# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Interlink Australia Pty Ltd v Lowe* [2015] QCA 211 |
| PARTIES: | **INTERLINK AUSTRALIA PTY LTD AS TRUSTEE FOR THE MALONEY SUPERANNUATION FUND**<br>ACN 091 360 020<br>(appellant)<br>**v**<br>**GWENDOLINE ELVA LOWE**<br>(respondent) |
| FILE NO/S: | Appeal No 8585 of 2014<br>DC No 2655 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | District Court at Brisbane – Unreported, 15 August 2014 |
| DELIVERED ON: | 30 October 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 March 2015 |
| JUDGES: | Gotterson and Morrison JJA and Dalton J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The appeal is dismissed.**<br>**2. The appellant pay the respondent's costs, of and incidental to the appeal, to be assessed on the standard basis.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – IMPLIED TERMS – where the respondent's home was situated on two adjoining lots – where the appellant sought to purchase the lots from the respondent – where the appellant only required one lot to build a display home, but was content to buy both lots on the basis they would build a display home on one lot and keep the second for an investment – where the intention of the appellant was that the contracts would be in two different names, Interlink Australia Pty Ltd and Interlink Holdings Pty Ltd – where the two executed contracts were mistakenly both in the name of the company – where the appellant sought to have one of the contracts amended to be in the name of the holding company, and also sought that the respondent have the lots split via the title office – where the respondent refused these requests – |

where initially the appellant sought performance of both contracts, but at trial sought for specific performance of only one contract, or damages in the alternative – where the trial judge found that subjective intention at the time the contracts were signed was that both lots would be sold together – whether it was the subjective intention of the parties, objectively ascertained, that the contracts be interdependent – whether a term as to contemporaneous settlements should be implied – whether the trial judge gave adequate reasons

*Attorney-General (Qld) v Fardon* [2013] QCA 64, cited
*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191; [1996] 3 All ER 365; [1996] UKHL 10, cited
*BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266; [1977] HCA 40, cited
*Breen v Williams* (1996) 186 CLR 71; [1996] HCA 57, cited
*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; [1982] HCA 24, considered
*Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108; [1941] 1 All ER 33, cited
*Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989; [1976] 3 All ER 570, cited

COUNSEL: P W Evans (*sol*) for the appellant
D A Savage QC, with M J Taylor, for the respondent

SOLICITORS: McKays Solicitors for the appellant
Wallace Davies Lawyers for the respondent

[1] **GOTTERSON JA**: I agree that this appeal must be dismissed. I agree also that, consistently with the statement of principle accepted by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[1] the express contractual terms and background circumstances identified by Dalton J in her reasons, taken together, amply justify the implication of the term that defeated the appellant at trial.

[2] **MORRISON JA:** Mrs Lowe is the elderly owner of her home, which straddles adjoining Lots 97 and 99, at 57 Seaview Street, Brighton.

[3] Interlink Australia Pty Ltd is a company of which Mr Maloney is a director. It is the trustee of the Maloney Superannuation Fund. Mr Maloney is a builder/developer, specialising in small-lot homes.

[4] Mr Maloney has another company, Interlink Holdings Pty Ltd, which is the trustee of the Maloney Family Trust.

[5] Mr Maloney's business approach involved the construction of display homes to entice customers to retain his services as a builder. He approached Mrs Lowe with a view to buying her home at Seaview Street, so that he could bulldoze the house and erect a display home on one of the two lots. Before he spoke to Mrs Lowe, Mr Maloney had done a search which revealed that the house straddled the two lots.

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1 (1982) 149 CLR 337.

[6] Mr Maloney only needed one lot to build the display home, but he was content to buy both lots on the basis that he would build the display home on one, and the other would go into the Maloney Superannuation Fund as an investment. For that reason he made offers for each lot, proffering a separate contract for each lot.

[7] When executed there were two unconditional contracts, each for $240,000. The purchasers were supposed to be different, Interlink Australia on one and Interlink Holdings on the other, but the name of Interlink Australia was put on each contract as purchaser.

[8] When that was discovered Mr Maloney's solicitors asked: (a) if the name of the purchaser of Lot 97 could be changed to Interlink Holdings, and (b) for the Lots to be "…'split' via the Titles office... [because] both Lots are on the same Title",[2] so that each could be sold to a different trust. Mrs Lowe refused to agree to that.

[9] Mr Maloney sought to enforce specific performance of Lot 99 only[3]. That would have meant Mrs Lowe's home would have to be moved to Lot 97, or cut up. Not surprisingly Mrs Lowe resisted on the basis that the two contracts were interdependent.

[10] The learned trial judge dismissed Interlink's claim, holding that the intention of the parties was to sell both lots together and not separately. His Honour found there was an implied term in the contract for Lot 99 to the effect that the settlement of Lot 99 was contingent upon the contemporaneous settlement of Lot 97.

[11] The issues raised by the appeal are:

(1) was the subjective intention of the parties, objectively ascertained, that the contracts be interdependent;

(2) should a term as to contemporaneous settlements be implied; and

(3) did the trial judge give inadequate reasons.

[12] On the appeal Interlink Australia no longer pressed the claim for specific performance, but sought damages.

**Subjective intention of the parties.**

[13] The learned trial judge observed, and it was accepted on appeal, that there was little dispute on factual matters. Further, it was common ground that the question of the contracts being dependent on one another was never expressly canvassed.[4]

[14] His Honour found that the subjective intention, as revealed by the objective evidence, was that at the time the contracts were signed each of Mrs Lowe and Mr Maloney intended that both Lots 97 and 99 would be sold, and not just one of them.[5]

[15] The evidence relied on by the trial judge was set out:[6]

(a) the address of the land was given, in both contracts, as 57 Seaview Street; that was the address for both lots, not just one;

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2 Reasons below at [5].
3 Or damages in the alternative.
4 Interlink's outline paragraph 8.
5 Reasons [48]-[50].
6 Reasons [49].

(b) all discussions prior to execution of the contracts were on the basis that the residential property was to be sold; that was both lots;

(c) both Mr Maloney and Mrs Lowe knew that Mr Maloney's intention was to "bulldoze" the home, and that could only be done if Mr Maloney had access to both lots;

(d) it was "inconceivable … that Mrs Lowe would have in any way contemplated selling one lot only; and equally, it seems obvious … that Mr Maloney would have realised that she would not sell unless she could sell both lots";

(e) Mr Maloney intended, as Mrs Lowe knew, to build a display home on Lot 97, and to hold Lot 99 as an investment;

(f) until the eve of the trial Mr Maloney, through Interlink Australia, was seeking to have both lots transferred by Mrs Lowe to one or other of Mr Maloney's companies.

[16] In my view that finding was not only amply supported by the evidence referred to by the learned trial judge, it was the compelling inference to be drawn from the following facts:

(a) at the time the contracts were signed Mrs Lowe was about 75 and a half years old, and had lived in her home for about 36 years;[7]

(b) the home straddled Lots 97 and 99, which were on the one title;

(c) when Mrs Lowe put her home on the market for sale, it was not as separate Lots;

(d) Mrs Lowe's evidence was that discussions about the possible sale were in terms of "your house"[8] or "my property",[9] an evident reference to the house on the two Lots;

(e) Mrs Lowe realised that the house would be bulldozed, but she intended to relocate to be closer to her children; that meant she would stay with the children until she was able to buy a new home for herself;[10] the inference is that she intended to use the proceeds of the sale to do so, something which would have been harder, if not impossible, if the proceeds of sale were only half the original total;

(f) Mrs Lowe had never contemplated selling only one Lot;[11] and

(g) when the question of two contracts being used first arose Mrs Lowe instructed her solicitor that she wanted only one contract and she would not split the Lots, but the purchaser insisted on two contracts.[12]

[17] Given the matters above, it would be perverse to find that Mrs Lowe contemplated a scenario whereby her house had to be moved or cut up, with her being left with only half of the sale price she negotiated. Plainly Mrs Lowe never had the intention that one contact could settle without the other.

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7 Appeal Book (**AB**) 46. The contracts were signed in March 2012 and the trial was in June 2014.
8 AB 48.
9 AB 49.
10 AB 50.
11 AB 50, 51.
12 AB 52, 54-55.

[18] Equally, it is right to conclude that the evidence supports the learned trial judge's finding that Interlink Australia, through Mr Maloney, had the same intention. Relevant to that are the following:

(a) Mr Maloney always knew that the house straddled two Lots;[13]

(b) his evidence was that he identified the address as 57 Seaview Street, that he wanted to make an offer "on that land", and an initial offer was made in the form of "an REIQ contract";[14]

(c) in his earliest conversations with Mrs Lowe, Mr Maloney said that they would bulldoze the house;[15] he knew that he would have to own both Lots to do that;

(d) Mr Maloney intended to buy both Lots, and the one not used for the display home would be put into his Superannuation Fund as an investment;[16] when his first two offers were rejected he "re-looked at the blocks. They were the blocks that we wanted and it was important to us – secure the blocks";[17]

(e) when it became apparent that the two contracts had the same purchaser, that "was annoying" but "I would like to change the contract but ultimately it was more important to secure the [two] blocks";[18]

(f) Mr Maloney said in cross-examination:[19]

> "We entered into a contract – into our conditional contracts which we were prepared to hold – to be held to. It was your client that decided not to proceed on those contracts. It was your client that decided not to change the name and certainly that's her choice. And – but as a result of your client deciding not to settle – that's why we're here and we – there's a dispute. So these two contracts, your client has signed both contracts individually. As I mentioned earlier, if there was one block there – we're only really interested in one block to put a display on. But there was two blocks there so we bought both of them because I could see an investment down the track for a second block. So we have a house on both blocks. We – I still say, yeah, we would settle."

(g) Interlink Australia lodged a caveat over both Lots;[20]

(h) Interlink Australia's pleading sought specific performance of both contracts, and it was only at trial that the claim in respect of Lot 97 was abandoned.

[19] There is an additional factor which, in my view, shows why Interlink Australia's presumed intention was to settle both Lots, and puts the lie to Mr Maloney's assertion that he was happy to settle just one. It is that, looked at rationally, one Lot was never going to be sufficient for the purposes that Mr Maloney had in mind. He intended to build a display home that would attract customers. Mr Maloney said that doing so would increase the values of other blocks in the street, and that was how he justified holding onto the empty block as an investment.[21] If the display home was immediately

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13 AB 12.
14 AB 12.
15 AB 13.
16 AB 14, 15, 20, 40.
17 AB 15 line 5.
18 AB 15 line 36.
19 AB 40 lines 5-14.
20 Exhibit 1, tab 1.
21 AB 14 lines 19-25.

adjacent to the remains of Mrs Lowe's house, cut along or near the boundary between Lots 97 and 99 that would be an unattractive setting for the display home and less likely to assist raising values. Acting as a rational builder/developer Mr Maloney is not likely to have tolerated that outcome.

**Implied term for contemporaneous settlement?**

[20] In my view the matters referred to above compel the implication of the term that the learned trial judge set out at paragraph [80] of the Reasons below. The presumed intention of Mrs Lowe and Interlink Australia, objectively ascertained, was that both Lots would settle together, not that just one Lot would settle. In such a circumstance there is authority that a term should be implied to give effect to that presumed intention.[22] On the facts of this case, a condition requiring contemporaneous settlement of both contracts is, in my view, something that is so obvious as to go without saying, it is reasonable and equitable, it is capable of clear expression and does not contradict the contractual terms otherwise.

[21] Further, it is necessary to give efficacy to the contract, because without it Mrs Lowe would be put in the position that her continued residence in her own home would be jeopardised, and the possibility of her house being cut or moved was a real one, given Interlink Australia's attitude.

**Inadequate reasons?**

[22] This ground turns on the contended failure to articulate what evidence was relied on the support the implication of the term. The contention faces considerable difficulties. The learned trial judge set out the evidence her relied upon to conclude that each of Mrs Lowe and Mr Maloney held the actual and presumed intention to sell both Lots and not just one.[23] His Honour then turned to an analysis of whether a term should be implied, and identified the basis of all the requisite elements from *Codelfa*:

- that it went without saying: Reasons [49]-[50];
- it is necessary to give efficacy to the contract: Reasons [79], [81];
- it is reasonable and equitable: Reasons [78]-[79];
- it does not contradict the terms of the contract: Reasons [60]-[78]; and
- it is capable of clear expression: Reasons [80].

[23] I do not consider that this contention can be sustained.

[24] Since preparing the reasons above I have had the advantage of reading the draft reasons of Dalton J. I agree with what her Honour has said in relation to the application of *Codelfa* and the implication of the term as to contemporaneous settlement.

**Conclusion**

[25] For the reasons expressed above I would dismiss the appeal.

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22 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (***Codelfa***); at 346-347, per Mason J (as he then was), Stephen and Wilson JJ agreeing. See also *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 292.

23 Reasons [48]-[50].

[26] I would propose the following orders:

1. The appeal is dismissed.

2. The appellant is to pay the respondent's costs, of and incidental to the appeal, to be assessed on the standard basis.

[27] **DALTON J:** Mrs Lowe owns two lots of land – 97 and 99 on Registered Plan 29101. The address for both is 57 Seaview Street, Brighton. She lives in a house which is built so that part of it is on lot 97, and part of it on lot 99. Mrs Lowe told the Court she was 77-and-a-half years old at the time of trial. She had lived in her house for 38 years.

[28] Mr Brian Maloney was the director of three companies:

(a) Interlink Australia Pty Ltd (Interlink), which was trustee for the Maloney Superannuation Fund;

(b) Interlink Holdings Pty Ltd (Holdings) which was trustee for the Maloney Family Trust; and

(c) Urban Homes Pty Ltd (Urban Homes), which carried on business as a builder.

Mr Maloney's business strategy was that Holdings would buy a piece of land which Urban Homes would lease. Urban Homes would build a house on the land and use it as a display home for a short period of time – perhaps two years – and then the trustee company would either sell or let the ex-display home.

[29] In December 2011 or January 2012, Mr Maloney was actively looking for sites in the Brighton area. He wished to have Urban Homes construct a display home there, as many of that company's enquiries came from that geographical area. Mr Maloney thought that 57 Seaview Street was a suitable block for this purpose. He had searches carried out and discovered that it was two lots – 97 and 99. He made approaches through the real estate agent who had the listing, but received no response. He then telephoned Mrs Lowe. He told Mrs Lowe he was interested in building a display home, which would involve bulldozing the existing dwelling – her home. According to Mr Maloney, Mrs Lowe said that she was looking forward to selling because she wanted to move to a retirement home. She expressed no emotional attachment to her home. This evidence was led by the plaintiff/appellant at trial.

[30] Mrs Lowe's home was listed with a real estate agent named Coronis. Mr Maloney enquired of Elders Real Estate whether they had any properties listed that would suit his purpose. The salesman, Brodie Roselle, offered some suggestions, but they were not suitable to Mr Maloney. Mr Maloney asked Mr Roselle to approach Mrs Lowe. Mr Roselle did so and found that Mrs Lowe's agency with Coronis was about to expire. Mr Roselle then approached Mrs Lowe and became her agent. He "took" her property to Mr Maloney. Having already made extensive enquiries as to the cost of developing Mrs Lowe's blocks of land, Mr Maloney gave Mr Roselle two unconditional REIQ contracts, one for each lot. On one the purchaser was Holdings; on the other, Interlink. They were signed by Mr Maloney on behalf of his companies and were to be presented to Mrs Lowe by way of offer.

[31] In his evidence Mr Maloney said that he really only wanted one lot but, as there were two there, he was happy to buy both. He thought that once he built the display home prices in the street would increase, so that buying the second block would be a good investment for his superannuation fund. As explained below, I do not think there was any realistic option for Mr Maloney to buy one lot and build a display home on it unless he had an arrangement with Mrs Lowe as to what would happen to her house.

[32] Mrs Lowe rejected the first pair of offers which were in an amount of $200,000 each. A week later two more offers were made, this time in an amount of $220,000 each. Again Mrs Lowe rejected them. Two weeks later Mr Maloney looked at the blocks again. In his evidence-in-chief he said, "They were the blocks that we wanted and it was important to us – secure the blocks. We upped the offer again to 230,000." Once again, Holdings and Interlink each offered to buy one block by signing REIQ contracts. Once again, Mrs Lowe rejected the offers. Mr Maloney increased them to $240,000 each. Once again, the offers were in terms of REIQ contracts. This time Mrs Lowe signed the contracts but added two special conditions which she initialled. In effect she rejected the two offers and made two counter-offers. These were dated 21 March 2012.

[33] In his evidence Mr Maloney said that the two contracts in the amount of $240,000 came back from Mrs Lowe signed, but with additional conditions. He initialled those changes, even though at that point he realised that, by mistake on the part of his agent or solicitor, the contracts for both lot 97 and lot 99 had named Interlink as purchaser, rather than naming Holdings as purchaser of lot 97. He said he did this because it was the right thing to do – he would have liked to have changed the contract for lot 97, "but ultimately it was more important to secure to [sic] blocks".[24] In a way which seems contradictory to that, Mr Maloney said in evidence that, after he signed the two contracts of 21 March 2012, "we" – he means his solicitors – requested that the contract for lot 97 was changed so that the purchaser was Holdings and that that was refused.

[34] In fact, what happened was more complicated than that. It appears that Mr Maloney did initial the special conditions Mrs Lowe had added. Then, on 2 April 2012, solicitors for Mr Maloney's interests wrote saying that they had noticed an irregularity with the contract for lot 97. The letter said:

> "It has come to our attention that the Contract of Sale that we have to hand in relation to Lot 97, has not be [sic] executed by the Buyer in the sense that the version we have to hand is a copy of the Contract for Lot 99 with the first Reference Schedule page changed to be for Lot 97 and initialled by the Seller it has not been initialled by the Buyer.
>
> Further the Contract of Sale that the Buyer signed for Lot 97 does not appear to have been presented to the Seller, rather the version used for Lot 99 has been used twice once for Lot 99 and once for Lot 97."

[35] From examination of the exhibits, it appears that letter accurately stated the position. It appears that the first substantive page of the contract for lot 99 had been photocopied and lot 97 had been written in handwriting where lot 99 had previously been typed. Just how this came about was not explored in evidence. It is not clear why anyone might do such a thing, except that it did have the result that the purchaser for lot 99 was the same purchaser as that on the "new" front page of the contract for lot 97 – Interlink as trustee for the superannuation fund. Mrs Lowe gave evidence that she had always wanted the purchasers on the two contracts to be the same. That may have been the motive for what occurred.

[36] The solicitors for Mr Maloney's interests sought to take advantage of this situation and tendered a further copy of the contract for lot 97, as originally signed by Mr Maloney. This showed Interlink as trustee for the family trust as purchaser. Their letter of 2 April continued:

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[24] I do not think it more likely that the correct transcription was "two", rather than "the".

> "The Contracts we have been provided with by the Agent have the Purchaser names on both Contracts as Interlink Australia Pty Ltd atf The Maloney Family Superannuation Fund, whereas the Contract for Lot 97 our client signed after being presented with the blank Contract from the Agent states the Purchaser's name as Interlink Australia Pty Ltd atf The Maloney Family Trust. As our client intends to purchase each lot in the name of a different trust a Contract must be entered into for Lot 97 and also the Lots must be split via the Title's office, as, as per the Title Search enclosed herewith, both Lots are on the same Title.
>
> Please confirm via return facsimile or email the following:
>
> 1. That your client will execute the Contract of Sale as discussed above sent to your offices via email;
> 2. That your client will instruct you to arrange for the Lots on the current Title to be split into two lots; and
> 3. That your client will bear the DERM costs of the splitting of the Lots from the one Title.
>
> We look forward to your prompt response."

[37] On 3 April, solicitors for Mrs Lowe replied:

> "We have been instructed to advise that our client does not wish to execute fresh Contracts, nor will she arrange for the Lots on the current Certificate of Title to be split at her cost.
>
> Accordingly, these matters are at an end.
>
> We shall authorise the agent to refund your client the deposits paid."

Mrs Lowe's solicitors maintained this attitude in a letter of 17 April 2012, mis-dated 27 March 2012.

[38] In his evidence at trial, Mr Maloney denied that he gave instructions to his solicitors to ask that Mrs Lowe split the title and maintained that his only issue was that he wanted Mrs Lowe to change the name of the purchaser of lot 97 to Holdings. This seems to be a misunderstanding or mis-remembering of the reason the parties fell into dispute about lot 97. As does his assertion that Mrs Lowe "cancelled the contract on lot 97" but was still going ahead on lot 99.

[39] The subsequent correspondence shows that Mr Maloney's solicitors took the view that they would proceed to settlement on the contract for lot 99 only and attended on the settlement date ready, willing and able to settle.

[40] The appellant brought a proceeding for specific performance in the District Court. Curiously enough the proceeding asked for specific performance of both the contracts – ie., for lot 97 and lot 99. From the evidence at the trial, it appears the action for specific performance of lot 97 was always doomed to fail. First, it appears that, for the reasons given in the letter of 2 April, there was never any contract properly signed for lot 97. Secondly, the correspondence only calls upon Mrs Lowe to settle on lot 99. Perhaps in recognition of these difficulties, counsel for Interlink announced in his opening that his case was confined to lot 99. The statement of claim was never formally amended and, perhaps more significantly, there was never any amendment to the defence.

[41] In his evidence at the trial Mr Maloney said that, while he had originally intended to build the display home on lot 97, he was happy enough to build it on lot 99 and that was what he now wished to do. His evidence was that, had Mrs Lowe settled on lot 99 alone, the appellant would have built the display home on lot 99 – "Would've built the display home. It would've been open. We would have made sales. Everyone would have been happy." It occurs to me that Mrs Lowe, still owning lot 97 and a house which straddled lots 97 and 99, may not have been particularly happy.

[42] When asked how he could establish a display home on lot 99 if Mrs Lowe continued to own lot 97, Mr Maloney said that he would cut Mrs Lowe's house along the boundary, or move it across so that it was wholly on lot 97. He said apropos this: "It is common. It happens every day." He prefaced this answer with rather a long, non-responsive speech to the effect that he was always prepared to be held to both the contracts, but that it was Mrs Lowe's choice not to proceed in respect of lot 97. I interpret this as an acknowledgment that the truly responsive part of his answer – that he would cut or move Mrs Lowe's house – is not realistic.[25] It was never explained at trial how Mr Maloney could proceed without Mrs Lowe's co-operation. Perhaps legal proceedings for the removal of an encroachment might have been essayed. I cannot imagine they would have been straightforward. Even assuming their success, how an attractive display home could be built next door to a lot which contained the remains of a cut house, or a house which had been entirely moved to sit wholly within the confines of lot 97, was never explained. The learned trial judge was very sceptical that this could be done, and I think rightly so. Even were it technically possible, the time and cost, both in legal fees, and in terms of either cutting or moving Mrs Lowe's house, would have been wholly disproportionate to the $240,000 price paid for lot 99.

[43] The learned trial judge did not accept Mr Maloney's evidence on this point. Generally as to credit he said that he thought Mr Maloney was an honest and intelligent man, who expressed himself well. He went on to say, "I do suspect, however, that some of his recollection has been clouded by what has happened since the material events occurred, and that at times there were elements of reconstruction involved in his evidence". When this topic was visited in addresses, his Honour remarked at one stage, "I mean, your client did a valiant job of trying to say he would shave a quarter of the house off, but … it just didn't ring true to me". A little later his Honour said much the same thing, "I thought your client was honest and a reasonable historian. I do think that he might have been subject to a bit of *ex post facto* justification in respect of some of his evidence. [As I say] he did a valiant job, I thought, of talking about the severance of the house, but he didn't convince me." Lastly, his Honour said, "It seemed to me he was almost apologising for, you know – you know, the brutal fact is, it's her fault so we'll do it, type of thing, and it didn't ring true to me. I think he's better than that."

**Legal Basis for Defence Below**

[44] The defence has to be read in the context that it was responding to a claim for specific performance for both lots. Even so, there are parts of it which are hard to understand. However, clearly enough, at paragraphs 2, 3(hB) and 3(j)(iii), the defendant does raise the defence that any agreement for the sale of lot 99 was dependent upon a concluded agreement for the purchase of lot 97. Counsel who drew the pleading raised the

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[25] I rather suspect that Mr Maloney expected that at some point before the trial Mrs Lowe would relent and sell him both blocks. Given that she wanted to sell them, and he wanted to buy them, this was perhaps not an unrealistic expectation, or at least not an irrational expectation.

primary defence as being that no contract was ever formed to sell one lot, as the parties never had that contractual intent: they intended to contract about two lots or nothing. This argument was advanced as the primary argument at trial. I can see why it might be possible to analyse the facts in that framework, but no case authority was advanced which was remotely similar to these facts. Nor was I able to find any. Like the learned trial judge, I prefer to analyse the matter in the alternative way put forward by the defendant/respondent: whether there was an implied term to the effect that settlement of lot 99 was subject to contemporaneous settlement of lot 97.[26] This is the way the case was argued on appeal.

[45] The case was conducted below on the basis that the defence raised an allegation of such an implied term. As a separate and distinct part of his argument in addresses, counsel for the defendant relied upon there being an implied term, and counsel for the plaintiff responded fully to that argument both orally and in his written submissions. In fact, counsel for the plaintiff complained in his oral submissions that he did not anticipate the primary defence submission that the parties had never intended to make an agreement about only one lot. No such complaint was made about an argument based on an implied term.

**Judgment Below**

[46] The learned primary judge found that there was an implied term in the contract for the sale of lot 99 that the settlement of the contract was subject to there being contemporaneous settlement of a contract for the sale of lot 97. The notice of appeal is to the effect that this was an error as a matter of law and also a finding against the weight of the evidence. It was also contended on appeal that there were inadequate reasons for the decision below. In my view, these three bases of appeal must be rejected.

[47] There is a very helpful discussion of implied terms in *The Interpretation of Contracts in Australia*.[27] The implied term found by the learned primary judge, and contended for by the plaintiff below, was a term "based on an intention imputed to the parties from their actual circumstances".[28] Of such a term Gaudron and McHugh JJ said this in *Breen v Williams*:[29]

> "A term implied in fact purports to give effect to the presumed intention of the parties to the contract in respect of a matter that they have not mentioned but on which presumably they would have agreed should be part of the contract."

[48] This type of implied term was described by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*:[30]

> "… with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it – it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it."

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26 There was a second alternative advanced at trial – mistake. I cannot see this as viable. It was abandoned at the appeal.

27 Lewison & Hughes, Lawbook Company, 2012.

28 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137.

29 (1995-1996) 186 CLR 71, 102-103.

30 (1981-1982) 149 CLR 337, 346.

**Background Circumstances**

[49] In deciding whether or not to imply a term into a contract the Court may consider the terms of the contract and the relevant background circumstances or setting in which the contract is made.[31] As to what surrounding circumstances the Court may take into account, Mason J in *Codelfa* adopted a line of reasoning from Lord Wilberforce in *Reardon Smith.*[32] The Court may have regard to the commercial purpose of the contract, including the genesis of the transaction and the background, context and market in which the parties are operating. While the Court does not have regard to the subjective actual intention of the parties, it has regard to the intention which reasonable people would have in that background or context. Mason J dealt with negotiations towards a contract, saying, "Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But insofar as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable." – p 352.

[50] The trial judge thought that the parties' actual intention was to buy and sell two lots. However, he was alive to the prohibition on having regard to the parties' actual subjective intention when determining whether or not to imply a term. He had considerable reference to the law on this subject, and was concerned not to have regard to extrinsic evidence impermissibly. For that reason he took an approach that he ought first decide whether or not the contract for the sale of lot 99 was ambiguous. He decided that it was, and thus thought it permissible to refer to extrinsic evidence. In my view, in order to consider whether to imply a term, it was not necessary to find ambiguity in the written contract before reference could be had to the type of background circumstances just discussed. Nonetheless, insofar as his Honour was in error, that error was one which favoured the appellant.

[51] The cautious approach by the trial judge was understandable, particularly given the emphasis in the judgment of Mason J in *Codelfa* on cases dealing with the introduction of parol evidence. I think, however, that when Mason J turned to consider whether, in that case, it was permissible to look at extrinsic materials (p 354 ff), he proceeded without identifying any ambiguity. I think the position is as stated by Brennan J at pp 402-403 of *Codelfa*, that "… where the term propounded is said to be implied in a contract, that term must inhere in its express terms, and reference to extrinsic circumstances is permissible only to construe the contract and to understand its operation. … Although the necessity for the term to be implied must appear from and in the express terms of a contract, not from extrinsic circumstances, those circumstances may aid in ascertaining the meaning of the express terms and in identifying the matters to which they relate. The meaning and operation of the express terms, thus established, are the sole foundation for implying a term which the parties have not expressed."

[52] In determining whether to imply a term, the judge below looked first at the provisions of the contract to sell lot 99. That was a correct starting point. And, in my view, he noted the significant features of the contract. First, that the property address on the contract was 57 Seaview Street, and that the contract was, in its terms, a contract for the sale of a house and land. At the description "land", the contract provided again that the address was 57 Seaview Street and then went on to specify that it was lot 99

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31 *Codelfa* (above) p 348; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 212.

32 *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989, extracted at p 350 ff of *Codelfa*.

on RP 29101. In my view, it was also permissible to take into account that the price for which lot 99 was purchased was $240,000 – a relatively small amount of money.

[53] In construing this contract, I think it was legitimate to take into account, as part of the background circumstances in which the parties contracted, that at the address 57 Seaview Street was one house straddling two lots of land. The trial judge did so. Moreover, I think it was correct to take into account that the home was an ordinary low-set residential home, and that both lots 97 and 99 were ordinary suburban lots.

[54] Further, I think that the extrinsic circumstances included the fact that the contract for lot 99 was tendered to Mrs Lowe as one of a pair, the other dealing with lot 97, and that she tendered a pair of contracts back to Mr Maloney's interests. Further, that prior to that exchange, the parties had proffered and rejected at least two other pairs of contracts, one for each lot on each occasion. I think this is a good example of using negotiation permissibly to show the subject matter of the transaction, without seeking to ascertain actual subjective intention. Further, I think part of the relevant background circumstances was that neither in the contract for lot 99, nor elsewhere, was there an agreement between Mrs Lowe and the appellant that, before or after completion, she would consent to her house being demolished or moved.

[55] I confess to having some difficulty determining whether or not the statements made in the initial conversation between Mrs Lowe and Mr Maloney could be admitted as part of the extrinsic circumstances in which the parties contracted. These statements were that Mr Maloney wished to buy both lots of land and demolish the house so that he could build a display home, and that Mrs Lowe wished to sell both lots of land because she no longer wished to live on either lot. As noted above, this evidence was led by the plaintiff/appellant, whose counsel thought at that stage that the only argument raised against his client was the implied term argument. That is, it rather implies counsel for the plaintiff/appellant considered it a relevant part of the background against which the question of the implied term was to be determined. The conversation was certainly part of the negotiation between the parties, and in that sense it was known to both. I think that part of my hesitation is related to the fact that the statements were as to future intentions, and thus subject to change. Even leaving that aside, I would prefer not to have regard to this as part of the relevant background matrix on the basis that this conversation goes to actual subjective intention of the parties to the contract, rather than being part of objective background circumstances. I am content to assume this without finally deciding it, for I do not think that it is necessary to have regard to that conversation in order to imply the term contended for by the respondent.

[56] I note that, while he did not expressly address this issue, it does not appear that the learned trial judge had regard to this conversation as part of the objective background matrix of fact. He does refer to it at [49c] and [49e], but I read [49] as being the reasons for the primary judge concluding that the actual intention of the parties was to buy and sell both lots. I think at [51] and following of his judgment, the primary judge moves on to discuss whether or not a term can be implied and what material he can look at as part of that exercise. The learned primary judge does not mention the demolition conversation again after [49] of his judgment.

**Implication of a Term**

[57] The Courts are slow to imply a term. In Australia there are two authoritative statements in the High Court as to when sufficient will be shown to imply a term. One is *Codelfa*

(above) and the other is *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[33] In the latter case, Lord Simon of Glaisdale in the Privy Council said:

> "… for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

This statement of principle was adopted in *Codelfa*.[34] It is a correct statement of the law relevant to this case, and was set out by the learned primary judge.

[58] In my opinion, when the written contract for lot 99 is read against the matters I have described as being part of the background factual matrix, there appears a necessity for the implied term found by the learned primary judge. The fact that on at least three occasions the appellant, or its related entity, had proffered signed contracts for both lots 97 and 99, and that the contract to sell lot 99 had been proffered, signed but with additional clauses, by Mrs Lowe, accompanied by a similar contract in relation to lot 97, is a clear indication that the subject matter of the transaction between them was the land at 57 Seaview Street, lots 97 and 99. This is supported, at least in part, by the terms of the contract to sell lot 99, as extracted above.

[59] When those indications are taken together with the fact that the small residential house straddled the two suburban blocks which were worth no more than $240,000 each, and there was no agreement between the parties as to what would happen to the house after completion of the sale of lot 99, it becomes clear beyond peradventure that the implied term found by the learned primary judge was necessary to give business efficacy to the contract. Objectively, without the implied term, both a reasonable buyer and the seller would have enormous legal and practical difficulty caused by Mrs Lowe's house straddling both lots. Time and money spent dealing with those legal and practical problems would be vastly disproportionate to the value of the block. The implied term found by the learned primary judge was therefore necessary to give efficacy to the contract – without it the parties' commercial purpose could not be achieved.

[60] Having regard to the remaining criteria on the list from *BP Refinery (Westernport)*, it is clear that the term is capable of clear expression and does not contradict any express term of the contract. It was objected that the term implied by the learned primary judge was never pleaded. This is true, but understandable, given the history of the appellant's late abandonment of the claim in relation to lot 97. Further, in my view the term is reasonable and equitable, for it brings about the only objectively sensible commercial result possible in the circumstances and relieves both parties from the invidious situation which conveyance of lot 99 only to Interlink would produce. The term implied in the contract for the sale of lot 99 would not operate unreasonably or inequitably against either party. I agree with the learned primary judge in his conclusion that, had the officious bystander been present at any time before completion of the written contract to sell lot 99, the parties would have replied, to enquiry, that of course they meant such a term as part of their bargain. In my view, the only reason it was omitted was that it was so obviously part of the parties' transaction that it went without saying.

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33 (1977) 180 CLR 266, 283.

34 (Above), see Mason J at p 347 and Brennan J at p 404.

[61] In my view, then, the facts proved at trial were sufficient to support the implied term found by the learned primary judge. His Honour applied the correct case law to arrive at his conclusion and I cannot see that (apart from the immaterial error in favour of the appellant noted above) he made any error of law in reaching his conclusion.

[62] Turning to the third ground of appeal, it is necessary that a judgment provide reasons in the sense that it "exposes the judge's reasoning processes so as to enable readers to understand how the judge arrived at her conclusions".[35] Evidence needs to be analysed and considered, not merely recited. Contradictions in evidence need to be resolved, and the basis of that resolution needs to be made clear. The relevant facts found need to be stated with precision and the process of legal reasoning about those facts needs to be apparent on the face of the judgment. On its face, the judgment needs to engage with, and resolve, the legal issues which arise. In my view, the judge below did provide sufficient reasons. It is clear from the judgment what facts are relevant to the decision and, in particular, what parts of the written contract and background circumstances are relied upon to find that the legal criteria for implication of a term are satisfied. It is clear what law was applied in that reasoning process. Complaint was made that paragraphs [80] and [81] of the judgment were brief, but those paragraphs are conclusory, depending upon the analysis which has gone before, at [51] ff.

[63] For the above reasons I would dismiss the appeal. I agree with the order proposed as to costs.

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[35] *Attorney-General (Qld) v Fardon* [2013] QCA 64, [86]. The following part of my paragraph is drawn from the considerations discussed in *Fardon*.