SUPREME COURT OF QUEENSLAND

CITATION:	*Mirvac Queensland Pty Ltd v Horne & Ors* [2009] QSC 269
PARTIES:	**MIRVAC QUEENSLAND PTY LTD** **ACN 060 411 207** (plaintiff) **v** **JONATHAN AARON HORNE, LINDY ANN EVANS AS TRUSTEE FOR BLEEP ENERGY TRUST AND NICHOLAS ANDREW WOLFF** (defendants)
FILE NO:	5500 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2009
JUDGE:	Applegarth J
ORDER:	**1. Application dismissed.** **2. The defendants pay the plaintiff's costs of and incidental to the application to be assessed on a standard basis.** **3. The plaintiff is directed to amend its reply and answer within seven days so as to specifically plead to subparagraph 4(e) of the defence.**
CATCHWORDS:	CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – MATTERS ARISING BETWEEN CONTRACT AND CONVEYANCE – OTHER CASES – where a disclosure statement given to pursuant to s 21 of the *Land Sales Act* 1984 (Qld) and s 213 of the *Body Corporate and Community Management Act* 1997 (Qld) for a proposed lot included a plan with a floor area of 177m^2 – where the contract provided for the size of the lot to be up to 5% different from that shown in the disclosure statement – where a further statement given pursuant to s 214 of the *Body Corporate and Community Management Act* 1997 included a different plan with a floor area of 176m^2 – whether the seller was required to give a rectification statement under s 22 of the *Land Sales Act* to the buyer PROCEDURE – SUPREME COURT PROCEDURE – SUMMARY JUDGMENT – QUEENSLAND – POWER

UNDER RULES OF COURT – SUMMARY JUDGMENT – where defendants claim for summary judgment on the plaintiff's claim and their counterclaim – whether the plaintiff has no reasonable prospect for success in its claim

Acts Interpretation Act 1954 (Qld), s 14A(1)
Body Corporate and Community Management Act 1997 (Qld), s 213, s 214
Land Sales Act 1984 (Qld), s 21, s 22
Uniform Civil Procedure Rules 1999 (Qld), r 292, r 293

Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd [2009] QCA 135, considered/applied
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, applied
DTR Nominees v Motor Homes Pty Ltd (1978) 138 CLR 423, cited
Hudpac Corporation Pty Ltd v Voros Instruments Pty Ltd [2009] QSC 275, cited
Lee v Surfers Paradise Beach Resort Pty Ltd [2008] 2 Qd R 249, cited
Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2003] 1 Qd R 259, cited
Savoy Investments (Qld) Pty Ltd v Global Nominees Pty Ltd [2008] QCA 282, cited
Sunbird Plaza Pty Ltd v Boheto Pty Ltd [1983] 1 Qd R 248, cited
Theseus Exploration NL v Foyster (1972) 126 CLR 507, cited

COUNSEL: J W Peden for the applicant
M D Martin for the respondent

SOLICITORS: Nicholsons Solicitors for the applicant
ClarkeKann for the respondent

[1] The defendants apply for summary judgment on the plaintiff's claim for specific performance of a building unit contract, and for summary judgment on their counterclaim that they have validly terminated the contract because of an anticipatory breach. One matter in dispute between the parties is whether s 22 of the *Land Sales Act* 1984 (Qld) ("the *LSA*") required the plaintiff to give a "rectification statement" to the defendants after the proposed lot became registered because, as the defendants allege, a disclosure statement which identified the lot to be purchased contained information that later became inaccurate in respect of the floor area of the proposed lot. Another matter in dispute is whether s 22 of the *LSA* required the plaintiff to give a rectification statement because further statements provided pursuant to s 214 of the *Body Corporate and Community Management Act* 1997 (Qld) ("the *BCCM Act*") acknowledged that the information contained in the original disclosure statement given pursuant to s 213 of the *BCCM Act* was or had become inaccurate. That matter involves a question of statutory interpretation about the extent of the duty in s 22 of the *LSA* in circumstances in which an original disclosure document is made pursuant to s 213 of the *BCCM Act* and s 21 of the *LSA*.

[2] The issues to be determined in applying the principles governing applications for summary judgment are:

(a) whether the plaintiff has no real prospect of succeeding on its claim, and there is no need for a trial of the claim because of a failure to provide a "rectification statement" pursuant to s 22 of the *LSA*; and

(b) whether the defendants are entitled on their counterclaim to a declaration that they have validly terminated the contract and to the return of their deposit because the plaintiff has no real prospect of successfully defending that counterclaim and there is no need for a trial of it because the plaintiff was not entitled to insist on settlement on the date that it fixed for settlement by reason of non-compliance with s 22 of the *LSA*, and that the plaintiff thereby committed an anticipatory breach of contract, entitling the defendants to terminate the contract.

Facts

[3] The defendants agreed to purchase a residential unit in an apartment block in a staged residential development known as Tennyson Reach. Prior to the defendants' entry into the contract on 27 June 2007, the plaintiff gave to the defendants a "Disclosure Statement" pursuant to the *BCCM Act* and the *LSA*, along with other documents including a sale contract, in respect of lot number 3209. A disclosure statement was required by s 213 of the *BCCM Act*, and a statement was required by s 21 of the *LSA* because the unit, which had yet to be constructed, was a proposed lot that was to be included as part of a community title scheme for the Tennyson Reach development. There was one disclosure document because, as contemplated by s 21(5) of the *LSA*, the statement in writing required by s 21(1) of the *LSA* was incorporated into the statement required by s 213 of the *BCCM Act*. The document was provided to the defendants on 24 June 2007. It consists of 196 pages, including a substantial volume of plans in Chapter 4. Clause 1.6 of Chapter 1 (Information Disclosure) states:

> "1.6 **Plans**
>
> Chapter 4 of this Disclosure Statement incorporates copies of the initial plan of subdivision SP 195275 and draft Building Format Plan SP 195376 for Stage 1 identifying the Lot as described in item 3 of this Chapter and *subject to the provisions of the Contract*." (emphasis added)

[4] The plans in the document included a floor plan for Level G and Lot 3209 was depicted on this plan by a mark around its perimeter. The plan showed it to be one of six apartments on Level G in Tower A. The plan depicted Lot 3209 having a floor area of 177 m^2 including a balcony of 15 m^2. The provisions of the contract include clause 6.3 which relevantly provides:

> "6.3 The Seller may make the following changes to the Lot:-
>
> (a) the size of the Lot or any part of the Lot may be up to 5% different (more or less) from that shown in the Disclosure Statement..."

The purchase price was $1,458,400, and the defendants paid a deposit in two parts totalling $145,840. Settlement was to occur no earlier than 14 days after the

plaintiff gave notice to the defendants that "the scheme" as that term is defined in the contract had been established.

[5] Further statements were provided by the plaintiff to the defendants, each of them expressed to be given pursuant to s 214 of the *BCCM Act*. The first "Further Statement" was dated 9 November 2007. A second further statement was dated 27 March 2009. Further statements were dated 16 April and 27 April 2009. The second further statement dated 27 March 2009 detailed various changes to the proposed community title scheme including a proposal to include a new lot in the scheme upon its establishment. The new lot was separated from the Stage 1 scheme land and its inclusion did not result in any changes to the lot entitlements of any residential unit lots. The second further statement also included as an annexure a copy of survey plans that had been submitted to the Brisbane City Council for sealing. Those plans included a plan for Level G indicating that the floor area of Lot 3209 was 176 m^2 including a balcony of 14 m^2.

[6] The proposed lot was registered on 28 April 2009. The solicitors for the plaintiff nominated 12 May 2009 as the date for settlement, and sought to deliver to the defendants a registrable instrument of transfer in respect of the lot.

[7] By letter dated 11 May 2009 the solicitors for the defendant noted that Lot 3209 as indicated on the registered plan was different to the proposed Lot 3209 as detailed in the plan contained in the disclosure documents provided to the defendants prior to contract. They asserted that in accordance with s 22 of the *LSA* the particulars of the statement given to the defendants in accordance with s 21 of the *LSA* had become inaccurate and requested a further statement in accordance with s 22 of the *LSA*. On 12 May 2009 the solicitors for the plaintiff wrote in respect of the scheduled settlement, but did not address the matters raised in the letter of 11 May 2009, possibly because its author had yet to receive or read the letter of 11 May 2009. In any event, on 12 May 2009 the defendants' solicitors wrote two further letters restating the defendants' objections to settling and requesting that the plaintiff comply with its obligations under s 22 of the *LSA*. They indicated that the defendants did not intend to tender at settlement that day. They suggested and requested a 21 day extension of the settlement date to enable the parties to consider their positions, with time to remain of the essence. On 13 May 2009 the plaintiff's solicitors addressed the matter raised in relation to alleged non-compliance with s 22 of the *LSA* and two other unrelated matters that were raised by the defendants' solicitors. The plaintiff's solicitors contended that the defendants' solicitors appeared to be confusing the disclosures given pursuant to s 213 of the *BCCM Act* and those required by s 21 of the *LSA*. The plaintiff did not accept that there had been any non-disclosure of the matters required by s 21 of the *LSA* and accordingly rejected the defendants' contention that a further statement was required to be delivered under s 22 of the *LSA*.

[8] On 25 May 2009 the plaintiff commenced a proceeding for specific performance of the contract and damages in lieu of or in addition to specific performance. The defence admitted most of the allegations contained in the statement of claim, but denied that the defendants were in breach of contract in failing to complete it on the date nominated for settlement, and denied the allegation that the plaintiff was ready, willing and able to complete the contract on that date. Paragraph 4 of the defence pleaded certain facts which are not in issue concerning the provision of the original disclosure statement on or about 21 June 2007, the further disclosure statements and

the fact that the original statement and the second further statement included information about the floor area of the proposed lot. Paragraph 4(e) of the defence pleaded that the original statement contained information that "subsequently to the time it was given became inaccurate, in that the Proposed Lot as disclosed in the plaintiff's Original Statement would have a floor area of 177 m^2 (including a balcony of 15 m^2); whereas the Registered Lot had a floor area of 176 m^2". The defence pleaded that, in the premises, pursuant to s 22(1) of the *LSA* the plaintiff was required to give the defendants a rectification statement pursuant to s 22(1) of the *LSA* as soon as reasonably practicable after the proposed lot had become registered on 28 April 2009. The reply and answer does not specifically plead to paragraph 4(e) of the defence, however, it denied that the plaintiff was required to provide a statement of particulars as required by s 22(1) of the *LSA* and pleaded that the identity of the lot did not alter from the time of disclosure to the time of registration of the lot.

[9] The reply and answer also pleaded that:

(a) the provision of the further statements as pleaded in the defence rectified any inaccuracy in the original disclosure statement so that:

(i) upon registration of the lot there were no inaccuracies in the Disclosure Statement; and

(ii) there was no requirement to provide a s 22(1) *LSA* statement of particulars.

(b) even if a notice pursuant to s 22 of the *LSA* was required (which was denied) the defendants had not been materially prejudiced within the meaning of s 25 of the *LSA*.

The plaintiff did not rely upon these additional matters in opposing the defendants' application for summary judgment.

[10] By their counterclaim the defendants relied upon the matters contained in their defence and upon the communication by the plaintiff's solicitors of an election to affirm the contract and pursue the remedy of specific performance. The defendants pleaded that the plaintiff's "failure and/or refusal to provide the Rectification Statement when requested to do so" and calling for settlement without having complied with s 22 of the *LSA* constituted an anticipatory breach of the contract by the plaintiff entitling the defendants to terminate it. By the delivery of their pleading, the defendants purported to accept the anticipatory breach and terminate the contract. In its answer to the counterclaim the plaintiff denied that the defendants had any right to terminate the contract, denied that the contract had been validly terminated and pleaded that pursuant to clause 6.3 of the contract the plaintiff was entitled to vary the size of the lot by up to five per cent.

The statutory regime

[11] The *BCCM Act* and the *LSA* provide for the disclosure of information by a seller to a buyer of a lot that is to be created in a community titles scheme. Each Act provides for certain disclosures to be made prior to entry into the contract. Section 213 of the *BCCM Act* provides for the disclosure of various matters in relation to the body corporate and the community titles scheme. Section 21(1) of the *LSA* provides for a statement in writing to be given that:

"(a) clearly identifies the lot to be purchased; and

(b) states the names and addresses of the prospective vendor and the prospective purchaser; and

(c) clearly states whether the prospective vendor or the prospective vendor's agent (whether personally or by any employee) has made or offered to the prospective purchaser or the prospective purchaser's agent any representation, promise or term with respect to the provision to the purchaser of a certificate of title that relates to the lot in question only; and

(d) if any representation, promise or term, such as is referred to in paragraph (c) has been made or offered, clearly states the particulars thereof; and

(e) states the date on which it is signed."

If a prospective seller of a proposed lot is required to give a statement under s 21(1) of the *LSA*, also is required under s 213 of the *BCCM Act* to give a first statement relating to the proposed lot, and gives the first statement under that section that incorporates in the first statement the matters prescribed by ss 21(1)(a) to (d) of the *LSA*, then there is sufficient compliance with s 21(1) of the *LSA*.[1]

[12] Each Act provides for further statements to be provided. Section 22(1) of the *LSA* requires a rectification statement to be given as soon as is reasonably practicable *after* the proposed lot has become a registered lot. It is necessary to set out s 22:

"**22 Rectification of statement under s 21**

(1) If a statement in writing of particulars referred to in section 21(1) given in accordance with, or pursuant to section 21(4) or (6) in sufficient compliance with, section 21(1) -

(a) is not accurate at the time it is given; or

(b) contains information that subsequently to the time it is given becomes inaccurate in any respect;

it is the duty of the vendor and the vendor's agent to give to the purchaser or the purchaser's agent a statement in writing signed by the vendor or the vendor's agent of particulars required to be included in a statement given for the purposes of section 21(1) as soon as is reasonably practicable after the proposed lot has become a registered lot.

(2) Subsection (1) applies whether the statement in writing is given in due time in accordance with section 21 or at a later time.

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1 *LSA* ss 21(5) and (6).

(3) It shall be sufficient compliance with subsection (1) if 1 of them, the vendor or the vendor's agent, discharges the duty thereby imposed, whereupon the other of them shall be freed of the duty in respect of giving the rectification notice that has been given.

(4) Where a vendor or a vendor's agent is required under subsection (1) to give to the purchaser or the purchaser's agent a statement of particulars then -

(a) the vendor or the vendor's agent shall not deliver to the purchaser or the purchaser's agent a registrable instrument of transfer in respect of the lot the subject of the purchase in question; and

(b) the purchaser shall not be required to pay the outstanding purchase moneys;

until the expiration of a period of 30 days after the receipt by the purchaser or the purchaser's agent of a copy of the statement of particulars in accordance with subsection (1) or until the time stipulated by the instrument made in respect of the sale and purchase for the payment of those moneys (whichever period is the later to expire) unless it is otherwise agreed in writing between the vendor or the vendor's agent and the purchaser or the purchaser's agent, after receipt by the purchaser or the purchaser's agent of a copy of the statement of particulars in accordance with subsection (1)."

[13] By comparison, s 214 of the *BCCM Act* applies if the contract has not been settled and:

"(a) the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into; or

(b) the disclosure statement would not be accurate if now given as a disclosure statement."[2]

In such a case the seller must, within 14 days (or a longer period agreed between the buyer and the seller) after subsection 214(1) starts to apply, give the buyer a further statement rectifying the inaccuracies in the disclosure statement.[3]

[14] Section 214(4) provides that the buyer may cancel the contract if:

"(a) it has not already been settled; and

(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and

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2 *BCCM Act* s 214(1).

3 *BCCM* Act s 214(2).

(c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement."[4]

Subsections 214(1) to (4) continue to apply after the first statement is given, on the basis that the disclosure is taken to be constituted by the disclosure statement and any further statement, and the disclosure statement date is taken to be the most recent further statement date.[5]

[15] One significant difference between the further disclosure regime under s 22 of the *LSA* and the further disclosure regime under s 214 of the *BCCM Act* relates to the timing of the further statement. As can be seen from s 22(1) of the *LSA*, the rectification statement under that Act must be given as soon as is reasonably practicable *after* the proposed lot has become a registered lot. Under s 214(2) of the *BCCM Act* the seller must give the buyer a further statement within 14 days (or a longer agreed period) after:

(a) the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into or;

(b) the disclosure would not be accurate if then given as a disclosure statement.

Accordingly, the obligation to give a further statement under s 214 of the *BCCM Act* may arise prior to the obligation to give a rectification statement under s 22(1) of the LSA. The obligation in s 214 of the *BCCM Act* does not cease once a scheme is established under the Act.[6] It continues until settlement.

[16] Another significant difference between s 22 of the *LSA* and s 214 of the *BCCM Act* is that s 22(4) of the *LSA* effectively extends the date for settlement until the expiry of a period of 30 days after the receipt of the rectification statement. This differs from s 214 of the *BCCM Act* where there is "no statutory moratorium".[7] Each Act confers certain rights to avoid or cancel the contract if the buyer would be materially prejudiced by reason of the inaccuracy of a particular in the first statement or the extent to which the disclosure statement was, or has become, inaccurate.[8]

[17] In *Hudpac Corporation Pty Ltd v Voros Instruments Pty Ltd*[9] I observed:

> "It is clear from the legislation that so far as the original disclosure statement is concerned that there is a legislative intent to ensure that there is not unnecessary duplication or repetition of the original information. However, the Act, in its terms, does not similarly state that a notice given under s 214 of the BCCM Act will operate to relieve a party from complying with the obligation in s 22(1) of the LSA. Such relief from the operation of section 22(1) cannot, in my

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4 *BCCM Act* s 214(4).
5 *BCCM Act* s 214(5).
6 *Lee v Surfers Paradise Beach Resort Pty Ltd* [2008] 2 Qd R 249 at 265-266 [25]-[28]; at 267 [37].
7 Ibid at 271 [58].
8 *LSA* s 25; *BCCM Act* s 214(4).
9 [2009] QSC 275. Ex tempore judgment delivered on 27 April 2009.

> opinion, be implied into the Act or carried forward by reason of the provisions in relation to the original statement.
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> The principal reason that I reach that conclusion is that s 22(1) of the LSA and s 214 of the BCCM Act confer different rights in different circumstances. The obligation to give a statement, which I will refer to as a rectification statement, under each Act may arise in some cases at different times. The most important point of distinction is that s 22(4) gives a purchaser, in the circumstances in which a notice under s 22(1) is received, a period of 30 days after receipt of the relevant document to pay. That section does not give a right to avoid.
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> However, the period of 30 days, amongst other things, will permit such a purchaser to check the title as registered and to, amongst other things, consider whether the changes are such as to give them a right to avoid the contract. By contrast, s 214 of the BCCM Act does not give that simple extension of time. It provides a buyer with an opportunity to cancel the contract if, amongst other things, the buyer 'would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate.'
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> In some cases the contents of the rectification statement will be relatively innocuous and not give a party such a right to avoid. In other cases, it may. In other cases, it may be a matter of uncertainty.
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> It might have been possible for the legislation to be better aligned so as to avoid the unnecessary provision of rectification statements pursuant to both s 22 of the LSA and s 214 of the BCCM Act. However s 22 gives important rights to a purchaser. One right is to consider their position. It is a right which is conferred by statute, being a statute that has the purpose of protecting the interests of consumers in relation to property development and I do not consider that, in those circumstances, the Act can be construed so as to make it apply on a basis identical to that provided in s 214 of the BCCM. In essence, s 22(4) of the LSA gives important rights conferred by statute to an extension of time to settle."

Summary judgment principles

[18] *UCPR* 292 and *UCPR* 293 govern summary judgment for the plaintiff and summary judgment for the defendant in near-identical terms. The discretion to give summary judgment for a plaintiff only arises if the court is satisfied that:

(a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and

(b) there is no need for a trial of the claim or the part of the claim.

The discretion to give summary judgment for the defendant against the plaintiff only arises if the Court is satisfied that:

(a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and

(b) there is no need for a trial of the claim or the part of the claim.

The term "no real prospects" in *UCPR* 292 and *UCPR* 293 has been the subject of extensive judicial consideration, including by the Court of Appeal in *Deputy Commissioner of Taxation v Salcedo*[10] and more recently in *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd*.[11] In *Bolton*[12] Holmes JA remained of the view that was expressed by her Honour in *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)*:

> "The more appropriate inquiry is in terms of the Rule itself: that is whether there exists a real, as opposed to a fanciful, prospect of success. However, it remains, without doubt, the case that:
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> > 'great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case'."[13]

Daubney J reached the same conclusion, and stated that the question is not whether a party's case is "hopeless" or "bound to fail".[14] Their Honours did not agree with the reasons of Chesterman JA that a case which has no real prospect of succeeding is one which is "hopeless" or "bound to fail".[15]

[19] The rules require a judge to be satisfied, amongst other things, that there is "no need for a trial". Each member of the Court in *Bolton* emphasised the need for caution in granting applications for summary judgment. Holmes JA observed that summary judgment cannot be granted without the confidence that "there is no need for a trial of the claim or the part of the claim".[16] Chesterman JA stated that it is only where a trial can be seen to be pointless that judgment should be entered summarily.[17] Daubney J also remarked upon "the necessity for a judge to exercise great care, and proceed with appropriate caution, having regard to the patent seriousness of a decision to summarily terminate a proceeding by effectively denying a party the opportunity to present its case at a trial 'in the ordinary way and after taking advantage of the usual interlocutory processes'".[18]

[20] The application of these principles may arise in a case in which the facts are not in dispute and the respective rights of the parties turn upon a question of law. Under the former rules governing summary judgment it was open to a judge to take the view that the extent and complexity of the matters of law and of argument thereon made it appropriate to decline to dispose of them "in chambers".[19] This view appears in *Theseus Exploration NL v Foyster*.[20] The Chamber Judge in that case dismissed the application for summary judgment without giving reasons. The High Court granted the plaintiff leave to appeal and heard full argument upon the legal

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10 [2005] 2 Qd R 232.
11 [2009] QCA 135.
12 Ibid at [2].
13 [2003] 1 Qd R 259 at 264-5 (with whom Davies JA and Mullins J agreed) (citations omitted).
14 [2009] QCA 135 at [66]-[74].
15 Ibid at [22]-[35].
16 Ibid at [2].
17 Ibid at [23] and see [24].
18 Ibid at [78].
19 As the Applications List was then known.
20 (1972) 126 CLR 507.

issues in dispute. Barwick CJ, having reached "a clear conclusion as to the lack of validity in the respondent's submission that the appellant was unable to recover the amount claimed", stated that he was not prepared to hold that the judge erred in the course he took. Equally however, the Chamber Judge would not have been in error if he had granted the appellant's application for summary judgment. Barwick CJ stated:

> "The case was one which, in my opinion, could have been disposed of upon legal argument upon the application. But it was for the judge to be satisfied that there was a matter to be tried. Whilst there were no facts to be decided, it was open to the judge, in my opinion, to take the view that the extent and complexity of the matters of law and of argument thereon warranted a hearing."[21]

Gibbs J adopted a similar view and reviewed earlier authority which recognised the existence of some discretion by a judge to whom application for summary judgment is made in deciding whether the question of law raised is so difficult that it ought not to be decided summarily. The case involved questions that were "serious and disputable and, assuming that the learned primary judge had a discretion, it was entirely proper for him to decline to dispose of them in chambers".[22] Logically, the appeal should have been dismissed, however, the High Court having heard full argument on the questions upon which the fate of the action depended, each member of the court reached the conclusion that the defence raised by the respondent must fail. Stephen J[23] observed that while it may have been correct, on the original chamber application and after the nature of the respondent's intended defence was outlined, to have refused the application for summary judgment, it was contrary to both good sense and to justice after full argument in the High Court to permit the action to go to trial, followed perhaps by an appeal.

[21] In *Sunbird Plaza Pty Ltd v Boheto Pty Ltd*[24] McPherson J (with whom Campbell CJ and Matthews J agreed) stated:

> "Difficult questions of law frequently arise in matters before the judge sitting in Supreme Court Chambers. There is authority for saying that in such instances the judge has a discretion which he may properly exercise by declining to determine such matters of law in Chambers for reasons such as pressure of work, the complexity of the issues involved, or the quality (or lack of it) of the submissions presented by counsel. But to require that a judge should invariably refrain from determining what are said to be difficult questions of law in Chambers, even though he may be ready, willing and able to undertake the task, is to deprive him of the discretion which the Rules unquestionably confer upon him in relation to such matters."

[22] In *Bolton*[25] Chesterman JA observed that where the facts are settled and the respective rights of the parties turn upon questions of law, *UCPR* 292 would require the Court to give judgment in advance of trial, even where the point is difficult. This conclusion was said to involve a departure from the practice under the former rules.

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21 Ibid at 514.
22 Ibid at 515.
23 Ibid at 523.
24 [1983] 1 Qd R 248 at 255.
25 (supra) at [26].

[23] I do not need to venture an opinion as to whether *UCPR* 292 and *UCPR* 293 have necessitated a departure from the practice under the former Rules concerning the discretion to determine, or to decline to determine, difficult questions of law on an application for summary judgment. The matter was not argued before me. I was prepared to hear the application for summary judgment and reserve judgment because the applicant/defendants contended that the facts were not in dispute and the issue turned on a matter of law concerning the application of s 22(4) of the *LSA*. It should not be assumed, however, that an application for summary judgment is the appropriate procedure to determine questions of law in advance of trial. Substantial time, legal costs and public resources can be occupied on applications for summary judgment only to reach the point in which the judge reaches the conclusion that the question of law is a complex one which cannot be conveniently heard and determined in the Applications List, or that what is presented as a question of law depends upon a contentious determination of factual issues that makes it inappropriate for summary judgment. If the application is likely to occupy more than two hours then generally it is an inappropriate matter for the Applications List and consideration should be given to the question of law being determined pursuant to *UCPR* 483. Even in cases in which a judge is able to embark upon difficult questions of law in the Applications List, consideration is required as to whether the determination of those questions, will facilitate "the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".[26] If the result is the entry of summary judgment then an appeal is a distinct possibility. The Court of Appeal may resolve the question of law but, in some cases, it may conclude that the matter was not a suitable one for summary judgment, for instance because what originally appeared to be a pure question of law in fact involved the resolution of contentious factual issues, with the result that the summary judgment is set aside. In such an event there will have been delay and unnecessary costs, without resolution of the question of law.

[24] In this matter the question of law concerning the proper interpretation of s 22(1) of the *LSA* was an appropriate one for determination in the Applications List.

Defendants' application for summary judgment on the plaintiff's claim

[25] On the application brought under *UCPR* 293 there is no dispute that a rectification statement has not been given to the defendants pursuant to s 22 of the *LSA*. The issue is whether s 22 of the *LSA* required the plaintiff to give a rectification statement because the original Disclosure Statement had become inaccurate. The defendants' submissions were in three parts. The first concerned the meaning of s 22(1). It involved the argument that s 22(1) is engaged if the disclosure statement contains information that "subsequently to the time it is given becomes inaccurate in any respect", even in respect of a matter that was not required to be included in the statement given pursuant to s 21 of the *LSA*. The essential argument is if the seller resorts to a single Disclosure Statement and chooses to include in that document information that subsequently becomes inaccurate, then s 22 is engaged.

[26] The second aspect of the defendants' case for summary judgment is that the further statements given to the defendants each state that the earlier statement given pursuant to s 213 of the *BCCM Act* "is or has become inaccurate".[27] This is said to involve admissions by the plaintiff that the original statement (which was also given

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[26] *UCPR* 5.

[27] See the affidavit of Mr Van de Beld, exhibit bundle at pages 311, 490 and 495.

in compliance with s 21) has become inaccurate, thereby necessitating a rectification statement under s 22. An associated submission is that the plaintiff's reply created a deemed admission that the information in the original statement became inaccurate because the size of the lot changed from 177 m^2 to 176 m^2.

[27] The third aspect of the defendants' argument is that, in any event, the original statement became inaccurate because the floor area of the lot was used to identify it, and this area changed. I shall deal with each aspect in turn.

[28] The defendants contend that any information in the Disclosure Statement that becomes inaccurate in any respect triggers the operation of s 22 of the *LSA*. They place reliance on the words in s 22(1)(b) "contains information that subsequently to the time it is given becomes inaccurate in any respect", and submit that s 22 focuses on inaccuracies in the disclosure statement. The result is that information which the seller chooses to include in a Disclosure Statement, whether in compliance with its obligations under s 21 of the *LSA*, its obligations under s 213 of the *BCCM* Act or otherwise[28] is covered by the section. I do not accept the defendants' interpretation of s 22. It is not supported by the words of the section or its purpose. Section 22(1) refers to "a statement in writing of particulars referred to in section 21(1)". It is this statement in writing of the particulars referred to in s 21(1) (namely the statement in so far as it gives particulars that clearly identify the lot to be purchased, states the names and addresses of the prospective vendor and the prospective purchasers etc) to which reference must be had for the purpose of s 22, and not the whole of the document in which these particulars are contained. For s 22 to apply the statement in writing of the s 21(1) particulars must be inaccurate at the time the statement of particulars was given or contain information that subsequently becomes inaccurate. Inaccurate information in the document that relates to other matters may be the subject of a separate obligation under s 214 of the *BCCM Act* or other consequences, however, it does not trigger s 22. The language of s 22 indicates that it is concerned with inaccuracies in the statement in writing of the particulars referred to in s 21(1), not extraneous matters.

[29] The defendants' contention about the scope of s 22 of the *LSA* would have unreasonable and even absurd consequences. For instance, a minor inaccuracy, such as an error in respect of a matter that had nothing to do with the information required by s 21(1) (such as a typographical error in the postcode of the address of a surveyor whose details appear on a plan) would trigger s 22, and if no rectification statement was given, result in a delay in settlement by at least 30 days by virtue of s 22(4). It is not a sufficient response to these unreasonable and absurd consequences to contend that a seller who chooses to include extraneous information in a document that also discloses the particulars referred to in s 21(1), must face the consequences if the extraneous information proves to be inaccurate. An interpretation of s 22 that will best achieve the purpose of the *LSA* is to be preferred to any other interpretation.[29] The objects of the Act are:

> "(a) to facilitate property development in Queensland; and
>
> (b) to protect the interests of consumers in relation to property development; and

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[28] I raised during argument the hypothetical example of a statement that accurately stated in June 2007 "The Prime Minister is Mr Howard" being information that subsequently became inaccurate.

[29] *Acts Interpretation Act* 1954 (Qld), s 14A(1).

> (c) to ensure that proposed allotments and proposed lots are clearly identified; and
>
> (d) to achieve the objects mentioned in paragraphs (a) to (c) without imposing procedural obligations on local governments in addition to their obligations under the *Integrated Planning Act 1997*."[30]

Although a wide view of s 22 might protect the interests of consumers in relation to property development by requiring the provision of a rectification statement in respect of information in any part of a disclosure statement that contains information that is inaccurate at the time the statement is given or which contains information that subsequently becomes inaccurate in any respect, the purpose of the section is more limited. It is the rectification of a statement of particulars given under s 21. A broad interpretation of s 22 is not necessary to protect the interests of consumers in relation to property development, since other consumer protection legislation exists to protect consumers from statements that are misleading or deceptive or likely to mislead or deceive. The wide interpretation of s 22 contended for by the defendants might frustrate the timely settlement of contracts and generate substantial costs through the provision of rectification statements that are not necessary to correct a statement of the particulars referred to in s 21(1). Such an interpretation is inconsistent with facilitating property development in Queensland and is not necessary to protect the interests of consumers in relation to property development or to ensure that proposed lots are clearly identified.

[30] I conclude that the information at which s 22(1)(b) is directed is information that is contained in the "statement in writing of particulars referred to in section 21(1)", and not in other parts of a document which do not include these particulars but which, for instance, disclose other matters required by s 213 of the *BCCM Act* or extraneous matters which the seller is not obliged to disclose under either s 21 of the *LSA* or s 213 of the *BCCM Act*.

[31] The second aspect of the defendants' application for summary judgment points to the fact that the further statements given by the plaintiff pursuant to s 214 of the *BCCM* Act state that "information contained in the First Disclosure Statement given to the Buyer pursuant to s 213 of the *BCCM Act* (and as rectified by Further Statements given pursuant to s 214 of the *BCCM Act*) is or has become inaccurate".[31] This is relied upon as an admission that the original Disclosure Statement (which also operated as a statement for the purpose of s 21 of the *LSA*) contains inaccurate information and thereby triggers s 22. However these further statements appear to be an admission of inaccuracy in respect of matters required to be disclosed pursuant to s 213 of the *BCCM Act*, rather than the statement of particulars required by s 21 of the *LSA*. Given the contents of the further statements it is at least strongly arguable that this is the case, and the factual issue of whether these statements constitute an admission that the original Disclosure Statement had become inaccurate in respect of its statement of the particulars referred to in s 21(1) is not one which is appropriate for determination on an application for summary judgment.

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30 *LSA*, s 2.

31 See Further Statements at pages 311, 490 and 495 of the affidavit of Mr Van de Beld filed 13 August 2009.

[32] Subparagraph 4(e) of the defence pleads that the disclosure statement that was provided to the defendants in June 2007 "contained information that subsequently to the time it was given became inaccurate, in that the Proposed Lot as disclosed in the plaintiff's Original Statement would have a floor area of 177 m² (including a balcony of 15 m²); whereas the Registered Lot had a floor area of 176 m²". This allegation was not specifically pleaded to by way of a denial or non-admission in the reply and answer and the defendants accordingly rely on a deemed admission under *UCPR* 166(1). At the hearing of the application counsel for the plaintiff indicated that subparagraph (4)(e) should have been specifically addressed in the reply and answer and indicated an intention to amend to specifically plead to it. It is apparent from the parties' pleadings, their correspondence and the submissions on the application for summary judgment that the real issue in dispute is whether the Disclosure Statement given in June 2007 contained information that subsequently became inaccurate in a respect which obliged the plaintiff to give a rectification statement pursuant to s 22 of the *LSA*. The plaintiff denies that it was required to provide a statement under s 22, and pleads that the identity of the lot did not alter from the time of disclosure to the time of registration of the lot. The defendants, in their submissions, recognise that this is a matter which goes "to the heart of the issue in dispute". The reply and answer pleads that pursuant to clause 6.3 of the contract the plaintiff was entitled to vary the size of the lot by up to five per cent. The plaintiff's reply and answer should be amended so that it specifically addresses paragraph 4(e) of the defence so as to facilitate the just and expeditious resolution of "the real issues" in the proceeding at a minimum of expense.[32] The application for summary judgment should not be determined on the basis of a deemed admission that the original statement contained information in relation to the floor area of the lot which subsequently became inaccurate in circumstances in which the plaintiff's pleaded case is that it was entitled to vary the size of the lot as depicted on the plans by up to five per cent.

[33] The third aspect of the defendants' case for summary judgment against the plaintiff's claim relates to the floor area of the proposed lot and whether, as alleged in paragraph 4(f) of the defence, the plaintiff was required pursuant to s 22(1) of the *LSA* to give the defendants a statement in writing of the particulars required to be included in the statement given for the purposes of s 21(1) as soon as reasonably practicable after the proposed lot had become a registered lot. Section 21(1) of the *LSA* requires a statement to be given that "clearly identifies the lot to be purchased". In this matter the lot was identified by lot number and by, amongst other things, a marking on a detailed drawing of the location of Lot 3209. The sheet is Sheet 10 of 15 amongst the plans contained in Chapter 4 of the Disclosure Statement and depicts Level G of the development. Lot 3209 appears on this sheet as one of six units in Tower A. This served to identify the lot as being located on Level G of Tower A and its position in relation to other units on that floor. Other plans in the Disclosure Statement identified other geographical aspects of relevance to the unit's location.[33]

[34] The defendants rely on the floor area of the lot as recorded on Sheet 10 as something that identified the lot to be purchased. There is a compelling argument that the floor area of the unit is part of "describing and identifying the precise

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32 *UCPR* 5, *UCPR* 375; *Aon Risk Services Australia Ltd v Australian National University* (2009) (2009) 258 ALR 14.

33 cf *Sunbird Plaza Pty Ltd v Boheto* (supra) at 258.

compartment of air space into which the constructed unit will fit".[34] The competing argument is that the Disclosure Statement sufficiently and clearly identified the lot without reference to its floor area and that the lot was clearly identified by its lot number, the floor on which it was intended to be and the marking on the drawing that indicated its location on that floor and its shape.

[35] Although it may be possible to clearly identify a lot to be purchased without recording its total floor area in a statement provided under s 21 (a matter which I am not required to decide in order to determine this application) in a case such as this where the floor area is included on the plan, the better view is that the description of its floor area serves to clearly identify the lot in conjunction with other matters such as the lot number, the floor on which it is located and its position in the building. However, the identification of the lot by reference to the plan that I have described, which recorded it having a floor area of 177 m² (including a balcony of 15 m²) has to have regard to the Disclosure Statement's contents concerning those plans. As previously noted, clause 1.6 of the Information Disclosure in Chapter 1 of the Disclosure Statement indicated that the plans incorporated in Chapter 4 including the draft building format plan for Stage 1 identifying the lot was "subject to the provisions of the Contract". The contract provided that the seller could make changes to the size of a lot of up to five per cent (more or less) than that shown in the Disclosure Statement. Accordingly, the description of the floor area on the plan insofar as it operated to clearly identify the lot should be taken to be up to five per cent different (more or less) from 177 m², namely that it would have an area of between 168.15 m² and 185.85 m². On this basis the reduction in the size of the balcony by 1 m² as depicted on later plans including plans that became part of the second further statement did not mean that the Disclosure Statement contained information concerning the floor area of the proposed lot that became inaccurate.

[36] In short, insofar as the description of the floor area served to clearly identify the lot, the floor area was to be between 168.15 m² and 185.85 m² and this information did not become inaccurate after the Disclosure Statement was given. On this basis, the reduction in the size of the balcony by 1 m² did not give rise to an inaccuracy that the plaintiff was required to address in a rectification statement under s 22. The plaintiff has grounds to resist the defendants' defence to its claim for specific performance on this basis. It cannot be said that the plaintiff has "no real prospect" of succeeding on its claim because of this ground of defence or that there is no need for a trial of the claim.

[37] The defendants' application for summary judgment pursuant to *UCPR* 293 should be dismissed.

Defendants' application for summary judgment on its counterclaim

[38] The defendants' counterclaim rests on the correctness of their contentions in relation to the necessity for a rectification statement to be given pursuant to s 22. The reasons that I have given in relation to the defendants' application for summary judgment on the plaintiff's claim also preclude summary judgment on their counterclaim. Two other matters also preclude summary judgment on their counterclaim. For the purpose of addressing these issues I shall assume for the purpose of argument the correctness of the defendants' contentions that the plaintiff was obliged to give a s 22 rectification statement, failed to do so and called for

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[34] *Sunbird Plaza Pty Ltd v Boheto Pty Ltd* (supra) at 258.

settlement on 12 May 2009 in circumstances in which s 22(4) operated to delay settlement beyond that date. The relevant issue is whether the plaintiff's conduct in this regard constituted an anticipatory breach of the contract that entitled the defendants to terminate it.

[39] If the defendants are correct then the plaintiff took an erroneous view of the settlement date because s 22(4) dictated that the plaintiff should not deliver to the defendants a registrable instrument of transfer in respect of the lot and the defendants were not required to pay the outstanding purchase moneys until the expiration of a period of 30 days after the receipt by the defendants or their agent of a copy of a statement of particulars in accordance with subsection 22(1) or until the time stipulated in the contract (whichever period was later to expire) unless the parties otherwise agreed in writing after receipt of the statement in accordance with s 22(1). In effect, s 22(4) postponed the settlement date.[35]

[40] The plaintiff did not purport to terminate the contract. It kept the contract on foot. On the defendants' case, the plaintiff made erroneous contentions about the operation of s 22 and the date for settlement under the contract. In *DTR Nominees v Motor Homes Pty Ltd*,[36] Stephen, Mason and Jacobs JJ stated:

> "No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognize his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him. As Pearson LJ observed in *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699 at 734:
>
> > 'In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments'..."

This principle applies in the present circumstances. The plaintiff should not be found to have committed an anticipatory breach of contract, at least for the purpose of determining an application for summary judgment, by making what are assumed for the purposes of argument to be incorrect contentions concerning the interpretation and application of s 22 of the *LSA* and calling for settlement on the basis that s 22 of the *LSA* did not operate to postpone the date for settlement under the contract. It cannot be said that the plaintiff has no real prospect of successfully defending the counterclaim on the basis that its conduct did not constitute an anticipatory breach of the contract, and that there is no need for a trial of the counterclaim in relation to this issue.

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35 In this regard, the operation of s 22(4) should be contrasted with the consequences of non-compliance with obligations under s 214 of the *BCCM* Act which does not provide a "statutory moratorium" on settlement: *Lee v Surfers Paradise Beach Resort Pty Ltd* [2008] 2 Qd R 249 at 271 [58]; and see *Hudpac Corporation Pty Ltd v Voros Investments Pty Ltd* (supra).

36 (1978) 138 CLR 423 at 432; applied in *Savoy Investments (Qld) Pty Ltd v Global Nominees Pty Ltd* [2008] QCA 282 at 41.

[41] Finally, it is at least arguable that the defendants' asserted entitlement to terminate the contract requires them to prove that they were ready, willing and able to perform their obligations under the contract.[37] The defendants have not pleaded this matter and not addressed it in evidence.

[42] The defendants' application for summary judgment pursuant to *UCPR* 292 in respect of its counterclaim should be dismissed.

Conclusion

[43] The defendants have not established an entitlement to summary judgment pursuant to *UCPR* 293 in respect of the plaintiff's claim for specific performance and other relief, and they have not established an entitlement to summary judgment pursuant to *UCPR* 292 in respect of their counterclaim.

[44] The plaintiff is directed pursuant to r 375 to amend its reply and answer within seven days so as to specifically plead to subparagraph 4(e) of the defence.

[45] The orders will be:

1. Application dismissed.

2. The defendants pay the plaintiff's costs of and incidental to the application to be assessed on a standard basis.

3. The plaintiff is directed to amend its reply and answer within seven days so as to specifically plead to subparagraph 4(e) of the defence.

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[37] *Savoy Investments (Qld) Pty Ltd v Global Nominees Pty Ltd* (supra) at [46]-[49].