SUPREME COURT OF QUEENSLAND

CITATION:	*Osaka Enterprises Pty Limited v Seaview Pacific Pty Limited* [2010] QSC 112
PARTIES:	**OSAKA ENTERPRISES PTY LIMITED** **(ACN 062 874 560)** (Plaintiff) **v** **SEAVIEW PACIFIC PTY LIMITED** **(ACN 112 132 939)** (Defendant)
FILE NO:	9806 of 2009
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2009
JUDGE:	McMurdo J
ORDER:	**1. The plaintiff's claim is dismissed.** **2. Judgment for the defendant on the counter-claim in the sum of $262,561.**
CATCHWORDS:	CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – where the defendant granted the plaintiff a put option to purchase certain land – where the plaintiff purported to exercise the put option but made an error in the documentation – where the plaintiff later withdrew the erroneous documentation and provided compliant documentation – whether the plaintiff's earlier purported exercise of the put option amounted to a counter-offer and rejection of the defendant's offer making the later exercise of the put option invalid. CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – OFFER AND ACCEPTANCE – where the parties agreed that upon the due exercise of a put option there would be a binding contract for the sale of certain land – where a special condition set out a further requirement for the existence of a binding contract for the sale of the land – whether a binding contract for the sale of the land existed when the put option had been duly exercised by the plaintiff but the special condition had not been fulfilled.

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – TERMINATION – where the form of contract for the sale of land subject to a lease provided that the defendant may terminate the contract if the particulars contained in the Lease Schedule were not accurate – where the particulars contained in the Lease Schedule were the subject of an amendment which was to take effect upon completion of the contract – whether the particulars contained in the Lease Schedule were accurate.

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – TERMINATION – where the form of contract for the sale of certain land provided that the defendant may terminate the contract if the land was affected by a proposal to modify any road or railway abutting the land – where future improvement to the transport network in the vicinity of the subject property was contemplated – whether the defendant was entitled to terminate in those circumstances.

Supreme Court Act 1995 (Qld) s 47

Alusta Pty Ltd v Duncan [1973] 2 NSWLR 182

D & T Properties v Knox (Unpeported, Supreme Court of New South Wales, Helsham J, 15 September 1972)

David Deane & Associates Pty Ltd v Bonnyview Pty Ltd & Ors [2005] QCA 270

Duncan Properties Pty Ltd v Hunter [1991] 1 Qd R 101

Ex parte Christensen [1984] 1 Qd R 382

Gagliardi v Lamont [1976] Qd R 53

Grant v McRoss Developments Pty Ltd [2003] QSC 169

Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd (2003) NSWLR 312

Laybutt v Amoco Australia Pty Limited (1974) 132 CLR 57

Petelin v Deger Investments Pty Limited (1975) 133 CLR 538

Re Copperart Pty Ltd (1995) 16 ACSR 351

COUNSEL: N J O'Bryan SC with S E Brown for the plaintiff

M D Martin for the defendant

SOLICITORS: J M Goncalves for the plaintiff

Tucker & Cowen for the defendant

[1] The ultimate question in this case is whether the defendant was contractually bound to purchase from the plaintiff certain land at Gold Coast Highway, Mermaid Beach. The plaintiff's case is that it duly exercised a put option, whereupon there was an enforceable contract of sale.

[2] The defendant resists that case upon four alternative grounds. The first is that the plaintiff's exercise of the put option was invalid, because the plaintiff previously purported to exercise the option but upon different terms, and that thereafter this extinguished the plaintiff's right to duly exercise that option. Secondly, it is said that the parties were not to be bound until both of them had signed the proposed form of contract of sale and that the defendant has not signed. Thirdly, the defendant says that there is a difference between the leases to which the property was subject, as disclosed within the contractual documents, and the true position, such that there was an express right of the defendant to terminate the contract. Fourthly, the defendant says that it was entitled to exercise another express right of termination, in this instance because the property was adversely affected by a proposal to resume part of the land for the widening of the Pacific Highway.

[3] If the defendant became bound to perform the contract as the plaintiff alleges, it failed to pay the balance of the deposit and the plaintiff was entitled to terminate the contract. The plaintiff has purported to terminate and claims damages calculated by the difference between the contract price of $5,250,000 and what it says was the market value of the property at the date of termination, which was $2,500,000. Allowing for such part of the deposit which had been paid ($275,000), the plaintiff seeks an award of $2,475,000. There is no challenge to the valuation evidence and I would accept it. Accordingly, if the plaintiff is entitled to succeed, it should have an award in that amount together with interest under the *Supreme Court Act 1995* (Qld) from the date of its termination of the contract. If the defendant was not bound to perform the contract, it is entitled to the return of $275,000 paid towards the deposit, of which $250,000 has been paid to the plaintiff and $25,000 has been paid to and is held by the defendant's solicitor.

The put and call options

[4] The parties executed a Put and Call Option Deed ("the Deed") which was dated 13 August 2008. The plaintiff granted an option to the defendant to purchase the land at that price of $5,250,000, the option to be exercised within the period of 11 months commencing upon the date of the Deed. In turn, if the call option was not exercised, the plaintiff was entitled to exercise a put option to sell the land to the defendant at that price, this option to be exercised within the period of 14 days following the expiry of the call option period. The defendant did not exercise the call option. The period of 14 days therefore commenced on 14 July 2009.

[5] The Deed provided for a so-called security deposit of $400,000, to be provided by $250,000 paid upon execution of the Deed and a further sum of $150,000 to be paid six months from that date. This term was varied by a deed of amendment between the parties dated 13 February 2009. By then the defendant had duly paid the sum of $250,000. The parties then agreed that in lieu of the further sum of $150,000, the defendant should pay five instalments each of $25,000, totalling $125,000, at the end of March, April, May and June and on 13 July 2009.

[6] By clause 4.2 of the Deed, it was agreed that the security deposit would be returned to the defendant if neither the call option nor the put option was exercised. By clause 4.3, upon the exercise of either option, the security deposit was to be immediately deemed to be the deposit under the contract.

[7] Upon the exercise of either option, there was to be a contract in the form set out in a schedule to the Deed. That was the standard REIQ form of contract for commercial land and buildings. It provided that the property sold would be subject to a certain lease, in favour of a company called Globe International Ltd. The schedule in the form of contract described that lease as having a term of five years commencing on 16 November 2006 and a rental of $275,000 per annum.

[8] By clause 4.6 of the Deed, the parties acknowledged the existence of a lease by reference to those particulars in the proposed form of contract. Clause 4.6(b) further provided as follows:

> "(b) The parties hereto acknowledge that a Form 13 Amendment to Lease is to be entered into between the Vendor as Landlord and the Tenant, Globe International limited ACN 077 066 033, whereby the Lease is varied as follows:
>
> (i) The date of termination of the Lease shall be varied to expire on 1st February 2010;
>
> (ii) A rent free period shall apply from the date of settlement of the Contract until 1st February 2010;
>
> (iii) That the terms and conditions of the Lease shall otherwise remain unchanged."

[9] The form of contract provided for completion 30 days from the date of the contract or 13 August 2009, whichever was sooner.

[10] The put option was the subject of clause 3 of the Deed. By clause 3.1, the defendant irrevocably offered to purchase the lot at the price and on the conditions set out in the form of contract and it was provided that its offer would lapse if not accepted by the plaintiff during the put option period and strictly in accordance with this clause 3. Clauses 3.2 and 3.3 provided as follows:

> "3.2 **Acceptance**
>
> The offer made by the Purchaser may be accepted by the Vendor at any time during the Put Option Period by giving to the Purchaser under clause 5.1:
>
> (a) written notice of acceptance of the offer; and
>
> (b) two (2) copies of the Contract which must be:
>
> (iv) completed by inserting the date of exercise of the option as the Contract Date;
>
> (v) properly executed by the Vendor.
>
> 3.3 **Power of Attorney**
>
> (a) The Purchaser irrevocably appoints:
>
> (i) the Vendor; and

(ii) each director of the Vendor; and

(iii) each attorney of the Vendor appointed under a power of attorney by the Vendor (as donor); and

(iv) the substitutes of any of the above.

(vi) any form under the PAMDA related to or connected with the transaction contemplated by the Contract.

(b) The rights granted under the power of attorney referred to in this clause 3.3 can only be exercised by the Vendor during the Put Option Period.

(c) The power of attorney in this clause 3.3 is given by the Purchaser as security for the performance of the obligation owed to the Vendor in accordance with clause 3.1."

[11] There appears to have been a typographical omission from clause 3.3(a), between subparagraphs (iv) and (vi) of clause 3.3(a)(v). The intention may have been to authorise the plaintiff to sign, amongst other things, the form of contract.

Exercise of the put option

[12] On 16 July 2009, the plaintiff purported to exercise the put option. It did so by a written notice of exercise of the option, with which it delivered two copies of a form of contract which it had signed and dated 16 July. These documents were delivered under cover of a letter from the plaintiff's solicitor. The letter was as follows:

"Re: Osaka Enterprises Pty Ltd and Seaview Pacific Pty Ltd – Contract
Pty: 2586 Gold Coast Highway, Mermaid Beach

I refer to Clause 3 of the Put and Call Option Deed dated 13 August, 2008.

Notice is hereby given that the vendor exercises the put option in accordance with the terms of Clause 3 and accepts the purchaser's offer on the terms and conditions as contained therein, and I enclose now,

1. Written notice of acceptance of offer signed by Osaka Enterprises Pty Ltd, and

2. Two (2) copies of the Contract completed with the date of exercise of the option as the Contract Date, and executed by Osaka Enterprises Pty Ltd.

I look forward to receipt of my client's copy of the Contract executed by Seaview Pacific Pty Ltd as purchaser together with confirmation of payment of the deposit, the balance of which remains to be paid to and held by the depositholder."

[13] The notice of exercise of option was in these terms:

> "Osaka Enterprises Pty Ltd
> A C N 062 874 560
>
> Hereby exercises the Put Option granted in the Put and Call Option Deed between Osaka Enterprises Pty Ltd A C N 062 874 560 as the Vendor and Seaview Pacific Pty Ltd A C N 112 132 939 as the Purchaser and dated 13 August, 2008, to require Seaview Pacific Pty Ltd to purchase the property described as 2586 Gold Coast Highway, Mermaid Beach in the State of Queensland and more particularly as Lot 9 on RP 837013 County of Ward Parish of Gilston Title Reference 18373024 pursuant to the terms of the Contract annexed to the Deed.
>
> Osaka encloses now two copies of the contract completed with the date of the exercise of the option as the contract date and executed by the vendor signing by its' [sic] directors pursuant to clause 3.2.
>
> The deposit is payable immediately. The sum of $250,000.00 has been paid by the Purchaser, receipt of which is acknowledged by the Vendor, on account of the deposit, and delivery of the balance as varied by Deed of Amendment dated 13 February, 2009, is required to be made immediately by cheque or otherwise as allowed by the contract, to JM Goncalves Solicitor, as follows:
>
> JM Goncalves Trust Account,
> JM Goncalves Solicitor,
> 22 Cornwall Drive, Elanora. Qld. 4221."

[14] The attached contract signed by the plaintiff provided for a deposit of $400,000, as originally agreed within the Deed, rather than $375,000 according to the subsequent variation. I accept that this was an error. The notice of exercise of option expressly referred to the required deposit being according to the Deed of Amendment dated 13 February 2009. Consistently with that Deed of Amendment, the form of contract which the plaintiff should have delivered was one which provided for a deposit of $375,000. In consequence, the plaintiff did not strictly comply with the requirements of the Deed for the exercise of its put option by the provision of these documents on 16 July 2009.

[15] Recognising this, the plaintiff sent further documents on 24 July 2009. The covering letter of that date from the plaintiff's solicitor said that the deposit set out in the contract forwarded on 16 July "did not accord with the deposit as amended by the Deed of Amendment 13 February, 2009" and that this was an oversight. The solicitor wrote that to avoid any confusion, the documents sent on 16 July were "withdrawn". He enclosed a fresh notice of exercise of the put option and a form of contract, each signed by the plaintiff. These documents in all respects complied with the requirements of clause 3 of the Deed.

[16] In the covering letter the plaintiff's solicitor wrote this in respect of the balance of the deposit:

> "The vendor requests that the balance of deposit be paid in the amended sum calculated as follows:

Deposit, as amended,	$375,000.00
less, paid	$250,000.00
	$125,000.00
less, paid as advised by Wockner Partners as depositholder to the Vendor as held in trust as depositholder	$25,000.00
Balance as calculated above	$100,000.00"

Termination

[17] There was no response from the defendant either to the correspondence of 16 July or to that of 24 July before the plaintiff purported to terminate on 29 July 2009. On that day the plaintiff's solicitor delivered a letter to the defendant's solicitor, referring to the contract of sale delivered on 24 July and to the fact that the balance of the deposit became payable immediately upon "the formation of the contract". It also referred to the fact that nothing further had been provided by way of deposit and asserted that the defendant was "in substantial breach of the contract". It gave notice that the plaintiff terminated that contract and declared the deposit forfeited. It gave notice of an intention to claim the balance of the deposit and otherwise reserved the plaintiff's rights.

[18] On 31 July 2009, the defendant gave a notice purporting to terminate the contract. This was by a letter from its solicitors who alleged that the plaintiff's purported termination on 29 July was a wrongful repudiation.

The first ground

[19] The defendant contends that what was sent on 16 July 2009 constituted a counter-offer and that this rejected the defendant's offer constituted by the put option. Accordingly, the defendant's offer was no longer available for acceptance and the exercise of the option on 24 July was of no effect.

[20] The defendant cites *Heggies Bulkhaul Ltd v Global Minerals Australia Pty Ltd*,[1] where Austin J held that in the circumstances of that case, a purported exercise of an option to renew a lease was in reality a counter-offer by the lessee. But the present question, which is whether the counter-offer puts paid to the offer to which it had purported to respond, did not arise in that case. The same may be said of *Re Copperart Pty Ltd*,[2] a decision of White J in this Court, where the purported exercise of an option to renew a lease in that case was made outside the time agreed for that act.[3]

[21] In my opinion there are several reasons why the defendant's argument cannot be accepted. The first is that the documents sent on 16 July, upon an objective view, could not be understood as a rejection of an offer constituted by the put option. The basis of the rule that a counter-offer operates to reject the original offer is the implication that this was the intention of the counter offeror. But that implication does not arise if the party making the counter-offer makes it clear that the original

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1 (2003) 59 NSWLR 312, [22]-[26].

2 (1995) 16 ACSR 351.

3 See to the same effect *Duncan Properties Pty Ltd v Hunter* [1991] 1 Qd R 101, 106.

offer is not being rejected.[4] In the notice of exercise of option dated 16 July, the plaintiff had referred to the amount of the deposit as varied by the deed of amendment dated 13 February 2009 and had said that this amount was to be paid immediately. Therefore there was an inconsistency between this document and the form of contract which was delivered with it, in relation to the deposit. On an objective view, it would be wrong to characterise the correspondence of 16 July, considered as a whole, as tantamount to a rejection of a contract in terms of the Deed as varied by the deed of amendment and an offer to contract only upon the basis originally agreed within the Deed. Accordingly, the foundation for this argument, which is that there was an implied rejection of the defendant's offer, is not established.

[22] Secondly, the weight of the authorities in respect of options is now that they should be regarded as conditional contracts rather than irrevocable offers,[5] and if so, the notion of the rejection of an offer is not apt.

[23] Thirdly, the effect or otherwise of the documents of 16 July 2009 must be considered in the context of the particular provisions of the Deed. By clause 3.2 the offer made by the defendant was able to be accepted at any time during the put option period and by clause 3.1 the offer was irrevocable. In these circumstances the ordinary rule that an offer is terminated once rejected by the offeree[6] would be displaced by the particular provisions of the Deed. Of course, in some circumstances an unequivocal representation, by the grantee of an option, that the option would never be exercised might result in the grantee being precluded from later exercising it, such as by the operation of an estoppel. But no such case is suggested here.

The second ground

[24] The form of contract attached to the Deed and as signed and sent to the defendant on 24 July 2009 contained a special condition in these terms:

> "2. This Contract shall be entered into and becomes binding on the parties named in the Contract upon the other party signing the Contract that has been signed by the other party (or a photocopy or facsimile copy of the same) and transmitting a facsimile copy of the signed Contract to the other party or to the other party's agent or solicitor. The parties agree that following execution of the facsimile copies of this Contract of Sale they shall execute and exchange original copies of the Contract."

[25] That clause is difficult to interpret at least because of its ambiguous references to "the other party". But read alone, its intended effect would appear to be that the parties would not become contractually bound in terms of that contract unless and until the form of contract had been signed by each of them.

[26] There is no dispute that the defendant did not sign the form of contract sent on 24 July 2009. Nor did the plaintiff sign on the defendant's behalf, as perhaps the plaintiff would have been entitled to do pursuant to clause 3.3 of the Deed which is

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4 John W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (5th ed, 2007) [3-52].

5 *Laybutt v Amoco Australia Pty Limited* (1974) 132 CLR 57; *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd & Ors* [2005] QCA 270, [22].

6 John W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia* (5th ed, 2007) [3-51].

set out above at [10]. Thus the defendant's argument is that the parties had not become contractually bound in terms of this form of contract before it was purportedly terminated by the plaintiff.

[27] The purpose of this special condition in the form of contract does not plainly appear. According to clause 3 of the Deed, the plain intention appears to have been that a contract for the sale of the land would be concluded by a due exercise of the put option. In particular that exercise required the plaintiff to provide two copies of the contract completed by the insertion of the date of the exercise of the option as the date of the contract.

[28] Clause 2 of the Deed provided for the call option. By clause 2.3 there was a similar provision for the defendant to exercise the option by signing two copies of the contract and inserting the date of its exercise of the option as the contract date. There was a further term in relation to the call option (clause 2.4) by which it was provided that the plaintiff was required to promptly sign both copies of the contract and return one copy to the purchaser. It was suggested in the argument for the plaintiff that special condition 2 of the form of contract was inserted with only the call option in mind. In particular it was suggested that the intention was that the plaintiff was not to be bound in consequence of the exercise of the call option until it had signed the form of contract. But special condition 2 was not in terms which distinguished between the call option and the put option.

[29] One view of the special condition is that it has been inserted from some concern as to the efficacy of using facsimile copies of the contract. But again the terms of the clause do not clearly indicate such a purpose.

[30] If possible, every term of a contract should be given effect. But in this case, the effect suggested by the defendant would be such as to undermine the plainly intended effect of the Deed. By the terms of the Deed, the parties agreed that upon the due exercise of either of the options, there would by that act exist a binding contract for the sale of the land.[7] Once the put option was duly exercised, there would be no purpose to be served by special condition 2. On the defendant's argument, special condition 2 would have the effect of making the existence of the contract of sale dependent not only upon the due exercise of the put option but upon some further act of concurrence on the part of the defendant. That would deny business efficacy to the agreement within the Deed. That construction of this special condition must be rejected, a conclusion which is more readily reached by its incomprehensible references to "the other party". Ultimately, the only effect which might be given to special condition 2 is that suggested by the plaintiff, which is that it applied to the exercise of the call option but not the put option. In that context, the plaintiff would have been bound by clause 2.4 to sign the contract.

[31] Accordingly this second ground is not established.

The third ground

[32] By clause 32.1 of the standard terms and conditions of this REIQ form of contract, it was provided that where the property was sold subject to any lease, the vendor stated that, except as disclosed in the contract, the particulars in the Lease Schedule were true and correct. As noted already, the relevant schedule in this form of

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[7] As in *Petelin v Deger Investments Pty Limited* (1975) 133 CLR 538, 542-543.

contract described the lease to Globe International Ltd as having a term of five years commencing on 16 November 2006 at a rental of $275,000 per annum. But those details were incorrect, as was at least indicated within clause 4.6(b) of the Deed.[8] The parties there acknowledged that by a proposed amendment to the lease, the lease would be varied so that its term would expire not on 16 November 2011 but on 1 February 2010, and that there should be a "rent free period" applying from the date of settlement of the contract of sale until 1 February 2010.

[33] However the amendment to the lease was in somewhat different terms. It provided for an expiry date not of 1 February but 13 February 2010. It did provide that no rent would be paid from 13 August 2009 until that date, 13 February 2010. But these amendments to the lease were expressed to be conditional upon the completion of a contract of sale of the land between the present parties. The amendment to the lease was in these terms:

> "In the event, and only in such event, of completion of a contract of sale of the Premises between Osaka Enterprises Pty Limited as Vendor and Seaview Pacific Pty Ltd as Purchaser and dated 13 August, 2008, the Lease is hereby varied in the following manner with effect from 13 August, 2008 ..."

[34] Clause 32.2 of the standard conditions of sale provides that if a statement contained in clause 32.1 is not accurate then the purchaser may terminate the contract. Necessarily the statement must be inaccurate *prior to* completion of the contract, in order for the right of termination to be exercisable. As at the date for completion, the lease had not been varied because the variations were to take effect only upon completion of the contract. At least for that reason, clause 32.2 was not engaged. Put another way, "at the date for completion" (as distinct from "on completion") the particulars in the Lease Schedule were correct.

[35] But in any case, the defendant is estopped from relying upon clause 32 and asserting that the details in the Lease Schedule were untrue. The undisputed facts are as follows. On 8 August 2008, Ms Goncalves, as the plaintiff's solicitor, had a conversation with Mr Wockner, as the defendant's solicitor, in relation to the terms of the then proposed sale of this land. They spoke about the existing lease of the property. Mr Wockner proposed that the lease be varied to provide that in the event of completion of the proposed sale, but only in that event, the date of the termination of the lease would be 1 February 2010 and that there would be no rent payable from the date of settlement until that date. He further proposed that this would be inserted in the put and call option deed which he would draft and submit to the plaintiff. That conversation was confirmed within Ms Goncalves' letter to Mr Wockner of the same day. Again on 8 August 2008, Mr Wockner faxed to Ms Goncalves a letter enclosing a draft put and call option deed. Mr Wockner wrote:

> "There will be no further need for the Licence Agreement to be attached to the Contract, as clause 4.6 of the Put and Call Option Deed relates to a Deed of Variation of the Lease which will give the Tenant a rent free period from settlement to 1st February 2010 under the terms of the Variation. The Purchaser will therefore be bound by the terms of the Lease as varied upon settlement."

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[8] Set out at [8] above.

[36] On 12 August 2008, Ms Goncalves delivered to Mr Wockner a copy of the lease together with a document described as a Form 13 Amendment to Lease which was to be signed by the plaintiff and the lessee. It was as Mr Wockner had proposed save that the rent free period was to be from 13 August 2009 to 13 February 2010 when the lease was to terminate. There was no request by Mr Wockner to alter the details of the lease in the schedule to the form of contract of sale which was attached to the Deed. So the parties executed the Deed on 13 August 2008 with the form of contract remaining in those terms.

[37] On 13 August 2008, Mr Wockner faxed a letter to Ms Goncalves enclosing a copy of the signature page of the Deed showing his client's execution of it. He enclosed his client's cheque for $250,000 as the required payment towards the Security Deposit. And in that letter, Mr Wockner wrote:

> "We note that in the Form 13 Amendment, that Item 5 needs to be changed to read '13th February 2010' and also in the attached Schedule, clause 3.1.2 needs also to be amended to read '13th February 2010'."

That latter reference was to clause 3.1.2 of the lease.

[38] On 5 September 2008 the Form 13 Amendment of Lease as executed by each of the plaintiff and the lessee was sent by Ms Goncalves to Mr Wockner.

[39] In summary then, the lease was varied in those terms at the defendant's request, the defendant was provided with and apparently approved the proposed variation prior to execution of the Deed, the defendant by its solicitor inserted clause 4.6 in the Deed and the Deed was executed with the intention by both parties that clause 4.6 would operate so that the references to 1 February 2010 would be treated as references to 13 February 2010. But at the same time, the parties overlooked the description of the lease which was in the schedule to the form of contract attached to the Deed.

[40] In those circumstances, as the defendant must have known, the Deed was executed by the plaintiff upon the expectation that the amendment to the lease in the terms which the present parties had discussed and agreed should not entitle the defendant to terminate a contract arising from the exercise of either of the options. It would have been unconscionable for the defendant to have terminated upon the ground that the description in the lease schedule was untrue and the defendant was estopped from terminating and from resisting this claim upon this ground.

[41] It follows that the third ground fails.

The fourth ground

[42] Clause 21 of the form of contract of sale relevantly provided as follows:

> "21.1 If it is established that at the date of this Contract:
>
> ...
>
> (c) the Land was affected by a proposal of any competent authority for the re-alignment, widening, resiting or altering of the then level or direction of any road or railway abutting the Land ...

> and any such facts are not disclosed in this Contract the Purchaser may by notice in writing to the Vendor given on or before the Date for Completion terminate this Contract."

[43] The date of the Contract was 24 July 2009. The defendant's case is that the land was then affected by a proposal to widen the Gold Coast Highway which would result in a resumption of three metres along the entire frontage of this land. This is said to have been a specific proposal within the project described as the Proposed Gold Coast Rapid Transit Project, which in essence involves the construction of a light rail system.

[44] The evidence going to this issue was uncontested. But the plaintiff argues that it is too general for the defendant to prove the proposal for which it contends. Most of this evidence is within an affidavit of Mr Thompson, the director of Howard Thompson Constructions Pty Ltd which was appointed by the defendant as the project manager responsible for the carriage of development applications for properties already owned by the defendant and which adjoined the subject land. Those properties have a frontage to the Gold Coast Highway, immediately to the north of this land.

[45] Since about mid-2006, Mr Thompson has caused two development applications to be prepared and ultimately approved by the Gold Coast City Council over those other lots. The first application resulted in a preliminary approval. The second of these applications was lodged with the Council on 29 February 2008. Following the lodgement of that application, routine requests for information were made by Queensland Transport and the Queensland Department of Main Roads. The latter request gave no indication of any proposed requirement for land or any resumption, other than what had been indicated by the preliminary approval, which was that some truncation at the corner of Gold Coast Highway and Pacific Fair Drive would be required. That requirement was not in consequence of the Gold Coast Rapid Transit Project. The request from Queensland Transport, dated 10 June 2008, gave no indication of any requirement for land dedication or of a proposed resumption, although it did mention a proposed meeting between representatives of that department and what was described as the Gold Coast Rapid Transit Team, to which the defendant's representatives would be invited.

[46] On 23 July 2008, there was a meeting with representatives of Queensland Transport attended by Mr Thompson and other consultants representing the defendant, as well as by representatives of the Council and the Gold Coast Rapid Transit Team. Subsequently there were some exchanges between the defendant's traffic engineering consultant and the relevant departments. On 11 August 2008, an email from Queensland Transport to the defendant's consultant, which was copied to Mr Thompson, advised:

> "In summary, TransLink have not progressed planning and design far enough on this section of the Gold Coast Highway to concisely [sic] determine road and property impacts. Main Roads have insisted that with the rapid transit in place the southbound highway should have two through lanes, a dedicated left turn lane into Pacific Fair Drive and a right turn pocket into Mermaid Avenue.

> TransLink proposed to expedite concept planning fronting the site, with the aim of meeting with us in about three weeks time."

[47] On 15 October 2008, one of the defendant's consultants sent to Mr Thompson an email which included, as part of an email chain, an email from Mr Webb of the Council which advised as follows:

> "I have received the Transport Planning comments and conditions from Ian Morecombe. Ian has applied some relaxed rates to calculate the car parking demand generated by the proposal, and has still concluded that the car parking proposed falls well short of Transport Planning's expectations. In addition, a road widening requirement of 3 metres along the Gold Coast Highway frontage may effect (sic) the existing basement layout, resulting in the loss of some spaces."

Mr Webb's email also advised:

> "The alignment for the Gold Coast Light Rail has a 3.0m wide land requirement from the Gold Coast Highway site frontage to the site. This has been discussed in negotiations between the project consultants and Queensland Transport.
>
> ...
>
> 9. Land dedication for road widening in Gold Coast Highway for Light Rail Alignment
>
> Land required for road widening to accommodate the Gold Coast Light Rail alignment, being a 3.0m wide strip from Lots 4, 5, 6, 7 and 8 on RP 45204 [being the defendant's lots immediately to the north of the subject land] must be dedicated to Council for road widening purposes and the building setbacks shall be adjusted to suit the proposed boundary. The land dedication must be completed, at no cost to Council and to the satisfaction of the Chief Executive Officer, prior to the earlier of endorsement of survey plans or commencement of the use."

[48] On 12 November 2008, Mr Thompson received an email from the defendant's town planners which attached a response from Queensland Transport to the effect that a setback was required from the Gold Coast Highway due to a proposed resumption for the Rapid Transit corridor. That response from Queensland Transport included a plan showing the land the subject of the defendant's development application (those five lots between the property the subject of this case and Pacific Fair Drive) and showing the area required from each lot under the proposed resumption: three metres along the entire Gold Coast Highway frontage was required from each lot.

[49] On about 14 November 2008, Mr Thompson received from the planners a copy of correspondence from Main Roads, which imposed a condition requiring a setback for the express purpose of "a future land requirement". This enclosed the same plan showing the three metre resumption for each lot.

[50] On 17 December 2008, the defendant received a decision notice from the Council upon this development application. By paragraph 35 of that notice, the Council advised as follows:

> "Land dedication for road widening in Gold Coast Highway for Light Rail Alignment
>
> Land required for road widening to accommodate the Gold Coast Light Rail alignment, being a 3.0m wide strip from Lots 4, 5, 6, 7 and 8 on RP 45204, must be dedicated to Council for road widening purposes and the building setbacks shall be adjusted to suit the proposed boundary. The dedication must be completed, at no cost to Council and to the satisfaction of the Chief Executive Officer, prior to the earlier of endorsement of survey plans or commencement of the use."

The unchallenged evidence of Mr Thompson, given from his experience in land development and in dealings with relevant authorities, is that sometimes the Gold Coast City Council will seek to acquire land by making it a condition of the approval rather than by a resumption.

[51] In 2009, Mr Thompson caused the defendant's solicitors to conduct various searches of the land the subject of the present case. The responses were as follows. On 18 March 2009, Queensland Transport advised:

> "Queensland Transport has reviewed the location of the property in relation to the proposed alignment for the Gold Coast Rapid Transit system. At this location the Rapid Transit route is proposed to run along the Gold Coast Highway frontage of the site. A potential property impact has been identified over the property on the Gold Coast Highway frontage. Preliminary planning indicates this potential requirement to a depth of approximately 3 metres from and parallel to the eastern (highway) boundary".

The response from the Department of Main Roads on 28 July 2009 was:

> "… [i]nvestigations for future improvement to the transport network in the vicinity of the subject property indicate that there may be a possible requirement from that property. However, details of that requirement at this stage are unknown".

On 7 August 2009, Queensland Transport advised in relation to a further search:

> "The Gold Coast Rapid Transport project has a potential impact on this property. Please email ... for further information".

[52] The defendant's solicitors received on 13 August 2009 a copy of an email from Mr Grennan, who was described as the Senior Property Adviser for the Gold Coast Rapid Transit Project. It is necessary to set this out in full:

> "The potential impact that we have identified relates to the Gold Coast Rapid Transit project. This is a Queensland Government Project being delivered in partnership with the Gold Coast City Council. The project will be developed in multiple stages and will utilise a fleet of light rail vehicles. The decision to approve the project was made by the Queensland Government after completion of the Concept Design and Impact Management Plan and the

> associated Business Case. On 6 July 2009 a ?heads of agreement? was signed by the federal, state and local government to deliver the project. The Department of Transport and Main Roads will be the constructing authority.
>
> Stage 1 of the rapid transit project is a 13 km corridor from Griffith University to Broadbeach, passing through the key activity centres of Southport and Surfers Paradise. The southern section of stage 1 will end at what will become an interchange on land directly opposite Pacific Fair. If you look at plan 18 on the project web-site ... the proposal for this area can be viewed. The potential impact shown on the search response will accommodate the continuation of the rapid transit corridor to the south."

[53] The document described as "heads of agreement ... signed by the federal, state and local government to deliver the project" is not in evidence. But this evidence of its existence and of its broad effect was admitted without objection. The plaintiff's argument about it is that the evidence is too general to prove the existence of a proposal by a competent authority for the purposes of clause 21.

[54] The plan on the project's website, referred to in that same email from Mr Grennan, is in evidence. It shows Stage 1 of the project in a corridor as described by Mr Grennan. There is other evidence that indicates that this Stage 1 would be constructed as far south as the Pacific Fair shopping centre which is immediately to the north of the subject land. The relevant stage of the project as far as the subject land is concerned is described within the plan as "future stages" and the "proposed rapid transit corridor" is shown as following the line of the Gold Coast Highway south from Broadbeach to Coolangatta.

[55] There is also in evidence a memorandum from Queensland Transport dated 29 September 2008, which refers to that same development application prosecuted by Mr Thompson. In that memorandum it was recorded that "[a] fully developed concept design would be required to identify accurately the land requirements [from the Rapid Transit Project]" and that "[t]o date, the GCRT project has not started planning as such for that section ... of the route." It was noted that the "preliminary planning and concept design process for that section is not expected to start before early 2009" and that "[i]n the absence of a detailed alignment, the GCRT land requirements can only be assessed at a high level, taking into consideration standard cross-section requirements and basic road geometrics requirements." It recorded that the Department of Main Roads had confirmed the minimum number of lanes required at the intersection of the Gold Coast Highway and Pacific Fair Drive and the required cross-section of the Pacific Highway between Pacific Fair Drive and Seaview Avenue, [which includes the frontage to the subject land] as being 45 metres. That included an area for the "RT corridor". The memorandum noted that as the existing road reserve was 39 metres wide, "the gap is 6 metres". Accordingly, it was said that "the GCRT project should aim to secure 3 metres of additional land along the Western side of GC Highway between Pacific Fair Drive and Seaview Avenue" upon the basis that this extra six metres be found by resuming land on each side of the highway. This document explains why the required land for dedication for the development of the defendant's adjoining land was three metres from each lot. It shows that this figure of three metres is not a

broad estimate of what might be required, but a calculation having regard to a particular configuration of lanes and the rail corridor.

[56] The questions then are whether there was at 24 July 2009 an existing proposal of a competent authority and whether that proposal was one which relevantly affected the land the subject of this contract of sale.

[57] The arguments were directed mainly to the first of those questions. For the plaintiff, it was argued that in order to constitute a proposal, there must be some intention which has been given force by adoption by the competent authority itself, by which that intention was given some operative effect. This argument cited *Alusta Pty Ltd v Duncan*,[9] *Gagliardi v Lamont*[10] and *Grant v McRoss Developments Pty Ltd*.[11] These and other cases were discussed by Thomas J in *Ex parte Christensen*.[12] The proposition advanced for the plaintiff is in terms taken directly from the judgment of Helsham J in *D & T Properties v Knox*[13] and should be accepted. These cases hold that there must be something more than a proposal within the office of a relevant authority: instead it must be a proposal of the authority itself and hence the requirement for some formal resolution or adoption by the authority.

[58] In the present case there is the undisputed evidence of the signing of heads of agreement by all three tiers of government on 6 July 2009. Although the document itself is not in evidence, the evidence of it and of its broad effect demonstrates that each of the Federal, State and local governments have decided to together implement this project. This is a project which will no doubt involve many agencies of different levels of government and for the purposes of clause 21 of the contract of sale, it may be that it is a proposal of several competent authorities. It is sufficient to say that one of them would be the Gold Coast City Council and another would be the Department of Main Roads.

[59] The further question is whether the proposal affected the land at 24 July 2009. Clearly the proposal includes the construction of the railway along the Gold Coast Highway as it passes the subject land. And it is clear that this will require a widening of that road. The precise position of the rail tracks upon the existing road reserve was not determined, or at least is not proved to have been determined as at 24 July 2009. But the proposal as at that date involved a substantial area of roadway to be constructed on each side of the rail corridor. The likely requirement for some of the subject land is plainly demonstrated by the outcome of the defendant's development application for its adjoining land. A condition of that approval was the dedication of a three metre strip along the frontage to the Gold Coast Highway. This shows the content of the proposal so far as the relevant land is concerned. A proposal to widen the Gold Coast Highway so as to affect this land is demonstrated. As Thomas J said in *Ex parte Christensen*[14] the fact that the intention of the relevant authority may change is not to the point and a present proposal may affect land in this sense before that land is resumed.

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9 [1973] 2 NSWLR 182, 184.
10 [1976] Qd R 53.
11 [2003] QSC 169, [13]-[16].
12 [1984] 1 Qd R 382.
13 (Unreported, Supreme Court of New South Wales, Helsham J, 15 September 1972).
14 [1984] 1 Qd R 382, 387.

[60] Accordingly a basis for termination of the contract pursuant to clause 21 has been established by the defendant. If it matters, the defendant could not be said to have been aware of the proposal, if it existed, at the date of the Deed. It is irrelevant that the defendant had not adverted to this ground at the time at which it purported to terminate the contract or when the plaintiff purported to terminate for the defendant's default in payment of the balance of the deposit. The plaintiff's argument appeared to accept that if the defendant was entitled to terminate pursuant to clause 21, then the plaintiff could not be entitled to damages for breach of contract and nor was the deposit forfeited.

Conclusion

[61] The plaintiff's claim will be dismissed. Upon the counter-claim it will be ordered that the plaintiff pay to the defendant the sum of $250,000. There should be interest on that sum from 29 July 2009 under s 47 of the *Supreme Court Act 1995* (Qld) at the rate of seven per cent per annum, being a further $12,561. Therefore, there will be judgment for the defendant against the plaintiff in the sum of $262,561. I will hear the parties as to costs.