SUPREME COURT OF QUEENSLAND

CITATION:	*Questcrown P/L v Insignia Towers (Southport) P/L* [2007] QCA 378
PARTIES:	**QUESTCROWN PTY LTD** ACN 099 232 407 (applicant/respondent) **v** **INSIGNIA TOWERS (SOUTHPORT) PTY LTD** ACN 115 729 783 (respondent/appellant)
FILE NO/S:	Appeal No 3515 of 2007 SC No 2353 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2007
JUDGES:	McMurdo P, Mackenzie J and Atkinson J Separate reasons for judgment of each member of the Court, McMurdo P and Mackenzie J concurring as to the orders made, Atkinson J dissenting
ORDER:	**Appeal dismissed**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – ILLEGAL AND VOID CONTRACTS – CONTRACTS ILLEGAL BY STATUTE – PARTICULAR STATUTES – whether requirement was in breach of s 73 *Workplace Health and Safety Regulations 1997* (Qld) – where vendor failed to comply with s 73 in that no inspection for asbestos was conducted – whether breach the Asbestos Management Code created an illegal contract or a contract contrary to public policy *Trade Practices Act 1974* (Cth), s 52, s 57 *Queensland Building Services Authority Act 1991* (Qld) *Workplace Health and Safety Act 1995* (Qld), s 24(1) *Workplace Health and Safety Regulation 1997* (Qld), s 73 *Connor v S P Bray Ltd* (1937) 56 CLR 464, cited *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, applied *Holman v Johnson* (1775) 1 Cowp 341 at 343; 98 ER 1120 at

1121, cited
Nelson v Nelson (1995) 184 CLETTER 538, cited
Rogers v Brambles Australia Ltd [1998] 1 Qd R 212, cited
Schiliro v Peppcorn Child Care Centres Pty Ltd (No 2) [2001] 1 Qd R 518, cited
Schulz v Schmauser & Anor [2000] QCA 17, cited
St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267, considered
Sutton v Zullo Enterprises Pty Ltd [2000] 2 Qd R 196, cited
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, applied

COUNSEL: D J Topp for the appellant
D G Clothier for the respondent

SOLICITORS: Mortimore & Associates for the appellant
Brian Bartley & Associates for the respondent

[1] **McMURDO P**: The facts and issues are set out in Atkinson J's judgment so that I can explain my reasons for refusing the appeal much more briefly than otherwise.

[2] Questcrown Pty Ltd ("Questcrown") entered into a contract on 20 September 2006 to sell commercial property at 67-71 Nerang Street, Southport to Insignia Towers (Southport) Pty Ltd ("Insignia") for $14 million. The contract was subject to Insignia's due diligence[1] with a due diligence period of 49 days. The sale was also "*as is, where is*" subject to all faults and defects whether or not apparent.[2] Insignia was obliged under the contract to carry out "extensive and comprehensive investigations in relation to the Property" and satisfy itself in relation to matters including whether the building or other structures erected on the land complied with the terms of any Act or regulation.[3] The contract in its ultimate form provided that the deposit to be paid by Insignia was non-refundable unless the contract was terminated through Questcrown's default in performing its obligations under it.[4]

[3] Insignia did not pay the $500,000 final instalment of the deposit by 16 February 2007 as required under the contract. On 26 February 2007, the settlement date, it wrote to Questcrown contending that Questcrown had breached s 73 *Workplace Health and Safety Regulation 1997* (Qld) ("the Regulations"). It offered to grant Questcrown an extension of the settlement date on terms to enable Questcrown to comply with its s 73 obligations. Questcrown responded by denying Insignia's right to terminate the contract and electing itself to terminate the contract because of Insignia's default in not paying the final instalment of the deposit and the balance of the purchase price.

[4] Questcrown brought an application seeking (relevantly) a declaration that Insignia's deposit paid under the contract had been validly forfeited and also judgment in its favour against Insignia for the unpaid balance of the deposit together with interest.

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1 Special conditions, cl 5.1.
2 Special conditions, cl 6(a).
3 Special conditions, cl 6(d)(ii).
4 See cl 2(d) of the first deed of variation.

The matter came on before the applications judge in the trial division of this court. Insignia contended that its contract with Questcrown was void as contrary to public policy because of Questcrown's non-compliance with s 73 of the Regulations and alternatively that Questcrown in offering the premises for sale was guilty of misleading and deceptive conduct under s 52 *Trade Practices Act 1974* (Cth). In response to the judge's enquiry as to whether Insignia sought an adjournment, Insignia's counsel stated that he was instructed there was no further evidence that could be provided on the issues for determination and he was content for the hearing to proceed.

[5] The applications judge made orders including a declaration that Insignia forfeit the deposit it paid to Questcrown and judgment against Insignia for the outstanding portion of the deposit together with interest. Insignia was also ordered to pay the costs of and incidental to the proceeding.

[6] Insignia appeals against those orders contending that the judge erred in not finding that its contract with Questcrown was always void because of Questcrown's failure to comply with s 73 of the Regulations and in failing to find that Questcrown engaged in misleading and deceptive conduct in breach of s 52 *Trade Practices Act* by offering the property for sale without first complying with s 73 of the Regulations. Insignia also contends that, even if these contentions are not conclusively made out, the judge erred in any case in giving summary judgment when Insignia had real prospects of defending Questcrown's application and in counterclaiming.

Was the contract void because of s 73 of the Regulations?

[7] Whether the contract was void because it was expressly or impliedly prohibited by s 73 of the Regulations is a question of construction of that statutory provision: *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*.[5] If the legislative purpose of s 73 can be fulfilled without finding the contract void and unenforceable, the contract will be construed as valid: see *Fitzgerald v F J Leonhardt Pty Ltd*[6] and *Tonkin v Cooma-Monaro Shire Council*.[7]

[8] The Regulations were made under the *Workplace Health and Safety Act 1995* (Qld) ("the Act").[8] The objective of the Act is to prevent a person's death, injury or illness being caused by or at a workplace[9] by preventing or minimising a person's exposure to the risk of death, injury or illness caused by or at a workplace[10] through the establishment of a framework for preventing or minimising exposure to risk by imposing workplace health and safety obligations on persons who may affect the health and safety of others by their acts or omissions.[11] The Act states that the achievement of its objectives will help reduce the human cost; the financial burden; the burden on the workers' compensation scheme and related costs imposed on industry relating from such deaths, injuries and illnesses and maintain the community standard for workplace health and safety which is eroded when persons

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5 (1978) 139 CLR 410, Gibbs ACJ at 413, Mason J at 423 (Aickin J agreeing at 436) and Jacobs J at 430.

6 (1997) 189 CLR 215, McHugh and Gummow JJ at 227;

7 [2006] NSWCA 50, [72].

8 The Act, s 26.

9 The Act, s 7(1).

10 The Act, s 7(2).

11 The Act, s 7(3)(a).

gain an unfair competitive advantage by not implementing appropriate standards.[12] Part 3 of the Act imposes workplace health and safety obligations, breach of which results in a maximum penalty of 500 penalty units or six months imprisonment for a standard breach and up to 2000 penalty units or three years imprisonment if the breach causes multiple deaths.

[9] Section 73 of the Regulations required Questcrown as owner of a structure that is a workplace[13] to comply with the Asbestos Management Code ("the AMC") either on or before 1 January 2008 or before offering the property for sale.[14] This was a workplace health and safety obligation under the Act.[15] For the purposes of its summary application only, Questcrown was prepared to accept that its offering the property for sale to Insignia without complying with s 73 of the Regulations was an offence against the Act.[16] But neither the Regulations nor the Act expressly made it an offence for the owner of property on which there was a structure that is a workplace to enter into a contract to sell the property without complying with the AMC and nor did they expressly state that any such contract would be void. But was that the implied effect of the legislative scheme?[17]

[10] The Act was plainly aimed at the commendable objective of protection of the public in the workplace. Consistent with this objective is the protection of the public in the workplace from asbestos-related injury. But making commercial contracts for the sale of premises illegal and therefore always void when the AMC is not met before the vendor offers the premises for sale is not something which is necessary to provide protection to the public in the workplace. That is because any obligation under s 73(1), if not met by the vendor prior to sale, shifts to the new owner at settlement. The language of the applicable legislative provisions making it an offence to offer for sale premises containing a structure which is a workplace without complying with the AMC is directed, not at preventing owners from selling such premises, but at ensuring owners comply with the AMC on or before 1 January 2008. This has the result that the public in the workplace is protected from asbestos-related injury, consistent with the objectives of the legislative scheme. It seems improbable that, in the absence of the clearest of language, the legislature intended to invalidate all contracts made as a result of offers to sell in breach of s 73.

[11] We have not been referred to any cases comparable to the present factual and legislative scenario where courts have found like contracts to be illegal and therefore always void. Many of the cases where courts have found contracts to be illegal involved an unlicensed or unqualified person acting in a capacity to enter into the contract.[18] They are clearly distinguishable from the present case.

[12] Insignia submits that its position receives support from cases such as *Schulz v Schmauser*[19] and *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2).*[20]

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12 The Act, s 7(4)(a)-(d).
13 See the Regulations, s 72.
14 Above, s 73(2) and (5).
15 Above, s 73(4).
16 See the Act, s 24(1).
17 See *Yango* (1978) 139 CLR 410
18 See, for example, *Cope v Rowlands* (1836) 2 M&W 149, 150 ER 707 and *Cornelius v Phillips* [1918] AC 199.
19 [2001] 1 Qd R 540; [2000] QCA 17, Appeal No 9022 of 1998, 11 February 2000.

Insignia now contends that it has a civil cause of action under the Act because of Questcrown's alleged breach of s 73 of the Regulations. I am not entirely sure whether Insignia's claim to a civil cause of action against Questcrown under the Act is said to assist its claim that the contract with Questcrown is void or whether it contends it is entitled to damages comparable to those claimed by it under s 52 *Trade Practices Act*.

[13] *Schulz* and *Schiliro* held that s 28 of the Act, and its broadly comparable predecessor (s 9 *Workplace Health and Safety Act 1989* (Qld)), provided a civil cause of action to an employee injured at work. As this Court explained in *Schiliro*, the scope of the Act in an historical and policy context demonstrates an intention to add to the common law duty of care in the interests of employee safety. That consideration is entirely absent in the present case which concerns the responsibilities of two companies of apparently equal bargaining power under a $14 million commercial contract for the sale of premises, the owner of which must comply with the AMC by 1 January 2008. See also *Heil v Suncoast Fitness*[21] and *Percy v Central Control Financial Services Pty Ltd*.[22] The Act and the Regulations did not, on the limited facts placed before the primary judge, give Insignia a civil cause of action.

[14] As s 73 of the Regulations did not clearly prohibit, either expressly or by implication, the making or performance of the contract entered into by Insignia and Questcrown, the fact that Questcrown may have breached s 73 does not affect its rights against Insignia and Insignia's obligations under the contract. The ground of appeal fails.

Misleading or deceptive conduct?

[15] Insignia contends that Questcrown's failure to inform it of its non-compliance with s 73 meant that, had it completed the contract, it would have inherited Questcrown's obligations to comply with the AMC within a very short time (by 1 January 2008). It contends that this amounted to misleading and deceptive conduct on Questcrown's part under s 52 *Trade Practices Act* as a result of which Insignia suffered detriment; the court was required to declare the contract void under s 87(2)(a) *Trade Practices Act*.

[16] The contract was due to settle on 26 February 2007, 10 months before the required date for compliance with the AMC. Insignia provided no evidence at the hearing relevant to a claim under s 52. Its counsel did not take up the judge's offer to consider an application for an adjournment but stated Insignia had no further evidence to assist its case. In the absence of competing evidence, the "due diligence" and "as is, where is" conditions of the contract undermined Insignia's assertion of a claim under s 52. The contract was a commercial one between parties of apparently equal bargaining power. Its terms made very clear that Insignia carried the responsibility of satisfying itself about aspects associated with purchasing the property such as any obligations it may inherit as owner under s 73 of the Regulations. This ground of appeal also fails.

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20 [2001] 1 Qd R 518.
21 [2000] 2 Qd R 23.
22 [2002] 1 Qd R 630.

Conclusion

[17] Insignia's contentions, neither now nor at first instance, raise an arguable ground of defence to Questcrown's application for a declaration for the forfeiture of the deposit paid by Insignia under the contract and for summary judgment against Insignia for the unpaid portion of the deposit and interest. The primary judge's orders were correct. The appeal should be dismissed with costs.

[18] **MACKENZIE J:** The facts and the principles to be distilled from relevant authorities are set out in the reasons of Atkinson J. I am grateful to adopt what has been written in that regard, but I differ as to the conclusion to be drawn for the reasons that follow.

[19] In *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, Gibbs ACJ applied, with approval, Devlin J's observation in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 at 287, which is as follows:

> "The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way: one must have regard to all relevant considerations and no single consideration, however important, is conclusive."

[20] Section 73 of the *Workplace Health and Safety Regulation 1997* (Qld) ("*WHSR*") is applicable by a combination of s 73(1) and (2). An obligation was cast upon the respondent, as owner, to comply with the Asbestos Management Code because a relevant event, offering the property for sale, (s 73(5)), was proposed. According to s 73(2) the respondent was obliged to comply with the Asbestos Management Code before the offer for sale was made. Section 73(4) provides that s 73(1) and (2) are "workplace health and safety obligations for the Act".

[21] Section 24(1) of the *Workplace Health and Safety Act 1995* (Qld) ("*WHSA*") provides that a person on whom a workplace health and safety obligation is imposed must discharge that obligation. A range of penalties defined by reference to the consequences of the breach are prescribed. For each of the categories of penalties, a monetary penalty or imprisonment is available as a sentencing option if the obligation is not carried out.

[22] There is, however, no prohibition against a purchaser entering into a contract where s 73 *WHSR* has not been complied with by the vendor. Neither is there any express prohibition on such a contract being entered into, nor any legislative declaration that a contract entered into is unlawful or void. Unless "offer", which is not specially defined, and which is a well understood term in the law of contract, has an unusual meaning, it would arguably not be a contravention of s 73 for an owner to accept an offer to purchase made to him by someone who wished to purchase the property, at least where the offer to buy was the initiation of the transaction and the initial offer was accepted by the vendor without any subsequent bargaining. It was not suggested in submissions or in the record that, if a transfer of land in respect of which the vendor had not complied with the obligation in s 73 were presented for registration in the Land Titles Office, it would not be registered. Upon registration indefeasible title would be conferred on the purchaser.

[23] All of these factors suggest that it was not the legislative intention to render a contract entered into by a vendor who had not complied with s 73 unlawful or void

or of no effect. If such an outcome was intended, it is difficult to understand why the provision would not have said so directly.

[24] A major premise of the appellant's argument is that, by analogy with *Rogers v Brambles Australia Ltd* [1998] 1 Qd R 212 and *Schulz v Schmauser* [2001] 1 Qd R 540, a civil cause of action was created for a breach of the obligation imposed by the Act. If that is correct, the argument runs, it would be unjust and unconscionable and/or contrary to public policy for the appellant to be forced to complete a contract in a situation where the other contracting party has breached a workplace health and safety obligation "which breach sounds in a civil cause of action" in favour of the appellant as the innocent party. Both of the authorities relied on were concerned with whether the predecessor of the present *WHSA* created a private cause of action in favour of an employee injured in the workplace. *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [2001] 1 Qd R 518 established a similar principle under the present Act in cases where employees are injured in the workplace.

[25] The impreciseness of the analogy between these cases and the present case is underlined by Dixon J in *O'Connor v S P Bray Ltd* (1937) 56 CLR 464, 478, where he says:

> "Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears."

There is not a valid analogy between a right of action of that nature and the kind of action asserted that forms the basis of the appellant's primary argument.

[26] The second limb of the appellant's argument was that it was an implied term in the contract that there was a representation by conduct, by offering the building for sale, that the appellant had complied with the obligation under s 73 of *WHSR*. Because it had not, the representation was misleading or deceptive conduct. Alternatively, it was submitted that there was misleading or deceptive conduct by omitting to disclose that the Asbestos Management Code had not been complied with. The argument proceeded on the premise that the applicant would have had to assume the obligation of complying with the Code, which may be doubted having regard to s 73(3). In any event, the argument proceeded that, notwithstanding that the contract was not settled, s 87(2)(a) of the *Trade Practices Act 1974* (Cth) empowered a court to declare a contract void and if the court thought fit, void *ab initio*.

[27] The contract entered into by the parties was unusual in that a number of the standard terms and conditions were replaced with other terms including one that the property was being bought "as is, where is", and that the appellant had satisfied itself as to a variety of matters concerning compliance with statutory and other requirements, which had the effect of shifting the responsibility of conducting and making enquiries to the appellant. The appellant was entitled to terminate the contract within the due diligence period if it was not satisfied with the outcome of its due diligence enquiries. The respondent argued that the parties were commercial entities and had bargained at arms' length in making the contract.

[28] The appellant submitted that, because the obligation to comply with the Asbestos Management Code was a personal one that rested upon the respondent, it was impermissible to rely on the terms of the contract. In one sense that is true. There is no doubt that it is correct to say that the obligation was one cast upon the respondent, and it became liable to penalty if it did not discharge it. But the terms of the contract which the appellant freely entered into make it difficult to establish that any representation was relied on. There is also no evidence that the appellant had become aware of the implied misrepresentation except to the extent that it was raised on the last day when settlement might be effected. An opportunity to have the application adjourned extended by the judge for the purpose of adding context and content to this aspect of the case was declined because, it was said, no further evidence could be produced.

[29] On the evidence before the judge at first instance, I am satisfied that no error has been demonstrated and that the appeal should therefore be dismissed.

[30] **ATKINSON J**: This is an appeal against orders made on the summary hearing of an originating application which was amended by leave on the day of hearing. The orders made reflect the amended originating application which was before the court. Those orders were:

1. That Caveat Dealing No. 710386475 be removed forthwith.

2. Declare that the amount of $500,000 paid by the respondent to the applicant as part of the deposit payable pursuant to the contract (as amended) which is exhibited to the affidavit of Graeme Angus Ingles filed in these proceedings has been validly forfeited by the applicant.

3. That there be judgment for the applicant against the respondent in the amount of $504,246.55, inclusive of interest to the date of judgment.

4. That the respondent pay the applicant's costs of and incidental to the proceeding to be assessed.

[31] The removal of the caveat was not opposed either at the hearing or on appeal. However, the appellant sought to have paragraphs 2, 3 and 4 of the orders set aside and the matter remitted to the trial division so that it may proceed to trial in the ordinary way, that is to continue as if started by claim.

Summary determination of originating process

[32] The *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), as is made explicit in r 5(1), are designed "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". A civil proceeding may be started in the Supreme Court by claim or by application (r 8 (2)). Ordinarily a proceeding must be started by claim, pursuant to r 9, unless the UCPR require or permit the proceeding to be started by application. Relevantly for this matter, an application is permitted to be the originating process, pursuant to r 11 (a), if "the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely". If the court considers that a proceeding started by application should have been started by claim or may more conveniently be started by claim, then it may, pursuant to r 14 (2) (a), order that the proceeding continue as if started by claim.

[33] The UCPR encourage the early determination of proceedings wherever possible. In a proceeding started by claim, the plaintiff may obtain judgment by default if no defence is filed within the time allowed by rules (r 281), or obtain summary judgment pursuant to r 292. It is settled law that the words of that rule need no further gloss.[23] The goal of expeditious resolution at a minimum of expense is met by the court's capacity to give summary judgment; the goal of just resolution of the real issues is protected by the requirement of the court to be satisfied both that the defendant has no real prospect of successfully defending all or part of the claim and that there is no need for a trial of the claim or part of the claim, as well as the residual discretion to refuse summary judgment even where both those requirements are satisfied.

[34] One consequence of the proceeding being started by application is that there is no claim or statement of claim to set out the issues (r 149). No defence will have been filed which would serve to confine the issues to be litigated (r 134). An application need only set out the orders or other relief sought.

[35] Because an application is apt for use when there is no need for a trial, there is no need for an equivalent rule to r 292 for the summary disposition of an originating process which is in the form of an application. By analogy, the test must be that the court has a discretion to grant the orders sought in such an application if the respondent has no real prospect of successfully opposing the making of the orders and there is no need for a trial. The second ground should ordinarily be made out where the originating process has properly been by way of application as a proceeding may only be started by application where a substantial dispute of facts is unlikely.

[36] The first ground may be somewhat more troublesome where there are no pleadings to confine the issues in the proceeding. The respondent must have no real prospect of successfully opposing the orders sought on any ground. If it has no real prospect of opposing one or more of the orders sought in the application, then those orders should be made. Conversely if the applicant has no real prospect of having one or more of the orders made, then the application should to that extent be summarily dismissed. In any other situation, an application which is an originating process should in the usual case proceed to trial as if started by claim. The respondent has an evidentiary onus to raise the grounds on which it has a real prospect of opposing the orders sought but the onus lies on the applicant at all times to satisfy the court that the respondent has no real prospect of opposing the orders sought and that there is no need for a trial of the action. The applicant in this case so satisfied the learned primary judge. The respondent appealed to this Court and will hereafter be referred to as the appellant.

[37] The appellant argued that the appeal should succeed because the contract on which the respondent relied as applicant in the application was arguably void or unenforceable for illegality or because it would be contrary to public policy to enforce it. The appellant also argued that the respondent was in breach of an implied term to do all that was necessary to give the appellant the benefit of the contract and that the respondent had engaged in misleading and deceptive conduct. If there were pleadings, this would have to be pleaded in the defence. If the claim that the contract was void or unenforceable for illegality is arguable then the matter

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[23] *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232.

should proceed to trial as if started by claim. The first question to be determined on this appeal is whether or not the contract is void or unenforceable because of illegality.

The factual matrix

[38] For the purposes of the summary determination of application, the respondent to the appeal was prepared to act on a certain assumption of facts some of which would be contested if the matter were to proceed to trial. Those facts were as follows. By contract dated 20 September 2006 ("the contract") the respondent agreed to sell to the appellant property at 67-71 Nerang Street, Southport ("the property") for $14,000,000. The contract was in a standard REIQ form for the sale of commercial land and buildings, together with some special terms set out in Annexure A. The contract was subsequently varied by two Deeds of Variation.

[39] The deposit under the original contract for the sale of the land was $100,000. Clause 3.2 of the standard conditions of contract provided that if the appellant failed to pay the deposit, it was in substantial breach and the respondent might affirm or terminate the contract and exercise its rights under clauses 13.2 or 13.3 respectively. If the respondent terminated the contract for the appellant's failure to pay the deposit it was entitled to declare the part of the deposit paid as forfeited and to recover as a liquidated debt any part of it which had not yet been paid. Clause 11 provided that any monies not paid when payable would bear interest from the due date for payment and that any judgment for such money would likewise bear interest from the date of judgment to the date of payment.

[40] Clause 26 provided that, except as otherwise provided in the contract, time should be deemed to be of the essence of the contract. Clause 25.1, however, provided that completion was to be effected at such time and place as might be agreed upon by the parties between the hours of 9.00 am and 5.00 pm on the date for completion.

[41] Under the special conditions of the contract a number of the clauses in the standard commercial terms were deleted. These had the effect of shifting much of the risk to the appellant. Clause 5 of the special conditions provided that the contract was subject to the purchaser's due diligence which must be carried out within 49 days of the contract date. By clause 6 of the special conditions the appellant agreed to purchase the property in an "as is where is" condition subject to all faults and defects whether or not they were apparent.

[42] The date for the completion of due diligence was extended by agreement to 22 November 2006 and the settlement date to 15 January 2007 with time to remain of the essence. On 24 November 2006 the appellant's solicitors confirmed that the contract of sale had become unconditional.

[43] By the first Deed of Variation the deposit payable was increased to $500,000 and the date for completion was extended to 12 February 2007 and the condition as to due diligence was deleted. Special condition 9.3 was deleted and replaced with a clause which provided that the deposit was a non-refundable amount which belonged to the respondent to be used at the respondent's discretion. The respondent would not be required to repay the deposit to the appellant unless the contract was terminated due to the default of the respondent in performance of the respondent's obligations under the contract.

[44] On 12 February 2007, the parties agreed to a second Deed of Variation whereby there was an extension of time of the settlement date to 26 February 2007 and a fourth instalment of $500,000 deposit was to be paid by bank cheque to the respondent by 4.45 pm on 16 February 2007. Time was again said to be of the essence.

[45] The appellant did not pay the $500,000 instalment of the deposit by 5.00 pm on 16 February 2007 and the respondent's solicitors reserved its rights in respect of that. At 4.53 pm on 26 February 2007, the date for settlement, the appellant's solicitors wrote to the respondent's solicitors drawing attention to what it said was a breach by the respondent of s 73 of the *Workplace Health and Safety Regulation 1977* (Qld) (WHSR) in that it had not complied with the asbestos management code by failing to obtain a material and products report prior to selling the property.

[46] By facsimile transmission of 26 February 2007 at 6.48 pm the respondent's solicitors wrote to the appellant's solicitors terminating the contract due to the appellant's default in failing to pay the fourth instalment of the deposit of $500,000 by 16 February 2007 and failing to pay the balance of the purchase price by 5.00 pm on 26 February 2007. They declared the deposit paid forfeited and reserved its rights to take action to recover the fourth instalment of the deposit.

[47] On 27 February 2007 the appellant's solicitors wrote to the respondent's solicitors disputing the respondent's right to forfeit the appellant's deposit and terminating the contract as a result of the respondent's failure to comply with the asbestos management code. It requested the refund of the $500,000 deposit already paid. By facsimile dated 2 March 2007 the appellant's solicitors purported to withdraw its termination notice and said that the appellant wished to settle the contract subject to the respondent's prior compliance with the asbestos management code workplace health and safety obligation. It also on that date lodged a caveat over the property.

Relevant statutory provisions

[48] Part 11 of the WHSR deals with asbestos removal and management. It was adopted in Queensland in the *Workers Compensation and Rehabilitation and Other Legislation Amendment Regulation (No. 1)* 2005 (SL 308 of 2005) which was publicly notified on 16 December 2005 and tabled in Parliament on 14 February 2006. It was designed to implement in Queensland two National Standards with regard to asbestos: the National Occupational Health and Safety Council's *National Code of Practice for the Management and Control of Asbestos in Workplaces* [NOHSC 2018 (2005)] (the "asbestos management code") and the revised *National Code of Practice for the Safe Removal of Asbestos* 2nd edition [NOHSC: 2002 (2005)]. Part 11 of the WHSR is designed to provide "a nationally consistent approach to the safe management, control and removal of asbestos"[24] by creating a national standard for businesses wherever they operate throughout Australia.

[49] Under s 73(1) of the WHSR, the owner of a structure or part of a structure which is a workplace must comply with the asbestos management code on or before 1 January 2008. However, pursuant to s 73(2), if a relevant event is proposed for the structure or part of it before 1 January 2008, the owner must comply with the asbestos management code before the relevant event happens. Those requirements

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[24] Explanatory Notes for SL 2005 No. 308 at [6].

are said, by s 73(4), to be workplace health and safety obligations for the *Workplace Health and Safety Act 1995* (Qld). A relevant event is defined in s 73(5)(a) of the WHSR to occur if the structure or part of it is to be offered for sale or lease. By s 73(3), the obligation to comply before 1 January 2008 applies only the first time the structure or part of it is offered for sale or lease. No doubt this is because once the asbestos management code has been complied with, there is no need for a later owner to comply with it because the obligation has already been completed. There is a personal obligation placed on the owner of the building not to offer a property for sale unless the asbestos management code has been complied with.

[50] The asbestos management code requires all asbestos containing material to be identified, labelled, its location and condition to be placed in a register and for a management plan to be developed in relation to the identified asbestos containing material.[25] These provisions relate to a substance exposure to which has been identified as having potentially grave consequences.[26]

[51] The learned primary judge assumed for the purpose of the application, as we do on appeal, that the contract was formed by the acceptance by the appellant of an offer made by the respondent and that the respondent was in fact in breach of its obligations under the asbestos management code. That obligation was that it did not prepare a register of asbestos containing materials and a management plan before it offered the property on which the structure was erected for sale.

[52] The question before this Court is whether or not the learned primary judge erred in deciding that the appellant had no real prospect of successfully opposing the making of the orders and that there was consequently no need for a trial. That in turn depends on whether or not the appellant would be unable to resist an order that the contract had been validly terminated by the respondent and that therefore the amount of deposit paid should be forfeited and summary judgment should be given for the amount of the deposit unpaid as a liquidated debt. That in turn depends on whether or not the appellant has any real prospect of showing that the contract was void or unenforceable for illegality or it would be contrary to public policy to enforce it.

[53] Counsel for the respondent, in detailed and able submissions, argued that the statute in question did not expressly provide that any contract of sale made when the offeror had not complied with the asbestos management code was illegal and thereby void. While it was made mandatory upon an owner to comply with the asbestos management code before offering the structure for sale and failure to do so is visited with criminal penalties, the statute does not explicitly provide that any sale of the building is itself a criminal offence. He submitted that the statute does not prohibit entering into or performing the contract. The vendor is explicitly commanded not to offer the property for sale rather than not to sell it. If the statute provided a clear prohibition on selling rather than on offering for sale, then, it was submitted, the argument that formation of the contract was prohibited by statute would have been more likely to have been made out.

[54] In this case the owner of the building is prohibited from offering the building for sale. The owner is not prohibited from accepting an offer to purchase and so it

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25 Explanatory Notes at [73].

26 See generally the article by B Cannon "Asbestos Management in Queensland" Proctor, Vol 27 no 2, March 2007, 19-21.

cannot be said that any contract where the owner has not complied with the asbestos management code is necessarily void for illegality under the statute. If, however, the contract was formed by the acceptance of an offer to sell made by the owner, then arguably the formation of the contract could be regarded as expressly or impliedly prohibited by the statute. The question of how the contract was formed is a factual matter incapable of being determined in these proceedings.

The common law

[55] The law as to when contracts may be considered to be void or unenforceable for illegality is by no means straightforward. In *Fitzgerald v F J Leonhardt Pty Ltd*[27] Kirby J observed:

> "Illegality, and the associated problems of statutory construction and public policy, have been described as a 'shadowy', and 'notoriously difficult' area of the law where there are 'many pitfalls'. Many of the authorities on the point are difficult to reconcile. Commentators claim that some of them are marked by 'obscurities, supposed distinctions and questionable techniques of decision'. They suggest that this is an area of the law which is 'intensely controversial and confused'. The House of Lords has recently proposed that is is ripe for thorough re-examination by the Law Commission so that it may be subjected to legislative reform. Special concern has been expressed about the danger that illegality, in some way connected with a contract, will (unless tightly controlled) let loose the 'unruly horse' of public policy to a 'blind gallop through the doctrinal forests of [the law]'. Various other equine metaphors are invoked to express the suggested dangers of uncertainty and the potentially harsh and unjust outcomes that would follow enlargement of court discretions to decline relief on the ground that a contract is somehow touched by illegality." (footnotes deleted)

[56] In *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*[28] the High Court considered whether a mortgage and guarantees given by a body corporate carrying on an unauthorised banking business in breach of s 8 of the *Banking Act 1959 (Cth)* to secure a loan made by the body corporate in the course of that business were void or unenforceable. Gibbs ACJ held[29] that there are four main ways in which the enforceability of a contract may be affected by statutory provisions which render particular conduct unlawful:

> "(1) The contract may be to do something which the statute forbids;
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> (2) The contract may be one which the statute expressly or impliedly prohibits;
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> (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or

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27 (1997) 189 CLR 215 at 231-232.

28 (1978) 139 CLR 410.

29 (supra) at 413.

> (4) the contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits."[30]

[57] This case is concerned with the second of those means by which a contract may be avoided. This serves to distinguish this case from *Fitzgerald v F J Leonhardt Pty Ltd*[31] where the factual situation fell into the fourth category and where it was conceded that there was no defect of illegality in the formation of the contract between the parties.

[58] As a general rule a contract, the formation or performance of which is expressly or impliedly prohibited by statute, is void and unenforceable. Dealing with the express prohibition, Jacobs J said:[32]

> "When a statute expressly prohibits the making of a particular contract, a contract made in breach of the prohibition will be illegal, void and unenforceable, unless the statute otherwise provides either expressly or by implication from its language."

A prohibition which can be implied from the words of the statute has the same effect.[33]

[59] Whether or not the formation or performance of a contract is prohibited by statute depends on a number of factors. The first and most important factor is the proper construction of the language of the statute. As Deane and Gummow JJ observed in *Nelson v Nelson*,[34] an express statutory provision against the making of a contract may fasten upon some act which is essential to its formation. In *Fitzgerald v F J Leonhardt Pty Ltd*,[35] McHugh and Gummow JJ expressed the same idea in the double negative:

> "The courts should *not* refuse to enforce contractual rights arising under a contract … where the contract was *not* made in breach of a statutory prohibition upon its formation …" (emphasis added).

An offer by a vendor may be considered essential to the formation of a contract which is formed by the acceptance of that offer by a purchaser.

[60] A second factor is found in the scope or purpose of the statute: where an object of a statute is to protect the public rather than simply to secure the revenue then it is more likely that the contract must be taken to be prohibited.[36] A third, related, factor is whether or not the purpose of the statute is served by the imposition of a penalty, notwithstanding it is for the protection of the public.[37] A fourth consideration is whether the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the

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30 This classification was adopted in *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 218-219.

31 (1997) 189 CLR 215.

32 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (supra) at 430.

33 (supra) at 430.

34 (1995) 184 CLR 538 at 552.

35 (supra) at 229.

36 *Cope v Rowlands* (1836) 2 M&W 150 at 157; 150 ER 707 at 710 per Parke B as quoted by Jacobs J in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (supra) at 430-431.

37 *Fitzgerald v F J Leonhardt Pty Ltd* (supra) at 220.

object of the statute.[38] A fifth factor is whether or not the Parliament intends by the Act to prohibit a contract or only to penalise the carrying on of the business without authority. The Court in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* concluded that the language of s 8 of the *Banking Act* indicated that it was directed not at the making or performance of particular contracts, but at the carrying on of any banking business. A sixth factor is whether or not the person seeking to enforce the contract has done the very thing which the statute prohibits. This was the dominant factor in the money-lender cases such as *Victorian Daylesford Syndicate Ltd v Dott*[39] and *Cornelius v Phillips*[40] where the money-lending transactions were avoided because, as Lord Atkinson said:[41]

> "the very mischief against which the statute … was directed was brought about."

[61] It was held in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* that even if the making of a contract is not expressly or impliedly forbidden by statute, then it may be unenforceable on grounds of public policy if it could only be performed "in contravention of a statute or was intended to be performed illegally or for an illegal purpose."[42] In *Fitzgerald v F J Leonhardt Pty Ltd*, for example, the contract was capable of being performed lawfully and so was not unenforceable.

[62] Finally even if a contract might be considered unenforceable because of the well known dictum of Lord Mansfield in *Holman v Johnson*[43] that a court will not lend its aid to a plaintiff who founds the action on an illegal or immoral act, it may be that one of the exceptions set out by McHugh J in *Nelson v Nelson*[44] or the limitations expressed by McHugh and Gummow JJ in *Fitzgerald v F J Leonhardt Pty Ltd*[45] would apply so that relief would be granted notwithstanding the illegality or the contract enforced notwithstanding the illegality:

> "The preferable course, in cases of contract alike to those involving trusts, is as follows. A case may come within one of the accepted exceptions or qualifications to *Holman v Johnson*. As indicated above, these are set forth, with examples from authority, in the following passage from the judgment of McHugh J in *Nelson v Nelson*:
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> > 'First, the courts will not refuse relief where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. Second, the courts will not refuse relief where the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member. Third, the courts will not refuse relief where an illegal agreement was induced by the defendant's fraud, oppression

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38 *Archbolds (Freightage) Ltd v S Spanglett Ltd* (1961) 1 QB 374 at 390; *Dalgety and New Zealand Loan Ltd v V C Imeson Pty Ltd* [1963] SR (NSW) 998 at 1004 quoted by Gibbs ACJ in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (supra) at 415.

39 [1905] 2 Ch 624.

40 [1918] AC 199.

41 *Cornelius v Phillips* (supra) at 214 quoted by Gibbs ACJ in *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (supra) at 416.

42 (supra) at 433; *Fitzgerald v F J Leonhard Pty Ltd* (supra) at 220.

43 (1775) Cowp 341 at 343; 98 ER 1120 at 1121.

44 (1995) 184 CLR 538 at 604-605

45 (supra) at 229-230.

> or undue influence. Fourth, the courts will not refuse relief where the illegal purpose has not been carried into effect.'

Even if the case does not come within one of those exceptions, the courts should not refuse to enforce contractual rights arising under a contract, merely because the contract is associated with or in furtherance of an illegal purpose, where the contract was not made in breach of a statutory prohibition upon its formation or upon the doing of a particular act essential to the performance of the contract of otherwise making unlawful the manner in which the contract is performed. Rather, the policy of the law should accord with the principles set out by McHugh J in *Nelson v Nelson*. His Honour said:

> 'Accordingly, in my opinion, even if a case does not come within one of the four exceptions to the *Holman* dictum to which I have referred, courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies.'" (footnotes deleted)

[63] It is not possible to decide each of those matters in this case summarily, since it would require pleadings to raise a relevant exception or reason to enforce the contract notwithstanding its apparent illegality and determination of questions of fact which were not raised by the appellant in the application below.

[64] *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* was considered by this Court in *Sutton v Zullo Enterprises Pty Ltd*.[46] The Court considered whether or not a contract entered into by a builder who was not licensed under the *Queensland Building Services Authority Act* 1991 (Qld) (QBSA) was void or unenforceable. The QBSA also prohibited, independently of contract, the right of a builder to recover restitution for such work. This latter prohibition had no doubt been added to exclude the quantum meruit remedy allowed in *Pavey & Matthews Pty Ltd v Paul*[47]. That matter is however irrelevant to the determination of this case so will need not be further considered.

[65] The relevant section for the purpose of this discussion was s 42(1) of the QBSA which provided that a person must not carry out, or undertake to carry out, building work unless that person held a contractor's licence of the appropriate class under the QBSA. As McPherson JA held,[48] the statutory provision embodies two different

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46 [2000] 2 Qd R 196.
47 (1987) 162 CLR 221.
48 (supra) at 202.

prohibitions: the first one was that the person must not "undertake" to carry out building work unless appropriately licensed, and the second was that such a person must not "carry out" building work. As His Honour observed:

> "The first of these two prohibitions is directed at an element in the formation or making of a contract to do building work. One cannot (except perhaps in a case of a rare and most unusual kind) make a contract to do building work without at the same time 'undertaking' to carry out that work."

[66] With regard to that prohibition McPherson JA held:

> "… it would be surprising if, having prohibited the making of such a contract, the legislature had not also intended that it should be unenforceable. This conclusion is not founded on the circumstance that, by s 42(7), a person contravening s 42 commits an offence, although it provides additional support for such a legislative intention. Even if it were not an offence for an unlicensed person to 'undertake' to do building work, the result would in my opinion probably be the same. When Parliament prohibits the very process of formation of a contract, it scarcely lies with the courts to ignore that prohibition and enforce the contract despite the express legislative embargo on its being made at all. At least that is so where the party seeking to enforce it is the person who contravened the prohibition, which is so here."[49]

[67] His Honour expressly declined to decide, given that it was not necessary for the decision, whether the innocent party was also disabled from enforcing it. However, he observed that the answer may in the end depend on the weight to be given to the fact that prohibition in s 42(1) is directed only to the person "undertaking" to carry out the building work.[50]

Application to the common law principles to this case

[68] Applying the factors set out earlier in this judgment to the statutory provisions and the contract in question, one is able to make the following observations:-

1. The language of s 73 of the WHSR strongly suggests that a contract which is formed by the acceptance of an offer of a building for sale where the offeror has failed to comply with the asbestos management code is unlawful.

2. The purpose of the statute as revealed in s 73 is to prevent the owner of a structure which is a workplace from offering it for sale unless the owner has complied with the asbestos management code. This is a workplace health and safety obligation not a statute to protect the revenue.

3. The purpose of the statute is, at least arguably, not satisfied by the imposition of a penalty given the potential health and safety consequences of offering a building which is used as a workplace for sale, without complying with the asbestos management code.

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[49] See also Pincus JA at 208.

[50] See also *Corradini v O'Brien Lovrinov Crafter Pty Ltd* (2000) 77 SASR 125 at 141-142 per Doyle CJ.

4. It does not appear that avoiding contracts entered into as a result of the offeror's unlawful failure to comply with the statute would cause harm to innocent members of the public. Rather the contrary appears to be the case. Neither can it be said that it would cause commercial uncertainty. The prohibition on offering the structure for sale is made clear in the WHSR and there is a significant public policy reason for the legislature to prohibit the offering for sale of structures that do not comply with the asbestos management code.

5. The statute on its face appears to prohibit the making of a contract of sale unless the statute is complied with rather than, as in *Yango Pastoral Company Pty Ltd v First Chicago Ltd*, prevent the business in which the contract was made being carried on.

6. The person seeking to enforce the contract appears to have done the very thing that the statute forbids.

[69] If it was unlawful for the respondent to offer to sell the property to the appellant without having complied with its obligations under the Part 11 of the WHSR, then it would be open to conclude, depending on the facts found at trial, that the formation of the contract was unlawful and the contract was void or at least unenforceable at the suit of the wrongdoer.

[70] It is unnecessary to consider the appellant's other submissions. I expressly refrain from deciding the speculative argument raised that there is, by analogy with cases such as *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [51] and *Schulz v Schmauser*,[52] some civil action based on breach of statutory duty available to a purchaser in a case such as this.

[71] On the material before the Court, there was insufficient evidence on which to base a misleading and deceptive conduct claim.

Conclusion

[72] In the circumstances it was not appropriate to dispose of the case summarily. The appeal should be allowed. Orders 2, 3 and 4 should be set aside. The matter should be remitted to the trial division to continue as if started by claim.

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51 [2001] 1 Qd R 518

52 [2000] QCA 17