SUPREME COURT OF QUEENSLAND

CITATION:	*Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust (No 2)* [2010] QSC 405
PARTIES:	**VERCORP PTY LTD ACN 010 198 268** (First applicant) **and** **HEGIRA LIMITED ABN 7100 8610 357** (Second applicant) **v** **ACN 096 278 483 PTY LTD as trustee of THE WILLIAMS FAMILY TRUST** (Respondent)
FILE NO:	BS 6442 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27-28 September 2010
JUDGE:	McMurdo J
ORDER:	**1. It will be declared that on 7 June 2006 the respondent was bound to complete contracts for the sale to the first applicant of lots 413 and 414 on SP 133280.** **2. The claims for specific performance of contracts for the repurchase of lots 411 and 412 on SP 133280 will be dismissed.** **3. The applicants' claim for liquidated damages will be dismissed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – DISCHARGE BY AGREEMENT – NOVATION – where the applicants agreed to sell four vacant lots to "Barrier Developments and/or nominee" – where the contracts for sale contained extensive provisions relating to the development of the land post settlement – where Barrier Developments nominated the respondent as the buyer – whether the respondent was bound

to perform the post settlement provisions.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – CONDITIONS – CONDITIONS PRECEDENT AND SUBSEQUENT – where each contract required "the buyer" to construct on the land a house, of a certain standard and within a certain time – where in no case did that occur – where each contract further provided that if that did not occur, the vendor could elect to repurchase the land – where the repurchase contract was to be completed within 30 days of delivery of the notice of exercise of the option and the purchase price was to be the market value determined by a valuer appointed by the President of the Australian Institute of Valuers and Land Economists – where the applicants exercised the options to repurchase lots 411 and 412 but failed to obtain a valuation of the properties within 30 days – where the President of the Australian Institute of Valuers and Land Economists declined to appoint a valuer due to a conflict of interest and so the Vice President made the appointment – whether the repurchase contracts for lots 411 and 412 were duly terminated by the respondent.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – PERFORMANCE – where the applicants exercised the options to repurchase lots 413 and 414 – where the valuation was not provided to the applicants until the day of settlement – where the applicants advised the respondent at 12:20 pm that settlement was to occur at 3 pm on that day – where no representative of the respondent attended settlement – whether the respondent was bound to complete the repurchase contracts for lots 413 and 414.

CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – VENDOR'S REMEDIES – GENERALLY – where the original contracts for sale gave the applicants a right to liquidated damages in the event of the buyer's breach and also a right to repurchase the land if the buyer failed to construct houses to a certain standard, within a specified time – where the applicants commenced proceedings in the District Court claiming liquidated damages for the respondent's breach of covenant in relation to lots 411, 412 and 413 – where the applicants later exercised the options to repurchase lots 413 and 414 – where the applicants now claim liquidated damages for breach of covenant in relation to all four lots – whether the applicants made a binding election not to exercise the options to repurchase lots 413 and 414.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – PENALTIES AND LIQUIDATED DAMAGES – OTHER PARTICULAR

CASES – where the original contracts of sale provided that if the buyer breached any of the covenants the buyer would be liable to pay to the vendor "$25,000 by way of liquidated damages, and not as a penalty, or such greater sum as may represent the actual loss or damage suffered" by the vendor by reason of the breach – where the respondent breached one of the covenants by failing to conduct substantial building works on any of lots 411, 412 and 413 for longer than one month – whether the amount claimed for liquidated damages constitutes a penalty.

Land Title Act 1994 (Qld) s 61
Property Law Act 1974 (Qld) s 55
Sale of Goods Act 1896 (Qld) s 12
Stamp Act 1984 (Qld) s 54(6A)
Trade Practices Act 1974 (Cth) ss 82, 87

Avzur Hotels Pty Ltd v Ivanhoe Entertainment Pty Ltd & Ors (2009) 257 ALR 498
Booker Industries Proprietary Limited v Wilson Parking (Qld) Proprietary Limited (1982) 149 CLR 600
Bounty Systems Pty Ltd v Odyssey Gaming Services Pty Ltd [2007] QSC 230
Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales (1982) 149 CLR 337
Commissioner of State Revenue v Politis [2004] VSC 126
CPG01 Pty Ltd v Kourinos [2010] WASC 92
David Deane & Associates Pty Ltd v Bonnyview Pty Ltd & Ors [2005] QCA 270
Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited [1915] AC 79
GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd (No 1) (1990) ANZ Conv R 367
Harry v Fidelity Nominees Pty Ltd (1985) 41 SASR 458
Hewitt v Debus (2004) 59 NSWLR 617
Honner v Ashton [1980] ANZ Conv R 343
Hurrell v Townend [1982] 1 NZLR 536
International Air Transport Association v Ansett Australia Holdings Limited & Ors (2008) 234 CLR 151
Jenkins v Smyth [1973] VR 441
Kinivan & Anor v Maoudis & Ors (1988) ANZ Conv R 320
Karangahape Road International Village Ltd v Holloway [1989] 1 NZLR 83
Lambly v Silk Pemberton Ltd [1976] 2 NZLR 427
Le & Anor v Quieshi & Anor [2003] QDC 442
Lord Elphinstone v The Monkland Iron and Coal Company Limited and Liquidators (1886) 11 App Cas 332
Lord & Anor v Trippe & Anor (1977) 14 ALR 129
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451
Parland Pty Ltd & Ors v Mariposa Pty Ltd (1995) 5 Tas R 121
Re Ronim Pty Ltd [1999] 2 Qd R 172

Salter & Ors v Gilbertson & Ors (2003) 6 VR 466
Tonelli v Komirra Pty Ltd [1972] VR 737
Sudbrook Trading Estate Ltd v Eggleton & Ors [1983] 1 AC 444

COUNSEL: D R Cooper SC and C L Francis for the applicants
A J H Morris QC and L Jurth for the respondent

SOLICITORS: Hynes Lawyers for the applicants
Londy Lawyers for the respondent

[1] The principal question in this case is whether the respondent company, which is the registered owner of four pieces of land at Pacific Harbour on Bribie Island, is obliged to transfer them to the first applicant, which I will call Vercorp. The respondent acquired the properties in 2001 pursuant to contracts of sale with the then owner, the second applicant which I will call Hegira. The buyer was described in each contract as "Barrier Developments and/or Nominee". The respondent became the nominee.

[2] Each contract required "the buyer" to construct on the land a house, of a certain standard and within a certain time. In no case did that occur. Each contract further provided that if that did not occur, the vendor could elect to repurchase the land. In December 2003, Hegira purported to exercise that option to repurchase two of the properties and in May 2006, Vercorp (as Hegira's assignee) purported to exercise the options over the other two properties. By then the rights (if any) from Hegira's exercise of options had been assigned to Vercorp.

[3] The respondent has refused to transfer any of the four lots and Vercorp seeks specific performance of the alleged contracts for their repurchase. There are many issues, not the least of which is whether the respondent became bound by the building and repurchase provisions of the original contracts of sale, given that it was not the named buyer. There is also a counterclaim by the respondent for relief under ss 82 and 87 of the *Trade Practices Act 1974* (Cth). By reason of a previous order, the respondent's case in that respect was not litigated within this trial. What must now be determined is Vercorp's entitlement to the properties, leaving open the possible impact of the respondent's counterclaim upon the parties' contractual positions.

The 2001 contracts

[4] These four properties were vacant allotments within a large residential subdivision. Described as lots 411 to 414, each was the subject of a contract of sale dated 9 April 2001. The prices varied between the lots, in a range of $530,000 to $650,000. The named buyer was Barrier Developments Pty Ltd, which was controlled by Mr Williams. Each contract provided for a deposit of 10% of the purchase price, payable as to $1,000 upon the buyer's signing the contract and the balance within seven days. The then standard REIQ form of contract was used, but with the addition of many additional terms.

[5] Each contract was subject to finance in an amount which was described as "sufficient to complete" and to be obtained from a "bank or financial institution on

or before 14 days from" the date of the contract. The agreed date for settlement was 30 October 2001.

[6] To each contract there was an "Annexure A" containing special conditions. There was condition 18.3 by which the contract was subject to the registration of the plan of subdivision which would create these four lots. By condition 18.4, the settlement date might be extended according to the date of notice of registration of the plan of subdivision. And by special condition 20 it was agreed as follows:

> The Buyer acknowledges that they (sic) have received and signed a document headed 'Community Development Covenants' annexed hereto.

The term "the Buyer" took its meaning from the first page of the contract, where in the schedule within the REIQ form this appeared:

> Buyer: Barrier Developments and/or nominee

[7] The document headed "Community Development Covenants" was "Annexure B" to each contract. It is necessary to set out much of this document:

> The Buyer/s acknowledges and agrees with Pacific Harbour that the subject Land is part of a residential development, the object of which is to establish a modern attractive and well designed residential Estate and it is desirable that supervision and control be exercised by Pacific Harbour for the protection and in the interest of the Buyer/s in relation to the nature and type of construction.
>
> …
>
> In consideration of the Seller agreeing to sell the Land to the Buyer under the contract to which these covenants are attached, and in further consideration of Pacific Harbour hereby covenanting to pay to the Buyer at settlement, the sum of $1.00, the Buyer agrees and covenants with Pacific Harbour to comply with the Covenants contained in this Contract of Sale.
>
> **1. DEVELOPMENT**
>
> 1.1 All development by the Buyer/s or any successor in title of the Buyer/s or any other person, must be constructed to and comply with the Community Development Standards for Pacific Harbour and in accordance with the Schedule of Requirements set out in the Annexure 'C' of the contract of sale to which these covenants are attached.
>
> ...
>
> **2. APPROVAL**
>
> 2.1 The Buyer will not submit to the Local Authority or other relevant Authority or seek approval through a private certification process for its approval, any plans, drawings, specifications or other information necessary to obtain building approval for any building works on the Land and/or development work on or near the allotment until the Buyer

has received the approval of Pacific Harbour in accordance with the Community Development Standards and then only in accordance with the plans approved by Pacific Harbour and such conditions of approval imposed by it.

3. DEFAULT

3.1 If and whenever the Buyer/s shall make any default under any of these covenants, Pacific Harbour, without prejudice to its other rights, remedies and powers, shall be at liberty to enter upon the Land and any building thereon and to remove any structure, improvement, article, sign or animal contravening these covenants and to perform such work thereon as shall be necessary or expedient for the purpose of having the same comply with these covenants and to recover all costs of and incidental thereto from the Buyer/s including the cost of storage and disposal.

3.2 The Buyer/s shall pay to Pacific Harbour interest at the Contract Rate calculated daily on all costs incurred by Pacific Harbour under Clause 3.1 for as long as those costs shall remain outstanding.

4. SALE OR DISPOSITION

4.1 The buyer acknowledges that he will not sell, transfer or otherwise dispose of the allotment without firstly delivering to the Developer a Deed of Covenant duly executed by the Purchaser in favour of the Developer containing covenants in the same terms (mutatis mutandis) as are set forth in these covenants including an obligation for each purchaser to obtain a further Deed of Covenant from any subsequent purchaser.

4.2 To facilitate the execution of a deed of covenant duly executed by such buyer, transferee of disponee in favour of the Developer, the buyer agrees to do the following:

(a) the buyer will notify the Developer of his intention to sell the Allotment and to furnish details of his solicitor and in the event that the buyer is acting for himself, he shall advise the seller accordingly;

(b) to include a provision in any contract for the sale of the Allotment requiring the purchaser to execute the assignment of covenant and the Developer will provide the buyer with a sample clause to be inserted in any such contract of sale for this purpose;

(c) to include as annexures to any contact for the sale of the Allotment copies of the community

standards, community covenants and sample assignment of covenants which shall form part of the contract of sale for the Allotment;

(d) immediately a contract of sale is executed between the buyer and a purchaser for the Allotment, the buyer will furnish the Developer with a copy of any such contract of sale;

(e) to execute all documents and do all acts and things and take all steps necessary and possible to procure the execution of the covenants by the purchaser;

(f) the buyer, its successors and assigns irrevocably nominate constitute and appoint the developer and its nominee or nominees to be the true and lawful attorney of the buyer on behalf of and in the name of and as the act and deed of the buyer to execute a Deed of Covenant or Assignment of Deed of Covenant in favour of the Developer and to do all such things and sign all such documents as may be necessary to procure assignment of the Deed of Covenant and do and perform all such further acts, matters and things and to sign and execute all notices, applications, documents and instruments that may be necessary or that the attorneys may deem necessary or proper for the purpose of giving full effect to the Deed of Covenant or Assignment of Deed of Covenant.

(g) the Buyer for itself, its successors and assigns ratifies confirms and agrees to ratify and confirm whatever the Attorney, nominees or substitute does or purports to do by virtue of these presence.

4.3 The buyer will procure any such assignment of covenant in the form annexed hereto and marked Schedule 1.

5. DAMAGES FOR BREACH

5.1 That, in the event of a breach by the Buyer/s of any of these covenants, Pacific Harbour shall suffer loss which each of the parties presently estimate to be in the amount of not less than $25,000. The Buyer hereby covenants with Pacific Harbour that in the event of such breach by the Buyer of any of these covenants, the Buyer shall pay to Pacific Harbour the sum of $25,000 by way of liquidated damages, and not as a penalty, or such greater sum as may represent the actual loss or damage suffered by Pacific Harbour by reason of such breach.

6. NO MERGER

6.1 The parties hereto agree that the provision of the Annexure will not merge on the conveyance herein but shall continue in full force and effect and remain binding on the Buyer/s, its heirs, executor, administrators, successors and assigns in favour of Pacific Harbour and its successors.

6.2 Pursuant to the provision of Section 13 of the Property Law Act 1974 - 1979, the Buyer has entered into these covenants on behalf of himself, his successors in title and the person deriving title under him and such covenants shall have effect as if such successors or other persons were expressed therein.

…

8. ACKNOWLEDGEMENTS

8.1 It is hereby acknowledged and agreed by the parties hereto that it is not their intention by these covenants to create any legal duty enforceable by a third party pursuant to the provisions of Division 2 of the Property Law Act.

…

11. TERMINOLOGY

11.1 The words 'Pacific Harbour', 'the Developer'; 'Hegira Limited', 'Vercorp Pty Ltd', 'the Seller' and 'the Vendor' wherever they shall appear in this document shall be used interchangeably with each other.

…

11.6 'buyer' means the person why buys the allotment from the developer.

11.7 'purchaser' means a person who buys an allotment from a buyer;

[8] A schedule to that attachment was a form of Deed of Covenant as contemplated by cl 4.1 of that annexure, whereby a person who bought an allotment from the "Buyer" would agree to be bound by the same covenants. That form contained recitals that "the Assignee" (which was clearly intended to mean "the Assignor") was "the owner of the Land" and that the Assignee (correctly described here) had "entered into a Contract to purchase the land".

[9] The next annexure to each of these contracts of sale was a document described as "Community Development Standards", which prescribed certain requirements for the building upon and use of the land. Then there was an "Annexure D", which was a two page document described as "Special Conditions" to form part of the contract of sale, and which was described as made between "Hegira (as Seller)" and "Barrier Developments (As Buyer)". It is this document which contained the option to repurchase the land upon which the applicants sue. It contained these terms:

22 The Buyer undertakes to complete construction on the said land in accordance with these covenants within 30 months from the date hereof. For the purpose of this condition, completion of construction will mean the buyer obtaining a certificate of completion of the dwelling house from the Local Authority.

23 In preparing the design of the dwelling or other building to be constructed on the said land the Buyer shall use a registered practicing designer or architect approved by Pacific Harbour.

24 The Seller agrees to rebate the Buyer the sum of $10,000 toward the use of a Registered Practicing Designer or Architect approved by Pacific Harbour, referred to above upon the completion of the dwelling house provided all conditions of the contract have been complied with.

25.1 In consideration of the payment of the sum of One Dollar ($1.00) by the seller to the buyer (the receipt of which the buyer acknowledges) the buyer grants to the seller an option to purchase the land at the price hereinafter determined and on the conditions specified herein.

25.2.1 This option is binding on the buyer and in the event of his death on his estate.

25.2.2 The benefit of this option may be assigned and may be exercised by the seller or its duly appointed assignee.

25.3 This option may be exercised at any time after 30 months from the date hereof in the event that the buyer has not completed construction of an approved dwelling house on the land in accordance with the terms of this contract.

25.4.1 Notice of exercise of option shall be given by written notice to the buyer together with a bank cheque for $1,000 by way of deposit on account of the purchase price.

25.4.2 On delivery of the Notice of Exercise of Option the buyer and the seller become immediately bound as Vendor and as Purchaser respectively under a Contract for sale of land in accordance the terms of the Contract currently approved by the Real Estate Institute of Queensland for the sale of land.

2.4.3 Settlement of the Contract shall take place within 30 days of the date of delivery of the notice of exercise of option, or such extended period as may be agreed.

25.5 The purchase price to be paid by the seller to the buyer pursuant to this clause shall be the market value determined by a Valuer or Land Economist appointed by the President

> for the time being of the Australian Institute of Valuers and Land Economists (Queensland Division).
>
> …

It also provided that if the buyer wished to sell the land prior to performing the required construction, it was to give the seller a right of first refusal.

[10] For lot 411, the time allowed for completion of the construction of the house was 30 months (from 9 April 2001), as set out in cl 22 and cl 25.3. For lot 412, the agreed period was 18 months, for lot 413 it was 54 months and for lot 414 it was 42 months.

Before settlement of the sales

[11] The date for approval of finance was 23 April 2001. On that day, the solicitors for Hegira wrote to Coyne Coyne & Towers, who were named in each contract as the buyer's solicitors, asking for advice on the outcome of their "clients' application". On the same day, Coyne Coyne & Towers replied as follows:

> We advise that the intended purchaser of the above will be ACN 096 297 483 Pty Ltd being the trust company of the William Family Trust.
>
> We further advise that our client's Accountants are presently setting up the Williams Family Trust and further that although the company presently holds assets further assets are to be transferred and we are instructed that some assets are not to be transferred until after the end of this financial year (ie 30/6/2001).
>
> As our client's Bank requires to view financial documents once the company is in receipt of these assets, we request an extension of the date for loan approval to July 15, 2001 with time to remain of the essence. This will allow full transfer of property/assets to allow the Bank to proceed with unconditional loan approval.
>
> Would you kindly refer the above to your client and revert to us. We are able to provide further information from our client's Accountant should this be required.

[12] The applicants' case places particular emphasis upon that letter. Their argument is that the solicitors' reference to "our client" was to the respondent company, there identified as the intended purchaser. Upon that basis, the argument characterises this as a request by the respondent, rather than by Barrier Developments Pty Ltd, for a variation of the terms of each contract by an extension of the date for finance. The request was agreed by Hegira through its solicitors' letter of 1 May 2001. But that response said nothing of any substitution of the respondent as the contracting party. Rather, the response from the solicitors was under a heading which identified the transaction as a sale by Hegira to "Barrier Developments and/or nominee". In any case, the reference to "our client" by Coyne Coyne & Towers, in their letter of 23 April 2001, was not unambiguously a reference to the respondent. As I read that letter, it distinguished between "our client" and the respondent which was described

there as "the company". Accordingly, no contractual relationship between Hegira and the respondent was formed by this correspondence.

[13] The respondent had been incorporated on 21 March 2001 and had been appointed the trustee of the Williams Family Trust on the following day. But there is no pleaded case that the contracts were made by Barrier Developments as the respondent's agent. There is some suggestion to that effect in one argument for the applicants, which referred to the amount of stamp duty paid by the respondent. It is said that the duty which was paid corresponded with what was payable for a single transaction, rather than a sale to Barrier and a subsequent disposition consequent upon the nomination of the respondent as the purchaser. Under the terms of the then *Stamp Act 1984* (Qld), each contract of sale would have been subject to duty as a conveyance and the transfer pursuant to each contract, being a transfer to a different party, would also have been dutiable unless, according to s 54(6A) of that Act, the transfer was to a party for whom the purchaser named in the contract had been acting under a written authority executed prior to the execution of the contract of sale. The documents here were stamped "in house". The applicants suggest that there were two possibilities: either that there was such an authority or that the respondent had evaded duty on the transfers to it. The applicants have alleged that the respondent did sign authorities in accordance with s 54(6A), which the respondent has denied. But as already noted, the applicants' pleading does not include an allegation that the contracts were made on behalf of the respondent. And the applicants' case was not argued on the basis, even in the alternative, that the respondent had been a party to the contracts of sale from the outset. Should it matter, I would not be persuaded that more probably than not, there were authorities under s 54(6A) or that the respondent was an undisclosed principal to the contracts when they were made.

[14] The extended date for finance (15 July 2001) passed and on the following day Coyne Coyne & Towers wrote to Hegira's solicitors as follows:

> We advise that our client's Accountants KPMG are finalising the necessary paperwork to be provided to our client's Bank and further it has been mutually agreed between the parties that an extension of finance approval has been granted to August 7, 2001 (time to remain of the essence) upon payment of a further deposit in the sum of $700,000 to the Trust Account of the Selling Agent.

Again the letter was under a heading which referred to Barrier Developments Pty Ltd but not to the respondent. Those further deposits ($175,000 per lot) were paid by the respondent (not by Barrier Developments) on or about 2 August 2001.

[15] By a letter dated 8 August 2001, Coyne Coyne & Towers advised that "our client is now in receipt of loan approval …". Again this was under a heading which referred to Barrier Developments and not to the respondent.

[16] On about 2 October 2001, the plan of subdivision was registered and Hegira's solicitors advised of this in letters which were dated 3 October and were headed by describing the buyer as "Barrier Developments and/or nominee". On 10 October 2001, Coyne Coyne & Towers (under that same heading) wrote to Hegira's solicitors, enclosing a draft transfer document and a Property Transfer Information form. In each case the transferee was shown as the respondent.

[17] On 2 November 2001, the contracts were settled. The respondent paid the balance purchase prices from moneys which it borrowed. Each lot was then conveyed to the respondent.

After settlement of the sales

[18] The respondent applied to Hegira for approval to construct houses on each lot and applied for and received local authority approval. It commenced construction on each of lots 411, 412 and 413, but failed to complete it. It did not commence construction work on lot 414.

[19] By letters dated 5 and 18 December 2003, Hegira exercised, or purported to exercise, the option to repurchase lots 411 and 412. On 24 February 2004, the respondent's present solicitors, Londy Lawyers, wrote to Hegira's solicitors, in response to those notices exercising the options, as follows:

> We now act on behalf of ACN 096 278 483 Pty Ltd as Trustee for the Williams Family Trust. Our client has instructed us to write to you in relation to your letter of 5 December 2003 to our client's former solicitors Coyne Coyne & Towers and your letter of 18 December 2003 to our client's former solicitors Corrs Chambers Westgarth.
>
> Under clause 25.4.3 of the respective contracts of sale, the settlement of the contracts formed by the exercise of the options contained in those contracts of sale was required to:
>
> > take place within 30 days of the date of delivery of the Notice of Exercise of Option, or such extended period as may be agreed.
>
> We further note that clause 25.4.2 of the respective contracts of sale provides that:
>
> > On delivery of the Notice of Exercise of Option the Buyer and the Seller become immediately bound as Vendor and as Purchaser respectively under a Contract for Sale of land in accordance with the terms of the Contract currently approved by the Real Estate Institute of Queensland for the sale of land.
>
> As you will be aware, the Real Estate Institute of Queensland approved contract provides that if a buyer fails to comply with any provision of the contract, the seller is entitled to terminate the contract.
>
> We note that in the case of each of the two contracts formed by the exercise of the options, your client failed to tender the balance of the purchase price on the due date for settlement. Our client regards this failure as a serious breach of each of the contracts. In the circumstances, our client elects to terminate both of those contracts.

[20] This letter thereby accepted that the respondent had become contractually bound by the repurchase provisions and that contracts of repurchase had been formed by the

exercise of the options. There is no evidence which explains this inconsistency with the respondent's present case that there was no contractual relationship between it and Hegira. There was further correspondence concerning the repurchase of lots 411 and 412 in the months which followed in 2004. But throughout all of this correspondence, there was no contention that the respondent had not been contractually bound to reconvey those properties at the points in time when the options to repurchase were exercised.

[21] On 4 November 2005, Hegira assigned to Vercorp its rights in respect of lots 413 and 414. On 8 May 2006, Vercorp gave to the respondent notice of that assignment and exercised, or purported to exercise, the options to purchase lots 413 and 414. Correspondence ensued between Vercorp's solicitors and Mr Londy's firm, in which the respondent refused to reconvey those lots. But again there was no contention at that stage that the respondent had not been bound by the repurchase provisions.

Did the respondent become bound?

[22] The applicants' principal argument is that the respondent became bound when nominated by Barrier Developments to be the transferee under each of the 2001 contracts. The argument relies not only upon the terms of the contracts, but also upon discussions between Ms Mengel on the Hegira side of the transaction and Mr Williams, which preceded the contracts. It also relies upon the post contract events which I have summarised.

[23] Ms Mengel gave evidence of conversations with Mr Williams in the course of negotiations in about March 2001. Her evidence, in this respect at least, was not challenged and I see no reason not to accept it. Mr Williams told her that he needed to have accounting advice on which entity was to purchase the properties. She asked him why that was necessary to which he responded: "I'm purchasing four properties. One is for myself to live in, one is for my father, one is for my family to use as a holiday home, and then the fourth one I'm using for my employees as a holiday home. So that is why I need to get accounting advice". She discussed it with Mr Russell from her head office who said that he would accept the words "and/or nominee", but only upon the condition that whatever entity purchased the land, it must comply with the building requirements and otherwise perform the contract. She passed that on to Mr Williams. She told him that Mr Russell had insisted that it be a requirement that whatever entity purchased the land it would have to comply with "the contract, the building covenant and especially the building timeframes". Mr Williams replied that that was "not a problem at all". They also negotiated the different times for construction across the various lots, Mr Williams saying that he would be unable to commence construction of the four houses simultaneously.

[24] The construction of these contracts is to be undertaken with a consideration of the surrounding circumstances known to the parties and the purpose and object of the transaction: *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales*;[1] *Pacific Carriers Ltd v BNP Paribas*;[2] *International Air*

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1 (1982) 149 CLR 337 at 350.

2 (2004) 218 CLR 451 at 462.

Transport Association v Ansett Australia Holdings Limited.[3] Ms Mengel's evidence might be thought to prove that the parties contracted with each side knowing that Barrier Developments intended not only to nominate another entity as the transferee, but also that the entity would be controlled by Mr Williams. The evidence shows that the parties to the original contracts of sale had identified the buyer's purpose of the transaction. However, the critical question here involves the intention, objectively viewed, also of another entity, which is the respondent. As I have noted, it is not the applicants' pleaded case that Barrier Developments was acting as its agent, at least before the contracts were signed. The relevance of Ms Mengel's evidence to the respondent's intention is less clear.

[25] The applicants' case encounters an abundance of authority for the proposition that where there is a contract for the sale of land to a certain purchaser "or nominee" and an entity is nominated, nevertheless the contract remains one between the vendor and the originally named purchaser: *Tonelli v Komirra Pty Ltd*;[4] *Jenkins v Smyth*;[5] *Lambly v Silk Pemberton Ltd*;[6] *Lord v Trippe*;[7] *Hurrell v Townend*;[8] *Harry v Fidelity Nominees Pty Ltd*;[9] *Karangahape Road International Village Ltd v Holloway*;[10] *Salter v Gilbertson*;[11] *Commissioner of State Revenue v Politis*;[12] *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd*;[13] *Avzur Hotels Pty Ltd v Ivanhoe Entertainment Pty Ltd*;[14] *CPG01 Pty Ltd v Kourinos*.[15] Many of the cases say that it is open to the parties to agree that upon the original purchaser's nomination, the nominee will become a party to the contract or at least, to *a* contract with the vendor. But there are several observations to the effect that clear words would be needed to achieve that result. Thus in *Harry v Fidelity Nominees Pty Ltd*, King CJ said that he would be "most unwilling to construe a contract as containing a provision of such unusual character … unless the language of the contract was quite clear".[16] And in *Salter v Gilbertson*, Phillips JA said:[17]

> As has been pointed out often enough, although it must be so if the context so demands, it is a strong thing to regard the words "or nominee" as authorising B, unilaterally and in his or her own absolute discretion, to nominate a purchaser to stand *in the place of* B, with all the attendant consequences for A [the vendor]. For such a construction 'compelling language' is required … .

[26] In *Harry v Fidelity Nominees Pty Ltd*, King CJ remarked that not only was the notion of a vendor binding himself to accept an unknown nominee, as the party to whom he must look exclusively for performance of the contract, an unusual one, it

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3 (2008) 234 CLR 151 at 160.
4 [1972] VR 737.
5 [1973] VR 441 at 447.
6 [1976] 2 NZLR 427.
7 (1977) 14 ALR 129 at 143.
8 [1982] 1 NZLR 536.
9 (1985) 41 SASR 458.
10 [1989] 1 NZLR 83.
11 (2003) 6 VR 466 at 473.
12 [2004] VSC 126 at [16].
13 [2005] QCA 270 at [30].
14 (2009) 257 ALR 498 at 501.
15 [2010] WASC 92.
16 (1985) 41 SASR 458 at 460.
17 (2003) 6 VR 466 at 473.

was "by no means clear that such a provision could be made legally effective".[18] King CJ said that "[t]he substitution could only occur if the nominee subsequently agreed, for a fresh consideration or under seal, to perform the [original purchaser's] obligations under the contract".[19]

[27] However, there is at least one case where this intention, to substitute the nominee as the party to be contractually bound, was identified, which is the judgment of Green CJ in *Parland Pty Ltd v Mariposa Pty Ltd*.[20] In that case the defendant contracted with two individuals to sell land the subject of a proposed rezoning application. Shortly after the contract was made, the purchasers said that they wished to nominate another purchaser and to amend the agreement by adding the words "and/or nominee". The response by the defendant, through its solicitors, was that "[t]he matter therein raised will be attended to at or prior to settlement". A form of transfer was then submitted to the defendant which showed the plaintiff (the nominee) as the transferee. Subsequently, the contract was settled, when the executed transfer was handed over together with an amended contract by which the words "or their nominee" were added after the names of the individual purchasers. Importantly, the contract contained a condition that in the event that "the purchaser" was unsuccessful in having the property rezoned within three years from the date of completion, then the purchaser might require the vendor to repurchase the property upon certain terms. The plaintiff was unsuccessful in having the property rezoned and called upon the defendant to repurchase it. The defendant refused upon the basis that the plaintiff was not a contracting party and was not "the purchaser" for the purposes of that clause. After referring to some of the cases and setting out a passage from *Harry v Fidelity Nominees Pty Ltd*, Green CJ said:[21]

> Whilst accepting the above statements and also accepting that in this particular case there was evidence of the conveyancing practice referred to in those passages it must be kept in mind that every case must be determined on the basis of the circumstances and terms of the particular contract under consideration.
>
> In my view the following circumstances militate in favour of a conclusion that the first plaintiff was not merely the transferee of the property but was a contracting party.
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> The contract was 'between … the vendor of the one part and Andrew Hamilton and Andrew McGregor or their nominee [hereinafter called 'the purchaser'] of the other part'. *Prima facie* the effect of those words is that if Hamilton and McGregor did not nominate anyone the contract was between the vendor of the one part and Hamilton and McGregor [thereinafter called 'the purchaser'] of the other part and that if they did nominate someone then the contract was between the vendor of the one part and the person nominated [thereinafter called 'the purchaser'] of the other part. It follows that *prima facie* the person nominated was a contracting party and that the word 'purchaser' refers to the person nominated wherever it appears in the contract. Another internal indication supporting that construction is

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18 (1985) 41 SASR 458 at 460.
19 Ibid.
20 (1995) 5 Tas R 121.
21 Ibid at 128.

> provided by the fact that the only way in which the rezoning referred to in cl15 could have been achieved was by an objection by the owner or occupier of the property pursuant to the *Local Government Act* 1962, s727(4). If the defendant's contention is correct and for the purposes of cl15 'the purchaser' should be construed as referring to the second and third plaintiffs notwithstanding that the first plaintiff was nominated as the transferee, the clause would have been unworkable from the beginning because the second and third plaintiffs were not the owners and would not have had standing to lodge the objection which was necessary to achieve the rezoning.

There are two matters which were of apparent importance for the result in that case. The first was that the contract was amended at the same time as the original sale was settled, with the result that there was no outstanding obligation to be performed by the plaintiff as the nominee. Secondly and importantly for the present case, the provisions in the contract which were to operate after settlement of the sale would have been unworkable if they were unenforceable by the plaintiff.

[28] That second feature exists in the present case. By the terms of these contracts, there were detailed provisions, obviously inserted with the intention of ensuring that a house was constructed upon the land within a certain time, and of a certain standard. If a nominee were not to become bound by the provisions which were to operate after settlement of the original sales by Hegira, how was Hegira to have had the benefit of the contracts in those respects? Moreover, if "the buyer" referred to in Annexures B and D was to remain Barrier Developments, the outcome would be that it, and not the transferee, would have to construct houses upon land in which it had no interest. The more likely intention to attribute to Barrier Developments was that its exercise of its power of nomination should result in the nominee being bound in its place. And that was the likely intention to attribute also to Hegira, for otherwise the benefit of these post settlement provisions would be substantially denied to it.

[29] In some of the authorities, it is said that the vendor would be unlikely to have agreed to the substitution of an unknown person as the purchaser. But in this case that consideration does not have the same significance. The purpose of the contract, on the purchaser's side of the transaction, as known to both parties, was to permit an entity controlled by Mr Williams to acquire the lands and to build upon them. In any case, the post settlement provisions specifically anticipated the substitution of a subsequent owner, although such a person might be unknown to the vendor. As set out above, cl 4.1 of Annexure B required "the buyer" to obtain a deed of covenant from its purchaser by which it agreed to be bound by these provisions. It is not suggested that cl 4.1 was engaged here by the nomination of the respondent by Barrier Developments. But this provision indicates, upon an objective view, an intention that the vendor should be able to enforce these post settlement provisions against whoever was the then owner of the land.

[30] Accordingly, the term "the buyer" within these post settlement provisions should be construed as a reference to the entity which became the transferee, whether Barrier Developments or, in the event of its nomination of another transferee, that nominee. That is not inconsistent with the identification of "the buyer" on the first page of each contract. Nor is it inconsistent with the definition of "buyer" for Annexure B

within cl 11.6, where the term was defined as the person who "buys the allotment from the developer".

[31] Ordinarily a vendor is taken to have agreed to transfer the land to the purchaser or to the purchaser's nominee, whether or not the contract specifically provides for such a nomination: *Lord v Trippe*.[22] In these contracts, by necessary implication, Hegira agreed to transfer to the nominee of Barrier Developments, but only upon the basis that the nominee agreed to be bound by the post settlement provisions.

[32] The applicants must not only demonstrate that it was Hegira's intention to have the transferee as the party against which it could enforce the post settlement provisions. They must also prove that the respondent agreed to be so bound. The respondent, through Mr Williams, must be regarded as a transferee which knew of the terms of the contracts of sale. It was the respondent which caused the contracts to be completed on the buyer's side. In particular, it was the respondent which paid the price in each case upon settlement. In these circumstances, in taking the transfer, by necessary implication the respondent agreed with Hegira to be bound as "the buyer" under the post settlement provisions. The consideration for the respondent's agreement was that transfer and Hegira's release of Barrier, neither of which Hegira had agreed to do absent the nominee agreeing to be bound. In consequence, upon settlement of each contract, the respondent became bound to perform the post settlement provisions. It is unnecessary then to decide the relevance of the respondent's subsequent conduct, which is consistent only with a belief on the respondent's behalf that it had become bound by those provisions.

[33] It is also unnecessary to consider an alternative argument for the applicants, which was that the respondent is estopped from denying that it was bound by the post settlement terms, except to record some factual findings. The alleged estoppel is an estoppel by convention. The applicants plead that from about March 2001, Hegira, Barrier Developments and the respondent conducted their affairs on the common assumption or understanding that the respondent would be "identified" as the buyer in each contract, it would be the transferee and it would be responsible for the performance of the obligations and covenants post completion. That allegation was not proved, insofar as the respondent was concerned. I accept that there was a common assumption or understanding, at least from the making of each of the contracts, that some entity would be nominated as the transferee and that it would be obliged to perform the post settlement obligations. However, the respondent was not a party to that understanding, at least prior to the making of the contracts. Mr Russell's evidence suggested that he had thought that the respondent was involved in the pre-contractual stage. But he was not dealing with Mr Williams. According to Ms Mengel, although Mr Williams made it clear that someone would be nominated, the indication prior to the contracts being signed was that a decision was yet to be made by him, contract by contract, as to the transferee. It was not until the letter from Coyne Coyne & Towers of 23 April 2001 that the parties had a common understanding that the transferee would be the respondent and that it would perform the post settlement obligations.

[34] There is also another argument for the applicants, which is based upon s 55 of the *Property Law Act 1974* (Qld). The suggested operation of s 55 was not entirely clear, but it seems to have been based on a theory that, in terms of the section, "the

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22 (1977) 14 ALR 129 at 143.

promisor" was Barrier Developments and "the beneficiary" was the respondent. Had it been necessary to consider this argument, that analysis could not have been accepted.

The repurchase of lots 411 and 412

[35] The respondent was obliged to complete the construction of a dwelling on lot 411 within 30 months from the date of the contract of sale, ie by 9 October 2003. It was obliged to complete the construction of a house on lot 412 within 18 months, ie on 9 April 2002. It failed to do so in each case. In the second half of 2003 Mr Williams and Mr Dal Bon for the respondent gave frequent assurances that the buildings would be completed but these were not fulfilled. Accordingly, Hegira became entitled to exercise the options to repurchase lots 411 and 412.

[36] On 5 December 2003, Hegira's solicitors wrote to Coyne Coyne & Towers, exercising the options in respect of lots 411 and 412 on behalf of "Hegira Pty Ltd" rather than Hegira Limited. On 18 December, Corrs Chambers Westgarth for the respondent replied, contending that the notices were ineffective because of that misnomer. On the same day, Hegira's solicitors wrote back confirming that they acted on behalf of Hegira Limited and that their earlier notice had contained a typographical error. They asserted that the previous notices were valid. Alternatively, they said that this letter of 18 December should be taken as an exercise of the options. Bank cheques totalling $2,000 had been posted with the previous notices, consistently with cl 25.4.1 of Annexure D. They wrote, as they had earlier written on 5 December, that the purchase price was to be the market value determined by a valuer appointed according to cl 25.5 and that they would forward a form of contract in the terms then approved by the REIQ in accordance with cl 25.4.2. At the end of each of their letters of 5 and 18 December, they wrote:

> We note settlement is due within thirty (30) days or such further time as may be agreed. Obviously the purchase price will need to be organised beforehand but we will attempt to expedite that matter.

[37] On 18 December, Hegira's solicitors wrote a further letter to Corrs Chambers Westgarth, demanding the payment of $25,000 in respect of each of lots 411, 412 and 413, in consequence of the respondent's failure to conduct substantial building work on each lot for a period of in excess of one month. That amount was claimed under cl 5.1 of the covenants in Annexure B.

[38] On 19 December 2003, Hegira's solicitors wrote to the President of the Australian Property Institute (Queensland Division), which was the body previously known as the Australian Institute of Valuers and Land Economists. They asked for the appointment by the President of a valuer or land economist to fix the market value of each of lots 411 and 412, pursuant to cl 25.5 of Annexure D. Their letter was copied to Corrs Chambers Westgarth.

[39] On 22 December 2003, Corrs Chambers Westgarth wrote to request an extension, under the (2001) contracts of sale, of the date for completion of construction to 15 September 2005. That was rejected by a letter from Hegira's solicitors of 29 December 2003.

[40] On 15 January 2004, an officer of the Australian Institute of Property Valuers telephoned Hegira's solicitors to advise that the appointment would be made by the

Vice President because "the President is with the NAB [National Australia Bank] and a bit close to the matter". The President was Mr Ide who, as an employee of that bank, perceived a potential conflict of duties because Hegira was a wholly-owned subsidiary of the bank. In fact, on settlement of the (2001) contracts of sale, on Hegira's behalf he had executed the transfers to the respondent. After some further discussions between the Institute's Executive Officer, Mr McNamara, and Hegira's solicitors, they wrote to Corrs Chambers Westgarth on 19 January 2004, advising of the problem with Mr Ide and of his preference for the Vice President to make the nomination of the valuer. They asked for advice by 21 January of whether the respondent had any objection to the President making that nomination. There was apparently no reply before 2 February 2004, when Hegira's solicitors wrote to Mr McNamara requesting that the Vice President make the nomination. On 17 February 2004, Mr McNamara wrote to Hegira's solicitors, with a copy to Corrs Chambers Westgarth, advising that "the Institute" had nominated a valuer, Mr Harvey. Mr McNamara wrote that the nomination had been undertaken by the Vice President "on the basis that such will be acceptable to both parties".

[41] On 19 February 2004, Hegira's solicitors wrote to Mr Harvey to give him instructions. On 23 February, Mr Harvey replied, giving a quotation of his fees. At the same time he wrote to Londy Lawyers, who by then were acting for the respondent.

[42] On 24 February, Mr Londy wrote the letter referred to above at [19]. No point was there taken about the appointment of a valuer by the Vice President, rather than by the President. The respondent's position there stated was that Hegira had wrongly failed to tender the balance of the purchase price on the due date for settlement, which was 30 days from either 5 or 18 December 2003, and in consequence the respondent purported to elect to terminate each contract of repurchase.

[43] On the following day, Hegira's solicitors wrote to dispute that contention and to argue that by an implied term, the date for settlement was to be extended to a reasonable time after receipt of the valuation.

[44] On 27 February 2004, Hegira's solicitors corresponded further with Mr Harvey, enclosing copies of quotations for demolition of the houses which had been partially constructed for the purposes of his valuation. On 3 March, they wrote to Mr Londy proposing that the valuer's fees be shared equally between the parties. Mr Londy replied on 5 March saying that in view of the respondent's termination of the contracts, "the valuation exercise in which you are belatedly engaging, is entirely pointless". Undeterred, Hegira's solicitors wrote to Mr Harvey on 7 April 2004, confirming his engagement and offering to pay all of his fees in the event that the respondent did not contribute to them.

[45] After some further correspondence between the solicitors as to whether the contracts had been validly terminated, Hegira's solicitors wrote on 19 April contending that the parties had impliedly agreed to extend time to the extent necessary in order for the prices to be fixed. They also suggested another view of the events, which was that the contracts of repurchase had been "terminated by frustration for the failure of the anticipated event that the independent valuer would fix a purchase price", in which case, they contended, the options could be exercised afresh given that the houses remained uncompleted. All of that was rejected by Mr Londy in a letter of 27 April.

[46] On 30 April 2004, Mr Harvey sent his valuation of lots 411 and 412 to Hegira's solicitors. It appears that he did not send it also to Mr Londy. Mr Harvey valued lots 411 and 412 at $750,000 and $800,000 respectively.

[47] On 7 June 2004,[23] Hegira and Vercorp executed a document entitled "Assignment of Contract" in relation to each of lots 411 and 412 whereby Hegira assigned to Vercorp all of its rights and interests in the repurchase contracts which were said to have resulted from the exercise of the options on 5 December 2003.

[48] On 8 June 2004, Hegira's solicitors again wrote to Mr Londy. Their letter made no reference to the assignment to Vercorp. But they enclosed transfer documents for lots 411 and 412 in which Vercorp was shown as the transferee. They wrote that "[o]ur client is now in a position to settle the purchase of the above lots" and they nominated 16 June 2004 at 2.30pm at the Titles Office as the time and place for settlement. The consideration shown on the transfers corresponded with Mr Harvey's valuations.

[49] On 16 June 2004, someone from Hegira's solicitors attended at settlement. No-one attended for the respondent. On that day Hegira's solicitors sent a letter to Mr Londy saying that they were ready, willing and able to settle throughout the remainder of the day and they enclosed copies of the bank cheques which they held for settlement. That afternoon, Mr Londy replied saying that he had not received copies of the valuations. He maintained that the contracts had been terminated by the respondent. Alternatively, he contended that Hegira was in breach by failing to provide the valuations to the respondent within a reasonable time or by failing to complete within a reasonable time after receipt of the valuations. On 25 June, Mr Londy wrote again, putting forward further reasons why the respondent had not been obliged to settle on 16 June. It is unnecessary to consider these points which by a previous order, I struck out of the Defence.

[50] The respondent argues that it duly terminated the repurchase contracts, by its solicitors' letter of 24 February 2004 or by subsequent correspondence including the solicitors' letter of 16 June 2004. It is necessary to consider only the validity of the termination of 24 February 2004. By then more than 30 days had passed from the notice of exercise of the options, whether given on 5 or 18 December 2003. The date for settlement of the repurchase contracts, as provided by cl 25.4.3 of Annexure D, had passed. No extended period for settlement had been agreed. If it matters, in my view the notice of 5 December 2003 was effective notwithstanding the misnomer of Hegira. Having regard to cl 10.4 of the REIQ terms, it was deemed to have been given on the day on which it was faxed to the buyer's solicitors.

[51] It is not alleged that the respondent caused Hegira to be unready to settle on whatever was the due date for settlement in January 2004. And there is no plea that the respondent represented to Hegira that it need not then tender performance . The practical difficulty, of course, was that the prices were then unknown. That is not said to have been the respondent's fault. Clause 25.5 required the purchase price to be a current market value determined by a valuer appointed by the President of the Institute. It did not require the President to be approached by both parties. The

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[23] The assignment for Lot 411 is dated 7 June 2004; the assignment for Lot 412 is undated but apparently was signed on the same day.

parties were bound to do all that was reasonably necessary to ensure that the contract could be performed and enforced by obtaining such a valuation. But it was open to Hegira to unilaterally request the Institute to appoint the valuer and to have that valuation undertaken. This is what Hegira did, beginning with its solicitors' letter to the President of the Institute dated 19 December 2003. And there had been no impediment to Hegira taking that step earlier, even prior to giving its notice exercising the options, as long as the valuation which was procured could be said to provide a market value which was still current at the time of the required settlement of the repurchases.

[52] But the respondent's argument that Hegira was in breach of the repurchase contracts, by failing to complete within 30 days of its exercise of the options, cannot be accepted. There was no obligation on either party to complete those contracts unless and until the price was fixed. And Hegira had not promised that the lands would be valued within that 30 days. Accordingly, the repurchase contracts were not able to be terminated by the respondent on account of a breach or repudiation by Hegira, as the respondent purported to do so by its solicitor's letter of 24 February 2004.

[53] The real question here is whether the fact that the price had not been fixed within the 30 day period had the result that the contract was able to be terminated by the respondent, not for a breach or repudiation by Hegira, but for non-fulfilment of a condition precedent to performance. The contracts which came into existence upon the exercise of the options were not uncertain because the price in each case had not been fixed. They were contracts the performance of which was subject to the prices being fixed. If that was a condition which had to be satisfied within the period of 30 days, then it was open to either party to terminate the contract upon the failure of that condition and the respondent's termination on 24 February 2004 was valid, although its basis was misstated.

[54] At this point, there is a question of what the parties agreed, within cl 25.5, about the way or ways in which the price could be fixed. Was it a price which could be fixed only by a valuer or land economist appointed by the President of the Institute? Or was it to be a price which was the market value of the land, which failing an appointment of a valuer or the completion of a valuation by the appointee, could be determined by the Court? The applicants argue that it was the latter. Relying on *Sudbrook Trading Estate Ltd v Eggleton*,[24] they argue that the Court could fix the price by itself determining the market value of the land.

[55] The applicants' argument is put upon the questionable premise that *Sudbrook Trading* represents the law in Australia, for which they cite the judgment of Brennan J in *Booker Industries Proprietary Limited v Wilson Parking (Qld) Proprietary Limited*.[25] However, their argument on that point does not refer to the joint judgment of the majority in the same case. Nor does it refer to an important qualification in the judgment of Brennan J.

[56] In *Sudbrook Trading*, a lessee was given an option to purchase the reversion at a price to be agreed by two valuers, one to be nominated by each side of the transaction or by an umpire to be appointed by them. The lessor refused to appoint

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[24] [1983] 1 AC 444.

[25] (1982) 149 CLR 600.

a valuer and resisted the lessee's claim for specific performance on the basis that the contract was uncertain for want of an agreed price. Lord Fraser of Tullybelton said that the provisions for the appointment of valuers were "only subsidiary to the main purpose of the agreement which is for sale and purchase of the property at a fair or reasonable value".[26] His Lordship described the relevant distinction as being "between those cases where the mode of ascertaining the price is an essential term of the contract, and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential".[27] The majority held that when the option there was exercised, there was a contract for sale at a fair price, and if the agreed machinery for the ascertainment of that price broke down, the Court could "substitute other machinery to carry out the main purpose of ascertaining the price …".[28]

[57] *Sudbrook Trading* was decided in the House of Lords after the argument but before the High Court's judgment in *Booker Industries*. That was a claim for specific performance of an agreement for the renewal of a lease. The lessee had been given an option to renew for a further term at a rental to be mutually agreed or failing agreement, to be fixed by an arbitrator appointed by the President of the Law Society. The lessee exercised the option but the lessor required it to vacate the premises. The lessee remained in possession and sued for specific performance. The majority (Gibbs CJ, Murphy and Wilson JJ) held that the lessee was entitled to an order that the lessor do whatever was reasonably necessary to ensure that the rent was fixed, and upon its being fixed, to grant a further lease. Brennan J would have decreed specific performance in terms which required the lessor to grant a lease which contained a clause whereby the rent would be fixed in conformity with the clause which dealt with rental which was within the option. This reflected the different views within the Court as to the effect of the agreement about the process by which the rental was to be fixed and the consequence for the parties if that process were to fail. In the view of Gibbs CJ, Murphy and Wilson JJ, the failure of that process would put paid to the exercise of the option. Their Honours wrote:[29]

> In the present case, the lease itself provides the entire mechanism for determining the rental for the renewed term. There is no further agreement required of the parties. It is true that if they do agree upon that rental, then there is no occasion to resort to the independent mechanism that the lease provides. But, there being no such agreement, all that is required is that the President name a person to fix a figure being not less than the minimum rental operative during the original term. No formality is required to effect the necessary appointment. Either party may request the President to facilitate the fulfilment of the agreement. It may be assumed that if he declines to do so, or if the person nominated declines to carry out the task assigned to him, then the renewal cannot be effected, and that Wilson's exercise of the option will have been fruitless. Nevertheless, in the circumstances as they stand at the present, there is a valid agreement for the renewal of the lease subject to the fixation of a rental for the new term. The fixation of that rental is a condition precedent to the performance of the agreement.

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26 [1983] 1 AC 444 at 483.
27 [1983] 1 AC 444 at 483.
28 [1983] 1 AC 444 at 484.
29 (1982) 149 CLR 600 at 604-605.

In contrast, Brennan J wrote:[30]

> If the contractual machinery for fixing the rental were to fail, the rental would be fixed by the court. There is therefore no impediment to granting a decree of specific performance of the contract and requiring Booker to grant to Wilson a lease containing a clause relating to the fixing of the rental drawn in conformity with cl 4.01. Such a lease would be valid, for if the machinery for fixing the rent should fail, the court's machinery will be available to fix it: certum est quod certum reddi potest.

[58] There was an important qualification in Brennan J's judgment. He emphasised that the case involved a question of construction of a lease, for which the Court would lean towards a construction that provided the necessary term (the rent) where the lessee had been allowed into possession, "for the parties cannot be taken to have intended that the lessee should have been entitled to rent-free possession if the machinery should fail to fix the rent".[31] But he then added that "[c]ontracts for the sale of property may stand on a different footing where an obligation to convey or transfer would not arise until the price is fixed".[32] He cited *Sudbrook Trading*, but held that it was not necessary to consider whether the law in Australia should be redefined in the light of that case.[33] Consequently, the judgment of Brennan J is of limited assistance to the applicants' case. His Honour's reasoning was inconsistent with that of the joint judgment on the point which is presently relevant, and he specifically put on one side cases of contracts for the sale of land.

[59] *Sudbrook Trading* has received some acceptance in Australian judgments. In *GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd*,[34] Young J said that since *Sudbrook's* case, Australian courts have been more ready to construe a contract to the effect that if the essential agreement was for a fair and reasonable price, and the agreed machinery to ascertain that price had broken down, the court could supply the necessary machinery. In this Court, in *Bounty Systems Pty Ltd v Odyssey Gaming Services Pty Ltd*,[35] Muir J referred to *Sudbrook Trading* in construing a software licence agreement where a fee was to be assessed by an expert appointed by agreement or by the President of the Australian Computer Society. The expert chosen by the parties withdrew from the exercise. In that context, Muir J said that the Court should endeavour, wherever possible, to give effect to a contract and not to frustrate it and that:[36]

> [i]f referral (to the expert) is made and the determination miscarries for whatever reason the appointment of the expert can be revoked and a new expert appointed in his stead.

But that was not to say that the court could fix the fee failing the operation of the mechanism which the parties had agreed. Similarly, in *Kinivan v Maoudis*,[37] McPherson J accepted at least some of the reasoning in *Sudbrook Trading*, but specifically left open the question, which he identified by reference to the speech of

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30 (1982) 149 CLR 600 at 617.
31 (1982) 149 CLR 600 at 616.
32 Ibid.
33 (1982) 149 CLR 600 at 617.
34 (1990) ANZ Conv R 367 at 369.
35 [2007] QSC 230.
36 [2007] QSC 230 at [61].
37 (1988) ANZ Conv R 320.

Lord Fraser, "concerning the power of the Court to substitute 'other machinery' for arriving at the price if that selected by the parties breaks down".[38]

[60] In the present case, the parties adopted an objective standard by which the price was to be fixed, which was the then market value of the land. That strengthens the argument for the applicants that a failure of the agreed machinery for determining that market value did not put paid to their agreement. A court could determine the then market value. Nevertheless, the question of construction remains: did the parties agree that the price must be determined by, and only by, the valuer appointed under cl 25.5?

[61] In my conclusion, that last question must be answered "yes", mainly because the parties agreed that settlement should take place within 30 days of the exercise of the option. It may be accepted that the parties could have reasonably anticipated some failure of the agreed machinery which would have left the price undetermined at the end of that period. But notwithstanding the difficulties which were experienced in this case in the appointment of a valuer, the risks of the machinery failing were relatively small. After all, Hegira was under no express time limit to exercise the option. And it was not precluded from asking the President of the Institute to appoint a valuer and from obtaining that valuation prior to exercising its option. There was no requirement for the respondent to be involved in the appointment process. It was possible then to ensure that the machinery was working before it was to be employed. On the other hand, it could not have been anticipated that there would be any prospect of a determination of the market value of the land by a court within the period of 30 days.

[62] Young J saw the same problem in *GPI Leisure Corporation Ltd v Herdsman Investment Pty Ltd (No 1)*. In that case, the fact that the property there would have to be valued and traded "in a relatively short period of time" was in his view relevant in considering whether a clause should be construed as requiring a sale of certain property at a fair market price.

[63] The time limit of 30 days is important in this way, regardless of whether it was a term of the repurchase contracts that time should be of the essence. Clause 25.4.2 of Annexure D incorporated into the repurchase contracts the terms of the then REIQ form of contract (which were also those which the parties had employed in the 2001 contracts of sale). By cl 6.1 of those terms, time was of the essence of the contract (except regarding any agreement between the parties on a time of day for settlement). The applicants argue that such a term was so inconsistent with the purpose of the options to repurchase that by necessary implication, that standard term should be excluded. I do not accept that submission. If anything, the purpose of the option to repurchase would be promoted by a term making time of the essence, for it would tend to expedite the repurchase of the land so that Hegira could put paid to the impact of the purchaser's default in complying with the building covenants. But regardless of whether time was made of the essence, it is clear that the parties agreed upon a settlement of the repurchase contract within 30 days. They did not agree, for example, upon a settlement which was to occur according to when the price was determined. Nor did they simply agree that a settlement should occur within a reasonable time. They agreed upon a settlement at the end of a

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38 Ibid at 323.

period, within which there was no real prospect that the price could be determined other than by the machinery of a valuation expressed within cl 25.5.

[64] It follows that the relevant condition precedent to performance was the determination of that market value by a valuer acting under cl 25.5 and that this condition had to be satisfied by the agreed date for performance. Because that condition was not fulfilled, the contract of repurchase was able to be terminated by either party.

[65] That is not an unlikely intention to attribute to the parties. It broadly accords with the position in contracts for the sale of goods, for which s 12 of the *Sale of Goods Act 1896* (Qld) (and its equivalents in other jurisdictions) provides that where there is an agreement to sell on terms that the price is to be fixed by the valuation of a third party, and the third party cannot or does not make the valuation, the agreement is avoided. In cases such as the present, the contract would be voidable by either party for failure of the condition, it being a condition precedent to performance and not to the existence of the contract itself. But that difference is of no practical consequence here, where the respondent unequivocally terminated the contracts on 24 February 2004.

[66] Should it matter, the appointment of Mr Harvey's firm was not an appointment made by the President of the Institute. It was an appointment made by the Vice President and it is not demonstrated that he did so pursuant to some delegation of the power of the President in that respect. Accordingly, the valuation which was ultimately forthcoming was not one made under cl 25.5.

[67] In consequence the contracts for the repurchase of lots 411 and 412 were duly terminated by the respondent and the claim for specific performance of those contracts must be dismissed.

Lots 413 and 414

[68] The construction period for lot 414 expired on 9 October 2004 and for lot 413 on 9 October 2005. On 4 November 2005, Hegira assigned to Vercorp its rights in respect of these properties.

[69] On 8 May 2006, Vercorp gave to the respondent notice of that assignment and notices exercising the options to repurchase lots 413 and 414. Ultimately, there was no challenge to Vercorp's claim to be entitled to exercise those options (if the respondent had become bound by them). The date for settlement was therefore 7 June 2006. Also on 8 May, Vercorp wrote to the President of the Australian Property Institute asking for a valuer to be nominated. On the following day, Mr McNamara for the Institute replied, advising that a certain valuer had been nominated.

[70] The valuer then contacted Mr Londy, who said that his client did not then acknowledge that the options had been validly exercised and said that it would not participate in the valuation process. Correspondence then passed between the valuer, the Institute and Vercorp's solicitors. All of this must have caused some delay in the completion of the valuation. The valuation was not provided until the date of settlement, 7 June 2006. Lots 413 and 414 were valued at $800,000 and $600,000 respectively.

[71] By a facsimile transmission at about 12.20pm on 7 June, Vercorp's solicitors sent to Mr Londy a copy of the valuation and a transfer to be executed by the respondent and handed over at settlement. They attached copies of bank cheques for $800,000 and $600,000 payable to the respondent. Their letter concluded as follows:

> We note that there is a mortgage on each Lot to NAB. We nominate settlement to take place at the Titles Office at 3:00pm today unless you notify us of the contrary in writing. However, if your client requires additional time to have the transfers executed and releases obtained from NAB then please provide us with a written request for an extension of the settlement date.
>
> Our client is ready, willing and able to settle today.

[72] At the appointed time of 3.00pm, Mr Murdoch of the solicitors for Vercorp attended at the Titles Office to settle the contracts. No one representing the respondent attended. A little later, Vercorp's solicitors sent a fax to Mr Londy saying that Mr Murdoch had attended for the settlement but had left at 3.20pm, and that Vercorp remained ready, willing and able to settle at any time up to 5.00pm that day. They added that if the respondent wanted an extension of time then Mr Londy should fax a request so that they could take Vercop's instructions. There was no response that day from Mr Londy.

[73] On 8 June 2006, Vercorp's solicitors wrote to Mr Londy, purporting to affirm the contract and advising that if Mr Londy contended that the 30 days ran from some other time, they expected that Vercorp would be "agreeable to settling on whatever date is the appropriate date".

[74] On 13 June 2006, Mr Londy replied that if Vercorp proved that the options were validly exercised by it (which Mr Londy said, the respondent did not admit), Vercorp was not entitled to an order for specific performance for two reasons. One was that the amount of the valuations was "much too low" and that ultimately the valuation report was "unreliable and invalid for the purposes of the present exercise". That contention was struck out of the Defence by an order on 16 December 2008. The other ground was an alleged estoppel, apparently based upon something which had occurred at an unsuccessful mediation held in July 2005. The details of that ground need not be considered here because it is not pleaded. In that letter, there was also some complaint that the valuation had been given only two hours prior to the time for settlement, which was said to have given "insufficient time to properly consider our client's position". But the respondent's pleaded point, which was that an unreasonably short time was allowed for settlement of the repurchase contracts, was not raised.

[75] The respondent's pleaded case is that settlement was to occur only upon "reasonable notice by either party", or alternatively, "within a reasonable time after a date and time stipulated by either party". But ultimately, the respondent argued that it was entitled to terminate upon a different basis, which was that a specific term requiring Vercorp's solicitors to submit transfer documents a reasonable time before the settlement date had not been performed. After the hearing and over the objection of counsel for the respondent, I received a further written submission from the applicants' counsel on this point. The objection was well taken insofar as the applicants' counsel had sent it to me without first notifying their opponents. The objection was not well founded given that this point had not been flagged by the

Defence. I received a written submission from the respondent's counsel in response. Ultimately, the point involves legal questions which can be fairly determined despite the absence of a pleading and it is convenient to go now to it.

[76] One of the REIQ terms incorporated in these contracts was cl 5.2(1) which provided as follows:

> 5.2 Transfer Documents
>
> (1) The Transfer Documents must be prepared by the Buyer's Solicitor and delivered to the Seller a reasonable time before the Settlement Date.

Another of the REIQ terms was cl 9.1 as follows:

> 9.1 Seller May Affirm or Terminate
>
> If the Buyer fails to comply with any provision of this contract, the Seller may affirm or terminate this contract.

The respondent's case is that Vercorp, here the buyer, failed to comply with cl 5.2(1) because the transfer documents were not delivered a reasonable time *before* the settlement date. Instead, the transfer documents were delivered *on* the settlement date.

[77] Clause 9.1 is in terms by which it is engaged by any breach of the contract by the buyer, no matter how serious. That was the view in the New South Wales Court of Appeal in relation to substantially similar provisions in a contract for the sale of land in *Honner v Ashton*.[39] That case was the subject of academic criticism before it was effectively overruled in 2004 by a majority of the same Court in *Hewitt v Debus*,[40] where the outcome was apparently affected by the circumstance that, unlike the present contracts and what is usually the position in Queensland in contracts for the sale of land, time had not been agreed to be essential. The potential for cl 9.1 to have harsh consequences, at least in a rising market, was identified by Judge Robin QC in *Le v Quieshi*.[41] Nevertheless, the question is whether Vercorp "failed to comply" with cl 5.2(1).

[78] Plainly Vercorp did not have its solicitor deliver the transfer documents before the settlement date. But was Vercorp obliged to do so in the circumstance where that was impossible pending the quantification of the price? By s 61 of the *Land Title Act 1994* (Qld), the transfer document had to include an acknowledgement of the amount paid (or details of any other consideration). As already discussed, the determination of the price under cl 25.5 of Annexure D was a condition precedent to the performance of a repurchase contract. In the same way, by necessary implication it was a condition precedent to the performance of the obligation expressed in cl 5.2(1). Such an implication satisfies the prerequisites for an implied term according to *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales*.[42] The implication is necessary in the same way as a similar term was implied in *Re Ronim Pty Ltd*.[43] In that case, on the date fixed for

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39 [1980] ANZ Conv R 343.
40 (2004) 59 NSWLR 617.
41 [2003] QDC 442.
42 (1982) 149 CLR 337 at 347.
43 [1999] 2 Qd R 172.

completion it became impossible to search the relevant title because the Land Titles Office computer was inoperative. For that reason, the purchaser did not settle by 5.00pm on the settlement date. But the vendor was unable to terminate the contract, because the Court implied a term that where, through no fault of the parties, they could not carry out the necessary checks to verify title on the day for completion, the obligation to complete should be suspended until that could be done. The Court (de Jersey CJ, Pincus and Thomas JJA) said:[44]

> Such a term is reasonable and equitable, so obvious that it goes without saying (especially in light of the evidence about uniform conveyancing practice), is capable of clear expression, and is not contradictory of any express provision of the contract. As to the other requirement, that the term be necessary to give business efficacy to the contract, while it is true that the contract *could* operate without such a provision, it could not in these circumstances operate effectively, because the purchaser would be quite unable to determine whether it would, in exchange for the balance purchase moneys, receive the title it had been promised. It is to our mind inconceivable that had the parties given consideration to this possibility, they would have assumed that the purchaser would be obliged nevertheless to stumble on in the dark.

[79] In the present case, by the unavailability of the valuation, which was not the fault of Vercorp, it became impossible for Vercorp to comply strictly with cl 5.2(1). It cannot be thought that the parties intended that in this circumstance, Hegira or its successor should find itself in breach of the repurchase contract, such that the unwilling vendor of the land might have all of the rights and remedies for breach of contract, including a right of termination. Clause 9.1 is engaged only where there is a failure to comply with the provision of the contract. As other parts of cl 9 confirm, it is only a breach of contract which will engage cl 9. Because Vercorp was under no obligation to deliver the transfer documents until they could be prepared, as long as the impediment to their preparation was not through its default, the obligation under cl 5.2(1) was suspended and was not breached. Accordingly, cl 9 was not engaged.

[80] The evident purpose of cl 5.2(1) is to ensure that a seller has sufficient time to execute the transfer documents to be delivered at settlement. In the present case, if it was impossible for that to occur because the transfer documents were delivered only on the day for settlement, then the respondent would have been excused from the obligation to settle on that day. This would have been because either performance of the contract would have become impossible, thereby discharging the contract, or because by a further implication, the contract would have remained on foot but with the settlement date extended to allow the respondent whatever time was required. However, it is unnecessary to discuss that question, because there is no evidence that it was impossible for the respondent to settle on 7 June. More precisely, there is no evidence that it was impossible for the respondent to execute the transfer documents and to bring them to a settlement on that afternoon. Notably, at the time there was no complaint made by or for the respondent that this was impossible.

[81] Accordingly, the argument based on an alleged breach of cl 5.2(1) fails.

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44 [1999] 2 Qd R 172 at 180.

[82] I return then to the pleaded case, which is that Vercorp did not give reasonable notice of its proposal for a settlement on the afternoon of 7 June 2006. In support of this case, the respondent led evidence from an independent solicitor, Mr Denny, to the effect that four days' notice is usually required for a vendor's mortgagee to attend a settlement. He also referred to the Queensland Conveyancing Protocol, which has been adopted by the Queensland Law Society Incorporated. That has been in place from only 1 July 2006, but I accept that there was no change to what had been considered to be an acceptable conveyancing practice in June 2006. He also identified the so-called Conveyancing Checklists, which have been prepared by the main insurer of solicitors in Queensland. Mr Denny described the steps which the respondent's solicitors had to take in order to attend to settlement. They had to agree the necessary figures and adjustments to the purchase price, having taken instructions from the respondent as to that proposed price in consequence of the valuation. They had to contact the respondent's bank to book a time for settlement, which Mr Denny said is not usually done whilst the price is unknown. They had to have the respondent sign any documents required for the discharge of its mortgage and to find out the payout figure from the mortgagee. They had to review the transfer document prepared by the buyer's solicitor and have the respondent execute that document.

[83] Clearly, what occurred here was unusual. Ordinarily a settlement would be arranged some days prior to its occurrence. The conveyancing protocol and the conveyancing checklists represent what are prudent guidelines for solicitors. But the question here, if a term is to be implied as the respondent alleges, is whether something less than reasonable notice was given when its solicitors called for settlement on the day in question. That question must be answered by reference to the facts and circumstances of these contracts, albeit informed by the general practice of conveyancers.

[84] The applicants called Mr Murdoch, who had attended for settlement on the day. He said that he had experience where transfer documents had had to be signed on the day of settlement but the settlement had then occurred. He said that it was possible, although not probable, that these transactions could have been settled within the 2½ hours that was allowed by the letter which his firm sent at about 12.20pm. In answer to a question of whether 2½ hours notice would be reasonable, where no prior arrangements had been made to effect settlement, Mr Murdoch agreed that it would not be reasonable, although in re-examination he appeared to qualify that, saying that in the particular circumstances of this case, it was a reasonable time, because of "the fact that we didn't receive the valuations until the morning of the 7th of June and thereby there was nothing reasonably more that we could do other than do what we did".

[85] Any difficulty for the respondent in settling on 7 June 2006 could have been the result of two circumstances. The first was that the price was unknown until the morning of the date for settlement. The second was that the respondent had refused to acknowledge the existence of the contracts. Ordinarily, well prior to the date for settlement the respondent as the seller would have contacted its mortgagee. I am unpersuaded that this would have been impracticable without knowing the purchase prices. The respondent did not call evidence as to the position taken by any mortgagee or as to what amount would have been required to be paid to discharge any mortgage. Nor did it call evidence to establish that in the circumstances it could not have settled by 5.00pm on the date for settlement because, for example, the

relevant person or persons who were to execute the transfer documents was or were unavailable. The respondent chose to lead no evidence from Mr Williams, Mr Londy or the respondent's mortgagee.

[86] The respondent (like Vercorp) was obliged to settle on 7 June if this had not been made impossible by circumstances beyond its control. It is not established that the steps required to be taken on the respondent's side could not have been taken that afternoon so as to effect a settlement.

[87] In any event, I am not persuaded that a term should be implied as the respondent has pleaded. Such a term does not satisfy the prerequisites that it is necessary to give the repurchase contracts business efficacy. Nor is it so obvious as to go without saying. No authority was cited by the respondents for the implication of such a term, although these contracts adopt the REIQ terms. Clause 5.1(1) of the REIQ terms provided that settlement was to occur between 9.00am and 5.00pm on the settlement date. Clause 5.1(2) provided that the place of settlement was to be the Titles Office, failing a nomination of another place by the respondent. According to the express terms then, the parties were obliged to settle on the settlement date without any notice by one to the other of a date, time or place. There is no basis then for implying a term that any such notice was required and that it be reasonable notice or for settlement "a reasonable time after a date and time stipulated by either party".[45] Instead, each party was obliged to settle on the due date as long as that had not become impossible and by circumstances beyond that party's control.

[88] The outcome is that Vercorp was not in breach of contract and the respondent was not entitled to terminate these contracts for the repurchase of lots 413 and 414.

[89] What must now be considered is whether Vercorp or its predecessor, Hegira, made a binding election not to seek specific performance.

Election

[90] On 19 January 2004, Hegira brought proceedings against the respondent in the District Court claiming $75,000. The pleaded case was for $25,000 under each of the contracts for the sale of lots 411, 412 and 413, pursuant to cl 5.1 of Annexure B to the contracts, as Hegira's solicitors had demanded on the previous day. That provision, set out above at [7], provided that in the event of any breach of any of those covenants, the Buyer was to pay to Hegira $25,000 by way of liquidated damages "or such greater sum as may represent the actual loss or damage suffered by Pacific Harbour by reason of such breach". The breach complained of was that between August 2003 and December 2003, the defendant had conducted no substantial building works on any of lots 411, 412 and 413. That was pleaded as a breach of a term within that attachment described as Community Development Standards. The relevant term was as follows:

> No building shall be left without substantial work being carried out for longer than one (1) month. Total construction time for erection of a building shall not exceed nine (9) months. …

The alleged breach, in essence, was halting the progress of construction. This was not the basis for the exercise of an option to repurchase according to Annexure D,

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45 Defence, para 107.

because the option could be exercised only in the event that construction had not been *completed* in accordance with the contract. The date for completion of lot 414 was 9 October 2004, and the date for lot 413 was a year later. The District Court proceedings were thereby commenced before the option to repurchase either of those properties was exercisable.

[91] Accordingly, the option was not exercisable for the breach which was pleaded in the District Court proceedings and nor had the options for lots 413 and 414 become exercisable at the time that those proceedings were issued. At least for those reasons, the respondent's argument that the commencement of the District Court proceedings involved an election not to exercise the options to repurchase cannot be accepted. By their written submissions, counsel for the respondent argue that "the right to claim damages and the option to repurchase are inconsistent rights because each would result in the Applicants being compensated for the same breach". But there is no inconsistency. And a further problem with the submission is that the option to repurchase is not compensatory.

[92] There seems to be an argument that there was a binding election by the pleading of the statement of claim in the present proceedings. Paragraph 18(b) pleads that the respondent, in breach of cl 22 of Annexure D, failed to complete construction of a dwelling house upon lots 411, 412 and 413. Paragraph 18(c) alleges that in breach of the same provision of the contract for 414, the respondent failed to construct a house upon that land. Paragraph 20 pleads the liquidated damages clause. Paragraph 21 pleads that the respondent's failure to complete construction of a house on each of the four lots has had some consequences for the owner of the Pacific Harbour development. Then in paragraph 22, it is claimed that in those premises, the respondent is liable to Vercorp in the sum of $100,000 (4 x $25,000) for liquidated damages.

[93] The argument for the respondent is that the claim within the present proceedings for liquidated damages is not pleaded as an alternative to the claims for specific performance of the repurchase contracts. But if there is an inconsistency in the sense that the applicants, or more particularly Vercorp, could not be given both liquidated damages and specific performance of the repurchase contracts, that is not to say that there has been a binding election to abandon the claim for specific performance. It is to say only that Vercorp should now be put to that election.

[94] The respondent also argues that the present proceedings are an abuse of process because they involve the same claim for the recovery of liquidated damages as that in the District Court. That must be rejected. The District Court proceedings have not been prosecuted. But in any case, the breach or breaches which are complained of in those proceedings are different from those pleaded in paragraphs 18(b) and (c) of the present statement of claim.

[95] It follows that there has been no election which would disentitle Vercorp to specific performance of the contracts for lots 413 and 414.

Claim for liquidated damages

[96] The respondent argues that cl 5.1 constitutes a penalty. From the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor*

Company Limited,[46] there are three presently relevant propositions. First, a provision will be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. Second, there is a presumption that it is a penalty when a single lump sum is made payable, on the occurrence of one or more of several events, some of which may occasion serious and others but "trifling damage". Thirdly, a sum may be a genuine pre-estimate of damage, although the consequences of the breach are such as to make a precise pre-estimation almost an impossibility.

[97] The onus is upon the respondent to prove that this is a penalty. But the fact that the same sum ($25,000) is payable regardless of the breach, and in circumstances which might involve but little or no damage, raises the presumption here that the clause is a penalty. For example, cl 1.1 of Annexure B required that all development was to be in compliance with the Community Development Standards which were Annexure C. One requirement within those standards was that the owner was to keep the grass cut; another was to screen all hot water systems from view. It is difficult to see that the sum stipulated was a genuine pre-estimate of the likely damage in each and every of the very many circumstances which might have been contemplated at the time of these agreements. That impression is confirmed by the evidence of Mr Russell. He said that this provision was inserted "to ensure that people did comply with the building covenant" and that the figure was probably arrived at upon the advice of the developer's solicitors rather than there being "a matter of consulting with … sales staff as to the likely impact on sales if there was non-compliance with the building covenants". He had no recollection of any calculations to work out whether $25,000 was a fair estimate of the likely financial impact upon the developer. When asked whether this was "a figure intended to frighten purchasers into complying with their obligations under the building contract?", he answered "I prefer to say more encourage them to comply with the terms of the contract".

[98] I am satisfied that the figure was not a genuine pre-estimate of the likely loss to the developer and that cl 5.1 is a penalty. Accordingly, the applicants are not entitled to liquidated damages.

The assignment to Vercorp

[99] The applicants anticipated a defence that the assignments from Hegira to Vercorp were invalid. But ultimately no such argument was advanced.

Conclusion

[100] Vercorp should not have a decree for specific performance at this stage because there is yet to be litigated that part of the respondent's counterclaim which seeks relief under the *Trade Practices Act* for misleading and deceptive conduct said to have been engaged in by the applicants in obtaining the valuations for the purpose of the repurchases. Conceivably, if that misconduct were established and depending upon the evidence of a loss or potential loss by reason of it, it might be appropriate to grant relief under s 87 which affects the performance of the repurchase contracts, at least by varying the prices from those according to the 2006 valuations.

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46 [1915] AC 79 at 87-88.

Therefore, in this judgment it will be declared that on 7 June 2006 the respondent was bound to complete contracts for the sale of lots 413 and 414, which were made by the due exercise of options to purchase on behalf of the first applicant. The claims for specific performance of contracts for the repurchase of lots 411 and 412 will be dismissed. The claim for relief in paragraph (b) of the prayer for relief of the statement of claim is also yet to be litigated.[47] The claim within paragraph (c) of the prayer for relief in the statement of claim, which is the claim for liquidated damages, will be dismissed. I will hear the parties as to other orders and as to costs.

[47] Being a claim for damages for the cost of removal of structures from the lots.