SUPREME COURT OF QUEENSLAND

CITATION:	*Vercorp Pty Ltd v Lin* [2006] QSC 419
PARTIES:	**VERCORP PTY LTD ACN 010 198 268** (plaintiff) v **CHING TE LIN** (defendant)
FILE NO:	BS 2941 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	22 December 2006
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	4, 5, 6 September 2006
JUDGE:	Douglas J
ORDER:	**Declare that the contract made 7 January 2004 pursuant to which the defendant agreed to sell and the plaintiff agreed to buy land at 417 Seaside Drive, Banksia Beach, Bribie Island in the State of Queensland more properly described as Lot 417 on SP133280, County of Canning, Parish of Woorim bearing title reference 50367602 ought to be specifically performed and carried into execution.** **Further submissions sought as to the form of the order and costs.**
CATCHWORDS:	EQUITY - EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – PARTICULAR CONTRACTS – SALE OF LAND – where defendant purchaser was party to a contract where right of pre-emption existed in favour of the seller if certain conditions existed – where those conditions existed and the right to pre-emption accrued and the seller assigned its rights under the contract to the plaintiff – where the plaintiff agreed to buy the land from the seller pursuant to the terms of the contract – whether an order for specific performance should be made requiring the defendant to sell to the plaintiff on the terms of the contract – whether the purchase price was certain – whether there was consideration for the grant of the right of pre-emption - whether the contract contained an invalid and unenforceable restraint on alienation – whether the defendant did provide proper notice under the contract, and the plaintiff was out of time in

exercising its right to pre-emption – whether an issue of estoppel arises

Burnitt v Pacific Paradise Resort Pty Ltd [2004] QDC 218, applied
Caboche v Ramsay (1993) 119 ALR 215, applied
Caxton Street Agencies Pty Ltd v Korkidis [2002] QSC 210, cited
Elton v Cavill [No 2] (1994) 34 NSWLR 289, cited
Franks v Norfolk Estates Pty Ltd [2004] QSC 301, cited
Gheko Developments Pty Ltd v Azzopardi [2005] QCA 283, cited
Hall v Busst (1960) 104 CLR 206, cited
Hoggett v O'Rourke [2002] 1 Qd R 490, cited
John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc (2004) 88 SASR 334, applied
Micarone v Perpetual Trustees Australia Pty Ltd (1999) 75 SASR 1, cited
Mission Development Group Pty Ltd v Rhett [2004] QSC 359, cited
Norco Co-operative Ltd v Parmalat Australia Ltd [2006] QSC 38, applied
Norco Co-operative Ltd v Parmalat Australia Ltd [2006] QCA 129, cited
Nullagine Investments Pty Ltd v Western Australian Club Inc (1993) 177 CLR 635, cited
Peppers Hotel Management Pty Ltd v Hotel Capital Partners Limited [2004] NSWCA 114, cited
Petersen v Moloney (1951) 84 CLR 91, cited
Reuthlinger v MacDonald [1976] 1 NSWLR 88, cited
Saliba v Saliba [1976] Qd R 205, cited
THL Robina Pty Ltd v The Glades Golf Club Pty Ltd [2005] 2 Qd R 186, cited
Transfield Properties (Kent Street) Pty Ltd v Amos Aked Swift Pty Ltd (1994) 36 NSWLR 321, cited
Wollondilly Shire Council v Picton Power Lines Pty Ltd (1994) 33 NSWLR 551, cited

COUNSEL: D R Cooper SC with C Francis for the plaintiff
G D O'Sullivan for the defendant

SOLICITORS: Kinneally Miley for the plaintiff
Cruise Lawyers for the defendant

[1] **Douglas J**: On 26 February 2002 Hegira Pty Ltd agreed to sell a freehold lot of vacant residential land to Mr Ching-Te Lin for $520,000. The land was on Bribie Island and known as Lot 417 in a development called Pacific Harbour. There was a right of pre-emption in Annexure F of the contract whose benefit was assigned by Hegira to Vercorp Pty Ltd, the plaintiff in this action. Vercorp claims to have exercised the right of pre-emption and seeks specific performance of a contract for the sale of the land by the defendant, Mr Lin, to it.

Background

The people

[2] Vercorp and Hegira were joint venturers in the development of Pacific Harbour. Hegira's shares were owned by National Australia Group Services Ltd, a company owned by the National Australia Bank. One of that bank's employees, Mr Youren, was a director of Hegira at the relevant time and was the person responsible for the day to day activities of that company. Mr Morrell was another National Australia Bank employee who, on Mr Youren's evidence, did not have any authority to act on behalf of Hegira unless he gave it to him. Mr Youren would ask him to do some things as part of looking after Hegira's affairs, but under his instruction. On the evidence Mr Morrell clearly had some autonomy in making inquiries and conducting correspondence on behalf of Hegira but the decision making required the involvement of Mr Youren; see T60-61 and T72 ll23-34.

[3] Vercorp was owned and controlled separately from Hegira, its shareholder being QMP Nominees Pty Ltd and its directors being a Mr Haseler and a Mr Russell. Its secretary was a Mr MacGinley. Mr Haseler and Mr Russell were also directors of QM Sales and Marketing Pty Ltd and QM Properties Pty Ltd. A Ms Mengel was also a director of QM Sales and Marketing and Mr MacGinley was the secretary of both QM Sales and Marketing and QM Properties. QM Sales and Marketing was the vendor's agent named in the contract. QM Properties was the project manager for the development. Mr Russell was the director of Vercorp actively involved in this matter. Mr MacGinley was not called as a witness but he also engaged in correspondence with Mr Morrell about this contract.

[4] Quinn & Scattini were described as the seller's, Hegira's, solicitors in the contract but Hegira or the National Australia Bank also sought advice from Mallesons Stephen Jaques in respect of the right of pre-emption. Mr Duncan Murdoch was the solicitor at Quinn & Scattini responsible for the transaction.

[5] Mr Lin's mother, Chun Lien Hsieh, normally known as Mrs Lin, provided the money for the purchase and was the moving force behind her son's acquisition of Lot 417. Mr Leo Cruise, a solicitor of Leo Cruise & Co. acted for her and her son but took his instructions from Mrs Lin.

The contract

[6] There were some "community covenants" in Annexure B of the contract that describe the land as "part of a residential development, the object of which is to establish a modern attractive and well designed residential Estate and it is desirable that supervision and control be exercised by Pacific Harbour for the protection and in the interest of the Buyer/s in relation to the nature and type of construction". Clause 12.1 of those covenants said, among other things, that the words "Pacific Harbour", "Hegira" and "Vercorp" should be used interchangeably with each other in the document. Mr Lin also agreed in cl. 4.1 of the community development covenants that he would not:

> "sell, transfer or otherwise dispose of the allotment without firstly delivering to the Developer a Deed of Covenant duly executed by the Purchaser in favour of the Developer containing covenants in the same terms (mutatis mutandis) as are set forth in these covenants

including an obligation for each purchaser to obtain a further Deed of Covenant from any subsequent purchaser."

[7] To facilitate the execution of such a deed of covenant the buyer also agreed in cl. 4.2 to notify the developer of his intention to sell the allotment and to "furnish details of his solicitor".

[8] As well as the right of pre-emption, the special conditions of the contract gave the seller an option to repurchase the land at any time after two years from the date of settlement in the event that the buyer had not commenced construction of an approved dwelling house on the land. That option to repurchase and the right of pre-emption were contained in Annexure F of the contract in the following terms:

> "22 The Buyer undertakes to commence construction on the said land in accordance with these covenants within 2 years from settlement. For the purpose of this condition, commencement of construction will mean the completion of footings and slab of the dwelling house in accordance with the covenant.
>
> 23 In preparing the design of the dwelling or other building to be constructed on the said land the Buyer shall use a registered practicing designer or architect approved by Pacific Harbour.
>
> 24 The Seller agrees to rebate the Buyer the sum of $10,000 toward the use of a Registered Practicing Designer or Architect approved by Pacific Harbour, referred to above upon the completion of the dwelling house provided all conditions of the contract have been complied with.
>
> 25.1 In consideration of the payment of the sum of One Dollar ($1.00) by the seller to the buyer (the receipt of which the buyer acknowledges) the buyer grants to the seller an option to purchase the land at the price hereinafter determined and on the conditions specified herein.
>
> 25.2.1 This option is binding on the buyer and in the event of his death on his estate.
>
> 25.2.2 The benefit of this option may be assigned and may be exercised by the seller or its duly appointed assignee.
>
> 25.3 This option may be exercised at any time after 2 years from the date of settlement in the event that the buyer has not commenced construction of an approved dwelling house on the land.
>
> 25.4.1 Notice of exercise of option shall be given by written notice to the buyer together with a bank cheque for $1,000 by way of deposit on account of the purchase price.

25.4.2 On delivery of the Notice of Exercise of Option the buyer and the seller become immediately bound as Vendor and as Purchaser respectively under a Contract for sale of land in accordance with the terms of the Contract currently approved by the Real Estate Institute of Queensland for the sale of land.

25.4.3 Settlement of the Contract shall take place within 30 days of the date of delivery of the notice of exercise of option, or such extended period as may be agreed.

25.5 The purchase price to be paid by the seller to the buyer pursuant to this clause shall be the net purchase price paid for the land by the buyer to the seller or market value as determined in default of agreement between the parties by a Valuer or Land Economist appointed by the President for the time being of the Australian Institute of Valuers and Land Economists (Queensland Division), at the request of either party, whichever value shall be the lesser.

26.1.1 This right of pre-emption is binding on the buyer and in the event of his death on his estate.

26.1.2 The benefit of this right of pre-emption may be assigned and may be exercised by the seller or its duly appointed assignee.

26.2.1 Notice of Intention to Sell shall be given by written notice by the buyer to the seller.

26.2.2 On delivery of the Notice of Intention to Sell the Seller shall have 28 days in which to accept the offer. On acceptance in writing by the seller accompanied by a cheque for One Thousand Dollars ($1,000.00) by way of deposit the buyer and the Seller become immediately bound as Vendor and as Purchaser respectively under a Contract for sale of land in accordance with the terms of the Contract currently approved by the Real Estate Institute of Queensland for the sale of land.

26.2.3 Settlement of the Contract shall take place within 30 days of the date of delivery of the notice of acceptance of offer or such extended period as may be agreed.

26.3 The purchase price to be paid by the seller to the buyer pursuant to this clause shall be the net purchase price paid for the land by the buyer to the seller or market value as determined in default of agreement between the parties by a Valuer or Land Economist appointed by the President for the time being of the Australian Institute of Valuers and Land Economists (Queensland Division), at the request of either party, whichever value shall be the lesser.

> 27. In the event that the buyer wishes to resell the land and the seller does not exercise its option or right of pre-emption then, and in such case the buyer hereby constitutes and appoints the seller (together with any other real estate agent) as the buyer's agent for the sale of the land on the same terms and conditions as being offered generally, until the property shall be sold.
>
> 28 The Buyer shall not either Subdivide the said land or construct a duplex thereon."

[9] The "net purchase price paid for the land by the buyer to the seller" referred to in cll. 25.5 and 26.3 was not defined in the contract. The balance purchase price was defined in cl. 1.1(2)(a) as "the Purchase Price less the Deposit adjusted under clause 2.5", which itself seems to have been a mistaken reference to cl. 2.6 which dealt with adjustments to the balance purchase price in respect of outgoings and rent up to and after the settlement date.

[10] Vercorp's contention is that the net purchase price paid for the land by the buyer to the seller was $484,000 based on the settlement figures shown in the vendor's solicitors' letter for the purchase as follows:

"Sale Price	$520,000
Less Rebate	$10,000
Less Deposit	$26,000
Balance payable	$484,000"

[11] The rebate referred to in the settlement figures reflected the figure of $10,000 which the seller agreed to rebate towards the use of a designer or architect approved by Pacific Harbour for the design of any dwelling house to be erected on the land.

The sequence of events

[12] After the contract was formed, and by April 2003, Mrs Lin decided on her son's behalf that she did not want to build on the land. Her evidence was that during that period she told her solicitor of her intention to sell "but they didn't do anything"; T117 ll39-40. In August 2003 she spent about $2,000 having drawings for a house prepared, in the belief that she should do that to avoid the loss of money from having to sell the land back at the original price; T117 ll45-55. This passage of the evidence suggested that she was aware of how the contract might operate if a building was not erected on the land in a timely fashion.

[13] By a letter of 10 June 2003 on Pacific Harbour letterhead, Mr Bourke, described as the community development manager, advised Mr Lin that the date by which he was required to construct a home was fast approaching and reminded him that he was required to submit his plans for covenant approval before starting construction. Mr Bourke's responsibilities included the examination and approval of building plans to make sure they were suitable for the development. He pointed out to Mr Lin that it was important to use a registered building designer to gain maximum value from his home as some houses in one area of the development had sale prices of $1.8 million to $2.6 million. Mr Bourke was employed by QM Properties, the

project manager for the development. His evidence was that he had no authority to act on behalf of Hegira. That was also the evidence of Mr Youren, Hegira's director responsible for its day to day activities.

[14] On 15 October 2003 Mr Lin's solicitors sent a facsimile to "QM Property – Pacific Harbour" to the attention of a lady called Kim Crawley. The message was:

> "As discussed earlier by telephone, our client and his family no longer want to move to Bribie Island and have decided to sell lot 417 without building on it.
>
> This brings in to play certain special conditions in the contract and in April next year will enable the developer to buy the property back.
>
> As our client has already decided to dispose of the property, we can begin the sale procedure immediately.
>
> Would you please advise what information your inquire [sic]."

[15] Ms Crawley drew that facsimile to the attention of Mr Bourke. She also appears to have spoken to Mr Lin's solicitor, Mr Cruise, who informed her that Mr Lin would be happy to sell the land back to Hegira for $800,000 Mr Bourke then sent a memo seeking advice, also dated 15 October 2003, to the "contracts manager at head office", a Mr Don Murphy, which was then directed to a Mr Mike Cane.

[16] Mr Cruise later, on 3 November 2003, asked for a response to his facsimile of 15 October 2003. Mr Bourke, also on 3 November 2003, sought advice from Quinn & Scattini on Pacific Harbour letterhead about the effect of the document dated 15 October 2003. The advice was that the facsimile of 15 October 2003 was not effective as a notice under cl. 26 because, in the view of Mr Murdoch, a solicitor at the firm, it merely made an enquiry rather than served any notice as prescribed in the special conditions relevant to Hegira's exercise of the right of pre-emption.

[17] During this period there was also correspondence between Mr MacGinley for QM Properties and Mr Trevor Morrell, the National Bank employee who sometimes did some work for Hegira under the overall control of Mr Youren. Mr MacGinley pointed out the provisions in Annexure F dealing with the right of pre-emption to Mr Morrell. His view, in a facsimile of 17 November 2003, was that, as the current market value of the land was approximately $1 million, it made good business sense for "us" to repurchase this block as soon as possible and re-list it for sale. He thought it prudent to move fairly quickly on the matter in case the purchaser changed his mind.

[18] In another facsimile to Mr Morrell of 28 November 2003 he said:

> "I refer to your facsimile of 20 November 2003 on this matter and confirm the contract price will be $520,000. I have attached a copy of Annexure F of the contract and point out that Clause 26.3 states 'the purchase price to be paid by the seller to the buyer pursuant to this clause shall be the net purchase price paid for the land by the buyer to the sellar [sic] or market value as determined in default of agreement between the parties by a valuer ……. whichever value

> shall be the lesser', Any current valuation of the land would value it in excess of $520,000 and clause 26.3 would then dictate that the contract price be $520,000.
>
> As it is apparent that Cruise Lawyers have not read the contract closely and they do not seem to realise the price is to be $520,000 it might be prudent not to commence discussions at this time. Mr Ching (sic) would still have the opportunity to sell to a third party who might commence construction by April 2004 and thereby satisfy the building time-frame of Annexure F if Mr Ching thought he would get a better price that way.
>
> On reflection, it is probably better we wait until March or April 2004 and if Mr Ching still owns the land at that point we can then go to contract at $520,000 and he would not have the option to sell the land to a purchaser who could comply with the building requirement of Annexure F.
>
> Please let me know if you agree with this approach."

[19] Mr Morrell did agree but, after a later notice of 10 December 2003 appeared, Mr Morrell told Mr MacGinley that Hegira did not support any action to buy back the land. It is likely that Mr Youren did not become aware of these discussions between Mr MacGinley and Mr Morrell until about mid-December 2003 when it became necessary for him to consider, and seek advice about, the later notice dated 10 December 2003.

[20] Mr Cruise sent the notice dated 10 December 2003 by prepaid ordinary post addressed to the managing director of Hegira at 349 Ann Street in Brisbane. The address for Hegira in the contract was actually 345 Ann Street, and the letter was returned to Mr Cruise's office endorsed as having "insufficient address".

[21] Apart from the specific provision in cl. 26.2.1 for the giving of notice of intention to sell, there was a general provision in the contract for the giving of notices in cl. 10.4 as follows:

> "**10.4 Notices**
>
> (1) Notices under this contract must be in writing and may be given by a party's solicitor.
>
> (2) Notices are effectively given if:
>
> (a) delivered or posted to the other party or its solicitor; or
> (b) sent to the facsimile number of the other party or its solicitor."

[22] The notice dated 10 December 2003 that Mr Cruise wished to send read as follows:

> "We act on behalf of Mr Ching-Te Lin, the owner of lot 417 Seaside drive.

> We hereby give notice as required by clause 4.2 of the *community development covenants* which form annexure B to the contract dated 26 February 2002, that Mr Lin intends to enter into a contract for the sale of the land.
>
> We are required to include a provision in the contract for sale requiring the purchaser to execute the assignment of covenants. Would you please provide a sample clause to be inserted in the contract of sale."

[23] Having attempted to send that notice to Hegira, Mr Cruise also sent a copy by facsimile to QM Sales and Marketing, the vendor's agent named in the contract. Although the defence pleads, in effect, in para. 6(a) that Mr Lin's solicitors sent the notice to Hegira's solicitors, Quinn & Scattini, whose facsimile number and address was also set out in the contract, it does not seem that that occurred. The plaintiff admitted in its reply, however, that Hegira came into possession of the notice on 10 December 2003. Mr Cruise did not give evidence in the case.

[24] Clause 4.2 of the Community Development Covenants was the clause which required the buyer to notify the developer of his intention to sell the allotment to which I have already referred. The notice did not refer explicitly to cl. 26.2.1 of Annexure F, the notice of intention to sell to be given by written notice by the buyer to the seller, which could be used to trigger the right of pre-emption, but, in my view, the notice can be effective for both purposes.

[25] Also on 10 December 2003, Mr Cruise sent a facsimile, again to "QM Property – Pacific Harbour" for the attention of Kim Crawley, which read as follows:

> "We note that we have received no response to our letters dated 15 October and 3 November 2003 in relation to the sale of our client's land.
>
> We attach for your information a notice given pursuant to the *community development covenants* annexed to the contract dated 26 February 2002.
>
> Would you please provide the sample clause for inclusion in the contract of sale. We require this information by close of business today failing which we will draft our own clause."

[26] When that facsimile of 10 December 2003 came to Mr Bourke's attention he again sought advice from Quinn & Scattini. Quinn & Scattini, through Mr Murdoch, responded on 10 December 2003 to Mr Cruise informing him that the firm acted for Hegira which had sent them his facsimile of 10 December 2003. It was not clear on the evidence what Hegira's involvement was in the transmission of the letter to Quinn & Scattini but it was subsequently treated by the plaintiff as a notice of intention to sell for the purposes of the exercise of the right of pre-emption. If it had not been given by the buyer to the seller or its solicitor that omission seems to have been waived by the plaintiff at least.

[27] Mr Murdoch said that he would forward a clause as referred to in the final paragraph of Mr Cruise's facsimile but that he would not be able to do it that day. He did so the next day, 11 December 2003.

[28] During the latter part of December 2003 and into early January 2004 Hegira considered whether it wished to or was able to exercise the right of pre-emption contained in cl. 26 of annexure F. Its solicitors, in this instance Mallesons Stephen Jaques, advised it that it could not exercise the right effectively and it decided not to do so, it seems, on Mr Youren's evidence, because it was not in the business of buying property. One can infer that Vercorp's solicitors or advisors took a different view, and Hegira was willing to assign its rights to Vercorp.

[29] On 7 January 2004 Hegira assigned the rights pursuant to cl. 26.1.2 and cl. 25.2.2 of annexure F to Vercorp. Mr Murdoch, on his evidence acting for Vercorp, then sent a letter to Mr Cruise in these terms:

> "LOT 417 SEASIDE DRIVE, BANKSIA BEACH
>
> Your letter dated 10 December 2003 addressed to the managing director of Hegira Limited giving notice that your client Mr Lin intends to sell has been handed to us with instructions to reply.
>
> Our client elects to exercise the right of pre-emption contained in Annexure 'F' clause 26 of the contract for the sale of the property to your client.
>
> Enclosed is a cheque for $1,000.00 by way of deposit.
>
> Settlement of the contract shall take place within 30 days.
>
> Hegira Limited has assigned the benefit of the right of pre-emption to Vercorp Pty Ltd and accordingly the buyer will be Vercorp Pty Ltd."

[30] That was delivered to Mr Cruise and Mr Murdoch gave evidence that the words "our client" in the letter were meant by him to refer to Vercorp. Vercorp also lodged a caveat on the land on the same day.

[31] On behalf of Mr Lin, Mr Cruise wrote on 4 February 2004 asserting that the notice of 15 October 2003 was, in effect, a notice for the purposes of cl. 26.2.1 not accepted within the 28 days provided by cl. 26.2.2. He asserted that Mr Lin was under no obligation "to sell the property back to your client".

[32] By his facsimile of 5 February 2004, Mr Murdoch of Quinn & Scattini asserted that the facsimile sent 15 October 2003 did not constitute a notice given to Hegira because it was addressed not to it but to "QM Property – Pacific Harbour" and also asserted that it did not give notice of an intention to sell. He went on to say that both of those issues were corrected in Mr Cruise's letter sent 10 December 2003 and that his client exercised his right of pre-emption pursuant to the terms of the contract on receipt of the correct notice.

[33] The date for settlement nominated in a settlement statement he had sent earlier was 6 February 2004. He attended on settlement but it did not take place.

[34] On 23 December 2003 Mr Lin entered into an agreement with SRD Developments Pty Ltd to sell the land to them for $630,000. Neither Vercorp nor Hegira became aware of that contract until much later, during the course of this litigation. That contract had not been stamped because it contained a special condition making it subject to and conditional upon the seller and buyer entering into an assignment of covenant with Hegira before the settlement date and Hegira had not agreed to enter into such an arrangement.

[35] I received the document in evidence on the basis that it be given to the Commissioner of State Revenue pursuant to an arrangement approved by me under s 487(2)(a) of the *Duties Act* 2001. That was done and the Commissioner accepts that no duty is yet payable on the agreement.

The issues

[36] The defendant attacked the exercise of the right of pre-emption on several bases. It was said to be uncertain because the words "net purchase price paid for the land by the buyer to the seller" in cl. 26.3 were undefined and unenforceable because of lack of consideration. It was also argued that it was an invalid and unenforceable restraint on alienation.

[37] Mr O'Sullivan, for the defendant, also relied upon the notice of 15 October 2003 to "QM Property – Pacific Harbour". The plaintiff's case was that that notice was not given to Hegira and was therefore not effective, but the defendant argued that it came to the attention of QM Sales and Marketing through Mr Bourke as Hegira's agent, by 14 November 2003 or by 17 November 2003, by the letter of QM Properties to Hegira, in circumstances where Hegira did not exercise its right of pre-emption within 28 days of those dates.

[38] The defendant also argued that it was received by Hegira's solicitors on 3 November 2003, although sent to them by Mr Bourke rather than from the defendant or his solicitors, and that this indirect notice to the solicitors amounted to notice given "by the buyer to the seller" for the purposes of cl. 26.2.1. Again there was no exercise of the right of pre-emption within 28 days of 3 November 2003.

[39] The defendant also argued that Vercorp was estopped from relying on the right of pre-emption because of the provision by Mr Murdoch on 11 December 2003 of the clause for insertion into a proposed contract of sale in circumstances where the defendant was asked to advise Hegira's solicitors of the settlement date of the proposed contract. It was argued that that amounted to a representation that the defendant could enter into a contract without Hegira exercising its right of pre-emption, that in reliance on that representation it entered into the contract with SRD on 23 December 2003 making it unconscionable for Hegira or Vercorp to resile from that representation.

[40] The defendant also argued that SRD's interest was superior to that of Vercorp disentitling Vercorp from the remedy it sought, specific performance. That potentially gave rise to the issue of what effect could be attributed to the SRD contract if it was not properly stamped.

[41] The defendant has also counterclaimed for damages alleging that the caveat lodged by Vercorp was lodged without reasonable cause and that it is exposed to a damages claim from SRD.

Whether the right of pre-emption is unenforceable

Uncertainty

[42] The net purchase price paid for the land by the buyer to the seller can be made certain simply by reference to the settlement figures contained in ex. 2, Quinn & Scattini's letter to Leo Cruise & Co. dated 20 March 2002. From that evidence it is apparent that a deposit of $26,000 had been paid and that a further payment of $484,000 was required, a total of $510,000 or $10,000 less than the agreed price of $520,000. That $10,000 was identifiable as the rebate allowed pursuant to cl. 24 for the buyer to use for a designer or architect. There was a separate agreement at p. 167 of ex. 1, the contract, that referred to an agreement to discount the purchase price by $10,000 that may or may not have been the same as the rebate allowed under cl. 24, but only one such sum was deducted for the purposes of settlement.

[43] Although Mr Cooper S.C. for Vercorp argued that the true figure was the same as the "balance purchase price" defined in cl. 1.1(2)(a) as the purchase price less the deposit, or $484,000, I can see no reason to leave the deposit out of account when calculating how much was paid for the land by the buyer to the seller. Clause 2.6 permitted the balance purchase price to be adjusted for outgoings and rent but there was no evidence of such an adjustment and no reason to say that the absence of such figures rendered any agreement arising from the exercise of the right of pre-emption unenforceable.

[44] In my view the net purchase price paid by the buyer to the seller was $510,000 and certain.

Lack of consideration

[45] The defendant's argument is that the right of pre-emption purports to grant the seller rights to purchase the property but creates no obligation to do so. The plaintiff argues that the consideration for the grant of the right of pre-emption is to be found in the range of mutual promises in the agreement as a whole as well as those to be found in cl. 26. I agree with that submission.

[46] Even when cl. 26 is considered in isolation it includes a promise by the seller in cl. 26.2.2, if it receives the notice of intention to sell from the buyer required by cl. 26.2.1, to pay $1,000 within 28 days as a deposit if it decides to accept the offer constituted by the delivery of that notice. As Vercorp also submitted, the rebate of $10,000 in cl. 24 was given in return for the promise by the defendant to comply with all provisions of the contract. In other words the obligation on the buyer to notify the seller of his intention to sell is supported at least by the promise to allow the rebate and gives the seller the right or opportunity to repurchase the property in accordance with the conditions promised in cl. 26.2.2. In my view it does not matter that the seller is not obliged to repurchase. It gave the rebate and made its other promises in the contract in return for the promise that it would have the right to repurchase should it so wish. I am satisfied that the right of pre-emption is supported by consideration.

Restraint on alienation

[47] That then requires me to consider the argument that the right of pre-emption amounts to a restraint on alienation that should be treated as ineffective. The first issue to determine in this context is the period during which, on the proper construction of the contract, the right of pre-emption persists. Prima facie it appears to be unlimited, but it needs to be looked at in context. The special conditions, of which the right of pre-emption is part, are set out above at para. [8].

[48] The buyer undertakes to commence construction on the land, within two years of settlement, of a house designed by an approved designer or architect; cll. 22, 23 and 24. There is an option to repurchase given to the seller that is exerciseable at any time *after* the period of two years from the date of settlement, but only if the buyer has not commenced construction of the house; cl. 25.

[49] The right of pre-emption in cl. 26 is not said explicitly to exist only if construction of the house has not commenced, but it makes commercial sense only if it is understood as existing during the period up to two years after the date of settlement and where the buyer has not commenced construction of the house. Otherwise, construed literally, it would apply at any stage after settlement and when a house, obviously intended to be a well designed and expensive structure, had been erected on the land. It is also significant that there is no attempt to exact a similar promise from subsequent purchasers.

[50] Such a construction would allow the seller to expropriate the property at the lesser of the net purchase price paid by the buyer originally and the market value of the property at any time, even if an expensive house had been built on it, a consequence that would be grossly unfair or unconscionable. It would also be inconsistent with the existence of the option to purchase after the two year period which itself is exerciseable only where construction of the house has not commenced. Should the clause be treated as bearing the construction that it is exerciseable at any time after the contract or should it be understood as limited in the sense I have just articulated?

[51] The correct approach to the construction of commercial contracts was examined recently by Chesterman J. in *Norco Co-operative Ltd v. Parmalat Australia Ltd* [2006] QSC 38 at [11]. His Honour said:

> "1. The court must first look at the words of the document which constitutes the contract between the parties. The whole of the document must be considered and a construction should be attempted which will make all clauses operate harmoniously. If the words are plain and unambiguous the court must give effect to them even though the result may appear one sided or even unreasonable. See *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.
>
> 2. If the language of the contract is ambiguous, or open to two constructions, or if the plain meaning of the clause renders it inconsistent with another, the court should resolve the ambiguity, or reconcile the inconsistency, by adopting a construction which accords with 'business common sense' or the commercial purpose of the agreement which appears from its terms and the knowledge, common to the parties, which formed the background to the formation of their agreement. See *Australian Broadcasting*

> *Commission*; *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-4 per Kirby P.
> 3. If the words of a contract, while plain and unambiguous, lead to a result which is not only unreasonable but absurd, the court should construe the contract, if necessary by supplying, omitting, or correcting words to avoid the absurdity: *Watson v Phipps* (1985) 60 ALJR 1 at 3; *Westpac Banking Corporation v Tanzone Pty Ltd* [2000] NSWCA 25 paras [19] and [20]. Before this rule is put into operation it must, I think, be unmistakably clear that the parties cannot have meant what they said was their bargain."

[52] That expression of principle was approved by Jerrard J.A. on the appeal in the matter; *Parmalat Australia Ltd & Ors v. Norco Co-operative Ltd* [2006] QCA 129 at [42] and see Williams J.A. at [24]. When I apply those principles, the better view seems to me to be that the right of pre-emption should be construed as effective during the period up to two years after the date of settlement and where the buyer has not commenced construction of the house.

[53] Is such a right so construed an invalid restraint on alienation of the land held by Mr Lin? To ask the question in that form is, essentially, for reasons I shall discuss, to require a negative answer. It is also significant that the right in this case, although assignable, is exerciseable only during a limited period after notice is given, after which the purchaser is at liberty to sell the property unaffected by cl. 26 "on the same terms and conditions as being offered generally"; see cl. 27.

[54] Although Dixon C.J. and Menzies J. recognised, in *Hall v. Busst* (1960) 104 C.L.R. 206, 215, 217-218, 230-231, 235-236 that a contractual restraint, having an independent effect, against a purchaser transferring at any time, without the vendor's consent, land she had bought from that vendor, was void as a restraint on alienation, that principle does not extend to these facts. Nor does the view of Fullagar J. at 224-225 assist the defendant here. His Honour's view was that, even though the clauses there should have been construed in context to require that the purchaser should not alienate the land without first offering the property to the vendor at a stated price, giving him "not merely an option to purchase but an option to purchase or consent", it was still an invalid restraint because it was of indefinite duration, also because it required the sale to be at a fixed price not necessarily related to the then value of the property and required the purchaser to give an option to purchase to the vendor when she may merely have wished to enter into a short term lease or a mortgage.

[55] Kitto J., dissenting, at 228-229, took the view that the relevant clauses should have been construed so as to create a right of pre-emption which, if not exercised by the vendor buying back the property, would have required him to consent to the purchaser's proposed sale. On that construction his Honour said that there could be no valid objection to the clause said to prohibit alienation. Windeyer J. agreed in substance with that view at 246.

[56] In my view the relevant clauses in this case create a right of pre-emption that is both limited in time, for the relatively short period of two years after settlement, and, although fixed in price, nominates a price effectively the same as that paid by the buyer. If the right is not exercised by the seller then the buyer is explicitly at liberty to sell the land pursuant to cl. 27. Where the land is in the same state as when sold

originally and there is no reliable evidence of a significant change in its value there is no reason to treat that fact by itself as a reason to regard the clause as imposing a restraint on alienation. Even if there were such evidence of a change in value that would not necessarily make any difference; *Reuthlinger v. MacDonald* [1976] 1 N.S.W.L.R. 88, 100 F-G. There was no expert evidence of the value of this land in January 2004.

[57] The collateral purpose for the existence of the right of pre-emption and the option to purchase was said to be to ensure that the estate had high quality homes built in accordance with the community development covenants within a two year period, a purpose equally to the benefit of the developer and other purchasers in the estate who had made similar promises. That seems to me to be a valid construction of the contract and a collateral purpose of the type that rights of pre-emption may protect; *Reuthlinger v MacDonald* at 95-101.

[58] The agreement in *Saliba v Saliba* [1976] Qd. R. 205, a decision relied on by the defendant, that the tenants in common of the land in question would give each other the right of first refusal of the share each held in the land for a fixed price being one half of the purchase price of the land, was unlimited in time where there was evidence that the value of the property had increased significantly by the time of trial. Kneipp J. said at 207 that the effect of the agreement was that, no matter how much the value of the land rose during the joint lives of the parties, neither could sell their share without first offering it to the other at what might be a grossly inadequate price. His Honour took the view that, in those circumstances, the agreement should be held to be against public policy and void. That decision is distinguishable from this one because of the period during which, on my interpretation, the right of pre-emption persisted. See also the criticism of the decision by Toohey J in *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 C.L.R. 635, 671.

[59] Of greater significance for this case is the decision of the New South Wales Court of Appeal in *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 N.S.W.L.R. 551. There, as here, the purchaser company had a potential obligation to resell within two years if industrial buildings had not been built on the land. After discussing *Hall v. Busst*, Handley J.A. said:

> "The clauses in the present contract stand in marked contrast to those in *Hall v Busst*. The relevant restraint imposed by subcl (a) only continued until the company had built industrial buildings on the land which subcl (b) contemplated would occur within two years of the sale. Once that condition was fulfilled the restraint came to an end. Subclause (a) to this extent was neither independent nor unlimited in duration. Moreover the contract for resale came into existence because the respondent failed to perform its promise to build which was one of the terms on which it obtained the land from the Council. The contract did not come into existence because the respondent wished to alienate the land.
>
> It cannot be doubted that any contract for sale or option or right of pre-emption binds the grantor not to alienate the land to a third party in a manner which would be inconsistent with the rights of the purchaser or grantee. This negative stipulation, if not expressed, is necessarily implied: see *Woodroffe v Box* (1954) 92 CLR 245 especially at 257-259, *Oliver v Oliver* (1958) 99 CLR 20 and *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at

> 629, 647. Restraints of this kind, arising as incidents of a personal contract for the sale or other disposition of land stand right outside any legal doctrine which invalidates contractual restraints on alienation. In my opinion neither subcl (b) nor the relevant part of subcl (a) are invalid as unlawful restraints on alienation."

[60] Although the approach adopted in the last paragraph of that passage has been viewed with apparent scepticism by Young J. in *Elton v. Cavill [No. 2]* (1994) 34 N.S.W.L.R. 289, 298-299, his Honour went on at 300 to conclude that, while it was clear from *Hall v. Busst* that the rule against alienation of property still applied, authorities such as *Wollondilly* showed that it may be relatively easily held inapplicable where other parts of the common law now effectively cover the field. He went on to conclude that the "collateral purpose rule" could justify a restraint on alienation which is for the purpose of securing a proper collateral benefit.

[61] Besanko J., speaking for the South Australian Full Court, in considering a similar issue in *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc* (2004) 88 S.A.S.R. 334, also said this at 370 [120]-[122]:

> "[120] In the case of a grant or devise, a total restraint on alienation is void on the basis of repugnancy or public policy or possibly the indirect effect of Quia Emptores. Many years ago, Professor Glanville Williams argued persuasively that repugnancy could not be the real basis for the doctrine ("The Doctrine of Repugnancy — I: Conditions in Gifts" (1943) 59 LQR 343). The doctrine will also lead to the striking down of a partial restraint on alienation in a grant or devise. It is very difficult to reconcile all the cases that deal with the striking down of partial restraints in a grant or devise (see the discussion in Professor Glanville Williams' article referred to above; Mr C Sweet, Restraints on Alienation I" (1917) 33 LQR 236 and "Restraints on Alienation II" (1917) 33 LQR 342).
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> [121] The common law doctrine also applies in the case of restraints by way of bond, covenant or contract. The reason for the application of the doctrine in this area is the public policy consideration that private property should be fully alienable. Of course, there are many restrictions on the full alienability of private property which are upheld by the courts. Furthermore, there is an important countervailing public policy consideration, and that is the consideration that parties who freely negotiate an agreement should be bound by the terms of the agreement. In my opinion, there is a great deal to be said for confining the operation of the common law doctrine within narrow limits insofar as it applies to restraints imposed by bond, covenant or contract. This result could be achieved either by holding that certain restraints are not caught by the doctrine, or by developing the exception of a lawful collateral object (see the discussion in Mr Sweet's first article referred to above).
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> [122] Having said that, it would appear to be established by the authorities that a right of first refusal will attract the operation of the doctrine in certain circumstances. Relevant factors will be the scope of the initial prohibition, whether the right exists for a limited period or indefinitely, whether the grantor of the right must extract a similar promise from subsequent purchasers and whether the right is to be exercised by reference to a fixed price."

[62] A comparable approach to the application of the doctrine to contractual restraints was taken by Gummow J in the Full Court of the Federal Court in *Caboche v. Ramsay* (1993) 119 A.L.R. 215, 232 where his Honour said:

> "In *Nullagine Investments Pty Ltd v Western Australian Club Inc*, supra, at ALR 33, Brennan J, after referring to the above passage from *Hall v Busst*, said that in the case of contractual restraints the only basis for holding the covenant or agreement invalid was public policy. Furthermore, it would appear in the case of contractual restraints that the question is one of degree: *Reuthlinger v MacDonald* [1976] 1 NSWLR 88 at 94–101, approved on appeals unreported, 20 October 1976, No CA92 of 1976."

[63] As I have already pointed out, in this case the right exists for a limited period of two years if no house is built on the land. It could not be said that the grantor of the right here must extract a similar promise from subsequent purchasers, having regard to cl. 27 in particular, and, although the right is to be exercised by reference to a fixed price, the price fixed is that which the purchaser paid for the property, a price treated as appropriate in *Wollondilly*.

[64] The discussion in the article by K Mackie, *Contractual Restraints* (1998) 12 JCL 255, where the author concluded that the principle established in *Hall v. Busst* has little, if any, application to contractual options or rights of pre-emption, it having only been directly applied in one case, *Saliba v Saliba*, which the author described as "now of doubtful authority", is also useful in helping me to arrive at the conclusion that the enforcement of the contract is not prevented by the application of the rules dealing with restraints on alienation.

The effect of the letter of 15 October 2003

[65] The letter of 15 October 2003, relied on by Mr Lin as an early notice of his intention to sell for the purposes of cl. 26, says that he has "decided to sell" and "can begin the sale procedure immediately". It does not mention any prospective purchaser. SRD did not sign a contract until 23 December 2003 and there does not seem to have been a prospective purchaser in existence on 15 October. What is clear is that Mr Cruise was then seeking to negotiate a repurchase by Hegira at a price of $800,000.

[66] A right of first refusal or a right of pre-emption has been described as a right in the holder to "receive the first offer, which he also may accept or not as he wishes"; see *Mackay v Wilson* (1947) 47 SR (NSW) 315, 325 followed in *THL Robina Pty Ltd v The Glades Golf Club Pty Ltd* [2005] 2 Q.d R. 186, 193-194, [19]-[20]. Prima facie, that does not seem to me to require the owner to identify a competing potential buyer, separate from the holder of the right of pre-emption, before giving notice of the intention to sell. Such an approach may be appropriate in some cases depending on the wording of the relevant contract; see, e.g., *Peppers Hotel Management Pty Limited v Hotel Capital Partners Limited* (2004) 12 B.P.R. 22,879 at *22, 884-5* [26], 22, 888 [40]-[43] and 22, 896-7 [99]-[107]. In this case, however, and contrary to the plaintiff's submission, it was open to Mr Lin to express his intention to sell using the language referred to above.

[67] The real question is whether the letter addressed by his solicitors to "QM Property – Pacific Harbour" was given by written notice by the buyer to the seller, to use the

language of cl. 26.2.1, or "delivered or posted to the other party or its solicitor" or "sent to the facsimile number of the other party or its solicitor" to use the language of cl. 10.4 of the standard conditions of the contract.

[68] The particular clause of the contract that governs this situation is cl. 26.2.1, more so than the general clause in cl. 10.4. In requiring the notice to be given by the buyer to the seller it prescribed a step that was important in fixing the commencement of the 28 day period available to the seller to accept the offer. In that context it is not appropriate to treat the giving of notice to the project manager as equivalent to the giving of notice to the seller. There is no evidence that Hegira had nominated "QM Property" as its agent for the purpose of receiving such notices. Nor is there evidence that Mr Bourke, or Mr Morrell, who also received the letter, had been clothed with such authority. The evidence at T60 ll45-60 that Mr Morrell could discuss matters surrounding the project with "QM" and then bring them to Mr Youren does not permit such a conclusion. Although Mr Morrell, a NAB employee, did some work for Hegira, it was work performed for a particular purpose for Mr Youren who did not clothe him with the authority to receive such a notice; see *Petersen v. Moloney* (1951) 84 C.L.R 91, 94-95; *Micarone v. Perpetual Trustees Australia Pty Ltd* (1999) 75 SASR 1, 124-125 at [638]-[640] and *Gheko Developments Pty Ltd v Azzopardi* [2005] QCA 283 at [13]-[14].

[69] Although Hegira's solicitors received the notice on 3 November 2003, through Mr Bourke, they were not given it by Mr Lin or his solicitors. They received it independently of them. Where the date of giving the notice by the buyer to the seller has significant consequences for later steps in the exercise of the right of pre-emption by the seller, it is not appropriate to leave the fixing of that date to the chance that an intermediary, not specifically authorised to receive the notice, or who received it independently of the buyer, will at some unspecified time forward the letter giving notice to the seller. The contract spelled out a means by which the buyer should give notice to the seller and the buyer should be held to that contractual provision; *Gheko Developments Pty Ltd v. Azzopardi* at [14], [38]-[42]. Nor would it have been difficult for the letter to have been sent to Hegira or its solicitors by Mr Lin or his solicitors had Mr Lin wished to give such a notice. The contract provided the relevant details.

[70] In this context it is significant that Mr Youren, the controller of Hegira for NAB, did not know until mid-December that Mr Lin wished to sell the property. In my view, therefore, the letter of 15 October 2003 directed to "QM Property – Pacific Harbour" did not amount to a written notice by the buyer to the seller of the buyer's intention to sell.

Estoppel

[71] The defendant's argument that the plaintiff is estopped from relying on its right of pre-emption relies upon a facsimile dated 11 December 2003 from Quinn & Scattini which itself responded to another facsimile of 10 December 2003 from Cruise Lawyers requesting a sample clause be inserted in the contract of sale that Mr Lin intended to enter into. The facsimile from Quinn & Scattini set out the recommended clause and went on to say: "Please advise of the settlement date." The conclusion sought to be drawn from that sequence of events was that Hegira represented to Mr Lin that a contract of sale may be entered into by him without Hegira exercising its right of pre-emption.

[72] This exchange occurred within a day of the service of the letter of 10 December 2003 treated by the plaintiff as the notice entitling it to exercise the right of pre-emption. In my view the mere provision of the sample clause required to be inserted into a contract for the sale of the allotment to another person, even with an enquiry as to the settlement date, does not amount to a representation that the right of pre-emption will not be exercised. Hegira, before it assigned its rights to Vercorp, had 28 days in which to accept the offer constituted by delivery of the notice of the intention to sell. Its solicitor's facsimile does not address what Hegira's intentions were in respect of the exercise of the right. In my view, therefore, the response from Quinn & Scattini should be seen as the provision of information necessary to allow Mr Lin to enter into a contract with a third party if that occurred but not a representation that the right of pre-emption would not be exercised.

[73] The plaintiff also argued that Mr Lin himself did not act in reliance on this representation as he was ignorant of it and simply acted at the behest of his mother. His evidence was that he was selling the land because his mother had made that decision and he did not then know the identity of the purchaser. The plaintiff's counsel make the point that there is no pleaded case which can make the defendant's mother's behaviour relevant in any sense to the estoppel pleaded, as it is not pleaded that she caused her son to act in reliance on her state of mind. It seems quite clear, on the evidence, that Mrs Lin was the controlling mind in respect of the actions of her son, Mr Lin. The case was conducted on the basis that she controlled what was done by her son and, in my view, it would be reasonable to treat a representation acted on by her as his agent as one affecting his conduct. Because, however, I do not believe that the representation has the consequences alleged by the defendant, I conclude that no estoppel exists which would prevent the plaintiff from relying upon its exercise of the right of pre-emption.

[74] I should add, for completeness, that the exercise of the right of pre-emption by the letter from Quinn & Scattini dated 7 January 2004 was attacked by the defendant on the basis that, at that stage, Quinn & Scattini were acting for Hegira, not Vercorp. That is contrary to the evidence of Mr Murdoch and the letter of 7 January 2004 in referring to "our client" also makes it clear that Hegira had assigned the benefit of the right of pre-emption to Vercorp and that the buyer would be Vercorp.

Position of SRD

[75] SRD's contract was entered into on 23 December 2003 with Mr Lin. The existence of that contract was alleged in the defence to disentitle the plaintiff from seeking its remedy of specific performance on the basis that its interest is inferior to that of SRD. The submission to the contrary is that a right of pre-emption gives rise to an interest in land from the date of the "triggering event", in this case the giving of the notice on 10 December 2003, and is not deferred to the date when the pre-emption is actually exercised. The authority relied on is *Transfield Properties (Kent Street) Pty Ltd v. Amos Aked Swift Pty Ltd* (1994) 36 N.S.W.L.R. 321, 341-343.

[76] That decision of Santow J. "that the right of first refusal may thus not from the outset represent an interest in land but only when the occasion for its exercise triggers it" accords with my view of the effect of the notice given pursuant to this contract creating an interest in the land recognised by equity. Here the plaintiff has

also caveated to protect its interest and, to my mind, has priority to the interests of SRD and its contract to Mr Lin.

[77] Had I formed a contrary view it would have been necessary for me to consider the effect of the SRD contract which is not stamped. As I said earlier, the Commissioner of State Revenue accepts that there is no obligation to stamp it yet and as I have received it into evidence by arrangements approved by me it seems to me that that contract is available for use in these proceedings. In that context, I prefer the view of McGill DCJ in *Burnitt v Pacific Paradise Resort Pty Ltd* [2004] QDC 218 to the views of Holmes J in *Hoggett v O'Rourke* [2002] 1 Qd R 490 and *Caxton Street Agencies Pty Ltd v Korkidas* [2002] QSC 210. See also *Franks v. Norfolk Estates Pty Ltd* [2004] QSC 301 at [20]-[23] and *Mission Development Group Pty Ltd v Rhett Pty Ltd* [2004] QSC 359 at [11]-[16].

Effect of the caveat

[78] There was a counterclaim by the defendant asserting that the caveat lodged by the plaintiff was lodged without reasonable cause and continued without reasonable cause. In view of my findings this counterclaim fails. The plaintiff also argued that any monies paid in respect of this counterclaim were paid not by the defendant but by Mrs Lin and that there is no pleading or evidence that the money was paid by her on account of Mr Lin or that he had some enforceable obligation to repay that money to her. There was substance to those submissions but, in view of my conclusions about the principal matters, it is not necessary for me to resolve this issue.

Orders

[79] There will then be an order for specific performance of the contract made 7 January 2004 pursuant to which the defendant agreed to sell and the plaintiff agreed to buy land at 417 Seaside Drive, Banksia Beach, Bribie Island in the State of Queensland more properly described as Lot 417 on SP133280, County of Canning, Parish of Woorim bearing title reference 50367602. I shall hear further submissions about the form of the order and costs.