SUPREME COURT OF QUEENSLAND

CITATION:	*Amnico Holdings Ltd v Griese* [2014] QSC 247
PARTIES:	**AMNICO HOLDINGS LIMITED ACN 125 001 425 as trustee** (applicant) v **VANESSA JANE GRIESE** (respondent)
FILE NO:	BS8238/14
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	3 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2014
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. Paragraph 3 of the applicant's application filed 2 September 2014 is dismissed.** **2. It is declared that from on or about 21 February 2014 the contract between the applicant and respondent dated 10 December 2013 was an "instalment contract" within the meaning of s 71(2)(b) of the *Property Law Act* 1974.** **3. It is declared that applicant failed to comply with s 72(1) of the *Property Law Act* 1974 before purporting to terminate the contract on 26 May 2014.** **4. It is declared that the applicant's purported termination of the contract on 26 May 2014 was ineffective to determine the contract.**
CATCHWORDS:	REAL PROPERTY – STRATA AND RELATED TITLES – COMMUNITY TITLES SCHEME - where the buyer purported to terminate the contract on the basis the seller had not complied with s 206(1) of the *Body Corporate and Community Management Act* 1997 (Qld) – where the seller disputed that the Act applied to the scheme – where the lot in question is part of a group title plan registered under the *Building Units and Group Titles Act* 1980 (Qld) and governed by the *Sanctuary Cove Resort Act* 1985 (Qld) –

whether the group title plan was an "existing 1980 Act plan"

REAL PROPERTY – SALE OF LAND – INSTALMENT CONTRACTS – where the settlement date for the purpose of property was extended – where the terms of the extension included several payments of interest – whether the interest payments were payments the "purchaser is bound to make…without becoming entitled to receive a conveyance in exchange for the payment or payments" – whether the contract was an instalment contract within the meaning of the *Property Law Act* 1974 (Qld)

Body Corporate and Community Management Act 1997 (Qld), s 206(1), s 206(7)
Building Units and Group Titles Act 1980 (Qld), s 326
Property Law Act 1974 (Qld), s 71, s 72(1)
Sanctuary Cove Resort Act 1985 (Qld)

Braidotti v Queensland City Properties Ltd (1991) 172 CLR 293, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1977-8) 138 CLR 423, cited
Foran v Wight (1989) 168 CLR 385, cited
Kaneko v Crawford [1999] 2 Qd R 514, considered
Keswick Developments Pty Ltd v Keswick Island Pty Ltd [2012] 2 Qd R 114, referred to
Lombok Pty Ltd v Supetina Pty Ltd (1987) 14 FCR 226, referred to
Phillips v Scotdale Pty Ltd (2008) Q ConvR 54-692, considered
Starco Developments Pty Ltd v Ladd [1999] Qd R 542, considered
Wacal Developments Pty Ltd v Realty Developments Pty Ltd (1978) 140 CLR 503, cited

COUNSEL: P Hackett for the applicant
S Deaves for the respondent

SOLICITORS: Woods Hatcher Solicitors & Attorneys for the applicant
Kelly Legal for the respondent

[1] **Jackson J:** The applicant was the seller and the respondent the buyer of a residential property. Under the contract of sale of land in the REIQ and Queensland Law Society standard form, time was of the essence for the obligations of the parties to settle or complete the contract on the agreed date for completion. The originally agreed date for completion was extended eight times. Time remained of the essence on each occasion.

[2] As the price of the first extension sought, the buyer agreed to release the deposit paid under the contract to the seller. For later extensions, the buyer agreed to pay sums calculated as an amount of "interest" on the outstanding purchase monies, for the period of the delay from the existing date for completion. Those sums were paid.

[3] On 22 May 2014, the day before the last agreed date for completion, the buyer purported to terminate the contract. The ground was that the seller had not complied with s 206(1) of the *Body Corporate and Community Management Act* 1997 (Qld) ("BCCMA") because the seller had not given to the buyer a disclosure statement which complied with that section, before the buyer entered into the contract.

[4] On 23 May 2014, the date for completion, the seller informed the buyer that s 206 did not apply to the contract. The seller also advised that it remained ready and willing to complete the contract on that day. The buyer did not do so.

[5] On 26 May 2014, the seller purported to terminate the contract, relying on the buyer's failure to complete the contract on the date for completion.

[6] On 2 July 2014, the buyer again purported to terminate the contract, this time relying on the seller's termination of 26 May 2014 as a repudiation. The buyer's (alternative) contention is that, if the contract remained on foot after 22 May 2014, the seller was precluded from terminating for default on the part of the buyer in payment of the balance of the purchase price, because of s 72(1) of the *Property Law Act* 1974 (Qld) ("PLA"). For that purpose, the buyer contends that the contract is an "instalment contract" within the meaning of s 71 of the PLA.

[7] Also on 22 May 2014, the buyer lodged a caveat forbidding the registration of any instrument affecting the land the subject of the contract, under s 74(1) of the PLA. Under that sub-section, a purchaser under an instalment contract for the sale of land is entitled to lodge a caveat of that kind until completion of the instalment contract. It was a curious thing for the buyer to lodge a caveat based on its right to completion of the alleged instalment contract whilst on the same day sending a notice terminating the contract for failure to comply with s 206 of the BCCMA. In any event, on the hearing of the application, the buyer did not seek to justify the caveat only under s 74. Instead or as well, the buyer sought to justify the caveat as supported by a purchaser's lien for the return of the deposit.

[8] On these facts, the parties cross-apply for relief. The seller seeks a declaration that its termination of the contract on 26 May 2014 was valid, an order for removal of the caveat and an order for compensation against the buyer under s 130 of the *Land Title Act* 1994 (Qld) in the amount of its legal costs in respect of the lodging, dealing with and removal of the caveat.

[9] For its part, the buyer seeks a declaration that the seller's termination on 26 May 2014 was unlawful and a repudiation of the contract and that its termination of the contract "on or before" 2 July 2014 was valid. In argument, the buyer sought to justify the termination on 22 May 2014 based on non-compliance with s 206 of the BCCMA, as well as the termination on 2 July 2014 based on the seller's repudiation on 26 May 2014. Additionally, the buyer sought an order for repayment of all sums paid under the contract and interest on those sums.

[10] For the reasons which follow, in my view, the buyer's termination on 22 May 2014 was invalid or ineffective, because s 206 of the BCCMA did not apply to the contract. Second, although the buyer's failure to complete the contract on 23 May 2014 was a clear breach of contract, otherwise entitling the seller to terminate the contract as it purported to do on 26 May 2014, the seller was precluded in law from

doing so under s 72(1) of the PLA because it did not serve a notice on the buyer in the approved form under that section 30 days before it determined the contract.

[11] Third, in the circumstances, it is not appropriate to determine that the seller's attempt to terminate the contract on 26 May 2014 was a repudiation, and it does not clearly appear that the buyer was entitled to terminate the contract for the seller's repudiation on 2 July 2014, because the buyer did not show it was ready and willing to perform the contract at that or any relevant time. Nevertheless, if neither party has validly terminated, only two possible outcomes are left. Either the contract remains on foot or it is has been abandoned. The parties did not argue this last issue or whether, if the contract is abandoned, the buyer is entitled to repayment of any sum paid under the contract for decision and it is not appropriate to determine them.

[12] It is necessary to explain those conclusions in more detail.

Section 206 of the BCCMA

[13] In part, s 206(1) of the BCCMA provides that:

> "The seller (the ***seller***) of a lot included in a community titles scheme … must give a person (the ***buyer***) who proposes to buy the lot, before the buyer enters into a contract (the ***contract***) to buy the lot, a disclosure statement."

[14] The obligation to give a disclosure statement applies to the seller of a lot "included in a community title scheme". The lot in the present case is lot 45 on Group Title Plan 107128 County Ward Parish Coomera Title Reference 50506791. The Group Title Plan referred to is one registered under the *Building Units and Group Titles Act* 1980 (Qld) ("the 1980 Act"). That Act applied to the land, although its application was affected by the *Sanctuary Cove Resort Act* 1985 (Qld).

[15] The BCCMA did not repeal the 1980 Act. Instead, Ch 8 of the BCCMA provided for the transition of most building unit plans and group titles plans under the 1980 Act to become community title schemes. Thus, s 325(1)(a) provides that the approach adopted in Pt 1 of Ch 8 of the BCCMA is for community title schemes to be established in place of building unit plans and group titles plans under the 1980 Act. That approach, however, was subject to exceptions. Section 325(2)(a) provided that:

> "… the 1980 Act continues in force for …building units plans and group titles plans registered under the 1980 Act, if their registration under the 1980 Act was for a specified Act."

[16] The *Sanctuary Cove Resort Act* 1985 (Qld) was defined to be a "specified Act" in s 326.

[17] The buyer accepted, therefore, that the 1980 Act continued to apply to the lot the subject of the contract. However it submitted that the BCCMA applied as well. That contention depends on whether the group title plan became a community titles scheme under the BCCMA.

[18] In the case of an existing plan, that occurred, if it occurred, under Div 3 Pt 1 Ch 8 of the BCCMA. By s 329, that division "applies to each existing 1980 Act plan (the ***existing plan***)" (underlining added). Section 330 of the BCCMA established a community titles scheme for the existing plan, as so defined. It provides:

> "(1) On the commencement, a community titles scheme (the ***new scheme***) is established for the existing plan.
> (2) The new scheme is a basic scheme.
> (3) Each lot in the existing plan becomes a lot included in the new scheme.
> …
> (6) The body corporate under the 1980 Act for the existing plan is taken to be, without change to its corporate identity, the body corporate for the new scheme.
> …"

[19] Thus it can be seen that the transition of a group titles scheme to a community titles scheme under the BCCMA depends on whether or not the group titles scheme was an "existing 1980 Act plan". Section 326 defines a number of expressions for Ch 8 Pt 1 of the BCCMA. It provides, in part:

> "In this part -
> ...
> ***existing 1980 Act plan*** means –
> (a) …
> (b) a… group titles plan registered under the 1980 Act;
>
> to which, immediately before the commencement, the 1980 Act applied, **other than a** … **group titles plan registered under the 1980 Act but brought into existence for a specified Act**." (emphasis added)

[20] The exception to the definition of "existing 1980 Act plan" includes the group titles plan in this case, because it was brought into existence for the *Sanctuary Cove Resort Act* 1985 (Qld). Because of that, Group Titles Plan 107128 is not an "existing 1980 Act plan" within the operation of the definition in s 326 of the BCCMA and, therefore, not an "existing plan" within the meaning of s 329. Accordingly, s 330 of the BCCMA did not create a community titles scheme for that existing plan on the commencement of the BCCMA.

[21] There was no other basis identified by the buyer for the contention that s 206 of the BCCMA applied to lot 45. Accordingly, I reject that contention. In my view, it follows that the buyer had no right to terminate the contract under s 206(7) of the BCCMA for non-compliance with s 206(1). In my view, the buyer's termination on 22 May 2014 was invalid.

Instalment contract

[22] Under s 72(1) of the *PLA* it is provided that:

> "An instalment contract shall not be determinable or determined because of default on the part of the purchaser in payment of any instalment or sum of

> money (other than a deposit or any part of a deposit) due and payable under the contract until the expiration of a period of 30 days after service upon the purchaser of a notice in the approved form."

[23] Within the meaning of that section, the terms "deposit", "instalment contract" and "purchaser" are all defined in s 71, as follows:

> "***deposit*** means a sum -
> (a) not exceeding 10% of the purchase price payable under an instalment contract; and
> (b) paid or payable in 1 or more amounts; and
> (c) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser."
>
> ***instalment contract*** means an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments.
> …
> ***purchaser*** includes any person from time to time deriving an interest under an instalment contract from the original purchaser under the contract."

[24] Although ss 71 and 72 use the term "purchaser" rather than "buyer", I will continue to use "buyer" for the purchaser and "seller" for the vendor, when referring to the parties. In the present case, the buyer contends that the contract is an instalment contract. The buyer points to two categories of payments which were agreed to be made and paid. First, on 12 February 2014, the parties agreed to extend the date for completion to 28 February 2014, on the condition that the deposit was transferred or released by the agent to the seller or the seller's solicitor's trust account. The buyer contends that was a payment it was bound to make without becoming entitled to receive the conveyance in exchange, with the consequence that the contract became an instalment contract.

[25] Second, seven further agreements to extend the date for settlement were made, between 21 February 2014 and 21 May 2014, on condition that the buyer made payments of amounts of default interest in particular amounts. Some of the extensions involved other terms, including a waiver of the benefit of one of the conditions of the contract and payment of a contribution to the seller's legal costs. It is unnecessary in these reasons to consider those other provisions or each of the relevant agreements for extension of the date for completion. The buyer submits that the agreement made on 21 February 2014 to extend the date for completion to 20 March 2014 in consideration of the payment of default interest of $4,722.84 to be paid each week by 12 noon on Friday, with the first payment due on 21 February 2014, rendered the contract an instalment contract. The buyer submits that each of the weekly payments was a payment it was bound to make without becoming entitled to receive a conveyance in exchange.

[26] The buyer's argument as to the agreement for transfer or release of the deposit is that although the amount paid by way of deposit under the contract to the agent was then a deposit (and the contract was not an instalment contract at that time) upon that sum being transferred or released to the vendor it ceased to have the character

of a deposit, so that the payment to the seller was a payment the buyer was bound to make without being entitled to receive a conveyance in exchange.

[27] The definition of "deposit" in s 71 requires that the relevant sum is "liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser". *Phillips v Scotdale Pty Ltd*[1] was relied on by the seller and buyer as supporting their respective positions. In that case, the contract provided for payment of the deposit to the agent, followed by immediate transfer or release by the agent to the seller. It was contended that upon payment by the agent to the seller the payment was not a deposit within the meaning of s 71 because there was nothing liable to be forfeited by the seller in the event of breach of contract by the buyer. That was said to follow from the conclusion that the seller already had the property in the money which had been paid to it. The relevant provision of the contract expressly provided that the buyer should have no claim against the seller "except where the Seller is in breach of its obligations under this Contract in which case nothing will prevent the Buyer from recovering from the Seller any amounts entitled to it under this Contract or at law".

[28] Keane JA held that the contractual right of the buyer to recover the amount of the deposit, if the seller failed to comply with their obligations to complete the contract,

> "is inconsistent with the proposition that the purchaser had once and for all lost all entitlement to that sum when it was paid to the vendors … the purchaser's right to recover this sum from the vendors, even if it can properly be described as contingent, was not to be finally extinguished before the termination of the contract".[2]

[29] Keane JA continued:

> "Whatever the shades of meaning of 'forfeiture' or 'liability to forfeiture' under the general law or in another statutory contexts, there can be no doubt that, when s 71 of the PLA speaks of the sum in question being 'liable to be forfeited and retained by the vendor', the liability referred to is a liability to the loss of the sum which is final and absolute, not provisional or defeasible. One must give force to the words 'and retained by the vendor' in paragraph (c) of the definition of 'deposit'. These words confirm that the liability to forfeiture there referred to is a liability in the purchaser to lose the sum finally and absolutely to the vendor. Special condition 13 did not operate of its own terms finally and absolutely to extinguish the purchaser's entitlement to the moneys payable by the purchaser under special condition 1. That loss of entitlement could only occur upon the occurrence of subsequent events, one of which was breach of the contract by the purchaser."[3]

[30] The buyer in the present case seeks to distinguish *Phillips* on the basis that the sum in that case retained its character as a deposit, notwithstanding transfer or release to the vendor, because of the express term of the agreement that it would be repaid if

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1 (2008) Q ConvR 54-692; [2008] QCA 127.
2 Ibid, [23].
3 Ibid, [24].

the contract were terminated for the seller's breach. The provision was that "nothing will prevent the Buyer from recovering from the Seller any amounts entitled to it under this Contract or at law."

[31] In my view, it does not have the distinguishing effect contended for by the buyer. I accept that on transfer or release of the deposit to the seller, the money or chose in action became the seller's property at law. Yet, under the contract, it still operated as a deposit in the sense that if the contract is terminated for the buyer's breach, then the seller is entitled to keep the sum. On the other hand, it is also true that, if the contract is terminated for the seller's breach of contract, the buyer would be entitled to recover the deposit from the seller. That result would follow because, under a contract for sale of land, a sum paid by way of deposit and in part payment of the purchase price is part of the consideration paid by the buyer for the seller's performance of the contract by conveying the land to the buyer. On termination of the contract by the buyer, for breach of contract by the seller, the buyer is entitled to "obtain restitution of the deposit which they [have] paid. Their claim for the return of the deposit [is] not founded on the rescinded contract. … It [is] a claim founded in the equitable notions of fair dealing and good conscience which require restitution of a benefit received as, or as part of, the quid pro quo for a consideration which has failed".[4]

[32] Accordingly, in my view, the effect of the agreement made between the buyer and the seller in the present case for the transfer or release of the deposit by the agent to the seller did not constitute the contract an instalment contract within the meaning of s 71 and s 72 of the PLA.

[33] Whether the agreement made between the parties on 21 February 2014 to extend the date for completion in consideration of the payment of a sum or sums by way of interest for the period of the extension rendered the contract an instalment contract is a more difficult question.

[34] In *Wacal Developments Pty Ltd v Realty Developments Pty Ltd*,[5] the contract provided for the payment of a deposit of just under ten percent and payment of the balance on a future date in exchange for a conveyance. However, the contract further provided that from a date between date of the contract and the date for completion the buyer would pay further sums to the seller on the balance of the purchase price. In the result, the buyer was bound to pay monthly sums for a period of two years until the date for completion. It was unsuccessfully argued by the seller that the contract was not an instalment contract because the relevant payments were not payments of instalments of the purchase price but payments of interest. As Aickin J put it:

> "… the word 'payments' is quite general. Section 72 speaks of default 'in payment of any instalment or sum of money (other than a deposit or any part thereof)', which is also quite general. The draftsman has thus used two different expressions (or three if one counts Form 2) in a context where the nature of the legislation might well lead one to suspect there was one thing in contemplation.

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4 *Foran v Wight* (1989) 168 CLR 385, 438.

5 (1978) 140 CLR 503.

> The relevant protection given to such a purchaser is that he is to have not less than thirty days after notice of default in respect of a payment due under the contract, in which to remedy that default. It seems an unlikely contention to provide such protection in respect of failure to pay an instalment and not to provide it in respect of failure to pay other amounts of money due to the vendor."[6]

[35] On the other hand, some arrangements to make a payment of a sum, described as interest, in consideration for an extension of the date for completion, where the request for the extension is made by the buyer, do not render the contract an instalment contract: *Kaneko v Crawford*.[7]

Interest as payments the buyer is bound to make

[36] As at 21 February 2014, the agreed date of completion was 28 February 2014. On or about 21 February 2014, an agreement was made to extend the date for completion to 20 March 2014. The agreement was made on the terms of correspondence from the seller's solicitors:

> "We advise our client is agreeable to the extension of the date for settlement to 20 March 2014 with time to remain of the essence on the following basis;
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> > 1. Default interest at the rate of $4,722.84 is paid to our trust account weekly by 12 noon each Friday;
> > 2. The first payment is to be made today 21 February 2014;
> > 3. Any outstanding/final default interest will be added to the settlement figures; and
> > 4. Evidence that your client has adequate share holdings to cover the shortfall and will be available for settlement on 20 March 2014."

[37] The agreement for extension thus reached provided for the making of four payments of $4,722.84 on the Friday of each week, starting 21 February 2014, in consideration of the extension of the date for completion by just under a month. The first of those payments could be viewed as being made at the time of the agreement for extension and on the footing that neither the seller nor the buyer was to be bound by the agreement for extension until that payment was made. However, in my view, upon that payment being made, the seller became bound by their agreement to extend the date for completion and the buyer became bound to make further payments of $4,722.94 on 28 February 2014, 7 March 2014 and 14 March 2014.

[38] Thus, the payments agreed to be made on 28 February 2014, 7 March 2014 and 14 March 2014 were payments the buyer was bound to make under the terms of the contract.

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6 Ibid, 531.
7 [1999] 2 Qd R 514.

[39] The seller relied on *Kaneko v Crawford*[8] and *Starco Developments Pty Ltd v Ladd*[9] as supporting the contrary conclusion. The facts of those cases are not precisely analogous to the facts in the present case.

[40] The ratio decidendi of *Kaneko*, in my view, is that an arrangement or agreement, properly construed as one under which the seller is not bound to an agreed extension of time until payment is made of the agreed sum of money to be paid as consideration for the extension, does not render the contract an instalment contract, because the payment is not one the purchaser is bound to make in terms of the contract. Adapting that reasoning, the seller in the present case submits that the agreement for the payments of interest should be viewed as being made outside the terms of the contract. Therefore, it submits that the payments provided for were not payments which the buyer was bound to make under the terms of the contract.

[41] In my view, the judgment in *Kaneko* did not turn on whether the agreement for the payment of a sum in consideration of the extension of the date for completion operated outside the terms of the contract. Rather, it turned on the view that the agreement to vary the contract, by extending the date, only came into effect as a variation of the contract upon the payment being made. Because at the time when the variation came into effect the payment had already been made, it was not a payment "the purchaser is bound to make" within the meaning of the definition of instalment contract in s 71. I reach that view from the following part of the reasons in *Kaneko* (at 516):

> "The critical point in the present case is: what were the parties' mutual obligations in the period between the making of the agreement for extension of 6 July and payment of the $677.97? The choice is between interpreting the arrangement as one under which the vendor agreed to an extension in exchange for the mere promise to pay the money, and in interpreting it as one in which the vendor was not bound at all until the money was paid. If the former view is correct, the purchaser was immediately indebted in the sum of $677.97. The latter view appears to accord better with the language used and with what one would expect the parties to have intended. …
>
> The conclusion then, … is that the agreement of 6 July did not bind the purchaser to pay any sum: prima facie, that agreement could not have made the contract of sale into an 'instalment contract'."

[42] In my view, it is impossible to view an agreement to pay interest on the unpaid balance of purchase monies in consideration of an extension of the date for completion as operating completely outside the contract. That is because the consideration moving from the seller to the buyer is the seller's agreement to extend the date for completion under the contract. The agreement operates as a variation of the original contract. And in the present case, on payment of the first weekly instalment of $4,722.84 on 21 February 2014, the seller became bound to extend the date for completion to 20 March 2014 and the buyer became bound to pay the subsequent weekly instalments.

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8 [1999] 2 Qd R 514.

9 [1999] 2 Qd R 542.

[43] Once that conclusion is reached, this case can be seen as analogous to *Starco*. In that case, one of the terms of the agreement to extend the date for completion was that the buyer pay an amount of interest which had been earned on the deposit to the seller.[10] The Court of Appeal held that the contract, as varied by that term, was an instalment contract. De Jersey CJ held that the agreement to authorise the trustee holding the deposit to "forthwith" pay the interest on the previously paid deposits to the seller, bound the buyer to make that payment. Although *Kaneko* was relied on by the seller, it did not answer that conclusion on the facts in *Starco*, because the payment was to be made after the variation was agreed and binding. McPherson JA held that as the agreement to authorise the trustee to pay the deposit plus all interest (which exceeded ten percent of the contract price) "bound the purchasers to make or permit a payment or payments to the vendor without receiving a conveyance in exchange for that payment or payments. As such, it was sufficient to constitute the contract as varied an instalment contract within s. 71". Thomas JA held that "by agreeing to [the clause] I consider that the purchaser bound himself to make that payment by direction."

[44] I note that both *Kaneko* and *Starco* proceed on the assumption that a contract which is not an instalment contract in the first place may become an instalment contract by an agreed variation. The parties in the present case did not challenge that assumption as to the proper construction of the operation of s 71. Similarly, I note that default in the payment of the balance of purchase monies to be exchanged for the conveyance of the land was the basis of the seller's termination in the present case. That was a payment for which the purchaser would have been entitled to have received a conveyance in exchange. However, the seller did not contend that the contract was no longer an instalment contract at the time that payment was due because it would have entitled the buyer to receive a conveyance in exchange. Consistently with that approach, the majority of the High Court of Australia in *Braidotti v Queensland City Properties Ltd*[11] commented on the difference in the language of ss 71(2)(b) and 72(1) and continued:

> "The alteration from the formula of words in the definition to '*any* instalment *or sum of money* (other than a deposit or any part thereof)' (emphasis added) in s. 72(1) is to be explained by the need to ensure that the restriction on the right to rescind extended to a rescission for non-payment of the balance of the purchase price …"

[45] The result in the present case is unsatisfying. This contract is not an instalment contract of a usual kind. All that happened was that the buyer sought indulgence from the seller to extend the date of completion and the seller in exchange for the indulgence sought to protect itself from the loss it would have suffered from the delay. However an unsatisfying outcome is no warrant for departing from the language of ss 71 and 72 and the decided cases as to their meaning. It does, however, call for a repetition of the plea originally made in *Wacal*, and repeated in *Kaneko*, that these provisions have consequences which the legislature could hardly have intended and require amendment.

[46] It follows that the seller's termination on 26 May 2014 was not lawful. It was precluded by s 72(1) of the PLA. The seller had not served a notice in the approved

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10 There were other terms which are not of present relevance.

11 (1991) 172 CLR 293.

form upon the buyer and 30 days after service of a notice in the approved form had not expired.

Further consequences

[47] The remaining questions relate to the validity of the buyer's termination on 2 July 2014. The buyer's cross-application claims that it validity terminated the contract on 2 July 2014.

[48] A number of possible questions arise. First, was the seller's invalid termination on 26 May 2014 itself a repudiation of the contract?[12] Second, in any event, was the buyer not ready and willing to complete the contract, and therefore not entitled to terminate the contract for the seller's repudiation?[13] If, for either of those reasons, the buyer was not entitled to terminate the contract on 2 July 2014, a third question would arise, namely, whether in circumstances where both parties purported to terminate the contract, the proper view to take is that neither party intends that the contract should be further performed and the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract.[14] It has been held that a consequence of such an abandonment and abrogation is that the deposit is returnable.[15]

[49] However, neither of the parties was prepared to argue those questions. On the first question, the seller was unclear as to whether or not it wished to contend, in law, that its purported termination on 26 May 2014 should not be treated as a repudiation, if the termination was precluded by s 72(1) of the PLA. On the second question, the buyer submitted that it wished to put in further evidence from its financier that it was ready and willing to complete the contract on 2 July 2014. On the third question, neither of the parties made submissions as to whether or not the contract should be treated as abandoned and abrogated, or what order should follow in relation to the deposit if that conclusion was reached.

[50] In those circumstances, it would inappropriate to determine those questions on the present applications. Because they are not to be resolved, in my view, there is a question whether it was appropriate for either of the parties to have brought their application under s 70 of the PLA, which provides for a summary determination of any question arising out of or connected with a contract (not being a question affecting the existence or validity of the contract) or as an application permitted under *Uniform Civil Procedure Rules* 1999 (Qld), r 11(a) where the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely. Nevertheless, I have proceeded to determine the questions set out previously. It is to be hoped that the determination of those questions will assist the parties to resolve their remaining disputes.

[51] It follows that par 3 of the seller's application for a declaration that the contract between the seller and the buyer dated 10 December 2013 was lawfully terminated by the seller on 26 May 2014 must be dismissed. It also follows that it should be

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12 Compare *Keswick Developments Pty Ltd v Keswick Island Pty Ltd* [2012] 2 Qd R 114, 129 [56]-[58], *Lombok Pty Ltd v Supetina Pty Ltd* (1987) 14 FCR 226 and the cases referred to in *Carter's Breach of Contract*, 2 ed, [8-23]-[8-25].

13 *Foran v Wight* (1989) 168 CLR 385.

14 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd & Anor* (1977-1978) 138 CLR 423, 434.

15 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd & Anor* (1977-1978) 138 CLR 423, 434.

declared that the contract is an "instalment contract" within the meaning of s 71(2)(b) of the PLA, that the seller failed to comply with s 72(1) of the PLA before purporting to terminate the contract on 26 May 2014 and that seller's purported termination of the contract was ineffective to determine the contract.

[52] None of the other relief which is claimed by the seller's application or the buyer's cross-application should be disposed of at the present time. I will hear the parties on the order for costs which should be made.