

Recent cases on Performance and Breach of Contracts of Sale of Land

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INTRODUCTION

1. This is the Paper accompanying the Foleys CPD podcast I gave on 5 March 2021. I cover Victorian Supreme and County Court cases for approximately the last five years on performance and breach of contracts of sale of land. This follows my podcast and Paper last November on formation of contracts of sale of land. In this Paper I cover -
 - A. Rescission for mistake.
 - B. Rectification.
 - C. Construction and interpretation of contracts – general
 - D. Severance of terms.
 - E. Variation of contracts.
 - F. Breach – the prevention principle.
 - G. Anticipatory breach
 - H. Rescission for breach pursuant to notice or repudiation.
 - I. Specific Performance.
 - J. Forfeiture of deposit or relief against it under s. 49 of the Property Law Act 1958 (PLA), penalties, claims for damages against purchasers, recovery by purchasers of instalments of purchase price.
 - K. Claims for damages against vendors.

A. RESCISSION FOR MISTAKE.

2. I deal with this topic at the start because it follows naturally from my previous Paper. *Toma v Olcorn* [2019] VSCA 116 was an unsuccessful appeal from the County Court. The facts were –

- The respondent owned a rural property. In 2012 she leased approximately 100 sq. m. to a company associated with Vodafone for 99 years on which it constructed a telecommunications tower. The rent was \$385,000 including GST, all paid in the first year of the lease.
 - The respondent authorised an estate agent to offer the property for sale for about \$900,000. The applicant and the respondent orally agreed on a sale for this amount. The vendor instructed a conveyancer to draw a contract and that she was to retain all the rent. The conveyancer drew a contract with a special condition whereby the purchaser acknowledged the existence of the lease and that all payments due under it had already been paid. However, the conveyancer overlooked the retention of general condition 15 which provided that any rent must be apportioned between the parties on the settlement date.
 - The vendor entered into the contract under the impression that she was retaining the rent. If rent was adjusted she would receive approximately \$330,000 than she had expected from the sale. The day after the contract was made the purchaser's solicitor sought clarification that rent would be adjustable at settlement. The vendor then refused to proceed.
3. Judge Macnamara found that the purchaser had been aware of the vendor's mistake and had opportunistically sought to take advantage of it. His Honour relied on the foundational statement on rescission of unilateral mistake by Mason ACJ, Murphy and Deane JJ in *Taylor v Johnson* (1983) 151 CLR 422 at 432 that:
- “a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering into the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension”.
- Judge Macnamara also relied on the statement by Kenny JA in *Leibler v Air New Zealand Ltd [No 2]* [1999] 1 VR 1 at 26 that in some circumstances this principle extended to the situation where the non-mistaken party chose to leave the

mistaken party under a misapprehension in executing the agreement. The Court of Appeal upheld Judge Macnamara's decision to rescind the contract of sale.

B. RECTIFICATION

4. Logically following from whether a contract should be rescinded for unilateral mistake is whether a contract should be rectified for common mistake. *Chatham v Coral Park Pre-Training & Breaking Pty Ltd [2020] VSC 814* concerned sale of a racehorse breeding and training facility on the Mornington Peninsula. The defendant vendor was controlled by a horse trainer whose business Jason Warren Racing Stables also operated from the property and occupied most of the stables. On his instructions an agent represented to the plaintiff that save for certain licensees the vendor would provide vacant possession. The Particulars of Sale however stated that the property was "Subject to lease – refer to Special Condition 22". Special condition 22.1 provided –

"The purchaser acknowledges and accepts that the property is currently tenanted on a "month to month" basis by Jason Warren Racing Stables Pty Ltd. No written tenancy agreement or lease is available".

Could the contract be rectified to provide for vacant possession? Daly AsJ referred to statements in *Queensfield Pty Ltd v Gordon Finance Pty Ltd [2020] VSCA 282*, quoting High Court authority, in substance that:

the purpose of rectification is to correct the written instrument so that it conforms to the true agreement between the parties, which the instrument mistakenly fails to express;

there must at the time of execution of the written instrument have been an 'agreement' between the parties in the sense of a 'common intention' and that the written instrument was to conform to that agreement;

that common intention need not be communicated by express statement but must at least be the parties' actual intentions, viewed objectively from their words or actions, correspondingly held by each party;

the fact that the instrument does not reflect the ‘agreement’ must be due to common mistake.

Daly AsJ held (at [234]) there was merely a common understanding, not a common intention, that Jason Warren Racing Stables would vacate the property at settlement, and accordingly the contract was not rectified.

C. CONSTRUCTION AND INTERPRETATION OF CONTRACTS – GENERAL.

5. The cases are –

Express Terms.

A & A Property Developers Pty Ltd v MCCA Asset Management Ltd & Anor [2017] VSCA 365 – whether sale inclusive or exclusive of GST?

Bisognin & Anor v Hera Project Pty Ltd [2016] VSCA 322 – responsibility re referral authorities.

Wollert Epping Developments Pty Ltd v Batten [2019] VSC 618, 60 VR 62 – which of vendor or purchaser responsible for dealing with small adversely possessed part of land sold?

CAG v Cheruku & Anor [2020] VCC 13 – interpretation of licence agreement.

Implied terms?

Aurumstone Pty Ltd v Yarra Bank Developments Pty Ltd [2017] VSC 503 implied deletion of express term?

Simcevski v Dixon [2017] VSC 197 – no implied term as to investigations re contamination.

Mediratta v Clark [2019] VSC 685 – no implied term as to investigation for finance purposes.

Ventura & Anor v Ventura & Ors [2018] VSC 485, 56 VR 118 – implied term that co-owner vendor required to sign instrument of transfer.

Express terms.

6. The cases frequently contain long, fairly standard, formulations of the principles of contractual interpretation but a brief synopsis is stated by Osborn and Kaye JJA in *A & A Property Developers Pty Ltd v MCCA Asset Management Ltd & Another* [2017] VSCA 365 at [80] that –

“The question [of interpretation of a particular term] ... is to be determined objectively by reference to the language used in the contract in the context of the contract as a whole, and by reference to its purpose. The meaning of the terms of the contract, that are in issue, is determined according to what a reasonable business person would have understood them to mean”.

In the non-commercial context the word “business” would be omitted from this quotation.

7. In *A & A Property Developers Pty Ltd v MCCA Asset Management Ltd & Another* [2017] VSCA 365 the subject matter of the contract was residential land in Ringwood improved by a single dwelling with the benefit of a planning permit allowing construction of ten dwellings and removal of vegetation. General condition 13.1 provided that the purchaser was not liable for GST unless the particulars of sale specified the price as “plus GST”. General condition 13.2 reinforced this. The particulars of sale stated that ‘The price includes GST (if any) unless the words “plus GST” appear in this box’, with an adjacent box provided. The contract included only ‘GST’, not ‘plus GST’, in the relevant box. The four spaces in the particulars immediately under this notation were left blank and the sixth space (relevant to the words ‘this contract does not include any special conditions unless the words “special conditions” appear in this box’) contained the words ‘Special conditions’.
8. Ginnane J held that the absence of the word “plus” rendered the price GST inclusive. The Court of Appeal disagreed, holding that it sufficed that the contract manifested a general intention to attract the operation of general condition 13.1. In particular: in the context that it could be inferred objectively, from the systematic manner in which the particulars were completed, that where the parties left a box blank they intended not to attract the operation of the

relevant general condition or other relevant scheme, the fact that the relevant box was not left blank was more significant than the lack of strict compliance with general condition 13.1; as was apparent from the contract and attachments to the section 32 statement the property had development potential, to which the parties specifically adverted in a particular special condition, so the potential liability of the vendor for GST was far from theoretical.

9. ***Bisognin & Anor v Hera Project Pty Ltd [2016] VSCA 322*** is one of several Court of Appeal decisions in the long-running litigation between these parties which also gave rise to many single judge decisions. The facts were –

- In 2012 the registered proprietors of a rural five acre block entered into a contract to sell three acres off-the-plan to a developer who desired to erect a supermarket. Completion was due after registration of the plan of subdivision.
- A special condition provided in substance that the purchaser would prepare and submit a plan for sealing by the Council and do everything reasonably necessary to have the plan registered. Before the council could certify the plan, every ‘referral authority’ (relevantly here two water authorities and a power authority) had to consent. Before the council could issue a statement of compliance, it had to be satisfied that agreements existed with the referral authorities.
- After litigation between the parties was settled, a new contract was made in 2015 extending the date by which registration had to occur to 25 August 2015 but mostly on the same terms as before. The special conditions included -

“2(a) The Purchaser shall at its own cost and expense prepare a Plan of Subdivision ... and submit the same to the City of Casey for sealing [ie certification] ... and shall use its best endeavours and do all things reasonably required to expedite and procure the registration of the said Plan ...;

...

10. The Vendors will use their best endeavours to co-operate with the Purchaser, ... and to give effect to the approval and registration of the plan of subdivision and to give effect to the UDF [ie draft Urban Design Framework] including making the duplicate title available for the purposes of registration, and will make any Growth Areas Infrastructure Contribution (GAIC) payment promptly if required by the relevant authority”.

10. The initial dispute concerned who was obliged to undertake financial obligations with respect to the provision of services. Allowing an appeal from the decision of Sloss J. the Court of Appeal held that the purchaser bore this responsibility. The court reasoned:
 1. No provision in the agreement expressly dealt with entry into agreements with the referral authorities, nor with who was responsible for meeting the financial commitments under them. [73]
 2. The contract was poorly drafted but upon its proper construction the vendors were required to enter into agreements with referral authorities but were not required to pay for the establishment or provision of services to the property. Whilst ordinarily a vendor would bear the burden of performing all steps required to register a plan of subdivision this contract had shifted the burden to the purchaser. In particular special condition 2(a) cast all the obligations it identified upon the purchaser and this interpretation was supported by the context that the vendors were approached by a developer (the original purchaser before nomination) with developed plans for commercial exploitation. [77]-[79], [81], [82], [84]
 3. Special condition 10 was auxiliary to special condition 2. [83]
 4. However the vendors were not at this time entitled to terminate the contract as they were in breach of the best endeavours requirement imposed on them by special condition 10. [103]

11. In *Wollert Epping Developments Pty Ltd v Batten* [2019] VSC 618, 60 VR 62 the facts were –
 - The defendants were registered proprietors of approximately 58 ha. of farmland included in an Urban Growth Zone. A strip of land along the boundary of the land contained in the certificate of title was, owing to a misaligned fence, possessed by the vendor's neighbour. The neighbour claimed and intended to assert possessory rights to the strip.

- The plaintiff was a subsidiary of a listed property developer and sought to acquire the land to develop into a residential housing estate.
- After a contract validly rescinded by the plaintiff under a due diligence clause the parties entered a contract of sale in June 2018 in the standard LIV form. On the execution page were the words: “Property address 405 Epping Road, Wollert 3750” and “The vendor agrees to sell and the purchaser agrees to buy the property, being the land and the goods,” etc. On the page headed ‘Particulars of Sale’, were words including “Land (general conditions 3 and 9) The land is described in the table below” and then followed the certificate of title number and lot number on a particular plan. On the next page were the words: Property address The address of the land is: 405 Epping Road, Wollert 3750.
- The general conditions included –
 - 1.3 The vendor warrants that the vendor:
 - ...
 - (c) is in possession of the land, either personally or through a tenant; and
 - ...
 - (e) will at settlement be the holder of an unencumbered estate in fee simple in the land;
 - ...
 - 2.5 The warranties in general conditions 2.3 ... are subject to any contrary provisions in this contract
 - ...
 - 3.1 An omission or mistake in the description of the property or any deficiency in the area, description or measurements of the land does not invalidate the sale.
 - 3.2 The purchaser may not:
 - (a) make any objection or claim for compensation for any alleged misdescription of the property or any deficiency in its area or measurements;
 - ...
 - ...
 - 10.1 At settlement
 - ...
 - (b) the vendor must:
 - (i) do all things necessary to enable the purchaser to become the registered proprietor of the land; and
 - (ii) give either vacant possession or receipt of rents and profits in accordance with the particulars of sale.

- Settlement was due in January 2020. Between the date of contract and date of settlement the purchaser learnt of the adverse possession. The vendor and purchaser then disputed about whose responsibility it was to deal with this encroachment and the consequences if it was not dealt with, leading to the purchaser issuing a vendor and purchaser summons under s. 49 of the PLA seeking answers to certain questions.

12. Derham AsJ held –

1. The application was properly brought under s. 49 and having regard to the power of the court to make a declaration. [33]-[44]
2. Applying contractual construction principles (set out in paragraph 6 of this Paper) the subject matter of the sale was the land in the certificate of title not the land at the address of the property enclosed by the fences. The definition of the “land” in the contract described what was contained in the certificate of title. [53]-[57]
3. As was the position formerly with respect to requisitions on title, the warranties in general condition 2.3 were subject to the operation of general condition 3. [69]
4. General condition 3.1 fell into two parts, dealing respectively with “the property” and “the land”. The “omission or mistake” to which it referred concerned the totality of the subject matter of the sale, ie “the property”, being “the land and the goods”. The “deficiency in the area, description or measurements” to which it referred concerned “the land”, ie that described in the certificate of title. [71]
5. General condition 3.2(a) maintained the same distinction. The prevention of the purchaser from making any objection or claim for compensation for “any alleged misdescription of the property” covered misdescription of the whole of the subject matter of the sale, that is, the land and the goods. The prevention of the purchaser from making any objection or claim for compensation for “any deficiency in its area or measurements” referred to the land. [72]

6. A breach of the warranties in general condition 2.3 of the kind constituted by the encroachment did not invalidate the sale or give rise to any objection or claim for compensation because it was a deficiency in the area or measurements of the land. When combined with the rest of the clause “any deficiency in the area, description or measurements of the land” included a small part of a property being adversely possessed. [73]
 7. A condition such as general condition 3 was subject to the so-called rule in *Flight v Booth* to the effect that a significant discrepancy would justify avoidance of the contract by the purchaser, and the associated “rule of thumb” that a 5% or greater diminution in area was likely to be considered significant, ie was of the kind which constituted a departure from the terms of the contract that so materially altered the character of the land as to be in substance a different thing from that which the purchaser contracted to buy. The deficiency in the area or measurements of the land in this case was not significant. [74], [80], [81], [84]
 8. In conclusion, the protection to the vendors afforded by general condition 3 was enlivened so that, although prima facie there was a breach of the warranty as to possession and there would, if the position remained the same, be at settlement breaches of the warranty that the vendor was the holder of an unencumbered estate in fee simple and of general condition 10.1(b), those breaches were negatived and not actionable. Further, in the particular circumstances of this case, if the exact measurements of the property were important the purchaser as an experienced property developer would have performed a check survey before entering the contract. [85], [83]
13. In *CAG v Cheruku and Kosaraju* [2020] VCC 13 the facts were –
- A contract of sale with a settlement date in September 2019 included the following handwritten clause –
The Vendor allows the purchaser to take possession of the property under lease LICENCE agreement on the March 20th March [sic] 2019 at \$700 per week until Settlement.

- After the contract was signed the vendor proceeded on the basis that the purchasers were required to sign a further agreement, a draft of which it tendered, described as a ‘Licence Agreement’ which included extensive terms not found in the contract of sale.
 - The purchasers refused to sign this agreement and did not take possession before settlement. The plaintiff sued to recover \$16,500 with interest being \$700 per week between the date of contract and settlement.
14. Judge Marks held the purchasers not liable on the alternate grounds that the vendor was not ready, willing and able to offer possession as provided in the contract, but had required entry into the additional terms contained in the ‘Licence Agreement’, and because, as the term used the word ‘allows’ and so was permissive, the defendants were not obliged to and had not taken possession.

Implied terms?

15. In *Aurumstone Pty Ltd v Yarra Bank Developments Pty Ltd* [2017] VSC 503 the facts were –

- A CBD property was the subject of a planning permit for demolition of the buildings thereon and construction of a multi-storey mixed-use building. Promotional material stated that the permit allowed for a 66 level tower including 431 apartments.
- However part of the existing building was subject to a lease already extended to 2020 and with a possible further extension to 2025.
- In September 2016 the defendant vendor agreed to sell the property to the plaintiff purchaser for \$42,600,000 payable by 10% deposit, the balance to be paid on 8 May 2017. The property was sold subject to the lease. Special condition 3 with deletion and (shown in *italics*) addition provided:

“3. GST and Tenants

~~The Vendor agrees to use all reasonable endeavours to ensure that the sale of the Property under this Contract is sold as a going concern.~~

The Vendor further agrees that the Purchaser may but not earlier than two (2) months before the Settlement Date secure a tenant or tenants for any vacant

part of the Property (provided the terms of such tenancy are on terms acceptable to the Vendor (acting reasonably)). As part of the terms of any lease, the lease must terminate should the Purchaser not settle the Property on the Settlement Date.

~~The Vendor further agrees that it will ensure that the current tenant of the Property as at the Day of Sale will have vacated the Property on or before the Settlement Date or will provide the Purchaser with a deed of surrender that requires the tenant to vacate the Property not later than two (2) months after the Settlement Date.~~

The Vendor further agrees that it will provide the Purchaser with a deed of surrender or termination of lease that requires the current tenant at the Property as at the Day of Sale to vacate the Property not later than two (2) months after the Settlement Date. For the avoidance of doubt, the Vendor may terminate the lease at any time prior to the Settlement Date by deed or otherwise at the Vendor's discretion."

- On Sunday 7 May 2017, ie the day before settlement was due, the vendor re-entered the part of the property leased to the tenant, asserting this entitlement for non-payment of rent. The vendor confirmed to the purchaser that this lease was so terminated and that a new lease to Yongzhong Australia Pty Ltd started that day. However the tenant obtained injunctions, including from VCAT, restraining any re-entry and requiring that the tenant's right to peaceful enjoyment be respected. The final hearing of the VCAT proceedings was set down for December 2017.
- On 25 May the parties agreed to vary the contract broadly by extending the settlement date to 15 July 2017. In consideration of these variations the purchaser agreed inter alia to immediate release of the deposit, and to sign a deposit release statement under s. 27 of the Sale of Land Act, and that this release was effective notwithstanding s. 27(2).
- On 25 May the purchaser provided a notice for release of the deposit pursuant to s. 27(4), stating inter alia that the contract was not subject to any condition enuring for its benefit and that it was deemed to have accepted title.
- The settlement date of 15 July passed and on 19 July 2017 the vendor's solicitor served a rescission notice on the basis of an alleged default in paying the balance of the purchase price.

- The purchaser sought an order under s. 49(1) of the PLA that the rescission notice was invalid.
- The vendor argued that there was an implied term that, if amended special condition 3 was one enuring for the benefit of the purchaser, the deposit could not be legally transferred unless the effect of the variation of 25 May was to delete special condition 3 from the contract or otherwise discharge the vendor's obligation to comply with it.

16. Riordan J. held –

1. By failing to provide the purchaser with a deed of surrender or termination of the lease the vendor had not complied with amended special condition 3. The terms of the contract were unambiguous but, even if ambiguous, reference to events, circumstances and things external to the contract only supported this unequivocal requirement. In particular, the purchaser was proposing to develop the property. [29]
2. As to the vendor's argument that special condition 3 had been impliedly deleted from the contract -
 - (a) Section 27(2) provided that s. 27(1) (under which a purchaser may authorise the stakeholder to release the deposit monies before settlement) shall only operate (a) where the contract is not subject to any condition enuring for the benefit of the purchaser; and (b) where the purchaser has accepted title or may be deemed to have accepted title.
 - (b) The meaning of "condition" in s. 27(2)(a) included an essential promissory term the breach of which gave rise to a right to terminate the contract, and was not limited to a contingent condition (ie one providing that the formation of a contract, or its performance, was subject to a contingency). [51]-[52]
 - (c) The five criteria that must be satisfied before a term would be implied to give business efficacy to a contract were not met. The implication argued for by the vendor would be inconsistent with the surrounding factual circumstances including email communications leading to variation, which

patently demonstrated that the deed of surrender remained fundamental to the transaction. The commercial context known to both parties was that the purchaser was proposing demolition and development. [61]-[62]

Accordingly the rescission notice was ineffective.

17. In *Simcevski v Dixon* [2017] VSC 197 –

- The subject matter of the contract was a former service station site. It contained many special conditions imposing the risk of contamination on the purchaser. Special condition 11.6.1.1.6 provided that the purchaser must make all of its own investigations and enquiries as to any contamination caused to the property because of its use as a service station. The settlement dated was 31 March 2016.
- The purchaser attempted to raise finance. On 29 March his solicitor advised that a lender and prospective mortgagee would not settle on the due date as the valuers appointed by it had now sought an environmental audit report. Also that day a geotechnical expert engaged by the purchaser told the vendor that the proposed soil test would involve drilling three to five holes 150mm. wide in the concrete floor, taking some bore samples, and that the holes would be ‘grouted over’. He said that he could have a crew available to undertake the work the next day.
- Contact then occurred in which the parties and their solicitors could not agree on the right of the purchaser to undertake this test or on what terms or on an extension of the settlement date or on what terms.
- The settlement date passed. The vendor served a 14 day rescission notice which expired.
- The purchaser claimed the right to carry out certain investigations before settlement for valuation purposes and that the vendor had impeded this.

18. Riordan J. held –

1. The contract did not impose an obligation on the purchaser to make any relevant investigations or enquiries. The clause as to investigations was

simply an acknowledgement by the purchaser that he was responsible to make his own relevant investigations or enquiries as he choose and that the vendor was not responsible to make them. [47]

2. There was also no implied term that the vendor would permit the purchaser to carry out the proposed investigations. As to the criteria for a term to be implied to give business efficacy to a contract, the suggested term was not not reasonable and equitable as between the parties, not necessary to give business efficacy to the contract, not so obvious that ‘it goes without saying’, and not capable of clear expression. [51]
 3. As the contract did not require the purchaser to carry out the investigations the vendor’s general duty to co-operate did not extend to requiring him to permit them. [57]
19. In *Mediratta v Clark* [2019] VSC 685 the facts were –
- Under a contract of sale the balance of purchase moneys, being \$665,000, were due at settlement fixed to be 30 June 2018, which was a Saturday and so extended by general condition 16.2 to 2 July. The contract was not subject to a condition as to finance. It included:
 - General condition 22 which provided that the “purchaser and/or another person authorised by the purchaser may inspect the property at any reasonable time during the 7 days preceding and including the settlement day”.
 - Special condition 16 which provided that the contract set out all the terms and conditions of the sale.
 - The purchaser was having difficulty arranging finance. On or about 27 June 2018 it sought to have a valuer and a person authorised by the purchaser and/or the nominee inspect the property. The inspection did not occur. Settlement also did occur, the vendor gave a notice of default and pursuant to this purported to terminate the contract. The purchaser commenced proceedings under s. 49 of the PLA seeking to have this notice set aside.

20. Derham AsJ held –

1. The vendor had not breached general condition 22. In the context of the contract being unconditional as to finance, the purpose of this condition, bearing in mind that it was a general not a special condition, was to permit a final inspection by a purchaser to assess whether or not the property was in the state commensurate with the vendor's contractual obligation. It did not permit inspection by a valuer for the purpose of the purchaser obtaining finance to complete the purchase. Its operation depended on the assumption that purchaser was ready, willing and able to complete the contract on the settlement date. [63], [68]

2. Where the contract was subject to a condition as to finance for the benefit of the purchaser, the vendor would usually be under an obligation to allow the purchaser's financier or a valuer to inspect the property at a reasonable time well in advance of the settlement day. And, where the contract was unconditional it may be necessary for the vendor under the duty to co-operate to allow an inspection by a valuer to enable the purchaser to have the benefit of the contract. That duty or an implied term could not however be so wide as to be unlimited as to time, which would allow inspection by a valuer right up to and including the day of settlement. Accordingly there was no implied term to the effect that:

“The vendor is required to co-operate with the purchaser by allowing a valuer, on behalf of the financier of the purchaser and/or the purchaser's nominee, access to the property in order to allow the purchaser and/or the purchaser's nominee to attempt to obtain finance which would enable the purchaser and/or the purchaser's nominee to pay the balance of the purchase price at settlement in accordance with the contract”. [51]-[53], [57].

3. Special condition 16 was a further possible barrier to such an implied term. Where the parties had agreed that the contract contained their entire agreement the court should be slow to imply a term so wide as the suggested

implied term and unnecessary to make the contract work. However, his Honour did not finally determine this point. [58]

The purchaser also argued that the default notice was invalid on the ground of ambiguity. This is dealt with later in this Paper.

21. In *Ventura & Anor v Ventura & Ors* [2018] VSC 485, (2018) 56 VR 118 Derham AsJ held that on a sale by three co-owners (who had all signed the contract of sale) one co-owner who refused to sign the transfer was in breach of a term implied as a matter of business efficacy to sign the instrument of transfer, or of an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. [15]-[16]

D. SEVERANCE OF TERMS

22. Certain facts of *Chatham v Coral Park Pre-Training & Breaking Pty Ltd* [2020] VSC 814 are set out in paragraph 4 above including that Special Condition 22.1 provided –

“The purchaser acknowledges and accepts that the property is currently tenanted on a “month to month” basis by Jason Warren Racing Stables Pty Ltd. No written tenancy agreement or lease is available”.

General condition 4 provided -

In the event of any part of this Contract being or becoming void or unenforceable or being illegal then that part shall be severed from this Contract to the extent that all other parts shall not be or become void or unenforceable or illegal but shall remain in full force and effect and shall be unaffected by such severance.

Daly AsJ held that Special Condition 22.1 was incomplete and uncertain on account of lack of reference to any rent paid or to be paid and was thus void. But, having regard to the pre-contractual negotiations and surrounding circumstances this special condition was not so fundamental to the bargain between the parties that it could not be severed from the contract, given the common understanding of the parties that the tenant would vacate the property at settlement, and the fact that

it had in fact taken preparatory steps to do so. Special condition 22.1 was accordingly severed from the contract. [226]-[227]

E. VARIATION OF CONTRACTS

23. *Chan & Anor v Liu & Anor* [2020] VSCA 28 mostly concerns the law of caveats but the facts also included a number of oral extensions of the settlement date. The Court of Appeal noted that although any such arrangement may not constitute a formal variation of the contract (which would have been required to comply with s. 126 of the Instruments Act) it may qualify as a waiver of the stipulated settlement date or found an estoppel precluding the vendors relying on that date. [55], [56]

F. BREACH - THE PREVENTION PRINCIPLE.

24. As stated in paragraphs 9 and 10 above in *Bisognin & Anor v Hera Project Pty Ltd* [2016] VSCA 322 the Court of Appeal held that in a sale of three acres off-the-plan the vendors were required to enter into agreements with referral authorities but were not required to pay for the establishment or provision of services to the property. Thereafter the vendors (having entered another contract for a higher amount which required the vendors to terminate this contract) continued to attempt to stymie completion of this contract, first by purportedly rescinding because of the purchaser's failure to comply with the term that the plan of subdivision be registered by 31 August 2016. In *Hera Project Pty Ltd v Bisognin (No 3)* [2017] VSC 268 the purchaser sought an injunction restraining the vendors from doing this and also sought orders in the nature of specific performance. The purchaser alleged that the vendors had lost this right to rescind by reason of their conduct, including their breach of a best endeavours obligation in the period from 4 March 2016 to 31 August 2016 ('the relevant period').

25. Riordan J. held –

1. Under the “prevention principle” a person could not take advantage of the existence of a state of things that he had produced himself. So, a party

wishing to rescind for breach of a condition could not take advantage of its own ineffective or inefficient measures to comply with its contractual obligations which deprived the other party of a 'substantial chance' of fulfilling the condition. The relevant term was thereby transformed to one requiring performance within a reasonable time. [105]-[107]

2. The vendors breached their best endeavours obligations during the relevant period by failing promptly to undertake the necessary steps to facilitate the registration of the plan of subdivision, representing that they would pay the fees, charges and bond moneys of the referral authorities and yet failing to do so, failing to enter into a section 173 agreement, and failing to comply with previous court orders. [118]-[121], [124]-[127]
3. By this default the vendors deprived the purchaser of a substantial chance of the plan of subdivision being registered by 31 August 2016 and of the contract being settled. If the vendors had not committed this default the purchaser would have been able to raise the finance and to pay the authorities' fees, and if the plan of subdivision had been registered by 31 August 2016 the purchaser would have been able to raise the finance to settle the contract. [129], [135], [142]
4. Accordingly, the vendors were not entitled to exercise the right to terminate the contract pursuant to special condition 8 (requiring registration of the plan of subdivision by 25 August 2015) and special condition 10 transformed into a term requiring performance within a reasonable time. [143]
5. The vendors were accordingly ordered to take the necessary steps to enable the registration of the plan of subdivision and to specifically perform the contract. [145], [149]

In *Bisognin v Hera Project Pty Ltd* [2018] VSCA 93, referred to later in this Paper, the Court of Appeal dismissed an appeal from this and other single judge decisions.

G. ANTICIPATORY BREACH

26. In *Harris v K7@Surry Hills Pty Ltd* [2019] VSC 551 –

- The respondent was proposing to develop an apartment complex including residential units and basement levels including car parks and storage cages;
- In pre-contractual negotiations for the purchase of two residential units, being lots 306 and 307 on an unregistered plan of subdivision, and car spaces an agent of the vendor represented to the purchaser that the vendor would provide two full length storage cages in the basement and not ‘over the bonnet’ storage cages which were elevated and placed above car spaces.
- The parties entered a contract whereby the plaintiff agreed to purchase lots 306 and 307 off-the-plan together with two car parking spaces and two storage cages. The contract included –
 - Specific clauses reserving to the vendor the discretion to allocate any car space or storage cage to a lot ‘in its absolute discretion’ (special condition 17) or to make alterations to the plan of subdivision (special condition 20).
 - Special condition 38 which stated - “The contract is subject to and condition upon the vendor providing to the purchaser two (2) car parks that are adjacent. This special condition prevails regardless of any other condition in this contract to the contrary. The vendor and purchaser both warrant that they have read and understood this special condition and that it is an essential term of the Contract”.
 - The section 32 statement which annexed a version of “Plan E” and architectural drawings. These documents had the effect that the purchaser was to receive, subject to amendment to give effect to special condition 38: one ‘grade’ car park with an over the bonnet storage cage in a particular place and a second car park in a car stacker; and one standalone full length storage cage. The grade car park and full length storage cage were shown on sheet 4 of Plan E whilst the over the bonnet storage cage was only revealed by the building plans in Annexure B to the contract.

- An annexed sketch plan with the handwritten term:

“This Contract is subject to and conditional upon this Revised Plan being adopted prior to the registration of the Plan. If the Plan registered does not incorporate such amendments made to lot 306 and 307 the Contract is at an end and the deposit must be returned to the Purchaser and any interest accrued to the Purchaser within 14 days”.

- Subsequently the vendor proposed to amend the proposed plan of subdivision by Plan H, altering what the purchaser was to receive. The purchaser’s solicitor sought confirmation that his client would receive two free-standing storage cages at a particular place, not over bonnet spaces, and two adjacent car spaces as per the special condition (not satisfied by a car stacker). The solicitor for the vendor wrote not agreeing with this but stating that the contract of sale would be complied with.
- The purchaser’s solicitor treated the statements by the solicitor for the vendor as repudiatory and on 11 March 2018 wrote rescinding the contract on the alternate grounds that: the changes between Plan E and Plan H materially affected the lots to which the contract related, permitting rescission under s. 9AC(2) of the Sale of Land Act, or; the failure to provide two adjacent car spaces (and the failure to allocate two free standing storage cages) breached an essential term being special condition 38.

27. Derham AsJ held –

1. The contract construed as a whole plainly contemplated changes to the Plan E so that the plan of subdivision would accord with the terms of the contract. [25]
2. Because special condition 38 was both a condition and essential a breach of it by the vendor, no matter how technical or slight, gave the purchaser a right of rescission and to return of the deposit. (But if the parties had merely agreed that it was a condition, that might not have been sufficient of itself). Further,

the fact that it was handwritten gave it priority in the event of inconsistency with other terms. In its terms it prevailed over special conditions 17 and 20. [41]-[42]

3. The test of determining the intention of a party, and whether that party was ready, willing and able to perform in accordance with the contract, was an objective one to be found in either words or conduct. An intention was sufficiently evinced by conduct if the party renouncing had acted in such a way as to lead a reasonable person to the conclusion that the party does not intend to fulfil his part of the contract. The provision of Plan H was evidence of the vendor's intention not to be bound by special condition 38 and so was an anticipatory breach constituting a repudiation capable of acceptance by the purchaser. Its notification was objectively to be considered by the reasonable observer to be the final plan of the development, disclosing a definitive statement of intent. [44], [45], [65], [74], [76]
 4. The purchaser's rescission was effective from 11 March notwithstanding that the letter was not completely clear that the purchaser exercised his common law right to rescind for breach of an essential condition, particularly because the letter rolled together the failure to provide adjacent car parks with the failure to provide free standing storage cages. However, the law treated rescission on the basis of any breach as effective if there was a basis at law for claiming the rescission. [78]
 5. Alternatively, the contract was validly terminated under s. 9AC(2) because the proposed amendment of the plan of subdivision (Plan H) materially affected the lot within the meaning of s. 9AC, the material change between Plan E and Plan H being the removal of a full length storage cage shown on the Plan E. [107]
28. Certain facts of *Chatham v Coral Park Pre-Training & Breaking Pty Ltd* [2020] VSC 814 are stated in paragraphs 4 and 22 above. Special condition 22.1 as to the sale being subject to a tenancy having been severed from the contract, the purchasers were entitled to treat the vendor's refusal to provide vacant possession

at settlement as an anticipatory breach of the contract of sale. The purchasers purported to rescind the contract on 13 December 2017, the day before the appointed settlement day.

29. Daly AsJ noted that a party was only entitled to rescind for anticipatory breach if it satisfied the burden of proof that it was ready, willing and able to perform its own obligations under the contract. The purchasers had not satisfied the burden of proving that at the time they purported to rescind they were in a position to fulfil their obligations under the contract (by reason of having sufficient funds to complete the purchase) at the time due, being the following afternoon. [212]

The purchasers nonetheless, by reason of deficiency in the section 32 statement outside the scope of this Paper, recovered their deposit under s. 32K(2) of the Sale of Land Act, and (as discussed later in this Paper) would also as necessary have been able to do so under s. 49 of the PLA.

H. RESCISSION FOR BREACH PURSUANT TO NOTICE OR REPUDIATION.

30. The cases are –

Mediratta v Clark [2019] VSC 685

162 Tucker Pty Ltd v SPG Tucker Pty Ltd & Ors [2020] VCC 284

31. The facts of *Mediratta v Clark* [2019] VSC 685 are set out in paragraph 19 above. The vendor's rescission notice stated that the due date for settlement was 30 June 2018 and that the purchaser was in default by having failed to settle on 2 July 2018. The purchaser alleged the notice was invalid on the ground of ambiguity. Derham AsJ noted that the law was –

- (a) that the notice must in relation to its essential features as required by the relevant contractual conditions be clear and unambiguous;
- (b) as to this the court applied an objective approach. It was insufficient if a reasonable reader in the position of the purchaser, having considered the notice as a whole, fairly and properly, might entertain a doubt as to its meaning in relation to some essential matter, even though the reader would

form in his or her mind a preference for one view, rather than the other, of what the notice was intended to convey. [84]

Particularly in light of general condition 16.2 the notice was clear and unambiguous to a reasonable reader with knowledge of the transaction and circumstances surrounding it.

32. In *162 Tucker Pty Ltd v SPG Tucker Pty Ltd & Ors* [2020] VCC 284 the contractual settlement date was 28 February 2017. The deposit had been paid but by successive agreements settlement was extended to 14 March, 20 March, 28 March, 7 April, 13 April, 24 April, 28 April and 4 May 2017. However, on 15 March the vendor's solicitor served a default notice stating particulars of default as failure to pay deposit and balance of purchase monies due, the due date being specified as 28 February and requiring that the default be remedied by 29 March. And on 1 May another default notice was served specifying particulars of default as -

“failure to pay balance of purchase monies on due date
failure to remedy default on due date pursuant to the notice of default dated 15th of March 2017”.

Finally, on 4 May the purchasers did not attend for settlement and the balance of purchase monies was never paid. On 15 May the vendor wrote purporting to terminate the contract by acceptance of the purchaser's repudiation of the contract.

33. Judge Smith held –
1. The first notice was invalid because, as a consequence of the extension agreements then in existence, the purchaser was not at that date in breach of the contract at all. Accordingly the notice did not identify any valid particulars of default. [32], [36]
 2. The second notice was invalid because it also did not identify any valid particulars of default. [41], [42]

3. Nonetheless, as at 1, 4 and 15 May the purchaser demonstrated an inability or unwillingness to settle the transaction. Its conduct amounted to a repudiation which the purchaser was entitled to accept and so terminate the contract. [43]

I. SPECIFIC PERFORMANCE.

34. The litigation between Hera Project Pty Ltd and the Bisognins engaged the law of specific performance. In particular –
 1. In *Hera Project Pty Ltd v Bisognin & Anor* [2016] VSC 591, a decision of Macaulay J after the decision of Sloss J and before the first Court of Appeal decision, the purchaser sought relief without trial including specific performance and orders that vendors comply with the requirements of various public authorities so that plan of subdivision could be registered, which would lead to settlement of the contract. The application failed and much of Macaulay J’s judgment concerns the law of injunctions but relevant to this Paper was his Honour’s holding that an order for specific performance was generally only appropriate after trial. [6]
 2. As stated in paragraph 25 above, in *Hera Project Pty Ltd v Bisognin (No 3)* [2017] VSC 268 Riordan J. ordered the vendors to specifically perform the contract.
 3. Although not strictly an order for specific performance, in *Hera Project Pty Ltd v Bisognin & Anor (No 5)* [2017] VSC 383 the purchaser obtained an order under s. 9AD(3) of the Sale of Land Act that the vendors allow it reasonable access to Lot 1 on the unregistered plan of subdivision for the purpose of completing a cultural heritage management plan.
 4. In *Hera Project Pty Ltd v Bisognin & Anor (No 6)* [2017] VSC 438 the purchaser obtained further orders by way of specific performance that the vendors: (a) provide to the purchaser a particular notice relating to Lot 1 issued by the Commissioner of State Revenue under a particular section of the Planning and Environment Act as required by a particular section of the Subdivision Act. This related to growth areas infrastructure contribution; (b) procure the ANZ Bank to make the certificate of title available for the

purposes of registration of the plan of subdivision and give its consent to the registration of such plan.

5. ***Bisognin v Hera Project Pty Ltd* [2018] VSCA 93** was an appeal against the decisions referred to in 2 and 3 above and against another decision not relevant to this Paper. The Court of Appeal dismissed the appeals. It noted that the readiness and willingness of the party who sought specific performance to perform the contract was relevant to the court's decision whether to exercise its discretion to grant this relief, it being for that party to prove this. It held that Riordan J. had correctly determined this in favour of the purchaser. Riordan J.'s decision concerning s. 9AD of the Sale of Land Act was also upheld.

J. FORFEITURE OF DEPOSIT OR RELIEF AGAINST IT UNDER S. 49 OF THE PLA, PENALTIES, CLAIMS FOR DAMAGES AGAINST PURCHASERS, RECOVERY BY PURCHASERS OF INSTALMENTS OF PURCHASE PRICE.

35. The cases are –
 - 162 Tucker Pty Ltd v SPG Tucker Pty Ltd & Ors* [2020] VCC 284 – forfeiture of deposit, instalments paid taken into account.
 - Simcevski v Dixon (No 2)* [2017] VSC 531, 53 VR 357 – penalty, s. 49(2) claim fails.
 - Ironbridge Holdings Pty Ltd v O'Grady* [2020] VSC 344 – forfeiture of deposit, instalments paid taken into account, restitution.
 - Chatham v Coral Park Pre-Training & Breaking Pty Ltd* [2020] VSC 814 – s. 49(2) claim would succeed.
36. ***162 Tucker Pty Ltd v SPG Tucker Pty Ltd & Ors* [2020] VCC 284** is a standard case of recovery by a vendor (against the guarantor of the purchaser) following repudiation by a purchaser (see paragraph 33 above) and of recovery the purchaser of instalments of the purchase price. The chief items recovered by the vendor were forfeiture of the deposit and damages for loss on resale. A number of other minor items were recovered. However, under the rule in *Hadley v*

Baxendale the vendor failed to recover the costs of its continuing mortgage expenses.

37. *Simcevski v Dixon (No 2)* [2017] VSC 531, 53 VR 357 which followed *Simcevski v Dixon* [2017] VSC 197 dealt with in paragraphs 17 - 18 above, concerned whether a vendor is defeated from forfeiting certain monies on the ground that they were a penalty and whether a purchaser can be relieved under s. 49(2) of the PLA, which provides that where the court refuses to grant specific performance or in any action for the return of a deposit the court may, if it thinks fit, order repayment of the deposit. The contract price was \$3.5m. and the particulars of sale recorded that the deposit was agreed to be \$175,000. This had been paid. However clause 28.4(a) of the contract provided that if the contract ended by a default notice given by the vendor: “~~the deposit up to~~ 10% of the price is forfeited as the vendor’s absolute property, whether the deposit has been paid or not”.
38. Riordan J. held –
1. The anomalous position of deposits in the law of penalties protected them, in most circumstances, from invalidity notwithstanding that usually a deposit is not a liquidated damages clause, ie a sum fixed by the parties to a contract as a genuine pre-estimate of damage in the event of breach, which was the ‘contrasting concept’ to a penalty. The obligation in cl 28.4 to pay further sum of 5% of the price was void as a penalty. Such payment would be made in order to punish the breaching party for the inconvenience its conduct caused the innocent party rather than to protect any legitimate commercial interest of the innocent party arising from a breach. It was not a deposit or a liquidated damages clause. [15], [31], [32]
 2. The purchaser was not entitled to recover the deposit of 5% under s. 49(2). A deposit was security for the due performance of the contract. Exceptional circumstances warranting repayment of the deposit by order under s. 49(2) did not exist. The contract was unconditional as to finance and the risk of land

pollution was known at the time of entry into the contract and the purchaser took the risk of it. [46], [122]

39. In *Chatham v Coral Park Pre-Training & Breaking Pty Ltd* [2020] VSC 814, dealt with in paragraphs 4, 22, 28 and 29 above, Daly AsJ would if necessary have relieved the purchaser under s. 49(2). It would have been unjust and inequitable for the vendor to retain the deposit, because by representing and subsequently resiling from the representation that the tenant would vacate the property at settlement the vendor materially altered the quality of the bargain that the purchasers were induced to believe they had struck. [318]
40. *Ironbridge Holdings Pty Ltd v O'Grady* [2020] VSC 344 concerned an instalment contract of rural land at Torquay which the purchaser hoped to subdivide, with a very long settlement date, subsequently extended. A deposit and certain instalments of purchase money were paid, but the final instalment was not. Part of the land was transferred. The vendor rescinded the contract. Ginnane J held inter alia –
1. The consideration for the contract was the conveyance of title to the land. The contract was severable and the transferred land was severed. The consideration for the contract in respect of the remaining land totally failed. [11]
 2. The vendor was entitled to retain the deposit and the payment for the transferred land. [10]
 3. The purchaser was entitled to restitution of the instalments of purchase price with the vendor being entitled to counter restitution for the remediation and rehabilitation of part of the land, interest being payable. [11]

K. CLAIMS FOR DAMAGES AGAINST VENDORS.

41. In *Singh v Lugondela* [2020] VSC 544 the purchaser claimed damages against a vendor who could not complete the contract through inability to compel the mortgagee to discharge the mortgage, and so to procure production of the

certificate of title. The vendor argued that the rule in *Bain v Fothergill* applied. This rule was that where, on a contract for the sale of land, the vendor, in the absence of any fraud and any expressed stipulation, is unable to make a good title, the purchaser is not entitled to recover damages for the loss of the bargain but only damages limited to the return of the deposit, interest, and any expenses in investigating title.

42. Derham AsJ held –

1. The rule in *Bain v Fothergill* applied only to title defects and not to matters of ‘conveyancing’, and so was inapplicable where the vendor was at fault, in the sense of having refrained from taking proper steps to secure a good title. Inability to compel the mortgagee to discharge the mortgage was not a defect in title within the meaning of the rule. [4]
2. The purchaser was entitled, therefore, to damages for loss of bargain. The purchaser was thus, so far as money could do it, to be placed in the same situation with respect to damages, as if the contract had been performed. The conventional date for assessment of those damages was at the date of breach of contract. However, this general rule gave way in particular cases to solutions best adapted to giving the injured party the amount in damages to most fairly compensate that party for the wrong suffered and where the interests of justice called for it. [67], [68], [73], [87]
3. The plaintiff was duty bound to take all reasonable steps to mitigate the loss suffered and was debarred from claiming any part of the damage due to his neglect to take such steps. The purchaser had pursued a proceeding for specific performance but then elected not to pursue this remedy but to claim damages. The damages should be assessed not at the date of breach but a reasonable time after the purchaser was informed that the mortgagee would not discharge the mortgage. It was appropriate to calculate the purchaser’s loss of value at the time when the purchaser should have elected to claim damages and proceeded to find another investment property so as to mitigate his loss and damage. [4], [84], [87]

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