Supreme Court

New South Wales

Case Name:	Mehmet v Carter
Medium Neutral Citation:	[2020] NSWSC 413
Hearing Date(s):	8 - 10, 14 - 17 October 2019
Date of Orders:	17 April 2020
Decision Date:	17 April 2020
Jurisdiction:	Equity
Before:	Ward CJ in Eq
Decision:	1. Declare that the plaintiffs are entitled to the return of the funds representing the deposit paid by them on the contract for the sale of land dated 6 July 2015 for the purchase of the property the subject of the present proceeding. 2. Order judgment for the plaintiffs for recovery of damages in the sum of $29,855.47. 3. Dismiss the cross claim with costs. 4. Order that the defendants pay the plaintiffs/cross-defendants' costs of the proceeding, including (as per the orders of the Court of Appeal) the costs of the separate question determination the subject of the proceeding before Darke J in 2017.
Catchwords:	CONTRACTS — Termination — Repudiation of contract — where purchasers raised requisitions — where plausible contentions and vendors refused to address LAND LAW — Conveyancing — Contract for sale — Breach — Error or misdescription — Requisitions — Vendors' obligations — Notices to complete — Purchasers' remedies

ENVIRONMENT AND PLANNING — Heritage conservation — Protection of Aboriginal heritage — meaning of “Aboriginal object” — National Parks and Wildlife Act 1974 (NSW)

Legislation Cited:

Aboriginal Land Rights Act 1983 (NSW), ss 41, 86
Competition and Consumer Act 2010 (Cth), Sch 2 (Australian Consumer Law), s 18
Conveyancing Act 1919 (NSW), ss 13, 55(1), 55(2A), 57
Electricity Supply Act 1995 (NSW), s 51
Evidence Act 1995 (NSW), ss 60, 69(2)(b), 72, 74, 78, 81, 135, 136
Evidence Amendment Act 2007 (NSW)
Fauna Conservation Act 1974 (Qld), s 7(1)
Law Reform (Law and Equity) Act 1972 (NSW), s 5
Local Government Act 1993 (NSW), s 59A
Mining Act 1992 (NSW), s 164
National Parks and Wildlife Act 1967 (NSW), ss 3(1), 33D
National Parks and Wildlife Act 1974 (NSW), ss 2A(1), 5(1), 83, 84, 85A, 86, 87, 89A, 90K(1)(b), 90Q(3)(d)
Racial Discrimination Act 1975 (Cth)
Real Property Act 1900 (NSW), s 42
Succession Act 2006 (NSW), Pt 4.4

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Akiba v Queensland (No 2) (2010) 204 FCR 1; [2010] FCA 643
All Options Pty Ltd v Flightdeck Geelong Pty Ltd [2019] FCA 588
Australian Competition and Consumer Commission v Woolworths Ltd [2019] FCA 1039
Batey v Gifford (1997) 42 NSWLR 710
Bell v Scott (1922) 30 CLR 387; [1922] HCA 13
Borda v Burgess [2003] NSWSC 1171
Byers v Dorotea (1986) 69 ALR 715
Carlish v Salt [1906] 1 Ch 335
Carpenter v McGrath (1996) 40 NSWLR 39
Carydis v Merrag Pty Ltd [2007] NSWSC 1220
Chambers v Borness [2014] NSWSC 890
City of Botany Bay Council v Jazabas Pty Ltd [2001] NSWCA 94
Clark Equipment Credit of Australia Ltd v Kiyose

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Crowe v Rindock Pty Ltd [2005] NSWSC 375; (2005) 12 BPR 22,823
Dainford Ltd v Lam (1985) 3 NSWLR 255
Davies v Morgan (1831) 1 Cr & J 587; 148 ER 1557 (Ex)
DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd [2016] NSWCA 117
De Rose v State of South Australia [2002] FCA 1342
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317; [2003] HCA 51
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12
Eighth SRJ Pty Ltd v Merity (1997) 7 BPR 15,189
Elwes v Briggs Gas Company (1886) 33 Ch D 562
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22
Festa Holdings Pty Limited v Adderton [2004] NSWCA 228
Fink v Robertson (1907) 4 CLR 864 [1907] HCA 7
Fligg v Owners Strata Plan 53457 [2012] NSWSC 230
Flight v Booth [1834] Eng R 1087; (1834) 131 ER 1160
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51
Frankel v Paterson [2015] NSWSC 1307
Galafassi v Kelly (2014) 87 NSWLR 119; [2014] NSWCA 190
Gardiner v Orchard (1910) 10 CLR 722; [1910] HCA 18
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Gumana v Northern Territory (2005) 141 FCR 457; [2005] FCA 50
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Re Ford & Hill (1879) 10 Ch D 365
Re Ridgeway and Smith's Contract [1930] VLR 111; (1929) 36 ALR 79
Re Spollon and Long's Contract [1936] Ch 713
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Category:	Principal judgment
Parties:	Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust (First Plaintiff/Cross-Defendant) Cameron Mehmet t/as ATF Cameron Mehmet (Second Plaintiff/Cross-Defendant) Errol Mehmet t/as ATF Errol J Mehmet Testamentary Trust (Third Plaintiff/Cross-Defendant) Cheers Aviation Pty Ltd t/as ATF KMGC Investment Trust (Fourth Plaintiff/Cross-Defendant) Murray John Carter (First Defendant/Cross-Claimant) The Wheel Resort Pty Ltd (Second Defendant/Cross-Claimant) Cathscompany Pty Ltd (Third Defendant/Cross-Claimant) Matthews Cheers (Fourth Cross-Defendant)
Representation:	Counsel: D Smallbone with YLR Chen (Plaintiffs/Cross-Defendants) T Alexis SC with M Southwick (Defendants/Cross-Claimants) Solicitors: Beswick Lynch Lawyers (Plaintiffs/Cross-Defendants) Heydons Lawyers (Defendants/Cross-Claimants)
File Number(s):	2015/00360420
Publication Restriction:	Nil

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JUDGMENT

1 **HER HONOUR**: This matter involves a dispute as to the termination of a contract for the sale of land in Byron Bay. The land in question comprised an area of some 30 acres over two lots on which there was in operation at the time (on the smaller of the two lots) an ecological tourist resort then known as the Rainforest Resort (and formerly known as The Wheel Resort). The contract for sale of land was entered into on 6 July 2015 at the same time as, and interdependent with, a contract for the sale of the Rainforest Resort business conducted thereon (although the evidence of the purchasers is that they were not interested in running the business as such; rather, they were interested in the development potential of the land which they understood was confined to an area of about seven acres zoned for commercial use).

2 The plaintiffs are the purchasers and the defendants/cross-claimants are the vendors under the relevant contracts. Each party, in essence, contends that it validly terminated the relevant contracts. For ease of reference, I will refer to the parties collectively as the purchasers or the vendors, as the case may be.

3 The primary position of the purchasers, noting that they put various alternative cases, is that the vendors were not ready and willing to show and prove a good title to the land in question, in that they were not ready, willing and able to show that there were no “Aboriginal objects” (as that term is defined in the *National Parks and Wildlife Act 1974* (NSW) (the *National Parks and Wildlife Act*)) in or on the land (or, if such objects were present, to remove or otherwise provide good title to them); and that this amounted to repudiatory conduct on the part of the vendors. The purchasers maintain that it is not necessary, for the purposes of the primary way in which they put their case, for it to be proven that there are, or were, in fact Aboriginal objects on the land, it being sufficient for them to establish that there was a plausible contention that there were (on the basis

that it was then for the vendors either to establish that there were not or otherwise to make good the defect in title). That, of course, is itself predicated on the presence of Aboriginal objects on or in the land being capable of constituting a defect in title, which the purchasers maintain is the case.

4 The purchasers rely on the common law rule to the effect that any defect in title is a valid ground for objection to completion of the contract for sale of land. Alternatively, they rely on the rule in *Flight v Booth* [1834] Eng R 1087; (1834) 131 ER 1160 (*Flight v Booth*), where Tindal CJ said that where a misdescription, other than one proceeding from fraud, "is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all …", the purchaser might avoid the contract without resorting to the compensation clause (which, the purchasers note, in that case was a non-annulment clause). The purchasers say that in the present case the subject matter of their objection (the presence of Aboriginal objects on the land) was a material and substantial matter affecting the contract in that it may reasonably be supposed that, but for the promise of a title free of interest in the Aboriginal objects, the purchasers might never have entered into the contract at all (using the terminology of Tindal CJ).

5 In the alternative to the primary way in which the purchasers put their case (i.e., that it is not necessary for them to establish the existence in fact of Aboriginal objects in or on the land), the purchasers say that they have established the existence of Aboriginal objects on the land and that the vendors did not in fact have a good title to the land (i.e., a title free of Aboriginal objects) because of the presence in or on the land of one or more Aboriginal objects (see below at [513]ff). As they do under the principal way in which their claim is put, the purchasers again rely on the common law rule as to defects in title or, in the alternative, the rule in *Flight v Booth* (though they accept that the application of the latter, on this alternative way in which their case is put, depends on what Aboriginal objects are found to have been on the land).

6 Irrespective of the determination of those first two ways in which their claim is put, the purchasers put a further alternative repudiation case. They say that the

vendors' insistence on what the purchasers maintain was an invalid notice to complete, and the vendors' purported termination of the contract on that basis, amounted to a repudiation by the vendors of the contract thereby entitling the purchasers to accept that repudiation and to bring the contract to an end. The purchasers say, as to that notice to complete, that the notice was given in circumstances where the purchasers had not been in default of any valid appointment to complete; and where the vendors had insisted on an invalid demand for interest and had refused to comply with a notice requiring them to withdraw the demand for interest.

7 Finally, the purchasers complain (and they rely on this in their defence based on s 18 of the *Competition and Consumer Act 2010* (Cth) sch 2 (*Australian Consumer Law*) to the vendors' cross-claim, as to which see below) that the vendors made misleading representations as to the suitability of the land for development use. The misleading conduct allegations are also relied upon by the purchasers as justifying an order under s 55(2A) of the *Conveyancing Act 1919* (NSW) (*Conveyancing Act*) for the return of the deposit.

8 For their part, the vendors: contend that the purchasers have not established that there were Aboriginal objects (within the meaning of the *National Parks and Wildlife Act*) on the land; maintain that even if there were Aboriginal objects on the land this did not amount to a defect in title entitling the purchasers not to complete the contract(s); and say that it was the purchasers who repudiated the contract for sale of the land and, therefore, that they (the vendors) validly terminated the contracts.

9 In their further amended defence, among other things: it is alleged by the vendors that the existence of Aboriginal remains or Aboriginal objects (which is denied) does not affect the vendors' right to sell the land (see [43](b); [46]); reliance is placed on the content of printed cll 5.2 and 10.2 and special conditions 3(b), 4(a) and 5 of the contract (see further below) (see [44] and [45]); and reliance is placed on printed cl 6 and special condition 6 (see[12](f), [44], [53](e), (f)).

10 The vendors maintain that they are entitled to forfeit (and hence retain) the deposit paid under the contract and have cross-claimed for damages for

breach of contract. In this regard, after the deposit of $300,000 is brought to account, the vendors claim a loss of bargain of $175,000 (plus costs and expenses associated with the resale of the land at auction in November 2015).

11 The procedural history of this matter has not been uncomplicated. At an earlier stage in the proceeding, orders were made by consent (on 16 December 2016) for the separate determination of a number of questions, including whether the existence of the alleged Aboriginal objects in or on the land was capable of constituting a defect in title to the land on which they are located (see *Mehmet v Carter* [2017] NSWSC 1067 at [5], to which I will refer as the Separate Question Decision). The matter was then heard by Darke J on the basis of a schedule of agreed facts and on the assumption that there were Aboriginal objects on the land; there being a number of agreed outcomes between the parties depending on the answers to the separate questions (see as set out at [16] per Beazley P, as Her Excellency then was, in the subsequent Court of Appeal decision in *Mehmet v Carter* (2018) 98 NSWLR 977; [2018] NSWCA 305, to which I will refer as the Appeal Decision).

12 Darke J held, relevantly, that question 1 of the questions posed for separate determination should be answered in the negative (see the Separate Question Decision at [137]). The parties' agreed outcome following that determination was that the purchasers were to accept that they had no right to terminate the contract and no claim for damages arising from the existence or possible existence of the alleged Aboriginal objects; and it was to remain in issue as between the parties whether the purchasers should have relief under s 55(2A) of the *Conveyancing Act*, as well as the defendants' claims pursuant to an amended cross-claim, which issues it was agreed would be determined at a later trial.

13 However, as is not uncommonly the case where the course of hearing questions for separate determination is pursued (see the observation by Einstein J in *Idoport Pty Limited v National Australia Bank Limited* [2000] NSWSC 1215 as to the experience of courts being that separation of proceedings often merely causes added delay and expense to the resolution of the litigation), as it transpired the agreement between the parties (no doubt for

laudable reasons in terms of the perceived efficiency in terms of case management in so doing) to embark on a separate determination of the questions relating to the defect in title issues ultimately did not result in any saving of costs or time.

14 The purchasers sought and obtained leave to appeal from his Honour's decision (the application for leave to appeal and appeal itself being heard concurrently). The appeal, as ultimately argued, involved only one issue (namely, whether the primary judge erred in concluding that the alleged Aboriginal objects were not capable of constituting a defect in title, that issue arising under question 1 of the separate questions (see Bathurst CJ at [1])). The Court of Appeal held that it was inappropriate to answer question 1 (and hence inappropriate to answer question 4) because: the question was vague and hypothetical; any utility in answering it might depend on the way in which the matter was conducted at trial; and the answer to the question would not finally determine the proceeding (see the Appeal Decision at [2]-[9] per Bathurst CJ; at [103] per Beazley P; McColl JA, agreeing with both at [107]). The whole of the proceeding was then remitted to the Equity Division (with costs of the hearing of the separate questions before Darke J to be costs in the cause) and the matter was heard by me over seven days in October last year. Having regard to the now significantly reduced quantum of the purchasers' claim and the quantum of the vendors' cross-claim, it seems likely that the overall costs of the proceedings in this Court and the Court of Appeal will now outweigh the amount in issue in the substantive dispute.

15 By way of further complication, I am informed that during the course of the proceeding the deposit (which had been held by the vendors' agent as stakeholder in a trust account) was misappropriated by the then principal of the vendors' agent (not, I hasten to add, the real estate agent who acted on the sale and who gave evidence in the proceeding before me); and hence, those funds are now represented by a claim against the statutory compensation fund applicable to real estate agents' trust accounts (payment out of those funds awaiting the determination of the present proceeding).

Summary of conclusions

16 For the reasons set out below, I have concluded that the evidence, including reputation evidence (as to the admissibility of which, see below) establishes that there was a plausible contention at the time of the relevant events that there were Aboriginal objects on the land within the meaning of the *National Parks and Wildlife Act*, (in particular and relevantly, the remains of two Aboriginal elders, Harry and Clara Bray, known as the King and Queen of the Bundjalung tribe; and a memorial stone and plaque recording their burial near the site of the plaque); and that the presence of such Aboriginal objects was capable of constituting a defect in title.

17 I do not accept that the contract for sale of land should be construed as excluding any Crown property on the land (such as would be constituted by the presence of any Aboriginal objects falling within the relevant definition).

18 In those circumstances, I consider that the refusal of the vendors to address the purchasers' objection as to the defect in title issue, coupled with the vendors' insistence on an invalid notice to complete (there having been no valid appointment to settle and the vendors having insisted upon an invalid claim for default interest), amounted to a repudiation of the contract, entitling the purchasers to accept that repudiation and terminate the contract, which they did in September 2015. Thus, the principal way in which the purchasers make their claim is made good and the vendors' cross-claim should be dismissed with costs.

19 Had it been necessary to determine the purchasers' alternative case, I would have concluded that the memorial stone and plaque (the presence of which on the land is not denied) do constitute Aboriginal objects within the meaning of the *National Parks and Wildlife Act* having regard to the recognised breadth of the statutory definition; and that the constraint posed to development of Lot 1 by the presence of those objects, while small in area, might reasonably be regarded as a substantial matter for the purposes of the common law principles and the rule in *Flight v Booth*.

20 Otherwise, while I accept the reputation evidence as evidence of the belief of the Aboriginal community that Harry and Clara Bray were buried on the land

(and most probably in the vicinity of the swimming pool constructed at the Rainforest Resort), I do not consider that the reputation evidence establishes the existence of the graves as a matter of fact on the land nor that they are in a location that would pose a substantial development constraint (since, by way of example, if the graves are, contrary to the belief of the Aboriginal elders, on Lot 10 rather than Lot 1, it is difficult to see that their presence would pose any substantial constraint on development of that area which is largely unavailable for development in any event). In the case of the other objects, again, I am not satisfied that the reputation evidence establishes as a matter of fact the existence of other graves on the land (and, in any event, what it does establish is a belief that any such graves would be on the swampy ground or area of Lot 10); I am not satisfied that the evidence establishes as a matter of fact the remains of a gunyah on the land (though I accept the reputation evidence that Harry Bray lived in a gunyah on the land) nor any extant "ceremonial mound" on the area of Lot 1; and I am not satisfied that the bunya pine (which it is admitted is on Lot 1) is an Aboriginal object within the meaning of the *National Parks and Wildlife Act*.

21 As to the further alternative repudiation claim based on the insistence by the vendors on completion based on an invalid notice to complete coupled with an invalid claim for default interest (which claim does not depend on the presence or otherwise of Aboriginal objects on the land), had it been necessary to determine the case on this contention, I would have concluded that it was made out.

22 Accordingly, the purchasers have succeeded in establishing that the vendors repudiated the contract and that they, the purchasers, have validly terminated the contract. They should recover the deposit (or, more precisely, the funds now representing the misappropriated deposit). Were it necessary for the purchasers to rely on s 55(2A) of the *Conveyancing Act* for relief against forfeiture of the deposit, I would have concluded that it would be unjust for the vendors to retain the deposit in circumstances where the vendors refused to address the objection to title in any meaningful way and insisted upon completion nonetheless. There should be an order for the reimbursement of

the costs associated with the terminated contract (quantified by the purchasers in the order of about $30,000).

23 Finally, had it been necessary to determine the misleading or deceptive conduct claim (raised as a defence to the vendors' cross-claim), I would have concluded that it was not made out because (quite apart from the fact that I consider that the statements relied upon were of the nature of mere puffery insofar as they went to the "unique opportunity to value add" or "huge potential" or to the characterisation of the property as a "diamond in the rough") I do not accept that the purchasers relied upon those representations. Rather, they relied upon their own inspection of or enquiries as to the property, including, significantly, the enquiries made of the town planner from whom they sought advice before entry into the contract (Mr Chris Lonergan).

24 Thus, while I have some sympathy for the proposition that this was a contract hastily entered into by the purchasers about which they then suffered (as was clearly Mr Carter's view) "cold feet", so to speak; and that the discovery of the reputed existence of Aboriginal objects on the land may have provided a convenient basis (or excuse) for them to walk away from the contract, conveyancing is an area of the law in which technical points are not uncommonly taken and are open to be taken (see the comments of Windeyer J in *Crowe v Rindock Pty Ltd* [2005] NSWSC 375 at [33]; (2005) 12 BPR 22,823 (*Crowe v Rindock*) below) and, applying those principles, I consider the purchasers' principal claim to be made good.

Background

25 It is necessary now to elucidate the background in some detail.

The subject land

26 As adverted to above, the subject land comprises two lots: Lot 1, which covers an area of approximately seven acres (of which a lesser area is zoned for commercial tourism use); and Lot 10, which covers an area of approximately 23 acres principally comprising rainforest land and is zoned for environmental protection. Lot 1 is the land on which the Rainforest Resort was operated at the relevant time (as to which see further below) and a re-development of Lot 1 would have required reliance on existing use rights (since, as I understand it,

part of the existing resort encroached on a 50m buffer zone now required as part of the bushfire hazard constraints).

27 Lot 1 in DP is the parcel of land on which the purchasers contend that the burial site and remains of Harry and Clara Bray, known as the King and Queen of Bundjalung, are located. There is certainly no dispute that situated on Lot 1 there is a memorial stone and a plaque (said by the vendors to be "readily visible" and "is situated in a prominent place" but which the purchasers say they did not observe prior to entry into the contract for sale). The plaque records that "Harry and Clara Bray tribal elders of the Bundjalung tribe buried near this site circa late 1890" (a date which it is accepted is incorrect by some three decades). The memorial stone and plaque are situated on Lot 1 near the swimming pool fence and close to the walkway or entrance to what were referred to in the evidence as Cabins 5 and 6 (closest to Cabin 6).

28 The vendors admit the presence on the land of the plaque (and the words that are inscribed thereon) but not the accuracy of the plaque (see their Notice Disputing Facts and Authenticity of Documents dated 3 August 2018); nor do they admit that there are present on or within the land the remains of any Aboriginal persons (be those the remains of Harry and Clara Bray or others).

29 Both sides point in their submissions to the lack of any archaeological investigation or excavation of the site: the vendors in the context of their submissions that there is no evidence to support the proposition that, nearly 100 years after the death of Harry Bray, there are any Aboriginal remains in existence on or near the site at all; the purchasers emphasising that the presence of Aboriginal remains on the land has not been negatived by the vendors and decrying any suggestion that there should have been an archaeological examination of the site as being, amongst other things, inconsistent with the objectives of the *National Parks and Wildlife Act*, which include the preservation and conservation of Aboriginal objects (to which see further below).

30 The subject land has been held under Torrens title since 14 September 1953. In an affidavit sworn 22 June 2016, Mr Mark Henry Groll, a land title searcher,

deposes to his title searches in respect of the land. I note that Mr Groll was not required for cross-examination and his evidence is not challenged.

31 Mr Groll prepared a schedule of the history of Lot 1 by searching the Crown Tenure Index and the General Register of Deeds in the period from 30 December 1916 to when the initial Certificate of Title issued on 14 September 1953; and then inspecting the Certificates of Title through to when the computer folio was created for Lot 1 on 29 July 1988. Prior to the creation of the computer folio, the land had been comprised in Vol. 12074, Fol. 50 (and before that in earlier folios of the register). Part of Lot 1 was formerly a road, which was closed. Before 1953, the land was held (initially by a Mr Davidson) under Crown Tenure Conditional Purchase and, before 1925, under Crown Lease.

32 Mr Groll has also deposed (see at [4]) that part of Lot 1 was formerly part of Crown Reserve No. R 43074 for use of the land by Aborigines (the Crown Aboriginal Reserve) prior to 30 December 1916; a matter to which the purchasers point as being of considerable significance as to the presence (or likely presence) of Aboriginal objects.

33 Pausing here, I note that on the Cadastral Records Enquiry Report annexed to Mr Groll's affidavit (and marked Exhibit 7 in the proceeding), the area highlighted by Mr Groll as the location of the "10 acres parcel" the subject of the search enquiry (which I understand to be the area formerly part of the Crown Aboriginal Reserve) overlaps (albeit only to a minor extent) with part of the subject land. It is relevant here to note also that uncertainty as to the precise location of the reputed burial site of Harry and Clara Bray on the property is compounded by apparent uncertainty on the part of some of the witnesses as to the location of the former Crown Aboriginal Reserve (and, in particular, whether the Crown Aboriginal Reserve is synonymous with the Rainforest Resort land itself).

34 From 1916 (when it formed part of the Crown lease and then was later the subject of the Crown Tenure Conditional Purchase) until 1985, the Rainforest Resort land was held by the Davidson family. From 1985 to 1990, Lot 1 was held solely by Ms Phillippa Nichol (who gave evidence in the proceeding and

under whose ownership The Wheel Resort was constructed). From 1990, Lot 1 land was held jointly by Ms Nichol and Mrs Catherine Carter (nee O'Reilly), the late wife of the first defendant (Mr Murray Carter). In late 1995, Ms Nichol sold her then half share in Lot 1 to Caths Company Pty Ltd (referred to inconsistently in some of the documents as Cathscompany Pty Ltd and in some as Caths Company Pty Ltd but in any event the third defendant in the present proceeding), a company which is now controlled by Mr Carter.

35 Meanwhile, Lot 10 (the larger of the two lots) was held in the name of The Wheel Resort Pty Ltd (the second defendant in the present proceeding), that also being a company associated with Mr Carter and/or his late wife.

36 In terms of a general description of its location, the subject land is located to the south of the town of Byron Bay. It is situated across Broken Head Road from the Byron Bay Golf Course, and is to the south of a caravan park. Tallow Creek runs through and alongside the east of the property. Tallow Beach is to the east of the property (and there was reference in the evidence to sand mining at some stage on the land – presumably in the area of sand dunes near the beach). To the east of the Rainforest Resort, the land was described in some of the evidence as swampy ground (see for example T 171 the reference to swampy ground closer to Tallow Creek).

37 Relevantly, there is in the vicinity of the Rainforest Resort another (apparently more upmarket) resort near Byron Bay (now known as the "Byron at Byron" resort but formerly known as "The Everglades"). This resort is to the south of the subject land. Also to the south of the property (and a narrow strip on the east of Tallow Creek) is an area known as Suffolk Park, to which reference was also made in the evidence.

38 Also relevant to note at this stage is that it is clear that there were at all times various constraints affecting the development potential of the property as a whole (including endangered flora and fauna; bushfire hazards; and potential traffic impact considerations) quite apart from any heritage or archaeological considerations posed by the existence or reputed existence of Aboriginal objects on the land (see for example the expert opinion provided by a town planner, Mr Stephen Connelly, dated 31 May 2019, in connection with the

proceeding) (Exhibit 10) and the joint expert opinion of Mr Connelly, Mr Anderson, and Mr Robins, dated 13 September 2019, that was tendered in evidence in the proceeding (to which I will refer as the joint expert report) (Exhibit M)). An expert report prepared by one of the expert consultants, Mr Darryl Anderson of DAC Planning Pty Ltd (dated June 2016), for example, refers to the site containing high conservation value vegetation and two endangered ecological communities (littoral rainforest and coastal cypress woodlands together with a small area of SEPP 14 wetlands), the likely presence on the site or in the locality of 12 threatened species of fauna, and that the site is mapped as a bushfire prone area bushfire hazards.

39 There is a 50m buffer zone required for bushfire hazard purposes, at least part of which it seems not to be met by the existing "footprint" of the Rainforest Resort (hence for any re-development of the resort it would likely be necessary to rely on existing use rights).

40 In summary, it does not appear to be disputed that the commercial development potential of the land was largely, if not wholly, limited to the smaller lot (Lot 1) (the purchasers referring to this, seemingly not strictly accurately, as the "seven acres" of commercially useable land); and even then the joint expert report appears to acknowledge that there would have been some constraints on development (irrespective of the presence or otherwise of Aboriginal objects on the land).

Marketing of property for sale in 2015

41 As already noted, at the time of the events the subject of the present proceeding (in around July 2015), there was an existing "eco-tourist" resort, known as the Rainforest Resort (formerly known as The Wheel Resort) located substantially on the smaller of the two lots (Lot 1).

42 In 2015, having previously, in 2014, placed the Rainforest Resort on the market for sale through a different real estate agent, Mr Carter retained Ms Ruth Gotterson of Unique Estates Australia Pty Ltd (Unique Estates) to market the resort for sale. As I understand it, Ms Gotterson had not been involved in the marketing of the resort in 2014.

43 At some point, according to Mr Carter's oral evidence, the financier in respect of the property (Mayne Finance) decided it wanted to close its books; and Mr Carter said he had a choice whether to refinance or sell the property and decided to take the latter course (see from T 262.36). However, nothing turns on why the decision was made to sell the property. It simply explains one of the entries in a note made by the solicitor acting on the transaction at the time (see below at [119]).

44 The land was marketed with reference to its development potential: the Unique Estates marketing brochure and advertisements referred to the area of the property as being "30 acres across two titles" and referred to the "unique opportunity to value add", including the statement that the property represented "an iconic tourism or redevelopment opportunity (stca)" (which the purchasers understood to mean "subject to Council approval"). The asking price for the property and business (as specified in the marketing material) was $3.8 million.

45 There is a dispute in the evidence (to which I will come in due course) as to whether Ms Gotterson advised Mr Carter not to disclose the Aboriginal or cultural heritage aspects of the resort in the marketing for the sale. Ms Gotterson denies that she did so (see T 326), though it appears that she accepts that there was some conversation as to whether there should be reference to the cultural heritage in the marketing material (see below). In particular, Ms Gotterson denies that she was instructed to conceal or otherwise minimise the existence of the memorial plaque in relation to Harry and Clara Bray (see her affidavit sworn 30 May 2019 at [7]). Ms Gotterson's evidence is that, in or about 8 June 2015, Mr Carter asked her if she thought something should be put in the brochure about the cultural heritage and that her answer was that she did not think that buyers would be particularly interested and that, anyway, it was all set out on the Rainforest Resort webpage (see her affidavit at [12]). (The reference to the webpage is a reference to a web page that was accessible via a link that contained Mr Carter's "Nature Notes" for the site and to which I subsequently refer as the Nature Notes – see below at [301].)

46 Ms Gotterson deposes that Mr Carter informed her that there was "an old approval for the house" (see at [7]); which I understand to be what was referred

to in the evidence as the "second house site". There was some dispute in the evidence as to what the purchasers were told as to an existing approval for a second house on the site (the evidence of the town planner, Mr Lonergan, being that it had lapsed by 2015) but nothing turns on this.

47 As noted, the land and business were marketed for sale in 2015 as an eco-tourist resort with opportunity for redevelopment opportunity. It seems not to be disputed that at the time the infrastructure at the Rainforest Resort was (in advertising parlance) "tired". Where there was dispute is as to whether the grounds around the pool (where the memorial stone and plaque are located) were overgrown (it being the evidence of one of the witnesses that the resort had become a "jungle" – a description not supported by the relatively contemporaneous photographs of the area). In any event, it was Ms Gotterson's view (which I accept was genuinely held by her) that there was "huge potential" for a purchaser to re-develop the Rainforest Resort; and it seems probable that she conveyed that opinion when marketing the property.

The purchasers

48 The purchasers, who entered into the contract dated 6 July 2015 for the sale of the land, were a group or consortium associated with: various members of the Mehmet family (three brothers, Ian, Cameron and Errol Mehmet, each of whom entered into the contract as trustee for a named testamentary trust or partnership) as to a 70/100 share of the property; together with Cheers Aviation Pty Ltd, a company controlled by Mr Matthew Cheers, as trustee for another investment trust, as to a 30/100 share of the property. Mr Cheers is a friend of Mr Ian Mehmet's son, Mr Adam Mehmet.

49 Mr Cheers and Mr Adam Mehmet were the two persons who inspected the Rainforest Resort and first indicated an interest on the part of the purchasers in acquiring the property. It seems that there was some idea at one stage that Mr Adam Mehmet would manage the tourist resort (and hence that the acquisition would present an employment opportunity for him) (see, for example, Mr Ian Mehmet's affidavit sworn 9 June 2016 at [21]).

50 The purchasers' evidence, which I have no reason not to accept, is that they had experience in tourism and resort operations (as well as other businesses)

and that they entered into the contract for the purpose of re-developing the resort to an intensified standard of operation within the existing footprint (which, again, was principally situated on Lot 1). It is noted by the purchasers that their intention to develop the land was communicated to the vendors before entering into the contract (reference is made to [16] of Mr Carter's affidavit sworn 9 February 2016 in this regard). There is some dispute as to precisely what was said as to the purchasers' plans but nothing ultimately turns on this, particularly where no claim is now pressed by the purchasers for damages by reference to the loss of opportunity to develop the resort.

Inspections of the property

51 There is some divergence in the accounts of the lay witnesses over certain of the details as to the times at which discussion took place in relation to the potential purchase of the property (for example, Mr Adam Mehmet recalls meeting Ms Gotterson at a time in late June 2015 at a café whereas Ms Gotterson denies any meeting at the café on 29 or 30 June 2015; and there is some discrepancy as to where the offer to purchase the property was made: whether in Ms Gotterson's office or at a café – the Cool Katz café in Byron Bay). Broadly, however, the chronology of the various inspections of the property and entry into the contract, as given by the respective witnesses, was consistent and is outlined below.

Early June 2015

52 Mr Cheers has deposed that, in or about early June 2015, he noticed a billboard advertisement marketing the Rainforest Resort for sale (see [20] of his 27 June 2016 affidavit); that he then further read about the property on the internet (though not the Nature Notes on the website for the Rainforest Resort to which I refer later in these reasons); and that he sent a text message on or about 11 June 2015 to Mr Adam Mehmet forwarding an advertisement for the property (see [21] of his 27 June 2016 affidavit). Consistently with this, Mr Ian Mehmet's evidence is that he received a telephone call in mid-June 2015 from Mr Adam Mehmet, in which Adam told him that there was a property called the Rainforest Resort for sale that had seven acres zoned for commercial/tourism (see Mr Ian Mehmet's affidavit sworn 9 June 2016 at [15]). As adverted to above, the real estate brochure in evidence referred to a site "30 acres across

2 titles with beach access and just 3 flat kilometres from Byron Bay CBD"; specified a price of $3.8 million; and included the words "unique opportunity to value add".

53 Pausing here, one of the disparities in the witnesses' accounts of the various conversations is as to the area of Lot 1 (or the lot zoned for commercial/tourism) being "7 acres". Various of the purchasers referred to an area of seven acres zoned for commercial or tourism use (and referred to statements made as to it being rare for a property of this size being zoned for commercial use to be so close to Byron Bay). However, the advertising material does not refer to this as the area of Lot 1 (simply referring to the land being 30 acres across two titles); and Mr Lonergan denies having referred to an area of seven acres and says that he had no idea at the time of the area of the property (see T 300). Mr Adam Mehmet's recollection was that Mr Cheers had told him the area was seven acres (see T 147). The most likely explanation is, it seems to me, that the source of the purchasers' belief as to "7 acres" being the area zoned for commercial use was Ms Gotterson, as she quite candidly said in the witness box that the smaller parcel was seven acres and this was the convenient way of referring to it (see T 330). Nothing turns on this other than that it may otherwise have pointed to some unreliability in the purchasers' recollections of conversations as to the property.

18 June 2015 – first inspection by Mr Cheers

54 Mr Cheers has deposed that he visited the property for the first time on or about 18 June 2015 with a business colleague (Mr Paul Harris, who I interpose to note did not give evidence in the proceeding – a matter to which the vendors have pointed in their submissions though without directly seeking a *Jones v Dunkel* inference at T 411 (see *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298)) and Ms Gotterson (see [23] of his 27 June 2016 affidavit); and that he spent approximately one hour at the property, during which time Ms Gotterson showed him (and Mr Harris) around the property and that Ms Gotterson did not say anything to him about the Aboriginal heritage significance of the property. Mr Cheers recalls that Ms Gotterson said words to the effect "This is a diamond in the rough"; that "this has limitless potential"; and that "properties of this size in town with this type of zoning are rare" (see [23] of his 27 June 2016

affidavit). He says that he observed the property was run down and in need of an upgrade.

55 Mr Cheers has also deposed that, at the meeting on 18 June 2015, Ms Gotterson said words to the effect that a site had been approved for a second house on Lot 10 allowed by a boundary adjustment; and that Mr Lonergan did the work for that approval for Mr Carter and would be the person to ask about it. Mr Cheers describes the second house site as being within the "7 acres of commercially usable land" and points out that this was referred to in the real estate advertisements for the property (see [24] of his 27 June 2016 affidavit).

56 Ms Gotterson's evidence is that on the 18 June 2015 inspection Mr Cheers and she (with another person whose name she does not recall) walked around the property for about an hour and that they walked on the path which passed by the memorial plaque. Ms Gotterson's evidence in this regard (which was read only as to her lay opinion subject to weight) was that the plaque was "clearly visible". Relevantly, her evidence is that the plaque was not covered by plants or undergrowth (see her affidavit sworn 30 May 2019 at [15]). I interpose here to observe that the visibility of the plaque goes largely to the issue as to whether, if it amounted to a defect, it was patent; but also as to the credibility of the relevant witnesses (as to which, see below). Ms Gotterson denies that she told Mr Cheers that the development consent (for the second house site) was active; and she denies that she said the property was a "diamond in the rough" (see her affidavit at [17]).

1 July 2015 – meeting with Mr Cheers, Mr Adam Mehmet with Mr Lonergan

57 Mr Cheers has deposed that, on around 1 July 2015, he and Mr Adam Mehmet had a meeting with Mr Lonergan at his office (see [38]ff of Mr Cheers' 27 June 2016 affidavit), at which time he says that Mr Lonergan said various things, including that there was a seven acre area zoned commercial/tourism; that the rest of the land was "habitat protected and would be difficult … to do much with"; that, as to the potential for development of the seven acres, they could "build Club Med" if they wanted to; that his recommendation would be to use electric chain saws and clear as much as they could before getting anyone to

assess it; that he could see no reason why they could not build up to 100 units on the property; and that he was fairly certain that the DA approval for a second house site on the second title had never been activated and had lapsed (see [39] of Mr Cheers' 27 June 2016 affidavit).

58 Mr Lonergan confirms that he had a meeting at about 3.00pm on 1 July 2015 with Mr Cheers and Mr Adam Mehmet (see his affidavit sworn 31 May 2019 at [12]) and has annexed his diary note of the appointment. He denies that he said many of the things attributed to him by Mr Cheers and Mr Adam Mehmet (including the references to building "Club Med" if they wanted to, the use of electric chain saws to clear the site; and building up to 100 units) (see Mr Lonergan's affidavit at [16]). He also denies referring to the tourist zone as the "7 acre area", deposing (as adverted to above) that he has no recollection of knowing the size of the area of the tourist zone at the time of the meeting. Mr Lonergan does, however, agree that there was a reference to "Club Med" in the meeting but what he says is that he said words to the effect "Of course, if it was as simple as that you could build Club Med". He says it is a standing joke in Byron Bay to talk about building a Club Med, which he says the locals understand would never happen (see his affidavit at [17]).

59 Exhibited to Mr Cheers' affidavit is a copy of a zoning map that he says he was given by Mr Lonergan during the meeting. Mr Lonergan denies providing Mr Cheers with the so-called "zoning map" which he says appears to be a draft Byron Local Environment Plan 2013, noting that at the time of the meeting he knew that the Byron Local Environment Plan 2014 had been gazetted (see Mr Lonergan's affidavit at [16](e)).

60 Mr Cheers' evidence is that following this meeting he and Mr Adam Mehmet had a telephone conversation with Mr Ian Mehmet about the property (see [42] of his 27 June 2016 affidavit). This is consistent with Mr Ian Mehmet's recollection that some days after the initial telephone conversation with Mr Adam Mehmet he received a further call from him about the meeting that Adam and Mr Cheers had had with Mr Lonergan (see Mr Ian Mehmet's affidavit sworn 9 June 2016 at [16]).

61 By email at 5.15pm on 1 July 2015, Mr Adam Mehmet forwarded to Mr Ian Mehmet a link to the property, adding “notice the golf course across the road in the picture!”

2 July 2015 – second inspection by Mr Cheers (first inspection by Mr Adam Mehmet)

62 Mr Cheers says that, on or about 2 July 2015, he visited the property again, this time with Mr Adam Mehmet and Ms Gotterson; that, among other things, Ms Gotterson said she would “walk out” what she understood to be the borders of the seven acres of commercially usable land; that she showed them the cleared area for the second house site (Mr Cheers says he told her that Mr Lonergan said the approval had lapsed); that Ms Gotterson (in response to a query) said that there were other interested purchasers; and, again, that Ms Gotterson said that it was a “diamond in the rough” (see [55]-[56] of his 27 June 2016 affidavit).

63 Ms Gotterson confirms that, on 2 July 2015, Mr Cheers and Mr Adam Mehmet visited the resort with her. She says that she was present for approximately 40 minutes while they were inspecting the property and she observed that they walked along the footpath beside the plaque on a number of occasions (see her affidavit at [22]; [25]). As already noted, Ms Gotterson denies that she described the property as a “diamond in the rough”.

64 Mr Cheers says that after he and Mr Adam Mehmet had walked around the property they went into the main house to see Mr Carter; and that they had a conversation with Mr Carter, including as to what their plans were for the property (whether they were planning to develop this as a resort for backpackers) and as to the financials for 2004 (see [57]-[58] of Cheers’ 27 June 2016 affidavit). Mr Cheers says that in this conversation he told Mr Carter that they had been told that the second house site approval had lapsed; and that they were not planning to run the resort as a backpackers and would need to create more beds and cabins.

65 Mr Cheers says that he and Mr Adam Mehmet spent a further two hours or so walking around most of the 30 acre property before leaving and that he did not see any burial plaque (see [59] of his 27 June 2016 affidavit).

66 In his reply affidavit sworn 23 July 2019, Mr Cheers described the area in relation to the memorial plaque and stone in the following terms (at [9]):

> … I did not see lilies, native ginger, a plaque or a stone. I saw a jungle. The forest had come back and taken over the resort. The path [Mr Carter] refers to was a brick or stone path. It was full of tree roots and mould which lifted the paving, so that you had to be careful with your footing. Even the cabins were affected by tree roots. There was a tree that had fallen over and crushed part of the roof of one of the cabins. This tree was still alive. The white ants were so bad you could put your fingers through the walls. I could not even see the stone, let alone the plaque.

67 In his reply affidavit, Mr Cheers also maintained his evidence that Mr Carter had said that there were Aboriginal remains "all over the property", but not until a post-exchange meeting (see at [12]; and at [73] of Mr Cheers' 27 June 2016 affidavit).

3 and 4 July 2015 – offer of $3 million for property and business

68 Mr Cheers has deposed that on about 3 July 2015 he had a meeting with Mr Adam Mehmet and Ms Gotterson; that after some discussion either he or Mr Adam Mehmet made an "unconditional" offer of $3 million for the land and the business with a 14 day settlement; and that the following day (4 July 2015), Ms Gotterson telephoned him and said words to the effect that an extra $100,000 for Mr Carter "would get it over the line" (see [60]-[61] of Cheers' 27 June 2016 affidavit).

69 It appears that the solicitor who drafted the contract and who acted, at first, for both parties in respect of the sale (Mr Stuart Garrett) understood that the purchasers were to take the property "as is" (see Mr Garrett's file note dated 3 July 2015 which records "[p]urchaser to inspect property "as is" without pest, building, council or financial advice").

70 Certainly, Mr Garrett's understanding of the status of the offer (which followed a conversation with Ms Gotterson and therefore had presumably been conveyed to him by Ms Gotterson) was conveyed to Mr Carter in an email sent on 5 July 2015 as being that:

> … the offer is ABSOLUTELY unconditional – and that the Purchasers will take the properties and business "as is" without any conditions (with all and any problems that may exist).
>
> That is also without any finance condition or due diligence …

> It does not require you to provide any Accounting or Tax material …
>
> It is not clear when they would require you to vacate.

6 July 2015 – contracts for sale of land/sale of business exchanged

71 On 6 July 2015, Mr Cheers sent Ms Gotterson an email in which he conveyed an offer to engage Mr Carter as a consultant for the next 12 months, stating that "[w]e are prepared to pay 100k on or before settlement to secure his expertise". Ms Gotterson responded the same day to the effect that Mr Carter agreed to be engaged as a consultant for the next 12 months for a fee of $100,000 and that the fee should be paid by bank cheque on or before settlement. Pausing here, I find the suggestion that the purchasers were intending to rely on the expertise of Mr Carter as a consultant for any intellectual technology or management expertise, in circumstances where on their evidence they had not even accessed the web site at that stage, they had not displayed any interest in the financials of the business, and they were intending to develop the property, seems implausible. It seems far more likely that, as Mr Cheers has suggested, the consultancy fee was an additional payment to make the offer more attractive to Mr Carter) see Mr Cheers' 27 June 2016 affidavit at [61]).

72 The contracts for the sale of land (the relevant terms of which I consider in due course) and sale of business were signed on 6 July 2015. Suffice it at this stage to note that Mr Garrett was named on the contract for sale as both the vendor's solicitor and the purchaser's solicitor; and the purchase price was $3 million, including a deposit of $300,000. The coversheet specified the completion date as the 30th day after the contract date (which would have been 5 August 2015) but at least potentially was inconsistent with special condition 21(c) of the contract (which provided for completion 14 days after notification of registration of the transmission application in respect of the late Mrs Carter's interest in the property). The contract did not disclose the existence of any Aboriginal objects in or on the land; and it made no reference to any Aboriginal cultural significance of the site. The purchasers emphasise that the contract unconditionally promised a title free of any other interest in the land.

73 None of the Mehmet brothers (Ian, Errol and Cameron) had seen the property before contracts were exchanged; and none of the Mehmet brothers (nor for that matter Mr Adam Mehmet or Mr Cheers), according to their evidence, had read the material on the Rainforest Resort website in which Mr Carter had set out certain information as to the Aboriginal cultural history in relation to the land on which the resort was located (see below).

74 At the same time as the contract for sale of land, the purchasers entered into a contract with The Wheel Resort Pty Ltd for the sale of the business known as the Byron Bay Rainforest Resort. The purchase price for the business was noted as being included in the price for the sale of land.

75 Mr Cheers has deposed that when the contracts were signed he and Mr Adam Mehmet were in the office with the solicitor acting for both parties in respect of the sale (Mr Garrett) and that Mr Ian Mehmet was present by Skype. Mr Cheers has deposed that prior to signing the contract for the sale of the property they discussed the contract "in detail" with Mr Garrett and that Mr Garrett asked whether "you all understand you are waiving your rights under the contract" (which Mr Cheers understood to be referring to "your rights in getting the financials of the business" and your "rights [as] in building and pest inspections" – see [63] of Mr Cheers' affidavit sworn 27 June 2016). He also says that Mr Garrett said that he had done all the relevant checks and searches; and that Mr Ian Mehmet said that "[w]e will sign now but you must ensure all relevant searches have been done" (see [63] of Mr Cheers' affidavit).

76 Mr Garrett, to the contrary, says that none of the purchasers wanted him to undertake any searches prior to exchange of contracts and that the purchasers did not want the contract to be subject to any search or due diligence (see [10]-[11] of Mr Garrett's affidavit sworn 1 July 2019). In a reply affidavit sworn 22 July 2019, Mr Ian Mehmet, among other things, denies that Mr Garrett said to him in that meeting that the expression "warts and all" or "as is" included defects in title and he maintains that his instructions were to carry out all the "relevant" searches. I interpose to note that an instruction to carry out all relevant searches would seem otiose at least to the extent that the contract provided that the property "is purchased in its present state and condition" (see

cl 3(c)); though of course the purchasers might have been seeking those searches for purposes other than completion of the sale. In any event, whether the purchasers understood what they were entering into or not, it is clear from its terms that the contract was an unconditional contract and that they were purchasing the property in its present state and condition.

77 Pausing here, the clear impression I have from the timing of the events leading to exchange of contracts (on whichever version of the instructions given to Mr Garrett by the purchasers be correct) is that the purchasers were keen to move quickly to secure the sale of the property (perhaps due to their belief that it was rare to find a property of this size with potential for commercial/tourism development this close to Byron Bay; perhaps due to the impression that there were other interested purchasers). Whatever be their reason for moving so quickly, it is understandable in that context that Mr Carter subsequently formed the view (as he made clear at the meeting on 16 July 2015 – see below) that the purchasers were using the reputed presence of Aboriginal objects on the land as an excuse to "walk away" from the contract. That may also explain the way in which Mr Carter responded to the purchasers' stated concerns as to the 'defect in title' issue. However, whether or not this was a situation in which the purchasers, having entered into the contract in some haste, had subsequently repented their decision and were just looking for an excuse to walk away from the contract (and whatever the commercial ethics if that were to have been the case), is largely irrelevant to the questions here to be determined (namely as to whether there was a repudiation of the contract by the vendors which entitled the purchasers to terminate the contract). I say "largely" because, amongst other things, it might have had some relevance to any damages claim had that still been pressed on the loss of opportunity basis and it might also have relevance to the question as to whether there had been any reliance on any representations as to the development potential of the land.

Contract for sale of land

78 The form of the contract for sale of land used in the present case was the 2005 Law Society edition of the standard contract for sale of land in New South Wales, with additional special conditions.

79 On the cover page of the contract for sale, the completion date (for the purposes of cl 15) is specified as being "30th day after the contract date" (i.e., 5 August 2015, given that the contract is dated 6 July 2015). I note that, somewhat inconsistently with this, special condition 21 allows up to three months for satisfaction of the condition there specified (see below).

80 Before cl 1 of the printed contract terms, the contract contains the statement that: "[t]he vendor sells and the purchaser buys the *property* for the price under these provisions instead of Schedule 3 Conveyancing Act 1919, subject to any *legislation* that cannot be excluded" (italicised terms being terms defined in the standard printed contract). The term "property" is defined in cl 1 as "the land, the improvements, all fixtures and the inclusions, but not the exclusions". The land is specified on the cover page of the contract by reference to address, registered plan and title reference and is stated to be "subject to existing tenancies". The improvements, inclusions and exclusions are also identified on the cover page of the contract. The only exclusions are the "[f]urniture from Managers Home".

81 Printed cl 4, headed "Transfer", provides that, *normally*, the purchaser must *serve* the form of transfer at least 14 days before the completion date (cl 4.1); but that if any information needed for the form of transfer is not disclosed in the contract the vendor must *serve* it (cl 4.2).

82 Printed cl 5 deals with requisitions. Printed cl 8 deals with the vendor's right to rescind if, on reasonable grounds, the vendor is unable or unwilling to comply with a requisition. Printed cl 10, headed "Restrictions on rights of purchaser" provides that the purchaser cannot make a claim or requisition or rescind or terminate in respect of, *inter alia*, a condition, exception, reservation or restriction in a Crown grant.

83 Printed cl 6, headed "Error or misdescription", provides that:

> 6.1 The purchaser can (but only before completion) claim compensation for an error or misdescription in this contract (as to the *property*, the title or anything else and whether substantial or not).
>
> 6.2 This clause applies even if the purchaser did not take notice of or rely on anything in this contract containing or giving rise to the error or misdescription.

> 6.3 However, this clause does not apply to the extent the purchaser knows the true position.

84 Printed cl 15, headed “Completion date” provides that the parties must complete by the “completion date” and that if they do not then a party can serve a notice to complete if that party is otherwise entitled to do so. As already noted on the cover page the completion was specified as the 30th day after the contract.

85 Printed cl 16.3 (on which the purchasers place much weight) provides that:

> 16.3 *Normally*, on completion the vendor must cause the legal title to the *property* (being an estate in fee simple) to pass to the purchaser free of any mortgage or other interest, subject to any necessary registration.

86 Printed cl 21 (headed “[t]ime limits in these provisions”) includes: 21.1 “[i]f the time for something to be done or to happen is not stated in these provisions, it is a reasonable time”; and 21.2, “[i]f there are conflicting times for something to be done or to happen, the latest of those times applies”.

87 Printed cl 29, which applies only if a provision says “this contract or completion” is conditional on an event (cl 29.1), as amended by the special conditions, provides that if the time for the event to happen is not stated the time is 30 days after the contract date.

88 The special conditions to the contract for sale of land make clear that the terms and conditions of the printed contract are deemed to be included in the contract to which the special conditions are annexed and shall be read subject to the special conditions; and that, if there is a conflict between the printed contract and the special conditions, then the special conditions shall prevail.

89 Special condition 2 contains a standard form “whole agreement clause”.

90 Special condition 3 contains an acknowledgement by the purchasers that they had not been induced to enter into the contract by any statement made or given by or on behalf of the vendors; that the purchasers relied entirely upon suitable enquiries and inspection as to the condition of the property before entering into the contract; that the property is purchased in its present state and condition; and the purchasers expressly agreed not to rescind in relation to any of the foregoing matters.

91 Special condition 4 contains a release by the purchasers in favour of the vendors from all “demands, claims, actions, suits, costs and expenses now or later arising in relation to”, among other things, any interests of any third party to any property, goods or chattels included in the sale; and the purchasers indemnified the vendors against any claims whatsoever and howsoever in relation thereto. Pausing here, it is submitted by the vendors that if any Aboriginal objects formed part of the sale, then the purchasers thereby released the vendors from all demands, claims, actions, arising in relation to any interest of the Crown in the objects and indemnified the vendors against any such claims.

92 Special condition 5, to similar effect as special condition 3, contains an acknowledgement that the vendors did not warrant the use to which the property might be put and that the purchasers had satisfied themselves as to the use of the property; and provided that the purchasers will not make any objection, requisition or claim for compensation nor delay settlement nor have any right of rescission or termination arising from the existence of any defect “referred to above”.

93 Special condition 6, headed “Contamination”, provides that the purchasers accepted the property in its present condition and state of repair “including any latent or patent defects of any nature whatsoever” and provided that the purchasers will make no objection, requisition or claim for compensation nor delay settlement nor have any right of rescission or termination arising from the existence of any defect “referred to above”.

94 Special condition 8 provides for interest payable for delay in completion (being 10% computed at a daily rate from the day immediately after the completion date to the day on which the sale shall be completed). Thus, if the completion date was as specified on the coversheet, 5 August 2015, interest would not have been payable until (at the earliest) 6 August 2015.

95 Notwithstanding cll 6 and 7 of the printed contract, special condition 11 provides that any claim for compensation and/or any objection by the purchasers shall be deemed to be a requisition for the purposes of cl 8 in entitling the vendors to rescind the contract.

96 Special condition 18 provides that the contract for sale of the land is interdependent with the contract for sale of the business of the Rainforest Resort and the parties agreed that the two contracts comprise one single transaction and indivisible contract; that they were interdependent; and, among other things, that completion of one contract shall be dependent upon completion of the other.

97 Special condition 21 provides that completion of the contract is conditional upon Mr Carter, as executor of the estate of his late wife, becoming registered proprietor of the subject land by way of transmission within three months of the date of the contract; and contains an undertaking to do all things reasonable and necessary to obtain and become proprietor by way of registration of a transmission application. Relevantly, special condition 21(c) provides that completion shall take place within fourteen days "after the Vendor's solicitors have notified the Purchaser or the Purchaser's solicitor in writing of registration of the Transmission Application".

98 Special condition 22 provides for a guarantee by the director of the corporate purchaser, Cheers Aviation Pty Ltd (that is, Mr Cheers), of the performance of the purchaser's obligations under the contract and an indemnity in favour of the vendors in that regard. There was provision in the document for Mr Cheers to sign as "Sole Director/Secretary" under special condition 23 (the counterparts clause) but his evidence is that he did not sign this (and there is no signed copy to contradict this evidence).

9 and 10 July 2015 – the Parker Report

99 The genesis of the dispute that has led to the present proceeding (however genuine or otherwise the concern it is said to have inspired in the purchasers at the time) was the receipt by Mr Ian Mehmet of a copy of a report dated 7 May 2012 that had been prepared by an environmental consultant, Mr Peter Parker (the Parker Report). Mr Ian Mehmet's evidence is that on 9 July 2015 he received a copy of the Parker Report from another real estate agent, Mr Liam Annesley.

100 The Parker Report had been prepared for the Northern Rivers Catchment Management Authority. It included reference to the "high conservation value of

the site, together with adjoining land along Tallow Creek and the creek itself" and referred to an application under a 2011-2012 Incentive Program that referred to: endangered ecological communities, the SEPP 14 Coastal Wetlands, the Cape Byron Marine Park and the Arakwal National Park ("all of which occur either on or adjacent to the site") (see at [1.0]). The application to which it referred (to which I will refer as the Norman Application) was for funding for weed control. Mr Carter signed the Norman Application as a participating landholder. Pausing here, there is some issue as to whether the whole document was before Mr Carter at the time. Mr Carter's evidence is that he did not see the application form (see from example T273.3). This is relevant insofar as the purchasers seek to rely on his signing of the consent and approval as an adoption of the statements therein (and in that sense as an admission.)

101 The Parker Report made reference to cultural heritage values (see at [1.2]), including a reference to the burial site of Harry and Clara Bray, who were described as "two prominent Bundjalung elders who were buried at the Rainforest Resort in the early 1900s".

102 The vendors objected to the tender of the Parker Report. I provisionally allowed it into evidence, indicating that I would rule on this objection in my final reasons (which I do in due course).

103 The Parker Report noted that Amanda Norman (who I understand to be an owner of a neighbouring property) had compiled the cultural history component of the report and that it was reviewed by Mr Carter (see [1.3]).

104 Among other things, the Parker Report noted (see [1.5]) that: Tallow Creek and its surrounds were a traditional camping, swimming and fishing area remembered by Arakwal elders; that Harry Bray, son of Bobby Bray "king of the Bumberin tribe", lived with his wife Clara and their children "at the site which operated as a dairy farm from around the turn of the century to the 1930s or 40s"; and that Harry lived in a gunyah "just off the main road opposite the golf course, presumably the site". The Parker Report stated that:

> When the site became a wheelchair friendly resort in 1988, known as the Wheel Resort, a cabana was built over a concrete dairy slab (Plate 1 at page 17) and a pool constructed. During excavations the remains of Harry and Clara

> and possibly one of their children were discovered and a stone with a plaque acknowledging their burial place erected. This site is of particular significance to the Arakwal.

105 The Parker Report also notes that there are a number of large trees at the site and that these include a bunya pine close to a burial site located at the area (noting that the bunya seed is likely to have come from the Bunya Mountains in Queensland after the last Bunya Festival in the late 19th century; and that as many as 3,000 Aboriginal people travelled up and down the coast for the festival carrying seeds on their return).

106 Mr Ian Mehmet forwarded the email attaching that report to Mr Cheers and to Mr Adam Mehmet at about 9.10am on 10 July 2015, with the comment that:

> Liam Annesley, forwarded this environmental report to me, I would say that it could have a big impact on what we can and cannot do on the site, may be an idea to forward it to the town planner adviser for comment.

107 Pausing here, when the email was duly forwarded by Mr Cheers to the town planner (Mr Connelly), the words from "I would say that it could have a big impact … for comment" were deleted from the email. Rather, Mr Cheers included the comment "[w]e wanted to engage you and see what our options are with the property. Attached is a [sic] environmental plan done in 2012". Mr Cheers could not explain in the witness box why he had deleted Mr Ian Mehmet's comment when forwarding the report on to Mr Connelly.

108 Mr Ian Mehmet says he also emailed a copy of the Parker Report to his brothers, Errol and Cameron Mehmet, on 10 July 2015 at approximately 10.09am.

109 Mr Cheers has deposed that on 10 July 2015 he made contact with Mr Connelly (to whom he had been referred, prior to 10 July 2015, by Mr Garrett) to arrange a time for him to meet Mr Cheers and also the Mehmet brothers and that on that day he provided Mr Connolly with a copy of the Parker Report (which Mr Cheers says he had not yet had a change to consider "fully" at that stage). Annexed to Mr Cheers' affidavit is a copy of an email chain between Mr Cheers and Mr Connelly from 10.44am on 10 July 2015 to 8.05am on 13 July 2015 in that regard (see below). Mr Cheers' evidence is corroborated on this by Mr Connelly. Mr Cheers subsequently cancelled the meeting with Mr Connelly. I note that this might be because a decision had by

then been made by one or more of the purchasers not to proceed with the purchase, but that would be mere speculation. Nevertheless, Mr Adam Mehmet appears to have accepted that by the time of the meeting a decision had been made not to proceed (see for example T 162.12.)

13 July 2015 – meeting of Adam Mehmet and Mr Cheers with Mr Carter

110 On 13 July 2015, Mr Adam Mehmet and Mr Cheers met Mr Carter at the Rainforest Resort. There is a dispute as to what was said at this meeting.

111 Mr Cheers has deposed (see [71] of his 27 June 2016 affidavit) that during this meeting Mr Carter said that:

> The King of Bundjalung and his family are buried on the property next to the pool. The site has more cultural significance than Cape Byron … The elders still regularly come to this site around every 6 months. About 30 elders visited me a couple of weeks ago, saying they wanted to be involved with the new owners to preserve the site.

112 Pausing here, there was no evidence of a visit by a large number of Arakwal or other Aboriginal elders taking place a couple of weeks before 13 July 2015; though there was evidence of a visit to the site in about November 2014 by members of the community; so it is not implausible that Mr Carter may have referred to such a visit in the conversation with Mr Cheers and Mr Adam Mehmet on 13 July 2015.

113 Mr Cheers says that on that occasion Mr Carter showed him and Mr Adam Mehmet a memorial plaque referring to the burial of Aboriginal elders Harry and Clara Bray that he says was "hidden under overgrown plants near the pool" and was "so covered by plants and weeds that unless you knew it was there, one would not have found it" (see Mr Cheers' affidavit sworn 27 June 2016 at [72]).

114 Mr Cheers has deposed that at around the "second house site" he saw Mr Carter point to the ground and heard him say "[t]here could be a grave site there" and that Mr Carter also said that "[a]round 100 Aboriginal people lived here at the beginning of the white settlement" (see Mr Cheers' affidavit at [73]). Mr Cheers says that Mr Carter pointed to a large mound next to the "second house site" and said:

> I have seen a photo of the last King standing in front of that. It is a very significant site.
>
> […]
>
> This site has been used for thousands of years and I believe there could be thousands of bodies buried all over the property.

115 Mr Cheers deposes that Mr Carter also pointed towards Cabin 1 and said, in effect, that he was pretty sure that if they cleared the big bunch of shrubs near there they would find the original footings and remains of Harry Bray's original cabin (see his affidavit at [74]).

116 Mr Carter denies that he made a number of the statements attributed to him by Mr Cheers. In particular, he says (and I would accept) that it would be nonsense to suggest that there were thousands of bodies buried on the property. His explanation is that he was referring to the country as a whole (T 252.25).

14 July 2015 meeting with Adam Mehmet and Mr Cheers with Mr Garrett; conversations with Mr Lonergan/Mr Connelly

117 Mr Cheers has deposed that following the 13 July 2015 meeting at the Rainforest Resort he arranged a meeting with Mr Garrett (see his affidavit at [77]). He says that, at that meeting, Mr Adam Mehmet and he gave Mr Garrett a summary of the meeting at the property and that Mr Garrett said words to the effect that he had no idea this was a real problem; that this could mean "massive complications with selling the property to anyone"; and that Mr Carter "should be smart and just walk away" (at [78] of his affidavit). Mr Garrett denies this. Mr Cheers says that Mr Garrett (I have to say surprisingly for a solicitor who was at that time acting for Mr Carter and who was clearly conscious of the potential for a conflict arising between his duty to his respective clients as evidenced by the course he then adopted) also said (at [78]):

> I remember that Murray wanted to advertise the Aboriginal significance of the property in the local paper but he said he had been told by Ruth not to mention to anyone about the Aboriginal connection.

118 Mr Garrett adamantly denies any such statement. His evidence is that on or about 14 July 2015 he had conversations with both parties to the effect that "[a]s I previously advised you, if there is a problem, I will be unable to act for either party" (see his affidavit sworn 1 July 2019 at [14]).

119 Relevantly, there was in evidence a handwritten file note of Mr Garrett (Exhibit Q), which appears to confirm that there was a conversation between Mr Garrett and Mr Carter on 14 July 2015 in which Mr Carter told Mr Garrett that there had been a discussion the previous day in which reference had been made to a registered burial site. The file note reads as follows:

> 14/7 1.25
> → MURRAY
> Not aware of any notice or order
> Full + frank discussion yesterday
> Regd burial site
> Now suspect relates to proposed expansion of cabin operation – more cabins
> You now in diff situation
> - Mayne - refinance
> - Advice to other related parties
> - OSR etc
> ? Alternatives
> - Agreemt
> - Conflict
> Can't advise either party [because] of conflict

120 Mr Cheers has deposed to a conversation on the afternoon of that same day with Mr Lonergan in which he says Mr Lonergan told him he had not heard of the Parker Report; that it was "really bad"; that "Aboriginal groups are the most powerful in the system"; and that "the red tape alone would hold you up for a lifetime" (at [79] of his affidavit). Mr Cheers also deposes to a conversation with Mr Connelly, either on 14 or 15 July 2015, about the Aboriginal significance of the site, in which he says that Mr Connelly said that if he wanted to renovate and improve the current infrastructure he thought it would be "pretty straightforward as you have existing use rights" but that if it was correct that there were Aboriginal remains then he believed there would be "great difficulty getting anything more done" (see his affidavit at [80]).

121 Insofar as Mr Cheers has deposed that Mr Connelly said to him that Aboriginal remains would likely mean major restrictions on what could be developed on the site, Mr Connelly denies this (at [13] of his affidavit sworn 3 May 2019

affidavit). He has deposed that it is not his usual business practice to give such advice to a prospective client without a fee agreement in place, nor to do so without having carried out a review of the relevant information affecting a site (see his affidavit sworn 3 May 2019 at [14]). Mr Connelly did not record any time for any such advice and has no entry in his diary for 14 July 2015 recording such advice (and Mr Connelly says he did not invoice Mr Cheers or anyone on behalf of the plaintiffs for the provision of any advice in relation to the resort in 2015). Having regard to the emphasis placed by Mr Connelly in cross-examination on the need to record his billable hours (see from example T 338.38), I have no difficulty accepting this evidence.

15 July 2015 – cancellation of meeting with Mr Connelly; Mr Garrett ceases to act

122 Mr Cheers says that on 15 July 2015 he cancelled the meeting that had been arranged with Mr Connelly (see his affidavit at [81]) "pending clarification regarding our position"; also, that on 15 July 2015 Mr Garrett ceased to act as their solicitor "due to conflict of interest". The latter is consistent with Mr Garrett's file note of 14 July 2015 (Exhibit Q), namely that Mr Garrett had taken a position at that stage that he could not act for either party if there was a dispute as to the contract and had at least advised Mr Carter of this (if not also Mr Cheers) by then.

16 July 2015 – meeting in Mr Garrett's boardroom

123 A meeting was arranged to take place on 16 July 2015 in Mr Garrett's boardroom. Mr Garrett was not in attendance at the meeting which is consistent with the position being that he could no longer advise either of the parties due to a conflict (see his affidavit sworn 1 July 2019 at [17]-[18]).

124 Prior to the 16 July 2015 meeting, Mr Ian Mehmet and Mr Adam Mehmet had been forwarded an email sent by an archaeologist, Ms Jacqueline Collins, to the General Manager of the Bundjalung of Byron Bay Aboriginal Corporation (Arakwal) (the local Aboriginal community group), Mr Gavin Brown, in which Ms Collins responded to a query confirming that:

> Re: Harry and Clara Bray Burial Site in former Wheelhouse Resort
>
> The above burial site is definitely registered on the Department of Environment & Heritage AHIMS. As far as I am aware, the burial site is registered as #04-5-0034 (on former 'Everglades'). This locality also contains a registered open

> campsite (#04-5-0035 [probable destroyed]) and a Bora/ceremonial ground [#04-5-0036 [destroyed]).
>
> The 10 acre (4ha) Aboriginal Reserve at Tallow Creek (No 43074/5) was gazetted on 9/9/1908 and revoked on 10/3/1916. I understand that Harry and Clara Bray were buried on this reserve, at least part of which was subsequently incorporated into the 'Everglades' and later 'Wheel House Resort'.
>
> Considering the above, an Aboriginal cultural heritage assessment should be undertaken before any further development of the subject land is approved, so that sites/place of special Aboriginal significance (eg the Harry and Clara Bray burials) can be preserved and protected.

125 It should be noted that the AHIMS site card references in the above email, which was only provisionally admitted, (being references to the Aboriginal Heritage Information Management System (AHIMS) site cards on which information as to Aboriginal objects is registered) are clearly incorrect insofar as it is there suggested that the "former Wheelhouse Resort" is the former "Everglades". They are two different properties (the former Wheelhouse Resort being the Rainforest Report; the former Everglades resort being to the south of the Rainforest Resort and now being the Byron at Byron resort). Moreover the memorial plaque (near which it is said Harry and Clara Bray were buried) is not, as I understand it, situated on the former Crown Aboriginal Reserve. I consider the significance, if any, of these discrepancies in due course.

126 The 16 July 2015 meeting was attended by Mr Carter, Ms Gotterson, Mr Ian Mehmet, Mr Adam Mehmet and Mr Cheers. There is some dispute as to what was there discussed (see Mr Cheers' affidavit sworn 27 June 2016 at [81]; Mr Ian Mehmet's affidavit sworn 9 June 2016 at [37]; Mr Carter's affidavit sworn 21 May 2019 at [36]).

127 Mr Cheers has deposed that, at this meeting, Mr Carter acknowledged that he was aware of the Parker Report (and that Mr Carter said "what has that got to do with anything"); and that Mr Ian Mehmet showed Mr Carter a document (which Mr Cheers understood to be an email chain of 15 to 16 July 2015 that included the email from Ms Collins referred to at [124] above).

128 Mr Cheers says that Mr Carter agreed that there were Aboriginal remains on the property but that Mr Carter said that Mr Mehmet had the wrong registration number for the burial site (and that the site card number to which Ms Collins

was referring was for a burial site on the byron@byron land; i.e., the former Everglades land) (see [82] of his 27 June 2016 affidavit).

129 Mr Cheers says that at the meeting Mr Carter said that "I think you guys just have cold feet and want to get out of the contract". Mr Cheers' recollection was that Mr Ian Mehmet proposed that, to avoid legal action, both parties walk away from the contract and the deposit be returned (and that Mr Carter said he would get advice and be in touch) (see [82] of his 27 June 2016 affidavit).

130 Mr Ian Mehmet also deposes to this meeting (see his affidavit from [37]ff); and recalls that the Parker Report was "tabled" at the meeting. His recollection of the discussion is broadly consistent with that of Mr Cheers. He recalls that, when questioned, Ms Gotterson said she did not know anything about the burials (see his affidavit at [40]).

17 July 2015 – lodgement by Mr Garrett of transmission application

131 On 17 July 2015, Mr Garrett lodged for registration a transmission application in respect of the late Mrs Carter's interest in Lot 1. As noted, by this stage, Mr Garrett seems already to have advised Mr Carter that he would not be able to continue to act for both parties (see his 14 July 2015 file note) and there seems no reason not to accept Mr Cheers' evidence that Mr Garrett had also conveyed that decision to the purchasers at around this time. It may be that the lodgement of the form was seen as an administrative function or already underway when Mr Garrett otherwise ceased acting. In any event, the significance of this is that, as noted earlier, the contract for sale was conditional on the transmission of the late Mrs Carter's interest in the property (Lot 1) and special condition 21(c) provided that completion was to take place within fourteen days after notification "in writing" of registration of the transmission application. The purchasers point to the lack of any notice in writing of registration of the transmission application, as required by the contract, in the context of their submission as to the invalidity of the respective notices to complete that were issued by the vendors.

18 July 2015 – retainer of new solicitors for purchasers

132 By letter dated 18 July 2015, Mr Garrett advised the solicitors apparently by then retained to act for the vendors (Heydon Lawyers) that the purchasers had

nominated Beswick Lynch Lawyers of Sydney to act for them and that Mr Garrett had forwarded the purchasers' file to them. The letter noted that the new solicitor for the purchasers (Mr Tim Lynch) had requested that a copy of the counterpart contracts be supplied. There is no suggestion in this letter that notice of registration of the transmission application (assuming it had occurred by that stage) was thereby being given to the purchasers' new solicitor.

133 I note that the annexures to Mr Lynch's affidavit include an invoice dated 4 August 2015 issued in relation to his firm's fees, the narrative to which records the first time entry as being on 17 July 2015 "Initial instructions, peruse documents and emails from client, peruse contract and related documents, teleconf with MCheers, SGarrett" (for 26 units or just over two and a half hours). This is consistent with receipt of instructions not being until at or about the time of lodgement of the transmission application by Mr Garrett.

134 In a subsequent affidavit sworn 27 June 2017, Mr Lynch deposes that he received the plaintiffs' file in connection with the sale of the property under cover of the letter dated 18 July 2013 from Mr Garrett and that (which I read as an assertion) this the letter or file "contained no notice of the vendors having effected registration of a transmission application" (see his 27 June 2017 affidavit at [2]). Mr Lynch further deposes to have examined his file containing correspondence from the vendors and that it does not include notice from Mr Garrett (or the vendors' new solicitors) that a transmission application had been registered; nor did he recall receiving such notice from the vendors' solicitors (see his 27 June 2017 affidavit at [3]).

135 Mr Cheers has deposed that, shortly after Beswick Lynch Lawyers were retained, he obtained through them a registration report from the New South Wales Environment and Heritage Office AHIMS service (at [84] of his affidavit sworn 27 June 2016) (see below).

AHIMS search result

136 In evidence there was an AHIMS Web Services search result dated 27 July 2015 in relation to Lot 1, which recorded that "Aboriginal sites are recorded in or near the above location". The search recorded that it was for the area of Lot 1 with a buffer of 50m; and further contained the statement that "the map does

not accurately display the exact boundaries of the search … [and] is to be used for general reference purposes only". The search result also recorded that:

> Information recorded on AHIMS may vary in its accuracy and not be up to date. Location details are recorded as grid references and it is important to note that there may be errors or omissions in these recordings.

137 The site list report included the following details:

> SiteID SiteName … Site Features … SiteTypes
>
> 04-4-0036 Tallow Creek;Tallow Beach Burial :- Burial/s

138 The reference to the site card details also included, under the heading "datum", the initials "AGD" (see the evidence of Mr Robins, archaeologist, as to the difference in the datum used for the plotting of sites for purposes such as this) and the recorders were noted as being "J Gonda, M Wheeler, Mr Davidson, Ms Adrienne Howe-Piening".

AHIMS site card

139 The AHIMS site card in question (ID 4-4-36 or 04-04-36), as indicated in the search result referred to above, includes the site type as "Burials". It records the site name as "Tallow Creek/Suffolk Beach". The site card includes "directions for site relocation" that read:

> From Byron Bay Golf Course Entrance travel towards Byron Bay for 100m. Turn Right [sic] onto an unimproved dirt road, the house to your left belongs to Mr Davidson. The burials are in his backyard.

140 The site description records:

> The graves are covered with lilly's [sic]. A post marks both graves. Harry & Clara Bray are buried here.
>
> Graves measure ← ↑ 2.25cm →
>
> ↓ 1.25cm (see attached photos a sketch of graves)
>
> [there is then a photo with handwritten caption reading "Tallow Creek Burials Byron Bay Mr Davidson standing near the two graves"; this photograph has been reproduced in the publication entitled *"In Sad but Loving Memory: Aboriginal Burials and Cemeteries of the Last 200 years in NSW"* see below at [179](9)]

141 The site card includes the recommendation that "[a] small fence be placed around the graves with a small plaque stating who is buried here (see attached report)". The site card includes the following report (signed by J Gonda, Site

Officer) bearing the date 23 July 1980 (to which I will refer to as the 1980 site report):

> Report on Tallow Creek Burials [the grid reference being 6795.4425]
>
> On the 10-7-80 I spoke to a Mr. Davidson of Broken Head Road, Byron Bay, who has the graves of an aboriginal King and Queen, on his land.
>
> The graves are 150ft behind Mr. Davidsons' home. They have been marked by poles and have lillies [sic] covering them. The graves measure 125cm in width and 225cm in length.
>
> Mr. Davidson told me that many years ago there was an aboriginal reserve on his property. There are still remains of one home used by the aboriginal people. After the aboriginals moved or died Mr. Davidson's father bought the land. *An old* [A]*boriginal told Mr. Davidson's father about the graves* and he had taken care of them until his death.
>
> Now, Mr. Davidson owns this property. He said some aboriginals would come and pray beside the graves. *One aboriginal called Jimmy Kay would come frequently.* Mr. Davidson believes Jimmy Kay is now deceased and he hasn't seen any aboriginals coming down to the graves for over 15-20 years. Since there has been no recent visitation from the aboriginal people, and since this site was sacred at one stage, it is thought that, either the aboriginals have forgotten about this site, or for reasons unknown the elders did not pass down this information to the younger aboriginals.
>
> […]
>
> [Emphasis added]

142 There is a hand drawn sketch of the land with the burials (expressly not drawn to scale) which shows the location of "[the] old house used by the aboriginals" (said by counsel for the purchasers to be close to Cabin 1 of the Rainforest Resort); and the burials to the east of Broken Head Road, north of the golf course, bounded by scrub to the east and north, next to a tank and an "old shed". On the site card map, the burials are located at a point south of Byron Bay, south of the caravan park, and north of the Everglades and Suffolk Park, to the west of Tallow Creek.

143 I will deal in due course with the objections to the AHIMS site card and related evidence.

Correspondence between solicitors as to the alleged defects in title

144 There was then correspondence between the parties' respective solicitors. Relevantly, the purchasers contended that the vendors were obliged to show and prove a title to the land free of any interest in a third party or, if they could not show this, to show that they could procure such a title to be given on

completion; whereas the vendors denied that there were any Aboriginal objects in the land or that their obligations extended any further (say, to conducting archaeological investigations in relation thereto). The vendors issued successive notices to complete, the first of which was withdrawn by the vendors.

145 On 28 July 2015, the purchasers' solicitor objected to the Aboriginal objects as a defect in title and asked whether the vendors were able to remove it before completion and, if so, when and how. Mr Lynch, the purchasers' new solicitor emailed the AHIMS search result to the vendors' new solicitor on 3 August 2015.

146 On 4 August 2015, the vendors' solicitor appointed settlement for the following day at 11.00am, supplying transfers, draft settlement figures, cheque directions and copies of land tax and rates notices.

147 On 5 August 2015, the vendors' solicitor forwarded to the purchasers' solicitors by facsimile transmission a letter dated 3 August 2015, in which an appointment to settle on 5 August 2015 was confirmed but, on page 2, it was said that the vendors would prepare to settle on 6 August 2015. The letter also responded to the letter of 28 July 2015 asking for "the detail of that alleged defect and your claim". That letter also asserted that the purchasers had not supplied settlement figures or transfers.

148 On 17 August 2015, the purchasers' solicitor responded to the request for further information made in the 5 August 2015 facsimile transmission.

149 The vendors' solicitor then sent a letter dated 20 August 2015 (which the purchasers complain neither answered the questions put on 28 July and 17 August 2015 nor committed the vendors to a position that the purchasers' objection was not a valid objection to title). The letter sought further explanation of "how the remains if any, affect the title as distinct from the quality of the land" (a point the purchasers say had already been repeatedly answered with reference both to ss 5 and 83 of the *National Parks and Wildlife Act* and the AHIMS report). The vendors' solicitors' letter of 20 August 2015 also stated that:

> If you are referring to the remains of Harry and Clara Bray referred to on the plaque, please identify what remains you are talking about and evidence of their ongoing existence.

150 By letter dated 27 August 2015, the purchasers' solicitor referred to the vendors' duty to disclose latent defects and to make a good title free of encumbrance or interest at completion; requested a formal concession that the objects do constitute an "Aboriginal object"; and requested further information from the vendors, including an explanation of why they would contend that the objects do not constitute an "Aboriginal object". The letter of 27 August 2015 also stated:

> If there is to be an issue about whether the relics are 'aboriginal objects', it may be necessary for the parties to approach the Court for declaratory relief, so the impact of that issue upon the parties' rights can be known before either party commits itself to an irrevocable position as to whether the contract is or is not liable to be rescinded.

151 The vendors' solicitor issued a notice to complete under a letter dated 27 August 2015, appointing 10 September 2015 as the settlement date and providing settlement figures (that the vendors emphasise were draft settlement figures). The covering letter stated that the vendors "remain to be persuaded that there are any remains at all after approximately 100 years" and asserted that the purchasers were "unable to identify what remains you allege are present nor where they are located".

152 The settlement figures supplied under this notice to complete required payment of default interest from 5 August 2015.

153 On 28 August 2015, the vendors' solicitor responded further to the purchasers' solicitors' letter of 27 August 2015. This letter raised the question whether the remains persisted in the land. As to the memorial plaque, the presence of which was accepted, the vendors stated that they did not know whether or not it could be removed. The purchasers say that this was followed by an (allegedly) repudiatory statement that the plaque represented a very small fraction of the area of this property. The 28 August 2015 letter included the statement that "[i]t is a matter for your client [i.e., the purchasers] what applications your client makes to the Court".

154 On 2 September 2015, the purchasers' solicitor responded to the 28 August 2015 letter and to the notice to complete. This letter reiterated the purchasers' position and, among other things, called on the vendors to disclose what they knew about the Aboriginal objects. The letter required the vendors to state whether they were in a position to provide a good title to the land on 10 September 2015 and asserted that if the vendors were not able to show this then the notice to complete must be invalid. It was further contended that the notice to complete was bad in any event because the vendors had failed to show a good title at the time of its issue.

155 On 8 September 2015 (at a time, the purchasers note, when no response to the 2 September 2015 letter had been received), the purchasers' solicitor submitted to the vendors' solicitor a transfer (expressly tendered subject to the above notice to perform and subject to contract) and requested cheque directions.

156 On 9 September 2015, the vendors' solicitor responded to the notice of 2 September 2015 contending in answer to the objection to title that s 83 of the *National Parks and Wildlife Act* did not prevent a sale of land (because it does not prevent use, and sale is a use); and denying that the presence of a fixed plaque on the land was evidence of the existence of Aboriginal relics (being the remains of Harry and Clara Bray). The letter stated that the "ongoing existence and location of the remains is a matter of conjecture" (a statement here relied upon by the purchasers as a declaration by the vendors that they were unable to show a good title because they were ignorant of necessary facts). The letter asserted that the statements relied upon by the purchasers were hearsay and said that the AHIMS search could not be relied on because of the possibility that the site might be within the "50 metre buffer" (an issue said by the purchasers now to be resolved by Mr Robins' examination of the map reference co-ordinates – see the Everick Report at pp 15-16; see [179](13) and [179](14) below). The letter concluded that:

> … nothing in s 83 seems to restrict the delivery of good title. Accordingly our client is in a position to deliver good title to the land on 10 September 2015.

157 Also on 9 September 2015, revised settlement figures were provided (which still included the claim for default interest) and cheque directions were also given.

158 The purchasers' solicitor responded the same day, rejecting the vendors' assertions and requiring that the problem be directly addressed.

159 On 10 September 2015, the vendors' solicitor responded that "[y]ou are correct we do not know whether there are Aboriginal objects on the Land", and maintained that settlement was to take place at 2:00pm that day.

160 Later on 10 September 2015, the purchasers attended at the appointment for settlement (with bank cheques drawn in accordance with the cheque directions that had been provided), represented by their solicitor Mr Lynch in the company of one of his staff. The vendors were represented by an agent, Mark Hazlett of Hazlett & Co.

161 In his affidavit sworn 9 June 2016, Mr Lynch gives evidence, relevantly, as to his attendance on 10 September 2015 at the time appointed for settlement and as to the instructions by the vendors that they could provide an undertaking "potentially [to] remove the defect in title" but that they could not provide that undertaking that day (see at [9]). It is not clear, linguistically, whether this was a potential undertaking (as would seem likely from the context) or (as would seem from the text) an undertaking potentially to take certain action. In any event, what seems clearly to have been conveyed was that there was no certainty as to any undertaking for the removal of the alleged defect in title (assuming there were in fact to be a defect in title).

162 Mr Lynch's affidavit deposes that, when the he enquired whether the vendors' settlement agent had any deed of assignment of title to the Aboriginal objects, evidence of title to such objects, or anything at all in relation to Aboriginal objects on the land, the settlement agent advised him that he would seek instructions; and that after he did so the settlement agent asked Mr Lynch whether he would accept an undertaking that the vendors would supply the required documents at a later point. Mr Lynch further deposes that he was offered an undertaking "to potentially remove the defect in title" [sic] but that it

could not be provided that day. Mr Lynch refused to accept the undertaking and settlement was called off.

163 On 11 September 2015, the vendors withdrew their first notice to complete. Under cover of the same letter, the vendors gave a further notice to complete (without settlement figures) appointing 28 September 2015 for completion.

164 Further updated settlement figures were then provided on 17 September 2015, including a claim for default interest expressed to be for the period from 5 August 2015 (and calculated for the period after 5 August 2015).

165 On 23 September 2015, the purchasers gave to the vendors a notice to withdraw their demand for default interest, and submit corrected figures by the following day (the second last business day before the settlement appointment). The notice made time of the essence in this regard. The purchasers also disputed the validity of the second notice to complete, demanded that it be withdrawn by the following day and gave a notice to perform within a reasonable time. The letter complained that the vendors had rejected the purchasers' earlier suggestion that the dispute be submitted for determination by the Court.

166 The vendors responded on 24 September 2015 insisting on the claim for interest; asserting that the purchasers were in default for failing to complete on 5 August 2015; insisting on the second notice to complete; and refusing to comply with the notice to perform. The letter stated that the first notice to complete was withdrawn because of a defect in its statement of the venue for settlement. The letter also stated that:

> Your client's suggestion that the dispute be submitted to the Court for declaratory order was not capable of acceptance because it was vague as to the questions to be put to the Court. We note that you have not committed this offer in writing.

167 The purchasers then terminated the contract by notice on 25 September 2015.

168 On 6 October 2015, the vendors responded alleging that the purchasers' notice of termination was repudiatory and themselves terminating the contract.

169 By this stage, therefore, on any version of events, the contract for sale was thus at an end (either terminated on 25 September 2015 by the purchasers'

election to accept what they maintained was the vendors' repudiation of the contract or on 6 October 2015 by the vendors on the basis of the purchasers' notice of termination).

Re-sale of the property

170 The property was re-sold at auction on 29 November 2015 for $2.525 million. The marketing materials prepared for the re-sale (on which the purchasers here place significance) contained disclosures in relation to Aboriginal culture. In particular, a report was prepared by Mr Lonergan, dated 10 November 2015 (to which I will subsequently refer to as the Lonergan report) which contained the following item:

> 7 CULTURAL HERITAGE
>
> Anecdotally, when the pool on site was constructed, an aboriginal grave was found. This area has been preserved and a plaque erected to indicate its location and significance. This site will need to be maintained as part of any continued use or redevelopment of the site (NPWS ID 4-4-36).
>
> […]

171 The conclusion section of that report included the following comments:

> It is considered that this development site, due to the favourable SP3 Tourist zoning that applies to the north western development area, where the Motel and its current infrastructure exist, could be significantly redeveloped to achieve a broad range of tourist accommodation options, as permitted by the new zone.
>
> …
>
> The wetlands to the east are as previously stated, of significance, and their development would be limited to such things as elevated / educational board-walks etc, which along with the sites aboriginal history, could be marketed as a feature of the site.

172 The re-sale contract included the following disclosure in special condition 47:

> 47. Burial Site
>
> 1. The vendor discloses and the purchaser acknowledges that an Aboriginal burial site is registered as a notification in the Aboriginal Heritage Information Management System (AHIMS).
>
> 2. Annexed hereto are AHIMS search results for the subject property.
>
> 3. The vendor discloses and the purchaser acknowledges that there is a plaque located on the property commemorating the burial of Harry and Clara Bray.
>
> 4. The purchaser will make no objection, requisition or claim for compensation nor will the purchaser have any rights of rescission or

termination or to delay settlement due to the vendors' disclosure in this Special Condition.

Proceeding

173 This proceeding was commenced by the purchasers in 2015.

174 The purchasers sued for: recovery of the deposit; damages, including for wasted costs and expenses and for loss of the bargain; and alternatively, for relief under ss 55(1) and 55(2A) of the *Conveyancing Act.*

175 The vendors have filed a defence to the claim and seek to retain the deposit (maintaining that they are entitled to forfeit the deposit). They have cross-claimed against the purchasers and Mr Matthew Cheers (who is alleged to be a guarantor) for damages comprised in the loss of the sale. I note that the purchasers point out that, although the vendors re-sold the property within 12 months, they have not made a liquidated claim under cl 9 of the standard form contract for sale of land.

176 The purchasers (as cross defendants) in answer to the cross claim: deny breach; deny that the cross claimants were ready and willing to perform; rely on s 55; and raise a misleading conduct in trade and commerce defence.. In addition, Mr Cheers denies that he was a guarantor of the contracts.

177 As noted earlier, the alleged representations the subject of the misleading conduct defence are to the effect that the property was an excellent site for development as an improved and expanded tourist resort. It is contended that those representations were conveyed by the vendors' agent as the effect of certain express statements contained in: written advertisements (including express statements that the resort was an iconic tourism or redevelopment opportunity in a prestigious location); and oral statements by Ms Gotterson in circumstances where the property was being marketed as a tourism resort.

Evidentiary rulings

178 It is convenient at this point to deal with the evidence that had been only provisionally admitted during the hearing (I indicated at the time that I would rule on the objections to that evidence in my final reasons). Broadly speaking, the evidence that was provisionally admitted was evidence going to the Aboriginal heritage and cultural significance of the property (and, in particular,

as to the reputed existence of Aboriginal objects, including Aboriginal remains, on the land).

Hearsay evidence subject of objection: ss 72 and 74 of the Evidence Act

179 The evidence to which objection was taken in this regard was as follows:

(1) the AHIMS site card (see at [139]ff above for site no 4-4-36 (including the 1980 site report to which I have previously made reference);

(2) documents produced on subpoena by Mr Peter Parker (the subpoena, broadly speaking, called for documents in Mr Parker's possession in the course of or in connection with the preparation of the Parker Report, and the pages in question comprising: a document headed "Broken Head Road Plan – draft on cultural/heritage significance"; a "Workplan" seemingly prepared in connection with the Norman Application; and the form for the Norman Application dated 5 June 2011);

(3) the Parker Report;

(4) the Lonergan report (as I have previously mentioned, dated 10 November 2015 and prepared by Mr Lonergan in connection with the re-sale of the property) assessing the development potential of the property (which included item 7 on the cultural heritage of the site (see at [170] above);

(5) documents relating to a meeting of the Byron Shire Council Social/Community Advisory Committee on 14 June 2011 which include an annexure (3(b)) from the Byron Shire Information Directory, referring to Aboriginal history and, in particular, the statement that Harry and Clara Bray are buried opposite Byron Bay Golf Club;

(6) copies of articles published in the Northern Star Lismore newspaper on 8 April 1907 and 19 October 1922 (the former noting the death and burial "near Tallow Beach" of Bobby Bray, Harry Bray's father and himself a King of the Bundjalung tribe; the latter recording the death the previous afternoon (i.e., 18 October 1922) of Harry Bray "at his camp");

(7) extracts from a book, *Time and Tide Again: A History of Byron Bay*, authored by Ryan and Smith (2001, Northern Rivers Press), chapter 8 of which (headed "Cameos of Byron History") records the reminiscences by George Flick of Harry Bray "in his last years" (see below at [539]);

(8) a Byron Bay Bypass Historical Heritage Assessment report dated 27 September 2015 prepared on behalf of Byron Shire Council (including an Aboriginal Cultural Heritage Assessment dated June 2015 prepared by JP Collins, consultant archaeologist, which includes in the table of sites registered on the AHIMS database a reference to the AHIMS site card [site card 4-4-0036] with the description "Tallow Creek; Tallow Beach; Burial; Low subcoastal dune; Historic Aboriginal Reserve burial ground");

(9) a publication entitled *"In Sad but Loving Memory: Aboriginal Burials and Cemeteries of the Last 200 years in NSW"* published by the New South

Wales Department of Environment and Climate Change in 1998 and reprinted in June 2007;

(10) a DVD entitled, "*Walking with my Sisters*", in which descendants of Harry and Clara Bray (Lorna Kelly, Linda Kay and Dulcie Nicholls) recount matters relating to their ancestors. In the DVD, the memorial stone and plaque are shown and Lorna Kelly (a granddaughter of Harry and Clara Bray, and Ms Kelly's mother) says:

> "Lord knows what they did with the remains that were buried there.
>
> "I know they were buried there.
>
> "It was dug up and made a pool of it, before we knew about it."

(Pausing here, the vendors note that the documentary also refers to a company known as Zircon undertaking sandmining operations from 1933 "along the coast where the sisters lived".)

(11) portions of the affidavits of Mr Cheers, Mr Ian Mehmet and Mr Adam Mehmet referring to one or more of the above documents (as well as the affidavit of Ms Kirsti Makinen relating to the AHIMS site card);

(12) portions of the affidavits of each of Ms Nichol, Ms Kelly and Ms Nicholls as to evidence of the "burial sites" and their oral evidence regarding the burial site (see T 168-185);

(13) the Aboriginal Cultural Heritage Expert Report prepared by Mr Tim Robins of Everick Heritage Consultants Pty Ltd (Exhibit H) (see rulings 21/6/16);

(14) the supplementary Aboriginal Cultural Heritage Expert Report prepared by Mr Adrian Piper of Everick Heritage Consultants Pty Ltd (Exhibit J) (objection to which is taken to Part 2.2 and Annexure A) (see rulings 5/7/16);

(15) extracts from the publication entitled "Historical Report Arakwal National Park" dated 20 March 2003 and by a Ms Kate Waters (Exhibit N); and

(16) a document entitled "Byron Coastline Values Study" dated December 2000 prepared as "[b]ackground information for the Byron Coastline Management Study and Plan" (Exhibit O) (relied on by the purchasers as a business record).

Further observations as to the documentary evidence listed above

180 The contents of a number of the above documents have been described above and need not here be repeated. In particular, I have already made reference to the contents of the Parker Report and the AHIMS site card. For completeness, I note the following as to the content of the additional documents to which objection is taken.

181 As to the publication, *"In Sad but Loving Memory: Aboriginal Burials and Cemeteries of the Last 200 years in NSW"*(item (9) above), the purchasers say that this document illustrates the public purpose that the *National Parks and Wildlife* legislation serves, particularly in relation to Aboriginal burials and cemeteries; noting that the site in question in the present case is included in this book (at 26-27) (including a photograph of former owner, Mr Davidson, at the grave site in 1980 and that the reference for this burial site is given by reference to the AHIMS site card 4-4-36).

182 As to the Historical Report Arakwal National Park dated 20 March 2003 (item (15) above), this makes reference to the two sites of Aboriginal reserves in the Byron area, noting that both lie just below the southern boundary of the Arakwal National Park: the 1890 reserve (40 acres excised from Portion 142 to the south west of the "Racecourse area", described as "lying '… near what is known as Tallow Creek, near the beach'"), which reserve was revoked in 1896; and the 1908 reserve (an area of about 10 acres, part of which overlapped with the first reserve area), which the report notes was revoked partially in 1916 and completely in 1924.

183 The Historical Report Arakwal National Park document makes reference to the 1980 site report (included in item (1) above) recording the graves of Harry and Clara Bray as located within Portion 280 (that being the area held by Mr Davidson under Crown Lease from 1916 and which he converted to conditional purchase in 1925). The document records that it is not possible from the information in the site report to determine if the graves lie within the boundaries of the original reserves for Aboriginal use but states that "they do, however, clearly lie within the general area".

184 The Historical Report Arakwal National Park document also draws on information in the site report as to the existence of the remains of a house used by Aboriginal people; and on the reminiscences of George Flick (see at 83) for reference to the passing of Clara Bray in May 1922 and Harry Bray less than six months later.

185 As to the Byron Coastline Values Study (item (16) above), this includes a table of "Aboriginal Sites in the Coastal Zone of Byron Shire". In the table, zone 3, Byron Bay, includes the following information:

Site Type	Count	Record Number and Comments
Burial	3	4-4-36 – Tallow Beach, additional burials are likely to occur here
		4-5-34 – Suffolk Beach, associated with open campsite 4-5-35 and Bora ground 4-5-36, appears destroyed by residential development
		4-4-37 – Cape Byron (Clarks Beach)

186 This document includes the statement that not all of the data relating to sites along the Byron Shire coastline is considered reliable and that no comprehensive audit has been done to check which sites are still present or what their current condition is.

Further observations as to the oral (reputation) evidence

187 As to the oral evidence relied on as evidence of reputation, it is convenient at this stage to summarise the evidence from Ms Nichol (the previous owner of the property) and from Ms Kelly and Ms Nicholls (being two great grand-daughters of Harry and Clara Bray).

Ms Philippa Nichol (previous owner of the Rainforest Resort land)

188 In her affidavit sworn 13 May 2016, which I provisionally read over the objection of the vendors, Ms Nichol deposes to her acquisition of Lot 1 on 30 May 1995 from Walter George Davidson and her development on the land of The Wheel Resort as a resort that could be easily navigated by wheelchair users. Ms Nichol has deposed that during the planning and construction of the resort no issue or incident caused an impediment or delay of any kind "particularly in regards to any [A]boriginal remains or relics on the property" (see Ms Nichol's affidavit at [4]).

189 As to the history of use of the land, Ms Nichol has deposed that the previous owner's wife had told her the land was previously worked as a pineapple farm and that some sand mining had also taken place on the land (see Ms Nichol's affidavit at [5]). She has also deposed to another conversation with Mrs Davidson (Mr Davidson's wife),to which objection was taken, in which Mrs Davidson said words to the following effect (see Ms Nichol's affidavit at [6]):

> "'Aboriginals by the name of Harry and Clara Bray, who were Aboriginal elders, have previously lived on this property, including when the Davidson family has lived on this land which goes a long way back. The Brays lived near where a number of bunya nut trees grew and these trees were regarded by the Aboriginals as a very important food source. The ownership of these trees, in the Aboriginal's view, was the Bray's as they lived on the property in a hut dwelling. This land was also used as a dairy farm before it was a pineapple farm.'"

190 Ms Nichol goes on to depose that during this conversation:

> "Mrs Davidson then pointed with her outstretched hand and described the spot where the Bray's hut had been located, which was close to and on the western side of a very large fig tree growing on the Land. Later on, after I had purchased the Land, I decided to clear this area, and on starting to do so, I discovered a number of stumps in the ground, where Mrs Davidson had previously indicated as the location of the Bray hut. I discontinued the clearing of this area due to the large number of spiders that inhabited the area. The stumps remained undisturbed as and where they were found, at least so long as I was involved with the Land."

191 Ms Nichol has further deposed (see Ms Nichol's affidavit at [7]) that, during the above conversation, Mrs Davidson also told her that both Harry and Clara Bray were buried on the property; that Mrs Davidson took her to a spot where she said they were buried; and that they planted a plant to mark the "graves". Ms Nichol has deposed (see Ms Nichol's affidavit at [8]) that the location of the "graves" is "at the north east corner of the pool fence". Ms Nichol says that she understood this area to be a sacred and special area and that she caused it to be protected by the pool fence on one side (the cabana being built to the north and a fire pit for guests to use as a barbecue built to the north east). Ms Nichol says that the pathway which was constructed avoided the area by going around the site (see Ms Nichol's affidavit at [8]). Her recollection of the location is that it was approximately 110-120 metres from Broken Head Road from the east towards the west, and about 60 metres from the southern boundary towards the north (see Ms Nichol's affidavit at [9]).

192 Ms Nichol also recounts her conversation with some Aboriginal women (one of whom identified herself to Ms Nichol as Ms Lorna Kelly, who is Ms Kelly's mother) who visited the property in about 1987 or 1988 in which conversation, when asked about this, Ms Nichol said that her observation was that no grave had been disturbed during the excavation for the pool (see Ms Nichol's affidavit at [11]).

193 Ms Nichol also deposes to the circumstances of the placement of the memorial stone and plaque. Ms Nichol's evidence is that she was approached by a woman who claimed she was of Aboriginal descent; that the woman told her that she was representing the Government to commemorate the bicentenary and that her job was to identify any Aboriginal burial site and mark it accordingly; and that the woman believed there was such a site on the land. Ms Nichol says that after some discussion it was agreed to place the plaque about six or seven metres to the south east of the actual burial site which had been identified to Ms Nichol by the previous owner's wife (Mrs Davidson); and that, several months later, the woman returned and a few weeks after that a truck arrived with a machine and placed a large rock with the plaque at the agreed place (see Ms Nichol's affidavit at [12]-[13]).

Ms Annette Kelly and Ms Theresa Nicholls (Arakwal community members and descendants of Harry and Clara Bray)

194 As I have adverted to, affidavits were also provisionally read from two descendants of Harry and Clara Bray – Ms Annette Kelly and Ms Theresa Nicholls. Ms Kelly and Ms Nicholls depose that they were required, and had been given permission by the community elders, to give evidence about the sensitive matters concerning their cultural heritage. They are both great-granddaughters of Harry and Clara Bray. They both displayed quiet dignity and genuine emotion during the giving of their evidence (which was taken with sensitivity to their cultural beliefs – in particular, as to the giving of evidence as to burial sites and the deceased).

195 Ms Kelly is the chairperson and a board member of the Bundjalung of Byron Bay Aboriginal Corporation (the Corporation). She is the daughter of the late Lorna Kelly (nee Kay), who in turn was the granddaughter of Harry and Clara Bray (Lorna's mother, Linda, being their daughter and her father, Jimmy Kay, being the Aboriginal who Mr Davidson told Ms Nichol had visited the property to pray).

196 Ms Kelly's evidence is that she has lived her life in the Arakwal community and that throughout her life she has understood that Harry and Clara Bray are buried in the land now known as the Rainforest Resort (and formerly called The Wheel Resort) (see Ms Kelly's affidavit at [7]-[8]).

197 Ms Kelly has deposed that her mother passed on knowledge and information to herself and her siblings that the Rainforest Resort land was a very sacred and spiritual place where their ancestors and others were buried on the site (see Ms Kelly's affidavit at [10]). It is her understanding that "this particular burial site [by which I understand her to mean the site where her ancestors, Harry and Clara Bray, were buried] was part of an Aboriginal [r]eserve" (see Ms Kelly's affidavit at [12]) and that her mother and aunties, with their parents, would visit the site and pay their respects to their great grandparents, Harry and Clara.

198 Ms Kelly has deposed that she was taken to the "burial site" by her mother and aunties when the resort was called The Wheel Resort; that when she was first shown the site it was covered in small flowers and had been "left undisturbed"; and that her mother had been terribly upset when the pool was added to the property ("knowing that the burial site had been disturbed and bones being disturbed"). The site was described by Ms Kelly as being to the east of the pool area (see Ms Kelly's affidavit at [14]-[16]).

199 Ms Kelly explains that the resort area and the burial site remains a very sensitive issue for the family and that the burial site of Harry and Clara had always been regarded in the Arakwal community as a sacred area (see Ms Kelly's affidavit at [17]-[19]). Ms Kelly also deposes that as a child she heard the elders say that there were other burial sites where the resort is now and that they were "always told not to walk at the back of the Resort for fear of disturbing burial sites" (see Ms Kelly's affidavit at [25]-[26]).

200 Ms Kelly has deposed that her mother pointed out to her stumps situated close to Broken Head Road off to the right of the entrance to the Rainforest Resort and told her that those were the stumps of a hut that their elders used to use (see Ms Kelly's affidavit at [23]).

201 Ms Nicholls is also a member of the Board of the Corporation. She is the daughter of another of Jimmy and Linda Kay's daughters, Ms Dulcie Nicholls (who Ms Nicholls has deposed is elderly and too frail to give evidence); and hence she too is a great grand-daughter of Harry and Clara Bray. Ms Nicholls

has lived most of her life in the Arakwal community (see Ms Nicholls' affidavit at [1]-[8]).

202 Ms Nicholls has deposed to her understanding throughout her life that Harry and Clara Bray are buried in the land known as the Rainforest Resort (and formerly called The Wheel Resort) (see Ms Nicholls' affidavit at [9]) and says that, from her participation in the community, she is aware that this belief is held in the Arakwal community and has been for as long as she can remember (see Ms Nicholls' affidavit at [10]).

203 Ms Nicholls has deposed that her mother and her mother's late sisters (Lorna Kelly, Linda Vidler and Yvonne Graham) visited their grandparents' "burial site" with Linda and Jimmy Kay many times and that she heard her mother and aunties discuss those visits many times (see Ms Nicholls' affidavit at [12]). Ms Nicholls has deposed that she has also visited the "burial site" with members of her family over the years (see Ms Nicholls' affidavit at [13]); and refers to the "site at the Resort" having been an Aboriginal reserve many years ago. Ms Nicholls has deposed that she was shown the "burial site" of Harry and Clara by her mother and aunties "when the land was still known as Wheelers Resort [by which I understand her to mean The Wheel Resort]" (see Ms Nicholls' affidavit at [15]); and has similarly deposed to many members of her family being upset at the construction of the pool because it disturbed the sacred "burial site" (see Ms Nicholls' affidavit at [17]).

204 Ms Nicholls deposes that she was told by her aunties, Lorna and Linda, and by her mother, Dulcie, that prior to the pool being added to the property the area had been kept undisturbed with flowering plants (see Ms Nicholls' affidavit at [18]). Ms Nicholls also explains the significance in her culture of burial sites and that disturbance of burial sites is a very sensitive issue (see Ms Nicholls' affidavit from [20]ff).

205 Similarly, Ms Nicholls has deposed to her memory of stories of the family staying in the hut close to Broken Head Road off to the right of the entrance to the Rainforest Resort and recalls visiting the site and seeing the remains of stumps amongst the well grown long grass (see Ms Nicholls' affidavit at [22]).

206 Ms Nicholls recounts hearing stories of other burials within the reserve "that is, where the Resort is" (see Ms Nicholls' affidavit at [26]). She has deposed to hearing stories as to a mother and baby buried east of the Rainforest Resort buildings "over the far side, heading towards the swampy ground" and says that they were not to walk there for fear of disturbing that and other burial sites (see Ms Nicholls' affidavit at [25]).

207 Annexed to Ms Nicholls' affidavit are copies of photographs taken when members of the Board had visited the property on 21 November 2014, which Ms Nicholls says were photographs of the burial site of Harry and Clara.

Vendors' evidentiary objections

208 The vendors maintain that the evidence listed at [179] above is inadmissible. In particular, they say the following as to the particular documents sought to be tendered.

209 First, as to the 1980 site report (see [179](1) above), which records the representation by Mr Davidson to the site officer (Ms Gonda), the vendors submit that this does not satisfy the business record exception (see s 69(2)(b) of the *Evidence Act 1995* (NSW) (*Evidence Act*)).

210 The vendors say that Mr Davidson (when making the representation to Ms Gonda) was not a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact (i.e., based on what Mr Davidson saw, heard or otherwise perceived) because it was based on a previous representation made by a person about the fact, being the representation made by the "old Aboriginal person" to Mr Davidson's father (cf sub-s (5)). The vendors point out that the identity of the "old Aboriginal person" is not known; nor is it known if that person saw, heard or otherwise perceived any burial on the subject land. The vendors say that although the Victorian Court of Appeal in *Lancaster v R* (2014) 44 VR 820; [2014] VSCA 333 (*Lancaster*) held that "directly and indirectly" in s 69(2)(b) of the *Evidence Act* "embraces degrees of remoteness beyond second-hand hearsay" (see at [27]), that does not assist the purchasers.

211 Pausing here, the purchasers maintain their submission that the 1980 site report is part of the business records of the Office of Environmental Heritage

(formerly National Parks and Wildlife) (OEH). They say that the submission that the person who is the source must be identified is contrary to the express statement in *Lancaster* (at [27]) that "[s]o long as the nature and context of the recorded representation permits that inference [that the information was supplied by someone who had personal knowledge of the fact] to be drawn, the supplier of the information need not be identified". The purchasers say that the submission that the "old [A]boriginal" cannot be a qualified source because he or she is unidentified must therefore be rejected. They say that there is a reasonable inference that that person had knowledge of the relevant fact (due to age and the circumstances under which the information was provided to Mr Davidson) (see T 375). The purchasers further say that the vendors' submission overlooks the additional matter of the references to Jimmy Kay.

212 Second, as to the AHIMS search, the vendors say that this is not a business record for the same reason (its content regarding site ID 4-4-0036 being sourced from the 1980 site report). Otherwise, it is submitted that the search ought be accorded little, if any, weight, noting the qualification expressed in the search (and referring to s 90Q(3)(d) of the *National Parks and Wildlife Act*, which provides that the AHIMS register is not conclusive).

213 As to the above submission (and see T 391.37), the purchasers say that it does not follow, from the statutory provision, that the card is not conclusive or that the site card is not even *prima facie* evidence. The purchasers maintain that it is a business record. The purchasers further say that, insofar as the vendors have pointed to the fact that the site card records a decision not to declare the site an Aboriginal place, this is misconceived. It is noted that Aboriginal places, as defined under the legislation, arise by virtue of a declaration by the Minister and it is submitted that ss 83 and 84 of the *National Parks and Wildlife Act* do not impose mutually exclusive schemes.

214 Third, as to the objections raised to the Parker Report and the Norman Application, the vendors say that these are not business records for the same reasons (and they emphasise the source of the statements in relation to the burial that are made in the Parker Report and the Norman Application).

215 Fourth, as to the affidavit evidence of Ms Kelly and Ms Nicholls, insofar as the purchasers seek to invoke s 72 of the *Evidence Act* in relation to this evidence, the vendors say that this exception to the hearsay rule only applies to evidence of a representation *about* the existence or non-existence of the traditional laws and customs of an Aboriginal group (relevantly, the Arakwal people of Byron Bay). The vendors say that the hearsay evidence as to the location of the burial or grave site of Harry and Clara Bray is not a representation about the traditional laws and customs of the Arakwal people.

216 Insofar as the purchasers seek to invoke s 74 of the *Evidence Act* in relation to each of the above documents (including the DVD, and particularly the 1980 site report, the AHIMS search and the Parker Report, including the draft material produced by Mr Parker on subpoena) and in relation to the affidavit evidence of Ms Kelly and Ms Nicholls and of the previous owner, Ms Nichol, as well as the expert evidence of Mr Robins and Mr Piper, the vendors say that this exception applies only to evidence of reputation concerning the existence, nature or extent of a public or general right. It is said that, in order to qualify, the evidence should concern the reputed existence of such a right, not the particular fact(s) from which the existence of the right might be inferred.

217 The vendors further say in relation to the hearsay evidence relied upon that goes to the reputed location of the burial or grave site of Harry and Clara Bray on the subject land, that reputation evidence of that fact says nothing about the existence, nature or extent of any rights that are said to exist by reason of that fact. To the extent that the purchasers point to the *National Parks and Wildlife Act* as the source of the "rights" that are relied upon, the vendors say that this depends on the existence of Aboriginal remains on the subject land as a fact (i.e., here the evidence relied upon is reputation evidence of the fact, not reputation evidence of the right).

218 The vendors say that the evidence in issue in *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141 (*Milirrpum*) (to which decision the purchasers have here pointed) was directed to the establishment of the plaintiffs' social organisation, way of life and land holding rules; and that what Blackburn J admitted under the reputation evidence exception were statements

by Aboriginal witnesses as to what their deceased ancestors had said about the *rights* of various clans to particular pieces of land and the system of which these rights form part. The vendors note that *Cross on Evidence* (J D Heydon, *Cross on Evidence* (11th ed, 2017, LexisNexis Butterworths) at [33160] fn 107 refers to this decision as an example of general rights of ownership of land by a particular Aboriginal tribe.

219 The vendors argue that the passage from *Wigmore on Evidence* cited by the purchasers (see below), to the effect that it is misleading to say that reputation evidence cannot be received as to a particular fact, overlooks the context in which the statement is made that "[i]t is obvious that as to particular occasions or acts of its exercise there can be no fair opportunity for a reputation to arise. It can only arise as to the practice or validity of the right or custom in general"; namely that the author is there clearly dealing with reputation evidence of customs or rights and distinguishing evidence of particular occasions of exercise.

220 Thus the vendors say that the hearsay evidence (among other things, as to the location of the burial or grave site of Harry and Clara Bray on the subject land) is inadmissible and ought not be admitted into evidence.

Purchasers' submissions

221 I have already, in outlining the vendors' objections, made reference to some of the purchasers' submissions in relation to admissibility of this evidence.

222 As adverted to above, reliance is placed by the purchasers on what is said in *Wigmore* (Ch 55) as to the proof of historical matters (including in relation to land boundaries) by evidence of reputation as an exception to the hearsay rule; and to s 74(1) of the *Evidence Act* which provides that the hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

223 The purchasers note that the common law distinguished between public or general rights (concerning the entire population or a class, respectively) and purely private rights; and that evidence of ancient reputation was admissible even in respect of a private right, if a public right coincided therewith (see *Thomas v Jenkins* (1837) 6 Ad & El 525; 112 ER 201). Reference is made to

Cross on Evidence (6th ed., at [33160]) where examples given of general rights include: rights of corporations (citing *Davies v Morgan* (1831) 1 Cr & J 587; 148 ER 1557 (Ex)); and the ownership of land by a particular Aboriginal tribe (citing *Milirrpum*; and *Mabo v State of Queensland* [1992] 1 Qd R 78 at 88 per Moynihan J).

224 The purchasers submit that the present case is concerned with a public right because it is concerned with the rights of the Crown conferred by a public statute for public purposes. It is noted that s 85A of the *National Parks and Wildlife Act* expressly empowers the Crown to alienate Aboriginal objects to Aboriginal owners as defined or, if there are no Aboriginal owners, then to a person or class of persons prescribed by the regulations; and that, in making a decision in relation to an Aboriginal heritage impact permit (AHIP), the Chief Executive is required by s 90K(1) of the *National Parks and Wildlife Act* to consider matters including:

> (f) the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit (including any submissions made by Aboriginal people as part of a consultation required by the regulations).

225 It is further noted that s 90A of the *National Parks and Wildlife Act* requires an application for an AHIP to contain or be accompanied by such documents and information as is required by the regulations; and that the regulations in force then and now require an applicant to carry out an Aboriginal community consultation process in accordance with the relevant clause of the regulation before making an application for an AHIP. It is noted that the organisations required to be consulted under these regulations include the relevant Local Aboriginal Land Council, the Registrar appointed under the *Aboriginal Land Rights Act 1983* (NSW) (*Aboriginal Land Rights Act*), a number of public organisations and the Department of Planning, and any Aboriginal persons whose names are given by any of those organisations as Aboriginal persons who may hold knowledge relevant to the affected Aboriginal objects.

226 Thus, the purchasers say that the location of Aboriginal objects in land is a question involving a public right, being proprietary rights of the Crown (or its permitted assigns), and the general right of Aboriginal persons who may hold knowledge relevant to the object to be consulted in relation to any application

for an AHIP in respect of the object; and, hence, they submit that evidence of reputation is admissible notwithstanding the hearsay rule.

227 It is noted that evidence of reputation includes evidence of the declarations of deceased persons. Reference is made to *Wigmore on Evidence* (Vol. 5 at 550), where it is said that the form in which the reputation is presented is immaterial to its admissibility (whether individual writings, maps, leases or the like, so long as it "represents common repute") and that the representation should be as to the subject itself rather than particular occasions of its manifestation.

228 Other relevant exceptions to the hearsay rule relied on by the purchasers are: s 72 of the *Evidence Act* (concerning representations of traditional law or customs of an Aboriginal group) in relation to the evidence of Ms Kelly (at [17], [19], [24] and [25] of her affidavit) that the burial site has always been regarded in her community as sacred and needing to be protected and not disturbed (and also the affidavit of Ms Nicholls of 17 May 2019 at [17], [20], [21] and s 69 of the *Evidence Act* as to business records, said to be relevant because the purchasers tender a number of documents produced by the Government or public authorities or private businesses which record previous representations about these matters).

Determination

229 I turn now to determine these evidentiary objections. I do note, however, that certain of the evidence would be admissible for a non-hearsay purpose (see s 60 of the *Evidence Act*) if, say, it was or might potentially be relevant to the primary allegation of repudiatory conduct (which does not turn on whether in fact there are Aboriginal objects on the land; only as to whether there was a plausible contention that there were at the relevant time). The issue presently to be determined is whether some or all of this evidence is admissible, as the purchasers contend, to prove the truth of the facts asserted.

Consideration of Wigmore on Evidence

230 As I have outlined, both parties made reference to the seminal work of Professor John Wigmore, specifically as to the admissibility or otherwise of "reputation" evidence.

231 Trite though it is to observe, it must be borne in mind that “reputation” (as historically and theoretically elucidated upon by Professor Wigmore and others) is not an independent, separate or freestanding basis of admissibility; rather, the specific question of admissibility falls to be determined pursuant to the applicable exceptions provided for under the *Evidence Act*, including those statutory exceptions codifying particular incidents of historical exceptions to the hearsay rule. That said, academic writings do inform, in accordance with and only as permitted by rules of statutory interpretation, the applicability of those statutory provisions. Along with the need properly to elucidate the submissions of the parties, it is therefore appropriate here to outline and consider these passages, as appear in the Chadbourn Revision of this text (James H Chadbourn, *Evidence in Trials at Common Law* (Chadbourn Revision, 1974) Bk 5).

232 Four excepted subjects are identified in which common repute could, historically and then even after final settlement of the hearsay rule (and its application) in the 1700s, be admitted as evidence (see at 544). Two of these are presently relevant: first, land boundaries and land customary rights; and second, events of general history.

233 Chadbourn identifies (at 545), as underpinning each of those four subjects, “[the] common and rationalized principle … the twofold one … as the basis of all exceptions to the hearsay rule, namely, the principle of *necessity* and the principle of a *circumstantial probability of trustworthiness…”* (emphasis added).

234 As to this principle of necessity, the learned author opines (at 545) that the principle is “found in the general dearth of other satisfactory evidence of the desired fact, by reason of which we are thrown back upon reputation as a source of information … [in relation to land customs] this necessity is found to exist where the matter is an ancient one, and thus living witnesses are not to be had”.

235 As to the principle of fair trustworthiness, the author opines (at 545) that the principle is to be “found when the topic is such that the facts are likely to have been generally inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and

thus the community's conclusion, if any has been formed, is likely to be a trustworthy one".

Land Boundaries and Customs

236 At 545, there is identified, as a peculiar incident of this necessity principle, the requirement of antiquity of the right asserted; namely "[a]n 'ancient' matter would ordinarily be a matter upon which no living witnesses having personal knowledge were attainable; so the reputation is often predicated as coming merely from deceased persons or deceased old persons" (at 546). Seldon J in *McKinnon v Bliss* 21 NY 206 (1860) at 218 stated it thus:

> The fact sought to be proved being of too ancient a date to be proved by eye-witnesses, and not of a character to be made a matter of public record, unless it could be proved by tradition there would seem to be no mode in which it could be established. It is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable.

237 Chadbourn ventures three more specific rules to be derived from the more general principle (see at 546-547): first, the *matter to be proven* must be *ancient* (that is, "of a *past* generation. The custom, landmark, or boundary must either be a former one or, if it is still in existence, its existence in a previous generation must be the subject which the reputation is concerned"); second, the *reputation offered* must also be *ancient* (again, that is, of a past generation); and third, if that reputation be shown by means of reported statements of individuals, the persons whose statements are so reported must themselves be shown to be deceased.

238 As to the principle of a circumstantial probability of trustworthiness, it is sufficient here to note the emphasis placed on the need to show that the matter asserted has been subject to "prolonged and constant exposure … to observation and discussion in a whole community… [t]hese conditions are usually found where the matter is one which in its nature affects the common interests of a number of persons in the same locality …" (see also *Wright v Tatham* (1857) 5 Cl & F 670).

239 From this, it is said (see at 548-549) that the evidence offered must be, in the words of Baron Wood in *Moseley v Davies* (1822) 11 Price 162 at 180, "the result of received reputation" (contra individual assertion).

240 Further, it is said (see at 550-551) that the reputation must be as to the custom or right itself, and not as to particular exercise of that right. The following example of this is offered: that "[t]here may legitimately be a common reputation as to whether (for example) a general duty existed for the townspeople … to pay a fee … but not whether John Doe paid it on a particular occasion". Similarly, it is noted (at 551) that the reputation must relate only to matters of general interest; and that, though reputation may be admitted in the determination of land boundaries, it cannot be admitted as *evidence of title* (see at 552-556).

Events of general history

241 As noted at 561, the principles concerning admission of reputation as to events of general history do not differ materially from those considered above. Accordingly, it is sufficient briefly to note that: first, the event of history must be ancient, or in other words, "one as to which it would be unlikely that living witnesses could be obtained … a matter concerning a former generation" (footnotes omitted); and second, the evidence must be of interest to all members of the community such as to have received "general and intelligent discussion and examination by competent persons, that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality" (see at 564-565).

Admissibility under s 72: Aboriginal and Torres Strait Islander traditional laws and customs

242 It is convenient next to consider the exception under s 72 of the *Evidence Act*; before turning to the exception under s 74 of the *Evidence Act*.

243 Section 72 of the *Evidence Act* provides that:

> **72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs**
>
> The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

244 It is also relevant here to note s 78A of the *Evidence Act* which, to similar effect, provides:

> **78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs**
>
> The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

245 The Dictionary to the *Evidence Act* relevantly provides that:

> ***traditional laws and customs*** of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

246 The question therefore is whether any of the evidence constitutes, or contains, a representation, or reputations, about the existence or non-existence, or the content, of the traditions, customary laws, customs, observances, practices, knowledge and (relevantly) beliefs of an Aboriginal group (here, the Arakwal community) for the purposes of s 72 of the *Evidence Act*.

247 Sections 72 and 78A were introduced by the *Evidence Amendment Act 2007* (NSW) following recommendations made in the joint report of the Australian Law Reform Commission (see Australian Law Reform Commission, *Uniform Evidence Law Report* (ALRC Report 102, December 2005), New South Wales Law Reform Commission (see New South Wales Law Reform Commission, *Uniform Evidence Law Report* (NSWLRC Report 112, December 2005) and the Victorian Law Reform Commission (see Victorian Law Reform Commission, *Uniform Evidence Law Report* (VLRC Final Report, December 2005)).

248 As is noted in the Explanatory Note to the Evidence Amendment Bill 2007, the law reform commissions intended for the proposed amendments "to shift the focus from whether there is a technical breach of the hearsay rule [and also, as regards s 78A, the opinion rule] to whether the particular evidence is reliable. Evidence given will still be subject to the safeguards of relevance provided by s 55, and the discretionary and mandatory exclusions in sections 135–137…".

249 In the Second Reading Speech, the then Attorney-General for New South Wales, Mr John Hatzistergos MLC, said (see New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 24 October 2007 at 3199-3200; and see also New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 17 October 2007 at 2811-2812):

… In their Report, the Law Reform Commissions found that the Evidence Act should be amended to be more responsive to Aboriginal and Torres Strait Island oral traditions.

It is *not appropriate for the hearsay rule* (and by extension, the legal system) *to treat orally transmitted evidence of traditional law and custom as prima facie inadmissible, when this is the very form by which law and custom are maintained under Indigenous traditions.*

Similarly, *a member of an Aboriginal or Torres Strait Islander group should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law and custom of his or her own group.*

The *intention is to make it easier for the court to hear evidence of traditional laws and customs*, where relevant and appropriate. The *exceptions proposed in the Bill shift the focus away from whether there is a technical breach of the Evidence Act, to whether the particular evidence is reliable*.

Factors relevant to reliability or weight will include the source of the representation, the persons to whom it has been transmitted, and the circumstances in which it was transmitted.

The requirements of relevance in sections 55 and 56 [of the Evidence Act] may operate to exclude representations which do not have sufficient indications of reliability.

Reliability will also be ensured if courts continue to use their powers to control proceedings to create a culturally appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs.

Further safeguards are provided by the court's powers under sections 135, 136 and 137 [of the Evidence Act] to exclude or limit the use of evidence.

For the purposes of the exceptions to the hearsay and opinion rules, *the Commissions also concluded that a 'broad definition of traditional laws and customs' was desirable*.

The *everyday meaning of "traditional law", or "traditional custom" is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.* However, the High Court has held — in *Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422* [46], per Gleeson CJ, Gummow and Hayne JJ, with McHugh J agreeing — that for the purposes of the Native Title Act 1993, "traditional laws and customs" refers specifically to traditional laws and customs "whose content originates in the normative system of Aboriginal and Torres Strait Islander societies prior to assertion of sovereignty by the British Crown".

The Commissions considered that for the purposes of the Evidence Act, 'traditional laws and customs' should not be limited to that interpretation. To ensure that the Act covers the full range of matters within the scope of "traditional laws and customs", *a broad definition of "traditional laws and customs" has been inserted. The new definition is not limited to "normative rules"". It contains a non-exhaustive list of matters that includes customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal or Torres Strait Islander people.* The Commissions consider that this broader definition will enable the Court to

receive *more diverse evidence which can be used to prove the existence and content of traditional laws or customs.*

The definition also refers to "any of the traditions, customary laws, customs"' and so on, of the group. This is to make clear that the new exceptions to the hearsay and opinion rules apply to traditions and customs generally, and not only to those whose content has been shown to originate in traditional law and custom in force prior to the assertion of sovereignty by the British Crown. Just like the common law we have inherited from Britain, Aboriginal and Torres Strait Island traditional law and custom did not ossify in 1788, but has continued to evolve. Moreover, it is impractical and inappropriate to require courts to inquire whether the content of any given traditional law or traditional custom has its origins before sovereignty, in order to decide whether the exceptions may apply. Requiring such an inquiry would be contrary to the purpose of the new exceptions, which is to shift the focus away from technical obstacles to admissibility, and on to whether the particular evidence is reliable and what weight it should be accorded.

[…]

The great advantage of the proposed exceptions for traditional law and custom is that these exceptions make it easier for community members to speak to the court, and to explain what their traditions really are. If any person tries to misrepresent tradition out of self-interest, community members can much more easily set the record straight in court.

[…]

If traditional law and custom is a relevant and appropriate consideration in a court case, it is highly impractical to exclude it on the grounds that it breaches the hearsay or opinion rules. …

[Emphasis added]

250 These provisions were considered in some detail by Lindsay J in *Re Estate of Jerrard, Deceased* (2018) 97 NSWLR 1106; [2018] NSWSC 781 (*Re Estate of Jerrard*). His Honour there observed (at [76]) that:

> 76 In civil proceedings such as those under Pt 4.4 of the Succession Act, the practical effect of the Evidence Act, as amended, is:
>
> (a) implicitly to embrace the view that, in substance, "rules of evidence" relating to "traditional laws and customs" can be encapsulated in two questions: Is a particular piece of evidence *relevant* to a fact in issue? Is it *probative* of a fact in issue?
>
> (b) to shift forensic contests about the admissibility of evidence about "traditional laws and customs" away from an application of rules governing admissibility towards consideration of whether an order should be made by the court to exclude, or limit the use of, evidence the probative value of which is substantially outweighed by a danger that it might be unfairly prejudicial to a party, be misleading or confusing, or cause or result in undue waste of time
>
> (c) to force the parties, if not the court, into a conversation about factors relevant to reliability or weight of evidence about "traditional laws and customs" irrespective of its form.

[Emphasis in original]

251 His Honour concluded (at [80]) that "[s]ection[s] 72 and 78A of the *Evidence Act*, in combination with Pt 4.4 of the *Succession Act*, demonstrate a legislative intention that the court take a liberal view of the existence, and content, of 'traditional laws and customs' of Indigenous communities".

252 Pausing here, having regard to the statutory language of and purposes underlying s 72 of the *Evidence Act*, I see that there is some force in the proposition that much of the evidence presently under consideration is, relevantly, not evidence of "traditional laws and customs", as distinct from evidence or assertions as to the existence or non-existence of particular facts (being the existence or non-existence of Aboriginal objects). There is, on one view, a relevant difference between, say, evidence of a group of persons attending at a place to pray or pay respects to the group's ancestors as distinct from evidence that a particular object (such as a grave) is in fact located at that place. Similarly, there is a conceptual difference between: evidence of a group's belief as to the cultural and spiritual significance of a location based on a belief that a particular object exists at that location as distinct from evidence as to the very existence (or otherwise) of that object at that location; or between evidence of a group's belief that a particular object exists at a location as distinct from evidence as to the actual existence, as a matter of fact, of that object at that location. Evidence of the former kind in each of these three examples would, to my mind, clearly engage s 72; whereas evidence of the latter kind arguably does not.

253 This distinction may be illustrated by reference to the decision in *Sampi (on behalf of the Bardi and Jawi People) v Western Australia* [2010] FCAFC 26; (2010) 266 ALR 537, where the Full Court of the Federal Court (North and Mansfield JJ) considered whether the primary judge, for the purposes of determining a native title application, had erred in concluding (largely by inference) that two groups of Aboriginal peoples did not form a single society at sovereignty (see at [5]). Relevantly, evidence had been given at trial by various Aboriginal witnesses in relation to the traditional laws which they understood and recognised. It was held on appeal that, on the basis of that evidence, the primary judge should have found that the Bardi and Jawi people

"acknowledged the same laws and observed the same customs concerning rights and interests held in land and waters…" (see at [63]ff). Although s 72 of the *Evidence Act* was not considered (as the proceedings at first instance occurred prior to the enactment of the relevant statutory amendments), the decision usefully illustrates the distinction between evidence of "traditional laws and customs" and evidence of the underlying factual matters which form the foundation, or are incidents, of such customs.

254 Having said this, I consider that much of the evidence (to which objection is taken) is capable of falling within the statutory definition on the basis that the evidence is, relevantly, evidence as to the "*knowledge and beliefs* of the group" (my emphasis). For example, as here, evidence as to traditional knowledge and beliefs that persons (Harry and Clara Bray) were buried at a particular place (even though there is some uncertainty as to the precise location of their graves and whether their remains still exist). Further still, the evidence that Jimmy Kay came to the Rainforest Resort to pray and that his family members (Ms Kelly and Ms Nicholls as children with their mothers and aunts) continued the tradition of visiting what they understood (from stories passed down to them by their mother) to be the burial site of their ancestors, and their distress at the prospect that the burial site had or may have been disturbed, is in my view admissible evidence of the beliefs of an Aboriginal group within the meaning of the definition of "traditional laws and customs".

255 The permissible use of evidence of that kind would, however, be limited to proof of that knowledge and those beliefs (not as to the underlying facts of the existence or non-existence of Aboriginal objects). Put differently, such evidence is not evidence as to whether that knowledge and those beliefs are correct in the sense of, to take the above example, proof that those persons are in fact buried at the place or that the remains of those persons still exist at that place.

256 Further, this evidence taken with other evidence (particularly, the contemporaneous newspaper reports of the deaths and burial on the land of Harry and Clara Bray and the reported reminiscences of the contemporary witness, George Flick) is capable of leading to a conclusion as to there being a

plausible contention or concern as to the basis of that belief (i.e., that Harry and Clara Bray were buried somewhere on the Rainforest Resort land, even if not precisely where the memorial stone and plaque are located and even if the precise location cannot be determined). I consider in due course the submissions made by the vendors that no such conclusion as to the fact of burial on the land should be made. For present purposes I am simply dealing with the admissibility of the evidence of belief, not the weight to be attached to it or the ultimate conclusions to be reached on that evidence.

257 In this regard, I am conscious of the context in which evidence of this kind is often relied upon (and which was a principal impetus for the statutory reforms); that context being the difficulties of proof in native title litigation. As the Hon Michael Black AC said, speaking extra-curially as the then Chief Justice of the Federal Court of Australia, it is necessary in native title proceedings for claimants to prove "that [the claimants] do possess rights and interests under the traditional laws and customs that involve a connection with land or waters" (see the Hon Michael Black AC, "Developments in Practice and Procedure in Native Title Cases" (2002) 13 Public Law Review 16, 17; and see also *De Rose v State of South Australia* [2002] FCA 1342 (*De Rose*) at [264]ff per O'Loughlin J). In that context, the relevance of the evidence (of traditions, customs and such matters) is generally to prove a connection, on the part of the claimant group, to the land in question. It is not, at least generally speaking, led to prove the existence or non-existence of a disputed underlying factual matter (again, as here, the location, be it precise or imprecise, of a burial site on the land). Nevertheless, I see no reason why the difficulties of proof which the enactment of s 72 was intended to address would not equally be applicable to proof of traditional beliefs as to matters of the present kind.

258 I am fortified in this conclusion having regard to the learned commentary in *Wigmore on Evidence* which I have considered above, including that, in the present case, the evidence sought to be admitted, while not directed to land boundaries as such, is evidence of custom and belief of an identified Aboriginal community and is of a "past" generation or "ancient" in the sense that no contemporaneous witness to the burials is now able to give evidence as to those events.

259 I consider that the particular evidence listed at [179] above (other than the draft material produced on subpoena by Mr Parker which seems to me to have no probative value) is admissible under s 72 to establish the knowledge and belief of the Arakwal community that Harry and Clara Bray were buried on land now comprising the Rainforest Resort and that their remains are there (at least to the extent not disturbed by the excavation at the time of construction of the pool); and, in particular, the belief of Jimmy Kay and his daughters (and granddaughters) that the burial site was in the vicinity of what is now the pool (though I accept that the evidence does not establish on the balance of probabilities the precise location of the burial site). With this said, this evidence is not admissible as evidence or proof of the underlying fact (i.e., the correctness of that belief and the existence, in fact, of those Aboriginal objects at the precise location).

260 Insofar as the evidence tendered (in particular the evidence of Ms Kelly and Ms Nicholls) extends to the beliefs of the Arakwal community that there are other Aboriginal remains on the land (the location of which is even more imprecise), I similarly conclude that the evidence is admissible to establish those beliefs. However, I consider the weight to be attached to this evidence, as discussed in due course, is limited.

261 Finally, I consider that evidence of the belief by the Arakwal community that Harry Bray had lived in a gunyah on the property is admissible on the same basis. However, I accept that such a belief says little, if anything, about whether there is any visible sign now remaining of that gunyah or, further still, whether it still exists.

262 Therefore, subject to weight, I would admit (again, other than the draft material produced on subpoena by Mr Parker) the evidence listed at [179] above pursuant to the exception to the hearsay rule provided for by s 72 of the *Evidence Act*.

263 It is convenient next to note, for completeness, the following observations and considerations as to the weight to be afforded to this evidence.

264 First, returning to *Re Estate of Jerrard*, Lindsay J there noted (at [78]) that the evidence adduced by the plaintiff, and her corroborative witnesses, about "'the

traditional customary lore'" essentially took the form of bare declarations which were not independently verifiable by the Court except by the drawing of inferences from: the sufficiency of the publication of the notice of the plaintiff's claim under Pt 4.4 of the *Succession Act 2006* (NSW); "the identity, and ostensible status within an Aboriginal community, of each person making a declaration"; and the absence of an application for an order under ss 135 and 136 of the *Evidence Act* for the evidence to be excluded or limited in some way. Of course, here there was objection to the admission of the evidence and calls for the limitation of the use to be placed on it; and hence any inference of the kind that Lindsay J considered could be drawn from the third of those matters would be subject to that.

265 Lindsay J noted (at [82]) that "[a]n apparently authoritative declaration about 'traditional laws or customs' by Elders, members or official representatives of an Indigenous community may have a powerful, persuasive effect on a decision-maker; but *courts need to remain conscious* [as to whether those opinions are] *independently verifiable by the court upon a review of underlying facts*"; and (at [86]) that "Counsel for the defendant [in those proceedings], correctly, urged the *court not to accept uncritically evidence in favour of the plaintiff's assertion of a 'traditional customary lore'*…" (emphasis added). I here bear that caution in mind.

266 Second, I note that much of this evidence is, in the words of Jessup J in *Sandy (on behalf of the of Yugara People) v State of Queensland (No 2)* [2015] FCA 15; (2015) 325 ALR 583, "highly derivative" (see at [167]). In particular, the documentary reports relied upon (other than the newspaper articles and George Flick reminiscences) largely draw upon the recollections of the previous owner of the property (Mr Davidson) as to what he was told by an unidentified "old Aboriginal person".

Admissibility under s 74: public and general rights

267 Having found that the evidence (other than the draft material produced on subpoena by Mr Parker) is admissible under s 72, it is not strictly necessary for me to consider admissibility under s 74. However, I here consider s 74 in the

event that my preceding conclusion is wrong, having in mind that the parties have fully argued admissibility under s 74.

268 As the learned author of *Cross on Evidence* (11th ed, 2017, LexisNexis Butterworths) explains (at 1241), at common law, a declaration (oral or written) by a deceased person as to the reputed existence of a public or general right is admissible as evidence of the right provided that: the declaration was made before a dispute had arisen; and, in the case of a reputed general right, provided the declarant had competent knowledge.

269 Section 74 of the *Evidence Act* now provides that:

> **74 Exception: reputation of public or general rights**
>
> (1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.
>
> (2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

270 This statutory exception is, like s 72, of considerable import in the context of native title litigation. For example, in *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, Olney J (at 544) observed that s 74(1) "[of the *Evidence Act 1995* (Cth)] … enable[s] the Court to have regard both to the evidence of witnesses who have *recounted details concerning relationships and traditional practices which have been passed down to them* by way of oral history and to matters recorded by ethnographers and other observers…" (emphasis added).

271 Section 74 was considered in some detail by Selway J in *Gumana v Northern Territory* (2005) 141 FCR 457; [2005] FCA 50 (a case also decided before the introduction of s 72). Relevantly, his Honour there observed (at [157]) that:

> 157 However, where the evidence of the anthropologist (or anyone else) is derived from what that person has been told the issue is more complicated. This evidence may be subject to the hearsay restriction contained in s 59 of the Evidence Act. It restricts the admissibility of evidence "of a previous representation made by a person" where that representation is sought to be used to "prove the existence of a fact that the person intended to assert by the representation". The hearsay restriction is subject to a number of exceptions. First, where the evidence is of a fact, rather than what is said about the fact, then it is not hearsay. This is reflected in s 74 of the *Evidence Act* which provides that evidence can be given in relation to "evidence of reputation concerning the existence, nature or extent of a public or general right". In my view evidence of a "custom" or tradition *including evidence of what is believed about a custom or tradition is evidence of a fact and is not hearsay.* It can be

> treated as evidence of "reputation" for this purpose. In my view there is no prohibition under the *Evidence Act* of the admissibility of that evidence. *Evidence can be given* pursuant to s 74 of the *Evidence Act of the "reputation" of the existence, nature and extent of Aboriginal custom by those subject to Aboriginal custom* and by those who have studied it over a long period …
>
> [Emphasis added.]

272 His Honour cited *Milirrpum* (at 161-162) and *De Rose* (at [265]-[271]), cases to which I have previously referred, in support of those propositions.

273 Admissibility of the evidence under s 74 encounters much the same difficulty as that which attended the question of admissibility under s 72; namely, that much of the evidence sought to be admitted is evidence of, and is for the purposes of or only relevant to establishing, the existence of the alleged Aboriginal objects. That is, the existence of those objects as a matter of fact, as distinct from a public or general right (or even a belief as to the existence or reputed customary exercise of any such rights).

274 I am conscious of Selway J's observation, in the passage which I have just quoted, that "evidence of a 'custom' or tradition *including evidence of what is believed about a custom or tradition* is evidence of a fact and is not hearsay". It could be said that evidence of what is believed as to the location of the remains (and, perhaps, also about the other alleged Aboriginal objects) is evidence of the fact of the belief and therefore not hearsay.

275 However, again, to my mind there is a distinction between evidence *of a belief* and evidence of that of which the belief is held. Evidence of a belief is not of itself evidence as to the underlying fact in issue. In this regard, there is a question as to the relevance, in the instant proceedings, of evidence as to the former to the extent that the critical facts in issue are the existence of the Aboriginal objects and the locations thereof (not the belief as to the same for the purposes, say, of demonstrating a connection to country).

276 That distinction is illuminated by the decision in *Akiba v Queensland (No 2)* (2010) 204 FCR 1; [2010] FCA 643, where Finn J was called upon to determine the admissibility of a monograph (and two papers authored by the same authors) of a study of traditional fisheries in the Torres Strait. The study was based on information told to the authors, and observed by them, in Torres Strait Island communities between 1983 and 1987 (see at [134]-[135]). It was

said by the relevant parties that the information contained was "'evidence of reputation concerning the existence, nature or extent of a … general right' for the purposes of s 74(1) of the *Evidence Act* … [and that] [t]o the extent that conclusions are drawn from that information these, it [was] said, constitute lay opinion of what the authors saw, perceived or heard for the purposes of s 78(a) of the *Evidence Act*".

277 The applicant's objection to the tender of that evidence was based on inadmissibility as opinion evidence and the general discretion to exclude. For present purposes, what is relevant to note is that there was a distinction drawn between the reputed existence and enjoyment of rights (for example, the right to exploit fisheries as was purportedly evidenced by the monograph and articles) and the existence or non-existence of a particular fact in itself. Similarly, in the present case, a distinction may be drawn between evidence as to the reputed right to occupy land or to attend at a burial site and whether or not remains are in fact situated at the location.

278 Albeit in a very different context, evidence of reputation concerning the existence or nature of a road as a public road was admitted under s 74 in *Jarosz v State of New South Wales* [2019] NSWSC 692.

279 As to the purchasers' submission that the present case is concerned with a public right because it is concerned with the rights of the Crown conferred by a public statute for public purposes, I can well accept that the ultimate determination in this proceeding may have the effect, in lay terms, of recognising a public or general "right" (in the sense that the purchasers' argument is at one level predicated on certain property being vested in the Crown); and also, in the sense that if there are found to be Aboriginal objects on the land then logically the provisions of the *National Parks and Wildlife Act* would control what could be done with those objects (and would, for example, confer a "right" on certain Aboriginal persons to be consulted in relation to any application for an AHIP). However, it seems to me that this is a different issue from the question as to whether the *specific evidence* which is sought to be admitted concerns, or is evidence of, reputation concerning the existence of any such right(s).

280 As to the purchasers' contention, seemingly put on a narrower footing than the preceding, that the location of Aboriginal objects on or in the land is concerned with a public right (because it is concerned with the rights, being proprietary rights in the Aboriginal object, of the Crown conferred by a public statute for public purposes) and a general right (of Aboriginal persons who may hold knowledge relevant to the object and have the right to be consulted in relation to any application for an AHIP), this argument, again, appears to conflate the *particular evidence sought to be admitted* with the broader issues which must ultimately be determined in, and be effected and affected by the findings made in disposing of, this proceeding. So, while the location of Aboriginal objects *may*, for the reasons identified by the purchasers, ultimately concern (in the sense of effecting and affecting) a public and/or general right by engaging a particular statutory regime which may result in the conferral of those "rights", it seems to me to be a different question as to whether *particular evidence* concerns, or is *of*, reputation concerning such right(s).

281 I do not accept that, because the statutory regime operates so that a particular consequence may follow upon the identification of a particular object, hearsay evidence as to the very existence and location of that object is admissible on the basis that the evidence itself is reputation concerning the existence, nature or extent of a public or general right.

282 It is again instructive to consider the underlying rationales for the historical exception accommodating receipt of reputation evidence (which I have previously noted and excerpted from ch 55 of *Wigmore on Evidence*.

283 In any event, I am not persuaded that the exception under s 74 is here engaged; and I would not have admitted the evidence at [179] above under this exception to the hearsay rule.

Admissibility under s 69: business records

284 As has been noted in the parties' respective submissions, admissibility under s 69 requires that the representation, or representations, sought to be admitted under the exception was, or were, made by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact(s) or that the representation was made on the basis of information supplied

directly or indirectly by such a person. In this regard, it is true that in *Lancaster* the Victorian Court of Appeal recognised (see at [20], [27]) that the requirement of s 69(2) of the *Evidence Act* does not limit permissible tenders to first or second hand hearsay. It is also correct that the Court in *Lancaster* (see at [27]) recognised that it is not necessary that the original supplier of the representation be identified.

285 As to the 1980 site report, this document contains various representations some of which, to my mind, relevantly fall within the ambit of s 69(2) (and are therefore admissible under the business records exception) while others do not (and are therefore not admissible under the business records exception). Specifically, the representation that "[Mr Davidson] said some [A]boriginals would come and pray beside the graves. One [A]boriginal would come frequently" is admissible as the representation was made on the basis of information directly or indirectly supplied by a person (being Mr Davidson) who had or might reasonably be supposed to have had personal knowledge of the asserted fact (being the frequent visitation of Aboriginal persons to pray at the site and, particularly, that one individual would attend frequently). However, representations such as "[a]n old [A]boriginal told Mr Davidsons' father about the graves and he had taken care of them until his death" are not admissible under the business records exception as the requirement of s 69(2)(b) is not satisfied. I do not see that there is a permissible inference to be drawn that the unidentified person had knowledge of the relevant fact, even taking into account the circumstances in which the information was conveyed to Mr Davidson's father.

286 As to the AHIMS search, the representation in this document that the burials exist is not admissible under the business records exception because, as the vendors correctly submit, this representation is sourced from the respective representation(s) in the 1980 site report which, as I have just ruled, are not admissible under s 69.

287 As to respective representations in the Parker Report and the Norman Application, for the same reason, these are not admissible under s 69.

288 As to respective representations in the "Byron Coastline Values Study" dated December 2000, the representation in this document that the burials exist is not admissible under s 69 because the relevant representation is sourced from the representation in the AHIMS search which, as I have just ruled, is not admissible because itis sourced from the (inadmissible) representation(s) in the 1980 site report. The same applies to the email excerpted at paragraph [124] above.

Further evidence subject of objection: "admissions"

289 It is convenient next to consider the purchasers' reliance on various statements of, or representations by, Mr Carter (including representations contained in some of the documents the subject of the hearsay objections – see above) which they maintain amount to admissions by him as to the existence of Aboriginal objects on the land.

290 This evidence is: the statements contained on the Rainforest Resort website (see Mr Carter's 9 February 2016 affidavit at [7]); the inclusion of special condition 47 in the re-sale contract (as extracted earlier); the statements contained in the Lonergan report prepared in connection with the re-sale (see at [170] above); the statements that Mr Carter admits he made at the site meeting on 13 July 2015; Mr Garrett's confirmation that such information was passed on to him on 14 July 2015 (see from T 287.40 and Ex V); the statements that Mr Cheers and Mr Adam Mehmet depose Mr Carter made to them on 13 July 2015; the statements that Mr Carter made at the meeting in Mr Garrett's board room on 16 July 2015; the statement in the Parker Report attributing information to Mr Carter and stating that he had reviewed the Aboriginal cultural heritage section of the report; and the signed application for funding that it is said that Ms Amanda Norman made on his behalf (to which I have referred as the Norman Application) (Ex T).

291 The purchasers note that, in his affidavits, Mr Carter has identified as sources of his knowledge: the plaque; his "general knowledge of the area" (see Mr Carter's 21 May 2019 affidavit at [16]); and his "general enquiries and conversations over the years" (see Mr Carter's 16 February 2016 affidavit at

[8], [9] and [23]). It is further noted that, in his oral evidence, Mr Carter also referred to the newspaper death notices.

292 The purchasers say that an absence of direct personal knowledge of the facts does not deprive the statements made by Mr Carter from their status as admissions available to prove the truth of those facts. They maintain that it is significant, in evaluating the weight of his "admissions", that Mr Carter chose not to lead any comprehensive or detailed evidence of the sources of his knowledge (and did not state them when called upon to do so before termination of the contract – the purchasers here referring to the demands and notice to perform that the purchasers issued calling for that information). The purchasers say that there is no reason to discount the admissions in circumstances where Mr Carter has not attempted to identify and discredit the sources of his own knowledge, nor has he suggested that he did not believe the facts he admitted; and where Mr Carter has not asserted that he does not have, or does not believe, indirect knowledge as to the remains of Harry and Clara Bray in the site. Insofar as it has not been suggested that Mr Carter had ever seen the AHIMS site card, the purchasers say that his knowledge must have a source and that it should be inferred that disclosing that source would not have assisted the vendors' case.

293 Reference is made by the purchasers to *Lustre Hosiery Ltd v York* (1935) 54 CLR 134; [1935] HCA 71 (*Lustre Hosiery Ltd v York*) where (at 143-144) Rich, Dixon, Evatt and McTiernan JJ said:

> This course of authority seems consistent with the view that words or conduct amount to an admission receivable in evidence against the party if they disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief. In determining whether he intends to affirm or acknowledge a state of facts the party's knowledge or source of information may be material. For if he states that another person has told him of it, and it appears that he has additional sources of information to the like effect, it may be right to understand him as implying a belief in what he repeats. Or, again, a person who fails to contradict a statement concerning matters within his own knowledge may be understood as acquiescing in the statement if the circumstances are such as to make it unlikely that he would allow an erroneous statement to pass unchallenged. But, although the meaning of his words or conduct may depend upon the state of his knowledge, once that meaning appears and an intention is disclosed to assert or acknowledge the state of facts, its admissibility in evidence as an admission is independent of the party's actual knowledge of the true facts. When admitted in evidence, however, its probative force must be determined by reference to

> the circumstances in which it is made and may depend altogether upon the party's source of knowledge. If it appears that he had no knowledge, or that, although he had some means of knowledge, he had formed no certain or considered belief and indicated nothing amounting to a personal judgment or conclusion of his own, the probative force of the admission may be so small that a jury ought not to be allowed to act upon it alone, or in preference to opposing evidence.

294 The purchasers note that those principles were applied in *Smith* v *Joyce* (1954) 89 CLR 529 at 535–536; [1954] HCA 15 (*Smith v Joyce*); and refer also to *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317; [2003] HCA 51 (*Dovuro Pty Ltd v Wilkins*) (at [68]-[71] per Gummow J) and *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314; [2008] FCA 369 at [35], [37] per Rares J.

295 Reliance is here placed on the fact that Mr Carter, through his real estate agent, circulated the Lonergan report of November 2015 as part of the marketing information on the re-sale of the property. The purchasers argue that Mr Carter thus adopted as his own the representations made at item 7 as to the cultural heritage of the site (see above at [170]) and the comments made in the conclusion section of the report concerning the Aboriginal objects. The purchasers say that those words disclosed an intention to affirm or acknowledge the fact that an Aboriginal grave had been preserved at the site (and that it is significant and would need to be preserved in any subsequent development). Similarly, it is noted that, on his website, Mr Carter affirmed and acknowledged that Harry and Clara lived on the land where the Rainforest Resort is and that Harry was buried with Clara.

296 The purchasers contend that these admissions (not formally sought to be admitted as admissions under s 81 of the *Evidence Act*) establish not only that the grave site is an Aboriginal object but also its materiality to a purchaser (satisfying the *Flight v Booth* test given that the site was marketed as a development site). It is said that the inference of continuance applies to show that the remains are still located in the vicinity of the plaque.

Determination

297 In *Richards v Morgan* (1863) 4 B & S 641 at 661, Cockburn CJ said:

> It cannot be doubted that *a man's assertions are admissions*, whether made in the course of a judicial proceeding or otherwise, and, in the former case, whether he was himself a party to such proceeding or not. *It may be given in evidence against him in any suit or action in which the fact so asserted or*

> *admitted becomes material to the issue to be determined*. And in principle, there can be no difference whether the assertion or admission be made by the party himself who is sought to be affected by it, or by someone employed, directed or invited by him to make the particular statement on his behalf. In like manner, a man who brings forward another for the purposes of asserting or proving some fact on his behalf, whether in a court of justice or elsewhere, must be taken himself to assert the fact that he thus seeks to establish.
>
> [Emphasis added]

298 In their submissions, as noted above, the purchasers have cited the decision of the plurality in *Lustre Hosiery Ltd v York*, and the later application of those principles in *Smith v Joyce*. In the latter, Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ said (at 535) that it is a question of law whether a statement made by a party is capable of constituting an admission on any relevant issue; and that this, generally, must be determined by examining the words used (see also *Dovuro Pty Ltd v Wilkins* at [68]-[71] per Gummow J).

299 When one turns to the representations said to amount to "admissions" in this sense, they fall broadly into two different categories: representations made or adopted by Mr Carter before the dispute arose; and representations made in connection with the November 2015 re-sale.

300 As to the latter, to my mind, the representations relied upon after the dispute had arisen (the Lonergan report and the re-sale contract) do not affirm or acknowledge the relevant matter (being the preservation of an Aboriginal grave on the site); rather, the Lonergan report (and the contract for re-sale) make clear in their terms that what is there being acknowledged is anecdotal. It is true that item 7 of the Lonergan report indicates that the area has been preserved and that a plaque was erected to indicate its location and significance. However, that does not go further than to draw to a potential purchaser's attention the possibility that there is an Aboriginal grave on the property (and to acknowledge the significance of such a grave if it were to exist on the property). Similarly, the disclosure in the re-sale contract is carefully worded to be confined to a disclosure of the fact of registration of an Aboriginal burial site in the AHIMS records and the AHIMS search results; as well as the presence of the plaque "commemorating the burial of Harry and Clara Bray". It leaves open whether the burial site has been correctly recorded in the AHIMS register. Thus I do not consider that these are relevant admissions. This

evidence not being admissible as an "admission" to prove the truth of the facts asserted, I do not see the relevance of these representations as regards a non-hearsay purpose (specifically, as representations made to the purchasers giving rise to a plausible contention that there were Aboriginal objects.

301 As to the former, I consider that the statements recorded in the Nature Notes (which were published on the Rainforest Resort website at the time of the subject contract for sale) do evince an intention on Mr Carter's part to assert the relevant facts. Relevantly, there, amongst sections headed "Natural History", "Birdland", "Mammals", "Creepy Crawlies" and "Trees", is a section on Aboriginal history, which includes the following statements, with a photograph of the memorial plaque:

> "The ARAKWAL people are the recognised custodians of Byron Bay, a subgroup of the Bunjalung tribes of North east NSW.
>
> "Descendants of this tribe live in the area today and trace their lineage to Harry Bray who was the tribal elder at the turn of the century.
>
> […]
>
> "Harry lived with his wife Clara and several children, on the land where the resort is today, in a wood and bark GUNYAH which was a traditional native home. […]
>
> […]
>
> Clara died at the turn of the century and Harry lived till the 1920's when he was found dead by one of the farmers children and buried next to Clara.

302 Those statements, in my opinion, amount to a clear admission by Mr Carter as to his belief that Harry and Clara Bray lived on the land where the resort is (in a wood and bark gunyah); that Harry was buried next to Clara; and, coupled with portrayal in the photograph of the inscription on the memorial plaque, that they were buried in the general location of the plaque (i.e., somewhere in the resort).

303 As to the statements made by Mr Carter during inspections of the property (both before and after exchange of contracts), there is dispute as to precisely what was said (which I consider in the context of dealing with the credibility of witnesses and I bear in mind in determining the issues in the dispute). Broadly speaking, I accept that Mr Carter identified the presence (or existence) of the memorial stone and plaque (and seems to have admitted the reputed burial of

Harry and Clara Bray on the property) but otherwise I do not consider that he made any relevant admissions.

304 The purchasers say that Mr Carter's evidence, both written and oral, demonstrated a substantial acquaintance, on his part, with the Aboriginal cultural heritage of the site; and that he made important admissions in communications between the parties in the period from 13 to 16 July 2015. In that context, it is submitted that Mr Carter's attempt, in subsequent correspondence between the solicitors, to "walk away" from those admissions was not the conduct of a vendor ready and willing to perform the contract. It is submitted that the purchasers (confronted with the Parker Report, its reference to information received from Mr Carter, and the admissions made by Mr Carter himself in the period from 13 to 16 July 2015) were entitled to expect that the questions raised as to title (and to the vendors' ability to transfer and convey title) ought to have been answered in a substantial way (citing *Want v Stallibrass* (1873) LR 8 Ex 175 (*Want v Stallibrass*)).

305 It is thus submitted that it was open to the purchasers to rely on Mr Carter's "admissions" as to the existence of Aboriginal objects in objecting to the vendors' ability to give title; and that they were entitled to insist that the vendors negative those facts (or avoid them by lawful removal), without being guilty of repudiation for refusing to complete in the facet of vendors "who simply refused to address legitimate concerns as to a doubtful title". The purchasers say that:

> There is something wrong about a man admitting *inter partes* that there are objects present (which the opposite party complains would constitute defects in title) being then able to insist on performance by the innocent party on the ground that the admissions were based on hearsay and therefore cannot be relied on unless independently proved by the innocent party at considerable expense and inconvenience.

306 It is further submitted that, on ordinary principles of contract law, a party who admits that he cannot perform (or admits facts which in law have the consequence that he cannot perform) is guilty of repudiation and the opposite party is entitled to act on that repudiation and terminate the contract.

307 The purchasers maintain that the vendors' conduct (in effect requiring the purchasers to prove that they did not have clear title) amounted in at law to a want of readiness and willingness to perform because of the normal obligation

of vendors to answer requisitions going to the promised title, to disclose latent defects, and to show and prove a good title (especially where there was an express promise in cl 16.3 to provide at completion a title free of interest in any other person). I consider the purchasers' repudiation argument shortly. Before doing so, however, I set out the relevant provisions of the National Parks and Wildlife legislation and of the contract for sale.

308 As I understand it, the reliance sought to be placed by the purchasers on these "admissions" largely (if not wholly) goes to the proposition that it was reasonable to expect that the vendors would explain, in the context of the dispute that subsequently arose, why those representations were wrongly made (or the content of those representations was, in fact, not correct), if the vendors proposed to show a title free of the objects mentioned in those communications; and that it was not reasonable for the vendors to expect the purchasers to proceed to settlement of the $3 million purchase as if the admissions had not been made or as if they could be disregarded.

309 That is to say, the purchasers do not seek admission of this evidence, as "admissions" pursuant to the hearsay exception provided in s 81 of the *Evidence Act*, in order to prove the truth of the facts asserted; rather, it is sought to be relied on as evidence of what Mr Carter had said (again, in the context of the dispute that subsequently arose and, generally speaking, the purchasers' subsequent requests of the vendor to show "good title").

310 Pausing here, there is, as I have adverted to, some doubt and dispute as to whether any of the purchasers read the Nature Notes at the relevant time (and therefore, it could be said that the Nature Notes are not relevant for the non-hearsay purpose which I have just identified). However, the vendors themselves rely on the Nature Notes in arguing that the existence of the memorial stone and plaque was a patent defect in title and are therefore admissible.

311 To these ends, I see no reason why this evidence cannot be relied on as original evidence it being relevant for the above reasons as going to the above issues.

The substantive issues in the proceedings

312 I have already outlined the background to the proceeding and, generally, the respective cases for the purchasers and the vendors. Having ruled on the admissibility of provisionally admitted evidence, I turn now to determine the substantive issues.

313 It is convenient first to set out the relevant provisions of the National Parks and Wildlife legislation.

National Parks and Wildlife legislation

314 Prior to the 1974 Act, provisions for the protection and conservation of (as well as alteration of title to) Aboriginal objects were contained in Pt IVA of the now-repealed *National Parks and Wildlife Act 1967* (NSW) (the *1967 Act*). Part IVA was inserted into that Act by the amending Act No 78 of 1969, commencing in 1970.

315 The second reading speech of the Minister for Lands in the Legislative Assembly on 4 November 1969 (see New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 4 November 1969) discloses (at 2190-2192) broad protective and conservative objects. At 2190, the Minister referred to the previous regulatory regime as having "done little to inhibit the progressive despoliation of such areas"; and said (at 2190-2191) that "[i]f this despoliation is allowed to continue unimpeded and our more valuable relic areas are not protected in a permanent and effective manner, or otherwise carefully recorded and scientifically studied, we will, as a nation, be immeasurably impoverished".

316 Section 33D, introduced into the *1967 Act* by Act No 78 of 1969, vested title to certain "relic[s]" in the Crown. "Relic" was defined in s 3(1) of the *1967 Act*, as amended by Act No 78 of 1969, as follows:

> "Relic" means any deposit, object or material evidence (not being a handicraft made for sale) relating to indigenous and non-European habitation of the area that comprises the State of New South Wales, being habitation both prior to and concurrent with the occupation of that area by persons of European extraction.

317 Section 33D of the *1967 Act*, as amended, provided that:

> 33D (1) Subject to this section, a relic that, immediately before the commencement of this Act—

(a) was not the property of the Crown; and

(b) was not in the possession of any person,

and any relic that is abandoned after that commencement by a person other than the Crown, shall be deemed to be, and always to have been, the property of the Crown.

(2) For the purposes of subsection one of this section, a person shall not be deemed to have had possession of a relic that was not originally real property only by reason of the fact that it was in or on land owned or occupied by him.

(3) Nothing in this section shall be construed as restricting the lawful use of land or as authorising the disturbance or excavation of any land.

(4) No compensation shall be payable in respect of the vesting of a relic by this section.

318 Pausing here, the purchasers argue that s 33D(2) distinguished between an object that was always real property (i.e., part of the land) and one that was "'not originally real property'" (i.e., that was not originally, but has since become, real property). It is submitted that this must refer to the alteration of things from the character of movable objects to real property, by their permanent affixation to the land, and thus that the effect of sub-s (2) is to establish that such affixation (and therefore that alteration of an object into real property) will not deprive s 33D(1) of its effect in vesting title to the object in the Crown. In this regard, reference is made to *Stockland (Constructors) Pty Ltd v Carriage* (2003) 56 NSWLR 636; [2002] NSWSC 1179 (*Stockland v Carriage*) at 648 per Bergin J, as her Honour then was.

319 The purchasers say that only objects that were originally part of the land will be considered as being in the possession of the person entitled to possession of the land and thus excluded by operation of s 33D(1)(b) from vesting in the Crown. The purchasers say that this conforms broadly with the explanation given by the Minister in the second reading speech in the Legislative Assembly on 4 November 1969 (see at 2191) - the Minister there giving, as examples of relics that would not vest in the Crown, cave paintings, rock carvings and carved trees *in situ.* The purchasers say that this is significant for consideration of the word "abandoned" in each of s 33D(1) of the *1967 Act* and s 83(1)(b) of the later *National Parks and Wildlife Act*; and that "abandoned" in the legislation is "evidently intended to be capable of application to an Aboriginal object regardless of whether it has the character of a chattel or of land or human remains". The purchasers argue, for example, that a cutting tool made

from part of the land might be abandoned and might become a deposit in land; similarly, it is noted that in *Country Energy v Williams; Williams v Director-General of National Parks and Wildlife* (2005) 63 NSWLR 699; [2005] NSWCA 318 (*Country Energy v Williams*), Basten JA suggested (at [56]) that a fireplace might fall within the definition of "Aboriginal object".

320 Section 2A(1) of the *National Parks and Wildlife Act* sets out the objects of the Act as including:

> […]
>
> (b) the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to:
>
> (i) places, objects and features of significance to Aboriginal people, and
>
> (ii) places of social value to the people of New South Wales, and
>
> (iii) places of historic, architectural or scientific significance, […]

321 As I have just adverted to, s 83 of the *National Parks and Wildlife Act* vests title to certain Aboriginal objects in the Crown. Section 83 provides as follows:

> **83 Certain Aboriginal objects to be Crown property**
>
> (1) Subject to this section:
>
> (a) an Aboriginal object that was, immediately before the commencement day, deemed to be the property of the Crown by virtue of section 33D of the Act of 1967, and
>
> (b) an Aboriginal object that is abandoned on or after that day by a person other than the Crown,
>
> shall be, and shall be deemed always to have been, the property of the Crown.
>
> (2) Nothing in this section shall be construed as restricting the lawful use of land or as authorising the disturbance or excavation of any land.
>
> (3) No compensation is payable in respect of the vesting of an Aboriginal object by this section or section 33D of the Act of 1967.

322 Section 5(1) of the *National Parks and Wildlife Act* includes the following definitions:

> ***Aboriginal object*** means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.
>
> […]

> ***Aboriginal remains*** means the body or the remains of the body of a deceased Aboriginal person, but does not include:
>
> (a) a body or the remains of a body buried in a cemetery in which non-Aboriginal persons are also buried, or
>
> (b) a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination, for forensic or other purposes, of the bodies of deceased persons.
>
> ***Act of 1967*** means the *National Parks and Wildlife Act 1967*.
>
> […]

323 The purchasers argue that the language of both the *1967 Act* and the *National Parks and Wildlife Act,* confirmed by the disclosed statutory purposes, indicates that the "abandonment" to which reference is made in those statutes is a reference to the object itself (rather than the land in which it is deposited) and that that consequence is not avoided by deposit in land which is privately possessed. It is said that although the *National Parks and Wildlife Act* does not make express provision in the same terms as s 33D(2) of the *1967 Act*, it is evident, both from the definition of "Aboriginal object" in s 5(1), as well as from the equal application of sub-ss 83(2) and (3) to both limbs of sub-s 83(1), that the abandonment concept does apply to objects abandoned on or in land after the commencement of the Act, just as much as it does to chattels. In this regard, reference is made to *Stockland v Carriage* at [52]-[53]. The purchasers argue that it is evidently expected that such objects would normally be found on or in land; such that, when the possessor of the object abandons it by affixing it to land or leaving it in land without the intention to retain ownership, it is abandoned within the meaning of s 83(1)(b) or s 33D(1)(b). Thus it is said that these provisions effect an alteration to the title to such objects.

324 As is evident from the preceding, under Pt 6 of the *National Parks and Wildlife Act* there is close regulation and control over such objects. The following sections are also relevant to the instant proceeding.

325 Section 85 imposes on the Chief Executive responsibilities for the proper care, preservation and protection of Aboriginal objects, and for the restoration of land that has been disturbed or excavated under an AHIP.

326 Section 85A provides a limited facility for disposing of Aboriginal objects to Aboriginal owners (a term defined in s 5(1) to have the same meaning as it has

in the *Aboriginal Land Rights Act*) and in certain cases to other persons. The purchasers have noted in this regard that the *Aboriginal Land Rights Act* was described by Handley JA in *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300 (at 310) as establishing a system involving a measure of local self-determination and self-government for Aboriginal people; and that s 4(1) of the *Aboriginal Land Rights Act* provides that "Aboriginal owners of land means the Aboriginal persons whose names are entered on the Register of Aboriginal Owners because of the persons' cultural association with particular land".

327 Section 86 provides several offences for the harming or desecrating of Aboriginal objects and Aboriginal places, including two offences of strict liability. "Harm" is defined to include moving an object from the land on which it had been situated (s 5(1)(b)). It is a circumstance of aggravation that the offence was committed in the course of carrying out a commercial activity.

328 Section 89A imposes a mandatory reporting obligation on persons who are aware of the location of an Aboriginal object, except where the person believes on reasonable grounds that the Chief Executive is already aware of its location.

329 Part 6 Div 2 makes provision for the issue of AHIPs. Section 87 makes it a defence to a prosecution under s 86 that the harm or desecration concerned was authorised by an AHIP. Section 90K(1)(b) permits the Chief Executive to consider the "actual or likely harm to the Aboriginal objects … that are the subject of the permit" as a factor in making a decision in relation to an AHIP.

330 Section 90Q requires that the Chief Executive establish the AHIMS, the purposes of which are prescribed by s 90Q(3) and one of which is "to allow access to the AHIMS … by or on behalf of persons exercising due diligence to determine whether an act or omission would harm an Aboriginal object for the purposes of section 87(2)". Section 90Q(3), as already noted, provides that the register is not conclusive "about whether any information or records contained within it is up-to-date, comprehensive or otherwise accurate".

The cases for the plaintiffs and for the vendors

331 I turn now to consider the various alternative cases for the plaintiffs and the vendors. It is convenient to proceed through each alternative case in turn.

Purchasers' principal repudiation case

332 As adverted to in the introduction to these reasons, the primary way that the purchasers put their case as to repudiation by the vendors does not turn on whether it is established (whoever bears the relevant onus) that there are Aboriginal objects in or on the land. Nor is the purchasers' principal contention dependent on any finding that the vendors failed to discharge an onus to show that the Aboriginal objects were not present in or on the land. Rather, the purchasers' principal contention is that the position taken by the vendors, insofar as they refused to attempt (or were unable) to show or prove a title free of Aboriginal objects, meant that they were not ready and willing to perform the contract at the time (being in August and September 2015) of the respective notices to complete and at the time (being 25 September 2015) of the purchasers' termination of the contract.

333 Presumably, that was the basis for the decision of the parties to seek separate determination of the question as to whether the existence of Aboriginal objects on the land was capable of constituting a defect in title (since that issue forms the basis for the argument as to repudiation constituted by the refusal by the vendors to meet that concern); and hence this issue is identified by the vendors as the primary issue for determination in the present proceeding. I say this without any intention to cavil with the conclusion reached by the Court of Appeal that the question should not have been heard separately for, amongst other reasons, it was vague and hypothetical; rather, I mention this simply to indicate what I consider to be the explanation for the course that was adopted at the time.

Vendors' obligation to prove and provide good title

334 Before dealing with the vexed (and at this stage admittedly hypothetical) question as to whether the presence of Aboriginal objects in or on the land was capable of being a defect in title (I say "vexed" because this has already been considered twice – once in the Separate Question Decision; and once, albeit obiter, in the Appeal Decision), it is convenient first to consider the content of a vendor's obligation to prove and provide a good title and, for that matter, what constitutes a defect in title.

Purchasers' submissions

335 The purchasers point to the obligation at law of a vendor of land to provide a "good safe holding and marketable title" (citing ICF Spry, *Equitable Remedies* (8th ed, 2009, Sweet & Maxwell) at 289 (*Spry*); *Bell v Scott* (1922) 30 CLR 387 at 394; [1922] HCA 13 per Isaacs J (*Bell v Scott*)); namely. a title which will enable the purchaser to sell the property "without the necessity of making special conditions of sale restrictive of the purchaser's rights" (using the terminology of Luxmore J (as his Lord Justice then was) in *Re Spollon and Long's Contract* [1936] Ch 713 at 718 per); citing by way of example the restrictive building covenant considered by Sugarman J in *Hamilton v Munro* (1951) 51 SR (NSW) 250).

336 In respect of land under the *Real Property Act 1900* (NSW) (*Real Property Act*), it is noted that s 57 of the *Conveyancing Act* lays down certain minimum obligations of the vendor under a contract for sale of such land (noting that s 57 requires an abstract of any instrument forming part of the vendor's title in respect of which a caveat has been lodged). Reference is also made to cl 4.2 of the printed standard form contract in this respect.

337 The purchasers contend that the common law obligations to show and prove title have not been displaced entirely by the provisions of the *Real Property Act*; rather, that the Torrens legislation facilitates and renders easier that proof of title which would otherwise be required. It is noted that the *Real Property Act* is entitled "[a]n Act to consolidate the Acts relating to the declaration of titles to land and the facilitation of its transfer" and that in *Fink v Robertson* (1907) 4 CLR 864 at 891; [1907] HCA 7 it was said by Higgins J that "[t]he Act was not intended to be a complete self-sufficing code of law for land under its operation. The old law as to land and as to contracts was to remain except in so far as inconsistent with [the] Act". Reference is also made to *Lewis v Keene* (1936) 36 SR (NSW) 493 at 500 and to various texts on conveyancing law in this regard.

338 In particular, reference is made to FE Moss, *Sale of Land in New South Wales* (5th ed, 1973, Butterworths) where reference is made (at 264) to the duty of a vendor of land under the *Real Property Act* "to show a good title and, if it is

defective, to remedy it at the earliest possible moment …". Reference is also made to several other texts.

339 It is noted that there are many statutory exceptions to the conclusiveness of the Register and that ultimately the obligation to proffer a good title remains with the vendor.

340 Thus, the purchasers maintain that, once there was a plausible contention raised as to the existence of a defect in title, it was for the vendors to exclude the possibility of, or otherwise rectify, that defect.

341 The purchasers say that Mr Carter's evidence, both written and oral, demonstrated a substantial acquaintance, on his part, with the Aboriginal cultural heritage of the site; and that he made important admissions in communications between the parties in the period from 13 to 16 July 2015. In that context, it is submitted that Mr Carter's attempt, in subsequent correspondence between the solicitors, to "walk away" from those admissions was not the conduct of a vendor ready and willing to perform the contract. It is submitted that the purchasers (confronted with the Parker Report, its reference to information received from Mr Carter, and the admissions made by Mr Carter himself in the period from 13 to 16 July 2015) were entitled to expect that the questions raised as to title (and to the vendors' ability to transfer and convey title) ought to have been answered in a substantial way (citing *Want v Stallibrass*).

342 In this regard, the purchasers say that, implicit in the obligation of the purchaser to prepare funds for payment at completion of a conveyancing transaction being dependent on the vendor's readiness and willingness to give title (citing *Foran v Wight* (1989) 168 CLR 385; [1989] HCA 51) is "the ascertainment of facts to a reasonable state of satisfaction". It is submitted that the degree of proof is one that turns on the nature of the exercise, its legal incidents and established practice; and that in a conveyancing transaction there is no reason why the availability of evidence to prove (or disprove) a good title would be confined to evidence admissible in a court.

343 It is thus submitted that it was open to the purchasers to rely on Mr Carter's "admissions" as to the existence of Aboriginal objects in objecting to the

vendors' ability to give title; and that they were entitled to insist that the vendors negative those facts (or avoid them by lawful removal) without being guilty of repudiation for refusing to complete in the face of vendors "who simply refused to address legitimate concerns as to a doubtful title". The purchasers say that:

> There is something wrong about a man admitting *inter partes* that there are objects present (which the opposite party complains would constitute defects in title) being then able to insist on performance by the innocent party on the ground that the admissions were based on hearsay and therefore cannot be relied on unless independently proved by the innocent party at considerable expense and inconvenience.

344 It is further submitted that, on ordinary principles of contract law, a party who admits that he cannot perform (or admits facts which in law have the consequence that he cannot perform) is guilty of repudiation and the opposite party is entitled to act on that repudiation and terminate the contract.

345 The purchasers maintain that the vendors' conduct (in effect requiring the purchasers to prove that they did not have clear title) amounted at law to a want of readiness and willingness to perform because of the normal obligation of vendors to answer requisitions going to the promised title, to disclose latent defects and to show and prove a good title (especially where there was an express promise in cl 16.3 to provide at completion a title free of interest in any other person). As to what constitutes a defect in title, the purchasers rely upon the common law rule that any difference, however trivial, between the subject matter described in the contract and the property which is available to be transferred or conveyed by the vendor at completion will constitute a defect in title justifying termination at law. In this regard, reference is made to *Dainford Ltd v Lam* (1985) 3 NSWLR 255 (*Dainford v Lam*) (at 265D), where Powell J said (at 265D) that:

> At common law, a deficiency error in the smallest portion or interest in the subject-matter of the sale either as to quantity or otherwise was equivalent to a total want of title; and the purchaser was entitled, at Common Law, to annul the sale, and, on so doing, to the return of all moneys paid, plus costs of investigation of title. […]

Reference is also made in this context to *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 (*Travinto Nominees*) at 27 per Menzies J and *Spry* at 289-290.

346 It is said that s 13 of the *Conveyancing Act* does not abrogate this common law rule, except where there is a suit for specific performance (reference being made to the observations of Beazley P, as Her Excellency then was, in the Appeal Decision at [89] in this regard).

347 Reliance is placed by the purchasers on the Parker Report, the AHIMS search result and the communications by Mr Carter up to 16 July 2015 as giving rise to the plausible suggestion that there were Aboriginal objects on the land (and that the vendors were not able to show a good title).

348 The purchasers contend that the presence of Aboriginal objects in or on the land was capable of being a defect in title because the promised title was an estate in fee simple in the land defined in the certificate of title as free of any interest in any third party and, under the *National Parks and Wildlife Act,* relevant Aboriginal objects vest in the Crown in accordance with the provisions of the Act to which I have previously referred. Thus it is said that the affectation of land by an Aboriginal object would be a defect in title because it would vest in the Crown part of the subject matter which the vendor has contracted to sell (referring to s 83 of the *National Parks and Wildlife Act* and s 33D of the *1967 Act*; and also to *Stockland v Carriage* at [54]).

349 This submission proceeds, first, on the footing that, to the extent that the Aboriginal objects are deposits in the land they are part of the land (the purchasers citing *Elwes v Briggs Gas Company* (1886) 33 Ch D 562; *North Shore Gas Company Ltd v Commissioner of Stamp Duties (NSW)* (1940) 63 CLR 52; [1940] HCA 7; *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534; *Stockland v Carriage*) but that the effect of the *National Parks and Wildlife* legislation is to vest those Aboriginal objects in the Crown (those provisions being an instance of a statutory exception to the indefeasibility of title under the Torrens system, citing *South Eastern Drainage Board (South Australia) v Savings Bank of South Australia* (1939) 62 CLR 603 in this regard).

350 Second, the purchasers argue that the nature of the *National Parks and Wildlife* legislation is so significant as to bring an Aboriginal object within the concept of a defect described in *Flight v Booth* (i.e., a defect that would prevent a vendor from succeeding in a suit for specific performance notwithstanding a

non-annulment clause) pointing to the observations of Beazley P at [100] in the Appeal Decision (to which see below).

351 It is submitted that the observations of her Honour (at [89]-[90]) in the Appeal Decision readily demonstrate why Aboriginal objects may have the effect of constituting a defect in title and it is submitted that it was the vendors' obligation to negative plausible concerns that such objects might be present and that, thereby, the *Flight* v *Booth* test was satisfied. It is noted that the *Flight* v *Booth* test (quoting *Hamilton v Munro* (1951) 51 SR (NSW) 250 at 253-254 per Sugarman J):

> … is not subjective, in the sense that it merely involves an inquiry into the mind of the purchaser as to the immediate use of the property, but objective, that is whether, considering the whole effect of those restrictions on use, a possibility that the purchaser might not have purchased is a reasonable supposition from the nature and extent of the difference between what was contracted to be sold and what can be conveyed.

352 The purchasers say that it is obvious that the potential Aboriginal objects on the land carried substantial potential for affectation of the use and development of the land, including by delaying and complicating development. In particular, it is said that the joint expert report establishes that the Aboriginal cultural heritage issues were a potentially significant issue even for what was postulated as the first stage of the proposed development there considered (insofar as the experts said that, although that stage of the development would probably have succeeded, its success was not assured and it could well have been significantly delayed). The purchasers say that there was no challenge to their evidence that they desired to establish the first stage of the proposed development quickly so as to take advantage of seasonal business.

353 As to the suggestion, in cross-examination of the purchasers, that the burial site was confined to a very small portion of the land (with only the need to fence about two square metres), the purchasers say that: suggestions from the owners in the Norman Application can by no means be assumed to represent the outcome of a prospective development application or the attitude of the local council, or if an AHIP were required, that of the Chief Executive; the vendors themselves sought to cast doubt on the exact location of the burial site; other potential objects were disclosed; and the vendors themselves point

to various other restrictions on use and development of the land such that additional restrictions or risks due to cultural heritage constraints were matters that purchasers might reasonably regard as substantial considerations in a decision whether to purchase the property, particularly given that it was marketed as a development site.

354 The purchasers also point to cl 47 in the contract for the re-sale of the property (extracted earlier), which they argue illustrates that these affectations are of a kind which would prevent the vendor from giving a good marketable title (and thus constitute a defect in title).

355 The purchasers therefore say that their termination of the contract (on 25 September 2015) was valid because the vendors were not ready and willing to show and prove a title free of Aboriginal objects whilst also insisting on the notice to complete and/or refusing to comply with the notice to perform.

Vendors' submissions

356 The vendors do not appear to cavil with the proposition that they had an obligation to show good title to the land free of any interest of a third party therein. However, the vendors maintain that the purchasers' argument (that if there is some form of Aboriginal object on the land then it is vested in the Crown and is the "property" of the Crown) conflates "property" rights in Aboriginal objects under s 83(1) of the *National Parks and Wildlife Act* with legal title to the subject property, being an estate in fee simple. It is submitted that the property rights to, or in, the relevant property are different.

357 Reference is made in this context to *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53 (*Yanner v Eaton*), where Gleeson CJ, Gaudron, Kirby and Hayne JJ (at [30]) explained (with reference to s 7(1) of the *Fauna Conservation Act* 1974 (Qld)) why "property" conferred on the Crown is not accurately described as "full beneficial, or absolute, ownership". It is said that the statutory vesting of "property" in the Crown was there seen to be nothing more than, in the words of Gleeson CJ, Gaudron, Kirby and Hayne JJ (at [28]), "'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource'" and hence that the "property" which that Act and its predecessors

vested in the Crown was no more than the aggregate of the various rights of control that the legislation created.

358 The vendors argue that any "property" of the Crown in, say, the memorial stone and plaque was not a defect in title to the subject land; and that the aggregation of rights of the Crown over the stone and the plaque under the *National Parks and Wildlife Act* do not affect the legal estate of the land upon which the stone resides. It is submitted that the vendors could therefore pass the legal title to the property to the purchasers, free of any mortgage or other interest, because the Crown had no relevant legal interest (being an estate in fee simple) in the land.

359 As to the concept of defects in title, the vendors point to the statement (at 15,193) by Young J, as his Honour then was, in *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189 (*Eighth v Merity*), that:

> A very fine, but real, distinction exists between defects in title which entitle a person to rescind and defects in quality which do not. What is a defect in title is difficult to define, but usually encompasses the situation where the vendor is unable to convey the full estate which it promised to convey to the purchaser. A defect in quality merely means that the purchaser obtains the appropriate title to the land but that there are some facts relating to the quality of the property sold which affects its value. …

360 The vendors note that town planning defects have been held to be defects in quality (citing *Carpenter v McGrath* (1996) 40 NSWLR 39) and make reference to *Borda v Burgess* [2003] NSWSC 1171 (*Borda* v *Burgess*) where a mining lease was found to be only a defect in quality. The vendors argue that, in the same way, any "property" of the Crown in, say, the memorial stone and plaque ought be characterised in the same way (namely that those rights did not prevent the vendors from conveying the full estate in the land).

361 The vendors further maintain that, on its proper construction, the property the subject of the contract for sale of land did not include any Aboriginal objects in, or on, the land that were not owned by the vendors. The vendors seem to follow and rely upon Darke J's reasoning in the Separate Question Decision in this regard and argue that the Court of Appeal did not hold otherwise (rather, that the Court of Appeal concluded that whether or not objects on or within

property are the subject of sale does not determine whether there is a defect in title).

362 Insofar as the purchasers rely on the common law rule as supporting a right to terminate, the vendors rely on the provisions of the contract (and particularly cl 6.1), including special conditions 3, 4, 5 and 6 (which I have set out earlier) which they say, on their proper construction, prevent the purchasers *inter alia* from rescinding or terminating the contract where any defect was substantial or serious enough to attract the rule in *Flight v Booth*.

363 As to the principle in *Flight v Booth*, the vendors say that if there are any Aboriginal objects on the land, they are insubstantial or immaterial on, or to, the use of the land; and that this is the effect of the joint expert report which assumed a "burial site" on the subject land. The vendors place emphasis on s 83(2) of the *National Parks and Wildlife Act*, specifically the provision that "[n]othing in this section shall be construed as restricting the lawful use of land or as authorising the disturbance or excavation of any land".

364 The vendors say that, to qualify as a defect in title, the "defect" must be a "substantial latent defect", referring to *Micos v Diamond* [1970] 3 NSWR 407; (1970) SR (NSW) 392 (*Micos v Diamond*) where there was found to be a defect in title by reason of the statutory powers of the Water Board that could be exercised in respect of the land (and comparing this to the powers contained in s 59A of the *Local Government Act* 1993 (NSW) and s 51 of the *Electricity Supply Act* 1995 (NSW), which expressly have effect despite s 42 of the *Real Property Act*). In contrast, it is said that Pt 6 of the *National Parks and Wildlife Act* does not override indefeasible title. It is also noted that in the Appeal Decision, Beazley P (at [101]) considered the case on the appeal to be "only 'analogous'" to *Micos v Diamond*., and did not determine that Pt 6 was capable of constituting a defect in title "in the full sense" assuming there were Aboriginal objects on the land.

365 In aid of these submissions, the vendors note that the stone and plaque are located between the swimming pool fence and Cabin 6 in the garden adjacent to a footpath. It is said that, assuming the two square metre fence around the memorial recommended in the Parker Report, this represented only 0.0091%

of Lot 1 with an area of about seven acres (2.185ha) (noting that the whole of the subject land was, of course, 30 acres) and that the items are also located on the part of Lot 1 where development in the zone is prohibited. In this regard, it is said that this is the effect of the joint expert report, which assumed a "burial site" on the subject land.

366 Therefore, it is submitted that if, say, the stone and the plaque amount to a defect, the defect is one of quality. It is noted that a vendor has no obligation at general law to disclose defects in quality or improvements, whether latent or patent.

367 Moreover, the vendors say that if the memorial stone and plaque was a defect in title, it was patent; and they note that a vendor need not disclose to the purchaser patent defects in title. It is noted that a patent defect in title is one that is discoverable by the exercise of reasonable care when inspecting the property and that, where the purchaser knew of an irremovable defect in title at the time of entry into contract, there can be no implication that the subject of the sale was the unencumbered fee simple (and the purchaser is bound to take the title subject to that defect). Reference is made to *Lahoud v Lahoud (No 2)* [2005] NSWSC 1019, where Palmer J said (at [11]) that:

> It is well established that in a simple or "open" contract for the sale of land which does not state expressly the nature of the interest to be sold the law implies a term that the sale is of the fee simple free of encumbrances; the implication can, however, be rebutted by proof that the purchaser knew of a particular encumbrance prior to entry into the contract.

368 The vendors say that the existence of the memorial stone and plaque was clearly discoverable by the exercise of reasonable care. In this regard, the vendors refer to: the photograph (with Mrs Dulcie Nicholls, referred to as Aunt Dulcie) the caption on which indicates that it was taken on 21 November 2014 (Ex 5); the photograph taken on 9 February 2016 (Ex 3); the other photographs in Ex 2 and Ex 3; Mr Carter's affidavit evidence (at [6]-[9]) (said not to have been seriously challenged in cross examination); Ms Gotterson's affidavit evidence of walking right past the memorial stone and plaque with Mr Cheers and Mr Paul Harris on 18 June 2015 and then with Mr Cheers and Mr Adam Mehmet on 2 July 2015 (in particular, her evidence that "I observed that they walked along the footpath beside the plaque on a number of occasions") while

also noting that the proposition of a “jungle” was not put to Ms Gotterson in cross examination; and the content of the Nature Notes on the website, which it is said formed part of the sale of the business and which clearly disclosed the memorial plaque.

369 As to the bunya pine tree that is 30 metres tall, the vendors note that, not only was this a tree that was clearly discoverable by the exercise of reasonable care, it was actually admired by Mr Cheers during his inspection of the property (referring to T 88.15).

370 If, however, the memorial stone and the plaque are held to be a latent defect in title, then the vendors contend that the question arising is whether the purchasers were entitled to rescind irrespective of the magnitude of the defect or because the defect falls within the principle in *Flight v Booth*.

371 As to the common law rule that a purchaser is entitled to rescind for a defect in title however trivial, the vendors rely on the compensation clause (cl 6) and other special conditions.

372 It is noted that in the Appeal Decision, Bathurst CJ (at [6]) observed that, while cl 6 did not expressly state that no error or misdescription (whether as to property, title or otherwise) could “annul the sale” (as did the clause in *Batey v Gifford* (1997) 42 NSWLR 710), it was arguable that cl 6 had the same effect. The vendors also refer to special condition 11 which provides that, notwithstanding cll 6 and 7, the parties expressly agree that any claim for compensation by the purchaser shall be deemed to be a requisition for the purpose of cl 8 entitling the vendor to rescind the contract. It is submitted that this shows a plain intention to limit the purchasers’ contractual rights to a claim for compensation for an error or misdescription (whether substantial or not) and that this entitled the vendor to rescind as if the claim for compensation was a requisition. The vendors also rely on the special conditions referred to above. The vendors say that in *Dainford v Lam* the relevant error did not exist at the time of contract so the compensation clause could not there be engaged.

373 As to the principle in *Flight v Booth*, the vendors note that the test is, objectively, whether a reasonable person in the position of the purchaser would have taken the view that she or he was not getting substantially the property for

which he or she had contracted to obtain. It is submitted that the existence of the memorial stone and plaque (assuming those to be Aboriginal objects) needs to be seen in the context of the serious planning constraints that already applied to the 30 acres of land being purchased. It is submitted that the zoning constraints themselves (even aside from ecology, bush fire and traffic constraints) prohibited development in the area of the memorial stone and plaque. It is further submitted that the existence on the land of the memorial stone and plaque made no material difference and that, again, this is the effect of the joint expert report (which assumed a "burial site" on the subject land).

374 The vendors further say that the oral evidence of Mr Cheers (at T 132.15 to T 135.40) and Mr Ian Mehmet (from T 200.1) is instructive when evaluating the question whether a reasonable person in the position of the purchasers would consider that he or she was getting, or not getting, that for which he or she had bargained.

Purchasers' response

375 As to the submission that *Yanner* v *Eaton* supports a different view of "property", the purchasers emphasise that *Yanner v Eaton* was not concerned with fixed property, whether chattels or land, but with native wildlife; and that it turned on the terms of the particular statute. In their reply submissions, the purchasers reiterated the submissions put before Darke J on this issue.

376 Of particular relevance, the purchasers say that the passages in *Yanner v Eaton* (at 365-367) are "somewhat general and conceptual"; and that the plurality (at [22]-[31]) considered the terms and effect of the particular statute in question in that case as to what was the nature of the 'property' created by that statute and its operation and effect In this regard, it is said that the *Yanner v Eaton* turned on the terms of the particular statute as establishing a form of public regulation of public property, rather than rights that were comparable to the traditional understanding of private property; and that each statute must be construed according to its own terms and purpose.

377 The purchasers submitted to Darke J that the acceptance in *Yanner v Eaton* that "property" is a description of a legal relationship with a thing is, as was said in that case, the starting point for investigating the content of that legal

relationship; what rights the statute confers under the name “property” but that the acceptance that it means *something* definite (the content of which is to be collected from the particular statute) is significant where the objects consist of fixtures or deposits. It is further submitted that if a third party is given any rights in such a fixture or deposit, and if they are of a proprietary nature, then it must follow that that is property in land and that it is not necessary for the purchasers to show that it is an estate in fee simple, or some other form of ownership resembling one or other of the various kinds of property recognised under the common law.

378 The purchasers also repeated the submissions made before Darke J that, in the present case, the traditional elements of property are strongly present. They submit that the provisions of the *National Parks and Wildlife Act* (including s 85, s 85A, s 87, s 90 to which I have previously referred and, as relevant, excerpted or summarised) indicate that the property that is vested by s 83(1) is conformable with the ordinary concepts of property and does not comprise “merely some abstract notion of public ownership leaving otherwise undiminished the otherwise proprietary rights of otherwise owners”.

379 The purchasers maintain that the conclusion that s 83 affects property in land is supported by *Stockland v Carriage* (see at [63]; namely that property in the relics vested in the Crown before the commencement of the *Racial Discrimination Act 1975* (Cth), so that even if the defendant in that case had been an “Aboriginal owner” of the land, the vesting of the relics without compensation to him could not have been a contravention of that Act).

380 As to the vendors’ submission concerning the two contractual provisions extracted in *Borda* v *Burgess*, the purchasers argue that *Borda v Burgess* was decided on narrow grounds and does not support any general proposition that no contract for sale of land ever promises a title free of an interest of the Crown in the subject land nor any general proposition that statutorily vested or reserved Crown interests in land do not have the character of land. In this regard, it is noted that at [11] of *Borda v Burgess*, Young CJ in Eq was recording a submission, not making a finding. The purchasers say that there is nothing in the reasons to indicate that the contrary submission was argued

before his Honour and maintain that the case was determined on a narrower basis.

381 The purchasers note that the only provision that was dealt with (at [5]-[33] of *Borda v Burgess*) was s 164 of the then *Mining Act 1992* (NSW); his Honour there considering whether the mining lease was an interest of land and whether there was a statutory right of way constituting an interest in land. The purchasers say that s 5 of the *Mining Act* was not relevant to that question (and note that it was not referred to at all in that part of the reasons). The purchasers thus say that his Honour did not express any view about the operation or effect of s 5, except in the earlier part of the reasons (at [12]) concerning an earlier part of the argument in that case where his Honour simply observed that s 5 vested all coal in the Crown.

382 Similarly, the purchasers say that nothing in *Borda v Burgess* expresses any general proposition about the construction of the terms of the particular contract identifying the subject matter (noting that the parcels, reservations in the grant and form of title under which the land was held were not referred to in the reasons of Young CJ in Eq); rather, the case was about the nature, effect and consequences of the mining lease in question. Further, it is said that the vendors have not confronted, or perhaps overcome, the difficulty identified by Bathurst CJ at [11] (McColl JA agreeing at [107]).

383 The purchasers further argue that alienation is not use and sale is not permitted (because title is vested in the Crown and this is inconsistent with the right of any other person to dispose of the object).

384 As to the application of the common law rule (and the reference by the vendors in their opening submissions to the observations made in Christopher Rossiter, *Principles of Land Contracts and Options in Australia* (2003, LexisNexis Butterworths) at [8.78]ff as to the omission of a "non-annulment" clause from the standard form contract for sale), the purchasers note that (notwithstanding Professor Butt's comments at [6.2] of the 1998 edition of his text, *The Standard Contract for Sale of Land in New South Wales* (2nd ed, 1998, Law Book Co) that whether, given the omission of non-annulment clauses in the editions of the standard form since 1992, the purchaser's common law right to terminate

for any difference between the land described in the contract and the land actually available for transfer is thus preserved and the absence of any authority casting doubt on *Dainford v Lam*) the omission of a non-annulment clause from successive editions of the standard contract has continued. They further note that in *Dainford v Lam* there was a non-annulment clause but the defect fell outside its terms and the matter was governed by the common law.

385 The purchasers maintain that (contrary to the suggestion by Rossiter at [8.78] that the compensation clause is superfluous - to which I have previously referred when outlining the vendors' submissions), the ordinary rules of construction would require the Court to strive to give the compensation clause some meaning and effect (and note, in any event, that there is a difference between the compensation clause in the subject contract and the clause recited in Rossiter's text). It is noted that cl 6.3 of the parties' contract expressly states that cl 6 "does not apply to the extent the purchaser knows the true position". The purchasers submit that if the clause amounts to a non-annulment clause this would have the perverse consequence that the purchasers would not be prevented from terminating if they knew the true position, whereas they would be barred from annulment and limited to compensation if they did not know it at the time of contracting; and that this cannot be a reasonable construction of the clause.

386 The purchasers say that the persistence of the common law rules was the very platform for the equitable principles established in *Halsey v Grant* (1806) 13 Ves 73 (*Halsey v Grant*) and *Flight v Booth* (referring to the implicit recognition of this by D Skapinker and P Lane in *Sale of Land: Commentary and Cases* (4th ed, 2009, LawBook Co) at 336-337). The purchasers point to the practice of introducing into contracts a provision that a difference from the contract description of the subject matter would not annul the sale (often, but not always, coupled with a contractual right to compensation in such a case) and to the development of the further principle that equity would not permit the vendor to hold the purchaser to the contract if the defect were "a substantial defect in title such that it may reasonably be supposed that but for the misdescription of the subject matter of the sale, the purchaser might never have entered into the contract" (citing *Pamamull v Albrizzi (Sales) Pty Ltd (No 2)* [2011] VSCA 260 at

[123]). They also note that the principle is not limited to defects in title but may also apply to defects in quality (see *Frankel v Paterson* [2015] NSWSC 1307 at [54], [113] per Young AJA).

387 The purchasers argue that resort is not needed to the *Flight v Booth* principle where the purchaser is entitled to terminate in any event; and that, where the principle does apply, the purchaser has, in effect, an election between termination and claiming compensation under the contract.

388 As I have already adverted to, the purchasers argue that in *Dainford v Lam*, Powell J was concerned with precisely the above situation (an action at law for damages for repudiation), where his Honour held that the purchasers were entitled to terminate, without making any finding that the difference was substantial or material. They point out that his Honour there noted that the vendor might well have succeeded in an action for specific performance, albeit with compensation to the purchaser for the deficiency (see *Halsey v Grant*) (arguing that this indicates that his Honour regarded the deficiency there as probably not substantial without finally deciding that question and noting that his Honour observed at 267B that the vendor "may well have" succeeded in establishing that the difference was not substantial, so as to come within the rule of *Halsey v Grant*). The purchasers argue that Powell J disposed of the matter instead on the basis that the equitable rule of *Halsey v Grant* did not apply at all to the action which was before his Honour and held that the old common law rule continued to apply in all its strictness to such an action (and that his Honour considered that, by reason of the difference between the contract description of the land and the land available for transfer to the purchaser, the purchaser's termination was not available to the vendor as an act of repudiation). It is noted that, although the contract in that case contained a non-annulment clause (cl 5 before its revision in later editions of the standard contract for sale of land) and that his Honour held (at 265A-B) that it was not applicable to the circumstances which arose in that particular case, the general law applied (see at 265D).

389 Therefore, the purchasers argue that *Dainford v Lam* remains authority for the proposition that the common law rule will apply to actions at law, in the

absence of an applicable non-annulment clause. It is said that cl 6 in the present contract is not a non-annulment clause and, in the absence of any such provision elsewhere in the contract, it follows that the common law rule will apply in the present case to both the purchasers' action and the vendors' cross claim.

390 The purchasers point out that the statement (contained in the head note in the report of *Dainford v Lam* at item (4)) that "[w]here there is a deficiency in title and the vendor had put it out of his way to seek specific performance the purchaser may pursue his common law rights to rescind and recover his deposit provided the deficiency is not insubstantial and immaterial*"* does not appear as such in the reasons at 268D; rather, the statement appears in a different context at 268C (dealing with examples of cases where, on an application for specific performance, equity would be prepared to treat a breach of contract as the breach of an inessential term notwithstanding that at law it would have been considered essential). It is said that his Honour was there refuting a submission that s 13 of the *Conveyancing Act* and s 5 of the *Law Reform (Law and Equity) Act 1972* (NSW) abolished the common law rule and assimilated the position for all purposes to the rule in equity (a so-called "fusion fallacy"); and that his Honour concluded, at 268C, that s 13 of the *Conveyancing Act* did not apply because the vendor was no longer seeking specific performance.

391 The purchasers also note that, in dealing (at 268E to 269B) with an alternative ground for rescission relied on by the purchaser, Powell J proceeded on the basis that to establish that ground the purchaser would need to establish that the effect of certain road widening proposals on the relevant land was "both substantial and adverse". The alternative ground there relied upon by the purchaser was that cl 17 of the contract (see 258F-G) conferred an express right of rescission in the event of substantial and adverse affectation of the property by, relevantly, any road widening proposal by any competent authority. The purchasers maintain that this part of the decision turned on the particular terms of that clause, whereas the earlier ground (on which the purchaser's defence succeeded) turned on the right to terminate at common law. It is noted that in *Byers v Dorotea* (1986) 69 ALR 715, Pincus J (at 727)

took the same approach (namely, that the common law rule prevails unless there is an available claim for specific performance of the contract).

392 The purchasers say that this conclusion is sufficient to dispose of the issue in the present case, as the vendors have themselves put it out of their power to seek specific performance of the contract by purporting to terminate it and by reselling the property. It is said that, assuming that there is a defect in title, the vendors could not in any event seek specific performance in circumstances where they issued notices to complete demanding payment of the purchase price in full (i.e., without any abatement for the defects), and expressly refused the purchasers' invitation to submit the matter to the court for decision on the issue of the deficiency. The purchasers also here invoke the maxim that "[h]e who seeks equity must do equity".

393 As to the vendors' submission based on the reasoning in the Separate Question Decision (to the effect that the promised title did not include Aboriginal objects not owned by the vendors), the purchasers do not cavil with the authorities cited by Darke J as calling for an approach based on the "reasonable bystander" and "commercial sense" canons of construction. However, they say that his Honour departed from those orthodox principles of construction and instead (impermissibly) approached the matter in fact as a process of implication. The purchasers refer to *Abraham v Mallon* (1975) 1 BPR 9157, and also *Redapple and Howgate v Hely* (1931) 45 CLR 452, and submit that "common sense construction is not a licence for departing from the express meaning of words and the settled construction attributed by previous authority to particular types of expression".

394 In this regard, the purchasers note that his Honour (at [87]) expressly recognised that the language of the contract was capable of referring to everything in or on the land within the boundaries indicated in the title but (at [88]) reasoned by reference to the "commercially unexpected and inconvenient results" that his Honour considered would flow in order to come to a view that, notwithstanding the words of the contract, the parties should not be taken to have meant what they said. In response to this, the purchasers submit as follows:

> Why these "unexpected and inconvenient results" should point in a direction thus favourable to the vendors, who might be expected to be better placed to know what they had, rather than to confirming the ordinary position that purchasers are entitled to insist on a clear title was not explained by his Honour.
>
> It would be surprising and most disappointing for purchasers of a development site who thought they were purchasing the land in a certificate of title free of interest in any other person to find themselves purchasing, despite the express words of the contract, only so much of the land in the certificate as was not vested in any other person so far as Aboriginal objects were concerned. These results, are at least equally, if not more, inconvenient and unexpected for a purchaser (given the advantages of incumbency that a vendor enjoys). The view his Honour took was wrong.

395 In any event, the purchasers argue that the Court of Appeal's approach cannot be reconciled with the reasoning at [88] of the Separate Question Decision (and hence they submit that it cannot be said that the approach adopted by Darke J remains open here to be followed). In this regard, the purchasers point out that Darke J relied on the statutory provisions as publicly known circumstances telling in favour of the conclusions his Honour reached as to what the parties were to be taken to have agreed; whereas the Court of Appeal relied on the same legislation for the view that Aboriginal objects are capable of constituting a defect in title in the sense indicated in *Flight v Booth.*

396 The purchasers submit that the premise of finding any *Flight v Booth* defect is that the thing contracted for is substantially different from the thing that the vendor is seeking to give; and that if the correct construction of the contract were that the purchasers agreed to purchase only the land (and not any Aboriginal objects) then it is difficult to see how the *Flight v Booth* test could be satisfied since *ex hypothesi* the purchasers had agreed to accept such deficiencies; and, from that, the Court of Appeal's view could not then be right. Thus, the purchasers argue that Darke J's view cannot here be supported.

397 As to the vendors' oral submissions of 16 October 2019 to the effect that there is circularity in the purchasers' position as to the obligation to show and prove a good title, the purchasers say that no question of circularity is involved; rather, it is the obligation of a vendor to show good title and it is not implying the existence of a defect to say that the vendor is obliged to show that it has a good title.

398 As to what the vendors could have done to show a good title, the purchasers say that the existence of an obligation does not imply that the vendor must be able to fulfil it. It is noted that if the vendors had a good title they might, for example, demonstrate that the site card co-ordinates were erroneous, or might have refuted the reputation or otherwise produced evidence of a "ground penetrating radar study" (all of which contingencies suppose a clear title).

Determination

399 At the outset, it is not inapt to bear in mind the operation in this area, of the *caveat emptor* principle. A purchaser of land must make inspections and enquiries as to what he or she is proposing to buy before entering the contract of sale (see, eg, *Lowndes v Lane* (1789) 2 Cox, Eq Cas 363; 30 ER 16). In *Oldfield v Round* (1800) 5 Ves 508; 31 ER 707, for example, a purchaser contracted to buy a meadow without it having been mentioned that a public road ran across the meadow. Loughborough LC there observed (as reported in the nominate report) "[c]ertainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser; who does not choose to inquire. It is not a latent defect".

400 It was in this context that the common law, at an early stage, distinguished between defects in title and defects in quality. A defect in title is any fact which prevents the purchaser obtaining such title to the property as the purchaser was led to expect (see, eg, *Liverpool Holdings Ltd v Gordon Lynton Car Sales Pty Ltd* [1978] Qd R 279 at 283; (1978) 43 LGRA 388 per Kelly J). Examples of a defect in title include: the existence or non-existence of something that detracts from the vendor's good right to convey the estate (see, eg, *Re Brine and Davies' Contract* [1935] Ch 338); where a vendor cannot convey the estate free from encumbrances, such as easements and covenants (see, eg, *Re Ridgeway and Smith's Contract* [1930] VLR 111; (1929) 36 ALR 79); or where the land is affected in such a manner that the whole of the land which was to be sold is not owned by the vendor (see, eg, *Flight v Booth* ; *Torr v Harpur* (1940) 40 SR (NSW) 585 (*Torr v Harpur*); *Micos v Diamond*). Pausing here, the third of these categories is, for reasons to which I will come shortly, particularly apposite to this proceeding.

401 In contrast, a defect in quality is such that the purchaser obtains appropriate title but the existence or non-existence of something relating to the property affects its value or desirability. For example, in *Eighth v Merity,* a termite infestation was held to be a defect in quality; and, in *Borda v Burgess*, the land sold was subject to an undisclosed mining lease which was ultimately held to be a defect in quality. It will be necessary, in due course, to return to *Borda v Burgess*.

402 The common law further classifies defects in title into latent and patent defects. As already adverted to, a patent defect is one which is discoverable by the purchaser in the exercise of reasonable care when inspecting the property (see, eg, *Yandle and Sons v Sutton* [1922] 2 Ch 199). It has been suggested that courts tend to regard all but the most obvious defects as being latent defects. For example, in *Shepherd v Croft* [1911] 1 Ch 521 (*Shepherd v Croft*), Parker J held that the existence of a hole in some lawn, through which was visible pipes which the vendor had not disclosed, was not sufficient to render the defect patent. His Honour stating (at 529) that: "I do not think that any one [sic] who inspects a property with a view to its purchase can reasonably be expected to look into every hole which the gardener has made in the lawn…".

403 A vendor is obliged only to disclose latent, and not patent, defects (see, eg, *Carlish v Salt* [1906] 1 Ch 335). A vendor is not obliged to disclose defects in quality and a failure to disclose does not, at general law, give rise to a right to rescind (see, eg, *Fligg v Owners Strata Plan 53457* [2012] NSWSC 230).

404 At common law, as the purchasers here emphasise, any discrepancy between the land and the description of it (that is, the defect in title), however slight, was considered to be fundamental and therefore entitled the purchaser to rescind. As has been adverted to in the parties submissions, this rule was ameliorated by the intervention of chancery (see, eg, *Halsey v Grant* at 223–225 per Erskine LC). In chancery, where the discrepancy was such that the purchaser could be adequately compensated by a monetary sum, equity would order specific performance on giving adequate compensation for the deficiency (see the discussion of Menzies J in *Travinto Nominees* at 27-28). In this regard,

where the agreement for sale contains an error or misdescription clause, it will be necessary to distinguish between an error and a misdescription (see *Travinto Nominees* at 14 per Barwick CJ) and to determine whether the particular error or misdescription falls within the ambit of the clause.

405 Of course, the preceding simply outlines the general position at common law and in equity; and regard must always be had to the contract(s) in, and the facts of, any particular case. For example, where a vendor gives particular contractual undertakings as to the suitability of land for some particular purpose, the non-fulfilment of such a warranty can amount to a defect in title. For example, where the contract in *Tambel Pty Ltd v Field* (1982) 2 BPR 9593; (1982) NSW ConvR ¶55-077 disclosed that six flats were tenanted but only four were able to legally be occupied as flats, Rath J (at 9598) held, in the particular circumstances and the contractual undertaking, that there was such a restriction on the enjoyment of the property as would constitute a defect in title. Similarly enough, it is trite to observe that the law of misrepresentation applies equally to agreements for the disposition of real property.

406 In the present case, I have the substantial advantage of the Separate Question Decision and the Appeal Decision. The reasoning of each of Darke J at first instance, and Bathurst CJ and Beazley P on appeal, with respect, helpfully elucidates the relevant principles and authorities. That said, these judgments are not dispositive of the issues presently under consideration. That is so for, amongst others, the following reason.

407 Some of the positions adopted, and submissions made, by the parties appear to me to have proceeded on the footing that the existence of *any* Aboriginal object *anywhere* on a particular property will be a defect in title and one sufficient to give rise to the right to rescind. As the history of this litigation illustrates, it is not helpful to approach this matter at such a level of abstraction; rather, it is necessary to approach the issues with a greater degree of specificity having regard to the precise facts of the case. This is because it is not desirable to attempt to find, and to articulate in the abstract, some bright line demarcating what is, and what is not, a defect in title. As Young J, as his Honour then was, said (at 15,193) in *Eighth v Merity*, “[w]hat is a defect in title

is difficult to define…". That undesirability is even more acute if one were to attempt to articulate in the abstract a bright line demarcating those defects that would give rise to the right to rescind, noting the rule at common law and the intervention of the chancery jurisdiction (as well as more recent statutory reform) (see, for example, *Dainford v Lam* at 268 per Powell J), and those which would not.

408 Related to this, although the question which I am presently determining has been the subject of appellate review, the relevant findings of the Court of Appeal were made in disposing of the "vague and hypothetical" (see Appeal Decision at [2] per Bathurst CJ) question which had been reserved for separate determination. In this regard, two points must be observed: first, the Court of Appeal (see Beazley P, with whom both the Chief Justice at [10] and McColl JA at [107] agreed) did determine that the presence of an Aboriginal object *can* be (i.e. is capable of being) a defect in title; second, however, I do not understand the Court of Appeal as having determined that the presence (actual or supposed) of the particular Aboriginal objects, in the precise location on the property, in this case *are* (or *were*) defects in title.

409 The relevant findings of the Court of Appeal were thus, given the ultimate determination of the appeal, *obiter dicta*. Nevertheless, I consider, with respect, the careful and detailed exposition undertaken by Beazley P (again, with whom Bathurst CJ at [10] and McColl JA at [107] agreed) to be instructive (and see the admonition as to the weight to be accorded to carefully reasoned dicta in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [134] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

410 At [75] of the Appeal Decision, Beazley P noted the common law principle, as laid down in *Flight v Booth* (and as extracted earlier in these reasons). At [77]-[78], her Honour also noted that Williams J, then a judge of this Court, in *Torr v Harpur*, a case concerning an underground drain, stated (at 594):

> The law laid down in *Flight v Booth* appears to be only one application of the general law of contracts that where an essential promise has been broken the innocent party is enabled to treat himself as discharged from the contract, whereas the breach of a non-essential promise sounds in damages only …

> The compensation clause is applicable in cases in which damages, but not in cases in which cancellation, would be the appropriate remedy for the breach.

411 Williams J there observed (at 591) that if the drain was situated "where its presence would not be a serious disadvantage … [then the purchaser would have] obtain[ed] substantially what he contracted for". In that case, the drain was "situated beneath part of the foundations of the cottages"; there was evidence that the walls of the cottages might crack and, if that were to occur, then underpinning of the walls "would be a very expensive job" (see at 593); his Honour also accepted evidence that the presence of the drain "would be an extremely grave defect if the purchaser desired to resell or to mortgage the property" (at 593). His Honour concluded (at 594) that if relief were refused, he "he would be *forcing upon the purchaser something which 'by reason of a departure from the terms of the contract, is so materially altered in character as to be in substance a different thing from that contracted for*'" (as quoted by in the Appeal Decision at [81]) (emphasis added).

412 *Torr v Harpur* was later considered in *Micos v Diamond*. That case concerned a suit for negligence against a solicitor who had failed to inform the purchaser of the existence of a sewer drain and the rights of the relevant statutory body. Relevantly, the sewer drain was located close behind the house and it was an offence to build over or otherwise interfere with or obstruct it. It was stated (at 410):

> The statutory right of the Water Board arises from s 32(1)(e) which allows the [Water Board] to enter upon any private land and to lay or place therein any sewerage main. Then when the sewerage main is laid it becomes an offence under s 62 to erect, construct or place any building or other structure in, upon, over or under that sewerage main so as to interfere with or to obstruct the sewer. Furthermore the Board may where there is a threatened breach of the section sue for and obtain an injunction to prevent any damage to, interference with or obstruction of the sewer. See subsection (3). When the Water Board has rights of this kind over part of the land there is clearly in our opinion a defect in an owner's title to the fee simple.

413 As Beazley P observed (Appeal Decision at [84]), "[i]t is apparent from this passage that the distinction drawn between a 'defect of title in the full sense', as opposed to the 'special sense of *Torr v Harpur*', was a reference to the statutory powers of the Water Board that could be exercised".

414 At [85]-[89], her Honour also considered the application of these principles by Palmer J in *Liberty Grove v Yeo* [2006] NSWSC 1373; (2006) 12 BPR 23,709 and Powell J in *Dainford v Lam*. It is unnecessary here to recount her Honour's reasons in this regard.

415 As I have adverted to, it is, however, necessary to say something about *Borda v Burgess*, not least given the vendors' reliance (before me, in the Court of Appeal, and before Darke J) on this decision (see Appeal Decision at [91]-[93]). That case concerned the sale of a property the subject of a consolidated mining lease for coal. The lease had not been disclosed in the contract. Crucially, the coal on and in the land was vested in the Crown. The purchaser purported to rescind on the basis that this was a defect in title. The vendor later purported to terminate and commenced proceedings for declaratory relief. The purchaser cross-claimed. Young CJ in Eq held that, because the vendor had never contracted to sell the coal and the lease was not an interest in the land, there was no defect in title; only a defect in quality. While I appreciate the factual similarities to the present case before me, as Beazley P observed "whether or not objects on or within property are the subject of sale does not determine whether there is a defect in title" (see at Appeal Decision at [93]). Further, as the Chief Justice observed in the Appeal Decision (at [11]), "*Borda v Burgess* … does not decide to the contrary. The issue in that case was whether an undisclosed mining lease for coal gave a right to the purchaser to terminate the contract. Provisions in the contract expressly excluded a right to rescind on this ground. It was in that context that Young CJ in Eq held that there was no contract to sell the coal."

416 Beazley P noted (at [100]) that under the *National Parks and Wildlife* legislation (which I have previously outlined and considered in some detail): the preservation of any Aboriginal objects on the land is the responsibility of the Director-General; it is an offence of strict liability)to which significant penalties attach) to harm an Aboriginal object; it is a more serious offence to harm or desecrate what is known to be an Aboriginal object; an Aboriginal object cannot be moved from the land unless in accordance with AHIP; and obtaining a permit is an onerous process and the grant of such a permit is uncertain. These matters led Beazley P to the conclusion that, "should there be Aboriginal

objects on the land, their presence *is capable* of constituting a defect in title" (emphasis added).

417 As did the then President (see Appeal Decision at [101]), I consider this case to be analogous to *Micos v Diamond*. To my mind, the onerous statutory requirements to obtain an AHIP before removing the object from the land; the risk of destruction, defacement or damage to the object and consequent risk of criminal liability; and, following, the real and significant interference that these matters present for use and development of the land all tell towards this conclusion.

418 However, this conclusion is not absolute and will depend upon the precise facts of the case, particularly the location of the Aboriginal object or objects on the property. Indeed, as I have sought to indicate by emphasising the words "is capable", I do not read the judgment of Beazley P as concluding that the presence of any Aboriginal object, wheresoever situated, will constitute a defect; rather, only that it *may* constitute a defect.

419 The authorities to which I have previously referred support this approach. It is, to my mind, important to bear in mind the emphasis that Tindal CJ in *Flight v Booth* and Williams J in *Torr v Harpur*, amongst other authorities that may readily be identified, on the need for materiality, substantiality and/or essentiality of the promise which has been broken; that is, the materiality, substantiality and/or essentiality of the purported defect. Put differently, in this case, if an Aboriginal object were situated at a location on the land that would have little, if any, impact on the use of the land then it would not constitute a defect in title (whether the purchaser sought to rescind pursuant to the common law rule or the vendor had come to a court of equity seeking the decree of specific performance).

420 Having in mind these principles, the location of the purported burial site, relative to the existing Rainforest Resort, is clearly significant.

421 It follows that, when considering the first way in which the purchasers contend that there was a repudiation of the contract by the vendors, it must be accepted that there was a plausible contention that, if Aboriginal objects were present on

the land at the locations then identified (to which, see further below), the presence of those objects would amount to a defect in title.

422 As to whether the existence of any deficiency of interest, constituted by any of the alleged Aboriginal objects (however minor), which the vendor is unwilling or unable to remove at completion is a sufficient ground for termination of the contract by the purchaser (on the *Dainford v Lam* test), the purchasers have contended (and I accept): that the contract for sale in the present case does not contain any non-annulment clause for error or misdescription of the subject matter; that while cl 6 gave to the purchaser an election to claim compensation for error or misdescription it did not require resort to that provision and it did not provide in favour of the vendors for a non-annulment; and that the vendors did not attempt to resort to cl 6 (rather, at all times insisting on payment of the full purchase price without abatement).

423 As noted earlier, the purchasers say that, even on an application for specific performance, the vendors would not have been assisted by the equitable rule in *Halsey v Grant* because of their express promise (in cl 16.3) of a title free of third party interests; but, in any event, the purchasers note that the vendors refused to submit the dispute to determination by the court when invited to do so.

424 In the present case therefore, was the conduct of the vendors in refusing to address the concerns as to defects in title, coupled with insistence on the notice(s) to complete, repudiatory?

425 I start with the general observation that, where there is an irreparable defect in title with no prospect that the vendor will be able to cure it, the purchaser may elect to terminate immediately *brevi manu*. As Needham J in *Walton v Stocks & Parkes Investments Pty Ltd* (1975) 1 BPR 9660 (citing *Bell v Scott* at 392 per Knox CJ, at 395 per Isaacs J and at 398 per Higgins J) said (at 9663):

> … where there is a defect in title but the vendor is able, without the concurrence of any other person, to get in the outstanding interest (in which case the purchaser must wait until the time fixed for completion, if any, or a reasonable time before he can rescind); secondly, the case where there is a defect in title and the vendor is dependent upon the consent of some other person for its removal (in which case, the purchaser may rescind, and must do so, if he proposes to do so, immediately).

426 Obviously, there is a risk inherent in that course because, if a purchaser resorts to do so where the vendor can demonstrate a capacity to cure the defect, the purchaser's purported termination may itself constitute repudiation (see, eg, *Bell v Scott*). Similarly, where the purchaser alleges a defect which is subsequently found not to be a defect then the purchaser may have themselves wrongfully terminated.

427 In this regard, a purchaser may, by way of a requisition, request information from, or that some action be taken by, the vendor (see, eg, *Flight v Booth*). Similarly, a purchaser may, by way of objection, assert that, due to the existence of a defect in title or otherwise, the vendor is unable to perform the agreement (see, eg, *Gardiner v Orchard* (1910) 10 CLR 722 at 730; [1910] HCA 18 per Griffith CJ). As I have adverted to, these rights are now generally subject of specific contractual provision, including in the various standard form agreements.

428 Nevertheless, as a general matter and at a minimum, the vendor has an obligation at common law to respond to any requisition concerning a possible latent defect. An inadequate response to a requisition may amount to a default on the part of the vendor which might, for example, thereby affect the vendor's ability to give notice to complete (see, eg, *Crowe v Rindock* at [29] per Windeyer J, citing *Winchcombe Carson Trustee Company v Ball-Rand Pty Ltd* [1974] 1 NSWLR 477). I shall return to this particular issue shortly in these reasons. It is, however, convenient first briefly to record some general observations relating to repudiation.

429 Repudiation (contra an actual breach of contract) occurs when a contractual party, by words or conduct, evinces an intention to be no longer bound by the contract. Such an intention may take the form of a refusal to perform, or an inability to perform, an essential (or, substantial non-performance of an intermediate) term (see, eg, *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115; [2007] HCA 61 at [43]-[49] per Gleeson CJ, Gummow, Heydon and Crennan JJ (*Koompahtoo*); *Galafassi v Kelly* (2014) 87 NSWLR 119; [2014] NSWCA 190 at [62]-[64] per Gleeson JA (*Galafassi v Kelly*)).

430 In *Heyman v Darwins Ltd* [1942] AC 356, Lord Wright described five different connotations of the term "repudiation". His Lordship then stated (at 379):

> … But perhaps the commonest application of the word "repudiation" is what is often called an anticipatory breach of the contract where a party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract.

431 Of course, a contract may be repudiated by express words or it may be implied from words and/or conduct (see, eg, *Galafassi v Kelly* at [62]-[64] per Gleeson JA). It is necessary to consider the conduct of the alleged defaulting party in all the surrounding circumstances in order to determine whether the words and/or conduct carries an implication of an intention to repudiate (*Koompahtoo* at [44], [60] per Gleeson CJ, Gummow, Hayden and Crennan JJ).

432 Relevantly, and as I have already adverted to, a party may be held to have repudiated even though that party contends *bona fide* that they are abiding by the terms of the contract. This can occur where the party intimates their intention of performing a contract in accordance with a particular contractual construction which that party believes to be the proper construction but which is in fact held subsequently to be mistaken (see, eg, *Morris v Baron & Co* [1918] AC 1 at 41 per Lord Parmoor); *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 37 per Mason J, 38 per Wilson J and with whom Deane J and Dawson J relevantly agreed. Again, I shall return to this issue, particularly in relation to the vendors' insistence on payment of interest, in due course.

Crowe v Rindock

433 Disputes as to technical aspects of conveyancing transactions are not uncommon. *Crowe v Rindock* is a case not dissimilar to the present proceeding and, as to the specific matter of repudiation and/or breach arising from a purported failure to adequately answer requisitions and/or comply with notices to complete, there are some useful observations to be taken from the judgment of Windeyer J in that case.

434 *Crowe v Rindock* concerned whether the defendant vendors' purported termination for failure by the plaintiff purchaser to comply with a notice to complete was effective; or whether the purported termination was wrongful and

amounted to a repudiation which was accepted by the purchaser. Those issues arose in part from (alleged) failures on the part of the vendor to properly respond to requisitions.

435 The relevant facts (see particularly at [10]-[18]) can be briefly stated. The purchaser's solicitor had sent, relevantly, four requisitions on title to the vendors' solicitor. Over two months later and with only four days until settlement, the vendor's solicitor responded in the following terms, "[t]he Purchaser must rely on his own inquiries". Some days later, a clerk of the vendor's solicitor had a conversation with the purchaser's solicitor during which the plaintiff's solicitor complained about the answers received in reply to the requisitions. The clerk subsequently discussed the matter with the vendor's solicitor and a further reply to two of the requisitions was then sent on 16 December 2003. Some few minutes after, the vendor's solicitor sent a notice to complete by 15 January 2004. Then, on 12 January 2004, the clerk wrote to the purchaser's solicitor inquiring as to settlement and warning of the vendors' intention to terminate if settlement did not take place as required. On 14 January 2004, being the day before the stipulated date for settlement, the purchaser's solicitor sent a fax to the vendor's solicitor which included the following paragraph: "[w]e submit that the notice to complete is not valid as it was issued prematurely as our request for amended answers to certain requisitions on title was not satisfied until the moment that the notice to complete was served on us". Pausing here, at the opening of the trial in *Crowe v Rindock*, Senior Counsel for the purchaser conceded that this objection was motivated by the fact the purchaser could not sell her house and would be unable to complete until she had done so.

436 Completion did not take place and on 19 January 2004 the vendors' solicitor gave notice of termination. On 20 January 2004, the purchaser's solicitor wrote reiterating his contention that the notice to complete was issued prematurely and was invalid and stating the purported termination was a repudiation which his client accepted. As adverted to above, it was accepted by Senior Counsel for the purchaser that, as at 12 December 2003 and at the time of the purported termination and the time of acceptance of the claimed repudiation, the purchaser was unable to pay the balance purchase price.

437 As to the initial response from the vendor's solicitor generally, Windeyer J observed (at [11]):

> … [the reply] was of little assistance with four days to go until settlement. It is fair to say that had the reply to 12(a) been "there are none" and the replies to the others "not to the vendors' knowledge" this litigation would probably not have commenced. It is generally accepted that a reply in the form of reply given is an insufficient response to a proper requisition, whereas the response "not so far as the vendor is aware, but the purchaser should make his own inquiries" is proper…

438 It is convenient now to turn to the particular requisitions in that case.

439 As Windeyer J noted (at [22]), citing *Festa Holdings Pty Limited v Adderton* [2004] NSWCA 228 at [7] per Mason P, "[a]ny question is not a valid requisition because it is a question. The common law determines whether it is or not". Specifically, it is necessary, in determining whether an answer from the vendor is necessary and (if so) adequate, to consider whether the particular requisition is properly seen as concerning something that the purchaser can herself or himself ascertain and, also, whether it is really nothing more than a reminder to the vendor (see *Godfrey Constructions Pty Ltd v Kanangra Park Pty Limited* (1972) 128 CLR 529 at 536 per Barwick CJ). If it be so, it may be that the vendor is not required to respond or that a passing response is entirely adequate.

440 One of the four requisitions made in *Crowe v Rindock* concerned a town planning matter. It was in the following terms (see at [10]):

> 17A (c) Is there any currently applicable development approval or consent to the use of the premises?
>
> (d) Are there any restrictions on the use of, or development of, the subject land by reason of the likelihood of landslip, bush fire, flooding, tidal inundation, noise exposure, subsidence or any other risk?

441 There is, I think, some analogy here to be drawn with the instant proceeding and so it is illustrative to quote Windeyer J's observations (at [23]) concerning that requisition:

> 23. 17A(d)
>
> It is generally accepted that town planning matters do not go to title. But that is because they are general affectations over areas of land usually not specifically related to particular properties. In any event it does not necessarily mean that it is not a proper inquiry or question, because requisitions are not limited to requisitions on title. What makes this demand impermissible in my

> view is its breadth. In the words of *Re Ford & Hill* (1879) 10 Ch D 365, it is "a wide and searching interrogatory". The words "or any other risk" could include earthquake, or restrictions on the height of structures to prevent damage by aircraft or restrictions due to proximity to a security installation and any risk which might be thought of in the nature of an act of God. It might be a proper requisition to inquire whether the vendor is aware of any limitations on the use of the land imposed by any competent authority by reason of specified risks. But to ask such a searching unlimited question requiring the vendor to search his or her mind as to what other risk there might be and to decide whether the specified and unspecified risks give rise to restrictions on use not necessarily imposed by competent authority is, I consider, impermissible. I should add that the question, so far as it relates to bush fire, flooding or tidal inundation is quite inappropriate for the property the subject of the contract.

442 As Windeyer J makes clear, it is impermissible for a purchaser to make a requisition that is too wide such as to constitute, in the words of James LJ in *Re Ford & Hill* (1879) 10 Ch D 365 at 369, "a searching interrogatory".

443 Another of the requisitions made was as follows (see at [10]):

> 20 Has the subject land been proclaimed to be a mine subsidence district within the meaning of the Mine Subsidence Compensation Act, 1961?

444 Again, there is an analogy here to be drawn with the instant proceeding. As to this requisition, Windeyer J observed as follows (at [23]-[25]):

> 23. Counsel for the purchaser argued that this was a town planning matter and is not a requisition on title. However, as I have said, that is not a determining matter. I consider it a proper question in relevant circumstances. Section 16 of the Mines Subsidence Compensation Act 1961 provides that in circumstances where improvements have been erected on proclaimed land subsequent to proclamation without approval of the Mines Subsidence Compensation Board, then the purchaser under a contract for sale of the subject land is entitled to rescind that contract. *This I consider makes the question, if appropriate, a genuine requisition on title*. There was a somewhat similar right under earlier Acts.
>
> 24. [The purchaser's solicitor] gave evidence of his interest in coal mining through living at Balmain. However, it was not put to him that any suggestion that he considered that there was any possibility of number 38 Murdoch Street, Cremorne, being in an area proclaimed under the relevant Act was fanciful, but rather that his objections to the replies were just an endeavour to buy time. [The purchaser's solicitor] insisted he was entitled to proper answers even in light of the s149 certificate annexed to the contract, which it seems he did not read, and the certificate he obtained himself. Mr Straton, the vendors' solicitor, gave no evidence. Mrs French did not appear to have any understanding of why the answers originally given might be considered insufficient. There is no evidence as to the location of land in New South Wales subject to a relevant proclamation.
>
> 25. In summary I consider requisition 20 to be a proper demand, at least in relevant circumstances. *That does not necessarily mean failure to respond properly could be relied upon as it has been.*

[Emphasis added.]

445 As to whether the purchasers could rely on the vendor's failure to answer (adequately or at all) the requisitions in order to state that the vendors were in breach at the relevant time, Windeyer J said (at [27]):

> 27. Subject to what comes later, the failure to give a proper answer to requisition 17A(c) and 20 before 12 December 2003, meant that the vendors were not entitled to expect completion on the completion date provided for by the contract. In fact the vendors were in breach by failing to give any reply prior to 8 December 2003 as such a time was not reasonable. Had a proper reply been given prior to the date for completion in the contract, even if only a few days – but not minutes, - it might be that even taking into account the default in failing to respond at all within a reasonable time, the default could have been overlooked. … However, as I have said the purchaser was entitled to a proper reply to requisitions 17A(c) and 20 at least if relevant to the property. Nothing really arose out of the replies served; they were just not a proper response. The vendors were in default through failing to give proper responses to requisitions. That precluded them from serving a valid notice to complete when they purported to do so. …
>
> [Emphasis added.]

446 Windeyer J summarised his findings (in what his Honour described as a "rather long judgment") as follows (see at [34]). The vendors did not, as they were obligated to, give a proper answer to requisition 20 (to which I have made reference above) before the date fixed for completion. This meant that the purchaser was not in default for failing to complete on the date for completion in the contract. The answer given to requisition 17A(c) on 16 December was adequate but, as the date fixed for completion had passed, it was necessary to allow the purchaser reasonable time after the reply was made before the purchaser could be in default so as to justify a notice to complete (and, that time had not passed). The vendor's purported termination consequent upon the expiry of the notice to complete amounted to a repudiation which the purchaser was able to, and did, accept thereby bringing the contract to an end and entitling the purchaser to recovery of her deposit.

Conclusion

447 Turning back to the present case, I have concluded that there was a plausible contention that there were Aboriginal objects (as defined in the *National Parks and Wildlife Act*) on the land. In particular, the reputation evidence establishes a credible belief that Harry and Clara Bray were buried on the property; evidence that is reinforced by the inscription on the memorial stone and plaque

and the “admissions” made by Mr Carter as to the reputed burial on the site; and it was a plausible contention that the burial site was on Lot 1 in the vicinity of the pool. I have concluded that the presence of Aboriginal objects on the land was capable of constituting a defence in title (either because they were property that had vested in the Crown, such that the vendors could not convey a title free of third parties property interests, or because, if they were on Lot 1, they were, applying the rule in *Flight v Booth*, a defect in the title to the property that was of a substantial and material effect given the potential additional development constraints that would pose).

448 Therefore, it was incumbent on the vendors to address that objection squarely. I consider that the refusal to do so did amount to repudiation (particularly when coupled with the issue and insistence upon the subsequent notices to complete).

449 Thus I find that the principal way the purchasers make their claim is made good.

Purchasers’ alternative case re Aboriginal objects as a defect in title and Flight v Booth

450 As I have adverted to, the next alternative case for the purchasers is that their termination of the contract was valid because the vendors in fact did not have a good title because the title was not free of Aboriginal objects (whilst insisting on a notice to complete and/or refusing to comply with the purchasers’ notice to perform).

451 The purchasers accept that their alternative contention depends on a finding that there are Aboriginal objects in or on the land. It involves the same contentions as to the application of the common law rule that any deficiency in title is a sufficient basis for objection; but, as to that rule and *Flight* v *Booth* test, the purchasers accept that the significance of the defects may differ depending on the particular objects that are found to exist.

452 At the outset, when considering this issue, it is relevant to note the observation of Basten JA in *Country Energy v Williams* (at [56]), as to the definition of “Aboriginal object”, that:

> Even the most mundane signs of Aboriginal habitation fall within the scope of the definition. A fireplace created this century may qualify, even if it has no cultural significance to Aboriginal people.

453 His Honour there tentatively concluded (see at [59]) that the power under s 90 of the *National Parks and Wildlife Act* (the power to issue an AHIP) extended to Aboriginal objects which had not yet been identified at the time of granting the AHIP. Giles JA reached the same conclusion, referring (at [7]) to:

> The width of the definition of "Aboriginal object", the extent to which Aboriginal objects as defined may be expected to be encountered and the necessity that consents may be expressed in terms of Aboriginal objects not known to exist, lest ordinary farming activity, let alone projects such as the ETL be stultified ….

454 It is necessary now to consider, in more detail, the alleged Aboriginal objects.

455 Before doing so, however, it is necessary to record some observations briefly as to the credibility of the lay witnesses, since this is of some relevance to certain of the findings for which one or other of the parties contends.

Credibility findings

456 Relevantly, the vendors contend for a finding that Mr Cheers and Mr Adam Mehmet saw the memorial stone and the plaque when they inspected the property with Ms Gotterson but that, "in the excitement of their foolhardy rush to secure the property to build a 'Club Med' without any prior investigations or any due diligence, they did not think much of it at the time" (and, it is noted in this context that Mr Ian Mehmet and his brothers did not inspect the property before exchanging contracts on 6 July 2015 and relied entirely on the observations of those who did).

457 I do not accept that such a finding can be made. There is nothing to point to either of them actually having seen the plaque at the time. The questions raised on the inspection of the site on 13 July 2015 and the reaction by the purchasers to discovery of the Parker Report – corroborated by the evidence of Mr Garrett as to the meeting on 14 July 2015 – strongly suggests that neither Mr Cheers nor Mr Adam Mehmet actually saw the memorial stone prior to exchange of contracts.

Mr Cheers

458 The vendors submit that Mr Cheers was not a credible or reliable witness and that his evidence generally should be rejected. In particular, it is submitted that his "jungle" evidence is "almost laughable", the vendors pointing to Mr Cheers' evidence (at T 84.20 and T 85.6) that the overgrowth was waist high (after being shown the photograph of Aunt Dulcie next to the plaque in November 2014). The vendors point out that the other person present at the inspection on 18 June 2015 with Mr Cheers (Mr Paul Harris), who Mr Cheers accepted was an able-bodied colleague who could have given evidence, was not called to corroborate the alleged concealment of the memorial stone and the plaque.

459 As to Mr Cheers' evidence that he looked at the Rainforest Resort website but did not "click on Murray's Nature Notes" and had no interest in those notes, the vendors point out that this answer was volunteered before Mr Cheers was asked about them. It is submitted that Mr Cheers' demeanour as a witness was one of assertive self-interest; and that he exhibited a lack of candour. It is noted by the vendors that Mr Cheers (see from T 74.35) said that if he had seen the Nature Notes on the web site, he would have done more research; that Mr Adam Mehmet looked at the website (as did his father); and that Mr Ian Mehmet said he could not remember looking at it in any depth but accepted that "we would have done some further investigation about the Aboriginal heritage side of it". It is said that doubtless any such research/further investigation would have indicated that Pt 6 of the *National Parks and Wildlife Act* might apply if the stone and the plaque was an Aboriginal object.

460 As to Mr Cheers, he initially presented as being pedantic and less than helpful in his answers (see the difficulty with which his admission as to familiarity with zoning generally was obtained – see from T 68.39 – such as "depends on what you call a lot" and as to zoning "in regards to what"). Though, I pause to note that this may have been a concern not to be making any unintended admissions or the not uncommon suspicion displayed by witnesses of their cross-examiners. My overall impression of his evidence was not that he lacked candour but that he was prone to exaggeration and to putting a gloss on events (perhaps unconsciously) that accorded with his interpretation of events.

461 The “jungle” evidence is a prime example. No one disputes that there were plants or some form of growth in the vicinity of the memorial stone and plaque. However, it is simply not credible that the vegetation or plant growth was waist high (see T 80) or that the forest had come back and taken over the resort and it was a jungle again (see T 79) (particularly by reference to the photographs taken for the marketing of the site and at the time of the site visit only a few months prior to the marketing of the site). Mr Cheers’ evidence (which I consider to be exaggerated) is inconsistent with the observations of Mr Adam Mehmet and of Ms Gotterson (let alone those of Mr Carter). It is certainly possible that the rainforest part of the land may have been able to be described as a “jungle” but the notion that it had overtaken the resort is not supported by any objective evidence.

462 Similarly, Mr Cheers’ recollection of various other conversations (denied by the other parties thereto) is inherently implausible. The suggestion that an experienced town planner would seriously have advised a client to use electric chain saws to clear the site before seeking development approval is not credible (and is denied by Mr Lonergan). Mr Cheers’ explanation for such a statement seems to be that Mr Lonergan is reputed to be a “cowboy” (see for example T 116.9). I could not possibly make such a finding on the evidence before me. As to the conversation about building a “Club Med”, Mr Lonergan accepts that he made some reference to “Club Med” but says it was a standing joke amongst locals and I consider it more plausible that it was said in that fashion.

463 As to the statements attributed by Mr Cheers to Mr Garrett, again it seems to me inherently implausible that a solicitor acting for both sides on a transaction would have made those statements; particularly a solicitor who at that stage was clearly conscious of the potential for dispute between his respective clients and who had identified a conflict and indicated that he would be withdrawing from acting for both sides.

464 That said, I consider that Mr Cheers’ version of various of the conversations could be explained by a misinterpretation or gloss on what had been said, for example: the “Club Med” comments as a misunderstanding of the joke; the

comments attributed to Ms Gotterson about the property being a "diamond in the rough", a description she considers unlike her words, similarly being perhaps Mr Cheers' expression of what he understood was being conveyed to him (since it is clear that Ms Gotterson had a high opinion of the development potential for the property).

465 Therefore, I make no finding of dishonesty. I simply consider that some caution needs to be exercised in taking at face value Mr Cheers' version of events (at least in the way the reported conversations are expressed) and, as always, I place more weight on contemporaneous documents than recollections well after the event of oral conversations.

466 I also note that Mr Cheers was somewhat assertive and prone to argue his point – as, for example, when he gave in answer to cross-examination as to the small size of the tourist zone that might be affected by any development constraint referable to the Aboriginal objects, the example of the problem that can be caused by a small hole in a plane. Nevertheless, his account of events (other than, for example, the description of the "jungle") was largely consistent with other accounts. His evidence that the reference to Aboriginal remains was a "red flag" to him (see from T 74.15), in particular, seemed to me genuine and quite plausible. And his candid admission that "we weren't really interested in the business" (see T 72.13) makes it readily explicable that he would have paid little if any attention to the Nature Notes even if he had accessed the web page for the resort.

467 Less plausible was his explanation for having deleted the comment from the email sent by Mr Annesley to Mr Ian Mehmet when on-forwarding that email to Mr Connelly (see from T 118): his answer first being that he did not see it as relevant and then saying that he conveyed this "over the phone" (T 119.4).

468 There was also some confusion as to the dates of inspections in his various affidavits (see from T 120) but nothing really turns on this.

Mr Adam Mehmet

469 The vendors describe Mr Adam Mehmet as "a little more frank" in his evidence (see for example at T 137.40) in that, although he said the garden was "overgrown". It is noted that, when confronted with the photographs, Mr Adam

Mehmet said that he could not recall the condition of the garden or say one way of the other; and that he accepted (see for example at T 140.20) that he could have walked past the plaque and simply not noticed it (but not because of overgrowth).

470 I considered Mr Adam Mehmet to be a relatively straightforward witness. He made appropriate concessions (as illustrated by the example to which the vendors point) and his lack of recollection of various matters is consistent with his father being the driving force from the Mehmet family side. I accept his evidence that he did not himself research the web page (it certainly seems not implausible to me that if he had done so he would have shown an interest in the Nature Notes"; and I accept that he did not see the plaque. His answers in that regard were not given in a manner that suggested he was dissembling. In that regard, Mr Adam Mehmet did not overstate his recollection of events – for example, he recalled something being said about chain saws in the meeting with Mr Lonergan but he could not remember what and he said he was aware of the "Club Med" joke (see T 151).

471 There was some confusion as to the timing of the meetings. Mr Adam Mehmet's recollection was that he had met Ms Gotterson at the Cool Katz café once before he went to inspect the property (see Ms Gotterson's evidence at to a meeting at the café with Mr Cheers and Mr Adam Mehmet at the end of June at T 332), though again, nothing really turns on this.

472 Mr Adam Mehmet's evidence was that he agreed by the meeting on 16 July that they had made a decision not to proceed (see T 162.12).

Mr Ian Mehmet

473 As indicated, I consider it apparent from the documents and from the various accounts of the 16 July 2015 meeting that Mr Ian Mehmet was the driving force, at least as between he and his son, in relation to the transaction. He came across as a blunt and matter of fact witness. His evidence as to his understanding of what was meant by buying the property "as is" or "warts and all" does not accord with the transaction that was in fact entered into but that does not gainsay that his understanding was genuine (albeit mistaken).

474 If the direct manner in which Mr Ian Mehmet gave his evidence is any guide, it suggests to me that at the meeting on 16 July 2015 he was in effect dictating terms to Mr Carter (that they walk away from the transaction) with which Mr Carter was not prepared to agree. Certainly, Mr Ian Mehmet did not strike me as someone likely to "pull his punches", so to speak. Mr Ian Mehmet's comment that he regarded Mr Carter's comment at the meeting as "very flippant" (T 199.36) seems to me to be telling. Mr Mehmet struck me as someone likely to have strong feelings about matters and little hesitation in making those feelings known.

Messrs Errol and Cameron Mehmet

475 There is no real issue raised as to the oral evidence of Messrs Errol and Cameron Mehmet and no reason not to accept that they had no knowledge of the plaque or the reputed burial site.

Ms Annette Kelly and Ms Theresa Nicholls

476 Ms Kelly and Ms Nicholls (who, it will be recalled, are two of Harry and Clara Bray's great granddaughters, who have been part of the Arakwal community all their lives and hold responsible positions with the local Aboriginal corporation), gave their evidence in a dignified and genuine manner. Each displayed some emotion. Each was quiet and restrained. I have no hesitation in accepting their evidence as to the beliefs and customs passed down to them from their mothers and aunts; and as to their recollection of personal visits to the site and their observations on those occasions. There was no attempt by them to overstate matters; and they readily accepted the limitations on their recollection of events. I have no doubt as to the cultural significance of the site for them and the Aboriginal community they represent and I record here my appreciation to the Aboriginal elders for having given them permission to attend and to speak about matters that are culturally sensitive for the people of our First Nations; and to Ms Kelly and Ms Nicholls (who were present in Court when the DVD showing images of some of their deceased ancestors was played) for the assistance they have given me with their evidence.

477 It is relevant to note that the DVD was published in 1998 and that Ms Nicholls said that the photograph of the group taken in 2014 was in front of the cabana (the site, Mr Carter says, of the old milking shed, not Cabin 6 near the

memorial stone and plaque). This is relevant insofar as there is an indication on the DVD of the burial site as being in the direction of what, from the cabana, would be the swampy ground, not the pool itself.

Ms Phillippa Nichols

478 No issue as to the credibility of Ms Nichols (the former owner of the Rainforest Resort) arises.

Mr Tim Lynch

479 Mr Lynch, the solicitor acting for the purchasers after Mr Garrett ceased to act, was cross-examined as to the circumstances of his knowledge of registration of the transmission application. He was a calm and considered witness. There is no reason not to accept his evidence.

Mr Tim Robins

480 Mr Robins, a heritage consultant, of Everick Heritage Consultants, was called by the purchasers. He gave evidence as to the plotting of the coordinates from the 1980 site report and, helpfully, explained the differences in the datum now used (GPS) as opposed to that which was used at the time of the AHIMS site report (AGD). That evidence was relevantly as follows (see from T 311.27):

> Q. Can you just explain to me AGD and DGA coordinates, what are they?
>
> A. Sure, the - in the - effectively the earth moves slightly so we need to every periodically adjust the, the datum of where the earth is in reality so that it can account for the slight movement. So if you always kept the same grid system, if you imagine the grid system is a grid overlaid over the earth but the earth slightly moves within it.
>
> […]
>
> A. So it is necessary to periodically update the grid system to be able to maintain accurate coordinates. I am not an expert in GIS. I am not the person that does the GIS within our company, so I can assist you as best I can in that regard.

481 Mr Robins explained the reason for caution in relation to AHIMS report (see T 308.39), namely, that the site cards are dependent on the skill and accuracy of the person recording the co-ordinates.

482 I regarded Mr Robins as an impressive witness. He explained the process clearly and the basis on which he considered that Ms Collins was in error when she plotted the burial site with the site card references for the Everglades site

and not the Rainforest Resort land. Mr Robins gave his evidence in a professional and reasoned manner. I accept his evidence.

483 Mr Robins' experience was that AHIMS search results were frequently inaccurate; and that, insofar as the results disclosed the location of a burial site, they must be treated with caution. He agreed that one factor for this was "because the accuracy of the coordinates that inform the location on the land, as disclosed by the search, depends on the skill of the person who recorded them" (see at T 308.47), and that this was particularly so where the underlying coordinates were recorded prior to the use of GPS or global position systems.

484 Mr Robins explained that before GPS, one typically applied a ruler or some other measure on a plan to scale off the location; and that GPS was not available until about the mid-1980s and finally adopted "a little bit thereafter" (see at T 309.14). In his report he referred to projection errors in his experiences occurring on the AHIMS database. He explained that one part of a projection error was that it depended on the accuracy of the person plotting the coordinates recorded in the database on a map but said that the primary error that seemed to have occurred within the AHIMS database had been "as the datum has changed over the years" (T 309.25), referring by this to different editions of the underlying map in respect of which the recorded datum on that map has changed, and the advent of the global information system.

485 Mr Robins' evidence was that the scale of the map was of importance in that the larger the scale the less definitive the map (see from T 308). He was taken to two maps (the Tweed Heads 1:250,000 scale map and the Byron Bay scale map) and agreed that the more definitive map in terms of scale was the map known as the Byron Bay 1:25,000 map (the grid references on that map being approximately one kilometre).

486 On the document in question, the document grid references have been recorded (6795-4425 in relation to the Tweed Heads map; 5970-2762 in relation to the 1:25,000 Byron Bay map). He said that they had used the co-ordinates on the site card to plot the location and check the location on the AHIMS. He said that (see from T 310.48):

A. That the, the plot that was used here was an electronic plot using the coordinates and the choice of how to plot where that site was informed by using the map sheet and then we reviewed that and then determined that correct datum to be used was the former no longer AGD but GDA datum.

[…]

Q. Sorry, were you going to add something to that?

A. I was just going to add, when the AHIMS site card is - sorry, the AHIMS search is provided to us it also comes with an Excel file which provides both AGD and GDA coordinates with it which are two, two separate coordinate systems.

487 Mr Robins explained the process as being that at the time that the plot (figure 3) was prepared he did not have the old site card in the handwritten form; in locating the site in figure 3, an assumption was made that the easting and northing northern bearings as disclosed in the site search accurately reflect the grid references that were originally recorded back in 1981 in the old site card; then as part of that work he sought to check the plot that was done in his office (figure 3) against plots that others had done at other points in time. He said (see from T 312.22):

A. The particular site, we sought to sense check the application of the datum and the correct coordinate system also through consultation with local community members and through review of the original map sheet as it related to the site cards.

Q. But you also checked it against plots that had been done by others and we see that in figure 6 and figure 7 of your report at page 1883 and 1884 of court book 3, is that so?

A. Yes if you're referring to the Collins' plans yes.

488 He said that the plot that was used was an electronic plot using the coordinates and the choice of how to plot where that site was, was informed by using the map sheet. The evidence was relevantly as follows (see from 312.48):

Q. So should we understand that because based on the AHIMS search result your plot was in a similar location to that plotted by Collins in 2003 you thought that was consistent with your sense check, is that right?

A. Broadly consistent

Q. Broadly consistent, thank you.

A. My understanding is, is that the - that these plans are prepared in hand, using a hand, hand methods or sometimes a, using photoshop and a, a, a circle will be inserted onto these plans. My experience is that if the site itself is not critical to the report that is being prepared at the time, sometimes those plots will be inaccurate because it, it is irrelevant whether it was a hundred or 200 metres one way or the other.

489 Taken to Ms Collins' report to which reference is there made, which was made about seven years after the site card, it was noted that there were no references to site 4-4-0036 (Ms Collins then prepared the June 2015 cultural heritage assessment report, which refers to an extensive search of the AHIMS database performed in February 2015, and it includes a reference to table 2, plotted on figure 4" for "site ID 4-4-0036 (the reference on the old site card)). Mr Robins assumed that Ms Collins had made a mistake by inaccurately reciting the ID reference for the "burial", namely that instead of reciting ID 4-5-0036 it should have been site ID 4-4-0036 (which is plotted by Ms Collins on Lot 1). Mr Robins agreed that he had assumed that Ms Collins had made an error and that he believed that the reference to the burial at site should be 4-4-0036.

490 It is noted that the locations at which Ms Collins had plotted the burial said to be referable to site ID 4-4-0036 were in different locations: figure 6 is plotted just to the south of the caravan park whereas in the bypass report appendix, Ms Collins has plotted that site ID down in the location of Suffolk Park, which is some distance to the south of the Rainforest Resort. Mr Robins' assumption was that was in reference to what should have been 4-5-0036. He would put the 4-5-0036 burial site closer to Suffolk Park and the 4-4-0036 site closer up to the caravan park (and he noted that Ms Collins also missed two other site references from her original report (being 4-4-0034 and 0035, which are in figure 6 of her original report).

491 Mr Robins said he was quite confident that the location of site 4-4-0036 is within Lot 1. The evidence, was relevantly, as follows (see from T 317.3):

> Q. But I think you've already told me that in making that assumption, you don't know if the easting and northing referred to in the AHIMS search accurately reflects the grid references that are recorded in handwriting on the old site card back in 1981?
>
> A. We use the site card and, and the same map sheet that the site card - that contemporary map sheet, to when the site card was recorded, and we plotted that, that location, and that location came up within lot 1.

492 Questioned as to the Suffolk Park location after being taken to George Flick's reminiscences, there was the following (see from T 318.1):

> Q. You know that area being referred to is the area of Suffolk Park; correct?

A. Suffolk Park and my understanding is may include lands to the north as well, but that's an assumption, but, yes.

493 As noted, I found Mr Robins to be an impressive witness and I accept his evidence as to the location of the area with the grid references as per the 1980 site card is on Lot 1.

Mr Carter

494 The principal witness for the vendors was Mr Carter. To describe him as loquacious may well be an understatement. Nevertheless, I say this without criticism of his honesty or his preparedness to give evidence. He was a co-operative witness. Although the purchasers criticise his inability to distinguish what he meant by the difference between a milking shed and a dairy shed, it struck me at the time that Mr Carter was somewhat flummoxed by the question rather than attempting to avoid answering it.

495 Mr Carter is the author of the eponymous "Murray's Nature Notes" (to which I have previously referred as the Nature Notes). The style in which they are written to some extent mirrored some of his oral evidence. He twice, for example, gave the illustration of "Venice versus Vegas" when describing the Rainforest Resort (see T 235; T 239). I considered him to be a genuine and truthful witness.

496 In particular, I accept his denial (T 244.33) that Ms Gotterson ever advised him not to put reference to the Aboriginal heritage in the marketing reports (and I find that his explanation as to why it was included in the re-sale documents rings true – faced with a contentious dispute about this very issue it is easy to see why one would exclude any possibility of it arising again).

497 Mr Carter was adamant that the size of Lot 1 was 6.5 acres and that he never saw it as seven acres in his mind (T 246-247). His evidence as to the remains of a building near Cabin 1 (and as to why he considered it not to be an Aboriginal building) seemed to me quite logical (even if he could not explain the difference in his mind between a milking shed and a dairy shed).

498 My opinion of Mr Carter as a witness is that he was quite open and guileless. His explanation (at T 263-264) as to the Parker Report (i.e., that if the purchasers had not read the website why would they have read the Parker

Report), though effectively a submission, does not lead me to doubt his genuineness. He had no difficulty admitting that his views had been sought in relation to that report. He did not think Ms Norman had provided him with the application form for the Norman Application (see T 273.3). That of itself is not implausible, though it would suggest an inattention to detail on his part.

Ms Ruth Gotterson

499 Ms Gotterson was a voluble but not uncooperative witness. I suspect that her attention to detail might be somewhat lacking and that she adopts a broad brush approach to the marketing of real estate (which would explain gloss on the marketing details).

500 Ms Gotterson says she advised Mr Carter that it was not necessary to spend money to fix up the property (T 322). She did not agree that the property was overgrown, though accepted that some parts of garden may have been overgrown; but said that all of the paths were tidy (T 324). I do not read her emails as to the marketing of the property as inconsistent with this evidence.

501 Ms Gotterson seems to accept she had discussion with Mr Carter about Aboriginal cultural heritage but that she did not think it relevant to reasons why the property was being sold and did not think there was a deliberate decision not to include (rather, simply that it was not important). She agreed that Mr Carter raised this as a question to include in marketing material. She said (understandably) it was not her job as to what went into the contract. As for its inclusion on the resale, she said obviously they did not want a dispute to arise again (T 328).

502 Ms Gotterson did not remember using the words “unlimited potential” but conceded that she may have for she believed that the property had a lot of potential (see T 328) and she clearly believed that the best way to market the property was its location and potential to “value add” (see T 334).

503 Ms Gotterson believed that the smaller lot was seven acres and had commercial zoning (see from T 330). She agreed she told Mr Cheers that properties of this size and zoning were rare (T 331.28). She says that she did not know where the boundary of the commercially useable land was (T 333.13) and agreed that some of the seven acres is bush (T 333.24).

504 I do not accept that the evidence establishes any intentional concealment of the Aboriginal heritage on the part of Ms Gotterson (or anyone on behalf of the vendors for that matter).

Mr Stephen Connelly

505 Mr Connelly left little doubt as to the fact that he would record in his diary anything "plausibly billable" (i.e., anything for which there was potential profit - T 338.38); if it was going to be part of project billing he would ordinarily record it (T 339.32).

506 At the time he spoke to Mr Cheers he was not aware that some cabins on Lot 1 were partly located in the buffer zone (T 341.7).

Mr Chris Lonergan

507 Mr Lonergan has been a town planner for over 30 years and was involved, though not as a townplanner, in the development of the former Everglades Resort.

508 Mr Lonergan, relevantly, gave evidence that he did not know exact size of the lots (see T 300), which casts doubt on him being the source of the "seven acre" belief of the purchasers. He denied a number of the comments attributed to him (see for example at T 301). He said, and there is no reason not to accept, that he had not seen the Parker report at the relevant time.

Mr Stuart Garrett

509 Mr Garrett has been in practice as a solicitor since 1979, his principal area of practice being property and estate work. I found that he was measured in his answers. When taken to his file note (Exhibit Q), his recollection was that two of the purchasers came into his office late in the morning of 14 July 2014 and were concerned about the issue (in relation to the burial site) and that he then telephoned Mr Carter (see at T 282).

510 He said that he thought the transmission application was probably prepared quite soon after the contract was signed (T 284); and that after he had confirmation from the mortgagee's solicitor on about 10 July 2014 that they would produce the title he had sent the transmission application to the law stationers (to lodge). He was taken to other file notes (Exhibit V and Exhibit W)

which record times of 1.10 pm and 1.20 pm respectively and are consistent with the time frame indicated by Exhibit Q.

511 Questioned as to whether he had made the comments attributed to him by Mr Cheers, his response was balanced and not overly defensive. He said it was unlikely that he would have said to the effect that "Murray should be smart; just walk away" (see T 290-291). He denied that he had said that Murray had wanted to include Aboriginal significance but Ms Gotterson had said no (see T 290.15).

The alleged Aboriginal objects

512 I now turn back to the alleged Aboriginal objects.

513 As I have already adverted to, in the present case the purchasers have identified six "Aboriginal objects" as being on the subject land and as constituting a defect in title: (i) a memorial stone and plaque bearing the inscription "Harry and Clara Bray, Tribal Elders of the Bundjalung Tribe buried near this site circa late 1890"; (ii) the remains of Harry and Clara Bray (and possibly one or more of their children); (iii) the remains/burial sites of other Aboriginal persons; (iv) the remains of a gunyah (described as a traditional native Aboriginal home or shelter); (v) a ceremonial "mound"; and (vi) a bunya pine tree.

514 There is no dispute as to the presence of some of the objects on the land (namely, the memorial stone and plaque; and the bunya pine tree), although there is a dispute as to their classification as Aboriginal objects. As to the other alleged Aboriginal objects, there is a dispute as to their presence (or continuance if they were ever present) on the land.

515 I consider each in turn.

<u>The memorial stone and plaque</u>

516 As noted, it is not disputed that the memorial stone and plaque are located on the land; nor is it disputed that the inscription on the plaque as to the date of burial (circa 1890) is incorrect. The vendors say this is relevant when assessing the reliability of the inscription on the plaque; the purchasers say nothing turns on the error as to the date.

517 The purchasers contend that this memorial is itself sufficient to constitute an Aboriginal object as defined in s 5 of the *National Parks and Wildlife Act*, being a "deposit, object or material evidence (not being a handicraft made for sale)". It is noted that the stone and plaque are objects; and that they are fixtures or deposits because they are permanently affixed to the soil. It is submitted that these items are "material evidence" of Aboriginal habitation because of the assertion that they contain concerning the site as a burial site for Harry and Clara Bray, elders of the Bundjalung tribe. The purchasers note that the definition of Aboriginal habitation is not confined to the period before occupation by Europeans and others; and it is said that these items relate to such occupation because they are a memorial to particular elders of the local Aboriginal tribe and the plaque makes assertions concerning their burial site.

518 As already noted in the context of considering their submissions as to the inadmissibility of the reputation evidence to prove the existence of the burial site or existence of the remains of Harry and Clara Bray, the vendors maintain that there is no evidence to establish those asserted facts. Further, the vendors maintain that the memorial stone and plaque do not establish the location of any Aboriginal remains on the subject land, nor their existence.

519 As to the requirement of abandonment, insofar as the vendors submissions have raised an issue as to whether a grave and any human remains contained therein comprised land vested in the registered proprietor, the purchasers note that in *Spooner v Brewster* (1825) 3 Bing 136; 130 ER 465 it was held that that, although the freehold of the churchyard is in the parson, the right to a tombstone vests in the person who erects it (though it is conceded that "the relation of such a right in England to ecclesiastical law and special rules of law applicable to church land is likely to make 'the common law with respect to remains' an uncertain guide to the question of this stone memorialising the burial of Aboriginal elders in unconsecrated private ground in NSW").

520 The purchasers submit that there is no dichotomy between human customs and behaviour concerning the dead and human habitation. By way of analogy, the purchasers point to the graves of the kings and queens in Westminster Abbey as material evidence of English habitation on the island of Albion; the

terracotta warriors at Xi'an as evidence of Chinese habitation in East Asia; and the archaeological study of burial sites (in fields such as Egyptology). It is submitted that, in the present case, there is evidence of habitation in the area of Tallow Creek, including the site itself; that the plaque expressly refers to the "tribe" and to the deceased as "tribal elders"; and that it is a memorial of them and their role among their people.

The remains of Harry and Clara Bray (and possibly one or more of their children)

521 There is no dispute that, under the *National Parks and Wildlife Act* expressly, the remains of Aboriginal persons are capable of being an Aboriginal object. However, there is dispute as to whether Harry and Clara Bray were buried on the Rainforest Resort land and as to whether, if so, their remains continue to be present there (either because they were disturbed by the construction of the pool on the resort or having regard to the lapse of time since any such burial).

522 The purchasers maintain that there is ample evidence to establish as a matter of reputation that Harry and Clara Bray were buried on the resort land, including: the statements relied on as admissions (as set out earlier), including Mr Carter's website (on which he published a photograph of the memorial plaque and stated that Harry Bray was buried next to his wife Clara); evidence as to the report of George Flick; newspaper death notices; and historical accounts as matters of repute within the general local community as to the historical use of the site as a place of Aboriginal habitation and its particular use as the home of Harry Bray and his family, the location of their gunyah and as the site of burial of Harry and Clara Bray; an inference from the custom of the Arakwal people to attend and pray or pay respect at the grave site; that the site includes material evidence of Aboriginal habitation that provides the focus for these observances; evidence of the reputation passed down through that community as to the interment of Harry and Clara Bray and other Aboriginal persons, and the presence of a gunyah; evidence through the AHIMS site card of the report to George Davidson from persons, "an old [A]boriginal" and Jimmy Kay, who may be supposed to have had direct knowledge of the facts; evidence of the continued preservation of the site by successive owners, George Kay and Philippa Nichol (supporting, it is said, an inference of continuance); and documentary records such as the AHIMS site card,

publications of the OEH, and records of public authorities such as Byron Council which it is said repeat the matters of repute and which are likely to be drawn from one or more of the above mentioned sources or from similar sources.

523 The purchasers rely on Mr Robins' expert report dated 21 June 2016 which locates the site within the boundaries of Lot 1. It is submitted that the documentary evidence shows that numerous secondary and tertiary sources have acted on the AHIMS registration and that the reputation is firmly established. Reliance is also placed on the evidence given by each of Ms Kelly and Ms Nicholls and to the fact that the registration of the site as an Aboriginal burial site was disclosed in cl 47 of the resale contract (pointing again to Mr Lonergan's report prepared in connection with marketing the property for resale that included the statement that "[t]his site will need to be maintained as part of any continued use or redevelopment of the site" and gave the site card reference number 4-4-36).

524 The purchasers say that human remains would not be "'originally real property'" (there being no title at common law to a dead person's body; see *Williams v Williams* (1882) 20 Ch D 659). Further, it is said that the memorial stone and plaque have a secondary significance in that Mr Carter's evidence is that he has been acquainted with the site since about November 1990 (and managed it from 1991).

525 Insofar as the amended defence (at, *inter alia*, [42]) denies that the vendors have any "non hearsay" knowledge of the "continuing" existence or location of Aboriginal remains and asserts that these are "matters that would presumably require the archaeological excavation of the site" (reference also being made to [5]-[10], [23] and [24] of Mr Carter's affidavit of 10 February 2016), the purchasers submit that Mr Carter's evidence (at [9] of his 10 February 2016 affidavit) amounts to an admission *inter partes* but in any event is evidence of reputation.

526 Insofar as it is submitted for the vendors that it cannot be assumed that human remains would survive to this day, even if originally buried in the site, the purchasers say that this suggests that the vesting in the Crown of remains of

Aboriginal persons will at some point cease to be operative; and that this invites speculation as to the longevity of human remains (and also as to the contents of graves, which it is said might be expected to contain also clothing, ornaments and other objects) and that this would require archaeological excavation. Pausing here, it is to my mind speculative to make any assumption as to how the burials recorded in the historical accounts occurred other than as there recorded and I have no intention of entering into, nor would the evidence permit, debate as to the longevity of human remains.

527 The purchasers further say that there is no suggestion of the vendors having made application at any stage for a permit for archaeological excavation; and submit that it is doubtful that, if such an application were made, a permit would be granted "to facilitate the disproof of something that Mr Carter seems to have admitted on many occasions to be true, especially given the undisturbed presence of a memorial stone for decades and other historical evidence". Reference is made in this regard to Mr Robins' comments on the practice of the OEH in respect of the grant of permits (see Everick Report at 23, 31).

528 The purchasers say that the consequence of the vendors' position would be that (in spite of the due diligence provisions in ss 87(2) and 90Q(3)) no one could be expected to know whether or not land was actually affected by a title to Aboriginal objects vested in the Crown; and that vendors and purchasers would be encouraged (every time developable land was to be sold) to apply for permission to excavate, and thus to disturb Aboriginal burial sites (which the purchasers say this legislation was intended to inhibit, referring to s 90K which prescribes factors that the Chief Executive is to take into account when asked to grant a permit). It is noted that the *National Parks and Wildlife Act* requires account to be taken of the wishes of Aboriginal persons (see s 90K(1)(f)-(h)). The purchasers submit that an Aboriginal grave, once it has vested in the Crown, remains property of the Crown perpetually, unless and until it is disposed of or destroyed in accordance with the provisions of the *National Parks and Wildlife Act*.

529 Insofar as the vendors have raised doubts as to whether the remains of Harry and Clara Bray had been disturbed when the pool at the resort was excavated

and constructed (see the Parker Report, and the account of Lorna Kelly on the DVD (to which I have already referred), which account was confirmed in the cross examination of Ms Kelly and Ms Nicholls (see T 168.49 to T 169.16, T 183.45 to T 184.5), the purchasers note that the statements in the evidence of Ms Nichol (at [8]-[13]) and the Parker Report were not squarely explored with Ms Kelly or Ms Nicholls in cross examination. The purchasers say that the persistence of the reputation that the remains are in the site was not challenged; and that it was not put to Ms Kelly or Ms Nicholls for example that they had no belief that the remains are buried in the resort or that the report to them set out in their affidavits (to the effect that the remains are buried in the resort) was not received by them. The purchasers note that Ms Nicholls (at T 169.45) confirmed that her understanding is that the remains were in the vicinity of the pool.

530 The purchasers point out that the Parker Report suggests that the remains were "discovered" but also states that they continue to exist in the resort and were acknowledged by a stone and plaque; that Ms Nichol was emphatic that the graves were not disturbed; that they were located by the pool fence; and that the stone was deliberately placed six or seven metres away from the actual grave site; and reference is made to a statement on the DVD *"'Walking with my Sisters"* (in a voice said to be that of Ms Yvonne Lucille Graham) that "it's very important to us, where our great-grandparents are buried there, in the area there", as also demonstrating a continuing reputation that the remains of Harry and Clara Bray are buried in the property (as, it is said, does the depiction in that video of the site visit and the comments made during that visit).

531 The purchasers say that any challenge to the existence of the reputation needed to be squarely put to the relevant witnesses. It is further noted that Mr Piper was not cross examined about the report made to him by the late Mrs Dulcie Nicholls and by Mrs Linda Vidler which also states that the remains are buried in the site; and that the vendors sought expert evidence from Mr Parker, but called no evidence from him on this subject (and, in this regard, it is submitted that it should be inferred that his evidence would not have assisted

the vendors with any contradiction of the statement in his report, which puts the location of the remains as still in the site).

532 The purchasers say that, insofar as the reputation evidence includes evidence to the effect that the remains were moved when the pool was constructed, it does not assist the vendors. Rather, it is said, this evidence tends to confirm that the remains are located within the land because: it states that they were found when the excavation was made for the pool; it states that the remains were memorialised within the site; and it states that they are in the site. It is said that the plaque, which is associated with Ms Nichol's period of ownership, confirms that the remains were treated respectfully (not disrespectfully) and that, again, they remain in the site.

533 As to the statement of Lorna Kelly to Ms Nichol, after the pool was built, culminating in the comment by Ms Kelly as to "unfinished business", the purchasers place significance on Ms Nichol's evidence that she had directed excavation to avoid the site of the graves and she had observed that the gravesite was not disturbed during the work (and that no remains were in fact excavated). It is said, again, that none of this evidence was challenged.

534 As a consequence, the purchasers say that it should be found that the evidence of reputation of the original site remains the relevant reputation, and that, so far as it is contradicted by the "variant reputation" (as to the disturbance during pool construction), this arises from a concern that is refuted by direct observational evidence of Ms Nichol.

535 The vendors maintain their position that the hearsay evidence as to the location of the burial or graves of Harry and Clara Bray does not establish the existence of Aboriginal remains on the land as at July 2015; and say that the reputation evidence from Aboriginal elders suggests that any remains were disturbed and removed when the swimming pool was constructed at the resort.

536 The vendors note that the understanding of each of Ms Kelly and Ms Nicholls is based on what their mother and/or aunts told her. The vendors emphasise that, on the DVD, Lorna Kelly said that she did not know what was done with the remains of Harry and Clara Bray after the pool had been built; and that Ms Nicholls accepted in cross-examination that *"*no-one really knows whether

the remains still exist because of the work done with the pool and other work in the area" (see T 169.30) and that when she first visited the area, the pool, the stone and the memorial plaque were already in place.

537 The vendors also note that both Ms Kelly and Ms Nicholls refer in their affidavit evidence to the former Aboriginal Reserve. The vendors say that, insofar as their understanding seems to equate the Aboriginal Reserve and the Rainforest Resort as the same land, this is not accurate. In this regard, the purchasers say that the overlap of the legal boundaries of the Aboriginal Reserve is of no significance; rather, that what is important in evaluating the evidence of the Arakwal people was their appreciation and history of connection with the site.

538 The vendors point out that Ms Nichol purchased *part* of the subject land (that is, Lot 1) from Mr Davidson in 1985; that Lot 1 had formerly been used as a dairy farm; and that sandmining had also taken place on the subject land (by which I take the vendors to the land as a whole since there was no suggestion of sandmining on the Rainforest Resort part of the land). As to the suggestion of sand mining, the purchasers say that this was without foundation. It is noted that sand mining is mentioned in the DVD at a point when the people are standing on the beach and dunes.

539 The vendors say that there is credible evidence from George Flick (the only contemporary witness of the burial) that puts the location of the burial to the south of the subject land in Suffolk Park. This is based on the extract from chapter 8 of the book entitled *Time and Tide Again: A History of Byron Bay* (2001, Northern Rivers Press) (referred to above) (at 82):

> I will never forget one day I went down to see old Harry. I peeped inside the old gunyah and there was Harry sitting there. … I said: "Are you asleep Harry." When I shook him he just toppled over and didn't move. …
>
> The police came out and asked Dad and Wally if they could cut some rough boards out of a ti-tree to make a box. They sawed this up at the mill. It was so heavy being made out of green timber, that it took four of them to carry it down the road. My brother and I got in it, we thought it was great. The Church of England minister came out. It would be 1920. … They buried him in that area. *There was a lot of Aboriginal people buried in that area where the houses have been built today*
>
> [emphasis as per vendors' submissions.]

540 The vendors say that the "area" referred to here by Mr Flick (purportedly the only contemporary witness of the burial) is well south of the subject land, namely in Suffolk Park, on the basis that Suffolk Park is "where the houses are today". The vendors submit that Mr Robins, the archaeologist called by the purchasers, agreed with this (the purchasers cavil with this). The vendors also point out that this is consistent with the location identified in Ms Collins' Aboriginal Cultural Heritage Assessment dated June 2015 and note that Mr Robins agreed with this (although, as I have previously outlined, he had plotted site ID 4-4-36 on Lot 1 on the basis that he had assumed certain errors had been made by Ms Collins when doing a "sense check" against her work – see above). Pausing here, as to the vendors' submission in respect of the location of the burial at Suffolk Park, the purchasers point out that Mr Robins did not agree that Suffolk Park was the area referred to "where houses are today"; rather, his answer (at T 318.3) was:

> A. Suffolk Park and my understanding is may include lands to the north as well, but that's an assumption, but, yes.

It is noted that in the George Flick memoire, the "area" refers to something previously identified; and that the only area previously identified is the place where Harry Bray lived (the "old gunyah").

541 The purchasers accept that Mr Robins clearly disagreed with Ms Collins' report and that it may well be that the reference by Ms Collins to GDA, rather than AGD, may be a source of error. However, the purchasers (somewhat plaintively) say that the vendors have had three years (since Mr Robins' report) to prove Mr Robins wrong and that the vendors cannot explain why Jimmy Kay went to the wrong site to pray (if that be the case).

542 The vendors note that various of the documentary material seems to be sourced from the memorial plaque or the content of the 1980 site report and or else the source is unknown (such as the statement in the Norman Application that "[t]he foundations of an early gunya are close by, under a covering of fishbone fern"; and the statement in the document entitled "Aboriginal history" forming part of some papers for the Social/Community Advisory Committee Meeting of Byron Shire Council on 14 June 2011 that "Harry and Clara Bray are buried opposite Byron Bay Gold Club". (As to the Norman Application,

again the purchasers emphasise that Mr Carter signed the consent and approval.)

543 The vendors also point to the qualification that appears on the AHIMS search result dated 27 July 2015 (as extracted earlier) that:

> Information recorded in AHIMS may vary in its accuracy and may not be up to date. Location details are recorded as a grid references and it is important to note that there may be errors or omissions in these recordings.

544 The vendors further point to Mr Robins' experience that the AHIMS search results should be treated with caution, as they frequently contain inaccuracies.

545 As to Mr Lonergan's report of November 2015, the vendors say that this can only be an admission of an anecdote, not an admission of the fact. It is noted that Mr Lonergan said in his oral evidence that he did not speak to Mr Carter about the report; that he obtained the site identification number from the National Parks and Wildlife website before preparing the report; that it appeared from the mapping that the references in the National Parks and Wildlife documentation "didn't seem to relate to this property. It seemed to be somewhere proximate" (see T 305.40); and that, when he contacted the Aboriginal Officer with Byron Shire Council, that person knew nothing of the site and so Mr Lonergan said it was a "dead end" and that he did not pursue it further.

546 It is noted that the expert report from Mr Robins records the result of (hearsay) "consultations" with a Marcus Ferguson (who expressed the opinion that "Aboriginal burials" were at the site of the swimming pool) and Delta Kay (who claimed that "there were burials" in the Rainforest Resort); and that the expert report from Adrian Piper similarly refers to discussions with Ms Nicholls and with her mother and aunt (Linda Vidler) in November 2007, to the effect that Harry and Clara Bray were buried in the "Wheelers Resort".

547 Further, it is submitted by the vendors that even if it is accepted that the information from the old Aboriginal person to Mr Davidson's father is accurate as to the approximate location of the burial site, there is no evidence to support the proposition that nearly 100 years later there are any Aboriginal remains in existence near the location at all (the vendors here noting again that there has

been no archaeological or other investigation(s) to determine if there were any Aboriginal remains in existence on the subject land in 2015).

548 The vendors thus say that the reputation evidence to the effect that the burial or grave site of Harry and Clara Bray is reputed to exist near the memorial stone and plaque does not establish the existence of Aboriginal remains on the site at the relevant time.

Remains/burials of other Aboriginal persons

549 Reference is made by the purchasers in this regard to the evidence of Mr Cheers (in his 27 June 2016 affidavit at [71]-[73]) of statements made by Mr Carter on 13 July 2015 to the effect that the site was of longstanding use by Aboriginal people and that there could be very many burial sites in the property (evidence that is disputed by Mr Carter); as well as to the evidence of Ms Kelly and Ms Nicholls as to other burials on the site. The purchasers say that the existence of other remains/burials is supported also by the site card 4-4-36, the Parker Report and other documentary references.

550 The vendors dispute the existence of other Aboriginal remains on the site for reasons similar to those advanced in relation to the allegation that the remains of Harry and Clara Bray are buried, and still exist, on the land.

Remains of a gunyah

551 The purchasers rely on documentary references to a gunyah (a traditional Aboriginal shelter) on the land, including the Norman Application (at 3) (see Mr Cheers' affidavit of 27 June 2016 at [89]-[90]; and at [74] as to a purported admission), referred to in the Parker Report at 14. The relevant statement in the Norman Application is that:

> The burial site of Harry and Clare [sic] Bray, prominent Bundjalung elders buried in 1890 is on Lot 1. The foundations of an early gunya are close by, under a covering of fishtail fern …

552 The purchasers also note that in *"Time and Tide"*, George Flick writes that Harry Bray lived opposite the Golf Club (which is opposite to Lot 1); that "he lived in a grand old bark gunyah"; and when Harry Bray died, Mr Flick found him in the gunyah. Reference is also made to the Historical Report Arakwal National Park as supporting the location of the gunyah on the site (sourced from representations by the late Mr Davidson).

553 The purchasers also rely on the evidence: (see from T 266.40) where Mr Carter accepted having communicated with Amanda Norman or Peter Parker in relation to the Aboriginal cultural heritage aspect of the Parker Report; (see from T 170.25) that Ms Nicholls recalled seeing one stump and the area being overgrown; and (at T 184.22) that Ms Kelly said her mother around about the year 2000 told her about some stumps.

554 The purchasers contend that the remains of a gunyah would be capable of qualifying as an Aboriginal object (predating the commencement of s 33D of the *1967 Act*), constituting an improvement effected by human intervention, rather than naturally part of the realty, and constituting material evidence of Aboriginal habitation. Pausing here, I have no difficulty with the contention that if the remains of a gunyah are on the land then this would be an Aboriginal object under the legislation. The issue, relevantly, is whether it is established that the remains are there.

555 The purchasers note that Mr Carter accepted that there is a relic of a timber structure protruding from the ground (see his evidence from T 277.1) and they say that it is not controversial that on 13 July 2015, Mr Carter pointed at something and mentioned to Mr Cheers and Mr Adam Mehmet about "original footings and remains" of that structure being hidden under some shrubs (see his affidavit at [32(h)]). The purchasers say that the issue is whether or not it was a gunyah. The purchasers contend that on 13 July 2015, at the site, Mr Carter made an admission that it was a gunyah or at least an Aboriginal structure. Mr Carter in his evidence denied making this admission, and denied that it was a gunyah (see at T 256.26 and T 277.43); but Mr Carter also said that he does not know what the structure has been used for (see at T 256.24).

556 The purchasers point out that the reason Mr Carter does not think it could have been a gunyah is because of the "cement base" and "some tin on it" (see T 252.40 and T 276.44) but they note that Mr Carter later said the concrete and the brick and the tin was located "right next door" and "adjacent" to the structure (see T 277.47). It is noted that Mr Carter says that it was in the vicinity of Cabin 1 that he pointed at the remnant (see T 252.35), although he later said it was between Cabins 2 and 3 (T 256.13). It is also noted that Cabin

1 is distinct and distant from the dairy shed (see T 252.39) at the site of the cabana (which is confirmed by the Parker Report). The purchasers say that Mr Carter was unable to explain the distinction he sought to draw between a dairy shed and a milking shed (see T 253.5). It is noted that there is no historical record in evidence that supports the existence of a second shed structure associated with the dairy.

557 The vendors say that there is no evidence that any "remains" of a gunyah existed on the land in July 2015. In this regard, they emphasise that the Parker Report refers to George Flick's reminiscence of Harry Bray living "down a bit of a road" just opposite the Golf Club; and that Harry "lived in a grand old bark gunyah - they used to have a fire in there for warmth" in the following terms (at [1.5]) as "Harry lived in a gunyah just off the main road opposite the gold course, *presumably the site*" (*Time and Tide Again: A History of Byron Bay*, to which I have previously referred) (emphasis added as per vendors' submissions). The vendors emphasise that there is nothing in the Parker Report to the effect that any remains of a gunyah existed in 2012; and they submit that there is no reason to suppose that a "bark gunyah" has survived since Harry Bray's death in 1922.

558 It is noted that the 1980 site report includes the hand drawn sketch of "land with burials of Harry & [sic] Clara Bray" and, in an area denoted as "scrub", there is a square with the words "remains of old house used by Aboriginals" but the vendors point out that this was nearly 40 years ago.

559 As to the evidence of Ms Kelly (of an occasion when her mother pointed out some stumps that were situated close to Broken Head Road that were said to be stumps of a hut "that our Elders used to use"), the vendors point out that this occurred after the pool was built but before the DVD was published in 1998; and that, in her oral evidence, Ms Kelly confirmed that she did not actually see the stumps - her mother "just showed the direction - there was too much grass" (see from T 185.10).

560 As to the evidence of Ms Nicholls (that she received stories of family staying in "a hut" that was close to Broken Head Road and gave evidence of observing a "stump" that was like "erected footings"), the vendors note that she described it

as “timber sticking out of the ground” (something like about 30 cm) and that it was deteriorated; that the area was overgrown and that Ms Nicholls was unable to say whether her observation was made before or after the pool was built (see T 171.25).

561 The vendors note that there is no reference to any remains of a gunyah on the Rainforest Resort in the DVD *“Walking with my Sisters”.*

562 As to Ms Nichol’s evidence (as to the discovery of “stumps in the ground”, where Mrs Davidson had previously indicated as the location of the Bray hut, after she purchased the land in 1985), the vendors say that whatever timber stump(s) may have existed historically (noting that Ms Nichol’s observation was made about 30 years ago) and even assuming that they related to the “hut” referred to by Ms Kelly and Ms Nicholls, there is no evidence to show that the stump(s) existed on the land in July 2015. The vendors emphasise that there is no reference to the remains of a gunyah in the AHIMS search.

563 The vendors point to Mr Carter’s evidence that he had not seen anything on the land that looked like the remains of a gunyah (see his 21 May 2019 affidavit at [23]). It is also noted that he had an interest in the cultural history of the area and that he often looked to see if there were any visible artefacts on or around the Rainforest Resort yet he did not find anything.

564 The vendors note that there were remains of the old dairy near Cabin 1 and there were four stumps that looked to be part of a water tank stand. They point to Mr Carter’s oral evidence that it had “cement foundations, there were bricks and tin. The tin was collapsed onto … the cement”; and that, in re-examination, Mr Carter described the “building” as “ruins of some kind of structure … a cement base … some fragments of board, fibre board … quite small” and referred to four pieces of timber protruding from the ground about “[three] foot apart … in a square”. It was said to be right next to where the concrete and the brick and the tin was located. Mr Carter’s lay opinion was that it “was definitely not a gunyah … quite different”.

565 The vendors say from this that it follows that there were no Aboriginal objects on the subject land in July 2015 in the form of the remains of a gunyah.

A “mound” of significance to the Aboriginal people

566 Mr Cheers gives evidence as to a “mound” that he says Mr Carter advised him was of Aboriginal significance. Mr Adam Mehmet similarly gives evidence in relation to this “mound” in his affidavit sworn 9 June 2016 (at [56]).

567 The vendors say that there is no evidence of a ceremonial mound on the subject land in July 2015; that it is not referenced in any of the documents or the purchasers’ affidavit evidence in relation to the subject of Aboriginal remains; and it is not referred to in the 1980 site report or the AHIMS search. (It is noted that there is a reference to a “Bora/ceremonial ground [#04-5-0036 [destroyed]” in the email dated 15 July 2015 to Mr Gavin Brown but that the former Everglades (now the Byron at Byron Resort) referred to in the email is to the south of Lot 10 DP.)

568 The vendors point to Mr Carter’s evidence that he had not seen anything on the land that looked like a “[c]eremonial mound” and had no knowledge of a “large mound” next to the “second house site”; and to his oral evidence (see from T 251.49), in which he speculated that a photograph seen in the DVD of “Bobby” (Harry Bray’s father) and others might have been taken near a sand dune close to the eastern boundary of Lot 1.

569 The vendors say that it follows that there was no Aboriginal object on the subject land in July 2015 in the form of a ceremonial mound.

Bunya pine

570 Finally, it is not disputed that there is a bunya pine located on the site. The purchasers note that the Parker Report (at 14) states that:

> There are a number of large mature trees at the site. These include a bunya pine close to a burial area located at the site. The bunya seed is likely to have come from the Bunya Mountains in Queensland after the last Bunya Festival in the late 19th century. As many as 3,000 aboriginal people travelled up and down the coast for the bunya festival, carrying seeds on their return (www.derm.qld.gov.au/parks/bunya-mountains).

571 It is noted that Ms Nichol in her affidavit at [6] relates further information provided to her by Mrs Davidson in relation to the bunya pine. The purchasers say that the Aboriginal planting and cultivation of traditional trees associated with Aboriginal festivals and cultural practices means that such trees are capable of constituting Aboriginal objects.

572 The vendors accept that there are three bunya pine trees on the subject land. They note that one is 30 metres high and located in the vicinity of Cabin 4.

573 However, the vendors say that a tree cannot be an Aboriginal object. It is submitted that it is inconceivable that the legislature intended a tree to be caught by the definition (such that the tree is the property of the Crown).

574 Insofar as the Parker Report (at [1.5]) states that "[t]he bunya seed is likely to have come from the Bunya Mountains in Queensland after the last Bunya Festival in the late 19th century. As many as 3,000 [A]boriginal people travelled up and down the coast for the bunya festival, carrying seeds on their return", the vendors say that this says nothing about the tree being an object or material evidence relating to Aboriginal habitation; and they note that there is no reference to this in the 1980 site report or the AHIMS search.

575 As to Ms Nichol's affidavit evidence that Mrs Davidson told her that "the Brays lived near where a number of bunya nut trees grew and these trees were regarded by the Aboriginals as a very important food source", the vendors say that this is the only (hearsay) evidence in the purchasers' case that refers to a bunya pine tree; and that it cannot be reputation evidence, for the reasons given in relation to the other alleged Aboriginal objects.

576 It is submitted that even if it is admitted, however, this evidence does not establish that the tree(s) (as distinct from any nuts that may have been eaten) is, or are, an object or material evidence relating to Aboriginal habitation. It is submitted that a sensible construction of the definition of Aboriginal object would not be that the fact that the fruit of a tree is eaten by an Aboriginal person renders the tree an Aboriginal object under the *National Parks and Wildlife Act*.

Determination

577 As to each the alleged Aboriginal objects, I find as follows.

578 First, in relation to the memorial stone and plaque I accept that they are, relevantly, a "deposit, object or material evidence …" (generally for the reasons articulated by the purchasers).

579 Where I have had difficulty is as to whether the memorial stone and plaque satisfy the second component of the definition namely as "*relating to* the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction" (emphasis added). Critical to this is the meaning, and scope, of the conjunctive phrase "relating to"; a phrase that in other contexts has been recognised as being of very broad scope (see, for example, *Waugh Hotel Management Pty Ltd v Marrickville Council* [2009] NSWCA 390 at [44]-[52] per Campbell JA and at [159]-[161] Young JA).

580 Pausing here, as to the requirement that the thing relate to "habitation before or concurrent with (or both) occupation … by persons of non-Aboriginal extraction", I have no difficulty accepting that if it is established that the memorial stone and plaque *relate to* habitation then no issue arises as regards the temporal dimension of that habitation. This is because, by the language "habitation *before or concurrent with (or both)* the occupation of that area by persons of non-Aboriginal extraction" (emphasis added), the definition does not circumscribe any temporal limitation.

581 As noted above, the purchasers contend that the memorial stone and plaque satisfy this component of the definition because "of the assertion that [the memorial stone and plaque] contain concerning the site as a burial site for Harry and Clara Bray, elders of the Bundjalung tribe"; and say that they relate to Aboriginal habitation because they comprise "a memorial to particular elders of the local Aboriginal tribe and makes assertions concerning their burial site".

582 The vendors, to the contrary, submit first that the "stone and plaque have no connection to Aboriginal habitation in the past, to the contrary, the words of the inscription clearly acknowledge *deceased* Aboriginal people buried *near* the site". To the extent that this particular submission proceeds, at least in part, on a purported temporal limitation – being, in effect, that an object must relate to habitation contemporaneous with the creation or placement of the object itself – that, as I have just indicated, is not evinced by the words used in the statutory definition. To that extent, I do not accept this submission.

583 Second, as adverted to above, the vendors submit that if the purchasers' contention be correct, then every tombstone or memorial of a deceased Aboriginal person who lived in New South Wales, would be an Aboriginal object and be property of the Crown. To this, it is submitted by the purchasers that assuming that they had been "abandoned" (noting that the vendors have previously in this case referred to ancient law of the Church of England under which headstones in churchyards remained the property of those who erected them), if there is no one who retains property in a headstone, to care for it, then it would promote the policy of the *National Parks and Wildlife Act* that "such headstones of Aboriginal burials should be legally protected on pain of criminal sanction against despoliation by those who have little respect for aboriginal people".

584 The vendors' submission seems to me to be put too broadly in that, pursuant to s 83(1), an Aboriginal object shall be, and deemed to have always been, property of the Crown if: the object was immediately before the commencement day, deemed to be the property of the Crown by virtue of s 33D of the *1967 Act*, and the object is abandoned on or after that day by a person other than the Crown.

585 That aside, it is further said by the vendors that, "[w]hilst the Court of Appeal in *Country Energy* referred to the breadth of the definition, it needs to be sensibly applied to 'signs' of actual Aboriginal habitation". They maintain that it is difficult to conceive that the legislature intended memorials of deceased Aboriginals to be caught by the definition.

586 The use of the word "signs" has the potential here to confuse the issue. An accepted meaning of a "sign" is something that is used to convey information. Here, the memorial stone and plaque do, quite literally, "convey information" about "actual [past] Aboriginal habitation". To that extent, the use of this word and the language of the submission more generally add little to determining the relevant meaning of "Aboriginal object".

587 Nevertheless, there may be some force to the underlying submission; being, if I understand it correctly, a purported distinction between: on the one hand, actual, direct evidence of human habitation at, or of, a place (for example,

building structures); and on the other, signs, notices and such other secondary materials recording, as an historical or other such record, the fact or opinion that a place was once inhabited.

588 I have been unable to identify any authority that has squarely considered this point (being the relevant meaning and scope of "relating to" as a conjunctive phrase as deployed in the definition of "Aboriginal object").

589 Returning to, *Country Energy v Williams*, to which I have referred above, Basten JA observed (at [29]) that, "[c]learly the definition is deliberately formulated in broad terms which are apt to catch anything in physical form which bears witness to the presence of Aboriginal people anywhere within New South Wales" and as already noted his Honour referred (at [56]) to the very breadth of the definition of Aboriginal object, going on to say that "[e]ven the most mundane signs of Aboriginal habitation fall within the scope of the definition".

590 What can be drawn from the above is that his Honour considered that something that was a "sign" of Aboriginal habitation would fall within the definition. I respectfully concur with his Honour that the definition has great breadth and that even an object created today, and having no cultural significance to Aboriginal people, may fall within it. Insofar as his Honour refers to an object that "bears witness to the presence of Aboriginal people", this is consistent with looking for something that is a sign of Aboriginal habitation. If that is the test then this would be consistent with the distinction to which I have adverted above: that is, the purported Aboriginal object must bear witness in some sense to Aboriginal habitation and it may not be sufficient that an object be only a record of past habitation or historical events.

591 In *Henry v Director-General of the Department of Environment and Conservation* (2007) 159 LGERA 17; [2007] NSWLEC 722, Preston CJ at LEC opined (at [99]) that:

> [99] Any unidentified Aboriginal objects on the land would need, of course, to have physical existence in order to be Aboriginal objects within the meaning of the Act, that is to say they must constitute a deposit, object or material evidence relating to the Aboriginal habitation of the area. *An historical narrative can not be an Aboriginal object.* The Aboriginal objects *would also need to have some relationship to the alleged massacre.* An example would

> be where there is an associated burial on the land of Aboriginal persons who died in or as a result of the massacre or of their artefacts.
>
> [Emphasis added.]

592 As to the comment that "[a]n historical narrative can not be an Aboriginal object", I understand this to be directing attention to the requirement that there be a thing, an *object*, a *res* in order to fall within the definition and, therefore, that the historical account *eo ipso* is insufficient. That is to say, for example, while an historical account is *not* an object, a book detailing that account surely *is* an object. Next, the use of the phrase "would also need to have some relationship…" seemingly directs attention to the "relationship" between the object and the habitation (that being the relevant event) and in this sense directs attention to the requirement that the object, in the words of Basten JA, "bear witness" to the habitation. The example proffered by Preston CJ at LEC, of an associated burial, would accord with this interpretation.

593 However, there is a risk in treating the above observations as definitive of the scope of the objects that will fall within the definition. It must be noted that the definition does not speak in terms of a "sign" of Aboriginal habitation; it speaks in terms of a deposit, object or material evidence "relating to" such habitation.

594 With this in mind, it is convenient now to return to the vendors' submissions where emphasis is placed on the point that, under s 84 of the *National Parks and Wildlife Act*, the Minister may declare any place that, in the opinion of the Minister is or was of special significance with respect to Aboriginal culture, as "an Aboriginal place" for the purposes of the *National Parks and Wildlife Act*. The vendors emphasise that the *National Parks and Wildlife Act* distinguishes between an Aboriginal place and an Aboriginal object; and that, while rightfully accepting the "significance of the memorial stone and plaque to the Arakwal people", the memorial stone and plaque "could more naturally be classified as a *place* of significance within the statutory scheme (and within the ordinary language of s 84), rather than an "Aboriginal object".

595 More precisely perhaps, this submission could be understood as being that the memorial stone and plaque could be classified as a *marker of* (cf "as") a *place* of significance within the statutory scheme.

596 To similar effect, s 2A of the *National Parks and Wildlife Act* identifies the statutory objects of the Act relevantly to include the conservation of objects, places or features of cultural value within the landscape, including, places, objects and features of significance to Aboriginal people. This is a further illustration of the difference to be drawn between *places* and *objects* of significance.

597 This is, however, not the end of the matter presently under consideration. I see no reason why an object that is a marker of an Aboriginal place could not also be an Aboriginal object for the purposes of the legislation and I accept the purchasers' submissions in this regard that these are not mutually exclusive terms. Crucially, the statutory definition is tolerably broad.

598 Therefore, if it can be established on the evidence that the memorial plaque and stone have borne witness to the presence of Aboriginal people or otherwise relate to Aboriginal "habitation" then I would have little difficulty concluding that the memorial plaque and stone are, relevantly, "Aboriginal objects". The requisite relationship might perhaps be established if, for example, it could be demonstrated that Aboriginal persons have participated in traditional, cultural, customary, and/or spiritual practices at the memorial stone (and in one sense the attendances at the site by Jimmy Kay to pray might suffice for this purpose). Nevertheless, I do not see this as essential for the objects to be seen as "relating to" Aboriginal habitation; nor perhaps would it necessarily be sufficient.

599 Indeed, what is required (at the risk of belabouring the words of the definition) is that the object be one that relates to Aboriginal habitation or something that is material evidence relating to Aboriginal habitation. In that sense, it must also be remembered that the relevant area of habitation is the state of New South Wales (not the location of the object itself – here, the memorial stone).

600 I have had considerable hesitation on this issue. A memorial stone or plaque (relating to human remains) certainly relates to human habitation in the sense that it is recording or commemorating the fact that someone who is now deceased was once living. Does it relate to the habitation of the deceased person of any particular area? It seems to me that it is possible to conceive of

memorial stones or plaques that are placed to commemorate places where someone died but not where that person lived. A common example would be roadside crosses or markers to commemorate the site of deaths on the road. The person there commemorated might not have inhabited that particular area at all. In the present case, however, I think it is easily established on the balance of probabilities that Harry and Clara Bray lived in New South Wales (by way only of example, the reputation evidence is that they lived in a gunyah on the land opposite the Byron Bay Golf Club and the reputation evidence is that they were buried in that area; and I accept that the co-ordinates plotted by Mr Robins are likely to be the most reliable record of the burial site as recorded in the original site record, particularly having regard to the evidence that their descendants came to pray at the site and believed this to be their burial place). However, even if the burial site was closer to Suffolk Park, the fact remains that Harry and Clara Bray lived in the area that is New South Wales and the memorial stone and plaque, in recording their burial, are objects that provide material evidence of the fact that they lived (in New South Wales).

601 In those circumstances, having regard to the breadth of the definition, I consider that the memorial stone and plaque fall within the definition of Aboriginal objects under the legislation.

602 As to the question whether the memorial stone and plaque were, relevantly for the purposes of s 83, “abandoned”, I consider the tombstone example unhelpful. That is because in the present case there is no suggestion that ownership of the memorial stone and plaque was ever asserted by the authority which placed them on the land after doing so. I consider that they would be treated as having been abandoned having regard to the common law test of abandonment (see, for example, *Gupta v Fordham Laboratories Pty Ltd* [2018] NSWSC 551 particularly at [166]-[184]).

603 I should also say something, in addition to what I have said previously, in relation to patent defects in title; specifically, whether the memorial stone and plaque, being (as I have just found) a defect in title, constituted a “patent” defect for the purposes of this alternative case (it will be recalled that a vendor has no obligation to disclose a patent defect in title).

604 I have previously observed that Mr Cheers was, at least initially, prone to pedantry and was somewhat unhelpful. Relevantly, I have found that his "jungle" evidence is not plausible. Relatedly, I have observed that Mr Adam Mehmet conceded that he himself may have walked past the memorial stone and not noticed it. I repeat these observations because it may be fairly accepted, on the evidence, that Mr Cheers and Mr Adam Mehmet might have seen the memorial stone on their inspection prior to the exchange of contracts (and thereby ground the argument that this defect was patent).

605 However, notwithstanding that plausibility, I do not think there is sufficient evidence, or even any evidence, to indicate that they paid any attention to the memorial stone and certainly not that they read the plaque or had identified that this was, in fact, a memorial (let alone them having read the plaque or appreciated the significance as regards it being an "Aboriginal object" and the legal consequences of this). Indeed, the evidence indicates the opposite. Nor do I think, in these circumstances, there could have been a reasonable expectation on the part of the purchasers to conduct any further, more detailed surveys or to have appreciated the potential operation of the *National Parks and Wildlife* legislation. There is, to my mind, an analogy to be fairly drawn with *Shepherd v Croft*, as well as the other authorities to which I have referred in that regard.

606 I can deal with the remaining items more quickly.

607 As to the remains of Harry and Clara Bray (and possibly one or more of their children), the difficulty I have is that the reputation evidence does not establish the fact of burial, as opposed to the belief of burial; and for that reason, though I consider that belief to be accorded great weight and though I recognise the spiritual significance of the land as a burial site because of that belief, I am not persuaded that the evidence establishes as a matter of fact the existence of the remains on the property. It is therefore not necessary (nor appropriate) to determine the issue as to the longevity of human remains when buried as these would have been.

608 As to the remains/burial sites of other Aboriginal persons, I have reached the same conclusion. I would point out also that the lack of evidence of this is even

more problematic and the reputation evidence itself would place any such remains, not on Lot 1, but in the direction of the swampy ground near Tallow Creek.

609 As to the remains of the gunyah, while I accept the reputation evidence as to belief of its existence, I am not persuaded that the evidence establishes on the balance of probabilities that the timber stumps that were discovered were part of the gunyah nor that they still remain. Unlike the position with the burial sites, I would have thought this could have easily been established. It was not.

610 As to the ceremonial mound, I have reached the same conclusion as that in relation to the gunyah. I am left in the position where I cannot be satisfied to the requisite degree of proof that there is a ceremonial mound remaining on the property.

611 Finally, as to the bunya pine, I am not persuaded that a tree is an "Aboriginal object" within the definition. It is not to my mind "material evidence" relating to human habitation.

612 The remaining question for this alternative case is as to whether the presence of the memorial stone and plaque (constituting an "Aboriginal object") is a defect in title such that, on the application of the common law rule in *Dainford v Lam*, failure to remove it would entitle the purchasers to terminate or else whether that defect is so substantial or material as to satisfy the rule in *Flight v Booth*.

613 For the reasons given in relation to the purchasers' principal repudiation case, I consider that this claim is made good. Therefore, were I to be incorrect in my disposition of the purchasers' principal repudiation case, I would nevertheless come to the same conclusion on this alternative case (namely that the purchasers were entitled to terminate the contract and the same consequences for relief would follow).

Purchasers' alternative repudiation case

614 The matters to be determined under this alternative case arise irrespective of the outcome of the purchasers' principal contentions, this principally being the issue as to whether the vendors' conduct in issuing notices to complete (and

insistence on completion) in the circumstances amounted to a repudiation entitling the purchasers themselves to terminate (even if there was no defect in title). In particular, it is said that the purchasers' termination was valid because the vendors insisted on a notice to complete in circumstances where the purchasers had not been in default of any valid appointment to complete (and where the vendors had insisted on an invalid demand for interest in conjunction with their insistence on that notice to complete and/or refused to comply with a notice requiring them to withdraw the demand for interest).

615 The purchasers' position therefore is that: they were not in default of an appointment to complete; the vendors were not entitled to give a notice to complete; the purchasers were entitled to demand that the vendors withdraw their claim for interest; and, because of the vendors' insistence on these matters, the purchasers were entitled to (and did effectively) terminate the contract on 25 September 2015.

616 I have already set out the general principles relating to repudiation of contracts. The alleged repudiatory conduct here to be considered is the setting of the initial appointment for completion and the issue of the subsequent notice(s) to complete, coupled with the invalid demand for interest.

Purchasers' submissions

617 Complaint is made by the purchasers that, on 4 August 2015 (without prior warning), the vendors attempted to appoint the following day for completion. It is said that: 4 August 2015 was too late to attempt to arrange a settlement appointment for 5 August 2015 (especially if it were to occur at 11.00 am); the vendors' correspondence on 4 and 5 August 2015 attempting to arrange settlement was inconsistent; and the request for "the detail of that alleged defect and your claim" intimated that the vendors had no real expectation of completion on 5 or even 6 August 2015. It is further said that the effect of that last request was an acceptance that there was an unresolved objection to title which the vendors should consider and to which they should respond. It is submitted that Mr Lynch's letter of 28 July 2015 remained an operative objection to the title and still awaited substantive response. The purchasers say that the stance of the vendors taking further time to consider the objection was

inconsistent with retaining a right (if it otherwise existed) to have completion occur on 5 August.

618 Having regard to the relative positions of the parties, the complexity of the steps to be taken at completion, the interdependence of those obligations and the need for sharing of information to enable performance (such as the preparation and service of settlement figures, and directions to pay, so that appropriate cheques could be drawn), it is said that a party to such a contract is entitled to appropriate notice to perform his obligations, or notice of the details of performance, before he can be put in breach (referring to *Michael Realty Pty Ltd v Carr* [1977] 1 NSWLR 553 at 571C-D per Mahoney JA; *Gustin v Taajamba Pty Ltd* (1988) NSW Conv R 55-433 at 57,919 per Mahoney JA).

619 Thus, the position of the purchasers is that an appointment to settle was required to be made with reasonable notice and could not be unilaterally imposed without appropriate arrangements or opportunity for arrangements; that completion requires co-operation and reasonable arrangements for an event requiring mutual performance; and that this did not happen. Again, it is said, in this regard, that the purchasers were not in default in any event.

620 The purchasers point to aspects of the facsimile communications that it is said illustrate the shortness of time involved in these communications; in particular, the double fax headers and the handwritten alterations to Mr Lynch's fax number (said to indicate that the letters were drafted by one person, sent by facsimile transmission to Heydons' office and then on-forwarded by facsimile transmission to Mr Lynch); and the date inconsistency (in that the letter faxed on 5 August 2015 appears to have been drafted or in the process of preparation on 3 August 2015, before the letters that were sent on 4 August 2015). It is said that the letter sent on 5 August 2015 both purports to "confirm" an appointment to settle either half an hour earlier or a very short time after it seems to have been sent, but also engages with the objection to title that had been made, invites response "before the Completion Date" and concludes with the statement that the vendors will prepare for settlement on the 6 August 2015. It is suggested that this letter may have been drafted on 3 August 2015 and revised on 5 August 2015 (indicative of "extreme haste"). Furthermore, the

purchasers say that there is no suggestion that the vendors actually attended at Level 7, 400 George Street Sydney at 11.00 am on 5 August 2015 expecting and ready to settle.

621 The purchasers thus say that the 4 August 2015 letter was not reasonable notice, even if the vendors had been entitled to dispense with notice under special condition 21(c) (which the purchasers dispute in any event).

622 As to the 5 August 2015 letter, the purchasers say that the vendors' solicitor could have had no expectation that completion was actually going to take place on 5 August 2015 when asking for further information as to an alleged defect and a claim. Further, it is noted that under cl 14 of the printed contract for sale the parties are required to make adjustments for land tax and other matters. The purchasers point out that this information would normally be in the possession of the vendor and that it was not supplied by the vendors in the present case until 4 August 2015 (with the settlement figures themselves).

623 Reference is made in this context to the comment of Professor Butt (see at [16.70]) (to which I have previously referred) as to doubt and divergence in the authorities on who should prepare the settlement figures. It is submitted by the purchasers that even on the view that a purchaser should calculate and present the figures, it would still be necessary for the vendors to supply details to enable this to be done (such as, for example, the requisite land tax and rate notices).

624 In any event, the purchasers say that, as at 5 August 2015, they had not received a special condition 21(c) notice giving the required 14 days' notice. It is submitted that the inference is open that the vendors had no real expectation that completion would take place on either 5 or 6 August 2015 (it is said that they were "[n]o doubt seeking to test the seriousness of the purchasers' objection to the title").

625 As to the special condition 21 specifically, the purchasers contend that there is no construction of the contract that allows special condition 21 to be by-passed; and that what was required was formal written notice of registration of the transmission application in order for the time for completion to start running. It is noted that the contract was a conditional contract and notice under this

clause was a condition of the obligation to complete. The purchasers say that no notice (formal or otherwise) of registration of the transmission application was given 14 days before 5 August 2015.

626 The purchasers say that it is not to the point (referring to the amended defence at [20A](a)) whether the purchasers actually knew at all times that the transmission was in fact registered on 17 July 2015. They say that they did not know this but, more relevantly, they say that they did not at any relevant time receive notice of it as required by the contract. It is said that no notice was given by the vendors' solicitor to the purchasers or their solicitor at least, or even within, 14 days before 5 August 2015.

627 The purchasers maintain that "adventitious information" is not the notice required by special condition 21. It is noted that special condition 21(c) provides a timing mechanism; and that the requirement of notice (to be given by the vendors) is there for the purchasers' benefit (as well as for the vendors' benefit), in that it is a period that enables preparation for completion, including the necessary arrangements to have figures and funds ready.

628 Insofar as the vendors allege (in the amended defence at [20A](a)) that the purchasers' solicitor lodged the transmission application on 17 July 2015, the purchasers say that this must be a reference to Mr Garrett but that he had ceased acting for the purchasers at the latest by 15 July 2015, due to the conflict of interest which had by then arisen (referring to Mr Cheers' 27 June 2016 affidavit at [81]). Reference is made to the letter dated 27 August 2015 from the vendors' solicitor that states that "the same solicitor was acting for both parties but ceased acting for both parties on or around 14th July". I have considered above the correspondence in this regard. It would appear that Mr Lynch was not instructed until 17 July 2015 but that from 14 July 2015 (or at the latest 15 July 2015) Mr Garrett had indicated that he was ceasing to act for, among others, the purchasers. Moreover it would appear from Mr Garrett's evidence that the transmission application lodgement was put in train before 14 July 2015.

629 In any event, the purchasers submit that, in registering the transmission application, Mr Garrett was acting for the vendors, whose document it was and whose obligation it was to register it (see special condition 21(b)).

630 Insofar as the amended defence (at [20A](b);(c)) relies on the form of transfer served on 4 August 2015 and the notice to complete served 27 August 2015 as notice or "constructive notice" of registration of the transmission, the purchasers say that these events were not a notice under special condition 21 and, in any event, came too late to oblige the purchasers to complete the contract on 5 August 2015.

631 The purchasers attach significance to the fact that 14 days is also the period for a notice to complete (referring to special condition 7). It is said that, although the two notices serve different objectives for a vendor, the reason for the period of notice is the same or similar (namely, that it is in effect an agreement by the parties as to what is reasonable notice for the steps that are required to be taken by the party receiving notice to prepare or finish preparing for completion).

632 By contrast, it is said that the purpose of 21(c) is to state the consequences for completion and give to both parties certainty as to when it should occur, so that they can prepare accordingly, and co-operate as required by the contract; and that its importance is so that the parties know when time starts to run. It is said that the requirement for notice to be *in writing* also emphasises the function of notice as a starting point in a project of making obligations of performance and its timing tolerably certain.

633 The purchasers thus say that there was no obligation on them to complete the contract on either 5 or 6 August 2015, as no notice had been given under special condition 21 and, in any event, the attempt to arrange a settlement on 5 August 2015 was done without reasonable notice (and was further confused by the inconsistent letter faxed on 5 August 2015 suggesting that the vendors themselves would prepare for settlement on 6 August 2015).

634 Further, it is said that, to the extent that the vendors now assert that special conditions excuse them from providing a title free of Aboriginal objects, they must establish full and frank disclosure of the particular defects at the time of

contracting (citing *Szanto v Bainton* [2011] NSWSC 278 at [37] per White J, as his Honour then was).

635 As to the 27 August 2015 notice to complete, the purchasers say that the vendors' letter amounted to the vendors saying that they did not know whether or not there was a defect in title but giving notice to complete anyway. It is submitted that the statement in the notice that the vendors were "ready, willing and able to complete" was insincere. The purchasers say that this was not a *bona fide* notice to complete (in that a party that does not know whether or not it can perform and is not willing to find out is not "ready" and "willing" to perform).

636 The purchasers say that the vendors were, in any event, not entitled to give notice to complete because the purchasers were not in default; noting that no attempt had hitherto been made to give reasonable notice of a time for completion and no valid appointment for settlement had been made; nor had any such appointment passed unsatisfied through default of the purchasers. It is noted that the vendors had not validly appointed 5 August 2015 and in any event, had not insisted on it but had sought further information concerning the objection, which was later supplied. It is said that, thereafter, no attempt was made to make a further appointment for completion other than the notice to complete itself.

637 As to the claim for default interest, the purchasers say that this was unwarranted. It is noted that special condition 8 provided that, in case of failure by the purchasers to complete by the completion date without default by the vendors, the purchaser should pay interest on the balance of the purchase price at 10% per annum computed from day to day to the day of actual completion. The purchasers say that as there had been no such default, no such interest was payable. The purchasers say that no completion date had been set at all. They say that, even if the correct date was 18 August 2015, on either view the vendors were claiming more than they were entitled to and the purchasers were entitled to demand that they withdraw, or at least reduce, their claim for interest.

638 The purchasers maintain that the vendors' insistence on maintenance of a notice to complete (for the whole price, without any abatement, regardless of the admitted possibility of an irremovable memorial and the unrefuted allegation of Aboriginal remains based on documented admissions and the public AHIMS register) without the vendors knowing that they could complete and being willing to perform only in such manner as suited them, amounted to repudiation.

639 Further, the purchasers argue that the proposal for an undertaking that was contained in the 10 September 2015 letter is inconsistent with the claim that the vendors were ready and willing to complete the contract; and consistent with the "ambivalence" of the letter of 27 August 2015. It is submitted is that the real position is that the vendors in their own minds did not know that they could complete. Moreover the purchasers note that neither with the 11 September 2015 further notice, nor subsequently, did the vendors provide any undertaking to remove the impediment to the title or otherwise attempt to demonstrate that the title was free of any Aboriginal object.

640 Thus the purchasers say that the terms of the contract did not require completion by 5 August 2015 and that nothing was done by the vendors (under special condition 21 or otherwise) validly to appoint that date as the date for settlement. (Nor, it is said, did the vendors insist on completion at that time). It is thus submitted that, regardless of the issue between the parties concerning Aboriginal objects, the purchasers were not guilty of a failure to complete on 5 August 2015.

641 As to the second notice to complete issued on 11 September 2015, insisting on settlement on 28 September 2015, the purchasers say again that they were not at that time in default and that the second notice to complete was not justified.

642 As to the claim for interest calculated from and including 6 August 2015, the purchasers note that on 23 September 2015 they gave notice to the vendors requiring them to withdraw the claim for interest and submit corrected settlement figures in time for cheques to be drawn. This notice required the interest claim to be withdrawn by the following day, making time of the essence; and that, on 24 September 2015, the vendors responded refusing to

withdraw the claim for default interest. The purchasers say that this meant that the vendors were insisting on completion and payment of the whole sum including default interest by 2.00 pm on 28 September 2015 with time of the essence (and were unwilling to accept tender of the correct figure whilst requiring the purchasers to proceed with performance).

643 The purchasers argue that the objective position, therefore, was that the vendors would not perform their side of the contract unless the purchasers paid them an amount of money to which the vendors were not entitled under the contract; and that the notice to complete carried the implicit threat that the vendors would terminate unless the purchasers paid that money by the time specified. It is said that conduct of this kind will ordinarily amount to repudiation of a contract, giving the other party the right to terminate if it wished to do so.

644 Reference is made to *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 432; [1978] HCA 12, where it was held that an intention to repudiate a contract should not be attributed to a person who, though asserting a wrong view of a contract that he believes to be correct, is willing to perform the contract according to its tenor. The purchasers submit that willingness to perform a contract according to its tenor, once the correct position is understood, is something that excuses or explains conduct that is *prima facie* repudiatory (i.e., that it is necessary for the repudiating party to withdraw from or qualify the absoluteness of its position by indicating a willingness to submit to correction by the court if it be wrong).

645 It is noted that the question of repudiation must be determined objectively (see *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 657-658; [1989] HCA 23 per Deane and Dawson JJ). The purchasers say that it is not a requirement that the innocent party provide to the repudiating party an exposition of the correct position.

646 This, it is submitted, was repudiation entitling the purchasers were entitled to terminate the contract, as they did, on 25 September 2015.

Vendors' submissions

647 Insofar as the purchasers rely on the vendors' miscalculation of the interest payable under the contract for sale on the balance of the purchase money

pursuant to special condition 8, the vendors note that this was contained in the draft settlement figures. The vendors point out that Darke J found on the facts (in answering separate question 4) that the vendors did not repudiate the contract by advancing a claim for interest that was founded on an erroneous calculation. The vendors maintain that there is no reason to depart from that conclusion. Further, it is noted that the purchasers did not dispute the interest calculation at the time. Rather, it is said, the purchasers relied upon the alleged defect in title and asserted that the vendors were in default for that reason.

648 It is noted that, at the settlement appointed for 10 September 2015, the purchasers' solicitor attended with cheques drawn in accordance with the vendors' direction (that included the interest). It is submitted that the vendors' conduct, in the context in which it occurred, did not evince an intention no longer to be bound by the contract.

649 The vendors maintain that they were trying to have the purchasers complete the contract; and point to Darke J's finding that they were justified in thinking that they had grounds to issue the second notice to complete when they did on 11 September 2015. They also note that his Honour found that the purchasers seemed to accept that the date for completion was 5 August 2015 and that both parties proceeded from that erroneous base. It is submitted that in these circumstances the incorrect interest calculation advanced by the vendors could not amount to a repudiation. It is noted that special condition 8 was not an essential term of the contract.

650 It is submitted that, had the purchasers enunciated the correct interpretation of the contract as to the completion date, it is "highly likely" that the vendors would have recognised the error or that completion would have occurred with arrangements for the disputed interest being quarantined in a controlled moneys account to abide the resolution of the issue. It is further submitted that on any view, this was a minor aspect of a $3 million conveyancing transaction.

Determination

651 It is instructive at this point to consider the case of *Carydis v Merrag Pty Ltd* [2007] NSWSC 1220 (*Carydis*), a case concerning the sale of real property and alleged repudiatory conduct; not unlike the claims and pleadings in the present

proceeding. The factual background to the case is not straightforward and it is unnecessary for present purposes to go into any great detail in that regard.

652 Relevantly, in that case each of the draft contracts included a special condition in the following terms (see at [3] per Brereton J, as his Honour then was):

> 3. … "If completion of this Contract does not take place on the completion date as specified on Page 1 of the Contract otherwise than as a result of any default by the vendor the purchaser shall pay interest at the rate of ten per centum per annum (10%) on the balance of the purchase price and any other monies owing pursuant to this contract from the completion date until the date that completion actually takes place (but without prejudice to all or any other rights of the vendor pursuant to this Contract) and in addition the sum of $220.00 to cover legal costs and other expenses incurred as a consequence of the delay and it is agreed that the said interest and sum are a genuine preestimate of the vendor's losses. It is an essential term hereof that such interest amount be paid on completion.

653 In the events that happened, various disputes subsequently arose between the parties, including whether one of the parties was entitled to rescind one of the contracts (see from [5]).

654 One of those disputes, which arose later in time, concerned a purported right to interest (see at [16]-[17]). Of particular relevance for present purposes, it was there ultimately asserted by solicitors for the vendors that, in the event that the purchasers were only prepared to settle the transactions on the basis that no interest was payable, "it follows that [the purchasers] have repudiated their obligations under the agreements. We advise that [the vendors] accept your clients' repudiation. [The vendors] hereby terminate each of the agreements".

655 The purchasers responded relevantly rejecting the assertion that failure to respond to the earlier correspondence was repudiatory and seeking an explanation as to the basis upon which the vendors asserted an entitlement to interest (see at [18]). Further correspondence followed and the matter did not resolve as between several of the parties.

656 As to the insistence by the purchasers on their view of the contract that interest was not payable, Brereton J (having found that a binding contract had earlier been made under which no interest was indeed payable) observed (at [29]) that "[i]t follows … that the view asserted by the purchasers – that no interest was payable – was correct … As the purchasers were insisting on a correct view of the contractual position, there could not possibly have been a

repudiation". The corollary of this is, of course, that his Honour appears to have accepted that insistence on payment of interest, where no obligation exists under the contract properly construed, may in a particular case constitute repudiatory conduct.

657 In this regard, such repudiatory conduct will more readily be found where the insisting party intimates that its own performance is conditional on the payment of the interest to which that party has no contractual entitlement. *Carydis* demonstrates this; and it is but a particular incident of the more general propositions which I have previously outlined.

658 In answering question 4 of the questions posed for separate determination, Darke J did not consider that an intention on the part of the vendors to repudiate or renounce the contract should be inferred from their conduct (see from [128]ff of the Separate Question Decision). His Honour thought it difficult to conclude that the vendors were persisting in their erroneous interpretation in the face of a clear enunciation of the true agreement (there distinguishing the case from that of *DTR Nominees* at 432), saying that "[t]hey were told that the plaintiffs were not in default, but were not told that the completion date had not yet arrived. It is therefore difficult to conclude that the defendants were persisting in their erroneous interpretation in the face of a clear enunciation of the true agreement in circumstances where, while they had been …". His Honour said (at [132]-[133]):

> 132. It is appropriate to consider the defendants' conduct in the context in which it occurred. That context includes the on-going debate over what can fairly be described as the central issue, namely, whether the defendants were willing and able to show and make a good title. On that score, the defendants were in my view acting in accordance with the contract. Moreover, in circumstances where the parties had attended an appointment for settlement on 10 September 2015 (which did not proceed to completion only because of the defect in title issue), and no suggestion had been made that the time for completion had not arrived, the defendants were justified in thinking that they had grounds to issue the second Notice to Complete when they did on 11 September 2015 (see cl 15 and Special Condition 7).
>
> 133. Even if the defendants had no right to interest at all, I would not be prepared to infer from the defendants' conduct, viewed overall, that the defendants intended to repudiate the contract or not perform it in accordance with its terms. The erroneous position advanced concerning interest does not evince an intention to be no longer bound by the contract. In my view, neither does the defendants' conduct indicate that the defendants were only prepared to proceed in a manner inconsistent with the terms of the contract. I do not

> think that the conduct of the defendants was such as to convey to reasonable persons in the position of the plaintiffs that the defendants were renouncing the contract (see *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115; [2007] HCA 61 at [44]). I have not overlooked the fact that the defendants did not take up the plaintiffs' suggestion that an approach be made to the Court. I note, however, that this suggestion was made in relation to the defect in title question, not the interest question.

659 His Honour noted (at [134]), and I fully accept, that contractual repudiation is a serious matter, not something to be lightly found or inferred (his Honour there citing *DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd* [2016] NSWCA 117 at [39] per Gleeson JA, with whom Macfarlan JA and Sackville AJA agreed) and concluded that the conduct of the vendors in this case (referring to the refusal to withdraw the claim for interest) was not repudiatory as contended by the purchasers.

660 With respect, I have come to a different view. The difficulty for the vendors in the present case seems to me to be twofold: until notice in writing of registration of the transmission application was given the time for completion did not commence (reading special condition 21(c) as prevailing over the definition of completion date on the cover sheet); and until there was failure to complete on a date properly appointed for settlement, default interest was not payable.

661 Here, the appointment of 5 (or, confusingly, 6) August 2015 as the date for settlement cannot, given the time frame and the various matters still to be arranged prior to settlement, have been reasonable (and time had not yet commenced to run for the 14 day period to completion).

662 The first notice to complete is irrelevant because it was withdrawn (for other reasons). As to the second notice to complete on 11 September 2015, there still had been no notice in writing of registration of the transmission application. "Implied" notice in the sense of service of a transfer is not to my mind what is required to satisfy the requirement for notice in writing of the registration of the transmission application.

663 As to the significance of the incorrect claim for default interest, the difficulty I have with the vendors' submission that it is highly likely they would have acted differently is that the vendors had received a demand to withdraw the claim for

interest and to submit corrected settlement figures. Yet, the vendors refused to do so. Their position could not have been more plain in that regard, particularly in circumstances where time had been made of the essence for the withdrawal of the interest claim (see the letter of 23 September 2015). It must have been apparent to the vendors that the purchasers were taking the issue seriously and presumably the vendors made a conscious decision not to withdraw the default interest claim. In those circumstances, they were insisting on settlement in accordance with an incorrect view of the contract and they did so at the risk of being wrong and thereby having repudiated the contract.

664 This is a highly technical area of the law (as recognised in *Crowe v Rindock*). What in hindsight the vendors might have done had they realised the consequence of their actions is not to the point (but, if it were, then the response they gave to the sensible question that the position might be determined by reference to the court gives some indication of the likelihood that the vendors would have proceeded differently).

665 Were it necessary to determine, I would have concluded that this amounted to repudiation.

666 In light of determination of the purchasers' principal repudiation case, it is not necessary to do so.

Conveyancing Act s 55(1) and s 55(2A)

667 I turn now to the purchasers' claim for recovery of the deposit pursuant to the *Conveyancing Act*.

668 The purchasers note that s 55(1) of the *Conveyancing Act* is engaged where, by reason of a defect in title, the court would not have decreed specific performance had such an application been made; and that s 55(2A) gives the court a wide power to consider whether to order the refund of deposit. Reference is made to *Chambers v Borness* [2014] NSWSC 890, where Pembroke J said (at [10]) that the Court is to "to weigh in the balance the monetary outcomes to the parties".

669 It is accepted that, on an application under s 55(2A) the purchaser must show some injustice, or something that was inequitable about the conduct of the

vendor (see *Greek Orthodox Parish Community of St Marys and District Ltd v Denis Stanley Merrick* [2014] NSWSC 1196 at [17] per Young AJA).

670 In the present case, it is submitted that the principal injustice comes from the defect in title. The purchasers say that if the deposit is not refunded, the purchasers would essentially have been forced to accept something which is less than that for which they bargained, or risk losing the deposit. It is noted that "[a] purchaser who will suffer hardship may obtain an order under the section" (citing *Pratt v Hawkins* (1991) 32 NSWLR 319 at 324F per young J referring to the decision of Needham J in *Hasanovic v Polistena* [1982] NSW Conv R 55-078).

671 In the alternative, it is said that injustice arises from the vendors' conduct before and after contracting. It is said that it is common ground in the parties' evidence that the Aboriginal significance of the land was well within the vendors' knowledge; the purchasers' complaint being that it was not disclosed by the vendors before exchange notwithstanding the property was marketed as a development proposition.

672 It is noted that the re-sale, in which disclosure was made, produced a substantially lower price. The purchasers also note that it is common ground that, shortly after receiving the Parker Report, the purchasers spoke to Mr Carter to confirm the Aboriginal significance, and that, within eight days of exchange, the purchasers communicated doubts in the vendor's title to the vendors at the meeting in Mr Garrett's boardroom on 14 July 2015. It is said that, from that point, the vendors had opportunity to accept a rescission and promptly re-sell but that the vendors chose not to do so "attempting to hold on to an unjust gain".

673 The plaintiffs submit that such conduct on the vendors' part was unjust and that the power under s 55(2A) should be exercised.

674 In the circumstances, were it to have been necessary for the purchasers to rely on this (and I note that it was put in the alternative) I consider that the power under s 55(2A) should be exercised for the reasons, in essence, put forward by the purchasers.

Misrepresentation case

675 I turn finally to the misrepresentation case.

Purchasers' submissions

676 The purchasers case is that there was misrepresentation to them as to the development potential of the property that they were looking to develop.

677 This case is pleaded on the alternative bases of the purchasers' primary case concerning affectation of development potential by Aboriginal objects or plausible contentions that they existed, on the one hand, and on the other hand the case presented by the vendors themselves that development potential was subject to severe restriction due to environmental and related concerns.

678 The representations alleged in the misleading conduct defence are that the property was an excellent site for development as an improved and expanded tourist resort. It is contended that the representations were conveyed by the vendors' agent as the effect of certain express statements contained in written advertisements, including express statements that the resort was an iconic tourism or redevelopment opportunity in a prestigious location, and certain oral statements by Ms Gotterson, in circumstances where the property was being marketed as a tourism resort. The purchasers submit that those representations are inconsistent with the vendors' case that development was a difficult proposition and with the conclusions stated in the expert evidence on both sides.

679 The purchasers say that these were representations as to future matters made in trade and commerce; that the vendors have not sought to lead evidence to support a view that they had a reasonable basis for making them; and accordingly, they are presumed to have been misleading. It is further said that the representations were an inducement to enter into the contract and that, on ordinary principles, such inducement would be likely to have that effect.

680 The purchasers' case is that if the cross defendants are held to be liable on the cross claim, that liability would be a consequence of entry into the contract under those representations; and accordingly, any liability to the cross claimants is coincident with the loss to them resulting from the misleading

conduct and the claim of the cross claimants is impeached by that conduct and loss.

681 It is alleged that the misleading representations as to the suitability of the land for development use justify an order under s 55(2A) of the *Conveyancing Act* with respect to the deposit (to which see above) and give rise to a defence under s 18 *Australian Consumer Law* to the cross claim, because of the "cloud" arising from plausible contentions that Aboriginal objects are present on the land. Alternatively, it is said that if the vendors' contentions that the land was severely affected by the other development constraints that they have alleged (as set out in Mr Connelly's expert report) are made out then the representations were misleading because of those constraints.

682 It is noted that representations in the marketing campaign included: representations as to the development potential of the property (the focus of the marketing campaign) (see T 328.20); that on 18 June 2015, Ms Gotterson told Mr Cheers that properties of this size in town and this type of zoning were rare (see from T 331.25); use of the phrase "unlimited potential" in an email to other potential purchasers; evidence that Ms Gotterson told the purchasers that the property was "diamond in a rough" on 2 July 2015); wording in the brochures such as "[u]nique opportunity to value add" and "[a]s it stands, the Rainforest Resort represents an iconic tourism or redevelopment opportunity (stca)" [i.e., subject to council approval or consent approval].

683 The purchasers also point to evidence that they were looking to develop the property, namely: discussion with Mr Lonergan, it will be recalled the town planner, on 1 July 2015 (see particularly from T 300.5); and discussion as to the topic of redevelopment during the inspection on 2 July 2015 (see from T 331.48, T 332.15). It is noted that there are conflicts in the evidence as to whether the purchasers' plan, and the need for ability to add new cabins, were disclosed to the vendor or the vendor's agent. However, in that respect, it is noted that Mr Carter in cross examination made admissions, including that there was a discussion about "four star style accommodation" (T 245.45).

684 The purchasers further say that the making of such representation was a deliberate choice. They refer to: the email from Ms Gotterson to the vendor's

solicitor, Mr Garrett (see T 291.15); Ms Gotterson's evidence that she did think the property had unlimited potential (see from T 328.25); the fact that, within Unique Estates (it will be recalled, the real estate agents) they thought the property had "huge potential" (see T 329-330); and that Ms Gotterson advised the vendor that the best way to market the property and maximise the price was to focus on the location and potential "to value-add" (see from T 335.16).

685 It is said that the real position was that the property was subject to "several constraints" when it comes to redevelopment: the presence of the Aboriginal objects and the concerns of the local Aboriginal community (or at least plausible concerns that such objects existed, which would be a factor in any development processes); one or more "non-Aboriginal related" issues (including sewerage connections and wildlife issues (to which see below), the need to protect endangered ecological community the SEPP14 Coastal Wetland Zone and the uncertainty of even Stage 1 of the proposed development).

686 In this regard, the purchasers say that it is not disputed that the plaque on the site is significant to the local Aboriginal community; and they note that Mr Carter admits that, during the meeting on 16 July 2015, he had reason in his mind as to what he regarded as the issues which had caused the purchasers to have second thoughts, saying in cross-examination that (from T 230.41):

> "I think the first one is sewerage connections to the Council, the second one would be traffic along Broken Head Road and entrances to Broken Head Road, then we would be moving to vegetation issues, numerous types of plant growing on the resort, there were koalas at the resort. So, there were numerous rare and scheduled plants and flora and fauna in the area and I knew the history of development in Byron Bay over ten or 20 years.
>
> "It was a difficult place to get, certainly to get any kind of, anything approved but certainly large developments, there were political, there were community groups and environmental groups and the council was of a green flavour so that would be generally, yeah generally the - and I had dealings with the council myself, so I knew the layout and most people up there at Byron Bay are aware of it too."

687 The purchasers note that the joint expert report says that even Stage 1 of the proposed development is uncertain and that Mr Connelly's evidence is severely adverse to the development prospects of the site.

Vendors' submissions

688 The vendors submit that the purchasers' claim founded on the alleged "puffery" of Ms Gotterson ought to be rejected for the following reasons. (I note that the vendors also rely on these submissions on the s 55(2A) claim which I have dealt with above). First, that any representations about the development potential of the subject land were clearly expressed to be subject to Council approval and it is noted that all of the purchasers well understood this.

689 Second, that none of the purchasers seriously relied on the real estate agent and that, to the extent that Mr Cheers argued to the contrary, his evidence should be rejected.

690 Third, that Ms Gotterson recommended that the purchasers seek town planning advice from Mr Lonergan (which they did on 1 July 2015). It is submitted that any inducement caused by the "diamond in the rough" could hardly retain any meaningful currency after Mr Lonergan had provided his advice (as to which there is a controversy that it is said is unnecessary to resolve, because he was not the agent of the vendor).

691 Thus, it is argued that there was no reliance on the representations that are said to have been made by the agent.

Determination

692 I am not persuaded that there was a relevant misrepresentation (as opposed to mere puffery) nor that a representation as to the development potential of a property is necessarily a representation as to a future matter (rather it is the development potential as at today's date for the property in the future).

693 As to the latter, a representation concerning the future development or potential for development of a property could conceivably be either a future representation or a representation of a present state of affairs, depending on the words used and their context (see *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (No 17)* [2014] NSWSC 55 at [1125]; [1128] per Ball J, for example). I see, however, a difference between a statement as to the likelihood of receiving development approval, subject to zoning and other requirements (held to be a future representation in *City of Botany Bay Council v Jazabas Pty Ltd* [2001] NSWCA 94) or as to the future profitability of a site (held to be a

representation as to a future matter and not a representation of present belief in *All Options Pty Ltd v Flightdeck Geelong Pty Ltd* [2019] FCA 588) on the one hand, and a statement that the property has development potential or even huge development potential (noting that a representation as to the value of a property was held not to be a future representation as it was a statement of the property's present day value in *Schulze v Williams* [2006] SASC 330), on the other hand. In this regard, I have considered the recent decision of Mortimer J in *Australian Competition and Consumer Commission v Woolworths Ltd* [2019] FCA 1039 (which, I understand, is now subject of appeal to the Full Court of the Federal Court), concerning representations as to allegedly biodegradable food packaging, in which the future representation issue was squarely raised.

694 It is not, however, necessary to delve into these issues (of puffery or as to future representation versus present belief) in any detail because I do not accept that the purchasers entered into the sale contract in reliance on any representation by the vendors (or their agent) as to the development potential of the property.

695 I am prepared to accept that Ms Gotterson made statements as to the property having development potential (perhaps even "huge" development potential) and that she conveyed the impression (even if not in these words) that the property was a "diamond in the rough". It is also the case that the development potential of the property (confined in essence to Lot 1) was limited by the various constraints identified by the various town planning experts (even apart from any cultural or heritage issues).

696 However, I do not see the reference to this being an "unique opportunity to value add", or the marketing of the property as a re-development opportunity, as being misleading (particularly when the marketing brochure included the qualification "stca").

697 Moreover, it is abundantly clear that the purchasers were acting in reliance on their own enquiries and inspection of the property; not least because of the consultation with and advice sought from Mr Lonergan. Therefore, I do not consider that the misleading and deceptive conduct claim has been made good.

Mr Cheers' denial of guarantee claim

698 Special condition 22 of the contract made provision for Mr Cheers to join as a guarantor party by signing in the prescribed execution clause at the foot of the page. Mr Cheers denies that he did so. His evidence is that this matter was not specifically drawn to his attention.

699 The purchasers say that the terms of the contract prescribed the manner and form for adoption of that obligation by Mr Cheers as a party and, that form not being fulfilled, the correct construction is that Mr Cheers did not become a party to the contract.

700 This issue does not arise given the determination of the other issues in the proceedings. Had it arisen then, in the absence of a warranty of authority or misrepresentation claim, I would have concluded that the defence should succeed.

701 The capacity in which a person who is a director of a company signs a contract (whether in a personal capacity or as director) was considered in *Clark Equipment Credit of Australia Ltd v Kiyose Holdings Pty Ltd* (1988) 21 NSWLR 160. There, Giles J, as his Honour then was, (having considered what was said in *National Commercial Banking Corporation of Australia Limited v Cheung* (1983) 1 ACLC 1326; *NEC Information Systems Australia Pty Limited v Linton* (Supreme Court (NSW), Wood J, 17 April 1985, unrep) and *Scottish Amicable Life Assurance Society v Reg Austin Insurance Pty Limited* (1995) 9 ACLR 909) concluded (at 174-175), that the proper approach in determining whether a signatory has assented to be personally bound is to ascertain the objective (not subjective) intention as to that issue, having regard to the construction of the document as a whole and the surrounding circumstances (to the extent to which evidence of the latter is permissible); the inquiry not being limited to consideration of the signature and its qualification, if any. In that case, his Honour declined to find an intention that the directors were personally bound having regard to the form of the signing clause (which stated that one was signing for and on behalf of the company and the other as witness) in circumstances where: the same form of words had been used for a person who no one contended was personally bound; the addition of the common seal

pointed to them having signed simply in their capacity as directors; and that the same form of words were used in a separate document where there was no provision for personal responsibility.

702 The above considerations were applied in *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56, where I considered that the most compelling indication that both the individual director and the company were to be bound by the contractual obligation in question was that the director had signed the document twice (once above his name and once below the title of managing director of the appellant entity).

703 In the present case, the indication from the terms of the document was that it was intended that Mr Cheers' company be bound as purchaser and that Mr Cheers would guarantee the performance of those obligations. That can be seen from the text of the contract and from the fact that there was provision for Mr Cheers to sign separately. He did not do so. On ordinary contract principles, therefore, he is not bound as a guarantor.

Relief

704 The purchasers claim by way of damages the costs incurred and expenses thrown away, as set out in the affidavit of their solicitor, Mr Lynch, sworn 9 June 2016 (relying on *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; [1951] HCA 79).

705 Those costs and expenses are itemised as: legal costs charged by Mr Stuart Garrett ($2,301.08); solicitor's costs ($16,902.52); Counsel's costs ($10,651.87); totalling the sum of $29,855.47. The purchasers do not pursue expectation damages as a head of loss.

Conclusion

706 For the reasons set out above, I find for the purchasers on their principal claim and for them as cross-defendants on the cross-claim. On the basis that costs generally follow the event, there will be a costs order in their favour.

707 Further, pursuant to the Court of Appeal's decision that the costs of the separate question for determination be costs in the cause, there will also be an order for the vendors to bear the costs of that hearing.

Orders

708 For the above reasons, I make the following orders:

(1) Declare that the plaintiffs are entitled to the return of the funds representing the deposit paid by them on the contract for the sale of land dated 6 July 2015 for the purchase of the property the subject of the present proceeding.

(2) Order judgment for the plaintiffs for recovery of damages in the sum of $29,855.47.

(3) Dismiss the cross claim with costs.

(4) Order that the defendants pay the plaintiffs/cross-defendants' costs of the proceeding, including (as per the orders of the Court of Appeal) the costs of the separate question determination the subject of the proceeding before Darke J in 2017.

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