

SUPREME COURT OF QUEENSLAND

CITATION: *Mirvac Queensland Pty Ltd v Beioley & Anor* [2010] QSC 113

PARTIES: **MIRVAC QUEENSLAND PTY LTD**
(ACN 060 411 207)
(Plaintiff)
v
SCOTT JAMES BEIOLEY AND ELAINE BARBARA BEIOLEY
(Defendants)

FILE NO: 5502 of 2009

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 April 2010

DELIVERED AT: Brisbane

HEARING DATE: 14 December 2009

JUDGE: McMurdo J

ORDER: **The contract between the plaintiff and the defendants dated 2 July 2007 be specifically performed.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – GENERALLY – where the plaintiff agreed to sell to the defendants an apartment in a building that was not yet constructed – where the proposed apartment was identified on a plan by reference to the lot number, the internal area, the area of the two balconies and the total area of the proposed apartment – where each of those areas within the actual apartment was less than indicated on the plan – whether the plaintiff was required to inform the defendants of those changes under the *Land Sales Act* – whether the plaintiff's failure to so inform the defendants amounted to a repudiation of the contract – whether those changes in area constituted a breach of contract

Body Corporate and Community Management Act 1997 (Qld) ss 213, 214

Building Units and Group Titles Act 1980 (Qld) s 49

Land Sales Act 1984 (Qld) ss 21, 22, 25

Land Title Act 1994 (Qld) s 175

Agricultural and Rural Finance Pty Ltd v Gardiner (2008)
238 CLR 570

Flight v Booth (1834) 1 BING NC 370; 131 ER 1160

Mirvac Queensland Pty Ltd v Horne & Ors [2009] QSC 269

Sunbird Plaza Pty Ltd v Boheto Pty Ltd [1983] 1 Qd R 248

COUNSEL: M D Martin for the plaintiff

P D Dunning SC with C Jennings for the defendants

SOLICITORS: ClarkeKann for the plaintiff

Broadley Rees Hogan for the defendants

- [1] By a contract of sale dated 2 July 2007, the plaintiff agreed to sell to the defendants an apartment in a building to be constructed near the Brisbane River at Tennyson. The price was \$1,542,000 with a deposit of 10 per cent. The contract was to be settled within 14 days after notice from the plaintiff that the proposed community title scheme had been established. The scheme was registered on 28 April 2009 and the plaintiff called for settlement on 12 May 2009. But the defendants did not attend at settlement. Subsequently they purported to terminate the contract on the basis of an alleged non-compliance with s 22 of the *Land Sales Act 1984* (Qld) (“the LSA”).
- [2] The plaintiff seeks specific performance, which the defendants resist upon essentially three bases. The first is that they were entitled to terminate for non-compliance with s 22. The second is that by insisting upon settlement in disregard of the plaintiff’s alleged obligations under s 22, the plaintiff repudiated the contract which entitled the defendants to terminate it. The third is that the apartment which has been constructed does not correspond in certain respects with that which the plaintiff contracted to build and to sell. As I will discuss, each of those grounds arises from the fact that the sizes of the balconies within this apartment are less than the plaintiff had represented that it would build.
- [3] Prior to the contract, the plaintiff provided to the defendant a disclosure statement pursuant to s 213 of the *Body Corporate and Community Management Act 1997* (Qld) (“the BCCM Act”). Within that document was included a statement as required by s 21 of the LSA.¹ In the disclosure statement the proposed apartment was described as Lot No 3105. The disclosure statement contained a clause 1.6 as follows:

“1.6 Plans

Chapter 4 of this Disclosure Statement incorporates copies of the initial plan of subdivision SP 195275 and draft Building Format Plan SP 195376 for Stage 1 identifying the Lot as described in item 3 of this Chapter and subject to the provisions of the Contract.”

- [4] The plans within Chapter 4 depicted two apartment buildings, described as Tower A and Tower B or the Softstone and Lushington buildings. The proposed Lot 3105

¹ Which was able to be included within the statement under the *BCCM Act* by s 21(5), (6) of the *LSA*.

was shown at the western end of Tower A, two levels above the ground floor. One of these plans was a drawing showing the rooms within each apartment upon that floor. Another showed the boundaries of each of the lots, and the balcony or balconies for each apartment, specifying the amount of internal floor space and that of the balcony or balconies. In particular, this proposed Lot 3105 was shown as having an internal area of 173 m², an area for its north facing balcony of 29 m², an area for its south facing balcony of 13 m² and a total area of 215 m².

- [5] The statement expressed to be under s 21 of the LSA, the validity of which is not challenged, was as follows:

“Pursuant to Section 21 of the *Land Sales Act* 1984 (Qld) neither the Seller nor the Seller’s agent (including by any employee), has made or offered to the prospective Buyer or his agent any representation, promise or term with respect to the provision to the Buyer of a Certificate of Title that relates to the Lot in question only except that a separate indefeasible freehold title pursuant to the *Land Title Act* 1994 (Qld) will be available on settlement of the Contract in accordance with the terms of the Contract.”

- [6] In the contract of sale, clause 6 provided for the development to be undertaken by the plaintiff as follows:

“6. CONSTRUCTION OF THE LOT, ETC

6.1 Subject to this Contract, the Seller must cause Stage 1 and the Lot to be constructed:-

- (a) in a good and tradesman-like manner; and
- (b) substantially as shown or described in the Disclosure Statement.

6.2 The Seller may make the following changes to Stage 1 and any other aspect of the Tennyson Reach Development:-

- (a) any changes (provided that the Buyer is not materially prejudiced by the change);
- (b) change the number of Stage 1 Lots and the design of the Stage 1 Lots (this Clause 6.2(b) does not apply to the Lot);
- (c) change the design or any other aspect of Stage 1 or the Tennyson Reach Development (provided that the Buyer is not materially prejudiced by the change);
- (d) make a change in Stage 1 or any other aspect of the Tennyson Reach Development if the Council or any other Authority requires it even if the Buyer is materially prejudiced;

- (e) alter the area or configuration of the Scheme Land (or the Base Parcels) in accordance with any approval of the Council or any other Authority;
- (f) alter the Common Property or any facilities or rights in relation to use of same;
- (g) change anything in any Body Corporate Agreements;
- (h) construct any services on or under the Scheme Land (and register any easements required in connection with such services);
- (i) grant any exclusive use, special privileges or occupation authorities over or in respect of any Common Property areas;
- (j) include any Additional Land in the Scheme Land (whether before or after settlement);
- (k) exclude or remove from the Scheme any part of the Base Parcel originally intended to be included in the Scheme Land; and
- (l) any change contemplated in the Disclosure Statement.

6.3 The Seller may make the following changes to the Lot:-

- (a) the size of the Lot or any part of the Lot may be up to 5% different (more or less) from that shown in the Disclosure Statement; ...”

The “Stage 1” referred to in that clause was defined within the contract to mean the first stage of the Tennyson Reach Development which had been detailed in the disclosure statement.

- [7] It can be seen then that clause 6 imposed requirements both for the construction of Stage 1 and specifically for the construction of the apartment the subject of the contract. Clause 6.1 obliged the plaintiff to cause Stage 1, including the Lot, to be constructed “substantially as shown or described in the Disclosure Statement”. That was qualified by clause 6.2 which permitted the plaintiff to make certain changes to Stage 1, although not to the design of the particular apartment being purchased by the defendants, as clause 6.2(b) made clear. The plaintiff was permitted to make changes to this particular Lot by clause 6.3. The defendants argue that, upon the proper construction of clauses 6.1 and 6.3(a), changes to the size of the Lot or any part of the Lot in excess of five per cent were not permitted.
- [8] It is uncontroversial that as constructed, this apartment had a total area and areas of specific parts, which differed from what had been represented in the original disclosure statement as follows:

	Disclosure Statement	As Built
Total area	215 m ²	209 m ²
Interior	173 m ²	172 m ²
North balcony	29 m ²	26 m ²
South balcony	13 m ²	11 m ²

Accordingly there was a reduction in size of 10.35 per cent in the case of the northern balcony and 15.38 per cent in the case of the southern balcony.

- [9] On 9 November 2007 and 20 February 2009, the plaintiff sent further statements pursuant to the BCCM Act about which there is no issue. Then on 27 March 2009, the plaintiff provided a further disclosure statement which, by an attached plan, clearly advised that the total area of this Lot and the areas of the internal space and the respective balconies had been built as I have set out above. The defendants accept that this further statement met the requirements of s 214 of the BCCM Act.
- [10] Section 214(4) of the BCCM Act is as follows:
- “(4) The buyer may cancel the contract if –
- (a) it has not already been settled; and
- (b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and
- (c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement.”

Accordingly, the defendants were entitled to cancel the contract if the results of those changes were that they would be materially prejudiced if compelled to complete.

- [11] On 8 April 2009, the solicitors for the defendants requested further information in relation to the proposed changes and an extension of the 14 day period within s 214(4)(c). By a letter of the same date, the plaintiff by its solicitors agreed to provide the information requested and agreed to the extension of that period until 14 days after its provision. That information was provided on 14 April 2009, so that the period for s 214(4) expired on 28 April 2009, during which there was no purported cancellation of the contract. By a letter of that date, the solicitors for the plaintiff informed the solicitors for the defendants that the Tennyson Reach Community Title Scheme had been established so that the contract was due for settlement on 12 May 2009.
- [12] Clause 3.3 of the contract provided as follows:
- “... [i]f the Buyer’s Solicitors give the Seller’s Solicitors an undertaking to use the Transfer Documents for stamping purposes only and to hold them complying with the directions of the Seller pending settlement then the Seller will cause the Seller’s Solicitors to

forward the Transfer Documents to the Buyer's Solicitors before the Settlement Date."

An undertaking according to clause 3.3 was provided by the defendants' solicitors in their letter of 5 May 2009 which was as follows:

"We refer to the above and to your facsimile to us dated 28 April 2009.

In accordance with clause 3.3 of the Sale Contract, we request that you provide us with signed transfer documents as soon as possible on our undertaking to use them for stamping purposes prior to Settlement. Please do not crease or fold the Form 1 or Form 24 as this may lead to rejection by the Department of Natural Resources and Water.

Please ensure that Part B of the Form 24 is completed in full, in particular a street address for the Transferor (Item 3), Safety Switch (Item 5(f)) and Smoke Alarms (Item 5(g)).

We will require a Declaration of Non-Revocation of the Power of Attorney to be returned with the documents if they are to be signed under Power of Attorney."

- [13] On 12 May 2009 the solicitors for the plaintiff advised that their client was ready, willing and able to settle on that day. The defendants did not respond and did not attend at the appointed time for settlement. On 25 May 2009 the plaintiff commenced these proceedings.
- [14] On 12 June 2009 the defendants' solicitors wrote to the plaintiff's solicitors saying that the defendants did not intend to settle the contract. On 23 June 2009 they again wrote, for the first time suggesting that there had been a non-compliance with s 22 of the LSA. It was also asserted that the plaintiff had repudiated the contract by refusing to provide a statement under s 22. The third argument which is now advanced, which is that the apartment did not correspond with that which the plaintiff had agreed to build because of the differences in the areas of the balconies, was not then advanced. By that letter the defendants purported to terminate the contract. The third ground was not raised until a letter from the defendants' solicitors of 3 September 2009, in which there was a (further) purported termination of the contract.
- [15] Section 21(1) of the LSA provides as follows:
 - "Before a person enters upon a purchase of a proposed lot there shall be given to the person (or to the person's agent) a statement in writing, signed by the person who is to become the person's vendor or that person's agent, that –
 - (a) clearly identifies the lot to be purchased; and
 - (b) states the names and addresses of the prospective vendor and the prospective purchaser; and

- (c) clearly states whether the prospective vendor or the prospective vendor's agent (whether personally or by any employee) has made or offered to the prospective purchaser or the prospective purchaser's agent any representation, promise or term with respect to the provision to the purchaser of a certificate of title that relates to the lot in question only; and
- (d) if any representation, promise or term, such as is referred to in paragraph (c) has been made or offered, clearly states the particulars thereof; and
- (e) states the date on which it is signed."

[16] Section 22 of the LSA provides, in part, as follows:

"22 Rectification of statement under s 21

- (1) If a statement in writing of particulars referred to in section 21(1) given in accordance with, or pursuant to section 21(4) or (6) in sufficient compliance with, section 21(1) -

- (a) is not accurate at the time it is given; or

- (b) contains information that subsequently to the time it is given becomes inaccurate in any respect;

it is the duty of the vendor and the vendor's agent to give to the purchaser or the purchaser's agent a statement in writing signed by the vendor or the vendor's agent of particulars required to be included in a statement given for the purposes of section 21(1) as soon as is reasonably practicable after the proposed lot has become a registered lot.

- (2) Subsection (1) applies whether the statement in writing is given in due time in accordance with section 21 or at a later time.

- (3) ..."

Section 25 of the LSA provides:

"25 Avoidance of instrument for breach of s 21(1)

- (1) Where in respect of a purchase to which section 21(1) relates -

- (a) there has not been given to the purchaser or the purchaser's agent a statement in writing in accordance with, or that pursuant to section 21(4) or (6) sufficiently complies with, section 21(1); or

- (b) there has not been given to the purchaser or the purchaser's agent when required by section 22(1) a

statement in writing in accordance with that section;
or

- (c) a statement in writing in accordance with, or that pursuant to section 21(4) or (6) sufficiently complies with, section 21(1) (whether given in due time in accordance with that section or at a later time) and a statement in writing in accordance with section 22(1), have been given to the purchaser or the purchaser's agent;

the purchaser may avoid the instrument made in respect of the purchase of the proposed lot by notice in writing given to the vendor or the vendor's agent if the purchaser has been materially prejudiced by the failure to give a statement in writing referred to in paragraph (a) or (b) or, in the case referred to in paragraph (c), by the inaccuracy of any particular in the statement in writing first mentioned in that paragraph.

- (2) A notice of avoidance under subsection (1), if it is to be effectual, shall be given -
 - (a) before a registrable instrument of transfer that relates to the lot in question has been delivered by the vendor or the vendor's agent to the purchaser or the purchaser's agent; or
 - (b) where the purchaser seeks to avoid the instrument in question by reason of the inaccuracy of any particular in the statement in writing given in accordance with, or pursuant to section 21(4) or (6) in sufficient compliance with, section 21(1) -
 - (i) before the expiration of a period of 30 days after the receipt by the purchaser or the purchaser's agent of the statement in writing given in accordance with section 22(1); or
 - (ii) before the delivery of a registrable instrument of transfer as aforesaid;

whichever occurs sooner.”

- [17] The defendants argue that the statement given under s 21 contained information which subsequently became inaccurate. The inaccuracy is said to have been in the identification of the lot to be purchased. It is argued that the Lot had been identified originally by reference to, amongst other things, its total area and the respective areas of its internal space and balconies. Because those areas changed, it is argued, the original identification of the Lot became inaccurate. Accordingly, the plaintiff was bound to give a further statement identifying the Lot by reference to those areas

of the apartment as constructed. Of course the plaintiff did provide that information to the defendants, by the further disclosure statement under BCCM Act dated 27 March 2009. However it is said that this did not suffice for the purposes of s 22 of the LSA, because the information had to be provided “*after* the proposed Lot [became] a registered Lot”: s 22(1).

- [18] A similar argument was rejected by Applegarth J in *Mirvac Queensland Pty Ltd v Horne & Ors*,² a case concerning another apartment within this development. It was shown in the (original) drawing within the s 213 disclosure statement as having a total area of 177 m², comprising 162 m² of internal space and 15 m² of balcony. As constructed, the Lot had a floor area of 176 m², of which the balcony consisted of 14 m². Applegarth J accepted that the specification of the floor area of the lot served “to clearly identify the lot in conjunction with other matters such as the Lot number, the floor on which it is located and its position in the building”.³ However, the specification of the floor area had to be considered in the context of the term of the proposed contract which was identical to clause 6.3(a) in the present case. Consequently, the specification of the total area of 177 m² was to be understood as a specification of a total area within five per cent of that figure.⁴ Because the total area varied by less than five per cent, the information originally provided in that respect had not become inaccurate so as to engage s 22 of the LSA.
- [19] I respectfully agree with that reasoning. But the present argument was not put to His Honour and therefore was not considered. It is that the area of a *part* of the actual Lot varies by more than five per cent from the area depicted upon the drawing for that part. In this case the area of each of the balconies varies from what was shown within the original drawing by, in one case, 10.35 per cent and in the other by 15.30 per cent. Because clause 6.3(a) of the proposed (and actual) contract permitted a change up to five per cent to the “size of the Lot or any part of the Lot” it is argued that these changes made the actual Lot different from the proposed Lot as originally identified.
- [20] I do not accept this argument essentially for two reasons. The first is that the balcony was within the Lot and the relevant area insofar as the identification of the proposed Lot under s 21 was concerned, was the area of that Lot as a whole. Had there been no specification of the size of the balconies and the size of the internal space, but simply a specification of the area of the Lot as a whole, still the lot to be purchased would have been clearly identified in compliance with s 21. The fact that the area of the balcony was almost certainly of interest to the defendants as prospective purchasers does not mean that it was part of the information which had to be provided under s 21. A similar view was expressed by McPherson J in *Sunbird Plaza Pty Ltd v Boheto Pty Ltd*.⁵ That case concerned the requirement of s 49 of the *Building Units and Group Titles Act 1980* (Qld), which required a purchaser of a lot or a proposed lot to be provided with a statement which, amongst other things, clearly identified the lot or proposed lot to which it related. The document there identified the proposed lot as “Unit A on the 14th Floor as identified in sketch plan in subject agreement (where Building Units Plan has been registered, Lot 52 in Registered Building Units Plan No ...)”. The contract identified the property to be sold as Lot 52 on the fourteenth floor and provided that the plan for

² [2009] QSC 269.

³ [2009] QSC 269, [35].

⁴ [2009] QSC 269, [35].

⁵ [1983] 1 Qd R 248, 258.

that floor would be “in accordance substantially with the plan in the eighth schedule hereto. ... The said plan is incorporated in this Agreement for identification only”. It was argued that the lot was not identified because there was nothing which specified the location of the building in which this apartment would form a part, in relation to the land on which the building stood.⁶ McPherson J said:⁷

“However, there are, in the case of a building not yet constructed, obvious difficulties in describing and identifying the precise compartment of airspace into which the constructed unit will fit, and I am satisfied that by s 49(2)(a) the legislature does not require this to be done. The lot is sufficiently identified by the unit number, lot number, the floor on which it is intended to be, and the detailed drawing contained in the eighth schedule. That is not to say that a purchaser has no need to be, or in the present case has not been, informed of the geographical aspect of the unit which he has agreed to buy. Ordinarily one would expect him before contract to make inquiries or perhaps ask to see a plan of the building to determine its location on the land. But it is quite a different matter to suggest that the incorporation of such information is required in order to “identify” the lot.”

- [21] There is no statutory requirement for a registered plan in this context to delineate and quantify the area of a balcony within a lot. The probable explanation for that being done in this case is that it is the practice of the Registrar of Titles to require such parts of a lot to be delineated and given a specific area within the registered plan.⁸ It is apparently considered desirable for there to be the most precise definition of the boundaries of a required lot. But it does not follow that such information is necessary for the clear identification of a proposed lot for the purposes of s 21, where the apparent concern of the legislature is that there should be no misunderstanding of the subject matter, not yet in existence, of a proposed contract of sale.
- [22] Secondly, the defendants’ argument proceeds upon what I see as an incorrect construction of clauses 6.1 and 6.3 of the contract. The same difficulty underlies the third of the defendants’ grounds for resisting this case. In the defendants’ argument, clause 6.3 is to be interpreted as requiring the Lot to be constructed so that the size of the Lot or any part of the Lot was within five per cent of the figure shown in the Disclosure Statement. But clause 6.3(a) was not in terms of an obligation; rather, it was in permissive terms. It is to be read with clause 6.1 which did impose an express obligation in relation to the construction of the Lot. It obliged the plaintiff to cause both Stage 1 and (in particular) the Lot to be constructed “... substantially as shown or described in the Disclosure Statement”. The apparent purpose of clause 6.3(a) is to qualify that obligation, so that the plaintiff would not be in breach of contract if Lot 1 was constructed within that five per cent tolerance. It is a different matter to say that clause 6.3(a), by implication, deems the plaintiff to be in breach if the Lot or any part of the Lot was outside that range. There is no necessity for such an implied term, to be superimposed upon the express obligations as to the construction of the Lot within clause 6.1. This contract

⁶ The same point could not be made in the present case where the location of the building within the site was depicted.

⁷ [1983] 1 Qd R 248, 258.

⁸ See Direction 9 of Directions for the Preparation of Plans issued by the Registrar of Titles under s 10(1)(b) of the *Land Title Act 1994* (Qld).

would be efficacious without such an implied term. And the position of the purchasers was also protected by the requirements of the BCCM Act. In particular they contracted with the protection of s 214 of that Act, by which they were entitled to cancel the contract if they became materially prejudiced by some change which made the Disclosure Statement inaccurate.⁹

- [23] Accordingly the proposed Lot was identified for the purposes of s 21 by reference to, amongst other things, the respective areas of and within the Lot on the relevant drawing, but subject to such variations as would be consistent with the due performance of the proposed contract. In other words the proposed Lot was identified as “substantially as shown or described in the Disclosure Statement”.
- [24] The unchallenged evidence of Mr Wallace, the Chief Executive Officer of the plaintiff, is that there is no difference to the function or amenity of this apartment in any respect from the changes to the dimensions of the balconies. This evidence was tendered over the objection of the defendants, for whom it was submitted that it was irrelevant because it was no part of their case that the value or amenity of the apartment was affected by these changes. I admitted the evidence in case it became relevant to a case of “material prejudice” under s 25 of the LSA, which at that point was foreshadowed but not pleaded by the defendants. I find that the plaintiff did cause the Lot to be constructed substantially as shown or disclosed in the Disclosure Statement in compliance with clause 6.1 and otherwise according to the contract of sale.
- [25] I should record that I was not persuaded by the submission for the plaintiff that the balconies did not constitute parts of the Lot for the purposes of clause 6.3(a). In my view “any part of the Lot” within that clause meant any part for which a size had been shown in the Disclosure Statement.
- [26] Because s 22 was not engaged, the first and second of the defendants’ grounds are not established. And because there was no breach of contract by constructing the balconies outside the five per cent tolerance within clause 6.3(a), the defendants’ third ground fails. There was no argument for the defendants that there was some substantial disparity between the property as described in the contract and the apartment as constructed, so as to provide a basis for refusing specific performance or, if that were to be decreed, for an order for compensation.¹⁰ It follows that the defendants are obliged to perform the contract.
- [27] But should a different view be taken, it is necessary that I say something more about the facts and the arguments.
- [28] The plaintiff argued that if s 22 was engaged, its requirements were satisfied. It relied firstly upon the further Disclosure Statement of 27 March 2009, which as already noted, included a revised drawing showing the ultimate areas for the balconies and otherwise. On 8 April 2009 the defendants’ solicitors wrote to the plaintiff’s solicitors referring to “changes made to its [sic] Lot” and asking for copies of the original plans showing dimensions of the Lot including the balconies and “copies of new plans showing the dimensions of the Lot including the balcony as now shown in the Further Statement.” This suggests that the defendants had noticed the changes but for some reason wanted to see more detailed design or

⁹ Section 214(4).

¹⁰ *Flight v Booth* (1834) 1 BING NC 370, 377; 131 ER 1160, 1162-1163.

construction plans. On 14 April 2009, the plaintiff's solicitors replied, enclosing plans with more detailed information in relation to the sizes of the rooms within the apartment. On 20 April, there was an email from a solicitor for the defendants asking questions as to those internal measurements which was answered by the plaintiff's solicitor on the next day.

- [29] However, the relevant plan of survey was registered on 27 April 2009. It was upon that registration that the proposed Lot became a registered lot for the purposes of s 22(1) of the LSA. The plaintiff argues that the Lot became a registered lot on 16 April 2009 upon the basis of s 175 of the *Land Title Act 1994* (Qld) which provides that "[a] registered instrument forms part of the freehold land register from when it is lodged". In my view, however, that does not affect the date upon which a proposed lot becomes a registered lot for the purposes of s 22 of the LSA: otherwise the vendor would be at risk of breaching s 22 by the effective backdating of the commencement of the period in which the further statement is to be given. And this point would have assisted the plaintiff only with its alternative argument that it complied with s 22 by what occurred after 16 April 2009.
- [30] On any view, the disclosure statement of 27 March 2009 plainly was given prior to the proposed Lot becoming a registered lot. For whatever reason, a vendor's obligation under s 22 is expressed in terms which seem to require the required notice to be given after registration of the plan, so that this statement would not have sufficed. As to the plaintiff's alternative argument that it gave the necessary information on 21 April 2009, this information referred only to certain internal dimensions and said nothing as to the areas of the balconies. Of course the reason was that the changes in these respects had already been disclosed. In summary, had a statement under s 22 been required, none was given.
- [31] On the premise that s 22 required a further statement, the plaintiff was not to deliver to the defendants a "registrable instrument of transfer" and the defendants were not required to pay the outstanding purchase monies until 30 days had expired after the receipt of a statement in accordance with s 22(1) (if later than the time agreed for settlement): s 22(4). Again upon that premise, the settlement was effectively postponed until there was compliance with s 22. Section 25 permits a purchaser to avoid the contract where there has not been given a statement as required by s 22, if the purchaser is materially prejudiced by the failure to give such a statement: s 25(1). The defendants plead that the plaintiff's refusal to give a statement under s 22 has had a "serious effect" upon them in that the defendants have:
- “(a) lost their ability to consider whether the changes made to the Lot are such as to give them a right to avoid the Contract;
 - (b) lost their ability to exercise the rights granted to them under the LSA;
 - ...
 - (d) lost their ability to consider (during the 30 day period provided) whether they have been materially prejudiced by the Plaintiff's failure to give a statement under s 22;

(e) lost their ability to check the title as registered.”¹¹

But there appears to be ultimately no pleaded case that the defendants were materially prejudiced, for the purposes of s 25, by the absence of a s 22 statement. There is a plea of material prejudice upon the alternative premise that the letter from the plaintiff’s solicitors of 21 April 2009 was a s 22 notice. The defendants pleaded that they were materially prejudiced for the purposes of s 25 by inaccuracies in that statement because it said nothing about the variations to the areas of the balconies. In all of this, there is no demonstrated material prejudice from which the defendants could have avoided the contract. Had such a statement been required and duly provided, it would have informed them of changes to the dimensions of the balconies, which they do not suggest had any significance for the enjoyment or value of the apartment.

[32] The plaintiff argued that any right to avoid the contract was lost by the defendants electing to call for the performance of the contract by a letter from their solicitors of 5 May 2009. By that letter, they required the plaintiff to immediately deliver an executed transfer pursuant to clause 3.3 of the contract. On behalf of the defendants, it was argued that they were not put to an election as at 5 May 2009, so that they should not be regarded as having elected by that correspondence. The first of those matters might be accepted. But if they were not bound to then elect, it does not follow that there was in fact no election.

[33] In *Agricultural and Rural Finance Pty Ltd v Gardiner*,¹² Gummow, Hayne and Kiefel JJ held that “the exercise, despite knowledge of a breach entitling one party to be discharged from its future performance, of rights available only if the contract subsists, will constitute an election to maintain the contract on foot.” In this case there was no issue as to the defendants’ knowledge of the relevant facts because at least by 5 May 2009 they knew that the building which had been constructed had balconies of these different areas and they knew what they had or had not received insofar as s 22 was concerned. The defendants argued that they did no more than keep open the possibility of settlement, by calling for the transfer to be provided for stamping. But in doing so they invoked clause 3.3 of the contract and thereby required the plaintiff to perform the contract. That was a right only available to them whilst the contract subsisted and in my view would have constituted an election to affirm the contract had I concluded that the defendants had a right to avoid it.

Conclusion

[34] The plaintiff has established its right to specific performance. It will be ordered that the contract between the plaintiff and the defendants dated 2 July 2007 be specifically performed. I will hear the parties as to other orders, including costs.

¹¹ Paragraph 25 of the Second Further Amended Defence.

¹² (2008) 238 CLR 570, 589.