SUPREME COURT OF QUEENSLAND

CITATION:	*Coghlan v Pyoanee P/L* [2003] QCA 146
PARTIES:	**PETER CHARLES COGHLAN** (plaintiff/appellant) **v** **PYOANEE PTY LTD** ACN 003 671 109 (defendant/respondent)
FILE NO/S:	Appeal No 29 of 2003 SC No 6498 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2003
JUDGES:	McPherson and Williams JJA, and Atkinson J Separate reasons for judgment of each member of the Court, Each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – INTERPRETATION – OTHER MATTERS – whether subsequent agreement later found to be void for uncertainty rescinded or varied the earlier contract - whether agreement was "entirely inconsistent" with earlier contract – whether agreement disclosed the intent of parties to rescind original agreement – whether an ineffective attempt to alter contract should receive effect TRADE AND COMMERCE – CONSUMER PROTECTION – MISLEADING CONDUCT – CHARACTER AND ATTRIBUTES OF CONDUCT – AS TO CONTRCTS - purchaser/borrower's failure to disclose that he was undeclared bankrupt - whether a duty to disclose exits - where plaintiff made an active misrepresentation on an unrelated issue – whether representation after contract is formed is relevant *Sale of Goods Act* 1893 (Qld), s 17 *British & Benningtons v North West Cachar Tea Co* [1923]

AC 48, applied
Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) 201 CLR 520, applied
Dewhirst v Edwards [1983] 1 NSWLR 34, considered
Dyster v Randall & Sons [1926] 1 Ch 932, applied
Johnstone v Veitch [1957] QWN 18, referred to
Knight Sugar Coy Ltd v Alberta Railway & Irrigation Co [1938] 1 All ER 266, referred to
Meehan v Jones (1982) 149 CLR 571, considered
Mehmet v Benson (1965) 113 CLR 295, referred to
Morris v Baron & Co [1918] AC 1, applied
Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd [1983] HKLR 197, referred to
Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957) 98 CLR 93, followed
United Dominions Corporation (Jamaica) Ltd v Shoucair [1969] 1 AC 340, followed

COUNSEL: D R Cooper SC, with C L Francis, for the appellant
S Couper QC for the respondent

SOLICITORS: Porter Davies Solicitors for the appellant
Colin Biggers & Paisley for the respondent

[1] **McPHERSON JA:** The plaintiff Peter Coghlan, who is the appellant in this Court, agreed to sell to the respondent defendant Pyoanee Pty Ltd, of which a Mr Jamieson is the principal, his land and house at 38 Wolseley Road, Point Piper in Sydney for a price of $6,850,000. The contract ex 1, which is dated 5 September 2001 ("the September contract"), was prepared by solicitors in New South Wales and was concluded by an exchange of counterparts. It is in the printed form (2000 edition) sponsored by the Law Society of New South Wales and the Real Estate Institute of that State. As one would expect, it incorporates a large number of detailed printed contractual conditions, some 27 to 30 in all, not counting sub-clauses, together with statutory information and a front page or first schedule setting out the identity of the parties, the subject matter and the price. The agreement it contains is for the sale of registered (Torrens) land and improvements for the price of $6,850,000 by way of a deposit of $342,500 and balance of $6,507,500. Completion date is specified as "6 calendar months from the date hereof", which would have placed it at 5 March 2002. Clause 9 of the printed conditions provides that, if the purchaser does not comply with the contract in any essential, the vendor can terminate by serving notice, whereupon the purchaser has certain rights under the succeeding sub-clauses of cl 9.

[2] The contract was not completed. On 18 February Mr Jamieson met Mr Coghlan and, after a discussion about "vendor finance", they signed in duplicate a handwritten document recording the following agreement.

> "Agreement Between Pyoanee Pty Ltd and Peter Coghlan. For 38 Wolseley Rd Point Piper.
>
> On settlement Peter Coghlan will receive $3 million plus the deposit paid. The remaining amount $3,507,500 will be made available as a second mortgage at a rate of 8% for 2 years or to completion of sales.

6,850,000 - PURCHASE PRICE
342,500 - DEPOSIT
3,000.000 - PAID AT COMPLETION OF SETTLEMENT
3,507,500 - SECOND MORTGAGE 8%
6,850,000 -

A FEE OF $35,000 TO BE PAID ON SETTLEMENT ON 4TH MARCH 2002 TO PETER COGHLAN"

[3] At the trial it was acknowledged by both parties, and indeed it was part of the plaintiff's pleaded case, that the February agreement as it was described was uncertain and void. The principal question at the trial was whether that agreement had any impact on the September contract. The plaintiff submitted that its effect was to rescind and discharge that contract; the defendant that, being void, it had no effect at all on the contract, which being unaffected by it remained specifically enforceable. The defendant counterclaimed for specific performance, and was successful. It is against that order that the plaintiff now appeals.

[4] Having made a contract, parties are generally free to deal with it as they wish. They may agree to rescind and discharge or terminate it altogether. Alternatively, they may agree to vary its terms, leaving the contract in force and enforceable according to its terms as varied. There is a third possibility, which is that, although not varied as such, one of the parties by a mere voluntary waiver may bind himself not to insist on performance of a particular term or condition. No one suggests that this third possibility has any relevance here. The choice, if any, is between outright rescission, for which the plaintiff argues, and "mere" variation, for which, in so far as it needs to do so, the defendant contends. Its submission, which was accepted by the learned trial judge, is that, because the February agreement was admittedly uncertain and void, it left the September contract unaffected and hence enforceable. If that is correct, then there is no need to investigate whether the February agreement involved rescission or simply variation of the September contract. It is, to adopt or adapt, Lord Asquith's aphorism, a thing writ in water.

[5] In deference to the submissions of Mr Cooper SC for the plaintiff, I will, however, take the longer way round. The question is whether the agreement superseded and so extinguished by replacing the September contract in its entirety, or simply altered, and so varied, one or more of its terms. In *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 524, the High Court approved a statement in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93, 144, in which Taylor J said:

> "It is firmly established by a long line of cases … that the parties to an agreement may vary its terms by a subsequent agreement. They may of course rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement."

What is involved is a comparison of the earlier and later contracts and an assessment of the significance, if any, of the differences between them in the light of the circumstances surrounding the contracts. To establish rescission, the latter

contract must, in the words of Lord Atkinson in *British & Benningtons v North West Cachar Tea Co* [1923] AC 48, 69, be "entirely inconsistent" with the earlier contract; or, if not entirely inconsistent with it, be "inconsistent with it to the extent that goes to the very root of it". His Lordship spoke there of a subsequent parol or oral contract, but the test is the same where the later agreement is in writing as it is here.

[6] His Lordship's statement was approved by Dixon CJ and Fullagar J in *Tallerman v Nathan*, where their Honours added that the question was one of degree (98 CLR 93, 113). No doubt it may be difficult to answer in some cases. In the present case, however, it is my opinion that it is not. The February agreement concerned itself with only one element of the September contract, which was payment of the price. It did not purport to rescind the September contract expressly, but substituted for what was previously to have been a single cash payment (after deposit) of the purchase moneys on completion a provision for a part payment of $3,000,000, with the balance of $3,507,500 to be secured by "second mortgage 8%". It dealt with no other provision or obligation arising under the September contract. The clear inference or implication to be derived from what the parties agreed was that the September contract was to stand except to the extent that it had been altered by the February agreement. If that was not their intention, then the only other available conclusion was that they intended to enter into an "open" contract for the sale of land without a deposit, leaving it to the general law to supply some (but not all) of the many detailed conditions which were otherwise provided in ex 1. This seems inherently improbable. Both Mr Coghlan and Mr Jamieson were experienced businessmen, who had gone to the trouble and expense of engaging solicitors to attend to the legal details of the sale and purchase of what was plainly a very valuable and expensive property. It defies belief that they would completely cast aside the efforts and expertise of their professional advisers in favour of a 12 line handwritten agreement which dealt only with one subject or item of the September contract.

[7] It is no doubt true to say that, from the standpoint of the vendor, the price or its payment is everything. But, as well as a right to the purchase moneys on completion, a vendor under a contract of sale has obligations which, if not performed, will ordinarily result in default on his part. It was as much in the interests of Mr Coghlan as vendor to have, or to leave, those obligations properly defined as it was for the purchaser to do so. If the September contract as varied by the February agreement could have been and had been carried into effect the relationship of vendor and purchaser would have been replaced by that of mortgagee and mortgagor: *Johnstone v Veitch* [1957] QWN 18, the vendor's obligations on completion being merged in the transfer: *Knight Sugar Coy Ltd v Alberta Railway & Irrigation Co* [1938] 1 All ER 266, P C; *Pallos v Munro* [1970] 3 NSWR 110; (1970) 92 WN (NSW) 797.

[8] In my opinion, therefore, the February agreement, even if it could be given effect, did not and was not intended to work a rescission or abrogation of the September contract, but was intended at most to produce a variation in the terms concerning payment of the price. Since, however, it is accepted that the February agreement was void, it is difficult to see how it could have had any such effect. In *Morris v Baron & Co* [1918] AC 1, which is the source of much of the law on this subject, their Lordships were concerned with an oral contract that was held to have effectively rescinded an earlier written contract for the sale of goods. That was held

to be so even though the later oral contract was unenforceable for want of compliance with the requirement of writing then imposed by s 17 of the *Sale of Goods Act* 1893. It is, I think, implicit in the speech of Viscount Haldane that the result would be different if the later contract had been void rather than simply unenforceable: see *Morris v Baron & Co* [1918] AC 1, 18. The point was expressly left open by Lord Atkinson in the same case ([1918] AC 1, 30). It was, however, referred to again by the Privy Council in *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340. The contract or mortgage in that case was a money lending transaction that was subject to a local statute which made it unenforceable if not recorded in writing and signed by the borrower. The borrower agreed to a variation in the interest rate increasing it from nine to 11 per cent without its being recorded in writing and signed. In reversing the majority decision of the Jamaican Court of Appeal, the Privy Council held that the original loan agreement was not destroyed. In giving the advice of the Board, Lord Devlin said ([1969] 1 AC 340, 347):

> "If the statute made the amending contract void and of no effect there would be no problem at all. An attempt at changing the original contract would have failed altogether and so left it untouched. But unenforceability creates only a procedural bar. The substance of the contract is good; yet, although alive and real, the court will not give effect to it unless its existence can be proved in the way prescribed by the statute."

[9] It is the first two sentences of this extract from Lord Devlin's reasons that are relevant here. They are in one sense admittedly obiter because the second agreement in the Jamaican case was not void but merely unenforceable, which was held by the Privy Council not to affect the enforceability of the original contract or mortgage. Byrne J, who was the trial judge in the proceedings now before us, applied what was said by Lord Devlin to the present case. In my opinion he was correct in doing so. Why should an indisputably ineffective attempt to alter a contract receive any effect at all? It was submitted by Mr Cooper SC for the appellant that it had the result of rescinding or abrogating the contract because, although void, it demonstrated an intention on the part of the parties to terminate the first contract irrespective of whether or not the second contract was valid or invalid. Such a conclusion could be reached only if the void contract were somehow to be viewed as an effective act of the parties even though it lacked all validity in its character as a contract, which is itself a difficult conception. Mr Cooper SC sought to distinguish the Privy Council decision on the ground that what was involved there was only a minor variation and not a rescission of the earlier contract, mortgage or loan. But as I have already concluded, the February agreement had the effect, if any, only of varying and not of rescinding the September contract. Being a variation that was void it could have no legal impact on the original September contract, which remained binding and enforceable on the parties in its original and unvaried form.

[10] The plaintiff's submission on this point also sought in the conduct of the parties after the February agreement had been signed evidence of a common intention on their part to regard the September contract as still binding on them only to the extent that it had been effectively altered by the February agreement: it was said that, after that, it was "not intended to have any operation independent of the terms of the [February] variation agreement". But that is a feature of all contractual variations. The intention of the parties is that it will henceforth be the contract as varied, and not the original contract, that governs their relations. It tells you nothing

about the status of the original contract if the attempted variation is legally ineffective to achieve its aim.

[11] Prima facie it can have no more effect than if the parties had sought, but failed, to negotiate an agreed variation, which is in substance what happened here. They believed they had arrived at a binding agreement to vary, whereas in law they had not. There was no express agreement to discharge the September contract if the February agreement was ineffective to vary it. It is not pleaded that any such agreement can be implied, and there is no proper basis for implying it. The evidence of the plaintiff at the trial makes it clear that at all the times before 15 July 2002 he continued to regard the September contract as binding the defendant to pay the full purchase price on completion. The letter dated 2 April 2002 (ex 20) from the plaintiff's solicitors asserting the invalidity of the February agreement refers to the property as "being purchased" for $6,850,000 and claims that the defendant has failed to comply with special condition 8(b) of the September contract. At that stage, of course, the defendant was asserting that the contract was varied. There were, as the learned trial judge found, compelling commercial reasons why the defendant would not have intended to abandon a contract in or under which it had already invested large amounts of money in preparing a development application. For the same reasons, it is not possible to infer that the parties shared a common intention to abrogate or abandon the September contract either generally or conditionally in the event that the February agreement was ineffective to vary it.

[12] It was submitted on appeal, as it had been in the court below, that specific performance ought not to be granted because the defendant came to equity without "clean hands". A variety of circumstances were relied on. The plaintiff was an 80 year old man with prior experience of Mr Jamieson, whom he distrusted. Through him, the defendant was aware that what the plaintiff wanted was a cash contract and settlement. The plaintiff's solicitors had warned Jamieson not to communicate with the plaintiff directly but only through his solicitors. Despite this, Mr Jamieson called on the plaintiff personally and persuaded him to enter into the February agreement. In doing so, Jamieson, as the judge found, falsely represented to him that he had arranged a first mortgage loan with the St George Bank to secure repayment of $3,000,000 and needed finance of only about another $3.5 million from the plaintiff on which, at the plaintiff's suggestion, he was prepared to pay interest at 8%. Mr Jamieson had only recently been discharged from bankruptcy, although after paying all his debts, a fact which he failed to disclose to the plaintiff. Had it been revealed to the plaintiff he would not, he said in evidence, have been prepared to enter into the February agreement.

[13] It is convenient to dispose of the bankruptcy question first. In *Dyster v Randall & Sons [1926] 1 Ch 932*, the plaintiff, knowing that the defendants would refuse to deal with him, arranged for another to enter into a contract to purchase land from them on his behalf. He failed to disclose to the defendants that that other person was contracting as his agent or that the plaintiff himself was an undischarged bankrupt. Lawrence J held that neither of these considerations debarred him from obtaining an order for specific performance ([1926] 1 Ch 932, 939-940). In *Meehan v Jones* (1982) 149 CLR 571, the fact that the purchaser was an undischarged bankrupt was also relied on by the defendants to defeat the claim. The point is not expressly referred to in the reasons of their Honours on the appeal in that case, but, in reversing the decision of the Full Court of Queensland, the High Court ordered specific performance of the contract in favour of the bankrupt purchaser. If,

although not disclosing it to be so, an undischarged bankrupt is not debarred from obtaining specific performance of a contract for the sale of land, it would be surprising if a former bankrupt were obliged to disclose the fact that he had previously been bankrupt but had been discharged at the time the contract was made.

[14] There is nothing in the *Trade Practices Act* to suggest that in the circumstances of this case any more exacting standard of disclosure is now required in respect of a matter like that. What a vendor bargains for and expects is that he will receive the purchase money on completion: *Mehmet v Benson* (1965) 113 CLR 295, 308. If that is what he gets, he is no worse off than he would have been if he had contracted with someone else who had never been bankrupt at all. In a case like this, the efficacy of the payment under the law of bankruptcy is not capable of being brought into question as it was sought to do in *Dyster v Randell & Son* [1926] 1 Ch 932; cf also *Thistlethwayte v Gender Estates Pty Ltd* (1976) 8 ALR 700, 704.

[15] The present case differs from *Dyster v Randall & Sons* in that here there was an active misrepresentation by Mr Jamieson acting on behalf of the defendant, not about his former bankruptcy but about the amount of the loan he had or needed to complete the September contract. That would have entitled the plaintiff to avoid the February agreement; but, because it was in any event void for uncertainty, there was no occasion for him to rid himself of it in that way. The plaintiff nevertheless submits that the effect of the misrepresentation, taken with the defendant's other conduct to which reference has been made, precludes him from obtaining specific performance of the unvaried September contract.

[16] It is not easy to locate a reported decision in the last 150 years or so in which specific performance of a contract of the sale of land has been refused in equity or under the *Trade Practices Act* on account of "unclean hands" consisting of conduct falling short of misrepresentation or of some kind of illegality. On this appeal, the assiduity of appellant's counsel succeeded in turning up the decision of the Privy Council in *Sang Lee Investment Co Ltd v Wing Kwai Investment Co Ltd* [1983] HKLR 197, in which the matter was considered, although once more specific performance was not refused. In giving the opinion of the Judicial Committee in that case, Lord Brightman said ([1983] HKLR 197, 208):

> "As already indicated, Sang Lee's basic proposition in this appeal as it was in the courts below, is that, 'as specific performance is an equitable remedy, a party who calls for the aid of a Court of Equity must come with clean hands'. It is accepted that the want of probity, to disentitle a plaintiff to equitable relief must arise 'in the transaction'; it must have 'an immediate and necessary relation to the equity sued upon'. See *Cadman v Horner* [1810] 18 Ves 10, *Dering v Earl of Winchelsea* [1787] 1 Cox 318.
>
> One of the more helpful statements to which their Lordships were referred is to be found in the American case of *Weegham v Killefer* [1914] 215 Federal Reporter 168, 171, quoting from an earlier authority: 'A court of equity will leave to his remedy at law - will refuse to interfere to grant relief to - one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that

> which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud or any unconscionable act in the transaction which forms the basis of his suit'. Two conditions are therefore to be satisfied by the litigant who seeks to resist equitable relief on the ground of the misconduct of his opponent. First, such conduct must be wanting in good faith. Secondly, it must be 'in the transaction' which is the basis of the suit."

A similar but possibly more precise criterion was adopted in *Dewhirst v Edwards & Ors* [1983] 1 NSWLR 34, 51, where it was said that the conduct in question "must have an immediate and necessary relation to the equity sued for". This statement is cited in Meagher Gummow & Lehane, *Equity Doctrines and Remedies* (3rd ed) §326, at 84, on which Byrne J relied in the present case.

[17] The question here therefore is whether any improper conduct of the defendant concerning or perhaps arising out of the February agreement had an immediate or necessary relation to the defendant's equity to enforce the September contract and to do so specifically. Having regard to the fact that the February agreement was void, it is not at first sight apparent how it could have done so. In applying the principle in the present case, his Honour decided that Jamieson's misconduct in inducing the plaintiff to sign the February agreement lacked "a direct connection with the antecedent contract sought to be enforced". His Honour went on:

> "By the same token, it would not be fair to invoke the *Trade Practices Act* to deny enforcement. Such a punitive result would be out of proportion to the misconduct and its significance for the parties' relationship."

[18] It is, with respect, difficult to improve on his Honour's observations. Mr Jamieson's conduct in inducing the plaintiff to enter into the February agreement by misrepresentation was improper and contemptible, but it had no discernible impact on the plaintiff's rights under the September contract. In appealing to his solicitors as he did on 15 March 2002 to extricate him from the February agreement, the plaintiff described his signing it as a "stupid mistake I made". His solicitors obtained counsel's opinion to the effect that the February agreement was void for uncertainty. This leads to the conclusion which has been reached here that the February agreement had no impact or effect on the September contract. Apart from some outlays on legal fees, for which the plaintiff could no doubt have sued or could claim recompense in equity as having been caused by misleading conduct, the plaintiff has been restored to the position he was in before the February agreement was signed. The delay occasioned was said to have denied him the opportunity of terminating the September contract by giving a notice to complete on 5 March 2002. However, the plaintiff did not then have a certificate of title with which to complete on that day, and he also remained willing to negotiate over vendor finance for some weeks after receiving counsel's advice about the February agreement. It was not until 15 July 2002 that notice was given that the contract for purchase was, as his solicitors claimed, "uncertain and unenforceable". In my opinion, there was and is no proper basis in equity for refusing the defendant specific performance of the September contract because of his conduct in relation to the February agreement.

[19] What remains to be considered is the plaintiff's submission that the defendant purchaser was not ready, willing and able to perform the contract at the relevant time. The learned trial judge was satisfied that the defendant passed this test. It is clear that in this he was referring to the date of the trial and judgment. Without a qualification which will be mentioned concerning Special Condition 5, the defendant established that he had in his possession or power the funds needed to complete the September contract: see ex 43. It was submitted that he had failed to prove that that was so at the date when the proceedings for specific performance were commenced, which was when the defendant's defence and counterclaim was filed on 19 August 2002. For this, reliance was placed on a statement of Windeyer J in *Mehmet v Benson* (1965) 113 CLR 295, 314; but what his Honour said there was that at the date when the suit was commenced "the plaintiff must then be in a position to say that he is ready and willing to do at the proper time in the future whatever in the events that have happened the contract requires that he do". He did not say that a claimant for specific performance must also prove that he was able to produce and pay the purchase moneys at that date. To have said that would have been inconsistent with the proposition that the plaintiff must be ready and willing to do at the proper time in the future whatever the contract required him to do. If there was any doubt about what his Honour meant (and in my opinion there is none) it would be put to rest by what was said by Barwick CJ, with the concurrence of McTiernan J, in the same case (113 CLR 295, 307-308):

> "The question as to whether or not the plaintiff has been and is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contract and what on the part of the plaintiff in a suit for specific performance are his essential obligations. Here the substantial thing for which the defendant bargained was the payment of the price: and, unless time be and remain of the essence, he obtains what he bargained for if by the decree he obtains his price with such ancillary orders as recompense him for the delay in its receipt. To order specific performance in this case would not involve the court in dispensing with anything for which the vendor essentially contracted."

In the present case the defendant was ready and willing to do what the contract required it to do, which was to complete the contract by paying the purchase moneys when required to do so pursuant to the terms of the order for specific performance sought in his counterclaim. It was proved at the trial that it had the money available and was or would be able to complete by paying the purchase moneys at the time when the order required it to be done.

[20] The only other matter requiring consideration is the effect of Special Condition 5 of the contract. It is as follows:

> "If for any reason whatsoever not attributable to the default of the Vendor this agreement shall not be completed within the time stipulated for completion in the First Schedule hereto, the Purchaser shall thereafter but without prejudice to any other right of the Vendor as provided in this agreement or otherwise pay the Vendor interest on any monies then remaining owing under this agreement at the rate of ten (10) per centum per annum calculated on a daily basis for that period commencing on the first working day following the expiration of the period stipulated in the First schedule hereto and continuing

> [to] the date of completion and all such interests shall be in addition to any other monies payable under this agreement."

There was a dispute on appeal whether the plaintiff's pleading sufficiently raised the issue whether the defendant was ready willing and able to perform the obligation imposed by this condition. I am disposed to the view that it did not, but it is in the end not necessary to resolve the question. There are other reasons for thinking that it is in this case an obligation to which proof of the defendant's readiness, willingness and ability to complete the contract did not properly extend.

[21] The first point to be noticed about Special Condition 5 is that the obligation it imposes on the defendant is not absolute or unqualified. It is an obligation to pay interest if the contract is not completed within the stipulated time (5 March 2002) only if it is not so completed "for any reason whatsoever not attributable to the default of the vendor". The second point of note is that the interest to be paid and its amount depend on there being "any monies then remaining owing under this agreement". No doubt in this and most other cases it is a comparatively simple matter to arrive at what is owing by subtracting what has been paid from what is payable; but the question may depend on whether the expression "monies … owing under this agreement" includes the adjustments that under cl 14 are to be made on account of profits as well as rates, land tax and other outgoings. Their amount depends on the date at which completion of the contract takes place. The same observation applies to the quantum of interest payable, which is to be calculated on a daily basis at the specified rate "commencing on the first working day following the expiration of the period stipulated in the First schedule hereto [six calendar months from 5 September 2001, i.e. 5 March 2002] and continuing [to] the date of completion …".

[22] It is apparent that, in the events which have happened here, the total interest payable pursuant to Special Condition 5 cannot be determined until the date for completion is ascertained. That was so both at the trial and on appeal, and it will remain so until these proceedings are resolved and a specific date for settlement and completion is fixed pursuant to the decree. Recognising this, his Honour on 20 December 2002 made only the first or formal stage of the judgment or order for specific performance as described in *Hasham v Zenab* [1960] AC 316, 329-330, the time for performance having not yet been fixed. Paragraph 3 of the judgment of that date orders that the further hearing of the matter be adjourned to a date to be fixed "to determine the sum payable by the defendant pursuant to the sale contract including interest (if any)". The parties were to prepare more detailed minutes of order, which would no doubt have specified a date for settlement and so enabled the total interest, if any, payable to be ascertained, when events were overtaken by this appeal. As a result, that date and the amount of interest due under Special Condition 5 remain to be ascertained, as do the adjustments required under cl 14.

[23] In the light of these considerations, it seems to me to be impracticable, if not impossible, for the defendant or other party similarly placed to adduce evidence of any utility demonstrating an ability to pay interest in an indeterminate amount calculated by reference to some indeterminable date in the future. The only way it might perhaps be achieved would be by paying some conjectural amount into a deposit account bearing interest at 10% and retaining it there until settlement took place. When account is taken of the fact that, under the Special Condition 5, interest at the rate of 10% is payable to the plaintiff as vendor only if failure to complete at

5 March 2002 is "not attributable to the default of the vendor", it seems to me to be an unreasonably onerous obligation to expect the defendant to discharge. What is more, the special condition itself explicitly describes interest payable under its terms, not as part of the price or purchase moneys or even adjustments under cl 14 payable on completion, but as being payable *in addition to* any other monies payable under this agreement. This suggests to my mind that interest under that clause or condition does not bear the character of purchase moneys or price, which was the substantial thing bargained for, but instead is, in the words of Barwick CJ in *Mehmet v Benson*, a "recompense … for the delay in the receipt", which is properly catered for in the orders "ancillary to the decree". If that interest is not paid when required under the decree, the order for specific performance may well be vulnerable to rescission; but it is not one of the defendant's essential obligations which it is bound to prove its ability to perform as a condition precedent to obtaining the judgment or order in the more limited form which it has so far attained in these proceedings.

[24] I would dismiss the appeal with costs.

[25] **WILLIAMS JA:** The background facts relevant to the determination of this appeal are set out in the reasons for judgment of McPherson JA which I have had the advantage of reading.

[26] As I understand the submissions of Mr Cooper SC, Senior Counsel for the appellant-vendor, the principal contention is that upon the documents dated 18 February 2002 being executed:

(i) the earlier contract of 5 September 2001 was terminated; and

(ii) the agreement between the parties thereafter comprised the terms of the contract of 5 September 2001 subject to the terms contained in the documents of 18 February 2002 replacing the terms found in clause 16.7 of the contract of 5 September 2001.

The argument then proceeds that, as the provisions recorded in the documents of 18 February 2002 were uncertain, the contract so made on 18 February 2001 was void for uncertainty. It followed that, as the contract of 5 September had been rescinded, and the contract of 18 February 2002 was void for uncertainty, there was no contract remaining on foot with respect to the subject land which could be specifically enforced.

[27] In order to succeed with the contention that the contract of 5 September 2001 was no longer in existence the appellant had to establish either that it was rescinded by agreement or had been mutually abandoned. Given the terms of the conversation, as found by the learned trial judge, leading to the execution of the documents of 18 February 2002 there was no express agreement that the contract of 5 September 2001 be rescinded. The appellant was forced to fall back on the contention that there was an implied rescission of that contract. As is demonstrated in the reasons of McPherson JA that is a highly unlikely scenario. The conduct on 18 February 2002 is more readily explicable on the basis that the intention was to vary one clause in the contract of 5 September 2001, not to rescind it entirely and replace it with a fresh contract (containing in all but one respect the same terms as the original).

[28] For the reasons given by the learned trial judge, and by McPherson JA, the compelling conclusion is that there was no express or implied rescission of the contract of 5 September 2001 by what occurred on 18 February 2002.

[29] Nor in my view does the evidence support the conclusion that the parties so conducted themselves as to mutually abandon or abrogate the contract of 5 September 2001 (*Summers v The Commonwealth* (1918) 25 CLR 144 and *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 434).

[30] The learned trial judge rejected the appellant's evidence that Jamieson, who acted for the respondent on 18 February 2002, said on that occasion that the respondent could not complete the September contract without the provision of vendor finance. The learned trial judge concluded it was more probable than not that Jamieson did tell the appellant that the respondent had a distinct preference for substantial vendor finance. His Honour also found that there was some misrepresentation by Jamieson as to the amount the respondent was borrowing on first mortgage from the bank such as would have entitled the appellant to set aside the February agreement if it otherwise amounted to a contract. In those circumstances the appellant challenged the rejection of the appellant's evidence that he was told that the respondent could not complete the September contract without vendor finance.

[31] The findings made by the learned trial judge were amply justified by the evidence in the light of his findings as to the credibility of witnesses. There is no basis for this court setting aside his finding and substituting a finding that a statement along the lines alleged by the appellant was made by Jamieson. But even if such a finding was substituted that would not, in my view, alter the position in law as outlined above. It would not, in my view, result in a conclusion that the September contract was either rescinded by agreement or mutually abandoned. At best for the appellant it was a statement evidencing possible anticipatory breach at a time before the completion date had arrived. The response of the appellant was to vary the clause dealing with the purchaser's obligations on completion so as to meet the purchaser's concerns, rather than to elect to rescind because of that anticipatory breach.

[32] The consequence of uncertainty in the terms of an agreement is that there is no contract – as it is often put, the contract is void for uncertainty. Here it was accepted that the agreement evidenced by the February documents was void for uncertainty and that means that in law there never was any variation of the September agreement. What the parties purported to do was a nullity, and the consequence in law is that the September agreement remains on foot in its original terms. The passage in the judgment of Lord Devlin in *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340 at 347 clearly supports that approach.

[33] On the basis that the September 2001 contract remained on foot for purposes of the respondent's claim for specific performance, the appellant contended that such relief should be denied because for a number of reasons the respondent was not ready, willing and able to complete. I only wish to deal with the argument based on Special Condition 5 which obliges the respondent in certain circumstances to pay interest. The amount, if any, of interest payable can only be determined at the time of or after completion and after it has been determined that the reason the contract was not completed within the time originally stipulated was not attributable to the default of the appellant-vendor. Here, as will most frequently be the case, there is a

dispute between the parties on that issue which will require resolution by the court. Because of that it is my view that the Special Condition does not impose on the respondent-purchaser an obligation which forms part of the obligation to complete. In my view the clause stands on its own and the obligation imposed thereby does not merge in the settlement. After completion of the contract the purchaser may be found to be liable to pay interest pursuant to that clause. For that reason the potential liability of the respondent to make a payment of interest is not relevant when consideration is being given to the question whether the purchaser is ready, willing and able to complete. That approach is in accord with the reasoning in *Pallos v Munro* [1970] 3 NSWR 110; (1970) 92 WN (NSW) 797 and *Dybing v Bridges* (1990) 5 BPR 11,402.

[34] On all other issues there is nothing I can usefully add to what is said by McPherson JA in his reasons.

[35] The appeal should be dismissed with costs to be assessed.

[36] **ATKINSON J:** I have had the advantage of reading the reasons of McPherson JA. There is nothing I can usefully add. I agree that, for those reasons, the appeal should be dismissed with costs.