SUPREME COURT OF QUEENSLAND

CITATION:	*Modi & Clements v SDW Projects Pty Ltd & Ors* [2013] QCA 221
PARTIES:	**In Appeal No 268 of 2013:** **SANJU MODI** (appellant) **v** **SDW PROJECTS PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)** ACN 110 335 923 (first respondent) **LISA JANE CLEMENTS** (second respondent) **HOLDING REDLICH (A FIRM)** (third respondent) **THOMAS BRADLEY** (fourth respondent) **In Appeal No 233 of 2013:** **LISA JANE CLEMENTS** (appellant) **v** **SDW PROJECTS PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)** ACN 110 335 923 (first respondent) **SANJU MODI** (second respondent) **HOLDING REDLICH (A FIRM)** (third respondent) **THOMAS BRADLEY** (fourth respondent)
FILE NO/S:	Appeal No 233 of 2013 Appeal No 268 of 2013 SC No 10460 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 August 2013
DELIVERED AT:	Brisbane

HEARING DATE: 16 May 2013

JUDGES: Holmes and Gotterson JJA and Boddice J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **Appeals dismissed with costs.**

CATCHWORDS: CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATIONS ON VENDOR: DISCLOSURE, WARNING AND LIKE MATTERS – where the appellants were solicitors retained by the first respondent to assist in conveying units in a proposed development – where buyers under the contracts of sale withdrew their offers to purchase, arguing that they were not bound because of non-compliance with s 365(2A)(c)(ii) of the *Property Agents and Motor Dealers Act* 2000 – where the first respondent obtained a declaration that letters sent by the appellants to the buyers' solicitors, returning executed contracts with warning statements and information sheets, did not direct the buyers' attention to the warning and information sheet, as required by s 365(2A)(c)(ii) – whether reference in the letters to the "Contract of Sale" could be regarded as encompassing the warning statement and information sheet – whether the context in which the letters were received or the form of the documents obviated the need to make specific reference to the relevant documents – whether the letters met the requirements of s 365(2A)(c)(ii)

Property Agents and Motor Dealers Act 2000 (Qld), s 10, s 363, s 364, s 365, s 366, s 366A, s 366B

Beckwith v The Queen (1976) 135 CLR 569; [1976] HCA 55, cited
Boylan v Gallagher [2012] 1 Qd R 420; [2011] QCA 240, considered
Day & Dent Constructions Pty Ltd v North Australian Properties Pty Ltd (1982) 150 CLR 85; [1982] HCA 20, cited
Hedley Commercial Property Services Pty ltd v BRCP Oasis Land Pty Ltd [2008] QSC 261, considered
MNM Developments Pty Ltd v Gerrard [2005] 2 Qd R 515; [2005] QCA 230, considered
SDW Projects Pty Ltd v Modi & Ors [2012] QSC 400, related

COUNSEL: R J Anderson for the appellant/second respondent, Clements
D Clothier QC, with R Jackson, for the appellant/second respondent, Modi
D Kelly QC, with D Pyle, for the first respondent
D de Jersey for the third respondent
G Gibson QC, with D O'Brien, for the fourth respondent

SOLICITORS: Barry Nilsson Lawyers for the appellant/second respondent, Clements
Bartley Cohen for the appellant/second respondent, Modi
Mullins Lawyers for the first respondent
Thynne and McCartney for the third respondent
Ashurst Australia for the fourth respondent

[1] **HOLMES JA**: The first respondent was the developer of a set of units at Mudgeeraba. It retained, in turn, the appellants, Mr Modi and Ms Clements, both of whom are solicitors, to assist it in conveying the proposed units. Subsequently, it commenced separate actions against the appellants alleging a negligent failure to comply with the requirements of s 365(2A)(c)(ii) of the *Property Agents and Motor Dealers Act* 2000 (*PAMDA*). By an interlocutory application, the first respondent sought determination of whether letters which the appellants sent to buyers' solicitors, returning executed contracts with warning statements and information sheets, directed the attention of the buyer in each case to the warning statement and information sheet, as s 365(2A)(c)(ii), *inter alia*, required. The primary judge declared that the letters did not do so. The appeals are against that judgment.

[2] The third and fourth respondents are, respectively, a firm of solicitors and a barrister who gave advice to the first respondent to the effect that the letters did not meet the *PAMDA* requirements. They were joined as parties in the determination of the question as to whether the letters met the requirements of the *PAMDA* provision.

The legislation

[3] Section 365 appears in chapter 11 of *PAMDA*, which is concerned with residential property sales. Section 363 sets out the purposes of the chapter, and at the relevant time (June – October 2007) was as follows:

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

[4] At the time of the transactions here, the scheme of chapter 11 parts 1 and 2 was, firstly, to impose certain requirements for provision of documents when a contract was furnished for the buyer's signature and, secondly, to make the contract's binding effect, once signed, contingent on provision again of such documents in the way prescribed. Part 3 of the chapter provided for a five-day cooling-off period,[1] which started when the contract became binding and during which the buyer remained entitled to give notice of termination of the contract. The documents to be provided under parts 1 and 2 included, apart from the contract itself, a warning statement which by virtue of s 366D of the Act was required to include information,

[1] Defined in s 364.

inter alia, about the cooling off period to which the contract was subject, and, where the contract was for the sale of a unit, an information sheet in a form approved under s 320 of the *Body Corporate and Community Management Act* 1997, explaining the obligations attendant on membership of a body corporate.

[5] The issue in the present case arose at the second, post-execution stage, which was then governed by s 365 of *PAMDA*. The section is set out below, with, for convenience, the sub-section applicable in this case emphasised in bold print:

> "**365 When parties are bound under a relevant contract**
>
> (1) The buyer and the seller under a relevant contract are bound by the relevant contract when—
>
> (a) for a relevant contract, other than a relevant contract relating to a unit sale—the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2); or
>
> (b) for a relevant contract relating to a unit sale—the buyer or the buyer's agent receives the warning statement, the information sheet and the relevant contract in a way mentioned in subsection (2A).
>
> …
>
> (2) For a relevant contract, other than a relevant contract relating to a unit sale, the ways are—
>
> (a) by fax, but only if the documents mentioned in subparagraphs (i), (ii), (iii) and (iv) are sent in the following order—
>
> (i) a single cover page that includes a clear statement directing the attention of the buyer or the buyer's agent to the warning statement and the relevant contract;
>
> (ii) the warning statement;
>
> (iii) the relevant contract;
>
> (iv) any other documents; and
>
> (b) by electronic communication other than fax, if the electronic communication contains—
>
> (i) a message that includes a clear statement directing the attention of the buyer or the buyer's agent to the warning statement and the relevant contract; and
>
> (ii) a single document, consisting only of the warning statement and the relevant contract, that is protected against unauthorised change, with the warning statement appearing as the first or top page of the document; and
>
> *Example of electronic communication—*
>
> • email

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii) and (iii) other than by electronic communication, if—

(i) the warning statement is attached to the relevant contract and appears as the first or top page; and

(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement and the relevant contract.

Example of receipt other than by electronic communication—

- post

Examples of how attention may be directed—

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

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

…

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii), (iii) and **(iv) other than by electronic communication, if—**

(i) the warning statement and the information sheet are attached to the relevant contract with the warning statement appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement; and

(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement, the information sheet and the relevant contract.

Example of receipt other than by electronic communication—

- post

Examples of how attention may be directed—

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

…

(6) In this section—

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

[6] Sections 366, 366A and 366B of the Act as it stood at the relevant time were relevant to the first of the stages, pre-execution, described above. Section 366 was concerned with the situation where the proposed contract was faxed for signature, s 366A where it was sent by another means of electronic communication, and s 366B where it was sent otherwise than by electronic communication. The last section provided:

> "**366B Warning statement if proposed relevant contract is given in another way**
>
> (1) This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent for signing in a way other than by electronic communication.
>
> (2) The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement and, if the proposed relevant contract relates to a unit sale, an information sheet with the warning statement appearing as its first or top page and any information sheet appearing immediately after the warning statement.
>
> (3) If the proposed relevant contract does not comply with subsection (2)—
>
> (a) if the seller gave the proposed relevant contract—the seller; or
>
> (b) if the seller's agent gave the proposed relevant contract—the seller's agent;
>
> commits an offence.
>
> Maximum penalty—200 penalty units.
>
> (4) If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.
>
> *Note—*
>
> A contravention of this subsection is not an offence. Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer.
>
> (5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.
>
> (6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement."

[7] Section 364 provided a definition of "attached":

> "***attached***, in relation to a warning statement, any information sheet and a contract, means attached in a secure way so that the warning statement, any information sheet and the contract appear to be a single document.
>
> *Examples of ways a warning statement and any information sheet may be attached to a contract—*
>
> - binding
> - stapling"

In the same section "relevant contract" was defined as meaning

> "a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction."

The facts

[8] Mr Modi was retained between June and October 2007 and on 12 occasions provided contracts (each a relevant contract as defined by s 364 of *PAMDA*) and associated documents to the solicitors for the buyers. On 11 occasions, he sent two sets of documents by courier to the solicitors for the buyers; in the twelfth case, the two sets of documents were hand-delivered. Each set of documents was spiral bound, with a clear plastic sheet as its cover. One of the two sets of documents delivered in each case contained as its first page, visible through the clear plastic cover, the *PAMDA* warning statement, followed by the information sheet and the contract. The warning statement and contract had previously been signed by the buyer, and the contract recorded that the buyer had received the information sheet. The other set of documents delivered on each occasion concerned disclosure under the *Body Corporate and Community Management Act* 1997, the *Land Sales Act* 1984 and the *Corporations Act* 2001 (Cth).

[9] The letters accompanying the two sets of documents in each case were headed with reference to the buyer's name and the property the subject of the sale, and contained the following:

> "We refer to the above matter and advise that we act on behalf of the vendor and note that you act on behalf of the purchasers.
>
> We now **enclose** Contract of Sale and Disclosure Statement for your attention…"

One letter did not contain the words "for your attention", but his Honour observed that no party had relied on the difference, and he did not have regard to it.

[10] Ms Clements, on the pleadings, was retained in October 2007 in place of Mr Modi to carry out the functions he had performed in relation to a further two contracts and to review the twelve contracts of sale for which he had previously been responsible. She adopted the same practice as he did of providing the warning statement, information sheet and contract in a spiral-bound volume, although it is not known whether the volume had a clear cover sheet. Again, the warning statement and contract had previously been signed by the buyers and receipt of the information sheet had been acknowledged.

[11] Ms Clements's covering letters were slightly different. One said that it enclosed "Executed Contract of Sale" and the "disclosure statement". The other merely said "We now **enclose** signed Contract for your attention". That was because in that instance only one spiral-bound volume, containing the warning statement, information sheet and contract, was delivered. In relation to that bound volume, there was also this difference: the first sheet in the bundle was, rather than a warning statement, a "Statement and Acknowledgement" that the buyer's attention had been directed to accompanying documents which included the warning statement, information sheet and contract. That statement and acknowledgment had previously been forwarded for the purposes of s 366B to the buyer, who had executed and returned it.

[12] In January 2009, the buyers under the 14 contracts sought to withdraw their offers to purchase on the ground that they were not bound by the contracts because of non-compliance with s 365(2A)(c)(ii). The result was that the first respondent sued each of the appellants for negligence and breach of the retainer agreements. The appellants pleaded that the letters they had sent with the documents met the provision's requirements and that any loss was caused by the third respondent, which had advised that the buyers were entitled to terminate. (The fourth respondent had also provided advice to that effect.) The first respondent then brought its application for declarations that the letters did not comply with s 365(2A)(c)(ii).

The judgment

[13] The primary judge noted the sequence of requirements under chapter 11. Similar requirements to those in s 365(2A)(c)(ii) existed before the contract was entered, under s 366B: the seller had to provide the warning statement and information sheet with the contract in the designated order and to direct the prospective buyer's attention to both. The fact that the requirements existed in both those contexts underscored the importance which the legislature attached to them. The section provided that the obligation to direct attention to the documents could be satisfied by directing the attention of the buyer's agent to them, and in s 365(6) it was recognised that that agent might be a lawyer. It was clear that the obligation was unaffected by the fact that the documents were to be delivered to a lawyer rather than a lay person.

[14] The learned primary judge set out comments made by de Jersey CJ in *MNM Developments Pty Ltd v Gerrard*[2] as to the purpose of the technical requirements in the chapter, of ensuring consumer protection for purchasers of residential property; which might, in some cases, give a purchaser a right to terminate "even for quite technical contraventions" and regardless of any disadvantage suffered. His Honour observed that those comments remained applicable to the chapter.

[15] The primary judge distinguished on its facts the case of *Boylan v Gallagher*[3] which dealt with a similar question, under an earlier version of s 365(2)(c)(ii), of whether the attention of the buyer had been directed to the contract and warning statement. However, he took note of statements in *Boylan* to the effect that the section did not require the relevant direction to refer expressly to the warning statement or contract

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2 [2005] 2 Qd R 515.

3 [2012] 1 Qd R 420.

(there being no requirement for an information sheet in *Boylan*, which did not concern a unit sale); that it was unnecessary for the seller to prove that the buyer or his agent had, in fact, become aware of the documents; and that whether attention had been sufficiently directed to them would depend on the circumstances of each case. However, in the case before him, the letters referred to the "Contract of Sale"; and the contract for the sale of each property, as it appeared in the bound volume, bore that title. The letters, in his Honour's view, thus directed attention to the contract, but not to the other documents in the bound volume. It did not assist that each of the letters was sent to a solicitor; there was no reason to think that a solicitor would take the reference to a contract of sale as meaning anything other than that. Consequently, he made the declarations the subject of this appeal.

The chapter 11 cases

[16] In *MNM Developments Pty Ltd v Gerrard*, the focus was on the requirement in s 366 that the warning statement be attached to the contract "as its first or top sheet". The facts of the case were that the agent for the seller sent the buyer a single sheet fax which comprised a covering letter, a disclosure statement, a warning statement and the contract in that order. The court held that the warning statement was not attached as the first or top sheet of the contract. The Chief Justice remarked that the legislature had intended that a buyer on receiving a contract would first see the warning statement, a result which would be achieved if physical attachment were required. He made this observation about construction of the provision:

> "The context of the requirement set up by s. 366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s. 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchasers of residential property. One of the objects of the Act, stated in its preamble, is 'to protect consumers against particular undesirable practices'. That protection extends, in cases like these, to giving a purchaser a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage."[4]

(Those were the comments which the primary judge regarded as remaining generally applicable to Ch 11 Pt 1.)

[17] In *Boylan v Gallagher*, the seller had become entitled to exercise a "put option", pursuant to which the buyer was required to purchase the land under a contract in the form annexed to the relevant deed. The buyer executed the deed and the warning statement, which was stapled to the front of the deed, and her solicitor sent it to the seller's solicitors under cover of a letter, which said that it enclosed "Put and Call Option document in duplicate signed by client". The seller executed the deed and his solicitors returned it with the warning statement in the same form in which they had been received, with a covering letter to the buyer's solicitor. The letter advised that "[the buyer's] full executed copy of the Put and Call Option document" was enclosed.

[18] Fraser JA, delivering the leading judgment, agreed with the buyer's submission that compliance with the provision was important because it identified the commencement of the cooling-off period, which was at the heart of the legislative

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4 At 519.

scheme for buyers' protection. However, the provision contained no prescription as to how the direction was to occur. Neither the text nor the examples required express reference to the warning statement or the contract; the direction could be by conduct. His Honour continued:

> "The focus of the provision is upon what was said, written, or done by the seller or the seller's agent. The statutory purpose is fulfilled if the seller or the seller's agent does what is required to be done on the part of the seller to direct the attention of the buyer or the buyer's agent to the warning statement and the relevant contract. No less is sufficient but no more is required."[5]

[19] It was not necessary for the seller to prove that the buyer had, in fact, taken note of the direction; and what the parties or their solicitors thought was conveyed by the communication was irrelevant. The circumstances of the case were different from those in *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*[6] (which involved a failure to direct attention to the relevant documents). His Honour regarded it as significant in the construction of s 365(2)(c)(i) that, unlike s 365(2)(a)(i) and s 365(2)(b)(i), it did not require a "clear statement" directing attention to the warning statement and contract.

[20] Fraser JA rejected a submission that the reference in the buyer's solicitor's letter to the enclosure as the "Put and Call Option document" only comprehended the deed; rather, that was the description which the solicitor had given the warning statement and deed as a single composite document on providing them to the seller's solicitors. By using the same expression as the buyer's solicitor together with the latter's reference and the same name of the matter in the body of the letter, the seller's solicitors had directed the buyer's lawyer back to his own file and his letter with its collective reference to the documents as the "Put and Call Option document".

[21] Other relevant circumstances were that there were only a few days between the parties' letters, so it was unlikely that the buyer's solicitor had forgotten what was enclosed with his letter. The fact that the words "warning statement" appeared in large and obvious form on the first page of the composite document reinforced the conclusion that the seller's solicitors' statement that they were enclosing the executed copy of the "Put and Call Option document" referred both to the warning statement and the relevant contract. The seller's letter had, it was concluded, directed the attention of the buyer's solicitor to the warning statement and the relevant contract, as s 365(2)(c)(ii) of the Act required.

[22] *Hedley Commercial Property Services*, referred to by Fraser JA, was a single judge decision which concerned a number of aspects of chapter 11 of *PAMDA*. Of relevance to the present case was a question as to whether the requirements of s 365(2)(b)(i) were satisfied by, firstly, an email which referred to sending a counterpart copy of the relevant contract (a call & put option deed) and, secondly, a follow-up letter which said that it enclosed the call & put option deed signed by the vendor and its counterpart copy signed by the buyer. Fryberg J in that case held that neither satisfied the requirements of the subsection, because the buyer's attention was not directed to the warning statement, although it was, in fact, attached as the top sheet of the contract. Fryberg J pointed out that the requirement

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5 At 430.

6 [2008] QSC 261.

of the Act was "not that the buyer be aware of the warning statement; it is that the seller direct attention to it".[7]

The contentions on appeal

[23] The appellants made these points. The primary judge had erred in concluding that the expression "Contract of Sale" in the letters referred only to the contract itself, rather than to the documents in the bound volume as a whole. That group of documents could colloquially be described as the "Contract of Sale". The question should have been whether there had been a sufficient direction to the relevant documents, not whether some particular form of words should have been used.

[24] If the content of the letter taken in isolation were not sufficient, the learned primary judge should have considered the surrounding circumstances, including what was actually enclosed with the letters. The reasoning in *Boylan v Gallagher* entailed what was described as a realistic approach to the direction requirement in s 365(2A)(c)(ii), of having regard to all the relevant circumstances in deciding whether the requirement was met. The primary judge, in contrast, had not done so and had taken too narrow a view of s 365(2A)(c)(ii).

[25] In other contexts, the statutory requirements were more specific than those in s 365(2A)(c)(ii). Section 365(2)(b)(i) and s 365(2A)(b)(i) required, where the documents were sent by electronic communication other than fax, a message that included "a clear statement" directing attention to the warning statement and contract. Under s 366B(6), where the contract was given to the proposed buyer in a way other than by handing it to him or his agent, included with it had to be a statement directing attention to the warning statement and, if applicable, the information sheet and any disclosure statement. There was no such prescription in s 365(2A)(c)(ii). It followed that the requirement was intended to be less onerous and more flexible where documents were physically delivered; the form of the documents themselves was part of the circumstances which could be taken into account in determining whether adequate direction had been given.

[26] In this case, the warning statement, under clear plastic, was the first page of the relevant set of documents, so that it was obvious that the volume consisted of more than the contract itself. The letters and accompanying documents were returned soon after they had been executed by the buyers; within a week or so. They were documents which the recipients must have been expecting, and the reference parts of the covering letters made it clear that they were being returned as part of the relevant property transaction in each case. The second bound volume, described as the "disclosure statement", contained on its front page (again under clear plastic) a list of the documents contained on it and was evidently a compilation.

[27] Section 365(2A)(c)(ii) specifically allowed for the direction to be given to the buyer's agent which, by definition in s 365(6), included a lawyer. Here the recipients were solicitors retained to act in the purchase whose professional obligation was to appreciate the legal significance of the documents and to examine them. That, too, was a relevant circumstance in considering whether the direction of attention to the documents was adequate.

[28] A solicitor receiving the letter which said that it enclosed "Contract of Sale and disclosure statement" together with two bound volumes would regard it as identifying the two distinct volumes, one as the contract and the other as the

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7 At [88].

disclosure statement. It was not necessary that each of the warning statement, information statement and contract be separately listed. The form of the bound documents was designed to comply with s 366B(2), which required the attachment to the contract of the warning statement and the information sheet so that the warning statement appeared as "its" (the contract's) first page; the requirement being, effectively, to treat those documents as part of the contract. Similarly, s 365(2A)(c)(ii) required the warning statement, information sheet and contract to be attached in that order, so as to appear as a single document. If attention was directed to the volume, which, by statute, was required to appear as a single document, attention was necessarily directed to every part of it. That was to be drawn from *Boylan v Gallagher*.

[29] The learned primary judge should not have distinguished *Boylan v Gallagher*, which was factually on all fours with this case. Fraser JA had rejected the respondent buyer's submission that the reference in her solicitor's letter to the enclosure as the "Put and Call Option document" only referred to the deed, saying that since the warning statement and deed, as a composite document, were enclosed with the letter, it was clear that it referred to both. That was a conclusion that where it was apparent that the composite document consisted of more than just the contract, any reference at all to the documents was to the composite document. It did not depend on any mutual use of language, because this was the first of the letters between the parties. The fact that the seller's solicitors had adopted the description used by the buyers' solicitors was thus not necessary to the conclusion in that case.

[30] Counsel for Ms Clements made some additional submissions. He criticised the primary judge's reliance on the Chief Justice's comments in *MNM Developments*, arguing that they over-stated the purpose of the Act. The preamble to the Act, in speaking of protection against undesirable practices, was paraphrasing s 10, which related to the promotion of residential property rather than the regulation of contracts. In any event, s 363 expressly set out a more limited purpose: to give parties a cooling-off period; to require contracts to include consumer protection information including a statement about the cooling-off period; and to ensure the independence of lawyers acting for buyers. None of that suggested an approach to s 365(2A) which would result in a narrow reading of the words in the manner adopted by the primary judge. The court should take the view that because s 366B created penalties, the obligations imposed under it were more stringent than those under s 365(2A) which had no such consequence.

[31] The fact that the first document in the second of the bundles forwarded by his client was a "Statement and Acknowledgment", rather than a warning statement, reinforced rather than defeated the argument. That document referred specifically to the warning statement, information sheet and contract, a circumstance relevant in assessing the question whether the letter directed attention to the warning statement, information sheet and contract.

Discussion

[32] One must not lose sight of the particular issue framed by the parties at first instance. It did not entail some consideration at large of whether attention was drawn to the documents but the specific question of whether the letters sent with the documents drew attention to the information sheet and warning statement. The surrounding

circumstances to which the appellants attach importance in their arguments were no more than the context in which "what was said, written, or done"[8] by their solicitors fell to be considered.

[33] In this case, the focus, given what was pleaded and what was at issue, was necessarily on what was written: the contents of the letters said to direct attention to the documents and whether they performed that function. That entailed a consideration of the effect of drawing attention to the "Contract of Sale". The provision required that the buyer's attention be directed to each of the three documents, the contract, the warning statement and the information sheet. No compelling argument has been advanced as to why a solicitor on receiving a letter which said that it enclosed the "Contract of Sale", without more, would regard the expression as encompassing the other documents. (It may be noted that in *PAMDA* itself "information sheet", "relevant contract" and "warning statement" are all separately defined in s 364.) The question, then, is whether the context in which the letters were received made a difference.

[34] It may be accepted, as was pointed out in *Boylan v Gallagher*, that it is not essential that there be express reference to the documents sent. In a particular case there may be something about the circumstances – such as the mutual adoption of particular terminology – to obviate the need to make a specific reference to the relevant documents. But contrary to the appellants' submission, Fraser JA did not conclude in *Boylan* that a reference to the bound volume as a whole, without more, directed attention to the individual documents contained in it. His statement that the reference to the "Put and Call Option document" in the buyer's solicitor's letter comprehended both the warning statement and the deed was made in response to the buyer's contention that her solicitor's letter referred to only one document, even though he, as the sender of it, enclosed both documents. That conclusion had nothing to do with whether the reference made at that stage directed attention to both documents from the perspective of someone receiving it, and was only relevant to whether, by the time the documents were returned to the buyer's solicitor, there was, indeed, a mutually adopted expression covering both documents.

[35] In *Boylan*, the reference in the seller's letter was not to the relevant contract (the deed) but to the "Put and Call Option document": the expression which the buyer had used for the composite document consisting of the warning statement and deed. It was clear that what was being returned was what was sent. No such common form of expression exists here. Instead, what the letters did in this case was to direct the reader's attention to the delivery of only one of the documents, the contract. The primary judge was correct in distinguishing *Boylan*.

[36] The argument for Ms Clements that s 365(2A) should be read more liberally than s 366B because the latter has penal consequences seems to me an unorthodox approach to statutory construction. Section 365, as a protective provision, ought to be given a wide scope,[9] while if there is real doubt as to the meaning of s 366B, it should be resolved construing it in favour of the vendor liable to penalty.[10] Generally, reference to the slightly different language of other sections (requiring a "statement" or a "clear statement") is of limited assistance; one is still left with the question of whether the buyers' attention was directed to the relevant documents.

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8 *Boylan v Gallagher* [2012] 1 Qd R 420 at 430.

9 See, for example, *Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd* (1982) 150 CLR 85 per Mason J at 108.

10 *Beckwith v The Queen* (1976) 135 CLR 569 at 576.

With respect, I would adopt Fryberg J's observation that the Act requires not merely that the buyer be aware of the relevant documents, but that the seller act to make him aware, by directing attention to them. Whether the seller has directed the buyer's attention to the documents cannot be determined by the likelihood of the latter's solicitor examining the material himself.

[37] That the form of the documents might make their content more readily ascertained did not obviate the need to draw attention to them. In *Boylan*, the warning statement, the only item additional to the contract, was obvious at the top of the document. Here the warning statement might have been physically obvious, but the information sheet was not. The fact that the warning statement, information sheet and contract had, by virtue of the s 364 definition, to be attached so as to appear as a single document, does not assist. As the examples to that section demonstrate, that could be achieved simply by stapling them together. That attachment did not render them in fact or legally a single document, and it did not follow that a recipient who saw from the letter that the contract was enclosed and through a clear cover sheet that the warning sheet was in the bundle was thus made aware that the information sheet was with them.

[38] The reference in *MNM Developments* to one of the objects of the Act as protecting consumers against particular undesirable practices may, as Ms Clements' counsel submitted, have overlooked the context of that particular object, which related to the promotion of residential property. But it was, nonetheless, accurate to say, as the Chief Justice did in that case, that chapter 11 contained a separate set of requirements directed to ensuring consumer protection for purchasers of residential property. As the primary judge also pointed out, the repeated obligation to direct the buyer's attention to the documents reinforces the importance attached by the legislature to the requirement. The learned judge did not err in his assessment of the significance of compliance with the requirements; nor did he do other than give the provision its ordinary meaning.

[39] The fact that the second of the bundles sent by Ms Clements contained the "Statement and Acknowledgement" as its first document alters little. If the document were, indeed, the first in the bundle, it would appear that s 365(2A)(c)(i) was not complied with, since the warning statement did not appear as the first page. No reason was given for returning the "Statement and Acknowledgement" to the buyer; it was relevant, under s 366B, only to the earlier, pre-execution stage of the contracting process. It was not a document which required any further consideration or action by the buyer, who had already signed it. Its appearance (if it were visible) was not apt to do anything other than increase confusion about what the vendor was sending.

[40] No convincing reason has been advanced as to why "Contract of Sale" in the letters should be regarded as embracing the warning sheet and the information sheet. There was nothing in the surrounding circumstances which would alter the meaning of that expression and no practice adopted by the parties in this case which would lead to a different view. As the primary judge noted,[11] the taking of a "practical approach" did not change the effect of the expression used.

[41] No error has been identified in the reasoning of the learned primary judge. I would dismiss both appeals with costs.

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[11] *SDW Projects Pty Ltd v Modi & Ors* [2012] QSC 400 at [40].

[42] **GOTTERSON JA:** I agree with the orders proposed by Holmes JA and with the reasons given by her Honour.

[43] **BODDICE J:** I have read the reasons for judgment of Holmes JA. I agree with those reasons and the proposed orders.