SUPREME COURT OF QUEENSLAND

CITATION:	*Coast Corp Pacific Pty Ltd v Stockland Development Pty Ltd* [2018] QSC 305
PARTIES:	**COAST CORP PACIFIC PTY LTD ACN 137 110 144** (plaintiff) **v** **STOCKLAND DEVELOPMENT PTY LTD ACN 000 064 835** (defendant)
FILE NO:	SC No 12645 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18, 19, 20 and 21 June 2018
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The plaintiff's claim is dismissed.** **The court directs that:** **2. The parties file and serve any affidavits and submissions on costs by 24 December 2018.** **3. The parties file and serve any responsive submissions on costs by 25 January 2019.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where plaintiff purchased land – where contract provided that defendant to construct stormwater discharge points – where contract provided that upon construction of the discharge points the plaintiff will be entitled to discharge stormwater through "future stormwater retention basin and pond … which will be constructed by or on behalf of the vendor" – whether "which will be constructed" identifies the infrastructure or creates obligation to construct

INTERPRETATION – ADMISSIBILITY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS – WHEN EVIDENCE ADMISSIBLE – TO SHOW MEANING OF TERMS – IN GENERAL – where plaintiff seeks to rely on evidence of negotiations in construction of clause relating to stormwater discharge points – whether evidence assists construction of clause

INTERPRETATION – ADMISSIBILITY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS – MATTERS PARTICULARLY RELATING TO CONTRACT – COLLATERAL CONTRACTS – CONSISTENCY OF COLLATERAL CONTRACT WITH MAIN CONTRACT – where plaintiff alleges statements by defendant in relation to its proposed construction of a wetlands site on adjacent lot were promissory not mere representations – where plaintiff alleges a collateral contract obliging defendant to construct wetlands site – where defendant provided written confirmation that "the scope of works … has not changed" and "[as] confirmed … [it] won't be too dissimilar from what we have represented" – whether statements promissory rather than representational – where contract contains entire agreement clause – where entire agreement clause does not expressly exclude "collateral contracts" – whether entire agreement clause applies to exclude collateral contract

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – LOSS OF PROFITS – where plaintiff alleges loss arising from reduced sale prices of developed townhouses due to reduction in amenity of view compared to if wetlands site had been constructed by defendant in accordance with plan – where expert evidence adduced from valuers for each side – what is an appropriate allowance for reduced sale prices

Air New Zealand Ltd v Nippon Credit Bank Ltd [1997] 1 NZLR 218, cited
Apple and Pear Australia Ltd v Pink Lady America LLC (2016) 343 ALR 112, cited
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424, considered
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304, cited
Chappel v Hart (1998) 195 CLR 232, cited
Cherry & Anor v Steele-Park (2017) 351 ALR 521, cited
Clark v Macourt (2013) 253 CLR 1, cited
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, cited
Commonwealth Steel Co Ltd v BHP Billiton Marine & General Insurance Ltd [2018] NSWCA 242, cited

Commonwealth v Arklay (1952) 87 CLR 159, cited
De Lassalle v Guildford [1901] 2 KB 215, cited
Duffy v Minister for Planning (2003) 129 LGERA 271, cited
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, cited
Gould v Vaggelas (1985) 157 CLR 215, cited
Hanflex Pty Ltd v NS Hope & Associates [1990] 2 Qd R 218, cited
Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348, considered
Hoyt's Pty Ltd v Spencer (1919) 27 CLR 133, considered
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, cited
JJ Savage & Sons Pty Ltd v Blakney (1970) 119 CLR 435, cited
John v Price Waterhouse [2002] EWCA Civ 899, cited
Johnson Property Group Pty Ltd v Thornton [2015] NSWSC 1389, cited
Kizbeau Pty Ltd v WG & B Pty Ltd (1995) 184 CLR 281, cited
L'Estrange v F Graucob Ltd [1934] 2 KB 394, cited
Lindley v Lacey (1864) 17 CB (NS) 578; 144 ER 232, cited
MacDonald v Schinko Australia Pty Ltd [1999] 2 Qd R 152, cited
Maurici v Chief Commissioner for State Revenue (2003) 212 CLR 111, cited
McMahon v National Foods Milk Ltd (2009) 25 VR 251, not applied
Robertson v Kern Land Pty Ltd (1989) 96 FLR 217, cited
Rosenberg v Percival (2001) 205 CLR 434, cited
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, cited
Shepperd v Council of the Municipality of Ryde (1952) 85 CLR 1
Spencer v Commonwealth (1907) 5 CLR 418, cited
Stevens v McHugh (1951) 68 WN (NSW) 240, cited
Sykes v Midland Bank, Executor & Trustee Co Ltd [1971] 1 QB 113, cited
Valuer General v Fenton Nominees Pty Ltd (1982) 150 CLR 160, cited

COUNSEL: J Peden QC, with S Russell, for the plaintiff
G Beacham QC, with D Chesterman, for the defendant

SOLICITORS: Russells for the plaintiff
Corrs Chambers Westgarth for the defendant

[1] **JACKSON J:** When Peter Corcoran caused the trustee of his superannuation trust,[1] to purchase a vacant townhouse development site from the defendant he expected that the defendant would carry out proposed works on an adjacent lot,[2] described as the "Wetlands Site", substantially in accordance with a plan, described as the "Wetlands Plan", subject to some orally agreed or indicated variances ("Wetlands Plan Works"). The purchased land was Lot 43, 47 Witheren Circuit, Pacific Pines,[3] Pacific Pines ("Lot 43") and the price was $1,250,000.

[2] In particular, Mr Corcoran expected that the townhouses would have an attractive view over the developed Wetlands Site, which would enhance their value. First, that was because he expected that all or nearly all of the trees on the Wetlands Site that obscured views from Lot 43 to the east would be removed. Second, that was because he expected that the attractive landscape features shown on the Wetlands Plan would improve the visual amenity of the Wetlands Site. Mr Corcoran's expectations were created by a series of oral representations and one written representation made by employees of the defendant with whom he negotiated over the purchase. There is no dispute of substance that some or all of the alleged representations were made.

[3] It is not suggested that the representations to the effect that the Wetlands Plan Works would be carried out substantially in accordance with the Wetlands Plan were made unreasonably at the time. However, as events transpired after the purchase, the defendant did not carry out any of the proposed Wetlands Plan Works. In the result, the views from the constructed townhouses on Lot 43 over the Wetlands Site were not substantially altered from their state when the contract was made and the Wetlands Site remained mostly as an area of natural bushland.

[4] The plaintiff claims damages for breach of contract by reason of the defendant's failure to carry out the Wetlands Plan Works substantially in accordance with the Wetlands Plan and alleges that it has suffered loss or damage in selling the townhouses because, as constructed, they had inferior views and a reduced amenity when compared with that which they would have had if the proposed work had been carried out.

[5] The principal issues between the parties are whether any representations that were made constituted contractual promises by the defendant to carry out the Wetlands Plan Works substantially in accordance with the Wetlands Plan and, if so, whether and to what extent the trustee suffered any loss by reason of the breach or breaches of contract. The plaintiff brings the claim for damages for breach of contract as successor to the original trustee's rights by reason of its appointment as replacement trustee.[4]

Pacific Pines and the Wetlands Site

[6] Pacific Pines is a suburb located south of Studio Village and north of Gaven on the western side of the M1 Motorway. It was developed by the defendant as a master planned

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1 Corcoran Construction Pty Ltd.
2 Lot 997 on SP 194054, County Ward, Parish Barrow, Title Reference 50680093.
3 Lot 43 on SP 194054, County Ward, Parish Barrow, Title Reference 50680088
4 *Trusts Act* 1973 (Qld), s 15.

community. The overall development was planned to be and was undertaken in several stages.

[7] The overall development included plans for stormwater management. They included temporary sediment catchment basins. The Wetlands Site was the subject of those plans. A construction dam was constructed towards the northern end of the Wetlands Site that retained water from the natural watercourse. The dam was used as a source of water during construction in the area.

[8] At a time when it was the proprietor of the Wetlands Site, the defendant obtained approval to carry out the work shown on a plan entitled "QE1 Wetland Landscape Plan", being drawing number 975719–04 Issue B ("Wetlands Plan"). The Gold Coast City Council's (the "Council") stamp of approval for those works to be carried out in accordance with the plan was dated 10 April 2003.

[9] On 22 August 2007, as part of the overall development of Pacific Pines and the dedication of parkland and reserves, the defendant transferred the Wetlands Site to the Council. From that time, the Council was the proprietor of the land.

[10] In April 2009, the defendant commenced marketing of a number of remaining development sites within Pacific Pines, including Lot 43.

[11] Among others, the defendant retained Peter Tesic as an agent to market Lot 43 on the terms of a written agreement styled the "Consultancy Brief".

Negotiations – first stage

[12] In April 2009, Mr Tesic contacted Mr Corcoran, who was one of the leads identified in the Consultancy Brief, and who he knew personally from prior dealings. Mr Tesic took Mr Corcoran to a number of sites, including Lot 43.

[13] On 27 April 2009, Mr Corcoran met with Mr Tesic and two employees of the defendant, Ben Byrne and John Collins, although Mr Collins was not present at the beginning of the meeting.

[14] During the meeting, Mr Corcoran said that he was concerned about the trees on Lot 43 and the Wetlands Site. Mr Byrne said that as part of its infrastructure agreement with the Council, the defendant was obliged to formalise an engineered bio-retention basin on the Wetlands Site where the existing construction dam was in front of the site.

[15] Mr Corcoran asked what was going to happen with the trees between Lot 43 and the Wetlands Site. Mr Byrne responded to the effect that the trees would all have to go. The level of earthworks the defendant would have to do to construct the wetlands was extensive and the defendant would not be able to do the earthworks without the trees being removed. Mr Byrne said further that the works were fully engineered and fully landscaped and there was a path that was proposed to be connected to Lot 43. He added that the defendant would be spending $750,000 to $800,000 to carry out the works.

[16] Mr Byrne further said that the defendant had recently finished a development similar in nature at Highland Park Reserve and that Mr Corcoran should go to and look at that to give him a good idea of what the final outcome would be. As well, he said that due to the shape of Lot 43, townhouses on the site should be positioned to take full advantage of the view across the wetlands and to obtain access via the wetlands to a retail and commercial centre that was zoned across Pitcairn Way.

[17] At some point in the conversation, Mr Byrne said to Mr Corcoran that he would provide a copy of the approved plan for the Wetlands Site to Mr Corcoran.

[18] On 28 April 2009, Mr Corcoran sent an email to Mr Tesic containing a number of questions for the defendant. One of them was:

> "F - Confirm that the construction dam will be fully rehabilitated and converted into a wetland and what is proposed for remnant bush/regrowth between the site and the proposed wetland"

[19] On 30 April 2009, Mr Tesic handed a copy of the Wetlands Plan to Mr Corcoran, which had been provided to him in electronic form by the defendant, for that purpose.

[20] On 1 May 2009, Mr Corcoran caused the trustee to make an offer to the defendant to buy Lot 43, on written terms in summary form.

[21] On 6 May 2009, Mr Corcoran and Mr Tesic met Mr Byrne, Mr Collins and others at the defendant's offices.

[22] During the meeting, the Wetlands Plan was discussed. Mr Byrne ran over the plan, what was to be provided and what the proposed works would look like or would resemble. He said that the planned work would be similar in stature to the Highland Park Reserve.

[23] Mr Corcoran referred to his written question (question F) about what was proposed for remnant bush regrowth between the site and the proposed wetland and said that he had not got an answer on what was going to happen with the trees. Mr Byrne said that all the trees would be going. The level of engineering works that would have to be done was such that the trees would not be able to be retained. Mr Collins said that some of the larger trees may be retained, depending on the earthworks, but at that stage it looked like they were all going.

[24] During the meeting, there was some discussion about the proposed high flow bypass channel marked on the Wetlands Plan. The defendant's representatives said they were unsure whether the bypass channel may have to be shifted from the eastern side of the Wetlands Site to the western side.

[25] Further, Mr Byrne said words to the effect that the defendant intended to complete all work at Pacific Pines by December 2010, as part of the process of the defendant exiting Pacific Pines.

[26] On 18 May 2009, Mr Tesic forwarded a draft contract prepared by the defendant's solicitors to Mr Corcoran.

[27] On 25 May 2009, Mr Byrne sent an email to Mr Corcoran attaching a further version of the Wetlands Plan.

[28] Mr Corcoran's trustee company made an offer for Lot 43 and another property. However, the negotiations at that time did not result in any concluded agreement or contract.

Negotiations – second stage

[29] In September 2009, Mr Tesic again approached Mr Corcoran about Lot 43. Negotiations in earnest resumed. In particular, Mr Corcoran sought the defendant's agreement, as a term of the proposed contract, to build a wall shown on the Wetlands Plan that was to be located on the Wetlands Site immediately adjacent to and following the boundary between Lot 43 and the Wetlands Site. The wall was depicted as a boulder retaining wall on the Wetlands Plan, but there was no information as to the relative level or height of the wall.

[30] Mr Corcoran asked if the wall could be constructed as a reinforced concrete block retaining wall, in lieu of the boulder retaining wall marked on the Wetlands Plan. The defendant considered the proposition.

[31] On 22 October 2009, Mr Byrne sent an email to Mr Corcoran attaching a plan that had been prepared of a proposed reinforced block retaining wall.

[32] On 2 November 2009, Mr Byrne sent an email to Mr Corcoran informing him that the defendant's cost estimate to build a reinforced concrete block retaining wall instead of a mixed rock wall/batter retaining system was $80,000 above the original budget. He proposed either that the purchaser agree to construct the retaining wall or that the purchase price be increased by $80,000 for the defendant to construct it.

[33] On 2 November 2009, Mr Corcoran responded, in effect deleting the suggestion of a reinforced concrete block retaining wall and requesting that the originally proposed rock wall be constructed to an agreed RL25.5 at the top.

[34] On 3 November 2009, it appears likely that Mr Corcoran met Mr Byrne but there was no evidence as to what was said at that meeting.

[35] On 3 November 2009, Mr Corcoran sent another email to Mr Byrne reiterating an earlier proposal about the level of the top of the proposed rock retaining wall. Mr Corcoran also requested that the defendant consider still providing a footpath between the eastern boundary of Lot 43 and the proposed high flow drain should the drain be located to the west of the Wetlands Site, rather than on the east as shown on the Wetlands Plan.

[36] On 5 November 2009, Mr Byrne sent an email to Mr Corcoran setting out the defendant's final position on the commercial terms for for the sale of the property. The purchase price

would be $1,250,000 (excluding GST), a reduction from $1,300,000 previously negotiated. That was on the basis that the purchaser would construct the rock retaining wall along the eastern boundary or Lot 43. Mr Byrne continued:

> "Management have a firm position on not building the retaining wall on this site, hence the adjusted price of $1.25M (ex. GST). We don't see any operational/planning issues by adopting this structure, as construction of the wall (and related works) can be undertaken within the boundary of the [Lot 43] site exclusively. If access is required onto the adjoining wetland, it will be a process of Stockland and yourself working together to ensure our programmes align."

[37] On 6 November 2009, Mr Corcoran sent an email to Mr Byrne accepting the commercial terms.

[38] On 13 November 2009, the defendant's solicitor sent a draft contract of sale for Lot 43 to the trustee's solicitor.

[39] On 20 November 2009, the trustee's solicitor sent an email attaching a letter to the defendant's solicitor requesting amendments to the draft contract. No amendments were requested in relation to the Wetlands Plan Works on the Wetlands Site.

[40] On 25 November 2009, Mr Corcoran telephoned Mr Byrne. Mr Corcoran said that he wanted written confirmation that the proposed works for the Wetlands Site would be constructed.

[41] On 25 November 2009, Mr Byrne sent an email to Mr Corcoran headed "Contract Execution" stating:

> "Further to our discussion today, the scope of works for the wetland upgrade adjoining [Lot 43] has not changed. As both John Collins and I have confirmed, the configuration of the works may change but [it] won't be too dissimilar from what we have represented over the past few months."

[42] On 27 November 2009, the defendant's solicitors sent a further draft contract of sale to the solicitors for the trustee, amended in accordance with the correspondence between the solicitors.

[43] On 2 December 2009, the defendant's solicitors sent the original contract of sale executed by the trustee and by Mr Corcoran as guarantor to the defendant for execution. It was subsequently executed by the defendant on 18 December 2009.

Terms of the contract

[44] Clause 48 of the contract of sale provided as follows:

> "**48 Overland Drainage and Sewerage Rights**
>
> **48.1 Purchaser's acknowledgement**

(a) The Purchaser acknowledges and agrees that:

(i) the Vendor may have, prior to the Contract Date, constructed sewerage lines upon or under the Property. The Purchaser will take no objection to the continued existence of the sewerage lines and will not directly or indirectly cause interference with the operation of any sewerage line in any manner or form.

(ii) the Purchaser will execute all documents and do any acts and things as may be necessary or required from time to time by the Vendor to ensure that the rights of the Vendor under this clause 48 are confirmed and ratified including, where required, and without limitation, execute any easement if such document is required by the Local Government or the Vendor.

48.2 Overland discharge

(a) Subject to clause 48.2(b), following completion of the Contract, the Vendor agrees to construct the Discharge Points from the Land to and over the Vendor's Adjoining Property that is adjacent to the Land (**Adjacent Property**). The parties acknowledge and agree that upon construction of the Discharge Points, the Purchaser will be entitled to discharge stormwater through the future stormwater retention basin and pond (**Infrastructure**), which will be constructed by or on behalf of the Vendor on the Adjacent Property. The Purchaser's entitlement commences on the date the Vendor notifies the Purchaser, in writing, of completion of construction of the Infrastructure.

(b) Within 90 days of the Contract Date, and before the Purchaser lodges the Application Documents (as approved by the Vendor under clause 44.1(c)) with the Local Government under clause 44.1(d), the Purchaser must give written advices to the Vendor of the approximate:

(i) pipe size of the Discharge Points; and

(ii) proposed location of the Discharge Points on the boundary of the Land,

on the basis that the Discharge Points:

(iii) service no more than 36 attached dwellings on the Land; and

(iv) are reasonably proximate to the Adjacent Property.

(c) The Purchaser must act reasonably in relation to determining the pipe size and location of the Discharge Points under clause 48.2(b).

(d) The Vendor is not required to construct the Discharge Points by any nominated date. The Vendor agrees that the Discharge Points will be constructed before the date which is the later of:

(i) the Vendor exiting the "Pacific Pines Estate" as owner of the Vendor's Adjoining Properties;

(ii) the Vendor complying with all conditions of the Local Government's development approvals for the "Pacific Pines Estate" (**Pacific Pines Approval**) where the Vendor is still obliged to comply with any conditions of the Pacific Pines Approval to service, tidy up or otherwise maintain the works or infrastructure constructed by or on behalf of the Vendor pursuant to the Pacific Pines Approval (including, but not limited to, conducting any ancillary works required by the Local Government or other relevant Authority to comply with the Vendor's ongoing obligations under the Pacific Pines Approval); or

(iii) the expiry of the last on-maintenance period nominated by the Local Government for completion of works in the "Pacific Pines Estate" constructed by or on behalf of the Vendor pursuant to the Pacific Pines Approval.

(e) If the Purchaser commences any stage of the Purchaser's Development, the Vendor agrees that the Adjacent Property may receive any overland stormwater flow until the Discharge Points are constructed. The Vendor will give written notice to the Purchaser once the Discharge Points have been constructed.

(f) The Vendor may locate the Discharge Points in a different area on the Land (but as close to the location identified by the Purchaser under clause 48.2(b) as is practicable) if:

(i) it is a requirement of any Authority; or

(ii) discharge of stormwater from the Discharge Points to the Adjacent Property would be more effectively achieved for the Vendor and/or the Purchaser."

[45] The "Discharge Points" referred to in clause 48.2 were defined in clause 35.1 of the contract as follows:

> "**Discharge Points** means two stormwater discharge points of a size and location determined under clause 48.2."

[46] The surrounding circumstances mutually known to the parties at the time of the contract included that Lot 43 was a block that sloped from west to east so that the natural run-off

or overflow from Lot 43 drained on to the Wetlands Site across the boundary between the two lots. It was also mutually known that the defendant proposed to construct the Wetlands Plan Works on the Wetlands Site in accordance with the Wetlands Plan, subject to the possible variations that had been discussed.

[47] Apart from clause 48.2, no other clause of the contract of sale dealt with either the Wetlands Site or the proposed works in a relevant way.

[48] Clause 36.1 of the contract provided:

> "**36.1 Condition and state of repair**
>
> The Purchaser acknowledges and agrees that:
>
> (a) in entering into this Contract, the Purchaser:
>
> (i) has relied entirely upon the Purchaser's own enquiries and inspection of the Property;
>
> (ii) is satisfied in all respects as to the nature, quality, condition and state of repair of the Property (including the soil and sub-strata of the Property) and the purposes for which the Property may be lawfully used; and
>
> (iii) has not relied upon any warranty (other than an express warranty contained in this Contract);
>
> (b) the Vendor is not liable as a result of any information, statement, warranty (other than an express warranty contained in this Contract), representation, letter or documents or arrangement or any conduct provided, made or done on behalf of the Vendor; and
>
> (c) the Property is sold and accepted by the Purchaser subject to all defects (whether latent or patent) in its present state of repair, condition, dilapidation and infestation including the presence of any Contaminant in, on, under or emerging from the Property or groundwater."

[49] Clause 38 of the contract of sale provided in part:

> "**38 Entire agreement**
>
> **38.1 Entire agreement**
> To the extent permitted by law, in relation to the sale of the Land by the Vendor to the Purchaser, this Contract:
> (a) embodies the entire understanding of the parties, and constitutes the entire terms agreed on between the parties; and
> (b) supersedes any prior written or other agreement between the parties.

38.2 No warranty by Vendor

Without limiting this clause 38, the Vendor does not warrant or represent that any information or statements contained or referred to in any brochure, advertisement or other document made available by or on behalf of the Vendor in connection with this sale or this Contract is accurate or complete.

38.3 Warranty by Purchaser

The Purchaser acknowledges and agrees that no warranty or representation is given (whether express or implied) by the Vendor or anyone on behalf of the Vendor as to:

(a) any financial return or income that can be derived from the Property;

(b) any use permitted by law or any development to which the Property may be put;

(c) the amenity or neighbourhood in which the Property is located; …"

[50] On or about 5 May 2010, the contract of sale was settled.

Construction of the townhouse development and the Wetlands Site

[51] On 4 May 2010, the trustee made application to the Council for a development approval for Lot 43 for a material change of use and operational works. The proposed development was for 34 attached dwellings being townhouses.

[52] In accordance with clause 44 of the terms of the contract of sale, the trustee's application was required to be made and was made with the consent or subject to the disapproval of the defendant.

[53] On 23 June 2010, the Council sent an information request to the trustee. Item 8 thereof noted that the proposal involved the construction of townhouses in close proximity to the waterway of the wetland and requested the trustee to provide a buffer from the waterway in accordance with Performance Criterion 8 of the Natural Wetlands and Natural Waterways Code ("Performance Criterion 8"), with the buffer to be measured from the top of the high bank, and to be identified on an amended plan of development. In substance, the request was for a buffer of not less than 30 metres width. Protracted dealings and delays followed. It is unnecessary to set them out.

[54] On 17 November 2010, the defendant made an application to the Council for a development approval for the Wetlands Site for operational works to remove trees from the Wetlands Site in accordance with an attached vegetation management plan.

[55] On 13 December 2010, the Council made an information request upon the defendant's application. It stated that the proposal in the vegetation management plan did not correspond with the approved open space management plan (being the Wetlands Plan or another plan or plans in the same series of plans), requested an amended open space management plan, and noted that an operational works public landscape application would be required once that plan was finalised. The information request also sought a

copy of a stamped approved plan for the QE1 Wetland Layout, the subject of the proposed tree clearing. Apart from the Wetlands Plan, there was no such stamped approved plan adduced in evidence. As well, the information request sought amendments to the vegetation management plan as submitted. Negotiations between the Council and the defendant proceeded thereafter.

[56] On 8 March 2011, the defendant responded to the Council's information request.

[57] On 14 April 2011, the defendant requested that the application for tree clearing operational works on the Wetlands Site be put on hold until further notice.

[58] On 21 April 2011, the Council sent a further information request to the defendant on the application for development approval for operational works to remove trees on the Wetlands Site.

[59] Meanwhile, from May 2011, the defendant considered different options for the development of the Wetlands Site, including leaving it largely in its then current state. This consideration was informed by views expressed by Council staff that it may be desirable to leave the Wetlands Site and its trees as they were.

[60] On 3 August 2011, Mr Byrne sent an email to Mr Corcoran attaching information and material relevant to Performance Criterion 8 upon the trustee's application for development approval for Lot 43 in relation to removal of any condition for a proposed buffer from the development approval for the subdivision.

[61] By 25 October 2011, the defendant had decided to propose the course to Council that it may be desirable to leave the Wetlands Site and its trees as they were, and it did so by an email from the defendant to the Council sent on 6 December 2011.

[62] On 24 January 2012, Mikalah Malone of the Council sent an email to the defendant's consultants requesting whether a further extension to the information response period was required for the development approval application for operational works to remove trees from the Wetlands Site. The defendant did not request an extension and the application lapsed.

[63] On 1 April 2012, the trustee made a second application for a development approval for Lot 43 for a material change of use and operational works in similar terms to the trustee's earlier application.

[64] On 26 October 2012, the Council issued a decision notice to the trustee upon the trustee's second application for a development approval for Lot 43 for a material change of use and operational work. The decision notice did not require a buffer zone on the eastern boundary of Lot 43, as in accordance with Performance Criterion 8, but did require compensatory planting due to the loss of 50 protected size trees from the portion of Lot 43 located adjacent to the Wetlands Site.

[65] Ultimately, the construction of the townhouses commenced in January 2016 and was completed in November 2016.

Claim under clause 48.2(a)

[66] The plaintiff alleges that by clause 48.2(a) of the contract of sale the defendant agreed to carry out the Wetlands Plan Works under the Wetlands Plan, subject to minor agreed or intimated variations.

[67] The plaintiff alleges that on the proper construction of the contract of sale, the "Infrastructure" referred to in clause 48.2(a) is the proposed Wetlands Plan Works under the Wetlands Plan, included "clearing of substantially all of the trees" on the western side of the Wetlands Site to a standard comparable to the Highlands Reserve. The plaintiff relies on the negotiations leading up to the contract as particulars of its alleged proper construction.

[68] The construction of clause 48.2(a) must begin with the text. Sometimes, in the scramble to construe a written commercial contract by reference to applicable common law principles of interpretation or extrinsic evidence outside the terms of the contract, there is a risk that too little attention is paid to the ordinary meaning of the text of the written contract itself appearing in the context of the balance of the contract.

[69] In the cognate field of discourse of the interpretation of statutes, the High Court has emphasised over and again that the task of statutory construction must begin with and must usually end with the text. The same emphasis does not appear as often in statements of the principles of interpretation applicable to the construction of commercial contracts, but the same emphasis applies, as *Cherry & Anor v Steele-Park*[5] confirms. As well, in the celebrated statement of principle of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[6] there is recognition "that the words of a contract are ordinarily to be given their plain and ordinary meaning", although that was qualified shortly thereafter by the recognition that "it has frequently been acknowledged that there is more to the construction of the words of written instruments than merely assigning to them their plain and ordinary meaning".[7]

[70] It is expressly provided that the heading of a clause in the contract of sale does not affect the interpretation. The first sentence of clause 48.2(a) is a promise by the defendant to construct the "Discharge Points" from Lot 43 and over to the "Adjacent Property". The definition of "Adjacent Property" is clumsy. It refers to another defined term, the "Vendor's Adjoining Property". The term "Vendor's Adjoining Properties" is defined to mean:

> "any properties owned by the Vendor which are located near the Property and are comprised within the "Pacific Pines Estate" from time to time."

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5 (2017) 351 ALR 521, 537-538, [72]-[75].
6 (1982) 149 CLR 337, 347.
7 (1982) 149 CLR 337, 347-348.

[71] As stated previously, the Wetlands Site was transferred to the Council by the defendant in 2007. It did not answer the description of land owned by the defendant in the contract of sale. Nevertheless, having regard to clause 48.2(a) in the context in clause 48.2 generally, there can be no doubt that the promise made by the defendant in the first sentence of clause 48.2(a) was to construct the Discharge Points from Lot 43 to the Wetlands Site.

[72] The second sentence of clause 48.2(a) is an agreement by the parties that following construction of the Discharge Points, the purchaser will be entitled to discharge stormwater through them and the future stormwater retention basin and pond. The defined expression "Infrastructure" is a reference to "the future stormwater retention basin and pond".

[73] The third sentence of clause 48.2(a) is an agreement between the parties as to when that entitlement commences. The date identified is when the defendant notifies of completion of construction of the Infrastructure.

[74] The plaintiff submits that the second sentence of clause 48.2(a) contains a further operative promise by the defendant that the future stormwater retention basin and pond will be constructed. The plaintiff's argument is that the words "which will be constructed by or on behalf of the Vendor on the Adjacent Property" operate as a promise by the defendant to construct the future stormwater retention basin and pond or to have them constructed. However, on the ordinary meaning of clause 48.2(a) the words relied on by the plaintiff do not operate as an express direct promise by the defendant to the purchaser to do the proposed work.

[75] The second sentence of clause 48.2(a) contains a promise (by way of acknowledgment and agreement) that the plaintiff will be entitled to discharge stormwater through the future stormwater retention basin and pond. That promise is to operate upon construction of the Discharge Points.

[76] As a matter of grammar, the relative clause "which will be constructed by or on behalf of the Vendor on the Adjacent Property" does not modify the verb "acknowledge and agree" in the principal clause of the second sentence. The relative clause is introduced by the relative pronoun "which" that refers to the future retention basin and pond. The relative clause defines the future stormwater retention basin and pond as one to be constructed by or on behalf of the defendant on the Wetlands Site through which the parties acknowledge and agree that the plaintiff will be entitled to discharge stormwater.

Prior negotiations and surrounding circumstances

[77] Perhaps to overcome that difficulty in the ordinary meaning of clause 48.2(a), the plaintiff seeks to rely on evidence of the negotiations between the parties as extrinsic evidence admissible in aid of the construction of the clause. The plaintiff seeks to deploy the prior negotiations in two ways. First, it seeks to fasten upon changes that were made to the drafting of clause 48.2(a) in settling the terms of the contract of sale as supporting it. Second, it seeks to rely on the oral negotiations and the representations previously set out as supporting it.

[78] There is great difficulty in identifying the true limits of the use to which evidence of the negotiations between the parties may be deployed for such a purpose.[8] However, putting that question to one side, the negotiations in the present case do not assist the plaintiff in the construction of clause 48.2(a).

[79] On 1 May 2009, as previously stated, Mr Corcoran caused an offer to be made for Lot 43 on summary written terms. Special Condition 11 of that offer provided that the defendant was "to construct two piped stormwater discharge points from the site into the proposed adjoining wetland area during the construction of the wetlands. The pipe sizing and positioning shall be determined during the design stage of the proposed residential developments."

[80] On 18 May 2009, as previously stated, Mr Tesic forwarded a draft contract prepared by the defendant's solicitors to Mr Corcoran. Clause 48.2(a) provided:

> "Following completion of the Contract, the Vendor agrees to construct a Discharge Point from the Land to and over the Vendor's Adjoining Property which is immediately adjacent to the Land (**Adjacent Property**). The parties acknowledge that upon construction of the Discharge Point, the purchaser will be entitled to discharge stormwater through the future stormwater retention basin and pond which will be constructed at a point in the future on the Adjacent Property."

[81] On 2 November 2009, Mr Corcoran sent an email to Mr Byrne saying:

> "To be fair to me I havent got a clue what is happening on the wetland side of the boundary and would like a detailed update
>
> including any updated plans for the wetlands
>
> I am sure you will be able to enlighten me with a brief round table and I will be able to provide you with an answer to meet your deadline."

[82] On 3 November 2009, Mr Corcoran sent an email to Mr Byrne confirming he would be proceeding to purchase the site on the previously agreed terms. He continued:

> "In respect of the redesign of the wetlands (advised on 3/11/09) the goal posts have shifted somewhat. **Whilst the wetland is not connected to the intended contract**, it was originally presented to us very much linked to the site which was what made the site attractive to us initially." (emphasis added)

[83] On 5 November 2009, Mr Byrne sent an email to Mr Corcoran setting out the final position of the defendant on the commercial terms for the proposed sale.

[84] On 6 November 2009, Mr Corcoran sent an email to Mr Byrne accepting those commercial terms.

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[8] For examples, see *Commonwealth Steel Co Ltd v BHP Billiton Marine & General Insurance Ltd* [2018] NSWCA 242, [34]; *Cherry & Anor v Steele-Park* (2017) 351 ALR 521, 537-538 [71]-[85]; *Apple and Pear Australia Ltd v Pink Lady America LLC* (2016) 343 ALR 112, 155 [137]-[138].

[85] On 13 November 2009, the defendant's solicitor sent an email to the plaintiff's solicitor attaching a draft contract of sale, containing clause 48.2(a) in the form it took in the final contract, as previously set out.

[86] Neither clause 48.2(a) nor any other term of the contract was amended to reflect the agreement that the plaintiff would construct any retaining wall on Lot 43 between the eastern boundary of Lot 43 and the Wetlands Site. Nor were they amended in any way following Mr Corcoran's conversation with Mr Byrne on 25 November 2009 and Mr Byrne's email sent to Mr Corcoran on that day.

[87] In my view, these negotiations do not show or evidence that the terms of clause 48.2(a) were adopted to reflect an agreement or mutually known fact that the defendant was promising to carry out the proposed works for the Wetlands Site in accordance with the Wetlands Plan. Even if admissible, the negotiations do not provide a basis for concluding that, contrary to the ordinary meaning of clause 48.2(a), the second sentence of that clause contains a promise by the defendant to the purchaser that the defendant will carry out the proposed works.

A collateral contract

[88] The plaintiff alleges in the alternative that the representations made that the defendant would do the Wetlands Plan Works on the Wetlands Site substantially in accordance with the Wetlands Plan constituted an agreement by way of collateral contract that in consideration of the trustee entering into the contract of sale, the defendant would:

(a) develop the Wetlands Site substantially in accordance with the Wetlands Plan;

(b) clear substantially all of the trees on the Wetlands Site;

(c) develop the Wetlands Site to a standard comparable to the work at Highlands Reserve; and

(d) finish the development of the Wetlands Site within a reasonable time.

[89] As particularised, this alleged collateral contract was made partly in writing, partly orally and was partly implied. To the extent it was oral, the plaintiff alleges that it was made at the meetings of 27 April 2009 and 6 May 2009, and by the telephone conversation between Mr Corcoran and Mr Byrne on 25 November 2009. To the extent it was in writing, the plaintiff alleges that it was evidenced by the Wetlands Plan, Mr Corcoran's written request on 28 April 2009 in item F, the further copy of the Wetlands Plan sent by Mr Byrne to Mr Corcoran on 25 May 2009, emails sent by Mr Corcoran to Mr Byrne on 2 June 2009, by Mr Byrne to Mr Corcoran on 4 June 2009, by Mr Byrne to Mr Corcoran on 25 November 2009 and some further emails sent during the course of the negotiations.[9] To the extent that it was implied, the plaintiff alleges that was by reason of the facts previously summarised as an inducement to the trustee to enter into the sale contract.

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[9] Emails from Mr Corcoran to Mr Byrne sent on 2 June 2009, from Mr Byrne to Mr Corcoran sent on 4 June 2009, from Mr Tesic to Mr Corcoran sent on 15 September 2009, and from Mr Byrne to Mr Corcoran sent on 22 September 2009.

[90] The defence denies the alleged collateral contract on the grounds that the alleged terms are based on representations which the parties did not intend to be promissory in character or a legally binding contract and, in any event, are inconsistent with clauses 36.1(b), 38.1, 38.2 and 38.3(c) of the contract.

[91] In the findings of fact previously made, I have described some of the statements made as representations. In order to deal with the first ground of defence, it is necessary to be more precise about what is a "representation".

[92] Nowadays, perhaps as a result of the language adopted first in s 51A of the *Trade Practices Act* 1974 (Cth),[10] it is unremarkable to characterise a statement as to what will happen in the future, whether it be a promise or a prediction, as a representation as to a future matter. At common law, however, in a number of relevant contexts, a "representation" was confined to a statement as to an existing matter, be it of fact or law. Consistently with that taxonomy, a statement as to what would happen in the future was held to be a representation only to the extent that it conveyed a representation of the maker's state of mind. In these reasons, in accordance with current practice, I have used the word "representation" to describe a statement as to a future matter that may or may not made by way of promise.

[93] When D says to P that something will happen in the future, the context may support the conclusion that the statement is made by way of D's present expectation and as a prediction, without any promise or assurance by D that it will happen.

[94] It is unnecessary to trace the history here, but the enforcement of an oral promise or assurance as a collateral contract or warranty to a main contract in writing was developed as a response to the parol evidence rule and the Statute of Frauds. Professors Greig and Davis,[11] described a collateral contract thus:

> "The theory was that an oral promise was made in consideration of the promisee entering into the main written agreement. It constituted a unilateral contract which bound the promisor to honour his promise if the promisee performed the designated act (that is, entered into the main contract). This separate, or collateral, contract was binding. Evidence could be given of its existence because it was distinct from the principal contract contained in the written document."[12]

[95] The difficulty in distinguishing between what amounts to a collateral contract or warranty, and what does not, does not yield to or profit from detailed analysis.

[96] So, in *JJ Savage & Sons Pty Ltd v Blakney*,[13] a statement made by the expert boat builder who built a vessel, as to its estimated top speed if powered by a nominated engine, was held to constitute an estimate that was merely representational and not promissory.

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10 Now see the *Australian Consumer Law*, s 4(2).

11 Greig and Davis, *The Law of Contract* (Law Book Co, 1987), 467.

12 *Lindley v Lacey* (1864) 17 CB (NS) 578; 144 ER 232; *De Lassalle v Guildford* [1901] 2 KB 215; *Stevens v McHugh* (1951) 68 WN (NSW) 240.

13 (1970) 119 CLR 435.

[97] Yet, in *Shepperd v Council of the Municipality of Ryde*,[14] statements made by the vendor and developer of a subdivision of land, as to the plans for the land use of the area surrounding the lot to be sold, including the location of two adjoining areas of parkland designated on the plans, were held to constitute a promise that the buyer would be able to enjoy the amenity to be provided by the adjoining areas of park.

[98] Yet again, in *Robertson v Kern Land Pty Ltd*,[15] statements made by the vendor of a lot of land, that the vendor would provide road access to the northern boundary of the lot to be sold at an approximate point by reference to a proposed subdivisional plan of surrounding land, were held to constitute a mere representation as to what the proposals, plans or intentions of the vendor then were, not a promise as to the location of the proposed access.

[99] It is unnecessary to go further to illustrate that the distinction between a statement that is promissory and a statement that is merely representational can be a fine one, made by reference to the particular facts and the evidence adduced in the particular case. In the present case, it is possible to characterise the defendant's employees' statements as merely representational, as statements of the defendant's obligation to the Council to carry out the proposed works on the Wetlands Site in accordance with the Wetlands Plan, and its intention to do so, rather than as a promise to the trustee that the defendant would do so.

[100] However, among the chronology of the facts relating to the relevant statements and conduct, the plaintiff relies on two circumstances as pointing towards the conclusion that the statements in the present case were promissory.

[101] First, in the context of discussions about executing the main contract, on 25 November 2009, Mr Corcoran telephoned Mr Byrne and requested written confirmation that the defendant would carry out the proposed work on the Wetlands Site in accordance with the Wetlands Plans, supporting the contention that the response in the form of the email sent by Mr Byrne to Mr Corcoran on 25 November 2009 was a promise or assurance. Against that, however, the language of the email is equivocal. It refers to the work that Mr Byrne and Mr Collins had previously represented would be carried out.

[102] Second, the plaintiff relies on the agreement made between Mr Byrne and Mr Corcoran that the purchase price of Lot 43 would be reduced by $50,000 because the defendant would not carry out the part of the proposed work shown on the Wetlands Plan as a rock retaining wall between the eastern boundary of Lot 43 and the Wetlands Site. The reduction of the purchase price suggests that the parties considered that the defendant was otherwise obliged to carry out that work. Against that, it was Mr Corcoran who, in September or October 2009, had proposed an additional term of the proposed contract of sale that the defendant carry out the work of constructing a concrete block retaining wall on that boundary. And it was Mr Corcoran in his email to Mr Byrne on 3 November 2009 who said that the Wetland was not connected to the intended contract.

[103] In the result, although it may not be necessary to form a concluded view as to whether the defendant's statements or conduct were promissory and not merely representational, I

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14 (1952) 85 CLR 1.
15 (1989) 96 FLR 217.

conclude in the plaintiff's favour that they were promissory to the extent of Mr Byrne's statement in writing to Mr Corcoran on 25 November 2009:

> "Further to our discussion today, the scope of works for the wetland upgrade adjoining [Lot 43] has not changed. As both John Collins and I have confirmed, the configuration of the works may change but [it] won't be too dissimilar from what we have represented over the past few months."

[104] A ground of defence was pleaded but not pressed in final submissions that the representations or assurances as to the proposed works were too vague and uncertain to be the subject of a collateral contract or warranty. In my view, the facts do not support it. In any event, I set out my summary views of the ground.

[105] First, there is nothing that makes a promise to carry out the Wetlands Plan Works on the Wetlands Site generally in accordance with the Wetlands Plan uncertain as a matter of contract law. Some of the features on that plan may require interpretation. It is also right to say that it is in the form of an approved concept plan, rather than a construction drawing. However, in my view, that does not make its content uncertain to the degree that it is incapable of being the subject of a contractual promise to do the proposed work shown on the plan.

[106] Second, it may be accepted that there were a number of features of the proposed Wetlands Plan Works on the Wetlands Plan that were potentially subject to variation, as discussed between the parties. One point was that Mr Collins said that some of the major trees may be retained on the Wetlands Site towards the western boundary, but his opinion was that probably they would all have to go. Another point was that the proposed high flow drainage channel might be moved from the location shown on the Wetlands Plan on the eastern side to the western side of the site. That possibility was mentioned earlier, but was probably the subject of discussion at the 3 November 2009 meeting. Whether or not Mr Corcoran was shown a revised or proposed plan of the relocation of the high flow drainage channel is not clear. But, in any event, that proposed change did not concern him. A third point is that it was not clear whether the proposed pathway on the western side of the Wetlands Site would be constructed. That was a matter raised earlier and then again by Mr Corcoran in negotiations in early November 2009. At that time, he was looking for a commitment by the defendant to construct it, which was not given, so far as the evidence revealed. In my view, none of these matters made the proposed works in accordance with the Wetlands Plans otherwise so vague as to be uncertain.

[107] In my view, it is unnecessary to discuss the other grounds of defence in greater detail because the defendant must succeed on the ground that the alleged collateral contract cannot stand with the express terms of the contract.

Clause 38 – an entire agreement clause

[108] As set out previously, clause 38.1 provides that the contract of sale embodies the entire understanding of the parties and constitutes the entire terms agreed upon between the parties. It further provides that the contract supersedes any prior written or other

agreement between the parties. Those matters are agreed "in relation to" a specified subject matter, namely the sale of the land by the defendant to the purchaser.

[109] The defendant submits that the alleged collateral contract constitutes a breach of clause 38.1 by the plaintiff, because its terms are not part of the entire terms embodied in and constituted by the contract of sale. The plaintiff submits that clause 38.1 does not apply for two reasons. First, the terms of the alleged collateral contract are not terms in relation to the sale of the land by the defendant to the purchaser. Second, the alleged collateral contract was entered into contemporaneously with the main contract, and is not a prior written or other agreement between the parties that is superseded by the main contract.

[110] In my view, on the ordinary meaning of clause 38.1, neither reason can be sustained. It is true that the terms of the collateral contract do not involve carrying out work on Lot 43. But, in my view, it does not follow that they are not terms agreed between the parties in relation to the sale of that land. Ex hypothesi, the collateral contract is one which would not have existed had the parties not entered into the contract of sale of Lot 43. At least to that extent, the terms of the collateral contract relate to the sale of the land. Second, the whole purpose of the collateral contract was to give the purchaser the benefit of the better views and other amenities that Lot 43 would have enjoyed by reason of the development of the Wetlands Site substantially in accordance with the Wetlands Plan. Terms agreed for that purpose relate to the sale of Lot 43 by the defendant to the purchaser. Without the sale of Lot 43, there would have been no reason to enter into the alleged collateral contract.

[111] The phrase "in relation to" is one which takes its meaning from the context in which it appears, but it is a form of expression which ordinarily denotes a wide meaning, subject to that context.

[112] The present context is one where the connection posed by the text is that "in relation to the sale of the land" the contract embodies the entire understanding of the parties and constitutes the entire terms agreed upon. As Davies JA said in *MacDonald v Schinko Australia Pty Ltd*,[16] the purpose of such a clause:

> "…is to exclude any… evidence either to prove terms additional to or different from the written instrument **or collateral contracts** or to construe the instrument in a way different from the meaning to be inferred solely from [the contract's] terms." (emphasis added)

[113] Having regard to the purpose of an entire agreement clause, the context in the present case does not suggest that the words "in relation to the sale of the Land" should be given a narrow meaning.

[114] Similarly, in my view, there is no reason to construe the provision in clause 38.1 that the contract supersedes any prior written or other agreement between the parties, as not extending to a collateral contract, because such a contract is made contemporaneously with the main contract as a matter of law. It is true that the consideration moving from the promisee who obtains the benefit of a collateral contract or warranty is the promisee's

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16 [1999] 2 Qd R 152, 156.

entry into the main contract with the promisor. But it is also true that the promise made by the promisor may have been made before the collateral contract becomes binding. There is no disconformity in treating such a promise as one previously made and as a prior agreement between the parties that is superseded by the contract.

[115] In oral argument, the plaintiff submitted further that an entire agreement clause, like clause 38, does not operate so as to exclude evidence of or a finding of collateral contract. This submission is not based on the ordinary meaning of the text of clause 38.1 but was advanced as a matter of construction of the contract of sale, based on the application of the relevant principles of interpretation.

[116] An entire agreement clause like clause 38.1 is a common provision in a formal written contract. Sometimes, such a clause is described as a "merger" clause. In my view, it is better to describe it as an entire agreement clause. It operates by way of mutual contractual promises. It may also operate as an implied or express rescission by agreement of a prior contract. However, it does not operate as a merger of prior rights or liabilities, in the way that a cause of action merges in a judgment.

[117] Some cases draw an analogy between an entire agreement clause and the parol evidence rule. For present purposes, a broad working statement of the parol evidence rule may be taken from an article written in 2011 by the Hon JJ Spigelman AC:[17]

> "The traditional approach to the interpretation of a written contract in common law nations turned, in large measure, on the application of the parol evidence rule. The rule has been stated in different ways, but the core principle is that, when parties have reduced their contract to writing, a court should only look to the writing to determine any issue of interpretation.
>
> The rule excluded extrinsic evidence for the purpose of interpretation. However, the rule applied only if the parties had, as a matter of fact, determined that the whole of their contract would be in writing. Extrinsic material could be considered to determine whether that was or was not the case."

[118] Despite contrary views by some members of the Academy and the Law Commission of England and Wales, it is not open to an Australian judge below the level of the High Court to posit that the parol evidence rule no longer applies, or only applies in an attenuated form under the law of contract. In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*,[18] the High Court unanimously reaffirmed, inter alia, the parol evidence rule, saying that it proceeds, *inter alia*, from the premise that a party executing a written agreement is bound by it.

[119] In any event, the defendant's reliance on clause 38.1 does not depend on the parol evidence rule, even if that rule is described as merely a presumptive rule of evidence. It is arguable that is the effect of the characterisation given to it by Allsop J in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*.[19] It further appears that Allsop J in *Branir* took

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17 "Contractual Interpretation: A Comparative Perspective" (2011) 85 ALJ 412, 414.

18 (2004) 218 CLR 471, 483-484 [33]-[35].

19 (2001) 117 FCR 424, 505-509 [277]-[293].

the view that an entire agreement clause operates as no more than "the epitome of the operation of the parol evidence rule" because "[t]he parties have merely expressly avowed that the totality of the contract, *about the relevant subject matter*, is to be found within the four corners of the document."[20] If that is to be taken as saying that an entire agreement clause does no more that operate as "an evidentiary foundation for a conclusion that the agreement is wholly in writing",[21] with respect I cannot agree.

[120] As previously stated, an entire agreement clause is a positive contractual provision containing a promise by each party to the other that the contract embodies the entire understanding of the parties and constitutes the entire terms agreed on between them in relation to the subject matter. For a party to depart from that promise is a breach of contract. When a party faced with a claim based on a contractual term inconsistent with the terms of an entire contract clause pleads it by way of defence, they set up a term of the contract itself and a binding contractual promise by the opposite party as to the extent of the terms of the contract. They do not merely rely on a presumptive rule of evidence.

[121] It may be acknowledged that in this and some other jurisdictions there is support for the conclusion that, notwithstanding an entire agreement clause, extrinsic evidence may be admitted for the purposes of interpretation.[22] However, in my view, there is nothing in the common law of Australia which prevents the parties to a contract from agreeing, as a matter of contract, to the terms of an entire agreement clause.

[122] There are numerous policy reasons why parties should be free to do so and why a court should uphold the parties' bargain if they do. It is unnecessary to discuss them in detail here. It is enough to repeat a passage from *Equuscorp* that bespeaks some of the reasons why parties are to be held to their written contracts:

> "… in the nature of things, oral agreements will sometimes be disputable. Resolving such disputation is commonly difficult, time-consuming, expensive and problematic. Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so unless relief is afforded by the operation of statute or some other legal or equitable principle applicable to the case. Different questions may arise where the execution of the written agreement is contested; but that is not the case here. In a time of growing international trade with parties in legal systems having the same or even stronger deference to the obligations of written agreements (and frequently communicating in different languages and from the standpoint of different cultures) this is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. It is a time to maintain those rules. They are not unbending. They allow for exceptions. But the exceptions must be proved according to established categories. The obligations of written agreements between parties cannot simply be ignored or brushed aside."[23]

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20 (2001) 117 FCR 424, 542 [440].
21 (2001) 117 FCR 424, 509 [293].
22 For example, *John v Price Waterhouse* [2002] EWCA Civ 899, [67]; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218, 224.
23 (2004) 218 CLR 471, 483 [35].

[123] A leading case in the High Court on the operation of an entire agreement clause is *Hope v RCA Photophone of Australia Pty Ltd*.[24] In that case, the lessee under a contract of hire of chattels alleged that the lessor supplied second hand equipment in breach of a term of the contract that the equipment be new. The lessor relied on the terms of the written contract between the parties. They did not provide expressly that the hired equipment was to be new. To contrary effect, a clause of the contract provided that it:

> "contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or otherwise relating to the equipment or the provisions hereof on any of the matters to which [the contract] relate[s]."

[124] The question arose whether proof of circumstances external to the terms of the written contract could conceivably provide material such that when the writing was applied, an implication might be discoverable, supporting a term that the equipment was to be new. It was held that the entire agreement clause effectually excluded an implied condition or a warranty.[25] In my view, the conclusions in that case are consistent with the views I have reached as to the proper construction of clause 38.1 and its operation to exclude the alleged collateral contract.

[125] An alternative view of the question of inconsistency between the alleged collateral contract and clause 38.1 may be formed by reference to *Hoyt's Pty Ltd v Spencer*.[26] As the principle of that case was stated by Knox CJ and Isaacs J, a distinct collateral agreement is valid and enforceable even though the main agreement be in writing, provided the two may consistently stand together so that the provisions of the main agreement remain in full force and effect.[27] However, it is unnecessary in the circumstances of this case to separately analyse the extent of the application of that cognate rule where the parties have expressly agreed upon an entire agreement clause in the main contract.

[126] Against this reasoning, the plaintiff relied upon *McMahon v National Foods Milk Ltd*,[28] in which an entire agreement clause was construed not to exclude evidence of a collateral contract made by the consideration of the promise under the collateral contract entering into the main contract. Clause 33 of the main contract in that case provided as follows:

> "This Agreement controls the entire agreement and understanding between the parties as to the subject matter of this Agreement and merges all prior discussions amongst them. Neither party will be bound by any conditions, definitions, warranties or representations with respect to the subject matter of this Agreement other than as expressly provided in this document. The execution of the Agreement by a party provides an absolute irrevocable release from all claims whatsoever that the other party may have against the

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24 (1937) 59 CLR 348.
25 (1937) 59 CLR 348, 357-358, 363 and 365.
26 (1919) 27 CLR 133, 140-141 and 145-146.
27 (1919) 27 CLR 133, 139; see also 147 and 148.
28 (2009) 25 VR 251.

> first party arising under any other agreement between them or between them and any other party, relating to the subject matter of this agreement…"

[127] The Victorian Court of Appeal reasoned:

> "… because proof of a collateral contract is an exception to the parol evidence rule, a merger provision should not be permitted to stand in the way of proof of a collateral contract unless the merger provision is clearly expressed to have that effect. I do not consider that cl 33 is sufficiently clearly expressed to have the effect of preventing proof of the collateral contract for which the McMahons contended.
>
> It seems that the view which has been taken in England is that a merger provision should generally be treated as applying to agreements which might otherwise operate as collateral contracts. And at one level, the logic of that approach is appealing. If business persons were asked as a matter of principle what is meant by an entire agreement clause, they would probably reply that it means what it says. Shorn of surrounding circumstances, the idea that an entire agreement clause should not be taken to extend to a collateral contract because the latter is a separate contract would possibly be thought of as quaint. But lawyers must beware of generalities. In an age of contractual development which puts contextual interpretation ahead of formalism, each case is unique. The question in each case is what the merger clause in question 'would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'."[29] (footnotes omitted)

[128] Next, the court referred to an argument advanced in an article by two learned authors, that:

> "… if there is no express reference to collateral contracts, it seems odd to regard a clause in the main agreement as effective to prevent enforcement of the collateral contract. At least in cases where the alleged collateral contract was contemporaneous with the main contract, it would seem logical to infer that the parties intended the collateral contract to operate because otherwise the very reason why one party entered into the main contract — the willingness of the other to enter into the collateral contract — would count for nothing."[30]

[129] That reasoning led the court in *McMahon* to conclude that the party relying on the collateral contract might have had a case if it had been able to prove breach of the alleged collateral contract.[31]

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29 (2009) 25 VR 251, 272 [38]-[39].
30 (2009) 25 VR 251, 273 [39].
31 (2009) 25 VR 251, 273 [42].

[130] Young AJA doubted some aspects of this reasoning in *McMahon* in *Johnson Property Group Pty Ltd v Thornton*,[32] although his Honour did not consider that it was so clearly wrong as not to be binding. However, in my view, this reasoning was not part of the ratio of the decision, so it is not binding, notwithstanding that as a judge of this court I am bound to follow decisions of an intermediate court of appeal of another Australian jurisdiction as to the common law.[33]

[131] With all respect, I cannot agree that it is "odd" for an entire agreement clause to exclude a collateral contract, because otherwise the very reason the promisee under the collateral contract entered into the main contract would count for nothing. If primacy is to be given to that reason for entering into the main contract, logically it extends to all of the terms of the main contract that would operate inconsistently with the promises made by the promisor under the collateral contract. If so, the same reasoning must also negate the principle associated with *Hoyt's Pty Ltd v Spencer*[34] that the terms of a collateral contract may not contradict the terms of the main contract.

[132] I am fortified in this view by the following statement of the plurality of the High Court in *Campbell v Backoffice Investments Pty Ltd*,[35] that:

> "… the share sale agreement contained an entire agreement clause and a provision denying that the purchaser relied on any warranty made by or on behalf of the vendor, except those set out in the agreement. **Clauses of these kinds have been held effective answers to claims to set up collateral agreements** but no claim of that kind is at issue in this matter" (footnote omitted) (emphasis added)

[133] The clause in that case provided:

> "9.1 This Agreement:
> (a) constitutes the entire agreement between the parties; and
> (b) in relation to that subject matter, supersedes any prior understanding or agreement between the parties and any prior condition, warranty, indemnity or representation imposed, given or made by a party."[36]

[134] Further, in support of the proposition that clauses of these kinds have been held effective answers to claims to set up collateral agreements, the plurality in *Campbell v Backoffice Investments Pty Ltd* referred by footnote to *L'Estrange v Graucob*.[37]

[135] The main question in *L'Estrange v Graucob* was whether the clause formed part of the contractual terms, but Scrutton LJ identified the operation of the clause, as against that of clauses considered in earlier cases, as follows:

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32 [2015] NSWSC 1389, [58]-[59].
33 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152 [135].
34 (1919) 27 CLR 133, 140-141, 145-146 and 148.
35 (2009) 238 CLR 304, 348 [127].
36 *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359, 410 [242].
37 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

> "The clause here in question would seem to have been intended to go further than any of the previous clauses and to include all terms denoting collateral stipulations, in order to avoid the result of these decisions."38 (emphasis added)

[136] The clause in that case provided:

> "This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded."

[137] For the purposes of the particular present discussion, neither the clause in *Campbell v Backoffice Investments Pty Ltd* nor the clause in *L'Estrange v Graucob* expressly excluded any collateral contract. They are relevantly indistinguishable from clause 38.1.

[138] In my view, there is no special rule of construction that applies to the operation of an entire agreement clause, to the effect that something amounting to express words of exclusion of a collateral contract is required before an entire agreement clause can apply to a collateral contract. To the extent that *McMahon* is suggested to stand for a contrary rule or approach, in my view, it is not binding authority and I would not follow it.

Clause 38.2 and 38.3

[139] Because I have concluded that the alleged collateral contract is excluded by 38.1, it is unnecessary to separately consider the grounds of defence raise upon clauses 38.2 and 38.3.

[140] Nevertheless, I record my conclusion that clause 38.2 would not operate as a ground of defence to the alleged collateral contract. The promise made by the defendant was not as to the accuracy or completeness of any a statement made in any brochure, advertisement or other document made available by or on behalf of the Vendor. It was that it would do the Wetlands Plan Works on the Wetlands Site substantially in accordance with the Wetlands Plan.

[141] As to clause 38.3, I record my tentative view that the alleged collateral contract would not have constituted a warranty given expressly or impliedly as to the amenity of the neighbourhood in which Lot 43 was located. The substance of the collateral contract was to do the Wetlands Plan Works in accordance with the Wetlands Plan on the Wetlands Site. I do not consider that was limited to a promise as to the amenity or neighbourhood in which Lot 43 was located, although doing the work would affect those matters. But it is unnecessary to further expand on that question.

[142] Because of the conclusion I have reached, the plaintiff's claim must be dismissed. Nevertheless, against the possibility of error, it is appropriate to make necessary findings

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38 [1934] 2 KB 394, 402.

and to give brief reasons as to the issues joined upon the breach of contract and damages case.

Breach of contract

[143] There was no dispute that the defendant did not carry out any of the works proposed as the Wetlands Plan Works that might have been relevant to the plaintiff's claim for damages based on the difference between the sale prices achieved on the sale of the townhouses in the "Seek" development carried out on Lot 43 and the hypothetical values of the townhouses had the Wetlands Plan Works been carried out substantially in accordance with the Wetlands Plan on the Wetlands Site.

[144] There were some subsidiary disputes between the parties as to the extent of the obligation to carry out any work and what hypothetical assumptions should be made, or not made, to inform the valuation opinion that evidenced the hypothetical or counterfactual scenario. However, it is not necessary to resolve them, in my view, beyond accepting that the work to be done was the Wetlands Plan Works, substantially in accordance with the Wetlands Plan on the Wetlands Site, which I accept was the extent of the defendant's obligation.

Causation

[145] Because a cause of action for breach of contract is complete upon a plaintiff establishing breach, whether or not the plaintiff has suffered loss or damage, a plaintiff who establishes breach is entitled at least to a judgment for nominal damages.[39] But a plaintiff who claims damages beyond that must plead and prove any special damage.[40]

[146] It may seem surprising, but there are relatively few cases of high authority dealing with the requirements of proof of causation upon a claim for damages for breach of contract. It is enough to dispose of this case to accept that a plaintiff who alleges loss of a valuable business opportunity must prove that the breach of contract caused the loss on the balance of probabilities[41] and that usually that will require the plaintiff to prove that they would have taken advantage of the opportunity if it had been available.[42]

[147] The defendant submits that because Mr Corcoran did not say in evidence that he would have increased the prices of the townhouses in the "Seek" development by an average of 7.5 percent (or at all), the plaintiff has failed to prove that any breach of contract caused it any loss.

[148] But the absence of direct evidence is not necessarily fatal on a question of causation of loss of this kind.[43] Two illustrations are enough to make the point. First, in a case for damages for breach of a contractual duty to exercise a reasonable care that causes harm

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39 For example, *Hanflex Pty Ltd v NS Hope & Associates* [1990] 2 Qd R 218.

40 *Uniform Civil Procedure Rules* 1999 (Qld), rr 150(1)(b) and 155(1) and (2).

41 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 353 and 355.

42 *Chappel v Hart* (1998) 195 CLR 232, 246 [32], 258 [71], 270 [93]; *Rosenberg v Percival* (2001) 205 CLR 434, 441 [14], 443-444 [24]-[25] and 462 [88].

43 Pace *Sykes v Midland Bank, Executor & Trustee Co Ltd* [1971] 1 QB 113, 125, 129 and 131-132.

by way of economic loss, a plaintiff is prohibited by statute from giving such evidence.[44] In other words, cause in fact can only be proved by inference. Second, on the potentially comparable question whether a fraudulent representation caused a plaintiff's loss, the absence of evidence that the plaintiff acted to their detriment on the fraudulent inducement is not fatal.[45]

[149] In my view, it is reasonable to draw the inferences in the present case that had Mr Corcoran been able to ask for higher prices in selling the townhouses in the "Seek" development, he would have done so and that he believed that the defendant's failure to carry out the Wetlands Plan Works substantially in accordance with the Wetlands Plan on the Wetlands Site decreased the amenity of the townhouses in the proposed development because of the effect on the views from Lot 43 of failing to clear most of the trees from the Wetlands Site.

Damages

[150] The plaintiff's claim is for compensatory damages for breach of contract, to be assessed as follows:

> "The applicable principle, confirmed in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* and traceable to *Robinson v Harman*, is that damages for breach of contract are to put the promisee, so far as money can do it, in the same situation as if the contract had been performed as promised."[46] (footnotes omitted)

[151] Application of the principle in the present case requires a comparison between the actual scenario, namely what the plaintiff received on sale of the townhouses in the "Seek" development built on Lot 43 with the amenity of the Wetlands Site without the Wetlands Plan Works being carried out, and a hypothetical or counterfactual scenario, namely, what the plaintiff would have received on sale of the townhouses had the Wetlands Plan Works been carried out substantially in accordance with the Wetlands Plan on the Wetlands Site. In modern terms, the loss alleged is capable of characterisation as a loss of a valuable commercial opportunity.[47]

[152] The plaintiff claimed damages measured by a 7.5 percent average uplift from the actual sale prices received to the hypothetical prices that it alleges it would have received. The parties each called a valuer to give opinion evidence as to values. In some respects, the evidence did not address the relevant factual issues and, in others, it was unconventional, and unacceptable, in my view.

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44 *Civil Liability Act* 2003 (Qld), s 11(3). The mischief of a plaintiff giving self-serving evidence which the section was intended to remedy is discussed in *Chappel v Hart* (1998) 195 CLR 232 and *Rosenberg v Percival* (2001) 205 CLR 434.

45 *Gould v Vaggelas* (1985) 157 CLR 215, 219, 238-239 and 249-252.

46 *Clark v Macourt* (2013) 253 CLR 1, 11 [26].

47 *Sellars v Adelaide Petroleum NL* (1994) 170 CLR 332, 349 and 355.

[153] The defendant's valuer was requested to and expressed opinions as to whether the actual sale prices represented market value. That was not a relevant question, except possibly as evidence going to whether higher prices than the actual sale prices would have been obtained if the Wetlands Plan Works had been carried out on the Wetlands Site substantially in accordance with the Wetlands Plan.

[154] Otherwise, "market value" was relevant to establish whether the plaintiff lost the valuable commercial opportunity of selling the townhouses for an average uplift of 7.5 percent from the actual sale prices. The concept of market value is "what in all the relevant circumstances would be the price that a willing purchaser would have to pay a vendor willing but not anxious to sell in order to obtain the land".[48] One method of ascertaining the market value of land is the comparable sales method.[49] The High Court has said of that method:

> "We agree, with respect, with Wells J., who said:
>
> > 'Speaking generally, where the subject matter of the sales, and the market in which they were concluded, reveal a sufficiently high degree of comparability with the notional sale of the land in question and the market in which it would be the subject of negotiation, the particular circumstances and considerations that induced the respective parties to come together at the several prices agreed upon are regarded as immaterial, unless, in a given case, they are such as plainly to take a sale out of the ordinary run of transactions that together constitute the relevant market.'"[50]

[155] According to this approach, the defendant's valuer's method of reaching his opinion as to the market values of the "Seek" townhouses was obviously flawed. He excluded all comparable sales of new townhouses in the relevant market, as not representing market value, and treated those sales as affected by special circumstances, because the majority of buyers of those townhouses were overseas buyers whom he considered were not properly informed as to market values. He did not seem to appreciate the apparent contradiction, in purporting to value the market value of a new townhouse for sale in the market for such townhouses, of using the comparable sales method but, in doing so, excluding all sales of new townhouses in that market.

[156] In some situations when a court is assessing damages it must adopt an adjusted or "true" value to the exclusion of "market" value. For example, where a plaintiff is induced to pay the prevailing market price for shares when that price is inflated because of the defendant's fraudulent representation, the defendant will not be heard to say that the difference between the price paid and the value of that which was acquired was nil because the price paid by the defendant was market value. In this and other situations, the "true" value may be ascertained in assessing damages taking into account after acquired

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48 *Duffy v Minister for Planning* (2003) 129 LGERA 271, 281 [22]; *Commonwealth v Arklay* (1952) 87 CLR 159, 169-170; *Spencer v Commonwealth* (1907) 5 CLR 418, 432.

49 *Duffy v Minister for Planning* (2003) 129 LGERA 271, [23]; *Maurici v Chief Commissioner for State Revenue* (2003) 212 CLR 111, 121 [18].

50 *Valuer General v Fenton Nominees Pty Ltd* (1982) 150 CLR 160, 166-167.

knowledge.[51] But that is not relevant in the present case to the actual prices received by the plaintiff. Whether they were "true" market values or not, they were the amounts received against which the question whether the plaintiff would or might have received increased prices must be asked.

[157] Ultimately, the approach of both the valuers was to consider whether and to what extent the values of the townhouses in the "Seek" development would or might have been increased by an improvement in their amenity if the Wetlands Plan Works had been carried out substantially in accordance with the Wetlands Plan on the Wetlands Site and in particular, with improved views to the east and the benefit of the other works shown on the Wetlands Plan.

[158] The valuer called by the plaintiff chose an average of 7.5 percent. The valuer called by the defendant chose an average of 5 percent, if he followed the same method in principle as the valuer called by the plaintiff. A number of observations should be made about how those percentages were derived. First, although both valuers examined comparable sales, the defendant's valuer did so with in a way that contained the error as to what were relevant sales in the market for new townhouses. Second, in any event, the derived percentages were not for a single townhouse, but for the average over the townhouses in the "Seek" development, that were not all equal and would not have equally benefited from better views or amenity from carrying out the Wetlands Plan Works. Third, both valuers separately considered and took in to account the assumption as to the comparability of another "lakeside" development in the adjoining suburb, called the "Highlands Reserve" which, on any view, is in some respects distinctly different. Fourth, both percentage estimates were conclusions based on broad judgment, although informed by looking at the effect on values of better views or aspects within other developments. Neither percentage could be strongly supported by a close analysis of directly comparable sales. Neither of the valuers was able to analyse the effect of the circumstance that the townhouses in "Seek" were marketed overseas by a specific agent who had access to overseas buyers.

[159] The absence of more precise evidence does not prevent the court from making a finding as to the amount of the loss, because "where there has been an actual loss of some sort, the common law does not permit difficulties in estimating the loss in money to defeat an award of damages".[52]

[160] In my view, taking into account the matters specifically mentioned and some other subsidiary points raised in the arguments of the parties, it is appropriate to allow an average uplift of 4 percent on the actual sale prices that were achieved in selling the townhouses.[53] That would result in a finding that the amount of the loss or damage suffered by the plaintiff was $616,000.

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51 *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281, 293; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 656-659 [35]-[40].

52 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 349.

53 There was an estimated value for one unsold townhouse, identified as "Unit 6".