SUPREME COURT OF QUEENSLAND

CITATION:	*Mango Boulevard Pty Ltd v Spencer & Ors (No 2)* [2012] QSC 347
PARTIES:	**MANGO BOULEVARD PTY LTD** **ACN 101 544 601** (Plaintiff) v **RICHARD WILLIAM SPENCER** (First Defendant) and **SILVANA PEROVICH** (Second Defendant) and **KINSELLA HEIGHTS DEVELOPMENTS PTY LTD** **ACN 100 373 368** (Third Defendant) and **MIO ART PTY LTD** **ACN 010 101 875** (Fourth Defendant) and **ROBERT WILLIAM WHITTON, AS TRUSTEES OF THE PROPERTY OF RICHARD WILLIAM SPENCER** (Fifth Defendant) and **ROBERT WILLIAM WHITTON, AS TRUSTEES OF THE PROPERTY OF SILVANA PEROVICH** (Sixth Defendant)
FILE NO/S:	BS 1999 of 2006
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2012
JUDGE:	Philip McMurdo J
ORDER:	**1. Save for the claim determined within the judgment of 3 December 2009 in this proceeding, the plaintiff's claim against the defendants be dismissed.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties are in dispute as to the proper construction of the Shareholders Deed governing their joint venture – whether the definitions of several terms included in cl 1, the definitions clause of the Shareholders Deed, are displaced in later clauses because the context requires other meanings to be given to those terms

Mango Boulevard Pty Ltd v Spencer & Ors [2009] QSC 389, considered

COUNSEL: J K Bond SC with E Goodwin for the plaintiff

F M Douglas QC with D Smith and D D Keane for the first, second and fourth defendants

SOLICITORS: Minter Ellison for the plaintiff

Delta Law for the first, second and fourth defendants

[1] This case, which was commenced in 2006, has had a complex and unfortunate history. There have been many interlocutory contests, two of which went to the Court of Appeal. Each side was refused summary judgment, and the pleadings raised what appeared to be extensive factual questions. But ultimately, the facts are not in dispute and the outcome turns upon the proper construction of the parties' contract, entitled the Shareholders Deed ("the Deed").

[2] The plaintiff ("Mango Boulevard"), the first defendant ("Spencer") and the second defendant ("Perovich") were parties to a joint venture for the development of land north of Brisbane. The joint venture vehicle was the third defendant ("Kinsella Heights"). The operation of the joint venture was the subject of several written agreements but it is the effect of the Deed, in circumstances which are now agreed, which is in question and neither side suggests that the proper interpretation of the Deed is affected by the content of those other agreements.

[3] The purpose of the Deed, which was executed in 2003, was to regulate the relationship between Mango Boulevard, Spencer and Perovich as shareholders in Kinsella Heights. Mango Boulevard held and holds 50 per cent of the shares and Spencer and Perovich each held 25 per cent. After the commencement of this proceeding, Spencer and Perovich each became bankrupt, resulting in the joinder of their trustees in bankruptcy. But Spencer is said to have held his shares as a trustee and to have been replaced in that capacity by the fourth defendant ("Mio Art"). Nothing here turns upon that change of trusteeship.

[4] Mango Boulevard claims to be entitled to compulsorily acquire the shares of Spencer (or Mio Art) and Perovich, pursuant to a term of the Deed by which the shares of a party who was relevantly in default of the Deed could be compulsorily

acquired by the other shareholder or shareholders. But the defendants[1] say that Mango Boulevard itself was in default and therefore, on the proper construction of the Deed, it was and is disentitled to acquire their shares. Mango Boulevard now concedes that it was, according to a deeming provision of the Deed, a defaulting party. The question is whether the Deed disentitles Mango Boulevard to acquire the defendants' shares in this circumstance.

[5] Before going to the critical provisions of the Deed, something should be said about its other terms. By cl 3.2, the parties were to be just and faithful in their mutual dealings in respect of the development project. There were covenants to preserve the confidentiality of a wide category of information relating to the project and to the interests of shareholders.[2] Clause 4.1 provided for the constitution of the board of directors, specifying that initially there should be four directors, two nominated by Mango Boulevard and two by Spencer and Perovich. A quorum for a meeting of the board required at least one of the two appointees from each side. Clause 4.5 provided that if Mango Boulevard ceased to be a shareholder for whatever reason, it should cause the directors nominated by it to resign from any office to which they had been appointed in respect of the company and similarly, in the event that both Spencer and Perovich ceased to be shareholders for whatever reason, they should cause the directors nominated by them to resign from any such office. There were provisions regulating the manner in which directors were to decide to pay dividends. There were provisions restricting the circumstances in which money could be loaned by a shareholder to Kinsella Heights. And clause 9 provided that shareholders could not transfer any of their shares or any interest in them except according to that clause, which required that any shareholder wishing to transfer its shares should offer them first to the other shareholders.

[6] It is the construction of cl 10 which is critical here. It is necessary to set it out in full:

> "10.1 A Shareholder will be in default under this Deed if:
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> (a) it transfers any of its Shares or any interest in any of its Shares except in accordance with this Deed;
>
> (b) it fails to remedy any breach of its obligations under this Deed within 14 days after written demand for remedy has been made by another Shareholder;
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> (c) it goes into liquidation or is wound up or dissolved or a receiver, receiver and manager, official manager, administrator, trustee, provisional liquidator or similar officer is appointed over any of its assets or it enters into a scheme of arrangement, composition or compromise with or assignment for the benefit of any of its creditors or an inspector of all or any part of its affairs is appointed or if any steps or proceedings are taken for any of these purposes;

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1 That is to say the first, second and fourth defendants, there being no active participation at the trial by the other defendants.

2 Clauses 3.2(a), 3.3 and 3.4.

(d) it commits an act of bankruptcy, becomes bankrupt or unable to pay its debts or suspends payment of its debts within the meaning of the Bankruptcy Act 1966;

(e) any change occurs in its shareholders or its directors;

(f) it commits any criminal offence which affects or compromises the operations of the Company;

(g) execution, distress or other legal process is levied against any of the goods and assets of it and such process is not satisfied within 30 days of being levied.

10.2 If a party is in default of its obligations under this Deed as described in sub-clause 10.1 ('Defaulting Party') then another party may give:

(a) a notice in writing setting out the default ('Default Notice') to the Defaulting Party; and

(b) a copy of the Default Notice to the Company's accountants together with an instruction to determine within 30 days of the their [sic] receipt of a copy of the Default Notice, at the cost of the Defaulting Party:

(i) the value of the Shares held by the Defaulting Party at the end of the last preceding Financial Year under the principles set out in clause 11; and

(ii) the damages sustained by the other Shareholders ('Non-Defaulting Parties') resulting from the default by the Defaulting Party ('Damages').

10.3 On serving a Default Notice on the Defaulting Party, the Non-Defaulting Party has, in addition and without prejudice to the Non-Defaulting Party's other rights at law or in equity, an option ('Option') to acquire the Defaulting Party's Shares at a price per Share determined by the Company's accountants under paragraph 10.2(b)(i).

10.4 The Non-Defaulting Party ('Acquiring Party') may, within 60 days of receiving the determination of the Company's accountants under paragraph 10.2(b)(i), by notice in writing to the Defaulting Party exercise the Option.

10.5 Completion of the sale of the Defaulting Party's Shares must take place within 14 days of the date that notice under sub-clause 10.4 exercising the Option is given to the Defaulting

Party at a time and place to be agreed by the Acquiring Party and the Defaulting Party or, failing agreement, at 10.00am on the next Business Day after the 14 day period at the Company's registered office.

10.6 At completion of the sale of the Defaulting Party's Shares:

(a) the Acquiring Party must pay to the Defaulting Party the purchase price for the Defaulting Party's Shares less the following amounts:

(i) any payments incurred by the Non-Defaulting Parties for the Defaulting Party;

(ii) the damages assessed by the Company's accountants under sub-paragraph 10.2(b)(ii); and

(iii) the costs of the Company's accountants making the valuations referred to in paragraph l0.2(b); and

(b) the Defaulting Party must deliver to the Acquiring Party the certificates for the Defaulting Party's Shares and transfers of and stamp duty declarations for the Defaulting Party's Shares executed by the Defaulting Party.

10.7 If the Defaulting Party defaults in complying with sub-clause 10.6, the Directors are irrevocably authorised by the Defaulting Party to receive the purchase money and to execute transfers of the Defaulting Party's Shares to the Acquiring Party on behalf of the Defaulting Party. Following execution and stamping of the appropriate transfers, the Company must register the transfers of the Defaulting Party's Shares and the Directors are to hold the purchase money on trust for the Defaulting Party. The receipt of the Directors for the purchase money will be a good discharge to the Acquiring Party and after its name has been entered in the register under this sub-clause the validity of the actions of the Directors under this sub-clause may not be questioned by any person."

[7] As I determined in a previous judgment,[3] each of Spencer and Perovich was, as at 22 February 2006, unable to pay his or her debts and was thereby in default as described in sub-clause 10.1(d). On that date, Mango Boulevard, acting under cl 10.2, gave Default Notices to Spencer and Perovich, relying upon the default. Mango Boulevard claims to be entitled to an option to acquire their shares pursuant to cl 10.3 and seeks declaratory relief to that effect.

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3 *Mango Boulevard Pty Ltd v Spencer & Ors* [2009] QSC 389.

[8] On 28 March 2006, each of Spencer and Perovich gave a Default Notice to Mango Boulevard. They alleged defaults under cl 10.1(e) in that changes had occurred in Mango Boulevard's directors. In August 2003, Mr Hailey resigned as a director of Mango Boulevard and Mr Bird was appointed in his place and in July 2004, Mr Thomson was appointed as an additional director. In the course of this proceeding, Mango Boulevard raised many arguments, reflected in its extensive pleadings, to the effect that whilst those changes had occurred, they were not matters upon which Spencer and Perovich could rely. Ultimately, all of those arguments were abandoned. It is conceded that those changes in the directorship of Mango Boulevard were deemed defaults under cl 10.1(e) and that they remained so on 22 February 2006 when it delivered its notices to Spencer and Perovich. Consequently, it became common ground that each of the three shareholders was a party in default of its, his or her obligations under the Deed as described in sub-clause 10.1.

[9] The argument for Mango Boulevard is as follows. Regardless of its own default, Spencer and Perovich was each a Defaulting Party, within the meaning of that term in cl 10, which was effectively defined within the introductory words of cl 10.2. It was then open to Mango Boulevard, as "another party"[4] to give a Default Notice to them as Defaulting Parties. The giving of that notice engaged cl 10.2(b), so that the accountants for Kinsella Heights were to value the shares held by Spencer and Perovich and the damages sustained by Mango Boulevard. In the terms of cl 10.2(b), Mango Boulevard was and is "the other Shareholder" or the Non-Defaulting Party. Therefore, in the terms of cl 10.3, Mango Boulevard as the Non-Defaulting Party became entitled to an option to acquire the shares of the parties to whom that notice had been given (cl 10.3).

[10] Thus under this argument, Mango Boulevard was the Non-Defaulting Party, although in truth, it was also in default. The term Non-Defaulting Party, it is said, takes this remarkable meaning from the way in which the term Non-Defaulting Parties is introduced in cl 10.2(b). Any shareholder, regardless of its own default, could serve a notice upon a defaulting shareholder under cl 10.2, and thereby become the Non-Defaulting Party, entitled to the option to acquire shares under cl 10.3. It is irrelevant that in any ordinary sense Mango Boulevard would not be regarded as a non-defaulting party.

[11] But what must also be considered is the Deed's definition of Non-Defaulting Party in cl 1.1. The term is there defined to mean:

> "… the parties other than the Defaulting Party at that time."

Clause 1.1 contains also these definitions:

> "'Defaulting Party' means a party which is in default of that party's obligations under this Deed or a party who has committed an Event of Default pursuant to clause 11.1;
>
> …
>
> 'Event of Default' means the occurrence of one or more of the events listed in clause 11.1;"

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4 Clause 10.2.

It is common ground that within those definitions, the references to cl 11.1 should be read instead as references to cl 10.1.

[12] For Mango Boulevard, it is argued that these definitions have no application to cl 10. It points out that the definitions clause (cl 1.1) begins with the statement that the definitions do not apply where the context otherwise requires. But apart from cl 10 and a related provision, the definitions in cl 1.1 of these three expressions have no work to do within the Deed. The expressions Defaulting Party and Non-Defaulting Party appear in cl 11.2(a), which provides that the Defaulting Party is to bear the burden of the costs of the valuation and transfer of shares which are compulsorily acquired under cl 10. But having regard to the relation between cl 11.2 and cl 10, the expressions must have the same meanings in both clauses. Thus the effect of Mango Boulevard's argument is that the definitions of these expressions, together with the expression "Event of Default", which are within cl 1.1 are redundant. On an objective view, that is an unlikely intention to attribute to the parties. This is not a document which is the product of the use of some standard form with the addition of a few terms for the particular facts and circumstances of this transaction, where the standard terms might be easier to disregard. According to cl 1.1, these expressions are to be given the meanings which are set out in that clause. The question is whether this is precluded by the words of cl 10.

[13] As Mango Boulevard emphasises, there are two limbs to the definition of Defaulting Party in cl 1.1. The first is where a party is in default of that party's obligations under the Deed. The second is where a party has committed an Event of Default pursuant to cl 10.1 or, in other words, where for that party there occurs one or more of the events listed in cl 10.1. It is only a default within the second limb which could engage cl 10.2. Of the facts and circumstances described in the various paragraphs of cl 10.1, those within paragraphs (a) and (b) would involve a breach of a covenant within the Deed.[5] Apart from the particular case of paragraph (a), a breach of a party's obligations under the Deed, of itself, was not agreed to be an event within cl 10.1 so as to engage cl 10.2. There also had to be a written demand for the remedy of that breach after which the breach had to remain unremedied for at least 14 days. Therefore every breach would fall within the first limb of that definition of Defaulting Party in cl 1.1, but not every breach would fall within the second limb.

[14] Consequently, Mango Boulevard submits, the term Defaulting Party, where it is introduced at the commencement of cl 10.2 and where it is used in the following provisions of cl 10, cannot have the meaning as defined in cl 1.1. In cl 10.2, it can refer only to a case within that second limb. To that point, I accept Mango Boulevard's argument.

[15] The question then is whether the expression Non-Defaulting Party has a meaning other than according to its definition in cl 1.1. The expression first appears in cl 10 within cl 10.3, although Non-Defaulting Parties appears in cl 10.2(b)(ii).

[16] Mango Boulevard submits that in cl 10.2, the Non-Defaulting Parties are the "other Shareholders", that is to say those other than the recipient of the Default Notice. It says that the Non-Defaulting Party in cl 10.3 is the shareholder which has served the

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5 A transfer of shares or an interest in shares, except in accordance with the Deed, as referred to in paragraph (a) would be a breach of cl 9.1.

Default Notice. It is not suggested that the meaning of Non-Defaulting Party in cl 10.3 derives from the way in which the expression Non-Defaulting Parties is used in cl 10.2. Rather, it is, a shareholder becomes the Non-Defaulting Party by serving a notice upon a Defaulting Party, although it is itself a Defaulting Party. Upon Mango Boulevard's argument then, a shareholder can be both a Defaulting Party and the Non-Defaulting Party.

[17] Moreover, upon this argument, where each shareholder is a Defaulting Party under cl 10.2, each shareholder could give a Notice under cl 10.2 thereby becoming the Non-Defaulting Party. The argument concedes that the giving of a Notice under cl 10.2 does not immunise that party from the receipt of a Notice and the compulsory acquisition of its own shares. Thus in the circumstances which occurred here, each of the three shareholders became the Non-Defaulting Party, as Mango Boulevard would have that term understood for the purposes of cl 10.3. That curious result is said to come from the language of cl 10 and its suggested exclusion of the operation of the definition of Non-Defaulting Party in cl 1.1.

[18] As defined in cl 1.1, a Non-Defaulting Party means the party or parties other than the Defaulting Party. Within cl 1.1, the expression Defaulting Party has a meaning as defined in that clause. Therefore, a Non-Defaulting Party as defined in cl 1.1 is a party which has not committed an Event of Default according to cl 10.1 and which is not at that time in default of an obligation under the Deed. In this way, the definition of Defaulting Party in cl 1.1 has some work to do: it affects the meaning of Non-Defaulting Party. Its operation is displaced in cl 10 where Defaulting Party clearly does not have an identical meaning. But it does not follow that the operation of the definition of Non-Defaulting Party is also displaced within cl 10.

[19] In cl 10, the entitlement to give a Default Notice is conferred upon "another party". But the entitlement to an option to acquire shares, pursuant to cl 10.3, is conferred not upon anyone who has given a Default Notice; rather it is conferred upon the Non-Defaulting Party. The argument for Mango Boulevard fails to acknowledge the specific use of the expression Non-Defaulting Party in cl 10.3, rather than words such as "the party serving the Default Notice …". On this argument, what would otherwise be the meaning of the Non-Defaulting Party (its meaning under cl 1.1) is displaced by the use of the expression "another party" in cl 10.2. But there is an alternative for which that displacement is unnecessary. It is that when read with cl 10.3, the reference to another party in cl 10.2 is necessarily confined to a shareholder which, according to cl 10.3, is entitled to compulsorily acquire the shares of another, that is to say the Non-Defaulting Party as defined in cl 1.1.

[20] In my conclusion, the operation of the definition of Non-Defaulting Party in cl 1.1 has not been displaced by cl 10. Upon an objective view, the shareholders must be taken to have agreed that the expression Non-Defaulting Party has the meaning which, according to cl 1.1, it was to have.

[21] As a result, cl 10 operates in this way. The clause is engaged only once there is an event within cl 10.1. That means that not every breach of an obligation within the Deed, without more, would make the party in breach susceptible to a compulsory acquisition of its shares. Where there is an Event of Default by or in respect of a party, engaging cl 10, that party's shares can be compulsorily acquired only by another shareholder which "at that time" is not in default in complying with the Deed or which had not committed an Event of Default under cl 10.1. Thus where a

party had breached an obligation under the Deed but had remedied that breach, it would be able to compulsorily acquire a defaulter's shares under cl 10.3. In that circumstance, it would not be a Defaulting Party as defined in cl 1.1 because "at that time" it would not be "a party which *is* in default of that party's obligations under this Deed". But where a shareholder is itself then in breach of the Deed or an Event of Default in respect of it has occurred, it cannot at the same time compulsorily acquire the shares of another. It can be seen with this interpretation, cl 10 does not lead to any absurd or even unusual result.

[22] On the other hand, under Mango Boulevard's interpretation, the results would be curious indeed. Upon its argument, in the circumstances of the present case, each side of this dispute was able to compulsorily acquire the 50 per cent shareholding of the other. That is because a shareholder could be at once both a Defaulting Party and the Non-Defaulting Party. Clause 10 does not provide that once a party receives a Default Notice which has been duly given, it becomes disentitled to employ cl 10 for the default of the other party or parties. As I said in an earlier judgment,[6] upon an objective basis it is unlikely that the parties intended that each would be able to acquire the other's shares in these circumstances or that they intended that whoever was the first to give a Default Notice, or alternatively to exercise its option, would prevail.

[23] The outcome then is that Mango Boulevard is not entitled to an option to acquire the defendants' shares because it is not the Non-Defaulting Party as that term is used in cl 10.3, which is according to its defined meaning in cl 1.1. Mango Boulevard therefore fails to establish its right to the relief which it seeks in this proceeding. In the earlier judgment, Mango Boulevard succeeded in obtaining a declaration (as to the defendant's defaults). It will be ordered that save for the claim determined within that judgment of 3 December 2009, the plaintiff's claim against the defendants be dismissed.

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6 *Mango Boulevard Pty Ltd v Spencer & Ors* [2009] QSC 389 at [57].