SUPREME COURT OF QUEENSLAND

CITATION:	*Celik Developments Pty Ltd v Mayes* [2005] QSC 224
PARTIES:	**CELIK DEVELOPMENTS PTY LTD** ACN 093910671 (applicant) **v** **DOUGLAS MALCOLM MAYES AND ROBYN JUNE MAYES** (respondent)
FILE NO/S:	BS No 6096 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2005
JUDGE:	White J

ORDER:

1. **A declaration that the seller failed to comply with s 213(5) of the *Body Corporate and Community Management Act* 1997 by failing to attach an information sheet in the approved form to the contract in relation to the buyer's purchase of Lot 3004.**

2. **A declaration that the seller failed to comply with s 213(5)(b) of the *Body Corporate and Community Management Act* 1997 before contracting with the buyer in relation to the buyer's purchase of Lot 3004.**

3. **A declaration that the first community management statement as amended by the statement comprised in Sunland Group Limited's letter of 1 October 2004 is inaccurate within the meaning of s 217 of the *Body Corporate and Community Management Act* 1997.**

4. **A declaration that by reason of that inaccuracy the buyer would be materially prejudiced if compelled to complete the contract within the meaning of s 217 of the *Body Corporate and Community Management Act* 1997.**

5. **A declaration that the contract in relation to the**

purchase of Lot 3004 has been lawfully terminated pursuant to s 213 and s 217 of the *Body Corporate and Community Management Act* 1997.

6. The seller refund the deposit paid by the buyer in the amount of $94,000 plus interest.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHAGE, BREACH, DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – ELECTION AND RESCISSION – STATUTE GIVING RIGHT TO AVOID CONTRACT – where contract for the sale of residential property under the *Body Corporate and Community Management Act* 1997 ("*BCCM Act*") – where *BCCM Act* requires an information sheet to be placed immediately beneath the warning statement that must be attached as the first or top sheet of the contract – whether an approved form – where buyer terminating for want of compliance with the *BCCM Act* – whether appropriate product disclosure statement provided – where obligation to purchase a furniture package if the buyer wished to be part of a letting pool not disclosed – whether non-disclosure constituted material prejudice to the buyer

Body Corporate and Community Management Act 1997 (Qld), s 4, s 213, s 217, s 320, Form 14 Versions 1-4
Property Agents and Motor Dealers Act 2000 (Qld), s 365, s 366

Devine Limited v Timbs [2004] QSC 024, cited
Golden Horseshoe Estates Co v R [1911] AC 480, cited
MNMD Developments Pty Ltd v Gerrard [2005] QCA 230, followed
Morgan v Thomas (1882) 9 QBD 643, cited

COUNSEL: Mr P Woods for the applicant
Mrs K Magee for the respondent

SOLICITORS: Adamsons for the applicant
Hoy McCormack for the respondent

[1] A director of the applicant ("the buyer") Mr Ozcan Celik decided to purchase "off the plan" a unit – Lot 3004 – to be constructed in the Q1 (or Q Tower) residential apartment complex at Surfers Paradise. He proposed to purchase the lot from the respondent, Mr and Mrs Mayes ("the seller") who had purchased it originally "off the plan" from the developer. The construction of the complex, including Lot 3004, is not complete and settlement date of the contract has not been notified.

[2] The seller's real estate agent, Sunland Realty Pty Ltd ("Sunland") referred Mr Celik to Gray's Professional Services ("Gray's"), a firm of solicitors, to complete the

conveyance of the purchase. Gray's were experienced in this development handling some 170 conveyancing files in respect of it.

[3] Mr Richard Gray, a conveyancing clerk employed by Gray's, received the original documents from the seller's real estate agent, Ms Dianna Scott of Sunland, on or about 9 October 2003. Those documents and disclosure documents were sent by express post to Mr and Mrs Celik as directors of the buyer to execute. The documents were executed and returned to Gray's on 15 October 2003.

[4] The seller executed the contract on 23 October 2003.

[5] On or about 16 December 2004 Mr Celik asked Mr Gray to prepare his file for collection. When he did so he requested Mr Gray to number the pages in the order in which the documents had been received originally from the seller's agent on 9 October 2003. Mr Gray numbered the first 24 pages in Mr Celik's presence.

[6] An initial deposit of $1,000 was paid on signing the contract by the buyer followed by the balance of $93,000 within a month of the execution of the contract by the seller, that is, 24 November 2003.

[7] On or about 16 September 2004 the buyer received a letter from the developer about joining the Q1 letting pool. Another letter was received on 1 October 2004 on the same subject and another on 14 July 2005.

[8] On 10 January 2005 the buyer's present solicitors wrote to the seller's solicitors terminating the contract of sale of Lot 3004 on the grounds that no warning statement was attached as the first or top sheet to the contract contrary to the provisions of s 366 of the *Property Agents and Motor Dealers Act* 2000 ("*PAMD* Act"); that information contained in the Disclosure Statement was incorrect and the buyer would be materially prejudiced as a result; and sought the return of the deposit. These grounds were elaborated, added to and varied in subsequent correspondence.

[9] In a conversation between the seller's solicitors (Ms Samantha McCormack) and the buyer's solicitors (Mr Jason Hall) on 19 May deposed to by Mr Hall, Ms McCormack said that the seller's solicitors held an original contract joined by a bulldog clip in a particular order. This order was consistent with the order as numbered by Mr Gray. Eventually a copy of those documents was received by the buyer's solicitors.

[10] The seller did not accept the buyer's termination of the contract.

[11] On 25 July 2005 the buyer's solicitors identified to the seller's solicitors further grounds for terminating the contract.

[12] On this amended originating application the buyer seeks declarations that

> 1. The seller failed to comply with s 213(5) of the *Body Corporate and Community Management Act* 1997 ("*BCCM* Act") by failing to attach an information sheet in the approved form to the contract in relation to the buyer's purchase of Lot 3004.

> 2. The sellers failed to comply with s 213(5)(b) in that the *BCCM* Act information sheet was not the document immediately following the *PAMD* Act s 366 warning statement before contracting with the buyer in relation to the sale of Lot 3004.
>
> 3. Alternatively that the first community management statement as rectified by the statement comprised in Sunland Group Limited's letter of 1 October 2004 is inaccurate within the meaning of s 217 of the *BCCM* Act.
>
> 4. By reason of that inaccuracy the buyer would be materially prejudiced if compelled to complete the contract within the meaning of s 217 of the *BCCM* Act.
>
> 5. The contract in relation to the purchase of Lot 3004 has been lawfully terminated pursuant to s 213 and/or 217 of the *BCCM* Act.

The buyer seeks an order that the seller refunds the deposit in the amount of $94,000 plus interest.

[13] This application requires a consideration of the provisions of the *PAMD* Act and the *BCCM* Act although it is now alleged that there has been breach of the latter legislation only such as to entitle the termination of the contract. It is uncontroversial that Lot 3004 is residential property so that its sale is governed in part by Chapter 11 of the *PAMD* Act. The parties to such a sale become bound when the buyer or the buyer's agent receives a copy of the contract signed by the buyer and the seller, s 365(1). By s 366(1):

> "A relevant contract must have attached, as its first or top sheet, a statement in the approved form (**"warning statement"**) containing the information mentioned in subsection (3)."

[14] By s 366(3) the warning statement must state certain information:

> "(a) the contract is subject to a cooling-off period;
>
> (b) when the cooling-off period starts and ends;
>
> (c) a recommendation that the buyer seek independent legal advice about the contract before the cooling-off period ends;
>
> (d) what will happen if the buyer terminates the contract before the cooling-off period ends;
>
> (e) the amount or the percentage of the purchase price that will not be refunded from the deposit if the contract is terminated before the cooling-off period ends;
>
> (f) a recommendation that the buyer seek an independent valuation of the property before the cooling-off period ends;

(g) if the seller under the contract is a property developer, that a person who suffers financial loss because of, or arising out of, the person's dealings with a property developer or the property developer's employees can not make a claim against the claim fund."

[15] The statement purporting to be a warning statement is of no effect unless before the contract is signed by the buyer, the statement is signed and dated by the buyer and the words on the statement are presented in substantially the same way as the words are presented in the approved form.

[16] If a warning statement is not attached to the contract to which a warning statement must be attached or is of no effect under the provisions of s 366(4) the buyer under the contract may terminate the contract at any time before the contract settles by giving a signed, dated notice of termination to the seller or to the seller's agent. If the contract is terminated the seller must refund any deposit paid under the contract to the buyer. If the real property is subject to the *BCCM* Act, further material must be given by the seller to the buyer. Section 213 which is in the Part dealing with proposed lots, applicable here, provides:

"(1) Before a contract (the **contract**) is entered into by a person (the **seller**) with another person (the **buyer**) for the sale to the buyer of a lot (the **proposed lot**) intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed, the seller must give the buyer a statement (the **first statement**) complying with subsections (2) to (4).

(2) The first statement -

(a) must state the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot; and

(b) must include, for any engagement of a person as a body corporate manager or service contractor for the scheme proposed to be entered into after the establishment of the scheme, or proposed to be continued or entered into after the scheme is changed –

(i) the terms of the engagement, other than any provisions of the code of conduct that are taken to be included in the terms under section 118; and

(ii) the estimated cost of the engagement to the body corporate; and

(iii) the proportion of the cost to be borne by the owner of the proposed lot; and

(c) must include, for any authorisation of a person as a letting agent for the scheme proposed to be given after the establishment of the scheme, or proposed to be continued or given after the scheme is changed, the terms of the authorisation; and

(d) must include details of all body corporate assets proposed to be acquired by the body corporate after the establishment or change of the scheme; and

(e) must be accompanied by –

(i) the proposed community management statement; and

(ii) if the scheme to be established or changed is proposed to be established as a subsidiary scheme – the existing or proposed community management statement of each scheme of which the proposed subsidiary scheme is proposed to be a subsidiary; and

(f) must identify the regulation module proposed to apply to the scheme; and

(g) must include other matters prescribed under the regulation module applying to the scheme.

(3) The first statement must be signed by the seller or a person authorised by the seller.

(4) The first statement must be substantially complete.

(5) The seller must attach an information sheet (the **information sheet**) in the approved form to the contract –

(a) as the first or top sheet; or

(b) if the proposed lot is residential property under the *Property Agents and Motor Dealers* Act 2000 – immediately beneath the warning statement that must be attached as the first or top sheet of the contract under section 366 of that Act.

(6) The buyer may cancel the contract if –

(a) The seller has not complied with subsections (1) and (5); and

(b) The contract has not already been settled.

> (7) The seller does not fail to comply with subsection (1) merely because the first statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.
>
> (8) In this section –
>
> **Residential property** see the *Property Agents and Motor Dealers Act* 2000, section 17."

[17] It is the buyer's contention that the seller failed to comply with s 213(5) by failing to attach an information sheet in the approved form immediately beneath the warning statement that must be attached as the first or top sheet of the contract under s 366 of the *PAMD* Act. The argument has two aspects – the first is that the form utilised was not "the approved form"; the second concerns the order of the documents. Mr Celik and Mr Gray gave evidence in addition to the evidence in their affidavits about the latter.

[18] Mr Gray deposed that he received documents relating to the conveyance of Lot 3004 from the seller's agent in the following order

> (i) *PAMD* Act Form 30c – warning;
> (ii) *PAMD* Act Form 27b – selling agent's disclosure
> (iii) *Land Sales Act* 1984 Form 1
> (iv) *BCCM* Act 14 Version 1 (first page twice) – contract warning
> (v) Contract

Mr Gray acted for about 170 purchasers in the Q Tower complex and had the conduct of all of those files. When not being worked on they were stored in a dedicated conveyancing room to which others in the office had access. Initially Mr Gray said he did not send the above documents to Mr and Mrs Celik for execution believing them to have already been executed when received. He accepted, in light of Exhibit 1 (letter from Gray's reference to him of 9 October 2003 to Mr and Mrs Celik to execute the documents), that he had done so. He wrote

> "In accordance with instructions received from the Q Tower sales office we enclose for signing and return the following documents: -
>
> 1. Contract of sale in duplicate – both copies to be **signed and returned**.
> 2. Disclosure Statement – copy to be **signed and returned**."

[19] Mr Gray said he remembered the order because this contract was different from the others in that it was a resale rather than a purchase from the developer. He could not now recall any particulars about the contract except the order of the documents as deposed by him and could not say how the documents were bound or if interleaved when received. Mr Gray based his recollection on his usual practice of complying with the requirements of the relevant legislation and the usual conduct of this selling agent which would have the *PAMD* Act Form 30c on the top.

[20] Mr Celik deposed that he received the contract documents from Gray's on or about 9 October in the following order

> (i) *PAMD* Act Form 30c – warning;
> (ii) *PAMD* Act Form 27b – selling agent's disclosure
> (iii) *Land Sales Act* 1984 Form 1
> (iv) *BCCM* Act 14 Version 1 (first page twice) – contract warning
> (v) Contract

He also received the disclosure documents relating to the solicitors from Gray's. The documents were executed and returned. In cross-examination Mr Celik was confident that he had received the contract documents in the order deposed to in his affidavit. He is a licensed real estate agent in NSW presently residing in Queensland and has bought property in Queensland previously. He has some familiarity with the applicable legislation. He said that the documents were attached to each other by a bulldog clip. He did not remove the clip. The documents had "sign here" stickers next to each place where they were to be signed by Mr and Mrs Celik. It was therefore unnecessary to take the documents, which constituted a considerable bundle – almost 200 pages – apart.

[21] There was no affidavit from the seller's agent to contradict the evidence of Mr Gray and Mr Celik. Whilst there may be some questioning of Mr Gray's recollection when he signed his affidavit on 5 August 2005, he had as an aide memoire the pagination done on 16 December 2004 in Mr Celik's presence. Mr Celik's recollection was not shaken in cross-examination. There is no reason not to accept his evidence on the order of the documents. There is support from Mr Hall's evidence about the order of the documents in the contract held by the seller's solicitor not contradicted.

[22] The *PAMD* and *BCCM* Acts concern, *inter alia*, consumer protection. The requirements of s 366 of the *PAMD* Act were construed strictly by the Court of Appeal in *MNMD Developments Pty Ltd v Gerrard* [2005] QCA 230. The Chief Justice concluded at para 16

> "The context of the requirement set up by s 366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchasers of residential property. One of the objects of the Act, stated in its preamble, is "to protect consumers against particular undesirable practices". That protection extends, in cases like these, to giving a purchaser a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage. See, for example, s 366(4)(a), s 366(4)(b) (including the example) and s 367(2)."

At para 21 the Chief Justice concluded

> "The legislature has considered an exacting obligation justified to secure the goal of consumer protection."

[23] Williams JA, agreeing with the Chief Justice's approach, added at paras 30 and 31 of his reasons for judgment

> "The obligation is on the party who prepares the contractual documents (and it is not unheard of for that to be the purchaser) to ensure that the documents submitted to the purchaser for execution comprise the necessary contractual documents to which is attached as the first or top sheet the approved warning statement. In the present case it seems clear that the documents were prepared by the respondent and in consequence there was an obligation on the respondent to present the documents to the appellant for execution in that form.
>
> The critical question to be determined in deciding whether or not the appellant had its asserted right of termination is whether or not the documents as presented for execution by the appellant complied with that statutory requirement."

[24] The *BCCM* Act has as its primary object the provision of flexible and contemporary communally based arrangements for the use of freehold land having regard to the secondary objects. Those secondary objects are, *inter alia*, to provide an appropriate level of consumer protection for owners and intending buyers of lots included in a community titles scheme, s 4(f). See discussion by Helman J in *Devine Limited v Timbs* [2004] QSC 024. So far as the arguments advanced on this application are concerned, the objects of the *BCCM* Act and the *PAMD* Act are the same – consumer protection – and call for an approach requiring strict compliance with the *BCCM* Act.

[25] There are three arguments advanced to support the termination of the contract.

Not in approved form

[26] The buyer contends that the seller used a version of the *BCCM* Form 14 that was not approved within the meaning of the *BCCM* Act. Section 320 provides that the chief executive may approve forms for use under the Act. The Act commenced on 1 July 1997. Form 14 came into effect on the date of commencement of the Act. Version 2 of the Form changed the Coats of Arms of Queensland to the Queensland Government logo. It seems not to have been gazetted. The *BCCM* Act was amended in 2003. The reprint of the Act published on 9 April 2003 consolidated the amendments and settled the numbering of the sections. Form 14 was amended to reflect that renumbering. Version 3 was the approved form for use from 9 April 2003 to 30 June 2003. Version 4 came into operation on 1 July 2003, was gazetted on 3 July 2003 and revoked on 31 May 2004. Accordingly Version 4 was the approved form for use at the relevant time on 23 October 2003.

[27] Mrs McGee submitted that Form 14 Version 1 had not been expressly revoked and therefore might be used as "the approved form". No Queensland Government Gazette has been identified revoking Version 1. I note from S Christensen *Property Law/Conveyancing Manual (QLD)* that Form 14 Version 2 was not gazetted. The method of revocation of Form 14 Version 4 was for a notification of approval of forms under the *BCCM* Act and the revocation of previously approved forms. Form 14 Version 3 was gazetted and came into effect of 6 June 2003.

Form 14 Version 1 which was the form of the contract warning sent with the subject contract is different from Version 4. The name of the relevant Government department has changed and the Queensland Government logo has replaced the Queensland Coat of Arms. Material differences do, however, appear in the second paragraph. Version 1 provides

> "The seller must also provide you with a statement under s 163 (for an existing lot) or 170 for a proposed lot of the *Body Corporate and Community Management Act* 1997 setting out certain basic details about the scheme. This may form part of the information supplied in the contract. This must also be provided to you before you sign the contract."

The analogous paragraph in Version 4 has the same words but the sections referred to are different being "s 206 (for an existing lot) or 213 (for a proposed lot)". A buyer consulting the *BCCM* Act in force when the buyer was contemplating entering into the contract to purchase would find that s 170 dealt with "exclusive use by by-law". What the buyer needed to be directed to were the provisions of s 213 which is concerned with statements about proposed lots. It therefore cannot be the case that the two versions could co-exist. The contract warning, an important feature of the consumer protection provisions of the *BCCM* Act has the potential to mislead a consumer if the non-current version of the form was used. It was not the "approved" form pursuant to s 320.

[28] Accordingly the seller has not complied with s 213(5) of the *BCCM* Act, namely,

> "The seller must attach an information sheet (the information sheet) in the approved form to the contract."

Warning statement not immediately following the PAMD Act warning

[29] Section 205(3) of the *BCCM* Act requires the information sheet to be attached immediately beneath the warning statement which must be attached as the first or top sheet of the contract documents pursuant to s 366 of the *PAMD* Act. I have accepted the evidence of Mr Gray and Mr Celik as to the order in which the documents were received. Mr Woods, for the buyer, has proposed the definition in the Oxford Dictionary of "immediately" to govern the interpretation of the section. The Oxford Online meaning is "without intermediary, intervening agency or medium; by direct agency; indirect or proximate connection or relation ..." The evidence, which I accept, was that after the *PAMD* Act Form 30c – the warning statement – the *PAMD* Act Form 27b was inserted (the selling agent's disclosure to buyer), followed by the *Land Sales Act* 1984 Form 1 (notice to proposed purchaser) before the *BCCM* information sheet. As the authorities, to which reference has been made, make clear, the consumer protection provisions must be interpreted strictly. Accordingly s 213(5) was contravened.

[30] Mrs McGee submitted that the buyer was not entitled to cancel the contract because s 213(6)(a) provides that a buyer may cancel the contract if the seller has not complied with subsections "(1) and (5)." It is not suggested that the seller has not complied with s 213(1) – only s 213(5). Mr Woods submitted that "and" should be read as "or". Although "and" is generally read as a cumulative word requiring the fulfilment of all the conditions that it joins together, by force of context "and" may

need to be read as "or", *Morgan v Thomas* (1882) 9 QBD 643 per Jessel MR, *Golden Horseshoe Estates Co v R* [1911] AC 480 at 488. It is the context in which "and" appears which will determine the construction. Section 212 of the *BCCM* Act permits the buyer to cancel the contract if there has been a contravention of "subsection (1) or (2)". It would appear that the legislature has considered the use of the conjunctive "and" and the disjunctive "or" in a similar context in a section adjacent to s 213. However, the effect of requiring cumulation of s 213(1) and (5) would be to put a buyer – the consumer – at a disadvantage if buying a lot in a community title, that is, if buying a home unit, compared with one who purchases residential property governed only by the *PAMD* Act. That cannot be the intention of a legislature solicitous for the welfare of consumers. The context, therefore, suggests that "and" in s 213(6) must be read as "or". Accordingly, there having been a breach of s 213(5), the buyer was entitled to terminate the contract.

Breach of s 217 of the BCCM Act

[31] The seller contends that the contract was also validly terminated pursuant to s 217 of the *BCCM* Act. It provides

> "The buyer may cancel the contract if—
>
> (a) it has not already been settled; and
>
> (b) at least 1 of the following applies—
>
> (i) the community management statement recorded for the scheme on its establishment or change is different from the proposed community management statement most recently advised to the buyer;
>
> (ii) a community management statement, to which the recorded community management statement mentioned in subparagraph (i) is subject, is different from a proposed or existing community management statement previously advised to the buyer;
>
> (iii) the community management statement most recently advised to the buyer is required under section 66(1)(d) to explain why the contribution schedule lot entitlements are not equal and does not contain the explanation;
>
> (iv) information disclosed in the first statement, as rectified by any further statement, is inaccurate; and
>
> (c) because of a difference or inaccuracy under paragraph (b), the buyer would be materially prejudiced if compelled to complete the contract; and
>
> (d) the cancellation is effected by written notice given to the seller by the buyer not later than the latest of the

following—

(i) 3 days before the buyer is otherwise required to complete the contract;

(ii) 14 days after the buyer is given notice that the scheme is established or changed;

(iii) another day agreed between the buyer and the seller."

[32] Section 213(1) requires the seller to give a buyer of a proposed lot a statement known as the first statement complying with s 213(2) to (4). Section 213(2)(c) requires the statement to include any authorisation of a person as a letting agent for the scheme proposed to be given after the establishment of the scheme or given after the scheme has changed the terms of the authorisation. A ground for cancelling the contract prior to settlement provided for in s 217(b)(iv) is that the information disclosed in the first statement as rectified by any further statement is inaccurate and the difference or inaccuracy would materially prejudice the buyer if the buyer were compelled to complete the contract, s 217(c).

[33] Mr and Mrs Celik as directors of the buyer received disclosure statement documentation including a document entitled "Caretaking and letting agreement of Q Tower". It sets out the obligations of the resident caretaker which include

"**9. Letting business**

9.1 The Resident Caretaker may carry on from the Resident Caretaker's Unit (or such other location as the Committee approves of from time to time) the business of:

(a) letting lots in the Scheme; and

(b) all associated services commonly rendered in connection with letting lots in developments similar to that comprising the Scheme.

The Resident Caretaker must not provide food and beverages by means of vending machines without the consent of the Committee of the Body Corporate.

9.2 The Resident Caretaker may provide such letting service for such owners of lots in the Scheme as require that service. However the owners are free to choose whether or not to use the letting services of the Resident Caretaker to be provided under this Agreement.

9.3 If the Resident Caretaker decides to provide the services referred to in this clause, then:

(a) it must be on the Scheme Land for such times as are found to be necessary to provide the proposed letting service; and

(b) it will supervise the standard of tenants of all such letting arranged by it and ensure, so far as practicable, that no nuisance is created on the Scheme Land and that the Scheme and lots in it are not brought into disrepute.

9.4 In so far as it is lawful, the Resident Caretaker may erect signs reasonably necessary in or about the Scheme Land for the purpose of promoting and fostering the letting business. Such signs must be temporary and moveable.

9.5 The Resident Caretaker must comply with all laws in conducting the letting business."

It is accepted that clause 9 met the requirements of s 213(2)(c) of the *BCCM* Act.

[34] On 16 September 2004 the buyer received from the developer's agent a letter which stated, *inter alia*,

> "If you are intending to place your apartment into our Q1 Letting Pool, the purchase of the Q1 Homeware and Furniture Package is a pre-requisite to ensure all apartments made available for resort holiday rental are offering our guests a consistent look and feel. Please refer to the section entitled 'Q1 Furniture and Homeware Package'."

By letter dated 1 October 2004 the agent enclosed the Q1 apartment management agreement folder containing, *inter alia*, two copies of the *PAMD* Act Form 20A and two copies of the Q1 apartment management agreement. It also included a product disclosure statement which provided

> "3.3 A prerequisite of joining the Q1 letting pool is that you purchase a standard Q1 furniture and homeware package for your apartment. This is so the operator can ensure all apartments in the Q1 letting pool are consistent in their look and standard of presentation."

Clause 2.2 of the disclosure statement set out how an owner could participate in the letting pool

> "2.2 How to participate
>
> There are five things you need to do so your Apartment can be part of the Q1 Letting Pool. These are as follows:
>
> (a) Read this PDS, which explains how the Q1 Letting Pool works.
>
> (b) Purchase an Apartment at Q1.

> (c) Purchase a Q1 Furniture and Homeware Package for your Apartment (see section 3.3 for more details)."

[35] Clause 1.2(c) of the product disclosure statement sets out

> "The body corporate is entitled to appoint a caretaker to maintain the common property on its behalf. The caretaker is paid a salary by the body corporate to do this work. Where it is necessary, the caretaker may engage skilled tradespersons to do the work. If this happens, then the cost of the tradespersons must be paid by the body corporate, and these costs are passed on to apartment owners in their body corporate levies. The agreement between the body corporate and the caretaker is usually called a 'caretaking agreement'."

Clause 1.2(d) states

> "The body corporate can also grant the caretaker the exclusive right to conduct a letting business from the relevant complex. There is no fee payable by either party to the other for this right. The agreement between the body corporate and the caretaker granting this right is usually called a 'letting agreement'."

[36] The buyer contends that the product disclosure statement constitutes a further statement within the meaning of s 217 of the *BCCM* Act as provided for in s 217(b)(iv). It concerns the body corporate granting the proposed caretaker the exclusive right to conduct a letting business from the complex.

[37] The buyer complains that the further statement requires the applicant to purchase a furniture package if the buyer wishes to be part of the Q Tower letting pool. The cost of the furniture package is $41,900. This obligation was not disclosed in the first statement. It is submitted that the information disclosed in the first statement as rectified by the further statement is inaccurate and the buyer will be materially prejudiced if it is compelled to complete the contract. Mr Celik deposed that the buyer will be materially prejudiced, without further elaboration, if compelled to complete the contract. Mrs McGee submitted that without elaboration it is impossible for the court to draw a conclusion of material prejudice to the buyer. Mr Celik gave oral evidence but was not cross-examined about the assessment of material prejudice. The obligation to pay an extra $41,900 must be considered a substantial sum and exclusion from the letting pool for failure to pay this further sum might properly be characterised as constituting material prejudice to a buyer.

[38] Mrs McGee submitted further that the notice of termination of contract was given more than 14 days after the buyer was given notice that the scheme had been changed, as required by s 217(d)(ii). That submission fails to take into account s 217(d)(i) which requires a notice of termination to be given three days before the buyer is otherwise required to complete the contract. The date for completion has not yet arrived.

[39] I conclude that there has been a breach of s 217 of the *BCCM Act*.

[40] The following orders and declarations are made

1. A declaration that the seller failed to comply with s 213(5) of the *Body Corporate and Community Management Act* 1997 by failing to attach an information sheet in the approved form to the contract in relation to the buyer's purchase of Lot 3004.

2. A declaration that the seller failed to comply with s 213(5)(b) of the *Body Corporate and Community Management Act* 1997 before contracting with the buyer in relation to the buyer's purchase of Lot 3004.

3. A declaration that the first community management statement as amended by the statement comprised in Sunland Group Limited's letter of 1 October 2004 is inaccurate within the meaning of s 217 of the *Body Corporate and Community Management Act* 1997.

4. A declaration that by reason of that inaccuracy the buyer would be materially prejudiced if compelled to complete the contract within the meaning of s 217 of the *Body Corporate and Community Management Act* 1997.

5. A declaration that the contract in relation to the purchase of Lot 3004 has been lawfully terminated pursuant to s 213 and s 217 of the *Body Corporate and Community Management Act* 1997.

6. The seller refund the deposit paid by the buyer in the amount of $94,000 plus interest.

[41] I will receive submissions as to costs.