SUPREME COURT OF QUEENSLAND

CITATION:	*THL Robina Pty Ltd v The Glades Golf Club Pty Ltd & Anor* [2004] QSC 461
PARTIES:	**THL ROBINA PTY LTD (ACN 091 486 672)** (applicant) **v** **THE GLADES GOLF CLUB PTY LTD** **(ACN 094 431 535)** (first respondent) and **SURFERS PARADISE GOLD CLUB LIMITED** (second respondent)
FILE NO:	SC No 8054 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2004
JUDGE:	Chesterman J
ORDER:	**1. The answers to the questions posed to the Court are:** **1. No** **2. Yes** **3. No** **4. Yes**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the applicant and the respondent entered into a contract by which the applicant sold the subject golf course to the respondent – where the contract contained a clause to the effect that if the respondent intended to sell the golf course during the development period the respondent had to first offer to sell it to the applicant – where the respondent then proposed to sell the golf course to the second respondent without first offering to sell the golf course to the applicant – whether the respondent was lawfully entitled to contract with the second respondent in those circumstances – consideration of the meaning of 'sell' *Beneficial Finance Corporation Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510, discussed

Chappell & Co Ltd v Nestle Co Ltd [1960] AC 87, discussed
Esso Australia Ltd v Air Ride Transportation Pty Ltd and Mobil Oil Australia Ltd (unreported, Supreme Court of Victoria, 28 September 1988), discussed
Fimiston Mining NL v Western Reefs Ltd & Ors (unreported, Supreme Court of Western Australia, 22 November 1995), discussed
Francis & Others v NPD Property Development P/L [2004] QCA 343, discussed
G J Dawson (Clapham) Ltd v H & G Duttfield [1936] 2 All ER 232, discussed
Gardner v Coutts & Company [1968] 1 WLR 173, discussed
Goldmaster Homes Pty Ltd v Johnson [2004] NSWCA 144, discussed
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, discussed
Mackay v Wilson (1947) 47 SR (NSW) 315, discussed
Pritchard v Briggs [1980] 1 Ch 338, discussed
Re *A lease between Permanent Trustee Australia Ltd and Woolworths (Q'land) Pty Ltd* (unreported, Supreme Court of Queensland, 6 November 1998), discussed
Robshaw Brothers Ltd v Mayer [1957] 1 Ch 125, discussed
Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002) 76 ALJR 436, discussed
Simsmetal Ltd v Wanless Metal Industries Pty Ltd & Ors (unreported, Supreme Court of New South Wales, 19 March 1997), discussed
Southern Founderies (1926) Ld v Shirlaw [1940] AC 701, discussed
Woodroffe v Box (1954) 92 CLR 245, discussed

COUNSEL: Mr J D McKenna SC, with Mr A Pomerenke, for the applicant
Mr F L Harrison QC, with Mr D J Schneidewin, for the first respondent
The second respondent was not a party to the application

SOLICITORS: Allens Arthur Robinson for the applicant
Chan Lawyers for the first respondent
The second respondent was not a party to the application

[1] 'The Glades' is a master-planned community which is in an advanced stage of development and is located at Robina on the Gold Coast. It is also the name of a championship golf course designed by Mr Greg Norman. The applicant owns some 37 hectares of land which adjoins the golf course which is owned by the first respondent ('the respondent'). It is set within 103 hectares of land on part of which has been built a clubhouse, small hotel, tennis courts and a swimming pool. The applicant bought the land comprising both the residential development and the golf course and associated facilities, in March 2000. On 23 October 2000 the applicant sold the golf course land to the respondent. It retained the 37 hectares which it has developed and continues to develop for residential use. This land 'was designed in

relatively distinct pockets, which are largely surrounded by the golf course … so as to integrate the residential land within the golf course …'.

[2] The background facts relevant to the question the parties have asked the Court to determine are not contested. They are:

- In March 2000, the applicant acquired 140.6 hectares of land at Robina.

- At that time, the land enjoyed a "special facilities" zoning within the Albert Shire, permitting it to be used (inter alia) as a golf course and for residential development.

- The land was being developed pursuant to a master plan for an integrated golf and residential resort.

- The land had already been substantially improved (at a cost of about $40 million) by the construction of a championship golf course, over approximately 103 hectares of land, which had been designed by a well-known Australian professional golfer (Greg Norman).

- The works remaining to be completed on the golf course land, pursuant to the master plan, included the construction of a clubhouse (with dining and conference facilities), recreational facilities (eg tennis courts and swimming pool) and a lodge (with 26 accommodation rooms).

- The master plan provided for residential development on 37 hectares within the overall landowning. The residential land was planned to be developed in stages over a number of years. The master plan configured the residential land in pockets set within the golf course land, which:

  - were largely surrounded by the golf course.

  - allowed many lots to have views over the golf course.

  - were located in close proximity to the golf course clubhouse and its associated facilities.

- The applicant acquired the land for the purpose of carrying the master plan into effect, and proceeded to do so.

- The applicant promoted the development of the residential land by reference to its outlook over, proximity to and access to the facilities at the golf course.

- The applicant adopted the same name ("The Glades" and logo for the promotion of both the golf course and the residential development.

- The applicant began to seek a suitable purchaser for the golf course land, with whom it could work co-operatively, and to their mutual benefit, in the development of The Glades.

- The applicant sought the following mutual benefits from this relationship:

    - for itself – of having its residential land associated with a high-class, well-operated championship 'signature' golf course.

    - for the purchaser of the Golf Course – of having the benefit of members and patrons from the residential land.

- The applicant sought a purchaser for the golf course land by private approaches to potentially suitable parties.

- During this process, the applicant commenced negotiations with Mr Ian Baker-Finch (and associates).

- Mr Baker-Finch was a well-known Australian golfer with favourable personal qualities.

- The price was negotiated, not by reference to other offers or the cost of construction of the golf course land, buy by reference to the yield which the operation of the golf club could generate (resulting in a core price of $5 million).

- On 11 September 2000, the respondent was incorporated. Its original directors were Mr Ian Baker-Finch, Mr Peter Senior and Mr Barry McCollam.

- On 23 October 2000, the negotiations between the applicant and Mr Baker-Finch resulted in:

- the Contract of Sale being executed by the applicant and respondent (being a company nominated by Mr Baker-Finch and associates), Mr Baker-Finch and Mr McCollam.

- a related Agency Agreement being executed by the applicant and the respondent.

- Completion of this contract duly occurred.

[3] It is important to the success of the applicant's development that the golf course which adjoins it should be well run and maintained to a high standard and to be available to purchasers of residential lots in the development who may wish to become members of the golf course or to play socially.

[4] In the years since the applicant sold the golf course to the respondent there has been a change in the shareholding of that company. The original shareholders transferred their shares to Mr Edwin Yu. Mr Yu's interests lie in the direction of developing land, not playing golf over it. He has reached an understanding with the Surfers Paradise Golf Club Ltd, the second respondent, which played no part in the proceedings, by which ownership in The Glades Golf Course would be transferred to the second respondent in return for the payment of $20,000,000 and the transfer to the first respondent of the land comprising the Surfers Paradise Golf Course. The respondent would then develop that land and the second respondent would operate its golf course and club at The Glades.

[5] The applicant is alarmed by this prospect which it fears will diminish the attractiveness, and hence the value, of its development, and may give rise to legal difficulty with some of those who have purchased residential lots from it in the past.

[6] On 9 March 2004 the respondents executed a Memorandum of Understanding which provided:

> 'Whereas the parties are desirous of entering into agreements for the exchange of the Surfers Paradise Golf Course land … and the Glades Golf Course … by means of sale Contracts (… the proposed transaction).
>
> **1. Purpose of Memorandum of Understanding**
>
> The parties enter this Memorandum … to confirm the intent of the parties that:
>
> (a) they will negotiate the Proposed Transaction; and

(b) they will negotiate legally binding agreements for the purpose of the Proposed Transaction and other necessary agreements …

…

4. Negotiating of Contracts

The Glades will deliver draft Contracts … for consideration by SP and the parties will:

(a) co-operate in good faith and use their reasonable endeavours to negotiate and execute the Contracts; and

(b) bear their own respective costs and expenses of negotiating and executing the Contracts.'

[7] Attached to the Memorandum of Understanding was a second document entitled 'Major Commercial Terms for the Contracts'. Clause 3 of this document provided that:

'(a) Glades will transfer its property known as the Glades Golf Course and Club House to SP in exchange for SP land.
(b) Glades will pay the sum of $20 milion to SP.
(c) …'.

"Glades" is a reference to the respondent. "SP" refers to the second respondent.

[8] On 13 September 2004 a special general meeting of the second respondent resolved to authorise its board of directors to 'execute a contract for the sale of' its golf course in exchange for the acquisition of the Glades Golf Course land and premises on terms which included that the contracts for the sale of the second respondent's golf course and the acquisition of the respondent's golf course 'will provide a net amount to the [second respondent] of twenty million dollars ($20,000,000.00) …'.

[9] Apparently pursuant to this resolution the second respondent's solicitors prepared two contracts, each for the sale of land, and each in the standard form approved by the Real Estate Institute of Queensland and the Queensland Law Society Inc. One contract provided for the sale by the second respondent to the respondent of the Surfers Paradise Golf Course land for a price of $35,000,000. The second provided for the sale by the respondent to the second respondent of The Glades Golf Course for a price of $15,000,000. Neither contract has been executed.

[10] The respondent's solicitor has deposed that the contracts 'had not been agreed to by or on behalf of [the respondent]. They are not acceptable to [the respondent].' The solicitor further deposes that on 5 October 2004 he sent a draft of an agreement

described as a call option to the solicitors for the second respondent. There have been discussions between the respondents about the terms of the draft agreement which has not yet been executed. It is said to be the intention of the respondent to 'enter into an agreement along the lines of the draft call option' should the respondent be successful in this litigation.

[11] The essence of the call option agreement is that each party to it grants the other an option to require the other to effect the exchange of the two golf course properties and for the respondent to pay the second respondent the sum of $20,000,000. The option may not be exercised by either party prior to 1 November 2005. After that it may be exercised within seven days of the fulfilment of a specified contingency by written notice.

[12] The terms of cl 20 of the contract by which the applicant sold the golf course to the respondent are critical to the outcome of the application. It provides:

> '**20 Right of First Refusal**
>
> **20.1 Definitions**
>
> In this clause:
>
> ***Acceptance Date*** means the date on which the Vendor accepts the Purchaser's offer to sell the Property in accordance with clause 20.3;
>
> ***Property*** includes any part of the Land or Property; and
>
> ***Resale Contract*** means a contract for sale of land specifying the property being sold, the sale price and the conditions on which the Purchaser intends to sell.
>
> **20.2 Offer by Purchaser**
>
> If the Purchaser intends to sell the Property during the Development Period, the Purchaser shall first offer to sell the Property to the Vendor by delivering a form of Resale Contract to the Vendor. This right is personal to the Vendor and may not be assigned.
>
> **20.3 Acceptance by Vendor**
>
> The Vendor may accept the Purchaser's offer to sell the Property by delivering to the Lessor within 30 days of receipt of the Resale

Contract:

(a) the Resale Contract duly executed by the Vendor as purchaser and completed by the insertion of:

(i) the name, address and facsimile number of the Vendor as purchaser;

(ii) the name, address and facsimile number of the solicitor(s) for the Vendor as purchaser's solicitor; and

(iii) the Acceptance Date as the date of the Contract; and

(b) a cheque for the deposit payable under the Resale Contract, drawn in favour of the person named as stakeholder in the Resale Contract.

20.4 Consequences of acceptance

If the Vendor accepts the Purchaser's offer in accordance with clause 20.2:

(a) on the date of delivery of the executed Resale Contract to the Purchaser, the Vendor and the Purchaser will be taken to have entered into a contract in the form of the Resale Contract; and

(b) the Purchaser shall, within 7 days after the Acceptance Date, duly execute and deliver to the Vendor or the Vendor's solicitor(s) a counterpart of the Resale Contract completed as set out in clause 20.3.

20.5 Non-acceptance by Vendor

If the Vendor does not accept the Purchaser's offer in accordance with clause 20.2:

(a) the Vendor will be taken to have rejected the offer;

(b) the Purchaser's offer will be taken to have been withdrawn; and

(c) subject to clause 20.6, the Purchaser may sell the Property to any other person for the price and on the conditions contained in the Resale Contract.

20.6 Altered price or conditions

If the Purchaser intends to sell the Property to another person for a lower price or on conditions more favourable to that person than those contained in the Resale Contract, the Purchaser shall make an offer to sell the Property to the Vendor for that lower price and/or on those more favourable conditions, and the provisions of this clause shall apply to that offer.

20.7 Exceptions

This clause 20 shall not apply:

(a) to a sale of the Property by public auction where the Vendor has been given no less then [*sic*] 28 days' prior written notice of that auction or to a sale of the Property by private treaty which takes place within 14 days after that auction;

(b) to a sale to a related body corporate (as defined in the Corporations Law) of the Purchaser.

20.8 Purchaser's Obligations on Sale

If the Purchaser after complying with the other provisions of this clause sells the Property to a purchaser other than the Vendor, the Purchaser must at the Purchaser's expense procure that purchaser to enter into a deed between the Vendor and the purchaser to the effect that the purchaser covenants with the Vendor to be bound by:

(a) this clause 20;

(b) the last paragraph of clause 5.1;

(c) clause 17; and

(d) clause 19,

as if that purchaser had executed this Contract as Purchaser.'

[13] In particular the dispute turns upon the proper construction of cl 20.2. The purchaser is, of course, the respondent and the applicant is the vendor. The development period referred to in the subclause is five years from either 20 or 23 October 2000. The development period will have come to an end before either respondent can exercise the contemplated call option.

[14] The applicant sees in a number of the other terms of the contract indications relevant to the construction of cl 20. Generally speaking those other clauses require a degree of co-operation between applicant and respondent to allow the applicant to continue with its residential development which may have some adverse impact upon the operation of a golf course, and for the completion of the golf course facilities, particularly the clubhouse, to a standard that would enhance the attractiveness of the residential development and provide social and recreational facilities to the residents to a high standard. From these provisions the applicant discerns a contractual intention that the parties were to enjoy a 'symbiotic relationship' such that 'if both enterprises went well, they would benefit each other; if either went badly they had the great potential to hurt each other … a lot of things … required co-operation … so the contract was drafted … to protect both parties from the vulnerability that they had because of this symbiotic relationship.' I do not think it necessary to set out the contractual provisions which are said to establish this relationship which in turn is submitted to give rise to the need to construe cl 20 to protect the applicant against its vulnerability should the golf course be transferred to someone the applicant regards as unsatisfactory. I see no real substance in this particular argument.

[15] On 26 October 2004 I ordered that certain questions concerning the construction of the contract be decided separately from the other questions in the proceedings. The questions to be determined now are:

> (1) 'whether, upon the true construction of the Contract, the First Respondent is lawfully entitled to contract with the Second Respondent for the transfer of "the Property" (within the meaning of clause 20.1 of the Contract):
>
> (i) if the proposed contract provides that the transfer is for non-monetary consideration moving from the proposed transferee, such as the transfer of another parcel of land;
>
> (ii) if the proposed contract does not require completion of the transfer to occur during the Development Period;
>
> (iii) where the First Respondent has not first offered that property to the Applicant pursuant to clause 20.2 of the Contract.'
>
> (2) 'whether, upon the true construction of the Contract, an "intention to sell the Property during the Development Period" (within the meaning of clause 20.2 of the Contract) includes

an intention during the Development Period to transfer the Property:

(i) for non-monetary consideration only;
(ii) on terms that completion is to occur after the Development Period;
(iii) where all terms on which an offer to the transferee capable of acceptance by the transferee have not yet been determined by the First Respondent;
(iv) where all terms of the proposed offer have not yet been agreed with a proposed transferee.'

(3) 'whether, upon the true construction of the Contract, a "Resale Contract" within the meaning of clause 20.1 can properly include a term which requires the Applicant to transfer to the First Respondent a property, such as the Second Respondent's golf course, which the Applicant:
(i) does not own;
(ii) does not have the right to acquire;
(iii) could not acquire on terms reasonably satisfactory to the Applicant.'

(4) 'if "no" to [(3)], whether clause 20.2 prevents the First Respondents from disposing of the Property otherwise than by sale for a cash consideration.'

[16] The parties' submissions raise four main points. They are:

(a) Whether the making of a contract in the terms of the proposed call option is caught by cl 20.2 which applies where the respondent 'intends to sell' the golf course.

(b) Whether the clause applies to a transaction in which the conveyance of The Glades Golf Course would not occur until after 23 October 2005 though the antecedent agreement to convey may have been made earlier.

(c) Whether the clause prevents the respondent agreeing to sell its golf course before offering to sell it to the applicant or whether the clause is complied with if the offer to the applicant is made at any time before the actual sale, i.e. conveyance of the golf course to a transferee.

(d) Whether cl 20.2 gives rise to an implied promise not to dispose of the golf course without first offering to sell it to the applicant.

[17] The starting point for the exercise of ascertaining the proper meaning of cl 20.2 is to have regard to the words of the clause itself read, of course, in the context of the whole contract. It is appropriate to regard more than just the 'internal linguistic considerations' of the contract. One may consider the circumstances with reference to which the words in question were used, and may use those circumstances to discern the commercial purpose the parties meant to achieve by their contract. An appreciation of the commercial purpose of a contract presupposes knowledge of the genesis of the transaction, its background and context and the market in which the parties are operating. I take these principles from the judgments in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 paras 10 and 69. I give heed to the respondents' counsel's warning based on the judgment of Lord Wright in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 130 that judicial decisions on the construction of particular contracts do not embody rules of law. They may be helpful by way of analogy or illustration but the construction of a particular contract must depend on a consideration of its own language read in the light of the material circumstances of the parties when the contract was made.

[18] Clause 20 is entitled 'Right of First Refusal' although those words do not appear in the clause itself. Clause 1.2 of the contract proclaims that headings are for convenience only and do not affect interpretation. Nevertheless cl 20.2 is a term of a type commonly found in contracts that deal with real property and although each such clause must be construed according to its own language and contractual context there are authorities which do provide elucidation, in general, on the meaning and operation of such clauses.

[19] Street J described a right of first refusal in *Mackay v Wilson* (1947) 47 SR (NSW) 315 and 325:

> 'But an agreement to give "the first refusal" or "a right of pre-emption" confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself it imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer, which he also may accept or not as he wishes.'

[20] This passage was said by the New South Wales Court of Appeal in *Goldmaster Homes Pty Ltd v Johnson* [2004] NSWCA 144 not to be authoritative because it was *obiter dicta* and the other judges, Davidson J and Jordan CJ did not endorse it. However it was accepted as correct by Goff LJ in *Pritchard v Briggs* [1980] 1 Ch 338, and is reproduced *verbatim* in *Halsbury's Laws of England*, 4th edition, volume 22 at para 26 as an accurate statement of the law. As Young J pointed out in *Beneficial Finance Corporation Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510 at 525 *Pritchard v Briggs* has been soundly criticised. I still regard the passage from *Mackay v Wilson* as an accurate exposition. I accept it as such.

[21] In *Woodroffe v Box* (1954) 92 CLR 245 Fullagar and Kitto JJ said (257):

> 'The term "first refusal" is not a technical term. It is a colloquial term, and indeed a somewhat inept term, because what the potential offeree wants is an opportunity of *accepting* an offer rather than an opportunity of refusing an offer. It may, and does, occur in various phrases … And these phrases may be found in various contexts. It seems clear that a mere promise to give the first refusal should be taken prima facie as conferring no more than a pre-emptive right. If I promise to give you the first refusal of my property, I am making prima facie only a negative promise: I am saying: "I will not sell my property unless and until I have offered it to you and you have refused it." But the whole of the burden of justifying this interpretation rests … upon the word "first".'

Their Honours said later (258):

> 'The truth is, indeed, that, in dealing with such a loose and colloquial expression, it may often be a mistake to cling strongly to a preconceived meaning. The safer and sounder course is to regard it as an expression of fairly flexible input, to look at the whole of what the parties to instrument have said, and in the light of that whole to determine [what contract the parties have made]'.

[22] The import of this caution with respect to contractual promises to confer a right of pre-emption or, 'first refusal', is the same as that expressed with more general reference to the construction of contracts by Lord Wright.

[23] The first point to decide is whether cl 20.2 is called into operation by the respondents' manifested intention to dispose of the golf course by making the call option agreement with the respondent. That agreement is not in its terms a contract to sell the land, and entering into the contract will certainly not effect a sale of the property. The clause provides that if the respondent intends to sell the property during the development period it shall first offer to sell it to the applicant. Has the respondent evinced an intention to sell the property by negotiating the call option agreement? A sale, according to *Halsbury's Laws of England*, 4th ed, volume 41, para 601, is the transfer by mutual assent of the ownership of a thing from one person to another for a money price. Where the consideration for the transfer consists of other goods or some other valuable consideration (not being money) the transaction is called exchange or barter. However the authors contend, by reference to a number of cases, most of which are quite old, that a contract to acquire goods in consideration of money and other goods on which a fixed value was put may be treated as one of sale for the aggregate sum of the price. Other cases suggest that the contract may also be one of sale even when no fixed value is put on the goods delivered in part exchange.

[24] One of the cases cited is *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 in which a majority of the House of Lords held that contracts to sell gramophone records for

a small sum of money and three chocolate bar wrappers were contracts of sale. The wrappers were of no value but to acquire them to tender as part of the price for which the chocolate company would sell the records the purchaser first had to buy the chocolate maker's confectionary. The authors of *Benjamin's Sale of Goods*, 5th ed at para 1-035 appear to agree with this assertion. It is pointed out at para 1-037 that a transaction may be treated as a sale if it is possible to discern 'a element of price' in the consideration.

[25] In *G J Dawson (Clapham) Ltd v H & G Duttfield* [1936] 2 All ER 232 Hilbery J held that a contract by which the plaintiffs agreed to supply two second hand motor lorries to the defendants for £435, £250 of which were to be paid in cash and the balance by the delivery from the defendants to the plaintiffs of two other lorries was an entire contract for the sale by the plaintiffs of the two trucks.

[26] The import of the decisions and their analysis by *Halsbury* and *Benjamin* is that if the consideration for the transfer of property is expressed to be a money sum the transaction is a sale even though the consideration may be satisfied in part by exchange of property. It is not necessary to decide whether a contract for the conveyance of the Surfers Paradise Golf Course to the respondent in consideration of $20,000,000 and the transfer of The Glades Golf Course to the second respondent would be a sale. It may well be, but that is not the agreement the respondents have in fact made. The call option agreement which is proposed is not a sale, nor a contract for sale, though such a contract may follow from the performance of the call option agreement.

[27] The notice of a sale was considered by Upjohn J in *Robshaw Brothers Ltd v Mayer* [1957] 1 Ch 125. Having reviewed the leading texts and authorities his Lordship concluded that the plain *prima facie* meaning of sale or purchase is that of a transfer of property for a money consideration. This 'strict primary meaning' may be displaced depending on the context in which the word sale is employed, but Upjohn J thought that there must be a clear indication in the context that 'sale' was intended to cover transfers of property for money's worth, or valuable consideration other than money, before the primary meaning was displaced.

[28] *Robshaw* and its approach to construction was approved by McPherson J in *Francis & Others v NPD Property Development P/L* [2004] QCA 343 at paras 14-16 where it was pointed out, *inter alia*, that cases decided under the Stamp Acts which have given a wider meaning to 'sale' are of no real use outside their own context in determining what meaning is to be given to the expressions 'sale' or 'contracts for sale'.

[29] The applicant submits that when cl 20.2 speaks of an intention to sell the contractual context requires that the clause relates to any disposition of the property. It is urged that the uncontested facts do not suggest any reason why the parties would have been concerned to distinguish a sale in the technical legal sense from any other disposition. Rather it is submitted the facts suggest that the parties were concerned about a change in ownership of the golf course land however that came about. Furthermore to restrict the clause to cases where the respondent intended to sell the

golf course, in the strict sense, but not to other modes of disposition, would not fulfil any commercial purposes but on the contrary detract from the commercial purpose of protecting the applicant against the risks involved should there be a change in owner and operator of the golf course. The applicant also submits that its construction avoids the 'capricious' result which would follow if the clause should apply only to particular forms of disposition of the golf course. It is pointed out that the contract prepared by the second respondent's solicitors pursuant to its special resolution effected the exchange of the property by way of two separate contracts of sale, i.e. a conveyance in return for money. It is also pointed out that the respondent's construction of the clause would allow its evident purpose to be evaded.

[30] The respondent in answer submits that these arguments are insufficient to displace the plain meaning of the word 'sale' in cl 20.2. In elaboration the respondent points to that part of the clause which deals with the resale contract. The respondent must first offer to sell the property to the vendor 'by delivering a form of resale contract' to it. This is 'a contract for sale of land specifying the property being sold, the sale price and the conditions on which the [respondent] intends to sell.' By cl 20.5 if the applicant does not accept the offer constituted by the resale contract the respondent may sell the golf course to any other person 'for the price and on the conditions contained in the resale contract.' By cl 20.6 if the respondent intends to sell the property to someone other than the applicant 'for a lower price or on conditions more favourable … than those contained in the Resale Contract' the respondent must offer to sell at that price and on those conditions to the applicant.

[31] The definition of 'resale contract' and the mechanism provided by cl 20.5 and cl 20.6 suggest that cl 20.2 comes into play only when the respondent intends to sell the golf course, giving 'sell' its primary legal meaning. The provisions relating to the resale contract require it to set out the terms, including price, on which the respondent intends to dispose of the property. Clause 20.2 calls on the respondent to offer to sell to the applicant on those same terms. There is no doubt the resale contract contemplates a sale in the strict sense. There is, perhaps, good reason to think the word 'sell' where it appears twice in cl 20.2 should have the same meaning on each occasion. The price and conditions which the resale contract must contain are those 'on which the [respondent] intends to sell'. This phrase clearly refers to the opening words of cl 20.2 as suggesting that the resale contract is only called for where the respondent intends to sell, and not to dispose of the golf course in some other way.

[32] The applicant's response to the submission is that the provisions dealing with resale contracts can work without difficulty whether the respondent's intention is to dispose of the golf course by any means, whether by sale, exchange or gift. The submission is that in the event of an intention being formed to dispose of the property the respondent must formulate an offer to sell the property to the applicant by setting out the terms on which it is prepared to sell in a resale contract.

[33] There is force in both submissions. Both are persuasive. If anything the attraction of the respondent's submissions is greater. The contract was prepared by a leading firm of commercial solicitors who presumably understood what constituted a sale.

The word has a precise legal meaning and it is not unreasonable to suppose that the parties intended the contract between them to be expressed with precision. One needs something compelling in the context to give the word 'sale' a meaning other than its primary one.

[34] In my opinion the answer to the proper construction of cl 20.2 is to be found in the nature and scope of the implied negative promise to which the clause gives rise. There is no doubt there is such an implied promise: the authority of the High Court and of Street J establishes its existence. Its origin is apparently to be found in the doctrine of the law of contract which obliges parties to a contract not to do anything which would make the performance of their bargain impossible. The point was expressed by Lord Atkin in *Southern Founderies (1926) Ld v Shirlaw* [1940] AC 701 at 717. The respondent's term of employment as managing director of the appellant was terminated as a consequence of being removed as a director. He sued for wrongful dismissal. Lord Atkin said:

> 'Thus the contract of employment for the term of ten years was dependant upon the managing director continuing to be a director. This continuance of the directorship was a concurrent condition. The arrangement between the parties appears to me to be exactly described by the words of Cockburn C.J. in *Stirling v Maitland* [5 B. & S. 840, 852]: "If a party "enters into an arrangement which can only take effect by the "continuance of an existing state of circumstances"; and in such a state of things the Lord Chief Justice said: "I look on the "law to be that … there is an implied engagement on his part "that he shall do nothing of his own motion to put an end to "that state of circumstances, under which alone the arrangement can be operative." That proposition in my opinion is well established law. Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself "of his own motion" brining about the impossibility of performance is in itself a breach.'

[35] If cl 20.2 is to confer a right of pre-emption of real value on the applicant the respondent must offer to sell the land to the applicant before disposing of it. If the respondent were to give the land away or to contrive a mode of disposition so it did not constitute a sale the right of pre-emption could be rendered nugatory. For this reason courts have been prepared to extend the implied negative promise to all modes of disposition.

[36] *Gardner v Coutts & Company* [1968] 1 WLR 173 was a case in which the defendant was the executor of a landowner who had sold a property to the plaintiff's predecessor in title. By a separate agreement, which formed part of the same transaction, the landowner promised that if in his lifetime he decided to sell an adjoining property, or if he died still owning the property, the plaintiff's predecessor should have the option of purchasing it for a nominated price. Towards the end of his life the landowner made a gift of the adjoining property to his sister. The

plaintiff brought an action for damages for breach of contract against the estate. In upholding the claim Cross J said (179):

> '… the notion of a first refusal is inconsistent with the idea that the person who has to give the first refusal should be entitled to give the property away without offering it to the other party. In support of that way of looking at a first refusal counsel … referred me to a passage in the case of *Manchester Ship Canal Company v. Manchester Racecourse Company* [[1901] 2 Ch. 37, 51, C.A.]. Vaughan Williams L.J., in giving the judgment of the Court of Appeal, said:
>
> > "The contract here to give the canal company the 'first refusal' involves the negative contract not to part with the land to any other company or person without giving that first refusal."
>
> It is fair to say … that … the Court of Appeal had not the possibility of a gift of the property in mind … and in using the words "not to part with the land" meant no more than not to sell the land.
>
> But in viewing this matter apart from any express authority, I think that it is implicit in a grant of first refusal that the person who has to offer the property to the other party should not be entitled to give it away without offering it and so to defeat the first refusal.'

[37] To the same effect is the decision in *Esso Australia Ltd v Air Ride Transportation Pty Ltd and Mobil Oil Australia Ltd*, an unreported decision of Marks J in the Supreme Court of Victoria, 28 September 1988 (BC 8800555). The first defendant was the proprietor of a service station. It contracted with the plaintiff that in the event it decided to sell the freehold on which the service station stood it would notify Esso prior to entering into a contract of sale, giving notice of the price and terms upon which it proposed to sell the land, and Esso should have the first right of refusal to buy the land on those terms. Without giving adequate notice the first defendant granted Mobil Oil an irrevocable option to purchase the freehold for a price of $1,570,000. The option was duly exercised and the plaintiff sued for damages for breach of the contractual right of pre-emption. Marks J was prepared to accept the submission that the option was not a contract of sale, but rejected the submission that the pre-emption agreement required the first defendant to give notice to the plaintiff only in the case where it proposed to enter into a contract of sale. His Honour said (at 20):

> 'It is undeniable that the common intention of the parties to the Loan Agreement was that in the event of Air Ride deciding to sell the freehold Esso was to be provided with an opportunity to buy it on terms acceptable to Air Ride before other would-be buyers. The right of Esso is not merely to receive notification but also to accept an offer to purchase. This clear common intention would be defeated

> if the interpretation for which [the first defendant] contended were adopted.'

He referred to the judgment of Lord Atkin in *Shirlaw* and went on (at 22):

> '… these authorities show that to establish breach by Air Ride … it is unnecessary to imply any terms. I think that this submission is correct. … The grant of the … option to Mobil was simply a breach … by Air Ride of its obligations first to offer the freehold for purchase by Esso. It is true that in the analogous case of Gardner v Cootes … Cross, J, chose to rely on an implied term … However the result in Gardner … is strongly confirmatory that Air Ride in this case committed a breach of contract. … Cross, J, … said …:
>
> "… I think it is implicit in a grant of first refusal that the person who has to offer the property to the other party should not be entitled to give it away without offering it and so defeat the first refusal." '.

[38] These decisions appear to me to be eminently sensible. I cannot readily see any reason why I should not follow them. Nor can I see any objection to the basis for there being an implied contractual term not to render performance of the contract impossible by parting with the property in such a way as to defeat the right of pre-emption. But whether by way of implied term or positive legal obligation the result is the same. The cases refute the respondent's submission that the implied negative promise was one limited to selling the property. The respondent had argued that the only prohibition to be found in cl 20.2 was that it should not sell the property without first offering it to the applicant. It resisted the notion that the prohibition extended to other modes of disposition. The cases are against that proposition.

[39] The consequence is, I think, that the applicant's construction of the phrase 'intend to sell' should be accepted. If 'sell' in this instance is taken to mean 'dispose of' or 'alienate' the clause is consistent with the extent of the implied negative promise which extends to such modes of disposition.

[40] It cannot seriously be doubted that the respondent intends to dispose of its golf course. Its solicitor has admitted as much and the negotiations with the second respondent and the preparation of the draft call option agreement make the intention plain.

[41] Nevertheless the respondent submits that it did not have to 'first offer' to sell the property to the applicant by delivering a form of resale contract. This is for the reason that it does not intend to dispose of the property until after the expiration of the development period. The submission is that cl 20.2 applies only to an intention to make a disposition of the property within the period and the clause does not apply in circumstances where the intention to dispose of the property occurs within the period but the intention is to effect the disposition outside the period. The relevant words are 'if the [respondent] intends to sell … during the development period …'.

The respondent argues that the temporal qualification 'during the development period', applies to the sale (or other disposition) of the property not to the formation of the intention to sell. If that were meant the respondent submits that cl 20.2 would have read:

> 'If the [respondent] intends, during the Development Period, to sell the Property …'

[42] I cannot accept the submissions. It is, I think, clear from the analysis in *Woodroffe* that the effect of a pre-emption is that the promisor says "I will not sell my property unless and until I have offered it to you and you have refused it." The respondent wishes to limit the scope of cl 20.2 to contracts of sale which will settle outside the development period no matter when the intention to sell was formed or, for that matter, when the contract was made. The submission is a vehicle for the avoidance of the clause. If accepted the respondent could, the day after it had contracted in terms of cl 20.2, agree to sell the golf course to a third party with a settlement set to occur the day after the expiration of the development period. The whole point of the pre-emption is to allow the applicant to purchase, on the terms set out in a resale contract, in priority to the land being offered to anyone else. Accordingly the temporal limitation must apply to the formation of the intention not to the date of settlement of any contract of sale.

[43] The respondent made a further point which was not articulated with any great clarity. It was, as I understood it, that the respondent's obligation to 'first offer' to sell the golf course to the applicant meant no more than the offer must be made before the golf course was actually sold to a third party. In the submission 'sale' is given its technical meaning of conveyance and transfer of property. This is said to follow from the use of the word 'sell' in the opening phrase of cl 20.2. It involves giving that word its technical legal meaning and involves building on that meaning by saying that the sale is the only event before which the offer to sell to the applicant must be made.

[44] This cannot be right. For a start I have found that the word 'sell' in the opening phrase of the clause means 'dispose of'. Secondly the submission is an invitation to disregard the clause altogether. The respondent cannot offer to sell a property to the applicant if it has bound itself to sell to someone else. As I have just said the whole point of the pre-emption is to oblige the respondent to offer the golf course for sale to the applicant before offering it to any others.

[45] This leaves for consideration only the contents of any resale contract which, on the construction I have put on cl 20.2, the respondent must offer to the applicant prior to executing any contract to dispose of the golf course to the second respondent. The point is that the resale contract cannot readily replicate the terms of the transaction proposed between the respondents. The respondent does not intend a straightforward sale of its golf course. By the transaction it intends to acquire the second respondent's land which it will develop for a profit, no doubt a substantial one. By the terms of the proposed agreement the respondent will dispose of its golf course in return for which, together with the payment of $20,000,000, it will acquire

a large development site. The question the parties ask the court to answer is whether the respondent may make a condition of the resale contract if proffers to the applicant that the applicant deliver to it, as part of the consideration for the purchase of The Glades Golf Course, the Surfers Paradise Golf Course land. If the resale contract could contain such a condition it would pose obvious difficulties for the applicant to accept.

[46] There are authorities which suggest that the resale contract may not contain such a condition. In *Fimiston Mining NL v Western Reefs Ltd & Ors*, an unreported decision of the Supreme Court of Western Australia (Steytler J, No 1655 of 1995, 22 November 1995, BC 9506587), the parties to a mining joint venture agreed that neither of them would transfer all or part of its interest in the mining tenements until the interest were first offered in writing to the other parties. One of the parties proposed to dispose of its interest to a third party, a company, in exchange for $200,000 and 3,000,000 shares in the company. It made an offer to its joint venturer offering to transfer its interest in the tenements for the same consideration, i.e. $200,000 and 3,000,000 shares in the third party. Steytler J held that the pre-emption, which included a term that the offer by one joint venturer to the other should set out the purchase price for which the offeror would effect the transfer, meant that a price had to be specified which was 'not so structured as to make it impractical for anyone other than a specific third party to satisfy it.'

[47] *Simsmetal Ltd v Wanless Metal Industries Pty Ltd & Ors*, an unreported decision of the Supreme Court of New South Wales (Cohen J, No 1357 of 1997, 19 March 1997, BC 9700743), concerned a right of pre-emption by which the defendant, which conducted a scrap metal business in Queensland, if it proposed to sell its business would first give the plaintiff notice in writing of all the terms and conditions upon which it proposed to make the sale and the notice was to constitute an offer by the defendant to the plaintiff to purchase the business on the same terms and conditions. The defendant negotiated for the sale of its business to a third party on terms which included an issue of shares by that third party to that defendant and the appointment of a director of the defendant to a senior management position with the third party. In purported conformity with the contract between them the first defendant offered to sell its business to the plaintiff on the same terms which, of course, the plaintiff could not accept. It could not issue shares in the third party and it could not procure the director's employment by the third party. Cohen J said (14):

> '… a notice to contain the terms and conditions upon which the grantor proposes to sell … is also required … to be an offer. It therefore has a dual role, and in the second category it must be in terms which permit acceptance in order to create a contract. If the so-called offer contains conditions which the grantee cannot comply with because they are extraneous to any relationship which it might have with the grantor and are personal to another proposed purchaser, then the balance of [the clause] can never be brought into operation.'

[48] Similarly in Re *A lease between Permanent Trustee Australia Ltd and Woolworths (Q'land) Pty Ltd*, an unreported decision of the Supreme Court of Queensland (Moynihan J, No 9507 of 1998, 6 November 1998, BC 9805880), Moynihan J had to construe a clause which required a lessor who desired to sell the demised premises during the term of the lease to first give notice in writing to the lessee of its desire to sell together with a contract 'containing the terms and conditions upon which the subject premises are offered to the lessee for sale …'. The lessor wished to sell the demised premises, and an adjacent property which it also owned, to a developer. It accordingly gave notice to the lessee offering to sell it the demised premises together with the adjacent premises. The contract of sale which accompanied the notice contained a condition that the purchase was to be of both properties. Moynihan J held that (para [6]):

> '… the proper function of conditions of sale for land is to set out the terms on which the land is sold … . In other words, the terms and conditions referred to in [a pre-emption clause] are ancillary to, but necessary to give effect to a contract for sale of the subject premises. The provision does not authorise the respondents including the sale of land other than the subject premises as a condition of sale of that land.'

[49] I see no reason not to follow these cases. Their acceptance prevents the erosion of the right conferred by the grant of a pre-emption and tends to preserve the bargain made by parties who agreed to give and receive a 'right of first refusal'.

[50] It follows that the respondent may not include as a condition of the resale contract it submits to the applicant that the applicant deliver title to the Surfers Paradise Golf Course land. The terms and conditions including those as to price contained in the resale contract must be such as to be capable of acceptance by the applicant. This is not to say, as Cohen J pointed out in *Simsmetal*, that the terms and conditions may not be onerous, or even harsh, or the price so high as to prove difficult for the applicant to pay. What makes an offer incapable of acceptance in this context 'is a condition which can only be fulfilled by a person … which is not the grantee' of the pre-emption. Such a condition is one which is 'extraneous to any relationship which it might have with the grantor and is personal to another proposed purchaser.'

[51] This conclusion, together with the terms of cl 20.5(c) and cl 20.6 indicates that if the applicant does not accept the offer contained in the resale contract the respondent's right to sell the golf course by private treaty is limited to a sale on the terms and conditions set out in the resale contract. Clause 20.5(c) is worded permissively but the context requires it to be understood as saying that the applicant 'may *only* sell' on those conditions. The respondent does not have to sell. It may await the expiration of the development period or it may take advantage of the terms of cl 20.7 and sell by public auction.

[52] In setting the price in the resale contract the respondent is entitled to have regard to the particular value to it of its golf course. Because of the second respondent's apparent desire to relocate the respondent has an opportunity to acquire valuable

development land. Clause 20.2, I have held, obliges the respondent to offer The Glades Golf Course to the applicant before it can dispose of the land to the second respondent, but it does not follow that the price at which it must offer the golf course to the applicant must ignore the respondent's particular circumstances. The price can reflect the profit the respondent would anticipate from the acquisition and development of the Surfers Paradise Golf Course land. No doubt the profit would have to be discounted to allow for immediate receipt and the avoidance of the risk inherent in the development, but so adjusted the price can contain that profit element as well as the intrinsic value of the golf course itself.

[53] The answers to the questions posed are:

1. No
2. Yes
3. No
4. Yes

[54] I should perhaps mention that the parties did not concentrate any attention on those parts of question 2 found in paras (iii) and (iv). It was said briefly by the respondent that there could not be an intention to sell so as to enliven the operation of cl 20.2 unless the respondent had formulated with some precision the terms of which it would sell the golf course. Whether or not this is right as an abstract proposition is of little relevance in the present case where the respondent has considered in great detail the terms on which is it proposed to part with the golf course and has set them forth in the call option agreement.