SUPREME COURT OF QUEENSLAND

CITATION:	*Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 2)* [2012] QSC 348
PARTIES:	**MIO ART PTY LTD (ACN 121 010 875) as trustee of the Spencer Family Trust** (Plaintiff) v **MANGO BOULEVARD PTY LTD (ACN 101 544 601)** (First Defendant) and **SILVANA PEROVICH** (Second Defendant) and **ROBERT WILLIAM WHITTON as trustee of the bankrupt estate of Silvana Perovich** (Third Defendant) and **BMD HOLDINGS PTY LTD (ACN 010 093 348)** (Fourth Defendant)
FILE NO/S:	BS 1714 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	14 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 – 27 July 2012
JUDGE:	Philip McMurdo J
ORDER:	**It is declared that:** **1. The LandMark White valuation, as it is described in the amended statement of claim, was the "Valuation" for the purposes of cl 4.4 of the Share Sale Agreement.** **2. The Sergiacomi Valuation, as it is described in the amended statement of claim, was not an "Alternative Valuation" for the purposes of the Share Sale Agreement.**

3. **The Alternative Sergiacomi Valuation, as it is described in the amended statement of claim, was the "Alternative Valuation" for the purposes of cll 4.6, 4.7 and 4.8 of the Share Sale Agreement.**
4. **The plaintiff is entitled to require the question of the true value of the Property to be submitted to mediation under cl 4.8, and if the parties are unable to resolve the dispute through mediation within 30 days after the dispute has been referred to mediation, the plaintiff may require the dispute be submitted to arbitration pursuant to cl 4.9.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties agreed that land the subject of a joint venture between them would be valued according to the procedure set out in the Share Sale Agreement in order to determine the price one party would pay the other for the purchase of the land – where the Share Sale Agreement set out a procedure to be followed if one side did not accept the initial valuation of the land – whether each of the valuations procured by each party was a valuation for the purposes of the Share Sale Agreement – whether the parties are now required to participate in a mediation under the Share Sale Agreement

Integrated Planning Act 1997 (Qld), s 3.5.17, 3.5.19

Alliance Petroleum Australia NL & Ors v Australian Gas Light Company (1985) 39 SASR 84, considered
Andrews v Qld Racing Ltd (No 2) [2009] QSC 364, cited
Arenson v Arenson [1977] AC 405, cited
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, cited
Business and Professional Leasing Pty Ltd v Akuity Pty Ltd [2008] QCA 215, considered
Corpco No 23 Pty Ltd v JS Hemingway Investments Pty ltd [2003] 2 Qd R 32, cited
Gollin & Company Limited v Karenlee Nominees Pty Ltd & anor (1983) 153 CLR 455, considered
Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314, considered
Norco Co-operative Ltd v Pauls Trading Pty Ltd [2006] QSC 166, cited
Nuttall v S4U Pty Ltd [2010] QSC 191, considered
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR

537, cited
Reid v Moreland Timber Co Pty Ltd (1946) 73 CLR 1, cited
Ross Cook and Brett Cook Pty Ltd v Australian Sugarcane Feeds Pty Ltd [2009] QSC 178, considered
Sutcliffe v Thackrah [1974] AC 727, cited
Vale Belvedere Pty Ltd v BD Coal Pty Ltd [2011] 2 Qd R 285, cited
Vale Belvedere Pty Ltd v BD Coal Pty Ltd [2012] QCA 77, cited
Tew v Harris (1847) 11 QB 7 [116 ER 376], considered
Trencrom Investments Pty Ltd v Caltex Petroleum Pty Ltd [2011] QSC 160, considered
United Scientific Holdings Ltd v Burnley Burrough Council [1978] AC 904, considered
Wickham Properties Pty Ltd v Astor Motel Pty Ltd [1994] 1 Qd R 211, cited
Wilden Pty Ltd v Green (2009) 38 WAR 429, considered
Yarraman Pine Pty Ltd v Forestry Plantations Queensland [2009] QCA 102, cited
York Air-conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth (1949) 80 CLR 11, cited

COUNSEL: F M Douglas QC with D Smith and D D Keane for the plaintiff

J McKenna SC with A Stumer for the first and fourth defendants

S Perovich appearing on own behalf

SOLICITORS: Delta Law for the plaintiff

Minter Ellison for the first and fourth defendants

[1] This is yet another case which arises from a joint venture, commenced in 2003, for the development of certain land at Mango Hill north of Brisbane. The subject land was purchased by Kinsella Heights Developments Pty Ltd ("Kinsella Heights"). When the contract for that purchase was made on its behalf, Kinsella Heights was a company wholly owned by one side of this dispute, namely Mr Spencer and Ms Perovich. The other side acquired its interest in the joint venture effectively by purchasing, through the defendant Mango Boulevard Pty Ltd ("Mango Boulevard") one-half of the shares in Kinsella Heights. That company was and is a subsidiary of the fourth defendant ("BMD)". I will refer to these two companies as "the defendants".

[2] In another proceeding, the parties have been litigating the question of whether Mango Boulevard is entitled to compulsorily acquire the remaining 50 per cent of the shares in Kinsella Heights.[1] In the present proceeding, the dispute is as to what amount, if any, must be paid by Mango Boulevard for the 50 per cent shareholding which it presently holds, that is to say the shares which it purchased in 2003. Those shares were sold pursuant to the Share Sale Agreement, made between Mr Spencer, Ms Perovich and Mango Boulevard on 4 July 2003 ("the SSA"). The SSA was one

1 BS 199 of 2006.

of several agreements which the parties then made, some of which will be discussed here.

[3] The SSA provided for the price to be paid not immediately but upon the issue of a preliminary approval by the relevant local authority for the proposed development. Under the agreed formula by which the price was to be fixed, the value of the land which was to be developed could be a factor in the calculation of that price. By the SSA, the parties agreed on the sequence of steps by which that value would be fixed if it could not then be agreed. The land was to be independently valued. If one side did not accept that valuation, it could obtain an alternative valuation. If the two valuations were within 10 per cent of each other, the value would be taken to be the average of the two valuations. If the difference was more than 10 per cent, a dissatisfied party could require the parties to go to mediation, and failing a resolution of the question of value by that means, a party could require the dispute as to value to be submitted to arbitration.

[4] In early 2007, Mango Boulevard obtained a valuation from LandMark White. Kinsella Heights had purchased the Property, without the benefit of an approval for development, for $22 million. LandMark White valued the land at $12.19 million, very much to the dissatisfaction of Mr Spencer and Ms Perovich. Eventually they obtained what they say was an alternative valuation according to the SSA. But this was not until July 2009. The valuer, Mr Sergiacomi, valued the land at $186 million. Mango Boulevard disputed its efficacy under the SSA. Mr Spencer and Ms Perovich obtained another valuation from Mr Sergiacomi. Under the second valuation, which was provided in June 2011, he valued the land at $170 million.

[5] The plaintiff is the new trustee of a trust under which Mr Spencer held his shares in Kinsella Heights. Ms Perovich is a defendant here, but supports the plaintiff's case, which is that in the events which have occurred, the parties are now obliged to engage in a mediation, or failing that an arbitration, to determine the value of the land for the purpose of finally fixing the price for the shares which were purchased under the SSA. The response by Mango Boulevard and the fourth defendant is that the value has been conclusively determined by the LandMark White valuation because neither of Mr Sergiacomi's valuations was an alternate valuation under the process required by the SSA..

[6] This judgment determines certain questions which were ordered to be tried in advance of the others in this proceeding. The questions are as follows:

1. Whether the LandMark White valuation was a valuation for the purposes of the SSA.
2. Whether the 2009 valuation of Mr Sergiacomi was a valuation for the purposes of the SSA.
3. Whether the 2011 valuation of Mr Sergiacomi was a valuation for the purposes of the SSA.
4. Whether the parties are now required to participate in a mediation under the SSA.
5. Whether the parties are now obliged to submit to arbitration the question of the true value of the land for the purposes of the SSA.

The SSA

[7] The SSA is dated 4 July 2003 and was made between Mr Spencer, Ms Perovich and Mango Boulevard. It recited that the company called Neo Lido Pty Ltd had entered into a contract, as agent for Kinsella Heights, to purchase the subject land, which it described as the Property. It also recited that another Spencer/Perovich company, Neolido Holdings Pty Ltd (there described as the "Consultant") had prepared what was described as the Development Application.

[8] Mr Spencer and Ms Perovich each agreed to sell to Mango Boulevard, which agreed to buy, half of their shares, which were to be transferred no later than 7 July 2003. The shares were transferred accordingly and two representatives of the purchaser joined Mr Spencer and Ms Perovich as directors of Kinsella Heights.

[9] The purchase price was to be paid much later than the transfer. No part of the price was to be paid before the date of settlement of Kinsella Heights' purchase of the Property or what was described as the Effective Date, whichever was the later date.[2] The parties agreed that the payment of the price, as to $5 million, would be secured by the provision of bank guarantees and guarantees by the fourth defendant.

[10] The purchase price was to be calculated according to cl 4, which it is necessary to set out in full:

> "4.1 The purchase price of the Shares shall be calculated as the greater of:
>
> (a) the difference between the purchase price of the Property set out in the Contract and the improved market value of the Property immediately after the Effective Date less $2,000,000.00; or
>
> (b) $5,000,000.00;
>
> which purchase price shall be reduced by:
>
> (a) the total amount in respect of the Monthly Development Management Fee (excluding GST) which have been paid by the Company to the Consultant as at the Effective Date;
>
> (b) the Bank Guarantee Fees (excluding GST).
>
> 4.2 Mango Boulevard shall procure that Urbex:
>
> (a) lodge and prosecute one Development Application in respect of the whole Property, which incorporates a development plan that is appropriate so as to maximise the potential yield of the Property and profit in relation to the Project;
>
> (b) prosecute and lodge the Development Application as expeditiously as is reasonably possible;

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[2] Clause 5.

(c) use its best endeavours to procure that the Development Application is granted as soon as is reasonably possible, including negotiating in good faith with all referral agencies, stakeholders and interested parties ('Interested Parties') to reach reasonable comprises and commercial solutions to any conditions or objections raised by Interested Parties; and

(d) use its best endeavours to obtain Preliminary Approval and Development Permits in respect of the whole of the Property which are appropriate so as to maximise the potential yield and profit in relation to the Project.

4.3 For the purpose of clause 4.1(a), the valuation of the Property shall be a market valuation. The parties shall consult with each other in an attempt to agree on the market value of the Property immediately after the Effective Date. If, however, the parties are unable to agree on the value of the property within 30 days from the Effective Date, a valuation of the Property shall be carried out by a registered valuer agreed between the parties. If the parties are not able to agree on a registered valuer within 40 days after the Effective Date, any one of the parties may request the president for the time being of the Australian Property Institute to select a valuer from the panel of valuers approved by Mango Boulevard's financiers at that time ('Valuer').

4.4 The Valuer shall value the Property on the assumptions that:

(a) Development Permits have been issued in respect of the whole Property which authorise the development of the Property on substantially similar terms to the terms of the Preliminary Approval, including substantially similar:

(i) MCU;

(ii) density per hectare;

(iii) yield; and

(iv) conditions;

(b) the Project would achieve a Profit on Cost percentage return of 25% ('Valuation').

4.5 The cost of the Valuation shall be borne by Mango Boulevard.

4.6 If any of the parties are dissatisfied with the outcome of the Valuation ('Dissatisfied Party'), then that party may arrange an alternative valuation ('Alternative Valuation'). The Alternative Valuation does not have to be carried out by a valuer on the panel of Mango Boulevard's financiers, however, the Alternative Valuation shall be carried out on the basis of the same assumptions set out in clause 4.4. The cost of the Alternative Valuation shall be borne by the Dissatisfied Party.

4.7 If the difference between the Valuation and the Alternative Valuation is 10% or less, the value of the Property shall be calculated as the average of the Alternative Valuation and the Valuation.

4.8 If the difference between the Valuation and the Alternative Valuation is more than 10%, then the Dissatisfied Party may require that the question of the true value of the Property be submitted to mediation in accordance with clause 8.

4.9 If the parties are unable to resolve the dispute through mediation within 30 days after the dispute has been referred to mediation, then the Dissatisfied Party may require that the dispute be submitted to arbitration in accordance with clause 8."

[11] Subject to certain deductions, the agreed price was thereby a minimum of $5 million or a price which would be calculated according to "the improved market value of the Property immediately after the Effective Date".

[12] Clause 12.1 contained a number of definitions, including the following:

"'Development Application' means the application which has been prepared by the Consultant pursuant to the Contract, for Preliminary Approval under the *Integrated Planning Act 1997* authorising a material change of use ("MCU") of the Property for residential purposes generally;

…

'Development Permits' means development permits issued by the Pine Rivers Shire Council pursuant to the Preliminary Approval regardless of the terms, conditions or costs attaching to those permits;

…

'Effective Date' means the date on which the Preliminary Approval authorising the

	MCU of the whole Property takes effect (as that term is used in the *Integrated Planning Act 1997*);
…	
'Preliminary Approval'	means MCU (Preliminary Approval) granted by the Pine Rivers Shire Council pursuant to the Development Application regardless of the terms, conditions or costs attaching to that approval;"

[13] As appears from cl 4.4, the valuer or valuers were to make certain assumptions, one of which was that Development Permits had issued in respect of the whole Property, authorising the development of the Property on substantially similar terms to the terms of the Preliminary Approval, including substantially similar terms as to the material change of use, density, yield and conditions of approval. But the precise content of the Preliminary Approval, and in turn the assumed permits with their conditions, would not be known until the Preliminary Approval issued from the Council. What was sought was a preliminary approval, the legal effect of which would be according to s 3.1.5 and s 3.1.6 of the *Integrated Planning Act 1997* (Qld).

[14] The valuer was also to assume that "the Project would achieve a Profit on Cost Percentage return of 25%".[3] The expression "Profit on Cost Percentage", was defined to be the profit of the project, being its income less its "Cost", expressed as a percentage of that cost. Clause 12.1 contained an extensive definition of the word "Costs" which, the arguments agree, meant the same as "Cost" in this context. The Costs were defined as the aggregate of certain categories of costs of the development of the land into individual lots, including the costs of civil works and the provision of infrastructure. Included in those costs was the purchase price of the property, that is to say $22 million. But as each side appears to accept, a valuer would not logically bring that component (and another) into account. And there were other items for which their inclusion in a valuation of market value would be questionable, as I will discuss. But subject to those matters, the valuer would consider the other costs, in calculating what the hypothetical purchaser would be prepared to pay for the Property immediately after the Effective Date, with a view to achieving a profit of 25 per cent of the total costs and upon the valuer's opinion of the likely income from the project.

The SSA is varied

[15] Therefore the content of the Preliminary Approval and the (assumed) development permits would have to be known by the parties when endeavouring to agree upon the value of the property under cl 4.3, or by a valuer or valuers acting under cll 4.4 or 4.6. It was not unlikely the parties would have an expectation as to the content of the Preliminary Approval at least as the issue of that approval became imminent. But it was not the content of an approval which was sought by the Development Application which was relevant; rather it was the content of the Preliminary Approval if and when it was granted.

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[3] Clause 4.4(b).

[16] Shortly after the SSA was signed, the parties agreed to take a different course in seeking the necessary planning permission. From discussions with the Pine Rivers Shire Council, the parties concluded that there should be not one but two Preliminary Approvals which should be sought. Apart from an isolated parcel, described as lot 976, the Property was effectively divided into two components by a rail corridor. The parties agreed to make separate applications for Preliminary Approvals for the areas respectively south and north of the corridor. The application for approval for the southern precinct was to be made immediately. For the northern precinct, the parties had in mind a development which included a shopping centre or something of that kind, which was expected to be more controversial. In particular, it was anticipated that it would draw strong opposition from Westfield which had a nearby facility. The parties agreed that an application for a Preliminary Approval for the entire Property, as they had agreed in the joint venture documents including the SSA, could be unduly delayed by opposition to that development in the northern precinct.

[17] The agreement that separate applications should be made for these southern and northern precincts was recorded by correspondence between the parties in 2003. But what is not as clear is whether the parties reached a concluded agreement, and if so upon what terms, about the impact of this change upon the terms of the SSA for calculation of the purchase price. In particular, if there were to be two Preliminary Approvals issuing at different times, what was to be the Effective Date at which the property as a whole was to be valued?

[18] At this point some other provisions of the SSA should be noted. The Spencer/Perovich side, through their company Neolido Holdings Pty Ltd, was entitled to certain payments under another of the agreements made on the formation of the joint venture, which was entitled the Consultancy Services Agreement. The parties to that agreement were Neolido Holdings as the Consultant, Kinsella Heights as the Principal and Mango Boulevard. In consideration of the provision of services as set out in that agreement, Mango Boulevard agreed to pay to Neolido Holdings what was there described as a "Monthly Development Management Fee" of $25,000, for each month from the date of settlement of the purchase of the Property until the date on which what was there described as the Preliminary Approval was granted. In that agreement, the term Preliminary Approval had effectively the same meaning as it had in the SSA.

[19] Under the same agreement, Mango Boulevard also agreed to pay to Neolido Holdings what was there described as a Lump Sum Development Management Fee of $2 million. It was to be paid by four instalments, each of $500,000, the last of which was to be paid on the earlier of 30 September 2004 or "the date on which the Development Permit authorising the Material Change of Use of the Property or any part of the Property takes effect".

[20] It is apparent that these payments to Neolido Holdings were to be brought into account in the calculation of the purchase price under the SSA. The sum of $2 million which, according to cl 4.1(a), was to be deducted from the price if calculated as the difference between the market value of the property and the amount paid for the land ($22 million), was effectively the so-called Lump Sum Development Management Fee. And the Monthly Development Management Fee by which, according to cl 4.1, the price was to be reduced, was that sum of $25,000 per month which was given the same description in the Consultancy Services Agreement.

Therefore the timing of the Effective Date under the SSA would affect not only the date at which the Property was to be valued, but also the amount of the deductions from the price otherwise to be paid under cl 4.1 of the SSA.

[21] In the SSA the parties provided for the contingencies that the Preliminary Approval might be delayed or not granted. They agreed that if the Preliminary Approval was not granted by the first anniversary of the date of completion of the contract for the purchase of the Property, defined as the "Sunset Date", then the sellers could either extend the Sunset Date for a period of 12 months or receive $5 million less their share of the Bank Guarantee Fees and the total amount which had been paid for the Monthly Development Management Fees as at the Sunset Date.

[22] In the event that they extended the Sunset Date by 12 months (to the so-called "Revised Sunset Date"), cl 6(b) of the SSA then provided for two possibilities, which were that the Preliminary Approval was granted by then or it was not. In the former case, the price would be calculated according to cl 4. In the latter case, the price was to be calculated according to cll 6.1(b) and 6.2. Under those provisions, the price was to be calculated in substantially the same way as under cl 4. It was to be either the sum of $5 million less the Bank Guarantee Fees and the total amount of Monthly Development Management Fees which had been paid to that point or the difference between the market value of the Property "after the Revised Sunset Date" and the purchase price for the land (again less $2 million). Clause 6.2 provided a sequence of steps whereby the value of the land at the Revised Sunset Date was to be determined in effectively the same way as set out in cl 4. Therefore the grant or absence of a grant of the Preliminary Approval, by the Sunset Date or the Revised Sunset Date, had consequences for the quantification of the purchase price.

[23] It can be seen then that there were many provisions of the SSA which should have been considered by the parties when they decided to seek not one but two preliminary approvals over different parts of the Property. As I will now discuss, it appears that not all of these provisions were considered.

[24] Less than a week from the date of the SSA, consideration was being given to the making of separate applications. On the Mango Boulevard side, this is evidenced by an email from Mr Long (the Development Director of this project from April 2003 until late 2005) to others within Mango Boulevard and its parent company on 10 July 2003. Mr Long wrote of the strong preference which the Council had expressed for an application for the area south of the rail line to be made without further delay. He there wrote:

> "Whilst the MOU[4] and associated agreements with Neolido provide for us to lodge one application for MCU,[5] Richard [Spencer] and Silvana [Perovich] accept the logic of submitting two, and will not object. Nonetheless, as an abundance of caution, it may be wise to formalise their non-objection by way of a variation to the MOU/agreements …"

[25] On 22 July 2003, Mr Long wrote to Ms Perovich as follows:

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4 The document described as the Memorandum of Understanding which the parties had signed ahead of the making on the contracts governing the joint venture.

5 Material change of use.

> "Reference is made to our discussions with Pine Rivers Shire Council on 10 July 2003.
>
> It was agreed between Council, Neo Lido representatives and ourselves that the best way forward is to submit two (2) separate Material Change of Use (MCU) applications, with the first of these to be submitted as soon as possible to cover the area south of the rail corridor. This is to enable our development proposal to be formalised at the earliest possible time, so that Council's consultants can include it in the Priority Infrastructure Plan.
>
> A second MCU application covering the area north of the rail corridor will be submitted as soon as the planning proposals and technical assessments for that area are completed.
>
> Clause 2.1.20 of the Memorandum of Understanding executed on 6 June 2003 provided for the lodgement of one (1) MCU application for the whole of the site.
>
> In view of the recent discussions with Council and agreement with you and Richard that two (2) MCU applications are preferred, we seek your formal agreement with this approach, in spite of Clause 2.1.20.
>
> Your early written confirmation of your agreement would be appreciated."

Mr Perovich, writing as the director of the Neolido Group, replied on 6 August 2003 as follows:

> "Thank you for your letter of 22nd instant.
>
> We confirm that we'll be happy with the lodgement of 2 or more MCU applications for the practical reasons that have emerged. The arrangements between us are governed by the share sale agreement and associated agreements which followed the Memorandum of Understanding.
>
> I think the best way to cover of this new approach is for you to confirm that you will still make applications that will eventually cover the whole of the property and that we can elect to trigger the valuation process upon issue of preliminary approval for part of the property or alternatively for the whole of the property. I recall this is consistent with our discussions with Brent."

[26] On 12 August 2003, Mr Long sent an email to Mr Bird of BMD and Mr Varitimos, one of its lawyers. Its relevance is that it indicates that there was not then a concluded agreement for the variation of the SSA, in relation to the calculation of the price, in consequence of there being two separate applications for a Preliminary Approval. Mr Long there wrote:

> "It now is proposed to submit two separate MCU applications for the 'southern' (first application) and 'northern' (second application) parts of the property, to allow the first application to be lodged asap to meet the Council's infrastructure planning requirements. The

> second application needs a fair bit more work before it is ready for submission, and this is likely to follow the first application by up to 3 months or more. The approval for the second application may take a lot longer than the first, as it is more likely to draw out major objectors (eg Westfield) depending on the extent of retail/commercial uses which are adopted in the 'northern' part of the property.
>
> Neolido want to have an option to trigger the valuation process after the first MCU approval, either for the whole of the property or for the part approved. It seems that they also want to be able to trigger a second valuation when the second MCU application is approved, and want the purchase price for the shares to be adjusted if applicable.
>
> We need to consider what changes are to be made to the provisions of the Share Sale Agreement to accommodate the elections sought by Neolido. Can you have a think about this? …"

[27] Mango Boulevard's case is that in one or more likely two conversations of 15 August 2003 the parties agreed to vary the provisions for calculation of the price. In the way in which Mr Long gave evidence of these conversations, his recollection was heavily dependent upon some handwritten notes which he then made. One of the notes was written upon a copy of that email of 12 August. It reads:

> "Silvana/Richard Spencer
>
> 15/8/03
>
> Neolido now happy to leave docs as is ie <u>not</u> trigger <u>two</u> valuations."

This was written against that paragraph of the email which referred to Neolido wanting "an option to trigger the valuation process" after the first approval "either for the whole of the property or for the part approved".

[28] His other note of 15 August 2003 was made, he said, to record a conversation with Mr Spencer on that day. With the benefit of this note, he recalled that Mr Spencer said words to the effect that the relevant documents should be left "as is" because to change them, so as to allow for separate applications and the consequences for the calculation of the purchase price, would result in "a fee-fest". Mr Long's evidence was that Mr Spencer then said that "we should keep the same legal documents or leave the documents as they were, that is, only one valuation and, therefore, we could - Mr Spencer and Ms Perovich could trigger a single valuation at either - upon an MCU for the first part of the site which was the southern precinct or, alternatively, when the second MCU went through to the Council and got approved".[6] Mr Long said that he then agreed with "the proposition", that is to say with what he said had been the proposal by Mr Spencer and Ms Perovich.

[29] Ms Perovich could not recall being involved in discussions about this question, although it was possible, she said, that she was involved. She was clear that she and Mr Spencer did agree to there being two applications for a Preliminary Approval.

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6 T 3-10.

And she agreed that Mr Spencer had her "authority to discuss the matter with Mr Long".[7]

[30] Mr Spencer agreed that the letter of 6 August 2003 was written by Ms Perovich with his authority.[8] He recalled that he had some discussions with Mr Long about "the documentation of any changes". His recollection was that the "matter was complicated and that I would need to look at it closely and look at any proposed correspondence about it".[9] He remembered "that it wasn't concluded and that it was probably a little more complex than was being discussed and I recall that there was a discussion about whether one or - one or more might be appropriate, but in my own mind I recall that there was nothing concluded".[10] Mr Spencer agreed that he did say to Mr Long something to the effect that the matter could be resolved "without involving the lawyers", although he said that this would be done "through an exchange of letters or doing it myself".[11] As to that second possibility, Mr Spencer was a solicitor although perhaps not then in practice. He recalled that he had wanted to consider the matter further, at the time of his conversation with Mr Long,[12] and that it was "a matter to be considered carefully and sorted out through the written word".[13]

[31] On 3 September 2003, there was an exchange of emails between Mr Long and Mr Perovich and Mr Spencer. Mr Long sent an email to them, referring to possible meetings between them and representatives of the BMD Group. About two hours later, Mr Spencer emailed this response:

> "Thanks Greg,
>
> We realise you guys are a little busier than usual right now.
>
> When we can get together we can talk about the rail spur, AGDF and the letters about the valuation trigger. …"

The "rail spur" and "AGDF" references are not presently relevant. But the "valuation trigger" was a reference to the event which might "trigger" the process of valuation by which, under the SSA, the purchase price for the shares was to be calculated.

[32] Mr Long made a handwritten note dated the same day, which he thought was made from a conversation with Mr Spencer between those two emails on that date. There was no specific mention made in that note of valuations.

[33] According to Mr Long, there were no further discussions between the parties, as to a valuation or valuations, until subsequent years. On his evidence, the parties made an agreement orally on 15 August 2003, to provide for the price to be fixed by a valuation "triggered" by the sellers upon either the grant of the first approval or the grant of the second approval, at the election of the sellers.

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7 T 1-35.
8 T 1-84.
9 T 1-84.
10 T 1-84, 85.
11 T 1-88.
12 T 1-88.
13 T 1-89.

[34] The evidence of Mr Spencer might indicate that whilst the parties agreed that there would be two separate applications made to the Council, they did not reach a concluded agreement as to any other variation to the SSA.

[35] The defendants argue that the variation for which they contend is supported by the subsequent conduct of Mr Spencer and Ms Perovich. In this respect, firstly they rely upon an exchange of correspondence in 2005. The issue at that point concerned that part of the property which was described as lot 976 and whether it should be included "in the MCU process", as Mr Spencer put it in his letter of 3 August 2005 to a representative of the Mango Boulevard side. Mr Spencer there wrote:

> "It has been our understanding that this land has been already included in the MCU process as it was always intended that it may be a 'sacrificial lamb' in response to environmental dictates of the Shire or any referral authorities. As discussed, there may be development potential in this land and there may be merit in bringing it in for development and our agreeing that any specific application for this land alone be held over until 'the time is right'.
>
> However, the formalities with respect to the agreement between the parties should be addressed. To facilitate this it seems that we should expressly confirm and record that this land be:
>
> (i) excluded from the provisions of the agreement relating to MCU timing on the basis that timing for any formal MCU application for this land remain unfettered as suggested; and
>
> (ii) included in the provisions of the agreement in terms of assessing uplift value applicable in the event that an MCU is obtained for the land.
>
> Can you kindly advise accordingly.
>
> The position outlined in this letter deals with the present position concerning this land. Our position generally is as outlined in our letter of 6th August 2003 when we gave formal consent to lodgement of more than a single development application in response Greg Long's letter of 22nd July 200[3]."

[36] In response, Mr Atkinson of BMD wrote to Mr Spencer on 8 August 2005. Because this letter relates also to the issue between the parties in relation to lot 976, it is necessary to set it out in full:

> "In response to your correspondence to Russ Thomson dated 3rd August 2005 we advise the following.
>
> Lot 976 has not been included in the MCU Applications to date for a number of sound planning reasons. In consultation with our planning consultant, THG Resource Strategists, it was considered that the inclusion of Lot 976 in the initial application would attract too much attention by the various Local, State, and Federal regulatory authorities due to the environmental sensitivities of the site.

In addition, park calculations for the overall site would have needed to include Lot 976 in the proposal, however Lot 976 in itself would not have been considered in the overall park *contribution* due to the level of flood inundation of the land thus increasing the overall open space burden on the development.

We consider that Lot 976 offers extremely limited value to the overall proposal in terms of commercial or residential development potential and that its ultimate use may be a low key educational set up such as a system of interpretive boardwalks/bird hide/viewing platforms & shelters etc.

Based on the above, the strategy for the initial approval stages of the development kept Lot 976 for use as a future *bargaining tool* or *trade off* in the event that the Pine Rivers Shire Council imposed extraordinary park or other social infrastructure requirements on the development. Also, it is worth noting that the future use of Lot 976 has been discussed with key Council officers from the outset and the Council is fully aware that Lot 976 will be play some role in the overall proposal.

In relation to items (i) and (ii) of your letter dated 3 August 2005, it would seem that the matter is dealt with adequately in previous correspondence, namely our letter dated 22 July 2003 and your letter dated 6 August 2003. However, we acknowledge that pursuant to the *Share Sale Agreement*, once the MCU's are approved then there is to be an assessment of the uplift in value of the relevant land and that this will form the basis of payment to yourselves.

The fact that Lot 976 has been excluded from applications to date will not prevent the uplift in value being realised for the balance of the land. In other words Lot 976 will be treated as a special case to be dealt with separately. Further, once it is determined exactly how Lot 976 is to be dealt with, its uplift in value will be realised pursuant to the terms of the Share Sale Agreement.

To this end, the following is proposed as the basis of an extension to the formal agreement between us in relation to Lot 976.

> '*Lot 976 has been excluded from formal Development Applications to date as it is considered that its real value to the development is as a bargaining tool for future negotiations with the Pine Rivers Shire Council in relation to Open Space and other Social Infrastructure contributions. It is unclear at this stage exactly how Lot 976 will be included into future discussions with Council, or what its ultimate use will be, however it is expected it will ultimately play some role in the overall project scheme. Lot 976 will therefore be treated as a special case and its value uplift will be evaluated separately.*'

Please contact the undersigned if any clarification is required or if you require any further details."

[37] On 18 August 2005, Mr Spencer replied that "the exchange of correspondence and the whole of your letter (and not just the italics section) will constitute the extension of the agreement suggested …".

[38] For Mango Boulevard, it is said that Mr Spencer's 2005 correspondence is telling, because had there been no concluded agreement as to valuation, Mr Spencer would have taken the opportunity to then say so. This correspondence was not put to Mr Spencer in cross-examination, but he was tested as to why he had not sought to conclude an agreement on the matter of the valuation provisions. He said that he felt that it had been "left a bit ambiguous" but that he was "concerned about the relationship that had developed between ourselves and BMD then" and that he did not have "the confidence and bargaining power to raise it again".

Subsequent events

[39] The defendants also rely upon the sellers' conduct in late 2006, after the grant of a preliminary approval for the southern precinct. But first it is necessary to refer to some intervening events.

[40] In October 2003, the Project Management Committee, upon which each side was represented, approved a new Master Plan for the project, covering both the southern and northern precincts. An application for approval for the southern precinct (excluding lot 976) was lodged with the Council on 19 December 2003. The Development Application for the northern precinct was not lodged until 27 May 2005. By that stage, it appears that the sellers were in financial difficulty. In June 2005, an unrelated entity appointed receivers to Neolido.

[41] The date of completion of the contract for Kinsella Heights's purchase of the Property was 31 August 2004. Therefore the Sunset Date, according to cl 6 of the SSA, was 31 August 2005. On 23 August 2005, Mr Spencer and Ms Perovich wrote to Mango Boulevard as follows:

> "By this letter we give notice to you pursuant to clause 6.1(b) of the abovementioned agreement of our election to extend the Sunset Date for a period of 12 months."

It is common ground that this extended the Sunset Date according to cl 6. Therefore it would appear to be common ground that there remained but one Sunset Date, notwithstanding the existence of two (undecided) applications for a Preliminary Approval.

[42] At least by 2006, the relationship between the joint venturers had broken down. Each side then gave to the other a notice claiming that the recipient was in default of the Shareholders Deed,[14] making that side's shares in Kinsella Heights susceptible to compulsory acquisition and consequent exclusion from the joint venture. The dispute about the effect of the Shareholders Deed became the subject of proceedings which were commenced later in 2006.

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[14] Another of the contracts governing the joint venture which was made in 2003.

[43] The Revised Sunset Date was 31 August 2006. One day prior to then, the Pine Rivers Shire Council forwarded a Preliminary Approval for a Material Change of Use in respect of the southern precinct, dated 29 August 2006.

[44] The Mango Boulevard side took steps to obtain a negotiated decision notice under s 3.5.17 of the *Integrated Planning Act 1997* (Qld), which resulted in such a notice being issued on 19 December 2006. The legal effect of this notice was to replace the decision notice of 29 August 2006.[15] But in the interim period, the approval pursuant to the August notice had taken effect.[16]

[45] On 31 October 2006, Mr Spencer and Ms Perovich sent to Mango Boulevard a notice which required a meeting under cl 4.3 of the SSA. The notice recited the SSA's requirement to have regard to the "improved market value of the Property defined in the share sale agreement", in determining the purchase price of the shares, and that cl 4.3 provided that the parties were to consult with each other in an attempt to agree on "the market value of the Property". The notice called upon Mango Boulevard (or its representatives) to meet with them on 2 November 2006 for the purpose of "an attempt to agree on the market value of the Property". There was no indication within this notice of any proposal to determine the value of only the southern precinct, either by agreement or by a valuation. Indeed there was no indication within the notice to any variation having been made to the SSA.

[46] On the same day, Mr Spencer and Ms Perovich wrote to Minter Ellison, who were acting for the Mango Boulevard side. They complained that Mango Boulevard had sought to delay the payment of the purchase price for the shares by, amongst other things, making representations to the Council with a view to obtaining a negotiated decision notice which, they claimed, was inconsistent with the SSA. They wrote:

> "When the SSA was negotiated, we were particularly concerned to ensure that our payment date not get caught up in any process of appeals or delays associated with the issue of planning approval as this could potentially result in the very behaviour that we are currently seeing. It was agreed between the parties that our SSA payment process would be triggered and become operative at the time of first issue of the planning approval and not get caught up in indeterminate delays associated with townplanning appeals and the like. Brent Hailey Chief Executive Officer of the BMD Group at the time clearly agreed that this was to be the case and that we were never to be caught up in any appeal or similar manoeuvres."

[47] A meeting did take place on 2 November 2006. It was attended by Mr Spencer, Ms Perovich and the three persons from the Mango Boulevard side. There was no agreement on the value of the Property.

[48] The next step, according to cl 4.3, was for the parties to agree upon the identity of a valuer. On 22 November 2006, Mr Bird for Mango Boulevard wrote to Mr Spencer and Ms Perovich, proposing either Mr McEvoy of LandMark White or another named valuer. They replied by an email two days later, agreeing to the appointment of Mr McEvoy.

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15 s 3.5.17(4)(d).

16 s 3.5.19(1).

[49] On 21 December 2006, a letter of instruction was sent to Mr McEvoy by Mango Boulevard's Mr Atkinson, together with a briefing note and extensive attachments. It will be necessary to return to the content of these documents. But clearly LandMark White was being asked to value the whole of the Property pursuant to cll 4.3 and 4.4 of the SSA. This was just after the issue of the negotiated decision notice. But Mr Atkinson's letter referred only to the original decision, granting a Preliminary Approval, of 29 August 2006. The letter made it clear that the approval had been granted only for the southern precinct. But the enclosures instructed the valuer to assume an approved development for the entire property.

[50] Mr Spencer and Ms Perovich did not prepare or approve of the content of the instructions which were given to LandMark White. There was correspondence from them to the Mango Boulevard side from at least 13 December 2006, complaining about the then proposed instructions. On 18 December 2006, Mr Spencer and Ms Perovich gave a notice to Mango Boulevard, to convene a meeting for the purpose of "determining and agreeing upon the instructions to the agreed valuer". On the same day, Mr Atkinson replied that it was not then possible to arrange a meeting. On 19 December, Ms Perovich emailed Mr Atkinson asking for a teleconference. On the following day, Mr Atkinson responded by email, declining to discuss the matter until the reopening of BMD's office in the new year. In this email he added:

> "Further it is my understanding that clause 4.3 of the Share Sale Agreement relies on the 'Effective Date' which we have not reached as yet."[17]

[51] On 21 December 2006, Ms Perovich emailed Mr Atkinson to complain about the refusal to discuss the instructions to the valuer either within a meeting or within a teleconference. Notwithstanding those protests, Mango Boulevard's instructions went to the valuer on that day.

[52] Apparently unaware that LandMark White had been instructed, Mr Spencer and Ms Perovich continued to press for a meeting to agree upon the instructions to the valuer. It seems that by the afternoon of 28 December 2006, they had become aware that the valuer had been briefed but they had not been provided with a copy of the instructions. Mr Spencer then emailed Mr McEvoy, suggesting that the instructions to him must be incomplete and saying that they had not been approved by the sellers. Mr McEvoy was asked to await a "final brief" before making his valuation.

[53] On 24 January 2007, Mr Spencer and Ms Perovich wrote to the directors of Mango Boulevard. In this correspondence they took a different course, asserting that they were entitled to elect as to "the part of the subject property to be valued" and purporting to then elect that the southern precinct only be valued. They referred to the correspondence of 22 July and 6 August 2003 and to Mr Atkinson's letter of 8 August 2005. They said that a valuation of the northern precinct should take place when a Preliminary Approval for it had been granted.

[54] In a letter in reply dated 29 January 2007, Mango Boulevard rejected those contentions. It asserted the existence of the agreement for which it argues here. It said that the sellers' right was to elect between a valuation of the whole Property on

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[17] His point there appears to have been that the Effective Date would be when the Negotiated Decision Notice took effect.

the granting of the first approval or upon the granting of the second, and that the sellers had elected for the former.

[55] On 2 February 2007, Mr Spencer and Ms Perovich wrote to Mr McEvoy, disputing the validity of the process by which his firm had been retained and asserting that he should instead value only the southern precinct. On the same day, they wrote to Mango Boulevard, disputing its case.

[56] On 5 February 2007, the valuer wrote to Mr Spencer and Ms Perovich, saying that his firm had been instructed to value the whole of the Property, upon the assumption that the northern precinct had received a Preliminary Approval. That was disputed by them in a letter in reply.

[57] LandMark White completed its valuation and a copy was sent by Mango Boulevard to the sellers on 27 February 2007. The market value of the Property was assessed at $12.19 million as at 18 January 2007. Mr Spencer and Ms Perovich immediately disputed its efficacy. Mango Boulevard demanded that they appoint an alternate valuer by 13 April 2007, failing which it would rely upon the LandMark White valuation. They responded by a letter which was dated 13 April, asserting that the LandMark White valuation was not effective for the purposes of cl 4.3 of the SSA but that alternatively, they had appointed a valuer.

[58] What then followed was some correspondence in which Mr Spencer and Ms Perovich complained that they had not been provided with documents or information, in particular material relating to a survey of the site, which they said was necessary in order for the alternative valuer to be briefed. By July 2007, Mango Boulevard was calling upon them to produce an alternate valuation by the first week of August 2007, failing which it would treat the LandMark White valuation as conclusive for the purposes of calculating the purchase price. The response was a letter from the solicitors for the sellers, dated 23 July 2007, calling for more documents, including site surveys, and asserting that the sellers were endeavouring to obtain the valuation as soon as possible.

[59] The correspondence about whether further information or documents should be provided to the sellers continued in 2008 and 2009. During this period, each of the sellers was made bankrupt, but the present plaintiff, through its lawyers, continued to press for the material for the purposes of the preparation of an alternated valuation. Finally, by a letter dated 28 July 2009, Mio Art sent to Mango Boulevard what was said to be an alternative valuation. The valuer was Mr Sergiacomi and his valuation, dated 4 July 2009, assessed the market value of the Property at $186 million.

[60] I return then to the question of what was agreed, as a variation to the SSA, in 2003. In the ultimate submissions for the plaintiff, the Mango Boulevard case on this point was apparently conceded.[18]

[61] The plaintiff had pleaded that if an agreement was concluded in 2003 to vary the SSA in respect of the valuation of the Property and payment for the shares, it was to this effect: the sellers could elect to have that part of the Property which was the subject of the first approval valued at that point and to have the balance of the property valued upon the grant of the approval relating to it. However, there is no

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18 Plaintiff's outline of submissions and oral submissions, T 5-55.

support for that case in the evidence. It is certainly contrary to Mr Long's evidence and neither Mr Spencer nor Ms Perovich was able to express a recollection of a conversation with Mr Long to the effect that the SSA would be varied in that way. Nor was that case supported by the correspondence of 22 July and 6 August 2003, which was equally consistent with there being only one valuation and which, in any case, was followed by the discussions which were related by Mr Long.

The LandMark White valuation

[62] In my view the plaintiff was right to abandon its pleaded case that the sellers had the right to elect, which they did, to have the southern precinct valued upon the grant of the approval for it. Undoubtedly, the parties agreed that there should be two applications for separate approvals for the southern and northern precincts. Upon the evidence, there was some basis for concluding that the parties failed to agree upon the impact of the pursuit of two approvals upon the operation of the SSA for the calculation of the price. However, the plaintiff (with the concurrence of Ms Perovich) ultimately conceded that the parties had agreed that there should be still only one point at which the land, being the entire Property, should be valued, which was either when the first or the second of the approvals was granted. The plaintiff concedes that the result of this agreement was that when the approval for the southern precinct issued, the sellers were entitled to have the Property then valued. Further, the plaintiff concedes that according to the agreement which was made in 2003, the Sunset provisions of cl 6 had no operation, at least because the approval for the southern precinct was granted prior to the Revised Sunset Date. When the approval for the southern precinct was granted, the sellers had an election to have the Property then valued or await the grant of the approval for the northern precinct. They elected to have the Property then valued, by their unequivocal conduct from 31 October 2006 through to 24 January 2007. It is sufficient to refer to the notice of 31 October 2006, which convened the meeting of the parties to agree upon "the market value of the Property" which was a step unequivocally pursuant to cl 4.3 of the SSA. Further, it is also common ground that the Effective Date for the purposes of the SSA became 30 January 2007, which was the expiry of the period of any appeal by the submitters against the approval contained in the Negotiated Decision Notice.

[63] There were many points pleaded in the Reply which challenged the efficacy of the LandMark White valuation. Ultimately, most of them were not pressed and what remains was summarised within one paragraph of the plaintiff's written submissions handed up at the commencement of its address.[19] For example, the "two valuations" point, as I have just discussed, was abandoned.

[64] It may be necessary to say something about a related point, which concerns lot 976. In paragraph 5AA of the Reply, it was pleaded that the LandMark White valuation did not comply with the SSA because (amongst other reasons) the instructions given to the valuer were wrong in that they asked him to value the whole of the Property, although the Preliminary Approval had not been given at that time in respect of the northern precinct or lot 976".

[65] I have set above Mr Atkinson's letter to Mr Spencer of 8 August 2005.[20] Mr Spencer replied on 18 August 2005, agreeing to Mr Atkinson's proposal. The

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19 Paragraph 13.

20 At [36].

effect of this proposal was that lot 976 would be excluded from the application or applications for a Preliminary Approval, so that there would be no enhancement to its value from the grant of an approval or approvals for the remaining land. This was because it was expected that lot 976 would not have any value as land to be developed, when it would be likely to be offered as public space. Thus any "uplift in value" of lot 976 was to be dealt with separately from the process of valuation of the remaining land. In the instructions to the valuer, Mr Atkinson said nothing in his covering letter about the exclusion of lot 976. In his attachments, in a table under the heading "Land Use Schedule", there was an apparent inclusion of lot 976. However, it is apparent from the valuation that lot 976 did not affect the outcome. In other words, Mr McEvoy did not attribute any value to lot 976. Rather, he assessed the income which was to be derived from selling the remaining part of the Property (as developed lots). He then calculated the price which would be paid for the land by a developer, so that this land cost when aggregated with the costs of the development, would result in total costs which were effectively 80 per cent of the projected income, that is to say which would provide the assumed level of profit of 25 per cent of the total costs. In summary, lot 976 did not affect this valuation and this was entirely consistent with the agreement between the parties reached in 2005.

[66] It is submitted for the plaintiff that Mr McEvoy did not assess the improved market value of the Property, but rather he conducted what is described as a residual value analysis which was based upon a misinterpretation of cl 4.4 of the SSA. It is said that an assessment of the improved market value of the Property required a comparison with other sales of comparable land, which was not undertaken by the valuer. As mentioned already, the value was calculated by reference to the projected income (from the sales of developed lots), the projected costs (apart from the cost of the land) and the assumed profit of 25 per cent of the costs (including the land). The valuer assessed the likely income of the project at $260,838,458. On the assumption that the profit would be 25 per cent of the costs (or in other words 20 per cent of the income), the assumed profit became $52,342,719. This meant that the costs would have to be limited to $208,495,739. The costs, as assessed or assumed by the valuer but apart from the cost of the land itself, totalled $196,305,739. Therefore the hypothetical purchaser would pay no more than $12,190,000 for the land.

[67] Mr McEvoy wrote that this amount of $12,190,000 was the "As Is Site Value assuming Development Approval subject to the Share Sale, Consultancy Services and Project Management Agreements exclusive of GST".

[68] As to the appropriate methodology, Mr McEvoy wrote:[21]

> "The most appropriate approach to the valuation of a residential redevelopment site is by way of a reconciliation of the Direct Comparison method and a Residual Cash Flow Analysis. However given the Agreements in Place namely the share sale agreement the site cannot be directly compared due to the nature of this Agreement for the purpose of a market value assessment and accordingly the Residual Cashflow Analysis approach that has been adopted as the sole method.

[21] Page 24 of his valuation.

> This approach will provide a market value of the site subject to the conditions of the share sale agreement whereby the specific inputs and agreed conditions between the parties can be accurately detailed. …
>
> This method of assessment determines a price that could be paid for the land, given the expected gross realisation from the sale of the completed lots and the cost and charges of the proposed development, assuming normal market profit expectations, with cognisance of … all the known characteristics of the property and the inherent risks involved in its proposed development."

[69] This methodology was not inconsistent with the SSA. In my view, it was what was required of the valuer, having regard to the assumptions which the valuer was to make according to cl 4.4. Once those assumptions were made, necessarily the valuer was constrained in his assessment of the value. Nevertheless, in the valuer's opinion this approach did provide a market value of the site. The question is not whether the valuation would have been the same, unconstrained by the assumptions imposed by cl 4.4.

[70] Alternatively, if the valuer was not required to apply those assumptions (perhaps because they were to be applied only if he saw fit to conduct a residual cash flow analysis), it was open to the valuer to reach a market value as he did. The question here is not whether the valuation is inaccurate or the valuer has made some mistake. It is whether the valuation satisfied the requirements of the SSA. Clauses 4.3 and 4.4 required a market valuation of the Property. They did not provide that the valuation would have effect under the contract only if it was error free or reasonable, or only if the valuer had taken into account matters which, according to what might be thought to be proper valuation practice, a valuer should take into account in this exercise. Although this is a question of the interpretation of this particular contract, authoritative guidance is provided by the judgment of McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*.[22] McHugh there said:[23]

> "In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in *Baber v Kenwood Manufacturing Co Ltd* (at 181). A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is 'final and binding on the parties'. By referring the decision to a valuer, the parties agree to accept this

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22 (1985) 1 NSWLR 314.

23 (1985) 1 NSWLR 314 at 335-336.

> honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. It is now settled that an action for damages for negligence will lie against a valuer to whom the parties have referred the question of valuation if one of them suffers loss as the result of his negligent valuation: *Sutcliffe v Thackrah* [1974] AC 727; *Arenson v Arenson* [1977] AC 405. But as between the parties to the main agreement the valuation can stand even though it was made negligently. While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract."

This passage has been consistently followed in Queensland.[24]

[71] Counsel for the defendants referred me also to three Queensland cases, which were suggested to be of a different effect which is that in this context a valuation might be invalid if the valuer were to "err in principle in some serious way": *Ross Cook and Brett Cook Pty Ltd v Australian Sugarcane Feeds Pty Ltd*,[25] *Nuttall v S4U Pty Ltd*[26] and *Trencrom Investments Pty Ltd v Caltex Petroleum Pty Ltd*.[27] And counsel for the plaintiff said that it was this test which should be applied here. But as to those cases, the most recent of them did not endorse the proposition for which it was said to be an authority; rather, the judge was there referring to an argument for which the two other cases had been cited. In *Ross Cook and Brett Cook Pty Ltd*, the Chief Justice said that:

> "Also, should the valuer err in principle in some serious way in his determination, it may be that that determination would be invalid: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* [1985] 1 NSWLR 314, 331, 336."

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24 *Wickham Properties Pty Ltd v Astor Motel Pty Ltd* [1994] 1 Qd R 211 at 214; *Norco Co-operative Ltd v Pauls Trading Pty Ltd* [2006] QSC 166 at [27]; *Yarraman Pine Pty Ltd v Forestry Plantations Queensland* [2009] QCA 102 at [9], [48]; *Corpco No 23 Pty Ltd v JS Hemingway Investments Pty ltd* [2003] 2 Qd R 32 at [18] and [19]; *Andrews v Qld Racing Ltd (No 2)* [2009] QSC 364 at [24]; *Vale Belvedere Pty Ltd v BD Coal Pty Ltd* [2011] 2 Qd R 285 at [24]; *Vale Belvedere Pty Ltd v BD Coal Pty Ltd* [2012] QCA 77 at [14].

25 [2009] QSC 178 at [17].

26 [2010] QSC 191 at [17].

27 [2011] QSC 160 at [21].

When read with that reference to the passage of the judgment of McHugh JA, which is the passage I have set out above, the reference to an "error in principle in some serious way" can be properly understood. And in *Nuttall*, the Chief Justice simply referred to his earlier judgment without taking the matter further. Therefore, these cases do not represent some distinct line of authority.

[72] Although the question is ultimately one of the requirements of the particular contract which is in dispute, ordinarily the parties will not be understood to have agreed that the expert's determination will lack contractual effect for some professional error. So even allowing for the possibility that a reasonable valuer might have approached this exercise without applying the assumptions and employing the methodology of Mr McEvoy, it far from follows that his valuation had no effect for this contract.

[73] Next it is argued that the LandMark White valuation was not that required by the contract because the valuer did not exercise any independent skill and judgment except possibly in his consideration of the sales values of the developed lots. It is said that he simply adopted the information with which he was briefed, in respect of the yields and density of development and the costs. It is true that Mr McEvoy did value the land upon premises, as to those matters, according to the information with which he was briefed. However, he gave evidence that he still exercised some judgment in relation to them.

[74] This was not the first encounter which Mr McEvoy had with the project. He had valued the Property on at least three previous occasions and he had also valued the shares in Kinsella Heights, which involved an assessment of the expected profit from the development. He gave evidence that he formed the view that the proposal for the development of the Property was consistent with the terms of the approval for the southern precinct and the draft structure plan for the northern precinct. As to the yields or density of the development, Mr McEvoy was briefed with material to the effect that the development would yield 1,731 lots. He adopted that figure which substantially corresponded with the lot yield which he had used in his valuations of May 2004, March 2006 and August 2006. In relation to the costs, he said that:

> "The costs were reviewed to make sure that there was no overlapping, that we weren't putting in contingencies where there were already contingencies in, and then recalculating or adjusting the cost to fit the cash flow that we were creating, and the cash flow is driven by the sales rate. So there had to be adjustments and review and considerations. There were a number of questions about costs that we asked, but basically form a view that we weren't overlapping or double dipping on the costs."[28]

He said that he considered the costs to be appropriate. Clearly however, he did not make his own independent assessment of the costs of the project. That would have been beyond his expertise. He is a valuer and not a quantity surveyor or engineer. At one point in his valuation, he stated that he had adopted the construction cost estimate which was briefed to him, which he assumed to be adequate "although this should be verified by a suitably qualified engineer".[29]

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28 T 4-25.

29 Page 6 of his report.

[75] Nor was Mr McEvoy required to employ the expertise of a lawyer or perhaps a town planner in interpreting the Negotiated Decision Notice in order to determine the required minimum density imposed under that approval. Whatever were the requirements of the approval in that respect, they had to be applied upon the premise of a certain area or areas to be the subject of the development. That subject is controversial between the parties. Ultimately it is a question for a surveyor, which Mr McEvoy is not. Therefore, his adoption of a certain number of lots for the development, and a certain mix of different types of lots, was necessarily dependent upon information which could be verified only by other professionals.

[76] Mr McEvoy was engaged as a valuer. His expertise was being employed primarily to assess the likely income from the development, that is to say the likely values of the lots to result in the development. The plaintiff's argument rightly concedes that he did exercise his judgment about those matters, and the related question of the rates of sales.

[77] In my view, the fact that he made assumptions about costs, yields and density which he was unable to verify in all respects, does not make his valuation ineffective. In this context, I respectfully adopt the reasoning of McClure JA (with whom Newnes AJA agreed) in *Wilden Pty Ltd v Green*.[30] In that case, a valuation of units in a trust was challenged on the ground that the valuer had not himself valued some of the trust assets or the liabilities of the trust. Rather, he had adopted the figures for those items which appeared in an auditor's report. The primary asset of the trust was a shopping centre and the valuers had expertise in the valuation of land but not in accounting or auditing. The trial judge had found that the reliance by the valuer on the auditor's conclusions rendered the valuation non-binding. That finding was overturned on appeal. McClure JA identified three categories of relevant matters in that case being:

> "First, those that require or would benefit from the expertise of the appointed valuers, secondly, those that require or would benefit from a person with expertise beyond that of the appointed valuers and thirdly, source facts with no, or no significant, evaluative content."[31]

Her Honour continued:[32]

> "Having selected an expert not an arbitrator to determine the current repurchase value of the units in the trust where there is the potential for the trust assets to comprise different types of property and the determination of value to be made by a single [expert], the parties can only have intended that a valuer appointed under cl 7.4 be entitled to rely on (adopt) the expert opinion of a third party in relation to matters of opinion outside the valuer's area of expertise. An implied term to that effect satisfies the requirements in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283-284."

[78] In the present case, the parties agreed that in the first instance, the value would be determined by a valuer acting as an expert and inevitably applying information not all of which could be verified by the employment of the valuer's professional expertise. What the contract required was a valuation arrived at by the application

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30 (2009) 38 WAR 429.

31 (2009) 38 WAR 429 at [72].

32 (2009) 38 WAR 429 at [78].

of that expertise. That did not require the valuer to undertake an inquiry to verify facts outside his expertise, in the way in which an arbitrator might have to proceed.

[79] The plaintiff ultimately relied also upon the fact that the valuation did not speak "immediately after the Effective Date". As already noted, it is common ground that the Effective Date became 30 January 2007. The LandMark White valuation valued the Property as at 18 January 2007. Remarkably, whilst most of the matters pleaded by the plaintiff against the validity of this valuation were ultimately abandoned, this point was not pleaded.

[80] It is true that the valuation unambiguously states that the Property is valued as at 18 January 2007. The question is whether this was not, in substance, an assessment of the market value of the Property immediately after the Effective Date. That was the point at which the parties agreed that the Property should be valued, because they wished to have it valued with the benefit of the Preliminary Approval. Some misstatement by the valuer of the Effective Date was not necessarily fatal if, in substance, it was a valuation of the Property as it was at a certain stage in the project, namely once the Preliminary Approval had been granted and taken effect. Mr McEvoy misstated the date on which that stage was reached. But he valued the Property as it was at that stage, that is to say "immediately after the Effective Date".

[81] His mistake in identifying the relevant date might have mattered if, in the period between then and the correct date, there had occurred some important change in any relevant circumstance. In such a case, the mistake might be such as to take the valuation outside the contract. But here there is no suggestion of any change in circumstances in this period, which after all was less than a fortnight. Mr McEvoy delivered the valuation in February 2007 and said nothing to indicate any change in the circumstances from 18 January. This ground for challenging the LandMark White valuation must also be rejected.

[82] What I have said thus far accounts for the matters which were ultimately argued against the LandMark White valuation. It should be added that in written submissions handed up by counsel for the plaintiff at the commencement of the trial, the plaintiff had said that it did not challenge the LandMark White valuation as a valuation for the purposes of the SSA. It was prepared to accept that this had been a valid step under the contract, from which it sought to bolster its argument that the plaintiff was by this stage entitled to a mediation or an arbitration. But the validity of the LandMark White valuation is in issue in these proceedings and it is the first of the questions which were ordered to be determined within this trial.

[83] In view of the way in which the case was argued at the conclusion of the trial, it is unnecessary to discuss all of the matters pleaded by the plaintiff as to the LandMark White valuation. But something should be said about the pleaded case which was to the effect that Mr McEvoy acted upon instructions which were incorrect, as to the developable area and the number of lots which would be developed. In their closing submissions, counsel for the plaintiff described these as "matters quintessentially for the arbitrator" and not for decision by the Court. They submitted that "the plaintiff has intruded into this area partly because of the issues raised by the defendant in relation to Mr Sergiacomi's valuations but apart from forming a

general view as to the reasonableness of his approach, the Court should not try to resolve these issues".[33]

[84] For these reasons, I conclude that the LandMark White valuation was a valuation for the purposes of the SSA.

The Sergiacomi valuations

[85] I go then to the valuations of Mr Sergiacomi.

[86] Mr Sergiacomi has produced two valuations. As mentioned already, the first was dated 4 July 2009 and assessed the market value at $186 million. The second valuation was dated 21 June 2011 and assessed the value at $170 million. Mango Boulevard says that neither valuation was an alternative valuation for the purposes of cl 4. Most of its arguments apply equally to the two valuations. There is one argument which relates only to the first valuation, which is that the property was not valued as at the correct date.

The first valuation – the Effective Date ground

[87] In the first valuation, Mr Sergiacomi assessed the market value of the Property as at November 2007. In the second valuation, the value was assessed as at 30 January 2007. The difference in dates explains the difference between the amounts of the two valuations. That was confirmed by the evidence of Mr Clarke, a valuer called by Mango Boulevard, who said that property prices rose during 2007. It also appears from comparison of the feasibility studies attached to the valuations.

[88] Once it is accepted that the Effective Date for the first valuation under cl 4 (the LandMark White valuation) was 30 January 2007, it follows that the alternative valuation under cl 4.6 was required to value the property as at the same time. By the time of this valuation, the Preliminary Approval for the northern precinct had been granted, as Mr Sergiacomi recorded. But the agreement between the parties, made in 2003 when they decided to apply for two Preliminary Approvals, was that there was to be but one valuation, which was to be conducted either when the first approval was granted or when the second was granted, at the election of the sellers. Once they elected for the former, both the valuation and an alternate valuation had to address the value at a certain stage which was immediately after the date upon which the first approval took effect. Instead, Mr Sergiacomi's first valuation valued it at a substantially different date, because it is apparent that there had been a change in a relevant circumstance or circumstances, namely the condition of the market for the sale of such lots, between the relevant date and the date at which he valued the Property. By this first valuation, Mr Sergiacomi did not value the property at a point which was "immediately after the Effective Date". The parties could not have intended that the contractual effect of the valuation under cl 4.3 could be disturbed by another valuation where it valued the Property at a significantly different date. In my conclusion, at least for this reason, the first valuation of Mr Sergiacomi was not an alternative valuation for the purposes of the SSA.

The identification of the valuer ground

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[33] Plaintiff's outline of submissions on 27 July 2012, paragraph 20.

[89] The next of Mango Boulevard's arguments is that each valuation was ineffective because, prior to arranging the valuation, the sellers did not communicate to it that they had chosen Mr Sergiacomi as the valuer to prepare an alternative valuation. It pleads that it was an implied term of the SSA that a valuation could be challenged in accordance with cll 4.6 to 4.9 only if the identity of the valuer was communicated prior to arranging the valuation. The argument relies particularly upon the judgment of the High Court in *Gollin & Company Limited v Karenlee Nominees Pty Ltd & anor*.[34]

[90] That case concerned a rent review clause under a lease. The rent was fixed for the first three years of the term, after which it was to be a percentage of the mean of two valuations made by two valuers, one to be "appointed" by each party. Each side obtained a valuation but neither informed the other before doing so that he had appointed a valuer or that a valuation was being sought. The critical question became whether each valuer had been "appointed" for the purposes of the relevant clause of the lease at the time at which he made his valuation. The Court (Mason, Murphy, Brennan, Deane and Dawson JJ) said:

> "In some cases, the appointment of a person to fill a particular role or to perform a particular task will require nothing more than communication between appointor and prospective appointee. That is not ordinarily so in a case where one party to a contract is entitled or required to appoint a third person to do something with consequences that are contractually binding upon the other party or parties. In such a case and in the absence of contrary provision in the contract, the appointment will ordinarily be effective only when the prospective appointee has been clothed with the requisite authority by being identified as the person appointed for the purposes of the contract by communication of his identity by the party entitled or required to appoint to the other party or parties."[35]

After discussing, in particular, the judgments in *Tew v Harris*,[36] the Court said this of the reasoning underlying that proposition:

> "That reasoning appears from the above extracts from the judgments in *Tew v Harris*. It encompasses the following four related considerations: (i) that such an appointment involves the exercise of the contractual right to appoint which exists against the other party to the contract; (ii) that a purpose of such an appointment is that the actions of the person appointed will be binding upon that other party; (iii) that that other party is ordinarily entitled to object if the purported appointment does not comply with the requirements of the contract or is vitiated by conflict of interest on the part of the purported appointee or by fraud or corruption; and (iv) that the opportunity so to object should be available to the other party before the appointee embarks on the appointed task."[37]

They added this observation:

> "[I]n a situation where it is common ground that, apart from the case where an initial appointment miscarries, the clause was intended to

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34 (1983) 153 CLR 455.
35 (1983) 153 CLR 455 at 470.
36 (1847) 11 QB 7 [116 ER 376].
37 (1983) 153 CLR 455 at 471-472.

> authorize each party to appoint but one valuer as distinct from 'shopping around' for the lowest or highest valuation, a conclusion that a party could effectively appoint a valuer for the purposes of the clause without notifying the other party until after the valuation had been received would place the other party in a situation where he would ordinarily have no means of knowing whether the valuation produced was in fact the valuation made by the valuer appointed (ie the valuer first appointed) for the purposes of the clause."[38]

[91] The plaintiff argues that the present contract is different, because the alternative valuation, by providing a value which varied from the LandMark White value by more than 10 per cent, could not bind Mango Boulevard. In the circumstances which existed after the LandMark White valuation, there was no prospect that the alternative valuation would alter the price which would be calculated upon the basis of the original valuation. The value would have to exceed $22 million to matter for the calculation of the price, and that value could not be reached by averaging the LandMark White value with an alternative value which was different by no more than 10 per cent. But the alternative value could have mattered, in that if it was within 10 per cent of the LandMark White valuation, it would have resolved the controversy as to the value and therefore as to the price.

[92] Therefore, if it is otherwise valid as an alternative valuation, either of the Sergiacomi valuations will have consequences which are contractually binding upon Mango Boulevard. It will oblige it to participate in a mediation and, absent a settlement by that process, potentially an arbitration which could be a lengthy and expensive exercise. I do not accept the plaintiff's submission that the reasoning in *Gollin* does not apply to this contract and to the circumstances which arose after the LandMark White valuation. In my view, that reasoning is relevant here and the SSA contained the implied term pleaded by Mango Boulevard.

[93] It is accepted that the identity of Mr Sergiacomi, as the valuer appointed to undertake the alternative valuation, was not disclosed to Mango Boulevard before his 2009 valuation was arranged. It follows that this was not an alternative valuation arranged pursuant to cl 6 and having the consequence of engaging cl 4.8. For this further reason, the first of Mr Sergiacomi's valuations was ineffective.

[94] The position is different for the 2011 valuation. Mango Boulevard does not argue that some further notification had to precede the arrangement for that valuation. It was performed in the circumstance where Mango Boulevard had taken the point that the 2009 valuation did not value the property at the relevant time. The plaintiff had Mr Sergiacomi correct that error by producing the 2011 valuation. Mango Boulevard does not say that it was in some way prejudiced by not receiving some notification that Mr Sergiacomi was to produce another valuation.

[95] Instead, the argument for Mango Boulevard is that the failure to identify Mr Sergiacomi prior to the arrangement for his first valuation forever precluded the use of Mr Sergiacomi as the alternative valuer. In their written submissions, counsel for Mango Boulevard put the argument in this way:

> "Pursuant to the implied term discussed above, the failure to communicate the identity of Mr Sergiacomi prior to his engagement

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38 (1983) 153 CLR 455 at 472.

> prevents Mio Art from relying on any valuation from Mr Sergiacomi, even a valuation obtained after Mango became aware that he had been engaged.[39]

[96] According to the implied term pleaded by Mango Boulevard, it was necessary only for the identity of the proposed alternative valuer to be disclosed prior to the arrangement for the valuation which was to be relied upon as the alternative valuation. Mango Boulevard's argument accepts that prior to the arrangement of the 2011 valuation, Mr Sergiacomi had been identified as the proposed alternative valuer. Therefore, this 2011 valuation does not offend the implied term which, it should be noted, is pleaded in language that corresponds with the judgment in *Gollin*. It follows that the 2011 valuation is not invalid upon this ground.

The Sergiacomi valuations – were they too late?

[97] The next argument which is said to invalidate each of these valuations is that they were provided beyond what was in all the circumstances a reasonable time. Mango Boulevard says that it was an implied term of cl 4 that a valuation could be challenged under cll 4.6 to 4.9 only if a dissatisfied party arranged and provided an alternative valuation within a reasonable time of the original valuation. They refer to *Reid v Moreland Timber Co Pty Ltd*, where Dixon J stated:[40]

> "An implication of a reasonable time when none is expressly limited is, in general, to be made unless there are indications to the contrary."

[98] To the same effect, in *York Air-conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth*, Dixon J stated:[41]

> "[T]he ordinary prima facie rule is that when a contract provides for the doing of an act and there is no express provision as to time the law implies that it must be done within a reasonable time."

[99] The plaintiff submitted[42] that there was no time limit expressed within the SSA for the performance of this step so that this was the end of the matter. But that means only that the term would exist, if at all, by an implication. The absence of an express time limit provides no answer to the defendants' argument. In my conclusion, the implication must be made. It would not be efficacious for a dissatisfied party to have an unlimited amount of time in which to engage the process set out in cl 4.6 and subsequent provisions. There was some need for some finality.

[100] The questions then arising are whether the valuations, or at least one of them, was provided beyond a reasonable time and, if so, whether that denies the valuation a contractual effect under the SSA?

[101] As the defendants submit, referring to what was said by Muir JA (with whom the other members of the Court agreed) in *Business and Professional Leasing Pty Ltd v*

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39 Defendants' written submissions, paragraph 360(a).

40 (1946) 73 CLR 1 at 13, approved by Gibbs CJ in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 543.

41 (1949) 80 CLR 11 at 62, cited in *Business and Professional Leasing Pty Ltd v Akuity Pty Ltd* [2008] QCA 215 at [45].

42 Outline of opening submissions, paragraph 10.

Akuity Pty Ltd,[43] what constitutes a reasonable time for the exercise of a right such as this is to be determined in the light of the circumstances existing at the time at which the right is exercised.

[102] Before going to the relevant facts and circumstances, some other matters should be noted. The implied limitation is in the terms of a reasonable time, which means a time which is reasonable having regard to the respective interests of the parties and their intention, insofar as it appears from the express terms of the contract, for the operation of the provisions within cl 4. It was in the interests of the parties that this process of valuation, mediation and arbitration not be interminable, but instead result in the provision of an outcome by which each side would know with certainty what it was to pay or receive. It was also important that the value be fairly and accurately assessed, because the intention of the parties was that the price should be calculated by reference to, as far as possible, the true value of the Property. Expedition in the calculation of the price was not the only consideration. Thirdly, the assessment of what constituted a reasonable time is affected not simply by the amount of time which was required to produce an alternative valuation. The implication was that the valuation would be provided within a reasonable time and not that it would be provided as soon as was practicable. And the assessment was also to be affected by the prejudice, or lack of it, to the "satisfied" party from the passage of time between the original and the alternative valuation. Some delay which was productive of some real prejudice would be more likely to matter in this context than delay which had caused no prejudice.

[103] Much of the period which passed before the first Sergiacomi valuation involved extensive correspondence in which the sellers, or solicitors on their behalf, were seeking extensive material which was said to be required for the purposes of briefing an alternative valuer. I do not understand the defendants to submit that this was all a deliberate exercise in delay and I would not be persuaded to find that it was. But they argue that this was an unproductive exercise which provides no reasonable explanation for the passage of more than two years before the first valuation of Mr Sergiacomi. They point out that none of the material was ultimately briefed to, or at least used by Mr Sergiacomi and that it had not been used by Mr McEvoy. However, the question is not whether this material was ultimately useful or necessary. It was whether the sellers unreasonably delayed in arranging an alternative valuation by pursuing it. From their perspective, the material may well have had the potential to be relevant and useful to their case. For example, material going to the calculation of the area able to be developed was likely to be important in the calculation of the number of lots to result from the development, and in turn the income. I am not persuaded that the pursuit of this information was unreasonable. It provides some explanation for the time which passed before the first valuation.

[104] Perhaps most importantly, there is the absence of any complaint in 2009 that the first Sergiacomi valuation was provided so late as to be beyond a reasonable time. That is relevant in two ways. First, it strongly suggests that the defendants had not considered that, in all the circumstances, an unreasonable time had passed. Secondly, it demonstrates the absence of any prejudice from the passage of time. For example, there was no suggestion that the passage of time would make it more difficult to assess the relevant facts and circumstances as they were in January 2007.

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43 [2008] QCA 215 at [45].

In that respect, it was not as if the defendants had parted company with this project. Nor was there any suggestion that the uncertainty about the amount of the price had caused any prejudice to the defendants.

[105] Indeed, after the first of Mr Sergiacomi's valuations was provided to Mango Boulevard, its solicitors wrote to the plaintiff's solicitors on 24 August 2009, complaining that the valuation was not effective under cl 4.5, but specifically inviting the plaintiff to procure an alternative valuation to be carried out on the correct basis. At this stage, the plaintiff was taking steps to have a mediator appointed, purportedly under cl 4.8. It had asked the President of the Queensland Law Society to appoint a mediator. Mango Boulevard, through Minter Ellison, wrote to the President to resist that appointment. They contended that the valuation by Mr Sergiacomi was not effective, but not because it had been provided too late. Instead, the solicitors wrote that "until Mio Art provides a valuation carried out on the basis of the same assumptions as those set out in cl 4.4 of the SSA, it cannot invoke the mediation provision". They repeated that statement in their subsequent letter to the President of the QLS on 9 September 2009.

[106] Similarly, in a letter of 18 November 2009 to Mio Art's solicitor, Minter Ellison wrote:

> "Our client's position has always been that it will comply with the provisions of the Share Sale Agreement and will participate in a mediation when properly invoked under the Share Sale Agreement."

A similar statement had been made in their letter to Mio Art's solicitor of 14 October 2009. But despite that being Mango Boulevard's position in 2009, it now argues that Mr Sergiacomi's valuation of July 2009 was provided so late as to be ineffective on that ground.

[107] It should also be noted that at no stage did the sellers indicate that they were other than dissatisfied with the LandMark White valuation. In other words, at no stage did they indicate that they would accept it as providing the true value. Nor does Mango Boulevard now claim, for example, that there was such inactivity on the sellers' part that they believed that the LandMark White valuation would not remain in dispute.

[108] Of course it can be said that it was desirable that the process under cl 4 be pursued in a timely way, in order to finally determine the value of the Property and thereby the purchase price. However, this question was hardly the only matter in dispute between the parties. It was not as if this question was particularly pressing, in that it was holding up the completion of the joint venture or more generally, the winding up of the dealings between the parties.

[109] In all of the circumstances, I am unpersuaded that the first of Mr Sergiacomi's valuations was provided beyond a reasonable time, so as to be ineffective on that ground.

[110] As I have held, the first of his valuations was ineffective, partly for the reason that it valued the Property as at the wrong date. But that point was not made by Mango Boulevard until the pleadings in this case. It was first raised in the defence filed on 29 March 2011. The plaintiff's response was to arrange the second valuation of Mr Sergiacomi, correcting that mistake. The fact that the point was not taken earlier by Mango Boulevard is not fatal to its complaint of unreasonable delay.

Nevertheless it is relevant. It must be inferred that had this mistake in the first Sergiacomi valuation been pointed out earlier, the second valuation would have been provided earlier.

[111] The timing of the provision of the second valuation must be considered also in the context that the first of Mr Sergiacomi's valuations had been provided. Assuming for the moment that the complaints about the *content* of that valuation (apart from the time at which the property was valued) are not matters which would affect its validity, the sellers had provided Mango Boulevard with a valuation which, if corrected for the mistake as to the valuation date, plainly indicated the near inevitability of a further valuation which would be 10 per cent more than the LandMark White figure and which would then lead to a mediation and probably an arbitration. Mango Boulevard knew what would be, in substance, the case for the sellers. It is unsurprising then that there was and is still no complaint of prejudice resulting from the timing of the provision of the second of Mr Sergiacomi's valuations.

[112] In my conclusion, the second of the Sergiacomi valuations has not been shown to have been provided so late as to deprive it of contractual effect. The result is that this ground for challenging the valuations should be rejected.

[113] This makes it unnecessary to decide upon the plaintiff's submission that if a valuation of Mr Sergiacomi was given beyond a reasonable time, that is inconsequential for the operation of the SSA. For this submission the plaintiff cited *Alliance Petroleum Australia NL & Ors v Australian Gas Light Company*.[44] In that case, the parties had agreed for the supply of gas at prices which were subject to a review as could be required by either of them, and the terms for the review included a requirement for the matter to be referred to arbitration by two arbitrators, one to be appointed by each side. The contract provided for those appointments to be made within a defined time. One of the arbitrators was appointed beyond that time and the other party contended that this put paid to the right to an arbitration and thereby to a review of the price. After a thorough discussion of the authorities, Cox J concluded that the obligation to appoint an arbitrator within the stipulated time was not an essential term of the contract, so that the appointment which was made out of time was valid and effectual.

[114] That was consistent with, amongst other authorities, *Gollin v Karenlee*. Although the appointments of the valuers in that case were invalid for the lack of the prior identification of the appointee to the other party, an alternative challenge to the appointment of one of the valuers, namely that it was invalid because it was made beyond a reasonable time, was rejected by the High Court. The rent review provision there expressed no time limit for the making of the appointment. The High Court accepted that each side was obliged to do so within a reasonable time.[45] But an appointment made outside a reasonable time, it was held, would not affect its validity, because it was neither a condition of the availability of the rent review procedure nor of the essence of the contract that the obligation to make the appointment be performed within that reasonable time.[46] The Court noted that this

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44 (1985) 39 SASR 84.

45 (1983) 153 CLR 455 at 467.

46 (1983) 153 CLR 455 at 468.

procedure, requiring the appointment of valuers, was the only agreed procedure for ascertaining the rent. The Court then stated:[47]

> "In these circumstances, even if the lease had contained a provision expressly requiring Gollin and the lessors respectively to appoint a valuer or to activate the rent review procedure within a specific time, the performance of that obligation within that particular time could not, without more, have properly been seen either as a condition of the applicability of [the rent review clause] or as being of the essence of the contract. (See, generally, *United Scientific Holdings Ltd v Burnley Burrough Council*.)"[48]

[115] The resolution of this argument for the plaintiff would turn upon the proper interpretation of the present contract. In favour of the defendants, it might be said that the SSA is different from the agreement in *Gollin*, because absent the employment of the procedure in cll 4.6 to 4.9, the price was able to be calculated with the benefit of the original valuation. But having regard to the breadth of the propositions in the speeches in *United Scientific Holdings Ltd v Burnley Burrough Council*, that may not be a sufficient point of distinction.

Yields

[116] The next challenge to the Sergiacomi valuations is in relation to the number of lots which he assumed for the purpose of his valuation. He assumed that there would be a total of 3,000 lots across the southern and northern precincts. Mr McEvoy had assumed, as he had been instructed by the defendants, that there would be 1,731 lots. The difference is at least largely attributable to two factors. The first is the area of land which was considered as being able to be developed as lots for sale. The second is in the density per hectare, that is to say the number of lots to be derived from a certain area. The defendants say that the critical flaw in Mr Sergiacomi's adopted yield of 3,000 lots is that he has incorrectly calculated the area. It is said that there was no justification for his doing so in the circumstance where the area or areas had been calculated and were part of the Preliminary Approval.

[117] Clause 4.4(a) required the valuer to assume that development permits had issued in respect of the whole property, authorising its development "on substantially similar terms to the terms of the Preliminary Approval", including "substantially similar … density per hectare [and] yield …". The parties thereby anticipated that the precise density per hectare, and most critically the yield, would be unknowns at the time of the valuation. The valuer was required to make assumptions which were informed by the terms of the Preliminary Approval, but there was no single correct figure which had to be assumed for the yield. Further, because of the variation to the SSA to permit different applications for the southern and northern precincts, at the time of the approval of the southern precinct the likely terms of the development permits for the northern precinct were yet more difficult to predict.

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47 Ibid.

48 [1978] AC 904.

[118] What then were the relevant terms of the Preliminary Approval, contained within the Negotiated Decision Notice? The statement of the Council's approval was in these terms:

> "Council approves the application for a Preliminary Approval for a Material Change of Use on land described as [the southern precinct] by granting a Preliminary Approval for the existing Future Urban and Rural zoned land to be used for urban development in accordance with the Mango Hill Structure Plan subject to the following Conditions …"

[119] The Mango Hill Structure Plan was a policy document which relevantly contained a plan described as "Structure Plan Figure 2 land use". It depicted, amongst other things, the proposed development of the southern precinct. There were three distinct "urban residential neighbourhoods" shown on the plan within the southern precinct, in which there would be different densities of development. There was one area in which the required minimum density would be 15 dwellings per hectare, another requiring 25 dwellings per hectare and a third area in which the minimum would be 40 dwellings per hectare. This plan was scaled. But the areas for those respective neighbourhoods were not quantified on the plan.

[120] Returning to the Negotiated Decision Notice, immediately below the passage which I have set out were the conditions. The first of them was in these terms:

> "1 Plan of Development
>
> The approved Plan of Development comprises the following drawings:
>
> Drawing No S3871-SP-002 (Kinsella Heights Preliminary Approval Plan of Development) and …
>
> prepared by THG Resource Strategists on behalf of Urbex Pty Ltd received and dated stamped by Council 22 August 2006.
>
> The applicant shall amend the Plan of Development to include the whole of Lot 993 on S312890 within the Preliminary Approval subject area. The small balance area not currently shown on the plan shall be included in the 'Rural and Open Space' area. The amended plans shall be approved by the Manager, Development Services prior to the Developer lodging the first application for a Development Permit on the subject land.
>
> The Plan of Development provides guidance on the general development parameters of the site. More detailed plans to be submitted with subsequent development applications for Development Permits associate[d] with this Preliminary Approval shall reflect the Plan of Development."

The "Plan of Development" as referred to in that condition depicted a proposed development of the southern precinct. Again, it showed three different residential neighbourhoods. But in the first category, a legend on that plan showed a figure of 12 dwellings per hectare, rather than 15 dwellings per hectare according to the Mango Hill Structure plan. This legend also set out approximate areas within each of the neighbourhoods. There was an area for the lowest density of "approximately 105Ha", for the medium density of "approximately 7.5Ha" and for the high density of "approximately 1.0Ha".

[121] The only indication within the Preliminary Approval of the likely sizes of the different neighbourhoods was within that Plan of Development, which according to the condition of the approval, was to provide "guidance" only. On the plan itself, the measurements were given as approximates. The Preliminary Approval did not prescribe a certain number of hectares for any of the areas which were to be subdivided within this southern precinct. It did indicate, within both the Structure Plan and the Plan of Development, the parts of the site which were to be developed as lots and the three precincts within those parts. But there was no single set of figures for the developable areas which, according to cl 4.4 of the SSA, had to be assumed. Moreover, the area or areas in the northern precinct were even less certain at this stage.

[122] Nor was the density per hectare straightforward. The terms of the approval itself required a development in accordance with the Mango Hill Structure Plan, part of which stipulated a minimum yield of 15 lots per hectare in the low density zone. But the first condition, by its reference to the Plan of Development and its "guidance on the general development parameters for the site", might be thought to have indicated a minimum density of 12 dwellings per hectare. Further, within conditions 17.1 and 17.6 of the Preliminary Approval, there were references to housing within the low density area as being at 12 dwellings per hectare. And condition 16.1 provided that:

> "A minimum residential density and lot yield is to be achieved across the development in accordance with the provisions of the Mango Hill Structure Plan Statement of Planning Policy PE SP.21."

In the text of the Structure Plan, cl 1.2.2 referred to, amongst other things, the three degrees of density of residential neighbourhood, the least dense being "RD15". It provided that "the specified densities in the Structure Plan are minimums" but that "Council will consider … applications for higher densities in appropriate locations". It referred to a table which was said to indicate "the range of dwelling products Council considers acceptable within the various designated density areas". The table was divided into three sections, for those three different neighbourhoods. The first neighbourhood was described, under the heading "Density Designation (Average Minimum Dwelling Units Per Hectare) 12 or 15du/ha". The Mango Hill Structure Plan also contained an annexure 2.5, which contained a table showing that the low density neighbourhood within the southern precinct would have a minimum net density of 15 dwellings per hectare. Now the Structure Plan was itself a statement of policy with no independent legislative force. But it was effectively incorporated within the terms of the Preliminary Approval, because that approval was stated to be for the use of the land for urban development "in accordance with the Mango Hill Structure Plan". As I see the position, that structure plan was flexible in that it did allow, specifically within the table in cl 1.2.2, for development within the relevant neighbourhood within the range of 12 to 15 dwellings per

hectare. In turn, the Preliminary Approval allowed for a density for that neighbourhood within that range.

[123] If the valuer was to adhere faithfully to the terms of the Preliminary Approval, which of these numbers of dwellings per hectare was to be assumed? The answer, in my view, was that either of them could have been assumed. The valuer had to hypothesise, by assuming that Development Permits had issued "on substantially similar terms" to those of the Preliminary Approval. Had the Development Permits issued in terms of either figure per hectare, they would have been upon terms, in that respect, which were substantially similar to those of this Preliminary Approval.

[124] Mr Sergiacomi calculated his yield upon the assumption of 15 lots per hectare within this low density zone, both in the southern and northern precincts. In doing so, he did not make an assumption which was inconsistent with cl 4.4(a). But if there was such an inconsistency, would it have resulted in his valuation being ineffective in the operation of the SSA? Where the Preliminary Approval was reasonably capable of two interpretations, the adoption of that which might be considered, upon a precise legal analysis, to be the incorrect interpretation, would not be a mistake of the kind which would invalidate the valuation for the purposes of the SSA. The parties agreed upon what the valuer was to assume. It is another thing to say that they agreed that if his calculations did not faithfully correspond with those assumptions, either because of a mathematical error or a mistake of law, the valuation would have no effect. For example, in a case where the alternative valuation was within 10 per cent of the original valuation, so that it would directly affect the value and (perhaps) the price, did the parties intend that the certainty provided by the process should be lost from an error of that kind?

[125] I return to the question of the relevant area or areas for subdivision. Mr Sergiacomi calculated areas for the low, medium and high density neighbourhoods in the southern precinct of 117.35 hectares, 18.66 hectares and 6.84 hectares. In the northern precinct he calculated 20 hectares of low density and five hectares of high density (40 lots per hectare). Mango Boulevard says that these areas were so outside any range which could have been assumed consistently with cl 4.4, that these errors invalidate each of his valuations.

[126] Mr Sergiacomi had a survey plan prepared by Cottrell Cameron & Steen Surveys Pty Ltd, which had taken the Plan of Development and calculated the areas of different parts within the southern precinct. The neighbourhood for low density development, described in the Plan of Development as having an area of approximately 105 hectares, was measured by these surveyors at 109.69 hectares. To this number Mr Sergiacomi added what was depicted on the Plan of Development as a "community centre" and three spaces which were designated in that Plan as parkland.

[127] According to cl 1.2.2.2 of the Mango Hill Structure Plan, density was to be "based on the area occupied by housing and associated land plus the area of local roads and local open space". It provided that "the average net residential density is taken to be the measure of housing density expressed as dwellings per hectare calculated by adding the area of residential lots plus the area of local roads, local-level park, open space (ie excluding arterial roads and Rural and Open Space designated areas) and then dividing by the number of dwellings created".

[128] The parkland areas which Mr Sergiacomi added were ambiguously described in the legend of the Plan of Development and also in the Structure Plan 2. On each plan, the legend showed them to be both "Rural and Open Space" and "Local Park". I am not persuaded that the assumptions prescribed by cl 4.4 of the SSA required him to exclude these areas in calculating the yield. If the matter had to be decided one way or the other, I would prefer the interpretation which Mr Sergiacomi adopted. As for the inclusion of 3.65 hectares which was designated as a community centre, again the terms of the Preliminary Approval are not precise as to whether this was to be included. It was reasonable for him to include it because upon one view of cl 1.2.2.2 of the Structure Plan, this was not within the description of those areas which were to be excluded in the calculation of density.

[129] However, it now appears that there was an area which should have been excluded from the low density neighbourhood. One of the conditions of the Preliminary Approval required the widening of an arterial road. Mr Christofis, a surveyor called in the defendants' case, has calculated the area required for the road widening as 7.98 hectares. This does not seem to have been depicted on the Plan of Development. The calculation of the yield would require it to be excluded. The result is that it could be seen that Mr Sergiacomi's total of 117.35 hectares for the low density neighbourhood was excessive by about eight hectares.

[130] In the medium density neighbourhood, the space which the Plan of Development had described as having an area of approximately 7.5 hectares was measured by Cottrell Cameron & Steen at 12.12 hectares (Mr Christofis measured it at 12.19 hectares). Mr Sergiacomi added two green spaces, which totalled 6.54 hectares, to reach 18.66 hectares for this neighbourhood. The defendants say that the green areas were wrongly included. Again this involves the ambiguity from these spaces being within those described as both "Rural and Open Space" and "Neighbourhood Park" and "Linear Linkage Park". I am not persuaded that these amounts were wrongly included by Mr Sergiacomi.

[131] For the high density region, which was shown on the Plan of Development as having approximately one hectare, Cottrell Cameron & Steen measured the space at 2.18 hectares (Mr Christofis measured 2.21 hectares). Again the contentious item is an addition for green areas, which again were ambiguously described in both the Plan of Development and the Structure Plan.

[132] The required assumptions for the northern precinct were even less clear because as at the Effective Date for the approval of the southern precinct, there was no Preliminary Approval for the northern precinct. The plan which is figure 2 within the Mango Hill Structure Plan showed no lots to be derived from the northern precinct. But the defendants' argument accepts that the valuer should have assumed some development of the northern precinct, or at least a part of it, into individual lots. The defendants accept that the valuer could have assumed that the space shown on Figure 2 as a regional sport and recreational facility would instead be used for residential development. Mr Christofis has measured that space (insofar as it was within the northern precinct) at 18.38 hectares. The defendants concede that the valuer could have assumed a yield of 221 lots from the northern precinct, which is 18.38 hectares by 12 dwellings per hectare. Alternatively at 15 dwellings per hectare, the yield would be 276 dwellings.

[133] Mr Sergiacomi assumed an area of 20 hectares for low density development in the northern precinct and five hectares for high density development, resulting in 500 lots overall. The correctness of these assumptions is certainly questionable. But the requirements of cl 4.4 of the SSA, once the agreement had been varied to permit separate applications to be made but a valuation to be undertaken before each was approved, necessarily affected whatever precision there may have been in the assumptions which were required to be made. The valuer was left to speculate upon the likely Preliminary Approval for the northern precinct. There was no correct answer, at least for the northern precinct. It is not demonstrated Mr Sergiacomi's assumptions for this precinct were unreasonable.

[134] Therefore of the many criticisms which were made of Mr Sergiacomi's calculation of the likely yield, the defendants have established that he incorrectly included whatever was the area which was required for the widening of the arterial road. This is now known to be 7.98 hectares. Otherwise, I am not persuaded that his figures for relevant areas, and in turn relevant yields, from the southern precinct were inconsistent with the Preliminary Approval and therefore with the assumptions required by cl 4.4 of the SSA. Nor is it established that his assumptions for the northern precinct were inconsistent with cl 4.4, as its effect was necessarily compromised when the parties agreed to seek separate approvals.

[135] However, if Mr Sergiacomi did make errors in the calculation of the relevant areas in each of the respects for which the defendants contend, does this invalidate his 2011 valuation for the purposes of the SSA? In my conclusion, the answer is in the negative. The parties agreed that the valuer was to make assumptions as to density and yield. But ultimately there was no single correct set of answers for the yield at least because, at the stage at which the Preliminary Approval was obtained, there was some flexibility allowed in respect of the areas which could be developed. The Plan of Development was for "guidance". The areas which it gave within the legend were expressed as approximates. The work done by Mr Christophis demonstrates the degree of approximation. The valuer was not required to cause a survey to be undertaken, as Mr Christofis did for the purposes of this case. The valuer was required to apply the indicated density to numbers of hectares to reach a yield which would be "substantially similar" to that which was indicated by the Preliminary Approval. Because there was no single set of figures which were the correct ones, the parties' agreement was to allow for the likelihood that different valuers could use different yields.

[136] Consistently with the approach referred to in the cases cited above at [70], the parties should be taken to have agreed that a valuation or an alternative valuation under this scheme would not be made ineffective by a mistake by the valuer in the calculation of yields, including a mistake in the calculation of the areas from which those yields would be derived. Especially where the calculation of yields was necessarily imprecise, it was not the intention of the parties, upon an objective view, for the process for determining the value of the Property to be susceptible to the uncertainty which would come from challenges to the valuer's work such as the defendants now make. That is fortified by the fact that the parties agreed that if necessary, the value was to be determined finally by an arbitrator.

[137] Ultimately, the plaintiff desisted in its challenge to the LandMark White valuation as being effective for the purposes of the contract. But it may be noted that this valuation was open to criticism in respect of the yields which Mr McEvoy assumed.

He was instructed that the yield would be 1,731 lots across the two precincts. That assumption may be compared with the yields according to the calculations of Mr Christofis of the relevant areas, upon the assumption that the defendants are correct upon each of their arguments as to what should have been included or excluded in this respect. Upon those premises, the yield would be 1,845 (at 12 dwellings per hectare for the low density neighbourhoods) or 2,208 (at 15 dwellings per hectare in that neighbourhood). Adopting the latter figure at least, it follows that the assumption as to yields made by Mr McEvoy was not substantially similar to what was indicated by the Preliminary Approval. But for the same reason, I would not hold that Mr McEvoy's valuation was ineffective for the purposes of the SSA.

Lot 976

[138] During the trial the defendants were given leave to amend to add a further complaint about Mr Sergiacomi's valuations, which was that he wrongly included lot 976. I have discussed the agreement by the parties about lot 976 already at [65]. This was an agreement to exclude it from an application for Preliminary Approval and to leave open the entitlement of the sellers for any enhancement of its value, resulting from any subsequent approval in respect of it, to be added in the process of calculating the price. It was consistent with that agreement that the LandMark White valuation did not include anything for lot 976. But it does not follow that the inclusion of lot 976 by Mr Sergiacomi was inconsistent with that agreement. And if there was such an inconsistency, it would not follow that this would infect his whole valuation.

[139] It was for the sellers to opt to include lot 976 in the valuation exercise. If they did so before lot 976 had any approval relating to it, they ran the risk that it would not be given the value which it would have after an approval for it was sought and granted. It appears that the sellers did not ask Mr Sergiacomi to include it but that he saw fit to do so. This appears from the inconsistent references to lot 976 within his valuation. On page 3, the valuation was stated to be prepared upon the assumption that lot 976 was "excluded from the valuation". But in his attached Feasibility Study, as he conceded in cross-examination, there is a reference to an amount of $2 million of income which is included for lot 976. I infer that he included it by mistake, having regard to what appears on page 3 of his valuation.

[140] But its inclusion does not invalidate the valuation. Its impact upon the valuation of $170 million was of no significance, because indisputably the exclusion of this item would have had no material effect on the valuation. It would still have been far beyond a range of 10 per cent from the LandMark White valuation. Even if the inclusion of lot 976 was inconsistent with the 2005 agreement about that land, it is plain that Mr Sergiacomi has valued the balance of the Property as beyond a figure which would resolve the question of value according to cl 4.7.

The argument about 'costs' in the valuation

[141] The remaining complaint is that Mr Sergiacomi did not correctly apply the definitions of "income" and "costs" in the SSA. It is necessary to set out those definitions:

"'Income'	means the aggregate of the gross sale prices achieved in respect of the

Property or each of the Proposed Lots comprising the Property following reconfiguration for sale as residential land, less:

(a) GST paid in respect of the sale of each of the Proposed Lots (if any); and

(b) the selling commission (including GST) paid in respect of the sale of each of the Proposed Lots; and

(c) legal costs (including GST) paid by the Principal in respect of the sale of each of the Proposed Lots;

‘Costs’ means the aggregate of the following costs in respect of the Project:

(a) the purchase price of the Property referred to in the Contract;

(b) $5,000,000.00 in respect of the purchase price of the Shares;

(c) the costs in relation to the civil contraction, internal and external to the Property;

(d) the costs relating to the provision of infrastructure to the Property including electricity, telecommunications, gas etc;

(e) Council fees and charges relating to the Property, including headworks charges;

(f) consultants fees incurred in relation to the Project;

(g) Development Management Fees;

(h) the Development Facilitation Fee;

(i) landscaping and open space betterment costs in relation to the Property;

(j) holding costs in relation to the Property, including interest, land tax and rates;

(k) advertising and marketing costs relating to the sale of the Property or any Lot, including costs in relation to the set up and maintenance of a sales office;

(l) such other costs as may be reasonably incurred in relation to the Project;

However, Costs do not include the following costs:

(a) any commissions paid in connection with the sale of the Lots;

(b) conveyancing fees and costs associated with the sale of the Lots;

(c) any costs or fees in relation to the project which have been paid to the Management Committee, Urbex, BMD Constructions Pty Ltd, BMD Consulting Pty Ltd or any other person who is a Related Person of Mango Boulevard or BMD and which are in excess of reasonable arm's length commercial fees;

(d) corporate costs incurred by the Consultant, the Company, Mango Boulevard, Urbex and BMD which are not Project specific costs, including overhead costs, *(to be advised)*."

[142] The first complaint here is in relation to selling commissions and legal fees. According to the definitions in the SSA, those amounts are brought into account in calculating the income rather than in calculating the costs. Mr Sergiacomi included

them in the costs. There are alternative calculations within his "Property Development Feasibility Study", but on the relevant page, which is where he uses the 25% margin (page 1), they are included in the costs. I accept that this was inconsistent with the SSA, which required that the valuer would achieve a "Profit on Cost Percentage" of 25 per cent, with "Profit" meaning "Income minus Cost". These amounts totalled approximately $41 million. This had the effect of inflating the income. Of course the costs were increased by the same amounts. But overall the calculation of the market value of the land would be higher for the fact that these items were included in the calculation of costs rather than in the calculation of income because of the assumption that, in effect, costs (including the market value) would be 80 per cent of the income.

[143] The next complaint is that the item in paragraph (b) of the definition of "Costs" was not included, which was "$5,000,000.00 in respect of the purchase price of the Shares". At this point the definition of "Costs" appears to be illogical for the purposes of assessing the market value of the Property. The SSA required the valuer to assume a certain margin of income over costs. But within that constraint, this was to be a market valuation, requiring an assessment of the value of the Property, with the benefit of the Preliminary Approval, to a hypothetical developer. The $5 million minimum price for the shares would not be a cost to the hypothetical developer. And if this was to be an assessment of the value specifically to the owner (Kinsella Heights), it would not be logical to include this component because it would not have been a cost to that company.

[144] Similarly, the definition of "Costs" included:

> "(a) the purchase price of the Property referred to in the Contract".

or in other words, $22 million. Mr McEvoy appeared to see the flaw in including this component. Had he done so, he would have arrived at a market value which was a negative figure. The value was to be calculated by assessing the likely income, from which the total amount of the developer's costs could then be ascertained given the assumed profit percentage. Once the total costs were ascertained, the assessed (or assumed) development costs apart from the cost of the acquisition of the land were to be subtracted from the total costs, resulting in the amount which the hypothetical developer would be prepared to pay for the purchase of the land, or in other words, the market value. Thus it is clear that this definition of "Costs" was not to be applied without some qualification. Mr McEvoy included that cost of $5 million. But just as it would have been illogical to have included the $22 million component, so too was it illogical to include the $5 million component, which would not be a cost to the hypothetical developer. In turn, Mr Sergiacomi was not wrong to have excluded it.

[145] The Development Management Fees were excluded by Mr Sergiacomi. In my view this was correct. The first reason is that again, this was not an item of cost which would burden the hypothetical purchaser: it was specific to the agreements which these parties had made. Further, cl 4.1 required the total of the monthly Development Management Fees to be deducted in calculating the purchase price of the shares. To include them also in the calculation of the value of the Property, by diminishing the value by the total of these amounts, would involve double counting.

[146] Lastly, there is a complaint that Mr Sergiacomi included nothing for "landscaping and open space betterment costs in relation to the Property". I accept that he did not include anything under that description. That is confirmed by the evidence of Mr Clarke, a valuer called in the defendants' case. But I also accept that those costs were included within his calculations as construction costs.

[147] Mr Clarke caused to be performed an exercise which involved a reworking of Mr Sergiacomi's calculations, to include the components of costs which the defendants say were wrongly excluded. The overall difference is about $15 million. In other words, Mr Sergiacomi's first valuation of $186,495,226 would be adjusted to $171,708,945. The extent of the adjustments to the second valuation, it can be safely inferred, would be insignificant for the operation of cl 4 of the SSA. Further, in that exercise of comparison, it is difficult to discern what adjustment, if any, was made for the item of landscaping and open space betterment costs, just as it is difficult to identify that item within the calculations of Mr McEvoy.

[148] The result is that I accept that Mr Sergiacomi acted inconsistently with the SSA by including some items as costs rather than in the calculation of income. But neither that item, nor any of the other complaints in relation to "Costs", could amount to an error or errors of the valuer which would make his valuation ineffective for the purposes of the SSA. It remained an alternative valuation with the effect for which the parties had agreed, which was that they would have to proceed to the other steps prescribed by the SSA to determine the value and in turn the price. Were it otherwise, then it would follow that the LandMark White valuation was invalid not excluding the cost of $22 million.

[149] It follows that none of the challenges to the so-called Alternative Sergiacomi Valuation is successful. It is an alternative valuation for the purposes of the SSA.

Conclusions

[150] It will be declared that:

1. The LandMark White valuation, as it is described in the amended statement of claim, was the "Valuation" for the purposes of cl 4.4 of the Share Sale Agreement.
2. The Sergiacomi Valuation, as it is described in the amended statement of claim, was not an "Alternative Valuation" for the purposes of the Share Sale Agreement.
3. The Alternative Sergiacomi Valuation, as it is described in the amended statement of claim, was the "Alternative Valuation" for the purposes of cll 4.6, 4.7 and 4.8 of the Share Sale Agreement.

[151] The consequence was that the sellers were entitled to require that the true value of the Property be submitted to mediation, pursuant to cl 4.8 of the SSA. The plaintiff had required a mediation when the first of Mr Sergiacomi's valuations was produced. More recently, the essence of the plaintiff's argument has been that the plaintiff is entitled to submit the dispute to arbitration, whether or not each of the steps within the regime in cl 4 has been taken. I would not have been persuaded to construe cl 4 in that way. But the point is of little practical importance because I do not understand the plaintiff to be unwilling to undergo a mediation as required by cl 4.8.

[152] It will therefore be declared that the plaintiff is entitled to require the question of the true value of the Property to be submitted to mediation under cl 4.8, and if the parties are unable to resolve the dispute through mediation within 30 days after the dispute has been referred to mediation, the plaintiff may require the dispute be submitted to arbitration pursuant to cl 4.9.