SUPREME COURT OF QUEENSLAND

CITATION:	*Pensini & Anor v Tablelands Regional Council & Anor* [2012] QCA 137
PARTIES:	**PAUL JAMES PENSINI** (first appellant) **NOEL PETER PENSINI** (second appellant) **v** **TABLELANDS REGIONAL COUNCIL** (first respondent) **NATIONAL AUSTRALIA BANK LIMITED** ACN 004 044 937 (second respondent)
FILE NO/S:	Appeal No 8341 of 2011 SC No 324 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	25 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2012
JUDGES:	Margaret McMurdo P, White JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appeal against the costs order is dismissed.** **3. Appellants pay the first respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – where appellants alleged that the trial judge erred in finding that a binding contract existed and in ordering specific performance – whether the trial judge was correct in concluding that the Council and the appellants had entered into a binding and enforceable contract – whether Council provided consideration for the contract – whether there were discretionary reasons as to why specific performance should not be ordered – whether the trial judge erred in ordering specific performance of the contract *Land Act* 1994 (Qld), s 98, s 99, s 100, s 101, s 102, s 108, s 109, s 358 *Local Government Act* 1993 (Qld), s 914 *Uniform Civil Procedure Rules* 1999 (Qld), Chapter 9 Part 5, r 360(1)

Jones v Millward [2005] 1 Qd R 498; [2005] QCA 76, cited

COUNSEL: A P J Collins for the appellants
M A Jonsson for the respondents

SOLICITORS: Williams, Graham & Carman Solicitors for the appellants
MacDonnells Law for the respondents

[1] **MARGARET McMURDO P:** I agree with Margaret Wilson AJA's reasons for dismissing the appeal (including the appeal against costs) with costs and with the orders proposed.

[2] **WHITE JA:** I have read the reasons for judgment of Margaret Wilson AJA and agree with her Honour's reasons and the orders which she proposes.

[3] **MARGARET WILSON AJA:** The appellants are primary producers at Kairi on the Atherton Tableland. They were registered owners as tenants in common of seven parcels of land in the County of Nares Parish of Barron within the area of the Atherton Shire Council ("the Council"). The second respondent was the mortgagee of the land.

[4] The land was bounded to the north by Pasetti Road, to the east by Tinaroo Falls Dam Road and to the west by Sorrensen Road. To the south it was bounded by Johnson Road and Poggioli Street. Another road ("the subject road") ran through the land from Tinaroo Falls Dam Road to Sorrensen Road. The area of the subject road was about 1.744 ha.

[5] Three of the parcels were to the north of the subject road. Lot 830 on Crown Plan N 157361 (64.75 ha) adjoined the subject road, and lots 850 (8.746 ha) and 829 (4.047 ha) on NR 118 adjoined the northern boundary of lot 830.

[6] Four of the parcels were to the south of the subject road. Lots 292 (10.825 ha) and 293 (21.322 ha) on Crown Plan NR 1265 adjoined the subject road, lot 292 also adjoining Sorrensen Road, and lot 293 also adjoining Tinaroo Falls Dam Road. Lot 241 on Crown Plan NR 1265 (10.876 ha) and lot 294 on Crown Plan NR 6366 (21.105 ha) lay to the south of lots 292 and 293.

This proceeding

[7] The first respondent (as successor to the Council) commenced this proceeding against the appellants as first and second defendants, and the second respondent (the mortgagee) as third defendant on 24 June 2009. It sought specific performance of an agreement between the Council and the appellants for the amalgamation into single parcels of each of:

(a) lot 850 on Crown Plan NR 118, lot 829 on Crown Plan 118 and lot 830 on Crown Plan N 157361;

(b) lot 92 on Survey Plan 213036 and lot 241 on Crown Plan NR 1265;

(c) lot 91 on Survey Plan 213036 and lot 294 on Crown Plan NR 6366.

[8] The first respondent identified the formation and terms of the alleged agreement in four letters:

(a) 27 June 2007: letter from the Council to the appellants;[1]

(b) 2 July 2007: letter from the appellants to the Council;[2]

(c) 5 July 2007: letter from the Council to the appellants;[3]

(d) 27 July 2007: letter from the appellants to the Council.[4]

[9] The second respondent elected to abide the order of the court.

[10] The trial judge found that there was an enforceable agreement constituted by the four letters, requiring the appellants to complete the amalgamation of their seven existing parcels of land into three lots, and ordered specific performance.[5] His Honour ordered the appellants to pay the first respondent's costs of and incidental to the proceeding on the indemnity basis. He granted leave to appeal against the costs order.[6]

This appeal

[11] The appellants filed a notice of appeal, and served it on the second respondent as well as the first respondent. Both the appellants and the first respondent served their outlines of submissions on the second respondent.

[12] The second respondent did not appear at the hearing of the appeal. The Court proceeded on the basis that it had had notice of the appeal and did not wish to take any active part in it, being content to abide the order of the Court.

[13] The appellants did not file a separate notice of appeal with respect to costs, but the issues relevant to the costs appeal were canvassed in the parties' written outlines of argument. The Court resolved to proceed on the basis it was not necessary to file a separate notice of appeal, but if the Registrar subsequently sought a direction in

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1 AR 151.
2 AR 152.
3 AR 154.
4 AR 155.
5 Reasons AR 263 – 276; order AR 277 – 278.
6 Reasons AR 106 – 110; order AR 279.

relation to the necessity for one, the parties would be given the opportunity to make submissions. The Registrar did not subsequently seek such a direction.

The statutory scheme

[14] Under the *Land Act* 1994 (Qld) roads vest in the State.[7] The Minister has power to close a road permanently or temporarily. Sections 98 and 99 provide (relevantly):

> "**98 Closure of road**
>
> (1) If, after inquiry and notice the Minister considers appropriate, the Minister is satisfied a road is not needed, the Minister may –
>
> (a) permanently close the road under division 4; or
>
> (b) temporarily close the road by gazette notice.
>
> (2) The Minister may permanently close the road without receiving an application under section 99(1).
>
> …
>
> **99 Application to close road**
>
> (1) An entity may apply for the permanent closure of a road if the entity is –
>
> (a) a public utility provider; or
>
> (b) an adjoining owner for the road.
>
> …
>
> (3) An adjoining owner who makes a permanent road closure application may ask for the road, on its closure, to be amalgamated with the adjoining owner's adjoining land.
>
> (4) Subsection (5) applies if the adjoining owner under subsection (3) is a registered owner, other than as trustee under a deed of grant in trust, of the adjoining land and other land that would be adversely affected by the permanent closure of the road.
>
> (5) The adjoining owner may ask in the application that, on the closure of the road, the road, the adjoining land and the other land be amalgamated."

[15] Sections 108 and 109 (which are in Chapter 3 Part 2 Division 4 of the Act) provide:

> "**108 Permanent closure of road**
>
> (1) If the Minister permanently closes a road, the road is permanently closed by the registration of a plan of subdivision.
>
> (2) The permanent closure of the road takes effect on the day the plan of subdivision is registered.

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7 *Land Act* 1994 (Qld) s 95.

> **109 Closed road may be dealt with as lot or amalgamated with adjoining land**
>
> (1) If the Minister is satisfied a road being permanently closed is of adequate area, having regard to the location of the road and the use made of adjoining land, to be used as a lot, the road–
>
> (a) must be shown as a lot on the plan of subdivision; and
>
> (b) may be dealt with as unallocated State land.
>
> (2) If the Minister is not satisfied under subsection (1), the road must be amalgamated with–
>
> (a) adjoining unallocated State land; or
>
> (b) if there is no adjoining unallocated State land - the land of an adjoining owner for the road."

[16] Section 358 provides (relevantly):

> "**358 Changing deeds of grant—change in description or boundary of land**
>
> (1) A registered owner or trustee may surrender the land contained in the registered owner's deed of grant or trustee's deed of grant in trust if the description of the land is no longer correct because of –
>
> …
>
> (e) the opening or closing of a road, through or adjoining any land held in fee simple, under section 109(2)(b), 109A or 109B; or
>
> …
>
> (3) On the surrender of the land –
>
> (a) the deed of grant or deed of grant in trust is cancelled; and
>
> (b) a new deed must be issued containing the land to which the registered owner or trustee is entitled."

The facts

[17] On 6 April 2004 the appellants lodged an application for the permanent closure of the subject road with the Department of Natural Resources, requesting that it be amalgamated with lot 830.[8]

[18] The Minister gave appropriate public notice of the application as required under the *Land Act*[9] and notice to the Council as required under the *Local Government Act* 1993 (Qld).[10] The Council objected to the proposed permanent closure of the subject road on the ground it provided a transport link in the rural area which was still used and still required.[11]

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8 AR 198 – 199.

9 *Land Act* 1994 s 100.

10 *Local Government Act* 1993 (Qld) s 914.

11 AR 201.

[19] Negotiations between the Council and the appellants followed; in November 2004 the Council agreed to a temporary closure.[12]

[20] By letter dated 7 April 2006 an officer of the Department advised the appellants that the application for permanent closure would be refused.[13] The letter contained the following:

> "The decision to refuse the permanent road closure application is based on the views of the Atherton Shire Council and the public. Atherton Shire Council advised that the subject area provides a transport link in the rural area which is still used and required. It has been determined that the road area is still required for its gazetted purpose as road and that the application for permanent closure should be refused."

The appellants were invited to show cause why the permanent closure should not be refused on those grounds and should be given favourable consideration. The writer also said that the Department was prepared to request the Minister to close the subject road temporarily and to issue a road licence, and set out the Department's requirements in that regard.

[21] Further correspondence and negotiations ensued. On 27 September 2006 the Department again sought the Council's views on a permanent closure.[14] On 19 October 2006 the Council resolved:

> "…that it has no objection to the permanent closure of the road provided there is an amalgamation of the various allotments owned by NP & JP [sic] Pensini in the vicinity of the road in question."[15]

The Council advised the Department of its attitude by letter dated 23 October 2006.[16]

[22] By letter dated 23 April 2007 the Department advised the appellants:

> "It has now been approved to permanently close the road shaded blue on the attached sketch and sell the land to you at a purchase price of $11,550.00 inclusive of GST for inclusion in Lot 830 on Plan N157361 subject to you;
>
> 1. bearing all costs in relation to the application including survey, and
> 2. making satisfactory arrangements with the Atherton Shire Council in respect their amalgamation requirements and Council advising this Office in writing that satisfactory arrangements have been made.
> 3. making satisfactory arrangements with Ergon Energy in respect their installations on the road area and Ergon Energy advising this Office in writing that satisfactory arrangements have been made.

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12 AR 205.
13 AR 128 – 131.
14 AR 132.
15 AR 136.
16 AR 137.

…

This offer will lapse unless:

(a) within one (1) month from the date hereof you forward the sum of 11,921.20, together with the attached account, Form 1 Transfer and acceptance of offer to this Office.

(b) within four (4) months from the date hereof the ***original*** **plan of survey has been delivered to this Office (marked to the attention of the State Land Asset Management group)** to enable the plan to be endorsed with the approval of the Delegate of the Minister for Natural Resources Mines and Water. **Please be aware that a plan fee (currently $120.10 per plan plus $17.85 per lot) is payable to enable processing of the plan. This fee is included in the attached account.**

If you believe that you will be unable to comply with all the offer conditions by that date, you should apply for an extension of time for acceptance of the offer before it lapses, setting out what action you have taken to comply with the offer conditions and why the conditions cannot be compiled (sic) with by the due date.

…

When all requirements have been finalised the Minister for Natural Resources and Water will be requested to seek Executive Authority for the issue to you of a Deed of Grant over the area comprised in existing Lot 830 on plan N157361 and the area of closed road.

…

Should the requirements contained herein not be complied with, the offer will lapse and a new application for road closure will be required if you wish to proceed at a later date."[17]

[23] On 16 May 2007 the appellants signed a notification of acceptance of the Department's offer.[18] It referred to "the Department's letter of offer dated 23 April 2007" and included:

> "We note that this acceptance shall not be effective until I/we have complied with all the conditions of the offer within the time specified in the letter of offer previously referred to."

They forwarded to the Department the notification, a cheque for $11,550 and a transfer in form 1 of lot 830 to the State of Queensland for the purposes of s 358 of the *Land Act*.[19]

[24] On 23 May 2007 the Council resolved that there should be a maximum of three separate titles following amalgamation of the existing lots.[20] The appellants were advised of this by letter from the Council dated 25 May 2007.[21]

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17 AR 138 – 140.
18 AR 141.
19 AR 147.
20 AR 148.
21 AR 149.

[25] The appellants' proposal to amalgamate the existing seven lots into four new titles was rejected by the Council on 21 June 2007, and by letter dated 27 June 2007 the Council told them it would be advising the Department that it had been unable to make satisfactory arrangements with them regarding the amalgamation and that its agreement to the permanent closure was withdrawn.[22]

[26] On 2 July 2007 Ms Louise Pensini on behalf of the appellants wrote to the Council. She said:

> "We are in receipt of your letter dated 27/06/07 re. conditions of road closure and amalgamation of blocks.
> We are aware of the fact that Council at its recent meeting declined our suggestion to create 4 blocks from 7 blocks.
> We accept Council requirements to amalgamate 7 portions into 3 portions.
> Our preferred amalgamation arrangement to create 3 blocks from 7 would be.
>
> 1. Amalgamate 3 Lots. Lot 850 on NRl18 and Lot 829 on NR118 and Lot 830 on N15736, along with the recently purchased road area.
> 2. Amalgamate 2 Lots. Lot 292 on NR1256 and Lot 241 on NR1256.
> 3. Amalgamate 2 Lots. Lot 293 on NR1265 AND Lot 294 on NR6366.
>
> I trust that you will now provide a written acceptance of our proposal, and approval for survey of these properties to go ahead."[23]

[27] On 4 July 2007 the Council resolved to accept the appellants' proposal provided the area of the road was amalgamated with the lots on its southern side.[24]

[28] The Council replied to Ms Pensini's letter on 5 July 2007:

> "I refer to your letter dated 2 July 2007 regarding the permanent closure of the road separating Lot 830 on N157361 from Lots 292 and 293 on NR1265, Parish of Barron, and your advice that you accept Council's requirement to amalgamate the existing seven lots into three new titles.
>
> Council further considered this matter at its Meeting held on 4 July 2007 and I advise that the proposals for the amalgamation of the seven lots are acceptable to Council on the proviso that the area of road to be closed is amalgamated with the new lots to be created on the southern side of the road.
>
> On receipt of your advice that you are agreeable to the road closure area being amalgamated with the lots on the southern side of the road, Council will then inform the Department of Natural Resources and Water that its requirements relating to the permanent road closure have been satisfied."[25]

[29] On 27 July 2007 Ms Pensini on behalf of the appellants wrote to the Council:

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22 AR 150 – 151.
23 By letter dated 2 July 2007: AR 152.
24 AR 153.
25 AR 154.

> "We are in receipt of your letter dated 5 July/07 with reference to Amalgamation of the seven existing lots into three new titles.
>
> We agree to Council decision to amalgamate the road area with the new lots to be created on the south side of the road.
>
> I have given our surveyor, Roger Twine instructions to proceed with the full survey status of the land required as above.
>
> Please notify Department of Natural Resources that Council requirements relating to the Permanent Road Closure have been satisfied."[26]

[30] When they applied to the Department for the permanent closure of the subject road, the appellants had requested that the area of the road be amalgamated with lot 830 – that is, with land to its north. They appreciated that their agreement with the Council that the area of the road be amalgamated with land to its south was outside the scope of the Department's "offer" of 23 April 2007, and on 4 August 2007 Ms Pensini wrote to the Department on their behalf, asking it to approve amalgamation with land to the south of the road. She said:

> "Your Offer dated 23/4/07 lapses on 23/8/07. We were given (4) months. We prefer to finalize the matter without need to request an extension of time."[27]

There was never an express extension of time.

[31] On 28 August 2007 the Council wrote to the Department explaining why it did not want the area of the road amalgamated with the land to its north, and concluding:

> "The Pensini's have agreed to Council's requirements for the road area to be amalgamated with the lots on the southern side and in this regard I enclose herewith copies of letters dated 2 July 2007 and 27 July 2007 from Mrs Louise Pensini and Council's letter to Mrs Pensini dated 5 July 2007.
>
> … Council requests that the Department amend the offer made to NP & PJ Pensini by letter dated 23 April 2007 to require that the area of road to be closed is amalgamated with the lots on the southern side of the road as per the plan attached hereto."[28]

[32] By letter dated 12 September 2007 the Department said to the appellants:

> "I refer to your recent agreement with the Atherton Shire Council in regard to which land the area of road that has been approved for permanent closure will be included.
>
> Approval has now been given to include the permanently closed road in Lots 292 and 293 on plan NR1265 with no alteration to the purchase price payable.
>
> Please find enclosed a fresh Form 1 Transfer for completion by yourselves and return to this office.
>
> Please find a fresh account enclosed. ONLY PAY AN AMOUNT OF $25.05 being the increased fees payable.

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26 AR 155.
27 AR 156 – 157.
28 AR 158 – 159.

> Please also arrange for a copy of this letter to be given to your surveyor and have the original plan forwarded to this office as soon as possible."[29]

[33] Under cover of letter dated 21 January 2008 the appellant's surveyor provided the Department with a plan:

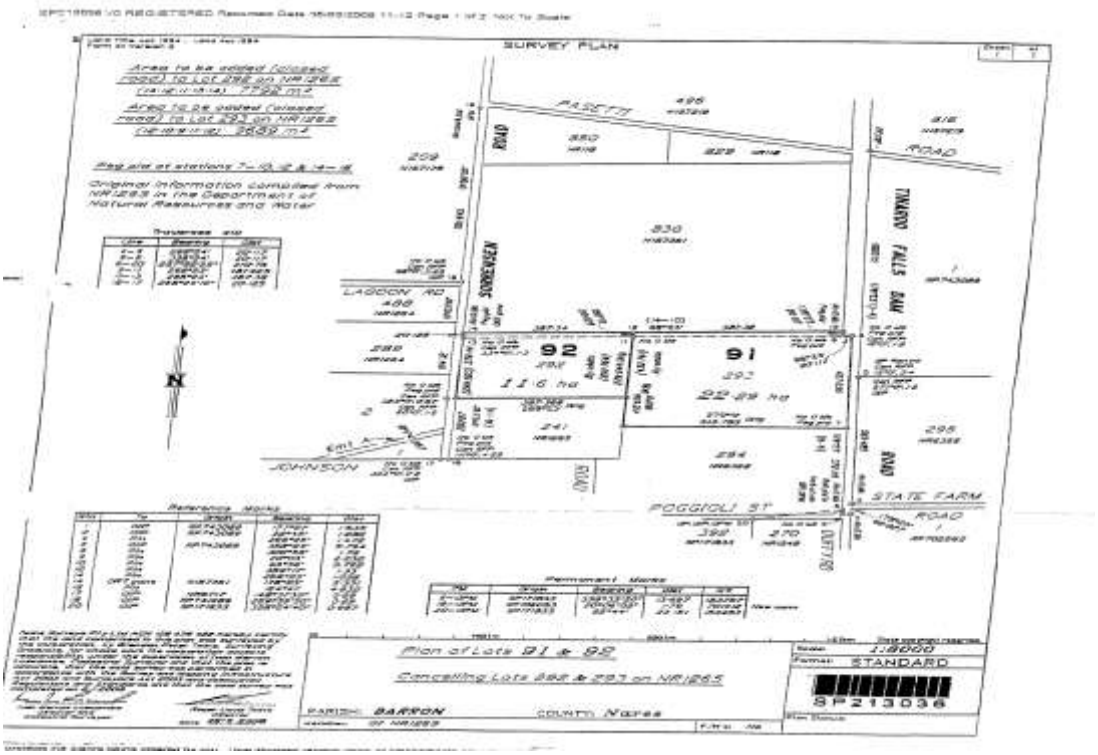
(i) amalgamating the three lots north of the subject road (lots 850, 829 and 830) into one lot;

(ii) amalgamating lots 292 and 241 and part of the subject road into one lot; and

(iii) amalgamating lots 293 and 294 and the balance of the subject road into one lot.[30]

[34] The Department considered that there should be a two step process – the amalgamation of the area of the road with lots 292 and 293 to meet its requirements, and then the amalgamations required by the Council. On 29 January 2008 it rejected the plan as not meeting the requirements in its letter of 12 September 2007, and asked that a plan showing the road being added to lots 292 and 293 be forwarded to it.[31] On 20 February 2008 it advised the surveyor that the amalgamation of the freehold parcels had to be on a separate plan.[32] Three days later the surveyor submitted a plan creating lots 92 and 91 comprised of the former lots 292 and 293 and the area of the road.[33]

[35] The amalgamation of the road area with lots 292 and 293 (by the creation of lots 92 and 91 on Survey Plan 213036) was effected by the registration of that plan on 5 March 2008.[34]



29 AR 161.
30 AR 166 – 170.
31 AR 171.
32 AR 175.
33 AR 177 – 181.
34 AR 183 – 189.

[36] On 4 November 2008 the first respondent wrote to the appellants in these terms:

> "The above matter was considered by Council at its meeting held on 3 October 2008.
>
> Council noted that you have still to effect the amalgamation to which you agreed in your letters of 2 and 27 July 2007.
>
> In order to fulfil this agreement you need to:
>
> - Amalgamate Lots 829 and 850 NR118 with Lot 830 N157361
> - Amalgamate Lot 91 SP213036 with Lot 294 NR6366; and
> - Amalgamate Lot 92 SP213036 with Lot 241 NR1265
>
> Would you please submit to Council an appropriate plan or plans of amalgamation prepared by your surveyor. Once the plan or plans have been approved by Council these will need to be registered in the Titles Office section of the Department of Natural Resources and Water.
>
> As it is now more than seven months since the road closure plan was registered. Council requires the amalgamation plan or plans to be prepared and submitted within the next 60 days.
>
> Please give this matter your urgent attention. If you have any query please contact Council's General Manager, Executive Services on the above telephone."[35]

[37] The appellants refused to comply with the Council's demand.[36]

The trial judge's reasoning

[38] Referring to the Department's letter of 23 April 2007, the trial judge said:

> "[10] Despite the use of the word 'approved' in the opening sentence other terms in the letter make clear that the department was making an offer on disposition of the application which the defendants could accept or reject. That departmental offer was accepted by the defendants who noted that their acceptance 'shall not be effective until we have complied with all the conditions of the offer within the time specified in the letter of offer previously referred to.[37] The relevant time for completion and delivery of the survey plan was four months."

[39] His Honour noted the statutory regime for road closure, including s 102 of the *Land Act* which provides:

> "**102 Changing application**
>
> In deciding an application, the Minister may change a road closure application in the way the Minister considers appropriate."

His Honour said:

> "[25] … In the present case, the Minister was deciding an application initially lodged by the defendants on 5 April

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35 AR 190.
36 AR 192.
37 Ex 1 document 10.

> 2004 for the permanent closure of the road which adjoined three of the above lots - Lots 830, 292, 293. The defendants' application proposed that the road area be added to Lot 830. The department offered to approve the application in those terms but subject to conditions which the Minister obviously considered appropriate, including 'making satisfactory arrangements with the ASC in respect of their amalgamation requirements.'
>
> [26] The final notice of approval from the department refers to the defendants' 'recent agreement with the Atherton Shire Council in regard to which land the area of road that has been approved for permanent closure will be included.' In the context of this exchange of correspondence, the department was clearly referring to the plaintiff's notification that its amalgamation requirements referred to in condition No.2 had been fulfilled." (Footnotes omitted.)
>
> …
>
> [32] … The ministerial approval to amalgamate the road area with the southern lots was not, in my view, an action separate to, and independent of, the initial offer to approve the road closure. The approval letter of 12 September 2007 followed the plaintiff's request to amend the initial offer. The approval followed the terms of that request. Section 102 of the *Land Act* permits the Minister to change an application in any way the Minister considers appropriate. Here, there is only one application and only one approval. The change in arrangement for the amalgamation of the road area and the decision to close the road was a direct result of the fulfilment of condition No.2 of the initial departmental offer. The suggestion that the department's rejection of the first survey plans put an end to the initial application with the department then accepting an informal application based simply upon new survey plans cannot be countenanced. Such an approach would deny the local authority its right to raise objections and would result in the Minister acting unlawfully by failing to give public notice of the proposed closure as required by s 100 of the *Land Act* 1994 (Qld)."

[40] His Honour was satisfied that the Department was not concerned about, or desirous of overseeing, the amalgamation requirements which were at the heart of the Council's objection to the road closure.[38] The process by which the amalgamations were to be achieved assumed no significance in the discussion between the appellants and the Council.[39] The terms of the four letters relied on by the first respondent were clear, and in accepting the offer, the appellants understood the consequences of their acceptance.[40] There was consideration for the agreement: in this regard, his Honour said:

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38 Reasons para 33 – AR 272.

39 Reasons para 34 – AR 272.

40 Reasons para 35 – AR 272.

> "[36] Nor do I consider there is any lack of consideration. The defendants' submission that there was lack of consideration for the agreement contained within the four letters, was based on the contention that the final approval for road closure was a separate independent act of the Minister and the agreement had therefore had no effect. Having rejected that contention, I find that the promise by the plaintiff to withdraw its objection to road closure, or more correctly to advise the department its 'requirements relating to permanent road closure have been satisfied' is sufficient consideration to support the agreement. But here, the plaintiff has, in fact, completed the terms of its bargain by the formal expression of its satisfaction with the amalgamation requirements agreed to by the defendants."

[41] His Honour was satisfied there was no discretionary reason to refuse specific performance.

Arguments on appeal

[42] Counsel for the appellants submitted that the four letters (27 June 2007, 2 July 2007, 5 July 2007 and 27 July 2007) did not fulfil condition 2 in the Department's letter of 23 April 2007:

(a) The Department's offer had lapsed on 23 May 2007 pursuant to subparagraph (a) of its letter of 23 April 2007. It was implied in the stipulation that the appellants deliver a transfer in form 1 within one month that the transfer be one capable of execution by the State of Queensland. The transfer delivered was a transfer of lot 830. This was incapable of acceptance by the State because the proposed amalgamation with lot 830 had been rejected by the Council.

(b) Even if the Department's offer did not lapse after one month, it lapsed on 23 August 2007 pursuant to subparagraph (b) of its letter of 23 April 2007. The plan of survey which was ultimately registered was not delivered to the Department within four months as required by subparagraph (b).

(c) Once the Department's offer lapsed, the parties could not reach any agreement which the Department was obliged to accept or which could retrospectively fulfil condition 2 of the letter of 23 April 2007.

(d) The trial judge erred in calling the letters of 5 and 27 July 2007 "[a] clarification as to the disposition of the road area by adding it to the boundaries of the southern lots."[41]

(e) The trial judge erred in finding that the decision to close the road was a direct result of the fulfilment of condition 2 of the letter of 23 April 2007.[42]

(f) Even if the Department's offer was still open, any agreement between the Council and the appellants had to be within the confines

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41 Reasons para 28 – AR 271.

42 Reasons para 32 – AR 271.

of that offer. The Council sought to impose a condition that the area of the road be amalgamated with land to its south, which was contrary to the terms of the Department's offer.

(g) The appellants' "acceptance" by the letter of 27 July 2007 of what was in effect an entirely new proposal was nothing more than a "conditional offer" on terms different from those proposed by the Department. It was thus no offer at all.

(h) The Minister could approve the appellants' application upon terms he decided. "It was something he was entitled to do in any event, but particularly so given the earlier offer had lapsed."[43]

(i) The Council's real complaint seems to be with the Department: that after reaching an agreement with the appellants in terms different from its offer of 23 April 2007, it approved a plan without further recourse to the Council.

(j) There was no consideration for the agreement: the Council's approval or otherwise [sic] was given in respect of a matter to which the Department had not agreed.

(k) The trial judge's discretion whether to grant specific performance miscarried. His Honour erred in not having proper regard to the matters of which the second respondent would need to be satisfied before consenting to any amalgamation.

(l) The trial judge ought to have refused specific performance on account of delay.

[43] Counsel for the first respondent submitted:

(a) As the trial judge observed, condition 2 of the Department's offer of 23 April 2007 conferred on the Council, in a practical sense, a right to veto the road closure sought by the appellants.

(b) Against that background, the contract formed between the appellants and the Council involved a simple, unqualified exchange of promise and counter-promise. In exchange for the appellants' promise to proceed with the amalgamation of:

(i) lot 850, lot 829 and lot 830 as one discrete parcel;
(ii) lot 292, the adjoining area of the proposed road closure, and lot 241 as another discrete parcel; and
(iii) lot 293, the adjoining area of the proposed road closure, and lot 294 as the third discrete parcel

the Council counter-promised that it would inform the Department that the Council's requirements relating to the permanent road closure were satisfied.

(c) The appellants' letter of 2 July 2007 was an offer, which was met with a counter-offer in the form of the Council's letter of 5 July 2007. The appellants accepted the counter-offer by their letter of 27 July 2007.

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43 Amended outline of argument on behalf of first appellant and second appellant para 35.

(d) There was nothing in the correspondence between the Council and the appellants which in any way suggested that their promises were in any sense qualified, conditioned or constrained by any particular limitations found within the Department's letter of offer.

(e) The appellants' letter to the Department of 4 August 2007[44] and the Council's letter to the Department of 28 August 2007[45] were evidence of the performance of the agreement between the appellants and the Council.

(f) Under s 102 of the *Land Act* the Minister could "change" the appellants' road closure application.

(g) At most, performance of the contract was dependent upon the Minister's "changing" the appellants' road closure application pursuant to s 102.

(h) Alternatively, there was a simple exchange of unconditional, unqualified promises made on the assumption that Ministerial concurrence would ultimately be forthcoming, with an implied obligation to cooperate to bring about that outcome.

(i) There was ministerial concurrence: the road closure proceeded in the manner the appellants and the Council contemplated and despite the lapse or earlier expiration of the time limit.

(j) The consideration that passed from the Council in exchange for the appellants' promise to amalgamate the lots in the agreed manner was the Council's promise to inform the Department that its amalgamation requirements had been satisfied.

(k) There is no merit in the appellants' criticism of the trial judge's approach to the position of the second respondent as mortgagee.

(l) The trial judge did not err in finding that any delay by the Council in enforcing its rights was minor and justifiable.

Discussion

[44] The trial judge found that the four letters of 27 June 2007, 2 July 2007, 5 July 2007 and 27 July 2007 constituted an agreement. In my view, the letter of 27 June 2007 was part of the matrix of facts in which the parties reached an agreement rather than part of the agreement. I accept counsel for the first's respondent's analysis of the next three letters as an offer, a counter-offer and acceptance. The consideration for the appellants' promise to proceed with the amalgamations the Council wanted was the Council's promise to inform the Department that its requirements relating to the road closure had been satisfied.

[45] The terms of the agreement between the appellants and the Council are to be found within the letters of 5 July 2007 and 27 July 2007. What they meant by the new lots on the southern side of the road is readily ascertainable from the letter of 2 July 2007.

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44 AR 156 – 157.
45 AR 158 – 159.

[46] There is no warrant for implying any constraint on the parties' mutual obligations by reference to the Department's letter of 23 April 2007. That the Department's "offer" may have lapsed before 27 July 2007 when the appellants accepted the Council's counter-offer was not relevant to whether an agreement was reached. As counsel for the first respondent submitted, there was a simple exchange of unconditional, unqualified promises made on the assumption that Ministerial concurrence would ultimately be forthcoming, with an implied obligation to cooperate to bring about that outcome. And, in the event, the Minister did close the road.

[47] The process by which the Minister ultimately effected the road closure was not in issue in this proceeding.

[48] The trial judge's description of the Department's letter of 23 April 2007 as "an offer on disposition of the application which the [appellants] could accept or reject" was not challenged on appeal. Indeed, the parties referred to it as an offer in their correspondence with the Department on 4 August 2007 and 28 August 2007. While it may have been more correct to describe it as a conditional approval, its true characterisation is not critical to this appeal.

[49] Closure of the road was a matter for the Minister under s 98 of the *Land Act*. The Minister had extensive powers. He could close a road in the absence of an application under s 99. Where there was a road closure application, there were requirements for notice of the application to the public[46] and to the relevant local government.[47] The Minister could impose conditions on his approval of an application, s 101(2) providing:

> "**101 Minister to consider objections**
>
> …
>
> (2) The Minister may approve the road closure application, with or without conditions, or refuse the application."

He could change a road closure application in any way he considered appropriate: s 102.

[50] The trial judge considered that the approval of 12 September 2007 followed the Council's request (made on 28 August 2007) that the Department amend its initial offer to the appellants. Referring to the Minister's power under s 102 to change an application, his Honour opined:

> "The change in arrangement for the amalgamation of the road area and the decision to close the road was a direct result of the fulfilment of condition No. 2 of the initial departmental offer."

It is not necessary to determine whether that analysis was correct.

Discretionary issues

[51] Specific performance is, of course, a discretionary remedy. Counsel for the appellants submitted that there were two matters which ought to have led the trial judge to refuse this form of relief – the first concerned the rights and interests of the second respondent as mortgagee and the second was laches.

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46 *Land Act* 1994 s 100.

47 *Local Government Act* 1993 s 914.

[52] The appellants wanted to expand the irrigation system on their property, and they regarded the road as an obstacle to their doing so. They agreed to the amalgamations as the price they had to pay to secure the advantages of closing the road.[48]

[53] The outstanding amalgamations would require the second respondent's consent. The second respondent was a party to the proceeding. It elected to abide the order of the court, and so the appellants called David Paul Wallis, a senior agribusiness manager in its employ.

[54] Mr Wallis' evidence was in very general terms. He said that if asked for its consent, the second respondent would undertake a review:

> "What steps would you need to undertake in order to review the position?-- I would need to prepare a submission or an application detailing what was proposed and put that down to our credit department, I can't make that call by myself and credit department needs to review the position and - and - and have a look it.
>
> Specifically, what are the areas of concern that you would have to address in respect of that facility?-- In -essentially, what that does to the valuation of the property, how that effects our overall borrowing position, the usual credit assumption such as debt load against assets, et cetera, et cetera."

He described the securities held by the second respondent as not being limited to borrowings related to each subject lot but as being:

> "…. a lot more complex. There's multiple properties and multiple borrowings and everything's intertwined."[49]

Since 2007 the appellants had made six or seven applications for further finance and increased their level of borrowings by $2 million or more. He could not anticipate what would be the outcome of any such review.

[55] The trial judge said:

> "[41] … The applications by the defendants for further financial accommodation based on the security of the subject lots was sought in the full knowledge that these proceedings could result in the amalgamation to which the defendants were, at a certain stage, prepared to agree. There is no evidence of any impending financial difficulty and no evidence of the likely reduction in the value of the lands as security once amalgamation is effected."[50]

[56] There is no substance in counsel for the appellants' submission that his Honour focussed on the absence of evidence of value as opposed to the matters which would have been critical to the second respondent in deciding whether to consent to the amalgamations. To the contrary, his Honour gave balanced consideration to the evidence such as it was, and was not satisfied that he should refuse specific

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48 AR 72 – 73.
49 AR 66.
50 AR 273 – 274.

performance because of the interests of the second respondent. The appellants have not demonstrated that his Honour erred in so concluding.

[57] Counsel for the appellants submitted that the trial judge ought to have refused specific performance because of delay. In March 2008 the first respondent knew that the road had been closed and its area amalgamated with lots 292 and 293, but it was not until November 2008 that it wrote to the appellants calling on them to submit plans to effect the further amalgamations and it was not until March 2009 that its solicitors issued a letter of demand.[51] In the meantime, as the first respondent was aware,[52] the appellants conducted their business activities in accordance with the road closure that had been effected. Further, the debt secured against the land had risen. Counsel for the appellants conceded before the trial judge and on appeal that the delay was not inordinate.

[58] The trial judge said:

> "[46] In this case the delay is in my view minor and explicable by the plaintiff's changed circumstances. It did not have the character of prolonged inaction. Nor is there any evidence showing that the defendants acted to their detriment or suffered hardship. More particularly, the fact that the defendants have taken in full the benefit of the agreement which will continue to their advantage, suggests that the defence of laches has not been made out."[53]

[59] His Honour did not err in his approach to this issue or in his conclusion.

Conclusion on the substantive issues

[60] The trial judge was correct in his conclusion that on or about 27 July 2007 a contract was made between the appellants and the Council requiring the amalgamation into single parcels of each of:

(a) lot 850 on Crown Plan NR 118, lot 829 on Crown Plan NR 118 and lot 830 on Crown Plan N 157361;

(b) lot 92 on Survey Plan 213036 and lot 241 on Crown Plan NR 1265;

(c) lot 91 on Survey Plan 213036 and lot 294 on Crown Plan NR 6366.

[61] The first respondent, as the successor to the benefits and obligations of the Council upon the amalgamation of a number of local authorities in March 2008,[54] was entitled to enforce that contract. There was no discretionary reason why specific performance should not be ordered.

Indemnity costs

[62] The trial judge made orders for specific performance requiring the appellants to deliver all such documents and plans in registrable form as might be necessary to cause or procure the amalgamations. In reality, the appellants would have to obtain

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51 Letter from MacDonnells Law to Williams Graham & Carman, 6 March 2009 – AR 210.

52 Trial transcript - AR 45 lines 48 – 50.

53 AR 275.

54 AR 265 para [1], 274 para [44].

the second respondent's consent, which would have to be produced to the Registrar of Titles before the plans were registered.[55]

[63] His Honour ordered the appellants to pay the first respondent's costs on the standard basis. He delayed the coming into effect of that costs order to allow the parties to make submissions about a different costs order. After subsequently receiving submissions on costs, he ordered that the costs be on the indemnity basis.

[64] On 3 November 2010, the first respondent made an offer to settle pursuant to chapter 9 part 5 of the *Uniform Civil Procedure Rules*. The offer was in these terms:

> "**TAKE NOTICE** that the Plaintiff hereby offers to settle this matter pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules 1999* on the basis that:-
>
> 1. the First Defendant and Second Defendant sign all such documents and do all such things as may be necessary or convenient to amalgamate into single parcels each of the following:-
>
> (a) Lot 850 on Crown Plan NR118, County of Nares, Parish of Barron, Lot 829 on Crown Plan NR118, County of Nares, Parish of Barron and Lot 830 on Crown Plan N157361, County of Nares, Parish of Barron;
>
> (b) Lot 92 on Survey Plan 213036, County of Nares, Parish of Barron and Lot 241 on Crown Plan NR1265, County of Nares, Parish of Barron;
>
> (c) Lot 91 on Survey Plan 213036, County of Nares, Parish of Barron and Lot 294 on Crown Plan NR6366, County of Nares, Parish of Barron;
>
> 2. each party bear their own costs of this action.
>
> This offer remains open for acceptance for fourteen (14) days from the date of service of this offer upon the First Defendant and Second Defendant."[56]

[65] The first respondent's solicitors served the offer by email to the appellants' solicitors. It was accompanied by a letter of even date and an email from the second respondent dated 7 October 2010. The letter was in these terms:

> "Please find **enclosed** our client's formal offer to settle this matter pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules 1999*, together with a copy of the email from National Australia Bank wherein it advised that it is prepared to consent to an amalgamation if your client requests it to do so."[57]

The email from the second respondent was in these terms:

> "Confidential - Without Prejudice

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55 AR 273.
56 AR 115 – 116.
57 AR 114.

…

> The Bank's position is that the Bank would be prepared to consent to an amalgamation if, as part of a settlement agreement between your client and the customer, the customer requested NAB to do so."[58]

[66] The appellants did not accept the offer.

[67] A claim for specific performance is by its nature an all or nothing claim. By the time the offer was made, the proceeding had been on foot for 17 months, with pleadings exchanged and disclosure given. In those circumstances, the first respondent's offer to bear its own costs involved a true element of compromise.[59]

[68] On the substantive issue, the first respondent succeeded in obtaining a judgment requiring the appellants to carry into effect the same amalgamations as those proposed in the offer to settle. It also succeeded, at least provisionally, in obtaining an order for costs in its favour.

[69] The trial judge found that the first respondent was entitled to indemnity costs pursuant to rule 360(1) of the *Uniform Civil Procedure Rules* which provides:

> "**360 Costs if offer to settle by plaintiff**
>
> (1) If –
>
> (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
>
> (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
>
> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances."

[70] Counsel for the appellants submitted to the trial judge and on appeal that the offer was not one made pursuant to r 360 because it was directed only to two of the defendants (the appellants). He submitted that the email from the second respondent should not be considered part of the formal offer and further that its contents had not been strictly proved. The trial judge rejected both contentions. His Honour said:

> "In this case, the third defendant was a necessary party to the proceeding, but it was not a true disputant. It did not file any material and did not participate in identifying points of defence. Its position was always likely to be, as it was ultimately expressed to the Court, one of neutrality and preparedness to abide by the order of the Court.
>
> Given its status as a non-combatant in the proceeding, the fact that the notice to settle was not addressed to the third defendant does not, in my view, affect the validity of the notice.

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58 AR 117.

59 See the discussion in *Jones v Millward* [2005] 1 Qd R 498.

> The plaintiff ascertained the position of the third defendant in advance of making the offer and accompanied the notice to settle with an email setting out the third defendant's position. The email, on its face, was the combination of contact between the plaintiff and the third defendant's legal department. The email is admissible as direct evidence of the bank's position in relation to the plaintiff's offer to settle.
>
> The third defendant required only appropriate action to be taken by the first and second defendants. Indeed, acceptance of the offer to settle and the completion of the settlement only required action on the part of the first and second defendants. They have failed to agree to take the action necessary to give effect to this proposed settlement.
>
> I am satisfied that rule 360 applies to these circumstances. That rule requires that I now order indemnity costs unless another order is appropriate in the circumstances. I'm satisfied that another order is not appropriate and that the rule should be applied in full."[60]

[71] His Honour added that even if that rule were not applicable, in light of the offer and its rejection, he would be disposed to order indemnity costs.

[72] The trial judge did not err in concluding that r 360 was applicable. It was an offer to settle the proceeding as against the appellants. The proposal was necessarily limited to the appellants signing all documents and doing all things within their power as might be necessary or convenient to effect the amalgamations. In the circumstances that would have included their obtaining the second respondent's consent. The effect of the email was to alert them that such consent was likely to be forthcoming.

Order

[73] I would dismiss the appeal, including the appeal against costs, and order the appellants to pay the first respondent's cost of the appeal on the standard basis.

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60 AR 108 – 109.