SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Estates P/L v Cairns City Council* [2005] QCA 328
PARTIES:	**AUSTRALIA ESTATES PTY LTD** ACN 098 087 168 (applicant/appellant) **v** **CAIRNS CITY COUNCIL** (respondent/respondent) **CAIRNS CITY COUNCIL** (applicant/respondent) **v** **AUSTRALIA ESTATES PTY LTD** ACN 098 087 168 (respondent/appellant)
FILE NO/S:	Appeal No 9821 of 2004 Appeal No 9822 of 2004 SC No 9130 of 2004 SC No 503 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	18 May 2005
JUDGES:	McMurdo P, Jerrard JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS – APPROVALS AND PERMITS – INTERPRETATION AND CONSTRUCTION – GENERALLY – where contract for the respondent to sell land to the appellant – where the appellant hoped to construct commercial and residential buildings on the land – where the appellant applied for a variation to a decision notice and received a negotiated decision notice CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where contract for the respondent to sell land to the appellant – where the appellant hoped to construct

commercial and residential buildings on the land – where the contract concerned the process in the *Integrated Planning Act* 1997 (Qld) – whether the decision notice or the negotiated decision notice issued by Brisbane City Council should be characterised as "approval" within the meaning of the contract

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where contract varied by agreement – whether the variation was void at common law for common mistake – where performance of the contract not rendered impossible

EQUITY – GENERAL PRINCIPLES – MISTAKE – EFFECT ON CONTRACTS – GENERAL PRINCIPLES – where contract varied by agreement – whether the variation was void for common mistake – where appellant unable to show that the view it held of the facts or the legal effect of the facts was mistaken when the agreement was made to vary the completion date of the contract

Integrated Planning Act 1997 (Qld) s 3.5.15, s 3.5.17, s 3.5.19, s 4.1.27

Bell v Lever Bros Ltd [1932] AC 161, considered
Clasic International Pty Ltd v Legos [2002] NSWSC 1155; (2002) 60 NSWLR 241, not followed
Cook v Cook (1986) 162 CLR 376, considered
Cooper v Phibbs (1867) LR 2 HL 149, considered
Gheko Developments Pty Ltd v Azzopardi & Anor [2005] QCA 283; Appeal No 274 of 2005, 12 August 2005, considered
Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679, followed and applied
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10; (2003) 56 NSWLR 298, considered
Hayes v Walker [2004] QCA 288; (2004) 134 LGERA 290, distinguished
McRae v Commonwealth Disposals Commission (1951) 84 CLR 377, considered
Solle v Butcher [1950] 1 KB 671, not followed
Strickland v Turner [1852] 7 Exch 208, considered
Svanosio v McNamara (1956) 96 CLR 186, considered
Taylor v Johnson (1983) 151 CLR 422, considered

COUNSEL: B O'Donnell QC for the appellant
P J Lyons QC for the respondent

SOLICITORS: Bolton Cleary and Kern for the appellant
Williams Graham Carman for the respondent

[1] **McMURDO P:** I agree with Atkinson J that the appeal should be dismissed with costs. Her Honour in her reasons sets out the relevant facts, issues, portions of the contract between the parties and sections of the *Integrated Planning Act* 1997 (Qld) ("the Act"). I need only repeat these as required to explain my own reasons.

[2] The parties entered into a contract for the sale of land subject to the appellant purchaser obtaining development approval in respect of the land from the relevant local government.[1] The respondent was also the local government responsible for approving the appellant's development application but that unusual factor does not affect the issues in this appeal.

[3] The contract provided in special condition cl 2.9 that:

> "[i]f the Approval is granted on terms that are unsatisfactory to the Purchaser, the Purchaser may terminate this Contract by written notice to the vendor within said period of 5 business days, failing which the Purchaser will be deemed to have given notice that the terms of the Approval are satisfactory."[2]

[4] The appellant obtained a decision notice from the local government granting the development approval on 26 July 2004 under s 3.5.15(2) of the Act. On 2 August 2004 the appellant made representations to the Vouncil to vary conditions of the approval contained in the decision notice under s 3.5.17 of the Act. Before a negotiated decision notice was issued under that section, the respondent's solicitor on 13 August 2004 faxed a letter to the appellant's solicitor stating that the local government's decision notice of 26 July 2004 was clearly an approval for the purposes of the special condition in the contract relating to the development approval of the land; although the appellant had not complied with all the requirements of that special condition the respondent proposed that the date of that letter (13 August 2004) be taken as the date of satisfaction of the special condition requiring development approval and that 12 October 2004 be the completion date with time remaining of the essence. The appellant's solicitor on 18 August 2004 responded by letter confirming that the settlement date for the contract was to be 12 October 2004 and stating that the deposit (payable under the contract upon satisfaction of special condition cl 2) had been paid.

[5] The local government issued the negotiated decision notice on 31 August 2004. On 8 October 2004 the appellant told the respondent that the negotiated decision notice, not the decision notice, was the approval for the purposes of the special conditions of the contract and that the completion date was 25 October 2004, not 12 October 2004 as agreed on 18 August 2004. When the appellant did not settle on 12 October 2004 the respondent elected to terminate the contract and the appellant lodged a caveat over the land.

[6] The learned primary judge refused the appellant's application for a declaration that the contract was not lawfully terminated by the respondent and that the date for completion of the contract was Monday, 1 November 2004. His Honour granted the respondent's application that the appellant's caveat be removed.

[7] The appellant contends the judge should have concluded that it only received development approval under the contract when it received the local government's

---

1 Contract Special Conditions Definitions 1.1(2) provided that "**Approval**" means the approval of the Application by the local government.

2 Contract cl 2.9.

negotiated decision notice on 31 August 2004 and that in agreeing to vary the contract on 18 August 2004 both parties were acting under a common mistake as to the effect of the contract so that the contract as varied should be set aside and the parties bound only by the original contract.

[8] Contracts for the sale of land are not infrequently subject to the purchaser obtaining development approval and such contracts are sometimes interpreted by courts. See for example, *Gheko Developments Pty Ltd v Azzopardi & Anor*[3] and *Hayes v Walker*.[4] Each case will naturally turn on the provisions of the particular contract.

[9] What is of significance in the special conditions relating to the development approval of this contract is that, under special condition cl 2.9, if the approval was granted on terms unsatisfactory to the appellant, the appellant could terminate the contract by written notice to the respondent within five business days, failing which the appellant was deemed to have given notice that the terms of the approval were satisfactory. What special condition cl 2.9 emphasises is the appellant's right to terminate where the terms of the development approval are unsatisfactory to it, not the effect of the Act: see *Gheko Developments Pty Ltd v Azzopardi & Anor*.[5] The appellant's agreement through its solicitor on 18 August 2004 that the settlement date of the contract was to be 12 October 2004 must objectively be taken to have been an acceptance by the appellant that the terms of the approval it then had under the decision notice of 26 July 2004 were satisfactory to it and that it was agreeing to this variation of the initial contract with the respondent.

[10] In any case, by contrast to the position in *Hayes v Walker*, the decision notice here of 26 July 2004 not having been replaced by a negotiated decision notice remained a valid development approval as at 18 August 2004 when the parties agreed to vary the initial contract. The letter of 18 August 2004 to the respondent's solicitor from the appellant's solicitor was objectively an unambiguous acceptance of the variations suggested by the respondent; it constituted an acceptance by the respondent that the terms of the development approval stated in the decision notice of 26 July 2004 were not so unsatisfactory to the appellant for it to terminate the contract. The appellant instead agreed through its solicitor to the respondent's suggestion that the date of satisfaction of special condition cl 2 relating to development approval be 13 August 2004.

[11] There is simply no evidence that the parties acted under any common mistake in agreeing to vary the contract in this way. It follows that it is unnecessary to consider the interesting question, first raised by Jerrard JA with counsel in the course of argument during the appeal hearing, as to the effect in Australia on the law of mistake in contract of the decision of the English Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*.[6]

[12] The learned primary judge was right to refuse to make the declaration sought by the appellants and to order that the caveat be removed.

[13] The appeal should be dismissed with costs to be assessed.

---

3 [2005] QCA 283; Appeal No 274 of 2005, 12 August 2005.
4 [2004] QCA 288; (2004) 134 LGERA 290.
5 [2005] QCA 283; Appeal No 274 of 2005, 12 August 2005, [1], [9], [10], [31].
6 [2003] QB 679.

[14] **JERRARD JA**: In this appeal I have had the advantage of reading the reasons for judgment of Atkinson J, and the orders proposed by Her Honour, and I respectfully agree with those reasons and orders.

[15] The contract the parties entered into in this matter appeared to be a standard form of contract particularly relevant when one party is selling another land upon which the purchasing party intends, if a development application is approved, to carry out development work. That form of contract was adapted to this matter, in which one party was the Council, who would approve the development application; that fact results in the agreed terms requiring the purchaser to notify the Council as vendor of decisions the Council had made and communicated to the purchaser as applicant for development approval.

[16] That oddity apart, the terms of the contract do not assist the appellant's argument. I agree with Atkinson J that there was no relevant mistake made by either party on 18 August 2004, that being the date of the letter by which the appellant's solicitor communicated agreement confirming the suggestion made 13 August 2004 by the respondent's solicitors, namely that 12 October 2004 be agreed as the completion date. As at 18 August 2004 there had been two decision notices issued on 26 July 2004, received by the appellant on 30 July 2004, and the appellant's solicitor had written on 9 August 2004 accepting that the development permit received on 30 July 2004 constituted an "approval" for the purposes of clause 2 of the contract; and agreeing to pay the balance deposit. There was no fact about which any party was mistaken on 18 August 2004. No negotiated decision notice favourable to the appellant had been made by that date, and of course it was possible on 18 August that the appellant's application to the Council for that negotiated decision could be refused.

[17] The appellant contends that the fact a negotiated decision notice issued dated 31 August 2004 significantly changed matters, including that it once again had the right pursuant to clause 2 to notify the Council as purchaser as to whether the conditions of the negotiated decision notice were satisfactory to it, or alternatively, if unsatisfactory, to terminate the contract by notice within five business days of 31 August 2004. Further, the appellant's solicitor wrote on 8 October 2004 to the respondent, contending that because the negotiated decision notice was issued on 26 August 2004 (it is actually dated 31 August 2004) the completion date was 60 days from 26 August 2004, namely 25 October 2004, not the previously agreed date of 12 October 2004.

[18] There is much that can be said about that latter argument. However, even if every other assumption in it was correct, the fact is that the parties had agreed by 18 August 2004 on the date 12 October 2004 as the completion date, at a time when both parties knew that the purchaser had made submissions to the vendor, in which the purchaser had sought a negotiated decision notice giving it more favourable terms for development than those in the decision notice. The date 12 October, agreed to, did not depend on either construing the reference to a decision notice in clause 2 in the special conditions of the contract as meaning only the original decision notice, or on construing it to include a negotiated decision notice later made; the date 12 October 2004 was fixed irrespective of either potential construction of the contract, and without reference to the result that would be arrived at by applying either construction; it was simply a date that the respondent suggested and to which the appellant agreed. It did not result from any view of the

proper construction of the contract, whether mistaken or not. That much is clear from the correspondence between the parties.

[19] The appellant nevertheless contended before the learned trial judge that there had been a relevant mistake. This was said to arise from the fact that the appellant's solicitor swore that, while he was aware on 6 August 2004 and 9 August 2004, as his correspondence with the respondent's solicitor showed, that there were negotiations between the appellant and the respondent in respect of some of the conditions of the approval, he was not personally familiar with the provisions of the *Integrated Planning Act* 1997 (Qld) ("the IPA"), and had not grasped that the decision notices of 26 July 2004 might be replaced at some future time by what he later learnt was a negotiated decision notice. Accepting that evidence, and the learned trial judge made no finding about it, it establishes only a period of ignorance of the relevant law, not any common or unilateral mistake of fact. Whether or not the appellant's solicitor grasped that a negotiated decision notice was being sought, and that such a thing could exist, as at 18 August 2004 there was only the first decision notice, and the possibility of any negotiated decision notice was a matter of speculation.

[20] In any event, I also agree with Atkinson J that the proper construction of the contract leads to the conclusion that the parties objectively intended *not* to include a negotiated decision notice as a decision notice referred to in clause 2 of the special conditions of the contract. This is because construing the contract as the appellant wishes produces the result that the appellant purchaser could affirm the contract, negotiate for conditions more acceptable to it, obtain those, and then rescind after it obtained those better conditions. That would be an odd result; there was also the point made by Mr Lyons QC for the respondent, that if the appellant was correct in its construction, a contract would become unworkable if the appellant gave notice that the terms were satisfactory and then made representations seeking a negotiated decision notice, which representations had not been determined upon by the otherwise applicable completion date. Neither party could know whether settlement should occur on the date calculated by reference to the original decision notice, or whether it was to be on some later date, which would only become clear if and when a negotiated decision notice issued. (It should be appreciated that where a Council rejects representations made to it, that rejection does not constitute a negotiated decision notice under s 3.5.17 of the IPA; it is only when a Council *agrees* with any of the representations that a negotiated decision notice is issued).

[21] The fact that the contract could readily become unworkable if the appellant's construction was correct adds to the probability that the parties deliberately omitted reference to a negotiated decision notice in the contract, whereas they deliberately provided for the possibility of there being submitters, and for an appeal by those submitters. The latter situation could result in matters beyond the control of either party, and accordingly by clause 2.15 the parties agreed that if one or more submitter did appeal, then either party might terminate the contract by notice in writing to the other. In contrast, it was within the purchaser's power to determine whether to seek a negotiated decision notice or not, thus improving its position, after electing to affirm the contract on receipt of the first decision notice.

[22] Mr O'Donnell QC for the appellant contended that construing the contract to interpret "decision notice" as meaning a decision notice excluding a negotiated decision notice denied the appellant the opportunity of obtaining a binding contract on more favourable terms than those in the first decision notice. He submitted that

in reality the purchaser was entitled to simply screw up the first decision notice received and toss it in the bin; that submission depended on the assumption that a favourable decision notice was later received. On that assumption, his submission was that the purchaser was entitled to ignore the time limits in clause 2 of the special conditions, since those would only come into effect once the negotiated decision notice was received.

[23] That argument was also based on an asserted injustice to the appellant if it was dissatisfied with the conditions conveyed in the original decision notice, and unwilling to commit itself to a purchase on those conditions, but confident of obtaining better ones. Implicit in the submission was the associated contention that the appellant had been in fact unwilling to enter into the agreement on the conditions originally notified. But that assumption does not bear scrutiny. The appellant's solicitor, who says now that he was ignorant of the law then, and was acting on the mistaken belief that the original decision notice was the relevant decision notice for the purposes of the contract, accepted the development permit as an "approval" for the purposes of clause 2 of the contract in that solicitor's letter of 9 August 2004. It follows that the solicitor must have had instructions that his clients were willing to accept the contract on those terms. If the solicitor's opinion then was correct, that "decision notice" in the contract meant the decision notice which had already been received, and no other decision notice, then it was necessary for the solicitor to affirm the contract as his correspondence of 9 August 2004 did. That left it open to the purchaser to improve the conditions, if it could, in subsequent negotiations, without risking loss of the contract. If the view the appellant now has of the contract is correct, namely that a "decision notice" referred to in the contract could include a negotiated decision notice, then where the solicitor held instructions that the purchaser wanted to secure a binding contract even on the originally imposed conditions, those being in fact acceptable to the purchaser, it was an entirely appropriate commercial decision for the purchaser to have the solicitor accept the original decision notice as a decision notice and affirm the contract. Failing to do that would risk loss of the contract if the negotiations were unsuccessful. When they were successful, the purchaser obtained a second opportunity to rescind.

[24] It follows that on either view of the proper construction of the contract, whether it be that which the solicitor originally held or that which the appellant now advances, it was appropriate for the purchaser to take the steps that it did to confirm the contract, and that step did not relevantly result from any mistaken view of the law. It resulted from instructions which can confidently be inferred.

[25] Accordingly, while I agree with the analysis of the law undertaken by Atkinson J – other than that I consider *Cooper v Phibbs*[7] was a case of mistake (even at common law) in which only an equitable remedy was appropriate – no relevant mistake operated to cause the contract to be affirmed, or the date 12 October 2004 settled upon as the completion date. I agree that the appeal should be dismissed, with costs.

[26] **ATKINSON J**: By a contract dated 9 May 2003 Cairns City Council ("the Council") agreed to sell to Australia Estates Pty Ltd ("Australia Estates"), land in Grafton and Lake Streets in Cairns ("the land"), some of which was to be leased back to the Council ("the contract"). The purchase price was $3,000,000. Special

---

[7] (1867) LR 2 HL 149

Conditions of the contract made provision for an application for an approval from the Council (as the local government and, therefore, assessment manager) for development of land; and fixed the date for completion of the contract by reference to events associated with obtaining the approval. The purchaser wished to construct residential and commercial buildings on what was referred to as the old Council library site.

[27] The Special Conditions of the contract which relate to the approval process refer to the vendor and the local government. Usually the vendor and the local government would be quite different entities but in this case because the Council was the owner of the land, it was both the vendor and the local government and assessment manager. Australia Estates is variously referred to herein as the applicant and the purchaser because of its different roles as purchaser under the contract and applicant under the approval process found in the *Integrated Planning Act* 1997 (Qld) ("IPA").

[28] The relevant terms of the Special Conditions are set out below:

> "**2. Development Approval**
>
> 2.1 This Contract is subject to the Purchaser obtaining the Approval by the Approval Date.
>
> …
>
> 2.5 If:
>
> (1) the draft Application is not provided to the Vendor in accordance with sub-clause .3; or
>
> (2) the application is not lodged by the Lodgement Date;
>
> the Vendor may terminate the Contract by notice in writing to the Purchaser.
>
> …
>
> 2.7 The Purchaser must notify the Vendor within 2 business days of receiving the Decision Notice and provide the Vendor with a copy thereof.
>
> 2.8 Within 5 business days of receipt of the Decision Notice the Purchaser must notify the Vendor in writing whether the Application has been approved and if so whether the conditions of the Approval are satisfactory to the Purchaser.
>
> 2.9 If the Approval is granted on terms that are unsatisfactory to the Purchaser, the Purchaser may terminate this Contract by written notice to the vendor within said period of 5 business days, failing which the Purchaser will be deemed to have given notice that the terms of the Approval are satisfactory.
>
> …

2.11 Following the giving of an Approval Notice the purchaser will ascertain from Local Government whether notification is required to be given to any Submitter in respect of the Approval, whether such notification has been given and the date of expiry of the Submitter's Appeal Period and immediately give written notice thereof to the Vendor (and in any event within 5 business days following the giving of the Approval Notice).

2.12 If no Submitters have any rights of appeal in respect of the Approval, subject to the Purchaser's rights under clause 2.9, this clause will be deemed to be satisfied in respect of the Application, upon the giving of the Approval Notice.

2.13 If one or more Submitters have a right of appeal against the Approval then, within 2 business days following the expiration of the last of the Submitter's Appeal Periods, the Purchaser will give written notice to the Vendor as to whether any Submitter has appealed.

…

5. Completion

5.1 The Completion Date will be 60 days after clause 2 is satisfied.

…"

[29] Clause 2.1 of the Special Conditions provided that the contract was subject to the purchaser obtaining the approval by the approval date. The "Approval" was defined to mean the approval of the Application by the local government and the "Approval Date" was defined to mean 150 days after the "Lodgement Date" which in turn was defined to mean 150 days after the "Contract Date". The "Application" was defined in the contract to mean the application for developmental approval to use the land. So the contract was subject to Australia Estates receiving the approval by 4 March 2004, i.e. 300 days after the contract date of 9 May 2003. The date for the approval was, however, extended by agreement to 31 August 2004.

[30] Clause 2.7 of the Special Conditions provided that Australia Estates was obliged to notify the Council, as vendor, within two business days of receiving the decision notice. The decision notice was defined in the Special Conditions to mean the decision notice from the Council in relation to the application. In accordance with the Janus-like role of the Council in this contract, Australia Estates was obliged to provide the Council as vendor with a copy of the decision notice it had received from the Council as assessment manager. Australia Estates was also obliged under cl 2.8 to notify the Council, as vendor, in writing within five business days of receipt of the decision notice whether the application had been approved and if so whether the conditions of approval were satisfactory to the purchaser. If the approval was granted on terms which were not satisfactory to the purchaser, Australia Estates had the right under cl 2.9 to terminate the contract by giving written notice within five business days of receipt of the decision notice. If it did not give notice terminating within that time, it would be deemed to have given notice that the terms of the approval were satisfactory.

[31] "Approval Notice" was defined in cl 1.1(4) of the Special Conditions of the contract to mean "…a notice (or deemed notice) by the Purchaser to the effect that the Approval had been granted and that the conditions applying to such Approval are satisfactory to the Purchaser."

[32] Australia Estates made application for approval of a material change of use in respect of the land on 3 October 2003. No submissions[8] were received in opposition to its application. Decision notices were issued on 26 July 2004 pursuant to s 3.5.15 of the IPA which provides:

"**3.5.15 Decision notice**

(1) The assessment manager must give written notice of the decision in the approved form (the "**decision notice"**) to—

(a) the applicant; and

…

(c) if the assessment manager is not the local government and the development is in a local government area—the local government.

(2) The decision notice must be given within 5 business days after the day the decision is made and must state the following—

(a) the day the decision was made;

(b) the name and address of each referral agency;

(c) whether the application is approved, approved subject to conditions or refused;

(d) if the application is approved subject to conditions—

(i) the conditions; and

(ii) whether each condition is a concurrence agency or assessment manager condition, and if a concurrence agency condition, the name of the concurrence agency;

(e) if the application is refused—

(i) whether the assessment manager was directed to refuse the application and, if so, the name of the concurrence agency directing refusal and whether the refusal is solely because of the concurrence agency's direction; and

(ii) the reasons for refusal;

(f) if the application is approved—whether the approval is a preliminary approval, a development permit or a combined preliminary approval and development permit;

---

[8] A Submitter is a person who makes a submission against the grant of all of part of an approval: s 4.1.28

(g) any other development permits necessary to allow the development to be carried out;

(h) any code the applicant may need to comply with for self-assessable development related to the development approved;

(i) whether or not there were any properly made submissions about the application;

(j) the rights of appeal for the applicant and any submitters.

…"

Australia Estates received a copy of the decision notices on 30 July 2004. The first decision notice was for preliminary approval with conditions showing that the applicant needed a development permit. The second decision notice was the approval of the development permit subject to the conditions contained therein. Such decision notices constituted development approval as defined in Schedule 10 of the IPA:

"**development approval** means a decision notice or a negotiated decision notice that—

a) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and

b) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval."

[33] On the receipt of the decision notice Australia Estates had rights and duties under the contract as purchaser as well as rights and duties provided by statute to it as applicant. The statute, the IPA, gave Australia Estates a right of appeal to the Planning and Environment Court pursuant to s 4.1.27. It did not exercise that right. The applicant had the right to make representations about a matter in the decision notice to the assessment manager. If it did so, the assessment manager had duties pursuant to s 3.5.17 of the IPA. Section 3.7.17 provides:

"**3.5.17 Changing conditions and other matters during the applicant's appeal period**

(1) This section applies if the applicant makes representations to the assessment manager about a matter stated in the decision notice…

(2) If the assessment manager agrees with any of the representations, the assessment manager must give a new decision notice (the "**negotiated decision notice"**) to—

(a) the applicant; and

(b) each principal submitter; and

…

(3) Only 1 negotiated decision notice may be given.

(4) The negotiated decision notice—

(a) must be given within 5 business days after the day the assessment manager agrees with the representations; and

(b) must be in the same form as the decision notice previously given; and

(c) must state the nature of the changes; and

(d) replaces the decision notice previously given.

(5) If the assessment manager does not agree with any of the representations, the assessment manager must, within 5 business days after the day the assessment manager decides not to agree with any of the representations, give a written notice to the applicant stating the decision about the representations.

(6) Before the assessment manager agrees to a change under this section, the assessment manager must reconsider the matters considered when the original decision was made, to the extent the matters are relevant.

…"

If the assessment manager agreed with any of the representations then it was obliged to give a new decision notice, the negotiated decision notice, to the applicant. Only one negotiated decision notice might be given. If the assessment manager did not agree with any of the representations, then he or she was obliged to give written notice to the applicant stating the decision about the representations.

[34] On 2 August 2004, Australia Estates made representations to the Council under s 3.5.17 of the IPA to vary conditions contained in the decision notice, with regard to the amount of car parking space required. The Council made its determination on those representations on 26 August 2004, and on 31 August 2004 issued a negotiated decision notice which made slight changes to the decision notices of 26 July 2004. The negotiated decision notice was then taken to be the development approval which took effect from the time the negotiated decision notice was given: IPA s 3.5.19 which provides:

"**3.5.19 When approval takes effect**

If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect—

(a) if there is no submitter and the applicant does not appeal the decision to the court—from the time the decision notice is given; (or if a negotiated decision notice is given, from the time the negotiated decision notice is given); or

(b) if there is a submitter and the applicant does not appeal the decision to the court—when the submitter's appeal period ends; or

(c) if an appeal is made to the court—subject to the decision of the court, when the appeal is finally decided.

It then replaced the decision notice which was previously given: IPA s 3.5.17(4)(d).

[35] With regard to its contractual rights and duties, no notice was given by Australia Estates pursuant to cl 2.9 terminating the contract by 6 August 2004 (ie within five business days of receiving the decision notice). However, on that date, solicitors for the purchaser sent a letter by facsimile transmission to the solicitors for the Council saying that there were still some outstanding issues being negotiated and asking for confirmation that the decision notice for preliminary approval was not the "Approval Notice" referred to in cl 2 of the Special Conditions. If it were considered the "Approval Notice", then the purchaser said it would make arrangements to comply with cl 2. The Council's solicitors replied on the same day pointing out that Australia Estates had been given two decision notices and saying that whilst the preliminary approval might not be approval for the purposes of the contract, the development permit clearly was, and asking what their client's position was in relation to cl 2. At this point, Australia Estates had an approval which it could not lose. It knew that the conditions of approval might be made more favourable to it but could not be made more onerous or lost. It was not surprising in those circumstances that the decision notice was the triggering event for the appellant to elect whether or not to terminate the contract.

[36] On 9 August 2004, the solicitors for Australia Estates accepted that the development permit was an "approval" for the purposes of cl 2 but asked, in view of the ongoing negotiations about the conditions of approval, that the five day notification period pursuant to cl 2.11 of the Special Conditions be extended to 10 September 2004 with both parties agreeing that the notices received by Australia Estates constituted approval in terms of the contract. Clause 2.11 referred to the requirement on the purchaser to give notice to the vendor within five business days of the giving of the approval notice of whether any notification was required to be given to any submitter, whether such notice had been given and the date of expiry of the submitter's appeal period.

[37] As there were no submitters, cl 2.12, rather than cl 2.11, applied to ascertain the time when cl 2 was satisfied or deemed to be satisfied. That date was significant because cl 5 provided that the completion date was 60 days after cl 2 was satisfied. Clause 2.12 provided that, subject to the purchaser's rights to terminate under cl 2.9, cl 2 was deemed to be satisfied upon the giving of the approval notice, i.e. the notice (or deemed notice) by the Purchaser to the effect that the approval had been granted on satisfactory terms. Under the contract, that was deemed to have occurred pursuant to cl 2.9 when the five business days had expired, i.e. on 3 August 2004, unless the purchaser had exercised its right to terminate.

[38] In this case, as no right to terminate had been exercised, the completion date under the contract was to be 3 October 2004, 60 days after 3 August 2004.

[39] On 13 August 2004, the Council's solicitors replied to the letters of the purchaser's solicitors of 6 and 9 August 2004. They reiterated that the decision notice dated 26 July 2004 approving a development permit was an approval for the purposes of cl 2 of the Special Conditions. They referred to the fact that no notifications had been received pursuant to cl 2.7, cl 2.8 or cl 2.9 and therefore cl 2 had been satisfied. Clause 5.1 provided that the completion date was 60 days after cl 2 was satisfied. However the Council proposed that the date of their solicitors' letter be taken to be the date of satisfaction of cl 2 and that 12 October 2004 be the completion date with

time to be and remain of the essence. This was an offer to vary the contract with regard to the completion date.

[40] On 18 August 2004, the Council and Australia Estates, through their solicitors, reached agreement that the completion date for the contract would be 12 October 2004. On that date, the solicitor for Australia Estates wrote to the Council's solicitors saying, "I confirm the settlement date as 12 October 2004". This was a variation to the contract binding on both parties. At that time, Australia Estates paid the balance of the deposit, which under the contract was payable on satisfaction of cl 2 of the Special Conditions.

[41] On 8 October 2004, four days before the agreed completion date, Australia Estates raised for the first time the contention that the negotiated decision notice, and not the decision notice, was the approval for the purposes of the Special Conditions of the contract; and that accordingly the completion date under the contract was 25 October 2004.

[42] Settlement did not occur on 12 October 2004, and on 13 October 2004 the Council elected to terminate the contract. The learned trial judge found that the Council was entitled so to terminate the contract.

Should the agreement be set aside for mistake?

[43] In order to succeed on appeal the applicant must succeed in having the agreement in which the date for settlement was arranged for 12 October 2004 set aside. The applicant says that that agreement should be set aside because it was vitiated by common mistake. The applicant submitted that when the contract for the sale of land was varied to provide for a settlement date of 12 October 2004, both parties were operating under a mistake of mixed fact and law. The mistake was said to be that approval was obtained by the decision notice on 26 July 2004, as the Council contended, rather than the negotiated decision notice of 31 August 2004, as Australia Estates subsequently contended.

[44] The applicant relied on the principles derived from *Solle v Butcher*,[9] a decision of the Court of Appeal in England. These principles were conveniently set out in the judgment of Palmer J in the New South Wales Supreme Court in *Clasic International Pty Ltd v Legos*[10] where his Honour held:

> "The defendants invoke the principle that equity may set aside a contract if both parties were induced to enter into it by a common mistake as to a fundamental matter, provided that the party seeking to set aside the contract was not at fault.
>
> The principle is expressed thus by Denning LJ in *Solle v Butcher* [1950] 1 KB 671 at 693:
>
> > 'A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to the facts or to their respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault …'."

---

9 [1950] 1 KB 671 at 693.

10 (2002) 60 NSWLR 241 at 249; [2002] NSWSC 1155 at [39]-[40]

[45] The problem with reliance on this decision is that *Solle v Butcher* has itself been overruled by the Court of Appeal in England in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd.*[11] The parties to this appeal were unaware of that decision but were given leave to file further submissions. There is no suggestion that it would have required any findings of fact or evidence that was not traversed at the trial.

[46] There was no appeal from the decision in *Clasic International Pty Ltd v Legos*. However reliance on the authority of *Solle v Butcher* was touched upon in an appeal from another judgment of the same trial judge to the Court of Appeal in New South Wales, *Harris v Digital Pulse Pty Ltd*,[12] where exemplary damages had been awarded for breach of fiduciary duties by an employee. On appeal, the respondent submitted that although exemplary damages had never been granted for equitable wrongs in England or Australia, neither was there any case in which exemplary damages had been sought and refused.[13] Relying on the proposition stated by the learned author of *Hanbury and Martin Modern Equity*[14] that "the principles of equity have constantly developed and found new fields of application", the respondent submitted that those developments could extend to the awarding of exemplary damages in equity.

[47] Heydon JA (as his Honour then was), in dismissing an argument that equity was sufficiently creative and dynamic to expand so as to create a power to award exemplary damages for breach of fiduciary duties by an employee when no such power had previously been held to exist, said:[15]

> "So far as the plaintiff's argument relied on what Hanbury and Maudsley said, it must be remembered that most of the various examples which that work provides of equity's 'creativity' and 'dynamism' fall into the following classes: they are decisions of the House of Lords, not lower courts (eg *Barclays Bank Ltd v Quistclose Investments Ltd*[16]; they have since been overruled or damagingly criticised by the House of Lords (eg the reasoning in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, was not accepted in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714-715); they have since been overruled by other courts in England (eg *Solle v Butcher* [1950] 1 KB 671, was overruled in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] 3 WLR 1617; [2002] 4 All ER 689); they have been held by this Court and the High Court not to be law in Australia (eg Lord Denning MR's "new model constructive trust"); they are said by Hanbury & Martin Modern Equity, 14th ed itself to be problematical or wrong; or they are not really novel."

In other words, the apparent adventurousness of some of the developments in equity should not be replaced with adventurism.

---

11 [2003] QB 679.

12 (2003) 56 NSWLR 298; [2003] NSWCA 10.

13 The learned authors of R P Meagher, W M C Gummow, and J R F Lehane, *Equity, Doctrines and Remedies*, 3rd ed, Butterworths, Sydney, 1992 at 3 [102] have described equity's progress as being "haphazard" and "ad hoc".

14 J E Martin (ed) 14th ed, Sweet & Maxwell Ltd, London, 1993 at 44.

15 at [455].

16 [1970] AC 567.

[48] In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, the Court of Appeal, in a judgment of conspicuous clarity, examined the common law of mistake and the equitable doctrine of rescission for mistake. The court held that the following elements must be present if common mistake is to avoid a contract at common law:[17]

> "(i) there must be a common assumption as to the existence of a state of affairs;
>
> (ii) there must be no warranty by either party that that state of affairs exists;
>
> (iii) the non-existence of the state of affairs must not be attributable to the fault of either party;
>
> (iv) the non-existence of the state of affairs must render performance of the contract impossible;
>
> (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."

[49] The common law doctrine of common mistake, as the Court of Appeal held,[18] fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality. A common mistake at common law makes a contract void ab initio. For example in *Strickland v Turner*[19] neither the vendor nor the purchaser of an annuity realised that the annuitant had died when the bargain was completed. In such a case there was no annuity in existence, and the contract was void ab initio. A common mistake in equity on the other hand rendered a contract voidable. An example is found in *Cooper v Phibbs*[20] when a contract whereby a purchaser bought property which neither he nor the seller realised already belonged to the purchaser was liable to be set aside in equity for that common mistake. However the Court of Appeal observed that cases of common mistake were likely to be rare because where parties agree that something shall be done which is impossible at the time of making the agreement, it is more likely that, on a true construction of the agreement, one or the other will have undertaken responsibility for the mistaken state of affairs.[21]

[50] After the discussion of *Bell v Lever Bros Ltd*[22] in *Solle v Butcher*, it was assumed in later cases that the common law of mistake was different from the equitable jurisdiction to set aside a contract for mistake. In *Great Peace Shipping v Tsavliris Salvage*, the Court of Appeal held that this had led to incoherence and confusion in this area of the law. The only way of resolving that confusion was to declare, as the court did, that there was no jurisdiction in equity to grant rescission of a contract on the ground of common mistake where that contract was valid and enforceable in common law on ordinary principles of contract law. In doing so, the court overruled *Solle v Butcher*, as well as many English decisions which had followed it.

---

17 (supra) at 703.
18 *Great Peace Shipping Ltd v Tsavliris Salvage Ltd* (supra) at 704.
19 [1852] 7 Exch 208.
20 (1867) LR 2 HL 149.
21 (supra) at 706.
22 [1932] AC 161.

Should *Great Peace Shipping v Tsavliris Salvage* be followed by this Court?

[51] Prior to the High Court's decision in *Cook v Cook*[23] it was considered that the Supreme Court of a State, even when sitting on appeal, should as a general rule follow decisions of the English Court of Appeal if there was no other controlling authority. However, this rule was abandoned in that case. Mason, Wilson, Deane and Dawson JJ observed:[24]

> "The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning."

Brennan J (as his Honour then was) specifically concurred with that observation.[25]

[52] In this case, the persuasiveness of the court's reasoning in *Great Peace Shipping v Tsavliris Salvage*, together with the negative reference to *Solle v Butcher* by Heydon JA in *Harris v Digital Pulse* and the somewhat qualified approach taken to *Solle v Butcher* by the High Court, the history of which is detailed below, suggests that the law as stated in *Great Peace Shipping* should be applied by this Court in preference to the law as stated in *Solle v Butcher* and the cases which have followed it.[26]

[53] *Solle v Butcher* had, even before its overruling in the House of Lords, a cautious reception in the High Court. The first case in which it was referred to was *McRae v Commonwealth Disposals Commission*[27] where the court held that the contract in question was not voidable in equity for mistake. The case concerned the sale of an oil tanker by the respondent to the appellant. It was apparently one of many vessels which were wrecked or stranded off the coast of Australia during the Second World War and which were sold for salvage. However, there was no oil tanker lying at the location specified by the Commission in its agreement with McRae.

[54] Referring to the judgment of Denning LJ in *Solle v Butcher*, Dixon and Fullagar JJ agreed with an observation made by his Lordship about the inapplicability of the French law as to mistake to the common law but, in doing so, their Honours expressed a reservation about the remainder of his Lordship's reasons by saying that they "would not be prepared to assent to everything that is said by *Denning* L.J. in the course of this judgment". [28] As to the doctrine of mistake their Honours said:

---

23 (1986) 162 CLR 376.

24 (supra) at 390.

25 (supra) at 394.

26 *Great Peace Shipping* has been followed in England in *Brennan v Bolt Burdon* [2005] QB 303; *Champion Investments Ltd v Ahmed* [2004] EWHC 1956; referred to in *EIC Services Ltd v Phipps* [2005] 1 WLR 1377; and cited with approval at first instance in the Supreme Court of Queensland in *Donkin v Official Trustee in Bankruptcy* [2003] QSC 401; 251 of 2002, 26 November 2003 at [52].

27 (1951) 84 CLR 377.

28 *McRae v Commonwealth Disposals Commission* (supra) at 407.

> "*Denning* L.J. indeed says in *Solle v Butcher*,[29] at p. 692:-- 'Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. *A fortiori* if the other party did not know of the mistake, but shared it'. But, even if this be not wholly and strictly correct, yet at least it must be true to say that a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party." [30]

[55] Dixon and Fullagar JJ rejected the proposition that the contract in question could be avoided because of mistake, mistake being defined as "a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual relations."[31] Rather their Honours held that the appellant was entitled to damages for breach of contract because the contract included, on its proper construction, a promise by the Commission that the tanker existed in the position specified. If the doctrine of mistake were to be considered, their Honours held:[32]

> "…then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground."

McRae was referred to with approval in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*,[33] as an example of the second and third of the elements to which it referred which must be present for a contract to be void for common mistake.

[56] The next time *Solle v Butcher* was considered by the High Court was in *Svanosio v McNamara*,[34] where the respondents had agreed to sell to the appellant land, together with the licensed premises known as the Bullshead Hotel erected thereon, the victualler's licence in respect of the hotel and the goodwill. After completion it was discovered that the hotel stood partly only on the land conveyed and partly on adjoining Crown land. The appellant sought a declaration that the transactions were void and an order setting aside the agreements and the conveyance. He sought a declaration that the agreement was entered into and executed by the appellant and the respondents under a common mistake as to the existence of a fact accepted by all parties as a basis or condition fundamental to the transactions, namely that the defendants were the owners of the whole of the land upon which the hotel was erected or which was used or occupied in conjunction with the hotel.

[57] After referring to their discussion of *Solle v Butcher* in *McRae v Commonwealth Disposals Commission*, Dixon CJ and Fullagar J contemplated that mistake might afford a ground on which equity would refuse specific performance of a contract and even that there might be cases of "mistake" in which it would be so inequitable

---

29 [1950] 1 KB.
30 (supra) at 408
31 *McRae v Commonwealth Disposals Commission* (supra) at 409.
32 (supra) at 410.
33 (supra) at 703-704.
34 (1956) 96 CLR 186.

that a party should be held to his or her contract that equity would set it aside. However their Honours went on to say:[35]

> "…it is difficult to conceive any circumstances in which equity could properly give relief by setting aside the contract unless there has been fraud or misrepresentation or a condition can be found expressed or implied in the contract."

In other words their Honours were saying that the contract could only be set aside either on traditional grounds in equity or under the common law of mistake.

[58] The High Court held that the contract was not void and it should not be set aside. Importantly their Honours held that in the absence of fraud or misrepresentation, the plaintiff was not entitled to the equitable relief he sought. It would not therefore be set aside in equity for mistake alone although that might be a ground to refuse specific performance.[36]

[59] The high water mark for *Solle v Butcher* in the High Court was found in *Taylor v Johnson.*[37] In that case, the respondent, Mrs Johnson, granted an option to Laurence Taylor or his nominee to purchase land for a purchase price of $15,000. The option was exercised by Mr Taylor within three weeks and less than a month later, Mrs Johnson and Mr Taylor's children, as his nominee, entered into a contract for the sale of land with the purchase price being $15,000 as provided by the option. However Mrs Johnson declined to perform the contract in accordance with its terms saying that at the time she granted the option and executed the contract, she believed that the document she was signing provided for a consideration of $15,000 per acre which would have made the consideration $150,000, rather than the $15,000 which both documents specified. The High Court held that it could be inferred that Mr Taylor and Mrs Johnson each believed that the other was acting under a mistake or misapprehension, either as to price or value, when each agreed to a sale at the purchase price which each believed the other had accepted. The court found that Mr Taylor deliberately set out to ensure that Mrs Johnson was not disabused of the mistake or misapprehension under which he believed her to be acting.

[60] Mason ACJ, Murphy and Deane JJ in their joint judgment referred to the line of authority discussed above. With regard to the caution expressed by Dixon CJ and Fullagar J, their Honours said:

> "Dixon C.J. and Fullagar J. referred … to a difficulty in conceiving circumstances in which equity could properly give relief by setting aside the contract unless there had been fraud or misrepresentation or a condition could be found expressed or implied in the contract. Presumably, their Honours were referring to 'fraud' in the wide equitable sense which includes unconscionable dealing. If they were not, we do not share the difficulty to which they referred. To the contrary, it seems to us that the reported cases, including *Solle v. Butcher* itself, readily provide concrete examples of such circumstances." [38]

---

35 at 196.

36 cf *Tanwar Enterprises Pty Limited v Cauchi* [2003] HCA 57 at [58], [64], [106]; 217 CLR 315 at 335, 336, 351.

37 (1983) 151 CLR 422.

38 *Taylor v Johnson* (supra) at 431

[61] However, their Honours also expressed the view that Lord Denning had, in *Solle v Butcher*, formulated a more general proposition than the speech of Lord Atkin in *Bell v Lever Brothers Ltd*,[39] on which it was based, would warrant. *Bell v Lever Brothers* was an authoritative declaration of the common law of mistake.

[62] *Taylor v Johnson* was itself a case of unilateral mistake where the other party, while not inducing the mistake, stood by knowing the vendor was labouring under a fundamental error as to the terms of the contract. The ratio of the case was narrowly stated:[40]

> "It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contact if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension."

Application of the law to this case

[63] The appellant in this case argued that the parties were mistaken about a fundamental matter and that Australia Estates, the party seeking to set aside the contract, was without fault. That is the test from *Solle v Butcher*. However for the reasons already given, that is no longer the appropriate test. Even if it were the test, for the reasons given below, the appellant would fail.

[64] In my view, the correct question to be posed on this appeal is whether the agreement is void at common law for common mistake. The test that should be applied is that found in the five elements set out in *Great Peace Shipping v Tsavliris*. It is abundantly clear in applying those elements to this case that the common law of mistake could not be used to declare the agreement void. For the reasons discussed below, there was no mistake. Even if there had been, the mistake (or non-existence of a state of affairs) alleged by the appellant did not render the performance of the agreement impossible. There is no equitable jurisdiction to set aside, on the ground of common mistake, an agreement, which is valid and enforceable at common law.

[65] If, contrary to my view, the test to be posed is that found in *Taylor v Johnson*, the appellant must show that when it entered into the agreement to vary the completion date of the contract, the Council was aware that circumstances existed which showed that Australia Estates entered into that agreement under a serious mistake or misapprehension about the content or subject matter of a fundamental term and that the Council deliberately set out to ensure that Australia Estates did not become aware of the existence of its mistake or misapprehension.

[66] The serious mistake or misapprehension about the content or subject matter of a fundamental term was said to be that Australia Estates was unaware that the effect of s 3.5.19 of the IPA was that the application could not be taken to be approved for the purposes of cl 2 of the Special Conditions of the Contract until the negotiated decision notice issued on 31 August 2005. The appellant also has to show that the Council was aware that circumstances existed which showed that Australia Estates laboured under that mistake or misapprehension and deliberately set out to ensure

---

39 [1932] AC 161.

40 (supra) at 432.

that Australia Estates did not become aware of the existence of its mistake or misapprehension. All of these elements are based on the proposition that there was a mistake. Australia Estates would first have to show that the view it held of the facts or the legal effect of the facts was mistaken when the agreement was made to vary the completion date of the contract. This it has been unable to do.

[67] Section 3.5.19(1) of the IPA provides that if the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect, if there is no submitter and the applicant does not appeal the decision to the court, from the time the decision notice was given, or if a negotiated decision notice was given, from the time the negotiated decision notice was given. The operative date is important for statutory purposes because time starts to run from that date and it governs when the approval will lapse.

[68] However the appellant argued that s 3.5.19 of the IPA should be used to construe the contract so that the effect of the negotiated decision notice issuing is that only the negotiated decision notice of 31 August 2004 took effect as the development approval and that the decision notice of 26 July 2004 did not take effect even at the time it issued as the development approval. That argument is wrong both as a matter of statutory interpretation and construction of the contract.

[69] As to the statute, the IPA provides that when it issues, a negotiated decision notice replaces the decision notice. As a matter of statutory construction, the negotiated decision notice becomes the development approval from the time it issues and not before. It does not mean that the decision notice never had effect but rather that from the time of issue of the negotiated decision notice, it replaces the decision notice as development approval.

[70] The contract itself makes no mention of the possibility of a negotiated decision notice although it does contain detailed provisions to cover various other contingencies. If the appellant's argument were correct, grave difficulties of interpretation would arise. A number of sub-clauses in cl 2 of the Special Conditions require the purchaser to send notifications of various types to the vendor. Each of them uses the receipt of the decision notice as the trigger for the sending of that notification. If notification is not sent in accordance with cl 2.9 within five days of receipt of the decision notice, then cl 2 is deemed to be satisfied and the contract becomes unconditional as to cl 2. The contract would become hopelessly ambiguous and uncertain if either the vendor or the purchaser was not sure whether the satisfaction of cl 2 had occurred because there might or might not come into existence some time after the decision notice, a negotiated decision notice. The uncertainty would arise because there is no duty on a purchaser to apply for a negotiated decision notice; and if such an application be made, it may or may not be granted. There might never be a negotiated decision notice. The contract is drafted on the basis that when a decision notice is received, the time for the contract becoming unconditional starts to run.

[71] Indeed at the time the parties entered into the agreement to vary the date for completion the only approval was the decision notices issued on 26 July 2004. There was no operative mistake on that date.

[72] The appellant relied on the decision of this Court in *Hayes v Walker*.[41] However analysis of the contract in that case, shows that reliance is misplaced. *Hayes v Walker* concerned a contract for the sale of land subject to development approval. Condition 1 of the contract provided:

> "This contract is subject to the seller obtaining from the Brisbane City Council approval to develop the land and to construct:
>
> 5x3 bedroom townhouses and
>
> 2x2 bedroom townhouses
>
> The contract is conditional upon the buyer being satisfied with all the terms, condition and requirements as set down by the Brisbane City in relation to the said D.A."

Submissions were made objecting to the development application. In that case, a decision notice was received which specifically said that it had no effect until either the submitters' appeal period had ended or, if an appeal were made to the court or a tribunal, the decision of the court or tribunal was made in favour of the proposed development. In those circumstances the decision notice could not constitute a development approval so as to satisfy the condition in the contract. As the Chief Justice observed:[42]

> "It is not a case where an 'approval', though inchoate or incipient, is nevertheless an approval."

The contract referred to "development approval" being obtained, not the receipt of a "decision notice". Where, as in that case, there were submissions in opposition, the decision notice was not effective of itself to grant development approval.

[73] The present case is quite different. The receipt of the 'decision notice' was the triggering event; and it was effective in granting development approval. At that point, the notification requirements in cl 2 were activated. If no negotiated decision notice were applied for or issued, the decision notice would remain the development approval. The appellant had development approval when it received the decision notice. It was, as the learned trial judge held, effective until, and as I would add, unless, replaced. The agreement to vary the date for completion of the contract was entered into at a time when the decision notice was the development approval.

[74] The parties were very careful to spell out when the right to terminate under cl 2 arose and when it was satisfied or deemed satisfied. The contract specified in detail, for instance, what happened if there were submitters with a right to appeal. Importantly, even then, the contract did not contemplate that the parties had to await the outcome of any appeal. If a submitter had a right of appeal against the approval then the purchaser was obliged to give notice to the vendor within 2 business days of the expiration of the time for appeal, if any submitter had appealed (cl 2.13). If there were no such appeal, then cl 2 was deemed satisfied on the giving of the notice referred to in cl 2.13. Again it did not await any negotiated decision notice. If there were an appeal, then either party might terminate the contract by notice in writing to the other party within the period referred to in cl 2.13. If neither party terminated, then cl 2 was deemed satisfied.

---

[41] (2004) 134 LGERA 290; [2004] QCA 288.
[42] (supra) at 295, [15].

[75] In any event, the question of when the approval could be said to have been given was not a fundamental term of the agreement to vary the completion date. If there were any mistake, it was not as to a fundamental term of the agreement under consideration ie the agreement to vary the date for settlement of the contract. If it were a mistake, it was a mistake that motivated the agreement to vary the contract not a mistake as to a fundamental term.[43]

[76] Even if the appellant had been successful in its argument that it was labouring under a serious mistake or misapprehension about the content or subject matter of a fundamental term, it could not succeed on the other elements of the test in *Taylor v Johnson* i.e. that the Council knew that this was a mistake and deliberately set out to ensure that Australia Estates did not become aware of its mistake or misapprehension. The Council did not believe that Australia Estates was labouring under any such error or deliberately set out to ensure that Australia Estates did not become aware of its error.

[77] The appeal should be dismissed with costs.

---

[43] cf *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374 at 384.