# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd & Ors* [2012] QCA 18 |
| PARTIES: | **PORTLAND DOWNS PASTORAL COMPANY PTY LTD**<br>ACN 011 029 413<br>(appellant)<br>**v**<br>**GREAT NORTHERN DEVELOPMENTS PTY LTD**<br>ACN 094 805 286<br>(first respondent)<br>**LAWRENCE PAUL ROBSON, CHRISTOPHER MALCOLM EDWARDS and CHRISTOPHER HAWKINS**<br>(second respondents) |
| FILE NO/S: | Appeal No 5512 of 2011<br>SC No 1576 of 2006 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 24 February 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 November 2011 |
| JUDGES: | Chesterman and White JJA, and Margaret Wilson AJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal dismissed with costs.** |
| CATCHWORDS: | CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – GENERALLY – where the appellant sold its interest in a joint venture to the first respondent – where the sale was recorded by written agreement – where clause 2.3 set out the consideration for the agreement – where the effect of cl 2.3 was that if the building was not completed within two years or exceeded $26 million then the first respondent was not obliged to transfer the Units to the appellant or pay the purchase price – where on completion the first respondent did not transfer the Units to the appellant – where appellant brought proceedings for compensation equal to the value of the Units or for damages for breach of contract – where the primary judge dismissed the claim – whether the primary judgment should be set aside and the appellant either awarded |

equitable damages for the loss of the Units with interest or damages and interest

ESTOPPEL – ESTOPPEL BY CONDUCT – EQUITABLE ESTOPPEL GENERALLY – where appellant effected improvements on the Units – where value was lost when Units sold to third parties – where appellant claims that wasted expenditures gives rise to an estoppel binding on the respondent – whether imputed knowledge was sufficient to give rise to an estoppel

*Australasian Medical Insurance Ltd & Anor v CGU Insurance Ltd* [2010] QCA 189, cited
*Baden v Société Générale* [1993] 1 WLR 509; [1992] 4 All ER 161, cited
*Brand v Chris Building Co Pty Ltd* [1957] VR 625; [1957] VicRp 91, applied
*Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598, cited
*New South Wales Trotting Club Ltd v Glebe Municipal Council* (1937) 37 SR (NSW) 288, cited
*Olsson v Dyson* (1969) 120 CLR 365; [1969] HCA 3, cited
*Portland Downs Pastoral Co Pty Ltd v Great Northern Developments Pty Ltd & Ors* [2011] QSC 142, cited
*Ramsden v Dyson* (1866) LR 1 HL 129, applied
*Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387; [1988] HCA 7, cited
*Ward v Kirkland* [1967] 1 Ch 194, cited
*Willmott v Barber* (1880) 15 Ch D 96, applied

COUNSEL: D J Campbell SC, with C J Fitzpatrick, for the appellant
P L O'Shea SC, with J W Peden, for the respondents

SOLICITORS: Broadley Rees Hogan lawyers for the appellant
Frews Solicitors for the respondents

[1] **CHESTERMAN JA**: The appellant ("Portland") and Moonbrook Holdings Pty Ltd ("Moonbrook") agreed in about 2002 to jointly develop land at Marcoola by building highrise apartment buildings and selling the units. A company, Discovery Beach Project Pty Ltd, ("Discovery Beach") was incorporated or acquired by Portland and Moonbrook, who became equal shareholders in it, to undertake the development. Derek Williams was then its sole director. Discovery Beach owned the land.

[2] On 1 August 2002 Portland and Moonbrook executed a joint venture agreement ("JV agreement") "to record their Rights and Obligations in conducting the joint venture and in the operation of the Venture Business" (Recital F). By clause 2.3 Portland and Moonbrook agreed that Discovery Beach:

> "(a) … is acting as agent for the Venturers …
> (b) … agree that … all acts of the Company whether or not expressly contemplated by this Agreement, shall be engaged in as agent for the joint venture."

[3] By cl 4 the venturers agreed to appoint a project control group ("PCG") with two members, one appointed by Moonbrook and one by Portland. The decisions of the PCG were to be unanimous. One of its members was to be chairman. Under cl 4.4 Mr Williams was to be the first chairman. Meetings of the PCG were to occur at least monthly. The venturers appointed Arden Property Group Pty Ltd ("Arden") and Portland as the development manager of the joint venture. Arden was appointed separately as project manager. The PCG was to manage and administer the business of the joint venture.

[4] The development manager was to implement directions, decisions and policies of the PCG and manage all activities of Discovery Beach in relation to the joint venture. As soon as possible after development approval had been granted Discovery Beach was to enter into a building contract for construction of the apartment buildings on terms approved by the PCG.

[5] By September 2002 substantial difficulties had arisen between Portland and Moonbrook which they agreed to resolve by Portland's sale of its interest in the joint venture to the first respondent, Great Northern Developments Pty Ltd ("GND"). The sale was effected by Portland transferring its share in Discovery Beach to GND.

[6] The sale was recorded by written agreement ("sale agreement") dated 27 September 2002 though executed on 13 November 2002. The earlier date was adopted to reflect the date on which GND took over Portland's obligations under the JV agreement. Consequent upon the sale GND replaced Portland as Moonbrook's joint venturer under the JV agreement. Mr Jaffe, Portland's director and controlling mind, resigned as a director of Discovery Beach and member of the PCG. He was replaced in both roles by Mr Robson, a director of GND.

[7] Clause 2.3 of the sale agreement set out the consideration for the transfer of Portland's share in Discovery Beach. It provided:

> "**2.3 Purchase Consideration**
>
> (a) Notwithstanding that Completion has been effected, the Purchase Consideration is to be paid by GND to the Vendor as follows:
>
> (i) on Practical Completion of the North Tower in the Development GND must cause to be transferred to the Vendor free from any security or third party interest the Portland Units from GND's Interest in the Joint Venture, provided that Practical Completion of the North Tower is effected within 2 years of the Agreement Date; or
>
> (ii) if Practical Completion of the North Tower is not completed within 2 years of the Agreement Date, (in the Vendor's sole discretion, the Vendor may extend the period within which practical completion of the Portland Units is to be completed) then GND must make payment to the Vendor of the Purchase Price by way of bank cheque drawn on an Australian Registered Bank payable to the Vendor on that date which is 2 years from the Agreement Date,
>
> whichever occurs first.

(b) The delivery of the Portland units or the purchase price to the Vendor is subject to GND or any company of which GND is a shareholder successfully negotiating with the builder to construct the project for a total sum of $26,000,000.00 or less. The parties acknowledge that the $26,000,000.00 sum referred to above incorporates an amount of $2,554,000.00 for the construction of the six beach houses and that if this component is increased the figure of $26,000,000.00 shall for the purposes of this clause be increased by the same amount. The construction is based on the schedule of fixtures and finishes contained in the sales contract. If construction occurs post January 2003 the $26,000,000.00 cost may be adjusted. If the parties cannot agree on the reviewed value this shall be determined by an expert appointed by the President of the Queensland Law Society.

(c) If the building contract for the project exceeds $26,000,000.00 or the adjusted value GND has the choice of continuing with the development or:

(i) Withdrawing from the project and sell its share to Moonbrook Holdings Pty Ltd ACN 089 494 673; or

(ii) Sell its share to a third party provided that the Purchase Price is paid to the Vendor.

(d) GND agrees to pay 15% per annum on any late payments due to the Vendor."

[8] "Portland Units" were defined to mean Units 6 and 12 on Level 5 of the North Tower "and their roof top gardens". The "Purchase Price" was defined to mean "$700,000 (inclusive of GST)" and "Purchase Consideration" was defined to mean either transfer of the Portland Units or payment of the purchase price. The Agreement Date was defined to mean 27 September 2002.

[9] It may be seen that the effect of cl 2.3 of the Sale Agreement was that:

(a) GND had to transfer the Portland Units to Portland if practical completion of the building occurred within two years from 27 September 2002, or such later date as Portland fixed by written notice.

(b) If practical completion did not occur within two years, or within the extended time, GND did not have to transfer the Units, but had to pay Portland $700,000.

(c) GND was not obliged to transfer the Units, or pay the purchase price, unless it or Discovery Beach made a contract with a builder to construct the building for no more than $26 million.

(d) If the building price exceeded $26 million then GND had three options:

(i) continue with the development;

(ii) withdraw from the joint venture and sell its share to Moonbrook;

(iii) sell its share in the joint venture to a third party and pay Portland $700,000.

[10] The North Tower was practically complete on 5 November 2004, more than two years after the date of the sale agreement. Portland had not given written notice extending time. On completion GND did not transfer the Portland Units to Portland nor pay it $700,000. Portland brought proceedings in the Trial Division of the Supreme Court for compensation equal to the value of the Portland Units, or for damages for breach of contract. It did not claim the purchase price of $700,000. On 30 May 2011 the Chief Justice dismissed its claim and on 9 June 2011 made separate orders for costs against Portland. Portland has appealed. It seeks orders that the judgment be set aside and that it be awarded equitable damages for the loss of the Portland Units in the sum of $1,565,000 together with interest or, alternatively, damages of $700,000 (not claimed at trial), and interest. The second respondents were the directors of GND and were sued as guarantors of GND's obligations.

[11] The price under the building contract which Discovery Beach made for the construction of the building exceeded $26 million. As to this the Chief Justice found in *The Portland Downs Pastoral Co Pty Ltd v Great Northern Developments Pty Ltd & Ors* [2011] QSC 142 at [142]:

> "[38] GND left the negotiation of the construction cost to Mr Williams and Discovery Beach. The negotiated total construction cost exceeded $26 million. The sum specified in the May 2003 construction contract, $27.25 million, was not enough because of deletions made to satisfy the financier, but in respect of work which had to be done – with the cost "added back in" as variations and financed differently. In any case, on the evidence of Northbuild's managing director Mr Boddington, which I accepted, the overall scope of the work had not been determined by May, and the negotiations were not concluded until December that year, with a construction cost of the order of $31.5 million – well above the specified amount regardless of GST."

[12] His Honour concluded that Portland's claim failed, so that "GND's obligation to transfer the units to Portland did not arise"; nor did the obligation to pay the purchase price because of the failures to complete the building within two years and to execute a contract for a price of no more than $26,000,000.

[13] Mr Jaffe sought and obtained Mr Williams' consent for Portland to engage contractors to effect improvements (or at least make alterations) to the Portland Units and to buy additional car parks for use by those who might occupy the Units. The work commenced before practical completion of the building and finished afterwards. The improvements took the form of extra tiling, the supply and installation of marble and stonework, the installation of superior quality whitegoods and extra plumbing and built in furniture. Altogether Portland spent about $212,000 on improving the two units. The value was lost when, after completion of the building, the units were sold to third parties.

[14] Portland relies upon this wasted expenditure as giving rise to an estoppel binding on GND and precluding it from denying that time was extended under cl 2.3(a) and that it negotiated a construction price of no more than $26 million. The estoppel was said to arise from GND having stood by and acquiesced in Portland's improvements to the units knowing it would suffer detriment if it did not obtain title to them.

[15] Portland's claim was to the units, or for their value. GND's obligation was to pay the purchase price, and not transfer the units, if the building was not finished within two years (there being no extension of time). It was therefore necessary for Portland to contend that cl 2.3(a) was satisfied in some other way. There is no doubt that the estoppel was argued with respect to cl 2.3(a) and that Portland contended that GND could not deny that time had been extended. The Chief Justice rejected the argument. His Honour did not consider estoppel with respect to cl 2.3(b), saying that "[t]he defences of waiver and estoppel are not raised in respect of this issue." Counsel for Portland disputes this and argues that estoppel was advanced with respect to both cl 2.3(a) and cl 2.3(b). Counsel for GND submits that the estoppel was not relied on at trial with reference to the building price and that Portland cannot argue on appeal that an estoppel operated so as to obviate the operation of cl 2.3(b).

[16] If the finding of fact, that the price agreed between Discovery Beach and the builder exceeded $26 million, is accepted, and if there was no estoppel preventing GND from relying upon cl 2.3(b), the appeal must fail. The claim would have been rightly rejected because the clause operated to remove GND's obligation to pay the purchase consideration in either form.

[17] It is necessary therefore to determine whether Portland did plead and argue an estoppel with respect to cl 2.3(b).

[18] The Statement of Claim was straightforward. It identified the parties and their inter-relationship; pleaded the relevant terms of the sale agreement; pleaded that it had extended time for Practical Completion, "from time to time", by giving notice to Mr Williams (i.e. Discovery Beach); alleged completion of the apartment building and GND's failure to transfer the Portland Units to Portland and claimed the value of the Units, $1.9 million, as damages in the event the units could not be conveyed to it.

[19] Relevantly the Defence denied that notice to Williams was notice to GND and more generally denied that Portland had extended time.

[20] In its Reply Portland dealt with the "Extension of time for Practical Completion and associated issues" in paragraphs 3 to 10. The relevant allegations were:

> "**Waiver by the plaintiff**
>
> 4. Properly construed:
>
> (a) the proviso in clause 2(a)(i) and the condition in clause 2(a)(ii) of the Sale Agreement were for the benefit of [Portland].
>
> (b) [Portland] was entitled to waive the benefit of the said proviso and condition therein.
>
> 5. By its conduct referred to in paragraphs 6 to 10 … [Portland] waived the benefit of the proviso … and the condition … ."

[21] There followed a recital of the facts which Portland relied upon to establish the estoppel (i.e. the work undertaken on the Portland Units), expenditure on the units and the acquisition of further car parks all of which "Arden and [Discovery Beach]" knew about.

[22] Paragraph 17 dealt with "Estoppel", and pleaded that in the circumstances set out in paragraphs 6 and 10:

> "(a) [Portland] acted to its detriment after 27 September 2004 by continuing to arrange and undertake, and incur expenditure

> in bringing to completion [the improvements] in the belief and expectation that [GND] remained obliged pursuant to clause 2.3(a)(i) … to transfer the Portland Units … .
>
> (b) [GND] stood by and permitted [Portland] so to act to its detriment.
>
> (c) accordingly, it would be unconscionable, and [GND] is estopped from asserting, that it does not remain obliged pursuant to clause 2.3(a)(i) of the Sale Agreement to transfer the Portland Units to [Portland] …".

[23] GND amended its Defence on 28 August 2008 to include, for the first time, reliance on cl 2.3(b) of the sale agreement. The amendment pleaded that there was no obligation to pay the purchase price because GND had not been able to negotiate a building contract for a price of $26 million or less. Paragraph 2B set out cl 2.3(b) *verbatim*. Paragraph 8 was amended to include subparagraph (d):

> "further, by virtue of the fact that [Discovery Beach], being a company in which [GND] was a shareholder, did not successfully negotiate with the builder to construct the project for a total sum of $26,000,000.00 or less and by operation of clause 2.3(b) of the Sale Agreement, no obligation has ever arisen, whether of [GND] or [Discovery Beach] to deliver the Portland Units or pay the Purchase Price [to Portland]."

[24] The amendments to the Defence in turn brought amendments to the Reply, but not to paragraphs 4, 6 to 10, or 17 of that pleading. Paragraph 8(d) of the Amended Defence was answered by paragraph 18A of the Amended Reply. It alleged that "the construction price under the building contract was $27,250,000.00 inclusive of GST", and that the sale agreement was to be construed so that "amounts under that agreement were exclusive of GST." The pleading went on:

> "(h) [I]n the alternative if [Discovery Beach] did not successfully negotiate with a builder to construct the project for a total sum of $26,000,000.00 or less … then:
>
> (i) on a proper construction of clauses 2.3(b) and (c) … [GND] was entitled … to …:
>
> (A) continue with the development; or
>
> (B) withdraw from the project and sell its share in the first third party; or
>
> (C) sell its share to a third party, provided that … the purchase price was paid to [Portland];
>
> (ii) [GND] elected to continue with the development:
>
> …
>
> (iii) [A]ccordingly, [GND] was at all material times, and … remains, obliged to [Portland] pursuant to the Sale Agreement."

[25] Counsel for Portland submitted that paragraph 17 of the Reply raised estoppel as an answer to cl 2.3(a) and cl 2.3(b), notwithstanding the reference only to cl 2.3(a)(i). The argument was that the obligation to transfer Portland Units was expressed in cl 2.3(a), and an assertion that it would be unconscionable not to transfer them encompassed both conditions precedent to the obligation to transfer, that time be extended and that the construction price be no more than $26 million. In a nutshell the submission was that paragraph 17 pleaded that by reason of the facts giving rise

to the estoppel GND was precluded from denying its obligation to transfer the Portland Units whether the contractual basis for its denial was Portland's failure to give notice to extend time for practical completion, or GND's inability to have the construction undertaken for no more than $26 million.

[26] Portland relies also on the terms of paragraph 18A(h)(iii) of the Amended Reply which was said to give rise to the estoppel because it asserted that, notwithstanding that the building price was in excess of $26 million, GND remained obliged to transfer the Portland Units to it.

[27] Neither submission can, in my opinion, be accepted. On a fair reading of paragraph 17 of the Reply estoppel was not pleaded with respect to cl 2.3(b). Apart from the explicit references to cl 2.3(a) there is the telling consideration that at the time the paragraph was pleaded GND did not rely upon cl 2.3(b). It relied only upon cl 2.3(a) that time had not been extended. The Reply must be understood in that context. Moreover, it is not the case, as counsel for Portland submitted, that the plea of estoppel was general in its application. It was expressly limited to the circumstances described in paragraphs 6 to 10 which were a response to the defence that time had not been extended so that there was no obligation to transfer the Portland Units. Paragraph 17 was not amended after the Defence was amended in August 2008. Given that history the paragraph was unresponsive to the amendments made to the defence in August 2008. The course of argument before the Chief Justice indicated that counsel for GND understood the estoppel was not raised in respect of cl 2.3(b). Portland's counsel at trial did not make a contrary assertion.

[28] Nor is paragraph 18A(h)(iii) capable of doing the work Portland requires of it. *UCPR* 149 provides that a pleading must "state specifically any matter that if not stated specifically may take another party by surprise". *UCPR* 150(i)(e) requires estoppel to be specifically pleaded. Even an astute litigator could be forgiven for not realising that paragraph 18A(h)(iii) was intended to raise estoppel as a defence to GND's reliance upon cl 2.3(b). Paragraph 18A does not mention the topic of estoppel. It did not identify estoppel as the basis for the obligation to transfer Units despite the building price exceeding $26 million. It did not plead acquiescence, or a standing by, or a knowledge in GND that Portland was acting to its detriment in the mistaken belief, which GND appreciated, that the Portland Units would be conveyed to it. It did not incorporate by reference other parts of the Reply where similar facts had been asserted in support of the estoppel against the operation of cl 2.3(a). There was a complete failure to comply with the *UCPR* to alert an opponent to the intended reliance on estoppel. The only reasonable conclusion is that GND did not, in truth, plead that case.

[29] Paragraph 18A of the Amended Reply disputed GND's ability to rely upon the terms of cl 2.3(b) on two distinct grounds. One was that the price under the building contract was to be adjusted for GST and so adjusted was less than $26 million. The other was that the proviso to cl 2.3(c)(iii) applied whether or not the conditions of cl 2.3(a) and cl 2.3(b) were satisfied. These are discrete defences which have nothing to do with estoppel.

[30] The conclusion is reinforced by the course of written and oral submissions at trial. The question of estoppel was dealt with in paragraphs 38 to 43 of Portland's written submissions. Having referred to the facts and the authority relied upon, *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387, the submission concluded:

> "… that GND is estopped from denying that the following legal relationship arose between the parties:
>
> (a) the purchase consideration is to be made by way of transfer of the Portland Units and not by payment of the purchase price;
>
> (b) transfer of the units would take place once there was practical completion, irrespective of the date."

There was no mention at all of an estoppel against the operation of cl 2.3(b). The contention that the date of practical completion was irrelevant can only be a reference to the operation of cl 2.3(a), which might have transmuted the obligation to transfer the units into an obligation to pay money.

[31] Accordingly, the Chief Justice was right to conclude that Portland had not pleaded or argued that GND was estopped from relying upon cl 2.3(b).

[32] Counsel for Portland did not submit that it should be permitted to raise the point for the first time on appeal. Its argument was that the point had been taken at trial. I would not, in any event, allow the point to be taken on appeal without having been litigated at trial. Estoppel depends upon facts and inferences from facts. It is impossible to say that GND may not have had an answer in fact to the estoppel which it did not adduce because the point was not tried.

[33] It is hardly ever satisfactory to dispose of an action which went to trial on the basis of a pleading point. Despite concluding that Portland's action should fail, as the Chief Justice thought, because the operation of cl 2.3(b) was not argued to be affected by estoppel, in deference to the arguments of counsel the point of substance should be considered.

[34] Although Portland's submissions referred to both estoppel and waiver the latter concept was not advanced as a separate basis for circumventing the operation of cl 2.3(b). The argument proceeded on the basis that what was in issue was estoppel. That was an appropriate course given the factual basis for the response to GND's reliance upon cl 2.3(b).

[35] The estoppel advanced was of the kind considered in *Ramsden v Dyson* (1866) LR 1 HL 129, described in the headnote:

> "[I]f a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land.
>
> But if a stranger builds on land knowing to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it."

[36] Dyson was a tenant-at-will from Ramsden. He spent considerable sums erecting houses on the land the subject of the tenancy-at-will. He claimed that Ramsden's agent had encouraged him to believe that he could have a lease of the land for a term of 60 years if he asked for it, but no such lease was agreed to or granted. When Ramsden died the trustees of his infant heir took possession of the land, with the improvements. The House of Lords held they were entitled to it. Lord Cranworth, who was Lord Chancellor, said (at 142):

> "… If I had come to the conclusion that [the tenant], when he erected his building … did so in the belief that he had against [Ramsden] an absolute right to the lease he claims, and that [Ramsden] knew that he was proceeding on that mistaken notion, and did not interfere to set him right, I should have been much disposed to say that he was entitled to the relief he sought. But a full consideration of the evidence has not led me to any such conclusion. It has failed to satisfy me, first, that [the tenant] supposed that he had against [Ramsden] any absolute right beyond that of a tenant from year to year; or, secondly, that [Ramsden] knew or believed [the tenant] was expending his money in the mistaken belief that he possessed such a right."

[37] Of some relevance to the present appeal the Lord Chancellor also said (at 147):

> "the more important question yet remains to be considered, namely, whether there is evidence to shew that [Ramsden] knew, or even suspected, that representations were made which might fairly be supposed to lead his tenants at will or from year to year to expend money in building, in the belief that by building they acquired a title which he could never disturb."

[38] Lord Wensleydale said (at 168-169):

> "If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it. If a tenant of mine does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build. … if it could have been shewn … that the landlord … believing the tenant to be ignorant of his rights, had purposely allowed him to go on, the case might fall within the same principle as a case of fraud."

[39] The passages suggest that the unconscionability arises from the knowledge in the landowner that the stranger is spending money in the mistaken belief that he has a title to the land and will reap the benefit of the expenditure, and that the landowner deliberately or "purposely" allows him to remain in ignorance so as to accrue the benefit for himself.

[40] It is this element that is lacking in Portland's case. GND's directors did not know of Portland's expenditure on the units. The arrangement was made between Mr Jaffe and Mr Williams and was not brought to the attention of Messrs Robson, Edwards or Hawkins. The Chief Justice found in *The Portland Downs Pastoral Co Pty Ltd v Great Northern Developments Pty Ltd & Ors* [2011] QSC 142 at [13] and [15]:

> "[13] The allegations of estoppel and waiver necessitate consideration of whether the directors of GND, Messrs Robson, Edwards and Hawkins, were aware at relevant times that Portland was expending money on those upgrades. Each

> of them gave evidence, which I accepted, of becoming actually aware of those upgrades, for the first time, well after they had been accomplished: Mr Robson in 2004/5, 'around the time of practical completion'; Mr Edwards after completion of the units and in the case of the car spaces, at trial; and Mr Hawkins, after completion and in the case of the car spaces, in 2009. Mr Jaffe had not informed them about the changes.
>
> …
>
> [15] It is convenient to record now my view that for 'standing by' under this concept, Portland would need to establish that GND actually knew what was being done, or chose deliberately to 'close its eyes' to what was being done. My conclusion is that its directors did not have actual knowledge, and their (innocent) detachment from relevant events precludes a conclusion of 'wilful blindness'. I develop this a little more later in these reasons."

[41] Mr Robson testified that he first became aware of the extra work undertaken by Portland after practical completion in November 2004 and was, he said, "annoyed with Derek Williams for … allowing John Jaffe to do this work." Mr Hawkins was not aware of the work until some time after it had been done. Mr Edwards was informed by one of his co-directors after the building was complete that Portland had carried out idiosyncratic decoration to the Units. Counsel for Portland did not challenge these important findings of fact.

[42] Its argument was that the facts were known to Discovery Beach (Mr Williams) with whom Mr Jaffe had agreed the work could be done. The JV agreement made Discovery Beach GND's agent for the purpose of implementing the joint venture. Mr Williams' knowledge should, Portland submitted, be imputed to GND notwithstanding the genuine ignorance of GND's directors. Alternatively it was submitted that GND should not be allowed to take advantage of its ignorance because its directors had had been "wilfully blind" to the facts, knowledge of which should therefore be imputed to them.

[43] "Wilful blindness" can be disposed of shortly. It was said to arise from the following facts:

(a) Portland was given permission to make the improvements by Discovery Beach.
(b) Discovery Beach was the agent for the joint venturers.
(c) Mr Robson was one of two directors of Discovery Beach and also director of GND. He was appointed to be "a conduit for information between the venturers".
(d) GND did not contend that Discovery Beach had acted beyond the limits of the authority as agent for the joint venturers.
(e) Arden the project manager knew about the improvements being made to the Portland Units and it too had authority to act on behalf of the joint venture.
(f) Arden had a contractual obligation to report to the PCG at least monthly by way of "a detailed written report as to the status of the

> development …", so that if these "control measures" had been properly used Mr Robson would have known of the improvements being undertaken.

[44] Wilful blindness, or what Gibson J in *Baden v Société Générale* [1992] 4 All ER 161 called "Nelsonian" knowledge, is equivalent to actual knowledge or notice "for the purposes both of law and equity", according to the authors of *Jacobs' Law of Trusts in Australia*, 6th ed at [1335]. The concept involves a refusal to look at the obvious, or to refrain from making enquiries which circumstances demand be made, or a refusal to draw the obvious inference from known facts. But the circumstances identified by Portland do not make out such a case. They do not show a refusal to make inquiries, or to conclude the obvious. They show only that GND's agent knew of the work, as did the project manager, and had GND made inquiries it too would have known. Significantly, no fact is put forward to suggest that GND had any reason to make inquiries. It had no reason to suspect the work was being done.

[45] One is then left with the argument that the knowledge of GND's agent, Discovery Beach, should be imputed to it. The research of counsel did not find a case which dealt directly with the question, whether imputed knowledge was sufficient to give rise to an estoppel. The point, put more specifically, is whether a party is estopped when he did not himself know, though his agent did, that the other party was acting to his detriment because of some mistaken assumption as to a state of affairs. The cases do show that some conduct properly described as unconscionable is essential to estoppel.

[46] Jordan CJ described the estoppel in *New South Wales Trotting Club Ltd v Glebe Municipal Council* (1937) 37 SR (NSW) 288 at 308:

> "What is usually referred to as the principle in *Ramsden v Dyson* … or equitable estoppel by acquiescence, becomes applicable where a person improves land in the mistaken assumption that it is his own, the true owner being aware of the mistake and deliberately doing nothing to undeceive the other; in such a case a Court of Equity, so far as it can, will prevent the owner from profiting by the mistake."

[47] The Chief Justice repeated the description in *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598 at 603:

> "… equitable estoppel by acquiescence, which prevents a person, who has knowingly permitted another to act, through mistake, to his own detriment and to the advantage of the former, from profiting by the other's mistake."

[48] According to the authors of the fourth edition of *Meagher Gummow & Lehane's Equity Doctrines & Remedies* at [17-075]:

> "In the *Ramsden v Dyson* line of cases, equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him …"

[49] *Brand v Chris Building Co Pty Ltd* [1957] VR 625 was another case in which a party mistakenly built on another's land. Hudson J said (628):

> "What does the law say about such a position? I think the correct statement … is as set out in Halsbury's Laws of England (3rd ed), Vol 14, para 1179 … : 'When A stands by while his right is being infringed by B, the following circumstances must as a general rule be

> present in order that the estoppel may be raised against A: (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted; (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights; (3) acquiescence is founded on contract with a knowledge of one's legal rights, and hence A must know of his own rights; (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake; (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right'."

[50] The missing elements in this case, where GND was ignorant of Portland's activities and expenditure, are (4) and (5). Without knowledge that one is acting to his detriment the other cannot encourage the continuation of the activity that amounts to the detriment. The need for encouragement, or something like it, suggests that something more than imputed knowledge in the owner of the legal right is necessary.

[51] *Equity Doctrines & Remedies* (4th ed) describes the basis of *Brand's* case, and others like it, as:

> "… the fraudulent conduct of the true owner in lying by or acquiescing whilst the mistaken party spends money or effort. It is his duty to be active and state his adverse title and it would be dishonest for him to remain wilfully passive in order afterwards to profit by the mistake of another which he might have prevented: *Ramsden v Dyson* …" [17-095]

[52] In *Willmott v Barber* (1880) 15 Ch D 96 Fry J said (at 105-106):

> "… the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act … on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money … either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

[53] This passage was cited with approval by Ungoed-Thomas J in *Ward v Kirkland* [1967] 1 Ch 194 at 238. His Lordship pointed out that the fraud in question is "fraud in equity" and expressed the opinion (at 239) that "merely standing aside with the knowledge that such money was being expended in reliance on having the right which is claimed" is sufficient to amount to encouragement. He went on:

> "The fundamental principle of the equity is unconscionable behaviour, and unconscionable behaviour can arise where there is knowledge by the legal owner of the circumstances in which the claimant is incurring the expenditure as much as if he was himself requesting or inciting that expenditure."

[54] *Ward v Kirkland* was expressly approved by Kitto J in *Olsson v Dyson* (1969) 120 CLR 365 at 379.

[55] This reasoning is picked up in the judgments in *Waltons Stores*, the authority on which Portland principally relies. Mason CJ and Wilson J spoke (164 CLR 387 at 404) of "a common thread" which links the cases together:

> "… namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party … has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it': per Dixon J in *Grundt*; see also *Thompson*. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption." (footnotes omitted)

[56] To the same effect Brennan J spoke (at 428) of Waltons becoming aware that Mr Maher was acting to his detriment and "deliberately" refraining from correcting what it knew must have been an erroneous belief.

[57] Because the basis of the estoppel is dishonesty, or fraud, which is a subjective state of mind, the knowledge required for the conduct, the encouragement or inactivity must be actual. A principal who does not himself know of the state of affairs cannot be said to be acting dishonestly with respect to the state of affairs. He may be negligent in not making enquiries but his inactivity cannot sensibly be described as dishonest.

[58] These notions of standing by, or encouraging, or deliberately refraining from correcting a mistake which it was known the other party was making cannot readily be applied to one who is in fact ignorant of the circumstances. That is not to say that an agent's knowledge will never be imputed to his principal to raise an estoppel. It is unprofitable to speculate about what sort of case would make that course appropriate. This case is similar to *Ramsden* in which Lord Cranworth remarked that Ramsden had no knowledge of, and no reason to suspect what his agent had said to the tenants. This ignorance was held inimical to the tenant's claim for an estoppel.

[59] Mr Jaffe and Mr Williams were friends. The arrangement by which Portland set about improving the units was made privately between them. Making the improvements was not an implementation or performance of the joint venture. The agreement may have been within Discovery Beach's scope of authority as agent for the joint venturers but it was something done incidentally to the joint venture and for a purpose other than the joint venture development. Mr Williams did not tell

GND of his agreement or of Portland's activities. GND had no reason to suspect the existence of the agreement or of the work being done. It cannot fairly be criticised for its ignorance.

[60] In those circumstances the element of unconscionability in GND's inactivity is lacking. It did not dishonestly, or fraudulently do nothing while Portland laboured over the units. Its inertia was innocent, the result of ignorance, not duplicity.

[61] Accordingly, I would conclude that the findings of fact that GND knew nothing of Portland's improvements of the units until after their completion would be a sufficient answer to the argument that GND was estopped from relying upon cl 2.3(b).

[62] There was another ground for the same conclusion, which was not argued but should be mentioned. It is that Portland could never have believed that it was expending money on units it owned or would own. This is the first element necessary for the estoppel described in *Brand* and *Willmott*. Mr Jaffe must at all times have realised the units were the property of Discovery Beach and may or may not have been conveyed to him. The whole point of cl 2.3 was to make the right to conveyance conditional upon completion of the building within two years. If construction costs exceeded $26 million there was no right to any consideration. The parties clearly contemplated that in some circumstances Portland's rights were limited to those set out in cl 2.3(c). Portland took the risk when it expended moneys on the Units that they may never become its property. *Ramsden v Dyson* make it clear that the estoppel does not operate to protect those who engage in folly. Portland could have protected itself to some extent by extending time under cl 2.3(a) and by seeking an adjustment of the contract price under cl 2.3(b). It did neither. That apart, it cannot be said that it effected improvements to the units mistakenly believing them to be its own property.

[63] For this reason also the estoppel should be rejected.

[64] Two points remain for consideration that can be dealt with briefly. The points are those raised by paragraph 18A of the Amended Reply.

[65] The first is the contention that, as a matter of fact, Discovery Beach, a company in which GND was a shareholder, did make a contract for the erection of the apartment building for a price not exceeding $26 million. The price was said to be $27,250,000 which, excluding GST, was less than the "trigger point" of $26 million for cl 2.3(b).

[66] Clause 1.3 on which Portland relies is inapplicable. It provided that:

> "an amount payable by a party under this Agreement in respect of the supply by another party which is a taxable supply under the GST Law, unless expressly provided otherwise, represents the GST exclusive value and price of the supply."

[67] The builder with whom Discovery Beach contracted for the erection of the apartment building was not "another party" to the sale agreement. Clause 1.3 did not therefore apply to its "taxable supply under the GST Law", for the building work.

[68] Moreover, there is clear evidence that in their pre-contractual negotiations Portland and Moonbrook intended that the sum of $26 million was to include GST. They negotiated on that express basis. That agreement, as to the computation of the price,

formed in negotiations, can be taken into account as an extrinsic circumstance in construing the meaning of cl 2.3(b). See *Australasian Medical Insurance Ltd & Anor v CGU Insurance Ltd* [2010] QCA 189 at [62].

[69] Another, even more compelling, answer to Portland's submission is that the Chief Justice found, as I have noted, that the building price was $31.5 million which exceeded the limit in cl 2.3(b), with or without GST. Portland did not contest this finding of fact.

[70] The second point is that the proviso in cl 2.3(c), "provided that the Purchase Price is paid to the Vendor", applies not only where the building price exceeded $26 million and GND sold its share in the joint venture to a third party, but also where GND chose to continue with the development, or withdrew from it and sold its share to Moonbrook.

[71] The construction contended for cannot be accepted. It would involve a complete rewriting of cl 2.3(c). There was no ambiguity or uncertainty in the subclause such as to require a notional adjustment to its wording. Nor is there anything in the extrinsic circumstances, drawn to the Court's attention, which requires such an alteration to the plain meaning of the clause. The parties contracted on terms which identified circumstances in which the purchase price was payable either in money or the conveyance of the Portland Units. In the event that the building contract price exceeded $26 million the purchase price was to be paid only in the event provided for in cl 2.3(c)(ii), the price exceeding the contracted amount, and GND not having sold its share to a third party the purchase price was not payable.

[72] Counsel for Portland submitted that unless the proviso was applied to the other circumstances the sale agreement would be unreasonable and work unfairness on Portland, who would have sold its interest in the joint venture for no return at all. The argument is answered by the fact that Moonbrook and Portland made a separate agreement at or about the time the sale agreement was made pursuant to which Moonbrook paid Portland all the expenses it had occurred in promoting the joint venture to that date. The result is that the purchase consideration under the sale agreement represented a share of the profits of the joint venture which Portland would receive if cl 2.3 were satisfied. There was no particular unfairness in Portland recovering its expenditure but not profits unless the agreed terms were satisfied.

[73] The appellants have failed to demonstrate any error in the judgment of the Chief Justice. The appeal should be dismissed with costs.

[74] **WHITE JA:** I have read the reasons for judgment of Chesterman JA and agree with his Honour that the appeal should be dismissed with costs. I merely wish to note my agreement that on the particular facts raised in this appeal, as discussed by his Honour at [59] of his reasons, the agent's knowledge ought not to be imputed to the principle to raise an estoppel. There may be, no doubt, circumstances where it would be correct to impute the conduct of an agent to the principle so as to prevent the principal from taking advantage of the other party's mistaken belief. In this area of the law close analysis of the facts will suggest whether or not to do so will be consistent with principle.

[75] **MARGARET WILSON AJA**: The appeal should be dismissed with costs for the reasons given by Chesterman JA.