SUPREME COURT OF QUEENSLAND

CITATION:	*Mayfair Property Holdings Pty Ltd v Southland Packers Pty Ltd* [2016] QSC 27
PARTIES:	**MAYFAIR PROPERTY HOLDINGS PTY LTD** (plaintiff) **v** **SOUTHLAND PACKERS PTY LTD** (defendant)
FILE NO/S:	SC No 9813 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	26 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2016
JUDGE:	Bond J
ORDER:	**The order of the court is that the separate questions should be answered as follows:** **Question 1: Whether, in the events that have happened, the Mayfair Contract came to an end pursuant to special condition 7?** **Answer to Question 1: No.** **Question 2: Whether, in the events that have happened, Southland was in breach of the Mayfair Contract as alleged in paragraph 19 of Mayfair's statement of claim?** **Answer to Question 2: Yes.**
CATCHWORDS:	CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - PARTIES - GENERAL PRINCIPLES - where plaintiff and defendant entered into a contract to sell property - where property subject to a lease - where lessee had a right of pre-emption under the lease - where parties acknowledged lessee's pre-emptive right and contract provided that the contract would be at an end if lessee exercised that right - where defendant made an offer to the lessee but was not accepted by the lessee - where defendant entered into a contract with a related entity of the lessee - whether the contract required an offer to be made to and accepted by the lessee - whether the offer made which resulted in the contract with the related entity was made to

and accepted by the lessee as required by the contract

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - OTHER MATTERS - where contract provided that offer to lessee be "on the same terms" as the contract between the plaintiff and the defendant - what, if any, latitude for departure from terms of the contract is permissible

ACN 096 278 483 Pty Ltd v Vercorp Pty Ltd [2011] QCA 189, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, cited
In Re Pellick's Transfer [1987] 1 Qd R 73, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 89 ALJR 990; [2015] HCA 37, cited
Salter v Gilbertson (2003) 6 VR 466, considered
Simsmetal Ltd v Wanless Metal Industries Pty Ltd (Unreported, Supreme Court of New South Wales, Cohen J, 19 March 1997, BC9700743), considered
THL Robina Pty Ltd v Glades Golf Club Pty Ltd [2005] 2 Qd R 186, considered

COUNSEL: A M Pomerenke QC, with P J McCafferty, for the plaintiff
A P Collins, with C G Curtis, for the defendant

SOLICITORS: Russells Lawyers for the plaintiff
Bell Legal Group for the defendant

Introduction

[1] On 3 September 2014, the defendant ("Southland") as vendor and the plaintiff ("Mayfair") as purchaser entered into a contract ("the Mayfair Contract") for the sale and purchase of land at Ashmore in Queensland ("the Property") for a contract price of $3,650,000.

[2] The Property was a BP service station. It was the subject of a registered lease ("the Lease") between Southland and BP Australia Pty Ltd ("BP Australia"), Southland being referred to as "the Lessor" and BP Australia (and its successors and permitted assigns) as "the Lessee". The Lease provided for a term of 10 years due to expire on 8 November 2015.

[3] The Mayfair Contract contained a term (i.e. special condition 7) in which, amongst other things, the parties –

(a) acknowledged the fact that the Lease contained a pre-emptive right of purchase of the Property in favour of the Lessee;

(b) provided that in the event that the Lessee availed itself of that right, that would operate to terminate the Mayfair Contract and require the refund of all deposit monies.

[4] Southland contended that events happened which had engaged the operation of that term with the result that the Mayfair Contract was terminated. It proceeded to settle the sale contract created as a result of its contention that the Lessee had exercised its pre-emptive right under the Lease. Mayfair disagreed that Southland had been entitled to take that

course. In this proceeding, Mayfair contends that Southland breached the terms of the Mayfair Contract and has sued Southland for damages for breach of contract.

[5] On 17 December 2015, at the request of the parties, I made orders for the determination of the following separate questions:

(a) Whether, in the events that have happened, the Mayfair Contract came to an end pursuant to SC 7?

(b) Whether, in the events that have happened, Southland was in breach of the Mayfair Contract as alleged in paragraph 19 of Mayfair's statement of claim?

[6] It is appropriate first to identify the relevant facts and then to consider the arguments sounding upon the answers to those questions.

The facts

[7] The relevant terms of the Mayfair Contract were as follows (Southland being referred to as "the Vendor" and Mayfair as "the Purchaser"):

(a) By Item A, the Contract Date was 3 September 2014.

(b) By item B that there was a named Vendor's Agent. Clause 30 provided that that agent was confirmed as the agent of the Vendor to introduce a buyer.

(c) By item M for "Leases and Service Contracts" as set out in a schedule. The schedule named BP Australia and contained appropriate details of the Lease. Clause 32 of the standard commercial terms and conditions contained other provisions which operated by reference to the details there set out.

(d) By Items N and O for a purchase price of $3,650,000 and a deposit of $105,000. In turn, SC 5 provided that the deposit would be paid $5000 on contract execution by the Purchaser and $100,000 on the Purchaser having obtained a satisfactory environmental report as provided in SC 6. That clause permitted the Purchaser to terminate in the event that an unsatisfactory such report was obtained within 45 days of the Contract Date.

(e) By item Q for a Date for Completion of 90 days from the Contract Date.

(f) By SC 3 "Access" that the Vendor authorised the Purchaser and agents to enter on the property at their own risk for various nominated purposes and regulated the manner by which that right could be exercised.

(g) By SC 4 "Novation by Purchaser":

> 4. NOVATION BY PURCHASER
>
> 4.1 The Purchaser, at any time prior to the Date of Completion, may nominate another purchaser ("Nominee") of the Property by written notice to the Vendor provided that the notice is accompanied by:
>
> (a) an agreement to rescind this Contract;
>
> (b) a new Contract and director's Guarantee on the same terms (and dates) as this Contract (with the exception that the Nominee is named as purchaser) signed by the Nominee and its directors; and .
>
> (c) a written authority signed by the Purchaser and the Nominee addressed to the Vendor and the Stakeholder authorising the Vendor and the Stakeholder to apply and use the deposit monies and further monies paid under this Contract as deposit monies and further monies under the new Contract as executed by the Nominee,
>
> and the Vendor agrees that, provided the Purchaser is not then in default in any respect under this Contract, upon tender to it of the notice

accompanied by the documents referred to in sub-clauses (a)-(c) above, it will enter into the documents referred to in sub-clauses (a) and (b) above.

4.2 Upon the new Contract being executed, the Purchaser and the Purchaser's director shall also sign a ·Guarantee and indemnity in favour of the Vendor on terms reasonably required by the Vendor so that they are jointly and severally liable for, and indemnify the Vendor on demand, against all claims, demands, causes of action, losses, liabilities, costs, compensation or expenses of whatever nature or kind arising from or made in connection with a breach by the Nominee of its obligations under the new Contract including a failure by the Nominee to complete the new Contract.

(h) By SC 7 "Pre-emptive right of purchase":

7. PRE-EMPTIVE RIGHT OF PURCHASE

7.1 The Purchaser acknowledges that the Lease of the Property referred to in the Lease Schedule to the Contract contains at Clause 45 a pre-emptive right of purchase of the Property in favour of the Lessee.

7.2 The Vendor warrants that it will make an offer (which must be on the same terms as this Contract) to sell the Property to the Lessee in accordance with the requirements of clause 45 of the Lease within 5 Business Days after the date of this Contract and give notice thereof to the Purchaser (such notice must contain a copy of the documentation submitted to the Lessee and advise the date which the period under Clause 45.3 of the Lease will lapse).

7.3 The Vendor must provide written notice to the Purchaser or the Purchaser's solicitors within 2 Business Days after 5:00pm on the date 14 days after the date of the offer above as to the Lessee's acceptance or otherwise of the offer.

7.4 This Contract is subject to and conditional upon the Lessee falling to accept the Vendor's offer to sell within 14 days in accordance with the Lease.

7.5 In the event that the Lessee accepts the Vendor's offer to sell made in accordance with Clause 45 of the Lease then this Contract shall be at an end and all deposit monies shall be refunded to the Purchaser.

7.6 If the Vendor does not provide the notice required pursuant to Special Condition 7.3 in time, the Purchaser may terminate this Contract in which event all deposit monies must be refunded to the Purchaser.

7.7 The Vendor must not very the Lease without the consent of the Purchaser, including (without limitation) in relation to the time for the Lessee to exercise its rights under Clause 45 of the Lease.

7.8 The Vendor indemnifies, and must keep indemnified, the Purchaser against any claim made against the Purchaser or any damage suffered by the Purchaser as a result of the Vendor not complying with Clause 45 of the Lease.

(i) By SC 8 "Guarantee", that the Mayfair Contract was subject to and conditional upon the execution of a guarantee in the name of a specified individual as set out in annexure B to the Contract.

[8] Clause 45 of the Lease was the term identified in SC 7. It provided:

PART 45 – PRE-EMPTIVE RIGHT OF PURCHASE

45.1 The Lessor must not dispose of an estate in fee simple in the Premises without first offering them to the Lessee on terms no less favourable than those on which the Lessor is prepared to dispose of the Premises to any other person.

45.2 Any offer by the Lessor under this Part must be in writing and state the price and terms and conditions on which the Lessor wishes to dispose of

the Premises.

45.3 The offer may be accepted by the Lessee by written notice to the Lessor within 14 days of delivery of the offer to the Lessee.

45.4 Until the expiration of that period, the Lessor must not dispose of the Premises other than in accordance with this Part unless the offer is unconditionally declined by the Lessee in writing.

45.5 If the offer is declined or lapses, the Lessor may dispose of the Premises as it thinks fit at the nominated price or a price in excess of the nominated price. If the Lessor desires to reduce the price at which it will dispose of the Premises, the provisions of this clause 45.1 will apply to give the Lessee the option of purchasing at the reduced price.

45.6 For the purpose of this Part, time is of the essence.

45.7 The pre-emptive rights contained in this Part continue throughout the Term and bind the Lessor's assigns.

45.8 The Lessor must not transfer an estate in fee simple in the Premises to any person other than the Lessee without first obtaining from the transferee a covenant in favour of the Lessee that the transferee will be bound by the pre-emptive rights contained in this Part and that the transferee will obtain a similar covenant in favour of the Lessee from any further transferee of an estate in fee simple in the Premises.

[9] By email to the appropriate officer of BP Australia on 1 September 2014 (which was sent by registered post to BP Australia on 2 September 2014) Southland's solicitors wrote as follows:

> **SOUTHLAND PACKERS PTY LTD PROPOSED SALE**
> **PROPERTY: 2 CENTRAL AVENUE, ASHMORE**
>
> We act on behalf of Southland Packers Pty Ltd and Mr Ross Venuto. As instructed by Mr Venuto, please find **enclosed** a copy of a Contract for the sale of the above property on terms agreed with the proposed purchaser. The purchaser's details have been deleted at its request for confidentiality purposes. We have today received the purchaser's signed Contract by way of offer and we expect that our client will be signing the Contract later today.
>
> We have been asked to inform you that the purchaser under the enclosed Contract is an investor.
>
> This email will serve as notice to BP Australia Pty Ltd under clause 45 of your Lease of the above premises by way of an offer to sell on exactly the same terms as the enclosed Contract save for SC 7.
>
> Please reply to this email to acknowledge service of the notice although it does not formally comply with the notice provisions under the Lease. Please also note that, in accordance with the terms of your Lease (Part 41 – Notices), we have also forwarded this letter and a copy of the Contract to the address for service of notices.
>
> Please let us have your response within 14 days as required by the terms of your Lease.

[10] As explained on the face of that letter, the offer was made to BP Australia, which was the Lessee under the Lease. The terms on which the offer was made were the same as those contained in the Mayfair Contract, save that SC 7 had been deleted and the names of the Purchaser and the Guarantor had been redacted. Southland contended (and Mayfair conceded) that the offer complied with the SC 7.2 requirement that it be on the "same terms as [the Mayfair Contract]".[1]

[11] However, Mayfair contended that the offer could not be regarded as compliant with SC 7.2 because it failed to comply with the requirement that it be made "within 5 Business Days after the date of [the Mayfair Contract]". The date of the Mayfair Contract was 3 September 2014. As to this argument:

---

1 As will appear, each party had a different approach to the construction of that phrase and, necessarily, different reasons for reaching that result.

(a) Mayfair contends SC 7.2 required the offer to be made in a 5 business day period commencing on 4 September 2014 and ending on the 5th business day thereafter, and not either before that period started or after that period ended.

(b) On that basis, the offer made by email on 1 September 2014 could not be compliant. Nor could the offer sent by registered post on 2 September 2014 have been compliant, because cl 42 of the Lease[2] would have meant that the sending of the offer by registered post on 2 September 2014, would be taken to have been received by BP Australia on 3 September 2014.

(c) However, I do not think that, in this respect, the clause should be construed in the way for which Mayfair contends. In order to give the clause a businesslike interpretation so as to produce a commercial result, whilst at the same time preserving the protective purpose or object of the provision[3] – which is what both parties invited me to do – one should regard the purpose of the time frame stated in SC 7.2 as being to provide an end point by which the offer must be made. In my view the word "within" in the phrase "within 5 Business Days after …" should be regarded as "not beyond", which is one of the meanings which the Macquarie Dictionary attributes to "within".

(d) On that basis, the offer was made in a time frame which complied with the clause. Of course it would have been otherwise if the offer was made after the expiry of the period: in that case it would have been made beyond the period.

[12] Notably, the offer was not accepted by the Lessee whether within the 14 days referred to in cl 45 and SC 7 or at all.

[13] The Lessee's response was a letter sent by the solicitors for the Lessee dated 11 September 2014, stating that the Lessee intended to exercise its rights under cl 45 (subject to receiving final approval) and indicating that the Lessee required some amendments to be made to Southland's offer, including that the Purchaser be changed from BP Australia to a different company, BP Refinery (Bulwer Island) Pty Ltd. The letter was in these terms:

> **Southland Packers Pty Ltd proposed sale - BP Australia Pty Ltd**
> **Property: 2 Central Avenue, Ashmore**
>
> We confirm that we act on behalf of BP Australia Pty Ltd. We refer to your letter to our client of 1 September 2014 enclosing your client's offer to sell the Property pursuant to pre-emptive right to purchase under clause 45 of the Lease.
>
> We note that our respective clients have been in discussion in relation to the offer and our client intends upon exercising its rights under clause 45 of the Lease (subject to receiving final approval).
>
> As discussed with your client, our client requires a few amendment& to the offer that was provided to them on 1 September 2014 being:
>
> 1. a shorter settlement period, with the Date for Completion to be 31 October 2014 with a right for our client to extend for 30 days, if necessary;
> 2. the deletion of the requirement to pay a Deposit In Item O;
> 3. that the Purchaser be changed to BP Refinery (Bulwer Island) Pty Ltd so that there is no merger of the lease at Completion, to ensure that the going concern GST exemption applies:
> 4. the deletion of the following SCs:

---

2 Because SC 7 refers to the making of an offer "in accordance with …" cl 45 of the Lease, it seems to me to be legitimate to look to the other clauses in the lease which affect when such an offer would be regarded as having been made. There was otherwise no evidence as to when the letter was received by registered post.

3 Cf *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] per French CJ, Hayne, Crennan, and Kiefel JJ.

(a) SC 3 - Access. As our client leases the Property, this is not required;

(b) SC 4 - Novation. Our client does not require this right;

(c) SC 5 - Deposit. As stated above, our client requires the deletion of the requirement to pay a Deposit;

(d) SC 6 - Environmental Report. Our client does not require this right, given that it is the current tenant;

(e) SC B - Guarantee. Our client is unable to provide a guarantee;

5. the insertion of the reference to the easement that benefits the property (Easement 601209797) in Item L; and

6. amendment of SC 2.1 to correct the reference to "17.7" (it should be "17.1").

We attach a copy of the Contract which incorporates the above amendments. Can you please urgently seek your client's instruction in relation to the above and confirm in writing that your client offers the Property for sale to our client upon the attached Contract? We look forward to receiving your urgent advice.

If so (and subject to our client obtaining its final approvals), we will arrange for the attached Contract to be executed by our client and sent to your office. Can you please confirm that you hold instructions to accept service of the Contract?

We look forward to receiving your urgent response.

[14] Although Southland contended the contrary[4], I do not think that it is possible to regard that letter as anything other than an invitation by the Lessee to Southland to make an amended offer. Importantly, the amended offer which the Lessee invited Southland to make was not an offer to enter into a contract with the Lessee, but was an offer to enter into a contract with a different person altogether, namely BP Refinery (Bulwer Island) Pty Ltd. The Lessee plainly was not accepting Southland's offer, but was asking Southland to make an offer to BP Refinery (Bulwer Island) Pty Ltd in altered terms from the offer which it had made to the Lessee. That intention was made even more obvious by the enclosure which was in REIQ form, which –

(a) identified BP Refinery (Bulwer Island) Pty Ltd (and not the Lessee) as the purchaser;

(b) identified that the Lessee's solicitors were also the solicitors for BP Refinery (Bulwer Island) Pty Ltd for the purposes of a contract in that form; and

(c) provided a signature clause in respect of BP Refinery (Bulwer Island) Pty Ltd as purchaser and not in respect of the Lessee.

[15] Southland's solicitors responded by letter dated 12 September 2014 as follows:

SOUTHLAND PACKERS PTY LTD SALE TO BP REFINERY (BULWER ISLAND) PTY LTD
PROPERTY: 2 CENTRAL PARK AVENUE, ASHMORE

Thank you for forwarding the draft Contract.

My client requests the following changes:

1. deletion of the selling agent;
2. as the purchaser is a separate entity from the tenant clause 7 .6 will need to be amended as it would not be acceptable for the purchaser entity to be entitled to rely on a breach or those warranties by the vendor;
3. Change the place of settlement to Bundall.

I will let you have a redrafted version of the Contract shortly.

[16] Whilst that letter was not the offer which the Lessee had invited Southland to make to BP Refinery (Bulwer Island) Pty Ltd, the subject matter of the letter at least made clear that

---

4 Southland contended the letter could be regarded as (1) an acceptance of the offer, and then (2) request for an amendment to the contract so formed.

Southland was content to sell the Property to BP Refinery (Bulwer Island) Pty Ltd instead of the Lessee. That communication should be taken to be a communication both to the Lessee and to BP Refinery (Bulwer Island) Pty Ltd because, it will be recalled, Southland's solicitors had been told that the same solicitors acted for both.

[17] The next step was a further letter dated 12 September from Southland's solicitors to the solicitors for both the Lessee and BP Refinery (Bulwer Island) Pty Ltd. That letter provided:

> **SOUTHLAND PACKERS PTY LTD SALE TO BP REFINERY (BULWER ISLAND} PTY LTD**
>
> **PROPERTY: 2 CENTRAL PARK AVENUE, ASHMORE**
>
> I have amended the draft Contract and it is attached in a form which will be acceptable to my client.
>
> If your client agrees, could you please arrange for it to be executed and sent to us by way of offer which we will submit to our client for acceptance forthwith.
>
> Please confirm that your client agrees to the formation of the Contract by email.

[18] As to this letter:

(a) It was clear that the contract of sale contemplated was a sale by Southland to BP Refinery (Bulwer Island) Pty Ltd and not to the Lessee. Again that was made explicit by the subject matter line, but it was also made explicit by the form of the enclosure which identified (and provided a signature clause for) BP Refinery (Bulwer Island) Pty Ltd as the purchaser.

(b) Southland invited me to construe the two letters of 12 September 2014 as an offer made by Southland, but I think that would be an error. The second letter of 12 September was not on its face an offer capable of acceptance by either the Lessee or BP Refinery (Bulwer Island) Pty Ltd. It expressly invited the submission of an offer from the latter company in the form of the provision of an executed form of contract. Moreover, insofar as it referred to acceptance by Southland, it did so in the future tense (namely, "will be acceptable" and "we will submit to our client for acceptance forthwith"), rather than something which was not necessary in order for there to be a binding contract.

[19] Ultimately a contract was entered into between Southland and BP Refinery (Bulwer Island) Pty Ltd pursuant to which Southland agreed to sell the Property to BP Refinery (Bulwer Island) Pty Ltd ("the Bulwer Island Contract"). I observe:

(a) The contract was undated, but executed by both parties.

(b) The evidence does not reveal either the order in which execution occurred or how the fact of execution by the last party who executed the document was communicated to the other. Southland's director gave evidence before me and could not recall the order in which those events happened.

(c) The result is that the evidence does not reveal the date on which that contract was made, or whether the way in which it was made was by Southland accepting an offer from BP Refinery (Bulwer Island) Pty Ltd or vice versa.

(d) What is clear is that the offer which was accepted so as to give rise to the contract was not an offer by Southland to the Lessee which was accepted by the Lessee.

[20] The Bulwer Island Contract contained some terms which were different from the terms of the Mayfair Contract. In particular, the Bulwer Island Contract:

(a) did not identify a "Vendor's Agent";

(b) did not require that a deposit be paid;

(c) contained a different completion date, namely 31 October 2014, subject to the purchaser extending the date by a period of up to 30 days by written notice to the vendor given on or before 5.00pm on 31 October 2014.

(d) did not contain the following SCs which had been contained in the Mayfair Contract:

(i) SC 3 (Access);

(ii) SC 4 (Novation by purchaser);

(iii) SC 5 (Deposit);

(iv) SC 6 (Environmental Report); and

(v) SC 8 (Guarantee).

[21] By letter dated 15 September 2014, Southland's lawyers informed Mayfair's lawyers as follows:

> **SOUTHLAND PACKERS PTY LTD SALE TO MAYFAIR PROPERTY HOLDINGS PTY LTD AS TRUSTEE**
> **PROPERTY: 2 CENTRAL PARK AVENUE, ASHMORE**
>
> We refer to SC 7 of the Contract and confirm as follows:
>
> 1. our client has complied with the terms of clause 45 of the Lease;
> 2. the lessee has accepted our client's offer in accordance with clause 45 of the Lease;
> 3. this Contract is now at an end and the deposit moneys will be refunded to your client under SC 7 .5.

[22] One might ordinarily regard such a letter as providing at least some sort of evidentiary support for the proposition that the Bulwer Island Contract must have been made between 12 and 15 September 2014. However because the letter was – in point 2 – factually inaccurate and because Southland's solicitors subsequently refused to provide details of what had happened when requested to do so by Mayfair's solicitors, I formed the impression that the formation of the wording of the letter may have been influenced by considerations exterior to a mere desire to record facts which had happened. I am not willing to use the letter as a basis for drawing such an inference of fact.

[23] BP Refinery (Bulwer Island) Pty Ltd became registered proprietor of the Property on 29 September 2014, when the Bulwer Island Contract settled.

Question 1: In the events that have happened, has the Mayfair Contract come to an end pursuant to SC 7?

[24] Southland contended for an affirmative answer to this question on the basis that - as its solicitors had suggested to Mayfair's solicitors on 15 September 2014 - the Lessee had accepted an offer by Southland to sell made in accordance with cl 45 of the Lease.

[25] In order to resolve the various arguments advanced by the parties for and against this proposition, it is necessary to make some preliminary observations as to the evident purpose of SC 7 and some aspects as to its proper construction.

[26] It was common ground that I should seek to determine questions of construction in accordance with what the terms of the contract would convey to a reasonable business person in the position of the parties. I should consider the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be

secured by the contract.[5] I am entitled to approach the task of giving the contract a businesslike interpretation on the assumption that the parties intended to produce a commercial result and to avoid making commercial nonsense or working commercial inconvenience.[6]

[27] In my view a reasonable business person in the position of the parties armed with the requisite knowledge would have thought that the commercial purpose of the Mayfair Contract was for Southland to sell the Property to Mayfair so long as it could do so consistently with its existing obligations to the Lessee under the Lease to accord the Lessee a pre-emptive right to purchase the Property. That purpose was achieved by –

(a) entering into a contract with the requisite provisions obliging Southland to sell to Mayfair; and

(b) regulating – in SC 7 – the time within which and the means by which Southland could be excused from its obligation to sell to Mayfair because of the operation of the pre-emptive right accorded to the Lessee in cl 45 of the Lease.

[28] A reasonable business person in the position of the parties would have thought that the structure of SC 7 revealed a coherent scheme for the regulation of the latter possibility. I make the following observations:

(a) SC 7.1 acknowledged the existence of pre-existing right of pre-emption in cl 45 of the Lease.

(b) The parties must be taken to have contemplated that Southland would comply with its obligations under cl 45 of the Lease because SC 7.8 provided that Southland indemnified Mayfair against any claim by the Lessee for damage suffered as a result of Southland not complying with them.

(c) But a reasonable business person would also have concluded that an evident purpose of the clause was to ensure that Southland was only to have limited rights to be excused from its obligation to sell to Mayfair. That much flows from the evident purpose mentioned at [27](a) above, but also from the structure of SC 7:

(i) by SC 7.4, the contract was conditional upon the Lessee failing to accept not just any offer, but "the Vendor's offer" and, in context that can only have been a reference to the offer referred to in SC 7.2. That offer is the same offer referred to in SC 7.3.

(ii) by SC 7.5, the contract would be at an end if the Lessee accepted "the Vendor's offer…". In context that can only be the offer referred to in the previous 3 subclauses.

(iii) By SC 7.7 Southland had agreed that it would not vary the Lease (including, without limitation, by altering the time within which the Lessee could exercise its cl 45 rights). In context, the reference to "vary the Lease" must be construed not merely as a prohibition against formally changing the terms of the Lease for the future, but also as a prohibition against varying the effect of the Lease in relation to the particular transaction concerned.

---

5 It was uncontroversial that there were aspects of the clause which were relevantly ambiguous. The question which sometimes arises as to whether ambiguity is a requisite threshold question to admissibility does not arise in this case.

6 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] per French CJ, Hayne, Crennan, and Kiefel JJ and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990; [2015] HCA 37 at [47]-[51] per French CJ, Nettle and Gordon JJ.

(d) SC 7 also set out some additional requirements for the protection of Mayfair. The offer to the Lessee not only had to comply with cl 45 of the Lease, but also had to comply with the requirements that –

(i) the offer be "on the same terms" as the Mayfair Contract; and

(ii) the offer be made within a particular time frame and the subject of notification to Mayfair (also within a particular time frame).

(e) These two requirements, of course, formed no part of Southland's obligations to the Lessee under cl 45.

(f) As to the "on the same terms" obligation:

(i) Clause 45 required Southland's offer to the Lessee to be on terms "no less favourable" than those Southland was prepared to offer to Mayfair.

(ii) The evident purpose of cl 45 of the Lease was to ensure that the Lessee received an opportunity to match the proposed sale to an external party. It would require Southland to offer to sell to the Lessee on terms equal to or more favourable to the Lessee (*qua* offeree) than the terms offered to Mayfair.

(iii) The "same terms" requirement in the Mayfair Contract meant that Southland was not permitted to offer to sell to the Lessee on terms more favourable to the Lessee. From Mayfair's position, it would operate to reduce the objective likelihood that the Lessee might receive an offer which would motivate it to take steps which would result in Mayfair losing the sale.

(iv) In conjunction with the limited right of Southland to avoid the contract, that requirement would operate to protect Mayfair against the possibility that the Lessee might seek to obtain the Property by inviting an offer from Southland on terms which, although less favourable to the Lessee would be more favourable to Southland. In those circumstances Southland could not avail itself of SC 7.5.

(g) As to the particular time frame obligation in SC 7.2 and the notice regime, the evident purpose of those requirements was to set up a regime not found in cl 45 of the Lease which would mean that Mayfair would know by the date which was 19 days after the contract date of the Mayfair Contract whether or not its contract had become unconditional (at least in respect of the possibility of losing the contract to the Lessee). This supports the assessment of evident purpose adverted to at [28](c) above because there would be no point creating that regime, if Mayfair was always at risk of the contract coming to an end because the Lessee accepted some other offer which complied with cl 45 of the Lease.

[29] The result is that in my view the proper construction of SC 7.5 is that in order for Southland to make good its contention referred to at [24] above, it would have to demonstrate that –

(a) Southland had made a compliant offer (namely an offer to the Lessee which complied with both SC 7.2 of the Mayfair Contract and cl 45 of the Lease); and

(b) the Lessee had accepted that offer (and not some other offer).

Mayfair's first argument

[30] Mayfair's argument was essentially that –

(a) the reference to "Lessee" in SC 7 was a reference to the person named as such in the Lease, namely BP Australia and not to any other person;

(b) the SC 7 requirement for an offer to be made to and accepted by the Lessee meant what it said and left no room for an offer to be made to or accepted by anyone other than the Lessee; and

(c) that analysis was fatal to Southland's case.

[31] For its part, Southland contended:

(a) The term "Lessee" in SC 7 should be regarded as encompassing both BP Australia and any nominee which it might make because Mayfair had no business or commercial interest in "Lessee" being read to exclude a nominee.

(b) In support of that, Southland suggested that because it is well-established that generally a purchaser under a contract for the sale of land can direct that the property in question be conveyed either to itself, or as it directs (relying on *In Re Pellick's Transfer* [1987] 1 Qd R 73 at 74 to 75), I could safely conclude that the reference to "Lessee" as the person to whom an offer would be made and by whom an offer could be accepted must have been intended to encompass a nominee. Such an intention was also, Southland contended, supported by the fact that in the Mayfair Contract the parties provided for novation as set out in SC 4.

(c) If it is accepted that ordinarily a purchaser, such as BP Australia, would have had the right to direct Southland to convey the Property to any person it nominated, the identity of the purchaser must be regarded as not having any significance. The same result could have been achieved by BP Australia entering into the contract as purchaser and directing it be conveyed. The identity of the purchaser was therefore immaterial in terms of any commercial substance.

[32] I reject Southland's arguments.

[33] As to the first point, I have explained the approach which a reasonable business person in the position of the parties would have taken as to the purpose of the transaction at [27] above. It seems to me that on that basis at Mayfair had a business and commercial interest in not expanding the bases on which Southland might obtain an excuse from its promise to sell the Property to Mayfair.

[34] As to the second and third points:

(a) There is a fundamental distinction between –

(i) a vendor making an offer to sell to a purchaser, which admits of the possibility that after the contract is formed as between vendor and purchaser, the purchaser might direct that the conveyance of the land sold must be made to a third party;

(ii) a vendor making an offer to sell to a purchaser in a form which admits of the possibility that the purchaser might nominate a third party such that the contract must be formed as between the vendor and the third party in lieu of the purchaser; and

(iii) a vendor making an offer to sell to a purchaser in a form which admits of the possibility that after the contract is formed as between vendor and purchaser, the purchaser might take steps which compel the vendor to accept the rescission of the original contract and the substitution of a new contract between vendor and a third party,

notwithstanding that at the end of the day each scenario will result in the property ultimately being conveyed by the vendor to the third party.

(b) That these scenarios are fundamentally different is recognised in cases which seek to determine whether a contract which provides for a sale from A to B "or nominee", could be read as empowering B to nominate a third party to be the purchaser in lieu of B: see, for example, *Salter v Gilbertson* (2003) 6 VR 466 at [16] to [18] (Phillips JA, with whom Winneke P and Batt JA agreed) and *ACN 096 278 483 Pty Ltd v Vercorp Pty Ltd* [2011] QCA 189 at [20] to [21].

(c) I do not think one can legitimately conclude from the fact that there are different pathways to the same end result, that the differences between the pathways must have been regarded as irrelevant.

(d) Parties to contracts choose language which is apposite to indicate whether or not any of these things matter. In this case the language chosen in both the Lease and the Mayfair Contract was clear in relation to the parties' intention concerning the person to whom the compliant offer had to be made and by whom it had to be accepted.

(e) The right which operated as a possible exception to Mayfair's right to have the Property sold to it was a right which was expressed by reference to "the Lessee". Although "Lessee" was not a term defined in the Mayfair Contract, the contractual terms to which I have referred at [7](c) above do not permit of any other conclusion. Indeed, because it was common ground that at the time they entered into the Mayfair Contract both parties knew of the terms of the Lease, then it is relevant to note that cl 1.1 of the Lease provided that "Lessee" meant BP Australia and included "its successors and permitted assigns". The use of the language of the Lease tends to suggest the parties meant to apply the definition which appeared in the Lease.

(f) There is simply no reason to think that the use of the term "Lessee" in SC clause 7 was a reference to anyone other than BP Australia or its successors and permitted assigns. There is no reason to think that "Lessee" would have been intended either as between –

(i) Southland as Lessor and BP Australia as Lessee; or

(ii) Southland as vendor and Mayfair as purchaser,

to be regarded as "Lessee or nominee", let alone any reason to regard the term as intended to bring about the scenario to which I have adverted at [34](a)(ii) above.

(g) Indeed, to some extent, the fact that the Mayfair Contract contained SC4 was a factor against Southland's argument. It showed that at least as between Southland and Mayfair, the parties regarded the identity of contracting parties as important. Southland could not be placed in a position of having to contract with someone else unless Mayfair availed itself of the SC4 procedure. Moreover, SC 7.2 obliged Southland to make the offer to "the Lessee" in a form which necessarily would have included SC 4 is also a factor somewhat against Southland's argument. Why contract in a way which required the offer to include such a term if the identity of the offeree was never a matter of moment?

[35] The result is that I prefer Mayfair's argument. SC 7 contemplated that the offer had to be made to and accepted by BP Australia. It did not permit of the possibility that the offer could be made to and accepted by a nominee of BP Australia.

[36] The involvement of the third party had the result that there is no satisfactory view of the chronology of events which I have examined at [12] to [22] above in which -

(a) Southland had made a compliant offer (namely an offer which complied with both SC 7.2 of the Mayfair Contract and cl 45 of the Lease) to BP Australia; and

(b) BP Australia accepted that offer (and not some other offer).

[37] I accept Mayfair's contention that this is fatal to Southland's case.

Mayfair's second argument

[38] Mayfair's second argument was that the offer which was accepted so as to make the Bulwer Island Contract was not "on the same terms" as the Mayfair Contract within the meaning of that expression as used in SC 7.2. One can infer from the terms of the Bulwer Island Contract as entered into that the offer was on terms which differed in the respects identified at [20] above.

[39] The question – as Mayfair correctly put it – is what, if any, latitude for departure from the terms of the Mayfair Contract was permitted by the expression "on the same terms".

[40] Mayfair submitted that the only room for departure was in respect of terms which were personal to Mayfair and incapable of acceptance by the Lessee. Otherwise, Mayfair submitted, the terms had to be exactly the same or at least to the same effect. If entire clauses such as those identified at [20] above were missing, then it could hardly be said that the offer was on the same terms. The reason why Mayfair conceded that the offer of 1 September was "on the same terms" was that the deletion of SC 7 and of the names of the purchaser and the guarantor was the deletion of terms which were personal to Mayfair and not capable of acceptance by the Lessee.

[41] In support of this contention, and by way of exemplification of its approach, Mayfair referred me to:

(a) *THL Robina Pty Ltd v Glades Golf Club Pty Ltd* [2005] 2 Qd R 186, in which Chesterman J reviewed the authorities, including *Simsmetal Ltd v Wanless Metal Industries Pty Ltd* (Unreported, Supreme Court of New South Wales, Cohen J, 19 March 1997, BC9700743), and concluded (at [50]) that the terms offered pursuant to a right of first refusal must be:

> …such as to be capable of acceptance by the applicant. This is not to say, as Cohen J pointed out in Simsmetal, that the terms and conditions may not be onerous, or even harsh, or the price so high as to prove difficult for the applicant to pay. What makes an offer incapable of acceptance in this context 'is a condition which can only be fulfilled by a person … which is not the grantee' of the pre-emption. Such a condition is one which is 'extraneous to any relationship which it might have with the grantor and is personal to another proposed purchaser'.

(b) In *Simsmetal*, Cohen J had said (at 14 to 15):

> If the so-called offer contains conditions which the grantee cannot comply with because they are extraneous to any relationship which it might have with the grantor and are personal to another proposed purchaser, then the balance of cl 4 can never be brought into operation.
>
> Thus, in my opinion, the offer made by the grantor to the grantee must be capable of acceptance by the grantee. This in turn means that the notice which constitutes that offer must contain terms and conditions which are capable of that acceptance. When I refer to capability of acceptance I do not of course refer to a price which may be difficult for the grantee to pay or to terms and conditions which might prove harsh or onerous. These matters would relate only to the grantee's capacity to accept the offer. What in my opinion would not amount to an offer, and therefore could not be contained in the notice under cl 4.1, is a condition which can only be fulfilled by a person or company which is not the grantee. The condition of the allotment of shares in Metalcorp and the other conditions to which I have referred are impossible of performance by the plaintiff and in my opinion prevent the notice given on 28 January 1997 from complying with the requirements of cl 4.1.

[42] For its part, Southland contended that this approach to what might constitute an offer being "on the same terms" was far too literal. The essence of its approach was to construe "on

the same terms as [the Mayfair contract]" as encompassing "on terms which are so far as material the same terms as [the Mayfair contract]". Southland contended:

> It is respectfully submitted that the expression "same terms" must be interpreted to refer to material, commercial terms of the sale itself and not insubstantial or inconsequential terms, or terms that are incidental to the fact that the buyer was a different entity than Plaintiff. It is important to note that the Plaintiff and Defendant were aware of the content and effect of clause 45 of the lease. The qualification in the warranty in special condition 7 was that the purported compliance with clause 45 of the lease was to be qualified by an requirement that the offer be in the same terms. It is submitted a court will be guided by the evident commercial purpose or substance of the transaction, which was to, in effect, ensure that the offer made to the lessee, BP, was not on more favourable terms than the Mayfair contract. Adopting a commercial approach, the expression "same terms" was intended to achieve the result of requiring an offer no more or less favourable. Price and the period of the lease are undoubtedly the dominant commercial terms.

[43] On this approach Southland would invite the Court to evaluate the missing terms and form the view that their absence could not be regarded as material.

[44] I prefer the construction for which Mayfair contended. It seems to me that whilst the Lease in cl 45 used terms which might have required an open-textured process of evaluation (i.e. "no less favourable") it is more likely that by SC 7 the parties were seeking to avoid that imprecision and that is why they chose the language of "on the same terms". It seems to me that Mayfair's approach provides sufficient flexibility to encompass typographical errors, or the use of different words which have the same legal effect, but also sufficient precision to avoid the relative uncertainty which would be foreseeable if the concept of "materiality" was introduced.

[45] The result is that I conclude that the offer which was accepted so as to make the Bulwer Island Contract was not "on the same terms" as the Mayfair Contract within the meaning of that expression as used in SC 7.2.

[46] Quite apart from timing considerations and considerations of the identity of the offeror or offeree, this view of SC 7 is fatal to Southland's case.

Mayfair's third argument

[47] Mayfair's third argument was that the offer which was accepted so as to make the Bulwer Island Contract was not an offer "in accordance with the requirements of clause 45 of the Lease" as required by SC 7.2 because, contrary to cl 45.1 of the Lease, it contained terms which were less favourable than those of the Mayfair Contract.

[48] A question arises as to the time at which one assesses the question whether an offer is "no less favourable" and the criterion which one must use for measurement.

[49] Because cl 45 is addressing a comparison which *ex hypothesi* is to be made with a state of affairs which must exist at some time in the future, namely the time at which the Lessor is prepared to dispose of the Property to some other person, I think the parties must have contemplated that the comparison occur at that time. For present purposes that means at the time of the Mayfair Contract.

[50] The criteria by which one measures the issue must be from the point of view of the Lessee, *qua* offeree. The test must be objective. Whether or not it was met in any particular case, could not turn on what was the subjective attitude of the Lessee at the time. That must be so otherwise the Lessor, *qua* offeror, would be subject to the whim of the Lessee and could never know whether or not it had made an offer which complied, without first finding out what was the attitude of the Lessee.

[51] Save as to say that the question whether terms are "no less favourable" is to be addressed objectively from the point of view of the offeree, the considerations which sound as to favourability are undefined. In this context I think "favourable" means advantageous.

[52] The relevant question is whether a reasonable business person standing in the shoes of the parties to the Lease would have regarded the terms of the relevant offer as no less advantageous to the Lessee *qua* offeree than the terms on which the Lessor was prepared to sell to Mayfair.

[53] Mayfair contended that the terms of the offer which was accepted so as to make the Bulwer Island Contract must be regarded as less favourable than the terms of the Mayfair Contract, when one has regard to:

(a) the earlier completion date (SC 3);

(b) the absence of SC 4 (Novation by purchaser);

(c) the absence of SC 6 (Environmental Report).

[54] Mayfair did not, however, develop any reason why that conclusion should be reached. As I apprehended Mayfair's argument, if I reached that conclusion I would also conclude that this was another reason why Southland could not contend that SC 7.5 applied (even if its other points about the identity of the offeree and the timing of the offer were rejected).

[55] As to the earlier completion date:

(a) SC 3.1 of the Bulwer Island Contract provided that the completion date was 31 October 2014. By SC 3.2, the offeree was entitled to give notice extending the completion date for a period of up to 30 days. The latest completion date under SC 3.2 was 1 December 2014.

(b) By Item Q the completion date for the Mayfair Contract was 2 December 2014.

(c) I see no reason why SC 3 of the Bulwer Island Contract should be regarded as less advantageous than the comparable term of the Mayfair Contract. In fact it seems to me to confer on the offeree greater flexibility than the completion date of the Mayfair Contract.

(d) I reject Mayfair's argument insofar as it relies on this difference between the terms.

[56] As to the absence of SC 4:

(a) The Lessor was prepared to offer to sell to Mayfair on terms which permitted Mayfair to compel the Lessor to accept, post acceptance of the offer, novation to a person nominated by Mayfair.

(b) An offer without this term should be regarded as less advantageous from the perspective of the offeree because it does not contain a material right which the offeree would otherwise have had. The subjective consideration that this particular offeree did not want the right is irrelevant to this outcome.

(c) I accept Mayfair's argument insofar as it relies on this difference between the terms.

[57] As to the absence of SC 6:

(a) SC 6 conferred on Mayfair a right to obtain an environmental report and to terminate the purchase in the event that the report contains anything which was not satisfactory to Mayfair, acting reasonably.

(b) It might be argued that an offer without this term should be regarded as less advantageous from the perspective of the offeree because it does not contain a material right which the offeree would otherwise have had. A countervailing

objective consideration is that the hypothetical offeree is the person who had been the Lessee for almost 10 years and, accordingly, would have been regarded as a person with intimate knowledge of the environmental history of the Property.

(c) I am not persuaded that the absence of this right would mean that the a reasonable business person standing in the shoes of the parties to the Lease would have regarded the terms of the relevant offer as no less advantageous to the Lessee *qua* offeree than the terms on which the Lessor was prepared to sell to Mayfair.

(d) I reject Mayfair's argument insofar as it relies on this difference between the terms.

[58] The result is that I would conclude that the absence of the SC 4 clause meant that the offer which was accepted so as to make the Bulwer Island Contract was not an offer "in accordance with the requirements of clause 45 of the Lease" as required by SC 7.2 because, contrary to cl 45.1 of the Lease, it contained terms which were less favourable than those of the Mayfair Contract.

[59] This conclusion is also fatal to Southland's case.

Mayfair's fourth argument

[60] Mayfair's fourth argument addressed the possibility that the letter of 12 September was a complaint offer.

[61] Mayfair submitted that the letter was not an offer capable of acceptance by the offeree, but was an invitation to treat. I agree for the reasons given at [18] above.

[62] But even if it was an offer by Southland, Mayfair submitted that it could not be regarded as a compliant offer because –

(a) it was not given "within 5 Business Days after" the date of the Mayfair Contract as required by SC 7.2; and

(b) was not the subject of a notification to Mayfair in accordance with SC 7.3.

[63] I do not accept the correctness of the second proposition because such a failure does not seem to me to go to the question of whether or not the offer may be characterised as an offer as required by the wording of SC 7.5.

[64] However, I do agree with the first proposition. An offer given after the date 5 business days after 3 September 2014 would not be the offer contemplated by the wording of SC 7.5. Southland invited me to regard the timing requirement set out in SC 7.3 as unimportant. However I reject that contention. It seems to me that the scheme should be construed in the way I have previously articulated. An objective business person standing in the shoes of the parties would have thought that the timing considerations were critical for the reasons I have already identified.

[65] This is also fatal to Southland's contention.

Mayfair's fifth argument

[66] Mayfair's fifth argument addressed the possibility that the offer of 1 September was a complaint offer.

[67] Mayfair first contended that the offer of 1 September could not be regarded as a compliant offer because it was made out of time. I reject that submission for the reasons articulated at [11] above.

[68] Mayfair then pointed out that even if the offer was a complaint offer, it was not accepted. In my view that submission must be accepted: see [12] to [22] above. The offer was an offer to the Lessee. The Lessee did not accept any offer, let alone that one. And even if

BP Refinery (Bulwer Island) Pty Ltd could be regarded as having accepted an offer (and, contrary to my view, the fact that it was not "the Lessee" did not matter), the offer which it accepted could not be regarded as the offer of 1 September.

[69] This is also fatal to Southland's contention.

Answer to question 1

[70] For the reasons I have articulated, the Mayfair Contract did not come to an end pursuant to SC 7.

Question 2: In the events that have happened, was Southland in breach of the Mayfair Contract as alleged in paragraph 19 of Mayfair's statement of claim?

[71] The breaches of the Mayfair Contract alleged in paragraph 19 were the following:

> 19. In the premises, by reason of the facts, matters and circumstances pleaded at paragraphs 10 to 18 above:
>
> (a) [Southland's] purported termination of the Mayfair Contract in reliance on SC 7 was invalid because:
>
> (i) by [SC 7.2] [Southland] warranted that it would make an offer to the Lessee on the same terms as the Mayfair Contract;
>
> (ii) by operation of [SC 7.4] the Mayfair Contract was subject to and conditional upon the Lessee failing to accept [Southland's] offer to sell the Property on the same terms as the Mayfair Contract within 14 days;
>
> (iii) the nominated purchaser under the Bulwer Island Contract was not the Lessee under the Lease;
>
> (iv) for the reasons pleaded at paragraph 10 above the terms of the Bulwer Island Contract were not the same as the Mayfair Contract.
>
> (b) in purporting to terminate the Mayfair Contract as pleaded in paragraph 11 above [Southland] acted in breach of the Mayfair Contract;
>
> (c) further and in the alternative, [cl 45] of the Lease was not invoked because [Southland] failed to comply with its terms, in that:
>
> (i) the Lessee did not accept the offer made by [Southland] purportedly under [cl 45] of the Lease;
>
> (ii) [Southland] subsequently offered the Property to a different entity being BP Refinery (Bulwer Island) Pty Ltd; and
>
> (iii) the terms of the offer made by [Southland] to BP Refinery (Bulwer Island) Pty Ltd were less favourable within the meaning of [cl 45] because the terms of the Mayfair Contract were different from the terms of the Mayfair Contract as pleaded in paragraph 10 above;
>
> (d) in executing and settling the Bulwer Island Contract, [Southland]:
>
> (i) made the completion of the Mayfair Contract impossible; and
>
> (ii) breached the Mayfair Contract.

[72] My reasoning in relation to the answers I have given to the first question demonstrates that an affirmative answer must be given to this question. It is unnecessary to elaborate further on that conclusion. Indeed, no significant argument was addressed to this question by the parties.

Conclusion

[73] The separate questions should be answered as follows:

Question 1: Whether, in the events that have happened, the Mayfair Contract came to an end pursuant to SC 7?

Answer to Question 1: No.

Question 2: Whether, in the events that have happened, Southland was in breach of the Mayfair Contract as alleged in paragraph 19 of Mayfair's statement of claim?

Answer to Question 2: Yes.