SUPREME COURT OF QUEENSLAND

CITATION:	*McGrath Corporation Pty Ltd v Ryan* [2010] QSC 101
PARTIES:	**McGRATH CORPORATION PTY LTD** ACN 010 829 491 (plaintiff) **v** **RYAN, Rose-Anne** (defendant)
FILE NO/S:	BS1460/09
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	1 April 2010
DELIVERED AT:	Supreme Court at Brisbane
HEARING DATES:	25 and 26 November 2009
JUDGE:	Margaret Wilson J
ORDER:	**(a) That the defendant pay the plaintiff the amount of $882,175.00;** **(b) That the defendant pay the plaintiff interest on that amount pursuant to s 47 of the *Supreme Court Act* 1995 at ten percent per annum from 6 November 2007 to this day;** **(c) That the defendant pay the plaintiff's costs of and incidental to the proceeding to be assessed on the indemnity basis.**
CATCHWORDS:	CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – PURCHASER'S REMEDIES – DAMAGES – MEASURE OF DAMAGES – where plaintiff was vendor and defendant purchaser of luxury penthouse apartment pursuant to a contract dated 18 April 2007 – where defendant refused to complete contract – where plaintiff accepted defendant's conduct as a wrongful repudiation and elected to terminate contract – where plaintiff forfeited deposit and sued for damages for breach of contract – where Court asked to assess those damages – where plaintiff submits market value of apartment at date of breach was $2,500,000 and defendant submits it was $3,350,000 – assessment of market value at date of breach – whether sale expenses are properly to be brought to account, and how *Body Corporate and Community Management Act* 1997 (Qld) *Supreme Court Act* 1995 (Qld), s 47

Brewarrana Pty Ltd v Commissioner of Highways (No. 1) (1973) 32 LGRA 170, considered
Boland v Yates Property Corporation Pty Ltd (1999) 74 ALJR 209, cited
Crompton v Commissioner of Highways (1973) 32 LGRA 8, considered
Kenning Investments Pty Ltd v Rusty Tees Pty Ltd, unreported, Supreme Court of Queensland, Ambrose J, 24 March 1992, cited
Spencer v The Commonwealth of Australia (1907) 5 CLR 418, cited

COUNSEL: D O'Brien for the plaintiff.
T C Somers for the defendant.

SOLICITORS: Ruddy and Company for the plaintiff.
Griffiths Parry for the defendant.

[1] **MARGARET WILSON J**: The plaintiff was the vendor and the defendant was the purchaser of a luxury penthouse apartment at Kangaroo Point pursuant to a contract dated 18 April 2007. The defendant refused to complete the contract. The plaintiff accepted the defendant's conduct as a wrongful repudiation and elected to terminate the contract; it forfeited the deposit and sued for damages for breach of contract. This is the assessment of those damages.

The contract

[2] The purchase price was $3,600,000, payable by way of $180,000 deposit on or before the execution of the contract and the balance of $3,420,000 on settlement.

[3] Settlement was due on 6 November 2007. The plaintiff was ready, willing and able to complete, but the defendant refused to do so. On 21 November 2007 the plaintiff accepted the defendant's conduct as repudiation and terminated.

[4] The contract provided:-

> "DEFAULT:
>
> 5. If the buyer fails to comply with the conditions of sale set out in this Agreement or any of them, then (in addition to any other remedy available to the Seller either at law or in equity) the Seller may (subject to the provisions of the *Property Law Act* 1974);
>
> (a) affirm this Agreement and sue the Buyer for damages or specific performance; or
> (b) affirm this Agreement and sue the Buyer for damages and specific performance; or
> (c) without notice to the Buyer, terminate the Agreement from the date of the breach and:

(i) resume possession of the Lot; and/or
(ii) forfeit to the Seller the moneys paid on account of the Purchase Price by the Buyer to the extent of ten percent (10%) of the total Purchase Price and interest earned on its investment; and/or
(iii) sue the Buyer for damages for breach of contract; and/or
(iv) without notice to the Buyer resell the Lot by public auction or by private contract with power to vary or rescind any agreement for sale and to buy at any auction and any deficiency in price on such resale and the expenses including legal costs on a solicitor and own client basis of and incidental to repossession and to the present sale and such resale and any abortive attempt to resell together with all rates, taxes and other outgoings accrued due in respect of the Lot at the date of resale, which were payable by the Buyer under the terms of this Agreement, shall be paid to the Seller by the Buyer and shall be recoverable as liquidated damages. Any excess on resale shall belong to the Seller.

Any moneys paid by the Buyer above ten percent (10%) of the Purchase Price may be held by the Seller as security for any deficiency arising out of a resale or as security for any damages awarded as a result of the Buyer's default.

The Buyer will indemnify the Seller against any loss which the Seller sustains as a result of the Buyer's default. Without limiting the generality of this indemnity, the Seller's loss will include legal costs both party and party and solicitor and own client which the Seller may incur."

Measure of damages

[5] Common law damages for breach of contract are compensatory in nature. The measure of damages is generally the difference between the contract price of the property and its market value at the date of the breach. It was common ground that the damages should be assessed at the date of the breach – 6 November 2007.[1]

[6] The market value of a property is the price at which a willing but not anxious vendor would sell, and at which a willing but not anxious purchaser would buy.[2]

[7] I accept the submission of Counsel for the plaintiff that what must be ascertained is the difference between the net benefit to the plaintiff had the contract been

---

1 Even if the more appropriate date is that on which the plaintiff accepted the defendant's failure to complete as repudiation and elected to terminate (20 November 2007), there is no evidence of any material difference in the value of the apartment between 6 and 20 November 2007.

2 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at par 266-269; *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418 at 432 at 441.

performed and the net benefit to the plaintiff had a contract for a price equivalent to the market value as at the date of the breach been performed. See *Kenning Investments Pty Ltd v Rusty Rees Pty Ltd*.[3] It was common ground that the amount of the deposit which has already been forfeited ($180,000) must be deducted from the difference.

Issues

[8] The issues in the trial were:

(a) the market value of the apartment at the date of the breach, the plaintiff contending that it was $2,500,000 and the defendant contending that it was $3,350,000; and

(b) what sale expenses are properly to be brought to account, and how.

The apartment

[9] Millennium is a community titles scheme within the meaning of the *Body Corporate and Community Management Act* 1997 at 1 O'Connell Street, Kangaroo Point. Two residential towers have been erected on land at the corner of O'Connell and Cairns Streets. The complex is approximately three kilometres south of the Brisbane GPO and within 1.5 kilometres of schools, shops and public transport.

[10] The subject apartment is Unit 109, a two level penthouse on levels 12 and 13 of Tower One. It is 421m^2 in area – 229m^2 on level 12 (including a balcony of 89m^2), 133m^2 on level 13, and 59m^2 in the basement level (three side by side car parks). The apartment has virtually uninterrupted views north-west to the CBD and east and north-east over the Shafston Reach of the Brisbane River.

[11] The apartment's features include three bedrooms, a plunge pool on the upper balcony, a BBQ on the lower balcony, air-conditioning, and audio intercom security system, a media room, and a rumpus room with wet bar facilities. The common facilities in the building include an onsite manager/concierge, a spa and a pool.

[12] The plaintiff's valuer Mr Early and the defendant's valuer Mr Quinlan agreed that there were negative features. The design and finishes within the apartment are below the standard expected for prestige penthouses in the area. And the complex does not have river frontage.

Method of valuation

[13] Both valuers purported to adopt the comparable sales method of valuation, which involves an analysis of sales of comparable properties, making allowances for

---

[3] Unreported, Supreme Court of Queensland, Ambrose J, 24 March 1992; *McGregor on Damages* 14th ed at 524.

differences in size, location and features. It was explained by Wells J in *Brewarrana Pty Ltd v Commissioner of Highways (No. 1)*[4] in these terms:-

> "It is general valuation practice for sales characterized as comparable sales to be used as bases for the valuation of lands said to be similar. But allowances must always be made before such sales can be so used. No two parcels of land are identical in all respects: the sale price of any given piece of land is not necessarily the price at which it ought to have been sold, or the sale thing as its true value. Before using any allegedly comparable sale, therefore, the valuer must consider whether, having regard to the circumstances (using that word in its broadest sense) appertaining to the parcel of land in question, and to the transaction of sale, there are sufficient similarities to the circumstances appertaining to the subject land and to the notional sale presupposed by the test formulated in *Spencer v The Commonwealth of Australia*[5] and in later cases to warrant a court's reasoning from the sale price paid under the allegedly comparable sale, with or without other evidence, to a value for the subject land. Adjustments must, of course, be made every time reasoning of that kind is undertaken. For example, in relation to the land itself and the circumstances appertaining to it, it may be necessary to consider such matters as topography, location, size, shape, slope, view, land use (actual and potential), scope for, and difficulties of, development, services and amenities; and in relation to the transaction of sale, the valuer must weigh such things as the character, business and relationships of the parties, their motives, the terms and conditions in their contract of sale, and any other special considerations that induced or may have induced them to conclude the contract at the selling price agreed, as well as the dates when the contract of sale and the transfer were concluded or effected. I do not for a moment pretend that I have been exhaustive. What I am concerned to emphasize is that, as I understand the evidence, and according to the inferences that I feel I can safely draw from it, there is no hard and fast rule by the application of which a valuer may, whatever the circumstances, draw the line that clearly separates the sales that are comparable from those that are not. It is, in my view, all a matter of degree: some adjustment is always necessary; too much adjustment will render it unsafe to use a sale, subject to such a degree of adjustment, for the purpose of the reasoning process in the comparable sales method. Just where the line is to be drawn is, it seems to me, the very sort of question that is fit for the expert valuer to determine; the assessment of the risks of adjustment is peculiarly within his sphere of skill. The valuer must use his skill to winnow out the element of comparability if it is there, and use it with discretion."

---

4 (1973) 32 LGRA 170 at 179-180.

5 (1907) 5 CLR 418.

In *Crompton v Commissioner of Highways*[6] Wells J said:-

> "Upon reading some works on comparable sales, one might be pardoned for supposing that, within narrow limits of tolerance, sales of land similar to the subject land must fall into two rigid categories: comparable sales and non-comparable sales. Such a supposition would, in my opinion, be an over-simplification and could lead to error. It seems to me that, ideally, the valuer should, in the first instance, look at the sales of land over a wide geographical and temporal range, and from these select those that appear potentially useful as a basis for comparison. Those selected should then be carefully analysed by reference to an extensive list of characteristics of land sales the compilation and assessment of which fall clearly within the province of the experts. Whether or not one or more of those sales is, and how it or they ought, to be compared with the subject land becomes then a matter of degree, and a final decision is reached, often by those same experts drawing a series of nice distinctions. Obviously, no two sales of land will be found to be the same, or even similar in all respects. Those that bear a close similarity to the assumed sale of the subject land will be more reliable than those whose similarity is less proximate and in respect of which adjustments or allowances must be made before they can be safely introduced into the valuation process. At a particular point it will be found that, in respect of the remaining available sales, the adjustments and allowances that would need to be made are of such a magnitude that it ceases to be safe or sound to treat them as sufficiently similar to the assumed sale of the subject land, and they must thenceforward be rejected. "

[14] The valuer must arrive at an assessment of overall comparability: this is usually done by referring to the "comparable" properties relied on as inferior or superior to the subject property. In this case relevant factors include the locations of the buildings in which the apartments were situated, the positions of the apartments within the buildings, their design, and the facilities in the apartments and the common property. The timing of the sales is also significant, given that the breach occurred on 6 November 2007, and there was a substantial fall in the market in February 2008.[7]

Comparable sales

[15] The properties considered by the valuers may be summarised as follows:-

---

6 (1973) 32 LGRA 8 at 23-24.

7 In this regard I accept the evidence of Mr Early: Transcript 1-33,ll 8-13.

The valuers

Property	Features	Date	Sale Price	Early	Quinlan	Comment
Unit 203 Millennium	Single level apartment in the other tower	01/08/07	$1.675m	*		
Unit 3, Mon Reve, 98 Thorn St	2 level apartment (not a penthouse) – absolute river frontage	04/05/07	$2.8m	*	*	
Unit 4, Mon Reve, 98 Thorn St	2 level apartment (not a penthouse) – absolute river frontage	28/04/08	$2.45m		*	
Unit 5 Mon Reve, 98 Thorn St	1 level apartment – absolute river frontage	30/09/07	$2.375m	*	*	
Unit 501, The Cliffs, 33 Ellis Street	Single level apartment – level 5	04/09/07	$2.35m	*	*	Quinlan referred to this in his report but in oral evidence said he did not rely on it[8]
Unit 402, The Cliffs, 33 Ellis Street	Single level apartment – level 4	02/04/08	$2.15m		*	
Unit 5, South Shores, 68 Lower River Terrace	Single level apartment	18/09/07	$2.17m	*		
Unit 1101 Castlebar Cove, 44 Castlebar St	Single level sub-penthouse – absolute river frontage	26/10/07	$4.5m		*	
Unit 2011 Castlebar Cove, 44 Castlebar St	Single level sub-penthouse – absolute river frontage	29/01/08	$3.8m		*	
Unit 2062 Castlebar Cove	Single level apartment – one of two on 6th level above ground – related party sale	04/02/08	$2.85m		*	
Unit 1002, South Central, 43A Peel St, South Brisbane	2 level penthouse apartment – mixed commercial/residential development	23/03/07	$2.5m	*		

[8] Transcript 1-70.

[16] The plaintiff's valuer Mr Early was an impressive witness. He is a registered valuer with extensive practical experience. He has been a lecturer in real estate valuation for the Auctioneers and Valuers Association of Australia for more than ten years, and is a Dispute Committee panellist for the REIQ. He applied orthodox comparable sales methodology, analysing six sales to arrive at a value of the subject property as at 6 November 2007 of $2,500,000.

[17] Mr Early's valuation was not seriously challenged in cross-examination. The principal challenges were to his reliance on the sale of a property in Peel Street, Kangaroo Point as being in a different location from the subject property, and his failure to rely on sales in an apartment complex called Castlebar Cove, which is in close physical proximity to Millennium.

[18] The defendant's valuer Mr Quinlan was not an impressive witness. He is a registered valuer with many years experience as a rural financial and agronomic consultant. He has been a self-employed valuer and consultant since 1990, but I am not satisfied that residential valuations have been a prime focus of his work. Several criticisms were fairly levelled at his valuation. Although he purported to adopt the comparable sales method of valuation, he seemed to think that "comparable" meant "equal to".[9] He did not express a view as to the overall comparability of the properties. He relied on sales in Castlebar Cove - a far superior complex, which is not truly comparable. He superimposed a square metre rate analysis upon the comparable sales analysis, but failed to explain how he arrived at a square metre value of the subject property as at 6 November 2007 of $7,957.

[19] What Mr Quinlan seemed to do in his square metre rate analysis was -

(a) to identify sales of comparable properties;

(b) to derive a square metre rate for each of those sales;

(c) to determine a square metre rate for the subject apartment based on what he considered sales of comparable properties; and

(d) to multiply that rate by the area of the apartment to arrive at a value of $3,349,897.

In arriving at a square metre rate for the sales of the comparable properties, he applied different weightings to different types of area (main living area, courtyard, garage), and then came to a rate per square metre for the particular property. But he failed to explain his calculations which lead to the rate of $7,957 per square metre for the subject property as at 6 November 2007.

[20] But, as Mr Early explained, one of the main drivers of price in the prestige penthouse market is the design of the apartment. Other significant drivers are the extent to which the apartment exploits available views, and the standard of its finish and exclusivity. There is no direct relationship between size and price.

[21] In all of the circumstances, I accept Mr Early's valuation of $2,500,000 rather than Mr Quinlan's evaluation.

---

[9] Transcript 1-53.

Expenses of sale

[22] Counsel for the plaintiff submitted, and Counsel for the defendant seemed to acknowledge, that legal and commission expenses should be deducted in arriving at the net benefit to the plaintiff.

[23] In assessing the legal costs of the aborted sale to the defendant, I accept the evidence of Mr Stephen McGrath, a director the plaintiff, that $1,375.00 was incurred. In assessing what would have been the legal costs of a sale for $2,500,000 as at 6 November 2007, I accept the evidence of Mr Mark Ruddy, a solicitor experienced in commercial litigation and property matters, that approximately $1,100.00 (inclusive of GST) would have been incurred.

[24] I accept the evidence of Mr McGrath that the commission payable on the aborted sale was $118,800.00 and that on a sale for $2,500,000 as at 6 November 2007 would have been $68,750.00. This accords with standard REIQ rates.

[25] Counsel for the plaintiff contended that a further $50,000 should be deducted from the value at the date of the breach for marketing costs in relation to resale. Counsel for the defendant submitted that this is a resale cost which would have been recoverable had the plaintiff chosen to resell and claim the deficiency on resale (which it might have done under cl 5(c)(iv) of the contract), but that it was not recoverable as a component of common law damages for breach of contract (cl.5(c)(iii)).

[26] In principle there is no reason to treat marketing costs differently from legal and commission costs. However, there are several difficulties in the application of this principle to this case.

(i) The plaintiff claims $50,000, as marketing costs associated with an unsuccessful attempt to resell in April 2008 ($25,198.50) plus a further sum of approximately $25,000 being an estimate of marketing costs which would be incurred in a further attempt to sell the property. Its Counsel submits that given the nature of the property, it would be reasonable to have two attempts at resale.

(ii) There was a significant fall in the market in February 2008.

(iii) There is no evidence of marketing costs incurred in relation to the sale to the plaintiff pursuant to the contract of 18 April 2007. Perhaps this is because the plaintiff was the developer of the apartment complex and the sale was "off the plan": it may be that the complex had been marketed as a whole, and that marketing costs had been taken into account in fixing the price of the apartments. But this is speculative.

[27] I do not accept that simply because this was a luxury penthouse apartment two attempts at resale would reasonably have been required. At most I would take account of $25,000 for one set of marketing costs. To make some allowance for marketing costs of the original sale, I will allow only $12,500 to be deducted from the value at the date of the breach in arriving at the net benefit to the plaintiff from a sale as at that date.

Assessment of damages

[28] In summary, I assess the plaintiff's damages for breach of contract as $882,175.00 made up as follows:-

Net benefit had contract been performed

Contract price		$3,600,000.00	
less legal costs	$1,375.00		
less commission	$118,800.00	$120,175.00	**$3,479,825.00**

***Less* Net benefit from sale at market value at date of breach**

Sale price		$2,500,000.00	
less legal costs	$1,100.00		
less commission	$68,750.00		
less marketing	$12,500.00	$82,350.00	**$2,417,650.00**
		Difference	$1,062.175.00
		less Deposit	$180,000.00
		Damages	**$882,175.00**

[29] I allow interest on damages pursuant to s 47 of the *Supreme Court Act* 1995 at ten percent per annum from 6 November 2007 to judgment.

[30] The plaintiff seeks costs on the indemnity basis. This was provided for in cl 5 of the Contract. Accordingly the defendant should pay the plaintiff's costs of and incidental to the proceeding on the indemnity basis.

Orders

(a) That the defendant pay the plaintiff the amount of $882,175.00;

(b) That the defendant pay the plaintiff interest on that amount pursuant to s 47 of the *Supreme Court Act* 1995 at ten percent per annum from 6 November 2007 to this day;

(c) That the defendant pay the plaintiff's costs of and incidental to the proceeding to be assessed on the indemnity basis.