SUPREME COURT OF QUEENSLAND

CITATION:	*Arden Property Group P/L v Concept Five – Architects & Managers P/L; Barmac Properties P/L v Concept Five – Architects & Managers P/L* [2003] QCA 198
PARTIES:	**ARDEN PROPERTY GROUP PTY LTD** ACN 086 839 885 (applicant/respondent) **v** **CONCEPT FIVE – ARCHITECTS & MANAGERS PTY LTD** ACN 091 702 706 (respondent/appellant) **BARMAC PROPERTIES PTY LTD** ACN 097 692 585 (applicant/respondent) **v** **CONCEPT FIVE – ARCHITECTS & MANAGERS PTY LTD** ACN 091 702 706 (respondent/appellant)
FILE NO/S:	Appeal No 10206 of 2002 SC No 8859 of 2002 SC No 8860 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	2 May 2003
JUDGES:	de Jersey CJ, Williams JA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – OTHER PARTICULAR CASES – where respondents repudiated agreement with appellant – where appellant purported to secure payment of monies owing under agreement by executing mortgage debentures in names of respondents and lodging caveats over respondents' land – whether failure to

demand that respondents execute and deliver securities precluded existence of legal charge

McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457, approved

COUNSEL: P W Hackett for the appellants
P E Hack SC for the respondents

SOLICITORS: Morgan Conley for the appellants
Hopgood Ganim for the respondents

[1] **de JERSEY CJ:** The respondents were property developers. The first named respondent ("Arden") was interested in acquiring and developing land at Jindalee, and the other respondent ("Barmac") was interested in developing land at Newstead. During the year 2001 each had related dealings with the appellant ("Concept Five").

[2] In July that year, prior to the incorporation of Barmac (which occurred on 1 August 2001), a director of Arden approved a fee proposal submitted by Concept Five in relation to the Newstead development. It envisaged payment of a total of $206,000, which was four percent of an estimated $5.15 million construction cost.

[3] On 12 September 2001, Barmac, Concept Five and others executed a document called a "Strategic Alliance Agreement" dated 10 September 2001 in relation to the Newstead land, and Arden, Concept Five and others executed a similar agreement in relation to the Jindalee property.

[4] The issue arising on the appeal depends on Concept Five's contentions that, first, the "Strategic Alliance Agreement" had contractual force, and second, that those agreements effectively incorporated a further document entitled "Conditions of Engagement", also dated 10 September 2001. There is a substantial issue whether either of those contentions can be sustained on the facts. But for the disposition of this appeal, one may assume they can be.

[5] The events giving rise to the proceeding at first instance concern cl 6.8 of those "Conditions of Engagement". That clause provides (Concept Five being referred to as "the Firm"):

> "**Charge**
> In order to secure payment of all monies for which the Client may become liable to pay the Firm the Client hereby charges the beneficial owner all the Client's freehold and leasehold interest in land both in which the Client is now possessed or which may hereafter acquire, along with all the Client's personal property both personally owned by the Client and that which a Client may hereafter acquire. The Client further agrees immediately upon demand being made upon the Client by the Firm the Client shall deliver to the Firm such bill of mortgage, a bill of encumbrance, or such other instrument of security or consent to caveat the Firm may require, duly executing or consented to by the Client. In the event that the Client shall neglect or fail to deliver the required instrument, the Client hereby appoints the Firm to be the Client's lawful attorney for the purposes of executing and registering such instruments."

(The provision is inelegantly or clumsily expressed, but its meaning is clear.)

Concept Five, relying on cl 6.8, executed mortgage debentures in the names of the respondents and lodged caveats over their land – to secure payment of monies allegedly owing under the "Conditions of Engagement".

[6] It will be seen that Concept Five's right to execute instruments as the attorney of a respondent arose should that respondent fail itself to execute them, following demand that that be done. On 22 April 2002, Concept Five made demand on each respondent that the respondent execute a mortgage debenture. On 3 May 2002, Concept Five executed debentures, purportedly as attorney of the respective respondents. Concept Five subsequently also lodged caveats over the respondents' land.

[7] Concept Five commenced proceedings against the respondents, claiming, against Arden, $600,000 monies owing or damages, or alternatively $64,585.80 on a quantum meruit for architectural services rendered, and declarations as to the validity of the charge; and against Barmac, $137,043.04, being the balance of the fee of $206,000, as monies owing or damages, alternatively $3,337.26 on a quantum meruit, and a declaration as to the validity of the charge.

[8] The respondents sought orders for the removal of the charges and the caveats. They submitted that the conditions of engagements lacked contractual force, and that even if they had such force, cl 6.8 did not survive a termination of the agreements which had occurred prior the execution of the instruments. The learned primary Judge accepted those submissions, and ordered removal of the debentures ("without prejudice to the respondents' entitlement to argue for the validity of the…debenture…in other proceedings"), and removal of the caveats. Concept Five appeals against those orders.

[9] The central submission for the appellant was that its entitlement to act as it did under cl 6.8 was sufficiently arguable to warrant preserving the caveats and the registration of the debentures pending trial. But there was, to my mind, an insurmountable difficulty which precluded reliance on cl 6.8. That is an accepted repudiation of the agreement between the parties preceding any purported reliance on the provision.

[10] By letter dated 15 November 2001 Arden advised Concept Five that Arden had sold the Newstead property. That sale amounted to a repudiation of any agreement between the parties. Concept Five responded on 21 November 2001 in terms which, as accepted by Mr Hackett who appeared for the appellant, amounted to acceptance of Arden's repudiation. Concept Five also accepted repudiation of the agreement in relation to the Jindalee property: that acceptance was notified on 7 December 2001. In neither case was any reference made to cl 6.8 of the Conditions of Engagement. It will be seen that any agreement binding either respondent was therefore terminated well prior to any demand purportedly made under that provision, by Concept Five, for execution by the respondent of the security instrument.

[11] By the time of the termination of the agreements through acceptance of repudiation, equitable charges would have arisen, by force of the first sentence in cl 6.8, in order to secure monies owing for architectural services already rendered. To convert any

such equitable charge into a legal charge, it would itself have been necessary for Concept Five to go through the step of demanding that the respondent execute and deliver the requisite form of security, failing which Concept Five would itself have been entitled to execute and register it as the respondent's lawful attorney. No such demand had been made prior to the termination of any agreements.

[12] In my view, when executing the debentures and caveats purportedly as attorney of the respondents, Concept Five therefore lacked lawful authority to do so. By the time of the termination of the agreements between the parties, such a right had not arisen. Although an equitable charge may have arisen, any power to give that legal force, by execution as attorney of the respondent, was contingent upon the respondent's own failure to attend to the matter itself following demand – and no demand had been made.

[13] The relevant principle was expressed in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476-7 by Dixon J (as he then was) as follows:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."

[14] In this case, no right to execute instruments as a respondent's attorney had, by the time of termination, been "unconditionally acquired" by Concept Five, for the reasons already expressed. Concept Five's purported reliance on cl 6.8 in perfecting the securities was therefore not justified.

[15] For that reason, the orders made by the learned primary Judge were in my view warranted.

[16] I would dismiss each appeal, with costs to be assessed.

[17] **WILLIAMS JA:** I have had the advantage for reading the reasons for judgment of the Chief Justice. I agree with them, and have nothing to add. Each appeal should be dismissed with costs to be assessed.

[18] **HELMAN J:** I agree with the orders proposed by the Chief Justice and with his reasons.