SUPREME COURT OF QUEENSLAND

CITATION:	*Ross Nielson Properties Pty Ltd v Orchard Capital Investments Ltd* [2011] QCA 49
PARTIES:	**ROSS NIELSON PROPERTIES PTY LTD** ACN 010 754 873 (appellant) **v** **ORCHARD CAPITAL INVESTMENTS LIMITED** ACN 077 235 879 (respondent)
FILE NO/S:	Appeal No 10629 of 2010 SC No 1049 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2011
JUDGES:	Fraser and Chesterman JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed with costs to be assessed on the standard basis**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – SPECIFIC INTERPRETATIONS – where the appellant and respondent were parties to a development agreement to construct a shopping centre – where the appellant purported to terminate the development agreement pursuant to s 367(2) of the *Property Agents and Motor Dealers Act* 2000 (Qld) ('PAMDA') – where the development agreement contained a call option and a put option which only became exercisable upon the fulfilment of a series of contingencies – where the appellant argued that an appellate decision handed down subsequent to the primary judge's decision showed that the primary judge erred in his approach to characterising the development agreement – whether the development agreement was "a contract for the sale of" land, and therefore a "relevant contract" for the purposes of s 367(2) of PAMDA

Property Agents and Motor Dealers Act 2000 (Qld), s 10(1), s 10(2), s 10(3), s 17(4), s 363, s 364, s 365(1), s 366, s 366(1), s 366(4), s 367(2), s 368, s 369

Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd [2007] 1 Qd R 132; [2006] QSC 182, considered
David Deane & Associates P/L v Bonnyview P/L & Ors [2005] ANZ Conv R 518; [2005] QCA 270, considered
Mark Bain Constructions Pty Ltd v Barling [2006] ANZ Conv R 281; [2006] QSC 48, considered
Nguyen v Taylor (1992) 27 NSWLR 48, cited
Orchard Capital Investments Limited v Ross Neilson Properties Pty Ltd [2010] QSC 340, considered
Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust [2010] QCA 259, distinguished

COUNSEL: P H Morrison QC, with G J Handran, for the appellant
A B Crowe SC, with V G Brennan, for the respondent

SOLICITORS: Broadley Rees Hogan Lawyers for the appellant
McMahon Clarke Legal for the respondent

[1] **FRASER JA:** The appellant, Ross Nielson Properties Pty Ltd ("RNP") as "developer", and the respondent, Orchard Capital Investments Limited ("OCIL"), as "owner", were parties to a "development agreement" made on 2 September 2005. On 8 February 2010, RNP purported to terminate the development agreement under s 367(2) of the *Property Agents and Motor Dealers Act* 2000 (Qld) ("PAMDA"[1]) on the ground that OCIL had not attached or drawn RNP's attention to a "warning statement", which PAMDA requires in relation to "relevant contracts".

[2] OCIL commenced proceedings in the trial division for orders designed to enforce RNP's obligations under the development agreement. RNP defended the proceedings. The trial judge found in OCIL's favour and declared that the development agreement was not a "relevant contract" as that term is defined in s 364 of PAMDA and that RNP was not entitled to terminate the development agreement as it purported to do by letter dated 8 February 2010.[2] Consequential orders giving effect to those declarations were made.

[3] There was no warning statement attached to the development agreement. RNP sought to justify its purported termination of the development agreement under s 367(2) of PAMDA, which provides that if a warning statement is not attached to a "relevant contract" the buyer may terminate the contract at any time before the contract settles. The term "relevant contract" is defined in s 364 to mean "a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction." There was no provision for sale by auction in the development agreement and the relevant land was at all times "residential property" (because it

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1 The relevant version of PAMDA is that which was in force on 2 September 2005 when the development agreement was made (reprint 2F).

2 *Orchard Capital Investments Limited v Ross Nielson Properties Pty Ltd* [2010] QSC 340 at [51], [135]. The trial judge also resolved other issues but they are not the subject of the appeal.

was in a "residential area", since it was, in terms of s 17(4), "an area identified on a map in a planning scheme as an area for residential purposes.")

[4] Accordingly, the question in RNP's appeal is whether the development agreement was "a contract for the sale of" the land, and thus a "relevant contract", within the meaning of those expressions in s 364. RNP contended that the development agreement possessed that character because one clause in it conferred a "put option" in favour of OCIL, the exercise of which would require RNP to purchase residential land from OCIL.

Chapter 11 of PAMDA

[5] In construing the definition of "relevant contract" the trial judge derived assistance from the statutory purposes expressed in PAMDA. Section 10(1) expresses PAMDA's objects as including the provision of a system for (amongst other things) regulating persons as property developers, which "… achieves an appropriate balance between—

> "(a) the need to regulate for the protection of consumers; and
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> (b) the need to promote freedom of enterprise in the market place."

[6] Section 10(2) provides that another significant object of PAMDA is "to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property." Section 10(3) provides that the objects are to be achieved mainly by, amongst other methods, "(d) providing protection for consumers in their dealings with marketeers". More specifically, s 363 sets out the purposes of Chapter 11 of PAMDA as being:

> "(a) to give persons who enter into relevant contracts a cooling-off period; and
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> (b) to require all relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that the contract is subject to a cooling-off period; and
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> (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers."

[7] The trial judge also found assistance in the scheme established by Chapter 11. Section 366(1) provides that a "relevant contract" must have attached, as its first or top sheet, a warning statement in the approved form containing information specified in s 366(3), including that the contract is subject to a "cooling-off period". Section 366(4) requires the statement to be signed and dated by "the buyer" before the buyer signs the contract. Under s 364 the cooling-off period is five business days from the first business day upon which the buyer is bound by the contract which, under s 365(1), is when the buyer or the buyer's agent receives a copy of the contract signed by the buyer and "the seller". As I have mentioned, s 367(2) provides that if a warning statement is not attached to a relevant contract the buyer may terminate the contract at any time before the contract settles. By s 368, a buyer under a relevant contract who has not waived the cooling-off period may terminate the contract before the end of that period, in which event the seller must refund

to the buyer "any deposit paid under the contract" less the "termination penalty" (a term defined in s 364 to mean 0.25 per cent of the purchase price). In broad terms, the effect of s 369 is that the cooling-off period may be waived before the buyer is bound by the contract by the buyer giving to the seller a lawyer's certificate which confirms that the lawyer is independent of the seller and others involved in the sale, the lawyer will not benefit in connection with the sale otherwise than by receiving professional costs and disbursements from the buyer, and the lawyer has explained to the buyer the effect of the contract and the purpose, nature and legal effect of the certificate.

The development agreement

[8] It is necessary now to refer to the effect of the development agreement. At the same time I will mention some events that occurred in relation to that agreement.

[9] The original parties to the development agreement were RNP and SAI Teys McMahon Property Ltd ("SAITMPL"). SAITMPL contracted in its capacity as the responsible entity for a property fund. Subsequently, OCIL was appointed in place of SAITMPL as the responsible entity for the fund. The parties were content to adopt the convention that OCIL should be regarded as having been a party to the development agreement when it was made. In what follows I will adopt the same convention for ease of reference, as did the trial judge.

[10] Before the parties entered into the development agreement, RNP and Starlistic Pty Ltd ("Starlistic"), the owner of land at Caloundra West ("the Property"), made a contract dated 7 April 2005 (the "Starlistic Call Option"). The Starlistic Call Option required RNP to pay Starlistic an "Option Fee" of $100,000, comprising an initial option fee of $10,000, which RNP paid, and a balance option fee of $90,000. In exchange, Starlistic granted RNP an option to purchase the Property. The Starlistic Call Option permitted RNP to exercise the option to purchase the Property or to nominate another person as the person entitled to exercise the option. If RNP gave Starlistic a notice of nomination, the nominee would be entitled to exercise the option to the exclusion of RNP. If the option were exercised, the Option Fee of $100,000 would constitute the deposit under the resulting "Land Contract" for the purchase of the Property.

[11] The development agreement was formed some months later, on 2 September 2005. It recited to the effect that Starlistic was the registered owner of the Property, that as at the "Effective Date" (completion of the Land Contract resulting from exercise of the Starlistic Call Option) OCIL would be entitled to be the registered owner of the Property, and that OCIL wished to engage the services of RNP to procure a development approval in respect of the Property, the execution of an agreement for lease with Coles Myer Limited as the "Anchor Tenant", and completion of construction of "the Works" (which included the building of a shopping centre and related improvements) on the Property.

[12] The development agreement included provisions to the following effect:

(a) OCIL should pay RNP the Option Fee of $100,000 by a specified "Option Condition Date".

(b) RNP should pay to Starlistic the balance Option Fee of $90,000 payable under the Starlistic Call Option.

(c) RNP would be entitled to retain $10,000 from the $100,000 paid to it by OCIL as reimbursement for RNP's payment of that amount as the initial Option Fee under the Starlistic Call Option.

(d) In consideration of the payment by OCIL to RNP of the Option Fee, RNP should nominate OCIL (or its nominee), by notice to Starlistic, as the purchaser under the Land Contract resulting from exercise of the Starlistic Call Option.

(e) OCIL must comply with its obligations under the Land Contract (or ensure that its nominee does so) and do anything necessary to effect completion under the Land Contract in accordance with its terms.

(f) If OCIL did not complete the Land Contract (otherwise than by its default or that of its nominee), then the development agreement should be at an end.

(g) RNP would use its best endeavours to obtain a development approval for a retail centre with approximately 4,250 square metres net lettable area and otherwise in accordance with plans annexed to a pre-commitment from Coles Myer as the Anchor Tenant. The development approval was to be on terms and conditions acceptable to RNP in its absolute discretion and to OCIL acting reasonably.

(h) RNP would use its best endeavours to procure Coles Myer Limited to enter into an agreement for lease in certain terms by a specified date.

(i) OCIL would pay RNP $500,000 seven days after the date of execution of the development agreement by OCIL, $200,000 seven days after RNP lodged the development application with the local authority, and $2 million seven days after notification by RNP to OCIL that the development approval had issued.

(j) RNP would carry out the development (including by engaging a builder to construct the shopping centre) and OCIL would pay RNP the balance of the "Contract Price" under the development agreement by way of periodic progress payments to RNP or, in specified cases, to the builder.

[13] RNP embarked upon its obligations under the development agreement, including by nominating OCIL under the Starlistic Call Option and pursuing the necessary development approval and agreement for lease. OCIL paid the first instalment of $500,000 to RNP on 9 September 2005. On 16 September 2005 Starlistic contracted to sell the Property to the then custodian of the fund by a contract which, the parties accepted, should be regarded as being the Land Contract contemplated by the Starlistic Call Option and the development agreement. The purchase price under the Land Contract was $2.2 million. It was completed on 23 September 2005. OCIL paid the second instalment under the development agreement of $200,000 to RNP on 21 December 2005.

[14] RNP was unable to obtain the necessary development approval from the local authority so that the development could not proceed. Clause 13 of the development agreement made provision for that contingency. Clause 13 applied if RNP had not obtained the development approval and the agreement for lease. Clause 13.2

provided that in this event RNP would "procure an independent valuation of the Property by a reputable valuer with at least 5 years experience in valuing similar properties" and prepare and submit to OCIL a "development and/or realisation strategy in relation to the Property". Clause 13.3 provided that the recommendation would consider, as alternatives, the sale of the Property, the development of the Property on terms or conditions other than that proposed in the development application, the retention of the Property, and such other commercial proposal as RNP determined. Clause 13.4 obliged RNP to base its recommendation on specified criteria, which included the highest and best use of the Property and the value of the Property obtained pursuant to the independent valuation conducted under clause 13.2. Clause 13.5 provided that OCIL must advise RNP as to whether it accepts or rejects the recommendation in relation to the future development of the Property no later than 14 business days after RNP made the recommendation. Clause 13.6 provided that if RNP's recommendation was to sell the Property and OCIL accepted that, or if the recommendation was to hold or develop the Property and OCIL rejected that, then the Property was to be sold as soon as practicable in accordance with clauses 13.7-13.14.

[15] On 2 October 2008 RNP submitted to OCIL a recommendation under clause 13.2 that a development approval be sought for a development incorporating 12 townhouses and 114 units on the land, with RNP to prepare and submit the application and to provide development management services at no cost. OCIL was to pay certain costs of the application and approval (approximately $150,000). On receipt of approval the Property was to be marketed and sold with the benefit of the approval, with the profits to be shared equally between RNP and OCIL. OCIL rejected that recommendation on 8 October 2008 and indicated that it wished to proceed with the sale of the Property. (At the trial, RNP claimed that OCIL's rejection of the recommendation was made in breach of a contractual obligation to act in good faith. The trial judge rejected that claim. RNP abandoned its challenge to that decision at the commencement of the hearing of the appeal.)

[16] By this point the development venture had failed. The Property would not be improved by a development approval, RNP would not be paid the third instalment ($2 million) or any further amount under the development agreement and, under provisions which I will now set out, OCIL might merely recoup expenditure it had made in pursuing the development:

> "13.7 As the Developer is required in accordance with clause 13.10 to contribute to any shortfall between the Net Property Sale Proceeds and the amount of $2.9million, the Owner acknowledges that the Developer is to have control over the sale process including, without limiting the generality of the foregoing:
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> 13.7.1 the appointment of any agent to effect the sale of the Property, including the terms of such appointment;
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> 13.7.2 the manner in which the Property is to be offered for sale (i.e. by auction, tender, etc.);
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> 13.7.3 any negotiations with third parties in respect of the terms for the sale of the Property; and

13.7.4 such other matters relating to the sale process of the Property that the Developer requires control over in order to properly effect the sale of the Property.

13.8 The Owner shall (or if applicable, procure the Owner's Nominee to), no later than 2 business days after written request from the Developer:

13.8.1 execute any document required to appoint an agent recommended by the Developer to effect the sale of the Property;

13.8.2 execute any contract recommended by the Developer for the sale of the Property provided that such contract is in the form of an Approved Contract; and

13.8.3 such other documents as the Developer may reasonably require to be executed by the Owner in order to effect the sale of the Property.

13.9 The Owner shall (or if applicable, procure the Owner's Nominee to) strictly comply with the terms of any Sale Document and acknowledges that any failure by the Owner (or Owner's Nominee) to comply with the terms of the Sale Document constitutes a breach of this Agreement.

13.10 If the Property is sold and the Net Property Sale Proceeds are:

13.10.1 less than $2.9million, then the Developer shall pay to the Owner on settlement of the sale of the Property an amount equal to $2.9million less the Net Property Sale Proceeds; or

13.10.2 greater than $2.9million, then the Owner shall pay to the Developer 50% of the excess on settlement of the sale of the Property."

[17] There was no sale within the 12 month period specified in clause 13.11, which expired on about 8 October 2009. In this event, the "Put Option" in clause 13.11 became available for exercise. Clause 13.11 provided:

"13.11 If the Property is not sold by that day being 12 months from the date that the provisions of clause 13.6 apply (**Sale Date**), then the Owner (or Owner's Nominee) shall be entitled to exercise the Put Option contained in this clause 13.11:

13.11.1 The Developer grants to the Owner (or Owner's Nominee) for a period of 7 days from the date the Developer delivers to the owner the Supporting Material an option to require the Developer or its nominee to

purchase the Property in accordance with the Option Contract. The Developer shall execute and deliver to the Owner (or Owner's Nominee) the Supporting Material no later than 2 business days after the Sale Date.

13.11.2 The Developer may at any time prior to exercise of the Put Option, nominate in writing to the Owner (or Owner's Nominee), another person or corporation who is to acquire the Property from the Owner (or Owner's Nominee) (**Nominee**). In order for the nomination to be effective, the Developer must procure the Nominee [to] deliver the Supporting Material to the Owner (or Owner's Nominee) duly executed.

13.11.3 The Put Option may only be exercised by the Owner (or Owner's Nominee) delivering to the Developer on a business day at the address for service of notices on the Developer specified in Schedule 1, Item 4, a Put Option Notice executed by the Owner (or Owner's Nominee).

13.11.4 On exercise of the Put Option, the Option Contract will be deemed to have been entered into between the Owner (or Owner's Nominee) as Vendor and the Developer or its Nominee as Purchaser.

13.11.5 Following receipt of the Option Notice, the Owner (or Owner's Nominee) shall cause to be delivered to the Developer 2 copies of the Option Contract duly completed by inserting the appropriate details in any blanks, duly executed by the Owner (or Owner's Nominee). Following receipt of the Option Contract duly executed by the Owner (or Owner's Nominee), the Developer shall also promptly execute both copies of the Option Contract and deliver 1 copy to the Owner (or Owner's Nominee) duly executed by both parties.

13.11.6 Any duty under the Duties Act arising in relation to the provisions of this clause 13.11 or any transaction arising as a result of the Owner (or Owner's Nominee) exercising the Put Option under this clause is to be borne by the Owner, other than any duty under the Duties Act payable in respect of the Option Contract which shall be paid by the Developer.”

[18] Clause 13.12 conferred a call option in RNP's favour, in similar terms.

[19] A draft of the Option Contract which would result from the exercise of the Put Option in clause 13.11 (or from the exercise of the call option in clause 13.12) was set out in a schedule to the development agreement. It provided for RNP (or its nominee) to purchase the Property for $2.9 million, with settlement in 60 days. That price was equivalent to the sum of the purchase price paid by OCIL to Starlistic to buy the Property and the two instalments paid by OCIL to RNP under the terms of the development agreement.

[20] The "Supporting Material" referred to in clause 13.11.1 of the development agreement was defined to mean:

> "(a) a Lawyer's Certificate under section 369 of the Property Agents and Motor Dealers Act 2000 (Qld), waiving the cooling-off period under the Contract, duly signed by the Developer or Nominee's solicitor; and
>
> (b) Form 30C under the Property Agents and Motor Dealers Act 2000 (Qld), annexed as the top sheet of the Contract, duly signed by the Developer or its Nominee."

The fact that the Supporting Material appears to have been designed to meet requirements of PAMDA has no enduring significance because the parties accepted that the relevant time for the application of PAMDA was when the development agreement was made.

[21] In the events that had occurred, the effect of clause 13.11.1 was that RNP became obliged to execute and deliver to OCIL (or its nominee) the Supporting Material and RNP granted to OCIL (or its nominee) an option to require RNP (or its nominee) to purchase the Property. On 16 October 2009 OCIL's solicitors wrote to RNP's solicitors calling upon RNP to deliver the Supporting Material to OCIL. RNP did not comply with that demand. Ultimately, RNP gave OCIL the notice purporting to terminate the development agreement under s 367(2) of PAMDA which I mentioned earlier.

The reasons of the trial judge

[22] The trial judge referred to authorities which described the general character of an option to purchase land as a conditional contract to purchase land,[3] and to *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd*,[4] in which Keane JA referred to that characterisation and held that, in the circumstances of that case, certain option agreements constituted "contracts of sale" within the meaning of a commission agency agreement. The trial judge then discussed *Devine Ltd v Timbs*[5] and *Mark Bain Constructions Pty Ltd v Barling*[6] (in which option agreements in forms similar to the options in clause 13.11 and clause 13.12 of the development agreement were characterised as "relevant contracts" under PAMDA) and *Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd*[7] ("*Cheree-Ann*")

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3 *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57; *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326; *Whitemore Pty Ltd v OF Gamble Pty Ltd* (1991) 6 WAR 110 at 116-117; *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia* [2008] WASCA 107 at [16]-[18]; *Traywinds Pty Ltd v Cooper* [1989] 1 Qd R 222.

4 [2005] QCA 270.

5 [2004] 2 Qd R 501.

6 [2006] QSC 48.

7 [2007] 1 Qd R 132.

and *Vale 1 Pty Ltd v Delorain Pty Ltd*[8] (in which the opposite conclusion was reached where option agreements included additional provisions which facilitated or permitted the prospective purchaser under the options to market the land and profit by introducing a third party as a substitute purchaser).

[23] From those cases the trial judge derived the propositions that, in the case of an option, it is the option agreement, rather than a document executed after the exercise of the option, to which attention must be paid for applying the provisions of PAMDA; and in the case of an option agreement which includes a put option, the potential purchaser becomes bound to purchase the land "by virtue of obligations it undertakes as part of the option agreement, though the engagement of those obligations depends upon an act of the seller."[9] It followed that it was necessary to consider whether PAMDA applied to the development agreement in which clause 13.11 created the Put Option. The focus was upon the character of the development agreement itself: in a subsequent passage of the reasons,[10] the trial judge concluded that the provisions of PAMDA did not apply in relation to the Put Option considered separately from the development agreement, or in relation to any exercise of the Put Option or any contract which would result from that exercise.

[24] RNP did not challenge those conclusions. It accepted that what was in issue was the characterisation of the development agreement itself. RNP's case on appeal was that the Put Option in clause 13.11 clothed the development agreement with the character of a "relevant contract".

[25] The trial judge rejected that case in the following passage:

> "[46] Immediately before the parties entered into the Development Agreement, RNP had the benefit of the Starlistic option. Accordingly, it had an equitable interest in the land. At that time, neither OCIL nor any entity associated with it had any interest in the land. It seems to me it would produce a curious result if the Development Agreement were held to be a "relevant contract" for the purposes of the PAMD Act, in respect of which OCIL was the "seller" and RNP was the "buyer".
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> [47] I have previously summarised the principal features of the Development Agreement. In substance, it was an agreement intended to bring about the development of the land as a shopping centre. It may be that the Development Agreement constituted a joint venture, and that as a result of its contributions, RNP acquire, or may have acquired, some equitable interest in the land, but it is unnecessary to reach a final view about this. The primary mechanism chosen by the parties to bring the project to an end, in the event that its primary purpose could be achieved, was the sale of the land, to be conducted by RNP, with a guaranteed minimum return to OCIL related to the amount paid by it (or an entity associated with it) for the purpose of the project, and a provision for sharing any

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8 [2009] QSC 425.

9 *Orchard Capital Investments Limited v Ross Nielson Properties Pty Ltd* [2010] QSC 340 at [45].

10 [2010] QSC 340 at [60]-[87].

> excess above that amount between RNP and OCIL. If that mechanism was unsuccessful, and RNP had not previously exercised its call option rights under the Development Agreement, the put option came into effect. The put option appears to be a mechanism of last resort.
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> [48] Adopting the analysis of Mullins J [in *Cheree-Ann*], it cannot be said that the sale of the land by OCIL (or an associated entity) to RNP is the substance of the Development Agreement.
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> [49] The question which has to be determined is whether the Development Agreement was, in the language of the definition of "relevant contract" in the PAMD Act, a "contract for the sale of residential property". It seems to me that some assistance in understanding the expression can be obtained by a consideration of the type of transaction envisaged by Chapter 11. It envisages a party who can be characterised as the buyer, and another who can be characterised as the seller, in relation to the contract. The contract is likely to be prepared by the seller. It is likely to be signed by the buyer, before it is signed by the seller. It is likely to make provision for the payment of a deposit. The envisaged contract is one which "settles". It is not easy to see the development agreement as a contract to which the provisions of Chapter 11 are intended [to] apply.
>
> [50] The stated purposes of Chapter 11 include that purchasers who "enter into relevant contracts" have the benefit of a cooling-off period, and to require "all relevant contracts for the sale of residential property in Queensland" to include certain consumer protection information with regards to s 363. These statements of purpose provide no real assistance in understanding what is a relevant contract. More assistance is to be found in the provisions of s 10 of the PAMD Act. One of the significant objects of the Act is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property. Moreover, additional context may be derived from s 17, which identifies residential property as a single parcel of land, on which a place of residence is constructed or is being constructed, or if vacant, is in a residential area. Taken together, these considerations strongly suggest that Chapter 11 is directed to transactions involving consumers, and not to a transaction including the commercial complexities of the development agreement."[11] (citation omitted)

[26] The trial judge found that those considerations indicated that a "relevant contract" was "one, the principal purpose of which is to bind the parties to the purchase and

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[11] *Orchard Capital Investments Limited v Ross Nielson Properties Pty Ltd* [2010] QSC 340 at [46]-[50].

sale of residential property of the kind identified in s 17 of [PAMDA]". His Honour held that the development agreement was not a "relevant contract", compliance with s 366 was not required, and RNP's attempt to terminate the development agreement on the basis of non-compliance with that section was ineffective.[12]

Consideration

[27] RNP's principal contention in this appeal was that the trial judge erred by applying the "substance test" which was derived from *Cheree-Ann*. That contention was based upon a decision which was delivered after the trial judge gave judgment. In *Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust*[13] ("*Vale*"), the Court (Applegarth J, with whose reasons McMurdo P and White JA agreed) upheld an appeal against the decision in the trial division, holding that the trial judge had erred by applying the "substance test". RNP contended that *Vale* dictated the conclusion that the development agreement was a "relevant contract".

[28] That argument attributed too much to the decision in *Vale*. The option agreement considered in that decision was a "Call and Put Option Deed" by which a property developer ("Delorain") undertaking the construction of a residential development granted an option to purchase to Vale, who wished to purchase proposed apartments, and Vale granted to Delorain a "put option" to require Vale to purchase the apartments. The only conditions relating to the exercise of those options concerned the time and manner of their exercise. Notwithstanding reservations expressed in a different case,[14] the Court proceeded on the basis of earlier decisions in which certain option agreements in relation to residential property had been held to constitute "relevant contracts".[15] The option agreement in *Vale* differed from the agreements considered in the earlier cases because it contained additional clauses which permitted Vale to find a third party to purchase the property in Vale's place on terms which entitled Vale to share in any excess over the purchase price at which Vale would be obliged to purchase. In *Cheree-Ann* Mullins J held that an option agreement which contained similar provisions was not a "relevant contract" for the purposes of the consumer protection provisions of Chapter 11 because that agreement "in substance" provided stock for a property marketer. In that context, Applegarth J framed the first question for decision in *Vale* as being whether *Cheree-Ann* should be followed in concluding that, "… an option agreement that in substance provides stock for a property marketer should not be characterised as a "contract for the sale of property" for the purposes of the consumer protection provisions of Chapter 11".[16]

[29] It was that question which Applegarth J addressed in the observations that "… the mere presence in an option agreement of provisions that permit a party to market an "off the plan" lot to a potential purchaser and to refer that third party purchaser to the grantor/developer does not mean that what otherwise would be a "relevant contract" ceases to be so …", and that "[t]he contingency that the property may be

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12 *Orchard Capital Investments Limited v Ross Nielson Properties Pty Ltd* [2010] QSC 340 at [51].

13 [2010] QCA 259.

14 *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2010] 1 Qd R 439 at 441 [5], per Chesterman JA, with whose reasons Dutney J agreed.

15 See *Vale 1 Pty Ltd as Trustee for the Vale 1 Trust v Delorain Pty Ltd as Trustee for the Delorain Trust* [2010] QCA 259 at [4] per McMurdo P, at [9]-[14] per White JA, and at [33]-[35], [86] per Applegarth J, and the cases there cited.

16 [2010] QCA 259 at [40].

sold to a third party purchaser ... does not alter the nature of the Deed as one that provided for the sale of residential property."[17] The rejection in *Vale* of the "substance test", though expressed at times in general terms,[18] must be understood in that context. What *Vale* decided was that an option agreement of a kind which had been held to constitute a "relevant contract" was not deprived of that character by the addition of provisions to the effect of those found in the option agreements in *Vale* and *Cheree-Ann*. *Vale* did not decide that the mere presence in any agreement of any "put option" relating to residential land, whatever may be the terms of the option and the agreement, necessarily defines the agreement as a "relevant contract".

[30] RNP emphasised Applegarth J's references to the desirability of a certain definition of "relevant contract".[19] His Honour identified the significance of that consideration in the following passage:

> "In this matter Delorain invites the Court to apply, or even extend, the exception recognised in *Cheree-Ann*. However, such an approach is apt to create undesirable uncertainty concerning the application of the definition of "relevant contract" in future cases. Certainty concerning parties' rights in relation to transactions for the sale of residential property is important. Consumer protection is enhanced by certainty in determining whether or not an agreement constitutes a "relevant contract". Unnecessary uncertainty and the potential for litigation of the present kind is not in the interests of consumers or other persons involved in contracts for the sale of residential property. The first basis upon which *Cheree-Ann* was decided leaves the definition of "relevant contract" in an uncertain state and, on balance, I consider that the decision should not be followed in that respect."[20]

[31] The concern about commercial certainty related to the creation of an exception to the general proposition concerning option agreements of the kind which had been held to constitute a "relevant contract".[21] Here the question is instead whether a very different kind of agreement should be characterised as a "relevant contract" because it included a put option which would become exercisable only upon fulfilment of a series of contingencies. *Vale* could not and does not answer that question. It is necessary to examine the particular agreement in issue and decide whether it falls within the statutory definition.

[32] Where such questions of statutory characterisation are concerned, cases may arise where it is debatable whether or not a particular arrangement falls within the statutory definition. In the case of Chapter 11 of PAMDA, uncertainty inevitably results from the absence of any express limitation of its application to "consumers", the absence of any definition of that term, and the generality of the definition of "relevant contract". That has been manifested in the extensive litigation about those

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17 [2010] QCA 259 at [36] and [37]. See also the expressions to similar effect at [38], [39], [54], [59], [68], [84], and [86].

18 See, for example, [2010] QCA 259 at [67].

19 [2010] QCA 259, particularly at [55], [67], [73], [81], [89].

20 [2010] QCA 259 at [89].

21 See also [2010] QCA 259 at [4]-[5] per McMurdo P and at [13]-[14] per White JA.

provisions. If that uncertainty is thought to be undesirable, the remedy lies with the legislature.

[33] The parties accepted that an option agreement might constitute a "contract for sale" and thus a "relevant contract". However the exercise of applying the definition is not foreclosed by reference to tags such as "option agreement". As I have sought to emphasise, the question in this appeal is whether the development agreement itself was a "contract for the sale of" residential property, and thus a "relevant contract", within the meaning of s 364 of PAMDA.

[34] As to that, it is significant that the expression "contract for the sale of" does not have a fixed, technical meaning. Its meaning is capable of being influenced by the context in which it appears. The trial judge therefore adopted the conventional approach of construing that expression in a way which sought to reconcile it with the statutory context and the underlying legislative purpose, so far as that purpose could be detected in the language of the statute and any admissible extrinsic material.[22] The trial judge summarised the statutory context and the legislative purpose in paragraphs [49] and [50] of his Honour's reasons. I will return to the legislative purpose but, as OCIL contended, the provisions in Chapter 11 themselves indicate that a "relevant contract" is a contract "for the sale" of "residential land" between parties who may be described as "the buyer" and "the seller" of that land, which might "settle", and in respect of which a "deposit" might be payable and, if paid, might be returned to "the buyer" upon termination. That is not an apt description of the development agreement.

[35] Nor is there any real analogy between the development agreement and those option agreements which have been held to constitute "relevant contracts". In that regard, it is sufficient to refer to one such case. In *Mark Bain Constructions Pty Ltd v Barling*,[23] Philippides J held that a "Put and Call Option Deed", under which the grantee was entitled to exercise a call option to purchase residential property during a specified period and the grantor was entitled to exercise a put option requiring the grantee to purchase that property if the grantee had not exercised the call option, constituted a "contract for the sale of land", and therefore a "relevant contract", for the purposes of s 366 of PAMDA. Philippides J was influenced by Gibbs J's view in *Laybutt v Amoco Australia Pty Ltd* that an option to purchase was "a contract to sell the land upon condition that the grantee gives the notice and does the other things stipulated in the option."[24] Her Honour also relied upon a passage in *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd*[25] in which Keane JA explained "how an option or contract relating to the sale of property may, by mutual resolution of the contingencies to which it was previously subject, become properly characterised as a contract of sale."[26] After referring to those decisions Philippides J said:

> "In the present case, even if the option deeds could only be characterised as contracts *of* sale upon the fulfilment of the

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22 See *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, which Applegarth J applied in this context in *Vale* [2010] QCA 259 at [46].

23 [2006] QSC 48.

24 (1974) 132 CLR 57 at 76.

25 [2005] QCA 270 at [23].

26 [2006] QSC 48 at [32].

> contingent conditions to which they were subject, the option deeds are, nevertheless, in my view properly characterised as contracts *for* the sale of residential property. Although contingent on the exercise of the put and call options granted under the deeds, the applicant assumed obligations to sell and the respondents assumed obligations to purchase from which they could not withdraw. The form and substance of the contracts resulting from the exercise of the options, including the sale price, fell to be determined by reference to the option deeds. The option deeds thus contained the machinery provisions which were facultative of the realization of the lots by sale by the applicant to the respondents. Further, as Barwick CJ observed in *Petelin v Deger Investments Pty Ltd*, a clause in an option requiring a new contractual document in an identified form to be signed or exchanged does not contemplate the formation of a new and different contract, but merely the recording in a formal fashion of the agreement which resulted from the exercised option."[27] (citations omitted)

[36] In *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd*[28] one question was whether such a transaction constituted a valid and enforceable "contract of sale" the completion of which would entitle an agent to commission under a commission agency agreement. In the passage cited by Philippides J, Keane JA said:

> "Further, to speak of a contract of sale is to speak of a contract to transfer property for money. Those are the essential rights and obligations which characterize a contract as a contract of sale. The option agreements provided a mechanism by which these rights and obligations could be engaged. If the appellants elected to exercise their put option then the form and substance of the resulting contract, including the sale price, would be determined by reference to the provisions of the option agreements. In that regard, clauses 3 [which provided for the exercise of the call option by the grantee] and 5 [which provided for the exercise of the put option by the grantor] of the option agreements were machinery provisions facultative of realization of the lots by sale by the appellants to Traspunt or its nominees. Once the machinery conditions in the option agreements became irrelevant to the respective substantive rights of the appellants and Traspunt, the description of the arrangements in the option agreements as a contract of sale was undeniably accurate. What might have originally been characterized as options or contracts relating to a sale or even contracts simpliciter, but not contracts of sale, had become, by the mutual resolution of the contingencies to which they were previously subject, contracts which were properly characterized as contracts of sale and which were, indeed, performed as such. This point, that the character of a contract may change as its conditions are fulfilled or dispensed with, may be illustrated by reference to the observations of Wilson J in *Perri v Coolangatta Investments Pty Ltd* where his Honour said:

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27 [2006] QSC 48 at [32].

28 [2005] QCA 270.

> "The obligation to complete [the contract] is contingent on the fulfilment of the condition, but in the meantime there is a conditional contract in existence from which neither party is at liberty to withdraw at will. Interim obligations were undertaken by both parties. The vendor had to make good its title to sell, and the purchasers were obliged to pay the deposit and make all reasonable efforts to bring about a sale of the Lilli Pilli property.
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> Speaking for myself, I have difficulty in assigning the decision in *Aberfoyle* to the very limited category of cases dealing with conditions precedent to the formation of a contract. It seems to me that when Lord Jenkins ([1960] AC at pp 128, 130) spoke of a condition precedent, he was speaking of the condition in that case as precedent to the coming into existence of a binding contract *of sale*. As Sachs L.J. remarked in *Property and Bloodstock Ltd v. Emerton* ([1968] Ch 94 at p 121), after referring to Lord Jenkins' words,
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> > 'The distinction, of course, is there drawn between a contract and a contract of sale, and that particular distinction is one which derives from the long-used phraseology, almost the traditional phraseology, such as that to be found in *Anson on Contract*, 22nd ed. (1964), p. 111, and in *Chalmers' Sale of Goods* 14th ed. (1963), p. 243.'
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> Again, in *In re Sandwell Park Colliery Co.; Field v The Company* ([1929] 1 Ch 277 at p 282), Maugham J. refers to a 'condition upon which the validity of the contract as one sale depends' (sic '*one of sale*') and to a 'condition precedent to the validity of a contract *for sale* of land' (my emphasis) ([1929] 1 Ch at p 283)."
>
> The result, in my view, is that it must be accepted that the option agreements constituted valid and enforceable contracts of sale between the appellants and Traspunt."[29] (citations omitted)

[37] The expression "contract for sale" in the definition of "relevant contract" encompasses a broader range of transactions than does the technical term "contract of sale". In that light, notwithstanding Keane JA's observation that the option agreements "might have originally been characterized as options or contracts relating to a sale or even contracts simpliciter, but not contracts of sale" before "the mutual resolution of the contingencies to which they were previously subject", his Honour's analysis supported the conclusion that the similar put and call options in *Mark Bain Constructions Pty Ltd v Barling* constituted "contracts for sale". In both cases one party assumed a binding obligation to sell and the other party assumed a binding obligation to purchase, the obligation in each case being contingent only upon exercise by one party of the relevant option. That contingency might properly be disregarded for present purposes, particularly bearing in mind the consumer protection purposes of Chapter 11 of PAMDA: sellers could not evade the

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29 [2005] QCA 270 at [23].

legislative purpose merely by substituting options for conventional contracts of sale.[30]

[38] With those considerations in mind, for the purposes of Chapter 11 of PAMDA a contract of sale formed upon the exercise of such an option might be assimilated with the option agreement from which it originated so that the option agreement itself, though not a contract "of" sale, might be treated as a contract "for" sale; and it then does not unduly stretch the language to treat the purchaser and vendor under the contract of sale formed upon exercise of the option as "the buyer" and "the seller" under the option agreement, to treat settlement of the contract of sale as amounting to settlement of the option agreement, and to treat a deposit payable upon the purchase as a deposit payable under the option agreement. That process of assimilation may also be justified in a case like *Vale*, where an option agreement of the same kind contains additional provisions which facilitate marketing of the land and the introduction of a substitute purchaser. Such provisions create uncertainty about the identity of the ultimate purchaser, but a party to such an option agreement may nevertheless be characterised as "the buyer" where, as in *Vale*, that party remains bound to purchase if it is unable to find a third party to complete the purchase instead.

[39] The development agreement does not lend itself to any similar process of assimilation. OCIL would become entitled to exercise the Put Option only if OCIL had earlier exercised RNP's option to purchase the land from the owner and then only if three further contingencies were subsequently fulfilled: first, that the contemplated shopping centre could not proceed, because RNP was unable to procure the necessary development approval or the agreement for lease with Coles Myer Ltd; secondly, that OCIL then decided not to retain the land after considering the recommendation by RNP; and thirdly, that RNP did not within 12 months after OCIL's decision arrange a sale of the land to a third party at any price, on terms that RNP would make up any shortfall between the price and $2.9 million or would be entitled to 50 per cent of any amount by which the price exceeded that amount. Only if all of those contingencies were fulfilled would the Put Option become available for exercise by OCIL.

[40] It is clear from the last of those contingencies that the Put Option was merely one of the contractual mechanisms which implemented the allocation of risk in the development venture. RNP's contention that the development agreement comprised an option with other provisions grafted on to it has the tail wagging the dog. The contractual terms reveal instead that the aim of the development agreement was a shopping centre development under which the land would cease to be "residential land" and it would be retained by OCIL. It was only in the unwanted event that such a development proved to be unachievable that there was to be any possibility of OCIL selling the land to RNP. As a matter of ordinary language such an agreement was not a contract "for" the sale of residential property in which RNP was "the buyer" and OCIL was "the seller". Nor was the agreement of a character which might partake of the payment by "the buyer" of a refundable deposit upon the purchase of land.

[41] Further, if RNP were entitled to terminate the contract after OCIL had exercised the Starlistic Call Option, OCIL would forfeit substantial payments it had made to RNP and it would be left holding land in which it held no interest before it entered into

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30 See *Nguyen v Taylor* (1992) 27 NSWLR 48 at 52E-F per Kirby P.

the development agreement. I do not accept RNP's contention that the last mentioned consideration was irrelevant. As RNP contended, there is nothing unconventional about a contract for the sale of land by a seller who does not then own the land but expects to be in a position to secure title to the buyer at the time of settlement. In this case, however, OCIL was not in a position to secure title to the land before it contracted with RNP. It was RNP which held the right to acquire the land. Further, it was RNP, not OCIL, which had negotiated the price at which the option was to be exercised under the Starlistic Call Option, and that price would ultimately form one of the components in the price payable by RNP to OCIL upon any exercise of the Put Option. Regardless of the precise legal nature of any interest OCIL held in the land after execution of the development agreement, the fact that the supposed "buyer" was a person who contracted to give up the right to exercise that party's option to purchase land in favour of the supposed "seller" militates against the characterisation of the development agreement as a contract "for" the sale of the land.

[42] Nor do the expressed purposes of PAMDA suggest that the ordinary meaning of the expression "contract for sale" should be stretched so far. RNP contended that the trial judge was mistaken in taking into account the consideration that Chapter 11 of PAMDA was directed towards transactions involving "consumers". As I have indicated, there is no definition of the term "consumer" and that term is not expressed to be a criterion for the application of Chapter 11. It follows that an agreement might amount to a "relevant contract" even if "the buyer" might not be thought to be a "consumer" in the popular sense of that term. As Applegarth J held in *Vale*, PAMDA "does not state an exception of the kind formulated in *Cheree Ann* for cases of parties who seemingly are not in need of the consumer protection that Chapter 11 provides."[31] That is not to say, however, that the expressed consumer protection purpose of PAMDA is irrelevant to the construction of the definition of "relevant contract". The purpose, understood in light of the statutory scheme, indicates that the consumer intended to be protected is "the buyer" of residential land from "the seller" under a contract "for the sale of" that land, being a contract of a kind which might "settle", and in respect of which a "deposit" might be payable and, if paid, might be returned to "the buyer" upon termination. That consumer protection purpose would not be served by extending the drastic remedy given by s 367(2) to cases in which the ordinary meanings of those terms are inapplicable. As the trial judge considered, the statutory purpose tends to confirm that Chapter 11 is not directed to the "commercial complexities of the development agreement."[32]

[43] RNP did not seek to rely upon decisions under the *Statute of Frauds* that a contract fitted the statutory description where the contract included both a discrete promise which answered the statutory description and other promises.[33] Those decisions are distinguishable both because of differences between the applicable legislative regimes and because the Put Option in clause 13.11 of the development agreement was not a discrete promise which amounted to a contract for the sale of residential land. Its effect could not be ascertained without reference to the other provisions of the development agreement, particularly those provisions which identified the contingencies upon which the Put Option might become available for exercise.

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31 [2010] QCA 259 at [88].

32 [2010] QSC 340 at [50].

33 See, for example, *Horton v Jones* (1935) 53 CLR 475 at 485 per Rich and Dixon JJ; *Marginson v Ian Potter & Co* (1976) 136 CLR 161 at 168-169 per Gibbs and Mason JJ.

[44] When regard is had to the whole of the development agreement, as is necessary for the purposes of Chapter 11 of PAMDA, it is clear that the development agreement did not meet the statutory definition of "relevant contract".

Proposed Orders

[45] I would dismiss the appeal, with costs to be assessed on the standard basis.

[46] **CHESTERMAN JA:** I agree that the appeal should be dismissed with costs for the reasons given by Fraser JA.

[47] **MARTIN J:** I agree, for the reasons given by Fraser JA, with the order he proposes.