SUPREME COURT OF QUEENSLAND

CITATION:	*Sunbay Projects Pty Ltd v PR Wieland Holdings Pty Ltd & Anor* [2010] QSC 368
PARTIES:	**SUNBAY PROJECTS PTY LTD (ACN 097 451 717)** (Plaintiff) v **PR WIELAND HOLDINGS PTY LTD** **(CAN 103 924 947)** (First defendant) and **PETER RICHARD WIELAND** (Second defendant)
FILE NO/S:	10987 of 2009
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme
DELIVERED ON:	24 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2010
JUDGE:	Ann Lyons J
ORDER:	**The contract between the plaintiff and the first defendant dated 7 November 2008 be specifically performed**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – PERFORMANCE – Where the plaintiff vendor and first defendant purchaser entered into a contract for the sale and purchase of a proposed lot in a development – where the second defendant was guarantor – where the defendants requested on multiple occasions to extend the date for settlement of the contract –where the first defendant later advised the plaintiff it was exercising its right to terminate the contract pursuant to s 367 of *Property Agents and Motor Dealers Act* 2000 (Qld) (PAMDA) – where the defendants now deny the existence of the contract – where alternatively the defendants submit that if the contract was formed it was lawfully terminated – whether the plaintiff is entitled to specific performance of the contract against the first and second defendants.

Agricultural and Rural Finance Pty Ltd v Gardiner & Anor (2008) 238 CLR 570
Collis v Currumbin Investments Pty Ltd [2009] QSC 297
Fairborne v Strata Store Noosa [2009] QSC 250
Fletcher v Kakemoto [2010] QSC 219
Freshmark Ltd v Mercantile Mutual Insurance (Aust) Ltd (1994) 2 Qd R 390
Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd [2008] QSC 261
Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1993) 112 ALR 609
Juniper v Roberts [2007] QSC 379
McDonald v Tinbilly Travellers P/L [2008] QCA 17
Mirvac Queensland Pty Ltd v Beioley [2010] QSC 113
MP Management (Aust) Pty Ltd v Churven [2002] QSC 320
Sargent v ASL Developments Ltd (1974) 131 CLR 634 at 658;
Sunbird Plaza Pty Ltd v Maloney (1987-1988) 166 CLR 245

Corporations Act 2001 (Cth))
Property Agents and Motor Dealers Act 2000 (Qld

COUNSEL: P Roney for the Plaintiff
P W Hackett for the First and Second Defendants

SOLICITORS: Macrossan & Amiet Solicitors for the Plaintiff
Redchip Lawyers for the First and Second Defendants

Ann LYONS J:

[1] The plaintiff Sunbay Projects Pty Ltd (Sunbay Projects) is the owner and developer of a project at Airlie Beach North Queensland called the Whitsunday Aviation Village Estate (WAVE). This matter relates to a sale of a block of land to the defendants, PR Wieland Holdings Pty Ltd (Wieland Holdings). The plaintiff's claim is for specific performance of the contract of sale as against the first defendant as purchaser and the second defendant as guarantor. The defendants deny the existence of a contract.

Agreed Facts

[2] The agreed facts are contained in the affidavit of Andrew Telford and the affidavit of Peta McMullan, both sworn on 17 August 2010. Those agreed facts are set out in the following paragraphs.

[3] In October 2007, an "Application to Register Interest", signed by Mrs Kristie Wieland on 6 October 2007 in relation to Lot 34 at the WAVE development was received by the solicitors for Sunbay Projects. Stapled to that application was a business card in the name of Peter Wieland, describing him as the Managing Director of a number of entitles which were listed on the back of the card, one of

which was PR Wieland Holdings Pty Ltd as Trustee for PR Wieland Family Trust (the Trust).[1]

[4] On 12 October 2007, a holding deposit of $5,000 was receipted into Macrossan & Amiet's Trust Account. That deposit had been paid by cheque drawn by Mr Wieland.

[5] On 4 March 2008, Macrossan & Amiet received an email from Peta McMullan of Sunbay Projects,[2] requesting that a contract be sent to Mr Wieland with the name of the buyer on the contract left blank, as Mr Wieland would give the contract to his accountants to work out which company of his would be the buyer.

[6] Macrossan & Amiet wrote to Mr Wieland by letter dated 4 March 2008, enclosing a number of documents referred to in the letter, including a Form 30c, the contract, a disclosure document and a buyer's acknowledgment.[3] The contents of that letter included the following:

> "On behalf of the Seller, your attention is drawn to the Warning Statement (PAMD Form 30c Version 3) attached to the Contract as the top sheet, the Information Sheet (Form BCCM 14 Version 6) immediately following the Form 30c and the BCCM Disclosure Statement and the Contract of Sale.
>
> …
>
> We confirm that the buying entity has been left in blank. It is necessary for the buying entity to be inserted into both the Contract and the Disclosure Statement. If the buying entity is a Company or a Trust then Item 13 on Page 6 needs to be completed by inserting names of the Guarantors (i.e. the Directors) and further, Item 15 on Page 7 needs to be completed by inserting the shareholders or the beneficiaries of the Trust, whichever is applicable."

[7] On 25 August 2008, Macrossan & Amiet received a letter[4] from the buyer's solicitors Redchip Lawyers, dated 21 August 2008, enclosing several documents, which included a buyer's acknowledgment, a PAMD Form 27c, a Form 30c attached to a signed Contract of Sale and a disclosure statement, all of which had been signed by Mr Wieland.

[8] The Form 30c indicated Mr Wieland had signed the box on the form where the "Buyer/s" was required to sign on 12 August 2008.[5] The contract at Item 5 named the buyer as "PR Wieland Family Trust" and at Item 13 named Peter Richard Wieland as guarantor. At Item 15, under the heading of "Corporations and Trustees", the names of Peter Richard Wieland and Kristie Gaye Wieland were inserted under the heading "Names of Shareholder and/or Beneficiary." At page 8 of the documents Mr Wieland signed in the section nominated for the Buyer and in the section nominated for the Guarantor. His signature in both sections was witnessed by his wife.

[9] The contract provided in clause 30 as follows:

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1 Exhibit 2, document 2.
2 Exhibit 2, document 5.
3 Exhibit 2, document 6.
4 Exhibit 2, document 10.
5 Exhibit 2, document 1.

> "30. GUARANTEE
>
> 30.1 The Contract is not binding on the Seller unless and until each Guarantor has signed this Contract as Guarantor.
>
> 30.2 Each Guarantor confirms his request for the Seller to enter into the Contract, accepts all obligations specified in the Contract, agrees to be bound as a party to the Contract and signs the Contract as a deed.
>
> 30.3 Each Guarantor agrees that they are liable jointly and severally to the Seller if the Buyer breaches the Contract. The Guarantor agrees to pay the seller any money for the Seller's loss resulting from the breach."

[10] On 25 August 2008, a fax was sent from Macrossan & Amiet to Redchip Lawyers asking for the details of identity of the trustee so that the contract could be completed prior to signing by Sunbay Projects.[6] That letter was as follows:

> "We refer to the above matter and confirm that we have received Contracts which appear to have been signed by Peter Wieland. The buyer details have been completed to show 'P R Wieland Family Trust' as the purchaser. Would you please confirm and provide us with a copy of the relevant pages of the Trust Deed so we may ascertain the legal entity that is the Trustee of the PR Wieland Family Trust.
>
> Our client is unable to execute the Contracts in their current form as the purchaser must be represented as the Trustee of the Trust as the Trust itself is not a legal entity capable of entering into a Contract to Purchase. Depending upon the legal entity of the Trustee the Contracts may be able to be amended with your client's authorisation, or alternatively, the contracts may need to be returned to you for re-execution.
>
> Would you please provide us with details of the correct legal entity that is to be reflected on the Contract of Sale so this matter can be attended to as quickly as possible."

[11] Subsequently, on 26 August 2008, Macrossan & Amiet received a fax from Redchip Lawyers of the same date stating that they were obtaining instructions from their client and that they would obtain from their client authorisation to allow Macrossan & Amiet to amend the contracts to reflect the correct name of the purchaser as follows.[7]

> "We are in the process of obtaining instructions from our client and will revert to you at our earliest opportunity.
> We will also obtain from our client the appropriate authorisation to allow you to amend the contracts to reflect the correct name of the purchaser."

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6 Exhibit 2, document 11.
7 Exhibit 2, document 12.

[12] A follow-up fax was sent to Redchip Lawyers on 9 September 2008. Two further follow-up faxes were sent; the first on 23 September 2008 and the second on 29 September 2008. Because no response had been received from Redchip Lawyers, Macrossan & Amiet sent a fourth fax on 15 October 2008.[8]

[13] On 5 November 2008, an email was received by Macrossan & Amiet from Redchip Lawyers, advising that the "purchasing entity" was "PR Wieland Holding Pty Ltd as Trustee for the PR Wieland Family Trust".[9]

[14] After that information was received, the contract information was completed by an employee of the plaintiff's solicitors firm by adding in handwriting the name of the trustee company. An error, however, was made by misspelling the name incorrectly as "PR Weiland Holdings Pty Ltd", instead of "PR Wieland Holdings Pty Ltd". Nothing turns on that misspelling.

[15] Subsequent to that, arrangements were made for Sunbay Projects to sign the contract, which it did.

[16] The signed contract dated 7 November 2008 and other documentation was returned to Redchip Lawyers by letter of 7 November 2008 as follows.[10]

> "We enclose the following:-
>
> 1. Signed copy of the Contract of Sale dated the 7th day of November 2008;
>
> 2 Signed Body Corporate Disclosure Statement;
>
> 3. Signed Buyer's Acknowledgement;
>
> As agent for the Buyer and as required by the Property Agents and Motor Dealers Act we draw your attention to:-
>
> (a) The PAMD Form 30c Warning Statement, which is attached to the front sheet of the Contract of Sale and which contains important information regarding the Buyers rights and in particular, the Cooling Off Period;
>
> (b) The Body Corporate Information sheet, Form 14, which immediately follows the Form 30c Warning Statement, and which contains important information regarding ownership of property in a body corporate;
>
> (c) The Contract itself, which contains the Terms and Conditions of the purchase;
>
> We confirm that the enclosed documentation is being delivered to you as Agent for the Buyer and we confirm that the Cooling off Period will commence on the day that you receive this letter."

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8 Exhibit 2, documents 13, 14, 15 and 16.
9 Exhibit 2, document 17.
10 Exhibit 2, documents 1 and 18.

[17] Notice of registration of plan and creation of the scheme was given to Redchip Lawyers by fax on 23 March 2009. Notice to Complete was also given which stated that under the terms of the Contract "settlement is to occur on Tuesday 7 April 2009". The letter continued:

> "For convenience, we confirm that our office will prepare the Transfer documents and have same executed by our client. The Transfer will be prepared using the Buyer's name as shown on the Contract."

[18] On the same date under cover of a separate letter the Transfer documents and Form 24 duly executed by the plaintiff were sent to the defendants' solicitors.

[19] On 30 March 2009, the Settlement Statement[11] was forwarded confirming that the date for settlement was 7 April 2009, specifying how the cheques were to be paid on settlement and providing the sellers cheque details.

[20] By fax sent on 2 April 2009 to Macrossan & Amiet, Redchip Lawyers advised that an extension of time was sought to 7 May 2009 as their client was "finding it extremely difficult to source finance."[12] This was agreed to on the basis that the settlement figures remained as at 7 April but that the buyer would pay "default interest from 7th April 2009 to the day of settlement with time to remain of the essence of the Contract".[13]

[21] On 7 May 2009, a request for a further extension of time to 18 June 2009 was received and agreed to on the basis of the "same conditions" as previously agreed.[14]

[22] A further request for an extension until 9 July 2009 was received by fax on 18 June 2009. Later that day, a further request was sent by fax seeking an extension until 20 July 2009. A letter was then sent by Macrossan & Amiet on 18 June 2009, advising that a "final extension for settlement to 20th July 2009" was agreed to, once again on the same conditions.[15]

[23] Arrangements were made for the settlement on 20 July 2009. The plaintiff was in a position to settle the transaction. On 20 July 2009, Redchip Lawyers sent an email stating:

> "We are instructed by our client to advise that he is not in a position to settle this matter."

[24] On 28 July 2009, Macrossan & Amiet sent a fax to Redchip Lawyers giving notice that the seller required the buyer to settle the contract on Tuesday 12 August 2009. Settlement details were forwarded to Redchip on 29 July 2009. The plaintiff seller was in a position to proceed to settlement on 12 August 2009. There was no attendance by the buyer.

[25] It was also agreed between the parties as follows:

- that Mrs Wieland was a co director of the first defendant.

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11 Exhibit 2, document 25.
12 Exhibit 2, document 26.
13 Exhibit 2, document 27.
14 Exhibit 2, document 29.
15 Exhibit 2, document 32.

- that at all material times there was a trust in existence known as the Pr Wieland family Trust and in respect of which the first defendant was the relevant Trustee.

- That at all material times the second defendant was a director of the first defendant.

- That on 12 August 2008 the second defendant affixed his name and signature to the PAMD Form 30c.

- That on or about 10 August 2010 the plaintiff incurred an outlay by way of stamp duty of $26,348.85.

[26] On 12 January 2009, the first defendant advised Macrossan & Amiet by letter that it was exercising its right to terminate the contract (if any). On 17 August 2010 Redchip Lawyers wrote to Macrossan & Amiet advising that the first defendant was exercising its right to terminate the contract (if any) pursuant to s 367 of *Property Agents and Motor Dealers Act* 2000 (Qld) (PAMDA).

Is the plaintiff entitled to an Order for Specific Performance?

[27] The plaintiff argues that by its clear terms the contract of sale imposed an obligation to complete the contract on both the first and second defendants.

[28] The defendants deny the existence of the contract. Alternatively, they argue that if the contract was formed, it was lawfully terminated. In any event, the defendants submit that the contract does not permit specific performance against the second defendant.

Was there a contract?

[29] The defendants assert that no contract was formed for a number of reasons.

The use of the Name PR Wieland Trust

[30] The first argument is that the only contract executed on behalf of the buyer was on behalf of the Trust, a non-existent legal entity, as the plaintiff's solicitors acknowledged in their letter of 25 August 2008.[16] The defendants argue that the alteration to the name of the buyer was made by the plaintiff's solicitors and that change has never been initialled by or on behalf of the buyer. Neither, they argue, was the buyer ever asked to re-execute the contract or warning statement.

[31] It is not disputed that the plaintiff's solicitors sought details of the correct purchasing entity and an authority to complete on behalf of the purchaser.[17] The defendants argue, however, that while the correct entity was subsequently identified, no authority to complete was ever forthcoming.[18] The defendants also submit that the contract and warning statement required re-execution consistent with the authorities.

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16 See paragraph 10 above.
17 Exhibit 2, document 11.
18 Exhibit 2, documents 12 and 17.

[32] In my view, the correspondence clearly reveals that the plaintiff's solicitors required two matters to be clarified by Redchip Lawyers, who were acting for both defendants. First, the name of the entity which was to enter into the Contract to Purchase and second, once that information had been provided, whether the documents needed to be re-executed or whether they could be amended with the authorisation of the defendants. The letter in reply from the defendants' solicitors stated that instructions as to the appropriate purchasing entity were being sought. The solicitors then advised in positive terms that "We will obtain from our client the appropriate authorisation to allow you to amend the contracts to reflect the correct name of the purchaser".

[33] The email of 5 November 2009 subsequently advised that "The purchasing entity is P.R. Wieland Holdings Pty Ltd as trustee for the P R Wieland Family Trust". If the defendants required the documents to be re-executed, then there was no reason to provide the name of the entity to the plaintiff's solicitors. The only reason to provide such information was for that information to be inserted into the existing contract. The subsequent behaviour of all parties also confirms that this was the reason the information was provided. In my view, the email of 5 November was a clear indication to the seller that re-execution of the contracts was not required by the buyer. This was consistent with the approach they had, in fact, foreshadowed in the letter of 26 August 2009.

[34] In my view, therefore, given the course of conduct between the parties, the email of 5 November 2009 clearly implied that the solicitors for the plaintiff were authorised to insert the correct name of the purchasing entity. When the insertion was initialled by the solicitors for the plaintiff, they were clearly doing so on the basis that they believed that they were authorised to do so by the defendants. I consider that the objective interpretation of the conduct of the parties, particularly Redchip Lawyers email of 5 November 2008 which initiated the insertion of the words, is that the defendants' solicitors authorised the purchaser's solicitors to do so. The defendants' solicitors were acting as the defendants' agents in relation to the purchase from the seller and were clearly authorised to give that authorisation to sign. In those circumstances, the additional words did not have to be initialled or re-executed by the defendants, given the clear indication by their solicitors that such amendment was in fact duly authorised by the defendants. I also consider that the subsequent conduct of the defendants' solicitors in asking for extensions of the settlement date also confirms the actual authorisation by the defendants of the alteration to the contract.

[35] Furthermore, the contract was indeed with an identified and identifiable buyer, as the plaintiff asserts. The second defendant had signed the form 30c on behalf of the family trust, which he indicated was to be the purchasing entity. Clearly, the trustee of the trust was, in fact, the purchasing entity, and the trustee of the trust was PR Wieland Holdings Pty Ltd. Mr Wieland was one of the directors of that company and one of the other directors, his wife, was the witness to his signature. It would appear from the company search that the other director was his 72 year old mother. The defendants accept that at all times there was a trust so named and that the first defendant was the trustee. The identity of the purchaser was always able to be discerned. In my view, the insertion of the words by the clerk at the plaintiff's solicitors firm did no more than clarify the proper name of the purchasing party.

[36] Accordingly, I consider that the insertion of the words identifying the identity of the trustee of the already nominated PR Wieland Family Trust was not only authorised by the defendants but was also intended to accurately reflect what the parties had, in fact, intended by their objective conduct.

[37] The argument, therefore, that a contract was not formed on that basis cannot succeed. Turning then to the second basis upon which the defendant asserts that no contract was formed.

The Execution of the Contract

[38] This second argument relates to the execution of the contract. Clause 30.1 makes it clear that "The Contract is not binding on the Seller unless and until each Guarantor has signed the Contract as Guarantor". This clause was obviously solely for the benefit of the seller. It is clear from the correspondence, that reliance on clause 30.1 has been waived by the seller.

[39] Clause 30.2 provides that "Each Guarantor confirms his request for the Seller to enter into the Contract, accepts all obligations specified in the Contract, agrees to be bound as a party to the Contract and signs the Contract as a deed". The defendants argue that whilst the plaintiff claims the purchaser is the first defendant company, the contract indicates that there is no binding contract until all directors of the purchaser sign the contract (clause 30.2), and this has not occurred.

[40] The basis of the argument on behalf of the defendants is that there are three directors of the first defendant company and only one of them, Mr Wieland, has signed the contract as guarantor. It is argued that this requirement that all the directors sign as guarantors was a condition precedent to the formation of the contract and could only have been cured by the execution of the contract by the other two directors of the first defendant as guarantors. Whilst it is clear that that has not occurred, on my reading of the contract, the contention of the defendants cannot be sustained. There is no requirement in the contract requiring all directors of the purchasing company to be guarantors. The only guarantor was Mr Wieland and he signed as required by that clause.

[41] Furthermore, there is no requirement that when a document is signed by a corporate entity, there is a particular formality which is required. Section 127 (1) of the *Corporations Act* 2001 (Cth) provides that a company may execute a document without using a common seal if the document is signed by two directors of the company, a director and a company secretary or, if it is a proprietary company with a sole director who is also the company secretary, that director. Section 127 (4), however, provides that the section does not limit the ways in which a company may execute a document, including a deed.

[42] It is clear that only one director signed the warning statement as buyer, despite the fact that the co director witnessed Mr Wieland's signature at other parts of the documentation. As Counsel for the plaintiff submits, the courts have consistently upheld contracts lacking the relevant formalities. In *McDonald v Tinbilly Travellers P/L*,[19] the appellant contended that the relevant deed of settlement in his employment dispute was invalid because two directors did not sign it. The court held that s 127(4) does not limit the ways in which a company may execute a

[19] [2008] QCA 17.

document under s 127(1). It held that the person who executed the document, purportedly on the respondent's behalf, had implied (actual) authority to do so. The deed was, therefore, validly executed.

[43] Section 366D(4) of PAMDA provides that a warning statement is of no effect unless the "buyer signs the warning statement". It is clear that Mr Wieland signed the warning statement. In my view, when one objectively looks at the documentation as a whole, in light of the surrounding circumstances and the conduct of the parties, it is apparent that when Mr Wieland signed the Form 30c, he did not do so in his personal capacity but rather, on behalf of the family trust which he nominated in the contract as the buyer. This necessarily had to be in his capacity as director of the company PR Wieland Holdings Pty Ltd, which was the Trustee of the family trust, PR Wieland Family Trust, which he had inserted as the buyer.

[44] I consider that the documentation was validly signed by a director of the company, which was intended from the outset to be the buyer. There was only one way in which the family trust could purchase the property and that was through the company, which was the Trustee of the trust. Mr Wieland advised from the outset that he was not buying it in his personal capacity, as he had made it clear that he wanted the buyer's name left blank as he would give the contract to his accountants "to work out which company of his would be the buyer". The words that were inserted into the contract reflect what was, in fact, intended by the parties and simply accurately reflects the correct purchasing entity by its proper name, rather than a more general reference to it being a family trust. I also note that there was no evidence to the contrary advanced by the defendants at trial.

Was the "Warning Statement" signed by the first defendant?

[45] The third argument advanced by the defendants is that s365 of PAMDA prescribes when a party becomes bound by a contract. Section 365 (1) provides that the buyer and seller under a relevant contract are bound to the contract when the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller's agent in the way mentioned in subsection (2). That subsection provides that the warning statement is to be attached to the relevant contract and appear as the top page, and the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the statement and the contract.

[46] It, therefore, requires receipt by the buyer or its agent of a warning statement (signed by the buyer at the time the buyer signed the relevant contract) and the relevant contract from the seller or the seller's agent, with a clear statement directing the buyer to the warning statement. Accordingly, the defendants argue that there has never been a warning statement signed by the first defendant company and the attempt to rely upon the earlier warning statement signed by Mr Wieland, the second defendant, and attached to the earlier unenforceable contract, is contrary to authority. The defendants argue that because of the non-compliance with s365 the contract is not binding.

[47] The defendants argue that this defect was incapable of being cured without execution of a fresh warning statement by the first defendant company (and Mr Wieland, if he too is a buyer, as the plaintiff suggests, upon its construction of the guarantee) and the initialling of the alteration to the contract and re-execution of the same by both the buyer (first defendant) and guarantor (Mr Wieland). The

defendants argue that the authorities establish that the warning statement is intended to be a warning applicable to the proposed relevant contract under consideration and that reliance on an earlier warning statement, even if it had been signed by the correct buyer, would be insufficient.

[48] Similar issues arose in *Fletcher v Kakemoto*,[20] where Martin J dealt with a situation where a purchaser signed a contract and a warning statement but amendments were subsequently made to the contract. The question was whether the purchaser had to sign a new warning statement before signing the amended contract.

> "[28] Mr Fletcher argued that the alterations made to the proposed contract were such that it was in fact a new contract. I dealt with a somewhat similar submission in *Doolan v Rothmont Projects Pty Ltd* [2010] QSC 193. The difference in that case, though, was that the prospective purchasers made an offer which was responded to by the vendor with a counter-offer. In other words, the vendor had received and considered the offer, assessed it as being inadequate in some respects, and proposed a different contract. That is not what occurred here. It was clear to Mr Fletcher that until the certificate from a solicitor about the waiving of the cooling-off period was obtained, the vendor would not consider his offer. After that certificate was obtained he accepted and initialled changes which had been suggested. He need not have done so. It was his offer. Unlike the position in *Doolan*, the vendor had not considered his proposal and had not made a counteroffer. The circumstances which played out on 13 April are such that they should be categorised as, in the main, a 'tidying up' of the proposed relevant contract in a form which could be put to the vendor. Even though the document was prepared by the vendor's real estate agent (and then subject to some further changes) it still amounts to an offer being made by the plaintiff.
>
> [29] The major aim of the warning statement provisions in the Act is to bring them to the attention of a prospective purchaser. That statement must be signed before any proposed relevant contract is signed. That does not mean, though, that a prospective purchaser is required to sign a new warning statement or resign the original warning statement on each occasion that the purchaser makes any changes to a proposed relevant contract before it is submitted to a vendor."

[49] As previously stated, in my view, Mr Wieland signed the warning statement as director of the first defendant as buyer at the time he signed the contract. I consider, therefore, that the statement was signed in accordance with the provisions of s 365 of PAMDA and that what was occurring when the name of the trustee was inserted was, in fact, no more than a "tidying up" of the proposed relevant contract, in a form which could be put to the vendor. The entity was the same but it was now being described by its correct, rather than its incorrect name. I agree with Martin J, that a prospective purchaser is not necessarily required to sign a new warning statement or re-sign the original warning statement on each occasion that changes are made to a proposed relevant contract.

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[20] [2010] QSC 219.

[50] Accordingly, I am satisfied that the PAMDA provisions were satisfied and that a contract came into existence.

Waiver and Termination

[51] The plaintiff argues that even if there has been non-compliance with the execution of the warning statement as required by PAMDA, then the defendants have waived non-compliance by their conduct. In particular, reliance was placed upon the decision of Muir J in *MP Management (Aust) Pty Ltd v Churven*[21].

> "[45] Waiver, insofar as it is a sustainable principle independent of estoppel, in this context at least, applies only where there are alternative rights inconsistent with one another and a party acts, with knowledge of the facts giving rise to the law applicable to the rights, in a manner consistent only with his having chosen to rely on one of them.
>
> [46] Returning to the question for determination, there is no inconsistency between acknowledging the existence of the contract and taking a step under or in reliance on it on the one hand and the maintenance of the right to terminate conferred by s 367(2), on the other. That provision gives a buyer the right to terminate 'the contract at any time before the contract settles', irrespective of the nature and extent of the performance under the contract and irrespective of the party's conduct by reference to it. Consequently, failure to exercise the right of termination of a contract, even with full knowledge of the right to terminate, is not necessarily inconsistent with acts which acknowledge the continued existence of the contract.
>
> [47] As Brennan J expressed it in *Verwayen* —
>
> > 'As a right is waived only when the time comes for its exercise and the party for whose sole benefit it has been introduced knowingly abstains from exercising it, a mere intention not to exercise a right is not immediately effective to divest or sterilise it.'"

[52] The defendants submit that that decision was then applied by Douglas J in *Juniper v Roberts*:[22]

> "[13] Because s 367(2) provides a right to terminate at any time before the contract settles it also seems to me that it is correct to say that there is no occasion to elect between alternative rights in this case. In proceeding with the contract until close to the time for settlement, Mr Juniper did not elect to forego the statutory right to terminate at any time before settlement. Accordingly, there is no occasion to apply the doctrines of waiver or election."

[53] Accordingly, the defendants submit that the conduct relied upon by the plaintiff to constitute a waiver is no different to that in *MP Management (Aust) Pty Ltd v Churven* and *Juniper v Roberts*, therefore, in the circumstances, there was no waiver of the right to terminate by the defendants.

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21 [2002] QSC 320 at [45]–[47].

22 [2007] QSC 379 at [13].

[54] In the present case, it is clear that once the correct entity was inserted in the contract by Macrossan & Amiet on 7 November 2008 pursuant to the email advice from Redchip Lawyers on 5 November 2008, the relevant documents were then sent by mail back to the buyer's solicitors Redchip Lawyers. The documents included the signed copy of the Contract of Sale dated 7 November 2008, the signed Body Corporate Disclosure Statement and the Signed Buyer's Acknowledgement. The letter also stated that as Redchip Lawyers were agents for the buyer, their attention was directed to the PAMD Form 30c Warning Statement, which was attached to the front sheet of the Contract of Sale and that it also contained important information regarding the buyer's rights and the cooling off period.

[55] The correspondence between the parties after that date related to the postponement of the settlement and did not dispute, in any way, the documentation or information provided in the letter of 7 November 2008. In particular, on 23 March 2009 a notice for completion was given. Transfer documents were sent on 23 March 2009 which identified the transferee as the first defendant. There was no objection to the transferee so described. A settlement statement was then sent on 30 March 2009, to which no objection was taken.

[56] On 2 April 2009, the defendants' solicitors indicated Mr Wieland was arranging finance by way of borrowing against his principal place of residence but that it was "extremely difficult to source finance". An extension was sought and granted on the proviso that the settlement figures, as set out at the 7 April 2009 notice, applied and that default interest applied to the day of settlement. On the extended date, namely 7 May 2009, the purchasers asked for a further extension and said that their client would be contacting the developer to discuss it. This extension was also granted.

[57] On 18 June 2009, a further extension was granted on the basis that funds were still being sourced for settlement. On 20 July 2009, notification was given that the buyer was not in a position to settle that day. On 11 August 2009, notification was given that the buyer was still not in a position to settle the matter the next day. I agree with the submission of the plaintiff, that where a party is entitled to bring a contract to an end but chooses to continue with the contract for exercising rights or otherwise conducting itself in a way explicable only on the basis that the contract remains on foot, then that party is taken to have affirmed a contract and thereby lost the right of termination.[23] In *Mirvac Queensland Pty Ltd v Beioley*[24] P McMurdo J held:

> "[32] The plaintiff argued that any right to avoid the contract was lost by the defendants electing to call for the performance of the contract by a letter from their solicitors of 5 May 2009. By that letter, they required the plaintiff to immediately deliver an executed transfer pursuant to clause 3.3 of the contract. On behalf of the defendants, it was argued that they were not put to an election as at 5 May 2009, so that they should not be regarded as having elected by that correspondence. The first of those matters might be accepted. But if

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[23] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 658; *Immer (No 145) Pty Ltd v Uuniting Church in Australia Property Trust (NSW)* (1993) 112 ALR 609; *Freshmark Ltd v Mercantile Mutual Insurance (Aust) Ltd* (1994) 2 Qd R 390; *Agricultural and Rural Finance Pty Ltd v Gardiner & Anor* (2008) 238 CLR 570 per Gummow, Hayne and Kiefel JJ at [56].

[24] [2010] QSC 113 at [33].

> they were not bound to then elect, it does not follow that there was in fact no election.
>
> [33] In *Agricultural and Rural Finance Pty Ltd v Gardiner*,12 Gummow, Hayne and Kiefel JJ held that 'the exercise, despite knowledge of a breach entitling one party to be discharged from its future performance, of rights available only if the contract subsists, will constitute an election to maintain the contract on foot.' In this case there was no issue as to the defendants' knowledge of the relevant facts because at least by 5 May 2009 they knew that the building which had been constructed had balconies of these different areas and they knew what they had or had not received insofar as s 22 was concerned. The defendants argued that they did no more than keep open the possibility of settlement, by calling for the transfer to be provided for stamping. But in doing so they invoked clause 3.3 of the contract and thereby required the plaintiff to perform the contract. That was a right only available to them whilst the contract subsisted and in my view would have constituted an election to affirm the contract had I concluded that the defendants had a right to avoid it."

[58] In the present case, after the plaintiff instituted proceedings, the defendants' solicitors by letter dated 20 November 2009, wrote to the plaintiff's solicitors noting that, in the event, the contract was at an end, the plaintiff had failed to terminate the contract, mitigate its loss or quantify its damage, and stated that in those circumstances it was appropriate for the plaintiff to terminate the contract, mitigate its loss by selling the land and to quantify its damages. Such action is, indeed, consistent with an acknowledgment by the defendants that the contract is on foot.

[59] In *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*[25] Fryberg J considered waiver rights under s 365(3) and found that the purchaser had conveyed to another entity that it was a party to a binding contract and had sent a consent to that entity for forwarding elsewhere. It was held this act was inconsistent with retaining an option not to be bound and that the right to terminate had been waived. In *Collis v Currumbin Investments Pty Ltd*,[26] the Chief Justice was considering a failure to draw a purchaser's attention to a PAMDA warning statement in relation to a contract for a house and land package. Prior to settlement, the vendor offered further inclusions, then an extension for the period of construction. The purchaser sent a form agreeing to that course. The Chief Justice held that the purchaser's attention had been drawn to the relevant warning statement but, in the event that the parties had not by then become bound to the contract because there had been non compliance with the Act, then he concluded that Mr Collis had waived his statutory right to have the warning statement drawn to his attention or to terminate in relation to any aspect of that requirement.

[60] I consider that the following conduct is inconsistent with the maintenance of a right to terminate, and I consider it evidence a waiver of such entitlement by conduct:

(i) correspondence about the impending settlement dates and cooperation about completion on those dates;

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25 [2008] QSC 261.
26 [2009] QSC 297.

(ii) the acknowledgment that the contract was on foot but due to the purchaser's own difficulties in obtaining finance the settlement date be extended to facilitate that;

(iii) the agreement to pay consideration for the grant of further time in which to obtain those funds;

(iv) the invitation to the vendor to terminate for breach and quantify its loss in the loss of bargain.

[61] However, it is not necessary to determine the question of waiver of the right to terminate given that I consider that there has not been a breach of the Act. Accordingly, no right to terminate in fact arose.

Termination

[62] The defendants also argue that if a contract did come into existence, then it was validly terminated. The defendants argue that the right to termination is set out in s 367(2), which provides that if the warning statement is not given or if it does not comply with s 366D, then the buyer's rights are provided for in s367(2):

> "(2) *The buyer* under a relevant contract may terminate the relevant contract at any time before the relevant 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 relevant contract is *terminated under this section*." (my emphasis)

[63] The defendants argue that by its solicitors it gave such a notice as buyer on 12 January 2009 and again on 17 August 2010, and by themselves on 19 August 2010. Accordingly, the defendants argue that if the contract was in fact formed, then the circumstances indicate that it was lawfully terminated.

[64] As I have indicated, I do not consider that there has been a breach of the provisions of the Act in relation to warning statements. Accordingly, it is not necessary to decide if there has been a valid termination pursuant to s 367 and whether the requirements of that section have been complied with.

[65] Accordingly, a valid contract was formed with the first defendant and the plaintiff is entitled to specific performance as against the first defendant.

Can Specific Performance be ordered as against the guarantor Mr Wieland?

[66] The plaintiff in its Amended Claim also seeks an order for specific performance as against the second defendant, based on the terms of the guarantee.

[67] Clearly, a creditor's rights against a guarantor depend on the terms of the guarantee and the nature of the obligation, performance of which is guaranteed.[27] The plaintiff argues that those terms place an express obligation on the second defendant to pay the sums of money which are due under the contract.

[68] The guarantee provides:

> "30.2 Each Guarantor confirms his request for the Seller to enter into the Contract, accepts all obligations specified in the Contract, agrees

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27 *Sunbird Plaza Pty Ltd v Maloney* (1987-1988) 166 CLR 245 at 255.

> to be bound as a party to the Contract and signs the Contract as a Deed.
>
> 30.3 Each Guarantor agrees that they are liable jointly and severally to the Seller if the Buyer breaches the Contract. The Guarantor agrees to pay the seller any money for the Seller's loss resulting from the breach.
>
> ...
>
> 30.5 The Seller may recover from the Guarantors damages for the Seller's losses in enforcing this guarantee.
>
> 30.6 The Guarantor indemnifies the Seller against any liability, loss and costs incurred by the Seller resulting from the Buyer's breach of the Contract."

[69] In my view, a reading of those clauses does indicate an obligation to meet a claim for damages for loss resulting from the breach. There is also an acceptance of an express obligation to meet all obligations specified in the contract and an agreement to be bound as a party to the contract and to sign it as a deed. Furthermore, at clause 30.3 the guarantor agrees to be "jointly and severally liable to the seller if the buyer breaches and agrees to pay the seller any money for the seller's loss resulting from the breach".

[70] The plaintiff argues that those clauses, whereby the guarantor accepts all obligations specified in the Contract, impose an express obligation on the guarantor to pay the sums of money which are due under the contract which would include the purchase price (clause 7), interest (clause 14.5) and indemnity costs (clause14.6). Furthermore, it is argued those clauses confer rights on the seller to sue the guarantor for specific performance because clause 30.2 "must mean something more than what is provided for in clause 30.3 and 30.5 and 6, which deal expressly with the damages situation".[28]

[71] The plaintiff argues that there is a high degree of likelihood that the first defendant, if ordered to complete, would be unable to do so and that an order is therefore sought, requiring performance of the obligations of the guarantor. There is evidence here which does indicate, at least historically, the first defendant's inability to settle due to lack of finance. I also accept that in the present case there is essentially a family company which is controlled by the second defendant, who essentially determines whether it has funds or not.

[72] Despite that argument, I consider the relief currently sought as against the second defendant is premature. It is clear that on the proper construction of the guarantee, Mr Wieland guaranteed the payment to the plaintiff of any *monetary loss* it establishes against the buyer as a consequence of its breach of the contract as purchaser. However, no damages are sought as the plaintiff seeks specific performance of the contract by the buyer (the first defendant).

[73] A default by the buyer by failing to specifically perform the contract in accordance with the order sought for specific performance will, if the contract is then

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[28] Transcript day 1 p 51 ll 1-10.

terminated by the plaintiff, give rise to an entitlement on the part of the plaintiff to sue the buyer and Mr Wieland for damages for breach of the terms of the contract and guarantee respectively.

[74] In my view, therefore, the relief sought as against the second defendant is in fact premature because a guarantor should not be compelled to do something until the principal has failed. In *Fairborne v Strata Store Noosa*,[29] Daubney J refused an application for specific performance against the guarantors:

> "[39] It seems to me that the pursuit of an application for specific performance against the guarantors at this point in time sits ill with the applicant's request for a decree of specific performance against the first respondent. True it is that the liability of the guarantors, determined according to the terms of the guarantee given, is additional to the primary liabilities and obligations of the purchaser under the contract of sale. But making an order requiring the guarantors to "pay and perform the obligations" of the first respondent under the contract at a time when the first respondent itself is subject to a decree that it perform its own obligations would cause immediate and wholly undesirable tensions to arise both in respect of the legal consequences (e.g. 18 whether, and to what extent the guarantors are subrogated to the rights and responsibilities of the purchaser under the contract of sale) and in the practical consequences of the Court simultaneously ordering two discrete parties (i.e. the purchaser and the guarantors) separately to perform the same obligations under the same contract at the same time.
>
> [40] The vendor having persuaded me that the first respondent purchaser has not demonstrated good reason for refusing an order for specific performance against it, I consider it premature for the vendor to seek simultaneous orders tantamount to performance of the guarantee at this juncture."

[75] Accordingly, I do not consider it is appropriate to make orders as against the second defendant at this time.

[76] The plaintiff has established its right to specific performance as against the first defendant. It will be ordered that the contract between the plaintiff and the first defendant dated 7 November 2008 be specifically performed.

[77] I will hear the parties as to the other orders, the form of orders and as to costs.

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[29] [2009] QSC 250.