SUPREME COURT OF QUEENSLAND

CITATION:	*Orchard Capital Investments Limited v Ross Neilson Properties Pty Ltd* [2010] QSC 340
PARTIES:	**ORCHARD CAPITAL INVESTMENTS LTD** ACN 077 235 879 (applicant) **v** **ROSS NEILSON PROPERTIES PTY LTD** ACN 010 754 873 (respondent)
FILE NO/S:	SC No 1049 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2010; 18 May 2010; 19 May 2010
JUDGE:	Peter Lyons J
ORDER:	**Order made in terms of the initialled draft placed with the file**
CATCHWORDS:	CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - OFFER AND ACCEPTANCE - OFFER - OPTION FOR VALUABLE CONSIDERATION OR UNDER SEAL - NATURE OF OPTION AND GENERALLY – where the respondent and the predecessor of the applicant entered into a Development Agreement with a view to developing a shopping centre on certain land – where the project was unsuccessful – where the Development Agreement made provision for the exercise of an option requiring the respondent to purchase the land on which the project was intended to be carried out – where the applicant required the respondent to take steps intended in the Development Agreement to lead to the exercise of the option – where the respondent refuses to do so – where the respondent submits that the steps for which the Development Agreement provides are in conflict with provisions of the *Property Agents and the Motor Dealers Act* 2000 (Qld) – whether the Act applies to the Development Agreement - whether the Act prevents the applicant from obtaining the relief under the Development Agreement

CONVEYANCING - STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE - PROTECTION OF PURCHASERS - OBLIGATIONS ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS – where the respondents submit that the *Property Agents and the Motor Dealers Act* 2000 (Qld) applies to the Development Agreement – where no warning statement was attached to the Development Agreement – whether the Act applies to the Development Agreement – whether the Development Agreement is a contract for the sale of residential property under the Act – whether the respondent was entitled to terminate the contract because no warning statement was attached to it

CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS - where the respondent was required by the Development Agreement to submit to the applicant a recommendation relating to the development or realisation of the land in the event that the respondent failed to obtain development approval – where the applicant rejected the respondent's proposal – whether the applicant's decision to reject the recommendation was made in breach of the applicant's obligation to act in good faith – whether the applicant can rely on the provisions of the Development Agreement which take effect as a result of the rejection of the recommendation – whether the applicant can be granted the relief it seeks under the Development Agreement – whether the doctrine of election precludes the respondent from resisting the relief sought by the applicant by reference to the alleged breach of the obligation of good faith

Property Agents and the Motor Dealers Act 2000 (Qld), s 17, s366B, s 367
Property Agents and the Motor Dealers Act 2000 (Qld) Reprint No 2F rv, s 10, s 363, s 365, s 365B, s 366, s 367, s 368, s369,

Alghussein Establishment v Eton College [1988] 1 WLR 587, cited
Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd [2007] 1 Qd R 132; [2006] QSC 182, considered
Craine v The Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305; [1920] HCA 64, considered
David Deane & Associates Pty Ltd v Bonnyview Pty Ltd [2005] QCA 270, considered
Devine Ltd v Timbs [2004] 2 Qd R 501; [2004] QSC 24, considered

Fitzgerald v FJ Leonhardt Pty Ltd(1997) 189 CLR 215; [1997] HCA 17, considered
Glencor Grain Ltd v Flacker Shipping Ltd (The Happy Day) [2002] 2 Lloyd's Rep 487, applied
Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57, considered
Mark Bain Constructions Pty Ltd v Barling [2006] QSC 48, applied
Mercantile Credits Ltd v Shell Co of Australia Ltd (1976) 136 CLR 326, cited
Nelson v Nelson (1995) 184 CLR 538; [1995] HCA 25, considered
Overlook Management BV v Foxtel Management Pty Ltd [2002] NSWSC 17, considered
Petelin v Deger Investments Pty Ltd (1976) 133 CLR 538, considered
Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia [2008] WASCA 107, cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634, applied
St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267, considered
Traywinds Pty Ltd v Cooper [1989] 1 Qd R 222, considered
Vale 1 Pty Ltd v Delorain Pty Ltd [2009] QSC 425
Whitemore Pty Ltd v OF Gamble Pty Ltd (1991) 6 WAR 110, considered
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, considered

COUNSEL: A Crowe SC, with V Brennan, for the applicant
P O'Shea SC, with G Handran, for the respondent

SOLICITORS: McMahon Clarke Legal for the applicant
Broadley Rees Hogan for the respondent

[1] The respondent Ross Neilson Properties Pty Ltd (RNP) and the predecessor of the applicant Orchard Capital Investments Limited (OCIL) entered into a Development Agreement dated 2 September 2005, with a view to developing a shopping centre on land in the City of Caloundra. The project was unsuccessful. One of the courses of action for which the Development Agreement then made provision was the exercise of an option requiring RNP to purchase the land on which the project was intended to be carried out. OCIL requires RNP to take steps intended in the Development Agreement to lead to the exercise of the option. RNP refuses to do so, alleging that the Development Agreement is not enforceable, because it was subject to the provisions of the *Property Agents and the Motor Dealers Act* 2000 (Qld) (PAMD Act) relating to the giving of a warning statement, which were not complied with; or that the steps for which the Development Agreement provides are in conflict with provisions of the PAMD Act; or that at an earlier point, OCIL has acted in breach of its obligations under the Development Agreement and is not entitled to require RNP to take the steps previously referred to.

Background

[2] RNP is a property developer. It entered into an agreement with Starlistic Pty Ltd dated 7 April 2005 (*the Starlistic option*), conferring on RNP the option for the purchase of land located at Sunset Drive, Caloundra West. Clause 6 of the Starlistic option prohibited assignment of the option and other rights under the deed without the prior written consent of Starlistic. However, clause 7 entitled RNP to nominate another person as the person entitled to exercise the option, with the consequence that that person might exercise the option, and RNP might not.

[3] In September 2005 (when the Development Agreement was executed) SAITeysMcMahon Property Limited (*STMPL)* was the responsible entity of the Orchard Diversified Property Fund ASRN 093 304 379. It is admitted that on about 11 July 2007, STMPL retired as the responsible entity of the Fund, OCIL being appointed in its place; with the result that OCIL was treated as being a party to any document executed by STMPL as the Fund's responsible entity. It follows that it is to be treated as being a party to the Development Agreement. Henceforth, in relation to matters prior to 11 July 2007, I shall simply refer to OCIL, even if it would be more correct to refer to STMPL.

[4] It is convenient to identify the more significant provisions of the Development Agreement. It required RNP to exercise the power of nomination in the Starlistic option, in favour of OCIL, and to pay the balance of the option fee (which would have resulted in a payment of a total of $100,000 to Starlistic). It then made provision for the exercise of the Starlistic option.

[5] The Development Agreement then required RNP to use its best endeavours to obtain a development approval for a shopping centre with a net lettable area of approximately 4250 square metres on the land. RNP was to pay all costs associated with the application for the development approval. The Development Agreement also required RNP to use its best endeavours to procure Coles Myer Limited (described as the major tenant) to enter into an agreement for lease of a tenancy within the proposed centre.

[6] The purchase price for the land under the Starlistic option was $2.5 million. The option fee of $100,000, required to be paid to Starlistic under the Starlistic option, was agreed to be the deposit, and part payment of the purchase price.

[7] OCIL was required to pay RNP $500,000, seven days after the date of execution of the Development Agreement; a further sum of $200,000 seven days after the lodgement of the application for the development approval; and the sum of $2 million, seven days after notification of the issue of the development approval.

[8] The Development Agreement also made provision for RNP to carry out the development, provision being made for additional payments to it.

[9] It is convenient at this point to note the steps taken under the Development Agreement. On 9 September 2005, the sum of $500,000 was paid to RNP pursuant to the Development Agreement. On 16 September 2005, Starlistic entered into a contract for the sale of the land to the Custodian of the Fund, for the sum of $2.2 million. It seems to be accepted that this was a consequence of the Starlistic option, and the relevant provisions of the Development Agreement. The contract was

completed on about 23 September 2005. On 21 December 2005, the further sum of $200,000 was paid to RNP pursuant to the Development Agreement.

[10] On 23 September 2005, RNP lodged the development application with Caloundra City Council. The application was not approved. RNP then filed an appeal in the Planning and Environment Court. On 19 August 2008, that court dismissed RNP's appeal, with the result that the development application was refused.

[11] Further, it is admitted that RNP has failed to procure the anchor tenant to enter into an agreement for lease.

Development agreement: failure to obtain development approval and secure agreement for lease with anchor tenant

[12] If RNP did not obtain the development approval, or the agreement for lease from the anchor tenant, then the provisions of part C of the Development Agreement were to apply. They include the following (RNP being referred to as the Developer, and OCIL as the Owner):

> "**Developer to make recommendation**
> 13.2 Promptly after notification that the provisions of clauses 2.1 and 3.2 have not been satisfied, the Developer will:
> 13.2.1 procure an independent valuation of the Property by a reputable valuer with at least 5 years experience in valuing similar properties. The cost of the valuation shall be bourne (sic) equally by the Developer and the Owner. However, if a valuation has been obtained in accordance with clause 15.1 (and Schedule 3), which valuation is dated no later than 4 calendar months from the date of notification that the provisions of clause 2.1 and 3.2 have not been satisfied, then the Developer will not be obliged to obtain a new valuation; and
> 13.2.2 prepare and submit to the Owner a development and/or realisation strategy in relation to the Property (**Recommendation**).
> 13.3 The Recommendation will consider the following alternatives:
> 13.3.1 the sale of the Property;
> 13.3.2 the development of the Property on terms or conditions other than that proposed in the Development Application. Any such development proposal may include the Developer as a development manager on the basis that:
> (a) the Developer will provide its development management services at no cost to the Owner;
> (b) all external consultants and other approval costs will be payable by the Owner; and
> (c) the Developer will be entitled to a share in any profit.
> 13.3.3 the retention of the Property;

13.3.4 such other commercial proposal as the Developer determines.

Developer to make a recommendation having regard to criteria

13.4 The Recommendation to the Owner in relation to the alternatives referred to above must be on the basis of the following criteria:

13.4.1 the highest and best use of the Property;

13.4.2 the current supply of properties similar to the Property and the market demand at that time;

13.4.3 the demographics applicable to the area within which the Property is situated;

13.4.4 the growth of the area in which the Property is situated and that status of any infrastructure proposed to be constructed in the vicinity of the Property which may affect its value;

13.4.5 the likelihood of obtaining any approval for development of the Property and whether such approval is likely to be obtained with or without the necessity for instituting court action;

13.4.6 the value of the Property obtained pursuant to clause 13.2; and

13.4.7 such other criteria as the Owner may notify the Developer at the time the Developer is preparing its recommendation.

Acceptance by the Owner

13.5 The Owner must advise the Developer as to whether it accepts or rejects the Developer's Recommendation in relation to the future development of the Property, no later than 14 business days after the Developer has made the Recommendation to the Owner.

13.6 If the Developer’s Recommendation is to:

13.6.1 sell the Property and that Recommendation is accepted by the Owner; or

13.6.2 hold or to develop the Property and that Recommendation is rejected by the Owner,

then the Property is to be sold as soon as practicable in accordance with clauses 13.7-13.14.

13.7 As the Developer is required in accordance with clause 13.10 to contribute to any shortfall between the Net Property Sale Proceeds and the amount of $2.9 million, the Owner acknowledges that the Developer is to have control over the sale process including, without limiting the generality of the foregoing:

13.7.1 the appointment of any agent to effect the sale of the Property, including the terms of such appointment;

13.7.2 the manner in which the Property is to be offered for sale (i.e. by auction, tender, etc.);

13.7.3 any negotiations with third parties in respect of the terms for the sale of the Property; and

13.7.4 such other matters relating to the sale process of the Property that the Developer requires control over in order to properly effect the sale of the Property.

13.8. The Owner shall (or if applicable, procure the Owner's Nominee to), no later than 2 business days after written request from the Developer:

13.8.1 execute any document required to appoint an agent recommended by the Developer to effect the sale of the Property;

13.8.2 execute any contract recommended by the Developer for the sale of the Property provided that such contract is in the form of an Approved Contract; and

13.8.3 such other documents as the Developer may reasonably require to be executed by the Owner in order to effect the sale of the Property.

13.9 the Owner shall (or if applicable, procure the Owner's Nominee to) strictly comply with the terms of any Sale Document and acknowledges that any failure by the Owner (or Owner's Nominee) to comply with the terms of the Sale Document constitutes a breach of this Agreement.

13.10 If the Property is sold and the Net Property Sale Proceeds are:

13.10.1 less than $2.9million, then the Developer shall pay to the Owner on settlement of the sale of the Property an amount equal to $2.9million less the Net Property Sale Proceeds; or

13.10.2 greater than $2.9million, then the Owner shall pay to the Developer 50% of the excess on settlement of the sale of the Property.

13.11 If the Property is not sold by that day being 12 months from the date that the provisions of clause 13.6 apply (**Sale Date**), then the Owner (or Owner's Nominee) shall be entitled to exercise the Put Option contained in this clause 13.11:

13.11.1 The Developer grants to the Owner (or Owner's Nominee) for a period of 7 days from the date the Developer delivers to the owner the Supporting Material an option to require the Developer or its nominee to purchase the Property in accordance with the Option Contract. The Developer shall execute and deliver to the Owner (or Owner's Nominee) the Supporting Material no later than 2 business days after the Sale Date.

13.11.2 The Developer may at any time prior to exercise of the Put Option, nominate in writing to the Owner (or Owner's Nominee), another person or corporation who is to acquire the Property from the Owner (or Owner's Nominee) (**Nominee**). In order for the nomination to be effective, the Developer must procure the Nominee deliver the Supporting Material to the Owner (or Owner's Nominee) duly executed.

13.11.3 The Put Option may only be exercised by the Owner (or Owner's Nominee) delivering to the Developer on a business day at the address for service of notices on the Developer specified in Schedule 1, Item 4, a Put Option Notice executed by the Owner (or Owner's Nominee).

13.11.4 On exercise of the Put Option, the Option Contract will be deemed to have been entered into between the Owner (or Owner's Nominee) as Vendor and the Developer or its Nominee as Purchaser.

13.11.5 Following receipt of the Option Notice, the Owner (or Owner's Nominee) shall cause to be delivered to the Developer 2 copies of the Option Contract duly completed by inserting the appropriate details in any blanks, duly executed by the Owner (or Owner's Nominee). Following receipt of the Option Contract duly executed by the Owner (or Owner's Nominee), the Developer shall also promptly execute both copies of the Option Contract and deliver 1 copy to the Owner (or Owner's Nominee) duly executed by both parties.

13.11.6 Any duty under the Duties Act arising in relation to the provisions of this clause 13.11 or any transaction arising as a result of the Owner (or Owner's Nominee) exercising the Put Option under this clause is to be borne by the Owner, other than any duty under the Duties Act payable in respect of the Option Contract which shall be paid by the Developer.

[13] The terms of the Option Contract are found at Schedule 10 of the Development Agreement. The term "Supporting Material" is defined in the Development Agreement as follows:

> "**Supporting Material** means:
>
> (a) a Lawyer's Certificate under section 369 of the Property Agents and Motor Dealers Act 2000 (Qld), waiving the cooling-off period under the Contract, duly signed by the Developer or Nominee's solicitor; and
>
> (b) a Form 30C under the Property Agents and Motor Dealers Act 2000 (Qld), annexed as the top sheet of the Contract, duly signed by the Developer or its Nominee."

[14] RNP was also given a call option in respect to the land by clause 13.12.

[15] Clause 14 of the Development Agreement included express obligations of good faith, to which reference shall be made later in these reasons.

[16] On 2 October 2008, RNP submitted a recommendation for the purposes of clause 13.2 of the Development Agreement (*the RNP recommendation*). In essence, it was

that an application be made for a development approval for a development incorporating 12 townhouses and 114 units on the land, with RNP preparing and submitting the application, and RNP providing development management services at no cost; and OCIL paying "hard costs" for the application and approval (estimated to be approximately $150,000). On receipt of the approval, the property was to be marketed and sold with the benefit of the approval, and the profits to be shared equally by RNP and OCIL.

[17] OCIL responded by an email dated 8 October 2008 (*the OCIL response*). OCIL's response was stated succinctly in the body of the email, to the following effect:

> "We have considered the attached proposal under our standard review and approval processes. The Orchard Diversified Property Fund does not invest in, or develop residential real estate. As such, the proposal to apply for a DA and sell the property with that DA is not within the Fund's Investment allocation. As such, we wish to proceed with selling the property as governed under the terms of the Development Agreement."

[18] At the hearing, it was common ground that the OCIL response identified the basis on which a RNP recommendation was rejected by OCIL, and it was accepted that the facts stated in the OCIL response were believed to be true by those responsible for it. It was also common ground that attempts were made by RNP to sell the property under clause 13.7. The Development Agreement allowed 12 months for this process. That period expired on about 8 October 2008, without the land having been sold. Clause 13.11.1 then required RNP, in the circumstances to which the clause applied, to deliver the Supporting Material to OCIL.

[19] In a letter to RNP's solicitors dated 16 October 2009, OCIL's solicitors called on RNP to deliver to OCIL the Supporting Material. RNP, however, did not comply with this demand.

[20] On 8 February 2010, RNP gave a notice of termination of the agreement, relying on rights said to arise under chapter 11, part 2 of the PAMD Act, and in particular s 367(2).

[21] It is common ground that at all times the land has been "residential property" as that expression is defined in s 17 of the PAMD Act.

Provisions of PAMD Act

[22] For the purpose of considering the position of the parties at the time they entered into the Development Agreement, it seems to me that the relevant provisions of the PAMD Act are those in force on 2 September 2005.

[23] It is convenient to commence with a reference to the objects of the PAMD Act, found in s 10:

> **10 Objects**
>
> (1) The main object of this Act is to provide a system for licensing and regulating persons as restricted letting agents,

real estate agents, pastoral houses, auctioneers, property developers, motor dealers and commercial agents, and for registering and regulating persons as registered employees, that achieves an appropriate balance between—

(a) the need to regulate for the protection of consumers; and

(b) the need to promote freedom of enterprise in the market place.

(2) Another significant object of this Act is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property.

(3) The objects are to be achieved mainly by—

(a) ensuring—
(i) only suitable persons with appropriate qualifications are licensed or registered; and
(ii) persons who carry on business or are in charge of a licensee's business at a place under the authority of a property agents and motor dealers licence maintain close personal supervision of the way the business is carried on; and

(b) providing—
(i) protection for consumers in their dealings with licensees and their employees; and
(ii) a legislative framework within which persons performing activities for licensees may lawfully operate; and

(c) regulating fees and commissions that can be charged for particular transactions; and

(d) providing protection for consumers in their dealings with marketeers; and

(e) promoting administrative efficiency by providing that—
(i) responsibility for licensing rests with the chief executive; and
(ii) responsibility for minor claims against the fund rests with the chief executive; and
(iii) responsibility for claims, other than minor claims, against the fund rests with the tribunal; and
(iv) responsibility for reviewing particular decisions of the chief executive rests with the tribunal; and
(v) responsibility for disciplinary matters rests with the tribunal; and

(f) establishing a claim fund to provide compensation in

particular circumstances for persons who suffer financial loss because of their dealings with persons, other than property developers and their employees, regulated under this Act; and

(g) providing for the enforcement of matters involving marketeers by the tribunal and the District Court; and

(h) providing increased flexibility in enforcement measures through codes of conduct, injunctions, undertakings, and, for contraventions by marketeers, preservation of assets and civil penalties.

[24] Chapter 11 deals with residential property sales. The purposes of Chapter 11 are set out in s 363, which is as follows:

363 Purposes of ch 11

The purposes of this chapter are—

(a) to give persons who enter into relevant contracts a cooling-off period; and

(b) to require all relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that the contract is subject to a cooling-off period; and

(c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.

[25] Section 363 generally identifies the effect of the principal provisions of Chapter 11. The chapter also includes the following:-

365 When parties are bound under a relevant contract

(1) The buyer and the seller under a relevant contract are bound for all purposes by the contract when the buyer or the buyer's agent receives a copy of the contract signed by the buyer and the seller.

[26] Other relevant provisions are as follows:

366 warning statement if proposed relevant contract is faxed

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

(2) The seller of the property or a person acting for the seller who prepares a relevant contract commits an offence if the seller or

person prepares a contract that does not comply with subsection (1).
Maximum penalty—200 penalty units.

(3) The warning statement for a relevant contract must state the following information—
(a) the contract is subject to a cooling-off period;
(b) when the cooling-off period starts and ends;
(c) a recommendation that the buyer seek independent legal advice about the contract before the cooling-off period ends;
(d) what will happen if the buyer terminates the contract before the cooling-off period ends;
(e) the amount or the percentage of the purchase price that will not be refunded from the deposit if the contract is terminated before the cooling-off period ends;
(f) a recommendation that the buyer seek an independent valuation of the property before the cooling-off period ends;
(g) if the seller under the contract is a property developer, that a person who suffers financial loss because of, or arising out of, the person's dealings with a property developer or the property developer's employees can not make a claim against the claim fund.

(4) A statement purporting to be a warning statement is of no effect unless—
(a) before the contract is signed by the buyer, the statement is signed and dated by the buyer; and
(b) the words on the statement are presented in substantially the same way as the words are presented on the approved form.
Example for paragraph (b)—
If words on the approved form are presented in 14 point font, the words on the warning statement must also be presented in 14 point font.

367 Buyer's rights if a warning statement is not given or is not effective

(1) This section applies to a contract to which a warning statement must be attached.

(2) If a warning statement is not attached to the contract or is of no effect under section 366(4), the buyer under the contract may terminate the contract at any time before the contract settles by giving signed, dated notice of termination to the seller or the seller's agent.

(3) The notice of termination must state that the contract is terminated under this section.

(4) If the contract is terminated, the seller must, within 14 days

after the termination, refund any deposit paid under the contract to the buyer.
Maximum penalty—200 penalty units.

(5) If the seller, acting under subsection (4), instructs a licensee acting for the seller to refund the deposit paid under the contract to the buyer, the licensee must immediately refund the deposit to the buyer.
Maximum penalty—200 penalty units.

(6) If the contract is terminated, the seller and the person acting for the seller who prepared the contract are liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract.

(7) If more than 1 person is liable to reimburse the buyer, the liability of the persons is joint and several.

(8) An amount payable to the buyer under this section is recoverable as a debt.

368 Terminating contract during cooling-off period

(1) A buyer under a relevant contract who has not waived the cooling-off period for the contract may terminate the contract at any time before the cooling-off period ends by giving a signed, dated notice to the seller or the seller's agent indicating that the buyer terminates the contract.

(2) If notice of termination is given under subsection (1), the contract is at an end.

(3) The seller must, within 14 days after the contract is terminated, refund any deposit paid under the contract to the buyer less the amount of the termination penalty.
Maximum penalty—200 penalty units.

(4) An amount payable to the buyer under subsection (3) is recoverable as a debt.

369 Waiving cooling-off period

(1) A buyer who proposes to enter into a relevant contract may waive the cooling-off period for the contract by giving the seller under the proposed contract or the seller's agent a lawyer's certificate in the approved form.

(2) The buyer may waive the cooling-off period only if the certificate is given to the seller or the seller's agent before the buyer is bound by the contract.

(3) The lawyer's certificate must be signed and dated by the lawyer giving the certificate and confirm the following by stating—
(a) the lawyer is independent of the seller, the seller's agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and has no business, family or other relationship with any of those persons;
(b) the lawyer has not received, is not receiving, or does not expect to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property, other than professional costs and disbursements payable by the buyer;
(c) the lawyer has explained to the buyer—
(i) the effect of the contract; and
(ii) the purpose and nature of the certificate; and
(iii) the legal effect of the buyer giving the certificate to the seller or the seller's agent.

(4) In this section—
benefit means monetary or other benefit.

[27] Section 365B provides some additional context to the statutory provisions of primary interest in this case. It is as follows:

365B Lawyer's disclosure to buyer about independence

(1) This section applies if a buyer or prospective buyer (***buyer***) engages a lawyer in relation to the purchase or proposed purchase of a residential property under a relevant contract.

(2) The lawyer must give the buyer a lawyer's certificate in the approved form and explain to the buyer the purpose and nature of the certificate.

(3) The lawyer's certificate must be signed and dated by the lawyer and must state—

(a) whether the lawyer is independent of the seller, the seller's agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and whether the lawyer has a business, family or other relationship with any of those persons; and

(b) whether the lawyer has received, is receiving, or expects to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in

> connection with the sale, of the property, other than professional costs and disbursements payable by the buyer; and
>
> (c) the lawyer has explained to the buyer the purpose and nature of the certificate.
>
> (4) In this section—
> ***benefit*** means monetary or other benefit.

[28] A key concept for these provisions is the expression, "relevant contract", defined in s 264 to mean a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction. There is no dispute that the land in question was "residential property in Queensland". Nor is there any suggestion that any contract of significance in this case was formed on a sale by auction. The critical question is whether any contract which is relevant for these proceedings is "a contract for the sale of residential property", as the expression is used in Chapter 11.

[29] It is useful to note some relevant features of a transaction envisaged by these provisions. The legislation envisages a party who is the "buyer" and another party who is the "seller". The first step envisaged by the legislation is the preparation of a contract, including the preparation and attachment of a warning statement.[1] The next is the signing and dating of the warning statement by the buyer.[2] A deposit may be paid, though that is not essential.[3] The legislation envisages that the contract signed by the buyer will be submitted to the seller, and the seller will then return a copy of the contract signed by both parties to the buyer. It is at this point that the parties become bound by the contract.[4]

[30] The Act then creates a cooling-off period during which the buyer, if the buyer has not waived the cooling off period, may terminate the contract. However, if a warning statement is not given, the buyer may terminate the contract "at anytime before the contract settles". The exercise of either right will result in the refund of the deposit, or part of it.

Did the PAMD Act apply to the Development Agreement?

[31] On behalf of RNP, it is submitted that the PAMD Act applied to the Development Agreement, and that, because no warning statement was attached to the Development Agreement, it was entitled to terminate the contract "at anytime before the contract settles", which it did by the letter from its solicitors of 8 February 2010.

[32] The submission depends upon a finding that the Development Agreement is "a contract for the sale of residential property", in respect of which RNP is the "buyer", and OCIL is the "seller".

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1 s 366(1) and (2).
2 s 366(4).
3 s 366(3)(e), s 367(4), (5).
4 s 365(1).

[33] Ultimately, that submission is founded upon the Put Option for which provision is made in clause 13.11. Before considering this submission, it is convenient to note some observations about the nature of an option, and to consider the position of the parties immediately before they entered into the Development Agreement.

[34] In *Laybutt v Amoco Australia Pty Ltd*,[5] Gibbs J (as his Honour then was) considered the effect of a contract containing a grant of an option. His Honour expressed the view that such an option was in substance a conditional contract for the sale of the land.[6] A primary reason for that conclusion was that an option itself creates an equitable interest in the land to which it relates. Another reason was that an act by the grantor purporting to revoke it is in effectual, and that result is inconsistent with the alternative characterisation on an option as an offer, together with the contractual obligation not to revoke it.

[35] In *Mercantile Credits Ltd v Shell Co of Australia Ltd*,[7] Barwick CJ adopted the views expressed by Gibbs J in *Laybutt*.[8] In *Whitemore Pty Ltd v OF Gamble Pty Ltd*,[9] *Laybutt* was applied by Malcolm CJ to conclude that the right or option of renewal of a lease constituted a conditional agreement to grant a new lease at the expiration of the term. This view was applied by the Western Australian Court of Appeal in *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia*.[10]

[36] In *Traywinds Pty Ltd v Cooper*[11] both the analysis of the nature of an option given by Gibbs J in *Laybutt*, and the alternative view that an option is no more than an offer which, if given for consideration, is irrevocable, were considered.

[37] More recently, in *David Deane & Associates Pty Ltd v Bonnyview Pty Ltd*[12] the Court of Appeal had to consider whether a real estate agent was entitled to a commission, the right to commission arising if the agent introduced "a purchaser who enters into a valid and enforceable Contract of Sale …". The agent relied upon option agreements, which included options capable of exercise by the prospective vendor. The court held that the agent was entitled to commission. In doing so, Keane JA (with whom the other member of the court agreed) said that there was much to be said for the view that the option agreements amounted to valid and enforceable contracts of sale, referring to the judgment of Gibbs J in *Laybutt*.[13] His Honour pointed out that, once an option was exercised, the option agreement identified the rights and obligations of the parties.[14]

[38] There have been a number of cases which have considered whether an option agreement attracted the operation of the warning statement provisions of the PAMD Act.

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5 (1974) 132 CLR 57.
6 See pages 75-78.
7 (1976) 136 CLR 326.
8 See *Mercantile Credits* at 338.
9 (1991) 6 WAR 110, 116-117.
10 [2008] WASCA 107 [16]-[18].
11 [1989] 1 Qd R 222.
12 [2005] QCA 270.
13 See at [22].
14 See [23].

[39] In *Devine Ltd v Timbs*[15] the parties had entered into option agreements for the sale of certain lots in a proposed community titles scheme. Attached to each option agreement was a warning statement, conforming with the requirements of the PAMD Act at the time when the agreement was formed. At the time when the options came to be exercised, the provisions of the PAMD Act had changed. Helman J held that the relevant provisions were those in force at the time when the parties entered into the option agreement. His Honour accepted a submission to the effect that it was at that point that "pursuant to the option agreement, the (buyer) became bound by the terms of the proposed sale contract subject only to the exercise by the (seller) of its put option".[16] That view echoes the analysis of Gibbs J in *Laybutt*.

[40] In *Mark Bain Constructions Pty Ltd v Barling,*[17] parties had entered into put and call option deeds relating to two proposed lots in a community titles scheme. The proposed purchasers gave notice of termination, relying in part upon the provisions of the PAMD Act. Warning statements had not been attached to the option deeds, but annexed to each deed were proposed contracts, the first two pages of which were warning statements under the PAMD Act. Philippides J held that the option deeds were "relevant contracts" for the purposes of the PAMD Act, and had been validly terminated. In reaching that conclusion, she adopted the analysis by Keane JA in *David Deane*, including the reference to the judgment of Gibbs J in *Laybutt.*[18] Her Honour also referred to a statement by Barwick CJ in *Petelin v Deger Investments Pty Ltd,*[19] to the effect that in a case where an option agreement requires a new contractual document in an identified form to be signed or exchanged, that does not result in the formation of a new and different contract, but merely the recording in a formal fashion in the agreement which resulted from the exercise of the option.[20]

[41] In *Cheree-Ann Property Developers Pty Ltd v East West International Development Pty Ltd,*[21] one of the parties was in the course of carrying out a residential development by way of subdivision of land which it owned. It had entered into agreements with the other party relating to a number of the proposed lots. The agreements made provision for the other parties to sell the lots to third parties, but provided that, in respect of any lots which were not sold, the land owner could require the marketeers to purchase those lots. No warning statement was attached to the option agreements. The marketeers argued that the option agreements were not enforceable. Mullins J held that the agreements were not "relevant contracts" for the purposes of the PAMD Act, notwithstanding that they included put options granted to the land owner. Her Honour said:[22]

> "… I consider it would unduly strain the definition of 'relevant contract' in s 364 of the Act to conclude that an agreement that facilitates the marketing of lots to third party purchasers whilst the subdivision is being developed can be characterised as a contract for

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15 [2004] 2 Qd R 501.
16 See *Devine* at [12], [13].
17 [2006] QSC 48.
18 See *Mark Bain* at [30]-[32].
19 (1976) 133 CLR 538, 542.
20 *Mark Bain* at [32].
21 [2007] 1 Qd R 132.
22 At [51].

> the sale of those lots to the marketer, because the agreement also incorporates a put option to be exercised by the vendor against the marketer. The substance of each agreement was to provide stock for the applicants as property marketers and the agreements cannot be characterised as contracts for the sale of property."

[42] Her Honour also identified an alternative basis for her decision.[23] It was that the warning statements provisions of the PAMD Act applied only to a contract dealing with a single parcel of land on which a place of residence is constructed or being constructed; or a single parcel of vacant land in a residential area.[24]

[43] *Vale 1 Pty Ltd v Delorain Pty Ltd*[25] was a case where the facts were quite similar to those in *Cheree-Ann Property Developers.* Douglas J noted the submission made on behalf of Delorain that the substance of the agreements between the parties was to facilitate the marketing by Vale of lots owned by Delorain to third party purchasers, while Delorain carried out the subdivision the land which produced those lots, and accordingly the agreements could not be characterised as contract for the sale of those lots to Vale. His Honour observed that the submission paraphrased the language of Mullins J in *Cheree-Ann Property Developers.*[26] His Honour concluded that the case was "really on all fours" with the decision in *Cheree-Ann Property Developers,* a decision which His Honour considered should be followed.[27] His Honour noted that the agreements did not result in a contract of sale to a clearly identified buyer; and that until the purchaser was identified as a result of Vale's marketing activities, it was impossible to conclude that the contract of the sale of the property had come into existence.

[44] There were submissions that the remarks to which I have referred, relating to the identity of the ultimate buyer, identify the true rationale for the decision in *Vale 1*. In my view, that is not correct. His Honour's identification of the facts of that case with those considered in *Cheree-Ann Property Developers*, and his Honour's statement that that decision should be followed, lead me to conclude that his Honour's decision was based on the proposition that the substance of the agreement was to enable Vale to carry on marketing activities in relation to the lots which Delorain was in the course of producing. That view is supported by his Honour's earlier reference to the submission made on behalf of Delorain, which His Honour describes as paraphrasing the language of Mullins J from *Cheree-Ann Property Developers.*

[45] The cases to which I have referred, rather strongly point to the view that, in a case where an option is created, the document to which attention must be paid for applying provisions of the PAMD Act is the option agreement, and not a document recording the obligation of the parties, executed subsequent to the exercise of the option. In the case of an option agreement which includes a put option, the potential purchaser becomes bound to purchase the land by virtue of obligations it undertakes as part of the option agreement, though the engagement of those obligations depends upon an act of the seller. It is clear, therefore, that consideration must be given to whether the PAMD Act applied to Development

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23 See [52].
24 See *Cheree-Ann Property Developers* at [59]-[60]; and s 17 of the PAMD Act.
25 [2009] QSC 425.
26 See *Vale 1* at [4].
27 *Vale 1* at [13].

Agreement. I shall later discuss whether it is necessary to consider whether the provisions of the PAMD Act apply at the time when the option comes to be exercised.

[46] Immediately before the parties entered into the Development Agreement, RNP had the benefit of the Starlistic option. Accordingly, it had an equitable interest in the land. At that time, neither OCIL nor any entity associated with it had any interest in the land. It seems to me it would produce a curious result if the Development Agreement were held to be a "relevant contract" for the purposes of the PAMD Act, in respect of which OCIL was the "seller" and RNP was the "buyer".

[47] I have previously summarised the principal features of the Development Agreement. In substance, it was an agreement intended to bring about the development of the land as a shopping centre. It may be that the Development Agreement constituted a joint venture, and that as a result of its contributions, RNP acquire, or may have acquired, some equitable interest in the land,[28] but it is unnecessary to reach a final view about this. The primary mechanism chosen by the parties to bring the project to an end, in the event that its primary purpose could be achieved, was the sale of the land, to be conducted by RNP, with a guaranteed minimum return to OCIL related to the amount paid by it (or an entity associated with it) for the purpose of the project, and a provision for sharing any excess above that amount between RNP and OCIL. If that mechanism was unsuccessful, and RNP had not previously exercised its call option rights under the Development Agreement, the put option came into effect. The put option appears to be a mechanism of last resort.

[48] Adopting the analysis of Mullins J, it cannot be said that the sale of the land by OCIL (or an associated entity) to RNP is the substance of the Development Agreement.

[49] The question which has to be determined is whether the Development Agreement was, in the language of the definition of "relevant contract" in the PAMD Act, a "contract for the sale of residential property". It seems to me that some assistance in understanding the expression can be obtained by a consideration of the type of transaction envisaged by Chapter 11. It envisages a party who can be characterised as the buyer, and another who can be characterised as the seller, in relation to the contract. The contract is likely to be prepared by the seller. It is likely to be signed by the buyer, before it is signed by the seller. It is likely to make provision for the payment of a deposit. The envisaged contract is one which "settles". It is not easy to see the development agreement as a contract to which the provisions of Chapter 11 are intended apply.

[50] The stated purposes of Chapter 11 include that purchasers who "enter into relevant contracts" have the benefit of a cooling-off period, and to require "all relevant contracts for the sale of residential property in Queensland" to include certain consumer protection information with regards to s 363. These statements of purpose provide no real assistance in understanding what is a relevant contract. More assistance is to be found in the provisions of s 10 of the PAMD Act. One of the significant objects of the Act is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property. Moreoever, additional context may be derived from s 17, which identifies

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[28] See *Muschinski v Dodds* [1985] 160 CLR 583, 618, 619.

residential property as a single parcel of land, on which a place of residence is constructed or is being constructed, or if vacant, is in a residential area. Taken together, these considerations strongly suggest that Chapter 11 is directed to transactions involving consumers, and not to a transaction including the commercial complexities of the development agreement.

[51] In my view, these considerations indicate that a contract for the sale of residential property, as that expression is used in the definition of "relevant contract" is one, the principal purpose of which is to bind the parties to the purchase and sale of residential property of the kind identified in s 17 of the *Land Act*. In my view, the Development Agreement is not a "relevant contract", and compliance with s 366 was not required. RNP's attempt to terminate the Development Agreement on the basis that the section had not been complied with is, in my view, ineffective.

[52] I should add that in reaching this conclusion, I am conscious that a somewhat similar expression appears in s 59 of the *Property Law Act* 1974. A signed written record is required to enable an action to be brought "upon any contract for the sale or other disposition of land or any interest in land". The scope of the expression in s 59 is wider than the scope which I have attributed to the expression "a contract for the sale of residential property" in the definition of "relevant contract" in the PAMD Act. It is apparent from the language used in s 59 that the section is intended to have a wide operation. Moreover, the evident purpose of s 59, and the context in which it is found, are quite different to those for the provisions of the PAMD Act.

PAMD Act and OCIL's exercise of put option

[53] RNP submits that, if OCIL were to exercise its rights under the put option for which provision is made in clause 13.11 of the Development Agreement, the contract which is then to be executed is a "relevant contract" for the purposes of Chapter 11 of the PAMD Act, and accordingly the provisions relating to a warning statement must be complied with.

[54] Changes have been made to the PAMD Act since the Development Agreement was entered into. The basic features of it, and to which reference has previously been made, remain unchanged. There are, however, more detailed provisions relating to the use of facsimile and other electronic communication as the means by which a proposed relevant contract is given to a buyer.

[55] It is convenient to set out the current provisions dealing with the circumstance where a proposed relevant contract is given to a proposed buyer other than by electronic means. They are found in s 366B, in the following terms:

> **366B Warning statement if proposed relevant contract is given in another way**
>
> (1) This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent for signing in a way other than by electronic communication.
>
> (2) The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement and, if the proposed relevant contract relates to a unit sale, an

information sheet with the warning statement appearing as its first or top page and any information sheet appearing immediately after the warning statement.

(3) If the proposed relevant contract does not comply with subsection (2)—
(a) if the seller gave the proposed relevant contract—the seller; or
(b) if the seller's agent gave the proposed relevant contract—the seller's agent;
commits an offence.
Maximum penalty—200 penalty units.

(4) If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.
Note—
A contravention of this subsection is not an offence. Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer.

(5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.

(6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.
Maximum penalty—200 penalty units.

(7) It is a defence to a prosecution for an offence against subsection (3) or (6) for the seller or the seller's agent to prove that the seller or the seller's agent gave notice to the proposed buyer or the proposed buyer's agent under section 366C.

[56] Section 366 contains analogous provisions if a proposed relevant contract is sent by facsimile to a proposed buyer or the proposed buyer's agent for signing; and s 366A contains analogous provisions if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent by electronic communication, other than facsimile, for signing.

[57] It is a curious feature of these provisions that each depends upon the giving, whether by facsimile, other electronic means, or by other means, to a proposed buyer or a proposed buyer's agent, of a proposed relevant contract for signing. The reference in these provisions to a "proposed relevant contract" and a "proposed buyer" assume no anterior obligation by the buyer to buy the land.

[58] Moreover, the provisions impose a requirement on the seller (or its agent) to ensure that a warning statement is attached to "the proposed relevant contract" (or in the case of a contract sent by a facsimile or other electronic means) the inclusion of the warning statement with the proposed relevant contract sent to the proposed buyer. These provisions do not deal with the situation where a buyer simply submits a contract already in its possession, which it has signed.

[59] Section 367 provides that if a warning statement requirement for a proposed relevant contract is not complied with (subject to a corrective action under s 366C), the buyer may terminate the relevant contract.

[60] In my view, these provisions do not apply to clause 13.11 of the Development Agreement, or the actions to be taken pursuant to it.

[61] The first difficulty arises from the characterisation of the put option as a conditional contract, entered into when the parties entered into the Development Agreement. From that time, RNP had undertaken a binding, conditional, obligation to purchase the land under the Option Contract. The steps to be taken under clause 13.11 do not result in a new or different contract. It then becomes difficult to identify a "proposed relevant contract" for the purposes of s 367(1)(a). If there is no proposed relevant contract, it is difficult to identify the "warning statement requirement" (defined at s 367(9)) for the purpose of s 367(1).

[62] Further, clauses 13.11.3 and 13.11.4 have the effect that, on delivery of a Put Option Notice by OCIL, RNP is bound by the option contract. That is the consequence of those clauses, and the action of OCIL in delivering the Put Option Notice. Although clause 13.11.5 requires the subsequent delivery by OCIL of two copies of the option contract, executed by it, to RNP, to be followed by execution by RNP of the option contract, it seems me that those are machinery provisions which do not result in the creation of any binding obligation. It is therefore difficult to describe the actions taken under clause 13.11.5 as the delivery of a proposed relevant contract. Accordingly, it is difficult to see that the PAMD Act would result in an obligation imposed on OCIL to attach a warning statement.

[63] I should add that this conclusion appears to me to be consistent with the decision in *Devine*. It is also consistent with the conclusion reached by Philippides J in *Mark Bain Constructions*[29] in relation to the appropriateness of granting a cooling-off period in connection with the exercise of a put option.

[64] It does not seem to me that this result is inconsistent with the purpose of the relevant provisions of the PAMD Act. If the true source of the obligations of a party to purchase land is a contract which is not itself a "relevant contract" as defined in that Act, then it is difficult to see why something which is in truth part of the mechanism by which an obligation is performed should itself be intended to be subject to the Act's protection.

The requirement that RNP deliver the Supporting Material

[65] Clause 13.11.1 of the Development Agreement required RNP to deliver to OCIL a signed warning statement annexed to the top sheet of the option contract, together

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29 At [24]-[26].

with a Lawyer's Certificate under s 369 of the PAMD Act, waiving the cooling-off period in relation to the contract, and signed by RNP's solicitor.

[66] If the provisions of the PAMD Act to which reference has been made do not apply to clause 13.11 of the Development Agreement and the steps to be taken under it, it seems to me that the requirement that RNP deliver these documents is simply a machinery step in the procedures set out in clause 13.11. It is a step which must be taken before OCIL enjoys the benefit of the put option under clause 13.11.1.

[67] Different considerations arise if these provisions of the PAMD Act apply.

[68] It is difficult to suggest that the requirement that RNP execute and deliver to OCIL a warning statement annexed to the Option Contract, before either party signs it, is in any way inconsistent with the provisions of the PAMD Act. It could well be regarded as one means by which OCIL ensured that a warning statement was attached to the contract, to give effect to the obligation imposed, for example, by s 366B(2).

[69] The written submissions of RNP argue that the requirement found in clause 13.11.1 to execute and deliver the Supporting Material is inconsistent with the protection afforded by s 366B of the PAMD Act. The obligations in s 366B relate to what is to be done when the seller gives the contract to the buyer for signing. A requirement that a proposed buyer have, execute, and deliver a copy of the warning statement before the contract is given to it for signing does not seem to me to be inconsistent with the provisions of s 366B.

[70] However, the submissions also make reference to the requirement for delivery of a Lawyer's Certificate under s 369. It is submitted that an order requiring RNP to comply with this aspect of clause 13.11.1 would have the effect of requiring RNP to waive its statutory right to the cooling-off period, prior to having received the warning statement, and having had an opportunity to rely upon it. Reference is made to aspects of the doctrine of illegality.

[71] Thus, RNP relies upon a passage from *Fitzgerald v FJ Leonhardt Pty Ltd*[30] to the effect that courts should not refuse to enforce rights simply because they arose out of, or were associated with an unlawful purpose, unless the statute discloses an intention that those rights should be unenforceable in those circumstances. The submission suggests first that an unlawful purpose is associated with clause 13.11; and secondly, a statutory intention that the rights which the clause confers (specifically, the right granted to OCIL to have the benefit of the delivery to it by RNP of Lawyer's Certificate under s 369) is to be of no effect "in all circumstances".

[72] Reference is also made to a passage from *St John Shipping Corporation v Joseph Rank Ltd*[31] where there is discussion of a contract "impliedly prohibited by statute". The submissions suggest that RNP is entitled to receive a warning statement prior to execution of the contract, and to have the benefit of the right to take advantage of the cooling-off period, said to accrue as a consequence of its entitlement to receive a warning statement.

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30 (1997) 189 CLR 215, 230.

31 [1957] 1 QB 267, 283.

[73] In this context, RNP has relied on the following passage from *Mark Bain Constructions*:[32]

> "… A vendor could defeat the consumer protection provisions of ch 11 of the PAMD Act by simply employing the vehicle of an option agreement and requiring, as a pre-condition of that agreement, that the purchaser waive the cooling-off period as it applied to the contract executed under the option. Such an approach would defeat the reformatory object of the legislation. It is clearly not intended that the cooling-off period can be waived without a warning statement having first been provided in the manner required by s 366. Indeed, it is central to the implementation of the consumer protection purposes of ch 11 that, before a buyer executes a contract, the buyer will be provided with information concerning the cooling-off period and the right to terminate during that period. This is also made apparent by the terms of the PAMD Form 32a Lawyer's Certificate. And while s 369 permits the waiving of a cooling-off period, it does not permit the waiving of the requirement that a warning statement be provided and signed as required by s 366." (References omitted.)

[74] It should be noted that s 369 does not, in terms, provide that a Lawyer's Certificate is ineffective, if delivered before the buyer receives a warning statement. The content of the Certificate required by s 369(3) evidently makes it necessary for a lawyer to explain to the buyer that, unless a Certificate is given to the seller, then the buyer has the benefit of the cooling-off period. It does not seem to me that it is inconsistent with the reformatory object of the PAMD Act provisions that a buyer give to a seller a Lawyer's Certificate, before the buyer has been given a warning statement. The purpose of s 369 is to enable a buyer who has been appropriately advised, to waive the cooling-off period. A consideration of that purpose does not warrant the conclusion that the Certificate may only be given to the seller after the buyer has received a warning statement. On the contrary, it seems to me to be more effectively achieved by enabling a buyer to give an effective certificate before receipt of a warning statement.

[75] However, an earlier agreement requiring a buyer to give such a Certificate raises different considerations. Such an agreement is, of its nature, intended to deprive the buyer of the choice, conferred by the PAMD Act, either to have the benefit of the cooling-off period, or to waive that benefit, having received appropriate legal advice.

[76] It seems to me the first question to be considered is whether the formation of such an agreement is impliedly prohibited by statute.[33] It may then be necessary to consider the principles formulated by McHugh J in *Nelson v Nelson.*[34]

[77] Cases where it has been held that a statute by implication prohibits the making of a contract are commonly cases where the implied prohibition is related to some other

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32 At [28].

33 See *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413, 426.

34 (1995) 184 CLR 538, 613; see also *Fitzgerald* at 230.

prohibition, such as acting in a particular capacity without a license or qualification.[35] This case is not in that category.

[78] However, it has been said that if the object of a statute can only be attained by holding that a particular class of contract is prohibited, then prohibition must necessarily have been intended in respect of any contract within the class.[36] Chapter 11 of the PAMD *Act* establishes a quite specific regime which creates a cooling-off period for a relevant contract, and requires that a proposed buyer under such a contract be notified that the contract is subject to the cooling-off period. It also provides for waiver by the buyer of the benefit of the cooling-off period, but only if that occurs before the buyer becomes bound by the contract.[37] One of the objects of Chapter 11 is stated to be the giving to a person who enters into a relevant contract, the benefit of a cooling-off period.[38] The question, therefore, is whether the object of Chapter 11 can only be attained if a contract requiring a buyer under a proposed relevant contract to waive the benefit of the cooling-off period is prohibited.

[79] It will be apparent that the object of Chapter 11 to which I have made reference is, in fact, broader than the provisions of the Chapter. The Chapter permits waiver, before the buyer becomes bound. It seems to me, therefore, that the relevant object of Chapter 11 is more accurately stated as being to give a buyer under a proposed relevant contract the benefit of the cooling-off period, unless that benefit is waived in the manner identified in s 369, before the buyer becomes bound by the relevant contract. It is apparent from the form (no doubt designed to give effect to the legislative purpose) that the specification of the right of waiver found in s 369 was intended to ensure that the proposed buyer received appropriate legal advice from an independent lawyer, prior to the buyer being bound by the proposed relevant contract, as to the effect of the contract, and the consequences of the delivery of the certificate. In other words, it seems to me that a purpose of s 369 is to ensure that the benefit of the cooling-off period is only waived by a person not yet bound by a relevant contract, who has received legal advice about the effect of waiving the contract. A contract which requires a person to waive the benefit of a cooling-off period may well defeat this purpose, as there is no certainty that the legal advice will have been given before the person becomes bound to waive the benefit of the cooling-off period. It, therefore seems to me, that the relevant object of Chapter 11 can only be attained by holding that such contracts are prohibited.

[80] In view of that conclusion, it is not necessary to consider in detail the principles formulated by McHugh J in *Nelson*. However, I shall comment on them briefly.

[81] In *Yango*, Gibbs ACJ[39] identified "four main ways" in which the enforceability of a contract might be affected by a statutory provision rendering particular conduct unlawful. The third of those ways was that a contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful. It seems to me, that the tests formulated by McHugh J in *Nelson* relate to cases of that kind. McHugh J formulated this class of case in slightly different terms, identifying

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35 See *Yango* at 416.

36 Carter, Peden, and Tolhurst *Contract Law in Australia* (5th ed) at [25-13].

37 See s 369(2).

38 See s 363(a).

39 At 413.

as one way that statutory legality can arise as being where a contract is associated with or made in furtherance of the purpose of frustrating the operation of a statute.[40]

[82] McHugh J first identified four exceptions to the principle that a court will not lend its aid to a person who founds a cause of action upon an immoral or an illegal act.[41] Even in a case outside those exceptions (which are not relevant in the present case), his Honour said that a court will not refuse to enforce rights simply because they arose out of or are associated with an unlawful purpose unless one of two conditions are satisfied. I propose to comment on the second of those conditions.

[83] However, it is first necessary to consider whether an unlawful purpose is involved. It seems to me that such a purpose is established, if a contract is intended to defeat the policy or purpose of a statute.[42] If the exercise of the put option would result in a relevant contract, that will be the purpose of clause 13.11.1.

[84] The condition to which I have referred, as stated by McHugh J, itself has three components, namely, that the sanction of refusing to enforce the rights is not disproportionate to the seriousness of the unlawful conduct; the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policy; and the statute does not disclose an intention that the sanctions and remedies contained in it are to be the only consequences of a breach of the statute or the frustration of its policies.

[85] The right in question is the right to require a proposed buyer to waive the benefit of the cooling-off period. It seems to me that the sanction of refusing to enforce that right is not disproportionate to the seriousness of the conduct of a party who makes a contract with another requiring the other to waive such a right. For reasons already discussed, the imposition of the sanctions is necessary to protect the objects and policies of the PAMD Act. Nor, in my view, does the PAMD Act disclose an intention that any sanction or remedy contained in it is to be the only legal consequence of an act done to frustrate its policies; indeed, no relevant sanction or remedy is identified.

[86] Accordingly, if it were necessary to consider the applicability of this test, it would seem to me that if the exercise of the put option were to result in a relevant contract, then a court would not enforce the obligation otherwise imposed by clause 13.11.1 that RMP execute and deliver the Supporting Material to OCIL.

[87] However, I have elsewhere concluded that the contract resulting from the exercise of the Put Option is not itself a relevant contract under the PAMD Act; and accordingly, these considerations do not prevent the enforcement of clause 13.11.1.

OCIL's rejection of RNP's recommendation

[88] It will be recalled that clause 13 of the agreement required RNP promptly to submit to OCIL a recommendation relating to the development or realisation of the land, in the event that it failed to obtain a development approval for the shopping centre, or

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40 *Nelson* at p. 611.

41 *Nelson* pp. 604-605.

42 See *Nelson* at 606.

to secure an agreement for lease with the anchor tenant. It then made provision for OCIL to accept or reject RNP's recommendation. Clause 14.1 included a provision relevant to OCIL's decision in relation to RNP's recommendation, in the following terms:

> **14 Obligations of the parties**
>
> 14.1. Both the Owner and the Developer must act in good faith in terms of:
>
> 14.1.1. the Developer's preparation of any Recommendation for the Owner in respect of the future development of the Property; and
>
> 14.1.2. notification by the Owner as to whether it wishes to proceed with any Recommendation nominated by the Developer."

[89] It was accepted that clause 14.1.2 relates to the decision by OCIL on RNP's recommendation, and it was not to be read literally as relating to the notification of that decision.

[90] RNP submits that OCIL's decision was made in breach of its obligation to act in good faith; and accordingly, it cannot rely on the provisions of the Development Agreement which take effect as a result of a rejection by OCIL of RNP's recommendation. Accordingly, so RNP submits, OCIL cannot now have the relief it seeks, in reliance on the provisions of the Development Agreement.

[91] On behalf of OCIL, it is submitted that the rejection was not made in breach of the contractual obligation of good faith; and in any event, OCIL submits that RNP has relied on rights conferred by the Development Agreement, which are consequent upon OCIL's rejection of RNP's recommendation; and accordingly, submits that the doctrine of election precludes RNP from resisting the relief sought by reference to the alleged breach of the obligation of good faith.

[92] The issues raised by these submissions will be considered in turn.

Content of contractual obligation of good faith

[93] In this context, both parties make reference to propositions formulated by Sir Anthony Mason, writing extra-judicially, which identify that "good faith" embraces three notions, namely:-

> 14.1.3. an obligation on the parties to cooperate in achieving the contractual objects (loyalty to the promise itself);
> 14.1.4. compliance with honest standards of conduct; and
> 14.1.5. compliance with standards of conduct which are reasonable having regard to the interests of the parties.

[94] The submissions made on behalf of OCIL also make reference to the decision of Barrett J in *Overlook Management BV v Foxtel Management Pty Ltd*.[43] Barrett J made reference to the three propositions formulated by Sir Anthony Mason. His

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43 [2002] NSWSC 17.

Honour suggested[44] that the first proposition "may well include the duties not to hinder fulfilment of the promise's purpose and to do everything necessary to enable the other party to have the benefit of the promise". With reference to the standards of conduct referred to in the second and third proposition, his Honour said:[45]

[95]

> "If adherence to such standards of conduct is the predominant component of a separate obligation of good faith in performance of a contract, it becomes necessary to enquire about the extent to which selflessness is required. It must be accepted that the party subject to the obligation is not required to subordinate the party's own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become), in words used by McHugh and Gummow JJ in *Byrne v Australian Airlines Limited*[46] 'nugatory, worthless or, perhaps, seriously undermined'."

[96] By reference to the third of the propositions, RNP submits that the requirement of "reasonableness" imports "proper purpose"; and requires a party not to exercise a discretion for a purpose extraneous to the contract. It also submits that OCIL was required to consider any recommendation which came within the ambit of clause 13.3. It further submits, by reference to clause 13.4, that OCIL was limited to a consideration of the criteria identified; and if it wished any other matter to be taken into account, it was required, by reference to clause 13.7, to identify that to RNP before the recommendation was made. It further submits that clauses 13.3 to 13.5 had as their object, the weighing up of the "commercial pluses and minuses"; and accordingly OCIL's decision on RNP's recommendation had to be based on a weighing up of those matters. It also submits that the ground relied upon by OCIL results is a breach of the obligation of good faith, because the factual basis relied upon is wrong.

[97] For OCIL, it is submitted that the obligation is not breached, unless it acted in bad faith, in the sense that its decision was dishonest; or made for an improper purpose; or arbitrary and capricious; or an objectively unreasonable interference with the enjoyment of a benefit conferred on RNP by the express contractual terms such the enjoyment becomes (or could become) nugatory or worthless.

[98] It was common ground that the obligation of good faith did not require OCIL to subject its own interests to those of RNP.

[99] It is to be noted that the parties, by including a "good faith" requirement in clause 14.1, have avoided stating specifically the obligation or obligations on which they were agreeing. They have chosen an expression, the meaning of which courts have been grappling with for a number of years. In those circumstances, it seems to me to be particularly appropriate to construe the expression, and determine the obligations imposed, by reference to the remainder of the contract.

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44 At [64].

45 At [65].

46 (1995) 185 CLR 410.

[100] It is relatively easy to conclude that the obligation did not require OCIL to act reasonably in reaching its decision.[47]

[101] Further, it is necessary to have some appreciation of the relevant position of the parties, as revealed by the contract. It is clear that OCIL was acting as the responsible entity of a property fund.[48] The Development Agreement required RNP to carry out a number of actions which required a significant level of expertise in property development and related matters (securing a development approval for a shopping centre; securing an agreement for lease with an anchor tenant; completing the proposed shopping centre). The relative position of the parties may explain the good faith obligation imposed on RNP by clause 14.1.1.

[102] It is apparent, from a reading of the Development Agreement as a whole, that its primary purpose was to achieve the development of the proposed shopping centre. It is only if the primary purpose failed that there was any scope for the operation of cl 13. In my view, those matters were correctly described by Senior Counsel for OCIL as "exit mechanisms".

[103] The first step under cl 13 was for RNP to prepare the recommendation. The alternatives to be considered in the recommendation were the sale of the land; its development; its retention; or such other commercial proposal as RNP might determine. The recommendation in fact made by RNP was a recommendation to obtain a development approval for a relatively intense residential development, and then to sell the land with the development approval. It seems to me that this recommendation comes within the fourth category (some other commercial proposal); though arguably it comes within the second category (other development of the land). It is a notable feature of cl 13.3 that, particularly with respect to these two categories of recommendation, the provisions of the Development Agreement are quite general. A recommendation falling within either category is inherently likely to raise a broad range of concerns which RNP would have to take into account before it could agree to adopt such a recommendation; and the negotiations which may need to be carried out between RNP and OCIL before such a recommendation could be adopted are likely to be extensive. It seems to me that that is a consideration relevant to the submission made on behalf of RNP that OCIL, in determining whether to accept a recommendation, was limited (whether as a matter of construction of cl 13, or by virtue of the express obligation of good faith) to the considerations specified in cl 13.4.

[104] Under cl 13.4.7, OCIL was entitled to nominate further criteria while RNP was preparing the recommendation. It might be thought that that confirms the submission advanced on behalf of RNP. However, the generality of the categories of recommendation in cl 13.3 makes it, in my view, unlikely that (whether simply as a matter of construction of cl 13, or by virtue of the obligation of good faith), in deciding whether to accept or reject a recommendation, OCIL was limited to the criteria specified in cl 13.4. That assumes an ability to foresee the issues which might occur to it after receipt of the recommendation, before the recommendation is received (a recommendation which RNP was required to submit "promptly": cl 13.2). In my view, it is an unlikely intention to attribute to the parties at the time when they entered into the Development Agreement.

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47 Compare cll 2.11-2.13, 3.5.2, and 11.11.2.

48 See, for example cll 24.1-24.4.

[105] I therefore do not accept the submission that OCIL was, in considering the recommendation, limited to a consideration of the criteria specified in cl 13.4.

[106] Moreover, it seems to me that the discretion conferred on OCIL to accept or reject RNP's recommendation is to be understood in the context of the Development Agreement as a whole, and in particular cl 13. OCIL supplied the basic assets required for the project (essentially money, a substantial sum was used to purchase the land). RNP supplied its expertise. The primary purpose of the Development Agreement was to facilitate the development of a shopping centre on the land.

[107] The balance of cl 13 (cll 13.7-13.12) contains mechanisms designed to ensure that OCIL is not required to retain the land, and is guaranteed the recovery of a minimum sum of $2.9 million, if the development does not proceed. That amount in fact represents the sum of the amounts paid out by OCIL under the Development Agreement; though precise identity with this sum is not particularly significant. Protection of OCIL's position in relation to the money that it has invested is also apparent from cl 17, which required RNP to pay interest on the amounts paid out by OCIL, as events have occurred, from the date the development application was lodged with the Council.

[108] Against that background, it is not difficult to identify that cll 13.3 and 13.4 were included for the benefit of OCIL, to provide it with assistance in relation to the property, which would be the result of the utilisation of the expertise of RNP. In some circumstances RNP might obtain a benefit, but that was not an essential part of the procedures envisaged by cll 13.3-13.11. On the contrary, in some circumstances (if the property was sold for less than $2.9 million), RNP was required to make up the shortfall.[49]

[109] It seems to me that where a discretionary power is to be exercised in good faith, then it is required to be exercised for a purpose which the parties are taken to have envisaged at the time they entered into the Development Agreement. The difficulty in the present case is that the discretion granted to OCIL was a broad one. Moreover, its purpose was, in my view, to enable OCIL to consider whether it would be in its interest that some action other than the sale of the property was taken; or whether it was in its interest that the property should be sold. It seems to me that the broad nature of the discretion which the Development Agreement gave to OCIL meant that it was entitled to take into account matters such as the ground on which it rejected the recommendation.

[110] It should be noted that a recommendation simply that the land be retained carried no benefit for RNP, save that it was likely to mean that it would not be called upon to purchase the property under the Put Option. A recommendation that the land be sold, and the rejection of other recommendations, were not without potential benefit to RNP. In either case, it would have 12 months within which to market the property; and if it were able to achieve a sale at an amount in excess of $2.9 million, it would receive 50% of the excess. The recommendation procedure was not directed to conferring a benefit on RNP; though in some circumstances, a benefit to RNP might result from it.

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[49] See cl 13.10.1.

[111] Ultimately, therefore, when considered in the context of the Development Agreement, the provisions of cll 13.2 to 13.5 were intended, in the event that the primary purpose failed, to enable RNP to identify a course of action, which might mean that it would not be required to purchase the property. It seems to me, therefore, that the good faith requirement imposed on OCIL meant that it had to give genuine consideration to any recommendation which RNP made; but in doing so, it was entitled to take its own interests into account.

[112] If the purpose of cl 13.5 was to enable OCIL to make a decision on RNP's recommendation, in its own interest, then it seem to me that it cannot be said that the discretion was not exercised for a proper purpose.

[113] For RNP it is submitted that the object of these provisions relating to RNP's recommendation and OCIL's decision was for "all of the commercial pluses and minuses to be weighed up". It will be apparent from what has already been set out that I do not accept this view of the object of these provisions; or more accurately, I do not accept that this is an exhaustive statement of the objects of these provisions. It seems to me that, while an object of these provisions (particularly when read with cl 14.1.2) was that OCIL was to consider the "commercial pluses and minuses" of any proposal, OCIL was nevertheless left with a broad discretion to act in its own interests in accepting or rejecting such a proposal.

[114] For RNP, it is submitted that there was no weighing up at all of the commercial pluses and minuses. The onus lies on it to demonstrate this fact. It seeks to do so, by referring to the only ground stated by OCIL in rejecting the application. In my view, that does not establish that no consideration was given to the commercial pluses and minuses. The decision was given six days after the recommendation was made. It commences with a statement that, "we have considered the attached proposal under our standard review and approval processes." These processes were not explored in evidence; and it is difficult to think that they excluded a consideration of commercial benefits and disadvantages. Otherwise, the evidence is silent as to what was considered, as distinct from what was decisive for OCIL's rejection.

[115] RNP also submits that the basis for the decision was factually incorrect; and that a decision cannot be made in good faith, if the decision maker relies on something which is not true and which is inconsistent with the document conferring a right to make the decision.

[116] It is necessary to focus on the stated ground for refusal. It was that the Fund "does not invest in, or develop residential real estate."

[117] To controvert this, RNP relies on the Development Agreement itself. It was common ground, as previously noted, that the land was "residential property" for the purposes of the PAMD Act. This, submits RNP, demonstrates that OCIL does invest in residential property.

[118] In my view, the submission does not correctly characterise the nature of the investment. Its clear purpose was to produce a shopping centre. The initial purchase of the land was, in my view, simply a step along the path taken with a view to achieving that outcome, rather than an investment in the land as residential land.

[119] RNP also relies upon the fact that OCIL was permitted by the Fund's Constitution to invest in residential properties. However, the rejection of the recommendation was not based upon the proposition that such an investment was outside the powers conferred by the Constitution. A natural reading of the stated ground for refusal was that it was not OCIL's practice to do so. On the other hand, OCIL points to its Prospectus and its Product Disclosure Statement (PDS). The Prospectus stated that (subsequent to a nominated investment) the Fund would hold interests in properties "representing a balanced mix of industrial, commercial office, commercial hotel, special purpose commercial (medical) and retail property". The PDS stated that, "in the main, the Fund will seek to invest in commercial property, which includes office, industrial and retail properties … but does not include residential property such as houses or apartments." It also stated that, "where possible, property assets are selected which improve the overall level of diversity in the portfolio, both in terms of asset class (office, retail, industrial, with some exposure to special purpose property) and geographical location."

[120] In my view, the effect of the Prospectus and the PDS was to represent that the Fund's investments would not extend to investment in retail property. As such, it is consistent with the stated ground for refusing RNP's recommendation. There is no specific evidence (with the arguable exception relating to the purchase of the land subject to the Development Agreement) that OCIL has invested in residential property. In my view, this ground was not made out.

[121] In any event, it was accepted on behalf of RNP that those responsible for the rejection of its recommendation honestly believed the factual basis of the stated ground for rejection to be true. In those circumstances, it seems to me, even if RNP were to establish the factual basis was incorrect, it would not establish an absence of good faith. I was not referred to any authority in support of the proposition that a decision made on a wrong factual basis is a decision not made in good faith. A common use of the expression strongly indicates the contrary.

Consequences of breach of good faith requirement

[122] RNP relies upon this alleged breach as the basis for a submission that OCIL cannot now seek to enforce the obligation found in cl 13.11.1 of the Development Agreement that RNP execute the Supporting Material and deliver it to OCIL. In support of that submission, it relies upon the fact that a party to a contract will not ordinarily be entitled to take advantage of its own breach, as against the other party to the contract. It refers to *Alghussein Establishment v Eton College*[50] as both authority for the principle, and as demonstrating that it applies to a contract which remains in force.

[123] OCIL submits that, if the breach were established, RNP's conduct subsequent to the rejection of its recommendation amounts to an election which precludes RNP from relying on the breach of the good faith requirement.

[124] Notwithstanding my conclusion that there has not been a breach of the good faith requirement, it is convenient to deal with these submissions.

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50 [1988] 1 WLR 587, 591, 594.

[125] It is debatable whether OCIL is in truth relying on the alleged breach of the good faith requirement, when it seeks to enforce the obligation imposed by the Development Agreement relating to the Supporting Material. The stated condition for the obligations found in cl 13.11 is that the land has not been sold within in the 12 month period. Notwithstanding the action taken by RNP, the sale did not occur in that period.

[126] Further, to accept the submissions made on behalf of RNP would accord interdependence between OCIL's rights in relation to the Supporting Material and the good faith requirements set out in cl 14.1.2[51] which is not immediately obvious from the Development Agreement. Clause 13.11 identifies the condition which gives rise to RNP's obligation in relation to the Supporting Material. The good faith requirement is found elsewhere in the contract, in cl 14.1.2; and relates to a decision under cl 13.5.

[127] However, it is unnecessary to reach a conclusion in relation to these matters. It seems to me that the issue can be decided by reference to the doctrine of election. In *Sargent v ASL Developments Ltd*[52],` Stephen J said:

> "The doctrine of election as between two inconsistent legal rights is well established but certain of its features are not without their obscurities. The doctrine only applies if the rights are inconsistent the one with the other and it is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remain in existence … by surrendering one right the elector thereby gains an advantage not previously enjoyed, the ability to exercise to the full the other inconsistent right."

[128] Speaking of waiver in the sense of election, Isaacs J in *Craine v The Colonial Mutual Fire Insurance Co Ltd*,[53] said of it that:

> "It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated' so as to prevent him from 'reprobating' – in English terms whether he has elected to get some advantage to which he would not otherwise have been entitled, so as to deny him a later election to the contrary. His knowledge is necessary, or he cannot be said to have approbated or elected."

[129] *Glencor Grain Ltd v Flacker Shipping Ltd (The Happy Day)*[54] is a case with some significant similarities to the present case. It concerned a charter party, under which service of a Notice of Readiness (NOR) was a condition of the rights of a ship owner to claim demurrage.[55] The charter party was a berth charter,[56] and, there

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51 See *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439, 454.

52 (1974) 131 CLR 634, 641; discussed in Handley, estoppel by conduct and election, pp 229-230

53 (1920) 28 CLR 305, 326.

54 [2002] 2 Lloyd's Rep 487.

55 See [2] and [3]

being no congestion at the berth, a NOR given before the ship had reached the berth and was ready to begin discharging was premature, and accordingly invalid, pursuant to the charter party.[57] In *Glencor*, the NOR was given prematurely, to the knowledge of the charterers. Under the charter party, the NOR served as the trigger for the charterers' obligation to unload, which in turn caused laytime to start to run.[58] The charterers commenced to unload, without insisting on a valid NOR. They were held to have waived their right to do so, and accordingly the award, which determined that laytime had commenced, was upheld. Potter LJ (with whom the other members of the Court agreed) said:[59]

> "Thus, it is clear that whether or not the party entitled to notice has waived a defect upon which he subsequently seeks to rely, will depend upon the effect of the communications or conduct of the parties, the intention of the party alleged to have waived his rights being judged by objective standards. This being so, it seems to me clear that, in an appropriate commercial context, silence in response to the receipt of an invalid notice in the sense of a failure to intimate rejection of it, may, at least in combination with some other step taken or assented to under the contract, amount to a waiver of the invalidity or, put another way, may amount to acceptance of the notice as complying with the contract pursuant to which it is given."

[130] Having referred to the facts of the case, His Lordship said:[60]

> "On an objective construction of those matters, although the charterers were not under a contractual duty to indicate rejection of the NOR, by their failure to do so, coupled with their assent to commencement of discharging operations, they intimated, and a reasonable shipowner would have concluded, that the charterers thereby waived reliance upon any invalidity in the NOR and any requirement for a further notice."

[131] The reference in the second passage set out above to a conclusion to be reached by a reasonable shipowner appears to be a reference to the need for an unequivocal representation that the breach would not be relied upon. It is obvious that the shipowners' claim in *Glencor* depended upon service of the NOR, which was carried out in breach of the requirements of the charter party.

[132] The present case has been conducted on the basis that the OCIL response identified the basis of its rejection of RNP's recommendation. In the present case, there has been no suggestion that RNP's state of knowledge has changed since its receipt of that response. Assuming the decision to have been made in breach of the good faith obligation, RNP had the choice of insisting on a decision made in accordance with the good faith requirement; or of accepting the decision as one satisfying the requirements of the Development Agreement, and exercising the rights which

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56 See *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd* [1989] AC 1264, 1273.
57 See *Bulk Transport; Glencor* at [5].
58 *Glencor* at [72].
59 At [66].
60 At [69].

accrued to it as a result. It chose the latter course, and in my view, elected not to insist on a decision made by OCIL in accordance with the good faith requirement.

[133] In the course of argument, reference was made to the fact that a party may elect not to terminate a contract breached by the other party, but nevertheless seek to maintain a claim for damages. That seems to me to be a situation which is significantly different from the present situation. It is well established that a right to sue for damages for breach of contract is consistent with the continuation of a contract; and accordingly, a decision not to terminate a contract for breach does not prevent an action for damages flowing from that breach.

[134] In *Alghussein*, there was no suggestion of an election which might have affected the right of the innocent party to rely on the other party's contractual breach. In my view, the present case comes within the principles applied in *Glencor*. It follows that, RNP having elected to rely upon OCIL's decision as the basis on which cl 13.6 brought subsequent provisions of cl 13 into operation, including its right to control the sale process identified in cl 13.7, it cannot now assert that the decision is not effective for that purpose. It follows that its submission that OCIL cannot insist on the obligation imposed on RNP by cl 13.11.1 to provide the Supporting Material by reason of RNP's breach of the good faith requirement, should be rejected.

Conclusion

[135] In my view, the Development Agreement was not subject to the requirements of the PAMD Act relating to the provision of the warning statement. It follows that RNP's purported termination of that agreement, in reliance on the PAMD Act, is ineffective. Nor do the provisions of that Act apply to the Put Option for which provision is made in the cl 13.11 when the sale process is unsuccessful. Accordingly, that Act does not prevent OCIL from obtaining the relief it seeks. Nor, in my view, was OCIL's rejection of RNP's recommendation in relation to the land made in breach of its good faith obligations in cl 14.1.2. If that conclusion were wrong, then in my view RNP, by reason of its subsequent conduct, can no longer rely on that breach to avoid the obligations imposed by the provisions of cl 13 subsequent to cl 13.6.

[136] Before making final orders, I shall invite the parties to make submissions as to the appropriate form of relief, and as to costs.