

SUPREME COURT OF QUEENSLAND

CITATION: *Mirvac Queensland Pty Ltd v Wilson* [2010] QCA 322

PARTIES: **MIRVAC QUEENSLAND PTY LIMITED**
ACN 060 411 207
(respondent/appellant)
v
CATHERINE FRANCES WILSON
(applicant/respondent)

FILE NO/S: Appeal No 4196 of 2010
SC No 13896 of 2009

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 November 2010

DELIVERED AT: Brisbane

HEARING DATE: 22 September 2010

JUDGES: Margaret McMurdo P, Fraser JA and Jones J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: CONVEYENCING – APPEAL AND NEW TRIAL – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATIONS ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS – where respondent agreed to purchase a residential apartment in a proposed community titles scheme from appellant – where appellant provided a disclosure statement under s 213 of the *Body Corporate and Community Management Act 1997* (Qld), and subsequently a further statement under s 214 – where respondent asserted she would be materially prejudiced if compelled to complete the contract and purported to cancel it under s 214(4) of the Act – where the appellant submits that there was no inaccuracy in the disclosure statement – where the appellant contends that there was an error in the court finding that there was material prejudice to the respondent – whether the learned trial judge erred in finding that the statutory right to cancel the contract arose

Body Corporate and Community Management Act 1997 (Qld), s 4(g), s 214(1), s 214(4)(b), s 214(5), s 215(1), s 216
Building Units and Group Titles Act 1980 (Qld) (Repealed)

Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal [2004] 1 Qd R 346; [2003] QSC 276, cited
Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd (1983) 155 CLR 129; [1983] HCA 44, cited
Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd (1993) 176 CLR 332; [1993] HCA 5, cited
Flight v Booth (1834) 1 Bing (NC) 370; 131 ER 1160; [1834] EngR 1087, cited
Gold Coast Carlton Pty Limited v Wilson [1985] 1 Qd R 182, cited
Gold Coast Carlton Pty Ltd v Kamalesvaran [1984] Q ConvR 54-144, cited
Hutchinson & Anor v Equititour & Ors Pty Ltd [2010] [QCA 104](#), cited
Latitude Developments Pty Ltd v Haswell [2010] QSC 346, cited
McHale v Watson (1966) 115 CLR 199; [1966] HCA 13, cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634; [1974] HCA 40, cited
Singh v Varinder Kaur (1985) 61 ALR 720, cited
Sommer v Abatti Holdings Pty Ltd [1992] 1 Qd R 300, cited
Stingel v The Queen (1990) 171 CLR 312; [1990] HCA 61, cited
Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union (1979) 42 FLR 331; [1979] FCA 85, cited
Vennard v Delorain P/L as Trustee for the Delorain Trust [2010] [QCA 309](#), cited

COUNSEL: M D Martin for the appellant
S Lumb for the respondent

SOLICITORS: Clarke Kann for the appellant
Van de Graaff Lawyers for the respondent

- [1] **MARGARET McMURDO P:** I agree with Jones J's reasons for dismissing this appeal with costs.
- [2] This case highlights the onerous nature of the requirements placed on vendors selling units "off the plan" by Ch 5 *Body Corporate and Community Management Act* 1997 (Qld) (the Act). The original disclosure statement of the appellant/vendor (Mirvac) of December 2007 was deemed under the Act to have become inaccurate once Mirvac sent the respondent/purchaser (Ms Wilson) the further disclosure statement provided in August 2009. This was because of the combined effect of s 214(1) and (5), s 215(1) and s 216 of the Act. It is true that Mirvac later assured Ms Wilson that, all respects relevant to this appeal, the further disclosure statement of 11 August 2009 was inaccurate and the original disclosure statement of 4 December 2007 was accurate. But this is of no assistance to Mirvac as, by the time it informed Ms Wilson of this, she had, as the trial judge and Jones J have explained, lawfully terminated the contract under s 214(4)(b).
- [3] Although this result may appear harsh to vendors, it is consistent with the scheme of Ch 5 of the Act, the terms of s 214 to s 216, and with the Act's primary object "to

provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects".¹ The most relevant of those secondary objects for present purposes is "to provide an appropriate level of consumer protection for ... intending buyers of lots included in community title schemes; ...".²

- [4] I agree with the orders proposed by Jones J.
- [5] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Jones J. I agree with those reasons and the order proposed by his Honour.
- [6] **JONES J:** Mirvac Queensland Pty Ltd (hereinafter "Mircac") appeals against a decision whereby the Court declared that the respondent, Catherine Frances Wilson, was entitled to cancel the contract which the parties had entered into on 4 December 2007. By that contract, the respondent had agreed to purchase a proposed lot in a staged community titled scheme development. As such, the contractual process was governed by the requirements of Chapter 5 Part 2 of the *Body Corporate and Community Management Act 1997* ("BCCMA"). Those requirements included provisions for the giving of information by the seller and for cancellation of the contract by the buyer if the information was, or became, inaccurate.
- [7] The respondent cancelled the contract by notice dated 24 August 2009. In cancelling the contract the respondent asserted she had a statutory right to do so pursuant to s 214(4) of BCCMA because she would be materially prejudiced if compelled to complete the contract on the terms of changed information identified in the further statement. The learned summary judge found the respondent to have been materially prejudiced by the changes and declared that the contract was validly cancelled.
- [8] Mirvac challenges the findings of the learned primary judge, asserting that there was no inaccuracy in the disclosure statement, that the disclosure statement did not become inaccurate by reason of the contents of the further statement and also, that there was no material prejudice to the respondent. It contends that the statutory right to cancel the contract did not arise in this instance.

Background facts

- [9] The development project was to be conducted in five stages and it involved the construction of six luxury high rise residential unit buildings. The subject lot was to be included in the third such residential unit as part of Stage 2 of the development. The proposed building was identified by the name "Farringford".
- [10] The community title scheme was established upon the completion of Stage 1 on 27 April 2009 and was known as "*The Tennyson Reach Community Title Scheme No. 39925*".
- [11] The respondent has acknowledged that prior to the signing of the contract, she received various documents as required by the BCCMA. These documents included a disclosure statement dated 4 December 2007. This document, including its

¹ *Body Corporate and Community Management Act 1997* (Qld), s 2.

² Above, s 4(g).

various schedules, contained some 215 pages and dealt with topics which are identified by the following chapter headings:-

| | |
|-------------|--|
| Chapter 1: | Information Disclosure |
| Chapter 2: | New Community Management Statement |
| Chapter 3: | Schedule of Finishes |
| Chapter 4: | Plans |
| Chapter 5: | Body Corporate Budget and Schedule of Levy Calculations and Lot Entitlements |
| Chapter 6: | Caretaking Agreement |
| Chapter 7: | Letting Agreement |
| Chapter 8: | Administration Agreement |
| Chapter 9: | Draft Site Management Plan |
| Chapter 10: | Power of Attorney Extract |
| Chapter 11: | FIRB Approval |

- [12] Of significance, the disclosure statement in Chapter 1 dealt with the setting up of a body corporate to which Mirvac would provide certain assets. Relevantly, these included:-

“4.4 Proposed Assets of the Body Corporate

The Seller proposes to provide at its cost the following items of equipment and furnishings which will become Body Corporate Assets upon establishment of the Body Corporate, namely:

Gymnasium/Lap Pool

...

Other Recreational Pools...

...

- (c) BBQ, outdoor tables and chairs

General

- (a) artworks and loose decorative items within lift foyer and common areas;
- (b) CCTV, cameras and security monitoring equipment;
- (c) Caretakers’ office equipment;
- (d) Caretakers’ gardening equipment;
- (e) Caretaker’s vehicle for transport of refuse containers to compactor; and
- (f) 6 lift curtains.

It is not proposed that the Body Corporate acquire any other assets after establishment of the Scheme, however, the Body Corporate may acquire other assets if the Body Corporate considers the assets would be beneficial to the operation of the Scheme.³”

³ Appeal Book p 78.

- [13] In Chapter 3 of the disclosure statement, there is a schedule of standard inclusions and finishes for a typical apartment in the Farringford building containing the proposed lot. That schedule includes an entry as follows:-

“CCTV: Provided to select locations within the common property.⁴”

- [14] In Chapter 5 of the disclosure statement, are details of the body corporate contribution to be raised from the potential lot owners and a budget for the likely expenditure by the body corporate.

- [15] Chapter 6 of the disclosure statement sets out the terms of the proposed caretaker agreement which would impose on the caretaker the undertaking of a daily check “for any security breaches, vandalism, broken glass...and monitor (if installed) any close circuit security television cameras and keep daily video tapes for at least 7 days”.⁵

- [16] On 6 August 2009, Mirvac provided a further statement as required by s 214 of the Act to rectify inaccuracies in the original disclosure statement. The letter enclosing the further statement was received by the respondent on 11 August 2009. The parties had agreed that the period for re-disclosure referred to in s 214(2) would be extended to the day on which the seller notified the buyer that the scheme had been established.⁶

- [17] On 24 August 2009, the respondent gave notice that she was cancelling the contract identifying eight grounds on which she claimed to be entitled so to do. They relate in particular to changes that were identified by the differences between the contents of the disclosure statement and the further statement referred to above. Only one such ground was sought to be litigated in the summary proceedings from which this appeal arises.

- [18] Foremost amongst the concerns raised by the respondent was the absence in the further statement of the provision of CCTV, cameras and security monitoring equipment to which reference had been made in clause 4.4 of the disclosure statement as set out in paragraph [13] above.

- [19] The further statement followed the same format as the disclosure statement using the same chapter headings but identifying changes chapter by chapter. In Chapter 1 of the further statement clause 4.4 was in the following terms:-

“4.4 Assets of the Body Corporate

Details of the Body Corporate Assets are incorporated in Chapter 5 of this Disclosure Statement.

It is not proposed that the Body Corporate acquire any other assets, however, the Body Corporate may acquire other assets if the Body Corporate considers the assets would be beneficial to the operation of the Scheme.”⁷

- [20] The details of body corporate assets in Chapter 5 are in a list entitled “Body Corporate Asset Register”⁸ and “Initial Body Corporate Equipment Schedule”.⁹

⁴ Appeal Book p 158.

⁵ Appeal Book p 249.

⁶ Sale Contract clause 15.24. Appeal Book p 58.

⁷ Appeal Book p 311.

⁸ Appeal Book p 491.

⁹ Appeal Book p 493-6.

Neither of these lists make any reference to the provision of CCTV, cameras security monitoring equipment, BBQ, outdoor tables and chairs, artworks and loose decorative items within lift foyer and common areas, or the six lift curtains. Nor were those assets thereafter referred to in the further statement other than in the repetitions of the terms in the Schedule of Finishes and the Caretaker's Agreement as set out in the original disclosure statement. In this sense there was some internal inconsistency in the further statement. But the substantial difference arises in the comparison of the respective clauses 4.4 in Chapter 1 and the lack of provision of the particular assets referred to in the disclosure statement.

- [21] That was the difference relied upon by the respondent to assert there was inaccuracy in the original statement such that she would be materially prejudiced if compelled to complete the contract. As the material prejudice relied upon relates to security, it will be sufficient to refer to the missing items simply as the camera security system.
- [22] After the respondent had given notice of cancellation, Mirvac's solicitors wrote on 9 September 2009 advising that all assets listed in the original disclosure statement will be provided and that it was "by oversight that some of the items were not listed in the asset register".¹⁰ A copy of an amended asset register containing the admitted items was attached to the letter.¹¹

Statutory scheme

- [23] The statutory scheme requiring the provision of these statements is found in Division 2 of Chapter 5 of the BCCMA. By s 213 a seller of a proposed lot must give to an intending buyer a signed disclosure statement. The contents of the statement must include certain prescribed information, be accompanied by prescribed documents and identify regulations applying to the scheme. Of particular note is the requirement "to include details of all body corporate assets proposed to be acquired by the body corporate after the establishment or change of the scheme". For a proposed residential lot additional forms as required under the *Property Agents and Motor Dealers Act 2000* must also be given. The disclosure statement must be substantially complete as at the day the contract is entered into. Compliance with this section does not fail if there are inaccuracies in the statement. The consequence of inaccuracies, however, becomes significant for the purpose of s 214 and the following sections whose terms I set out in full:-

214 Variation of disclosure statement by further statement

- (1) *This section applies if the contract has not been settled, and—*
- (a) *the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into; or*
 - (b) *the disclosure statement would not be accurate if now given as a disclosure statement.*
- (2) *The seller must, within 14 days (or a longer period agreed between the buyer and seller) after subsection (1) starts to apply, give the buyer a further statement (the further statement) rectifying the inaccuracies in the disclosure statement.*

¹⁰ Appeal Book p 563.

¹¹ Appeal Book p 568.

(3) *The further statement must be endorsed with a date (the further statement date), and must be signed, by the seller or a person authorised by the seller.*

(4) *The buyer may terminate the contract if—*

(a) it has not already been settled; and

(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and

(c) the termination is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement.

(5) *Subsections (1) to (4) continue to apply after the further statement is given, on the basis that the disclosure statement is taken to be constituted by the disclosure statement and any further statement, and the disclosure statement date is taken to be the most recent further statement date.*

215 Statements and information sheet form part of contract

(1) The disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract.

216 Buyer may rely on information

The buyer may rely on information in the disclosure statement and each further statement as if the seller had warranted its accuracy.

[24] The terms of s 214(1) make it clear that a buyer can only become entitled to terminate the contract if firstly, there is an inaccuracy in the original disclosure statement or the disclosure statement becomes inaccurate. The inaccuracy must be “real or of substance as distinct from ephemeral or nominal”¹² such as to impact on the bargain. Secondly, by s 214(4) the buyer’s right to cancel the contract arises only if the buyer is materially prejudiced given the extent of that inaccuracy. Thirdly, the right exists only for a limited time.

[25] It is noted from the terms of s 215 that both the original document and the later statements have contractual effect. The respondent was entitled to rely upon the information in both as if Mirvac warranted their accuracy. These provisions highlight the level of consumer protection and disclosure that must be complied with. This is in keeping with the expressed secondary objects of the legislation set out in s 4(g) which provides:-

“(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;”

[26] In construing these sections little guidance can be gained from the decisions from other States because of the disparate terms of the legislative provisions – a point

¹² *Tillmans Butcheries Pty Ltd v AMIEU* (1979) 42 FLR 331 at p 348.

made by the authors of the article “Evaluating Information Disclosure to Buyers of Real Estate”.¹³ Consequently, close attention needs to be given to the decided cases on these sections and the equivalent provisions in the precursor legislation, the *Building Units and Group Titles Act 1980*.

The decision below

- [27] Having considered the statutory provisions, the terms of the disclosure statements and the circumstances on which material prejudice was based, the learned primary judge found:-

“[24] In providing the Further Statement, from which these items of Body Corporate property had been omitted, the respondent warranted that they would not be provided. The applicant had only 14 days in which to cancel the contract under s 214(4). The legislation did not cast any obligation, on the applicant to ensure that information in the Further Statement was accurate before acting on it. I accept the submission of her counsel that the statutory right of cancellation is dependent on the content of the Disclosure Statement and Further Statement and not on other facts unknown to the buyer, but known the seller.

[25] The applicant was entitled to cancel the contract if she would be materially prejudiced if compelled to complete, given the extent to which the original Disclosure Statement was, or had become, inaccurate.

...

[35] In my view it would be enough for the applicant to establish that she would be disadvantaged in some substantial way if she were obliged to complete the contract on the premise that the body corporate would not have the CCTV security system and other items of property which had been included in the first Disclosure Statement and omitted from the Further Statement. I note that the applicant’s assertion of material prejudice was based principally on the omission of the CCTV security system. She relied on the other omissions as compounding the prejudice.

...

[39] The apartment was to be the principal place of residence for the applicant, her husband, and two teenage children. It was adjacent to the Queensland Tennis Centre (a major public facility) and a busy public thoroughfare. At the time the applicant’s husband’s occupation was such that the whole family might reasonably have a heightened sense of vulnerability to unlawful attack. The security system had been promoted as an integral feature of the development and arrangements for its management. Viewed objectively, a person in the applicant’s circumstances in August 2009 would be disadvantaged in a substantial way by its omission. That disadvantage was compounded by the omission of other items of property which would have enhanced the amenity of the apartment.”

The issues

- [28] Mirvac contends that the learned primary judge erred in finding:-

¹³ [2007] *QUT Law and Justice Journal* 11.

- (i) That the disclosure statement was inaccurate;
- (ii) That the respondent was materially prejudiced when she was never told in clear terms that she would not receive the camera security system; and
- (iii) That the evidence was sufficient to establish material prejudice.

Was the disclosure statement inaccurate?

- [29] Mirvac argues on appeal, as it did below, that the original disclosure statement remained accurate such that if the contract settled on those terms the respondent would receive what she had bargained. Mirvac further contends that the disclosure statement itself never became inaccurate and so on a literal construction of s 214(4)(b) the circumstances to found a cancellation of contract did not arise.
- [30] To rebut these suggestions, the respondent points to the preamble of the further statement in which Mirvac states that the information “has become inaccurate” and that the statement “rectifies any such inaccuracies by making the Further Statement”.¹⁴ Primarily, the respondent points to the absence of the camera security system in the list of assets attached to the further disclosure statement as the source of inaccuracy.
- [31] The substance of Mirvac’s argument on this point is that although there may have been some inconsistencies between the two statements, there was in fact no material prejudice because the inconsistency was the result of an oversight which was corrected once it became known. With or without that correction the original disclosure statement remained accurate.
- [32] In my view, that argument overlooks the standing and the effect of the disclosure statements as provided for in the legislation. Firstly, it is necessary to note that the disclosure statement and each further statement form part of the contract and the vendor warrants their contents to be accurate (ss 215 and 216). Secondly, the obligation to disclose any inaccuracy in the information provided in the original disclosure statement continues to apply until completion. Thirdly, the date of the later statement is the disclosure statement date. (s 214(5)) If the correction of any inaccuracy is made then the corrected information becomes the subject of the warranty to apply at completion. Where a further statement has been made, the disclosure statement cannot thereafter be looked at in isolation to determine whether there is any inaccuracy. The information which the seller now warrants will be the basis on which the buyer will be compelled to settle. The issue for the buyer is whether to accept the change in the warranted information or, if there is material prejudice, to cancel the contract. This is consistent, not only with the legislative terms, but with the clear purpose of the legislation to protect buyers against having to settle on the contract which would not have been entered into had the relevant information been known.
- [33] In this instance there was inconsistency in the information contained in the two statements. The buyer was entitled to regard the most recent statement as the warranted information. This meant that the camera security system was not to be part of the assets of the body corporate and that the body corporate did not propose

¹⁴ Appeal Book p 293.

to acquire it. As such, the disclosure statement information was no longer accurate and the finding of the learned primary judge to this effect was plainly correct.

Was there material prejudice?

- [34] Mirvac contends that the respondent has not shown material prejudice because firstly, she was never told in clear terms that she would not receive the camera security system and secondly, that the evidence failed to establish that there was, in fact, any material prejudice in the circumstances.
- [35] As to the first of these points, Mirvac argues that as the result of the further statement the information about the camera security system remained equivocal. It points to the repeated representations in Chapter 3 of the further statement that the CCTV camera would be “provided to select locations”¹⁵ and the Chapter 6 representation of the terms of the caretaking agreement which terms were at best only suggestive of a security system being installed.¹⁶
- [36] In giving notice of cancellation the respondent referred to those inconsistencies between the two statements, describing them as “confusing”.¹⁷
- [37] Mirvac argues that any inquiry by the respondent to resolve her confusion would have revealed the inadvertent omission from the assets register and the fact that the items had been provided for Stage 1. She made no such inquiry. Mirvac also suggests that by giving a cancellation notice on the 13th day after receiving the further notice, the respondent gave it no time to clear up any confusion.
- [38] The difficulty for Mirvac in this argument is in showing that there was any obligation on the respondent either to make such an inquiry and to give notice of intention to cancel the contract. The inaccuracy was a result of the seller’s conduct. If the inaccuracy was attended by material prejudice a buyer was placed in the situation of having to elect, within a 14 day period, whether to continue with the contract or to cancel it. A failure to cancel in the knowledge of an inaccuracy would result in the buyer losing the right to do so, notwithstanding the existence of material prejudice.
- [39] The respondent argues that if such an obligation existed the result would be that a buyer could not take any further statement at face value. That clearly is not the intention of the statutory terms. Counsel for the respondent drew support for this contention from the remarks of Peter Lyons J in *Latitude Developments Pty Ltd v Haswell*¹⁸ where he said:-

“[55] The test stated in s 214(4)(d) is whether “the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement...has become...inaccurate”. On its face, this provision suggests that what is required is a comparison between the information communicated by the disclosure statement, and that communicated by the further statement. On that basis, attempts made by Latitude Developments to mitigate the consequences of staging the development, which were not recorded in the further statement, would be irrelevant.

¹⁵ Appeal Book p 414.

¹⁶ Appeal Book p 512.

¹⁷ Appeal Book p 558.

¹⁸ [2010] QSC 346.

[56] There is some merit in this approach. A buyer is allowed only 14 days within which to cancel the contract. The buyer may be located somewhere remote from the development. Verification of matters said to mitigate the effect of changes may require access to information not readily available to a buyer.

...

[58] Moreover, it seems to me that the question of material prejudice cannot be determined by reference to facts which might have existed at the relevant date, but which were not known to the buyer, or of which it cannot at least be said that the buyer should have known them.”

- [40] Counsel for the respondent also pointed out that the seller is usually the sole repository of relevant knowledge and would be well aware of the limited time available for inquiries, such that it may not always be easy for a buyer to make inquiries within that time.
- [41] The short answer to this issue is that there is no statutory provision obliging the buyer to make inquiries to resolve any inaccuracy and there are good reasons why no such obligation should be inferred. A buyer in such circumstances is placed in the position of having to make an election to exercise alternative and inconsistent rights. The circumstance upon which the election arises – the existence of inaccuracy – stems from the documents and can be objectively determined. That is important in the interests of certainty because contracting parties ought to know where they stand: *Sargent v ASL Developments Limited*¹⁹. Imposing an obligation to inquire may well lead to uncertainty, either as to the facts upon which an election could be made or whether the right of election continues to exist. Doubt as to these matters is inimical to contractual certainty and would also have the tendency to provoke litigation.
- [42] The time within which the election must be made, if it is not to be lost, is relatively short. This again is in keeping with the desirability of contractual certainty and with commercial realities. The right to elect is based on the existence of inaccuracy and, assuming material prejudice, the buyer would have the right to cancel at any time within the 14 day period. But at any time prior to cancellation, the seller has the power to remove any inaccuracy. If the inaccuracy is removed by the giving of a rectifying statement, the statutory right to cancel would be lost. Once the contract is cancelled, there would be no further opportunity for compliance with the disclosure requirements. As a consequence, the period of uncertainty is limited to the time preceding the election to cancel but in any event, to a period of no longer than 14 days. Any further limitation on a buyer’s right to cancel would result in a further prejudice to the buyer’s interest: *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd.*²⁰
- [43] In this instance the respondent was confronted by information about the camera security system which rendered the original disclosure statement as inaccurate. The oblique references to the security system in Chapter 3, Standard of Finishes, and in Chapter 6, the Caretaking Agreement, were not such as to alter what was the substantial difference between the two documents – the lack of provision of the

¹⁹ (1974) 131 CLR 634 at p 655-6.

²⁰ (1993) 176 CLR 332 at p 342.

camera security assets. I reject Mirvac's argument that there was an obligation on the respondent to resolve any sense of confusion which the Mirvac documents gave rise to.

- [44] The second issue of material prejudice relates to whether the evidence was sufficient for a conclusion of prejudice to be drawn and whether, as Mirvac contends, the issue ought not to have been determined in a summary way. At the hearing Mirvac submitted that the matter should go to trial because it might wish to lead evidence of the limited nature of the security afforded by the camera security system and because of the reduced benefit of the system the respondent would not result in material prejudice. The learned primary judge rejected this submission, principally on the basis that Mirvac bore an evidentiary onus to raise that issue if it wished to rely upon it and that it failed to adduce any such evidence.
- [45] The issue presented for determination by the Originating Application was the validity of the respondent's notice cancelling the contract pursuant to s 214(4). The respondent bore the onus of establishing her entitlement to do so. As has been shown above, the question of inaccuracy fell to be determined on a consideration of the content of the two statements. The question of material prejudice was considered in the context of the affidavits of the respondent and her husband who were not cross-examined and against whose evidence no contrary evidence was led. The only evidence adduced on behalf of Mirvac was the affidavit of Steven Cardell which did not challenge the respondent's claim of material prejudice which had been the subject of detailed evidence. The onus imposed on the respondent below was thus satisfied giving her a prima facie entitlement to judgment. Thereafter, Mirvac bore an evidentiary onus to at least raise a basis for challenging the claim of prejudice. See *Singh v Varinder Kaur*²¹; *Hutchinson v Equititour Pty Ltd*²². In the absence of any such evidence, the learned primary judge was correct in determining the issue in a summary way.
- [46] I turn then to the evidence of prejudice and Mirvac's assertion that in the absence of any detail as to the benefit of the camera security system, the lack of equipment could not be said to constitute 'material prejudice'.
- [47] To this end, Mirvac contended that the benefits of the camera security system as set out in the first disclosure statement, could not reasonably provide the level of security which the respondent expected or which would be adequate for the protection of herself and her family. This was a reference to the fact that the respondent's husband was then a Federal Magistrate who had been provided by the Commonwealth of Australia with a security system at his residence. This included a monitored security system, a panic button and crim-safe security screens.²³
- [48] The question of material prejudice was not in this instance to be determined by a comparison of what the respondent had at her existing residence. Rather, the removal of the camera security system from the statement of assets had to be seen in the circumstances in which the proposed lot was located. In that regard, the Farringford building was in close proximity to a public arena, parklands, car-parks and a transport hub. At times the area would be used by large numbers of non-residents. Such circumstances gave rise to an expectation that effective security

²¹ (1985) 61 ALR 720.

²² [2010] QCA 104.

²³ Affidavit of Keith Neale Wilson sworn 11 December 2009 at para [9].

would be provided. Moreover, Mirvac conceded that the security system was promoted as part of its marketing effort.²⁴

- [49] The security of her residence was a very important matter for the respondent as was acknowledged by Mirvac in the course of argument.²⁵ The omission of the camera security system was properly found to be a significant disadvantage to the respondent.

The concept of “material prejudice”

- [50] The parties are in substantial agreement as to the tests by which ‘material prejudice’ is to be assessed. The learned primary judge, conscious of the fact that there was no authoritative decision on the point for the purpose of this legislation, considered a number of cases where references had been made to terms ‘material prejudice’ and ‘materially affect’. Her analysis and ultimate conclusion on this point is not challenged on this appeal. However, it is appropriate to relate the test to give the framework in which her Honour’s finding of prejudice was arrived at. She said:-

“[32] Some matters are clear.

- (a) The focus is on *the* buyer. This suggests that the test is objective having regard to the particular buyer’s circumstances: would someone in those circumstances be materially prejudiced?
- (b) Given that the buyer has only 14 days in which to cancel the contract, and the completion date may still be some months away (as it was in this case), material prejudice must be assessed in the light of the buyer’s circumstances when the Further Statement is received or at the latest at the expiration of 14 days from its receipt.
- (c) There must be a causal relationship between the inaccuracy and the prejudice.
- (d) There must be proportionality between the inaccuracy and the prejudice.
- (e) Because this is consumer protection legislation, it should be construed beneficially.”

Those conclusions are in accord with principle and the objects of the legislation.

- [51] Two passages relied upon by the learned primary judge were drawn from the decisions of the High Court of *Deming No. 456 Pty Ltd & Ors v Brisbane Unit Development Corporation Pty Ltd*²⁶ and of the Full Court of Queensland in *Gold Coast Carlton Pty Limited v Wilson*²⁷ where the Courts were concerned with the phrase ‘materially affect’ as it applied to the interests of a buyer under s 49 of *Building Units and Group Titles Act 1980* (Qld). In its terms, that section provided relief to the buyer the equivalent to that provided by s 214 of BCCMA.
- [52] In *Deming*, the buyer appealed a decision on a summary hearing ordering it to specifically perform a contract for the purchase of a lot notwithstanding that it had purported to cancel the contract for the seller’s non-compliance with the statutory

²⁴ Appeal Book transcript 1-25/1-10.

²⁵ Transcript 1-20/10-20.

²⁶ (1984) 155 CLR 129.

²⁷ [1985] 1 Qd R 182.

provisions. The High Court determined that the issues ought to have been determined on trial. Relevant to the test for deciding whether the buyer was ‘materially affected’ Wilson J said (at p 168-9):-

“In an earlier case, *Bassingthwaite v Butt*, McPherson J offers an objective test of materiality, namely, whether the possibility that the purchaser might not have purchased is a reasonable supposition. His Honour refers to Stonham, *Vendor and Purchaser*, pars. 373 and 374. If that is an appropriate test, then I would agree with his Honour that the possibility that Deming might not have purchased the property had its lot entitlement been represented as 1/37 instead of 1/41 is not a reasonable supposition. However, we are not applying equitable doctrines. We are construing a statute which reflects a firm resolve on the part of the legislature to protect the purchasers of home units with quite specific statutory remedies. Section 49(4) contemplates that there will be circumstances which are capable of materially affecting the rights of purchasers. These circumstances encompass the entry into or variation of a management agreement or service agreement, the making or variation of a by-law or a change in the lot entitlement of any lot or the aggregate lot entitlement. Of course, it would be quite unjust if minor changes or adjustments in these areas were to entitle a purchaser to avoid a contract. On the other hand, if the changes are not insignificant and have the effect of changing the substance of that contracted for, the intention of the legislature would seem to be plain.”

The plural judgment (Mason, Deane, Dawson JJ) dealt with the point in a cursory way having also determined that the variation relied upon by the buyer was such as to require the question of ‘material affect’ to be determined at trial.²⁸

- [53] In *Gold Coast Carlton* the court was concerned with a minor variation in the annual cost of body corporate services. Highlighting the need for a purchaser to show a significant disadvantage, Andrews SPJ said (at p 189):-

“The respondents argued that their rights were ‘materially affected’. What this amounts to is that their share of the costs of the services of Body Corporate Services Pty Ltd was to be \$63.00 for the first year, rising to \$70.00 for the next year. Whether this amounts to material affectation of their rights is a question of fact...I cannot accept that “materially affect” means other than to affect rights deleteriously in some way. I am by no means persuaded that to show that a purchaser is to pay what appears to be a rather modest sum for work of this kind is to show that his rights have been affected at all.”

- [54] The term ‘material prejudice’ was considered by Chesterman J in *Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal*²⁹ he said (at para [66]):

“...The term ‘material prejudice’ has no special meaning. Prejudice in this context means disadvantage. It is material if it is substantial or of much consequence. The misstatement in question was the omission in the accounts of the receipt of income which would have

²⁸ Ibid at p 152; see also per Gibbs CJ at p 139.

²⁹ [2004] 1 Qd R 346.

entirely offset an item of expenditure which, on the face of the accounts, the residents would have had to meet. There was no error in the actual amounts received and spent. The residents did not pay out more than they should have. The accounts did, however, wrongly, give rise to the belief that the residents had paid or were obliged to pay more than they were legally obliged to pay. However, a belief inculcated by a misstatement does not ordinarily cause disadvantage or prejudice, let alone of a substantial sort, unless it is acted on to one's detriment."

That statement found favour with the learned primary judge, except for the view expressed about the relevance of a person's belief.

- [55] For the purpose of assessing material prejudice for the purpose of s 214 a person's belief would not ordinarily be relevant. The statutory right to cancel the contract depends upon the existence of the facts which trigger the right. Actual inaccuracy, rather than one's belief as to inaccuracy is what is required. Mirvac's contention that the respondent acted upon a mistaken belief does not accord with facts accepted below, and not varied here. There was, in fact, inaccuracy in the disclosure statements.
- [56] Mirvac argues here, as it did below, that the tests for determining material prejudice was the same as that enunciated by Derrington J for the purpose of s 49(4) of *Building Units and Group Titles Act* in *Sommer v Abatti Holdings Pty Ltd*³⁰. In so doing his Honour was guided by earlier decisions on that section including a decision of the Full Court of Queensland in *Gold Coast Carlton Pty Ltd v Kamalesvaran*³¹. These decisions followed a test laid down in *Flight v Booth*³² for determining entitlement to rescind a contract for the transfer of property on the basis of a misdescription of what the premises could be used for. The Court there was applying general principles of contract. The judgment of Tindall CJ states:-

"It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only...But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud will vitiate the contract of sale. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed, that, but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."

³⁰ [1992] 1 Qd R 300.

³¹ (1984) Q ConvR 54-144.

³² (1834) 1 Bing (NC) 370; 131 ER 1160.

- [57] It is difficult to see how that identification of a general principle can determine the test for a remedy provided by statute which must find its basis in the ordinary meaning of the words of the statute itself. The learned primary judge was, in my view, correct in rejecting the test referred to in *Sommer* and in adopting the approach derived directly from the terms of the legislation.
- [58] Turning then to the terms of the legislative provision. In the context of s 214 (and also s 217), the question of prejudice depends upon the information which has come to the buyer's actual knowledge and whether the information on an objective basis is inaccurate. As with the provision considered by Chesterman J above, the prejudice for the purpose of s 214 flowing from the inaccuracy arises from some detriment or disadvantage to the buyer. In its ordinary meaning "prejudice" in this context means "to injury or to impair the validity (of a right, claim or interest) to damage". A person is "prejudiced" when affected disadvantageously or detrimentally.³³
- [59] A person would be "materially prejudiced" if disadvantaged "substantially" or "to an important extent"³⁴. The Court of Appeal in *Vennard v Delorain Pty Ltd as Trustee for the Delorain Trust*³⁵ suggested, that in a similar context, the phrase meant "disadvantaged in a way which is substantial or of much consequence"³⁶. It is this concept that requires a consideration of the personal circumstances of the buyer in what is otherwise a determination to be made objectively. The concept of using an objective standard but having regard to personal characteristics is not novel in law. It commonly finds expression in relation to personal self control in criminal law³⁷ and in relation to varying standard of care in "reasonable person" tests.³⁸ The material prejudice for the purpose of s 214 (and s 217), has to be assessed in the context of the buyer's personal circumstances being required to complete the contract on its changed terms. The evaluation of whether any disadvantage or detriment reaches the level of material prejudice such as to warrant cancellation of the contract, must be objectively determined in accordance with community standards.

Conclusion

- [60] On the only evidence led below, there was no challenge to the fact that the presence of a security system was "a very important matter" for the respondent. Given the location of the Farringford building and the likely intrusion of non-residents, the presence of a security system would, inherently, be important to residents generally. It was sufficiently important to be raised by the seller in its promotional material. The finding of the learned primary judge that "viewed objectively, a person in the (respondent's) circumstances in August 2009 would be disadvantaged in a substantial way" was clearly open on the evidence.
- [61] Mirvac has not, in my view, demonstrated any error in the finding of the learned primary judge that the respondent was materially prejudiced by the omission of the camera security system.

³³ Oxford English Dictionary 2nd Edition; Macquarie Dictionary 4th ed.

³⁴ Oxford English Dictionary 2nd Edition – materially (4).

³⁵ [2010] QCA 309.

³⁶ Ibid at para [27].

³⁷ *Stingel v The Queen* (1990) 171 CLR 312.

³⁸ *McHale v Watson* (1966) 115 CLR 199.

[62] That being the case, Mirvac has not succeeded in any of its contentions. The grounds of appeal are not made out and the appeal should, in my view, be dismissed with costs.