SUPREME COURT OF QUEENSLAND

CITATION:	*Highmist P/L v Tricare Ltd* [2005] QCA 357
PARTIES:	**HIGHMIST PTY LTD** ACN 073 507 481 (plaintiff/respondent) v **TRICARE LTD** ACN 009 657 345 (defendant/appellant)
FILE NO/S:	Appeal No 3483 of 2005 SC No 6356 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2005
JUDGES:	Jerrard and Keane JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay the costs of the respondent to be assessed on the standard basis**
CATCHWORDS:	CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - REPUDIATION AND NON-PERFORMANCE - CONDITIONS - CONDITIONS PRECEDENT AND SUBSEQUENT - where the appellant had contracted to subdivide land and sell part of the subdivision to the respondent - where a contract for the sale of land was subject to, among other things, a condition that the approved plan of subdivision obtained by the appellant should not differ in certain respects from a plan attached to the contract - the boundaries of the actual subdivision were not to vary by more than 20 metres from those on the contract plan - the area of the land to be purchased was not to be reduced by more than three per cent from that area shown on the contract plan - where, having registered a plan of subdivision, the appellant called on the respondent to complete the contract - where the respondent did not tender performance when called upon to do so - where there was

unchallenged evidence at trial that the registered plan of subdivision did not accord with the contract plan - whether the minor deviations between the registered plan and the contract plan were material - whether the appellant fulfilled its contractual obligations with respect to the plan of subdivision - whether the appellant was ready, willing and able to complete and entitled to call upon the respondent to do the same

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - REPUDIATION AND NON-PERFORMANCE - ELECTION AND RESCISSION - LOSS OR WAIVER OF RIGHT TO RESCIND - where the appellant called on the respondent to complete the contract - where, when the respondent failed to tender performance as requested, the appellant communicated an intention to seek specific performance of the contract - whether the communication of this intention amounted to an affirmation to keep the contract on foot - whether this communication meant that the appellant lost the right to rescind the contract as a result of the respondent's failure to complete

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - REPUDIATION AND NON-PERFORMANCE - REPUDIATION - WHAT AMOUNTS TO REPUDIATION - where the respondent had insisted that the contract of sale contained an implied term that the land to be transferred should have access to a nearby road - where the appellant had rejected this interpretation of the contract - where the respondent commenced an action for specific performance in order to resolve this controversy - where the learned trial judge found that there was no implied term of the kind contended for by the respondent but that the argument that had been advanced was not untenable - whether the actions of the respondent amounted to repudiation of the contract because they manifested a willingness to perform only on the basis that the respondent's interpretation of the contract was correct - whether the appellant was ready, willing and able to perform the contract and hence in a position to act on any repudiation of the contract by the respondent

Mixed Use Development Act 1993 (Qld)

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, applied

Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd (1998) 43 NSWLR 364, cited

Dabbs v Seaman (1925) 36 CLR 538, cited

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138

CLR 423, applied
Foran v Wight (1989) 168 CLR 385, cited
Green v Sommerville (1979) 141 CLR 594, applied
Havenbar Pty Ltd v Butterfield (1974) 133 CLR 449, applied
Hoad v Swan (1920) 28 CLR 258, applied
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1988) 166 CLR 623, cited
Lombok Pty Ltd v Supetina Pty Ltd (1987) 14 FCR 226, cited
Pan Foods Company Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd [2000] HCA 20; (2000) 170 ALR 579, cited
Trinity Point Hotel Pty Ltd v State of Queensland [1993] QCA 421; Appeal No 36 of 1993, 21 October 1993, cited

COUNSEL: D J S Jackson QC, with M D Martin, for the appellant
P J Lyons QC, with M K Conrick, for the respondent

SOLICITORS: Gadens Lawyers for the appellant
Praeger Batt Solicitors for the respondent

[1] **JERRARD JA**: In this appeal I have read the reasons for judgment of Keane JA and I agree with those reasons and orders.

[2] The appellant had originally acquired freehold title to an area of over 40 hectares of land west of Broadbeach on the Gold Coast, which had been rezoned Special Facilities (Retirement Village Nursing Home) in or about 1986. The conditions attached to that rezoning included that access to the site was to be limited to one entrance, which entrance was to be on the Gold Coast/Springbrook Road. That condition still applied to the entire development at the time of the agreement to sell a portion of the land to the respondent in April 1996, and was known to both parties.

[3] The contention the appellants make on this appeal is that the trial judge erred in law and in fact in not finding that the contract between the parties had been rescinded by the appellant's acceptance of the respondent's conduct in repudiation of its contractual obligations. That conduct by the respondent is alleged to be its carrying on with its proceedings commenced on 13 July 2001 in which it claimed specific performance of the agreement. Asking a court to enforce a contract is not a step that would ordinarily be construed as repudiating it. The appellant points to the fact that the respondent had pleaded an implied term in the contract that it would have access to the main thoroughfare for the purpose of future development of the land which it was purchasing, and that the respondent did not advance any argument at the trial that the term could be implied from the facts of the case, as it had earlier intimated it would argue. Instead, it argued (for the first time, at the trial) that such a term should be implied as a matter of law, relying on a principle arguably extracted from the decision in *Dabbs v Seaman* (1925) 36 CLR 538.

[4] That reliance was despite the observation of Young J in *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 364 at 372 that:

> "Anyone who relies on *Dabbs v Seaman* in the light of its subsequent history is a bold person. From *Jobson v Nankervis* (1943) 44 SR (NSW) 277 onwards it has been considered that *Dabbs v Seaman* is a

> very special case and must be closely confined because it is outside all general principles."

The appellants also point to the fact that the respondent raised very late, and only on the eve of the trial, the contention that the land the appellant proposed to convey to it, lot 21, failed to satisfy the requirement as to gross area and the location of the boundaries, specified in clause 47 of the contract. All that the respondent had claimed in its pleading until the eve of the trial was that the area conveyed was less than that agreed, but without particularising the asserted deficiency. This conduct by the respondent was relied on as showing that it had maintained a position it knew to be untenable, because it was unwilling to perform the contract according to its tenor.

[5] The appellant also contended that time had remained of the essence of the contract even after its own affirmation of it on 27 September 2001, when its solicitors wrote to the appellant's solicitors, advising the former had instructions to institute proceedings for specific performance following the respondent's refusal to complete by purchasing what the appellant was then offering, lot 21. That submission about time still being of the essence is contradicted by the decision of the High Court in *Havenbar Pty Ltd v Butterfield* (1974) 133 CLR 449 at 457-458. There a purchaser had been in default in an obligation to procure a survey plan by a specified date. The vendor, although entitled to do so by the terms of the contract, did not then treat it as at an end, but purported to rescind on a later date. The High Court held:

> "The contract is an enforceable one further performance of which is now being denied by the vendor. He cannot now rely upon the default of the purchaser in procuring a surveyor's 'proposal plan' before the stipulated date; he lost that opportunity when, after the purchaser's default on 12th December 1972, the vendor nevertheless continued to treat the contract as still on foot. When the purchaser belatedly sought to have a 'proposal plan' prepared the vendor prevented this from being done and repudiated the contract. Time having ceased to be of the essence so far as concerned satisfaction with that plan the vendor could not then avoid the contract in reliance upon the absence of such a plan on the stipulated date."[1]

[6] As Keane JA observes, the learned trial judge found against the respondent on its argument that there was any implied term as contended by it, and the respondent does not challenge that ruling on this appeal, nor attempt to resurrect the argument that any such term about access should be implied as a matter of fact. The appellant somewhat dismissively argues in this appeal, regarding the claim for such an implied term, that "self evidently, that would have obliged the defendant to burden the mixed used development scheme upon registration of the plan with an unregistered access easement." By implication, the appellant adopts that part of the judgment of the learned trial judge in which the learned judge observed that the thoroughfare would be a community property lot under the Mixed Use Development Scheme approved under the *Mixed Use Development Act* 1993 (Qld), the provisions of which make community property lots the property of the Community Body Corporate.

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1 At CLR 457-458 in the judgment of Menzies, Stephen and Jacobs JJ

[7] As to those latter arguments by the appellant, I observe that in correspondence in 1996 in which the appellant was seeking a variation of the contract, it had not suggested any difficulties about causing the respondent to have access to that thoroughfare. In a letter dated 9 September 1996[2] the appellant's solicitors referred to "the private road (community property lot 5) on our client's retained land"; on 17 September 1996 the appellant's solicitors required "a detailed proposal for access via our client's own land";[3] on 1 October 1996 the reference was to "your client's request that access to the contract land be provided via the retained land";[4] on 30 October 1996 the appellant's solicitors referred to an agreement "whereby our client would provide access to the property";[5] and finally on 15 November 1996 the appellant's solicitors advised that their client did not wish to grant access rights "to your client via our client's property".[6] The learned trial judge was accordingly entitled to find there were factors which might have led someone in the respondent's position to think that it was entitled to access over the thoroughfare, which matters included the rezoning conditions originally imposed on the appellant's land prior to the agreed sale, and those negotiations with the appellant in 1996 when it wanted to vary the contract about excision of the site for the medical centre in return for access. In those negotiations, and until the letter of 15 November 1996, there had been nothing to suggest any impediment to the appellant insuring that there was access, and nothing to suggest access or non-access was a choice open to the appellant to grant.

[8] In a passage in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1977) 138 CLR 423, the joint judgment at 432 reads, in a passage which Mr Jackson QC for the appellant described as much quoted, as follows:

> "No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract should not be attributed to him."

[9] In another passage, at page 433, their Honours wrote:

> "A party in order to be entitled to rescind for anticipatory breach must at the time of rescission himself be willing to perform the contract on its proper interpretation. Otherwise he is not an innocent party, the common description of a party entitled to rescind for anticipatory breach, and indeed could profit from his misinterpretation of the contract, as the appellant seeks to do in this case when it claims forfeiture of the deposit and damages. By insisting on its incorrect interpretation of the contract to the point of claiming to rescind because the respondents were relying on the different but correct interpretation, the appellant by that stage

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2 At AR 530
3 At AR 533
4 At AR 537
5 At AR 544
6 At AR 545

> showed that 'definitive resolve or decision against doing in the future what the contract' [required] which is referred to by Dixon CJ in *Rawson v Hobbs*[7] …
> The appellant never accepted that the contract be performed according to its correct interpretation and thus the facts are different from those in *Lennon v Scarlett & Co.*[8]"

[10] The appellant argues, and the respondent denies, that the respondent by persisting from October 1997 onwards in a view of the contract found to be wrong, namely that it contained a term giving it access to the thoroughfare, was evincing from then on an intention not to perform the contract according to its terms. The appellant then pointed to the respondent's failure to complete when called upon to do so by the appellant on 25 September 2001, the completion date which had been arrived at by the exercise of the respondent's option given in clause 47.

[11] In reply the respondent pointed to the evidence of its conduct over a number of years prior to September 2001, in which it had repeatedly advised in disputes with the appellant that it would seek directions from the court on the construction of the contract or a judgment summons, and indeed had done so. It had expressly elected to affirm the contract on 15 August 1997, when it was obvious that the date for completion, if 18 months after the date of the contract, would be reached before any plan of subdivision was approved and registered. The respondent accordingly elected, as clause 49.1 of the contract entitled it to do, to alter the date for completion and make it five days after the registration of a plan of subdivision in accordance with clause 47. However, the appellant denied it had that right; the respondent was obliged to file a judgment summons dated 17 October 1997, seeking a declaration on the proper construction of clause 49. It succeeded in upholding its interpretation before Dowsett J, and an appeal was dismissed. The appellant had contended before Dowsett J that it had the right to terminate if the subdivision plan was not registered by the 18 month date, and that the respondent could not move the completion date back. The respondent argued on this appeal that its conduct in that earlier litigation, and generally, was hardly that of a party evincing an intention not to be bound by the terms of the contract and unwilling to accept an authoritative exposition of the contract's correct interpretation. I think that submission is correct.

[12] This Court was referred to *Foran v Wight* (1989) 168 CLR 385 at 425, and the comments of Brennan J therein where he quoted the observations of Dixon CJ in *Rawson v Hobbs*,[9] reminding that:

> "One must be very careful to see that nothing but a substantial incapacity or definitive resolve or decision against doing in the future what the contract requires is counted as an absence of readiness and willingness. On the other hand it is absurd to treat one party as tied to the performance of an executory contract although the other has neither the means nor intention of performing his part when his turn comes, simply because his incapacity to do so is not necessarily final or logically complete."

[13] As to that, the respondent pointed to the fact that its original pleading, while wrongly contending that it was an implied condition of the contract that the plaintiff

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7 (1961) 107 CLR 466 at 481
8 (1921) 29 CLR 499
9 (1961) 107 CLR 466 at 481

would have access to the main thoroughfare for the purposes of future development of the land, sought only "specific performance of the contract, in particular the subdivision of the land in accordance with the plan attached to the contract," and in lieu of specific performance an order for damages, and such further or other relief or order as the court may deem meet, and did not ask in terms for any order for access to the main thoroughfare. Further, it had never sought that order in specific terms. The respondent relied on the observation of Mason J in *Green v Sommerville* (1979) 141 CLR 594 at 611, that it is a general principle of the law of contract that the court will not readily infer from a party's insistence on a wrong construction of a contract that that party is unwilling to perform it according to its true construction.

[14] In *Laurinda Pty Limited v Capalaba Park Shopping Centre Pty Limited* (1988) 166 CLR 623 Deane and Dawson JJ observed at 658 that an issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention. It suffices that viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it. Reference was also made to the judgment of Fitzgerald P in *Trinity Point Hotel Pty Ltd v State of Queensland* [1993] QCA 421 at 43, wherein after to referring to authority, His Honour wrote:

> "Subjective attitudes with respect to the nature and extent of contractual obligations do not determine whether or not a repudiatory intention is established; the intent of the party which has allegedly repudiated is to be determined as an objective inference from what it has said and done."

[15] In that regard the respondent pointed to the appellant's affirmation of the contract in its letter of 27 September 2001, followed by an ineffective and purported rescission by a pleading delivered on 26 October 2001, purporting to accept the respondent's wrongful repudiation of the contract; when that pleading was struck out on the respondent's application to this Court, the appellant's ultimate position in its pleadings dated 8 February 2002 was that it claimed that the respondent's conduct on and after 26 September 2001 had been a repudiation of the contract, which the appellant, by its own pleading, accepted. The problem facing the appellant about that position was that on and from late October 2001 it had consistently declared that it had elected to terminate the contract, relying on its claim that the respondent by its conduct had repudiated the respondent's contractual obligations. But its pleading of 8 February 2002 could only rely on the respondent's continued determination to have this Court order specific performance of the contract, and nothing else. Because the appellant had elected on 27 September 2001 to affirm the contract after the respondent's failure to complete as requested, time had ceased to be of the essence, and the appellant did not give the respondent a notice requiring it to complete at any time between 27 September 2001 and the hearing before the learned trial judge. That had the result that throughout that time time had continued not to be of the essence, and that mitigates against the argument that in seeking construction of the contract by this Court, the respondent was manifesting an intention not to perform it according to its terms as found by the Court.

[16] The respondent's conduct was certainly less obviously that of a party unwilling to perform terms found by the court than that of the purchaser in *Lombok Pty Ltd v Supetina Pty Ltd* (1987) 14 FCR 226, in which that purchaser's application sought declarations that contracts were "void and/voidable at the instance of the

[purchaser]". Pincus J, when considering the question whether the institution of the proceedings constituted a repudiation of the contract, referred to the decision in *Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Co Ltd* (1919) 121 LT 628, in which the purchasers had claimed rescission of contracts for the construction of ships and "alternatively, a declaration that the contract was null and void, or had been frustrated, or was at an end"; and in which case the Court of Appeal held that what the purchaser wanted, in substance, was to have the Court determine the parties' rights, and that there had been no repudiation. Pincus J observed that if that case was right, it was difficult to see how the application and statement of claim being considered in *Lombok v Supetina* could constitute a repudiation; it is all the more difficult then to see how the application and pleading in this case could constitute a repudiation.

[17] The appellant then complains that the learned trial judge was too specific in enforcing those agreed terms, and that, to take an example, the agreement that the registered subdivision would be no more than 3% less in area than what had been earlier agreed should not have been considered to the degree of refinement of three decimal places. Translated, that complaint meant that a fraction over 3% was an acceptable variation. But the parties agreed on 3%, neither more nor less, and it is an inadequate response to say that the variation would have been within permissible limits if considered only to the first decimal point (3.0%), but not when considered to the third, 3.000%). An agreed variation of no more than 3% means just that.

[18] Putting aside the variations which in fact failed to satisfy the contract term, as the appellant repeatedly urged the court to do, the appellant still failed to establish that the respondent's conduct, in seeking an order of this Court enforcing the contract the respondent said it had made, showed that the respondent would not comply with its contractual obligation if the appellant's construction of the contract was accepted as correct. The respondent acted lawfully in asking the Court to decide the proper construction of the contract. Nothing in its pleadings or other conduct showed an unwillingness to accept an adverse interpretation. The appellant was unable to point to any decision holding that an unsuccessful claim for specific performance of a contract, based on a construction of it rejected by a court, justified the other party in rescinding the contract where hearing the claim had delayed its completion. I agree the appeal should be dismissed.

[19] **KEANE JA:** On 21 April 2005, the learned trial judge made orders for the specific performance of a contract dated 27 April 1996 between the respondent as purchaser and the appellant as vendor.[10] The basis for the appellant's challenge to the decision of the learned trial judge is essentially that the learned trial judge erred in failing to conclude that the respondent had repudiated the contract, and that this repudiation had been accepted by the appellant, so as to bring the contract to an end. In my respectful opinion, the appellant's challenge must fail.

[20] Some further reference to the facts of the case is necessary for a proper appreciation of the appellant's arguments on the appeal, and so I propose to set out the factual background which is not in controversy. I will then discuss the appellant's arguments on the appeal by reference to the conclusions of the learned trial judge.

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[10] *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115; SC No 6456 of 2001, 21 April 2005.

Factual background

[21] The land to be transferred to the respondent in exchange for the purchase price under the contract was described as follows:

> "Address: Springbrook Road, Cypress Gardens
> Present Use (if any): Vacant land
> Description: Part of lot 1 on RP 890439 as is approximately shown on the attached plan
> County: Ward
> Parish: Gilston
> Title reference: 50086052
> Area: 25.87 ha (approximately) (more or less)
> Type of Holding: Freehold
> Lease No:
> Local Government: Gold Coast City Council."

[22] The plan annexed to the contract was a reproduction of a plan prepared by the appellant's surveyors in relation to a mixed use development scheme in respect of, inter alia, part of Lot 1 on RP 890439. The appellant proposed to retain part of this land. The total area of Lot 1 on RP 890439 was 29.48 hectares. The area to be sold was marked out by a thick hand drawn line. To be withheld from sale was an area of 3.27 hectares in the south-eastern corner of Lot 1 as a "proposed Lot 20" and an area of 0.34 hectares as "proposed CPL1" which were associated with the mixed use development in which the appellant was involved.

[23] The hand drawn line delineating the area to be sold began approximately halfway along the existing northern boundary from a point immediately to the west of a private road (referred to in the proceedings as "the main thoroughfare") which was on the land to be withheld from sale for the benefit of the body corporate of the mixed use development scheme. This dividing line then ran south along the edge of the main thoroughfare before skirting the western side of a lake that extended all the way to the existing southern boundary. In all other respects, the boundaries of the new lots were essentially the same as those which had existed previously. The contract was silent about street access to the land being sold.

[24] The contract was in the standard form then approved by the Real Estate Institute of Queensland and the Queensland Law Society for the conveyance of residential land, units or houses. It also contained the following special conditions:

> "46 DUE DILIGENCE
> This contract is subject to and conditional upon the Purchaser satisfying itself within a period of 60 days from the date hereof as to the feasibility of the Purchaser's proposed development of the subject property on terms to the complete satisfaction of the Purchaser in every respect. The Purchaser's proposed development includes the possible future sale of part of the Land to the Gold Coast Italo - Australian Club Limited for use as a Licensed Sporting Recreational Club. The Purchaser undertakes to notify the Vendor or the Vendor's solicitors in writing prior to the expiration of the aforementioned 60 day period as to the satisfaction or otherwise of this clause. In the event that the Purchaser is unable to satisfy itself as to the feasibility of the development of the property and gives notice in writing to that effect to the Vendor or the Vendor's solicitors then this contract shall

be at an end. If the Purchaser fails to give notice in writing within the aforementioned period of the Purchaser's satisfaction as to the feasibility of the Purchaser's proposed development then at any time thereafter at the option of the Vendor this contract shall be at an end. This condition is solely for the benefit of the Purchaser and the Purchaser may at any time prior to 5.00pm on the last day of the relevant period waive the said condition by written notice to the Vendor and upon waiver in this manner the condition shall be deemed to have been satisfied.

47 SUBDIVISION REGISTRATION

47.1 This contract is subject to:

(a) approval by the Local Authority and registration in the appropriate office of a plan of subdivision substantially in the form attached; and

(b) the issue of an indefeasible title under the Land Title Act 1994 for the Land required to register the transfer to the Purchaser,

on or before the Completion Date.

47.2 If the condition referred to in clause 47.1 has not been satisfied by the Completion Date the Purchaser may terminate this contract by notice in writing given to the Vendor. In such event all deposit and other moneys received by the Vendor or the Stakeholder on account of the purchase price (other than the First Deposit Instalment and the Second Deposit Instalment) shall be refunded to the Purchaser without deduction.

47.3 The Vendor will diligently pursue the Local Authority and relevant government offices in relation to the subdivisional plans and applications lodged by it under this clause.

47.4 The plan of subdivision shall be taken to be substantially in the form attached notwithstanding that the boundaries differ, provided that:

(a) the boundaries do not vary from those on the attached plan by a distance of more than 20 metres at any point; and

(b) the area of the Land to be purchased does not reduce by more than 3%.

47.5 Notwithstanding clause 47.4, the purchaser may at its sole discretion elect to complete this contract, if the boundaries do vary from those on the attached plan by a distance of more than 20 metres at any point, or the area of Land to be purchased does reduce by more than 3%.

47.6 If the condition is satisfied the Vendor shall give notice in writing of such satisfaction to the Purchaser promptly and in any event not later than 2 business days after the date of satisfaction.

…

49 COMPLETION

49.1 The date of completion under this contract is the date falling 18 calendar months after the date of this contract or at the option of the Purchaser, the date being 5 days after registration of the plan of subdivision in accordance with clause 47.

> 49.2 Despite clause 49.1, the Purchaser may at its sole discretion elect to complete this contract prior to the date falling 18 calendar months after the date of this contract, but after the date of satisfaction of the condition contained in clause 47.1. Should the Purchaser wish to complete this contract during that time, the Purchaser shall give the Vendor 5 business days prior notice in writing, which notice shall specify the date upon which the Purchaser requires completion to be effected."

[25] It is now common ground between the parties that the date for completion of the contract was five days after registration of a plan of subdivision approved by the relevant local authority substantially in the form attached to the contract. Time was of the essence.

[26] The respondent commenced proceedings for specific performance on 13 July 2001. At that time, no plan of subdivision had been registered. There had been considerable disputation between the parties as to their respective rights under the contract.

[27] A plan of subdivision previously approved by the local authority was registered on 21 September 2001. The land to be transferred to the respondent under the contract was designated as Lot 21 on SP 144932. Under this plan, the respondent did not have access to the main thoroughfare. Under the town planning arrangements then in force in respect of the whole of the land the subject of the subdivision, the respondent had no means of obtaining street access otherwise than via the main thoroughfare.

[28] On 25 September 2001, the appellant asserted to the respondent that this plan met its contractual obligations. The appellant asserted that it was "ready, willing and able to proceed to settlement tomorrow" and called upon the respondent to complete the contract on the following day. It is clear from that facsimile that the appellant's position was that the registered plan of subdivision was in conformity with its contractual obligations, and that it was not amenable to any proposal to vary that plan. The respondent did not tender performance on that day. The respondent had earlier asserted to the appellant that the plan attached to the contract provided for the respondent to have access to the main thoroughfare. By facsimile transmission on 26 September, the respondent's solicitors wrote to the appellant's solicitors:

> "With respect, the plan in its current form clearly does not conform to the Contract and accordingly, if your client seeks to enforce the Contract or terminate the Contract then we advise that our client has instructed us to make an application to the Court for a Caveat to be lodged over the property."

[29] On 27 September 2001, the appellant's solicitors sent the respondent's solicitors a facsimile transmission in which, inter alia, the following was said:

> "It is without question that our client has complied with its obligations under the contract in that:
>
> (a) …
>
> (b) our client was ready, willing and able to complete the contract pursuant to clause 49.1 on the date 5 days after registration of the plan of subdivision in accordance with clause 47.1.

> Given that your client has failed or refused to complete the contract in accordance with its clear terms, we are instructed to immediately institute proceedings for specific performance."

[30] In the action which had been commenced by the respondent, the appellant delivered a pleading on 29 October 2001. In that pleading, it claimed to terminate the contract by reason of the respondent's failure to complete the contract on 26 September 2001. The respondent successfully applied to have this aspect of the appellant's defence struck out on the basis that the appellant had elected to perform the contract by its solicitors' facsimile of 27 September 2001.

[31] In February 2002, the appellant again purported to terminate the contract.

[32] On 24 November 2004, in answer to a request by the appellant to identify with greater particularity the orders sought by it, the respondent advised the appellant that it was willing to accept a transfer of Lot 21 in the event that the court were to conclude that Lot 21 conforms to the contract.

The arguments on the appeal

[33] The principal argument advanced by the appellant on the appeal was that the respondent had repudiated the contract by its insistence that the land to be transferred to it should have access to the main thoroughfare on the footing that this was implicit in the description of the land to be transferred to the respondent. The learned trial judge concluded that the respondent did not enjoy any such implied right, but that the adoption by the respondent of this position was not, in the circumstances of the case, a repudiation by it of the contract. Her Honour also held that Lot 21 did not satisfy the appellant's obligations under the contract. It seems to me that, even without this latter conclusion, the learned trial judge's ultimate decision could be sustained; but having regard to the arguments advanced in relation to this latter conclusion it is convenient to consider them before addressing the appellant's principal submission on the appeal.

Was the appellant in breach?

[34] The learned trial judge held that the registered plan of subdivision was not substantially in the form of the plan attached to the contract.[11] In particular, on the registered plan of subdivision, the land being sold, described in the registered plan of subdivision as Lot 21, was not contiguous with the private road area retained by the appellant. There was evidence from a surveyor, Mr Pozzi, that Lot 21 was 3.015 per cent smaller than the area of the land to be sold shown on the contract plan. Further, the boundaries of Lot 21 vary from those shown on the contract plan in that the point at which the eastern and southern boundaries intersect is about 26 metres south-west of the point at which they intersected on the contract plan. At one point, the southern boundary of Lot 21 is approximately 38 metres from where it was shown on the plan attached to the contract. This evidence was accepted by her Honour. Her Honour's findings of fact are challenged on this appeal although the accuracy of Mr Pozzi's evidence is not attacked. Further, the appellant challenges the conclusions which flow from her Honour's acceptance of this evidence.

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[11] *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115; SC No 6456 of 2001, 21 April 2005 at [31].

[35] In my respectful opinion, the learned trial judge correctly concluded that Mr Pozzi's evidence established that there had been significant departures from the requirements of special condition 47.4. This special condition expressly dealt with the subject of the extent of departure by the appellant from the contract plan allowed to the appellant if the registered plan of subdivision was to be taken to comply with its obligations as vendor in respect of the extent and configuration of land to be transferred. It defined the limits of acceptable deviation from the contractual description of the land which the appellant was obliged to transfer to the respondent in performance of its contract. These limits were not ambiguous. The boundaries of the registered subdivision were not to vary from the subdivision shown on the contract plan by more than 20 metres at any point and the area of land to be purchased was not to be reduced by more than three per cent. As I have noted, there was unchallenged evidence that both these limits were exceeded. The appellant cannot be said, therefore, to have performed its obligations under the contract. The appellant's assertion on 25 September 2001 that it was "ready, willing and able" to perform its contractual obligations was, objectively speaking, quite wrong.

[36] The appellant made a submission which was, in essence, that its failure to observe the requirements of special condition 47.4 is inconsequential because the respondent still "received substantially what it had contracted to purchase". I am unable to accept this submission. Special condition 47.1 of the contract provided that "This contract is subject to: … registration in the appropriate office of a plan of subdivision substantially in the form attached". The opening words of special condition 47.4 that "The plan of subdivision shall be taken to be substantially in the form attached notwithstanding that the boundaries differ …" necessarily imply that, if the tolerances provided for in special condition 47.4 were exceeded by the registered subdivision plan, then that plan could not be taken to be a "plan of subdivision substantially in the form attached" as required by special condition 47.1.

[37] The appellant argued that the learned trial judge erred in finding that the tolerances prescribed in special condition 47.4 were required to be strictly adhered to. In particular in this regard, it was argued that the three per cent limit on reduction in area of land to be transferred was exceeded only by .015 per cent and that this should be disregarded. It was also said that the shift of part of the boundaries of the land to be transferred by more than 20 metres was not shown to be material in terms of what the respondent was entitled to receive under the contract.

[38] It was argued on behalf of the appellant that special condition 47.4 had been satisfied because it did not contemplate a reduction in the area of the land to be transferred in excess of three per cent if that excess could be measured only by reference to three decimal places as in 3.015 per cent. It is necessary only to state this argument to see why it must be rejected. Special condition 47.4 contemplated a reduction in area by three per cent **and no more**; it stated the maximum extent to which the appellant was at liberty to reduce the area to be transferred to the respondent in the course of the exercise of the powers conferred on the appellant by special condition 47. There is no good reason why the appellant's power to reduce the benefit of the bargain to the respondent should be read in a way which expands that power and does so in a way which is necessarily productive of uncertainty.

[39] The appellant also argued that the respondent had not pleaded that the requirements of special condition 47.4 had not been met by the appellant because the boundaries of the land to be subdivided to produce Lot 21 varied, at some points, by more than

20 metres from the contract plan. It was clearly the effect of Mr Pozzi's evidence that this was so. The appellant did not seek an adjournment to seek to contradict this evidence. It was not asserted by the appellant at trial that the finding which her Honour made on the basis of Mr Pozzi's evidence was not open to her. These circumstances tend to confirm that the appellant was not prejudiced at trial by the respondent's failing specifically to plead its reliance on the excessive movement of the boundary. The appellant argued that the extent to which the boundaries differed by more than 20 metres from the contract plan was not "material". But, as I have said, special condition 47.4 is an express and exhaustive statement of the limits of the appellant's power adversely to affect the respondent in terms of the extent and configuration of the land to be transferred to it under this contract. Beyond those limits, the appellant cannot claim that alterations in the plan attached to the contract are not material. Once again, the desirability of avoiding commercial uncertainty militates against accepting the appellant's contention.

[40] The appellant's submission in relation to this point amounts to an argument that, because the degree of deviation from the terms of special condition 47.4 was relatively minor, this deviation should effectively be overlooked for the purposes of special condition 47.1. Such an approach does not accord with the accepted canons of contractual interpretation. There is no warrant, either in authority or in principle, for reading into a contract between two apparently well-advised commercial entities a proviso of the type argued for by the appellant. As Stephen J said in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:

> "This agreement is one in which, in my view, two corporations have determined, in unambiguous terms and in a formal document obviously prepared with legal assistance, their quite complex contractual relationship … The approach of the courts to the construction of such documents, when they contain no ambiguity nor any other patent error or omission, cannot be other than that of an uncritical rendering of the meaning of the text."[12]

As Gibbs J pointed out in the same case:

> "If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust."[13]

[41] It is, therefore, not to the point to consider whether or not the respondent would have received "substantially what it had contracted to purchase". The clear terms of the contract required the appellant to register a plan of subdivision in conformity with the explicit requirements of special condition 47.4. This was not done. To excuse this failure because the amount by which the specifications of the registered plan deviated from those stipulated in the contract was "small" would be to deprive the terms agreed upon by the parties and contained in that special condition of any real meaning. The common law does not operate in this way. On the contrary, as Kirby J said in *Pan Foods Company Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd*:

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12 (1973) 129 CLR 99 at 114 - 115. This principle is now "well-established": See *M K & J A Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39; CA 40751/04, 3 March 2005 at [44].

13 (1973) 129 CLR 99 at 109.

> "The law facilitates and upholds commercial contractual obligations and the expectations that derive from them … Business is entitled to look to the law to keep people to their commercial promises."[14]

A contracting party such as the appellant must abide by, and expect to be held to, the parameters of an agreement freely entered into by it.

[42] The appellant argued that the respondent was not aware of the appellant's impermissible departures from the plan attached to the contract when it refused to complete in September 2001 and, indeed, that these departures were not made apparent until Mr Pozzi's opinion was obtained shortly before the trial. That may be so, but the point is irrelevant because, in truth, the appellant was not able to perform its contract as at 26 September 2001. As a result, it was not entitled to require the respondent to complete at that time. By October 2001, the appellant had made it clear that its attitude was that the contract was at an end. From that position, it never wavered.

[43] In my opinion, the learned trial judge was correct to conclude that the appellant was not entitled to call upon the respondent to complete the contract on 26 September 2001 because the appellant itself was not ready, willing and able to complete the contract in accordance with its terms.[15]

The appellant affirmed the contract

[44] As I have mentioned, that conclusion is not, in my view, essential to upholding the decision below. That is because the appellant did not purport to terminate the contract as a result of the respondent's failure to complete the contract on 26 September 2001. Rather, the appellant affirmed the contract by its facsimile transmission of 27 September 2001 in which it communicated its intention to seek specific performance of the contract. That intention was consistent only with an election to affirm the contract. As has been mentioned, the appellant delivered an amended defence and counterclaim on 29 October 2001 in which it claimed to have terminated the contract upon the respondent's failure to settle on 26 September 2001. The respondent had this pleading struck out on the basis of the appellant's election to affirm the contract by the facsimile of 27 September 2001.

[45] As a result, whatever the appellant's rights might otherwise have been by reason of the respondent's failure to complete the contract in accordance with the appellant's demand, the appellant's solicitors' facsimile of 27 September 2001 meant that the appellant lost the right to rescind the contract as a result of the respondent's failure to complete on that date. As Barwick CJ said in *Green v Sommerville*:[16]

> "The law is, as I apprehend it, that a vendor, who has a right to take steps unilaterally to rescind the contract for the default of the purchaser, loses the right to rescind out of hand if, notwithstanding such default, he treats the contract as continuing on foot."

Did the respondent repudiate?

[46] In turning now to consider the appellant's principal argument on appeal, it is convenient to note that the appellant's affirmation of the contract on 26 September

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14 [2000] HCA 20 at [24]; (2000) 170 ALR 579 at 584 - 585.

15 See *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 433; *Sattel v The Proprietors - Be Bees Tropical Apartments Building Units Plan No 71593 (No 2)* [2001] QCA 560 at [49]; [2002] 2 Qd R 427 at 439.

16 (1979) 141 CLR 594 at 599.

2001 is material to the arguments advanced by the appellant to support its submission that the respondent repudiated the contract by its insistence that the land transferred should provide access to the main thoroughfare. In this regard, the decisions of the High Court in *Hoad v Swan*[17] and *Havenbar Pty Ltd v Butterfield*[18] afford clear authority for the proposition that once the appellant confirmed the contract after the respondent's failure to settle on 26 September 2001, time ceased to be of the essence of the contract.

[47] The appellant argued that time remained of the essence. In my respectful opinion, this aspect of the appellant's submission cannot be accepted. It is not supported by any authority. It is contrary to the authorities to which I have referred. And it involves a contradiction in terms in that, once time has ceased to be of the essence of a contract, that necessarily means that performance on a given date, and no other, is an essential obligation breach of which entitles the other party to rescind for breach of a condition of the contract.

[48] The significance for the present case of the appellant's argument that time did not cease to be of the essence of the contract on 27 September 2001 when the appellant elected to affirm the contract was that it was submitted the respondent's attitude to the contract should be assessed in the light of the delay which occurred thereafter. The appellant sought to suggest that the respondent's failure immediately to recognize that its claim to a transfer of land which gave it access to the main thoroughfare was untenable meant that, because timely performance of the contract was still an essential obligation of the parties, the respondent could be seen to have manifested an intention not to perform the contract save to the extent that it suited it to do so.

[49] For the reasons I have given, that submission should be rejected. It should also be rejected for the further reason that it involves a confusion of concepts. The essentiality of time is concerned with the necessity for performance of the concurrent obligations which the contract imposes on the parties on a fixed date. Ability or willingness to perform on another date will not do to establish actual performance of the contract on the stipulated due date. The law relating to repudiation by one party, and consequent termination of the contract by the other party, is concerned to relieve an innocent party from the injustice of obliging that party, who is intent on enforcing its bargain, and ready and able to do so, to wait (husbanding its resources and foregoing other commercial opportunities) to perform its obligations until a stipulated date in the future when the other party has already made it clear that it will not perform its part of the contract. The law achieves this end by conferring on the innocent party the option of terminating the bargain and taking its business elsewhere. Where the date for performance has come and gone and an innocent party chooses to affirm the contract, the contract must be performed within a reasonable time. So long as the innocent party continues to seek specific performance of the contract, the contract will remain on foot for the benefit of both parties. And if the innocent party changes its mind and decides to terminate by reason of the other party's continuing delay, it may make time essential again by reasonable notice to the other side. If, after the expiration of reasonable notice, the other party fails to complete on the due date the innocent party may rescind, but that rescission is for actual breach. In the present case, after October 2001, the

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17 (1920) 28 CLR 258 at 263 - 264.

18 (1974) 133 CLR 449 at 457 - 458.

appellant's position was not that of an innocent party seeking to enforce the contract. Its position was unequivocally that the contract was over. It was the respondent who was seeking to enforce the contract. The appellant also purported to rescind the contract in February 2002; but the appellant had not in the meantime sought to make time of the essence by appropriate notice calling upon the respondent to perform its obligations under the contract.[19] The appellant was, therefore, not entitled to charge the respondent with breach of contract in failing to complete the contract on or before that date.

[50] On the appeal, the appellant did not seek to rely on the respondent's failure to settle the contract on 26 September 2001 as a ground for terminating the contract. Rather, the appellant fixed upon assertions made in the respondent's statement of claim that it was an implied term that the appellant was obliged to obtain a registered plan of subdivision which would provide to the respondent "access to the main thoroughfare [of the mixed use development scheme] for the purpose of the future development of the [subject] land". The appellant asserted, in its written submissions on the appeal, that the adherence by the respondent to this position was "a plain and continuing breach of contract" which entitled the appellant to rescind the contract.

[51] It may be said immediately that it is clearly wrong to characterize this stance on the point of the respondent as "a plain and continuing breach of contract". The statement by the respondent of its view of the appellant's contractual obligations could not amount to an actual breach of contract; at most, it could amount to a manifestation of an intention not to perform the contract when the time for performance arrived. No doubt for that reason, Mr D J S Jackson QC, who led for the appellant on the hearing of the appeal, abandoned that written submission. The real question, in Mr Jackson's submission, was whether the respondent's conduct amounted to a repudiation of the contract which the appellant was entitled to accept and thereby bring the contract to an end.

[52] It has been seen that, on 24 November 2004, the respondent expressly indicated to the appellant its willingness to accept a transfer of Lot 21 "in the event that the court concludes the [sic] Lot 21 on SP 144932, conforms to the contract …" This intimation was elicited by the appellant's request that the respondent identify with greater particularity the orders it sought. As the learned trial judge observed, the respondent's "nomination of that alternative should not … be seen as evidence that it knew that the interpretation of the contract for which it contended was incorrect".[20]

[53] The learned trial judge concluded that the implied obligation of the appellant as to access to the main thoroughfare for which the respondent had contended prior to November 2004, whether as necessary to give business efficacy to the contract or as a matter of law, could not be sustained.[21] Her Honour concluded, nevertheless, that the assertion of this entitlement by the respondent could not be treated as a repudiation of its contractual obligations.[22] The appellant contends that the position

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19 Cf *Green v Sommerville* (1979) 141 CLR 594 at 600.

20 *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115; SC No 6456 of 2001, 21 April 2005 at [41].

21 *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115; SC No 6456 of 2001, 21 April 2005 at [38].

22 *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115; SC No 6456 of 2001, 21 April 2005 at [40] - [41].

adopted by the respondent can only be understood as an indication that it was, prior to November 2004, only willing to perform the contract if it obtained a right of access to the main thoroughfare.

[54] In that regard, when the respondent commenced proceedings in July 2001, it sought specific performance of the contract. In particular, it sought subdivision of the land and a consequent transfer in accordance with the plan attached to the contract. As the learned trial judge held "[s]ince July 2001 the respondent has maintained its claim to specific performance of the contract, seeking subdivision in accordance with the plan attached to the contract or such other order as the Court may deem fit".[23] The determination of what was involved in the performance of the contract was a matter about which the respondent had sought the determination of the court. The respondent's claim was to a transfer of the land described in the plan attached to the contract. It did not put its claim on the footing that it would be willing to perform the contract only if some particular arrangements for access were ordered by the court. No special order in relation to access was sought. In these circumstances, in my respectful opinion, the learned trial judge was correct in concluding that the respondent had not manifested a willingness to perform the contract only if the court upheld a claim which was obviously untenable.

[55] It may be accepted that, as Mr Jackson contended, the question whether a party has manifested an intention to repudiate is to be determined objectively by reference to that party's conduct and communications to the other side. It may also be accepted that the possibility that the sale might proceed on the footing that the land to be conveyed to the respondent should not have street access was not so unthinkable as to necessitate the implication of a term for the provision of access; but it is also understandable that the purchaser might have regarded such an outcome as an unreasonable view of the effect of the description of the land to be transferred, even though it was willing to tolerate that outcome if that was the legal result of the bargain it had made. So far as the respondent's position, viewed objectively, is concerned, it is not insignificant that the appellant's letter of 18 May 2001 to the respondent's solicitors expressly advised that the appellant "will consider providing your client an easement over Lot 20 to gain access to the round-a-bout maintained by Dept [sic] of Main Roads (as shown in the attached plan). Provision of this easement would be subject to settlement of the contract, and the roadway and associated costs would be the responsibility of your client".

[56] In my respectful opinion, the learned trial judge was correct to conclude that this is not a case in which the respondent had manifested a willingness to perform the contract only on the basis that its view of what the contract meant was accepted.[24] It cannot be said that, before the respondent's intimation of 24 November 2004, the respondent was asserting that it was no longer bound by the contract, or that it would perform the contract only to the extent that its view of the extent of the appellant's obligations were correct and not otherwise.[25]

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23 *Highmist Pty Ltd v Tricare Australia Ltd* [2005] QSC 115; SC No 6456 of 2001, 21 April 2005 at [41].

24 Cf *Lombok Pty Ltd v Supetina Pty Ltd* (1987) 14 FCR 226 at 234 - 235, 243 - 244.

25 Cf *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 33, 37 - 38, 40; *Trinity Point Hotel Pty Ltd v The State of Queensland* [1993] QCA 421; Appeal No 36 of 1993, 21 October 1993.

[57] It is significant, in this regard, that counsel for the appellant were unable to cite one example of a case where a purchaser seeking specific performance of a contract has been held to have repudiated the contract by reason merely of the assertion of an erroneous view of the obligations of the parties to the contract.[26] It was submitted by Mr Jackson that the question of whether a party to a contract who has commenced proceedings seeking specific performance of the contract can be seen to have repudiated the contract by reason of that party's overreaching assertions in its pleadings as to the entitlements it claims under the contract is always a question of fact. That submission may well be correct, but where the context in which such assertions are made is a pending action in which the court's assistance has been invoked to enforce the contract, and nothing more, that is a strong reason to resist the conclusion that the party which has brought proceedings does not intend to perform the contract according to its tenor as determined by the court. This must be so where that party's pleadings do not assert a claim to specific performance in which the claimant's willingness to perform the contract is conditioned, expressly or by clear implication, upon the contract being held to operate in a way which is found to be untenable. Indeed, far from suggesting that the respondent was repudiating the contract, the making of the claim for specific performance carried an implied assertion that the respondent was ready, willing and able to perform its contractual obligations.[27]

[58] For these reasons, I respectfully agree with the learned trial judge that this case is governed by the decision in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*[28] where it was held that "an intention to repudiate the contract" should not be attributed to a party who, despite labouring under an incorrect understanding of the terms of the contract, was "willing to accept an authoritative exposition of the correct interpretation". In the present case, the respondent expressed this willingness when it placed its claim for specific performance in the hands of the Court in July 2001.

Was the appellant entitled to rescind?

[59] At this point, it is necessary to refer to an argument on behalf of the respondent which was to the effect that the appellant, as a party itself in breach and having repudiated the contract, was not entitled to accept the respondent's repudiation (had the respondent been held to have repudiated) so as to bring the contract to an end. The appellant accepted the proposition that if the appellant had itself evinced its intention not to perform its contractual obligations by its correspondence of 25 and 26 September 2001, then it would not have been entitled to terminate the contract by reason of repudiatory conduct on the part of the respondent.[29] The appellant sought to argue that it had not manifested any such intention as would disentitle it from effectually rescinding the contract in February 2002. That argument is difficult to accept because it had made it clear by October 2001 that it regarded the contract as at an end. However that may be, for my part, I would prefer to reserve my opinion on this point.

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26 Cf *Lombok Pty Ltd v Supetina Pty Ltd* (1987) 14 FCR 226 at 243.

27 *Uniform Civil Procedure Rules* 1999 (Qld) r 153(1); *Baird v Magripilis* (1925) 37 CLR 321 at 330 - 331.

28 (1978) 138 CLR 423 at 431 - 433.

29 See *Sattel v The Proprietors - Be Bees Tropical Apartments Building Units Plan No 71593 (No 2)* [2001] QCA 560 esp at [49]; [2002] 2 Qd R 429 esp at 439; see also *Foran v Wight* (1989) 168 CLR 385 at 424 - 425.

[60] It is to be emphasised that we are not here concerned with termination for an actual breach of contract by reason of a failure to perform the contract on the date fixed for performance where time is of the essence. It may be that statements in the authorities which appear to lend support to the proposition accepted by the appellant, viz that only a party who is ready, willing and able to perform its contractual obligations is entitled to rescind when the other side has repudiated the contract, should be understood as operating only to confine the availability of damages for the loss of bargain to the case of rescission by an innocent party, rather than denying a party who is not ready willing and able to perform its contract the ability to bring the contract to an end where the other party has manifested an intention not to perform the contact.

[61] It makes commercial sense to allow a party to recover damages for loss of bargain only where that party was itself in a position to perform its side of the bargain. If it were otherwise, it could not sensibly be said that it was the other side's conduct which caused the loss of the profit involved in the bargain. That advantage could not have been obtained even if the other side had fulfilled its obligations. On the other hand, it does not make much sense to say that, where both parties to a contract declare to each other their fixed resolve not to perform their contract, the contract continues in existence in some legal limbo for the reason that neither party is ready, willing and able to perform the contract. Such a proposition may be intelligible to metaphysicians, but it is of little use in terms of the regulation of commerce according to the reasonable expectations of honest people.

[62] To the extent that repudiation is no more than the communication of an intention not to perform the contract, if both parties express that intention it is difficult to see why the contract should not be regarded as at an end, not because one or the other has exercised a right conferred by law unilaterally to terminate the contract, but because the original consensus by which the bargain was created has been replaced by a new consensus - that the bargain should be terminated. Such a case could, in my tentative view, be characterised as a case of termination by mutual assent. However all this may be, it is unnecessary to resolve the issue in this case because, as I have concluded, the appellant's submission that the respondent repudiated the contract must be rejected.

[63] Finally, it should be noted that the appellant also advanced an argument in its written submissions that the respondent was not entitled to decline to complete the contract on 26 September 2001 because it might have completed the contract and sued for damages. This contention, which was not advanced in oral argument by Mr Jackson, seriously misstates the rights and obligations of the parties to a contract for the sale of land. The respondent was entitled to performance by the appellant of its contractual obligations; these included the transfer of the land agreed to be sold. The respondent could not be forced, by the appellant's recalcitrance, to be satisfied with damages in lieu of the transfer of the land.

Conclusions and orders

[64] For these reasons, I am respectfully of the opinion that the decision of the learned primary judge should be affirmed. This conclusion makes it unnecessary to address the argument, advanced by the respondent's notice of contention, that the appellant breached an implied term of the contract in procuring the plan of subdivision.

[65] In my respectful opinion, the appeal should be dismissed and the appellant should pay the respondent's costs to be assessed on the standard basis.

[66] **CULLINANE J:** I have read the reasons for judgment of Jerrard JA and Keane JA in this matter and agree, for the reasons each has given, that the appeal should be dismissed with costs.