SUPREME COURT OF QUEENSLAND

CITATION:	*Hope Island Resort Holdings P/L & Anor v Jefferson Properties (Qld) P/L & Ors* [2005] QCA 315
PARTIES:	**HOPE ISLAND RESORT HOLDINGS PTY LTD** ACN 091 967 921 (plaintiff/first defendant by counterclaim/first appellant) **McROSS DEVELOPMENTS PTY LTD** ACN 001 176 263 (second defendant by counterclaim/second appellant) **v** **JEFFERSON PROPERTIES (QLD) PTY LTD** ACN 003 729 851 (first defendant/first plaintiff by counterclaim/first respondent) **MARK McIVOR** (second defendant/second respondent) **MM PROPERTIES PTY LTD (formerly JEFFERSON PROPERTIES PTY LTD)** ACN 010 860 821 (second plaintiff by counterclaim/third respondent)
FILE NO/S:	Appeal No 1086 of 2005 SC No 9926 of 2000 SC No 10887 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2005
JUDGES:	McMurdo P, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, Williams and Jerrard JJA concurring as to the order made, McMurdo P dissenting in part
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where Development Deed entered into – where the respondents covenanted and warranted the amounts for which the relevant mortgagees would release their mortgages over the developed land – where the appellant was obliged to pay out the mortgages – where it emerged that the mortgages

were overstated in the Development Deed by $471,118.22 – learned trial judge found that the appellants were obliged to pay the respondents the overstated amount – general rule of construction in *Alghussein Establishment v Eton College* [1988] 1 WLR 587 – whether the contract should be construed so as to deny a party in breach of contract to benefit under the contract by the breach

INTERPRETATION – ADMISSIBILITY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS – MATTERS PARTICULARLY RELATING TO CONTRACT – COLLATERAL CONTRACTS – WARRANTIES – where the respondents covenanted and warranted in the Development Deed the amounts for which the relevant mortgagees would release their mortgages over the developed land – interpretation of the warranty – whether the respondents warranted that the amounts specified in the Deed are the only amounts which will secure release, or whether those amounts are the maximum amounts which will be required by the mortgagees to secure release

Alghussein Establishment v Eton College [1988] 1 WLR 587, considered
Brothers v Park & Anor [2004] NSWCA 241, considered
Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 2 AC 180, considered
Drinkwater v Caddyrack Pty Ltd, unreported, Supreme Court of New South Wales Equity Division, No 3970 of 1996, 25 September 1997, cited
Nodnara Pty Ltd v Federal Commissioner of Taxation (1997) 97 ATC 4982, cited
TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130, considered
Thompson v ASDA-MFI Group Plc [1988] Ch 241, cited
Thornton v Abbey National Plc [1993] TLR 111, cited

COUNSEL: J D McKenna SC, with L F Kelly, for the appellants
D J S Jackson QC, with D G Clothier, for the respondents

SOLICITORS: Deacons for the appellants
Tucker & Cowen for the respondents

[1] **McMURDO P:** The facts, issues and relevant provisions of the Deed of Development ("the Deed") which are central to this appeal are set out in Williams JA's reasons. I will only repeat or add to these where required to explain my own reasons and proposed orders.

[2] The first appellant Hope Island Resort Holdings Pty Ltd ("HIRH") brought proceedings against the first respondent Jefferson Properties (Qld) Pty Ltd ("JPQ") and the second respondent Mark McIvor to enforce rights which it claimed under the Deed. JPQ in turn commenced proceedings against HIRH and an associated company, the second appellant, McRoss Developments Pty Ltd ("McRoss"), to enforce rights which it claimed under the Deed. The learned primary judge

dismissed HIRH's claim with costs and in JPQ's claim ordered that HIRH and McRoss pay it $535,705.67 inclusive of interest and costs. HIRH and McRoss appeal from those orders.

[3] HIRH was, from 30 June 2000, the assignee of the interests of Hope Island Resort Development Corporation Limited ("HIRDC") under the Deed of 7 April 2000 between HIRDC, JPQ and Mr McIvor to develop areas of Hope Island land. The particularly pertinent clauses of the Deed are as follows:

> "3.2 **No charge or encumbrance**
>
> At the Date of Commencement[1] JPQ and Mr McIvor covenant and warrant that:-
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> …
>
> (b) the amounts for which the relevant Mortgagee will release its Mortgage over a Lot is as detailed in Schedule 2.
>
> …
>
> 4.1 JPQ and Mr McIvor warrant:-
>
> …
>
> (d) the information referred to in Schedules 1 and 2 of this Agreement are true and correct;
>
> …
>
> 8. **HIRDC'S OBLIGATIONS**
>
> 8.1 As from the Start Date, HIRDC will be responsible for and pay all outgoings in respect of the Land including all interest and fees payable to the mortgagees pursuant to the Mortgages.
>
> …
>
> 8.3 From the Commencement Date, HIRDC assumes the liability of JPQ for the loan amounts referred to in Schedule 2 and HIRDC indemnifies JPQ in respect of those liabilities. In the event that on completion of the sale of all the Lots the aggregate amount (the '**Total**') paid to the Mortgagees differs from $13,584,018.00 then:
>
> (a) to the amount by which the Total exceeds $13,584,018.00 Mr McIvor will arrange for payment of that amount to HIRDC; and
>
> (b) the amount by which the Total is less than [the Schedule 2 amount] HIRDC will pay to JPQ that amount,
>
> within 14 days after completion of the last Lot to settle."

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[1] That is, 7 April 2000: see cl 1 of the Deed, definition '**Commencement Date**'.

[4] In essence, under the Deed HIRDC was to develop the land in return for both paying $5M to JPQ and for taking over JPQ's loan obligations as set out in schedule 2 of the Deed. On the sale of the land HIRH as assignee of HIRDC was obliged to pay out the mortgages specified in schedule 2 and was entitled to any residue profit,[2] subject to cl 8.

[5] After the Deed land was all sold, it emerged that the schedule 2 amount relating to the mortgages held by Arkway Pty Ltd ("Arkway") was overstated by $300,000 and that the schedule 2 amount relating to the mortgages held by GIO Finance Ltd ("GIO") was overstated by $171,118.22. JPQ sought payment from HIRH of these amounts under cl 8 of the Deed. HIRH sought to avoid payment of these amounts, relying on JPQ's warranties in cl 3 and cl 4 of the Deed in construing cl 8.

The Arkway amount

[6] I agree with Williams JA and with the learned trial judge that HIRH was required to pay JPQ the $300,000 arising out of the Arkway amounts set out in schedule 2 of the Deed. It was common ground that the amount specified in schedule 2 for which Arkway would discharge its mortgages over the Deed land was $8,136,500, an amount $300,000 more than the amount of the Arkway loan secured over the Deed land at the time the parties entered into the Deed. Mr McIvor provided the only further relevant evidence on this issue. As noted earlier, the Deed of 7 April 2000 was between Mr McIvor, JPQ and HIRDC. Mr McIvor was a director of both JPQ and HIRDC and his relevant evidence is as follows. He arrived at the schedule 2 figure in respect of the Arkway amount ($8,136,500) because of advice from Mr John Haney, solicitor for Arkway, shortly prior to entering into the Deed. Mr McIvor always had in mind that the total consideration for the Deed would be approximately $18,500,000, comprising a payment for equity fixed at $5M with the balance to comprise the assumption of debt owed on the Deed land. Shortly before executing the Deed, Mr McIvor had a series of telephone conversations with Mr Haney and finally ascertained that in the light of JPQ's obligations to Arkway under deeds of cross-collateralization unrelated to the Deed land, Arkway would agree to release its securities over the Deed land for $300,000 in addition to the amount actually lent on the Deed land. The schedule 2 amount in respect of the Arkway securities on the Deed land reflected the real possibility at the time the Deed was entered into that Arkway would require payment of more than the Arkway loans over the Deed land before releasing its securities over that land.

[7] The learned primary judge was entitled to find, on this undisputed evidence, that schedule 2 correctly stated the amount for which Arkway would release its mortgage over the Deed land on 7 April 2000.[3] It follows that JPQ and Mr McIvor did not breach their warranties to HIRDC under cl 3 or cl 4 of the Deed and HIRH as HIRDC's assignee is obliged to pay that amount to JPQ under cl 8 of the Deed. The appellants' contentions as to the $300,000 concerning the Arkway mortgages fail.

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2 See also Deed cl 10 and cl 11, set out in William JA's reasons at [20] - [21].

3 *Hope Island Resort Holdings Pty Ltd v Jefferson Properties (Qld) Pty Ltd & Anor* [2004] QSC 401, [21] - [24].

The GIO amount

[8] The $171,118.22 overstatement in schedule 2 as to the amount owed to GIO secured over the Deed land is in a different category. It is common ground that schedule 2 overstates the amount secured by the GIO loans on the Deed land by $171,118.22; the schedule 2 amount in respect of the GIO loans states the limit of the GIO loan facility, not the amount borrowed on and secured by the Deed land which would have to be repaid to GIO before it released its mortgages over the Deed land. Clause 8 of the Deed would then, if read in isolation, require HIRH to repay this amount to JPQ. Clause 8 must, however, be read with the whole Deed including cl 3.2 and cl 4.1. Under cl 3.2, at the date of commencement of the Deed (7 April 2000) JPQ and Mr McIvor warranted that the amounts for which GIO would release its securities over the Deed land was as detailed in schedule 2. Under cl 4.1(d) they warranted that the information referred to in schedule 2 was true and correct. In fact, at the date of commencement of the Deed schedule 2 overstated the amount for which GIO would release its securities over the Deed land by $171,118.22. It follows that JPQ and Mr McIvor breached their warranties in cl 3 and cl 4 by misstating the GIO amount in schedule 2. In those circumstances cl 8.3(b) should be interpreted together with cl 3 and cl 4 as not requiring HIRH to pay to JPQ the sum of $171,118.22. This approach is consistent with the principles referred to by Lord Jauncey of Tullichettle in his speech in *Alghussein Establishment v Eton College*;[4] a party cannot benefit from the party's own wrong nor take advantage of a condition which the party has brought about; that proposition is not limited to cases where the party at fault or in breach was seeking to avoid the contract.[5] See also *Cheall v Association of Professional Executive Clerical and Computer Staff*;[6] *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd*[7] and *Brothers v Park & Anor*[8]. The respondents have referred the Court to *Thornton v Abbey National Plc*[9] discussed by Young J (as he then was) in *Drinkwater v Caddyrack Pty Ltd*[10] and *Nodnara Pty Ltd v Federal Commissioner of Taxation*[11] which appear to limit the principles stated in *Alghussein* to instances where the claimant has suffered some actual detriment. For the purposes of discussion in this case, I am content to accept that there may be some limitation on the *Alghussein* principles where there has clearly been no detriment to the claimant; but if there is such a limitation, it does not apply here. Unlike the cases discussed by Young J, HIRH has suffered a detriment in a broad sense because of JPQ's and Mr McIvor's breaches of cl 3 and cl 4 of the Deed. Under the Deed, HIRH was to develop and sell the land in return for paying JPQ $5M and taking over its obligations under all mortgages over the Deed land. If JPQ were able to rely on cl 8 of the Deed irrespective of the warranties in cl 3 and cl 4, HIRH would be obliged to pay $171,118.22 to JPQ, an amount it was not necessary to pay to GIO for GIO to release its mortgages over the Deed land at the date of the Deed's commencement. In that sense HIRH would suffer a detriment resulting from JPQ's breach of the warranties in cl 3 and cl 4 of

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4 [1988] 1 WLR 587, 591 - 595.

5 Above, 595.

6 [1983] 2 AC 180, Lord Diplock, 189.

7 (1989) 16 NSWLR 130, Hope JA (with whom Priestly JA substantially agreed and with whom Maher JA agreed), 147 - 149.

8 [2004] NSWCA 241, Giles JA (with whom Ipp JA and Wood CJ at CL agreed), [82].

9 [1993] TLR 111.

10 Unreported, Supreme Court of New South Wales Equity Division, No 3970 of 1996, 25 September 1997, 25 - 29.

11 (1997) 97 ATC 4982, 4984.

the Deed. The learned primary judge erred in finding that HIRH and McRoss were obliged to pay $171,188.22 to JPQ under cl 8 of the Deed.

Order

[9] I would allow the appeal and set aside the orders made at first instance. I would give the parties seven days to make submissions consistent with these reasons as to the appropriate form of any further orders.

[10] **WILLIAMS JA:** This is an appeal from a judgment of a judge of the Trial Division which effectively ordered that Jefferson Properties (Qld) Pty Ltd (hereinafter referred to as "JPQ") recover from Hope Island Resort Holdings Pty Ltd (hereinafter referred to as "HIRH") and McRoss Developments Pty Ltd (the "second appellant") the sum of $535,705.67 (including interest). That judgment depended upon the construction placed by the learned trial judge upon a deed (hereinafter referred to as the "Development Deed") dated 7 April 2000 between JPQ, Hope Island Resort Development Corporation Ltd (hereinafter referred to as "HIRDC") and Mark McIvor (hereinafter referred to as the "second respondent"). The contention of the appellants is that upon the proper construction of the Development Deed, and in the events which happened, there should be judgment for HIRH against JPQ and the second respondent for $10,000.00 together with interest from 26 June 2001.

[11] From about 1997 JPQ had owned land at Hope Island suitable for development; that land will subsequently be referred to as the "Hope Island land". At all material times that land was subject to mortgages to six mortgagees, in particular mortgages to Arkway Pty Ltd ("Arkway") and GIO Finance Ltd ("GIO"). JPQ and other interests associated with the second respondent had obtained funds secured by other mortgages and by an arrangement referred to in the course of argument as "cross collateralisation". The Hope Island land was also security with respect to those other advances primarily secured by those other mortgages.

[12] At all material times prior to April 2000 JPQ intended to develop the Hope Island land. Prior to 7 April 2000 the second respondent and one Fish were directors of JPQ.

[13] At all material times the second respondent was also the director and principal shareholder of Jefferson Properties Pty Ltd which on 4 July 2002 changed its name to MM Properties Pty Ltd (hereinafter referred to as "the third respondent").

[14] HIRDC was incorporated on 7 May 1999. The second respondent was a director and the third respondent was the majority shareholder until after the Development Deed was executed. Apparently the intention was that HIRDC was to be the company which actually carried out the development of the Hope Island land.

[15] In the early part of 2000 it appears that the second respondent was desirous of obtaining sole control of JPQ and divesting himself from the obligation of developing the Hope Island land; other entities were then interested in bidding for the right to proceed with the development of that land. It appears that there was more than one bidder but principally in the period March - April 2000 there were discussions between the interests of the second respondent and a group referred to in the material as the Devine Group. There followed negotiations primarily carried on between McCullough Robertson as solicitors for the interests of the second

respondent and Clayton Utz as solicitors for the Devine Group. What appears ultimately to have happened is that it was agreed that a deed should be entered into between JPQ, HIRDC, and the second respondent in terms of which the Hope Island land would be developed by HIRDC in accordance with the terms of the deed which would also provide for payment of a specified sum to JPQ. That deed was apparently designed to facilitate the Devine Group (or some other developer) taking over the development of the Hope Island land using HIRDC as the vehicle. Before referring to the terms of the deed as executed it is necessary to say something more of the history.

[16] After the Development Deed was executed, the Devine Group dropped out of the picture. Other interests represented by HIRH then took over the development of the Hope Island land by taking on 30 June 2000 an assignment from HIRDC of its benefits pursuant to the Development Deed. By Deed of Assignment dated 30 June 2000 and a letter bearing that date, HIRH assumed all the liabilities of HIRDC pursuant to the Development Deed. To complete the background historical narrative in broad terms it is sufficient to say that in July 2000 HIRH paid out the Arkway and GIO mortgages.

[17] Subsequently, after the development of the Hope Island land had been completed, a dispute arose between HIRH and JPQ as to the accounting between them pursuant to the terms of the Development Deed. Hence this litigation. It is now necessary to refer to the relevant terms of the Development Deed.

[18] At all times until all the Hope Island land was ultimately sold as developed lots, ownership of the land was to remain with JPQ and it was obliged not to dispose of any part of that land except as provided for in the Deed. JPQ was to make the land exclusively available to HIRDC for purposes of development; that included permitting HIRDC to enter upon the land and to do all things necessary to complete the development. It was specifically acknowledged that, subject to the mortgages, the legal and beneficial interest in the land remained with JPQ and HIRDC did not by reason of the performance of development work secure any legal or beneficial interest in the land. (Clauses 3.1, 3.4, 6.1, 6.2 and 7.1).

[19] The principal obligation of HIRDC was to carry out the "Development Works", defined as including "the construction of improvements on the Land and arranging for the sale of the Land". HIRDC was responsible for paying for all outgoings in respect of the land including interest and fees payable to the mortgagees. (Clause 8.1). It was also responsible for insurance. (Clause 8.2). Then, importantly for present purposes, by clause 8.3 it was provided that HIRDC assumed the liability of JPQ "for the loan amounts referred in Schedule 2 and HIRDC indemnifies JPQ in respect of those liabilities." In other words HIRDC was obliged to pay out the mortgages. Schedule 2 broke the Hope Island land up into several lots or parcels and set an amount against each of those lots or parcels which, by operation of clause 3.2(b) of the Deed, JPQ and the second respondent covenanted and warranted were the "amounts for which the relevant Mortgagee will release its Mortgage over a Lot". The amounts set out in Schedule 2 totalled $13,584,018.00, however it was not the case that particular debts were owed against particular lots. The total amounts owing to each of the six mortgagees were otherwise known. It should also be noted that, by clauses 3.2(a) and 3.3, JPQ and the second respondent covenanted and warranted that the land was free of mortgage except those mortgages specified therein and that they would not vary the terms of those mortgages, or create any

new incumbrances, or cause any increase in the amount secured by the mortgages, during the currency of the Deed.

[20] Clause 10 provided for the sale of the developed lots. JPQ was empowered to appoint a real estate agent but HIRDC was empowered to direct that agent in relation to the sale of the lots. By clause 10.2 JPQ agreed "to sign any contract presented to it by HIRDC for the sale of the Land or a Lot where that contract is for a price not less than the loan amount for the relevant Lot as referred to [in] Schedule 2." If the sale price was less than the loan amount then HIRDC was responsible for the payment of any shortfall to the mortgagee. HIRDC was also responsible for all costs associated with marketing and selling the land. (Clause 10.3). Then clause 10.4 provided that the proceeds from any contract of sale of a lot upon settlement were to be applied in the following order of priority; firstly repayment of the loan amount specified in Schedule 2, and then the balance to be paid to HIRDC.

[21] By clause 11.1 it was provided that in consideration of HIRDC undertaking the Development Works, JPQ agreed to pay HIRDC development fees of an amount equal to the sale price of the Lots less the amount to be paid to the mortgagees for those Lots being the amount referred to in Schedule 2. In other words the profit belonged to HIRDC. That development fee was calculated on completion of the sale of each lot and payable to HIRDC. Then followed clause 11.3 which provided:

> "JPQ shall be paid JPQ Amount on the date of this Agreement by HIRDC being JPQ's total share of the proceeds from the Development Works including the sale of the Land. The JPQ Amount is non-refundable."

[22] By definition the JPQ Amount was the sum of $5,000,000.00. In other words JPQ was to be paid upfront $5,000,000.00 which was to be its share of the proceeds of the overall development.

[23] I have already referred to warranties given by JPQ and the second respondent in relation to the mortgages (clause 3.2(b) and clause 3.3). In addition JPQ and the second respondent gave relevant warranties in clause 4.1. Relevantly they warranted:

> "(b) that JPQ has provided to HIRDC . . . in writing prior to the date of this Agreement the extent and nature of HIRDC's obligations under clause 8 and that such information was: -
>
> (i) true and accurate; and
>
> (ii) fully and comprehensively detailed all the liabilities for which HIRDC will be liable under the terms of the clause 8;
>
> (c) not to do or omit to do any act or matter or thing which will or may give rise to an increase in HIRDC's quantum or the extent of HIRDC's liability under clause 8;
>
> (d) the information referred to in Schedules 1 and 2 of this Agreement are true and correct."

[24] It only remains to refer to the critical provision of the Development Deed for present purposes. I have already referred to the first sentence in clause 8.3 which provided that HIRDC assumes the liability of JPQ for the loan amounts referred to in Schedule 2 and HIRDC indemnifies JPQ in respect of those liabilities. That clause then goes on to provide as follows:

> "In the event that on completion of the sale of all the Lots the aggregate amount (the "**Total**") paid to the Mortgagees differs from $13,584,018.00 then:
>
> (a) to the amount by which the Total exceeds $13,584,018.00 Mr McIvor will arrange for payment of that amount to HIRDC; and
>
> (b) the amount by which the Total is less than $13,584,018.00 HIRDC will pay to JPQ that amount,
>
> within 14 days after completion of the last Lot to settle."

[25] I have already referred to the fact that in July 2000 HIRH paid out the Arkway and GIO mortgages. The Arkway mortgages were paid out on 6 July 2000 for a total amount of $7,836,500.00 which was $300,000.00 less than the total of the loan amounts referred to in Schedule 2 with respect to the Arkway mortgages. Further, on the GIO mortgages being paid out, the amount paid to GIO was $171,118.22 less than the total of the loan amounts referred to in Schedule 2 with respect to those mortgages. It was in consequence of those payments, and on the construction of clause 8.3 advanced by JPQ and the second respondent, that they claimed $471,118.22 in the proceeding.

[26] It was not disputed that another mortgagee of the Hope Island land, HG & R Nominees Pty Ltd, claimed an additional $10,000.00 over the amount set out in Schedule 2 for principal and that additional amount was paid by HIRH. In consequence there was no real dispute at the trial that that $10,000.00 should be set off against the amount underpaid of $471,118.22 if otherwise the claim of JPQ and the second respondent was upheld. That left a net figure of $461,118.22 which, with interest, became the amount of the judgment the subject of the appeal.

[27] It should be noted that in the proceedings below (claim and counter-claim) other issues were raised and disposed of by the learned trial judge, but the only issue on appeal was with respect to the finding that HIRH and the second appellant were obliged to pay JPQ the sum of $461,118.22 plus interest.

[28] The appeal essentially involves the proper construction of clause 8.3. Construed literally it must mean that upon the sale of the last lot to settle, if more or less than $13,584,018.00 has been paid by HIRDC to secure the release of the mortgages over the Hope Island land, an adjustment payment will be made so that HIRDC ultimately pays no more than $13,584,018.00, and JPQ will be the ultimate beneficiary of any lesser amount paid to the mortgagees. That is essentially the way in which the learned trial judge construed the provision. That approach is attacked by the appellants who contend that when clause 8.3 is read together with clauses 3.2(b) and 4.1(d) such a construction cannot be supported. Further, relying on the principle that a party to a contract should not be permitted to take advantage of its own breach of contract in order to secure a benefit under the contract the appellant

submitted that JPQ and the second respondent ought not be entitled to recover against HIRH and the second appellant the amount of the underpayment to the mortgagees.

[29] Those issues pose the question what is meant by the expression in clause 3.2(b) "the amounts for which the relevant Mortgagee will release its Mortgage". Are JPQ and the second respondent covenanting and warranting that the precise amount specified in the Schedule is the one and only amount payment of which will secure release, or are they merely covenanting and warranting that such is the maximum amount which will be required by the mortgagee to secure the relevant release? The argument for the appellants is that the former is correct, whereas the respondents contend for the latter construction. It has already been noted that the mortgages in question were over the undeveloped parcels of land and there was no particular indebtedness secured by a particular developed lot. To facilitate the implementation of the sale of developed lots pursuant to clause 10 of the Development Deed the second respondent had negotiated with the mortgagees the amount specified in Schedule 2. That was clearly understood by all the parties to the Development Deed. (Clause 4.1(b).) The particular amounts in Schedule 2 total $13,584,018.00 and that was to be the maximum liability to which HIRDC was exposed with respect to the mortgages. Against that background clause 8.3 has an obvious operation. If HIRDC had to pay more than $13,584,018.00 then it could recover the overpayment from the second respondent. But if for any reason its total payout to mortgagees was less than $13,584,018.00 then it would be obliged to pay the difference to JPQ.

[30] The learned trial judge preferred the construction advanced on behalf of JPQ and the second respondent and in my view it cannot be said that he was wrong. Indeed that appears to be the logical construction.

[31] The evidence placed before the court at first instance clearly establishes that so far as the Arkway mortgages were concerned the parties to the Development Deed recognised the possible impact of the cross-collateralisation agreement. Because of that the second respondent negotiated with Arkway that for the release of all of the Hope Island land over which it held mortgage security it would accept a maximum of $8,136,500.00 being $300,000.00 more than the amount directly secured by its mortgages over that land. When on 6 July 2000 HIRH paid out Arkway it was prepared to accept the amount actually secured, namely $7,836,500.00. That is how there came to be an underpayment for the purposes of clause 8.3 of $300,000.00.

[32] Further, with respect to the GIO mortgages over the Hope Island land, the amounts specified in Schedule 2 were calculated on the limit of the loan facility and not on the actual amounts in fact borrowed. In consequence there was an error of $171,118.22 in specifying the relevant amounts in Schedule 2. It followed that when the GIO mortgages were paid out by HIRH there was an underpayment of $171,118.22 for the purposes of clause 8.3.

[33] In those circumstances the appellants cannot demonstrate breach of warranty on the part of JPQ or the second respondent. If the only warranty was that the amount specified in Schedule 2 was a maximum amount then there has been no breach of warranty. In the light of that, reliance on the reasoning in *Alghussein Establishment v Eton College* [1988] 1 WLR 587, and the cases in which that decision has been applied, does not avail the appellants.

[34] There is, in any case, much to be said for the proposition that even if there has been a breach of warranty the consequence is governed by clause 8.3. If there had been a breach of warranty the innocent party would only be entitled to recover insofar as the breach caused an overpayment (or in theory an underpayment) for purposes of the operation of clause 8.3.

[35] On the basis of the findings made by the learned trial judge there was no breach of warranty established, particularly when the clauses in question are construed in the way in which they were by the learned trial judge.

[36] It follows that that the reasoning of the learned trial judge was correct and the appeal should be dismissed with costs.

[37] **JERRARD JA**: In this appeal I have had the benefit of reading the reasons for judgment of each of the President and of Williams JA, and the orders their Honours propose; and I respectfully agree with the conclusions and orders proposed by Williams JA. I agree with much of his reasoning, and also in part with that of the President. Hence I state my own reasons, while adopting the description of the facts given by their Honours.

[38] The project resulting in this litigation was a commercial land development by experienced property developers, and the primary object of the contract was to bargain a price for the rights and obligations in relation to the future profits to be generated as against the current value of the cost of those. The respondents fixed that at $18,584,018.00, being the $5,000,000.00 to be paid to JPQ and the total of $13,584,018.00 for which HIRDC would assume JPQ's liability to the mortgagees. JPQ, HIRDC, and its majority shareholder, Jefferson Properties Pty Ltd ("JP") collectively owed the mortgagee Arkway Pty Ltd more than $23,000,000.00 which total obligation was secured over eight of the lots in the development which JPQ owned and had mortgaged to Arkway. The debt JPQ owed in respect of its borrowings from Arkway was $7,836,500.00 secured against the eight lots, but "cross-collaterisation" of the obligation of JPQ, JP, and HIRDC, coupled with "all monies" clauses in the JPQ mortgages, meant that each JPQ mortgage secured the obligations of all three borrowing companies in respect of the total $23,000,000.00 owed to Arkway, against those eight lots.

[39] GIO Finance Limited ("GIO") was the mortgagee of 11 of the lots, and the total sum GIO had agreed to lend was $3,463,539.20; the amount actually borrowed from it at the relevant commencement date of the deed was $3,292,420.98. Another mortgagee was HG & R Nominees Pty Ltd ("HG&R").

[40] The evidence demonstrated that the deed was drafted in circumstances in which it was considered commercially necessary for it to be completed very quickly. Its objects included providing a mechanism whereby the party performing the role of HIRDC would have the opportunity of developing the lots for sale and receiving the gross profits from those sales as a development fee paid by JPQ, which would transfer its title to the ultimate purchasers. JPO would receive only the sum of $5,000,000.00, a figure far below the amount the developer presumably expected to receive, namely a total amount sufficiently in excess of $18,584,018.00 to allow the developer an acceptable profit.

[41] Individual amounts had not been lent by the mortgagee against the individual property. What was important for the parties to the deed was to establish the amount for which the mortgagees would release all relevant securities over each lot when a purchaser was found for that developed lot. Mr McIvor, the principal shareholder ultimately controlling each of JP, JPQ and HIRDC, knew all those objectively ascertainable background facts.

[42] Mr Jackson QC for the respondents submitted that the expression "loan amount", not defined in the deed but referred to in schedule 2, should be understood as meaning what was described in clause 3.2(b), namely the amount appearing in schedule 2, that figure being the amount for which the relevant mortgagee would release its mortgage over each lot. He submitted that clause 4.1(d) warranted that the information as to those loan amounts in schedule 2 was true and correct as a description of the amounts for which the relevant mortgagee would release the mortgage. His further submission was that, when considered in the context of the objectively ascertainable and understood background facts, clause 3.2(b) should be understood as warranting a maximum amount for which the relevant mortgage would release a mortgage over any particular lot, or that it would be no higher than that figure.

[43] I consider that that last submission is correct. The evidence, given entirely by affidavit without any cross-examination upon it, shows that at least in respect of the Arkway mortgages there was a need for Mr McIvor to establish a figure for which that mortgagee would release mortgages over each of the individual lots on which Arkway held security, and as at the date of the deed the evidence did show, as the learned judge found, that that figure was $8,136,500.00. That was the figure Arkway's lawyers named as the principal debt owing (as at 24 March 2000) on 31 March 2000; that amount was then in schedule 2 distributed between the various lots mortgaged to Arkway. The fact that, as it transpired, Arkway did not insist on payment of any more than the $7,836,500.00 JPQ actually owed Arkway in respect of its own borrowings on 7 April 2000 did not mean that it was inaccurate for JPQ and Mr McIvor to warrant in the deed that the amount for which Arkway would release its mortgage over each lot was as detailed in schedule 2; that was what Arkway had represented, and Mr McIvor had achieved that warranted position as a result of negotiations designed to establish a figure.

[44] Negotiations had also established the figures for the individual lots over which mortgages were held by GIO and HG&R, but as it transpired there were two errors in respect of those figures as well. The amount owing to GIO on the commencement date of the deed was only the $3,292,420.98 borrowed to date, and that was the amount which should have been distributed over the lots secured to GIO. Instead the total possible borrowing from GIO ($3,463,539.20) was distributed over those lots in error, resulting in a total liability to GIO being misrepresented in schedule 2 by an overstatement of the total liability secured to GIO by that amount of $171,118.22 which had not then been borrowed from GIO. Presumably that overstated debt was allocated between the 11 lots mortgaged to GIO. The respondent admitted that the GIO amounts had been overstated by that $171,118.22 figure.

[45] With HG&R the error worked the other way, with that mortgagee requiring $10,000.00 more than the amount specified in respect of the lots over which it had security before it would release all lots. Those errors (overstatements of liability to

mortgagees of $300,000.00 and $171,118.22 and understatements of that liability by $10,000.00) resulted in a net overstatement of $461,118.22. That was the amount by which HIRDC's ultimate liability to all mortgagees was less than the $13,584,018.00 described in the deed.

[46] Mr McKenna SC submitted for the appellant that clause 8.3 could not be relied on by JPQ to claim payment of that $461,118.22 from HIRH because of what he submitted was a fundamental rule of construction of instruments applicable to the deed, namely that in the absence of clear words to the contrary, the parties to a contract could not be presumed to have intended that one of them could invoke a contractual right or remedy which arose only because of their own breach of that contract. That was how Mr McKenna SC expressed the proposition in his oral submission; his written submission described a well established principle that a contract should be construed so as to deny a party in breach of contract to benefit under the contract by that breach. In argument Mr McKenna SC cited in support of the principle the cases referred to by the President in her judgment.

[47] In *Alghussein Establishment v Eton College*[12] Lord Jauncey wrote that it was well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of that party's own breach as against the other party.[13] Lord Jauncey cited from the judgment of Lord Diplock in *Cheall v Association of Professional Executive Clerical and Computer Staff*,[14] where the latter described a well known rule of construction that, except in the "unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end". In *Alghussein* Lord Jauncey considered that principle was not limited to cases where the party in breach was seeking to avoid the contract. His Lordship held[15] it applied just as much to a party taking advantage of that party's own wrong when the wrongdoing party sought to obtain a benefit under a continuing contract.

[48] Those two decisions (*Cheall* and *Alghussein)* were cited with approval by Hope JA in *TCN Channel 9 Pty Ltd v Hayden Enterprises*,[16] relevantly giving the judgment of the Court, for the proposition that there is a line of authority which has established a rule of construction based upon a broad proposition described by Lord Diplock in *Cheall*, that being "a man cannot be permitted to take advantage of his own wrong". That principle was also referred to as a rule of construction by Giles JA, again giving the judgment of the Court, in *Brothers v Park & Anor* [2004] NSWCA 241 at [82], citing *TCN Channel 9 Pty Ltd v Hayden Enterprises*. Giles JA described the principle as that a party to a contract terminating upon an event, or conferring a benefit upon an event, cannot rely on that party's own breach of contract bringing about the event. He observed it has also been seen as an implied term, referring to *Thompson v ASDA-MFI Group Plc* [1988] Ch 241. No term was actually implied to that effect in that case, although the proposition was considered.

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12 [1988] 1 WLR 587
13 At WLR 591
14 [1983] 2 AC 180
15 At WLR 594
16 (1989) 16 NSWLR 130 at 147

[49] Those authorities Mr McKenna SC relied on do establish, as a general rule of construction, the principle that in the absence of clear provision of the contrary, it is presumed that the parties to an agreement did not intend that the other should be entitled to obtain a benefit under the contract on account of that other party's breach of it and where the party in breach is thereby taking advantage of that party's own wrong. Mr McKenna SC argued for the application of that principle for the appellants' benefit in this fashion. He submitted that each overstatement of liability, while not resulting in an increased liability by HIRH to the mortgagees, and while actually resulting in a reduction of that anticipated or warranted liability, was nevertheless a breach of what he contended was the warranty in clause 3.2(b) and the warranty in clause 4.1(d). He submitted that clause 3.2(b) was a warranty as to what the true loan amounts, being the figure in a loan ledger for a particular loan, actually were.

[50] That submission, regarding the warranty in clause 3.2(b), does not come to grips with the evidence that there was no individual loan in respect of any individual lot, but only larger sums borrowed from the mortgagees and allocated as described in schedule 2 across the secured properties; and in respect of the Arkway mortgages, the evidence that a far larger amount was secured. For a number of mortgagees, the loan amounts described in schedule 2 were considerably less than the debts owing to the mortgagee secured over each of those lots. When that evidence is considered, I consider the preferable construction of clause 3.2(b) is not that it warrants the amount in the mortgagee's ledger describing the principal loan secured over each lot, but that it warrants that the mortgagee if paid the figure in schedule 2 in respect of any lot would release its security. It does not warrant either that that is the debt owing to the mortgagee in respect of that lot, or that the mortgagee would not release security over that lot if paid any smaller figure. In any event, for the reasons given earlier, I agree with the learned trial judge that that warranty was not breached by the "Arkway" understatement.

[51] The warranty in clause 4.1(d) is different, because the latter warranty is as to accuracy of the information in each of schedules 1 and 2. That information includes the relevant real property descriptions, the nature and number of the lots being developed, the number completed and uncompleted, and, in my view, the amount it was necessary to pay for the mortgagee to release security over each lot. If the amount necessary was more or less, that warranty was breached. It follows that I agree with the President that the respondents breached the warranty in clause 4.1(d), both by understatements of amounts for which the relevant mortgage would release security, and by overstatements.

[52] Mr Jackson QC conceded some circumstances in which the principle Mr McKenna SC relied on would apply, those being principally, in his submission, where there was an executory obligation left unperformed by the party seeking to rely on the clause, and in circumstances in which letting the party breaching that executory obligation rely on the relevant benefit under clause 8.3 would result in an outcome that was bizarre. He submitted that that accorded with the language used in the cases relied on by Mr McKenna SC as instances of the application of the rule of construction, and suggested that perhaps in any event the principle was restricted to the conduct of the party attempting to take advantage of that party's own wrong to avoid a contract and thereby entirely escape a party's obligation. His principal submission was that it applied only in cases where the results were absurd, and

perhaps only where there was, as described, an executory obligation left unperformed.

[53] Applying his arguments to clause 8.3 he submitted that if, for example, HIRH had left unperformed its obligation to pay rates, or pay interest on the mortgages, and if those unperformed obligations resulted in debts being capitalised under the relevant mortgages and added to the principal sum owing, then that non-performance of its obligations by HIRH would have meant it was not entitled to claim from Mr McIvor, or any other party, the amount by which the total payments to mortgagees had exceeded $13,584,018.00, when the increase was occasioned only by HIRH's conduct in breach of its executory obligations, and which was conduct calculated to increase the mortgage debt. Save for that situation, he submitted that clause 8.3 applied to aggregate the effect of what events established to be misstatements in schedule 2, and that the rule of construction should not benefit HIRH.

[54] In my view the parties should not be presumed to have objectively intended and agreed that that clause would be operative in the circumstances in which Mr Jackson QC submitted it would not operate, namely where one party breached an executory obligation in a way calculated to affect the total figure specified in clause 8.3. I also agree with Mr Jackson QC that the parties intended that clause 8.3 operate as a remedy or summary result clause, to be engaged if there was a net payment to the mortgagees of either more or less than the figure of $13,584,018.00 resulting from totalling those amounts in schedule 2. Its express purpose was a dealing with the "unders" and the "overs", which could reasonably be predicted to result from the exercise attempted in schedule 2 of identifying specific sums for which each lot could be freed of security. Any number of events could alter those figures, and clause 8.3 was intended to establish a mechanism for deciding if over or understatements of those warranted amounts had resulted in damage to either party, and how to assess the result of any breach of the warranties that those were the maximum amounts required, or the amounts necessary to pay, for the mortgagees to release the relevant securities. That mechanism was to operate on the assumption that warranted amounts might be inaccurate either way.

[55] The overstatements and understatements, each strictly a breach of the warranty in clause 4.1(d) as to accuracy, were thus "collected" by clause 8.3, and the parties agreed therein that it was only if the net result changed that $13,584,018.00 figure that there should be any adjustment. The parties should be taken to have agreed that it was irrelevant to that adjustment whether the necessity for it resulted from breaches of the warranties as to accuracy, or whether over and understatements were each breaches of the warranties; the overall effect of the over or understatements was what the parties agreed was relevant, and agreed by clause 8.3. The figures in schedule 2 were figures for partial releases in relation to the ongoing completion of an overall development, and each of the warranties in 3.2(b) and 4.1(d), and clause 8.3, must be read together and in that context. So read 8.3 is a mechanism the parties settled upon for resolving breaches of the warranties as to the accuracy of loan amounts in schedule 2, and that was their expressly agreed method of resolving the consequences of those breaches, expressed in clear words.

[56] Clause 8.3 is expressed in unqualified terms which provide to the contrary of the presumption relied on by Mr McKenna SC. Pursuant to that clause HIRH assumes the liability of JPQ for the loan amounts referred to in schedule 2, and where the schedule overstated those loan amounts and HIRH actually assumed a smaller

liability than it agreed to, the construction that would be bizarre would be the one advanced by Mr McKenna SC. That would disentitle JPQ to the benefit specifically agreed to in clause 8.3(b). Mr McKenna SC submitted that clause 8.3 should be construed as if the words "provided the claimant did not cause this difference by their own breach of contract" were added after the word "then" immediately before (a) in that clause; Mr Jackson QC really made much the same submission, except that he would have substituted the words "breach of executory obligations" for the words "breach of contract". I consider his submission accorded more with the authorities Mr McKenna SC cited than Mr McKenna SC's submissions did.

[57] That construction I prefer means that HIRH does not establish any claim for damages for breach of warranty by reason of understatement of $10,000.00, when there were offsetting overstatements totalling $471,118.22. I also agree with the learned trial judge that the consideration JPQ took under the deed included a reduction in its mortgage exposure by the amount of $13,584,018.00. That was expressed in clause 8.3 by the assumption by HIRDC of the liability of JPQ for loan amounts totalling that figure; the effect of the clause is that even if the lots described in schedule 2 were released from their securities by payment of an amount less than that specified total, JPQ was entitled to receive the difference from HIRDC. Whether it paid that difference in reduction of its mortgage exposure was its option; it was entitled by the clause to receive the difference. That was what it negotiated to get.