SUPREME COURT OF QUEENSLAND

CITATION:	*VDMT P/L & Anor v Francher P/L* [2009] QSC 351
PARTIES:	**VDMT PTY LTD** ACN 079 980 626 (first plaintiff) **NOONBREEZE PTY LTD** ACN 083 148 145 (second plaintiff) **v** **FRANCHER PTY LTD ACN 113 257 408 AS TRUSTEE FOF THE FRANCHER UNIT TRUST** (defendant)
FILE NO/S:	BS 7190 of 2007
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2009 to 2 September 2009
JUDGE:	McMurdo J
ORDER:	**The plaintiffs' claim is dismissed.**
CATCHWORDS:	CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – AUTHORITY OF AGENTS – CONSTRUCTION AND EXTENT OF AUTHORITY – AUTHORITY CREATED BY OTHER MEANS – OTHER CASES – where the parties had agreed as to price – where the agreement was not subject to finance – where the size of the transaction was large relative to previous authorised transactions – where a director of the defendant had authority to negotiate – whether that director had actual authority to conclude this agreement – whether that director had apparent authority to conclude the agreement *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451, applied *Thompson v Palmer* (1933) 49 CLR 507, applied
COUNSEL:	D O'Sullivan for the plaintiffs G C O'Driscoll for the defendant
SOLICITORS:	McKays for the plaintiffs BCI Lawyers for the defendant

[1] The first plaintiff is a company controlled by Mr Kevin Ellul. The second plaintiff is a company controlled by his brother-in-law, Mr Gerard Muscat. The plaintiffs owned the Beach Tourist Caravan Park at Mackay which they purchased in 1997. By 2005 they had decided to redevelop this land for residential lots and apartments, and they closed the caravan park in September that year.

[2] About 30 kilometres away was the Hay Point Hotel Motel and Caravan Park. In 2005 it was purchased by the defendant company. It was a trustee of a unit trust, two units being under the effective control of Mr Frank Venturi and the other unit under the effective control of Mr Ian McCarthy. More precisely, that unit was held by a company of which Mr McCarthy's wife was the director, he then being an undischarged bankrupt. Mr Venturi was the defendant's only director. They decided to expand the size of the hotel and caravan park in order to take advantage of the high demand for accommodation in the area.

[3] Those circumstances led to a number of transactions between the parties. The plaintiffs wished to dispose of the chattels and, if possible, the fixtures upon their land for which they no longer had any use, and some of these things were useful in the defendant's plans. Under the first and largest of these transactions, the defendant purchased from the plaintiffs, under a written agreement made in July 2005, 33 demountable cabins together with their contents for a price of $1,472,000 plus GST. That agreement was performed apparently without incident and the plaintiffs make no complaint about it. In addition it is common ground that at various times between July 2005 and September 2006, the plaintiffs sold other items to the defendant, for which the defendant paid in total at least $80,000. There were two cheques, each in the sum of $19,550, which the defendant gave to the respective plaintiffs in June 2006 and the plaintiffs say they were paid another $40,000 to $50,000 in cash. Any contract for such an item was made orally between Mr Muscat and Mr McCarthy.

[4] The plaintiffs' principal case is that they contracted with the defendant for the sale of another building to be removed from their land, and that the defendant's refusal to perform that contract entitles the plaintiffs to damages. This agreement is said to have been made orally, again by Mr Muscat for the plaintiffs and Mr McCarthy for the defendant, in March 2006. This was a building comprising 10 units or suites for accommodation. The plaintiffs allege that the price was $120,000 and that the defendant was to undertake and bear all the costs of its removal. They further claim that there were other items which they sold to the defendant, in addition to those for which they have been paid $39,100, and that they are owed $48,260 for them.

[5] As to the claim upon the alleged contract for the building to be removed, the defendant denies that there was a contract on several bases. It disputes that there was a concluded agreement, or one in sufficiently certain terms. Alternatively, the defendant says that any such agreement was subject to finance and that such a condition was not fulfilled. Further, it denies that Mr McCarthy had actual or apparent authority to make this contract on its behalf. And if there was an enforceable contract, the defendant argues that it was not in breach or had not repudiated before the plaintiffs purported to terminate it, so that it was relieved of the obligations of performance at least from then. There is also an argument as to one component of the damages claimed for breach of this contract.

[6] As to the claim for the balance owing for other items of property, the defendant disputes that it has failed to pay for any of them.

[7] None of the dealings upon which the plaintiffs' case relies was made in the presence of or through Mr Venturi. In September 2006, Mr Venturi and Mr McCarthy fell out and Mr Venturi thereafter excluded him from active participation in the defendant's business. There is other litigation between them as to the affairs of defendant company and its property at Hay Point. In the present matter, Mr McCarthy was a witness who was called in the plaintiffs' case. His evidence relevantly corresponded with that of Mr Muscat as to the alleged agreements and dealings. But as I will discuss, it does not prove that he had actual authority to bind the defendant to the alleged contract for the purchase and removal of the building.

[8] The transactions in question were not documented, at least in terms which accord with the plaintiffs' case. The plaintiffs were apparently unable to produce any accounts or books to show what payments were made to them and for what items they were paid.

[9] In contrast, the completed transaction for the 33 demountable buildings was pursuant to a deed of agreement, which was prepared by the plaintiffs' solicitors. The deed was dated 22 July 2005 and was between the plaintiffs, the defendant and Mr Venturi as a guarantor of the defendant's performance. It provided for a deposit of $50,000 and a "settlement date", which was to be seven days after the plaintiffs notified the defendant that the caravan park was closed for business. The balance purchase price was to be paid by the defendant on the settlement date in exchange for any documentation necessary to vest the ownership of the demountable buildings and plant and equipment in the buyer, releases of any encumbrances over the demountable buildings and the plant and equipment and a valid tax invoice detailing the purchase price and the amount of GST. The deed was executed by the signature of Mr Venturi, alongside which was written "sole director". He also executed the deed as a guarantor. The defendant was then to remove the buildings and the items contained in them (as detailed in a schedule to the deed) 14 days after the settlement date.

[10] Under this deed, the defendant promised to engage "qualified and insured tradesmen to remove the Demountable Buildings and Plant and Equipment…" It was expressly provided that no warranty was given as to the fitness of the buildings and plant and equipment but that the plaintiffs were to maintain them in the condition in which they were at the date of the agreement. There was an express agreement as to insurance, the property being at the risk of the plaintiffs until removal and the plaintiffs being obliged to insure them. The plaintiffs promised to disconnect all services to the demountable buildings by the settlement date and agreed that any damage caused by this disconnection would be made good at their expense.

[11] Before this deed was made, Mr Venturi had gone with Mr McCarthy to the plaintiffs' premises where he met Mr Ellul. According to Mr Ellul, Mr McCarthy introduced Mr Venturi to him as his "partner" and said that Mr Venturi was "putting up the money…" Mr Ellul gave them the keys to the 33 demountable buildings and also to the building now in question so that they might inspect them. Mr McCarthy returned the keys and Mr Ellul had no further dealings with Mr Venturi. Mr McCarthy lived for much of the time at the Hay Point site and he made several visits to the plaintiffs' caravan park. Mr Venturi lived in Sydney but for much of

the period relevant to this case he was staying in Bundaberg to attend to another business.

[12] Mr Venturi agrees that he inspected the caravan park site before executing the deed for the demountable buildings. He agrees that he left it to Mr McCarthy to negotiate the terms of that agreement. But the deed does not suggest that it merely recorded an enforceable contract already made between the parties, and in particular one already made for the defendant by Mr McCarthy. I find that the agreement for the demountable buildings was made by the deed of agreement itself. As to meeting Mr Ellul, Mr Venturi agrees that he was introduced "as the finance person", but more specifically as "the finance person who could do the deal that he [Mr McCarthy] had been talking about in relation to the 33 demountable cabins."[1]

[13] The defendant purchased its hotel and caravan park pursuant to contracts made in May 2005. The hotel/motel was purchased for a price of $3,950,000. It was situated upon freehold land. The caravan park at Hay Point was upon land leased from the Ports Corporation of Queensland under a lease then to expire on 14 April 2007. The defendant purchased the caravan park business together with the vendor's interest under that lease for $50,000. These purchases were financed, in part, by the Bank of Western Australia Ltd. The balance was provided by Mr Venturi.

[14] There was an agreement between the defendant and that bank apparently contained within correspondence which was co-signed by Mr Venturi and Mrs McCarthy in August 2005. According to that correspondence, the total finance to be provided by the bank was $5,515,000, comprising a "commercial advance" of $3,265,000 and equipment finance of $2,250,000. The commercial advance was expressed to consist of various components, but all were concerned with the acquisition or improvement of the hotel/motel. The "equipment finance" consisted of two components. The first, called "Facility 1", was $615,000 "to assist with the acquisition of plant and equipment, including 35 gaming machines, in relation to the hotel/motel". The second, "Facility 2", was $1,635,000 "to assist with the acquisition of demountable accommodation cabins in relation to the [caravan park]". Notably, whilst the bank was to finance the entire cost of the 33 demountable buildings, the agreed finance did not extend to any proposed acquisition of this 10 unit building. On the plaintiffs' case, this could be explained by the fact, as they allege, that the agreement for the building was not made until March 2006.

[15] There are documents which show that both Mr McCarthy and Mr Venturi were minded to acqure the 10 unit building. In particular there are site plans for the defendant's proposed development, prepared by its architects, which show a building described as "10 units" and of a size approximating the subject building. One of those plans was attached to an email from Mr McCarthy to Mr Venturi of 27 July 2005. There is also a written agreement between the defendant and a company called BBI (DBCT) Management Pty Limited ("BBI"), which was the owner of the lease at the Dalrymple Bay Coal Terminal. It was signed by each of the parties on 16 December 2005. Mr Venturi signed for the defendant. The agreement recited that the defendant would offer accommodation at Hay Point for BBI's workforce at certain rates. A schedule attached to the agreement, which was

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1 Transcript 3-38.

signed for the defendant by Mr McCarthy, detailed the proposed accommodation which the defendant was to provide, which included 10 one-bedroom motel units to be available on "28-Feb-06". Mr Venturi agreed, when cross-examined, that he had seen this schedule by about January 2006.

[16] There is also a valuation said to have been prepared for the bank on behalf of the defendant of the hotel/motel and caravan park, which is dated 29 March 2006. I accept that it was prepared on information provided to the valuer by Mr McCarthy. But Mr Venturi knew of the valuation. On page 3, in describing the caravan park, the valuer said that the site was "currently being expanded to provide a substantial accommodation facility with…ten (10) bedsitter style motel units with cooking facility and ensuite bathrooms…" This was repeated on another page. The valuers assessed the caravan park, when completed, as having a value of $4,060,000, which they reached by a capitalisation of projected earnings. Those earnings were derived from the agreement with BBI. Again, this document evidences an intention on the part of the defendant to have its caravan park include a building of 10 units, which corresponded with the building in question on the plaintiffs' land. Mr Venturi says that to the extent that he thought about the matter, he believed that a 10 unit building could be built rather than using the one on the plaintiffs' land. I reject that evidence. The inherent likelihood is that the 10 unit building anticipated by the architect's plans, the accommodation agreement and this valuation was the subject building. But that is not to say that Mr McCarthy made a binding contract for its acquisition, or that he was authorised to do so.

[17] As mentioned, the plaintiffs' case is that the agreement for the building was reached in March 2006. There is no contemporaneous document which evidences that agreement. And on 11 April 2006 there was a written application to the bank for further finance made by Mr McCarthy, purporting to act for the defendant, which is inconsistent with the plaintiffs' case. On that day Mr McCarthy sent a fax to the bank seeking further finance in several components totalling $4,200,000. Most of that was attributed by Mr McCarthy to funds required for construction of parts of the expanded hotel/motel. However, $588,000 was said to be required "for caravan park renovation" which included $180,000 described for these purposes:

> "<u>10 Unit Hotel</u>
>
> | | |
> |---|---|
> | - Purchase | 100,000 |
> | - Transport | 50,000 |
> | - Installation | 20,000 |
> | - Services | 10,000 |
> | | <u>$180,000</u>" |

Mr McCarthy agreed that this was a reference to the subject building. Mr Venturi did not see this document and Mr McCarthy said he did not recall discussing this application with him. It is difficult to reconcile it with the agreement said to have been made with the plaintiffs in the previous month, because the figure put against "Purchase" was $100,000, not $120,000.

[18] Mr McCarthy's copy also has some of his handwriting alongside the typed text which was sent to the bank. He says he later added this when making another application for finance on the defendant's behalf to the bank on 29 August 2006. The handwriting on his copy of the 11 April document attributes "120,000" to the "Purchase" as well as "200,000" to "Transport" and "30,000" to "Services". His

fax of 11 April 2006 referred to the subject building, saying that it "will now cost $330,000". In his evidence, Mr McCarthy endeavoured to relate this to his handwritten figures. However the figures total $350,000. Overall the application of 11 April 2006 is inconsistent with the plaintiffs' case. It indicates that at this stage, there was no concluded agreement and that Mr McCarthy then had it in mind to purchase the units for $100,000.

[19] The only document which was a purported record of any alleged contract for this building was one issued from the plaintiffs in the form of a tax invoice dated 24 July 2006, addressed to "Hay Point Beach Tourist Park". It described the sale of the building and its delivery as follows:

"Description	Amount	Code
Sale of ten (10) unit motel building fully furnished to the Hay Point Tourist Park	$120,000.00	GST
Delivery of ten (10) unit motel building fully furnished to the Hay Point Tourist Park	$200,000.00	GST."

At the foot of the invoice, the "Balance Due" was said to be $352,000, including $32,000 for GST.

[20] Mr Muscat and Mr McCarthy each said that this invoice, in effect, was a misrepresentation, because the plaintiffs were not to be involved in the delivery of the building to Hay Point. Rather, they say that it was the defendant which was to remove the building. Further the amount to be paid was $120,000 *inclusive* of GST. Mr Ellul says that he caused this document to be prepared at Mr McCarthy's request because "it would make it easier for his bank if it was all packaged together, the sale of the units and the removal". Mr Ellul's evidence was that Mr McCarthy had then said that: "There was no problems with the finance, that had already been approved of, this [was] just a way of making it quicker through the system". In truth, it appears that finance had not been approved, although perhaps Mr Ellul did not know that. Mr Ellul said that the figure of $200,000 was an estimate which had been given by a Mr Palframan, who was a contractor proposed for the removal work. He had been the contractor who removed the 33 demountable units. There is no document or evidence from Mr Palframan. It would appear that if he ever gave a quote or an estimate for this work, it was not reduced to writing.

[21] This tax invoice was attached by Mr McCarthy to his written application for finance addressed to the Bank of Western Australia dated 29 August 2006, in which was sought "equipment finance" for a total of $499,271.30, including $352,000 for the "purchase of 10 motel style rooms to be relocated to the Hay Point Beach Tourist Park". The bank responded on 14 September 2006 by a fax to Mr Venturi and to Mr McCarthy, offering the finance which had been sought. I accept that Mr McCarthy told Mr Venturi of his intention to apply for this finance at a meeting in Sydney in August 2006. Mr Venturi agrees that he saw this application to the bank but "rejected it" because it was too much more to borrow when the defendant was having difficulty meeting its existing commitments to the bank. I prefer Mr McCarthy's evidence that he had Mr Venturi's concurrence to make the application. It is unlikely that he would have sent it to the bank if Mr Venturi, whose agreement the bank would have required, was opposed to it.

[22] However, on the eve of this response from the bank, Mr Venturi told Mr McCarthy that he would be excluded from the defendant's business. According to Mr McCarthy, Mr Venturi then asked him "whether the 10 units had been paid for". He says that when he told Mr Venturi that finance had not been approved, Mr Venturi said "Well we won't be getting them [the 10 units]. We won't be paying for them". Mr Venturi disputes that account of their conversation of 13 September 2006, consistently with his denial of Mr McCarthy's authority to make the application to the bank. Although I accept that Mr Venturi did approve this application being made to the bank, I am not persuaded to accept Mr McCarthy's account of the 13 September conversation, because it is unlikely that Mr Venturi would have been concerned that the plaintiffs had been paid when he had not been asked to sign any document for the finance and otherwise had no information as to the bank's response to the application.

[23] On the plaintiffs' case, the agreement for the building required the defendant to remove it as soon as possible, but in any case by "July or August 2006 at the latest". The first written complaint of a breach of this contract was by a letter from the plaintiffs' solicitors to the defendant dated 12 December 2006. It complained that the building, together with another building described as the office/shop complex, remained on the plaintiffs' land and that their presence was holding up its redevelopment. The letter referred to the plaintiffs' invoice of 24 July 2006 and demanded payment of $320,000 plus GST by 15 December 2006, asserting that this sum remained outstanding. The letter noted that "your finance is available from BankWest for you to attend to immediate payment". That is likely to have been written with the benefit of information from Mr McCarthy. The letter also demanded removal of the building by the same date. These demands were inconsistent with one another, because the invoiced amount included $200,000 plus GST for the *plaintiffs* to attend to the removal. Notably there was no assertion within this letter that corresponded with what is now the plaintiffs' case.

[24] On 15 December 2006, the defendant's solicitors replied, denying that there was any agreement and saying that Mr McCarthy had no authority to bind the defendant. On 19 December 2006, the plaintiffs' solicitors wrote again. In this letter to the defendant's solicitors, the present case was put, that is to say that the contract was for $120,000 and that the invoice had been provided merely to assist the defendant to obtain finance. Nevertheless, the amount then demanded was $120,000 *plus* GST, so that again there was a difference from the plaintiffs' ultimate case. The letter required the building to be removed urgently. It also asserted that the plaintiffs were owed "another (approximately) $20,000.00 for various items such as the pool system and truck hire" and that the solicitors were "currently waiting for Ian McCarthy to provide us with a schedule of agreed items to be paid for". The letter was copied to Mr McCarthy. I infer that it was written from information provided by him, especially given the reference to his providing the solicitors with the schedule.

[25] The first question is whether a concluded agreement was made between Mr Muscat for the plaintiffs and Mr McCarthy for the defendant, assuming for the moment that he had authority to bind it. According to the evidence of Mr Muscat and Mr McCarthy, they did reach a concluded agreement. Mr Muscat described the process of bargaining by which the price of $120,000 was reached. I am satisfied that they did discuss a transaction under which this building would be removed by the defendant and it would pay $120,000 to the plaintiffs. That is supported by a

handwritten document which Mr McCarthy wrote, under the heading "Prices Still to be Determined", a list of items against which Mr Muscat subsequently wrote certain amounts. Mr McCarthy wrote the item "Studio Apartments", which I accept was a reference to this building. Mr Muscat subsequently wrote the amount "120,000" alongside it. The precise timing both of Mr McCarthy's writing and Mr McCarthy's subsequent additions is, in neither case, clear. But it supports their evidence that at some point, consensus as to the price of $120,000 was reached. That is likely to have been later than March 2006, because as discussed, the application for finance made by Mr McCarthy on 11 April 2006 referred to a price of $100,000. Was a concluded agreement reached, or instead was there simply consensus as to the price but without an intention to be then bound?

[26] Several circumstances point to the latter being the case. First, there was the size of this transaction, compared with any other between the parties save for the purchase of the 33 demountable units. The documents evidencing the defendant's facilities with the bank demonstrate the defendant's need for finance to conclude a transaction of this scale. No allowance for such a transaction was made by the finance facilities agreed with the bank in 2005: hence Mr McCarthy's applications to the bank in 2006. At least if the removal was to cost something of the order of $200,000, the defendant did not have the means to relocate this building without further finance from the bank or some other financier. This makes it relatively unlikely that Mr McCarthy dealt with the plaintiffs so as to bind the defendant. That is not to say that the agreement was made subject to finance: rather, it is likely that Mr McCarthy stopped short of contractually binding, or purporting to bind, the defendant without approved finance.

[27] Even on Mr McCarthy's evidence, he did not have Mr Venturi's specific approval of a price of $120,000 or the incurring of an all up cost of the order of $350,000 for this building. I accept that Mr Venturi was minded to acquire the building and was content for Mr McCarthy to conduct negotiations to that end. However, it is unlikely that Mr McCarthy would have seen fit to contractually bind the defendant to such a substantial transaction (particularly considered with the cost of relocation) without informing Mr Venturi of the cost and obtaining his approval for it to be incurred. At this point it is convenient to discuss the question of Mr McCarthy's actual authority or otherwise to conclude this contract.

[28] On this issue, the case as opened for the plaintiffs was that in about June 2005, when Mr McCarthy and Mr Venturi visited the plaintiffs' caravan park, they agreed that Mr McCarthy would "get those studios if he could". That was not supported by the evidence. But the plaintiffs rely upon evidence given by Mr McCarthy in cross-examination, that at this visit to the site, he and Mr Venturi agreed that "we'd get as much of this site as possible to put on the caravan site down at Hay Point" and that:

> "we agreed that we would buy whatever we could put down on the caravan park, but we hadn't finalised – one, we hadn't finalised the price for it and, two, we hadn't finalised the feasibility of whether it could be shifted."

On the basis of no more than this evidence it was argued for the plaintiffs that Mr McCarthy was authorised by the defendant, through Mr Venturi, to conclude an agreement for the purchase of the building if it could be moved to Hay Point, and if the price was "acceptable", meaning "acceptable" as assessed by Mr McCarthy with

no further reference to Mr Venturi. I do not accept that the evidence, if accepted, would support such a finding. It is unlikely that Mr Venturi would have left the matter of price, in a transaction as substantial as this one, to Mr McCarthy's assessment, or that Mr McCarthy could have understood that he was so authorised. In any event I am not persuaded to accept this evidence from Mr McCarthy which, as I have said, emerged only in cross-examination.

[29] Mr Venturi said that he went to the plaintiffs' caravan park again in December 2005, and on this occasion told Mr McCarthy that he did not think that the building could be moved. That version was rejected by Mr McCarthy. I am unable to accept that evidence from Mr Venturi. It is inconsistent with the documentary evidence referred to already, which indicates that both men had it in mind to acquire this building.

[30] As discussed, the then proposed application to the bank in August 2006 was discussed with Mr Venturi. This seems to have been the first occasion, even upon Mr McCarthy's evidence, that Mr Venturi was given some indication of the likely price of the building. But as this was after the time at which the agreement is said to have been made with the plaintiffs, they do not rely upon the meeting as a basis for actual authority.

[31] The plaintiffs rely upon the evidence of Mr McCarthy that, on 13 September 2006, Mr Venturi asked him whether the building had been paid for, as demonstrating that the dealings between them had been such as to give Mr McCarthy the requisite authority. As I have said, I do not accept that evidence. But in any case, it would not fill the gap on the plaintiffs' case as to an authorisation of Mr McCarthy prior to the alleged contract being made. Ultimately then the plaintiffs' case as to actual authority depends upon the effect to be given to a conversation said to have taken place in June 2005. As I have said, that case is not established. Actual authority is not proved; indeed the absence of actual authority is proved.

[32] In turn, the absence of actual authority is relevant to the likelihood that Mr McCarthy so acted towards the plaintiffs as to make a contract on behalf of the defendant. Of course, individuals sometimes exceed their actual authority in purporting to conclude contracts. But Mr McCarthy was unlikely to have done so in this instance. There was no particular urgency: the plaintiffs were not about to dispose of the building to someone else. Nor would he have been tempted to exceed his authority because of some advantage to him such as a fee or commission. The transaction could not have been completed without Mr Venturi's concurrence, so there was no apparent reason to purport to bind the defendant before having Mr Venturi's authority.

[33] A further matter is that a contract for the removal of this building required attention to other terms, such as those which the parties had included in their deed of agreement for the 33 demountable units.[2] Mr Muscat was not a man likely to be concerned with such matters of detail. However, this was a more complicated transaction than, for example, those under which Mr McCarthy bought items such as barbeques or microwaves.

[34] The absence of a concluded agreement is also supported by the apparent inactivity on the part of Mr McCarthy after making the agreement. Although the parties are

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2 As discussed above at [9].

said to have agreed that the building would be removed as soon as possible, Mr McCarthy did not go to Mr Venturi with a proposed application for finance until late August 2006. It was said that the contractor proposed for the removal was responsible for the defendant's delay. For that there is only the evidence of Mr McCarthy. The contractor was not called. Nor is there evidence of any quotation from him. And the fact that the cost of removal and relocation was said to be $200,000 suggests that this was more an estimate than a price agreed with the contractor or quoted by him. That would explain Mr McCarthy's need to have the plaintiffs falsify the position to the bank within the invoice of July 2006.

[35] In these circumstances, I am not persuaded that the dealings between Mr Muscat and Mr McCarthy reached the point where they made a binding contract. It is more probable that Mr McCarthy understood that he could negotiate with Mr Muscat about the building, but that he knew that he did not have authority to reach a concluded agreement and should not do so, especially when it appears that the defendant did not have the funds necessary to perform the contract absent further finance from the bank. The evidence from Mr McCarthy on this and other questions is affected by his clear antagonism towards Mr Venturi. He may have good reason to be so, but it made his evidence less persuasive. It follows that at least for this reason, the plaintiffs' principal claim must fail.

[36] It is necessary that I make findings on other issues concerning this claim. The first of them is the plaintiffs' case that Mr McCarthy had apparent authority to bind the defendant. The plaintiffs' case is not that Mr Venturi said or wrote anything to Mr Ellul or Mr Muscat which represented that Mr McCarthy had authority. Rather it is that he allowed the plaintiffs to adopt and act upon the faith of the assumption that Mr McCarthy was authorised.

[37] In *Pacific Carriers Ltd v BNP Paribas*,[3] the holding out of a person as an authorised agent by permitting him to act in a certain manner was discussed as follows:

> "A kind of representation that often arises in business dealings is one which flows from equipping an officer of a company with a certain title, status and facilities. In *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd*,[4] for example, the Court spoke of the representation that might flow from supplying a particular person with 'a blank order form, thus arming him with a document which, when he signed it, would bear the hallmark of authenticity'. The reference to corporate administrative procedures under which an officer is armed with a document to which he or she can, by signature, impart an appearance of authenticity is a reminder of the wider principle of estoppel which may be relevant to a question of ostensible authority.[5] The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation."

Their Honours then set out this passage from *Thompson v Palmer*[6] where Dixon J said:

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3 (2004) 218 CLR 451 at 467 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

4 (1975) 133 CLR 72 at 80.

5 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 200 per Dawson J; at 212 per Gaudron J.

6 (1933) 49 CLR 507 at 547.

> "The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct … or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption."

[38] The plaintiffs here rely particularly upon that alternative, referred to by Dixon J, of the case where the "imprudence" of the alleged principal, where care was required of it, was a proximate cause of the other party's adopting and acting upon the faith of an assumption of the agent's authority. The argument relies upon a number of circumstances, the first of which is that, so it is argued, "Mr Venturi allowed himself to be introduced as Mr McCarthy's partner, and as the person funding the Hay Point re-development" when attending the plaintiffs' caravan park in June 2005, and then allowed him "to negotiate and conclude the agreement" reached shortly afterwards for the sale of the 33 cabins. In that last respect, the submission misstates the position. Mr McCarthy was allowed to negotiate the contract for the cabins. He was not allowed to conclude it. As I have said, the agreement was concluded by the deed of agreement. I accept the submission for the defendant that this transaction in 2005 is unsupportive of the plaintiffs' argument, because it was a transaction contracted by the signature of Mr Venturi rather than the agency of Mr McCarthy.

[39] A more substantial argument for the plaintiffs is that Mr Venturi knowingly permitted Mr McCarthy to conclude transactions under which numerous items of property were acquired from the plaintiffs for which they were paid in total about $80,000. Mr Venturi's evidence was that he knew that Mr McCarthy was making purchases of this order that involved "a lot of stuff", and that this included a structure described as a manager's residence. Related to this was the fact that Mr Venturi was able to operate the defendant's bank account, as he did when drawing those cheques to the plaintiffs. However, in no case was an item said to have been sold for a price of the order of $120,000 or anything approaching that amount. Nor were they transactions which would have involved the removal of such a large fixture from the plaintiffs' land. Although the alleged price for this building was small compared with the price paid for the 33 cabins, there was a similarity in that each involved those substantial removal works. Indeed the demountable units were sold as such, whereas the mobility of the subject building was not so obvious.

[40] The plaintiffs also point to Mr Venturi's knowledge that Mr McCarthy was keen to acquire the building and his knowledge, from his visit in 2005, that it was for sale.

It was said that it was incumbent upon Mr Venturi to take some step to contact Mr Ellul or Mr Muscat to tell them that Mr McCarthy was not in fact authorised to purchase the building. Again the need for external finance for this transaction is relevant. From Mr Venturi's perspective, it was one thing to expect that Mr McCarthy would purchase items from time to time as could be paid for from the defendant's operation of the Hay Point businesses. It was another to contemplate that he would bind the defendant to a transaction which it could undertake only with further bank finance.

[41] I am not persuaded that Mr Muscat believed that he had made a binding contract with the defendant for this building. I would accept that he believed that the negotiations as to the price had been resolved by a consensus as to the amount of $120,000. But that is different from a belief that Mr McCarthy was able to contractually bind the defendant and had done so. However, had that been Mr Muscat's belief, I would not be persuaded that the defendant's denial of Mr McCarthy's authority would be an unjust departure from that assumption in the relevant sense. In contrast to, for example, the facts in *Pacific Carriers Pty Ltd v BNP Paribas*, Mr McCarthy was not armed with documents to which he could impart "an appearance of authenticity".[7] In my view this was not a case of the required "imprudence" on the part of the defendant, where care was required of him. In summary, I would not have been persuaded to accept the plaintiffs' case as to apparent authority.

[42] For the defendant it was argued that the plaintiffs were not entitled to damages for breach of the alleged agreement because they were not entitled to terminate it when they purported to do so. The argument appeared to be that the letter from the plaintiffs' solicitors of 12 December 2006 required performance of the agreement in less than a reasonable time by requiring payment and removal of the building by 15 December. Had I accepted the plaintiffs' case that there was an agreement made between the parties as they contend, I would not have accepted this argument for the defendant. The alleged contract required the removal of the building and payment of $120,000 as soon as practicable but in any case by August 2006. At least after then, the defendant would have been in breach and there would have been no requirement for the plaintiffs to give something analogous to a notice to complete. The fact that the defendant did nothing to perform the alleged agreement, considered together with the correspondence on its behalf in December 2006, would have entitled the plaintiffs to terminate such an agreement.

[43] The damages claimed for breach of this contract comprised three components. First, there was the sum of $120,000. Secondly, it was agreed at the trial that the cost to the plaintiffs of demolishing the building so that they could proceed with their development was at least $45,000. There was no serious challenge to either of those components.

[44] Thirdly, the plaintiffs claimed losses from a consequent delay in their commencing and thereby completing their development, and in turn the completion of sales of individual lots created by that subdivision. The case was that there was a 48 day delay at the outset of the development because the bulk earthworks for the proposed residential lots had to stop for that period during the period of demolition of the building. There are contemporaneous documents supporting, for the most part, that

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7 (2004) 218 CLR 451 at 467.

case. In particular there are documents between the plaintiffs and their builder which show an extension of time granted to the builder 'to work on another site whilst the existing buildings are demolished". The period granted was 30 days or six weeks. The plaintiffs' claim was for 48 days on the basis of records which show that the demolition of this building occurred over such a period from late January 2007. However, the best evidence of the delay to the contractor's work is the extension of time which it claimed and was granted. I would accept that this delay at the outset of the project had a commensurate impact on the completion of it. The evidence demonstrates that there were certain contracts of sale which had dates for settlement according to the issue of the separate titles, the timing of which, in turn, was affected by the performance of the works.. For those contracts, the plaintiffs have proved that they were probably delayed in the receipt of the purchase monies by this six week delay in the completion of the project.

[45] The plaintiffs have proved the interest which they were paying on their borrowings for this development whilst they were effectively delayed in completing the sales. Applying those interest rates to $4,900,000, being the net sale proceeds from the 13 relevant contracts of sale, over a period of 42 days, results in a loss of $45,106.

[46] Accordingly, had I upheld the plaintiffs' claim for damages for breach of contract, I would have assessed those damages at $210,106.

[47] I turn then to the plaintiffs' other claim, which is for the sum of $48,260 as the unpaid price of goods sold and delivered to the defendant. This was not within the plaintiffs' case when these proceedings were commenced in August 2007. There was then a pleading that during 2005 and "early 2006", the 33 demountable cabins "and various other plant and equipment from the Caravan Park" was sold and delivered, and particulars were provided which referred to the deed of agreement and

> "various agreements concluded orally between Ian McCarthy … and Gerard Muscat … between about July 2005 and March 2006, in respect of the items particularised at Appendix A hereto."

That Appendix A listed 33 items. But in no case was it alleged that anything was owing for an item. The pleading in this respect seemed to be relevant, if at all, only as part of the factual background to the alleged agreement of March 2006 for the 10 unit building.

[48] As already discussed, in the letter from the plaintiffs' solicitors dated 19 December 2006, it was contended that the plaintiffs were owed approximately $20,000 "for various items such as the pool system and truck hire" and they were then waiting for Mr McCarthy to provide a schedule of the relevant items. Nevertheless, it appears that this claim was not pursued until an amendment to the plaintiffs' pleadings filed on 16 April 2009.

[49] The claim now pleaded is that it was agreed by Mr McCarthy and Mr Muscat on a particular occasion in or about June 2006 at the plaintiffs' caravan park that a certain nine items would be sold to the defendant at prices which totalled $38,260. In addition it is alleged that in February or March 2006, Mr McCarthy and Mr Muscat agreed upon the sale of a van, then registered to the second plaintiff, for a price of $10,000, and that this was delivered to Mr McCarthy at that time.

[50] The Further Amended Defence denies the relevant paragraphs in the statement of claim "on the basis that the defendant is not indebted as alleged or at all in that the said goods have been paid for". The particulars of that denial are "cash payments received by the plaintiff for the goods sold". In that respect the defendant's case relies upon evidence from the plaintiffs that in addition to the two cheques totalling $39,100, the plaintiffs received other cash payments of the order of $40,000 to $50,000.

[51] In his evidence Mr Muscat conceded that no invoices were ever issued by the plaintiffs for any of the items the subject of this claim. And when asked whether there was any system of records "to analyse what payments related to what goods" he answered:

> "Well, there kind of was, you know, like those pieces of paper, are like spreadsheets, I suppose, as I call them, once something was sold. I used to make a new spreadsheet with that item removed."

As I understand this evidence, and examples of what are said to have been spreadsheets of this kind,[8] they do not record payments made for items. The plaintiffs did not keep records of cash payments for any of the items, whether within this claim or otherwise. Nor are there other records from which inferences could be drawn as to what payments were made, what items were paid for and in what amounts. Mr Muscat conceded that no receipts were issued and payments were made in cash in order to "hide the transactions [and] hide where it came from".[9] The conduct of Mr McCarthy and Mr Muscat in this respect and that of Mr Ellul and Mr McCarthy with respect to the tax invoice hardly contributes to the weight of their evidence on this part of the claim or otherwise.

[52] The plaintiffs' case is built entirely upon a reconstruction by Mr McCarthy. That was foreshadowed by the reference to a schedule to be compiled by Mr McCarthy (rather than by Mr Ellul or Mr Muscat) in the letter from the plaintiffs' solicitors of 19 December 2006. In turn, Mr McCarthy was unable to prove this part of the plaintiffs' case. He could offer no records of cash payments to the plaintiffs. He agreed that the items for which payment is claimed had not been paid for, with the possible exception of the van. But there was no document or other circumstance which indicated how he was able to recall these things.

[53] The weight to be given to the evidence of Mr Muscat and Mr McCarthy about these non-payments is also affected by the absence of any such complaint by the plaintiffs, at least until 19 December 2006, as well as by the absence of this claim within the proceedings as commenced by the plaintiffs. Ultimately the plaintiffs would hope to recover without any documentary proof of how much they were paid or how much ought to have been paid. They had what they regarded as good reasons not to keep records and to receive payments in cash. Ultimately I am unpersuaded to accept this case about non-payments.

[54] The result is that the plaintiffs' claim is dismissed. I will hear the parties as to costs.

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8 Exhibits 13 and 14.

9 Transcript 2-31.