SUPREME COURT OF QUEENSLAND

CITATION:	*Hope Island Resort Holdings P/L v Jefferson Properties (Q) P/L & Anor* [2004] QSC 401 *Jefferson Properties (Q) P/L & Anor v Hope Island Resort Holdings P/L & Anor* [2004] QSC 401
PARTIES:	**HOPE ISLAND RESORT HOLDINGS PTY LTD** **ACN 091 967 921** (plaintiff) **v** **JEFFERSON PROPERTIES (QLD) PTY LTD** **ACN 003 729 851** (first defendant) **MARK MCIVOR** (second defendant) **JEFFERSON PROPERTIES (QLD) PTY LTD** **ACN 003 729 851** (first plaintiff) **MM PROPERTIES PTY LTD (FORMERLY JEFFERSON PROPERTIES PTY LTD)** **ACN 010 860 821** (second plaintiff) **v** **HOPE ISLAND RESORT HOLDINGS PTY LTD** **ACN 091 967 921** (first defendant) **MCROSS DEVELOPMENTS PTY LTD** **ACN 001 176 263** (second defendant)
FILE NOS:	S9926 of 2000 S10887 of 2000
DIVISION:	Trial Division
PROCEEDING:	Claim
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JUDGE:	Byrne J
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Alghussein Establishment v Eton College [1988] 1 WLR 587
Brothers v Park [2004] NSWCA 241
Drinkwater v Caddyrack Pty Ltd, SC NSW (Young J), 25 September, 1997
Geroff v CAPD Enterprises Pty Ltd [2003] QCA 187
Havenbar Pty Ltd v Butterfield (1974) 133 CLR 449
Micklefield v SAC Technology Ltd [1990] 1 WLR 1002
Pacific Carriers Ltd v BNP Paribas (2004) 78 ALJR 1045
Thornton v Abbey National PLC [1993] TLR 111.

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Essentials of the Deed

[1] Mr Mark McIvor controls Jefferson Properties (Qld) Pty Ltd ("JPQ"). In 2000, JPQ owned parcels of land ("the lots") at the Hope Island Resort at the Gold Coast. Mr McIvor then also controlled Hope Island Resort Development Corporation Limited ("HIRDC") through his control of its majority shareholder, Jefferson Properties Pty Ltd ("JP").[1]

[2] On 7 April 2000, JPQ, HIRDC and Mr McIvor executed a "Development Deed" ("the Deed") to facilitate the divestiture of JPQ's interests in the lots for a substantial price. Put shortly, the Deed provides for the lots to be made available to HIRDC for development, and then, under HIRDC's direction, for sale by JPQ to purchasers, and at prices, chosen by HIRDC.

[3] On 30 June 2000, HIRDC assigned its rights under the Deed to Hope Island Resort Holdings Pty Ltd ("HIRH"). By letter the same day, HIRH assumed HIRDC's liabilities under the Deed, and McRoss Developments Pty Ltd ("McRoss") guaranteed the performance by HIRH of its obligations under it.

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[1] JP has since changed its name to MM Properties Pty Ltd.

[4] The Deed provides that:

- The lots will be available to HIRDC[2] so that HIRDC can develop them[3] and arrange for their sale[4] to purchasers introduced by a real estate agent to be directed by HIRDC.[5]
- HIRDC is to pay $5,000,000 to JPQ on 7 April 2000 as JPQ's "total share of the proceeds" from the development and sale of the lots.[6]
- HIRDC is to assume JPQ's liabilities to its mortgagees up to monetary limits specified in Schedule 2.[7] Those "loan amounts", as the Deed describes the borrowings, amount, in aggregate, to $13,584,018.[8] HIRDC is also to pay all "outgoings" in respect of the lots, including interest and fees payable to the mortgagees.[9]
- JPQ warrants that, as at 7 April 2000,[10] the amount for which a financier will release its mortgage over a lot to facilitate its sale is the "loan amount" specified for that lot in Schedule 2;[11] and that the information in Schedule 2 is true.[12]
- HIRDC is responsible for the costs of selling the lots.[13]
- HIRDC is entitled to the balance of the proceeds of sale of a lot after paying the mortgagee the Schedule 2 "loan amount" for that lot.[14]
- JPQ is to pay HIRDC "development fees" equal to the sale price of the lots, less the nominated loan amounts.[15]
- Within a fortnight after completion of the sale of the last of the lots, a payment is to be made by JPQ or HIRDC if the aggregate amount paid to the mortgagees differs from the $13,584,018.[16] If HIRDC has paid more, Mr McIvor is to arrange for the excess to be paid to HIRDC; if less, HIRDC is to pay JPQ that difference.[17] The precise words of cl 8.3 are:

> "From (7 April 2000), HIRDC assumes the liability of JPQ for the loan amounts referred to in Schedule 2 and HIRDC indemnifies JPQ in respect of those liabilities. In the event that on completion of the sale of all the Lots the aggregate amount (the "Total") paid to the Mortgagees differs from $13,584,018.00 then:
>
> (a) to the amount by which the Total exceeds $13,584,018.00 Mr McIvor will arrange for payment of that amount to HIRDC; and

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2 cl 3.4.
3 cl 7.1.
4 cl 1 definition of "development works".
5 cl 10.1.
6 cl 11.3 and the definition of "JPQ's Amount" in cl 1.
7 cl 8.3.
8 Schedule 2.
9 cl 8.1.
10 see cl 1 definition of "commencement date".
11 cl 3.2(b).
12 cl 4.1(d).
13 cl 10.3.
14 cl 10.4.
15 cl 11.1.
16 cl 8.3.
17 cl 8.3.

(b) the amount by which the Total is less than $13,584,018.00 HIRDC will pay to JPQ that amount,

within 14 days after completion of the last Lot to settle."

Basic facts

[5] The lots were all sold by 9 April 2003. To achieve completion of the sales, less than $13,584,018 was paid in respect of the Schedule 2 mortgages.

[6] Some of the context in which the questions concerning the meaning and effect of the Deed arise needs to be set.[18]

[7] When the Deed was executed, eight of the lots were mortgaged to Arkway Pty Ltd ("Arkway") by three mortgages. JPQ, JP and HIRDC collectively then owed Arkway more than $23,000,000. Cross-collaterisation[19] contracts which these McIvor-controlled entities had concluded, coupled with "all moneys" clauses in the JPQ mortgages, meant that each JPQ mortgage secured the obligations of the three borrowers in respect of the total Arkway debt. Schedule 2 identifies "loan amounts" aggregating only $8,136,500 for the allotments mortgaged to Arkway. In the result, Arkway was content to accept $7,836,500[20] to release them from its mortgages. JPQ seeks to recover the $300,000 difference under clause 8.3(b).

[8] GIO Finance Ltd ("GIO") was the mortgagee of 11 of the lots. Schedule 2 specifies loan amounts aggregating $3,463,539.20 for them. $3,292,420.98 was paid to GIO to procure relevant discharges of the mortgages: $171,118.22 less than the total of the GIO "loan amounts". The higher figure had been inserted in error. It was referable to the limit of the loan facility, not to the amount owing on 7 April 2000. JPQ claims the $171,118.22 under cl 8.3(b).

[9] So $471,118.22 less than the aggregate of the nominated Schedule 2 loan amounts was paid to obtain relevant releases of the Arkway and GIO securities. However, another mortgagee, HG & R Nominees Pty Ltd ("HG & R"), required $10,000 more than the amount specified for that financier. On balance, therefore, $461,118.22 is the amount by which "the Total" was "less than $13,584,018.00". Accordingly, if cl 8.3 means, what, literally construed, it says, HIRDC had to pay JPQ the $461,118.22. And, pursuant to the 30 June 2000 assignment arrangements, HIRH would be liable for that debt.

HIRH's defence

[10] HIRH resists a literal interpretation of cl 8.3, contending that to accord the words such a meaning would yield results at odds with the commercial objective of the transaction the Deed embodies. JPQ would then get more than the $5,000,000 that cl 11.3 calls "JPQ's "total share of the proceeds" from selling the developed lots, [21] and in circumstances where HIRDC, not JPQ, had assumed the risks attending the venture.[22] On HIRH's case, $5,000,000 – no more – was the price for which JPQ sold the opportunity to profit from developing the land, by realising the surplus available after meeting the development expenses and the costs of procuring releases of the mortgages mentioned in Schedule 2.

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18 All the facts related were, it is common ground, known (through Mr McIvor) to the parties to the Deed when it was executed and may be taken into account in construing it: cf *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045, 1050 [22].

19 As the effect of the arrangements was characterised in argument.

20 Arkway's mortgages were transferred to DKL Nominees Pty Ltd as part of a refinancing. Nothing turns on this.

21 cl 11.3.

22 Ex 4, Para 22.

[11] HIRH also argues that cl 8.3(b) ought not to be construed as requiring an adjustment in JPQ's favour where, in breach of JPQ's warranties concerning the accuracy of the "loan amounts," the amount a mortgagee required to release its security was overstated in Schedule 2.[23] For JPQ to derive such a benefit, would, HIRH contends, be a perverse result in circumstances where HIRDC assumed the commercial risks in developing the land for sale.[24] The warranties as to the accuracy of the Schedule 2 loan amounts were "fundamental to the distribution of risk and profit,"[25] it is said. To construe cl 8.3(b) as requiring an adjustment in favour of JPQ where, in breach of the warranties, JPQ had overstated the loan amounts would be to permit JPQ to profit from its own breach of contract.

Warranties

[12] Clause 3.2 of the Deed stipulates:

> "At the Date of Commencement[26] JPQ and Mr McIvor … warrant that:-
>
> …
>
> (b) the amounts for which the relevant Mortgagee will release its Mortgage over a Lot is as detailed in Schedule 2."

[13] By cl 4.1, JPQ and Mr McIvor warrant:

> "…
>
> (d) the information referred to in Schedules 1 and 2 of this Agreement are (sic) true and correct …".

[14] Clause 3.2(b) promises that, on 7 April 2000, a financier would release a lot from its security on payment of the Schedule 2 "loan amount". Clause 4.1(d) warrants the accuracy of the Schedule 2 information on the day the Deed is executed. There is no promise that that state of affairs would persist. So much is common ground. There is, however, a dispute concerning the content of the warranties.

[15] JPQ argues that cl 3.2(b) can only be construed as a promise that the loan amount mentioned in Schedule 2 is *no more than* the sum for which the mortgagee would release its security. If so, an overstatement is not a breach of the warranty. HIRH contends that the warranties are directed to the accuracy of the loan amounts and are contravened if, on 7 April 2000, a mortgagee would have released a lot for less than the stipulated sum.

Are the warranties engaged by overstatement?

[16] On JPQ's case, the parties could not have envisaged that the cl 3.2(b) warranty would be breached if a financier would have accepted less than the Schedule 2 loan amount to release its security over a lot. The reason is, as JPQ propounds its case, that HIRDC could not have been disadvantaged by a mortgagee's willingness to take less. Such a decision could only benefit HIRDC: in that event, HIRDC would retain the difference until cl 8.3(b) triggered an obligation to pay it to JPQ.

[17] That view of things, however, assumes that JPQ's construction of cl 8.3(b) is correct. As HIRH would have it, the difference was never to be paid to JPQ. Rather

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23 Ex 4, Para 31.

24 Ex 4, Para 29.

25 Ex 4, Para 29.

26 This expression is not defined. No doubt "Commencement Date" was intended. That is defined to mean "the date of this Agreement", which was 7 April 2000. In any event, it is common ground that the date referred to is 7 April 2000, the date the Deed bears.

the saving reduced the cost to HIRDC of its acquisition, thereby increasing its gain on the venture. HIRH contends:

> "If the schedule 2 amounts were inaccurate in being <u>less</u> than was actually owed to the mortgagees, then there would be potentially more profit available to HIRDC by way of its development fee. The warranties ensured that HIRDC did not lose the value of the profit for which it had bargained, either by reason of the secured debt being greater than JPQ had warranted or the amount of JPQ's equity being greater than $5 million."[27]

[18] This dispute about the purpose of the warranties reflects the conflict about the role of cl 8.3(b). For reasons to be mentioned shortly, JPQ's interpretation of cl 8.3(b) is preferable. On that basis, there is considerable force in JPQ's argument that HIRH's construction of cl 3.2(b) is "uncommercial", and something most unlikely to have been intended. If HIRDC could not have been disadvantaged by an overstatement, it makes sense to regard "is as detailed …" in cl 3.2(b) as conveying "is *no more than* as detailed …". So construed, cl 3.2(b) has nothing to say about a Schedule 2 loan amount overstatement.

[19] Clause 4.1(d) is more problematic. Given the disposition to construe commercial documents so as to make commercial sense of them,[28] perhaps the warranty it contains should be construed narrowly: as relevantly adding nothing to cl 3.2(b). But if it has any significance for the "loan amounts" information in Schedule 2, cl 4.1(d) must promise that the sums so nominated are "true and correct". Can that be said of an overstatement? If the financier will accept less than the stipulated sum, is it not at best a half-truth to assert that it will release a lot from the reach of its security on payment of more?

[20] In the view I take of cl 8.3(b), however, it is unnecessary to decide whether cl 4.1(d) takes matters beyond cl 3.2(b). Even if an overstatement of the amount the mortgagee would have accepted breaches cl 4.1(d), nonetheless cl 8.3(b) entitles JPQ to the difference.

Overstatements?

[21] In respect of the GIO mortgages, there was such an overstatement.[29] With Arkway, there was not.

[22] On 7 April 2000, JPQ owed Arkway $7,836,500 in respect of JPQ's own borrowings. The amount stipulated as the total Schedule 2 "loan amount" for Arkway was $8,136,500. The extra $300,000 was related to the more than $23,000,000 contingently payable by JPQ under the cross-collateralisation arrangements.[30]

[23] Before executing the Deed, Mr McIvor concluded negotiations about the amount that Arkway would require before releasing its mortgages. He proposed, and Arkway agreed, on a figure of $8,136,500 in aggregate.

[24] So the $8,136,500 nominated in Schedule 2, though $300,000 more than JPQ's outstanding borrowings, correctly stated the amount which, on 7 April 2000,

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27 Ex 4, Para 24

28 *Geroff v CAPD Enterprises Pty Ltd* [2003] QCA 187, [36]-[40].

29 See para [8].

30 See para [7].

Arkway required to discharge its securities.[31] The $300,000 difference was not an overstatement of the true position. It follows that the $300,000 is payable by HIRH pursuant to cl 8.3(b).

[25] That leaves the GIO $171,118.22.

Benefit from breach?

[26] There is a pronounced disinclination to construe a contractual provision in such a way as would allow a party to rely on its non-performance to derive a benefit under the contract[32]. HIRH relies on this notion to contend that to construe cl 8.3(b) as comprehending an overstatement of a Schedule 2 loan amount is to permit JPQ to take advantage of its breach of warranty to obtain the benefit of the cl 8.3(b) adjustment. This, however, is not an apt characterisation of the consequences of acceding to JPQ's claim to the $171,118.22; or, if it is, still cl 8.3(b) provides for JPQ to receive the adjustment.[33]

[27] Before discussing the purpose of cl 8.3(b), it is as well to mention the limited scope for its operation on HIRH's interpretation: that the term is activated only by an occurrence after 7 April 2000 which does not involve a breach of JPQ's obligations under the Deed: in particular, the warranties. Such a restrictive interpretation does not empty cl 8.3(b) of all potential. On this approach, the term accommodates the possibility that a payment might afterwards be made – as, for example, to Arkway in respect of the cross-collateralised securities – which reduced the amount a mortgagee could insist on receiving before discharging a lot from its security.[34]

8.3 in context

[28] The Deed contained several provisions designed to reduce the risk that events after 7 April 2000 might result in a financier's becoming entitled to demand more than the loan amount nominated in Schedule 2 before releasing a lot from a security. HIRDC was to pay future interest and fees payable to the mortgagees.[35] JPQ and Mr McIvor authorised the mortgagees to enter into agreements with HIRDC (on behalf of JPQ) concerning payment of the loan amounts and interest under the relevant mortgages.[36] JPQ promised not to "vary the terms of the mortgages" without HIRDC's consent,[37] not to cause any increase in the amounts under the mortgages,[38] and "not to do or omit to do any act matter or thing which … may give rise to an increase" in the extent of HIRDC's liability to the mortgagees.[39] Even so, cl 8.3(a) shows, the parties anticipated that circumstances might arise in which HIRDC would need to pay more than the $13,584,018 aggregate "loan amounts"

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31 It is not suggested that Arkway was not entitled to insist on payment of more than the outstanding borrowings by JPQ before releasing its security in respect of an affected Lot.

32 Chitty, *On Contracts*, 29th ed., (2004), para 12-082; *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *Brothers v Park* [2004] NSWCA 241, [82]; *Drinkwater v Caddyrack Pty Ltd*, SC NSW (Young J), 25/9/1997, at 25-29; cf *Havenbar Pty Ltd v Butterfield* (1974) 133 CLR 449, 456.

33 cf *Micklefield v SAC Technology Ltd* [1990] 1 WLR 1002, 1007; *Thornton v Abbey National PLC* [1993] TLR 111.

34 There is no evidence that anyone had adverted to such a prospect in the negotiations that resulted in the Deed. And the surrounding circumstances indicate that the chance of such a payment would have presented as at least unlikely. More than two-thirds of the price was represented by HIRDC's assumption of the JPQ debt. Given that, it would not have seemed probable that payments would afterwards be made by JPQ (or another McIvor-controlled entity) that reduced the debt, particularly as it was anticipated that the project would soon be refinanced.

35 cl 8.1.

36 cl 4.2.

37 cl 3.3(a).

38 cl 3.3(c).

39 cl 4.1(c).

before it could sell all the developed lots. Clause 8.3(b) reveals that the parties also anticipated that HIRDC might not need to pay as much as $13,584,018.

[29] The function cl 8.3(b) serves needs to be considered in the context of other provisions of the Deed.[40] In view of the importance HIRH attaches to them, a few merit quotation:

> "10.4 The proceeds from any contract for the sale of any Lot (including any interest paid to JPQ under the relevant contract of sale) shall upon settlement of each contract for the sale of a Lot be payable in the following order of priority:-
>
> (a) repayment of the loan amount for the Lot as specified in Schedule 2;
>
> (b) the balance shall belong to and be paid to HIRDC. …
>
> 11.1 In consideration of HIRDC undertaking the Development Works, JPQ has agreed to pay HIRDC development fees of an amount equal to the sale price of the Lots less the amount to be paid to the mortgagees for those Lots being the amount referred to in Schedule 2;
>
> 11.2 The development fees payable to HIRDC shall be calculated on completion of the sale of each Lot and paid to HIRDC on completion of that sale.
>
> 11.3 JPQ shall be paid JPQ Amount on the date of this Agreement by HIRDC being JPQ's total share of the proceeds from the Development Works including the sale of the Land. The JPQ Amount is non-refundable."

[30] Revenue considerations exercised considerable influence on the structure of the transaction, as cl 11 illustrates, in describing the source of HIRDC's profit – the price the lots fetched on sale, less the Schedule 2 loan amounts payable to the mortgagees – as HIRDC's "development fees". JPQ's cash reward is called[41] the "JPQ Amount"- an expression defined[42] to mean $5,000,000, "as JPQ's total share of the proceeds from the Development of Works[43] including sale of the Land".

HIRH's case elaborated

[31] HIRH relies on cl 11 as revealing that the parties intended that JPQ would not get more than $5,000,000 in cash:[44] a prospect said to be inconsistent with the idea that JPQ is entitled to more under cl 8.3(b). HIRDC was to receive the difference between the sale price of a Lot and, given the warranties, the correct "loan amounts" as they should have been stated in Schedule 2. According to HIRH, cl 10.4, with its reference to the "balance" that is "to belong to" HIRDC, reinforces this idea about the destination of the proceeds of sale. The Deed envisaged that those proceeds would be used to make payments to the Schedule 2 financiers. But, says HIRH, the

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40 Summarised in para [4].

41 cl 11.3.

42 See clause 1 definition.

43 Defined by clause 1 to mean HIRDC's works and activities in relation to and in respect of the Land including the securing of approvals, and the construction of improvements on the Land, and arranging for the sale of the Land.

44 At least not unless, after 7 April 2000, JPQ made a payment to a mortgagee that reduced the amount it could insist on receiving before releasing a lot from the pertinent security.

contractual scheme did not provide for any further payment to JPQ except where, after 7 April 2000, cl 8.3(b) was triggered by an event that did not constitute a breach by JPQ of a term of the Deed. Clause 8.3(b) could not have been intended to allow JPQ to claim its benefit in circumstances where it was in breach. Such a construction would, it is said, enable JPQ, by virtue of its breach, to increase its profit beyond the agreed $5,000,000.

Making sense of 8.3(b)

[32] If cl 8.3(b) does not extend to overstatements like the GIO $171,118.22, the venture would yield HIRDC a windfall at odds with the promised consideration: $5,000,000, repayment of as much as $13,584,018 of JPQ's (larger in aggregate) debt, and assumption of other liabilities under the mortgages. By the same token, such an outcome would devalue the JPQ assets. For the financial benefit JPQ was to extract from the disposition of its interests included a $13,584,018 reduction in its exposure to its financiers.

[33] Clause 8.3 establishes a mechanism for maintaining the $18,584,018[45] consideration payable by HIRDC to develop the land and retain the surplus proceeds arising on sale of the lots. It ensures that the consideration remains no more, and no less, than that. Without the clause, one party would, as it was put for JPQ, be short-changed were HIRDC to pay either more or less than $13,584,018 to the mortgagees. Clause 8.3(b) caters for the situation where less than $13,584,018 is paid by directing to JPQ the money not required to be paid to the financiers. It does not diminish either what HIRDC must part with to acquire JPQ's interests in the lots or the corresponding value that JPQ is to derive from the disposition.

[34] In short, far from there being a business imperative to support the restrictive interpretation for which HIRH contends, the commercial sense of the transaction embodied in the Deed supports JPQ's case that cl 8.3(b) should be interpreted in accordance with the meaning its words naturally suggest.

[35] JPQ is entitled to the $461,118.22.[46]

HIRH claim

[36] HIRH claims more than $55,000 as damages for breach of cl 4.1(c) and cl 3.3(c).

[37] By cl 4.1(c), JPQ and Mr McIvor warranted:

> "Not to do or omit to do any act … or thing which will or may give rise to an increase in HIRDC's quantum or the extent of HIRDC's liability under clause 8."

[38] By clause 8.1,

> "As from the Start Date,[47] HIRDC will be responsible for and pay all outgoings in respect of the Land including all interest and fees payable to the mortgagees …"

[39] On 26 June 2001, HIRH paid HG & R the money required to release its lots. This included $55,626.20 claimed as default interest and extra charges arising from the expiry on 30 June 2000,[48] by effluxion of time, of the related finance facility.

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45 Putting aside HIRDC's assumption of JPQ's liability under the mortgages to pay interest and satisfy other burdens.

46 See the calculation in para [9].

47 "Start Date" is defined to mean 24 March 2000: cl 1.

48 Ex 4, para 42. The assignment was also concluded on 30 June 2000: see para [3].

[40] Neither JPQ nor Mr McIvor attempted to obtain an extension of the facility. They did not consider themselves bound to do so. The quantum of this HIRH claim not being in dispute, the question is whether cl 4.1(c) or cl 3.3(c) obliged them to secure the extension.

[41] HIRH contends that JPQ's and Mr McIvor's omission to secure such an extension resulted in an increase in the amount that had to be paid to HG & R to obtain a release of its mortgages. In this sense, the omission is said to have occasioned an increase in HIRDC's quantum under cl 8.1,[49] in breach of the cl 4.1(c) warranty.

[42] The second provision relied on by HIRH is cl 3.3(c), which stipulates that JPQ and Mr McIvor would not "… cause any increase in the amounts owing under the mortgages". JPQ and Mr McIvor are said to have defaulted in the performance of that obligation by neglecting to extend the facility.

[43] Either way, HIRH's claim to recover the additional expense depends upon the proposition that JPQ and Mr McIvor had to procure an extension of the facility. The Deed, however, imposed no such duty.

[44] The Deed authorises the mortgagees to enter into arrangements with HIRDC (on behalf of JPQ) in relation to the loan amounts, their payment, and interest under the relevant mortgages.[50] It contemplates that HIRDC, not JPQ, will negotiate with the mortgagees about loan repayments. Consistently with this, JPQ and Mr McIvor are prohibited from doing anything concerned with mortgaging the lots;[51] HIRDC assumed responsibility for paying all outgoings, including all interest and fees payable to the mortgagees;[52] and JPQ appointed HIRDC's directors as its attorneys in relation to the lots. Under this regime, HIRDC controlled relations with the mortgagees about the loans, with the power and responsibility to make arrangements about repayments. And, under the assignment arrangements, HIRH relevantly assumes HIRDC's place.

[45] So the omission by JPQ and Mr McIvor to arrange for an extension of the facility did not involve a contravention of cl 4.1(b) or cl 3.3(c).[53]

[46] HIRH's claim fails.

Disposition of the litigation

[47] JPQ is entitled to recover $461,118.22.

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49 And cl 8.3.

50 cl 4.2.

51 cl 3.3.

52 cl 8.1.

53 The claim is also scarcely consistent with a Deed of Variation of Development executed on 6 December 2001 by JPQ, Mr McIvor and HIRH. By cl 4.2 of this Deed:

> "The parties agree that the first sentence of clause 8.3 of the Development Deed is varied so that it reads as follows:-
>
> > *'From the Commencement Date, HIRDC (and on and from 30 June 2000, HIRH) assumes the liability of JPQ and JP for the loan amounts referred to in Schedule 2 and HIRDC (and on and from 30 June 2000, HIRH) indemnifies JPQ and JP in respect of those liabilities'*.
>
> The balance of clause 8.3 remains the same."

And as to clause 3.3(c), the omission by JPQ and Mr McIvor to arrange for an extension did not "cause" an increase in the amounts owing under the mortgages.