SUPREME COURT OF QUEENSLAND

CITATION:	*Wilson v Mirvac Queensland Pty Ltd* [2010] QSC 87
PARTIES:	**WILSON, Catherine Frances** (applicant) **v** **MIRVAC QUEENSLAND PTY LIMITED** ACN 060 411 207 (respondent)
FILE NO/S:	BS13896/09
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	26 March 2010
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	19 January 2010
JUDGE:	Margaret Wilson J
ORDER:	**1. it is declared that the applicant has validly cancelled, pursuant to s 214(4) of the *Body Corporate and Community Management Act* 1997 ("the BCCMA"), the written contract entitled "Sale Contract Tennyson Reach" dated 4 December 2007 between the applicant and the respondent;** **2. the respondent pay the applicant's costs of and incidental to the originating application, limited to the claim for relief under the BCCMA, to be assessed.**
CATCHWORDS:	CONVEYENCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATIONS ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS – where applicant agreed to purchase a residential apartment in a proposed community titles scheme from respondent – where respondent provided a disclosure statement under s 213 of the *Body Corporate and Community Management Act* 1997 (Qld), and subsequently a further statement under s 214 – where applicant asserted she would be materially prejudiced if compelled to complete the contract and purported to cancel it under s 214(4) of the Act – where applicant seeks declaration that she validly cancelled the contract – whether applicant validly cancelled the contract

Acts Interpretation Act 1954 (Qld), s 14A(1)
Body Corporate and Community Management Act 1997 (Qld), s 2, s 4, s 30, s 31, s 94(1), s 152(1)(a), s 213, s 214, s 215, s 216, s 217(b)(iv), s 218, s 219
Building Units and Group Titles Act 1980 (Qld), s 49
Environmental Protection Act 1994 (Qld), s 421(3)
Land Sales Act 1984 (Qld), s 22
Retirement Villages Act 1999 (Qld)

Bassingthwaighte v Butt [1982] Qd R 670, considered
Celik Developments Pty Ltd v Mayes [2005] QSC 224, considered
Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal [2004] 1 Qd R 346, considered
Deming No. 456 Pty Ltd & Ors v Brisbane Unit Development Corporation Pty Ltd (1984) 155 CLR 129, considered
Corporation Pty Ltd (1984) 155 CLR 129, considered
Flight v Booth (1834) 1 Bing. (N.C.) 370; 131 E.R. 1160, cited
Gold Coast Carlton Pty Ltd v Wilson [1985] 1 Qd R 182, considered
Lee v Surfers Paradise Beach Resort Pty Ltd [2008] 2 Qd R 249, considered
Simons v Herald & Weekly Times Ltd [1970] VR 131, cited
Sommer v Abatti Holdings Pty Ltd [1992] 1 Qd R 300, considered

COUNSEL: S R Lumb for the applicant.
M D Martin for the respondent.

SOLICITORS: Van de Graaff Lawyers for the applicant.
ClarkeKann Lawyers for the respondent.

[1] **MARGARET WILSON J**: The applicant agreed to purchase a residential apartment in a proposed community titles scheme from the respondent.

[2] The respondent provided a disclosure statement under s 213 of the *Body Corporate and Community Management Act* 1997, and subsequently a further statement under s 214.

[3] Asserting that she would be materially prejudiced if compelled to complete the contract, the applicant purported to cancel it under s 214(4) of the Act.

[4] In this proceeding the applicant seeks a declaration that she validly cancelled the contract. Further or alternatively, she seeks a declaration that she validly rescinded it pursuant to s 421(3) of the *Environmental Protection Act* 1994.

[5] The originating application came before the Court on the Applications List. Counsel for the applicant asked the Court to determine only the lawfulness of the cancellation under the *Body Corporate and Community Management Act*, on the basis that if that issue were determined against his client, the matter should proceed to trial on the issue of rescission under the *Environmental Protection Act*.

[6] Counsel for the respondent submitted that the matters in issue should be the subject of pleadings and determination at trial. However, the respondent failed to satisfy the evidentiary onus it bore to persuade the Court there were relevant disputes of fact which should go to trial. Accordingly, whether the applicant validly cancelled the contract under s 214 of the *Body Corporate and Community Management Act* is an appropriate issue for separate summary determination.

BCCM Act ss 213 and 214

[7] The Act draws a distinction between sales of existing lots and sales of proposed lots (ie. sales "off the plan"). Under s 213, before a contract for the sale of a proposed lot is made, the vendor must give the purchaser a statement disclosing various matters reasonably expected or proposed to be in place when the community titles scheme is established. Under s 214 it must give the purchaser a "further statement" if, before settlement of the contract, it becomes aware that information in the first statement was inaccurate at the date of the contract or if the first statement would not be accurate if now given. The first statement and the further statement are part of the contract[1] and the purchaser may rely on them as if the vendor had warranted their accuracy.[2] The purchaser has certain rights to "cancel" the contract in the event of the vendor's non-compliance with these obligations or inaccuracy in the statements.[3]

[8] Sections 213 and 214 provide:-

> "**213 Information to be given by seller to buyer**
>
> (1) Before a contract (the *contract*) is entered into by a person (the *seller*) with another person (the *buyer*) for the sale to the buyer of a lot (the *proposed lot*) intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed, the seller must give the buyer a disclosure statement.
>
> (2) The disclosure statement—
>
> (a) must state the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot; and
>
> (b) must include, for any engagement of a person as a body corporate manager or service contractor for the scheme proposed to be entered into after the establishment of the scheme, or proposed to be continued or entered into after the scheme is changed—
>
> (i) the terms of the engagement, other than any provisions of the code of conduct that are taken to be included in the terms under section 118; and
>
> (ii) the estimated cost of the engagement to the body corporate; and

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1 *Body Corporate and Community Management Act* 1997 (Qld), s 215.
2 *Body Corporate and Community Management Act* 1997 (Qld), s 216.
3 *Body Corporate and Community Management Act* 1997 (Qld) ss 214(b) and 217(b)(iv).

(iii) the proportion of the cost to be borne by the owner of the proposed lot; and

(c) must include, for any authorisation of a person as a letting agent for the scheme proposed to be given after the establishment of the scheme, or proposed to be continued or given after the scheme is changed, the terms of the authorisation; and

(d) must include details of all body corporate assets proposed to be acquired by the body corporate after the establishment or change of the scheme; and

(e) must be accompanied by—

(i) the proposed community management statement; and

(ii) if the scheme to be established or changed is proposed to be established as a subsidiary scheme—the existing or proposed community management statement of each scheme of which the proposed subsidiary scheme is proposed to be a subsidiary; and

(f) must identify the regulation module proposed to apply to the scheme; and

(g) must include other matters prescribed under the regulation module applying to the scheme.

(3) The disclosure statement must be signed by the seller or a person authorised by the seller.

(4) The disclosure statement must be substantially complete.

(5) If the proposed lot the subject of the contract is not residential property, the seller must give the buyer an information sheet (the *information sheet*) in the approved form with the contract in a way mentioned in section 213A.

(5A) If the proposed lot the subject of the contract is residential property, the seller must ensure that an information sheet (the *information sheet*) in the approved form and a warning statement are given as required under the *Property Agents and Motor Dealers Act 2000*, section 366, 366A or 366B.

(6) If the contract has not already been settled, the buyer may cancel the contract if —

(a) the seller has not complied with subsection (1); or

(b) the seller has not complied with subsection (5) or (5A), whichever is applicable.

(7) The seller does not fail to comply with subsection (1) merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.

214 Variation of disclosure statement by further statement

(1) This section applies if the contract has not been settled, and—

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

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

(2) The seller must, within 14 days (or a longer period agreed between the buyer and seller) after subsection (1) starts to apply, give the buyer a further statement (the *further statement*) rectifying the inaccuracies in the disclosure statement.

(3) The further statement must be endorsed with a date (the *further statement date*), and must be signed, by the seller or a person authorised by the seller.

(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.

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

The Facts

[9] The respondent is the developer of a staged development known as Tennyson Reach Development. By a contract dated 4 December 2007 the applicant agreed to purchase a proposed residential lot in stage 2 of that development, described as Lot 5111 "Farringdon".

[10] The respondent gave the applicant a Disclosure Statement dated 3 December 2007 in fulfilment of its obligations under s 213. The Disclosure Statement had a table of contents, listing 11 chapters, namely:-

"CHAPTER 1 – Information Disclosure
CHAPTER 2 – New Community Management Statement
CHAPTER 3 – Schedule of Finishes
CHAPTER 4 – Plans
CHAPTER 5 – Body Corporate Budget and Schedule of Levy Calculations and Lot Entitlements
CHAPTER 6 – Caretaking Agreement

CHAPTER 7 – Letting Agreement
CHAPTER 8 – Administration Agreement
CHAPTER 9 – Draft Site Management Plan
CHAPTER 10 – Power of Attorney Extract
CHAPTER 11 – FIRB Approval"

(a) The following appeared in chapter 1 –

"4.4 **Proposed Assets of the Body Corporate**
The Seller proposes to provide, at its cost, the following items of equipment and furnishings which will become Body Corporate Assets upon establishment of the Body Corporate, namely:

Gymnasium/Lap Pool
(a) pool cleaning equipment;
(b) pool furniture;
(c) tables and chairs for meeting room use;
(d) fitness equipment;
(e) AV equipment.

Other Recreational Pools
(a) pool cleaning equipment;
(b) outdoor pool furniture;
(c) BBQ, outdoor tables and chairs.

General
(a) artworks and loose decorative items within lift foyer and common areas;
(b) CCTV, cameras and security monitoring equipment;
(c) Caretakers' office equipment;
(d) Caretakers' gardening equipment;
(e) Caretakers' vehicle for transport of refuse containers to compactor; and
(f) 6 lift curtains.

It is not proposed that the Body Corporate acquire any other assets after establishment of the Scheme, however, the Body Corporate may acquire other assets if the Body Corporate considers the assets would be beneficial to the operation of the Scheme."

(b) By-law 29 of schedule C to the proposed Community Management Statement contained in chapter 2 empowered the Body Corporate to operate a security system for the Scheme Land, including implementing security procedures and security equipment designed to prevent unauthorised entry to the Scheme Land.

(c) Clause 3.4 of chapter 1 provided that details of the finishes for the lot were incorporated in chapter 3, which provided, inter alia, that CCTV would be "provided to select locations within the common property".

(d) A copy of the proposed Caretaking Agreement was set out in chapter 6. Schedule 3 to the agreement listed the caretaking duties, including:-

(i) By clause 1.1:-

> "The Caretaker must within a reasonable time after the Commencement Date become familiar, and maintain that familiarity, with:
> …
> (e) the security devices and systems used in the Development
> …"

(ii) By clause 3.1 (under the heading "Daily Requirements"):

> "Security: check for any security breaches, vandalism, broken glass and ensure all fire doors are secured according to the code requirements and monitor (if installed) any close circuit security television cameras and keep daily video tapes for at least seven days".

[11] After stage one of the development had been completed, the respondent's solicitors wrote to the applicant's husband on 6 August 2009. They said:-

> "**Mirvac Queensland Pty Limited ("Seller") sale to Catherine Frances Wilson ("Buyer") – Lot 5111 Tennyson Reach, Stage 2**
>
> By way of update, the Tennyson Reach Community Titles Scheme 39925 was established on 27 April 2009 upon completion of Stage 1 of the Development. As a consequence of requirements of the Brisbane City Council as part of the process of establishment of the Scheme and subsequent events (such as the Body Corporate adopting a Budget and entering into Body Corporate Agreements as contemplated by the first Disclosure Statement), a number of changes have been made to, or are proposed in respect of, the Scheme.
>
> We **enclose** a Further Statement pursuant to s.214 of the *Body Corporate and Community Management Act* which details all the changes made or proposed to the Scheme and to the information contained in the first Disclosure Statement given to the Buyer."

[12] The applicant received the Further Statement on 11 August 2009. It consisted of a five page document headed "Further Statement" explaining how the first statement was or had become inaccurate and how the inaccuracies were being rectified, together with a substitute Disclosure Statement dated 6 August 2009 incorporating the changes. The five page document made no mention of any change to cl 4.4 of chapter 1.

[13] The substitute Disclosure Statement had a table of contents – 11 chapters described as in the first Disclosure Statement, except for chapter 5 which was:-

> "CHAPTER 5 – Body Corporate Budget and Schedule of Levy Calculations and Lot Entitlements and Schedule of Body Corporate Assets"

Chapter 5 included a two page Body Corporate Asset Register and a four page Initial Body Corporate Equipment Schedule. Neither the Asset Register nor the Equipment Schedule contained any reference to:-

(a) CCTV, cameras and security monitoring equipment;

(b) BBQ, outdoor tables and chairs;

(c) artworks and loose decorative items within lift foyer and common areas: or

(d) six lift curtains.

But the other provisions to which I have referred (the by-law, the finishes, and the caretaking duties) were unaltered.

[14] By s 214(4)(c) of the *Body Corporate and Community Management Act* the applicant had 14 days from receipt of the Further Statement in which to cancel the contract if she would be materially prejudiced if compelled to complete, given the extent to which the first Disclosure Statement had become inaccurate. She purported to do so by letter to the respondent's solicitors dated 24 August 2009. (She relied, as well, on other grounds for terminating the contract, but they are not presently relevant.)

[15] The applicant wrote:-

> "Security is and was a very important consideration for my husband and myself, given our personal circumstances, and the proximity of the Farrringford building to the State Tennis Centre and proposed public parklands. Further, if the fee to the caretaker was based, even in part, on the security monitoring function, and that function does not have to be performed, the fee paid is accordingly inflated.
>
> To a lesser extent, but still importantly, the absence of artworks, decorative items and a BBQ and tables and chairs detracts from the amenity of the development, and the Seller's unwillingness to supply these items marks an unwarranted departure from the initial Disclosure Statement. If the Body Corporate has to acquire these items it will put all unit-holders to expense.
>
> The provision of lift curtains is necessary to prevent damage occurring if items are being moved in or out of the building, and to minimise the expense that would be incurred by the body corporate if that were to occur.
>
> I regard the amendment to clause 4.4, the inclusion of the Body Corporate Asset Register, the omission of the assets to which I have referred, and the provisions of the Caretaking Agreement to be such that I would be materially prejudiced if compelled to complete the

> contract. Accordingly, I cancel the contract, pursuant to s. 214(4) of the Act."

[16] On 9 September 2009 the respondent's solicitors replied:-

> "**1. Body Corporate Assets**
>
> The BCCM Act only requires a seller to disclose 'details of all Body Corporate Assets proposed to be acquired by the Body Corporate after the establishment or change of the Scheme'.
>
> Neither the original Disclosure Statement nor the Further Statement suggested that it was proposed that the Body Corporate would be required to acquire any Body Corporate Assets. All assets that the Seller proposes will become Body Corporate Assets as listed in the original Disclosure Statement will be provided by the Seller at its cost and the Seller confirms that all the items of equipment and furnishings listed in the original Disclosure Statement have or will be provided by the Seller at its cost. It is noted that some items will be progressively provided by the Seller upon completion of each Stage of the Development. By oversight, some of those items which have already been provided by the Seller upon completion of Stage 1 were not listed on the Body Corporate Assets Register in the Further Statement. We **enclose** a Further Statement confirming the Seller's original undertaking to provide the assets listed in the original Disclosure Statement and annexing a copy of the amended Body Corporate Assets Register."

[17] Counsel for the respondent submitted that the applicant was not entitled to cancel the contract because the original Disclosure Statement never became inaccurate: the inaccuracy was in the Further Statement.

[18] Of course, the original Disclosure Statement did become inaccurate in other respects, necessitating the provision of the Further Statement.

Effect of the Legislation

[19] Both the original Disclosure Statement and the Further Statement had contractual effect[4] and the applicant was entitled to rely on the information in both as if the respondent warranted its accuracy.[5]

[20] The primary object of the *Body Corporate and Community Management Act* is:-

> "…to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects."[6]

[21] Its secondary objects are:-

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4 *Body Corporate and Community Management Act* 1997 (Qld), s 215.
5 *Body Corporate and Community Management Act* 1997 (Qld), s 216.
6 *Body Corporate and Community Management Act* 1997 (Qld), s 2.

> "(a) to balance the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes;
> (b) to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;
> (c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;
> (d) to provide a legislative framework accommodating future trends in community titling;
> (e) to ensure that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;
> (f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;
> (g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;
> (h) to ensure accessibility to information about community titles scheme issues;
> (i) to provide an efficient and effective dispute resolution process."[7]

[22] In construing the Act, the interpretation which best achieves these objects is to be preferred to any other.[8] Sections 213 – 219 are consumer protection provisions. As such, they should be construed beneficially, resolving any ambiguity in favour of the consumer.

[23] By s 216 the applicant could rely on the information in the original Disclosure Statement and that in the Further Statement as if the respondent had warranted its accuracy. I do not accept the submission of counsel for the respondent that s 216 has no application to this case.

[24] In providing the Further Statement, from which these items of Body Corporate property had been omitted, the respondent warranted that they would not be provided. The applicant had only 14 days in which to cancel the contract under s 214(4). The legislation did not cast any obligation on the applicant to ensure the information in the Further Statement was accurate before acting on it. I accept the submission of her counsel that the statutory right of cancellation is dependent on the content of the Disclosure Statement and Further Statement, and not on other facts unknown to the buyer, but known the seller.

[25] The applicant was entitled to cancel the contract if she would be materially prejudiced if compelled to complete, given the extent to which the original Disclosure Statement was, or had become, inaccurate.

[26] The test for determining whether "the buyer would be materially prejudiced if compelled to complete the contract" within the meaning of s 214(4)(b) has not been authoritatively determined.

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7 *Body Corporate and Community Management Act* 1997 (Qld), s 4.
8 *Acts Interpretation Act* 1954, s 14A(1).

[27] In *Celik Developments Pty Ltd v Mayes*[9] White J held that a requirement that a buyer purchase a furniture package for $41,900.00 in order to be part of the letting pool in an apartment complex constituted material prejudice under s 217. In *Lee v Surfers Paradise Beach Resort Pty Ltd*[10] Dutney J, as a member of the Court of Appeal, discussed in *obiter dicta* whether certain changes might constitute material prejudice. However, material prejudice was not relied on in that case and his Honour did not discuss the test for its determination.

[28] Counsel referred to a number of decisions on s 49 of the *Building Units and Group Titles Act* 1980. In case of a contract for the purchase of a proposed lot "off the plan", the original proprietor or vendor was obliged to give the purchaser a statement in writing containing particulars of various matters such as lot entitlements, by-laws, management and maintenance agreements. The purchaser was then given a right to avoid the contract if his rights would be "materially affected" by a change in the information. In *Bassingthwaighte v Butt*[11] McPherson J said[12]:-

> "My conclusion is that the rights of the plaintiff as purchaser were undoubtedly affected by the change or alteration in aggregate lot entitlement between contract and registration of the building units plan. The question is whether they were altered or affected 'materially'. On the meaning of 'material' I was referred to *Simons v Herald & Weekly Times Ltd*,[13] where 'material' was treated as connoting 'of consequence'. Among the meanings given in the *Shorter O.E.D*. is '5. Of much consequence; important'. It is clear that much depends on the context in which the word is used. It is implicit in s. 49(4) that it is not any or every alteration in aggregated lot entitlement that is to be regarded as giving rise to a right of avoidance but only such as 'materially affect' the rights of the purchaser."

His Honour also considered that the issue was to be determined by an objective test – whether the possibility that the purchaser might not have purchased was a reasonable supposition.[14] His Honour's approach was doubted by Wilson J in *Deming No. 456 Pty Ltd & Ors v Brisbane Unit Development Corporation Pty Ltd.*[15] Wilson J dissented in the outcome of that case, but none of the other members of the Court disagreed with what he said in this regard:-

> "In an earlier case, *Bassingthwaighte v Butt*,[16] McPherson J offers an objective test of materiality, namely, whether the possibility that the purchaser might not have purchased is a reasonable supposition. His Honour refers to Stonham, *Vendor and Purchaser*, pars. 373 and 374. If that is an appropriate test, then I would agree with his Honour that the possibility that Deming might not have purchased

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9 [2005] QSC 224.
10 [2008] 2 Qd R 249 (see A).
11 [1982] Qd R 670.
12 [1982] Qd R 670 at 680.
13 [1970] V.R. 131, 138
14 [1982] Qd R 670 at 680 – 681.
15 (1984) 155 CLR 129 at 168 – 169.
16 [1982] Qd R 670 at 680 – 681.

> the property had its lot entitlement been represented as 1/37 instead of 1/41 is not a reasonable supposition. However, we are not applying equitable doctrines. We are construing a statute which reflects a firm resolve on the part of the legislature to protect the purchasers of home units with quite specific statutory remedies. Section 49(4) contemplates that there will be circumstances which are capable of materially affecting the rights of purchasers. These circumstances encompass the entry into or variation of a management agreement or service agreement, the making or variation of a by-law or a change in the lot entitlement of any lot or the aggregate lot entitlement. Of course, it would be quite unjust if minor changes or adjustments in these areas were to entitle a purchaser to avoid a contract. On the other hand, if the changes are not insignificant and have the effect of changing the substance of that contracted for, the intention of the legislature would seem to be plain."

[29] Then in *Gold Coast Carlton Pty Ltd v Wilson*[17] the question was considered by the Full Court of the Supreme Court of Queensland. Andrews SPJ said that it was a question a fact, not meaning other than to affect rights deleteriously in some way.[18]

[30] Section 49 of the *Building Units and Group Titles Act* was subsequently amended. Sub-section (4) was omitted and a new sub-section was substituted. The new sub-section introduced concepts of inaccuracy and "material prejudice". In *Sommer v Abatti Holdings Pty Ltd*[19] Derrington J considered the meaning of "material prejudice" in the context of the new s 49(4) of the *Building Units and Group Titles Act* (and s 22 of the *Land Sales Act* 1984). His Honour said -[20]

> "The words 'material prejudice' in the section relate to the concepts of material disparity or material and substantial misdescription referred to in the general principle first laid down in *Flight v Booth*[21] that where a misdescription is 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 the contract at all, the contract is avoided altogether. In such case the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

[31] With respect, I do not consider that the approach of Derrington J is applicable to the construction of s 214 of the *Body Corporate and Community Management Act*.

[32] Some matters are clear.

(a) The focus is on ***the*** buyer. This suggests that the test is objective having regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced?

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17 [1985] 1 Qd R 182.
18 [1985] 1 Qd R 182 at 189.
19 [1992] 1 Qd R 300.
20 [1992] 1 Qd R 300 at 302.
21 (1834) 1 Bing. (N.C.) 370; 131 E.R. 1160

(b) Given that the buyer has only 14 days in which to cancel the contract, and the completion date may still be some months away (as it was in this case), material prejudice must be assessed in the light of the buyer's circumstances when the Further Statement is received or at the latest at the expiration of 14 days from its receipt.

(c) There must be a causal relationship between the inaccuracy and the prejudice.

(d) There must be proportionality between the inaccuracy and the prejudice.

(e) Because this is consumer protection legislation, it should be construed beneficially.

[33] In *Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal*[22] Chesterman J considered the jurisdiction of a Retirement Village Tribunal constituted under the *Retirement Villages Act* 1999. The scheme operator of a retirement village applied for judicial review of a decision of the Tribunal setting aside residence contracts between it and a number of former residents of the village. Jurisdiction turned on whether the applicant had contravened a provision of the legislation by giving the residents a document containing information which it knew to be false or misleading and if it had, whether the residents were "materially prejudiced by the contravention". The applicant gave the residents a statement of receipts and payments for the year ended 30 June 2000. The accounts had been audited, but nevertheless contained an error. The amount appearing for common lighting included an amount expended on electricity for a nursery (also owned by the applicant) which adjoined the retirement village. An offsetting reimbursement was omitted form the accounts. This led to an inflated impression of the amount the residents had to pay for common area lighting. However, the budget was prepared on the basis of the reimbursement, and was not affected by the erroneous inflated expenditure item in the accounts. The residents were not in fact overcharged. Both the audited statement of account and the budget were supplied to the residents. His Honour said –[23]

> "……. The term 'material prejudice' has no special meaning. Prejudice in this context means disadvantage. It is material if it is substantial or of much consequence. The misstatement in question was the omission in the accounts of the receipt of income which would have entirely offset an item of expenditure which, on the face of the accounts, the residents would have to meet. There was no error in the actual amounts received and spent. The residents did not pay out more than they should have. The accounts did, however, wrongly, give rise to the belief that the residents had paid or were obliged to pay more than they were legally obliged to pay. However, a belief inculcated by a misstatement does not ordinarily cause disadvantage or prejudice, let alone of a substantial sort, unless it is acted on to one's detriment."

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22 [2004] 1 Qd R 346.

23 [2004] 1 Qd R 346 at [66].

[34] In the present case the applicant had only 14 days in which to cancel the contract. The error in the Further Statement was not brought to her attention or corrected in that time. She was entitled to act on the assumption that the information in the Further Statement was accurate. What Chesterman J said about the meaning of "material prejudice" is of assistance in determining its meaning in s 214 of the *Body Corporate and Community Management Act*, but what he said about a belief inculcated by misstatement is not.

[35] In my view it would be enough for the applicant to establish that she would be disadvantaged in some substantial way if she were obliged to complete the contract on the premise that the Body Corporate would not have the CCTV security system and other items of property which had been included in the first Disclosure Statement and omitted from the Further Statement. I note that the applicant's assertion of material prejudice was based principally on the omission of the CCTV security system. She relied on the other omissions as compounding the prejudice.

[36] In an affidavit sworn on 10 December 2009 the applicant deposed:-

> "14. At the date of the Contract, the issue of security was very important to me. My residence, both at the time and presently, has a security system with 24 hour base monitoring and Crimsafe screens on the windows.
>
> 15. The Lot is to be situated in the 'Farringford' building which forms part of the Development.
>
> 16. At the date of the Contract, the issue of security for the (proposed) Lot (including security for the 'Farringford' building) was very important to me.
>
> 17. The Lot was proposed to be purchased as the principal place of residence for me, my husband and 2 of my 3 children who reside with me (aged 13 and 18 respectively).
>
> 18. My husband is, and has been since 14 August 2006, a Federal Magistrate based in Brisbane. My husband and I were married prior to that date. My husband presides over various matters including family law matters.
>
> 19. At the date of the Contract the Queensland Tennis Centre was planned to be (and is now) situated adjacent to the 'Farringford' building. The Queensland Tennis Centre was opened before 24 August 2009. The 'Farringford' building is positioned adjacent to what appears to be a public thoroughfare, King Arthur Terrace (and this was the case as at 24 August 2009).
>
> 20. The 'Farrington' building appears to be a stage near to, or at, completion."

In an affidavit sworn on 11 December 2009 her husband deposed:-

> "9. At the time my wife entered into the Contract (and before), the issue of security was very important to me. I was appointed as a Federal Magistrate on 14 August 2006. I am based in Brisbane. My wife and I were married prior to my appointment. In my position as a Federal Magistrate, I am provided by the Commonwealth with a monitored security system, a panic button and Crimsafe security screens at the residence of my wife and me. As a Federal Magistrate many of the cases heard by me involve family law disputes."

[37] Counsel for the respondent submitted that the applicant could not be materially prejudiced by the omission of the property from the Further Statement because it was not property which the respondent had contracted to provide the applicant: rather it was to be property of a third party, the Body Corporate. However, the Body Corporate was to come into existence on the establishment of the scheme,[24] and the applicant as the owner of a lot would be one of its members.[25] Under cl 4.4 of chapter 1 of the Original Disclosure Statement the respondent undertook to provide, at its cost, items of property which, upon the establishment of the Body Corporate, would become Body Corporate Assets. The Body Corporate would then be obliged to administer those assets for the benefit of lot owners, including the applicant.[26] In these circumstances, it does not follow that because the property was to be Body Corporate Assets, the applicant could not be materially prejudiced by its omission.

[38] Counsel for the respondent submitted that the matter should go to trial, because his client might wish to lead evidence of the limited nature of the security afforded by a CCTV system such that the applicant would not be materially prejudiced by its omission. One aspect of the submission was that the CCTV system would not provide the level of security apparently provided to the applicant's husband by the Commonwealth Government because of his position as a Federal Magistrate. But I understood the submission to go further and, superficially at least, to suggest that the respondent might wish to establish at trial that the CCTV system did not in fact provide much security at all. This was a curious submission in light of the respondent's having used the installation of such a system as a positive marketing tool in promoting the development. Be that as it may, while the applicant bore the onus of satisfying the Court of material prejudice, given the nature of the application, the respondent bore an evidentiary onus to raise the issue if it wished to rely on it. It failed to do so.

[39] The apartment was to be the principal place of residence for the applicant, her husband, and two teenage children. It was adjacent to the Queensland Tennis Centre (a major public facility) and a busy public thoroughfare. At the time the applicant's husband's occupation was such that the whole family might reasonably have a heightened sense of vulnerability to unlawful attack. The security system had been promoted as an integral feature of the development and arrangements for its management. Viewed objectively, a person in the applicant's circumstances in August 2009 would be disadvantaged in a substantial way by its omission. That

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24 *Body Corporate and Community Management Act* 1997 (Qld), s 30.

25 *Body Corporate and Community Management Act* 1997 (Qld), s 31.

26 *Body Corporate and Community Management Act* 1997 (Qld), ss 94(1), 152(1)(a).

disadvantage was compounded by the omission of other items of property which would have enhanced the amenity of the apartment.

[40] In short, I am persuaded that the applicant was entitled to cancel the contract, and that she validly did so. There should be a declaration accordingly.