SUPREME COURT OF QUEENSLAND

CITATION: *Williamson and Ors v JIA Holdings Pty Ltd and Ors* [2011] QSC 84

PARTIES: **JEFFREY JAMES WILLIAMSON & ANOR**
(Plaintiffs)

and

JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST & ANOR
(Defendants)

STEPHEN ASHLEY COOPER & ORS
(Plaintiffs)

and

JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST & ANOR
(Defendants)

MARK CLINTON CRASWELL
(Plaintiff)

and

JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST & ANOR
(Defendants)

KERRY ALLAN SHORT & ANOR
(Plaintiffs)

and

JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST & ANOR
(Defendants)

GEOFFREY WILLIAM BARRITT & ANOR
(Plaintiffs)

and

JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST & ANOR
(Defendants)

GREGORY KEITH OLIVE & ANOR
(Plaintiffs)

and

JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST & ANOR
(Defendants)

FILE NO/S:	BS 5987 of 2005, BS 5989 of 2005, BS 5990 of 2005, BS 5991 of 2005, BS 5992 of 2005 and BS 5993 of 2005
DIVISION:	Trial Division
PROCEEDING:	Declaratory Relief (Claim)
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	Friday, 15 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2011, 18 February 2011, 21 February 2011, 22 February 2011
JUDGE:	Boddice J
ORDER:	**Each of the plaintiffs' claims is dismissed**
CATCHWORDS:	CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – SALE OF PROPOSED LOT – BREACH OF EXPRESS PRECONDITION OF CONTRACT – TIMELY REGISTRATION OF COMMUNITY TITLE SCHEME – VENDOR'S OBLIGATIONS – Where plaintiffs allege the contract required the vendor to do everything reasonably necessary to have the plan constructed and registered – whether the vendor used its best endeavours in carrying out those tasks *Body Corporate and Community Management Act* 1997 (Qld) *Earle Cameron (Industrial) Pty Ltd v Comprador Properties Pty Ltd* (1986) NSW ConvR 55-305 *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 *Joseph Street Pty Ltd and Ors v Khay Tea Tan and Ors* [2010] VSC 586 *Masters v Belpate Pty Ltd* (2001) NSW ConvR 55-988
COUNSEL:	Myers, RA for the 1st – 6th plaintiffs No legal representation for the defendants
SOLICITORS:	Baker O'Brien Toll for the 1st – 6th plaintiffs No legal representation for the defendants

[1] By contracts in writing entered into by each of the plaintiffs in or about September 2003, the plaintiffs agreed to purchase a unit in a building unit development proposed to be built by the first defendant at The Esplanade, Bargara Beach in the State of Queensland, which was to be known as "Synergy The Esplanade Bargara Beach", and be registered as a community title scheme pursuant to *Body Corporate and Community Management Act* 1997 (Qld) ("the Act").

[2] By claims filed in or about July 2005, the plaintiffs seek to recover damages for breach of those contracts arising out of the first defendant's failure to complete the construction of Synergy. Each asserts an entitlement to recover the loss of profit sustained as a consequence of the first defendant's failure to provide a unit in accordance with the agreed contract. Each proceeding was heard together with orders that the evidence in one be evidence in the others.

[3] It is common ground the development did not proceed, and no community title scheme was registered in accordance with the contract. The issues in dispute are whether the contract required the defendant to build the units, and whether the failure to obtain registration of the community title scheme was by reason of default on the part of the first defendant.

[4] The plaintiffs contend that on a proper construction of the contracts the first defendant had a contractual obligation to construct the development, and to establish the community title scheme by 31 December 2005, and that there were both express and implied terms of the agreement entered into between the parties which required the first defendant to do everything reasonably necessary to ensure that the development was constructed and the scheme was established by that date. The plaintiffs say the contract was not conditional upon the first defendant obtaining construction finance to fund the proposed development, and that the first defendant's ability to obtain construction finance was irrelevant to its obligations. Further, the first defendant did not do everything reasonably necessary to obtain an approval for construction finance, and to register the community title scheme by the due date.

[5] The first defendant contends the contract did not obligate it to build the development, that it took all reasonable steps to obtain construction finance and that it was unable to obtain such finance so as to fund the construction of the development and establish the community title scheme by 31 December 2005.

[6] The plaintiffs further claim that loan agreements entered into between the first defendant and the second defendant subsequent to commencement of proceedings by each of the plaintiffs were entered into to deprive each of them of the opportunity to recover damages. The plaintiffs seek orders setting aside those transactions.

The pleadings

[7] In their respective amended statements of claim, the plaintiffs claim:

(a) some time prior to 28 August 2003 the first defendant caused to be published a brochure entitled "Synergy The Esplanade Bargara Beach" in which it promoted the proposed construction of "20 luxury residential apartments" which it represented it intended to construct on the subject land and cause to be registered as a community title scheme pursuant to the Act;

(b) the brochure held out that the first defendant's partners each had "valuable skills in the property and development fields" and a "strength and level of expertise that allows development opportunities to be recognised early and acted upon decisively", and that care had been taken to ensure the proposed project fulfilled a market need, that every aspect of the project would be carried out safely, professionally and with high quality, and that the acquisition of a lot in the proposed development would be an investment;

(c) that by the representations the defendants meant and intended that the project would proceed to completion and that any purchasers who executed

the pre-release contract were guaranteed an indefeasible title in fee simple to the unit of the purchaser's choice on the proposed completion date;

(d) that induced by those said representations and in reliance upon them, each of the plaintiffs were induced to believe that:

(i) the first defendant had ensured there would be no restrictions upon its ability to complete the construction of the proposed development; and

(ii) upon completion of construction and registration of individual units pursuant to the Act, the first defendant would convey title to the individual units to the plaintiffs

whereby each of the plaintiffs were induced to enter into a contract with the first defendant.

(e) by a contract in writing made between each of the plaintiffs and the first defendant, the first defendant agreed to sell and the plaintiffs agreed to buy, proposed lots in the development;

(f) clauses 1 and 2 of the contract obligated the first defendant to construct the building substantially in accordance with the draft plans, to register the building pursuant to the Act, and to sell the designated lot to the plaintiff;

(g) clause 5(a) of the contract provided that completion would be effected on the day 14 days after notification in writing by the first defendant's solicitors to the plaintiffs or the plaintiffs' solicitors that the community title scheme had been established in accordance with the Act;

(h) the contract provided 30 June 2005 as the date for establishment of the community title scheme, and provided that if it had not been established by that date either party might terminate the contract by written notice to the other whereby all moneys paid by the plaintiffs should be refunded without deduction and neither the plaintiffs nor the first defendant should have any further claims against the other under the contract;

(i) neither the plaintiffs nor the first defendant purported to terminate the contract at any time in accordance with cl 5(a), although there was an agreement to extend the date for establishment of the community title scheme to 31 December 2005;

(j) in breach of the contract, and notwithstanding requests by the plaintiffs' solicitors, the first defendant in early September 2004 declared it was not going to proceed with the development thereby evincing an intention no longer to be bound by the terms of the contract;

(k) the first defendant wrongfully failed and refused to complete construction of the proposed building in accordance with the contract and thereby repudiated the said contract;

(l) the plaintiffs have been at all material times and are now ready willing and able to perform their obligations under the contract;

(m) the construction time for the proposed development was 42 weeks and the first defendant's failure to commence construction of the complex by no later than 24 July 2005 constituted a repudiation of the contract;

(n) the plaintiffs accepted the first defendant's repudiation by issue of the claim by reason of the first defendant's breaches;

(o) the plaintiffs suffered loss and damage, being the unit's value at anticipated date of completion, less contract price and other charges and interest.

[8] The plaintiffs further claim that the first defendant took steps to enter into deeds of loan with the intention of defrauding the plaintiffs in respect of the claims. They seek declarations that loan agreements and two mortgages entered into between the

first defendant and the second defendant in or about March 2009 were entered into with the intent to defraud the plaintiffs, and orders that the transactions are void and of no effect and ought to be removed from the title deed.

[9] In their defence, the defendants:

(a) admit that prior to 28 August 2003 the first defendant caused to be published the brochure, and that it contained details of the proposed development entitled "Synergy The Esplanade Bargara Beach";

(b) deny the brochure contained any statement that it intended to cause the proposed apartments to be registered as a community title scheme pursuant to the Act;

(c) deny that any statements in the brochure amounted to representations;

(d) in the alternative, say that if any statements did amount to representations, such representations were not false and were representations the first defendant had reasonable grounds to make;

(e) deny that any statements in the brochure provided any guarantee the project would proceed to completion, and that upon execution of the pre-release contract, the plaintiffs would have transferred to them an indefeasible title;

(f) say that at the date the plaintiffs signed the pre-release contract attached to the brochure, construction of the proposed development had not commenced and a reasonable person in the position of the plaintiffs would have known that the brochure was in respect of a construction which may not occur, and did not provide a guarantee of purchase in a completed project;

(g) deny the plaintiffs were induced by any statements to enter into the contract and say that prior to entering into the contract, the plaintiffs were provided with the contract and disclosure statement and that by reason thereof the plaintiff knew or ought to have known that completion of the contract was conditional upon the establishment of a community title scheme by 31 December 2005 and that no express or implied term of the contract imposed upon the defendant an obligation to establish the said scheme;

(h) admit that by letter dated 1 September 2004 the first defendant wrote to the plaintiffs informing the plaintiffs that since the formation of the contract the cost of construction of the development had increased significantly and the residential market had experienced a sharp downturn and that as a consequence the first defendant had been unable to obtain a satisfactory approval of construction of finance required by the defendant to proceed with the development and that the first defendant considered there was only a remote possibility of the scheme being reached by 30 June 2005 and that the first defendant proposed the contract be terminated by mutual agreement of the parties and the deposit be returned;

(i) say that on the proper construction of the contract completion of the contract was conditional upon the establishment of the scheme by 31 December 2005 and there was no express or implied contract imposed on the first defendant to establish the scheme by that date;

(j) say it was an implied term of the contract, being necessary in order to give business efficacy to it, that the first defendant would use reasonable endeavours to establish the community title scheme by 31 December 2005;

(k) say the first defendant used reasonable endeavours to establish the scheme by that date but was unable to do so as the first defendant required construction finance in order to build the development and establish the scheme, and its ability to obtain that finance depended upon the projected profitability of the development;

(l) say that despite obtaining quotes and tenders for construction of the proposed building, by early September 2004 it was reasonably apparent to the first defendant that construction finance to fund the building could not be obtained and that establishment of the scheme would not occur by 31 December 2005 and that further steps would have been futile in order to establish the scheme;

(m) pursuant to cl 5 of the contract the first defendant refunded to the plaintiffs without deduction the deposit and as a consequence thereof the plaintiffs are not entitled to the relief sought;

(n) deny that the two deeds of loan entered into with the second defendant were entered into for the purposes of defeating any creditors.

The contract

[10] Relevantly, the contract provided:

"1. **PREAMBLE**

(a) The Seller is the registered owner of the Land.

(b) The Seller shall construct a multi storey building comprising twenty units ('the Building') on the Land substantially in accordance with plans prepared for the Seller and approved or to be approved by the Local Authority and incorporating the Finishes specified in the Second Schedule.

(c) The Buyer wishes to purchase from the Seller the estate in fee simple in the Lot upon the establishment of the Scheme and the creation of a separate indefeasible title for the Lot and upon the terms and conditions herein contained.

2. **SALE**

Subject to the terms of this Contract, the Seller shall sell to the Buyer and the Buyer shall purchase from the Seller the estate in fee simple in the Lot free from any mortgage or other encumbrances (except as notified herein or in the Disclosure Statement or as contained on the SP or CMS) and easements created or implied by the Act or service easements.

…

5. **COMPLETION**

Completion shall be effected on the day which is fourteen (14) days after the Seller's Solicitor gives notice in writing to the Buyer or the Buyer's Solicitors that the Scheme has been established

PROVIDED THAT if the Scheme is not established by the date set forth in Item K of the Item Schedule then either party may terminate this Contract by written notice to the

other or its Solicitor and upon such termination all monies paid by the Buyer shall be refunded without deduction and neither party shall have any further claim against the other under this Contract.

PROVIDED FURTHER THAT if the establishment of the Scheme is delayed due to:

(i) delays by the local authority or other authority in giving any necessary or desirable approval on conditions satisfactory to the Seller provided the Seller has taken all reasonable steps to obtain that approval;

(ii) delay in the completion of the Building or Lot by reason of inclement weather, fire, explosion, earthquake, lightning, storm, flood, tempest, war, civil commotion or strikes;

(iii) damage to the Building or to the Lot by fire, explosion, earthquake, lightning, flood, tempest, other act of God, war, civil commotion or strike;

(iv) proceedings being taken or threatened by or disputes with adjoining or neighbouring owners;

(v) industrial disputes affecting or delaying construction and/or completion of the Building or Lot;

(vi) delay in the Local Authority sealing the Survey Plan or the registration of the Survey Plan or the recording the CMS (other than delay due to default by the Seller); or

(vii) any other cause beyond the Seller's control,

the Seller may at any time after the delay arises by written notice to the Buyer extend the date set forth in Item L of the Items Schedule for the period of delay."

Item K dealt with the stakeholder and trustee, but Item L listed the date for establishment of the scheme as 30 June 2005.

[11] The deposits paid by each of the plaintiffs were refunded in full in May 2006. This was after institution of the present proceedings.

Evidence

[12] No plaintiff gave oral evidence at the hearing. Affidavits swearing to their respective losses were tendered in evidence. The defendants did not seek to cross-examine any plaintiff.

[13] Wendy Browning, a valuer, gave evidence that she was asked in 2006 to value each of the proposed units as at June 2005.[1] Those valuations were prepared on the assumption Synergy would be constructed and fitted out in accordance with the marketing brochure. Her methodology in undertaking that valuation was to look at comparable sales at the relevant time. She also took into account the grounds, improvements and position of the unit within the complex as well as the density of the unit block. In 2004, the market was a very buoyant market. It started to slow down in 2005, although there was still a lot of interest in units. In her opinion, the value of the unit would have changed between June 2005 and 31 December 2005 with a reduction in value of 6%.

[14] Ms Browning was subsequently asked in 2009 to prepare an additional report. In that report, she opined the first defendant would have been successful in achieving presales at market value during the period August 2003 to December 2004 of all or substantially all of the 20 units in the proposed Synergy complex had it chosen to submit all of those units to the market. The first defendant would also have been successful in selling at market value at least part of its stock of development property during that period had it chosen to do so.

[15] John Patrick Logan, a valuer, gave evidence he was instructed in 2010 to provide market valuations and a project feasibility analysis relating to the proposed development. He prepared a report dated 12 July 2010 in which he assessed the market value of the units as at 27 October 2003 and 10 June 2004.[2] He also made an assessment of the project feasibility as at October 2003. In his opinion, the project was likely to return a minimum profit on cost of 20.3%. He relied on market data in order to reach his conclusions. That data indicated there was a capital appreciation of units in Bargara from 2002 to 2006, with the number of sales peaking in 2003/2004 but declining in 2005. There was not a great volume of stock available for sale through 2005.[3] Synergy was probably one of the best proposed developments in Bargara with the presentation of the whole complex of high quality.[4] There was substantial capital appreciation occurring during the period October 2003 to June 2004 and that was what he applied to his assessment. He looked at properties that were sold at or around the time in order to support his conclusion that during the relevant periods the market continued to appreciate.[5] His valuations had the benefit of hindsight[6] which was "a big advantage".[7] Whilst sales on penthouse units in another development, C Bargara, had reduced in value between 2003 and 2005, penthouse units were attracting strong demand because of the limited supply and were most attractive to end users or owner occupants as opposed to investors.[8] Synergy was the first complex to be taken up by end users rather than investors.[9]

[16] Clive Douglas Schulz was requested to prepare two reports in relation to the availability of finance for the Synergy project. He has been involved in financing developments since 1984. In his opinion, finance would have been available from a

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1 Exhibit 3.
2 See Exhibit 5.
3 T1-41/50.
4 T1-45/15.
5 T1-55/5.
6 T1-49/50.
7 T1-58/45.
8 T1-61/40.
9 T1-64/20.

number of sources based on the projected profitability of the project and the available security.[10] Banks relied on profit on cost as one of the measures in assessing proposals. Typically, in those days, a bank required a profit on cost of 15% to 20%.[11] In his opinion, the first defendant's prospects of obtaining satisfactory finance were diminished in consequence of:

- its failure to lock into place a construction contract prior to June 2004;
- its failure to make a formal application for finance until mid-2004;
- its failure to place nine unsold units back on the market after they had been withdrawn from the market in late August 2003;
- its decision to retain all of its development land stock and to arrange loans for the purchase of two motor vehicles in 2003 and 2004. The first defendant could have used other properties owned by an associated group as collateral security for construction finance. Mr Schulz disagreed with valuations provided by Herron Todd White. They were based on incorrect information. He preferred and relied upon Mr Logan's analysis.[12]

[17] Yvonne Mary James gave evidence that she and her husband contracted to purchase two units in Synergy. She considered they were binding contracts on both parties. On 7 September 2004 she telephoned one of the directors of the first defendant, Jordan Bazley, and enquired about the availability of units in Synergy. Mr Bazley replied "they were all sold".[13] She asked what they would be worth when completed and he gave a range of $450,000 up to $1,000,000 on the top floor.[14] She told Mr Bazley she already had a contract on those units and that the first defendant was saying they were not going to be built. He "sort of mumbled something about 'I didn't say it was going to proceed'".[15]

[18] Jordan Bazley was a director of the first defendant at the time Synergy was marketed for development. He has had over 25 years in the building and construction industry. He said the Synergy site was purchased around the middle of 2003. Mr Bazley set about looking at a profit and loss model to construct 20 units on that site. Synergy was intended "to create something with a bit of sizzle and something a little bit different, owner occupied …".[16] Mr Bazley spoke to Herron Todd White. He also obtained a quantity surveyors report on the probable cost of construction of the proposed development. That projected a building cost of $5.6 million.[17] Mr Bazley prepared a profit and loss as at 17 June 2003.[18] Mr Bazley's cost in that first profit and loss model was based on sale prices achieved at another development, Bargara Blue.[19] The prices the first defendant was looking at achieving at Synergy were "pioneering to the area" as the first defendant was proposing to build a superior product.[20]

[19] Mr Bazley said that prior to going to market with the pre-release of Synergy on 12 July 2003, he was happy with the probable costs of construction as obtained from the quantity surveyor. The first defendant had also contacted a strata title company

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10 T1-70/5.
11 T1-72/10.
12 T1-74/10-25.
13 T1-80/25.
14 T1-80/40.
15 T1-80/55.
16 T2-41/50.
17 Exhibit 16.
18 Exhibit 17.
19 T2-47/40.
20 T2-47/55.

who expressed interest in management rights of Synergy. This was a requirement for the community management scheme, and would be an annexure to the contract when the unit was sold.[21] Mr Bazley gave Stewart Silver King and Burns authority to establish the community title scheme.[22]

[20] When the first defendant went to market it was "inundated with expressions of interest".[23] It arranged for solicitors to prepare presale contracts. Shortly thereafter, Mr Bazley was contacted by Snitzco, the builder of another development in Bargara, Coral Sands. Snitzco's guess estimate of the building costs was about $5.2 million. That was a favourable assessment having regard to the quantity surveyor's report.[24] Mr Bazley then commenced working through documentation to arrive at construction drawings so that a contract price could be obtained from Snitzco. As part of that process, he agreed to stop the progress of consultants the first defendant had already commissioned and to engage consultants suggested by Snitzco.[25]

[21] Mr Bazley said various banks had expressed an interest in funding the project. On 11 August 2003, he put together a list of documentation for those banks. However, on 28 August 2003 Snitzco advised they had put together a probable cost summary on the project based on advanced drawings. That cost summary totalled $6.5 million.[26] This price was some $900,000 over the quantity surveyor's report and $1.3 million above the original guess estimate. Such a price rendered Synergy not viable based on the presale commitments already obtained by the first defendant.[27] Mr Bazley arranged to discuss the design with the various consultants to see whether savings could be made.

[22] Mr Bazley prepared four further profit and loss modules based on different scenarios after receiving Snitzco's price. Each was an internal document with hypothetical sale figures.[28] Those profit and loss modules indicated that based on Snitzco's price and the original sale prices, the project was showing a profit of 14.2%.[29] At that margin, it wasn't viable as banks require a profit margin of 20% to 25%.[30] Mr Bazley asked the first defendant's solicitors for a print-out of who had paid their full deposits and what contracts were sent out. There were 11 signed contracts. The first defendant decided not to proceed with the remaining nine contracts because of the build price.[31] A letter was sent by the first defendant to Snitzco advising the first defendant was working out possible areas of saving.[32]

[23] The first defendant arranged for a valuation report from Herron Todd White. This report was dated 27 October 2003.[33] On 7 November 2003, the first defendant received a further quantity surveyor's report. The quantity surveyor assessed the construction cost at $5.9 million.[34] The first defendant decided to use their own

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21 Exhibit 25.
22 T3-5/1.
23 T2-63/12.
24 T2-65/1.
25 T2-65/30.
26 Exhibit 24.
27 T2-67/55.
28 T3-8/50.
29 Exhibit 27.
30 T3-6/50.
31 T3-9/35.
32 Exhibit 32.
33 Exhibit 9.
34 Exhibit 33.

consultants, and put the price of construction out to tender. Snitzco was advised by letter dated 20 November 2003.[35] The first defendant arranged for reports to be prepared, as well as architectural drawings, to allow for tender. Tenders for construction went out in late March or early April 2004.

[24] On 6 April 2004, the first defendant's solicitors wrote to the purchasers' solicitors requesting an extension of time under the contract to establish the community title scheme until 31 December 2005. This extension was sought because construction was to take 44 weeks, and Mr Bazley was aware the bank would require a six month period from finalisation of construction to settlement.[36] The ANZ had indicated it needed time. If there was insufficient time to allow the statutory documentation to finalise title there was a risk presale contracts could be terminated when the bank had loaned money relying on those presale contracts.[37]

[25] On 14 April 2004, the first defendant received a tender price from DDQ. It was for $6.667 million. This was the first defendant's first firm lump sum price in respect of the Synergy project.[38] On 30 April 2004, J M Kelly Project Builders tendered at a price of $7.5 million. [39] That price included several PC items which Mr Bazley considered unusual. On 18 May 2004, Snitzco tendered at a price of $7.2 million.[40]

[26] ANZ Bank indicated the construction price had to be under $6.4 million.[41] On 15 May 2004, the first defendant wrote to DDQ advising it needed the construction price to be below $6.4 million in order to satisfy its bankers and attain a reasonable development margin. On 23 May 2004, DDQ sent the first defendant further details as to its costings. By letter dated 25 May 2004, the first defendant confirmed DDQ's contract price. It noted there was 42 weeks for construction.[42] The first defendant entered into a contract with DDQ.[43] It had a start date of 5 July 2004. Finance was required by 28 June 2004. The construction price was $6.375 million. At that time, the first defendant also entered into a side agreement with DDQ that it would pay at completion a further $191,000 being the balance of its construction price.[44] This agreement was entered into so that the construction price was less than $6.4 million. ANZ Bank was aware of the side agreement. Mr Bazley said that around this time the first defendant also received documentation from other potential financiers expressing an interest in financing the project. However, their interest rates were very high, or they required other conditions which were outside the first defendant's profitability requirements for the project.[45]

[27] On 10 June 2004, Herron Todd White produced a valuation report.[46] It placed the profit on cost assessment at 17%. As such, the valuation was outside bank guidelines.[47] Up until the provision of that report, ANZ bank was keen to fund the project. Its mood changed. On 22 July 2004, ANZ Bank provided a draft letter of

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35 Exhibit 34.
36 T3-18/55.
37 T3-19/30.
38 T3-19/50; Exhibit 41.
39 Exhibit 42, T3-20/20.
40 Exhibit 43.
41 T3-22/30.
42 Exhibit 46.
43 Exhibit 48.
44 T3-24/15, T3-24/35.
45 T3-31/5.
46 Exhibit 18.
47 T3-32/20.

offer in respect of financing the Synergy project.[48] This draft offer included conditions not previously discussed, including the provision of further security over property not owned by the first defendant and a requirement the first defendant sell two of the remaining units. Both were above the $500,000 price bracket, and had to be sold subject to the normal presale conditions. These conditions were unacceptable to the first defendant.[49] The bank advised the conditions were not negotiable.[50]

[28] Mr Bazley said that despite being shattered when he got the Herron Todd White valuation, and the draft finance letter, he decided to approach other financiers to get finance. He wanted to build Synergy.[51] JBA Finance Solution were not able to assist because the profit margin was 17.2% and for other minor reasons.[52] Suncorp advised on 30 August 2004 it could not finance the project as it sat outside bank lending guidelines.[53] An application for finance from FBI Group was also "knocked back".[54] Another potential financier, Northwest Commercial, wanted a lot more interest components put in the project so they were no good.

[29] Mr Bazley said at the end of August 2004, the first defendant did not have construction finance. The 11 contracts had a completion time for establishment of the community title scheme of 31 December 2005. That allowed 15 months, with a 10½ month construction timeframe. The first defendant asked their solicitors to approach the solicitors for the 11 purchasers on a without prejudice basis to see whether they would mutually terminate the contracts.[55] The first defendant was relying on cl 5.[56] There was no longer ample time to complete the project so as to establish the community title scheme by 31 December 2005.[57] Five purchasers agreed to mutually terminate. Each of the plaintiffs did not agree.

[30] Mr Bazley said the first defendant did not place the remaining stock of units on the market in September 2003 as the main variable, confirmation of a fixed tender for construction, was moving at an alarming rate, escalating skywards.[58] He was not prepared to go back to the market without a building price. Whilst any contracts could have been subject to the first defendant's ability to obtain construction finance, that has not been how he had addressed developments in the past.

[31] The initial price that came from Snitzco was based on preliminary contract documents. It was not a lump sum price.[59] To obtain a full lump sum price it was necessary to finalise the tender documentation through all consultants. That would take about three months at best.[60] You would not enter into a building contract without that tender documentation.[61] The final drawings may lift the price, as it did

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48 T3-34/20.
49 T3-35/25.
50 T3-36/10.
51 T3-36/20.
52 T3-38/30; Exhibit 59.
53 T3-42/30; Exhibit 69.
54 T3-42/45, T3-42/55.
55 T3-43/30; exhibit 70.
56 T3-55/55.
57 T3-56/60 – T3-57/30.
58 T3-47/20.
59 T3-48/50.
60 T3-48/50 – T3-49/1; T3-67/40.
61 T3-68/50.

with Snitzco's price increasing to $7.2 million.[62] Mr Bazley relied on the report from the quantity surveyor as to the likely cost of construction. In his experience a bank requires a quantity surveyor's report of construction costs, and a document from a valuer to say that the project has a profitability of 20% to 25%.[63]

[32] Mr Bazley accepted it was the first defendant's intention as at 21 September 2004 not to proceed further with the Synergy project. There was no longer ample time to obtain finance and construct the building for completion for a community title scheme to be registered by 31 December 2005. The construction time was 42 weeks. The bank required a six month period at the end of construction.[64] That was the reason he had initially sought the further six month extension from 30 June 2005. A bank will not provide construction finance without a firm lump sum price from a builder, and a quantity surveyor's report in respect of that price.[65]

[33] The first defendant could not have obtained development finance if they had sold other properties. That depended on how fast they could be sold.[66] There would have been difficulty in achieving the bank's requirement of selling two more units in the project as the bank letter also required construction to start on 1 August 2004, some nine days after receipt of the draft finance document.[67]

[34] Anthony John Bailey, a valuer employed by Herron Todd White, prepared a valuation of Synergy for the first defendant on 27 October 2003. He was told by Mr Bazley that 20 units were under contract. However, only 11 contracts were supplied to him. Mr Bazley gave estimates of the prices of the units. Mr Bailey's valuation agreed with the proposed prices set by the first defendant in its pre-release of the units in 2003, apart from units 18 and 19 which were valued at $65,000 less than the contract price of $725,000. The contracts on units 18 and 19 at $725,000 were disregarded "because it could not be collaborated with other sales. It looked high and out of line to me whereas the sales below that figure looked in line with other sales, therefore, I used those sales".[68] The unit market in Bargara in 2002 to 2004 was extremely buoyant with blocks of land rapidly increasing in value within months. Mr Bailey tried to deal with the rapid rise in the market by using under contract sales of units not yet completed, together with sales of units that had been finalised, to put together conclusions as to the market value.[69] He had regard to other complexes available in the area as they were competition to any person trying to sell a unit in a place like Bargara.[70] It was important to paint a picture of the environment in which a bank may have to sell if it was left with that unit. A bank would want to know the competition and the likelihood of selling the number of units in that market.[71]

[35] Mr Bailey also had regard to market risk. The market in Bargara was going up so rapidly there weren't very many chances it would keep going up at that level. There was a high risk the values would reduce over the next two to three years.[72] Whilst

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62 T3-69/25.
63 T3-79/50.
64 T3-84/40, T3-84/50.
65 T3-85/15.
66 T3-89/35.
67 T4-16/55.
68 T2-17/20.
69 T2-18/40.
70 T2-20/45.
71 T2-21/25.
72 Exhibit 9

Herron Todd White Month in Review publications in September 2003 had stated the relevant market continued to perform strongly with sale prices continuing to rise, units 18 and 19 were contracted at sales which seemed high in relation to any other evidence available to him. He chose to set a value based on what he thought was in line with other sales of completed unit complexes.[73] There was no evidence to suggest units in Bargara were likely to achieve "anything like that" and people would simply stay at the Sunshine Coast or go into another market and pay the higher figure because historically there were no sales at Bargara at that high level.[74]

[36] Neville Coonan undertook a valuation for Herron Todd White in June 2004. His valuation was based on an analysis of the market and the sale evidence at the time. He was given a list of proposed values but made his own assessments. He accepted the proposed values up to unit 13 as he considered they were appropriately priced for the marketplace. He did not accept the proposed values in respect of the units on the top levels. Developers were obtaining prices readily for bottom level units, but once the units reached the fourth or higher level developers were endeavouring to add higher prices which the market wasn't prepared to accept at that time. Mr Coonan said only one fourth floor unit in C Bargara had sold which suggested to him the fourth floor units were overpriced and the market wasn't prepared to pay that extra price.[75] The market was buying the cheaper units. Mr Coonan relied on this sales evidence to reduce the figures for the value of the upper units in Synergy. He had to make judgments as to whether the market would pay the suggested prices. By June 2004, the market had started to "really level off". He had noted in his report that demand for new units had declined significantly from the very high levels experienced in late 2003. Whilst enquiry rates were good, purchasers were hesitant about entering into contracts. Many contracts were falling over.[76] He was aware of the market as he was valuing all of the projects happening in Bargara at the time.[77] The market was working in the lower price range up to half a million dollars, but there were no buyers for over half a million dollars.[78] His assessment of the profit on cost of Synergy was 17.2%.

Findings

[37] The plaintiffs contend that on a proper construction of the contract the first defendant had a contractual obligation to construct Synergy, and to establish the scheme by 31 December 2005. The plaintiffs also contend there were both express and implied terms of the agreement entered into between the parties that the first defendant would do everything reasonably necessary to ensure that Synergy was constructed, and the scheme established by the due date.

[38] A proper construction of the contract does not lead to the conclusion that the first defendant had an absolute obligation to construct Synergy, and establish the scheme by the due date. A plain reading of cl 5 indicates it was in the contemplation of the parties that circumstances may arise whereby Synergy may not be constructed, and the scheme may not be established by 31 December 2005. Were it otherwise, there would be no need for a clause allowing a mutual termination of the contract in the event the scheme was not established by 31 December 2005.

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73 T2-27/45.
74 T2-28/10.
75 T2-53/10.
76 T2-56/10.
77 T2-58/10.
78 T2-59/40.

[39] However, a party relying on a special condition in a contract of sale has an obligation to perform those obligations by acting honestly and reasonably.[79] A party that does not perform its obligations acting honestly and reasonably loses its right to rely upon the special condition to rescind. The issue to be determined is whether the first defendant performed its obligation under the contract "acting honestly and reasonably".

[40] The plaintiffs contend the failure to construct Synergy, and to establish the relevant community title scheme, was as a result of the first defendant's own default in that the first defendant did not make all reasonable endeavours to obtain construction finance. Instead, it sought to avoid its obligations because it had struck a poor bargain. The first defendant's failure to take all reasonable steps means that it cannot be seen to have been acting bona fide, and cannot rely on cl 5 of the contract.

[41] Mr Bazley impressed me as a considered, experienced developer of unit complexes. His evidence, which I accept, established that the first defendant took the following steps after execution of the plaintiffs' contracts in an effort to build Synergy, and establish the community title scheme:

(a) On 12 July 2003, it obtained a guess estimate from Snitzco of a construction building price of $5.2 million. This price was less than the quantity surveyor's report of $5.6 million. This accorded with Mr Bazley's experience. Builders generally come in at or under the estimated costs of the quantity surveyor.[80]

(b) After receipt of Snitzco's quote, the first defendant arranged for consultants recommended by Snitzco to commence work on preparation of the necessary documentation so as to arrive at construction drawings to allow for a firm contract price.

(c) On 11 August 2003, the first defendant put together a list of documentation for bankers in relation to obtaining construction finance.

(d) On or about 28 August 2003, Snitzco provided the first defendant a probable cost summary for the project based on advanced architectural drawings and preliminary drawings from engineers. It was $6.5 million. This was $900,000 over the quantity surveyor report, and $1.3 million above the original guess estimate.

(e) On 18 September 2003, the first defendant advised Snitzco that it was looking at possible areas of savings in relation to the construction costs. However, it continued to progress work, including clearing the site.[81]

(f) On 27 October 2003, the first defendant obtained a valuation from Herron Todd White.

(g) On 7 November 2003, the first defendant obtained a further quantity surveyor report. It assessed the construction price at $5.9 million.

(h) On 20 November 2003, the first defendant resolved to put the construction costs out to tender. It advised Snitzco of this decision.[82] The first defendant arranged to obtain reports and architectural drawings for construction.[83] This would take 3 months at best.

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79 *Masters v Belpate Pty Ltd* (2001) NSW ConvR 55-988; see also *Joseph Street Pty Ltd and Ors v Khay Tea Tan and Ors* [2010] VSC 586.

80 T3-53/55.

81 T3-10/15.

82 Exhibit 34.

83 Exhibit 35.

(i) In early December 2003, the first defendant was contacted by the ANZ Bank. The first defendant subsequently transferred its business to ANZ.[84]

(j) On 22 March 2004, the first defendant arranged for an energy bond with Ergon Energy so as to bring power to the Synergy site.[85] This was by a bank guarantee.[86] ANZ knew about the project and had funded the land.[87]

(k) In late March/early April 2004, tenders issued for construction of Synergy.[88]

(l) On 6 April 2004, the first defendant's solicitors sought an extension of the date for establishment of the community title scheme from 30 June 2005 to 31 December 2005.

(m) On 14 April 2004, DDQ tendered with a lump sum contract construction cost of $6,667,000.[89]

(n) On 29 April 2004, the first defendant spoke to ANZ in relation to a build price of $6.667 million. ANZ was advised the build price had to be under $6.4 million.[90]

(o) On 30 April 2004, J M Kelly Projects tendered with a construction cost of $7.5 million.[91]

(p) On 18 May 2004, Snitzco tendered with a construction cost of $7.2 million.[92]

(q) On 23 May 2004, the first defendant executed a development contract with DDQ. The construction starting date was 5 July 2004, with finance due on 28 June 2004. The construction price was $6.375 million.

(r) On 3 June 2004, the first defendant and DDQ entered into an agreement to pay a further $191,000 upon completion of the project.

(s) On 10 June 2004, the first defendant received a further valuation from Herron Todd White.

(t) In June 2004, the first defendant lodged formal application for bank finance from ANZ Bank.

(u) On 22 July 2004, the first defendant received a draft offer of finance from the ANZ Bank. It included two new conditions which were unacceptable to the first defendant.

(v) On 27 July 2004, the first defendant pursued other finance options through JBA Finance Solutions and Suncorp Finance.

(w) On 3 August 2004, the first defendant gave information to FBI Group.[93]

(x) On 4 August 2004, the first defendant was advised that JBA Finance was unable to finance the project.[94]

(y) On 10 August 2004, the first defendant forwarded further documentation for Suncorp Bank in respect of its application for finance.

(z) On 30 August 2004, the first defendant was advised Suncorp Finance could not finance the project.

(aa) In late August 2004, the first defendant was advised that FBI Group could not finance the project.

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84 Exhibit 37.
85 T3-16/55.
86 Exhibit 39.
87 T3-17/25.
88 T3-19/35.
89 T3-19/50.
90 T3-22/25.
91 Exhibit 42.
92 Exhibit 43.
93 T3-37/30; Exhibit 56.
94 Exhibit 59.

(bb) On 2 September 2004, the first defendant's solicitors wrote to the purchaser's solicitors on a without prejudice basis seeking mutual termination of the contracts due to an inability to comply with cl 5 in relation to registration of the community title scheme by 31 December 2005.

I find that each of those steps was taken by the first defendant acting honestly and reasonably in an attempt to construct Synergy, and to arrange for registration of the community title scheme by 31 December 2005.

[42] The plaintiffs contend the first defendant's inability to obtain construction finance was irrelevant to its obligations to build Synergy as the contracts were not conditional upon the defendant obtaining construction finance. Whilst the contracts were not conditional on finance, the obtaining of construction finance was a necessary step in construction of the project, itself a necessary step in registration of the community title scheme by 31 December 2005. The steps taken by the first defendant to obtain such finance are relevant to whether the first defendant discharged its contractual obligation acting honestly and reasonably.

[43] The plaintiffs further contend the first defendant did not use its best endeavours to construct Synergy and to arrange registration of the community title scheme as it could, and should, have placed the remaining units for sale in October 2003. As at October 2003, the major variable in construction of Synergy was the construction cost. It had increased from a guess estimate of $5.2 million to a provisional construction price of $6.5 million. The provisional cost was not based on final construction drawings. The price could increase having regard to those final drawings. The first defendant could not obtain a firm construction price without those construction drawings. Against that background, it was reasonable for the first defendant to not return to the market until it was able to obtain a firm construction cost. The first defendant did not abandon its obligations. The first defendant took steps to clear the site, arrange for power to be placed on it, and to obtain a construction price. Those steps included seeking an extension of the time period for registration of the community title scheme.

[44] The plaintiffs relied upon the contents of the profit and loss scenarios prepared by Mr Bazley in September 2003[95] to support a contention the first defendant could have achieved significant prices for the remaining units. I accept Mr Bazley's evidence that those profit and loss scenarios contained hypothetical prices inserted in an effort to assess the profitability of the project based on different scenarios. The first defendant is a developer. It makes money from developing projects. Had Mr Bazley believed, as Exhibit 29 suggested, that the project could have been completed at a construction price of $6.5 million with a 40.8% return on gross costs, the first defendant would have proceeded with the project. Exhibit 29 did not represent figures Mr Bazley considered were achievable sales figures.

[45] In this respect, the evidence of Mr Bailey in relation to the marketplace for units as at October 2003 was significant. Mr Bailey impressed me as careful and methodical. I accept he went about his task in a professional and responsible manner. Whilst the plaintiffs contend Mr Bailey's valuation of units 18 and 19, at a price substantially less than the unconditional contracts, meant his valuation ought to be ignored, I found Mr Bailey's explanation for those valuations compelling. It is to be expected a reasonable, careful valuer, undertaking the valuation of a building

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95 Exhibits 27, 28, 29, 30.

project will give proper regard to market factors when assessing the worth of units should the units be required to be sold. Those factors include competition in the marketplace, together with the risk factors associated with a marketplace which had been rising at abnormally high levels.

[46] The plaintiffs also contend Mr Coonan's valuation was flawed, and Mr Logan's should be preferred. I accept and prefer Mr Coonan's evidence to that of Mr Logan. Mr Coonan impressed me as a careful, reasonable valuer. His evidence as to the market in Bargara in 2004 was based on his knowledge of a significant decline in high value units. He was at that time engaged in valuing a substantial portion of the development projects being undertaken in Bargara. Mr Logan's valuation was done many years later, in a different market. He accepted his evidence had the benefit of hindsight. I also prefer to accept the evidence of Mr Bailey and Mr Coonan over that of Ms Browning. Ms Browning's evidence as to market conditions in 2003 and 2004 did not accord with their evidence.

[47] The plaintiffs contend the first defendant would be likely to obtain construction finance had it made a timely application for finance, or sold some of its substantial assets or made it available for security. It relies on Mr Schultz's evidence. Mr Schultz accepted his evidence was based on an acceptance of Mr Logan's valuation and analysis. Mr Logan's evidence had the benefit of hindsight. I prefer and accept Mr Coonan's evidence. This conclusion renders Mr Schultz's evidence unpersuasive. I do not accept that evidence.

[48] I accept the first defendant made a timely application for finance. Finance could not be obtained until a firm building contract price had been ascertained, together with a quantity surveyor's report in relation to that price. These steps could not be taken until preparation of proper construction documentation. The first defendant took all reasonable steps to obtain that documentation at the earliest opportunity. Thereafter, the first defendant moved promptly to obtain tender prices, to obtain a quantity surveyor's price and to submit the application to the bank. Whilst the formal application for finance was not submitted until late June 2004, I accept Mr Bazley's evidence that he was constantly in contact with the bank, and that the ANZ Bank was aware of the application throughout this period. Any finance application made on the basis of a quantity surveyor's cost assessment would have been conditional upon a contract build price within bank lending margin requirements. It would also have been conditional upon a valuation. The valuation obtained from Herron Todd White showed a profit on cost outside bank lending requirements. The plaintiffs contend the first defendant should have taken steps to change ANZ's proposed conditions for finance. I accept Mr Bazley's evidence that those conditions were not negotiable. Mr Bazley took steps to immediately seek other finance. Those steps were reasonable in the circumstances.

[49] An obligation to use "best endeavours" does not require a person to go beyond the bounds of reason.[96] The first defendant was keeping its banker ANZ Bank fully informed in relation to the Synergy project. That bank had security over the first defendant's assets. It was not reasonable to require the first defendant to sell some of those assets and/or to provide security from related entities. Best endeavours does not require a party to do "whatever it takes" in order to satisfy a condition. Reasonableness is to be determined in all the circumstances, having regard to the

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96 *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 at 64.

party's position as a contracting party.[97] The first defendant had no obligation to sell its other properties, or pledge other assets.

[50] The plaintiffs further contend that the pretext call made by Ms James to Mr Bazley on 7 September 2004 is consistent with the first defendant having no honest intention of proceeding with construction of Synergy whilst the plaintiffs' contracts remained on foot. Mr Bazley was not cross-examined on that conversation. Whilst Ms James was not challenged on her version of events by the first defendant, the first defendant was not legally represented. If it was to be contended Mr Bazley had an ulterior purpose in the conversation had with Ms James, fairness dictated he should be given an opportunity to comment on that proposition. Against that background, I am not prepared to find that the conversation with Ms James evidenced an intention by the first defendant not to complete the project until it had effected termination of the plaintiffs' contracts.

Conclusions

[51] The first defendant advised each of the plaintiffs in September 2004 it would be unable to satisfy cl 5 of the contract. Having regard to the lengthy construction period necessary to complete the project, and the available time left to satisfy cl 5, it was reasonable for the first defendant to seek mutual termination of the contract at that time. Each of the plaintiffs refused to accept termination at that time. Whilst the first defendant did not formally terminate the contracts after 31 December 2005, each of the plaintiffs commenced these proceedings before that date each plaintiff accepted repayments of their deposits in full in May 2006. That was the extent of the first defendant's obligations under cl 5 of the contract.

[52] Each of the plaintiffs has failed to satisfy me that the first defendant did not use its best endeavours to ensure registration of the community title scheme by 31 December 2005. Each of the plaintiffs' claims is dismissed.

[53] If I had allowed each of the plaintiffs' claims, it would have been necessary to consider damages. The plaintiffs' claims were based on valuations provided by Ms Browning as to the value of the units as at 31 December 2005. The first defendant challenged those valuations, although it did not adduce evidence as to values as at that date. As indicated previously, I prefer the evidence of Mr Bailey and Mr Coonan as to market values in Bargara in 2003 and 2004 to that of Ms Browning. Had it been necessary to determine the plaintiffs' damages, I would not have been satisfied any of the plaintiffs had established loss in any event.

[54] The plaintiffs also made claims in respect of declarations concerning loan documentation entered into between the first and second defendants in or about March 2009. That documentation was not tendered as part of the plaintiffs' case. Against that background, and having regard to my finding in respect of each of the plaintiffs' claims, it is inappropriate to further consider this aspect.

[55] I shall hear the parties as to the form of orders, and costs.

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97 *Earle Cameron (Industrial) Pty Ltd v Comprador Properties Pty Ltd* (1986) NSW Conv R 55-305 at [12].