SUPREME COURT OF QUEENSLAND

CITATION:	*Restoration Island Pty Ltd v Longboat Investments Pty Ltd & Anor* [2012] QSC 208
PARTIES:	**RESTORATION ISLAND PTY LTD (ACN 010 160 755)** (plaintiff) **v** **LONGBOAT INVESTMENTS PTY LIMITED (ACN 062 489 301)** (first defendant) **DAVID GILRONAN GLASHEEN** (second defendant)
FILE NO/S:	549 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	9 August 2012
DELIVERED AT:	Cairns
HEARING DATE:	26 & 27 March 2012 and 4, 5, 6 & 7 June 2012
JUDGE:	Henry J
ORDER:	**1. The plaintiff recover from the defendants possession of the land known as Special Lease No. 43/50238 of Lot 4 on Crown Plan WMT63 in the County of Weymouth, Parish of Weymouth on Restoration Island, North Queensland.** **2. The counterclaim is dismissed.** **3. I will hear the parties as to costs.**
CATCHWORDS:	CONTRACT – BREACH – where Heads of Agreement were entered into by parties – where first defendant was to develop a resort – where the first defendant was to use its reasonable endeavours to comply with the development schedule – whether there was an implied term that building approval would be obtained within a reasonable time – where building approval was not obtained and where development did not progress past a planning and preparation stage – whether the plaintiff could terminate the agreement LEASES – TERMINATION – where the plaintiff subleased the land on which the development was to occur to the first

defendant – where the sublease contained a clause that the sublease would automatically terminate if the Heads of Agreement was terminated – whether this had occurred – alternatively, whether the sublease was never effective and enforceable where it had not been registered as required

Corporations Act 2001 (Cth) ss 232, 233, 234.
Land Act 1994 (Qld) ss 301, 332, 335(1).
Local Government (Planning and Environment) Act 1990 (Qld), s 4.13.

Legione v Hateley (1983) 152 CLR 406.
Masters v Cameron (1954) 91 CLR 353.
Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315.
Wayde v NSW Rugby League (1985) 180 CLR 459

COUNSEL: DP Morzone on behalf of the plaintiff
DG Glasheen on behalf of the first defendant and himself

SOLICITORS: Devenish Law Pty Ltd on behalf of the plaintiff
DG Glasheen on behalf of the first defendant and himself

[1] The plaintiff seeks recovery of possession of the land known as Special Lease No. 43/50238 of Lot 4 on Crown Plan WMT63 in the County of Weymouth, Parish of Weymouth ("the land").

[2] That land is located on Restoration Island[1] in Far North Queensland. It is approximately 15.3 ha in size and occupies about one third of the western side of the island. The plaintiff is the registered lessee of the land under a 50 year lease granted for Business (Tourist Resort and Commercial Fishing) purposes. The lease commenced on 1 March 1989.

The relationship between the parties

[3] The second defendant, Longboat Investments Pty Ltd ("Longboat"), is a minority shareholder in the plaintiff. The second defendant, Mr Glasheen, is the director of Longboat. He apparently acted as an alternate director of the plaintiff on one occasion.

[4] On 22 February 1994, Heads of Agreement were entered into between the plaintiff and Longboat and three directors of the plaintiff, Colin Lindsay, Dewar Wilson Goode and Bruce John Hattam. That Heads of Agreement provided for the development of a resort on the land.

[5] Subsequently, on 14 October 1996 the plaintiff subleased the land to Longboat for a term to 27 February 2039.[2]

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1 So named by Captain Bligh when, during his epic voyage subsequent to the mutiny on the Bounty, he there made landfall on the anniversary of the restoration of King Charles II.

2 Second Further Amended Statement of Claim (Statement of Claim) [6], [14](g); Second Further Amended Defence and Counterclaim (Defence and Counter-Claim) [1] & [10]; Ex 2, doc 6, (see Recital clause B and clauses 1 & 2 of the sublease).

The Heads of Agreement

[6] Clause 3 of the Heads of Agreement, Obligations of the Developer, provided:

> "3.1 The Developer shall use its reasonable endeavours to comply with the Development Schedule.
>
> 3.2 Notwithstanding the provisions of Clause 3.1 hereof the Developer shall not be responsible for delays in complying with the Development Schedule due to acts of God, strikes, decisions of Local, State or Federal Governments, Aboriginal or other land title claims, or other matters beyond the control of the Developer; and accordingly the Owners and Shareholders agree to permit such reasonable extensions of time and adjustment of costs in the Development Schedule as are necessary to allow for such occurrences.
>
> 3.3 The Developer may vary the Development Schedule subject to the receipt of a written request from the Owner provided that the Developer shall form an estimate of the time and cost involved in such variation and these Heads of Agreement and the Development Schedule will be varied accordingly. Should the Developer not accept variation of the Development Schedule the Developer may terminate these Heads of Agreement without further notice.
>
> ..."

[7] Clause 7 dealt with termination. It provided:

> "7.1 These Heads of Agreement may be terminated by any party hereto at any time upon the happening of any of the following events:
>
> ...
>
> (e) by any Party hereto upon written notice to the others of a breach or non observance of any one or more of the Terms and Conditions set out in these Heads of Agreement that is of a material nature and likely to have a materially adverse effect upon the development of Restoration Island. If such notice is given the party or parties receiving such notice shall have 30 days within which to cure, if capable of cure, the specified defect before these Heads of Agreement may be terminated and, when appropriate, the development schedule shall be adjusted accordingly.
>
> ..."

[8] Clause 8.1 provided that:

> "8.1 These Heads of Agreement may only be varied or replaced by a document in writing duly executed by the parties."

[9] Annexure 1 of the Heads of Agreement was the Development Schedule ("the schedule"). The schedule included some dates that had already passed by the time the Heads of Agreement was entered into.

Facts

[10] It was not until February 1996 that Longboat made an application for development approval. The Cook Shire Council approved that application in part on 20 August 1996.[3] A condition of the approval was:

> "30. A contribution of $11,000.00... is to be provided... to enable Council to construct facilities at the embarkation point at Portland Roads for the convenience of resort guests during transit to the island..."

[11] There was a submitter appeal to the Planning and Environment Court and Longboat appeared as a respondent by election. That appeal was dismissed on 9 February 1998 following a trial.[4]

[12] By 1 March 2000 Longboat still had not obtained Building Approval. In response to this failure, a letter was sent from the plaintiff (signed by Colin Lindsay, Bruce Hattam and Dewar Goode as directors) to Longboat.[5] It stated in part:

> "We have previously expressed to you on a number of occasions our concern that your company as developer has not performed its' obligations under the Agreement in a timely, expedient and proper manner.
>
> We confirm our recent advice that a Building Application (being item 7. [i]n the Development schedule attached to the Agreement) has not been lodged in accordance with the timetable set out in the Development Schedule. There has been no extension of the timetable and accordingly your company is in material breach. If that breach is not rectified it will have a material adverse effect on the development of Restoration Island.
>
> We therefore give you thirty (30) days notice pursuant to Clause 7.1 (e) of the Agreement to cure the defect, and of the defect is not so cured the Agreement will terminate at the expiration of that period."

[13] In reply, Ian Curtis, a director of Longboat sent a facsimile to Colin Lindsay on 20 March 2000. A letter was attached to that facsimile, addressed to the directors of Restoration Island Pty Ltd:[6]

> "Contrary to your assertions, there have been extensions of time granted, namely:

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3 Ex 2, doc 5.
4 See Ex 3, the written reasons for judgment.
5 Ex 2, doc 15.
6 Ex 2, doc 16.

- For the preparation of a comprehensive environmental impact study involving eight private consultants;

- To defend an appeal by the Lockhart River Aboriginal Community in the planning and environment court, and a two day hearing in Brisbane...

You are also aware of the fact that there is a still unsettled native title claim over the island, that was lodged shortly after we had succeeded in having the approval upheld by the courts...

Accordingly, we reject your notice to remedy the breach..."

[14] Mr Lindsay replied in a facsimile dated 20 March 2000.[7] He advised, "Bruce & I concur that our position remains the same as regards termination". That prompted another letter from Ian Curtis on behalf of Longboat dated 21 March 2000.[8] It stated therein:

> "I think there is some confusion here...Payment of council contributions for the town planning consent is implied, however, normally does not take place until lodgement of the BA."

[15] On 10 April 2000 a letter was sent from Colin Lindsay on behalf of the plaintiff to Hans Andzesen on behalf of Longboat.[9] That letter was headed "Cancellation of Heads of Agreement" and stated:

> "As I have had no response to the Notice of Cancellation faxed to you on 6 March 2000 the Heads of Agreement and Sub-Lease are now cancelled, however there are a number of matters still to be resolved, namely:
>
> ...
>
> 2. OCCUPATION of RESTORATION ISLAND
>
> Could you please arrange for Vacant possession to be effected by 10 May 2000 and ensure that all plant and equipment owned by Restoration Island Pty Ltd is in similar condition to when you took possession, and any plant and equipment owned by Longboat Pty Ltd is removed from the island.
>
> ..."

[16] Ian Curtis sent a letter on behalf of Longboat on 11 April 2000 to Colin Lindsay purporting to reject the cancellation notice.[10]

[17] There was subsequent correspondence between the parties, including requests for Longboat and Mr Glasheen to provide vacant possession of the land on 14 June 2008[11] and 27 October 2008.[12]

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7 Ex 2, doc 17.
8 Ex 2, doc 18.
9 Ex 2, doc 19.
10 Ex 2, doc 20.

[18] Nonetheless, Longboat and Mr Glasheen remained on the land and this occupancy continues today.

Issues

[19] There are a number of issues which must be determined in relation to the Heads of Agreement. These are:

1. whether Longboat was required to comply with the schedule, including by obtaining building approval in a reasonable time after 22 February 1994 or whether the Heads of Agreement had been varied orally;

2. whether the Heads of Agreement was breached;

3. whether the Heads of Agreement was terminated.

Compliance with the schedule

[20] Clause 3.1 of the Heads of Agreement required Longboat to use its reasonable endeavours to comply with the schedule. Important here are event numbers 7 and 8 in the schedule. Event 7, scheduled for 31 January 1995 was: "Full working drawings complete, lodge BA". The acronym "BA" stands for "Building Approval". Event 8, scheduled for 30 April 1995, three months after event 7, was: "75% commitment, BA issues construction commences". In short the schedule contemplated the building approval would be issued within 3 months of it being lodged.

[21] The plaintiff claims that further to this there was an implied term that Longboat would obtain a building approval within a reasonable period after 22 February 1994, which was the date the Heads of Agreement was entered into.

[22] Such an implication is consistent with the general principle that where there is no express provision as to when an act required by the terms of a contract is to be performed then, in the absence of indications to the contrary, it is to be performed within a reasonable time.[13] The implied term is so obvious as to go without saying and is obviously necessary to give business efficacy to the agreement.[14] Longboat was the developer. It was for it to obtain development and building approvals. Its performance of those obligations were critical to the plaintiff's performance of its own obligations under the Special Lease in that it had to make improvements to the island to the value of $200,000 within five years.[15] It would be absurd against that background to construe the agreement as allowing the indefinite postponement of the obtaining of building approval.[16] It would also be inconsistent with the words of the Heads of Agreement.

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11 Ex 2, doc 23.

12 Ex 2, doc 25.

13 See, eg, *York Air Conditioning and Refrigeration (A/sia.) v The Commonwealth* (1949) 80 CLR 11 at 63; *Perri v Coolangatta Investments* (1982) 149 CLR 537 at 543.

14 Conditions identified in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347 as relevant to the grounding of an implied term.

15 Ex 2, doc 2 & 9.

16 See *Nashvying P/L v Giacomi* [2007] QCA 454 at [42] where Muir J discussed the curious result which would flow from such a construction in the similar circumstances of that case.

[23] Under the Heads of Agreement, signed on 22 February 1994, Longboat was required by clause 3.1 to use its "reasonable endeavours" to comply with a schedule under which the building approval was to be lodged by 31 January 1995 and issued by 30 April 1995. This implies Longboat had an obligation to obtain the building approval. The requirement of reasonable endeavour coupled with the scheduled time frame for the issue of the building approval makes it obvious that the fulfilment of that obligation was to be pursued in a timely manner.[17] While clause 3.2 of the agreement excused Longboat from responsibility for delays in complying due, inter alia, to decisions of governments and other matters beyond its control, it also went on to require the owner and shareholders to agree to permit such "reasonable extensions" of time as are necessary to allow for such occurrences. The effect of clause 3.2 is not to absolve Longboat of its effectively ongoing responsibility to use its reasonable endeavours to comply with the schedule. Were an extension of time to be given under clause 3.2 the assessment of what reasonable extension of time is necessary would inevitably be premised on the assumption Longboat would continue to use its reasonable endeavours in seeking the issue of the building approval as soon as possible, notwithstanding that the date in the schedule has not been met.

[24] The implication that Longboat would obtain building approval within a reasonable period after the entry into the Heads of Agreement therefore flows from the words of the agreement. I find there was such an implied term. The dates in the schedule and the impact of any circumstances of the kind contemplated in clause 3.2 would be relevant to the assessment of what length of time would be "reasonable" for the purposes of the implied term.

Oral variation

[25] The defendants allege that the Heads of Agreement was varied orally in or about March 1998 in a conversation between Colin Lindsay representing the plaintiff and Mr Glasheen representing Longboat. The effect of that oral variation alleged in paragraph 4(h) of the Second Further Defence and Counter-Claim was that the construction of the resort on the land, as embodied in the schedule, was deferred indefinitely. This oral variation, on the defendants' case, also had the effect of requiring Longboat to complete preparatory works on the land, including the clearing of rubbish.

[26] Mr Glasheen's evidence did not support the existence of the oral variation as pleaded. The following interchange occurred in cross-examination:

> "MR MOROZONE: Now, when you were asking questions of Mr Lindsay you indicated you didn't know where 4(h) came from; that is, some agreement, as you can read there, "that the construction of the resort development as embodied in the development approval being deferred indefinitely." Do you adhere to your view that you don't know where 4(h) came from? -- There was - we had an oral agreement but it was in relation to the development clause and - an offset agreement. The word "indefinitely", I - that word I've - I've

[17] I do not overlook the fact that some of the dates for events earlier in the schedule had passed by the time the agreement was signed. While that may be relevant to assessing reasonableness it does not detract from the implication of timeliness.

seen it, I've seen twice now and I've never - I don't know where that came from, but I think that came from the lawyers.

Yes. You agree with me that it was never agreed in or about March 1998 - or anywhere, any time - that the construction of the resort "as embodied in the development approval be deferred indefinitely"? -- No.

And coupled with that same time, there was no agreement in relation to some "preparatory works, including clearing of rubbish" as part of some overall agreement about the deferral of the construction? -- The, the, the - it's all, it's all sort of - we had no construction underway. We had, we had - we've been to Court, at this point we've been to the Land and Environment Court, it's ruled in our favour. We have a – we have a development - or if, if we deemed it to be the right development we could've proceeded, subject to finance, subject to a third party equity finance. But it was deemed to be the wrong development. We didn't want to lose the application, hence I've engaged other architects before this date to look at an alternative and smaller idea that we could develop in the future that was more sympathetic and acceptable to the community. Because it-----

But you never reached an agreement with Mr Lindsay or anyone from Restoration Island about an alternative development either? -- It was verbal, we didn't have formal - at this – at this time of the proceedings, as I said the two active people, in terms of what was happening on the island, was Colin Lindsay and myself..."[18]

[27] Mr Lindsay also gave relevant evidence in chief on the matter:

"MR MORZONE: Okay. Mr Lindsay, you're aware in these proceedings that at paragraph 4 subparagraph (h) the defendants say this - if I could ask you to listen - "In or about March 1998 it was orally agreed in a conversation between Colin Lindsay, representing the plaintiff, and David Glasheen, the second defendant representing the first defendant, and the development - that the development by schedule be varied by (1) the construction of the resort development as embodied in the development approval being deferred indefinitely; and (2) the first defendant completing preparatory works including the cleaning of rubbish off the land." Can I ask you first: Do you recall such a conversation? -- No.

Did any conversation occur in your recollection? -- Not with respect to deferring the development.

Mmm-hmm. Had it been contemplated by the plaintiff at any stage that the development ought be deferred? -- No. However, we were aware that there were delays because of the native title - not the native title - the Aboriginal appeal to the DA.

...

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18 T4-88, L10-L48.

> Okay, Do you recall any extension of time to the development schedule being sought and gated -- No.
>
> Nothing written or oral? -- No."[19]

[28] Mr Lindsay later admitted he did recall seeing plans of a varied development layout:

> "SECOND DEFENDANT: Do you recall that I engaged further architects after the Land and Environment Court? It was a clear understanding from the Court, as you - as we - that there is - I wasn't - I didn't attend the Court but the - the reading from the Court and the reaction in the community was not very particularly good. So I - I spoke to you about re-engaging more architects to come up with an alternative plan; do you recall those - that conversation and those plans? -- I do recall that.
>
> Okay. Do you remember - do you recall on or about what date it was? -- No.
>
> Well, it was - here's a letter here for example, Andresen O'Gorman Architects, the 5th of May 1998 - and 19 - yeah, 1998 where they've come up with alternative plans for a - a smaller resort, maintaining the integrity of our development. I think this - the question I guess I ask is do you remember seeing those drawings? -- Yes, I have."[20]

[29] The evidence, at its highest, is that Mr Glasheen spoke to Mr Lindsay about pursuing a different resort development. This falls well short of there being an oral variation.

[30] It appears that the alternative development referred to by Mr Glasheen represented his own personal vision which was not shared by either the plaintiff or Longboat:

> "MR MORZONE: You see, the impression I get from reading the correspondence from Longboat is that your co-directors, Mr Curtis and Mr Adzersen, did not communicate anything of an alternative to the approved development. Do-----? -- There were communications going on. I'm saying the details of those - some people involved I know. They were mainly talking to money people...
>
> I'm not talking about that. I'm talking about the correspondence from your company, from two directors other than you who are talking about the approved development as moving forward. What I'm asking you is: how is it that you can explain that they didn't jump up and down and talk about some agreement that there was some different development, or some deferral of the existing development? -- Well, I just had - personally had a different view which is - which - which really wasn't material because I was only one director out of four. So, regardless of what my thoughts were, it - it wasn't going to - if - if - if I'm the only - if I'm the odd person out, I'm overruled

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19 T1-30,L4-24, T-31, L13-L16.

20 T2-71, L24-L42.

> anyway. So, I always accepted that. I just had - I took the view that this could go on for a lot longer than anticipated.
>
> Your - is it then fair to summarise this; that the alternate proposal, that is the downscaled proposal that was the subject of a document you tendered earlier today, Exhibits 21 and 22 and the plan, they were really your personal ideas and they were never approved by Longboat as being the changed development? Is that fair? -- No. They - they were a personal - I - I paid for that personally, yes.
>
> Okay? -- On the - on - but on the basis of that - that we - depending on - on what happened with - with the finance. And also some of the parties we were talking to were not happy with the - with the potential design because it's got to be an economic thing, and so-----
>
> In that alternative design you've reduced the number of bures from 25 down to 13? -- No. It was - there was a main long house that accommodated I think from memory 10 or 12, I think, and there were - there were bures up to - basically the - the numbers were about half of the total development because there were - there were bures as well which could be grown if necessary, but - but the whole idea was to look at it is a low key - a low key development, a lower level of cost to try to - my - my idea was, as I said, this was a speculative on my part personally, because I was looking for an alternative way to - to get something happening. The big - the big idea was having problems with the investment - with the third party equity people. So - but there was nothing other than the design. It was just - it was just a simplistic punt on my part to say, "Here's an alternative." As I said I - I showed it to Colin Lindsay. He was - he just wanted something to happen on the island and I don't blame him because since 1980, we're not 2012, 32 years and nothing has happened really, you know. So, people get pretty frustrated..."[21]

[31] The documentary evidence tendered at trial is also inconsistent with a finding that there was an oral variation. The correspondence exchanged between the parties includes no references to any change or deferment of the schedule and in fact appears to be written on the understanding that the development was supposed to have progressed.[22]

[32] There was no oral variation.

[33] Furthermore, even if there had been some general conversation consistent with the alleged oral variation, the circumstances of the case were such that it was the not intention of the parties to make a concluded bargain, unless and until they executed a formal contract.[23] Moreover, a finding that there was an oral variation would be precluded given clauses 3.3 and 8.1 of the Heads of Agreement strictly requires any variation to be in writing.

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21 T4-94, L32 – T-95, L41.

22 See Ex 2, doc 11-20.

23 Consistent with the third class of case discussed *Masters v Cameron* (1954) 91 CLR 353 at 360.

Breach

[34] The plaintiff, pursuant to clause 7.1(e), gave Longboat 30 days notice to remedy the failure to obtain building approval by a letter dated 1 March 2000.[24]

[35] At that point in time Longboat had not paid the $11,000 required as a condition of the issuance of Town Planning Consent Approval[25] and further had never lodged a building application or achieved building approval.[26] By this time over 6 years had passed since the signing of the Heads of Agreement and over 5 years had passed since the date identified in the development schedule for the lodging of the building approval.

[36] It appears that it was a deliberate decision on behalf of Longboat to not pay the $11,000 on the basis that once it was paid timeframes in relation to building approval would start to run. In this regard Mr Glasheen stated:

> "MR MORZONE: Just before I take you to that document, have a look at Exhibit 35 for me. That's the letter from Stafford Moor Nieland of 14 January 2000. That is a letter from Ian Curtis in his capacity as the director of Longboat Investments; is that right? -- Yes.
>
> In there Mr Curtis suggests on behalf of Longboat that there are priorities; the second dot point in the priorities is council contributions to secure a town planning permit. Do you agree with that? -- Council fees for the BA?
>
> Yes? -- That one? Yes.
>
> No, the town planning permit. You understood that? That was a priority as of January 2000? -- Well, no, it wasn't because the - the - our feeling was - was that the minute we - we sent - it was 11,000 in fact, the contribution asked for. The minute we actually sent that cheque to the council our advice was the BA will be issued, a consensual development consent. It was - we had a development - consent to a development by - by complying by sending the 10,000. So the offer was made by the Cook Shire to us. For us to accept that offer we had to pay - by paying 11,000 the meter is on for the - the building approval. And that's why we didn't do it.
>
> So-----? -- To protect - to protect the build - to - to protect the development approval."[27]

[37] However, Longboat did not appreciate the importance of paying that $11,000. That amount was a security under the *Local Government (Planning and Environment) Act* 1990 (Qld) (preserved by the repealing act, *Integrated Planning Act* 1997 (Qld)), s 4.13(6). Under s 4.13(6A) where such a security is required and it is not

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24 Ex 2, doc 15.
25 See Ex 2, doc 7.
26 See Statement of Claim [9A]; Defence and Counter-Claim [3A].
27 T4-91,L20-L46.

lodged within two years of the date of the local government's decision or the Court's order, the decision in respect of the application is void.

[38] Here, the time runs from 9 February 1998, the date the Planning and Environment Appeal was decided. The $11,000 was therefore required to be paid by 9 February 2000. This was not done and the decision was therefore void. In effect then, by 1 March 2000 Longboat did not even have development approval.

[39] In any event the letter of 1 March 2000 was correct in asserting the building approval had not been lodged. Longboat was plainly in breach of the Heads of Agreement by that time.

[40] It is undisputed that the breach was not remedied by Longboat. Rather, Longboat disputes the effect of the breach on the limited grounds that:

1. the defendant did use its best endeavours up to 31 January 1995 and the alleged oral variation excused further performance;[28]

2. time was at large because of the absence of time being of the essence;[29]

3. the plaintiff was estopped from relying on the breach.[30]

[41] The first of these must fail given my finding that the Heads of Agreement was not varied orally. The development was not deferred indefinitely and as such Longboat's obligations continued past 31 January 1995.

[42] As to the second ground the defendants allege time was not of the essence because the time limit in the schedule had passed at the time the sublease was entered into, no new schedule had been agreed and no notice was given making time of the essence. It was submitted the schedule should be viewed as merely providing indicative dates for various events to occur and it was not essential that the events occurred by those dates. However, as already explained, the obligation on Longboat to use its reasonable endeavours to comply with the schedule did not lapse on the passing of the dates in the schedule. It remained obliged to obtain building approval within a reasonable period of entering into the Heads of Agreement.

[43] Furthermore, clause 7.1 of the Heads of Agreement provided a mechanism for making time of the essence. This is the mechanism that was employed by the plaintiff in sending the letter of 1 March 2000.[31] It follows the second ground must fail.

[44] The final defence to the breach relies on estoppel. It is generally accepted that promissory or equitable estoppel may operate to preclude the enforcement of

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28 Defence and Counter-Claim, [4].

29 Defence and Counter-Claim, [12].

30 Ibid.

31 Despite the fact that 30 days notice was given in this case, it is submitted that under clause 7.1 the plaintiff was entitled to immediately determine the Heads of Agreement as the breach was incapable of cure. This argument is based on the fact that the Town Planning Consent Approval had lapsed by 1 March 2000 because the $11,000 was not paid.

contractual rights and prevent a party from treating the contract in question as terminated for failure to meet an essential time stipulation.[32]

[45] The defendants claim the plaintiff was estopped from relying on the breach as a basis of issuing the demand on 1 March 2000 because of the oral agreement and because the plaintiff knew the defendants had expended funds on defending the Planning and Environment Court appeal and completing work clearing rubbish from the land.

[46] I have already found the oral agreement did not occur.

[47] Defending the Planning and Environment Court appeal and clearing rubbish were endeavours integral to Longboat's role as the developer and implicitly contemplated by clauses 3.1 and 3.2. The former was part of pursuing proper approval and the latter an example of reasonable endeavour in which a developer might engage to facilitate the timely commencement of the construction contemplated by the development schedule. To the extent Mr Glasheen expended such funds or completed such work it is self evident he did so on Longboat's behalf. In short the expenditure and activity relied upon were done pursuant to Longboat's obligations as a developer under the agreement.

[48] In *Legione v Hateley* Mason and Deane JJ identified a number of important questions, the resolution of which will influence the result where estoppel is alleged in a given case:

> "(1) Did the conduct of the vendor contribute to the purchaser's breach? (2) Was the purchaser's breach (a) trivial or slight; and (b) inadvertent and not wilful? (3) What damage of other adverse consequences did the vendor suffer by reason of the purchaser's breach? (4) What is the magnitude of the purchaser's loss and the vendor's gain if the forfeiture is to stand? (5) Is specific performance with or without compensation an adequate safeguard for the vendor?"[33]

[49] The answer to the first two questions is in the negative. It is difficult to comprehend then how the defendants' estoppel argument could succeed.

[50] In the later High Court decision of *Tanwar Enterprises Pty Ltd v Cauchi*[34] the majority warned that the questions identified in *Legione* should be treated with care given they do not deal with the basic issue of whether a party is entitled to relief against forfeiture of the interest of the party under the relevant contract. Nonetheless, it is obviously significant that Longboat's breach went to such a fundamental feature of the agreement and that the plaintiff's conduct did not contribute to that breach.

[51] In this case there was no oral agreement and the expenditure and work undertaken by Longboat were endeavours of the kind implicitly contemplated by clauses 3.1 and 3.2 of the Heads of Agreement. In reality, Longboat purports to avoid the

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32 *Legione v Hateley* (1983) 152 CLR 406 approved in *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315.

33 Ibid at 449.

34 (2003) 217 CLR 315.

consequences of a breach of its fundamental obligation as the developer under the agreement by complaining that it did perform some tasks as the developer.

[52] In the circumstances the defence of estoppel must fail.

Was the Heads of Agreement terminated?

[53] It is undisputed that the breach was not remedied in the 30 days allowed by the plaintiff's letter of 1 March 2000. I therefore find that the Heads of Agreement was terminated by the plaintiff's letter of 10 April 2000 in accordance with clause 7.1(e).[35]

[54] In the course of the trial the defendants, represented by Mr Glasheen in person, pursued a variety of issues that went beyond the issues pleaded. There was particular focus upon the reliability of the records of the plaintiff's internal corporate decision making and the legitimacy of the manner in which the plaintiff's own corporate decision to terminate was reached, notwithstanding that these were not issues raised by the pleadings. In any event the evidence adduced at trial established on the balance of probabilities that the above-mentioned letter of 10 April 2000 was written on behalf of the plaintiff company and effected the legitimately made decision of the plaintiff company to terminate the Heads of Agreement.

The sublease

[55] On 14 October 1996 the plaintiff subleased the land to Longboat for a term from that date to 27 February 2039.[36] This sublease remained on foot as at 1 March 2000.

[56] The plaintiff submits that:

1. the sublease was automatically terminated by the termination of the Heads of Agreement; or alternatively

2. the sublease was ineffective and unenforceable because it was never registered.

Automatic Termination

[57] Clause 13 of the sublease provided:

> "In the event that Heads of Agreement entered into between the Sub-Lessor and the Sub-Lessee Colin Lindsay, Dewar Wilson Goode and Bruce John Hattam dated 22 February 1994 is validly terminated this Sub-lease shall immediately be at an end for all purposes without prejudice to all liabilities accrued by either party up to the date of such termination." (emphasis added)

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35 It is unclear whether that letter's reference to a notice of cancellation faxed on 6 March 2000 is a reference to the means by which the letter dated 1 March 2000 was forwarded but nothing turns on the point. It cannot be doubted there was a failure to remedy the breach.

36 Statement of Claim [6], [14](g); Defence and Counterclaim [1], [10],Ex 2, doc 6 (see Recital clause B and clauses 1 and 2 of the sublease).

[58] The plaintiff submits this clause means that the sublease was terminated on 10 April 2000 (the date the Heads of Agreement was terminated).

[59] That is the obvious consequence of the plain meaning of the clause. The clause makes plain that the continuation of the Heads of Agreement is so important as to be fundamental to the continuation of the sublease.[37] By that clause the parties clearly agreed that the sublease would automatically end on the happening of the valid termination of the Heads of Agreement.

[60] The defendants' pleadings dispute the automatic termination on the basis that no notice was served in accordance with s 124 of the *Property Law Act* 1974 (Qld). However, that section expressly provides that it relates to:

> "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, obligation, condition or agreement (express or implied) in the lease..."

The section has no application to this case because the rights being enforced do not rely upon such a breach of the sublease. Rather they rely on the sublease's straightforward provision for its automatic termination as a consequence of the termination of the heads of agreement.

[61] I find the sublease was automatically terminated as a consequence of the termination of the heads of agreement.

Tenancy at will or sufferance

[62] The plaintiff submits, in the alternative to claiming for possession upon termination of the sublease, that subsequent to 10 April 2000, the nature of the defendants' occupancy was a tenancy at will or alternatively a tenancy at sufferance.

[63] It seems the more appropriate characterisation is that after 10 April 2000 there was a tenancy at sufferance given that the plaintiff did not want the defendants on the land and unsuccessfully requested them to leave.[38] No notice to quit is needed to determine such a tenancy.

[64] In any event the plaintiff has made repeated written requests for vacant possession.[39] The defendants are trespassers on the land.

Effect of not registering the lease

[65] The plaintiffs also claim in the alternative that if the sublease did not automatically determine, the sublease was never effective or enforceable and the defendants have no legal interest in the land.

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37 See *Shevill v Builders Licensing Board* (1982) 149 CLR 620 where the landlord was entitled to terminate on the happening of certain events as set out in the lease.

38 See *March v Neumann* [1945] SASR 167; *Fry v Metzelaar* [1945] VLR 65; *Anderson v Bowles* (1951) 84 CLR 210; *Wheeler v Mercer* [1957] AC 416.

39 Ex 2 doc 19, 23, 25.

[66] The *Land Act* 1994 (Qld) prescribes that a lease under the Act (such as the lease in this case) may only be subleased if the Minister gives written consent.[40] This consent was obtained on 13 September 1996.

[67] However, it is further required that the sublease must be registered with the Department[41] and if that is not completed within six months of the Minister's approval the approval lapses.[42] In this case the sublease was never registered and the approval therefore lapsed. The effect of not registering the sublease is that no legal interest was created.[43]

[68] The defendants claim that the doctrine of estoppel precludes the plaintiff relying on the lack of efficacy of the sublease.

[69] The same principles as were discussed in relation to estoppel in the context of the Heads of Agreement are relevant here. The facts of this case do not disclose any reason why the defendant should be entitled to relief against forfeiture of its interest. It was the failure of Longboat that the sublease was not registered. The *Land Act* clearly sets out the requirement of registration and the effect if that is not complied with.

[70] The fact the plaintiff agreed to the sublease cannot logically ground an estoppel in circumstances where its continuation was predicated upon the continuation of Heads of Agreement. Otherwise, as already discussed there was no oral agreement and the expenditure and work undertaken by Longboat was implicitly contemplated by the Heads of Agreement.

[71] The defence of estoppel must fail.

Counter-claim

[72] Longboat makes a counter-claim for oppression of a minority shareholder pursuant to s 232 of the *Corporations Act* 2001 (Cth).

[73] Longboat has standing to apply under s 232 given that it is a minority shareholder in the plaintiff. Mr Glasheen on the other hand is not a shareholder in the plaintiff and therefore conduct towards him is not relevant.

[74] The pleadings outline the following conduct as being oppressive and or unfairly prejudicial to Longboat:

> "19. The conduct of the plaintiff in:
>
> (a) issuing the letter of 1 March 2000;
>
> (b) purporting to terminate the Heads of Agreement and sub-lease by letter dated 10 April 2000, or in the alternative if the Defence is unsuccessful, terminating the Heads of Agreement; and

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40 Section 332(1)(a).
41 Section 335(1).
42 Section 332(4).
43 Section 301.

(c) issuing these proceedings for possession;

(d) without compensating the First Defendant for monies expended in compliance with the heads of agreement from 31 January 1995 until 10 April 2000 was in the circumstances set out in paragraph 4 of the Defence conduct that was oppressive to and/or unfairly prejudicial to the First Defendant.

20. It was an express term of the Heads of Agreement by clause 5.3 thereof that Dewar Wilson Goode a shareholder in the Plaintiff would not sell or transfer his shares in the Plaintiff without first offering those shares ("Goode's shares") for sale to the First Defendant at a price no greater than that at which they could be sold to any third party ("the first right of refusal").

21. In or about April 2007 Colin Lindsay acquired Goode's shares from the estate of the then deceased Dewar Wilson Goode for $12,500.00.

22. Goode's had not been ordered for sale to the First defendant prior to the said sale taking place.

23. Colin Lindsay, and therefore the Plaintiff, was aware the sale of Goode's shares had been agreed to and completed without compliance with the first right of refusal.

24. The Plaintiff registered the transfer of Goode's shares to Colin Lindsay.

25. The conduct of the plaintiff in registering the transfer of Goode's shares to Colin Lindsay in the circumstances set out in paragraphs 19 through 23 above was conduct that was oppressive to and/or unfairly prejudicial to the First Defendant.

[75] In order for that conduct to be oppressive it must be either contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.[44] It was submitted that these words reflect the concern of the oppression provisions as a composite whole, in which unfairness is a central theme.[45]

[76] The test for unfairness is:

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44 Section 232(1)(d)(e).

45 Relying on *Wayde v NSW Rugby League* (1985) 180 CLR 459; *Thomas v HW Thomas Ltd* (1984) 1 NZLR 686. Also, *Backoffice Investments Pty Ltd v Campbell* (2007) 61 ACSR 144. The conduct will also be caught by s 232 where it is contrary to the interests of the members as a whole however this is not relied on in these proceedings.

> "whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair."[46]

[77] In other words, Longboat must show that the conduct was inequitable or unjust in all of the circumstances.[47]

[78] The evidence at trial does not support a finding that any of the conduct was oppressive and or unfairly prejudicial.

[79] The main complaint appears to relate to the transfer of Dewar Wilson Goode's shares. The allegation in effect is that the shares were supposed to be acquired by the first defendant rather than Mr Lindsay. The allegation is unsustainable.

[80] Article 10 of the plaintiff's articles of association originally provided for rights of pre-emption in favour of the existing shareholders.[48] However the Heads of agreement caused the deletion of article 10 and included inter alia an undertaking of Goode not to divest himself of any share without first unconditionally offering his shares to the first defendant at the option price.[49] Mr Goode unconditionally offered to sell his two shares in the plaintiff to the first defendant in about June 1996.[50] However the first defendant declined the offer.[51] Furthermore, the heads of agreement were duly terminated on 10 April 2000 and the rights of pre-emption fell away in any event. Mr Goode died in 2002. His shares were transferred to his son and were later acquired by Mr Lindsay. [52] By the time of that acquisition the first defendant had long ago declined its option to acquire the shares and, furthermore, the agreement conferring that option had since been terminated.

[81] The defendants' complaint in respect of the shares is therefore misconceived.

[82] The other complaint relates to the termination of the Heads of Agreement and the subsequent enforcement of possession of the land without compensation. It is difficult to identify any oppression and or unfair prejudice on the plaintiff's part.

[83] The defendants' conduct has caused the plaintiff to default in its performance of the condition of the Special Lease from the Crown that it effect improvements on the land in the nature of tourist accommodation, recreational facilities and commercial fishing facilities of a value of not less than $200,000. The first defendant assumed the critical responsibility for developing such improvements in entering into the Heads of Agreement but it breached that agreement. It is not as if it expended significant resources in actually developing the improvements and fell just short of delivering what was bargained for under the agreement. Such expenditure of

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46 *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 approved in *Dynasty Pty Ltd v Coombs* (1995) 59 FCR 122.

47 *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 395.

48 Ex 2, doc 1.

49 Ex 2, doc 3.

50 Ex 1, Admitted Fact 17.

51 Ex 24.

52 It is unclear exactly when the shares were purchased. See, eg, Defence and Counter-Claim [24]; Reply and Answer [24]. Ex 10 contained the record of transfer in the company register but the date is obliterated. The interests were duly registered with the Australian Securities and Investments Commission recording the date of change as 20 June 2004.

resources as did occur on the part of the defendants delivered no windfall gain to the plaintiffs. The development was never materially advanced beyond the preparation and planning stage. The first defendant did not even obtain building approval. Despite the valid termination of the agreement and the automatic termination of the sublease the first and second defendants have wrongly deprived the plaintiff of its asset for over a decade during which time they have enjoyed its benefits. If they expended resources during that time, even if in the hope of eventually advancing a development, it was as an incident of their choice to continue in occupation. Even if the first defendant's prolonged occupancy could be characterised as an incidence of its capacity as a shareholder, such occupation and deprivation of the asset from the plaintiff would constitute an unauthorised dealing with the plaintiff's capital.

[84] In the light of such conduct by the defendants their allegation of oppression or prejudice on the plaintiff's part is truly breathtaking. A commercial bystander would consider the plaintiff behaved entirely reasonably in terminating a contract for development where no such development was proceeding. There was no inequitable or unjust conduct on the part of the plaintiff. Its conduct was not oppressive or unfairly prejudicial.

[85] The counter claim must be dismissed.

Orders

[86] It follows from my earlier reasons that the plaintiff is entitled to recover possession of the land.

[87] As to costs it appears inevitable in the light of my reasons that costs should follow the event and that the defendant should pay the plaintiff's costs of the action. However, I will give the parties an opportunity to be heard on the topic.

[88] My orders are:

1. The plaintiff recover from the defendants possession of the land known as Special Lease No. 43/50238 of Lot 4 on Crown Plan WMT63 in the County of Weymouth, Parish of Weymouth on Restoration Island, North Queensland.

2. The counterclaim is dismissed.

3. I will hear the parties as to costs.