

SUPREME COURT OF QUEENSLAND

CITATION: *Arc Holdings (Aust) Pty Ltd and Riana Pty Ltd and Reppals (1) Pty Ltd t/as Main Commercial First National* [2009] QSC 374

PARTIES: **ARC HOLDINGS (AUST) PTY LTD (ACN 111 648 643)**
(plaintiff)
v
RIANA PTY LTD (ACN 010 976 815)
(first defendant)
and
**REPPALS (1) PTY LTD (ACN 085 994 136) Trading as
MAIN COMMERCIAL FIRST NATIONAL**
(second defendant)

FILE NOS: BS 9189/05

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 11 December 2009

DELIVERED AT: Brisbane

HEARING DATE: 29 April 2009; 30 April 2009; 27 August 2009; 28 August 2009

JUDGE: Daubney J

ORDER: **1. The relief claimed by the plaintiff in paragraphs 1, 2 and 3 of the Amended Claim is refused;**
2. I will hear the parties as to the necessary orders and as to costs.

CATCHWORDS: CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OTHER MATTERS – where plaintiff entered into a contract to purchase land – where plaintiff purported to terminate the contract as a result of the failure of the first defendant or their agent to attach a warning statement in the approved form as the first or top sheet of the contract in breach of s 367 of the *Property Agents and Motor Dealers Act 2000* (Qld) – where first defendant denied the plaintiff had validly terminated the contract and refused to refund the deposit on the basis the land was not “residential property” and was therefore not governed by the Act – whether the land was identified on a map in a planning scheme as “residential property” within the meaning of the

term in s 17 of the *Property Agents and Motor Dealers Act* 2000 (Qld)

Body Corporate and Community Management Act 1997 (Qld)
Property Agents and Motor Dealers Act 2000 (Qld)
Integrated Planning Act 1997 (Qld)

Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd (2008) QSC 261, considered
Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd [2009] QCA 231, applied
Tolocorp Pty Ltd v Noosa Shire Council [2007] QCA 33, considered

COUNSEL: R Lilley S.C. with R Frigo for the plaintiff
 J A Griffin QC with P J Woods for the first defendant
 K D Dorney QC with W L Cochrane for the second defendant

SOLICITORS: Delaneys Lawyers for the plaintiff
 J Hall Lawyers for the first defendant
 Carter Newell Lawyers for the second defendant

- [1] By a contract dated 17 December 2004 (“the Contract”) the plaintiff agreed to sell the first defendant a three hectare block of land situated at 24 Gooding Drive, Merrimac (“the Land”). The Contract was the standard REIQ/QLS form for “Commercial Land and Buildings” (2nd edition). The purchase price was \$5,000,000.00. The deposit of \$250,000.00 required under the Contract was paid to the stakeholder, a real estate agent who was acting in conjunction with the second defendant. Settlement of the Contract was due on 26 August 2005.
- [2] The Contract did not have attached as the first or top sheet the warning statement referred to in s 366 of the *Property Agents and Motor Dealers Act 2000* (“PAMDA”). As that section stood as at the date of the Contract, and read with s 363, it required a specific warning statement to be attached to a “relevant contract”, that being a “contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction.”
- [3] On 26 August 2005, the date for settlement, the plaintiff’s solicitors gave notice to the first defendant’s solicitors of the plaintiff’s election to terminate the Contract under s 367 by reason of the non-compliance with s 366. The plaintiff also demanded the return of the deposit.
- [4] On 12 September 2005, the first defendant denied that the plaintiff had validly terminated the Contract.
- [5] The plaintiff has sued the first defendant seeking, inter alia, orders that it validly terminated the Contract, for return of the deposit, and for compensation under *PAMDA* against the first defendant vendor and the second defendant (the first defendant’s real estate agent who prepared the Contract).

- [6] On 29 August 2008, the Court ordered by consent that the issues as to validity of termination and the return of the deposit be tried separately.
- [7] Those issues, which were tried before me, turn on whether the Land was “residential property” within the meaning of that term in *PAMDA*.
- [8] It was not in issue before me that the Land was a single parcel of vacant land. By s 17(1) of *PAMDA*, the Land would be “residential property” under *PAMDA* if it was in a “residential area”.
- [9] Sub-sections 17(3) and (4) of *PAMDA* provided:
- "(3) Despite subsections (1) and (2), the following property is not *residential property*—
- (a) a single parcel of land on which a place of residence is constructed or being constructed if the property is used substantially for the purposes of industry, commerce or primary production;
- b) a single parcel of vacant land, if the property—
- (i) is in a non-residential area; or
- (ii) is in a residential area, but only if a local government has approved development in relation to the property, the development is other than for residential purposes and the approval is current; or
- (iii) is used substantially for the purposes of industry, commerce or primary production.
- (4) In this section—
- development* see the *Integrated Planning Act 1997*, section 1.3.2.
- non-residential area* means an area other than a residential area.
- planning scheme* see the *Integrated Planning Act 1997*, section 2.1.1.
- residential area* means an area identified on a map in a planning scheme as an area for residential purposes.
- residential purposes* includes rural residential purposes and future residential purposes.
- vacant land* means land on which there are no structural improvements, other than fencing.”
- [10] Having regard to the definition of “residential area”, the question whether the Land was “residential property” falls to be determined by assessing whether the Land was in an area identified on a map in a planning scheme as an area for residential purposes.
- [11] By reference to particular planning scheme maps, which I will describe in more detail below, the plaintiff submitted that the Land was residential property because:
1. The Land was identified on Map PS-1 and Domain Maps Worongary 21 and 22;
 2. Those were maps in a planning scheme; and
 3. it was identified on those maps as land upon which residential development was an appropriate use.

[12] In summary, the first defendant submitted:

1. The Land was not within a “residential area” because it was not identified on a map in a planning scheme as an area for residential purposes. Specifically, Domain Maps Worongary 21 & 22 identified the subject site as being in a “Private Open Space Domain.”
2. The Land was not shown to be part of the “Urban Residential” Land Use Theme in Map PS-1, and was not wholly or at least substantially within the “residential area.”
3. If the Land was shown to be partly or wholly within the “Urban Residential” Land Use Theme referred to in Map PS-1, this did not cause the Land to be within a “residential area” because the theme is only a “broad spatial expression” of the planning strategy and does not infer land use rights.

[13] Similarly the second defendant argued:

1. Domain Maps Worongary 21 & 22 identify the Land as falling within the Private Open Space Domain, but that domain is not an area identified on that map as an area “for” residential purposes.
2. It is not permissible to go to a subsidiary Map (PS-1) in order to determine whether the Land is in the relevant identified “area,” because that is the function of the domains.
3. The term “for residential purposes” in s 17 of *PAMDA* should not be given such a wide interpretation so as to include any area which might at some stage be the subject of an impact assessable application for residential purposes.

[14] Resolution of these competing submissions obviously requires some further reference to the maps in question.

The Planning Scheme

[15] The relevant planning scheme in this case was the *Gold Coast City Council Planning Scheme 2003* version 1.0 (“the Planning Scheme”).

[16] The area in which the Land is situated is depicted in several maps in the Planning Scheme, namely Planning Strategy Map PS-1 (“Map PS-1”) and the Domain Maps Worongary 21 and 22 (“Domain Maps”).

[17] In order to understand some of the terminology used in connection with these maps, and indeed what is depicted in the maps, it is necessary to understand the distinction under the Planning Scheme between what are described as “Land Use Themes” and “Domains” under the Planning Scheme.

- [18] According to the Planning Scheme, the Planning Strategy is the “broad citywide strategy adopted by the Planning Scheme to achieve ecological sustainability”¹ It is explained that:

“The Planning Strategy therefore provides guidance for the broad distribution of land uses within the city and certainty for the efficient, effective and coordinated provision of community infrastructure and services, including the land, facilities and works necessary to support social and economic activity. It also identifies specific valuable features of Gold Coast City, and sets out a policy context for their use, conservation, enhancement and protection. These valuable features include the City’s resources and areas of ecological significance, the areas that contribute significantly to amenity, the areas and places of cultural heritage significance, and the resources and areas of economic value.”

- [19] The Planning Scheme identifies² the two major components of the Planning Strategy as “15 Key Strategies that apply across the entire City” (being the “major citywide policy initiatives necessary to advance ecological sustainability within the City”) and “18 Land Use Themes that apply to particular parts to the City”, stating:

“Land Use Themes indicate, for major areas of the City, the generalised mix of land uses that is considered to be desirable to implement the [Desired Environmental Outcomes] and Key Strategies. As such, they provide a broad spatial expression to the Planning Strategy and, taken together, account for the total area of the City.”

- [20] In relation to the depiction of Land Use Themes, the Planning Scheme³ provides:

“The pattern of Land Use Themes for the City of Gold Coast is shown on **Planning Strategy Map PS-1**. These themes provide a broad indication of the type of activities and development envisaged for distinct parts of the City in order to achieve the Desired Environmental Outcomes (DEOs) and the intent of the Planning Strategy. As such, they provide a broad spatial expression to the main initiatives encompassed by the Planning Scheme.

The Land Use Themes are not domains or Local Area Plans (LAPs). Rather, they are indicative of the types of domains or LAPs that could be expected in the areas described. Implementation of the stated planning intent will occur through the provisions of the applicable domains or LAPs and any other relevant development code. However Council will also have regard to the Land Use Themes as expressions of broad planning policy when considering proposals for impact assessable development that do not fully accord with applicable codes.”

- [21] One of the Land Use Themes shown on Map PS-1 is “Urban Residential”, which is more particularly described in the Planning Scheme in the following terms⁴:

“This Land Use Theme acknowledges residential uses and a range of other land uses that support local community needs. It identifies where the majority of the city’s population will live, and encompasses a wide

¹ Planning Scheme Part 3 Div 1 Chap 1.

² Planning Scheme Part 3 Div 1 Chap 2.

³ Planning Scheme Part 3 Div 3 Chap 1.

⁴ Planning Scheme Part 3 Div 3 Chap 7.

diversity of housing types and styles, as well as the provision of local and neighbourhood services and facilities. Open space, recreation and nature conservation areas are also acknowledged, as these form important elements of local character and neighbourhood amenity within urban areas.”

Under the heading “Planning Intent”, the description of this particular Land Use Theme continued to provide, inter alia, as follows:

“A diverse range of dwelling types will be facilitated, with residential densities generally being greatest in areas offering close proximity to the main commercial centres. Medium and mixed densities will be encouraged in areas within reasonable proximity to the major activity centres, or in close proximity to neighbourhood and local centres where the development supports increased neighbourhood identity and amenity enhancement.

Neighbourhood and local centres are included within this Land Use Theme and, as such, are not specifically identified on the Planning Strategy Maps. Such centres provide a limited range of goods and services to satisfy the convenience requirements of an immediate catchment. Council will ensure that any new centre, or a proposal to expand an existing centre, does not exceed its genuine catchment requirements, and centres will not be permitted to expand to the point where they significantly compete with those designated on **Planning Strategy Map PS-4**. Neighbourhood centres will typically provide a maximum of 3,000 m² of retail space and local centres will normally provide less than 8,000 m² of retail floor space. However, the ultimate size of such centres will be determined through a comprehensive needs assessment and factors such as the size and location of other centres, vacancy rates in the locality, and any existing commercial development approvals not yet acted upon.

All development within this Land Use Theme will be expected to be supportive of planned transport infrastructure, including pedestrian access to local centres. Improved housing design solutions will be encouraged, and development will be required to be responsive to streetscape character and to reasonable neighbour amenity expectations. Development should not adversely impact upon any local environmental values, but strengthen these where possible.”

- [22] When one looks at Map PS-1, one sees that it is a large scale map of the whole area of the Gold Coast City Council. It is colour coded to depict the areas of the various Land Use Themes, and also shows some features such as railways and highways. The plaintiff submitted that it was possible, having regard to the Land’s address, to locate the situation of the Land on Map PS-1 and that one could conclude that the Land was contained within the “Urban Residential” Land Use Theme. In this regard, I was referred to the fact that the Land is situated close to the Merrimac floodplain area shown on Map PS-1 and that this floodplain area is totally within what is known as the Guragunbah local area plan. It was said that, as the Land is totally outside the Guragunbah local plan, it cannot be the case that any of it is within the Merrimac floodplain and therefore it had to be situated within the adjacent area marked on the map for the “Urban Residential” Land Use Theme.
- [23] However, as counsel for the first defendant pointed out, the boundaries delineating the various Land Use Themes on Map PS-1 are not cadastrally based, and that in a case

such as the present, where the Land lies in an area where the boundary of a particular Land Use Theme area appears to run, it is difficult, if not impossible, from Map PS-1 to be sure on which side of the boundary the property lies. Having viewed Map PS-1, I have to agree with the defendants' submissions on this point. There are no "metes and bounds" descriptions of the areas of the Land Use Themes. It is not possible, by using a large scale map such as Map PS-1, to identify whether the Land falls inside or outside the "Urban Residential" Land Use Theme. To find otherwise would result in the impossible task of identification and of reconciling cadastrally based information with maps that are simply not intended to provide the detail necessary for land identification purposes.

[24] But even if the Land was within the "Urban Residential" Land Use Theme on Map PS-1, that would not, of itself result in a finding that it was in "an area for residential purposes" for the purpose of s 17 of *PAMDA*. As articulated in the Planning Scheme (quoted above at [20]), Map PS-1 is only a "broad spatial expression" of the planning strategy. It is a "broad indication of the type of activities and development envisaged" for the area.

[25] Moreover, it is clear from the description of the "Urban Residential" Land Use Theme which I have quoted above that land contained within an area marked on Map PS-1 as falling under that theme may be applied not only to residential uses but to a range of other land uses that support local community needs, such as local and neighbourhood centres, parks, reserves and recreational facilities, and cultural and health facilities.

[26] Similar considerations arise when one considers the domain within which the Land lies. It is convenient, then, to turn now to consider the Domain Maps.

[27] The Planning Scheme describes 18 domains. Their purpose is stated as follows⁵:

"The purpose of the domains is to signal that the City is divided into land units with common characteristics, for the purpose of land use and development control. The term "domain" is introduced to identify those areas of the City with a particular use mix or development character (or that have potential in this context) that will benefit from the application of consistent planning guidance and development control.

Domains provide for the distribution, mixing and segregation of different types of development. Each domain is intended to provide for compatible development within identified parts of the City and to segregate incompatible development. Importantly, each domain is intended to include planning measures to achieve the Planning Scheme's Desired Environmental Outcomes (DEOs)."

[28] The 18 domains described in the Planning Scheme apply to land identified on the domain maps.⁶ The section of the Planning Scheme describing the application of the domains states⁷:

"The inclusion of land in a particular domain, under the provisions of this Planning Scheme, does not imply that part or all of such land is capable of

⁵ Planning Scheme Part 5 Div 1 Chap 1.

⁶ Ibid.

⁷ Ibid.

being subdivided or is suitable for subdivision for developments permitted by this Planning Scheme.”

- [29] It is uncontroversial that the Land is identified on Domain Maps Worongary 21 and 22 (“the Domain Maps”) as contained in the “Private Open Space” domain.
- [30] It was argued by the defendants that the “Private Open Space” domain is not an area “for” residential purposes, and accordingly the Land could not be considered residential property under s 17 of the *PAMDA*.
- [31] The plaintiff submitted that:
- (a) Identification of the Land in Map PS-1 for urban residential purposes is sufficient to meet the requirements of the definition in s 17(4) of *PAMDA*.⁸ That Map PS-1 has this effect is confirmed by Growth Management Policy No 2 which refers to the fact that “the future extent of residential development is indicated on Planning Strategy Map PS-1.”⁹ These arguments suffer from the defect, however, that it is not possible to identify that the Land is contained within Map PS-1.
 - (b) In the Private Open Space Domain, residential development in the nature of attached dwellings and detached dwellings is appropriate development;¹⁰
 - (c) Any suggestion that the need for a Material Change of Use is evidence that the Land is not residential is wrong because all residential development requires a Material Change of Use;¹¹
 - (d) All residential development in the Planning Scheme requires assessment, although different domains call for different levels of assessment. It follows that unless “identified for residential purposes” means something akin to “where residential development can be carried out whatever level of assessment” then there is no land identified in the Planning Scheme for residential purposes because the definition in s 17 is not restricted by the necessary level of assessment;
 - (e) It would impose an unusual strain on the words of s 17(4) of *PAMDA* to import into them a requirement that an area identified for residential purposes was one where residential development required a particularly low level of assessment as opposed to some higher level of assessment;
 - (f) A construction of s 17(4) which rules out the residential purposes of the land identified in Map PS-1 or the Domain Maps must involve adding or implying words which should not, in these circumstances, be permitted.¹²

⁸ *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* (2008) QSC 261 at [12]

⁹ See GM Policy 2 at Part 3, Division 2, Chapter 3 “Population Growth Management” at paragraph 2.2.

¹⁰ Planning Scheme “Material Change of Use For the Private Open Space Domain” at Part 5, Division 2, Chapter 16 and Part 5 Division 1, Chapter 2 at 4.6.1

¹¹ Tables A for Park Living, Village, Detached Dwelling and Residential Choice Domains at Planning Scheme Part 5, Division 2.

¹² *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersy; *Birmingham Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 per McHugh JA.

[32] The plaintiff contended that, under the Planning Scheme, in relation to s 17(4) of *PAMDA*:

- Vacant land is residential property if it is in a residential area.
- An area is identified for residential purposes if residential development is appropriate development within that area.
- It is not necessary that the area:
 - be approved for residential development;
 - be an area in which residential development is exempt from assessment; and
 - be an area identified solely for residential purposes.
- An area is identified for residential purposes if it is identified for current residential development irrespective of the level of assessment required.
- An area is also identified for residential purposes if it is identified for residential purposes in the future.¹³

[33] Some further discussion of the Planning Scheme is required to deal with these arguments.

[34] The Planning Scheme relevantly explains¹⁴ that the domains are closely related to the Land Use Themes, that the domains implement, through effective planning measures, the purpose of each Land Use Theme, that in this sense, the domains have evolved from the planning measures developed to implement the intent of Gold Coast City Planning Scheme, and that the domains are the key to the assessment status of individual development proposals within their subject areas.

[35] The Planning Scheme contains a table which sets out the relationship of the Land Use Themes, and their planning measures, through the 18 domains of the Planning Scheme.¹⁵ That table refers to the Private Open Space Domain (Chapter 16, under the column headed “Directly Relevant Land Use Theme/s”) and specifies the following directly relevant land use themes:

1. Open Space/Nature Conservation; and
2. Urban Residential.

[36] There is another domain in the Planning Scheme described as “Residential Choice”. On the table to which I have just referred, it is correlated with the “Urban Residential” Land Use Theme. Counsel for the plaintiff noted that the use of the same residential determination as for the Private Open Space Domain indicated that the Domain Maps are maps in the Planning Scheme which reveal that the subject land is identified for residential purposes.

¹³ See s 17(4).

¹⁴ Planning Scheme Part 5 Div 1 Chap 1 Cl 4.

¹⁵ Ibid.

- [37] But the mere fact that residential development might be possible within a domain does not, it seems to me, provide an answer to the present dispute. The parties' submissions need to be viewed in context of the intent of the Planning Scheme.
- [38] The Planning Scheme provides¹⁶ that each domain contains an intent statement setting out the primary objectives of the planning scheme for the land included within that domain. The intent statement is informed by, *inter alia*, Land Use Themes.¹⁷ The statement of planning intent for development in a Private Open Space Domain provides, in summary, for regulation of private open space areas of the Gold Coast for recreation purposes, for example, golf course facilities. It goes on to state that the domain applies to land intended to be used for resort open space or for commercial recreational facilities that are predominately, but not exclusively, maintained as open space.¹⁸
- [39] The first defendant referred to the fact that, in assessing applications for impact assessable development, the Assessment Manager (in this case, the Gold Coast City Council) is required to consider, amongst other things, the intent of the Private Open Space Domain.
- [40] It was argued that while some forms of residential development are envisaged as Impact Assessable Development within the Private Open Space Domain, an assessment of such a proposal against planning provisions would ensure that the domain retained its character as a predominately open space. Therefore, it would reasonably be expected to occupy a small part of the site, with the main use of the site being for open space.
- [41] Viewed as a whole, the Planning Scheme does not prohibit residential development in any of the domains of the City of Gold Coast. I accept the first and second defendants' submission that *PAMDA* should not be interpreted to mean that, merely because residential development is *possible* within a domain, it satisfies the definition of "residential property" for the purposes of *PAMDA*. Such a construction would lead to an interpretation where by the entirety of the City of Gold Coast would be treated as a "residential area."
- [42] Having regard to the stated intent of the Private Open Space Domain, and notwithstanding that residential development is possible within that domain, I do not think it can properly be said that the fact that the Land is depicted on the Domain Maps as falling within the Private Open Space Domain means that it is land identified on a map in a planning scheme as "for" residential purposes.
- [43] It was asserted that there should not be any differentiation between the domains on the basis that some make specific reference to residential development while others do not. Rather, that the touchstone is what appears on the planning map. I accept this proposition.
- [44] In all the circumstances I am satisfied the Land was not "residential property", as that term is defined in s 17 of *PAMDA* for the following reasons:

¹⁶ Planning Scheme Part 5 Div 1 Chap 2.

¹⁷ Ibid at paragraph 2.0.

¹⁸ Ibid at paragraph 2.0.

1. Domain Maps Worongary 21 & 22 identify the Land as being in the “Private Open Space Domain”, but that does not determine that the Land is “for” residential purposes;
2. It is not possible to identify the Land as falling within the area marked for “Urban Residential” on Map PS-1. While it may be possible to determine unequivocally on that map that some other areas fall within the “Urban Residential” Land Use Theme”, Map PS-1 is not cadastrally based and therefore it is not possible to definitively determine whether the Land falls inside or outside the specified area of the “Urban Residential” Land Use Theme. In any event, land use themes only provide a broad spatial expression of the main initiatives encompassed by the Planning Scheme, and are not determinative of whether particular localities within a theme are specifically “for” residential purposes.

Alternative ground of defence

- [45] Having determined that the Land was not “residential property” within the meaning of *PAMDA*, it is not strictly necessary to determine the alternative ground of defence. For the sake of completeness however, I should express the following views.
- [46] Both the first and second defendants submitted that if the Land were otherwise considered to be “residential property” within the meaning of s 17(1)(b), s 17(3)(b)(ii) applied to exclude it from the definition of that term. This argument requires some consideration of the planning history of the Land.
- [47] On 12 November 2004, Rackemann DCJ in the Planning and Environment Court made an order, by consent, granting a development permit for “Accommodation Premises (54 town house units) and Private Recreation (tennis court)” on the Land subject to certain conditions (“Development Approval”).
- [48] The order provided for the development of a Community Titles Scheme under the *Body Corporate and Community Management Act 1997*. It contemplated the subdivision of the Land into lots, thereby falling within the terms of the *Integrated Planning Act 1997 (Qld)* as it related to the reconfiguring of a single parcel of land to create more than one lot when it previously comprised only a single lot.¹⁹ It is also clear that the order provided for roads, drainage and “public space” as well as a tennis court for use by each of the 54 lots in addition to any residences which may become a lot or lots in the relevant Community Titles Scheme.
- [49] The defendants argued that the Land was within the exceptions in s 17(3)(b)(ii) because the Development Approval allowed for development “other than for residential purposes” by:
- (a) Providing for roads, drainage and public space; and
 - (b) Requiring the subdivision of the Land to create more than one lot.
- [50] The plaintiff argued that this interpretation strains the understanding of “residential purposes” and distinguished the present case from *Hedley Commercial Property*

¹⁹ See s1.3.2(d) and 1.3.5.

Services Pty Ltd v BRCP Oasis Land Pty Ltd ²⁰. In that case Fryberg J considered what was excluded from the definition of “residential property” by the operation of s 17(3)(b)(ii).

- [51] His Honour approached the term “residential area” by identifying “residential purposes” widely, referring to his own judgment in *Tolocorp Pty Ltd v Noosa Shire Council* [2007] QCA 33:

“The phrase presently under consideration contains the preposition “for”. That is a word capable of a wide variety of meanings. In the present case it is important to have regard to its context. Tolocorp submitted that as a matter of ordinary language, and from a land use perspective, land is zoned for a particular purpose if the use rights conferred by reason of the inclusion of the land in the relevant zone permit the purpose in question to be carried out without the necessity for any further land use approval. On its submission, that was where the inquiry ended. None of the other parties challenged that submission (the State conceded that it “might be correct”), so there was no direct challenge to Tolocorp's submission. Nonetheless in my judgment the meaning proposed in the submission is unnecessarily narrow. In particular it is difficult to apply except in the context of a traditional table of zones and associated zoning maps conferring use rights. Areas allocated in the Strategic Plan, for example, are unlikely to carry with them a conferral of rights. **In my judgment land may be said to be allocated as part of an area for particular purposes if on reading the planning scheme as a whole it appears that the intent of the scheme is to favour the use of the (land or area) for those purposes**”²¹ (emphasis added).

- [52] In considering the operation of s 17(3)(b)(ii), Fryberg J held that a development approval involving the reconfiguration of a lot to end up with three lots where there were previously two, was not one for residential purposes. Rather, it was held to be “other than for residential purposes.”²² However, Fryberg J also noted that it was not the case that there could never be a reconfiguration for residential purposes.²³
- [53] The plaintiff distinguished the present case on the basis that there was no mention of reconfiguration of the land in the order of Rackemann DCJ which would prevent it from being considered as for residential purposes. The plaintiff argued that the reconfiguration of parts of the development which the second defendant says is inherently approved by the approval attached to the contract, does not require development approval. According to the plaintiff it is self assessable because in Schedule 9 Table 3 of the *Integrated Planning Act 1997* the reconfiguration of a lot with common property to create a community titles scheme under the *Body Corporate and Community Management Act 1997* is development that is exempt from assessment against a planning scheme.
- [54] Further, in relation to the construction of roads, storm water drainage and the provision of public utilities and services, it was argued that they do nothing to detract from the residential purpose of the Development Approval and are necessary infrastructure incidental to the subject development.

²⁰ [2008] QSC 261.

²¹ At [73].

²² At [43].

²³ At [44].

- [55] After oral argument in the present case, the Court of Appeal gave its judgment in the appeal from the judgment of Fryberg J – see *Hedley Commercial Property Services P/L v BRCP Oasis Land P/L*²⁴. The parties asked for, and obviously were given, the opportunity to make further submissions in light of the judgment of the Court of Appeal. Both the first and second defendants submitted that the judgment in that case was of little or no further assistance to the determination of the present matter as the parties in *Hedley* had agreed that the lot was “within a residential area”²⁵ which is one of the very issues in contest in the present case.
- [56] The core issue determined by the Court of Appeal was whether the relevant property was not residential property within the meaning in s 17 of the *PAMDA* because of the exclusionary provision found in s 17 (3)(b)(ii).
- [57] The Court found that the trial judge erred in his interpretation of s 17(3)(b)(ii) and in his subsequent finding that the land was the subject of an approval “other than for residential purposes.”
- [58] While the Court of Appeal did not accept the reasoning of the learned primary judge, the appeal was dismissed. It was found that the decision identifying the land as being “other than for residential purposes” was the correct decision albeit it should have been reached on other grounds which reflected the matters set out in a Notice of Contention delivered by the respondent.
- [59] Chesterman JA, with whom McMurdo P and Dutney J agreed, held:²⁶

“[20] The correctness of his Honour’s view depends upon what is meant by the phrase “the development is other than for residential purposes”. There are, I think, two competing constructions. One, favoured by the primary judge, is that development for something which is not for residential purposes is “development ... other than” for those purposes. So reconfiguration to create more lots than existed previously is not for “residential purposes”: it is for subdivision. The alternative construction is that the development must be for a designated purpose which is not residential. By this construction the exclusion will not operate unless there is approval for development, the terms and conditions of which will permit improvements to the land which are not residences.

[21] The choice between constructions is whether (i) the phrase requires development to be for a purpose which is not residential; which is other than, or different to, residential development or (ii) any development (such as reconfiguration) which is not itself for residential purposes will come within the exclusion. With due respect to the primary judge, who thought otherwise, the first construction is, in my opinion, the only possible one. The other would seriously erode the protection which *PAMDA* intends to confer upon purchasers of residential property. Its consequence would be that a single parcel of vacant land in a residential area would be excluded from the definition of residential property if a local authority had approved development in relation to the land for a purpose not itself residential but which might result in development for residential purposes. The first construction has the result that such vacant land

²⁴ [2009] QCA 231.

²⁵ At [12].

²⁶ At [20]-[21].

is residential property unless the approved development is for something that is not residential property, in which case it can be certain that a contract for the sale of the vacant land will not be one for residential property.”

- [60] In the present case, the approved development included Accommodation premises and Private Recreation (a tennis court). I accept the plaintiff’s submissions that the present case can be distinguished from the decision in *Hedley* on the basis that the development approval had as its purposes residential accommodation involving “permanent or long term” occupation of the subject 54 townhouses and the argument that the roads, drainage and public space provided for in the development approval were necessary conditions associated with and incidental to the residential purpose of the development.
- [61] In doing so, I reject the first and second defendant’s submissions that the tennis court and internal roads, although ancillary uses, were not necessarily associated with “residential purposes.”

Findings

- [62] Whilst I would have been against the defendants in their alternative defence had it needed to be invoked, for reasons previously articulated, I am of the opinion the contract is not subject to the provisions of ss 366 and 367 of *PAMDA* and the plaintiff was therefore not entitled to terminate the contract.
- [63] The first defendant was therefore entitled to treat the plaintiff’s actions as a breach of contract and have the deposit forfeited. I would therefore refuse the relief in paragraphs 1, 2 and 3 of the Amended Claim.
- [64] I will hear the parties as to the necessary order and costs, and as to further directions, if required.