SUPREME COURT OF QUEENSLAND

CITATION:	*Menniti v Chan* [2007] QSC 190
PARTIES:	**LUCIANO MENNITI (as Trustee)** **(**first plaintiff) **SALVATORE MENNITI and PASQUALINA MENNITI** (second plaintiff) v **SHARON ANN WINN as administrator for HUO YEN FRANCIS CHAN and AMY CHAN KUNG WAI YING** (defendants)
FILE NO:	BS 4440/05
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	1 August 2007
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	26, 27, 28 February, 1, 2 March 2007
JUDGE:	Wilson J
ORDER:	**THE JUDGMENT OF THE COURT IS THAT:** **1. The plaintiffs' claims be dismissed.** **2. There be judgment for the defendants on their counterclaim in the sum of $663,311.23.** **3. The plaintiffs to pay the defendants the sum of $136,400.70, representing interest on $663,311.23 pursuant to s 47 of the *Supreme Court Act 1995* (Qld) at 9% per annum from 19 April 2005 to 1 August 2007.** **4. The plaintiffs to pay the defendants' costs of and incidental to the proceedings calculated on the indemnity basis.** **THE COURT DECLARES THAT:** **5. In respect of the amounts payable by the plaintiffs to the defendants under order 2 above, the plaintiffs are to have credit to the extent of the amount to be paid to the defendants pursuant to order 6 below.** **THE COURT ALSO ORDERS THAT:** **6. There be a payment out of court to the defendants of the sum of $271,500 plus all accretions thereon.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – ENFORCEMENT OF STATUTORY RIGHTS AND REMEDIES – WHERE REMEDY PRESCRIBED BY STATUTE – NEW RIGHT OR OBLIGATION – EXCLUSIVENESS OF REMEDY – PARTICULAR CASES

– section 206 of the *Body Corporate and Community Management Act 1997* requires that a seller of a lot in a community titles scheme disclose certain matters – the Act provides that if the seller breaches that section the buyer may terminate the contract – whether damages are available for breach of s 206

STATUTES – ACTS OF PARLIAMENT – ENFORCEMENT OF STATUTORY RIGHTS AND REMEDIES – BREACH OF STATUTORY DUTY – IN GENERAL – the *Body Corporate and Community Management Act* imposes certain duties of disclosure on sellers of lots in a community titles scheme – whether the seller breached those duties – whether the buyer was entitled to terminate the contract

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – PENALTIES AND LIQUIDATED DAMAGES – OTHER PARTICULAR CASES – the contract was a standard REIQ contract for the sale of residential lots in a community titles scheme – the defendants counterclaim for damages for breach of contract – the contract provided for the liquidated damages recoverable by the seller – what damages the defendants are entitled to

Body Corporate and Community Management Act 1997 (Qld) s 206, s 209, s 223
Body Corporate and Community Management (Standard Module) Regulation 1997 (Qld) s 144

Lonhro Ltd v Shell Petroleum Co Ltd [1982] AC 173, cited
Hicks v State of Queensland [1998] 1 Qd R 644, cited
Martin v Western District of the Australian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department) (1934) 34 SR (NSW) 593, applied

COUNSEL: M J Byrne for the plaintiffs
P L O'Shea SC and J W Peden for the defendants

SOLICITORS: PHV Law for the plaintiffs
Flower & Hart for the defendants

[1] **WILSON J**: Over 40 years ago a block of nine flats was constructed at 42 Toorak Road, Hamilton, Brisbane. It was acquired by Professor and Mrs Chan in about 1988 and subsequently strata-titled under the *Building Units and Group Titles Act 1980* (Qld).[1] On 19 March 2005 the nine units were sold at auction to the plaintiffs for $2.715 million.[2] That contract was not completed, and the units were resold for $2.105 million.[3]

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1 The Building Units Plan was registered on 17 September 1992: exhibit 16.
2 The contract became exhibits 13, 14, and 14A.
3 Exhibit 30.

Claim and counterclaim

[2] In this proceeding the plaintiffs claim return of the deposit under the first contract ($271,500), and the defendants seek a declaration that they are entitled to retain that deposit and damages for loss sustained on the resale.

[3] The plaintiffs' pleadings are obtuse, and despite an attempt by the defendants' solicitors to obtain clarification shortly before trial,[4] it was only during final submissions that the basis of their claims became tolerably clear. The plaintiffs purported to terminate the contract on 1 April 2005;[5] they asserted that they were entitled to do so in consequence of the defendants' breaches of ss 206 and 223 of the *Body Corporate and Community Management Act 1997* (Qld).[6] They abandoned their claim for damages for conduct in breach of the *Trade Practices Act 1974* (Cth).[7] They maintained a claim for damages, apparently for breach of statutory duty – the only loss and damage claimed being return of the deposit.[8]

[4] The defendants contended that the plaintiffs' purported termination on 1 April 2005 was a wrongful repudiation of the contract, and on that basis themselves elected to terminate on 20 April 2005.[9]

The factual context

[5] Professor and Mrs Chan lived in Hong Kong and the units were rented to tenants. They were managed by real estate agents Harcourts Clayfield. As the building aged, no major maintenance or refurbishment was carried out.

[6] Because they retained ownership of all of the units in the building, Professor and Mrs Chan managed the building and ran the affairs of the body corporate informally, without complying with the requirements of the *Body Corporate and Community Management Act*. They endeavoured to visit the property once a year.[10] They left the payment of recurring expenses such as electricity, gardening, rubbish removal and the servicing of fire extinguishers to Harcourts, who met these expenses out of rent receipts.[11] Communications with the insurer also went through Harcourts.[12] Annual meetings of the body corporate were held in Hong Kong,[13] but these were not always conducted as they should have been under the legislation. There was no administrative fund or sinking fund established, and no annual contributions were set.

[7] In January 2004 Professor Chan suffered "a brain aneurism",[14] and was in a coma for several months. He has been incapable of managing his financial affairs since then. Communications addressed to him by the agents went unanswered until May 2004 when they established email contact with Mrs Chan.

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4 Letter from Flower & Hart to PHV Law, 8 February 2007 (exhibit 22).
5 Exhibit 5.
6 Transcript of the proceeding, p 377.
7 Transcript of the proceeding, p 382.
8 Transcript of the proceeding, pp 381-382.
9 Exhibit 7.
10 Transcript of the proceeding, p 245.
11 Transcript of the proceeding, p 311.
12 See exhibits 38, 39, 43-46, 49-52.
13 Transcript of the proceeding, p 261; exhibit 68.
14 Transcript of the proceeding, p 186.

[8] In the meantime there had been a small fire in one of the units and the agents had submitted an insurance claim in relation to the damage caused. The assessor appointed to investigate the claim inspected the property and reported to the insurer that certain maintenance works were required to reduce the risk of accident claims.[15] In June 2004 the agents obtained a quotation for these works from a registered builder Peter James Hanlon in the sum of $28,400 plus GST,[16] and in July 2004 they advised Mrs Chan of further problems identified by Mr Hanlon.[17]

[9] Mrs Chan is an intelligent, business like and methodical person. She contacted Mr David Watt, a partner of the Brisbane law firm Flower & Hart, for advice. He obtained a report from a structural engineer Mr Eric Fox dated 29 July 2004.[18]

[10] The tenants were required to vacate the building[19] and some remedial works were effected, including repairs to the concrete driveway.[20]

[11] By order of the Guardianship and Administration Tribunal on 16 August 2004 Sharon Ann Winn was appointed Professor Chan's administrator for all financial matters.[21]

[12] Flower & Hart commissioned a valuation of the property from Herron Todd White. In a report dated 5 October 2004[22] they concluded –

> "It is considered likely that a unit developer would pay between $1,800,000 to $2,000,000 for the property 'as is' and probably at the lower end of this range. The likely highest and best use value achievable is from the prestige owner occupier who may utilize existing improvements and reconfigure the structure for prestige residential use as opposed to a unit redeveloper. As such a market value of $2,000,000 is assessed."

On Mrs Chan's express instructions, Harcourts were not given a copy of the valuation report by Herron Todd White or told what figure the valuers had put on the property.[23]

[13] In late January 2005 Harcourts were engaged as the selling agent.[24]

[14] On 15 February 2005 the body corporate's insurer issued an endorsement to the policy excluding indemnity on all claims while the building was vacant and undergoing renovations.[25]

[15] The agents were supplied with a disclosure statement under s 206 of the *Body Corporate and Community Management Act*[26] and contract documentation

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15 Exhibit 9 (dated 23 April 2004).
16 Exhibit 11.
17 Exhibit 26.
18 Exhibit 8.
19 Exhibits 52, 62, 63; transcript of the proceeding, pp 205, 257, 273, 316.
20 Exhibit 66; transcript of the proceeding, p 165.
21 Exhibit 1.
22 Exhibit 27, p 12.
23 Transcript of the proceeding, pp 260, 278, 297.
24 Exhibit 28.
25 Exhibit 10.
26 Exhibit 2.

including a seller's disclosure under s 223 of the Act and special conditions[27] prepared by Flower & Hart.[28]

Mr Lou Menniti's Inspections of the Property

[16] The first plaintiff is known as Lou Menniti and I shall refer to him as "Mr Menniti". He is the son of the second plaintiffs. He has worked with his father, who is known as Sam Menniti and who is a licensed builder, on various home unit projects, his father acting as the construction supervisor and he organising tradesmen, paperwork, finance, wages, etc.

[17] Neither of the second plaintiffs gave evidence, although Mr Sam Menniti was present in Court, and their counsel said in his opening that he expected to call him. The evidence he might have given was never opened.

[18] The principals of Harcourts Clayfield were Phillip and Carmel Murray. Mr Murray concentrated on sales and Mrs Murray on property management.[29] Mr Murray had known Mr Menniti for several years.[30]

[19] Mr Menniti was an unimpressive witness. He gave differing versions of his inspections of the property before the auction and of what happened on the day of the auction and in the following days. By contrast Mr Murray's evidence was internally consistent, not embellished and in a number of instances supported by documents. I shall endeavour to illustrate these features of their evidence in the succeeding paragraphs. Where their evidence differed, I accept that of Mr Murray.

[20] Mr Menniti drove past the property two or three weeks before the auction and saw a sign outside the building giving the agent's name and phone number. He noted these, and later called, spoke to Mr Murray and arranged to meet him there. Mr Murray said that Mr Menniti contacted him on about 10 February 2005 and arranged to inspect the property. He kept an Enquiry Register[31] of those persons who showed any interest in the property; he recorded their names, contact details, how they had learnt about the property (eg by advertisement, referral, etc), and comments (including dates of inspections and price indications). Mr Menniti's name was entered in the register under the date 10 February 2005. Mr Menniti did not keep the appointment.

[21] Mr Menniti inspected the property on about three occasions before the auction day.

(a) Despite Mr Menniti's evidence to the contrary, I accept the evidence of Mr Murray that the first of these was on a day when the property was open for inspection. He is recorded in the Enquiry Register as having inspected on Saturday 26 February 2005, and the property was open for inspection that day.

(b) There was a gate across the front set of stairs which was padlocked. Mr Menniti said he was told it was padlocked to keep vandals out; later in his evidence he said he was given another explanation which had something to do with insurance. Mr Murray had no recollection of Mr Menniti asking why the stairs were locked. He said the staircase was sealed off to direct people to the

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27 Exhibits 13, 14, 14A.
28 Transcript of the proceeding, p 275.
29 Transcript of the proceeding, p 273.
30 Transcript of the proceeding, p 277.
31 Exhibit 56.

unit where he had set up a table and displayed documents, and that access to the units was not otherwise impeded.

(c) Mr Menniti said he asked why the owners were selling, and that Mr Murray replied that the "old fellow" had Alzheimer's disease and did not want to spend money on the property. Mr Murray denied that Mr Menniti asked why the owners were selling and that he had said this. Of course, Professor Chan did not have Alzheimer's disease and there would have been no basis for Mr Murray to have asserted that he did.

(d) Mr Menniti said his father was with him and that Mr Murray showed them through the units for which he had keys. Mr Murray did not mention Mr Sam Menniti being present, and denied walking through the units with Mr Menniti. It would have been surprising for him to have done so on an "open for inspection" day, because as he said it was more important for him to stay in one unit and greet people as they came in.

(e) Mr Menniti said they discussed likely rental income, either with or without the benefit of some cosmetic improvements, and that he told Mr Murray if he received $220 – $240 per unit per week he would be able to meet his commitments. Mr Murray did not remember such a conversation.

(f) Mr Menniti said that Mr Murray told him there was a valuation for $2.5 million, but that the solicitors or the owners had it. At another point he said Mr Murray told him the valuation was for "over" $2.5 million. He said he asked Mr Murray what the property would sell for, that Mr Murray replied "two million plus" and that when he asked why Mr Murray replied that there was a valuation of $2.5 million. He said that he called Mr Murray several times chasing up the valuation, but that Mr Murray always made excuses. Mr Murray had a vague recollection of Mr Menniti asking about the price, and his replying that it would sell for "$2 million plus". Mr Murray denied saying there was a valuation for $2.5 million. It would have been strange for him to have said so. Although, on instructions from Flower & Hart, he had arranged for the valuation to be conducted, he did not have a copy of it, and of course it was for $2 million, not $2.5 million.

(g) It is not clear precisely how many times Mr Menniti visited the property before the auction. He lived in the area, and may well have driven past it comparatively often. The imprecision in his evidence on this probably did not evince any deliberate evasiveness or attempt to mislead. I accept that he inspected the property with Mr Murray again on 3 March 2005. An appointment with Mr Menniti at the property at 10 am that day is noted in Mr Murray's diary,[32] and the inspection is noted in the Enquiry Register.[33] Mr Murray recalled arranging to open the building for him on that day, and that Mr Menniti, his father and someone else attended and looked through all of the units; he said he did not accompany the group around the building, and thought that the conversation about selling price may have occurred on that occasion.

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32 Exhibit 57.

33 Exhibit 56.

[22] There was another occasion when a young employee of Harcourts met Mr Menniti at the property.

Display of Disclosure Statement and Contract

[23] In preparation for the "open for inspection" day the agents erected a board in one of the units, where they would meet people coming in to look at the building. They displayed relevant documents, such as the disclosure statement, the contract and rental assessments on that board. Generally, one page documents were placed in a series of plastic pockets which were pinned to the board and multiple page documents were stapled to the board so that people could flick through them.

[24] I accept the evidence of Mr Murray that the disclosure statement pursuant to s 206 of the *Body Corporate and Community Management Act* (a three page document) was placed in a plastic pocket.[34] A copy of it appears as Annexure A to these reasons for judgment. The contract included a seller's disclosure of matters arising from s 223 of the Act: that document (a copy of which is Annexure B hereto) and a page of special conditions (a copy of which is Annexure C hereto) were displayed in plastic pockets, while the other terms and conditions of the contract were stapled and affixed to the board.[35]

[25] I am satisfied that those documents were on display in that format when Mr Menniti inspected the property and at the auction,[36] despite Mr Menniti's assertions that only the contract was displayed at the auction,[37] that he could not remember seeing the disclosure statement on the board at the auction,[38] and that the seller's disclosure was not displayed until the day of the auction.[39]

The auction

[26] The auction was conducted at the property on Saturday 19 March 2005.

[27] Mr Menniti attended with his father. Mr Murray registered him as a bidder and inquired what his level of bidding would be. He responded that his maximum would be $1.7 million[40] or $1.6 million.[41]

[28] The bidding was competitive. Ultimately Mr Menniti won the auction with a bid for $2.715 million. He and his father signed the contract on site immediately after the auction, and his mother signed it later in the day when it was taken to her home. The deposit was paid sometime that day, after Mr Menniti had collected the cheque from somewhere off site.

[29] Mr Menniti conceded seeing the disclosure statement under s 206 when he signed the contract,[42] and reading the seller's disclosure under s 223 before signing the contract,[43] having glanced at it 10 minutes before the auction.[44]

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34 Transcript of the proceeding, p 295.
35 Transcript of the proceeding, pp 294-295.
36 Transcript of the proceeding, pp 57, 294, 303.
37 Transcript of the proceeding, p 59.
38 Transcript of the proceeding, pp 59-60.
39 Transcript of the proceeding, pp 107-109.
40 Transcript of the proceeding, p 280.
41 Transcript of the proceeding, pp 292-293.
42 Transcript of the proceeding, pp 61, 119-121.
43 Transcript of the proceeding, pp 102-104.
44 Transcript of the proceeding, p 109.

After the auction

[30] After the auction, while he was still on site, Mr Menniti had some conversations with neighbours, with Mr V Ferraro, and with Mr Hanlon. It is not clear whether these conversations occurred before or after he and his father signed the contract,[45] but nothing turns on this. Nor is the content of the conversations clear.[46] I note that Mr Menniti gave several accounts of when the conversation with Mr Hanlon occurred – at the auction after signing the contract,[47] a few days after the auction,[48] a few weeks after the auction,[49] but Mr Hanlon could not recall any in-depth conversation with Mr Menniti until one in the months leading up to the trial.[50] Where Mr Hanlon's recollection of the conversation differs from Mr Menniti's, I accept Mr Hanlon's version – but nothing turns on this apart from a further adverse reflection on Mr Menniti's credibility as a witness.

[31] A few days after the auction Mr Menniti rang Mr Murray. The conversation was heated. Mr Menniti alleged that there had been false bidders at the auction. He demanded the name of the underbidder, which Mr Murray gave him. On his version, he complained about defects in the building which had not been disclosed, although Mr Murray said the state of the building was not raised. According to Mr Murray, Mr Menniti said that he had miscalculated his figures and paid too much for the property. He said he would not be settling.[51]

Termination of the contract

[32] Mr Menniti spoke to his solicitors on the Monday or Tuesday after the auction.[52] His solicitors wrote to Flower & Hart on 23 March 2005 raising various matters in relation to the disclosure statement under s 206 and other alleged breaches of the legislation. They asserted that the plaintiffs were entitled to cancel the contract and said they were seeking further instructions.[53] Flower & Hart responded the next day refuting that the plaintiffs were entitled to terminate and reserving the defendants' rights.[54] By letter dated 1 April 2005 the plaintiffs' solicitors purported to terminate.[55] Flower & Hart responded by letter dated 20 April 2005 asserting that the plaintiffs' purported termination was a wrongful repudiation of the contract, and advised of the defendants' election to themselves terminate and forfeit the deposit.[56]

[33] The deposit of $271,500 had been paid to the agents to hold as stakeholder.[57] It was paid into Court and orders were made for its investment pending the determination of this proceeding.[58]

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45 Transcript of the proceeding, p 300 (Mr Murray); cf pp 64, 65 (Mr Menniti).

46 Transcript of the proceeding, pp 286, 300: Mr Murray overheard conversation about zoning; pp 64-65, 113: Mr Menniti said the neighbours and Mr Ferraro told him about the fire and structural problems; pp 65, 74: Mr Menniti said Mr Hanlon told him about structural problems and that repairs would cost $700,000, while at pp 138, 140 Mr Hanlon said the conversation was fleeting, that Mr Menniti had asked him why he had not bought the building and they may have spoken about zoning

47 Transcript of the proceeding, p 65.

48 Transcript of the proceeding, p 66.

49 Transcript of the proceeding, p 73.

50 Transcript of the proceeding, pp 138-139, 145.

51 Transcript of the proceeding, pp 122-124, 286.

52 Transcript of the proceeding, p 66.

53 Exhibit 3.

54 Exhibit 4.

55 Exhibit 5.

56 Exhibit 7.

57 Exhibit 14A (contract), cl 2.2(1).

58 Transcript of the proceeding, pp 213-214; exhibit 32.

Resale

[34] The property was resold to Pacifique Management Pty Ltd for $2.105 million, completion being effected on 28 June 2005.[59]

Inspection by plaintiffs' engineer

[35] On 16 September 2005 the building was inspected by Mr Peter Knight, structural engineer, on behalf of the plaintiffs.[60]

The allegations in the plaintiffs' statement of claim

[36] The thrust of the plaintiffs' claim is contained in paragraphs 3 – 8 of their statement of claim, which are reproduced as Annexure D to these reasons for judgment.

[37] The defendants sought further and better particulars of the statement of claim. Relevant paragraphs of their request and the plaintiffs' response are contained in Annexure E to these reasons for judgment.

[38] It is necessary to consider ss 206 – 210 and ss 220 – 224 of the *Body Corporate and Community Management Act 1997* in analysing these allegations. Those sections are reproduced in Annexure F to these reasons for judgment.

[39] The alleged representations can be grouped into 3 categories –

(i) representations as to value;

(ii) representations as to matters in s 206; and

(iii) representations as to matters in s 223.

Representations as to value – S/C para 3(a), 5(a), (b) and (c)

[40] There was no evidence that the agents made any representation at the auction that they were in possession of a valuation for $2.5 million. Mr Menniti's evidence was that Mr Murray told him this before the auction.[61] I reject his evidence on this, and find that no such representation was ever made.

Representations as to matters in s 206 – S/C para 3(b) and (c), 4(c) and (i), 5(d)(i)-(xxi), 6

[41] By s 206 of the *Body Corporate and Community Management Act* the defendants were obliged to give the plaintiffs –

(i) a statement (referred to in this proceeding as the "disclosure statement") as to matters about the body corporate and the common property prescribed in subsec (2);[62] and

(ii) an information sheet containing general information about a community titles scheme.[63]

Section 206 also makes reference to the warning statement required to be given under s 366 of the *Property Agents and Motor Dealers Act 2000* (Qld).

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59 Transcript of the proceeding, pp 212-213; exhibits 29, 30, 31.
60 Exhibit 19.
61 Transcript of the proceeding, p 96.
62 s 206(1).
63 s 206(5).

[42] The defendants supplied the information sheet and warning statement in one document ("Form 14") headed "Contract Warning".[64] It provides no basis for any of the representations pleaded.

[43] In the disclosure statement[65] the defendants set out by way of side headings the various matters required by s 206(2). Because of the informal way in which the body corporate had been conducted, there was no information which they could supply in response to most of these. Their non-compliance with requirements of the *Body Corporate and Community Management Act* and the *Standard Regulation Module* which applied to the scheme was apparent on the face of the document. The provision of the statement did not constitute a representation that the defendants had complied with the Act and in particular s 206 – statement of claim para 4(c). The body corporate had come into existence upon the registration of the plan, and insofar as the provision of the statement was a representation of its being in existence, the representation was true and correct; insofar as it was a representation that it was "operated informally", that was true – statement of claim para 4(i).

[44] In paragraph 5 of the statement of claim the plaintiffs allege that the representations were "negligently made in that the defendants failed to exercise the duty of care of disclosure required by s 206". It became tolerably clear in the course of oral submissions that this part of their claim for damages is based on breach of statutory duty.[66] I will consider the factual allegations first, and then turn to whether there is such a cause of action for breach of s 206.

[45] It is alleged that the defendants "had not complied with the provisions and practice required by s 206" in a number of respects - statement of claim para 5(d).

(i) *that there were no body corporate records, informal or otherwise*.[67] Section 206 imposes no obligation to maintain records. In any event, there were body corporate records, many of them in evidence.[68]

(ii) *that there was no person listed as acting formally or informally for the management of the body corporate interests or property*.[69] Section 206 does not require the statement to include this.

(iii) *that there were no annual or any contributions fixed to be payable by the lots within the scheme*.[70] The statement was correct.

(iv) *that there was no identification of improvements or otherwise on the common property of the body corporate*.[71] The statement was correct.

(v) *that there were no body corporate assets listed*.[72] There were none to be listed.[73]

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64 The first two pages of the contract documents: exhibits 14, 14A
65 Exhibit 2.
66 Transcript of the proceeding, pp 381-382.
67 para 5(d)(i).
68 Exhibit 68; transcript of the proceeding, pp 261, 266, 338.
69 para 5(d)(ii).
70 para 5(d)(iii).
71 para 5(d)(iv).
72 para 5(d)(v).
73 Transcript of the proceeding, p 312; *Body Corporate and Community Management (Standard Module) Regulation 1997* (Qld) s 144(1).

(vi) *that there was no identification of the relevant regulation module applying to the scheme*.[74] The *Standard Regulation Module* was identified.

(vii) *that there was no listing of any person or persons acting formally or informally for the body corporate or who performed the functions of the body corporate committee*.[75] Section 206 does not require the statement to include this.

(viii) *that there was no s 206 Body Corporate and Community Management Act statement, formal or informal, available*.[76] This is an extraordinary allegation in the face of exhibit 2. If it means that the statement was so defective as to be a nullity, I reject the contention.

(ix) *that there were no details as to the insurance or insurance policy of the building apart from a notation allegedly endorsed thereon*.[77] Section 206 does not require this. In any event, the endorsement on the policy was set out in the disclosure statement provided.

(x) *that there was no aggregate interest schedule, formal or informal, available or in existence*.[78] Section 206 does not require this.

(xi) *that there was no lot entitlement schedule, formal or informal, available or in existence*.[79] This is incorrect; it was part of the registered building units plan.[80]

(xii) *that there was no differentiation, formal or informal, between common and other property in the scheme*.[81] This is incorrect; see the registered building units plan.

(xiii) *that there was a body corporate in name only and for all intents and purposes did not operate as a body corporate, formally or informally or at all*.[82] There was a body corporate and it did operate, albeit informally. For example, it held insurance cover and an electricity account.

(xiv) *the defects pleaded in paragraph 4(d)(iii)*.[83] This is incomprehensible.

(xv) - (xxi) Doing the best I can to understand the structure of the pleading, these particulars all relate to non-disclosure of documents about the condition of the building, correspondence with the insurer, and rectification costs. None of them was required to be disclosed under s 206.

[46] Section 206 imposes a statutory duty to provide a statement containing certain information. The legislation provides remedies for non-compliance. The scheme of the relevant provisions is as follows –

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74 para 5(d)(vi).
75 para 5(d)(vii).
76 para 5(d)(viii).
77 para 5(d)(ix).
78 para 5(d)(x).
79 para 5(d)(xi).
80 Exhibit 16.
81 para 5(d)(xii).
82 para 5(d)(xiii).
83 para 5(d)(xiv).

(a) By subsec (1) the statement must comply with subsecs (2) to (4) – that is, it must contain the information in subsec (2), be signed by the seller or a person authorised by the seller, and it must be substantially complete.

(b) By subsec (8) inaccuracies will not amount to non-compliance if the statement is substantially complete as at the date of the contract.

(c) By subsec (7) the buyer may cancel the contract if –

(i) subsecs (1) and (5) have not been complied with – that is, if the statement does not contain the information in subsec (2); is not signed as required by subsec (3); is not substantially complete as required by subsec (4); and is not accompanied by the information sheet required by subsec (5); and

(ii) if the contract has not already settled.

(d) By s 209 the buyer may cancel the contract if it has not already settled –

(i) if the statement is inaccurate and if the buyer would be materially prejudiced thereby if compelled to complete the contract; or

(ii) if, despite reasonable efforts, the buyer is unable to verify the information in the statement.

[47] Here the disclosure statement was substantially complete. It was signed by Mrs Chan. There is no evidence of any inaccuracy which would have resulted in the plaintiffs being materially prejudiced if compelled to complete the contract. There is no evidence of any efforts to verify the information in the statement, and further the notice of termination[84] did not identify any efforts made to verify the information.[85] The plaintiffs had no right to cancel the contract for breach of s 206.

[48] In *Martin v Western District of the Australian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department)*[86] Jordan CJ said –

> "If a statute creates a new duty, the question whether a person who suffers damage by reason of a breach of the new duty, may maintain an action in the ordinary courts for the breach depends upon the intention to be extracted from the statute when read as a whole, having regard to its general scope and purview as well as to its particular provisions.[87] Regard may be had to considerations of policy and to the convenience or inconvenience which would result from the existence or non-existence of a right of action,[88] and to the probability or improbability that the Legislature would intend to impose liabilities of the character which would arise from the existence of a right of action. No single feature – other than a provision dealing expressly with the point – can be regarded as being in all cases conclusive. Each statute must be considered for itself.

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84 Exhibit 5.
85 s 209(1)(c)(ii).
86 (1934) 34 SR (NSW) 593, 596-598.
87 *Pasmore v Oswaldtwistle Urban District Council* ([1898] AC 387, at p 394).
88 *ibid*.

> But there are various matters which are important as pointing to the existence or non-existence of a right of action, as the case may be. Of the matters which go to negative the existence of a right [of] action, the most important is the provision by the statute which creates the new duty of a special means for its enforcement. Where a special means is so provided, the general rule is that the performance of the duty cannot be enforced in any other manner;[89] and *prima facie* there is no other remedy.[90] But this rule is not invariable.[91] It may not apply if the remedy is inadequate. Thus it has been held that a penalty does not exclude a right of action in the ordinary courts, where the new duty has been created to protect a particular class of persons from injury of a particular kind.[92] The fact that the duty is created for the benefit of the public generally suggests that it was intended to create a public duty only, and goes to negative a right of action in any individual who may suffer special damage by its breach, although it is not conclusive:[93] but where the duty is negative in its character, the fact that it is for the benefit of the public generally will support proceedings by the Attorney-General for an injunction to restrain a breach, notwithstanding that the statute prescribes a penalty for breach.[94] Other matters which point to the absence of any right of action are: the fact that the statutory remedy enures for the benefit of the person injured by the breach;[95] the fact that the statute is private rather than public and general in its character;[96] and the fact that the scheme of the Act leaves the questions involved to be determined by a special tribunal.[97] On the other hand, matters which point to the existence of the right of action are: the fact that no remedy,[98] or an obviously inadequate remedy,[99] has been provided by the statute creating the duty (although the fact that no forensic remedy is provided is not of itself necessarily sufficient to give a right of action;[100] the fact that the new duty is created for the benefit of a particular class of persons;[101] the fact that the duty is to make a money payment;[102] and the fact that the person injured receives no benefit from the statutory penalty.[103] But the question is in every case to be resolved by a consideration of the Act as a whole. There

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89 *Pasmore's Case* (*supra*) ([1898] AC at p. 394).

90 *Phillips v Britannia Hygienic Laundry Co Ltd* ([1923] 2 KB 832, at p 841); *Josephson v Walker* (18 CLR 691, at 697, 701).

91 *Groves v Lord Wimborne* ([1898] 2 QB 402, at p 416); *Phillips v Britannia Laundry Co Ltd* ([1923] 2 KB 832, at p 841); *Josephson v Walker* (18 CLR 691, at 700-1, 702); *Mallinson v Scottish Australian Investment Co Ltd* (28 CLR 66, at pp 70-1).

92 *Groves v Lord Wimborne* ([1898] 2 QB 402); *Butler v Fife Coal Co* ([1912] AC 149, at pp 165-6).

93 *Phillips v Britannia Hygienic Laundry Co Ltd* ([1923] 2 KB 832, at pp 841-2).

94 *Attorney-General v Sharp* ([1931] 1 Ch 121); *Attorney-General v Premier Line, Ltd* ([1932)] 1 Ch 303).

95 *Groves v Lord Wimborne* ([1898)] 2 QB 402, at pp 416-7).

96 *Johnston v Consumers' Gas Co of Toronto* ([1898] AC 447, at p 455).

97 *Josephson v Walker* (18 CLR 691 at p 698).

98 *Josephson v Walker* (18 CLR 691, at pp 700-1).

99 *Mallinson v Scottish Australian Investment Co Ltd* (28 CLR 66, at pp 72-74).

100 *Johnston v Consumers' Gas Co* ([1898] AC 447, at pp. 454-5).

101 *Butler v Fife Coal Co* ([1912] AC 149, at pp 165-6); *Mallinson's Case* (28 CLR 66, at 71).

102 *Mallinson's Case* (28 CLR 66, at p 70).

103 *ibid* at p 74.

> is no hard and fast rule which can be applied to solve any particular case.[104],,[105]

See also *Lonhro Ltd v Shell Petroleum Co Ltd*[106] per Lord Diplock[107] and *Hicks v State of Queensland*[108] per Moynihan J.

[49] The primary object of the *Body Corporate and Community Management Act* is

> "... to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects."[109]

The secondary objects include –

> "(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;
>
> (h) to ensure accessibility to information about community titles scheme issues."[110]

The statute itself provides civil law remedies for breach of s 206.

[50] In these circumstances, I consider that there is no common law action for damages for breach of s 206.

Representations as to matters in s 223 – S/C para 4(d)-(j), 5(d)(xv)-(xxi), 7

[51] By s 223 of the *Body Corporate and Community Management Act* certain warranties relating to the common property, body corporate assets and the affairs of the body corporate were implied in the contract. By s 224 the buyer may cancel the contract and recover the deposit if it can establish a breach of the warranties under s 223.

[52] The plaintiffs rely on three warranties being those in:

(a) s 223(2)(a), by paragraph 7(a) of the statement of claim ("latent or patent defect case");

(b) s 223(2)(b), by paragraph 7(b) of the statement of claim ("body corporate records case");

(c) s 223(3), by paragraph 7(c) of the statement of claim ("body corporate affairs case").

[53] The contract documentation included a "seller's disclosure"[111] which contained disclosures under three sub-headings –

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104 *Groves v Lord Wimborne* ([1898] 2 QB 402, at p 417).
105 Citations in text in the original.
106 [1982] AC 173.
107 [1982] AC 173, 185.
108 [1998] 1 Qd R 644.
109 s 2.
110 s 4.
111 Annexure B to these reasons.

(i) latent or patent defects in common property or body corporate assets – s 223(2)(a) and (b);

(ii) actual or contingent or expected liabilities of the body corporate – s 223(2)(c) and (d);

(iii) circumstances in relation to the affairs of the body corporate – s 223(3).

This was complemented by special conditions,[112] by which the plaintiffs accepted the property on an "as-is where-is" basis, acknowledged that the body corporate had been conducted informally, and acknowledged the endorsement on the insurance policy.

[54] To make out the latent or patent defect case under s 223(2)(a) the plaintiffs needed to establish –

(a) that there were latent or patent defects in the common property as at 19 March 2005;

(b) that the defendants knew of such defects as at 19 March 2005;

(c) that the defects were not disclosed in the disclosure statement or the special conditions; and

(d) that the defects were not defects arising through fair wear and tear.

[55] The defects disclosed in the seller's disclosure[113] were a fair and accurate summary of the matters in Mr Fox's report of 29 July 2004.[114] Both Ms Winn and Mrs Chan gave evidence that they were not aware of any defects in the common property not attributable to fair wear and tear apart from those referred to in the seller's disclosure.[115] The contrary was not suggested to them. Otherwise it was not part of the plaintiff's case that there were other such defects of which they ought reasonably to have had knowledge[116] or that there were such defects known to Harcourts of which they should be deemed to have had knowledge.

[56] That the defendants did not know of other defects not attributable to fair wear and tear is sufficient to defeat the latent or patent defects case. But for the sake of completeness I shall review the evidence in relation to the defects particularised. Those in the further and better particulars were drawn from the report of Mr Knight.[117]

[57] *Statement of claim para 7(c)(iv)* There was no evidence of cracks in the structural part of the building that were indicative of a serious structural defect of an unknown cause and extent affecting the strength of the building.

para 7(c)(iv)-(viii) In so far as these are allegations of defects, those defects were disclosed. Otherwise they are not allegations of fact, but mere speculation as to the cause and extent of the defects.

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112 Annexure C to these reasons.
113 Annexure B to these reasons.
114 Exhibit 8.
115 Transcript of the proceeding, pp 205-206, 210, 258.
116 s 223(4).
117 Exhibit 19.

para 7(c)(ix) These are matters arising from the Fox report,[118] and they were disclosed.

Further and better particulars para 4(a)-(j), (m) These allegations relate to the stairways and concrete block work supporting the stairways. They are based on the report of Mr Knight.[119] The need for maintenance and in some cases structural repair of the stairways was adequately disclosed.

para 4(k) I accept the evidence of Mr Fox[120] that the rusting of the SHS posts supporting the roof structure on the front patio was surface rust only, and due to fair wear and tear.

para 4(l) This was adequately disclosed.

para 4(n) The presence of asbestos was not a defect, but merely the product of building practice at the time of construction.[121]

para 4(o) and (p) Mr Knight conceded that these were based on speculation.[122]

para 4(q) There were no cracked bricks, and any brick growth had ceased.[123] There was no defect to be disclosed.[124]

para 4(r) This was disclosed.

para 4(s) I find that brick fretting is usually the result of rising damp.[125] There was no evidence of rising damp. There was no defect to be disclosed.

para 4(t) There was no defect not attributable to fair wear and tear to be disclosed.

[58] The plaintiffs alleged that the defendants breached s 223 in that the body corporate records did not disclose any defects other than those "disclosed and pleaded hereinbefore"[126] – the "body corporate records case". The plaintiffs were apparently invoking s 223(2)(b). However, no particulars were provided and no evidence was led of other defects not disclosed in the body corporate records. I am unpersuaded that the report of Mr Fox,[127] correspondence with the insurer,[128] Mr Hanlon's letter of 4 June 2004[129] or the agent's options for the building[130] referred to any such defects which were not disclosed.

[59] I have had difficulty in understanding the basis upon which the plaintiffs contend that the defendants breached the warranty in s 223(3), that is, their warranty that, as at completion, there were no circumstances known to them in relation to the affairs

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118 Exhibit 8.
119 Exhibit 19.
120 Transcript of the proceeding, pp 226, 331.
121 Transcript of the proceeding, p 162.
122 Transcript of the proceeding, p 164.
123 See transcript of the proceeding, p 328: brick growth ceases after the first few years.
124 Transcript of the proceeding, p 165.
125 Transcript of the proceeding, pp 165, 329-330.
126 Statement of claim para 7(b).
127 Exhibit 8.
128 Exhibits 9, 10.
129 Exhibit 11.
130 Exhibit 12.

of the body corporate likely materially to prejudice the plaintiffs. As to these allegations –

(a) First, the affairs of the body corporate were not in disarray; nor were its records so incomplete or non existent that there was no reasonable prospect of the plaintiffs determining whether the warranties in s 223(2)(b) had been breached or determining any matters concerning the body corporate or the common property.[131] While the body corporate's affairs had not been conducted in accordance with the statutory requirements, they had nevertheless been conducted in a businesslike and methodical way by the Chans and the agents, and records had been kept. That its affairs had been conducted informally was disclosed in the Disclosure Statement[132] and in the Special Conditions.[133]

(b) The second is, on the facts, a nonsense. An administrator for Professor Chan's financial affairs had been appointed under the *Guardianship and Administration Act 2000* (Qld). Such an appointment was not an appointment "to the joint owners and/or the body corporate of the building",[134] and it was not a circumstance in relation to the affairs of the body corporate likely materially to prejudice the plaintiffs.[135]

(c) It is not clear from the structure of the pleading whether the existence or likely existence of patent and latent defects is relied upon as a particular of breach of this warranty,[136] but in so far as it is, I repeat what I have already said about the defect allegations.

(d) In so far as it is alleged that there were documents not made available to prospective buyers from which the defendants were made aware that the condition of the building posed a risk of injury or damage and required remedial action and of the insurer's response to the presence of certain defects,[137] I am satisfied that adequate disclosure of latent and patent defects in the common property and of the endorsement placed on the policy by the insurer was made.[138]

(e) There was no evidence of defects in the building which would cost $1.2 million to repair.[139] I note that one of the options Harcourts presented to Professor and Mrs Chan estimated the total cost of refurbishing the building at $1,155,000-$1,200,000.[140] That estimate was for a substantial refurbishment of the entire building, and the estimate included, among other things, new kitchens and bathrooms for each unit: it does not support the claim that "[t]he

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131 Statement of claim para 7(c)(i).
132 Annexure B to these reasons.
133 Annexure C to these reasons.
134 Statement of claim para 7(c)(ii).
135 s 223(3).
136 Statement of claim para 7(c)(iii)-(ix).
137 Statement of claim para 7(c)(x)-(xv).
138 See Seller's Disclosure (Annexure B to these reasons) and Special Conditions (Annexure C to these reasons).
139 Statement of claim para 7(c)(xvi).
140 Exhibit 12.

cost of rectifying the defects of the building as hereinbefore pleaded was [$1.2 million]."[141]

[60] In short, no breach of any of the warranties implied by s 223 has been made out. The plaintiffs were not entitled to cancel the contract under s 224.

Plaintiffs' claim fails

[61] The plaintiffs were not entitled to terminate the contract. They have not established any right to damages. Their claims for return of the deposit and damages should be dismissed.

Counterclaim

[62] By clauses 9.3, 9.4 and 9.5 of the contract[142] –

> "9.3 **If Seller Terminates**
>
> If the Seller terminates this contract under clause 9.1, it may do all or any of the following:
>
> (1) resume possession of the Property;
> (2) keep the Deposit and interest earned on its investment;
> (3) sue the Buyer for damages;
> (4) resell the Property.
>
> 9.4 **Resale**
>
> (1) The Seller may recover from the Buyer as liquidated damages:
>
> (a) any deficiency in price on a resale; and
> (b) its expenses connected with this contract, any repossession, any failed attempt to resell, and the resale;
>
> provided the resale settles within 2 years of termination of this contract.
>
> (2) Any profit on a resale belongs to the Seller.
>
> 9.5 **Seller's Damages**
>
> The Seller may claim damages for any loss it suffers as a result of the Buyer's default, including its legal costs on a solicitor and own client basis."

[63] The defendants resold the property for $610,000 less than the original contract sum.[143] In addition to the deposit, they are entitled to recover the contractual shortfall of $338,500 calculated as follows –

Purchase price under contract with defendants	$2,715,000
Less purchase price on resale	$2,105,000
	$ 610,000
Less deposit under contract with defendants	$ 271,500
	$ 338,500

141 Statement of claim para 7(c)(xvi).

142 Exhibits 13, 14, 14A.

143 Exhibit 30; transcript of the proceeding, p 212.

[64] The defendants are also entitled to recover the following expenses incurred –

Legal costs	$ 2,807.37[144]
Rates 19 April 2005[145] – 27 June 2005	$ 1,832.86[146]
Advertising on resale	$ 6,992.00[147]
Commission on resale	$41,679.00[148]
	$53,311.23

[65] There was no evidence whether commission had been paid on the first sale, but I infer that it had not. In the ordinary course, it would have been payable out of the deposit had the contract been completed. Of course, it was not completed, and the total commission was paid into Court. The plaintiff's counsel submitted that the defendants were not entitled to recover the commission on the resale, because it was an expense that would have been incurred in any event. This argument is superficially attractive, but it cannot prevail in the face of clause 9.4 which allows recovery of the expenses of both sales.

[66] Accordingly, there should be judgment for the defendants on their counterclaim for $663,311.23. In addition, I allow interest on that amount pursuant to s 47 of the *Supreme Court Act 1995* (Qld) at 9% per annum from 19 April 2005 until judgment.

Orders

[67] I will hear the parties on the form of the orders and on costs.

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144 Exhibit 36; transcript of the proceeding, pp 241- 242.
145 The date for completion under the original contract.
146 Exhibit 58; transcript of the proceeding, p 312.
147 Exhibit 31; transcript of the proceeding, p 212.
148 Exhibit 31; transcript of the proceeding, p 212.

ANNEXURE A

15/03/05

DISCLOSURE STATEMENT

Body Corporate and Community Management Act 1997 – Section 206

Body Corporate	Name of Body Corporate: Kevin Lodge Community Titles Scheme No: 3686 Lot No: 1-9 in BUP 11913	
Secretary of Body Corporate S206(2)(a)(i)	Name: Address: Telephone: Facsimile:	Not applicable
OR		
Body Corporate Manager S206(2)(a)(ii)	Name: Address: Telephone: Facsimile:	Not applicable
	NB. Body Corporate not being formally operated as all lots owned by Huo Yen Francis Chan and Amy Chan Kung Wai Ying The insurance policy has endorsed upon it the following notation: *"It is hereby declared that Policies 1-Building and common Area Contents, 2 – Legal liability, 6 – Office Bearers liability and 8 – Building Catastrophe insurance will exclude indemnity on all claims including resultant damage arising directly or indirectly whilst the building is vacant and undergoing renovations"*	
Annual Contributions S206(2)(b)	Administrative Fund:	Nil
	Sinking Fund:	Nil
If Seller is original Owner and the Contribution Lot entitlements for each Lot in the Scheme are not equal – Reason stated in the CMS for the Lot Entitlements not being equal S206(2)(c)		Not Applicable
Improvements on common property for which the Buyer to be responsible S206(2)(d)		Not Applicable
Body Corporate Assets Required to be Recorded on Body Corporate Register S206(2)(e)		Not Applicable

Regulation Module Applying to Scheme S206(2)(f)	[Tick the relevant box] If no box is ticked, the Standard Regulation Module is taken to be designated as the applicable Regulation Module.	☒ Standard Regulation Module ☐ Accommodation Regulation Module ☐ Commercial Regulation Module ☐ Small Schemes Regulation Module ☐ Other Regulation Module (specify)
Is there a:- • Committee for the Body Corporate; or • Body Corporate Manager engaged to perform the functions of the committee S206(2)(g)		No committee or manager. Body Corporate not being operated formally.
Information prescribed under applicable Regulation module S206(2)(h)		
Signing	(*signed by Mrs Chan*) …….. Seller/Person authorised by Seller	15-3-05 Date
Buyer's Acknowledgment	The Buyer acknowledges having received and read this statement from the Seller before entering into the contract. (*signed by L Menniti, S Menniti and P Menniti)* …….. Buyer	19-3-05 Date

ANNEXURE B

Contract

The REIQ Terms of Contract for Residential Lots in a Community Titles Scheme (Pages 1-6) First Edition Contain the Terms of this Contract

Seller's Disclosure

[**WARNING: The Seller is taken to have knowledge of significant Body Corporate matters that may affect the Buyer, where the Seller ought reasonably to be aware of those matters.**
Section 223(4) *Body Corporate and Community Management Act 1997]*

Latent or Patent Defects in Common Property or Body Corporate Assets
[Sections 223(2)(a) and 223(2)(b) *Body Corporate and Community Management Act 1997]*

[Annex details of disclosure made by the Seller (if any)]

The common property has the following defects:-

- balustrades and hand rails in need of repair and maintenance
- rusted steel columns at south west corner of building requiring repair
- stairways require maintenance and in some cases stairways require repair of structural damage
- cracked block work supporting concrete stairs requires repair
- concrete tarmac at rear of units requires repair

Actual or Contingent or Expected Liabilities of Body Corporate
[Sections 223(2)(c) and 223(2)(d) *Body Corporate and Community Management Act 1997]*

[Annex details of disclosure made by the Seller (if any)]

Costs associated with carrying out repairs of the items referred to in the list of "Latent or Patent Defects in Common Property or Body Corporate Assets" above.

Circumstances in Relation to Affairs of the Body Corporate
[Section 223(3) *Body Corporate and Community Management Act 1997]*

[Annex details of disclosure made by the Seller (if any)]

- Body Corporate not operated formally
- No Budgets set
- No levies issued
- No ongoing maintenance of Body Corporate Assets to the required standard
- No sinking fund analysis obtained
- No keeping of formal accounts
- Insurance policy has notation referred to in special condition 2.1(b) of this Contract
- No separate bank account for the Body Corporate

Exceptions to Statements in Clause 7.4(2)

[Annex details of disclosure made by the Seller (if any)]

ANNEXURE C

Annexure "A"
SPECIAL CONDITIONS

1. **"AS-IS WHERE-IS"**

1.1 Condition and Authority Requirements The Buyer accepts the Property:-

(a) as is, in its present condition, subject to all latent and patent defects and defects in quality;

(b) subject to all restrictions on use of the Property whether under any relevant planning scheme or otherwise;

(c) subject to the conditions of any consents or approvals issued by any competent authority in respect of the Property whether or not those conditions have been performed (or are due for performance)

2. **BODY CORPORATE**

21. The Buyer acknowledges that the Body Corporate:-

(a) has been conducted informally by the Seller; and

(b) insurance policy has endorsed upon it the following notation:-

"It is hereby declared that Policies 1- Building and common Area Contents, 2 - Legal liability, 6 - Office Bearers liability and 8 - Building Catastrophe insurance will exclude indemnity on all claims including resultant damage arising directly or indirectly whilst the building is vacant and undergoing renovations"

2.2 The Buyer will not:-

(a) raise any requisition or objection; or

(b) make any claim against the Seller; or

(c) terminate this contract,

for reasons arising from or relating to any inadequacies of the Body Corporate insurance or the failure of the Seller and/or the members of the Body Corporate to comply with legislation.

2.3 From the Contract Date, the Buyer releases the Seller, the Body Corporate and all members of the Body Corporate from any liability which may arise with respect to the Property and/or the common property of the Body Corporate by reason of the inadequacies of the insurance policy and/or the informal operation of the Body Corporate.

3. **Fax and Counterparts**

This Contract may be executed in any number of counterparts (including facsimile counterparts). Each counterpart is deemed an original and all the counterparts together constitute one instrument, which is deemed to be dated on the date the last party signs

(signed by Mrs Chan and Ms Winn as administrator for Professor Chan)
……
Seller

(Signed by L Menniti, S Menniti and P Menniti)
……
Buyer

ANNEXURE D

PLAINTIFF'S STATEMENT OF CLAIM
Paras 3-8.

3. At the said auction, Harcourts represented (the "representation"):-

   (a) Orally to the plaintiffs and on behalf of the defendants and with the defendants' knowledge that Harcourts were in possession of a valuation of the said property in the sum of $2,500,000.00, which was held by them at their office;

   (b) By placing a form 14 and information sheet under the *Body Corporate and Community Management Act* on public display at the auction site those matters pleaded in paragraph 4 hereof;

   (c) By placing a *Body Corporate and Community Management Act* s.205 [s.206] statement on public display at the auction site those matters pleaded in paragraph 4 thereof [sic];

4. The representation pleaded in paragraph 3 hereof was:-

   (a) A representation as that term is used in s.52 of the *Trade Practices Act*;

   (b) With respect to the price payable for land as that term is used and meant under s.53A of the *Trade Practices Act*;

   (c) A representation that the vendors had complied with the requirements of the *Body Corporate and Community Management Act* and in particular, s.206;

   (d) A representation that the implied warranties of s.223 of the *Body Corporate and Community Management Act* that there were no other latent or patent defects in the common property or body corporate assets other than the following defects:-

      (i) Balustrades and hand rails in need of repair and maintenance;

      (ii) Rusted sheet columns at south west corner of building requiring repair;

      (iii) Stairways require maintenance and in some cases stairways require repair of structural damage;

      (iv) Cracked block work supporting concrete stairs requires repair;

      (v) Concrete tarmac at rear of units requires repair;

   (e) A representation that apart from the costs associated with the said defects in subparagraph (d) hereinbefore there were no other actual or expected or contingent liabilities of the body corporate;

(f) An implied representation by omission that body corporate records were in existence and available for inspection despite the fact that the body corporate was run informally;

(g) An implied representation of the existence and availability of a functional community management statement for the scheme despite the fact that the body corporate was run informally;

(h) An implied representation that there were sufficient records, formal or informal, in existence to enable the plaintiffs to determine the state of affairs of the body corporate and/or the body corporate assets and/or the property itself;

(i) A representation that there was a body corporate in existence but was operated informally;

(j) An implied representation that the defects as disclosed were defects of a minor character in that they were not of a structural nature relating to the building itself and were capable of remedy through repair of the item disclosed rather than a structural repair of the building itself.

5. The representations pleaded in paragraph 4 hereof were false and were misleading and deceptive as those terms are used in the *Trade Practices Act* and/or were negligently made in that the defendants failed to exercise the duty of care of disclosure required by s.206 of the *Body Corporate and Community Management Act* in that:-

(a) There was no valuation of the property for $2,500,000.00 or at all;

(b) The agents represented to another buyer, one Vincent Fe[r]raro that there was a valuation on the land and held by Harcourts at $2,000,000.00;

(c) There was no valuation on the land at $2,000,000.00 or at all;

(d) The vendors had not complied with the provisions and practice required by s.206 of the *Body Corporate and Community Management Act* in that:-

Particulars

(i) There were no body corporate records, informal or otherwise;

(ii) There was no person listed as acting formally or informally for the management of the body corporate interests or property;

(iii) There were no annual or any contributions fixed to be payable by the lots within the scheme;

(iv) There was no identification of improvements or otherwise on the common property of the body corporate;

(v) There were no body corporate assets listed;

(vi) There was no identification of the relevant regulation module applying to the scheme;

(vii) There was no listing of any person or persons acting formally or informally for the body corporate or who performed the functions of the body corporate committee;

(viii) There was no s.206 *Body Corporate and Community Management Act* statement, formal or informal, available;

(ix) There were no details as to the insurance or insurance policy of the building apart from a notation allegedly endorsed thereon;

(x) There was no aggregate interest schedule, formal or informal, available or in existence;

(xi) There was no lot entitlement schedule, formal or informal, available or in existence;

(xii) There was no differentiation, formal or informal, between common and other property in the scheme;

(xiii) There was a body corporate in name only and for all intents and purposes did not operate as a body corporate, formally or informally or at all;

(xiv) The defects pleaded in paragraph 4(d)(iii).

(xv) There were documents provided to the defendants or their servants and agents Flower & Hart Lawyers which were not made available to prospective buyers which made the defendants aware from 23 April 2004 that the condition of the building posed a risk of injury or damage and required remedial action.

Particulars

a. Concrete broken under stair case;
b. Major eroding of block wall near units 7 and 8;
c. Rusty steel hand railings;
d. Cracked concrete surfaces:
e. Cracked concrete driveway

(xvi) On or about 23 April 2004 the insurers for the defendants, CHU Underwriting Agencies ("CHU") advised the defendants in writing, which documents were not made available to prospective buyers, that the defects should be attended to and a preventative maintenance regime be implemented.

(xvii) On 8 July 2004 CHU reserved its rights, which reservation was not disclosed to prospective buyers, to decline any Claim arising from any incident for property or personal damage arising out of the failure to have the defects remedied.

(xviii) On 15 February 2005 CHU, suspended all insurance coverage of the building, which suspension was not disclosed to prospective buyers.

(xix) On 18 July 2005 CHU requested that the defendants seek other insurers, which request was not disclosed to prospective buyers.

(xx) There were in existence documents relating to the Body Corporate of which the defendants were in possession by themselves and/or through their servants or agents Flower & Hart Lawyers which were not disclose to prospective buyers pursuant by s.206 of the *Body Corporate and Community Management Act*.

Particulars

a. Report of the Units: EFC Consulting Engineers dated 29 July 2004
b. Letter dated 23 April 2004 from CHU
c. Letter dated 8 July 2004 [to] CHU
d. Letter dated 15 February 2005 from CHU
e. Letter Peter Hanlon Builder dated 4 June 2004
f. Report on option for building dated 27 August 200[2]

(xxi) The cost of rectifying the defects of the building as hereinbefore pleaded was one million, two hundred thousand dollars ($1.2 Mill).

6. Further, the defendants were in breach of s.206 of the *Body Corporate and Community Management Act* by failing to comply with the provisions of that Act as particularised in paragraph 5(d) hereof.

7. Further, the defendants breached the implied warranties of s.223 of the *Body Corporate and Community Management Act* in that:-

(a) There were patent or latent defects in the property other than the said defects as disclosed by the vendor and hereinbefore pleaded;

(b) The body corporate records, formal or informal, did not disclose any defects other than the said defects disclosed and pleaded hereinbefore;

(c) There were circumstances in relation to the affairs of the body corporate that were likely to prejudice the plaintiffs in that:-

Particulars

(i) The body corporate had failed to comply with the provisions of the *Body Corporate and Community Management Act* as pleaded in paragraph 5(d) hereof such that the affairs of the body corporate were in disarray and/or the records were incomplete or non existent, such that there was no reasonable prospect of the plaintiffs determining whether the warranties in s.223(2)(b) of the *Body Corporate and Community Management Act* as to latent defects had been breached and/or there was no reasonable prospect of the plaintiffs determining any matters concerning the body corporate or the property;

(ii) An administrator had been appointed to the joint owners and/or the body corporate of the building;

(iii) There existed or there was likely to exist patent defects or latent defects:-

Particulars

(iv) Cracks appearing in the structural part of the building that were indicative of a serious structural defect of an unknown cause and extent affecting the strength of the building;

(v) New concrete had been laid in the driveways but there was no indication whether such repairs were cosmetic, structural or drainage related but was indicative of a subterranean or foundation failure of unknown cause and extent;

(vi) The disclosed structural damage in the stairways was, or could have been, indicative of a more extensive building, rather than stairway, structural failure of unknown cause and extent;

(vii) The disclosed cracked block work supporting the concrete stairs was, or could have been, indicative of a more extensive and underlying building, rather than stairway, structural defect of unknown cause;

(viii) The disclosed damaged concrete tarmac at the rear of the building was indicative of a more extensive subterranean or foundation failure of unknown cause and extent.

(ix) As of July 2004:

a. The balustrades needed significant remediation as a matter of priority by January 2005.
b. The four steel columns supporting the upper levels of the south western comers of the building were rusted to the extent of 50% and needed repair by January 2005.

c. Two of the rusted steel columns were seriously weakened and was potentially a very serious structural matter

(x) There were documents provided to the defendants or their servants and agents Flower & Hart Lawyers which were not made available to prospective buyers which made the defendants aware from 23 April 2004 that the condition of the building posed a risk of injury or damage and required a remedial action.

Particulars

a. Concrete broken under stair case;
b. Major eroding of block wall near units 7 and 8;
c. Rusty steel hand railings;
d. Cracked concrete surfaces;
e Cracked concrete driveway

(xi) On or about 23 April 2004 the insurers for the defendants, CHU Underwriting Agencies ("CHU") advised the defendants in writing, which documents were not made available to prospective buyers, that the defects should be attended to and a preventative maintenance regime be implemented.

(xii) On 8 July 2004 CHU reserved its rights, which reservation was not disclosed to prospective buyers, to decline any Claim arising from any incident for property or personal damage arising out of the failure to have the defects remediate [sic].

(xiii) On 15 February 2005 CHU, suspended all insurance coverage of the building, which suspension was not disclosed to prospective buyers.

(xiv) On 18 July 2005 CHU requested that the defendants seek other insurers, which request was not disclosed to prospective buyers.

(xv) There were in existence documents relating to the Body Corporate of which the defendants were in possession by themselves and/or through their servants or agents Flower & Hart Lawyers which were not disclose[d] to prospective buyers pursuant by s.206 of the *Body Corporate and Community Management Act*.

Particulars

a. Report of the Units: EFC Consulting Engineers dated 29 July 2004
b. Letter dated 23 April 2004 from CHU
c. Letter dated 8 July 2004 [to] CHU
d. Letter dated 15 February 2005 from CHU
e. Letter Peter Hanlon Builder dated 4 June 2004
f. Report on option for building dated 27 August 200[2]

(xvi) The cost of rectifying the defects of the building as hereinbefore pleaded was one million, two hundred thousand dollars ($1.2 Mill).

8. The plaintiffs, acting in reliance on the said representations:-

(a) Successfully bid at the auction for the said property in the sum of $2,715,000.00; and

(b) Thereafter entered into a written contract dated 19 March 2005 for the purchase of the property; and

(c) Paid to the defendants' agent the required deposit of $271,500.00.

ANNEXURE E

PARTICULARS OF STATEMENT OF CLAIM

Request

1. As to paragraph 3(a) provide full particulars of:

    (a) who on behalf of Harcourt's [sic] is said to have made the oral representation referred to in paragraph 3(a); and

    (b) the facts, matters and circumstances by which, and on whose behalf, it is alleged that that person had authority (and stating the nature of the alleged authority) to make the representation therein alleged.

Response

1. In relation to paragraph 1 of the Request and using the same paragraph numbering:

    (a) The person on behalf of Harcourts was one Phillip Murray;

    (b) Mr Murray as real estate agent for the defendants had, as a matter of law, authority to act on the defendants' behalf; and further:-

        (i) The representation was made by the real estate agent acting for and on behalf of the defendant and vendor of the property by placing the said forms and information on public display at the auction as alleged;

        (ii) Further, approximately one week prior to and on the morning of the auction, Mr Philip Murray made oral representations to the first plaintiff as pleaded in paragraph 3(a) of the statement of claim in addition to the following

            (1) That the premises was [sic] completely vacant because it was easier to allow purchasers to inspect the premises when they were vacant;

            (2) That the various landings and staircases were gated and locked so as to prevent vandalism of the unoccupied property;

            (3) That Mr Murray was of the view that the units could secure rentals in the vicinity of $180.00 - $200.00 per week which would defray the servicing costs generated from any loan and mortgage secured to acquire them.

Request

2. Further as to paragraph 3(a) of the Statement of Claim provide full particulars of the facts matters and circumstances in support of the allegation that the Defendants had full knowledge of the matters therein alleged, such particulars being required by Rule 151 of the *Uniform Civil Procedure Rules*.

Response

2. In relation to paragraph 2 of the request, the defendants had full knowledge of the representations pleaded in paragraph 3(a) of the statement of claim because Mr

Phillip Murray intimated in making the above representations that the valuation in possession of Harcourts was obtained by the Defendants for the purposes of the Auction.

Request

3. As to subparagraphs 4(f), (g), (h) and (j) of the Statement of Claim, provide full particulars of the facts matters and circumstances giving rise to the allegation that the representations therein pleaded would be implied.

Response

3. In relation to paragraph 3 of the request:-

(a) As to the implied representation alleged in paragraph 4(f) of the statement of claim, the plaintiff says that by failing to state in the form 14 and/or information sheet and/or the s.205 BCCM statement that there were no body corporate documents the defendant led the plaintiffs to believe that there were in existence body corporate documents used in the administration of the body corporate pursuant to the *Body Corporate and Community Management Act*, and that pursuant to that Act such documents would be available for inspection;

(b) As to the implied representation alleged in paragraph 4(g) of the statement of claim, the defendant, by failing to advise that there was no community management statement for the body corporate scheme implied that the defendant complied with *Body Corporate and Community Management Act* and that such a statement was in existence;

(c) As to the implied representation alleged in paragraph 4(h)(j) [sic] of the statement of claim, the defendant implied in posting the statements alleged in paragraph 3(b) and (i) of the statement of claim in accordance with the *Body Corporate and Community Management Act* implied that the body corporate operated in compliance with the *Body Corporate and Community Management Act* and that the defects disclosed were the only defects, patent or latent, that existed;

(d) Further, the implication arose from the:-

(i) Nature and the course of the dealing;

(ii) The obligations created by the *Body Corporate and Community Management Act*;

(iii) The custom and usage of the forms the effect of which creates the implications pleaded;

(iv) The *Body Corporate and Community Management Act* applying to the dealing and requiring the implication of those matters alleged to have been implied.

Request

4. As to paragraph 7(a) of the Statement of Claim provide full particulars of the patent or latent defects in the property alleged to exist, specifically any such defects other than those listed on page 12 of 12 of the contract.

Response

4. In relation to paragraph 4 of the request, the patent and latent defects in the property are those particularised in paragraph 7(c)(iii) of the statement of claim and further:

(a) The external stair flight to the right hand side of the building facing Toorak Road is under considerable stress;

(b) The footing on the right hand side has sunk;

(c) The block work screen wall has large cracks in the mortar;

(d) The landings to the building proper are noticeably tilted down;

(e) The landings to the building proper show cracks on the top surface where they join onto the main building;

(f) Signs of corrosion on the reinforcement where the stair stringers abut the landings;

(g) The stairs appear to be unsafe;

(h) The external stress [sic] flight on the opposite side of the building to those referred to in (a) above have similar signs of distress as described above but not as acute;

(i) The stair flight on the river side of the building is cracked and appears that the top landing may leak;

(j) The ingress of water as described in (i) above has put at risk the durability of the reinforcement necessary for maintaining the structural integrity of the landing;

(k) The SHS posts supporting the roof structure on the patio fronting Toorak Road are heavily rusted;

(l) The balustrades generally are heavily rusted;

(m) The posts in the external stair flights are heavily rusted;

(n) The soffit sheeting to the eaves and patio contains asbestos;

(o) The retaining walls beneath the building leak;

(p) The slab Soffits visible in the garage under croft area are stained indicative of possible corrosion of the reinforcement in the floor slab;

(q) The rear corners of the building show signs of brick growth as a result of the absence of expansion joints in the long walls allowing brick expansion of the corners to push forward on the slab;

(r) External driveways have moved differentially producing steps between the slabs;

(s) The brickwork has started to fret evident in the front right hand corner of the building which is evidence of rising damp;

(t) External retaining walls show cracks and movement in that section on the boundary with the higher block.

Request

5. As to paragraph 7(b) of the Statement of Claim, provide full particulars of the defects referred to therein as being those defects other than the defects disclosed on page 12 of 12 of the contract.

Response

5. In relation to paragraph 5 of the request, the plaintiff repeats and relies upon paragraph 4 hereof.

ANNEXURE F

***BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997* (Qld)**

206 Statement to be given by seller to buyer

(1) The seller (the ***seller***) of a lot included in a community titles scheme (including the original owner of scheme land, or a mortgagee exercising a power of sale of the lot) must give a person (the ***buyer***) who proposes to buy the lot, before the buyer enters into a contract (the ***contract***) to buy the lot, a statement (the ***statement***) complying with this subsections (2) to (4).

(2) The statement must —

(a) state the name, address and contact telephone number for—

(i) the secretary of the body corporate; or

(ii) if it is the duty of a body corporate manager to act for the body corporate for issuing body corporate information certificates—the body corporate manager; and

(b) state the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot; and

(c) if the seller is the original owner and the contribution schedule lot entitlements for each lot included in the scheme are not equal—state the reason stated in the community management statement for the lot entitlements not being equal; and

(d) identify improvements on common property for which the owner is responsible; and

(e) list the body corporate assets required to be recorded on a register the body corporate keeps; and

(f) identify the regulation module applying to the scheme; and

(g) state whether there is a committee for the body corporate or a body corporate manager is engaged to perform the functions of a committee; and

(h) include other information prescribed under the regulation module applying to the scheme.

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

(4) The statement must be substantially complete.

(5) The seller must attach to the contract, as a first or top sheet, an information sheet (the ***information sheet***) in the approved form.

(6) However, the seller is taken to comply with subsection (5) if—

(a) the lot the subject of the contract is residential property; and

(b) the information sheet is attached to the contract immediately beneath the warning statement that must be attached as the first or top sheet of the contract under the *Property Agents and Motor Dealers Act 2000*, section 366.

(7) 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.

(8) The seller does not fail to comply with subsection (1) merely because the statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.

(9) In this section—

residential property see *Property Agents and Motor Dealers Act 2000*, section 17.

207 Contents of contract

When the contract is entered into, its provisions—

(a) include the statement and all material accompanying the statement; but

(b) do not include the information sheet.

208 Buyer may rely on information

The buyer may rely on information in the statement as if the seller had warranted its accuracy.

209 Cancelling contract for inaccuracy of statement

(1) 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 statement is inaccurate, and the buyer would be materially prejudiced if compelled to complete the contract, given the

statement's inaccuracy, but only to the extent that the statement was inaccurate when the contract was entered into;

(ii) despite reasonable efforts by the buyer, the buyer has not been able to verify the information contained in the statement; and

(c) the cancellation is effected by written notice given to the seller—

(i) notifying the seller that the contract is cancelled; and

(ii) if the buyer relies on paragraph (b)(ii) for cancelling the contract—advising the seller of the efforts made by the buyer under the paragraph.

(2) The written notice mentioned in subsection (1)(c) must be given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the buyer's copy of the contract is received by the buyer or a person acting for the buyer.

(3) In a proceeding in which it is alleged that the buyer did not make reasonable efforts under subsection (1)(b)(ii), the onus is on the buyer to prove the buyer made reasonable efforts.

210 Cancellation under this part

If the buyer cancels the contract under this part, the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot the subject of the contract.

220 Definitions for pt 3[149]

In this part—

lot means—

(a) a lot included in a community titles scheme; or

(b) a lot (a ***proposed lot***) intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed.

221 Part's purpose

This part—

(a) establishes certain warranties that are implied in a contract for the sale of a lot; and

(b) establishes a right to cancel a contract for the sale of a lot.

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149 Note that Part 3 encompasses ss 220-224.

222 Effect of warranties and right to cancel

(1) The warranties and right to cancel established under this part have effect despite anything in the contract or in any other contract or arrangement.

(2) The right to cancel established under this part is in addition to, and does not limit, any other remedy available to the buyer of a lot for a breach of a warranty established under this part.

223 Implied warranties

(1) The warranties stated in this section are implied in a contract for the sale of a lot.

(2) The seller warrants that, as at the date of the contract—

(a) to the seller's knowledge, there are no latent or patent defects in the common property or body corporate assets, other than the following—

(i) defects arising through fair wear and tear;

(ii) defects disclosed in the contract; and

(b) the body corporate records do not disclose any defects to which the warranty in paragraph (a) applies; and

(c) to the seller's knowledge, there are no actual, contingent or expected liabilities of the body corporate that are not part of the body corporate's normal operating expenses, other than liabilities disclosed in the contract; and

(d) the body corporate records do not disclose any liabilities of the body corporate to which the warranty in paragraph (c) applies.

(3) The seller warrants that, as at the completion of the contract, to the seller's knowledge, there are no circumstances (other than circumstances disclosed in the contract) in relation to the affairs of the body corporate likely to materially prejudice the buyer.

Examples for subsection (3)—

1. An administrator has been appointed under the order of an adjudicator under the dispute resolution provisions.

2. The body corporate has failed to comply with the provisions of this Act to the extent that its affairs are in disarray, records are incomplete and there is no reasonable prospect of the buyer finding out whether the warranty mentioned in subsection 2(b) has been breached.

(4) For subsection (2), a seller is taken to have knowledge of a matter if the seller has actual knowledge of the matter or ought reasonably to have knowledge of the matter.

224 Cancellation for breach of warranty

(1) The buyer may, by written notice given to the seller, cancel the contract if there would be a breach of a warranty established under this part were the contract to be completed at the time it is in fact cancelled.

(2) A notice under subsection (1) must be given—

(a) if the lot is a proposed lot—not later than 3 days before the buyer is otherwise required to complete the contract;
or

(b) if paragraph (a) does not apply—within 14 days after the later of the following happen—

(i) the buyer's copy of the contract is received by the buyer or a person acting for the buyer;

(ii) another period agreed between the buyer and the seller ends.

(3) If the buyer cancels the contract, the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot the subject of the contract.