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**REPUDIATION, RESCISSION AND TERMINATION**

Sydney Jacobs  
LL.M (Cam)  
13 Wentworth Chambers

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## INTRODUCTION

1. I have been asked to address on what options one has where one party to a contract for the sale of land cannot complete or otherwise breaches the contract of sale. I have been asked to consider options of the parties and what remedies those options offer, including through the prism of some recent New South Wales Court of Appeal decisions. I have been asked to address also upon the following issues:
  - (a) when will a breach amount to repudiation;
  - (b) what rights does a breach provide upon a repudiation;
  - (c) when is it better to terminate or rescind;
  - (d) what if you want to wait how do you avoid waiving your rights (*Koutsopoulos*);
  - (e) how do you indicate readiness to settle (*Everest Properties, K&K Real Estate*); and
  - (d) other recent case law.
2. I will address these topics in order.

## WHEN WILL A BREACH AMOUNT TO REPUDIATION?

3. Repudiation is a complex topic dealt with over many pages in the standard texts. A brief introduction to relevant terms is as follows.
4. Repudiation occurs where one party is either unable or unwilling to perform its contractual obligations. The analysis focuses on the readiness and willingness of a promisor to perform. If the promisor is not ready and willing to perform its obligations or at the contractually appointed time will be unable to perform, then the promisee has a right to terminate the contract, but only so long as the requirement of seriousness is satisfied.
5. Repudiation occurs where the promisor is unable to perform even if it is willing and vice versa.
6. “Anticipatory breach” occurs where the promisor indicates prior to the contractual day for performance, that it will on the relevant date be unable or unwilling.
7. Hence, repudiation can occur either by words or conduct or by reference to the promisor’s actual position.
8. It is long established that inability to perform need not be expressly declared but can be inferred from conduct.

9. Repudiatory conduct sometimes has little significance until there is “acceptance” of the repudiation and it is at that point that the legal consequences crystallise. For example, it is at that point that the promisee’s action for damages becomes complete.
10. However, an unaccepted repudiation nevertheless can have serious legal consequences. It may absolve a promisee from the consequences which would otherwise flow from the promisee’s failure to perform its obligations. The leading case in this regard is *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 which concerned the sale of goods and aspects of maritime law. This case is discussed in some of the property law cases referred to below, for example *Foran v Wight* [1989] HCA 51; (1989) 168 CLR 385 (*Foran*).
11. *Foran* (1989) 168 CLR 385 will be dealt with in some detail but for present purposes it can be noted that the purchasers could not prove their ability to perform. It was held that the purchasers could nevertheless validly terminate after the date for settlement because there was no evidence of inability at the time of the vendor’s declaration of inability to perform. Various judges provided different legal theories as to why this ought to be so, including estoppel.
12. Rescission usually refers to a right to rescind a contract ab initio ie from the beginning, whereas termination normally refers to the discharge of performance in futuro. As a general proposition a breach of contract does not give the right to rescind however, a right to rescind is often provided by statute or contract. However care must be taken to determine from the context in which the word is used whether what is really meant is the discharge in futuro or rescission ab initio. See generally, *Contract Law in Australia*, Carter, Peden & Tolhurst, chapter 30, ff.
13. As a matter of general contract theory, a right to terminate is only effected when the promisee elects to terminate but a promisee may lose the right to terminate by electing to continue performance because that is inconsistent with termination. Generally an election by the promisee whether to continue performance or terminate is final.
14. The object of *rescission* is to release parties from all of their obligations under the contract and to seek to put them in the position as if the contract had never existed. So, for example, if one speaks of rescission of the contract for the sale of goods and the vendor had already provided the goods to the purchaser, one would expect the goods to be returned to the vendor. Nice questions arise where a contract which has been performed or partly performed by one party but not all by the other is “agreed” to be rescinded. See generally Trietel, *The Law of Contract*, 12<sup>th</sup> Ed, para 3/055 ff.
15. One sometimes considers rescission where there has been misrepresentation but in that event the rescinding party must offer restitution and the inability to provide restitution is sometimes a bar to the right to rescind; so too where third party rights have intervened. See generally Trietel, (*ibid*), chapter 9.

### Accrued rights not divested

16. The fundamental distinction between termination and rescission is that, where the contract is discharged for breach or repudiation, that does not absolve the guilty party from any claims that the promisee has based on accrued rights. The case most often associated with this principle is *McDonald v Dennys Lascelles Ltd* (1993) 48 CLR 457. The two categories of rights which survive termination are the right to damages and the right to receive performance of a contractual obligation. See Prof Carter et al, (above), chapter 32.

### Rescission v Termination

17. Where an innocent party wishes to claim damages for a breach it will more likely wish to consider terminating the contract and suing for damages under the contract, for example clause 9 of the standard contract, or perhaps damages for repudiation at common law. On the other hand, where a party wishes to bring a contract to an end and avoid the obligations to pay damages because it cannot perform, then it will more likely consider whether it has the right to rescind eg where a contract for the sale of land provides a right to rescind where for example finance is not obtained within a certain time or perhaps where the development application is not obtained in sufficient time. It is in those circumstances where, as demonstrated by the cases that I will consider below, there is an interplay between the purchaser's rights to rescind and the vendor's rights to terminate. If the purchaser can get in first and serve a valid notice of rescission it can then avoid the serious consequences of the vendor serving a notice of termination.

### DAMAGES OF DEVELOPER WHO SELLS OFF THE PLAN AND WHO TERMINATES

#### *Higgins v Statewide Developments Pty Ltd* (2011) NSWCA 35

*Holding costs of developer who sells "off the plan" and who terminates recoverable as damages only upon proof of loss; such head of loss will not be inferred; also, rule against double recovery where property has appreciated in value*

18. Assume the vendor is entitled to terminate the contract for a unit sold off the plan. What damages can it claim? Assume further the contract has fairly standard clauses which provide along the following lines (NSW standard contract, clause 9):

#### **"Purchaser's default"**

If the purchaser does not comply with this contract (or a notice under or relating to it) in an essential respect, the vendor can *terminate* by *servicing* a notice. After the *termination* the vendor can -

- 9.1 keep or recover the deposit (to a maximum of 10% of the price);
  - 9.2 hold any other money paid by the purchaser under this contract as security for anything recoverable under this clause -
    - 9.2.1 for 12 months after the *termination*; or
    - 9.2.2 if the vendor commences proceedings under this clause within *12 months, until those proceedings are concluded*; and
  - 9.3 sue the purchaser either -
    - 9.3.1 where the vendor has resold the property under a contract made within *12 months after the termination, to recover -*
      - the deficiency on resale (with credit for any of the deposit kept or recovered; and
      - the reasonable costs and expenses arising out of the purchaser's non-compliance with this contract or the notice and of resale and any attempted resale; or
    - 9.3.2 to recover damages for breach of contract.
19. Vendors would generally consider claiming one or more of the following:
- (a) The loss in value of the property since the date of the contract.
  - (b) Liability to pay increased interest expenses in connection with the development since the date for completion which it otherwise would not have incurred but for the purchaser's default.
  - (c) Liability to pay holding costs and expenses in respect of the property including:
    - i. strata levies;
    - ii. other fees, costs and levies to the owners corporation;
    - iii. council rates;
    - iv. utilities including electricity, water and telephone;
    - v. increased taxation liability; and
    - vi. legals.
20. Assume further the vendor had not resold within 12 months after termination of the contract or at all. Consequently, the vendor's right is simply to recover damages for breach of contract pursuant to clause 9.3.2.
21. Since the vendor regains title to the property free from any obligation to

transfer to the purchaser, the unpaid purchase money does *not* represent the vendor's loss. The central question in this scenario was articulated in *Higgins v Statewide Developments Pty Ltd*; [2010] NSWSC 183 (appeal dismissed in [2011] NSWCA 35) ('*Higgins*') as follows:

"whether the [V]endor's position of continuing ownership of the property is more or less advantageous than the position that would have pertained if the [V]endor had conveyed the property to the purchaser and received the price in its place.": *Higgins* [2010] NSWSC 183 at [96].

22. Ordinarily, where the property is not resold by a vendor, the vendor's loss is assessed by comparing the contract price with the value of the property at the time of breach: *Higgins* [2010] NSWSC 183 at [97].
23. If the value is greater than the price, no damage is been suffered. But if the value is less, the difference is an element of the vendor's loss along with the expenses of sale, but allowing for the deposit received under the contract of sale.
24. The vendor must prove the value of the property at the date of the purchaser's breach or thereafter.
25. In short, there is no presumption that the value of the property is less than the purchase price under the contract.

#### **Continuing interest incurred by innocent vendor: general rule and exceptions**

26. The general principle is that a defaulting purchaser is not liable for continuing interest payments incurred by the vendor under a mortgage on the property, because the vendor's obligation to pay the mortgage arises, not from the purchaser's breach, but from the vendor's decision to terminate the contract.
27. The exception is where the loss was contemplation by the parties as the probable result of a breach at the time they made the contract: see *Jampco Pty Ltd v Cameron (No 2)* (1985) 3 NSWLR 391, at 396, per Young J.

#### **Rental off-set**

28. Rent derived by the vendor from the property must be offset against the strata levies, local government rates, water rates and land tax paid by the vendor. *Higgins* [2010] NSWSC 183 – see below.

#### **Causal relationship must be proved**

29. A plaintiff must prove a causal relationship between the breach and the loss claimed. In *Palasty v Parlby* [2007] NSWCA 345 (which was abstracted in

*Higgins*) a vendor terminated a contract for the sale of a house because the purchaser failed to complete. The vendor forfeited the deposit and resold the house at a loss. The vendor sued for damages, including the loss on resale and interest on the unpaid balance of the purchase price from the date of the purchaser's breach until completion of the resale.

30. It was held that the vendor was entitled to interest as a loss suffered due to the delay in the vendor receiving the purchase moneys to which he was entitled (ie in accordance with the principles set out in *Hungerfords v Walker* [1989] HCA 8; 171 CLR 125). Mason P held (at [53]) that the vendor's loss flowing from the timely receipt of the purchase moneys really fell within the first limb of *Hadley v Baxendale*, since it was "a demonstrable loss incurred directly in consequence of the purchaser's failure to complete on the due date".
31. There was no dispute in *Palasty v Parlby* [2007] NSWCA 345 that the loss by way of interest foregone was caused by the breach. The vendor had a need for funds and had promptly put the house back on the market once the contract for sale was terminated (at [3]). As such, Mason P allowed interest for the whole of the period until the resale was complete, holding (at [54]) that:

[I]nterest damages spanning this full period depended upon the vendor, showing as he did, that he acted diligently in his efforts to resell.

32. His Honour did not hold that lack of due diligence in putting the property up for resale would break specifically the chain of causation.
33. In *Higgins v Statewide Developments Pty Ltd*; [2010] NSWSC 183 (appeal dismissed in [2011] NSWCA 35) the vendor's claim for damages included interest and costs attributable to the vendor's retention of the property for the almost three years from the date of the purchaser's breach until the hearing. The vendor valiantly sought to assert before the trial judge that it had diligently attempted to resell the property after termination of the contract.
34. The Court of Appeal emphasised that the vendor adduced almost no evidence about when supposed sales "campaigns" had been conducted; and that the vendor's witness on this point:
- (a) was unable to recall whether any offers had been made to buy the property, leaving open the possibility that some offers had been made but rejected by the vendor;
  - (b) was not asked about the price sought for the property and how the price related, if at all, to the purchase price in the Contract;
  - (c) was not asked to explain why three units in the development had sold, but the relevant apartment had not; and
  - (d) was not asked about general market conditions affecting units in the

area of the Homebush Bay development over the period 2007 to 2010:

On this evidence, it is impossible to conclude that the Vendor used diligent efforts to sell the Apartment shortly after the Purchaser's breach, the termination of the Contract or indeed at any other time. The evidence is consistent with the Vendor not deciding to attempt to sell the Apartment until well after the Contract had been terminated (by which time market conditions may well have changed for the worse). The evidence is also consistent with the Vendor's attempts being unsuccessful because it refused to meet the market or because it placed a higher priority on selling other units in the development. Furthermore, the fact that the Vendor received some \$54,000 in rental payments over an unspecified period strongly suggests that a commercial decision was made at some stage to retain the Apartment in order to lease it. The evidence did not reveal the period during which the Apartment was leased and rent derived by the Vendor.

As the primary Judge pointed out, the Vendor did not adduce any evidence as to the value of the Apartment at the date of breach (April 2007) or its value at any time between that date and the date of the hearing. Mr Touma's evidence is consistent with the Apartment having risen significantly in value between October 2003 (the date of the Contract) and April 2007 (the date of the breach). This is not a case where a contract of sale was terminated only a short time after it had been entered into by the vendor and the purchaser. In such a case, in the absence of valuation evidence, there might be little reason to suppose that there was any material difference between the contract price and the value of the property at the date of breach. In the present case, however, *nearly four years elapsed between the date of the Contract and the date the Vendor terminated the Contract*. In the absence of any evidence from the Vendor (a property developer with knowledge of the market) as to the value of the Apartment at the latter date or even of general market conditions, it is reasonable to infer that the Apartment had increased in value over the four year period.

In *Carpenter v McGrath*, Clarke JA observed (at 44) *that it is wrong in principle to regard an obligation which arises merely because a vendor makes a commercial decision to retain a property as flowing from a breach of contract by the purchaser*. It is not necessary in the present case to find that, following termination of the Contract, the Vendor made a commercial decision to retain the Apartment. *The critical point is that the evidence does not enable a finding to be made that any of the losses claimed by the Vendor resulted from the Purchaser's*

*breach of the Contract.*

On the evidence, the losses said to have been sustained by the Vendor might have resulted from any one of a number of decisions made by the Vendor. These include a decision to retain the Apartment in order to lease it, *rather than attempt to resell it at the earliest opportunity*; a decision to offer the Apartment for resale at a price higher than the market could reasonably bear; a commercial decision to give a higher priority to the sale of other units in the development; and a decision to refuse offers which, although lower than the Vendor's expectations, were nonetheless substantially higher than the price stipulated in the Contract.

The Vendor adduced no evidence that, having terminated the Contract, it was unable promptly to place the Apartment on the market or to realise its true value (whatever that was) within a relatively short period. Nor was there any evidence that there were circumstances associated with the Purchaser's breach that prevented the Vendor selling the Apartment at any time during the three years between the date of the breach and the trial. Given the possibilities that are consistent with the evidence, none of the losses claimed by the Vendor can be said to have been incurred as the result of the Purchaser's breach of the Contract. *The evidence is consistent with the claimed losses being the result of the Vendor's own decisions or conduct.*"

35. In the circumstances, the Court of Appeal upheld the decision by the trial judge to dismiss the damages claim.

**No double compensation: damages on capital and revenue accounts**

36. The Court of Appeal in *Higgins* then addressed an "additional problem" with the vendor's claim for damages, as follows:

...It seeks damages for what might be described as losses on revenue account (the ongoing expenses associated with retention of the Apartment). The Vendor does not claim damages on capital account (the difference between the Contract price and the value of the Apartment at the date of breach or termination of the Contract). As has been noted, it has adduced no evidence as to the value of the Apartment at any time after the Purchaser's breach.

In *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; 216 CLR 388, the High Court ...pointed out that losses on capital account may be incurred at a time different from losses on revenue account and that care must be taken to ensure that any relief *avoids double counting of losses*.

The fundamental principle is that the plaintiff is entitled to be placed in the same situation, so far as money can do it, as if the contract had been performed. *The evidence in the present case, bearing in mind the lapse of four years between Contract and breach, does not permit a finding on the balance of probabilities that the Vendor's losses on revenue account would not have been more than offset by the Vendor's gains on capital account.* On the evidence, an award of damages calculated solely by reference to losses on revenue account is as likely as not to place the Vendor in a better position than if the Purchaser had performed the Contract...

### Clause 9 provides by implication for liquidated damages

37. Clause 9 of the conditions of contract is set out above.
38. Per White J in *June St Clare Buchanan v Catherine Elizabeth Dunstan* [2007] NSWSC 248:

Unlike previous versions of this clause in the standard contract, clause 9.3.1 does not expressly provide that moneys payable under it are payable as liquidated damages. However, that is its effect ...

Accordingly, ...it is no answer to a claim under clause 9.3.1 that in a particular case, a vendor might be over-compensated. The clause, or a similar clause, providing for an election between liquidated and unliquidated damages has been included in the standard contract for sale for decades without being challenged as a penalty. No such challenge was made in this case.

### SET-OFF OF FORFEITED DEPOSIT AGAINST COSTS AND EXPENSES RECOVERABLE UNDER THE SECOND LIMB OF CL 9.3.1

*Where vendor sues for unliquidated damages*

39. **Acknowledgment** : Case abstracts and propositions in this section are taken mainly verbatim from the with respect, excellent analysis of White J in *June St Clare Buchanan v Catherine Elizabeth Dunstan* [2007] NSWSC 248 but duly edited and re-arranged in chronological order for lecturing purposes.
40. Where a purchaser defaults, and the vendor then terminates and sues for *unliquidated damages* , the vendor must set off against the damages claimed the amount of the deposit which has been forfeited.
41. In *Cratchley v Bloom* (1984) 3 BPR 9432; (1984) NSW ConvR 55-203 ('*Cratchley*'), the Court of Appeal held that pursuant to clause 16 of the 1972 edition of the Law Society and Real Estate Institute's conditions of contract, the deposit, on being forfeited, should be set off against the deficiency on

resale including the expenses of resale (that contract included in the expenses of resale against which the forfeited deposit was credited an expense for additional rates incurred by the vendor prior to resale).

42. Clause 16 of the 1972 edition provided (and it should be noted that this clause did not expressly provide for the forfeited deposit to be credited against the deficiency on resale or against the expenses of resale or attempted resale):

16. If the purchaser defaults in the observance or performance of any obligation imposed on him under or by virtue of this agreement the deposit paid by him hereunder, except so much of it as exceeds 10 per cent of the purchase price, shall be forfeited to the vendor who shall be entitled to terminate this agreement and thereafter either to sue the purchaser for breach of contract or to resell the property as owner and the deficiency (if any) arising on such resale and all expenses of and incidental to such resale or attempted resale and the purchaser's default shall be recoverable by the vendor from the purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this agreement.

43. In *Cratchley* (1984) 3 BPR 9432, Samuels JA said (at 9436, 57,415):

It is certainly clear that a vendor who terminates the contract for breach by the purchaser and then sues for damages may recover the difference between the contract price and the value of the property at the date of determination of the contract together with any incidental expenses flowing from the breach, *but must give credit against the aggregate of these items for the amount of any deposit...* In point of principle, I cannot see why the rule to be adopted when a vendor sells under the contractual power of sale should differ from that applied in an action for damages at common law. ... Hence I agree with Hutley JA that the expenses of resale must also be set off against the deposit.

44. Mahoney JA concurred in the result, but said (at 9438, 57,417) that the "deficiency on resale" within the meaning of clause 16 referred only to the difference in price between the sale price on the sale and the resale, because the expenses of the sale and of resale were specifically provided for.

45. *Cratchley* (1984) 3 BPR 9432 established that:

- (a) in the absence of express provision to the contrary a forfeited deposit should be credited against a deficiency on resale even where the deficiency was claimed as liquidated damages under the contract.

- (b) in the absence of sufficient indication to the contrary the expenses of resale should be taken into account in calculating the deficiency.
46. However, the condition considered in *Cratchley* (1984) 3 BPR 9432 is in substantially different terms from the modern clause.
47. *Carpenter v McGrath* (1996) 40 NSWLR 39 ('*Carpenter*') concerned the 1986 form of contract. The purchaser defaulted. The vendor terminated, did not resell the property and claimed *unliquidated* damages.
48. The trial judge awarded damages for:
- (a) loss of a deposit which the vendors had placed on a property they were to buy where they could not complete the contract because of their purchasers' default;
- (b) costs and expenses on the sale of the property on which the purchasers had defaulted, the vendors' legal costs and expenses of their aborted purchase of the property where they could not proceed, and loss of income. The trial judge deducted the forfeited deposit from all of these heads of damage.
49. The trial judge also awarded interest on the purchase price pursuant to an express contractual term.
50. The Court of Appeal rejected the claim for loss of income. It was common ground that the vendors were also entitled to an allowance for removal expenses. The majority of the Court of Appeal, Clarke and Sheller JJA, held that the vendors were entitled to damages representing the loss of their deposit which they forfeited on their own purchase, removal expenses and the legal costs and expenses of the sales of both properties (see (1996) 40 NSWLR 39 at [46] and [63]).
51. Their honours held that the deposit should be set off against each of these heads of damage. As the forfeited deposit exceeded the allowable damages, the vendors' claim failed.
52. As in *Cratchley* (1984) 3 BPR 9432, condition 9 of the 1986 edition of the contract made no express provision for the crediting of the deposit against either a common law claim for unliquidated damages for breach of contract, or against a claim for liquidated damages, being a deficiency on resale and expenses of resale or expenses arising from the purchaser's default.
53. In *Consolidated Credit Network Pty Limited v Illawarra Retirement Trust Limited (No. 2)* [2005] NSWSC 1007, Campbell J (as HH then was) said (at [78]):

The first defendant's cross-claim seeks damages under Clause 9.3.1 of

the contract. The vendor has established that it has suffered loss in consequence of the purchaser's non-compliance with the contract, in the form of paying rates on the property for longer than it would have paid them if the contract had been performed, and paying legal expenses in connection with the termination of the contract, and the entering into of the new contracts with the new purchasers of the land. It will not be known, however, whether the payment of those amounts results in the vendor sustaining a net loss in consequence of the purchaser's breach, until it is known whether the contracts entered with the new purchasers will settle in accordance with their terms. If the new contracts settle in accordance with their terms, the likelihood is that, given that the new contracts are for the same purchase price as the contract with the plaintiff, the vendor will not, taking into account the amount of the deposit bonds which it is entitled to receive in consequence of the termination being held good, and its right to recover the other 5% of the deposit as damages for the purchaser's breach, suffer any net loss. It is for that reason that I have stood the proceedings over, to a date by which it should be known whether the new contracts have settled in accordance with their terms, for the purpose of deciding whether anything further needs to be done about the quantification of the vendor's claim for damages.

54. Whilst HH proceeded on the basis that a vendor claiming damages under clause 9.3.1 must show that he or she has suffered loss after taking into account the forfeited deposit, it does not appear that this issue was raised before HH. Hence, HH did not deal with the implications arising from the fact that clause 9.3.1 is a liquidated damages clause, nor with the implications arising from the fact that the clause provides for the deposit to be credited only against the deficiency on resale recoverable under the first limb.
55. The above cases were considered by White J in *June St Clare Buchanan v Catherine Elizabeth Dunstan* [2007] NSWSC 248, and their abstracts are, to a large degree, taken verbatim from. White J referred to Prof Butts, *The Standard Contract for Sale of Land in New South Wales*, 2nd ed, (1998), Sydney, LBC Information Services, who dealt with the equivalent clause in the 1996 edition (which was materially the same).
56. Professor Butt noted at (at [9.176]-[9.177]):

[9.176] In determining whether there is a deficiency on resale, any deposit forfeited must be brought into account. This is made express in the first bullet point under 9.3.1. Even in the absence of express mention, the same principle would apply: 'There can be no deficiency unless the difference between the original price and the resale price overtops the deposit.' ...

[9.177] Must the deposit also be set off against the heads of loss specified in the second bullet point of clause 9.3.1? That is, must it be set off against ‘the reasonable costs and expenses arising out of the purchaser’s non-compliance with the contract or the notice [of termination] and of resale and any attempted resale’? In contrast to the first bullet point, the second bullet point omits any reference to giving credit for the deposit; from this it might be argued that there is no need to give credit for it against the recoverable damages. And so, for example, if there were no deficiency on resale (first bullet point), the vendor could nevertheless recover all the losses listed in the second bullet point without deduction for the deposit; likewise, if there was a deficiency on resale, but it did not exceed the amount of the deposit, the vendor could keep the whole deposit plus any damages recovered under the second bullet point. The argument might derive support from Cole JA’s judgment in *Carpenter v McGrath* (1996) 40 NSWLR 39 at 74-75, suggests that the deposit is to be set off against the combined amounts recoverable under the first and second bullet points; .....that is, the amounts recoverable under the first and second bullet points are totalled, and from that total is deducted the amount of the forfeited deposit.

57. At [47], HH differed from Prof Butt and did not consider that *Carpenter* (1996) 40 NSWLR 39 resolves the issue under clause 9.3.1 as to whether a deposit forfeited to the vendor can be credited against costs and expenses payable under the second limb of that clause:

62 In construing clause 9, it is essential to appreciate that 9.3 confers an election on the vendor who has terminated the contract either to claim unliquidated damages at common law for breach of contract, (cl 9.3.2), or liquidated damages in accordance with 9.3.1. The measure may be different (*Eighth SRJ Pty Limited v Merity* [1996] NSWSC 86; (1997) 7 BPR 15,189). That difference may well be substantial if the vendor is entitled to damages under the second limb of *Hadley v Baxendale*. However, whether the difference in calculation of damages at common law and liquidated damages under 9.3.1 is substantial or not, one cannot simply translate the principle that a forfeited deposit is set off against common law damages to clause 9.3.1.

*It may be that not crediting a forfeited deposit against liquidated damages under 9.3.1 gives rise to other rights (for example, relief against forfeiture), but that is not relevant to the construction of the clause.*

63 Clause 9.3.1 expressly provides for the deposit to be credited only towards the deficiency on resale, and not against costs and expenses

recoverable under the second limb of the clause. *I do not think that if the credit for the forfeited deposit exceeds the deficiency on resale that the balance in favour of the purchaser can be carried forward in assessing the reasonable costs and expenses recoverable under the second limb. The clause could easily have provided for the forfeited deposit to be credited against both heads of recovery but did not do so.*

**WHEN IS A TERMINATION A REPUDIATION? WHEN IS A VENDOR'S UNREADINESS AT THE TIME FOR SETTLEMENT NOT A BAR TO IT TERMINATING? IN OTHER WORDS, WHEN HAS A PURCHASER "INTIMATED" THERE WOULD BE NO POINT IN THE VENDOR ATTENDING SETTLEMENT?**

(**Acknowledgment** : Below is an abstract of the headnote, duly edited and engrossed with extracts from the case)

*Amaya v Everest Property Holdings Pty Ltd; Firmstone v Everest Property Holdings Pty Ltd; Sarkar and Islam v Everest Property Holdings Pty Ltd* [2010] NSWCA 315

58. The three appeals concerned the validity of the purported termination of three sale contracts for units off the plan in Church Street Parramatta. The purchasers could not complete by the apparent initial completion date, each purchaser obtained various extension dates for completion. Neither the purchasers nor the vendor, Everest Property Holdings Pty Ltd ('Everest'), attended on the extended date with the relevant documents ready to enable completion. The vendors sought to terminate and call upon the deposit. The purchasers treated that termination as a wrongful repudiation and sought to terminate themselves, demanding the return of the deposit.
59. An occupation certificate served before completion and pursuant to special condition 7 of the contract (sc 7), which set the date for completion, did not contain the fire safety certificate prescribed by the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA') and *Environmental Planning and Assessment Regulation 2000* (NSW), r 155(2).
60. Special Condition 7 provided as follows:
- (a) Completion of this contract shall take place on the later of the following dates:
    - (i) the date which is twenty one (21) days of the date on which the vendor's solicitor shall notify the purchaser that the Strata Plan has been registered; and
    - (ii) the date which is fourteen (14) days after the date the vendor serves on the purchaser the original or copy of an occupation certificate as provided in (b) below.
  - (b) The vendor must serve at least fourteen (14) days before completion the original or a copy of an occupation certificate

within the meaning of the Environmental Planning and Assessment Act 1979 (being an interim occupation certificate or a final occupation certificate) in relation to the Building or part of the Building, of which the Property and access to the Property form part.

- (c) For the purposes of this clause, the part of a building comprising access to a lot is any part of the building reasonably necessary for access to the lot.
  - (d) The purchaser does not have to complete earlier than 14 days after service of the original or copy certificate.
61. Special condition 7(b) is reflected clause 2 of schedule 2 to the *Conveyancing (Sale of Land) Regulation 2005* (NSW) which prescribed in respect of sales of strata units off the plan that the vendor must serve an occupation certificate “within the meaning of the Environmental Planning and Assessment Act 1979” at least 14 days before completion.
  62. Regulation 155 of the *Environmental Planning and Assessment Regulation 2000* (NSW) as in force in the first half of 2007 prescribed the form of an occupation certificate. Sub-regulation (2) provided that “the certificate must be accompanied by a fire safety certificate and fire safety schedule for the building”.
  63. The purchasers regarded the time for completion as having never arisen. The appellants in the first appeal, Mr Firmstone, and the second appeal, the Amayas, were legally represented during the conveyancing procedures. Messrs Sarkar and Islam, the appellants in the third appeal, acted for themselves. The solicitor acting for the vendor at the time refused to provide an affidavit as to the firm’s conduct and motivation during the failed conveyance.
  64. At trial, [2010] NSWSC 32 reported in (2010) 14 BPR 27, 243, White J dismissed proceedings for declarations and consequential orders that the purchasers had validly terminated the contracts. He held that s 7 did not require the service of the fire safety documents on the purchasers in order for the time for completion to arise and for the termination to be valid. Regulation 155(2) did not provide that fire certificates and schedules are *part* of the occupation certificate, but that they must *accompany* an occupation certificate at the time it is issued. White J found that the vendor’s termination was effective despite the vendor’s unreadiness to complete at the time of termination, because the purchasers impliedly intimated that it was useless for the vendor to tender settlement and thereby dispensed the vendor with the requirement that the vendor be ready willing and able to complete.
  65. On appeal, the purchasers argued, first, that the requirement that the occupation certificate “must be accompanied” by the fire certificate does not point only to the time of issue of the certificate. Rather, “accompanying” is used in a continuing sense that applied to any time where there is a reference

to occupation certificate. Whether the fire documents were “part” of the certificate is irrelevant to this requirement.

66. Secondly, the vendor’s unreadiness at the time fixed for settlement by the notice to complete of the vendor disentitled the vendor from rescinding based on the purchasers not performing at the time and place specified. The trial judge erred in finding an implied intimation, as there was no evidence that the vendor’s solicitors did not attend settlement *because of* their acting upon the purported intimations.
67. The appeal raised 4 issues:
- (a) Whether an “occupation certificate” within the meaning of the *EPA* had to be accompanied by the fire documents when served in accordance with s 7.
  - (b) Whether proof of reliance is required to support an "implied intimation".
  - (c) Whether there was evidence capable of demonstrating reliance on an intimation by Amayas or Mr Firmstone.
  - (d) Whether Sarkar and Islam’s gave rise to an unequivocal intimation which was acted on.
68. The Court held, Young JA (Campbell JA, Beazley JA agreeing), dismissing the appeal of Amaya and Firmstone and allowing the appeal of Sarkar and Islam:
- 1. As to whether an occupation certificate satisfying sc7 was served**
69. It was held that *the fire certificate is not a part of the occupation certificate*. Hence, if the fire certificate does not accompany the occupation certificate, that does not nullify the occupation certificate.
- 2. As to the requirement of reliance in an implied intimation**
70. Justice Young, for the plurality, observed “for the guidance of future conveyancers” that there may be considerable problems for a vendor who issues a notice to complete requiring completion “not later than” a specified date as it may be that the purchaser can attend for completion at an early date without notice and wrong foot the vendor who has not arranged for discharges of mortgage etc for the earlier time.
71. Ordinarily, both vendor and purchaser are bound by the notice to complete. It is a condition precedent to a vendor intending to terminate for the purchaser’s breach that it itself is ready willing and able to complete at the time and place fixed by the notice.
72. The “vital point” on this aspect of the appeals is whether the vendor was dispensed from compliance with that condition precedent because it was reasonable for it to infer that the purchasers did not intend to attend its solicitors’ offices to settle.
73. (As to the rule in *Foran v Wight* in *Sharjade Pty Ltd v Commonwealth of*

*Australia* [2009] NSWCA 373, whose scope was debated). Either because of estoppel, a purchaser who intimates that it would be a waste of time for the vendor to get ready for settlement is not allowed to say that the vendor was not ready, willing and able to complete or else equity would, despite time being of essence, retrain the purchaser from terminating the contract for a reasonable time to permit the vendor to get ready from completion, its failure to do so in due time being the fault of the purchaser. However, the vendor must show that it relied on the purchasers' intimation that it was useless to arrange for performance to its detriment (relying on in *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* [1954] HCA 25; 90 CLR 235, 246-247).

74. The intimation might not be express; it can be implied. For example, in *Blacktown City Council v Fitzgerald* (1990) 6 BPR 13,409 ('*Blacktown*') at 13,414-13,415, which was endorsed, there was a failure by the purchaser's solicitors to give figures in the usual way was and the Court thought this an indication that they would not be in attendance, i.e. a failure to carry out usual conveyancing steps was an indication that the purchaser would not be represented at the proposed settlement.
75. Justice Young said this about the *Blacktown* case:

91 However, it must be observed that Cohen J in the *Blacktown* case acted on the evidence of Ms Gow, the conveyancing clerk in the vendors' solicitors' office that it had been her intention to attend the proposed settlement, but took the view that, in the light of non-response of the purchaser's solicitors and her experience in conveyancing matters, it was useless to go from Blacktown to the City for settlement. Her evidence was reinforced by the evidence of an experienced conveyancing solicitor who confirmed that vendors' solicitors generally would have taken that approach.

92 There is no equivalent evidence in the instant case. Furthermore, the case is not authority for the proposition that in every case, at least if there are no special features, the vendor's solicitors are entitled to assume that they are dispensed from attendance at settlement and must be presumed to have made that assumption on the basis of a purchaser's intimation that he or she would probably not be ready to settle.

76. Justice Young noted the submission that, particularly in a case where it is necessary for a vendor to obtain payout figures from mortgages, it is ridiculous for any party, whether represented by a solicitor or not, to expect that a vendor will need to attend a settlement conference with figures and documents when there has been no response to recent correspondence pointing out the time and place designated for completion:

121 Indeed, there is a clear policy in conveyancing cases that there is no universal rule that performance in conveyancing transactions must be measured out in coffee spoons (per Glass JA [after TS Elliot] in *Lohar Corporation Pty Ltd v Dibu Pty Ltd* (1976) 1 BPR 9177, 9186). Australian courts have generally taken a very practical approach to questions such as the present.

### **3. As to whether there was evidence capable of demonstrating reliance**

77. The NSWCA endorsed the finding that there was an inference open to the vendor's solicitor that Mr Firmstone's was not in a position to settle at the time fixed for completion. Mr Firmstone's solicitor's informed Church & Grace (the vendor's solicitors) that they would be contacted to arrange a settlement date as soon as the purchaser's solicitor was in a position to do so. He failed to do so and requested an extension of time. Likewise, Amaya's solicitor's informed the vendors that his clients could not proceed with settlement due to financial problems and health issues. This supported a finding of reliance on those "intimations" that they would not settle. Amaya's and Mr Firmstone's solicitors omitted to follow the requirements of normal conveyancing practice that the purchasers arrange a time for settlement, agree upon adjustments, and ascertain how cheques are to be made out. The vendor's solicitors did not ready itself for settlement and the purported to rescind immediately after the expiry of the notice to complete.

### **4. As to whether Sarkar and Islam's silence was equivocal**

78. There may be exceptional cases where silence after receipt of a letter or demand from an opponent may in all the particular circumstances lead to an estoppel or an unequivocal representation for the purposes of waiver, but not in the ordinary case. The whole of circumstances must show that it was reasonable in all the circumstances to treat the silence plus conduct as an unequivocal abandonment of a right. There was no overt act or other conduct of Sarkar and Islam which could have added to the purchasers' silence to permit a reasonable person to infer that the purchasers had dispensed the vendor from attending on settlement, nor material from which reliance could be inferred. Where Sarkar and Islam acted for themselves there was no implied term or mutual understanding that the normal procedures of conveyancers must govern; nor could the vendors be taken to have relied on Sarkar and Islam to act in the way of agents who know the relevant law and procedure.
79. Accordingly, in the case of Sarkar and Islam the vendor was not dispensed with the requirement to be ready and willing to complete and the purported termination was invalid.

### ***K&K Real Estate Pty Ltd v Adellos Pty Ltd* [2010] NSWCA 302**

80. *K & K Real Estate Pty Ltd v Adellos Pty Ltd* [2010] NSWCA 302 also

discussed the principle in *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* [1954] HCA 25; (1954) 90 CLR 235, 246-7 applied; *Foran v Wight* [1989] HCA 51; (1989) 168 CLR 385.

81. The plaintiff as purchaser and the defendants as vendors entered into a contract for sale in the usual form to buy and sell land at Oran Park for \$5.6 million. The deposit of \$560,000 was duly paid.
82. The contractual date for completion was 25 January 2010.
83. On 19 January 2010, as the contractual date for completion of 25 January 2010 approached, the vendor noted that a transfer and settlement statement had not been received and requested them as a matter of urgency. On the next day, 20 January 2010, the purchaser said that it would not be in a position to complete on 25 January 2010. The vendor asked when they “may be expected to be in a position to complete”.
84. Nothing more happened, and the purchaser did not complete on 25 January 2010.
85. In accordance with the contract, the vendors gave a notice to complete for 3pm on 12 February 2010 making time of the essence.
86. On the day following the service of the notice the purchaser’s solicitors wrote the vendors’ solicitors two letters both marked “Without Prejudice”. One asserted that the notice was invalid, giving reasons that really were hopeless (in truth, the purchaser could not organise its finance); the other indicated that it was for the interest of both parties that there be negotiations.
87. Negotiations took place. There was, however, no request that these take place on the basis that time would not run under the notice to complete.
88. No-one attended on settlement at the expiry of the notice to complete.
89. The negotiations appeared to have continued in a desultory way until July 2010 when the vendors gave notice of termination based on the non-compliance with the notice to complete.
90. The purchaser maintained that the essentiality of time had been waived and that in any event the vendors were not themselves ready, willing and able to complete at the expiry of the notice to complete. The vendors acknowledged this last matter but said that in accordance with the authorities they had been dispensed from the requirement that they be ready, willing and able to complete. As a last alternative, the purchaser sought recovery of its deposit under s 55(2A) of the *Conveyancing Act 1919*(NSW).
91. Hamilton AJ found against the purchaser who appealed. The Court of Appeal dismissed the appeal.
92. On the facts of the correspondence and the conduct of the parties there was no waiver of essentiality of time.
93. The purchaser had intimated to the vendors that they need not prepare for completion and thus had dispensed the vendors.

It was emphasised, by reference to *Foran v Wight*, that “intimation” can be implied.

The trial judge had held that there was no suggestion after the vendors had been informed that completion could not occur, that the plaintiff would be able to complete on 25 January or on 12 February 2010; and it was confirmed in a letter of the purchaser’s solicitor’s that it continued to lack funds to complete.

In these circumstances, the trial judge formed the view that that the vendors “were absolved from removing caveats and preparing transfers, discharge of mortgage and settlement sheets for use on 12 February 2010. It cannot be said that they were not ready, willing and able to complete on 12 February 2010.”

94. As to reliance, the purchaser submitted that there was no evidence of reliance on dispensation in relation to completion on 12 February 2010 and, on the contrary, from the foreshadowing of a counter-proposal and from the counter-proposal sent on 15 February 2010 the vendors were motivated to hold on to what they regarded as an advantageous sale. The purchaser said that the vendors’ failure to put themselves into a position to complete and attend on settlement was not because they considered it was pointless to do so, but because their commercial interests lay in keeping the contract alive and negotiating with a view to a later settlement date.
95. It was held that there was no inconsistency between those two positions; rather the circumstances spoke strongly of the vendors acting upon a belief that it would be pointless to prepare for settlement on 12 February 2010, as it had been pointless to prepare for settlement on 25 January 2010. The same inability of the purchaser to complete was conveyed with respect to 12 February 2010, and the purchaser had not submitted a transfer or a settlement statement and had done nothing towards completion on that day.
96. It was held that the fact that the vendors were prepared to negotiate towards a later completion date contributes to, rather than detracts from, the clear inference that they did not take steps towards settlement because there was no point in doing so. There was no point because, at the purchaser’s instigation due to its inability to complete, there were to be negotiations towards another date (although the parties maintained positions outside the negotiations, see below).
97. Hence, reliance was to be inferred.
98. Justice Young said this as regards reliance:

113 It is true that there was little direct evidence of reliance. However, in the present type of case the authorities show that reliance is normally inferred unless there is material to counter the inference. It is not realistic to expect people to make expensive preparatory steps to complete where the other party has clearly let it be known that it will not attend.

114 When a party shows that given a few days it could have been ready to complete, but does not get ready, one can readily infer that that party did not do so because of the other party's intimation of the conventional procedure to complete conveyancing transactions and that the reason for the party not tendering performance was the other party's intimation.

115 The view that relatively little is required to show reliance in this type of case is reinforced not only by the way in which numerous judges at first instance have dealt with these cases, but also by analogy with the way reliance has been treated in cases under the Trade Practices legislation.

116 It is significant that there are so few conveyancing cases which actually refer to the "innocent party" having established reliance to the court's satisfaction.

117 Again in *Zaccardi v Caunt* [2008] NSWCA 202 [109] Campbell JA said (with the agreement of Allsop P and Barr J) that he was able to infer readiness, willingness and ability where the tasks required to get ready for completion were rudimentary (even though they included obtaining a discharge of mortgage) and that that party had shown its desire for completion by giving a notice to complete. There an inference was drawn of readiness to perform from the ordinary course of a conveyancing transaction.

118 In considering reliance in Trade Practices cases one applies a "common law practical or common-sense concept" (*Wardley Australia Ltd v Western Australia* [1992] HCA 55; 175 CLR 514, 525) and courts often have little difficulty in inferring reliance from the facts and circumstances.

99. The primary judge's refusal to exercise his discretion to return the purchaser's deposit was upheld.

***Koutsopoulos v Pintusen (No 2)* [2011] NSWCA 122**

100. The purchaser set her wishes on a property in Dural which she wanted to use as a licensed restaurant. She needed to get development consent from the Council and also finance and hence, when she exchanged contracts for \$1.3 million there were two special conditions. Special condition 42 made the contract conditional upon obtaining development consent and provided the right to the purchaser to rescind by notice in the event Council did not make a positive determination by 31 July, 2008.
101. Special condition 43 made the contract conditional upon finance being provided. Special Condition 43 set up a regime for the purchaser to apply for finance and inform relevant parties of the progress for finance and gave the

right to both parties to rescind if the finance approval had not been obtained by 30 June, 2008.

102. It seems as though, from the outset, the contract set up an unworkable regime because a financier would only approve finance if development consent were first obtained. However, the dates in the special conditions were the wrong way around.
103. On 31 July, 2008 the parties agreed to alter special condition 42 (i.e. relating to the consent) and there was no condition about special condition 43, i.e. regarding finance.
104. The pith and substance of the variation appears to be the granting of an additional 30 days to the purchaser in relation to the development consent issue. The mechanism for this was that the vendor agreed it would refrain from exercising its rights to serve a notice to complete in accordance with special condition 44 for an additional 30 days and in consideration for that the purchaser acknowledged and agreed it would pay interest.
105. The process of obtaining development consent and finance was delayed apparently somewhere within the domain of the bank. The vendors gave the purchaser a notice to complete, which they were entitled to do, and after some extensions the notice required completion by 5.00 pm on 31 October, 2008. Mid afternoon that day, 31 October, the purchaser's solicitor sent a notice of rescission. The vendors' solicitor rejected the validity of this rescission and pressed for completion by 5.00 pm that day and when that did not occur the vendors gave a notice at 5.22 pm purporting to terminate the contract and forfeit the deposit.
106. The purchaser sought relief by way of the return of deposit and a declaration that she had rescinded and the vendors cross-claimed for a declaration that they had properly terminated and had validly declared forfeit the deposit.
107. The primary judge, Bryson J, found for the purchaser.
108. On appeal, the vendors took 3 points. The first that the purchaser had elected against rescission by a letter 31 July, 2008; second, that the purchaser had affirmed the contract after her right to rescind had arisen and third that the pre-condition of the right to rescind under special condition 43 had not been established.
109. On appeal it was emphasised that on 30 June, 2008 the purchaser's solicitor wrote to the vendors' solicitors advising that the purchaser was still awaiting approval of the development application and that if it was not received by 31 July they had a right to rescind and also seeking an extension of the deadlines in special condition 42. And there was correspondence which concerned special conditions 42 and 44 but did not advert in any way to special condition 43. And that the vendors' solicitors were prepared to extend the deadline for development approval.
110. In that context, the purchaser's solicitor replied by letter 31 July, 2008 which

confirmed that the purchaser "...has elected not to exercise her right to rescind the Contract herein in consideration of the amendments to special condition 42...".

111. The vendors sought to argue on appeal that the letter of 31 July, 2008 constituted an election not to rescind at all whether under special conditions 42 or 43.
112. The Court of Appeal noted that Justice Bryson had given short shrift to this argument because the correspondence had to be construed in its factual matrix, including the relevant correspondence and when that was done, it was obvious that the only election that was being made was not to rescind under clause 42 which dealt with the development consent being granted.
113. On appeal, the Court agreed.
114. A further line of argument by the vendors on appeal was that the purchaser had elected not to exercise the rights of rescission in special condition 43 by a number of steps later than 31 July, 2008. The vendors pointed to many factors such as negotiations for further alteration, steps taken after receipt of development consent, notifying of development consent, seeking execution of an application for liquor licence transferral, obtaining quotations for restaurant construction, communicating with the prospective financier, agreeing to a partial release of deposit, negotiating for concession on interest and negotiations to extend various dates.
115. Once again, the Court of Appeal endorsed Justice Bryson's approach which was in effect, that all of this conduct was indeed consistent with the continuing existence of the contract and implied affirmation of it but the implied affirmation could only have related to the whole contract and all of the purchaser's rights in it; and that bundle of rights and obligations included the right to rescind under special condition 43.
116. Justice Young, who spoke for the plurality on appeal, noted that the vendors' argument was "too simplistic".
117. There is then the rather classic line from Justice Young who referred to one of the seminal Australian cases on election, namely *Immer (No. 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* [1993] HCA 27; 182 CLR 26 at 41 where the plurality said:

The true nature of election is brought about in this sentence from the seminal work of Spencer Bower and Turner...

'It is of the essence of election that the party electing must be "confronted" with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice'

118. Justice Young at paragraph 47 then said:

Unfortunately that passage has disappeared from the fourth 2004 edition which does not even refer to the Immer case, the authors'

preferred excuse for the latter omission being recorded in their preface that they were ignorant of Australian decisions and did not at the time cure their ignorance.

119. I think one can see that it is all downhill from there.

120. Justice Young then retorted, in paragraph 50:

where in the instant case, it must be asked, was the purchaser electing between two mutually inconsistent rights? At all times, at least up until 23 October 2008, she was in the position where she had an approval in principle from her bank for finance, she spent (so she claims) \$100,000 on plans and legal and town planners' fees in preparation for completion, she had no warning that her finance would be refused and even when it was refused at the last minute, she indicated that she wanted to complete but that her resources would not permit her to complete unless the purchase price was reduced by \$250,000.

51. The vendors refused to reduce the price and took the gamble of purporting to terminate, a decision which has cost them a six figure sum.

52. When one looks at the conduct of the purchaser as a whole, it is consistent with her wishing to complete, but keeping in reserve, her right to rely on Special Condition 43. Indeed, the correspondence from 16 October onwards specifically indicates that that is her position.

...

56. Again, when one analyses the cases on affirmation amounting to election, one must be careful to distinguish between two situations. Case A is where: (1) there has been a breach of contract; or (2) there has been the happening of an event either of which entitles John Doe to choose to termination or rescind on the one hand or to affirm the contract. A classic example is *Sargent v ASL Developments Ltd* [1974] HCA 40; 131 CLR 634 where the purchaser was given a right to rescind if a certificate was not annexed to the contract. It was as clear as day that, where the contract did not have the certificate attached, the purchaser had the right to rescind.

57. Case B is where the right to rescind is contingent on some event which may or may not occur in the future. Up until the time the contingency becomes actual, the purchaser is not in a position where she has two or more inconsistent courses from which she must choose. Up to the time of the contingency becoming an actuality, she has but one course open and that is to proceed with the contract.

Comments and constructive criticism welcomed to:

[sjacobs@wentworthchambers.com.au](mailto:sjacobs@wentworthchambers.com.au)