IN THE SUPREME COURT OF QUEENSLAND No. 1341 of 1983

FULL COURT

BEFORE:

The Chief Justice (Sir Walter Campbell)

Mr. Justice Connolly

Mr. Justice McPherson

BRISBANE, 24 OCTOBER 1984

BETWEEN:

DAINFORD LIMITED (Plaintiff) Appellant

-and-

BOCADA PTY. LTD. (Defendant) Respondent

JUDGMENT

THE CHIEF JUSTICE: In my opinion this appeal should be dismissed with costs. I publish my reasons.

I am authorised by my brother Connolly to say that in his opinion the appeal should be dismissed with costs, and I am authorised by him to publish his reasons which I now do.

MR. JUSTICE McPHERSON: I would allow the appeal and make the orders that appear on page 23 of the reasons which I now publish.

THE CHIEF JUSTICE: The order of the Court is that the appeal is dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 1341 of 1983
DAINFORD LIMITED (Plaintiff) Appellant

-and-

BOCADA PTY. LTD. (Defendant) Respondent

THE CHIEF JUSTICE

CONNOLLY J.

McPHERSON J.

Judgments delivered by Chief Justice, Connolly J. and McPherson J. on 24th October, 1984. McPherson J. dissenting.

"APPEAL DISMISSED WITH COSTS".

IN THE SUPREME COURT OF QUEENSLAND No. 1341 of 1983

FULL COURT

BETWEEN:

DAINFORD LIMITED (Plaintiff) Appellant

-and-

BOCADA PTY. LTD. (Defendant) Respondent

JUDGMENT - THE CHIEF JUSTICE

Delivered the TWENTY-FOURTH day of OCTOBER 1984.

I have come to the conclusion, for the reasons given by Connolly J., that this appeal should be dismissed. The essential facts and the opposing submissions of counsel are set out in the judgment of Connolly J. and I will add only some short observations concerning the matters put in issue at the trial, the conduct of the hearing before the learned trial Judge and the nature of the argument on appeal. I think that such matters preclude the appellant from successfully contending that His Honour should have made a decree of specific performance of the contract and thus giving the appellant time and opportunity to satisfy its obligations under the contract at a date for settlement specified by the court. I do so in the light of the contention of the appellant's counsel that a court of equity often granted indulgence in point of time to a vendor to enable him to overcome any difficulties in matters of conveyance.

The trial took place on 10th and 13th February, 1984 and judgment in favour of the respondent was given on 5th March, 1984. The appeal was heard on 20th and 21st June, 1984 and the decision was reserved. At the request of the appellant, the appeal was listed for further hearing on 28th August, 1984. At that hearing the appellant sought leave to read an affidavit sworn by the Chairman of the Council of the Body Corporate which had been filed on 23rd August, 1984, showing that on 6th August, 1984 the by-laws were lawfully amended so as to grant to unit holders the irrevocable right to the exclusive use and enjoyment of the car spaces allocated to the several units.

The defence (para. 5(b)) specifically raised the point that the appellant was not at material times ready, willing and able to perform its obligations under the contract so as to ensure that prior to settlement the by-laws granted to the respondent the exclusive use for car parking of that space outlined on the plan in accordance with cl. 5(a) of

the contract. The learned trial Judge had requested that the addresses of counsel be transcribed and they have been included in the appeal book. At the trial the respondent's counsel relied on the point that the appellant had not amended the by-laws within the specified time to give the respondent exclusive use of the car space. He submitted: "If Your Yonour were to order or the defendant were to offer settlement of this contract today or next week the plaintiff could not complete and this is so in a most important respect," and "the point is taken Dainford will have to find some other means of arranging a secure car parking space". In his submissions to the learned Judge counsel for the appellant said: "The body corporate may well choose to comply with a suggestion by the plaintiff in this particular case". In reply the respondent's counsel said: "... the evidence is really fairly clear, that the plaintiff would not be able to complete and has never been able to complete".

During argument before us reference was made to the decision of this Court in Dainford Limited v. Smith (unreported - No. 1343 of 1983 - judgment delivered on 5th June, 1984). In response to a statement from the Bench that the appellant's problem was that the only title it was suggested that it could make out was one which this Court has held not to be good enough, [referring to Dainford Limited v. Smith] Mr. Boyce Q.C., for the apellant, said: "Yes, it is a fatal obstacle ... We hoped ultimately that the decision will be reversed". When asked, again from the Bench, if there had been any debate at the trial as to the possibility of altering by-law 40 into a form which satisfied cl. 5(b) of the contract, which clause enabled the appellant to include the car space as part of the relevant unit in the plan, Mr. Boyce replied: "I think it is almost impossible once the developer has embarked on the course which he has embarked on here and got the building plan registered. It becomes almost impossible .... With the co-operation of the body corporate a developer could presumably set about this in a given time. One never knows

... one never knows whether some eccentric unit holder does not have objection".

What I have said shows that the issue of title relating to the exclusive use of the car space, or the ability of the vendor to give the purchaser such exclusive use, was put squarely in issue in the pleadings and at the trial; even on the hearing of the appeal no firm answer could be given to the question as to how the appellant could give the respondent exclusive use of the car space, and it was not until we relisted the matter that we were informed that the by-laws had been amended. In my opinion, it would be wrong for an appellate court to reverse the decision of a trial Judge where an appellant vendor, seeking specific performance, has failed to show the trial court that he was in a position of being able to complete title - or in a position where he could reasonably be expected to give a good title - especially when that very issue of title was prominently raised in the pleadings.

IN THE SUPREME COURT OF QUEENSLAND No. 1341 of 1983

BETWEEN:

DAINFORD LIMITED (Plaintiff) Appellant

AND:

BOCADA PTY. LTD. (Defendant) Respondent

JUDGMENT - CONNOLLY J.

Delivered the day of 1984.

By a contract of 21st August, 1981 the appellant agreed to sell to the respondent Lot 131 as outlined on a plan annexed to the contract. It was described as "28th level 'C' type". The plan snows that on the 28th level there were five units and the "C" type unit was that on the north-eastern corner. The price was $281,000.00 and a deposit of $28,100.00 was duly paid. By cl. 3(a) settlement

was to take place within 30 days after notice from the appellant or its solicitors to the respondent or its solicitors that the relevant Building Units Plan had been registered.

On 29th December, 1982 the respondent wrote to the agents for the appellant saying that having inspected the unit it was felt that the building and unit were not satisfactory and that the respondent would "defend the contract of purchasing". The agents were asked to withhold the deposit which was held in their trust account and not to pass it to the appellant until such time as the whole dispute should be resolved. The learned trial judge was of the opinion that this letter was equivocal and should not be treated as a repudiation. In any case, it was not accepted and the contract remained on foot.

The Building Units Plan was registered on 31st December, 1982 and the solicitors for the appellant wrote immediately to the solicitors for the respondent notifying them of that fact and appointing 1st February, 1983 as the date for settlement. That letter was posted at 6.18 p.m. on 31st December, and by virtue of cl. 15 of the contract was deemed to have been received on 1st January, 1984 although it was not in fact received by the respondent's solicitors until 5th January. The period of 30 days limited by cl. 3(a) expired on 31st January which was a Monday and a public holiday. The appellant's solicitors took the view that what they described as the correct date for settlement was 30th January put because this was a Sunday and the next day was a public holiday they considered 1st February to be the appropriate date. There is room for doubt whether this is correct. The time limited is a time within which settlement is to be effected and the clause does not appoint a date upon which this is to occur. The respondent's solicitors contended for settlement on 4th February. The fact however, is that the respondent did not attend on 1st February and in fact no tender of the balance purchase price or of a registrable transfer was ever made by the respondent. Time was of the essence of the contract

but neither party sought to discharge the contract for failure to settle within the appointed period. The appellant's solicitors then appointed 17th March, 1983 but again there was no attendance by the respondent and no tender of the balance purchase price or of a registrable transfer. Neither party took any steps to discharge the contract and on 21st March, 1983 the appellant instituted this action for specific performance.

Specific performance was resisted by the respondent on three grounds which it maintained up to judgment. The first was that the contract was uncertain as to the location of Lot 131; the second was that the appellant was unable to give the respondent what it had contracted to give in the matter of a car space; and the third was that the contract was for the sale of a two bedroom unit whereas Lot 131 as tendered was not such a unit. Other grounds were taken in the defence but were abandoned as a result of the introduction into the Building Units and Group Titles Act of s. 49A. It will be convenient to deal with those points in order.

The alleged uncertainty arose from the fact that there were 41 levels above ground in the building as designed. The architect's plans to which attention is directed by recital (b) of the contract were approved by the local authority on 14th August, 1981 and they show Lot 131 on the 27th level treating the ground floor as level 1. They also snow that level 13 was advisedly omitted so that Lot 131 is on the level numbered 28. Once these facts are understood there is in truth no uncertainty. It was never suggested that the respondent's directors believed that Lot 131 was to be on the level which was in fact the 28th above ground rather than on the level numbered 28 or that any misrepresentation was made and D.M. Campbell J. who tried the action rejected this ground of defence.

The two bedroom point was also rejected by the learned trial judge. There is no support in the contract for the view that the appellant warranted that Lot 131 had two

bedrooms. The respondent set up, without pleading, a representation by the vendor's agent but the learned trial judge was not satisfied that it was made and in any case, rightly pointed out that on the present state of the authorities cl. 9(3)(d)(i) of the contract which contains an acknowledgement by the purchaser that it has not relied on any representation by the vendor's agent or any other person precludes the setting up of representations in the absence of fraud.

I turn then to the car space point. Clause 5(a) provided as follows:—

> "(a) The Vendor will ensure that prior to settlement the By-laws of the Body Corporate brought into existence upon the registration of the plan will grant to the proprietor for the time being of the said unit the exclusive use for car parking of that part of the common property outlined in red on the sketch plan marked 'B' annexed hereto."

Plan "B" did not have a car space outlined in red but car space 107 was outlined and the initials of the executing parties appear beside it. In substance what the respondent was entitled to by virtue of cl. 5(a) was exclusive possession of car space 107 secured to it by the provisions of the by-laws. The third schedule to the contract contained proposed alterations to the by-laws and one of them was proposed by-law 40 which so far as is material read as follows:—

> "The proprietor for the time being of each lot in the building shall be entitled to the exclusive use for himself and his licensees of the car space or spaces the identifying number or numbers of which shall be notified in writing by Dainford Limited to the Council of the Body Corporate within twelve months after the date of registration of the plan."

The alterations of the by-laws were adopted by the First Annual General Meeting of the Body Corporate on 5th January, 1983. The alterations to the by-laws came into

operation by being recorded by the Registrar of Titles on 4th February, 1983. See section 30(3) of the Building Units and Group Titles Act. It was proposed that on settlement of this transaction the appellant should give to the Council of the Body Corporate a notice identifying car space 107 as the car space to which the proprietor of Lot 131 was entitled. This would not have satisfied clause 5(a) in the sense that the obligation of the vendor under that provision was to ensure that the proprietor of Lot 131 was entitled under the by-laws to exclusive use of space 107 prior to settlement. However the procedure proposed would have given the respondent the right substantially contracted for from the date of settlement viz. exclusive possession of car space 107 secured by the by-laws. The transaction however has never been settled and the period of twelve months after the date of registration of the Plan within which the appellant was to give the notice under by-law 40 expired on 31st December, 1983 and before judgment in the action, which was given on 5th March, 1984. As the appellant had not given the notice under by-law 40 and was not, at the trial of the action, in a position to give such a notice, the learned judge held that the appellant did not have a present ability to perform the contract and refused a decree.

One of the grounds taken in the notice of appeal is that there was no evidence that the notice pursuant to by-law 40 had not been given to the Body Corporate. The finding of the learned trial judge is however supported by incontrovertible evidence. A Mr Davies-Graham a partner in the firm of solicitors acting for the appellant identified Ex. 13 as "the formal notification to the Body Corporate by Dainford Limited with the allocation of car space 107 to Lot 131 in the Imperial Surf development". He went on to say that this particular notification was not delivered but was ready for delivery if settlement had proceeded; that it was in his possession at all times so that the transaction might have been settled; that Ex. 13 was the original (and I pause to say that an examination of Ex. 13 plainly shows it to be an original document); that the original having

been shown to the purchaser would have gone to the Body Corporate and a copy would have been handed to the purchaser or its solicitor. The copy which would have been handed to the purchaser or its solicitor was tendered as Ex. 14.

The situation may then be summed up as follows:—

(a) The strict requirements of cl. 5(a) were not complied with.

(b) By-law 40, if valid, and its validity is the subject of an appeal to the High Court of Australia, Dainford Limited v. Smith, at present awaiting hearing, would have resulted in exclusive use of car space 107 being acquired by the purchaser of Unit 131 if, but only if, Dainford nominated it within 12 months of the registration of the Building Units Plan. From 31st December, 1983 this became impossible.

(c) In Dainford v. Smith (supra) Williams J. held cl. 40 to be as I understand it a substantial compliance with the obligation imposed by cl. 5(a) and for my part I am prepared to assume that that decision was correct.

(d) By the time of the trial even substantial performance of the car space obligation required the concurrence of the Body Corporate by unanimous resolution. See s. 30(7) of the Building Units and Group Titles Act 1980-1984.

Paragraph 5(b) of the defence clearly raised the car space issue. It alleged that the plaintiff had failed as required by the contract to ensure that prior to settlement the by-laws of the Body Corporate brought into existence upon the registration of the plan granted to the defendant the exclusive use for car parking of that part of the common property outlined in red on the sketch plan marked "B" annexed to the contract. This allegation is in the

precise language of cl. 5(a) of the contract. It is plainly made out as the breach occurred when the first by-laws of the Body Corporate were brought into existence and no matter what date for settlement might have been appointed by the court, subsequent amendments of the by-laws could not have altered this position. It must however be conceded that by subsequent amendments it might have been possible for substantial performance to be tendered by the vendor. The point however is that the car space point was clearly raised by the pleadings and the case was decided by the learned trial judge precisely upon the point which was argued by Mr Robin for the respondent, who properly drew his Honour's attention to the decision of Williams J. to which I have referred and pointed out, rightly in my opinion, that it was impossible for the vendor ever to comply with by-law 40. The only reply made by Mr Boyce Q.C. was that the court should not assume that on completion the vendor would not be able to convey what was agreed. What was agreed was contained in cl. 5(a) and that submission was plainly wrong. It was then argued that a decree should be made on the footing that the Body Corporate might well choose to comply with a suggestion from the vendor. There was no suggestion in argument that the appellant had as much as ground for belief that a unanimous resolution of the Body Corporate was likely to be forthcoming before any date for settlement which the court might appoint. At the date of the trial the vendor was in breach of cl. 5(a), unable to tender substantial performance under by-law 40 and had lost control of the Body Corporate by which alone the substantial effect of the purchaser's rights under cl. 5(a) could be given.

In my opinion the conclusion reached by the learned trial judge was correct. To give the respondent substantially what it contracted to purchase involved not merely possession of car space 107 but a right, protected by the by-laws, to the exclusive use of that car space. The appellant's ability to fulfil its obligation in this respect was distinctly put in issue by the defence; and throughout the trial and up to judgment it was not able to

fulfil that obligation. Nor did it offer any indication of future ability to do so. This would have involved a further amendment of the by-laws and the appellant was no longer in control of the Body Corporate. It is true that since the hearing of this appeal an appropriate amendment of the by-laws has been made with effect from 7th August, 1984. That however is irrelevant to the correctness of the decision under appeal.

I cannot accept the view that the appellant has an easy solution to this problem in cl. 5(b) of the contract, which provided that the vendor might elect to include the car space as part of the unit the subject of the contract of sale in the Plan. The car parking space, as is recognized by cl. 5(a), is part of the common property. Upon the registration of the Plan there come into existence not only the individual home units but also the common property. See s. 8 of the Building Units and Group Titles Act. The common property is held by the proprietors as tenants in common in shares proportional to their lot entitlements: s. 20. Part of the common property may be transferred only by the body corporate pursuant to a unanimous resolution: s. 22(1). It follows that on any view, the ability of the appellant to give to the respondent at settlement possession of the car parking space which was protected by the by-laws and its ability to transfer the title to the same car parking space both require positive action by the body corporate in which the title to that space was vested. It was not a case in which the vendor could point to the likelihood of its securing the necessary action on the part of the body corporate in the foreseeable future and right up to the close of argument on the appeal the appellant advanced no such case.

The argument however runs that it is erroneous to regard a decree for specific performance as a judgment given once for all, as it is said. The contention is that the usual order decreed amongst other things an enquiry as to title. Enquiries as to title are almost unheard of under the Torrens System. They were a great advantage to

purchasers under the old system, requiring as they did much fuller disclosure by the vendor than was involved in the abstract of title. It is plain however that it was not an invariable rule that there be an enquiry as to title. Fry on Specific Performance (6th ed., 1921) at p. 609 contains the following passage:—

> "1316. Where the vendor of land sues the purchaser for a specific performance of the contract, the defendant may, in some cases, succeed in having the action dismissed at the trial, on the ground of a defect in the plaintiff's title, provided the defect in title has been prominently put forward in the pleadings: but where this is not the case, the defendant is entitled to have an inquiry directed as to the title of the vendor to the lands in question. This right is derived from the extraordinary nature of the jurisdiction which the vendor seeks to put in action, in consideration of which the purchaser has a right, not only to have such a title as the vendor offers upon the abstract unauthenticated, but the highest assurance upon the nature of his title which can be acquired for him by the production of deeds, the directing of inquiries, and the sifting of the vendor's conscience."

In Lucas v. James (1849) 7 Hare 418; 68 E.R. 170 Sir James Wigram V-C said at pp. 425 and 175 respectively:—

> "I do not, in the least degree, doubt the power of the court to enter upon the question of title at the hearing of the cause, or to make such a question a ground for dismissing a bill; but, in order that it may be proper so to deal with a cause, the defect or supposed defect in the title should be prominently put forward in the pleadings."

In this case the central point litigated was the inability of the appellant to give to the respondent on settlement an exclusive right to the car park protected by the by-laws. The appellant had in fact contended in a variety of ways that it could meet its obligation in relation to the car space. Had the learned judge directed the enquiry as to title, something he was not asked to do so far as I can see, there is nothing to indicate that the

Master's answer would have been any different than that which emerged at the trial. The fact that five months later the situation has changed is not, in my opinion, to the point.

Fry op. cit. at para. 1386 cites a rule laid down by Leach V.C. after consultation with Lord Eldon, in Esdaile v. Stephenson (1822) 6 Mad. 366; 56 E.R. 1131,

> "that where a necessary party to the title was neither in Law nor Equity under the control of the vendor but had an independent interest, unless there was produced to the Master a legal or equitable obligation on the part of the stranger to join in the sale, the Master ought to report against the title; otherwise, where a necessary party to the title was under the legal or equitable control of the vendor, as a mortgagee, where the Master might well report that upon payment of the mortgage a good title could be made."

One must in my judgment come back to first principles. As Windeyer J. observed in Mehmet v. Benson (1965) 113 C.L.R. 295 at p. 314 -

> "It is necessary that the plaintiff in an action for specific performance should allege in his pleading and prove at the nearing his readiness and willingness to perform the contract on his part: and readiness involves an ability to perform it: Ellis v. Rogers (1884) 29 Ch.D. 661, 667; McDonald v. McMuller (1908) 25 W.N. (N.S.W.) 142; Alam v. Preston (1938) 38 S.R. (N.S.W.) 475; Bando v. Goldberg, (1944) 62 W.N. (N.S.W.) 87; King v. Poggioli (1923) 32 C.L.R. 222 at p. 247 . At the date when the suit is commenced the plaintiff must then be in a position to say that he is ready and willing to do at the proper time in the future whatever in the events that have happened the contract requires that he do."

The appellant in this case was unable to demonstrate its readiness and ability to perform the substance of the contract either at the institution of the action or at the date of judgment; or the likelihood of its being able to do so at the date for settlement to be appointed by the decree which it sought.

The appellant derives no comfort from the decision of this court in Powell v. Whyte [1968] Qd.R. 255. That case concerned oral agreements for mutual easements of way and for the laying of concrete car tracks. Specific performance was decreed although the defendant, without raising the matter on the pleadings, contended amongst other things at the trial that the plaintiff was unable to perform by reason of having put a tenant into possession of the land in question. The learned trial judge considered that the point was to be tested as at the date of the carrying out of the judgment and not of the trial and on the former date the tenancy would almost have expired. The fact however was that prior to judgment the concurrence of the tenant has been obtained and the court was aware of this before judgment was entered. In these circumstances it was quite inconceivable that the Full Court would set aside the decree by reason of the tenancy.

It would, in my judgment, be quite wrong for us to set aside this judgment and decree specific performance on the basis of a change in circumstances 16 months after the issue of the writ and five months after the judgment.

I would dismiss this appeal with costs.

IN THE SUPREME COURT OF QUEENSLAND No. 1341 of 1983

FULL COURT

BETWEEN:

DAINFORD LIMITED (Plaintiff) Appellant

-and-

BOCADA PTY. LTD. (Defendant) Respondent

JUDGMENT - McPHERSON J.

Delivered the 24th day of October, 1984.

The facts relevant to this appeal are these. The defendant purchaser agreed to buy a unit in the plaintiff vendor's building "Imperial Surf" together with a designated car space no. 107. Under the contract cl. 3(a) settlement was to take place within 30 days of notice that the building unit plan had registered. Registration occurred on 31st December 1982 and notice was given on the same day. In the circumstances, including the provisions of cl. 3(a) and cl. 15 of the contract, that meant that settlement was due on 1st February 1983, and the purchaser's solicitors were advised accordingly. Time was by cl. 11 expressed to be of the essence of the contract.

On 29th December 1982 the purchaser wrote a letter (ex. 9) to the estate agents acting for the vendor. In it the defendant said "we feel that the building and unit is not satisfactory and we will defend the contract of purchase and therefore are requesting to withhold the deposit ... not to pass it on to the vendor...". The learned trial judge said of this communication that "the letter was plainly ambiguous and was not acted upon by the parties as a notice of rescission". However that may be, the purchaser failed to attend to settle the transaction on 1st February 1983. Correspondence then ensued between the solicitors and on 25th February 1983 the vendor's solicitors nominated 17th March 1983 as a further settlement date. The purchaser failed to attend on that occasion also. On 17th May 1983 the purchaser gave notice pursuant to s. 49 of the Building Units and Group Titles Act 1980 ("the Act") purporting to "void" the contract. This notice was not relied upon by the purchaser at the trial, because it had by then been overtaken by the legislative amendment which inserted s. 49A in the Act. On appeal it was nevertheless sought to invoke that notice as a communicated election by the purchaser to treat the contract as at an end by reason of essential breach on the part of the vendor in the performance of the contract.

The first question on appeal therefore is whether there had been any such breach by the vendor. At the trial

the purchaser defended the vendor's action for specific performance on various grounds of which the principal ground was that the vendor was at the contract date for settlement on 1st February 1983 unable to satisfy the requirements of cl. 5 of the contract. That clause is as follows:—

> "5. (a) The Vendor will ensure that prior to settlement the By-Laws of the Body Corporate brought into existence upon the registration of the Plan will grant to the proprietor for the time being of the said unit the exclusive use for car parking in that part of the common property outlined in red on the sketch plan marked "B" annexed hereto.
>
> (b) The Vendor may elect to include the car space as part of the said unit in the Plan. If the Vendor so elects then the terms of paragraph (a) of this clause shall not apply and the By-Laws to be adopted on registration of the Plan shall be varied accordingly."

The trial judge accepted that on 1st February 1983 the vendor was not able to perform in terms of cl. 5 and that the plaintiff had therefore failed at the trial to show that it was, and in the past had been, ready, willing and able to perform the contract. He accordingly dismissed the plaintiff's action. The second question on appeal therefore is whether, even if the vendor was not in breach of the contract so as to justify rescission of the contract, His Honour was correct in refusing specific performance by reason of the alleged failure of the vendor to establish its readiness, willingness and ability to perform.

I begin by considering the effect of the vendor's conduct at the date for settlement, which was 1st February 1983, when the vendor attended for settlement but the purchaser did not. What is alleged against the vendor is that it was on that date not able to complete the contract. In paragraph 5 of its defence the purchaser positively alleged that the plaintiff was not "at material times" ready, willing and able to perform its obligations under the contract. Particulars volunteered in paragraph 5(b)

confined that issue, so far as relevant here, by saying that "the plaintiff has failed as required by the contract to ensure that prior to settlement the by-laws ... brought into existence ... granted to the defendant the exclusive use for car parking of the identified car space." In paragraph 10 of the defence this is alleged to form a ground for rescission of the contract. The reference in paragraph 5(b) is to by-law 40, which purports to confer on the proprietor for the time being of each lot in the building the right to exclusive use of the car space of which the identifying number is to be notified in writing by the vendor to the Council of the Body Corporate within 12 months after the date of registration of the building units plan.

The vendor is said to have been in breach of cl. 5 of the contract for two reasons associated with that by-law. One is that the by-laws including by-law 40 were not registered until 4th February 1983, which was three days after the contract date for settlement. The other is that the evidence failed to establish that the body corporate had been notified by the vendor of the identifying number of the designed car space either on or before 1st February or on any date within the period of 12 months after registration of the plan on 4th February 1983.

The question to be considered first therefore is whether the matters referred to constituted a breach by the vendor that justified the purchaser in terminating the contract, as it claims to have done by its letter dated 17th March 1983. The primary obligations of the parties are, as stated in cl. 3, that:—

> "(c) On settlement the vendor will execute and deliver to the purchaser in exchange for the balance of the purchase money a memorandum of transfer of the said unit in registerable form (other than for stamping). The memorandum of transfer shall be prepared by the purchaser and delivered to the vendor's solicitors in sufficient time prior to settlement to permit execution thereof by the vendor."

Further, by cl. 3(e) the certificate of title to the said unit, if then available, is to be delivered to the purchaser "on settlement." In addition, the vendor is required by cl. 5(a) to ensure that the by-laws grant to the proprietor of the unit the right to exclusive use of the designated car space. That is to be done "prior to settlement", which must, I think, be taken to extend to the last moment before settlement takes place.

It will be seen that in each of these provisions the obligations of both vendor and purchaser are defined by reference to "settlement" rather than the original date fixed by the contract for settlement to take place. The fundamental obligation under cl. 3(c) is to exchange the registrable transfer for the balance of purchase money and to do so "on settlement." For that purpose both parties must attend at the time and place determined in accordance with cll. 3(a) and 3(b) respectively. If without justification either or both of them fail to attend on settlement the contract is not thereby discharged. The contract remains on foot thereafter although time ceases to be of the essence. The original date for settlement having passed, it becomes necessary to fix a new date for settlement. Only by doing that can operative effect be once again given to the obligations of the parties defined as they are in cll. 3 and 5 by reference to "settlement".

Much of this is so elementary as to be scarcely worth stating; but it shows that in the present case the vendor was not in breach. True it is that on or before 1st February 1983 the by-laws had not been brought by the vendor into the form required by cl. 5(a). But the period available for performing that obligation continued until the moment of settlement or immediately before it. By failing to attend on 1st February 1983 the purchaser precluded settlement on that date and so prevented that moment from arriving. In doing so, the purchaser itself acted in breach of cl. 3(c) of the contract. But since the vendor did not elect to rescind, the contract accordingly remained in being awaiting the fixing of a new date for

settlement. It follows that the period available to the vendor for performing its obligations under cl. 5 was correspondingly enlarged. Unless and until the parties attend for settlement, the vendor cannot be said to be in breach of its obligation under cl. 5 to do an act at any time "prior to settlement."

If instead of absenting itself the purchaser had attended for settlement on 1st February 1983 and tendered the purchase money, it would no doubt have succeeded in placing the vendor in default. Having to that time failed to comply with the requirements of cl. 5(a), the vendor would have been unable to complete the contract, and the purchaser would thus have earned the right to terminate or rescind. It does not follow that, without the ritual of attendance and formal tender, the purchaser would never have been entitled to rescind. The right to do so would arise if it could be shown that at any time in the course of the contract the vendor was "wholly and finally disabled from performing essential terms of the contract altogether": see British & Benningtons Ltd. v. North West Casnar Tea Co. [1923] A.C. 48, 72. A party so disabled cannot thereafter enforce the contract if at that point the other party renounces it: Rawson v. Hobbs (1961) 107 C.L.R. 466, 481. But that is not the present case. There is no question here of the vendor's being wholly and finally disabled on 1st February 1983 from performing, on or before settlement at some time in the future, its obligation under cl. 5(a) of the contract. The by-laws of the body corporate, including by-law 40, were registered on 4th February 1983. It cannot be suggested that the requisite notification under by-law 40 could not have been given then or during the ensuing 12 months. Even if the effect of the decision of this Court in Dainford Ltd. v. Smith (unreported) can be said to have rendered that method of performance ineffective, other valid means remained and remain available for satisfying cl. 5. The vendor might at any time before settlement procure an amendment to the by-laws that validly conferred on the purchaser the right to exclusive use of car space 107. Such an alteration is

possible under s. 30(7) of the Act by unanimous resolution of the body corporate. Alternatively, the vendor might elect to perform under cl. 5(b) of the contract by including the car space as part of the lot on the registered plan. In my view the purchaser failed to establish that the vendor had at any time become wholly and finally disabled from performing its obligation under cl. 5 "prior to settlement", whenever that might or may take place.

In support of the purchaser's submission that the vendor's incapacity to perform must be considered by reference to its ability to do so on 1st February 1983, reliance was placed upon a decision of the New Zealand Court of Appeal in Pearce v. Stevens (1904) 24 N.Z.L.R. 357 and on a decision of the Capital Territory Supreme Court in Vukelic v. Sadil-Ouinlan & Associates Pty. Ltd. (1976) 26 F.L.R. 457. In the latter case the question was whether a vendor was ready, willing and able at the date for settlement fixed by a notice to complete given by him to the purchaser. On the date in question he had not procured a certificate of fitness in respect of a garage on the premises and so had not, as required by cl. 3 of the contract, complied with all provisions of the Crown lease the subject of the contract. It was held that he was not entitled to rescind the contract by reason of non-compliance by the purchaser with the notice. Assuming that there is a sufficient analogy with a case such as the present, in which the vendor seeks not rescission but specific performance of the contract, the decision referred to must now be read subject to the qualification recognized in the two subsequent New South Wales decisions of McNally v. Waitzer [1981] 1 N.S.W.L.R. 294 and Taylor v. Raglan Developments Pty. Ltd. [1981] 2 N.S.W.L.R. 117. That qualification is that the vendor should be "currently able to fulfil his obligations at the due time": see McNally v. Waitzer [1981] 1 N.S.W.L.R. 294, 297, per Reynolds J.A.; at pp. 303-304 per Hutley J.A. In that case the due time was "on completion", just as in this it is "on settlement" or "prior to settlement". See also Taylor v. Raglan

Developments Pty. ltd. [1981] 2 N.S.W.L.R. 117, 132, per Powell J.; and Ellis v. Rogers (1884) 29 Ch.D. 661, which is referred to hereafter.

The New Zealand decision referred to occupies a different space in the law. It rests on the special rule that a purchaser under a contract of sale of land is not in all cases obliged to wait until the date for completion in order to see whether the vendor can convey title to the land sold. He is entitled to rescind the contract forthwith (or breyi manu, as it is said) once it becomes clear that the vendor cannot himself convey the land nor compel a conveyance of it by some other person whose participation is necessary: see Forrer v. Hash (1865) 35 Beav. 167; 55 E.R. 858; Bell v. Scott (1922) 30 C.L.R. 387; Rawson v. Hoobs (1961) 107 C.L.R. 466, 481-482; Rands Developments Ltd. v. David (1975) 133 C.L.R. 26, 30; Meriton Apartments Pty. Ltd. v. McLaurin & Tait (Developments) Pty. Ltd. (1976) 133 C.L.R. 671, 674-675. The right of the purchaser to rescind in such circumstances has been said to be "a special right arising out of the difficulty of making title to land in England": Price v. Strange [1978] Ch. 337, 355. In England the rule as stated in its modern form in Halkett v. Earl of Dudley [1907] 1 Ch. 590 appears to be treated simply as an application or the doctrine of mutuality in suits for specific performance. In Australia it seems more correct to regard it as an illustration of the principle in British and Benningtons Ltd. v. North Western Cashar Tea Co. [1923] A.C. 48, 72, to which reference has already been made. See on this subject what was said by Dixon C.J. in Rawson v. Hobbs (1961) 107 C.L.R. 466, 480-482. Adopting that approach, the vendor in the present case was, for reasons already given, not at any time wholly or finally disabled from performing its obligation under cl. 5 on settlement of the contract. The purchaser was therefore not entitled to rely on the principle referred to as a basis for electing to rescind the contract, if that is what its letter dated 17th May 1983 is to be taken to have intended.

I said that the first question was whether the purchaser was justified in rescinding for a breach by the vendor in an essential respect. That was the issue raised by paragraph 10 of the defence, and it must in my opinion be answered in the negative. The second question is the issue of the readiness, willingness and ability of the vendor to perform. It is no doubt correct that, once put in issue by the defence, the plaintiff is bound to prove its readiness, willingness and ability to perform the contract: see Hensley v. Reschke (1914) 13 C.L.R. 452, 467-468. In the present case an issue was raised by paragraph 5 of the defence, although as I have said paragraph 5(b) of that pleading appears to limit that issue to what is expressly pleaded there. That is that the plaintiff had "failed as required by the contract to ensure that prior to settlement the by-laws brought into existence" granted to the defendant exclusive use of the car space. As to that issue, it is plain that the defendant cannot succeed because there has never been a settlement of the contract by reference to which the plaintiff's ability to complete might be tested. Paragraph 5(b) of the defence in truth involves an attempt to import the contract date for settlement, which was 1st February 1983, into the provisions of cl. 5(a) of the contract for the purpose of asserting that the plaintiff was not ready, willing and able to perform on settlement. But, as I have said, settlement did not take place on that date because the purchaser itself failed to attend at the place and date fixed and tender the purchase money. The vendor therefore never came under an obligation at that date to be ready, willing and able to complete the contract. The moment at which that obligation fell to be performed had not then and has not yet arrived.

In the court below the learned trial judge approached the matter on a broader footing, holding that the plaintiff was bound to prove that it "has been and is now", ready, willing and able to fulfil its obligations under the contract. His Honour concluded that "a present ability to perform the contract cannot be shown as the time for settlement has passed and more than 12 months have elapsed

since registration of the plan." The question is whether this conclusion is correct, and if so whether the consequence is to deny to the plaintiff vendor a right to specific performance of the contract.

There is, I think, no doubt that in specific performance proceedings the requirement that the plaintiff be ready, willing and able to perform is capable of bearing a double aspect. In the first place it may mean that past conduct of the plaintiff has been such that, in accordance with settled principles, he will be denied the discretionary remedy of specific performance. Or it may mean that he will not be able to perform and complete his contract at the time in the future when he is bound to do so. Those two aspects of the requirement or rule are treated as distinct in a number of authorities, of which it is sufficient here to refer here to the passage in the 6th edition of Fry on Specific Performance cited with approval by Starke J. in King v. Poggioli (1923) 32 C.L.R. 222, 247. The first aspect is an application of the principle that equity will not assist a plaintiff who is himself in breach of essential obligations under the contract. It is an exemplification of the maxim that he who comes to equity must come with clean hands: see Green v. Sommerville (1979) 141 C.L.R. 594, 610. A plaintiff who is in breach only of inessential terms will not be denied relief if he remains ready, willing and able to perform the substance of his contract: Fuller's Theatres Ltd. v. Musgrove (1923) 31 C.L.R. 524, 550; Mehmet v. Benson (1965) 113 C.L.R. 295, 307; Green v. Sommerville (1979) 141 C.L.R. 594, 610.

This first aspect of the rule cannot prevent the vendor from succeeding in the present case. Certainly the obligation under cl. 5(a) is essential; but in the absence of the purchaser at settlement the vendor cannot have been in breach of the obligation "prior to settlement" to ensure that the by-laws were in the required form it is however with the second aspect of the rule that the present case is concerned; that is, with the question whether the vendor will be able to perform the contract at the time when he is

required to do so. That, in the circumstances that have occurred in the present case, will be the time fixed by the order, if any is made, for specific performance or by directions given under that order. The vendor will at that time, or immediately before it, be bound by cl. 5(a) of the contract to ensure that the by-laws confer on the defendant the exclusive right to the car space; or under cl. 5(b) it may at its election include the car space as part of the unit in the building units plan. In the latter event the certificate of title delivered on settlement will perfect the title of the purchaser to that car space.

The vendor's obligation under cl. 5 is thus a matter that goes to conveyance and not to title. As such, it is prima facie not a matter to which objection can be taken as a defence to the action for specific performance. The point is made in a number of authorities. In Ellis v. Rogers (1884) 29 Ch.D. 661, the plaintiff sought specific performance of a contract for the sale to the defendant of a lease containing a covenant not to assign without the licence or consent of the landlord. That consent had not been obtained at the time when the defendant repudiated the contract. The plaintiff was thereupon compelled to resume possession with a view to sale. He consequently abandoned his claim for specific performance and confined his claim in the action to damages. Kay J., in a passage that was referred to with approval by Windeyer J. in Mehmet v. Benson (1965) 113 C.L.R. 295, 314, said that the plaintiff was bound to snow ability to perform at the time of bringing his action. His Lordship held that, as the licence to assign had not been obtained and as no inference could be drawn that it would be obtained, the plaintiff's claim for damages failed: see 29 Ch.D. 661, 667. On appeal Cotton L.J. dissented from that view saying (29 Ch.D. 661, 671):—

> "The vendor up to the time when the purchaser refused to go on had been ready and willing to do all that was required to be done by him up to that time, and the proceedings had not reached a stage when it was necessary for him to be furnished with a licence to assign. It seems to me, therefore, that if there had been no other

> objection to the plaintiff's title he would have been entitled to relief, but I do not decide the point."

To the same effect are passages in the judgments of Bowen and Fry L.JJ. in that case.

As can be seen from what was said by all of the learned Lords Justices, the appeal in Ellis v. Rogers (supra) was disposed of on another ground, so that their remarks on this point are obiter; but they were subsequently treated as correct by Lindley H.R. and Rigby L.J. in their joint judgment in Day v. Singleton [1899] 2 Ch. 326, 327. The same approach is manifest in the judgments of the High Court in Burges v. Williams (1912) 15 C.L.R. 504, where before settlement the vendor mortgaged land that he had contracted to sell. The existence of the mortgage was held to be no obstacle to specific performance provided, as Griffith C.J. said, the vendor "can make a good title to the property upon the inquiry into title" (15 C.L.R. 504, 507). Barton J. was of the same opinion, and Higgins J. said he had "no doubt that if the action succeeds the mortgage can be paid off. The existence of the mortgage is an objection of conveyance, not an objection to title." The case is a particularly strong one because the mortgage in question had been granted by the vendor after the action for specific performance had been instituted. The plaintiff had before instituting the action also agreed to sell or sold a small portion of the subject land. As to that, Burnside J. in the Full Court of Western Australia, whose decision was affirmed by the High Court, said (14 W.A.L.R. 193, 144):—

> "In my opinion the plaintiff must make a good title to the land which he has sold, and if he is unable to make such a good title the decree for specific performance obviously cannot be completed. If he is able to make a good title at the time when he is directed to do so, that is at the conclusion of the inquiry, then his dealing in the land in the meantime does not appear to me to form any defence to the claim for specific performance endorsed upon the writ."

What I have said assumes that the obligation of the vendor under cl. 5 goes to conveyance rather than title. However, there has long been a settled Chancery rule by which a matter of conveyance might in some circumstances be treated as one of title. That has been said to be so:—

> "where a necessary party to the title was neither in law nor equity under the control of the vendor, but had an independent interest, unless there was produced to the Master a legal or equitable obligation on the part or the stranger to join in the sale, the Master ought to report against title ..."

See Esdaile v. Stephenson (1822) 6 Madd. 366; 56 E.R. 1131, per Leach V.-C. The judgment proceeds to say that after such a report, the Court will, at the hearing upon further directions, compel the purchaser to take the title if at that stage the vendor has succeeded in curing the defect. The matter of the car space seems to me to be one to which that Chancery rule might well apply, both because the Act conceives of the car space as a right appurtenant to the lot (see s. 30(8) of the Act), and because, at least as regards performance of the obligation under cl. 5(a), the vendor requires the participation of the body corporate by unanimous resolution under s. 30(7) to make the requisite by-laws. On that footing the ability of the vendor to assure the right to the car space may be regarded as a matter of title to be dealt with on the inquiry for title.

Before the Judicature Act the Chancery practice in proceedings for specific performance was to direct an inquiry or reference as to title in virtually all cases where title was in dispute. Where the only question in the proceedings was one of title the reference was ordinarily directed before trial, although it might also be directed at trial: see Daniell's Chancery Practice, 6th ed., vol. 2 p. 1132. The Judicature Act and rules somewhat enlarged the power of the Court to direct inquiry as to title "at any stage of the proceedings": see R.S.C. (QLd), O. 37 r. 5; but Daniell presumes that the power would not be exercised

before trial where the validity of the agreement is put in question: Daniell, op. cit., p. 1133. The terms of such an inquiry are referred to in volume 1 of the same edition of Daniell, p. 626, as follows:—

> "It may be noticed here that the terms in which the direction for an inquiry as to the title of a vendor is framed, are not to inquire whether he could make a good title at the time of entering into the contract, put whether he can, that is, at the time of the inquiry, make a good title; and it has been held that in the vendor can snow a good title at any before the result of the inquiry into the title by the officer of the Court has been certified, it will entitle him to a judgment. And even after the certificate, if the vendor can satisfy the Court that he can make a good title by clearing up the objections, the court will make a judgment in his favour."

The authorities cited in support of the first proposition are Langford v. Pitt (1731) 2 P. Wms. 629; 24 E.R. 890, 891; Parr v. Lovegrove (1857) 4 Dr. 170; 62 E.R. 66, 68; Gamers v. Bonnor (1884) 54 L.J.Ch. 517. They do indeed establish that the inquiry is whether good title can be made at the time of the inquiry. The further inquiry when such title could first be made was relevant mainly, if not solely, to the question of costs. The purchaser is ordered to pay the costs only up to the time when a good title is shown unless the litigation was caused by something other than title, in which event "if the purchaser is wrong, the vendor is entitled to all the costs of action, though he did not bring in the evidence until just before the certificate": Gamers v. Bonnor (1834) 54 L.J.Ch. 517, 519, per Pearson J.

Inquiries as to title are not often directed, at any rate in Queensland, at the present time. No doubt one reason for this is that what is commonly bought and sold is freehold land, and in this State title to such land is now almost invariably registered under the Real property Act 1861-1982. Section 96 of that Act provides that in any suit for specific performance by a registered proprietor of land

against a purchaser the certificate of title is to be conclusive evidence of title entitling the proprietor to specific performance. Section 96 would therefore govern this case if the vendor here makes title to the car space under cl. 5(b) of the contract. Alternatively he may be able to snow good title to the car space under cl. 5(a) if he can demonstrate on the inquiry as to title that the by-laws have been appropriately altered pursuant to s. 30(7) of the Act. The question is whether such an inquiry should now be ordered.

Although inquiries as to title are not often sought or directed, a recent instance in Queensland in which that course was envisaged is to be found in the decision of this Court in Powell v. Wnyte [1968] Qd.R. 255. There an objection taken to specific performance of an agreement to grant an easement of way was that the dominant tenement was in the possession of a tenant of the plaintiff under a lease that had not expired. The learned trial judge disposed of this objection by saying that the time for carrying out the judgment was the relevant time, not the date for judgment citing inter alia Burges v. Williams (supra): see 1968 Qd.R. 255, 260. Between trial and the hearing of the appeal the plaintiffs procured a variation of the lease acknowledging the power of the plaintiffs to grant the easement. In the Full Court Wanstall J., after referring to the passages mentioned above, but in the 7th edition, of Daniell's Chancery Practice held that it followed that a good title would have been certified had an inquiry as to title been directed in the court below: see [1968] Qd.R. 255, 270. His Honour held that the objection to title ought to be disposed of by doing what should have been done below had the inquiry been directed. Gibbs J. (with whom Douglas J. agreed) likewise held that:—

> "there is no reason why the plaintiffs should not grant a lease provided that they could show that they were able effectively to grant the easement when inquiry as to title was made after the decree. See Burges v. Williams (1912) 15 C.L.R. 504, at p. 507, upon which cue learned judge rightly relied."

In the present case the vendor on appeal sought an order that there be an inquiry as to title directed to the question whether the vendor can under cl. 5 of the contract make title to the car space in the event that specific performance is ordered. Powell v. Whyte (supra) and Burges v. Williams (supra) are authority for adopting that course in a case such as this. It is true that in Powell v. Whyte some emphasis appears to have been placed upon the circumstance that at trial in that case "the defence as pleaded did not raise any issue as to the title of the plaintiffs, or their ability to carry out their part of the agreement": see [1968] Qd.R. 255, 274, per Gibbs J. in the present case one aspect of that issue may be said to have been raised by paragraph 5 of the defence, alleging that the plaintiff "was not at material times" ready, willing and able to perform; and also by paragraph 5(b), which relied on the plaintiff's failure prior to settlement to ensure that the by-laws satisfied cl. 5(a) of the contract. For reasons that have been given, that issue will on this appeal be determined against the purchaser.

The question whether, if a decree were made, the defendant would be able to fulfil its contractual obligation as to the car space does not appear to have attracted much specific attention at the trial, although it is clear from the submissions (which were transcribed) of senior counsel for the plaintiff that he urged that the court should not assume that if an order for specific performance were made the vendor would be unable on settlement to convey what it had agreed to convey, and that the body corporate of the building units might well choose to comply with a suggestion by the plaintiff on the matter of the car space (see pp. 66-67 of the record). Earlier he had also submitted (at p. 65) that the proper course was to order specific performance leaving it to the defendant purchaser "to see what is available to him on settlement". That is consistent with a very long line of authorities dealing with specific performance of a contract for the sale or assignment of a lease for which the approval or consent of the landlord is required. See, for Australian

examples, Macaulay v. Greater Paramount Theatres Limited (1921) 22 S.R. (N.S.W.) 66, 74-75, per Harvey J.; Ferguson V. Hullock; [1955] V.L.R. 202, 207, where Gavan Duffy J. said that the matter of such consent could be "left to be dealt with on making title and a conditional decree for specific performance be made (see Ellis v. Rogers (1885) 29 Ch.D. 661)"; and Kennedy v. Vercoe (1960) 105 C.L.R. 521. In Dillon v. Hasn [1950] V.L.R. 293, 298, in the course of reviewing the authorities, Sholl J. said that "specific performance will not be refused on the ground that the consent or licence of a third party is necessary, unless it further appears that it cannot be obtained". If in the end the requisite consent is not obtained then the decree or the contract may have to be rescinded; but the time of trial is not the time for determining that: Macaulay v. Greater Paramount Theatres Limited (1922) 22 S.R.N.S.W. 66, 75.

What is meant in this context by a conditional decree for specific performance is a decree that simply declares that the contract ought to be specifically performed leaving it to a later stage to determine whether or not there should be a full decree finally ordering that the contract be specifically performed. Such orders are commonly made in cases where the contract is expressly or impliedly subject to the consent or approval of a particular person or authority and the propriety of taking that course is recognized by many decisions of binding authority: see, for example, Patti v. Belfiore (1958) 100 C.L.R. 198; Kennedy v. Vercoe (1950) 105 C.L.R. 521; McWilliam v. McWilliams Wines Pty. Limited (1964) 114 C.L.R. 556; Brown v. Heffer (1967) 116 C.L.R. 344. Those were all cases in which some further step, usually involving a third party, was necessary before the vendor or purchaser became obliged to perform by transferring or, as the case may be, taking a transfer of the subject matter sold; cf. also Booker Industries Pty. Ltd. v. Wilson Parking (Old.) Pty. Ltd. (1982) 56 A.L.J.R. 825. It would be a radical departure from those authorities to require the plaintiff to prove at trial that the third party will

in the future give his consent so as to enable the transfer to take place.

In the present case the learned trial judge referred to the order made in Kennedy v. Vercoe (supra) and considered whether an order in that conditional form should be made. He said that "if a decree were to be made, it would only be made upon the defendant being given the exclusive use of car space 107". However His Honour rejected that course on the ground that "a present ability to perform cannot be shown as the time for settlement has passed and more than 12 months have elapsed since registration of the plan". with respect I cannot agree that the time for settlement has passed. For reasons I have given, the time for settlement has not yet arrived, the purchaser having prevented its arrival by its failure to attend on the date fixed for settlement and its subsequent unwarranted repudiation of the contract.

The reference in that portion of His Honour's judgment to the period of 12 months is, of course, a reference to that period in by-law 40, which has been mentioned earlier in these reasons. If anyone is responsible for the lapse of that period of time without settlement taking place, it is the purchaser, and it would be surprising if the purchaser were now permitted to take advantage of that circumstance. On appeal the vendor sought to challenge the finding implicit in that passage quoted from His Honour's reasons. I do not think it necessary here to examine in detail the basis of that challenge. What is clear is that a notification to the body corporate under by-law 40 of car space 107 is not the only means open to the vendor of assuring to the purchaser its right to that car space. As it is, the decision of this Court in Dainford Ltd. v. Smith (supra) although presently under appeal to the High Court, binds us to hold that such a notification would be ineffective in law to achieve its purpose. But there nevertheless remain available to the vendor other means under cl. 5 of the contract of assuring to the purchaser its right to the car space; that is, by procuring its

incorporation in the certificate of title, or by procuring an alteration of the by-laws by unanimous resolution. On one occasion when this appeal was listed for further consideration, the vendor sought to tender an affidavit snowing that the by-laws of the body corporate had pursuant to s. 30(7) now been amended so as to confer upon the proprietor of the subject lot an exclusive right to the use of car space no. 107. That affidavit was objected to by Mr. Robin for the purchaser on grounds that included a claim to investigate and challenge the validity of the new by-law or the procedure adopted in it. That is something which the purchaser is plainly entitled to do, and an opportunity for doing it will be afforded upon the inquiry as to title if that is ordered. In my view, therefore, what I have described as the second question on this appeal does not involve any valid basis for refusing specific performance in the action.

Two other matters relied on by the purchaser by way of defence at the trial are: (a) an allegation in paragraph 5(a) of misdescription of the unit as a two bedroom unit, whereas lot 131 the subject of the contract was a one bedroom unit; and (2) what is alleged in paragraph 6 of the defence to be uncertainty in the contract arising from the description of the lot as "28th level 'C' type". As to the first of these matters, His Honour, rightly in my opinion, held that there was no misdescription or misrepresentation; and that the point was in any event covered by the provisions of cl. 9(3)(d)(i) of the contract. As to the second matter, the uncertainty evidently resulted from the omission from the building at the design stage of a level numbered 13, with consequent alteration in the numbering of levels above floor 12 in the building. In Dainford Ltd. v. Tari Nominees Pty. Ltd. I have recently given reasons for my conclusion that, in the description of the unit the subject-matter of the contract, the lot number (in this case Lot no. 131) refers to the lot number on the building units plan to be registered in order to create the lot sold; and that that element in the description prevails over the reference to level, in this case "28th level". I

adhere to those reasons here, with the consequence that it cannot on any view be said that the contract sought to be enforced in this action is uncertain. In my view, the defence of uncertainty therefore fails, as His Honour in the court below, although for a different reason, held that it did.

Finally, it should be added that some time after the appeal had been heard, the purchaser by its counsel sought to adduce before this Court evidence by affidavit which, it was said, would justify a finding that the purchaser had been entitled all along to avoid the contract pursuant to s. 49 of the Act. It will be recalled that this formed the basis of allegations in paragraphs 7, 8 and 9 of the defence which were abandoned at the trial. The particular ground of avoidance now sought to be raised is not to be found among those alleged in the paragraphs that were abandoned, out relies on entirely fresh matter that was never pleaded, raised or determined at the trial. To entertain it now would require amendment of the pleadings, as well as discovery directed to that issue, and a further trial to determine that question. By any standard it is now plainly far too late to permit such a course. I would therefore not exercise any discretion that may exist in favour of admitting such fresh evidence.