SUPREME COURT OF QUEENSLAND

CITATION:	*Davidson & Anor v Bucknell & Ors* [2009] QCA 383
PARTIES:	**WILLIAM JAMES ALEXANDER DAVIDSON** (first plaintiff/first appellant) **DAVIDSON CATTLE COMPANY PTY LIMITED** ACN 122 578 518 (second plaintiff/second appellant) **v** **ROBERT WILLIAM BUCKNELL and SUSAN ROSEMARY BUCKNELL** (first defendants/first respondents) **RASS FARMING PTY LTD** ACN 116 788 286 (second defendant/second respondent)
FILE NO/S:	Appeal No 8355 of 2009 SC No 1 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	11 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2009
JUDGES:	Keane JA, Fryberg and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellants to pay respondents' costs of and incidental to the appeal to be assessed on the standard basis**
CATCHWORDS:	CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – VENDOR'S REMEDIES – RESCISSION OR TERMINATION – PURSUANT TO CONDITION GIVING RIGHT TO RESCIND OR TERMINATE – where respondents agreed to sell appellants three separate parcels of land by way of three separate contracts – where first contract settled and further two contracts provided for contemporaneous settlement – where appellants did not have financial ability to complete further two contracts – where respondents purported to terminate further two contracts – where appellants refused to accept purported termination on ground that respondents were not in position to perform under contracts – where respondents'

chattels remained on one parcel of land and fixed and floating charge attached to other parcel of land – whether respondents entitled to rescind two further contracts

Corporations Act 2001 (Cth), s 262

Alghussein Establishment v Eton College [1991] 1 All ER 267, cited
Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 2 AC 180, cited
Clark v Raymor (Brisbane) Pty Limited [No 2] [1982] Qd R 790, cited
Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264, cited
Davidson & Anor v Bucknell & Anor [2009] QSC 182, affirmed
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51, cited
Gange v Sullivan (1966) 116 CLR 418; [1966] HCA 55, cited
Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd (1992) 11 WAR 40, cited
Halkidis v Bugeia [1974] 1 NSWLR 423, cited
Hope Island Resort Holdings P/L & Anor v Jefferson Properties (Qld) P/L & Ors [2005] QCA 315, cited
Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2) [2008] FCA 810, cited
Jeppesons Road P/L v Di Domenico & Anor [2005] QCA 391, considered
Kyrwood & Ors v Drinkwater & Ors [2000] NSWCA 126, cited
Lee v Surfers Paradise Beach Resort Pty Ltd [2008] 2 Qd R 249; [2008] QCA 29, cited
Lohar Corporation Pty Ltd v Dibu Pty Ltd (1976) 1 BPR 9177, cited
New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France [1919] AC 1, cited
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537; [1982] HCA 29, cited
Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd (1954) 90 CLR 235; [1954] HCA 25, cited
Rands Developments Pty Ltd v Davis (1975) 133 CLR 26; [1975] HCA 36, cited
Roadshow Entertainment Pty Ltd v ACN 053 006 269 Pty Ltd (1997) 42 NSWLR 462; [1997] NSWSC 473, cited
State Trading Corporation of India Ltd v Golodetz Ltd [1989] 2 Lloyd's Rep 277, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35, cited
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57, cited
Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632, cited

COUNSEL: P L O'Shea SC, with M A Jonsson, for the appellants
D G Mullins SC, with S C Holland, for the respondents

SOLICITORS: Preston Law for the appellants
Miller Harris Lawyers for the respondents

[1] **KEANE JA:** By three contracts, each dated 15 June 2007, the defendants ("the vendors") agreed to sell to the plaintiffs ("the purchasers") three separate parcels of land at Tumoulin in northern Queensland. One of these contracts was duly settled in August 2007. The other two contracts provided for contemporaneous settlement on 3 March 2008, but the date for settlement was extended by agreement to 7 October 2008 with time remaining of the essence. On 7 October 2008 the purchasers did not have the financial ability to complete the two remaining contracts.

[2] The vendors under each of those contracts (R W and S R Bucknell and Rass Farming Pty Ltd respectively) purported to terminate the contracts, but the purchasers (W J A Davidson and Davidson Cattle Company Pty Ltd respectively) refused to accept that termination, contending that the vendors themselves were not in a position to perform their own contractual obligations at settlement. In this regard, certain chattels belonging to the vendors were still on one of the pieces of land at the settlement date, and there was a fixed and floating charge over the other parcel of land which had not been released by the chargee. It was said by the purchasers that because of the concurrent nature of the obligations of vendor and purchaser at settlement of a contract for the sale of land, the vendors were not entitled to charge the purchasers with a breach of contract for failing to tender payment of the purchase price, such an entitlement being necessary for the vendors lawfully to rescind the contracts.[1]

[3] On 5 January 2009 the purchasers commenced proceedings for specific performance of the contracts on the basis that they were then ready, willing and able to complete the contracts. The vendors defended the claim on the basis that they had validly terminated the contracts on 7 October 2008.

[4] The matter proceeded to trial. The learned trial judge held that the vendors were indeed entitled to terminate the contracts on 7 October 2008 and dismissed the purchasers' action. The purchasers now appeal to this Court.

[5] The primary facts of the case are not controversial and may be summarised briefly together with the reasons for decision of the learned trial judge. I will then proceed to a discussion of the arguments agitated in this Court.

The contracts

[6] The first contract in issue involved the sale of a house and 1.137 hectares of land for a price of $450,000. It provided:

- by Special Condition 1 that "[t]his contract is subject to and conditional upon the contemporaneous completion of the [second contract]";
- by Standard Condition 2.5(1) that "[o]n the Settlement Date, the Buyer must pay the Balance Purchase Price by Bank cheque as the Seller directs";

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1 Cf *Ireland v Leigh* [1982] Qd R 145 esp at 151 – 153.

- by Standard Condition 5.3(1) that "[i]n exchange for payment of the Balance Purchase Price, the Seller must deliver to the Buyer at settlement:
  (a) any instrument of title for the Land required to register the transfer to the Buyer;
  (b) unstamped Transfer Documents capable of immediate registration after stamping;
  …"

- by Standard Condition 6.1 that "[t]ime is of the essence of this contract".

[7] The first contract also contained the following Standard Conditions:

> "**5.5 Possession of Property and Title to Included Chattels**
> On the Settlement Date, in exchange for the Balance Purchase Price, the Seller must give the Buyer vacant possession of the Land and the Improvements except for the Tenancies. Title to the Included Chattels passes at settlement.
>
> **5.6 Reservations**
> (1) The Seller must remove the Reserved Items from the Property before the Settlement Date.
> (2) The Seller must repair at its expense any damage done to the Property in removing the Reserved Items. If the Seller fails to do so, the Buyer may repair that damage.
> (3) Any Reserved Items not removed before settlement will be considered abandoned and the Buyer may, without limiting its other rights, complete this contract and appropriate those Reserved Items or dispose of them in any way.
> (4) The Seller indemnifies the Buyer against any damages and expenses resulting from the Buyer's actions under clauses 5.6(2) or 5.6(3)."

[8] The second contract in issue involved the sale of an area of 96 hectares of land for a price of $1,150,000.

[9] The second contract provided:

- by Standard Condition 4 that "the balance of the Purchase Price shall be paid on the date for Completion in exchange for … a properly executed transfer for the Land in favour of the [purchasers] capable of immediate registration (after stamping) in the appropriate office free from Encumbrances …";

- by Special Condition 6 that "this contract is subject to and conditional upon the contemporaneous completion of the sale of Lot 142 on SP154473 by [the vendors] to [the purchasers]."

[10] I pause here to note the difference between the provisions of the two contracts in relation to completion. Under the second contract the obligations of vendor and purchaser at settlement were clearly mutually dependent. On the other hand the first contract was couched in terms which might arguably be said to impose an obligation on the purchaser to pay the balance of the purchase price at settlement

independently of the performance by the vendors of their obligation. At first instance the parties argued the case on the basis that the obligations of buyer and seller at settlement were mutually dependent under both contracts; and it is not necessary to the determination of this appeal to consider the ramifications, if any, of this difference in contractual language.

[11] The learned trial judge found that it was not until 3 November 2008 that the purchasers had finalised their applications for finance to enable them to complete the contracts, and that it was not until 14 April 2009 that they actually had the financial capacity to complete the contracts.[2]

Arrangements for settlement in October 2008

[12] On 1 October 2008 the vendors' solicitors provided to the purchasers' solicitors a settlement statement for each contract, confirmed the date for completion as 7 October 2008, and nominated the place of settlement as their offices at Mareeba at 10.00 am.[3]

[13] The purchasers' solicitors responded on the same day seeking a further extension of time for completion to 17 October 2008. That request was rejected by letter dated 6 October 2008. On the afternoon of 6 October 2008, the purchasers' solicitors sought an extension of time for settlement until 10 October 2008. This request was rejected immediately.[4]

[14] On 7 October 2008 the vendors' solicitors sent a facsimile transmission to the purchasers' solicitors at 9.20 am again proposing settlement at 10.00 am. The only response came at 1.00 pm when the purchasers' solicitors sent a facsimile transmission asserting that the second contract was an "instalment contract" within the meaning of s 71 of the *Property Law Act* 1974 (Qld) and that the second contract could not be terminated until the expiration of 30 days after a notice had been duly served in accordance with s 72 of the *Property Law Act*. It may be noted that no attempt has been made, either at first instance or on appeal, to maintain that these assertions were correct, or even arguable.

[15] At 4.00 pm on 7 October 2008 the purchasers lodged caveats asserting that the two contracts remained on foot.[5]

[16] At about 5.30 pm on 7 October 2008 the vendors' solicitors wrote to the purchasers' solicitors terminating the contracts.

[17] As at 7 October 2008 there were some of the vendors' chattels still on the land the subject of the first contract. The purchasers argued at trial that the vendors were obliged by cl 5.6 to remove these chattels **prior** to 7 October 2008 and that their failure to do so meant that they were unable to give vacant possession at settlement.

[18] On 7 October 2008 the land the subject of the second contract was subject to a fixed and floating charge in favour of Suncorp Metway Limited. The vendors did not have available to them a release executed by Suncorp Metway Limited excluding the land the subject of the second contract from the charge. Nor did the vendors hold a written consent by Suncorp Metway Limited to the transfer of the land to the

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2 *Davidson & Anor v Bucknell & Anor* [2009] QSC 182 at [9].
3 [2009] QSC 182 at [10].
4 [2009] QSC 182 at [10].
5 [2009] QSC 182 at [11].

purchasers. The purchasers argued that, as a result, the vendors were unable to give the purchasers a transfer of the land "capable of immediate registration … free from Encumbrances".

The decision of the learned trial judge

[19] The learned trial judge found that the vendors removed their personal belongings from the house the subject of the first contract on 7 October 2008. Some of their belongings were in a shipping container which was situated on the south-eastern corner of the land. The container was to be removed on 7 October 2008 but the arrangements were cancelled when the contract was not completed.[6]

[20] The learned trial judge held that Standard Conditions 5.5 and 5.6(1) of the first contract did not require that the land be cleared of all chattels prior to the settlement date, it being sufficient compliance with these provisions if the vendors' chattels had been removed prior to settlement.[7] His Honour also observed that there was "considerable merit" in the argument that the presence of a shipping container in an area of 1.137 hectares would not constitute an "impediment" to the purchasers' enjoyment of the land the subject of the first contract.[8]

[21] His Honour went on to conclude that the vendors were entitled to terminate the first contract and that their termination pursuant to that entitlement meant that they were entitled to terminate the second contract.[9] Even if the vendors could not have given a transfer capable of registration free from the encumbrance of the fixed and floating charge, they were nevertheless entitled to rely on Special Condition 6 of the second contract to bring it to an end by virtue of their lawful termination of the first contract.

[22] It may be noted that the learned trial judge also found as a fact in relation to the second contract that the evidence of Mr Drewett, an officer of Suncorp Metway, the holder of the fixed and floating charge, to the effect that the charge was no longer required by the chargee established that "the provision of a letter of exclusion was little more than a formality had a request been made by [the vendors]."[10]

The arguments in this Court

[23] On the appeal the purchasers argue in relation to the first contract that the terms of Standard Condition 5.6 required the removal of all chattels reserved from sale before 7 October 2008 as an aspect of the vendors' obligation in relation to the giving of vacant possession. That the vendors might have been able to remove the chattels at some time on that day – even prior to the time of settlement – is said to be beside the point because the vendors were obliged to remove all Reserved Items from the property **before** the settlement date. Accordingly, the vendors were not in a position to charge the purchasers with breach of their obligation to tender the balance of the purchase price at settlement.

[24] The purchasers go on to argue that the vendors were not entitled to terminate the first contract, and as a result they were not entitled to rely upon Special Condition 6 of the second contract to bring it to an end. Furthermore, the purchasers say that the vendors were not in a position to produce at settlement a release of the fixed and

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6 [2009] QSC 182 at [16], [24].
7 [2009] QSC 182 at [20] – [21].
8 [2009] QSC 182 at [24].
9 [2009] QSC 182 at [30] – [33].
10 [2009] QSC 182 at [37].

floating charge in favour of Suncorp Metway in respect of the land the subject of the second contract.

[25] The purchasers rely upon this Court's decision in *Jeppesons Road Pty Ltd v Di Domenico & Anor*[11] where it was held that a vendor who, at settlement was not able to tender proper performance of its own obligations, was not entitled to charge the purchasers with failure to perform obligations which were concurrent with the vendor's obligations at settlement, and was accordingly not entitled to terminate the contract.

[26] The purchasers also argue that because the vendors were not able to perform their obligations under the second contract, Special Condition 1 in the first contract and Special Condition 6 in the second contract operated to disentitle the vendors from terminating the first contract.

[27] On behalf of the vendors, it is argued that this is not a case to which the decision in *Jeppesons Road Pty Ltd v Di Domenico & Anor* applies because the vendors were ready and willing to perform the substance of their obligations at settlement and, to the extent that in minor respects they were not ready to do so, the purchasers by their conduct had dispensed with the vendors' obligation to tender performance at settlement.[12] The vendors argue that the present case is within that category of cases discussed by Brennan J (as his Honour then was) in *Foran v Wight*[13] in that the manifest intention of the purchasers not to complete the contract on 7 October 2008 absolved the vendors from having to perform or be ready, willing and able to perform in order to be able to charge the purchasers with breach of contract. The purchasers argue in response that the vendors did not act any differently in relation to their obligations under Standard Condition 5.6, or in relation to procuring a release of the fixed and floating charge by reason of the purchasers' intimations that they would be unable to settle on the due date.

[28] The vendors also argue that the matters of which the purchasers complain were not breaches of contract apt to relieve the purchasers of their obligation to tender the balance of the purchase price at settlement.

[29] Finally, the vendors argue that each of Special Condition 1 of the first contract and Special Condition 6 of the second contract are to be understood as conferring on each party a right to terminate the particular contract containing the clause if that party has lawfully terminated the other contract. On this argument, even if the vendors were not in a position to terminate the second contract for the purchasers' breach, they were entitled to terminate it pursuant to Special Condition 6 of the second contract.

Discussion

[30] It may be said immediately that it is not possible to view the purchasers' failure to respond to the vendors' 1 October 2008 letter of nomination of a time for settlement, save by their requests for an extension of time, as other than an indication that performance by the vendors of their obligations on 7 October 2008 would be futile. On the other hand, notwithstanding the conduct of the purchasers prior to settlement, one cannot conclude that the vendors were likely to have complied with

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11 [2005] QCA 391 esp at [21] – [22].

12 Cf *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 253 – 254; *Lohar Corporation Pty Ltd v Dibu Pty Ltd* (1976) 1 BPR 9177 at 9186.

13 (1989) 168 CLR 385 at 423.

Standard Condition 5.6 of the first contract or obtained a release of the fixed and floating charge in relation to the second contract but for the conduct of the purchasers. There was no evidence from the vendors justifying the conclusion that they would have attended to the matters of complaint raised by the purchasers in the ordinary course of preparing for settlement. The better view is that the vendors simply overlooked the matters of complaint now raised by the purchasers.

[31] The learned trial judge did not conclude that, to the extent that the vendors were not in a position strictly to perform the obligations required of them at settlement, that situation had been brought about by the conduct of the purchasers. I do not think that this Court can or should make a finding that his Honour did not make and was not invited to make. It would, I think, be going too far to say that this is a case where, in stark contrast to *Jeppesons Road Pty Ltd v Di Domenico & Anor*,[14] the purchasers engaged in "a manoeuvre … to catch [the] vendor[s] unprepared".[15]

[32] In my respectful opinion, however, the vendors are entitled to succeed on the basis that the vendors under the first contract were entitled to charge the purchasers with breach of that contract and so to terminate it, and in consequence to terminate the second contract in reliance on Special Condition 6 in that contract.

[33] Standard Condition 5.5 of the first contract obliged the purchasers to pay the purchase price at settlement in exchange for vacant possession. Under the general law a vendor is unable to provide vacant possession if there is some "impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property".[16] It is not disputed by the purchasers that the vendors were indeed able to provide vacant possession in this sense. The purchasers understandably eschewed the hopeless task of seeking to persuade this Court to hold that the presence of the shipping container on the south-eastern corner of a block of land 1.137 hectares in area for the short period before its prearranged removal could have impeded the purchasers' enjoyment of a substantial part of the land in a substantial way. The learned trial judge was clearly not disposed to make such a finding, and I respectfully share his Honour's disinclination.

[34] The purchasers sought to argue that Standard Condition 5.6(1) serves to qualify the concept of "vacant possession" under the general law so that if the vendors were in breach of Standard Condition 5.6(1), they were also in breach of Standard Condition 5.5. In my respectful opinion, that argument must be rejected.

[35] Reference to the text of Standard Condition 5.6 shows that it does not seek to alter the general law understanding of the "vacant possession" which a vendor is obliged to provide at settlement.[17] Compliance with Standard Condition 5.6 by the vendors was not a condition of compliance by the purchasers with their obligation to pay the purchase price. The very point which the purchasers make most emphatically, namely that Standard Condition 5.6 obliges the vendors to "remove Reserved Items from the Property **before** the Settlement Date", makes it clear that Standard Condition 5.6 is not concerned with the concurrent obligations of the parties **at settlement**.

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14 [2005] QCA 391 esp at [47] and [53].

15 See also *Halkidis v Bugeia* [1974] 1 NSWLR 423 at 427 – 428.

16 Cf *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 271.

17 Cf *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 271.

[36] Even if the presence of some chattels on the land at the beginning of the settlement date gave rise to a breach of Standard Condition 5.6(1), that breach would not necessarily disable the vendors from tendering performance of their obligations at settlement. As is apparent from the text of Standard Condition 5.6, it is not concerned with the content of the parties' obligations at settlement. In particular it is not concerned to alter the content of the concept of vacant possession under the general law. Rather, it is a machinery provision concerned to oblige the vendor to facilitate an appreciation by the purchaser of whether the state of the land at settlement will be such that the vendor will be able to give vacant possession at settlement. If the extent of chattels on the property was such as to be inconsistent with an ability to give vacant possession under the general law at settlement, the purchasers might be entitled to rescind for anticipatory breach depending on the vendors' response to inquiry as to its intention at settlement. If a vendor is in breach of Standard Condition 5.6(1), a purchaser may be put to expense in ascertaining whether it is obliged to complete; and that expense will be recoverable as damages for breach of that provision.

[37] There may be a question as to whether a vendor under this form of contract would be entitled to terminate the contract if Standard Condition 5.6(1), though not an obligation on which performance of the purchasers' obligations at settlement depends, could nevertheless be regarded as a condition breach of which would justify termination by the purchasers.[18] It is not necessary to resolve that question. It is clear that Standard Condition 5.6(1) is not a term of the kind described by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*[19] as "a promise of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict … performance of the promise, and that this ought to have been apparent to the promisor …" The other terms of cl 5.6 are intended to ensure that the presence of chattels, being Reserved Items, left on the land will not result in loss to the purchaser. They serve to ensure that breach of Standard Condition 5.6(1) will not result in loss to the purchaser if the contract is completed. Accordingly, one cannot postulate of Standard Condition 5.6(1) that a strict or literal compliance with its terms was essential to the parties' bargain.

[38] In *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*, Jordan CJ also referred to a promise substantial performance of which was essential to the bargain. A substantial breach of such a promise "will ordinarily justify a discharge". A purchaser cannot contend that substantial performance of Standard Condition 5.6(1) is essential to his or her obligations under the terms of the first contract. So long as a vendor is in a position to give vacant possession at settlement, a purchaser can suffer no diminution in the value of his bargain by reason of a mere breach of Standard Condition 5.6(1).

[39] As to the second contract, so far as the fixed and floating charge is concerned, by virtue of s 262(8) of the *Corporations Act* 2001 (Cth), the charge in favour of Suncorp Metway could not affect the purchasers' title once the transfer to the purchasers was registered under the *Land Title Act* 1994 (Qld).

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18 As to which see *State Trading Corporation of India Ltd v Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 285 – 287; *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd* (1997) 42 NSWLR 462 at 479 – 481; *Lee v Surfers Paradise Beach Resort Pty Ltd* [2008] 2 Qd R 249 at 269 – 271 [51] – [58]; *Kyrwood & Ors v Drinkwater & Ors* [2000] NSWCA 126 esp at [238] – [252]. But see *Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd* (1992) 11 WAR 40 at 51 and *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No 2)* [2008] FCA 810 at [364] – [385].

19 (1938) 38 SR (NSW) 632 at 641 – 642.

[40] Further, the mere existence of the fixed and floating charge could not have impeded the "immediate registration … in the appropriate office free from Encumbrances" of the "properly executed transfer" in accordance with the contract. To the extent that the fixed and floating charge might have created an equitable interest in Suncorp Metway in respect of the land which might have supported a caveat by the chargee, the chargee's failure to lodge a caveat to protect that equitable interest meant that the chargee's interest would have been postponed to the equitable interest of the purchasers and their legal right to registration of the transfer.[20]

[41] After settlement of the contract the chargee could not, in the circumstances of this case, have impeded the registration of the transfer and the creation of an unencumbered title in the purchasers. The purchasers sought to rely upon the observations of Jacobs J in *Rands Developments Pty Ltd v Davis*:[21]

> "The procedure to be adopted on settlement must be such that it gives to the purchaser the fullest protection which is consonant with a settlement of transactions without undue delay or expense. The purchaser is entitled to all reasonable protection. Once a purchaser or transferee is registered as proprietor no substantial problems can arise, particularly when the proprietor obtains the wide protection enunciated in *Frazer v Walker* ([1967] 1 AC 569) and *Breskvar v Wall* ((1971) 126 CLR 376). The protection which a purchaser or transferee requires is protection between the date of settlement and the date of registration, particularly if he has notice of any outstanding interests to which on registration his title would be paramount. Until registration the transferee has no statutory protection. His interest in the land is equitable only and he runs the risk of being postponed to a prior equity. There is no provision in Queensland legislation which is similar to s 43A of the *Real Property Act*, 1900 (NSW) which gives some further protection against notice of prior interests to transferees between settlement and registration."

[42] In this case there is no reason to conclude that the purchasers were "at risk" of being postponed to a prior equity in Suncorp Metway. I say this because the absence of a caveat by Suncorp Metway in respect of the land under the *Land Title Act* meant that, in accordance with the decision of this Court in *Clark v Raymor (Brisbane) Pty Limited [No 2]*,[22] the purchasers' entitlement to registration as registered proprietors of the land free of encumbrances would have prevailed over any equity in Suncorp Metway.

[43] There was no suggestion that the purchasers were affected with actual notice of the charge in favour of Suncorp Metway which might have altered the position in this regard. And to the extent that the provisions of the *Corporations Act* might have given rise to an argument about constructive notice, it is arguable that they have no application by reason of s 262(8) of that Act, and in any event, in the circumstances of this case, constructive notice of Suncorp Metway's interest could not have enured to the prejudice of the purchasers. There was no suggestion that Suncorp Metway, the chargee of the land, was disposed to seek to prevent the registration of the

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20 *Clark v Raymor (Brisbane) Pty Limited [No 2]* [1982] Qd R 790 at 792 – 793, 799 – 800.

21 (1975) 133 CLR 26 at 34 – 35 (citations footnoted in original).

22 [1982] Qd R 790 at 792 – 793, 799 – 800.

transfer from the vendors to the purchasers. Indeed the evidence of Mr Drewett excluded, as a matter of fact, all possibility of such action by the chargee.

[44] In the event, it is not necessary to resolve this last argument because I agree with the learned trial judge that the vendors were entitled to rely on Special Condition 6 of the second contract and their lawful termination of the first contract to terminate the second contract. In this regard, I reject the purchasers' argument that Special Condition 1 of the first contract and Special Condition 6 of the second contract operate to prevent termination of either contract unless the party terminating is entitled to terminate both contracts.

[45] Each of Special Conditions 1 and 6 are conditions which confer an entitlement to terminate the contract in which it appears if the other contract is not to be completed.[23] There can be no doubt that each of these provisions is intended to allow a party entitled to terminate one contract to rely on the termination of that contract to exercise the right conferred by this Special Condition in the other contract.

[46] It may be accepted for the sake of argument that, if the party purporting to rely on Special Condition 6 in the second contract had contributed to the non-completion of the first contract by its own default under that contract, that party could not invoke Special Condition 6.[24] But in this case the vendors were lawfully entitled to terminate the first contract. Because the first contract could not be completed for reasons which did not involve default on their part, the vendors were entitled to terminate the second contract in reliance on Special Condition 6 even though they might not have been entitled to charge the purchasers with breach of the second contract. That is because the vendors' entitlement to terminate the second contract derives not from the general law as to rescission of contracts but from the terms of Special Condition 6 and the occasion for the exercise of that right did not arise by virtue of any default on the part of the vendors.

Conclusion and orders

[47] The vendors were entitled to terminate the contract because of the purchasers' failure to tender payment of the balance of the purchase price at settlement on 7 October 2008. The purchasers' action for specific performance was rightly dismissed.

[48] The appeal should be dismissed.

[49] The purchasers should pay the vendors' costs of and incidental to the appeal to be assessed on the standard basis.

[50] **FRYBERG J:** I agree with the orders proposed by Keane JA and with his Honour's reasons for those orders.

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23 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 552. See also *Suttor v Gundowda Pty Limited* (1950) 81 CLR 418; *Gange v Sullivan* (1966) 116 CLR 418.

24 *Gange v Sullivan* (1966) 116 CLR 418 at 442; *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 546, 566 – 567; *New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France* [1919] AC 1 at 8 – 9; *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180 at 188 – 189; *Alghussein Establishment v Eton College* [1991] 1 All ER 267 at 274; *Hope Island Resort Holdings Pty Ltd & Anor v Jefferson Properties (Qld) Pty Ltd & Ors* [2005] QCA 315 at [8], [47] – [49]; *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 334 – 335 [57].

[51] The first contract used the fifth edition of the REIQ/Queensland Law Society Terms of Contract For Houses and Land. Clause 2.5 obliged the buyer to pay the balance purchase price on the settlement date. It did not in terms make that obligation dependent upon the performance or the tender of performance of any of the seller's obligations. Clause 5.3 obliged the seller at settlement to deliver various things to the buyer in exchange for payment of the balance purchase price. It is arguable that the buyer's obligation (to pay, or at least to tender, the balance purchase price) was not as a matter of construction dependent on that of the seller; in other words that, on the buyer's side, the obligations were not "mutual or concurrent obligations, the performance of each being conditional upon the performance of the other."[25]

[52] As Keane JA has demonstrated, it is unnecessary for the resolution of this appeal to determine this argument.

[53] **APPLEGARTH J:** I agree with the reasons of Keane JA and with the orders his Honour proposes.

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[25] *Foran v Wight* (1989) 168 CLR 385 at p 450. The point was not raised in *Jeppesons Road Pty Ltd v Di Domenico* [2005] QCA 391; counsel's concession in that case (see para [30]) means it should not be regarded as resolving the point.