SUPREME COURT OF QUEENSLAND

CITATION:	*Latitude Developments Pty Ltd v Haswell* [2010] QSC 346
PARTIES:	**LATITUDE DEVELOPMENTS PTY LTD** ACN 110 660 510 (plaintiff) **v** **ROBERT JOHN HAMILTON HASWELL** (defendant)
FILE NO:	SC No 7672 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 December 2009; 19 March 2010; last submissions received 18 June 2010
JUDGE:	Peter Lyons J
ORDER:	**The application for summary judgment should be granted**
CATCHWORDS:	PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS - SUMMARY JUDGMENT - where the plaintiff carried out the development of a resort – where a number of lots and common property under the *Body Corporate and Community Management Act* 1997 (Qld) were created – where the defendant entered into a contract to purchase one of the units - where the plaintiff gave notice of changes to the project shortly before the settlement date – where those changes affected the creation of common property – where the defendant gave notice of termination of the contract – where the plaintiff has sued the defendant for specific performance of the contract - whether the defendant can seek summary judgment – whether the defendant can rely on any rights said to accrue under the *Land Sales Act* 1984 (Qld) and the *Body Corporate and Community Management Act* 1997 (Qld) CONVEYANCING - THE CONTRACT AND CONDITIONS OF SALE - OTHER PARTICULAR CONDITIONS - OTHER CASES – where the plaintiff advised of changes to the project - where the defendant submits that under the *Land Sales Act* 1984 (Qld), the plaintiff was required to give to the defendant a rectification notice – where the defendant submits that because no

rectification notice was given, the plaintiff could not call for settlement when it did – where the defendant submits that his termination letter effectively terminated the contract – whether the identity of the lot was changed by the changes to the project – whether the plaintiff was required to give notice under the *Land Sales Act* 1984 (Qld)

CONVEYENCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATIONS ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS - where the defendant submitted that the staging of the development brought the provisions of s 214 of the *Body Corporate and Community Management Act* 1997 (Qld) into operation – whether s 214 gives the defendant the right to cancel the contract – whether the defendant would have been materially prejudiced if compelled to complete the contract – whether the defendant validly terminated the contract

Body Corporate and Community Management Act 1997 (Qld), s 35, s 209, s 213, s 214, s 215, s 217
Land Sales Act 1984 (Qld), s 21, s 22
Trade Practices Act 1974 (Cth), s 52, s 53

Bankmist Holdings Pty Ltd v Azina Holdings Pty Ltd [2009] WASC 230, not followed
Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal [2004] 1 Qd R 346; [2003] QSC 276, cited
Clegmere Pty Ltd v Samspring Pty Ltd [1983] 2 Qd R 399, considered
Deming No 456 Pty Ltd & Ors v Brisbane Unity Development Corporation Pty Ltd (1983) 155 CLR 129, considered
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, cited
Dey v Victorian Railway Commissioners (1949) 78 CLR 62, cited
Flight v Booth (1834) 1 Bing (NC) 370; 131 ER 1160, considered
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Harris v Prigg [2009] QCA 47, applied
Minion v Graystone Pty Ltd [1990] 1 Qd R 157, considered
Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119, considered
Sommer v Abatti Holdings Pty Ltd, considered
Wilson v Mirvac Queensland Pty Ltdi [2010] QSC 87, considered

COUNSEL: B O'Donnell QC for the plaintiff
P Roney for the defendant

SOLICITORS: Gadens Lawyers for the plaintiff
Macrossan & Amiet Solicitors for the defendant

[1] The plaintiff (*Latitude Developments*) has carried out the development of a resort at Airlie Beach, creating a number of lots and common property for which there is a community titles scheme under the *Body Corporate and Community Management Act* 1997 (Qld) (*BCCM Act*). The defendant (*Mr Haswell*) entered into a contract to purchase one of the units. Shortly before the settlement date, Latitude Developments gave notice of changes to the project, which affected the creation of common property. Mr Haswell then gave a notice of termination of the contract. Latitude Developments has sued Mr Haswell for specific performance of the contract. Mr Haswell seeks summary judgment against Latitude Developments. He relies principally on rights said to accrue under the *Land Sales Act* 1984 (Qld) (*LS Act*) and the *BCCM Act*.

Background

[2] The resort was intended to be known as the Peppers Coral Coast Resort, Airlie Beach. Mr Haswell had earlier entered into a contract dated 7 December 2005 to purchase a unit then described as proposed Lot Number 77 in Building F in the resort (*the 2005 contract*). The 2005 contract envisaged the creation of the lot by the registration of a subdivision plan under the *Land Title Act* 1994 (Qld) (*LT Act*). It also provided that the contract might be terminated if the subdivision plan was not registered three years after the date of the contract.

[3] It became apparent that the right to terminate the 2005 contract would accrue, before the project was completed and the subdivision plan was registered. As a result, the parties entered into another contract for the sale of the unit, dated 15 May 2008 (*the 2008 contract*). It retained most of the provisions 2005 contract, though, not surprisingly, it included a change to the date by which the contract might be terminated if the subdivision plan was not registered. Under the 2008 contract, this date was 30 June 2010. In the 2008 contract, the description of the lot was changed. It was now identified as proposed Lot 713 in Peppers Coral Coast Resort, Airlie Beach.

[4] The documents constituting the 2008 contract included a single signed sheet which made applicable the 2005 contract and identified the variations; and a copy of the 2005 contract, which itself included contract terms, a subdivision plan, a Product Disclosure Statement under the *Corporations Act* 2001 (Cth), and a "BCCM Act disclosure statement" (given under the *BCCM Act*) attached to which was a proposed community management statement. The contract terms expressly stated that the contract included the product disclosure statement and the *BCCM Act* Disclosure Statement "which accompanied this Contract". A further Product Disclosure Statement dated 21 February 2008 (*the PDS*) was provided to Mr Haswell at about the time the contract was executed. A further BCCM Act disclosure statement (*the BCCM DS*) was provided to Mr Haswell and signed by him on 1 May 2008, again accompanied by a Proposed Community Management Statement (*the CMS*). The CMS included plans showing the location of the proposed buildings and lots. It is likely that the PDS and the BCCM DS, including

the CMS, formed part of the 2008 contract. I understood that to be the basis on which the parties proceeded.

[5] It is necessary to make reference to what the plans included in the CMS identified in relation to a building towards the southern end of the resort. It was referred to as Building A, and consisted of two towers, Tower A and Tower B. Within Building A, at level B, the plans identified a lot, Lot 101; as well as some areas of common property; and within the common property, some exclusive use areas, one for a porte-cochere, one for services or utilities associated with the proposed day spa, and others described as "Special Rights Areas".

[6] The 2008 contract included a subdivision plan, SP184771 (annexed to the 2005 contract). With respect to Building A, it shows that at level B, Building A contained a single lot, there identified as Lot 1, with the balance of the building at this level (at least half of the floor space) being common property. There was also an area of common property external to the building. At level C, there were relatively large areas of common property adjacent to Tower A and Tower B, as well as what appeared to be common property external to the building. At Level D and above, there were also areas of common property, internal to the building, and servicing individual units within the two towers.

[7] The PDS confirmed that the community titles scheme was to be in accordance with the subdivision plan attached to the contract of sale. It noted that there would be common property, which would include shared facilities. One of the shared facilities was the resort swimming pool. It also recorded that a day spa, conference centre and restaurant were to be constructed within "the facilities complex". These were to be owned by an entity described as "the operator", said initially to be intended to be Latitude Developments or a related entity. However, the PDS recorded that a management agreement had been entered into with Peppers Leisure Limited (*Peppers*), under which Peppers agreed to carry out the on-site manager's duties under a caretaking and letting agreement, and to run the business of letting apartments in the development for those owners who appointed the on-site manager as their letting agent. The PDS stated that the day spa, conference centre and restaurant were to be available to unit owners and resort guests (as well as members of the public) at commercial rates. It is plain from the PDS that what was envisaged was the on-site operation of the resort, with lot owners having the opportunity to make their units available as part of the pool of units used in the resort; and that the resort would have facilities which would be available to owners and their guests.

[8] The BCCM DS identified the lot sold to Mr Haswell as Lot 713 in the community titles scheme identified on certain plans. The CMS described the scheme as "a basic community titles scheme". It stated that the common property for the scheme included common facilities, one of which was a swimming pool. It also stated that the scheme would not be further developed. It made provision for an on-site manager, who would own a lot, and whose lot might be used for resort management and letting of lots, and the operation of a restaurant or café and day spa.

[9] The BCCM DS also included proposed bylaws. One of the bylaws provided that the swimming pool and associated facilities might only be used by occupiers, or people accompanied by occupiers of a lot; and within certain hours. The bylaws also regulated the use of the areas of common property nominated for the day spa

services, and the porte-cochere, identified on the plans as exclusive use areas; as well as the areas identified as special rights areas, intended as outdoor dining areas.[1]

[10] By April 2009, difficulties had been experienced with completing the development. Latitude Developments made an application to Whitsunday Regional Council to reconfigure the land on which the development was being carried out, to create four lots and one area of common property. The evidence seemed to proceed on the basis that it was this application, and its approval, which put Latitude Developments into a position where it could decide to stage the development, although the development application itself refers to an earlier approval of a staged development. However, no point was made about this, and I shall ignore it.

[11] On 27 May 2009, Latitude Developments' solicitors wrote to Mr Haswell's solicitors. The letter advised that Latitude Developments had "decided to stage completion of the lots in the Peppers Coral Coast Resort". It stated that Mr Haswell's lot was in stage 1, and that the plan would be "lodged for registration this week". It also stated that the second and final stage, the land for which was identified as Lot 20, is "expected to be completed by the end of June". The letter enclosed a revised CMS, and a revised budget. The letter expressly stated that it was intended to serve as a further statement under s 214 of the *BCCM Act*.

[12] The revised CMS confirmed that the scheme would include Lot 20 on SP184771. It stated that the common property for the scheme included, amongst other things, the swimming pool. That statement appears to be incorrect, at least for stage 1 of the scheme. The swimming pool, under construction at this time, was located in proposed Lot 20. The revised CMS made reference to the use of "lot 101" for management of the resort, although Lot 101 was not identified as part of the scheme land, and was not created in stage 1. The revised CMS stated that the scheme was intended to be "developed progressively in stages". However, it described the scheme as "a basic scheme initially made up of 81 housing and duplex allotments and units (it then identified the lots comprising stage 1), common property and a lot comprising stage 2 of the scheme (Lot 20 on SP184771)." The revised CMS continued, "The facilities complex including a day spa, conference centre, and restaurant will be completed as part of stage 1, but will be separately titled as part of stage 2". Reference was made to plans, included with the revised CMS, and described as a Concept Plan of Future Development, which showed what apparently is the footprint of Building A, in Lot 20, designated on the plan as stage 2.

[13] The revised CMS included revised bylaws. The bylaws relating to the exclusive use areas and the special use areas were not retained. Somewhat curiously, under the heading "USE OF COMMON PROPERTY", the bylaw relating to the use of the pool was retained.

[14] The revised CMS made reference to stage 2, stating the number of units (it would appear inaccurately), and that it included a lot for the central facilities, and additional common property. With respect to some of the stage 2 land, there were proposed additional bylaws, relating to the exclusive use areas (day spa utilities and porte-cochere) and the special rights areas (outdoor dining areas). Plans were included relating to stage 2, which showed Level B for Building A. They appear to include some variations from the plans in the CMS which was included with the

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1 See s 170 of the *BCCM Act*.

contract. The revised CMS made clear the indicative nature of the Concept Plans, said to have been provided for illustrative purposes only.

[15] On 28 May 2009, Survey Plan 184771 was registered. It included variations from earlier plans identified by the same number. On its face, it was described as a building format plan. Under this plan, the area of land which previously included Building A was created as a separate lot (Lot 20) in the southern portion of the site. Lot 20 was not shown as including any building. For the balance of the site, the plan made provision for other buildings in the development, and their subdivision into lots, and for common property. One of the lots created by registration of this plan was Lot 713 (in Building F).

[16] On 1 June 2009 the solicitors for Latitude Developments gave notice that a separate certificate of title had issued for Lot 713, and that settlement was to occur on 15 June 2009.

[17] Mr Haswell's solicitors replied to the letter of 27 May 2009 in a letter sent by facsimile transmission to the solicitors for Latitude Developments on 11 June 2009 (*the termination letter*). The termination letter contested a number of matters raised by the letter of 27 May 2009; and terminated the contract on a number of grounds. The letter is considered in greater detail, later in these reasons.

[18] The solicitors for Latitude Developments responded on 12 June 2009, rejecting the termination of the contract. The letter took issue with a number of statements in the termination letter. It also stated that the construction of the swimming pool had been completed, and that the developer had granted a licence to the body corporate to enable all owners and occupiers to have full use of the pool from settlement (that being a matter about which the termination letter complained). The letter also stated that registration of the stage 2 plan was expected to occur within the next few weeks, and again called for settlement on 15 June 2009. The licence referred to in the letter is in evidence. It is a deed dated 11 June 2009, taking effect the following day.

[19] There is a body of evidence, including photographs, identifying the extent to which work associated with the development had been carried out at various times in June 2009.

[20] The survey plan for stage 2 was registered at about the end of July 2009.[2]

Summary judgment

[21] A defendant's application for summary judgment should only be granted where there is no real prospect that the plaintiff will succeed in its action.[3] A real prospect of success may be contrasted with a prospect of success which is only fanciful.[4] Nevertheless, in determining whether to grant summary judgment, a court must consider whether there is a need for trial, and keep in mind the reasons why the

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2 Mr Thompson, a director of Latitude Developments, deposes that the plan was registered on 30 July 2009, although the copy of the plan which he exhibits has on it a "Recorded Date" of 27 July 2009. The difference in these dates does not appear to be material.

3 See r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*).

4 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, 234-235.

interests of justice usually require issues to be investigated at a trial.[5] It has been authoritatively stated the propositions derived from *Dey v Victorian Railway Commissioners*[6] and *General Steel Industries Inc v Commissioner for Railways (NSW)*[7] are applicable to applications for summary judgment under the *UCPR*.[8] The effect of those statements is that summary judgment may only be granted in a case where there is a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

Land Sales Act

[22] On behalf of Mr Haswell, it is submitted that the events which occurred early in 2009 gave rise to a requirement under s 22 of the *LS Act* that Latitude Developments give what is referred to as a rectification notice, once SP184771 was registered, and accordingly, it could not call for settlement on 15 June 2009; and on that basis, the termination letter effectively terminated the contract.

[23] The relevant provisions of the *LS Act* apply to the sale or purchase of a lot resulting from the registration of a plan and the recording of a community management statement for a community titles scheme under the *BCCM Act*.[9] Section 21 of the *LS Act* requires the giving to a person who is considering entering "upon a purchase" of a proposed lot of this kind, a statement which, amongst other things, "clearly identifies the lot to be purchased". Where a statement given under s 21 is not accurate at the time it is given, or contains information that subsequently becomes inaccurate, the vendor is required by s 22 to give the purchaser a statement of the particulars required under s 21, "as soon as is reasonably practicable after the proposed lot has become a registered lot". Section 22(4) then contains provisions, the effect of which is that settlement is not to occur until the expiration of 30 days after the receipt by the purchaser of a notice given under s 22(1) (unless the contract of sale provides for a later settlement date, or the parties reach some other agreement after the purchaser has received a notice under s 22(1)). Where there has been a failure to give a notice required by s 22(1), s 25 provides that the purchaser may avoid the contract, if materially prejudiced by the failure to give the notice. The same section provides that, where a notice has been given under s 22(1) which is inaccurate, the purchaser may avoid the instrument if "materially prejudiced … by the inaccuracy of any particular …" in the notice given under s 22(1).

[24] It should also be noted that s 21(6) provides that where a prospective vendor is required to give a notice under s 213 of the *BCCM Act*, and the prospective vendor includes in that notice the matters of which it was required to give notice under s 21(1), that is sufficient compliance with the requirements of s 21.

[25] In essence, it is submitted on behalf of Mr Haswell that the result of the events associated with the staging of the development in the early part of 2009 was that the identity of the lot changed, so that it was necessary for notice to be given under s 22; and that that did not occur.

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5 *Gray v Morris* [2004] 2 Qd R 118, 133, cited in *Salcedo* at 236.
6 (1949) 78 CLR 62, 91.
7 (1964) 112 CLR 125, 130.
8 See *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 at [81].
9 See ss 20 and 21(1) of the *LS Act*, and the definition of "proposed lot" in s 6 of that Act.

[26] The submission that the identity of Lot 713 changed as a result of the staging of the development is based upon s 35 of the *BCCM Act*. That section provides that common property for a community titles scheme is owned by the owners of the lots included in the scheme, as tenants in common; and that an owner's interest in a lot is inseparable from the owner's interest in common property. The section includes, as an example, a statement that a dealing affecting a lot, affects, without express mention, the interest which the owner of the lot has in the common property; and, as another example, a statement that an owner cannot separately deal with or dispose of the owner's interest in the common property. It is argued on this basis, that the identity of the lot being sold had changed; and that accordingly, the provisions of s 22 of the *LS Act* applied.

[27] The submission makes it necessary to focus on the provisions of the *LS Act*, and the contract. The obligation imposed by s 21(1) is to provide a statement in writing which "clearly identifies the lot to be purchased". The expression "lot" is defined to include both a registered lot and a proposed lot.[10] A proposed lot is defined to include a lot that will become a registered lot upon registration of a plan and the recording of a community management statement for a community titles scheme, under the *BCCM Act*.[11] A registered lot is defined to include a lot included in a community titles scheme registered under the *BCCM Act.* The term "lot" is defined in the *BCCM Act* to mean a lot under the *LT Act*.[12] The term "lot" is defined in the *LT Act* to mean a separate, distinct parcel of land created on the registration of a plan of subdivision. Such a plan may include a plan which identifies lots by reference to structural elements of a building, although such a plan must also identify common property.[13] The *BCCM Act*, by reference to which the term "proposed lot" is relevantly defined in the *LS Act*, clearly distinguishes between lots and common property.[14] In the context of the legislative framework of which the obligations of s 21(1) forms part, the requirement to identify the "lot to be purchased" is a requirement to identify a lot, rather than common property.

[28] Moreover, the requirement in s 21(1) of the *LS Act* directs attention to the subject matter of the contract. The contract was a contract to sell Lot 713. So much is clear from its express terms. The express provisions of the contract relating to settlement required the giving of vacant possession of the lot, and a form of transfer, required to transfer the title in the lot to Mr Haswell. The contract required no action in respect of the common property. That is not surprising, in view of the provisions of s 35 of the *BCCM Act*, to which reference has already been made. An examination of the contract confirms that "the lot to be purchased" as a result of the transaction is Lot 713. Mr Haswell would derive an interest in the common property, not as a result of a transfer of common property, but because of the transfer of Lot 713 and the effect of s 35 of the *BCCM Act*.

[29] In my view, therefore, a change to common property does not change the identity of "the lot to be purchased" referred to in s 21(1) of the *LS Act*, so as to bring into operation the provisions of s 22 of that Act.

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10 See s 6 of the *LS Act.*

11 Again, see the definition in s 6.

12 See Schedule of the *BCCM Act.*

13 See s 48C, 49C of the *LT Act.*

14 See the definition of these terms in Schedule 6 to the *BCCM Act*, and note s 10 of that Act.

[30] A somewhat similar question was considered in *Harris v Prigg.*[15] The question considered in that case was whether an encroachment from common property of land the subject of a community titles scheme was an encroachment from the lot which was the subject of the contract. Reliance was placed on s 35 of the *BCCM Act* for a submission that that was so. The reasoning in *Harris*, in my view, provides support for the conclusion which I have reached about the effect of s 21 and the present contract.

[31] I am therefore not prepared to grant summary judgment in favour of Mr Haswell by reason of the provisions of the *LS Act* on which he has relied.

Contentions relating to *BCCM Act*

[32] Prior to entering into a contract for the purchase and sale of a proposed lot to be included in a community titles scheme, s 213 of the *BCCM Act* requires the seller to give the buyer a disclosure statement. It also requires the disclosure statement to be accompanied by the proposed community management statement. Under s 66 of the *BCCM Act*, the community management statement must identify the scheme land; it must include bylaws (unless the bylaws are those in Schedule 4 of the *BCCM Act*); and, if the scheme is intended to be developed progressively, it must explain the proposed development and be illustrated by concept drawings, and state the purpose of any future allocations of common property or a body corporate asset under an exclusive use bylaw for the scheme, and the stages in which the future allocations are to be made. Further, the disclosure statement must include the terms of any authorisation of a person as a letting agent proposed to be given after the establishment of the scheme. Section 214 then requires, in a case where the contract has not been settled, and a point is reached at which it can be said that a disclosure statement previously given would not be accurate if given at that point, that a further statement be given "rectifying the inaccuracies in the disclosure statement". Section 214(4) gives the buyer the right to cancel a contract which has not settled if the buyer would be materially prejudiced, if compelled to complete the contract, "given the extent to which the disclosure statement was, or has become, inaccurate", and allows 14 days for the exercise of this right.

[33] On Mr Haswell's behalf, it was submitted that the staging of the development brought the provisions of s 214 into operation, giving Mr Haswell the right to cancel the contract, which had been exercised.

[34] For Latitude Developments, it was accepted that the staging of the development in 2009 gave rise to an obligation to give a notice under s 214. However, it was submitted that Mr Haswell would not have been materially prejudiced if compelled to complete the contract, having regard to the extent to which the disclosure statement was no longer accurate; and that in any event he did not exercise the right conferred by s 214(4) of the *BCCM Act*. However, it was accepted that if the notice were otherwise in accordance with s 214, it was given in time.

[35] For Mr Haswell, some reliance appears also to have been placed on s 217 of the *BCCM Act*, although detailed submissions were not provided in support of this. It is convenient to deal with this matter at the outset.

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15 [2009] QCA 47.

Termination under s 217 of the *BCCM Act*?

[36] This section creates a right to cancel a contract if the community management statement recorded for the scheme on its establishment, is different from the proposed community management statement most recently advised to the buyer; or the information disclosed in the disclosure statement is inaccurate; or, in a case where there was a requirement to provide an explanation for inequalities in contribution schedule lot entitlements, that explanation was not provided; and because of the difference, or inaccuracy, or lack of explanation, a buyer would be materially prejudiced if compelled to complete the contract.

[37] It has not been argued that the community management statement recorded for the Scheme is different from that most recently advised to Mr Haswell, nor has it been argued that the revised CMS in accurate. Nor has there been any submission based on the need to explain inequalities in the contribution schedule lot entitlements, and a failure to provide an explanation. There is no obvious difference between the community management statement recorded on 28 May 2009, and the version of it sent to Mr Haswell under cover of letter of 27 May 2009. The revised CMS included an explanation of the inequalities in the contribution schedule lot entitlements. No relevant inaccuracy (potentially giving rise to material prejudice) in the information in the disclosure statement, as revised by the letter of 27 May 2009, has been identified.

[38] In those circumstances, I would not be prepared to grant the defendant's application for summary judgment on the basis of a right to cancel the contract, said to have accrued under s 217 of the *BCCM Act*.

Did Latitude Holdings comply with s 214 of the *BCCM Act*?

[39] The submissions made on behalf of Mr Haswell focused on the requirement in s 214 that the seller give the buyer "a further statement … rectifying the inaccuracies in the disclosure statement". It was submitted that the letter of 27 May 2009, in providing a revised CMS, did not satisfy the requirement of s 214 to provide a statement "rectifying the inaccuracies" in the earlier statement.

[40] In support of that submission, reference was made to *Sommer v Abatti Holdings Pty Ltd.*[16] That was a case where a notice given under s 21 contained information that subsequently became inaccurate. The vendor was required by s 22 to give to the purchaser a statement of "particulars required to be included in the statement given for the purposes of section 21(1) on registration of the plan creating the lot." The notice identified matters which were changed, but otherwise did not include information which had previously been given. Derrington J held nevertheless, the requirements of s 22 had been satisfied. His Honour observed:[17]

> "The point of the section is obviously directed to the correction of the inaccuracy, and on the understanding that a considerable body of correct information may well have been given, the expression, 'particulars required to be included', refers to the true information which was required to be given but which was missing from the

16 [1992] 1 Qd R 300, a case concerned with s 22 of the *LS Act*.

17 At p 305.

> original statement … the purpose of s 22 is obviously to bring the correct information to the mind of a purchaser and providing it does that in substance in a reasonable way that purpose is fulfilled."

[41] A finding that a notice which identifies only the changes, without repeating information provided earlier and which remains correct, is sufficient to satisfy s 22, says nothing about whether the provision of the entire corrected disclosure statement does or does not satisfy the requirements of s 214 of the *BCCM Act.* It seems to me that a notice which retains information which remains correct, and includes information which is now correct in place of information which has ceased to be so, is a statement which rectifies the inaccuracies in the earlier statement. Although s 214 contains some formal requirements (the date of the statement, and the signature of the seller or the seller's agent), it contains no express requirement specifically to identify or otherwise draw attention to the changes in the disclosure statement. In respect of this matter, I am not satisfied that Latitude Developments has no real prospect of success in respect of its claim, by reason of this alleged failure to comply with s 214.

[42] I should add that the submissions made on behalf of Mr Haswell did not place reliance upon specific matters set out in the material provided on 27 May 2009 which may be incorrect, (for example, that the common property included a swimming pool). Accordingly, it is unnecessary for me to consider that question further.

Material prejudice

[43] The effect of the information communicated in the revised CMS sent to Mr Haswell's solicitors on 27 May 2009 was that on registration of SP184771, Lot 20 would be a lot in the scheme, and areas within it which had previously been identified as common property would not have that character as a result of the registration of SP184771. A consequence of that was identified in the revised CMS. It was, in effect, that title for what was referred to as the facilities complex (associated with the operation of the proposed resort), would not become available until completion of stage 2.

[44] The fact that that part of the resort located within Lot 20 would not contain any common property when SP184771 was registered, meant that a person such as Mr Haswell, if he completed the purchase of a lot prior to the registration of a subdivision plan for stage 2, would not have any interest in areas which had been shown as common property within what was to be Lot 20 on completion of the contract.

[45] That area included the swimming pool. In the CMS, it had been considered to be of sufficient importance to be specifically identified as part of the common property for the scheme. The evidence included photographs of the resort, including the pool, taken on 5, 11, 14 and 20 June 2009. It is apparent that it was being constructed as an attractive facility, one likely not to be unimportant to residents. If that had not been identified by earlier dealings between the parties, it would have become increasingly obvious in late May and early June 2009. The fact that Latitude Developments went to the trouble of entering into the Licence Deed on 11 June 2009 supports that conclusion.

[46] The area within Lot 20 also had been identified as including facilities to be located within the "facilities complex".

[47] The CMS had identified areas of common property as exclusive use areas for the day spa utilities, port-cochere, and an outdoor dining area, and included proposed bylaws regulating the use of these areas. The day spa utilities were obviously intended to be associated with a day spa to be operated by Peppers, as the resort operator. The other areas for which Peppers, under the bylaws, was to have exclusive use or other special rights were intended to be available to guests and visitors. The effect of staging the development was that the common property, of which these areas would form part, would not be created in stage 1.

[48] The revised CMS included a statement that "Lot 101 … is used for management of the resort and commercial purposes expected to be used predominantly by guests in the resort". However, registration of SP184771 was not intended to create Lot 101.

[49] The revised CMS dealt with the future subdivision of Lot 20, including changes to the bylaws to deal with the exclusive use areas and the special rights area. The bylaws included with the revised CMS¸ and which were intended to take effect on registration on SP184771, did not contain these provisions.

[50] It is necessary to bear in mind that the contract required settlement within 14 days of registration of the subdivision plan. Latitude Development, in giving notice on 1 June 2009 that settlement was due on 15 June 2009, apparently relied upon this provision, and the registration of SP184771. Clause 4.2 of the contract permitted Latitude Developments (subject to the *BCCM Act*) to alter the common property or any facilities or rights in relation to their use; and to change anything in the CMS.

[51] It is apparent, therefore, that if Mr Haswell were compelled to complete the contract, the title in exchange for which he would pay the purchase price would not carry with it an interest in not insignificant areas within Lot 20 which previously had been identified as common property, including the pool. Moreover, title to the lot obviously intended to be made available to Peppers to conduct the resort operation would not be created at that time; nor would areas of common property which were to be made available to Peppers in connection with the provision of resort facilities become available, and nor would the use of those areas be regulated by bylaws.

[52] Latitude Developments, however, points to the Licence Deed of 11 June 2009. It also points to the statements in the revised CMS relating to stage 2, which are indicative of an intention to produce the development identified in the CMS. It relies on the advanced stage of the development in late May and the first half of June 2009. It relies on the fact that the subdivision plan for stage 2 was registered by the end of July 2009. It refers to s 215 of the *BCCM Act* which provides that the disclosure statement, and any material accompanying it, and each further statement and any material accompanying such a statement, form part of the provisions of the contract. It points to cl 4.2 of the contract. It submits that, having regard to these matters, Mr Haswell would not have been materially prejudiced, if compelled to complete the contract.

[53] It is convenient first to deal with clause 4.2 of the contract. The power which it conferred on Latitude Developments to make changes to the common property,

facilities and associated rights was expressly stated to be subject to the *BCCM Act*, with an express reference to the right conferred to cancel a contract if the purchaser was materially prejudiced by the changes. That reference no doubt includes s 214. Because clause 4.2 expressly recognises that a purchaser would have the right to terminate a contract if materially prejudiced by the change, the power conferred by clause 4.2 to make changes is of no assistance in determining whether a particular change results in material prejudice to a purchaser.

[54] A question arises in relation to the determination of the issue of material prejudice. It is whether the question of material prejudice is to be assessed as at the date the further statement was given under s 214, that is, 27 May 2009; or at the date on which Mr Haswell's solicitors wrote to the solicitors for Latitude Developments, with a view to terminating the contract; or at some later date. This issue assumes that it is relevant to consider facts other than those apparent from the BCCM DS and the further statement.

[55] The test stated in s 214(4)(d) is whether "the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement … has become … inaccurate". On its face, this provision suggests that what is required is a comparison between the information communicated by the disclosure statement, and that communicated by the further statement. On that basis, attempts made by Latitude Developments to mitigate the consequences of staging the development, which were not recorded in the further statement, would be irrelevant.

[56] There is some merit in this approach. A buyer is allowed only 14 days within which to cancel the contract. The buyer may be located somewhere remote from the development. Verification of matters said to mitigate the effect of changes may require access to information not readily available to a buyer. However, neither party relied on this approach to s 214.

[57] Similar considerations suggest that the date at which the question of material prejudice is to be determined is the date when the buyer receives the further statement. In my view, the short period within which the right to cancel a contract is to be exercised, and the likely need to obtain professional advice, support that conclusion. However, it seems to me that the latest date of which, on any view of s 214, the question is to be determined is the day on which a buyer gives a notice exercising the right.

[58] Moreover, it seems to me that the question of material prejudice cannot be determined by reference to facts which might have existed at the relevant date, but which were not known to the buyer, or of which it cannot at least be said that the buyer should have known them. The exercise of such a right is an important matter, and it seems to me that it is quite unlikely that the legislature intended that an attempt to exercise the right created by s 214 to cancel a contract would turn out to be ineffective, by reason of matters unknown to the person on whom the right is conferred, at the time when the right is being exercised; or of which it cannot be said that the person should have known them.

[59] Since writing what has been set out above, I have become aware of the decision at first instance in *Wilson v Mirvac Queensland Pty Ltd.*[18] There Margaret Wilson J has helpfully reviewed cases dealing with the test for material prejudice in s 214 of the *BCCM Act*, and analogous provisions. Her Honour rejected the view in *Sommer*[19] that the question is to be answered by reference to the principle stated in *Flight v Booth*[20] that the change must be in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into it at all; it being a case where it may be considered that the purchaser has not really purchased that which was proffered at settlement. The test applied by her Honour was that a purchaser would be materially prejudiced if compelled to complete, if the purchaser would be disadvantaged in some substantial way if obliged to do so.[21]

[60] Her Honour derived some support for this approach from the reasons for judgment of Sir Ronald Wilson in *Deming No 456 Pty Ltd & Ors v Brisbane Unity Development Corporation Pty Ltd,*[22] which, although given in dissent, did not, as her Honour noted, result in disagreement from the other members of the Court.[23] Indeed, it seems to me that, on analysis, his Honour's approach seems consistent with the approach taken by the majority. It might be noted that the test applied by her Honour in *Wilson*, in this respect, accords with the formulation applied by Chesterman J (as his Honour then was) in *Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal,*[24] where his Honour with reference to material prejudice, said that it is material "if it is substantial or of much consequence".

[61] Her Honour determined the existence of material prejudice by reference to the buyer's knowledge of the effects of the change, as a result of the information in the further statement, and not by reference to corrections of errors in the further statement, communicated to the buyer after she had written a letter terminating the contract. That conclusion has the consequence, consistent with what has been stated earlier in these reasons, that material prejudice is not to be judged by reference to facts not known to the purchaser at the time when it gives a notice of termination.

[62] On 11 June 2009, when the termination letter was sent, Mr Haswell knew of the proposal to stage the development. He knew that meant that on settlement, he would not receive any interest in areas within Lot 20, which had previously been identified as common property. I have previously referred to the significance of these areas. Moreover, he knew that registration of SP 184771 would not result in the creation of the lot which was to be made available to Peppers. He knew that the arrangements relating to exclusive use areas and special rights areas, as identified in the CMS, were not intended to be implemented at the time of registration of SP184771. However, there is no reason to think he had any knowledge of the effect of these matters on Peppers.

[63] Submissions made on behalf of Latitude Developments point out that some of the facilities (conference centre, restaurant and day spa) were to be initially owned by

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18 [2010] QSC 87.
19 See *Sommer* at p 302.
20 (1834) 1 Bing (NC) 370; 131 ER 1160.
21 See *Wilson* at [35].
22 (1983) 155 CLR 129, 168-169.
23 *Wilson* at [28].
24 [2004] 1 Qd R 346 at [66], referred to in *Wilson* [33].

the resort operator (as identified in the PDS); whereas the submissions made on behalf of Mr Haswell seem to proceed on the basis that these facilities were intended to be within common property, in which Mr Haswell was to acquire an interest. The factual basis for the submissions made on behalf of Latitude Developments appears to be correct; and it is correct to say that the submissions made on behalf of Mr Haswell refer to the dining and spa areas as being within areas previously intended to be common property. That mistake, however, reflects the fact that Mr Haswell's concern was not simply with an interest in common property. It was with an interest in common property to be used by a resort operator, together with other facilities, to conduct a resort. It is clear the termination letter expressed concern, not simply about the fact that common property would not be the same as was previously represented, but also about the benefits which were to be made available by the commencement of the Peppers resort consequent on the completion of the entire development, including the resort facilities, simultaneously with the creation of Lot 713. While the error made in the submissions on behalf of Mr Haswell has some effect on the strength of his case, those submissions point to matters which, in my view, are relevant for determining the material prejudice question.

[64] Finally, the photographs taken on 11 June 2009 demonstrate the not insignificant work remained to be done to complete the resort on that date.

[65] It seems to me that these considerations lead to the conclusion that by reference to the facts known on 11 June 2009, Mr Haswell could have been materially prejudiced, if compelled to complete the contract, given the extent to which the disclosure statement by then had become inaccurate.

[66] That conclusion has to be weighed against the matters raised on behalf of Latitude Developments.

[67] The licence deed is dated 11 June 2009. There is no suggestion Mr Haswell had any knowledge of it prior to the termination letter. It seems to me, therefore, that regard may not be had to it, in determining whether Mr Haswell would be materially prejudiced if compelled to complete the contract.

[68] The development, and in particular the development of the building on Lot 20, was well advanced. However, that seems to me to be quite a different situation from one where the development had been completed, and title had issued in respect of that part of it intended to be contained within Lot 20, by the time settlement was to occur. While the development on Lot 20 was at that stage, there was a risk that for some reason it would not proceed, or would not proceed promptly, to completion. There was also a risk, at least based on the facts so far as they were known to Mr Haswell, of some issue in relation to Peppers commencing to operate the resort. Underlying these matters is the fact that, because the development was not complete, and was to proceed in stages, on settlement Mr Haswell would not receive the bundle of rights in relation to the development which he would have received, if the development had proceeded in a single stage.

[69] On behalf of Latitude Developments, it is submitted that at all times from 27 May 2009, there was no significant risk that Stage 2 of the development would not proceed. It may well be true to say that the probability that the development would not proceed to the completion of Stage 2 and the subsequent issue of titles was,

objectively speaking, not high, and in that sense the risk was not significant. However, if for any reason the development was not completed, the consequences for Mr Haswell could potentially have been significant. The resort might not have commenced to operate; or it might not have commenced to operate for a substantial period.

[70] In support of the proposition that there was no significant risk that Stage 2 of the development would not proceed, Latitude Developments points out that its contractor was obliged to complete the development; and Latitude Developments had in place financial arrangements necessary to pay for completion of the work. However, while it is likely that Mr Haswell would have assumed the existence of a contract with a builder, and that it was probable that financial arrangements had been made in the past to meet the expected costs of completion, there is no suggestion that he had any knowledge of the contractual position as between the builder and Latitude Developments at the end of May and in the first part of June 2009. Equally, there is no suggestion that he had any knowledge of the financial arrangements for the completion of Stage 2, as they stood in late May and early June 2009, after the decision had been made to stage the development, with delay in completing Stage 2.

[71] Section 215 has the effect that the further statement (and any material accompanying it) formed part of the provisions of the contract. Section 216 entitled Mr Haswell to rely on information in the further statement as if Latitude Developments had warranted its accuracy. On its behalf, it is submitted that Latitude Developments had as a result binding obligations arising from the further statement. These sections make it necessary to pay careful attention to the content of the further statement, particularly in relation to Stage 2.

[72] As mentioned, it stated that Lot 20 was intended to be subdivided into 16 lots for units, one lot for the central facilities, and additional common property. It identified exclusive use areas (day spa utilities and port-cochere) and the special rights area (outdoor dining area). Plans showing the proposed development for Stage 2 were described as "Concept Plans", of which it was said:-

> "The attached concept drawings are intended only to represent an indicative development plan for the 9A Heritage Drive Community Titles Scheme when completed.
>
> Accordingly, they have been annexed for illustrative purposes only. The contract drawings do not accurately fix or specify the location of boundaries of any lots or buildings which are subject to final survey being undertaken.
>
> The original owner may make amendments to or add further service location diagrams and/or exclusive use plans as required to permit the progressive development and reconfiguration of the Scheme land."

The letter of 27 May 2009 also stated that, "(t)he second and final stage is expected to be completed by the end of June (2009)".

[73] While s 215 of the *BCCM Act* has the effect that the further statement and accompanying material form part of the provisions of the contract, it seems to me that that does not result in a binding promise as to the timing for completion or ultimate form of Stage 2. Express rights to vary the form of Stage 2 were reserved by Latitude Developments. No more was warranted than that Latitude Developments had an expectation that Stage 2 would be completed by the end of June 2009. To the extent that that might refer to the registration of title, it is clear that that expectation proved to be wrong.

[74] In summary, at the date of the termination letter, Mr Haswell had no binding assurance about the date by which Stage 2 would be completed. Moreover, Latitude Developments had reserved the right to change the form of the development on Lot 20. Nor did Mr Haswell know whether the staging had any effect on Latitude Developments' relationship with its builder, its financier, or Peppers. It would have appeared to him to be likely that a resort could not commence to operate from the date when he would otherwise have been required to complete his contract, a situation which may be contrasted with the position if the development had not been staged. He was entitled to assume that the swimming pool would not, at the date nominated for completion, be on common property, and he had no knowledge of any arrangement to make it available to occupiers of Lot 713. The question is whether Mr Haswell has demonstrated, to a sufficiently high degree of certainty, that the changes which resulted from the decision to stage the development resulted in prejudice to him which was substantial, or of much consequence.

[75] I am satisfied that he has done so. On completion, he would not have been in a position immediately to re-sell the unit, as part of an operating resort, and with the benefit of an interest in common property available for use by the resort operator. He would not have been in a position, had he chosen to do so, immediately to place the unit in a letting pool. There would not have been available to the occupants of Lot 713 the facilities which were intended to be provided by the resort operator; nor would the swimming pool be available to them. Moreover, Latitude Developments had reserved the right to change the form of the development in Stage 2, a position which would not have obtained but for the decision to stage the development; and it had not undertaken a binding obligation to complete Stage 2 by a fixed date in the near future. It is inherently likely that these matters would be important to a purchaser, and the changes accordingly would result in prejudice to a purchaser which is substantial, or of some consequence.

[76] Some support for this conclusion may be found in the letter which Latitude Developments sent Latitude Development Group sent on behalf of Latitude Developments to Mr Haswell in about April 2008, and relied upon on behalf of Mr Haswell in support of the proposition that he suffered material prejudice as a result of the changes notified in May 2009. By April 2008 it had become apparent that Latitude Developments could not complete the development by 7 December 2008 (then referred to as the "sunset date"). The letter stated that the alternative was "to put the central facilities on hold" until the other units were completed, with the result that "we would move to settlements on time and before any of the sunset dates expire as the apartment will be fit for occupation, but the main resort facilities area will not be complete for some months afterward which would hinder operation of the resort". The letter later stated that the extension of the sunset date would avoid "the issue where you have a completed apartment, which you have paid for but minimal ability to generate income for some time".

[77] Of this letter, Mr Haswell said that he "was extremely concerned about the suggestion in the letter that the development would not be completely finished when I was required to settle", resulting in a telephone call to a representative of Latitude Developments, who assured him that if he signed the 2008 contract, "the resort would be fully finished in every detail" (no doubt by the time he was required to complete the 2008 contract).

[78] Moreover, Mr Haswell deposes to the fact that the availability of the swimming pool was important to him. He deposes that he is prejudiced by the fact that the decision to stage the development meant that he "would not be receiving a unit in a completed resort". He also deposes to a fact that he would have been prejudiced, if required to complete on 15 June 2009, because "the units were not suitable for investment purposes as they were not capable of producing any investment return". No attempt was made to cross-examine Mr Haswell, to demonstrate that there was any reason to think that these matters were not of substantial concern to him. Nor has any reason been identified for doubting this evidence from Mr Haswell. Latitude Developments has not identified facts sufficient to entitle it to contest whether Mr Haswell was materially prejudiced as a result of the changes.[25]

[79] I am therefore satisfied that, were the matter to proceed to trial in the ordinary way, Latitude Developments has no real prospect of successfully controverting Mr Haswell's contention that he suffered material prejudice as a result of the changes notified in May 2009.

Effective termination

[80] At this point, it is convenient to set out s 214(4) of the *BCCM Act*, which confers a right of termination on a buyer. It is in the following terms:

> "(4) The buyer may cancel the contract if—
> (a) it has not already been settled; and
> (b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and
> (c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement."

[81] It will be apparent that this provision confers on a buyer a right to cancel a contract if certain conditions are satisfied. The conditions stated in paragraphs (a) and (b) of sub-section (4) do not require further consideration. Paragraph (c), however, is intended to identify the mechanism by which the cancellation is effected. This is done by notice. The only requirement as to form is that the notice be in writing. As to content, there is no expressly stated requirement, though it is obvious that the notice must convey that the contract is cancelled. In particular, there is no stated requirement to identify the statutory provision on which the cancellation is based, nor the fact or facts which give the buyer the right or power to cancel the contract under s 314(4).

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25 *Wallingford v Mutual Society* (1880) 5 App Cas 685, 704.

[82] The term "cancel" is not defined in the *BCCM Act*. In some contexts, it conveys the notion of depriving a document or instrument of any effect, by some act done in relation to it (tearing the document up, or ruling lines through it). However, its dictionary meanings[26] include "… to decide not to proceed with (a previously arranged appointment, meeting, event, etc.); … to make void, annul … ". It is apparent from the sub-section that those meanings, rather than some physical act in relation to the contractual document, is intended, for the effect is to be achieved by written notice to the seller.

[83] Section 214(4) may be contrasted with s 367 of the *Property Agents and Motor Dealers Act* 2000 (Qld), a provision conferring a right of termination on purchasers of land. Section 367(3) requires that the notice of termination state "that the contract is terminated under this section".[27] Also, s 209(1)(c) of the *BCCM Act* requires the identification of a particular factual basis for exercising the right of termination conferred by that section. On the other-hand, s 212 confers a right of termination, but says nothing about its mode of exercise. It would seem broad enough to encompass any act manifesting an intention not to bound by the contract. A similar right is conferred by s 213(6).

[84] A somewhat analogous right to terminate a contract was conferred in rather similar terms by s 49(5) of the *Building Units and Group Titles Act* 1980 (Qld). In *Deming*, it was held that a purchaser who gave a notice under s 49(5), which did not specify any ground, was able to rely on any ground of which the purchaser became aware.[28] However, three members of the Court (Mason, Deane and Dawson JJ) reserved the question whether a purchaser who has given a notice under s 49(5), and has notified a particular ground which ultimately is not made out, may nevertheless rely upon some other factual basis to support the termination[29].

[85] The notice requirement found in s 49 of the *Building Units Group Title Act* was also considered in *Clegmere Pty Ltd v Samspring Pty Ltd.*[30] In that case, a notice had been given, which nominated a particular basis for terminating the contract under s 49. The basis was not made out, but a different basis was later identified. At first instance it was held that a purchaser was not entitled to rely upon grounds for exercising the power to terminate found in s 49, of which it had not given notice.[31] In the result, the decision was upheld on appeal, though not on this basis. The case was there decided because the notice was out of time. Two members of the court (Connolly and Carter JJ) made no reference to the issue concerning reliance on a ground different to that stated in the notice. That, and the fact that they decided the case on the basis that the notice was out of time, rather indicates that their Honours did not support the finding at first instance on this issue. GN Williams J (as he then was) referred to the issue, and expressly reserved this question for further consideration. The same occurred in *Silverton Ltd v Shearer*.[32]

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26 See the Macquarie dictionary, 3rd ed.

27 On the other-hand, s 368(2) of the same Act does not include a requirement to identify the section, when the right conferred by it to terminate a contract is exercised.

28 See p 143.

29 See p 144.

30 [1983] 2 Qd R 399.

31 See p 406.

32 [1983] 2 Qd R 411, 414.

[86] Against that background, it is necessary to give further consideration to the termination letter. It expressed concerns in a number of places about the effect of the decision to stage the development. One change was that, at settlement, Mr Haswell would not receive an interest in what had been proposed as common property but was now included in Lot 20. However, the letter also expressed concern that the development would no longer be built in one stage; and that the common property would not include the swimming pool area, (and, mistakenly, outdoor dining areas, and other facilities within the facilities complex). It also complained that Latitude Development was "demonstrably incapable of fulfilling its obligations to convey title to fulfil the very subject matter of a contract", and continued with the statement that the resort was by no means complete. Elsewhere, with reference to allegations of breaches of ss 52 and 53A of the Trade Practices Act 1974 (Cth), reference was made to the fact that the resort was marketed as an investment opportunity, and the unit to be purchased by Mr Haswell was to be part of a pool of units available to be let as part of the Peppers Resort. In the same context reference was made to representations (probably a reference to the letter of April 2008) that if the 2008 contract were entered into, Latitude Developments would achieve the completion of the entire resort at the one time, avoiding the risk associated with a reduced ability to generate income from the unit.

[87] The termination letter gave notice of termination on a number of grounds. One was based on alleged repudiation of the contract, primarily in reliance on the fact that title in what was proposed to be common property would not pass at settlement, as a result of the staging proposal. Another was on the basis of representations, referred to in the context of the *Trade Practices Act*. Another made reference to allegations that Latitude Developments had not complied with s 214 of the *BCCM Act* and s 22 of the *LS Act*, and continued:-

> "Further, even if your client has complied with its requirements under s. 22 of the (*LS Act*) and s. 214 of the *BCCM Act*, our client is entitled to avoid, and terminate the Contract of Sale pursuant to s. 25 of the (*LS Act*) and s. 217 of the *BCCM Act* and our client elects to do so."

[88] As discussed earlier, s 217 confers a right to cancel a contract which depends upon the fulfilment of one of a number of conditions. The final condition in this group depends upon the inaccuracy of the information disclosed in the disclosure statement. The others are of no relevance: there was no reference in the termination letter to the community management statement as registered, nor any suggestion that it was different to what had been notified; nor could there have been any suggestion of a failure to explain inequalities in the contribution schedule lot entitlements.

[89] The passage set out above from the termination letter is based on the proposition that s 214 is complied with. That carries with it the notion that inaccuracies which have arisen in the information contained in the previous disclosure statement have been rectified. It seems to me that a notice of termination given on the basis that s 214 of the *BCCM Act* had been complied with could not, in the circumstances of this case, have been based on s 217, and the reference to that section was an error.

[90] It seems to me that that conclusion is reinforced by complaints about the changes resulting from the staging of the development, and in particular, the delay in the

completion of the resort facilities and the commencement of the operation of the resort. As I have indicated, those matters provide the factual basis for establishing prejudice which entitled Mr Haswell to cancel the contract under s 214.

[91] As has been mentioned, s 214 contains no express requirement that the notice of cancellation refer to that section, or identify the basis for ending the contract. It appears in legislation intended to provide a remedy in circumstances identified in the section. The section itself is intended to identify what is to be done by a purchaser who exercises the right conferred by it. It is difficult by implication to conclude that more is required than the section states. Both the language of the section, and the brief period within which the right might be exercised, suggest that a technical approach should not be taken to the notice provision in the section. It seems to me that a written notice, given to the seller within the stated time, which makes clear that the purchaser is ending the contract, is sufficient. This conclusion, in my view, finds some support in the broad principle adopted in *Minion v Graystone Pty Ltd*[33] that, where a legal justification in fact exists for a course taken, it will suffice to support its validity, that a parties or one of them acted for other reasons and in ignorance of its existence. In *Minion,* the principle was restated as follows:[34]

> "… (the principle) is that the action taken must be capable of being justified at law, but that the grounds of justification, although they must have existed, need not have been known or relied upon at the time the action was taken."

[92] Counsel for Latitude Developments referred to *Bankmist Holdings Pty Ltd v Azina Holdings Pty Ltd.*[35] That case was concerned with a notice of termination given under s 69D of the *Strata Titles Act* 1985 (WA). The notice was held to be defective because it did not rely on a failure to provide relevant information, made no assertion that the conduct of the party to whom the notice was given was deficient in any way, and did not allege a breach of any statutory provision.[36] It should be noted that the legislation on which this decision is based is by no means identical with s 214 of the *BCCM Act.* For that reason, and because I regard the considerations discussed a little earlier in these reasons as quite significant, I do not propose to follow it.

[93] The termination letter referred to statutory provisions other than s 214, but did not refer to s 214 as a source of the right to terminate. I do not consider that a mistake in the identification of the legal authority for the termination of the contract to be material. Since s 214 does not require the identification of the statutory provision in the notice, it seems unlikely that a reference to another section of the *BCCM Act* would make the notice ineffective. In other contexts it has been said that a mistake in the identification of the source of a statutory power does not make an act done pursuant to the power invalid.[37] It seems to me that there is a strong analogy between the exercise of a statutory power, and the exercise of a statutory right to terminate a contract. The statute confers a right to terminate, which carries with it a

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33 [1990] 1 Qd R 157, 164.

34 At p 164.

35 [2009] WASC 230.

36 See *Bankmist* at [38].

37 *Johns v Australian Securities Commission & Ors* (1993) 178 CLR 408, 426, 469; *Minister for Urban Affairs & Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 85, 86; *Brown v West & Anor* (1990) 169 CLR 195, 203.

power; that is to say, it attaches legal effect to an action performed by the person on whom the right is conferred. In my view, this provides an additional basis for concluding that a mistaken reference to the statutory provision which enables a purchaser to terminate a contract does not, of itself, affect the validity of the notice of termination.

[94] While the termination letter complained of a number of matters, one was the fact that the development would be staged, and resort facilities were not included in the first stage of the development, the resort not being complete. It was amongst the factual matters relied upon for the termination of the contract. If I am wrong in holding that it is not necessary that a notice given under s 214 identify the ground on which the termination is based, it seems to me that the termination letter included in the matters relied upon the changes which would justify termination under s 214.

[95] The general tenor of the termination letter is that Mr Haswell intended to terminate the contract on any basis available to him. It included an express reservation of rights "in all relevant respects". To the extent it might otherwise have been argued that, by nominating other grounds and other statutory provisions Mr Haswell was intending to abandon such right to terminate the contract as s 214 might afford him, the reservation made clear that that was not the case.

[96] As this issue depends entirely on the construction of statutory provisions, and the effect of the termination letter, and there have been extensive written and oral submissions from both parties, it seems to me that this question can be dealt with appropriately on an application for summary judgment. In my view, the termination letter was an effective exercise on behalf of Mr Haswell of the right conferred on him by s 214 of the BCCM Act to terminate the contract.

Conclusion

[97] The matters to which I have referred are sufficient to dispose of this application. I consider that the application for summary judgment should be granted.