SUPREME COURT OF QUEENSLAND

CITATION:	*Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust* [2010] QCA 259
PARTIES:	**VALE 1 PTY LTD AS TRUSTEE FOR THE VALE 1 TRUST** (plaintiff/appellant) **v** **DELORAIN PTY LTD AS TRUSTEE FOR THE DELORAIN TRUST** ACN 125 370 461 (defendant/ respondent)
FILE NO/S:	Appeal No 594 of 2010 SC No 3884 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2010
JUDGES:	McMurdo P and White JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The orders of the Court made on 20 October 2009 be set aside and in lieu thereof it be ordered that: "It be declared that the Call and Put Option Agreement between the applicant and the respondent dated 29 October 2007 in respect of proposed Lot 14 in a residential development known as "Delor Vue Apartments" was validly terminated by the applicant by written notice of termination dated 18 November 2008."** **3. The respondent pay the appellant's costs of and incidental to the originating application filed 14 April 2009.** **4. The respondent pay the appellant's costs of and incidental to the appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – NON-COMPLIANCE WITH STATUTE – construction and interpretation of statutory provision – where parties entered three separate put and call option deeds in relation to proposed residential units – where provisions in

the deed enabled the appellant to market the lot to a potential purchaser and refer them to the developer, provided the on-sale was above a certain price – whether the appellant was entitled to terminate the deed on the ground that it did not satisfy certain consumer protection provisions of the *Property Agents and Motor Dealers Act* 2000 (Qld) – whether the deed was a "relevant contract" as defined in Chapter 11 of the Act – whether the primary judge erred in concluding that this case was on all fours with *Cheree–Ann Property Developers Pty Ltd v East West International Development P/L* [2007] 1 Qd R 132 – whether *Cheree-Ann* should be followed

Acts Interpretation Act 1954 (Qld), s 32C
Property Agents and Motor Dealers Act 2000 (Qld), s 364

APM Property 3 P/L v Blondeau & Ors [2009] QSC 326, cited
Cheree–Ann Property Developers Pty Ltd v East West International Development Pty Ltd [2007] 1 Qd R 132; [2006] QSC 182, not followed
David Deane & Associates P/L v Bonnyview P/L & Ors (2005) ANZ ConvR 518; [2005] QCA 270, followed
Hedley Commercial Property Services P/L v BRCP Oasis Land P/L [2009] QCA 231, discussed
Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57; [1974] HCA 49, cited
Mark Bain Constructions P/L v Barling & Ors (2006) ANZ ConvR 281; [2006] QSC 48, cited
MNM Developments Pty Ltd v Gerrard [2005] 2 Qd R 515; [2005] QCA 230, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Turrisi Properties P/L v LJ & BJ Investments P/L; Turrisi Properties P/L v McVicar; Turrisi Properties P/L v Mulcahy [2010] QSC 325, cited

COUNSEL: P J Roney for the appellant
G Handran for the respondent

SOLICITORS: Macrossan and Amiet for the appellant
Hickey Lawyers for the respondent

[1] **McMURDO P:** I agree with Applegarth J's reasons for allowing this appeal.

[2] The appellant ("Vale") as grantee and purchaser, and the respondent ("Delorain") as grantor and developer, entered into three contracts for three proposed units in a residential development known as "Delor Vue Apartments". Two of the contracts came to an end on another basis irrelevant to this appeal. This appeal concerns only the contract in respect of proposed unit 14. The trial judge explained the pertinent aspects of the contract:

> "By cl. 5 of each deed, the grantor granted an option to the grantee to purchase the property but also acknowledged in cl. 6.1 that a buyer

> may be referred by the grantee to the grantor to buy the lot. The sale was to be on terms annexed to the deed which identified the seller but not the buyer and recognised the grantee's rights to promote the lot for sale at a minimum price. Clause 8 also granted a put option to the grantor to sell the property to the grantee on the terms and conditions of the deed. That option was exercised by Delorain on 20 March 2009 in respect of unit 14 in the particular development dealt with by the deeds in a letter which contained a direction in the form required by the [*Property Agents and Motor Dealers Act* 2000 (Qld) (the Act)[1]]."

[3] The question for determination in this appeal is whether such a contract was a "relevant contract" under s 364 of the Act, that is, "a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction". If it is, the consumer protection provisions[2] contained in Ch 11 of the Act apply, and it is common ground that Vale was entitled to terminate the contract.

[4] In my opinion, an agreement of this kind, which gives the grantee an option with the right to acquire proposed unit 14 and also gives the grantor a put option to require the grantee to acquire proposed unit 14, is a contract for the sale of land. I consider that this is so, despite the obiter observations by Chesterman JA in *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*,[3] and even though the obligations to buy and sell are conditional on the exercise of put or call options: *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd & Ors*;[4] *Mark Bain Constructions Pty Ltd v Barling & Ors*;[5] *APM Property 3 Pty Ltd v Blondeau & Ors*;[6] *Turrisi Properties P/L v LJ & BJ Investments P/L; Turrisi Properties P/L v McVicar; Turrisi Properties P/L v Mulcahy.*[7]

[5] It follows that the contract between Vale and Delorain in respect of proposed unit 14 was a "relevant contract" within the meaning of that term under s 364 of the Act. This construction may mean that sophisticated commercial purchasers who have entered into like contracts could avoid their contractual obligations by taking advantage of consumer protection legislation not aimed at them. If so, that is the necessary short-term consequence of ensuring that the consumer protection provided under Ch 11 of the Act is effective and certain.

[6] I agree with the orders proposed by Applegarth J.

[7] **WHITE JA:** I agree with the orders proposed by Applegarth J and his Honour's reasons for doing so. I wish only to add some observations as to whether a put and call option deed, whereby the grantee, having the right to acquire land, and the grantor having the right to require the grantee to purchase the land, is a contract for the sale of land within the meaning of that expression in the *Property Agents and Motor Dealers Act* 2000 (Qld) ('the Act').

[8] In order to bring a vendor within the regime created by chapter 11 of the Act which requires a vendor to direct attention to certain warnings of a consumer protection

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1 It was common ground at the hearing of this appeal that the relevant reprint of the Act is Reprint 3A.
2 See s 10(1)(a), (2), (3)(b)(i) and s 363.
3 [2009] QCA 231, [5].
4 [2005] QCA 270, [1], [2], [22], [23], [28]-[31].
5 [2006] QSC 48, [30]-[34].
6 [2009] QSC 326, [22]-[24].
7 [2010] QSC 325 at [108]-[113].

kind, there must be a "relevant contract". A "relevant contract" is defined in s 364 and means:

> "a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction".

[9] Chesterman JA in *Hedley Commercial Property Services P/L v BRCP Oasis Land P/L*[8] was of the view that the put and call option deed there under consideration could not be characterised as a contract for the sale of residential property. He observed:[9]

> "The appeal was argued on the basis that the deed was a contract for the sale of Lot 203 and if that were residential property the deed was a relevant contract. The deed is obviously not a contract for the sale of Lot 203, or anything else. It is an agreement, having the effect of a deed, which conferred alternate rights on the parties to exercise an option in defined circumstances which would require the respective optionee to execute a contract in identified terms to buy or sell the land. Once the call or put option had been exercised, and the contract executed, a contract for the sale of property would have come into existence; but the deed was not such a contract. The parties conducted the litigation on the convention that the deed was such a contract and both refused adamantly to abandon the convention. The appeal should therefore be determined on the fiction adopted by the parties and these reasons will proceed on the basis that the deed was a contract for the sale of property."

Dutney J agreed without further elaboration but the President reserved her position since the point had not been argued.[10]

[10] In oral submissions, Mr Handran, for Delorain, did not seek to rely on those observations in *Hedley* and accepted that an ordinary put and call option as considered in *Mark Bain*[11] is encompassed in the definition of "relevant contract". He sought to bring Delorain within the exception carved out in *Cheree-Anne*.[12] Applegarth J has fully ventilated that submission, with which I respectfully agree.

[11] In *David Deane & Associates P/L v Bonnyview P/L & Ors*,[13] Keane JA (as his Honour then was) characterised the put and call options with "or nominee" clauses under consideration as "contracts of sale".[14] His Honour referred to observations of Gibbs J (as his Honour then was) in *Laybutt v Amoco Australia Pty Ltd*[15] as to the true nature of an option to purchase:[16]

> "For these reasons I consider that an option to purchase (at least one in a form similar to that in the present case) is a contract to sell the

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8 [2009] QCA 231.
9 Ibid at [5].
10 Ibid at [1].
11 *Mark Bain Constructions Pty Ltd v Barling & Ors* [2006] QSC 48.
12 *Cheree–Ann Property Developers Pty Ltd v East West International Development Pty Ltd* [2007] 1 Qd R 132; [2006] QSC 182.
13 [2005] QCA 270.
14 Ibid at [23].
15 (1974) 132 CLR 57; [1974] HCA 49.
16 Ibid at 76.

> land upon condition that the grantee gives the notice and does the other things stipulated in the option. An option to purchase, regarded in that way, is not an agreement which gives one of the parties the right to perform it or not as he chooses; it gives the grantee the right, if he performs the stipulated conditions, to become the purchaser …
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> The burden of the option in the present case was a contractual obligation…".

[12] In *Mark Bain*, Philippides J referred to *David Deane* and emphasised that the expression "relevant contract" is defined in s 364 of the Act not in terms of a contract "of" sale, but in terms of a contract "for" sale – a wider concept. Here, as in *Mark Bain*, the parties assumed obligations from which they could not withdraw, on Vale's part to purchase the land and on Delorain's part to sell the land. The option deed set out the mode of exercise of the option; the minimum purchase price; the form and substance of the contract was contained as an annexure to the deed including the warning statement; and the mode of disbursement of any surplus purchase price above the minimum price was settled. In other words, everything necessary to bring about the sale was contained in the deed.

[13] The primary judge referred to *David Deane* and *Mark Bain* and accepted that the option deed could be a relevant contract but that on the particular facts fell outside the purview of chapter 11 consistently with the approach in *Cheree-Ann*.

[14] In my opinion the present put and call option deed was a relevant contract to which the provisions of chapter 11 applied. As Applegarth J has carefully explained, while there is understandable resistance to the idea of including sophisticated and experienced purchasers and, particularly, marketers of property within the protective regime of chapter 11, the impossibility of drawing any bright line which would enable parties or their advisers to know if their transaction fell within or outside the consumer protection provisions of chapter 11, dictates an "all in" approach. This is particularly so when the legislature in the 2001 amendments expanded the reach of the kinds of contract covered, limited only by the plain words of chapter 11 defining a "relevant contract" as a contract for the sale of residential property in Queensland.[17]

[15] **APPLEGARTH J:** The appellant ("Vale") entered into a Call and Put Option Deed with the respondent developer ("Delorain") in respect of a proposed building unit. Vale purported to terminate the Deed. It contends that the Deed was a "relevant contract" as defined in Chapter 11 of the *Property Agents and Motor Dealers Act* 2000 ("the Act"). A "relevant contract" for the purposes of Chapter 11 means "a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction".[18] If the Deed was a "relevant contract" then certain of Chapter 11's consumer protection requirements for residential property sales were not met, and Vale was entitled to terminate it.

[16] The learned primary judge concluded that the Deed was not a "relevant contract" because this case was said to be "on all fours" with the case of *Cheree-Ann Property*

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17 The Explanatory Notes at 9 observe "This definition will remove the uncertainty that existed in relation to when a cooling-off period applies… The new definition … removes the uncertainty in identifying a relevant contract by including all sales of residential property other than those resulting from an auction sale".

18 The Act, s 364.

Developers P/L v East West International Development P/L.[19] In *Cheree-Ann* option agreements facilitated the marketing of residential lots to third party purchasers. Mullins J found that the substance of the agreements "was to provide stock for the applicants as property marketers" and the agreements could not be characterised as contracts for the sale of property so as to be within the definition of "relevant contract" in Chapter 11 of the Act.

[17] Vale submits that if *Cheree-Ann* leads to the conclusion that its agreement with Delorain is not a "relevant contract" then *Cheree-Ann* should not be followed. Alternatively, it submits that there are important points of distinction between this case and *Cheree-Ann*, and that the primary judge erred in concluding that this case is "on all fours" with *Cheree-Ann*.

[18] As in *Cheree-Ann*, the option agreement in this case facilitates the sale of the relevant property to a third party purchaser. The essential issues raised in the appeal are:

1. Should *Cheree-Ann* be followed?

2. If so, should the agreement between Vale and Delorain be characterised as something other than a contract for the sale of residential property, and in substance as an agreement to provide stock for Vale in facilitating the marketing of the proposed residential unit to a third party purchaser?

Background

[19] Delorain was a property developer undertaking the construction of a five-stage residential development to be known as "Delor Vue Apartments". In late July 2007 individuals named Valesini and Findlay decided that their family was "going to buy 3 units off the plan" at Delor Vue. Ms Sandra Valesini explained to the family's solicitor in an email on 20 July 2007 that the plan was "to buy 2 to sell before settlement & to keep one to rent." An unresolved issue at that stage was whether the units would be purchased by a corporate trustee of which Ms Valesini was a director, or in individual names. On 29 July 2007 Ms Valesini was advised by the family's solicitor, Macrossan & Amiet, that the better course was to have a separate Put and Call Option Agreement for each lot because:

> "That way each lot can be dealt with separately or collectively depending on whether you ultimately keep one, two or all three or sell one, two or all three."

On 30 July 2007 Macrossan & Amiet informed Delorain's then solicitors that their client:

> " ... would like to have three separate put and call option agreements for the right to purchase three lots in the development. The purpose of the agreements is to entitle our client [to] on-sell the right to purchase prior to settlement and a clause will be required to allow for a contract to come into existence with the purchaser as nominated by our client under the put and call agreement.
>
> I understand my client may also elect to exer[c]ise the option and keep the unit themselves and would like to cover the position if they

[19] [2007] 1 Qd R 132; [2006] QSC 182.

> later receive advices to change the purchasing entity for taxation purposes."

Macrossan & Amiet provided draft special conditions to be included in the proposed contracts.

[20] On 9 August 2007 Macrossan & Amiet wrote to Delorain's solicitors and advised that their client wished to enter into a Put and Call Option Deed for the purchase of:

(a) Unit 14 in the name of Vale;

(b) Unit 38 in the name of Lee Phyllis Findlay; and

(c) Unit 48 in the name of Roy William Valesini.[20]

Draft option agreements were communicated between solicitors. It seems that further negotiations occurred between the parties. On 1 October 2007 Macrossan & Amiet advised that their client accepted the terms of the proposed agreements for Lots 14, 38 and 48 and requested that the party on the agreements be Vale.

[21] Separate Call and Put Option Deeds dated 29 October 2007 were entered into between Vale and Delorain in respect of Units 14, 38 and 48. Each deed contained what is described as a "sunset clause" which provided that in the event that registration of the survey plan had not been effected within 18 months of the date of execution of the deed either party might terminate the deed without penalty. As matters transpired, Delorain acknowledged that the Call and Put Option Deeds in relation to proposed Lots 38 and 48 came to an end after reliance was placed upon this clause. The originating application in these proceedings sought declarations in relation to each option agreement, however, it was common ground before the primary judge that the relief sought related only to the agreement in respect of proposed Lot 14. The parties' entry into option agreements in respect of proposed Lots 38 and 48 was relied upon as being relevant to the circumstances surrounding their entry into the agreement for proposed Lot 14.

The provisions of the Deed

[22] Delorain was described as "the Grantor" and Vale was described as "the Grantee" in the Deed. The reference schedule stated that the price was $360,000, with an option fee of $18,000. The Exercise Date of the Call Option was no later than seven days after receipt of notification of registration of the proposed survey plan of the lot. By clause 3 Delorain granted an option to Vale to purchase the property and the grant of the Call Option constituted an offer for the sale of the property at the price of $360,000. Clause 4 provided that the Call Option could be exercised by Vale on any business day up to 5.00 pm on the Exercise Date. Clause 5 provided for the Call Option to be exercised by Vale by giving notice in writing delivered to Delorain or Delorain's lawyers together with a Contract and Disclosure Statement in the form of the documents annexed to the Deed, properly signed and completed by Vale showing, amongst other things, a waiver of the cooling-off period in Form 32a by Vale's solicitors.

[23] Clause 6 permitted Vale to refer a third party purchaser to Delorain to buy the proposed lot. Clause 6 relevantly provided:

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[20] AB 629.

"**Marketing and Sales to Buyer**

6.1 The Grantor acknowledges and agrees that a Buyer may be referred by the Grantee to the Grantor to buy the Lot. The sale of the Lot to a Buyer shall be on the terms of the documents contained in Annexures "A" and "B" and completed according to the terms of this Deed.

6.2 The Grantee shall not allow the Lot to be marketed for a price that is less than the Minimum Price.

6.3 The Grantee may promote the Lot from the date of this Deed to the Exercise Date and the Grantee agrees that:-

6.3.1 The Grantee will promote the Lot through its agents and employees.

6.3.2 The Grantee indemnifies the Grantor from any loss, costs or damages incurred by the Grantor due to any representations made by the Grantee or the Grantee's agents or consultants in marketing the Lot.

6.4 Nothing in this Deed appoints the Grantee as the Grantor's agent and there is no relationship of agency or partnership created by this Deed.

6.5 Any marketing carried out by the Grantee will be carried out in a professional and ethical manner and will not bring the Grantor or the Estate into disrepute."

Clause 6.6 provided for Delorain to enter into contracts for the sale of the lot to a Buyer if the Buyer's contract was completed with various details, signed by the Buyer and accompanied by a cheque for the initial deposit of five percent. Clause 6 went on to provide:

"6.7 If the Grantor wishes to terminate a contract with a Buyer as a result of any breach by a Buyer, the Grantor will give notice to the Grantee. If the Grantee cannot arrange a variation or extension under the contract which is suitable to the Grantor within 24 hours of receiving notice, the Grantor may terminate the contract. Any variation or extension which may allow a contract to settle more than fourteen (14) days after receipt of notification of registration of the Survey Plan will not be suitable to the Grantor.

6.8 Upon receipt of the deposit from the buyer (subject to clearance) the Grantor shall credit that amount from the option fee to the Grantee.

6.9 In the event that the Grantor terminates the contract in circumstances such that a Buyer is liable for the forfeiture of their deposit those monies shall be retained by the Grantor and treated as a part payment of the Price."

[24] Clause 7 provided for the distribution of sale proceeds upon settlement of a sale of the proposed lot to a Buyer. In general terms the proceeds of any sale to a Buyer

were to be distributed so that Delorain first received the Minimum Price of $360,000 plus or minus adjustments for outgoings, secondly in payment of GST, and thirdly in payment of any amounts payable by Vale to Delorain. Any balance remaining was to be paid to Vale.

[25] By clause 8 Vale granted Delorain a Put Option to sell the property to Vale on the terms and conditions contained in the Deed. Clause 8.2 provided that if by 5.00 pm on the Exercise Date the Call Option had not been exercised, Delorain was entitled to serve a notice in writing on Vale requiring it to buy the proposed lot. Clause 8.3 provided:

> "8.3 The Grantee agrees that should any contract for the Sale of the Lot be terminated (but not due to the Grantor's default) after the Exercise Date, the Lot shall be deemed unsold and the Grantor may exercise the Put Option with respect to the Lot. In this case, the Put Option may be exercised by the Grantor within seven (7) days of the Grantor terminating the relevant contract."

Subject to clause 8.3, the Put Option was able to be exercised by Delorain within seven days after the Exercise Date. Clause 10 detailed the manner in which the Put Option was to be exercised. In essence, upon delivery of a notice exercising the Put Option "a binding and unconditional contract for the sale and purchase" of the lot was deemed to come into existence upon the terms and conditions contained in annexures to the Deed.

[26] In summary, the Deed gave Vale the option to purchase the property upon specified terms and conditions if it exercised the Call Option up to 5.00 pm on the Exercise Date. It gave Delorain the option if the Call Option had not been exercised by that time to serve a notice in writing on Vale requiring it to buy the lot upon the same terms and conditions. The Deed also permitted Vale to refer a third party purchaser to Delorain to buy the proposed lot. Vale was not allowed to market the lot for a price less than the $360,000 which was the price under the contract, and any marketing carried out by it did not create any relationship of agency or partnership between Vale and Delorain. If a sale contract to a referred third party purchaser completed, and was for a price in excess of $360,000, then, subject to certain adjustments, Vale was entitled to be paid the excess.

[27] The provision for Vale to refer a third party purchaser to Delorain and for Delorain to enter into a contract for the sale of the lot to the purchaser did not have the effect of leaving Vale without any obligation to purchase the property. On the contrary, clause 8.3 provided that should any contract for the sale of a lot be terminated other than due to Delorain's default after the Exercise Date, the lot was "deemed unsold" and Delorain could exercise the Put Option with respect to the lot within seven days of it terminating the relevant contract.

The issue before the primary judge

[28] On 18 November 2008 Vale's solicitors purported to terminate the agreement pursuant to s 367 of the Act. Delorain's solicitors at the time rejected Vale's purported termination. In March 2009 those solicitors notified Vale's solicitors that the survey plan had been registered. Delorain purported to exercise its Put Option. In the proceeding before the primary judge Vale submitted that the Call and Put Option Deed was a "relevant contract" for the purposes of the Act. It identified a

number of respects in which the agreement did not comply with the requirements of the Act. Delorain accepted that if the Deed constituted a "relevant contract" then it did not comply with the Act. Accordingly, the issue before the primary judge was whether the Deed was a "relevant contract" within the meaning of that expression in s 364 of the Act.

[29] Delorain submitted that the substance of the three deeds entered into by Vale was to facilitate the marketing of the lots by Vale to third party purchasers, and that they could not be characterised as contracts "for the sale of residential property in Queensland" simply because each Deed incorporated a Put Option able to be exercised by Delorain against Vale. The parties' submissions before the primary judge addressed relevant authorities as to whether option agreements can be contracts for the sale of land.

The decision of the primary judge

[30] The primary judge considered relevant authorities concerning the characterisation of options, including *Mark Bain Constructions P/L v Barling*.[21] His Honour then referred to *Cheree-Ann* and stated that Mullins J in that case had to consider "a situation similar to this case where the option agreements contemplated that the applicants would endeavour to sell the lots to third parties at a minimum price." The primary judge quoted the following passages from *Cheree-Ann*:

> "[48] In this matter it is pertinent that the applicants bound themselves to purchase the lots which were the subject of the agreements, if they did not procure sales of the lots to third party purchasers and the respondent then elected to exercise the put options. If the applicants were unable to effect sales of the lots to third party purchasers for the prices stipulated in the agreements, the applicants could be compelled by the respondent to purchase the lots themselves.
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> [49] It is also pertinent that each agreement conferred on the relevant applicant a right to procure sales of the specified lots to third party purchasers and a call option that enabled the applicant to require the respondent to enter into a contract for sale of the relevant lot directly with any third party purchaser so procured by the applicant. The constraint on these sales was that the third party contracts had to be for a minimum price that accorded with the purchase price for the relevant lot shown in sch. 2 to the agreement. The benefit for the applicant in procuring such a sale was that the applicant then could not be compelled to purchase that lot and the applicant was entitled pursuant to cl. 3.1 of the agreement to keep any excess paid as purchase price of the lot by the third party purchaser above the price for that lot specified in sch. 2 to the agreement. These provisions of the agreement therefore facilitated the marketing of the lots by the applicants to third party purchasers while the subdivision works were being carried out by the respondent.
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> [50] Although each of the agreements included a put option which, if exercised, bound each applicant to purchase the subject lots,

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21 (2006) ANZ ConvR 281; [2006] QSC 48.

> the agreement conferred significant rights on each applicant that enabled it to carry on its business as a property marketer in respect of those same lots.
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> [51] In applying the definition of "relevant contract", I have had regard to the less restrictive term that is used within the definition of "contract for sale" and the preference expressed in *MNM Developments* for an interpretation of ch. 11 of the Act that is consistent with the aim of ensuring consumer protection for purchasers of residential property. Even so, I consider it would unduly strain the definition of "relevant contract" in s. 364 of the Act to conclude that an agreement that facilitates the marketing of lots to third party purchasers whilst the subdivision is being developed can be characterised as a contract for the sale of those lots to the marketer, because the agreement also incorporates a put option able to be exercised by the vendor against the marketer. The substance of each agreement was to provide stock for the applicants as property marketers and the agreements cannot be characterised as contracts for the sale of property."

[31] After quoting these passages, the primary judge concluded his reasons as follows:

> "This case is really on all fours with her Honour's decision in *Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd.* In my view, it is a decision which should be followed. These deeds did not result in a contract for the sale of the relevant property to a clearly identified buyer. In the performance of the deeds the identity of the eventual buyer depended on the potential exercise of rights under the call option in favour of Vale granted under cl. 5, or by Vale's referral of a buyer under cl. 6 or by Delorain's exercise of its option under cl. 8 after the exercise date. Until the purchaser is identified through that process it is impossible to conclude that a contract for the sale of the property has come into existence."

Vale's application for a declaration that the Deed had been validly terminated was dismissed with costs.

[32] The precise basis upon which the primary judge concluded that the Deed was not a "relevant contract" within the meaning of s 364 of the Act is not entirely clear. The primary judge's reasons do not suggest, however, that an option agreement that facilitates the referral of a third party purchaser is incapable, as a matter of law, of being a contract for the sale of residential property, and therefore a "relevant contract". The reference in the paragraph quoted above to "a clearly identified buyer" should not be read out of context to suggest that a contract for the sale of residential property in Queensland cannot be a "relevant contract" because it makes provision for the property to be sold to a party's nominee, or to a third party purchaser. Instead, the primary judge's reference to the fact that the Deed did not result in a contract for the sale of the relevant property to "a clearly identified buyer" should be understood in the context of a finding that this case is on all fours with *Cheree-Ann*. In *Cheree-Ann* it was not the mere possibility that the property might be sold to an as yet unidentified third party purchaser that led to the

conclusion that the agreement could not be characterised as a contract for the sale of property. It was the characterisation of the agreement as one that facilitated the marketing of lots to third party purchasers and a finding that its substance was to provide stock for a property marketer that led to the conclusion that the agreement was not a "relevant contract". In this case the primary judge appears to have undertaken a similar characterisation of the Deed in reaching the conclusion that this case is on all fours with *Cheree-Ann*.

Option agreements and contracts for the sale of the property

[33] The primary judge appears to have accepted that an option agreement may be a "relevant contract" for the purposes of Chapter 11. Authority, including *Mark Bain Constructions P/L v Barling,*[22] supports this conclusion. In *Hedley Commercial Property Services P/L v BRCP Oasis Land P/L*[23] the parties conducted the litigation on the basis that a Call and Put Option Deed that conferred alternate rights on the parties to exercise an option in defined circumstances which would require the respective optionee to execute a contract in identified terms to buy or sell the land might constitute a "relevant contract" if the land was residential property. Chesterman JA, with whom Dutney J agreed, disagreed with the shared assumption of the parties to the appeal, but proceeded to determine the appeal on the basis adopted by the parties, namely that the Deed was a contract for the sale of property. McMurdo P found it unnecessary to decide in that case, in the absence of considered argument, whether the Deed between the parties was a contract for the sale of land.

[34] In this matter the primary judge appears to have preferred the view adopted in *Mark Bain* that an option agreement is capable of being characterised as a contract for the sale of property. On the hearing of this appeal, counsel for Delorain did not urge this Court to adopt the view expressed by Chesterman JA in *Hedley Commercial Property Services*. Counsel for Delorain acknowledged, as did the primary judge, that the competing view, as stated in *Mark Bain*, was not the subject of discussion or considered argument upon the hearing of the appeal in *Hedley Commercial Property Services*. Counsel for Delorain accepted that the Act applies in "an ordinary put and call option situation, such as was considered in *Mark Bain*". Instead, reliance was placed by Delorain on the exception that was recognised by Mullins J in *Cheree-Ann*. Counsel for Delorain identified the exception as applying to a case in which there is an agreement that facilitates the marketing of lots to third party purchasers whilst the property is being developed where the substance of the agreement is to provide stock for a property "marketeer".[24] The reference to "marketeer" requires some explanation, and differs from the expression used by Mullins J in *Cheree-Ann* at [51] where her Honour referred to "property marketers", being the business conducted by the applicants in that case. Counsel for Delorain adopted instead the statutory term "marketeers", acknowledging that the threshold to be a marketeer in the Act is relatively low. It means a person directly or indirectly involved in any way in the sale, or promotion of the sale or provision of a service in connection with the sale, of residential property.[25]

[35] Although Delorain did not urge the view expressed by Chesterman JA in *Hedley Commercial Property Services,* accepted the correctness of the decision in *McBain*

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22 Ibid.

23 [2009] QCA 231.

24 Transcript 2 August 2010 1-38 ll 35-58.

25 The full definition of "marketeer" appears in Schedule 2 to the Act.

and relied principally upon the decision in *Cheree-Ann* in submitting that the Deed was not a "relevant contract", its written submissions sought to distinguish this case from what it described as "the conventional 'off the plan' option situation" dealt with in *Mark Bain*. It is appropriate to address that aspect before turning to the argument based upon *Cheree-Ann* which was accepted by the primary judge.

[36] Delorain observes that the rights granted to Vale in clause 6 of the Deed to refer a Buyer to Delorain and the rights conferred by clause 7.1.4 to be paid any balance remaining from the proceeds of a sale of the lot to such a Buyer were absent from the agreement considered in *Mark Bain*. It submits that provisions for Vale to market the lot to a third party purchaser are significant. I accept that the presence of such provisions may be relevant to the process of characterising the agreement as one which, in substance, provides stock for a property marketeer if the approach to statutory interpretation adopted in *Cheree-Ann* is followed. However, the mere presence in an option agreement of provisions that permit a party to market an "off the plan" lot to a potential purchaser and to refer that third party purchaser to the grantor/developer does not mean that what otherwise would be a "relevant contract" ceases to be so. In this case, the exercise of Vale's rights to refer a Buyer to Delorain may have led to Delorain entering into a contract for the sale of proposed Lot 14 to a Buyer. In such an event, Vale would still have had obligations under the Deed. The termination of any contract entered into between Delorain and a third party purchaser might have led to Vale exercising its Call Option within time, or permitted Delorain to exercise the Put Option pursuant to clause 8, including an exercise of the Put Option pursuant to clause 8.3. In any such event Vale would have been obliged to contract to purchase the proposed unit in accordance with the contract annexed to the Deed.

[37] The contingency that the property may be sold to a third party purchaser pursuant to the exercise of rights under clause 6 does not alter the nature of the Deed as one that provided for the sale of residential property. Vale would have been obliged to purchase the property upon the exercise by it of the Call Option. Entry by Delorain into a contract with a third party purchaser referred to it pursuant to clause 6 did not put an end to Vale's obligations. If such a contract was terminated Delorain might have exercised its Put Option in certain circumstances. The presence in clause 6 of provision for referral of a third party purchaser created a contingency of entry by Delorain into a contract with a third party purchaser. If that contingency did not come to pass, for example because Vale did not seek or find a third party purchaser to refer to Delorain, then Vale would have been obliged to purchase the property upon the exercise of either the Call Option or the Put Option.

[38] The presence of provisions facilitating the marketing of the property to a third party purchaser and for the referral of such a purchaser to Delorain distinguishes this case from the provisions of the option agreement considered in *Mark Bain*. But the presence of those provisions does not prevent the Deed from being a "relevant contract" for the purposes of Chapter 11 of the Act.

[39] If an option agreement would be a "relevant contract" within the meaning of Chapter 11 of the Act, the addition of a clause that facilitates the sale of the property to a nominee or subsequently introduced purchaser should not mean that it ceases to be a "relevant contract". The primary judge does not appear to have concluded otherwise. His Honour's reference to *Cheree-Ann* in the paragraph of his reasons that I have earlier quoted indicates that it was the substance of the agreement, not

the mere presence of a clause that facilitated the sale of the property, that placed this case "on all fours" with *Cheree-Ann*.

[40] The issues on appeal essentially involve:

(a) whether *Cheree-Ann* should be followed in concluding that, as a matter of statutory interpretation, an option agreement that in substance provides stock for a property marketer should not be characterised as a "contract for the sale of property" for the purposes of the consumer protection provisions of Chapter 11; and

(b) whether this case is on all fours with *Cheree-Ann*.

The interpretation of the Act adopted in *Cheree-Ann*

[41] In *Cheree-Ann* the respondent owned land that it was proceeding to develop and subdivide for the purposes of a residential development. The applicants were property marketers. The parties negotiated "put and call" option agreements in identical terms. The first related to 13 specified lots and the second related to 12 specified lots. The agreements contemplated that the applicants would endeavour to sell the lots that were the subject of the agreements to third parties, but if the applicants did not sell all those lots to third parties, they could be required under the agreements to purchase the lots remaining unsold from the respondent at the option of the respondent.

[42] The applicants sought to terminate each of the agreements in reliance upon non-compliance with s 366 of the Act. The issue before Mullins J was whether each agreement could be characterised as a "relevant contract" as defined in s 364 of the Act. It was common ground that the subject land was in a residential area, and so the essential issue was whether each contract was a contract "for the sale of residential property" as that term was defined in s 17(1)(b) of the Act. This sub-section defined "residential property" as "a single parcel of vacant land in a residential area". The respondent successfully argued that the reference in s 17(1)(b) to a "single" parcel of vacant land displaced the presumption of plurality created by s 32C of the *Acts Interpretation Act* 1954 (Qld), and indicated that it was clearly the Parliament's intention to confine the application of Chapter 11 in such a case to a contract for the sale of a single parcel of vacant land in a residential area. As a result the applicants failed to establish that each of the agreements was a "relevant contract" because each agreement had as its subject matter numerous parcels of land.

[43] This was the second and alternative ground upon which Mullins J concluded that each agreement was not a "relevant contract". The first ground has been quoted earlier.[26] It was based on a finding that the substance of each agreement was to provide stock for the applicants as property marketers and that it would unduly strain the definition of "relevant contract" in s 364 of the Act to conclude that an agreement that facilitates the marketing of lots to third party purchasers by a property marketer should be characterised as "a contract for the sale" of those lots to the marketer. As appears from the passages earlier quoted from the judgment in *Cheree-Ann*, account was taken of the fact that the applicants bound themselves to purchase the lots which were the subject of the agreements if they did not procure sales of the lots to third party purchasers and the respondent then elected to exercise

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[26] See [16].

the Put Options. However, each agreement was said to confer "significant rights on each applicant that enabled it to carry on its business as a property marketer in respect of those same lots." If the applicant procured a sale to a third party purchaser it could not be compelled to purchase the lot and the applicant was entitled pursuant to the agreement to keep any excess paid as purchase price of the lot by the third party purchaser above the price for that lot specified in the agreement. Mullins J concluded that it would unduly strain the definition of "relevant contract" in s 364 to conclude that such an agreement that facilitated the marketing of lots to third party purchasers whilst the subdivision was being developed could be characterised as a contract for the sale of those lots to the property marketers.

[44] In reaching that conclusion Mullins J had regard to the legislative history of the Act. The Act originally defined "relevant contract" as a contract to buy residential property in Queensland that arose "out of an unsolicited invitation to attend a property information session". The definition was amended in 2001 to extend the definition of "relevant contract" to all contracts for the sale of residential property in Queensland other than a contract formed on a sale by auction. This amendment was said to remove uncertainty that existed in identifying a relevant contract.[27] Mullins J also had regard to the approach to interpretation applied in *MNM Developments P/L v Gerrard*[28] which favours an interpretation that is consistent with the aim of ensuring consumer protection for purchasers of residential property. Her Honour reached the conclusion that notwithstanding the wide definition of "contract for sale" and Chapter 11's purpose of consumer protection, a put and call option agreement that facilitated the marketing of lots to third party purchasers by a property marketer, the substance of which was to provide stock for the property marketer, was outside the definition of "relevant contract".

[45] There is much to commend this view as a matter of policy. It seems improbable that the Parliament intended to extend the consumer protection provisions of Chapter 11 to a sophisticated buyer that enters a contract in respect of multiple lots of vacant land in a residential area as part of its business of property marketing, or, for that matter, multiple contracts to purchase separate vacant lots for the purpose of marketing those lots as part of its business as a property marketer. There is no finding in this case, and this Court is not invited to find, that Vale was carrying on a business as a property marketer when it entered the agreement in respect of Lot 14. Delorain submits, however, that this is not a relevant point of distinction, and that a purposive approach to statutory interpretation should be adopted.

[46] In conformity with well-established principles of statutory construction, Delorain submits that the term "relevant contract" must be construed so that it is consistent with the language and purpose of the Act viewed as a whole.[29] A significant purpose of the Act is to protect consumers.[30] Section 363 stated at the relevant time that the purposes of Chapter 11 are:

(a) to give persons who enter into relevant contracts a cooling-off period; and

(b) to require all proposed relevant contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection

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27 Explanatory Notes to the *Property Agents and Motor Dealers Amendment* Bill 2001.

28 [2005] 2 Qd R 515.

29 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

30 See the Act, s 10.

information, including a statement that a relevant contract is subject to a cooling-off period; and

(c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers;[31]

In general terms, a "cooling-off period" permits a buyer under a relevant contract who has not waived the cooling-off period to terminate the relevant contract at any time before the cooling-off period ends by giving a notice of termination, whereupon the seller must, within 14 days after the relevant contract is terminated, refund any deposit paid under the relevant contract to the buyer less the amount of "the termination penalty" (an amount equal to 0.25 per cent of the purchase price).

[47] Delorain submits that to construe "relevant contract" to encapsulate all contracts for the sale of residential property would have the undesirable effect of providing consumer protection, and the imposition of a cooling-off period, to all persons, even those that acquire residential property for the purposes of promoting it to consumers. Such an approach is said to "not achieve harmony with the express objects of the Act or of Ch. 11." Delorain submits that when the Act is read as a whole, the term "relevant contract" plainly means a contract for residential property entered into by a consumer, rather than a marketeer. It also expresses the submission in another way by submitting that the term does not apply to a contract entered into by a person "who expressly acquires the property to promote it to third party buyers, whether alone or with others." Such a construction is submitted to be consistent with the language and purpose of the Act.

[48] I am unable to accept Delorain's submission concerning the definition of "relevant contract".

[49] The language of the Act does not define "relevant contract" in terms of a contract for the sale of residential property to a "consumer" (however defined). If Parliament intended the term to be confined to contracts entered into with a consumer then one would expect this to be reflected in the language of the Act and, in particular, the definition of "relevant contract" and for the term "consumer" to be defined. The Explanatory Notes to the 2001 amendments to the Act indicate that Parliament intended a broad definition of "relevant contract" that did not depend upon the identity of the parties to it. The Parliament did not cast the definition in terms of contracts involving a "consumer" or create an exception in the case of a contract in which the purchaser was a "marketeer".

[50] Another reason for not accepting Delorain's submission concerning the definition of "relevant contract" is that it is not apparent that persons who contract to acquire residential property of the kind addressed in Chapter 11 with the intention of "on-selling" it are not in need of consumer protection of the kind that a cooling-off period provides. Parliament presumably was aware of the widespread practice by which contracts for the sale of residential property, including proposed lots in unit developments that are being constructed, are entered into by individuals and family companies in the hope or expectation of being able to sell the property to a third party purchaser before they are called upon to settle the contract. It is not apparent

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[31] A further purpose about information on sustainable housing measures has been added as s 363(d) by recent amendments.

that Parliament intended that the consumer protection provisions of Chapter 11 should not apply to such consumers who may enter contracts in circumstances in which they have been persuaded that they will be able to promote and sell the property to a third party purchaser.

[51] In short, neither the text of the definition of "relevant contract" nor the statutory context in which it appears supports the construction contended for by Delorain. Some persons who are induced to enter a contract with a view to selling the property to a third party purchaser may be thought to need the kind of consumer protection that Chapter 11 provides. Others may not need such protection. In any event, the statutory purpose of consumer protection does not compel the restrictive interpretation of "relevant contract" contended for by Delorain, and nor does the language that the Parliament used in defining "relevant contract".

[52] *Cheree-Ann* involved a party engaged in the business of property marketing which contracts to facilitate the acquisition of stock for its business. Such an entity does not have an obvious need for the kind of consumer protection provided by Chapter 11, and extending the requirements of Chapter 11 to a contract entered into by such an entity may be said to permit a sophisticated entity to terminate the contract on the basis of a technicality if those requirements are not met. The outcome in *Cheree-Ann* may be sound as a matter of policy so that the consumer protection provisions of Chapter 11 are not extended to entities who do not need such protection. But the interpretation of "relevant contract" adopted in that case, and followed by the primary judge in this case, presents a number of difficulties.

[53] There is no clear definition of the circumstances in which a contract falls outside the definition of "relevant contract". Does the rule of exclusion apply only in the case of a party that carries on business as a "property marketer"? Does it extend to any case in which the contract is entered into with a "marketeer", as defined in the Act, with its potentially wide-reaching definition of a person involved in any way in the sale, or promotion of the sale, of residential property? Who should be taken to be a "consumer" if the definition of "relevant contract" is to be read down to apply only to a contract in which a consumer is the purchaser?

[54] If Parliament had intended some exclusion from the definition of "relevant contract", or to otherwise not extend consumer protection in a case in which a person entered a contract to acquire residential property for the purpose of promoting it to third party purchasers, then the Parliament might have so provided, ideally in clear language capable of reasonably certain application.

[55] Providing certainty to consumers and others involved in the sale of residential property is important. A judicially-fashioned rule that, in effect, reads into the statutory definition of "relevant contract" words that are not there is unlikely to provide such certainty. Such a rule may be capable of easy application in situations such as *Cheree-Ann*. In other cases, the application of a definition that is developed by the courts is likely to be far more uncertain. The gradual working out of the scope of such a definition on a case by case basis is not conducive to the goal of consumer protection, or the other objects of the Act. Consumers and others should be able to know, or to be readily advised, whether a contract is a "relevant contract", and not be subject to the hazards and costs of litigation to determine on which side of an uncertain definition of "relevant contract" their case falls.

[56] A definition that is framed in terms of whether a party intended to promote the sale of the property to a third party purchaser and to sell it at a profit would require

investigation into, and potentially litigation over, a party's intentions at the time it entered the contract. Such an inquiry may present no practical difficulties in a case such as *Cheree-Ann*. It is likely to be more problematic in cases in which a party's intentions are not obvious, not recorded in writing or are ill-defined. For example, a party may enter a contract to buy a unit "off the plan" intending to on-sell the property prior to settlement at a substantial profit if the opportunity arises, but also intend to retain the property if such an opportunity does not eventuate. In such a case should the existence of such an intention mean that the contract is not a "relevant contract"?

[57] In some cases the party's intention may be apparent from pre-contractual communications, the nature of the party's business or other extrinsic circumstances. In other cases, it will not be.

[58] The presence of a provision in the contract facilitating the referral of a third party purchaser to the developer, and permitting the party to promote the property for sale provided the purchase price exceeds a minimum amount, may not be decisive of the existence of an intention to sell. Such a provision may be included in the contract by the developer so as to leave open the possibility of a party exploring such an opportunity. The inclusion of such a provision in the developer's standard contract may be attractive to some consumers. But it may be of no interest to others. Its presence may not be determinative of the existence of an intention at the time of entry into the contract to market the property to third party purchasers. Even in a case in which such a provision is included at the request of the other party, its introduction may be simply for the purpose of facilitating future promotion of the sale of the property in the event that the party's present intentions change and, depending for example upon market conditions or personal financial circumstances, a decision is made to sell the property rather than retain it, as originally intended.

[59] The fact that an option agreement permits, or even facilitates, the further sale of the relevant property to a third party purchaser does not determine whether the substance of the agreement has the character of the contract in *Cheree-Ann*, namely one to provide stock for property marketers.

[60] It is possible to imagine a case in which a family investment company contracts in respect of three proposed units in a residential development, with the intention at the time of entry into the contracts to sell two units, if possible, and retain one. The family may not have decided which of the three units will be retained. Would the developer in such a case be able to successfully contend that the family's intention means that none of the contracts was a "relevant contract"? Would the result be any different if the family intended to sell one, and retain two of the units?

[61] It is also possible to imagine cases in which a family's intentions are ill-defined, or heavily dependent upon future market conditions and personal financial circumstances. Including in a contract provision for marketing and sale in a form similar to clause 6 of the Deed under consideration in this case may be a precautionary measure.

[62] Entry by a party into more than one contract in respect of more than one proposed lot may not, in itself, demonstrate that the party's intention was to promote and sell one or more of the units to a third party purchaser. The party may have intended to retain each property.

[63] These examples serve to illustrate the uncertain application of a rule that makes the determination of whether an agreement is a "relevant contract" depend upon an assessment of whether the substance of the agreement was to provide stock for a sale to a third party purchaser. The terms of the agreement, and the inclusion of provisions that facilitate the marketing of lots to third party purchasers, may provide some indication of a party's intentions and permit, along with other circumstances, the agreement to be characterised as something other than a contract for the sale of property in accordance with the approach in *Cheree-Ann*. In many cases, however, the evidence of a party's intentions may be slight, particularly in cases in which a party's intentions are ill-defined, not recorded or not communicated. The definition of "relevant contract" contended for by Delorain should not be adopted because of its uncertain application in many cases.

[64] A different definition, based upon the facts of *Cheree-Ann*, that defines the term "relevant contract" by reference to whether the substance of the agreement is to provide stock to a property marketer, or alternatively a "marketeer" is also unsatisfactory. A party who contracts in respect of a single proposed lot in a building unit with the intention of profiting by promoting it to third party purchasers might be said to have entered the contract as a "marketeer". Yet it is not apparent that the Act's consumer protection provisions were not intended to apply to such a party, and, on their face, the terms of the definition of "relevant contract" suggests that they are.

[65] Whilst the interpretation of the Act in *Cheree-Ann* has much to commend it as a matter of policy in not extending Chapter 11's consumer protection provisions to companies that carry on the business of property marketing, I do not consider that it provides a sufficiently clear definition of the circumstances in which an option agreement that facilitates the marketing of lots to third party purchaser may be characterised as something other than a contract for the sale of residential property. The scope of the exception created by *Cheree-Ann* is uncertain. If the definition turns upon a determination of whether the substance of an agreement is to facilitate the marketing of lots to third party purchasers, then such a test is uncertain in its practical application in many circumstances.

[66] The policy of not unnecessarily extending the consumer protection provisions of Chapter 11 to contracts involving parties who do not require the protection that Chapter 11 offers warrants consideration. But tests based upon, or adapted from, *Cheree-Ann* which involve a determination of whether the substance of an agreement is to provide a property for marketing to third party purchasers are uncertain in their application.

[67] One may contemplate cases in which sophisticated purchasers are able to use the consumer protection provisions of Chapter 11 to escape what turn out to be improvident bargains. Permitting such parties to terminate contracts because of a vendor's failure to comply with Chapter 11's requirements may do little to advance the Act's purpose of consumer protection. However, on balance, I consider that it is better to adopt an interpretation of "relevant contract" that has the virtue of reasonable certainty, than formulate an uncertain definition of "relevant contract" which turns upon an assessment of the substance of the agreement entered into. The characterisation of the substance of a contract is something about which reasonable persons may easily differ in many cases. Such contention and uncertainty should be avoided.

[68] The purpose of the statute will be advanced by applying its language, according to its terms, in many cases. The fact that the current broad definition permits some sophisticated parties to escape contracts on the basis of what would seem to be a technicality does not provide a sufficient justification to depart from the language of the statute by, in effect, reading into the definition of "relevant contract" a qualification that turns on an assessment of the substance of the contract. If some categories of buyers are not thought to be in need of the consumer protection which Chapter 11 provides, then that assessment should be made by the legislature, based upon information and arguments that are not readily available to a court. Presently the legislature has chosen to define "relevant contract" to encapsulate all contracts for the sale of residential property in Queensland, other than a contract formed on a sale by auction. Any narrowing of that definition should be left to the Parliament, rather than reading into the definition qualifications that the language and purpose of the Act do not clearly support. The fact that a significant purpose of the Act is consumer protection provides an unsatisfactory basis for a court to read into the statutory definition qualifications that relate to the types of consumers who are thought to be deserving of its protection. It is for the Parliament to decide whether to narrow the extent of consumer protection provided to persons who may intend to on-sell residential properties.

[69] Pending any such amendments developers like Delorain and other vendors are not left entirely without an ability to protect their interests. First, they may do so by complying with the requirements of Chapter 11. Secondly, they may seek to negotiate for a waiver of the cooling-off period. Thirdly, in cases of the sale of multiple properties they may rely upon the alternative basis of *Cheree-Ann* and provide for a number of properties to be the subject of one contract.

Should *Cheree-Ann* be followed or confined to its facts?

[70] *Cheree-Ann* might be confined to its facts. The alternative course is to not follow it. The first course begs the question of the extent of the unstated qualification to the definition of "relevant contract" established by *Cheree-Ann*. As appears from the previous discussion, the qualification established by *Cheree-Ann* may be a narrow one that arises only in the case of a contract with a party that carries on business as a property marketer. The qualification may be, however, a broader one and extend to parties who enter contracts, the substance of which, is to provide a property for marketing to potential third party purchasers. The potential for conjecture and uncertainty over the types of contracts that fall outside of the definition of "relevant contract" by force of the reasoning at paragraphs [48] to [51] of *Cheree-Ann* should be avoided.

[71] The learned authors of "Land Contracts in Queensland" (2nd edition) observe in respect of *Cheree-Ann*:

> "Although few are likely to quibble with the result in this instance given the nature of the services to be provided, the decision demonstrates the very unsatisfactory current state of the law. The issue of whether or not an option agreement constitutes a 'relevant contract' should be a straightforward one. The issue should not be dependent on considerations of the substance of an agreement or whether or not third parties are contemplated."[32]

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[32] Christensen, Dixon, Duncan and Jones *Land Contracts in Queensland*, 2nd ed, Federation Press 2007, p 60.

[72] *Cheree-Ann* gives rise to a number of questions. Is the substance of the agreement to be determined from its terms alone, or from surrounding circumstances as well, such as entry by the same parties into other contracts for properties in the same development? How is the statutory definition to be applied in a case in which the agreement simply permits the marketing of lots to third party purchasers? Is the inclusion of provisions that facilitate the marketing of lots to third party purchasers sufficient to conclude that the substance of the agreement is to provide stock to a property marketer? Can such a conclusion be reached in the case of a party who enters only one contract in respect of a single lot? What may be inferred from a case in which there is evidence that a party entered into three contracts in respect of three separate units with a view to selling at least one of the units if sufficient profit could be made from a sale to a third party purchaser?

[73] *Cheree-Ann* did not consider these and other difficult questions. It was sufficient and appropriate to determine the issue by reference to the facts of that case in which the applicants carried on the business of property marketers and had an unmeritorious claim upon provisions that are designed to ensure consumer protection. However, the adaption of the approach in *Cheree-Ann* in other cases generates unnecessary uncertainty. Rather than attempt to confine the case to its facts, the preferable course, in my opinion, is to not follow the decision insofar as it turned upon an assessment of the substance of each agreement.[33] The result in *Cheree-Ann* would have been the same because of the alternative basis upon which Mullins J concluded that the subject of each contract was not "residential property" within the meaning of s 17(1)(b) of the Act as each agreement related to more than one parcel of vacant land in a residential area.[34]

Is this case on all fours with *Cheree-Ann*?

[74] Because I have reached the conclusion that *Cheree-Ann* should not be followed in the respect identified, it is unnecessary to determine whether the primary judge erred, as Vale submits that he did, in concluding that this case really is on all fours with *Cheree-Ann*. The parties' submissions on whether the circumstances of *Cheree-Ann* are materially different to this case tend to highlight the uncertainty about the type of cases to which the statutory definition of "relevant contract" would not reach if *Cheree-Ann* was followed. Clearly, it would not reach to a case in which the agreement facilitated the marketing of lots to third party purchasers whilst the development was being constructed, being an agreement entered into by a property marketer for the purpose of providing stock for its business as a property marketer.

[75] Vale submits that the circumstances in *Cheree-Ann* were materially different to the present case. It submits that the right to exercise the put option by the vendor only arose if a settlement of lots under third party contracts had not taken place by the settlement date. It submits: "the third party contracts took primacy under the agreement, not, as here where what has primacy are the obligations as between the option holders to buy and sell, with the prospect of a referred third party purchaser". Delorain submits that there are no material differences between the operation of clause 6 in the Deed and the clauses considered in *Cheree-Ann*. In both there was a right to procure sales to third party purchasers, and Delorain was obliged to enter into a contract with a third party purchaser procured by Vale. Vale was entitled to

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33 The reasoning that appears particularly at para [48] – [51].

34 Ibid at [52] – [60].

keep any excess paid as the purchase price by the third party above the price for the lot specified in the Deed. I do not consider that the differences between the Deed in this case and the terms of the agreements in *Cheree-Ann* are materially different. Both facilitated the sale of the relevant property to a third party purchaser.

[76] Next Vale points to the fact that the "purchaser" in *Cheree-Ann* was a company that carried on business as a property marketer and the agreement related to a total of 25 lots in a development, giving the agreements the characteristic of a marketing agreement. Delorain submits that there is no material difference. Whilst Vale may not have carried on the business of a "property marketer", it planned to market and sell, if possible, at least one of the lots that were the subject of the three deeds entered into in respect of proposed units 14, 38 and 48. It sought the inclusion of provisions that would entitle it to market each property and refer a third party purchaser to Delorain. I consider that there is a significant difference between a party that carries on business as a property marketer, and a family company that wishes to have the opportunity to market a property in order to make a profitable on-sale of a unit purchased "off the plan".

[77] Vale further submits that whereas in *Cheree-Ann* the relevant put option had not been exercised by the vendor, in this case Delorain purported to exercise its option and to compel the transfer of the property to Vale. It notes that there was no evidence of any marketing of the property by Vale in the meantime. However, I do not consider that these aspects present a relevant material difference. Whether or not the contract is a "relevant contract" should be determined at the time of entry into the relevant agreement.

[78] Vale also attempts to rely upon the fact that whereas in *Cheree-Ann* no document in the nature of a warning statement was attached to the agreements, in this case the Deed had attached to it a document purporting to be a warning statement under the Act. Vale submits that this conduct evidenced a recognition that the subject matter of the contract was the sale of residential property, not a marketing agreement. However, Delorain correctly submits that its conduct in attaching a warning statement is equivocal and that no reliance should be placed upon such conduct since the parties may have acted under the misapprehension that the Act applied. I agree with Delorain's submission that the determination of whether the agreement constituted a "relevant contract" turns upon the contents of the agreement, not its conduct in attaching a purported warning statement to it.

[79] Ultimately, it is possible to identify points of similarity and points of difference between the circumstances in *Cheree-Ann* and the circumstances of this case. The similarity between the two cases is that both agreements facilitated the marketing and sale of the relevant property or properties to a third party purchaser, provided the on-sale was above a certain price and, if the on-sale completed the "purchaser" could retain the difference between the price specified in the agreement and the price paid by the third party purchaser. The differences include the fact that *Cheree-Ann* was in the business of property marketing, whereas Vale was not. But Vale sought the inclusion of terms that permitted it to market each of the lots that were the subject of the three separate deeds, and if it chose to exercise the right conferred by clause 6 then it would be acting as a "marketeer". In *Cheree-Ann*, Mullins J stated that the agreements in that case "contemplated that the applicants would endeavour to sell the lots the subject of the respective agreements to third parties". The Deed in this case did not in terms contemplate that Vale would market

the lots, but made provision for it to do so. That difference does not appear to be one of great substance. The communications of 30 July 2007 indicate that Vale wished to retain the option of keeping the unit, rather than introducing it to a third party purchaser. The evidence concerning its intentions with respect to unit 14 at the time it entered the Deed in October 2007 is not terribly clear. One inference is that it wished to have the opportunity to on-sell the unit, but, as in July 2007, it also had in mind retaining the unit in its own name or referring it to a family member or some other purchasing entity for taxation purposes. By contrast, it appears that the "Buyer" in *Cheree-Ann* did not wish to retain the lots but was in the business of marketing them to third party purchasers. In *Cheree-Ann*, the substance of the agreement was characterised as providing stock for the applicants in their business as property marketers. The same characterisation cannot be made in this case. Vale did not carry on the business of a property marketer, but wished to have the opportunity to market each unit to a third party purchaser.

[80] If it had been necessary to determine the issue of whether this case is "on all fours" with *Cheree-Ann*, then I would have concluded that it was not. Although there were a number of common features between the agreements in each case, Vale was not in the business of property marketing, and it is not apparent to me why a contract with respect to unit 14 should be characterised as being in substance the same as the agreements for a property marketer to sell 25 vacant lots. In the context in which the characterisation exercise arises, namely whether it would unduly strain the definition of "relevant contract" to apply it to the Deed, there seems to me to be a material point of distinction. Whereas a company that undertakes a business as a property marketer and who acquires stock for that business may not seem to be in need of the consumer protection that Chapter 11 provides, the same cannot be necessarily said for a family investment company that hopes to on-sell one, two or three of the three units that it buys "off the plan".

[81] However, the scope for legitimate debate about how to characterise an agreement such as the Deed, and uncertainty about the scope of the definition of "relevant contract" in the light of *Cheree-Ann* serves to highlight why it is unsatisfactory to have the law in such an uncertain state that parties litigate issues such as whether their circumstances are materially different to those in *Cheree-Ann*. *Cheree-Ann* supports the proposition that an agreement, the substance of which provides stock to a property marketing business, is not a "relevant contract". It leaves uncertain whether a contract that facilitates the sale to an introduced third party purchaser should also fall outside the statutory definition of "relevant contract", at least where a party negotiates an agreement that entitles it to introduce a third party purchaser, and to retain the difference between the purchase price provided for in the option agreement and the purchase price negotiated with a third party purchaser. The uncertainty created by *Cheree-Ann* and the encouragement of litigation over whether another case is materially different from it, are reasons why I consider that the interpretation of "relevant contract" adopted in *Cheree-Ann* at [51] should not be followed.

Disposition of the appeal

[82] The primary judge was not invited to not follow *Cheree-Ann*. Instead, Vale submitted that *Cheree-Ann* was distinguishable on its facts. The primary judge concluded that *Cheree-Ann* was a decision that should be followed. I consider, however, that *Cheree-Ann* should not be followed.

[83] I do not consider that it unduly strains the definition of "relevant contract" in s 364 of the Act to conclude that an agreement that facilitates the marketing of a lot to a third party purchaser while the development is being undertaken is a "relevant contract".

[84] The inclusion of provisions that facilitated the marketing and sale of unit 14 to a third party purchaser and for Vale to benefit in the event that it sought and found a purchaser who was willing to pay a certain price and who completed such a sale, did not take the Deed outside of the statutory definition. Even if Vale pursued the opportunity to market the property, the Deed imposed obligations upon it that required it to enter a contract to purchase the unit upon the exercise of options. The Deed was a contract for the sale of residential property, notwithstanding the contingency of a sale to a referred buyer under clause 6.

[85] The Deed, being a contract for the sale of residential property in Queensland, and not being a contract formed on a sale by auction, was a "relevant contract". The parties accept that if the Deed was a "relevant contract" then Vale was entitled to terminate it.

Conclusion

[86] The appeal proceeded on the basis that an option agreement may fall within the definition of "relevant contract" in s 364 of the Act. That view is supported by *McBain* and other authorities, and the appeal should be determined on that basis in circumstances in which this Court was not urged to adopt the view expressed by Chesterman JA, with whom Dutney J agreed, in *Hedley*.

[87] The primary judge determined the application on the basis that this case was on all fours with *Cheree-Ann*. It is strictly unnecessary to decide that issue because I have reached the conclusion that the interpretation of "relevant contract" favoured in *Cheree-Ann* at [51] should not be followed. However, I consider that there are material differences between the facts of *Cheree-Ann* and the facts of this case.

[88] The definition of "relevant contract" should be applied according to its terms. The Act does not state an exception of the kind formulated in *Cheree-Ann* for cases of parties who seemingly are not in need of the consumer protection that Chapter 11 provides. Chapter 11's purpose of enhancing consumer protection for buyers of residential property may not be served by extending Chapter 11's consumer protection provisions to parties such as the applicants in *Cheree-Ann*. However, this policy issue is a matter for the legislature to consider. The legislature rather than a court should formulate a definition of "relevant contract" so as to place outside that definition categories of contracts entered into by parties who may not warrant Chapter 11's consumer protection. Whether all or some parties who enter contracts that facilitate the marketing of a residential lot to third parties should have the protection that Chapter 11 affords is a matter for the legislature to determine. The broad language used by the legislature in amending the Act in 2001 suggests that it intended to extend Chapter 11 to a wide range of contracts, including a contract by which a party purchases a unit "off the plan" intending to re-sell it at a profit.

[89] In this matter Delorain invites the Court to apply, or even extend, the exception recognised in *Cheree-Ann*. However, such an approach is apt to create undesirable uncertainty concerning the application of the definition of "relevant contract" in future cases. Certainty concerning parties' rights in relation to transactions for the

sale of residential property is important. Consumer protection is enhanced by certainty in determining whether or not an agreement constitutes a "relevant contract". Unnecessary uncertainty and the potential for litigation of the present kind is not in the interests of consumers or other persons involved in contracts for the sale of residential property. The first basis upon which *Cheree-Ann* was decided leaves the definition of "relevant contract" in an uncertain state and, on balance, I consider that the decision should not be followed in that respect.

[90] The application of the statutory definition of "relevant contract" leads to the conclusion that the Deed was a relevant contract and, as a result, Vale was entitled to terminate it.

Orders

[91] I would order as follows:

1. The appeal be allowed.

2. The orders of the Court made on 20 October 2009 be set aside and in lieu thereof it be ordered that:

> "It be declared that the Call and Put Option Agreement between the applicant and the respondent dated 29 October 2007 in respect of proposed Lot 14 in a residential development known as "Delor Vue Apartments" was validly terminated by the applicant by written notice of termination dated 18 November 2008."

3. The respondent pay the appellant's costs of and incidental to the originating application filed 14 April 2009.

4. The respondent pay the appellant's costs of and incidental to the appeal.