SUPREME COURT OF QUEENSLAND

CITATION:	*Heyes Investment Holdings Pty Ltd & Anor v Sharpe* [2006] QSC 387
PARTIES:	**HEYES INVESTMENT HOLDINGS PTY LTD ACN 078 722 451 AS TRUSTEE FOR THE HEYES FAMILY TRUST** (first applicant) and **HEYES INVESTMENT HOLDINGS PTY LTD ACN 078 722 451 AS TRUSTEE FOR THE HEYES PROPERTY UNIT TRUST** (second applicant) and **RODGER AND JUDITH HEYES AS TRUSTEES FOR THE HEYES SUPERANNUATION FUND** (third respondent) and **BENJAMIN SHARPE** (respondent)
FILE NO:	6573 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	30 November 2006
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21 November 2006; written submissions 23 November 2006
JUDGE:	Skoien A/J
ORDER:	**Declarations that an option agreement for the purchase of land is valid and binding and has been validly exercised; specific performance of the contract to purchase the land. Breach of contract by purchaser; deposit paid to agent of vendor other than agent specified in contract; estoppel, relief against forfeiture; whether found that purchaser ready willing and able to complete the contract.**
CATCHWORDS:	*Bank of China v Standard Chartered Bank of Australia Ltd* (CA NSW), 40203 of 1991, 16 July 1991 (unreported) BC9101781 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394

(*Kerrison v Martin Heyward* [1975] V.R. 401)

Legione v Hatley (1982) 152 CLR 406
Tamwar Enterprises Pty Ltd v Cauch; (2003) 201 ALR 359
Thompson v Palmer (1933), 49 CLR 507
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

COUNSEL: Mr D Campbell SC for the applicants
Mr P Hackett for the respondent

SOLICITORS: ABKJ Lawyers for the applicants
Redchip Lawyers for the respondent

[1] The action tried before me concerns an Option Agreement pursuant to which the respondent (Sharpe) claims to have a valid contract to purchase land from the applicants (Heyes). Sharpe seeks:-

(a) A declaration that the Option Agreement is binding and enforceable;

(b) A declaration that the Option Agreement has been validly exercised; and

(c) Specific performance of the contract to purchase the land which was brought into existence by a valid exercise of the option.

[2] Heyes denies the existence of an enforceable option agreement or alternatively pleads that the agreement has been terminated and seeks compensation under s.130 of the *Land Title Act* 1994 for damage suffered because of the lodgement by Sharpe of a caveat over the land.

The Facts

[3] On 9 March 2006 Heyes appointed Re/Max Territory (relevantly its employee Sharnelle James) as their agent to sell the land, and that appointment permitted Re/Max to act on a conjunctional basis with Pacific Commercial Real Estate (relevantly its employee Peter Smith).

[4] On 16 May 2006 Sharpe made a written offer, via Sharnelle James to Heyes to buy the land for $2,650,000. That offer named the proposed purchaser as Sharpe "and/or nominee".

[5] On 2 June 2006 Heyes obtained advice from their solicitors (ABKJ) about the documentation which had been prepared, including the legal effect of Sharpe's right to nominate another purchaser.

[6] On 8 June 2006 ABKJ prepared the final draft documents for the proposed transaction in the form of a Put & Call Option Agreement with annexed Contract of Sale. In the Option Agreement the deposit holder was identified as ABKJ; in the Contract of Sale no stakeholder was identified.

[7] On 13 June 2006 Sharpe (by his step-mother Wendy Kellas-Sharpe) paid to Peter Smith the $1 option fee provided for in the option agreement (which had not then been executed).

[8] On 16 June 2006:-

(a) At 4.49 pm the Option Agreement and annexed Contract of Sale were executed by Sharpe who sent a facsimile copy of it to Sharnelle James together with a facsimile copy of the cheque for the first instalment of the deposit ($5000) provided for in the Option Agreement (clause 14.1(a)). The payee of the cheque was then blank.

(b) Sharnelle James faxed a copy of the executed Option Agreement and annexed Contract of Sale to ABKJ for submission to Heyes.

(c) At 6.02 pm Wendy Kellas-Sharpe faxed to Sharnelle James a copy of the deposit cheque, with the payee identified as Re/Max Territory, a copy of a missing (but blank) page of the Option Agreement, and a copy of page 2 of the Contract of Sale in which the space for "Stakeholder" (blank in the 4.49 pm faxed copy) now contained the name "Remax Territory".

[9] On 19 June 2006:-

(a) At 2 pm Rodger Heyes phoned Sharnelle James and arranged for her to come to the Heyes house at 5.30 pm to have him and his wife Judith sign the Option Agreement and Contract of Sale. In evidence in chief she said that she told him that Sharpe was insisting that the deposit holder of the deposit be Re/Max, rather than ABKJ as the Option Agreement provided. In cross-examination she appeared to resile from that but the questions may have confused her as to which conversation was under review. Mr Campbell SC said "I suggest there was no mention made by you that the buyer wanted the stakeholder to be someone different from [ABKJ] because you didn't know that was the case", to which she replied "No I wouldn't' have". But by then she had received the faxed altered pages and the altered cheque which she obviously had seen by the time she spoke to Rodger Heyes. Later in cross examination she said that on re-thinking the matter, she believed she may have mentioned it to him at 2.00pm. Hesitant as that evidence appears to be, I think it is more likely than not that she mentioned the matter, it being by no means a trivial point. I therefore accept her evidence in chief on this point, and also accept that Rodger Heyes made no comment to her on that. I do not regard this finding as critical because of the fact that the topic was undoubtedly discussed when Heyes signed the documents but to the extent it gave Heyes some advance warning of the stakeholder issue it has some relevance.

(b) Sharnelle James then emailed Sharpe the details of the Re/Max trust account to enable the initial deposit to be paid into it. Again I regard this as consistent with the stakeholder issue having been referred to Rodger Heyes, provoking no adverse comment from him.

(c) At 5.30 pm Sharnelle James went to the Heyes house and met Rodger and Judith Heyes, each of whom carefully went through the Option Agreement and Contract of Sale, signed them and initialled some immaterial alternatives. The Option Agreement (para. 1.1 94)) identified the deposit holder as ABKJ and in the Contract of Sale, no stakeholder was identified. Sharnelle James witnessed the signatures. These documents, as they then existed, appear at pp 98-123 of exhibit "A" to the affidavit of Sharpe.

[10] I accept Sharnelle James' evidence that after Heyes and she had signed the document, Rodger Heyes caught sight, in her folder, of the documents referred to in para [8(c)] above and queried them. She told them that she had received them but that she believed she could not insert new material in the document signed by Sharpe and forwarded to her, that such an act would not be legal. She told them that it indicated that Sharpe was insisting that the deposit be paid to Re/Max and that the copy of the cheque supported that. The Heyes at that stage said nothing to indicate agreement or disagreement with the course of action stated by Sharpe.

[11] Sharnelle James then, in the presence of Rodger and Judith Heyes phoned Wendy Kellas-Sharpe, to discuss the question of the deposit holder. She repeated for the benefit of the Heyes what Wendy Kellas-Sharpe said to her in that conversation as she said it, which was that Sharpe was determined to pay the deposit to Re/Max. In fact she made two such calls at the end of which, having said that Sharpe was insistent that the deposit be paid to Re/Max, neither Rodger nor Judith Heyes indicated agreement or disagreement. Sharnelle James said to them "The deposit needs to be paid. The lawyers can sort this out tomorrow" and again nothing was said by Rodger or Judith Heyes to negate that. She then left the Heyes house.

[12] At that point the situation was:-

(a) That contractual documents (the Option Agreement and the Contract of Sale in the form described in para [9(c)] above, had been signed by the vendors (Heyes) and the purchaser (Sharpe).

(b) Those documents provided for the initial deposit of $5,000 to be paid "upon the execution of this agreement" (Option Agreement clause 14.1) to the deposit holder who was identified as ABKJ (ibid, clause 1.1(4)).

(c) Sharpe's cheque for $5,000 was in fact made payable to Heyes' agent Re/Max (and was banked by Re/Max in its trust account on 20 June 2006).

(d) Sharpe's firm desire to pay the deposit to Re/Max was known to the Heyes and their expressed attitude was then non-committal.

(e) Sharnelle James, Heyes' agent, had suggested to them that the lawyers could "sort out" the destination of the deposit, and that course, while not expressly accepted by them, was implicitly accepted by their silence.

[13] I have preferred the evidence of Sharnelle James on the meeting of 19 June 2006 over that of Rodger and Judith Heyes not because I think the Heyes have been wilfully untruthful, but because I think her recollection of the important facts is more likely to be true. She had acted correctly in putting before the Heyes the agreement which their solicitors ABKJ had drafted, which she had received and which had been signed by Sharpe. She was their agent and, as the reference by her in evidence to her real estate agent's licence emphasised, undoubtedly was aware of her legal obligations. She had no warrant to act as Sharpe's agent and could not accept instructions from him. She had received no clear request from Sharpe to put a counter-offer (that being the effect of the altered page of the contract of sale) to her clients. She regarded the altered page and the copy of the cheque as an indication of Sharpe's desire to pay the deposit to Heyes' agent Re/Max rather than to their solicitors, ABKJ. She no doubt believed that the money would be safe in the Re/Max trust account, whatever the period it should remain there. Each was, it must be remembered, the agent of Heyes and I feel comfortable in assuming that in her mind the point was one of minor detail rather than critical substance. Her advice to her clients was to let the lawyers sort out the legalities of the matter. I cannot accept that she would have defied her clients' express instructions. Had they instructed her that they insisted on the deposit going to ABKJ, I consider she would have taken steps to obey those instructions. She would surely have asked "Do you want me to get a fresh cheque made out to ABKJ, or will I bank this cheque and then transfer the sum to ABKJ's trust account?" Had Heyes positively instructed her one way or another I cannot accept that she would have failed to obey their instructions.

[14] Rodger Heyes' evidence, on the other hand, was to the effect that Sharnelle James said that the agreement they signed was "illegal", meaning (I gather) that they had signed the wrong contract. He said that she actually said "this is the one you should have signed", referring to the altered page. I consider it to be significant that this is not contained in his affidavit; indeed it is quite inconsistent with his affidavit, in which he swore that she said "This is illegal; I cannot substitute one page for another". This latter statement is broadly consistent with her evidence that it was not for her to alter the signed agreement she had received, in the absence of advice that that was the formal counter offer being put by Sharpe. The former statement suggests that she was secretly acting in Sharpe's interests, which I do not accept.

[15] Then, it is clear that Rodger Heyes was mistaken in his evidence when he swore that on 19 June he saw an alteration to clause 1.1(4) of the Option Agreement to substitute Re/Max for ABKJ. No such altered document was before him. The alteration was to the Contract of Sale. I also find it to be strange that, if, as he said in evidence, his attitude towards Re/Max and Peter Smith had in truth been soured by bickering between them on the division of commission to the extent that he was not prepared to allow Re/Max to hold, even temporarily, the $5000 (and particularly in the light of his belief that there was something suspicious about the correctness of the contents of the prepared agreement) he was not more robust in his attitude to Sharnelle James. He is clearly an experienced and successful man of business. In the witness box he did not appear to be a man who would give way on an important matter. Why did he not demand that she leave with him the signed agreement and the altered page so that he could take them to his solicitor for advice? Why did he not forbid her to bank the $5000 cheque until he had received advice?

[16] In a number of respects Rodger Heyes' evidence was unsatisfactory. Orally, he introduced a number of matters of relevance which his affidavit omits. I was unconvinced that he had an antipathy to the idea of a $5,000 cheque going into his own licensed real estate agent's trust account which was so great as to constitute in his mind a critical element of the transaction. All in all, I consider that his obvious present dislike and distrust of Sharnelle James has greatly affected his recollection and coloured it. In the circumstances it is not surprising that Judith Heyes' evidence should closely resemble his.

[17] On 21 June 2006 Sharnelle James:-

(a) on behalf of Re/Max Territory issued to Sharpe a trust account receipt for the initial deposit pursuant to the Option Deed in the sum of $5,000.00;

(b) forwarded an email to ABKJ and Sharpe's solicitors (Redchip) stating "Please be advised a deposit was banked into Re/Max Territory Trust account (Henry Homes Pty Ltd) on the 20/06/2006. The amount being held in the Trust is $5,000 for the Sharpe/Heyes Contract. If the initial deposit is to be transferred to another account other than Re/Max Territory I have been advised we need a letter from both Solicitors of the transfer to the agreed Stakeholder." No such instructions were given to her by either solicitor.

[18] On 21 or 22 June 2006 Peter Smith gave the $1.00 Option Fee to Sharnelle James.

[19] On 22 June 2006, unbeknown to Sharpe, Heyes entered in a new Put & Call Option Agreement and annexed Contract of Sale with Otinane Pty Ltd for $25,000.00 more than the contract price with Sharpe. The respondent did not learn this fact until 19 July 2006 when ABKJ told him after learning he had lodged a caveat over the land.

[20] On 23 June 2006:-

(a) Sharnelle James on behalf of Re/Max Territory issued to Sharpe a trust account receipt for the Option Fee pursuant to the Option Deed in the sum of $1.00.

(b) Redchip wrote to ABKJ insisting that the document signed by both parties and dated 19 June 2006 was effective as a binding agreement but that Sharpe was prepared to have an original copy of the document executed to replace the facsimile copy signed by both parties.

[21] On 4 July 2006 Sharnelle Jones wrote to:-

(a) Sharpe to advise that his offer had been successful;

(b) ABKJ and Redchip advising that Re/Max had received the sum of $5,001.00 being the $1.00 Option Fee and $5,000 initial deposit of the Security Deposit.

[22] On 6 July 2006 ABKJ wrote to Redchip alleging that no binding agreement had been created on 19 June 2006. On 10 July 2006 Redchip responded insisting that

the document signed by both parties and dated 19 June 2006 was effective as a binding agreement.

[23] On 17 July 2006:-

(a) Redchip wrote to ABKJ to advise finance had been approved and that the balance of the Security Deposit payable upon finance approval had been paid to the trust account of ABKJ ($80,000);

(b) Sharpe lodged a caveat over the land.

[24] On 18 July 2006:-

(a) ABKJ purported to terminate the 19 June 2006 agreement on the basis that the payment of the initial deposit to Re/Max Territory as opposed to ABKJ was wrongful or alternatively that the payment of the balance security deposit to them as opposed to Re/Max Territory was wrongful. No allegation was made about the payment of the Option Fee of $1.00 to Peter Smith as opposed to ABKJ.

(b) Redchip wrote to ABKJ to advise that they had instructions to proceed to settlement and that a caveat had been lodged.

[25] On 19 July 2006:-

(a) ABKJ demanded the removal of the caveat and advised (for the first time) that Heyes had entered into another agreement to sell the property prior to the lodging of the caveat. They did not advise the date of that agreement.

(b) Redchip reserved Sharpe's rights.

[26] On 25 July 2006 Sharpe duly exercised the option under the Option Deed.

[27] On 21 August 2006 Sharpe and his solicitors attended at the Titles Office for the purpose of tendering pursuant to the contract. There was no attendance by anyone on behalf of Heyes.

[28] On the evidence of Sharpe and Wendy Kellas-Sharpe, which I accept, while Sharpe had a genuine preference to pay the deposit to Re/Max, he did not regard that as a "make or break" issue and would, if Heyes insisted, have paid it to ABKJ. I note that he was quite prepared to pay the much larger second instalment ($80,000) to ABKJ.

The Issues

[29] The identified issues are:-

(a) whether there was a concluded agreement and, if so, in what form?

(b) if there was, did Sharpe comply with its terms?

(c) if he did not:

(i) did Heyes waive compliance or should Heyes be estopped for relying on Sharpe's failure to complyand/or;

(ii) should Sharpe be granted relief against forfeiture for his failure to comply?

(d) if Sharpe succeeds on any of the above, should he obtain Specific Performance?

(e) if Sharpe does not succeed, what damages should Heyes recover?

Concluded Agreement

[30] The submission of Mr Campbell S.C. was that there was no meeting of the minds of the parties because of the forwarding on 16 June 2006 by Sharpe to Heyes' agent of the page of the Contract of Sale, amended as to the identity of the deposit holder. That, it was submitted, was the relevant offer and it was never accepted by Heyes.

[31] In my opinion the forwarding of the original document, signed by Sharpe was a clear offer to buy the land. That offer was accepted by Heyes by their execution of the document. The proffering of the altered page by Sharpe to Heyes' agent Re/Max can be seen to be as an alternative offer by Sharpe, but one which was never accepted by Heyes. Sharpe said or did nothing to withdraw the offer constituted by his forwarding the original document signed by him.

[32] It is true that the statement of claim originally alleged that the agreement was constituted by the document signed by both parties but as varied by the alteration to the identity of the deposit holder. By amendment the statement of claim now alleges that the agreement is constituted by the document signed by both parties. In my opinion there is no difficulty in holding that the relevant agreement is the document signed by both parties. That was Heyes' document and while it did not set out the preferred position (as to the deposit holder) of Sharpe, on the evidence he accepted the document as his agreement. He has never denied its contractual effect. Indeed on 23 June and 10 July 2003 his solicitors were confirming Sharpe's position that he was bound by the signed documentation. The fact that, prior to Heyes signing the document, he made an unsuccessful attempt to vary it, does not destroy the contractual validity of the mutually signed document. I see the amendment to the statement of claim as Sharpe's lawyers recognizing that they initially approached the matter legally from the wrong direction.

Waiver/Estoppel

[33] Although the pleadings raise waiver, that principle was not really argued and the parties argued estoppel, strictly equitable estoppel. The argument on estoppel proceeds from the obvious fact that payment of the $50,000, the first instalment of the deposit was not made in strict compliance with the terms of the agreement.

[34] The law will not allow "an injust departure by one person from an assumption adopted by another as to the basis of some act or omission which, unless the assumption be adhered to would operate to that other's detriment", *Thompson v* Palmer (1933), 49 CLR 507 at 547, per Dixon J; described by Mason and Deane JJ as a "classic statement of the principle" in *Legione v Hatley* (1982) 152 CLR 406 at

430-1. See also *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen op cit*.

[35] In *Bank of China v Standard Chartered Bank of Australia Ltd* (CA (NSW), Mahoney, Priestley and Clarke JJA, 40203 of 1991, 16 July 1991, unreported, BC9101781, Clarke JA said (my emphasis added):-

> " 'In my opinion, it is useful to refer to the general principles settled in earlier times. In *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355 at 374, Isaacs CJ said:
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> > "The most recent, and one of the most authoritative statements of the principle is that of Lord Birkenhead LC in *Maclaine v Gatty* [1921] 1 AC 376 at 386; [1920] All ER Rep 70: 'where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time.'"
>
> In considering what is to be drawn from what a person has said and done, ie what representation is said to be made, Isaacs ACJ at 374 said:
>
> > "The word 'representation' is not to be understood in any rigid sense. In the domain of estoppel it includes an inference from conduct: per Lord Shand in the Indian case *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 Ind App 203 at 217; and this is exemplified in Craine's Case, above. The word 'unambiguous' is explained by Kay LJ in *Low v Bouverie* [1891] 3 Ch 82 at 1134; the word and its explanation occurring on the same page. The Lord Justice says: 'It is essential to show that the statement was of such a nature that it would have misled any reasonable man, and that the plaintiff was in fact misled by it.' Bowen LJ at 106 says: 'It must be such as will be reasonably understood in a particular sense by the person to whom it is addressed.' This is confirmed in *George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 145 per Lord Brampton and in *Bloomenthal v Ford* [1897] AC 156 at 166 per Lord Herschell."".

[36] In this case Heyes, by themselves and their agent Sharnelle James knew of the proposed breach in relation to the initial instalment of the Security Deposit before it occurred. Heyes did not object to Sharpe adopting that course. And Sharnelle James, of course, did nothing to suggest to Sharpe that the course would not be accepted. Had Heyes notified an objection to the proposed course, the breach would probably not have occurred and if it had already occurred, could and would no doubt have been remedied promptly, arguably within the time required by the Option Deed. The deed, cl 14.1(1) required the $50,000 to be paid "upon the execution of this agreement" (which took place on 19 June 2003). But that execution did not take place in Sharpe's presence so the clause must reasonably be read as allowing for time for Sharpe to be notified of the execution. In the circumstances set out in para [21] that was not done until 4 July. Sharpe would thus

have had ample time to re-direct the deposit cheque. Indeed Sharpe swears that if ABKJ preferred to draw up a fresh agreement to reflect Heyes preferred situation he was prepared to sign it. It is clear to me that Sharpe, on this question of the payment of deposit, was prepared to fall into line with Heyes' wishes. The breach was not remedied because of the conduct of Heyes and their agents.

[37] Heyes real estate agent Sharnelle James in fact on 19 June 2003 had directed Sharpe as to where the initial instalment of the Security Deposit was to be paid and provided the Re/Max trust account details. Heyes did not object to this. Indeed Re/Max issued a receipt for the payment, and also for receipt of the $1 option fee.

[38] Heyes' lawyers ABJK were asked if they required the initial instalment of the Security Deposit to be paid to another stakeholder and they did not respond. Notably there was no prejudice or detriment to Heyes by the payment of the $5,000 in the manner it occurred (it was held in trust by Heyes' agent).

[39] Sharpe's conduct illustrated that he believed, because of this apparent attitude of Heyes, that the payment of the $5,000 deposit to a person who was not the person named in the agreement (but was an agent for Heyes) was acceptable to Heyes and that belief was eminently reasonable in the circumstances. So the reliance was actual and was objectively reasonable (*Bank of China, supra*). In doing this and thus departing from the strict terms of the agreement Sharpe acted to his detriment in failing to take timeous steps to prevent the breach, or to correct it before Heyes relied on it to terminate the contract on 18 July 2006..

[40] Heyes by their conduct are therefore estopped from relying upon strict compliance with that term of the Option Deed, because, having without demur, allowed Sharpe to make the payment, and allowing that state to continue, it would be unfair to allow them to go back on it.

[41] No serious argument was put to me that the payment of the $1 option fee was in breach of the agreement. I do not think that it was. The option agreement, clause 8.1 required that the fee be paid "to the seller on the date of this Deed". It was paid before that date, and to the seller's agent. I see no reason why that should be seen to be in breach of the Deed's requirement.

[42] Although waiver was not argued it was never formally abandoned. In my view *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 makes it likely that the facts as I have found them would establish that Heyes waived the right to rely on strict compliance with the contractual term to pay the deposit to ABKJ. That, it seems to me, lies within the reasons of Brennan J (pp. 421 *et seq*), Dawson J (p. 451 *et seq*), Gaudron J (pp. 480 *et seq*). For example, at p. 427 Brennan J said:-

> "…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.

[43] Here the provision that ABKJ was the deposit holder was for the sole benefit of Heyes and the right created by it could have been exercised when Sharpe breached it (on 19 June, or at the latest on 21 June when it was banked in Re/Max's account and Sharpe's solicitors were so advised). Yet Heyes did not purport to terminate the contract till 18 July. There is also authority (*Kerrison v Martin Heyward* [1975] V.R. 401) for the proposition that, had Heyes withdrawn his waiver, Sharpe should

have reasonable time to correct his breach – something he could easily and quickly have done.

Relief against forfeiture

[44] There having been a breach of the agreement by Sharpe, if (contrary to my opinion) Heyes are not estopped by their conduct from relying upon such breach, in my opinion this is a proper case to give relief against forfeiture. Relief against forfeiture by an order for specific performance may be made notwithstanding Heyes election to terminate the contract for the respondent's breach: *Legione v Hatley* (1983) 152 CLR 406.

[45] In *Legione* at p. 449, Mason and Deane JJ concluded their analysis by saying that the result in a given case will depend on the resolution of a number of subsidiary questions of which the more important are:-

(a) Did the conduct of Heyes contribute to Sharpe's breach? I have made it clear that in my view it did.

(b) Was Sharpe's breach (a) trivial or slight; and (b) inadvertent and not wilful? In my view the payment of the initial deposit to the wrong agent of Heyes was trivial in the utmost degree and inadvertent in that Sharpe was reasonable in thinking his conduct was acceptable to Heyes;

(c) What damage or other adverse consequences did Heyes suffer by reason of Sharpe's breach? In my view there were none.

(d) What is the magnitude of Sharpe's loss and Heyes' gain if the forfeiture is to stand? Sharpe will lose the opportunity to buy the land (which is deemed to be unique). Heyes would have received $25,000 more on the later contract to sell the land but that is a minor consideration compared with Sharpe's loss of the land.

(e) Is specific performance with or without compensation an adequate safeguard for Heyes? Yes, because specific performance will carry out the parties intention as at 19 June 2006; Heyes will get precisely what he would have got on due performance of the contract after Sharpe exercised the option.

[46] In *Legione*, at 449, Mason and Deane JJ held that only in exceptional circumstances will specific performance be granted at the instance of a purchaser who is in breach of an essential condition and whether exceptional circumstances exist in a given case hinges on the existence of unconscionable conduct. Assuming that the breach was of an essential condition, in my view Heyes were guilty of unconscionable conduct. As the minority in *Tamwar Enterprises Pty Ltd v Cauch*; (2003) 201 ALR 359 said at [58]-[60], it is necessary to intervene to avoid injustice or, what is the same thing, to relieve against unconscionable – or more accurately unconscientious conduct.

Specific Performance

[47] The respondent attempted to complete the contract on the due date at the Land Titles Office but neither the applicants nor their solicitors appeared. It is not suggested that Sharpe failed properly to call on Heyes to complete. Rather it was suggested that the evidence is insufficient to prove that Sharpe was then ready (that he had the purchase price available) to settle.

[48] On 17 July 2006 Redchip told ABKJ that the finance had been approved and that the $80,000 second instalment of the Contract had been paid to ABKJ's trust account. Sharpe swore (on 11 August 2006) that "I am ready, willing and able to complete the acquisition of the property". On 21 August 2006, Redchip called on ABKJ to settle at the Land Titles Office. Sharpe attended but Heyes did not. Sharpe's affidavit was read on the trial of the action. He was not required for cross-examination. It is obvious from the facts and from Sharpe's conduct of the action that his readiness, willingness and ability to complete the agreement forms the basis of his case. I am satisfied, on the balance of probabilities that at all material time he was ready, willing and able to complete.

[49] There is no other reason why specific performance ought not to be granted.

[50] The caveat ought to remain registered pending completion of the contract.

Conclusion

[51] Sharpe is entitled to the declaration he seeks and an order for specific performance and I invite the parties to settle an appropriate order.

[52] The counterclaim must be dismissed. It is appropriate to record that in any event, the evidence did not satisfy me that the quantum of the damages has been proved. Some of the items claimed have no apparent connection with these parties or this transaction and further, the witness Mr Brideaux, was not qualified to prove the propriety of the fees claimed. So had Heyes succeeded in the action the proper judgment would have been for damages to be assessed.