SUPREME COURT OF QUEENSLAND

CITATION:	*Gough & Ors v South Sky Investments Pty Ltd* [2012] QCA 161
PARTIES:	**JOHN MACLAIN GOUGH** **NORMA PATRICIA GROVES** (first appellants) **LINEMINT PTY LTD** ACN 010 972 559 **DERICK BRISLEY** **DEBBIE BRISLEY** (second appellants) **JEFFREY AIDEN WICKS** **JULIE KATHRYN WICKS** (third appellants) **PATRICIA GAYE RYAN** (fourth appellant) **VICKI ANNE TAYLOR** **JENNIFER MAY FERGUSON** (fifth appellants) **JOHN CLIFTON PARSONS** **DOROTHY ANNE PARSONS** (sixth appellants) **v** **SOUTH SKY INVESTMENTS PTY LTD** ACN 097 092 709 (respondent)
FILE NO/S:	Appeal No 11905 of 2011 Appeal No 11906 of 2011 Appeal No 11911 of 2011 Appeal No 11912 of 2011 Appeal No 11913 of 2011 Appeal No 11915 of 2011 SC No 12179 of 2010 SC No 13323 of 2010 SC No 13613 of 2010 SC No 13615 of 2010 SC No 3091 of 2011 SC No 3092 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED ON: 15 June 2012

DELIVERED AT: Brisbane

HEARING DATE: 27 April 2012

JUDGES: Margaret McMurdo P and Muir JA and Margaret Wilson J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeals dismissed.**

2. The appellants' pay the respondent's costs of the appeal, including any reserved costs if any, on the indemnity basis.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where appellants were purchasers under contracts entered into with respondent for the purchase of proposed lots in a community titles scheme – where the development was referred to as 'The Oracle' in disclosure statements and promotional material – where the development was then branded 'Peppers Broadbeach' – where appellants purported to terminate their contracts – where appellants commenced proceedings against respondent seeking a declaration that the contracts had been lawfully terminated – where the primary judge gave judgment for respondent – where appellants submitted the language of the contract revealed an intention to treat the name as an essential term of the contract – where respondent submitted name merely assisted in identifying property to be sold – whether the name of the development was an essential term of the contract – whether appellants entitled to terminate contracts

Body Corporate and Community Management Act 1997 (Qld), s 213, s 215, s 216
Land Sales Act 1984 (Qld), s 29

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 66; [1961] EWCA Civ 7, considered
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61, followed
Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632, considered

COUNSEL: R Bain QC, with C Heyworth-Smith, for the appellants
S Doyle SC, with D Clothier SC, for the respondent

SOLICITORS: Johnsons Lawyers for the appellants
Allens Arthur Robinson for the respondent

[1] **MARGARET McMURDO P**: These appeals should be dismissed with costs on the indemnity basis. The various appellants contracted with the respondent to purchase units in Tower 1 of *The Oracle* development at Broadbeach. Prior to settlement, the appellants were informed that Peppers Retreats, Resorts and Hotels had acquired the letting rights to Tower 1 which was to be known as and promoted as *Peppers Broadbeach*. They sought to be discharged from their contractual obligations claiming that the respondent had breached its obligations to them; they had contracted to purchase an apartment in a residential tower known as *The Oracle*. Senior counsel for the appellants conceded at the appeal hearing that there was one central issue in these appeals. It was whether the trial judge, on the evidence, was right to conclude that the respondent was entitled to specific performance because it was not an essential term going to the root of the contracts that the development be known as *The Oracle*.[1] I agree with Muir JA's reasons for finding the primary judge was right to reach this conclusion.

[2] I also agree with the orders proposed by Muir JA.

[3] **MUIR JA: Introduction** The appellants are purchasers under six contracts entered into with the respondent for the purchase and sale of proposed lots in a community titles scheme which was to be registered in respect of tower one of a two tower development described as *The Oracle* at Broadbeach. The appellants, with the exception of the appellants in appeal 11905/11, entered into their contracts in late 2005 or early 2006. Consequent upon the respondent obtaining approval under s 29 of the *Land Sales Act* 1984 to extend the time within which it was required to provide a registrable instrument of transfer, those appellants entered into new contracts of sale and purchase. The appellants in appeal 11905/11 entered into their contract on 17 October 2006. That contract and the new contracts, all of which are in standard form, will be referred to collectively as "the contracts" and individually as "the contract". Promotional material provided to the appellants before they signed all versions of the contracts referred to the development as *The Oracle*. So too did various disclosure statements provided to the appellants by the respondent from time to time pursuant to s 213 of the *Body Corporate and Community Management Act* 1997 ("the Act").

[4] Before the due date for completion of the contracts, purchasers were notified that "The Oracle [would] be branded Peppers Broadbeach and [would] be the flagship Peppers hotel".[2] Peppers were appointed as caretaking and letting agents in respect of Tower 1. The appellants in appeal 11905/11 purported to terminate their contract by letter dated 13 October 2010. The other appellants purported to terminate on various dates after the respondent's solicitors sent letters nominating settlement dates.

[5] The appellants commenced proceedings claiming declarations that their respective contracts had been validly cancelled. They all relied on what the primary judge described in his reasons as:

> "…the same essential allegation…, namely that the [appellants] contracted to purchase an apartment in a residential tower in *The Oracle* when in fact the apartment purportedly offered in performance by [the respondent] is an apartment in a hotel/resort branded *Peppers Broadbeach*".[3]

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1 Appeal transcript 1-6 to 1-7.

2 Reasons at [54].

3 Reasons at [75].

[6] The primary judge found against the appellants who have appealed on grounds that:

1. Having found that:

   (a) Tower 1 is not known as *The Oracle*;

   (b) Tower 1 is known as *Peppers Broadbeach*; and

   (c) the respondent promised that Tower 1 was to be known as *The Oracle*,

   the trial judge erred in holding that the appellants were not entitled to treat the contracts as discharged for repudiation.

2. The trial judge erred in holding that the breach of the terms of the contracts that required the respondent to provide to the appellants at settlement lots in a residential tower known as *The Oracle* did not afford the appellants the right to treat the contracts as discharged for repudiation.

3. The trial judge erred in finding that the respondent proffered at settlement lots which were not substantially different from those for which the appellants contracted.

4. The trial judge erred in finding that the appellants did not plead or argue that either:

   (a) the terms of the contracts that the name of Tower 1 was to be *The Oracle* were essential terms, breach of which gave rise to a right to terminate the contracts; or

   (b) the terms of the contracts that the name of Tower 1 was to be *The Oracle* were indeterminate (sic) terms, the breach of which gave rise to a right to terminate the contracts.

Grounds 1, 2 and 3

The appellants' submissions

[7] The appellants relied on the following passage from the reasons of Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,[4] referring to observations of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*:[5]

> "What Jordan CJ said as to substantial performance, and substantial breach, is now to be read in the light of later developments in the law. What is of immediate significance is his reference to the question he was addressing as one of construction of the contract. It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination."

[8] The appellants' argument proceeded as follows. The language of the contract reveals an intention to treat the name as an essential term or as a term, a sufficiently

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4 (2007) 233 CLR 115 at [48].

5 (1938) 38 SR (NSW) 632 at 641 – 642.

serious breach of which would give rise to a right to terminate the contract. The contract refers to the development by that name and reiterates the name in the location plans and disclosure statements. It need not have referred to the name at all as the location and address on the plans would have identified the lot being sold equally well. The emphasis of the name reflects its centrality to the bargain.

[9] The language of the contract must be understood in the context of the relationship established by the contract and the commercial purpose it served.[6] The subject matter of the contract must be considered in the statutory context enabling entry into a contract for the purchase of freehold title of a lot in a building that does not yet exist. The subject matter of the contract is a bundle of rights described in the Act and the disclosure statement is incorporated into the contract: s 215 of the Act.

[10] The first document of the 13 documents in the Disclosure Statement was headed "*Information about the Development*" and stated that the residential component was to be "*known as The Oracle*". The s 213 Disclosure Statement (the second of the 13 documents) provided adjacent to the heading "*Lot Details*" that "*The proposed lot being purchased is lot no. ... **(Lot)** in The Oracle development as identified on the location plan contained in the contract of sale **(Contract)** which accompanies this Disclosure Statement*".[7] The Location Plan is headed "*Oracle*".

[11] "*The Oracle*" is more than just an identifier; it is a brand. This bears on the commercial purpose of the contractual term. Evidence of that significance derives from the evidence of the "*branding*" experts. In this regard, the trial judge failed to properly consider and characterise the effect of the change of name or brand on the value of the lots. Whilst noting the appellants' argument that "*the apartments are 'indexed' to the value of the Peppers brand and they have no control over how well or poorly Peppers will perform*",[8] his Honour considered only the effect of that "*indexation*" in so far as the management by Peppers of Tower 1 was concerned, without extending his consideration to the Peppers brand generally. The name was an essential consideration and how the residential towers are, now, effectively named ("branded") was an essential matter, accordingly.

[12] If viewed as an intermediate term of the kind described and considered in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[9] the difference between a lot in a tower known as "*The Oracle*" and a lot in a tower known as "*Peppers Broadbeach*" is sufficiently serious to give rise to a right to terminate for repudiation. A change from "*The Oracle*" to "*Peppers Broadbeach*" denotes a change from an independently recognisable ("*branded*") apartment tower to a hotel/resort in a chain of hotel/resorts. This is a sufficiently serious change to constitute a renunciation of the contract by the respondent or a sufficiently serious breach of the term that the lot be a lot in a tower known as "*The Oracle*" to give rise to a right to terminate for repudiation.

The primary judge's relevant findings

[13] The primary judge rejected the respondent's submissions to the effect that the words "*The Oracle*" in the contractual documents did not have any promissory effect.[10]

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6 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [48].

7 Emphasis added.

8 Reasons [224].

9 [1962] 2 QB 26; approved in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [51].

10 Reasons [114] – [116].

He found that "the subject matter of the contract was a proposed lot in a residential tower to be known as *The Oracle*"[11] and that Tower 1 "is not known as *The Oracle*"[12] and "is branded *Peppers Broadbeach*".[13] The primary judge accepted that although there was "Oracle branding throughout the entire precinct …Peppers is the dominant brand name for the residential elements of the site".[14] He found that Tower 1 was known generally as *Peppers Broadbeach* rather than *The Oracle*.[15]

[14] The primary judge held:[16]

> "The subject matter of the contract is a proposed lot in a residential tower. The failure to provide the relevant lot in a tower known as *The Oracle* does not indicate an intention not to provide at settlement the subject matter of the contract or something substantially different from that for which the [appellants] contracted. The unwillingness or inability to perform the term that provided for the tower itself to be known as *The Oracle* (as well as being part of a development described as *The Oracle*) would not convey to a reasonable person, in the situation of the [appellants], renunciation either of the contract as a whole or of a fundamental obligation under it.
>
> **Conclusion – alleged repudiation in relation to the name of the tower**
>
> The [appellants] have not proven that the unwillingness or inability to perform the contractual provision in relation to the name of the tower constitutes a renunciation of the contract or a fundamental obligation under it so as to amount to a repudiation.
>
> I have declined to find that the tower is not a residential tower, such that a description of it as a hotel/resort means that [the respondent] 'has changed the substratum of the bargain' or that the relevant apartment is substantially different from, or a 'different product' from, the subject matter of the contract, namely an apartment in a residential tower. I have declined to find repudiation in relation to the name of the tower. These conclusions determine the issue of repudiation on the bases that it was argued."

The contractual documents

[15] Before considering the grounds of appeal, it is useful to identify the provisions of the contract, Disclosure Statement and other documents on which the parties' debate was centred.

[16] The contract identified the property to be purchased as:

> "Proposed Lot No… on Level… identified on the Location Plan together with the Chattels.

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11 Reasons [119].
12 Reasons [199].
13 Reasons [157].
14 Reasons [177].
15 Reasons [193].
16 [2011] QSC 361 at [204] – [206].

Parking… space for …car"

The Location Plan was made up of:

"1. Site Plan
2. Matrix Plan – showing levels/floors
3. Draft Plan SP 189370
4. Draft Building Format Plan (Stage 1A) – draft SP 189371
5. Draft Building Format Plan (Stage 1B) – draft SP 189373."

[17] The words *The Oracle* were prominently displayed on each of these plans. The first page of the contract was headed "Contract of Sale: The Oracle" and the logo for The Oracle also appeared on that page above the words "The Oracle Central Broadbeach".

[18] "Development" is defined in clause 1 of the Terms of Contract as meaning "The Oracle development to be carried out on the Scheme Land in the way outlined in the CMS".

[19] The definitions in clause 1 of the Terms of Contract of "CMS", "Land", "Scheme Land" and "Scheme Buildings" are:

> "...***CMS*** means the community management statement for the Scheme recorded, or to be recorded, in accordance with the BCCM Act. A copy of the proposed CMS forms part of the Disclosure Statement.
>
> …***Land*** means the land as described in Schedule 1. Where the context permits, it includes any land that is ultimately derived from the Land.
>
> …***Scheme Buildings*** means the improvements to be made to Scheme Land (including the building of which the Lot will be part) as part of the Development.
>
> …***Scheme Land*** means the land derived from the Land."

[20] Other relevant provisions of the Terms of Contract are:

> "**3.1 Development of scheme land**
>
> Subject to other provisions of this Contract, the Seller will cause a licensed builder to build the Scheme Buildings on the Land substantially in accordance with the Location Plan and the Plans and Specifications.
>
> **3.2 Changes to the development**
>
> Subject to the BCCM Act, the Seller may:
>
> (a) change the name of the Scheme;
>
> (b) make variations to any of the Development, Scheme Buildings and Schedule of Finishes (including the substitution of any items with those of a similar

quality as decided by the Seller (acting reasonably)) but only minor variations to the Property;

…

(e) alter the Common Property or rights in relation to the use of the Common property;

(f) change anything in the CMS (but the proportion which the interest schedule lot entitlement and contribution schedule lot entitlement for the Lot bear to the total interest schedule lot entitlement and total contribution schedule lot entitlement respectively must not be substantially varied);

…

(h) grant any exclusive use or special rights over the Common Property or a body corporate asset;

…

3.7 Marketing/Construction of development

…

(b) The Buyer acknowledges that the construction of the Development may be carried out in stages. It will not object to, make any claim or take any other action whatsoever (including issuing any proceedings for an injunction or damages) related to:-

…

24.1 Variations in Staging

It is intended that the Scheme will be developed in 2 stages. However, the number of lots in each stage and, in particular, the levels of the Scheme Buildings included in a stage, may change as decided by the Seller in its absolute discretion. This clause applies despite any staging details disclosed in the Location Plan or the CMS.

24.2 No objection

The Buyer will not object or take any other action (including delaying settlement of this Contract or terminating it) in relation to any matters referred to in clause 24.1.

…

25.1 Granting of Lease

The Body Corporate will, if requested by the Seller, grant the Lease to the Seller (or any person nominated by it). The Lease will be over part of the Common Property (which is anticipated to be the roof of the Scheme Building).

25.2 Form of Lease

In this clause 25, *Lease* means a lease substantially in the form contained in Annexure 2 of the Disclosure Statement but incorporating such changes that the Seller may require, in its absolute discretion. In particular, the area the subject of the Lease may change.

…

28.1 Progressive Development

The Buyer acknowledges that:

(a) the Scheme will form part of a large mixed use development comprising a significant number of different uses (for example, and without limitation, residential, retail and commercial uses) which will be developed progressively over time;

(b) the Seller (and persons authorised by it) intends to lodge various Development Applications over that part of the Land (and, possibly, adjoining land) that will not be contained within the Scheme."

[21] The "Developer Product Disclosure Statement", which was provided to buyers under the managed investment scheme provisions of the *Corporations Act*,[17] had on its front page the words "The Oracle Broadbeach". *The Oracle* logo was under those words and under the logo "The Oracle Central Broadbeach" was written. Paragraphs 4 and 9 of this document provided:

"**4. An overview of the Oracle development**

(a) South Sky is proposing to construct a high rise building at the Location to create a strata title development to be known as Oracle. It is intended that the building will comprise:

(i) a non residential lot (which may be subdivided to create a community titles scheme); and

(ii) lots in an accommodation community titles scheme to be known as Oracle CTS.

(iii) It is proposed that the CTS will contain between 247 and 347 residential apartments. This PDS only relates to the residential apartments.

(b) It is proposed that the Body Corporate for the CTS will enter into a Caretaking and Letting Agreement with the Operator.

(c) Under the terms of the Caretaking and Letting Agreement the caretaker is required to maintain the

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17 Reasons at [102].

common property of the CTS and is also entitled to conduct on-site letting activities, which it may do itself or through a Manager it engages. It is these on-site letting activities which, in effect, comprise the management rights scheme referred to in this PDS.

(d) The Operator will issue a further Product Disclosure Statement (called an *Operator PDS*) in regard to the management rights scheme (known as the *OracleMR Scheme*) it intends to operate and give to Apartment Owners an Appointment for Apartment Owners' consideration.

…

9. Property to be owned or occupied by the Operator to allow it to conduct the Oracle MR Scheme

The Operator will own or have the right to occupy an on-site reception/office area which will allow it to operate the Oracle MR Scheme. It may also have certain rights over part of the common property of the CTS, for example, rights to erect signage. These rights will be outlined in the proposed community management statement contained in the BCCM Disclosure statement and the Caretaking and Letting Agreement."

[22] The finding that the Developer Product Disclosure Statement "was not incorporated [into the contract] by the terms of the contract, and …did not form part of the contract by virtue of s 215" was unchallenged.

[23] The next part of the bundle of documents provided by the respondent to the appellants commences with a front sheet, headed "Disclosure Statement", similar in wording and layout to the front sheet of the Developer Product Disclosure Statement.

[24] The next page was an index which provided:

"Index of documents contained in this Disclosure Statement

1. Information About The Development
2. Body Corporate and Community Management Act Disclosure Statement
3. PAMD Form 27c

Annexure 1

4. Budgets and Related Financial Information

Annexure 2

5. Body Corporate Manager's Agreement
6. Caretaking & Letting Agreement
7. Community Management Statement

8. Building Management Statement
9. Lease of Roof
10. Facility Sharing Agreement (burdening adjoining residential scheme)
11. Facility Sharing Agreement (benefiting adjoining residential scheme)
12. Facility Sharing Agreement (benefiting adjoining retail lot)
13. Electricity Agreement"

[25] The index was followed by a one page document headed "Information about the Development". The appellants placed substantial reliance on this document, which, for convenience, I will refer to as the "Information Page". It provided, inter alia:

> "• The information contained on this page is only intended to give buyers a general outline of the development being undertaken by the Seller (***Development***).
>
> • The Seller intends to construct a residential and retail development.
>
> • Land on which the Development will be constructed is proposed to be initially subdivided to create 2 lots (being a residential lot and a retail lot). The residential component, to be known as The Oracle, will be further subdivided by a building format plan to create a community titles scheme in respect of which there will be one body corporate. The Seller has not yet decided whether the retail component of the Development will be subdivided to create a community titles scheme. The retail component may also, at the Seller's discretion, be subdivided to create land from which another residential community titles scheme will be derived."

[26] After the Information Page came a document which the respondent claimed was the Disclosure Statement provided under the Act. It was headed "Disclosure Statement (s 213 of the [Act] and s 21 of the Land Sales Act 1984)". Its first page was numbered 2 and its last, a signing page, numbered 6, contained an acknowledgment that the "Buyer received this statement before entering into the Contract". This document, which also had on the top of each of its four pages, "Disclosure Statement" and "Allens Arthur Robinson", relevantly provided:

> "**1. Lot Details:** The proposed lot being purchased is lot no. … (***Lot***) in The Oracle development as identified on the location plan contained in the contract of sale (***Contract***) which accompanies this Disclosure Statement."

[27] The numbered pages of the Disclosure Statement were followed by a "Selling Agent's Disclosure to Buyer" form of three pages. The next document, headed "Disclosure Statement – Annexure 1 – Budgets and Related Financial Information"

was numbered 10 at the foot of the page. There then followed pages numbered 11 to 21 inclusive consisting of: a document headed "Body Corporate for The Oracle – Administrative Fund Budget"; a document headed "Body Corporate for The Oracle – Sinking Fund Budget"; a document headed "Body Corporate for The Oracle – Schedule of Lot Entitlements (Stage 1)" and a similar document for Stage 2. The next document, on page 22, was headed "Disclosure Statement"; underneath that were the further headings in bold type:

> **Annexure 2**
>
> **Body Corporate Manager and Service Contract Engagements and Letting Agent Authorisations and Other Agreements**
>
> This Annexure contains the following:
>
> - Body Corporate Manager's Agreement
> - Caretaking & Letting Agreement
> - Building Management Statement
> - Community Management Statement
> - Lease of Roof
> - Facility Sharing Agreement (burdening adjoining residential scheme)
> - Facility Sharing Agreement (benefiting adjoining residential scheme)
> - Facility Sharing Agreement (benefiting adjoining retail lot)
> - Electricity Agreement

Relevant contractual principles

[28] The principles relevant to the determination of whether the anticipatory breach of the contractual term found by the primary judge entitled the appellants to terminate the contracts were discussed in the following passage from the reasons of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW)*[18] quoted with approval by Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*:[19]

> The nature of the promise broken is one of the most important of the matters [ie, the matters which need to be considered in considering the legal consequences flowing from a breach of contract]. If it is a condition that is broken, ie, an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option either to treat himself as discharged from the contract and to recover damages for loss of the contract, or else to keep the contract on foot and recover damages for the particular breach. If it is a warranty that is broken, ie, a non-essential promise, only the latter alternative is available to the innocent party: in that case he cannot of course obtain damages for loss of the contract."

[29] Jordan CJ then considered the test for identifying whether a term was a condition or a warranty:

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18 (1938) 38 SR (NSW) 632 at 641-642.

19 (2007) 233 CLR 115 at 137.

> "The question whether a term in a contract is a condition or a warranty, ie, an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge. In some cases it is expressly provided that a particular promise is essential to the contract, eg, by a stipulation that it is the basis or of the essence of the contract; but in the absence of express provision the question is one of construction for the Court, when once the terms of contract have been ascertained."

[30] A little later in their reasons, their Honours further considered the approach to be taken in determining whether a term was such that any breach of it entitled the innocent party to terminate:[20]

> "It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination."

[31] Dealing with breaches of intermediate terms, their Honours said:[21]

> "Breaches of this kind are sometimes described as 'going to the root of the contract', a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term; the kind and degree of the breach, and the consequences of the breach for the other party. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to damages, the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract.
>
> A judgment that a breach of a term goes to the root of a contract, being, to use the language of Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd*, 'such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract', rests primarily upon a construction of the contract. Buckley LJ attached importance to the consequences of the breach and the fairness of holding an injured party to the contract and leaving him to his remedy in damages. These, however,

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20 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 138.

21 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 140.

> are matters to be considered after construing the agreement the parties have made. A judgment as to the seriousness of the breach, and the adequacy of damages as a remedy, is made after considering the benefit to which the injured party is entitled under the contract."

Consideration

[32] In support of the findings identified in paragraphs [11] and [12] above, the primary judge observed that any assessment of the consequences of Tower 1 not being known as "*The Oracle*" would need to have regard to:

- "the provision in the relevant documents about the conduct of the letting business";
- the ability of the letting agent to promote its own brand and use its own sign on Tower 1;
- the absence of a promise to promote *The Oracle* name or even to maintain its use.[22]

[33] Elsewhere, the primary judge found that:

- the apartment contracted for was in a tower with an on-site letting agent who could conduct the business of letting and provide services to residents and their guests;[23]
- no contractual provision indicated that Tower 1 was going to be occupied predominantly by owner-occupiers;[24]
- there was no evidence that the value of an apartment would fluctuate any more if the letting business was conducted by Peppers as opposed to any other manager;[25] and
- it was not established that any apartment was of lesser value in consequence of the appointment of Peppers, the conduct of Peppers or the Tower's branding as *Peppers Broadbeach*.[26]

[34] As the respondent submitted, the name *The Oracle* was not pleaded to have, and was found not to have, any content or significance independent of the subject matter of the contracts. There was no suggestion in the evidence which the primary judge accepted that *The Oracle* was a name which carried with it any particular attraction for purchasers or that the failure to use it exclusively or predominantly to identify Tower 1 would result in any detriment to the appellants.

[35] There is little, if anything, in the primary judge's findings which would support the finding of a contractual intention that a term that Tower 1 and/or the development be known as *The Oracle* was essential or one which would give rise to a right of termination in the event of a sufficiently serious breach.

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22 Reasons [213].
23 Reasons [228].
24 Reasons [231].
25 Reasons [232].
26 Reasons [233].

[36] The findings, which with respect were justified on the evidence, support the contrary conclusion. The mere fact that a development is given a name and that name is used in promotional and contractual documentation says little, if anything, about whether there is to be found in the contract an implied promise that the name will be used in respect of the completed building. Developments such as *The Oracle* are invariably given a name by the developer for the purposes of identification in marketing. If the name had commercial significance, for example signifying an association with a nationally or internationally recognised hotel or apartment or resort brand, one would expect to see provisions in contracts for the sale of apartments in the development relating to rights in respect of the retention and use of the name.

[37] The respondent argued that the reference to *The Oracle* in the contractual documents merely assisted the identification of the physical property to be sold and purchased. I accept that submission. At the time of contract, Tower 1 had not been constructed and the apartments were being marketed as apartments in Tower 1 of a development known as *The Oracle*. The Community Titles Scheme was to have the name "The Oracle Community Titles Scheme" with the relevant scheme number added. The references in the contractual documents to *The Oracle* were accurate and assisted in identifying the property, albeit peripherally, as a more precise identification was effected by the proposed lot number and by the "Location Plan" documents.

[38] It was apparent from the contractual documents, and in particular clause 3 of the Conditions of Sale, that the final form of the overall development was subject to change and that there might be significant changes even with respect to Tower 1: a possible change of name of the Community Titles Scheme was flagged.

[39] Putting aside for the moment the effect of any warranty deemed to exist by s 216 of the Act, there is little support for the conclusion that, in addition to the role played by the Oracle name in identifying the apartments to be sold and purchased, there was also a promise by the vendor that Tower 1 be known or described as *The Oracle* at the date of completion. If such a promise existed, it needed to be inferred and the inference, if it could be drawn, was far from obvious.

[40] The existence of an obvious commercial explanation for the references to *The Oracle* in the contractual documents is an impediment to the drawing of any such inference. However, there are significant indications in the contractual documents which are inconsistent with an intention that there be any such promise. One of the most obvious of these is the absence of a promise to promote, maintain or even use the name on or in connection with, Tower 1. There is no provision in the contracts which requires the use of *The Oracle* on signage, documents or anything else. There is, however, recognition that a letting agent may be engaged[27] and that a lease of part of the common property may be granted to the respondent or its nominee. Significantly, there are no restrictions in respect of the name under which a letting agent may carry on business and, as the respondent pointed out, it was always evident that any manager of the building would be a large corporate operator. Such an entity would be likely to trade under a nationally recognised name which it would use in relation to its business conducted at Tower 1.

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[27] Clause 11.1.

[41] The argument that the change of name from *The Oracle* to *Peppers Broadbeach* was a step too far is, in essence, no more than an assertion: an assertion which ignores the considerations just discussed. Accordingly, none of grounds 1, 2 and 3 was made out.

[42] For these reasons and for the reasons given below, I am unable to accept that the term found by the primary judge was either a condition or a warranty. There is nothing to indicate from "the general nature of the contract considered as a whole, or from some particular term or terms, that the promise [in such a term, assuming that there was one] is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise".[28]

[43] Assuming a breach of the term found to exist by the primary judge, it was not one which deprived the purchaser "of a substantial part of the benefit to which he is entitled under the contract".[29] It is of relevance in this regard that the development continued to retain and use *The Oracle* name. The primary judge found:[30]

> "There are many signs and icons throughout the general precinct that refer to The Oracle, Oracle Boulevard or a particular part of the development such as Oracle North, Oracle South, Oracle East or Oracle West…
>
> There are Oracle logos in the paving outside the reception of each tower. Oracle logos are built into glass as a safety feature. Oracle logos also appear in corridors and rooms within the towers."

The Information Page and the alleged statutory warranty

[44] I have thus far not considered the consequences of the primary judge's findings that the Information Page formed part of the Disclosure Statement or was "material accompanying" it and thus formed part of the provisions of the contract by operation of s 215 of the Act. The respondent challenged that finding in a Notice of Contention.

[45] The respondent argued that the Information Page, although bound up with the Disclosure Statement, was not part of the Disclosure Statement and did not relevantly accompany it. It was submitted also that to give literal meaning to the provisions of s 215(1) of the Act would lead to absurdity. For example, if documents which did not relate to the contract were included inadvertently in the envelope with the Disclosure Statement, statements in the irrelevant material would be treated as warranties. The way around this problem, it was submitted, was to read the reference to "any material accompanying the disclosure statement" as referring only to material of the type required to be contained in a disclosure statement under s 213 of the Act or to the material which the Disclosure Statement "must be accompanied by" under s 213(2)(e).

[46] As s 215 and s 216 of the Act relevantly provide:

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28 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 137.

29 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 140.

30 Reasons at [143] and [144].

> "**215 Statements and information sheet form part of contract**
>
> (1) The disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract.
>
> (2) The information sheet does not form part of the provisions of the contract.
>
> **216 Buyer may rely on information**
>
> The buyer may rely on information in the disclosure statement and each further statement as if the seller had warranted its accuracy."[31]

[47] Section 213 of the Act makes provision for the giving by a "seller" to a "buyer" of a proposed lot in a community titles scheme a disclosure statement before a contract for the sale of such a lot is entered into. Sub-section (2) of s 213 contains a list of matters which "must" be stated or included in the disclosure statement. Section 213(2)(e) requires that the disclosure statement "must be accompanied by" the proposed community management statement and, if the proposed scheme is to be a subsidiary scheme, a community management statement of "each scheme of which the proposed subsidiary scheme is proposed to be a subsidiary". Section 213(2)(f) requires the disclosure statement to "identify the regulation module proposed to apply to the scheme". The disclosure statement "must be signed by the seller or a person authorised by the seller"[32] and "must be substantially complete".[33]

[48] I accept that s 215(1) should not be construed so as to produce an absurd result. Like any other words in a statute, the words "any material accompanying the disclosure statement" take their colour from their context and from the evident purpose they were intended to achieve.

[49] The *Shorter Oxford English Dictionary* defines accompany as:

> "1. To add or conjoin to …; to send (or give) with the addition of …
>
> 2. To keep company with… to combine."

[50] Whether, for the purposes of s 215, any material accompanies a disclosure statement will normally depend, not only on physical proximity and the nature and degree of attachment or annexation, but the nature of the additional material. Plainly, the Legislature did not intend that the seller warrant the accuracy of statements in material which did not relate in any way to the contract; for example a sales brochure for another development.

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31 *Body Corporate and Community Management Act* 1997, reprint 3D as in force 15 March 2006.

32 Section 213(3).

33 Section 213(4).

[51] The respondent's reading down of "any material accompanying the disclosure statement" has the advantage of certainty and simplicity but, in my view, provides a far from obvious construction of the words "any material", which are general and all encompassing in nature. Also, it may be thought that those words are not particularly apt to describe either any material accompanying the disclosure statement of a kind required to be provided under s 213(2) or the proposed community management statement required to accompany the disclosure statement by s 213(2)(e).

[52] It is unnecessary for present purposes, and perhaps undesirable, to attempt any fuller exploration of what may constitute "material accompanying". Whether, in any particular case, the material comes within the description needs to be determined by reference to the facts or circumstances of that case. Also, it does not appear to me that the outcome of this appeal turns on the resolution of the questions now under consideration.

[53] Here, not only was the Information Page bound up with the three page Disclosure Statement, it was paginated as part of it, followed and was listed in an index headed "Index of documents contained in this Disclosure Statement" which was preceded by a "Disclosure Statement" front sheet. These considerations seem to me to overwhelm the significance of the heading of "Disclosure Statement" which commences at page 2 of the collocation of documents and the description in the index of the document as "Body Corporate and Community Management Act Disclosure Statement". The fact that the pagination extends to page 22 and that the paginated documents comprise two annexures each headed "Disclosure Statement" is also relevant. Viewed objectively, as it must be, the Disclosure Statement provided by the respondent included the cover page, the index and the Information Page. I do not accept the argument that the "Disclosure Statement" is limited to those parts of a document provided by a vendor as a disclosure statement which met the requirements of s 213. That section proscribes matters which must be included in a disclosure statement. It does not purport to otherwise confine the content of such documents.

[54] For the above reasons, I conclude that the Information Page was part of the Disclosure Statement. As the appellants submitted, the effect of s 215(1) of the Act was to make any statement in the Information Page "part of the provisions of the contract". That being so, the Information Page could not be read and understood in isolation from the provisions of the contract or, for that matter, as divorced from the balance of the Disclosure Statement, all of which formed part of the provisions of the contract.

[55] When the critical words in the Information Page, "The residential component, to be known as The Oracle", are considered in their context, it is doubtful that they can mean anything more than that the seller's present intention, subject to rights which may be exercised under the contract, the Caretaking and Letting Agreement, or the lease, is that the residential component will be known as "The Oracle".

[56] These words are not promissory in nature. If they were intended to be promissory, or even to provide a representation as to a state of affairs which would exist at settlement or continue beyond that, the terminology would have been quite different. More precise language would have been used in respect of matters such as rights to names and logos, their continued use and the nature and location of signage.

The brand name argument

[57] The appellants argued that the primary judge:

- failed to properly consider and characterise the effect of a change of name or brand on the value of the lots; and
- failed to consider the effect of "indexation" of the value of the apartments to the Pepper's brand generally.

[58] The argument, at best, has a marginal bearing on the nature of the term found to exist by the primary judge and on the appellants' rights in the event of breach or repudiation and is unsustainable.

[59] The primary judge's relevant findings are in paragraphs [224], [232], [233], [234], [235] and [237] of the reasons. Paragraph [232], in particular, deals with the impact of a deterioration in the Pepper's brand generally. The primary judge found, with respect correctly, that the point that the apartments may fluctuate in value "in line with the value of the Pepper's brand and/or the *Peppers Broadbeach* brand… seems to go [nowhere]". His Honour's finding that there is "no evidence that the value of an apartment would fluctuate any more if the letting business was conducted by Peppers as opposed to any other manager" is unchallenged and the impact of changes in fortune of the Pepper's brand cannot be considered in isolation from its business in respect of Tower 1. It is only whilst that business continues that the Pepper's name will have any bearing on the value of the apartments in Tower 1.

[60] The respondent submitted, accurately, that there is no evidence which required the primary judge to make findings contrary to those under consideration.

[61] But even if the statutory warranty is as found by the primary judge, it is not a contractual provision which is essential or which would give rise to a right of termination in the event of a sufficiently serious breach. Ample justification for that conclusion is to be found in paragraphs [32] – [40] and [56] above. It is of particular significance that the warranty is not to be found in the contract proper, but in a document which was plainly not intended by the parties to have contractual force. The Information Page expressly stated that it was intended to provide only "a general outline" of the development. To the extent that there is conflict or inconsistency between the Information Page on the one hand and the contract, the Disclosure Statement and the documents which expressly form part of the Disclosure Statement on the other, it may be readily inferred that the intention of the parties was that the latter documents would prevail over the former. For the above reasons, grounds 1, 2 and 3 of the Grounds of Appeal have not been made out.

Ground 4

[62] There was no issue on the appeals concerning the content of the pleadings or the primary judge's findings in that regard and, consequently, ground 4 ceased to have relevance.

Conclusion

[63] For the above reasons, I would order that the appeals be dismissed and that the appellants' pay the respondent's costs of the appeals, including reserved costs if

any, on the indemnity basis. Clause 7.3 of the Terms of Contract provides that "The Seller is entitled to damages for any loss which it suffers as a result of the Buyer's default, including legal costs on a full indemnity basis". It was not argued that this provision did not apply to the costs of the appeal.

[64] **MARGARET WILSON J:** I agree with the orders proposed by Muir JA and with his Honour's reasons for judgment.