SUPREME COURT OF QUEENSLAND

CITATION: *Francis & Others v NPD Property Development P/L* [2004] QCA 343

PARTIES: **JOHN WILLIAM FRANCIS AND DOREEN VICKI FRANCIS**
(applicants/respondents)
v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent/appellant)

LILLIAN ESTELLE DIPPEL
(applicant/respondent)
v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent/appellant)

WILLIAM JOHN GILES-DUFFY
(applicant/respondent)
v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent/appellant)

WILLIAM JOHN GILES-DUFFY AND ELIZABETH ANNE SCHMIDT
(applicants/respondents)
v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent/appellant)

LESLIE GORDON FISHER AND SUSANNE ELLEN FISHER
(applicants/respondents)
v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516
(respondent/appellant)

BRIAN LESLIE FISHER AND GREG ANTHONY FISHER
(applicants/respondents)
v
NPD PROPERTY DEVELOPMENT PTY LTD
ACN 088 360 516

(respondent/appellant)

FILE NO/S:	Appeal Nos 6482 to 6487 of 2004 SC No 2121 to 2126 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2004
JUDGES:	McPherson JA, Williams JA and Jerrard JA Separate reasons for judgment of each member of the Court, McPherson JA and Williams JA concurring as to the orders made, Jerrard JA dissenting
ORDERS:	**1. Allow with costs the appeal in each of the originating applications** **2. Set aside the declaration that the contract referred to in each originating application is void** **3. Order that the originating applications be dismissed** **4. Each party is to pay his, her or its own costs of the proceedings at first instance**
CATCHWORDS:	CONTRACTS – ILLEGAL AND VOID CONTRACTS – CONTRACTS ILLEGAL BY STATUTE – GENERAL PRINCIPLES – where appellant purchased land from each of the respondents on the condition that, after the transfer of the land and once subdivision approval had been obtained, a smaller "sellers block" would be transferred back to each of the respondents – whether contracts contravened prohibition in s 8 Land Sales Act 1984 *Land Sales Act 1984* (Qld) s 8 *AFA v Garendon Investments Pty Ltd* (1995) 37 NSWLR 221, applied *Anantamul Pty Ltd v Innes-Irons* [1984] 2 Qd R 180, applied *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651, considered *DKLR Holding Co (No 2) v Commission of Stamp Duties* [1980] 1 NSWLR 510, cited *Ex p Property Unit Nominees (No 2) Pty Ltd* [1981] Qd R 178, cited *Finance Corporation of Australia v Commissioner of Stamp Duties* [1981] Qd R 493, considered

Robshaw Brothers Ltd v Mayer [1957] 1 Ch 125
Snape v Kiernan (1988) 13 NSWLR 88, cited
Timber Top Realty Pty Ltd v Mullens [1974] VR 312, applied

COUNSEL: P A Keane QC with A W Duffy for the appellant
J K Bond SC with A M Pomerenke for the respondents

SOLICITORS: Bain Gasteen for the appellant
Frank Carroll solicitors for the respondents in Appeal Nos 6482 to 6485 of 2004
Jones Leach Hawley for the respondents in Appeal Nos 6486 to 6487 of 2004

[1] **McPHERSON JA**: On dates between August 2001 and January 2002 the respondents to these appeals, to whom I shall refer as the sellers, entered into written contracts with the appellant NPD Property Development Pty Ltd as buyer to sell to it for prices ranging between $1 million and $2.5 million land of which the sellers were severally registered as proprietors. There were in all six contracts each in the standard printed form in common use in Queensland supplemented by sets of special conditions. In the case of some of the contracts those conditions vary slightly from one to another but not so much as to prevent them from being considered together. In this regard, the contract with BL & GA Fisher represents something of an exception that will receive specific attention later in these reasons. The common question for determination on these appeals is whether the learned judge of the Supreme Court, who heard all six applications together, was correct in holding that the contracts contravened the provisions of s 8(1) of the *Land Sales Act 1984* and so were, as he declared, void by force of s 8(2) of the Act.

[2] The subject land comprises six separate registered lots varying in area from about two or more to some 12 acres in extent, which has hitherto evidently been used for farming activities. The buyer is a developer which is acquiring the land with a view to its being subdivided and sold as residential allotments. The difficulty, which is a not unfamiliar one, is that each of the sellers wished to retain the house and its curtilage (the Seller's Block, as it is called in contracts) in or on which they live. The problem which this presented for the buyer was that the process of excising those blocks from the larger areas being sold to it involves a subdivision, which can be effected only pursuant to a plan of survey approved by the relevant local government and registered in compliance with ss 49, 49A and 50 of the *Land Titles Act 1994*. No doubt, even if the buyer had wished it, there was little prospect of such approval being obtained from the local government except in conjunction with an overall plan of the complete area or areas being subdivided into a series of residential allotments of which each of the Sellers' Blocks to be retained would ultimately form a part.

[3] The solution adopted by those who drew the contracts was for the seller or sellers under each contract to agree to transfer to the buyer the whole of their existing registered lot on terms that they continued to retain equitable ownership of the Seller's Block, to which title would be reconveyed to them once the overall plan of subdivision was registered. The reference schedule constituting the first page of the contract, of which the contract with Mr & Mrs Francis may be treated as exemplary, describes the Property as Lot 2 on RP 162854 and the area as 6.806

acres or 2.7560 ha "calculated in accordance with Special Condition 12". When calculated in that manner, this area in fact represents the total area of lot 2 on the existing registered plan minus the area of the Sellers' Block. Under the heading **Seller's Block Dwelling House retained by Seller**, cl 12(a) of the Special Conditions defines "Seller's Block" as meaning a parcel of land of approximately 2000 sq metres on which the dwelling house currently occupied by the seller is located. By cl 12(b) the parties acknowledge that the sale does not include the conveyance of the Seller's Block to the buyer. Clause 12(c) provides that for the purposes of the conveyance of the property -

> "… it is agreed that the seller shall continue to retain equitable ownership of the Seller's block notwithstanding the completion of this contract and subject to the provisions as hereinafter appear. To facilitate the subdivision of the land by the buyer, it is agreed that the bare legal estate of the Seller's Block shall be transferred to the buyer, who agrees to hold the same on behalf of the seller pursuant to the terms of this contract ...".

Upon the recording of a separate instrument of title for the Seller's Block, cl 12(d) provides for transfer to the seller of the "bare legal title" to that Block.

[4] In contracting on these terms the parties evidently proceeded on assumptions that: (1) an absolute owner of land in fee simple holds two estates, one of which is legal and the other equitable; and (2) it is possible under the Torrens system to transfer only the bare legal title to such land. Both assumptions are unfounded, the first for reasons given by Hope J in *DKLR Holding Co (No 2) v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 519 (affirmed 149 CLR 431, especially at 463); and see also *O'Sullivan v Commissioner of Stamp Duties* [1984] 1 Qd R 212, 229-230; the second because a transfer by a registered proprietor of land of the bare legal estate in fee simple is not an instrument capable of registration under the Torrens system: *ex p Property Unit Nominees (No 2) Pty Limited* [1981] Qd R 178. In deference to this, the Francis contract in cl 5.3 of its printed terms expressly provides for delivery by the seller to the buyer of instrument of title required to register the transfer to the buyer of the land described as Lot 2 on RP 162854, which is the whole of the area.

[5] So far as can be gathered from the material in the record, nothing has yet been done or attempted to give effect to cl 5.3 or the provisions of Special Condition cl 12(c). Recent title searches of the lots being sold show that they remain registered in the names of the sellers. It is, however, helpful to consider the position as it would be if the contract in each case here were to be carried out by transferring to the buyer the title in fee simple, both legal and equitable, of each of the sellers to the whole of the land comprised in their existing registered lots. The result, according to Nelson J in *Timber Top Realty Pty Ltd v Mullens* [1974] VR 312, is that the buyer would hold the whole of the transferred land subject to a constructive trust to subdivide and transfer the retained land to the seller when the whole area was subdivided, and in the meantime to permit the seller to remain in occupation. Any attempt by the buyer to rely upon the indefeasibility of its superficially clear title to the whole area would be subject to the exception in s 185(1)(a) of the *Land Title Act 1994*, if not also to s 185(3)(b): see *Loke Yew v Port Swettenham Rubber Company Limited* [1913] AC 491, 504-506; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604, 614-615, 638-639, 654. It is probably correct to say that the sellers' interests in the Seller's Blocks are protected by an equitable charge over the whole of the land to

secure the performance of the trusts in their favour that subsist in that land. The result, therefore, is not unlike that sought to be achieved by cl 12(c).

[6] The terms of the contracts in the present case set out to establish similar rights in the sellers not simply by construction but by express provision. Clause 12(j) of the special conditions provides that following completion the seller may continue to occupy the dwelling house on the Seller's Block. By cl 12(l)(i) the buyer undertakes not to encumber the land until the Seller's Block has been transferred back to the seller, and by cl 12(l)(ii) it undertakes to procure the guarantee of its directors to the performance of this special condition. By cl 12(m) the buyer acknowledges the seller's right to lodge a caveat to secure its interest in the seller's block. See also special condition cl 11, which provides a mechanism for doing so.

[7] It is possible now to consider the impact if any on these contracts of the provisions of the *Land Sales Act 1984*. Section 8(1), so far as material, provides:

> "8(1) A person may sell a proposed allotment of freehold land only if, when the purchaser enters upon the purchase of the allotment -
>
> (a) local government unconditional approval of the subdivision application for the land is in force under the Planning Act."

Section 8(2) declares an agreement made in contravention of s 8 to be "void" and renders amounts paid under it recoverable with interest. A monetary penalty or alternatively a term of imprisonment of one year is imposed for breach of the subsection. There are definitions in s 6 of "allotment" and "proposed allotment", the former meaning a single parcel of land the boundaries of which are shown on a plan of survey registered under the *Land Title Act 1994*; and the latter a single parcel the boundaries of which are shown (or to be shown) on a plan of survey that is to be so registered. There is in s 6 an extended definition of the word "sell" which includes: (a) agree to sell, and (c) "enter upon a transaction that has as its object the grant of a right (not immediately exercisable) to purchase …". The expression "purchase" is correspondingly defined. By s 6A(1)(a) a person is taken to have entered upon a purchase of a proposed allotment if he or she signs an instrument intended to bind that person (absolutely or conditionally) to purchase that proposed allotment.

[8] At first instance and on appeal it was not in dispute that at the time the buyer entered upon the purchase of each of the subject allotments, and also at the present time, there was not in force within the meaning of s 8(1)(a) of the *Land Sales Act* any local government unconditional approval of the contemplated subdivision involved in excising the Seller's Block from the whole area of land of which each of the sellers was and is registered proprietor. In the case of the contracts with Mr & Mrs Fisher, Ms Dippel, Mr Giles-Duffy, and Mr Giles-Duffy & Ms Schmidt, Special Condition 3 making the contract conditional on obtaining local government approval to the subdivision has since been waived by the buyer; but that has not yet happened in the case of the other two contracts with LG & SE Fisher and BL & GA Fisher. The critical question is, however, whether in terms of s 8(1)(a) the contract in each case amounted to selling a "proposed allotment", meaning by this the Seller's Block.

[9] On this aspect of the matter, Muir J held that the contractual provisions did not have that effect so far as concerns transfer of the whole area from seller to buyer. In his reasons for judgment, his Honour said at paras [20] and [21]:

> "**[20]** The reference in Special Condition 12(b) to the sale and purchase not including the conveyance of the Seller's Block to the buyer must be read, subject to the other contractual provisions. It is clear from clauses 12(c) and 12(d) that it is in fact intended that the whole of the legal title be transferred to the buyer. That is the sale for the purposes of the Act. Special Condition 12(c) makes it plain that some equitable ownership is to remain with the Seller. Special conditions 12(d) and 12(c) contain the terms of an express trust obliging the Buyer to transfer to the Seller legal title to the Seller's Block. There was thus a sale of an allotment rather than a proposed allotment.
>
> **[21]** The provisions relating to the vesting of the legal title to the Seller's Block in the Seller do not constitute any sale from the Buyer to the Seller for the purposes of the Act. The vesting of legal title to land pursuant to the terms of a trust is not a sale in any relevant sense. It is merely a transfer to give effect to the equitable obligation upon the buyer created by the instrument. There is no separately identifiable consideration for the vesting of the Seller's Block in the Seller and it is not possible to 'dissect any consideration' from the Contract."

Later, after having referred to various decisions including some of those mentioned earlier here, his Honour concluded at para [40] of his reasons that:

> "**[40]** An instrument must be considered as a whole in order to ascertain its true legal effect. Arguably, the analysis put forward on behalf of the respondent [buyer] focuses impermissibly on the first limb of the contract's operation. The agreement to transfer an estate in fee simple in the whole of the land, if that is the true effect of the contract, is but part of an inseparable series of obligations under which the whole of the land is transferred to the buyer, the Seller's Block is created and then transferred to the seller by the buyer who retains title to the balance of the land. But for the purposes of determining the effect of the contract for the purposes of the Act, it is necessary, I think, to look to the legal operation of the contract rather than the net result of the transactions for which it provides.[1] With some hesitation, I conclude that the contract does not effect a sale of only part of the subject land to the buyer."

[10] Having said this, his Honour went on in para [41] to add that nevertheless "the approach which assists the respondent [buyer] in relation to the question of whether there is initially a sale to the buyer of only a part of the land operates against the respondent [buyer] when considering the assignment of the Seller's Block". In para [42] of his reasons his Honour then concluded:

> "**[42]** For the reasons just discussed, when the Seller's Block comes into existence it is impressed with a trust and there is an obligation on the buyer to transfer an estate in fee simple to the seller. That obligation arises under a commercial agreement in which there are mutual obligations supported by valuable consideration. The fact that when created the seller's block is held beneficially for the seller is

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1. Citation given as cf *DKLR* at 450.

> but one aspect of a larger commercial transaction. There is no doubt that the agreement to 're-transfer' the Seller's Block is for valuable consideration. For the reasons discussed earlier, the contract in so far as it obliges the buyer to transfer the seller's block to the seller for the purposes of the Act, is an agreement for the sale of the Seller's Block. The contract is thus made in contravention of s 8 of the Act and is void by operation of s 8(2)."

It is this step in his Honour's reasoning that is the target of the buyer's appeal.

[11] On the appeal, I did not understand Mr Bond SC for the sellers to be challenging the reasoning embodied in paras [20], [21] and [40] of his Honour's written judgment. Rather he accepted that the operation of the contract necessarily provided for transfer in the first place of the whole of the subject allotment contained in the existing registered plan of survey, which was, he said, "one of the steps the contract must contemplate" in seeking to achieve its purpose. That purpose nevertheless was to ensure that the subdivided Seller's Block was ultimately transferred to the seller or sellers who were entitled to it. It sought to achieve that purpose, Mr Bond submitted, "by conveying the whole piece and having a mechanism for reconveying the Seller's Block piece", which, he added, brought it within the prohibition imposed by s 8(1) against selling a "proposed allotment", meaning by that the Seller's Block in each case.

[12] On the first of these matters, therefore, all parties are at one. The contract must, so far as possible or permissible at law, be given operative effect as the agreement of the parties. The law should not earn the reproof of being the destroyer of bargains. If, as is the case, it is not legally possible or practicable in law to give literal effect to cl 12(c) as providing for transfer of the "bare legal estate" in the Seller's Block, then it is to be construed, as its terms suggest, as an agreement to transfer to the buyer the registered title for the seller's estate in the whole of the area, subject however to the obligation on the part of the buyer to retransfer or reconvey to the seller the title to the Seller's Block once it was lawfully excised by registration of a plan of survey authorising the subdivision. It is not, however, at this preliminary stage but at the next step that the issue arises. What was submitted by the sellers, and accepted by the learned judge in para [42] of his reasons, is that there was under each of the contracts a sale of the Seller's Block; or, in other words, that under each such contract the seller had agreed to sell to the buyer a "proposed allotment", being the Seller's Block, in contravention of the statutory prohibition in s 8(1)(a) of the *Land Sales Act*.

[13] There are several reasons why, with respect, I do not consider that this conclusion should be adopted. One is that the process of retransferring the Seller's Block does not resemble a sale according to ordinary conceptions of that word. It is simply the revesting in the present proprietors of title to a portion of the land which the parties never at any time intended should become beneficially the property of the buyer. Had they been free from the restraints imposed by the provisions of the *Land Title Act* to which I have referred they would no doubt have chosen to convey directly to the buyer only the balance of the existing areas of land owned by the seller or sellers while retaining title to the Seller's Block in each case. Under the general law or "old system" of unregistered conveyancing this might have been accomplished simply by excepting it from the grant or conveyance to the buyer. There is between such an exception and a reservation a distinction which is recognised by the High Court in *Commissioner of State Revenue v Pioneer Concrete*

(Vic) Pty Limited (2002) 209 CLR 651, 655-666. "A reservation", their Honours said (209 CLR 651, 665) "is of something newly created and involves a regrant of something that did not previously exist", whereas an exception excludes some part of that which is transferred, so that it remains with the transferor. Excepting the Seller's Block from a conveyance of the whole area would not under the general law have generated a sale that contravened s 8(1) of the Act. Even reserving it, and so perhaps creating something new, would not constitute a separate sale of it: see *AFA v Garendon Investments Pty Ltd* (1995) 37 NSWLR 221, 230, citing *Cook v Evans* (1948) 49 SR (NSW) 83, 85.

[14] The question is whether, being obliged by the requirements of the *Land Title Act* to take the long way round of transferring the whole and then retransferring the area to be excepted and retained as the Seller's Block, the contracts here are brought within the terms of the prohibition imposed by s 8(1). This depends on the meaning of the expression "sell" in that provision. The definition of that word in s 6 is of no real assistance in elucidating its meaning in the present context, and it is the context that is critical. There are decisions in cases concerning the *Stamp Act* or other revenue statutes which ascribe a wide but special meaning to "sell" and "sale" and "conveyance on sale" as including a transfer of property in return for money or money's worth or other valuable consideration. See *Finance Corporation of Australia Ltd v Commissioner of Stamp Duties* [1981] Qd R 493, 499, 511-512. Examples provided in the reasons at first instance in this case include *Great Western Ry Co v Commissioners of Inland Revenue* [1894] 1 QB 507, *John Foster & Sons Ltd v Commissioners of Inland Revenue* [1894] 1 QB 516, and *Attorney-General v Felixstowe Gas Light Co* [1907] 2 KB 984, 990. There are other decisions of that kind that suggest a different conclusion depending on the form and effect of the particular statutory provisions in issue. See, for example, *J & P Coats Ltd v Inland Revenue Commissioners* [1897] 1 QB 778, at 783; and *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners* [1963] AC 135, 152, per Viscount Simonds.

[15] In my opinion authorities of this kind cannot be given decisive weight in determining whether or not the agreement by the buyer here to retransfer the Seller's Block amounted to selling those Blocks within the terms of s 8(1), except perhaps to the extent that, even in the face of such special provisions, courts have on some occasions held that the primary meaning of sale or sell is the conveyance or transfer of something in return for money. It was this meaning that was given to the expression "contract for the sale of land" in a statutory context divorced from the influence of revenue-seeking voracity in *Robshaw Brothers Ltd v Mayer* [1957] Ch 125. The question there was whether RSC Order 14A of the English Rules providing for summary judgment for specific performance of such a contract authorised the giving of judgment in favour of a party to an agreement for the transfer of a lease not for money but in return for a promise by the transferor to undertake the obligations contained in the lease.

[16] Expressing himself as desirous of giving the order as wide an ambit as possible because of its utility, Upjohn J nevertheless held ([1957] Ch 125, 131-132) that the expression "contract for the sale of land" did not extend beyond its prima facie meaning of a conveyance for money. In arriving at this conclusion, his Lordship relied on *Simpson v Connolly* [1953] 1 WLR 911, in which it was held that an agreement to transfer land in consideration of the extinguishment of a debt was not a sale of land; and also on an article by the prominent English conveyancer Mr T

Cyprian Williams that the primary meaning of "sale" is the conveyance of some article for money. A different view may have been taken by Mahoney JA in *Snape v Kiernan* (1988) 13 NSWLR 88, at 96; but his Honour was concerned there with the question whether the grant of an option to buy land amounted to buying or selling it within the terms of the particular statute being considered in that case.

[17] By contrast, in the present case, although there was a sale to the buyer of the whole area of the existing registered land in its unsubdivided condition, there was, it was submitted no "sale" in the primary sense by the buyer to the sellers of the Seller's Blocks that were to be excised out of it. It was not a transfer in return for money but in satisfaction of the obligation in equity resting upon the buyer to carry out the terms of the express trust resting upon it to retransfer the Seller's Block in each case.

[18] It is not clear to what extent, if at all, the argument to this effect was placed before the learned judge at first instance. As can be seen from the passage set out above from para [42] of the judgment of Muir J, the essential reason why his Honour considered that the retransfer or reconveyance of the Seller's Blocks constituted a selling of the land being retained was that it "arises under a commercial agreement in which there are mutual obligations supported by valuable consideration"; that there was no doubt that the agreement to retransfer the Seller's Block was for such valuable consideration; and that that made it a sale of that Block within the meaning of s 8(1) of the Act. Probably because the buyer's case was not presented in the way it now is, the reasoning does not, however, take account of the possibility that the process of retransferring the Seller's Block is not a sale at all, or a conveyance on sale, but the specific performance of an express trust imposed by the parties on the buyer. To state it in another way, the proprietary right of the seller as beneficiary under the trust of the whole of the land was, as Mr Keane QC for the buyer submitted, to be carried into effect by the buyer's act of transferring to the seller title to the Seller's Block once it became available upon registration of the plan of survey incorporating the approved subdivision. On this view of the transaction, it would not matter that the contract was rendered void by the operation of s 8(2) of the Act. The trust of the whole area and the seller's beneficial proprietary interest in the land would remain and continue until discharged by retransferring title to the Seller's Block.

[19] As authority for this proposition, Mr Keane QC relied upon the decision of Derrington J in *Anantamul Pty Ltd v Innes-Irons* [1984] 2 Qd R 180. There the defendant purchased units in a trust of which the plaintiff was trustee on terms that, upon registration of a plan of subdivision of land held by the trustee and on surrendering the units which he held in the trust, the defendant would be entitled to a transfer of a designated lot in the subdivision. The defendant's submission in that case was that the transaction constituted a contravention of s 67(1) of the *Auctioneers and Agents Act 1971* prohibiting a person from selling land subdivided into more than five allotments until a plan of subdivision was registered enabling a separate certificate of title to be obtained containing only the land to which the sale related. It will be seen that there are certain similarities in the language of that statute and s 8(1) of the *Land Sales Act 1984*, of which the latter is historically a lineal descendant. The earlier statute of 1971 incorporated in s 67(4) an enlarged definition of the word "sell" which is comparable with that in s 6 of the Act of 1984 in making the word "sell" include a right to purchase.

[20] Derrington J rejected a submission by the defendant purchaser that the agreement contravened the prohibition in s 67 of the Act of 1971. It was, he said ([1984] 2 Qd R 180, 189):

> "… difficult to see how the acquisition of the title to the land by the defendant as proposed could be described as a purchase. The surrender of an interest in the trust in exchange for title to the land certainly means that the acquisition is associated with a form of consideration, but the land is the subject matter of his beneficial interest in the trust and indeed had been specifically allocated to this end in the original agreement upon his entry into the trust. By way of analogy an agreement by two beneficiaries of a trust to divide the trust property in specie between them could hardly be described as a purchase by both of them from the trust. Consequently the Act proposed by the agreement that the defendant take the land as his interest in the trust could not be described as a purchase, nor then could the election given to him in that respect be described as an option to purchase."

[21] The decision in *Anantamul Pty Ltd v Innes-Jones* was applied by the Court of Appeal in *AFA v Garendon Investments Pty Ltd* (1995) 37 NSWLR 221. There the subscriber for a time share in a unit trust carrying the right to obtain the transfer of a fractional interest as tenant in common in the land on which a resort was located was held not to have entered into a contract for the sale to him of that interest. Sheller JA, with whom Priestley and Clarke JJA agreed, said (37 NSWLR 221, 231):

> "In my opinion neither the subscription of moneys to a trust fund for the allotment, in exchange, of a unit carrying the right to obtain an interest in land … nor the act of the trustee in obtaining the transfer amounts to a contract of sale to the subscriber.
>
> For the same reason I do not think that the obtaining of the allotment or transfer of a share in the Club amounts to a contract of sale."

A similar conclusion was reached by Nelson J in *Timber Top Realty Pty Ltd v Mullens* [1974] VR 312, 315, 320, that the constructive trust held to subsist in that case did not contravene statutory provisions prohibiting or penalising the purported sale of allotments of land prior to obtaining approval of a plan of subdivision containing them.

[22] The result is that I am satisfied that the obligation of the buyer in each case to retransfer to the seller the title to the Seller's Block does not amount to selling that block within the meaning of s 8(1) of the *Land Sales Act* so as to render the transaction void by force of s 8(2). Having cast the buyer's obligation in terms of a trust to retransfer that portion of the land, the parties have succeeded in eluding the prohibition imposed by that section. It was nevertheless submitted by Mr Bond SC that, if one stands back and looks at what is taking place, it is clear that the purpose of the agreement between buyer and seller was to subdivide and sell the whole area of land by excising the Seller's Block in each case, and that this offended the prohibition in s 8(1).

[23] The objects of the *Land Sales Act*, as stated particularly in s 2(b), are to protect the interests of consumers in relation to property development. The expression

"consumer" is not defined but is one that, at least since the enactment of the *Trade Practices Act 1974* (Cth), has entered common usage as a means of designating members of the general public who acquire the benefit of goods and services from suppliers. In relation to land, the word "consumer" plainly involves a metaphorical rather than a literal use of the word. It is not altogether easy to conceive of it as extending to those who, like the sellers in this case, are the providers of the commodity (land) being supplied. One compelling, though perhaps not decisive, consideration in support of this view is to be found in s 29 of the *Land Sales Act*. It deals with the position, to quote the terms of s 29(1), "where a purchaser has avoided an instrument pursuant to this Part", by providing that "any person who ... has received money paid by or on behalf of the purchaser shall ... forthwith refund the amount of that money to the purchaser …". Section 29(2) confers on the person entitled to a refund under the section a right to recover the money by action as for a debt due. There is no corresponding provision in the Act with respect to sellers, which suggests that they were not the particular object of the legislature's concern when, in enacting the statute, it used the word "consumers".

[24] This impression tends to be confirmed on turning to the record of the Parliamentary second reading debate on the bill which became the *Land Sales Act 1984* (*Hansard*, 27 March 1984, at 2108-2111). The Minister said that the Bill when passed was intended to replace the existing provisions of ss 67 and 67A of the *Auctioneers and Agents Act* by separate legislation concerning the sale of land proposed to be subdivided, which, unlike the existing Act, would extend to land being subdivided into five or fewer allotments. It is apparent from the report in *Hansard* that the major concern was with the deposits paid or prepayments made by prospective purchasers of lots in a proposed subdivision. The developers wished to use it to cover their outlays (as was permitted at the time in the case of building units) but which, under the legislation as it stood, was to be paid into and remain in a trust account until registration of the plan of subdivision, a process which occupied some weeks after receipt of the requisite approval of the local government. The legislation in what became ss 11 and 23 of the Act represented an attempt to strike a balance between the interests of developers who had completed all the work leading to subdivision, and the interests of purchasers in ensuring that their prepayment of purchase moneys were protected before receiving title to the lot purchased. There is no suggestion anywhere in the Minster's speech that the or a purpose of the Act was to provide protection for those who, like the sellers here, sold their land to developers with a view to its subdivision and resale.

[25] In my opinion the *Land Sales Act* was not designed or needed to protect the interests of persons like the sellers in this case under contracts containing provisions of the nature of those contained in Special Condition 12; and that s 8(1) should not be so broadly construed as to provide such protection. Provisions similar to that Special Condition in the contract with Mr and Mrs Francis are also contained in the Special Condition of the contracts entered into with Ms Dippel, and in those with Mr Giles-Duffy and Giles-Duffy and Schmidt, as well as LG & SE Fisher, with the single difference in the latter three cases that two Seller's Blocks are to be provided, but of smaller dimensions. There are no considerations of principle to distinguish these contracts from what has been said about the contract with Mr and Mrs Francis.

[26] The contract with BL and GA Fisher requires special attention because it differs from the others in not having a Special Condition headed **Seller's Block Dwelling House retained by Seller**. Instead, Special Condition 13 contains a

provision conferring on GA Fisher the right after completion and subdivision to select at his discretion a subdivided lot within the development, which is to be within a radius of approximately 100 metres of the centre of the Seller's Land, to be transferred back to the sellers following subdivision. There would be some difficulty in lodging a caveat in respect of that allotment prior to its selection, and it is noteworthy that the provisions on that subject in Special Condition 15 of that contract have been struck out. In fact, the current titles search shows that no such caveat has been lodged in this instance. While there is no provision corresponding to Special Condition 12, there is in cl 15(a) provision that, following settlement, the buyer agrees to lease the property for 12 months to either BL or NM Fisher or Fisher Farms as tenant on terms that confer on the seller an unqualified right to occupy the house free of charge during the leaseback period, and in cl 15(b) provide for a further lease if the parties agree to it. There is, however, no express trust similar to that contained in the other five contracts, so that in this instance the buyer is obliged to rely on a constructive trust of the nature of that held to exist in *Timber Top Realty Pty Ltd v Mullens* [1974] VR 312, and in *Banmister v Banmister* [1948] 2 All ER 133 on which Nelson J relied in that case. Even so, I would not be prepared to say that the transaction was one that, providing as it does for an outright transfer of the sellers' title to the whole of the land, constituted a "sale" within s 8(1) of the allotment to be selected by GA Fisher after the contemplated plan of subdivision has been registered. The transaction envisaged at that stage is not a conveyance or transfer in return for money amounting to a sale in the primary sense in which that word or its derivatives are used in the *Land Sales Act*. If "sell" or "sale" in the legislation was to attract a wider meaning, it would have been easy enough to say so.

[27] It should be added that s 19 contains provisions on application to the Registrar (meaning the chief executive of the Department) for exemption from provisions of the Act. The buyer applied for and received exemptions in respect of the first four contracts. It has not yet done so in respect of the contracts with LG & SE Fisher or BL & GA Fisher because Special Condition 3 in those contracts has not yet been satisfied or waived. As regards the first four contracts, Muir J held the exemptions to be ineffective as having been applied for outside the period of 30 days provided for in s 19(7). In view of the conclusion reached on the principal aspect of the appeal, it is not necessary to consider whether this part of his Honour's decision is correct; but the decision on this point has recently been followed by Wilson J in *Wan v NPD Property Development Ltd* [2004] QSC 232. None of the other issues raised in the sellers' originating application were pursued on the appeal before this Court.

[28] In view of what has been said, the appropriate orders should be as follows:

1. Allow with costs the appeal in each of the originating applications.
2. Set aside the declaration that the contract referred to in each originating application is void.
3. Order that the originating applications be dismissed.

The applicants having succeeded at first instance on the point relating to s 19 of the Act, a fair disposition of the costs of the proceedings at first instance, in which there was partial success on either side, is that each party should pay his, her or its own costs of those proceedings, and it is so ordered.

[29] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA wherein all relevant facts are set out. For convenience sake I will adopt the terminology used therein.

[30] On the hearing of the appeal senior counsel for the buyer submitted that in law the consequence of the contract being executed was that a trust was created pursuant to which there was to be a transfer of the registered title to the existing allotment from the seller to the buyer in return for the purchase price, the buyer agreeing to hold that land on trust as to part of it to transfer to the seller the Seller's Block. If that be correct then, as McPherson JA has indicated in his reasons, s 8(1) of the *Land Sales Act* 1984 ("the Act") would not apply to the initial transfer because that was of the whole of an existing registered allotment, nor would the transfer of the Seller's Block back to the seller be caught by that statutory provision because that transfer was merely the carrying out of an obligation imposed on the buyer by the trust.

[31] My only concern is whether or not the contract as executed by the parties supports that submission.

[32] The following analysis is based on the contract executed by John William and Doreen Vicki Francis, but relevantly all the contracts in question are the same.

[33] Towards the top of the first page of the document it is said that the "Seller and Buyer agree to sell and buy the Property under this contract". There follows on that page particulars of the sale; opposite the term "Property" one sees the following:

> "Land Address: 574 Miles Platting Road, Rochedale QLD 4123
> Description: Lot 2 on RP162854
> County: Stanley Parish: Tingalpa
> Title Reference: 15808057 Area: 6.806 acres 2.7560 ha. (calculated in accordance with Special Condition 12)"

[34] One then finds the following definitions in the "Terms of Contract":

> "(k) "Property" means:
> (i) the Land;
> (ii) the Improvements; and
> (iii) the Included Chattels;
> …
> (n) "Transfer Documents" means:
> (i) the form of transfer under the *Land Title Act 1994* required to transfer title in the Land to the Buyer; and
> (ii) any other document to be signed by the Seller necessary for stamping or registering the transfer."

[35] It follows that the terms Property and Land do not refer to all the land being Lot 2 on RP162854 but rather to that land less the Seller's Block as that term is defined in Special Condition 12.

[36] Condition 5.3(1)(a) provides that in "exchange for payment of the Balance Purchase Price, the Seller must deliver to the Buyer at settlement … any instrument of title for the Land required to register the transfer to the Buyer".

[37] One then comes to Special Condition 12 which relevantly provides:

"(a) For the purpose of this Special Condition "Seller's Block" means a parcel of land of approximately 2,000m2 (with a variance of not greater than 5%) on which the dwelling house currently occupied by the Seller is located. The dimension and area of the parcel cannot be determined as at the Contract Date and will depend on the final layout of the future development of the Land. The parcel must be of such dimension to permit the dwelling house to be located in compliance with the minimum setback requirements of the Local Government.

(b) The Buyer and Seller acknowledge that this sale and purchase does not include the conveyance of the Seller's Block to the Buyer.

(c) For the purposes of the conveyance of the Property it is agreed that the Seller shall continue to retain equitable ownership of the Seller's Block notwithstanding the completion of this Contract and subject to the provisions as hereinafter appear. To facilitate the subdivision of the Land by the Buyer, it is agreed that the bare legal estate of the Seller's Block shall be transferred to the Buyer, who agrees to hold the same on behalf of the Seller pursuant to the terms of this Contract who shall pay any stamp duty (if applicable) in relation to this subparagraph.

(d) When a separate instrument of title for the Seller's Block is recorded at the Department of Natural Resources, the Buyer shall within fourteen (14) days of such instrument of title having been recorded, transfer the bare legal title to the Seller. To this end the Buyer and the Seller shall execute the necessary documentation to cause such transfer of the Seller's Block with all stamp duty and registration fees of and incidental to such transfer to be paid by the Seller. The Buyer shall undertake all reasonable steps as are necessary to effect the vesting of title in the Seller's Block to the Seller.

(e) Upon the vesting of title of the Seller's Block to the Seller, the Buyer's obligations under this Special Condition shall (subject to subparagraphs (f) and (g)) thereupon cease. The Buyer shall use all reasonable endeavours to have a separate instrument of Title registered in the Department of Natural Resources in respect of the Seller's Block.

(f) The Seller and Buyer agree that the Seller's Block:

(i) shall be that parcel of land generally of such dimension and size referred to in sub-paragraph (a), subject always to the requirements of the Local Government and sound engineering principles;

…

(l) To better secure the Seller's rights under this special condition the Buyer agrees:

(i) not to encumber the Land until the Seller's Block has been transferred back to the Seller;

…

(m) The Buyer acknowledges the Seller's rights to caveat the Land to secure its interest in the Seller's Block provided the Seller shall permit all dealings with the Land, particularly reconfiguration of the Land, consistent with the Contract."

[38] It is, in my opinion, immediately obvious that there is a problem with the construction of the Contract. If one only looks at the first page of the Contract, it is clear that the "Property" and "Land" is the 6.806 acres (or 2.7560 ha), that is the land described as Lot 2 on RP162854 less the Seller's Block. That interpretation is confirmed by the definition of Transfer Documents and Condition 5.3(1)(a) (given the definition of the term Land) and also Special Condition 12(b), but paragraphs (l) and (m) of Special Condition 12 can only be meaningful if "the Land" refers to the whole of the land described as Lot 2 on RP162854. Further, paragraph (c) of Special Condition 12 is not consistent with the initial transaction not involving the conveyance of the Seller's Block. That clause evidences an intention of the parties that the "bare legal estate of the Seller's Block should be transferred to the Buyer" at the initial stage. In other words paragraph (c) appears to evidence an intention that at the initial stage the Buyer should become the registered proprietor of all the land described in Lot 2 on RP162854.

[39] If on the correct construction of the contract the initial conveyance is not to include the Seller's Block then the transaction would be rendered void by force of s 8(2) of the Act. In that case there would be an obligation to transfer a "proposed allotment" which did not have "unconditional approval" pursuant to the relevant planning law.

[40] The problem is essentially one of construction; prima facie there are inconsistent provisions in the contract and, as pointed out by McPherson JA in his reasons, one cannot transfer a "bare legal estate" as contemplated by Special Condition 12(c).

[41] The uncertainty thereby created ought not be allowed to result in the conclusion that the contract was void for uncertainty. Courts have regularly had recourse to the "traditional doctrine that courts should be astute to adopt a construction which will preserve the validity of the contract." (See, for example, per Mason J in *Meehan v Jones* (1982) 149 CLR 571 at 589). The problem created by the instant contract calls to mind the often quoted words of Lord Halsbury L.C. in *Glynn v Margetson & Co* [1893] AC 351 at 357:

> "It seems to me that in construing this document … one must in the first instance look at the whole of the instrument and not at one part of it only. Looking at the whole of the instrument, and seeing what one must regard … as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract."

[42] To somewhat similar effect is the observation of Lord Diplock in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] AC 191 at 201 that a court should not adopt "detailed semantic and syntactical analysis of words in a commercial contract" that would "lead to a conclusion that flouts business commonsense". As Gibbs J said in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 "the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other

parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

[43] Bearing in mind the approach outlined in the quotes, it seems to me that the intention of the parties here was clear. However, the contract used ineloquent language in endeavouring to express that intention in legal terms. The fact that, for example, a "bare legal estate" is not capable of registration under the Torrens system ought not defeat the clear intention of the parties.

[44] I have come to the conclusion that the intention of the parties evidenced by the contract they entered into read as a whole was that all of the allotment presently registered pursuant to the Torrens system should be transferred to the buyer to be held on trust to reconvey at the appropriate time to the seller the Seller's Block. It follows that notwithstanding the inconsistencies in the terms of the contract and the use therein of inappropriate expressions the submission of senior counsel for the appellant as to the consequences in law of the document being executed was correct.

[45] It follows, for the reasons given by McPherson JA, that the appeal should be allowed. I agree with the orders proposed by McPherson JA.

[46] **JERRARD JA:** In this appeal I have had the benefit of reading the reasons for judgment of McPherson JA and Williams JA. I respectfully differ from the conclusion reached by those learned judges, for reasons which I can shortly state.

[47] All relevant matters of fact are described in those two judgments, and McPherson JA has reproduced the relevant provisions of s 8(1) of the *Land Sales Act* 1984[2]. His Honour has also described the extended definition of the words "sell" and "purchase" in that Act, and the terms of s 6A(1)(a).

[48] Adopting McPherson JA's use of the contract entered into by Mr and Mrs Francis as an example, and adopting the term "the buyer" to describe NPD Property Development Pty Ltd, I agree with His Honour that, for the reasons he gives, Mr and Mrs Francis agreed to transfer to the buyer their registered title to their estate in the whole of the area described as Lot 2 on RP162854 in the County of Stanley Parish of Tingalpa, having title reference 15808057. The area of land was misdescribed in the contract, but that misdescription itself provides evidence of the terms of the trust on which the buyer would hold the land agreed to be conveyed.

[49] I consider that the agreement the parties made to convey title to the Seller's Block, when available for transfer, is no different from the position which would apply if the buyer had agreed to a future transfer of title, not to the Seller's Block, but to an allotment to be excised from a quite different area of land held by the buyer, for example land with extensive sea views, which the buyer was also proposing to develop into saleable allotments, and which proposed allotment Mr and Mrs Francis had agreed to take as part of the consideration for the sale of the whole of their estate in Lot 2 on RP162854. The position would be that a promise by the buyer to transfer the title to a proposed allotment was offered and accepted as part of the consideration for the transfer of the title to the whole of Lot 2.

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[2] At [7] of his judgment.

[50] Mr and Mrs Francis agreed to take a promised transfer in the future of title to a proposed allotment, (the Seller's Block) and a substantial sum of money now, in consideration for the transfer by them now of the title to Lot 2. They sold Lot 2 for the whole of that consideration. I consider the buyer thereby agreed to sell them the proposed allotment - the Seller's Block - as part of the consideration for the purchase of Lot 2. The contract was intended to bind Mr and Mrs Francis to accept the transfer of the Seller's Block as part of that consideration. They accordingly entered upon the purchase of it within the meaning of s 6A(1), and the agreement by the buyer to sell it to them is caught by s 8(1) of the Act and made void by s 8(2).

[51] I am giving the word "sale" and "sell" a wider construction than McPherson JA prefers. I acknowledge that in *Chan v Dainford Ltd* (1985) 155 CLR 533 at 537 the joint judgment of the High Court observed that the primary meaning of "sale" is an exchange of property, the subject of the sale, for money. I respectfully observe that that view accords with the remarks of Upjohn J, as he then was, in *Robshaw Brothers Ltd v Mayer* [1957] 1 Ch 125 at 131, and with the subsequent judgments in the Full Federal Court in *Sunworld v Plant Breeder's Rights* (1998) 87 FCR 405 at 406, 412 & 413. The High Court has thus settled the primary or prima facie meaning of "sell" in Australian law, and that primary meaning accords with the most common form of a sale in the community, namely a sale for money. But that prima facie meaning was not declared by the High Court to be an exclusive one, and it is common enough to read advertisements of offers to accept, for example, a boat or an apartment in the city, in payment or part payment for the sale of small farm or a house in a rural town. The parties to those transactions would say they were selling the farm or country town house for a boat or a unit, and vice versa.

[52] The term "sell" is thus used in the community, and appropriate, to describe the exchange of title to real property for money and title to other real property, which is what Mr and Mrs Francis agreed to do; and applying that secondary or extended meaning to the meaning of "agree to sell" in the *Land Sales Act* is not precluded by the term "sell" having a narrower primary and everyday meaning. Nor do I consider the fact of its primary or more common meaning excludes the use of the term "sell", or the construction of it in the Act, to describe the transfer of title to real property, together with money, for title to other real property, which is what the buyer agreed to do here. That latter use accords with the Oxford English Dictionary definition of sale as "the action or an act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration".

[53] Mr Keane QC for the appellant submitted that other provisions of the Act assumed a sale for money rather than a sale for money or other consideration. He particularly relied on s 8(2), and the specific provision therein entitling a person paying money under a void agreement to recover it, together with accrued interest thereon, in an action for debt; s 10(3)(b)(i) and the provision therein prohibiting a vendor to whom a "significant variation notice" has been given from asking for the balance of the purchase price until the end of the prescribed period after that notice is given; and s 11A(a)(1), which entitles a purchaser to avoid the contract if the amount payable by a purchaser under an instalment contract relating to the sale of the proposed allotment is more than 10% of the purchase price of the proposed allotment.

[54] Section 8(2) gives a purchaser under a void contract a specific right better than the discretion given to a court by s 47 of the *Supreme Court Act* 1995, and where title to property forms part of the consideration of a void contract it would be recoverable

by the purchaser in any event, without specific provision in the Act; s 10(3)(b)(i) could equally apply to monetary or other consideration; and while s 11A(1) does assume a money consideration, s 23(1), upon which the respondent's senior counsel relied, does not. That section includes the expression that "Where an instrument…provides for the payment of money in respect of the purchase…". I consider that none of those quoted provisions relied upon by Mr Keane are sufficient to exclude the common enough meaning of a sale as including sale for money or other consideration.

[55] In *Anantamul Pty Ltd v Innes-Irons*, referred to by McPherson JA, Derrington J was considering a matter which that judge described in the following terms:[3]

> "Stripped to essentials, this transaction consisted of a purchase by the defendant of an interest in the trust which interest included the right, subject to the fulfilment of the conditions of registration of the plan and demand for and payment of the balance of purchase price of the units, to receive title to the relevant land upon the surrender of the units."

[56] For the reasons recited by McPherson JA at [20], Derrington J held that that process, if followed through, would not be a purchase of that land by that defendant. The process agreed upon in the transactions considered in *Anantamul*, whereby that defendant could obtain title to the land, and the transactions considered in *AFA v Garendon Investments*, also referred to by McPherson JA, differs from the process agreed upon by the parties here. There is no proposed surrender here of an interest in one variety of property, held on trust and purchased for valuable consideration, for title from the trustee to a different variety of property. What there is here is an agreed upon exchange of title to land for consideration, which consideration includes the conveyance in the future of title to different land.

[57] In this matter the fact that the terms of the contract, as construed by this court, result in the buyer holding the title to Lot 2 on trust to transfer title to the Seller's Block, when created, to Mr and Mrs Francis is no more than a consequence of the parties being obliged to act in accordance with the contract terms. This differs from the position in *Timber Top Realty P/L v Mullens*, also cited by McPherson JA, where the constructive trust, entitling a vendor to remain in possession of a house and the block of land on which it stood, did not depend upon any contractual right or term, but was imposed by equity. That trust was one by which the purchaser held that portion of land on trust to convey title to the vendor, when subdivided, and arose because of the expectation the purchaser had created in the vendor, who had transferred the property to the purchaser at a considerable undervalue in the belief that the portion of it on which the vendor's house stood, would be reconveyed to the vendor upon a subdivision creating title to that portion. There was no contractual term to that effect; the contract itself said nothing about any such reconveyance of that portion of land in the future, and the purchaser specified that the promise to do so was only a declaration of intent by the purchaser, and no more. The plaintiff purchaser later unsuccessfully claimed vacant possession of all of the land, including the portion of it on which the vendor's house stood and in which the vendor was still resided, when subdivision of that portion was opposed by the Country Roads Board.

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3 At [1984] 2 Qd R 188.

[58] The Victorian Supreme Court imposed the trust as a remedy to protect the vendor, holding it would be startling if the effect of legislation (in relevantly similar terms to the *Land Sales Act*) designed to protect an intended purchaser of subdivided land was to deprive the purchaser of an equity otherwise available. That decision did not hold that a contract to convey as yet subdivided land in the future could not constitute an agreement for the later sale of that as yet undivided block; the court held only that the constructive trust it imposed did not breach that legislation.

[59] The agreement the parties made in this matter was that the buyer would sell Mr and Mrs Francis the Seller's Block in part payment for it buying the land Mr and Mrs Francis owned. Although it may seem curious to describe the transfer of title, when that occurs, to the beneficiaries (Mr and Mrs Francis) without payment then of any consideration by them as a purchase of that title by them, that transfer will be the completion of the process by which that title was agreed to be transferred as consideration. That is when the sale of the Seller's Block will happen, as "sale" was explained in *Chan v Danford* at 155 CLR 437.[4]

[60] It follows that I respectfully agree with the conclusion reached by the learned primary judge and would dismiss each of the appeals.

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[4] "A sale occurs at the time when the title of the subject of the sale is conveyed or transferred".