SUPREME COURT OF QUEENSLAND

CITATION:	*Savoy Investments (Qld) P/L as trustee v Global Nominees P/L as trustee* [2008] QCA 282
PARTIES:	**SAVOY INVESTMENTS (QLD) PTY LTD** ACN 102 948 792 **AS TRUSTEE** (applicant/appellant) **v** **GLOBAL NOMINEES PTY LTD** ACN 107 422 088 **AS TRUSTEE** (respondent/respondent)
FILE NO/S:	Appeal No 3700 of 2008 SC No 2162 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2008
JUDGES:	Keane JA, Mackenzie AJA and Dutney 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 respondent's costs of and incidental to the appeal to be assessed on the standard basis**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – ANTICIPATORY BREACH – where the appellant contracted to purchase a commercial property from the respondent – where the property was sold subject to a lease – where the special conditions to the contract of sale required that a guarantee of the lessee's obligations under the lease be executed by the directors of the lessee company – where the appellant argues that the respondent unequivocally indicated its intention not to comply with this special condition – where the appellant, prior to the date for settlement, applied to the court for declarations to the effect that it was entitled to terminate the contract on the grounds of the respondent's repudiation – whether the respondent has acted in repudiation of its obligations under the contract – whether the appellant is entitled to terminate the contract for repudiation

DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, applied
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51, applied
Green v Sommerville (1979) 141 CLR 594; [1979] HCA 60 cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634; [1974] HCA 40, applied

COUNSEL: P W Hackett for the appellant
J B Sweeney for the respondent

SOLICITORS: Robinson & Robinson for the appellant
Hickey Lawyers for the respondent

[1] **KEANE JA:** On 10 September 2007 the appellant entered into a contract with the respondent under which the appellant agreed to purchase a commercial property at Labrador for the sum of $2.4 million. Settlement was due on 31 March 2008.

[2] Before that date, the appellant applied to the Supreme Court for declarations to the effect that it was entitled to terminate the contract on various grounds. On 28 March 2008 the learned primary judge declined to make the declarations sought, and dismissed the appellant's application.

[3] In this Court, the appellant contends that her Honour erred in failing to conclude that the respondent's failure to produce a directors' guarantee of the performance of the lessee of the property to the appellant prior to the due date for settlement constituted an anticipatory breach of contract or a repudiation which entitled the appellant to terminate the contract.

[4] The appellant does not dispute the learned primary judge's findings of fact. It is therefore convenient to summarise the factual background as found by her Honour, and then to set out her Honour's conclusions in order to set the stage for a discussion of the arguments agitated by the parties on the appeal.

Factual background: the contract

[5] The contract was in the standard form adopted by the Real Estate Institute of Queensland and the Queensland Law Society Incorporated for the conveyance of commercial land and buildings. It contained what were described as special conditions and standard commercial conditions. Where there was any inconsistency between them, the provisions of the special conditions were to prevail.

[6] The property was sold subject to a lease which was described in the lease schedule to the contract in the following terms:

"**Lease 1:**

Property:	10 Ivan Street, Labrador;
Tenant:	Migaris Composites Pty Ltd;
Use:	Marine Industry;
Location:	Whole of property;
Area of tenancy:	3,750m^2 including all buildings;
Current Rental per annum:	$200,000;
Current Lease Commencement Date:	1 June 2007;
Current Lease Term:	five years;

Remaining Options: five years."

[7] Clause 32 of the standard commercial conditions of the contract provided relevantly as follows:

"**PROPERTY SOLD SUBJECT TO LEASES**

32.1 Vendor's Statement

Where the Property is sold subject to any Lease … the Vendor states that, except as disclosed in this Contract, each of the following statements shall be accurate at the Date for Completion:

(a) the particulars in the Lease Schedule … are true and correct;

(b) …

(c) that all Leases … have been disclosed to the Purchaser prior to the execution of this Contract;

(d) …

(e) …

32.2 Inaccurate statement

If a statement contained in clause 32.1 is not accurate then the Purchaser may terminate this Contract by notice in writing to the Vendor.

32.3 Acceptance of Lease and Service Contract Terms

(1) Within 7 days of the date of this Contract, the Vendor will deliver to the Purchaser or the Purchaser's solicitor true copies of all Leases and Service Contracts together with a written statement that they constitute the whole of every agreement or arrangement with each of the tenants stated in those Leases or with each of the Service Contractors in those Service Contracts.

…

(3) If the Purchaser does not give written notice to the vendor pursuant to clause 32.3(2)(a) or 32.3(2)(b), the Purchaser agrees to be bound by the terms and conditions of each Lease and Service Contract disclosed by the Vendor in the Lease Schedule and the Service Contract Schedule from the Date for Completion as if the Purchaser were named as lessor in such Lease or as a contracting party in such Service Contract in substitution for the Vendor."

[8] The special conditions of the contract were as follows:

"1. Due Diligence – See attached Annexure A.

2. Initial deposit of $50,000.00 and a balance of $150,000 on unconditional date to be released to the vendor on unconditional date.

3. This contract is subject to the Vendor prior to settlement hereof arranging for an assignment of the current Lease to Mustang Marine with such lease as is assigned to be guaranteed by the Directors of that company.

4. Simultaneously with the Assignment referred to in Special Condition 3 hereof the Vendor shall procure the Assignee to enter into a Deed of Variation of the said Lease to provide that the Lease may thereafter be terminated by the Landlord by giving six (6) months written notice that intent to the Tenant, and that the Tenant may terminate the Lease by giving six (6) months notice to the Landlord.

In the event that the Landlord gives such notice then the Landlord shall have first option to negotiate and to offer the Tenant a Lease of alternative premises.

Should the Tenant give six (6) months notice to terminate then the tenant shall compensate the landlord by way of a one off payment equate to 50% of the balance of rent payable in accordance with the lease."

[9] The document described in cl 1 of the special conditions as "Annexure A" was relevantly in the following terms:

"(i) This Contract is subject to conditions upon the Purchaser conducting investigations and enquiries ('the enquiries') with respect to the property the subject of this contract and all matters relating thereto and being satisfied in all respects with the results of the enquiries including and without limitation:

…

(d) any lease and/or license agreements relating to any tenancies of the property;

…

(iv) The parties agree that the Purchaser shall be allowed a period of 21 days in which to conduct the enquiries.

(v) If the Purchaser is not satisfied in all respects with the results of enquiries then the Purchaser may, in its absolute discretion and without being required to give any reason, deliver written notice to the Vendor at any time on or before 5pm on the date being 21 days from the date of this Contract terminating this Contract. In the event that agreement shall be at an end, all monies paid by the Purchaser to the Stakeholder/deposit holder shall be refunded in full to the Purchaser and thereafter neither party shall have any further claim or action against the other apart from a Claim based on default by one party under the Contract prior to such termination.

(vi)

…

(vii) In the event that the Purchaser fails to give the written notice referred to in clauses (v) or (vi) by the time limitation referred to in clause (v) then the contract shall become unconditional and neither party shall have any claim thereafter against the other apart from a claim, based on a default by one party under the Contract prior to such termination."

Factual background: the parties' dealings with each other

[10] Notwithstanding the description of the lessee in the lease schedule as Migaris Composites Pty Ltd, the fact was that Migaris Composites Pty Ltd had vacated the premises on 16 August 2007. Another company, Mustang Marine Nominees Pty Ltd ("Nominees"), began using the premises to make fibreglass parts which it supplied to an associated company, Mustang Marine Pty Ltd ("Marine"). Nominees paid the respondent rent at the same rate as Migaris Composites Pty Ltd, but, at the time the contract was made between the appellant and the respondent, had not entered into a lease with the respondent.[1]

[11] The sole director of the respondent was Mr Paul Scanlon. He was also the sole director of Nominees. After the contract between the appellant and the respondent was signed, Nominees executed a lease of the property.

[12] Mr Kevin Jury, a director of the appellant, negotiated the contract with the respondent on behalf of the appellant. Prior to the execution of the contract, Mr Jury knew that Migaris Composites Pty Ltd was no longer the tenant of the property and that another company associated with Mr Scanlon was operating from the property. Nevertheless, Mr Jury was provided with a copy of the lease to Migaris Composites Pty Ltd. This document contained a guarantee of that company's performance of its obligations under the lease from its two directors.[2] The lease between the respondent and Nominees did not contain a guarantee by Mr Scanlon of the performance by Nominees of its obligations as lessee.

[13] The learned primary judge recounted the circumstances in which the respondent's lease to Nominees came to the knowledge of the appellant:

> "On 19 September 2007, which was during the due diligence period, the vendor's solicitors provided the purchaser's solicitors with a copy of the signed Mustang Marine Nominees lease relating to the Property which was previously provided to the vendor's agent on 12 September 2007. The letter also advised '…the attached Lease constitutes the whole of every agreement with the tenant and there are no service contracts in place.' The Lease was for the term 7 September 2007 to 6 September 2012 at an annual rental of $200,000 + GST and outgoings and was dated 8 September 2007 ('the new lease').
>
> At this point it should be noted that the new lease:
>
> (a) bears a date 8 September 2007, two (2) days before the contract was entered into but the solicitor who prepared the lease did not receive instructions until 10 September 2007;
> (b) contains no guarantee;
> (c) the lessor and the lessee have the same sole director Scanlon and it was signed in both capacities with a different signature for each.
>
> On 2 October 2007 the solicitors for the vendor advised the solicitors for the purchaser that the due diligence period had expired and that the contract was unconditional in all respects. There was no

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1 *Savoy Invest Qld P/L as trustee v Global Nominees P/L as trustee* [2008] QSC 56 at [13].

2 [2008] QSC 56 at [15] – [16].

> objection to that advice and on 4 October 2007 the purchaser's solicitors instructed the stakeholder, Colliers, to release the full $200,000 to the vendor in the following terms 'We now authorise release of the deposit to or at the direction of the Vendor'. They provided a copy of this letter to the solicitors for the purchaser on the same day and advised 'In due course we shall prepare and forward Transfer documentation.'"[3]

[14] Marine went into external administration on 10 October 2007. Marine's boat building business was subsequently sold by the administrators. Nominees continued to perform its obligations under its lease with the respondent.

[15] The nature of the dispute between the parties was succinctly described by the learned primary judge in the following passage:

> "A letter from the solicitors for the purchaser dated 14 December 2007 to the solicitors for the vendor contended that Special Condition 3 makes the Contract subject to the current lease being assigned and that the assignment was to be to Mustang Marine Pty Ltd and not Mustang Marine Nominees. Furthermore they contend that the new lease is in breach of Special Condition 3, and is not with the correct company and was never acceptable to the purchaser.
>
> Essentially the purchasers contend that there has been no agreement to vary the conditions of the Contract. Furthermore the purchaser contends that the new lease does not satisfy the requirements of the Special Conditions in a number of material respects:-
>
> (a) First, it is not an assignment of the Migaris lease and amended in accordance with Special Condition 4;
> (b) Secondly, it is not a lease by 'Mustang Marine' as that term was represented to Jury, and
> (c) Thirdly, there is no guarantee
>
> The purchaser contends that the attitude of the vendor is an anticipatory breach of Special Conditions 3 and 4 of the Contract or conduct in repudiation of the same in that it evinces an intention of the vendor:
>
> (a) not to assign the Migaris lease;
> (b) not to assign the new lease;
> (c) not to procure any directors guarantee.
>
> The purchaser's solicitors wrote to the solicitors for the vendor in respect of that conduct, inviting the vendor to withdraw the same and reserving the purchaser's rights should the vendor fail to do so.
>
> The vendor has refused to alter its position. The purchaser submits that the anticipatory breach of the contract in the circumstances is also a repudiation of the contract (*DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 19 ALR 223)."[4]

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3 [2008] QSC 56 at [18] – [20].

4 [2008] QSC 56 at [25] – [29] (citation footnoted in original).

[16] At the hearing before the learned primary judge, the respondent's stated position was that the appellant could no longer agitate any complaint in relation to the terms of the lease. The respondent made it clear, however, that if this position was erroneous, it would act upon the court's interpretation of its contractual obligations, particularly in relation to the provision of the guarantee. It is desirable to set out paragraphs [10] to [13] of the written submissions put to her Honour by the respondent:

> "The terms of the warranty clause, clause 32.l, and the terms of the lease schedule to which that clause refers, are to be construed in the context of the agreement of which they form part. It is necessary to have regard to other provisions of the agreement which elucidate the terms of the warranty clauses, including the due diligence clause and the special conditions.
>
> The better view is that the parties' objective intention was that any warranty at settlement under clause 32.1 was to exclude matters which had become known to the purchaser during the due diligence period, see for example *Mediservices Clinics Pty Ltd & Anor v Health 24 Pty Ltd* [1999] NSWCA 198 at [50] to [60] per Cole AJA. This would avoid the injustice of the purchaser being entitled to terminate in respect of circumstances known to it to [sic] at the time it decided to proceed to completion.
>
> Alternatively, the matter can be looked at as one of waiver or election. The conduct ordinarily required to constitute an election must be unequivocal, in the sense that it is consistent only with the exercise of one of the two sets of rights, and inconsistent with the exercise of the other; thus for a lessor to continue to receive rent under a lease will be consistent only with his rights as lessor and inconsistent with the exercise of a right to determine the lease: *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 646. In releasing the full deposit, with knowledge of the terms of the Mustang Marine Nominees lease, the Applicant (whether or not it subjectively intended this result) must be taken:
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> (a) to have waived the requirement for the assignment and deed of variation of the Migaris lease prior to settlement;
> b) to have agreed under clause 32.3.3 to be bound by, and entitled to the benefit of the Mustang Nominees lease from the date of possession; and
> c) to have approved of Mustang Marine Nominees Pty Ltd being the tenant; and
> d) to have waived the requirement for Mr Scanlan [sic] to provide a guarantee.
>
> If the vendor is wrong in relation to waiver of the guarantee, any anticipatory repudiation in that respect has not been accepted, and the vendor will provide the guarantee at settlement, so that it is not 'wholly and finally disabled from performing that obligation when the time for performance arises'. Thus there is no right to terminate."

The decision of the learned primary judge

[17] The learned primary judge found that:

"It is clear from the affidavit material that as at 10 September 2007, which was the date of the contract, Jury knew that Migaris was no longer the tenant at the Property and that an entity known as 'Mustang Marine' was in occupation.

It is also clear that Jury negotiated a due diligence condition that allowed the purchaser to undertake extensive investigations including investigations to allow it to be satisfied in all aspects with any lease agreements including any tenancies of the property.

Furthermore on 19 September 2007, during the due diligence period, the purchasers were not only aware of the Mustang Marine Nominees Pty Ltd (ACN123380996) lease but were provided with a copy of the 33 page lease which was in similar terms to the 34 page Migaris lease but did not include a guarantor at clause 11 on page two. Whilst the Lease is dated 8 September 2007 it is clear that the lease only came into existence after the date of the contract.

This new lease included new provisions at clauses 22 and 23 regarding termination rights of the Landlord and Tenant which were consistent with the Special Conditions of the Contract and were couched in terms to achieve the same effect as the variation and 'assignment of the current lease to Mustang' which was envisaged by Special Condition 3 and 4 of the Contract. These clauses were different to the termination clause 22 in the Migaris lease."[5]

[18] Her Honour analysed the position in terms of the appellant's apparent acceptance of Nominees as the lessee on the basis that, absent that acceptance, the appellant might have been entitled to terminate the contract of sale. Her Honour said:

"I consider the relevant analysis is as follows:

a) The Contract was clearly for the sale of property subject to a lease which had been to Migaris.

b) The purchaser at the date of the Contract on 10 September knew that Migaris was no longer in occupation.

c) The Contract was conditional on the assignment of the lease to 'Mustang Marine' pursuant to Special Condition 3.

d) The Contract at clause 32.2 gave the purchaser the right to terminate if the Lease Schedule was inaccurate.

e) The Contract pursuant to Special Condition 1 and Annexure A clauses (i) and (iv) gave the purchaser 21 days to satisfy itself about the lease.

f) On 19 September 2007 the vendor’s solicitors gave the purchaser's solicitors a copy of the Mustang Marine Nominees lease. This lease clearly demonstrated that the Lease Schedule was inaccurate (if the purchaser did not already know that) and that it would be inaccurate at the Date of Completion.

g) The purchaser did not then terminate the Contract.

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5 [2008] QSC 56 at [33] – [36].

h) The due diligence period expired on 31 September 2007 and the purchasers gave no notice that they were not satisfied of the results of enquiries during the due diligence period.

i) Clause (vii) of the Special Conditions provided in default of the purchaser giving such notice '…the contract shall become unconditional and neither party shall have any claim hereafter against the other, apart from a claim based on a default by one party under the contract prior to such termination.'

j) The balance deposit was then paid and on 4 October 2007 the purchaser gave Collier's instructions to release the deposit to the vendor."[6]

[19] Her Honour concluded from this analysis that:

> "By its actions the purchaser affirmed the contract and lost any right to rely on the Mustang Marine Nominees lease to terminate. In releasing the full deposit, with knowledge of the terms of the Mustang Marine Nominees lease, the purchaser must be taken to have waived the requirement for the assignment and deed of variation of the Migaris lease prior to settlement. Furthermore, the purchaser must be taken to have agreed under clause 32.3.3 to be bound by, and entitled to the benefit of the Mustang Nominees lease from the date of possession; and to have approved of Mustang Marine Nominees Pty Ltd being the tenant."[7]

[20] The learned primary judge considered that the same result could be reached by focusing on the effect of the dealings between the parties upon the terms of the contract of sale. On this analysis the parties could be seen to have varied the terms of their contract so that there was no material breach of contract by the respondent. Her Honour said:

> "An alternative analysis emerges from a consideration of the terms of the Contract. I am satisfied that considered objectively the parties intention was that any warranty at settlement under clause 32.1 was to the exclusion of matters which had become known to the purchaser during the due diligence period. During the due diligence period the purchaser had a copy of the lease which set out fully the name of the tenant as Mustang Marine Nominees Pty Ltd and not Migaris. The lease also indicated that the lease period commenced on 7 September 2007 and not 1 June 2007 as set out in the Migaris Lease. It also clearly indicated at Item 11 on page 2 that there were no guarantors and there were new provisions included in clauses 22 and 23 in relation to termination.[8]

The arguments on appeal

[21] It can be seen that the primary focus of the appellant's argument before her Honour was not upon the absence of a guarantee of the lessee. The argument that Special Condition 3 was breached because of the absence of a directors' guarantee was adverted to below but apparently as an aspect of the asserted disconformity between

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6 [2008] QSC 56 at [37].
7 [2008] QSC 56 at [38].
8 [2008] QSC 56 at [39].

the lease described in the contract and that produced by the respondent to the appellant during the due diligence period.

[22] The appellant now focuses squarely on the absence of a guarantee, contending that the respondent's obligations at settlement under Special Condition 3 could not be satisfied by the lease to Nominees. No guarantee of Nominees' obligations under its lease was included in the lease document and no guarantee was offered separately to the appellant by the respondent in the period between contract and the appellant's application to Court. According to the appellant, the respondent actually indicated a firm intention not to provide a guarantee at settlement and thereby repudiated one of its essential obligations under the contract.

[23] The appellant argues that the learned primary judge erred in failing to appreciate that the provisions of Special Condition 3 conferred rights on the appellant which were not subsumed in the provisions of cl 32 of the standard conditions or the due diligence provisions contained in the special conditions. The appellant argues that the due diligence regime was concerned only with the appellant's right and duty to satisfy itself as to the terms of the lease and did not extend to the separate obligation imposed by Special Condition 3 to deliver a guarantee prior to settlement.

[24] As to the appellant's contentions, the respondent argues that the appellant raised no objection during the due diligence period as to what was proposed by the respondent in terms of the lease of the premises, and that the due diligence process encompassed all matters pertaining to the lease including the guarantee. After the due diligence period, the appellant authorised the payment of the balance of the deposit to the respondent. The appellant thus conducted itself in a way consistent only with the contract remaining on foot. The respondent argues that, if the appellant was otherwise entitled to terminate by reason of the absence of a guarantee, this right was lost when it was not exercised at the end of the due diligence period.

[25] The respondent also argues that, as her Honour found, the appellant affirmed the contract. Thereafter, the appellant could not rely on any disconformity between the lease and its description in the contract to terminate the contract. As Mason J explained in *Sargent v ASL Developments Ltd*:[9]

> "If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making

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9 (1974) 131 CLR 634 at 658.

> of a choice, though he be ignorant of his alternative right. For reasons stated earlier the affirming party cannot be permitted to change his position once he has elected."

[26] The respondent also argues, pursuant to a notice of contention, that the appellant could have been entitled to terminate the contract for the respondent's anticipatory breach of an obligation which the respondent was not obliged to perform until settlement only if it could show that it was in a position to complete its obligations on the settlement date, and the appellant adduced no evidence to that effect.

The absence of a guarantee

[27] The appellant's argument invites attention to two issues. The first is whether any right which the appellant might have had to terminate for non-compliance with the guarantee obligation under Special Condition 3 of the contract could have survived the appellant's affirmation of the contract after the due diligence process. The second is whether the respondent did, in the circumstances, manifest such a resolve not to perform its obligation under Special Condition 3 that the appellant was entitled to regard the respondent as having repudiated the contract.

[28] As to the first issue, the due diligence provisions were concerned to enable the appellant to satisfy itself as to whether the performance proposed by the respondent answered its obligations in respect of the lease. Those obligations included those in Special Condition 3 which related to the guarantee of the lease. The extreme artificiality of the appellant's argument that the respondent's obligation to provide a guarantee under Special Condition 3 was separate and distinct from the due diligence process contemplated by cl (i)(d) of Annexure A to the Special Conditions is illustrated by the circumstance that, in the originating application which the appellant filed, the issue as to the guarantee was subsumed in the dispute about the lease. Paragraphs 4 and 5 of the appellant's originating application were in the following terms:

> "A declaration that the lease entered into between the Respondent and Mustang Marine Nominees Pty Ltd ACN 123 380 996 on 8 September 2007 does not satisfy the requirements of the Special Conditions to the Contract.
>
> A declaration that the Applicant is entitled to terminate the Contract because of the matter in paragraph 4 above."

[29] In my respectful opinion, the appellant's affirmation of the contract with full knowledge of the performance proposed by the respondent in relation to the lease and guarantee (as opposed to the mere non-exercise of a right of termination in accordance with the due diligence provisions of the contract), operated to preclude the appellant from terminating because of the non-conformity of the lease without a guarantee with Special Condition 3 of the contract. If the lease without a guarantee did not conform to Special Condition 3, the appellant had the right to terminate the contract on that basis. Once it chose not to do so by affirming the contract, then it could not thereafter choose to terminate the contract on the same basis.

[30] This conclusion would suffice to resolve the appeal against the appellant. It is, however, desirable to resolve the second issue to which I have referred.

The respondent's attitude to its contractual obligations

[31] To resolve this second issue, it is necessary to have close regard to the detail of the correspondence between the parties.

[32] On 24 October 2007 the appellant's solicitors wrote to the respondent's solicitors referring to the collapse of Marine and requesting the respondent to liaise with the appellant if it intended to enter into a new lease with another party before completion of the contract.

[33] On 29 October 2007 the respondent's solicitors replied relevantly as follows:

> "1. The special condition in the contract was originally drafted in that way before it was agreed by the parties that a lease would be entered into directly with Mustang Marine Nominees Pty Ltd ('Mustang');
>
> 2. As you are aware, a new lease was prepared on that basis and entered into by the landlord and Mustang in lieu of the assignment contemplated by the contract;
>
> 3. That lease was acceptable to your client;
>
> 4. Mustang Marine Nominees Pty Ltd has not been placed in receivership or under a similar administration;
>
> 5. The relevant lease was provided to you (during your due diligence) and pursuant to the terms of the contract (provided to you on 19 September 2007); and
>
> 6. No objection was made to the lease by you or by your client. Accordingly, your client is deemed satisfied with the terms of the lease."

[34] On 14 December 2007 the appellant's solicitors wrote back in the following terms:

> "1. Special Condition 3 makes the Contract subject to the current Lease over the property being assigned to Mustang Marine or the Lessor as noted on the Lease ie your client. Our client advises that the intent at all times was that such assignment would be to the operating company of Mustang Marine. Our client was never aware of the existence of Mustang Nominees Pty Ltd, which clearly is not the operating company.
>
> 2. The preparation and entering into a new Lease is in breach of Special Condition 3 of the Contract. In any event the 'new' Lease apparently as you advise is not with the operating company of Mustang Marine.
>
> 3. This 'new' Lease has never been acceptable to our client.
>
> 4. Mustang Marine Nominees Pty Ltd is not the company contemplated by Special Condition 3 of the Contract.
>
> 5. This Lease has never been accepted by our client.
>
> 6. Special Condition 3 of the Contract of Sale still applies and apparently is now in breach by your clients."

[35] It may be noted that, even at this stage, no specific complaint was being agitated by the appellant in relation to the absence of a guarantee.

[36] On 24 January 2008 the respondent's solicitors wrote to the appellant's solicitors a lengthy letter detailing grievances which did not include the absence of a guarantee. The complaints made in this letter were not agitated in argument in this Court. The letter was in the following terms:

> "I refer to your fax dated 14 December 2007 which we received by email on 21 January 2008.
>
> Our client responds to the matters raised in your fax using your numbering as follows:
>
> 1. As stated in our fax to you of 29 October 2007, and as your client is aware, Special Condition 3 of the Contract was prepared before it was agreed by the parties that a new Lease would be entered into ('New Lease'). Your client's assertion that your client's 'intent at all times was that such assignment would be to the operating company of Mustang Marine' is irrelevant. Our client was not aware that that was your client's intention.
>
> Furthermore, the special condition does not make any reference whatsoever to the Lease being assigned to the operating company of Mustang Marine. Your client cannot assert that it was 'never aware' of the existence of Mustang Marine Nominees Pty Ltd since Mustang Marine Nominees Pty Ltd was the tenant under the New Lease which was provided to you on 19 September 2007. Your client did not object to any of the terms of the New Lease during the due diligence period afforded to it under the Contract. The New Lease included provisions (clauses 22 and 23) regarding termination rights of the Landlord and Tenant which termination rights are consistent with the Special Conditions in the Contract. Accordingly, it is clear that the New Lease was the lease that was intended to be in place at settlement.
>
> In any event, your client did not make any claim or objection in respect of the New Lease nor did your client seek to terminate the Contract during the due diligence period afforded to it under the Contract. Accordingly, your client is deemed satisfied with the terms of the Lease.
>
> Additionally, we sent you a fax on 2 October 2007 confirming that the due diligence period had expired and that the contract was unconditional in all respects. Neither you nor your client made any objection to the terms of that fax. We note that your client also authorised the Stakeholder to release the Deposit to our client upon being satisfied that the Contract was unconditional. Obviously, your client must have been satisfied with the terms of the New Lease in order to authorise the release of the Deposit.

2. Your assertion that the preparation and entering into a new lease is in breach of Special Condition 3 of the Contract is clearly wrong for the reasons set out in our paragraph 1 above. The fact that Mustang Marine Nominees Pty Ltd is not the operating company of Mustang Marine is irrelevant;

3. Your statement that the New Lease has never been acceptable to your client is clearly incorrect and unfounded for the reasons set out in paragraph 1 above;

4. Refer to paragraph 1;

5. Refer to paragraph 1 and paragraph no 3; and

6. Incorrect. See above.

Accordingly, our client has at all times acted properly according to its obligations under the Contract.

Please confirm by no later than 5:00pm on Tuesday, 29 January 2008 that your client will make no further objection in respect of the New Lease and will attend settlement as required pursuant to the Contract.

In the event that we do not receive your client's confirmation as requested, our client will have no option but to treat your client's assertion that the terms of the New Lease are not acceptable to your client (in circumstances where your client was previously satisfied or deemed satisfied with the terms of that Lease) as a wrongful repudiation of the Contract by your client.

We reserve all of our client's rights against your client under the Contract, at common law and in equity."

[37] Only after this letter did the guarantee point arise. On 20 February 2008 the appellant's solicitors wrote as follows:

"We refer to your facsimile of 24 January 2008 in relation to which we have now had the opportunity to discuss with our client, take its instructions and to seek advice from Counsel in respect of the same.

As to paragraph 1 of your letter we respond as follows:-

1. We do not propose to debate your client's assertion that it was not aware of our client's intention in correspondence. The purpose of our letter was to put you on notice as the nature of our instructions and in particular the representations our client alleges were made to it as part of the process of negotiating. We have done that and if it is not clear from earlier correspondence we now make it clear that our client reserves its rights against your client, your client's director, Mr Scanlan [sic] and the agent in respect of those representations.

2. As you concede the new lease was provided to our firm on behalf of our client after entry into the contract. We have never asserted that our client was not aware of that entity from the date you provided us with the lease. Your suggestion to that effect is misguided. So too is your reference to the expiry of the due diligence period. The facts which you appear to [have] overlooked in your response to our earlier communication and in forming the view stated in the last sentence of the second paragraph (which our client disputes) is that:-

(a) The contract contains a lease schedule that provides the following particulars:-

(i) Property:	Ivan Street, Labrador;
(ii) Tenant:	Migaris Composities [sic] Pty Ltd;
(iii) Use:	Marine Industry;
(iv) Location:	Whole property;
(v) Area of tenancy:	3,750m2 including all buildings;
(vi) Rental:	$200,000 per annum;
(vii) Commencement:	1st June 2007;
(viii)Term:	5 years;
(ix) Options:	5 years.

(b) The provision of the new lease establishes that the above lease schedule is wrong contrary to the warranty contained in clause 32.1 of the contract.

(c) Our client has the right to terminate the contract under clause 32.2 in the circumstances. Our client reserves its rights in that regard.

(d) Even if our client ignores the disputed questions of the assignment of the lease required by special condition 3 (that is the old lease) and the [sic] to which entity it is to be assigned to (Mustang Marine) the special condition also required the lease to be guaranteed by directors guarantees at completion and the new lease does not contain directors guarantees.

In the above circumstances, our client contends that what is clear is that the new lease is not what is intended by the contract to be in place at completion. Your client's contention to the contrary may be construed as an anticipatory breach of the contract or a repudiation of the same, in that it appears to amount to a refusal to provide directors guarantees of the lease. We invite you to clarify your client's position in this regard within 7 days. Should your client fail to withdraw the conduct to which we refer, our client will treat the same as a repudiation of the contract and again reserves its rights in that regard.

3. Your references to the expiry of the due diligence period, the effect of the same and the release of the deposit in the remainder of paragraph 1 is misguided for the above reasons. Too you contend that clause 32.2 of the contract has some limitation not contained in the contract? If so please advise what it is.

We respond to paragraph 2 of your letter as follows:-

4. The anticipatory breach of special condition is established by:-

(a) the entry into the new lease making the assignment of the old lease an impossibility;

(b) further, your correspondence evinces an intention on the part of your client to refuse to assign either the old or new lease to the entity operating the boat building enterprise known as Mustang Marine;

(c) the refusal by your client to have in place at completion a director's guarantee.

As indicated above, we invite your client to clarify its position in this regard within 7 days and should your client fail to withdraw the conduct to which we refer, our client will treat the same as a repudiation of the contract and reserves its rights in that regard."

[38] At this point, it should be noted that the appellant's assertion that the respondent had refused to have "in place at completion a director's guarantee" is in no way justified by the terms of the correspondence emanating from the respondent. In light of what could only be seen as a transparent attempt by the appellant's solicitors to manufacture a grievance where there was no basis for that grievance, it is hardly surprising that the respondent's solicitors chose to refrain from further correspondence with the appellant's solicitors. The respondent's solicitors may have had in mind the saying: "He who sups with the devil must have a long spoon." Evidently, the respondent's solicitors decided that their spoon was not long enough to continue their correspondence with the appellant's solicitors.

[39] On 27 February 2008 the respondent's solicitors wrote to the appellant's solicitors:

"We refer to your letter to us dated 20 February 2008.

Our client's position remains unchanged. We note that the settlement date is 31 March 2008. Time is of the essence.

Any purported termination by your client will constitute a wrongful repudiation of the Contract by your client.

We reserve all of our client's rights against your client under the Contract, at common law and in equity."

[40] It is difficult to discern from this correspondence any resolve at all on the part of the respondent not to provide a guarantee of Nominee's lease at settlement much less the fixed resolve which, on the authorities, is required to constitute a repudiation of contract.[10] An issue as to the guarantee had not arisen at all until the appellant's letter of 20 February 2008. The respondent's letter of 27 February 2008 is not a categorical refusal to provide a guarantee at settlement: it does not refer to the question of the guarantee at all. There was no reason to think that if the lease to Nominees were otherwise acceptable to the appellant, a guarantee from Mr Scanlon would not or could not be forthcoming if it were required.

[41] In any event, the position taken by the respondent at the hearing before the learned primary judge as set out in paragraph [16] above made it clear that if on the authoritative interpretation of the contract a guarantee was required, the respondent was willing to provide it. In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*,[11] Stephen, Mason and Jacobs JJ said:

> "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 recognize 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 could not be attributed to him. As Pearson LJ observed in *Sweet & Maxwell Ltd v Universal News Services Ltd* ([1964] 2 QB 699 at 734):
>
> > 'In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments …'"

[42] The appellant's submission should be rejected, and the decision of the learned primary judge upheld.

The notice of contention

[43] In relation to the contention advanced by the respondent, the respondent sought to tender evidence of what occurred at the time appointed for settlement of the contract. This material was apt to demonstrate both, that the respondent was willing to provide Mr Scanlon's guarantee of Nominees' performance of its obligations under the lease of the property, and that the appellant was – at least at that time – not ready, willing and able to complete the contract. The appellant objected to the court's receiving this material in evidence, and the court reserved its ruling as to whether it would receive this material. In the end, having regard to the conclusion I have reached on the respondent's contention on the basis of the material before the learned primary judge, it is unnecessary to resolve this question.

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10 Cf *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 431 – 432.

11 (1978) 138 CLR 423 at 432 (citation footnoted in original).

[44] In my respectful opinion, the learned primary judge was right to decline to grant the declaratory relief sought by the appellant for the reasons advanced by the respondent pursuant to its notice of contention.

[45] Declaratory proceedings designed to elucidate the true meaning of a contract may be useful to clarify the rights and obligations of the parties to a contract prior to settlement. Indeed, s 70 of the *Property Law Act* 1974 (Qld) makes provision for summary application to the court by either vendor or purchaser under a contract for the sale of land in respect of questions "arising out of or connected with a contract". This beneficial provision should not be read down by imposing some artificial limitation on the broad language of the Act.

[46] In this case, the appellant was seeking to establish that it was entitled to terminate the contract before the due date for settlement. To obtain this relief, it had to show that it was entitled to terminate. That entitlement required it to show that it was ready, willing and able to perform its obligations under the contract. Thus, in *Foran v Wight*, Mason CJ said:

> "Accordingly, in relation to termination for actual breach, the principle is that established by the earlier decisions – the plaintiff is required to show that he was ready and willing to perform the contract if it had not been repudiated by the plaintiff. In other words, the requirement is that the plaintiff be ready and willing to perform except to the extent that the defendant dispensed with his performance. In the case of an anticipatory renunciation accepted by the plaintiff, the requirement of readiness and willingness extends only up to the time of acceptance because then the earlier repudiation results in an early termination of the contract. Accordingly, in the case of actual breach the requirement of readiness and willingness is more stringent; it continues through to the time for performance. That is because the termination of the contract does not antedate the time for performance. Subject to this difference and to the possibility of a difference in the onus of proof, the principle to be applied in the case of actual breach is consistent with that to be applied in the case of termination for anticipatory breach. The difference in the onus of proof arises because in the case of termination for anticipatory breach the plaintiff will generally be able to show at the time of termination that he would have been able to perform at the time for performance by demonstrating that he was not then disabled or incapacitated from such performance. As Dixon CJ noted in *Rawson v Hobbs* ((1961) 107 CLR at 481), 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'."[12]

[47] In the same case, Brennan J said:

> "Where a party claims to be entitled to rescind an executory contract on account of the other party's repudiation (whether by way of anticipatory breach or incapacity), the first party must show not only the other's repudiation but his own readiness and willingness up to

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12 (1989) 168 CLR 385 at 408 – 409 (citation footnoted in original).

> the time of rescission to perform his essential obligations under the contract: *Rawson v Hobbs* ((1961) 107 CLR at 480 – 481)."[13]

[48] In *Foran v Wight*, Dawson J said:

> "Of course, the date for settlement had not arrived at the time the vendors repudiated the contract and, as will appear, it is necessary to consider the purchasers' obligation at that time with that fact in mind. I shall return to that aspect of the matter shortly. First it is necessary to settle the question whether the purchasers were under any obligation to prove, as plaintiffs, that, notwithstanding the vendors' repudiation, they were ready and willing to perform their obligations under the contract. Of course, readiness and willingness implies not only disposition, but also capacity: *De Medina v Norman* ((1842) 9 M & W 820 at p 827 [152 ER 347 at p 350]).
>
> In any action for breach of contract, the readiness and willingness of the plaintiff to perform those mutual obligations remaining to be performed on his part under the contract is a condition precedent to his right to recover: see *Hensley v Reschke* ((1914) 18 CLR 452). Under the old rules a plaintiff was required to plead that he was ready and willing but under the present rules that fact is implied with the effect that he is not required to prove it unless the defendant puts it in issue. In that event, the burden of proving readiness and willingness rests upon the plaintiff. See Supreme Court Rules 1970 (NSW) Pt 15, r 11.
>
> But what if the breach is anticipatory rather than actual? The authorities have given conflicting answers to this question, but it is now clear that in cases of repudiation as well as actual breach, readiness and willingness on the part of the plaintiff is part of his cause of action. The position was clearly stated in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* ((1978) 138 CLR at p 433):
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> > '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 ...'"[14]

[49] In this case, there was no evidence to show that the appellant was, or would be at the time of settlement, ready, willing and able to perform its obligations under the contract.

[50] It is important to emphasise that the declarations sought by the appellant were not confined to resolving a dispute whether the performance proposed to be tendered at settlement by the respondent was in conformity with its contractual obligations. The declarations sought by the appellant extended to the determination of whether the appellant was then entitled to terminate the contract. It is, therefore, incorrect to say, as the appellant says, that its application was not an occasion for the appellant

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13 (1989) 168 CLR 385 at 424.

14 (1989) 168 CLR 385 at 451 - 453 (citations footnoted in original). See also *Green v Sommerville* (1979) 141 CLR 594 at 609.

to demonstrate by evidence its readiness, willingness and ability to complete the contract. If the appellant were to hold the respondent to the position it had adopted in correspondence as final and irrevocable as if the time for settlement had arrived, then elementary notions of substantive fairness and mutuality (which are reflected in the passages from *Foran v Wight* to which I have referred) required that the appellant demonstrate that, for its part, it was in a position whereby it could and would perform its obligations on the due date for settlement. It made no attempt to do so.

[51] For these additional reasons, the decision of the learned primary judge was correct.

Conclusion and orders

[52] The appellant's arguments should be rejected. In any event, the judgment below can be sustained by the argument advanced pursuant to the respondent's notice of contention. The appeal should be dismissed.

[53] The appellant should pay the respondent's costs of and incidental to the appeal to be assessed on the standard basis.

[54] **MACKENZIE AJA:** I agree with the orders proposed by Keane JA for the reasons he gives.

[55] **DUTNEY J:** I agree with the reasons for judgment of Keane JA and with the orders he proposes.