SUPREME COURT OF QUEENSLAND

CITATION:	*Boylan v Gallagher* [2011] QCA 240
PARTIES:	**KYM BOYLAN** (appellant) **v** **DONNA MARIE GALLAGHER** (respondent)
FILE NO/S:	Appeal No 4482 of 2011 SC No 7518 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2011
JUDGES:	Fraser and Chesterman JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed with costs.** **2. Judgment and orders set aside.** **3. The plaintiff's claim be dismissed.** **4. Judgment for the appellant on the counterclaim in the sum of $2,100,000, together with interest thereon at the rate of 10 per cent from 20 November 2008 to the date of judgment pursuant to s 47(1) of the *Supreme Court Act* 1995 (Qld).** **5. Leave to the parties to make submissions as to the costs of the proceedings in the Trial Division in accordance with paragraph 52 of Practice Direction No 2 of 2010.**
CATCHWORDS:	CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATIONS ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS – where the appellant and respondent entered into a put and call option deed for the purchase of land – where the respondent, as the prospective purchaser, executed a warning statement, attached it to the deed and forwarded the documents to the appellant's solicitors – where the appellant, as the prospective vendor, executed the deed and returned it to the respondent's solicitor – where the appellant

purported to exercise the put option – where the respondent contended that she was not bound by the deed because the appellant's solicitors had not directed the attention of the respondent's solicitor to the warning statement in their cover letter, as required by s 365(2)(c)(ii) of the *Property Agents and Motor Dealers Act* 2000 (Qld) – whether the respondent was bound by the deed and therefore in breach of the resulting contract of sale

Property Agents and Motor Dealers Act 2000 (Qld), s 363, s 365, s 365(2)(c), s 365(3)

Gallagher v Boylan [2011] QSC 94, overruled
Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd [2008] QSC 261, distinguished

COUNSEL: J McKenna SC for the appellant
D Savage SC for the respondent

SOLICITORS: Reichman Lawyers for the appellant
Morgan Conley Lawyers for the respondent

[1] **FRASER JA:** In May 2008 the appellant, the registered proprietor of land on the Gold Coast, and the respondent entered into a "Put & Call Option Deed" and the respondent paid a call option fee and a deposit totalling $250,000 under that deed. The respondent did not duly exercise her "call option" to purchase the land for $5,500,000, with the result that the appellant became entitled to exercise a "put option" to require the respondent to purchase the land for the same price pursuant to a contract in the form annexed to the deed.

[2] In October 2008 the appellant purported to exercise the put option. The respondent contended that she was not bound to purchase the land because of the effect of various provisions concerning "relevant contracts" in ch 11 of the *Property Agents and Motor Dealers Act* 2000 (Qld)[1] ("*PAMDA*"). On the date for completion of the purchase in November 2008 the appellant was ready, willing and able to complete the transaction and she sought to do so. The respondent failed to complete. In January 2009 the appellant's solicitors wrote to the respondent's solicitor purporting to terminate the contract for the respondent's breach of contract. In April 2009, the appellant resold the land for $3,561,000.

[3] The respondent brought proceedings against the appellant claiming the recovery of the call option fee and deposit of $250,000 and interest. The appellant counterclaimed for a declaration that she had validly terminated the contract and for liquidated damages pursuant to the contract, or damages for breach of the contract for the shortfall in the price on the resale of the land plus the expenses of resale, together with interest. It was agreed between the parties that the shortfall on the resale of the land plus the expenses of resale totalled $2,100,000.

[4] The trial judge gave judgment for the respondent for the sum of $250,000 and interest, ordered that $272,725, which had been paid into court, plus any accrued interest, be paid to the respondent on account of the judgment sum, dismissed the

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1 For present purposes the relevant provisions are in the form contained in Reprint No 3A.

appellant's counterclaim, and ordered the appellant to pay the respondent's costs of the proceeding on the standard basis or as otherwise agreed.[2]

[5] The appellant contends that those orders should be set aside and that judgment should instead be entered in her favour for $2,100,000 plus interest and costs.

The issues at trial

[6] The facts were established at trial by a statement of agreed facts signed by the parties' solicitors and an accompanying bundle of agreed documents. It was agreed that the only correspondence relevant to the proceedings was in writing between the solicitors for the respondent and the appellant and contained in the agreed bundle and there were no other notifications or directions, whether written or oral.

[7] The appellant contended at the trial that the land was not "residential property" within the definition in s 17(1) of *PAMDA* and the deed was therefore not a "relevant contract" to which ch 11 of *PAMDA* applied. The trial judge rejected those contentions and they are not in issue in this appeal.

[8] Section 365(3) of *PAMDA* provides that the buyer may withdraw "the offer to purchase made in the contract form … before being bound by the relevant contract under subsection (1) …". Under s 365(1)(a) of *PAMDA*, the buyer and the seller under a relevant contract other than one relating to a unit sale "are bound by the relevant contract when … the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2)". Where the documents are sent "other than by electronic communication", as in this case where the documents were sent by post, s 365(2)(c) provides that the way is "by being handed or otherwise receiving" the warning statement and the relevant contract, "if—

> (i) the warning statement is attached to the relevant contract and appears as the first or top page; and
>
> (ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement and the relevant contract."

[9] Section 365(6) defines the expression "buyer's agent" as including a lawyer acting for the buyer. It was uncontroversial that the respondent's solicitor acted as the "buyer's agent" and that the appellant's solicitors acted as the "seller's agent".

[10] The question whether the appellant's solicitors had directed the attention of the respondent's solicitor to the warning statement was in issue on the pleadings, but at the commencement of the trial the appellant's trial counsel conceded that the appellant's solicitors had not directed the attention of the respondent's solicitor to the warning statement, with the result that, if *PAMDA* applied, the respondent had become entitled under s 365(3) to withdraw her "offer to purchase". In that respect the appellant's case was that the respondent had waived that entitlement.

[11] The trial judge concluded that the respondent had not waived her entitlement to withdraw from the deed.

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[2] *Gallagher v Boylan* [2011] QSC 94.

The issues in the appeal

[12] The grounds stated in the notice of appeal filed by the appellant were directed to challenging that conclusion. At the commencement of the hearing of the appeal the appellant applied for leave to amend the notice of appeal by adding a new ground to the effect that the seller's solicitors had directed the attention of the buyer's solicitor to the warning statement in conformity with 365(2)(c)(ii). Senior counsel for the appellant acknowledged that the new ground was inconsistent with trial counsel's concession, but he submitted that the point could be considered on appeal without unfairness to the respondent and it was in the interests of justice to do so. Senior counsel for the respondent did not submit that there was any injustice or unfairness in allowing the amendment. He submitted that the amendment should be refused if the Court found that the new ground failed on its merits.

[13] The Court granted the appellant leave to add the additional ground of appeal. It was in the interests of justice to permit the amendment despite the fact that it raised a point which had been conceded at trial because, as the appellant submitted and the respondent did not contest: the new point involved only a question of law arising from uncontentious facts; if it had been pressed at trial it would have been argued on the same facts; the point is a short one which would not prolong or delay the appeal; if resolved in the appellant's favour it would be determinative of the appeal; the concession was not made for any forensic advantage but was instead the product of a responsible attempt by counsel to identify the real legal issues in the case; and the point was fairly arguable.

[14] Accordingly, the first issue in the appeal is whether the condition in s 365(2)(c)(ii) of *PAMDA* that "the seller's agent directs the attention of the … buyer's agent to the warning statement" was fulfilled. If not, the further issue arises whether the respondent waived the right to withdraw her "offer to purchase" under s 365(3).

The agreed facts and documents

[15] It is necessary now to refer in more detail to the facts and the legislative scheme.

[16] On 7 May 2008, the respondent executed the deed and the warning statement in the form required by *PAMDA*. The warning statement was attached by a staple to the deed as the first page of the composite document. On 8 May 2008, the respondent's solicitor sent that document under a covering letter, together with the deposit and the call option fee, to the appellant's solicitors.

[17] The text of the respondent's solicitor's covering letter was as follows:

> "Our Ref: MS:EB:20989
> Your Ref: Fraser Perrin/Christine
>
> 8 May 2008
>
> Perrin Partners
> PO Box 7342
> GOLD COAST MAIL CENTRE QLD 9726
>
> Dear Sir
>
> **RE: PUT AND CALL OPTION - GALLAGHER AND BOYLAN - 299 MONACO STREET, BROADBEACH WATERS QLD**

I refer to previous communications in relation to this matter and enclose the following:

1. Put and Call Option document in duplicate signed by client.
2. Call Option Fee of $1.00
3. Security Deposit by way of bank cheque in favour of Perrin Partners in the sum of $249,999.00

I look forward to receiving my client's fully signed copy of the Put and Call Option together with receipts for the moneys paid as soon as possible.

Yours faithfully
MICHAEL JOSEPH SMITH

Encl."

[18] On 12 May 2008, the appellant executed the deed and her solicitors returned the composite document with a covering letter by post. The text of the appellant's solicitors' letter was as follows:

"12 May, 2008

Michael Joseph Smith
Solicitor
PO Box 508
NERANG QLD 4211

Our Ref: FDP.CG.0805017
Your Ref: MS.EB.20989

Dear Sir

PUT AND CALL OPTION - GALLAGHER AND BOYLAN - 299 MONACO STREET, BROADBEACH WATERS

We enclose the following:

1. Your client's full executed copy of the Put and Call Option document
2. Trust Account receipt for Call Option Fee
3. Trust Account receipt for security deposit

Would you please confirm that in accordance with Clause 9 of the Put & Call Option Deed, the Call Option Fee and the Security Deposit can be released to our client.

Yours faithfully
PERRIN PARTNERS

Per:

Encl"

[19] On 14 May 2008, the respondent's solicitor wrote to the appellant's solicitors authorising them to account to the appellant for the deposit. This letter was submitted by the appellant to amount to a waiver by the respondent of any right that

accrued to her under s 365(3) of *PAMDA* to withdraw from the deed. The letter stated:

> "I refer to previous communications in relation to this matter and confirm that it is in order for you to account to the Grantor for the Security Deposit in terms of clause 1A of the Put and Call Option document."

[20] In that letter the respondent's solicitor corrected the mistaken reference to cl 9 in the appellant's solicitors' letter. The relevant clause was cl 1A, which provides:

> "1A. The Grantee must pay the Security Deposit to the Depositholder when the Grantee signs this Deed, which amount is non-refundable unless the Grantor is in default of its obligations under this Deed or the Contract, and the Depositholder is authorised to release and pay it to the Grantor immediately after a fully executed copy of this Deed has been delivered to the Grantee."

[21] The deposit is also referred to cl 5.2 of the deed:

> "5.2 The Grantor acknowledges that the Call Option Fee and the Security Deposit are substantial amounts and to further and better secure the Grantee's interest in the Property, the Grantor must provide an appropriate form of consent, for the purposes of s 126 of the *Land Title Act 1994 (Qld)*, to the registration of the caveat in favour of the Grantee as caveator."

The legislation

[22] Part 1 of ch 11 (s 363 to s 365B) is headed "Preliminary". The purposes of ch 11 of *PAMDA* are stated in s 363 as being:

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

[23] The "cooling-off period" for a relevant contract referred to in s 363(a) is defined in s 364 as meaning a period of five business days "starting on the day the buyer under the relevant contract is bound by the relevant contract or, if the buyer is bound by the relevant contract on a day other than a business day, the first business day after the day the buyer is bound by the relevant contract" and "ending at 5p.m. on the fifth business day."

[24] The starting day of the "cooling-off period" (the day on which the buyer is "bound by" or "bound under" the relevant contract) may be ascertained by reference to

s 365. I have already referred to the directly relevant provisions but I will now quote more extensively from s 365:

> "(1) The buyer and the seller under a relevant contract are bound by the relevant contract when—
>
> (a) for a relevant contract, other than a relevant contract relating to a unit sale—the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2); or
>
> (b) for a relevant contract relating to a unit sale—the buyer or the buyer's agent receives the warning statement, the information sheet and the relevant contract in a way mentioned in subsection (2A).
>
> *Note—*
>
> See the *Electronic Transactions (Queensland) Act 2001*, section 11 for a requirement about consent and section 24 for rules about when an electronic communication is received.
>
> (2) For a relevant contract, other than a relevant contract relating to a unit sale, the ways are—
>
> (a) by fax, but only if the documents mentioned in subparagraphs (i), (ii), (iii) and (iv) are sent in the following order—
>
> (i) a single cover page that includes a clear statement directing the attention of the buyer or the buyer's agent to the warning statement and the relevant contract;
>
> (ii) the warning statement;
>
> (iii) the relevant contract;
>
> (iv) any other documents; and
>
> (b) by electronic communication other than fax, if the electronic communication contains—
>
> (i) a message that includes a clear statement directing the attention of the buyer or the buyer's agent to the warning statement and the relevant contract; and
>
> (ii) a single document, consisting only of the warning statement and the relevant contract, that is protected against unauthorised change, with the warning statement appearing as the first or top page of the document; and
>
> *Example of electronic communication—*
>
> • email
>
> (c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii) and (iii) other than by electronic communication, if—

(i) the warning statement is attached to the relevant contract and appears as the first or top page; and

(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement and the relevant contract.

Example of receipt other than by electronic communication—
- post

Examples of how attention may be directed—
- by oral advice
- by including a paragraph in an accompanying letter

(2A) For a relevant contract relating to a unit sale, the ways are—

[The provisions in s 365(2)(a) to s 365(2)(c) are substantially repeated here, with the additional requirement for provision of the 'information statement' required for unit sales by the *Body Corporate and Community Management Act* 1997 (Qld).]

(3) Without limiting how the buyer may withdraw the offer to purchase made in the contract form, the buyer may withdraw the offer at any time before being bound by the relevant contract under subsection (1) by giving written notice of withdrawal, including notice by fax, to the seller or the seller's agent.

(4) For this section, a thing sent by fax is taken to be received by the person to whom it is sent if the sender's fax machine indicates that transmission has been successful.

(5) If a dispute arises about when the buyer and the seller are bound by the relevant contract, the onus is on the seller to prove when the parties were bound by the relevant contract.

(6) In this section—
buyer's agent includes a lawyer or licensee acting for the buyer and a person authorised by the buyer or by law to sign the relevant contract on the buyer's behalf."

[25] The effect of the "cooling-off period" is regulated by Pt 3 of ch 11. Section 368(1) confers upon a buyer under a relevant contract who has not waived the cooling-off period the right to terminate the relevant contract at any time before the cooling-off period ends. Under s 368(2) and s 368(3) the effect of such a termination is that the relevant contract is at an end and the seller must refund any deposit paid under it to the buyer, less the amount of the "termination penalty" (an amount equal to 0.25 per cent of the purchase price[3]). Under s 369 a buyer may waive the cooling-off period only by giving to the seller a lawyer's certificate in the approved form and only if the certificate is given to the seller or the seller's agent before the buyer is bound by the relevant contract. The provisions concerning the lawyer's certificate in s 369(3)

3 *PAMDA*, s 364.

require the lawyer to be independent and to have explained to the buyer, amongst other things, "the legal effect of the buyer giving the certificate to the seller or the seller's agent".[4] Under s 370 a buyer may shorten the cooling-off period only by giving the seller or the seller's agent a lawyer's certificate in the approved form. Section 370(2)(c)(iii) contains provisions concerning the content of the certificate which are analogous to those in s 369(3).

[26] The requirements concerning "warning statements" in Pt 2 of ch 11 (s 366 – s 367) implement the statutory purpose expressed in s 363(b) so far as it concerns "proposed relevant contracts". Where a "proposed relevant contract" is sent by fax,[5] by electronic communication other than fax,[6] or other than by electronic communication[7] to a proposed buyer or the proposed buyer's agent for signing, the seller or the seller's agent must also send and draw attention to other documents, including a warning statement in ways which are the same, or substantially the same, as those specified for "relevant contracts" in s 365(2)(a) – (c). A seller or seller's agent who fails to comply with those provisions commits an offence. Non-compliance also entitles the buyer under the relevant contract to terminate it at any time before it settles.[8]

[27] Those provisions did not apply in the present case because the "proposed relevant contract" (the proposed deed) was not sent to the buyer or the buyer's agent.

[28] The requirements for warning statements in s 365 implement the same statutory purpose in s 363(b) so far as it concerns "relevant contracts", but s 365 does not impose any obligation upon or create any relevant offence by sellers or their agents. Instead, non-compliance results in the buyer being entitled to "withdraw the offer to purchase made in the contract form" under s 365(3). (For present purposes it is not necessary to consider the position of the seller under s 365(1).[9])

[29] The parties agreed that s 365 applies whether or not Pt 2 of ch 11 also applies, for the reasons given in Fryberg J's analysis of the text and the history of the legislation in *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*.[10] In my respectful opinion that is correct.

[30] The content and form of a warning statement both for a "proposed relevant contract" and a "relevant contract" are regulated by s 366D. So far as content is concerned, s 366D(1) provides that a warning statement must include the following information:

> "(a) the relevant contract is subject to a cooling-off period;
>
> (b) when the cooling-off period starts and ends;
>
> (c) a recommendation that the buyer or proposed buyer seek independent legal advice about the proposed relevant

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4 *PAMDA*, s 369(3)(c)(ii).
5 *PAMDA*, s 366.
6 *PAMDA*, s 366A.
7 *PAMDA*, s 366B.
8 *PAMDA*, s 367(2).
9 See *Blackman v Milne* [2009] 1 Qd R 198 at 203 per Douglas J and *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2008] QSC 261 at [83] per Fryberg J.
10 [2008] QSC 261 at [77] - [86].

contract or relevant contract before the cooling-off period ends;

(d) what will happen if the buyer terminates the relevant contract before the cooling-off period ends;

(e) the amount or the percentage of the purchase price that will not be refunded from the deposit if the relevant contract is terminated before the cooling-off period ends;

(f) a recommendation that the buyer or proposed buyer seek an independent valuation of the property before the cooling-off period ends;

(g) if the seller under the proposed relevant contract or relevant contract is a property developer, that a person who suffers financial loss because of, or arising out of, the person's dealings with a property developer or the property developer's employees can not make a claim against the claim fund."

Consideration

[31] Because the respondent's solicitor received the deed (with the attached warning statement) by post from the appellant's solicitors, the relevant way mentioned in s 365(2) was that described in s 365(2)(c). Section 365(2)(c)(i) was satisfied by the warning statement being attached to the relevant contract as the first or top page. The question is whether the appellant's solicitors' correspondence of 12 May 2008 directed the attention of the respondent's solicitor to the warning statement and the deed in conformity with s 365(2)(c)(ii) or whether, as the respondent submitted, the respondent's solicitor's attention was directed only to the deed.

[32] As was submitted by the respondent, compliance with s 365(2)(c) is important because it identifies the commencement of the cooling-off period, and the provision of the cooling-off period is at the heart of the legislative scheme for the protection of buyers. I also accept the respondent's submission that it is of particular importance in a case such as the present where the requirements for a warning statement in Pt 2 of ch 11 do not apply. However the relevant test is that which is expressed in the statutory provision. Neither the text nor the examples require the relevant direction to refer specifically or expressly to the warning statement or the relevant contract and s 365(2)(c) also does not require the "clear" statement which is called for by s 365(2)(a)(i) and s 365(2)(b)(i). Nor are the examples exhaustive:[11] the necessary direction may be oral, written, or by conduct.

[33] Although proof of compliance with the provision ordinarily would justify an inference that the buyer or the buyer's agent in fact became aware of the documents, it is not necessary for the seller to prove that fact. The seller cannot ensure that, for example, the buyer will read a written direction of the kind contemplated in one of the examples for s 365(2)(c)(ii), but that is irrelevant. The focus of the provision is upon what was said, written, or done by the seller or the seller's agent. The statutory purpose is fulfilled if the seller or the seller's agent does what is required to be done on the part of the seller to direct the attention of the buyer or the buyer's agent to the warning statement and the relevant contract. No less is sufficient but no more is required.

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[11] *Acts Interpretation Act* 1954 (Qld), s 14D.

[34] Contrary to one of the respondent's submissions, the absence of oral evidence at the trial which explained what was conveyed by the applicant's solicitors' letter of 12 May 2008 is not significant. The parties agreed that all of the relevant communications were in the agreed bundle of documents. What the parties or their solicitors thought was conveyed by any such communication is irrelevant. An objective analysis is required.

[35] The respondent submitted that Fryberg J held in *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* that the kind of language upon which the appellant relied did not comply with s 365(2)(c)(ii). In that case the relevant communications were an email from the seller's solicitor to the buyer's solicitor attaching a copy of a counterpart deed and stating that the solicitors would provide the original signed counterpart copy in due course and a subsequent letter in which the seller's solicitor referred to an enclosed deed signed by the seller and a counterpart copy of the deed signed by the buyer.[12] Fryberg J referred to s 365(2)(b) and s 365(2)(c) and found non-compliance with those provisions because the email and the letter drew attention to the deed but not to the warning statement. His Honour observed that "[i]t might not have been necessary to include express reference to the warning statement in the covering letter if attention were drawn to it by some other means - by flagging it, for example", but that there was no evidence of such conduct.[13]

[36] The different circumstances of this case distinguish it from that decision and compel the conclusion that the appellant's solicitors did direct the attention of the buyer's solicitor to the warning statement and the relevant contract in conformity with s 365(2)(c)(ii). I do not accept the respondent's submission that the reference in the letter from the respondent's solicitor of 8 May 2008 to the enclosure as the "Put and Call Option document" only comprehended the deed. It cannot be doubted that it referred both to the warning statement and to the deed since, being attached together by a staple, they formed one composite document and that composite document was in fact enclosed with the letter. The appellant's solicitors' letter of 12 May 2008 in reply then used the same expression, "Put and Call Option document", to describe the composite document which was identical save for the execution of the deed by the appellant. Furthermore, the second letter included the respondent's solicitor's reference and the same name of the relevant matter within the body of the letter. By that means the respondent's solicitor was directed back to his file, including his own letter of 8 May 2008 which referred to the warning statement and the deed together as the "Put and Call Option document".

[37] It is also relevant that it is not likely that, over the few days which intervened between the two letters, the respondent's solicitor had forgotten what was enclosed with his letter or that the respondent had executed the warning statement. (The respondent's execution of the warning statement was not required by s 365: it was required by s 366D(3) only where the seller or seller's agent "hands a proposed relevant contract to the buyer for signing".)

[38] Another relevant circumstance is that the words "warning statement" appeared in very large, bold type on the first page of the composite document. The respondent submitted that this was not sufficient because it simply fulfilled the requirement in s 365(2)(c)(i) and the legislation required the additional direction specified in

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12 See [2008] QSC 261 at [74] - [75].

13 [2008] QSC 261 at [87].

s 365(2)(c)(ii). Whether or not it was sufficient in itself, it was certainly one of the relevant circumstances. The respondent's solicitor could not reasonably have failed to notice the words "warning statement" on the top of the composite document. That reinforces the conclusion that the statement in the appellant's solicitors' letter that they enclosed the respondent's executed copy of the Put and Call Option document referred both to the warning statement and to the relevant contract attached below the warning statement.

[39] Consistently with s 365(5), the onus was on the appellant to demonstrate compliance with the provision. The appellant fulfilled that onus. In the particular circumstances of this case, the appellant's solicitors' correspondence of 12 May 2008 plainly did direct the respondent's solicitor's attention both to the warning statement and to the relevant contract.

[40] Because I have concluded that there was no non-compliance with *PAMDA* such as the respondent alleged, the issue whether the respondent waived any rights under s 365(3) does not arise.

Disposition and orders

[41] It was not in issue that if the appeal were allowed there should be judgment for the appellant on the counterclaim in the sum of $2,100,000 together with interest thereon at the rate of 10 per cent from 20 November 2008 to the date of judgment pursuant to s 47(1) of the *Supreme Court Act* 1995 (Qld). Costs should follow the event of the appeal, but there may be room for debate about the appropriate order as to the costs of the proceedings in the Trial Division.

[42] Accordingly, in my opinion the appropriate orders are:

(a) Appeal allowed with costs.

(b) Judgment and orders set aside.

(c) The plaintiff's claim be dismissed.

(d) Judgment for the appellant on the counterclaim in the sum of $2,100,000, together with interest thereon at the rate of 10 per cent from 20 November 2008 to the date of judgment pursuant to s 47(1) of the *Supreme Court Act* 1995 (Qld).

(e) Leave to the parties to make submissions as to the costs of the proceedings in the Trial Division in accordance with paragraph 52 of Practice Direction No 2 of 2010.

[43] **CHESTERMAN JA:** I agree that the court should make the orders proposed by Fraser JA, and I agree with his Honour's reasons for proposing those orders. I agree also with the reasons of Philippides J.

[44] **PHILIPPIDES J:** I agree with the reasons of Fraser JA that the letter of 12 May 2008 from the solicitors of the appellant to the solicitors of the respondent was one which "directs the attention of the buyer or the buyer's agent to the warning statement and the relevant contract" within the meaning of s 365(2)(c) of the *Property Agents and Motor Dealers Act* 2000 (Qld) (*PAMDA*).

[45] Chapter 11 is directed to providing consumer protection to buyers of residential property. Its purpose is to give buyers who enter into relevant contracts a cooling off period, to require that they be given consumer protection information, including

that a contract is subject to a cooling off period, and to ensure the independence of lawyers acting for buyers: s 363.

[46] In addition to the warning statement which is required to be given under Part 2 *PAMDA*, when a buyer or buyer's agent receives a "proposed relevant contract" (which had no application in the present case, as the proposed relevant contract was not sent to the buyer or its agent), a warning statement must be given when a "relevant contract" is received by the buyer or its agent (s 365).

[47] As the document which provides consumer protection information, it is a critical document informing the buyer that a relevant contract is subject to a cooling off period and advising when that period commences and ends (s 366D). The cooling off period of five days starts on the day the buyer is bound under the relevant contract (s 364).

[48] Section 365(1)(a) is directed at fixing when the parties are bound under a relevant contract (other than one relating to a unit sale). It does so by reference to when the buyer or buyer's agent receives both the warning statement and the relevant contract in the manner specified in s 365(2). The manner specified varies depending on whether those documents are received by fax (for which see s 365(2)(a)), by electronic communication (for which see s 365(2)(b)) or by being handed or otherwise receiving them (in which case s 365(2)(c) governs). It is the latter provision that applied in the present case as the documents were sent by post.

[49] Unlike the position where the documents are provided by fax or electronic means, the situation envisaged by s 365(2)(c) is that there is a composite document in physical form that is received by the buyer or buyer's agent. The warning statement is required to be "attached" to the contract document (meaning that it is so secured as to appear to be a single document: s 364) with the warning statement appearing as the first page of that composite document (s 365(2)(c)(ii)).

[50] Section 365(2)(c) does not require the buyer's attention be directed to the warning statement and relevant contract by means of an explicit statement (cf s 365(2)(a)(i) which specifies that this be done by means of "a clear statement" on a separate cover page where the documents are received by fax and s 365(2)(b)(i) which also requires "a clear statement" in a message form where the documents are received by other electronic means).

[51] While the buyer's attention must be directed to both the warning statement and the relevant contract, there is nothing which requires each to be identified distinctly and specifically. Moreover, whether there has been a direction of attention to the warning statement must be informed by the circumstances of each case. Relevant factors in the present case are outlined by Fraser JA. It is significant that it was the respondent's solicitors who identified the composite document comprising the proposed relevant contract and attached warning statement signed by their client by the description "Put and Call Option document". A few days later, the appellant's solicitors returned the composite document duly executed by their client, with the pages of the documents remaining in the same order; that is with the warning statement as the first page. In returning the composite document, the appellant's solicitors referred to it by adopting the description used by the respondent's solicitors. It was an expression that was apt in the circumstances to refer to both the deed constituting the relevant contract and the warning statement and thus satisfy the requirement of s 365(2)(c)(ii).

[52] It follows that the respondent was not entitled to withdraw the offer to purchase the property in question from the appellant.

[53] I agree that the appeal should be allowed and that the orders proposed by Fraser JA should be made.