SUPREME COURT OF QUEENSLAND

CITATION:	*Lindaning Pty Ltd (Receivers and Managers Appointed) ACN 099 727 223 v Dean Goodlock and Michael Gore as Trustees of the Gorelock Unit Trust and Dean Goodlock and Michael Gore* [2011] QSC 266
PARTIES:	**LINDANING PTY LTD (RECEIVERS AND MANAGERS APPOINTED) ACN 099 727 223** Applicant **V** **DEAN GOODLOCK AND MICHAEL GORE AS TRUSTEES OF THE GORELOCK UNIT TRUST** First Respondent **AND** **DEAN GOODLOCK AND MICHAEL GORE** Second Respondents
FILE NO/S:	5740/11
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	7 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2011
JUDGE:	Byrne SJA
CATCHWORDS:	EQUITY – SPECIFIC PERFORMANCE – PRECONDITIONS TO OBTAINING SPECIFIC PERFORMANCE – INADEQUACY OF DAMAGES – Where the applicant vendor sought specific performance of a contract of sale of lots in a community title scheme – Where the "Buyer" named in the contract was the First Respondent "Dean Goodlock and Michael Gore ATF the Gorelock Unit Trust" – Where the respondents claim inability to raise sufficient finance to complete the purchase – Whether specific performance was available to the vendor - Whether damages would be a sufficient remedy for the failure to provide the balance of the purchase price CONTRACT: GENERAL PRINCIPLES – REMEDIES –

SPECIFIC PERFORMANCE AND INJUNCTIONS – SPECIFIC PERFORMANCE – Where the respondents claimed they did not have sufficient funds to complete the purchase – Whether specific performance ought to be refused on the basis that it was futile or impossible to comply with– Whether impossibility established

EQUITY – EQUITABLE DEFENCES – ILLEGALITY AND UNCLEAN HANDS – UNCLEAN HANDS - Where the purchasers argued that the vendor was not ready willing and able to complete at settlement because of the form of transfer document relied upon – Where the purchasers' solicitors had prepared the transfer document – Whether the purchasers could show an unwillingness to perform – Whether the vendor had demonstrated a readiness and willingness to carry out its obligations

CIVIL PROCEDURE – SUMMARY DISMISSAL, SETTLEMENT AND DISCONTINUANCE – SUMMARY DISPOSAL OF LITIGATION – SUMMARY JUDGMENT – Where both sides sought summary determination – Where the applicant admitted, once and for all, the truth of the facts stated in the respondents' evidence

Aranbel Ltd v Darcy & Ors [2010] IEHC 272, cited.
Boyarsky v Taylor [2008] NSWSC 1415, cited.
Dougan v Ley (1946) 71 CLR 142, cited.
Fairborne Pty Ltd v Strata Store Noosa Pty Ltd [2009] QSC 250, cited.
Georges v Peter Wieland [2010] NSWSC 1378, cited.
Great Northern Land Company Limited v Crowley [2010] NZHC 1944, cited.
Hamdan v Widodo (No 2) [2010] WASC 6, cited.
International Advisor Systems Pty Ltd v XYYX Pty Ltd & Anor [2008] NSWSC 2, cited.
Matila Ltd v Lisheen Properties Ltd & Ors [2010] EWHC 1832, cited.
North East Lincolnshire BC v Millenium Park (Grimsby) Ltd [2002] EWCA Civ 1719, cited.
Titanic Quarter Ltd v Rowe [2010] NI Ch 14, cited.
Turner v Bladin (1951) 82 CLR 463, cited.
Waitarere Rise Limited v Rangi [2010] NZHC 403, cited.
Vickery v Woods (1952) 85 CLR 336, cited.
Patel v Ali [1984] 1 All ER 978, cited.

COUNSEL: G J Handran for the Applicant

R A Nichols for the Respondent

SOLICITORS: Hickey Lawyers for the Applicant

HWL Ebsworth Lawyers for the Respondent

Specific Performance sought

[1] By originating application, Lindaning Pty Ltd ("the Seller") seeks specific performance of a contract dated 31 May 2010 for the sale to "Dean Goodlock and Michael Gore ATF The Gorelock Unit Trust" ("the Buyer") of eight lots in a community title scheme for a commercial development at the Gold Coast. The price is $2,073,500.00. The agreed, extended date for completion was 14 June 2011. Time is expressly of the essence.[1]

[2] A 10 per cent deposit was paid. The balance of the purchase price was not.

[3] Rather than rescind, resell and then sue to recover the loss on resale, the Seller seeks specific performance.

Damages adequate?

[4] A ground on which specific performance is resisted is that there is no evidence to show that damages are an inadequate remedy.

[5] Clause 9.4 of the standard conditions of this REIQ form of contract stipulates that a vendor, on electing to terminate the contract for a purchaser's breach, may recover "as liquidated damages" any deficiency in price and the expenses of resale.

[6] This provision might well obviate the risk of undervaluation that can attend assessment of a vendor's loss on resale, especially where there is conflicting valuation evidence: a prospective difficulty that often is a reason for supposing that damages may be an inadequate remedy.[2]

[7] There is, however, a general inclination to grant the vendor under a contract for the sale of real property specific performance even where, as here, the purchaser's obligations, except for payment of the price, have been performed.[3]

[8] Moreover, by cl 9.2 of this contract, if the Seller, after breach by the Buyer, affirms, "the Seller…may sue the Buyer for: … specific performance". That a purchaser has agreed to submit to the remedy is a material factor in deciding whether to withhold it.[4]

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1 See cl 6.1.

2 See e.g., A. Schwartz, "The Case for Specific Performance", (1979) 89 *Yale Law Journal* 271, 276-278; S. Shavell, "Specific Performance Versus Damages for Breach of Contract: An Economic Analysis", (2006) 84 *Texas Law Review* 831, 857.

3 *Dougan v Ley* (1946) 71 CLR 142, 150; *Turner v Bladin* (1951) 82 CLR 463, 473; *Fairborne Pty Ltd v Strata Store Noosa Pty Ltd* [2009] QSC 250, [15]; I.C.F. Spry, *The Principles of Equitable Remedies*, 8th ed, (2010), pp 61, 73 fn 72.

4 Spry, *supra*, pp 76-77; cf E. Yorio, *Contract Enforcement: Specific Performance and Injunctions*, (1989), § 19.2 ("a clause in a contract providing for specific performance…does not by itself bind a court to grant the agreed remedy"); A. T. Kronman, "Specific Performance", (1978) 45 *University of Chicago Law Review* 351, 371-372; and S. Shavell, *supra*, p 875 ("a clearly expressed desire of the parties does influence the courts, especially where specific performance would not be very difficult to enforce.")

[9] Another factor tends against the hypothesis that damages would be an adequate remedy: there is nothing to show that the lots are even readily marketable let alone saleable at an affordable, reasonable cost.

[10] All considered, damages are not shown to be the preferable remedy.

Impossibility

[11] Next, it is said that Mr Gore and Mr Goodlock do not have the means to specifically perform their obligations.

[12] The claimed inability to pay the price is not relied on as raising hardship – a discretionary bar that would have required a comparison of the difficulties the Seller would encounter by refusal of the decree with those that the respondents would likely experience in finding the purchase money.[5] There is, for example, no suggestion that the purchasers could only fund the acquisition by paying exorbitant interest rates.[6] The essential contention is that it would be impossible[7] – not just especially burdensome – for Mr Gore and Mr Goodlock to find the money.

[13] The sole trustee of the Gorelock Unit Trust ("the Trust") is Michael Gore, who has a 50% beneficial interest in the trust. The other unit holder is his brother, Scott.

[14] Mr Michael Gore explains the Buyer's failure to pay the adjusted purchase price.

[15] He deposes that, when entering into the contract, he expected to draw on two sources to pay the balance purchase price: $1,451,450 from what he calls "finance obtained through Future Assist Financial Services Pty Ltd[8] … via Future Financial Pty Ltd … as broker for the Adelaide Bank Limited"; and $432,490 of his "own funds".

[16] That plan changed "in or about January 2011" when Scott Gore was engaged by Future Assist to work in an executive position. When that happened, the brothers "agreed to share equally in payment of the balance funds towards the purchase …", Michael Gore deposes.

[17] By 9 June 2011, Future Financial's proposal to finance the acquisition had changed. The Adelaide Bank had decided that it would lend only $1,075,750 – 65% of an "as is valuation" of $1,655,000. This about $375,000 reduction in the level of bank finance meant that the brothers needed to find $808,190 to complete.

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5 R.P. Meagher, J.D. Heydon & M.J. Leeming, *Equity Doctrines and Remedies*, 4th ed, (2002), [20-100], p 672; cf *International Advisor Systems Pty Ltd v XYYX Pty Ltd & Anor* [2008] NSWSC 2, [51].

6 See *Boyarsky v Taylor* [2008] NSWSC 1415, [42].

7 The topic is discussed, with analyses of cases from several jurisdictions, in A. Dowling, "Vendors' Applications for Specific Performance", [2011] 75(3) *The Conveyancer and Property Lawyer* 208.

8 Michael Gore is the secretary and sole director of Future Assist.

[18] When Michael told Scott of the new financing proposals, Scott said that "he did not have sufficient cash flow or assets that could be exploited to provide additional funding over and above the finance amount" – a reference to the expectation that the brothers would have to find $432,490 from their own resources to contribute towards the adjusted purchase price. He has also said to Michael that "even if he did have sufficient cash to lend to the Trust to complete the contract he would not be prepared to do so".

[19] Michael Gore asserts that:

- Future Assist "does not have sufficient cash flow or assets … to provide funding … to complete the contract";
- The Trust "does not have any funds or assets in excess of the $1,075,750 'Finance Amount'";
- He does "not have sufficient funds or assets to provide the balance purchase price … over and above the Finance Amount … to the trust";
- He has an "honestly held belief" that, if ordered to pay the purchase price, "it would be impossible … to do so."

[20] Mr Goodlock swears that he does not have sufficient funds or assets "to provide the balance purchase price for the property".

Summary Trial

[21] There is an important procedural aspect.

[22] The affidavits of Mr Gore and Mr Goodlock lack detail about their financial circumstances. Even so, their evidence – untested by cross-examination and uncontroverted – might, perhaps, have sufficed to warrant a trial: an event where the facts concerning the respondents' assertions that they could not comply with an order for specific performance would be investigated, after the usual interlocutory steps, including disclosure, and where they might have augmented the limited evidence adduced in defending this application.

[23] Both sides, however, seek a summary determination of the Seller's claim to specific performance.

[24] Ms Nichols disavowed the idea that the case be sent for trial on another day if the respondents had shown that there was an issue that justified a trial.[9] She joined Mr Handran in asking that the specific performance part of the proceeding be finally determined now, on such evidence as has been adduced at this hearing. To eliminate the possibility of any disputed question of fact which might obstruct that outcome, for his part, Mr Handran admitted, once and for all, the truth of the facts stated in the affidavits of Mr Gore and Mr Goodlock.

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[9] cf *North East Lincolnshire BC v Millenium Park (Grimsby) Ltd* [2002] EWCA Civ 1719, [14]; *Titanic Quarter Ltd v Rowe* [2010] NI Ch 14, [22]; *Waitarere Rise Limited v Rangi* [2010] NZHC 403, [11]-[14].

Impossibility not proved

[25] A purchaser resisting specific performance on the basis of an inability to pay the price bears the burden of establishing that state of affairs.[10]

[26] By the time the application was heard, Ms Nichols had Mr Handran's outline of argument. It highlighted the paucity of evidence about the financial position of Gore brothers and Mr Goodlock. Despite this, no attempt was made to supplement the mere conclusory assertions concerning capacity to fund the acquisition.

[27] The respondents might have been expected to have adduced "all reasonable evidence necessary to allow the Court to assess whether there is a true case of impossibility".[11] Yet neither of the Gore brothers has provided any information concerning their assets, liabilities or borrowing capacity. Nor has Mr Goodlock. This is a striking deficiency in propounding a defence of impossibility. And there is simply no indication that any inquiry has been made of other potential lenders.

[28] Although their assertions must be taken to represent the truth, the respondents make a distinctly less than persuasive case that, if put to the test, Mr Gore could not raise the funds: by realising assets; by borrowing from commercial sources other than the Adelaide Bank, or from family or associates; or in other ways.

[29] The respondents have not demonstrated that there is a "very substantial probability"[12] that they could not find the money to pay the balance price. So they have not made out a case of impossibility.

Futility?

[30] The decree is said to be pointless[13] on the basis that the Buyer's inability to pay the price will eventually require the Seller to seek vacation[14] of the order to facilitate a termination of the contract and to allow a damages claim to proceed.

[31] Inconvenient consequences may attend specific performance.

[32] The Buyer might not pay. The litigation could then be complicated with contempt proceedings or by a return to court to have the decree vacated, with the fate of the lots in suspension in the meantime. Even if the Buyer completes, the lots must be retained pending the outcome of this application and any appeal. And there would be delay between decree and settlement. All the while, presumably, holding costs like insurance, rates and so on will be incurred. Apparently, the Seller prefers

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10 *Great Northern Land Company Limited v Crowley* [2010] NZHC 1944, [42].

11 *Aranbel Ltd v Darcy & Ors* [2010] IEHC 272, [5.3]; cf *Matila Ltd v Lisheen Properties Ltd & Ors* [2010] EWHC 1832, [259]; and *Fairborne Pty Ltd v Strata Store Noosa* at [24].

12 *Great Northern Land* at 423; cf the "no realistic possibility" test of a purchaser's ability to complete favoured in *Aranbel* at [2.4]-[2.5].

13 Spry, *supra*, pp 127–128. 133–134.

14 Meagher, Heydon & Leeming, *supra*, 4th ed, (2002), [20-265] pp 697-700; *Hamdan v Widodo (No 2)* [2010] WASC 6; *Georges v Peter Wieland* [2010] NSWSC 1378, [25].

confronting such eventualities[15] to the problems that would be involved in finding another purchaser and afterwards suing for the loss on resale.

[33] Things may not end well. But the prospect that the Seller's commercial judgment in pursuing specific performance could prove to be unwise is not a sufficient reason to refuse that remedy.

Hardships?

[34] Another contention relates to Mr Goodlock: that it would be unjust to compel specific performance on grounds associated with the circumstance that Mr Goodlock has never been a trustee of the Trust. In particular, it is said that the order would:

- mean that the Trust took only a 50 per cent interest in the lots when it was intended that it should acquire the entire legal estate;
- require Mr Goodlock and Mr Gore to co-operate, so far as concerns the property, in circumstances where they otherwise have no common interest or intention;
- compel Mr Goodlock to incur the costs of completion, and take conveyance of the lots, although he is not entitled to be indemnified out of the assets of the Trust for the expenses.

[35] Those contentions relate to a proposition that Mr Handran advanced: that the purchasers were Mr Gore, as trustee for the Trust, and Mr Goodlock, as tenants-in-common in equal shares.

[36] The "Buyer" named as such in the contract is "Dean Goodlock and Michael Gore ATF the Gorelock Unit Trust".

[37] The meaning of "ATF" is controversial. The Seller contends that "ATF" connotes "As Trustee For" and relates only to Mr Gore. The respondents argue that the abbreviation means "As Trustee**s** For" and indicates the capacity in which both Mr Goodlock and Mr Gore purported to buy.

[38] Whether "ATF" signifies "Trustee" or else "Trustees" is said to matter because Mr Goodlock has never been a trustee of the Trust[16] and did not have authority to purport to contract as such a trustee.

[39] What is the proper interpretation of "ATF"?

[40] On the face of the contract, "ATF…" looks to qualify both Mr Gore and Mr Goodlock. Three factors point to that conclusion:

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15 There may be other risks. The Seller, for example, will be left to try to recover the stamp duty it has paid should the Buyer not complete.

16 Mr Goodlock swears that he executed the contract because of his mistaken belief that he was a trustee of the Trust. There is no explanation for the mistake. But there is no suggestion that the Seller contributed to it.

- the abbreviation follows both their names;
- the contract does not state that the purchasers take either as tenants-in-common or else as joint tenants; and some such prescription might have been expected were Mr Goodlock to acquire a beneficial interest in the lots;
- a small point: the name of the Trust incorporates Mr Gore's surname and the second syllable of Mr Goodlock's, which tends to suggest that the two men are involved in the Trust.

[41] "ATF" signifies "As Trustee**s** For".[17]

[42] But there is no reason to suppose that Mr Goodlock will assert an interest, legal or beneficial, in the lots.

[43] Ever since the contract was made, one firm of solicitors has acted for the Buyer in the acquisition. Those solicitors prepared the transfer documents. Mr Gore and Mr Goodlock both maintain that Mr Gore is, and always has been, the sole trustee. Consistently with that joint position, the form of transfer submitted for the Seller's execution showed Mr Gore, as such trustee, as the transferee. Moreover, Mr Gore and Mr Goodlock are represented by the one barrister and by the same firm of solicitors in the litigation. These are all clear indications of ongoing co-operation and continuing common interests.

[44] So it may confidently be predicted that, at settlement, the Seller would furnish a duly executed transfer capable of immediate registration in the name of Mr Gore, as trustee.

[45] In short, there is no risk that the Trust will acquire only a 50 per cent interest in the lots. And that the purchasers might need to co-operate does not pose any real difficulty.

[46] Although Mr Goodlock will not acquire an interest in the lots, an order for specific performance would require him as well as Mr Gore to pay the price. That hardship,[18] however, might well not eventuate.

[47] Mr Gore's pessimism about funding the acquisition may prove to be unfounded. If ordered to complete, he could yet strive, successfully, to raise the money rather than risk contempt proceedings in which his capacity to find the purchase price would be investigated. In that event, Mr Goodlock need not contribute to the payment.[19]

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17 If extrinsic circumstances may be considered, that Mr Goodlock executed the contract because he mistakenly supposed that he was a trustee of the Trust would put the matter beyond doubt.

18 A promisor's unilateral mistake, although it does not affect contractual obligations, including a liability to pay damages for breach, may, in principle, afford a basis to exercise the discretion against granting specific performance on hardship grounds in exceptional circumstances: *Patel v Ali* [1984] 1 All ER 978, 982; *International Advisor Systems* at [50]-[51].

19 It is unnecessary to consider the significance of the fact that Mr Goodlock is, with Mr Gore, a guarantor of the obligations of the two of them "ATF Gorelock Unit Trust".

[48] There is an air of unreality about the notion that Mr Goodlock will have to contribute to the purchase price. It is no surprise that not a word of evidence is offered to support the concern.

Unclean hands contention

[49] The fourth objection is that the Seller was not ready, willing and able to complete at the time fixed for settlement because it was proposing to deliver a transfer solely in favour of Mr Gore, as trustee of the Trust.

[50] Contractually, the Seller was, at settlement, obliged to deliver "unstamped Transfer Documents capable of immediate registration after stamping".[20] "Transfer Documents" is defined[21] to mean "the form of transfer…required to transfer title to the Buyer…": "Dean Goodlock and Michael Gore ATF the Gorelock Unit Trust".

[51] The document the Seller intended to exchange for the price was the form of transfer that the Buyer's solicitors had submitted for the Seller's execution.

[52] Under the general law, "a vendor's obligation is to execute a conveyance of the land sold to the purchaser or as he shall direct".[22]

[53] It was not suggested that the terms of the contract displaced that entitlement.

[54] Having sought a transfer to Mr Gore alone, the Buyer, by conduct, waived the contractual right to a conveyance in favour of "Dean Goodlock and Michael Gore ATF the Gorelock Unit Trust".

[55] The respondents can scarcely complain that the Seller was not prepared to perform its obligations because it would have delivered the very transfer the Buyer had requested.

Disposition

[56] Specific performance should be decreed.

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20 Standard Condition 5.3(2).

21 Standard Condition 1.1(2)(cc).

22 *Williams, Vendor and Purchaser*, 3rd ed (1922-1927), p 579, cited in *Vickery v Woods* (1952) 85 CLR 336, 343.