

# SUPREME COURT OF QUEENSLAND

CITATION: *SDW Projects Pty Ltd v Modi & Ors* [2012] QSC 400

PARTIES: **SDW PROJECTS PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 110 335 923**  
(applicant)

**v**

**SANJU MODI**

(first respondent)

and

**LISA JANE CLEMENTS**

(second respondent)

and

**HOLDING REDLICH (A FIRM)**

(third respondent)

and

**THOMAS BRADLEY**

(fourth respondent)

FILE NO/S: 10460 of 2012

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 12 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 3 December 2012

JUDGE: Peter Lyons J

ORDER:

- 1. I declare that in respect of each of the letters referred to in paragraphs 34 to 40 and 41 to 45 of the second further amended statement of claim filed in proceeding BS 4244 of 2009 on 2 July 2012, the respective letter did not direct the attention of the buyer named in the contract referred to in that letter or that buyer's agent to a warning statement or to an information sheet in conformity with section 365(2A)(c)(ii) of the *Property Agents and Motor Dealers Act 2000* ("PAMDA");**
- 2. I declare that in respect of each of the letters referred to in paragraphs 16 and 18 of the further amended statement of claim filed in proceeding BS 11953 of 2009 on 2 July 2012, the respective letter did not direct the attention of the buyer**

named in the contract referred to in that letter or that buyer's agent to a warning statement or to an information sheet in conformity with section 365(2A)(c)(ii) of the PAMDA.

3. I order that the first and second respondents pay the costs of the applicant, and third and fourth respondents to be assessed on the standard basis or as agreed.
4. I order that the order for costs made today extend to the orders for costs made on 20 April 2012 in proceedings BS 4244 / 2009 and BS 11953 / 2009.

**CATCHWORDS:** **CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATION ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS** – where the applicant undertook a development to include 30 residential units – where the first and second respondent acted as solicitors on behalf of the applicant in relation to the sale of 14 of those units – where the first and second respondent sent letters on behalf of the applicant, to buyers of the 14 units – where the letters enclosed a bound document which included the warning statement, the information sheet and the contract of sale – where each letter drew the attention of the buyer to the ‘contract of sale’, but did not explicitly mention the warning statement or information sheet explicitly – whether the letters were sufficient to comply with the requirement under s 365 (2A) (c) (ii) of the *Property Agents and Motor Dealers Act 2000* (Qld) that the seller draw to the attention of the buyer, the warning statement, the information sheet and the contract of sale

*Acts Interpretation Act 1954* (Qld), s 14A  
*Body Corporate and Community Management Act 1997* (Qld)  
*Property Agents and Motor Dealers Act 2000* (Qld), ss 363, 365 (2A), 366B

*Boylan v Gallagher* [2012] 1 Qd R 420, distinguished;  
*Collis v Currumbin Investments Pty Ltd* [2009] QSC 297, cited;  
*Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2008] QSC 261, cited;  
*MNM Developments Pty Ltd v Gerrard* [2005] 2 Qd R 515, followed;  
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, followed.

COUNSEL: M Stewart SC with D Pyle for the applicant  
 RPS Jackson for the first respondent  
 SB Hooper for the second respondent  
 D de Jersey for the third respondent  
 G Gibson QC with D O'Brien for the fourth respondent

SOLICITORS: Mullins Lawyers for the applicant  
 Bartley Cohen for the first respondent  
 Barry & Nilsson Lawyers for the second respondent  
 Thynne & Macartney for the third respondent  
 Ashurst Australia for the fourth respondent

- [1] The issue in these proceedings is whether the provisions of s 365(2A)(c) of the *Property Agents and Motor Dealers Act 2000 (Qld) (PAMDA)* have been complied with by the sending of letters each of which enclosed a contract for the sale of a proposed unit, attached to which were a warning statement and information sheet<sup>1</sup>, when each letter did not, in terms, refer to the warning statement or information sheet.

### **Factual background**

- [2] In 2006, the applicant (*SDW*) undertook a residential development at 1 Hinterland Drive, Mudgeeraba. The development was to include 30 residential units. As is not uncommon, the proposed units were offered for sale before the development was completed.
- [3] *SDW* retained solicitors to assist it in relation to the sale of the proposed units. Between June and October 2007, it retained the firm "Gold Coast City Solicitors", the principal of which was the first respondent, Mr Modi. From early October 2007, *SDW* retained the second respondent, Ms Lisa Clements, of Clements Lawyers, to provide similar assistance.
- [4] On 12 occasions between 6 and 25 June 2007, Mr Modi forwarded by courier an executed contract for the sale of a proposed unit in the development and other documents to the solicitor representing each of the purchasers. The letters generally included the following:

**"RE: SDW PROJECTS SALE TO [BUYER NAME]  
 PROPERTY: UNIT [NUMBER AND ADDRESS]**

We refer to the above matter and advise that we act on behalf of the vendor and note that you act on behalf of the purchaser.

We now **enclose** Contract of Sale and Disclosure Statement for your attention.

... "

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<sup>1</sup> The meaning of these expressions is explained below.

- [5] However, one letter included the words set out above, save for the phrase, “for your attention”. No party relied on this difference, and I shall henceforth ignore it.
- [6] Enclosed with each letter were two spiral bound books of documents. In one book, the first page was the warning statement for which provision is made in *PAMDA*. Immediately following the warning statement was the information sheet (a document identified in the *Body Corporate and Community Management Act 1997 (Qld) (BCCMA)*); followed by the contract. In each case, the warning statement and the contract had previously been signed by the purchaser. Each contract recorded that the buyer had received the information sheet<sup>2</sup>.
- [7] The second book contained a disclosure statement (also a document identified in the *BCCMA*).
- [8] Ms Clements acted in relation to the sales of proposed unit 8 and proposed unit 27. On about 2 October 2007 she sent a letter to the solicitors for the purchasers of proposed unit 8. Apart from a reference to the transaction, that letter included the following:

“We refer to the above matter and enclose herewith the following:

1. Executed Contract of Sale;
2. Disclosure Statement.

We further note the following:

Contract Date: 9 October 2007

Initial Deposit: \$1,000.00

Balance Deposit 6 November 2007

Settlement: 14 days after the Sellers<sup>[1]</sup> Solicitors gives notice to the Buyer that the Scheme has been created at the Department of Natural Resources & Mines.”

- [9] On 7 February 2008 Ms Clements sent a letter to the solicitors for the purchaser of proposed unit 27. Apart from a reference to the transaction, that letter included the following:

“We confirm that the above contract has been accepted and signed by the Seller and is dated 01/02/2008. We now enclose signed Contract for your attention.

This Contract was sent to you by express post. The cooling off period commenced on your receipt of the Contract.

As the PAMD Act is not specific as to the date of receipt, and unless you immediately advise us to the contrary, we deem that the cooling off period will commence the next business day after the above date, on the basis that the policy of Australia Post with respect to express post, is next day delivery.

...”

<sup>2</sup> See cl 19.1.2 of each contract, and the signed Statement & Acknowledgement.

- [10] Each of these two letters included two booklets, corresponding to the booklets sent by Mr Modi. The warning statement and contract had been signed by the purchaser; and the contract contained similar provisions acknowledging receipt of the information sheet.
- [11] In early 2009, the purchaser in each of these 14 transactions gave notice of the withdrawal of its offer pursuant to s 365(2A)(c)(ii) of *PAMDA*. The third respondent, Holding Redlich, was retained by SDW in February 2009 to advise and act for it in its disputes with those purchasers. Holding Redlich briefed the fourth respondent, Mr Bradley, a barrister, to advise whether the purchasers could lawfully withdraw their offers. It seems appropriate to assume for the purpose of this application that, in a number of cases, he advised that letters did not satisfy s 365(2A)(c)(ii).

### **History of proceedings**

- [12] In April 2009, SDW commenced proceedings against Mr Modi (BS 4244/09), alleging that he had been negligent by reason of his failure, in the letters previously mentioned, to comply with the requirements of s 365(2A)(c) (ii). Mr Modi alleged that Ms Clements should have identified and attempted to rectify any non-compliance with the *PAMDA* requirements, resulting in Ms Clements' being added as a defendant in those proceedings.
- [13] SDW had also commenced proceedings against Ms Clements in respect of the two transactions previously mentioned (*BS11953/09*). In each case, SDW had alleged that Ms Clements was negligent in failing to comply with the requirements of s 365(2A)(c)(ii) of *PAMDA*.
- [14] Mr Modi and Ms Clements denied that they were negligent, on the grounds that in each of these transactions, their letter and the accompanying documents sufficiently complied with those requirements.
- [15] In her defence in each of these proceedings, Ms Clements has alleged that Holding Redlich was a concurrent wrongdoer because it failed to advise SDW that none of the purchasers was entitled to withdraw the offer to purchase, and because it failed to advise SDW to insist that each purchaser complete its contract of sale, and if necessary, to sue each purchaser for specific performance of its contract. It is anticipated that a similar allegation might be made against Mr Bradley by one of the other parties to this proceeding.
- [16] The present application has arisen as a consequence of a consideration and a review of the two actions commenced by SDW as to whether all necessary parties had been joined.

### **Statutory provisions**

- [17] The relevant provisions of *PAMDA* are found in ch 11. It is convenient first to note its stated purposes, as follows:

#### **“363 Purposes of ch 11**

The purposes of this chapter are –

- (a) to give persons who enter into relevant contracts a cooling-off period; and
- (b) to require all proposed relevant contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that a relevant contract is subject to a cooling-off period; and
- (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.”

[18] Relevant definitions for that chapter include the following:

**“364 Definitions for ch 11**

In this chapter—

*attached*, in relation to a warning statement, any information sheet and a contract, means attached in a secure way so that the warning statement, any information sheet and the contract appear to be a single document.

...

*cooling-off period*, for a relevant contract, means a period of 5 business days—

- (a) starting on the day the buyer under the relevant contract is bound by the relevant contract or, if the buyer is bound by the relevant contract on a day other than a business day, the first business day after the day the buyer is bound by the relevant contract; and
- (b) ending at 5p.m. on the fifth business day.

*Example—*

Assume a contract is entered into at any time on Monday and the buyer is bound by the contract. Assume also that the cooling-off period is not affected by public holidays. The cooling-off period ends at 5p.m. on Friday

*disclosure statement* see the *Body Corporate and Community Management Act 1997*, section 205A.

...

*information sheet* see the *Body Corporate and Community Management Act 1997*, section 206(5) or (6) or 213(5) or (5A).

*relevant contract* means a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction.

...

*unit sale* means a sale of a lot included in a community titles scheme, or proposed to be included in a community titles scheme, within the meaning of the *Body Corporate and Community Management Act 1997*.

**warning statement** means a statement in the approved form that includes the information mentioned in section 366D(1).”

- [19] Each transaction which gives rise to the present application was a “unit sale”. A contract for such a sale is affected by s 365 of *PAMDA* which includes the following:

**“365 When parties are bound under a relevant contract**

(1) The buyer and the seller under a relevant contract are bound by the relevant contract when—

- (a) for a relevant contract, other than a relevant contract relating to a unit sale—the buyer or the buyer’s agent receives the warning statement and the relevant contract from the seller or the seller’s agent in a way mentioned in subsection (2); or
- (b) for a relevant contract relating to a unit sale—the buyer or the buyer’s agent receives the warning statement, the information sheet and the relevant contract in a way mentioned in subsection (2A).

...

(2A) For a relevant contract relating to a unit sale, the ways are—

...

- (c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii), (iii) and (iv) other than by electronic communication, if—
  - (i) the warning statement and the information sheet are attached to the relevant contract with the warning statement appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement; and
  - (ii) the seller or the seller’s agent directs the attention of the buyer or the buyer’s agent to the warning statement, the information sheet and the relevant contract.

*Example of receipt other than by electronic communication—*

- post

*Examples of how attention may be directed—*

- by oral advice
- by including a paragraph in an accompanying letter

(3) Without limiting how the buyer may withdraw the offer to purchase made in the contract form, the buyer may withdraw the offer at any time before being bound by the relevant contract under subsection (1) by giving written notice of withdrawal, including notice by fax, to the seller or the seller’s agent.

...

(5) If a dispute arises about when the buyer and the seller are bound by the relevant contract, the onus is on the seller to prove when the parties were bound by the relevant contract.

(6) In this section—

*buyer's agent* includes a lawyer or licensee acting for the buyer and a person authorised by the buyer or by law to sign the relevant contract on the buyer's behalf.”

[20] Obligations in relation to the provision of a warning statement and an information sheet are set out in s 366B, as follows:

**“366B Warning statement if proposed relevant contract is given in another way**

(1) This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent for signing in a way other than by electronic communication.

(2) The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement and, if the proposed relevant contract relates to a unit sale, an information sheet with the warning statement appearing as its first or top page and any information sheet appearing immediately after the warning statement.

(3) If the proposed relevant contract does not comply with subsection (2) -

- (a) if the seller gave the proposed relevant contract—the seller; or
- (b) if the seller's agent gave the proposed relevant contract—the seller's agent; commits an offence.

Maximum penalty—200 penalty units.

(4) If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

*Note—*

A contravention of this subsection is not an offence. Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer.

(5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.

(6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention

to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

Maximum penalty—200 penalty units.”

- [21] The content of a warning statement is specified in s 366D. The words used in the warning statement must be presented in substantially the same way as those words are printed on the approved form. The statement is of no effect unless signed by the buyer, before the buyer signed the proposed contract<sup>3</sup>.
- [22] Provision is made for the cooling off period in pt 3 of ch 11. It is sufficient to note that it generally permits termination of a contract by signed notice<sup>4</sup>.
- [23] There has been no suggestion that any of the contracts was not a relevant contract, as that expression is used in these provisions. In each case the warning statement was in the approved form, with the word, “WARNING” in bold type near the top.

### **Contentions of the parties**

- [24] The applicant, the third respondent and the fourth respondent each contended that the first respondent and the second respondent had failed to comply with s 365(2A)(c)(ii) because in each of the transactions, the solicitor then acting for the applicant had failed to direct the attention of the buyer’s agent to the warning statement and information sheet in one of the booklets accompanying each letter. They relied upon the approach taken in *MNM Developments Pty Ltd v Gerrard*<sup>5</sup>; *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*<sup>6</sup> (*Hedley*); and *Collis v Currumbin Investments Pty Ltd*<sup>7</sup>. Their submissions sought to distinguish the decision in *Boylan v Gallagher*<sup>8</sup> (*Boylan*). It was submitted that this approach to s 365(2A)(c) was to be preferred, pursuant to s 14A of the *Acts Interpretation Act 1954* (Qld) (*AIA*) because it best achieved the purpose of the provision. Reference was also made to the passage from the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>9</sup> to the effect that ordinarily the legal meaning of a statutory provision will correspond to its grammatical provision.
- [25] The submissions of the first and second respondents drew attention to some statements of principle in *Boylan* (discussed below). They also draw attention to the factual similarities between that case and the present case. These respondents submitted that, so far as it discussed a requirement in ch 11 pt 1 of *PAMDA* relating to directing the attention of the purchaser to particular documents, *Hedley* dealt with a provision which required a “clear statement” which had that effect; and in any event, what was said was only said *obiter*. It was also submitted that the treatment of the relevant provision in *Hedley* was inconsistent with the subsequent decision of the Court of Appeal in *Boylan*. They submitted that the letters drew attention to the warning statement, the information sheet and the relevant contract, in the

<sup>3</sup> See s 366D(3).

<sup>4</sup> See s 368 of *PAMDA*.

<sup>5</sup> [2005] 2 Qd R 515, especially at [16].

<sup>6</sup> [2008] QSC 261.

<sup>7</sup> [2009] QSC 297.

<sup>8</sup> [2012] 1 Qd R 420.

<sup>9</sup> (1998) 194 CLR 355 at [78].

circumstances. Those circumstances were that in each case the letter drew attention (either by use of the words “for your attention” or at least by implication) to the enclosures; one of those enclosures was referred to as a “Contract of Sale”; the relevant enclosure was a booklet which included the warning statement, the information sheet, and the relevant contract; in relation to each transaction, the warning statement had been signed, and the information sheet had been seen, by the relevant purchaser; in each transaction, the recipient of the letter was a solicitor; and in each case the warning sheet was identified in bold and capital letters, and the information sheet immediately followed it in the booklet. It was submitted that in the circumstances, the purpose of s 365 of *PAMDA* had been satisfied.

### **Consideration**

- [26] It is convenient, consistent with the applicant’s submissions, to commence with a consideration of the sequence in which the operative provisions of ch 11 pt 1 of *PAMDA* take effect, and some related matters. It is sufficient to do so, by reference to provisions dealing with the sale of a proposed unit, not involving electronic communication.
- [27] If a proposed contract is given to a proposed buyer for signing, then the seller must ensure that the proposed contract has attached to it a warning statement and, for a unit, an information sheet; with the warning statement appearing as the first or top page, and the information sheet appearing immediately after the warning statement<sup>10</sup>. The seller must direct the proposed buyer’s attention to the warning statement, and the information sheet<sup>11</sup>. The warning statement is of no effect unless the buyer signs the warning statement; and in a case where a proposed contract is handed to the buyer, it is of no effect unless the buyer signs it before signing the proposed contract<sup>12</sup>. The matters referred to thus far are generally pre-contractual.
- [28] The general rule which would determine when a contract becomes effective is modified by s 365 of *PAMDA*. Its effect is that the parties are not bound by the contract until the buyer receives the warning statement, the information sheet, and the contract in accordance with s 365(2A)(c)<sup>13</sup>. Thus it is necessary that the buyer again receive a warning statement, and an information sheet, attached to the contract; whereas s 366B required that these documents be attached to the proposed contract. On both occasions, there is a requirement to direct the attention of the (proposed) buyer to the warning statement and the information sheet<sup>14</sup>.
- [29] The requirement to provide these documents on two occasions to a buyer, and to direct the buyer’s attention to them on each occasion, emphasises the importance which the legislature attaches to these matters.
- [30] The applicant’s submissions pointed out that the obligation to direct attention to these documents found in s 365(2A)(c)(ii) may be satisfied by directing the attention of the buyer’s agent to them; and that the statute expressly recognised that the buyer’s agent might be a lawyer<sup>15</sup>. The obligation to direct attention to the

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<sup>10</sup> See s 366B(2).

<sup>11</sup> See s 366B(4) and (5).

<sup>12</sup> See s 366D(3) and (4).

<sup>13</sup> See s 365(1) and (3).

<sup>14</sup> See s 366B(4) and (6); s 365(2A)(c)(ii).

<sup>15</sup> See s 365(6).

documents applies, notwithstanding that the documents are delivered to a lawyer acting as the buyer's agent.

- [31] In *MNM Developments Pty Ltd v Gerrard* the Court of Appeal had to consider ch 11, pt 1, of *PAMDA* as it stood prior to amendments made in 2005. Section 366 then required that a warning statement be attached to a contract as its first or top sheet; and s 367 provided that if that was not done, the buyer might terminate the contract before settlement. De Jersey CJ said:

“[16] The context of the requirement set up by s.366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s. 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchasers of residential property. One of the objects of the Act, stated in its preamble, is ‘to protect consumers against particular undesirable practises’. That protection extends in case like these, to give a purchaser a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage. See, for example, s.366(4)(a), s. 366(4)(b) (including the example) and s. 367(2).”

- [32] Notwithstanding the changes in the provisions, in my respectful opinion his Honour's comments remain applicable to ch 11, pt 1, including to the provisions which are significant in the present case.
- [33] In *Boylan*, the Court had to determine whether a provision found in s 365(2)(c) relating to directing attention to a warning statement and a relevant contract had been complied with. Save that there is no reference to an information statement, the provision is in the same terms as s 365(2A)(c)(ii). Of s 365(2)(c), Fraser JA (with whose reasons the other members of the Court agreed) said<sup>16</sup>:

“... the relevant test is that which is expressed in the statutory provision. Neither the text nor the examples require the relevant direction to refer specifically or expressly to the warning statement or the relevant contract and s 365(2)(c) also does not require the ‘clear’ statement which is called for by s 365(2)(a)(i) and s 365(2)(b)(i) ...

Although proof of compliance with the provision ordinarily would justify an inference that the buyer or the buyer's agent in fact became aware of the documents, it is not necessary for the seller to prove that fact ... The focus of the provisions is upon what was said, written, or done by the seller or the seller's agent. The statutory purpose is fulfilled if the seller or to the seller's agent does what is required to be done on the part of the seller to direct the attention of the buyer or the buyer's agent to the warning statement and the relevant contract. No less is sufficient but no more is required.”

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<sup>16</sup> *Boylan* at [32] – [33].

[34] In the same case, Philippides J (with whose reasons Chesterman JA agreed) said<sup>17</sup>:

“While the buyer’s attention must be directed to both the warning statement and the relevant contract, there is nothing which requires each to be identified distinctly and specifically. Moreover, whether there has been a direction of attention to the warning statement must be informed by the circumstances of each case.

[35] In my view, in a case where the parties would otherwise be bound by a contract relating to the sale of a unit, and a copy of the contract is delivered to the buyer by some means other than electronic communication, the effect of s 365 is that the parties are not bound until the buyer receives (in a case like the present case) a copy of the contract, the warning statement and the information sheet, in a way which satisfies two conditions. One is a condition containing several elements, they being that the warning statement and the information sheet are attached to the contract; and that the warning statement must be the first or top page of the document created by the attachment, with the information sheet appearing immediately after it. Moreover, because the statutory provision uses the defined term “warning statement”, the provision refers to a document with “WARNING” in bold type. The second condition is that the seller directs the attention of the buyer to the warning statement, the information sheet and the contract. In my view, both conditions must be satisfied, before the parties are bound by the contract.

[36] What has been said about the effect of s 365 thus far is not in dispute. The issue is whether the second condition is satisfied.

[37] The first respondent and the second respondent submitted that the second condition was satisfied in this case. The effect of their submission was that, since two booklets accompanied each letter, and one booklet was clearly referred to in the letter (the disclosure statement), the other reference in the letter was to the other booklet. It was submitted that a practical approach must be taken for determining whether the condition was satisfied, bearing in mind the circumstances of the case, previously mentioned.

[38] It is appropriate to describe the booklet containing the warning statement, the information sheet and the contract as a composite document. However, the difficulty for the first respondent and the second respondent in the present case is that that booklet included the contract, described on its face as a contract of sale. The same expression appeared in each letter. In my view, therefore, the letter in each case directed attention to the contract, but did not direct attention to the other two documents in that booklet. It might be observed that the argument for the first and second respondents is particularly weak in relation to Ms Clements’ letter of 7 February 2008.

[39] The specific reference in the letters to the contract of sale, rather than the booklet as a whole, materially distinguishes the facts in the present case, from those considered in *Boylan*. There, the buyer’s solicitor, had prepared what was referred to as a “composite document”, which included the warning statement and the contract (a deed). That solicitor described the composite document as “Put and Call Option

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<sup>17</sup> *Boylan* at [51].

document”. When the seller’s solicitor returned those documents after execution by the seller by a letter dated 12 May 2008<sup>18</sup>, the seller’s solicitor, in the letter, described the relevant enclosure as “full executed copy of the Put and Call Option document”. The adoption of the description adopted by the buyer’s solicitor was considered sufficient to refer both to the deed, and the warning statement. That conclusion was reinforced no doubt by the use of the word “full”. It might also be observed that the letter from the seller’s solicitor enclosing the executed documents, when wishing to refer to the contract itself, used a different description, “Put & Call Option Deed”<sup>19</sup>. Looked at in the context of the communications of the parties, it is in my respectful opinion, by no means surprising that the adoption by the seller’s solicitor of the expression used by the buyer’s solicitor to describe a bundle including both the warning statement and the contract was held to be “apt” to refer to both those documents<sup>20</sup>. That is not true in the present case.

- [40] In my view, the fact that each of the letters at present under consideration was sent to a solicitor does not assist the first respondent and the second respondent. There is no reason to think that a solicitor would understand a reference to a contract of sale to be a reference to something other than a contract of sale. The taking of a “practical approach” does not, in my view, alter the effect of the expression used in each letter.

### **Conclusion**

- [41] I am prepared to make the declaration sought by the applicant.

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<sup>18</sup> See *Boylan* at [17].

<sup>19</sup> See *Boylan* at [18].

<sup>20</sup> See *Boylan* at [51].