

SUPREME COURT OF QUEENSLAND

CITATION: *Richsilk Investments Pty Ltd v Cove Developments Pty Ltd*
[2011] QSC 63

PARTIES: **RICHSILK INVESTMENTS PTY LTD**
ACN 145 347 137
(plaintiff)
v
COVE DEVELOPMENTS PTY LTD
ACN 107 616 893
(defendant)

FILE NO: 1542 of 2011

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 31 March 2011

DELIVERED AT: Brisbane

HEARING DATE: 28 March 2011

JUDGE: Applegarth J

ORDER: **The contract executed by the plaintiff on 15 February 2011 be specifically performed.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – OFFER – OPTION FOR VALUABLE CONSIDERATION OR UNDER SEAL – EXERCISE OF OPTION – METHOD OF EXERCISE – where plaintiff buyer and defendant seller entered call option agreement – where exercise of option required buyer to deliver to seller “a properly completed and executed waiver of the cooling off period in Form 32a of the *Property Agents and Motor Dealers Act 2000 (Qld)*” – where form 32a contains three parts – where Part 2 of Form 32a relates to the waiver of the cooling-off period – where Part 1 of the form relates to independence of the buyer’s lawyer – where the form delivered to the seller had Part 2 completed and Part 1 not completed – whether this document was “a properly completed and executed waiver of the cooling off period in Form 32a of the *Property Agents and Motor Dealers Act 2000 (Qld)*” – where a separate Form 32a with Part 1 completed was sent by the buyer’s lawyer to the buyer – whether the plaintiff was also required to complete Part 1 of the form that was delivered to the seller – whether option

validly exercised

LEGISLATION: *Property Agents and Motor Dealers Act 2000 (Qld)* s 366, s 369A, s 369B

CASES: *Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd* [2007] 1 Qd R 132; [2006] QSC 182 cited
Orchard Capital Investments Ltd v Ross Nielsen Properties Pty Ltd [2010] QSC 340 cited
Ross Nielson Properties Pty Ltd v Orchard Capital Investments Ltd [2011] QCA 49 cited
Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust [2010] QCA 259 cited

COUNSEL: K N Wilson SC for the plaintiff
 D A Savage SC for the defendant

SOLICITORS: Van de Graaff Lawyers for the plaintiff
 MacGillivrays Solicitors for the defendant

- [1] The issue for determination is whether the plaintiff properly exercised an option to purchase the defendant's property. That issue turns on the proper construction of the parties' agreement and whether the documents delivered to the defendant's solicitors on 15 February 2011 included "a properly completed and executed waiver of the cooling off period in Form 32a of the *Property Agents and Motor Dealers Act 2000 Qld*" within the meaning of cl 5.1 of their agreement. If the issue of construction is determined in the plaintiff's favour, then it seeks an order for specific performance of a contract in the form executed by it on 15 February 2011. The defendant does not raise any issue in relation to the making of an order for specific performance if the issue of construction is determined against it.
- [2] The facts are not in dispute. The proceeding had an early hearing after a defence was filed on 11 March 2011 which did not dispute any question of fact. The hearing was conducted on the basis of documents that were tendered by consent. The plaintiff also read an affidavit, the contents of which were not contentious.

The facts

- [3] The parties entered into a Call Option Agreement dated 6 September 2010 ("the Agreement") in respect of certain land situated on the Dawson Highway at Gladstone. The plaintiff was described in the Agreement as "the Buyer" and the defendant was described as "the Seller". If the plaintiff validly exercised a call option it had the right to require the defendant to sell the property to it for a price of \$4,300,000.
- [4] Clause 3.1 of the Agreement relevantly provided:

"3.1 In consideration of the terms of this Agreement the Seller grants to the Buyer:

- (a) The irrevocable option to purchase the Property at the Purchase Price and upon the terms specified in the Sale Contract; or
- (b) The right to require the Seller to enter into a contract for the sale of the Property with a third party on the terms set out in the Third Party Contract, for a Purchase Price not less than the Property Price, with the proceeds of the sale to be dealt with in accordance with clause 7.”

Clause 5.1 relevantly provided:

“5. EXERCISE OF CALL OPTION

- 5.1 The Call Option may be exercised at any time prior to the Call Option Expiry Date pursuant to Clause 3.1(a) or Clause 3.1(b) by the Buyer delivering to the Seller an executed written notice of the exercise of the Call Option in the form of the Call Option Notice, two (2) completed copies of the Sale Contract executed by the Buyer or the Third Party (as the case may be) and **a properly completed and executed waiver of the cooling off period in Form 32a of the *Property Agents and Motor Dealers Act 2000 Qld*** (or any replacement form) by the Buyer or the Third Party (as the case may be). Immediately upon the exercise of the Call Option under this clause 5.1, there shall be deemed to come into existence between the parties a binding and concluded contract and the date of such contract shall be the date of the Call Option Notice.” (emphasis added)

[5] It is common ground that:

- (a) The plaintiff purported to exercise the option within time;
- (b) The plaintiff delivered to the defendant documents satisfying clause 5.1, other than a document that meets the description that I have highlighted above: the plaintiff says that it delivered such a document and the defendant denies this;
- (c) The plaintiff has complied with all other conditions of the Agreement, including the payment of monies, entitling it to exercise the option.

The documents that were delivered to the defendant on 15 February 2011 are in evidence. The critical document is a Form 32a, the contents of which I will later describe.

[6] Form 32a is an approved form by which certain “Lawyer’s certifications” may be given which relate to the requirements of ss 366, 369A and 369B of the *Property Agents and Motor Dealers Act 2000 (Qld)* (“the Act”). I annexe to these reasons a copy of the current Form 32a for ease of reference. The form is in three parts. Part 1 of the form is headed “Independence of lawyer”. Part 2 is headed “Waiving cooling-off period” and Part 3 is headed “Shortening calling-off period”.

- [7] The Form 32a that was sent to the defendant’s solicitors completed Part 2. Part 3 was not completed; however, nothing turns on this. The defendant accepts that it was unnecessary to complete Part 3 for the form to be “properly completed” within the meaning of cl 5.1 of the Call Option Agreement. However, the defendant contends that a “properly completed and executed waiver of the cooling off period in Form 32a of the *Property Agents and Motor Dealers Act 2000 Qld*” was not delivered to it by the plaintiff because Part 1 was not completed.
- [8] The plaintiff advances three arguments as to why the relevant document satisfied the requirements of cl 5.1 of the Agreement. Its first submission is that, on its proper construction, cl 5.1 required a properly completed and executed “waiver of the cooling off period” in Form 32a: it did not require a properly completed and executed Form 32a in its entirety.
- [9] In case it is relevant, the plaintiff points to the fact that a separate Form 32a, in which its solicitors completed Part 1, was sent to it under cover of a letter from its solicitors on 16 February 2011. The plaintiff’s position is that its solicitors’ completion of Part 1 of the form is irrelevant to the seller, that completion of Part 1 of the form that was delivered to the defendant’s solicitors on 15 February 2011 with other documents was unnecessary and that completion of Part 2 of that form made it “a properly completed and executed waiver of the cooling off period in Form 32a” for the purposes of cl 5.1 of the Agreement.
- [10] The resolution of the parties’ contentions requires consideration of the statutory context and the contents of the approved form.

The statutory context

- [11] At the time the parties made their agreement there was, and there remains, uncertainty about whether an option agreement of the present kind entered into for the sale of land, and any contract that is deemed to come into existence between the parties on the exercise of the option, is a “relevant contract” for the purpose of Chapter 11 of the Act. It is sufficient to observe that there is authority to the effect that certain forms of option agreement may constitute a “relevant contract” as defined in s 364, and that it is not clear that the Parliament intended the consumer protection provisions of Chapter 11 to apply to a contract entered into between commercially sophisticated parties in relation to the acquisition of a large parcel of land for development purposes.¹
- [12] Given the broad definition of “relevant contract” in Chapter 11 of the Act and the uncertain state of the law at the time the parties entered into the Agreement, it appears that they chose to address the possibility that a contract for the sale of the land described in their agreement would be a “relevant contract”, and thereby attract the “Cooling-off period” provisions of Chapter 11 of the Act. The parties provided for a properly completed and executed waiver of the cooling off period in Form 32a of the Act to be delivered with other documents in order to exercise the Call Option. It is not necessary for my decision, and I am not asked to decide, whether the Agreement, any contract that is deemed to come into existence upon the exercise of

¹ *Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd* [2007] 1 Qd R 132, [2006] QSC 182; *Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust* [2010] QCA 259; *Ross Nielson Properties Pty Ltd v Orchard Capital Investments Ltd* [2011] QCA 49.

the Call Option under cl 5.1, or both,² is or may be a “relevant contract”. The possibility that it might be is a relevant background fact in construing cl 5.1.

The approved form

- [13] The first page of Form 32a in addressing “Lawyer’s certifications” asks lawyers to note:

“The certifications in this form relate to the requirements of Sections 365B, 369 and 370 of the *Property Agents and Motor Dealers Act 2000*”.

At the time the parties entered into the Agreement s 365B (Lawyer’s disclosure to buyer about independence) was located within Part 1 of Chapter 11.³ It has since been relocated and renumbered as s 366 with one minor amendment⁴ to form one of the two sections in Part 2 (Independence of lawyers and particular valuations).⁵

- [14] At the time of the Agreement, ss 369 (Waiving cooling-off period) and 370 (Shortening cooling-off period) were located in Part 3. They have since been renumbered as s 369A and s 369B and are located in Part 3A (Waiving and shortening cooling-off periods). I shall refer to the provisions by reference to their section numbers in the Act as it applied at the time the purported notice of exercise of option was given. Neither party contends that the renumbering and re-location of these sections has any consequence.
- [15] Section 369 defines the “cooling-off period” for a relevant contract. Section 369A provides:

“369A Waiving cooling-off period

- (1) A person who proposes to enter into a relevant contract as a buyer (the *buyer*) may only waive the cooling-off period for the relevant contract by giving the seller under the proposed relevant contract a lawyer’s certificate in the approved form.
- (2) The lawyer’s certificate must be given to the seller before the buyer and the seller enter into the relevant contract.
- (3) The lawyer’s certificate must be signed and dated by the lawyer giving the certificate and confirm the following by stating—
 - (a) the lawyer is independent of the seller, the seller’s agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in relation to the sale, of the property and has no

² cf *Orchard Capital Investments Ltd v Ross Nielsen Properties Pty Ltd* [2010] QSC 340 at [45].

³ See Reprint 4F effective 1 July 2010.

⁴ Subsection (4) which stated “In this section – *benefit* means monetary or other benefit” has been deleted.

⁵ Reprint 5A effective 1 January 2011.

business, family or other relationship with any of those persons;

- (b) the lawyer has not received, is not receiving, and does not expect to receive a benefit in relation to the sale, or for promoting the sale, or for providing a service in relation to the sale, of the property, other than professional costs and disbursements payable by the buyer;
- (c) the lawyer has explained to the buyer—
 - (i) the effect of a relevant contract in terms of the proposed relevant contract; and
 - (ii) the purpose and nature of the certificate; and
 - (iii) the legal effect of the buyer giving the certificate to the seller.”

[16] The approved form for the purposes of s 369A is Form 32a. It is also the approved form for s 369B (Shortening cooling-off period) and for s 366 (Lawyer’s disclosure to buyer about independence). The form contains instructions about the lawyer’s certifications in the form. The plaintiff submits that Form 32a contains three separate kinds of certification. The first is a certification of the independence of a lawyer (so as to comply with the requirements of s 366, being the section formerly numbered 365B). The second relates to certification in respect of waiving the cooling-off period (s 369A, formerly s 369). The third relates to certification in respect of shortening the cooling-off period (s 369B, formerly s 370).

[17] The defendant points to the first instruction on the form which is in the following terms:

“This form must be completed by:

- any lawyer approached by a buyer for advice or assistance regarding the purchase of residential property (not by auction).
- a lawyer, before the five day cooling-off period can be waived or cancelled (applying to residential property sales not by auction).”

[18] The form then continues with the following notes in relation to the three kinds of certifications that appear in Part 1, Part 2 and Part 3.

“Lawyer’s certifications – independence of lawyer, waiving and shortening cooling-off period

Buyer please note

The certifications in this form are designed to ensure that you are aware of certain information which may influence your decision to enter into a contract for the purchase of property or your decision to

forgo or shorten the statutory cooling-off period. They are important certifications which your lawyer must attend to.

Please read the *PAMD Form 30c Warning Statement* (required by law to be attached to the front of a contract to buy residential property in Queensland) as it explains your right to a cooling-off period. You may waive or shorten the cooling-off period only by obtaining a certificate under Sections 2 or 3 in this form.

Lawyer please note

The certifications in this form relate to the requirements of Sections 365B, 369 and 370 of the *Property Agents and Motor Dealers Act 2000*.

Any lawyer engaged by a buyer or prospective buyer of residential property (other than by auction) in relation to the purchase of that property, must complete the certification in Section 1 below and must explain to the buyer the purpose and nature of the certificate.

The five day cooling-off period applicable to the purchase of all residential property in Queensland (other than by auction) can only be:

- a) waived, if a lawyer completes the certification in Section 2; or
- b) shortened, if a lawyer completes the certification in Section 3.

If you are approached solely in relation to the waiving or shortening of the cooling-off period and your declaration in Section 1 indicates that you are not independent from the seller, the seller's agents and anyone else involved in the sale, promotion of the sale, or provision of a service in connection with the sale of the property, you will not be able to make the certifications in Sections 2 or 3 below. The buyer must approach an independent lawyer to obtain such a certification.

Please refer to the notes on page 4 before completing this form."

The second page of Form 32a consists of "Part 1 – Independence of lawyer". "Part 2 – Waiving cooling-off period" and "Part 3 – Shortening cooling-off period" appear on page three. Page four consists of "Lawyer's notes" that explain, in relation to the "Independence of lawyer" certification, that the intention of the Act is for lawyers to disclose any relationships and any benefits they receive from the sale which may affect their ability to be objective when rendering advice to a buyer. Examples of relationships are given, as is guidance about the declaration of direct or indirect benefits. The "Lawyer's notes" also contain instructions about the steps to be taken before a contract is binding and when the five day cooling-off period commences.

[19] Part 1 of the form requires the buyer's lawyer to tick applicable statements. It commences:

Part 1 – Independence of lawyer

Lawyer to tick whichever is applicable

I have no business, family or other relationship with the seller, the seller’s agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I act for the seller, the seller’s agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property. If so, specify for whom you act and in what capacity:

.....
.....
.....
.....
.....

I have a business, family or other relationship with the seller, the seller’s agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property. If so, specify the nature of the relationship and with whom you have that relationship:

.....
.....
.....
.....
.....

If insufficient space, please attach a separate sheet detailing the relationships.

[20] The receipt of benefits is then dealt with as follows:

Lawyer to tick whichever is applicable:

I have not received/am not receiving and do not expect to receive:

I have received/am receiving or expect to receive:
a benefit (see note on what constitutes a ‘benefit’ over the page) in connection with the sale, or for promoting the sale or for providing a service in connection with the sale of the property other than the professional costs and disbursements payable by the buyer from the following people. If you have indicated a positive response to the above, please name the person, including a corporation, to whom the benefit relates and the amount, value or nature of the benefit:

Beneath this is a space to record the person providing the benefit and the benefit. Part 1 concludes with the statement:

“I have read and completed this certificate and have explained to the buyer the purpose and nature of this certificate.”

followed by space for the lawyer to sign and for the inclusion of the lawyer’s name and a date.

- [21] Part 2 of the Form 32a that was delivered to the defendant’s solicitors on 15 February 2011 adopted the words of the approved form and inserted the plaintiff’s name in the space provided. It is as follows:

Part 2 – Waiving cooling-off period

This certification must be given to the seller or the seller’s agent before the buyer is bound under the contract.

I have been instructed by my client Richsilk Investments Pty Ltd ACN 145 347 137 the buyer under a contract for the purchase of residential property in Queensland, that the buyer wishes to waive the cooling-off period.

The buyer under the contract is not yet bound by the contract.

I am independent of the seller, the seller’s agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have no business, family or other relationship with the seller or the seller’s agent.

I have not received, am not receiving and do not expect to receive any benefit in connection with the sale of the property from anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have explained to the buyer the effect of the contract, the purpose and nature of this lawyer’s certificate and the legal effect of the buyer giving this certificate to the seller or seller’s agent.

The plaintiff’s solicitor’s name is inserted beneath the certificate, and she signed and dated this part of the form.

- [22] Part 2 of the approved form does not precisely reflect the terms of s 369A(3). It reflects the requirements of that subsection save in two respects. Instead of stating that the lawyer has no business, family or other relationship with any of the persons described in s 369A(3)(a) (namely the seller, the seller’s agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in relation to

the sale, of the property.) it simply states “I have no business, family or other relationship with the seller or the seller’s agent.” Secondly, the certification of having not received any benefit does not include the qualification “other than professional costs and disbursements payable by the buyer” that appears in the concluding words of s 369A(3)(b).

- [23] The plaintiff’s solicitors used the approved Form 32a. The current version of that form is described as Version 6 and became effective from 1 July 2009. Although Part 2 of the approved form does not precisely reflect s 369A(3), it remains the part of the approved form that contains the lawyer’s certification for waiving a cooling-off period. In the circumstances, it would have been risky for the plaintiff’s solicitors to use a different form of words in Part 2 when s 369A(1) requires the relevant lawyer’s certificate to be given “in the approved form” and, more importantly, cl 5.1 of the Agreement required a properly completed and executed “waiver of the cooling-off period in Form 32a”. These words would be reasonably understood by a solicitor to refer to Part 2 of the form.
- [24] The plaintiff submits that Part 1 of Form 32a seems to apply more to s 366 (Lawyer’s disclosure to buyer about independence) than to s 369A, and that the form itself contains three separate certificates. It notes that Part 2 of the statutory form contains each of the matters required by s 369A(3) with “two minor exceptions”:
- (a) the lawyer does not certify that he or she has no business, family or other relationship with “anyone else involved in the sale”, or promotion of the sale, or provision of a service in relation to the sale; and
 - (b) the lawyer does not certify that he or she will not be receiving any benefit “other than professional costs and disbursements payable by the buyer”.

The plaintiff submits that these two matters are inconsequential to the seller, and that their omission from Part 2 of the statutory form does not mean that the document delivered to the defendant in this case did not satisfy the requirements of s 369A(1) of the Act.

- [25] The defendant does not know, and therefore does not admit, that the certifications in Part 2 of the form in this case are accurate in all respects. That said, it does not challenge the accuracy of the certifications contained therein or the accuracy of the separate certification as to independence that was sent by the plaintiff’s solicitors to the plaintiff in the form of a completed Part 1 of the statutory form on 16 February 2011. The defendant does not expressly concede the accuracy of the certifications; however, it acknowledges that Part 2 of the form that it was sent was completed. I note in passing that the form provides one space for the lawyer to sign and another space for the lawyer’s signature. As Mr Wilson SC noted, one of these might appear redundant. Nothing turns on this. Part 2 was signed by the solicitor with conduct of the matter and her name clearly appears in this part of the form along with the fact that she is a solicitor.

The issue

- [26] The issue is whether, on its proper construction, cl 5.1 of the Agreement required both Part 1 and Part 2 of a Form 32a to be completed. Expressed differently, the

issue is whether a Form 32a with Part 2 (Waiving cooling-off period) completed and with Part 1 (Independence of lawyer) not completed is a “properly completed and executed waiver of the cooling-off period in Form 32a” for the purposes of cl 5.1 of the Agreement.

The plaintiff’s submissions

- [27] The plaintiff submits that the terms of cl 5.1 of the Agreement required a properly completed and executed “waiver of the cooling-off period” in Form 32a, not a properly completed and executed Form 32a in its entirety. It submits that if the parties required additional parts of the Form to be completed for the purposes of cl 5.1 then it would have been easy for them to say so. It contends that Part 1 of the form is “not relevant to the seller”. As a result, it submits that only the part of the Form 32a that deals specifically with the waiving of the cooling-off period needed to be completed to meet the requirements of cl 5.1, and that this part was properly completed.
- [28] It supports its submissions in relation to the issue of construction by highlighting certain aspects of the approved form. It relies upon the headings on the first page of that document, namely “Lawyer’s certifications”, and adds that the note to lawyers commences “The certifications in this form ...”. The point the plaintiff makes is that the form contains three separate certifications which relate to the requirements of three different sections. The plaintiff also relies upon the instruction contained on page one of the form that appears after the instruction in relation to the completion of the certification in section 1. It states:

“The five day cooling-off period applicable to the purchase of all residential property in Queensland (other than by auction) can only be:
 (a) waived, if a lawyer completes the certification in Section 2; or
 (b) shortened, if a lawyer completes the certification in Section 3.”

The plaintiff relies upon the fact that the form does not say that a cooling-off period can only be waived if the lawyer completes the certifications in Sections 1 and 2. The plaintiff also relies upon the introductory words in Part 2 which I have earlier quoted, commencing “This certification must be given ...” as indicating that only the certification in Part 2 needs to be given in order to waive the cooling-off period. Reliance is placed upon the fact that there is no similar instruction in Part 1 to the effect that the certification in that Part must also be given in order to waive the cooling-off period. I note, however, that Part 1, unlike Part 2 and Part 3, does not commence with an instruction “This certification must be given ...”. However, the first page of the Form contains the relevant instruction as to when the certification in Part 1 must be completed, and it does not suggest that it must be completed in order to waive the cooling-off period.

- [29] In summary, the plaintiff’s submissions on the issue of construction focus on the words of cl 5.1 and the contents of Form 32a. It submits that since Part 2 of the Form was properly completed and executed and delivered to the defendant it has satisfied the requirements of cl 5.1 and has validly exercised the option. It emphasises that the relevant issue is whether there has been compliance with the requirements of cl 5.1, and the formation of a contract to sell the land, rather than the separate, though related, issue of whether the Form 32a (or the separate forms sent to the defendant and the plaintiff) complied with the requirements of ss 366 and

369A. The plaintiff submits that any failure to complete other parts of the form that was sent to the defendant does not affect the formation of the contract created upon the exercise of the option. Any such failure may arguably affect compliance with s 366 and s 369A(3). However, the plaintiff submits that completion and delivery of Part 2 of the form was sufficient to lead to the formation of a contract.

[30] The plaintiff's second argument is that, if the Act applies to the Agreement, as opposed to the contract created upon the exercise of the option:

- (a) Section 369A cannot apply at the stage of exercise of the option; or
- (b) Alternatively, despite Part 1 of the document being left blank, the Form 32a nevertheless complied with s 369A of the Act.

[31] Its third argument is that there has been substantial compliance with the requirements of s 369A and with Form 32a.

The defendant's submissions

[32] As to the principal argument in relation to the proper construction of cl 5.1, the defendant submits that cl 5.1 requires the delivery of a particular document in the stipulated form "properly completed", not merely by doing something which may or may not have the same legal effect. The fact that Parts 2 and 3 of the specified form contain inconsistent alternatives, only one of which needs to be filled out, is said to only emphasise that completion of Part 1 is always required in order to meet the requirement of the statute for a lawyer's certificate to be given in the approved form.

[33] The defendant submits that the fact that Part 1 deals with matters which are, as subjects of intellectual curiosity, possibly irrelevant to a seller and otherwise regulated by s 366 and other statutes, does not assist the plaintiff. The defendant is said to have an interest in knowing whether the statutory form has been "properly completed" because only if it is properly completed is it effective to waive the cooling-off period. In other words, the seller has an interest in the enforceability or otherwise of the contract during the cooling-off period and the contract will not be enforceable during this period unless the form is properly completed.

[34] As to the plaintiff's second argument concerning compliance with s 369A, the defendant relies upon the plaintiff's concession that the completed form did not comply with s 369A(3) in the two respects earlier identified. The defendant contests that these matters are "minor". These requirements are submitted to achieve one of the Act's purposes, namely ensuring as far as practicable, the independence of lawyers acting for buyers.

[35] As to the plaintiff's third argument that there has been substantial compliance with the requirements of s 369A and with the approved form, the defendant submits that authorities about strict or substantial compliance with statutory provisions are not apt, and do not apply to the construction of requirements for performance of contractual obligations. These are strictly construed and there is said to be nothing pedantic in preferring a literal, objective construction of cl 5.1 in the context of uncertainty about the application of the Act to the parties' agreement. Finally, the defendant submits that the form is simply not complete nor substantially complete.

The issue of construction

- [36] The terms of cl 5.1 did not require completion of Form 32a in its entirety. However, this does not determine the issue of construction. The clause required the delivery of a “properly completed and executed waiver of the cooling-off period in Form 32a”. If a properly completed and executed waiver of the cooling-off period in Form 32a required both Part 1 and Part 2 to be completed, then cl 5.1, in effect, required the entire form to be completed. The issue, then, is whether it was necessary for the plaintiff’s solicitors to complete the certification in Part 1 as well as the certification in Part 2 of the Form 32a that was delivered to the defendant.
- [37] The parties adopted the words “a properly completed and executed waiver of the cooling-off period in Form 32a”. They did not choose different words such as “A properly completed and executed Form 32a” or “Part 2 of Form 32a, properly completed and executed”. The words the parties chose directs attention to the approved form. The form must be seen in its statutory context as the approved form that is required to be used to meet the requirements of three different sections. The language of the form and its statutory context indicate that it provides for three separate “Lawyer’s certifications”. The form’s language and its arrangement into three parts does not indicate that Part 1 must be completed in order to provide the certification required to waive the cooling-off period. On the contrary, the instructions on page 1 of the approved form and the introductory words of Part 2 indicate that it is the certification in Part 2 that must be completed to waive the cooling-off period.
- [38] The instruction on the first page of the form that it must be completed by “any lawyer approached by a buyer for advice or assistance regarding the purchase of residential property (not by auction)” does not indicate unambiguously that all parts of the form must be completed in order to waive the cooling-off period. The instructions appearing below these words on page one and the balance of the form tend to indicate that Part 1 must be completed by a lawyer appointed by a buyer in order to comply with s 365B (now s 366), whereas Part 2 or Part 3 must be completed in order to waive or shorten the cooling-off period.
- [39] The words of the approved form and its format in three self-contained parts, when considered in their statutory context, lead to the conclusion that the form provides for three separate kinds of certification, and that a completed and executed Part 2 of the form is required for a waiver of the cooling-off period.
- [40] The fact that Part 1 of the form must be completed in order to comply with the renumbered s 366 does not mean that Part 1 must be completed in order properly to complete the form’s waiver of the cooling-off period. A failure to complete Part 1 may have consequences in respect of non-compliance with s 366, and possibly also in respect of compliance with s 369A(3) insofar as Part 2 of the form does not capture all of the contents of s 369(3)(a) and (b). However, the present issue is not whether the form that was completed and delivered to the defendant’s solicitors complied in all respects with s 366 and s 369A. The issue is the simpler one of whether there was a properly completed and executed waiver of the cooling-off period in a particular form, namely Form 32a.
- [41] In the context of an agreement where parties might reasonably seek some certainty as to whether any documents delivered in purported compliance with cl 5.1 were

effective to exercise the Call Option, the parties chose to require one such document to be in a particular form (Form 32a) and to address one particular subject (waiver of the cooling-off period). They did not bargain for delivery of a form which was required to comply with s 369A (or s 369 as it was previously numbered), leaving uncertainty and scope for lawyers to argue about whether completion of Part 2 complied or substantially complied with s 369A. The parties described the required document in terms of completion of a specific matter in statutory form, not compliance or substantial compliance with a statutory requirement, or some other form of waiver.

- [42] The words chosen by the parties and the contents of the form that they specified should be used to exercise the option lead to the conclusion that it was not necessary for the separate part of the form headed “Part 1 – Independence of lawyer” to be completed in order to provide a “properly completed and executed waiver of the cooling-off period in Form 32a”.
- [43] The words chosen by the parties are apt to require only completion of Part 2 of the form, being the part devoted to waiver of the cooling-off period.
- [44] Completion of Part 1 in a particular case may serve to reinforce the separate certification of independence in Part 2. However, it is Part 2 of the form, and not Part 1 and Part 2 together, that relates to “waiver of the cooling-off period”.
- [45] For the purpose of exercising the Call Option, the plaintiff’s solicitors were not required to complete Form 32a in its entirety. They may have been required to complete Part 1 and Part 2 to satisfy the separate obligations imposed by ss 366 and 369A. They were not required to do so in order to meet the requirements of cl 5.1.
- [46] Viewed objectively, the parties bargained for the delivery of a statutory form that had the part of it devoted to waiver of the cooling-off period completed. One or both of the parties may have assumed that the form properly completed in that respect would be effective to waive the statutory cooling-off period in respect of any contract that was formed upon the exercise of the option. Any such assumption may be correct or incorrect. If it is incorrect because, for example, the part of the statutory form devoted to waiving the cooling-off period does not completely reflect s 369A(a) and (b) of the Act and completion of the statutory form in accordance with its instructions in relation to waiving the cooling-off period is not regarded as substantial compliance with s 369A, then such a party’s assumption may be falsified. However, such a possibly unlikely outcome does not alter the words that the parties adopted in their agreement or cause me to alter the conclusion that I have reached about the construction of their words.
- [47] The parties bargained for the delivery of the statutory form that contained a properly completed waiver of the cooling-off period. That required completion of the part that the form instructed be completed for a waiver of the cooling-off period, namely Part 2. For the purpose of formation of a contract in accordance with the provisions of cl 5.1 of the Agreement, the parties did not provide that any other part of the statutory form needed to be completed.
- [48] I accept the defendant’s submission that it has an interest in knowing whether the statutory form has been properly completed, but this begs the question of what part of the statutory form had to be completed for the purpose of exercising the option. As a matter of construction I conclude that it was Part 2 of the form.

- [49] My conclusion on the issue of construction makes it unnecessary to address the plaintiff's second and third arguments.

Conclusion

- [50] The plaintiff properly exercised the option to purchase in accordance with cl 5.1 of the Agreement.
- [51] The plaintiff claims an order that the contract in the form executed by it on 15 February 2011 be specifically performed and carried into effect. The defendant does not advance any argument as to why there should not be an order for specific performance if, as I have found, the option to purchase was properly exercised.
- [52] The only order that I will make at this stage is an order that the contract in the form executed by the plaintiff on 15 February 2011 be specifically performed and carried into effect. I will make further orders as are necessary for the contract to be specifically performed. I direct the plaintiff to submit draft minutes of order within three days. Subject to hearing from the parties I propose to order that the defendant pay the plaintiff's costs of and incidental to the proceeding to be assessed on the standard basis.

Lawyer's certifications

Property Agents and Motor Dealers Act 2000

This form is effective from 1 July 2009

This form must be completed by:

- any lawyer approached by a buyer for advice or assistance regarding the purchase of residential property (not by auction).
- a lawyer, before the five day cooling-off period can be waived or cancelled (applying to residential property sales not by auction).

Lawyer's certifications—*independence of lawyer, waiving and shortening cooling-off period*

Buyer please note

The certifications in this form are designed to ensure that you are aware of certain information which may influence your decision to enter into a contract for the purchase of property or your decision to forgo or shorten the statutory cooling-off period. They are important certifications which your lawyer must attend to.

Please read the *PAMD Form 30c Warning Statement* (required by law to be attached to the front of a contract to buy residential property in Queensland) as it explains your right to a cooling-off period. You may waive or shorten the cooling-off period only by obtaining a certificate under Sections 2 or 3 in this form.

Lawyer please note

The certifications in this form relate to the requirements of Sections 365B, 369 and 370 of the *Property Agents and Motor Dealers Act 2000*.

Any lawyer engaged by a buyer or prospective buyer of residential property (other than by auction) in relation to the purchase of that property, must complete the certification in Section 1 below and must explain to the buyer the purpose and nature of the certificate.

The five day cooling-off period applicable to the purchase of all residential property in Queensland (other than by auction) can only be:

- a) waived, if a lawyer completes the certification in Section 2; or
- b) shortened, if a lawyer completes the certification in Section 3.

If you are approached solely in relation to the waiving or shortening of the cooling-off period and your declaration in Section 1 indicates that you are not independent from the seller, the seller's agents and anyone else involved in the sale, promotion of the sale, or provision of a service in connection with the sale of the property, you will not be able to make the certifications in Sections 2 or 3 below. The buyer must approach an independent lawyer to obtain such a certification.

Please refer to the notes on page 4 before completing this form.

Lawyer's details

Name

Firm

Address

.....

Property details

Address

.....

Lot

Plan

Title reference

Buyer's details

Name

Address

.....

Seller's details

Name

Address

.....

Seller's agent's details

Name

Address

.....

Part 1—Independence of lawyer

Lawyer to tick whichever is applicable.

- I have no business, family or other relationship with the seller, the seller's agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property.
- I act for the seller, the seller's agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property. If so, specify for whom you act and in what capacity:

.....

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.....

.....

- I have a business, family or other relationship with the seller, the seller's agent or another person associated with the sale, promotion of the sale or provision of a service in connection with the sale of the property. If so, specify the nature of the relationship and with whom you have that relationship:

.....

.....

.....

.....

.....

.....

If insufficient space, please attach a separate sheet detailing the relationships.

Lawyer to tick whichever is applicable:

- I have not received/am not receiving and do not expect to receive:
- I have received/am receiving or expect to receive:
a benefit (see note on what constitutes a 'benefit' over the page) in connection with the sale, or for promoting the sale or for providing a service in connection with the sale of the property other than the professional costs and disbursements payable by the buyer from the following people. If you have indicated a positive response to the above, please name the person, including a corporation, to whom the benefit relates and the amount, value or nature of the benefit:

Person providing benefit

Benefit

.....
.....
.....
.....
.....

If insufficient space, please attach a separate sheet detailing the benefits.

I have read and completed this certificate and have explained to the buyer the purpose and nature of this certificate.

Lawyer to sign.....

Name

Signature.....

Date / /

D D M M Y Y Y Y

Part 2—Waiving cooling-off period

This certification must be given to the seller or the seller's agent before the buyer is bound under the contract.

I have been instructed by my client the buyer under a contract for the purchase of residential property in Queensland, that the buyer wishes to waive the cooling-off period.

The buyer under the contract is not yet bound by the contract.

I am independent of the seller, the seller's agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have no business, family or other relationship with the seller or seller's agent.

I have not received, am not receiving and do not expect to receive any benefit in connection with the sale of the property from anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have explained to the buyer the effect of the contract, the purpose and nature of this lawyer's certificate and the legal effect of the buyer giving this certificate to the seller or seller's agent.

Lawyer to sign.....

Name

Signature.....

Date / /
D D / M M / Y Y Y Y

Part 3—Shortening cooling-off period

This certification must be given to the seller or the seller's agent before the cooling-off period ends. The effect of this certificate is to shorten the cooling-off period to 5 pm or another stated time on the date stated on this certificate.

I have been instructed by my client the buyer under a contract for the purchase of residential property in Queensland, that the buyer wishes to waive the cooling-off period.

The cooling-off period commenced on / / (date) and was to have ended at 5 pm

on / / (date).

The cooling-off period will **now** end at pm on / / (date).

I am independent of the seller, seller's agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have no business, family or other relationship with the seller, seller's agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property.

I have explained to the buyer the effect of the contract, the purpose and nature of this lawyer's certificate and the legal effect of the buyer giving this certificate to the seller or seller's agent.

Lawyer to sign.....

Name

Signature.....

Date / /
D D / M M / Y Y Y Y

If you need more information about this form, you can visit the Office of Fair Trading website at www.fairtrading.qld.gov.au or contact your local Office of Fair Trading on 13 13 04.

Independence of lawyer, waiving and shortening cooling-off period

Independence of lawyer

The intention of the Act is for lawyers to disclose relationships and benefits they receive from the sale which may affect their ability to be objective when rendering advice to a buyer.

Examples of **relationships** that should be disclosed include:

- trustee/beneficiary;
- fiduciary;
- solicitor and client (where currently active for both parties);
- donee of power of attorney;
- carer relationship;
- guardianship; and
- emotionally dependent relationships (e.g. de facto).

Relationships that do not need to be disclosed include:

- casual acquaintance; and
- membership of the same club or association

You should declare all direct or indirect **benefits** to you or your firm or to a person on your behalf or on behalf of your firm that will come from or will be charged against the proceeds of the sale, other than your professional costs and ordinary disbursements payable by the Buyer relating to the purchase of the property. If you do not know the exact amount of the benefit or if the benefit cannot be expressed in money terms, please estimate the value of the benefit in money terms or in relevant percentage terms (and note that it is an estimate), or describe the nature of the benefit.

Steps to take before contract is binding

The following steps must be completed before the seller and the buyer will be bound by the contract.

- The buyer signs the contract.
- The seller also signs the contract.
- The buyer or the buyer's agent receives a copy of the contract signed by the buyer and the seller.

The five day cooling-off period commences.

(Note: If the buyer is bound by the contract on a day other than a business day, the cooling-off period commences on the first business day after the day the buyer is bound by the contract, and ending at 5 pm on the fifth business day.)