SUPREME COURT OF QUEENSLAND

CITATION:	*Shepherd v Lawson & Anor* [2019] QSC 174
PARTIES:	**ANNE SHEPHERD** (plaintiff) **v** **STEPHEN JAMES LAWSON** **SUZANNE DENISE LAWSON** (defendants)
FILE NO/S:	BS No 10405 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24 & 26 April 2019, further written submissions 17 May 2019 and 23 May 2019
JUDGE:	Lyons SJA
ORDER:	**The orders of the court are:** **1. Judgment for the plaintiff in the amount of $135,988 plus interest.** **2. I will hear from the parties as to the form of the orders including orders in relation to the removal of the caveat and as to costs.**
CATCHWORDS:	CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – ENTITLEMENT TO DEPOSIT – OTHER CASES – where the plaintiff entered into a contract to purchase property from the defendants on a rent to buy basis – where the plaintiff paid a deposit and occupied the property by paying weekly licence fees – where the plaintiff made renovations to the property – where settlement did not proceed – where the plaintiff lodged a caveat over the property – where the plaintiff claims part of the purchase price of the property and the value of improvements made to the property – where the defendants seek removal of the caveat and counterclaims damages for breach of contract – whether the plaintiff is entitled to a return of the deposit – whether the plaintiff is entitled to equitable compensation for the increase in the value of the property as a consequence of the renovations and improvements – whether the defendants are entitled to damages for breach of contract

EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – where the plaintiff claims the defendants hold the property on constructive trust – where the plaintiff seeks a declaration of equitable interest as purchaser – whether the alleged defects of the property have the effect of denying the plaintiff an interest as the beneficiary of a constructive trust – whether the plaintiff is entitled to a declaration of equitable interest as purchaser of estate in fee simple

Civil Proceedings Act 2011 (Qld), s 58
Property Law Act 1974 (Qld), s 72
Residential Tenancies and Rooming Accommodation Act 2008 (Qld)

Equuscorp P/L v Glengallan Investments P/L (2004) 218 CLR 471
Freedom v AHR Constructions Pty Ltd [1987] 1 Qd R 59
Lexane Pty Limited v Highfern Pty Ltd [1985] 1 Qd R 446
Stern v McArthur (1988) 165 CLR 489

COUNSEL:	S Fisher for the plaintiff D Morgan for the defendants
SOLICITORS:	No appearance for the plaintiff Colville Johnstone Lawyers for the defendants

Background

[1] The defendants have been the registered proprietors of residential land at Akala Street, Camp Hill since 1999. As it was an investment property it was rented out to a number of tenants between 1999 and early 2012. In early 2012, the defendants rented the property out for $350 per week but as their mortgage payments were $2,363 per month they were experiencing financial difficulties.

[2] In early 2012 the plaintiff Anne Shepherd, who had recently separated from her husband, was living in emergency accommodation with her four young children including one year old twins. She was looking for a property to occupy with her children.

[3] On 1 March 2012, Ms Shepherd entered into a contract to purchase the property at Akala Street from the defendants on what is generally known as a 'rent to buy' contract which essentially allowed her to occupy the property after paying a substantial deposit and by paying a weekly licence fee. The contract provided for a deferred settlement date of June 2015 when the balance purchase price was payable.

[4] Unknown to the plaintiff, the defendants had entered into a joint venture agreement with Mark Kelly from Kelgar Pty Ltd (Kelgar) some weeks earlier whereby he or his nominee was given an exclusive option to purchase the property within the next five years.

[5] On 1 March 2012 Kelgar nominated Anne Shephard as its nominee.

[6] The plaintiff paid the deposit, licence fees, outgoings and did substantial renovations to the property.

[7] The settlement did not proceed in accordance with the contract in June 2015. The plaintiff lodged a caveat over the property in July 2015 which remains in place.

[8] The plaintiff seeks a number of orders including:

(i) A declaration that the plaintiff has an equitable interest as purchaser in the property,

(ii) Further or alternatively the plaintiff claims $451,067.27 payable or refundable by the defendants as sellers to the plaintiff as buyer under the contract as part-purchase price of the property.

(iii) Further or alternatively the plaintiff claims $451,067.27 payable or refundable by the defendants to the plaintiff as buyer as the part purchase price and the value of improvements made to the property which the plaintiff has paid.

(iv) Interest under s 58 of the *Civil Proceedings Act* 2011.

[9] Whilst the plaintiff initially sought a number of declarations pursuant to the *Residential Tenancies and Rooming Accommodation Act* 2008 together with damages, these were abandoned at trial.

[10] The defendants seek orders for the removal of the caveat and counterclaim an amount of $18,412 as damages for breach of contract.

Matters not in dispute

[11] The parties have agreed that there are a number of matters which are not in dispute and are contained in the following paragraphs.[1]

[12] The defendants are the registered owners of the land situated at Akala St,Camp Hill.

[13] Mark Kelly of Kelgar Pty Ltd was the defendants' sales agent for the purpose of selling the property.

[14] On 1 March 2012, the plaintiff entered into a contract to purchase the property from the defendants.

[15] The plaintiff paid $5,000 to Mark Kelly of Kelgar on 1 March 2012.

[16] A further amount of $80,000 was paid to Mark Kelly on 7 March 2012.

[17] The contract contained the following clauses:

1. An agreed purchase price of $500,000.

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1 List of Issues filed by leave on 23 April 2019.

2. A deposit payable on signing of $85,000.

3. The contract was unconditional

4. The settlement date on the contract was 30 June 2015 which was extended by agreement to 30 July 2015.

5. Time was of the essence of the contract.

6. The plaintiff was given early possession of the property from 1 March 2012 subject to paying a licence fee as per Special Condition 3(ii) of the contract.

[18] On 20 July 2015, the plaintiff lodged a caveat on the title to the property claiming an equitable interest as purchaser of an estate in fee simple pursuant to a contract dated 1 March 2012.

[19] The contract did not settle on the settlement date or at all.

[20] By notice in writing on 11 September 2015, the defendants called on the plaintiff to settle the contract on 18 September 2015.

[21] On 17 September 2015 the plaintiff advised the defendants that she would not be settling the purchase on 18 September 2015.

[22] On 22 September 2015 the defendants served on the plaintiff a Notice of Default under Instalment Contract pursuant to s 72 of the *Property Law Act* 1974, calling on the plaintiff to complete the contract within 30 days, that is, by 21 October 2015.

[23] The plaintiff did not settle the contract after being called on to do so by Notice of Default under Instalment Contract.

[24] The defendants gave notice to the plaintiff to terminate the contract on 24 February 2016 and the plaintiff vacated and delivered up possession of the property to the defendants on 29 February 2016.

[25] The caveat has been maintained by the plaintiff notwithstanding the plaintiff is no longer the purchaser of the property.

[26] The plaintiff has not paid a licence fee after 20 July 2015.

[27] The plaintiff did not pay rates or water charges in accordance with Special Condition 3(xii) totalling $2,252.47.

[28] The payments made by the plaintiff by way of licence fees are those recorded on pages 39, 40, 41, 42, 43 and 44 of the Affidavit of Ms Shepherd sworn 16 October 2015.

[29] The plaintiff paid the deposit prescribed in the contract in two tranches being $5,000 on 1 March 2012 and $80,000 on 7 March 2012.[2]

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[2] List of Matters not in Dispute filed by Leave on 23 April 2019 indicates at [4] and [5] that the payments made were $5,000 and $85,000. That is incorrect.

[30] The contract does not require or permit the plaintiff to renovate the property whilst in possession.

[31] The plaintiff did not at any time request or require the defendants to perform any maintenance on the property.

[32] The plaintiff did not at any time seek or obtain the defendants' consent to renovate the property.

[33] The defendants have not repaid $85,000 to the plaintiff after the termination of the contract dated 1 March 2012.

[34] Whilst not the subject of specific agreement prior to the trial a number of matters were able to be clarified and quantified during the trial namely:

(i) The amount that the plaintiff claims were paid in addition to the licence fee is $15,900 being an amount of $60 paid for 87 weeks ($5,220) and an amount of $120 for 89 weeks ($10,680);

(ii) The Licence Fee arrears up to the date the property was vacated on 29 February 2016 was $16,160 and together with the amount for the non-payment of rates and water charges of $2,252.47 is $18,412.47 ($16,160 + $2,252.47).

The Special Conditions contained in Annexure A to the Contract

[35] It was also agreed that the contract also included as Annexure "A" Special Conditions. Special Condition 1 was headed "Finance" and provided that Clause 3 and 4 of the Standard Contract were deleted.

[36] Special Condition 2 was inserted and was headed "Deposit" and included the following clauses:

(a) Special Condition 2(i) provided for the Initial Deposit to be paid on the Contract Date.

(b) Special Condition 2(ii) provided that the buyer would add a further $80,000 to the initial Deposit within 6 months from date of Possession as agreed, and if necessary the buyer can extend for a further 6 months at a cost of $135 per week to the seller as in Clause 3(ii).

(c) Special Condition 2(iii) provided that the Balance Deposit will be paid by 108 instalments of $60 each week the first of which is payable…week/fortnight/month from the Contract Date and then on the same day of each week/fortnight/month afterwards.

(d) Special Condition 2(iv) provided that the buyer will pay the Deposit to the seller directly or by such other method as the seller may direct.

(e) Special Condition 2(v) provided that the buyer releases the deposit to the seller, for the seller to reduce the weekly payments as in clauses 2(iii) and 3(ii) and therefore the balance owing accordingly.

[37] Special Condition 3 related to "Possession before Settlement" and included the following clauses:

(a) Special Condition 3(i) provided for possession before settlement.

(b) Special Condition 3(ii) provided that the buyer was to pay a licence fee for possession before settlement of $505.00 per week.

(c) Special Condition 3(v) provided that the buyer was to pay the licence fee direct to the seller by such method as the seller directed.

(d) Special Condition 3(vi) provided the licence fee became the property of the seller on payment.

(e) Special Condition 3(ix) provided that by entering into possession the buyer agrees to accept the condition and state of repair of the property at the date of entry and possession and will make no claims for repairs or compensation concerning the condition and state of repair of the property;

(f) Special Condition 3(x) provided that after entering into possession the buyer was solely responsible for all repairs, maintenance, replacement and damage to the property;

(g) Special Condition 3(xii) provided that the buyer was responsible for all rates, water taxes, land taxes and all services supplied to the property.

[38] The Standard Form REIQ Contract then contained the following Clauses in relation to Default.

[39] Clause 9 'Parties' Default' was as follows;

9.1 Seller and Buyer May Affirm or Terminate

Without limiting any other right or remedy of the parties including those under this contract or any right at common law, if the Seller or Buyer, as this case may be, fails to comply with an Essential Term, or makes a fundamental breach of an intermediate term, the Seller (in the case of the Buyer's default) or the Buyer (in the case of the Seller's default) may affirm or terminate this contract.

9.2 If Seller Affirms

If the Seller affirms this contract under clause 9.1, it may sue the buyer for:

1) damages;
2) specific performance; or
3) damages and specific performance.

9.3 If Buyer Affirms

If the Buyer affirms this contract under clause 9.1, it may sue the Seller for:

1) damages;
2) specific performance; or
3) damages and specific performance.

9.4 If Seller Terminates

If the Seller terminates this contract under clause 9.1, it may do all or any of the following:

1) resume possession of the Property;
2) forfeit the Deposit and any interest earned;
3) sue the Buyer for damages;
4) resell the Property.

9.5 If Buyer Terminates

If the Buyer terminates this contract under clause 9.1, it may do all or any of the following:

1) recover the Deposit and any interest earned;
2) sue the Seller for damages.

The plaintiff's evidence

[40] Ms Shepherd gave evidence that she was separated from her husband and in emergency accommodation in early 2012.[3] She was looking for a home to live in with her children when she came across an advertisement on the internet which indicated she could rent a house and the payments would go towards the purchase of the property. She states she phoned Mark Kelly on the number in the advertisement and had a long discussion with him about the proposal and was told that what they were offering would be 'perfect' for her. [4] They discussed the deposit which needed to be paid and she was told to bring that deposit to the property the next day.

[41] Ms Shepherd states she then met Mark Kelly at the property the next day with a woman called Lisa Johnson who also featured in the advertisement, and inspected the property. The advertisement she saw on the internet was in the same terms as the document she was given by Mark Kelly on 1 March 2012 which was headed "No bank! is needed". That advertisement included a photograph of the property at Akala Street, Camp Hill and contained the following words:[5]

> "No Bank! Is Needed
> To Own This 3 Bed Home Today! where
> U Fix it and U Keep The Profits
> This Puts You In Your Own
> Home Where You Don't need a loan to make some Money,
> You keep it Instead of the Bank…
>
> In a Central location in
> Camp Hill Brisbane

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3 Transcript 1-59 ll 21-22.
4 Transcript 1-18 ll 44-45.
5 Affidavit of A Shepherd filed 5 October 2015, Exhibit AS 3.

> We will Give the Right person the opportunity to Own this Home Today, without the Need of a Bank.
>
> You just need something to put down towards the Home, which comes off the price! from Today, You can pay the Rest later……..
>
> We supply the house at a fixed price like normal, you supply the labour and everything over that going forward is Yours
>
> (You Don't Have To Pay Us Back until you finish)
> All You Need is to be able to afford the weekly payments! and then cash in on your effects
>
> If this is You!!! and you can handle the Repayments of about $797 per week for the chance to Own Today and make some money without the need of a bank in Camp Hill"

[42] Ms Shepherd said that she signed a document entitled "Our agreement move in form" dated on 1 March 2012 which was also signed by Lisa Johnson on behalf of Kelgar.[6] Ms Shepherd also stated that she believed that Mark Kelly's signature also appears on the form acknowledging that the amount of $5,000 deposit was made. She accepts that document records the fact she agreed to buy the property at Akala Street and that the sellers were "Stephen/Suzanne Lawson and Kelgar Pty Ltd". The document included the following paragraphs;[7]

> "Agree to buy the above property at 46 Akala St, Camp Hill Qld and make payments of $565 per week fixed rate for 12 months & variable after that date, plus outgoings (water rates and insurance) as normal which go towards owning the home like a standard bank loan and will pay a total amount of $85,000 as initial deposit & a further $80,000 within 6 months which both amounts comes off the totally price of the house $500,000.
>
> A lock out deposit of $5k is required to secure the Home for yourselve [sic] today as discussed, which $1500 is an Admin cost to start the process; this also comes off the price of the property, for you to Own your Own home today. The remaining $80,000 to be paid 6/3/12 as agreed, the paper work will be drawn up based on this information in this agreement."

[43] Ms Shepherd stated that she signed the contract on the same day that she first met Mark Kelly and Lisa Johnson and that she was not legally represented at the time the contract was entered into and that no real estate agent was involved. Ms Shepherd confirmed that the contract for the purchase of the property was signed by her on the day she paid $5000. At the time the contract was entered into on 1 March 2012 Ms Shepherd states that she was also provided with another document entitled "Price finder" which contained a list of comparable properties and comparable sales in the Camp Hill area as at 28 February 2012.[8] She stated that this was used as a basis for the rent to be charged.

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6 Transcript 1-20 ll 10-11.
7 Affidavit of A Shepherd filed 5 October 2015, Exhibit AS 5.
8 Transcript 1-19 ll 8-12.

[44] Ms Shepherd gave evidence that she had no knowledge of any agreements between Mark Kelly and the defendants and was not provided with any documents evidencing an agreement between them before she entered into the contract to purchase on 1 March 2012.[9]

[45] Ms Shepherd said that she paid a further $80,000 later that week as agreed and moved in on 7 March 2012.[10] She stated that the property was not clean and the electricity could not be connected as she was informed by the electricity provider that it did not have proper electrical wiring. She also stated that it did not have a proper functioning hot water system, the free standing stove did not work,[11] there was a hole in one of the walls and that it was riddled with asbestos.[12]

[46] Ms Shepherd stated that after moving into occupation of the property on 7 March 2012, she not only made the payments as required per week, but has also made payments in relation to water rates and land rates. Ms Shepherd accepted that she had not paid some of the licence fees and the rates and utilities that were the subject of the counterclaim in the amount of $18,412.[13]

[47] She also stated that in addition to the weekly licence fees, she also paid instalments towards the purchase price of the property which were made in separate tranches initially at $60 per week and later at $120 per week. She made payments of $60 per week from 1 March 2012 to 1 November 2013 as part payment of the purchase price she says, pursuant to Special Condition 2(iii) of the contract. Those payments total $5,220. She then paid a further $120 per week from 1 November 2013 to 16 July 2015 and those amounts total $10,680. Those amounts were paid directly to Kelgar. The total amount paid was $15,900 which she stated she considered was a further part payment of the purchase price.

[48] Ms Shepherd gave evidence that the clear understanding was that she would move in and fix the property up and thereby obtain the greater equity in the property. Ms Shepherd stated that when she moved in and complained about the state of the property she was told in very clear terms by Mark Kelly and Lisa Johnson that that was her problem and her responsibility.[14]

[49] Whilst Ms Shepherd initially claimed she had paid $237,873 for improvements to the property, she based this on a number of large withdrawals from her ANZ Online Saver Account including an amount of $20,000 on 5 June 2013 and gave evidence that she would have used that amount to pay the tradesmen.[15] She was, however, unable to provide details of the specific amounts paid and to whom. In relation to a withdrawal of $24,260 on 18 February 2014 she was similarly unable to give details as to who she paid but stated that "90 per cent of it was for the renovation and the rest would've been rent, living".[16] On another occasion an amount of $46,000 was withdrawn on 27 March 2014 which was also for the renovations. She stated that she could not "pinpoint down to the dollar where it all went, but the majority of it was to pay any cash tradies I had at the-that had done

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9 Transcript 1-37.
10 Transcript 1-59 ll 45-47.
11 Transcript 1-60 ll 37-39.
12 Transcript 1-61 ll 20-23.
13 Transcript 1-90 ll 5-6.
14 Transcript 1-30 l 40.
15 Transcript 1-31.
16 Transcript 1-27 l 5.

work that I owed money to".[17] Whilst a further amount of $35,000 was also withdrawn on 31 March 2014 which she also states was for the renovations, that amount could not be substantiated.

[50] Ms Shepherd was able to provide some details of payments she had made for the improvements which identified the date of the payment, the source of the credit card and the purpose of the payment. She gave details of improvements to the property which she has paid for from her own resources between 1 March 2012 and 1 May 2014. She estimates that the improvements total $133,348.15 rather than $213,421.65 originally specified in her Amended Statement of Claim as some arithmetical errors had occurred in the calculation.[18] She said that she made significant improvements to the kitchen, the bathroom, replaced windows as well as replacing staircases and tiling. Her evidence was that she initially used a carpenter called Michael Ramsey who she had met through his parents who went to her church. Whilst he was not strictly the project manager he co-ordinated a lot of the work with the other trades and she would then pay them in cash. She also used him to do a lot of the carpentry work and also paid him in cash. During her evidence in chief her Counsel took her through her bank statements as well as her credit card statements and she outlined the payments she had made for the renovations.

[51] I accept that Ms Shepherd was truthful and in particular I note that she accepted that she could not give any detailed explanation for the cash amounts that she had withdrawn. She maintained however that most of the large amounts that were withdrawn were in fact spent on tradesmen rather than living expenses. Ms Shepherd also readily conceded that she did not have a written contract with any of the tradesmen and they all sought to be paid in cash. She maintained however that despite the fact that she did not have receipts from the various tradespersons, her experience was that once a quote was given, that was the amount that was expected to be paid and that was the amount that was paid. Ms Shepherd also accepted that in some of the items in the statement of claim, there was double counting which she conceded.

[52] I also note that Ms Shepherd did not dispute the report of Markus Pye other than to say that irrespective of the value that he assigned to the work, she had paid a large part of the amounts that she had outlined.

The plaintiff's claim

[53] Counsel argues that the evidence establishes that she paid significant amounts of money towards the renovations to the property. It is on this basis that her Counsel argues that she has an equitable interest as a purchaser of an estate in fee simple and by the caveat claims an equitable interest as purchaser.

[54] It is argued that the defendants hold the property on a constructive trust for her. Whilst the plaintiff initially claimed $451,067.27 her Counsel stated that was "the top end of the claim advanced" and that it was the aggregate of all the amounts.[19] Ms Shepherd maintains her claim for the amount of $85,000 which was paid as deposit. Additionally a specific amount of $15,900 was paid as well as the licence fee as part of the purchase price.

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17 Transcript 1-27 ll 23-25.
18 Transcript 1-16 ll 25-36.
19 Transcript 3-34 ll 16-31.

[55] Counsel for Ms Shepherd also conceded during submissions that the amount paid as licence fees, $84,750, should be deducted from this figure of $451, 067.27 but maintained a claim for the renovations and improvements in the amount of $133,348.15 as per the Further Amended Statement of Claim. Counsel for Ms Shepherd accepted however that the Report of Markus Pye established that his calculation for the value of the building improvements as at February 2016 was $103,500.

[56] Counsel also accepted that from this figure the amount of $18,412, which were payments Ms Shepherd should have made under the contract for licence fees and other outgoings.

The evidence of Stephen Lawson

[57] Stephen Lawson gave evidence that he and his wife had owned the property since 1999 and that it had been basically continually rented out until the middle of 2015 when they started to reside in the property after the sale of their Thorneside property. He stated that he saw a flyer on a lamppost near the Camp Hill property called "We buy your home".[20] As he was suffering mortgage stress at the time he was interested in the offer. He stated that prior to the execution of the contract with the plaintiff on 1 March 2012, he and his wife executed two documents with Mark Kelly of Kelgar Pty Ltd on 8 February 2012.[21] The first document was entitled "Working Together - Our Agreement"[22] and the second was called simply "Our Agreement"[23].

[58] The first document stated that it was a 'Heads of Agreement' which documented a 'Joint Venture' between the defendants as the property owner and Kelgar as the 'Joint Venturer'. The document then outlined that the project comprised the marketing and sale of the defendants' property at Akala Street whereby the defendants contributed the property to the joint venture at a value of $460,000 and Kelgar would contribute its expertise and strategies to offset a loss for the property owner and or achieve a profit for the joint venture "using a Vendor Finance Arrangement (not as a real estate agent) in which payments received will be in excess of the property mortgage repayments and outgoings. Or if that does not eventuate, as a standard sale, and in all cases, the sale price will be greater than the agreed value/loan debt".[24] The document also noted a mortgage from the defendants to the Adelaide Bank in an amount of $306,000 with repayments of $2,363 which was not in arrears.

[59] Mr Lawson stated that he understood that the arrangement Mark Kelly was offering involved a long settlement period during which the buyer would enter into occupation of the property and undertake renovation works to increase the value of the property which would then facilitate the provision of finance. He also accepted that the property was in need of some work when Ms Shepherd moved in. He knew that she was a single mother with children. He also stated that the $85,000 which was paid as a deposit was paid directly to Mark Kelly and he has never received it.[25]

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20 Transcript 2-10 ll 22-25
21 Transcript 2-38.
22 Exhibit 2, Document 68
23 Exhibit 2, Document 69.
24 Exhibit 2, Document 68, page 454.
25 Transcript 2-14 l 30.

[60] Mr Lawson was asked about an earlier version of the document which was dated 8 December 2011 but could not explain its origins and could not recall any detail of its preparation.

[61] Clause 7 set out the Joint Venturers responsibilities as follows:[26]

> "The Joint Venturer's responsibilities – The Joint Venturer will be responsible for the sale documentation, including setting the price, the 'upfront' deposit, the amount of the payments, the payment variations, the possession date and the term of the sale contract, including if necessary; replacing the purchaser and adjustments to the settlement term to recover the loss of achieve the profit needed. The joint Venturer will administer systems set up for the sale of the Property, under the Vendor Finance Agreement, including the payment systems, the issue of the statements to the Purchaser and the disbursement of the payments received from the Purchaser."

[62] Clause 8 then set out the payment under the arrangement as follows:[27]

> "The payments under this arrangement – The moneys received from the Purchaser during a Vendor Finance Arrangement are to be applied as follows:
>
> (i) The deposit or 'upfront' money, after payment of marketing and legal expenses is to be paid to the Joint Venturer;
> (ii) The periodic (weekly) payments are to be applied, firstly towards the mortgage repayments, then to outgoings (rates and insurance premiums), then to repairs and maintenance, and any remaining surplus to the Joint Venturer;
> (iii) The payment received from the purchaser at the end of a Vendor Finance Arrangement, when the Purchaser pays out the Arrangement, or on completion of a standard sale, is to be disbursed as follows:
>
> a) the full repayment of the balance owing under the property mortgage, including fees and expenses;
> b) the repayment to the Property Owner the agreed value/loan debt, less the payment under paragraph (a) less any principle [sic] moneys paid off the property mortgage from the date of this Agreement by the New purchaser/Joint Venturer, to the Purchaser/Joint Venturer;
> c) the payments of any unpaid joint venturer expenses; and
> d) the payment of the amount available after the payments in paragraphs (a), (b) & (c), to the Joint Venturer.

[63] Clause 12 of that document provides:

> "No Authority – neither the property owner or the joint venturer:
>
> (i) Has the authority to legally bind the other;

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26 Exhibit 2, Document 68, page 455, Clause 7.
27 Exhibit 2, Document 68, page 455, Clause 8.

(ii) Are partners, have a relationship of principle and agent or a trust relationship."

[64] The defendants accept that Mark Kelly of Kelgar Pty Ltd was their sales agent for the purpose of selling the property at Camp Hill but state that they did not give permission for anyone to execute any document on their behalf and in terms of the document styled "Our Agreement" dated 1 March 2012, which was executed between the plaintiff and Mark Kelly. They state that they did not give permission for anyone to execute that document on their behalf, and they had not seen the document prior to these proceedings.

[65] Mr Lawson stated that the second document which they entered into was titled "Our Agreement" and was entered into between the defendants and Mark Kelly on 8 February 2012. That document set out their agreement with Mark Kelly whereby Kelgar or a nominee was granted "and assumptive option to purchase" the property at Akala Street for $460,000. The agreement gave Kelgar until 30 June 2017 to exercise the option. Clause 2 was as follows:[28]

> "The payments to be made when the Purchaser buys the Property – When the option is exercised, a Contract of Sale will be entered into, and out of the price payable under the contract on completion, the Property owners will –
>
> (i) pay to the Property Financier or Bank, the loan balance owing under the Property mortgage, including fees and expenses; and
>
> (ii) reimburse to the Purchaser all loan repayments, council rates and water rates, repairs and maintenance if paid by the Purchaser, relative to the period before the Occupation Date;
>
> (iii) receive the Agreed Value, less the payments under paragraphs (i) & (ii) and less any principal moneys paid off the property mortgage by the Purchaser from the date of occupations to the Purchaser; and
>
> (iv) pay the Purchaser any surplus price above the Agreed Price."

[66] A document entitled "Notice of Nomination" is also in evidence which Stephen Lawson states he has no memory of. It is dated 1 March 2012 and is signed by Mark Kelly on behalf of Kelgar whereby Kelgar, as purchaser under an option agreement dated 8 February 2012, nominated Anne Shephard as the nominee. It also provided that Kelgar's equitable and beneficial interests in the property were not affected and in particular "if the nominee does not complete the purchase, the Nomination is withdrawn". Kelgar was then given the right to on sell the property pursuant to clause 7 of the option agreement.

The defendants' argument

[67] The defendants argue that the relationship between the plaintiff and the defendants was that of buyer and seller, and not landlord and tenant, and that the plaintiff moved into the property subject to paying a licence as provided by the contract. The defendants plead that the purpose of early possession and the extended period of settlement being a period in excess of three years was to provide the plaintiff as buyer with an opportunity to carry

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[28] Exhibit 2, Document 69, page 458, Clause 2.

out renovation works to the property so as to increase the value of the property and to increase the equity in the property prior to obtaining finance to purchase the property.

[68] The defendants pleaded from the outset that the *Residential Tenancies Act* did not apply, that any claims were justiciable in the Civil and Administrative Tribunal and in any event the claim was time-barred because the application has to be made within six months of the plaintiff becoming aware of the alleged breaches. As I have already indicated, that aspect of the plaintiff's claim has now been abandoned.

[69] The defendants plead that the renovations carried out are defective, in particular the renovations to the downstairs area of the house are not of legal height, and that significant areas show poor workmanship or improper installation. The defendants also plead that a number of the renovations have not been completed and are non-compliant in any event. The defendants argue that any improvements made to the property were made by the plaintiff as purchaser for her benefit.

[70] The defendants argue that pursuant to Clause 9.1 of the contract, if the buyer fails to comply with any of the provisions of the contract, the seller may affirm or terminate the contract. If the seller terminates the contract under Clause 9.1, then pursuant to Clause 9.3, it could either resume possession of the property, forfeit the deposit and interest earned on investment, and sue the buyer for damages, or re-sell the property.

[71] Pursuant to Clause 9.6 of the contract, the seller may recover from the buyer as liquidated damages any deficiency in price on resale and expenses connected with the contract. The default rate of interest was 11.40 per cent per annum.

[72] The plaintiff did not complete the contract.

[73] The defendants plead that at all material times from 30 July 2015 until 24 February 2016, the defendants were ready, willing and able to complete the sale. The plaintiff neglected or refused to pay the licence fees in accordance with Special Condition 3(ii) since 20 July 2015 and is therefore indebted to the defendants in the sum of $16,160.00 being 32 weeks.

[74] It is also argued that the plaintiff has not paid the rates and water charges in accordance with Special Condition 3, and is indebted to the defendants in the sum of $2,252.47.

[75] The defendants claim the Registrar of Titles be directed to remove the caveat and that the plaintiff pay to the defendants an amount of $18,412 for breach of contract together with interest and costs.

The evidence of Markus Pye

[76] The parties sought the provision of an independent report by Markus Pye who is an architect, urban designer and town planner. He was briefed jointly by the plaintiff and the defendants to provide a building report addressing the nature, quantity and likely costs of the alleged improvements to the property at Camp Hill.

[77] Mr Pye was asked to address:

1. The standard of work performed;

2. The legality of the work performed;

3. Any rectification work necessary to reach an acceptable standard of work;

4. Necessary rectification work required to obtain the required certification; and

5. The best estimate of cost to complete or rectify the works.

[78] He was also asked to provide the value of the building works at three points in time:

1. On or about 7 March 2012, the date of the occupation of the property;

2. On or about 30 April 2014 when the plaintiff alleges the works were completed by the plaintiff; and

3. On or about 29 February 2016 when the plaintiff vacated the property.

[79] The report was as at 29 September 2017.

The standard of works, the legality of works, necessary rectification works and best estimate of costs to complete or rectify the works

[80] In relation to the general house, it was noted that the original house has a building approval issued on 17 October 1947, and in 1989 there were minor building approvals granted in relation to a bedroom to the upper level, and additional storeroom. Mr Pye's report was very thorough and addressed the likely cost of all the alleged improvements. In particular he analysed the significant cost items as follows: [29]

(i) *Project Management* - the likely cost of all-inclusive project management was $8,455.

(ii) *Electrical* – the likely cost of the alleged improvements was $6,380 exclusive of PC items and the standard of the works performed was generally to industry standards but they were non-compliant in part. In relation to the electrical, it is noted that the plaintiff claimed $30,000. In relation to the work necessary to reach an acceptable standard, it was stated that the best estimate of cost to complete and rectify the works was $962.50.

(iii) *Plumbing* – the amount claimed was $18,000 and the likely cost of the alleged improvements was $10,173.83. The standard of the works performed was below standard in parts and that the legality of the works was unlawful. The necessary rectification works included the need to correct undersized pipes, missing vents and other issues. The best estimate to rectify the works was $5,000.

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[29] Affidavit of M Pye sworn 18 March 2019, MP-2.

(iv) *Plastering* – the amount claimed was $15,000 and the likely cost of the alleged improvements was $8,745. The standard of works performed was not installed to industry standard in parts, and the legality of the work was defective. The necessary rectification works included most areas of the ceiling plaster and the best estimate of costs was $300.

(v) *Asbestos removal* — the amount claimed was $25,000 and it was held that the likely cost of the alleged improvements was $7,293. A clearance certificate had been provided and no further rectification works were required.

(vi) *Sanding* - the likely cost of alleged improvements against a claim of $5,000 was $3,190, with the standard of works up to industry standards and no necessary rectification works were required.

(vii) *Painting* - $10,000 was claimed and the likely cost of the alleged improvements was $4,213.50, which does not however include the amount to paint the doors and frames which was included under another category. It was held that there were no further rectification works required in this regard.

(viii) *Floors* – an amount of $5,000 was claimed and the likely cost of the alleged improvements was $2,140 which were generally to the industry standard. Rectification works of $150 were required to tie down a new post.

(ix) *Significant items - Kitchen* – an amount of $25,000 was claimed and the likely cost of the improvements was $18,244. Whilst the standard was up to industry standard, the legality was non-compliant with a number of items needing to be fixed and cost in the order of $750.

(x) *Significant items - Bathroom* - $20,000 was claimed and the likely cost of the alleged improvements was $1,542. The standard of the works was non-compliant and the legality was non-compliant. The best estimate to complete was $450.

[81] The Report concluded that that the likely cost of the alleged improvements in total was $93,004.89 including GST with the likely cost to rectify being $9162.50 plus.

[82] In terms of the conclusion as to what was the added value that the plaintiff's contributions had made to the property, Mr Pye's report was in the following terms:

> The property was purchased for $500,000. At 6 March 2012 the Valuer-General valued the property at $450,000. As at 7 March 2019, the assumed added value of the existing building works were thus valued at $50,000. At 19 February 2014, the potential added value of the renovation building works was valued at $84,000. Combined with the existing building works valued at $50,000, the report noted the potential added value of the building and renovation works at $134,000

> In February 2015, the value of land increased 5.5 per cent to $475,000.
>
> At 17 June 2015, land and building values increased 12.5 per cent from 2014. The assumed added value of the existing building works therefore increased to $56,500, although the correct figure would be $56,250 (12.5 per cent increase of $50,000), and the potential added value of the renovation building works increased to $94,500. At June 2915, the added value to the property was $151,000.
>
> In February 2016, land and building values increased 9.5 per cent from 2015. The assumed added value of the existing building work was $61,500 and the potential added value of the renovation works by the plaintiff was $103,500. Therefore, the report concluded that at 29 February 2016 the additional value to the property was assessed at $165,000.

The Issues in Dispute

[83] The parties have not only tendered a document which sets out the List of Matters Not in Dispute,[30] but have also tendered a List of Issues in Dispute.[31] I shall turn to those issues at the outset as many of the issues can be disposed of quite quickly and I have removed from the list all questions which related to the *Residential Tenancies and Rooming Accommodation Act* 2008 given the abandonment of those aspects of the claim.

What is the effect of the newspaper advertisement?

[84] There can be no doubt that Ms Shepherd was influenced into entering into discussions with Mark Kelly because of the representations that were made in the advertisement. I also accept that she was given a copy of the advertisement at the time she entered into the written contract on 1 March 2012. Mr Lawson also conceded that he was aware of the advertisement and accepted that the advertisement set out his understanding of the vendor finance arrangement that he was entering into.

[85] The advertisement made it clear that a potential purchaser was able to renovate the property and indeed the expectation was that any potential buyer would indeed make improvements to the property. Mr Lawson also conceded that he understood that this would be the arrangement.

[86] However it cannot be ignored that Ms Shepherd and the Lawsons then entered into a written contractual agreement and there is very clear High Court authority which states that the parties are bound by that written contract that they entered into despite earlier discussions and oral representations which preceded the contract. In *Equuscorp P/L v Glengallan Investments P/L* the Court held:[32]

> "The respondents each having executed a loan agreement, each is bound by it. Having executed the document, and not having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it. The

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30 List of Matters not in Dispute filed by leave on 23 April 2019.
31 List of Issues filed by leave on 23 April 2019.
32 (2004) 218 CLR 471 at 33-35.

> parol evidence rule, the limited operation of the defence of *non est factum* and the development of the equitable remedy of rectification, all proceed from the premise that a party executing a written agreement is bound by it. Yet fundamental to the respondents' case that the operative agreements between the parties were wholly oral, and reached earlier than the execution of the written agreements, was the proposition that the written agreements subsequently executed not only *may* be ignored, they *must* be. That is not so. Having executed the agreement, each respondent is bound by it unless able to rely on a defence of *non est factum*, or able to have it rectified. The respondents attempted neither.
>
> There are reasons why the law adopts this position. First, it accords with the "general test of objectivity [that] is of pervasive influence in the law of contract. The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions.
>
> Secondly, 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." (footnotes omitted)

What is the effect of Clause 12 of the "Working Together Our Agreement" document executed by the defendants and Mark Kelly on 8 February 2012?

[87] This was an agreement entered into between the Lawsons and Mark Kelly of Kelgar. That agreement explicitly stated that neither party was the agent of the other. It does however explain the factual background and the mechanism whereby the arrangement between the parties worked in practice. It was pursuant to this document that Ms Shepherd became Kelgar's nominee. Whilst this arrangement was not known to Ms Shepherd it does not in any way affect the contract she in fact entered into with the Lawsons.

What is the relationship between Clause 12 of the "Working Together Our Agreement" document executed on 8 February 2012 and Clauses 1, 2, 4, 5, 6, 7, 8 and 16 of that document?

[88] The terms of the agreement explicitly provided that neither the property owner nor the joint venturer had the authority to legally bind the other or that they were partners or had

relationship of principal and agent or a trust relationship. However despite an argument that the parties were not principal and agent the defendants admitted that Mark Kelly had authority to act on their behalf for the purpose of introducing a purchaser, and selling the property; and see paragraph [64] above. To that extent, he must have been their agent. The Lawsons understood that the arrangement proposed by Kelly involved long term occupation before settlement, with the purchaser being allowed to improve the property; see paragraph [59] above. It would follow therefore that Kelly had authority to market the property for this kind of arrangement. Moreover, under clause 7 of this agreement, Kelly was made responsible for sale documentation. That seems to me to provide a good basis for saying that Kelly had authority to negotiate the terms of the agreement with the purchaser, including terms relating to occupation before settlement.

What is the effect of a document captioned "Our agreement move in form" dated 1 March 2012 entered into between the plaintiff and Mark Kelly of Kelgar?

[89] The plaintiff has the onus of proof in relation to allegations of agency. Clearly this document was between Ms Shepherd and Mark Kelly of Kelgar. The Lawsons were not a party to this document and neither is there any evidence that they had any knowledge of it. Not only has it not been signed by the Lawsons but there is simply no evidence before me that the Lawsons in any way authorised Mark Kelly to act as their agent in this regard in relation to the occupation of the property. In any event, no representation of authority made by Mark Kelly could bind the Lawsons if it was made solely by Mark Kelly without any holding out by the Lawsons to Ms Shepherd by words or conduct of some sort that he was their agent.

[90] While it was not pleaded in terms that Mark Kelly was an agent of the defendants with either actual or ostensible authority, paragraph 9 of the Statement of Claim alleges that Mark Kelly and Kelgar had "authority" to represent the defendants in relation to not only the sale of the house but also the occupation of the property before settlement. That was denied except to the extent that the Lawsons admitted he had authority for the limited purpose of introducing a purchaser and selling the property. The contract itself was silent as it did not contain any name under the section which provided for a "nominated agent' to be inserted. For reasons set out above, it would seem that Kelly had authority to agree terms with the purchaser. However, the document recorded that "paper work will be drawn up". It was an initial agreement, intended to be replaced by a more formal agreement, which occurred. The terms of the formal contract undoubtedly replaced terms recorded in this document.

Does that document captioned "Our agreement move in form" bind the defendants?

[91] Given the conclusion in relation to the previous issue, there can be no basis that such a document binds the defendants (see the comments above).

What was the effect of the contract of sale and early possession granted subject to the payment of a licence fee?

[92] The contract clearly provided at Special Condition 3(i) that the plaintiff was granted possession before Settlement and at 3(ii) that she would pay a weekly licence fee which was essentially a rental payment. The plaintiff conceded that the licence fees were properly retained by the defendants.

What was the state of the property when the plaintiff went into occupation on or about 7 March 2012?

[93] I accept Ms Shepherd's evidence about the state of the property when she went into possession. It was generally run down and in need of thorough cleaning. I also accept that there were some difficulties with electricity but that the issue was soon remedied. Mr Lawson's evidence was to the effect that the property was generally run down and in need of repairs. Indeed the advertisement clearly indicated that "she needs some luv". I also note, as Ms Shepherd testified, the purpose of her going into possession before settlement was for the very purpose of improving it and to add value to it.

[94] The contract that was entered into between the parties expressly provided at Special Condition 3(ix) that the plaintiff accepted the condition and state of repair of the property at the date of entry into possession.

Did the plaintiff renovate the property, and if so, for what reason?

[95] There is clear evidence that the mutual expectation of all of the parties was that the plaintiff would renovate the property so that she would have the advantage of being able to increase the value of the property prior to the settlement date which was some three years into the future. It was acknowledged that the purpose was to allow her to increase the value of the property to assist her in obtaining a loan.

If the plaintiff did renovate the property, what cost did the plaintiff incur?

[96] Whilst the plaintiff initially claimed that an amount of $237,873.10 was expended on renovations, that amount was based on a calculation which claimed the entire amounts she had withdrawn from her ANZ bank account in the period from July 2012 to July 2013. The plaintiff conceded in evidence that she could not substantiate that entire figure.

[97] The plaintiff as an alternative relied upon the figure of $213,421.65 which was based on specific details of payments made to particular tradesmen on particular dates for specific projects. During the trial her Counsel relied on a reduced figure of $133,348.15 given an error which had resulted in some double counting.

[98] I accept on the balance of probabilities that the plaintiff may well have expended such an amount on improvements to the property. The difficulty is that it is also likely on the balance of probabilities that some of the tradesmen either inflated their prices or did not provide all the services outlined in their quote given Mr Pye's expert report in relation to the objective cost of the renovations that were undertaken.

[99] Mr Pye's expert opinion was that the cost of the improvements actually undertaken was in the order of $93,004.89 including GST.

[100] Clearly then the likely amount expended is between $93,000 and about $133,000, the difficulty is however that it is not the cost of the improvements or the plaintiff's actual expenditure which is the figure which needs to be ascertained. As Brennan J stated in *Stern v McArthur,*[33] the figure which needs to be ascertained is the *value* of the improvements which have been made.

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[33] (1988) 165 CLR 489 at 509.

What is the value of the improvements made by the plaintiff?

[101] The added value of the improvements made by the plaintiff as outlined in Mr Pye's report and which is accepted by the plaintiff is $103,500.

Did the plaintiff have an obligation to ensure that the building works were performed to the requisite standard?

[102] The plaintiff was not required nor was she requested to undertake the improvements. She was clearly motivated to undertake the improvements in order to improve the value of the property she had contracted to purchase and to enjoy the benefits of such renovations. Under clause 8.5(4) of the contract she was obliged to indemnify the defendants against any expense or damages incurred by the defendants as a result of her possession. None is claimed.

Remaining issues

[103] As the issues in the trial evolved, however, it became clear that there were essentially two major matters in contention as follows:

(i) Whether pursuant to the terms of the contract the plaintiff was entitled to a return of the amount $85,000 paid in the amount of $5,000 on 1 March 2012 and $80,000 on 7 March 2012 which the contract termed as a 'deposit'.

(ii) Whether the plaintiff was entitled to any equitable compensation for the increase in the value of the property at Akala Street as a consequence of the renovations and improvements undertaken by the plaintiff.

[104] The remaining questions as outlined in the List of Issues settled between the plaintiff and the defendants included the following:

(i) Do the alleged defects of the property pleaded in paragraph 18 of the further amended defence have the effect of denying the plaintiff an interest as beneficiary of a constructive trust?

(ii) Is the plaintiff entitled to a declaration that she has an equitable interest as purchaser of an estate in fee simple?

(iii) Did the plaintiff, as buyer under the contract of sale, pay the sum of $451,067.27 or any other amount as part of the purchase price of the property?

(iv) Must the defendants pay or refund $451,067.27 as the part purchase price of the property paid by the plaintiff?

(v) Must the plaintiff pay to the defendants the sum of licence fees and outgoings due between the period 20 July 2015 and 29 February 2016?

(vi) Is the plaintiff liable or indebted to the defendants pursuant to the counterclaim and if so, is the amount of that debt or liability able to be set off against the monies claimed by the plaintiff?

(vii) Is the deposit of $85,000 to be repaid to the plaintiff?

I consider that all of those questions are more appropriately considered together when determining those two major matters which remain in contention as outlined above given that they are interrelated issues.

Is the plaintiff entitled to a return of the amount $85,000 paid in the amount of $5,000 on 1 March 2012 and $80,000 on 7 March 2012 which the contract termed as a 'deposit'?

[105] There was no dispute that an amount of $85,000 was called a deposit in the contract and that that amount was paid in two tranches. The amount of $5,000 was paid when the contract was signed and the balance of $80,000 was paid six days later prior to the plaintiff entering into possession.

[106] The plaintiff claims this as a part payment of the purchase price.

[107] It is of course necessary to commence with the actual contract entered into between the parties on 1 March 2012. It is clear from the evidence that neither the plaintiff nor the defendants had legal representatives and I infer from the evidence that the documentation was probably prepared by Mark Kelly. It was a cut and paste contract with some Special Conditions inserted. Whilst the contract provided for some matters such as the deposit to be paid, early possession and the date of settlement, it is completely silent in relation to any money expended on improvements to the property during the three years of occupation prior to settlement.

[108] The contract at page 2 referred to an Initial Deposit of $85,000 payable on signing and then referred to a 'Balance Deposit' to be paid as per Special Condition 2. There was no real contention that the amount of $15,900 was paid in addition to the weekly licence fee under the contract. Whilst those payments were termed a Balance Deposit pursuant to Special Condition 2(iii), those payments were clearly instalments of the purchase price and was conceded as such by both parties.

[109] As the defendants argue, there can be no doubt that the entitlement to the Initial Deposit is specifically provided for in the contract pursuant to Clauses 9.1 and 9.4. Clause 9.1 provided that if the seller or buyer fails to comply with an essential term or makes a fundamental breach of an essential term the seller or buyer may affirm or terminate the contract. Clearly the buyer, the plaintiff, failed to comply with an essential term by failing to pay the balance purchase price on the Settlement Date. Given the breach by the plaintiff, there can be no doubt that there has been a valid termination by the defendants in accordance with s 72 of the *Property Law Act.* Clause 9.4 then provided that in those circumstances the seller could resume possession of the property and the buyer would forfeit the deposit. Here, the defendants argue that means they were entitled under the contract to the $85,000.

[110] The amount of $85,000 is clearly $35,000 in excess of the usual 10 per cent deposit. The plaintiff has not pleaded her case in terms of relief against forfeiture but rather has argued

an entitlement to the return of the entire amount because it is argued that it was not a deposit but rather a part payment of the purchase price. The defendants argued that as the pleadings and trial proceeded on the basis that the deposit was a genuine deposit and as they were not abandoned expressly or by conduct there should be no departure from this position at this late stage. I accept that relief against forfeiture was not expressly pleaded but given the factual matrix it clearly arises out of the pleading that it was part of the amount of $451,067.27, characterised as part of the purchase price, for which she claimed repayment. For this amount of $85,000, that could only be on the basis that it was not truly a deposit, and the plaintiff was entitled to be relieved from its forfeiture. The defendants alleged that this claim was not grounded in contract, at law, or in equity.

[111] In *Lexane Pty Limited v Highfern Pty Ltd,*[34] McPherson J outlined some of the relevant principles in a situation where a purchaser under an instalment contract has paid amounts over and above the deposit and where the default under the contract was default by the purchaser in not paying the balance purchase price. Whilst the factual matrix in that decision was quite different, the relevant principles were set out in the decision. His Honour stated that the fundamental principle applicable to a vendor who rescinds for breach after receiving payment, wholly or in part, on account of the price is that "he cannot have the land and its value too"[35] and accordingly money so paid by the purchaser is recoverable from the vendor. His Honour noted however that there was the added proviso that a deposit "properly so called" falls outside the scope of the relief because it is paid as security for completion of the contract. It was held:[36]

> "The rules governing the granting of such relief are not in much doubt, although their practical application may give rise to some difficulties. The fundamental principle applicable to a vendor who rescinds for breach after receiving payment, wholly or in part, on account of the price is that "he cannot have the land and its value too": *Laird v. Pim* (1841) 7 M. & W. 474, 478; 151 E.R. 852, 854, *per* Parke B. Hence money so paid by the purchaser is recoverable from the vendor. At law it is recoverable as money had and received upon a total failure of consideration where the consideration for which it was paid is the conveyance or transfer that has not taken place: *McDonald v. Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457, 477–478, *per* Dixon J.; in equity it is recoverable by proceedings for restitution: *ibid*; see also 48 C.L.R. 457, 470, *per* Starke J. Equity relieves against a contractual provision purporting to entitle the vendor in the event of default to retain money so paid: *ibid.* A deposit properly so called falls outside the scope of this right to relief because it is paid as security for completion of the contract: *McDonald v. Dennys Lascelles Ltd. (supra)*, at p. 470. Equity has never intervened to relieve against forfeiture of a deposit that is reasonable in amount, and a deposit of no more than 10 per cent of a purchase price is *prima facie* reasonable: see *Mehmet v. Benson* (1963) 81 W.N. (Pt. 1) (N.S.W.) 188, 191, *per* Jacobs J. (revd. on other grounds: see 113 C.L.R. 295). Section 71(2)(a)(i) of the Act also appears to assume that 10 per cent is a proper deposit. A vendor is therefore entitled to retain such a sum: *Mayson v. Clovet* [1924] A.C. 980; *McDonald v. Dennys Lascelles Ltd. (supra)*; *Pitt v. Curotta* (1931) 31 S.R. (N.S.W.) 477, 483; *Chard v. Willett* [1933] St.R.Qd. 182, 188;

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34 [1985] 1 Qd R 446.
35 At 455.
36 At 455.

> although credit must be given, for the deposit in assessing any claim by the vendor for damages for breach of contract: *Cowan v. Stanhill Estates Pty. Ltd. (No. 2)* [1967] V.R. 641.
>
> With that exception money paid on account of the purchase price is repayable if the sale goes off. That includes not only instalments of price (other than deposit) but also interest thereon paid pending completion: *McDonald v. Dennys Lascelles Ltd. (supra)*; *Berry v. Mahoney* [1933] V.L.R. 314, 317, 323 (question 2). However, interest in arrear at the date of rescission is regarded as an element in the vendor's damages for breach: *Real Estate Securities Ltd. v. Kew Gold Links Estate Pty. Ltd.* [1935] V.L.R. 114, 123; as also is interest that was payable after such date: *Chard v. Willett (supra)*. On money that is repayable to the purchaser in accordance with these principles the vendor is liable to pay interest: *Pitt v. Curotta (supra)*; *Chard v. Willett (supra)*; see also *Sandeman v. Wilson* (1880) 1 L.R. (N.S.W.) Eq. 1, 11.
>
> In addition, the purchaser is entitled to restitution in respect of permanent improvements made to the land while in his possession to be measured by the extent to which the value of that land has been enhanced: *Sandeman v. Wilson (supra)*; *Real Estate Securities Ltd. v. Kew Golf Links Estate Pty. Ltd.* [1935] V.L.R. 114, 123–124 (cf. however *Rawson v. Hobbs* (1961) 107 C.L.R. 466, 485, where Dixon C.J. spoke of a refund of the "cost" of such improvements)."

[112] That decision made clear that amounts paid over and above a true deposit were recoverable but equity has never intervened to relieve against forfeiture of a deposit that is reasonable in amount, and a deposit of no more than 10 per cent of a purchase price is *prima facie* reasonable. In the circumstances of this case such a presumption should apply. I consider that an amount of $50,000 is the true deposit and the amount of $35,000 was paid as part of the purchase. In addition the amount of $15,900 is also clearly payment of part of the purchase price.

[113] Accordingly, the defendants are entitled to retain the amount of $50,000 paid as the initial deposit,[37] and the plaintiff is entitled to the return of $50,900 as part payment of the purchase price.

Is the plaintiff entitled to any equitable compensation for the increase in the value of the property at Akala Street as a consequence of the renovations and improvements undertaken by her?

[114] As Macpherson J held in *Lexane,* a purchaser of an instalment contract who has made improvements is entitled to restitution in respect of "permanent improvements made to the land while in his possession to be measured by the extent to which the *value* of that land has been enhanced."[38] This issue was considered by Brennan J in *Stern v McArthur*,[39] and whilst he was in dissent in that decision his articulation of the relevant principle was as follows:

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37 Recovery of the excess above ten percent of the purchase price is consistent with what appears in the judgment of McPherson J in *Freedom v AHR Constructions Pty Ltd* [1987] 1 Qd R 59 at 66.

38 [1985] 1 Qd R 446 at 455.

39 (1988) 165 CLR 489 at 509.

> "…the vendors accepted that, if successful, they were bound to allow the purchasers the value of the improvements they had made and they accept that, if successful in this Court, the up-to-date value of those improvements must be allowed. The vendors' acceptance of that obligation reflects a purchaser's entitlement in equity to compensation for the permanent improvements he has made with the vendor's consent while the purchaser was in possession if the vendor should rescind the contract of sale: see *Lexane Pty. Ltd. v. Highfern Pty. Ltd.* and cases there cited. I respectfully agree with McPherson J. that the measure of that compensation is "the extent to which the value of that land has been enhanced." (footnotes omitted)

[115] As I have set out above the report of Markus Pye stated that the figure which accurately represented the value of all building works made to the property at the time the contract was terminated was $165,000 but that the value of the improvements made by the plaintiff was $103,500 given that the assumed added value of the existing building work was $61,500.

[116] The contract provided for the payment of a licence fee per week. I accept that this figure was $500 per week which was clearly higher than the previous tenants were paying per week, but it was the price agreed to by the parties and, as the plaintiff concedes, these licence fees were paid pursuant to Special Condition 3(vi) and are properly retained by the defendants as were the outgoings for water and rates which were also specifically provided for in the contract.

[117] Accordingly the amount of $103,500 is the figure which represents the amount which should be paid to the plaintiff. To this figure should be added the figure of $50,900 previously referred to. The total amount is $154,400.

Counterclaim

[118] The defendants counterclaim the amount of $18,412 for breach of contract being the licence fees, water and rates which the plaintiff failed to pay in accordance with the contract. The defendants are entitled to have that amount set off against the amount of $154,400. I would enter judgment for the plaintiff therefore in the amount of $135,988 plus interest.

[119] I will hear from the parties as to the form of the orders including orders in relation to the removal of the caveat and as to costs.