson* (1963) 81 WN (Pt 1) (NSW) 188 per Jacobs J at 191 and see the discussion by McPherson J in *Freedom v AHR Contructions Pty Ltd* [1987] 1 Qd R 59 at 64 – 66.

Whether the amount of a deposit is reasonable is to be decided by reference to the surrounding facts and the terms of the contract.

[106] There are a number of factors which might be considered in deciding whether 16 per cent of the price paid for the unit under the "side" agreement is such as to constitute a penalty. There was evidence that the $277,200 was an undervalue for Lot 113 although this was greatly contested by Mr Hodul. There were other benefits, however, which he saw accruing to him in the ongoing commercial relationship with HIS Properties. He was entitled under the contract to possession until settlement. In fact, by the time the parties executed the 26 May contract Mr Hodul had been living in the unit rent free since late January 1999.

[107] In those circumstances a deposit of 16 per cent of the discounted contract price was not unreasonable and it would not constitute a penalty.

Entitlement to occupation rent

[108] Clause 2 of the "side" agreement provides that:

> "The Vendor has given irrevocable vacant possession to the Purchaser until settlement"

and the settlement date in the contract is on or before 24 June 1999. Vacant possession until settlement must mean the specified date for settlement or any agreed extension. The contract did not settle on that date. Negotiations were still on foot between the parties therafter and HIS Properties tacitly consented to Mr Hodul remaining in possession until 2 November 1999.

[109] By cl 8.6 if possession is given before settlement entry into possession is by licence personal to the buyer and revocable at any time. It does not create a relationship of landlord and tenant or waive the buyer's rights under the contract. The buyer agrees to indemnify the seller against any expense or damage incurred by the seller as a result of the buyer's possession of the property. The notice given on 2 November 1999 was sufficient to terminate Mr Hodul's licence to occupy. Thereafter he continued in possession thus depriving HIS Properties of its right to possession and is liable for occupation rent.

[110] Ms Sandra Prinz, the owner of management rights at the Neptune Resort was experienced in letting the property. She was of the opinion that Lot 113 could have been let in the holiday category, i.e., overnight or week to week in the range of $600 to $650 a week when she gave evidence, and would easily achieve $450 over the period of occupation. After Mr Hodul failed to comply with the order of the court that he should pay $450 per week in respect of notional occupation rent for Lot 113 and HIS Properties repossessed it, there was no reason advanced why Lot 113 could not have been let on a weekly basis.

[111] I conclude that cccupation rent is owed by Mr Hodul to HIS Properties from 2 November 1999 until 20 August 2001. I fix the amount of weekly rental at $450

over the whole period which will take account of fluctuating rates and periods of no rental. That amounts to the sum of $42,750 for 95 weeks. From that sum should be deducted the amount of $2,250 which has been paid into Hynes trust account which should be released to HIS Properties.

Breach of fiduciary duty and/or undue influence

[112] HIS Properties pleads its entitlement to avoid the contract on the alternative basis that there was a fiduciary relationship existing between HIS Properties and Mr Hodul which he breached and/or an obligation not to deal unconscionably with HIS Properties.

[113] Mr Hodul was given access to confidential information in respect of the units which would not in the usual course be given to other real estate agents who might be marketing those units. Mr Hodul said that he was engaged in a range of other commercial discussions with Mr Hayashi and that Mr Hayashi was concerned that these should continue. During the period between December 1998 and April 1999 by introducing prospective buyers to HIS Properties for the remaining Neptune Resort units, Mr Hodul was seeking to persuade Mr Hayashi of his value as a marketer. In that way he would be more likely to secure the exclusive marketing arrangements which he desired.

[114] HIS Properties contends that by embarking upon a concentrated effort to have Mr Hayashi release him from the contract price of $330,990 in the December 1998 contract for a greatly reduced sum Mr Hodul used tactics which were unconscionable including making much of the leaks in the unit which Mr Allsop said were commonplace in units built at the Gold Coast in recent years and which were still under the builder's warranty; complaining about the high body corporate levies of which he would have been aware when he entered into the December 1998 contract; requiring adjacent car parks; leaving the execution of the contract until Mr Hayashi was departing for Japan so putting pressure on him; and persuading him generally that the market was declining.

[115] HIS Properties contends that it was placed in a position of disadvantage or vulnerability by virtue of this pressure by Mr Hodul upon Mr Hayashi and it would be unconscionable for Mr Hodul to have the benefit of the contract.

[116] Mr Hayashi was a director of HIS Properties. He had been in Australia for a number of years working on significant projects for Mr Sawada's companies bringing them from commencement to completion. He was apparently impressed by Mr Hodul's energy and representations and very anxious to sell the remaining stock in Neptune Resort. They were on equal footing in every relevant sense and Mr Hodul did not owe HIS Properties any relevant duty in equity. There is no entitlement to an order setting aside the contract on equitable principles.

Specific Performance

[117] Throughout the hearing Mr Hodul made it clear that he did not regard the counterclaim of any importance or significance. He was concerned that he be entitled to an order for specific performance of the contract. The evidence does not suggest that Mr Hodul was either ready or able to complete the contract prior to 2 November and presently has demonstrated no capacity to do so. He evidenced a

mortgage facility in respect of an entity, Pelican Moorings Pty Ltd, of which he was a director, dated 2 July 1999. This was for $3.72m in respect of a loan having a term of one year repayable within a year for construction work in which advances were to be made progressively to the builder who was the joint borrower. Mr Hodul was the guarantor of the loan. There is no basis for supposing that this money could have been a source of funds for settling the contract on Lot 113.

[118] Mr Hodul declined to inform the court when pressed what, if any, assets he controlled or could call upon to satisfy the contract had it been still on foot. A not unlikely inference is that he intended to raise the settlement moneys out of fees generated by the sales of units in Neptune Resort when he entered into the contract.

The counterclaim

[119] Despite the allegations in his counterclaim Mr Hodul did not seem very concerned about the alleged defamatory implication that he was a user of illicit drugs. His complaint was that Ms Spencer had engaged in "blackmail" by suggesting that if he cooperated and removed himself from the premises she would not disclose the existence of the drug related items to the police. She denies having threatened him in that or any way but it may well be that in his heightened state he misunderstood what passed between them on the balcony.

[120] It is difficult to see how informing the police, who were brought to Lot 113 by Mr Hodul or his solicitors, that there was an implement for smoking illegal drugs and a small quantity of drugs in the kitchen, constitutes defamation. If the defamatory implication is be drawn then it was clearly a comment protected by qualified privilege pursuant to s 16(1)(h) of the *Defamation Act* 1989. I expressly find that any information given to the police was done without malice. It may be that if defamatory, the statement would attract the protection of s 20 of the *Defamation Act* 1989 – a trivial matter.

[121] Mr Hodul has not made out his allegation of assault against Ms Spencer. He does not seek damages for assault in his counterclaim, merely for defamation and trespass including exemplary damages. HIS Properties was entitled to repossession of the unit on 2 November and no trespass occurred when it re-entered and endeavoured to exercise its rights pursuant to s 8.6(2) of the contract including removing Mr Hodul's goods.

[122] The damages claimed for the chattels and the cleaning of the unit as a consequence of the conduct of the removalists were not the subject of any compelling evidence. The video followed the removalists who were dressed in uniform and appeared to be conducting themselves in a careful and professional manner whilst packing Mr Hodul's goods. They did not appear to be conducting themselves in a way which would require the lounge and carpet to be cleaned. Mr Hodul's friends brought his goods back from the basement where they were unloaded by the removalists and it may be that in doing so if damage occurred it happened then. Mr Hodul said he had photographs but these had not been disclosed and he only produced the shirt photographs. Mr Hodul did not put to Ms Spencer in cross-examination that any damage was caused except to his shirt. The defence pleads that Mr Hodul was shocked and distressed. It might be accepted that he experienced these emotions in some degree but they would not sound in damages. I

am not persuaded that Mr Hodul had made out his counterclaim to the requisite standard.

[123] The counterclaim is dismissed.

Costs

[124] Mr Roney foreshadowed, in the course of the trial, that whatever the outcome he would be seeking indemnity costs for the additional time it took for the trial because of Mr Hodul's conduct during the trial and particularly his failure to particularise the counterclaim and its prosecution although it was essentially trivial; the time wasted in irrelevant cross-examination; his failure to put his case to HIS Properties' witnesses when his obligations were clearly explained; and his persistent lateness for court throughout the trial.

[125] The court's power to order costs to be assessed on the indemnity basis is found in r 704 of the *Uniform Civil Procedure Rules* but otherwise costs are assessed on the standard basis. The circumstances in which a court might order that costs be so assessed are not limited and the principles have been discussed by Sheppard J in *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248 and earlier by Woodward J in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 and examples given. In brief, indemnity costs might be awarded when it is in the interests of justice to do so. By far the greatest amount of time was lost by Mr Hodul's assertion that he was unwell and the failure of his motor vehicle. The court is in no position to assess the truth or otherwise of these explanations. It might be concluded that perhaps a half or even a whole day was lost due to Mr Hodul's style of cross-examination which was rambling, except with Mr Allsop, the valuer, and his failure to give particulars of his counterclaim and the non-disclosure of relevant documents. However, I would have some difficulty in concluding that the justice of the case requires that indemnity costs be awarded against him for those reasons alone.

Orders

1. Declare that HIS Properties Pty Ltd validly terminated the contract(s) dated 26 May 1999 on 2 November 1999.
2. HIS Properties is entitled to unconditional possession of Lot 113 on BUP 105721 and is released from its undertakings given to the court on 2 July 2001.
3. The caveat with dealing number 705 006 023 registered over Lot 113 on BUP 105721 be removed.
4. Peter Hodul to pay occupation rent to HIS Properties Pty Ltd in the sum of $40,500 together with interest thereon at five per cent per annum from 2 November 1999.
5. The sum of $2,250 paid into the trust account of Hynes Lawyers pursuant to the order of Atkinson J of 2 July 2001 be released to HIS Properties Pty Ltd.
6. The counterclaim be dismissed.
7. Peter Hodul pay HIS Properties Pty Ltd's costs of and incidental to the claim and the counterclaim and Kim Spencer's costs of and incidental to the counterclaim.