SUPREME COURT OF QUEENSLAND

CITATION:	*Mullins v Kelly-Corbett* [2010] QCA 354
PARTIES:	**MICHELLE ALICIA MULLINS** (defendant/appellant) **v** **DONNA MARIA KELLY-CORBETT** (plaintiff/respondent)
FILE NO/S:	Appeal No 7569 of 2010 DC No 1208 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2010
JUDGES:	Muir and Fraser JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs**
CATCHWORDS:	CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – PERFORMANCE – appellant purchaser and respondent vendor entered into a contract for the sale of a residential property – appellant failed to settle on the date stipulated in the contract – respondent purported to terminate the contract and sold the property to another party – appellant submitted that the respondent had elected to affirm the contract after an earlier anticipatory breach by the appellant – appellant submitted that the affirmation meant the respondent remained under an obligation to be ready, willing and able to perform – appellant submitted that the respondent was not ready, willing and able to give vacant possession on the settlement date – whether the respondent was ready, willing and able to complete the contract on the settlement date – whether the appellant's conduct relieved the respondent of the obligation to be ready, willing and able to give vacant possession DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – GENERAL – appellant submitted that a damages clause should be construed with reference to common law principles

– whether common law measure of damages applied to claims under the clause – whether losses claimed were too remote to be recoverable

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – primary judge awarded respondent costs on an indemnity basis – whether respondent was entitled to indemnity costs

Alexander v Cambridge Credit Corporation Ltd (1987) 9 NSWLR 310, applied
Christopher Hill Ltd v Ashington Piggeries Ltd [1969] 3 All ER 1496, cited
Cohen & Co v Ockerby & Co Ltd (1917) 24 CLR 288; [1917] HCA 58, cited
Davidson & Anor v Bucknell & Ors [2009] QCA 383, cited
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51, applied
Hadley v Baxendale (1854) 156 ER 145; [1854] EWHC J70 (Exch), cited
Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1993) 182 CLR 26; [1993] HCA 27, cited
Mahoney v Lindsay & Ors (1980) 55 ALJR 118; (1980) 33 ALR 601, applied
Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd (1954) 90 CLR 235; [1954] HCA 25, applied
Rawson v Hobbs (1961) 107 CLR 466; [1961] HCA 72, cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634; [1974] HCA 40, cited
Sinason-Teicher Inter-American Grain Corporation v Oilcakes and Oilseeds Trading Co Ltd [1954] 1 WLR 1394, applied
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528; [1949] All ER 997, cited
Wenham v Ella (1972) 127 CLR 454; [1972] HCA 43, applied

COUNSEL: P D Dunning SC, with S J Armitage, for the appellant
R J Anderson for the respondent

SOLICITORS: Conroy & Associates for the appellant
Shand Taylor Lawyers for the respondent

[1] **MUIR JA: Introduction**
The appellant and the respondent entered into a contract dated 8 October 2005 for the sale by the respondent to the appellant of a residential property at 15 Dublin Street, Clayfield for a price of $1,200,000. The settlement date stipulated in the contract was 6 January 2006. Settlement did not take place. The respondent purported to terminate the contract and resold the property for $1,130,000 under a contract dated 2 April 2006. The respondent had entered into a contract dated 27 August 2005 to purchase a replacement dwelling ("the Reynolds contract").

[2] The respondent commenced proceedings in the District Court claiming against the appellant $130,298.90 together with costs and interest pursuant to clause 9.6 of the contract, or alternatively, for damages for breach of contract. The further statement of claim alleged that on 13 January 2006:

> "(a) the [respondent] was ready, willing and able to complete the contract;
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> (b) the [appellant] was contractually bound to complete the contract;
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> (c) the [appellant] failed to complete the contract;
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> (d) the [respondent] terminated the contract on the basis of the [appellant's] failure to complete."

[3] It was admitted on the pleadings that on 6 January 2006 the date for completion was extended to 13 January 2006 and that time remained of the essence of the contract. In her defence, the appellant alleged that the respondent was not ready, willing and able to settle on 13 January 2006, that the respondent wrongfully repudiated the contract, and that such repudiation was accepted by the appellant.

[4] The primary judge found that the respondent was absolved of the obligation to give vacant possession of the property because the appellant had made it "perfectly clear that she was not going to settle" on 13 January 2006 and that the respondent had lawfully terminated the contract. He gave judgment in favour of the respondent in the sum of $160,265.47 being $130,298.90 less deposit moneys of $15,000 plus interest.

The issues for determination on the appeal

[5] The central issues for determination on this appeal in relation to liability are:

(a) whether the respondent was ready and willing to complete at the time fixed for completion and, if not;

(b) whether the respondent, as a result of the appellant's conduct was relieved of the obligation to be ready and willing to give vacant possession at the time fixed for completion.

[6] The questions for determination in relation to damages are:

(a) whether the respondent elected to exercise her rights under clause 9.4 of the contract, confining her to recover by way of liquidated damages any deficiency in price on a resale and her expenses connected with the contract, any repossession, any failed attempt to resale and the resale;

(b) whether the common law measure of damages is applicable to claims under clause 9.5; and

(c) whether, if the common law measure is applicable, the losses claimed were too remote to be recoverable.

[7] There is also an issue about whether the primary judge should have ordered the appellant to pay costs on an indemnity basis.

The appellant's anticipatory breach, failure to complete and the termination of the contract

[8] The appellant accepted that there was an anticipatory breach of contract by the appellant when on 12 January 2006 her solicitors emailed the respondent's solicitors stating, inter alia:

> "I am instructed that my client's financier is definitely not in a position to settle tomorrow. As indicated to you this morning, my client is waiting for advices from her financier as to earliest possible settlement date. I will contact you as soon as I receive those instructions."

[9] That email was in response to an email from the respondent's solicitors to the appellant's solicitors stating:

> "It may come as no surprise that my client is absolutely distraught at the prospect of this matter not settling tomorrow - given the history of the matter. Can you please pass on to Mr. Mullins that it would be appreciated if he could give us the courtesy of letting us know before midday today whether he intends to settle tomorrow or not - otherwise our client needs to pu[t] other measures in place with respect to their ongoing purchase, of which you (sic) client is now aware."

[10] On 13 January 2006 the respondent's solicitors advised the appellant's solicitors by facsimile that the respondent required the appellant "to effect settlement today in accordance with the agreement reached between [the parties]". The place and time of settlement was nominated as 3 pm at the Titles Office. The email stated that failure to settle would result in forfeiture of the deposit and a claim for damages in accordance with the respondent's rights under the contract. In another facsimile to the appellant's solicitors of 13 January the respondent's solicitors noted the failure of the appellant to pay an additional deposit of $40,000 into the agent's trust account. They confirmed that the respondent was ready, willing and able to settle and the time and place of settlement as 4 pm at the Titles Office. It was stated that failure to settle would result in termination of the contract in accordance with clause 9.1 and that the respondent would rely on clauses 9.3, 9.4 and 9.5 of the contract "in addition to all the damages [the respondent] has suffered as a result of [the appellant's] failure to settle" and would "look to [the appellant] for any short fall on the re-sale of the property".

[11] On 20 January the respondent's solicitors advised the appellant's solicitors that their client's instructions were to terminate the contract, that the respondent would be forfeiting the deposit and that she reserved her rights to sue for loss in accordance with clauses 9.3 to 9.6 of the contract.

The appellant's argument concerning the respondent's right to terminate the contract

The appellant's contentions

[12] The appellant contended that after the appellant's anticipatory breach on 12 January 2006 the respondent elected to affirm the contract and by so doing, remained under an obligation to be ready, willing and able to complete. It was submitted that the respondent's "unequivocal call for performance in the face of an anticipatory breach" was a case *par excellence* of an election to affirm the contract. Reference was made to the following passage in the reasons of Dixon CJ in *Rawson v Hobbs*:[1]

> "In *British and Benningtons Ltd. v. North Western Cachar Tea Co.* Lord *Sumner* dealt with the question how far a party accepting an

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[1] (1961) 107 CLR 466 at 480, 481.

> anticipatory renunciation of a contract must up to that point himself be ready and willing to perform his contract as and when the time for performance arrived. It is hardly necessary to say that once there has been a renunciation of a contract or of future performance of an essential obligation thereof by one contracting party, the other if he elects to treat that as an anticipatory breach discharging the contract is relieved from all further obligation to perform on his side and in consequence need not thereafter be ready and willing to do what would otherwise be his part. But that is not the question. What is the question is whether up to that point he must not be ready and willing to proceed with the contract and, as and when the time comes to do his part, so far as it is of the essence, to perform the contract on his side. Lord *Sumner* speaks of a party 'already completely disabled from doing his part at all' and of a party who 'had become wholly and finally disabled from performing essential terms of the contract altogether'."

[13] It was contended that the respondent was not ready at the time fixed for completion to give vacant possession and was thus not in a position to terminate. Before considering whether the evidence supported the conclusion that the respondent was not ready and willing to complete it is appropriate to consider the contention that the consequence of the respondent's affirmation of the contract after the appellant's intimation that she would not settle on the due date was that such repudiatory conduct on the part of the appellant could not be relied on by the respondent to justify her not being in a position to give vacant possession. The proposition, in essence, was that once the contract had been affirmed the repudiatory conduct ceased to have any effect in relation to the parties' contractual rights and obligations.

Consideration

[14] No authority in support of the appellant's proposition was cited and it cannot be accepted.

[15] Repudiatory conduct, once a contract has been affirmed, cannot be relied on as a ground of rescission because of the application of the doctrine of election. The innocent party is presented with the right or option to choose between two inconsistent legal rights and the choice of one necessarily excludes the other. As Mason J explained in *Sargent v ASL Developments Ltd*:[2]

> "A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, i.e. when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach – in each instance the alternative right to insist on performance creates a right of election."

[16] In *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)*,[3] Deane, Toohey, Gaudron and McHugh JJ said:

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2 (1974) 131 CLR 634 at 655 and see also per Stephen J at 641, 642.

3 (1993) 182 CLR 26 at 41.

> "The true nature of election is brought out in this sentence from the seminal work of Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed. (1977) p. 313): 'It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice."

[17] Unless the innocent party who has affirmed the contract again seeks to rely on the repudiatory conduct as grounds for rescission, the doctrine of election is not engaged. An election not to accept repudiatory conduct as a basis for rescission does not produce the result that the conduct is deemed never to have occurred. The repudiatory conduct remains available to be relied on to relieve the innocent party, in appropriate circumstances, from an obligation to perform concurrent or other obligations. That is plainly established by *Foran v Wight*, [4] and other authorities.[5]

[18] Mason CJ explained the consequences of affirmation of a contract by an innocent party after repudiatory conduct by the other party in *Foran v Wight* as follows:[6]

> "A failure by the innocent party to treat an anticipatory breach of an essential term as a repudiation and to terminate the contract has the effect of leaving the contract on foot, in which event it remains in force for the benefit of both parties, just as it would if the anticipatory breach had never occurred, subject to a qualification to which I shall refer in a moment. The parties then remain bound by the contract and the repudiating party may rely on any supervening circumstance which justifies his non-performance of the contract when the time for performance arrives: *Bowes v. Chaleyer*; *Peter Turnbull*." (footnotes omitted)

[19] The qualification to which Mason CJ referred is central to the resolution of the issues between the parties on this appeal. It is that:[7]

> "… if the repudiating party by his refusal to perform or other conduct intimates to the innocent party that he need not perform an obligation which is a condition precedent to the performance by the repudiating party of his obligation, and does not retract that intimation in time to give the innocent party an opportunity to perform his obligation, that party may be excused from actual performance of the condition precedent. …"

[20] Mason CJ further explained how the principles under discussion operated in relation to contracts for the sale and purchase of land:[8]

> "In a contract for the sale of land, the vendor's obligation to deliver a good title and the purchaser's obligation to pay the purchase money are concurrent and mutually dependent obligations in the sense that

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4 (1989) 168 CLR 385.

5 *Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288 at 297, 298; *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235; and *Sinason-Teicher Inter-American Grain Corporation v Oilcakes and Oilseeds Trading Co Ltd* [1954] 1 WLR 935.

6 (1989) 168 CLR 385 at 395, 396.

7 At 396.

8 At 396.

> they are 'simultaneous acts to be performed interchangeably': *Palmer v. Lark*; *Michael Realty Pty. Ltd. v. Carr*; *Frankcombe v. Foster Investments Pty. Ltd.* Generally speaking, a party in breach of such an obligation cannot terminate for the other party's breach. But a party may be excused or absolved from performance of his concurrent obligation by conduct on the part of the other party amounting to a waiver or dispensation with performance. A repudiation by that party of his concurrent obligation may constitute such a waiver or dispensation. In that event the party excused or absolved from performance may terminate the contract and sue for damages." (footnotes omitted)

[21] In addressing what he had referred to as a qualification of the general principle that a plaintiff wishing to rely on the termination of the contract for breach, must show that he was ready and willing to perform the contract, Mason CJ said:[9]

> "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.
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> …
>
> The time for determining whether or not the purchasers would have been ready and willing to perform the contract had it not been for the dispensing conduct of the vendors is therefore the time for performance."

[22] It is, of course, termination for actual breach and failure to settle on the due date, which was alleged by the respondent and found by the primary judge to have occurred.

[23] Brennan J explained the circumstances in which a plaintiff may be relieved from the obligation to fulfil a concurrent condition on which the defendant's obligation to complete was dependent as follows:[10]

> "Where A refuses to complete and thereby intimates to B that he need not trouble to fulfil a concurrent condition on which A's obligation to complete is dependent, B may be entitled to sue for A's actual breach though B elected not to terminate the contract before the time for completion arrived. Kitto J. said in *Peter Turnbull*:

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9 At 408, 409.

10 At 419, 421.

> 'What does it matter for the purposes of that action that the refusal was not treated as ending the contract and as founding an action for anticipatory breach? The damages claimed are not for loss of the contract by premature termination, but for loss of the benefit which performance of the contract in accordance with its terms by both parties would by now have produced to B but for the fault of A. It is a cause of action which the facts I have assumed make out, unless the non-fulfilment of the condition is an answer to it; and as to that the inescapable fact is that A's refusal was *a continuing intimation that the condition need not be observed, and it did not become any the less an intimation to that effect because B chose not to determine the contract before its time.* The intimation having continued until the time came when A would certainly have been in default if the condition had been fulfilled, the law, as I understand it, treats A's obligation as absolute, and holds B entitled to damages for not having got what A promised he should have in the event of the condition being fulfilled.' (Emphasis added.)
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> …
>
> I would hold, in accordance with *Peter Turnbull* and *Mahoney v. Lindsay*, that an intimation of non-performance of an essential term of a contract amounts to repudiation and dispenses a party who acts upon it from performance of his dependent obligation though he does not rescind the contract." (footnotes omitted)

[24] Another case in point is *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd*,[11] which concerned a contract under which the plaintiff agreed to buy and the defendant agreed to sell a quantity of oats to be loaded on a ship or ships nominated by the plaintiff. The plaintiff was obliged to give 14 days notice of the ships and the shipping dates. The defendant gave notice to the plaintiff that it had no oats and was unable to carry out its contract. The defendant sought to resist the plaintiff's claim for damages on the basis that the plaintiff's failure to make the requisite nomination was a condition precedent to the defendant's obligation to deliver.

[25] It was held that despite the plaintiff's failure to accept the defendant's anticipatory breach of contract and treat the contract as having been discharged, the defendant by its conduct, had dispensed the plaintiff from fulfilment of its obligation to give notice. Dixon CJ said: [12]

> "Now long before the doctrine of anticipatory breach of contract was developed it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof: *Hotham v. East India Co.* But a plaintiff may be dispensed from performing a condition by the defendant expressly or impliedly intimating that it is useless for him to perform it and requesting him

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11 (1954) 90 CLR 235.

12 (1954) 90 CLR 235 at 246, 247.

> not to do so. If the plaintiff acts upon the intimation it is just as effectual as actual prevention." (footnote omitted)

[26] Dixon CJ then cited the following passage from the judgment of Lord Mansfield in *Jones v Barkley*:[13]

> "… The defendant pleads, that the plaintiff did not actually execute an assignment and release; and the question is, whether there was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act." (footnote omitted)

[27] In *Mahoney v Lindsay & Ors*,[14] Gibbs J, with whose reasons the other members of the Court agreed, applied the principles stated by Dixon CJ in *Peter Turnbull & Co* to excuse the respondent purchasers from seeking out the vendor appellant and tendering the purchase money. The facts, as reported in the headnote, are to the following effect. The appellant had indicated to one of the respondents in conversation that he wanted to get out of the subject contracts for the sale and purchase of land. On 15 June 1979 the solicitors for the respondents gave the appellant and his solicitor a notice to complete the contracts on or before 30 June 1979. The solicitors for the appellant wrote a letter stating that the appellant regarded the notice as invalid. The solicitor for the respondents deposed that on 28 and 29 June 1979 he had telephoned the solicitor for the appellant with a view to making an appointment to complete the matter and had been told on both occasions that the solicitor did not have the appellant's instructions to settle. Referring to these facts, Gibbs J said:[15]

> "In these circumstances, in my opinion, it was clearly open to the learned trial judge to conclude that the respondents were ready, willing and able to complete the contracts [and] … that the appellant's solicitor had indicated that it would be purposeless for the respondents to attend to make a tender in person on 29th June."

[28] English authorities are to like effect. *Sinason-Teicher Inter-American Grain Corporation v Oilcakes and Oilseeds Trading Co Ltd*[16] concerned a contract for the sale and purchase of grain. The trial judge, Devlin J, whose decision was upheld on appeal, relevantly said:[17]

> "It is no doubt true that if one party repudiates a contract, as the sellers did on September 10, the other party, the buyers in the present case, is not obliged to accept it. One party can keep the contract alive, and if they do so they keep it alive for the benefit of both parties. If, therefore, the sellers on September 15 had changed their minds and said, 'We think we were quite wrong about time, it ought to be worked backwards and not forwards: now tender,' it would have been no answer for the buyers to say, 'You have already repudiated.' The buyers had kept the contract alive, but it does not mean that if the buyer chooses to keep the contract alive he is

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13 (1781) 99 ER 434.
14 (1980) 55 ALJR 118.
15 *Mahoney v Lindsay & Ors* (1980) SS ALJR 118 at 119.
16 [1954] 1 WLR 935.
17 At 943, 944.

> obliged to behave in precisely the same way as if the seller had not repudiated. That is to confuse two things. It is plainly established by *Braithwaite v. Foreign Hardwood Co.* that that is not the case. If the seller's repudiation is such that he displayed an attitude which showed that he was, in effect, saying to the buyer, 'Although you are keeping the contract alive you can take up or perform your next obligation whatever it may be, tender your documents as much as you like, I cannot accept them,' the buyer is relieved from the obligation of making an empty and formal tender. He may, if he wishes for his own purposes, keep the contract alive and still claim that he is relieved from the obligation of making an empty and formal tender. The attitude of the sellers as shown in their cables was plain. They were not saying to the buyers in the period that elapsed between September 10 and 16: 'If you tender your document now we will look at it and see if it is all right.' What they were saying was: 'We have cancelled on September 10 and we stand on the fact that we cancelled on that date.' That made it plain that they were waiving any obligation on the buyer's part to trade during that period." (footnote omitted)

Was the respondent in fact ready and willing to give vacant possession and/or was she excused from arranging for the property to be vacant at the time fixed for completion?

[29] It is now appropriate to address the appellant's case that the respondent was not ready, willing and able to give vacant possession because on 13 January 2006 some 200 boxes of the respondent's personal effects remained on the property and, probably the day before, the respondent had informed the removalists she had engaged that their services were no longer required on 13 January. It was contended also that the respondent did not intend to commence moving her personal effects from the property until after completion of the contract had occurred.

[30] Counsel for the appellant relied on the following passages from the evidence of the respondent:

> "No boxes got moved on the 13th, did they?-- No boxes got moved till the 20th, no.
>
> No fridge, no furniture, nothing got moved?-- No; because we didn't have the keys 'cause we were - we were settling on the - on the Friday, the 20th. We needed the extra week to get the finance in place for if the contract fell over again.
>
> And you had nowhere to move to other than the Jolly Street residence?-- No. No.
>
> … Can I then ask you, please, to go to page 16 of Exhibit 5? Now, you'll agree with me that was a letter written on your instructions by Mrs Knowlman?-- Yes.
>
> … And you understood where she talks about in the third paragraph 'ready, willing and able to settle' that that meant that you would have the house empty ready for somebody to move in and be at the Titles Office at 3 o'clock?-- I don't go to the Titles Office; my solicitor goes to the Titles Office and we're ready for everything to be moved out the door. We -----

Well, just attend to my question. When she talks about ready, willing and able to settle, you understand her to be saying, and you understood at the time she sent this letter on your instructions to be saying that as at 3 p.m. the house would be ready for somebody else to move into, the Dublin Street house, and your solicitor would be at the Titles Office to settle the purchase; agreed?-- But manners comes into place. The house we're moving into, those people have to get their stuff out of their house, we've got to get the stuff out of our house, and the Mullins' have got to - you know, they can't all just magically, you know, like zoom, you know, 3 o'clock everyone - all of a sudden, everything transfers, you know, from one house to the next, you know. You have to - you have to be reasonable. There has to be some time to move things. But everything was ready to be moved, yes.

Well, if you'd just attend to my question, please. You understood by 'ready, willing and able to settle' that meant your house empty ready for somebody to move into and somebody at the Titles Office on your behalf to effect the settlement?-- No. I understand 'ready, willing and able.' What that means is that there was no reason why we couldn't move out of that place at 3 o'clock, and there was no reason why we couldn't move out. Everything had been organised that we could move.

So you had no intention of vacating the house until settlement occurred?-- No. Well, you can't move into something you don't own.

Just attend to my question, please. You had no intention of vacating the Dublin Street house until settlement had occurred?-- No; because why would we move out if someone else wasn't moving in?

… No had no intention of vacating the Dublin Street house until after Mrs Mullins paid over the purchase price?-- No. We were ready. We were ready to do it if she did pay.

… And then for as long as it took you to move out, she'd have to wait?-- I just - I don't get this. I don't get it. You know, like, you settle - when people settle a - have you ever bought a house? When you buy a house, you know, you settle, you get the keys to the house and then you start moving in. You can't - you can't move boxes on the footpath outside the house that you're planning to move into. You move it from one premises to another because you've got the keys to get in the house. So we were ready to go, yes, we were ready.

So the attitude you took to settlement of the Dublin Street property is that for reasons of your own convenience you would not commence to move your goods out of it until you had settled upon and had the keys to the Jolly Street premises? Just a 'yes' or 'no' is all I'm looking for?-- No. It had - it had to be - we wouldn't move out till Dublin Street was officially sold.

That is, you'd received the money?-- Yes.

> … Can I ask you, please, to go to page 18 of the bundle and just have a read of that for me? That was a letter written on your instruction?-- Yes.
>
> … And, Mrs Kelly-Corbett, I won't rehearse all those matters we have just gone through, but it's right to say that you didn't intend Mrs Knowlman to be at the Titles Office at 4 p.m., did you?-- Yes, we did.
>
> … And as at the time this letter was sent at about 3 o'clock or just after on the 13th, all the boxes were still in the Dublin Street house?-- On the 13th, yes.
>
> And there's no possibility they could be removed by 4 p.m.?-- They would probably - they would've started moving by 4, yes.
>
> Just attend to my question. There's no possibility they could've all been moved out by 4 p.m.?-- Not the whole lot, no."

[31] Counsel for the respondent relied on the following evidence given by his client:

> "And what state was the house and your possessions in on the 13th of January?-- It was in pristine condition, ready for us to move out.
>
> When you say, read[y] for you to move out, how would you describe your possessions in the house at that stage?-- People asked me who packed the boxes and I told everyone I packed 175 boxes and then stopped counting. So there were boxes everywhere, ready for us to move out. They had been ready and packed from the beginning of December.
>
> …
>
> Well, I'll just stop you there because I think critically we need to deal with the 13th of January-----?-- Mmm-hmm.
>
> -----which was the proposed date for settlement as it was extended. Who were the removalists that you had engaged?-- MiniMovers again.
>
> And can you describe for us please the position you were in on the 13th in terms of your ability to move out of the house on that day?-- On the 13th we were waiting for the sale to be completed by the Mullins, and then with personal savings we'd make up the difference to settle.
>
> Well, could I ask in these terms? On the 13th-----?-- Mmm.
>
> -----were you expecting the contract to settle on that day?-- Yes.
>
> And what steps had you put in place to enable you to complete your obligations at settlement? Do you understand what is required of you at settlement?-- That we'd hand the keys over.
>
> Could you have handed over the keys on the 13th of January?-- Definitely.
>
> And what enables you to say that?-- Because we were all packed up and ready to move to our new home that was settling at the exact same time. We didn't - we didn't have any mortgages over the place,

> there wasn't any extra money to be paid off. It was totally in my name, no debts whatsoever; we wanted to move.
>
> …
>
> … Now, you had made arrangements for Mini Movers to come on the-----?-- 13th again.
>
> -----13th. Yes. When did you cancel those arrangements?-- Well, as soon as we knew it wasn't going to happen.
>
> So you cancelled them on the 12th?-- I don't know. Well, soon as - soon as - well, soon as we - well, I don't - soon as we knew that it wasn't going to go through we would've cancelled it.
>
> Well, what I'm asking-----?-- And then set it aside again fro[m] the next week, for the 20th.
>
> Is what your saying that you cancelled Mini Movers after you saw the e-mail that's on page 15 from Mrs Mullins' solicitors?-- No. I'd say - because that's the-----
>
> Day before, the 12th?-- Yes. Well, I can't remember when we cancelled it. I just know that when we knew that it wasn't going to settle - when we officially knew - I don't know which e-mail or which letter or which phone call it was. There were a lot of them going on, trust me. I don't know which particular piece of communication it was when we decided we'd you know cancel Mini Movers but it was when it was obvious that it wasn't going to happen."

[32] The evidence then was that by 13 January the house had been cleaned, the keys were ready to be handed over and the respondent was ready to vacate. The contents of the house had been packed ready for transportation. A carrier had been engaged prior to 13 January to remove the 200 boxes on 13 January but after the respondent was advised that settlement would not take place on that day, the removalists' engagement was cancelled or deferred.

[33] The respondent's obligation to give vacant possession on 13 January was concurrent with the obligation of the appellant to pay the balance purchase price. The clear and unequivocal intimation by the appellant through her solicitors that she would not perform her part of the bargain on 13 January relieved the respondent of the obligation to tender the Memorandum of Transfer and give vacant possession. The authorities previously discussed make that plain.

[34] It seems to me that the only argument open to the appellant in respect of readiness and willingness arises from the respondent's evidence in cross-examination that she wouldn't "move out until the property was 'officially sold'". That was identified as when the respondent had "received the money". She accepted that on 13 January not all of the boxes could have been moved by 4 pm.

[35] The primary judge made the following findings:

> "a. At all relevant times the plaintiff wanted to complete the sale of her house;
>
> b. Prior to 13th January, 2006 the plaintiff had made appropriate arrangements to ensure that she could give vacant possession of her house to the defendant;

c. Those arrangements were cancelled only when the defendant made it clear that she did not intend to and would not settle on 13th January, 2010;

d. In the circumstances, the plaintiff could not give vacant possession at 3pm or 4pm on 13th January, 2010;

e. In all other respects the plaintiff could have fulfilled all her obligations under the contract at 3pm or at 4pm on 13th January, 2010."

[36] Those findings were supported by the evidence. The respondent's evidence about waiting for the property to be sold before moving her boxes must be understood in context. She had made it plain that prior to finding out that settlement would not take place she had arranged for carriers to remove the boxes on the day of settlement. There was no suggestion from the respondent that, at that time, she was going to wait until settlement had actually occurred to remove the boxes.

[37] Circumstances changed on 12 January. The respondent understood that settlement would not take place. Nevertheless, the respondent was ready, if settlement did take place, to move the boxes. The move could have commenced within an hour of settlement. To my mind, the fact that despite the appellant's clear intimation that settlement would not take place on 13 January, the respondent was prepared to remove the boxes immediately if settlement did eventuate, tends to show readiness and willingness rather than the contrary. That is, of course, assuming, as I have found to be the case, that the respondent had been relieved of her obligation to be ready to give vacant possession on completion. As Mason CJ explained in the passage from his reasons in *Foran v Wight* quoted in paragraph [18] above, for the appellant to be in a position to insist on vacant possession on completion etc, she would have needed to have retracted her intimation that she was not completing on the due date in time to give the respondent an opportunity to perform her obligations.

[38] The appellant faces an additional difficulty. Her argument about lack of readiness and willingness to perform is based on the premise that time was of the essence in respect of the time fixed for settlement. The premise is wrong. Under clause 6, time was of the essence of the contract "except regarding any agreement between the parties on a time of day for settlement". Clause 5 required settlement to occur between 9 am and 5 pm on the settlement date. The evidence seems to establish that all the boxes could not have been removed in an hour but it is by no means obvious that the presence on the property at 5 pm of a diminishing and unascertained number of boxes would constitute an "impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property".[18]

[39] Accordingly, the appellant has failed to establish that the respondent was not entitled to terminate the contract for the appellant's failure to settle on the due date.

The appellant's contentions in respect of the award of damages

[40] Counsel for the appellant did not maintain the argument that the respondent had elected to pursue a claim for common law damages and could not recover under clause 9.4 of the contract. It was accepted also that the respondent could recover loss under both clause 9.4 and clause 9.5 of the contract.

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[18] *Davidson & Anor v Bucknell & Ors* [2009] QCA 383 at [33] citing *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 287.

[41] Clause 9.5 provides:

> "**9.5 Seller's Damages**
>
> The Seller may claim damages for any loss it suffers as a result of the Buyer's default, including its legal costs on a solicitor and own client basis and the cost of any Work or Expenditure under clause 7.6(2)."

[42] The appellant challenges components of the damages awarded, namely bridging finance of $41,806.06 and costs of $4,307.77 incurred by the respondent in respect of the extension of the Reynolds contract. Counsel for the appellant argues that such damages cannot fairly and reasonably be considered to have:

(a) arisen naturally from the breach of contract; or

(b) reasonably been in the contemplation of the appellant and the respondent at the time they made the contract as the probable result of its breach.

[43] It is further submitted that the respondent did not "discharge her onus" in proving, on the balance of probabilities, that at the time of execution of the contract with the appellant on 18 October 2005, the appellant knew:

(a) the respondent and her husband had entered into the Reynolds contract;

(b) settlement of the Reynolds contract was to occur on 6 January 2006;

(c) the proceeds of sale of the Dublin Street property were necessary for the settlement of the Reynolds contract.

It is also submitted that the termination of the contract was not causative of the subject losses because:

> "(a) the Reynolds contract was entered into on 27 August 2005;
>
> (b) the Reynolds contract was subject to finance within 21 days of the contract date (19 September 2005);
>
> (c) by letter from Ryan Kruger to Damien Bourke & Assocs (solicitors acting on behalf the Reynolds) dated 19 September 2005, the [Respondent's] solicitors advised [that finance had been obtained by the respondent];
>
> (d) the Reynolds contract was not subject to the sale of the Dublin Street property;
>
> (e) the Dublin Street property was unencumbered;
>
> (f) the [Respondent] did not Appoint an agent for the sale of Dublin Street until 26 September 2005;
>
> (g) the Contract was entered into 18 (sic) October 2005." (footnotes omitted)

Consideration

[44] The appellant's arguments are based essentially on the notion that clause 9.5 imports common law principles concerning remoteness of loss formulated in cases such as *Hadley v Baxendale*[19] and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*.[20]

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19 (1854) 156 ER 145.

20 [1949] 2 KB 528 at 539, 540.

[45] It may be doubted that clause 9.5 is to be construed by reference to common law principles. It states in clear and simple language that the seller "may claim damages **for any loss** it suffers as a result of the Buyer's default". The assessment of damages then would seem to involve a determination of the losses resulting from the buyer's default. In other words, it is necessary to ascertain the nature and quantum of the loss caused by the default. But if, as the appellant contends, common law principles apply, no different result would follow.

[46] The principles to be applied in assessing damages at common law in the circumstances under consideration are those stated in the following passage from the reasons of Gibbs J in *Wenham v Ella*:[21]

> "If the present case is approached on principle it seems to me clear that the respondent was entitled to recover damages under both heads awarded by the learned trial judge. The general rule of the common law, which forms the starting point of a consideration of the assessment of damages, is that 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed' (per Parke B. in *Robinson v. Harman*, cited in *C. Czarnikaw Ltd. v. Koufos*. If the agreement of 7th December 1967 had been performed the respondent would have become one of the co-owners of the land at Broadmeadow and would have received his share of the net income that the land produced. However, the general principle is limited by the rule in *Hadley v. Baxendale* that 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'. The meaning of this rule was recently expounded in *C. Czarnikow Ltd. v. Koufos* where Lord Reid said:
>
> > 'The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.'
>
> Various expressions have been used in an attempt to describe the damage that, in accordance with this rule, is not too remote, and in *C. Czarnikow Ltd. v. Koufos* there was some difference of opinion as to whether it is right to say that the loss is recoverable if its occurrence was 'a serious possibility' or 'a real danger' or if it was 'liable' to occur, or whether it is more correct to refer to loss 'not unlikely' to occur, although there was general agreement that the colloquialism suggested by Asquith L.J. in *Victoria Laundry (Windsor) Ltd. v.*

[21] (1972) 127 CLR 454 at 471.

> *Newman Industries Ltd.*, 'on the cards', could not usefully be adopted. I need not consider which of the phrases suggested conveys most precisely the desired shade of meaning, because it is clear that a person injured by breach of contract need not go so far as to establish that the loss was 'a near certainty or an odds-on probability', and in the present case it seems to me that it was a near certainty that if the agreement were not performed the respondent would lose the return on his investment." (citations omitted)

[47] The contract was for the sale and purchase of a dwelling house in which the vendor resided. A reasonable person in the position of the respondent would have realised that: the appellant was likely to have been moving from one dwelling house to another; a replacement dwelling would be likely to be purchased; it was likely that the net proceeds of sale under the contract would be applied by the respondent towards the purchase price of the new dwelling and that a necessity to obtain bridging finance and/or to meet losses incurred by the vendor of the replacement premises could result from a failure to settle under the contract. All of these possibilities were ones which should have been in the reasonable contemplation of both parties at the time of the contract as the probable result of the breach of it.

[48] In order to apply the principles expressed in the above passage from the reasons of Gibbs J, it is not necessary for the appellant to have been aware of the respondent's financial and other contractual arrangements. The principles operate in relation to types of loss which a reasonable person would have had in contemplation.[22]

[49] The following passage from the reasons of McHugh JA in *Alexander v Cambridge Credit Corporation Ltd*[23] provides a useful exposition of the question under consideration.

> "An important matter in ascertaining whether the loss or damage is too remote is the extent to which the parties may be taken to have contemplated the events giving rise to that loss or damage. The parties need not contemplate the degree or extent of the loss or damage suffered: *Wroth v Tyler* [1974] Ch 30 at 61-62; *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* at 813 and *South Coast Basalt Pty Ltd v R W Miller and Co Pty Ltd* [1981] 1 NSWLR 356 at 364. Nor need they contemplate the precise details of the events giving rise to the loss. It is sufficient that they contemplate the kind or type of loss or damage suffered.
>
> ...
>
> It seems clear from these authorities that the parties must contemplate both the general nature of the loss or damage and the general manner of its occurrence: cf *Chitty on Contracts*, 25th ed (1983) at 934-935."

[50] The grounds of appeal in relation to damages have not been made out.

The primary judge's award of costs

[51] The primary judge awarded the respondent her costs on an indemnity basis. The primary judge based his order principally on an offer of settlement by the

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22 *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All ER 1496 at 1524 and *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 at 365-366.

23 (1987) 9 NSWLR 310 at 365-366.

respondent which, in his Honour's view, was significantly more favourable to the appellant than the judgment in favour of the respondent. Counsel for the appellant criticised the primary judge's findings on the basis that the subject offer was one which required the payment of money, not just the compromise of the proceedings on the promise of payment. There may be substance in that submission but clause 9.5 conferred on the respondent a contractual right to its legal costs "on a solicitor and own client basis". That basis is the equivalent of indemnity costs. The respondent was entitled to the indemnity costs awarded.

Conclusion

[52] For the above reasons I would order that the appeal be dismissed with costs.

[53] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the order proposed by his Honour.

[54] **BODDICE J:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the order proposed by his Honour.