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offer by the appellant to buy his shop premises at Burwood, near Sydney, for $24,000, no binding contract came into existence because the parties contemplated that they would not be bound unless and until a formal contract was signed by them and exchanged by their solicitors. On appeal from an order dismissing the suit the appellant submits that the learned judge should have held that the transaction between the parties itself amounted to a concluded contract and that as such it was not dependent on the execution and exchange of a formal contract …

No doubt it is right to say that the intention of the parties to a contract wholly in writing is to be gathered from the four corners of the instrument. The same may be said when parties have brought into existence a document intended to comprehensively record the terms of an agreement thus far reached, notwithstanding that it makes provision for the subsequent execution of a more formal contract which may contain terms not yet agreed. But even in these cases it is legitimate in the course of construing the document to have regard, when appropriate, to subject matter and surrounding circumstances. Here, however, we are concerned not with the construction of a written contract or document in the senses already discussed, but with an informal agreement arising out of an oral conversation, supplemented as it was by Ex D.

It is common ground that this informal agreement amounted to a limited consensus, but it is disputed that what then occurred amounted to a concluded contract. In resolving this dispute it is legitimate to ascertain the terms of the agreement then made by the parties, that is to say, what the parties relevantly intended, by drawing inferences from their words and their conduct in the making of that agreement. Where parties reach an agreement which is expressed informally, whether in writing or orally, the terms of their bargain are not ordinarily recorded in meticulous detail in the words which they use. To ascertain their relevant intention it is often necessary to resort to inference, a process for which there is little or no scope when the parties have taken care to comprehensively record the terms of their agreement in written form …

Once it is accepted that it was appropriate for the primary judge to draw inferences from the words and conduct of the parties it is evident that the conclusion which he reached was correct. There was in our view ample material from which his Honour could legitimately infer, as he did, that the parties mutually contemplated that a contract should come into existence in the normal course, that is, by means of the signing and the exchange of a contract in the form adopted by the Real Estate Institute of New South Wales, without relying on evidence that this was the unilateral intention or understanding of Mr Cummings, a finding which the appellant submitted was irrelevant.

The first consideration is that the usual method of selling real estate in New South Wales is by means of the signing and exchange of contracts in the form approved by the Real Estate Institute of New South Wales (see *Eccles v Bryant and Pollock* [1948] Ch 93, at p 99; *Smith v Lush* (1952) 52 SR (NSW) 207, at p 212), a practice which was confirmed by Mr Cummings' evidence of his understanding. That no departure from this method was intended is suggested by the absence of any discussion on 11 July of the terms (other than price) which one would expect to find in a binding contract for the sale of real estate (*Farmer v Honan and Dunne* (1919) 26 CLR 183, at p 192). The words "offer" and "accept" in that conversation do not give the matter a different complexion because in the circumstances of their use they suggest no more than that Mr Cummings and the respondent have decided the amount of the price. Then there is Ex D, which in our opinion puts the issue beyond all doubt. Prepared by Mr Cummings and signed by the respondent, it makes provision for the signing of a formal contract, a contract which as we know contains detailed terms and conditions neither agreed upon nor discussed in the conversation. Exhibit D makes it plain that Mr Cummings (on the appellant's behalf) and the respondent intended that the parties were to become bound by a formal contract containing a number of terms additional to the element of price which was the one matter upon which agreement had then been reached. In conformity with this intention instructions were given by Mr Cummings to the respondent's solicitor to send a contract to the appellant's solicitors.

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Viewed in this light the conversation of 11 July amounted to no more than a preliminary agreement which preceded the giving of instructions to solicitors and the signing and exchange of contracts in the usual way. And it was a preliminary agreement which was not in itself a binding contract …

For these reasons the appeal should be dismissed.

GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd

[1.110] *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631

[A number of letters passed between the prospective purchaser of a private hospital, Baulkham Hills Private Hospital ("the Purchaser") and the vendor, G R Securities ("the Vendor"). On 21 March 1986 the Vendor's agent sent to the Purchaser a letter offering to sell the hospital on certain conditions and which provided that upon acceptance of the offer by the Purchaser:

> our client would consider there to be a legally binding agreement in principle between yourself and it, until such time as formal contracts were exchanged.

On 25 March 1986 the Purchaser accepted the Vendor's offer. However on 10 April 1986 the Vendor denied that the parties had entered into a binding contract and refused to execute a formal contract. The Purchaser successfully sought an order for specific performance of the contract constituted by the exchange of correspondence. An appeal to the New South Wales Court of Appeal from the judgment of McLelland J was unanimously dismissed.]

McHugh JA (with whom Kirby P and Glass JA agreed):

Did the letters constitute a contract?

The principal issue in the appeal is whether the letters constituted a contract. The vendor says that the effect of the letters was that unless the parties exchanged contracts by 18 April 1986 "the deal" was off. It contends that no contract was made. Alternatively, it says that there was only a contract to hold the property for the purchaser until 18 April 1986.

An agreement for the sale of property at a specified price does not necessarily indicate a legally binding contract. The magnitude, subject matter, or complexities of the transaction may indicate that the agreement was a limited one not intended to have legal effect: *Sinclair, Scott & Co Ltd v Naughton* (1929) 43 CLR 310, at pp 316-317. In New South Wales, real estate is ordinarily sold by signing and exchanging contracts in the form approved by the Real Estate Institute and Law Society. Accordingly, even though the parties agree in writing that real estate is sold for a specified price, the presumption is that no binding contract exists until "contracts" are exchanged: *Smith v Lush* (1952) 52 SR (NSW) 207, at p 212; *Allen v Carbone* (1975) 132 CLR 528, at p 533. The vendor contends that the proper conclusion to be drawn from the sale of land, buildings and equipment which constitute a hospital containing sixty-two beds is that the sale was to be the subject of a formal contract drawn up by lawyers.

However, the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances: *Godecke v Kirwan* (1973) 129 CLR 629, at p 638; *Air Great Lakes Pty Ltd & Ors v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309, at pp 332-334, 337. If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction.

Even when a document recording the terms of the parties' agreement specifically refers to the execution of a formal contract, the parties may be immediately bound. Upon the proper construction

of the document, it may sufficiently appear that "the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms": *Sinclair, Scott & Co Ltd v Naughton* at (p 317) ...

The effect of the correspondence was to create an immediately binding contract which was to continue until formal contracts were exchanged. The offer of 20 March 1986 contemplated that contracts would be exchanged within thirty days. A written acceptance of that offer "would constitute a legally binding acceptance until such time as it is superceded [sic] by a formally binding agreement". The letter of 21 March accepted that offer subject to nine conditions. One of them was that formal contracts were to be exchanged by 18 April 1986. Another was that written acceptance "of these additional conditions" was to be received by 25 April 1986. In legal theory, the letter of 21 March was a counter offer. On receipt of the acceptance of that counter offer there was "a legally binding agreement in principle" which was to continue "until such time as formal Contracts were exchanged as aforesaid".

If the words "in principle" did not appear in the letter of 21 March, it would be impossible to contend that this correspondence did not constitute a binding agreement for the sale of the land, buildings, equipment and business name. Although the words "in principle" are curious, they cannot prevail against the conclusion to be drawn from the words "a legally binding agreement". Those words convincingly indicate that the parties intended to be bound immediately. Probably the phrase "legally binding agreement in principle" was intended to mean that the parties had reached agreement on the main matters and were content to be immediately bound.

Under the agreement each party was obliged to do all that was necessary on his part to enable the other party to have the benefit of the agreement concluded by the correspondence: *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at p 607. This included doing everything necessary to enable contracts to be exchanged by 18 April 1986: *Godecke & Anor v Kirwan* (at p 641). If the parties agreed on additional terms, they would be added to the formal contract. If they did not, the formal contract would give effect only to the agreed terms and conditions of the correspondence. The case, therefore, is one where the parties were bound by the informal agreement but expected to make a further contract which by consent might contain additional terms: *Sinclair, Scott & Co Ltd v Naughton* (at p 317).

Mr Simos QC for the vendor argued that the words "in principle" confirmed the conclusion that no binding contract was intended by this correspondence. He argued that the sale of a hospital containing sixty-two beds necessarily involved many complex matters which required the contractual imposition of rights and obligations extending far beyond the rudimentary conditions in the correspondence.

The matters to which Mr Simos refers would ordinarily require a conclusion that there was no binding agreement until formal contracts were exchanged. But the express words of the correspondence leave no room for the inference which would otherwise be drawn from the complexity, magnitude and subject matter of the transaction.

Mr Simos also argued that the correspondence contemplated further terms to be negotiated and that that was only consistent with no binding agreement. However, while the making of any further agreement would supersede the agreement in the correspondence, the operation of that agreement was to continue until formal contracts were exchanged.

In my opinion, the correspondence constituted a binding agreement for the sale of the land, building, equipment and business name. The appeal on this ground fails.

The requirement of writing

[1.120] Section 54A of the *Conveyancing Act 1919* applies to "any contract for the sale or other disposition of land or any interest in land". The *Interpretation Act 1987* defines "land" to include land "of any tenure or description, and whatever may be the estate or interest therein" (s 21(1)) and "estate" includes "any interest ... at law or in equity" (s 21(1)).

Section 54A of the *Conveyancing Act 1919* provides:

(1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

(2) This section applies to contracts whether made before or after the commencement of the *Conveyancing (Amendment) Act 1930*, and does not affect the law relating to part performance, or sales by the court.

(3) This section applies and shall be deemed to have applied from the commencement of the *Conveyancing (Amendment) Act 1930*, to land under the provisions of the *Real Property Act 1990*.

The effect of this section is that agreements for the sale of land which are not in writing are not void – they are merely unenforceable. As such, they are capable of passing interests in the land.

This section is satisfied by either a written contract or some note or memorandum evidencing a concluded contract. The contract or note or memorandum must be signed "by the party to be charged". This means that the party against whom the contract is to be enforced must have signed a contract or a note or memorandum of that contract. The contract, note or memorandum may be signed by an agent on behalf of a party, so long as the agent is authorised by that party. The agent does not have to be authorised in writing (compare s 23C(1), *Conveyancing Act 1919*). So, an informal document signed by an estate agent or legal adviser evidencing a concluded agreement (for example, a receipt by an estate agent for a deposit, or a letter by a legal adviser) may bind the party for the purposes of s 54A even before formal contracts have been signed and exchanged (provided the informal document contains all the essential terms of the contract and the parties intend to be bound immediately by that informal document). For this reason, anyone acting for a prospective vendor or purchaser should make it clear in any correspondence with the other side that the person represented is not bound until exchange of contracts.

Despite the clear words of s 54A, oral contracts involving land or interests in land are enforceable in equity under the doctrine of part performance (see s 54A(2)).The doctrine of part performance is discussed in *Regent v Millett* (1976) 133 CLR 679; *Geftakis v Maritime Services Board of New South Wales* (1988) NSW ConvR 55-378; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 432 (Brennan J); *Watson v Delaney* (1991) 22 NSWLR 358 and *Khoury v Khouri* (2006) 66 NSWLR 241. One significant restriction on the rights that flow from successfully invoking the doctrine of part performance is that the remedy provided by equity is specific performance, and it is not possible to claim damages for breach

of the contract based on the mere entitlement to specific performance alone (*JC Williamson Ltd v Lukey* (1931) 45 CLR 282; *O'Rourke v Hoeven* [1974] 1 NSWLR 622; *Powercell Pty Ltd v Cuzeno Pty Ltd* (2004) 11 BPR 21,429, *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 176).

It should also be noted that compliance with s 54A is not required where one party is estopped from denying the existence of a contract. The reason is provided by Gaudron J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 464:

> An assumption that exchange had taken place necessarily also involves an assumption that the agreement was duly executed by the appellant, and the question of compliance with s 54A of the *Conveyancing Act 1919* (NSW) becomes irrelevant.

The elements of estoppel are discussed in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466; *Austotel Ltd v Franklins Ltd* (1989) 16 NSWLR 582; *Commonwealth v Verwayen* (1990) 170 CLR 394; and *Giumelli v Giumelli* (1999) 196 CLR 101.

Section 54A extends to the acquisition or disposal of an interest in land, whether it already exists as an interest or is being created by the particular agreement. It applies to legal or equitable interests held under freehold or leasehold title, whether the land is held under statutory (for example, Torrens or Crown land title), documentary or possessory title.

When a transaction involves a contract for the sale or other disposition of an interest in land as well as some other transaction (for example, the sale of goods), s 54A(1) must be complied with in respect to the whole transaction when there is a single contract, and the consideration is indivisible and applicable to the whole transaction (*Horton v Jones* (1935) 53 CLR 475 at 485; *Ram Narayan v Rishad Hussain Shah* [1979] 1 WLR 1349).There is no doubt regarding the application of s 54A(1) of the *Conveyancing Act 1919* to commonly occurring land transactions, including each of the following transactions:

(a) an agreement for the sale of an estate in fee simple, whether based on statutory, documentary or possessory title;

(b) an option for the purchase of an estate in fee simple (*Di Biase v Rezek* [1971] 1 NSWLR 735) or an agreement to assign the benefit of such an option (*Mainline Investments Pty Ltd v Davlon Pty Ltd* (1969) 89 WN (Pt 1) (NSW) 359);

(c) an agreement for lease (*Pirie v Saunders* (1961) 104 CLR 149) and also an agreement to grant an option for renewal of lease (*O'Rourke v Hoeven* [1974] 1 NSWLR 622), but not a mere licence, which is not an interest in land (*Frank Warr & Co Ltd v London County Council* [1904] 1 KB 713; *JC Williamson Ltd v Lukey* (1931) 45 CLR 282 at 291);

(d) an agreement to sell or transfer a leasehold interest (*Tiverton Estates Ltd v Wearwell Pty Ltd* [1974] 1 All ER 209; *Cooney v Burns* (1922) 30 CLR 216), or an option to purchase an existing leasehold interest (*Jeffrey v Anderson* [1914] QSR 66);

(e) an agreement to surrender a lease (*Cocking v Ward* (1845) 1 CB 858; 135 ER 781);

(f) an agreement to grant an easement or a profit a prendre (*Webber v Lee* (1882) 9 QBD 315; *Turner v Bladin* (1951) 82 CLR 463);

(g) an agreement to advance money on the security of a mortgage (*Mounsey v Rankin* (1885) 1 C & E 492) or an agreement to grant a mortgage over an interest in land (*Harrison v Murphy* (1877) 3 VLR (E) 105);

(h) an agreement to sell or transfer a mortgage over land (*Topping v Lomas* (1855) 16 CB 145; 139 ER 711)

(i) a promise to declare a trust in the future over land (*Khoury v Khouri* (2006) 66 NSWLR 241 – an immediate declaration of trust is caught by *Conveyancing Act 1919* s 23C(1)(b)).

EXCHANGE OF CONTRACTS

[1.130] The general rule is that parties become bound by a contract when, and in the manner in which, they intend to become bound, and what method the parties have intended is a question of fact in each case (*Eccles v Bryant* [1948] 1 Ch 93, extracted at [1.140]). The usual method by which parties in New South Wales enter into binding contracts for the sale and purchase of land is by an exchange of counterpart contracts (*Allen v Carbone* (1975) 132 CLR 528), and the practice is so entrenched that it has been held to be a rebuttable presumption that there is no binding contract until exchange (*GR Securities v Baulkham Hills Private Hospital* (1986) 40 NSWLR 631 at 634). The procedure of exchange usually involves each party signing a copy of the contract and physically exchanging it for the other party's signed copy. This method is also common in other conveyancing transactions, such as agreements for the sale of business, the grant of options to purchase land or agreements for lease. The purpose of an exchange of contracts is to ensure that a vendor ends up holding a copy of the contract signed by the purchaser, and the purchaser ends up holding the copy of the contract signed by the vendor (*Harris v Fuseoak Pty Ltd* (1995) 7 BPR 14,511).

Four methods may be used to effect an exchange of contracts:

(a) physical exchange;

(b) exchange by post;

(c) exchange through a document exchange; and

(d) exchange by telephone.

(a) Physical exchange

Exchange is most frequently effected by a physical exchange of documents, where the solicitors or representatives of each party meet for that purpose. When this method is used, the contract is concluded at the moment each party receives the other party's signed copy of the contract.

(b) Exchange by post

Where exchange is effected by post, each party sends to the other a signed copy of the contract, or one party sends her or his signed contract first and the other party then returns the counterpart by way of exchange.

The first of these methods of postal exchange has some deficiencies. The first difficulty arises in determining the date of the exchange. Secondly, problems may arise if one of the copies is lost in the post. Thirdly, this method does not provide the parties or their solicitors with an opportunity of ensuring that the two copies are identical, especially where the parties have agreed on amendments to a draft contract. Although some of these problems may be eliminated if the second of the suggested methods of postal exchange is adopted, postal exchange still raises the unresolved question as to the point of time at which a binding contract comes into existence: is it when the document sent later in time has been posted, or upon actual receipt of the counterpart contract? This question was considered by Lord Greene MR

in *Eccles v Bryant* [1948] 1 Ch 93, without deciding which option is correct, and more recently by the Victorian Supreme Court in *Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd* (1992) ANZ ConvR 268, extracted at [1.150]. It would seem, as in all cases involving the making of contracts by post, that a determination of the time at which the contract comes into existence will always depend upon a construction of the correspondence between the parties to ascertain their intention.

(c) Exchange through a document exchange

The third possible method, through a document exchange, is similar to a postal exchange, except that a document exchange is used in lieu of the post. Exchange may be effected in each of the two ways suggested above for a postal exchange, with similar consequences.

(d) Exchange by telephone

The fourth method of exchange, by telephone, received judicial approval by the English Court of Appeal in *Domb v Isoz* [1980] 1 All ER 942, extracted at [1.160], and was endorsed by the High Court in *Sindel v Georgiou* (1984) 154 CLR 661, extracted at [1.190]. *Henderson v Hopkins* (1988) NSW ConvR 55-389, extracted at [1.170], is the first reported decision dealing with an alleged telephonic exchange in New South Wales. It indicates the care which is required for an effective telephonic exchange.

Some of the evidentiary and practical problems associated with postal or telephonic exchanges, or exchanges through a document exchange, can be overcome, for example, by sending a facsimile copy or a scanned copy by email of the signed document before exchange to ensure there are no material discrepancies between the two different parts.

Two issues arise in respect of any exchange, no matter what method is adopted. The first is the extent of the authority of the parties' solicitors or agents: the mere engagement of a solicitor in a conveyancing transaction does not automatically clothe the solicitor with implied or ostensible authority to bind the client to a contract, and such authority must be found as a fact, whether expressly conferred, or impliedly conferred by the terms of the retainer or the conduct of the client (see *Pianta v National Finance & Trustees Ltd* (1964) 180 CLR 146 at 152, 154; *Zaccardi v Caunt* [2008] NSWCA 202 at [24]). It is not normal practice for estate agents to participate in exchange of contracts, and there is some risk in the practice in that an agent will be tempted to exceed the authority conferred by the party in pursuit of the commission on a sale (*Harris v Fuseoak Pty Ltd* (1995) 7 BPR 14,511 at 14,521; *Golding v Vella* (2001) 10 BPR 18,919 at 18,932) but that does not mean that an agent cannot be authorised to participate in exchange. An agent's authority to bind a party to a contract must also be conferred expressly (s 64(2), *Property, Stock and Business Agents Act 2002*) if a solicitor acts for the party, but the contract is not invalid merely because of failure to comply with the section. An agent has implied authority to do "that which is generally considered to be in the ordinary course of business of real estate agents in selling land" (*Presser v Caldwell Estates Pty Ltd* [1971] 1 NSWLR 471 at 485) which is a question of fact, and in *Paterson v Clarke* (2003) 11 BPR 20,781 a valid contract was formed by exchange between an agent and the purchasers' solicitor on the basis of the vendor's implied actual authorisation of the estate agent. Where an agent is acting within the authority conferred on it by the principal, and intention is a relevant consideration, the intention of the agent will be attributed to the principal: *Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd* (2001) 50 NSWLR 679; (2003) 214 CLR 514 at 696-697 (NSWLR); 548 (CLR); *Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd* (2005) 61 ATR 593; [2005] NSWCA 280 at [75]-[86].

Solicitors have ostensible or implied authority to bind the party on matters of conveyancing, such as the mechanism for exchange, provided they are actually authorised to bring about the

existence of a binding contract (*Domb v Isoz* [1980] 1 All ER 942, extracted at [1.160]). Solicitors have no implied or ostensible authority to make changes to the contracts once a party has signed them and any such changes must be expressly approved or ratified before the party will be bound by them (see *Longpocket Investments Pty Ltd v Hoadley* (1985) NSW ConvR 55-244 – below at [1.200]). There is a distinction between the authority to agree to changes to the contract, and to exchange counterparts. Even if the solicitor is not authorised to agree on any variations to the contract, a binding contract may still be formed if the solicitor is authorised to exchange identical counterparts, and those counterparts contain the unauthorised variation (see *Zhang v VP302 SPV Pty Ltd* (2009) 223 FLR 213; [2009] NSWSC 73 extracted at [2.80]).

The second issue arises where the contracts which are exchanged are not exact counterparts. This situation is dealt with in [1.180] below.

Eccles v Bryant

[1.140] *Eccles v Bryant* [1948] 1 Ch 93

[Both parties to a proposed contract for sale signed their respective parts of the contract. The purchaser posted his part and it duly arrived at the offices of the vendor's solicitors. The vendor however declined to proceed with the transaction. The trial judge, Vaisey J, held that a contract had been entered into. The vendor's appeal to the English Court of Appeal was successful.]

Lord Greene MR:

... The parties were minded to enter into a contract for the sale and purchase of a house. The matter was put into the hands of their respective solicitors in the ordinary way. The basis on which the negotiations were being conducted was that the terms set out in the preliminary correspondence were stated to be subject to contract and survey. We are not troubled with the survey. The important words are "subject to contract." This is one of those cases where quite clearly and admittedly no contract came into existence in the earlier correspondence. It is common ground that the parties contemplated a definitive binding contract which was to come into existence in the future. One thing is quite clear on the facts of this case to my mind, that both firms of solicitors, ... when they were instructed to carry this matter through by their respective clients, contemplated and intended from beginning to end to do so in the customary way which is familiar to every firm of solicitors in the country, namely, by preparing the engrossment of the draft contract when agreed in duplicate, the intention being to do what I have no doubt at this very moment is happening in dozens of solicitors' offices all over the country, namely, to exchange the two parts when signed by their respective clients. That, indeed is what anyone would have understood, I think, from the language of the earlier correspondence and the words "subject to contract" – that the contract would be brought about in the way I have mentioned, by an exchange of the two parts signed by the respective parties.

Vaisey J pointed out that what he called the ceremonial form of exchange, namely, the meeting of solicitors in the office of one of them – the vendors' solicitors' office as a rule – and the passing of the two signed engrossments over the table may be taken to have fallen – and indeed, no doubt it has – into disuse to a certain extent, particularly when there are firms of solicitors in different parts of the country. He recognised that an exchange by post would, in many cases, take the place of the old more ceremonial exchange, but that an exchange was contemplated by both firms of solicitors from beginning to end appears to me to be clear from what took place and from the correspondence. I am prepared to assume – and I think I should probably be right in assuming – that their intention was that the exchange should take place by post. When an exchange takes place by post and a contract comes into existence through the act of exchange, the earliest date at which such a contract can come into

Eccles v Bryant cont.

existence, it appears to me, would be the date when the later of the two documents to be put in the post is actually put in the post. Another view might be that the exchange takes place and the contract thereby comes into existence when, and not before, the respective parties or their solicitors receive from their "opposite numbers" their parts of the contract. It is not necessary here to choose between those two views. I mention them particularly because Mr Hopkins, for the purchaser, here tried to suggest an intermediate stage, that where the parties contemplate an exchange by post the contract is completed not when an exchange takes place, but when one of the parties puts his part into the post. I am afraid I cannot accept that. It seems to me to be a contradiction in terms to speak of that as an exchange …

It is said that a contract took place when, in response to an alleged invitation on behalf of the vendors, the purchaser signed his part of the contract and communicated the fact to the vendors. It was argued that there is no necessity in this class of case for an exchange of documents at all, and that the references which have taken place in very many judgments in this court and other courts to an exchange are either inaccurate or wrong; a contract in this class of case, it is said, does not require exchange. The answer to that seems to me to be a simple one. When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied. In such a contract as this, there is a well-known, common and customary method of dealing; namely, by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place.

It was argued that exchange is a mere matter of machinery, having in itself no particular importance and no particular significance. So far as significance is concerned, it appears to me that not only is it not right to say of exchange that it has no significance, but it is the crucial and vital fact which brings the contract into existence. As for importance, it is of the greatest importance, and that is why in past ages this procedure came to be recognised by everybody to be the proper procedure and was adopted. When you are dealing with contracts for the sale of land, it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it. This particular procedure of exchange ensures that none of those difficulties will arise. Each party has got what is a document of title, because directly a contract in writing relating to land is entered into, it is a document of title. That can be illustrated, of course, by remembering the simple case where a purchaser makes a sub-sale. The contract is a vital document for the purpose of the sub-sale. If he had not got the vendor's part, signed by the vendor, to show to the sub-purchaser, he would not be able to make a good title.

If the argument for the purchaser is right and the contract comes into existence before exchange takes place, it would mean that neither party could call upon the other to hand over his part. The non-exchanged part would remain the property of the party who signed it, because exchange would be no element in the contract at all and therefore you could get this position, that the purchaser might wish to resell and would have no right to obtain from the vendor the vendor's signed part …

The principals in this case, in instructing their solicitors, must, in my opinion, be assumed to have given them authority to carry the business through in the ordinary way recognised as the customary way for dealing with conveyancing matters of this kind, in the absence of any evidence to the contrary. It would be quite impossible to carry through business unless one made some such assumption when a principal puts a matter into the hands of a solicitor. I go further than that and say that if the vendor's solicitor in this case had taken upon himself without authority to agree to a method of making the

Eccles v Bryant cont.

contract, other than the customary method, by dispensing with exchange, he would have been committing a breach of duty to his client and might have found himself liable for very heavy damages for negligence …

It is of the greatest importance it appears to me, that these principles should be upheld. The inconvenience and chaos into which these matters would be thrown by the adoption of any other rules appear to me to be very great; but ultimately the matter comes down to this: Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound. That is a question of the facts of each case, but in this case the manner of becoming bound which the parties and their solicitors must have contemplated from the very beginning was the ordinary, customary, convenient method of exchange. From that contemplation neither side and the solicitors to neither side ever resiled, and there is no justification for taking the view that some new method of making the contract was ever contemplated by anybody.

With great respect to Vaisey J, I cannot agree with his conclusion and, in my opinion, the action must be dismissed.

Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd

[1.150] *Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd* (1992) ANZ ConvR 286

[On 5 September 1988 the solicitors for Nunin Holdings ("Nunin") forwarded by post to the solicitors for Tullamarine Estates ("Tullamarine") a draft contract for sale, executed by Nunin, under cover of the following letter:

The Contract is forwarded on the basis that it will be held by you on our behalf pending receipt by us of an identical Contract signed by the vendor company …

On 12 September 1988 Tullamarine's solicitors posted, by ordinary post, the contract executed by Tullamarine "to complete the exchange". However, on 13 September 1988 Tullamarine's solicitor telephoned Nunin's solicitor to advise that Tullamarine did not wish to proceed with the exchange of contracts. This advice was confirmed in writing on 20 September 1988. Tullamarine's contract arrived at Nunin's solicitors' office on 15 September 1988.

Nunin sought damages for breach of contract by Tullamarine. This raised the question as to whether a binding contract came into existence when Tullamarine's contract was posted on 12 September or only when it was received on 15 September and if the latter, whether Tullamarine had effectively prevented the exchange by the telephone conversation between the solicitors on 13 September. Hedigan J held that no exchange of contracts had occurred.]

Hedigan J:

[Postal acceptance rule]

The so-called postal acceptance rule, has had a long but by no means uneventful history. Its genesis is probably to be found in *Adams v Lindsell* (1818) 1 B & Ald 681 but it was not until *Household Fire and Carriage Accident Insurance Co (Ltd) v Grant* (1879) 4 ExD 216 that the rule was itself finally accepted. It had, however, already been applied in Australia: *Tooth v Fleming* (1859) Legge 1152. Even in quite recent cases in the United States, the rule was still being called "the rule in *Adams v Lindsell*". But once more firmly established (*Henthorn v Fraser* (1892) 2 Ch 27), the rule became an important exception to the central principle that acceptance of an offer was not effective until actually communicated to the offeror. Moreover, although the postal system of the late nineteenth century was by all accounts

Anderson v Daniels cont.

reasons I have stated, a recurrent phenomenon. It is against this background that the conversations must be considered. This evidence leads me to the conclusion that what Mr Anderson said was deliberately intended to deceive the plaintiffs by actively concealing from them the true state of the premises. The opportunity for candour was offered; but the defendants failed to reveal what the repairs had concealed.

Moffitt P:

It was apparent that the purchaser was prepared to dismiss the evidence of the cracks seen by him as of no significance and that he was prepared to regard the internal walls to be as they appeared, namely indicative of no defects. Thus even if what had been done by the vendors, which had the effect of concealing the defects, were innocent at the time the acts of concealment were done, the failure of the vendors to reveal the truth and to correct the purchaser's misunderstanding was dishonest. The dishonesty of the failure is more apparent by reasons of the replies given, the effect of which was to put the purchaser off so his mind remained uninformed as to what was concealed and its significance.

The concealment in fact by the acts of the vendors of the otherwise patent defects, the replies when the question of cracks was raised in relation to the outside cracks and when the question concerning the condition of the internal walls was raised and the silence of the vendors, in particular on those occasions, concerning their acts of concealment referred to and their failure to correct the apparent misconception of the prospective purchaser involved a misrepresentation by them that there was no matter for concern for such purchaser as to the condition of the external walls or the internal walls which, of course, the vendors well knew was false and material.

Priestley JA:

... [O]n a consideration of the evidence which was before the District Court, it seems to me to be clear that prior to the sale to the plaintiff purchasers the vendors were aware of the problem with the structure of the building and aware also that the renovations would make it much more difficult for a lay person inspecting the house to see any indications of the underlying defect in the structure of the house. The vendors being in possession of that knowledge were, or one of them was from time to time in a situation where comment was called for in regard to cracking which was apparent both externally and, to a very small degree, internally in the structure of the house.

The responses to the comments or questions relating to cracks on one occasion ascribed the cause of the cracking to settlement, and on another to an earthquake. On a third occasion when an internal wall was referred to by Mr Daniels, Mr Anderson mentioned that no children had ever lived in the house, which in the context carried a clear implication that the wall was a sound one with no likelihood of cracking problems.

These matters seem to me to be positive conduct when taken into account together with the renovation work which had been done prior to sale calculated to mislead and which did mislead the purchasers with respect to a material fact, namely the state of the foundations of the house and the nature of the structure of the house in relation to its foundation.

Vendor's contractual duty of disclosure under the 2005 standard form contract

[4.140] The 2005 standard form contract contains no express terms extending a vendor's general law duty of disclosure to defects other than latent defects in title.

Under cl 16 a vendor is required to pass to a purchaser, on completion, "the legal title ... free of any mortgage or other interest" to the property. Although this clause does not expand

the vendor's general law duty of disclosure beyond latent defects in title, its express inclusion in the contract may confer remedies on a purchaser for an undisclosed, material *patent* title defect. This follows from the fact that a vendor of land, whose title is subject to such a patent defect which means the vendor cannot pass unencumbered legal title to the purchaser, will be in breach of contract even though not in breach of the general law duty of disclosure. If the vendor knows of a patent defect, it is generally disclosed in the contract, with an express acknowledgement by the purchaser that the disclosure has been made, and limiting the right to object or assert other rights in respect of the defect.

Clause 10 provides that a purchaser may not exercise any remedy in respect of a number of matters affecting the property or the vendor's title to it (such as the ownership or location of any dividing fence (cl 10.1.1), joint services to the property (cl 10.1.2), party walls (cl 10.1.3), conditions, exceptions, reservations or restrictions in a Crown grant (cl 10.1.6), authorities or licences to explore or prospect for gas, minerals or petroleum (cl 10.1.7), easements or restrictions on use (cl 10.1.8)).

Although cl 10 cannot deprive a purchaser of remedies arising from *undisclosed latent defects in title* (these being matters falling within the vendor's general law duty of disclosure), it will deprive a purchaser of any remedy in respect of the listed matters which do not constitute latent defects in title, or which are disclosed. This effectively requires a purchaser to make all relevant inquiries about those matters prior to entry into the contract.

A purchaser can only be deprived of her or his remedies in respect of easements or restrictions on use (cl 10.1.8) or other title defects (cl 10.1.9) if the vendor discloses "the substance" of the defect in the contract. Disclosure of "the substance" of a defect has been held to require disclosure of its "essence" (*Hills v Stanford* (1904) 23 NZLR 1061 at 1065-1066; *Gibson v Glos* (1916) 111 NE 123 at 125). It is always a question of fact whether sufficient disclosure is made so as to deprive a purchaser of remedies.

Clause 10.1.8 deprives a purchaser of any remedy in respect of an easement or restriction on use "the substance of either of which is disclosed in this contract or *any non-compliance* with the easement or restriction" (emphasis added). This paragraph appears to mean that if the substance of the relevant easement or restrictive covenant is disclosed in the contract, the purchaser will have no remedy in respect of any non-compliance with that easement or restrictive covenant. If the contract is varied to impose even less onerous duties on the vendor, for example by requiring only that the existence of the defect be disclosed in the contract, the purchaser's position is even weaker.

STATUTORY VENDOR DISCLOSURE

[4.150] A vendor's limited general law duty of disclosure obviously prevents the speedy exchange of contracts for the sale of land: it requires purchasers to investigate all matters affecting the quality and use of the land prior to entry into the contract. Section 52A(2) of the *Conveyancing Act 1919* was introduced in 1986, in an effort to reduce the need for pre-contractual investigation of the land by the extension of purchasers' post contractual remedies.

That section provides:

> A vendor under a contract for the sale of land –
>
> (a) shall, before the contract is signed by or on behalf of the purchaser, attach ro the contract such documents, or copies of such documents, as may be prescribed; and

(b) shall be deemed to have included in the contract such terms, conditions and warranties as may be prescribed.

It should be noted that, unlike the cooling off legislation in Divs 8 and 9 of Pt IV of the *Conveyancing Act 1919* (discussed in Chapter 1), the provisions of s 52A apply to all land and not merely residential property.

Section 52A(2) deals with two separate issues:

(a) the documents which have to be attached to a contract for the sale of land (referred to as "the Vendor Disclosure requirements"); and

(b) the warranties which are deemed to be included in such contracts (referred to as "the Vendor Warranty requirements of the legislation"). The Vendor Warranty requirements are discussed in detail in Chapter 12.

The purpose of the legislation was described by Kirby P in *Nguyen v Taylor* (1992) 27 NSWLR 48 at 52 as follows:

> The purpose of s 52A was to reduce the opportunity for gazumping. It achieved that purpose by shifting to the vendor the obligation to make disclosures to the purchaser, upon the basis of which the latter could thereafter sign the contract. The object was to do away with the costly and time-consuming searches and inquiries which occasioned the delays within which further offers to purchase the subject premises could be procured giving rise to the sale of the property to the later, higher bidder and disappointment to the earlier bidder still busily securing the results of the necessary searches on the faith of a sale. By facilitating the earlier exchange of contracts, it was hoped to reduce the practice of gazumping.

Clause 5(1) of the *Conveyancing (Sale of Land) Regulation 2005* ("the Regulation") provides that for the purposes of s 52A(2)(a), the prescribed documents are those specified in Sch 1 to the Regulation. These documents (which are referred to as "the Prescribed Documents") include:

(1) a certificate issued under s 149(2) of the *Environmental Planning and Assessment Act 1979* (unless the land is not within a local government area);

(2) a diagram for the land from a recognised sewerage authority (if available from the authority in the ordinary course of administration), indicating the location of the authority's sewer in relation to the land;

(3) if the contract relates to land under the provisions of the *Real Property Act 1900* (including any land that is the subject of a qualified or limited folio, but not including land under the *Strata Schemes (Freehold Development) Act 1973*, the *Strata Schemes (Leasehold Development) Act 1986* or the *Community Land Development Act 1989*):

  (a) a property certificate; and

  (b) a copy of a plan for the land issued by the Department of Lands (known as the Land and Property Management Authority from 1 July 2009), or any of its predecessors, or the office of Land and Property Information (except in the case of land that is the subject of a limited folio).

  Clause 3(1) of the Regulation defines a "property certificate" as any of the following:

  - a copy of the folio for the land;
  - a computer folio certificate;

  - a document that contains the information contained in the folio for the land, being a document that is certified (by or on behalf of the person to whom the information has been provided) as having been provided in accordance with s 96B(2), *Real Property Act 1900*. (Under this subsection, the Registrar-General provides on-line direct access to that part of the Register concerned with titles to land which is computerised. A document provided in accordance with that subsection is not an official search under the *Real Property Act 1900* and so does not constitute a copy of the folio for the land.)

  but does not include a certificate of title.

(4) Copies of all deeds, dealings and other instruments lodged or registered in the Land Titles Office which create or purport to create

  (a) easements; or

  (b) profits à prendre; or

  (c) restrictions on the use of the land; or

  (d) positive covenants imposed under Div 4 of Pt VI of the *Conveyancing Act 1919*, burdening or benefiting, or purporting to burden or benefit the land or any part of the land, including copies of Memoranda referred to in any such instrument;

(5) If the contract relates to land that comprises or includes a lot as defined in the *Strata Schemes (Freehold Development) Act 1973* –

  (a) a property certificate for the lot and the common property; and

  (b) a copy of the strata plan which shows the lot;

Items (6)-(9) and (12)-(15) relate to contracts for the sale of land that comprise or include a lot under the *Strata Schemes (Freehold Development) Act 1973*, the *Strata Schemes (Leasehold Development) Act 1986* or lots which form part of a community scheme, precinct scheme, neighbourhood scheme or community scheme under the *Community Land Development Act 1989*.

(10) a notice in or to the effect of the form set out advising purchasers of their rights under the legislation; and

(11) On or after 1 December 2006, (unless the notice is printed in the contract), a notice that is legibly printed, in bold type, with the words "WARNING" and "SMOKE ALARMS" which alerts purchasers to the requirements under the *Environmental Planning and Assessment Act 1979* to install smoke alarms (or in certain cases heat alarms) in certain buildings and strata lots, and the imposition of penalties for non-compliance.

Clause 4(1)(b) of the Regulation provides that in the case of land comprising one or more lots in a proposed plan of subdivision, the Prescribed Documents are such of those specified in Sch 1 as are relevant to the land from which the lot is to be created. There is no indication in either the *Conveyancing Act 1919* or the Regulation as to how current the Prescribed Documents must be. However, a vendor, who attaches to the contract a Prescribed Document which does not contain up to date information, runs the risk of breaching one of the Prescribed Warranties since there is some overlap between the documentation required under the Vendor Disclosure and the Vendor Warranty provisions of the legislation (for example, in relation to the zoning of the property). This is discussed in Chapter 12.

The information contained in the Prescribed Documents attached to the contract provides important details relating to the property and limits the purchaser's need for making pre-contract searches or inquiries regarding those matters. The existence of a long list of

warranties by the vendor about the property, most of which cover defects in quality falling outside the vendor's general law duty of disclosure, also limits the need for pre-contract inquiries relating to those matters. In cases where the vendor has excluded contractual liability for defects (as in cl 10) the statutory disclosure and warranty scheme may be the purchaser's only avenue for relief in respect of undisclosed matters affecting the property.

In the 2005 standard form contract all the Prescribed Documents are referred to in the Document section on page 2. It will be for the vendor's advisers to ensure that all of the prescribed documents are available, and that the list is correctly completed.

In addition, s 95(2) of the *Home Building Act 1989* (which commenced on 1 May 1997) requires an owner-builder who sells residential land, within seven years after the completion of building work on that land, to attach to the contract a certificate of insurance. Contravention of this section renders the contract of sale voidable at the option of the purchaser at any time before completion (s 95(4)). In *Festa Holdings Pty Ltd v Adderton* [2004] NSWCA 228, the Court of Appeal held that where uninsured building work had been done by a predecessor in title to the vendor, the purchaser was not entitled to insist on a certificate of insurance from the vendor or to complain, or delay completion, on the basis that the vendor was not able to provide such a certificate, particularly where the contract contained a special condition that required the purchaser to accept the property in its condition and state of repair at the date of the contract. The state of the building work was not a matter that went to title, nor was there any obligation imposed on the vendor by the legislation, or the contract, to obtain any insurance for the benefit of the purchaser.

Transactions covered by the Vendor Disclosure legislation

[4.160] It is implicit in the legislation that the *Conveyancing (Sale of Land) Regulation 2005* only applies to land situated in New South Wales. Certain prescribed vendors, contracts and land are exempted from the vendor disclosure requirements by cll 9, 10, and 11, and Schs 4 and 5, to that Regulation. Subject to those exemptions, the following are covered by this requirement:

(a) Contracts for the sale of the fee simple, in respect of land held under any system of title, for all types of properties.

(b) Contracts for the sale of other freehold estates, such as a life estate.

(c) Contracts for the sale of a conditional or other purchase tenure under the Crown lands legislation.

(d) Contracts for the sale of perpetual leases.

(e) Contracts for the sale of leasehold estates, where:

  (i) the unexpired term of the lease together with any option for renewal exceeds 25 years (although see discussion by Butt, "Vendor disclosure and long-term leases (NSW)", (1991) 65 ALJ 476);

  (ii) a lease of Crown land has an unexpired term of more than five years;

  (iii) a perpetual lease or other lease from the Crown has an unexpired term of more than five years.

(f) Contracts for the assignment of options for purchase, when the option constitutes an interest in land.

The Vendor Disclosure legislation and options to purchase land

[4.170] Difficulties arise in the application of the Vendor Disclosure legislation to options to purchase land. Section 52A(2)(a), *Conveyancing Act 1919* requires a vendor under a *contract* for the sale of land to attach to the contract certain Prescribed Documents. As an unexercised option does not amount of a *contract for sale of land*, it seems that a vendor need not attach the Prescribed Documents to the option itself. Applying this reasoning, it is only when the option is exercised and a contract entered into, that the need to attach the Prescribed Documents arises. McLelland J in *Todd v Georgievski* (1987) 10 NSWLR 319 at 323-324 summarised the position as follows:

> ... I would be inclined to draw the conclusion that s 52A had no application at all to options except in the case where upon exercise of an option the parties brought into existence and signed a new contract document which would on that basis be "the contract" for the purposes of s 52A(2) to the exclusion of the option agreement. It may be noted, although I do not rely on this for the purpose of construing sec 52A(2), that cl 6(2)(b) of the regulation appears to be framed on the premise that a contract for the sale of land as contemplated in the legislative scheme arises from, and not before, the exercise of an option to purchase ...
>
> It seems to me that if sec 52A operates at all in relation to an option, it is only when the option is exercised so as to bind the purchaser that a "contract for the sale of land" within the meaning of the section would come into existence...

A similar approach to the relationship between the Vendor Disclosure legislation and options was adopted in *Nguyen v Taylor* (1992) 27 NSWLR 48 and *Mucha v Berry* (1991) 24 NSWLR 595.

To complicate matters even further, s 66ZI(1) and (2) of the *Conveyancing Act 1919* require the Prescribed Documents to be attached to all options to purchase residential property at the time the option is granted (failing which either party is entitled to rescind the option, or if the option has been exercised, the contract resulting from the option, within the time provided in s 66ZI(4)). The cooling-off legislation is discussed in Chapter 1. Under that legislation, options to purchase residential property exercisable within 42 days of the option date are void (s 66ZG, *Conveyancing Act 1919*).

In an attempt to bring these different requirements together, Pt 2 of Sch 4 of the *Conveyancing (Sale of Land) Regulation 2005* expressly exempts from the Prescribed Documents requirement:

> A contract arising from the exercise of any ... option to purchase land (not being an option that is void under section 66ZG of the Act) so long as:
>
> (a) the proposed contract, and the documents ... prescribed under s 52A(2)(a) of the Act, are attached to the option; or
>
> (b) the terms of the option prevent its exercise earlier than 3 months after the date on which it is granted.

The effect of these requirements may be summarised as follows:

(a) *In respect of options to purchase non-residential property*

  (i) If the option may not be exercised within three months of its grant, vendors are not required to attach the Prescribed Documents to the *contract* arising from the exercise of the option.

  (ii) If the option may be exercised within three months of its grant, vendors *are* required to attach the Prescribed Documents to the *contract* arising from the exercise of the option, unless the contract and the Prescribed Documents are attached to the option itself.

(b) *In respect of options to purchase residential property*

(i) the Prescribed Documents must be attached to all options, irrespective of when they may be exercised (s 66ZI(2)(b)).

An option to purchase residential property which is exercisable within 42 days of its grant is rendered void by s 66ZG(1)(b), *Conveyancing Act 1919*. If the option is void under s 66ZG, the exemption provided by Pt 2 of Sch 4 of the *Conveyancing (Sale of Land) Regulation 2005* does not apply, and the Prescribed Documents must be attached to the contract.

(ii) if the contract and the Prescribed Documents were attached to the option at the date of the grant of the option, the Prescribed Documents need not be attached to the *contract* arising from the exercise of the option.

Remedies for failure to attach the Prescribed Documents

[4.180] When a vendor fails to attach any of the Prescribed Documents to a contract for the sale of land the purchaser may rescind the contract, but only within 14 days after the making of the contract (cll 19(1) and 20(1)(a), *Conveyancing (Sale of Land) Regulation 1995*).

In an effort to prevent a purchaser from arguing that one of the Prescribed Documents which is attached to the contract was not attached to the contract before it was signed by or on behalf of the purchaser, as required by s 52A(2), *Conveyancing Act 1919*, clause 20.1 of the 2005 standard form contract provides:

> The parties acknowledge that anything stated in this contract to be attached was attached to this contract by the vendor before the purchaser signed it and is part of this contract.

The effect of a similar clause in the 1988 standard form contract was considered in *Gibson v Francis* (1989) NSW ConvR 55-458, extracted below. It is arguable whether a purchaser can waive the statutory right to rescind the contract for non-attachment of the Prescribed Documents. Presumably the statutory right can be waived in the same way that the statutory right of rescission for breach of the Prescribed Warranties can be waived (as discussed in Chapter 12), namely, by construing the right of rescission as a right which exists if not otherwise lost. The right of rescission is in addition to other rights conferred by the general law, such as the right to a declaration that no contract has arisen where the contracts exchanged were not counterparts, or where the contract signed by the purchaser does not attach the prescribed documents, but the copy signed by the vendor does (see *Parkin v Pagliuca* [2008] NSWSC 168).

Gibson v Francis

[4.190] *Gibson v Francis* (1989) NSW ConvR 55-458

[On 6 December 1988 the purchasers, at an auction, entered into a contract (in the 1988 standard form) to purchase property at Bilgola Plateau. Although the contract identified the relevant deposited plan by number, the copy of the deposited plan attached to the contract was incorrect. On 14 December 1988 (8 days after the contract was made) the vendors' solicitors sent a copy of the correct deposited plan to the purchasers' solicitors. On 19 December 1988 the purchasers purported to rescind the contract under cl 7(1) of the *Conveyancing (Vendor Disclosure and Warranty) Regulation 1986* for a breach of s 52A(2)(a), *Conveyancing Act 1919* by the non-attachment of a copy of the correct deposited plan to the contract.

Gibson v Francis cont.

The vendors unsuccessfully sought an order for specific performance of the contract on the ground that the purchasers had waived their right to rescind the contract because of a contractual provision by which they had acknowledged that the relevant documents had been attached to the contract by the vendors prior to their signing of the contract. An alternative argument that the purchasers were estopped by this acknowledgement from asserting any right to contrary was also rejected.]

Studdert J:

[Legislative scheme]

The right to rescission which the defendants claim and which they claim to have effectively exercised, involves a consideration of sec 52A of the *Conveyancing Act* ...

It is not disputed but that amongst the documents prescribed for the purposes of sec 52A(2)(a) on the facts of the present case was the relevant deposited plan 236968. A copy of this document was not attached to the contract. It is not disputed that the purchaser purported to rescind the contract within the time and in the manner prescribed by reg 7(1). The scheme of the legislative provisions and Regulations reviewed does not make it relevant for me to consider whether the defendants were deceived or misled by the attachment of the copy of the wrong deposited plan. How then can the plaintiffs insist upon specific performance?

[Submissions]

The plaintiffs rely under condition 12 of the contract for sale which, so far as is relevant, provides in cl (a):

> The purchaser acknowledges that before this agreement was signed by or on behalf of the purchaser, the vendor attached to it pursuant to s 52A(2)(a) of the *Conveyancing Act 1919* the documents or copies of the documents referred to in the fourth schedule.

By reference to the fourth schedule, one finds reference to the relevant requirement of the plan. The defendants have acknowledged that they had the opportunity to examine the contract before the auction and that they each glanced at it. The contract was initialled in various places, including on p 4 where cl 12 appears, and on p 8 where the sketch attached to the surveyor's certificate correctly identified deposited plan 236968.

Against this background it is submitted by Mr Garling, on behalf of the plaintiffs, that the defendants have waived their right to rescind, and, alternatively, that they are estopped by their conduct from avoiding the contract. It is submitted by Mr Garling that the legislative provisions above reviewed give a qualified right to rescind. The purchasers, upon a breach by the vendor of sec 52A(2) have the choice of proceeding to completion or avoiding the contract provided that should they wish to pursue the latter course they elect to do so within 14 days as required by reg 7. Hence it is argued by Mr Garling that by executing the contract containing cl 12(a) the defendants waived their right to rescind. Alternatively, having executed the document notwithstanding the wrong attachment they are estopped by their acknowledgement in cl 12(a) from asserting any right to rescind.

I must reject these submissions.

[Waiver]

So far as waiver is concerned, there is no evidence that either defendant was in fact aware at the date of execution of the contract that the deposited plan attached to the contract was the wrong one. Indeed each defendant has sworn on affidavit he and she was not aware of the error at the time of execution and I accept this evidence. It seems to me on the facts of the case that the defendants had the statutory period of 14 days within which to elect whether they should proceed with the contract or not and that in the circumstances they cannot be treated as having waived their rights by execution of the document.

Gibson v Francis cont.

[His Honour then referred to a passage from the judgment of Mason J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 658 regarding the requirements of the doctrine of election, extracted at p 407, and continued]

Applying this statement of principle it seems to me the defendants did not, at the time of execution, have the requisite knowledge and, in any event, the statutory period of 14 days was still to run when the document was signed. I do not consider the defendants have waived their right of rescission.

[Estoppel]

Likewise the submission that the defendants are estopped from exercising their right of rescission must be rejected. Before any estoppel could arise the plaintiffs would have to establish that by their conduct the defendants have induced the plaintiffs to act to their detriment. There is no evidence here that the plaintiffs relied upon the execution of the agreement by the defendants to act to their detriment at all.

Moreover where, as here, the legislative scheme was clearly aimed at providing protection for purchasers and for this purpose afforded, as it were, a 14 day breathing space, the authorities indicate that estoppel will not arise. A party should not be allowed to set up an estoppel in the face of a statute (see *Kok Hoong v Leong Cheong Kweng Mines Ltd* (1964) AC 993). In the course of his judgment in that case, Viscount Radcliffe said at p 1015:

> Given a "statutory obligation of an unconditional character" it is not open to the court to allow the party bound by that obligation to be barred from carrying it out by the operation of an estoppel. Similarly there is in most cases no estoppel against a defendant who wishes to set up this statutory invalidity of some contract or transaction upon which he is being sued despite the fact that by conduct or other means he would be otherwise bound by estoppel ...

The statutory obligation arising under sec 52A(2) is of an unconditional character clearly aimed at protecting the purchaser and providing him with rights. It seems to me in the face of this statutory scheme, bearing in mind the above authorities, that the vendor cannot through the device of a clause such as cl 12(a) seek to set up an estoppel against the purchasers.

To my mind cl 12(a) is of dubious value. Certainly it could have evidentiary value in a case where a dispute arises as to whether or not the purchasers were provided with documents required under sec 52A(2)(a), but where, as in the present case, non-compliance with the requirements of the subsection is conceded by the plaintiffs, this possible use of the subclause does not arise.

PRE-CONTRACT INQUIRIES

Need for pre-contract inquiries

[4.200] A purchaser's need to make pre-contract inquiries will depend on the extent of the vendor's duty to disclose particular matters to the purchaser:

- under the general law; or
- under the contract; or
- by statute.

Having regard to the fact that, since 1986, a vendor of land in New South Wales is obliged to disclose to the purchaser latent defects in title, to attach the Prescribed Documents to the contract and to warrant that the land is not affected by the Prescribed Warranties, the main topics of pre-contract inquiries by a purchaser are likely to relate to:

(a) The quality of the subject matter of the sale.

These inquires will cover, for example, the structural soundness of any buildings included in the sale, existing defects and deterioration, pest infestation and land contamination. *Eighth SRJ Pty Ltd v Merity* (1997) NSW ConvR 55-813 illustrates the problems which may arise if pest infestation is only discovered by a purchaser after entry into the contract. This is particularly so where there has been recent building work, and the purchaser may need to take steps to ascertain whether the purchaser is protected under the statutory scheme established under the *Home Building Act 1989*.

(b) Proposals in respect of which the purchaser is not protected by express provision in the contract or by statute (for example, proposals by any sewerage authority to lay sewers on the land).

(c) The legality of structures on the property which form part of the subject matter of the sale (as discussed in Chapter 6).

(d) The legality of the existing use or intended use of the property.

Broadly, there are three main sources of inquiries. First, technical inquiries and investigations, regarding the value, condition and state of repair of the subject matter of the sale, including the land, buildings, improvements and chattels, should be made. That may involve obtaining a pre-purchase property inspection report from real estate valuers, building experts (such as architects, builders, engineers, inspectors from the Building Services Corporation and site auditors, pest control experts, plumbers, electricians).

Secondly, inquiries should be made of the local council and other statutory or resuming authorities about zoning, affectations and development potential.

Thirdly, inquiries should be made of the vendor or from the estate agent.

Form of inquiries

[4.210] Any inquiry may be oral or in writing. It is prudent for inquiries to be made in writing whenever possible, for three main reasons:

(a) to have evidence of the precise inquiry made,

(b) to direct attention to the seriousness of the inquiry,

(c) in order to elicit a more precise reply.

The danger of making an oral inquiry is illustrated in *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225. In that case, the purchaser's solicitor made an oral inquiry from the town planning section of a local council regarding the zoning of the property. The High Court held that the council owed no duty of care in relation to information given by phone in response to a telephone inquiry because it would not have been reasonable for the recipient of the information to have relied on it, whereas in respect of a written inquiry, the council knew or ought to have known of the significance of the inquiry for conveyancing purposes, and the fact that the recipient would rely on it.

Although it is possible to hold a statutory authority liable for negligent oral replies to oral inquiries, a purchaser's prospects of success will improve if there is an erroneous reply given in writing. If the reply is given gratuitously, liability depends on its constituting a negligent misrepresentation. If it is supplied for a fee, there will also be liability in contract when the contract contains an express or implied term that accurate information will be supplied. Priestley JA in the New South Wales Court of Appeal in *Council of the Municipality of*

Carpenter v McGrath cont.

for completion of the transaction by 11 July 1989. In the event that the contract was not completed by that date, clause 24(b) of the contract made provision for payment by the purchasers of interest on the balance of the purchase price "at a rate calculated on daily rests and being $2 per centum per annum in excess of the rate charged from time to time by the National Australia Bank on overdraft loans". The "rate charged from time to time … on overdraft loans" was the sum of the Bank's prime lending rate from time to time and a margin of between 0.5% and 3%.

Although the vendors had obtained development consent from the Gosford City Council for the erection of a rural shed and horse stables in 1983, they failed to obtain building approval before building a rural shed on the property in 1984. The vendors simultaneously entered into a contract to purchase a farming property, Tippaburgh, for $253,000.

The purchasers did not complete the contract by 11 July 1989 as required by the contract. On 17 July the vendors served on the purchasers a notice to complete the contract by 3 August 1989. During July and August 1989 the National Australia Bank's prime lending rate was 20.25%. This meant that its overdraft rate for the purposes of cl 24(b) was between 20.75% and 23.25%. The vendors' entitlement to interest on the outstanding purchase price accordingly fluctuated between 22.75% and 25.25%. The vendors claimed payment of $320,181.08 in the notice (which included a sum of $4,962.25 being interest at 25% or $215.75 per day for 23 days).

On 2 August 1989 the purchasers instructed solicitors to act for them. Despite the grant of an extension of time, the purchasers failed to complete the contract by 16 August 1989. On 17 August 1989 the vendors gave notice of termination of the contract and forfeiture of the deposit. As the vendors were unable to complete the purchase of Tippaburgh they lost their $25,300 deposit and Mr McGrath was forced to resign from a job he had obtained at the Tamworth TAFE college, in the vicinity of the Tippaburgh property.

The vendors commenced proceedings against the purchasers in the District Court for damages for breach of contract. They were awarded damages of $25,300 (for loss of the deposit on the new property), $7,184.58 (for interest under cl 24(b) on the unpaid purchase price), $1,740.50 (for legal costs and expenses on the sale), $2,036.10 (for legal costs and expenses on the purchase of Tippaburgh) and $15,000 (for the male vendor's loss of income). The forfeited deposit of $35,000 was then deducted from the total of these amounts, leaving a balance of $24,383.61.

The purchasers appealed to the New South Wales Court of Appeal and the vendors cross-appealed on the issue of damages.]

Clarke JA:

Liability

Both Sheller and Cole JJA have explained at length why the decisions in *Maxwell v Pinheiro* (1979) 46 LGRA 310 at 318–9 and *Borthwick v Walsh* (1980) 41 LGRA 144 at 150 are wrong and should not be followed. I agree with their Honours and in these circumstances any further explanation of my reasons leading to that conclusion would be otiose. It is true that in *Pisano & Anor v Fairfield City Council* (1991) 73 LGRA 184 I agreed with Kirby P who expressed a qualified acceptance of the two decisions to which I have referred. That part of his Honour's judgment did not, however, form part of the essential reasoning towards the conclusion and, on my understanding, my agreement was limited to those essential parts of the judgment. If that not be thought acceptable let me simply say that, having to confront the problem directly in this case, I am satisfied that *Pinheiro* and *Borthwick* cannot stand in the light of *Fletcher v Manton* (1940–41) 64 CLR 37 (see particularly Starke J at 45 and Dixon J at 49) …

Damages

…The general principle which applies to the awarding of damages for the breach by a purchaser of a contract of sale of real estate is that the injured party is to be placed in the same situation, so far as

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money can do, as if the contract had been performed (*Robinson v Harman* (1848) 1 Ex 850; 154 ER 363 at 855 (Ex), 365 (ER), per Parke B, cited with approval by Gibbs J in *Wenham v Ella* (1972) 127 CLR 454, at 471). This general principle is, however, limited by the rule in *Hadley v Baxendale*. That rule has been interpreted as containing two limbs and it is sufficient for my purposes to refer to Lord Upjohn's statement in *Koufos v C Czarnikow Limited* [1969] 1 AC 350 at 421, where his Lordship said that:

> (1) Damages should be such as may naturally and usually arise from the breach; or
>
> (2) Damages should be such as in the special circumstances of the case known to both parties may be reasonably supposed to have been in the contemplation of the parties, as the result of a breach, assuming the parties to have applied their minds to the contingency of their being such a breach.

The overriding principle, however, is that which is expressed in *Robinson*. For this reason it has long been accepted that if the deposit is forfeited it must be set off against any damages claimed. That rule does not simply apply to a deficiency on resale of the property but applies to all general damages allowed pursuant to the principle in *Hadley v Baxendale*. (See Butt, *The Standard Contract for Sale of Land in New South Wales* – (1985) at p 529, 530; *Ockenden v Henly* (1858) El Bl & El 485; 120 ER 590 at 493 (El Bl & El); 593 (ER); *Howe v Smith* (1884) 27 Ch D 89 at 100, 104-105; *Shuttleworth v Clews* [1910] 1 Ch 776; *Real Estate Securities Limited v Kew Golf Links Estate Pty Limited* [1935] VLR 114 at 124; *Mallett v Jones* [1959] VR 122 at 132; *Cowan v Stanhill Estates Pty Limited (No 2)* [1967] VR 641 at 649; *NLS Pty Ltd v Hughes* (1966) 120 CLR 583 at 589.)

It is clear to me that a failure to deduct the forfeited deposit from the damages allowed under the *Hadley v Baxendale* principle would lead to the over-compensation of the respondents who would thereby be better off than if the contract had been performed …

[**His Honour** agreed with the orders proposed by **Sheller JA**]

Sheller JA:

Grounds of appeal:

Defect in title

This legislative scheme empowered the council by notice in writing to order "the owner" of the subject property, defined in s 4 of the Act to include both owners in law and in equity, to demolish the shed which had been built without building approval. However, if the Council issued a building certificate under s 317AE, its power to order demolition was lost. By cl 12(b) of the agreement, the respondents warranted that the land was not affected "at the date of making of this agreement" by any notice pursuant to the provisions of s 317B of the *Local Government Act 1919* which had not been fully complied with.

In *Fletcher v Manton* (1940) 64 CLR 37, each member of the majority of the Court (Starke, Dixon and McTiernan JJ) referred to the well established rule of equity that when a valid contract for the sale of land is made and the vendor in the event makes good title, then, as from the date of the contract, the purchaser is to be considered the owner of the land and, by consequence, must suffer whatever loss or detriment may after that time fortuitously befall the property or be placed by the law upon the person filling the character of owner (at 45, 48 and 51) …

In the present case … the ownership of the subject land was unaffected until such time, if ever, as the Council gave a notice under s 317B(1A). The appellants sought to contrast the Council's non-approval of the particular shed built without approval by emphasising Dixon J's reference to the slum property being "liable under a general Act of Parliament to be affected at any moment of time" by the service of a demolition order. In *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1955) 91 CLR 610 at 624 the High Court said that there is all the difference between a public law affecting the enjoyment of land and a restriction of title. But I do not think that the phrase quoted detracts from

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the conclusion that for the same reason that the ownership of the land was unaffected until the vendor received a notice in *Fletcher v Manton*, the ownership of the subject land was unaffected until the Council gave a notice. It did not matter that until the council gave a notice the subject property with a building erected on it without Council approval was, to adapt the words of Dixon J, liable under the *Local Government Act* to be affected at any moment of time by a notice in writing ordering demolition.

> In New South Wales the courts have held to the contrary …
>
> [His Honour then referred to *Maxwell v Pinheiro* and *Borthwick v Walsh* and continued]
>
> In *McInnes v Edwards* [1986] VR 161, Kaye J held that the contravention of building regulations prior to contract which empowered the Council to order rectification, demolition or removal of the offending works did not constitute a latent defect in the vendor's title. His Honour referred to *Maxwell v Pinheiro* and *Borthwick v Walsh* and said that the ratio to be extracted from *Fletcher v Manton* was not reflected in the decisions. At 168 Kaye J said that Powell J's view in *Maxwell* at 318 "expressed as a conclusion from authorities, was not accepted, if not rejected, by the High Court in *Fletcher v Manton*". With due respect, I think this is correct. At 164 Kaye J quoted from the 5th edition of Megarry & Wade, *The Law of Real Property*, (1984) at 611 where the learned authors describe a good title as a title free from encumbrances including statutory liabilities "if they are not merely potential or imposed on all property generally" and continue:
>
> > But a statutory liability which first attaches to the property after the date of the contract must be borne by the purchaser (for the risk is on him) except to the extent that it is an outgoing which the vendor must meet as attributable to the period of his own occupancy, and except where it prevents the vendor from giving vacant possession on completion.
>
> In the present case it is not likely that the council would ever have exercised its powers under s 317B(1)(a) of the *Local Government Act*. Until it did the liability was at most potential.
>
> In *Delbridge v Low* (1990) 2 Qd R 317, Derrington J held, following *McInnes v Edwards*, that the mere existence of circumstances which created the possibility, probability or risk that a property would at a future date be subject to a statutory charge or burden did not constitute a latent defect in title. An inchoate or potential hazard at the date of the contract was not enough to constitute a defect in title. It could not be said that a risk of an order by the Council for the demolition of the roof sheeting to a carport constituted a defect in title within the meaning of the terms of the contract. His Honour reviewed the cases including *Summers v Cocks* (1927) 40 CLR 321 and *Tsekos v Finance Corporation of Australia Limited* [1982] 2 NSWLR 347 at 356.
>
> In *Pisano v Fairfield City Council* (1991) 73 LGRA 184, the appellants had sued the Council for having issued, allegedly with negligence, a certificate under s 317A. In the course of his judgment, Kirby P, with whom Samuels and Clarke JJA agreed, said, obiter, that he preferred the reasoning of Powell J in *Maxwell* and McLelland J in *Borthwick* to that of Kaye J in *McInnes v Edwards* …
>
> Of the authorities to which I have referred we are bound only by the decision of the High Court in *Fletcher v Manton*. The reasoning in that case points to the conclusion that in the present case, at the date of the agreement for sale, the title to the property was good and that any subsequent action by the Council affecting the ownership by a notice for demolition or alteration was the affair of "the owner" at the time, namely, the appellants. It should be observed that this conclusion is not affected by Div 7 of the *Conveyancing Act 1919* introduced by the *Conveyancing (Passing of Risk) Amendment Act 1986*.

Demand for interest payment

The appellants submitted that because the notice to complete demanded more than was due under the contract, it was invalid. In *Neeta (Epping) Pty Limited v Phillips* the vendor's notice to complete made an untenable claim that on completion she should receive interest on the purchase money. She submitted that the notice to complete was good because completion was sought "in

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accordance with the terms of the agreement" and that therefore the claim to interest should have been ignored by the purchaser if it was not in accordance with such terms. At 301-2 Barwick CJ and Jacobs J said:

> But this cannot be right. By the notice the vendor made the assertion that she was ready and willing to complete but at the same time by a second clause claimed the interest from the purchaser as a condition of completion. If that requirement was not met by the named time and day then, said the vendor, she would forfeit the deposit and sue for breach of contract etc. She plainly showed thereby that she was not willing to complete in accordance with the terms of the agreement.

In the notice to complete sent on 17 July 1989 the respondents appointed a time and place to complete the agreement:

> on the terms therein contained and to pay the balance of purchase monies as follows:…
> Purchaser allows interest on balance purchase monies of 25 per cent being $215.75 per day at 23 days – $4,962.25.

This claim was based on cl 24(b) of the agreement which provided that:

> (b) The purchaser will either on prior demand by the vendor or on completion pay to the vendor interest on the balance of purchase moneys payable hereunder as and from the date fixed for completion at a rate calculated on daily rests and being $2 per centum per annum in excess of the rate charged from time to time by the National Australia Bank on overdraft loans of an amount equivalent to such balance of purchase money hereunder.

The only evidence about rates charged by the National Australia Bank was contained in an affidavit of Mr Tony Imbruglia, a manager's assistant, apparently of that bank, who said that the National Australia Bank prime rate set on 3 July 1989 was 20.25 per cent, which continued until after 17 August 1989. The rate of interest for an overdraft facility throughout that period was calculated by adding to the prime rate a margin of between 0.5 per cent to 3.0 per cent, depending upon the quality of security offered and other discretionary matters. At the relevant time the National Australia Bank charged no one rate on overdraft loans but a range of rates. The maximum was 23.25 per cent.

The appellants submitted that the demand for interest calculated at the rate of 25 per cent was unsustainable. There was no evidence that in the given case the National Australia Bank overdraft rate would have been 25 per cent. It might have been less or it might have been marginally more. There was no rate charged on overdraft loans. The bank charged a prime rate plus a margin. The clause was too uncertain to be enforceable.

In the *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-7, Barwick CJ pointed out that a contract of which there can be more than one possible meaning or which, when construed, can produce in its application more than one result is not therefore void for uncertainty:

> As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides as its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. Lord Tomlin's words in this connection in *Hillas & Co Limited v Arcos Limited* (1932) 147 LT 503 at 512 ought to be kept in mind. So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G) & Nephew Limited v Ouston* [1941] AC 251 is not "so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention", the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted,

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particularly in the case of commercial arrangements. Thus will certainty of meaning, as distinct from absence of meaning or of intention, be resolved.

In my opinion the words here are capable of a definite and precise meaning. Clause 24(b) sets the rate chargeable as $2 per centum per annum "in excess of the rate charged by the National Australia Bank". If the National Australia Bank were shown at the relevant time to charge but one rate on overdraft loans of the particular amount, the calculation would be straightforward. Where there is a range of rates, 2 per cent per annum in excess of the rate must be 2 per cent per annum in excess of the maximum rate charged from time to time by the bank on overdraft loans. If, at the relevant time, the range had been from 20 to 25 per cent, 22 per cent would not be $2 per centum per annum in excess of the rate whereas 27 per cent would be. Accordingly, in my opinion, the clause enabled the respondents to charge at the relevant time, 25.25 per cent. They chose to charge less. By so doing they did not require the appellants to perform more than contractually they were bound to do.

Election not to rescind

The appellants submitted that the respondents, by their letter of 10 August 1989, elected not to terminate the contract in accordance with the notice to complete. The appellants relied upon the second paragraph in which the solicitors stated that the respondents required, pursuant to cl 24(b) of the agreement, payment of interest on the balance of purchase money from the date fixed for completion, namely, 11 July 1989 "to date at the rate of 23.5 per cent being an amount of $6,084.25". The letter must be read as a whole. The substance of it was that "completely without prejudice to their rights" the respondents were prepared to allow the appellants to the close of business on 16 August 1989 to complete. It was made plain that, if completion was not effected within that time, they would terminate. In *Tropical Traders Limited v Goonan* (1964) 111 CLR 41 at 53, Kitto J referred to and, for reasons he gave, approved of a passage in *Barclay v Messenger* (1874) 43 LJ Ch 449 at 456 in which Jessel MR, dealing with the effect of an extension of time under a contract making time of the essence, held that "a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time". Nevertheless the appellants submitted that the requirement pursuant to a clause of the contract that payment be made under it was inconsistent with the conclusion that the contract was at an end: compare *Tropical Traders* at 56. But, read in the context of the letter as a whole, the respondents were not requiring payment under the contract except as a condition upon which they were prepared to extend the time for completion. If the appellants had proffered the amount claimed and the respondents accepted it, the time would have been extended. Had the appellants then completed the agreement by the date mentioned, 16 August 1989, the right to terminate would have been lost. The letter made plain that if the appellants did not accept the respondents' proposal the contract would be terminated, as it was, on 17 August 1989. In my opinion the letter was not an election by the respondents to proceed with the contract in any event.

Quantification of damages

The general rule at common law is that where a party sustains a loss by reason of a breach of contract, the party is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed: *Robinson v Harman* (1848) 1 Ex 850; 154 ER 563 at 855 (Ex), 365 (ER); *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at 80, 98, 116, 134, 148 and 161 ...

The respondents were unable to extricate themselves from their obligations under the contract to purchase "Tippaburgh". Vanguard Pastoral Holdings rejected any postponement of any settlement and gave notice that unless completion took place on 27 September 1989 it would cancel the contract and the deposit would be forfeited. This is what happened. In the result the appellants did not resist

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the respondents' claim to recover damages for the loss of the deposit, legal costs and expenses on the sale of Mangrove Mountain and legal costs and expenses on the sale of "Tippaburgh" heads 1, 3 and 4 of the damages awarded ...

The appellants appealed against the amount of damages described as interest pursuant to cl 24(b). This represented interest under the contract up to the date fixed for completion and was allowed on this basis by his Honour. The appellants submitted that on rescission of the contract, the respondents were no longer entitled to the purchase price and thus could not be entitled to interest on the purchase price. In *McGregor on Damages*, 15th ed, (1988) at para 935, when speaking of the second remedy available to a vendor where the purchaser refuses to proceed with the contract in circumstances which amount to a repudiation, the learned author states the principle as follows:

> ... Secondly, [the vendor] may treat the breach as discharging the contract, forfeit any deposit but restore any payments made on account of the purchase price, and proceed to deal with the property as he desires. Each particular contract must be construed to ascertain whether money already paid by the purchaser is a deposit in earnest or guarantee of performance and therefore to be forfeited, or a part payment of the price and therefore to be restored.

If the vendor sues for damages to compensate for the loss of the bargain, the purchase price is taken into account in determining whether the vendor has suffered loss and, if so, the extent of it. Since damages in contract are usually assessed at the date of breach (*Johnson v Perez* (1988) 166 CLR 351 at 355) the normal measure is the contract price less the market price at the contractual time fixed for completion. If the market price at the time fixed for completion exceeds the contract price the vendor has not suffered any damage by the loss of the bargain. In the present case the respondents made no claim on this basis. But as Pollock MR pointed out in *York Glass Co v Jubb* (1925) 134 LT 36 at 40, the damages recoverable are not confined to the actual margin between the sum realised or realisable and the contract price. There may be incidental expenses which have necessarily flowed from the breach of contract.

If on proper analysis, as the author of *McGregor on Damages* suggests in para 940, the amount of damages the vendor is entitled to recover for the loss of the bargain is the full contract price less the net market value of the property left on the vendor's hands, that is to say the amount at which a re-sale has been or could be made deducting therefrom the costs of re-sale, any interest payable by the purchaser on the purchase price during the period up to that time becomes, for the purpose of the calculation, part of the full contract price at the date of breach when completion should have occurred. From the amount so calculated must be deducted the net market value at that date of the property which remains in the vendor's hands. Pursuant to cl 24(b) interest was payable "on prior demand by the vendor or on completion ... on the balance of purchase moneys payable". Interest was a component of the purchase price payable on completion and as such to be taken into account in assessing the damages to be awarded for the loss of the bargain. In consequence it was no more appropriate for the respondents to recover separately for interest on the balance of the purchase price up to the date fixed for completion than it was for the respondents to recover or retain the whole or any part of the purchase price. In my opinion, the amount of interest calculated under cl 24(b) cannot be isolated and awarded as a head of damage. On this part of the appeal the appellants succeed.

This brings me to the fifth head under which his Honour awarded damages, loss of income as lecturer. Judge Twigg found that the appellants knew that the respondents intended to purchase "Tippaburgh", which consisted of 560 acres with a homestead and farm buildings at Nundle in northern New South Wales ...

There was no evidence to support a finding that the appellants at the time the contract was made knew that Mr McGrath intended to take up a lecturing position at Tamworth TAFE. The position was sought and obtained well after the contract was made in April 1989. In my opinion the loss of this

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opportunity could not fairly and reasonably be considered to arise naturally according to the usual course of things from the breach of contract itself or to be something that might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. Accordingly his Honour was wrong to award damages under this head. Quite apart from this, the amount awarded took no account of other employment opportunities available to Mr McGrath in place of the lost lecturing work. No reason was given for assuming that Mr McGrath's earnings were, as a result of the breach of contract, reduced by the loss of the amount of the lecturing fee for twelve months.

Cross-appeal

The respondents cross appealed to recover for removal expenses which his Honour disallowed. The appellants accepted that an amount of $4,500 should have been allowed under this head.

The respondents further cross appealed on the basis that, if, as I think, correctly, the respondents were not entitled to recover interest on the purchase price pursuant to cl 24(b), they should otherwise have been allowed interest on the lost purchase price. However, as I have said, I do not think that damages can be calculated in this isolated way. The purchase price and interest on it up to the date of breach must be brought into account to determine what damages, if any, the vendor can recover for the loss of the bargain, because the vendor is left with the property worth, at the relevant date, less than the purchase price. If the vendor discharges the contract on the purchaser's breach and forfeits the deposit, neither the purchase price nor interest on it is payable by the purchaser. In my opinion this ground of cross appeal fails.

Finally the respondents submitted that the trial Judge erred in deducting the forfeited deposit from all the damages …

[His Honour referred to the termination clause in the contract, equivalent to cl 9 of the 1996 standard form contract]

In *Ockenden v Henly* (1858) El Bl & El 485; 120 ER 590, a purchaser agreed to buy a property for £120 pounds and pay a deposit of 20 per cent in part payment of the purchase money. The purchaser failed to pay either the deposit or the purchase price and did not complete the contract. The vendor sued to recover the difference between the purchase price and the amount for which the property was resold, £15, the deposit, £24, and the charges attending the resale, £9 and 5 shillings, a total of £48.5s. The jury awarded this amount. On a rule calling upon the plaintiff to show cause before the court why the verdict should not be reduced by the sum of £24 on the ground that the plaintiff was not entitled to recover that sum as deposit, as well as all the damages, the purchaser succeeded on the basis that the amount of the deposit recoverable, £24, should be brought into account against the other damages recoverable totalling £24.5s with the result that £24.5s was the amount of damages recoverable. At 492 and 593 Lord Campbell CJ, delivering the judgment of the court, said (at 492; 593):

> … But, the seller having obtained a right to the forfeited deposit, and making a further demand of damages sustained on the resale, it becomes necessary to consider what was the nature of the deposit. Now it is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money, and not as a mere pledge; Sugd V & P ch 1 sect III art 18 (13th ed). Therefore in this case, had the deposit been paid, the balance only of the purchase money would have remained payable. What then, according to the seventh condition, is the deficiency arising upon the resale which the seller is entitled to recover? We think the difference between the balance of the purchase money on the first sale and the amount of the purchase money obtained on the second sale: or, in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, as, without a forfeiture, he might have

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> done (*Palmer v Temple* (9 A & E 508)), still is to be brought by the seller into account if he seeks to recover as for a deficiency on the resale.
>
> The rule to reduce the damages to £24.5s will therefore be absolute.

The "seventh condition" appears to have been to the same effect as condition 9 of the agreement for sale. In *Cratchley v Bloom* (1984) 3 BPR 97206, Hutley JA and Samuels JA held, I think correctly, that the decision was authority for the proposition that the expenses of resale should be set off against the deposit. Their Honours held however that amounts claimed by way of occupation fee and for repairs and restoration of the property and its contents, separately recoverable under the contract whether the purchaser completed or not, should not be set off against the deposit. Samuels J said (at 9436-9437):

> … the deposit, as a part payment, is set against the deficiency produced by any difference in price less any expenses "which have necessarily flowed from the breach of contract" (*York Glass v Jubb* (1926) 134 LT 36 at 40) such as the costs of resale. But in the present case the occupation fee unpaid does not represent any expense of that kind, and its recovery does not involve any calculation to which the purchase price, or any part of it, is relevant. Clause 16 enables the vendor to retain "any money paid by the purchaser on account of the purchase other than the deposit money" as security for any damages, "including any allowance by way of occupation fee", awarded for the purchaser's default. This suggests that the deposit was not to be held for that purpose. Hence the claim under this head stands undiminished.
>
> I am of the same opinion concerning the claims for repairs and conversion, and for the same reason. In addition, cl 18 provides a remedy which appears to be independent of that conferred by cl 16.

With respect I agree with what his Honour said.

In *Essex v Daniell* (1875) LR 10 CP 538, it was said that the doctrine in *Ockenden v Henly* applied only where the power of resale had been exercised. There is no reason why this should be so. If the property is re-sold the deficiency may be measured by reference to the price on re-sale. If the property is not re-sold the deficiency is measured by the market value at the date of completion otherwise determined.

Essential to Lord Campbell's reasoning was the proposition that, but for the provision enabling the vendor to forfeit the deposit and prevent the purchaser from ever recovering it back, any part of the purchase price paid which the vendor had retained and which the purchaser was entitled to recover, had to be brought into account against damages recoverable by the vendor from the purchaser on the termination of the contract, being damages flowing from the purchaser's breach of contract in failing to complete. It follows that if a deposit has been paid by a purchaser and forfeited under the contract, and the damages flowing from such breach total less than the deposit, the vendor may retain the deposit, but if such damages exceed the deposit, the vendor may recover from the purchaser no more than the amount of the surplus. The court was not concerned with amounts claimed by the vendor under the provisions of the contract imposing obligations upon the purchaser separate from the obligation to complete. Such were the occupation fee and cost of repairs held in *Cratchley v Bloom* to be recoverable and not brought to account against the deposit. The distinction is explained by Professor Butt, *Standard Contract for Sale of Land in New South Wales* (1985) at 530.

In the present case the heads of damage allowed, namely, for the loss of deposit on forfeiture on sale of Tippaburgh, removal expenses, and the legal costs and expenses on the sales, were damages which flowed from the appellants' failure to complete the contract and as such must be set off against the deposit forfeited. Accordingly his Honour was correct in his approach and this ground of cross appeal fails.

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Cole JA

Defect in title

The appellants contended that failure to obtain building approval for erection of the shed constituted a defect in title. This was because there existed the potential for the local council to exercise its powers under s 317B(1A) to order demolition in consequence of absence of building approval.

There is a conflict of authority regarding whether erection or alteration of a structure without building approval constitutes a defect in title. In New South Wales, the Australian Capital Territory and New Zealand, the predominant view is that it does. In Victoria and Queensland the contrary view prevails …

Most recently in New South Wales, the matter was considered by the Court of Appeal in 1991 in *Pisano & Anor v Fairfield City Council* (1990) 73 LGRA 184 …

It will be seen that Kirby P's expression of view was greatly qualified. The contract being considered contained a provision which required the vendor to supply the purchasers on or before completion with a s 317A certificate. Further, the view expressed was restricted to the circumstance where the affected structure was the "principal purpose of the purchase". Neither circumstance applies in the present instance for there is no clause requiring the vendor to provide to the purchaser a s 317A certificate, or its more modern equivalent, nor could it be said that a shed on a rural property of 6 hectares being sold with house, stables and sheds could be said to be the principal purpose of the purchase. Further, Kirby P's view was qualified by the overriding obligation to respect the principles to be derived from *Fletcher v Manton* and *Summers v Cocks* in the High Court.

In my respectful opinion the principles to be so derived are those enunciated by Kaye J in *McInnes* and lead to the view that "the mere existence of circumstances which create the possibility or probability or risk that the property will at a future date be subject to a statutory charge or burden does not constitute a latent defect in title". I respectfully agree with the view expressed by Derrington J that there is no basis in principle for restricting that concept to circumstances arising otherwise than out of illegal conduct by the vendor, or for that matter, the vendor's predecessor in title. It follows in my view that the absence of building approval does not constitute a defect in title.

The decision in *Fletcher*, in particular, enunciates what Rich A-CJ described as the "undisputed principle" that "when a valid contract for sale of land is made *and a good title is shown*" (my emphasis), the purchaser becomes on exchange the inchoate equitable owner of the land. Thus he bears the risk or advantage thereafter of acts which affect the land or improvements …

In a sense there is a circularity in using the passing of risk at the date of contract which is dependent upon the subsequent making of good title, to justify a view that the existence of the potentiality of adverse affectation between contract and completion negates the characterisation of that potentiality as a defect in title. Nonetheless it is the title which the vendor has contracted to convey which is established by the contract and thus it must be determined at the date of contract. At that time a property may have the potentiality to be subjected to orders or charges pursuant to a number of local government, rating and other statutes, which potentiality may or may not in the future be realised. The passing of risk at the date of contract passes the risk of that potentiality. Thus, as it seems to me, it is correct in concept to hold that mere potentiality of affectation does not constitute a defect in title.

That does not leave a purchaser without protection. A purchaser may, by an appropriate provision in the contract, require a s 317AE certificate to be provided by the vendor. Alternatively a purchaser may apply himself for such a certificate, protecting his rights if such a certificate is unsatisfactory or does not issue. Thus there seems to me to be no reason of principle which should lead to the contrary result.

It follows that the challenge to the notice to complete, and right to terminate the contract for non-compliance with it upon the basis of a defect in title, fails.

Carpenter v McGrath cont.

Uncertainty

… As the range of interest rate possible under cl 24 was between 22.75 per cent at the lowest and 25.25 per cent at the highest, the clause was said to be uncertain and, further the notice to complete unenforceable because it required payment of a nominated amount calculated at 25 per cent which may not have been the rate determined under cl 24 if a rate could be determined.

I do not think that cl 24 is void for uncertainty. The clause directs the parties to add 2 per cent to the rate charged by the National Australia Bank on overdraft loans of an amount equivalent to the balance of purchase monies. That rate is ascertainable, even if it be that, in varying circumstances, the rate may vary. The intention of the parties was clear that the rate to be charged was to be derived from applying a factor to that charged by the National Australia Bank. On any view a minimum rate charged by the National Australia Bank on overdraft loans of the specified quantum is known. It is 20.75 per cent. The bank may, depending upon circumstances, charge more and may charge up to 23.25 per cent at the relevant time. If the vendor wished to levy a charge greater than the minimum rate because of circumstances, and that above minimum rate was not agreed, a court could determine whether an additional sum above the minimum rate was intended by the contract. As Gibbs CJ said in *Meehan v Jones* (1982) 149 CLR 571 at 578, after citing the well known passage from the judgment of Barwick CJ in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 436-437: "… it is only if the court is unable to put any definite meaning on the contract that it can be said to be uncertain".

Here a definite meaning can be put upon the contract. The rate is at least 20.75 per cent, and may, arguably, be more. However the court has not been asked to determine what the true rate contemplated by cl 24 is …

Election

It was contended that the vendors, after the date for completion had arrived, elected not to terminate the contract. This contention was based upon a paragraph in the letter from the vendor's solicitors dated 10 August 1989 which read: "Our client requires, pursuant to clause 24(b) of the Contract the payment of interest on the balance of purchase money from the date fixed for completion, namely 11 July 1989 to date at the rate of 23.5 per cent being an amount of $6,084.25".

This was said to be a reliance upon, and affirmation of, the contract. Thus there had been an election not to terminate.

The submission is without substance because it neglects the context in which the paragraph was written …

Damages

The remaining matters argued by the appellant relate to damages. It was contended that Twigg DCJ erred in allowing $7,184.58 damages pursuant to cl 24(b). The argument was that that was a contractual right dependent upon completion. As completion did not occur, interest was not payable.

I would reject that contention. The purpose of cl 24(b) was to compensate the vendor for late completion. The contract contemplated that the giving of a notice to complete may be necessary, and the parties had agreed in cl 25 that fourteen days was a proper period of notice. Non-performance of the contract occurred and a notice determining the date for completion given …

Part of the loss which the vendors suffered resulting from the purchasers not completing on 3 August 1989 was non-receipt of the monies payable pursuant to clause 24. The sum is not part of the purchase price but rather a sum contractually payable if settlement is delayed. The sum so payable is in my opinion damages suffered for breach of contract arising from the purchaser failing to complete by the fixed contractual date of 11 July, as extended by the notice to complete to 3 August 1989.