

# SUPREME COURT OF QUEENSLAND

CITATION: *Begley v Fisigi P/L* [2007] QCA 252

PARTIES: **TRACEY ELIZABETH BEGLEY**  
(plaintiff/respondent)  
v  
**FISIGI PTY LTD** ACN 109 242 284 **AS TRUSTEE**  
**UNDER INSTRUMENT NO 708061715**  
(defendant/applicant)

FILE NO/S: Appeal No 516 of 2007  
DC No 1508 of 2006

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time/General Civil Appeal

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 3 August 2007

DELIVERED AT: Brisbane

HEARING DATE: 19 April 2007

JUDGES: McMurdo P, Holmes JA and Lyons J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDER: **1. Application for leave to appeal granted**  
**2. Appeal dismissed**  
**3. Applicant to pay respondent's costs**

CATCHWORDS: CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – MATTERS ARISING BETWEEN CONTRACT AND CONVEYANCE – CONDITIONS OF SALE – GENERALLY – where the applicant entered into a contract of sale with the respondent – where the disclosure plan did not comply with s 9(2) of the *Land Sales Act 1984* (Qld) – where s 9(5) of the *Land Sales Act* provides for avoidance of the contract by written notice before the vendor gives the purchaser a registrable instrument of transfer – whether the transfer document was capable of immediate registration in the land registry

*Acts Interpretation Act 1954* (Qld), s 14A  
*District Court of Queensland Act 1967* (Qld), s 118  
*Duties Act 2001* (Qld)  
*Land Sales Act 1984* (Qld), s 9  
*Land Title Act 1994* (Qld), s 153

*Cawood v Infraworth Pty Ltd* [1990] 2 Qd R 114, considered

*Kelly v Arkdev Pty Ltd; Kelly v Harling Queensland Pty Ltd*  
[2005] QSC 318, considered

COUNSEL: D A Quayle for the applicant  
D J Thomae for the respondent

SOLICITORS: Redchip Lawyers for the applicant  
Bain Gasteen for the respondent

- [1] **McMURDO P:** I agree with Holmes JA that this application for leave to appeal should be granted but the appeal dismissed with costs. Her Honour has set out the relevant facts, issues and statutory provisions in her reasons so that my own may be briefly stated.
- [2] This appeal concerns the straightforward application of s 9(5) *Land Sales Act 1984* (Qld) ("the Act") to the pertinent facts of this case. The appellant vendor, a property developer, entered into a contract to sell a proposed allotment to the respondent purchaser on 12 December 2004. The disclosure plan and disclosure statement required to be provided by the vendor or vendor's agent to the purchaser under the Act did not comply with s 9. Under s 9(5) the purchaser therefore had a right to avoid the contract "by written notice given to the vendor before the vendor gives the purchaser the registrable instrument of transfer for the allotment". Under s 6 of the Act a "registrable instrument of transfer" relevantly means "a memorandum of transfer of the land in favour of that purchaser capable of immediate registration (subject to its being properly stamped under the *Duties Act 2001*) in the land registry".
- [3] On 5 October 2005 prior to settlement (it is common ground that under the contract settlement was to occur on 13 October 2005) the vendor's solicitors forwarded to the purchaser's solicitors memorandum of transfer documents for the land, executed by the vendor, with a covering letter which included these terms:  
"We return the enclosed documents to you on your undertaking to hold the stamped transfer on our behalf pending settlement and to use the transfer for stamping purposes only."
- [4] The central question is whether those transfer documents were "capable of immediate registration ... in the land registry". If they were, the respondent was not entitled to avoid the contract. As the primary judge rightly held, the transfer documents were not "capable of immediate registration" under the Act because in the terms of the letter accompanying them the vendor provided them to the purchaser's solicitors for "stamping purposes only" and to hold on the vendor's "behalf pending settlement". The vendor's letter of 5 October 2005 made clear that the transfer documents were not "capable of immediate registration" until, in this case, settlement had occurred on 13 October 2005. Registration could not be directly effected on 5 October 2005; registration could only be effected after settlement which was to take place on 13 October 2005: cf *Cawood v Infraworth Pty Ltd*.<sup>1</sup> The primary judge's carefully reasoned judgment in this respect entirely supported both the orders made at first instance and the dismissal of this appeal.

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<sup>1</sup> [1990] 2 Qd R 114, Macrossan CJ (Kelly SPJ agreeing) 119.

- [5] **HOLMES JA:** The applicant seeks leave to appeal against a summary judgment granting the respondent declarations as to her right to avoid a contract and ordering the repayment to her of deposits paid under it totalling \$26,500. It requires leave to appeal by reason of s 118(2) and (3) of the *District Court of Queensland Act 1967* (Qld), because the judgment relates to a claim relating to property with a value less than the Magistrates Courts' jurisdictional limit, that is, less than \$50,000. It was agreed that the merits of the appeal should be argued on the application.

**The issue on appeal**

- [6] By the judgment at first instance, it was declared that the respondent was not given a disclosure plan in the form required by s 9(2) of the *Land Sales Act 1984* (Qld) and thus was entitled to avoid a contract for the purchase of a "proposed allotment", a term defined in s 6 of the Act.<sup>2</sup> Section 9(5) of the Act gives a right to avoid for contravention of s 9(2) or (3):

"by written notice given to the vendor or vendor's agent before the vendor gives the purchaser the registrable instrument of transfer for the allotment".

- [7] The contract of sale was entered by the parties (to whom, for simplicity's sake, I will refer as vendor and purchaser, rather than applicant and respondent) on 12 December 2004. The settlement date under the contract was 14 days after notice in writing that the plan had been registered: as matters transpired, 13 October 2005. The purchaser's solicitors, as the contract required, prepared a transfer in the form prescribed by the *Land Title Act 1994* (Qld) and forwarded it to the vendor's solicitors. They returned it about a week before the settlement date, executed but undated, under cover of a letter containing the common formula to the effect that the documents were forwarded on the recipient solicitors' undertaking to hold the transfer on the vendor's behalf pending settlement and to use it for stamping purposes only. On the day before settlement was due, the purchaser gave notice by letter that she was avoiding the contract of sale on the basis that the disclosure plan did not show "appropriate contour intervals" as required by s 9(2)(c)(i) of the *Land Sales Act*.

- [8] There was no dispute that this defect constituted a contravention of s 9(2). The question was whether the transfer, forwarded on the proviso that it would not be used for any purpose other than stamping, constituted a "registrable instrument of transfer" for the purposes of s 9(5). The expression is defined in s 6 of the *Land Sales Act* as meaning, inter alia:

"In respect of land that was a proposed allotment of freehold land at the time when a person entered upon the purchase thereof – a memorandum of transfer of the land in favour of that purchaser capable of immediate registration (subject to its being properly stamped under the *Duties Act 2001*) in the land registry".

Attention, accordingly, focused on the expression "capable of immediate registration".

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<sup>2</sup> "*proposed allotment* means a single parcel of land, other than a lot within the meaning of this Act, the boundaries of which are shown, or to be shown, on a plan of survey that is to be registered under the *Land Act 1994* or *Land Title Act 1994*."

### **The decision at first instance**

- [9] The vendor’s position was that the notice of avoidance came too late, because the transfer document had been provided. The purchaser’s argument was that because the transfer had been forwarded only for the specific and limited purpose of stamping, it was not until settlement a “registrable instrument of transfer”. The learned primary judge accepted that argument and found it unnecessary to consider a second argument that because the document was undated it was not registrable. Had it been necessary to do so, he said, he would have received further evidence from the vendor as to Titles Office practice and would have given the purchaser an opportunity to respond to it. He did, however, consider that there was a further basis for finding in the purchaser’s favour: that her solicitor had received the transfer as agent for the vendor or the vendor’s solicitor; consequently the vendor had not given the purchaser the instrument of transfer but had merely passed it to the solicitor to hold on its behalf.
- [10] In arriving at his conclusion that the document provided was not a registrable instrument of transfer, the learned primary judge reviewed the history of the *Land Sales Act* at some length. As enacted, the Act prohibited selling freehold land subject to an unregistered plan of sub-division or a proposed plan of sub-division unless the plan had been approved by the local authority before the purchaser entered on the purchase.<sup>3</sup> Section 9 required provision of a copy of the relevant sub-division plan. If it became inaccurate, s 10 required the vendor to give the purchaser a notice in writing that rectified the inaccuracy; that requirement continued to operate until the Registrar of Titles had issued the relevant certificate of title. The Act permitted the purchaser to avoid a contract for the purchase of such land on the basis that the plan of sub-division was either not provided or proved inaccurate<sup>4</sup> or that a certain period of time had elapsed since the contract was made;<sup>5</sup> written notice of avoidance had to be given before a certificate of title relating to the land had issued.
- [11] That approach was criticised by commentators: it enabled a vendor to desist from giving a s 10 notice until a certificate of title issued, after which point the purchaser lost his or her right to avoid. The unfairness was noted in the second reading speech to the *Land Sales Act Amendment Act 1985* (Qld), which amended s 10 so that the duty now operated until “a registrable instrument of transfer that relates to the land in question has been delivered by the vendor or the vendor’s agent to the purchaser or the purchaser’s agent”; correspondingly, notice of avoidance was to be given before the registrable instrument of transfer was provided.<sup>6</sup> “Registrable instrument of transfer” was defined, for freehold land, as “a memorandum of transfer of the land in favour of [the] purchaser capable of being registered in the office of the Registrar of Titles”. The notion of delivery of the memorandum of transfer by the vendor or the vendor’s agent reflected, his Honour considered, what happened on completion or settlement of the contract.
- [12] Section 9 was not amended at that time. But his Honour observed that the legislature had intended by the alteration to alter the balance between vendor and purchaser so as to give greater protection to the latter. The date for completion was an obvious date for the legislature to choose in determining the point at which the

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<sup>3</sup> Section 8.

<sup>4</sup> Section 13.

<sup>5</sup> Section 15.

<sup>6</sup> Section 13.

right to avoid the contract should end. If the construction contended for by the vendor were correct, the amendment would not have assisted: it would still be possible as soon as the separate certificate of title issued to send the purchaser's solicitor a transfer, subject to the condition that it not be registered prior to completion, thus extinguishing the purchaser's right to avoid. It was unlikely that the legislation intended thus to make the time in which the purchaser retained the right to avoid subject to unilateral termination by the vendor.

- [13] In 1985, by a second amending Act, the *Land Sales Act Amendment Act (No 2) 1985* (Qld), the definition of registrable instrument of transfer was amended; the qualification as to its being properly stamped was introduced. Section 10 was redrawn to require provision of a copy plan of survey if it altered from the original. Where that requirement came into being, a vendor could not deliver a registrable instrument of transfer and the purchaser was not required to pay the outstanding purchase moneys until 30 days after receiving the copy plan of survey. Effectively that meant, his Honour said, that completion was not to occur for 30 days after the plan was received; another reason for supposing that the delivery of a registrable instrument of transfer meant delivery on completion.
- [14] In 1997 the *Land Sales and Land Title Amendment Act 1997* (Qld) introduced s 9 in its current form. Section 10 now dealt with significant variation notices, including a proscription on the vendor, having given such a notice, asking the purchaser to pay the balance of the purchase price or giving a purchaser a registrable instrument of transfer before the end of the prescribed period.<sup>7</sup> Again, his Honour considered, what was being spoken of was completion.
- [15] The learned judge accepted that the expression "capable of immediate registration" should be given the meaning ascribed to it, in a contractual context, in *Cawood v Infraworth Pty Ltd*.<sup>8</sup> In that case the standard form of contract required the vendor to provide a transfer in the purchaser's favour "capable of immediate registration (after stamping)". At the time of settlement there were two caveats on the title, although requests for withdrawal of both had been lodged in the Titles Office and the withdrawals passed for registration. However, until the withdrawals were registered, no further dealing with the land would be registered. The question was whether the transfer given to the purchaser was "capable of immediate registration". A majority of the Full Court took the view that the expression should be construed with regard to general conveyancing practice. The word "immediate", the majority concluded, was not meant to have a temporal connotation, but should be read as entitling the purchaser in that case to have delivered to him a memorandum of transfer directly in his favour from the registered proprietor, without need for any intervening registration.
- [16] However, the learned judge at first instance considered, the correspondence of the expression in the definition in s 6 with that used in relation to completion in the standard contract under discussion in *Cawood* was another indication that what the Act contemplated was the handing over of the transfer on completion. The transfer in this case was not capable of registration because the purchaser was not entitled to lodge it for registration; to do so would have been a breach of the contract and in breach of the undertaking on the basis of which it was provided to the purchaser's

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<sup>7</sup> Sub-section (3).

<sup>8</sup> [1990] 2 Qd R 114.

solicitors, as well as a fraud on the vendor. The definition of registrable instrument of transfer did not refer merely to a document in the correct form but to a document capable of being registered lawfully. The Act had a consumer protection element and should be strictly applied.

**The submissions on appeal**

- [17] The many proposed grounds of appeal turned, essentially, around an alleged error in his Honour’s reasoning: that the right of the purchaser to avoid subsisted until completion of the contract. Counsel for the vendor argued that on a literal reading of s 9(5), the vendor had given the purchaser the registrable instrument of transfer. His Honour had taken a purposive approach pursuant to s 14A of the *Acts Interpretation Act 1954* (Qld), but the construction he had preferred was not genuinely open, nor did it best achieve the purpose of the Act.
- [18] His Honour’s approach assumed, it was said, that sub-s 9(5) contemplated completion of the contract; but there were many agreements which would result in the transfer of a proposed allotment, but which would not fit within the terms “contract” and “settlement” or “completion”. It was clear, therefore, that the range of arrangements contemplated was much broader than the ordinary contract of sale, but his Honour’s approach did not accommodate such arrangements. In designing s 9(5) the legislature had to determine a trigger which would extinguish the purchaser’s right to avoid in a context wider than that of settlement of the contract. It could have specified that the right to terminate remained until settlement, but it did not do so in any of the Act’s incarnations.
- [19] The learned judge had taken the view that the original amendment of s 10 to impose a duty continuing until “a registrable instrument of transfer ... has been delivered by the vendor or the vendor’s agent” was a description of what happened on settlement; but “the vendor’s agent” was defined in the Act as meaning “anyone procuring another to purchase”; which could mean a real estate agent, not the vendor’s solicitor.
- [20] The necessary inquiry, it was submitted, was purely as to the form of the transfer document without regard to the wider contractual environment. Section 153 of the *Land Title Act* permitted the Registrar to register an instrument only if it complied with the Act and appeared on its face to be capable of registration; that in itself indicated that registrability should be regarded as a question of form. Here, the transfer was “capable of immediate registration” in the sense that it was accurate on its face and met the technical requirements of the Titles Office as to form and content. It was not a question of whether the document was capable of being immediately used to be registered. The word “immediate” was not much more than a historical curiosity without any particular work to do.
- [21] To the objection that this transfer was undated, the vendor relied on the decision of Dutney J in *Kelly v Arkdev Pty Ltd; Kelly v Harling Queensland Pty Ltd*.<sup>9</sup> The contract in that case contained the usual obligation on the vendor to provide a transfer capable of immediate registration. There was an error in the name of the vendor as recorded on the transfer: the word “Queensland” in its title had been abbreviated to “(Qld)”. Two officers of the Titles Registration Office said it was unlikely that the transfer would be requisitioned, and if it were, a statutory

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<sup>9</sup> [2005] QSC 318.

declaration would overcome the problem. Dutney J reached the conclusion that this discrepancy was of such minor importance that the transfer was a transfer capable of immediate registration as the contract required. The case demonstrated, the vendor argued, that some level of tolerance to minor errors had to be incorporated in considering what was formally required in the transfer.

- [22] The purchaser's submissions supported and did not significantly expand on his Honour's reasons.

### **The relevant provisions of the Act**

- [23] The objects of the *Land Sales Act* are set out by s 2. They include
- “(a) to facilitate property development in Queensland; and
  - (b) to protect the interests of consumers in relation to property development; and
  - (c) to ensure that proposed allotments and proposed lots are clearly identified ...”.

Section 6 contains a number of relevant definitions. In particular, “agreement” is defined as including “a written contract of sale, or another instrument, under which a sale or purchase is entered upon”. “Purchase” is given a wide range of meanings, one of which is “sign an instrument that is intended to legally bind a signatory to purchase”. The definition of “sale” is in correspondingly wide terms.

- [24] Part 2 of the Act deals with the sale of proposed allotments but is confined in its application to smaller transactions (those involving the sale or purchase by one individual of fewer than six proposed allotments).<sup>10</sup> Section 8 restricts sales, which may only be made where there is a development permit in place or, if it is State leasehold land, the Minister's approval has been obtained for subdivision.
- [25] Section 9(1) requires a vendor to give the purchaser a disclosure plan and disclosure statement for the proposed allotment or, alternatively, an approved copy of the plan of survey. A penalty is prescribed for non-compliance: 100 penalty units or six months imprisonment. Sub-section (2) sets out what the disclosure plan must include, while sub-s (3) prescribes the contents of the disclosure statement. Sub-section (5), as already noted, deals with the right to avoid on contravention, by written notice given before the vendor gives the purchaser the registrable instrument of transfer. Minor failures of disclosure do not lead to a right to avoid; contraventions of the requirements in s 9(3)(a) and (b) to give the parties' full names and addresses or in (h) to state the day the statement is signed, are excluded from the sub-section's application.
- [26] Section 10 contains requirements for the vendor to give the purchaser a significant variation notice if there is a significant variation between the disclosure plan and an approved plan of survey for the purposed allotment that the vendor proposes to register, or between the disclosure plan and a copy of the plan showing the constructed works. That obligation applies as long as the vendor has not given the purchaser a registrable instrument of transfer.<sup>11</sup> “Significant variation” is defined in sub-s (5) as meaning:

“*significant variation* means-

- (a) in the details between a disclosure plan and a survey plan-

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<sup>10</sup> Section 7A.

<sup>11</sup> Section 10(1)(a).

- (i) a variation of more than 2% in details of area; or
- (ii) a variation of more than 1% in details of linear dimensions;
- or
- (b) in the details between a disclosure plan and an as constructed plan - a variation of more than 500 mm in height in details of surface contours or fill levels.”

Again, there is a penalty of 100 penalty units or six months imprisonment for non-compliance.

- [27] Once a significant variation notice is given, the purchaser has, for 30 days or another agreed period, a right to avoid, and the vendor may not, during that same period, ask for the balance of the purchase price or give the purchaser a registrable instrument of transfer.<sup>12</sup> If the vendor fails to give the significant variation notice within 14 days of being given the plan of survey in the terms prescribed by s 10(2) the purchaser can avoid the instrument relating to the sale by written notice before the vendor gives the purchaser the registrable instrument of transfer for the allotment.<sup>13</sup>
- [28] Section 10A requires the vendor to give the purchaser the registrable instrument of transfer for the allotment not later than 18 months after the purchaser enters upon the purchase.<sup>14</sup> Similarly, he must also provide a copy of the registered survey plan, for operational work and a plan showing the constructed works, and a statement certified by a cadastral surveyor that there are no variations between the disclosure plan and the registered survey plan, or if there are variations, details of the nature and the extent of them.<sup>15</sup> If a vendor contravenes the requirement to provide the registrable instrument of transfer and the surveyor’s certified statement, he commits an offence, and the purchaser may avoid the contract by written notice given before the vendor provides a registrable instrument of transfer.

### Conclusions

- [29] Although it is not strictly necessary for me to decide the point, the vendor is, in my view, correct in its argument that s 9(5) does not necessarily contemplate completion of the contract as the relevant time at which the purchaser’s right to avoid is ended. The Act clearly envisages a variety of transactions, and there is nothing to say that the delivery of the registrable instrument of transfer will be contemporaneous with the payment of the settlement price. Indeed, s 10(3)(b) suggests that the two are independent events, in requiring that the vendor neither ask the purchaser to pay the balance of the purchase price **nor** give the purchaser a registrable instrument of transfer. The fact that s 10A(1) requires the vendor to give the purchaser the registrable instrument of transfer for the allotment not later than 18 months after the purchase is entered, but does not, within the same period, require settlement, also suggests that the two events are not synonymous.
- [30] It is entirely possible, then, that the vendor could give the purchaser a registrable instrument of transfer, within the meaning of s 9(5), at a time in advance of settlement, thus curtailing the right of the purchaser to avoid. In doing so of course, it risks enabling the purchaser to register a transfer before paying the balance of the

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<sup>12</sup> Section 10(3).

<sup>13</sup> Section 10(4)(a).

<sup>14</sup> Sub-section (1).

<sup>15</sup> Sub-section (3).

purchase price. But nothing in the language of the Act suggests otherwise. A measure of protection for the purchaser against a hasty provision of a registrable instrument of transfer is afforded by ss 9 and 10. The vendor must, on penalty of imprisonment for non-compliance, provide the disclosure plan. He might then seek to register a survey plan immediately so as to be in a position to obtain a real property description for the allotment and give the purchaser the registrable instrument of transfer, thus bringing to an end the purchaser's rights to avoid. But if the plan of survey he proposes to register, or the "as constructed" plan differ, in the case of the former, as to area and linear dimensions by more than the specified percentages, or in the case of the latter, by more than 500 mm in height as to service contours or fill levels, he is obliged to give a significant variation notice. Thereafter, the prescribed period during which the purchaser may avoid the sale agreement runs, and is unalterable by any unilateral action on the vendor's part. Those provisions thus ensure, consistently with the Act's objects, that the allotment is properly identified to the purchaser before he or she is required to complete by payment of the purchase price.

[31] Although I conclude that s 9(5) by its terms does not give a right of avoidance until settlement, there remains the question of whether provision of the transfer document, subject to a condition that it not be used for any purpose other than stamping, amounted to delivery of an instrument of transfer capable of immediate registration. I can say at once that the vendor is, I consider, correct in arguing that the transfer document was provided by it to the purchaser's solicitors for them to arrange stamping on her behalf; it was not provided for any purpose of the vendor and thus was not provided to them as agents for the vendor.

[32] But there are difficulties with the vendor's other arguments. It relied on what was said to be the literal approach to s 9(5); but it contended that the word "immediate" in the definition of "registrable instrument of transfer" should be given no effect at all, a notion which runs counter to the rule that:

"a court construing a statutory provision must strive to give meaning to every word of the provision."<sup>16</sup>

It had recourse to the common law: *Cawood v Infraworth Pty Ltd* was relied on for the proposition that "immediate" had no temporal connotation; but if registrability is purely a matter of form, contrary to the reasoning in that case, an obstacle such as the need for an intervening registration would have no bearing. And although whether the instrument of transfer was registrable was a pure matter of form, on this argument minor irregularities were to be overlooked, even though (as in *Kelly v Arkdev*) that might involve an inquiry into circumstances beyond the face of the document itself.

[33] Although it is unnecessary for the purposes of this case to set down the parameters of what constitutes an instrument of transfer capable of immediate registration, I do not think that the provision of a transfer document which is specifically barred from registration meets the description "capable of immediate registration". The construction given the expression in contractual contexts is of limited assistance, because in those instances interpretation must necessarily be governed by the objective intention of the parties as evinced by the contract as a whole; including, of course, terms as to settlement.

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<sup>16</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, at 382.

- [34] It is to be presumed that an expression is used consistently through an Act;<sup>17</sup> there is no reason to depart from that assumption in relation to this Act. Section 10A(1) ensures that the purchaser receives a registrable instrument of transfer within 18 months after entering on the purchase; it seems improbable that that requirement could be met by the vendor's providing a transfer with a caveat on its registration. To do so would be to defeat the section's evident purpose of ensuring that the purchaser has some reasonable degree of certainty about the time frame within which the matter will proceed. Nor do I think it meets that aim to suggest that the question of registrability is purely a question of form. And the purpose of consumer protection, made explicit in the objects section of the Act, is certainly not met by a construction which is confined to the purely formal requirements of the document and gives the word "immediate" no role at all.
- [35] The requirement of being capable of immediate registration is not met by a transfer which on its face is compliant with the requirements of the Registrar but is practically incapable of being registered. The better view, in my opinion, is that "immediate" should be construed as meaning that there is no real impediment to registration, a matter which may be a question of evidence. In this case the dealings between the parties were such that it was upon settlement that the transfer would become capable of immediate registration; but that was the result of their arrangements rather than any legislative prescription.
- [36] While it follows from what I have said that I respectfully disagree with his Honour's view that the expression "registrable instrument of transfer" means the transfer document as provided on settlement, I concur with his further reasoning, that the limited purpose for which the instrument of transfer was provided meant that it was not capable of immediate registration. Consequently I conclude that the declarations and order were rightly made.
- [37] Given the significant and novel question of construction involved I would grant leave to appeal, but dismiss the appeal. The applicant should pay the respondent's costs.
- [38] **LYONS J:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with the reasons of Holmes JA and with the orders proposed.

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<sup>17</sup> *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, at 452; *R v Central Cane Prices Board; Ex parte Colonial Sugar Refining Co Ltd* [1917] St R Qd 1, at 11; *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529, at 539.