Recent Cases on Formation of Contracts of Sale of Land

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INTRODUCTION

1. This is the paper accompanying my Foleys CPD podcast on 6 November 2020. In this paper I have covered Victorian Supreme and County Court cases for approximately the last four years. This paper covers -

   A. Offer and Acceptance including authority to make a contract – paras. 2 – 6.
   B. *Masters v Cameron* cases – paras. 7 – 15.
   C. Statute of Frauds – paras. 16 – 18.
   D. Void for uncertainty – para. 19.
   E. Estoppel against denying existence of a contract – para. 20.
   F. Section 32 statements – paras. 21 - 29.
   G. Cooling off – s. 31 Sale of Land Act – paras. 30 - 32.

A. OFFER AND ACCEPTANCE INCLUDING AUTHORITY TO MAKE CONTRACT

2. The cases are –

   Leahy v Javni [2020] VSC 680 - *Offer and acceptance, solicitor's authority.*
   Stewart v White [2020] VSC 116 - *Offer and acceptance.*
   Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd [2018] VSC 787 - *Company director's authority.*
   White v Woodward & Registrar of Titles [2020] VSC 258 - *Forgery.*

Offer and acceptance, solicitor's authority.

3. ***Leahy v Javni* [2020] VSC 680, Ginnane J.**

   The facts were –

   - Mrs Leahy owned a residential property at Eastern Beach, Geelong. In February 2017 she entered a contract to sell it to Mr Javni. He cooled off.

   - The selling agent Mr Cross kept in touch with Javni. On 15 May 2017 at about 2.20 pm a meeting occurred between Javni and Cross at Cross' office. The property was discussed. Cross said that if he was to put forward another offer to the vendor on Javni's behalf he would need to formalise it in a contract which would need to be filled out and taken to the vendor for approval or disapproval with a part deposit cheque of $50,000.

- Javni orally agreed subject to asking Cross to come back to his property after signing of the contract to collect the part deposit. It was disputed whether Javni required that his offer was conditional on his wife first approving the purchase. A form of contract was already substantially prepared. The contract was signed by Javni on the first and third pages but not on the second page. It contained a price of $4.5m., a reference to $50,000 having already been paid, and on its second (unsigned) page recorded Whyte, Just & Moore Lawyers (WJM) as the purchaser's legal practitioner or conveyancer. Javni gave evidence that he did not see or read the second page, and there was no discussion about who would act for him as conveyancer.

- Javni then went home, wrote a cheque for $50,000 by way of part payment of the deposit and gave it to Cross.

- At about 3pm Leahy signed copies of the contract. Cross returned to his office.

- Javni had not been able to contact his wife. At 4.12pm he texted Cross –

  "Hi Jim, Can you not see the people about house Eastern Beach I want to have a talk to my wife about it"

- At about 4.20pm Cross delivered the signed contract to WJM.

- After missed telephone calls Cross at around 4:30pm returned to Javni's home. His Honour found it probable that Cross told Javni that Leahy had accepted his offer and that Javni said that he needed more time to talk to Mrs Javni. His Honour considered it probable that Javni did not accept the copy of the contract which Cross proferred.

- Javni subsequently cancelled the cheque for $50,000 and declined to proceed with the purchase.

Leahy sued claiming the deposit of $450,000 as a debt. Was there a contract?

Ginnane J held Javni liable. His Honour held relevantly to offer and acceptance -

1. Javni's offer by his signing of the May contract was not subject to the condition precedent that Mrs Javni gave her approval to the purchase. This allegation failed on the facts: in the meeting commencing about 2:20pm Javni did not require or mention this. [76]-[83]

2. To form a contract, acceptance of an offer alone did not generally suffice. The fact of acceptance must be communicated to the offeror, before which the offeror was free to withdraw the offer. Accordingly the contract was not formed when Leahy signed it. [91]-[92]

3. There was no special formula for successful communication of withdrawal of an offer but it was essential that it be made clear to the offeree that the offeror no longer wishes to

proceed. It was insufficient to do no more than request that the other party pause while the requester further considered its position. [99]-[108]

4. Javni did not withdraw his offer by the 4.12 pm text. It was ambivalent and did not clearly convey that he did not wish to proceed. [109]

5. Javni did not withdraw his offer by any statement that he made to Mr Cross at his house at 4:30pm. Even if, as alleged by Javni, Javni had said (and it did not matter whether he used the word "contract" or "offer") "I haven't been able to speak to my wife and as far as I'm concerned that contract is not valid", this at most conveyed that he sought further time in which to consider his position and expressed the view that the contract was not valid. [112]-[114]

6. Whether Leahy communicated her acceptance of Javni's offer by Cross' delivery at about 4:20pm. of a copy of the signed contract to WJM raised the issue of whether that firm was agents for Javni with authority to accept notification that Leahy had accepted his offer. The question of their authority to do this raised three issues: first, did Javni appoint them; second, did WJM have knowledge that they were appointed and so consent to that appointment; and third, if they did consent to their appointment, what was the scope of their authority? [118]

7. Javni appointed WJM as his legal practitioners, notwithstanding that it was referred to on the unsigned page of the contract. Neither the Sale of Land Act nor the common law of contract required each page of a contract of sale to be signed. It was irrelevant whether a signing party had read the terms of the contract - the presence of a signature was a declaration that that person understood and intended to be bound by the terms of the contract. A signature, wherever placed on the document, sufficed if it reasonably appeared that it was intended to cover every part of the writing. [119]

8. WJM did accept appointment to act as Javni's lawyers in connection with the conveyance. [120]

9. Where an offeror has authorised an agent to receive notification of acceptance, then notice to the agent is treated as notice to the offeror personally. However, the scope of the agent's authority must include receiving such notice. It did not suffice if the agent is authorised merely to transmit the notification rather than to receive it on behalf of the offeror. [121]

10. A solicitor had no authority to enter into a contract on behalf of a client unless the solicitor had express and clear authority from the client to do so, or such authority was a necessary implication. Absent this, a solicitor's authority was, depending on the particular retainer, generally limited to negotiating on the client's behalf in anticipation of

a contract being entered into. The general rule was that a solicitor's authority was limited to matters of conveyancing and did not extend to matters of contract. [122]

11. The question of whether a solicitor had authority to receive notices was more complicated. The mere fact that a solicitor was acting or had acted for a client did not necessarily authorise receipt of notices on behalf of the client. Furthermore, while a solicitor may in some circumstances be treated as a client's alter ego for the purposes of imputation of knowledge, this was true only for the purposes of, and within the limits of, the specific authority. A client may, however, hold out solicitors as his or her medium of communication by having previously authorised the solicitors to make offers or other communications on the client's behalf, that is, there may be ostensible authority for the solicitors to act as the client's medium of communication. [123]

12. As to whether WJM had authority to make the contract, nomination as the purchaser's solicitor in a contract of sale operated only to give that firm authority once the contract came into existence for the purpose of completing the conveyance. It did not make the firm in advance the purchaser's agent for receiving notices. This was to be contrasted, for example, with the situation of a chain of correspondence passing between the solicitors acting upon instructions for each party. Further, a solicitor engaged to complete a contract for the sale of land did not have authority to vary the contract – the inclusion of a provision in the contract relating to notices did not mean that the solicitor named in the contract was authorised to receive or accept notifications of variations. [124]-[136]

13. Clause 17.2 of this contract, as to service of notices etc by service on the legal practitioner or conveyancer for a party, was irrelevant as it referred to a contract already formed. [137]-[139]

14. Cross' delivery of the contract signed by Leahy to WJM was not communication to Javni of her acceptance of his offer. Javni had not expressly authorised WJM to be his agent for the purposes of receiving notification of Leahy's acceptance of his offer so as to form a contract. Nor did that firm have ostensible authority to accept such notification. Its mere nomination as the purchaser's solicitor in the contract was not a relevant holding out of authority. And WJM's involvement in terminating the first contract did not suffice. [140]-[145]

15. However Cross, as agent for Leahy, did convey her acceptance of Javni's offer when Cross called at Javni's home at 4:30pm. Cross did in effect tell Javni that Leahy had accepted his offer or had signed the contract and he attempted to hand a copy of the signed contract to Javni. The refusal to accept the signed contract did not prevent a contract coming into existence, as the contract did not provide for acceptance by exchange of signed parts or copies. The contract was created when Javni was put on

notice by Cross' oral communication that Leahy had signed the contract and accepted the offer. [146]-[148]

Offer and acceptance.

4. ***Stewart v White* [2020] VSC 116, Macaulay J.** The facts were –

- On 28 August 2018 a contract was entered into under which the plaintiffs agreed to purchase a residential property at New Gisborne from the defendants.

- Overnight on 28 and 29 August a water pipe burst in the ceiling of the house (then unattended) causing significant water inundation, collapsing part of the ceiling.

- The purchaser delivered a cooling off notice. (This aspect of case is dealt with below under the topic of Cooling Off Notices).

- Early the following morning, 31 August, Mr Stewart told the agent that he and his wife now wanted to proceed with the purchase. At 8.48 am Mr Stewart emailed the defendants' solicitors stating –

  I spoke to [the agent] this morning. I do not wish to cool off from the sale and will work with the owner on resolution of repairs etc.
  I had given [the agent] a cooling off letter the other day to be held in escrow whilst we got over the shock and made a decision on the way forward, and due to a misunderstanding it appears to have been passed on. Please, however, disregard.

- The deposit of $87,500 was received by the agent in five tranches from 28 August to 3 September. Mr Stewart did not individually process each payment but rather scheduled all payments on the same day (presumably 28 August 2018) to be made electronically, staggering them to fit within his bank's daily transaction limit.

- On 1 September 2018 Mr Stewart told Mr White that he and his wife wished or intended to proceed with the purchase.

- On 4 September Mr Stewart, who was a solicitor, emailed on his firm's stationery to the vendors' solicitors' conveyancing officer stating that his firm acted for the purchasers, referred to the contract of sale dated 28 August, and stated that given the damage to the property the purchasers would waive their rights under special condition 11 (to enter possession of the property under a licence within 30 days of signing the contract) to allow the vendor to conduct repairs. The email continued with a request for the Stewarts to have 'input' into the selection of carpets and the floating floor to replace the damaged floor coverings, and an invitation to discuss whether the Stewarts might undertake some of the repairs themselves for a price reduction. Subsequently numerous text messages passed between the plaintiffs and defendants about the type and quality of carpets and fittings to be used.

- The defendants made an insurance claim and organised repairs to restore the house to have it ready for settlement. However, before the scheduled settlement date of 25 January 2019 the plaintiffs wrote stating that they wished to cancel and withdraw from the sale. The sale did not proceed.

Macaulay J relevantly held –

1. The contract was terminated by the cooling off letter. [51]

2. The contract was not reinstated, in effect, by the parties making a new contract upon the same terms as the 28 August contract. The 8.48am email could not be construed as an offer by the Stewarts to enter into a new agreement with the Whites on the same terms and conditions as the 28 August contract. Even if it could, the Whites had not accepted the offer. There was no conduct on their part unambiguously referable to them accepting that a new agreement was on foot. Like the Stewarts, their subsequent conduct was equally or better explained as them proceeding on the mistaken belief that the 28 August contract remained on foot. [54]-[63]

3. Accordingly no contract existed beyond 30 August. [64]

Company director's authority.

5. ***Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd*** **[2018] VSC 787, Mukhtar AsJ.**

One of two directors of a company signed Heads of Agreement. The Constitution of the defendant company provided that it may execute a document without using a seal if the document was signed by certain persons singly or in combination. Signature by one of two directors was not one of them.

His Honour gave summary judgment for the defendant –

1. Under the Constitution the signing director lacked authority to bind the company. [61]

2. Also, ordinarily at law, where a company had more than one director, an individual director did not have authority to bind the company. The company was bound only by collective resolution of the Board. For a single director to bind the company, there must be a grant of actual authority, which grant could be express, implied or by the company holding out the director as ostensibly having the authority. [62]-[72]

Forgery

6. ***White v Woodward & Registrar of Titles*** **[2020] VSC 258, John Dixon J.**

This case was a claim by a purchaser for specific performance of an alleged contract of sale. The vendor alleged that his signature was forged. The plaintiff failed to prove, on the balance of probabilities, that the defendant had signed the document. [177]

B. *MASTERS v CAMERON* CASES

7. This topic commences with a statement of the *Masters v Cameron* principles and of rules of contractual construction. Then the cases are –

Snapper Holdings Pty Ltd v Lentini [2018] VSC 800 – *is it Masters v Cameron at all?*
Verrocchi v Messinis [2016] VSC 490 – *Masters v Cameron category 2 or 4.*

Molonglo Group (Aust) Pty Ltd v Cahill [2018] VSCA 147 - *Masters v Cameron category 4, basic contractual interpretation.*

The Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd [2019] VSCA 91 - *Masters v Cameron category 3.*
Dreamfields v Zacutti [2020] VCC 1324 - *Masters v Cameron category 3.*
Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd [2018] VSC 787 - *Masters v Cameron category 3.*

Masters v Cameron principles.

8. In *Masters v Cameron* (1954) 91 CLR 353 the High Court described three kinds of case:

> "Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three cases.
>
> It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.
>
> "[I]n the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document;
>
> Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.
>
> Or, thirdly**,** the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract".
>
> "They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own: …"

Next, the High Court turned to the question how the contract is to be construed and, in particular, the effect of expressions such as 'subject to contract':

"The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape: … Nor is any formula, such as 'subject to contract', so intractable as always and necessarily to produce that result: … But the natural sense of such words [is] … 'if to a proposal or offer an assent be given subject to a point rovision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation'. …

This being the natural meaning of 'subject to contract', 'subject to the preparation of a formal contract', and expressions of similar import, it has been recognized throughout the cases on the topic that such words prima facie create an overriding condition, so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract. … When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail'."

Courts subsequent to *Masters v Cameron* have also discerned a fourth category of case, namely one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms. This kind of case was a variation upon the first *Masters v Cameron* category, the difference being that the parties contemplated agreeing upon future terms which will be added to the existing, binding, arrangement, rather than envisaging only the creation of a document to the same effect as the terms already agreed. A document falling within the fourth category is an immediately binding contract.

Rules of contractual construction

9. Victorian courts approaching *Masters v Cameron* problems commonly commence with applying the ordinary rules of contractual construction. These have been set out by the Court of Appeal recently in *Molonglo Group (Aust) Pty Ltd v Cahill* [2018] VSCA 147 -

(a) The meaning of contractual terms is to be ascertained objectively having regard to the language of the contract and, where appropriate, the surrounding circumstances known to the parties. [130]

(b) The meaning of the terms of a commercial contract was to be determined by what a reasonable businessperson would have understood those terms to mean. [130]

(c) The court also considered the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects was facilitated by an understanding of the genesis of the transaction, the background, the context the market in which the parties are operating. [130]

(d) The approach was similar where the issue was not the meaning of a term but whether the parties intended that the document in which it appeared should be a binding contract. [131]

(e) The parties' pre-contractual conduct was relevant and admissible on the issue of what each party by their words and conduct would have led a reasonable person in the position of the other party to believe. [131]

(f) Post-contractual conduct could be admissible, but only in limited circumstances, such as where the conduct constituted an admission against interest. Otherwise, the general position was that post-contractual conduct was not admissible for the purpose of construing a contract ([132]). (In *The Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd* [2019] VSCA 91 at [47] the court added the following. However, it may be relevant to examine correspondence and communications between the parties, including subsequent to the document in question, to place that document in the context of the negotiations and determine whether the parties intended it to constitute the terms of a binding agreement. Alternatively, even where there was no chain of correspondence, subsequent negotiations and communications between the parties may be relevant to demonstrate the nature and extent of the terms that might be necessary for the conclusion of a binding agreement but which were not included in the document in question).

Is it Masters v Cameron at all?

10. Sometimes to illustrate what something is one has to give an example of what it is not. In ***Snapper Holdings Pty Ltd v Lentini* [2018] VSC 800** the facts were -

- The defendant (Vicki) was the daughter and executrix of the estate of her late mother. She obtained probate. The second plaintiff (Angelo) was the defendant's brother.
- The estate held two of four equal shares in a Brunswick property. Vicki held one share in her own right. The first plaintiff (Snapper), which was related to Angelo's interests, held one share. Snapper's interest was subject to a mortgage to a bank.
- The estate held 34 of 100 shares in a Rosebud property. Vicki and Snapper each held 33 shares.
- Both as an executor and personally as a co-owner Vicki commenced a VCAT proceeding against Snapper under Part IV of the Property Law Act seeking sale of the properties and division of the proceeds between the co-owners.
- At a VCAT mediation Terms of Settlement were entered into. They had been drafted by counsel for Vicki and were then considered and amended after discussion between legal representatives. The Terms were finalised and signed by Vicki and by the plaintiffs' solicitor.

- The Terms included the following –
  - recitals which were agreed to form a part of the agreement. Recital G was that the parties had agreed to resolve the VCAT proceeding, as well as other issues relating to the estate, on the terms set out in the Terms.
  - Vicki (in her own right) and Snapper each agreed to transfer their respective interests in the Rosebud property to Vicki for an amount representing 34% and 33% respectively of a sum defined as 'the Rosebud Consideration', payable by Vicki on a date defined as the 'Brunswick Payment Date' being 9 March 2018 or earlier by agreement (cl 5);
  - Vicki (in her own right) and Vicki (as executor) each agreed to transfer their respective interests in the Brunswick property to Snapper for an amount representing 25% and 50% respectively of a sum defined as 'the Brunswick Consideration', payable by Snapper on the Brunswick Payment Date (cl 6);
  - '[t]he parties agree to execute all documents and do all things necessary or reasonably required in order to complete the transactions which are the subject of this agreement' (cl. 13);

Derham AsJ held –

1. The Terms did not state that they were 'subject to contract' or contain any similarly worded statements. Therefore, prima facie, the Terms did not envisage the execution of a formal contract in the future. [55]
2. The finality of the Terms and the intention of the parties to be bound by it was made clear by: Recital G; the fact that the Terms contained a final date for completion of the relevant transactions; and by cl. 13 - the phrase in cl. 13 'execute all documents' did not refer to the execution of a formal contract but to the execution of those documents required to bring about the completion of the transactions stipulated in the Terms. The lack of a section 32 statement did not point to an intention to execute a further formal contract. [62]-[64], [76]
3. The post-negotiation communications between the lawyers and dismissal of the VCAT proceeding demonstrated the intention of the parties to be bound by the Terms. [65]

Masters v Cameron category 2 or 4.

11. Although not a contract of sale of land ***Verrocchi v Messinis*** **[2016] VSC 490** illustrates categories 2 or 4 of *Masters v Cameron*. The facts were –
    - The defendant owned a pharmacy business. In May 2016 negotiations for sale of the business occurred between Mr Pamouktsis of one agency, as agent for the first plaintiff, and Mr Whelan of another agency, as agent for the defendant.

- On 27 May 2016 Mr Whelan emailed a document (referred to his Honour as "the alleged contract") to Mr Pamouktsis. It included –
  - the title 'Offer to Purchase Melbourne City Pharmacy';
  - the names of the 'Vendor' and the name of the 'Purchaser';
  - the words 'Status of this Offer: This Offer is intended to be legally binding upon the Vendor and the Purchaser';
  - an offer by the purchaser to purchase the business for a price to be allocated in a particular way;
  - the words: 'If this Offer is accepted by the Vendor within 3 business days of its date, the Settlement Date will be scheduled for 28th June 2016, or such other date as may be agreed …';
  - an agreement by the purchaser to pay the price by an initial deposit of $10,000 within three business days of the Vendor accepting the offer, by a further $130,000 upon execution of the contract of sale, and at settlement by the Purchaser paying an amount representing the balance of the price excluding stock and a further such representing stock;
  - 'upon acceptance of this Offer, the Purchaser and Vendor agree that they will as soon as practicable negotiate and execute a formal Contract of Sale of Business prepared by the Vendor's lawyers. The Contract of Sale will contain all of the general terms and conditions as those usually included in a Victorian Standard Contract for Sale of Business … plus further conditions precedent and special conditions … as set out in principle below';
  - these conditions precedent were as to the issue of any Medicare pharmaceutical benefit scheme approval number, approvals by the Pharmacy Council or authority to enable the purchaser to conduct the business, the consent of the landlord to the transfer of the existing lease;
  - these special conditions: were as to valuation of stock and determination of stock to be excluded in certain circumstances; provided for the transfer to the purchaser at settlement of all records and similar, fixtures and similar, and of any franchise agreement; provided for termination and re-employment of employees and adjustment of price related to their leave; provided that the sale constituted a 'going concern' for GST purposes.
- In late May and early June the first plaintiff and the defendant signed at the foot of the document under where it was stated 'Executed as an Agreement'.

The plaintiffs sought specific performance. Counsel for the defendant conceded that by the execution of the alleged contract, the parties did intend to enter into a legally binding contract but contended that what was in fact intended to be binding was only an agreement to negotiate a formal contract of sale of business.

Riordan J. held that the intention of the parties, on execution of the alleged contract, to be legally bound by the agreement to sell the pharmacy business on the terms expressed within the alleged contract. His Honour held –

1. The following facts supported the conclusion that a binding contract of sale was made –

   (a) The alleged contract was prepared by Mr Whelan after the 'commercial terms in the agreement' had been 'discussed and agreed to' by those agents.

   (b) The Offer Details in the document amounted to a clear statement of the terms by which the first plaintiff, as the offeror, was prepared to be bound to purchase the business, on acceptance of the offer by the defendant.

   (c) The settlement date was scheduled.

   (d) The document included details of payment of the agreed price including a deposit payable within a specified time of the Vendor 'accepting this Offer by signing and returning it to the Purchaser'.

   (e) The existence of the conditions precedent and special conditions. [39]-[46]

2. The fact that the parties, after setting out all of what they considered to be the 'commercial terms', then stated that the balance of the contract would contain general terms and conditions as those usually included in a standard contract, was indicative of them intending to complete a comprehensive document which would legally bind them for the sale of the business. [50]

Masters v Cameron category 4.

12. In ***Molonglo Group (Aust) Pty Ltd v Cahill*** **[2018] VSCA 147** the facts were –

- Kiversun Pty Ltd ('Kiversun') owned a commercial property in Rokeby Street, Collingwood ('Property'), subject to monthly tenancies in favour of entities associated with Kiversun. One director of Kiversun was George Paraskevakis.

- Vision Real Estate Pty Ltd ('Vision') was an estate agency employing Brett Simpson and Timothy Bindley.

- In early 2016 Simpson informed Mr Cahill that the Property was for sale. After purchase offers from Cahill and another entity, which were rejected, Cahill was informed by Simpson that there would probably be a highest and best bid process. Paraskevakis signed an exclusive sale authority in favour of Vision.

- Simpson told Cahill that 'we are good to go', that he had a 'commitment' from Mr Paraskevakis to sell, that he had 'authority' to 'do the deal', and that the highest and best bid would be successful. Brindley provided to Cahill one of Vision's pro forma 'Agreement to Purchase' documents.

- Offers were submitted. Cahill's offer dated 14 July, contained in a letter of offer accompanied by a revised version of Vision's pro forma 'Agreement to Purchase', was highest. The letter of offer included that Cahill looked forward to 'receipt of contracts and/or sale agreement signed by the Vendor'. Simpson typed everything out into one document which, subject to amendments referred to below, was referred to by the court as the 'Cahill Agreement'.

- On the authority of Paraskevakis, Simpson told Cahill that he had bought the property.

- On the morning of 15 July 2016 Simpson met with Paraskevakis and others. Simpson pointed out that the terms of what had been offered was 'binding on the vendor'. There was then discussion including Kiversun's accountant saying that he wanted to seek CGT advice, but that pending this advice it would be 'ok to sign the contracts' as long as Simpson held them and did not arrange for the purchaser to sign them. Paraskevakis said that this sounded 'okay' and that he wanted to change the time for payment of the deposit balance from 12 months to 3 months. Simpson made handwritten changes to the Cahill Agreement altering the time for the deposit ('deposit amendment') and recording the names of the vendor and purchaser. Paraskevakis then initialled the deposit amendment and signed the Cahill Agreement 'on behalf of the vendor'.

- Later that day the accountant's office informed Simpson that everything was 'clear and we were good to sign'. Simpson then met with Cahill and after discussion Cahill initialled as necessary and signed the Cahill Agreement.

- The Cahill Agreement was a three-page document on the letterhead of Vision, titled 'Agreement to Purchase Rokeby St, Collingwood' and expressed to be between 'Kiversun Pty Ltd as Vendor' and 'Peter Cahill and/or Nominee as Purchaser'. The Property was described by its street address, the purchase price of $9.9 m. was stated, the 'Purchaser' was described as 'Peter Cahill and/or Nominee' and the 'Vendor' was described as 'Kiversun Pty Ltd', and the settlement date and deposit required, being 10% (of which half was payable on exchange of contracts and half later), were stated. It contained six special conditions, as follows –

  '1. This offer is conditional upon the purchaser's solicitor's approval of the final contract of sale and Section 32 Vendor Statement documentation. The contract

documentation … must be returned to the agent signed by the purchaser along with the balance of the deposit no more than 5 business days after the purchaser receives the contract of sale documentation from the vendor. The vendor may withdraw from the sale and all monies will be refunded to the purchaser in full if not returned within this 5 business day period.

2 … The Vendor agrees to grant the Purchaser and associated consultants reasonable access to the Property to complete any Town Planning process inclusive of surveying …, environmental studies and testing and any other associated activities (Development Activities).

…

[the normal nomination clause]

5 The person executing this Agreement of Purchase acknowledges and agrees that in accordance with the Corporations Act they are entitled to enter this Agreement on behalf of the party they sign for.

6. The Purchaser buys subject to existing tenancies. …'

The Court of Appeal held that the Cahill Agreement was in *Masters v Cameron* category 4. It reasoned as follows –

1. The terms of the Cahill Agreement supporting the existence of an immediately binding contract were:

   (a) The title and descriptions of the parties as vendor and purchaser;

   (b) It contained all the essential terms for a contract of sale, namely, parties, property and price.

   (c) The references to 'Nominee' - it would be uncommon for a nominee to be substituted for a mere negotiating party.

   (d) The nomination clause, because the stipulation that the named purchaser remained personally liable indicated that the document created immediately enforceable substantive rights and obligations.

   (e) The use of the present tense in the words '[t]he Purchaser buys' in special condition 6.

   (f) The words '[t]he vendor may withdraw from the sale' in special condition 1.

   (g) The reference to approval of the 'final' contract by the purchaser's solicitor.

   (h) The development activities clause, because it conferred immediate rights of access and imposed obligations on the purchaser related to particular tasks.

   (i) The fact that the signature authentication clause required the signatories to acknowledge entitlement to enter the agreement on behalf of the party signed for.

The Cahill Agreement was within *Masters v Cameron* category 4. [163], [166]

2. The surrounding circumstances and parties' pre-contractual conduct supported this. [174]

Masters v Cameron category 3.

13. ***The Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd*** **[2019] VSCA 91** was an application to the Court of Appeal for leave to appeal against the decision of Riordan J. The facts were –

- In September and October 2017 Mr Stammers on behalf of the applicant (The Edge) made offers to purchase a property in Cheltenham to Mr Davie, the agent acting on behalf of the respondent (Jack Road).
- On 30 October Mr Davie sent to Mr Ten Dam of Jack Road a draft 'letter of offer', which was substantially in the form of the document subsequently signed. It took the form of a letter from Mr Davie to The Edge, headed "Offer to Purchase". It set out the terms that Mr Davie "would envisage that a vendor's standard contract of sale would incorporate" and made provision for the signature of the parties.
- On 2 November 2017 Mr Stammers sent Mr Davie what he described as "the signed Heads of Agreement", as well as a "Confidentiality Agreement". The Edge's representative had signed the letter and inserted that date, while adding two further handwritten conditions, numbered 5 and 6.
- Mr Davie emailed Messrs Ten Dam and Stammers, attaching the signed document and noting "the two amendments". As well as those amendments, there had been alterations in the particulars of the certificate of title and extensive changes to the conditions. Also, the words preceding the terms now stated that the vendor's standard contract of sale "will be adopted and would incorporate the following details".
- The letter, which remained dated 30 October 2017, was on the letterhead of Mr Davie's business. It was titled as an "Offer to Purchase" and: set out the title details; stated "please find below the proposed terms and conditions to purchase the above property"; stated that the vendor's standard contract of sale will be adopted and would incorporate certain details which it set out as to parties, property, price and settlement; and stated that the deposit was to be "20% of Purchase price being $1,200,000 to be paid on execution of the Contracts of Sale. (1% payable on signing the Offer to Purchase)".
- It also set out conditions including –

  1. The purchaser to have immediate access to Office/warehouse under a license upon payment of deposit and execution of the Contract of Sale …

> 2. The Purchaser agrees to release the full deposit being $1,200,000 at the expiry of 30 days from the exchange of contracts. …. the purchaser agrees to sign and return the notice [under s. 27 of the Sale of Land Act] to the vendor on exchange.
>
> 3. The purchaser agrees to be bound by the terms of the Confidentiality Deed Poll (provided with this letter) relating to the purchase of the property including all terms and conditions.
>
> 4. The offer is subject to the contract being executed.
>
> 5. The Confidentiality Agreement ceases upon execution of the contract of sale.
>
> 6. Once deposit is released, the Licence Agreement cannot be revoked under any circumstances unless settlement was not to occur.

- The letter concluded '[w]e hereby agree to the above terms and conditions' with space for signatures '[f]or and on behalf of Vendor' and '[f]or and behalf of Purchaser'. The letter was countersigned by Jack Road's representative on 3 November 2017.
- The Confidentiality Deed Poll referred to in the letter was also signed by The Edge's representative on 2 November 2017.
- Over roughly the next month the parties engaged in various actions including: considering the terms of a licence agreement; The Edge's representatives being given keys to the property; The Edge paying $60,000, being the 1 per cent instalment of the 20 per cent deposit.

Jack Road then denied that any contract was on foot. Riordan J upheld this contention. The Court of Appeal refused leave to appeal. It held that this case fell into the third *Masters v Cameron* category. Their Honours reasoned –

1. The question was ultimately one of interpretation of the letter of offer, to which the ordinary rules of construction applied. The following matters were particularly relevant –

   (a) The text of condition 4, in particular the expression "subject to the contract being executed"; [55]

   (b) Read in context, the execution of the contract was significant not only because the condition in condition 4 would be satisfied, but because: the balance of deposit became payable; The Edge would obtain immediate access under a licence; time commenced to run for the release of the deposit; the exchange of contracts was the deadline for the provision of a s. 27 notice; the confidentiality agreement was expressed to cease then. Finally, once the deposit was released, the licence became irrevocable unless settlement did not occur; [56]

   (c) There was no section 32 statement or explanation for its absence; [58]

   (d) The terms of the licence were not specified in the letter. [59]

2. Nothing in the post-signature conduct of the parties led to any different result. [62]

14. In ***Dreamfields Pty Ltd v Zacutti*** **[2020] VCC 1324** the facts were –

- Mr Luxmoore was registered proprietor of three adjacent blocks of land in Birregurra, being Lots 1 – 3 on a particular title plan;
- Mr Culkin-Lawrence, the second plaintiff and director of the first plaintiff (Dreamfields) owned land adjacent to Lot 1.
- In 2017 Luxmoore died. His sister the defendant was his sole executor, probate not yet being granted. Some weeks after Luxmoore's death Culkin-Lawrence contacted her expressing an interest in purchasing Luxmoore's land. They agreed to meet in Birregurra to talk further.
- In the meantime Culkin-Lawrence's partner Marie obtained from a solicitor a draft document entitled "Heads of Agreement" (HoA) and emailed it to Culkin-Lawrence. Various parts were left blank. It named Dreamfields as purchaser.
- On 2 July 2017 the Birregurra meeting occurred. Culkin-Lawrence took two copies of the HoA to the meeting. Zacutti had not previously seen a lawyer or the HoA, nor had an agent valued the land. She had no documents. After preliminaries Culkin-Lawrence either wrote, or produced his already written out, cheque for $70,000. After further conversation the parties orally agreed on a price of $93,000.
- The two copies of the draft HoA were then completed in handwriting. They were relevantly identical. They included certain normal purchase of land provisions and the words "The Vendor agrees to sell and the Purchaser agrees to buy on the terms and conditions set out above".
- They then set out special conditions commencing "This Agreement is subject to and conditional upon the following":

  "1. The sale is subject to and conditional upon the Vendor providing the Purchaser with a Contract of Sale and Section 32 Vendors Statement. The sale is further subject to and conditional upon the Purchaser's solicitor or conveyancer approving the contents of the Contract of Sale.

  2. The Purchaser agrees to pay an initial deposit of $70,000 upon signing of this Agreement to the Vendor. In the event of this sale not proceeding prior to the signing of an unconditional Contract of Sale, any deposit monies paid will be refunded to the Purchaser in full".

- The document was signed and witnessed. Culkin-Lawrence signed without specifying that he was the director of Dreamfields.

Judge Marks held that the document fell within *Masters v Cameron* category 3. Her Honour particularly noted –

1. While not using those precise words, it was clear that the HoA was subject to contract or subject to preparation of a formal contract because –

(a) the sale was stated to be 'subject to and conditional' on the matters set out in special condition 1;

(b) the sale was conditional on the approval of the purchaser's solicitor or conveyancer;

(c) special condition 2 then made clear that if an unconditional contract of sale was not signed the entirety of the deposit paid was to be refunded, ie no sale could proceed. [65]-[72], [76]

2. The lack of detail and informality in the HoA also suggested that the parties did not intend to be immediately bound. In particular: it did not deal with vendor warranties, provisions relating to adjustments or default provisions; and the purchaser was described in a confusing way – as a result of the handwritten additions it was unclear whether the purchaser was Culkin-Lawrence or Dreamfields. [77]-[82]

3. The surrounding circumstances supported the conclusion that the parties did not intend to create binding relations until a formal contract of sale of land was executed. [83]

15. In ***Count On Us Enterprises Pty Ltd v Hume Machinery Pty Ltd*** **[2018] VSC 787** the facts were –

- Mukesh Chopra was an estate agent. Peter Green was one of two directors of the defendant which was trustee of a unit trust and which owned a property in Mickleham.
- In October 2017 Green learnt that an estate agent identifying himself as Chopra had attended the property and spoken with Green's son about selling it. On about 23 October Chopra again attended the property unannounced. Green spoke with Chopra for the first time. In this conversation
  - Chopra said he had a client interested in buying the property and showed Green a two page document headed Heads of Agreement (HoA). Chopra said the document would not constitute a binding sale but would authorise him to procure offers.
  - The particulars of a possible sale had already been inserted including a purchase price of $11.5m.
  - Green said the unitholders would need to agree to any sale, that they did not want to sell before 30 June 2018, that the price was too low and that if he got an offer of $13m. he would take it to unitholders for consideration.
  - Chopra said he would speak to the client in relation to making an offer of $13m. and that a higher price might be obtained if the vendor agreed to extend the time for payment.
  - Green made two changes to the document, increasing the price to $13m. and extending the time for payment to three years, and handed it back to Chopra.
  - Green said that if the price was right and the others agreed to sell the property we could commence negotiations, or words to that effect.

- The document included –
  - The heading 'Heads of Agreement' but also stated "This is an expression of interest on 225 Olivers Road, Mickleham, Vic 3064 by Count On Us Pty Ltd (ABN: 45 089 388 803) through Eleet The Land Specialist Caroline Springs."
  - A statement that the HoA would be confidential to vendors, buyers, their lawyers and the 'vendor's selling agents' being Chopra's agency.
  - That a deposit of $1,115,000 will be payable in 60 days from this agreement (out of which $100,000) has already been paid.
  - Under 'Terms and conditions' it stated —

    "1. The vendor will deliver a Vendor's statement to the Purchaser with a formal contract of Sale document consistent with above terms

    2. Upon acceptance by the purchaser's solicitor, the client agrees to enter into a formal legally binding contract."

  - The statement that the sale was subject to the purchaser having a due diligence period of "14 Days from the date of the contract of sale" plus empowering it to enter the property to investigate and conduct tests and obtain a surveyor's report. The purchaser then had until the later of 14 days or by the expiration of the due diligence period in substance to cool off. If "Due Diligence is Unsatisfactory" in the purchaser's absolute discretion it could avoid the contract.
  - "Further terms and conditions (if any) will be added to the contract of sale by vendors and to be provided to purchasers along with vendor statement".

The purchaser named in the document was not the plaintiff but a company with no involvement in the case. Mukhtar AsJ granted summary judgment, holding -

1. The argument that when Green signed the HoA it converted it to an offer from the vendor, capable of acceptance by the purchaser by signing the document and tendering the deposit of $100,000, was invalid. The document was only an expression of interest. [78]-[79]

2. The third *Masters v Cameron* category was indicated by the words "Upon acceptance by the purchaser's solicitor, the client agrees to enter into a formal legally binding contract". [79]-[80]

3. The known circumstantial facts and the plaintiff's conduct supported a conclusion that it had not acted consistently with the heads of agreement being an immediately binding agreement. [91]

C. STATUTE OF FRAUDS

16. The cases are –

Vlahos Pty Ltd & Anor v Vlahos [2017] VSCA 166 – *basic principles.*

Snapper Holdings Pty Ltd v Lentini [2018] VSC 800 – *whether signed by defendant in her own right or as executor?*

17. ***Vlahos Pty Ltd & Anor v Vlahos*** **[2017] VSCA 166** was an application for leave to appeal and, if leave was granted, an appeal from a decision of Judge Cosgrave. The facts were –

- In 1990 the respondent (James) entered into a contract to purchase a two storey building for $590,000 from a third party, nominating the first applicant (the company) as sole transferee. He contributed $110,000 to the price and paid stamp duty.
- In 2011, when he was still a director of the company, James orally agreed with another director, his brother Andrew, who was the second applicant, that the property would be subdivided into a downstairs retail premises and an upstairs residential section, and that the latter would, with a car parking space, be transferred to him in discharge of his alleged interest in the property dating from 1990.
- They asked the company's accountant to draft Board minutes giving effect to the agreement. The minutes dated 8 December 2011 included –
  - "The directors resolved that the property at 50 Puckle Street which is owned by the company in its capacity as trustee of the S Vlahos Family Trust should be subdivided to separate the ground floor retail area from the residential area upstairs.
  - The directors also resolved that once the subdivision is complete, the upstairs residential area is to be transferred to Jim Vlahos or an entity that he nominates in specie by the trust".
- In 2012 the upstairs area was valued and a plan of subdivision prepared and lodged. James received upstairs rent and in return it was agreed that he pay the upstairs outgoings.

Judge Cosgrave found that the 1990 transaction constituted a resulting trust. His Honour also found that in the 2011 transaction an agreement involving a disposition of an interest in land had been made (save that there was no agreement about car spaces), which however was unenforceable for non-compliance with the modern day derivatives of the Statute of Frauds found in the Instruments Act s. 126 and the Property Law Act s. 53(1)(a) (the Statute of Frauds).

The main judgment on appeal was that of Kyrou JA, with whom the other judges agreed.

The court also upheld a notice of contention by James that the 2011 agreement did comply with the Statute of Frauds by reason of the doctrine of part performance.

The Court reasoned –

1. Where a contract does not comply with the Statute of Frauds, but a party has altered his or her position in reliance on the contract, the equitable doctrine of part

performance operates to prevent another party from improperly invoking those requirements in order to circumvent the real agreement between the parties. In particular -

(a) The act or acts constituting the alleged alteration relied on must be unequivocally and its own nature referable to "some such agreement as that alleged". Ordinarily, the payment of money is not an unequivocal act and cannot by itself be an act of part performance. By contrast, the giving and taking of possession of property may of itself suffice.

(b) By "some such agreement as that alleged" is meant some contract of the general nature or class alleged. It was unnecessary for the act(s) of part performance to point to the very contract alleged or to disclose the specific terms of that contract.

But act(s) would not suffice if equally referable to another arrangement.

(c) The act(s) must be those of the party to the agreement;

(d) There must be a completed agreement between the parties;

(e) The act(s) must be done under and pursuant to the terms of the agreement. It was, however, unnecessary that the act(s) should have been done in compliance with an obligation in the contract. Thus, for example, the giving and taking of possession of land would amount to part performance notwithstanding that under the contract the purchaser was entitled rather than bound to take possession. [96]-[103]

2. There were sufficient acts of part performance of the 2011 oral agreement. It was highly improbable that the acts upon which James relied were equally consistent with a decision by the Trustee to make an in specie distribution to James of the first floor rather than being undertaken pursuant to a contract between James and the Trustee. [121]
3. It could be inferred from the acts of part performance that the general nature of the contract was that the property would be subdivided into an upstairs residential lot and a downstairs retail lot and that the upstairs lot was to be transferred to James. [122]
4. The 2011 oral agreement was of the general nature as the putative contract to which the acts of part performance were referable. [123]

18. In ***Snapper Holdings Pty Ltd v Lentini*** **[2018] VSC 800** (discussed in greater detail in paragraph 10 above) the facts included that the defendant, in both her own right and as executor agreed to transfer her respective interest and that of the estate in a piece of land. Although it was unclear from the signing clause whether she signed only for herself personally or for herself as executor, when the document was construed as a whole and objectively, her signature was made in both capacities. [92]

D. VOID FOR UNCERTAINTY

19. In ***Snapper Holdings Pty Ltd v Lentini*** **[2018] VSC 800** (discussed in greater detail in paragraph 10 above) it was unsuccessfully argued that the Terms of Settlement were void for uncertainty. The arguments and their disposition by Derham AsJ were –

- It was argued that, to effect the Terms, there should be an express provision for transfer of the estate's interests in the two properties into the defendant's own name. However, as executor and trustee, it was (and remained) within the defendant's power to do this; [95]
- liability for GST did not require to be addressed; [97]
- it was unnecessary for the Terms to deal with what would occur if settlement could not or did not take place on the appointed date, including whether any and what rescission notice could be served or whether the terms set out in the schedule to the Transfer of Land Act were incorporated. The parties retained their common law rights. Contracts for the sale of land were only required to satisfy what his Honour described as "the four P's": party, property, price and promises. Express conditions of sale were unnecessary. [98]-[101]

E. ESTOPPEL AGAINST DENYING EXISTENCE OF A CONTRACT

20. The facts of ***Stewart v White*** **[2020] VSC 116** are set out in detail in paragraph 4 above. Macaulay J also held that the Stewarts were not estopped from denying that a contract was on foot under the doctrine of equitable estoppel ([67]-[85]). An equity created by an estoppel against denying the existence of a contract did not result in bringing the contract back into existence. Rather, it equipped the court with the means of fashioning a remedy to avoid the detriment occasioned by the reliance on the assumption that had been unconscionably induced. That detriment was not remedied by automatically granting the relief which the enforcement of the contractual promise would otherwise have delivered. The remedy must equate to the minimum required, in all the circumstances, to prevent the detriment actually suffered by the reliance and to do equity.

Although the Stewarts had induced the assumption that the 28 August contract remained on foot the Whites had not acted to their detriment thereon.

F. SECTION 32 STATEMENTS

21. The cases are –

Snapper Holdings Pty Ltd v Lentini [2018] VSC 800 – *effect of no section 32 statement.*
Tymstock Pty Ltd v Patrick [2019] VCC 1092 – *s. 32 complied with.*
Long Forest Estate Pty Ltd v Singh & Shri Guru Property Development Pty Ltd [2020] VSC 604 – *s. 32 complied with.*
Downing v Lau [2018] VCC 33 – *s. 32 breached, excused under s. 32K(4).*

McHutchison v Asli & Anor [2017] VSC 258 – *s. 32 breached, not excused under s. 32K(4).*

Effect of no section 32 statement.

22. The facts of ***Snapper Holdings Pty Ltd v Lentini*** **[2018] VSC 800** are referred to in paragraph 10 above. The Terms of Settlement contained provisions for the transfer of land but no provision for a section 32 statement. Derham AsJ relevantly held –

1. The lack of a section 32 statement made the Terms voidable, not void or unenforceable, but the plaintiffs had not sought to invoke their right to rescind under s. 32. [71]-[72]
2. It was accordingly unnecessary to decide whether or not the transfer of co-owned land from one co-owner to another constituted a sale of land as contemplated by the Sale of Land Act. It appeared however that it did: ie a sale of interest in land between co-owners was to be treated no differently than a sale by a vendor to a purchaser in an arm's length transaction. [77]-[84]

Section 32 complied with.

23. In ***Tymstock Pty Ltd v Patrick*** **[2019] VCC 1092 –**

- Tymstock owned a commercial property in West Melbourne (Unit 1, Lot 1). It was a three level combined office and warehouse building. It was part of a six lot subdivision. Each lot holder was also a unitholder in the owner's corporation. The north boundary of the Lot 6 truck parking area bordered a strip of municipal reserve and the Maribyrnong River. Subject to a Public Acquisition Overlay (PAO) was a slight part of this parking area. Most of the PAO (to the extent that it was contiguous with lot 6) covered the reserve and riverbank. The PAO was about 30 metres away from a concrete and windowless boundary wall on Unit 1.
- The plaintiff decided to sell Unit 1. The section 32 statement contained the information that a PAO did "not apply" to the property.

Section 32(d)(iv) provided that a section 32 statement must contain "in the case of land to which a planning scheme applies a statement specifying the name of any planning overlay affecting the land". Was there a failure to supply information within the meaning of s32K(2) by reason that the property was affected by a PAO, contrary to s32C(d)(iv)?

Judge Woodward held or noted –

1. In contrast to another part of s. 32, there was no requirement that the PAO be "directly and currently affecting the land". Beach J. had stated in 1995 (*Danjeet Nominees Pty Ltd v Ellul* (1995) V ConvR 54-521 at 66,154):

   "When one is talking about affecting land one is simply talking about producing an effect or change upon the land. If an approved proposal requires someone to do a physical act on the land or to the land, …, then one is affecting the land. A proposal could affect land even though it did not require a physical act to be carried out on the

land or to the land. If a proposal had the effect of closing a roadway giving access to an area of land, that would be a proposal affecting the land. If a proposal had the effect of rezoning land from rural to urban, that would be a proposal affecting the land."

The expression "affecting the land" as used in s32C(d)(iv) was to be construed consistently with *Danjeet.* [30]

2. Applying Beach J's reasoning "necessitates a qualitative assessment of the impact of the circumstance said to be affecting the land". Thus a potential effect alone is not enough. There must be an assessment of the likelihood of that potential being realised. The nature and extent of the effect was central. If the effect was no more than incidental, then s32C(d)(iv) was not engaged. [30]-[32]
3. It was far from clear that in this case any "effect" rose even to the level of "incidental". The PAO was is not proximate to the property. Nor did the fact that it sat on another lot in an owners corporation render it as affecting the lot sold. [32]

24. ***Long Forest Estate Pty Ltd v Singh & Shri Guru Property Development Pty Ltd*** **[2020] VSC 604** is an interesting decision on whether a vendor's statement is required to disclose declarations or decisions by a Minister or Department of the Commonwealth. Briefly the facts were –

- The plaintiff (Long Forest) owned farmland adjacent to a Nature Conservation Reserve. It had acquired the land for residential development but without any active planning approvals in place.

- The land was subject to –

  - three declarations of the Commonwealth Minister for the Environment and Heritage under the Environment Protection and Biodiversity Act 1999 (Cth) as to threatened species, ecological communities and key threatening processes;

  - two decisions of the Minister under that Act which related to Long Forest's proposal for residential development. The former decision, in 2014, described the proposed construction of a particular residential development as a controlled action, stating that the project would require assessment and approval under the Act before it could proceed. The latter decision, in 2015, informed the plaintiff that its proposal to construct the residential development would be approved subject to conditions.

  The declarations, applications for approval for projects constituting controlled action and any final approval by the Minister were publically available documents.

- However, by 2016 the plaintiff no longer intended to develop the land. It was listed for sale without a planning permit.

- Negotiations occurred between representatives of Long Forest and the first defendant (Singh). The Sale of Land Act s. 32D(a) required the vendor to disclose –

  "[P]articulars of any notice, order, declaration, report or recommendation of a public authority or government department or approved proposal directly and currently affecting the land, … "

The vendor's statement did not disclose the Minister's declarations or decisions. John Dixon J. rejected the argument that this breached s. 32D, relevantly holding -

1. Neither the Minister nor the Department was a public authority or a government department as those terms were used in the Sale of Land Act. The Victorian Parliament never contemplated that information issued by Commonwealth agencies or departments would need to be attached to a vendor's statement. [157], [158], [169], [174], [175]

2. Further, none of the declarations or notices directly and currently affected the land at the relevant time, as Long Forest had already abandoned its application for ministerial approval of the controlled action constituted by the subdivision of the land. Under the federal statutory regime, any approval of a proposed action and the conditions attached was affixed to the designated proponent and the project constituting the controlled action, rather than the land that constituted the relevant habitat or environment. [117], [141], [176], [179], [181], [182]

Section 32 breached.

25. In ***Downing v Lau*** **[2018] VCC 33** –

- A property in Kew had an old weatherboard house, a shed and a large garden area.
- In 2014 VCAT had determined that that property could be developed by erection of four buildings, setting aside a Council refusal of an application for a five building development. The consequential 2014 planning permit allowed development for four double storey buildings.
- The property was advertised for sale. The section 32 statement did not disclose the VCAT decision or permit.

Judge Marks held that the planning permit ought to have been be disclosed as it fell within the description of an approved proposal directly and currently affecting the land under s. 32D(a) ([11]). However s. 32K did not require disclosure of rejected applications for permits to develop properties nor of any non current planning permits ([146]). Accordingly the vendors were not required to disclose documents related to the Council rejection of the proposed five unit development and its appeal to VCAT.

26. In ***McHutchison v Asli & Anor*** **[2017] VSC 258 –**

- The plaintiff owned a property in Park Orchards. She had obtained a permit to use a septic tank from the local Council under the Environmental Protection Act. The permit contained conditions imposing obligations on the user of the tank. Condition 11 required disclosure of the permit to any new owner.

- The section 32 statement included a Yarra Valley Water Certificate with what the vendor referred to as an infrastructure plan. The section 32 statement specifically and falsely represented that the property was connected to a mains sewerage system (clause 8). The permit was not disclosed in the section 32 statement.

- Some months after the auction the purchasers' solicitor obtained a land information certificate from the Council which showed that mains sewerage was not connected to the property. A notice was issued a notice seeking to rescind the contract under s. 32K on the grounds that the section 32 statement failed to disclose this.

- The defendants' solicitors undertook further enquiries with Council and on about 4 April discovered the existence of the permit. On 10 April they purported to terminate the contract pursuant to ss 32K(1) and (2) and s 32D on the basis of non disclosure of the permit, to the extent that the previous purported termination notice was ineffective.

Digby J. held that the section 32 statement was inaccurate insofar as it stated that there was a sewerage connection ([8]). Accordingly, the vendor was in breach of ss 32(1) and 32H. His Honour also impliedly found that there was breach related to the tank.

Excused under s. 32K(4).

27. The facts of ***Downing v Lau*** **[2018] VCC 33** are set out in paragraph 25 above, to which is added –

- The vendor's mistake in failing to include the planning permit details in the s32 statement was made because the conveyancer did not ask, in the checklist, whether there were any current planning permits over the property. The checklist asked about building permits, but not planning permits. The vendor (and her husband) did not realise she needed to disclose the planning permit in the s32 statement.
- The defendant however knew about the existence of the permit before the sale.
- Further, the vendor gave the permit to the estate agent before the sale. The agent referred to it at auction before taking bids.
- The defendant hoped to develop the property with seven or eight units.

Judge Marks excused the vendor from her non-compliance with s. 32 pursuant to s. 32K(4). As to the elements in s. 32K(4):

(a) The vendor had discharged the onus of proving that she acted honestly and reasonably; [33], [36]-[45]

(b) As to the mistake by the conveyancer the issue was whether a want of care by someone engaged to prepare the s. 32 statement can be visited on the vendor. Put another way, has a vendor failed to act reasonably under s32K(4) by not providing information that is required to be produced under the Act, in circumstances where the vendor has relied on a trained professional to advise of the necessary material to be included, and that trained professional has given the wrong advice which has then been relied on by the vendor? The answer was yes. The conveyancer was not the agent of the vendor in the present case in preparing the section 32 statement. She was a retained expert. Accordingly the vendor ought fairly to be excused for the contravention; [46]-[110]

(c) The purchaser was substantially in as good a position as if all the relevant provisions of the section had been complied with. If claiming loss the purchaser should have led expert valuation evidence. Nor did the planning permit affect the purchaser's proposed development or the purchaser establish he would not have purchased the property for the same price had he known of the planning permit. The fact that a planning permit existed for the development of four dwellings did not mean a development proposal for a greater number of dwellings was not feasible. The purchaser's position in relation to being able to apply for a seven or eight unit development was the same before auction as after. Finally, the purchaser was not due to settle until 18 days after the permit had expired, by which time it would not affect the property. [143]-[167]

28. In ***Tymstock Pty Ltd v Patrick*** **[2019] VCC 1092** (referred to in paragraph 23 above) Judge Woodward held that if failure to disclose the PAO had breached s. 32 the vendor would have been excused under s. 32K(4). Adopting the analysis in *Downing v Lau* referred to in (b) in the preceding paragraph Tymstock (through its alter-ego the director) had no independent knowledge of any omission from the s. 32 statement and was entitled to rely (and did rely) on a conveyancer.

Vendor not excused under s. 32K(4).

29. Certain facts of ***McHutchison v Asli & Anor*** **[2017] VSC 258** are set out in paragraph 26 above. Further facts were –

- In 2016 the plaintiff engaged a selling agent. The agent published an advertisement stating that the property contained: "an environmentally-friendly fully irrigated watering system to the front and rear gardens via the Septic Treatment Plant and a 4,500-litre rain water tank with new Onga pump".

- The first defendant, who was an Iranian national, read the advertisement before inspecting the property. He did not understand the word "septic", and thought the words meant that the property contained a watering system supplied by rain water. . He did not understand from the advertisement that the property was not connected to the sewerage system or that it contained the tank.

- The mistake whereby the section 32 statement indicated that a sewerage service was connected was attributed by the vendor to a clerical error by the conveyancer in accidentally striking out the word "sewerage".

Digby J. refused to excuse the vendor under s. 32K(4). As to the four elements –

(a) The vendor had not discharged the onus of proving that she acted honestly or reasonably. There was inadequate evidence that the false evidence was merely attributable to a conveyancer's "clerical error". She had not explained the non-disclosure of the permit, condition 11 of which required disclosure of it to any new owner. [56]-[75]

(b) For the foregoing reasons the vendor ought not fairly to be excused. The purchaser was not substantially in as good a position as if all the relevant provisions of the section had been complied with. The ramifications of a septic tank as opposed to mains sewerage were far from minor or trivial or ephemeral or nominal. The first defendant had prima facie established the substantial cost of excavating and installing sewer pipes from the tank to any future sewer mains. [76]-[88]

G. COOLING OFF – S. 31 SALE OF LAND ACT.

30. The cases are *Stewart v White*, which concerns whether a cooling off notice can be suspended or withdrawn, and *Leahy v Javni* which concerns whether part of a deposit never handed over can be forfeited.

31. The facts of ***Stewart v White*** **[2020] VSC 116** are set out in paragraph 4 above. As there stated the purchaser delivered a cooling off notice. More particularly what occurred was that on 30 August 2018 Mr Stewart hand delivered to the defendants' estate agent a letter including the words –

"In light of the significant damage to the property since purchase, we give notice of withdrawal from the contract under the cooling off provisions.

During the conversation at which that letter was handed over Mr Stewart said that he wanted the agent to hold the letter "in escrow". That afternoon the agent passed this letter on to the conveyancing officer employed by the solicitors for the defendants. Then, as

stated in paragraph 4 above, early the following morning Mr Stewart purportedly recanted from the cooling off orally and by email.

Macaulay J held that the contract was terminated by the cooling off letter. The stipulation that it be held "in escrow" had no effect. It was not possible for a cooling off letter to be given in escrow. As a matter of legislative construction the legal effect of such a notice could not be deferred or suspended, once given, pending the satisfaction of a condition. The statutory effect of the satisfaction of the five objective facts referred to in s. 31 occurred without regard to the parties' intentions, words, conduct or beliefs. Further, a purchaser who had given a cooling off notice could not unconditionally simply withdraw it. [10]-[51]

32. The first fact set out in paragraph 3 above of ***Leahy v Javni*** **[2020] VSC 680** is that the purchaser cooled off under the first contract. He did so without having paid any part of the deposit. Ginnane J held that s. 31(4) of the Sale of Land Act, which provided that where a contract of sale had been terminated under the cooling off provision –

"the purchaser shall be entitled to the return of all moneys paid by him under that contract except for the sum of $100 or 0.2 per centum of the purchase price (whichever is the greater) which may be retained by the vendor" .

did not apply where no money had been paid under the contract ([67]-[71]).

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