

SUPREME COURT OF QUEENSLAND

CITATION: *Francis & Anor v NPD Property Development P/L* [2004]
QSC 202
Dippel v NPD Property Development P/L
Giles-Duffy v NPD Property Development P/L
Giles-Duffy & Anor v NPD Property Development P/L
Fisher & Anor v NPD Property Development P/L
Fisher & Anor v NPD Property Development P/L

PARTIES: **JOHN WILLIAM FRANCIS and DOREEN VICKI FRANCIS**
(applicants)

v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent)

LILLIAN ESTELLE DIPPEL
(applicant)

v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent)

WILLIAM JOHN GILES-DUFFY
(applicant)

v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent)

WILLIAM JOHN GILES-DUFFY and ELIZABETH ANNE SCHMIDT
(applicants)

v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent)

LESLIE GORDON FISHER and SUSANNE ELLEN FISHER
(applicants)

v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent)

BRIAN LESLIE FISHER and GREG ANTHONY

FISHER

(applicants)

v

NPD PROPERTY DEVELOPMENT PTY LTD**ACN 088 360 516**

(respondent)

FILE NOS: BS 2121 of 2004
 BS 2122 of 2004
 BS 2133 of 2004
 BS 2124 of 2004
 BS 2125 of 2004
 BS 2126 of 2004

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 30 June 2004

DELIVERED AT: Brisbane

HEARING DATE: 21 June 2004

JUDGE: Muir J

ORDER: **Declare that the contract referred to in the originating application is void.**

Order that the respondent pay the applicants' costs of and incidental to the application to be assessed on the standard basis.

CATCHWORDS: CONTRACTS – ILLEGAL AND VOID CONTRACTS – CONTRACTS ILLEGAL BY STATUTE – GENERAL PRINCIPLES – whether the contracts contravened section 8 of the *Land Sales Act* 1984 (Qld) and are consequently void

CONTRACTS – MATTERS NOT GIVING RISE TO BINDING CONTRACT – VAGUENESS AND UNCERTAINTY – SALE OF LAND – whether the contracts are void for uncertainty

CONTRACTS – ILLEGAL AND VOID CONTRACTS – EFFECT OF ILLEGALITY OR INVALIDITY – SEVERANCE - whether the relevant provisions should be severed from the contracts

Land Sales Act 1984 (Qld) ss 2, 6, 8, 9, 10, 19

Land Title Act 1994 (Qld) s 62

Attorney-General v Barker Bros Ltd [1976] 2 NZLR 495

Attorney-General v Felixstowe Gas Light Co [1907] 2 KB 984
Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600
Commissioner of Stamp Duties v Parbury Estates Limited (1913) 16 CLR 521
Day and Dent Construction Pty Ltd (In liq) v North Australian Properties Pty Ltd (1982) 40 ALR 389.
DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties [1978] 78 ATC 4147
DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1981-82) 149 CLR 431
Farm Products Co-op v Commissioner of Inland Revenue (1969) NZLR 874
Federal Commissioner of Taxation v Everett (1978) 78 ATC 4595
Godecke v Kirwan (1973) 129 CLR 629
Great Western Railway Co v Commissioner of Inland Revenue [1894] 1 QB 507
John Foster & Sons Ltd v Commissioner of Inland Revenue [1894] 1 QB 516
McFarlane v Daniell (1938) 38 SR (NSW) 337
Manifold v Diamond 4B & C, 243
O'Sullivan v Commissioner of Stamp Duties [1984] 1 Qd R 212
Palette Shoes Pty Ltd v Krohn (1937) 58 CLR 1
Perri v Coolangatta Investments Pty Ltd [1986] 149 CLR 537
Placer Development Ltd v The Commonwealth (1969) 121 CLR 353
Snape v Kiernan (1988) 13 NSWLR 88
Sudbrook Trading Estate Ltd v Eggleton [1983] 1 AC 444
Sun World Incorporated v Registrar, Plant Variety Rights (1997) 75 FCR 528
The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd (1989) 1 Ll Rep 205
Thomas Brown & Sons Ltd v Fazal Deen (1962) 108 CLR 391
Watson v Issell (1890) 16 VLR 607

COUNSEL: J K Bond SC, with P W Hackett for the applicants
 R G Bain QC, with A W Duffy for the respondent

SOLICITORS: Frank Carroll Solicitor, solicitor for the applicants in BS2121 of 2004; BS2122 of 2004; BS2123 of 2004; and BS 2124 of 2004
 Jones Leach Hawley, solicitors for the applicants in BS2125 of 2004 and BS 2126 of 2004
 Bain Gasteen Lawyers, solicitor for the respondent

Introduction

- [1] The applicants in each of the matters listed in the heading to these reasons are vendors under contracts for the sale to the respondent of relatively large parcels of land at Rochedale.
- [2] The respondent intends to subdivide the subject land and carry out a residential development on it. Each contract provides for a number of conditions reflecting this intention e.g. each contract is conditional upon the respondent entering into other contracts for the purchase of other parcels of land in the general vicinity of the land the subject of the contract and each contract is conditional upon a Local Plan and Infrastructure Charges Plan for Rochedale eventually being included in the City Plan.
- [3] The contracts the subject of proceedings BS2121, BS2122, BS2123 and BS2124 each contain a clause (“the Seller’s Block clause”) which purports to exclude from the sale a relatively small parcel of land within the boundaries of the larger block of land owned by the applicants which is to be transferred to the respondent. The excluded land is referred to as the “Seller’s Block” (or, in one case the “Seller’s Blocks”) and, in most cases, is the area on which the applicant’s dwelling house is located. The Seller’s Block clause provides a mechanism pursuant to which, after the subdivision of the whole of the land by the Buyer, separate title would be issued for the Seller’s block which would then be transferred to the relevant applicant.
- [4] The contract in proceedings BS2126 does not have such a clause. Rather, it contains a clause which provides that following completion of the sale, the respondent will transfer back to the applicant one of the subdivided lots within the contemplated development.
- [5] The contract in proceeding BS2125 contains both types of clause.
- [6] At the time each of the contracts was entered into, the subdivision contemplated by it had not occurred and the various local government approvals referred to in s 8(1) of the *Land Sales Act* 1984 (as it stood at the time of entering into the contracts) (“the Act”) had not been obtained.
- [7] The applicants in each matter claim the following relief:
 - (1) A declaration that the contract is void pursuant to s 8 of the Act on the basis that it effects a sale of a “proposed allotment” contrary to the provision of s 8. For the contracts which contain the Seller’s Block clause, s8 is said to apply, either because the contract should be regarded as a sale of a proposed allotment from the applicants to the respondent (the proposed allotment being the parcel of land defined by the deduction of the Seller’s Block from the land from which the extension is to be effected) or as a sale of a proposed allotment from the respondent to the applicants (namely the Seller’s Block). The contracts which contain the subdivided lot clause

- breach s 8 because they effect the sale of a proposed allotment, the proposed subdivided lot, by the respondent to applicants.
- (2) Alternatively, a declaration that they have a right to avoid the contract pursuant to s 9(5) or 10A(4) of the Act on the basis that, even if s 8 does not render the contract void, because the respondent has not given to the applicants the information referred to in ss 9(5) and 10A(4) of the Act (i.e. disclosure plans; plans of survey and a registrable instrument of transfer) within the time referred to in those sections.
 - (3) Alternatively, a declaration that the contract is void for uncertainty, either because of uncertainty of definition of the parcel or parcels of land to be re-transferred or because of uncertainty in the time for performance of the obligations in that regard.

Relevant Provisions of the *Land Sales Act 1984*

- [8] Section 8 of the Act relevantly provides:

8 Restriction on selling

(1) A person may sell a proposed allotment of freehold land only if, when the purchaser enters upon the purchase of the allotment--

- (a) local government unconditional approval of the subdivision application for the land is in force under the Planning Act; or

...

(2) An agreement made in contravention of this section is void and any person who had paid money thereunder shall be entitled to recover the amount thereof, together with the amount of interest (if any) that has accrued in respect of that amount since the money was so paid, by action as for a debt due and owing to the person by the person to whom the money was paid."

- [9] The meaning of "purchaser" and "vendor" for the purposes of the Act is provided in clause 6A:

"(1) For the purposes of this Act--

- (a) a person who signs (personally or by an agent) an instrument that is intended to bind the person (absolutely or conditionally) to purchase a proposed allotment or a proposed lot shall be taken to have entered upon a purchase of the allotment or lot and in this Act is referred to as "**the purchaser**";
- (b) a person who signs (personally or by an agent) an instrument that is intended to bind the person (absolutely or conditionally) to sell a proposed allotment or a proposed lot shall be taken to have entered upon a sale of the allotment or lot and in this Act is referred to as "**the vendor**".

- [10] "Purchase" is given an extended meaning in s 6 and includes:

- (a) agree to purchase;
- (b) acquire an option to purchase;
- (c) enter upon a transaction that has as its object the acquisition of a right (not immediately exercisable) ...

(d) sign an instrument that is intended to legally bind a signatory to purchase;”.

[11] “Sell” is defined in a similar manner.

The relevant provisions of the contract between the applicants in BS2121/04 and the respondent

[12] This contract dated 27 September 2001 was entered into on a standard printed Real Estate Institute of Queensland and Queensland Law Society form of “Contract for Houses and Land 4th edition”. The reference schedule, which appears on the front page of the contract, contains the following:

Property	<i>Land</i> Address:	<u>574 Miles Platting Road, Rochedale Qld 4123</u>	Built on	[*Delete one]
	Description	<u>Lot 2 on RP 162854</u>		
	County:	<u>Stanley</u>	Parish:	<u>Tingalpa</u>
				6.806 acres 2.7560 ha. (calculated in accordance with Special condition)
	Title Reference:	<u>15808057</u>	Area:	<u>12)</u> [more or less]
	Land sold as			
	“Freehold/ Leasehold			

[13] Clause 10.8(4) of the printed terms of contract provides that in the event of inconsistency between the printed provisions and “any provision added to” the contract, the added provision prevails.

[14] Clause 12 which is in typed Special Conditions of contract headed “Annexure A” provides:

“12. Seller’s Block Dwelling House Retained by Seller

- (a) For the purpose of this Special Condition “Seller’s Block” means a parcel of land of approximately 2,000m² (with a variance of not greater than 5%) on which the dwelling house currently occupied by the Seller is located. The dimension and area of the parcel cannot be determined as at the Contract Date and will depend on the final layout of the future development of the Land. The parcel must be of such dimension to permit the dwelling house to be located in compliance with the minimum setback requirements of the Local Government.
- (b) The buyer and Seller acknowledge that this sale and purchase does not include the conveyance of the Seller’s Block to the Buyer.
- (c) For the purposes of the conveyance of the property it is agreed that the Seller shall continue to retain equitable

ownership of the Seller's Block notwithstanding the completion of this Contract and subject to the provisions as hereinafter appear. To facilitate the subdivision of the Land by the Buyer, it is agreed that the bare legal estate of the Seller's Block shall be transferred to the Buyer, who agrees to hold the same on behalf of the Seller pursuant to the terms of this Contract who shall pay any stamp duty (if applicable) in relation to this subparagraph.

- (d) When a separate instrument of title for the Seller's Block is recorded at the Department of Natural Resources, the Buyer shall within fourteen (14) days of such instrument of title having been recorded, transfer the bare legal title to the Seller. To this end the Buyer and the Seller shall execute the necessary documentation to cause such transfer of the Seller's Block with all stamp duty and registration fees of and incidental to such transfer to be paid by the Seller. The Buyer shall undertake all reasonable steps as are necessary to effect the vesting of title in the Seller's Block to the Seller.
- (e) Upon the vesting of title of the Seller's Block to the Seller, the Buyer's obligations under this Special Condition shall (subject to subparagraphs (f) and (g)) thereupon cease. The Buyer shall use all reasonable endeavours to have a separate instrument of Title registered in the Department of Natural Resources in respect of the Seller's Block.
- (f) The Seller and Buyer agree that the Seller's Block:
 - (i) shall be that parcel of land generally of such dimension and size referred to in sub-paragraph (a), subject always to the requirements of the Local Government and sound engineering principles;
 - (ii) shall provide associated services (eg. sewerage, water, electricity) to be connected at the Buyer's cost within one (1) metre of the dwelling house in the Seller's Block provided that the Seller shall give notice of the location (being a direct route) of the services and the Seller shall accept responsibility for the disruption to lawns and gardens etc; all internal works required to connect the services to the internal systems shall be at the Seller's cost; and

- (iii) may include easements and services required by the Local Government or bodies such as Energex, Telstra, Optus, etc;

...

- (k) In the event that the provisions of the Land Sales Act apply to the transfer back of the Seller's Block then this Contract is subject to and conditional upon the buyer obtaining a grant under Section 19(2) of the Land Sales Act of an exemption from Sections 8 and 9 of the Act. The Buyer shall apply for that exemption, but if the grant is refused this Contract shall terminate whereupon all deposit monies paid by the Buyer on account of the Purchase Price shall be refunded in full. For the purpose of this special condition, any reference in the Contract to Deposit Holder shall be construed as a reference to "Trustee" in accordance with the provisions of the Land Sales Act.
 - (l) To better secure the Seller's rights under this special condition the Buyer agrees:
 - (i) not to encumber the Land until the Seller's Block has been transferred back to the Seller;
- ..."

- [15] Clause 1.1(k) of the standard form describes "property" as meaning:
- (i) the Land;
 - (ii) the Improvements; and
 - (iii) the included chattels.

The applicants' arguments in relation to s 8 of the Act – the J W & D V Francis contract in BS 2121/04.

- [16] The subject matter of the contract was part only of the land described in the reference schedule and did not include the "Seller's Block" of approximately 2,000 metres as:
- "(a) The area stated in the Reference Schedule is the area of the lot minus the area of the Seller's Block;
 - (b) The phrase "(calculated in accordance with Special Condition 12)" in the description of the property in the Reference Schedule further defines the subject matter of the sale;
 - (c) Words in clause 12(b) acknowledge that the sale and purchase "does not include the conveyance of the Seller's Block to the Buyer"."
- [17] The sale was of a "proposed allotment", as the boundaries of the parcel of land sold were not shown on a registered plan at the time of the contract.

- [18] Alternatively, if the contract is to be regarded as a contract for the sale of the whole of the land, it is one in which, in consideration of the seller agreeing to sell the land to the buyer, the buyer agreed to transfer part of the land (namely the Seller's Block) back to the seller at a time in the future when it became defined. The agreement is thus one in which the buyer (the respondent) sold a proposed allotment (the Seller's Block) in contravention of s 8 and is void. The words "sale" and "purchase" in the Act should be understood according to their ordinary and natural meaning of an agreement to transfer for valuable consideration.

The respondent's arguments in relation to s 8 of the Act – the J W & D V Francis contract in BS 2121/04.

- [19] The Act addresses only the issue of sale and purchase of legal title to land and says nothing of the creation or transmission of equitable estates or interests. The contracts each effect a sale of the whole of the land from the respective applicants to the respondent. Upon settlement, a registrable instrument of transfer for the whole of the land is delivered. In that regard, reference is made to the reasons of Williams J in *O'Sullivan v Commissioner of Stamp Duties*¹ in which his Honour said, inter alia:

“By definition, a trust is an equitable obligation, binding the trustee to deal with property in respect of which he has either legal title or control, for the benefit of a beneficiary. The obligation is not only one in personam, but also one which is affixed to the property in question. Where there is a ‘bare trust’, and the beneficiary is *sui juris*, the beneficiary may put an end to the trust by requiring the trustee to transfer the trust property to him (*Saunders v Vautier* (1841) Cr. And Ph. 240; 49 E.R. 282). Against that background it is not unusual for lawyers to say that the equitable estate is vested in the beneficiary. But it must not be overlooked that at law the fee simple in land, being trust property, is vested in the trustee, and when the trustee conveys the property to the beneficiary, thereby putting an end to the trust, he conveys the fee simple to him. Particularly where the land is subject to the Real Property Act there can be no transfer of a bare legal interest as such (cf. *Ex parte Property Unit Nominees (No. 2) Pty Limited* [1981] Qd R 178 and *D.K.L.R Holding Co (No 2) Pty Ltd v The Commissioner of Stamp Duties (NSW)* (1982) 56 ALJR 287, especially at 299). Perhaps the best summation of the position is to be found in the judgment of Hope JA in *DKLR Holding Co (No 2) v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 519:

Secondly, although the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the right which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in

¹ [1984] 1 Qd R 212.

fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons. In illustrating his famous aphorism that equity had come not to destroy the law, but to fulfil it, Maitland, *op cit*, at p 17, said of the relationship between legal and equitable estates in land: ‘Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here.’”

- [20] The reference in Special Condition 12(b) to the sale and purchase not including the conveyance of the Seller’s Block to the buyer must be read, subject to the other contractual provision. It is clear from clauses 12(c) and 12(d) that it is in fact intended that the whole of the legal title be transferred to the buyer. That is the sale for the purposes of the Act. Special Condition 12(c) makes it plain that some equitable ownership is to remain with the Seller. Special Conditions 12(d) and 12(e) contain the terms of an express trust obliging the Buyer to transfer to the Seller legal title to the Seller’s Block. There was thus a sale of an allotment rather than a proposed allotment.
- [21] The provisions relating to the vesting of the legal title to the Seller’s Block in the Seller do not constitute any sale from the Buyer to the Seller for the purposes of the Act. The vesting of legal title to land pursuant to the terms of a trust is not a sale in any relevant sense. It is merely a transfer to give effect to the equitable obligation upon the buyer created by the instrument. There is no separately identifiable consideration for the vesting of the Seller’s Block in the Seller and it is not possible to “dissect any consideration” from the Contract.

The meaning of “Sell” and” purchase” in s 8 of the Act.

- [22] Before proceeding further it is useful to ascertain the meaning of the key terms “sell” and “purchase”.
- [23] Although the Act contains extensive definitions of “purchase” and “sell”, it offers no guidance as to the fundamental nature of the concept of a sale for the purposes of the Act. In *Sun World Incorporated v Registrar, Plant Variety Rights*² French J observed:
- “There is considerable authority for the proposition that the ordinary meaning of the word "sale" in a variety of statutory and common law settings is an exchange of commodities for money - *J. & P. Coats Ltd v. Commissioners of Inland Revenue* [1897] 1 QB 778 at 783; *Simpson v. Connolly* [1953] 1 WLR 911; *Robshaw Brothers Ltd v. Mayer* [1957] 1 Ch 125; *Re Westminster Property Group PLC*

² (1997) 75 FCR 528.

[1984] 1 WLR 1117, [1985] 1 WLR 676. That meaning may be extended by statute expressly or by necessary implication - *J. & P. Coats Ltd v. Commissioners of Inland Revenue* (supra) at 783 and see generally the authorities reviewed in *FCT v. Salenger* (1988) 81 ALR 25 at 29-32 in relation to the treatment of compulsory acquisitions as "sales" for revenue purposes. Benjamin, *Sale of Goods*, 4th Edition, Sweet & Maxwell (1992), says at 1-034:

‘To constitute a sale it is necessary that the consideration for the transfer of the property in the goods should be in money. This may be either paid or promised (i.e. the sale may be for cash or on credit); but if the consideration is something other than money the contract is not, strictly speaking, one of sale in English law.’”

[24] His Honour had earlier quoted the following definition of the word “sale” in the *Shorter Oxford English Dictionary*:

“1. The action or an act of selling; the exchange of a commodity for money or other valuable consideration. Also: (ready, slow etc) disposal of goods for money; opportunity for selling.”

[25] There are also many examples of cases in which it has been held that the concept of the sale is not limited to a transaction in which the consideration is monetary. In *Great Western Railway Co v Commissioner of Inland Revenue*³ a copy of an Act of Parliament amalgamating two railway companies to form a new company with title to the assets of the former company which were then dissolved, was held to be chargeable with stamp duty. Exigibility was found on the basis that the transaction by which the amalgamation was effected was in substance a transfer on sale. In the course of his reasons Lopes LJ said:

“As was pointed out by Cave J in the court below, there is everything here that constitutes a sale – two parties, one party with something and the other giving something for it, the arrangement ultimately come to be embodied in an Act of Parliament.”

[26] In *John Foster & Sons Ltd v Commissioner of Inland Revenue*⁴ a deed between partners agreeing to transfer the property of the partnership to a company to be formed in consideration for the allotment of shares in the company to the partners in proportion to their respective shares in the partnership was held to be a conveyance of sale.

[27] In *Attorney-General v Felixstowe Gas Light Co*,⁵ Bray J said, referring to Lord Esher’s judgment in *Great Western Railway Co*:

“What is necessary to constitute a sale? No doubt as a general rule it is necessary that there should be two parties; there must be consensus

³ [1894] 1 QB 507.

⁴ [1894] 1 QB 516.

⁵ [1907] 2 KB 984 at 990.

between those parties; there must be a consideration and a transfer of the property.”

[28] It was held that where a limited company was dissolved, reincorporated with additional powers and the property of the dissolved company vested in the new company, the property in the dissolved company “vested by way of sale” within the meaning of s 12 of the *Finance Act* 1895.

[29] In *Commissioner of Stamps v Parbury Estates Ltd*,⁶ *John Foster & Sons Ltd* was approved in the judgment of the court⁷ and the following passage from *Manifold v Diamond*⁸ was quoted with approval:

“A sale imports a *quid pro quo*, in some way or other enuring to the benefit of the party selling.”

[30] In *Snape v Kiernan*,⁹ Mahoney JA, in considering the construction of s 1c(2) of the *Land Sales Act* 1964 (NSW) said:

“The terms ‘buy’ and ‘sell’ may, as one of their ordinary meaning, denote a transaction which is essentially the creation by the seller of the right to be vested in the buyer. In argument it was suggested, in my opinion correctly, that the words ‘a sale of a right of way’ are apt to describe the grant for consideration by a landowner to another of such a right. In *Moore v Western Australia* (1907) 5 CLR 326, ‘sale’ was seen as appropriate to describe a transaction involving the grant of a Crown lease of the kind there in question: see (at 337-340) per Griffith CJ. And words such as ‘buy’ and ‘sell’ are appropriate where the owner of, for example, an incorporeal right or a chose in action grants an interest in it to another: the owner of a lottery ticket may properly refer to ‘the sale of an interest in’ the lottery ticket to another person.

I think that that is the meaning intended by the legislature in this case. I am conscious that the statement is one directed to matters of conveyancing and that, to that extent, the language used may be intended to have a meaning appropriate to that context. But in the end, the meaning of words must be determined by the context and purpose of their use.”

[31] The *Land Sales Act* is a statute of a remedial nature. Its objects are stated in s 2 as including:

- “(b) to protect the interests of consumers in relation to property development; and
- (c) to ensure that proposed allotments and proposed lots are clearly identified ...”

⁶ (1913) 16 CLR 521.

⁷ At 533.

⁸ 4B & C, 243 at 246.

⁹ (1988) 13 NSWLR at 96.

- [32] It is difficult to see why the legislature, in extending protection to purchasers, would have wished to limit that protection to those transactions involving sales for a monetary consideration and to deny it where there was other valuable consideration. Any such restriction would be inconsistent with the object specified in s 2(c). In my view, the word “sell” in s 8(1) applies to a transaction in which land is agreed to be sold for valuable consideration. As the Act is a remedial statute, which is also protective in nature, no narrow or pedantic approach to its construction is warranted.¹⁰

Analysis of the J W & D V Francis contract

- [33] The respondent is correct in submitting that an agreement which provides for a conveyance of Torrens Title land even though providing, at the same time, for the transfer only of the “bare legal estate”, on a strict legal analysis, is an agreement for the sale of the land. That emerges, by inference, from the reasons of Williams J in *O’Sullivan v Commissioner of Stamp Duties* set out above and is a consequence of s 62 of the *Land Title Act* 1994. Reference may be had also to the following passage from the reasons of Turner J in *Farm Products Co-op v Commissioner of Inland Revenue*:¹¹

“I have no doubt at all that what was conveyed was *the shares*. This is what the transfer says was transferred, and it is therefore *the value of the shares* with which sec. 65 is concerned. It seems to me meaningless to speak of the transfers as transferring the ‘bare legal estate’ in the shares, or of valuing this ‘bare legal estate’. The shares were property. They were transferred. He who takes a transfer or conveyance of the legal estate in property takes a transfer or conveyance of that property. The property of which he takes a transfer or conveyance may be the subject of equitable interests vested in equity in another. But this does not affect the position at law; and at law he becomes the proprietor of the property of which he has taken a transfer or conveyance. It is the value of the property transferred or conveyance which determines assessment, and this is unaffected by the existence of any outstanding equitable interest.”

- [34] The above passage was referred to with approval by Sheppard J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties*.¹²

- [35] Clause 5.3 of the printed terms of contract provides:

“(1) In exchange for payment of the Balance Purchase Price, the Seller must deliver to the Buyer at settlement:

- (a) any instrument of title for the Land required to register the transfer to the Buyer:
- (b) unstamped Transfer Documents capable of immediate registration after stamping ...”.

¹⁰ Day and Dent Construction Pty Ltd (In liq) v North Australian Properties Pty Ltd (1982) 40 ALR 389.

¹¹ (1969) NZLR 874 but compare to observations of Mason J in *DKLR Holding Co (No 2)* at 460 where his honour refers to the possibility, at common law, of transferring a bare legal estate.

¹² 78 ATC 4147.

- [36] The only way in which that obligation could be fulfilled, one would think, would be by delivery of the certificate of title and a duly executed memorandum of transfer in respect of lot 2 on registered plan 162854. Clause 12 plainly envisages such a transfer, as subclause (d) contemplates the issue of a separate title to the Seller's Block and a transfer of "the bare legal title" back to the seller. There is thus a conflict between these obligations and the acknowledgement in subclause (b) that the sale and purchase does not include the conveyance of the Seller's Block to the buyer.
- [37] The continued retention of "equitable ownership of the Seller's Block" by the seller is a legal impossibility. At the date of the contract the seller had the whole right of the property in the land. There was no separate legal and equitable estates. As Aickin J observed in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*¹³:
- "If one person has both the legal estate and the entire beneficial interest in the land he holds an entire and unqualified legal interest and not two separate interests, one legal and the other equitable. If he first holds the legal estate upon trust for some other person and thereafter that other person transfers to him the entire equitable estate, then again the first-named person does not hold two separate interests, one the legal and the other the equitable estate; he holds a single entire interest – he is the absolute owner of an estate in fee simple in the land. The equitable interest merges into the legal estate to comprise a single absolute interest in the land. It is a fundamental principle of both the common law and of equity that the holder of an estate in fee simple cannot be a trustee of that fee simple for himself for what he holds is a single estate, being the largest estate known to the law".
- [38] In addition to the impossibility of transferring a bare legal estate in the Seller's Block, the Seller's Block can not come into existence until its precise boundaries are identified in accordance with the requirements of the clause. It is thus future property and, once it comes into existence, if that occurs after transfer of the whole of the land to the buyer, it will be held in trust by the buyer for the seller.¹⁴
- [39] Although the parties desired to reserve part of the whole parcel from the sale, in the way they framed their transaction, they did not achieve that result. That which was to be reserved could not be ascertained or had not been ascertained at the date of the contract. On one view of the contract, it is not an agreement by the seller to sell the whole of the land less the Seller's Block: it is an agreement to sell the whole of the land subject to conditions in respect of the creation and assignment of the Seller's Block.
- [40] An instrument must be considered as a whole in order to ascertain its true legal effect. Arguably, the analysis put forward on behalf of the respondent focuses

¹³ (1981-82) 149 CLR 431 at 463.

¹⁴ *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 16-17, 27 and *Federal Commissioner of Taxation v Everett* 78 ATC 4595 at 4609 per Deane J.

impermissibly on the first limb of the contract's operation. The agreement to transfer an estate in fee simple in the whole of the land, if that is the true effect of the contract, is but part of an inseparable series of obligations under which the whole of the land is transferred to the buyer, the Seller's Block is created and then transferred to the seller by the buyer who retains title to the balance of the land. But for the purposes of determining the effect of the contract for the purposes of the Act, it is necessary, I think, to look to the legal operation of the contract rather than the net result of the transactions for which it provides.¹⁵ With some hesitation, I conclude that the contract does not effect a sale of only part of the subject land to the buyer.

- [41] The next question to be decided is whether the provisions of the contract relating to the transfer of the Seller's Block constitute an agreement to sell or purchase. The main thrust of the respondent's argument is that for there to be a sale for relevant purposes, there must be something more than a transfer by a trustee to the beneficiary in satisfaction of the trustee's obligations under a trust. But the approach which assists the respondent in relation to the question of whether there is initially a sale to the buyer of only part of the land operates against the respondent when considering the assignment of the Seller's Block.
- [42] For the reasons just discussed, when the Seller's Block comes into existence it is impressed with a trust and there is an obligation on the buyer to transfer an estate in fee simple to the seller. That obligation arises under a commercial agreement in which there are mutual obligations supported by valuable consideration. The fact that when created the seller's block is held beneficially for the seller is but one aspect of a larger commercial transaction. There is no doubt that the agreement to "re-transfer" the Seller's Block is for valuable consideration. For the reasons discussed earlier, the contract in so far as it obliges the buyer to transfer the seller's block to the seller for the purposes of the Act, is an agreement for the sale of the Seller's Block. The contract is thus made in contravention of s 5.8 of the Act and is void by operation of s 8(2).

The L E Dippel contract dated 8 August 2001 in application BS 2122

- [43] The subject contract is materially the same as that in application BS 2121, except that clause 12A provides:
- "12. Dwelling House Retained by Seller
- (a) For the purpose of this Special Condition "Seller's Block" means a parcel of land of ~~approximately~~ minimum of 2,000m² on which the dwelling house (currently occupied by the Seller) is located. The dimension and area of the parcel cannot be determined as at the Contract Date and will depend on the final layout of the future development of the Land but will be ~~approximately 47m x 43 m~~ a minimum of 47m north to south (to incorporate an existing water bore in the sellers block) and a minimum of 4.2600m

¹⁵ cf DKLR at 450.

east to west. The parcel must be of such dimension to permit the dwelling house to be located in compliance with the minimum setback requirements of the Local Government.”

- [44] For the reasons given in respect of the JW and DV Francis contract, the contract was in breach of s 8 of the Act and is void.

The WJ Giles-Duffy contract in application BS 2123

- [45] The subject contract is materially the same as the JW & DV Francis contract save that clause 12(a) provides:

“12. Dwelling House Retained by Seller

- (a) For the purpose of this Special Condition “Seller’s Block” means two (2) parcels of land of approximately 1,000m² each, the first being the one on which the dwelling house (currently occupied by the Seller) is located and the second being a parcel immediately adjacent to the first parcel. The dimension and area of the parcels cannot be determined as at the Contract Date and will depend on the final layout of the future development of the Land. The parcels must be of such dimension to permit the dwelling house on one of the lots to be located in compliance with the minimum setback requirements of the Local Government.”

- [46] In this case, there were two Seller's Blocks rather than one; the area of land shown in the Reference Schedule was the total area of the parcels the subject of the contract without deduction on account of the areas of the Seller's Blocks and; instead of the words “calculated in accordance with Special Condition (12)”, the words “(pursuant to Special Condition (12))” appeared after the specification of the area. But those matters make no material difference to the principle addressed in relation to the JW & DV Francis contract. If anything, they offer stronger support for the conclusions reached. For those reasons, I find that this contract was in breach of clause 8 of the Act and, in consequence, void.

The WJ Giles-Duffy and EA Schmidt contract in application BS 2124

- [47] The contract was materially the same as the JW & DV Francis contract, except in the following respects. Clause 12(a) provided:

“12. Dwelling House Retained by Seller

- (a) For the purpose of this Special Condition “Seller’s Block” means two (2) parcels of land of approximately 1,000m² each, the first being the one on which the dwelling house (currently occupied by the Seller) is located and the second being a parcel immediately adjacent to the first parcel. The dimension and area of the parcels cannot be determined as at

the Contract Date and will depend on the final layout of the future development of the Land. The parcels must be of such dimension to permit the dwelling house on one of the lots to be located in compliance with the minimum setback requirements of the Local Government.”

- [48] Also the land the subject of the transaction was described in the same manner as it was described in the WJ Giles-Duffy contract. Accordingly, the contract contravenes s 8 of this Act and is void.

The LG & SE Fisher Contract in application BS2125

- [49] In this case, Special Condition 14 was the equivalent of Special Condition 12 in the JW & DV Francis contract. Clause 14(a) provided:

“14. Dwelling House Retained by Seller

- (a) For the purpose of this Special Condition “Seller’s Block” means a parcel of land of approximately 1,000m² on which the dwelling house currently occupied by the Seller is located. The dimension and area of the parcel cannot be determined as at the Contract Date and will depend on the final layout of the future development of the Land. The parcel must be of such dimension to permit the dwelling house to be located and include a minimum frontage of 25 metres and be in compliance with the minimum setback requirements of the Local Government.”

- [50] Otherwise Special Condition 14 is materially the same as Special Condition 12 in the JW & DV Francis contract. There is also a Special Condition 13 under which the buyer agrees that within a reasonable period after completion of the contract, the subdivision of the land within the vicinity of the seller’s property and the issue of separate titles for the subdivided lots, to transfer to the seller a specified lot within the development.

- [51] For the reasons given above, Special Condition 14 caused this contract to be in breach of s 8 of the Act. Special Condition 13 also contravened s 8 for the reasons stated in respect of the B L and G A Fisher contract. The contract is void.

The BL & GA Fisher Contract in application BS2126

- [52] This contract contained no equivalent of clause 12 of the JW & DV Francis contract. The description of the land the subject of the transaction in the Reference Schedule was of the whole of the land without reference to any special condition and without any qualification. Under Special Condition 13 the buyer agreed, within a reasonable period after completion of the contract, subdivision of the land “within the vicinity of the Seller’s Property” and issue of separate titles for the subdivided lots to transfer to the seller one of the subdivided lots. Clause 13 provides:

“(a) The Buyer shall following completion be developing the Land into a residential development. The Buyer agrees within a reasonable period after:-

- (i) completion of the contract;
- (ii) subdivision of the Land within the vicinity of the Seller’s Property; and
- (iii) issue of separate titles for the subdivided Lots

to transfer to the Seller, Greg Anthony Fisher, at his discretion one of the subdivided lots within the development as follows:-

- (1) the subdivided lot will be within a radius of approximately 100 metre radius of the centre of the Sellers Land (“the precinct”);
 - (2) the subdivided lot will be of average size for subdivided lots in the precinct, such lot to be not less than 800 square metres in size. In the event that a suitable lot of such size is not available and the Seller is to receive a subdivided lot of smaller size then the Buyer will give a cash equivalent on a proportional basis for the deficiency in size.
- (b) The Buyer will provide a plan and price list of the lots within the precinct when the Buyer is about to market the precinct to the public at large, notwithstanding this may be before issuance of separate titles. Greg Anthony Fisher must within seven days of receipt of the plan and price list select the Lot in accordance with this special condition. The Buyer will then do all things necessary to comply with this special condition.
- (c) Greg Anthony Fisher agrees to pay the stamp duty and registration fees on the transfer to him to the extent that the value/consideration is \$100,000.00 or less.....
- (d) The lot shall be transferred to the said Greg Anthony Fisher within six (6) months following date of subdivision and issue of separate title for the Lot.”

[53] In this case, as in the previous one, there is plainly a sale of a proposed allotment (the future lot in the proposed subdivision) in contravention of s 8 of the Act. The agreement to sell is part of the larger transaction and is for valuable consideration. The contract is in breach of s 8 of the Act and void.

Are the contracts void for uncertainty?

[54] The applicants argue that the contracts which contain the Seller's Block clause are void for uncertainty as there is no certainty about the precise location and

dimensions of the Seller's Block. Reference is made to *Watson v Issell*¹⁶ in which the description of the land to be sold and purchased as “all that piece of land, being part of Crown allotment 4, sec. 3, of the Parish of Frankston, County of Mornington, and being allotment [] on the plan of subdivision,” was held to give rise to uncertainty.

- [55] Putting aside the question of whether the bargain is illusory, the failure to agree on an essential term will not give rise to uncertainty if there exists some means or mechanism for determining it,¹⁷ or if in the absence of such a mechanism, the Court is able to make a determination by reference to some objective criteria or standards.¹⁸ Here, it is implicit that the buyer is to fix the boundaries of the Seller's Block within the parameters prescribed by clause 12 or its equivalent. It is implicit also that the precise identification of the boundaries of the Seller's Block must await the preparation of the subdivisional plan. That is a matter which is entirely for the buyer.
- [56] The applicants, rightly, raised no argument to the effect that the contract was illusory in accordance with the principles expressed in the dicta of Gibbs J in *Godecke v Kirwan*.¹⁹ Under the subject provisions, the buyer has no “discretion or option as to whether (it) will carry out that which purports to be the promise”.²⁰ The discretion vested in the buyer must be exercised within specified and quite limited parameters and the bargain is thus not of an illusory nature.
- [57] It is also contended that the LG and SE Fisher contract and the BL & GA Fisher contract are void for uncertainty on the basis that “the subject matter” of the clause which requires the buyer to transfer one of the subdivided lots on the registered plan is deficient in that the dimensions and area of the parcel to be transferred cannot be determined as at the contract date. The clause enables the buyer to determine the boundaries of the lot to be transferred and, as with clause 12 and its equivalents, describes clear criteria which apply to that determination. For the reasons already given, there is nothing uncertain about these provisions.

Can the respondent rely on exemptions granted under s 19 of the Act?

- [58] Section 19 relevantly provided at material times:²¹
- “19 Exemption from part**
- (1) Each of the following persons may apply to the registrar, in the approved form, for exemption from all or any of the

¹⁶ (1890) 16 VLR 607.

¹⁷ *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 605 and 610-617; *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495 and *The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* (1989) 1 LI Rep 205, 210.

¹⁸ *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444.

¹⁹ (1973) 129 CLR 629 at 646-647.

²⁰ cf *Placer Developments Ltd v The Commonwealth* (1969) 121 CLR 353 at 356.

²¹ It was submitted on behalf of the applicants, and not disputed by the respondents, that the correct version of the section is that appearing in Reprint No 4C. Argument proceeded on the assumption that sub-section (1) was capable of application to each contract.

provisions of this part in relation to land that is to be subdivided into not more than 5 allotments--

- (a) a person by or for whom the land is to be subdivided;
- (b) a vendor or purchaser of a proposed allotment.

...

- (4) While an exemption granted under subsection (2) subsists such of the provisions of this part as are specified in the instrument of exemption shall not apply in relation to the sale or purchase of 1 or more than 1 of the proposed allotments in respect of which it was granted.

...

- (6) Notwithstanding the provisions of section 8, a person may agree to sell a proposed allotment that is land in respect of which a person is eligible to make an application for exemption under subsection (1) if the instrument that binds a person to purchase the proposed allotment is conditional upon the grant under subsection (2) of an exemption from section 8 or from that section and any other provision of this part.
- (7) In a case to which subsection (6) applies application for the exemption shall be made within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment.
- (8) Where application for exemption for the purposes of subsection (6) is not received by the registrar within the time prescribed by subsection (7) the instrument in question referred to in subsection (6) is void and any person who has paid money thereunder shall be entitled to recover the amount thereof, together with the amount of interest (if any) that has accrued in respect of the money since it was so paid, by action as for a debt due and owing to the person by the person to whom the money was paid.”

[59] In the case of the LE Dippel, WG Giles-Duffy and WJ Giles-Duffy and EA Schmidt contracts, exemption applications were made on 28 October 2003 and exemptions from compliance with ss 8 and 9 of the Act were granted fully or partially: in the case of the Dippel contract on 26 February 2004 and in the case of the other two contracts on 4 March 2004. An application for exemption from compliance with ss 8 and 9 was made in respect of the JW and DV Francis contract on 19 November 2003 and granted on 18 February 2004. No application was made in respect of the Fisher contracts.

[60] Section 19(6) excludes from the operation of s 8 an instrument which would otherwise come within its terms if it is “conditional upon the grant under subsection (2) of an exemption from section 8”. Section 19(7) stipulates that in the case of such an instrument “application for exemption shall be made within 30 days after the

event that marks the entry of a purchaser upon the purchase of the proposed allotment". Subsection (8) of s 19 provides that where such an application for exemption is not received by the registrar within the 30 day period the instrument in question is void.

- [61] In the case of none of the contracts was there an application for exemption within the prescribed 30 day period. Mr Bain sought to avoid the consequences of this non-compliance by arguing that subsection (6) did not apply to contracts subject to a condition precedent which was yet to be fulfilled. It was said that only upon fulfilment of such a condition was it possible to say that the contract was one "that binds a person to purchase." I am not entirely sure whether it was being asserted that "condition precedent" meant a condition the fulfilment of which was necessary for the formation of a binding contract or one the fulfilment of which was a pre-requisite to the right to require the performance of obligations under the contract, such as the obligation to complete. I think it probable that the submission was directed to the latter type of provision as it seemed to be accepted that each contract was legally binding upon execution.²²
- [62] However the submission was meant to be understood it cannot be accepted. It would be quite remarkable if s 19 were to be given effect by reference to whether or not a condition precedent (to the formation of a contract) had been fulfilled. Such conditions are extremely rare in conveyancing transactions and their identification may be attended with difficulty. The thirty day period prescribed by subsection (7) runs from "the event that marks the entry of a purchaser upon the purchase of the proposed allotment." If the respondent's argument is correct, that time period would run immediately upon the fulfilment of the condition precedent even though a party may not be aware of the fact of fulfilment until after the expiration of the 30 day period.
- [63] If what is meant is a condition the fulfilment of which is necessary before a party is obliged to complete the transaction, the respondent's position is no stronger. Section 19(6), by referring to "the instrument that binds a person to purchase" picks up the terminology of ss 6A and 8. Section 6A provides that a person who signs an instrument "that is intended to bind the person (absolutely or conditionally) to purchase..shall be taken to have entered upon a purchase.." Subsection (6) identifies the type of instrument capable of obtaining an exemption under subsection (2): an instrument which is "conditional upon the grant..of an exemption.." Subsection (6) does not purport to limit, as the respondent's argument asserts, the types of instruments in respect of which applications for exemption may be made beyond the requirement that they be "conditional upon the grant..of an exemption.."
- [64] Again, if the respondent's argument was to be accepted, time would run once a condition subsequent was fulfilled whether the party wishing to apply for an exemption knew of it or not. Furthermore, it is surely unlikely that the legislature intended that, where contracts have in them conditions subsequent, no application

²²

For a discussion of conditions precedent and conditions subsequent see *Perri v Coolangatta Investments Pty Ltd* [1986] 149 CLR 537 at 542 – 5 per Gibb CJ, 549-552 per Mason J.

under s 19 could be made until fulfilment of the conditions. The point of the facility to seek the exemptions is to enable a contract, which would otherwise be in breach of s 8, to be entered into.

- [65] It was argued also that an exemption may be applied for and granted after a purchase has been entered upon and that once granted it will have retrospective effect. An adjunct to this argument was the assertion that the 30 days time stipulation was only directory in nature.
- [66] The fundamental difficulty with that submission is that subsection (7), in clear terms, requires application to be made within the prescribed 30 day period and subsection (8) states the consequences which follow where an application is not made within time: the subject instrument is void and any moneys paid there under are recoverable by the payer. Once subsection (8) has operated there is no contract in existence upon which any later application for exemption might operate. The legislation, by providing for the consequences of failure to apply for an exemption within the prescribed period, makes it pointless to consider whether subsection (7) is in mandatory or directory terms.

Severance

- [67] The respondent argues that if s 8 of the Act applies to the Seller's Block provisions or to other provisions requiring the transfer of a subdivided block, those provisions constitute a separate sale supported by a separately identifiable consideration and should be severed from the contract.
- [68] The relevant test of severability is that stated by Jordan CJ in *McFarlane v Daniell*²³ referred to with approval in *Thomas Brown & Sons Ltd v Fazal Deen*:²⁴

“If the elimination of the invalid promises changes the extent only but not the kind of contract, the valid promises are severable: *Putsman v Taylor* ((1927) 1 KB 637 at 640, 641).”

- [69] Severance here would bring about a radical alteration of the parties' bargain, depriving the applicants of land (and in most cases) a dwelling-house which they intended to retain. The respondent would, for no less a price, receive an additional parcel of land.

Conclusion

- [70] In each case there will be;

²³ (1938) 38 SR (NSW) 337.

²⁴ (1962) 108 CLR 391 at 411.

- (a) A declaration that the contract referred to in the originating application is void;
- (b) An order that the respondent pay the applicants' costs of and incidental to the application to be assessed on the standard basis.