SUPREME COURT OF QUEENSLAND

CITATION:	*Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2013] QSC 148
PARTIES:	**PRINCIPAL PROPERTIES PTY LTD** ACN 072 279 675 (plaintiff) v **BRISBANE BRONCOS LEAGUES CLUB LIMITED** **ACN 010 798 679** (defendant)
FILE NO/S:	BS 6489 of 2012
DIVISION:	Trial
PROCEEDING:	Determination of separate questions
DELIVERED ON:	7 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2013
JUDGE:	Jackson J
ORDER:	Adjourn the hearing of the application to a date to be fixed to enable the parties to make brief written submissions as to the form of order and as to costs
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where parties entered into a call option deed for the irrevocable offer to sell land subject to conditions precedent – where the call option required that either written notice be given terminating the option or a call option extension fee be paid to continue the call option – where the grantee failed to give written notice and failed to pay the call option extension fee – where grantor prevented a condition precedent being satisfied by not approving a development permit application and consenting to it being lodged – whether the call option came to an end when no notice of continuation was given and no call option extension fee was paid CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – OTHER

PARTICULAR CASES – where parties entered into a call option deed for the irrevocable offer to sell land subject to conditions precedent – where a conditions precedent not satisfied as the grantor refused to approve a development permit application and consent to it being lodged – whether the grantor can take a benefit from its own breach of contract – whether call option deed was suspended

Alghussein Establishment v Eton College [1988] 1 WLR 587, followed
Bass v Permanent Trustee Co Ltd [1999] HCA 9; (1999) 198 CLR 334, cited
Brown v Heffer [1967] HCA 40; (1967) 116 CLR 344, cited
Butts v O'Dwyer [1952] HCA 74; (1952) 87 CLR 267, cited
Business and Professional Leasing Pty Ltd v Akuity Pty Ltd & anor [2008] QCA 215, cited
Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 2 AC 180, cited
Foran v Wight [1989] HCA 51; (1989) 168 CLR 385, considered
Fraser v The Irish Restaurant & Bar Company Pty Ltd [2008] QCA 270, cited
Frikton v Jelekainen [2007] QCA 451, cited
Grieve v Enge [2006] QCA 213, considered
Hare v Nicoll [1966] 2 QB 130, distinguished
Hope Island Resort Holdings Pty Ltd & Anor v Jefferson Properties (Qld) Pty Ltd & Ors [2005] QCA 315, cited
Kennedy v Vercoe [1960] HCA 64; (1960) 105 CLR 521 at 529, cited
Laybutt v Amoco Australia Pty Ltd [1974] HCA 49; (1974) 132 CLR 57, cited
McWilliam v McWilliams Wines Pty Ltd [1964] HCA 6; (1964) 114 CLR 656, cited
MK & JA Roche Pty Ltd & Ors v Metro Edgely Pty Ltd & Anor [2005] NSWCA 39, applied
New Zealand Shipping Company v Societe des Ateliers et Chantiers de France [1919] AC 1, considered
Nyhuis v Anton [1980] Qd R 34, distinguished
QBE Insurance (Australia) Ltd v Tropical Reef Shipyard Pty Ltd [2009] FCAFC 161, cited
Quinn Villages Pty Ltd v Mulherin [2006] QCA 433, cited
Rainsford v State of Victoria [2005] FCAFC 163, cited
Rudi's Enterprises Pty Ltd v Jay (1987) 10 NSWLR 568, applied
Rushton (SA) Pty Ltd v Holzberger [2003] QCA 106, cited
Ruthol Pty Ltd v Tricon (Australia) Pty Ltd [2005] NSWCA 443, cited
Suttor v Gundowda [1950] HCA 35; (1950) 81 CLR 418, followed
Turner v Bladin [1951] HCA 13; (1951) 82 CLR 463, considered

United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 WLR 74, distinguished
United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904, distinguished
Vale 1 Pty Ltd v Delorain Pty Ltd [2010] QCA 259, cited

COUNSEL: L F Kelly SC and S Monks for the plaintiff
G A Thompson SC and D A Skennar for the defendant

SOLICITORS: Shine Lawyers for the plaintiff
McCullough Robertson for the defendant

[1] **JACKSON J:** Two questions are set down for separate determination. They are:

(a) whether on the proper construction of clause 3.4(b) of the Call Option Deed, if not later than the 3 Year Date the plaintiff failed to give written notice to the defendant that the Call Option is going to continue and to pay to the Defendant the Call Option Extension Fee, the plaintiff may no longer exercise the Call Option; and

(b) whether the matters pleaded in paragraph 7 of the amended answer have the consequence that the plaintiff continues to have an entitlement to give written notice that the Call Option is going to continue and pay to the grantor the Call Option Extension Fee.

[2] The parties on both sides tendered affidavit evidence. However, they did not seek the resolution of any substantial question of fact raised on the pleadings, such as whether the defendant was in fact in breach of contract as alleged in the paragraphs statement of claim which are picked up by paragraph 7 of the amended answer.

[3] The first question raises a question of contractual construction. In substance, the point is whether the plaintiff has lost any right it might otherwise have had to exercise the option in question because it did not extend the period to do so within the time or in the manner provided for under the parties' contract.

[4] The second question is intended to be answered as a matter of law on uncontested facts, assuming the factual matters alleged in the relevant paragraphs, but without deciding the facts alleged. That course is often not appropriate for a separate question, because the determination produces no final order which has utility.[1] Demurrers on the civil side are long abolished.[2] Although a separate question can be used to formulate what is, in effect, a demurrer, care must be taken that the facts alleged exhaust the relevant universe. There are strong statements against that course in some cases, although regard must be had to the particular context.[3] In substance, the second question posed is whether paragraph 7 of the amended answer discloses a reasonable defence to the claim made in paragraphs 2 to 7 of the

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1 *Bass v Permanent Trustee Co Ltd* [1999] HCA 9 at [50]; (1999) 198 CLR 334.

2 In Queensland, by the repeal of order 29 of the *Rules of the Supreme Court* upon the introduction of the *Uniform Civil Procedure Rules*.

3 *QBE Insurance (Australia) Ltd v Tropical Reef Shipyard Pty Ltd* [2009] FCAFC 161 at [22] – [27]; *Rainsford v State of Victoria* [2005] FCAFC 163 at [38] – [44].

counterclaim. I propose to deal with it as if that question were raised on an application under *UCPR* 171(1)(a). Thus, if the question is answered "no" paragraph 7 of the amended answer would be liable to be struck out but a "yes" answer will not have the weakness that the answer will lack utility because the facts have not been found or agreed. That answer would only have the binding effect that a dismissal of an application to strike out paragraph 7 of the amended answer would have had.

[5] In the result, it is not possible to answer either of the questions by a simple affirmative or negative answer. Either of the parties may apply for an appropriate form of order in the light of these reasons, although I will indicate my tentative view as to what the orders should be.

The dispute

[6] The plaintiff is a developer. The defendant is the proprietor of land which may be suitable for development. They entered into a contract in the form of a deed granting a call option to the developer to buy and develop some of the proprietor's land, depending on satisfaction of conditions precedent to the right to exercise the option.

[7] The contract is described as a "Call Option Deed" and is dated 3 November 2009. The "Call Option" is "an irrevocable option to purchase the Land for the Purchase Price [of $1,000,000] and otherwise on and subject to the terms and conditions contained in the Contract and this deed". The developer's entitlement to exercise the Call Option is made subject to the developer securing a development permit, sale of 90% of the residential units or apartments in the development and a construction contract to effect the works. If those conditions are not satisfied before the defined "Call Option Expiry Date", then either party is entitled to terminate the contract by notice.

[8] The Call Option Deed provides for the developer to pay option fees for the conditional right to exercise the Call Option. A modest initial payment of $100, described as the "Initial Option Fee" was paid, but if the Call Option was not exercised as at a date 3 years after the date of the Call Option Deed, defined as the "3 Year Date", the developer was given an election either to terminate the Call Option or to continue and to pay an additional sum of $100,000, described as the "Call Option Extension Fee". Doing so would have had the practical effect of continuing or extending the Call Option for the balance of the period until the Call Option Expiry Date is reached.

[9] The proprietor contends that because the developer did not give notice that the Call Option was going to continue and pay the $100,000, not later than the 3 Year Date, the Call Option is at an end. The developer disputes that conclusion. The developer alternatively contends that the proprietor's refusal to approve a development permit application for the project and to consent to the lodgement of that application in accordance with the contract suspended the operation of the extension clause.

[10] It is necessary to turn to the facts and contentions with more precision before considering the arguments.

Contextual provisions and facts

[11] In the Call Option Deed, the developer is identified as the grantee and the proprietor is identified as the grantor. As previously mentioned, the Call Option is granted to the developer, but that is subject to the terms and conditions contained in the Call Option Deed. The Call Option "is to be read and construed as an irrevocable offer rather than a conditional contract". That may have been intended to avoid the legal debate as to the characterisation of an option under the law of contract.[4]

[12] Clause 3.4 of the Call Option Deed provides:

> "**Call Option Extension Fee**
>
> If this Call Option is not terminated and (sic) not been exercised as at the date 3 years after the date of this Call Option Deed (in this clause 3.4, '3 Year Date'), then the Grantee must, not later than the 3 Year Date, either:
>
> (a) give written notice to the Grantor of termination of this Call Option in which case the Call Option will be terminated; or
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> (b) give written notice to the Grantor that the Call Option is going to continue and pay to the Grantor (or the Stakeholder if the law does not allow payment to the Grantor), the Call Option Extension Fee."

[13] Clause 1.1 of the Call Option Deed defines "Call Option Extension Fee" to mean the sum of $100,000 plus GST (if applicable).

[14] Three years after 3 November 2009 was 4 November 2012. That was the 3 Year Date within the meaning of clause 3.4.

[15] At the end of 4 November 2012 and thereafter, the developer had not given notice of termination of the Call Option. Equally, the developer had not given notice that the Call Option was going to continue or pay the Call Option Extension Fee to the proprietor or the Stakeholder.

[16] The developer does not allege that the proprietor intimated to it or represented to it that compliance with or making an election in accordance with clause 3.4 was not required. The developer also does not allege that it acted in reliance on any assumption of that kind. It contends that it was not required to do so as a matter of

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[4] *Laybutt v Amoco Australia Pty Ltd* [1974] HCA 49; (1974) 132 CLR 57 at 73. I note that Gibbs J appears to have left open the question whether an option in the form of an irrevocable offer is nonetheless a conditional contract of sale: at 75. And see *Vale 1 Pty Ltd v Delorain Pty Ltd* [2010] QCA 259 at [11].

law, because of the proprietor's failures to approve a development permit application for the land and to consent to the application being lodged.

[17] Clause 3.4 must be construed in its context in the Call Option Deed. Simplifying to some extent, salient features of the operation of the deed may be summarised as follows:

(a) the maximum period for the right to exercise the option was delineated by the "Call Option Expiry Date", which was defined by reference to the expiry of dates for a number of successive steps provided for under the Call Option Deed. The total was 47 months subject to any delay between the approval of a reconfiguration application for the sub-division of the proprietor's land to create a separate title for the land to be sold and the issue of a separate freehold title or titles for that purpose;

(b) the first of those steps was the satisfaction of a condition providing for the developer to acquire other land and to notify the proprietor that the condition was satisfied or waived by a date no later than 11 months from the date of the Call Option Deed called the "Due Diligence Date";

(c) the second step was the satisfaction of a condition providing for the developer to make due diligence inquiries and to notify the proprietor that the condition was not satisfied and terminating the contract by the Due Diligence Date;

(d) the third step was to be the lodging of a "Development Permit Application" by the developer on or before a date no later than 12 months from the Due Diligence Date, which was defined to be the "Development Application Date". The lodgement was to be preceded by the establishment of a committee by the parties with the function, inter alia, to approve the Development Permit Application before lodgement;

(e) the fourth step was to be that on and from the date the Development Permit Application was lodged the developer was obliged to diligently pursue it;

(f) the fifth step was to be that if the developer was dissatisfied with either a refusal of the "Development Applications" or conditions of their approval or that the Development is unlikely to be approved on acceptable terms or at all before 24 months after the Development Application Date, or any extension of that date under clause 17, which as previously mentioned was defined to be the Call Option Expiry Date, the developer is entitled to terminate the Call Option Deed; and

(g) the sixth step was to be that not less than 6 months prior to the Call Option Expiry Date the developer was required to apply to reconfigure the proprietor's land and the

> developer's entitlement to exercise the Call Option was subject to the condition that the application be approved and if that condition is not satisfied prior to the Call Option Expiry Date then either party is entitled to terminate the deed by notice in writing to the other.

[18] As previously mentioned, by clause 14.1 of the Call Option Deed the developer's "entitlement to exercise the Call Option is subject to the [developer] before the Call Option Expiry Date:

> (i) securing the Development Permit ("Permit Condition");
> (ii) securing… sale of 90% of the residential units or apartments in the Development ("Sales Condition"); and
> (iii) securing… a construction contract to effect the works… ("Construction Condition")",

which are collectively defined as the "Project Conditions".

[19] Clause 14.6 of the Call Option Deed provides that "[if] the Project Conditions are not satisfied before the Call Option Expiry Date then either party may terminate this deed by notice in writing to the other".

[20] There are a number of express obligations of the proprietor to co-operate with the developer in taking the steps calculated to achieve satisfaction of the Project Conditions and reconfiguration approval. Among them, clause 16.5 provides that the proprietor will sign as the registered owner all documents as in the opinion of the proprietor are reasonably necessary to enable the developer to make the Development Applications.

Contentions expanded

[21] The proprietor submits that continuance of the offer to sell comprised in the Call Option after the 3 Year Date required the developer to comply with clause 3.4(b). It relies on the imperative language of clause 3.4: "then the grantee **must** not later than the 3 Year Date …". It also relies upon cases to the effect that strict compliance is required with terms of contracts providing for the exercise of an option.[5]

[22] The proprietor's contention is that the failure to give notice under clause 3.4(b) that the Call Option is going to continue and to pay to the proprietor the Call Option Extension Fee had the same effect as giving notice of termination. It contends that the failure to give any notice under clause 3.4 automatically terminated the Call Option.

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[5] *Hare v Nicoll* [1966] 2 QB 130 at 141; *United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74 at 81; *Duncan Properties Pty Ltd v Hunter* (1991) 1 Qd R 101 at 103 and *Rushton (SA) Pty Ltd v Holzberger* [2003] QCA 106 at [14]-[18].

[23] The developer disputes that contention. It submits that the failure to give notice under clause 3.4 may have been a breach of a promissory term but it did not operate as an election either to terminate the Call Option or to continue the Call Option so as to trigger the obligation to pay the Call Option Extension Fee to the proprietor or the Stakeholder. Alternatively, it submits that if an election was made by a failure to give either of the notices expressly provided for under clause 3.4, the election was that it is going to continue the Call Option.

[24] The developer's primary contention, however, is that the proprietor's refusal to approve the developer's draft Development Permit Application and to consent to it being lodged was a serious breach of contract which has delayed the developer in the steps it proposed to take to progress the development towards obtaining a development permit, sales and finance for the project, and a construction contract to effect the proposed works.

[25] It contends that its obligations under clause 3.4 were suspended and remain so "until the plaintiff is able to obtain a judgment determining whether the defendant did repudiate its obligations". It relies on the relief sought in the claim by way of an order extending the date by which it must lodge the Development Applications to a day 14 days after the court makes orders and submits that the court can make a further order that extends the timeframe for clause 3.4 for an additional period of 13 months and 3 days, as that reflected by the timeframe between 30 September 2011 (the deadline specified in the Call Option for lodging the application) and 3 November 2012 (the deadline for payment of the Call Option Extensions Fee).

[26] The developer relies on *Grieve v Enge*[6] for the proposition that its obligations under clause 3.4 are suspended and on that case and *Turner v Bladin*[7] for the proposition that the court has power to extend the agreed time under clause 3.4.

Characterising some essential rights and obligations

[27] The Call Option Deed is a contract conferring rights and obligations in a form that is, in general, familiar in the context of property transactions in this State. Put and call options are now an everyday method of contracting for the sale of land. The present contract is purely a call option.

[28] A contract for the grant of an option to buy typically involves a money consideration passing from the grantee to the grantor in the form of option fees, which will remain the property of the grantor in the event that the option is not exercised. Also typically, the grantee is not obliged to exercise the option – that is a matter of right or power. Again typically, the right or power is time based – it exists for the option term or period. Failure to exercise the right or power during the term or period extinguishes the right or power without action on the part of the grantor being required.

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6 [2006] QCA 213.

7 [1951] HCA 13; (1951) 82 CLR 463 at 472.

[29] Clause 2.1 of the Call Option Deed defines the Call Option without referring to the term or period of the Call Option, except to the extent that the grant is expressed to be on the terms and conditions contained in the deed. Clause 4.1 provides that the Call Option may only be exercised by delivering an appropriate notice to the proprietor. Clause 4.2 provides that the notice "must be given on or before 5:00 pm on the Call Option Expiry Date". And clause 5(a) provides that "[i]f the Call Option is not exercised in accordance with clause 4 the Call Option will lapse at 5:00 pm on the Call Option Expiry Date". Thus far, the Call Option conforms to the usual time based structure of an option to buy.

[30] However, clauses 14.1 and 14.6 operate in a slightly confusing manner. Clause 14.1 provides that the developer's entitlement to exercise the option is conditional in the sense that the option cannot be exercised until the Project Conditions are satisfied. Reading that clause with clauses 2.1, 4.1, 4.2 and 5, that the Call Option will lapse if the Project Conditions are not satisfied by 5:00 pm on the Call Option Expiry Date.

[31] Yet, as previously mentioned, clause 14.6 provides that if the Project Conditions are not satisfied before the Call Option Expiry Date, then either party may terminate this deed by notice in writing to the other. It cannot be intended that either party could terminate at a time before the option has lapsed if the Project Conditions could still be satisfied. In my view, in context, clause 14.6 is intended to operate where one or more of the Project Conditions cannot be satisfied because it has failed at a time before the Call Option Expiry Date.

[32] A larger question is whether clause 14.6 confers a right to terminate the deed in circumstances where the option will have lapsed because the Call Option Expiry Date has passed without exercise of the Call Option. It is not at all clear what executory rights or obligations of the parties would be brought to an end by such a termination. One possibility is the right of first refusal conferred by clause 24, but that is not clear. It seems inconsistent with the conclusion that the option will have lapsed by virtue of the time based nature of the grant that either party should need to terminate the Call Option after 5:00 pm on the Call Option Expiry Date.

[33] It is clear that the parties agreed that the right to exercise the option had a commercial time value. That is reflected in both the Initial Option Fee and the Call Option Extension Fee. It is also reflected in the time restriction of the right or power of the developer to exercise the option to before 5:00 pm on the Call Option Expiry Date. It is inconsistent with that restriction for the developer to have a right or power to exercise the option after that time has expired. It should be accepted that clause 14.6 does not operate to extend that the time for the developer to give notice under clause 4.2.

Effect of not giving notice under clause 3.4

[34] It is now necessary to consider the operation of clause 3.4 more closely. It is an "if" clause, because it operates "if" the Call Option "is not terminated and [has] not been exercised as at the [3 Year Date]". Termination of the deed might occur under:

(a) clause 11(b), for failure of the condition that the developer acquire the land defined as the "Other Land";
(b) clause 12, for failure of the developer to be satisfied with the outcome of its due diligence enquiries;
(c) clause 14.6, for failure of one or more of the Project Conditions;
(d) clause 16.2, for the developer's determination that the development is unlikely to be approved on conditions which are acceptable or the satisfaction of the Permit Condition by the Call Option Expiry Date is unlikely; and
(e) clause 17.3(a), for failure to obtain approval of the reconfiguration application prior to the Call Option Expiry Date.

[35] None of those things had occurred at the 3 Year Date. Nor had there been a termination under any other right, whether under a provision of the deed or under the general law.

[36] Secondly, because clause 3.4 requires that the Call Option has not been exercised "as at" the 3 Year Date, that date must be reached for the clause to operate. The obligation under clause 3.4 to give notice of termination or notice that the Call Option is going to continue "not later than the 3 Year Date" could then mean that the election under clause 3.4 must be made and that the appropriate notice must be given on that day. Whether or not that be so, it seems clear that the words "must, not later than" preclude action being taken in accordance with the clause after the 3 Year Date.

[37] Thirdly, giving notice of termination under clause 3.4(a) has the consequence – "in which case" - that "the Call Option will be terminated". In its ordinary meaning, to terminate something is to bring it to an end. It is the "Call Option" rather than the deed which is to be brought to an end, but nothing seems to turn on that choice of words in clause 3.4.

[38] Fourthly, giving notice that the Call Option is "going to continue" under clause 3.4(b) reinforces the election presented by the two paragraphs of clause 3.4. There is no logical third alternative to terminating a thing on the one hand or continuing it on the other hand. The notices, one of which must be provided under clause 3.4, exhaust the logical possibilities as to the future existence of the Call Option.

[39] Yet the developer submits that there is an alternative presented by the possibility that the developer does not give any notice, notwithstanding that the parties agreed that it would. It submits that failure to give the notice is neither an election to terminate nor an election to continue the Call Option, at least to the extent that to continue requires that the Call Option Extension Fee be paid.

[40] Returning to the text of clause 3.4(b), it provides that the developer "must, not later that the 3 Year Date…give written notice… that the Call Option is going to continue and pay… the Call Option Extension Fee". As a matter of ordinary grammar and syntax, the text requires both that the notice be given and that the fee

must be paid not later than the date. There is no apparent contextual reason or any other reason which was advanced for a contrary conclusion. Case law supports the view that the payment requirement is essential.

[41] Acceptance of the developer's submission would have the consequence that by not giving either notice the developer can avoid the election it agreed to make and was required to make under clause 3.4 and do so in a way that gives it the outcome of continuing the Call Option as if it had elected to continue the call option but without paying the fee as part of that election.

[42] In my opinion, that is an uncommercial construction of clause 3.4 in the context of the Call Option Deed as discussed above. Commercially, the election provided for under clause 3.4 was an opportunity to continue the Call Option after three years provided an additional non-refundable option fee of $100,000 was paid at that time and on the basis that payment was a requirement of obtaining the continuation. Otherwise, the Call Option was defeasible by operation of time at the 3 Year Date, even if the Call Option Expiry Date had not yet been reached. It would totally undermine the intended operation of that commercial object if the developer were able to get the benefit of additional time without having to elect to continue and pay the fee up front. I reject that suggested construction of the clause.

[43] It follows, in my view, that notwithstanding failure by the developer to give notice of termination the Call Option would terminate upon the expiry of the 3 Year Date, in the absence of notice that the Call Option is going to continue and payment of the Call Option Extension Fee. The proprietor is entitled to a determination and declaration as to the meaning and operation of clause 3.4 consistent with that conclusion, unless the points raised by the developer in relation to the second question would preclude it from obtaining that order.

[44] The developer sought to avoid the conclusion I have just reached by focussing on the promissory nature of clause 3.4 and a discussion of how the term should be classified, that is, as a condition, warranty or intermediate term. As to the former, there is no inconsistency between a term of a contract operating as a contingent condition and in a promissory way. The question of contractual construction in this case is whether clause 3.4 operated to bring the Call Option to an end on 4 November 2012, because the developer failed to give notice one way or the other on that day, not whether the developer promised to give notice of termination of the Call Option in that event.

[45] In my view, there is no need to classify the promissory aspect of clause 3.4 as a condition, warranty or intermediate term. The purpose of that classification, in general, is to assess whether a right of termination is created by a breach of the relevant contractual term. That is not a question raised in the proceeding.

Allegation of suspension

[46] The effect of paragraph 7 of the amended answer is that the plaintiff alleges that:

(a) the proprietor was obliged to but failed to provide its approval of the developer's draft Development Permit Application on or about 19 September 2011;
(b) the proprietor has continued to fail to provide the signed consent form to enable the application to be lodged;
(c) the proprietor's representative on the committee failed to provide his approval of the developer's draft application on or about 19 September 2011;
(d) the proprietor's representative has continued to fail to provide his approval (I will refer to (a) to (d) collectively as "the proprietor's consent and approval failures");
(e) because of those failures, the developer was prevented from lodging the Development Permit Application by 30 September 2011;
(f) also because of those failures, the developer may not have time to satisfy the Project Conditions;
(g) the developer's obligation to give notice under clause 3.4 has been suspended until such time as the court determines whether the defendant was in breach of its obligations under the Call Option, with the consequence that the Call Option remains on foot.

[47] The developer contends that the proprietor's consent and approval failures were a serious breach of contract and amounted to a repudiation of the Call Option, which I take to mean the whole contract comprised in the Call Option Deed. The developer submits that the serious breach brings it squarely within the factual position dealt with by *Grieve* and that, applying that case's principles, the developer's obligations under clause 3.4 have been and will remain suspended until a judgment determines that the proprietor did repudiate its obligations.

[48] As to what would happen then, the developer submits that the court's ability to "mould" a decree of specific performance would enable appropriate directions to be given as to the operation of clause 3.4.

[49] The proprietor challenges those contentions by two principal points. First, it submits that the contract in question here is an option which is an offer coupled with a promise given for consideration not to revoke the offer and that the case law shows that the conditions for the exercise of the option and acceptance of the offer must be complied with strictly. Secondly, it submits that the principles on which *Grieve* is based do not permit a suspension in this case.

The concept of suspension and *Grieve*

[50] At the outset, it is appropriate to observe that Australian common law has not generally recognised an entitlement of one party to suspend performance of a contract because of breach by the other side. Speaking generally, it is important to distinguish between the concept of suspension of one's own performance obligations for a time because of breach on the other side and the principle that an innocent party may be relieved from the consequences of a failure to perform a

dependent contractual obligation because the other party's breach of contract prevents or conduct excuses the innocent party from doing so.

[51] Thus, Professor John Carter, in *Carter's Breach of Contract*, writes:

> "Except in some cases of supervening illegality, there is no common law right to suspend the performance of a contract. That is true even in the context of breach of contract. Accordingly, such a right must arise under an express term or under statute. Nevertheless, even in the absence of such a right, a promisee may enjoy the benefit of a right to suspend in the guise of an ability to withhold its own performance…
>
> The common law does not include a regime for suspension of the performance of a contract for breach analogous to the regime identified in this chapter in relation to the right to terminate performance for breach. Therefore, a breach of contract does not confer a common law right to suspend performance."[8]

[52] That said, in many contexts the principle that an innocent party may be relieved from the consequences of a failure to perform a dependent contractual obligation because the other party's breach of contract or conduct prevents or excuses the innocent party from doing so will have a similar operation to a concept of suspension.[9]

[53] Turning to *Grieve*, the question in that case was whether a seller's termination of a contract of sale of land was valid. The seller purported to terminate for the buyers' failure to give notice that they had obtained finance, failing which the contract provided that the seller could give notice terminating the contract. The circumstances were that the seller had repudiated the contract before the time for giving notice under the finance clause had elapsed. The buyers had not accepted the repudiation. They did not obtain finance by the time limited under the contract.

[54] The primary Judge found that the seller's earlier repudiation was an intimation that the seller did not require the buyers to take steps to obtain finance within the limited time. The Court of Appeal upheld that reasoning. De Jersey CJ said as follows:

> "What his Honour has held amounts to this. The manner of Mr Enge's repudiation of the contract relieved the respondents of the obligation to comply with the finance provision in accordance with its prescribed time-frame. For them to have done so would have had no practical utility. That is because by his repudiation, which the respondents did not accept, Mr Enge established a position which could only, absent compromise, be resolved by litigation.

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8 Carter, *Carter's Breach of Contract*, 2011, at [3-29] and [3-30].

9 *Foran v Wight* [1989] HCA 51; (1989) 168 CLR 385.

> Mr Enge's repudiation was unlawful, and the contract therefore remained on foot. To secure a decree for specific performance, the respondents must prove their readiness, willingness and ability at all material times to complete. That they did not comply with the finance provision did not in these circumstances mean they were not, at any relevant time, ready, willing and able to complete. Their obligation to take all reasonable steps to obtain finance, and otherwise comply with cl 3, was effectively suspended, by reason of the repudiation effected by Mr Enge, until a determination whether or not that repudiation was lawful. It will remain for the court, as necessary, to designate a new time-frame in relation to the finance provision."[10]

[55] There was an important fact in *Grieve* which affected the buyers' ability to notify that they had obtained finance. Consistent with his earlier repudiation, the seller refused to permit the buyers' financier to inspect the property for the purpose of assessing the buyers' application for finance. This contributed to the buyers' failure to notify that they had obtained finance by the stipulated date. The seller's conduct thus prevented or excused the buyers from doing so.

[56] *Grieve* has been referred to in a number of subsequent cases in support of the proposition that by an intimation or repudiation a contracting party may relieve the other party from compliance with an obligation, which might otherwise operate as a condition precedent to an entitlement to bring a proceeding for damages for breach of contract or for payment of a sum due under the contract.[11] But in *Grieve* the context was a claim for specific performance of the executory obligations under a contract of sale of land.

[57] In my view, notwithstanding the statement that the obligation to take steps to obtain finance was suspended and the statement that the court might designate a new time frame as necessary, the ratio of the decision in *Grieve* is no more than that the seller's termination was not valid, because his prior repudiation intimated to the buyers that the seller did not require the buyers to perform their obligation to take steps to obtain finance by the stipulated date.

Option as a privilege

[58] The proprietor sought to distinguish *Grieve* and its application in the present case by two principal contentions. First, it relied on the nature of the contract comprised in the Call Option Deed. It contended that the offer constituted by the Call Option was not open for acceptance after the 3 Year Date passed.

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10 At [20].

11 *Frikton v Jelekainen* [2007] QCA 451; *Business and Professional Leasing Pty Ltd v Akuity Pty Ltd & anor* [2008] QCA 215 and *Fraser v The Irish Restaurant & Bar Company Pty Ltd* [2008] QCA 270.

[59] In support of the contention, the proprietor relied upon the option cases previously mentioned, including *Hare v Nicoll*[12] where Willmer LJ said that "an option is a species of privilege for the benefit of the party on whom it is conferred. That being so, it is for the party on whom it is conferred to comply strictly with the conditions stipulated for the exercise of the option". Other cases stating the need to strictly comply with the terms for the exercise of an option were included in the proprietor's list of cases as previously noted, as was *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd*,[13] where Diplock LJ drew the distinction between bilateral or synallagmatic contracts on the one hand and unilateral or "if" contracts on the other. The reprise of Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council*[14] might be added to those cases.

[60] In my view, characterising the Call Option as a "privilege" of the developer, or as a unilateral or "if" contract, tends to mask the true analysis of the rights and obligations or duties of the parties under the Call Option Deed.

[61] The object or purpose of the overall transaction was to provide for the sale and development of the land if certain conditions were met. Both parties had interests in the outcome of the proposal for development, beyond the simple conveyance of the land for a price. The developer's commercial object was to obtain the conditions necessary to be able to develop the land as envisaged before electing to acquire the land for the purchase price. The proprietor's commercial objects were to have the land developed in a particular way, if it was to be developed, and to secure to itself particular monetary and non-monetary benefits out of the development as well as the purchase price of the land. Against these objects, the option was to be for a period, thereby limiting the time during which the proprietor would not be free to deal with the land otherwise. And the developer was to pay a price for the conditional right to elect to acquire the land under the option over the period.

[62] Some further particular features of this commercial transaction may be usefully identified at this point. Discussion of option contracts as unilateral or "if" contracts often proceeds from the premise that having paid the consideration for the option term, the option holder has no contractual obligation to purchase – hence the cases use such language as that the option is a "privilege". But under the Call Option Deed, the consideration moving from the developer was not limited to payment of the Initial Option Fee and the Call Option Extension Fee for the option to purchase the land during the period until the 5:00 pm on the Call Option Expiry Date. As well, the developer was obliged to:

(a) prepare the Development Application for approval of the committee under clause 15.2;
(b) set up and maintain the committee under clause 15;
(c) make monthly reports to the committee on the progress of Project Conditions and the Grantee's Due Diligence under clause 12;
(d) lodge the Development Permit Application on or before the Development Application Date under clause 16.1;

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12 [1966] 2 QB 130 at 141.
13 [1968] 1 WLR 74 at 83-86.
14 [1978] AC 904 at 928-929.

(e) diligently pursue the Development Permit Application when lodged under clause 16.3;
(f) bear all costs and expenses in relation to preparing and lodging the Development Applications and obtaining approval thereof under clause 16.4;
(g) lodge an application to reconfigure the land under clause 17.2; and
(h) carry out other work necessary for these purposes under clause 18(a).

[63] Given the nature of the development proposal as it appears in the other terms of the Call Option Deed, and the extent of the obligations to be performed by the developer during the term of the Call Option on the basis that it would bear the costs and expenses, it is perhaps not surprising that the Initial Option Fee was the nominal sum of $100 plus GST.

[64] However, the parties agreed that the relevant steps were to be accomplished within a time period, namely by 5:00 pm on the Call Option Expiry Date, if the developer were to have the conditional right to exercise the Call Option. That date, in the circumstances, is 47 months from the date of the Call Option Deed, namely 4 October 2013. The date may be extended under clause 17 but that need not be considered now.

[65] It is in that context that clause 3.4 operates. The commercial purpose of clause 3.4 is also clear enough. If by the 3 Year Date (4 November 2012) the Call Option was on foot but was not yet exercised, the developer had to pay the Call Option Extension Fee of $100,000 plus GST to continue to have the right to exercise the Call Option up to the Call Option Expiry Date. That is, the investment of the developer under the Call Option Deed and the risk to the developer of loss if it does not become entitled to exercise the Call Option or elects not to do so would be increased by that amount. Correspondingly, the risk to the proprietor of not being able to otherwise deal with the land for the period beyond the 3 Year Date until the Call Option Expiry Date was to be compensated by receipt of another non-refundable amount.

[66] Apart from those features, the other presently critical feature of the contract comprised in the Call Option Deed is that the right of the developer to exercise the Call Option is conditional on first securing the Project Conditions as required under clause 14.1.

[67] It is alleged that the breaches of contract by the proprietor's consent and approval failures have precluded the developer from being able to secure the Project Conditions to date.

[68] Thus, the developer contends, in effect, that it may be wholly deprived of any opportunity to exercise the Call Option by the Call Option Expiry Date.

[69] As part of that, it has been denied the benefit of the time between the stipulated dates for lodging the Development Permit Application and the 3 Year Date to

satisfy the Permit Conditions and to exercise the Call Option. That is, up to the 3 Year Date it has been wholly deprived of the benefit of the Call Option by the proprietor's consent and approval failures which have caused the Project Conditions not to be satisfied.

Relief from performance under the principle of *Foran v Wight*

[70] The proprietor submits that state of affairs (which is also denied by the proprietor as a matter of fact) did not relieve the developer from being required to make an election under clause 3.4(b) that it was going to continue with the Call Option, because the alleged breaches of contract neither prevented nor excused the developer from being able to make that election and to pay the Call Option Extension Fee.

[71] Developing this submission, the proprietor relied on passages in *Foran v Wight,*[15] to illustrate that the principles developed in that case and earlier like cases apply to an innocent party who is relieved of a dependent concurrent condition, such as the performance obligations of a buyer at settlement under a contract of sale of land, by an intimation to the innocent party that it need not perform. The proprietor submitted that does not relieve the innocent party of the consequences of any "supervening circumstance" which justifies the other party in refusing to perform.[16]

[72] I agree that *Foran v Wight* does not precisely answer the question posed in this case. I also do not think that the answer to the problem lies in the discussion in *Grieve*[17] of the distinction between an independently operating condition and mutual and concurrent obligations by reference to *Nyhuis v Anton.*[18] The discussion in *Grieve* supports the conclusion that the principles discussed in *Foran* may apply to an intimation that it is unnecessary to perform a term which is an independent promise, but it does not cover a case where the party in breach has not intimated that performance of that independent promise is not required.

Failure of condition caused by breach

[73] An important consideration in this case, in my view, is that if the proprietor's breaches of contract cause the condition of the developer's right to exercise the Call Option to fail, the option will not lapse, and there will remain a reasonable time for the satisfaction of the condition after the performance by the proprietor of its obligations to cause the proprietor's representative to approve the draft Development Permit Application and to consent to the lodgement of the Development Permit Application.

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15 [1989] HCA 51; (1989) 168 CLR 385.
16 At 396 and 417.
17 At [25].
18 [1980] Qd R 34.

[74] A supporting statement of principle made in relation to conditions for the exercise of an option contract is made in *Corbin on Contracts*[19]: "If the option giver prevents the giving of notice within the prescribed time, notice within a reasonable time thereafter will be effective."

[75] What is the basis for this statement? In my view, it is to be sourced in the "very old principle laid down by Lord Coke (Co. Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about" which was discussed and applied to the operation of contractual contingent conditions in *New Zealand Shipping Company v Societe des Ateliers et Chantiers de France*.[20]

[76] Following on from the older case law discussed in the decision of the House of Lords in the *New Zealand Shipping Case* in 1918, the principle of that case was accepted by the common law of Australia, from at least the time of *Suttor v Gundowda*,[21] where it was said that if it is provided that a contract is:

> "…void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either case putting an end to the contract."[22]

[77] Later English cases have more generally deployed the principle of preventing a contract breaker from taking advantage of its own wrong: *Cheall v Association of Professional Executive Clerical and Computer Staff*[23] and *Alghussein Establishment v Eton College.*[24]

[78] The application of the principle in the context of the failure of contingent conditions has been closely analysed in a number of recent cases at intermediate appellate court level in Australia. In particular, the question has been considered in *Rudi's Enterprises Pty Ltd v Jay*,[25] *MK & JA Roche Pty Ltd & Ors v Metro Edgely Pty Ltd & Anor*[26] and *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd.*[27]

[79] In my view, the principle to be adopted in this context was succinctly expressed by Hodgson JA in *MK & JA Roche* as follows:

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19 *Corbin on Contracts*, revised edition, vol 3, s 11.17.
20 [1919] AC 1 at 8. ("*New Zealand Shipping Case*").
21 [1950] HCA 35 at [14]; (1950) 81 CLR 418.
22 At 441.
23 [1983] 2 AC 180.
24 [1988] 1 WLR 587.
25 (1987) 10 NSWLR 568 at 576-580.
26 [2005] NSWCA 39 at [44]-[47].
27 [2005] NSWCA 443 at [19]-[25].

> "Thus, as asserted in *Rudi's Enterprises*, where the parties have clearly stipulated for automatic termination upon the occurrence of an event which could occur either without the default of either party or with the default of one or other party, and if the event occurs through the default of one party, then, although in general terms this would mean automatic termination, the party whose default caused the event can be prevented from taking advantage of this by direct application of the principle that a party cannot take advantage of its own wrong, rather than through construing the contract contrary to its clear meaning."

[80] In my view, there is no distinction to be made between the prevention of the effect of the failure of a contingent condition which makes a contract void under the *New Zealand Shipping Case* and *Suttor* principle and the prevention of the proprietor from relying on the failure of the developer to give notice exercising the Call Option on or before 5:00 pm on the Call Option Expiry Date, if that time were to expire without the developer being able to exercise the option by reason of the proprietor's consent and approval failures in breach of contract.

Application to clause 3.4

[81] My reasoning thus far is not precisely the same as the reasoning of de Jersey CJ in *Grieve*. It is not, however, inconsistent with that reasoning, although it may not go so far as to permit the setting of another period for the operation of clause 3.4 before the developer must elect to continue the Call Option or to terminate the Call Option. That is, on the reasoning in *Grieve*, prevention of the proprietor from relying on the failure of the developer to give notice exercising the Call Option on or before 5:00 pm on the Call Option Expiry Date, if that time were to pass by reason of the proprietor's consent and approval failures in breach of contract, might permit the Court to set another period for the operation of clause 3.4 before the developer must elect to continue the Call Option or to terminate the Call Option.

[82] Whilst I have reservations about the power of the court to fix a new time for giving the notice provided under clause 3.4 under the principle of *Grieve*, I am not prepared to go so far as not to follow that reasoning. There is no doubt that the power to award specific performance in the case of a conditional contract for the sale of land dependent upon the consent of a third party extends to making an order to give effect to the obligations of the parties to make the relevant application.[28] *Turner v Bladin*,[29] on which the developer relied, was more concerned with inexactness of future obligations of performance in speaking of "moulding" the decree, but it reflects the flexibility of the equitable remedy of specific performance. In principle, there does not seem to be a reason why a decree could not be fashioned to provide for steps which confer upon the parties the substance of the contractual rights and obligations under the steps provided for in the Call Option Deed. However, it is not necessary to finally decide this point for present purposes.

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28 *Butts v O'Dwyer* [1952] HCA 74; (1952) 87 CLR 267 at 280-283; *Kennedy v Vercoe* [1960] HCA 64; (1960) 105 CLR 521 at 529; *McWilliam v McWilliams Wines Pty Ltd* [1964] HCA 6; (1964) 114 CLR 656 at 660-661; *Brown v Heffer* [1967] HCA 40; (1967) 116 CLR 344 at 350.

29 [1951] HCA 13; (1951) 82 CLR 463.

[83] The point of failure of the developer to give notice exercising the Call Option on or before 5:00 pm on the Call Option Expiry Date has not been reached yet, although practically speaking it must now be almost inevitable. Instead, the 3 Year Date passed in circumstances where, on the developer's case, the developer could have given notice that the Call Option is going to continue and paid the Call Option Extension Fee but chose not to do so on the footing that it was not obliged to do so. It was not prevented from doing so. The proprietor did not intimate that it was not required to do so. The proprietor did not at any time contend that the Call Option Deed had come to an end before expiry of 4 November 2012.

[84] Nevertheless, in my view, to permit the proprietor to wholly deprive the developer of the benefit of the contemplated period between the Development Application Date and the 3 Year Date to secure the Project Conditions, while insisting that the developer give notice that the Call Option is going to continue and pay the Call Option Extension Fee if it is going to continue the Call Option, would be to allow the proprietor to take advantage of a condition which it has brought about in breach of contract, on the developer's case, as alleged in paragraph 7 of the amended answer.

[85] The operation of clause 3.4 in such circumstances is not a "supervening circumstance" in my view, within the discussion of the principle in *Foran v Wight* and like cases. On the contrary, on the developer's case, the very reason why the developer is required to make the election under clause 3.4 without any opportunity to give notice exercising the option before that time is because of the proprietor's consent and approval failures.

[86] Thus, although I accept that the circumstances of this case do not fall within the ratio of *Grieve*, where on the facts the buyers were precluded from giving notice of finance having been obtained and the seller by his repudiation had intimated that performance of the buyer's obligations under the contract was not required, the principle preventing a contract breaker from taking advantage of its own wrong may permit the conclusion that the plea in paragraph 7 of the amended answer does disclose a reasonable ground of defence to the claim made in paragraphs 2 to 7 of the counterclaim.

[87] In *Alghussein* the question was not whether the party in breach was prevented from contending that the contract had been automatically terminated or avoided. It was whether the party in breach was entitled to a benefit under the contract and to obtain specific performance of it. The benefit was the performance of the innocent party's promise to grant a lease of land to the party in breach if the contemplated development of the land was not finished by a particular date. The breach was the failure of the proposed lessee to take any steps to start the development by that time. The House of Lords reasons referred to the *New Zealand Shipping Case* and earlier and later cases discussing the principle against taking advantage of a contractual breach. They considered whether the principle was confined to cases concerning questions involving avoidance of a contract:

> "Although the authorities to which I have referred involve cases of avoidance the clear theme running through them all was that no man

> can take advantage of his own wrong. There was nothing in any of them to suggest that the foregoing proposition was limited to cases where the parties in breach were seeking to avoid the contract and I can see no reason for so limiting it. A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as a party who relies on his breach to avoid a contract and thereby escape his obligations."[30]

[88] *Alghussein* has been referred to and applied without disfavour at intermediate appellate court level in Australia, including the Court of Appeal.[31]

[89] It is authority which I should follow, where it applies, in relation to a relevant contractual benefit. In my view, on the developer's case, the entitlement to the Call Option Extension Fee if the Call Option is going to continue beyond the 3 Year Date is such a benefit. As well, on the developer's case, the termination of the Call Option in circumstances where the developer was deprived of the benefit of the opportunity to satisfy the Project Conditions before the 3 Year Date passed is an avoidance to which the principle extends.

[90] Thus, in my view, either as a matter of construction of clause 3.4 or as a direct application of the principle that a party cannot take advantage of its own wrong, the proprietor may be prevented from relying on that clause as having brought the Call Option Deed to an end, if the developer establishes the facts alleged in paragraph 7 of the amended answer. The answer to the second question should be that paragraph 7 discloses a reasonable ground of defence.

Conclusion

[91] In accordance with these reasons, in my view the proprietor has succeeded on the substance of the debate as to the construction of clause 3.4 raised by question (a), but it would be inappropriate to answer question (a) in its favour, because the answer to that question is subject to whether the developer succeeds on its plea in paragraph 7 of the amended answer.

[92] Also in accordance with these reasons, in my view the answer to question (b) is that the matters pleaded in paragraph 7 of the answer do disclose a reasonable ground of defence.

[93] The formal answers to the questions I propose, subject to hearing the parties on the form of order are:

(a) as to whether on the proper construction of clause 3.4(b) of the Call Option Deed, if not later than the 3 Year Date the plaintiff failed to

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30 [1988] 1 WLR 587 at 594.

31 *Hope Island Resort Holdings Pty Ltd & Anor v Jefferson Properties (Qld) Pty Ltd & Ors* [2005] QCA 315; *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433 at [24].

give written notice to the defendant that the Call Option is going to continue and to pay to the Defendant the Call Option Extension Fee, the plaintiff may no longer exercise the Call Option – because of the answer to question (b) below, it is unnecessary to answer this question; and

(b) as to whether the matters pleaded in paragraph 7 of the amended answer have the consequence that the plaintiff continues to have an entitlement to give written notice that the Call Option is going to continue and pay to the grantor the Call Option Extension Fee – the matters pleaded in paragraph 7 disclose a reasonable ground of defence.