Victorian Cases on Contracts of Sale of Land and on Forged Mortgages in 2021

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INTRODUCTION

1. This is the Paper accompanying my Foleys List CPD Podcast on 1 November 2021. In November last year I gave a Foleys List Podcast and Paper on Recent Cases on Formation of Contracts of Sale of Land. In March this year I gave a Foleys List Podcast and Paper on Recent Cases on Performance and Breach of Contracts of Sale of Land. Both these covered Victorian Supreme and County Court cases from 2016 to 2020. In this Podcast and accompanying Paper I intended to cover Victorian Supreme and County Court cases on contracts of sale in 2021. However there were only 6 such cases and accordingly I have had to widen the field to cover disputes not necessarily arising from the contracts themselves but rather connected with the sale of land. And because the whole topic of verification of identity is so important in property dealings I have included a Court of Appeal case dealing with verification of identity where a mortgage was forged.

2. The cases are –

***Hazelwood v Mercurio & Ors* [2021] VSC 362, Daly AsJ** – lack of authority of an agent to conclude a binding contract on behalf of a vendor; whether an exchange of emails can comply with the Statute of Frauds, vendor possibly estopped from denying contract.

***Betts v Harman* [2021] VCC 1349, Judge Macnamara** – sale by owner builder – no certificate evidencing existence of insurance as required by Building Act s. 137B(2)(c) – section 32 Statement defective under Sale of Land Act s. 32B(b) because no insurance certificate provided – purchaser could lose right to avoid contract under s. 137B(2)(c) by affirmation, waiver or estoppel, but this not established here and accordingly the contract was avoided – vendor would have been relieved under s. 32K(4) of section 32 Statement breach.

***Definity Clinic v AMD Rifat* [2021] VSC 325, Moore J** – contract conditional on issue of a particular town planning permit – condition not fulfilled.

***Pearl v Nannegari & Ors* [2021] VSC 468, McDonald J** – contract subject to finance – purchaser not doing everything required to get finance and not giving notice of lack of finance within time – vendor not estopped from treating notice out of time – defective default notice by vendor but vendor entitled to accept purchaser's repudiation.

***K7 Developments Pty Ltd v Abbotsford Estates Pty Ltd* [2021] VSC 422, Forbes J** – contract for sale of going concern – GST conditions in contract – time for completion agreed to be extended on certain conditions but question whether agreement applied where purchaser could complete in time – vendor not required to complete because purchaser not providing signed nomination form or Transfer – vendor giving notice of default when not entitled and notice defective – contract eventually settling – purchaser obtaining damages for vendor's breach re GST.

***Burger v Longboat Holdings Group2 Pty Ltd* [2021] VSC 469, Matthews AsJ** – sale off-the-plan – purchaser's right to rescind because of amendment to plan of subdivision materially affecting lot sold.

***Atanasovski & Anor v Huu Loi Yarra Valley Pty Ltd & Ors* [2021] VSC 594, Keogh J** – whether completion of mortgagee's sale should be enjoined at suit of purchaser from registered proprietor.

***Chen & Anor v Eumeralla Estate Pty Ltd and Ors* [2021] VCC 453, Judge Macnamara** – joint venture to develop land to be purchased – plaintiffs advance monies towards purchase – purchase never completed – defendants use monies advanced by plaintiffs to buy other land owned by a defendant – accessorial breach of trust - tracing.

***C & F Nominees Mortgage Securities Ltd v Karbotli & Another* [2021] VSCA 134, Kyrou, McLeish and Sifris JJA** – forged mortgage – whether mortgagee took reasonable steps under Transfer of Land Act (TLA) s. 87A to verify authority and identity of mortgagor – mortgagee not entitled to compensation under TLA s. 110.

3. ***Hazelwood v Mercurio & Ors* [2021] VSC 362. Daly AsJ.**

The facts were –

- The plaintiff vendor gave an Exclusive Sale Authority to an agent (whose employee was Campbell) to market an apartment and two separately titled car

parking spaces in the Melbourne CBD. The Authority provided that the agent would advertise, market and sell the property and that "sold" meant (in normal circumstances) "the result of obtaining a binding offer". Clause 13 also authorised the agent to –

- instruct a legal practitioner or conveyancer to prepare a section 32 statement, contract of sale, agree the content of either document, and advise and agree on other amendments or additions to either document;
- fill-up a standard form contract or contract to record the sale as permitted by statute;
- negotiate and, with the vendor's approval, agree and record, or have a legal practitioner or conveyancer record, the final terms of, and obtain signatures to, the contract;
- attend to contract exchange; receive the price and certain advice or notices; and make public certain information.

- The defendants deposed that on about 11 February 2021 they made an unconditional offer to purchase the apartment and one car space for $750,000, with settlement within seven days. Campbell deposed that the defendants imposed a very short deadline on the offer and that he conveyed it to the vendor.
- The defendants deposed that on 16 February Campbell said that he had found a purchaser for the other space and that the vendor had accepted their offer. Campbell disputed this, deposing that although he could not remember his exact words he had no intention of conveying that a sale had been completed until signing of a written agreement.
- The vendor deposed that Campbell told her that he had located a potential purchaser of the apartment and one car space and another purchaser of the second space, and that she instructed him to amend the documents accordingly.
- On 18 February Campbell emailed the defendants: stating that if they could "confirm the below points for me" he would start the paperwork. The points were: whether they had a conveyancer, but if not he could send them a list; their full names and address; price $750,000 with a 10% deposit; as to time for settlement; solicitors' details. The email concluded: "New paperwork is getting drawn up at our end so nothing for you to do at this stage".

- The defendants provided full names, address, lawyer's details, and stated that settlement would be on 12 March.
- On 24 February Campbell emailed an unsigned section 32 statement and contract. His email stated that he had just received these documents and not yet reviewed them "so let me know any questions you have and I'll work through them". The unsigned contract named the vendor, referred to the apartment and to particulars of title of one space, but omitted purchasers' names, price and settlement date. When a defendant queried this Campbell replied that he had "just hit send as soon as I received and so you could have your people quickly review it before signing".
- On being informed by Campbell that someone else had purchased the apartment and both spaces the defendants on 2 March caveated on the grounds of a "part performed oral agreement" with the plaintiff. On 4 March the vendor signed this contract to sell to a third party. The vendor issued a notice under the TLA s. 89A, leading to the caveators issuing a proceeding with a Statement of Claim. The vendor issued this proceeding under s. 90(3). Campbell deposed that on average more than ten apartments in the building would be marketed and sold in any year.

The Victorian Statute of Frauds provision, contained in the Instruments Act s. 126, provides that -

"An action must not be brought to charge a person … upon a contract for the sale … of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note".

In their Statement of Claim the caveators alleged, in the alternative to breach of contract, that the vendor represented that she would sell the apartment to them, such that she was estopped from resiling from that representation.

4. Daly AsJ held –

1. Accepting, for present purposes at least, that –

- to comply with s. 126 a contract of sale need not be contained in a single, self-contained document; [33]

- a sender of an email, by identifying themselves as the sender, can be considered to have "signed" the email; [33]

- section 126 should be construed as to accommodate "accepted contemporary business practices"; [34]

nonetheless, the vendor had not signed anything. The only signatory was Campbell, who was authorised to market the apartment but not to enter a contract on behalf of the vendor. In the Authority there was a material difference between the definition of "sell" and the phrase "endeavour to sell". More importantly, cl. 13 did not authorise the agent to sign any contract on behalf of the vendor, but contemplated personal execution by the vendor and purchaser. [35]-[39]

2. What was stated in the foregoing holding was based on the non-existence of a document in which the vendor not only confirmed her acceptance of the caveators' offer but also expressly authorised the agent to execute the contract on her behalf. If such a document existed, it should have been disclosed by the vendor in accordance with s. 26 of the Civil Procedure Act headed "Overarching obligation to disclose existence of documents". [46]

3. The English decision in *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* as to whether an exchange of emails between parties to a negotiation can constitute an agreement in writing for the purpose of the Statute of Frauds, was distinguishable. There was a material difference between English and Victorian legislation. [40]-[44]

4. If it had been necessary to consider the balance of convenience, this would have favoured the caveators because:

   - notwithstanding Campbell's evidence that the sale of properties equivalent to the apartment was not rare, this apartment was particularly suitable to the caveators' needs;

   - while the vendor not unreasonably considered that, absent an executed contract, she was free to deal with the apartment, and was now exposed to claims by the new purchaser, she entered this contract knowing that the caveators asserted that

they had a contract with her and so she assumed the risk of this being established. [47]

5. The caveators had not argued that their estoppel claim created an immediate equitable interest supporting a caveat. However this estoppel claim might found injunctive relief. Accordingly the order for removal of the caveat would be stayed for 7 days to enable the caveators to apply for an injunction as they may be advised. [24], [48] – [50]

5. ***Betts v Harman*** **[2021] VCC 1349, Judge Macnamara.**

The Building Act 1993 s. 137B(2) provided in substance that an owner-builder must not enter a contract of sale within 6 years and 6 months after the date of issue of the occupancy permit unless: (a) a report from a prescribed building practitioner, obtained not more than 6 months before the contract of sale, was given to the intending purchaser; (b) the person was covered by the required insurance (if any); (c) the person had given the purchaser a certificate evidencing the existence of that insurance; and (d) in the case of a contract for the sale of a home, the contract set out the warranties implied into the contract by s. 137C. Section 137B(3) provided that a contract contravening s. 137B(2) was not void by reason only of the contravention but was voidable at the option of the purchaser at any time before completion of the contract. By contrast s. 137C(3) provided that an agreement or instrument that purported to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in s. 137(1) was void to the extent that it applied to a breach other than a breach that was known or ought reasonably to have been known to the person to exist at the time the agreement or instrument was executed.

The Sale of Land Act s. 32B(b) provided that a section 32 Statement must, if there was a residence on the land constructed within the preceding 6 years and s. 137B of the Building Act applied, contain particulars of any required insurance under that Act applying to that residence. Under s. 32J(1) this information could be provided in an attached certificate, notice, or other document issued by a relevant authority. Under s. 32J(2), if the information required under s. 32B was contained in a policy of insurance the vendor may attach a copy of the policy or an extract of the policy. Section 32K(2) gave the right to rescind for breach of s. 32. Under s. 32K(4) the purchaser may not rescind if the court was satisfied that: (a) the vendor has acted honestly and

reasonably and ought fairly to be excused for the contravention; and (b) the purchaser is substantially in as good a position as if all the relevant provisions of this Division had been complied with.

The facts were –

- The defendant Mrs Harman was the registered proprietor of land. She had obtained a building permit for the construction of a dwelling and garage. She was shown as the "builder". In 2015 an occupancy certificate was issued for the dwelling.

- On 2 April 2019 she entered into a contract to sell the land to the plaintiff (Betts) for $5.5 million with a 10% deposit and the balance at settlement on 12 December 2019.

- General Condition 8 provided that the vendor warranted that the vendor would provide at settlement details of any current building warranty insurance in the vendors possession relating to the property if requested in writing to do so at least 21 days before settlement.

- Contemporaneously with the execution of the contract the parties signed the section 32 Statement. This disclosed that there had been an HIA Owner Builder insurance policy, the period of insurance being 15 November 2012 for a year, issued in the name of Phil Harman, the husband of the vendor. No insurance policy as required by s. 137B existed, and accordingly neither it nor any relative extract or certificate, was annexed. The section 32 Statement also included the report envisaged by s. 137B(2)(a) noting certain defects.

- On 4 April 2019 the purchaser's conveyancer requested, as per General Condition 8, supply of any current builder warranty insurance before or at settlement.

- On 8 April the vendor's conveyancer forwarded the Statement under s. 27 of the Sale of Land Act. At that time a building inspector engaged by the purchaser advised her that she should request from the owner-builder "Home Building Warranty Insurance with specific reference to building contractor and this project".

- On 10 April the vendor's conveyancer forwarded another s. 27 Statement, which was subsequently signed and returned.

- On 15 April Mr Harman emailed the purchaser stating inter alia "Home Building Warranty insurance for construction – included in s32" and that he would carry out certain cosmetic work.

- At some time between 15 April and mid May Mr Harman became aware that what had been furnished in the s. 32 Statement was not the home warranty insurance which had been sought by Betts' conveyancer. He was told that the first step necessary to obtain the insurance was a fresh building inspection report. On 14 October Mr Harman obtained the further report under s. 137B(2)(a) which was generally to the same effect as the earlier report.

- Shortly thereafter a Certificate of Insurance, Owner-Builder was issued in the name of the vendor. The insurance was said to be in compliance with "the Ministerial Order for Domestic Building Insurance issued under the Building Act s. 135" (which extended to loss and damage occurring up to the period of six years after completion of the building, apparently departing from s. 137B(7) which appear to prescribe a period of six years and six months). The insurance was said to exclude the defects noted in the report of 14 October. The insurance certificate was forwarded to the purchaser's conveyancer on 24 October.

- The purchaser gave evidence that the matters raised in the building report obtained by her had been dealt with. A PEXA settlement was fixed for 11am on 12 December. The purchaser sought an extension of settlement to arrange finance. The vendor refused. On 13 December the vendor issued a rescission notice.

- By 18 December the purchaser had obtained the advice of a solicitor and counsel that she could not escape from the contract. However, on 19 December a solicitor advised the purchaser that there may be a defect with the owner builder insurance certificate attached to the s. 32 Statement and sought instructions to make further inquiries. On 20 December the purchaser elected to avoid the contract under s. 137B(2) of the Building Act, stating also that the section 32 Statement was defective.

The purchaser sued alleging breach of s. 137B(2) of the Building Act and s. 32B(b) of the Sale of Land Act. The vendor denied these allegations but argued that if there was a breach of s. 32 she was entitled to be excused.

6. **Judge Macnamara gave judgment for the purchaser, holding –**

1. Under the occupancy permit issued on 30 January 2015, the "prescribed period" referred to in s. 137B had not elapsed at the date of the contract. Accordingly the vendor breached s. 137B(2) and, subject to considerations of waiver, estoppel, election or "contracting out", s. 137B(3) entitled the purchaser to avoid the contract. [62]

2. As it was open to a purchaser in the circumstances described in s. 137B(3) to complete or not complete a contravening contract at his or her option, the Parliamentary intention was not to protect such a person from himself or herself. Accordingly s. 137B did not override doctrines such as waiver, estoppel, and election. By contrast, in cases where it had been held that, relative to similar though by no means identical entitlements to avoid land purchase contracts, such overriding had occurred, the relevant court had regarded it as significant that the statute included a "no contracting out" provision. There was no such provision in s. 137B (though there was in s. 137C). [63], [90]-[93]

3. The purchaser had not elected to affirm the contract. At all material times she was aware of the factual matters which gave her the right to avoid the contract pursuant to s. 137B(3). However she only personally knew of the legal basis for the right to avoid the contract, as distinct from what might be imputed to her, in the period of 19 − 20 December when she purported to exercise it. As to the argument that her conveyancer was well aware of s. 137B, the letter of 4 April in which the conveyancer requested supply of any current builder warranty insurance before or at settlement, indicated no more than general awareness that warranty insurance needed to be dealt with as part of the transaction, not an awareness that, in the events that occurred, the purchaser had a right to avoid the contract. Accordingly –

(a) if knowledge of the legal right, as distinct from the factual basis, for the purchaser's right of avoidance was required before the purchaser was put to

her election, the purchaser elected to avoid the purchase contract forthwith upon becoming aware of the factual basis and her legal right of avoidance, and no election to affirm occurred;

(b) if the true view was that knowledge of the factual basis sufficed to put a purchaser to election in these circumstances, an effective election may be made on the basis of knowledge of the underlying facts as existed here without knowledge of the legal right to rescind only if the acknowledgment of the continuing effect of the contact entailed acts adverse to the other party such as demanding the payment of money, taking possession of property, and so forth. Merely continuing upon the assumption that the contract remained in force was insufficient to put a party to election in the absence of knowledge of the legal right so to do. Turning to the present case, therefore, the purchaser knew of the underlying facts since they derived from the contract and s32 Statement. She elected to avoid the contract forthwith upon becoming aware of her legal right so to do. The question therefore as to whether there has been an effective election or not depended upon the nature of Ms Betts' activities relative to the contract from its formation when she became aware of the underlying facts giving the right to avoid until the letter of avoidance from her solicitor. Although her conveyancers did call for production of insurance documentation, and she did insist upon an inspection of the premises and obtained a building report, what she did, whilst acknowledging the continued existence of the contract, did not constitute adverse steps in the relevant sense. [94],]101]-[103], [121], [122]

4. For the same considerations as applied to affirmation, the purchaser had not waived her rights. Merely to call for the warranty insurance material to be produced at or prior to settlement was too indirect and indefinite to constitute a waiver. [94], [124]

5. The purchaser was also not estopped from relying on non-compliance with s. 137B. Apart from normal steps taken in the performance of the contract and preparation for settlement the only steps that could be regarded as specifically directed to the issue of warranty insurance were the inclusion of General Condition 8 in the contract of sale, the letter of 4 April requesting warranty

insurance "to be supplied prior to or at settlement", and the provision on 24 October of the insurance. However, the acts relevant to creating an estoppel were those taken by the person relying upon the allegedly estopping representation, ie inducing the person to act to his or her detriment. None of the foregoing matters rose to the level of detriment. It was not shown that the actions of the purchaser - or perhaps more accurately inactions, in failing until perhaps after the 11th hour to raise the issue of s. 137B – caused the vendor to act to her detriment, at least in a manner which would create the injustice necessary to engage the doctrine of estoppel. [94], [126], [127], [131]

6. The court rejected the argument that the purchaser agreed to extend time for the provision of insurance up to and including settlement, whether by reason of General Condition 8 or otherwise. General Condition 8 was referable to the more typical situation where a dwelling house was constructed by a registered builder. Alternatively, if the general condition covered both situations, it still was not an agreement to dispense with the civil consequences of contravention of s. 137B. The same observation of lack of specificity may be made with respect to the conveyancers' letter of 2 April 2019. [133], [134], [137], [138]

7. The right of termination under s. 137B(3) was absolute and unconditional. Accordingly the purchaser was not precluded from exercising her statutory right to avoid and/or rescind because was in default of settling the contract on the due date. [152], [158], [159]

8. The vendor would have been relieved under s. 32K(4) from her contravention of s. 32B(b) –

   (a) As to "honestly" the court accepted that Mr Harman, who "took the lead" in this transaction, was ignorant of the statutory requirement but was eventually made aware of it by the conveyancer;

   (b) "Reasonableness" was an objective standard. Parliament must be taken to have assumed that the contravention, in itself, could not be sufficient to exclude the possibility that the contravenor had acted reasonably. Ignorance of particular legal rules did not in itself exclude a finding of reasonableness on

the part of the vendor, and she also relied on a conveyancer to prepare the s. 32 Statement;

(c) The purchaser was also now in as good a position as she would have been if the legislative requirements. The insurance cover became callable only if the owner-builder "dies, becomes insolvent or disappears", none of which applied here. The policy extended to loss and damage occurring up to the period of six years after the completion date of the building. The occupancy certificate was issued 30 January 2015. Therefore, the October 2019 policy of insurance had expired before the trial commenced without evidence of any major defect (Clause 37 of the Ministerial Order permitted the policy to exclude liability for fair wear and tear and maintenance issues). Accordingly the insurance was, aside from legalities, in practical terms a "non event". [141], [143]-[151]

7. ***Definity Clinic v AMD Rifat*** **[2021] VSC 325 Moore J.**

Under a Planning Scheme the permitted use of a property for sale was as a café. The directors of the plaintiff, respectively a cosmetic surgeon and medical practitioner, were interested in purchasing it to operate a cosmetic surgery, including to undertake liposuction, and in which they would both work. They made this known to the vendor and that they required a change of use from café to medical.

The plaintiff entered a contract to purchase the property from the defendant on 27 October 2017. A special condition provided -

"This contract is subject to and conditional upon vendor obtaining a medical permit for the premises for two (2) practioners [sic]…."

The vendor applied to the Council to amend the planning permit to permit the use of the property 'for the purpose of a Medical Centre comprising two practitioners', with certain hours and car spaces. A director of the plaintiff subsequently provided information, which was passed on the responsible authority, that the medical centre was to be a day procedure unit.

In due course the Council issued a notice of decision which gave effect to a change of use of the property from café to medical centre with an amendment to the existing permit condition to provide as follows:

"The Medical Centre … must have no more than two (2) people providing health services within the premises, with a maximum of six (6) patients attending the Medical Centre each day. …."

The purchaser advised the vendor that, while the desired amendment had been for two practitioners, two people providing health services was different in that two medical practitioners would require assistance from other staff to provide health services. A director of the purchaser was subsequently told by the Council that the requirements associated with a day procedure centre meant that the planning permit application should have been for a private hospital, rather than for a medical centre.

The parties were in dispute about whether this permit satisfied the special condition.

8. **Moore J. held that the requirements of the special condition were not satisfied, for the following reasons –**

1. The words 'medical permit' and 'two practitioners' were ambiguous. The word 'practitioner' lacked a fixed or certain meaning. Neither this special condition nor the remainder of the text of the contract assisted in determining whether the 'practitioners' were of a medical, or some other, background or qualification. [113]

2. The existence of ambiguity may permit consideration of the surrounding circumstances in determining the proper construction of the condition. As the remainder of the text provided no assistance, recourse to events, circumstances and things external to the contract were necessary to determine this proper construction. The argument that there were no objective background facts which could properly be taken into account in construction, because neither party knew anything about the type of permit that would be required to conduct a cosmetic surgery practice, was invalid because: it focused too narrowly on the word 'permit' in the expression 'medical permit for ... two (2) practitioners' and ignored the ambiguity inherent in the word 'practitioners'; both parties understood that the 'permit' was something issued by the Council yet no generic or uniform 'medical permit' existed; it wrongly equated knowledge in respect of a particular matter with intention – the reality that the parties did not know the specific type of planning permit required for a cosmetic surgery practice at the property did not

necessarily preclude consideration of the surrounding circumstances as illuminating an objectively ascertainable common intention as to the purpose of the condition. [114]-[118]

3. The relevant factual framework known to the parties within which the contract came into existence and which bore upon construction was not based on evidence the receipt of which breached the parol evidence rule. The facts were: the defendant had developed the property, which had a permitted use as a café, but had been unsuccessful in selling it; the directors of the plaintiff were interested in purchase to operate a cosmetic surgery, including to undertake liposuction from it, at which they would both work; being the owner, only the defendant had authority to deal with Council in relation to changing permitted use, and its director expressed confidence that the medical permit that could be obtained would be fit for their intended use. [119]-[120]

4. Accordingly the purpose of the condition was to protect the purchaser if it could not use the property in the manner in which it intended, namely, for the provision of cosmetic medical services, including liposuction, by its two medical practitioners. [121]

5. The vendor's submission that a 'medical permit' was, in effect, any planning permit which allowed a medical use, could not be reconciled with these surrounding circumstances. The construction of 'medical permit' in the condition as requiring a planning permit that would enable the property to be used for medical services of the type and scope that the purchaser wished to provide from the property was conducive of a commercial result, ie the sale would proceed at the agreed price; the construction of the condition advanced by the purchaser bore no significant commercial risk because if a permit for a medical use was obtained, but was one which would not enable the property to be used for the purchaser's intended purpose, the vendor would retain a property with enhanced value. [122]-[123]

9. ***Pearl v Nannegari & Ors*** **[2021] VSC 468 McDonald J.**

The facts were -

- On 26 March 2020 the plaintiff as vendor and the first defendant as purchaser entered into a contract of sale for $1,680,000 with a 10% deposit of which $10,000 was paid, the balance of the deposit being due 'once finance [was] approved'. The contract also included a subject to finance clause. HSBC was nominated as the 'Lender' for a loan of $1,500,000 with a finance approval date of 10 April 2020. Settlement was due on 12 June 2020.

- General condition 14, headed "Loan" provided:

  14.1 If the particulars of sale specify that this contract is subject to a loan being approved, this contract is subject to the lender approving the loan on the security of the property by the approval date or any later date allowed by the vendor.

  14.2 The purchaser may end the contract if the loan is not approved by the approval date, but only if the purchaser:

  (a) …

  (b) did everything reasonably required to obtain approval of the loan; and

  (c) serves written notice ending the contract on the vendor within 2 clear business days after the approval date or any later date allowed by the vendor; and

  (d) ….

  Special condition 31 and general condition 16 made time of the essence.

- The general conditions also included -

  27. DEFAULT NOTICE

  27.1 A party is not entitled to exercise any rights arising from the other party's default, other than the right to receive interest and the right to sue for money owing, until the other party is given and fails to comply with a written default notice.

  27.2 The default notice must:

  (a) specify the particulars of the default; and

  (b) state that it is the offended party's intention to exercise the rights arising from the default unless, within 14 days of the notice being given—

  (i) the default notice is remedied; and

  (ii) the reasonable costs incurred as a result of the default and any interest payable are paid.

  28. DEFAULT NOT REMEDIED

28.1 All unpaid money under the contract becomes immediately payable to the vendor if the default has been made by the purchaser and is not remedied and the costs and interest are not paid.

28.2 The contract immediately ends if:

(a) the default notice also states that unless the default is remedied and the reasonable costs and interest are paid, the contract will be ended in accordance with this general condition; and

(b) the default is not remedied and the reasonable costs and interest are not paid by the end of the period of the default notice.

... "

- No loan application was made to HSBC. The parties subsequently extended the time for finance to be obtained to 20 April 2020. On 20 April an extension to 27 April was sought. On 21 April the vendor's solicitors requested a letter from the bank detailing 'the steps undertaken so far to obtain finance approval, where the finance approval is at, if there is anything outstanding and when realistically it is expected to be obtained'. The conveyancer forwarded an email from One1Zero Finance which indicated that there was a delay in seeking finance and that a decision from ME Bank was pending.

- The purchaser intended to nominate the second to fourth defendants are purchasers. Evidence was tendered which suggested that these defendants had been advised on 21 April that ME Bank had rejected their loan applications. On 22 April 2020, the defendants' finance broker informed the plaintiff's solicitors that the loan applications were still under consideration and that an outcome was expected by 4 May 2020. On 23 April the plaintiff's solicitors responded that the material provided was insufficient and made a further request for a bank letter. On 24 April the purchaser stated that a decision would likely be reached the following Monday. On 27 April the conveyancer forwarded an email from One1Zero Finance referring to ongoing delays in the finance approval process.

- On 28 April the conveyancer emailed attaching a sale of real estate nomination form signed by the second to fourth defendants, with letters from ME Bank addressed to these defendants declining their loan applications. This email stated that the contract had been brought to an end, requested that the $10,000 deposit be

refunded, and foreshadowed lodgment of a caveat. A caveat was lodged on 20 May.

- On 4 May the vendor's solicitors served a default notice. It stated that the purchasers were in default particularised as: '[t]he Purchaser failed to pay the balance of the deposit by the Due Date or at all'. The notice also stated that 'the Vendor intend[ed] to exercise his rights unless the default [was] remedied within 14 days of the service of this notice'. The notice did not refer to general condition 28.

- By emails dated 19 May the vendor's solicitors asserted that the contract was terminated pursuant to the default notice and reserved all rights. On 20 May they again asserted this ground of termination but stated that in any event the plaintiff accepted the first defendant's repudiation of the contract.

- The plaintiff resold the property for $20,000 less than the price in its contract with the first defendant.

The plaintiff vendor orders under the Property Law Act (PLA) s. 49(1). Section 49 provided -

(1) A vendor or purchaser of any interest in land, or their representatives respectively, may apply to the Court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the Court may make such order upon the application as to the Court may appear just, …

(2) Where the Court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit

10. McDonald J held –

1. The contract was not terminated by the email dated 28 April 2020. The notice required under cl. 14(2)(c) was out of time by six days. Further, the failure to apply to HSBC for the loan amounted to non-compliance with the obligation to do everything reasonably required and so rendered the contract unconditional as to finance. Strict compliance was required with general condition 14.2. [11]-[13]

2. The vendor was not estopped from treating that email as being out of time for the purpose of ending the contract. A representation must be clear before it can found an estoppel, and the party acting in reliance on the representation must be in a position of material disadvantage if the departure from the representation is permitted. There was no clear representation that the finance date would be extended. The evidence regarding the date on which the defendants and their mortgage broker were advised of the rejections of their various loan applications was also unsatisfactory. [19]-[21]

3. However, even if there had been an estoppel to the effect that that notice of 28 April was not out of time, it did not follow that that email would have been effective to terminate the contract. The requirement under cl 14.2(b) that the purchaser do everything reasonably required to obtain loan approval was a discrete obligation, with which the defendants did not comply. [21]

4. The default notice dated 4 May 2020 satisfied the requirements of general condition 27.1 in that it specified the particulars of the default and the plaintiff's intention to exercise rights arising from the default unless it was remedied within 14 days. However, the notice was defective because it failed to include the additional matters referred to in general condition 28.2, ie it did not refer back to this sub-clause of the contract. [26]-[29]

5. The contract was terminated by the vendor's acceptance on 20 May of the first defendant's repudiation of the contract. As at 28 April he had manifested an intention not to be bound by the contract by conducting himself inconsistently with the contract remaining on foot, namely by: the purported notice of termination dated 28 April; the request to return the $10,000 deposit; the foreshadowing of a caveat. The fact that the emails of 19 and 20 May relied upon the defective default notice was irrelevant. [31]-[35]

6. The contract became unconditional because of the failure of the purchaser to comply with General Condition 14. There would accordingly be an order for retention of the part of the deposit already paid and for payment of the balance of the deposit as a debt. The first defendant would not be relieved from this outcome under s. 49: purchasers must do more than establish that forfeiture of the deposit would result in a financial 'windfall' to the vendor. The first defendant had failed

to establish grounds justifying a departure from holding him to his bargain. [44]-[47]

11. ***K7 Developments Pty Ltd v Abbotsford Estates Pty Ltd*** **[2021] VSC 422. Forbes J.**

Section 38.325 of the A New Tax System (Goods and Services Tax) Act 1999 (GST Act) provides that:

(1) The supply of a going concern is GST-free if … (b) the recipient is registered or required to be registered; and (c) the supplier and the recipient have agreed in writing that the supply is of a going concern.

(2) A supply of a going concern is a supply under an arrangement under which: (a) The supplier supplies to the recipient all of the things necessary for the continued operation of the enterprise; and (b) The supplier carries on or will carry on, the enterprise until the day of the supply ….

The facts were –

- On 15 June 2017 the defendant entered a contract to sell to the plaintiff a property in Abbotsford subject to four tenancy agreements with settlement on 15 March 2018. The contract specified that the property was to be supplied at settlement as a 'Going Concern' and the price was 'plus GST'. The relevant enterprise under s. 38.325(2) was the commercial leasing of the property. The Special Conditions prevailed over the General Conditions to the extent of any inconsistency. General Condition 13 provided -

  GST
  13.1 The purchaser does not have to pay the vendor any GST payable by the vendor in respect of a taxable supply made under this contract in addition to the price unless the particulars of sale specify that the price is 'plus GST'. However the purchaser must pay to the vendor any GST payable by the vendor:
  ...
  (c) if the particulars of sale specify that the supply made under this contract is of a going concern and the supply (or part of it) does not satisfy the requirements of section 38-325 of the *GST Act*.
  13.2 The purchaser must pay to the vendor any GST payable by the vendor in respect of a taxable supply made under this contract in addition to the price if the particulars of sale specify that the price is 'plus GST'.
  13.3 If the purchaser is liable to pay GST, the purchaser is not required to make payment until provided with a tax invoice, …

...
13.5 If the particulars of sale specify that the supply made under this contract is a 'going concern':
(a) the parties agree that this contract is for the supply of a going concern; and
(b) the purchaser warrants that the purchaser is, or prior to settlement will be, registered for GST; and
(c) the vendor warrants that the vendor will carry on the going concern until the date of supply.

- The Special Conditions included that: any nominee transferee be nominated no later than 14 days prior to settlement (21); the purchaser prepare and deliver a Transfer to the vendor at least 10 business days before the due date for settlement (22.1).

- Special Condition 31 provided -

  GST
  ...
  (e) Tax Invoice
  If a Taxable Supply is made or varied under this Contract in respect to which GST is payable, the supplier must provide the recipient of the supply a valid Tax Invoice as the case may be at or before the time of payment or variation.
  ...
  (g) Going Concern
  If the Particulars of Sale specify that the supply made under this contract is Supply of a Going Concern then the following shall apply:
  i. The Purchaser has concluded that the supply made under this Contract is a Supply of a Going Concern.
  ii. The Vendor provides no warranty that the supply made under this Contract will constitute the Supply of a Going Concern.
  iii. The Purchaser warrants that it is, and will be at Settlement, registered for GST within the meaning of the GST Act.
  iv. If after the date of this Contract the Vendor, acting reasonably, determines for any reason that only part of the supply constitutes a Supply of a Going Concern and that GST is payable in respect of a Taxable Supply under this Contract, then this Special Condition of this Contract shall apply and the Purchaser must pay to the Vendor an amount equal to the GST and any interest and/or penalties that the Vendor is required to pay to the Australian Taxation Office in respect of the Taxable Supply. In such a case the Vendor must notify the Purchaser in writing that the Vendor is required to pay the Australian Taxation Office specifying the GST and any interest and/or penalties payable in respect of the Taxable Supply and the Purchaser must forthwith pay to the Vendor the amount of any GST and any interest and/or penalties as notified to it within 14 days after receipt of the Vendor's notice.
  ….

- The section 32 documentation referred to four tenancy plans as being attached but did not attach them.

- On 17 November 2017 the purchaser requested a two month extension for settlement due to possible delay in obtaining funds.

- On 15 January 2018 the parties agreed (extension agreement) that: settlement may occur after 15 March up until 15 May 2018 upon 14 days' notice by the purchaser (condition 1); the purchaser pay interest at 16% compounding monthly from 15 March to the actual date of settlement; as to provision of further documents to the vendor and costs.

- On 5 March the purchaser stated that it could now settle on the original settlement date of 15 March. That day its solicitor provided an unsigned nomination form and an unsigned instrument of Transfer. Because these were unsigned they did not comply with the contract.

- The parties then entered into dispute about whether the extension agreement applied but on 15 March agreed to a new settlement date of 20 March.

- On 16 March the purchaser's solicitor requested plans for the four leases (not attached to the s. 32 Statement). They and no explanation of their whereabouts was ever provided.

- On 19 March the vendor notified the purchaser that two of the tenants had vacated, one in September 2017 and the other on 28 February 2018. The vendor provided no information about reletting. Rather, it simply noted that part of the supply was now subject to GST (because it was no longer entirely one of a going concern) for which the purchaser was liable.

- After the date of the sale a camera had been affixed to the top of the property by a construction company operating at a nearby site. On 19 March the purchaser notified the vendor that it had identified this camera and requested that the vendor disclose any lease or licence relating to the camera before settlement. The vendor provided no such disclosure but stated that it was arranging for the camera to be removed as soon as practicable. On 21 March the vendor requested that the construction company remove the camera.

- On 26 March the vendor proposed entering into a related party monthly lease for the vacant portion of the property. Between 26 and 28 March: the vendor

proposed settlement on 28 or 29 March, without proposing how to resolve outstanding issues and without providing outstanding documentation; the purchaser cited ongoing concerns about the potentially substantial GST liability, the viability for GST purposes of the proposed related party lease, and the camera.

- The construction company stated that it would enter into a licence agreement with the purchaser. On 5 April the purchaser agreed to this course. On 9 April the construction company sent a proposed licence agreement to the vendor for signature, which the vendor did not sign.

- On 5 April the vendor's solicitors reiterated that, in reliance on Special Condition 31(g)(ii), any GST liability lay with the purchaser. That email said, amongst other things:

  In the event a lease is not in existence... for the premises prior to settlement, our client acting reasonably determines that only part of the supply will constitute a Supply of a Going Concern and in our client's reasonable determination, GST will be payable in respect to the untenanted premises.

  This email also gave notice under SC 31(g)(iv) that the vendor "requires an amount equivalent to the GST liability to be paid by the purchaser in addition to the purchase price at settlement".

- After the vendor was uncontactable for some weeks the purchaser on 23 April offered to complete the purchase on certain conditions concerning the related party lease, amendment of the contract, and camera. There being no response, the purchaser on 14 May withdrew this offer and proposed a meeting to resolve outstanding settlement issues. On 15 May the vendor stated that it would strictly enforce the contract, particularly in relation to the purchaser's alleged obligation to pay GST. Neither party proposed settlement by 15 May in accordance with the extension agreement.

- On 12 June 2018 the vendor issued a Notice of Default under General Condition 27. The notice included –

  "Due Date: 15 March 2018 (original settlement date) and 15 May 2018 (extended settlement date pursuant to Purchaser's request agreed by Vendor subject to conditions as set out in the correspondence exchanged between B2B Lawyers and Katsu Lawyers from 11 January 2018 to 15 January 2018)."

Item 6 described "Conditions agreed by the Purchaser relating to the 15 May 2018 extended settlement date" and set out the five conditions of the extension agreement.

The Particulars of Default alleged: failure to pay all monies owed by the Due Date including but not limited to the balance of the price, GST of $96,912.00 payable on the non-tenanted area, accrued interest at 16% per annum compounding monthly from 16 March 2018 to 12 June 2018 totalling $254,952.81 and continuing, adjusted apportionable outgoings, and any legal expenses owed by the purchaser; failure to procure further documents referred to in the extension agreement; and failure to pay an invoice of the vendor's solicitors being legal costs incurred by vendor in relation to the settlement extension.

The Default Notice was the first time the vendor had quantified the GST allegedly payable on the non-tenanted area of the property.

- On 19 June the purchaser disputed this alleged default and the validity of the notice but offered to settle the sale on 25 June 2018 including payment of: the balance of the purchase price, the claimed GST amount of $96,912.00 (made under protest), penalty interest of $14,301.37 (covering the period from 16 March 2018 to 20 March 2018), legal costs associated with preparing documentation for the extension agreement and the usual adjustments of property outgoings.

- On expiry of the default notice the vendor asserted that the contract was terminated. On 8 August it offered settlement on particular terms. On 24 August the purchaser sued for specific performance. It had also caveated.

- On 5 September and on 26 September the vendor and purchaser respectively proposed settlement on particular terms. On 2 October the vendor purported to accept the purchaser's offer. However no settlement occurred because the parties disagreed on whether settlement was to occur 30 days from the date of acceptance or 30 days from the execution of a formal agreement.

- Correspondence followed in which the parties continued to disagree about liability for GST. In December 2018 the vendor counterclaimed for loss arising from the delayed settlement and steps to resell the property.

- On 29 January 2019 the vendor entered into a contract of sale with a new purchaser (which eventually did not proceed).

- The purchaser's loan facility had expired in January 2019. In March 2019 it reapplied for the loan facility and this was reapproved on 29 April.

- On 20 March 2019 the plaintiff made an open offer to settle the contract on 20 May 2019 for the original purchase price, with it paying GST subject to timely calculations and provision of a tax invoice, and with its Proceeding remaining on foot to determine damages, interest, costs and any GST liability. The vendor agreed to this in principle and after further negotiations settlement was fixed for 6 May 2019. Settlement occurred that day. The tax invoice for GST purposes was provided at settlement.

12. **Forbes J. held –**

1. The extension agreement was not a stand-alone document but was to be read in conjunction with the contract. It provided for specific circumstances by which the parties agreed to a flexible alternative settlement date within a two-month window. It did not change any of the existing contractual conditions, including the condition that settlement would occur on 15 March 2018. It applied only if the purchaser nominated a date for settlement after 15 March and on or before 15 May 2018. [88]-[90], [92]

2. On 5 March 2018, when the purchaser notified that it was in a position to settle on the original settlement date, there was no need to have recourse to the extension agreement. However, the purchaser was in default under the original contract by its late provision of the Transfer and nomination form. The vendor was entitled (without recourse to the extension agreement) to insist on adherence to the special condition that any nominee transferee be nominated no later than 14 days before settlement. [91], [92], [110]

3. General Condition 13.5(c) and Special Condition 31(g)(ii) were not inconsistent. Special Condition 31 and General Condition 13 should be interpreted harmoniously if possible. By Special Condition 31(g)(i) the purchaser reached its own conclusion as to whether the enterprise to be supplied was in fact that of a

going concern. It could only do so at the time of signing the contract. That Special Condition did not have prospective application. The warranty to carry on the enterprise until the date of supply (in General Condition 13.5(c)) was consistent not giving any warranty that as to whether the nature of the enterprise met the definition and description ie that the supply would constitute the supply of a going concern (Special Condition 31(g)(ii)). Special Condition 31(g)(iv) protected a vendor, acting reasonably to meet its warranty to carry on the enterprise until the date of supply, who nevertheless determined that part of the enterprise to be supplied can no longer be described as that of a going concern and therefore the exemption from GST is no longer applicable. It was not read so widely as to permit a vendor to decide unilaterally to cease operation of the enterprise it had warranted to continue. The requirement in that special condition to act reasonably incorporated the action of undertaking the enterprise not solely notifying the purchaser. [103]-[107], [109]

4. A party was only entitled to issue a Notice of Default if it was ready, willing and able to proceed to completion in accordance with the contract. As at 12 June 2018, the date of the notice, the vendor was in breach of contract in not taking any steps to comply with the warranty that it would carry on the going concern until the date of supply, ie following vacation by tenants. The purchaser had funds to settle the contract and was not seeking to delay settlement. [116]-[119]

5. Had the vendor been entitled to issue the Default Notice, in order for it to be valid it must be unambiguous and clear in its essential features to a reasonable reader in the position of the purchaser with knowledge of the transaction. It was not valid because –

   (a) as to the two due dates nominated, ie the original settlement date of 15 March and the extended settlement date of 15 May: the purchaser could settle on 15 March but the vendor could not; the notice failed to mention 20 March 2018 being the settlement date agreed on 15 March; on both 20 March and 15 May the vendor had not yet provided to the purchaser certain information, including about the changed tenancy situation and its GST implications;

   (b) it identified particulars of default only by reference to a default in performance of obligations undifferentiated by each “due date”;

(c) the absence of any differentiation between the asserted default applicable as at 15 March from the default applicable as at 15 May, and the silence in relation to the agreed 20 March settlement were sufficiently ambiguous in essential features to render the notice invalid. [121]-[123]

6. The purchaser was not in default of its contractual obligations when the Default Notice was issued or at any time other than between 15 and 20 March 2018. Accordingly the contract continued in force until settled on 6 May 2019. [127], [159]

7. The vendor's counterclaim asserted that it had suffered loss and damage due to delay by the purchaser from 15 March 2018 until settlement on 6 May 2019 because the purchaser was not at all times ready, willing and able to settle the contract. This counterclaim was dismissed because the purchaser was at all times ready, willing and able, in particular –

   (a) any lack of funds to settle was only temporary and a long time before settlement was due;

   (b) the argument that the purchaser delayed settlement by failing to provide a statement of adjustments, confirm payment of GST or request an invoice for GST prior to 20 March 2018 was invalid. The statement of adjustments required information from the vendor as to rental payments, requested on 5 March 2018 and not provided until 18 September 2018. GST payment had only been identified on 19 March 2018 without quantification or detail of lease areas upon which to calculate a likely amount. [126], [129]-[132], [134], [135], [137]

8. The purchaser's claims for loss and damage were dealt with as follows -

   (a) As the liability for GST that arose stemmed from the vendor's failure to take steps to maintain part of the property as a commercially leased going concern, any GST liability sounded as damages for that breach. The amount actually paid, $96,911.98 was recoverable. (If however the purchaser had been liable to pay GST the evidence called by the purchaser from a building surveyor that GST on the untenanted area, properly calculated was $40,969.39. This was

not opinion evidence but simply factual evidence as to measurements taken by him of what he understood to be the lettable area).

(b) The claim for a second arrangement fee paid to a financier and the financier's legal fees was dismissed because they were not incurred by the purchaser but by the nominee but in any event would not have been recoverable as the loan cancellation was more directed at protecting the purchaser's good relationship with its lender and were not required by the lender because of any lapse of time. [138]-[140], [145], [146], [150]-[152], [155], [156]

13. ***Burger & Ors v Longboat Holdings Group2 Pty Ltd*** **[2021] VSC 469, Matthews AsJ.**

Section 9AC of the Sale of Land Act provided -

(1) If after an off-the-plan contract has been entered into and before the registration of the relevant plan of subdivision an amendment to the plan is required by the Registrar or requested by the vendor, the vendor shall within 14 days ... advise the purchaser in writing of the proposed amendment.
(2) The purchaser may rescind an off-the-plan contract within 14 days after being advised by the vendor ... of an amendment to the plan of subdivision which will materially affect the lot to which the contract relates.

On such rescission the purchaser was entitled, under s. 9AF(1)(b), to return of the deposit. Any agreement under which a person purported to waive any right the person may have under the Act to avoid a contract was void (s. 14).

The facts were –

- The defendant was the owner and developer of land in West Footscray subject to an unregistered plan of subdivision. The plan went through a number of versions. Version 4 dated 22 November 2017 included Lots 30 and 46 which were two-bedroom apartments.

- In early 2018 persons surnamed Taupenas and Velasquez purchased Lot 46 off-the-plan with a car park and persons surnamed Burger purchased Lot 30 off-the-plan with a right to use a specific allocated car-stacker space. The purchasers paid deposits.

- Both s. 32 Statements contained Plan Version 4. Both contracts contained Special Condition 7 which included –

7.4 Minor variations to Plan

(a) Subject to the Sale of Land Act 1962 (Vic), the vendor may make minor variations to the Plan and the purchaser must not … terminate … this contract because of any variation made in accordance with this special condition. The vendor must promptly inform the purchaser in writing of the variation.

(b) Without limiting special condition 7.4(a), the vendor may:

(i) make such minor variations to the Plan as are necessary to comply with a requirement of any Government Authority or the Registrar of Titles;

(ii) alter the … size … any of the lots …; and

…

7.5 Other variations to Plan

If any variation to the Plan (other than a minor variation under special condition 7.4) is proposed or is necessary to comply with a requirement of any Government Authority or the Registrar of Titles:

(a) the vendor must promptly inform the purchaser in writing of the variation;

(b) …

(c) the purchaser may, within 10 Business Days after being informed by the vendor of the variation, but only if the variation will materially affect the property, by giving written notice to the vendor, terminate this contract, in which case the deposit must be refunded …

7.6 Purchaser's acknowledgment

The purchaser acknowledges and agrees that an amendment made to the Plan which alters the area of the property by 5% or less will not be regarded as an amendment which materially affects the property.

- Plan Version 4 designated Lot 46 as a Type A apartment. Its contract contained Special Condition 31 which provided:

  The Vendor and purchaser agree that the purchase of … (Lot 46) is subject to a change to the subdivision from a 'Type A' apartment to a 'Type G1' apartment … Should the change of subdivision not be finalised … then the purchaser has the right to end this contract and all monies in full will be refunded to the purchaser within 7 days of being notified.

- On 15 February 2018 the defendant provided the purchasers of Lot 46 with a plan version of that date being Plan Version 7. On 21 July 2018 the defendant provided the purchasers of Lot 30 with Plan Version 5 dated 12 February 2018. (As there was no material difference between these Plan Versions, the court used Plan Version 7 for the purposes of comparison with a later plan).

- The purchasers received no further versions of the Plan until on 15 March 2021 they received Plan Version 15 dated 20 August 2020, signed by the Maribyrnong City Council on 2 February 2021, without advice detailing amendments.

- When comparing Plan Version 15 with Plan Version 7 the purchasers of Lot 30 alleged –

  (a) Amendment of the boundary between the lot and another lot resulting in reduction of the size and shape of the master bedroom ('Master Bedroom Size and Configuration Changes');

  (b) Reduction in the size of the light court between the lot and another lot resulting in a reduction of available natural light in the master bedroom ('Light Court Change');

  (c) The assigned car park has been relocated from the upper-basement level to the sub-basement level and its size had changed ('Lot 30 Car Space Change'). Evidence was given that this space had changed from the top deck of the stacker to the bottom deck of the stacker and that the maximum height for the top deck was 1.8m and for the lower deck 1.7m.

  (d) Reduction in the area of common property no. 1 ('CP1') by the creation of reserve 1 to be vested in the Council ('Creation of the MCC Reserve'). By the creation of this reserve most of that portion of CP 1 in front of the apartments along one edge had become the reserve. An easement over this land had been created in 1971 preventing its use other than as landscaped reserve and only as approved by Melbourne Water. However during this development there had been significant flooding leading to the excision of the land subject to the easement from the title to become a reserve. This extended to the Council agreeing to undertake landscaping works.

  (e) Decrease in the area of land of common property 1 by the creation of common property 2 ('CP 2') ('Creation of CP 2'). On Plan Version 7 an area ('Area Two') was part of CP 1, and on the building plans contained in each s. 32 Statement Area Two was shown as landscaped. By Plan Version 15 Area Two had become part of CP 2. All lot owners were members of OC 1, which has the rights in respect of CP 1, but only 16 owners not including this owners of

Lots 30 and 46 were members of owners corporation no. 2 ('OC 2'). Only members of OC 2 had any rights in respect of CP 2.

- When comparing Plan Version 15 with Plan Version 7 the purchasers of Lot 46 alleged –

  (a) In effect the same allegation as (a) under the Lot 30 contract (Master Bedroom Size and Configuration Changes);

  (b) In effect the same allegation as (b) under the Lot 30 contract ('Light Court Change');

  (c) Decrease in the size of the car park ('Lot 46 Car Park Change'). The evidence was that this was a stand-alone car park reduced from 14.35m^2 to 12.74m^2 ie an 11% reduction solely in length.

  (d) As per (d) and (e) under the other contract;

- All purchasers purportedly rescinded under s. 9AC(2). The purchasers under the Lot 46 contract in the alternative give notice of termination pursuant to Special Condition 31.

The purchasers under both contracts each commenced a proceeding under s. 49(1) of the PLA raising whether the amendment to the plan materially affected the lot. Under s. 49(2), on an application under s. 49(1), the court also had a discretion to order repayment of a deposit as it thought fit. The two proceedings were tried together.

14. Matthews AsJ gave judgment for the plaintiffs for the following reasons –

1. The evidentiary burden to establish material affect lay on the purchaser. Provided the production to the court of the contract and the two plans enabled the court to see the changes and make some assessment on materiality the protective purpose of s. 9AC did not require such precision as to show the 'effect' of amendments in terms of specific loss of space in square-metre terms, or loss of light measured in lumens, or some other more precise loss of amenity. This was particularly so where, as here, the vendor had not described the amendment in any way and

where such more detailed information was within its knowledge rather than that of the purchasers'. [76], [77]

2. Special Condition 7.6 did not render boundary changes immaterial, that is, being a reduction of 5% or less, as: (a) to the extent that it purported to preclude the court's consideration of materiality it was is void pursuant to s. 14; (b) the purchasers' acknowledgment was irrelevant to the court's assessment of materiality. [63]- [65]

3. As to the Master Bedroom Size and Configuration Changes, there had been changes to the size of the properties much of which had occurred in the master bedroom which had been reduced by at least 4 sq. m. This reduction to a master bedroom that could hardly be described as palatial before the change was clearly material. The effect of the reduction was exacerbated by the positioning of a structural wall which in effect created a small alcove at the bedroom entry, decreasing its utility and potentially affecting the amount and distribution of natural light into the master bedroom from the light court. [79]-[82]

4. As to the Light Court Change, the length of one boundary of the light court had been reduced by 0.5m. This was likely to result in decreased light to the master bedroom, particularly when combined with the alcove created by the structural wall. This was a material change. [87], [93]-[95]

5. The Creation of the MCC Reserve affected the lot owners' rights in respect of the Easement Land. This effect on the bundle of rights attaching to each lot was material. Even if the lot owners' rights had previously been seriously restricted by the easement, those rights were exclusive to the lot owners save for the rights of Melbourne Water to come on to the Easement Land and carry out works there. Now any 'rights' the lot owners to walk over the land were no longer proprietary or exclusive and were dependent upon the Council giving access. The lack of exclusivity alone (excepting for the rights conferred by the Easement) was a material change. [125]-[127]

6. Even if Area Two was to be inaccessible to all residents its removal from CP 1 and insertion in CP 2 materially affected Lots 30 and 46 because of this loss of rights over Area Two, particularly if it became accessible. Although Area Two

was relatively small in the context of the whole development the loss of the use of a terrace or the ability to create a terrace was not insignificant. [139]-[141]

7. The Lot 30 Car Space Change was not material. [158], [160]

8. The Lot 46 Car Park Change was not material. There was no evidence of either the statutory minimum size for a car park and, unlike the Master Bedroom Size & Configuration Changes and the Light Court Changes, the effects of the reduction in length of the space were not apparent from the plans themselves. [169]-[171]

9. Even of the purchasers of Lot 46 had failed under s. 9AC they could rescind under Special Condition 31. Plan Version 15 did not in fact contain a Type-G1 Apartment. The purchasers were not required by the special condition to exercise this right within seven days of being notified of a Type G1 Apartment not being delivered. The reference to seven days in the special condition was to the time by which their deposit was to be refunded. [179]-[185]

10. If the plaintiffs had otherwise failed the court would not have exercised its discretion to order return of the deposit under s. 49(2) as there were no exceptional circumstances. [193]

15. ***Atanasovski & Anor v Huu Loi Yarra Valley Pty Ltd & Ors*** **[2021] VSC 594. Keogh J.**

The facts were –

- The first plaintiff (Atanasovski) was the director of a company ('McKimmies') which owned land. McKimmies entered a contract to sell the land to another company ('BPEH') for $16.8m. Another company ('Havenport') loaned BPEH funds to pay the deposit.
- The sale from McKimmies to BPEH was settled in July 2019 by BPEH paying $15.8m. from funds borrowed from Qi Yong 7 Pty Ltd ('Qi Yong 7') and Qi Yong 8 respectively secured by first and second registered mortgages. The remaining $1 m. was not paid but to secure its future payment McKimmies took a registered third mortgage.
- Mr Huynh ('Huynh') was the sole director of BPEH and another company (BPED). In October 2019 BPED entered a contract to purchase the property from

BPEH (the 'Bundoora contract') for $14.7m. with a deposit of $500,000 of which $30,000 had been paid, with the balance to be paid by 30 December 2019. The original settlement date was extended to 10 January 2021. BPED nominated a company (Toorak) as purchasers.

- The balance of the deposit was paid and apparently released to BPEH, and payments were made to its creditors, including approximately $107,000 to Qi Yong 7
- On 2 March 2020 Qi Yong 7 issued a notice of default to BPEH under the first mortgage. It took possession of the property as mortgagee. On 23 June 2020 Qi Yong 7 entered the contract to sell the property to Atanasovski for $12.5m. Atanasovski nominated the second plaintiff as transferee.
- In November 2020 a deed was prepared between BPEH and Qi Yong 7 reciting the Bundoora contract and requiring part repayment of $650,000 towards the loan from Qi Yong 7 secured by first mortgage.
- Huynh deposed that on 27 January 2021 he paid $850,000 to Qi Yong 7.
- The contract of sale from Qi Yong 7 to Atanasovski was due for settlement on 1 September 2021. In September Qi Yong 7 declined to settle because BPEH alleged that notice of default under s. 76 of the TLA had not been validly served and as a consequence Qi Yong 7 was not entitled to exercise the power of sale under s. 77 and the contract was liable to be set aside.

In response, the plaintiffs applied for a declaration under s. 49(1) of the PLA that Qi Yong 7 was not entitled to refuse to perform its settlement obligations under the contract of sale. After various procedural steps and other proceedings between various parties including additional parties an affidavit was filed deposing to service of the s. 76 notice by Qi Yong 7. BPEH eventually conceded that Qi Yong 7 validly served a s. 76 Notice. BPED still sought to enjoin completion of the contract from Qi Yong 7 to Atanasovski.

Atanasovski deposed to various reasons as to why it was urgent that the contract settle.

16. Keogh J. held -

1. The effect of default by BPEH was to empower Qi Yong 7 to take possession of the property and sell it as mortgagee. Assuming no lack of *bona fides* in the exercise of the power of sale, the right of BPEH to redeem the mortgage was extinguished upon Qi Yong 7 entering into a valid contract of sale with Atanasovski. [58]
2. Atanasovski as purchaser under the contract of sale from Qi Yong 7 as mortgagee in possession had an equitable interest in the property and was entitled to have the contract of sale performed. The declaration that Qi Yong 7 was not entitled to refuse to perform its settlement obligations under the contract of sale would be made. [54]
3. As to the injury sought by BPED –
   (a) BPED had not made out a prima facie case that it has an equitable interest in the property with priority over the interest of Atanasovski. BPED had argued that although a registered mortgagee would usually be entitled by reason of s. 77(4) to complete a sale with a subsequent purchaser despite the existence of a prior extant contract of sale between the registered proprietor and a buyer, in this case Qi Yong 7, by its conduct, affirmed or bound itself to the Bundoora contract and, aside from entering into the contract with Atanasovski, treated the Bundoora contract as being on foot at all material times, ie Qi Yong 7 received part of the deposit paid under the Bundoora contract and its agent led Huynh to understand that Qi Yong 7 agreed to perform the Bundoora contract. This argument was rejected.
   (b) There was no evidence that BPEH could or intended to redeem the secured interests on the property at a settlement of the Bundoora contract. The evidence suggestsed otherwise.
   (c) Atanasovski would suffer considerable detriment if the sale did not proceed.

   Accordingly the application for injunction would be refused both for this reason and on the balance of convenience. [57]-[62]

17. *Chen & Anor v Eumeralla Estate Pty Ltd and Ors* [2021] VCC 453, Judge Macnamara

Judge Macnamara observed [2]: there are no agreements in writing; the plaintiffs allege the existence of one partly-executed agreement which they say is in possession of the defendants, the defendants deny that any such written agreement ever existed;

the parties are at odds as to what transpired at meetings which they agree occurred; some meetings are alleged by the one side and denied by the other; in this proceeding very little is common ground, and nearly everything seems to be disputed; the task of setting out the background to the dispute is therefore difficult. The facts were –

- The plaintiffs, 'Jessica' and 'Lance' were in-laws, and the second and third defendants, 'Bo' and 'Jeff' were married.

- In 2016 Bo proposed a joint venture agreement with Jessica and others to develop a property in Ivanhoe, which however did not proceed. Jessica and Bo became good friends.

- In 2017 a property improved by a residence in Eumeralla Avenue Templestowe Lower was for sale. The parties entered into an oral arrangement with respect to its purchase, as to which there was dispute. The plaintiffs alleged an agreement that the parties would enter a joint venture. The defendants alleged that the arrangement was a simple on-sale or sub-sale by Bo to Jessica – she was merely to take the profit from purchasing it for $3.18m and on-selling it to Jessica and Lance for $3.6m. According to Jessica on 31 August 2017, in the words of the judge:

    - Bo asked Jessica "if it's possible we work together on the project" at Eumerella Avenue;

    - "Bo said it is a very good investment opportunity, even better than the Ivanhoe project. The land was initially was said more than 4,000 square metres with seven townhouse unit permits, and the price is over $3m.";

    - "[Bo] said that the property would cost $3.6m, and she [Bo] would have a two-thirds share, and we [presumably Jessica and Lance] would have one-third of the share and we work together to develop it.";

    - The suggestion was to borrow 80 per cent of the cost, with the venturers putting in the remaining 20 per cent, one-third for Jessica and two-thirds for Bo;

    - The $3.6m was the price of the land. There would be further costs for the erection of the seven units totalling $2.8m, an allowance for stamp duty at the

rate of 5.5 per cent, and a year's prepaid interest. This would require total contributions from the venturers of $1.65m additional to the 80 per cent borrowing from the bank.

- She said the proposal was that she, Jessica, would pay $550,000 with the balance from Bo.

- As to the issue of title, Bo said we would purchase it together – then she is going to do the operation and set up company and the four of us name would be in that company.

- On 1 September Bo signed the contract of sale for $3,180,000, with a 5 per cent deposit of $159,000 payable by 8 September, with $3,000 already having been paid. The purchaser was described as "Bo Xuan and or nominee".
- The rest of the deposit was paid as to $120,000 by the plaintiffs and $36,000 by Bo.
- In October Jeff arranged for the incorporation of the first defendant (Eumeralla). He was its sole director and the sole shareholder was a company controlled by him. On 20 December Bo nominated Eumeralla as the party to take title.
- Between 20 and 27 December 2017 the plaintiffs deposited some $430,000 into Eumeralla's bank account.
- His Honour found that the plaintiffs' version of the arrangement as stated by Jessica was true. Simply on the basis of the inherent probability of the plaintiffs' account and the improbability of the defendants' account he concluded that the arrangement was as alleged by the plaintiffs, ie a joint venture proposal not an "on-sale" or "sub-sale". The following factors pointed in its favour –
  - The improbability that Jessica would enter into an arrangement which locked in, for Bo's benefit, a profit of some $420,000 for the alleged on-sale;
  - If Bo were simply intending to take her profit and disappear from the scene, why bother with establishing the first defendant? A sub-sale would also needlessly incur duty. However the existence of the first defendant was consistent with a development scheme. It was plausible that Eumeralla was incorporated as part of a joint venture agreement according to the same model envisaged for the abortive Ivanhoe development proposal.

  - The plaintiffs' payments were consistent with the arrangement they alleged. $120,000 was one-third of a 10 per cent deposit on a purchase price of $3.6m, and their total contribution of $550,000 was one-third of a 20% equity contribution representing the amount required by the venturers in such a proposal, assuming that 80% per cent of the cost of land and buildings could be borrowed.
- In December 2017 Jessica, Lance and Jeff went to a meeting with Westpac to seek a loan which did not eventuate. According to the defendants the purpose was to raise money to enable a sub-sale to Eumeralla. There was conflicting evidence as to whether Jeff played a central role in the meeting or whether he just stayed outside after having made initial introductions. The former was likely. In the absence of lack of any documentation all of the improbabilities seemed against the defendants' account.
- The vendors served two rescission notices in February 2018. The vendors asserted that contract of sale was rescinded pursuant to the second rescission notice and claimed to forfeit the deposit.
- On 19 March 2018 Jeff withdrew $100,000 from Eumeralla's bank account. This withdrawal was made with Bo's prior or concurrent knowledge.
- On 3 May 2018, Bo entered into a contract to purchase a property in Kooyong for $1.575m. A deposit of $78,750 was paid that day. She nominated Jeff as purchaser.
- When combined with the withdrawal on 19 March Jeff in mid - 2018 withdrew $429,591 from Eumeralla's bank account without the plaintiffs' knowledge or approval. On 20 July there was a payment into the account of a company controlled by Jeff, White Knight, of some $100,000, described as "WHITEKNIGHT BUSI Loan WK", which Jeff denied had come from Eumerella's account. The White Knight bank accounts were not before the court.
- On 14 August $348,000 was withdrawn from Jeff's account to a solicitor's bank account for the purpose of settling the Kooyong purchase. Jeff became registered proprietor on 15 August.
- The defendants conceded that $173,999 was paid into Jeff's bank account, consisting of withdrawals of $150,000 on 20 July and $23,999 on 9 August. The

plaintiffs argued that $273,999 was paid into Jeff's bank account. The $100,000 difference was the 20 July payment into White Knight's account.

The plaintiffs sued for breach of trust and other remedies.

18. Judge Macnamara held –

1. The funds held by Eumeralla deposited by the plaintiffs were held for the purposes of completing the purchase and redevelopment of the property in Eumeralla Avenue. The primary purpose for the advance of funds by the plaintiffs having failed, Eumeralla held those funds on resulting trust for the plaintiffs. [177], [178], [210]
2. Based on *Barnes v Addy* (1874) LR 9 Ch. App. 244 liability for breaches of trust by third parties who are regarded as accessories to such breaches existed:
   (a) where the third party knowingly received property dealt with by the trustee in breach of trust, known for short as "knowing receipt", and
   (b) where the third party knowingly assisted in a dishonest breach by the trustee, known as "knowing assistance". This made a defendant liable who assisted a trustee or fiduciary with knowledge of a dishonest and fraudulent design on the part of the trustee or fiduciary. As to what constituted dishonesty for the purposes of this analysis, a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards. This included those who 'shut their eyes' against the receipt of unwelcome information. The following categories of knowledge sufficed to answer the requirement of knowledge for the second limb of *Barnes v Addy*: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man. However, knowledge of circumstances which would put an honest and reasonable man on inquiry did not suffice. Further, "dishonest and fraudulent design" for the purposes of this second limb extended to include not only breaches of trust but also breaches of fiduciary duty; but any breach of trust or breach of fiduciary duty relied on must be dishonest and fraudulent. [123], [126]-[129].

3. Jeff participated in Eumeralla's breaches of trust by effecting the withdrawals. He participated knowingly: he was aware that there was no "on-sale agreement" and accordingly the funds standing to the credit of Eumeralla could be moved and spent only with the authority of the plaintiffs. He was accordingly liable under the second limb of *Barnes v Addy* for $429,591. He was also liable as having knowingly received $173,999 and the $100,000 cash withdrawal. [158], [181]-[184], [191], [212]
4. Bo had not received any trust property. Her prior knowledge of the $100,000 withdrawal in March was insufficient to render her liable for Eumerella's breaches of trust. The evidence of her prior or concurrent knowledge relative to the other withdrawals was less definitive. Having regard to the gravity of this allegation, in light of the Evidence Act s. 140 and the judgment of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 this knowledge was not established. Accordingly, the argument that she was a knowing participant in the withdrawal of funds and so a knowing participant in Eumerella's trust breaches based upon general awareness of what Jeff had done and upon other matters including providing account details to the plaintiffs, failed. [162]-[165], [185], [186], [211]
5. Although equity made certain presumptions against fiduciaries and trustees who are in breach of trust and designated as "wrongdoers", which may be to create, in effect, a burden of proof as to exculpation upon the "wrongdoer" such that, in the absence of evidence, a relevant loss is presumed to have been sustained by the innocent party, the court was not referred to authority on whether similar presumptions applied to accessories to breach of trust. Accordingly there was no particular presumption which would lead to rejection of Jeff's denial that the White Knight item emanated from the funds deposited with Eumeralla. [170]-[171]
6. Tracing was a process by which a claimant demonstrated what had happened to his property, identified its proceeds and the persons who have handled or received them, and justified his claim that the proceeds can properly be regarded as representing his property. Only the sum of $173,999 could be traced into the Kooyong purchase. [201], [205], [213]
7. Where a trustee wrongfully used trust money to provide part of the cost of acquiring an asset, the beneficiary was entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal

claim against the trustee for the amount of the misapplied money. These principles applied to indirect recipients of funds such a Jeff. [202], [203]

8. The plaintiffs exercised the option of asserting corresponding beneficial ownership of a proportionate share of the Kooyong property, rather than treating it as a lien. A form of order would be made entailing sale of the Kooyong property if the amounts due to the plaintiffs were not paid within 30 days and a division of proceeds. This was a form of sale under Part IV of the PLA appropriate in a situation of co-ownership rather than where the claimant was asserting merely an interest as mortgagee or chargee. This was properly so in circumstances where an ownership right was asserted via the process of tracing. Although Part IV matters were normally at VCAT the court had jurisdiction under s. 234(4) the issue of co-ownership of land had arisen in the course of the proceeding. [207], [208], [213]

19. *C & F Nominees Mortgage Securities Ltd v Karbotli* [2021] VSCA 134 (Kyrou, McLeish and Sifris JJA)

The facts were –

- The first respondent (Ms Issa) was during her marriage known as 'Hend Karbotli'. She and her husband had a son James Karbotli ('Mr Karbotli'). The couple lived in Melbourne but eventually moved to Queensland.

- In 2006 the couple divorced and she reverted to her maiden name, identifying herself as 'Hind Issa'. She registered this change of name in Queensland in 2008.

- In her property settlement she became sole registered proprietor of a property in Bulleen. The certificate of title was in the name of 'Hend Karbotli'.

- The applicant (C & F) was a lender. On 2 February 2017 a solicitor who was both a director of C & F and a partner in a law firm acting for it received an email from a mortgage broker attaching a loan application. The email -

  - stated that the borrower was to be Mazop Pty Ltd ('Mazop'), with guarantees to be provided by directors Mr Karbotli and Ms Issa, and a mortgage to be given over the Bulleen property which was said to be in the name of 'Hend Issa'. (Ms

Issa was never a director of Mazop – a Form lodged with ASIC on 28 February 2017 notifying her appointment as a director was without her consent).

- noted an existing loan of $450,000.
- concluded 'Note that Hend Karbotli and Hend Issa are one in [sic] the same person as per Veda Report. Hend Issa is her name whilst she was married'.

- Attached to this email was a copy of a driver's licence in the name of 'Hind Issa' purportedly certified on 17 January 2017 by Paul Bruce Tuddenham, a Justice of the Peace. Also attached was the 'Veda Report', which was a credit report, which included –
  - The words 'Report for: HIND ISSA (+ 1 cross-reference)'.
  - A section headed 'Identity details' which stated 'Identities: 2'. The 'primary' identity was recorded as 'Hind ISSA', with a reference to driver's licence 96820587. The 'Cross reference' was recorded as 'Hind KARBOTLI'.
  - 'Current directorships' shown as '0'.
- The solicitor procured a title search which showed a caveat lodged on 19 January 2017 by an unregistered mortgagee ('FX'). The solicitor noted to the mortgage broker that this timing 'seems very odd' and asked for an explanation of the circumstances. The solicitor did not recall any response.
- On 3 February 2017 C & F sent a 'Loan Offer' to 'The Directors' of Mazop, care of the mortgage broker. 'James Karbotli' and 'Hend Karbotli' were the 'Guarantor/s'. The document stated that C & F required the borrower to obtain and provide a form of acknowledgment of having received independent legal advice.
- On 12 February 2017 the broker returned an executed version of the Loan Offer to C & F, which included under 'Acceptance of Offer' a signature (described by the court as 'fragile') discernible as 'Hind Karbotli', above the typed words 'For and on behalf of Mazop Pty Ltd' and under the date '10/02/2017'.

- The broker also sent C & F an 'Originator Agreement' dated 1 February 2017 between it, Mazop, and Mr Karbotli and Ms Issa as guarantors. The execution page included:

  (a) as to execution by Mazop, two signatures including one discernible as 'Hind Karbotli' above the type-written words 'Director/Secretary' and 'FULL NAME: Hend Karbotli';

  (b) the type-written words 'Execution for guarantor(s) SIGNED SEALED AND DELIVERED by Hend Karbotli' and adjacent to those words a hand-written signature, discernible as 'Hind Karbotli', purportedly witnessed by Carol Grevis.

- On 22 February 2017 security documents for execution were dispatched from the law firm to 'The Director' of Mazop, care of the mortgage broker including: the mortgage; the Memorandum of Common Provisions (MCP); a disbursement authority; a Solicitors Certificate for Borrower [sic]; and a 100 Point Identification Check Form.

- The 100 Point Identification Check Form had a section headed 'Identity Documents' and listed acceptable primary and secondary documents. In respect of the primary documents the form stated 'If you have changed your name from that on the document (eg, due to marriage etc), the document cannot be accepted'.

- On or around 4 March 2017 the executed mortgage and disbursement authority were returned by the mortgage broker to C & F. Inter alia the executed version of the mortgage:

  (a) stated, in the standard form general introductory paragraph, that the mortgage 'is given in consideration of and to better secure the principal sum lent or agreed to be lent to the mortgagor by the mortgagee';

  (b) described the mortgagor as 'Hend Karbotli';

  (c) was undated;

  (d) incorporated the provisions contained in a MCP;

  (e) included a page headed 'Covenants' (page 2 of 3) which stated:

  The mortgagor covenants with the mortgagee as follows:-

  1. To pay the principal sum in the manner and at the times specified.

  ...

  7. The Guarantor pursuant to Clause 4.2 is James Karbotli of 8 Amalf [sic] Drive, Surfers Paradise Qld 4217.

8. Mazop Pty Ltd will be primarily responsible for payment of the principal and interest as the money will be utilized by Mazop Pty Ltd.

(f) at the bottom of the covenants page of the mortgage, omitted any signatures following the type-written words 'Execution and attestation'; and

(g) included an execution page which included:

(i) the type-written words 'SIGNED by the said HEND KARBOTLI' and adjacent to those words a hand-written signature, discernible as 'Hind Karbotli', purportedly witnessed by Julie Archer;

(ii) the type-written words 'EXECUTED by MAZOP PTY LTD', and underneath those words two hand-written signatures, one of which was discernible as 'Hind Issa', and under those signatures the type-written words: 'Sole Director/Sole Secretary – James Karbotli of 8 Amalf [sic] Drive, Surfers Paradise QLD 4217'.

- The executed disbursements authority included signatures, the first discernible as 'Hind Karbotli', above the type-written words 'Signed- Hend Karbotli'.

- On 6 March 2017 the mortgage broker delivered copies of documents to C & F, including documents purporting to certify identity in accordance with the 100 point Identification Check Form. The covering 100 point Form stated in handwriting that the borrower was 'HIND ISSA' with her address. The documents provided included:

(a) a copy of an expired Queensland driver licence in the name of 'Hind Issa' purportedly certified by a Justice of the Peace, Gary Kimberly, on 18 January 2017;

(b) a Statutory Declaration of Carol Marie Grevis taken and declared before Mr Kimberly on 18 January 2017;

(c) a Westpac bank statement addressed to 'Hind Issa' as trustee for the Lion Enterprises Trust;

(d) a letter dated 25 May 2012 from Westpac Banking Corporation addressed to 'Hind Issa' as trustee for the Lion Enterprises Trust;

(e) a letter dated 24 May 2012 from Munro Accountants addressed to Mr Karbotli and 'Mrs H Issa' with a trust deed for the Lion Enterprises Trust;

(f) an ATO statement and an ATO notice addressed to 'Mrs Hend Karbotli' and an ATO notice addressed to 'Mrs Hind Issa'.

The identification provided in respect of Ms Issa was less than the 100 points required.

- On 27 March 2017 the broker emailed C & F copies of a biographical page of a current passport, a current Medicare card and the expired driver licence, all in the name of 'Hind Issa', purportedly certified by Mr Kimberly on 26 March 2017. The identification provided was again less than the required 100 points.

- Attached to this email was a 'Solicitor's Certificate'. This stated that it was provided by a solicitor holding a current Practising Certificate, Stephen Richard Picken, who had interviewed Hend Karbotli, and that he explained to her and she appeared to understand certain documents he had been provided with. He said that identification produced to him by the borrower was *Drivers Licence 096820587.* The certification clause by the client read: "*Hind Issa* Dated *4.3.2017*".

- The solicitor googled Picken's name and saw he was listed as a practising Queensland solicitor.

- On 29 March 2017 the loan settled with C & F paying $448,425.81 to discharge the FX mortgage and paying $310,414 directly to Mazop.

- After C & F attempted to lodge the mortgage the Registrar of Titles requisitioned because the covenants page of the mortgage document was not executed. In response to C & F's email Paul Tuddenham, a broker employed by Mazop, emailed an executed version of the covenants page which included a hand-written signature, discernible as 'Hind Issa', above the hand-written words 'HIND ISSA'. The mortgage was redated and registered in May 2017.

- Mazop defaulted in payment. It emerged that the signatures of Ms Issa were forgeries and that Mr Picken had not interviewed her.

On 15 December 2017 the applicant commenced a County Court proceeding against Ms Issa, Mr Karbotli and Mazop. Mr Picken and Registrar of Titles were joined a parties. Default judgment was entered against Mr Karbotli and Mr Picken. Mazop was in external administration.

Section 87A of the TLA, enacted in 2014, provided:

"Mortgagee to verify identity of mortgagor for execution of mortgage or variation of mortgage
(1) At the time of execution of a mortgage or a variation of mortgage, a mortgagee must take reasonable steps to verify the authority and identity of a mortgagor to ensure that the person executing the mortgage, or on whose behalf the mortgage is executed, as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.
(2) …
(3) If, in relation to a mortgage, the Registrar is satisfied that the mortgagee did not take reasonable steps to verify the authority and identity of the mortgagor and the registered proprietor of the land did not grant the mortgage, the Registrar may—
(a) …
(b) if the mortgage has been registered, remove the mortgage from the Register.
...
(5) If the Registrar removes a mortgage from the Register under subsection (3)—
(a) the mortgagee no longer has an indefeasible interest in the mortgaged land; and
(b) the mortgage is void."

Before the proceeding commenced or the Notice to Pay was served, s. 87A(1) was amended, with effect from 20 September 2017, replacing the opening words 'At the time of execution of a mortgage' with the words 'In respect of a mortgage'.

Section 110 of the TLA provided:

"Entitlement to indemnity
(1) Subject to this Act any person sustaining loss or damage (whether by deprivation of land or otherwise) by reason of—
...
(b) any amendment of the Register;
...
shall be entitled to be indemnified.
...
(3) No indemnity shall be payable under this Act—
(a) where the claimant his legal practitioner, conveyancer or agent caused or substantially contributed to the loss by fraud neglect or wilful default … (and the onus shall rest upon the applicant of negativing any such fraud, neglect or wilful default);
(4) Any indemnity paid in respect of the loss of any estate or interest in land shall not exceed—
(a) …;
(b) where the Register is amended, the value of the estate or interest immediately before the time of amendment;
(c) subject to paragraphs (a) and (b), in the case of a fraudulent mortgage where the mortgagee has complied with section 87A or 87B, the principal amount together with any interest …."

Judge Macnamara ordered that the mortgage be removed from the Register and the title be amended, for two reasons. First, it was declared that the plaintiff did not, at the time of execution of the mortgage, take reasonable steps to verify the authority and identity of Ms Issa, to ensure that the person executing the mortgage as mortgagor, was the same person as the registered proprietor. Secondly it was declared that the mortgage was 'void' and did not secure any amounts owing.

The claim against the Registrar under s. 110 failed because the judge held that C & F's loss was caused or substantially contributed to by its own neglect.

20. The Court of Appeal granted leave to appeal but dismissed the appeal, holding –

1. Before the introduction of s. 87A, as the holder of a registered instrument and not being a party to the forgery or fraud, C & F would have had an indefeasible right to enforce the mortgage. [2]

2. The nature of the 2017 amendment to s. 87A was to remove the specific focus on the time of the execution of the mortgage and to instead provide simply that 'reasonable steps' were to be taken with respect to the mortgage, ie to focus on the general circumstances of the mortgage without any anchor to a specific point in time. It was unnecessary to determine whether the 2014 or 2017 version applied in this case primarily because the judge did not refuse to address any fact, matter or argument on the basis that the conduct or fact or matter in question either pre-dated or post-dated the purported execution of the mortgage. [50]-[53]

3. Reasonable steps must be taken to ensure two related critical requirements regarding verification of authority and identity under s. 87A were satisfied. First, it must be verified by photographic identification and a comparison of likeness that the mortgagor (the person who will execute the mortgage) was indeed the mortgagor (the registered proprietor of the property). Secondly, it must be verified that the identified mortgagor was indeed the person executing the mortgage. [91], [97]

4. In all the circumstances, including the sequence of events and the documentation relating to execution of the mortgage, C & F did not in relation to the execution of

the mortgage take reasonable steps to verify the authority and identity of Ms Issa. In particular -

(a) The email of 2 February 2017 attaching the Veda Report referred to the registered proprietor as Hend Issa, the Report was in respect of Hind Issa and also referred to her as Hind Karbotli, and the registered proprietor was Hend Karbotli. C & F made no further enquiries and did not receive a certified copy of a change of name.

(b) The Veda Report did not list any directorships for Ms Issa.

(c) As to the Loan Offer -

(i) C & F Nominees was not dealing directly with Ms Issa. All dealings were through the broker, who was not the agent of C & F Nominees.

(ii) There was nothing in the Loan Offer about the need to verify the identity or authority of the proposed mortgagor.

(d) The signature of the Loan Offer by Ms Issa on behalf of Mazop was fragile and C & F knew from the Veda Report that Ms Issa was not a director of Mazop.

(e) As to the 100 Point Form –

(i) There were a number of issues with the purported identification documents, including that they were very old and under different names and directed to different addresses.

(ii) The identification provided in respect of Ms Issa was less than 100 points.

(iii) The form did not explain how this identity check had an effect on or was linked to the execution of the mortgage and in particular the witnessing of the mortgage, especially if this was done later. The form did not require any certification by the person certifying the documents, eg that the information on the form was true, that the documents were produced in a face to face interview or that the person

identified had a reasonable likeness to the person in the photographs in the identity documents.

(iv) In short, there was no link or connection between the 100 point identification check and the Solicitor's Certificate and the execution of the mortgage or satisfaction as to her authority and identity.

(f) The 100 point identification check and the passport, Medicare and licence documents provided on 27 March did not assist in the verification process. All they established is that there was a person named Hind Issa with a facial profile, and also that there was a person named Hend Karbotli. There was no evidence or indication that it was Ms Issa that confirmed and verified that she was indeed the Hind Issa referred to in the documents and the Hend Karbotli who was the registered proprietor.

(g) The Solicitor's Certificate, received three weeks after the mortgage, was, whether alone or together with other evidence, insufficient to establish reasonable steps, for at least the following reasons -

(i) It was ambiguous about whether Mr Picken conducted a face to face interview with Ms Issa.

(ii) Although the certificate referred to evidence of identification in the form of a particular driver's licence there was no reference to any comparison of likeness between the photographic identification in the licence and the person before Mr Picken.

(iii) It was designed to enable a mortgagee to ensure that independent legal advice was given to prevent a mortgagee from taking advantage of a special disability rather than to verify the identity and authority of the mortgagor. No attempt was made to amend the certificate so as to deal more specifically, clearly and precisely, with the issues of authority and identity. Although the certificate went some way to establishing authority and identity it was on its own insufficient for such purpose.

(iv) Insofar as the certificate purported to verify authority and identity, it did not speak at the time of execution of the mortgage, but some time before.

(v) There was no attempt to properly complete the document, eg there was continuous reference to the borrower, not the mortgagor, and the words 'he/she/they' appeared without deletion.

(vi) There was no certification of any verification by Mr Picken that Ms Issa was the same person as the mortgagor being Hend Karbotli.

(h) There was no evidence of any assessment or analysis of the documents by C & F to establish the authority and identity of Ms Issa.

(i) When the signed covenants page in mortgage was eventually provided, it was purportedly signed by Ms Issa without any indication of a witness. Further, it was signed 'Hind Issa' and the mortgage appeared to be signed by 'Hind Karbotli' whereas the mortgagor was 'Hend Karbotli'. [72]-[76], [78], [79], [81], [82], [84]-[94]

5. Even if reasonable steps had been taken to verify the authority and identity of the person who was going to execute the mortgage, there was a further critical problem concerning the authority and identity of the person who actually executed it. The purported witness to Ms Issa's signature on the mortgage, Julie Archer, did not notify C & F or provide any evidence that the person she observed signing the mortgage was indeed Ms Issa (and that Ms Issa was the same person as the registered proprietor, Hend Karbotli), as appeared from checking her likeness with suitable photographic identification. The applicant did not take any reasonable steps to ensure that any witness conducted the necessary checks. If the witness had said that they had conducted a check but in fact did not, C & F may have been entitled to rely on the purported verification and may be protected or indemnified. The applicant did not take this elementary but necessary step. [95]

6. The adequacy or reasonableness of the steps to confirm the authority and identity of the mortgagor depended on the facts and circumstances of the particular case, including the relationship between the parties, any unusual features of the transaction, and the knowledge of the mortgagee. In this case the obligation to take reasonable

steps needed to be assessed in light of the knowledge of the applicant, before settlement of the loan, of, inter alia, the following facts and matters in relation to Ms Issa –

(a) the fact that, despite having signed the Loan Offer, she was not a director of Mazop at the relevant time;

(b) the unusual and unexplained features of the unregistered FX Money Mortgage, secured by a caveat lodged about two weeks before the Loan Offer;

(c) the inadequate 100 point identification check, much of which was received on 27 March 2017 (together with the Solicitor's Certificate) well after execution of the mortgage and two days before settlement of the loan;

(d) the fact that Ms Issa was referred to by various names and the identification documentation provided was generally in the name of 'Hind Issa' and not the registered proprietor's name 'Hend Karbotli'. [96]

7. As the mortgage was void under s. 87A(5)(b) it was unnecessary to consider the applicant's ground of appeal that, as a matter of construction the covenant by the mortgagor (Ms Issa) was to repay the principal sum advanced to and utilised by Mazop, and that the judge accordingly erred in finding the mortgage secured nothing. However, as to this argument –

(a) Indefeasibility attached not only to the estate or interest in the property but also to any covenant to pay.

(b) The critical question of construction was precisely what the mortgage secured, given the tension between the standard form general introductory paragraph stating the consideration and not being promissory in nature and the specific personal covenants, which were promissory in nature. Whether the mortgage secured payment by Ms Issa of the principal sum even though funds were not lent to her depended on a proper construction of the entire document, ie the mortgage and the MCP.

(c) In many cases, where on a proper construction the mortgage was held to secure nothing, the covenant was directed to a transaction or loan that did not exist or was different to that embraced by the covenant. On the one hand if the mortgagor

covenanted to pay an amount advanced to X and no amount was advanced to X the covenant secured nothing. On the other hand the covenant may not be so narrow; it may not refer to a particular transaction or loan between identified parties – the covenant may more broadly refer to all amounts owing or it may simply identify an amount secured without reference to the underlying transaction or loan.

(d) On its proper construction Ms Issa had agreed to pay the principal sum, whether advanced to her or Mazop because –

(i) Under the specific personal covenant. Ms Issa agreed to pay $800,000 on 15 March 2018. The obligation to pay was not framed as a payment by reference to or dependent upon any further analysis. Such a clear covenant did not attract any of the complexities evident in many of the authorities.

(ii) Although covenant 8 clearly contemplated that the principal sum would not be used by Ms Issa but by Mazop and that it would bear primary responsibility for its payment, and it was arguable that Mazop incurred this obligation, the short point was that Ms Issa undertook to pay a defined amount, the principal sum, that she acknowledged she would not receive or derive the benefit of.

(iii) The specific direct covenant had primacy over the standard form general introductory paragraph.

(iv) The standard form MCP did not affect this analysis. [100], [110], [112]-[116], [120]-[126]

Accordingly leave to appeal would be granted on this ground but the appeal would be dismissed, C & F having failed to establish the validity of the mortgage.

8. C & F was not entitled to be indemnified under s. 110. The critical question was whether the applicant 'caused or substantially contributed to the loss by ... neglect'. It bore the onus of establishing that it did not. It could not claim indemnity in circumstances where, notwithstanding its failure to take the reasonable steps required any loss resulted directly from this failure. [135]-[139]

21. Take home messages (one per case) –

1. An estate agent generally lacks authority to conclude a contract on behalf of the vendor: *Hazelwood v Mercurio & Ors* [2021] VSC 362.
2. On a sale by an owner-builder attach the certificate evidencing existence of insurance as required by Building Act s. 137B(2)(c): *Betts v Harman* [2021] VCC 1349.
3. If a contract is conditional on obtaining a planning permit, get the right permit: *Definity Clinic v AMD Rifat* [2021] VSC 325.
4. A defective default notice may be overcome by acceptance of repudiation: *Pearl v Nannegari & Ors* [2021] VSC 468.
5. If selling a going concern make sure that it continues as such to settlement: *K7 Developments Pty Ltd v Abbotsford Estates Pty Ltd* [2021] VSC 422.
6. A purchaser off-the-plan can rescind because of an amendment to the plan of subdivision materially affecting the lot sold: *Burger v Longboat Holdings Group2 Pty Ltd* [2021] VSC 469.
7. A purchaser at a mortgagee's sale has priority over a previous purchaser: *Atanasovski & Anor v Huu Loi Yarra Valley Pty Ltd & Ors* [2021] VSC 594.
8. Money contributed to a joint venture cannot be used by a party for a separate purchase without consent: *Chen & Anor v Eumeralla Estate Pty Ltd and Ors* [2021] VCC 453.
9. Take adequate steps to VOI a prospective mortgagor: *C & F Nominees Mortgage Securities Ltd v Karbotli & Another* [2021] VSCA 134.

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