SUPREME COURT OF QUEENSLAND

CITATION:	*M P Management (Aust) P/L v Churven & Anor* [2002] QSC 320
PARTIES:	**M P MANAGEMENT (AUST) PTY LTD** ACN 069 812 424 (applicant) **PHILIP STUART CHURVEN and YLVA MARIA KJELLBERG** (respondents)
FILE NO:	1704 of 2002
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2002
JUDGE:	Muir J
CATCHWORDS:	CONTRACT – TERMINATION – WAIVER – alleged breach of the *Property Agents and Motor Dealers Act* 2000 – construction of the Act - where application seeks declaration that contract for sale of land validly terminated by notice – whether a warning statement was attached to contract – meaning of "attached" – whether waiver of right of termination – whether expenses incurred after notification of right to terminate are recoverable as reasonable CONTRACT – FORMATION – time of formation of contract – whether a warning statement was signed and dated before a witness – meaning of "sign" and "attestation" *Powers of Attorney Act* 1948 *Property Agents and Motor Dealers Act* 2000, s 365 s 366, s 367 *Property Law Act* 1974 s 45 *Succession Act* 1981, s 7 *Beckwith v R* (1976) 12 ALR 333 *Bosaid v Andrey* [1963] VR 465 *Clohesy v Maher* (1880) 6 VLR (L) 357 *Cohen v Roche* [1927] 1 KB 169 *Elliott Common School District No 48 v Country Board of*

School Trustees Tex Civ App, 76 SW 2d 786
Goodman v J Eban Ltd [1954] 1 QB 550 CA
Kammins Co v Zenith Investments (1971) AC 850
Minchin v Public Curator of Queensland (1965) ALR 91
Muirhead v Commonwealth Bank (1996) 139 ALR 561
Sargent v ASL Developments Ltd (1974) 131 CLR 634
Schneider v Norris (1814) 2 M & S 286
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23
The Commonwealth v Verwayen (1990) 170 CLR 394

COUNSEL: M Burnett for the applicant
D Campbell for the respondent

SOLICITORS: Kelly Lawyers for the applicant
Corums Lawyers for the respondent

Introduction

[1] The applicant, M P Management (Aust) Pty Ltd, entered into a contract dated 11 October 2001 with the respondents, Philip Churven and Ylva Kjellberg, for the sale and purchase of a parcel of vacant residential land located at 8 Annie Street, Hamilton. On 6 December 2001 the applicant purported to terminate the contract by notice given under s 366 of the *Property Agents and Motor Dealers Act* 2000 ("the Act"). In this application it seeks: a declaration that the contract was validly terminated by the notice; an order that the respondent authorise its agent, Damian Walsh Real Estate, to release to the applicant $46,000 held by way of deposit under the contract and an order that the respondent pay the applicant $10,620.14 by way of legal and other expenses incurred pursuant to the contract.

Events preceding the entering into of the contract

[2] During the afternoon of 8 October 2001, Mr Patrick Farrugia, a director of the applicant telephoned Mrs Paula Walsh, a real estate agent and a principal or employee of Damian Walsh Real Estate Clayfield with a view to obtaining her assistance in connection with the applicant's intended purchase of the land. He told her of his understanding that the land, although subject to a conditional contract of sale, was about to come back onto the market. He said that he would fax to her some information in relation to the land which he had obtained from another agent. He also requested her to ascertain the identity of the vendor. Damian Walsh Real Estate was not then the respondents' agent.

[3] Later that afternoon, Mrs Walsh, in a telephone call to Mr Farrugia, told him the name of the vendors, confirmed that the existing contract would not be proceeding and advised him to be in a position to enter into a contract immediately. On 9 October 2001, Mrs Walsh, at Mr Farrugia's request, met with the applicant's solicitor, Mr Kelly at the land where they carried out an inspection and Mrs Walsh produced a site plan and other title information to Mr Kelly. On 10 October, after a number of conversations with Mrs Walsh in which the terms of the offer the

applicant was proposing to make were discussed, Mr Farrugia asked Mrs Walsh to prepare a contract and bring it to his residence for execution.

[4] Mrs Walsh arrived at Mr Farrugia's residence at about 5 pm on 10 October bringing with her a draft form of contract which, after discussion, the applicant signed. It stipulated a purchase price of $940,000 and a deposit of $47,000 payable as to $1,000 on signing and $46,000 within 14 days. Mr Farrugia made a photocopy of the document after he had signed it but before Mrs Walsh had signed by way of attestation. Mr Farrugia also signed a warning statement prepared pursuant to s 366(4) of the Act. He swears that after he signed the contract document Mrs Walsh produced the warning statement which was then signed by him but not by her.

[5] Mrs Walsh has a different recollection of events. She swore that she presented to Mr Farrugia a manila folder containing the proposed contract, already signed by Mr Churven, and the warning statement as the uppermost document. The folder also contained three or four other forms of contract in respect of other properties. Her recollection is that the warning statement was signed by Mr Farrugia and witnessed by her before the contract document was signed. Mr Farrugia did not expressly assert that the warning statement was not on top of the form of contract when given to him but says that the contract documents in respect of the land and the documents relating to other proposed contracts "were in a pile in no particular order".

[6] His recollection, also, is that the form of contract was unsigned by the respondents when presented to him for signature. Mr Churven, who gave evidence, did not assert that he had signed the form of contract at this stage. I accept Mr Farrugia's evidence in this regard. It is supported by the existence of a photocopy of the form of contract made by him on 10 October which shows his signature, initialling by Mrs Walsh but no signature on behalf of the respondents. The photocopy also shows a contract price of $940,000 whereas the contract signed by the applicant and the respondents has a purchase price of $950,000. No plausible explanation is offered as to why the copy taken by Mr Farrugia would not have contained the higher figure if it had been inserted in the other copies of the contract documents produced to Mr Farrugia on the 10th.

[7] I do not accept that Mr Farrugia has an actual recollection of whether Mrs Walsh witnessed his signature on the warning statement. His contention in that regard, however, receives support from the fact that the pen used by Mrs Walsh on the warning statement was different from that used by both Mrs Walsh and Mr Farrugia in signing and initialling the form of contract. That tends to suggest that Mr Farrugia's signature on the warning statement was not witnessed by Mrs Walsh as part of one overall signing process. Of course, it is not inconsistent with the statement having been signed an appreciable time before the signing of the contract. Although I accept Mrs Walsh as a credible witness, I do not accept that she has retained a recollection of the circumstances in which she signed the warning statement and I do not consider it probable that she and Mr Farrugia signed it before he signed the contract.

The entering into of the contract

[8] Mrs Walsh and Mr Farrugia both agree that the warning statement was not stapled, pinned or otherwise affixed to the form of contract.

[9] Mrs Walsh, that evening or the next day, took the contract document to Mr Churven who expressed disagreement with some of its terms. Negotiations then ensued and a number of changes were made to its contents. On 15 October 2001 Mr Churven wrote to Mrs Walsh stating, inter alia, "I return the contract as executed by the purchaser now duly executed by the vendors". That observation was not completely accurate because Miss Kjellberg was in Sweden at the time and did not return a form of contract signed by her until about 19 October 2001. On 16 October Mrs Walsh wrote to the respondents' solicitors stating that she enclosed the original copy of the contract of sale, that the duplicate copy was being forwarded to Mr Churven and advising that an initial deposit of $20,000 was held by her firm.

[10] Mr Churven swore that agreement on amendments to the proposed contract was reached on or about 11 October, Mrs Walsh's recollection is that negotiations continued until the 15th. Her recollection sits more comfortably with the documentary evidence and I accept it as accurate.

[11] The copy of the contract sent to Mr Kelly on 16 October differed from the document signed by Mr Farrugia on 10 October in a number of material respects. The initials of both Mrs Kelly and Mr Walsh appeared against each alteration but the evidence did not disclose where or when the initialling had taken place.

Post contract dealings

[12] On 26 October Mr Kelly wrote to the respondents confirming agreement in relation to further variations to the contract and "the remaking of time of the essence of the contract". The letter gave notice pursuant to special condition 1 of the contract that the applicant was satisfied with due diligence enquiries and had not relied on any representations in arriving at a decision in that regard.

[13] There was then an exchange of communications concerning house plans, drawings and design. Mr Farrugia asserted that he had been promised a full set of working plans for the proposed dwelling on the site and had been frustrated in his attempts to obtain them. The respondents contended that they had done all they could to make such plans available to the applicant.

[14] On 31 October 2001 Mr Churven, in his capacity as solicitor for the respondents, wrote to the applicant's solicitors confirming the contract as varied and stating –

> "As there were earlier proposed contracts between these parties in the negotiation process, I attach a copy of a final contract document as executed by the parties and as now applicable. The vendors hold their copy of the terms of contract (pages 3-6) as referred to in the attached contract document and confirm that your client holds a similar copy.

> We confirm these matters in the context that our client had another purchaser for the subject property and have refused that parties offer on the basis that the written contract as amended is now unconditional and will proceed to settlement on the terms of such contract. …
> We confirm that settlement of the contract is due on 10th December 2001. Due to commitments that the vendors are now about to make on the basis of the within contract settlement will be required on that due date."

The "final contract document" referred to in the letter was not tendered or otherwise identified.

[15] On 6 December 2001 the applicant's solicitors wrote to the respondents' solicitors giving notice of termination under s 367 of the Act and stating –

> "For your information the Warning Statement had not been executed and witnessed, or dated, by the Seller or someone acting for the Seller at the time our client executed the Contract of Sale nor was it **attached** as the first and top sheet of the Contract. Hence it is of no effect under section 366(5)."

The competing arguments

[16] Mr Burnett, who appeared for the applicant, submitted that his client was entitled to terminate the contract on the grounds that in contravention of the Act –

(a) the warning statement was not attached as the "first or top sheet" of the contract;
(b) the warning statement had not been signed and dated by the buyer "before a witness" before the contract was signed by the buyer;
(c) the contract was not signed and dated before a witness by "the seller of the property or someone acting for the seller" before the contract was signed by the buyer.

[17] Mr Campbell, for the respondents, submitted that –

(a) no binding contract had been entered into and that, therefore, the Act did not apply;
(b) the attachment requirement in s 366(1) was satisfied by the placement of the warning statement in the manila folder on top of the form of contract;
(c) Mrs Walsh's signature on the warning statement opposite that of Mr Farrugia constituted the signing of the statement by "the Seller of the property or someone acting for the Seller";
(d) The requirement that the statement be signed and dated "before a witness" merely meant that the signing and dating must happen in the presence of a witness and not that the witness must actually attest the warning statement;

(e) the applicant had waived its rights to rely on s 367 of the Act by affirming the contract after knowing of the existence of the right to terminate it.

The relevant provisions of the *Property Agents and Motor Dealers Act* 2000

[18] Sections 366 and 367 of the Act, in the form in which they existed at the date of the contract, relevantly provided –

> **366 Warning statement to be attached to contract**
> (1) A contract for the sale of residential property in Queensland must have attached, as its first or top sheet, a statement in the approved form **("warning statement")** containing the information mentioned in subsection (3) or (4).
> (2) The seller of the property or a person acting for the seller who prepares a contract for the sale of residential property in Queensland commits an offence if the seller or person prepares a contract that does not comply with subsection (1).
> Maximum penalty—200 penalty units.
> …
> (5) A statement purporting to be a warning statement is of no effect unless –
> (a) before the contract is signed by the buyer, the statement is signed and dated before a witness by -
> (i) the seller of the property or someone acting for the seller; and
> (ii) the buyer; and …
> **367 Buyer's rights if warning statement not given**
> (1) This section applies to a contract to which a warning statement must be attached.
> (2) If a warning statement is not attached to the contract or is of no effect under section 366(5), the buyer under the contract may terminate the contract at any time before the contract settles by giving signed, dated notice of termination to the seller or the seller's agent.
> (3) The notice of termination must state that the contract is terminated under this section.
> (4) If the contract is terminated, the seller must, within 14 days after the termination, refund any deposit paid under the contract to the buyer.
> Maximum penalty—200 penalty units.
> (5) If the contract is terminated, the seller and the person acting for the seller who prepared the contract are liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract.
> …
> (7) An amount payable to the buyer under this section is recoverable as a debt."

Was there compliance with the requirements of the Act?

[19] I will address first the argument that the contract did not have attached, as its first or top sheet, a warning statement.

[20] The word "attached", in its less restrictive sense, may mean "accompanying" or "associated"[1] and, in that sense of the word, one thing may be "attached" to another without physical joinder.[2]

[21] In its more restrictive sense and, I rather think, every day sense, "attached" connotes some form of joinder, fastening or affixation. There is nothing in the context of s 366 or s 367 which would tend to indicate that the word should be construed broadly, quite the contrary. The aim of the sections appears to be to give prominence to the warning statement by ensuring that not only is it inseparable from the contract proper but that it is the first document to be seen by a prospective purchaser when perusing the contract.

[22] Subsection (1), by requiring a contract to "have attached" the warning statement "as its first or top sheet", suggests that more than the mere placing of the warning statement on the contract or providing it in a folder together with the contract is required and that some form of physical joinder or incorporation is necessary.

[23] It may be that the requirements of s 366(1) could be complied with without the warning statement being stapled, pinned to or bound up with a contract. For example, if the warning statement was the first of a number of loose sheets placed together in a folder and numbered or otherwise identified as the first sheet of the bundle, it may be arguable that the warning statement was "attached" to the other documents. That did not happen here. The contract form used was a standard REIQ form consisting of six pages without annexures. Written at the bottom of the front sheet, which bore every indication of being the first page of a document, were the words and figures "page 1 of 6". The succeeding pages were similarly numbered at the foot. Furthermore, the folder could not serve as a unifying device "attaching" the warning statement to the contract as its first or top sheet as it contained other contractual documents.

[24] The argument before me proceeded on the assumption that the critical time for compliance with ss 366 and 367 was the time of signing of the contract document by Mr Farrugia on behalf of the applicant on 10 October. That assumption does not appear to me to be well founded. What Mr Farrugia signed on 10 October was an instrument which contained the terms of an offer which the applicant proceeded to make to the respondents. It is difficult to untangle from the evidence the point at which the contract was formed, as this was not treated in submissions as an issue requiring resolution. Mr Campbell's written submissions contained an assertion that no contract had been formed but the submission was plainly untenable and was not pursued in oral submissions.

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1 *Bosaid v Andrey* [1963] VR 465 at 473.

2 *Elliott Common School District No 48 v Country Board of School Trustees* Tex Civ App, 76 SW 2d 786, 780.

[25] There was no attempt by either party to trace the movement (or placement in relation to any form of contract) of the warning statement from when it was taken by Mrs Walsh from Mr Farrugia's residence on 10 October. Nor was there direct evidence to the effect that if the warning statement was altered after being signed by Mr Farrugia, it was only by the placement on it of Mrs Walsh's signature. The only copy of the warning statement tendered was one which bore only the signatures of Mr Farrugia and Mrs Walsh. The inference I draw from the evidence is that if a warning statement accompanied the copy of the contract signed by Mr Farrugia after 10 October and sent by Mrs Walsh to Mr Kelly on 16 October, it was the document signed by Mr Farrugia on 10 October and witnessed by Mrs Walsh with no alterations. I also infer that no further act which might constitute attachment of the warning statement to the contract took place.

[26] I note that the applicant's solicitors, in a letter to Mr Churven of 10 December 2001, asserted that a copy of the warning statement did not accompany the original contract when it was hand delivered to their offices on 16 October. That allegation is not expressly denied.

[27] As the offer, made by Mr Farrugia's giving the form of contract to the respondents via Mrs Walsh, was not accepted, the warning statement could not have complied with s 366(1) unless it was later attached to the contract actually entered into (which was materially different in content from the applicant's offer) before that contract was signed by "the buyer". I infer that this probably did not occur.

[28] For the above reasons, I find that there was a breach of s 366 of the Act as the contract did not have a warning statement attached as its first or top sheet.

[29] I now turn to the question of whether, before the contract was signed, the warning statement was signed by the seller or someone acting for the seller and dated before a witness.

[30] There was a challenge to the evidence of Mrs Walsh and Mr Churven that Damian Walsh Real Estate had been appointed the respondents' agent by the time the warning statement and form of contract were signed by Mr Farrugia on 10 October. Suspicion was aroused by the fact that a form of appointment of agent was dated 1 October and because an earlier contract for the sale of the land was still on foot on 10 October. It was submitted that because of the existence of that contract, it was unlikely that the appointment of Damian Walsh Real Estate was made on the 10th. I do not find this point compelling. Mr Farrugia himself swears that terms of the proposed contract were being negotiated on 10 October and that the previous day Mrs Walsh had met with Mr Kelly at the land in order to discuss potential easement difficulties. An obvious step for Mrs Walsh to take was to obtain an appointment as agent and I have no reason to disbelieve the evidence of Mr Churven and Mrs Walsh that this was attended to on 10 October.

[31] The warning statement provides –

"I/We ……and ……....the

Buyer have read and understand the information contained in this Warning Statement. I/We understand that by signing the attached contract I/we may be entering a binding contract with no cooling-off period.

PLEASE SIGN HERE

BUYER	**BUYER:**	**WITNESS:**
Name:……	Name: …….	Name: …….
Signature ……..	Signature: …….	Signature: ……..
Date: ……	Date: …….	Date: ……..

SELLER/SELLER'S AGENT:	**SELLER/SELLER'S AGENT:**	**WITNESS:**
Name: …….	Name: …….	Name: ……..
Signature: ……	Signature: ……..	Signature: ……..……
Date: ……..	Date: ……..	Date: ……"

[32] Mr Farrugia signed the document under "BUYER" on the left hand side of the document and Mrs Walsh signed under "WITNESS" where that word appears in the same line as the words "BUYER". Her evidence was that she signed in order to witness Mr Farrugia's signature and did not intend to sign on behalf of the seller or as the seller's agent. That evidence was irrelevant as the question of whether the seller or seller's agent signed the warning statement for the purposes of s 366(5) is a question for objective determination and is not dependent on the state of mind of a signatory.

[33] Mrs Walsh placed her signature on the warning statement but did she "sign" the statement in the sense referred to in s 366(5)? In the context of Bills of Sale legislation, signing has been described as "the writing of a person's name in a bill or notice in order to authenticate and give effect to some contract thereon".[3] A similar approach is evident in respect of contracts of sale, where it has been held that a signature, wherever placed on the subject document, is sufficient to constitute a signed memorandum of the contract, if it reasonably appears to be intended to govern or authenticate every material and operative part of the writing.[4]

[34] Lord Ellenborough CJ gave the following explanation of the concept of signature in the following passage from his reasons in *Schneider v Norris*[5]-

> "Here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance, as if he had written 'Norris & Co' with his own hand."

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3 *Muirhead v Commonwealth Bank* (1996) 139 ALR 561.

4 See eg *Clohesy v Maher* (1880) 6 VLR (L) 357 and *Cohen v Roche* [1927] 1 KB 169.

5 (1814) 2 M & S 286, 289.

His Lordship was referring to a bill of parcels which had the defendant's name printed on it but which contained no written signature. In *Goodman v J Eban Ltd* [6] the question for consideration was whether a solicitor's bill of costs had been "signed by the solicitor" for the purposes of s 65 of the *Solicitor's Act* 1932 by virtue of the fact that the bill of costs sent by the plaintiff solicitor to the defendant clients had been accompanied by a letter which bore a facsimile of the plaintiff's business name in the plaintiff's handwriting impressed on it by a rubber stamp. Romer LJ, in upholding the sufficiency of the stamped signature, said[7] -

> "It is stated in Stroud's Judicial Dictionary (3rd ed) under the title 'Signed; signature' that 'speaking generally a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself or by his authority with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed'. This statement appears to me in accord with the authorities …"

[35] The function intended to be served by a "seller's" signature on the warning statement though is somewhat different from the role of a signature in the authorities discussed above. Insofar as it is possible to discern a function, it is not to authenticate or adopt the contents of a statutory form but to surround the use of the form with a degree of formality which, amongst other things, may provide evidence as to compliance with the relevant statutory requirement. That notwithstanding, I have concluded, after some hesitation, that the signing of the statement in the capacity of a witness is not a signing for the purposes of s 366(5) but merely an acknowledgement that the author of the signature has observed the signing of the statement by another person.

[36] Mr Campbell also argued that s 366(5) did not require that the warning statement be signed by the witness to the buyers' or seller's respective signatures. He pointed out that the literal requirement is that the statement be "signed and dated before a witness by … the seller … or someone acting for the seller: and by "the buyer". The point seems to me to be a good one. If it had been intended that the witness attest the document, it would have been an obvious enough thing for the legislation to stipulate. Such a course has been followed in statutes, recent and not so recent. For example, s 7 of the *Succession Act* 1981 requires witnesses to a testator's signature on a will to be present and "attest and .. subscribe the will".

[37] The term "attested" is used in s 45 of the *Property Law Act* 1974. The *Powers of Attorney Act* 1998, however, conveys the same concept without recourse to legal terminology by stating that "an enduring document" must "be signed and dated" by the person who witnesses the principal's signature.[8]

[38] Mr Burnett submitted that the absence of reference to attestation could be explained by the Act's use of plain English. It is possible, I suppose, that in striving for simplicity the drafter of the provision overlooked stating a requirement that the

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6 [1954] 1 QB 550 CA.
7 At 563.
8 s 44.

witness sign the document in such capacity. It is impermissible, however, for a court to attempt to remedy any such perceived deficiency by inserting a further requirement concerning signing. Failure to comply with ss 365 and 366 may constitute an offence and the circumstances in which an offence may be committed ought not be enlarged to resolve an ambiguity or perceived inadequacy in the language of the section.[9]

Did the applicant waive its right of termination

[39] The matters relied on by Mr Campbell to constitute waiver are knowledge that the warning statement did not comply with the Act and of the consequent right of termination when, on 26 October, confirmation was given that the contract was unconditional. Such confirmation was first given orally and confirmed in writing in a letter of 26 October, probably dictated and sent after the oral discussion. Part of it has been quoted earlier. Neither the conversations nor the letter make reference to the Act or the exercise of any rights under it. In those circumstances did the applicant, by its conduct, waive its statutory right of termination?

[40] Mr Campbell's written submissions, under the heading "Estoppel" asserted that the facts identified "amount to a waiver of section 366". In oral submissions he identified the facts to which I referred above and submitted that they constituted a waiver of the applicant's statutory rights. In that regard he referred to the following passage from the judgment of Mason CJ in *The Commonwealth v Verwayen* [10]-

> "The broad principles of election are not in doubt. They were formulated by this Court, under the title of waiver, in *Craine v Colonial Mutual* (1920) 28 CLR, at p 326; see also *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248, at pp 257-264. In *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, at 641 Stephen J explained:
>
> > 'The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence.'"

[41] In *Verwayen* Mason CJ had said earlier[11] -

> "According to its strict legal connotation, waiver is an intentional act done with knowledge whereby a person abandons a right by acting in a manner inconsistent with that right: *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at p 326; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at p 658. However, the better view is that, apart from estoppel and new agreement, abandonment of a right occurs only where the person waiving the

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9 *Beckwith v R* (1976) 12 ALR 333 at 339 per Gibbs J.
10 (1990) 170 CLR 394 at 406-407.
11 pp 406-407.

> right is entitled to alternative rights inconsistent with one another, such as the right to insist on performance of a contract and the right to rescind for essential breach: see *Kammins* [1971] AC at p 883. This category of waiver is an example of the doctrine of election."

[42] The concept of waiver was discussed also by Toohey and Brennan JJ. Toohey J said[12] –

> "Nevertheless, usage has sanctioned waiver as apt to signify 'the legal grounds on which a person is precluded from asserting one legal right when he is entitled to alternative rights inconsistent with each other' and 'the legal grounds on which a person is precluded from raising a particular defence to a claim against him': Mason J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, at p 655. While it has been said that the loss of a right in the circumstances postulated is 'better categorised as "election" rather than as "waiver"' (Lord Diplock in *Kammins Co v Zenith Investments* (1971) AC 850, at p 883), waiver is an appropriate term to describe the loss of a defence otherwise available to a defendant."

[43] Brennan J, also after quoting from the reasons of Stephen J in *Sargent v ASL Developments Ltd* [13] said –

> "Election consists in a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights."

[44] The same concept is encapsulated in the following passage from the judgment of Lord Diplock in *Kammins Co v Zenith Investments*,[14] quoted by McHugh J in his reasons[15] -

> "In my opinion, the cases to which I have referred do not establish any principle which supports the claim of waiver in the present case. *Ex parte Moore* and *Bock*, and perhaps *Phillips v Martin* and *Wilson v McIntosh*, are really cases of estoppel. Indeed, in *Kammins Co v Zenith Investments* Lord Diplock thought that all cases of the type to which I have referred were better categorised as estoppel cases. His Lordship said (at pp 882-883):
>
> > ' "Waiver" is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. We are not concerned in the instant appeal with the first type of waiver. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts

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12 At 467.
13 (1974) 131 CLR 634 at 655.
14 [1971] AC 850, at p 882-883.
15 At 496.

> which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have "waived" the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is better categorised as "election" rather than as "waiver". …'."

[45] Waiver, insofar as it is a sustainable principle independent of estoppel, in this context at least, applies only where there are alternative rights inconsistent with one another and a party acts, with knowledge of the facts giving rise to the law applicable to the rights, in a manner consistent only with his having chosen to rely on one of them.

[46] Returning to the question for determination, there is no inconsistency between acknowledging the existence of the contract and taking a step under or in reliance on it on the one hand and the maintenance of the right to terminate conferred by s 367(2), on the other. That provision gives a buyer the right to terminate "the contract at any time before the contract settles", irrespective of the nature and extent of the performance under the contract and irrespective of the party's conduct by reference to it. Consequently, failure to exercise the right of termination of a contract, even with full knowledge of the right to terminate, is not necessarily inconsistent with acts which acknowledge the continued existence of the contract.

[47] As Brennan J expressed it in *Verwayen*[16] -

> "As a right is waived only when the time comes for its exercise and the party for whose sole benefit it has been introduced knowingly abstains from exercising it, a mere intention not to exercise a right is not immediately effective to divest or sterilise it."

[48] As estoppel was not argued I do not intend to deal with it beyond observing that the facts do not suggest to me the presence of the elements necessary to ground an estoppel. There is no evidence of reliance by the respondents on any relevant representation or assumption as to a past, present or future state of affairs or of the existence of any such representation or assumption.

The expenses claim

[49] The sums claimed by the applicant are –

solicitor's costs	$6,220.14
surveyor's costs	$1,870.00
engineer's costs	$220.00
architect's costs	$3,520.00

16 At 427.

Total $11,830.14

[50] It is submitted by Mr Campbell that as the applicant, through its solicitors, was aware of the applicant's ability to terminate the contract by 18 October 2001, no money spent after that date should, as a general rule, be regarded as a reasonable expense recoverable under s 367(5). Further, it is submitted that as there is no evidence as to how the bills "can be broken up" no apportionment between pre and post 18 October 2001 expenditure is possible.

[51] The applicant's solicitors rendered two accounts, one dated 31 October 2001 and the other dated 24 January 2002. The former states that it is in respect of costs of and incidental to "acting herein which included …". There is then a list, in general terms, of telephone attendances, perusal of inward correspondence; drawing and engrossing of all outward correspondence and of perusal and drafting of documents. No dates were provided except for an attendance "on site 9.10.01 in excess of half an hour"; an attendance at a meeting on 16 October and an "attendance upon Eddie Kaan 17.10.01 in excess one hour". Obviously, part of the account refers to work done on 9 October. It is reasonable to infer that it also includes work done before the contract was entered into in relation to the entering into of the contract. As I observed earlier, the parties were not concerned to pinpoint the date on which the contract was entered into and I am not in a position to make any findings beyond a finding that a contract was entered into no later than 16 October 2001.

[52] Section 367(5) make the seller liable for the buyer's "reasonable, legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract". The reference to "the contract" in s 367(5) is a reference to the contract which existed and which was terminated pursuant to s 367(2). Plainly, a buyer may sign a contract document prior to the date on which the contract is entered into and s 367(5) makes its point of reference the date of signing rather than the date of contracting. I see no reason why the signing of the contract by the buyer encompasses the signing of an offer in the form of a contract document which does not contain the terms of the contract finally entered into.

[53] The evidence suggests that the applicant signed the form of contract on an occasion after 10 October by initialling the alterations made to the document and that the document so initialled came to embody all the terms of the contract until it was subsequently varied. The date on which the initialling took place is thus likely to be the operative date for the purposes of applying s 367(5). The evidence suggests that any such initialling must have taken place on or about 15 October. The account thus needs to be adjusted to exclude any matters referable to work done before that date. I have no means of making any such adjustment with any degree of precision. That being the case, Mr Campbell submits that the claim must fail. I do not accept that.

[54] To echo the language of Gibbs J in *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd*[17] it was possible for the applicant to prove "with some degree of

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17 (1977) 16 ALR 23 at 37.

certainty and precision" the extent of its outgoings and "it was not unreasonable to expect" the applicant "to call acceptable evidence" in that regard. In my view, however, it is plain enough that at least two-thirds of the account would be attributable to the period after the signing of the contract by the applicant and I am therefore prepared to find that two-thirds of the account is payable pursuant to s 367. As the evidence is deficient, the applicant cannot complain if the amount awarded is insufficient to recoup the full amount properly claimable by it.[18]

[55] By application of the principles referred to above, there would not seem to be any difficulty with the $220 fee payable to the consulting engineers. I allow one half of the sum of $1,870 paid to the surveyors and town planners. That account is dated 19 October and it is impossible to be satisfied that a significant amount of the work was not done prior to the signing of the contract. On the basis discussed above, I consider two-thirds of the amount claimed has been established.

[56] The architect's account is dated 15 November. It is not itemised in any way and merely states that it is in respect of a proposed residence at Annie Street. I have allowed two-thirds of it on the basis discussed above and also having regard to the principles discussed later in relation to the solicitor's accounts.

[57] The 24 January solicitor's account is expressed to be for acting after 31 October 2001. Mr Kelly swears, in relation to the accounts, that –

> "Our professional costs were calculated on an hourly rate in accordance with the time, care and consideration given to the file and in my belief are fair and reasonable."

[58] Mr Kelly's belief about the reasonableness of his fees may be safely disregarded. So too may the vague assertions about the basis of calculation of the fees. It was not argued, however, that the evidence did not permit a conclusion to be drawn as to the reasonableness of the solicitor's charges and I propose to proceed on the basis that the level of charges was not in issue.

[59] The 24 January memorandum, in summary, states that a fee of $3,080 is charged for a number of telephone attendances on Mr Farrugia, Mr Churven, Mrs Walsh, "Harvey Russell", "John Lowenstein" and "NAB"; perusal of "inward correspondence", "drawing and engrossing outward correspondence and perusal and drafting of all other necessary documents." All of the work was done after the applicant was advised of its right to terminate the contract and, for this reason, it is submitted that it is unreasonable. But a purchaser, knowing of the existence of a right to terminate, does not have to exercise it immediately. The purchaser may desire to proceed but later exercise the right to terminate because of some changed circumstance. For example, the purchaser may encounter unexpected financial incapacity, there may be default on the part of the vendor, a drop in market value or a change in the purchaser's priorities. Also, it is not unreasonable for a purchaser, having received advice that the contract may be terminated, to consider that advice and permit some work already contracted for to continue whilst that consideration is

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[18] cf *Minchin v Public Curator of Queensland* (1965) ALR 91 at 93.

being given. Whether any "legal" or "other expenses incurred" are "reasonable" will depend on an examination, in each case, of the circumstance in which the expenses were incurred.

[60] I have reservations about Mr Farrugia's explanation of the circumstances in which the applicant came to terminate the contract. I accept, however, that after he found out that he may have the right to terminate the contract he proceeded in good faith for a time. But for how long is unknown. The applicant's difficulty is that it has the onus of proving that its expenses were reasonable. Without evidence which clearly identifies the nature of relevant work done, the reason why it was done and the applicant's relevant state of mind at the time liability for the work was incurred, it is impossible for me to be satisfied that all of the work was reasonable. I am satisfied, however, that at least two-thirds of it was and I propose to allow that percentage.

[61] I have proceeded on the basis that "reasonable … expenses" in s 367(5) means expenses which are both reasonable in amount and reasonably incurred. The contrary was not suggested in argument.

[62] The applicant's recoverable expenses are thus calculated as follows:

$^2/_3$ of the solicitor's account of $3,096 dated 31.10.01	$2,064
$^2/_3$ of the solicitor's account of $3,124 dated 24.1.02	$2,083
Engineer's costs	$220
$^1/_2$ of the surveyor's account of $1,870 dated 19.10.01	$935
$^2/_3$ of the architect's account of $3,520 dated 15.11.01	$2,347
	$7,649

[63] Because I have decided questions relating to the application of the Act contrary to the approach the parties adopted before me, it is appropriate that I afford the parties a further opportunity to make submissions before making any final order. I will also hear submissions as to the appropriate order and costs.