DISTRICT COURT OF QUEENSLAND

CITATION:	*Bowman Development Corporation Pty Limited v Young Forever Property Pty Ltd* [2020] QDC 73
PARTIES:	**BOWMAN DEVELOPMENT CORPORATION PTY LIMITED** ACN 161 471 067 (Plaintiff) **v** **YOUNG FOREVER PROPERTY PTY LTD (as trustee for the Macquarie Custody Trust)** ACN 612 194 402 (First Defendant) **AND** **DAVID MARK YOUNG** (Second Defendant) **AND** **JEANETESS RELOVA ALMIRANTE** (Third Defendant)
FILE NO/S:	453/19
DIVISION:	Civil
PROCEEDING:	Trial
DELIVERED ON:	14 February 2020, ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2020
JUDGE:	Barlow QC DCJ
ORDER:	**THE JUDGMENT OF THE COURT IS THAT the first defendant specifically perform, carry into execution and complete the contract of sale made on 25 August 2016 between the first defendant and the plaintiff in respect of the real property comprising unit 23, block 47, section 50, division Macquarie, on deposited plan 11172 in the Australian Capital Territory and also known as Unit 23, 2 Henshall Way, Macquarie in the Australian Capital Territory (the contract), by complying with its obligations under clauses 2.5 and 2.6 of the contract in exchange for the plaintiff complying with its obligations under clause 3 of the contract and, in particular, transferring to the first defendant the title to the Lease defined in the contract.** **THE COURT ALSO ORDERS THAT:** **1. The plaintiff and the first defendant perform the**

contract on the basis that the date for completion is 24 April 2020.

2. **No earlier than seven business days before 24 April 2020, the plaintiff notify the first defendant at its address for service in this proceeding of the time for settlement at the place specified in clause 66.2 of the contract or such other place as the plaintiff and the first defendant agree in writing.**

3. **The trial of the proceeding against the second and third defendants be adjourned to 5 May 2020 and be set down for a hearing of one hour on that date.**

4. **The first defendant pay the plaintiff's costs of the proceeding as against the first defendant on the indemnity basis.**

CATCHWORDS: CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – VENDOR'S REMEDIES – SPECIFIC PERFORMANCE – plaintiff as vendor agreed to sell real property to first defendant as purchaser – deposit paid – first defendant failed to complete contract – plaintiff claimed order for specific performance – plaintiff submits first defendant is impecunious – plaintiff claims simultaneous order for specific performance of guarantee by second and third defendants – whether order for specific performance against first defendant would be futile – whether order for specific performance against the second and third defendants is premature

GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – neither purchaser nor guarantors had performed contract – whether orders for specific performance should be made against all defendants – whether order should only be made against the second and third defendants if the first defendant fails to comply with an order for specific performance

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – POWER TO ORDER – first defendant did not oppose the orders sought – defendants submitted a trial was still required in regard to the second and third defendants – claim for interest and equitable damages against the first defendant required a trial – no contractual right to indemnity costs – whether an indemnity costs order would be appropriate

Fairborne Pty Ltd v Strata Store Noosa Pty Ltd [2009] QSC 250, considered

Fairborne Pty Ltd v Strata Store Noosa Pty Ltd (No. 2) [2009] QSC 307, applied

Lindaning Pty Ltd (Receivers and Managers Appointed) ACN 099 727 223 v Goodlock [2011] QSC 266, applied

Sunbay Projects Pty Ltd v PR Wieland Holdings Pty Ltd [2010] QSC 368, distinguished

COUNSEL: M Hickey for the plaintiff

MD Martin QC for the defendants

SOLICITORS: Robinson Locke Litigation Lawyers for the plaintiff

Whitehead Crowther Lawyers for the defendants

[1] This proceeding came on for trial before me yesterday, 13 February 2020. It is in the commercial list of this Court. Given that commercial list matters are given some priority and that the parties have, very helpfully, considerably reduced the issues to only a few, I decided not to reserve my decision but instead adjourned to today to deliver my judgment and the reasons for it *ex tempore*. I do so without any disrespect to the parties or their legal representatives and the assiduity with which they approached the case.

[2] In August 2016 the plaintiff, to whom I shall refer as Bowman, and the first defendant, to whom I shall refer as Young, entered into a contract for the sale to Young of a unit in a proposed development in Canberra. The sale price was $505,900. The second and third defendants, to whom I shall jointly refer as the guarantors, are directors of Young and they guaranteed Young's performance of the contract.

[3] Young paid a deposit of $25,925, which is still held by the stakeholder. The contract provided that it was to be settled 14 days after Bowman gave notice to Young that the unit plan had been registered, the unit title had been issued, and all necessary approvals for occupation and use of the unit had been obtained.

[4] Bowman gave Young notice that the unit title had been issued on 12 December 2018. Bowman later gave Young notice nominating 21 December as the date for completion. I do not know under what right it did nominate that date, because that is not 14 days after having given notice of the unit title, but no point is made about that date by the defendants. Young did not complete the contract on that date. Although there is no evidence that notice was given of all the matters required under the contract, the defendants have admitted that the contractual completion date was 21 December 2018.

[5] Bowman then gave Young a notice to complete on two occasions and Young did not settle on either occasion. Bowman affirmed the contract on each occasion and later commenced this action. In the action it claims an order for specific performance of the contract by Young and an order for specific performance of the guarantee by the guarantors. Relevantly, the guarantee provides that Bowman may require the guarantors to make a payment or perform another obligation of Young under the contract without first asking Young to do so and irrespective of whether that payment or other obligation would be enforceable against Young.

[6] In essence, Bowman seeks an order that Young or the guarantors complete the contract. In the alternative it claims equitable damages in the amount of the contract price, namely, $505,900.

[7] Bowman contends that an order against Young for specific performance of the contract is appropriate because this unit is one of a number of units in the development that have not been sold; if Bowman were to sell it at a discount, that would adversely affect the value of the other units; and it should therefore be entitled to completion of this contract.

[8] Bowman also contends that the Court should make an order for specific performance at the same time against the guarantors. It gives two reasons, in essence, for contending that such an order should be made now: first, that it is highly likely, or almost inevitable, that Young will not comply with an order because it cannot, even though that has not been proved by any evidence; secondly, if there is any tension in the idea that both the purchaser and the guarantors may be ordered at the same time to perform the purchaser's obligations under the contract, that can be overcome by making an order against the guarantors conditional on the purchaser not itself performing those obligations, or in some other way fashioning an appropriate order against the guarantors.

[9] At the opening of the trial, Mr Martin QC, who appears for the defendants, said that the first defendant, Young, no longer opposes an order for specific performance being made against it, but the second and third defendants, the guarantors, oppose such an order against them on the basis that it would be premature until it is seen whether Young performs the contract, and to make such an order now against the guarantors would result in two inconsistent orders.

[10] Perhaps in response to that submission, and in order to support the plaintiff's submission about tension to which I have referred, Mr Hickey, who appeared on behalf of Bowman, admitted that Young is impecunious in the manner described in paragraph 25 of the defence; namely, it is impecunious insofar as it has insufficient assets or income to complete the contract and it is unable to borrow sufficient funds to complete the contract.

[11] At the conclusion of Bowman's case, the defendants elected not to call any evidence. I am faced, therefore, with evidence only from Bowman, together with a number of factual admissions by the defendants made either in their defence or in answer to a notice to admit facts. The defendants contend that, if an order for specific performance is made against Young, then there is no basis for ordering equitable damages against any of the parties. They did not contend at the trial, although they did plead, that damages are an adequate remedy, so I need not address Bowman's evidence and submissions about that expected issue.

[12] Alternatively, the guarantors contend, the damages claimed are excessive, being for the full purchase price even though, if the defendants do not complete the contract, Bowman will retain the unit. Mr Martin submitted that, although damages, if awarded, might ordinarily be calculated as the difference between the value of the unit and the purchase price, there is no evidence of the value of the unit and therefore, if the Court were not to order specific performance, no loss has been proved and no damages should be awarded.

[13] The relevant principles do not appear to be in dispute. Those guiding the exercise of the Court's discretion whether or not to make such an order, particularly in respect of contracts for sale of land, were helpfully set out by counsel for Bowman in his written submissions and in his address. I respectfully adopt those principles, particularly as set out in the written submission at paragraphs 39 to 52, which I shall not repeat.

[14] Mr Martin for the defendants relied on three cases, particularly for the proposition that a Court ought not, at least ordinarily, grant specific performance against both a purchaser and its guarantors at the one time. I shall discuss those cases later.

[15] The first question I shall consider briefly, though, is whether damages are an adequate remedy, because I do have a discretion whether or not to grant an order for specific performance despite the fact that it is not opposed by Young.

[16] I did not understand Mr Martin to press the contention that damages would be an adequate remedy. Certainly he did not challenge the evidence tendered for the plaintiff going to that question. But in case I am wrong, I record that I am satisfied that damages are not an adequate remedy in this case because: (a) this unit is one of many in the development built by Bowman, similar units have sold slowly since the development was completed, and Bowman still has not sold 16 out of 33 two-bedroom apartments similar to that in question, the development having been completed in about November 2018, and it has not sold a total of 31 out of 74 apartments; (b) if this contract were terminated and Bowman were to sell this unit at a discount in order to recoup some part of its loss and to mitigate its loss, that would be likely to affect adversely the prices at which it could sell the other two-bedroom apartments, but it would be difficult or impossible to demonstrate that effect; (c) the market in Canberra for similar apartments is already oversupplied and it appears that it will become considerably more oversupplied in the next year or two, making it even more difficult to sell this apartment or any of the other apartments; and (d) to order damages against Young, at least, would appear to be a bit of a charade as it is clearly unable to fulfil such an order.

[17] In those circumstances the first question for me to resolve is whether I should order specific performance against Young. Both parties contend that I should do so, however I still have a discretion, as I have said. I might not make such an order if I consider that it would be futile because Young could not possibly perform it. The defendants do not contend that it should not be made because it would cause Young or anyone else unnecessary hardship.

[18] So, would such a decree against Young be pointless and futile on the basis, as Mr Hickey submitted in contending that I should make an order against the guarantors, that it is almost inevitable that Young will not complete the contract, even if ordered to do so? The evidence does not justify such a conclusion. Indeed, there is no evidence about either Young's or the guarantors' ability now to complete the contract, although Bowman admits that Young is impecunious in the sense described earlier.

[19] In *Lindaning Pty Ltd (Receivers and Managers Appointed) ACN 099 727 223 v Goodlock and Gore* [2011] QSC 266, Justice Byrne considered whether an order for specific performance against the purchasers in that case was futile or pointless. He addressed it in paragraphs 30 to 33 of his reasons for decision. Without setting them out in my reasons for judgment, all that he said there applies in this case. For those reasons I am satisfied that it is appropriate in this case to order Young specifically to perform its obligations under the contract.

[20] The form of the order should be similar, with appropriate changes, to the judgment and orders 2 and 3 of the orders made by Justice Daubney in *Fairborne Pty Ltd v Strata Store Noosa Pty Ltd (No. 2)* [2009] QSC 307. Mr Martin requested that, in those circumstances, I allow Young 60 days to complete the contract, and I did not understand Mr Hickey to oppose that period of time. I consider it appropriate to give Young a final opportunity to find the resources necessary to complete the contract and to avoid it, perhaps, being in contempt of court by failing to comply

with the order. I propose therefore to give it a period of something in excess of 60 days, taking into account that a period of 60 days would include the Easter period.

[21] Having determined that I should make that order, the question remains whether I should order specific performance against the guarantors. As I have said, Bowman submits that I should make an order against all defendants at the same time, that is, that Young perform its obligations under the contract and that the guarantors perform Young's obligations under the contract in accordance with their own obligations under the guarantee.

[22] Mr Hickey submitted that Young is impecunious and it is inevitable that it will not be able to comply with an order against it and therefore that the guarantors will be obliged to fulfil their obligations under the guarantee by performing Young's obligations under the contract of sale. It would be unjust, said Mr Hickey, to put Bowman to the charade and expense of calling again on Young for settlement and deferring the guarantors' obligations, particularly where they have already admitted that they are in breach of those obligations.

[23] That admission is a deemed admission arising because, in paragraph 22 of their defence, they admitted that the guarantors had not performed the contract and did not dispute or answer in any way the allegation in paragraph 22 of the statement of claim, that that non-performance was in breach of the guarantee. Therefore, by operation of rule 166(1) of the *Uniform Civil Procedure Rules*, they are deemed to have admitted that allegation. Mr Martin did not contend otherwise.

[24] The guarantors are only required to perform their obligations under the guarantee, and thereby to perform Young's obligations under the contract, if Young does not perform its obligations under the contract and Bowman calls on the guarantors to perform those obligations. There is no evidence that Bowman, in fact, called on the guarantors to do that before commencing this proceeding, but I consider that it has done so by making this claim.

[25] Young's obligations under the contract are to pay the balance of the purchase price and interest under the contract upon settlement and to authorise the release to Bowman of the deposit. I paraphrase what the contract provides in that respect.

[26] It is only if Young does not do those things that the guarantors are obliged to perform those obligations if called on to do so. Mr Hickey submits that the guarantors' obligations under the guarantee are separate and distinct from Young's obligations under the contract and therefore there is no tension in this case in the Court making an order against all defendants at the one time.

[27] Mr Hickey submits in the alternative that, if the Court considered it necessary or appropriate, it could fashion an order concerning the guarantors that would do justice between the parties. An order that they specifically perform their obligations might be made conditional on Young first not complying with an order made against it. He pointed out that there is no pleading nor any evidence to the effect that the guarantors would not be able to provide the funds necessary for Young to complete the contract, or themselves to be able to complete it. He submitted that I should infer from the defendants' choice not to call evidence that any evidence about that topic would not have assisted their defence in this regard. In that respect I assume he is relying on the decision of the High Court in *Jones v Dunkel* (1959) 101 CLR 298.

[28] I understood Mr Hickey also to adopt, in the alternative, my suggestion that the Court might make an order against Young now and adjourn the case against the guarantors to a date after the date for Young's compliance.

[29] Mr Martin submits that, for the reasons expressed by Justice Daubney in *Fairborne Pty Ltd v Strata Store Noosa Pty Ltd* [2009] QSC 250 at paragraphs 39 and 40, I should not make any orders against the guarantors, but I should dismiss Bowman's claim against them with costs. The fact that Young is impecunious does not mean that it will inevitably be unable to comply with such an order against it. It may receive assistance from the guarantors. Even though it seems highly likely that it will not complete, that is not sufficient to justify orders against the guarantors at this point in time. There was no cogent reason for Bowman to sue the guarantors at the same time as Young and, in this respect, Mr Martin referred to *Fairborne (No. 2)*, to which I have already referred, at paragraph 9.

[30] As that was the nub of the defendants' submissions I will consider in some detail the *Fairborne* decisions, and also the decision of Justice Ann Lyons in *Sunbay Projects Pty Ltd v PR Wieland Holdings Pty Ltd* [2010] QSC 368, in which her Honour followed *Fairborne*.

[31] In each of those cases, the plaintiff seller sought orders for specific performance of a contract for the sale of land against both the purchaser and the guarantors at the same time. The guarantee in *Fairborne* was relevantly similar to that in this case, in that the guarantors both guaranteed the payment by the purchaser of the purchase price and themselves agreed to perform the purchaser's obligations if the purchaser did not.

[32] The wording in *Sunbay* was materially different and, most relevantly in that case, guaranteed the payment of any loss caused to the seller by the buyer's default.

[33] In this case, the contract provided, relevantly, in clauses 2.5 and 2.6, that on completion the buyer must give to the seller an authority directing the stakeholder to account to the seller for the deposit and must pay to the seller the balance of the purchase price. The guarantee relevantly provided as follows.

[34] By clause 1:

> The guarantor, as a principal obligor and not merely as surety, irrevocably and unconditionally guarantees to the seller (and indemnifies the seller in respect of) the due and punctual performance of all the obligations of the buyer under or arising out of the contract including (without limitation): (a) the prompt payment of all amounts payable by the buyer under the contract; (b) the prompt performance of all other obligations of the buyer under the contract.

[35] By clause 4:

> The seller may require the guarantor to make a payment or perform any other obligation of the buyer under or arising out of the contract: (a) without first asking the buyer to do so; and (b) irrespective of whether such payment or other obligation would be enforceable against the buyer.

[36] Similarly, the guarantee in *Fairborne* expressly stated that each guarantor would, on demand by the vendor in the event of default by the purchaser, "pay and perform the obligations" of the purchaser. As Justice Daubney said at paragraph 37 of his first

Fairborne decision, to which I shall refer as *Fairborne (No. 1)*, the relevant obligation which the guarantors had undertaken to perform was the purchaser's obligation to pay the balance of the contract price on completion. In this case the relevant obligations are those in clauses 2.5 and 2.6 of the contract to which I have referred.

[37] Relevantly, in *Fairborne (No. 1)* Justice Daubney had the following to say (I am quoting only the particularly relevant parts).

[38] At paragraph 38:

> The real question … is whether orders in the nature of specific performance … ought presently be made … to have the guarantors perform the obligations of the first respondent.

[39] At paragraph 39:

> … the pursuit of an application for specific performance against the guarantors at this point in time sits ill with the applicant's request for a decree of specific performance against the first respondent. True it is that the liability of the guarantors, determined according to the terms of the guarantee given, is additional to the primary liabilities and obligations of the purchaser under the contract of sale. But making an order requiring the guarantors to "pay and perform the obligations" of the first respondent under the contract at a time when the first respondent itself is subject to a decree that it perform its own obligations would cause immediate and wholly undesirable tensions to arise both in respect of the legal consequences (e.g. whether, and to what extent the guarantors are subrogated to the rights and responsibilities of the purchaser under the contract of sale) and in the practical consequences of the Court simultaneously ordering two discrete parties … separately to perform the same obligations under the same contract at the same time.

[40] His Honour went on at paragraph 40 to say:

> … I consider it premature for the vendor to seek simultaneous orders tantamount to specific performance of the guarantee at this juncture.

[41] His Honour later dismissed the application against the guarantors and ordered that the applicant pay their costs. That is the course urged upon me by Mr Martin in this case.

[42] In *Sunbay*, Justice Ann Lyons took a similar approach. However, her Honour considered only the effect of the clause by which the guarantors agreed to pay the seller for any loss suffered as a result of breach by the buyer. She did not determine the effect of another clause by which each of the guarantors accepted "all obligations specified in the contract" and agreed "to be bound as a party to the contract".

[43] At paragraph 70, her Honour said that the plaintiff in that case argued:

> … that those clauses, whereby the guarantor accepts all obligations specified in the contract, impose an express obligation on the guarantor to pay the sums of money which are due under the contract, which would include the purchase price. Furthermore, it is argued those clauses confer rights on the seller to sue the guarantor for specific performance because the relevant clause must mean something more than what is provided in other clauses which deal expressly with the damages situation.

[44] The plaintiff there argued that there was a high degree of likelihood that the first defendant, if ordered to complete, would be unable to do so and that an order was therefore sought requiring the performance of the obligations of the guarantor. There was evidence there which did indicate, at least historically, the first defendant's inability due to lack of finance.

[45] Notwithstanding the first of those submissions, her Honour did not really address the effect of the clauses referred to in paragraph 70 of her Honour's judgment, rather, concentrating on the guarantor's agreement to pay any losses consequent on the breach. As to that obligation, her Honour said at paragraph 72:

> … I consider the relief currently sought as against the second defendant is premature. It is clear on a proper construction of the guarantee, Mr Wieland guaranteed the payment to the plaintiff of any monetary loss it establishes against the buyer as a consequence of its breach of the contract as purchaser. However, no damages are sought as the plaintiff seeks specific performance of the contract by the buyer.

[46] And at paragraph 74 her Honour said:

> … the relief sought as against the second defendant is in fact premature because a guarantor should not be compelled to do something until the principal has failed –

and she went on to quote from Justice Daubney's judgment at paragraph 39.

[47] I consider her Honour's judgment in *Sunbay* to be distinguishable because her Honour did not really rule on the clause that may have had a similar effect to the relevant clauses of the guarantee here. However, I accept the force of Justice Daubney's concern about the tension involved in ordering two parties separately to perform the same obligation under the same contract at the same time. It raises the problems identified by his Honour. It would also magnify the "inconvenient consequences" of specific performance identified by Justice Byrne in *Lindaning* at paragraph 32.

[48] In this case the same difficulties and tension would apply if I were to make an order for specific performance against the guarantors at the same time as ordering that Young perform its obligations under the contract. The two sets of orders should only be made separately, if it becomes necessary, with an order against the guarantors only if Young fails to comply with the order against it.

[49] However, I do not consider it appropriate to dismiss Bowman's claim against the guarantors at this stage. I am very mindful of the need to do complete justice between the parties, as well as the Court's and the parties' obligations to attempt to resolve the real issues between the parties at a minimum of expense. That is the philosophy of the *Uniform Civil Procedure Rules*, but it applies not only to the application of the rules but also to the application by the Court of all its powers and jurisdiction.

[50] The Court's objective generally is that stated in rule 5, including to avoid undue delay, expense and technicality in exercising its jurisdiction and powers. To that end, instead of dismissing Bowman's claim against the guarantors at this stage, I have considered whether I should fashion an order against the guarantors that would take effect only if Young does not comply with the order to be made against it. I accept that I can, in the words of Mr Hickey, mould my decree to do more perfect justice between the parties.

[51] Mr Hickey pointed in particular to the complicated sets of orders made in *Kentucky Fried Chicken (Kedron) Pty Ltd v Leybourne* [1972] QWN 21 and in *Brice v Mackay* [1983] 2 Qd R 543. However, while that may be possible, it would be likely to be accompanied by, or to cause, all sorts of complications additional to those alluded to by Justices Byrne and Daubney respectively.

[52] I have instead determined that the claim against the guarantors should be adjourned to a date after that on which Young is to be obliged to perform its obligations under the contract of sale. Whether or not it performs the contract, unless the parties can then agree on final orders to be made, it seems to me that it will be necessary to consider what further steps or orders should be made at that time. If Young does not perform, Bowman may then re-enliven its claim for orders against the guarantors and it will be necessary to consider what other consequential orders should be made, including whether to vacate the order against Young in the circumstances. Alternatively, if Young performs, the parties may seek orders about the costs of the proceeding against the guarantors, although I would hope they would reach a sensible agreement instead of returning to Court in such a case.

[53] It may also be necessary before the completion date for the Court to determine how much is payable under the contract, particularly interest. Although, again, I would hope the parties could agree on that. I will grant liberty to apply to determine any issues arising from or concerning the orders that I make.

[54] Before I make the orders there is one other issue to consider. In its claim, Bowman seeks an order against all parties that they pay interest on the sale price from the original completion date, in accordance with the contract clause 22.1.2. I agree with Mr Martin's submission that such an order would be premature. The amount of interest due – not from completion I might add, as claimed, but from seven days after completion in accordance with the clause of the contract – can only be determined as at the date of final completion and is only payable on completion. Therefore I will not make any order concerning interest at this stage.

[55] Having indicated the form of orders which I would make, I sought submissions about them. Mr Hickey submits that I should make an order that the first defendant pay the plaintiff's costs of the proceeding as against the first defendant on the indemnity basis. He does not point to any contractual right to such an order but submits that the first defendant's defence of the case was clearly unjustified, especially in circumstances where, on the first day of the trial, it announced that it did not oppose such an order being made against it, and those circumstances meet the exception to the normal rule that costs be assessed on the standard basis.

[56] Mr Martin submits that, even if that had been conceded earlier by the first defendant, there would still have had to be a trial regarding the second and third defendants, and also the plaintiff made a claim for interest against the first defendant and for equitable damages in the alternative, both of which have had to be defended during the course of the trial.

[57] In my view, in the absence of any contractual right to indemnity costs, the first defendant was entitled, although barely, to defend the case and the order should be that it pay the plaintiff's costs of the proceeding as against it on the standard basis.

[58] I should also add there will be a fifth order that there be liberty to apply generally on at least three business days' notice in respect of any matter arising out of these orders.