SUPREME COURT OF QUEENSLAND

CITATION:	*Meridien AB Pty Ltd & Anor v Jackson & Ors* [2013] QCA 121
PARTIES:	**MERIDIEN AB PTY LTD** ACN 101 370 772 (first appellant) **MERIDIEN AIRLIE BEACH PTY LTD** ACN 101 370 763 (second appellant) **v** **RAYMOND JOHN JACKSON as trustee for the JACKSON FAMILY TRUST** (first respondent) **HORSESHOE (WA) PTY LTD as trustee for the SAD TRUST** (second respondent) **RAYMOND JOHN JACKSON** (third respondent) **SUZANNE LOUISE TEDESCO** (fourth respondent) **DARRYL ADRIAN TEDESCO** (fifth respondent)
FILE NO/S:	Appeal No 8766 of 2012 SC No 5714 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2013
JUDGES:	Margaret McMurdo P and Muir JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. Paragraphs 2, 3 and 4 of the orders made on 14 September 2012 be set aside.** **3. The application filed by the respondents on 5 March 2012 be dismissed.** **4. The respondents pay the appellants' costs of the application and of this appeal.**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – WORDS TO BE GIVEN LITERAL AND GRAMMATICAL MEANING – PARTICULAR CASES – where, at relevant times, s 27 of the *Land Sales Act* 1984 (Qld) allowed a purchaser to avoid a contract for the sale of land if the vendor had not given it a registrable instrument of transfer within three and a half years – where the primary judge held the language of s 27 to be "clear and unambiguous" and refused to read an exception into the section – where the primary judge derived support for his construction from the Explanatory Notes to the amending Act – where the appellants submit that a purchaser who wrongly refuses to attend settlement and receive a registrable instrument of transfer does not obtain a right to avoid a contract – where the appellants place particular reliance on the principle of statutory interpretation that courts will resist an interpretation that will permit a person to take advantage of their own wrong – whether, on the proper construction of s 27, a purchaser who wrongfully refuses to attend settlement and receive a registrable instrument of transfer obtains a right to avoid the contract

Acts Interpretation Act 1954 (Qld), s 14A
Land Sales Act 1984 (Qld), s 2(a), s 27
Sustainable Planning and Other Legislation Amendment Act 2012 (Qld), s 37

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, considered
Allina Pty Ltd v Federal Commissioner of Taxation (1991) 28 FCR 203; [1991] FCA 78, cited
Bropho v Western Australia (1990) 171 CLR 1; [1990] HCA 24, cited
Buswell v Goodwin [1971] 1 WLR 92, considered
Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross (2012) 87 ALJR 131; [2012] HCA 56, considered
Davenport v The Queen (1877) 3 App Cas 115; [1874-80] All ER 157, considered
Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd (1937) 57 CLR 610; [1936] HCA 64, cited
F C Shepherd & Co Ltd v Jerrom [1987] QB 301; [1986] 3 All ER 589, cited
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51, cited
Grain Elevators Board (Vic) v Dunmunkle Corporation (1946) 73 CLR 70; [1946] HCA 13, considered
Hepples v Federal Commissioner of Taxation (1992) 173 CLR 492; [1992] HCA 3, cited
Holden v Nuttall [1945] VLR 171; [1945] VicLawRp 29, considered

Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26; [1962] 1 All ER 474, considered
Hunter Resources Ltd v Melville (1988) 164 CLR 234; [1988] HCA 5, considered
Interlego AG v Croner Trading Pty Ltd (1992) 39 FCR 348; [1992] FCA 624, cited
Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404, considered
Meridien AB Pty Ltd & Anor v Jackson (as Trustee for the Jackson Family Trust) & Ors [2012] QSC 260, related
Momcilovic v The Queen (2011) 245 CLR 1; [2011] HCA 34, considered
Newcastle City Council v GIO General Ltd (1997) 191 CLR 85; [1997] HCA 53, considered
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328; [1983] HCA 9, cited
R v Registrar General, ex parte Smith [1991] 2 QB 393; [1991] 2 All ER 88, considered
R v Young (1999) 46 NSWLR 681; [1999] NSWCCA 166, considered
Saraswati v The Queen (1991) 172 CLR 1; [1991] HCA 21, cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634; [1974] HCA 40, cited
Thompson v Groote Eylandt Mining Co Ltd (2003) 173 FLR 72; [2003] NTCA 5, considered
Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177; [1969] HCA 28, cited
Woodcock v South Western Electricity Board [1975] 1 WLR 983; [1975] 2 All ER 545, considered

COUNSEL: J C Bell QC, with J O'Regan, for the appellants
P J Roney SC for the respondents

SOLICITORS: Hopgood Ganim for the appellants
Macrossan & Amiet Solicitors for the respondents

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for allowing this appeal and with his Honour's proposed orders.

[2] **MUIR JA**: **Introduction** The respondents entered into a contract of sale dated 2 January 2008 with the appellants for the purchase of an apartment in a proposed resort development at Airlie Beach. The first and second respondents are the purchasers named in the contract. The appellants are the vendors. The third to fifth respondents are guarantors of the obligations of the first and second respondents. The contract provided that at settlement:

1. the purchasers pay the balance purchase price to the vendors (cl 11.4); and

2. the vendors, in exchange for payment, deliver to the purchasers unstamped transfer documents capable of immediate registration after stamping (cl 11.5).

[3] In a letter dated 4 February 2011, the solicitors for the appellants wrote to the solicitors for the first and second respondents giving notice that:

1. the appellants appointed 28 February 2011 as the settlement date pursuant to cl 11 of the contract;

2. the conditions precedent in cl 5.2 of the contract had been satisfied and, in particular, the sub-division plan and the community management statement (CMS) had been registered; and

3. the Boathouse Community Title Scheme 42224 had been established.

[4] The letter stated the preparedness of the appellants' solicitors to forward transfer documents and settlement figures to the solicitors for the first and second respondents on their undertaking to use the transfer documents for stamping purposes only prior to settlement. They requested that the undertaking be provided "urgently by return". In a letter dated 15 February 2011, sent by facsimile to the appellants' solicitors, the respondents' solicitors provided the requested undertaking.

[5] In a letter dated 18 February 2011 to the appellants' solicitors, the solicitors for the first and second respondents gave notice that the first and second respondents exercised their right to terminate the contract on the basis of the appellants' alleged "misleading and deceptive conduct leading to their entry into the contract of sale". Also on that day, the solicitors for the appellants, by facsimile, advised the first and second respondents' solicitors that their clients "although ready, willing and able to settle" would not have their solicitors "attend at settlement to tender in the circumstances". They stated that for their clients to tender at any time on the settlement date would be futile. Neither the appellants nor the first and second respondents attempted to tender on the settlement date or at any time thereafter.

[6] The appellants commenced these proceedings on 30 June 2011 seeking specific performance of the contract, payment of the balance purchase price and damages for breach of contract.

[7] The period of three and a half years (the period relevant to the operation of s 27 of the *Land Sales Act* 1984 (the Act)) ended on 2 July 2011.

[8] On 25 November 2011, solicitors for the first and second respondents advised the appellants that their "clients elect[ed] to avoid the contract in accordance with and pursuant to the provisions of section 27 of the [Act]".

[9] On 5 March 2012, the respondents applied for summary judgment in the proceeding. On 14 September 2012, the primary judge dismissed the appellants' claim, declared that the first and second respondents had validly terminated the contract and were entitled to the $450,000 deposit paid under the contract together with interest. The receivers and managers of the appellants were ordered to pay the respondents' costs of and incidental to the proceeding on the standard basis. The appellants appeal against those orders.

[10] The appellants identified the issues for determination on the appeal as:

1. whether, on the proper construction of s 27 of the Act, a purchaser who wrongfully refuses to attend settlement and receive a registrable instrument of transfer obtains a right to avoid the contract; and

2. whether the respondents, by their conduct, waived any right to avoid the contract or are estopped from relying on any such right.

[11] At relevant times, s 27 of the Act provided:

> "**27 Purchaser's rights if not given a registrable instrument of transfer within a certain period**
>
> (1) This section applies if—
>
> (a) a purchaser entered upon the purchase of a proposed lot under an instrument relating to the sale of the proposed lot (the ***instrument***); and
>
> (b) the vendor has not given the purchaser a registrable instrument of transfer for the lot within 3½ years after the day the instrument was made.
>
> (2) The purchaser may avoid the instrument by written notice given to the vendor before the vendor gives the purchaser the registrable instrument of transfer for the proposed lot."

[12] Section 27(1)(b) was amended in February 2012 by the insertion of the words "other than as a result of the purchaser's default" after "the instrument was made".

The appellants' contentions

[13] The appellants argued, in effect, that the amendment to s 27(1)(b) was made out of an abundance of caution and that the meaning of the subsection was unchanged by it. It was contended that subsection (1)(b) was ambiguous in meaning. In that regard, it was asked, rhetorically:

> "Can a purchaser be said to have been 'not given' the instrument when that purchaser has refused to be given it? Is there a constructive 'giving' for the purposes of s 27(2) in these circumstances?"

[14] The argument was expanded as follows. On the proper construction of s 27(1), a purchaser does not obtain a right to avoid a contract in circumstances where: the vendor was ready, willing and able to provide a registrable instrument of transfer in return for payment of the purchase price on settlement; the vendor, as it was entitled to do, called for settlement within the prescribed period; and the buyer failed to settle. This "construction" was said to be supported by the following six matters:

1. It is consistent with the language of s 27 in that the words "the vendor has not given" refer only to the vendor's conduct. They are not apt to encompass the situation described in the previous paragraph.

2. It does not detract from the consumer protection purpose of s 27, and it is consistent with the mischief that s 27 was designed to address: preventing vendors from delaying indefinitely before providing a buyer with registrable title.

3. The primary judge's construction provides a disincentive for developers to sell lots "off the plan" as it makes them vulnerable to purchasers who deliberately delay settlement in order to enable them to avoid contracts under s 27. Such a construction conflicts with the object of the legislation stated in s 2(a) of the Act "to facilitate property development in Queensland".

4. The primary judge's construction allows a purchaser to benefit from its own breach of contract. A defaulting purchaser would escape all liability, including liability for damages for breach of contract, if the vendor decided to seek specific performance instead of immediately terminating the contract for breach and the prescribed period expired before judgment in the specific performance proceeding, thereby allowing the purchaser to avoid the contract.

5. The primary judge's construction gives rise to a substantial risk of a purchaser deliberately delaying settlement to engineer a situation in which it could avoid the contract under s 27.

6. The primary judge's construction, in practical terms, would remove the vendor's option of obtaining specific performance. In the absence of a clear contrary intention, legislation is presumed not to alter common law or equitable rights.

The respondents' contentions

[15] Counsel for the respondents argued that s 27 was one of the Act's consumer protection provisions and that three and a half years had been selected by the legislature as a period "sufficient to accommodate all of the contingencies which might arise either in the process of development, or indeed to accommodate any contingencies or uncertainties such as the commencement and resolution of proceedings … relating to the non-completion of contracts".

[16] It was also argued that the legislation contemplated that a vendor, wishing to protect itself against a defaulting purchaser delaying settlement until such time as it could give a notice under s 27(2), would provide the registrable title and rely on a caveat preventing dealings between the purchaser and third parties to protect its position. The argument is unattractive and unworldly. It is highly improbable that a defaulting purchaser would accept a stamped registrable transfer from the vendor and hold it on the vendor's behalf. If the vendor registered the transfer in favour of the purchaser, it would be unlikely, at least on the respondents' construction of s 27, that a transfer would have been "given" to the purchaser by the vendor for the purposes of s 27. Moreover, any secured creditor of the vendor is unlikely to be enthusiastic about relinquishing its security without payment of the moneys secured or the provision of substitute security.

Relevant principles of statutory construction

[17] General principles of statutory construction relevant for present purposes may be extracted, conveniently, from the joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*:[1]

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1 (2009) 239 CLR 27 at [47].

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy." (Citations omitted)

[18] After referring to the above passage, French CJ and Hayne J in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross & Ors*[2] said:

> "The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
>
> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added). And as the plurality went on to say in *Project Blue Sky*:
>
> > Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

[19] The primary judge referred to the following passage from the reasons of Heydon J in *Momcilovic v The Queen*:[3]

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2 (2012) 87 ALJR 131 at 138 [24]–[25].

3 (2011) 245 CLR 1 at 175–176.

"[441] Pursuant to the principle of legality, the common law of statutory interpretation **requires a court to bear in mind an assumption about the need for clarity if certain results are to be achieved, and then to search, not for the intention of the legislature, but for the meaning of the language it used, interpreted in the context of that language**. The context lies partly in the rest of the statute (which calls for interpretation of its language), partly in the pre-existing state of the law, partly in the mischief being dealt with and partly in the state of the surrounding law in which the statute is to operate. **The search for 'intention' is only a search for the intention revealed by the meaning of the language. It is not a search for something outside its meaning and anterior to it which may be used to control it**. The same is true of another anthropomorphic reference to something which is also described as a mental state but in this field is not — 'purpose'. And it is also true of the search for 'policy'.

[442] Thus in *Project Blue Sky v Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ said of the common law rules of statutory interpretation:

> [69] **The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute**. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos* Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, **the process of construction must always begin by examining the context of the provision that is being construed.**

What their Honours meant by 'purpose' is what Dixon CJ meant by 'purpose'. What he meant by 'purpose' may be inferred from his earlier analysis of a statutory discretion:

> it is incumbent upon the public authority in whom the discretion is vested … to decide … bona fide and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred … But **courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument.**
>
> The subject matter of an enactment, and its scope, like its purpose, can only be gauged from its language. And light is

> cast on what 'policy' means by the statement of Mason and Wilson JJ that a court could decline to adopt a literal interpretation where this did not conform to the legislative intent, meaning 'the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions'." (Citations omitted, primary judge's emphasis)

[20] The appellants placed particular reliance on the principle of statutory interpretation that courts will resist an interpretation that will permit a person to take advantage of his or her own wrong.[4] In this regard, reference was made by the appellants to *Holden v Nuttall*[5] and *Thompson v Groote Eylandt Mining Co Ltd*.[6] In *Nuttall*, Herring CJ was required to consider whether an order for recovery of possession of premises by a landlord from a tenant who went into possession on a sublease shortly before the original lease was due to expire would cause the tenant "hardship". His Honour observed:[7]

> "In the circumstances of this case, moreover, I think it may properly be said that the hardship the [tenant] will suffer is self-inflicted and that it is his own conduct that has caused any hardship he may suffer. He has chosen to make use of the [*National Security (Landlord and Tenant) Regulations*] for his own protection regardless of the injury he has done the [landlord] thereby…
>
> The [*National Security (Landlord and Tenant) Regulations*] were not made to enable injustice to be perpetrated in this way. And the word 'hardship' should if necessary be limited as a matter of construction so as to avoid attributing to the regulation-maker the intention of bringing about an injustice or allowing a man to benefit from his own wrong. It is certainly most undesirable that people should be encouraged to make use of the regulations for the purpose of acquiring benefits for themselves at the expense of the legitimate rights of others."

[21] In *Thompson*, the Court considered legislation which provided that employers were liable to pay their workers compensation for workplace injuries. The definition of "worker" relevantly included an employee who was a "PAYE taxpayer". That term was defined as a worker in respect of whom the employer "makes deductions" from the worker's pay under the PAYE provisions of the tax legislation. The respondent was legally obliged to make PAYE deductions from the appellant's pay but failed to do so. The appellant was injured at work and the respondent denied liability to pay compensation on the basis that the appellant was not a "worker" as the respondent had not made the PAYE deductions it was required to make. Mildren J, with whom Thomas J agreed and Martin CJ expressed general agreement, said:[8]

> "In *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 331, Barwick CJ said:

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4 Pearce & Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis Butterworths, Chatswood, 2011 at [2.41]; Bennion, *Statutory Interpretation*, 2nd ed, Butterworths, London, 1992 at 795–797.

5 [1945] VLR 171.

6 (2003) 173 FLR 72.

7 *Holden v Nuttall* [1945] VLR 171 at 178.

8 *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72 at 80.

> 'It is ... a sound rule of statutory construction that a meaning of the language employed by the legislature which would produce an unjust or capricious result is to be avoided. Unless the statutory language is intractable, an intention to produce by its legislation an unjust or capricious result should not be attributed to the legislature.'
>
> There is another rule of construction which I think is also of great significance in this case, and that is the rule expressed in the maxim nullus commodum capere potest de injuria sua propria: no man can take advantage of his own wrong. This is a very ancient rule and it applies equally to the construction of statutes as it does to contracts."

[22] In *Davenport v The Queen*,[9] which was cited in *Thompson*, it was said:[10]

> "In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, *however clear and strong*, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract: see *Doe v Bancks*; *Roberts v Davey* (1833) 4 B & Ad 664; 110 ER 606, and other cases in the notes to *Dumpor's Case* 4 Co Rep 1196; 76 ER 1110…
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> It is however contended that this rule of construction is inapplicable when the legislature has imposed the condition. But in many cases the language of statutes, *even where public interests are affected, has been similarly modified*. Thus, where the statute provided that if the purchaser at an auction refused to pay the auction duty, his bidding 'should be null and void to all intents and purposes', it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Coltman J said: 'It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view': *Malins v Freeman* (1838) 4 Bing (NC) 395; 132 ER 839.
>
> There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, *but the intention to exclude it should be clearly established*." (Emphasis added)

[23] The central issue for determination in *Davenport* was whether a proviso of forfeiture in s 8 of the *Agricultural Reserves Act* 1863 imported into the terms of a lease by the statute made the term of the lease void or voidable only upon a breach of the relevant condition. Section 8 relevantly provided:[11]

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9 (1877) 3 App Cas 115.

10 *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72 at 80–81.

11 *Davenport v The Queen* (1877) 3 App Cas 115 at 121.

> "If any person selecting lands in an agricultural reserve shall fail to occupy and improve the same, as required … the right and interest of such selector to the land selected shall cease and determine, and the amount of the purchase-money, less by one-fourth part, shall be refunded to him…"

[24] The principles discussed in *Davenport* were applied in New Zealand in *Burrows v Molyneux Gold-Dredging Co Ltd*[12] and *Bank of New Zealand & Ewing v Scandinavian Water-Race Co (No 2)*.[13] Those or related principles have been applied frequently in the United Kingdom.[14]

[25] In *Woodcock v South Western Electricity Board*,[15] the word "occupier" in a provision in the *Electric Lighting (Clauses) Act* 1899 requiring electricity authorities "upon being required to do so by the owner or occupier of any premises [to] give and continue to give a supply of energy for those premises",[16] was held not to include reference to persons whose original entry on the premises was unlawful.

[26] In *R v Registrar General, ex parte Smith*,[17] Staughton LJ, referring to the proposition that "statutory duties which are in terms absolute may nevertheless be subject to implied limitations based upon principles of public policy accepted by the courts at the time when the Act is passed",[18] said:[19]

> "In the case of statutory duties the rule is, in my opinion, based upon interpretation of the meaning intended by Parliament. It is not a rule imposed ab extra as in the case of contracts. That is apparent from the passage of the judgment of Donaldson L.J. which I have just quoted. To hold otherwise would come perilously close to infringing constitutional doctrine of major importance. Our courts have no power to dispense with the laws enacted by Parliament or (as it is now called) to disapply them, subject to the law of the European Community. So the rule is that we must interpret Acts of Parliament as not requiring performance of duties, even when they are in terms absolute, if to do so would enable someone to benefit from his own serious crime."

[27] Widgery LJ observed in *Buswell v Goodwin*[20] that:

> "The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one and one which the court would wish to endorse …"

Consideration of the construction question

[28] Although it may be accepted that the principal purpose of s 27 is consumer protection, it does not follow that the object in s 2(a) ("to facilitate property

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12 [1936] NZLR 211.
13 (1906) 26 NZLR 1351.
14 Bennion, *Statutory Interpretation*, 5th ed, LexisNexis Butterworths, London, 2007 at 1141.
15 [1975] 2 All ER 545.
16 [1975] 2 All ER 545 at 546.
17 [1991] 2 QB 393.
18 *R v Secretary of State for the Home Department, ex parte Puttick* [1981] QB 767 at 773.
19 *R v Registrar General, ex parte Smith* [1991] 2 QB 393 at 402.
20 [1971] 1 WLR 92 at 96.

development in Queensland") or the principles of construction relied on by the appellants have no room for application. The respondents' argument that the legislature had set a three and a half year period to cover all contingencies is not particularly persuasive. Any disputes between a vendor and a purchaser in relation to the purchaser's obligation to complete under the contract are likely to arise after completion of construction of the apartments (or completion of the subdivision as the case may be), near the time of registration of the relevant plan and thus close to the contractual settlement date. As litigation, particularly if there are appeals, could well take substantially in excess of 12 months, there is no compelling reason to conclude that the limitation period was intended to be sufficient to enable the merits of any dispute to be fully litigated.

[29] Moreover, if a dispute as to a purchaser's obligation to complete arises within the limitation period, when the vendor is ready, willing and able to comply with the statutory requirements, it is surely far from obvious that the legislature contemplated that a defaulting purchaser be permitted to take advantage of its own wrongdoing.

[30] The primary judge held the language of s 27 to be "clear and unambiguous".[21] I respectfully disagree. The provision was not intended to be read literally. It does not contemplate that the vendor "give" the purchaser a registrable instrument of transfer in the sense of providing it gratuitously. Nor does it contemplate that the transfer be provided irrespective of the performance by the purchaser of its contractual obligations. Section 27 concerns the conduct of the parties to a contract for the sale and purchase of a "proposed lot".[22] As such, it, necessarily, contemplates that, unless the contract makes provision to the contrary, a registrable instrument of transfer will not be provided by the vendor to the purchaser except in return for the balance purchase price. Such obligations on the part of the vendor and purchaser are concurrent and mutually dependent.[23]

[31] It tends to follow from the foregoing that it is unlikely that s 27(1) was intended to operate so as to permit a purchaser which refuses to settle in breach of its contractual obligations and which frustrates the vendor's attempts to settle in compliance with its contractual obligations, to escape from the contract and avoid liability. That proposition, I think, emerges sufficiently from the text and context of s 27(1) not to require the support of principles of statutory construction. But if such support is needed, it may be found in the principles against construing a statute so as to enable a person to benefit from his or her own wrong or to infringe common law rights.[24] In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[25] Diplock LJ spoke of "the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong".

[32] In my view it is implicit in subsections (1) and (2) of s 27 that the "purchaser" referred to is one which, at the time of giving notice under s 27(2), was not

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21 *Meridien AB Pty Ltd & Anor v Jackson (as Trustee for the Jackson Family Trust) & Ors* [2012] QSC 260 at [31].

22 In Section 6 of the Act, "***proposed lot*** means that which will become a registered lot upon —
(a) registration of a plan; or
(b) registration of a plan and recording of a community management statement for a community titles scheme under the *Body Corporate and Community Management Act 1997*".

23 See e.g. *Foran v Wight* (1989) 168 CLR 385 at 396.

24 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341.

25 [1962] 2 QB 26 at 66. See also *F.C. Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301 at 325.

wrongfully failing or refusing to perform those of its obligations under the contract which were concurrent with and dependent upon the obligations of the vendor to provide it with a registrable instrument of transfer. The section does not contemplate the conferring of a right of avoidance on a purchaser which would have been provided with a registrable instrument of transfer on settlement under the contract were it not for its own contractual default.

[33] Section 14A of the *Acts Interpretation Act* 1954 (Qld) requires that, in interpreting a provision, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[34] Neither s 14A nor the purposive approach to construction, however, authorises a departure from the grammatical or literal meaning of a statute, where that meaning gives effect to the purpose or object of the statute.[26] The court's role is one of construction not legislation.[27] Here, the construction urged by the respondents is arguably consistent with the consumer protection aims of the legislation. However, it is inconsistent with the object of the legislation "to facilitate property development in Queensland".[28]

[35] The limits within which the courts must operate in straining the language of a statute in order to ensure that the legislative purpose is not thwarted were explored in the reasons of McHugh J in *Newcastle City Council v GIO General Ltd*,[29] where, after referring to a statement by Brennan CJ and himself in *IW v City of Perth*,[30] his Honour said:[31]

> "Nevertheless, when the purpose of a legislative provision is clear, a court may be justified in giving the provision 'a strained construction' to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose. In *Jones v Wrotham Park Estates*, Lord Diplock said that three conditions must be met before a court can read words into legislation. First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect." (Citations omitted)

[36] Lord Diplock's statement of principle had earlier been adopted and applied by McHugh JA in *Kingston v Keprose Pty Ltd*,[32] in which his Honour said:

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26 *Saraswati v The Queen* (1991) 172 CLR 1 at 21.
27 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 109.
28 *Land Sales Act* 1984 (Qld), s 2(a).
29 (1997) 191 CLR 85 at 113.
30 (1997) 191 CLR 1 at 12.
31 (1997) 191 CLR 85 at 113.
32 (1987) 11 NSWLR 404 at 421–423.

"Where the text of the legislative provision which embodies the proposition is grammatically capable of only one meaning and neither the context, the purpose of the provision nor the general purpose of the Act throws any real doubt on that meaning, the grammatical meaning must be taken as representing Parliament's intention as to the meaning of the law. A court cannot depart from the grammatical meaning of a provision because that meaning produces anomalies or injustices where no real doubt as to the intention of Parliament arises: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305, 320 and *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 234-235, 237, 238; [1978] 1 All ER 948 at 951, 954, 955. If the grammatical meaning does give rise to an injustice or anomaly, however, a real doubt will usually arise as to whether Parliament intended the grammatical meaning to prevail: cf *Cooper Brookes* (at 320). As Cardozo J said in *Re Rouss* 116 NE 782 at 785 (1917): 'Consequences cannot alter statutes, but may help to fix their meaning.' A resulting anomaly or injustice is not itself, however, a ground for departing from the grammatical meaning. Equally the natural and ordinary grammatical meaning of the provision is not decisive. The courts no longer follow statements to the effect of that of Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 162, that 'when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable': see *Cooper Brookes* (at 319-320).

Ascertaining the ordinary grammatical meaning of a legislative provision is only the first step in the process of statutory construction. If the consequences of the literal or grammatical construction raise a real doubt as to Parliament's intent, the court is justified in refusing to give the words their literal or grammatical construction: *R v City of London Court Judge and Payne* [1892] 1 QB 273 at 290, 301; *R v Wimbledon Justices; Ex parte Derwent* [1953] 1 QB 380 at 384; *Re Lockwood* [1958] Ch 231 at 238; *R v Oakes* [1959] 2 QB 350 at 354, 355; *Luke v Inland Revenue Commissioners* [1963] AC 557 at 577; *Adler v George* [1964] 2 QB 7 at 9-10; *Wiltshire v Barrett* [1966] 1 QB 312 at 332-333; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 879; *University College, Oxford (Master and Fellows) v Durdy* [1982] Ch 413 at 419; *Director of Public Prosecutions v Hester* [1973] AC 296 at 323 and *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (at 311, 320-321). Fifty years ago in *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 at 201, MacKinnon LJ said that when 'the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a *strained interpretation* upon some words which have been inadvertently used' (my emphasis).

However, it is not only when words have been inadvertently used that a court is empowered to give a legislative provision a strained

construction. A strained construction may be justified because words have been omitted: *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* (at 880-882); or because by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved: *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105; or because the statute proceeds on a mistaken assumption: *R v Draper* (1870) 1 VR(L) 118; or because the purpose of the provision indicates that Parliament did not intend the grammatical meaning to apply: *Adler v George* (at 10); *Wiltshire v Barrett* (at 332-333); *R v Oakes* (at 354-355); or because words must be omitted to avoid absurdity; *Re Lockwood* (at 238). As many of the cases show, the purpose of the legislation may require a meaning to be placed on the words of a particular provision which, standing alone, they cannot reasonably bear. In *Adler v George*, the Divisional Court held that the words 'in the vicinity of any prohibited place' meant 'in or in the vicinity of any prohibited place'. In *Wiltshire v Barrett* the Court of Appeal held that the words 'may arrest … a person committing an offence' meant 'may arrest … a person committing or apparently committing an offence'. In *Kammins* the House of Lords held that the words, 'No application … shall be entertained unless …' meant that some applications could be entertained although the unless clause was not satisfied. But as Mason and Wilson JJ pointed out in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (at 321), the propriety of departing from the literal rule does not depend upon labels. It:

> '… extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.'

In *Jones v Director of Public Prosecutions* [1962] AC 635, Lord Reid said (at 662) that you may not attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. His Lordship expressed the view that if the words 'are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go'. The often quoted remarks of Lord Simonds in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 at 191 are to the same effect. But if these remarks were ever a correct exposition of the cases, they no longer express the modern law of statutory construction. In *Jones v Wrotham Park Settled Estates*, Lord Diplock said (at 105) that if the application of the literal or grammatical meaning would lead to results which would defeat the purpose of a statute the court may read words into the legislation. But his Lordship said that words could only be read into a statute if three conditions were fulfilled. First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to

> be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect."

[37] The above passage was referred to with approval by Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *Bropho v Western Australia*.[33]

[38] Spigelman CJ, in *R v Young*, after referring to *Kingston v Keprose Pty Ltd*, *Bropho v Western Australia* and other authorities, said:[34]

> "As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based."

[39] Spigelman CJ elaborated on the above observations as follows:[35]

> "Where the words actually used are not reasonably capable of being construed in the manner contended for, they will not be so construed: *McAlister v The Queen* (1990) 169 CLR 324 at 330; *R v Di Maria* (1996) 67 SASR 466 at 472-474. If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text – using consequences to determine which meaning should be selected – then the process remains one of construction.
>
> The construction reached in this way will often be more clearly expressed by way of the addition of words to the words actually used in the legislation. The references in the authorities to the court 'supplying omitted words' should be understood as a means of expressing the court's conclusion with clarity, rather than as a description of the actual reasoning process which the court has conducted. In all cases, what the court has done is to construe the words actually used in their total context."

[40] In my view the construction advanced in paragraphs [30]–[32] above construes the critical words in s 27 in their conveyancing context. The construction is not the literal one but, as was explained earlier, a literal construction fails to have regard to the conveyancing context of s 27 and is plainly not in accordance with the

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33 (1990) 171 CLR 1 at 20.
34 (1999) 46 NSWLR 681 at 687.
35 (1999) 46 NSWLR 681 at 687–688.

legislative intent. Once that is understood there is no difficulty in construing s 27 as I have done, particularly as this accommodates the principles of construction discussed earlier. This construction does not give the words of s 27 a meaning that they cannot reasonably bear. It conventionally reads down or limits the improbably broad scope of the words of s 27, if read literally, and gives effect to the principles against construing statutes to permit a person taking advantage of his own wrong and interfering with vested property interests and common law rights.[36]

[41] The primary judge derived support for his construction from the Explanatory Notes to the *Sustainable Planning and Other Legislation Amendment Bill* 2011 which relevantly provided:

> "The amendment is proposed to apply to existing contracts entered into before the commencement of the amendment. It is proposed to apply to such existing contracts regardless of whether the sunset period has elapsed. It will not apply to those contracts where the sunset period has elapsed, the vendor has not given a registrable instrument of transfer within the sunset period and the purchaser has given written notice to the vendor in accordance with section 27(2).
>
> This will mean those purchasers who have defaulted under existing contracts, which have not settled on the date required by the contract (and still within the sunset period), cannot terminate the contract once the sunset period has expired. In other words, retrospective operation would mean that *'defaulting' purchasers* with existing contracts to which the *Land Sales Act 1984* applies, *would no longer be able to take advantage of the ambiguity*.
>
> **There are cases where sellers have commenced litigation to seek specific performance of the purchaser's obligation to settle. This is also in full knowledge that the existing interpretation of section 27 leaving the purchaser the right to terminate. It is also understood some purchasers are fully aware of the existing interpretation and have expectations of their existing statutory right.**
>
> …
>
> Applying the proposed amendment to all existing contracts, regardless of court proceedings, will mean vendors can continue with their existing court proceedings or instigate proceedings, without being concerned with purchasers terminating the contracts due to *the ambiguity of section 27*.
>
> It is understood there are vendors with existing contracts for proposed lots with a cumulative value in the hundreds of millions of dollars. If purchasers choose not to settle in light of *the existing interpretation* of section 27, vendors are left with two options without the amendment. They are, to take the risk of seeking a court order for specific performance and hope it will be granted within the

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36 *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

> sunset period or, to terminate the contract because of the purchaser's default. It is understood the risk is higher in seeking a court order as the settlement dates are usually very near to the end of the sunset period. It is understood vendors are deciding to choose termination of contracts as they know they can, under the contracts, keep the paid deposits.
>
> If a defaulting purchaser terminates a contract under *the existing interpretation* of section 27, the vendor must return the deposit to the purchaser. This approach leaves the vendor in the position of no return on its investment and also facing new marketing and selling costs for the now completed but unsold lot. It is for these reasons that retrospective application is considered justified." (Emphasis added)

[42] Particular reliance was placed by the primary judge on the passage emphasised in bold type above. I am not confident, however, that the Explanatory Notes support the conclusion that it may be inferred from the amending legislation that the parliament indicated a view of the construction of s 27 consistent with that of the primary judge's. The words in italics demonstrate an understanding on the part of the Attorney-General, Minister for Local Government and Special Minister of State ("the Minister") that s 27 was ambiguous and that there was an interpretation, not necessarily the correct interpretation, which permitted a defaulting purchaser to take advantage of the section. There is no indication of a purpose to interfere with the vested rights of parties to contracts to which the proposed amendment of s 27 was not to apply.

[43] In his Second Reading Speech on the *Sustainable Planning and Other Legislation Amendment Bill* 2011, the Minister observed:[37]

> "I am also moving an amendment to the bill to clarify the meaning of section 27 of the Land Sales Act. Section 27 sets out circumstances in which a buyer of a proposed lot may validly terminate the contract for that lot. It requires the seller of a proposed community title scheme lot to give a buyer of that proposed lot a registrar's transfer form to convey its title within 3½ years. If this does not occur within that 3½ year period the buyer may terminate the contract. The policy intention underpinning section 27 is that the seller must provide the buyer with a finished product within a reasonable development period so that the buyer is not faced with uncertainty as to the date of the completion of the proposed lot. However, if a buyer has not settled in accordance with the contract—that is, paid the purchase price in exchange for the title—*it could be argued that a current reading of section 27 permits a buyer to still terminate the contract once the 3½ year period, or extended 5½ year period, expires. This clearly is not the policy objective intended by section 27. The overall policy objective of the act is to promote consumer protection for the buyer by compelling the seller to complete a relevant development on the proposed lot within a reasonable period.*
>
> *At the same time, a further objective of the act is to facilitate property development and protect a seller by creating contractual*

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37 Record of Proceedings, Wednesday 15 February 2012 at 149–150.

> *certainty*. The proposed amendment resettles the balance between these two objectives by clarifying that the buyer may only terminate a contract under section 27 if they are not in default under the contract or if they have not failed to settle in accordance with the contract. This will provide contractual certainty for both parties while at the same time preserve the rights to terminate if the seller does not give a registerable instrument of transfer within that 3½ years. In addition, the proposed amendment will apply to all existing contracts from midnight on the day the amendment is introduced into this House—that is today. Therefore, if you have already exercised your right or taken legal action it will not apply. If you have not sought to exercise any right then the new law will apply." (Emphasis added)

[44] It will be seen from the above that the Minister admitted only to the existence of an argument that s 27, as originally worded, permitted a defaulting purchaser to terminate. The Minister noted that this was "clearly … not the policy objective intended by s 27". His statement that the amendment will have the effect of "clarifying" that a buyer may only rely on s 27(2) if the buyer is not in default or has not failed to settle in accordance with the contract is inconsistent with the view that the section, if unamended, would have different consequences.

[45] In construing s 27 in its unamended form, regard may be had to the amending legislation. In *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd*,[38] Dixon, Evatt and McTiernan JJ said in a passage, which has often been repeated:

> "'An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it' (*Maxwell, Interpretation of Statutes*, 6th ed. (1920), p. 544, and, per Lord *Atkinson*, *Ormond Investment Co.* v. *Betts*). 'Where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute' (per Lord *Atkinson*). In *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, Lord *Sterndale* said: 'I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation, then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.'" (Citations omitted)

[46] Dixon J, in *Grain Elevators Board (Vic) v Dunmunkle Corporation*,[39] said:

> "It would be a strange result if we were to interpret the prior legislation as giving a wider exemption than that conferred by the [later] provision so that the express exemption it makes would prove unnecessary and the qualifications it places upon that exemption would be futile."

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38 (1937) 57 CLR 610 at 625–626.

39 (1946) 73 CLR 70 at 86.

[47] That passage was referred to by Dawson J in *Hunter Resources Ltd v Melville*,[40] where his Honour said:

> "In *Grain Elevators Board (Vict.) v. Dunmunkle Corporation* Dixon J. expressed the view that an amending Act might be taken into account in the interpretation of the prior legislation, at least to avoid a result that would render the amending legislation unnecessary or futile." (Citations omitted)

[48] However, in determining the proper construction of earlier legislation, regard must be had to the possibility that the amendments were made out of an abundance of caution in order to remove doubt.[41] In *Interlego AG & Anor v Croner Trading Pty Ltd*,[42] Gummow J relevantly said:

> "There is a line of authority that an amendment may be taken into account in determining the scope of the prior legislation, at least to avoid a result which would render the amendment unnecessary, or futile or deficient: see especially *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86; *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255. But in doing so caution should be exercised: see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988), §3.26. It is, after all, a curious way of revealing parliamentary intention at the time of passing the earlier provision. As was observed by Viscount Haldane LC in *Re Samuel* [1913] AC 514 at 526:
>
> > 'It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, ex abundante cautela, to remove possible doubts.'
>
> See also *Commissioner of Taxation (Cth) v Verzyden* (1988) 88 ATC 4,205 at 4,210; *Downey v Trans Waste Pty Ltd* (1991) 172 CLR 167 at 177."

[49] Section 37 of the *Sustainable Planning and Other Legislation Amendment Act* 2012 provides:

> "'**37 Transitional provision for Sustainable Planning and Other Legislation Amendment Act 2012**
>
> '(1) Section 27 as amended by the *Sustainable Planning and Other Legislation Amendment Act 2012*, section 22B applies to an instrument relating to the sale of a proposed lot if—

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40 (1988) 164 CLR 234 at 254–255.

41 *Allina Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 203 at 212; Pearce & Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis Butterworths, Chatswood, 2011 at 99; *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539–540; *Interlego AG & Anor v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 382.

42 (1992) 39 FCR 348 at 382.

(a) the instrument is in force, and settlement has not been effected, immediately before commencement; or

(b) the instrument is made on or after commencement.

'(2) Subsection (1)(a) applies—

(a) regardless of whether the sunset period ended or ends before, on or after commencement; and

(b) even if an action for specific performance of the purchaser's obligations under the instrument has been started by the vendor, but not completed, before commencement.

'(3) Subsections (1)(a) and (2) apply despite the *Acts Interpretation Act 1954*, section 20.

'(4) In this section—

commencement means the commencement of the *Sustainable Planning and Other Legislation Amendment Act 2012*, section 22B.

sunset period means the 3½ year period mentioned in section 27(1)(b) or, if that period is extended by a regulation made under section 28, the extended period.'."

[50] The amendment removes ambiguity and provides certainty in respect of instruments to which it relates. It does not apply to instruments which are not in force prior to its commencement or deal expressly or implicitly with the rights and obligations of the parties to such instruments. I do not detect in it any intention to declare or interfere with any rights or obligations in respect of instruments to which it does not apply.

Conclusion

[51] Having regard to the conclusions reached above, it is unnecessary to determine the merits of the appellants' waiver and estoppel arguments. I will content myself with these observations. As for the alleged estoppel, there did not appear to be any representation by the purchasers on which the vendors relied to their detriment. As for waiver, or election, it does not appear that the respondents elected between inconsistent rights.[43] As the primary judge's orders were based on an erroneous construction of s 27(2) of the Act, they must be set aside. There are plainly triable issues which cannot be resolved by this Court and I would therefore order that:

1. The appeal be allowed.

2. Paragraphs 2, 3 and 4 of the orders made on 14 September 2012 be set aside.

3. The application filed by the respondents on 5 March 2012 be dismissed.

4. The respondents pay the appellants' costs of the application and of this appeal.

[52] **ATKINSON J:** I agree with the reasons of Muir JA and the orders he proposes.

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43 C.f. *Sargent v ASL Developments Ltd* (1974) 131 CLR 634.