SUPREME COURT OF QUEENSLAND

CITATION:	*Vennard v Delorain P/L as Trustee for the Delorain Trust* [2010] QCA 309
PARTIES:	**TALIA REE VENNARD** (plaintiff/appellant) **v** **DELORAIN PTY LTD AS TRUSTEE FOR THE DELORAIN TRUST** ACN 125 370 461 (defendant/respondent)
FILE NO/S:	Appeal No 6740 of 2010 SC No 3886 of 2009
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeal
ORIGINATING COURTS:	Supreme Court at Brisbane
DELIVERED ON:	5 November 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2010
JUDGES:	de Jersey CJ, Fraser JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OTHER MATTERS – where the appellant agreed to purchase a proposed lot in a community titles scheme – where the appellant purported to terminate the contract under various statutory provisions, or for misrepresentation, and contended the contract was void for uncertainty – where the respondent denied that the contract was void or that the terminations were effective and insisted on completion – where the appellant applied for declarations that the contract was void for uncertainty, had been terminated under various statutory provisions or that she was entitled to avoid, not complete or cancel the contract – where the primary judge dismissed the applications – where the appellant challenged the primary judge's conclusion that she was not entitled to avoid or not complete the contract under s 25 of the *Land Sales Act* 1984 (Qld) for non-compliance with s 21 – whether the appellant was entitled to

avoid the contract under s 25 for non-compliance with s 21 – whether s 21 required a precise description of the proposed lot – whether the appellant proved she suffered material prejudice

CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATIONS ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS – where the appellant challenged the primary judge's conclusion that she was not entitled to cancel the contract for non-compliance with s 212 of the *Body Corporate and Community Management Act* 1997 (Qld) ('BCCMA') – whether the appellant was entitled to terminate the contract pursuant to s 213 – whether the appellant proved that the incompleteness in the disclosure statement was substantial

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – PRESERVATION OF RIGHTS, LIABILITIES AND LEGAL PROCEEDINGS ON AMENDMENT, REPEAL, LAPSING ETC OF ACT OR PROVISION – OTHER CASES – where the appellant challenged the primary judge's conclusion that she was not entitled to cancel the contract for non-compliance with s 212 – whether the appellant validly cancelled the contract pursuant to s 212 – whether the contract complied with s 212 prior to the amendment of the BCCMA by the *Body Corporate and Community Management Amendment Act* 2009 (Qld) – whether the amended Act applied with retrospective effect to the appellant's legal proceedings – whether the appellant had lawfully cancelled the contract prior to 5 June 2009 under s 212 – whether the appellant's originating application constituted an election to cancel the contract under s 212 – whether the exception to retrospectivity in s 362A(3)(b)(i) of the amended Act applied – whether the appellant was entitled to cancel the contract under the amended s 212

Body Corporate and Community Management Act 1997 (Qld), s 66(1)(d), s 66(1)(e), s 66(1)(f), s 171, s 213, s 213(1), s 213(2)(e)(i), s 213(4), s 213(6), s 213(7), s 214, s 217, s 362A(1), s 362A(2), s 362A(3)(b)(i), s 362A(3)(b)(ii)
Body Corporate and Community Management Amendment Act 2009 (Qld), s 3, s 4
Building Units and Group Titles Act 1980 (Qld), s 8(5), s 49
Land Sales Act 1984 (Qld), s 2, s 6, s 9, s 21(1), s 21(1)(a), s 21(5), s 21(6), s 25(1)
Land Title Act 1994 (Qld), s 37, s 38, s 42, s 49A, s 52
Property Agents and Motor Dealers Act 2000 (Qld), s 365(3)

Bankmist Holdings Pty Ltd v Azina Holdings Pty Ltd [2009] WASC 230, cited
Bossichix P/L v Martinek Holdings P/L [2009] QCA 154, cited
Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47, cited
Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal [2004] 1 Qd R 346; [2003] QSC 276, cited
Clegmere Pty Ltd v Samspring Pty Ltd [1983] 2 Qd R 399, cited
Clifford v Ashburton Borough [1969] NZLR 446, cited
Cowan & Sons v Lockyer (1904) 1 CLR 460; [1904] HCA 19, cited
Dainford Limited v Tari Nominees Pty Ltd & Ors, unreported, Campbell CJ, Sheahan and McPherson JJ, Supreme Court of Queensland, No. 563 of 1983, 24 October 1984, cited
Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd (1983) 155 CLR 129; [1983] HCA 44, cited
Hannah & Ors v TW Hedley (Investments) Pty Ltd & Ors [2010] QCA 256, cited
Highmist P/L v Tricare Ltd [2005] QCA 357, cited
Hough v Windus (1884) 12 QBD 224, cited
Landers v Schmidt [1983] 1 Qd R 188, cited
Latitude Developments Pty Ltd v Haswell [2010] QSC 346, cited
Mathieson v Burton (1971) 124 CLR 1; [1971] HCA 4, cited
Minion v Graystone Pty Ltd [1990] 1 Qd R 157, cited
Mirvac Queensland Pty Ltd v Beioley & Anor [2010] QSC 113, cited
Shepherd v Felt & Textiles of Australia Ltd (1937) 45 CLR 359; [1931] HCA 21, cited
Silverton Ltd v Shearer [1983] 2 Qd R 411, cited
Sunbird Plaza Pty Ltd v Boheto Pty Ltd [1983] 1 Qd R 248, cited
Vennard v Delorain P/L [2010] QSC 190, related
Williams v Frayne (1937) 58 CLR 710; [1937] HCA 16, cited
Wilson v Mirvac Queensland Pty Ltd [2010] QSC 87, cited

COUNSEL: P J Roney for the appellant
D A Skennar for the respondent

SOLICITORS: Macrossan and Amiet Solicitors for the appellant
Cronin Litigation Lawyers for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with the order proposed by His Honour, and with his reasons.

[2] **FRASER JA:** By contract dated 19 September 2007 the appellant agreed to buy a proposed lot in a community title scheme to be established by the respondent for $350,000. In subsequent correspondence between the parties' solicitors the appellant purported to terminate the contract under various statutory provisions or

for misrepresentation. She also contended that the contract was void for uncertainty. The respondent denied that the contract was void and that the appellant's purported terminations were effective. The respondent insisted that the appellant complete the contract.

[3] On 14 April 2009 the appellant applied in the trial division for declarations that the contract was void for uncertainty or that, under various statutory provisions, the contract had been terminated or that, under other statutory provisions, the appellant was entitled to avoid it, not complete it or cancel it. The primary judge found in favour of the respondent and dismissed the appellant's application with costs.[1]

[4] At the hearing of the appeal the appellant's counsel conceded that the primary judge was correct in holding that the contract was not void for uncertainty. The appellant also did not challenge the primary judge's rejection of her arguments that she had validly terminated the contract under the *Property Agents and Motor Dealers Act* 2000 (Qld) ("PAMDA").[2] The appeal was confined to challenges to the primary judge's conclusions that the appellant was not entitled to avoid or not complete the contract pursuant to s 25 of the *Land Sales Act* 1984 (Qld) ("LSA")[3] for non-compliance with s 21 of that Act and she was not entitled to cancel the contract for non-compliance with s 212 or s 213 of the *Body Corporate and Community Management Act* 1997 (Qld) ("BCCMA").[4]

***Land Sales Act* 1984 (Qld), ss 21 and 25**

[5] Section 21 of LSA applied because the contract was for the purchase of a "proposed lot" within the meaning of that term in s 6 (that which will become a registered lot upon registration of a plan and recording of a community management statement for a community titles scheme under BCCMA). Subsection 21(1) provides that before a person enters upon a purchase of a proposed lot there shall be given to the person, or to the person's agent, a statement in writing signed by the person who is to become the person's vendor or that person's agent, that (amongst other things), "clearly identifies the lot to be purchased". The effect of ss 21(5) and (6) is that s 21(1) is satisfied if a prospective vendor incorporates the prescribed matters in a first statement that the vendor is required to give under s 213 of BCCMA. Under s 25 of LSA a purchaser may avoid the instrument made in respect of the purchase of the proposed lot "if the purchaser has been materially prejudiced by" a failure to give to the purchaser or purchaser's agent a statement in accordance with, or that sufficiently complies with, s 21(1).

Identification of the proposed lot: s 21 of the *Land Sales Act* 1984 (Qld)

[6] The contract identified the lot to be purchased as "Proposed Lot 51 on proposed SP 207070, as highlighted on the Identification Plan contained in the Disclosure Documents" at "Unit No. 51 in "Delor Vue Apartments" situated at 3 Deloraine Close, Cannonvale, Qld." The annexed "Disclosure Documents" were addressed to the appellant and included the sub-heading "Re: Sale of Proposed Lot No. 51 "Delor Vue Apartments"". The appellant signed the Disclosure Documents above an acknowledgment that she had received them on 14 September 2007. The Disclosure Documents included a "Statutory Disclosure Statement" which stated that it made disclosures pursuant to s 21 of LSA and s 213 of BCCMA.

---

1 *Vennard v Delorain P/L* [2010] QSC 190.
2 Reprint No. 3A as in force from 1 July 2007.
3 Reprint No. 5A as in force from 1 July 2007.
4 Reprint No. 4 as in force from 1 July 2007.

[7] In the disclosure under s 21 of LSA the respondent stated that the lot to be purchased was the "Proposed Lot described on the front page of this Document". That page described the property as "Proposed Lot No. 51 "Delor Vue Apartments"". In the disclosure under s 213 of BCCMA the respondent stated that the proposed community management statement was attached. The attached "Proposed Community Management Statement", which was also described as "First/New Community Management Statement", included in Schedule B an "explanation of the development of scheme land". It described a progressive development of the scheme land over five stages. Clause 8 of Schedule B provided that each stage "will be created by way of a building format plan and a new Community Management Statement" and clause 9 provided that the development of the scheme land was depicted on the "concept plan as set out in Annexure "X" to this Schedule B". Clause 16 stated that the concept plan annexed was intended only to represent "an indicative development plan for the scheme land", it was annexed for "illustrative purposes only", and the concept drawing did not "accurately fix or specify the location of buildings or the boundaries of buildings, all of the same being subject to a final survey being undertaken after completion of all relevant civil works and landscaping works to be progressively undertaken on the scheme land as each stage is completed."

[8] The Disclosure Documents included numerous plans under the heading "Proposed Building Format Plan". The plans included:

(a) A schematic plan labelled "Delor Vue Apartments". It shows eleven rectangles of differing dimensions identified by letters from A to K as an "Apartment Building". The plan is marked with a scale and a North arrow. "Apartment Building J" appears near the eastern boundary between buildings "I" and "K" (which is near the southern boundary). "Deloraine Close" is printed below the western boundary.

(b) A schematic plan divided over two consecutive pages. This includes much the same information and some additional information. Some of the "Buildings" include the words "No car park level". Those words are not in "Building J". Different segments of the plan, each including one or more buildings, are labelled with "stage" numbers from 1 to 5. Each "Building" includes two or three apartment numbers for each of the three or two floors of the building. The numbers range from 1 to 62. On the second page of the plan (which shows buildings D, G, J and K) buildings J and K are marked as being in "Stage 3". "Building J" includes the following text under the word "Apartments": "55 56 Third", "53 54 Second", and "51 52 First". The number 51 is circled and highlighted. That page is signed by the appellant.

(c) A similar but more legible plan in two parts on consecutive pages. This plan substantially replicates the preceding plan except that it omits the references to stages. A legend on the second page refers to "62 Units 1 Deloraine CL Cannonvale". On the second page of this plan the number "51", within "Building J Apartments" is circled and highlighted. That page is signed by the appellant.

(d) A "Typical Building Setouts" plan. This includes a plan of a "Typical 2 Unit Block" and "Typical 2 Unit Carspace Floorplan".

(e) A "Typical Roof Plan". This shows such a plan for a 2 unit block and a 3 unit block.

(f) Elevations of all of the buildings. The elevations of "Block J" show a three storey building with two apartments on each floor.

(g) A "Ground Floor Part Plan South". The location of rectangles and smaller, adjacent squares marked with numbers from 51 to 56 corresponds with the location of "Apartment Building J" and "Building J" on earlier plans. The location of stairs on this plan also corresponds with the location of stairs on the "Typical 2 Unit Block Carspace Floorplan". A circle is drawn around a rectangle and smaller adjacent square, each of which is numbered 51 and highlighted. This plan is signed by the appellant.

[9] Taken together, those plans and elevations describe proposed Lot 51 as comprising 1 of the 62 apartments to be constructed at 1 Deloraine Close, Cannonvale, being apartment 51 on the first floor of "Building J", and the carpark and adjacent space on the ground floor of the same building, as generally described on those plans and elevations.

[10] The appellant argued that the contract and Disclosure Documents did not clearly identify the lot to be purchased because the purported identification was incomplete, ambiguous and confusing. The appellant emphasised that there was no annexure labelled "X" as contemplated by the proposed community management statement and there was no plan marked "SP 207070" as contemplated by the contractual description. The appellant also argued that there was no "Identification Plan" as contemplated by the contractual description and that the primary judge erred by referring to the plans annexed to Schedule B "of the contract", rather than Schedule B of the "proposed community management statement".

[11] The primary judge held that although there was no plan labelled "X" the annexed plans could appropriately be described as concept plans. That was a correct characterisation of what I have called the "schematic plans". The primary judge held that the contract was accompanied by an "Identification Plan". I agree. The annexed plans fell within the description of the property in the contract's reference schedule as the proposed lot "highlighted on the Identification Plan contained in the Disclosure Documents". The contract defined "Identification Plan" as meaning "the plans contained in the Disclosure Documents used in order to identify the location and approximate size of the Lot in the Development". Although the term "Identification Plan" was not printed on any plan, it is obvious that the plans were intended to identify the property to be purchased. So much clearly appears from the highlighting of the number 51 where it appeared on the plans and the appellant's signature on those particular plans. The primary judge concluded that the reference to "proposed SP 207070" was an irrelevant mistake which should not have confused the appellant.[5] Again, I would affirm that conclusion. Because there was no such plan proposed, and because there were annexed plans and elevations which did identify proposed Lot 51, the reference to the survey plan should be disregarded. A reasonable person in the appellant's position would not have been confused by any of those matters.

---

5 *Vennard v Delorain P/L* [2010] QSC 190 at [22]-[23].

[12] The appellant argued that the identification of proposed Lot 51 lacked clarity because there was no real property description of the land which was to be the subject of the scheme, the plans and elevations did not include dimensions, and they did not disclose which of the two apartments on the first floor of "Building J" was intended to comprise Lot 51.

[13] As to the first point, the land the subject of the proposed scheme was identified in the statement under s 213 of BCCMA and annexed plans by the residential address "Delor Vue Apartments" at "1 Deloraine Close, Cannonvale". The street number differed from that given in the cover page of the contract and the reference schedule ("3 Deloraine Close, Cannonvale") but it is commonplace to find a street address which includes more than one number for a large allotment. There was no evidence that the use of the different street number in the Disclosure Documents rendered the description inaccurate, confusing, or incomplete.

[14] The appellant argued that a requirement for a more precise description was suggested by the objects of LSA expressed in s 2 "to protect the interests of consumers in relation to property development" and "to ensure that proposed allotments and proposed lots are clearly identified". However another object expressed in s 2 is "to facilitate property development in Queensland". It is evident that there may be some tension between that object and the consumer protection objects upon which the appellant relied. The relevant question in the construction exercise is how far the legislation goes in pursuit of the relevant purpose or object.[6]

[15] The appellant argued that s 9 of LSA supported the view that s 21 required a precise description of the proposed lot. Section 9, which applies in relation to a proposed allotment rather than a proposed lot, requires the vendor to supply a copy of the plan of survey and a copy of any plan for reconfiguring a lot, with a metes and bounds description and contour map. In my view, the contrast between the terms of s 9 and s 21 suggests that s 21 does not require the precise description demanded by s 9. That is consistent with the nature of the "off the plan" unit sales to which s 21 applies. Section 21 does not require a clear description of the proposed lot, but merely that it be clearly "identified".

[16] The primary judge rejected the appellant's further argument that the contract did not make it clear that the carpark for Lot 51 was freehold. In fact the identified carpark was allocated as part of the title to the Lot which the respondent proposed to convey to the appellant, but that is not relevant to the present question. The appellant referred to the allocation of common property for the exclusive use as a carpark for some other owners, as reflected in a draft community management statement, but that is equally irrelevant to the present question.

[17] The appellant referred to the requirements of BCCMA in s 66(1)(e) that the community management statement include bylaws, unless the bylaws are those in Schedule 4, and the requirements in s 171 in relation to "exclusive use by-law[s]". However the proposed community management statement attached to the disclosure statement under s 213 of BCCMA included the word "Nil" under the heading "Schedule E Description of Lots Allocated Exclusive Areas of Common Property". That clearly conveyed that the appellant's proposed lot was not to be allocated the exclusive use of any common property. For that reason, the primary judge concluded that there was no significance in the absence of any information about the

---

6 *Carr v Western Australia* (2007) 232 CLR 138 at 143, point [7].

exclusive use of common property in the Disclosure Documents.[7] The appellant argued that this conclusion was inconsistent with the contractual definition of "Carpark Plan". That term was defined to mean "the plan(s) attached to the Proposed Community Management Statement used to identify the location of carpark spaces to be allocated by the Seller in accordance with clause 49". Clause 49 provided that the buyer acknowledged that it should only be entitled to "the exclusive use and enjoyment of the carparking and/or storage space/s as shown in the disclosure plan". (Presumably the area adjacent to the carpark was a storage space.)

[18] There is conflict between the general provision in clause 49.1 and both of Schedule E of the proposed community management and the contractual description of the property to be purchased in the reference schedule ("Proposed Lot 51 …as highlighted on the Identification Plan contained in the Disclosure Documents", read with the highlighting of the carpark and adjoining space, both numbered 51). The construction adopted by the primary judge appropriately applied the very specific and unambiguous provisions in Schedule E and the reference schedule rather than the general, standard form provision in clause 49.1.[8] The absence of by-laws about exclusive use of common property was irrelevant because no exclusive use was proposed.

[19] The appellant criticised the primary judge's further observation that if the appellant had wished to examine floor plans of the unit, the disclosure statement contained instructions as to how to obtain that information from the respondent. However the primary judge's observation was accurate. The Disclosure Documents (in a "Disclosure Statement for Offer to Participate in Management Rights Scheme Pursuant to Class Order 02/305") included the statement that floor plans could be obtained from the seller. Section 21 of LSA required a statement which itself clearly identified the lot to be purchased, but the primary judge's observation was relevant to the question of prejudice under s 25 and it did not detract from the force of the reasons for holding that there was a clear identification of the proposed lot.

[20] The descriptions of the apartment, carpark, and adjacent space numbered 51 were imprecise because there were no dimensions and, more significantly, because the description of the proposed apartment did not indicate which of the two apartments intended for the first floor in "Building J" was apartment 51. That lack of precision might have produced some uncertainty about the quality and amenity of the property which the appellant contracted to purchase, but that does not mean that the lot to be purchased was not clearly identified. The lot to be purchased was clearly identified in the disclosure under s 21. It was the proposed lot which would be Lot 51 on the registered plan for the community management scheme established for Delor Vue Apartments at 1 Deloraine Close, Cannonvale, comprising apartment 51, being 1 of 62 apartments to be constructed in 11 buildings at that place, apartment 51 being adjacent to apartment 52 on the first floor of a building to be constructed in the location of "Building J", and the carpark and adjacent space on the ground floor of the same building, all as generally described on the plans and elevations annexed to the contract.

[21] Decisions upon s 49 of the *Building Units and Group Titles Act* 1980 (Qld) support the conclusion that s 21 of LSA did not require any more elaborate or precise

---

7 *Vennard v Delorain P/L* [2010] QSC 190 at [28].

8 *Vennard v Delorain P/L* [2010] QSC 190 at [28].

identification. In *Sunbird Plaza Pty Ltd v Boheto Pty Ltd*[9] the question was whether a statement under s 49 clearly identified the lot or proposed lot to which the statement related. The proposed lot was identified as "Unit A on the 14th Floor as identified in sketch plan in subject agreement (where Building Units Plan has been registered. Lot 52 in Registered Building Units Plan No . . .)". The first page of the contract described the unit as "No. 14A" and as "Lot 52 on the building units plan, floor 14th" and referred to a floor plan "in accordance substantially with the plan in the eighth schedule hereto and edged in blue." The purchaser argued that the identification was insufficient because the plan did not indicate the location of the building in relation to the land on which the building was constructed.

[22] McPherson J, with whose reasons Campbell CJ agreed, rejected the purchaser's argument in the following passage:[10]

> "However, there are, in the case of a building not yet constructed, obvious difficulties in describing and identifying the precise compartment of airspace into which the constructed unit will fit, and I am satisfied that by s. 49(2)(a) the legislature does not require this to be done. The lot is sufficiently identified by the unit number, lot number, the floor on which it is intended to be, and the detailed drawing contained in the eighth schedule. That is not to say that a purchaser has no need to be, or in the present case has not been, informed of the geographical aspect of the unit which he has agreed to buy. Ordinarily one would expect him before contract to make inquiries or perhaps ask to see a plan of the building to determine its location on the land. But it is quite a different matter to suggest that the incorporation of such information is required in order to "identify" the lot. In my opinion, s. 49(2)(a) does not impose such a requirement."

[23] The appellant argued that the decisions on s 49 should not be applied because the text and purpose of that section differed from the purposed underlying s 21 of LSA, but the differences are not significant for present purposes. In *Mirvac Queensland Pty Ltd v Beioley & Anor*[11] McMurdo J applied McPherson J's analysis in holding that s 21 of LSA did not require a statement of the area of a proposed lot. McPherson J's reasoning is equally applicable in relation to the appellant's arguments about the absence of precise dimensions, the doubt about the location of proposed Lot 51 within the first floor of the relevant building, and any imprecision in the description of the land by a street address rather than a real property description. The identification of property to be sold as a numbered lot that will bear that number in a described plan to be registered and with reference to a described scheme to be recorded was a "precise" identification which was "adequate and sufficient"[12] at the time of the contract. If further information was required to ensure a "clear" identification, sufficient information for that purpose was supplied in the plans and elevations annexed to the contract.

---

9 *Sunbird Plaza Pty Ltd v Boheto Pty Ltd* [1983] 1 Qd R 248.

10 *Sunbird Plaza Pty Ltd v Boheto Pty Ltd* [1983] 1 Qd R 248 at [258].

11 [2010] QSC 113.

12 *Dainford Limited v Tari Nominees Pty Ltd & Ors*, unreported, Campbell CJ, Sheahan and McPherson JJ, Supreme Court of Queensland, No. 563 of 1983, 24 October 1984 per McPherson J (with whose reasons Campbell CJ agreed) at p 11.

[24] The primary judge was correct in holding that the respondent's statement clearly identified the lot to be purchased in conformity with s 21 of LSA.

Avoidance of the contract: s 25 of the *Land Sales Act* 1984 (Qld)

[25] Section 25(1) of LSA conferred a right upon the appellant to avoid the contract for non-compliance with s 21(1) only if the appellant had been "materially prejudiced by the failure" to clearly identify the lot to be purchased. The appellant did not challenge the primary judge's finding that there was no evidence that the appellant was prejudiced by the failure.

[26] The appellant argued that she was nevertheless prejudiced because the alleged non-compliance with s 21(1) practically prevented her from adducing evidence to prove that she had been prejudiced. That is plainly not so. If, contrary to my conclusion, s 21 required a more detailed description of the proposed lot, the appellant might have adduced evidence, for example, that (if it was the case) the absence of necessary details contributed to her misunderstanding of the nature of the property, she lacked an opportunity to take advantage of the invitation in the Disclosure Documents to view detailed floor plans, she was misled by those plans or the contract description, the amenity of Lot 51 was less desirable or it was worth less than would have been the case if it had been in a different location on the first floor of "Building J", or the Lot was worth less than the purchase price. The onus lay upon the appellant to prove that she was materially prejudiced by the failure and she failed to fulfil that onus.

[27] Authorities upon similar provisions suggest that "materially prejudiced" in this context means disadvantaged in a way which is substantial or of much consequence,[13] but a different view on that issue would not assist the appellant. If there was a non-compliance with s 21(1)(a), the appellant did not establish that it caused her any prejudice at all. The appellant therefore failed to establish that she was entitled to avoid the contract for the alleged non-compliance.

***Body Corporate and Community Management Act* 1997 (Qld), s 213**

[28] Subsection 213(1) of the BCCMA requires that the seller of a proposed lot must give the buyer a disclosure statement before the contract is entered into. One requirement for such a disclosure statement, in s 213(2)(e)(i), is that it be accompanied by the proposed community management statement. Subsection 213(4) provides that the disclosure statement must be "substantially complete". Subsection 213(6) provides that if the contract has not already been settled, the buyer may cancel the contract if the seller has not complied with subsection 213(1). Subsection 213(7) provides that the seller does not fail to comply with subsection 213(1) merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.

[29] The primary judge referred also to s 214, which permits variation of a disclosure statement by the giving of a further statement, and to s 217, which confers a right of the buyer to cancel the contract in specified circumstances. Those provisions are

---

13 *Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal* [2004] 1 Qd R 346 per Chesterman J at [66]; *Wilson v Mirvac Queensland Pty Ltd* [2010] QSC 87 per Margaret Wilson J at [35]; *Latitude Developments Pty Ltd v Haswell* [2010] QSC 346 per Peter Lyons J at [59]-[60] referring to *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 per Wilson J at 168 to 169.

not relevant to the issues in the appeal. The appellant's only contention under this heading is that she validly cancelled the contract under s 213(6) on 28 January 2009. The appellant argued that s 213(6) entitled her to terminate the contract because the disclosure statement failed to identify exclusive use areas, it did not include a services location diagram, and it failed to include a concept plan. I have already explained why the failure to identify exclusive use areas was not significant.

Services location diagram

[30] The appellant argued that the omission of location diagrams for service easements prevented the disclosure statement given under s 213(1) from being substantially complete. The appellant referred to s 66(1)(d) of BCCMA, which requires a community management statement to include one or more services location diagrams for all service easements for the standard format lots included in the scheme and for the common property for the standard format lots.

[31] It was common ground that the disclosure statement did not include a services location diagram. The primary judge held that the disclosure statement was substantially complete as at the day the contract was entered into so that the appellant was not able to cancel the contract in reliance on s 213. His Honour reasoned that the omission of the services location diagram was not shown to be a highly significant part of the disclosure it required, as was evidenced by the lack of any claim of material prejudice.[14] The primary judge referred also to the likelihood that, at the time of the contract, a services location diagram was not required by s 66(1)(d) because the scheme was not one for which development approval had been given after the commencement of that paragraph.[15]

[32] As to the last point, in my respectful opinion the absence of development approval at the time of the contract did not render s 66(1)(d) irrelevant in relation to the obligations under ss 213(1) and 213(2)(e)(i) to give a "proposed" community management statement. The expressed premise of s 213(1) is that the proposed lot will be "included in a community title scheme when the scheme is established". The proposed community management statement should therefore include the provisions which, at the time that proposed statement is given, the seller proposes to include in the community management statement when it is recorded. Presumably a development approval for this proposed scheme had not been given before s 66(1)(d) commenced on 4 March 2003,[16] but if the approval had not been obtained before the contract was made the respondent must have intended to obtain it before the statement was recorded. That was reflected in the condition precedent in clause 3.1(a) of the contract that the appellant obtain all necessary local government approvals for the development. Section 213(2)(e)(i) therefore incorporated the requirements of s 66(1)(d) to the extent that those requirements would be applicable in a community management statement which would be recorded after the necessary approval had been obtained.

[33] Accordingly, the proposed community management statement which accompanied the disclosure statement was incomplete because it did not include any proposed

---

14 *Vennard v Delorain P/L* [2010] QSC 190 at [16].

15 *Vennard v Delorain P/L* [2010] QSC 190 at [14].

16 The date of assent of the *Body Corporate and Community Management and Other Legislation Amendment Act* 2003 (Qld), No. 6 of 2003: see s 24 (section 66(1)(d) was then s 57(1)(ca)).

services location diagrams for any proposed service easements. There was no evidence about precisely what was proposed at the time of the contract in that respect, save perhaps what might be inferred from the services location diagrams subsequently included in the further statement given by the respondent on 10 February 2009, but it may be assumed that some such service easements were always intended to be included. The question is whether the absence from the original statement of any diagram showing those easements means that the statement was not "substantially complete" in terms of s 213(4).

[34] Because there was no services location diagram which identified what was proposed the disclosure was not complete but it does not follow that it was not "substantially" complete. The provision of such a diagram is merely one of the numerous requirements for a community management statement specified in s 66, which is itself merely one of the matters required to be disclosed under s 213. The appellant did not adduce any evidence to suggest that the absence of the diagram was significant in relation to proposed Lot 51, the proposed common property, or in any respect. Nor did the appellant argue that any particular feature of the diagram that was subsequently supplied indicated that the omission from the original disclosure was significant. The appellant's argument was instead that the absence of disclosure about any one of the numerous matters required to be disclosed itself established a substantial deficiency in the disclosure. That requires a non-literal and unlikely construction of s 213(4), which simply provides that the disclosure statement must be substantially complete. It does not provide that every item required to be included in the disclosure statement must be substantially complete.

[35] I would affirm the primary judge's decision that the appellant failed to fulfil its onus of proving that the incompleteness in the disclosure statement was substantial.

Concept plan

[36] The appellant argued that the primary judge failed to deal with the argument at trial that the disclosure statement was not substantially complete because the accompanying, proposed community management statement did not include concept plans which illustrated the intended progressive development of the scheme as s 66(1)(f) required. That is not correct. The primary judge referred to s 66(1)(f) and held that the annexures in the disclosure statements complied with the requirements that the community management statement explain the proposed development and be illustrated by concept drawings.[17] I am not persuaded that there was any error in that conclusion. It is therefore unnecessary to consider whether this scheme was intended "to be developed progressively" within the meaning of s 66(1)(f).

Former s 212 of BCCMA

[37] At the time when the contract was made s 212 of BCCMA[18] ("former s 212") provided:

> "(1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed

[17] *Vennard v Delorain P/L* [2010] QSC 190 at [12].

[18] Reprint No. 4 as in force from 1 July 2007.

must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.

(2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.

(3) The buyer may cancel the contract if—

(a) there has been a contravention of subsection (1) or (2); and

(b) the contract has not already been settled."

[38] The contract did not provide "that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed". Clause 26.1 provided:

> "When a separate title for the Lot has issued and the Seller is of the opinion that all other Conditions Precedent contained in clause 3.1 will be satisfied within fourteen (14) days, the Seller may give notice to the Buyer calling for settlement. Settlement is due fourteen (14) days after the Seller gives that notice."

[39] The Conditions Precedent in clause 3.1 were:

"(a) the Seller obtaining all necessary Local Government approvals for the Stage and the Development generally;

(b) construction of the Lot being substantially complete, except for minor omissions and defects in respect of which the Project Manager has certified that rectification will not prejudice the convenient use of the Lot;

(c) registration of the Plan;

(d) recording of the Community Management Statement establishing the Scheme under the BCCM Act; and

(e) issue of a Certificate of Classification under the Building Act for the Stage."

[40] The primary judge rejected the appellant's contention that she had validly cancelled the contract under former s 212 because clause 26.1 of the contract had the effect required by that section and, in any event, any right in the appellant to cancel the contract had been taken away by the replacement of former s 212 by the *Body Corporate and Community Management Amendment Act* 2009 (Qld)[19] with a new provision which applied in relation to the contract.[20]

Non-compliance with former s 212

[41] The aim of former s 212 was to ensure that the buyer learned that the scheme had been established in sufficient time before settlement to make the necessary searches and enquiries.[21] The appellant argued that clause 26.1 did not fulfil that aim

---

19 Act No. 20 of 2009.

20 *Vennard v Delorain P/L* [2010] QSC 190 at [40]-[42].

21 *Bossichix P/L v Martinek Holdings P/L* [2009] QCA 154 per McMurdo J at [21].

because it did not require the seller to inform the buyer that the scheme had been established. A notice merely calling for settlement in 14 days did not meet the statutory requirements. The respondent argued that it was not necessary for the contract to use the words of former s 212 and that clause 26.1 was to the effect required by that section.

[42] Decisions of this Court establish that former s 212 was satisfied if the contract made provision to the effect stated in that section.[22] The contract need not require the settlement notice to state that the scheme has been established if that was implicit in the notice.[23] The contract in *Bossichix* nevertheless did not comply with former s 212 because the contract permitted the seller to insist upon settlement 14 days after registration of the building format plan. The difficulty was that under the *Land Title Act* 1994 (Qld) the scheme was established upon the recording of the community management statement and that might not occur until after the lot was created by registration of the plan.[24]

[43] Clause 11.1 of this contract provides that title to the Lot is under the *Land Title Act* 1994 (Qld) and the Scheme will be established under BCCMA. Although the contract describes the property contracted to be sold as "proposed Lot 51", under clause 26.1 the notice calling for settlement may not be given until after issue of a separate title for "the Lot". A certificate containing an indefeasible title for a lot may be issued by the registrar on request once the particulars of the lot have been recorded, but there is no requirement in the *Land Title Act* 1994 (Qld) for the "issue" of any document of title for a lot.[25] The statement in clause 26.1 that a separate title has issued presumably refers to the point in time at which the "the Lot" is created and indefeasible title is established by the contemporaneous recording of particulars of that lot in the freehold register.[26] "Lot" is defined by the contract to mean a "proposed Lot in the "Scheme"" which is to be sold under the contract. "Scheme" is defined to mean "the Community Title Scheme to be established upon recording of the Community Management Statement (for Stage 1 of the Development) and registration of the Plan (for Stage 1 of the Development)". Accordingly, although a lot is created immediately upon registration of the plan, the expression "the Lot" in clause 26.1 connotes both registration of the plan and the recording of the community management statement. The establishment of the scheme is not expressed as a condition precedent, but the scheme will be established upon satisfaction of both of the conditions precedent in clause 3.1(c) (registration of the Plan) and (d) (recording of the Community Management Statement establishing the Scheme). In that context, the provision in clause 26.1 which allows "other" conditions precedent to be satisfied within the 14 days refers to conditions precedent other than those in (c) and (d).

---

22 *Bossichix P/L v Martinek Holdings P/L* [2009] QCA 154 per Holmes JA at [1], per McMurdo J at [21], per A Lyons J at [25]; *Hannah & Ors v TW Hedley (Investments) Pty Ltd & Ors* [2010] QCA 256 at [3], [15], [18].

23 *Hannah & Ors v TW Hedley (Investments) Pty Ltd & Ors* [2010] QCA 256 at [34].

24 *Land Title Act* 1994 (Qld), s 49A. See *Bossichix P/L v Martinek Holdings P/L* [2009] QCA 154 per McMurdo J at [12]-[16].

25 *Land Title Act* 1994 (Qld), s 42.

26 *Land Title Act* 1994 (Qld), ss 37, 38, 49A, and 52. The reference in clause 26.1 to a separate title being "issued" may be an obsolete reference to the issue of "a separate certificate title for each lot" in s 8(5) of the *Building Units and Group Titles Act* 1980 (Qld). (See also the transitional provision in s 202(4) of the *Land Title Act* 1994 (Qld), which applied in relation to contracts executed before 1 January 1995.)

[44] The appellant argued that a similar construction was rejected in *Bossichix*, but the settlement clause in that case unambiguously required settlement fourteen days after the plan was registered, even if the community management statement was not recorded at the same time.[27] In this case the parties' contractual intention, objectively ascertained, was that the respondent could give a settlement notice only after both events had occurred.

[45] However clause 26.1 provided simply for fourteen days' notice calling upon the buyer to settle the contract at that time. The respondent did not argue that a requirement for advice to the effect that the scheme had been established should be implied in clause 26.1. The conclusion seems inevitable that the contract did not require the settlement notice to advise the appellant that the scheme had been established. Unlike the provision held to be sufficient in *Hannah & Ors v TW Hedley (Investments) & Ors*,[28] the contract did not even require the settlement notice to advise that the conditions constituting establishment of the scheme (registration of the plan and recording of the scheme) had been satisfied. Whilst it was implicit in the giving of a settlement notice under clause 26.1 of the contract that the scheme had been established, former s 212 literally required the contract to provide for the seller to give the buyer advice to that effect. Having regard to the aim and consumer protection purpose of former s 212, the rather surprising results that follow from that literal meaning do not justify departure from it.[29]

[46] For these reasons the contract did not comply with former s 212(1).

The effect of the Amendment Act

[47] Shortly after this Court's decision in *Bossichix* on 5 June 2009, BCCMA was amended by the *Body Corporate and Community Management Amendment Act* 2009 (Qld). The Amendment Act commenced on 22 June 2009. Section 3 of the Amendment Act replaced former s 212 with a new s 212 as follows:

> "(1) This section applies to a contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed.
>
> (2) The contract is taken to include a term (the ***deemed term***) providing that, despite any other term of the contract, settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
>
> (3) The deemed term has priority over any other term of the contract relating to settlement.
>
> (4) Without limiting subsection (3), any notice the seller gives to the buyer is void to the extent it is inconsistent with the deemed term."

---

27 *Bossichix P/L v Martinek Holdings P/L* [2009] QCA 154 per McMurdo J at [4], [17]-[18]

28 [2010] QCA 256.

29 See *Hannah & Ors v TW Hedley (Investments) Pty Ltd & Ors* [2010] QCA 256 per Applegarth J at [24]-[27].

[48] Section 4 of the Amendment Act also inserted in BCCMA a new heading, Part 6A "Transitional provision for Body Corporate and Community Management Amendment Act 2009", and s 362A as follows:

> "**362A Section 212 to have retrospective affect**
>
> (1) Section 212, as inserted by the *Body Corporate and Community Management Amendment Act 2009*, (the ***inserted section***) applies, to the exclusion of existing section 212(1), to a contract mentioned in the inserted section whether entered into before or after the commencement.
>
> (2) Subject to subsection (3), subsection (1) applies for all purposes (including a legal proceeding started but not decided before the commencement).
>
> (3) Subsection (1)—
>
> (a) does not apply for the purpose of a contract settled before 5 June 2009; and
>
> (b) does not apply for the purpose of—
>
> (i) a contract that has, before 5 June 2009, been lawfully cancelled because the contract failed to make provision as required by existing section 212(1); or
>
> (ii) a legal proceeding relating to the lawfulness of the cancellation; and
>
> (c) does not apply for the purpose of a legal proceeding decided before the commencement.
>
> (4) In this section—
>
> ***commencement*** means the commencement of this section.
>
> ***existing section 212(1)*** means section 212(1) as in force before the commencement.
>
> ***legal proceeding***, in susbsection (2), includes an appeal from a legal proceeding mentioned in subsection (3)(c)."

[49] The primary judge held that the Amendment Act applied with retrospective effect in relation to the appellant's legal proceedings started but not decided before the commencement of the amending Act, unless the contract had been lawfully cancelled before 5 June 2009 under the former s 212(3). The primary judge concluded that the appellant had not attempted to cancel the contract because of non-compliance with s 212 until she purported to do so by facsimile from her solicitors dated 12 June 2009 and received by the respondent's then solicitors on 16 June 2009. By that time former s 212 had been replaced. The primary judge therefore held that the appellant had not validly cancelled the contract under former s 212.[30]

---

30 *Vennard v Delorain P/L* [2010] QSC 190 at [41]-[43].

[50] It was not contentious that the appellant's repudiations of the contract by her solicitor's letters sent before she commenced proceedings were expressed to be based upon grounds other than non-compliance with former s 212. The appellant first expressly purported to cancel the contract under former s 212 by letter from the appellant's solicitors dated 12 June 2009, which seems to have been received by the respondent's solicitors on 16 June 2009. The appellant did not challenge the primary judge's conclusion that this letter was not relevant to the present issue because it was sent after 5 June 2009. The appellant argued, however, that the primary judge should have held that s 362A(3)(b)(i) and (ii) of the Amendment Act applied in relation to this contract because, before 5 June 2009, the contract had been "lawfully cancelled because the contract failed to make provision as required by existing s 212" and because her originating application was a legal proceeding "relating to the lawfulness of the cancellation".

[51] The appellant argued that the primary judge's reasoning was founded upon a factual error that the appellant had not attempted to cancel the contract in reliance upon the former s 212 until after 5 June 2009. The appellant contended that she had cancelled the contract when she served her originating application in April 2009. The appellant argued that service of that application seeking a declaration that she had validly terminated the contract under s 212 amounted to communication of an election to terminate the contract on that basis. In an alternative argument, the appellant contended that she had effectively cancelled the contact under former s 212(3) by her solicitor's earlier letters even though those letters had not referred to non-compliance with or cancellation under s 212.

[52] In relation to the latter argument the appellant relied upon *Shepherd v Felt & Textiles of Australia Ltd*[31] as it was explained in *Minion v Graystone Pty Ltd*.[32] In *Minion v Greystone*, McPherson J referred to Sir Owen Dixon's observation in *Williams v Frayne*,[33] in a passage cited with approval in this Court in *Landers v Schmidt*[34] that:[35]

> "… as a general rule, it is enough that upon true facts a party is entitled to act as he has done, and his justification is independent of his own knowledge of the facts (Cp. the cases mentioned in *Shepherd v Felt & Textiles of Australia Ltd*)."

McPherson J held that the authorities supported the broad principle that an "action taken must be capable of being justified at law, but that the grounds of justification, although they must have existed, need not have been known or relied upon at the time the action was taken." [36]

[53] No authority was cited which directly concerned the requirements of an effective cancellation under former s 212(3) of BCCMA, but there is authority concerning the requirements for an effective cancellation under s 214. Section 214 applies in some circumstances where a disclosure statement is varied by a further statement. In the relevant cases s 214(4) empowers the buyer to cancel the contract if it has not been settled, if the buyer would be materially prejudiced if compelled to complete, and if the cancellation "is effected by written notice given to the seller" within a specified

---

31 (1937) 45 CLR 359.
32 [1990] 1 Qd R 157.
33 (1937) 58 CLR 710 at 733.
34 [1983] 1 Qd R 188 at 196.
35 *Minion v Graystone* [1990] 1 Qd R 157 at 164.
36 [1990] 1 Qd R 157 at 164.

time. That provision was considered in *Latitude Developments Pty Ltd v Haswell*.[37] P Lyons J analysed authorities, including *Minion v Graystone*, and held that a notice of termination was an effective exercise of the right to cancel the contract under s 214(4) of BCCMA even though the notice instead invoked a right to terminate the contract under s 25 of LSA and s 217 of BCCMA.

[54] As appears from P Lyons J's analysis, there are conflicting decisions relating to that question[38] and the question whether the principle expressed in *Shepherd v Felt & Textiles of Australia Ltd* applied in a similar statutory context, under s 49(5) of the *Building Units and Group Titles Act* 1980 (Qld), was expressly left open by Mason, Deane and Dawson JJ in *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd*.[39] I would add that *Minion v Graystone* and the decisions cited in that case concerned the exercise of common law and contractual powers rather than the exercise of statutory powers. The point is an important one and we heard only quite limited argument about it. In these circumstances I think it preferable to refrain from deciding whether a purported cancellation for an alleged non-compliance with a different statutory provision may be an effective cancellation of the contract under former s 212(3). It is not necessary to decide that question because of the effect of the Amendment Act, to which I now turn.

[55] The appellant commenced her proceeding in the trial division by an originating application filed on 14 April 2009. The application sought declarations that the contract was void for uncertainty, that the contract was properly terminated by the appellant on the 24 November 2008 by reason of non-compliance with the provisions of s 365(3) of PAMDA, that the appellant was entitled to avoid or not complete the contract pursuant to s 25 of LSA for non-compliance with s 21 of that Act, that the appellant was, by reason of non-compliance with s 213 of BCCMA entitled to cancel a contract, or "that the [appellant] is, by reason of non-compliance with s 212 of the BCCMA entitled to cancel the Contract".

[56] The appellant did not seek a declaration that she had validly terminated the contract because of non-compliance with former s 212. The contrast between the form of the claimed declaration concerning the alleged non-compliance with former s 212 and the form of the claimed declarations concerning uncertainty and s 365(3) of PAMDA emphasises the point. In relation to former s 212, the appellant sought only a declaration that she had an entitlement to cancel the contract because of the alleged non-compliance with that section. Although the appellant had repudiated the contract by refusing to settle and by purporting to terminate or cancel the contract on grounds other than non-compliance with former s 212, her originating application plainly did not constitute an election to cancel the contract because of non-compliance with s 212.[40]

[57] It is clear enough that "the cancellation" in s 362A(3)(b)(ii) of BCCMA refers to a cancellation described in subparagraph (i). Accordingly the only legal proceeding which qualifies under s 362A(3)(b)(ii) is a proceeding which relates to the lawfulness of a purported cancellation before 5 June 2009. The application for

---

37 [2010] QSC 346 at [87]-[96].

38 In *Latitude Developments Pty Ltd v Haswell* [2010] QSC 346 at [85], P Lyons J referred to *Clegmere Pty Ltd v Samspring Pty Ltd* [1983] 2 Qd R 399 and *Silverton Ltd v Shearer* [1983] 2 Qd R 411 at 414; see also paragraph [92] and P Lyons J's reference to *Bankmist Holdings Pty Ltd v Azina Holdings Pty Ltd* [2009] WASC 230.

39 (1983) 155 CLR 129 at 143 to 144.

40 C.f. *Highmist P/L v Tricare Ltd* [2005] QCA 357 at [16], [57]-[58], [62].

a declaration concerning former s 212 did not fit that description because the claimed declaration did not relate to any purported cancellation. It related only to the question whether an entitlement to cancel the contract had arisen.

[58] The remaining question is whether the exception to retrospectivity in s 362A(3)(b)(i) is applicable if the appellant's purported cancellation of the contract by her solicitor's letters before 5 June 2009 was effective under the principle explained by McPherson J in *Minion v Graystone*. In my opinion s 362A(3)(b)(i) was not applicable, even if the appellant's purported cancellation of the contract on other grounds should have been regarded as effective under former s 212 when it was in force.

[59] The appellant argued that her cancellation of the contract amounted to a vested right and she invoked the presumption against imputing to the legislature an intention retrospectively to affect vested rights.[41] However there is no doubt that the Amendment Act was intended to affect vested rights. Section 362A(1) undoubtedly applies the new s 212 to contracts entered into before that section commenced. Under s 362A(2), that amendment also applies in relation to legal proceedings which were started before the commencement of the amendment, subject only to the effect of s 362A(3).

[60] The issue concerns the breadth of the exception to retrospectivity in subsection (3). That exception applies only in relation to one category of lawful cancellations, namely, a cancellation because of non-compliance with the former s 212. Had it been intended that the exception would apply to any lawful cancellation the words "because the contract failed to make provision as required by existing section 212(1)" in s362A(3)(b)(i) would have been unnecessary. Furthermore, the Amendment Act afforded to purchasers in the appellant's position the same right to fourteen days' notice of the establishment of the community management scheme which had been the object of former s 212. That fulfilled the underlying purpose of former s 212. In that context, it is not surprising that the Amendment Act narrowly confined the exception to the retrospective operation of the new provision.

[61] I would hold that s 362A(3)(b)(i) does not comprehend a cancellation which was expressed to be made only under and for non-compliance with provisions other than former s 212. For the reasons I have given, that should not be regarded as a cancellation "because the contract failed to make provision as required by existing s 212". Upon that construction the new s 212 applied in relation to the contract to the exclusion of former s 212. The appellant had no entitlement to terminate the contract under the new s 212.

[62] In the result, the appellant could not rely upon former s 212 to justify her purported termination of the contract.

Proposed order

[63] I would dismiss the appeal with costs.

[64] **PHILIPPIDES J:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with the reasons of his Honour and with the proposed order.

---

[41] The appellant cited *Cowan & Sons v Lockyer* (1984) 1 CLR 460 at 466; *Hough v Windus* (1884) 12 QBD 224 at 237; *Clifford v Ashburton Borough* [1969] NZLR 446 at 448; and *Mathieson v Burton* (1971) 124 CLR 1 at 22 citing Wright J in *In re Athlumney; Ex parte Wilson* [1898] 2 QB 547: "If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."