SUPREME COURT OF QUEENSLAND

CITATION: *Williamson & McGillivray & Ors v JIA Holdings & Anor* [2011] QCA 346

PARTIES: **In CA No 4038 of 2011:**

JEFFREY JAMES WILLIAMSON & ROSEMARY FAY McGILLIVRAY
(appellants)
v
JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST
(first respondent)
A & I BARNES HOLDINGS PTY LTD ACN 099 042 547 as trustee for THE A & I FAMILY TRUST
(second respondent)

In CA No 4039 of 2011:

STEPHEN ASHLEY COOPER & DIANE PATRICIA COOPER & RONALD DAVID SMITH & SEBASTIANA GRACE SMITH
(appellants)
v
JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST
(first respondent)
A & I BARNES HOLDINGS PTY LTD ACN 099 042 547 as trustee for THE A & I FAMILY TRUST
(second respondent)

In CA No 4040 of 2011:

MARK CLINTON CRASWELL
(appellant)
v
JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST
(first respondent)
A & I BARNES HOLDINGS PTY LTD ACN 099 042 547 as trustee for THE A & I FAMILY TRUST
(second respondent)

In CA No 4041 of 2011:

KERRY ALLAN SHORT & DENISE VADA SHORT
(appellants)
v
JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST
(first respondent)

A & I BARNES HOLDINGS PTY LTD ACN 099 042 547 as trustee for THE A & I FAMILY TRUST
(second respondent)

In CA No 4042 of 2011:

GEOFFREY WILLIAM BARRITT & RAE BARRITT
(appellants)
v
JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST
(first respondent)
A & I BARNES HOLDINGS PTY LTD ACN 099 042 547 as trustee for THE A & I FAMILY TRUST
(second respondent)

In CA No 4043 of 2011:

GREGORY KEITH OLIVE & TRACY ANN OLIVE
(appellants)
v
JIA HOLDINGS PTY LTD ACN 099 049 822 as trustee for the JIA UNIT TRUST
(first respondent)
A & I BARNES HOLDINGS PTY LTD ACN 099 042 547 as trustee for THE A & I FAMILY TRUST
(second respondent)

FILE NO/S:	Appeal No 4038 of 2011 Appeal No 4039 of 2011 Appeal No 4040 of 2011 Appeal No 4041 of 2011 Appeal No 4042 of 2011 Appeal No 4043 of 2011 SC No 5987 of 2005 SC No 5989 of 2005 SC No 5990 of 2005 SC No 5991 of 2005 SC No 5992 of 2005 SC No 5993 of 2005
DIVISION:	Court of Appeal
PROCEEDINGS:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2011

JUDGES: Fraser and Chesterman JJA, and Margaret Wilson AJA
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. The appeals are allowed;

2. The judgments dismissing the appellants' actions are set aside and instead it is ordered that:

In CA No 4038 of 2011 there be judgment for the appellants against the first respondent for $364,762.45.

In CA No 4039 of 2011 there be judgment for the appellants against the first respondent for $320,339.71

In CA No 4040 of 2011 there be judgment for the appellant against the first respondent for $276,701.70.

In CA No 4041 of 2011 there be judgment for the appellants against the first respondent for $326,106.28.

In CA No 4042 of 2011 there be judgment for the appellants against the first respondent for $329,844.02.

In CA No 4043 of 2011 there be judgment for the appellants against the first respondent for $278,068.81.

3. It is declared that the Deeds of Loan and Mortgages made between the first and second respondents dated 1 March 2009 were alienations of property made with the intent to defraud creditors.

4. The Deeds of Loan and Mortgages are set aside.

5. The respondents are to pay the appellants' costs of the trials and of the appeals to be assessed on the standard basis.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the appellants signed contracts with the first respondent, a property developer, to buy apartments "off the plan" – where the first respondent advised that it had been unable to obtain satisfactory approval of construction finance required for development to proceed and proposed that the contract be terminated by mutual agreement – where the appellants then commenced proceedings for damages for breach of contract – where the trial judge found there had been no breach of contract – where the appellants argued the trial judge addressed incorrect issues and failed to consider the relevant clauses requiring the first respondent to build the residential apartment building – whether the trial judge erred in failing to consider the clauses in the contracts which unconditionally

and expressly obliged the first respondent to build the residential apartment building

REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – FRAUD OR FORGERY – DEALINGS TO DEFEAT CREDITORS – where the appellants claimed that the first respondent transferred property to the second respondent with the aim of defrauding the first respondent's creditors, in particular, the appellants – where the appellants sought orders against both respondents setting aside Deeds of Loan and Mortgages between them on the basis that the transactions were alienations of property made with intent to defraud creditors – whether the transfer was made with the intent to defraud creditors

CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – PURCHASER'S REMEDIES – DAMAGES – MEASURE OF DAMAGES – where the appellants claimed damages calculated as the difference between the market value of the units as at 31 December 2005 and the respective contract prices plus outlays incurred by each appellant – where the appellants adduced evidence of the value of the units at that date but the respondents did not – where the trial judge held that if it had been necessary to determine the appellants' damages, his Honour would not have been satisfied that the appellants suffered any loss – whether the trial judge erred in failing to give reasons for preferring one expert opinion over another with respect to the market values in the area – whether the trial judge erred in the assessment of damages and, if so, what is the correct measure

Body Corporate and Community Management Act 1997 (Qld)
Property Law Act 1974 (Qld), s 228

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1, considered
BP Refinery (Westernport) v Shire of Hastings (1977) 180 CLR 266; [1977] HCA 40, cited
Brauer & Co v James Clarke Ltd [1952] 2 All ER 497, cited
Cannane v J Cannane Pty Ltd (In liq) (1998) 192 CLR 557; [1998] HCA 26, considered
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, cited
Ellis v Wallsend District Hospital (1989) 17 NSWLR 553, considered
Hardy v Wardy [2001] NSWSC 1141, considered
Hawes v Cuzeno Pty Ltd [1999] NSWSC 1167, considered
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, cited
Insurance Commissioner v Joyce (1948) 77 CLR 39; [1948] HCA 17, considered
Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd [2006] QCA 126, cited

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, applied
Joseph Street Pty Ltd and Ors v Khay Tea Tan and Ors [2010] VSC 586, cited
Levinge v Director of Custodial Services, Department of Corrective Services & Ors (1987) 9 NSWLR 546, considered
Masters v Belpate Pty Ltd (2001) NSW Conv R 55-988; [2001] NSWSC 169, cited
New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France [1919] AC 1; [1919] All ER 562, cited
P T Garuda Indonesia Ltd v Grellman [1992] FCA 188; (1992) 35 FCR 515, considered
Re Gear (Deceased) [1964] Qd R 528, considered
Re Trautwein; Richardson v Trautwein (1944) 14 ABC 61, considered
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51, cited
Sheahan v Woulfe [1927] St R Qd 128, considered
Transfield Australia Pty Ltd v Arlo International Ltd (1980) 144 CLR 83; [1980] HCA 15, cited
Wardy v Hardy & Anor [2002] NSWCA 215, cited

COUNSEL: B O'Donnell QC, with R Myers, for the appellants
I Barnes in his capacity as director of the first and second respondents

SOLICITORS: Baker O'Brien Toll for the appellants
I Barnes in his capacity as director of the first and second respondents

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

[2] **CHESTERMAN JA:** These six appeals, which were heard together, were brought by the unsuccessful plaintiffs in six actions, also heard together, in which they sought damages for breach of contract against the first respondent, and orders against both respondents setting aside Deeds of Loan and Mortgages between them pursuant to s 228 of the *Property Law Act* 1974, on the basis that the transactions were alienations of property made with intent to defraud creditors. Each of the actions was dismissed with costs on 15 April 2011. The trial judge found that there had been no breach of contract, briefly considered the *quantum* of the appellants' claims and found that none had sustained a loss. Accordingly the claim under s 228 was not considered.

[3] The respondents were represented at trial and on appeal by Mr Barnes, a director of both companies.

[4] The first respondent was at relevant times a property developer. In 2003 it contemplated developing a beachfront property at Bargara by constructing a 20 unit residential apartment building to be known as "Synergy". It began marketing the apartments "off the plan" in mid 2003. It signed contracts agreeing to sell 11 apartments. The appellants were among the purchasers. The terms of the

contracts made between the first respondent and the appellants were identical save for the identity of the apartment, the subject of the contract, the price and date of contract. They were all executed in August 2003.

[5] On 2 September 2004 the first respondents' solicitors wrote to each of the 11 purchasers in the same terms:

> "We have been instructed to advise as follows: -
>
> 1. Since the formation of the Contract: –
>   (a) the cost of constructing the building has increased significantly; and
>   (b) the residential market has experienced a sharp downturn.
>
> 2. As a consequence of the above factors our client has been unable to obtain a satisfactory approval of construction finance required by our client to proceed with the development.
>
> In light of the above our client proposes that the Contract be terminated bythe (sic) mutual agreement of the parties and the deposit and interest accrued thereon be paid to your client.
>
> Please obtain your clients instructions and advise us of same as soon as possible."

[6] Five of the purchasers accepted the proposal. The remaining six, the appellants, did not, and in July 2005 commenced proceedings for damages calculated by reference to the difference between contract price and the value the apartments would have had if constructed in accordance with the contracts. There were also claims for incidental expenses.

[7] The first respondent accepted in its defence that it ceased its attempt to develop Synergy in September 2004. The trial judge found that as at 21 September 2004 the first defendant intended not to proceed with the development.

[8] It was common ground at trial and on appeal that the first respondent did not construct the apartment building, nor did it register a Community Title Scheme by the extended date for the establishment of the scheme, 31 December 2005.

[9] The Statements of Claim in each action pleaded:

> (i) That by failing to proceed with the development, and in particular by not constructing the residential apartments the first respondent had committed an anticipatory breach of the contracts and repudiated them.
>
> (ii) Each appellant accepted the first respondent's breach and repudiation as putting an end to the contracts by commencing proceedings.
>
> (iii) After the commencement of proceedings the first respondent transferred property to the second respondent with the aim of defrauding the first respondent's creditors, in particular the appellants.

[10] The respondents pleaded:

(i) That the proper construction of the contract's completion was conditional upon the establishment of the scheme by 31 December 2005.

(ii) There was no term, express or implied, which obliged the first respondent to establish the scheme by that date.

(iii) It was an implied term of the contracts that the first respondent would use reasonable endeavours to establish the scheme by 31 December 2005.

(iv) The first respondent used reasonable endeavours to establish the scheme by that date but could not do so because it could not obtain satisfactory construction finance so that it was reasonably apparent by September 2004 that the building could not be constructed and that further steps to establish the scheme "would have been futile".

(v) A denial that the transactions between the respondents were entered into for the purposes of defrauding creditors.

[11] Relevantly the contracts provided:

"**1. PREAMBLE**

(a) The Seller is the registered owner of the Land.

(b) The Seller shall construct a multi storey building comprising twenty units ('the Building') on the Land substantially in accordance with plans prepared for the Seller and approved … by the Local Authority and incorporating the Finishes specified in the Second Schedule.

(c) The Buyer wishes to purchase from the Seller the estate in fee simple in the Lot upon the establishment of the Scheme and the creation of a separate indefeasible title for the Lot and upon the terms and conditions herein contained.

2. SALE

Subject to the terms of this Contract, the Seller shall sell to the Buyer and the Buyer shall purchase from the Seller the estate in fee simple in the Lot free from any mortgage or other encumbrances … .

…

5. COMPLETION

(a) Completion shall be effected on the day which is fourteen (14) days after the Seller's Solicitor gives notice in writing to the Buyer … that the Scheme has been established

PROVIDED THAT if the Scheme is not established by the date set forth in Item K of the Item Schedule then either party may terminate this Contract by written notice to the other … and upon such termination all monies paid by the Buyer shall be refunded without deduction and neither party shall have any further claim against the other under this Contract.

PROVIDED FURTHER THAT if the establishment of the Scheme is delayed due to:

(i) delays by the local authority … in giving any necessary … approval … ;
(ii) delay in the completion of the Building or Lot by reason of inclement weather, fire, explosion, earthquake, lightening, storm, flood, tempest, war, civil commotion or strike;
(iii) damage to the Building or to the Lot by fire, explosion, earthquake …;
(iv) proceedings being taken or threatened by or disputes with adjoining or neighbouring owners;
(v) industrial disputes affecting or delaying construction …;
(vi) delay in the Local Authority sealing the Survey Plan or the registration of the Survey Plan …;
(vii) any other cause beyond the Seller's control,

the Seller may at any time after the delay arises by written notice to the Buyer extend the date set forth in Item L of the Items Schedule for the period of delay.

(b) The Buyer shall pay the Purchase Price less any Deposit … on the Completion Date in exchange for vacant possession of the Lot together with a duly executed transfer … capable of immediate registration … .

(c) Completion shall be effected at such time and place as may be agreed … .

(d) … .

(e) The Buyer agrees that the Seller may in its absolute discretion substitute fixtures or fittings of equivalent quality to the Finishes. The Certificate of the Architect as to equivalent quality is conclusive of that fact. …

…

7. MATTERS TO WHICH BUYER CANNOT OBJECT

(a) Subject to the provisions of the Act, the Buyer is not entitled to delay completion, make any objection … or claim for compensation … by reason of:

…

(ii) any minor variations between the Plans and the SP regarding the number of lots or the

numbering, size, location or lot entitlement …;

…

(v) any alteration in the location, configuration, mix, type or style of facilities to be contained within the Common Property from those depicted in the Plans or the Specifications;

…

15. CONSTRUCTION OF BUILDING

15.1 Building fitting and finishes:

(a) Subject only to this Contract, by the Completion Date, the Seller will ensure the Building is constructed in proper and workmanlike manner, and equipped with fixtures and fittings substantially as per the Finishes … .

…

15.2 Variations

(a) The Seller is entitled in its reasonable discretion … to make:

…

(iv) variations or alterations to the Plans and the Specifications …;

(b) Subject to any express or implied rights under the Act, the Buyer has no right to terminate this Contract, delay Completion, make any objection, requisition or claim for compensation … as a result of any of the variations … referred to in Clause 15.2(a)."

[12] The "Act" referred to was the *Body Corporate and Community Management Act* 1997. The "Buyers" were, of course, the appellants, and the "Seller" was the first respondent. "SP" was a reference to the survey plan necessary for the registration of the "scheme" being the Community Title Scheme containing the lots the subject of each contract of sale. The date for the establishment of the scheme was 30 June 2005. This was later extended by agreement to 31 December 2005. The "land" was identified by lot number as the land at 99 The Esplanade, Bargara.

[13] The trial judge reviewed the evidence led by the respondents about their attempts to obtain construction finance at some length. It is not necessary to repeat the recitation. There was no challenge to the finding that the first respondent did not obtain construction finance on terms satisfactory to it. Having reviewed the evidence the trial judge found:

"[38] A proper construction of the contract does not lead to the conclusion that the first defendant had an absolute obligation to construct Synergy, and establish the scheme by

> the due date. A plain reading of cl 5 indicates it was in the contemplation of the parties that circumstances may arise whereby Synergy may not be constructed, and the scheme may not be established by 31 December 2005. Were it otherwise, there would be no need for a clause allowing a mutual termination of the contract in the event the scheme was not established by 31 December 2005.
>
> [39] However, a party relying on a special condition in a contract of sale has an obligation to perform those obligations by acting honestly and reasonably. A party that does not perform its obligations acting honestly and reasonably loses its right to rely upon the special condition to rescind. The issue to be determined is whether the first defendant performed its obligation under the contract "acting honestly and reasonably". (footnote omitted)

The authorities relied upon for the proposition stated in the first sentence of paragraph [39] were *Masters v Belpate Pty Ltd* (2001) NSW Conv R 55-988 and *Joseph Street Pty Ltd and Ors v Khay Tea Tan and Ors* [2010] VSC 586.

[14] The trial judge then dealt with the appellants' submission that the first respondent was in breach of contract by not building Synergy and not establishing the scheme. His Honour reviewed the evidence of Mr Bazley, a director of the first respondent and its principal witness at the trial. The trial judge discussed and dismissed the appellants' criticisms of his evidence, that the reasons for not building was the unavailability of suitable finance, and concluded:

> "[49] An obligation to use "best endeavours" does not require a person to go beyond the bounds of reason. The first defendant was keeping its banker ANZ Bank fully informed in relation to the Synergy project. That bank had security over the first defendant's assets. It was not reasonable to require the first defendant to sell some of those assets and/or to provide security from related entities. Best endeavours does not require a party to do "whatever it takes" in order to satisfy a condition. Reasonableness is to be determined in all the circumstances, having regard to the party's position as a contracting party. The first defendant had no obligation to sell its other properties, or pledge other assets.
>
> …
>
> [51] The first defendant advised each of the plaintiffs in September 2004 it would be unable to satisfy cl 5 of the contract. Having regard to the lengthy construction period necessary to complete the project, and the available time left to satisfy cl 5, it was reasonable for the first defendant to seek mutual termination of the contract at that time. Each of the plaintiffs refused to accept termination at that time. Whilst the first defendant did not formally terminate the contracts after 31 December 2005, each of the plaintiffs commenced these proceedings before that date each plaintiff accepted repayments of their deposits in full in May 2006.

> That was the extent of the first defendant's obligations under cl 5 of the contract.
>
> [52] Each of the plaintiffs has failed to satisfy me that the first defendant did not use its best endeavours to ensure registration of the community title scheme by 31 December 2005. Each of the plaintiffs' claims is dismissed." (footnotes omitted)

[15] The appellants complain that the trial judge determined the case by addressing incorrect issues, and in particular, that it was wrong to give judgment by reference to whether the first respondent honestly and reasonably attempted to obtain construction finance, or whether it used its best endeavours to do so. His Honour asked, at different points in the reasons for judgment, whether it acted "honestly and reasonably" and whether it had used its "best endeavours to ensure registration of the … scheme by 31 December 2005." The tests are different.

[16] More fundamentally the appellants submit that the trial judge did not consider the clauses in the contracts which unconditionally, and expressly, obliged the first respondent to build Synergy. Those clauses are 1(b) and 15.1(a). The first of those was mentioned in the recital of the contract's terms, but was not discussed, or even referred to. Clause 15.1(a) was not adverted to at all. Instead the trial judge focused on cl 5 which was said to indicate that the parties had contemplated "that circumstances may arise whereby Synergy may not be constructed, and the scheme … established by 31 December 2005." Clause 5 was the basis for the conclusion that the proper construction of the contracts did not impose on the first respondent "an absolute obligation to construct Synergy … by the due date." The trial judge considered whether the first respondent had lost its right to rely upon cl 5 by not acting honesty and reasonably in its endeavours to construct the building. That led to a consideration of the first respondent's efforts to obtain construction finance.

[17] The reasons for judgment do not explain why the clauses containing express promises to build Synergy by 31 December 2005 were ignored. The conclusion that the contracts did not impose an absolute obligation on the first respondent to construct the building cannot stand in the presence of those clauses. The promises were relevantly unqualified. The introductory phrase to cl 15.1(a) "Subject … to this Contract" is not a qualification on the promise to build by the due date but a reference to the quality of the building which must be constructed. Clauses 5(e), 7 and 15.2 permitted the first respondent to build, to the extent permitted by those clauses, differently to the depiction of the building set out in the plans, specifications and schedules of finishes. Construction with the permitted variations would be performance of the promise to build. There was no term in the contracts which detracted from the express promises in cl 1(b) and cl 15.1(a). In particular the contracts did not make the promises conditional upon the availability of construction finance. Nor are the two express promises couched in terms of "best endeavours" or "acting reasonably" to bring about a completed structure. The promises were express and unequivocal.

[18] If cl 5 had the effect the trial judge ascribed to it the contract would have been illusory. If the effect of the clause was that the contracts could be terminated by giving notice if Synergy had not been built by the contract date the first respondent

had a discretion whether to perform the contract or not. It could do nothing, allow the time to pass, and then give notice of termination.

[19] It was presumably to avoid this inconvenient and unreasonable result that his Honour implied into the contracts terms that the first respondent had to act honestly and reasonably, or use best endeavours, to bring about completion of the building by the contract date.

[20] The implication was unnecessary given the express, unconditional promises to build. Moreover the implied term is inconsistent with the express terms obliging the first respondent to build by the completion date. Accordingly one of the conditions necessary before a term can be implied, that the implied term must not contradict any express term, was missing. See *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26 and *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-6.

[21] Clause 5 did two things. It gave the first respondent a right to extend the date for completion in the event that establishment of the scheme was delayed by any of the identified causes. Second, it conferred on both parties a right to terminate the contract by written notice if the scheme was not established by the contract date. The effect of the second proviso is that, if the first respondent gave written notice extending time for completion, it would not be in breach of contract by not establishing the scheme by the original contract date. The second proviso operated as a restriction on the first proviso so that the right to terminate was lost if the date was extended. Although the clause does not say so expressly, the effect of it appears to be that if time were not extended, and the scheme not established by the contract date for one of the reasons specified in the second proviso, either party could terminate the contract. Clause 5 did not provide that the contract would come to an end if the building were not constructed by the completion date. It allows the parties to terminate the contracts in that eventuality. Unless and until the power was exercised by one party or the other the promise to build remained unaffected.

[22] Clause 5 did not in terms qualify or otherwise effect cl 1(b) or cl 15.1(a). The promise contained in the latter clauses could operate unaffected by the condition set out in cl 5 which might in the circumstances described bring about termination of the contract. The contracts contained a promise to build by an identified date and a right to terminate if the apartments had not been built by that date. But that observation is an insufficient basis for ignoring the express promises to build by a specified date, or for imposing conditions on the promises which were not contained in the parties' written record of their bargains.

[23] It is true, as the trial judge observed, that the existence and terms of cl 5 showed that the parties contemplated that the building might not be constructed, or the scheme established, by 31 December 2005. But that clause, permitting termination in specified circumstances, operated according to its terms, as did cl 1(b) and clause 15.1(a), although a valid notice given under either proviso of cl 5 would preclude the appellants from claiming that a delay in establishing the scheme was a breach of contract. Clause 5 did not qualify cl 1(b) or cl 15.1(a). Clause 5 did not make the contract subject to finance, or convert the express promise to build into promises to use reasonable or best endeavours to build.

[24] The cases cited by the trial judge, *Masters v Belpate* and *Joseph Street Pty Ltd* were apparently relied upon to support the implication that the first respondent could not

terminate under cl 5 unless it had sought to perform its obligations in the contracts by acting honestly and reasonably. *Masters* may support the proposition. The second case does not. The trial judge did not identify what the first respondent's obligations under the contracts were. The task would have been easy had one looked at cl 1(e) and/or cl 15.1(a). Given that the subject matter of the contracts was the conveyance of lots un-constructed at the time of contract his Honour thought there was an implied promise to go about the task of building honestly and reasonably.

[25] The cases say nothing about implying a promise to build or doing so honestly and reasonably.

[26] *Masters* was concerned with a clause in contract for the sale of units off a plan, a clause of which provided that the vendor must do everything reasonably necessary to have the plan registered within the time specified in the contract and, in particular, whether the vendor could rescind the contract by reason of non-registration of the plan when its own consultant's delays were responsible for that situation.

[27] *Joseph Street* was another case of the sale of a unit "off the plan" where the contract was conditional upon the plan of subdivision being registered. The vendor was obliged "with all reasonable expedition (to) use its best endeavours to procure … the Plan of Subdivision is approved by the Registrar of Titles within the six months… ." Forrest J referred to *Brauer & Co v James Clarke Ltd* [1952] 2 All ER 497; *Transfield Australia Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 at 101 and *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 64 to arrive at the meaning of the phrase. The case is one in which the contract expressly provided that one party would use its best endeavours to achieve a result. It does not deal with the question whether, and in what circumstances, an obligation to use best endeavours should be implied into a contract.

[28] There is another reason why cl 5 cannot have affected the first respondent's obligation to build contained in the clauses identified. It is that the right given to buyer and seller to terminate in the specified eventuality was not exercised. The first respondent did not, and did not purport to, terminate the contracts pursuant to cl 5. Its solicitors wrote on 2 September 2004 to invite a mutual abandonment of the contract. Some purchasers accepted the invitation but the appellants did not. The letters were written almost 16 months prior to the completion date of 31 December 2005. Clause 5 could have had no operation in that circumstance. That apart, the letter did not purport to terminate the contract because of the non-establishment of the scheme by its due date.

[29] The trial judge found that the first respondent did not "formally terminate the contracts after 31 December 2005." What his Honour meant by "formally" is not clear. There was no finding that the power of termination contained in cl 5 was exercised in any way, at any time. Indeed it was common ground in the pleadings that neither the appellants nor the first respondent had purported to terminate the contract in accordance with cl 5. The relevant paragraphs are 4D of the Further Amended Statement of Claim and paragraph 1 of the Further Further Amended Defence of the first respondent.

[30] Because the contract was not terminated, as cl 5 might have permitted, the contract remained on foot and the rights and obligations contained in them remained

available to and binding on the parties. Relevantly the first respondent remained obliged to build Synergy.

[31] The emphasis given by the reasons for judgment to the question whether the first respondent had acted reasonably, or had used best endeavours, to perform the contract is puzzling. The trial judge saw the relevance of the question as touching the first respondent's right to terminate the contract under cl 5. His Honour held that the first respondent would have lost the right had it not acted reasonably, or used its best endeavours, to build Synergy. It is clear law that a party to a contract cannot take advantage of the existence of a state of affairs which he has himself brought about. If the non-completion of Synergy by the contract date was a consequence of the first respondent's breach of its contractual promises to build it, it could not have given notice of termination under cl 5. See *New Zealand Shipping Company v Société des Ateliers et Chantiers de France* [1919] AC 1 at 6-7. It is, presumably, for this reason that the trial judge anxiously considered whether the first respondent had acted honestly and reasonably, or used its best endeavours, in the performance of its contractual obligations. Ignoring the point that the analysis of the obligations was wrong, the whole exercise of determining whether the first respondent was in breach of its contractual obligations so as to preclude it from relying upon cl 5 was irrelevant. It was of no consequence whether or not the first respondent might have lost the right to terminate under cl 5. The first respondent never utilised cl 5 to terminate the contract. It never gave the notice required by the clause which did not operate to terminate the contract because the first respondent did not act in accordance with it.

[32] It is not clear what significance the trial judge attached to the fact, recorded in the reasons for judgment, that each of the appellants "accepted repayments of their deposits in full in May 2006." The deposits had been held by a stakeholder as provided by cl 3 of the contracts, and sections 23 and 24 of the *Land Sales Act* 1984. The appellants commenced their actions in July 2005 asserting that they had accepted the first respondent's anticipatory breaches of contract and its repudiation of them by refusing to proceed further with the construction of Synergy after September 2004. The receipt by the appellants of their respective deposits was consistent with their stated legal position that the contracts had been rescinded by their acceptance of the repudiation, and that they were entitled to the return of monies paid pursuant to the contracts, and damages for breach. The respondents did not argue that repayment of the deposits gave rise to any defence to the appellants' claims.

[33] Clause 1(a) did not specify a time by which the building should be constructed. Clause 15.1(a) obliged the first respondent to ensure the building was constructed by the completion date, which was fixed by reference, not to completion of the building, but to the establishment, or registration, of the scheme. The contracts contained no express term obliging the first respondent, or the appellants, to establish or register the scheme. However the establishment of the scheme was necessary for the contract to operate according to its terms. The mutual promises and obligations to pay the price and convey title to the lots depended upon the establishment of the scheme. Neither party could take any benefit from the contracts unless the scheme was established. It is, therefore, well established that the law will imply a term into the contract that each party should do all things reasonably necessary on its part to achieve the establishment of the scheme by 31 December 2005. See: *Secured Income Real Estate* at 607; *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126 at [19] and [49].

[34] The establishment of the scheme was clearly the responsibility of the first respondent. Clauses 1(b) and (c) recognise as much. The steps necessary for the establishment of the scheme,

- Preparing a plan of subdivision to create the lots in the scheme;
- Obtaining local authority planning approval for the plan;
- Registering the plan with the Registrar of Titles;
- Recording a Community Management Statement with the Registrar of Titles pursuant to s 115K of the *Land Titles Act* and s 24 of the *Body Corporate and Community Management Act* 1997;

were all things for the developer to attend to.

[35] The implied obligation recognised by the authorities is different from the term found by the trial judge. His Honour thought the limit to the first respondent's obligations was to use its best endeavours to build Synergy, or to act honestly and reasonably in the discharge of the obligation to build. It was not required "to go beyond the bounds of reason" or to do "whatever it takes" to perform the promise. By contrast the implied term reaffirmed in *Secured Income Real Estate* and *Jackson Nominees* is more onerous. With respect to this term the test of reasonableness relates only to identifying what must be done. Once a step is identified as being reasonably necessary to give a party to a contract the benefit of it, in this case the establishment of the scheme, the thing must be done.

[36] Authority for the proposition may be found in some cases in New South Wales which dealt with an express term identical in wording and effect to the implied term. The cases are *Hardy v Wardy* [2001] NSWSC 1141 (affirmed on appeal [2002] NSWCA 215) and *Hawes v Cuzeno Pty Ltd* [1999] NSWSC 1167. In *Hardy* Bryson J was concerned with a clause in a contract for the sale of a lot in an unregistered plan of subdivision. Clause 28.2 provided that the vendor "must do everything reasonable to have the plan registered *within* 6 months after the contract date …". Clause 28.3 provided that if the plan were not registered within that time the purchaser could rescind. Clause 28.3.2 provided that the vendor could also rescind but only if it had complied with cl 28.2.

[37] Bryson J said:

> "8 It will be seen that under cl 28.2 it is a contractual obligation of the vendor, expressed in imperative terms, to do everything reasonable to have the plan registered within six months. The effect of this is that if some step is reasonable and is necessary for registration within six months the vendor must take that step; the obligation is not that the vendor must do everything reasonable to take the step. The vendor's personal circumstances, knowledge of or ignorance of what is required, reliance on servants, agents or independent contractors, and the skill, knowledge and assiduity of any such agents are all irrelevant to the vendor's obligations; if a step is reasonable, the vendor must take it. My view of the meaning of cl 28.2 is produced by the express terms of the clause, and is reinforced by the consideration that if cl 28.2 is complied with, compliance can work adversely to the purchaser, who has no control

> over or influence on what the vendor does, or on the vendor's selection of courses to follow or selection of servants, agents or contractors, and has no control over the conduct or effectiveness of any such agents, but is bound by the vendor's decision if the vendor rescinds after compliance. The only protection the purchaser has against rescission is the stringency of the condition which the vendor must fulfil if he is to have a right to rescind. It would be inconsistent not only with the express terms of cl 28.2 but also with the purpose of cl 28 as a whole if inefficient or ineffective measures by the vendor or someone by whom the vendor acted could contribute to the vendor's gaining a right to rescind.
>
> …
>
> 10 Clause 28.3.2 … deals expressly with … clauses to similar effect … in standard forms of contract. Agreements for sale of home units "off the plan" before construction have incorporated clauses similar in effect to cl 28 … . The vendor has control over or the opportunity to influence the steps which it is necessary to take between selling a home unit off the plan and obtaining registration off the plan … . The purchaser has no opportunity to influence these and may well feel dissatisfied if the contractual time for them passes and the vendor rescinds."

[38] Bryson J's analysis and conclusion as to the meaning of cl 28.2 was affirmed on appeal: see [2002] NSWCA 215 at [59] to [64]. As well as being commended by authority, the reasoning is, I think, compelling and apposite to the contracts between appellants and first respondent. The appellants, and purchasers under similar contracts, could easily be deprived of the benefit of the contracts they made if the vendors were not under an obligation to do whatever was reasonably necessary to achieve performance of the contract. The reasoning is no less compelling because the term is implied rather than express. The expression is the same and the meaning must be the same.

[39] One of the things necessary to achieve the establishment of the scheme by 31 December 2005 was that the building be constructed by that date. Both the implied term, and the express terms (cl 1(b) and 15.1(a)), were to the same effect and imposed the same obligation on the first respondent. Not building by that date would have been a breach of contract, at least if no valid notice were given under cl 5.

[40] Subject only to the first respondent giving a notice under cl 5, terminating the contract or extending time for establishment of the scheme, the first respondent promised unconditionally to build Synergy by 31 December 2005, the completion date. It was an implied term of the contracts that the first respondent would do all things reasonably necessary to establish the scheme by 31 December 2005. The first respondent did not give notice pursuant to cl 5 terminating the Contract, which therefore remained on foot and binding on all parties. The trial judge erred in concluding that the first respondent's obligation was to use its best endeavours to ensure establishment of the scheme by 31 December 2005, or that it was to act

honestly and reasonably in performing its promises to build and to establish the scheme. In September 2004 the first respondent decided not to proceed with the development of Synergy. It ceased all attempts to obtain construction finance, to build or to establish the scheme. In the classic formulation it evinced an intention to no longer be bound by its contracts with the appellants. This was a clear repudiation by anticipatory breach of the contracts, by which the first respondent was to complete the building and establish the scheme by 31 December 2005. The appellants accepted the repudiation by commencing proceedings in July 2005.

[41] The trial judge should have found that the appellants were entitled to damages for breach of contract.

Damages

[42] Having found there was no breach of contract the trial judge dealt very briefly with the question of damages. His Honour said:

> "[53] If I had allowed each of the plaintiffs' claims, it would have been necessary to consider damages. The plaintiffs' claims were based on valuations provided by Ms Browning as to the value of the units as at 31 December 2005. The first defendant challenged those valuations, although it did not adduce evidence as to values as at that date. As indicated previously, I prefer the evidence of Mr Bailey and Mr Coonan as to market values in Bargara in 2003 and 2004 to that of Ms Browning. Had it been necessary to determine the plaintiffs' damages, I would not have been satisfied any of the plaintiffs had established loss in any event."

[43] The trial judge had earlier rejected criticisms of the evidence of the valuers called by the respondents, and preferred:

> "[46] … to accept the evidence of Mr Bailey and Mr Coonan over that of Ms Browning. Ms Browning's evidence as to market conditions in 2003 and 2004 did not accord with their evidence."

[44] Each of the appellants claimed damages calculated in the same manner, the difference between the market value of the unit as at 31 December 2005 and the respective contract prices, together with relatively small amounts of outlays incurred by each appellant. The amounts claimed (with interest brought up to date) were:

Williamson & McGillivray v JIA Holdings Pty Ltd
CA No. 4038 of 2011

Value of Unit at 31/12/05	$578,100.00
Less: Contract Price	($355,000.00)
	$223,100.00
Solicitor's costs	$ 1,100.00
Accountancy fees	$ 220.00
	$224,420.00
Interest thereon (1/1/06 to 30/06/07 = 546 days) @ 9%	$ 30,213.69

Interest thereon (1/7/07 to 02/12/11 = 1,615 days) @ 10%		$ 99,298.16
		$353,931.85
Costs of provision of deposit monies (calculated to return of deposit – 19/05/06) ($35,500 @ 11.25% p.a x 990 days)		$ 10,830.60
		$364,762.45

Cooper & Smith v JIA Holdings Pty Ltd
CA No. 4039 of 2011

Value of Unit at 31/12/05		$676,800.00
Less: Contract Price		($475,000.00)
		$201,800.00
Solicitor's costs		$ 1,100.00
Accountancy Fees		$ 220.00
		$203,120.00
Interest thereon (1/1/06 to 30/06/07 = 546 days) @ 9%		$ 27,346.07
Interest thereon (1/7/07 to 02/12/11 = 1,615 days) @ 10%		$ 89,873.64
		$320,339.71
Costs of provision of deposit monies (calculated to return of deposit – 19/05/06) ($47,500 @ 11.25% p.a. x 990 days)	$14,494.00	
Less interest accrued on investment by Stakeholder of deposit monies	($ 4,875.94)	$ 9,618.06
		$329,957.77

Craswell v JIA Holdings Pty Ltd
CA No. 4040 of 2011

Value of Unit at 31/12/05		$512,300.00
Less: Contract Price		($345,000.00)
		$167,300.00
Solicitor's costs		$ 1,100.00
Accountancy Fees		$ 220.00
		$168,620.00
Interest thereon (1/1/06 to 30/06/07 = 546 days) @ 9%		$ 22,701.33
Interest thereon (1/7/07 to 02/12/11 = 1,615 days) @ 10%		$ 74,608.58
		$265,929.91
Costs of provision of deposit monies (calculated to return of deposit – 9/05/06) ($34,500 @ 11.25% p.a. x 1,013 days)		$ 10,771.80
		$276,701.71

Short v JIA Holdings Pty Ltd
CA No. 4041 of 2011

Value of Unit at 31/12/05	$799,000.00
Less: Contract Price	($595,000.00)
	$204,000.00

Solicitor's costs	$ 1,100.00
Accountancy Fees	$ 220.00
	$205,320.00
Interest thereon (1/1/06 to 30/06/07 = 546 days) @ 9%	$ 27,642.26
Interest thereon (1/7/07 to 02/12/11 = 1,615 days) @ 10%	$ 90,847.07
	$323,809.33
Bank Charges associated with the provision of Bank Guarantee for the deposit	$ 2,296.95
	$326,106.28

Barritt v JIA Holdings Pty Ltd
CA No. 4042 of 2011

Value of Unit at 31/12/05	$700,300.00
Less: Contract Price	($495,000.00)
	$205,300.00
Solicitor's costs	$ 1,100.00
Accountancy Fees	$ 220.00
	$206,620.00
Interest thereon (1/1/06 to 30/06/07 = 546 days) @ 9%	$ 27,817.00
Interest thereon (1/7/07 to 02/12/11 = 1,615 days) @ 10%	$ 91,422.27
	$325,859.27
Bank Charges associated with the provision of Bank Guarantee for the deposit	$ 3,984.75
	$329,844.02

Olive v JIA Holdings Pty Ltd
CA No. 4043 of 2011

Value of Unit at 31/12/05	$568,700.00
Less: Contract Price	($395,000.00)
	$173,700.00
Solicitor's costs	$ 1,100.00
Accountancy Fees	$ 220.00
	$175,020.00
Interest thereon (1/1/06 to 30/06/07 = 546 days) @ 9%	$ 23,562.96
Interest thereon (1/7/07 to 02/12/11 = 1,615 days) @ 10%	$ 77,440.36
	$276,023.32
Bank Charges associated with the provision of Bank Guarantee for the deposit	$ 2,903.25
	$278,926.57

[45] Ms Browning was a valuer called by the appellants. Her report dated April 2006 assessed the market value of each of the appellants' apartments, if built in accordance with the contracts, as at June 2005. She reduced each valuation by six per cent to arrive at their market values as at 31 December 2005. Her evidence was that there had been a decline in market values of that magnitude in the second half of 2005. Ms Browning's was the only evidence as to the value of the appellants' apartments at the relevant date, 31 December 2005.

[46] The valuers called by the respondent, Messrs Bailey and Coonan, were both employees of Herron Todd White who had been engaged by the first respondent to prepare valuations to support its applications for construction finance. Mr Bailey valued the proposed apartments on 27 October 2003. That valuation was prepared "for first mortgage purposes" and was submitted to Westpac Banking Corporation. Mr Coonan's valuation was performed on 10 June 2004 and was prepared on the same basis, but for use by Suncorp-Metway Limited. Neither of them valued the apartments with respect to any other date.

[47] Ms Browning did not undertake a valuation of the appellants' apartments at any date other than June and December 2005. In particular, she did not undertake a valuation of the appellants' units in 2003 or 2004. She did prepare, in 2009, a report on the marketability of the apartments in the years 2003 and 2004.

[48] The reasons do not explain why the evidence of Messrs Bailey and Coonan was preferred to Ms Browning's. The preference for the respondents' valuers "as to market values … in 2003 and 2004 to that of Ms Browning" is puzzling given that she did not value the apartments for those years, and neither of them valued the apartments as at 2005.

[49] Not giving reasons why one expert opinion rather than another should be accepted is an error of law which entitles the appellants to a re-trial on the question of damages. The cases establishing the proposition are collected and discussed in *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219. In fairness to the trial judge it must be pointed out that the topic was dealt with as an epilogue, it having been found that there was no entitlement to damages.

[50] The appellants, however, asked this Court to assess damages on the basis of Ms Browning's evidence which they submit was not challenged in cross-examination and was not contradicted. They also submit that the trial judge's sparsely expressed preference for the respondent's evidence of markets in 2003 and 2004 is not a ground for not accepting Ms Browning's evidence of values in 2005.

[51] It is right that her evidence was not contradicted. It is not clear whether it was challenged. Mr Barnes' cross-examination of Ms Browning may have been intended as a challenge to her evidence. He asked questions about the comparable sales she relied upon as evidence of value, but the cross-examination did not demonstrate any error in Ms Browning's valuations, and it elicited no concessions damaging to her expressed opinions, methodology or factual bases for her opinions.

[52] The evidence of Ms Browning can thus be aptly described as un-contradicted and unaffected by challenge. Older cases suggest that such evidence must be accepted unless it is fanciful, or there are indications it is fabricated, or for some other reason it appears doubtful. For example *Sheahan v Woulfe* [1927] St R Qd 128 decided that un-contradicted evidence should be accepted unless the testimony on its face disclosed something justifying distrust in it, and that rejection of such evidence without reasonable explanation was an error. In *Re Gear (Deceased)* [1964] Qd R 528 Hart J (at 535) doubted the wisdom of such a strict "rule" and preferred the formulation:

> "Whether uncontradicted testimony should be accepted or not … must depend on all the circumstances of the case including its inherent probability and the possibility of calling evidence in denial."

[53] The same view has, I think, been taken with respect to evidence which was not subjected to cross-examination. That fact is regarded as "often … a very good reason for accepting the evidence … upon that matter" though there is "no requirement in law that the tribunal of fact must accept that evidence" per Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 18. In *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 (586-8) Samuels JA (with whom, on this point, Kirby P and Meagher JA agreed) came to the same conclusion. His Honour considered the opinion of McHugh JA (as he then was) in *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 at 560, that a court may not refuse to accept or disbelieve evidence which has not been the subject of cross-examination, and said:

> "It is not entirely clear … whether his Honour intended to advance a rule of law or merely to emphasise that in many cases it may be wrong, unreasonable or perverse to reject unchallenged evidence. If the former, then, with every respect, I cannot regard that view as correct or consistent with Australian authority. The matter is very fully dealt with in *Cross on Evidence*, 3rd Aust ed (1986) at 436 and following, where many cases are referred to and where … the view is expressed that it is not "Australian law" that evidence unchallenged by cross-examination must be accepted, an opinion in which I respectfully agree." (footnotes omitted)

[54] The current Australian edition of *Cross on Evidence* says [17460]:

> "Secondly, if the witness has not been cross-examined on a particular matter, that may be a very good reason for accepting that witness's evidence, particularly if it is uncontradicted by other evidence."

[55] The cost, delay and inconvenience of a re-trial should be avoided if this Court can, without injustice to the parties, assess damages by accepting Ms Browning's evidence of valuation. Her evidence was uncontradicted. It should therefore be accepted unless it contains patent errors, or unless some other evidence indicates it is unreliable.

[56] It is, I think, significant that the respondents chose to fight the case without calling evidence of value as at the relevant date, to directly contest her evidence. That her figures are substantially higher than the Herron Todd White valuations at earlier dates is explicable on two bases. The first is that, as Mr Coonan accepted, the price of residential apartments in Bargara rose strongly throughout 2003, "levelled out" in 2004, but improved again in 2005. The second is that Mr Bailey's valuation of the apartments was struck after he had discussed with the directors of the first respondent what prices they hoped to sell at, and after he had been supplied with copies of contracts of sale. In each case his valuation was the same figure as the contract price.

[57] Accordingly there is no apparent reason why Ms Browning's evidence should not be accepted. Each of the appellants should have an award of damages in accordance with the figures set out earlier. The evidence as to outlays was not disputed.

Claim against second respondent

[58] On 5 June 2009 the appellants filed an amended Statement of Claim which *inter alia* joined the second defendant (respondent). The case pleaded against it was:

"9. … the first defendant becoming aware of the claim … which was likely to mature into a debt in the … foreseeable future, on 1st March 2009, entered into Deeds of Loan with the second defendant.

10. …

11. In terms of two several Deeds of Loan, dated 1st March 2009, the first defendant acknowledged prior advances of $2,581,452.00 and $780,000.00 respectively to it from the second defendant.

12. In purported consideration of the second defendant not making demand for the payment of … any part of the … moneys allegedly due and owing, the first defendant agreed to grant registered Mortgages over the first defendant's real estate.

13. … the first defendant agreed with the second defendant to pay interest on the amounts … remaining unpaid … at the rate of 8% per annum, costs, charges and expenses of and relating to the Deeds and the … Mortgages … .

14. Thereafter, the first defendant entered into two several Mortgages on 13th March 2009, securing to the second defendant, in respect of all moneys which the first defendant might … become liable to pay to the second defendant, the real property more particularly described as:-

Lot on Plan Description	**County**	**Parish**	**Title Reference**
Lot 1 on RP 89697	Cook	Barolin	1314117
Lot 2 on RP 89697	Cook	Barolin	13473092
Lot 2 on RP 69573	Cook	Barolin	12616090
Lot 3 on RP 7232	Cook	Barolin	11972216
Lot 10 on SP 143682	Cook	Barolin	50365849
Lot 19 on SP 177626	Cook	Barolin	50552197
Lot 18 on RP 7232	Cook	Barolin	15472229

15. The dispositions … were made by the first defendant with an intention to defraud the plaintiffs in respect of the claim made herein which was likely to mature into a debt in the … foreseeable future.

16. It is and was highly likely that the plaintiffs would have a claim against the mortgaged properties and both the Deeds of Loan and the Mortgages are voidable at the instance of the plaintiffs who are prejudiced by the alienation … ."

[59] The first respondent delivered an amended defence and the second respondent delivered a defence to these amended claims. Relevantly the defences pleaded:

"14. As to paragraph 9. … the first defendant:

(a) admits that on 1 March 2009 it entered into 2 deeds of loan with the second defendant;

(b) denies that it entered into the … deeds … on becoming aware of the plaintiffs' claim …;

(c) denies that the plaintiffs' claim … was as at 1 March 2009 (or at any time) likely to mature into a debt in the … foreseeable future … ;

…

(d) says further that:

(i) between 8 February 2002 and 30 December 2008 the second defendant loaned moneys to the first defendant;

…

(iii) as at 1 July 2008 the first defendant owed … the second defendant the sum of $2,581,452.00 in respect of moneys loaned under the first facility;

(iv) as at 31 January 2009 the first defendant owed to the second defendant the sum of $780,000.00 in respect of moneys loaned under the second facility;

(v) the moneys loaned to the first defendant by the second defendant were due and payable on demand;

(vi) on 1 March 2009 the first defendant and the second defendant entered into deeds of loan in respect of the moneys due … under the … (facilities) which deeds provided for repayment … on terms (including the provision of mortgages over real property held by the first defendant) in consideration of which the second defendant was not to seek repayment of the loan moneys other than in accordance with the said deeds.

15. …

16. The first defendant admits the allegation contained in paragraph 11 of the … statement of claim;

17. As to paragraph 12 of the … statement of claim the first defendant:

(a) admits that the first defendant agreed to grant registered mortgages over the first defendant's real estate in consideration of the second defendant not making demands for payment of the loan moneys due to the second defendant;

…

18. The first defendant admits the allegations in paragraph 13 of the … statement of claim …;

19. As to the allegations in paragraph 14 of the … statement of claim the first defendant:

(a) admits the allegations save … that the … mortgages secured payment … of all moneys which the first defendant might purportedly become liable to pay to the second defendant;

(b) says that the mortgages secured payment … of moneys the first defendant was liable to pay … pursuant to the deeds of loan entered into on 1 March 2009;

(c) says the said mortgages were entered into pursuant to the terms of the deeds entered into 1 March 2009."

[60] The appellants' claims against the second respondent were brought pursuant to s 228 of the *Property Law Act* 1974. It provides:

"Voluntary conveyances to defraud creditors voidable

(1) Subject to this section, every alienation of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person prejudiced by the alienation of property."

[61] The appellants led no evidence in their cases in support of this claim. The appellants' counsel cross-examined Mr Bazley who had been a director of the first respondent at the relevant times about the Deeds of Loan and Mortgages, but Mr Bazley professed ignorance of the transactions. He however, testified that Mr Barnes knew "all about" them. It had, apparently, been the intention of the appellants' counsel to tender the transaction documents in the respondents' case, when eliciting what information he could from the cross-examination of Mr Barnes, who had told the trial judge that he intended to give evidence. When Mr Barnes changed his mind and indicated that he would not give evidence the appellants sought leave to re-open their cases to tender the documents. The trial judge refused leave because the respondents were not legally represented and counsel for the appellants had indicated his submissions would be made principally on the basis of the pleadings rather than the transaction documents themselves.

[62] After considerable indecision the appellants eventually sought in their Notices of Appeal:

"3. Orders sought:-

…

3.3 That there be a declaration that the loan and mortgage documentation entered into between the first and second respondents, in or about the month of March 2009, was executed with intention to defraud the appellants.

3.4 That the loan and mortgage documentation be set aside."

Alternatively,

"3.3 The appellants' claim to set aside the loan and mortgage documentation … be remitted to the trial judge for further hearing and determination."

[63] The appellants' primary submission is that the admitted facts, together with Mr Barnes' failure to testify, is sufficient to give rise to an inference of the existence of the fraudulent intention which makes the transaction.

[64] The operation of a section identical to s 228 was explained by Brennan CJ and McHugh J in *DM Cannane and Anor v J Cannane Pty Ltd (In Liquidation)* (1998) 192 CLR 557 (at 566-7):

> "But when the creditors … intervene and the disposition is avoided, the property fraudulently disposed of becomes available for distribution among the then existing general body of creditors.
>
> Although the party impugning the disposition of property must show an actual intent to defraud creditors at the time of the disposition, the intent may be inferred in the making of a disposition which, to adopt the words of Lord Hatherly LC in *Freeman v Pope* 'subtracts from the property which is the proper fund for the payment of [the] debts, an amount without which the debts cannot be paid'. The 'proper fund' may consist in assets out of which future creditors as well as present creditors would be entitled to be paid a dividend in respect of what is owing to them. Therefore a subtraction of assets which, but for the impugned disposition, would be available to meet the claims of present and future creditors is material from which an inference of intent to defraud those creditors might be drawn. Whether that inference should be drawn depends upon all the circumstances of the case." (footnotes omitted)

[65] That available assets are reduced as a result of the disposition of property can itself be a significant fact supporting the inference that the disposition was made with intent to defraud creditors. The effect of the cases was discussed by the Full Federal Court (Wilcox, Gummow and Von Doussa JJ) in *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at 523-5:

> "There is a substantial body of authority in decisions upon the Elizabethan Statute and its modern representatives which supports the statement by Clyne J in *Re Trautwein* … :
>
> > '… it is …clearly established that in determining whether or not an alienation has been made with intent to defraud creditors, a court must look at all the circumstances surrounding the alienation to ascertain if there were any such intent. It is not necessary to bring actual proof that the alienor had in his mind an intention to defraud creditors: for if it appears from the evidence that the effect might be expected to be and has in fact been to do so, the court will attribute the fraudulent intention to the alienor.'
>
> We refer to *Freeman v Pope* (1870) 5 Ch App 538 at 541 … ; *Mackay v Douglas* (1872) LR 14 Eq 106 at 120 … ; *Re Simms* [1930] 2 Ch 22 at 31-34 … . Further, in this Court, the matter was discussed in detail in … *Noakes v J Harvy Holmes & Son* (1979) 37 FLR 5. In the course of his judgment, with which Deane J and Fisher J agreed, Brennan J said (at 10-11):
>
> > 'We were pressed with some observations in *Williams v Lloyd*; *Re Williams* where the court affirmed that the

> burden of proof that a transfer was made with a real intent to defeat or delay creditors is upon the party who so alleges. But that was a case where, at the time of the challenged disposition of property by a husband to his wife, he was in a sound financial position … . In the present case, the inevitable result of the transfer … was to defeat or delay any attempt to execute the judgment … . The case falls squarely within the line of authorities of which *Freeman v Pope* is the leading example, where Lord Hatherley LC said (at 541):
>
> > 'But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement … some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors… .'
>
> That proposition does not trespass upon the rule as to onus of proof; it is a particular illustration of the discharge of the onus by inference from the known facts.'" (footnotes omitted)

[66] *Garuda* was referred to by Brennan CJ and McHugh J in their judgment in *Cannane*. Their Honours did not expressly endorse the passages I have quoted but the case was referred to without dissent or criticism. As well, their Honours quoted with approval a part of Lord Hatherley's judgment which was quoted at greater length by the Full Federal Court. The judgments in *Cannane* do not, I think, cast any doubt upon what was said in *Garuda* and *Trautwein.* Clyne J did not say that a subjective intention to defraud did not have to be proved. The passage in *Trautwein* says that if a disposition of property had the result that creditors would not be paid, and viewed objectively those disposing of the property "might be expected to" understand that would be the effect, the court will infer the actual intent to defraud.

[67] The facts in the present case are sparse because of the way the appellants conducted their cases and because Mr Barnes' decision not to testify meant that the appellants' counsel could not question him about the mortgages. The facts which were established by the admissions were that:

(i) a substantial period after the second respondent had lent the first respondent about $2.5million, and two months after it had lent the further sum of $780,000, the unsecured loans were secured by registered mortgages over the first respondent's real property;
(ii) the respondents are related companies;
(iii) the mortgages were executed after the appellants had commenced their actions and at a time when they were moving, though slowly, towards trial; and
(iv) there was no consideration for the grant of the mortgages.

[68] The effect of the mortgages was to confer on the second respondent priority in the payment of its debt over that of the appellants', should they obtain judgment. The first respondent's real property would be unavailable to satisfy the appellants' judgment debt to the value of the inter-company loans.

[69] Are the facts sufficient to infer an intention on the part of the first respondent to defraud the appellants (i.e. to deprive them of the fruits of any forensic victory)?

[70] Nothing is known about the respondent's financial positions, or whether the mortgaged land is the first respondents' only asset. The value of the land is likewise unknown, so it is not known if there will be a surplus if the loans to the second respondent were discharged from the land. There was some evidence that the first respondent's financial position was unhealthy. Mr Barnes informed the trial judge that the first respondent's former solicitors were exercising a lien over some of its documents because its costs were unpaid.

[71] Despite the paucity of the evidence the inference that the lands were mortgaged to defeat the appellants' claims, i.e. to defraud them, should be drawn. The effect of the transaction was to make the real property available to satisfy the related company loans, which predated the giving of security, in priority to the appellants' claims. It would be an unusually obtuse director who did not realise that the giving of the mortgages would postpone any rights the appellants had, in the event they obtained judgments, to execute against the land until the inter-company loan had been paid in full. There was no evidence that the respondents' directors did not understand the effect of the transactions. There was no evidence that the first respondent's remaining assets would be sufficient to meet the appellants' claims. There was no explanation advanced in the pleadings or in evidence for the transactions to allay the suspicion to which the effect of the transactions gave rise. If there were a reason for the mortgages other than that which the appellants asked the court to infer Mr Barnes could have supplied it. That fact is itself significant and strengthens the inference. He had full knowledge of the transactions, according to Mr Bazley, and chose not to give evidence after the appellants' counsel had shown an interest in pursuing the topic with him in cross-examination.

[72] The point made in *Jones v Dunkel* (1959) 101 CLR 298 applies with full force. Kitto J said (308):

> "… any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness … and the evidence provides no sufficient explanation of his absence."

Menzies J (312) said:

> "… that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference."

Windeyer J said (319):

> "But silence may amount to much more than an acquiescence in the primary facts. It may be eloquent in support of an inference to be drawn from those facts."

[73] To the same effect in the *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at (49) Rich J said:

> "But when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold."

[74] Accordingly, the appeals should be allowed and the appellants should have judgment in their respective actions. There should, as well, be orders avoiding the Deeds of Loan and Mortgages dated 1 March 2009 between the first and second respondents.

[75] I would order that all appeals be allowed and the judgments dismissing the appellants' actions should be set aside. Instead it should be ordered:

1. In CA No 4038 of 2011 there be judgment for the appellants against the first respondent for $364,762.45;
2. In CA No 4039 of 2011 there be judgment for the appellants against the first respondent for $320,339.71;
3. In CA No 4040 of 2011 there be judgment for the appellant against the first respondent for $276,701.70;
4. In CA No 4041 of 2011 there be judgment for the appellants against the first respondent for $326,106.28;
5. In CA No 4042 of 2011 there be judgment for the appellants against the first respondent for $329,844.02;
6. In CA No 4043 of 2011 there be judgment for the appellants against the first respondent for $278,068.81.

It should also be declared that the Deeds of Loan and Mortgages made between the first and second respondents dated 1 March 2009 were alienations of property made with the intent to defraud creditors. There should be an order that the Deeds of Loan and Mortgages be set aside.

The respondents should pay the appellants' costs of the trials and of the appeals to be assessed on the standard basis.

[76] **MARGARET WILSON AJA:** I agree with the orders proposed by Chesterman JA, and with his Honour's reasons for judgment.