SUPREME COURT OF QUEENSLAND

CITATION:	*Gheko Developments P/L v Azzopardi & Anor* [2005] QCA 283
PARTIES:	**GHEKO DEVELOPMENTS PTY LTD** ACN 105 201 563 (plaintiff/respondent) **v** **PHILIP AZZOPARDI and PAULINE AZZOPARDI** (defendants/appellants)
FILE NO/S:	Appeal No 274 of 2005 SC No 3249 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2005
JUDGES:	McMurdo P, McPherson and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed with costs** **2. Orders below set aside** **3. Judgment to be given in favour of the defendants in proceedings BS3249 of 2004 together with costs of and incidental to those proceedings including reserved costs if any**
CATCHWORDS:	ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS - COMMENCEMENT OF CONSENT - where appellants had agreed to sell a parcel of land to the respondent - where a condition of the contract of sale was that the respondent had an obligation to pay $50,000 to the appellants as a deposit within seven days of receiving a "development approval … which is satisfactory to [the respondent] in all respects" - where the respondent received a decision notice from the relevant local authority approving development but engaged in further negotiations with the local authority as to the nature of the conditions attached to the approval - where negotiations did not conclude until more than seven days after the decision notice had been received - where no changes were made to the conditions as a result of

these negotiations - whether the time limit of seven days began to run as soon as the decision notice was received or only once the respondent had made it clear that it would take no further steps to attempt to alter the substantive terms of the notice - whether the respondent had breached the terms of the contract of sale

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - REPUDIATION AND NON-PERFORMANCE - WHAT AMOUNTS TO REPUDIATION - where appellants had agreed to sell a parcel of land to the respondent - where a condition of the contract of sale was that the respondent had an obligation to pay "$50,000.00 to the Seller" once certain conditions had been satisfied - where respondent made payment to the appellants' real estate agent rather than directly to the appellants - where the payment to the real estate agent was the only payment made within the applicable time limit - where the appellants' real estate agent was named as the "Deposit Holder" in the contract of sale while the appellants were named as the "Seller" - whether the respondent had satisfied the condition contained in the contract of sale by paying the deposit to the appellants' real estate agent rather than directly to the appellants

Integrated Planning Act 1997 (Qld), s 3.5.19

Brien v Dwyer (1978) 141 CLR 378, applied
Codelfa Construction Pty Ltd v State Rail Authority (1982) 149 CLR 337, cited
Gange v Sullivan (1966) 116 CLR 418, cited
Hayes v Walker [2004] QCA 288; (2004) 134 LGERA 290, considered
Meehan v Jones (1982) 149 CLR 571, cited
Sorrell v Finch [1977] AC 728, applied

COUNSEL: S S W Couper SC, with P T Morrow, for the appellants
P J Flanagan SC, with P W Hackett, for the respondent

SOLICITORS: Linda Phelps & Company for the appellants
Colwell Wright for the respondent

[1] **McMURDO P:** The appeal should be allowed for the reasons given by McPherson JA and Keane JA. I agree with the orders they propose.

[2] **McPHERSON JA:** Philip Azzopardi and Pauline Azzopardi are the appellants in this appeal against summary judgment given against them for specific performance of a contract dated 18 August 2003 for the sale by them to the respondent Gheko Developments Pty Ltd of land at Elimbah for $1,350,000.00. Relevant terms of the contract are set out in full in the reasons of Keane JA which I have had the advantage of reading.

[3] For present purposes it is enough to refer to the following special conditions of contract:

> "1. This Contract is subject to the buyer paying in full a deposit of $1000 to the Seller within 24 hours of the Buyer signing this contract.
>
> 2. This is subject to and conditional upon the Buyer satisfying themselves within 180 days from date of this contract of the following.
>
> 3. The property described herein is capable of subdivision into residential lots on terms and conditions satisfactory to the Buyer in all respects.
>
> If at any time within the above-specified 180 days the purchaser forms the opinion that the terms and conditions likely to apply to the property will be unsatisfactory, the Buyer may terminate this contract by written notice to the Seller's solicitors and any deposit paid shall be returned to the Buyer.
>
> The Purchaser shall apply in a speedy manner to the Local Government, application for subdivision approval, in the event that approvals are not obtained or require negotiation between the Buyer and Local Government, then in that event the Seller agrees to allow a further 60 days.
>
> In the event that no notice is given to the Seller's solicitors under Clause 2 herein by 5 pm within the time periods specified above, this clause shall be deemed acceptable to the Buyer and will cease to be a condition of this contract."

[4] The deposit in special condition 1 was duly paid to the trust account of Ray White Caboolture/Morayfield, which or who was designated the "Deposit Holder" under the contract. The effect of special conditions 2 and 3 was to allow the buyer Gheko until 14 February 2004 within which to satisfy itself that the land was capable of subdivision into residential lots "on terms and conditions satisfactory to the Buyer in all respects". Before that date arrived, the buyer's solicitors on 4 February 2004 wrote to the sellers' solicitor requesting under special condition 3 an extension for a further 60 days of the time for obtaining subdivisional approval from the Caboolture Shire Council, which was the relevant local government. In response, the sellers' solicitors confirmed in writing that the requested extension was "agreed in accordance with the contract". This took it to 16 April 2004. Before then, however, the buyer's solicitors on 4 March 2004 advised that the buyer had instructed that "they are now satisfied with the conditions of the Development Approval received from the … Council", and that the balance deposit would be paid on 5 March 2004.

[5] The effect of a contractual provision or provisions in the form of special conditions 1, 2 and 3 is, subject to particular terms of the agreement in question, now well settled in Australia by authorities too numerous to mention. In general, it invests the buyer with an option to "avoid" or, as here, to "terminate" the contract if not satisfied with the terms and conditions on which, in this case, the land is able to

be subdivided. See, for example, *Gange v Sullivan* (1966) 116 CLR 418, 429-441; and cf *Meehan v Jones* (1982) 149 CLR 571. In some cases there would, one would expect, be an implied obligation on the buyer to inform the seller that it was satisfied or not with the terms of the approval obtained. In this instance, it is not necessary to decide this question or to consider the character or quality (whether honestly, or honestly and reasonably) which must be evinced by the buyer; because, as we have seen, the buyer Gheko through its solicitors on 4 March 2004 in fact expressed itself satisfied with the conditions of the development approval received from the Council. If it had not done so, but had simply done nothing, the special condition would under the fourth paragraph of special condition 3 have ceased to be available and the contract would in this respect have become unconditional.

[6] In resisting the claim for specific performance the sellers at the hearing in the Supreme Court claimed to have validly terminated the contract by letter dated 19 March 2004 from their solicitors. They did so on two alternative grounds, one of which was the buyer had not by 25 February 2004 paid the sum of $50,000; and the other that it had in any event paid that sum not to the sellers themselves but to their estate agent Ray White. To understand the significance of these contentions, it is necessary to set out the terms of cl 7 of the special conditions of contract. They are that:

> "7. The deposit herein has been paid as follows:
>
> 7.1 As to $1,000.00 to trust account of Ray White Caboolture/Morayfield which will be held pursuant to the terms and conditions attaching to this contract of sale;
>
> 7.2 As to $50,000.00 to the Seller within seven days after the Purchasers receive development approval from the Caboolture Shire Council which is satisfactory to the Purchasers in all respects. This will be paid on as a non-refundable deposit and is not held by the Seller pursuant to the provisions of Clause 2 of the Standard Conditions. The Buyer has no further claim on the deposit."

[7] There is a degree of incongruity in the opening words of special condition cl 7 where it says that the deposit "has been paid" when the deposit of $50,000 was still to be paid; but nothing is affected by that drafting solecism. The first of the two grounds for termination is based on the fact that the Council's decision conveying its decision, subject to specified conditions, to approve the subdivision was communicated by letter dated 16 February 2004 to the buyer. On this footing, it was argued that the period in special condition 7.2 "after the Purchasers receive development approval from the … Council" commenced to run on that date, and so expired on 25 February 2004, whereas the $50,000 deposit had, in breach of contract, not been paid within that time but only on 5 March 2004. This led the parties to turn to provisions of the *Integrated Planning Act 1997* and, in particular s 3.5.19 thereof, in order to determine when it was that the requisite approval to develop by subdividing took effect under the Act.

[8] With respect, however, this inquiry seems to me to involve an unnecessary and indeed illegitimate departure from the terms of the parties' contract itself. Relevant provisions of the *Integrated Planning Act* may fairly be considered as part of the factual including legislative matrix in which the contractual provisions are placed

and are to be understood as operating, in the sense that that is discussed in *Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337, 351-352. It is, however, quite another matter to treat sections of the Act (notably those of s 3.5.19 stating when approval takes effect) as incorporated in and definitive of the obligations of the parties under the contract. If that was what they had intended, it is reasonable to suppose they would have so provided in their contract.

[9] In any event, in arriving at the meaning and effect of special condition 7.2, there is no occasion to resort to the Act in order to determine the proper interpretation of the relevant contractual obligation. Clause 7.2 speaks not of a "development approval" in the abstract but of a "development approval from the … Council which is satisfactory to the Purchasers in all respects". It thus defines the approval not in terms of s 3.5.19 of the Act, but of the buyer's state of satisfaction with respect to the form of approval received from the Council. Clause 7.2 is ancillary to cl 3 of the special conditions, which also provides that the buyer is to be satisfied of various matters including, under paragraph 1 of cl 3 of those conditions, the subdivisional capability of the land on terms and conditions "satisfactory to the Buyer in all respects". If under the second paragraph of cl 3 the terms and conditions imposed by the Council are likely to prove unsatisfactory, the buyer may terminate the contract by written notice to the seller; but if no such notice is given, the clause is "deemed acceptable to the Buyer" and it ceases to be a condition of the contract. In short, unless within the time specified the buyer gives notice of its dissatisfaction with the terms and conditions of the subdivisional or development approval, the contract will cease to be conditional and so become unconditionally binding on the buyer.

[10] There is therefore no need or occasion to investigate the statutory meaning of development approval, or when under the Act it takes effect. The contractual provisions in the special conditions that define those matters are self-contained. An approval from the Council is deemed to be acceptable unless, in terms of the fourth paragraph of special condition cl 3, notice of the buyer's dissatisfaction is within the specified time given to the sellers' solicitors. Thereupon the contract ceases to be conditional and becomes unconditional.

[11] Here, far from expressing its dissatisfaction with the terms and conditions applicable to the subdivision, the buyer by its solicitor's letter dated 4 March 2004 communicated its satisfaction with the conditions of the development approval received from the Council. That had the consequence of activating the obligation under cl 7.2 to pay the further deposit of $50,000 within seven days of receipt of the approval satisfactory to it. Clause 7.2 of the special conditions provides that the deposit of $50,000 is to be paid "to the Seller". It is to be contrasted with the initial deposit of $1,000 which under cl 7.1 was payable and paid to the trust account of Ray White Caboolture/Morayfield to be held under the terms of the contract. The deposit of $50,000 under cl 7.2 is to be paid as "a non-refundable deposit and is not to be held by the Seller pursuant to the provisions of Clause 2" of the Standard Conditions of contract. The Buyer, declares cl 7.2 of the Special Conditions, is to have "no further claim on the deposit" of $50,000.

[12] It is at this point that matters went wrong for the buyer Gheko. Instead of paying the deposit of $50,000 to the sellers Philip and Pauline Azzopardi, the buyer on 5 March 2004 paid it to the trust account of Ray White Caboolture/Morayfield, who acknowledged receipt of it in a letter of that date to the sellers' solicitors. Why

the step was taken of making the payment to the estate agent and not to the seller does not appear from the record, but it is not suggested that it resulted from anything said or done by the sellers. The learned judge nevertheless considered that the effect of cl 7.1 of the special conditions "was to equate payment to the trust account of Ray White Caboolture/Morayfield with payment to the Seller, at least in relation to payment of $1,000". There is, her Honour said:

> "no reason not to extend that equation to the payment of $50,000. In other words, I do not consider that the plaintiff [buyer] breached its obligations under clause 7.1 by paying the $50,000.00 to the agent to be held on behalf of the defendants".

She reacted in part by reference to special condition 1 requiring payment of the deposit of $1,000 to the Seller, where cl 7.1 of those conditions requires it to be paid to Ray White Caboolture/Morayfield.

[13] I am, with respect, unable to agree. The parties expressly and specifically provided in cl 7.1 that the initial deposit of $1,000 was to be paid to the agent Ray White, whereas by cl 7.2 of the special conditions the sum of $50,000 was to be paid to the seller, meaning Philip and Pauline Azzopardi. The power of an agent to act on behalf of the principal is limited by the terms of the authority conferred, in this case by the terms of the contract itself. There is no general authority in an estate agent to accept a deposit before a contract is made, under an agreement "subject to contract": *Sorrell v Finch* [1977] AC 728; *Brien v Dwyer* (1978) 141 CLR 378, 395. But it is not necessary here to examine the extent of an estate agent's implied authority, if any, to receive a deposit under a contract to sell land. The special conditions of the contract in the present case expressly identify the person or persons to whom the deposit of $50,000 under cl 7.2 is to be payable. It was to be paid to Philip and Pauline Azzopardi as "the Seller". There is nothing in the contract or the clause itself to authorise payment to the estate agent.

[14] It may be and was said that it makes little difference that the deposit was paid to the agent, because it will in the end have to be accounted for to the seller. But it may make a considerable practical difference to the seller whether it or they receive it themselves or it is paid into the agent's trust account, where it is subject to trust obligations imposed by statute and to possible claims for commission. It is, however, not a question of whether payment to the agent can be equated with payment to the principal. Special condition 7.2 is specific about the persons to whom the $50,000 deposit is to be paid. The buyer Gheko did not pay it in conformity with the provisions of cl. 7.2, which is to say that it did not pay it at all or at any time in terms of the contract. Its claim for specific performance therefore cannot succeed.

[15] The appeal should be allowed with costs. The judgment in favour of the plaintiff should be set aside. There should be judgment in favour of the defendants in the proceedings BS3249 of 2004 together with the costs of and incidental to those proceedings including reserved costs if any.

[16] **KEANE JA:** By a contract in writing dated 18 August 2003, the appellants agreed to sell to the respondent a parcel of land at Elimbah for $1.35M. The appellants subsequently purported to terminate the contract. The respondent commenced proceedings to enforce the contract and, on an application by the respondent pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld), the learned

primary judge declared that the purported termination was unlawful and made orders for the specific performance of the contract.[1]

The dispute

[17] The issues before the learned primary judge, and before this Court, revolve around the true construction of the contract entered into by the parties. The material terms of the contract were contained in standard terms and special conditions. The relevant standard terms were as follows:

> "**2.2 Deposit**
>
> (1) The Buyer must pay the Deposit to the Deposit Holder at the times shown in the Reference Schedule. The Deposit Holder will hold the Deposit until a party becomes entitled to it.
>
> (2) The Buyer will be in default if it:
>
> (a) does not pay the Deposit when required;
>
> (b) pays the Deposit by post-dated cheque; or
>
> (c) pays the Deposit by cheque which is dishonoured on presentation.
>
> …
>
> **2.4 Entitlement to Deposit and Interest**
>
> (1) The party entitled to receive the Deposit is:
>
> (a) if this contract settles, the Seller;
>
> (b) if this contract is terminated without default by the Buyer, the Buyer; and
>
> (c) if this contract is terminated owing to the Buyer's default, the Seller.
>
> …
>
> **6. Time**
>
> **6.1** Time is of the essence of this contract, except regarding any agreement between the parties on a time of day for settlement.
>
> …
>
> **9. Buyer's Default**
>
> **9.1 Seller May Affirm or Terminate**
>
> If the Buyer fails to comply with any provision of this contract, the Seller may affirm or terminate this contract.
>
> …
>
> **9.3 If Seller Terminates**
>
> If the Seller terminates this contract under clause 9.1, it may do all or any of the following:
>
> (1) resume possession of the Property;
>
> (2) forfeit the Deposit and interest earned on its investment;
>
> (3) sue the Buyer for damages;
>
> (4) resell the Property.
>
> …
>
> **10. General**
>
> **10.1 Agent**
>
> The Agent is appointed as the Seller's agent to introduce a buyer.
>
> …
>
> **10.8 Interpretation**
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> …

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[1] *Gheko Developments Pty Ltd v Azzopardi & Ors* [2004] QSC 455; SC No 3249 of 2004, 15 December 2004.

(4) Inconsistencies
If there is any inconsistency between any provision added to this contract and the printed provisions, the added provision prevails."

[18] The special conditions of the contract were:

"1. This Contract is subject to the buyer paying in full a deposit of $1000 to the Seller within 24 hours of the Buyer signing this contract.
2. This is subject to and conditional upon the Buyer satisfying themselves within 180 days from date of this contract of the following.
3. The property described herein is capable of subdivision into residential lots on terms and conditions satisfactory to the Buyer in all respects.
If at any time within the above-specified 180 days the purchaser forms the opinion that the terms and conditions likely to apply to the property will be unsatisfactory, the Buyer may terminate this contract by written notice to the Seller's solicitors and any deposit paid shall be returned to the Buyer.
The Purchaser shall apply in a speedy manner to the Local Government, application for subdivision approval, in the event that approvals are not obtained or require negotiation between the Buyer and Local Government, then in that event the Seller agrees to allow a further 60 days.
In the event that no notice is given to the Seller's solicitors under Clause 2 herein by 5pm within the time periods specified above, this clause shall be deemed acceptable to the Buyer and will cease to be a condition of this contract.
…
7. The deposit herein has been paid as follows:
7.1 As to $1,000.00 to trust account of Ray White Caboolture/Morayfield which will be held pursuant to the terms and conditions attaching to this contract of sale;
7.2 As to $50,000.00 to the Seller within seven days after the Purchasers receive development approval from the Caboolture Shire Council which is satisfactory to the Purchasers in all respects. This will be paid on as a non-refundable deposit and is not held by the Seller pursuant to the provisions of Clause 2 of the Standard Conditions. The Buyer has no further claim on the deposit."

[19] The reference schedule which was part of the standard terms contained the following entry against the side heading price:

"Deposit Holder:	Ray White Caboolture/Morayfield
Purchase price:	$1,350,000.00
Deposit:	$1,000.00 payable when Buyer signs this contract. See Special Conditions.
Default Interest Rate:	10%."

[20] It is common ground that the respondent duly paid the deposit contemplated by special condition 7.1 of the contract to the agent, Ray White Caboolture/Morayfield, and that the respondent duly applied to the Caboolture Shire Council for subdivisional approval.

[21] On 16 February 2004 the Council issued a decision notice to the effect that on 10 February 2004 the respondent's application "was approved in full with conditions". The conditions were extensive. The decision notice was received by the respondent on 18 February 2004.

[22] Between 25 February and 4 March 2004 discussions ensued between representatives of the respondent and Council officers in relation to the conditions of approval.

[23] On 4 March 2004, the respondent's solicitors wrote to the appellants' solicitors in the following terms:

> "We have received the purchasers instructions that they are now satisfied with the conditions of the Development Approval received from the Caboolture Shire Council. We are further instructed that the balance deposit will be paid on 5 March 2004.
>
> We shall keep you advised in relation to the progress of the Council Approval of the Engineers Working Drawings."

[24] On 5 March 2004, the respondent paid the sum of $50,000 by way of deposit to Ray White Caboolture/Morayfield, who was described in the Reference Schedule to the contract between the parties as the "Deposit Holder".

[25] On 19 March 2004, the appellants' solicitors wrote to the respondent's solicitors purporting to terminate the contract by reason of one or both of the respondent's breaches of contract, first in not paying the $50,000 within seven days of the respondent's receipt of the Council's decision notice, viz 25 February 2004, and secondly in paying the $50,000 to the appellants' real estate agent rather than to the appellants themselves as "the Seller" within the meaning of special condition 7.2 of the contract.

The judgment at first instance

[26] The learned primary judge held that neither breach was made out. In relation to the first breach relied on by the appellants, the learned primary judge concluded:

> "Under clause 7.2 of the special conditions, the $50,000-00 was to be paid 'within seven days after the [plaintiff] receive[d] development approval from the Caboolture Shire Council which [was] satisfactory to [it] in all respects.' Counsel for the plaintiff submitted that his client did not receive such approval within the meaning of clause 7.2 until it elected, within the appeal period, not to appeal, and signed the Decision Notice Response Form; he submitted that the 7 days commenced to run on 4 March 2004. Counsel for the defendants submitted that the 7 days commenced to run on 18 February 2004 when the plaintiff received the Decision Notice.
>
> Under the *Integrated Planning Act* the time at which development approval has effect depends on whether the applicant (in this case the plaintiff) makes representations for a Negotiated Decision, where [sic] there is a submitter, and whether there is an appeal to the Planning and Environment Court. The plaintiff did not seek a Negotiated Decision or institute an appeal. There was no submitter. Under s 3.5.19(a) the Decision Notice was taken to be the development approval and to have effect when it was given (on 18 February 2004).

> 'Development approval' in clause 7.2 of the special conditions must mean effectual development approval. While the development approval was effectual from 18 February 2004, that it was so might not have been ascertained for 20 business days from that date (or even longer if the appeal period had been suspended under s 3.5.18). The $50,000-00 had to be paid within 7 days of the development approval. If that time started to run when the Decision Notice was given, it might expire before anyone could ascertain that it had even commenced to run. Clause 7.1 should not be interpreted so as to achieve such an absurd result. In my opinion it should be interpreted as requiring payment within 7 days from when it was ascertainable that an effectual development approval was in existence - that is, within 7 days from 4 March 2004."[2]

[27] In relation to the second breach, the learned primary judge concluded:

> "By clause 2.2(1) of the standard conditions the first tranche of the deposit ($1,000-00) was to be paid to 'the Deposit Holder', who was identified in the Reference Schedule as Ray White Caboolture/Morayfield. By clause 1 of the special conditions it was payable to 'the Seller', and by clause 7.1 of the special conditions it was referred to as having been paid to the trust account of Ray White Caboolture/Morayfield and as being held according to the terms and conditions attaching to the contract.
>
> By clause 7.2 of the special conditions the second tranche of the deposit ($50,000.00) was to be paid to 'the Seller' and to be non-refundable.
>
> The special conditions prevailed over the standard conditions to the extent of any inconsistency. The effect of clauses 1 and 7.1 of the special conditions was to equate payment to the trust account of Ray White Caboolture/Morayfield with payment to the Seller, at least in relation to the payment of the $1,000-00. There is no reason not to extend that equation to the payment of the $50,000-00. In other words, I do not consider that the plaintiff breached its obligation under clause 7.1 by paying the $50,000-00 to the agent to be held on behalf of the defendants."[3]

The appeal

The first breach

[28] In relation to the first breach asserted by the appellants, the appellants submitted that the decision notice took effect as soon as the development approval was "effectual" as such. They submitted that the development approval became effectual on the date on which the decision notice was received by the respondent, viz 18 February 2004.

[29] This conclusion was said to flow from s 3.5.19 of the *Integrated Planning Act* 1997 (Qld) ("the IPA") which provided at the time as follows:

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2 *Gheko Developments Pty Ltd v Azzopardi & Ors* [2004] QSC 455; SC No 3249 of 2004, 15 December 2004 at [16] - [18].

3 *Gheko Developments Pty Ltd v Azzopardi & Ors* [2004] QSC 455; SC No 3249 of 2004, 15 December 2004 at [20] - [22].

> "**When approval takes effect**
> If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect -
> (a) if there is no submitter and the applicant does not appeal the decision to the court - from the time the decision notice is given (or if a negotiated decision notice is given, from the time the negotiated decision notice is given); or
> (b) if there is a submitter and the applicant does not appeal the decision to the court - when the submitter's appeal period ends; or
> (c) if an appeal is made to the court - subject to the decision of the court, when the appeal is finally decided." [4]

[30] The appellants point out that in the present case there was no "submitter" within the meaning of s 3.5.19(b),[5] and that the respondent did not appeal. Accordingly, so the appellants submit, the decision notice took effect as the development approval on the date it was received in accordance with s 3.5.19(a) of the IPA.

[31] The first point to be made in response to the appellant's submissions is that we are concerned with the operation of a contract which contemplated a "development approval . . . which is satisfactory to the Purchasers in all respects". It is highly artificial to argue that such an approval was obtained at the moment when the decision notice was received, rather than when the respondent was in fact "satisfied" with the approval. And the terms of s 3.5.19 of the IPA cannot have any role to play in resolving that artificiality. The section deals with when a development approval takes effect; it says nothing about when an applicant for an approval must be satisfied with the terms of the approval that is received.

[32] The second point which may be made here is that, even if one were to proceed on the assumption that it is relevant to look at s 3.5.19 of the IPA as part of the background against which the contract is to be construed, the appellant's arguments cannot succeed. On this assumption, it may be accepted that there was relevantly no "submitter" and that there was no appeal by the respondent. Even if one were of the view that special condition 7.2 can only be understood against the background of the provisions of the IPA, the contract plainly contemplated that the respondent might seek to make representations to vary the conditions of the approval before it could be said to be "satisfactory to [the respondent] in all respects". While the appellants dispute her Honour's ultimate conclusion on this first issue, significantly they submitted in their written submissions, perhaps surprisingly having regard to the general thrust of their case on this issue, that "if the respondent wished to negotiate for a varied approval or to appeal, then necessarily the approval is not one which is satisfactory to the respondent in all respects. Special condition 7.2 is not enlivened".

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4 This section had been amended by the time the approval was given, however the amendment did not come into effect until 4 October 2004. See *Integrated Planning and Other Legislation Amendment Act* 2003 (Qld), s 70 and the Proclamation of 23 September 2004 (Subordinate Legislation 2004 No 199).

5 A "submitter" for the purposes of a development application means a person who makes a properly made submission about the application: *Integrated Planning Act* 1997 (Qld), Schedule 10.

[33] In my respectful opinion, this proposition does indeed reflect the proper construction of clause 7.2. While the respondent was involved in negotiating in good faith with the Council for a variation of the conditions of approval to its advantage, it could not sensibly be said that the respondent had "received a development approval which [was] satisfactory to it in all respects". If after a period of negotiation, the respondent chose to "live with" the conditions imposed by the Council rather than to appeal the Council's decision, then the respondent would have been obliged to make up its mind whether to accept the approval as one which was satisfactory to it in all respects. Its alternative, if it was not so satisfied, was then to terminate the contract. On either view, the contract contemplated that the respondent would have to make up its mind as to whether the approval was satisfactory to it in all respects. The logical consequence of this view is that, as the appellants themselves acknowledge in their written submission, the time for performing the obligation under special condition 7.2 could not begin to run against the respondent on the date when the decision notice was received but only from that date on which the respondent "made up its mind".

[34] This conclusion draws some support from the decision of this Court in *Hayes v Walker*[6] in which it was held that a reference in a conditional contract of sale of sale of land to a development "approval" could not be taken to be a reference to an approval which remained "inchoate or incipient" until finality was reached under s 3.5.19 of the *Integrated Planning Act*. In that case de Jersey CJ, with whom Jerrard JA agreed, said:[7]

> "In summary, Mr Morris submitted 'that the words "obtaining from the Brisbane City Council approval to develop the land" should be given their natural and ordinary meaning, as referring to an approval in fact obtained "from the Brisbane City Council", and not artificially construed (by reference to a statutory provision which is nowhere mentioned in the contract) as referring to the outcome of any appeal to the Planning and Environment Court from an "approval to develop the land" which has in fact been "obtain[ed] from the Brisbane City Council".'
>
> Mr Morris also sought to draw a distinction between the existence of a development approval, on the one hand, and its coming into effect, on the other. There is, I suggest at once, some artificiality about describing, as an approval, something which is of no current effect, and which may never be of any effect.
>
> In my view, the resolution of this proceeding depends on one matter alone, and that is whether the decision notice issued by the Council should be characterized as a 'development approval' within the meaning of conditions one and three. The 'approval' document obtained from the Council, being the only relevant document for the purposes of condition one, comprised a letter headed 'Decision Notice under section 3.5.15 of the *Integrated Planning Act 1997*', and an enclosed document headed 'Decision Notice Details (Section 3.5.15 of the *Integrated Planning Act 1997*)'. The final paragraph of that document reads: 'Pursuant to Section 3.5.19 of the *Integrated Planning Act 1997*, this development approval has no effect until either the submitters' appeal period has ended or, if an appeal is made

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6 [2004] QCA 288; (2004) 134 LGERA 290.

7 [2004] QCA 288 at [8]- [15]; (2004) 134 LGERA 290 at 293 - 295.

to the Court or a tribunal, the decision of the entity is made in favour of the proposed development.'

Section 3.5.19 of the *Integrated Planning Act* provides:

> "When approval takes effect
>
> If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect -
>
> (a) if there is no submitter and the applicant does not appeal the decision to the court - from the time the decision notice is given (or if a negotiated decision notice is given, from the time the negotiated decision notice is given); or
>
> (b) if there is no submitter and the applicant does not appeal the decision to the court - when the submitter's appeal period ends; or
>
> (c) if an appeal is made to the court - subject to the decision of the court, when the appeal is finally decided."

To my mind, the narrow question which therefore arises, as I have said, is whether the document dated 5 August 2003 amounted to the Council's development approval within the contemplation of conditions one and three. The conclusion that it did not is in my view inescapable, in light of the concluding paragraph set out above. It was at the highest an approval subject to a condition precedent: there being no appeal, or in the event of an appeal, its being unsuccessful. With the currency of the appeal, the decision of the council, by force of its own express terms, simply did not operate as an approval.

Mr Sullivan, for the respondent, referred us to *Magic Mountain Developments Pty Ltd v Laureate Australia Pty Ltd* [1991] 2 Qd R 570 at 581; (1990) 71 LGRA 140 at 150 and *Snowlife Pty Ltd v Robina Land Corporation Ltd* [1992] 1 Qd R 564 at 568; (1991) 73 LGRA 295 at 298, as to construing such contractual terms in the context of the *Integrated Planning Act*. It is not necessary to have resort to those dicta here, where the very terms of the 'decision notice' ordain that approach. In answering the question, 'does the decision amount to a development approval?', one is directed by the decision notice itself to s 3.5.19, and there being an unresolved appeal, the conclusion necessarily follows that the decision notice is not a development approval.

Mr Morris urged however that s 3.5.19 should be read as establishing two things: (a) that a decision notice advising the approval of an application is 'the development approval' (consistently with the definition of 'development approval' in sch 10 to the *Integrated Planning Act*); and (b) the time-frames within which that approval comes into effect. That construction may have been more arguable had the provision been split up in that way. The way it is framed rather favours the conclusion that the specified time-frames regulate both the 'decision notice' taking on the character of a 'development approval', and its coming into effect as such. But further, and more importantly, the definition of 'development approval' in sch 10 to the Act would embrace this 'decision notice', so that on Mr Morris's submission, there would have been no need to

> include in s 3.5.19 the words 'is taken to be the development approval'. The provision must be read, in the case of an appeal, as deferring the notice's taking on that character until, effectively, the dismissal of the appeal.
>
> It is not a case where an 'approval', though inchoate or incipient, is nevertheless an approval. Here, because of s 3.5.19 and the currency of the appeal, the decision notice is '(not) taken to be the development approval and (have) effect'."

[35] In this case there was no appeal on foot at any time and so it cannot be said that the approval that was granted to the respondent was prevented from being effectual in precisely the same way as in *Hayes*. There are, however, two important points to note about the decision in that case. The first is that it recognises that the lodgement of the appeal means that a decision notice will only be taken to be a development approval when that appeal is finally decided. The lodging of an appeal does not merely suspend the effectiveness of decision notice to constitute a development approval but changes the point in time at which it is deemed to be a development approval by the IPA. This highlights the difficulty with the construction of special condition 7.2 urged on this Court by the appellants. On that construction, the respondent must be taken to have had a satisfactory development approval after seven days had passed from the receipt of the decision notice. Yet the terms of the contract required that the respondent receive a development approval, not a decision notice, and it was common ground that it was the IPA that determined what amounted to a development approval. If the respondent had lodged an appeal on the eighth day after its receipt of the decision notice, as it was perfectly entitled to do, then s 3.5.19(c) would only operate to deem the decision notice to be a development approval once that appeal was determined. Prior to that date, the decision notice would not constitute a development approval and special condition 7.2 could not be satisfied.

[36] The second important point to be drawn from the passage I have quoted from *Hayes* is that the Court in that case rejected the submission that there are two elements to s 3.5.19 - the deeming of a decision notice to be a development approval and the timeframes for when such an approval becomes effective. Instead, it was held, correctly in my respectful opinion, that the better view is that the time frames specified in s 3.5.19(a), s 3.5.19(b) and s 3.5.19(c) apply to when a decision notice can be deemed to be a development approval. There are, therefore, difficulties involved in relying on s 3.5.19(a), as the appellants seek to do, to translate the decision notice into a development approval because the deeming effect of this provision is contingent upon the circumstance that "the applicant does not appeal the decision to the court". This contingency cannot be satisfied until the applicant's appeal period is at an end because it cannot be until then that it can be known, in the absence of a decision and communication from the applicant to a local authority like that which occurred on 4 March 2004 in this case, that the applicant is not appealing the decision. This again highlights the fundamental problem with the appellants' case with respect to what I have termed "the first breach". Putting aside whether or not the decision notice could be construed as a valid development approval, and that is an issue on which I express no concluded view, it is clear that no decision was made and no sign was given by the respondent before 4 March 2004 that the conditions attached to the decision notice were satisfactory. It could only be at that point that the respondent could be said to have obtained what it considered to be a satisfactory development approval.

[37] For these reasons, I consider that the appellants' submissions in relation to the first breach relied upon by the appellants must be rejected and that the learned primary judge was correct in concluding that time did not begin to run against the respondent for the purposes of special condition 7.2 until 4 March 2004.

The second breach

[38] As to the second breach relied on by the appellants, I am respectfully of the opinion that, contrary to the view of the learned primary judge, there is indeed "reason not to extend that equation [ie of payment to the trust account of Ray White Caboolture/Morayfield with payment to the Seller in accordance with special condition 1] to the payment of the $50,000-00".[8] That reason derives from the circumstance that special condition 7.2 expressly requires payment to "the Seller" as distinct from the "Ray White Caboolture/Morayfield" referred to in special conditions 1 and 7.1.

[39] Clause 2.2 of the standard terms did provide for the payment of "the Deposit" to the "Deposit Holder"; but as her Honour acknowledged, the special conditions of the contract must prevail over the general conditions to the extent of any inconsistency. The language of special condition 7.2 is quite specific in making special provision for the payment of the $50,000 to "the Seller" who is identified explicitly as the intended payee, distinct from the Deposit Holder in the provisions of the contract dealing with the payment of the deposit. Moreover, special condition 7.2, in its express reference to clause 2.2 of the standard terms, highlights that the mandate in clause 2.2 of the standard terms, does not apply in relation to the $50,000. The language of special condition 7.2 is distinctly contrary to the terms of clause 2.2(1) of the standard terms in relation both to the time for payment of the $50,000 and the designated payee.

[40] The respondent argues in relation to special condition 7.2 that:

> "If the deposit was to be paid directly to the appellants there was no reason to say that the deposit was not held pursuant to clause 2. It would have been enough to say that it was non-refundable. Only if the Deposit Holder was to be put into possession of the non-refundable deposit would it be necessary to clarify that it was not holding it under clause 2."

[41] But the language of special condition 7.2 makes it clear that the appellants' entitlement to the $50,000 was quite independent of the fate of the contract, and was to be put beyond any dispute by the respondent in that regard. Special condition 7.2, in providing that the $50,000 deposit will not be held by the Seller pursuant to the obligations in clause 2.2 of the standard terms, is emphatic of the Seller's immediate entitlement to this payment. That indefeasible present entitlement is entirely consistent with a requirement that it be paid directly to the Seller rather than to a Deposit Holder.

[42] Because the language of the contract expressly required the payment of the $50,000 directly to the appellants, there is no real occasion to speculate as to the commercial reasons why there should be different regimes in relation to the payment of the initial deposit and the further deposit of $50,000. Nevertheless, as a matter of

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[8] *Gheko Developments Pty Ltd v Azzopardi & Ors* [2004] QSC 455; SC No 3249 of 2004, 15 December 2004 at [22].

commercial reality, the arrangement in relation to the $50,000 would have the advantage to the appellants that it would ensure that they themselves would receive the $50,000 forthwith upon payment by the respondent, without any risk of delay or dispute as a result of claims by the real estate agent to a set-off or to retain the money or some part thereof on account of the agent's commission on the sale. That the agent may not, in fact, have made, or been disposed to make, any such claim is beside the point. The arrangement which the respondent made with the appellants protected the appellants against the possibility of any such dispute.

[43] Accordingly, I am of opinion that the appellants' argument in relation to the second breach must be upheld. It follows that the appellants were entitled to terminate the contract as they purported to do.

Conclusion and orders

[44] In my opinion, the appeal should be allowed with costs. The orders below should be set aside. There should be judgment in favour of the defendants in proceedings No BS3249 of 2004 together with the costs of and incidental to those proceedings including reserved costs if any.