SUPREME COURT OF QUEENSLAND

CITATION:	*Meridien AB Pty Ltd & anor v Jackson (as Trustee for the Jackson Family Trust) & ors* [2012] QSC 260
PARTIES:	**MERIDIEN AB PTY LTD 101 370 772** (first plaintiff/respondent) **MERIDIEN AIRLIE BEACH PTY LTD 101 370 763** (second plaintiff/respondent) **v** **RAYMOND JOHN JACKSON AS TRUSTEE FOR THE JACKSON FAMILY TRUST** (first defendant/applicant) **HORSESHOE (WA) PTY LTD ACN 107 685 512 AS TRUSTEE FOR THE SAD TRUST** (second defendant/applicant) **RAYMOND JOHN JACKSON** (third defendant/applicant) **SUZANNE LOUISE TEDESCO** (fourth defendant/applicant) **DARRYL ADRIAN TEDESCO** (fifth defendant/applicant)
FILE NO/S:	5714 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2012
JUDGES:	Martin J
ORDER:	**Application allowed.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – WORDS TO BE GIVEN LITERAL AND GRAMMATICAL MEANING – GENERAL PRINCIPLES – where s 27 of the *Land Sales Act* 1984 (at the relevant time) allowed a purchaser to avoid a contract if the vendor had not given it a registrable instrument of transfer within 3½ years – where the applicant seeks to read an exception into the section – whether the purchaser can avoid the contract if it had not attended settlement to receive the

instrument

STATUTES – ACTS OF PARLIAMENT – WAIVER OF STATUTORY RIGHTS – PROVISIONS CONFERRING PRIVATE RIGHTS – where respondents argue applicants waived their right to terminate under s 27 – whether the right was for public benefit or a private right capable of being waived – whether the applicants' conduct amounted to waiver

Acts Interpretation Act 1954, s 14A
Land Sales Act 1984 (Qld), s 27
Uniform Civil Procedure Rules, r 292, r 293

Begley v Fisigi Pty Ltd [2009] 1 Qd R 316
Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd [2008] QSC 261.
Momcilovic v R (2011) 85 ALJR 957
Newcastle City Council v GIO General Ltd (1997) 191 CLR 85
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Witheyman v Simpson [2011] 1 Qd R 170

COUNSEL: P J Roney SC with D de Jersey for the applicant/defendants
J C Bell QC with J P O'Regan for the respondent/plaintiffs

SOLICITORS: Macrossan & Amiet for the applicant/defendants
HopgoodGanim Lawyers for the respondent/plaintiffs

[1] The applicant/defendants entered into a contract of sale ("Contract") with the respondent/plaintiffs ("Meridien") for the purchase of an apartment in a proposed resort development called the Boathouse, at Airlie Beach ("Boathouse"). The first and second applicant/defendants are the purchasers and the third to fifth applicant/defendants are the guarantors (together, "the applicants").

[2] The Contract was entered into on 2 January 2008. Meridien informed the purchasers of the settlement date in early 2011 and two weeks later, the purchasers purported to terminate the contract. Meridien has brought an action against the purchasers for specific performance. The applicants now seek summary judgment against Meridien on the basis that they avoided the contract pursuant to s 27(2) of the *Land Sales Act* 1984 (Qld) ("the Act").

Background

[3] The Contract concerns property in a development which was intended to be an integrated resort development known as the Boathouse.

[4] The Contract provided, among other things, that at settlement:

(a) the purchaser must pay the balance of the purchase price to the vendor (cl 11.4), and

(b) the vendor must, in exchange for that payment, deliver to the purchaser (among other things) unstamped transfer documents capable of immediate registration after stamping (cl 11.5).

[5] On 2 February 2011, Meridien called for settlement on 28 February 2011.

[6] On 18 February 2011, the applicants purported to terminate the Contract on the basis of breach of contract and misleading and deceptive conduct by Meridien.

[7] On 20 February 2011, the applicants informed Meridien that they would not be attending settlement.

[8] The applicants have not tendered the sum required under the Contract. Meridien maintains, but this is disputed by the applicants, that it has been ready, willing and able to complete at the relevant times.

[9] On 30 June 2011, Meridien commenced proceedings against the applicants seeking specified performance of the Contract, the remainder of the purchase price and damages for breach of contract.

[10] As the Contract was made on 2 January 2008, the period of 3½ years (a period which is relevant to the operation of s 27 of the Act) ended on or about 2 July 2011.

[11] By email on 25 November 2011, the applicants informed Meridien that they were relying on the additional ground provided by s 27(2) of the Act to avoid the Contract. The defence and counterclaim was amended to reflect this additional ground.

[12] On 29 March 2012, the applicants filed an application for declaratory relief and summary judgment against Meridien. The basis of the application is the operation of s 27(2) of the Act.

[13] There were two main issues the subject of argument:

1. the construction of s 27 of the Act; and, depending upon that construction
2. whether the applicants had waived their rights under s 27.

Summary judgment

[14] The test for summary judgment in rr 292 and 293 of the *Uniform Civil Procedure Rules* is whether the court is satisfied that:

(a) the respondent party has no real prospect of succeeding on, or successfully defending, all or part of the claim; and

(b) there is no need for a trial of the claim or part of the claim.

Construction of s 27 of the Land Sales Act 1984 (Qld)

[15] At the relevant time s 27 of the Act provided:

> (1) This section applies if –
>
> (a) a purchaser entered upon the purchase of a proposed lot under an instrument relating to the sale of the proposed lot (the instrument); and
>
> (b) the vendor has not given the purchaser a registrable instrument of transfer for the lot within 3½ years after the day the instrument was made.

> (2) The purchaser may avoid the instrument by written notice given to the vendor before the vendor gives the purchaser the registrable instrument of transfer for the proposed lot.

[16] An amendment was made to s 27(1)(b) in February 2012, so that it now reads:

> (b) the vendor has not given the purchaser a registrable instrument of transfer for the lot within 3½ years after the day the instrument was made, **other than as a result of the purchaser's default**. (emphasis added)

[17] The amendment operates retrospectively on an instrument that is in force, where settlement has not been effected, regardless of whether the sunset period ended or ends before, on or after commencement.[1] That is, where a purchaser has not given the vendor written notice of avoidance by the commencement date (15 February 2012), the purchaser may not use s 27 to avoid the contract where it is in default.

[18] The parties agree that the amendment does not apply to the contract in these proceedings. It follows, then, that s 27 is to be construed as it stood prior to the February 2012 amendment.

The contentions of the parties

[19] Meridien contends that, on the proper construction of s 27(1), the words "the vendor has not given the purchaser a registrable instrument of transfer for the lot within 3½ years after the day the instrument was made" do not include circumstances where:

> (a) the vendor was and is ready, willing and able to provide a "registrable instrument of transfer" in return for the purchaser tendering the outstanding purchase price at settlement;
> (b) the vendor was entitled to, and did, call for settlement to occur within the prescribed period; and
> (c) the buyer failed to attend settlement.

[20] The applicants contend that the legislation affords a purchaser an unqualified right to terminate and there is no warrant to impose the conditions advanced by Meridien.

The principles of interpretation

[21] The relevant principles were considered in *Project Blue Sky Inc v Australian Broadcasting Authority*[2] where the following was said:

> " …the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. **The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning**. In *Statutory Interpretation*, Mr Francis Bennion points out:

---

1 *Sustainable Planning and Other Legislation Amendment Act* 2012, s 37.
2 (1998) 194 CLR 355

> 'The distinction between literal and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a grammatical meaning in itself. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the grammatical meaning is all that is of concern. If that were right, there would be little need for books on statutory interpretation. Indeed, so far as concerns law embodied in statute, there would scarcely be a need for law books of any kind. Unhappily this state of being able to rely on grammatical meaning does not prevail in the realm of statute law; nor is it likely to. In some cases the grammatical meaning, when applied to the facts of the instant case, is ambiguous. Furthermore there needs to be brought to the grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense). Consideration of the enactment in its context may raise factors that pull in different ways. For example the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.'"[3] (footnotes omitted, emphasis added)

[22] In *Momcilovic v The Queen*,[4] Heydon J said:

> "[441] Pursuant to the principle of legality, the common law of statutory interpretation **requires a court to bear in mind an assumption about the need for clarity if certain results are to be achieved, and then to search, not for the intention of the legislature, but for the meaning of the language it used, interpreted in the context of that language**. The context lies partly in the rest of the statute (which calls for interpretation of its language), partly in the pre-existing state of the law, partly in the mischief being dealt with and partly in the state of the surrounding law in which the statute is to operate. **The search for 'intention' is only a search for the intention revealed by the meaning of the language. It is not a search for something outside its meaning and anterior to it which may be used to control it**. The same is true of another anthropomorphic reference to something which is also described as a mental state but in this field is not — 'purpose'. And it is also true of the search for 'policy'.
>
> [442] Thus in *Project Blue Sky v Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ said of the common law rules of statutory interpretation:
>
> > [69] **The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of**

---

3 Per McHugh, Kirby, Gummow and Hayne JJ at [78].

4 (2011) 85 ALJR 957.

> **the statute**. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos* Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, **the process of construction must always begin by examining the context of the provision that is being construed.**

What their Honours meant by 'purpose' is what Dixon CJ meant by 'purpose'. What he meant by 'purpose' may be inferred from his earlier analysis of a statutory discretion:

> it is incumbent upon the public authority in whom the discretion is vested … to decide … bona fide and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred … But **courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument.**

The subject matter of an enactment, and its scope, like its purpose, can only be gauged from its language. And light is cast on what 'policy' means by the statement of Mason and Wilson JJ that a court could decline to adopt a literal interpretation where this did not conform to the legislative intent, meaning 'the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions'. (footnotes omitted, emphasis added)

[23] Section 14A of the *Acts Interpretation Act* 1954 (Qld) is consistent with those authorities in providing that when interpreting a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[24] As Muir JA stated in *Witheyman v Simpson* [2011] 1 Qd R 170 at [42]:

> "**Neither s 14A nor the purposive approach to construction, authorises a departure from the grammatical or literal meaning of a statute,** where that meaning gives effect to the purpose or object of the statute. The court's role is one of construction not legislation." (footnotes omitted, emphasis added)

[25] Justice Muir also cited Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:[5]

> "… **if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may**

---

5 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320.

> **seem inconvenient or unjust.** To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature." (emphasis added)

[26] Meridien contends for the implication of words which would result in the applicants not being able to secure the protection of s 27. There are limited circumstances in which it is permissible for a court to add words to a statute as part of the process of construction. These were articulated by McHugh J in *Newcastle City Council v GIO General Ltd*:[6]

> "Nevertheless, when the purpose of a legislative provision is clear, a court may be justified in giving the provision 'a strained construction' to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. **As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose**. In *Jones v Wrotham Park Estates*, Lord Diplock said that three conditions must be met before a court can read words into legislation. **First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect**."
> (footnotes omitted, emphasis added)

[27] The objects of the Act are set out in s 2 and they include:

> "(a) to facilitate property development in Queensland; and
> (b) to protect the interests of consumers in relation to property development…"

[28] Meridien submits that the proper construction of s 27 does not cover the circumstances where the vendor was ready, willing and able to provide a registrable instrument of transfer but the purchaser failed to attend at settlement. It argues that the legislature could not have intended to allow a purchaser to benefit from its own breach of contract, and a literal construction of s 27 conflicts with the object of facilitating property development in Queensland.[7] The effect of this submission is to ask this court to read an exclusion into s 27.

[29] The Court of Appeal in *Begley v Fisigi Pty Ltd*[8] considered s 6 of the same Act, and in particular the definition of a 'registrable instrument of transfer'. Holmes JA held (McMurdo P and A Lyons J agreeing) that a 'registrable instrument of transfer' had to be one capable of immediate registration, in that there was no real impediment to registration.[9] In coming to that conclusion, her Honour recognised in *obiter* that a vendor could provide a purchaser with a registrable instrument of transfer before the

---

6 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113.
7 Meridien's submissions, p 12.
8 [2008] 1 Qd R 316.
9 Ibid, 325.

prescribed period and thus curtail the purchaser's right to avoid the contract under s 9(5) of the Act. However, the vendor would risk "enabling the purchaser to register a transfer before paying the balance of the purchase price. **But nothing in the language of the Act suggests otherwise**."[10] (emphasis added)

[30] It is evident from the decisions referred to above and in *Begley* that the overriding principle of statutory construction is to give provisions their ordinary meaning where this accords with the purpose of the statute as a whole. Unless that construction is unreasonable or unnatural, the court should be slow to read words into legislative provisions.

[31] The language of s 27 is clear and unambiguous. It is also evident that the focus of the section is consumer protection. An Act may be passed by Parliament with multiple objects in mind, as evidenced by the list found in s 2 of this Act; however, this does not mean that each section has to meet every object articulated in the Act. To use the words of McHugh J in *Newcastle City Council*, the court should only read words into the statute when its wording misses the target of the clear legislative purpose. That is not the case here. The language of this section is "clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals",[11] and should therefore be given its ordinary and grammatical meaning.

[32] The exception contended for by Meridien should not be read into s 27 as it stood before 15 February 2012.

[33] I am supported in this conclusion by the Explanatory Notes to the *Sustainable Planning and Other Legislation Amendment Bill* 2011, the Bill which, when passed, amended s 27 to "[clarify] that the buyer may only terminate a contract under section 27 if they are not in default"[12] ("the amending Act").

[34] The Explanatory Notes to the amending Act relevantly provide:

> "The amendment is proposed to apply to existing contracts entered into before the commencement of the amendment. It is proposed to apply to such existing contracts regardless of whether the sunset period has elapsed. It will not apply to those contracts where the sunset period has elapsed, the vendor has not given a registrable instrument of transfer within the sunset period and the purchaser has given written notice to the vendor in accordance with section 27(2).
>
> …
>
> In other words, retrospective operation would mean that 'defaulting' purchasers with existing contracts to which the *Land Sales Act 1984* applies, would no longer be able to take advantage of the ambiguity.
>
> **There are cases where sellers have commenced litigation to seek specific performance of the purchaser's obligation to settle. This is also in full knowledge that the existing interpretation of section 27 leaving the purchaser the right to terminate. It is also understood some purchasers are fully aware of the existing**

---

10 Ibid, 324.

11 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320.

12 Second reading speech, then A-G, reference in Meridien's submissions.

> **interpretation and have expectations of their existing statutory right.**
> …
> Applying the proposed amendment to all existing contracts, regardless of court proceedings, will mean vendors can continue with their existing court proceedings or instigate proceedings, without being concerned with purchasers terminating the contracts due to the ambiguity of section 27.
>
> It is understood there are vendors with existing contracts for proposed lots with a cumulative value in the hundreds of millions of dollars. If purchasers choose not to settle in light of the existing interpretation of section 27, vendors are left with two options without the amendment. They are, to take the risk of seeking a court order for specific performance and hope it will be granted within the sunset period or, to terminate the contract because of the purchaser's default. It is understood the risk is higher in seeking a court order as the settlement dates are usually very near to the end of the sunset period. It is understood vendors are deciding to choose termination of contracts as they know they can, under the contracts, keep the paid deposits.
>
> If a defaulting purchaser terminates a contract under the existing interpretation of section 27, the vendor must return the deposit to the purchaser. This approach leaves the vendor in the position of no return on its investment and also facing new marketing and selling costs for the now completed but unsold lot. It is for these reasons that retrospective application is considered justified."[13]
> (emphasis added)

[35] The Explanatory Notes recognise that the "existing interpretation of s 27 leav[es] the purchaser the right to terminate", and that "some purchasers are fully aware of the existing interpretation and have expectations of their existing statutory right." It states that this is one of the reasons for amending the section and, importantly, why the amendment is to operate retrospectively.

[36] Section 27 as it applies in this case will only apply in a similar way to a finite number of situations. A purchaser who had not given written notice to a vendor by 15 February 2012 will not be able to take advantage of the 'ambiguity' of s 27 prior to its amendment, and will only be able to avoid its contract for reasons other than its own default.[14]

Waiver

[37] Meridien argues in the alternative that there is a factual dispute as to whether the applicants have lost their right to terminate under s 27 by operation of the principle of waiver. The applicants contend that refusing to tender at settlement could not have amounted to waiver as the right to avoid the contract only arose on the sunset date, about six months after the settlement date.

---

13 Explanatory notes to *Sustainable Planning and Other Legislation Amendment Bill 2011*, pp 3-4.

14 *Sustainable Planning and Other Legislation Amendment Act* 2012, s 37.

[38] The first question to consider is whether the right given by s 27 is able to be waived. That, then, raises the issue of whether the right provided by s 27 is a private right essentially for the protection of individuals or one which reflects a public policy benefit for the community.

[39] In *Sultana Investments Pty Ltd v Cellcom Pty Ltd*[15] a statutory provision that real estate agents could not receive payment unless licensed was held to be in the category of public policy for the benefit of the community and, therefore, could not be waived. On the other hand, a buyer's right under the *Property Agents and Motor Dealers Act* 2000 to have attention drawn to a warning statement was held in *Blackman v Milne*[16] to be a private right capable of being waived.

[40] The right afforded a buyer under s 27 is one which enures to that buyer's benefit. It constitutes one part of the scheme created by the Act for the benefit, more generally, of consumers but its observance, alone, is closer to the right considered in *Blackman v Milne* than the prohibition in *Sultana Investments Pty Ltd v Cellcom Pty Ltd* and so is capable of being waived. Further, it is consistent with the observations of McMurdo J in *Mirvac Qld v Beioley*[17] about the right under s 25 of the Act being subject to the doctrine of election.

[41] In the present case, regardless of the terminology used, Meridien's submissions turn upon the applicants acting in a way that is inconsistent with the continued existence of their right under s 27 to avoid the contract. Meridien submits that all or any of the three matters raised in paragraph 53 of its outline would be sufficient to constitute conduct inconsistent with their right.

[42] The waiver of statutory rights was considered by Fryberg J in *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd*.[18] His Honour stated that, for waiver to have occurred, there had to have been conduct inconsistent with the continued existence of the applicant's statutory right.[19] In that case, the existence of the applicant's right depended on it not having become bound by a deed. By signing a consent with the intention to convey to the respondent and the Office of Fair Trading that it was a party to the deed, the applicant had acted inconsistently with its statutory right.

[43] The right the applicants had in the present case was the right to avoid the contract if they had not been given a registrable instrument of transfer by the end of the prescribed period. Conduct inconsistent with that right would be, for example, accepting a registrable instrument of transfer *after* the end of the 3½ years.

[44] There was no such conduct in this case. As Mr Roney points out, the right to avoid had not crystallised at the time the Applicants elected not to attend at settlement. The applicants could not have waived their rights until that point, and even if they could, their conduct in purporting to terminate the contract on other grounds was consistent with them not wishing to follow through with the purchase.

---

15 [2009] 1 Qd R 589.
16 [2007] 1 Qd R 198.
17 [2010] QSC 113, [32]-[33].
18 [2008] QSC 261.
19 Ibid, [99].

Conclusion

[45] The application for summary judgment is allowed.

[46] I will hear the parties as to costs and further orders, if any.