

# SUPREME COURT OF QUEENSLAND

CITATION: *Jones v Millward & Anor* [2004] QSC 158

PARTIES: **RICHARD LAURANCE JONES and ELIZABETH ANN JONES**  
(Plaintiffs)  
v  
**MARK VINCENT MILLWARD and ROSEMARY JANE LEA**  
(Defendants)  
**GEORGE PERVAN**  
(Third Party)

FILE NO/S: 563 of 2002

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 26 May 2004

DELIVERED AT: Cairns

HEARING DATE: 6, 7 May 2004

JUDGE: Jones J

ORDER: **1. I declare that the defendants are bound specifically to perform as purchasers the contract between them and the plaintiffs dated 30 April 2002.**  
**2. I grant the parties liberty to apply in the event agreement cannot be reached between them as to the date for completion of the sale.**  
**3. I dismiss the third party claims.**  
**4. I adjourn the question of costs in respect of all claims for 14 days to allow the presentation and exchange of written submissions on this issue.**

CATCHWORDS: CONTRACT –SALE OF LAND –RECISSION - Where the defendants purported to rescind a contract for the sale of land on the basis that they were induced by representations made by the plaintiff and third party which were false – Whether the representations were made – Whether the representations induced the defendants to enter the contract – Whether purported rescission valid

PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – COMMISSION AGENT – Whether third party acted as "real estate agent" for the plaintiff or defendant as defined in Property Agents and Motor Dealers Act 2000

(QLD)

EQUITY – REMEDIES - SPECIFIC PERFORMANCE –  
SALE OF LAND

*Harbours Act 1955*

*Property Agents and Motor Dealers Act 2000*

*Transport Infrastructure Act 1994*

COUNSEL: Mr M Pope for the plaintiffs  
Mr A Lyons for the defendants  
Mr D Morzone for the third party

SOLICITORS: Bruce K Gillan for the plaintiffs  
Vince Martin & Co for the defendants  
Vandeleur and Todd for the third party

- [1] The plaintiffs are the registered owners of three contiguous parcels of land namely Lots 40, 57 and 58 on RP 706421, County of Nares, Parish of Mourilyan (“the land”). Improvements to the land include a dwelling house, a shed and a pontoon which extends into the Johnstone River. In fact, the surveyed northern boundary is shown as being in the river whose course has changed by eroding the bank and part of the land.
- [2] On 30 April 2002 the female plaintiff (hereinafter “Mrs Jones”) on behalf of herself and exercising a Power of Attorney for her husband, signed a contract for the sale of the land to the defendants. The sale was arranged through the third party, a licensed real estate agent, George Pervan. The contract provided for the completion of the sale on or before 31 August 2002. However, on 29 August 2002 the defendants purported to rescind the contract and thereafter refused to complete the sale. The basis for the defendants claiming a rescission is expressed in a letter of that date in the following terms:-

“Even though the Contract did not specifically state that the pontoon and walkway were to be approved for our clients purposes which were made known to the Agent, our clients were induced to enter into this Contract on the basis of a representation made by Mr George Pervan, as Agent for the vendors, that the pontoon and walkway were so approved. It is not of course suggested that Mr Pervan was being intentionally deceitful but, if necessary our clients reserve the right to claim that the representation was “fraudulent” in the sense of being made recklessly not really knowing whether the representation was true or false. However even if the representation was “innocent in a technical sense, our clients still have the right to rescind the contract.

It has now been established that the pontoon is not approved and apart from being of no use to our clients is an illegal structure. In the event of a public liability claim arising out of the pontoon an insurer would probably not indemnify the owner in respect of such a claim because the pontoon is illegal and this in itself is a matter of the utmost concern.”<sup>1</sup>

- [3] By their Amended Further Amended Defence, the defendants detailed two occasions when Pervan made such a representation<sup>2</sup> and allege that this occurred in the hearing of the female plaintiff<sup>3</sup> and that she did not deny the representation.<sup>4</sup>
- [4] It is common ground that there was no licence or approval for the use of the pontoon but the plaintiffs and Mr Pervan both assert that no representation was ever made to the effect that there was. At the relevant time approvals were required pursuant to s 86 of the *Harbours Act* 1955, that requirement being continued by virtue of s 236 of the *Transport Infrastructure Act* 1994 until 31 December 2002.<sup>5</sup>
- [5] The plaintiffs deny any misrepresentation by Mrs Jones or by anyone in her presence and assert that at all relevant times the third party was acting agent for the defendants. The plaintiffs seek specific performance of the contract. The defendants, by counterclaim, seek a return of the deposit with interest from the plaintiffs and damages from the third party. The third party denies that he made any representation of the type alleged and asserts that he was the defendants’ agent up to the time of the signing of the contract.
- [6] The primary issues therefore arising are –
- (i) Was any such representation made?
  - (ii) If yes, what were its terms and by whom was it made?
  - (iii) Was Pervan acting as agent for the plaintiffs or the defendants?
- [7] A resolution of these issues depends essentially on the credibility of the various witnesses.

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<sup>1</sup> See ex 1 document 10

<sup>2</sup> See para 5(a)

<sup>3</sup> See para 5A

<sup>4</sup> See para 5D

<sup>5</sup> See reprint 8 s 236(8)

**Background facts**

- [8] The contract arose as a consequence of a search by the defendants for premises in which to pursue a commercial fishing and boat building enterprise. The first named defendant (“Mr Millward”) had, at the relevant time, worked in the commercial fishing industry for a number of years. He was also a boat builder by trade. He acquired his first commercial fishing boat in 1983. Until 2001, he lived with his first wife, Cheryl, at 3 Payne Street, Innisfail which had a frontage to the Johnstone River some four doors downstream from the subject land. Mr Millward had two pontoons attached to this land<sup>6</sup> which he had, since late 1998, used in conjunction with his fishing business. He operated two commercial fishing trawlers. In 2001 following a breakdown in his marriage, Mr Millward left that address and moved to Cairns. His former wife remained in occupation of the Payne Street premises. Mr Millward has since married the second named defendant who will hereinafter be referred to as Mrs Millward.
- [9] In 2003 the defendants were keen to re-establish a trawler base in Innisfail and to this end began a search for available waterfront properties. Because of the nature of his business he required land to be located within the Town Plan zone “Waterfront Facilities”. That zoning in an earlier Town Plan had used the descriptor “Port Facilities”. The defendants engaged the services of Mr Pervan to help them in this search.
- [10] Mr Pervan identified to the defendants a number of properties for their consideration. One of them was quite remote from the river and it was of no interest. Others included properties at Coconut Point, at Corinda Street and some other addresses. On 20 March 2003 Pervan made available to the defendants documents which included details of properties resulting from his recent and his earlier enquiries.<sup>7</sup> Some properties were quickly rejected because they were not in the required zoning and Corinda Street because it did not have a pontoon.<sup>8</sup> Ultimately, Mr Millward asked Pervan to inquire about the availability of the

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<sup>6</sup> Transcript 49/55

<sup>7</sup> Ex 1 document 5

subject land and the adjoining properties owned by a Mr Nissen (“the Nissen land”). The Nissen land was appropriately zoned but it had no mooring. The river access was by way of a slipway. That feature was attractive to the defendants for the ship repair business but they needed moorings for the trawlers.<sup>9</sup> Mr Millward was well aware that the subject land had been used as a trawler base from his observations when he lived at 3 Payne Street and also because he had previously visited the subject land.

- [11] The plaintiffs took up residence of the land in January 2002 and they have, since that date, used the land both as a residence and as a base for a fishing trawler which the plaintiffs operate in their own right. Prior to that date the fishing business had been conducted in conjunction with a man named Posner. During this time the plaintiffs were joint owners of the property but did not, in their own right, control its use. In 2001 there was a restructure of their business and the plaintiffs bought out Mr Posner.
- [12] The subject pontoon was apparently installed in 1993. Documents tendered as part of ex 1 indicate that approval had been sought and granted for the construction of a jetty.<sup>10</sup> However, there was no approval for the construction and use of a pontoon as such. The pontoon was used only during the closure of the fishing season, between mid December and the end of February each year. During this period the vessel underwent repairs, refit and maintenance.
- [13] At the time of the negotiations and the signing of the contract Mr Richard Jones was at sea operating the trawler. Mrs Elizabeth Jones, who has a power of attorney to act on behalf of her husband, was the only member of the plaintiffs who was involved in the negotiations and who signed the documents. She describes how she was approached by Mr Pervan to enquire whether she and her husband would be prepared to sell the land. This approach, on her evidence, was made on 17 April 2002. They were not anxious to sell because they had only recently completed the restructuring of the business, to which I have referred. She told Mr Pervan that they did not want to be “mucked around”. Mr Pervan assured Mrs Jones that his clients were genuine buyers. She was asked to give a price that they would accept. Mrs

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<sup>8</sup> Transcript 33/36

<sup>9</sup> Transcript 36/50

Jones then discussed the question of price with her husband and advised Mr Pervan their selling price was \$320,000. The defendants initially offered \$300,00 and the parties compromised, agreeing on a price of \$310,000.

[14] On a date about which there is disagreement, Pervan arranged for an inspection of the land, the intended buyers were the defendants who were then introduced to Mrs Jones. Mr Millward, was known to Mrs Jones by reason of his also being involved in the fishing industry, although she had not previously met him.

[15] There was an initial inspection of the residence which was principally undertaken by Mrs Millward. The four persons – Mrs Jones, Mr and Mrs Millward and Mr Pervan – then moved to a point in the land adjacent to the shed and pontoon. It is at this point there was some divergence in the evidence of the witnesses as to what happened and this will be referred to in some detail later. However the outcome of the negotiations resulted in the defendants, on 24 April 2002, signing the contract to purchase the Nissen land for \$270,000 and the subject land for \$310,000.<sup>11</sup> The plaintiffs sought an extended period for the completion of the sale. Both contracts were subject to finance and the completion dates were respectively 31 July 2002 for the Nissen land and 31 August 2002 for the subject land. Mrs Jones executed the contract on behalf of the plaintiffs on 30 April 2002.

[16] In mid-June 2002 Mr Millward became aware that his former wife was prepared to sell her interest in the property at 3 Payne Street. He went on to acquire the property as part of a matrimonial property settlement in July 2002. He was then in a position to use that property, as he had in previous years, as his trawler base. This made the Nissen land and the subject land surplus to the defendants' needs. The defendants sought to be released from both purchases<sup>12</sup> but the vendors would not agree. The defendants completed the purchase of Nissen land but on-sold it in January/February 2003.

[17] On 16 July 2002 the defendants consulted with their solicitor Mr Martin with the information that the Nissen land had the required approval for its slipway but they

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<sup>10</sup> See letter dated

<sup>11</sup> Ex 1 docs 6 and 3 respectively

<sup>12</sup> Transcript 59/40

were not sure there was approval for the pontoon on the subject land.<sup>13</sup> Checks were made of the local authority zoning which checks confirmed the accuracy of the information given by Mr Pervan prior to the contract. However, checks by the defendants' solicitors on the status of the pontoon resulted in a response from the Environmental Protection Agency (EPA) dated 23 August 2002. This advice was to the effect that early approvals for the construction of the jetty had been given on 13 September 1979 and 13 January 1985 and the existing statutory requirements were explained.<sup>14</sup>

[18] The parties have proceeded on the basis that it was, in fact, necessary for the owner of the subject land to hold a licence for the use of the pontoon. Reference was made in evidence to some distinction between "private" and "commercial" use though no distinction is readily apparent from either the terms of the letter or my quick perusal of the Act. What is to be noted is that subsequent events have proven there was no significant difficulty in obtaining the relevant licence. The plaintiffs have, in fact, taken that step and were granted the licence within a short time but with an expenditure of approximately \$17,000.

[19] The third party is a registered real estate agent of some 18 years standing. He has served as a Shire Councillor for the Johnstone Shire Council for more than 12 years and currently holds the position of Deputy Mayor. Between 1997-2000 he was the Chairman of the Town Planning Committee. As a consequence he had knowledge of the zoning requirements within the Shire. Nonetheless, he did confirm before undertaking an inspection with the subject land that it was zoned as he had anticipated.<sup>15</sup> He had known Mr Millward for more than 20 years during which time he had been involved in sales and purchases of properties on Millward's behalf. Mr Pervan, in evidence, confirmed that he had been engaged by Mr Millward to locate a suitable property for him. The specific requirements were that the property be in the waterfront industry zone and that it have a mooring.<sup>16</sup> Mr Pervan said there was no mention in his instructions about the need for there to be approval for pontoons, walkways or jetties. Nor was he asked to inquire about any

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<sup>13</sup> Transcript 53/50

<sup>14</sup> See ex 1 doc 16

<sup>15</sup> Transcript 123/10 – see ex 9

<sup>16</sup> Transcript 115/45-116/10

such approvals. Mr Millward's evidence was that this feature was a matter of importance to him and he identified that fact to Mr Pervan.

- [20] After Mr Millward identified the Nissen land and the subject land as potentially fulfilling his requirements, he engaged Mr Pervan to approach the respective owners about a possible sale. Pervan's evidence about the initial approach and the setting of the price is consistent with the evidence of Mrs Jones.

### **The issues**

- [21] It is common ground between the defendants and Mr Pervan that Pervan was engaged to find suitable property. The terms of the agency as to remuneration does not appear to have been discussed. For reasons which follow I infer that it was intended that if a sale eventuated Pervan would endeavour to seek appointment as the vendor's agent and thus gain commission from the sale. In fact, Pervan did seek to establish himself as agent for the plaintiffs and to this end had Mrs Jones sign, in the statutory form, the appointment of him as agent for the purpose of the *Property Agents and Motor Dealers Act 2000* ("PAMDA").<sup>17</sup> That document shows the date of execution as 24 April 2002. It is common ground between Mrs Jones and Mr Pervan that the document was only signed by her after the contract of sale of the subject land had been executed. Consequently the appointment does not comply with s 133 of the PAMDA with the result that Pervan is not entitled to seek commission on the sale from the plaintiffs. See s 140.

- [22] I am satisfied that the actions taken by Mr Pervan before the initial contact with Mrs Jones were entirely for the benefit of the defendants. These included some research of available properties, the recovery of documents detailing earlier investigations, and attending on site inspection.<sup>18</sup> Whatever were the terms of the agency between Mr Pervan and the defendants, even if voluntary, they were actions taken on behalf of the defendants and not on behalf of the plaintiff. I find that at no time prior to Mrs Jones signing the contract had Mr Pervan been appointed to act as agent for the plaintiffs. I find that certainly there was no agency by which Pervan was authorised to make statements on behalf of the plaintiffs as to the status of the property or in

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<sup>17</sup> See form 22 ex 1 doc 4

<sup>18</sup> Ex 1 doc 5

particular of the pontoon attached to it. I find also that there had been no discussion between Mrs Jones and Mr Pervan about the attributes of the property prior to the date of its inspection by the parties. These findings accord with the evidence of both Mrs Jones and Mr Pervan.

[23] There is conflict between Mr Millward and Mr Pervan as to the terms of the agency that existed between them. The defendants allege in their Statement of Claim that Mr Pervan knew that it was important to the defendants for the pontoon and walkway to have all necessary approvals. In evidence Mr Millward said that Mr Pervan had told him that the approvals were in fact in existence.<sup>19</sup> Pervan asserts that he knew that the existence of the pontoon and walkway was a feature of the property that the defendants regarded as significant<sup>20</sup> but that he was never informed that approval for it was a requirement. By contrast Pervan agreed that in discussions the correct zoning was a critical matter as a consequence he checked the zoning to confirm his own knowledge as referred to above. The existence of the pontoon licence could, if necessary have been checked by enquiry at the relevant department. In fact, there was no effort to check on the status of the pontoon until after there had arisen a desire on the part of the defendants not to complete the contract of sale.

[24] Of all the parties involved in the negotiations, it was the defendants who had the more detailed knowledge of the requirements for pontoon licensing. Mr Millward had conducted his commercial fishing operation at 3 Payne Street, using two pontoons neither of which, to his knowledge, had the requisite approval. He said that one of the pontoons had an approval for “private” use. He said further, that he was in the process of obtaining approvals for the pontoons and had been doing so since a time prior to the entering into the first contract. It is noteworthy that he has yet to gain that approval. Notwithstanding his knowledge that the pontoons were not approved he did not hesitate to enter into a contract with his former wife for the transfer of the Payne Street property. Further to that the defendants have, since this dispute arose, purchased yet another property notwithstanding their knowledge that the pontoons attached to that property were not appropriately licensed though he used that knowledge to determine the price. In those circumstances; Mr. Millward’s

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<sup>19</sup> Transcript 37/25

<sup>20</sup> Further Amended Defence of third party para 4

claim that such pontoons would be of no use because they were “illegal structures”<sup>21</sup> would appear to be somewhat selective.

[25] Weighing all these matters I do not accept the defendants’ assertion that they regarded the licensing of the pontoons as a critical matter when they engaged Mr Pervan to seek a property nor when they agreed to purchase the subject land. Given that there were few properties which satisfied the main consideration, namely Waterfront Facilities zoning, the licensing of the pontoon (which has been demonstrated to be easily obtained) would have been of little significance to them. Were it otherwise then the pontoon licensing could have been a special condition of the contract. The defendants were experienced in dealing with land sales, and I infer were no strangers to conditions on contracts. My impression of them is that they would not be put off by a real estate agent’s advice about contractual terms if the point on issue was important to them. I accept therefore, the evidence of Mr Pervan that he was never informed that the defendants required the pontoon to be licensed or approved as a feature of the property, and his further evidence that he had no knowledge of the status of the pontoon and made no inquiry of that status from the relevant department nor of Mrs Jones.

[26] Turning now to the events associated with the inspection of the property and the alleged representations. It is to be noted firstly that there is a disagreement between the witnesses as to the date on which the inspection of the subject land was undertaken. Mrs Jones and Mrs Millward believe that this event occurred on Saturday, 20 April 2002 whilst Mr Millward (tentatively) and Mr Pervan believe it occurred on Wednesday, 24 April. If this latter date were to be correct it would mean the offer to purchase was made before any inspection. It is common ground that the initial asking price was \$320,000. The first written offer was expressed by Mr Millward by letter on Pervan letterhead dated 21 April 2002.<sup>22</sup> It is common ground that the plaintiffs agreed to accept a price of \$310,000 and this was confirmed in writing on 23 April 2002.<sup>23</sup>

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<sup>21</sup> Ex 1 doc 10

<sup>22</sup> Ex 1 doc 1

<sup>23</sup> Ex 1 doc 2

[27] Mrs Jones fixes the date of the inspection by reference to a diary in which she made contemporaneous entries. Mrs Millward fixes the date because her work commitment in Cairns permitted an inspection only at weekends.

[28] I accept that the more likely time for the inspection was the Saturday afternoon, 20 April 2003. This followed the transmission to Mr Millward of the material contained in ex 1 doc 5. I find that the inspection occurred on Saturday, 20 April. By this time an inspection had been made of the Nissen land and an inventory taken of the contents of the shed on that property which contents were to be included in that sale. Because the subject land provided the only opportunity for a mooring it was essential that the purchase of both properties be effected. I accept that Mr Millward and Mr Pervan had some familiarity with the property and that they had had some conversation before the inspection as to its suitability for the defendants' needs. I do not accept however, that there was a discussion between the defendants and Mr Pervan prior to the inspection that licensing of the pontoon was necessary. I accept Mrs Jones' evidence that, as at the time of inspection, she had no knowledge of any requirement for the licensing of the pontoon nor whether in fact it had been licensed.<sup>24</sup> The pontoon had been used as a trawler base for a number of years prior to her occupying the residence on the land. She had no reason to doubt the lawfulness of the pontoon status. She claims she did not involve herself in the inspection and that she had heard no conversation at the time about the status of the pontoon. Mrs Jones said that she remained back some distance from the shed and pontoon whilst these facilities were being inspected by the others. She illustrated her position and the relative distances in a sketch plan.<sup>25</sup> When the others returned to her position she said they simply returned to the house and left the premises. It was put to the plaintiff that she was involved in conversation concerning tools, power and flood mount but she denied this. It was not put to her that she nodded her head by way of adopting a statement by Mr Pervan about the existence of an approval for the pontoon. Mr Pervan also claims that there was no such conversation.

[29] The defendants' recollections of the conversations from which the representation is to be established vary significantly. Mr Millward said that the topic was raised on

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<sup>24</sup> Transcript 19-20

<sup>25</sup> See ex 1 doc 21

two occasions during the inspection.<sup>26</sup> He said that the conversation occurred on the concrete apron outside the shed and the following questioning occurred:-

“And what were you saying to George; very precisely, please? –  
“George, is this pontoon approved? Is this all okay?”

What did George say? – “Yes, everything’s fine, everything is approved,” words to those effects.

That’s the only conversation for which my client was present, you say? – No, this was ---

About the pontoon? – That was the only other time I spoke to George about it during that inspection.”<sup>27</sup>

[30] Mrs Millward recalls the topic being raised a number of times. She said:-

“Do you recall who said what in that discussion to which you referred? – Mark did a lot of discussions. He – he was saying it was very important for that – the approvals. He was very – you know, he’d been saying this all time. “Really important that we’ve got all the approvals for the pontoon and walkway in the properties”. And George was there and he said, “Yeah. Look, it’s all okay. It’s all approved. You know, it’s – it’s operational. You could start operations as soon as you bought the property”, basically. And Mrs Jones was there, and she was really just there with me, and I believed that she – she was there and part of the conversation. And sorry, when – when we’d finished looking around and – she had to shut the shed, and then we all walked back up to the – towards the house.”<sup>28</sup>

In later questioning the following exchange occurred:-

“You’ve walked around the property ---? -- Mmm.

--- and you’ve been down to the shed and the concrete pad and the pontoon, I think you said you then left. Did you have any discussions as you were leaving? – I didn’t say much. I think I was just walking along with the others, but I can recall Mark – Mark’s just saying constantly, “It’s really important that the approvals are in place.” He was very strict on this. “It’s really important it’s commercially approved”. It’s just – it was a big thing to him. I could see that. It was important from – I mean, understanding, I suppose, the need for those sort of approvals. With the work I do I can understand why it would be important and why it was important and just – and then we left.”<sup>29</sup>

Finally, Mrs Millward was further examined on the following day when she was asked by her counsel again about the discussion and she repeated that her husband said – “It’s good that all the approvals are in place” and she responded to the question:-

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<sup>26</sup> Transcript 63/40  
<sup>27</sup> Transcript 64/50-65/10  
<sup>28</sup> Transcript 76/40-55  
<sup>29</sup> Transcript 78/38-40

“Who were the others to whom you just referred? – Mrs Jones and George were – walking up with myself and Mark towards the house to leave ‘cause you have to walk up along that stretch beside the slipway. There’s a – a bit of gravelled drive that you walk up. And they didn’t say anything. They – but they were clearly hearing what he was saying and – and in agreement with that. I believe that they were nodding and, you – you know, “Yeah, it is good”, was the impression I got as I was walking up. Then Mrs Jones left us at the bottom of the stairs and she went upstairs and we said thank you to her for letting us look at the property, and George and Mark and I moved – sorry, moved forward out towards the front of the property where Jodrell Street was. And it took quite a long time. That inspection, you know, from – from my recollection we were there probably, you know, 35 – 40 minutes – 45 minutes. It was quite a long inspection.”<sup>30</sup>

[31] From Mr Millward’s point of view only a cursory inspection was necessary since the important feature of the property was the existence of a mooring point, of which fact he was already well aware. The existence of a licence could be determined by discussion or by checking. Whether there was a discussion about three phase power or the presence of molasses or the use of a mound during flood times were inconsequential. What must be noted is that the terms of conversations at the time of the inspection did not become important until two months later when the issue arose of whether the performance of the contract could be avoided.

[32] The first allegation made about the terms of the conversation is contained in the letter from the defendants’ solicitors dated 29 August 2002 referred to in para [2] above. That allegation makes no reference to Mrs Jones’ involvement in any representation or, indeed, even her presence at the time when the representation is alleged to have been made. It was not until the second round of amendments to the Defence that there was any allegation that the representation was made in the presence of Mrs Jones and even then the assertion was that she simply acquiesced by her silence. It was not until Mrs Millward gave evidence was there any suggestion of adoption of the representation by Mrs Jones’ nodding her head. This escalation of the claim as to Mrs Jones’ involvement causes me to doubt the evidence put forward by the defendants. I prefer the evidence of Mrs Jones and of Mr Pervan that no representations in the terms contended for by the defendants was made at all. I do not accept that the licensed status of the pontoon was a matter of

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<sup>30</sup> Transcript 84/18-35

significance for the defendants at the time of the inspection. Mr Millward was already aware that a licence could be applied for and that the use of the pontoon could go on pending its grant

- [33] Mrs Millward herself holds a senior position in the Queensland Parks and Wildlife Service. She has 20 years of experience in fisheries and resource management<sup>31</sup>. I anticipate that she has experience with the statutory requirements concerning the licensing of maritime structures. Despite her protestations about the unsuitability of her making inquiries, it seems to me that it would have been a simple matter with her knowledge to check on the status of the pontoon in advance of either the contract being signed or at a date well before it had proceeded to the point where it was to be completed. I would expect also that she would have been aware of the opportunities to obtain provisional licences or to obtain exemptions about the use of pontoons whilst the process of applying for a licence was undertaken.

### **Conclusion**

- [34] As a consequence of these findings, I hold that the defendants have no right to rescind the contract as they purported to do. The contract thus remains on foot and is enforceable. The plaintiffs seek specific performance of the contract rather than damages and have conducted their case only on this basis. I infer from this that they remain ready, willing and able to perform their obligations under the contract. Given the circumstances in which they agreed to the sale and the change in circumstances since that date it is not unreasonable for them so to do. The defendants have not pleaded, or raised evidence to support, any hardship or other basis upon which this discretionary relief should not be granted. I will therefore grant the relief as sought.

### **Third Party claim**

- [35] The defendants' claim against the third party depended upon the terms of the agency and the performance of duty thereby arising. There is an issue between the defendant and the third party as to when the defendants were informed by Mr. Pervan that he was acting as an agent for the plaintiffs. In evidence, Mr Millward said that Mr Pervan told him that he was the agent for the plaintiff during the

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<sup>31</sup> Transcript 69/40

meeting held after the inspection at Mr. Millward's mother house on the 20<sup>th</sup> April. Mr. Millward alleges that in a conversation regarding the possible sale price of the Jones' property Mr. Pervan responded as follows :

“Look, I don't work for you, I work for the Joneses and that's not what I do. I've got to try and keep the price up for my- my vendors.”<sup>32</sup>

Mrs Millward's evidence was consistent with that of her husband's.

[36] Mr Pervan asserts that he was not the plaintiff's agent at the time the meeting was held at Fitzgerald Street, and furthermore that he did not inform the defendants that he was the plaintiff's agent until a later meeting held approximately two months later when the defendant approached him about not continuing with the purchase of the Jones' property. I accept the evidence of Mr Pervan as being the more reliable on this issue. He was on friendly terms with Mr Millward and I have no doubt was concerned to bring about a sale. A conversation about the nature of his agency in the context of fixing a price seems to me to be unlikely in the circumstances of this transaction.

[37] The later date when Mr. Pervan said he informed the defendants of his agency status with plaintiffs is a more likely scenario but it is not a material issue. It has been established that Mr. Pervan did not in fact become an authorised agent of the plaintiff until after the sale was completed. At what time he communicated this information does not matter. He was at the relevant time of negotiations acting as agent for the defendants. For the reasons set out above, I find that the defendants did not inform Mr Pervan of any requirement that the pontoon be licensed such as to put him, as their agent, on inquiry as to the proper status of the pontoon.

[38] I would therefore dismiss the third party claim.

### **Orders**

[39] 1. I declare that the defendants are bound specifically to perform as purchasers the contract between them and the plaintiffs dated 30 April 2002.

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<sup>32</sup> Transcript 44/60

2. I grant the parties liberty to apply in the event agreement cannot be reached between them as to the date for completion of the sale.

3. I dismiss the third party claims.

4. I adjourn the question of costs in respect of all claims for 14 days to allow the presentation and exchange of written submissions on this issue.