SUPREME COURT OF QUEENSLAND

CITATION:	*Bartier v Kounza Investments Pty Ltd & Ors* [2003] QSC 390
PARTIES:	**PAUL WILLIAM BARTIER** (plaintiff) **v** **KOUNZA INVESTMENTS PTY LTD (ACN 010 695 815)** (first defendant) **GARY MICHAEL BELL** (second defendant) **PIPERLAND PTY LTD (ACN 010 744 877)** (third defendant)
FILE NO:	SC No 11457 of 2002
DIVISION:	Trial
PROCEEDING:	Civil Trial
DELIVERED ON:	19 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21, 22, 23, 24 and 27 October 2003
JUDGE:	McMurdo J
ORDER:	**1. The plaintiff be given judgment against the first defendant for the sum of $391,573.99.** **2. There be a declaration in favour of the plaintiff against the second and third defendants that any interest which the second or third defendant has in any real property constituted by any of Lots 1-8 on SP 141571 in the County of Stanley Parish of Indooroopilly or in any of the proceeds of sale thereof has been and is charged with the payment to the plaintiff of any money owing to the plaintiff by the first defendant under their contract or this judgment.** **3. The plaintiff be at liberty to seek within these proceedings such further orders as are appropriate to give effect to the plaintiff's said entitlement to a charge.**
CATCHWORDS:	CONTRACT – CONSTRUCTION AND INTERPRETATION - where claim by plaintiff for moneys said to be owed under a building contract – where contest as to terms of contract and parties to contract – whether second defendant party to contract – whether contract contained oral terms CONTRACT – CONSTRUCTION AND

INTERPRETATION - where sum claimed is unpaid balance of two final invoices submitted to defendants together with interest or alternately unpaid balance of final reconciliation of contract together with interest – where plaintiff contends final two invoices were progress claims under contract – where contract provided for claims to be made in accordance with stage of construction – where claims made approximately monthly – whether invoices were progress claims under contract

BUILDING AND ENGINEERING CONTRACTS – RECOVERY OF MONIES - where plaintiff entitled to claim monthly progress payments pursuant to s 67W *Queensland Building Services Authority Act* – where inconsistencies between provisions relating to progress payments contained in contract and those set out in s 67W must be resolved in favour of s 67W – where liability to pay progress claim limited to extent amount claimed is not put in dispute within time allowed for payment – whether evidence all or part of two final progress claims by plaintiff were disputed within time allowed for payment – whether plaintiff's entitlement to payment under progress claims displaced by claim for unpaid balance of final reconciliation of contract

BUILDING AND ENGINEERING CONTRACTS – RECOVERY OF MONIES - where alternate claim for unpaid balance of final reconciliation of contract – where defendants contend plaintiff has not made a final claim as required under contract – where evidence defendants dispensed with requirement plaintiff make final claim

BUILDING AND ENGINEERING CONTRACTS – CONTRACTS - where contract sum set out in contract does not correspond with total of elements building works as priced in pricing schedule – where contract sum may be adjusted where additional costs to elements in pricing schedule or elements not listed or variation to building works – whether additional costs to elements or variations subject to approval of second defendant – whether plaintiff substantiated additional costs in accordance with contract - whether contract sum proper reference point from which additional costs or savings should be calculated – whether plaintiff should recover actual costs of construction together with agreed margin – whether plaintiff should recover costs incurred by company set up by plaintiff and not a party to contract

ESTOPPEL - where contract provides plaintiff entitled to charge over property on unpaid monies – where property 99% owned by third defendant and 1% owned by second defendant – where only first defendant party to contract –

whether having regard to evidence first defendant and third defendant are estopped from denying its interest in property is charged

Queensland Building Services Authority Act 1991 (Qld), s 42, s 67E(2), s 67W

Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd (1989) 21 NSWLR 160, cited
Concrete Constructions Group Pty Ltd [1997] 1 Qd R 6, cited
Commonwealth v Verwayen (1990) 170 CLR 394, considered
Daysea Pty Ltd v Watpac Australia Pty Ltd[2001] QCA 49, cited
Foran v Wight (1989) 168 CLR 385, cited
Jones v Dunkel (1959) 101 CLR 298, applied
Muschinski v Dodds (1984-1985) 160 CLR 583, cited
Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd (1953-1954) 90 CLR 235, considered
Ramsden v Dyson (1886) LR 1 HL 129, considered
Scottish Amicable Life Assurance Society v Reg Austin Insurances Pty Ltd (1985) 9 ACLR 909, cited

COUNSEL: A Greinke for the plaintiff
R Bain QC, with A Collins, for the defendants

SOLICITORS: Crilly Lawyers for the plaintiff
O'Reilly Lilicrap for the defendants

McMURDO J:

The issues in outline

[1] This is a claim by a builder under his contract to construct eight townhouses at Central Avenue, Indooroopilly. He commenced work on the project in early December 2001 and the works were completed by about the end of October 2002.[1] Upon the plaintiff's case, the contract was made in writing, and the parties to it were the plaintiff, the first defendant ("Kounza") and the second defendant, Mr Bell. The plaintiff, Mr Bartier, claims to be owed by them the sum of $415,984.61, together with interest pursuant to the contract, as the unpaid balance of his last two progress claims, which he says became debts immediately due and payable within days of their being made according to what he contends is the effect of his contract. Alternatively, he claims the sum of $405,705.63 and interest thereon as the unpaid balance of the contract price calculated upon a final reconciliation of what is due to him.

[2] It is common ground that Kounza contracted with Mr Bartier, but Mr Bell denies that he is a contracting party. There are further issues as to whether the contract contained oral terms, and also as to what constituted the written terms as well as any terms implied by statute. There are substantial issues as to the proper interpretation

1 As alleged in paras 10, 11 of the Statement of Claim which are admitted.

of certain written terms. Despite some suggestion of non-performance by Mr Bartier during cross-examination, no case is pleaded or ultimately argued to the effect that he is disentitled to payment because of any failure to complete the works or because of any defective work. Instead, the defendants say that upon the proper interpretation of what they contend constituted the contract, no amount became due to Mr Bartier upon a progress claim, and that Mr Bartier is yet to make a final claim as required by his contract so as to entitle him to any sum upon a final assessment of what should be paid to him. In addition, it is said that some of the components of his claim are irrecoverable according to what the defendants argue is the proper interpretation of certain terms.

[3] At no time has Kounza been a registered owner of this site. The registered owners are the third defendant, "Piperland", Mr Bell and some other party, as tenants in common. Piperland's share is 98 per cent and Mr Bell's share is one per cent. Mr Bartier claims against Piperland that its interest in the site is subject to an equitable charge in his favour, upon the basis that he constructed these houses upon its land in the belief that he had contracted with the landowner and that his entitlement to payment was secured by a charge upon the site according to a term of his contract, and that Piperland knew of his mistake and nevertheless allowed him to proceed to build in circumstances which estop Piperland from denying him a charge for the moneys owing. If Mr Bell is not party to the contract, Mr Bartier makes a like claim against his interest in the land.

What Constitutes the Contract?

The written terms

[4] On 3 September 2001, Mr Bartier went to the office of Mr John Cunningham, upon his invitation, to meet Mr Bell to discuss the prospect of Mr Bartier's building these townhouses. It is common ground that a contract document was signed by Mr Bartier and Mr Bell at this meeting. A document in a standard form prepared by the Housing Industry Association and entitled "Medium Works Commercial Contract Conditions" was used. This document consists of 32 pages within a cover, bound as a book. There are four pages headed "Schedule", in which particulars such as the names and addresses of the parties and the contract sum are to be inserted against numbered items of the schedule. The printed terms of the schedule provide that the schedule is to be "attached to these Medium Works Contract Conditions", which conditions are then set out as the terms printed upon 24 pages within the book. Between the schedule and those printed conditions there is a printed page which is to be used for the signatures of the parties. Most of the items within the schedule are cross-referenced to particular clauses of the conditions. In the present case, some matters were written against certain items of the schedule. There was also a further page added to the standard form, which was typed in the course of this meeting, and which was stapled inside the cover of the book. That page was signed at the same time as Mr Bartier and Mr Bell also signed upon the appropriate page of the standard form. It is common ground that the typed page, which described itself as, "An Annexure to the Building Contract", and which I will call "the typed annexure", forms part of that contract. But remarkably, the defendants pleaded and for some time argued that the 24 pages of printed conditions within this book were not part of

the contract which was then made, before it was ultimately conceded on the last day of the trial that they were terms of the contract, as plainly they were.

[5] Ultimately then there is no contest as to what constituted at least the written terms. They are contained within that booklet[2], a further four page document called a "Pricing Schedule"[3], and a nine page document entitled "Specification"[4].

Were there oral terms?

[6] The defendants allege that there were also terms agreed orally. Before considering those allegations, it is necessary to discuss some of the written terms. Clause 2.2 of the conditions provided that: "The Client must pay the Builder the contract sum adjusted by any additions or deductions made under the contract". Item 18 of the schedule provided for the insertion of an amount as that contract sum, and the amount of $1,071,000 was inserted. By cl 21 of the conditions and what was inserted in item 16 of the schedule, it was provided that the builder could claim and receive progress payments at certain stages as follows:

> "5% deposit, 15% tilt up walls, 35% enclosure, 30% fixing and 15% completion".

[7] The typed annexure contained six clauses as follows:

> "1. This agreement is an annexure to the building contract signed by the parties for the above construction.
> 2. The building contract has been determined from the attached list of elements and their costs.
> 3. Additional costs to these elements or the cost of elements not listed will be paid by the owner to the builder.
> 4. Additional costs require a prior substantiation, and are subject to approval by John Cunningham.
> 5. The owner will place a sum of $50,000 into a trust account to be used for potential additional costs. (item 3)
> 6. Savings to the elements listed will constitute a saving to the owner in respect to the original building contract".

It is common ground that "the attached list of elements and costs" is the Pricing Schedule.

[8] There are issues as to the proper interpretation of these written terms concerning the way in which the actual costs of works should affect the ultimate price payable to Mr Bartier. It is common ground that the price could vary, at least in certain circumstances, according to the difference between the budgeted costs within the Pricing Schedule and the actual costs of the works. The potential for the ultimate price to increase is relevant to the defendants' case that there were two further terms agreed orally at this first meeting. The defendants allege that there was an oral term to the effect that at least in some circumstances, Mr Bartier would not be paid in full until completion of the sale of all of the eight townhouses. A further alleged term is that in addition to Mr Cunningham's approval for additional costs (pursuant to Conditions 3 and 4 of the typed annexure), Mr Bell also had to approve such costs.

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2 Exhibit 2.
3 Exhibit 3.
4 Exhibit 8.

[9] The first of those allegations has varied somewhat in the course of these proceedings. It was pleaded in terms "that the final progress payment would be made only after the settlement of all of the eight townhouses the subject of the construction contract".[5] However, the defendants' written submissions describe it as a term whereby Mr Bartier would not be paid any amounts *exceeding the fixed contract price* (an intended reference to the sum of $1,071,000) until after completion of those sales. In either case, it is possible for the defendants to construct arguments as to the written terms to avoid a problem of an inconsistency with this alleged oral term. Nevertheless, the fact that the parties did reduce to writing some matters in which they were departing from the standard conditions but did not record this matter strongly indicates that it was not an agreed term. The relevant evidence was from Mr Bartier and Mr Cunningham: the defendants did not call evidence from Mr Bell or any other witness. The alleged term is not established by the evidence of either Mr Bartier or Mr Cunningham. According to Mr Cunningham's evidence, there was some discussion at this meeting as to when any additional costs would be paid. Mr Cunningham recalled Mr Bell saying that they would be paid "within two weeks of the project finishing", because the townhouses were already the subject of contracts which would settle by then[6]. But Mr Cunningham denied that was an agreement as alleged. Mr Bartier's evidence was to the effect that he was not told until after he sent progress claim number 7 that he might have to wait until settlement of the sales. Accordingly, the oral evidence does not support this allegation. Further, it has no particular support from any established facts or circumstances. Importantly, it is unlikely that the parties agreed upon such an important term without including it within the written terms. I conclude that there was no oral agreement to the effect that any part of the moneys payable would be paid only after completion of the sales of the townhouses.

[10] Nor am I satisfied that there was an oral term to the effect that additional costs required not only the approval of Mr Cunningham but that of Mr Bell. The numerous versions of the defendants' pleading do not specifically plead this as an oral term. However, the case for an oral term to this effect was put in cross-examination of Mr Bartier and Mr Cunningham, without objection. Mr Bartier denied any discussion to the effect that Mr Bell's approval was necessary. There were some answers in Mr Cunningham's cross-examination which, taken alone, might be thought to provide some support for the defendants. In particular, there was this evidence:[7]

> "And Mr Bartier was told by Mr Bell that any additional costs or variations over and above $1,071,000.00 were to be substantiated or assessed, didn't he?-- No.
>
> You say that it hadn't been explored already in the conversation?— Not for $1,071,000.00. I think it was anything that was over the prices that were in the pricing schedule.
>
> Any additional costs or variations were to be substantiated and assessed?-- Mmm.
>
> And they were to be authorised by or passed by you, I should say?-- Mmm.
>
> Words to that effect?-- Yes.

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5 Para 3(c).

6 See transcript p 215.

7 See transcript p 218.

> Approved by you. Do you remember the word that was used by one or other of these gentlemen in your presence?-- No.
> And Mr Bell told Mr Bartier that any such additional costs or variations had to be also authorised by him?-- I can't – I can't remember that but I believe that's what happened.
> The – any proposed variations or additions Mr Bell told Mr Bartier it had to be given to you for your assessment first. Correct?-- Yes."

These questions concerned two matters, "additional costs" and "variations". As the terms added by the typed annexure made clear, Mr Cunningham's approval was potentially required in two contexts. The first was an additional cost to an agreed component of the works, ie to an "element" of the works described in the Pricing Schedule. The second was where some further item of work was performed, for which the cost was claimed. The defendants argue that according to the proper interpretation of the written terms, Kounza's approval was in each case required. As appears below, I reject that interpretation and conclude that the written terms required Kounza's approval to a variation in the sense of an addition to the contract works, the elements of which were specified in the Pricing Schedule, but the written terms did not require Kounza's approval to a claim for the extra cost of the original contract works or to the pricing of further works which the parties agreed should be added. The questions of Mr Cunningham did not distinguish between these matters, and for that reason the apparent agreement in Mr Cunningham's answers is not as telling. In addition, Mr Cunningham's statement that he could not remember but he believed 'that's what happened' shows the limited value of his answers. They are inconsistent with the evidence of Mr Bartier. Significantly, the alleged oral term was not reduced to writing. Moreover, it is unlikely that Mr Bartier would have agreed to such a term, which would so significantly affect his right to recover his costs of construction, and it is also difficult to understand why the parties agreed that Mr Cunningham's approval would be necessary if the client could decline any claim for extra costs. Mr Bartier's evidence on the point can be more readily accepted given Mr Bell's failure to give evidence[8]. This oral term is not established.

[11] Accordingly I conclude that the contract was one made entirely in writing.

Was Mr Bell a party?

[12] Mr Bell has signed within the contract book twice. On the printed page providing for the signatures of the parties, he wrote 'G M Bell' on the line opposite the printed words 'Signed for the Client'. He also signed on the typed annexure above the typed words 'Gary Bell'. The schedule within the contract form provides for the identification of the 'client' by the insertion of particulars against Item 1 of that schedule. What was inserted against Item 1 was as follows:

> 'Kounza Investments (Gary Bell)
>
> ACN … ABN 89 010 695815'

It appears that that number is the ACN number of Kounza. Taken alone, the completion of Item 1 of the schedule would strongly indicate that the client was

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8 *Jones v Dunkel* (1959) 101 CLR 298.

Kounza, and not both Kounza and Mr Bell. It would be curious to identify Mr Bell as one of the clients by inserting his name in brackets. Mr Bell's signature upon the signing page of the contract form supports his case, because his signature appears next to the words 'Signed for the Client' rather than words such as 'Signed by the Client'. However, Mr Bartier's argument is assisted by the wording of the typed annexure which is headed:

> 'AGREEMENT BETWEEN: Kounza Pty Ltd – Gary Bell (owner)
> and
> Paul Bartier (Builder)'

And where Mr Bell's signature appears upon this page, it is followed by his typewritten name without any specification that he was signing in a representative capacity.

[13] The present question is not concerned with the subjective intention of Mr Bell or Mr Bartier. It is one concerning the parties' intentions ascertained by the proper construction of the written contract as a whole, according to any surrounding circumstances known to the parties: *Scottish Amicable Life Assurance Society v Reg Austin Insurances Pty Ltd* (1985) 9 ACLR 909 per Kirby P at 914, McHugh JA at 923-924; *Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd* (1989) 21 NSWLR 160.

[14] The site was almost wholly owned by Piperland, and the reference to either or both of Kounza and Mr Bell as being the 'owner' misrepresented the position. So the parties did not contract upon a common understanding of who was the owner and the fact of Mr Bell's one per cent ownership, which was known by Mr Bell but not by Mr Bartier, does not assist in this process of construction.

[15] For Mr Bartier, clauses 3.6 and 3.7 of the printed conditions of contract are relied upon. These conditions provide that the client's interest in the site will be charged as security for payments due to the builder. The contract would thereby appear to be premised upon 'the client' being the owner of the site. From this it is argued that there is a particular significance in the appearance of '(owner)' immediately after 'Gary Bell' at the heading of the typed annexure as I have set out above at [7]. However, the word 'owner' there appearing is not unambiguously referrable only to Mr Bell rather than alternatively referrable also to Kounza. On another view, the words 'Kounza Pty Ltd – Gary Bell (owner)' identify the relevant party and owner as Kounza Pty Ltd, a company itself represented by Mr Bell.

[16] On any view, Kounza is expressed to be a party, as Mr Bartier's case concedes by alleging that he contracted not with Mr Bell alone, but with both Kounza and Mr Bell. Accepting that Kounza is a party, there is no distinct signature on its behalf if Mr Bell's signatures are treated as evidencing his agreement to be bound personally. Although I am conscious of the need to construe the document as a whole, in my view there is a particular significance from what is inserted against Item 1 in the schedule because that is where the form of contract requires the identification of the client. Especially where it is common ground that Kounza itself was a party, it is difficult to read the words inserted against Item 1, being 'Kounza Investments (Gary Bell)' as a reference to Kounza Investments *and* Gary Bell. Although Kounza is there described as 'Kounza Investments' rather than by its name Kounza Investments Pty Ltd, that corporate name is used in the typed annexure, making it

clear that "Kounza Investments" was not a trading name for Mr Bell. I find it difficult to reconcile what was inserted in the contract for the very purpose of identifying the client with the plaintiff's case that there were in fact two clients. In my view, the references to Mr Bell in both Item 1 of the schedule and in the annexure were by way of describing Kounza as a company controlled or represented by him. Upon what I have concluded is the proper interpretation of the contract documents, it is a contract between Mr Bartier and Kounza, and to which Mr Bell is not a party.

The Plaintiff's claims

[17] From February through October 2002, eight invoices were sent as purported progress claims. Mr Bartier caused them to be sent although upon their face they were invoices rendered by Satinay (Qld) Pty Ltd ('Satinay'). This was a company owned and controlled by Mr & Mrs Bartier. The first six of these invoices were promptly paid, involving payments totalling $968,416.26. There was never a dispute as to any of these invoices, and no point was ever taken that they were sent by Satinay and not by Mr Bartier or that they were in some other respect not progress claims made according to the contract.

[18] The seventh invoice was sent on 26 August 2002 and claimed $473,801.43. It was wholly unpaid when the eighth invoice was sent on 17 October 2002, claiming $587,609.61, which included the amount claimed by the seventh invoice. On 25 November 2002, $145,376 was paid with a letter from the defendants' solicitors stating that no further payment would be made.

[19] Mr Bartier claims the unpaid balance of the seventh and eighth invoices, upon the basis that they were progress claims made according to the contract, and relevantly undisputed within the time allowed to Kounza by the conditions of contract, with the consequence that they became debts due and owing some days after the dates upon which the invoices were sent. On this basis, he claims the amounts of those invoices less the payment of $145,376 and less further amounts totalling $11,404 representing payments by Kounza directly to his suppliers. He also gives credit for a sum of $14,845 which was correctly deducted in the calculation of the amount of invoice no. 7, but incorrectly omitted in the calculation of the eighth invoice. The result is that he claims a net balance of $415,984.61 as the unpaid total of the seventh and eighth invoices as progress payments which should have been paid in September and November 2002. He further claims interest at the rate of 18 per cent per annum, in reliance upon what he says was an express term to that effect.

[20] Alternatively, he claims a sum due upon a final accounting, i.e. as a final claim, which is for the slightly lesser sum of $405,705.63, representing some concession that the amounts claimed by the eight invoices, taken as a whole, exceeded what should have been claimed. Although this final claim is less than what is sought as the unpaid balance of progress claims, he asks for a determination of his final claim. He thereby acknowledges that any entitlement to unpaid progress claims is provisional in the sense that the rights and obligations of the parties in relation to them are subject to being merged in the ascertainment of the ultimate rights of the parties: see *re Concrete Constructions Group Pty Ltd* [1997] 1 Qd R 6 at 12; *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49 at [18] – [19].

[21] It is necessary to determine the merits of both his case in reliance upon progress claims and his case upon his final claim. If his final claim is upheld, in the amount claimed or otherwise, it is still necessary to determine whether he was entitled to certain progress payments and if so in what amounts, because of the impact of that issue upon his claims for interest.

Progress Claims

[22] I have already mentioned the agreed timing for progress payments recorded by what the parties inserted against Item 16 in the schedule: see [6]. That is read with cl 21 of the conditions which is as follows:

> "21.1 The *Builder* must claim progressively in accordance with *Item* 16 and Clause 27, as the case may be.
>
> 21.2 Each progress claim given to the *Client* must:
> (a) be in writing; and
> (b) include details of the value of the *works* carried out and of other moneys then due to the *Builder* pursuant to the provisions of the *contract*.
>
> 21.3 The *Client* must, within 7 days after receiving a progress claim:
> (a) pay the amount of the progress claim; or
> (b) give the *Builder* a progress certificate evidencing the *Client's* opinion of the moneys due from the *Client* to the *Builder* pursuant to the progress claim and the reasons for any difference and pay the amount certified.
>
> 21.4 If the amount payable under the *Client's* progress certificate is less than the *Builder's* progress claim then:
> (a) there is deemed to be a dispute, the details of which are the reasons for the difference stated in the progress certificate; and
> (b) the *Client's* progress certificate is also deemed to be the notice of dispute under subclause 32.1 regarding that dispute.
>
> 21.5 If the *Client* does not give a progress certificate within 7 days of receiving a progress claim:
> (a) the progress claim is deemed to be the progress certificate; and
> (b) the amount of the progress claim is deemed to be a debt due and payable.
>
> 21.6 Where the *contract* elsewhere provides that a progress payment is payable net of a retention, the *Client* must hold such retention as *security*."

[23] As it happened, the timing of the invoices, relied upon as progress claims, did not at all correspond with Item 16. Claims were not made according to the stage which the construction had reached. Nor was the agreed deposit of five per cent ever paid. Instead, an invoice was sent in each of the months from February through August

before the eighth invoice was sent in October. Plainly, the builder did not claim progressively in accordance with Item 16 and at least for that reason I conclude that the invoices did not constitute progress claims within cl 21 of the conditions.

[24] The defendants have further arguments as to why the invoices did not constitute progress claims. One is that they were issued by Satinay and not Mr Bartier. In turn Mr Bartier pleads that the defendants are estopped from denying the validity of the invoices as progress claims according to cl 21, at least insofar as they might otherwise be invalid for being delivered approximately monthly rather than according to the stages in Item 16 or because they were issued by Satinay. I accept that no objection was made to the timing of the invoices or to the fact that they were issued by Satinay before invoices 7 and 8 were sent, and that Mr Bartier assumed that they were valid progress claims. However I am not prepared to find that Mr Bartier's assumptions were induced by the defendants or that the defendants knew or intended Mr Bartier to act in reliance on that assumption. In addition I am not satisfied that there is any detriment to Mr Bartier which would warrant the relief claimed, which is that the defendants, or relevantly Kounza as the party to the contract, should be estopped from denying the validity of the invoices as progress claims on the grounds that they were made on a monthly basis or in the name of Satinay. As I have said, the ultimate entitlement of Mr Bartier under his contract will either be quantified by this judgment or, if the defendants' submissions are accepted, it will remain to be determined subsequently. The defendants deny that Mr Bartier is entitled to a final payment absent a final claim by him according to the contract, which they say he has not made. They concede, however, that it remains open to Mr Bartier to make such a final claim and ultimately to recover what is his proper entitlement. Either his rights to progress payments will be overtaken by a determination in this judgment of what should be his final payment (as he argues), or by a determination subsequent to this judgment when he makes a final claim (as the defendants argue). Ultimately, the validity of the progress claims will affect only his claimed entitlement to interest. Even then, Mr Bartier does not need the benefit of the estoppel for which he argues, because I have concluded, for the reasons that follow, that he was entitled to make progress claims upon a monthly basis and that the invoices apparently issued by Satinay were claims on his behalf.

[25] Mr Bartier was entitled to claim progress payments on a monthly basis by terms implied by s 67W of the *Queensland Building Services Authority Act* 1991. This is a commercial building contract as that term is used in the Act. By s 67W, terms are implied to the effect that the builder is entitled to monthly progress payments absent express provisions of the contract explaining the conditions implied by s 67W and expressly excluding such conditions. Clearly the implied conditions were not excluded by this contract. The relevant conditions are set out in s 67W in these terms:

> "67W Implied conditions for prompt payment
>
> (1) A commercial building contract is subject to the conditions stated in subsections (2) to (8).
>
> (2) From when the building work under the contract is started until when, under the contract, practical completion is reached, the contracted party for the contract has the right to receive progress payments for carrying out building work under the contract.

(3) The period between when the building work under the contract starts and when the contracted party has the right to submit a claim under the contract for the first progress payment must not be more than 1 month.

(4) The period between when the contracted party submits a claim under the contract for a progress payment and when the contracted party has the right to submit a claim under the contract for the next progress payment must not be more than 1 month.

(5) The amount of the first progress payment must be worked out having regard to the amount of building work carried out from when the building work started until when the claim for the first progress payment is made.

(6) The amount of a progress payment (the "current progress payment") other than the first progress payment must be worked out having regard to the amount of building work carried out from when the contracted party first submitted a claim under the contract for the progress payment most recently payable until the contracted party submitted a claim under the contract for the current progress payment.

(7) A progress payment must be made –
(a) within 21 days after the contracted party submits a claim under the contract for its payment; or
(b) if a longer or shorter time is agreed under the contract – within the longer or shorter time.

(8) If the contracting party for the contract disputes the payment of a progress payment for which the contracted party has submitted a claim under the contract, the contracting party must, within the time otherwise required for the payment of the whole of the progress payment, pay the contracted party the progress payment to the extent the contracting party's liability to pay the amount is not in dispute".

[26] By s 67E(2) if a provision of a building contract is inconsistent with a provision of Part 4A (which includes s 67W) applying to the contract, then the contract has effect only to the extent that it is not inconsistent with the relevant provision of the Act. Consequently the express terms for progress payments within this contract have effect only to the extent that they are not inconsistent with the terms implied by s 67W. So much is accepted by the parties, but there are competing arguments as to the extent to which the provisions of cl 21 are displaced by the regime resulting from s 67W. Cl 21.3 provides that the client must, within seven days of receipt of a progress claim, pay the amount of the claim or give a progress certificate evidencing the client's opinion of the monies due and the reasons for any difference and pay the amount certified. Cl 21.5 provides that if the client does not give a progress certificate within that period of seven days, the progress claim is deemed to be the progress certificate and the amount of the claim is deemed to be a debt due and payable. By s 67W(7) a progress payment must be made within 21 days of the claim or 'if a longer or shorter time is agreed under the contract – within the longer

or shorter time.' For Mr Bartier it is submitted that a shorter time has been agreed because cl 21.3 gives the client seven days to respond. The contrary argument is that the obligation to respond within seven days under cl 21.3 is an obligation to respond to a progress claim made under cl 21.1 rather than a monthly progress claim. Clearly s. 67W(7) permits the parties to provide for a longer or shorter time for the client's response to a monthly progress claim: the question is whether the parties have done so in this case by cl 21.3. In my view they have not done so. The apparent agreement within cl 21.3 is limited to a progress claim otherwise made according to cl 21, which these claims were not. It follows that Kounza had 21 days to respond to these progress claims.

[27] A further difference between the provisions of cl 21 and s 67W is that the former expressly provide that the client must issue a progress certificate, failing which the amount of the claim must be paid in full, whereas under the section, no progress certificate is required and the client's liability is to pay the claim to the extent that it is not in dispute. So under the section, the client need not pay if the debt is disputed within the time allowed for payment (in this case 21 days) although nothing in the nature of a progress certificate is issued. This is an inconsistency which must be resolved in favour of the operation of the section. Mr Bartier contends that to impose the requirement of a progress certificate would not affect the operation of s 67W but that it simply requires the client's dispute of the debt to be manifested by a progress certificate. Again however, it is my view that cl 21.3 and in turn cl 21.5 are not engaged by something other than a progress claim according to cl 21.1. It follows that Kounza had 21 days to respond to these invoices, if they were otherwise progress claims under s 67W, and that it was obliged to pay a claim only to the extent that the claim was not in dispute.

[28] In the present case, the absence of any progress certificate issued in response to either of these two invoices did not in itself result in the amounts claimed becoming immediately due. The question is whether, in each case, the claims were at all disputed, and if so, to what extent.

[29] In answering those questions, it is necessary to determine what is meant by an amount being 'not in dispute' for the purposes of s 67W(8). There was extensive cross-examination of Mr Bartier which suggested that Kounza, by Mr & Mrs Bell, had at least called into question the claims within these two invoices. Mr Bartier's response was to deny those suggestions. The course of this cross-examination sometimes gave the impression that the cross-examiner and Mr Bartier were at cross-purposes, in that Mr Bartier may have understood the suggestion to be that the Bells were asserting that some or all of the amounts claimed would never be paid, rather than simply querying them. In my view a party disputes a progress claim for the purposes of s 67W(8) although that party goes no further than questioning the relevant amount. This is consistent with one ordinary meaning of the word 'dispute'.[9] The evident intention from s 67W is to require the builder to be paid what is effectively conceded to be payable. Where the amount is called into question although the client remains sufficiently uncertain to deny its liability to pay the claim, the more likely legislative intention is that the amount claimed need not be immediately paid, ie as a progress payment.

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[9] Dispute; 5. To argue against, contest, controvert; a. To call in question or contest the validity or accuracy of a statement, etc., or the existence of a thing. The opposite of *to maintain* or *defend.* The Oxford English Dictionary. Oxford, Clarendon Press, 2nd ed, 1989.

[30] Save in one respect, I have concluded that the amounts claimed by these invoices were not in dispute within the relevant 21 days. That exception is the dispute of certain matters within a fax sent by Mrs Bell to Mr & Mrs Bartier, dated 4 June 2002 but faxed on 16 September, being just within 21 days from claim no. 7. Apart from that matter, I find that the amounts of these claims were not disputed. I accept Mr Bartier's evidence on this matter although Mr Bartier did not qualify his answers by reference to this fax. The absence of evidence from Mr or Mrs Bell again is relevant in deciding whether to accept Mr Bartier's evidence.

[31] The extent to which the fax of 16 September disputes what is claimed in invoice no. 7, dated 26 August, is not clear because it was not the subject of oral evidence. It is difficult to reconcile some of the matters there queried with what is claimed in invoice no. 7. Mr Bartier bears the onus of proving that the amounts within invoice no 7 were undisputed, for that is a fact he must prove to establish an entitlement to payment of the progress claim. Within the fax, information was sought in relation to five matters being 'plant hire', 'labour', 'hardware', 'frame + truss + floor' and 'carpentry'. Within claim no. 7, the first three of those matters is an identifiable subject of an amount claimed: for plant hire $13,960.66 is claimed, for labour there is an amount of $45,255.50 and for hardware there is an amount claimed against 'Bunnings' of $30,113.75. The Bells' query in relation to those matters went beyond what was claimed within this progress claim, but it sufficiently appears that they were disputing at least those three amounts within this progress claim, or at least that Mr Bartier has not proved otherwise. In other respects, however, I am satisfied that the fax does not dispute amounts claimed by the seventh invoice dated 26 August 2002. I find then that the amount of this seventh claim was disputed as to amounts totalling $89,329 and that it was relevantly undisputed within the relevant period of 21 days as to the balance of $369,629.38.

[32] The amount claimed by the invoice dated 16 October, which I find was sent on 17 October 2002, was undisputed to the extent that it claimed amounts not previously claimed by the unpaid claim no. 7.

[33] I reject the submission that these were not progress claims because they were invoices issued by Satinay. The contract was made with Mr Bartier, not with Satinay and there is no suggestion of any novation. At all times Mr Bartier remained the builder, bound to construct the townhouses and personally entitled to payment. They were invoices claiming for amounts said to be due under Mr Bartier's contract and they must be understood as claims on his behalf. As Satinay had no rights against any defendant, any claims by it could be relevant only as claims on behalf of Mr Bartier. This is not negated by the fact that Mr Bartier asked for payments to be made directly to Satinay. He was merely directing that payments due to him to be made to a third party. The payer must have regarded these as payments in discharge of the client's obligations to Mr Bartier and could only have regarded the payments as being made in response to claims made on his behalf.

[34] Some other arguments were made against the characterization of these invoices as progress claims, but they failed to address Mr Bartier's statutory entitlement to progress claims: as I have said, they were not claims purportedly made according to cl 21.1 and Item 16 of the schedule. It is also said that the claims failed to sufficiently particularise the value of the work and that it had now been demonstrated that some of the claims were excessive. I reject each of those submissions. In my view the claims are in terms sufficient to constitute them as

claims pursuant to s 67W. The fact that a claim is later demonstrated to be incorrect in some particular does not deny its validity as a progress claim and its impact upon the parties' positions according to s 67W pending a final reconciliation of what is due on completion of the works. Were it otherwise, the commercial purpose of many contractual regimes for progress payments in building contracts could be easily defeated.

[35] I conclude that on 16 September 2002, Kounza was obliged to then pay Mr Bartier the amount of $369,629.38 upon progress claim no. 7, and that on 7 November 2002 it was then obliged to pay the further sum claimed by the claim dated 16 October, which was an amount of $128,651.23.

[36] The defendants also argued that Mr Bartier in some way lost his entitlement to be paid these progress claims by what was described as an abandonment of those claims. They rely upon a number of acts by the defendants, the first of which was progress claim no. 8 itself which contained an adjustment of some earlier claims. But that only went to affect the amount claimed by progress claim no. 8: it was not by way of saying that the amount of unpaid claim no. 7 was now irrelevant. The contrary is demonstrated from the terms of claim no. 8 which apart from those relatively small adjustments, relied upon the unpaid balance of claim no. 7 in calculating what was then claimed in claim no. 8. The defendants then rely upon the meeting in November 2002 which was convened to discuss Mr Bartier's claims. The fact that Mr and Mrs Bartier went to the meeting prepared to discuss any item of concern does not show that they were abandoning the right to a progress payment. Nor is that indicated by subsequent conduct involving the sending of documents as attempted reconciliations of what should be the final payment. Their conduct must be assessed in the context of Mr Bartier's commencing these proceedings on 16 December 2002 in which he claimed amounts according to his seventh and eighth progress claims, and to his conduct thereafter in prosecuting the proceedings including the making of an application for summary judgment in March 2003 on the basis of those progress claims. So whilst he showed some inclination to compromise and to give way on certain items in the course of reaching a final resolution of this dispute, he continued to maintain his entitlement to these progress payments. On the evidence then there was no abandonment as the defendants suggest.

[37] I have concluded, however, that the plaintiff's entitlement must now be determined on a final basis as he seeks, and that accordingly the provisional position resulting from those unpaid progress claims is displaced by that determination within this judgment. Should I be wrong in that, because, for example, the defendants are correct in submitting that Mr Bartier is not yet entitled to have his claims determined as a final claim, he would be entitled to judgment in those amounts upon his progress claims. Further, consistently with what I say below as to interest, he would be entitled to interest on those amounts at the rate of 18 per cent per annum from the respective dates upon which they were due until judgment.

Final Claim

[38] There is a threshold question of whether Mr Bartier is as yet entitled to any final payment. The defendants submitted that he is not, although no doubt they did so in the hope that I would uphold sufficient of their submissions to also deny Mr Bartier

any judgment upon his progress claims. The defendants' argument at this point is that the contract requires the builder to make a final claim, and that Mr Bartier has not done so.

[39] The relevant conditions are cl 27 and 28 which are in these terms:

> "28.1 Within 7 days after the *Builder* gives the *Client* a final payment claim the *Client* must:
>
> (a) pay the amount of the final payment claim to the *Builder*; or
>
> (b) both:
>
> (i) give the *Builder* a *final certificate* evidencing the *Client's* opinion of all moneys due and payable between the *Client* and the *Builder* on any account in connection with the *contract* and the reasons for any difference; and
>
> (ii) pay that amount.
>
> 28.2 If the amount payable under the *final certificate* is less than the *Builder's* final payment claim then:
>
> (c) there is deemed to be a dispute, the details of which are the reasons for the difference stated in the *final certificate;* and
>
> (d) the *final certificate* is also deemed to be the notice of dispute under subclause 32.1 regarding that dispute.
>
> 28.3 If the *Client*:
>
> (a) pays the final progress claim in full; or
>
> (b) does not give the *final certificate*,
>
> within 7 days of receiving the final payment claim:
>
> (c) the final payment claim is deemed to be the *final certificate*; and
>
> (d) the amount of the final payment claim, if not paid, is deemed to be a debt due and payable.
>
> 28.4 The *final certificate* is conclusive evidence of the *Builder's* satisfaction, and in discharge of the *Builder's* obligations in connection with the subject matter of the *contract* except for:
>
> (a) fraud or dishonesty relating to any part of the *works* or to any matter dealt with in the final payment claim or the *final certificate*;
>
> (b) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or any arithmetical error in any computation; or
>
> (c) any unresolved issues the subject of any notice of dispute pursuant to Clause 32, given before the 7th

> day after the final payment claim became due and payable."

Clause 32 provides for a dispute resolution regime whereby the dispute must ultimately be determined by an expert acting as an expert and not as an arbitrator whose decision is final except as to questions of law.

[40] The defendants' submission is that there is no entitlement to a payment (unless it is a progress payment) unless the builder complies with cl 27 in making a written final payment claim. That clause requires such a claim to be made within 14 days after the expiry of the defects liability period. It is admitted on the pleadings that the works were completed by about the end of October and the contract provides for a defects liability period of 13 weeks from the date of practical completion[10]. I find then that the defects liability period expired on 30 January 2003. Mr Bartier does not say that he made a final claim within 14 days of that date or indeed that he has made one at all. At the commencement of the trial he did endeavour to plead that he made a final payment claim in April 2003, but he then abandoned this paragraph of his proposed amendments to his pleading when objection was made to it. Yet the defendants say that he is entitled to make a final payment claim: it is just that he is yet to make one. I have difficulty in accepting that submission. If the making of a final payment claim in accordance with cl 27 is a condition precedent to an entitlement to a payment (other than a progress payment) then Mr Bartier has not fulfilled that condition. Alternatively, if a claim under cl 27.1 is not a condition precedent to payment, but is necessary only to give the builder the other benefits of a final certificate, then the contract provides no obstacle to Mr Bartier's recovering now whatever amount is that to which he is finally entitled. I favour an interpretation which does require the builder to make a final payment claim as a condition precedent to payment. Clause 27.1 is in mandatory terms and there is a good commercial purpose in holding the parties to the timely performance of the steps set out in cl 27 and 28, because it promotes an expeditious determination of their ultimate entitlements and, if required, the process of dispute resolution according to cl 32. Of course that dispute resolution regime might be available if the builder is entitled to a final payment other than by following the steps prescribed by cl 27 and 28. But in that event the dispute resolution mechanism would not be compulsory. The interpretation which I favour has the purpose of requiring each party to follow the expeditious regime provided by cl 32. For the plaintiff, Dr Greinke submits that cl 32 is of limited effect because it provides that it does not prejudice the right of a party to sue or 'to enforce payment due under the contract or to seek injunctive or declaratory relief.' But that begs the question of whether monies for which a final claim has not been made under cl 27.1 can be said to be 'due under the contract'.

[41] Ultimately, however, it is unnecessary to decide this question of interpretation. This is because Kounza intimated that it would be useless for Mr Bartier to make a final claim, thereby relieving Mr Bartier from having to make it so that Mr Bartier is to be taken as having made that claim. Mr & Mrs Bartier had a lengthy meeting with Mr & Mrs Bell on 15 November 2002, in an endeavour to resolve the dispute which by then had arisen in relation to these two progress claims. The Bartiers brought copies of what they believed were all of the relevant invoices and records to that

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[10] Condition 26 and Item 15 of the Schedule.

meeting. On 25 November 2002, the solicitors for the defendants wrote to Mr Bartier in these terms:

> **"**We act on behalf of Konza Investments Pty Ltd.
>
> As settlement of the sale of the last of the units in the above development has now been completed, our client has asked that we arrange for the final payment under the terms of the Building Contract to be deposited into your bank account.
>
> We have attached to this letter a worksheet setting out the manner in which the moneys that are payable to you have been calculated. We have this morning deposited the sum of $145,376.00 in full and final satisfaction of the moneys owed by our client to you under the terms of the Building Contract into the following account:-
>
> National Australia Bank
>
> Account name: Satinay (Qld) Pty Ltd
>
> Branch No: 084-606
>
> Account No: 53 809 5240
>
> We understand that you have creditors claiming amounts in excess of the amount of the above payment. We suggest that you may wish to speak with a gentleman by the name of Morgan Lane from Worrells Accountants who may be able to provide you with some assistance in dealing with these creditors. Mr Lane and his firm are experienced in these circumstances and we suggest that it would be of assistance to you to speak with him."

[42] By this letter, Kounza effectively said that it would be useless for Mr Bartier to make a final claim because Kounza would not consider it. The effect of the letter is clear enough from its terms, but it is also indicated by the circumstance that the parties had extensively discussed Mr Bartier's outstanding claims at their meeting on 15 November. It is not suggested that Kounza was waiting for some further information before reaching a concluded and final response to them.

[43] In *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1953-1954) 90 CLR 235, Dixon CJ said at 246-247:

> 'Now long before the doctrine of anticipatory breach of contract was developed it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof: Hotham v East India Co[11]. But a plaintiff may be dispensed from performing a condition by the defendant expressly or impliedly intimating that it is useless for him to perform it and requesting him not to do so. If the plaintiff acts upon the intimation it is just as effectual as actual prevention.'

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11 (1787) 1 T.R. 638 [99 E.R. 1295]

This passage was applied by Brennan J in *Foran v Wight* (1989) 168 CLR 385 at 418, where his Honour at p 429 also set out passages from the judgment of Kitto J in *Peter Turnbull* to the same effect at p. 419.

[44] If the making of a final claim was a condition precedent to an entitlement to a final payment, then by the letter of 25 November Mr Bartier was dispensed from performing that condition and he is entitled to be treated as if he had performed it.

[45] Mr Bartier's pleading seeks a final payment as damages for breach of contract, but it is more correctly characterised as a debt claim. Para 23.3 pleads that Kounza and Mr Bell 'have failed to pay the sum of $405,705.63 and interest thereon as required by the Contract' but the prayer for relief seeks that sum as damages. There is no pleaded case that Mr Bartier terminated the contract so that he has lost the benefit of performance, entitling him to damages. In response to the letter of 25 November, he did not terminate; instead the contract remained on foot and performance of cl 27 was dispensed with so that his right to final payment became unconditional at the end of the defects liability period.

What is the Contract Sum?

[46] By cl 2.2 of the conditions it is provided that the client must pay the builder the contract sum adjusted by any additions or deductions made under the contract. Cl 1.1 of the conditions defines the term 'contract sum' as the amount stated in Item 18 of the schedule. Against Item 18 the parties inserted in words and figures the sum of $1,071,000. By cl 20 of the conditions, it was provided that the builder was not to vary the works except as directed or as agreed in writing and that absent an agreement on the price of a variation, that variation was to be priced according to cl 20.5 which provides:

> **"**20.5 If the *Client* and the *Builder* have not agreed on the price of a *variation*, that *variation* is to be priced by using:
>
> (a) comparative rates stated in the *contract*; or
>
> (b) if no rates are so stated, reasonable rates and prices,
>
> and, in the case of additional work, including an amount of 20% of the cost of the *variation* for overheads and profit and in the case of work that is taken out of the *contract*, the deduction must not include an amount for overheads or profit."

The Specification, which it is common ground also formed part of the contract, provided under the heading 'Variations' as follows:

> 'All variations from the contract documents, specifications, approved working drawings, or as requested by the owner are to be certified in writing by the owner, the designer and the builder. The builder is to supply a fixed cost variation which will be signed by all parties.'

[47] I have set out already at [7] the terms of the typed annexure which the parties inserted in the contract. There are two questions as to the interpretation of the contract, affecting the calculation of what is due to Mr Bartier, which arise from the

operation of the terms of the typed annexure against the terms for the contract sum and for variations mentioned in the preceding paragraph. The typed annexure provides for changes to the amount ultimately payable by reference to the Pricing Schedule and its specified 'elements' and their estimated costs and provides that additional costs to any agreed element will be paid to the builder as will the costs of elements not listed in the Pricing Schedule. It also provides for a reduction to the extent that there are 'savings to the elements listed'.

[48] One issue is the impact or otherwise of the provisions for variations in cl 20 of the conditions or within the variations clause in the Specification, and whether 'additional costs to these elements or the cost of elements not listed' as those matters are described in the typed annexure, are payable only if approved not only by Mr Cunningham but also by Kounza and in writing. In my view neither cl 20 of the conditions nor the variations provision of the Specification requires Kounza's approval for something which was always part of the required works. There are no plans or drawings which form part of the contract and I accept Mr Bartier's evidence that when he contracted, he was shown no plans or drawings which defined the works. The works were defined by the Pricing Schedule and the Specification. Mr Bartier's evidence demonstrates that at least in one respect, which was the provision of steel, there was an essential 'element' of the works not specified in the Pricing Schedule. The contract works must be taken to have included those elements specifically listed in the Pricing Schedule as well as such other items which were necessary for the construction of what is specified. The specified elements and those elements which by necessary implication were required as a result of what was specified were "these elements" within cl 3 of the typed annexure. Variations to the contract works are other works not expressly or impliedly required by the Pricing Schedule or the Specification, and they were "elements not listed" within cl 3. They were to be built only with the client's agreement, although there is no issue as to whether any of them was agreed. But they were to be priced under the provisions of the typed annexure, and to that extent, cl 20 of the printed conditions and the Specification were displaced by those provisions.

[49] A further issue concerns the relevance or otherwise of the insertion of $1,071,000 as the contract sum. Clause 2 of the typed annexure provides that 'the building contract has been determined from the attached list of elements and their costs'. Accordingly, the contract sum would be expected to correspond with the total of the elements as priced in the Pricing Schedule. But they do not correspond. There are various items in the Pricing Schedule that are there added up to give a 'Const. Total of $1,107,169'. There are then other items including an amount of $32,000 described as 'Builder's Number' (which has Mr Bartier's name typed next to it) as well as items described as 'Additional' which total $72,400, including an item for 'Contingency' of $10,000. The Pricing Schedule also contains a list of matters under the heading 'Fees' which together with provision for $38,000 to be paid to Mr Cunningham for 'Project Management' refer to amounts to be borne directly by the client. The total of the estimated prices of the elements for which the builder would be expected to be responsible is at least $1,217,000. So the position would appear to be this: if there were no changes to the costs according to the Pricing Schedule, then Mr Bartier would inevitably make a substantial loss if paid only the agreed contract sum of $1,071,000. And the evident intent of cl 6 is to give 'the owner' the benefit of savings to counter-balance the allowance in the builder's favour for increases in costs. The terms of the typed annexure plainly indicate that the price is to vary according to the cost but the question is whether it varies from a starting point

constituted by the contract sum of $1,071,000 or instead from effectively a total price from the Pricing Schedule. If the amount of $1,071,000 is varied by differences between the actual cost and the budget of $1,217,000, the builder will lose because the price would always be $146,000 short of his costs. If possible, a court should avoid a construction which creates results that are capricious or unreasonable[12], as a contract which inevitably causes a loss to the builder would be.

[50] For the defendants, it was submitted that the answer lies in the proper interpretation of the provisions in relation to savings in costs, and it is suggested that the builder is entitled to keep the benefit of some savings. The defendant's problem with this submission was then in identifying more precisely some interpretation by which some but not all savings and costs would be for the builder's benefit. Plainly cl 6 of the typed annexure gives the owner the benefit of at least some savings, but if only some, which savings are for the owner's benefit? The defendants' submission as to the savings provision was argued in these terms[13]:

> 'If there are savings to the elements listed which are such as to bring the cost below the $1,071,000, then that is the benefit which the builder picks up on a common sense interpretation, not a scenario whereby there is some type of reduction to the individual elements which all go back to … the owner or the contractor or developer … but rather the $1,071,000 is the threshold level by which savings are made or additional costs are incurred.'

[51] This suggested a way in which the builder could make a profit by giving him in effect, a minimum price of $1,071,000. But as the argument was further developed, it would have the contract operate in this way: if the ultimate cost was less than $1,071,000, then the builder would be paid only that cost, but if there were savings from the budget which still resulted in an actual cost of more than $1,071,000, then the builder would be paid $1,071,000.

[52] Neither seems a likely intention to attribute to the parties: the former makes for a substantial risk of a loss to the builder whilst the latter would deny him a profit in any circumstance. And on any view of it, the defendants' submission would require some significant rewriting of the express terms.

[53] In my view, there are but two possible interpretations. One is that additional costs or savings will be added to or subtracted from the sum of $1,071,000. The other, as the plaintiff argues, is that the specified contract sum of $1,071,000 should be effectively ignored so that he can recover the actual costs of construction together with his agreed margin. I have concluded that this second interpretation is correct. I reject an interpretation which would have the builder contracting to build at a loss. The amount of $1,071,000 inserted against the contract sum must be regarded as inserted in error. Notably, it is not referred to in the typed annexure, where there is no term which expressly requires the additional costs to be added to an amount of $1,071,000. If, contrary to my conclusion, the contract sum of $1,071,000 is to be adjusted by the difference between cost and budget, then the final payment should be $146,000 lower.

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12 *Lewis Constructions (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 50 ALJR 769.

13 Transcript 501.

What was the builder's agreed margin?

[54] This question arises because Mr Bartier had calculated the costs of some workmen he engaged by adding to the costs which they charged an increment of profit for Mr Bartier. Specifically, Mr Bartier added a margin of $15,078.86 to the cost of his carpenters. He argues that this is reasonable and reflects some usual industry practice. In my view, however, it is inconsistent with his contract. He is not entitled to an amount as an additional cost unless there is some impact upon his costs. It is not the value of work which affects the calculation of his entitlement but the cost of that work, and it is an actual and not a hypothetical cost which is relevant. This means that his agreed profit is effectively the sum of $32,000 put against his name and the item 'Builder's Number' in the pricing schedule. He has agreed to undertake this work at what seems a modest profit. However, he is assured of this profit because as I have interpreted the contract he is effectively protected against any increase in costs.

Satinay

[55] An issue arises as to the extent to which Mr Bartier was able to recover the cost of parts of the contract works because the relevant supplier or subcontractor has apparently dealt with Satinay and not with Mr Bartier. The defendants argue that in those circumstances, Mr Bartier has not incurred the cost and he cannot recover it under his contract.

[56] At the time of this contract, Mr & Mrs Bartier carried on the building business in partnership. Some weeks later, they were advised by an accountant that they should conduct business through a company to be acquired and controlled by them. They accepted this advice and became the shareholders of Satinay and Mr Bartier its sole director. As mentioned above, all progress claims were issued in the name of Satinay, and all progress payments were paid to its credit. I also find that many subcontractors or suppliers were engaged by Satinay, putting on one side for the moment whether Satinay contracted as a principal or as Mr Bartier's agent. However, the evidence does not enable some calculation of the extent to which the costs of this construction were from subcontractors or suppliers engaged by Satinay.

[57] As I have also mentioned above, there was no novation of the subject contract. In addition, Mr Bartier remained a licensed building contractor but Satinay at no time held a contractor's licence and accordingly was unable to carry out building work or recover any profit for carrying out building work: s 42 of the *Queensland Building Services Authority Act* 1991. I find that Mr & Mrs Bartier had no proper understanding of the extent to which their dealings were those of Satinay or of their former partnership or Mr Bartier alone. There was no documentation prepared to govern the transition from the partnership business to the company. Instead the Bartiers simply caused the company to be acquired, opened a bank account in its name and thereafter paid business expenses and received business income through that bank account. Their accountant prepared financial statements for the year ending 30 June 2002 for both the partnership and the company, representing that the partnership carried on business until 31 January 2002 and the company thereafter. I find that they gave no actual consideration to whether the company was engaging subcontractors or suppliers as a principal or as an agent or as to whether the

company should be entitled to be indemnified by Mr Bartier against any expense or liability from its doing something to enable Mr Bartier to perform his contract.

[58] In these circumstances the defendants submit that the use of Satinay has for them the very fortunate consequence of saving them perhaps some hundreds of thousands of dollars. If this is the result of the contract as it should be interpreted then its unfairness is irrelevant. However, there are two reasons why it is not the result.

[59] The first comes simply from the interpretation of the contract. Mr Bartier is entitled to 'additional costs' by reference to certain elements of work. The contract documents, and specifically the typed annexure and the Pricing Schedule, anticipate the provision of specified elements at a cost. They anticipate that these elements will be provided by subcontractors or suppliers, rather than by Mr Bartier, with the exception of the sum of $32,000 which is specified against Mr Bartier's name. The relevant cost of an element, in the calculation of any 'additional cost' or any 'saving' for the calculation of Mr Bartier's ultimate entitlement, is the cost of that element as passed on by the relevant subcontractor or supplier. According to the terms of the contract therefore, an increase in the costs of, say, plumbing comes from the total amount charged by the plumber being higher than that allowed in the Pricing Schedule. It is the fact of that increase which entitles Mr Bartier to his adjustment and his entitlement is unaffected by the dealings between him and Satinay.

[60] Alternatively, the same result is reached by some attempt to characterise the dealings between Mr Bartier and Satinay. That characterization must be by implication. On one view, Satinay has acted as his agent in procuring the provision of goods and services from suppliers and subcontractors. In that case, Mr Bartier was still incurring the relevant cost although by his agent, and by implication he would be obliged to indemnify his agent, either by an implied term of the agency contract, or absent such a contract, on a restitutionary basis.[14] The alternative characterization is that Mr Bartier and Satinay were contractor and subcontractor. In that case the (by implication) agreed price to be paid to the subcontractor could not have been expected to have been less than the subcontractor's costs, especially where the contractor was the director of the subcontractor, owing it a duty not to cause it to trade at a loss for his benefit. Again then any cost of engaging a supplier or subcontractor would be a cost for which Mr Bartier was ultimately responsible.

[61] I conclude therefore that the intrusion of Satinay has no practical impact upon the respective positions of the parties under this contract.

Substantiation and Approval of Costs

[62] Additional costs required 'a prior substantiation' and were subject to Mr Cunningham's approval. The defendants submit that fulfilment of neither of these requirements is demonstrated.

[63] As to substantiation, the defendant's submission depends upon substantiation being interpreted as meaning Kounza's agreement. But in my view, substantiation in this context refers to something by way of evidence or proof of the additional cost. That did not require the approval of Kounza. I am satisfied that the claims are in each case sufficiently evidenced so as to be substantiated in the required sense. The

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14 *Bowstead & Reynolds v Agency* (17th Ed.) at 7.058 and 7.059.

parties had extensive discussions as to the detail of the claims and at the November 2002 meeting to which the Bartiers brought copies of invoices and other documents supporting the claims. And at least through the process of disclosure, the defendants have had available to them all relevant documents evidencing these costs. With the benefit of access to that extensive material, they have pleaded by way of schedules to their Defence, certain items which should not be allowed. I conclude below that there are some items to be disallowed, but save for those matters I am satisfied that these claims are substantiated as required.

[64] Further, I am satisfied that the claims have in all respects been approved by Mr Cunningham. That is how I understand the effect of his evidence in chief[15] and Mr Bartier's evidence of approval by Mr Cunningham.[16] In any case, whilst the defendants have not admitted approval by Mr Cunningham, they have not denied it and nor have they alleged that Mr Cunningham has declined to approve any claim. I am satisfied that Mr Cunningham has approved the claims. But if he has not, he has done no more than fail to determine it one way or the other, in which case Mr Bartier could not be deprived of his entitlement if he can establish that they are amounts which should be approved. I am satisfied that in all respects, save as mentioned below, that those additions to the budgeted cost should be approved because they were costs reasonably incurred, on the evidence of Mr and Mrs Bartier, which save in respect of certain specific items, was unchallenged on this question. In particular I accept Mrs Bartier's evidence and that her final calculations are reliably based on documents and appropriately made.

Individual items challenged

[65] There are some relatively few items then the subject of dispute for reasons other than those dealt with already. They are some of the items within schedule B to the Defence, as amended in the variation handed up during the defendants' address. Some of the items still within schedule B were then conceded by Mr Collins on behalf of the defendants and I shall discuss only those which remain in issue.

[66] The first is an item of $8,000 for 'kitchen, laundry' etc. In progress claim no. 8, Mr Bartier had made an adjustment in Kounza's favour for this item but he now seeks to claim it, apparently because it is within a claim made by his subcontractor. Given his admission that he has no actual or contingent liability for this sum (being the admission within his progress claim), and given the absence of evidence to demonstrate that he is liable for it, I conclude that this sum should be deducted from his claim.

[67] The next item is one I have mentioned already which is the sum of $15,078.86 being Mr Bartier's own 'margin' added for the cost of carpenters. This amount should be denied to Mr Bartier for the reasons already given.

[68] The third item is a sum of $3,115.95 for 'stolen and damaged goods'. The precise makeup of these goods is not clear but it seems to be common ground that they were insured under a policy in favour at least of Mr Bartier but that he has chosen not to claim for them. It does not seem to me that Mr Bartier can claim to be under an

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15 At 202, 207-208.

16 At Transcript 137, 146.

additional cost burden when he has a right of indemnity against its insurer. This claim should be denied to him.

[69] Next is a claim for $1,343.69 described as tools used by Mr Bartier. I am not satisfied that this amount is recoverable, because I am not satisfied that they are in all respects tools used only on this job and not for any use beyond it.

[70] The remaining item is what is specified in schedule B as an amount of $67,580 being 'drawings or wages by plaintiff in excess of allowance in contract'. This amount involves an arithmetical error which is apparent from what was said in the course of the defendants' address[17]. Mr Bartier submitted a reconciliation of his claim on 15 April 2003. It included a number of schedules showing various costs. One is an eight page schedule attributing certain amounts to Mr Bartier's services including a total of $54,500 for 'supervision' and $32,000 as 'builder's margin'. A further schedule, however, shows additional components for Mr Bartier's services under the heading 'Labour' in amounts of $374, $1,320 and $1,760. The effect of the defendants' submission is that these amounts, (apart from that of $32,000), represent Mr Bartier's claiming as costs amounts which in effect have been paid to himself. I accept that submission and that these amounts are irrecoverable. The result will seem unfair to Mr Bartier who says that had someone else been engaged to do whatever work was involved in these items, the cost of that could have been passed on to Kounza. That may or may not be so but in my view Mr Bartier has not demonstrated that he is entitled to these amounts according to the contract. In particular, his claim for 'supervision' seems difficult to justify in the light of the pricing schedule, which attributes no such component to him but instead allows for an amount to Mr Cunningham of $38,000 for 'project management'. I conclude therefore that these amounts which total $57,954 should be excluded.

Final Amount Due (Before Interest)

[71] The total adjusted contract sum calculated by Mrs Bartier and as presented by the document of 15 April 2003 was $1,530,899.44. From that sum, it is necessary to deduct those items upon which the defendants have succeeded by reference to schedule B of their defence, being sums of $8,000, $15,078.86, $3,115.95, $1,343.69 and $57,954, totalling $85,492.50. I conclude that the adjusted contract price according to this contract was therefore $1,530,899.44 less $85,492.50, being an amount of $1,445,407.40.

[72] The payments made are common ground although the amounts vary insignificantly between certain documents according to whether amounts were expressed in whole dollars. I find that the payments made totalled $1,125,192.70. In consequence the net sum finally due, before interest, is $320,214.70.

Interest

[73] This involves yet another issue of the interpretation of the contract. The conditions of contract provided by cl 29 that 'interest in Item 17 becomes due and payable after the date of default in payment.' Item 17 of the schedule to the contract provides for the insertion of a rate as the rate per annum for interest on overdue payments.

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17 At 533-534.

Against Item 17, there is a blank space above a line followed by '% per annum' under which is printed (if nothing stated: 18% per annum). Nothing was stated, i.e. no number was inserted, so Mr Bartier says that he is entitled to interest at 18 per cent per annum. For the defendants it is submitted that the parties have agreed that there should be no contractual right to interest, by the fact that the printed line in the space allowed for the insertion of an interest rate has itself been crossed through. Importantly cl 29 has not been crossed through. The defendants would have the contract interpreted as if it had been deleted. But this could also be seen as consistent with an intention to leave Item 17 with no rate inserted so that the rate of 18 per cent would apply. I accept the plaintiff's submission. It follows that Mr Bartier was entitled to interest at that rate upon his outstanding progress claims. The fact that his entitlement then became one to a somewhat lesser sum as a final payment does not in my view affect the operation of the interest provision in the period between when his progress claims became due and when he became entitled to his final payment. Whilst the monies owing were for progress payments, interest was accruing due on those sums, until the plaintiff's entitlement was to a final payment, on which interest thereafter accrued. As I have found already, the works were practically complete by the end of October 2002 with the consequence that the defects liability period expired 13 weeks later, on 30 January 2003. By cl 28 the builder is entitled to a final payment within seven days of his final payment claim. As he is to be treated as if he had duly made his final payment claim, his entitlement to a final payment accrued within seven days of the date upon which such a claim could have been given, i.e. within seven days of 30 January 2003. I conclude therefore that he became entitled to his final payment on 6 February 2003.

[74] Mr Bartier should be paid interest under the contract upon the undisputed amounts of his outstanding progress claims, calculated from the date when payment was due (21 days from the claim) until 6 February 2003. That interest calculation must be adjusted to give credit for the payment of $145,376 paid on 25 November 2002 and also for payments of $11,404 made directly to suppliers. I do not know the dates on which those payments were made but I conclude that they were made no later than 25 November 2002 because they are shown as paid in the schedule accompanying the defendants' solicitor's letter of that date.

[75] The interest on the undisputed portion of progress claim no. 7 is as follows:

Amount of progress claim	$458,958.38	
Less disputed amounts	$89,329.00	
Undisputed amounts of progress claim no. 7	$369,629.38	
Interest thereon from 16 September 2002 until 25 November 2002 at 18%		$12,759.79
Interest on progress claim no.7 from 25 November 2002 to 6 February 2003:		
Amount payable	$369,629.38	
Less payments	$156,780.00	
Balance owing on progress claim after 25 November 2002	$212,849.38	
Interest thereon at 18% for 73 days		$7,662.57
Interest on progress claim no. 8:		
$128,651.23 at 18% from 7 November 2002 to 6 February 2003 (91 days)		$5,773.44
Total interest on progress claims		$26,195.80

[76] From 6 February 2003 Mr Bartier's entitlement was to a final payment of $320,214.78. He is entitled to interest upon that amount at 18 per cent from that date until the date of this judgment which I calculate as follows:

Interest on final payment at 18% for 286 days $45,163.41

[77] His entitlement to interest therefore amounts to $71,359.21. That sum must be added to the final payment due to him, resulting in an entitlement to judgment against the first defendant in the sum of $391,573.99

Claim to equitable charge

[78] When he signed the contract, Mr Bartier says that he did not know of the third defendant, Piperland. His evidence is that he believed Mr Bell to be the owner of the site. His evidence does not explain the role which he believed that Kounza was performing. I have concluded that the contract, upon its proper interpretation, was one between Mr Bartier and Kounza. But of course, Mr Bartier's belief as to the party with whom he was contracting, and who was the owner of the site could have been otherwise. I accept Mr Bartier's evidence that he believed he was contracting with the owner, and that he did not know of Piperland when he signed the contract. One reason for this is that the contract itself, within the typed annexure, refers to 'the owner' as the party contracting with the builder. And the standard conditions give rights to the builder which require the other party to have an interest in the site by cl 3.6 which provides as follows:

> '3.6 If no security is required to be provided by the client under Item 7, the client charges its interest in the site with the due payment to the builder for monies that are or may become payable to the builder arising out of the subject matter of the contract.'

There was no security required under Item 7.

[79] I also accept Mr Bartier's evidence that he did not become aware of Piperland's ownership of the site until after he had completed the works and this dispute had arisen. I accept his evidence that he would not have signed the contract had he known that some other party, and in particular Piperland, was the owner of the site. That evidence is inherently probable and there is no apparent reason to reject it. I infer that Mr Bartier performed this contract with knowledge of the contract's provision for a charge on unpaid monies. He may have misunderstood some of its terms, but I infer that he knew what was printed, typed or written within his contract, and the contrary was not put to him. I find that thereafter he believed that his contract entitled him to a charge on unpaid monies. The defendants would not appear to challenge those findings: instead they argue that there is 'no evidence that there was any discussion whatsoever about Piperland or that Bartier made any assumption as to the ownership of the site (as induced by Piperland) or that Piperland had induced an assumption on behalf of Bartier.' As to the first of those matters, it is correct to say that there was no discussion whatsoever about Piperland: that is Mr Bartier's case. The submission otherwise requires a consideration of what knowledge and conduct can be attributed to Piperland.

[80] Piperland must have been aware that eight townhouses were being constructed upon its land in circumstances where it was not a party to the building contract. Mr Bell was a director of Piperland as well as being a director of Kounza. Because of the obvious and substantial interest of Piperland in the proper and timely construction of these houses upon its land, Mr Bell's knowledge of matters relevant to that construction, and in particular of the terms of the building contract, should be attributed to Piperland. His knowledge of those matters was of immediate relevance to Piperland and his state of mind should be regarded as also that of Piperland. Again, that is a matter more easily inferred because of the absence of any evidence from Mr Bell or anyone else who could speak of Piperland's state of mind. Accordingly Piperland, through Mr Bell, knew that its land was being improved in circumstances where the builder had no legal right against it, and that he had instead contracted with another party or parties wrongly represented as 'the owner'. Further, it should be inferred that Piperland knew of the terms of the contract, involving the standard conditions. Again, if Mr Bell's evidence would have been that he did not believe that the printed conditions were part of the contract, it is not explained why he was not called to give that evidence, relevant as it was to this part of the case. Piperland thereby knew that the builder was performing his contract according to terms which purported to provide him with a charge against the interest of the owner in the site, whereas in truth the builder was unsecured.

[81] Mr Bartier's case is that in these circumstances, it is unconscionable for Piperland to take the benefit of his work for which there is such a substantial sum unpaid under the contract, without providing Mr Bartier with the security by way of the charge for those monies which he would enjoy had he contracted with the true owner. He says that Piperland is estopped from denying that its interest is thereby charged, in reliance upon authorities such as *Ramsden v Dyson* (1866) LR 1 HL 129. In Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (4th ed.) at [17-105] the authors summarise the elements of a proprietary entitlement by estoppel by reference to the leading cases. I respectfully adopt that summary which specifies those requirements:

> (a) an expectation or belief by A as to the property of B, for example, that it is the property of A or that B has given or will give A an interest in it;
>
> (b) knowledge by B of this expectation or belief of A;
>
> (c) activity of A in reliance upon his expectation or belief such as expenditure upon the property;
>
> (d) the interest or expectation of A must be one which B could lawfully satisfy (for example, a statute does not prohibit the transfer of title for the conferring of the interest upon A);
>
> (e) encouragement by B of the activities of A under (c) or at least knowledge of those activities with failure to assert his title to his property when they are adverse to it so that it is therefore fraudulent for him to rely on his legal rights to defeat the expectation encouraged by his conduct or lack of it; and

(f) knowledge by B of his property rights as under his enjoyment, control and disposition.

Each of those requirements would appear to be satisfied upon the facts. I have found that Mr Bartier believed that the owner would give him an interest in the property, by way of charge. Piperland knew of this expectation or belief because it knew of the terms of the contract, from which the builder would have that expectation or belief. I infer that the existence of security by a charge upon the subject land was material to the builder in performing the works, as is shown by his unchallenged evidence that he would not have entered into the contract had he been aware of Piperland's ownership and by the obvious importance to a builder of securing his payments. There is no impediment to Piperland's satisfying the expectation of a charge. Piperland has at least failed to assert its title and through Mr Bell has encouraged Mr Bartier to build these houses upon its land. Lastly, there is no suggestion that Piperland did not know of its ownership of this land.

[82] In *Commonwealth v Verwayen* (1990) 170 CLR 394 Mason CJ referred to what should now be regarded as 'a single overarching doctrine' of estoppel and Deane J referred to a 'general doctrine of estoppel by conduct' each of which would include equitable estoppel by conduct or acquiescence as argued here. Nevertheless, in the present case the content of what is required to give rise to the estoppel claimed is not affected by whether such an estoppel should now be seen as part of a single doctrine.

[83] Mr Bartier must also establish that the appropriate relief from the estoppel is a charge upon the land. In this, he must prove a relevant detriment from his reliance upon his expectation of a charge, for it is the nature and extent of the detriment which determines the appropriate relief, and the appropriate relief may not be the fulfilment of the plaintiff's expectation: *Commonwealth v Verwayen* at 411 (Mason CJ), 428-9 (Brennan J), 445 (Deane J), 454 (Dawson J), 475-6 (Toohey J), 487 (Gaudron J) and 501 (McHugh J). Had Piperland disclosed the truth during the progress of the work, Mr Bartier would have been entitled to stop work because of the misrepresentation by Kounza as to who was the owner. In a context where Mr Bartier was undertaking substantial financial obligations to perform this contract for such a relatively small return, I infer that he would have stopped work and demanded that his position be secured. The detriment from his reliance is that he is now an unsecured creditor for such a large sum especially when measured against the builders' margin of $32,000.

[84] There is evidence that the limit of the bank finance for this construction was $1,071,000.[18] Mr Cunningham's evidence confirms that the seventh and eighth progress claims could not be paid from available credit. I accept Mr Cunningham's evidence that Mr Bell said that costs above the sum of $1,071,000 would have to be paid from the proceeds of sales.[19] I infer that more probably than not, Kounza is unable to pay Mr Bartier at least without the benefit of the proceeds of sales of the units. The rights or otherwise which Kounza has against Piperland are unknown, again, because the defendants have not called evidence. Mr and Mrs Bell may have been intending to pay Mr Bartier some money from the sales but it is another thing to conclude that Kounza has an enforceable right to those proceeds. Again,

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18 Ex. 15

19 Transcript p 215

Piperland could have pleaded and proved such an entitlement if it exists. Instead, it would have Mr Bartier left with the substantial risk that Kounza has no right to those proceeds or any other means of satisfying Mr Bartier's debt. Mr Bartier is then in a situation where there is at least a substantial risk that his debt could not be paid by Kounza, and where the only means which Kounza has to pay him could be through its rights against Piperland, about which Piperland leaves him to speculate. In those circumstances, his detriment is that his debt is unsecured and the extent of his detriment is directly affected by whether Piperland allows its property, in particular the proceeds of sale of these houses, to be used to pay him. It is not inequitable to insist upon those proceeds being available to the plaintiff in these circumstances. Instead, the remedy is proportionate to the detriment.[20] If there is indeed a right to the proceeds which Kounza enjoys, then there is no financial burden upon Piperland from the relief Mr Bartier seeks. But if Kounza does not have that right, then Kounza is probably unable to pay Mr Bartier, and Mr Bartier's detriment should be avoided by the relief he seeks. I conclude that Mr Bartier should have a charge upon the houses or their proceeds of sale.

[85] There is a like claim against Mr Bell in relation to his one per cent interest in the land. In my view that claim should succeed for the same reasons. Like a charge on Piperland's interest, that would not have the result of making the chargor a guarantor of the Kounza debt. The appropriate relief against him is that his interest in the relevant property should be charged with the payment of Kounza's debt.

[86] The evidence as to present ownership of the townhouses is unclear. The statement of claim alleges that Mr Bartier lodged caveats over six of the townhouses on or about 26 November 2002. There is no counter-claim for the caveats' removal although the fact of lodgement of the caveats is admitted. On the pleadings it seems that six of the eight townhouses would remain owned by Piperland, Mr Bell and another. If so, it is appropriate that there be relief by which the interests of Mr Bell and Piperland in those six houses be charged in terms which correspond with the charge provided by condition 3.6 of the conditions of contract. The relief sought against Piperland, and relevantly against Mr Bell also, is 'a declaration that the interests of Bell and Piperland in the site were subject to an equitable charge in respect of any sums outstanding under the contract' together with further declaration 'that, at the time the caveats were lodged, Bartier had a caveatable interest in the site'. Apart from some further order to give effect to the entitlement to a charge according to these reasons, there should be a declaration against Mr Bell and Piperland that any interest which he or it has in any real property constituted by any of Lots 1-8 of SP 141571 in the County of Stanley Parish of Indooroopilly or in any of the proceeds of sale thereof has been and is charged with the payment to the plaintiff of any money owing to the plaintiff by the first defendant under their contract or this judgment. There is no indication that any third party would be affected by that relief which creates a charge with effect prior to the publication of this judgment,[21] and the plaintiff's caveats make that unlikely.

Conclusion

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20 *Verwayen* at 413

21 *Muschinski v Dodds* (1984-1985) 160 CLR 583 at 623 per Deane J

(a) The plaintiff should have judgment against the first defendant for the sum of $391,573.99.

(b) There should be a declaration in favour of the plaintiff against the second and third defendants in the terms indicated by the preceding paragraph of these reasons.

(c) The plaintiff should be at liberty to seek within these proceedings such further orders as are appropriate to give effect to the plaintiff's said entitlement to a charge.

[87] I shall hear the parties as to costs.