SUPREME COURT OF QUEENSLAND

CITATION:	*Fairborne Pty Ltd v Strata Store Noosa Pty Ltd (No. 2)* [2009] QSC 307
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/S:	BS 5824 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	24 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2009; 4 September 2009; 11 September 2009; 16 September 2009
JUDGE:	Daubney J
ORDER:	**The judgment of the court is that the first respondent specifically perform and carry into execution the contract of sale dated 27 July 2008 between the first respondent and the applicant in respect of the real property situated at Lot 302 Lionel Donovan Drive, Noosaville in the State of Queensland ("the contract").** **And the Court further orders:** **1. The application as against the second, third and fourth respondents is dismissed.** **2. The applicant and the first respondent are to**

perform the contract on the basis that the completion date within the meaning of cl 1.1 of the standard commercial conditions of the contract is 27 November 2009 ("the New Completion Date").

3. **No earlier than seven business days before the New Completion Date, the applicant is to notify the first respondent at its address for service in this proceeding of the time and place for settlement.**

4. **The first respondent is to pay the applicant's costs of and incidental to this application to be assessed on the standard basis.**

5. **The applicant is to pay the second, third and fourth respondent's costs of and incidental to this application to be assessed on the standard basis.**

CATCHWORDS: CONVEYANCING – COMPLETION OF CONTRACT – TIME FOR COMPLETION – OTHER MATTERS – where applicant sought settlement in 45 days – where first respondent sought settlement in six months – where first respondent argued the protracted period was justified because it was a large transaction and likely to require numerous finance applications – where first respondent already had significant time under the contract – whether the first respondent should be given an extended period for settlement

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where applicant sought costs against the first respondent on an indemnity basis – where applicant argued the first respondent's resistance for specific performance was in "wilful disregard of known facts or clearly established law" – where applicant submitted first respondent had no arguable prospects of success and served their affidavit material on the afternoon before the hearing of the application – where second respondent deposed to the possibility of the first respondent being put into voluntary administration if an order for specific performance was made against it - whether it was an appropriate case to depart from the usual order concerning costs

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – OTHER CASES – where applicant contended there should be no order in relation to the costs of the second, third and fourth respondents – where in the alternate the applicant argued that a "Bullock" order should be made in respect of those costs – where claim for relief against the second, third and fourth respondents was

premature – whether it was appropriate to make a costs order against the second, third and fourth respondents

Fairborne Pty Ltd v Strata Store Noosa Pty Ltd [2009] QSC 250
Colgate-Palmolive Co v Cussons Pty Ltd (1993) 46 FCR 225

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] Consequent on my judgment in this matter,[1] the parties have provided further written submissions on the form of order for specific performance and as to costs.

[2] The parties are largely agreed as to the orders which ought be made. The only issue between them is as to the date for settlement – the applicant seeks settlement in 45 days, while the first respondent has sought six months. This protracted period is said to be justified because it is a large transaction, likely to require numerous finance applications, and even the prospect of securing a third party purchaser of the property from the first respondent. All of this, it is said, will take time.

[3] The first respondent has already had significant time under this contract. The contract dated 27 July 2008 has been unconditional since 31 October 2008. It was originally due to settle on 25 February 2009. That was extended by agreement to 27 April 2009. A further extension was refused. The suggestion now that a purchaser under a contract which has been unconditional since 31 October 2008 ought have another six months to get its house in order for settlement can, I think, be safely described as bold.

[1] [2009] QSC 250

[4] The date for settlement under the order will be 27 November 2009, which is just over two months hence.

[5] In relation to costs, the first respondent does not oppose a costs order being made against it on the standard basis. The applicant, however, seeks costs against the first respondent on the indemnity basis, arguing that the first respondent's resistance to the order for specific performance was "in wilful disregard of known facts or clearly established law".[2] The applicant submitted that the first respondent was a "decoy" used by the other respondents to insulate themselves from the application. The applicant argued that there were special or unusual features which justified a departure from the normal order for costs, namely the fact that the first respondent had no arguable prospects of success, the respondents served their affidavit material only on the afternoon before the hearing of the application, and the fact that the second respondent has deposed to at least the possibility of the first respondent being put into voluntary administration if an order for specific performance is made against it.

[6] In my previous judgment, I set out at some length my reasons for rejecting the arguments which had been advanced on behalf of the first respondent to resist the making of a decree of specific performance.[3] Some of the points advanced on behalf of the first respondent were palpably weaker than others. The contention that the making of an order would be futile because of the first respondent purchaser's inability to comply with an order for specific performance was arguable, if ultimately unsuccessful on the material before me. True it is that the material relied upon for the purposes of that argument was delivered late, but it is not suggested on

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2 Invoking in that regard *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225.

behalf of the applicant that it suffered any prejudice as a consequence, and no application for an adjournment of the hearing was made.

[7] I do not think that this case falls within the category of exceptional cases which would warrant a departure from the usual order as to costs against the first respondent.

[8] The second, third and fourth respondents seek their costs. The applicant contends that there should be no order in relation to the costs of the second, third and fourth respondents, or alternatively that a "Bullock" order should be made in respect of those costs.

[9] As for the second of the points, it is not at all clear to me how it can properly be said that the unsuccessful first defendant should be ordered to pay, directly or indirectly, the costs of the successful second, third and fourth respondents. As I made clear in my previous reasons,[4] the claim for relief against the second, third and fourth respondent guarantors was, at the very least, premature. I set out my reasons at length for reaching that view, noting the incompatibility of seeking orders against the second, third and fourth respondents while the applicant was asking for a decree of specific performance against the first respondent. There was nothing about the conduct of the first respondent which necessitated the bringing of the application against the second, third and fourth respondents. The applicant had elected to affirm the contract with the first respondent. It has been successful in obtaining a remedy against the first respondent. No cogent reason for pursuing the second, third and fourth respondents at this point in time has been advanced.

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3 [2009] QSC 250 at [8]-[25].
4 At [28].

[10] In all the circumstances, then, I think it appropriate to order the applicant to pay the second, third and fourth respondents' costs of and incidental to the application on the standard basis.

[11] There will therefore be the following judgment:

The judgment of the court is that the first respondent specifically perform and carry into execution the contract of sale dated 27 July 2008 between the first respondent and the applicant in respect of the real property situated at Lot 302 Lionel Donovan Drive, Noosaville in the State of Queensland ("the contract").

And the court further orders:

1. The application as against the second, third and fourth respondents is dismissed.
2. The applicant and the first respondent are to perform the contract on the basis that the completion date within the meaning of cl 1.1 of the standard commercial conditions of the contract is 27 November 2009 ("the New Completion Date").
3. No earlier than seven business days before the New Completion Date, the applicant is to notify the first respondent at its address for service in this proceeding of the time and place for settlement.
4. The first respondent is to pay the applicant's costs of and incidental to this application to be assessed on the standard basis.
5. The applicant is to pay the second, third and fourth respondent's costs of and incidental to this application to be assessed on the standard basis.