SUPREME COURT OF QUEENSLAND

CITATION:	*Fairborne Pty Ltd v Strata Store Noosa Pty Ltd* [2009] QSC 250
PARTIES:	**FAIRBORNE PTY LTD ACN 074 190 864** (applicant) **v** **STRATA STORE NOOSA PTY LTD ACN 130 223 460** (first respondent) **GAVIN RICHARD BROWN** (second respondent) **ANTHONY MICHAEL MULLINS** (third respondent) **ERIC JOHN VAN WAAIJENBURG** (fourth respondent)
FILE NO:	5824/09
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2009
JUDGE:	Daubney J
ORDER:	**[1] There will be an order against the first respondent for specific performance of the contract of sale. I would dismiss the application against each of the second, third and fourth respondents; and** **[2] I will hear from counsel as to an appropriate form of order, and as to costs.**
CATCHWORDS:	CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – VENDOR'S REMEDIES – SPECIFIC PERFORMANCE – where applicant as vendor agreed to sell to the first respondent as purchaser a plot of land – where the contract's special conditions provided for the purchaser on execution of the contract to apply to the local authority for reconfiguration of the existing lot and an adjoining lot – where the vendor's solicitors wrote to the purchaser's solicitors advising that the vendor affirmed the

contract – where the vendor contended it was ready, willing and able to settle the contract – where the applicant vendor sought an order for specific performance of the contract against the first respondent purchaser – whether the applicant had failed to comply with a requirement in a special condition of the contract – whether the first respondent had validly terminated the contract in reliance on an alleged failure by the applicant to comply with a special condition of the contract – whether damages were an adequate remedy – whether requiring the first respondent to perform the contract would impose undue hardship on the first respondent

GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – GENERALLY – where the purchaser covenanted to procure execution of a specified form of guarantee by the directors of the purchaser – where that guarantee was executed by each of the second, third and fourth respondents – where the applicant claimed for an order that the second to fourth respondents perform the contract of guarantee – where the applicant claimed in the alternative an injunction requiring the second to fourth respondents to perform all obligations of the first respondent under the contract in accordance with the guarantee – whether the applicant's claim for relief against the guarantors by way of orders in the nature of specific performance or mandatory injunction was premature

Land Sales Act 1984 (Qld)

Boyarsky v Taylor [2008] NSWSC 1415, cited
Iambic Pty Ltd v Northwind Holdings Pty Ltd [2001] WASC 44, cited
JC Williamson Ltd v Lukey (1931) 45 CLR 282, cited
Pasedina (Holdings) Pty Ltd v Khouri (1977) BPR 9460, applied
Patel v Ali [1984] 1 Ch 283, cited
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245, applied

COUNSEL: A Musgrave with I Klevansky for the applicant

N H Ferrett for the respondents

SOLICITORS: Siemons Lawyers for the applicant

McKays Solicitors as Town Agents for Brand Partners Commercial Lawyers for the respondents

[1] By a contract dated 27 July 2008 made between the applicant as vendor and the first respondent as purchaser, the applicant agreed to sell and the first respondent agreed

to purchase for the sum of $1,854,980 (plus GST) land described on the face of the contract as "Part of Lot 32 on SP 170751", situated on Lionel Donovan Drive at Noosaville. The contract's special conditions provided for the purchaser, upon execution of the contract, to apply to the local authority for reconfiguration of the existing lot and an adjoining lot, such that the property sold under the contract would form one lot in the new survey plan.

[2] By special condition 4, the purchaser also covenanted to procure execution of a specified form of guarantee by the directors of the purchaser. That guarantee, executed by each of the second, third and fourth respondents, was in the following terms:

> "**IN CONSIDERATION** of the Vendor at the request of Gavin Richard Brown of 5 Woods Close, Winthrop in the State of Western Australia, Anthony Michael Mullins of 428 Ligar Street, Ballarat in the State of Victoria and Eric John Van Waaijenburg of 42 Arbor Drive, Ellenbrook in the State of Western Australia (hereinafter called "the Guarantor") entering into this Contract of Sale the Guarantor HEREBY GUARANTEES to the Vendor the due and punctual payment of moneys due and payable hereunder and the punctual observance and performance by the Purchaser of the covenants and provisions contained or implied under this Contract of Sale on the part of the Purchaser to be respectively paid observed or performed, and will immediately upon demand by the Vendor in the event of default by the Purchaser under this Contract of Sale pay and perform the obligations of the Purchaser under this Contract of Sale AND ALSO AGREES with the Vendor to be liable for and to indemnify and keep indemnified the Vendor against all actions claims suits demands and losses which the Vendor may incur or be liable for as a result of any default act or omission of the purchaser under the terms of this Contract of Sale AND FURTHER AGREES (any rule of law or equity to the contrary notwithstanding) that the guarantee and indemnity given by the Guarantor under this clause shall be a continuing guarantee and indemnity and that the granting of time, credit, concession or indulgence to the Purchaser or the Guarantor or the making of any composition with or the waiver of any breach or default by the Purchaser or the neglect or forbearance of the Vendor to enforce the covenants and provisions of this Contract of Sale or those of this guarantee and indemnify or the avoidance for any reason whatsoever by statute or otherwise of any payment by or on behalf of the purchaser or the Guarantor to the Vendor or any moratorium or other period staying or suspending by statute or the order of any court or other authority all or any of the Vendor's rights remedies or recourse against the Purchaser will not stay suspend release or discharge this guarantee and indemnity it being the intention that the guarantee and indemnity herein contained shall be unconditional and absolute in any and all circumstances

> AND the Guarantor HEREBY WAIVES in favour of the Vendor all rights remedies and recourse of the Guarantor against the Vendor and the Purchaser and any other person estate or assets so far as necessary to give effect to anything contained in this guarantee and indemnity. If the Guarantor comprises two or more person each Guarantor is jointly and separately liable hereunder and the liability of the Guarantor shall not be affected if the guarantee and indemnity herein contained on the part of another person is void defective or informal."

[3] The extended date for settlement of the contract was 27 April 2009. There is no issue that the purchaser failed to attend settlement, nor is there any issue that the purchaser failed to tender the purchase price.

[4] On 30 April 2009, the vendor's solicitors wrote to the purchaser's solicitors advising that the vendor affirmed the contract.

[5] The vendor contends that it is ready, willing and able to settle the contract. This has not been disputed by the purchaser.

[6] Accordingly, by an originating summons filed on 2 June 2009, the applicant vendor sought an order for specific performance of the contract against the first respondent purchaser.

[7] By this originating summons, the applicant has also sought relief against the second, third and fourth respondent guarantors. I will consider the relief sought against those parties separately.

The vendor's claim for specific performance

[8] The first respondent purchaser sought to resist the application for a decree of specific performance on the following bases:

(a) that the applicant had failed to comply with a requirement in special condition 9 of the contract, which required the obtaining of an exemption from compliance with the provisions of Part 2 of the *Land Sales Act* 1984 ("LSA");

(b) that the first respondent had validly terminated the contract in reliance on an alleged failure by the applicant to comply with special condition 8.10 of the contract;

(c) that damages are an adequate remedy, and that specific performance should not be ordered; and

(d) that it is not possible for the first respondent to perform the contract and/or enforcement of the contract would impose undue hardship on the first respondent.

[9] The first of these defences referred to special condition 9 of the contract, which was in the following terms:

> "9. Land Sales Act Exemption
>
> The Vendor shall forthwith upon execution of this Contract make application pursuant to section 19(1) of the *Land Sales Act* 1984 (as amended) ("the Act") for exemption from compliance with the provisions of Part 2 of the Act with respect to this Contract and the Purchaser shall at the request of the Vendor execute all documents and requests necessary for such application. The Vendor will use its best endeavours to obtain such exemption. In the event such exemption is not obtained within thirty (30) days from the Contract Date this Contract shall be deemed to be at an end and the deposit will be refunded to the Purchaser."

[10] The difficulty with the first respondent's contention in this regard is that on 14 August 2008, an exemption from provisions of the *LSA* was issued by the relevant officer within the Department of Justice and Attorney-General. That exemption was in the following terms:

> "DETERMINATION OF APPLICATION FOR EXEMPTION FROM COMPLIANCE WITH ALL OR ANY OF THE PRIVISIONS OF PART 2 OF THE LAND SALES ACT 1984
>
> Pursuant to Section 19(2) of the Land Sales Act 1984, I, Peter Harten, Principal Business Services Officer, Delegate of the Director General, Department of Justice and Attorney-General, hereby grant the application for exemption from compliance with the provisions of Sections 8 and 9 of the said Act made by Fairborne Pty Ltd ACN 074 190 864, C/- Siemons Lawyers, PO Box 870, Noosa Heads Qld 4567 and received in this Office on 7 August 2008 in relation to the subdivision of land described in the

> Schedule, being a subdivision of not more than five allotments for the purposes set out in the application.
>
> The granting of this exemption is subject to the condition that a copy of a plan referred to in Section 9(1)(b) of the said Act is to be given by the vendor to the purchaser as soon as practicable after such a plan becomes available."

[11] The submission which counsel for the first respondent sought to maintain before me was that this was insufficient for the purposes of compliance with special condition 9. The thrust of the submission was that it was insufficient because it only gave exemption "from compliance with the provisions of ss 8 and 9" while special condition 9 required "exemption from compliance with the provisions of Part 2" of the *LSA*.

[12] Even a cursory look at the provisions in Part 2 of the *LSA* reveals that the only sections within that part which could possibly or conceivably be of relevance or application to this particular contract were ss 8 and 9. Accordingly, the exemption dated 14 August 2008 was clearly sufficient for the purposes of fulfilling the requirements of special condition 9.

[13] The first respondent's second argument related to special condition 8.10, which conferred, in certain specific circumstances, a right upon either party to terminate the contract. Subsequent to the oral argument in this matter, however, the solicitors for the first respondent advised that their client conceded that it had waived its right to terminate the contract pursuant to special condition 8.10. Accordingly, this point was not pursued.

[14] The next contention advanced on behalf of the first respondent was that, because this deal was a commercial transaction as opposed to, say, the sale of a residential

dwelling, there was no reason to conclude that damages would not adequately compensate the applicant. Such a distinction is not, however, determinative of whether the Court ought, in a particular case, exercise its discretion to order specific performance. The contract in question, having been affirmed by the applicant vendor, remains executory. Specific performance is the remedy which compels execution in specie of that contract "which requires some definite thing to be done before a transaction is complete and the parties' rights are settled and defined in the manner intended".[1] In view of my finding with respect to the fulfilment of special condition 9, it can be said that this is a valid and binding contract. A challenge to the exercise of the discretion to grant specific performance on the basis that the applicant has an adequate remedy at law is not determined merely by characterising the contract as one relating to commercial land or one relating to residential land. Rather, the Court is called upon to assess whether, in all the circumstances of the particular case, an award of damages, rather than a decree of specific performance, will adequately ensure that justice is done between the parties.

[15] The only matter to which the first respondent has directed me for the purpose of making that assessment is, as I have said, the assertion that this is a contract for the sale of "commercial" not "residential" land. But even if I were to give any weight to that distinction, it has long been recognised that there is a justification for ordering specific performance against a purchaser of land arising from the vendor's legitimate interest in divesting itself of the land.[2] In all the circumstances, the interest of the applicant vendor seems to me to outweigh the impact of the distinction sought to be drawn by the first respondent purchaser.

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1 *JC Williamson Ltd v Lukey* (1931) 45 CLR 282 per Dixon J at 297.

2 See, for example, Cheshire and Fifoot's Law of Contract (9th Australian ed) (2008) at para 24.4 and the authorities referred to therein.

[16] Finally, it was contended on behalf of the first applicant that the purchaser would not be able to comply with an order for specific performance. In that regard, reliance was placed on the matters deposed to in an affidavit by the second respondent, Mr Brown, who explained something of the background to the first respondent. The first respondent, of which each of the second, third and fourth respondents are directors, is a wholly-owned subsidiary of Strata Store Group Pty Ltd. He says that there is a group of companies called the "Strata Store Group", and that the first respondent was one of a number of the companies within that group which have specific projects to undertake. The specific project which the first respondent was to undertake was to develop what is referred to as a strata storage facility at Noosaville. Such a facility is, in effect, a strata titled mini warehouse facility. He said that the group of companies is developing such facilities at Coolum in Queensland, Ballarat in Victoria and Bunbury in Western Australia. Other companies in the group also occasionally act as project managers for the facilities developed by other operators.

[17] Mr Brown acknowledged the existence of the contract with the applicant vendor, and said that when the contract was entered into, and when the time for settlement was extended, it was his belief, as managing director of the first respondent, that the contract would be completed. He then deposes to the following:

> "13. The First Respondent has made numerous attempts to obtain equity and/or loans to allow it to complete the Contract. We have had discussions with the following institutions or individuals: Maximum Capital; B&C Capital Group; Growth Corp Solutions; Global Capital; Mr Craig Wylie; Mr Cameron Barnes; Alliton Capital; CBA Private Banking; Marshall Michael; and Integra Capital. Many other individuals and organisations have been contacted – the above are institutions or individuals with whom there has been discussion with the First Respondent. However, none of these discussions have led to the provision of any funds.
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> 14. Whilst the First Respondent is presently solvent, it would not be able to satisfy orders that would require it to complete the Contract.

> Although I am not aware precisely of the sum that is sought by the Applicant for settlement of the contract, I believe that it would be of the order of two million dollars. In that regard I refer to the Exhibit at page 82 of the Affidavit of Mr Siemon referred to above, where the settlement price as at 27 April 2009 is stated as $1,972,881.89.
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> 15. Now produced and shown to me and marked "**GRB-3**" is a true copy of the most recent financial accounts in respect of the First Respondent, being for the year ending 30 June 2008. They show that the First Respondent had a total equity of negative $1,238 as at 30 June 2008. The First Respondent operates on a day-to-day basis by funding from other members of the Strata Store Group, or by injections of funds from individuals associated with the Strata Store Group."

[18] Mr Brown then says that if an order for specific performance were made he would "need to take urgent advice on placing the First Respondent into administration" and he believes that this is the course that would be adopted.

[19] The only financial accounts which are exhibited to the material filed before me are those for the first respondent for the year ended 30 June 2008. I have been provided with no information as to the financial wherewithal of the first respondent's holding company, Strata Store Group Pty Ltd. It is apparent from the matters deposed to by Mr Brown that the first respondent relies on other entities within the group, or associated with the group, for its day to day funding. Yet, apart from personal financial information relating to the second respondent, third respondent and fourth respondent, there is no testimony whatsoever concerning the ability, or lack of ability, of the group to source funding for this project. The affidavit of Mr Brown is carefully limited to providing information in relation to the first respondent only.

[20] In *Patel v Ali*,[3] Goulding J said[4] that "only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property".

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[3] [1984] 1 Ch 283.

[21] In *Pasedina (Holdings) Pty Ltd v Khouri*,[5] Holland J analysed the distinction between the defence of impossibility and the defence of hardship in cases of specific performance. He pointed out that the defence of impossibility was exemplified by a case such as *Sewell v Webster*,[6] in which an order that the defendant specifically perform his promise to pull down a party wall would have required him to act contrary to a statute which governed the matter. This presented a case of "legal impossibility". His Honour also referred to the case of *Ferguson v Wilson*[7] as an example of "factual impossibility", being a case in which a plaintiff had sought specific performance of a promise to allot part of an issue of company shares, but before the plaintiff began his proceedings all of the issue had been allotted to others.

[22] The case with which I am now concerned does not present issues of either legal impossibility or factual impossibility. Rather, the first respondent relies on the defence of hardship. In that regard, Holland J in *Pasedina (Holdings) Pty Ltd* said:[8]

> "A purchaser who pleads hardship as a defence to a vendor's claim that the purchaser be ordered specifically to perform the bargain into which he has entered has to meet and overcome the principle that specific performance is not a remedy which should lightly be refused when the vendor has established the existence of a valid contract that equity ordinarily decrees to be specifically performed which the purchaser has declined to complete: *Fullers Theatres Ltd v Musgrove* (1923) 31 CLR 524 at 548-9; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438. On the authorities, I doubt whether difficulty confronting a purchaser in finding the purchase money could, by itself, constitute sufficient reason to deny a vendor an order for specific performance. Financial hardship generally appears as only one ingredient in a group of circumstances which would make specific performance work a clear injustice to the defendant."

[23] His Honour's observations in that regard have been applied in other jurisdictions – see *Iambic Pty Ltd v Northwind Holdings Pty Ltd*;[9] *Boyarsky v Taylor*.[10]

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4 At 288.
5 (1977) BPR 9460.
6 (1859) 29 LJ Ch 71.
7 (1866) 2 LR Ch at 77.
8 At 9460-9461.
9 [2001] WASC 44.

[24] For the reasons I have set out above, I do not consider that the material relied on by the first respondent goes so far as to constitute sufficient reason to deny the vendor in this case an order for specific performance. At the very least (and without saying that it would necessarily have been sufficient), one would have expected to have seen material to demonstrate not merely that the first respondent had difficulty in sourcing finance on its own but that it had no capacity through the group of companies of which it is part or through the persons with whom it is associated, and on all of whom it in any event relies for ongoing funding, to make out a case of lack of financial resource to complete the purchase.

[25] No other circumstance has been pointed to which would make specific performance work a clear injustice to the first respondent, and I see no reason why the applicant ought be denied the necessary decree.

The vendor's claim against the guarantors

[26] By its originating application, the applicant has claimed for the following relief against the second, third and fourth respondents:

> "3. Further and alternatively, an order that the Second to Fourth respondents specifically perform the contract of guarantee made on or about 27 July 2008 between the applicant and the Second to Fourth Respondents by performing all of the obligations of the First Respondent under the contract ("the Guarantee").
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> 4. Further and alternatively, an injunction requiring the Second to Fourth Respondents to perform all of the obligations of the First Respondent under the contract in accordance with the terms of the Guarantee."

[27] I have set out the terms of the Guarantee above. By the terms of that Guarantee, each of the second, third and fourth defendants:

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[10] [2008] NSWSC 1415.

(a) guaranteed to the applicant the due and punctual payment of monies due and payable under the contract of sale;

(b) guaranteed to the applicant the punctual observance and performance by the first respondent of the covenants and provisions contained in the contract of sale; and

(c) guaranteed to the applicant that each would "immediately upon demand by [the applicant] in the event of default by [the first respondent] under this Contract of Sale pay and perform the obligations of [the first respondent] under this Contract of Sale".

[28] It seems to me, however, that the present claim for relief against the guarantors by way of orders in the nature of specific performance or mandatory injunctions is, at the very least, premature.

[29] In *Sunbird Plaza Pty Ltd v Maloney*,[11] Mason CJ (with whom Deane, Dawson and Toohey JJ agreed) said that a creditor's rights against a guarantor depend on the terms of the Guarantee and the nature of the obligation, performance of which is guaranteed. His Honour continued:

> "If the subject of the guarantee is payment of a debt or a sum of money which has accrued due, the creditor may, on default by the principal debtor, sue the guarantor instead of the principal debtor for the debt or sum of money, his claim being for a liquidated amount. If, on the other hand, the subject of the guarantee is the performance of some other obligation, then the person having the benefit of the guarantee may, upon default, sue the guarantor for damages for breach of contract."

[30] In that case, Sunbird Plaza Pty Ltd (the appellant before the High Court) had agreed to sell a home unit on the Gold Coast to Boheto Pty Ltd. The deposit payable under the contract was paid and the balance of the purchase price was payable on settlement. Annexed to the contract was a guarantee executed by Mr Maloney and Ms Cussan (the respondents before the High Court) by which they jointly and severally guaranteed "the performance by [Boheto Pty Ltd] of all of the terms and conditions of the contract including the payment of all moneys payable hereunder

by [Boheto Pty Ltd]". The contract provided that settlement was to be 14 days after the vendor's solicitor gave written notice of the registration of the relevant building unit plan. Time was expressly of the essence. Upon registration of the building unit plan, the vendor's solicitor gave the requisite notice, upon which the purchaser purported to avoid the contract. The vendor elected to treat the contract as still on foot. The vendor sought, and obtained, an order for specific performance against the purchaser. The purchaser failed to comply with the order for specific performance, but the vendor, without seeking that the order for specific performance be discharged and without determining the contract, sued the guarantors for payment of the money payable by the purchaser to complete the contract. The appellant's primary argument before the High Court was that the balance purchase price was a debt payable by the purchaser notwithstanding that the contract had not been completed by conveyance and that the respondents' guarantee required them to discharge the indebtedness of the purchaser.

[31] In respect of that argument, Gaudron J said, at 267-268:

> "The appellant's primary argument may be disposed of shortly. Under the contract of sale the purchaser agreed to pay the balance purchase price "upon settlement". A contractual provision in that form would normally be expected to attract the operation of the general rule that a vendor of land is not entitled to sue for the purchase price payable under a contract which has not been completed by conveyance. The general rule may be excluded by a contrary intention expressed in the contract. In *McDonald v. Dennys Lascelles Ltd.*, the position was put by Dixon J. as follows:
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> > "The general rule, however, that in an executory contract for the sale of land the vendor cannot sue for the price is excluded whenever a contrary intention is shown by the express terms of the contract. And it seems established by authority that a contrary intention is sufficiently shown in all cases in which by the express terms of the contract the purchase money or any part thereof is made payable on a fixed day, not being the agreed day for the completion of the contract by conveyance. In all such cases the purchase money or such part thereof becomes, on the day so fixed for its payment, a debt immediately recoverable by the vendor irrespective of the question whether a conveyance has been

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[11] (1987-1988) 166 CLR 245, at 255.

> executed and notwithstanding the fact that the purchaser may have repudiated his contract."

It is unnecessary in the present case to consider the nature of the debt thus recoverable, and the precise circumstances in which a debt thus recovered may be retained by a vendor who does not give a conveyance of the property: see *McDonald v. Dennys Lascelles Ltd.*; *Automatic Fire Sprinklers Pty. Ltd. v. Watson* and *Legione v. Hateley*.

It was argued on behalf of the appellant that cl. 3(c) of the contract made it clear that the purchaser, although entitled to a transfer, was not entitled to a conveyance. This being so, the argument ran, the contract evinced an intention that the balance purchase price was recoverable as a debt as and from the time fixed by the contract for settlement.

Even if it be correct that the purchaser is not entitled to a conveyance, that does not alter the fact that under the contract the balance purchase money is payable "upon settlement", and not upon the date fixed by the contract for settlement. It is not to the point (if it be the case) that as at the date fixed by the contract for settlement, the appellant had done everything on its part necessary for settlement to take place, for the contract makes it clear that settlement can only take place with the active participation of the purchaser. For example, by cl. 3(c), if the certificate of title is unavailable then the purchaser is to accept an undertaking that the certificate will be produced to permit registration of the memorandum of transfer, and by cl. 3(g) the purchaser is required to produce a copy of notice "completed in every respect in accordance with the requirements of ... Section 53(2)(a) [of the *Building Units and Group Titles Act* 1980 (Q.)] and duly executed by the Purchaser". Settlement, quite plainly, did not occur. The balance purchase price thus did not become a debt payable by the purchaser to the appellant, and as such, payable by the respondents pursuant to their guarantee."

[32] Mason CJ said, at 253-254:

> "I agree, for the reasons given by Gaudron J., that in the circumstances of the case the balance of the purchase price did not become a debt payable by Boheto Pty. Ltd. ("the purchaser") to the appellant vendor. The general rule, stated by Dixon J. in *McDonald v Dennys Lascelles Ltd.*, is that a vendor of land cannot sue for the price before the contract is completed by conveyance, unless the price is expressed to be payable on a fixed day, not being the day fixed for completion. Here the balance of the purchase price was payable "upon settlement". Settlement has not taken place and there has been no conveyance of the property sold. Once this is accepted, the appellant is faced with a daunting task in making good the submission that the respondent guarantors are liable under their joint and several guarantee to pay the balance of the purchase price and interest thereon, notwithstanding the absence of an accrued liability on the part of the purchaser to make the payment."

[33] His Honour, at 256, referred to the two common classes of guarantee of payment of instalments by a principal debtor, viz an undertaking by a guarantor that if the debtor fails to pay an instalment, the guarantor will pay (this being a conditional

agreement), and an undertaking by the guarantor that the debtor will carry out his contract. His Honour continued, at 257:

> "The appellant's argument is that the respondent guarantors were promising to pay a sum of money if the purchaser did not complete the contract. The terms of the guarantee do not support the argument. The respondents guaranteed "THE PERFORMANCE ... OF ALL THE TERMS AND CONDITIONS of the Contract including the payment of all moneys payable ... by the ... Purchaser". The respondent's promise was that the purchaser would perform its contractual obligations including the payment of all moneys payable under the contract. The promise falls within the second class discussed above, except, perhaps, in so far as the promise relates specifically to the payment of all moneys payable. In that respect the promise might well fall within the first category. Accordingly, if the balance of the purchase price had become payable, and had not been paid by the purchaser, the vendor might well have been entitled to sue the respondents for a liquidated amount, rather than claim damages for breach of contract. As it is, the balance of the purchase price did not become payable."

[34] Similar considerations apply in the present case.

[35] To the extent that each of the second, third and fourth respondents has, by the terms of the Guarantee, guaranteed the first respondent's performance of the subject contract of sale, including the performance by the first respondent of its obligation to pay the balance purchase price, a default by the first respondent by failing now to specifically perform the contract in accordance with the of specific performance will, if the contract is then terminated by the applicant, give rise to an entitlement on the part of the applicant to sue the second, third and fourth respondents for damages for breach of the terms of the Guarantee.

[36] Otherwise, to the extent that the Guarantee imposed an obligation on each of the second, third and fourth respondents to pay moneys which are due "and payable" under the contract, the balance of the purchase price under this contract, which is and remains executory, becomes payable upon settlement. The obligation on the purchaser to pay the balance purchase price is regulated by clause 4 of the REIQ

Standard Commercial Conditions (these being the relevant conditions of this contract):

> "**4 Completion and Possession**
> The balance of the Purchase Price shall be paid on the Date for Completion in exchange for:
> (a) possession of the Property (such possession to be vacant except for any Lease);
> (b) a properly executed transfer for the Land in favour of the Purchaser capable of immediate registration (after stamping) in the appropriate office free from Encumbrances (other than those set out in Item L) and title to the Property (other than the Land) free from Encumbrances (other than those set out in Item L) but subject to the conditions of this Contract;
> (c) any declaration required, by the *Stamp Act* 1894, to be furnished to procure the stamping of the transfer;
> (d) such other instruments or declarations as are required by law to be signed by the Vendor to procure the stamping and/or registration of the transfer;
> (e) except as otherwise provided in this Contract, any instrument of title for the Land required to register the transfer;
> (f) notice of assignment issued pursuant to clause 16.4;
> (g) all other instruments (which shall be duty stamped) in the possession or control of the Vendor evidencing estates and interests affecting the Property and which are exclusive to the Property;
> (h) true copies of all other instruments (which shall be duly stamped) in the possession or control of the Vendor evidencing estates and interests affecting the Property but which are not exclusive to the Property;
> (i) the Certificate of Classification pursuant to the Standard Building Regulation 1993 appropriate to the uses stated in Item H (if the improvements on the Land may not be lawfully occupied unless such certificate has issued);
> (j) all plans and drawings relating to the construction of the improvement son the Land in the possession or control of the Vendor; and
> (k) all documents in the possession or control of the Vendor which the Purchaser would reasonably require to enable the Purchaser to manage the Property and to prepare returns under the ITAA."

The requirements that the balance purchase price be paid in exchange for possession and all of the necessary documents for conferral of title on the purchaser make it clear, in my view, that the moneys are payable "upon settlement" (in the sense of that term as used in *Sunbird Plaza Pty Ltd v Maloney*). Settlement did not occur in the present case – hence the understandable desire for the applicant vendor to obtain an order for specific performance against the purchaser. The balance purchase price

is not a debt presently payable to the applicant which can be recovered from the guarantors at this point in time. This provides no basis for the relief sought in this application.

[37] The Guarantee, however, contained the further undertaking to which I referred above in [27](c), namely that each guarantor would on demand by the vendor in the event of default by the purchaser "pay and perform the obligations" of the first respondent. The relevant obligation to pay which the second, third and fourth respondents have thereby undertaken to perform is the first respondent's obligation to pay the balance purchase moneys "upon settlement".

[38] The real question, as raised by the relief sought in this application against the second, third and fourth respondents, is whether orders in the nature of specific performance, or of a mandatory injunction, ought presently be made, effectively on a *quia timet* basis, to have the guarantors perform the obligations of the first respondent.

[39] It seems to me that the pursuit of an application for specific performance against the guarantors at this point in time sits ill with the applicant's request for a decree of specific performance against the first respondent. True it is that the liability of the guarantors, determined according to the terms of the guarantee given, is additional to the primary liabilities and obligations of the purchaser under the contract of sale. But making an order requiring the guarantors to "pay and perform the obligations" of the first respondent under the contract at a time when the first respondent itself is subject to a decree that it perform its own obligations would cause immediate and wholly undesirable tensions to arise both in respect of the legal consequences (e.g.

whether, and to what extent the guarantors are subrogated to the rights and responsibilities of the purchaser under the contract of sale) and in the practical consequences of the Court simultaneously ordering two discrete parties (i.e. the purchaser and the guarantors) separately to perform the same obligations under the same contract at the same time.

[40] The vendor having persuaded me that the first respondent purchaser has not demonstrated good reason for refusing an order for specific performance against it, I consider it premature for the vendor to seek simultaneous orders tantamount to specific performance of the guarantee at this juncture.

[41] For these reasons, I consider the present claims sought against the second, third and fourth respondents in the originating application ought be dismissed.

Conclusion

[42] Accordingly, I am disposed to making an order against the first respondent for specific performance of the contract of sale. I would dismiss the application against each of the second, third and fourth respondents.

[43] I will hear from counsel as to an appropriate form of order, and as to costs.