SUPREME COURT OF QUEENSLAND

CITATION:	*Rolls v Radford & Anor* [2012] QSC 92
PARTIES:	**MARK ADRIAN ROLLS** (Plaintiff) v **LINDA REGINA RADFORD** (First defendant) and **CLAUDIA MARIA SCUPIN** (Second defendant)
FILE NO/S:	11830/09
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	6–9 February 2012
JUDGE:	Philippides J
ORDER:	**1. There be judgment for the plaintiff.** **2. It is declared that the Contract between the plaintiff and the defendants was lawfully terminated by the plaintiff.** **3. It is declared that the plaintiff is entitled to the sum of $50,000 paid as deposit.**
CATCHWORDS:	CONTRACT – construction of terms of Contract – where Contract to purchase a proposed lot – special condition that Contract was conditional on registration of a subdivision of an existing lot and creation of the proposed lot – where Contract entered into with registered owners of the existing lot – where subdivision was registered with registered owners continuing to be registered as owners of the new lot – where each owner transferred their respective interest so that each became the sole owner of a new lot – where cl 7.3 of the Contract provided that at the date for completion the vendor would be the registered owner of the Land the subject of the Contract – where Contract provided a right of termination for breach of that clause – whether Contract ambiguous – whether Contract breached CONTRACT – RECTIFICATION – whether written instrument gave effect to the common intention of the parties

Australian Gypsum Limited v Hume Steel Limited (1930) 45 CLR 54
Bennett & Ors v Stewart & Anor [2008] QSC 20
Fowler v Fowler (1859) 4 De G & J 250
Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 336
Mediservices Clinics Pty Ltd v Health 24 Pty Ltd [1999] NSWCA 198
MSW Property Pty Ltd v Law Mortgages Qld Pty Ltd [2003] QCA 487
Pukallus v Cameron (1982) 180 CLR 447
Rands Developments Pty Ltd v Davis (1975) 6 ALR 631
Savoy Invest Queensland Pty Ltd v Global Nominees [2008] QSC 56
Zanee Pty Ltd v CG Maloney Pty Ltd [1995] 1 Qd R 105

COUNSEL: R Cameron for the plaintiff
G Coveney for the defendants

SOLICITORS: Gill & Lane for the plaintiff
Walsh & Partners for the defendants

PHILIPPIDES J:

[1] The plaintiff, Mark Rolls, brings proceedings seeking the return of a deposit of $50,000 paid pursuant to a Contract for the purchase of a property from the first defendant, Linda Radford, and the second defendant, Claudia Scupin. The first defendant in turn seeks an order for the forfeit of the deposit and for damages totalling $120,000. In the alternative, the first defendant also seeks an order for rectification.

Background facts

[2] On 5 November 2008, Rolls entered into the Contract for the purchase from Radford and Scupin of land described as proposed Lot 41, on the plan attached as Annexure A being part of Lot 23 on GTP 107136, County of Ward, Parish of Nerang at 4023a Quayside, Royal Pines, Benowa. The purchase price was $1,000,000. A deposit of $50,000 was paid by Rolls. The date specified as the date for completion was 6 July 2009.

[3] In addition to entering into the Contract of 5 November 2008, Rolls also entered into a lease in respect of Lot 41 and commenced living there from November 2008, remaining a resident in Lot 41 until around October 2009.

[4] Rolls had previously signed another Contract to purchase Lot 41 on 24 October 2008, the terms of which were, for all practical purposes, identical to those contained in the Contract of 5 November 2008. Both Contracts were prepared by Hynes Lawyers ("Hynes"), who acted throughout the conveyance for both defendants. Both Contracts named Radford and Scupin as "Vendor". However, there was an issue with the disclosure statement concerning the earlier Contract and the parties proceeded on the basis that they should enter into a new Contract on the

same terms, which they did, after a new disclosure statement was prepared by Hynes. Rolls then engaged KRG Law to act for him in relation to the conveyance.

[5] The Contract dated 5 November 2008 was in the form of the REIQ Standard Residential Land and Residential Units and Houses (2nd Edition) and incorporated by reference, the Standard Residential Conditions, Residential Land and Residential Units and Houses (2nd Edition). The Contract provided by cl 5 of the special conditions that it was conditional upon the plan attached to the Contract being registered with the Department of Natural Resources on or prior to the date of completion and title for the property being created. That plan provided for the existing Lot 23 to be re-subdivided creating two lots, Lots 41 and 42, and was signed by both Radford and Scupin as "registered owner". The subdivision had not been registered as at 5 November 2008. As at the date of the Contract, title to Lot 23 was held by Radford and Scupin as tenants in common in equal shares.

[6] By letter dated 17 November 2008, KRG Law wrote to Hynes, noting the terms of cl 5 of the special conditions.

[7] On 19 November 2008, the re-subdivision was duly registered. Following registration, Radford and Scupin continued to be the registered owners as tenants in common of the newly created Lot 41 and Lot 42.

[8] In January 2009, Radford and Scupin transferred their respective interests in each of Lots 41 and 42 one to the other, so that Radford became the sole registered owner of Lot 41, and Scupin became the sole registered owner of Lot 42. It was not disputed that Radford and Scupin intended to execute transfers after the subdivision had occurred so that each would own one of the lots in their own name. However, the Contract made no mention that, subsequent to registration of the subdivision, title to Lot 41 would be held exclusively by Radford.

[9] On 21 May 2009, Hynes wrote to Rolls' solicitors in the following terms:

> "We confirm that registration of the survey plan has occurred. Please find attached a copy of the registration confirmation statement for your records.
>
> You will note that Linda Regina Radford is now the sole registered owner of the registered lot that your client is purchasing. Please confirm that your client will accept Ms Radford as the vendor pursuant to the terms of the Contract dated 5 November 2008."

[10] It was Rolls' contention that he did not know that Radford had become the sole owner of Lot 41 until after this notification by Hynes Lawyers and that he had not agreed to taking title from Radford only. This was disputed by the defendants who contended that the common intention of the parties was always that at settlement Rolls would take title from Radford only.

[11] On 3 July 2009, Hynes forwarded a signed transfer to Rolls' solicitors, naming only Radford as the transferor. Rolls' solicitors responded later that day with a settlement statement. In a further letter dated that day, Rolls' solicitors wrote to Hynes as follows:

> "We advise that the buyer requires the terms of the contract to be complied with in full including a transfer executed by both sellers

> notified on the contract and the certificate of title on completion in the name of both sellers."

[12] On 6 July 2009, Hynes wrote to Rolls' solicitors, attaching a copy of the dealing whereby Scupin had transferred her interest in Lot 41 to Radford. The letter went on to indicate that Radford was ready, willing and able to settle that day. Shortly thereafter, Rolls' solicitors wrote to Hynes giving notice of termination, stating, "We have conducted our check search. Your clients' statement is inaccurate with respect to condition 7.3(i) and accordingly pursuant to condition 7.4 of the contract we give notice that the purchaser hereby terminates the contract." On 9 July 2009, KRG Law wrote to Hynes advising that "the Seller [had] accepted the termination" and sought the return of the deposit.

[13] Clause 7.3(i) of the Contract provided:

> "The Vendor states that, except as disclosed in this Contract, each of the following statements will be accurate at the Date for Completion:
>
> ...
>
> (i) the Vendor is the registered owner or the lessee of the Land (according to the title expressed or implied in this Contract)."

[14] Clause 7.4 provided that, if a statement contained in cl 7.3 was not accurate, the purchaser was entitled to terminate the Contract by notice in writing to the vendor. The rights of the purchaser upon termination in reliance upon cl 7.4 are provided for in cl 7.5 as follows:

> "If this Contract is terminated pursuant to clause 7.4, the Deposit and other monies paid under this Contract shall be refunded to the Purchaser by the Vendor or the Stakeholder as the case may be and the Vendor shall be liable by way of damages as compensation for the loss suffered by the Purchaser in such sum as at the time this Contract was made was reasonably foreseeable as the loss liable to result, and which does in fact result from a termination of this Contract due to a statement contained in either clause 7.2 or clause 7.3 not being accurate."

Issues

[15] The defendants contended that Rolls was not entitled to terminate, either because he had no such right upon the true construction of the Contract, or alternatively because they should have an order for rectification. The defendants did not assert any waiver on the part of Rolls. Nor was there any issue whether Rolls was in a position to complete the Contract.

[16] The issues that arise are thus:

(a) whether upon the proper construction of the Contract, the plaintiff was entitled to terminate in reliance upon standard conditions 7.3(i) and 7.4, when Radford and Scupin were named as "vendor" in the Contract but ultimately as at the date for completion Radford alone was the registered proprietor of Lot 41; and

(b) if so, whether the defendants are entitled to an order for rectification of the terms of the Contract to provide that the vendor on title at the date for completion was to be Radford alone.

Evidence

The plaintiff's evidence

[17] Rolls gave evidence on his own behalf, in addition to calling Amy McKee (née O'Connor), formerly in the employ of Hynes, who drafted the Contract.

[18] Rolls gave evidence of being taken to see the townhouse at the Royal Pines Resort by Jillian Sheridan, a real estate agent, who worked for the Royal Pines Resort. Rolls made a verbal offer to purchase the property for $1,000,000.

[19] Rolls' evidence was that he signed the first Contract at the Royal Pines Resort in the presence of Sheridan on 24 October 2008. Sheridan said that, as there would be a subdivision, the lot number of the townhouse would change. The name of both owners was on the Contract. On 5 November 2008, Rolls signed the second Contract, which became the final Contract between the parties. The name of both owners was on this Contract.

[20] At the time of entering into the Contract, he believed he was contracting with both owners. He said, "I knew that the property had been developed jointly and we sat down to go over the Contract. Both owners were mentioned in the Contract and that is what I signed, as I understood."

[21] Rolls also negotiated a lease for the townhouse with Sheridan. Rolls signed a tenancy agreement for eight months with Royal Pines Resort Realty, as lessor, which required Rolls to pay rent to that entity as the managing agent. He also signed an Entry Condition Report in respect of the tenancy which referred to Radford as the lessor/agent.

[22] Sheridan gave Rolls the contact details of Radford so that he could buy various objects from the townhouse, which he negotiated directly with Radford. Sheridan advised Rolls that Scupin was to be the main contact regarding any building issues, and Rolls thereafter contacted Scupin in relation to such issues as they arose.

[23] Rolls denied that he was ever told by Radford or Sheridan that title to Lot 41 would be held solely by Radford at completion and that he would be taking title from her alone. His evidence was that he signed the Contract on the understanding that he was contracting with both Radford and Scupin, only becoming aware that Radford had become the sole registered owner of Lot 41 after the letter from Hynes.

[24] While Rolls was unable to recall specifically telephone calls with Radford on 18 February 2009 and 23 April 2009 and did not deny that they occurred, he did deny the version of the conversations put to him by the defendants' counsel. He denied that, during a conversation with Radford on 18 February 2009, Radford said that she had become the sole registered owner of Lot 41 and denied that he indicated that he was ready to settle in July. He also denied telling Radford, during a telephone conversation on 23 April 2009, that he was on track to settle with Radford in July. He disputed that Sheridan told him on 6 May 2009 that Radford had become the sole registered owner and that he confirmed that he would be settling on the

property. Nor did Rolls recall meeting Radford on 4 July while she was next door in Scupin's townhouse.

[25] Rolls' evidence was that after he gave instructions to his solicitors on 3 July 2009 to terminate the Contract, he had a telephone conversation with Radford about the termination of the Contract. His evidence was that Radford said that she understood, saying "I don't blame you for doing that. I would have done the same thing in your position" and that she was very angry with her lawyers and intended to sue them. Radford then asked if Rolls wanted to continue to rent the property. He proposed doing so on a monthly basis and said he would confirm that, which he did. He continued to rent the property until October 2009.

[26] Rolls also gave evidence of an email sent by him to his solicitors on 27 July 2009. The email refers to a conversation between Rolls and Radford on 10 July 2009, although in oral testimony Rolls accepted that the conversation occurred on 9 July 2009. The email sets out the details of the conversation in the following terms:

> "Linda advised me of her disappointment with her original solicitors [sic] lack of good advice in regards to changing the particulars on the title & also told me that she understood completely & accepted that the contract was now cancelled & that she would have done the same thing given the circumstances.
>
> Linda asked if I was still interested in renting the property to which I advised I was. I told her that we could work out something flexible that would not hinder her reselling the property if that was her intended path as long as I was given 2 or 3 months notice.
>
> Linda told me she was going to Bali for a holiday & then going in to hospital for an operation & that there was no hurry, we could discuss a shorter term lease upon her return. She also stated that she may decide to shift into the property herself in October."

[27] Amy McKee gave evidence as to her dealings on the conveyance on behalf of Radford. She obtained instructions from another employee in relation to the conveyance, who had spoken directly to Radford and had also received a draft Contract and details from the agent. She prepared a Contract for sale of the townhouse which she emailed to the agent on the basis of her understanding that both Scupin and Radford were to be the owners after subdivision. On 24 October 2008, Radford attended the office to sign the Contract and undertook to arrange for Scupin to sign. Upon realising deficiencies in the Contract (with the disclosure statement) McKee sent an updated Contract to the agent on 24 October and again on 27 October. At this time, McKee still understood both Scupin and Radford were to be the owners after subdivision. McKee was not involved in the signing of the second Contract.

[28] McKee gave evidence that she was not told by Radford that Radford was to become the sole registered owner of Lot 41 and only learnt of that on 19 May 2009, after arranging for a title search. When she raised the matter with Radford, Radford said she "didn't think it would matter, that the purchaser would settle anyway".

The defendants' evidence

[29] The defendants both gave evidence. They also called Sheridan, who gave evidence of showing Rolls the property. She prepared initial draft terms for a Contract with input from Radford and Rolls, which she forwarded to McKee on 23 October 2008. Sheridan did not tell McKee that Radford was to be sole owner at settlement. McKee sent Sheridan a copy of the draft Contract to be signed by the parties, which she read to ensure it was accurate.

[30] On 24 October 2008, Sheridan went through the Contract including the special conditions with Rolls. She said that she explained:

> "that Linda and Claudia were both on this contract, even though Linda was the sole owner, and … when clear title was given to both parties, that Linda would be the remaining vendor on the contract at settlement".

[31] She stated that Rolls said he understood and agreed and signed on that basis. When asked why she did not suggest the Contract specify that, she replied that she had explained to Rolls:

> "[the] particular details of Lot 23 in that Claudia and Linda were doing a joint venture and that Linda owned A and Claudia owned B. Separation of title was in process and Linda would remain the vendor. There would only be one name on the contract and I explained to Mark this would happen through the solicitors once clear title had been enacted."

[32] Sheridan accepted that there was nothing in the Contract she was given or the attached plan that indicated that Radford alone was to become the registered owner of Lot 41. Sheridan said she thought the special condition as it appeared was sufficient to cover the situation. Later McKee sent her a copy of a second Contract to be signed by the parties, which she again read to ensure it was accurate and forwarded to Rolls for signing.

[33] Sheridan gave evidence of having a meeting with Rolls on 6 May 2009 where, among other things, she mentioned "briefly" that the title had separated and Rolls told her that he was not going to settle on another property he had under contract at that time, but confirmed that he would proceed with the purchase of the property she had sold him.

[34] Scupin gave evidence of an initial contact with Rolls, but limited involvement after that. She gave instructions to Mortimore and Associates in respect of the title separation, which included instructions that at the end of the process Radford would be the sole registered owner of Lot 41. She did not, however, assert that she told Rolls anything to do with the title separation, nor did she negotiate the sale with him.

[35] Radford's evidence was that she received a call from Sheridan on 22 October 2008, about an offer for the townhouse. Radford asked Sheridan to prepare a Contract. Radford also authorised Sheridan to prepare a lease for Rolls over the townhouse. She engaged Hynes as solicitors to act for her in the conveyance and Contract of sale. Her evidence, which was not contradicted, was that she gave oral instructions to Karen Palmer of Hynes that she was to be sole owner at settlement.

[36] Radford said she met with Rolls at the townhouse once it became obvious that he was a serious buyer and contracts were being prepared. She said in evidence-in-chief that she wanted to discuss selling certain items of property in the townhouse. She said that it was on that occasion that she first told Rolls she was to be the sole owner of the townhouse at the time of settlement. Her evidence as to what was said by her to Rolls was as follows:

> "I explained to him that I wished to sell my apartment but at this point in time, I wasn't the sole owner of it, it was still in both Scupin and my name. Because the title had not been separated, we did the development jointly.
>
> …
>
> I explained to Mr Rolls that Claudia Scupin's name had to be on this contract because the contract had not yet completed; the title hadn't been separated, but when the title was separated and registered, it would be in my name solely. I would be the only person on the title and he would be buying it off me and me alone. I would be the only person that he'd be taking title off and the only person that he would be paying money to.
>
> …
>
> He accepted that and was happy with that arrangement."

[37] In cross-examination she initially said she thought the conversation took place after the initial Contract, but then settled on 23 or 24 October 2008.

[38] Because of a previous problem with a contract, Radford wanted everything to be accurate and agreed "she would not have signed a contract unless … satisfied in [her] own mind that it accurately reflected all of the terms of the agreement". She therefore read over the Contract at McKee's office very particularly and thought that it did reflect the agreement and her instructions at the time she signed it. When presented with the second Contract for sale, Radford again read the document carefully and agreed that she "regarded it as containing and reflecting all of the terms of the agreement between the parties".

[39] Radford stated that she telephoned Rolls on 18 February 2009 and told him that she had returned from overseas, and that "the contract was unconditional, the title had separated and I was now the proud owner of my villa and was he all set to settle". Her evidence was that he said "everything was on track for him to settle". Radford accepted that this conversation was short, only 57 seconds. She said she had a further telephone conversation with Rolls on about 24 April 2009 during which he again confirmed that everything was on track to settle and that he was intending to do so.

[40] On 19 May 2009, McKee called Radford to say that she was unaware that Radford would be the sole owner of the property, to which Radford replied that that was always to be the case and that she had so instructed her solicitors from the outset. McKee discussed with Radford sending a facsimile to KRG Law about the change in ownership. On 2 July 2009, Radford had a further telephone conversation with McKee during which McKee explained that there was a problem with the Contract because the title was only in Radford's name. Radford accepted that on neither occasion did she mention to McKee that Rolls already knew that she was the sole

owner or that he had agreed to contract on the basis that he would take title from her.

[41] Radford gave evidence of attempting to contact Rolls by telephone, and that she met again with Rolls at Scupin's property on 4 July 2009, at which time Rolls said there was "a problem".

[42] On 6 July 2009, Radford received a call from McKee saying that settlement had not occurred because of the title issue. Radford said she had told Hynes of what had been intended in that regard and that she would be seeking legal advice. Some time later, Radford received a call from Rolls during which he said he was entitled not to settle on the Contract referring to the registration of title in her name, and that her solicitors had made a mistake. Radford gave evidence that Rolls called her unexpectedly on 9 July, apologising for terminating the Contract. They spoke of whether or not he would continue to lease. Radford accepted that during one of those conversations, she said she did not blame him because he sought legal advice and that now she was going to do the same. She denied that she accepted Rolls' termination of the Contract in either telephone conversation.

The terms of the Contract

[43] The defendants contended that the language of the Contract was ambiguous or susceptible of more than one meaning in respect of the term "Vendor" for the purposes of cl 7.3. It was necessary to have regard to the Contract as a whole to ascertain the meaning of that term. It was submitted that the term, as it appears in cl 7.3(i), must be read to mean either, or both, Radford and Scupin.

[44] Although in the defendants' written submissions it was also contended that, given that the sale was of a proposed lot, there was additionally some ambiguity as to whether "Land" was intended to mean Lot 23 or the proposed Lot 41, the oral submissions did not press that argument. The term "Land" is defined in cl 1.1(k) to mean the land described in Item H of the Items Schedule. As Item H described the land in terms of the proposed Lot 41, being part of Lot 23, it is abundantly clear in those circumstances what the property contracted to be sold was.

[45] The principal submission as to ambiguity then concerned the meaning of the term "Vendor" in cl 7.3. Clause 1.1(s) of the Contract defined "Vendor" to mean the party named in Item C. Item C named Radford and Scupin. The defendants submitted this gave rise to ambiguity, given that "party" was a singular noun and in fact more than one "party" was listed at Item C. Moreover, cl 1.1 provided that the definitions had the meaning therein stated to the extent that they were not inconsistent with the context or subject matter to which they applied. Reliance was placed on cl 4 as directly relevant to the interpretation of the term "Vendor". Clause 4 concerned the Vendor's obligations on completion and provided that, in exchange for the balance of the purchase price, the purchaser receive "a properly executed transfer for the Land … capable of immediate registration". It was argued that the interpretation advanced by the plaintiff that the term "Vendor" referred to both Radford and Scupin was at odds with what the plaintiff had contracted for and was entitled to.

[46] In this regard reference was also made to cl 7.3(i), which was prefaced by the words "except as disclosed in this Contract". Moreover, by the terms of cl 7.3(1), the

vendor was only required to be the registered owner of the Land, "according to the title expressed or implied in [the] Contract". At the time of executing the Contract, there was no title for Lot 41 in existence.

[47] Reliance was placed on the following passage of Gibbs J in *Rands Developments Pty Ltd v Davis* (1975) 6 ALR 631 at 633:

> "The procedure to be adopted on settlement must be such that it gives to the purchaser the fullest protection which is consonant with a settlement of transactions without undue delay or expense. The purchaser is entitled to all reasonable protection. Once a purchaser or transferee is registered as proprietor no substantial problems can arise, particularly when the proprietor obtains the wide protection enunciated in *Frazer v Walker* [1967] 1 AC 569 ; [1967] 1 All ER 649 and *Breskvar v Wall* (1971) 46 ALJR 68 ; [1972] ALR 205."

[48] It was argued that reasonable protection in the sense referred to in *Rands* did not mean that the obligation on the vendor was "to match the most extreme requirements which could be formulated in order to eliminate even the most theoretical risk": *Zanee Pty Ltd v CG Maloney Pty Ltd* [1995] 1 Qd R 105 at 111. The mischief to which these cases was directed, it was submitted, was to prevent the purchaser not obtaining good title at settlement. In the present case, it was sufficient that title was given by Radford as the registered owner at settlement. There could be no reasonable suggestion that by only Radford being on the title Rolls lost any protection consonant with a settlement of the transaction.

[49] As a further basis for the above construction, but subject to findings of fact, it was submitted that, if it was found that Rolls was told of the intended transfer into Radford's name prior to entering into the Contract, the Contract should be interpreted to exclude from its operation any matters known beforehand: *Savoy Invest Queensland Pty Ltd v Global Nominees* [2008] QSC 56 at [39]-[40]. There is no operative warranty where disclosure has already occurred: *Mediservices Clinics Pty Ltd v Health 24 Pty Ltd* [1999] NSWCA 198 at [60]. Further, even if the court were not satisfied that Rolls was aware at the date of the Contract, he was certainly aware by 21 May 2009 when the letter from Hynes concerning title was sent to his solicitors.

[50] Taking into account all of the relevant provisions, and (if necessary) having regard to the information the defendants contended had been provided to Rolls prior to executing the Contract, it was submitted that "Vendor" as used in cl 7.3 should be construed by a court to contemplate that either (or both) of the parties named in Item C could be the registered proprietor of Lot 41 as at 6 July 2009, provided that on settlement Rolls could receive from that party a "properly executed transfer for the Land in favour of the Purchaser capable of immediate registration". Such title was available to be passed to Rolls on 6 July 2009.

[51] The plaintiff, on the other hand, contended that the words of the Contract were clear and unambiguous. Both Radford and Scupin were identified in Item C as the "vendor" and both signed the Contract in that capacity: see *Bennett & Ors v Stewart & Anor* [2008] QSC 20. Further, cl 1.5 provided: "Any defined terms used in any part of this contract shall have the same meaning when used in any other part of this contract." It was thus submitted that the words of the Contract should be given the natural meaning they bear: *Hyde & Skin Trading Pty Ltd v Oceanic Meat Traders*

Pty Ltd (1990) 20 NSWLR 310 at pp 313-314. To accord the Contract the construction contended for by the defendants would be to ignore the plain words of the Contract and give them a meaning contrary to their natural meaning.

[52] The plaintiff's submissions are plainly correct. Moreover, as the plaintiff argued, cl 4 does not assist the defendants. It is entirely separate and distinct from the warranty provided in cl 7.3(i), which was for the benefit of the purchaser. As was recognised in *Rands* (at 633), the question of whether a purchaser is entitled to require that a vendor shall be registered as proprietor at completion must depend primarily upon the terms of the particular Contract, "for if the parties have agreed that the vendor will at the date of completion be the registered proprietor of the land sold and will tender a transfer from himself to the purchaser, that will be decisive." The effect of cl 7.3(i) was to require that those specified as vendor be the registered proprietor as at the date of completion – namely both Radford and Scupin. There was no disclosure to the contrary as permitted by the introductory words of cl 7.3. And nothing in the terms of cl 4 or any other provision of the Contract negated the obligation on the defendants to produce the title in their names as "Vendor".

[53] A breach of cl 7.3(i) by the vendor expressly entitled the purchaser to terminate, as is made clear from cl 7.4. Accordingly, authorities such as *Zanee Pty Ltd* and *Mediservices Clinics Pty Ltd* do not assist the defendants, as they did not concern contractual warranties which if breached, gave rise to an express contractual right to terminate the Contract. The rights of the purchaser upon termination in reliance upon cl 7.4 are provided for in cl 7.5. Moreover, the express right in cl 7 for a breach of cl 7.3, is provided in the context of a purchaser not being entitled to deliver requisitions as to a vendor's title (cl 7.1).

Rectification

Principles

[54] In *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 Mason J at 350 made the following observations as to the remedy of rectification:

> "What is of importance is that the purpose of the remedy is to make the instrument conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately. And there has been a firm insistence on the requirement that the mistake as to the writing must be common to the parties and not merely unilateral except in cases of a special class ...
>
> It is now settled that the existence of an antecedent agreement is not essential to the grant of relief by way of rectification. It may be granted in cases in which the instrument sought to be rectified constitutes the only agreement between the parties, but does not reflect their common intention …
>
> … the court must be satisfied that the instrument does not reflect the true agreement of the parties. It cannot be so satisfied unless the writing was intended to record the earlier agreement and by the mistake of the parties it fails to do so. If the plaintiff fails to establish these elements he does not displace the hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties."

[55] McPherson JA observed in *MSW Property Pty Ltd v Law Mortgages Qld Pty Ltd* [2003] QCA 487 at [21]:

> "The principle governing rectification of a contract requires, as Wilson J (with the assent of Gibbs CJ) said in *Pukallus v Cameron* (1982) 180 CLR 447, 452, proof that the written contract does not embody the final intention of the parties, and that the omitted agreement be capable of such proof 'in clear and precise terms'."

[56] Clear evidence of a mistake common to both parties must be led, and the burden of proving that rests with the defendants, being the party alleging that the instrument ought to be altered: *Australian Gypsum Limited v Hume Steel Limited* (1930) 45 CLR 54. There have been various formulations as to the nature of the burden on the party seeking rectification. In *Fowler v Fowler* (1859) 4 De G & J 250 at 254, Lord Chelmsford LC explained that rectification should only be proved on "evidence of the clearest and most satisfactory description" which he stated required "something more than the highest degree of probability". In *Australian Gypsum Ltd* at 64 and *Maralinga* at 349, these comments were approved. In *Pukallus v Cameron* (1982) 180 CLR 447 Wilson J (with whom Gibbs CJ agreed) said at 452 that "convincing proof" was required that the written document did not embody the final intention of the parties. Other similar formulations are outlined by Meagher, Gummow and Lehane in *Equity Doctrine & Remedies*, 4th ed, at [26-050], where it is observed:

> "It has often been said, for example, in *Australia Hotel Co Ltd v Moore* (1899) 20 NSWLR (Eq) 155; 16 WN (NSW) 132, that in proceedings for rectification the most clear and strong evidence is required and that a court is very chary of acting on the evidence of a single witness. It has been said that the court will require 'very strong proof' before ordering a deed to be rectified on the ground of a mistake: *Kenny v Sholl* (1905) 7 WALR 197. Holroyd J said in *Chamberlain v Thornton* (1892) 18 VLR 192 that the proof of mistake in a rectification case must be 'convincing' and that 'mere suspicion although strong' would not be sufficient. (See also *Soloman v Soloman* (1878) 4 VLR (E) 40; *Mosses v Northern Assurance Co* (1856) 1 VLT 114)."

Discussion

[57] While it was not disputed that Radford and Scupin intended, as at 5 November 2008, that Radford would become the sole title holder of Lot 41, the critical issue is whether that intention was communicated to Rolls prior to his signing the Contract on 5 November 2008 and whether he agreed to Contract on that basis so that there was a common intention concerning that matter.

[58] On the plaintiff's part it was argued that there was no common mistake as to the true terms of the agreement struck between the parties, which was as recorded in the Contract. Proof that the instrument represents what the parties finally agreed is fatal to a suit for rectification. Having signed the Contract knowing (or in the case of Scupin not caring whether) it contained a term wholly inconsistent with the term the defendants now seek to be read into the Contract, they are bound by their agreement and cannot have an order for rectification.

[59] Certainly, Rolls' firm evidence was that when he entered into the Contract he did so on the express understanding that he was contracting with both Radcliffe and

Scupin as "Vendor". He denied that he had orally agreed with Radford and Scupin that he would purchase Lot 41 on the basis that Radford alone would become the sole registered owner of the lot at the date for completion. And he denied that he was ever told that by Sheridan or Radford.

[60] The plaintiff submitted that, even if it were found that Rolls was told prior to signing the Contract that Radford would become the ultimate proprietor of Lot 41 at completion, he did not agree (and cannot be taken to have agreed) to such a term being in the Contract. He was not mistaken as to the terms of the Contract and had signed two Contracts, neither of which contained a term that he would take title from Radford.

[61] Further, the plaintiff's counsel pointed to the evidence that Radford and Scupin each read over the Contract before signing it. Indeed, Radford conceded that the Contract, which she said she had carefully read, contained and reflected all of the terms of the agreement between the parties. It was submitted that the evidence showed that the defendants knew that they were each named as "vendor" in the Contract. Further, they knew (or perhaps in the case of Scupin did not care) that the Contract did not contain any term to the effect that Radford alone would be the registered proprietor of Lot 41 at the date of completion or that the standard conditions 7.3(i) and 7.4 did not apply. Certainly, neither Radford nor Scupin raised the matter as an issue with Hynes after reading the Contracts. The plaintiff submitted that, notwithstanding that knowledge, the defendants regarded the Contract as embodying the agreement struck between the parties with respect to the sale of the Land.

[62] The plaintiff contended that the defendants were aware (or taken to be aware) of the contents of the Contract when they executed it. They knew that the Contract contained no provision to the effect that Radford would be the registered proprietor of the land at completion and, knowing the true terms of the written agreement, they signed it. They were not mistaken as to the contents of the Contract. Rather, any mistake was merely a mistaken belief as to the Contract's effect, not as to its contents. That, it was said, was fatal to the defendants claim for rectification: *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 349.

[63] On behalf of the defendants it was submitted that the court should not accept Rolls' recollections where his evidence differed from that called by the defendants. It was said that Rolls was uncertain as to the dates of some conversations, or as to whether they occurred at all. There was no certainty to his recollections, and this should be contrasted with the clarity of the evidence given on this and other conversations by Radford.

[64] However, while there was some lack of detail in Rolls' evidence and aspects of his evidence where he was uncertain, there were also curious features to Radford's evidence. Radford's evidence was that, once she was told by her solicitors of the difficulty concerning ownership of Lot 41, she agreed to the suggestion that a letter be sent to KRG Law to see if Rolls would accept title from her. That resulted in the facsimile dated 21 May 2009 from Hynes to KRG Law which enquired whether Rolls would accept Radford "as the vendor pursuant to the terms of the contract". However, I note that Radford did not give evidence that upon being advised of the difficulty she advised her solicitors that Rolls had in fact agreed to contract on the basis that he would take title from her alone. One might have expected such a

response by Radford if there had in fact been a common intention, as argued by the defendants. This is even more so the case given Radford's evidence of a telephone call on 18 February 2009, during which she said she informed Rolls that she had become the owner of Lot 41. Likewise, one might have expected Radford to have raised her understanding that there had been an agreement that title would be given by her alone when she spoke to Rolls after becoming aware of the letter of termination from his solicitors, rather than merely indicating that she would consult her solicitors.

[65] The defendants' counsel pointed to matters that were said to demonstrate that Rolls knew that Radford was effectively the owner of Lot 41, subject to the formal separation taking place. In this respect, reference was made to a lease that Rolls took over the property. Emphasis was placed on evidence that prior to taking possession of the house, and critically, prior to 5 November 2008, Rolls dealt exclusively with Radford in respect of furniture and whitegoods in the house that he wanted to buy. He had no communication in this regard with Scupin. However, Rolls' evidence was that he understood that Radford and Scupin ran a business selling chattels displayed at Lot 41 and that Sheridan provided him with Radford's contact details for the purpose of negotiating the purchase of some of these chattels. In addition, although Rolls negotiated the purchase of the chattels from Radford alone, Sheridan had advised Rolls that Scupin was the main contact for any building or maintenance issues with the property and Rolls did contact Scupin in relation to such issues as arose during the lease.

[66] Further, in relation to the lease generally, Rolls recalled negotiating with Sheridan rather than either Radford or Scupin. Although counsel for the defendants pointed to the fact that the entry condition report for this lease was signed by Radford as lessor/agent, the original lease document signed by Rolls referred to Royal Pines Resort Realty as lessor and it was to Royal Pines as managing agent that Rolls paid rent. At the end of January 2009, Royal Pines Resort Realty was removed as lessor/agent. Rolls understood this change occurred as a result of errors in the way Royal Pines Resort Realty processed rent monies and he thereafter paid rent to an account belonging to Freezemohr Pty Ltd, although he did not place any significance on this. There is no evidence that Rolls knew that Radford was a director of Freezemohr Pty Ltd and the only individual with access to this account. The change in managing agent therefore did not cause him to deal directly with Radford in respect of the tenancy. I am not persuaded that I should infer that Rolls knew that Radford was effectively the owner of Lot 41 on the basis of the evidence surrounding the lease of the property.

[67] Nor do I consider that the defendants' reliance on conduct by Rolls after the Contract was terminated advances their case. In this respect, it was said that after the letter of termination, Rolls contacted Radford and not Scupin, although the latter was his neighbour. Additionally, he then instructed his solicitors to write to Radford's solicitors on 9 July 2009 that "the Seller has accepted the termination". Further, in his email of 27 July 2009 to his solicitors, Rolls related a conversation "between Linda Radford (seller)" and himself. I am unable to place any weight on these matters. All of that conduct must be understood against the background of the letter of 21 May 2009 from the defendants' solicitors advising that Radford was the sole registered owner of Lot 41.

[68] As to the evidence of Jillian Sheridan, upon which the defendants placed substantial weight as she was an independent witness, her evidence as to what she told Rolls on 24 October 2008 was at odds with her acknowledgement that the parties understood that they were contracting on the terms in the draft Contract and her acknowledgment that the Contract did not make it apparent that Radford would be the only registered owner of Lot 41 at the time of settlement. Moreover, her evidence as to what she told Rolls was at times inconsistent and confusing such as her statement that there was to be a separation of title and that "there would be only one name on the contract". I do not find her evidence to have any particularly persuasive weight.

[69] Having considered the evidence, I do not consider that the defendants have discharged the burden on them of proving that the Contract mistakenly fails to reflect the common intention of the parties and thus the true agreement of the parties.

Orders

[70] The orders are made:

1. There be judgment for the plaintiff.
2. It is declared that the Contract between the plaintiff and the defendants was lawfully terminated by the plaintiff.
3. It is declared that the plaintiff is entitled to the sum of $50,000 paid as deposit.