



Supreme Court
New South Wales

Case Name: Hobhouse v Mount Gilead Pty Ltd

Medium Neutral Citation: [2021] NSWSC 684

Hearing Date(s): 3 June 2021

Decision Date: 11 June 2021

Jurisdiction: Equity

Before: Kunc J

Decision: Option validly exercised

Catchwords: LAND LAW — Conveyancing — Options — Call options — Whether on proper construction option could be validly exercised if purchase price had not yet been determined in accordance with terms of agreement — No issue of principle

Cases Cited: Arnold v Britton [2015] AC 1619
Auburn Shopping Village Pty Ltd v Nelmeer Hoteliers Pty Ltd [2018] NSWCA 114
Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd [2017] NSWCA 99
Ballas v Theophilos (No 2) (1957) 98 CLR 193; [1957] HCA 90
Biki v Chessells [2004] VSCA 70
Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600; [1982] HCA 53
Bowman v Durham Holdings Pty Ltd (1973) 131 CLR 8; [1973] HCA 55
BP Refinery (Western Port) Pty Ltd v Shire of Hastings (1977) 180 CLR 226
Cherry v Steele-Park (2017) 96 NSWLR 548; [2017] NSWCA 295
Codelfa Constructions Pty Ltd v State Rail Authority of

New South Wales (1982) 149 CLR 337; [1982] HCA 24
Darin Nominees Pty Ltd v Franklin's Selfserve Pty Ltd
[1999] NSWCA 209
Electricity Generation Corporation v Woodside Energy
Ltd (2014) 251 CLR 640; [2014] HCA 7
Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd (1957)
59 SR (NSW) 122
HDI Global Specialty SE v Wonkana [2020] NSWCA
296
Helby v Matthews [1985] AC 471
In the matter of Prismex Technologies Pty Ltd; Taggart
v Matyear [2013] NSWSC 292
In the matter of Qatar No 2 and Qatar No 3 Pty Ltd
[2015] NSWSC 2088
Jong v Advanced Dental Services Pty Ltd [2019]
NSWCA 318
Kooee Communications Pty Ltd v Primus
Telecommunications Pty Ltd [2008] NSWCA 5
Laybutt v Amoco Australia Pty Ltd (1974) 132 CLR 57;
[1974] HCA 49
Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd
[2000] NSWSC 459
Metropolitan Gas Company v Federated Gas
Employees' Industrial Union (1925) 35 CLR 449
RHG Mortgage Securities v BNY Trust Co [2009]
NSWSC 1432
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR
315; [2003] HCA 57
Tonitto v Bassal (1992) 28 NSWLR 564
West London Syndicate v Inland Revenue
Commissioners [1898] 1 QB 226

Texts Cited: J D Heydon, Heydon on Contract (Thomson Reuters,
2019)

Category: Principal judgment

Parties: Katrina Julia Denzil Hobhouse (Plaintiff)

Mount Gilead Pty Ltd (First Defendant)
Kalemon Investments Pty Ltd (Second Defendant)
Lee Macarthur-Onslow (Third Defendant)
Leemaco Investments Pty Ltd (Fourth Defendant)

Representation:

Counsel:

B Coles QC and M T Keene (Plaintiff)

D B Studdy SC and J A Brezniak (Third and Fourth Defendants)

Solicitors:

Woolf Associates (Plaintiff)

Keypoint Law (Third and Fourth Defendants)

File Number(s):

2021/121084

Publication Restriction:

No

JUDGMENT

Summary

- 1 The parties to these proceedings are parties to a Deed of Settlement and Release made on 22 February 2021 (the Deed). The Deed resolved proceedings in this Court between members of the Macarthur-Onslow family, to whom I shall refer without any disrespect by their given names. Although all necessary parties had been joined in these proceedings, the active protagonists were the present plaintiff (Katrina) and her brother, the present third defendant (Lee).
- 2 The arrangements under the Deed are complex and involve significant property assets, conferring a number of options to purchase different properties on each of Katrina and Lee. As part of those arrangements, Lee was given a 60 day option to purchase an apartment in Yarranabbe Road, Darling Point, New South Wales. In the Deed (and in what follows in this judgment) the apartment was referred to as the Yarranabbe Road Apartment and the option as Lee's Yarranabbe Road First Call Option. The 60 days ran from the date of the Deed's execution.
- 3 The combined effect of cll 5.6 and 8.1(d) of the Deed was that the purchase price for the Yarranabbe Road Apartment under Lee's Yarranabbe Road First Call Option was the midpoint of two valuations to be obtained "promptly

following the execution of the Deed". Clause 12.2(d) required any option conferred by the Deed to be exercised by the giving of a written notice accompanied by an executed contract in a specified form, together with a cheque for the 10% deposit.

- 4 The present dispute has arisen because Lee's Yarranabbe Road First Call Option was to expire on 23 April 2021. He purported to exercise it by a notice given on 22 April 2021 in circumstances where only one of the two valuations had been obtained. The issue before the Court was whether, on the proper construction of the Deed, Lee's Yarranabbe Road First Call Option could be exercised before the purchase price had been determined in accordance with the Deed.
- 5 It was contended for Katrina that for several reasons, but most potently because of the requirement under cl 12.2(d) to provide a completed contract and the deposit cheque (both of which would require the purchase price to be known at the time of exercise), Lee's Yarranabbe Road First Call Option could not be validly exercised in accordance with the Deed unless the purchase price had been determined in accordance with cl 8.1(d) at the time of exercise.
- 6 Katrina's Summons sought a declaration that Lee had not validly exercised Lee's Yarranabbe Road First Call Option and consequential relief. The matter was heard urgently because the Deed gave Katrina a 60 day option to purchase the Yarranabbe Road Apartment if Lee had not exercised Lee's Yarranabbe Road First Call Option. A second valuation has now been obtained and Katrina's option, which she wishes to exercise if Lee has not validly exercised Lee's Yarranabbe Road First Call Option, expires on 22 June 2021. Katrina's interests were represented by Mr B Coles of Queen's Counsel with Mr M T Keene of Counsel. Lee's interests were represented by Mr D B Studdy of Senior Counsel with Mr J A Brezniak of Counsel.
- 7 The Court has concluded that Lee validly exercised Lee's Yarranabbe Road First Call Option because on its proper construction (determined by reference to a number of background and textual considerations) the Deed does not require the purchase price to have been determined at the time the option was exercised. However, when that option was exercised without the purchase

price being known, the result of the plain language of cl 12.2(d) was to create an unworkable situation. The Court therefore has also accepted that a term should be implied into cl 12.2(d) to the effect that an executed contract and cheque for the deposit were only required for the valid exercise of an option under the Deed (in addition to a written notice exercising the option) if, at the time of the option's exercise, the purchase price had been determined.

The facts

- 8 Setting aside the question of what matters the Court can take into account by way of background circumstances (see further at [42] below), and given the Court's conclusions, there are only three material facts, none of which were in dispute.
- 9 First, the parties entered into the Deed. To facilitate the readability of these reasons, all of the terms of the Deed which the Court considers to be relevant are set out in full as an annexure to these reasons.
- 10 Second, on 22 April 2021, Lee purported to exercise Lee's Yarranabbe Road First Call Option by serving this notice (the Notice):

“NOTICE OF EXERCISE OF OPTION TO PURCHASE

To: KALEMON INVESTMENTS PTY LTD (ACN 000 330 692)

C/- Mr Steven Rogers

Level 16, 1 Market Street

SYDNEY NSW 2000

LEE MACARTHUR-ONSLAW (Lee) of Unit XX, XX Yarranabbe Road Darling Point, New South Wales hereby exercises the first call option to purchase as set out in clause 5.6 of the document entitled Deed of Settlement & Release between Lee and others dated 22 February 2021 (Deed) to purchase the property known as Unit XX, XX Yarranabbe Road Darling Point, New South Wales (being the land in Lots XX in Strata Plan XXXX) at the midpoint market value as referred to in clause 5.6 of the Deed. If the Price is not known as at the date of this exercise, Mr Rogers is authorized to insert this amount (and the deposit) into the attached contract when the amount is known.

Dated this 22nd day of April 2021

[Signature]

Signed by Lee Macarthur-Onslow”

- 11 Attached to the Notice were:
 - (1) A cheque in favour of Kalemmon Investments Pty Ltd for \$437,500; and

- (2) Two copies of a contract for the sale and purchase of land for the Yarranabbe Road Apartment in the Law Society of New South Wales standard 2018 edition executed by Lee, dated 22 April 2021 but leaving the price and deposit blank.
- 12 The form of the Notice and the authority to Mr Rogers (the Accountant) had obviously been drawn to allow for the fact that, as at the date of the Notice, only one valuation of the Yarranabbe Road Apartment had been obtained. This was for \$4,250,000 to \$4,500,000. Lee's cheque for the deposit was for 10% of the midpoint of that valuation.

Legal principles

- 13 Before turning to the parties' specific submissions, it is convenient to set out some basic legal principles about which there was no disagreement.
- 14 A convenient and oft-cited summary of the Court's role in construing a contract is provided by the decision of the plurality in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7:

"35 Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience"."

- 15 Next, it is fundamental that the Court must give primacy to the contractual text. In *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295, the Court of Appeal decided that ambiguity was not a precondition to the admissibility of evidence of surrounding circumstances known to both parties which may be relevant of the construction of a contract. In the leading judgment of Leeming JA (with whom Gleeson and White JJA agreed), his Honour said this about the primacy of the text, in a passage which I respectfully adopt and will apply:

"The primacy of the text

72 The first is that the “plain meaning” reflects the primacy of the text of a written contract. The starting point and the ending point of the construction of a written commercial contract is the language chosen by the parties to record their bargain. In a familiar passage, Gibbs J referred in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; [1973] HCA 36 to the “primary duty” of a court construing a written contract to ascertain the legal meaning of a document “from the words of the instrument in which the contract is embodied”. As I have said, “very often, nothing in the context will come close to displacing the ordinary grammatical meaning of the legal text”: *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; [2014] NSWCA 184 at [74].

73 The limited scope for evidence of surrounding circumstances to detract from the contractual text may be illustrated by two statements made by this Court, both of which refer in terms to regard first being had to such evidence. In *Newey v Westpac Banking Corporation* [2014] NSWCA 319, Gleeson JA (with whom Basten and Meagher JJA agreed) said at [91]:

“there is no licence for ‘judicial rewriting’ of an agreement: *Koee Communications Pty Ltd v Primus Telecommunications Pty Ltd* [2008] NSWCA 5 at [27] (Basten JA; Giles and Tobias JJA agreeing); *Franklins* at [23] (Allsop P). The ability of courts to give commercial agreements a commercial and business-like interpretation is constrained by the language used by the parties. If, after considering the contract as a whole and the background circumstances known to both parties, a court concludes that the language of a contract is unambiguous, the Court must give effect to that language unless to do so would give the contract an absurd operation: *Jireh International Pty Ltd v Western Exports Services Inc* at [55] (Macfarlan JA; Young JA and Tobias AJA agreeing).

74 To the same effect, in *McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liq)* (2011) 81 NSWLR 690; [2011] NSWCA 315 at [17], Bathurst CJ said with the agreement of Macfarlan JA and Sackville AJA:

“Whilst it is correct in my opinion that context and the surrounding circumstances known to both parties can be taken into account (see *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* at 350, 352) even in cases where there is an absence of apparent ambiguity (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* at [40]; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151 at [8]; *Park v Brothers* [2005] HCA 73; (2005) 80 ALJR 317 at [39]; *Franklins Pty Ltd v Metcash Trading Ltd* at [14], [63], [305]) that does not permit the Court to depart from the ordinary meaning of the words used by the parties merely because it regards the result as inconvenient or unjust: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.”

75 Many authorities to the same effect could readily be collected. The ultimate question is whether the written language of the contract, when considered in light of legitimately relevant surrounding circumstances, permits a constructional choice to be made between two different legal meanings. This leads to the second point.”

- 16 Insofar as options are concerned, the valid exercise of an option requires strict compliance with the contractual terms governing that option: *Tonitto v Bassal* (1992) 28 NSWLR 564 at 474-475 (per Sheller JA; Handley JA and Hope AJA agreeing).
- 17 On the issue of the implication of a term, the well-known test in *BP Refinery (Western Port) Pty Ltd v Shire of Hastings* (1977) 180 CLR 226 (*BP Refinery*) at 282-283 is applicable. Any implied term must satisfy these conditions:
- (1) It must be reasonable and equitable;
 - (2) It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
 - (3) It must be so obvious that “it goes without saying”;
 - (4) It must be capable of clear expression;
 - (5) It must not contradict any express term of the contract.
- 18 On the question of whether a term is necessary to give business efficacy, I respectfully adopt and apply this summary in J D Heydon, *Heydon on Contract* (Thomson Reuters, 2019) (citations omitted):

“[10.740] Definition

A term of this kind cannot be implied unless it is necessary “to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men” or “to make the agreement work or to avoid an unworkable situation”. If the contract is workable, a term will not be implied even if it would improve the efficacy of the contract. And a term will not be implied merely because it would have been reasonable to have inserted it in the contract. In England there has been a suggestion that the second test (necessity) and the third test (obviousness) “can be alternatives in the sense that only one of them needs to be satisfied”. There has not yet been any Australian support for this view.”

The parties’ submissions

- 19 Without disrespect to the careful way in which the parties’ submissions were put, they can be summarised as follows.

Katrina’s construction argument

- 20 Mr Coles QC submitted for Katrina that Lee had not validly exercised Lee’s Yarranabbe Road First Call Option.
- 21 He contended that cll 12.2(a) and (b) provide that the grant of an option is an irrevocable offer at the price “as determined in this deed”. He submitted that

on the natural meaning of the words, the determination of the price in accordance with cl 8.1(d) is a condition precedent to the grant of Lee's Yarranabbe Road First Call Option. If the 60 day period elapses before the price is determined, an offer has not been made and Lee's Yarranabbe Road First Call Option is not available for exercise. A purported exercise of Lee's Yarranabbe Road First Call Option before the price is determined would at its highest be a counteroffer to purchase at a yet-to-be-determined price: *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR (NSW) 122 at 123. Mr Coles QC submitted that the parties had made provision in cl 8.1(e) for the event in which the price was not determined during either option period for the Yarranabbe Road Apartment.

- 22 He submitted that only by performing the conditions prescribed in cl 12.2(d), which required the price to have been determined, could Lee exercise Lee's Yarranabbe Road First Call Option. He contended that cll 12.2.(d), (e) and (f) indicate that a valid exercise of Lee's Yarranabbe Road First Call Option must result in complete and immediately enforceable contractual relations.
- 23 Mr Coles QC contended that his construction was consistent with the language of the Deed and its objects and purposes, which in his submission included speed and certainty.
- 24 In reply, Mr Studdy SC submitted for Lee that the words "the price as determined in this deed" in cl 12.2(a) simply refer to the mechanism in cl 8.1(d), and do not make the mechanism in cl 8.1(d) a condition precedent to the grant or exercise of Lee's Yarranabbe Road First Call Option.
- 25 Mr Studdy SC submitted that Katrina's construction would be contrary to the structure and purpose of the Deed, which in his submission were to grant Lee and Katrina symmetrical rights — equivalent and successive option periods — over the Yarranabbe Road Apartment and the Homestead Lot.
- 26 He contended that cll 12.2(a) and 5.6 provide for a contract to come into existence on the exercise of Lee's Yarranabbe Road First Call Option with the price to be determined later by the mechanism in cl 8.1(d): *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 604-605; [1982] HCA 53 (*Booker Industries*). He submitted that this is not precluded by cl 12.2.

27 Finally, Mr Studdy SC submitted that cl 8.1(e) provided for the event in which neither party chose to exercise their option to purchase the Yarranabbe Road Apartment, and not for the event in which the price failed to be determined during either option period.

Lee's construction argument

28 Mr Studdy SC's primary submission was that Lee had validly exercised Lee's Yarranabbe Road First Call Option. He advanced two arguments in support of this submission.

29 Mr Studdy SC first submitted that on its proper construction, Lee's Yarranabbe Road First Call Option was exercisable before or after the Accountant determined the price in accordance with the steps in cl 8.1(d). If the price had been determined before Lee's Yarranabbe Road First Call Option was exercised, strict compliance with cl 12.2(d) was required. If the price had not been determined, part or all of cl 12.2(d) was inapplicable and exercising the option required only communication of absolute and unqualified acceptance of the offer during the 60 day period: *Ballas v Theophilos (No 2)* (1957) 98 CLR 193 at 195; [1957] HCA 90; *Jong v Advanced Dental Services Pty Ltd* [2019] NSWCA 318 at [47]-[49]. Mr Studdy SC submitted that the Notice complied with this requirement.

30 He contended that being able to exercise Lee's Yarranabbe Road First Call Option without knowing the price was not a commercially odd result in circumstances where Lee is familiar with and has a right of occupancy over the Yarranabbe Road Apartment. In support of his argument that cl 12.2(d) would be inapplicable when the price had not been determined, Mr Studdy SC drew to attention that cl 12.2(d) applies to all options under the Deed, including options granted at specified prices.

31 Mr Studdy SC submitted that requiring strict compliance with cl 12.2(d) would remove the right that the Deed intended to confer on Lee where the Accountant was unable complete the tasks required by cl 8.1(d) during the 60 day period. He submitted that the Court should prefer an interpretation which avoids that outcome: *Bowman v Durham Holdings Pty Ltd* (1973) 131 CLR 8; [1973] HCA 55. He again drew to attention the intended symmetry between Lee and

Katrina's call options over the Yarranabbe Road Apartment and the Homestead Lot.

- 32 Mr Coles QC submitted in reply that there is no textual basis for treating cl 12.2(d) as inapplicable where the price has not been determined during Lee's Yarranabbe Road First Call Option period: *Metropolitan Gas Company v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 (Isaacs and Rich JJ). He contended that the Lee's construction argument would impermissibly contradict the express language of the Deed: *Arnold v Britton* [2015] AC 1619 at [76]; *Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd* [2008] NSWCA 5 at [27]-[38] (Basten JA).

Lee's implied term argument

- 33 In the alternative, Mr Studdy SC submitted that a term should be implied into the Deed to the effect that Lee's Yarranabbe Road First Call Option was exercisable before the price had been determined by giving written notice only, and that in accordance with this implied term, Lee had validly exercised the option. I have set out the implied term contended for by Mr Studdy SC in [71] below.
- 34 He submitted that the implied term would give effect to the parties' presumed intention in circumstances where the parties failed to consider and make explicit provision for the particular eventuality: *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346; [1982] HCA 24 (Mason J).
- 35 In reply, Mr Coles QC submitted that the implied term would be inconsistent with cl 12 in its entirety. He also observed that even where an implied term does not directly conflict with an express term, it still will not be implied if the parties contemplated the issue and deliberately omitted it, or otherwise intended to exhaustively set out their obligations in the terms of the Deed: *Darin Nominees Pty Ltd v Franklin's Selfserve Pty Ltd* [1999] NSWCA 209 at [35]; *Biki v Chessells* [2004] VSCA 70 at [25]-[26]. He submitted that cll 14, 18-21 demonstrate that the provisions of the Deed were intended to be an exhaustive code. He further contended that the parties had contemplated the timing of the valuations, because the option scheme in cl 9.1 for other

properties under the Deed prescribes that those option periods commence at the time of receipt of those valuations.

- 36 In response to a question from me, Mr Coles QC submitted that even if the term were implied, Lee would still not have validly exercised Lee's Yarranabbe Road First Call Option because of the reasons identified in [21] and [22] above.

Relief against forfeiture

- 37 If the Court did not accept that Lee had validly exercised Lee's Yarranabbe Road First Call Option, Mr Studdy SC submitted that Lee should be granted relief against forfeiture. Mr Studdy SC submitted that relief against forfeiture is available for an option: *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* [2000] NSWSC 459 at [20]-[22] (Young J). He acknowledged that the contrary view has been expressed: for example, in *In the matter of Qatar No 2 and Qatar No 3 Pty Ltd* [2015] NSWSC 2088 (*Qatar*) at [26]-[27] (Brereton J).
- 38 He submitted that an option confers equitable rights and interests insofar as the grantee can obtain relief in equity against the grantor: *Australia Capital Financial Management Pty Ltd v Linfield Developments Pty Ltd; Guan v Linfield Developments Pty Ltd* [2017] NSWCA 99 at [95]-[109] (Ward JA; McColl and Gleeson JJA agreeing); *Auburn Shopping Village Pty Ltd v Nelmeer Hoteliers Pty Ltd* [2018] NSWCA 114 at [49] and [56] (Bathurst CJ; Beazley P and Payne JA agreeing).
- 39 He submitted that relief against forfeiture should be granted, relying on the special head of accident for the Accountant's failure to obtain both valuations: *In the matter of Prismex Technologies Pty Ltd; Taggart v Matyear* [2013] NSWSC 292 at [52]-[59] (Brereton J); *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315; [2003] HCA 57 at [25], [58], [66]-[67]; *RHG Mortgage Securities v BNY Trust Co* [2009] NSWSC 1432 at [110]-[112], [138] (McDougall J).
- 40 Mr Coles QC submitted in reply that if the Court finds that Lee's Yarranabbe Road First Call Option was not validly exercised, relief against forfeiture cannot be granted because an option only gives rise to an equitable interest in property once the option is exercised: *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 76; [1974] HCA 49 (Gibb J); *Helby v Matthews* [1985] AC 471 at

478-80; *West London Syndicate v Inland Revenue Commissioners* [1898] 1 QB 226 at 238. Until its exercise, an option is a contingent equitable interest, which is not a proprietary interest that can be specifically enforced: *Qatar* at [26].

Consideration

- 41 In [14] and [15] above I referred to the legal principles in relation to the relevance of surrounding circumstances in construing a contract. A contract does not come into existence in a vacuum. However, in this case, the parties provided the Court with no evidence of what any relevant surrounding circumstances might be. Nevertheless, some fundamental surrounding circumstances (and all of what might be referred to as such in what follows in these reasons) can be divined from the terms of the Deed itself. The parties did not wish to be heard against this approach.
- 42 The fundamental surrounding circumstances are these. The Deed settles a complex family dispute involving large sums of money and valuable property interests between Lee and Katrina, who are brother and sister. Approaching the scheme evidenced by the Deed with a very broad brush, it is apparent that the parties have agreed upon the settlement of their legal dispute on the basis that Lendlease Corporation Limited (Lendlease) is obliged to make a very substantial payment towards the purchase of certain land adjacent to what the Deed refers to as the Homestead Lot. The commercial purpose of the Deed, apparent from its provisions, is to give Lee and Katrina the opportunity to purchase various properties with the benefit of the payment from Lendlease, made available to them through trusts and corporate structures which it is not necessary for me to describe in any detail.
- 43 Against that overall background, it is necessary to identify the constructional choice which these proceedings invite the Court to make. That choice involves the interaction of cll 5.6 and 8.1(d):

“5.6 First call option to purchase to Lee

Kalemon hereby grants a call option for Lee (or his nominee) to purchase the Yarranabbe Road Apartment, and Lee will have first right to purchase the Yarranabbe Road Apartment from Kalemon at the midpoint market value as set out in clause 8.1(d) (or receive it by way of a distribution *in specie* on a winding up of Kalemon with Katrina receiving an equivalent cash distribution)

(Lee's Yarranabbe Road First Call Option). Lee's Yarranabbe Road First Call Option expires at the same time as Katrina's Call Option under clause 3.10, or upon Lee's death, whichever is the earlier. ..

8.1 Kalemon

Lee and Katrina agree: ...

(d) they do hereby irrevocably authorise and direct the Accountant to obtain promptly following the execution of this Deed two current market valuations of the Yarranabbe Road Apartment and the property known as Southlands being the land in Folio Identifiers XXXX and, once obtained, for the Accountant to determine a midpoint valuation for the properties and to provide this in writing together with copies of the valuations (the first valuation notification) to Lee and Katrina ..."

- 44 The precise issue of construction concerns the words "at the midpoint market value as set out in clause 8.1(d)" in cl 5.6.
- 45 The parties accepted that the words "as set out" were literally inapt because cl 8.1(d) did not set out the midpoint market value, but rather set out how that value was to be determined. They further accepted that, in those circumstances, "as set out in" was equivalent to saying "as determined in accordance with" cl 8.1(d). That approach is supported by the Deed itself, which in cl 5.7 confers a subsequent option on Katrina to purchase the Yarranabbe Road Apartment "at the price determined under clause 5.6", which in turn refers back to cl 8.1(d).
- 46 The constructional choice is temporal. Mr Coles QC submitted that on its proper construction "as set out in" should be understood to mean "*as has been* determined in accordance with" cl 8.1(d) (my emphasis). In other words, Lee's Yarranabbe Road First Call Option could only be validly exercised once the midpoint market value had been determined in accordance with cl 8.1(d).
- 47 On the other hand, Mr Studdy SC submitted that the proper construction of those words in cl 5.6 did not have a temporal element, and did no more than point to the method by which the midpoint market value was to be ascertained. In other words, Lee's Yarranabbe Road First Call Option could be exercised at any time within the 60 days for which the Deed expressed it to be open for exercise, irrespective of whether at the time it was exercised the midpoint market value had been determined.

48 In support of his position, Mr Coles QC submitted that to the extent it could be said that there was ambiguity in the words “as set out in clause 8.1(d)”, that ambiguity was resolved by cl 12.2 of the Deed, and in particular cl 12.2(d), which provided (emphasis added):

“12.2 Terms of grants of options etc ...

(d) *Any such option* [which, it was submitted, referred to any option granted by the Deed — see cl 12.2(a)] and/or right of first or last refusal is to be exercised by service of written notice of exercise of option or right of last or first refusal (as the case may be) signed by the Grantee together with two copies of the Contract for the purchase of such property duly executed by the Grantee and cheque for the deposit payable under the respective Contract in favour of the vendor named in the Contract, by personally delivering those documents or forwarding those documents by prepaid registered post to the Grantor care of Mr Steven Rogers, XX Market Street, Sydney NSW or if there be a liquidator appointed to Kalemon to the Liquidator at the Liquidator’s usual business address.”

49 Mr Coles QC also submitted that one could not have “an irrevocable offer” of the kind referred to in cl 12.2(b) because for there to be “a binding agreement” of the kind referred to in that sub-clause, the exercise price of the relevant option had to be known.

50 In my respectful view, the terms of cl 12.2(d) would be the determinative factor in favour of Mr Coles QC’s construction of cl 8.1(d) in the absence of textual and circumstantial considerations sufficient to overcome that conclusion. The Court has concluded that there are seven such matters which point conclusively against the construction propounded by Mr Coles QC and in favour of the construction of cl 5.6 put to the Court by Mr Studdy SC. I will deal with each of these in turn.

51 First, there is what might be referred to as the overall scheme of the Deed. As is to be expected in a document recording the settlement of complex commercial litigation, it reflects a careful balancing of Katrina and Lee’s interests and evinces a primary commercial purpose of maintaining symmetry or equality between their respective positions.

52 That balance is acutely present when one considers the Deed’s provisions in relation to their respective rights to purchase the Yarranabbe Road Apartment and the Homestead Lot.

- 53 The combined effect of cll 3.8, 3.10 and 3.11 gives Katrina 60 days from the date of the Deed to purchase the Homestead Lot (and which pending the exercise of various rights under the Deed, Katrina is given a right to occupy under cl 3.1). If she does not exercise her call option to purchase the Homestead Lot at a price of \$40,000,000 within 60 days from the date of the Deed, cl 3.11 gives Lee an option for the next 60 days to purchase the Homestead Lot at that price.
- 54 Clause 3.19 provides for further equality between the positions of Katrina and Lee in relation to the Homestead Lot if neither of them exercises their respective options to purchase the Homestead Lot.
- 55 At the same time as the options in relation to the Homestead Lot are running, cl 5.6 gives Lee 60 days from the date of the Deed to purchase the Yarranabbe Road Apartment (which is the property the Deed gives as Lee's address and from which cl 5.5 permits Katrina to remove her personal belongings). If Lee does not exercise Lee's Yarranabbe Road First Call Option within 60 days from the date of the Deed, cl 5.7 gives Katrina a corresponding call option to purchase the Yarranabbe Road Apartment for the next 60 days.
- 56 As I develop in [62] below, it would be contrary to the symmetry or equality demonstrated in the drafting of the provisions in relation to the respective options to purchase the Homestead Lot and the Yarranabbe Road Apartment to interpret cl 5.6 in a way in which means that Lee would have fewer than 60 days in which to exercise Lee's Yarranabbe Road First Call Option.
- 57 The second contextual matter is that insofar as Lee and Katrina make any acquisitions pursuant to the Deed, it appears that those purchases are to be funded by vendor finance, set offs and in specie distributions, all intended to minimise (if not eliminate) the amount to be actually paid by Lee and Katrina, as it were, out of their own cash resources. As I have already noted, it appears that the funds are substantially to come from Lendlease's payment for land identified in the Deed. Provisions of the kind to which I have just referred also include further provision for the equal treatment of Lee and Katrina. The matters referred to in this paragraph appear from cll 3.12, 4.3, 4.4, 4.5, 8.1(a), 8.1(g), 9.1(f) and 9.1(g), noting especially that cll 8.1(a) and (g) relate to the

circumstance of either Lee or Katrina purchasing the Yarranabbe Road Apartment in accordance with their respective call options.

- 58 The presence of all of these provisions points to the conclusion that it is not essential to know the midpoint market value for the Yarranabbe Road Apartment at the time of the exercise of either Lee's Yarranabbe Road First Call Option or Katrina's option in relation to the Yarranabee Road Apartment because the actual settlement of funds is to occur through a much more complicated process that clearly would take longer than the 42 day settlement period provided for in the standard contract for sale of land to be entered into upon exercise, for example, of Lee's Yarranabbe Road First Call Option.
- 59 The third matter arising from the text of the Deed is that it makes express provision in relation to three types of option or first right to purchase:
- (1) The call options for the Homestead Lot are for fixed 60 day periods calculated from the date of the Deed and for a fixed price specified in the Deed (see cll 3.8(a), 3.10 and 3.11). This means that Katrina could exercise her call option to purchase the Homestead Lot immediately upon execution of the Deed and comply with the provisions of cl 12.2(d) in their entirety because the purchase price is specified in the Deed.
 - (2) The call options in relation to the Yarranabbe Road Apartment also run in 60 day periods from the date of the Deed but have a mechanism to determine the price that is not expressly linked to those 60 day periods (see cll 5.6, 5.7 and 8.1(d)).
 - (3) First rights to purchase are granted in relation to other properties where the exercise period is not linked to the date of commencement of the Deed. Instead, the relevant period commences when the parties receive notice of the midpoint of the two valuations to be obtained after the date of the Deed (see cll 9.1(a)-(d)).
- 60 The fact that the parties have established three different regimes for different call options or first rights to purchase supports the conclusion that, insofar as the call options for the Yarranabbe Road Apartment do not specify a purchase price in the Deed and do not have the option period connected to when the purchase price has been determined (unlike the other regimes), the parties did not contemplate that it was necessary for the midpoint market value of the Yarranabbe Road Apartment to have been calculated when either Lee or Katrina exercised their options in relation to that property.

- 61 It is convenient at this point to note that I have not overlooked that it might be said to be unusual for an option to be exercisable when the purchase price is unknown. I accept that observation would have considerable force in an arm's length commercial transaction. However, the Court accepts Mr Studdy SC's submission that this is not such a case. The Yarranabbe Road Apartment is a family asset. As I have already observed, the Deed lists the Yarranabbe Road Apartment as Lee's address, grants Lee a right of occupancy (cl 5.1) and provides for Katrina to remove her personal belongings (cl 5.5). Considerations of price are likely to be of less significance because any decision to exercise the option is likely to be driven by other factors at least in addition to price. It might be assumed that both Lee and Katrina would have some idea of the value of the Yarranabbe Road Apartment to the extent their decision was impacted by the issue of price rather than a desire to own a family asset.
- 62 The fourth textual matter is that the combined effect of cll 5.6 and 8.1(d) is that there must be a period from the date of the Deed while the mechanism prescribed by cl 8.1(d) was put into effect. On Katrina's construction, Lee would not be able to exercise Lee's Yarranabbe Road First Call Option during that period. Such a construction runs contrary to the equality or symmetry of treatment of Lee and Katrina which I have identified as a fundamental commercial purpose of the Deed generally and, in particular, in relation to how their respective options for the Homestead Lot and the Yarranabbe Road Apartment have been drafted.
- 63 As I have already observed, because the price for the Homestead Lot is specified in the Deed, Katrina could exercise her option to purchase the Homestead Lot at any time during the 60 days from the date of the Deed, whereas on Katrina's construction, Lee would not be able to exercise Lee's Yarranabbe Road First Call Option until the midpoint market value is calculated in accordance with cl 8.1(d).
- 64 This inequality as to the length of time within which their respective options could be exercised, which runs contrary to a fundamental commercial purpose of the Deed, is not cured by Mr Coles QC's acceptance that Katrina would be

similarly shut out from exercising her option to purchase the Yarranabbe Road Apartment if, by the time the second 60 days from the date of the Deed had begun, the midpoint market value had not yet been determined. The possibility of such a consequence, especially if the hypothesis becomes that the midpoint market value is not determined for 120 days from the date of the Deed so that neither of them can exercise their option in relation to the Yarranabbe Road Apartment, demonstrates the lack of commerciality of the construction propounded on behalf of Katrina. It runs completely counter to the careful architecture erected by the Deed that what are clearly important rights to the parties could be vitiated by the happenstance of when the midpoint market value for the Yarranabbe Road Apartment was actually able to be calculated in accordance with cl 8.1(d).

- 65 The fifth contextual matter is that cl 5.6 includes the words: “(or receive it by way of a distribution *in specie* on a winding up of Kalemon with Katrina receiving an equivalent cash distribution)”. Again, no commercially informed reading of the Deed could possibly contemplate that a distribution in specie on a winding up of Kalemon could occur within 42 days (the settlement period under the applicable contract for sale) of Lee having exercised Lee’s Yarranabbe Road First Call Option, even if he were to do so as late as 59 days after the date of the Deed. This is again a strong indicator that the actual purchase price for the Yarranabbe Road Apartment was not contemplated by the parties as something that had to be known at the time Lee exercised Lee’s Yarranabbe Road First Call Option or, for that matter, if Katrina exercised her option in the event Lee had not exercised his.
- 66 The sixth textual matter, drawn to attention by Mr Studdy SC, is that nothing in cl 8.1(d) links the determination of the midpoint valuation to the term of either Lee or Katrina’s options in relation to the Yarranabbe Road Apartment. The only provisions in relation to time in cl 8.1(d) are that the Accountant is to obtain the two current valuations “promptly following the execution of this Deed” and that “once obtained” he is to determine the midpoint valuation of the properties and provide copies of the valuations to Lee and Katrina (this determination and provision presumably to take place, on ordinary principles of

contractual interpretation, within a reasonable time from when the two current market valuations had been obtained).

- 67 The seventh textual matter is that the provisions of cl 12.2 in relation to the grant of options or rights of first refusal in the Deed generally, are plainly generic provisions intended to apply to the three different types of option or first right to purchase contained in the Deed (as to which see [59] above). If it appeared from the express terms of cl 12.2(d) that the parties had turned their minds to the application of that provision to Lee and Katrina's options to purchase the Yarranabbe Road Apartment under cll 5.6 and 5.7, it would be more difficult to conclude as a matter of construction or implication that cl 12.2(d) did not apply to the exercise of those options. Nor was there any evidence that the parties had considered and deliberately omitted dealing with the possibility that has now become a reality. It is clear that cl 12.2 is an omnibus provision and the parties had not turned their minds to the possibility which has given rise to these proceedings. This last conclusion is inferred from the terms of cl 12.2 and the absence of contrary evidence.
- 68 As is developed in [71] and following below, it is therefore open to the Court to imply the term set out in [71] precisely because there is no express provision relating cl 12.2(d) to the exercise of either option to purchase the Yarranabbe Road Apartment.
- 69 It follows from the seven textual matters which I have set out above that the Court concludes that a reasonable business person would have understood that cl 5.6 of the Deed did not require the midpoint market value to have been determined before Lee's Yarranabbe Road First Call Option (or for that matter, Katrina's option in relation to the Yarranabbe Road Apartment) could be exercised.
- 70 Up to this point of the analysis, the Court has accepted Mr Studdy SC's submissions on construction and does not accept that the determination of the purchase price is a condition precedent to the exercise of either Lee or Katrina's options to purchase the Yarranabbe Road Apartment. However, I do not consider that, as a matter of construction, it is then open to the Court to construe away the plain words of cl 12.2(d). "Any such option" relates to any

grant of an option under the Deed — “[a]ny such option” being an option of the kind referred to in cl 12.2(a) and (b), which must include the options in relation to the Yarranabbe Road Apartment. The text must be given primacy and the Court does not accept Mr Studdy SC’s construction of cl 12 as recorded in [29] above.

71 However, when that is understood, it becomes apparent on its plain meaning that cl 12.2(d) is unworkable if the price for the Yarranabbe Road Apartment has not been determined at the time of exercise of an option in relation to it. It is for this reason, in accordance with the principles set out in [17] and [18] above, that the Court concludes that it is necessary to imply into cl 12.2(d) the words “, and if the price has been determined in accordance with this Deed,” those words to be inserted as follows:

“(d) Any such option and/or right of first or last refusal is to be exercised by service of written notice of exercise of option or right of last or first refusal (as the case may be) signed by the Grantee, *and if the price has been determined in accordance with this Deed*, together with two copies of the Contract for the purchase of such property duly executed by the Grantee and cheque for the deposit payable under the respective Contract in favour of the vendor named in the Contract, by personally delivering those documents or forwarding those documents by prepaid registered post to the Grantor care of Mr Steven Rogers, XX Market Street, Sydney NSW or if there be a liquidator appointed to Kalemom to the Liquidator at the Liquidator’s usual business address.”

72 In reaching this conclusion, the Court is satisfied that the five conditions set out in *BP Refinery* have been satisfied:

- (1) The implied term is reasonable and equitable, precisely because it maintains the symmetry or equality in the respective positions of Lee and Katrina, especially in relation to the Yarranabbe Road Apartment. The implication of the term means that each of them has the full period of their respective options in which to exercise those options, irrespective of whether or not the midpoint market value of the Yarranabbe Road Apartment has been determined.
- (2) The implied term is necessary to give business efficacy to the Deed because it is clear that, without it, all of the elements for valid exercise of an option set out in cl 12.2(d) could not be strictly satisfied because the purchase price would not be known to enable completion of the contract for purchase and the calculation of the amount of the deposit cheque.
- (3) Because the Court’s construction of cl 5.6 makes it impossible to comply with cl 12.2(d) in every circumstance, the term to be implied is so obvious that “it goes without saying”.

(4) The proposed implied term is capable of clear expression, as set out at [71] above.

(5) It does not contradict any express term of the Deed.

73 In relation to this last point, Mr Coles QC submitted that that requirement for implication of the term was not satisfied. He contended that it contradicted the whole of cl 12. I do not agree. The proposed implication limits the circumstances in which the whole of cl 12.2(d) operates, but does not eliminate the operation of cl 12.2(d) in its entirety.

74 Furthermore, if Mr Coles QC's submission were correct, it would be an answer to most, if not all, examples of an implied term when the implication modifies the operation of an existing term. His submission is circular because it suggests the implied term contradicts the existing terms simply because it is not already express. Nor does cl 14, the "entire agreement" clause, also called in aid by Mr Coles QC, prevent the implication of a term, because an implied term is no less a term of the agreement from its outset than an express term.

75 Nor do I accept Mr Coles QC's submission that Lee's exercise of Lee's Yarranabbe Road First Call Option in accordance with cl 12.2(d) including the implied term would not give rise to a binding contract or be no more than a counteroffer. A binding contract to purchase would still come into existence because the option had been exercised in accordance with its terms. The terms of the contract would still be those specified in cl 12.2(a) and the date of entry into the contract would still be determined by cl 12.2(e).

76 Clause 12.2(a) specifies that the grant "is a grant at the price as determined in" the Deed and any contract is "subject to any terms and conditions specifically referred to in such grant". No further agreement as to the price is required because the parties, including Kalemon Investments Pty Ltd, have agreed to a mechanism for the Accountant to determine the price. It therefore cannot be said the agreement which arises on exercise of the option is incomplete: *Booker Industries* at 604-605. To the extent further contractual compulsion may be required to execute documents or do anything else once the purchase price was determined, this is provided by the further and better assurance provisions in cll 12.1 and 21.

Conclusion

- 77 The Court accepts Mr Studdy SC's submission that, on the assumption the implication referred to in the preceding paragraphs is made (as it has been by the Court), the Notice complies with the Deed. It is a "written notice of exercise of option ... signed by the Grantee" for the purposes of cl 12.2(d). It follows that the Court finds that, by giving the Notice, Lee has validly exercised Lee's Yarranabbe Road First Call Option.
- 78 Because the price of the Yarranabee Road Apartment had not been determined in accordance with cl 8.1(d), on the Court's construction of cl 12.2(d) it was not necessary for Lee to provide a cheque or an executed contract with the Notice. However, the fact that he has done so, including giving the Accountant authority to insert the purchase price, does not vitiate the efficacy of the Notice. He has done no more than volunteer something that was not required for strict compliance with cl 12.2(d) as construed by the Court. If the result of the second valuation means that a higher deposit than the cheque already proffered is required, provision of a further amount or any other steps to complete the contract for sale can be required by any party to the Deed pursuant to either or both of cll 12.1 and 21.
- 79 Finally, because of the conclusion which the Court has reached, it is not necessary to determine the issue of the availability of relief against forfeiture raised on behalf of Lee. As was apparent from the parties' thorough and nuanced submissions on this question, the issue is complex and unresolved at the appellate level, with distinguished judges taking contrary views. Furthermore, the debate attending these issues means that, in circumstances where this decision has had to be delivered with some urgency, I have concluded that it would be neither wise nor helpful to express tentative obiter dicta on whether relief against forfeiture is available.
- 80 Subject to hearing from the parties if they wish to contend for a different form of orders, the Court proposes that the Summons should be dismissed with costs.

ANNEXURE

The terms of the Deed relevant to these reasons are as follows:

“Deed of Settlement & Release

RECITALS

A. Katrina is the plaintiff in Supreme Court proceedings 2013/00231129 (**the Proceedings**).

B. Lee, Steve and Neil, as executors (**the Executors**) of the Estate of Lady Dorothy Wolseley Macarthur-Onslow (**the Estate**) and MGPL are defendants in the Proceedings.

C. Kalemon owns 100% of the ordinary shares issued by MGPL, and is trustee of the Mount Gilead Trust (**MGT**).

D. Katrina has also made allegations against Lee, MGPL and Kalemon (**Katrina’s Claims**).

E. The parties have agreed to settle the Proceedings and Katrina’s Claims on the terms set out in this Deed.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Deed:

Accountant means Steve or his nominee, being a director of Nexia Australia Chartered Accountants, with such nominee to be approved by Lee and Katrina both acting reasonably. ...

Home Precinct means the area on the Homestead Lot within the red boundary line shown on the aerial photograph at **Annexure “B”** to this deed, subject to Lee:

(a) being permitted access to the shed within the yellow boundary upon giving Katrina reasonable notice (being not less than 48 hours notice, such notice may be given by telephone to Katrina’s mobile number or by other means as provided in this Deed); and

(b) not having access in or out of the Shed marked with a purple X via the rear door, adjoining the red boundary line. ...

Homestead Deed means the document entitled Homestead Deed dated 17 April 2015 between MGPL, Lend Lease Communities (Mt Gilead) Pty Ltd and Lend Lease Communities (Australia) Limited. ...

Lendlease means Lendlease Corporation Limited, and any related body corporate of it. ...

Price means the amount of \$40,000,000, as referred to in clause 3.8. ...

1.2 Interpretation ...

(j) in this agreement an option or right of refusal benefitting Lee or Katrina shall extend to their respective nominee; “nominee” means a nominee company owned and controlled respectively by Lee or Katrina. ...

3. HOMESTEAD LOT

3.1 Licence

MGPL agrees that Katrina has the right to occupy the Homestead Lot (comprising Lot X in Deposited Plan XXXX), under licence from MGPL

("Licence"), free of rent or other charge by MGPL, with no interference from MGPL or Lee, but subject to:

(a) access (except in relation to the Home Precinct as defined in clause 1.1 above) for inspections and works upon reasonable prior notice by Lendlease Corporation Limited, and any related body corporate of it ("**Lendlease**") and any of their agents, employees or contractors in relation to rezoning and/or development of the land being Lot X in Deposited Plan XXXX (the **MDP Land**) and the land being Lot X in Deposited Plan XXXX and Lot X in Deposited Plan XXXX (the **Balance Land**) provided that such inspections and works do not unreasonably interfere with Katrina's use and enjoyment of the Homestead Lot and provided further that in relation to temporary works Lendlease returns the land as close as possible to the state of the land prior to such works; ...

(d) access by Steve and/or Neil and Lee together with Steve or Neil at the same time in their capacity as executors of the Estate of the late Lady Dorothy Wolseley Macarthur-Onslow ("**Estate**") and persons authorised by them, which they deem necessary (acting reasonably) solely for the purpose of finalising the Estate on condition that reasonable notice is provided to Katrina and that Katrina or her nominee are entitled to be present. This will involve (for instance) opening the safe in the homestead and taking an inventory of all items forming part of the Estate, and necessary action to inspect, record, value, sell and/or otherwise allocate those items. If an inventory is taken, Katrina must be provided with a copy of that inventory together with a list of any Estate assets, books, records or documents removed by the executors or nominee as soon as reasonably practicable after.

(g) Katrina will permit access to the Home Precinct, upon the receipt of at least 48 hours' notice, for repairs and maintenance as deemed necessary by MGPL, with such works to be at MGPL's cost. Except in the case of emergency, such access not to be exercised by Lee on more than one occasion in every six months.

(h) Katrina will on a day within 90 days of the date of this agreement as agreed between Katrina and Lee permit Lee access to remove Lee's personal belongings from Lee's bedroom in the main dwelling. ...

3.3 Quiet enjoyment

MGPL agrees that subject only to the terms of this deed and the Homestead Deed Katrina will have quiet enjoyment of the Homestead Lot during the period of the Licence without interruption by MGPL or any person claiming by through or under MGPL and MGPL will not interfere with or cause or permit any interference with the reasonable peace, comfort, privacy, use and occupation of Katrina in the Homestead Lot.

3.4 Expiry of Licence

The Licence will expire on settlement of the purchase following the exercise of Katrina's Call Option under clause 3.8, or (as the case may be) sale to Katrina in any manner or 14 days before the date for settlement of the purchase following the exercise of Lee's Call Option (or sale to Lee in any manner) or 14 days before the date for settlement on sale to a third party, or upon Katrina's death, whichever is the earlier.

3.5 Release and abandon any other right

Katrina releases and abandons any right to occupy the Homestead Lot other than as set out under the Licence and this deed. ...

3.8 Katrina's call option

(a) MGPL hereby grants a call option for MGHPL (Katrina's Call Option) to purchase the Homestead Lot at a price of \$40,000,000 (the Price), subject to and with the rights and obligations referred to in the Homestead Deed. The sale to be not a GST taxable supply being agreed to be on a going concern basis or sale of farm basis (as advised by the Accountant). ...

3.10 Expiry of Katrina's call option

Katrina's Call Option will expire 60 days following the execution of this Deed.

3.11 Lee's call option

If MGHPL does not exercise Katrina's Call Option prior to its expiration, then MGPL hereby grants a call option for Leemaco (**Lee's Call Option**) to purchase at the Price the Homestead Lot to be exercised within 60 days after the expiration of Katrina's Call Option.

3.12 Vendor finance

Subject to clause 3.13, MGPL will provide vendor finance to facilitate the purchase by MGHPL or Leemaco. The vendor finance arrangements by which the vendor finance is to be provided are set out in the spreadsheet prepared by Steve and signed by Lee and Katrina for identification purposes ("the Vendor Finance Arrangement") at **Annexure C**. For clarity it is noted that Lendlease made a payment of \$8,000,000.00 to MGPL on 18 July 2019 for purchase of the First Tranche of the staged acquisition of the MDP Land and a payment of \$8,000,000.00 to MGPL on 18 July 2020 for the Second Tranche. Twenty percent (20%) of the Price is to be paid to MGPL at the date of completion of the contract pursuant to exercise of Katrina's Call Option or Lee's Call Option by way of provision of the payment by MGPL under the Vendor Finance Arrangement and the balance of the Price when Lendlease pays for the acquisition of each of the three remaining tranches of the MDP Land. ...

3.19 Expiration of both call options

If Katrina's Call Option and Lee's Call Option both expire, MGPL will be at liberty to sell the Homestead Lot at a time and on terms that MGPL solely determines are appropriate provided that MGPL must use its best endeavours to maximise the sale price and provided that MGPL must give Katrina prior notice of such intended sale and if the sale is directly or indirectly to Lee or any person or body associated with Lee, Katrina to have equal opportunity and rights in relation to such proposed sale.

4. DIVIDENDS AND DISTRIBUTIONS

4.1 Declaration of dividends

MGPL will declare and pay fully franked dividends to its shareholders at least once each year provided the balance in its franking account allows.

4.2 Dividend after Second Tranche

Following the transfer of the Second Tranche of the MDP Land to Lendlease, MGPL to declare and pay a fully franked dividend, to the extent available, to its shareholders. If unable to pay a fully franked dividend, MGPL will advance a sum, interest free, equal to the value of all monies received from sales of land at Mt Gilead, less all normal costs and deductions and the usual provisioning

for expenses, equally to companies owned or controlled by Lee being Leemaco Investments Pty Ltd and by Katrina being MGHPL and KJDH Investments Pty Ltd.

4.3 Equal distributions

Subject to clause 3.14 and clause 9.1(h), Kalemon as trustee of the MGT is to exercise its discretion to make prompt distributions to such of the primary beneficiaries as nominated in clause 1(c)(i)(aa) and/or 1(c)(i)(cc) of the MGT Deed, so that in respect of each distribution made, amounts to Lee and entities in which Lee has an interest are equal in amount to amounts to Katrina and entities in which Katrina has an interest, the sum of such distributions to be equal to the amount of fully franked dividends received from MGPL, less all normal costs and deductions, and usual provisioning for expenses (except in the event of the death of either Lee or Katrina).

4.4 Actions following receipt of Second Tranche

Following completion of the transfer of the Second Tranche of the MDP Land to Lendlease and payment of the purchase price by Lendlease for that land, MGPL, Lee and Katrina are to do all things necessary, including voting as directors in Kalemon and/or Macarthur-Onslow Nominees Pty Ltd, to ensure that the net proceeds of the Lendlease purchases from MGPL and the net proceeds of sale of the Homestead Lot and other properties provided for in this Deed are distributed or advanced promptly and equally while each of them is alive, and in a manner and form recommended by Nexia Australia.

4.5 Loans from MGPL

Any such loans or advances made by MGPL to companies owned or controlled by Lee and Katrina will only be repayable on any wind-up of MGPL.

5. YARRANABBE ROAD

5.1 Occupation of Yarranabbe Road Apartment

Lee may occupy the property known as Unit XX, XX Yarranabbe Road Darling Point, being Lots XXXX in Strata Plan XXXX (**Yarranabbe Road Apartment**) free of rent or other charge from Kalemon for as long as Katrina has a right to occupy the Homestead Lot under the Licence, or upon Lee's death, whichever is the earlier.

5.2 Access for Katrina

Katrina as director of Kalemon to have access to the Yarranabbe Road Apartment upon giving 48 hours notice for repairs and maintenance as deemed necessary by Kalemon but works to be at Kalemon's cost.

5.3 Access for executors

Lee will allow access to the Yarranabbe Road Apartment by Steve and/or Neil in their capacity as executors of the Estate and persons authorised by them, which they deem necessary (acting reasonably) solely for the purpose of finalising the Estate. Lee will allow Katrina access to the Yarranabbe Road Apartment when assessment is being made of Estate assets in that Apartment. ...

5.5 Katrina's personal belongings

Lee will on a day within 90 days of the date of this agreement as agreed between Katrina and Lee permit Katrina access to remove Katrina's personal belongings from the Yarranabbe Road Apartment.

5.6 First call option to purchase to Lee

Kalemon hereby grants a call option for Lee (or his nominee) to purchase the Yarranabbe Road Apartment, and Lee will have first right to purchase the Yarranabbe Road Apartment from Kalemon at the midpoint market value as set out in clause 8.1(d) (or receive it by way of a distribution *in specie* on a winding up of Kalemon with Katrina receiving an equivalent cash distribution) (**Lee's Yarranabbe Road First Call Option**). Lee's Yarranabbe Road First Call Option expires at the same time as Katrina's Call Option under clause 3.10, or upon Lee's death, whichever is the earlier.

5.7 Second call option to purchase to Katrina

If Lee does not exercise Lee's Yarranabbe Road First Call Option prior to its expiration, then Kalemon hereby grants a call option for Katrina (or her nominee) (**Katrina's Yarranabbe Road Second Call Option**) to purchase the Yarranabbe Road Apartment to be exercised within 60 days after the expiration of Lee's Yarranabbe Road First Call Option at the price determined under clause 5.6.

5.8 Abandonment of other rights

Lee releases and abandons any right to occupy the Yarranabbe Road Apartment other than as set out in clauses 5.1 and 5.6. ...

8. KALEMON, KIPPALAW AND DWMO

8.1 Kalemon

Lee and Katrina agree:

- (a) to commence forthwith following the transfer of the Second Tranche of the MDP Land to Lendlease and payment of the purchase price by Lendlease for that land, the staged liquidation process set out in the Nexia memorandum dated 22 December 2014 (**the division process**) and to implement it in substantially the form and manner described therein, subject to any amendments or changes recommended or advised by Nexia Australia to optimise or otherwise facilitate the distribution of the assets of Kalemon to the shareholders;
- (b) to authorise the Accountant to take all action necessary to give effect to this agreement, including retaining lawyers;
- (c) to appoint a suitably qualified person nominated by Nexia Australia, other than Steve, as liquidator (**the Liquidator**) to Kalemon (such appointment to include terms as necessary to give effect to this Deed) and to provide a full indemnity to the Liquidator for acting in that capacity;
- (d) they do hereby irrevocably authorise and direct the Accountant to obtain promptly following the execution of this Deed two current market valuations of the Yarranabbe Road Apartment and the property known as **Southlands** being the land in Folio Identifiers XXXX and, once obtained, for the Accountant to determine a midpoint valuation for the properties and to provide this in writing together with copies of the valuations (**the first valuation notification**) to Lee and Katrina;

(e) If neither exercise their respective right to purchase the Yarranabbe Road Apartment, that property will be sold at the discretion of the Liquidator, which if conducted by public auction, Lee and Katrina will be permitted to bid;

(f) Southlands will be sold by the liquidator at public auction at which Lee and Katrina will be permitted to bid;

(g) If either Lee or Katrina purchases the Yarranabbe Road Apartment in accordance with clause 5 and/or Southlands in accordance with this clause or clause 9, the Liquidator will be requested to effect by way of an in specie distribution to offset, where available, all or part of the purchase price against an entitlement that party may have to participate in an in specie or cash distribution of the other assets of Kalemon, provided this does not alter an overall equal distribution to both Katrina and Lee. ...

9. CALAMONDAH, DEERSBROOK and SOUTHLANDS

9.1 Disposition of Calamondah, Deersbrook and Southlands

Lee, Katrina, MGPL, Kalemon and MON agree:

(a) They do hereby irrevocably authorise and direct the Accountant to obtain promptly following the execution of this Deedtwo current market valuations of the property known as Calamondah being the land in Auto-Consol XXXX, Auto-Consol XXXX, F/I XXXX, F/I XXXX, F/I XXXX, F/I XXXX (**Calamondah**), the property known as Deersbrook being the land in Folio Identifiers XXXX and XXXX (**Deersbrook**), and Southlands and, once obtained, for the Accountant to determine a mid point valuation (“the Midpoint Valuation”) for each property and to provide this in writing together with copies of the valuations (the **CD&S Valuation Notification**) to Lee and Katrina.

(b) Lee will have the first right to purchase Calamondah for the sum of \$7,800,000 inclusive of GST (if any) or the Midpoint Valuation obtained, whichever amount is the greater and/or Deersbrook for the sum of \$3,300,000 inclusive of GST (if any) or the Midpoint Valuation obtained, whichever amount is the greater.

(c) The first right to purchase Calamondah will lapse if not exercised within 14 days of receipt of the CD&S Valuation Notification whereupon Katrina will have 7 days in which she may exercise a right to purchase that property for the same price as in sub-paragraph 9.1(b).

(d) The first right to purchase Deersbrook will lapse if not exercised within 14 days of receipt of the CD&S Valuation Notification whereupon Katrina shall have 7 days in which she may exercise a right to purchase that property for the same price as in sub-paragraph 9.1(b).

(e) If neither Lee nor Katrina exercise any right of purchase for any of Calamondah or Deersbrook then the property for which neither have exercised the right of purchase shall be put to public auction by the Accountant (at a time determined by the Accountant being within a period of not more than 18 months from the expiry of the respective options to purchase Calamondah and Deersbrook) in relation to Calamondah and Deersbrook on behalf of MGPL and by the Liquidator in relation to Southlands. Lee and Katrina will be permitted to bid at any public auction of Calamondah or Deersbrook or Southlands.

(f) If either of Lee or Katrina purchases Calamondah or Deersbrook, the accountants for MGPL and the MGT will deal with distributions, loans and

payments as far as possible by book entries (most likely in the manner set out in Nexia Australia's excel spreadsheet at Annexure C so that Katrina or Lee are not materially out of pocket in relation to payments to MGPL contemplated under these arrangements.

(g) If either Lee or Katrina purchases Southlands, the Liquidator of Kalemon will be requested to effect by way of an in specie distribution to offset, where available, all or part of the purchase price against an entitlement that party may have to participate in an in specie or cash distribution of the other assets of Kalemon, provided this does not alter an overall equal distribution to both Katrina and Lee.

(h) Lee or Katrina respectively to pay (from their own funds) stamp duty, if any, payable in relation to any transfer of Calamondah, Deersbrook or Southlands respectively to Lee or Katrina (or their nominees).

10. DISMISSAL OF CURRENT PROCEEDINGS AND COSTS

10.1 Dismissal terms

(a) Katrina agrees to immediately take all steps necessary to dismiss proceedings in the NSW Supreme Court number 2013/231129 (**Proceedings**) and agrees not to commence any further proceedings in respect of the subject matter of that case, including (without limitation) in relation to estoppel and undue influence.

(b) Each party must pay its own costs associated with the current remaining element of the Proceedings and of the mediation subsequent to the orders made in the Proceedings on 13 March 2017.

(c) Lee, Steve, Neil and MGPL consent to the dismissal of the Proceedings on these terms.

11. RELEASES BETWEEN THE PARTIES

11.1 Katrina's releases

Upon the dismissal of the Proceedings, Katrina agrees subject to clause 11.3:

(a) to release and does unconditionally release Lee, Steve, Neil, the Estate and MGPL, its officers, employees and servants (**the Defendants**), from all Claims Katrina has or may have against any of the Defendants in any capacity whatsoever; and ...

11.2 Lee, Steve, Neil and MGPL's releases

Upon dismissal of the proceedings, Lee, Steve, Neil (in every capacity) and MGPL agree to:

(a) release and do unconditionally release Katrina from all Claims each has or may have against Katrina in any capacity whatsoever;

(b) not to make, take or institute any Claim Lee, Steve, Neil or MGPL or any of them has or may have against Katrina in any capacity whatsoever. ...

12. IMPLEMENTATION

12.1 Take all steps

Each party must take all steps, execute all documents and do everything reasonably required by any other party to give effect to the transactions contemplated by this agreement.

12.2 Terms of grants of options etc

(a) In this deed, the grant of an option or right of first or last refusal for purchase of a property is a grant at the price as determined in this deed and, subject to any terms and conditions specifically referred to in such grant, is on the conditions specified in the contract attached to this agreement in respect of the respective property the subject of the option or right of first or last refusal (the respective Contract). If no contract in respect of any such property is attached the terms and conditions shall be the terms and conditions of the contract for the sale and purchase of land 2018 edition published by The Law Society of New South Wales and The Real Estate Institute of New South Wales.

(b) A grant of the option or right of first or last refusal constitutes an irrevocable offer by the company granting the option or right ("the Grantor") to enter into a binding agreement for the sale of the property with the person who has in accordance with this agreement exercised such option or right of refusal ("the Grantee").

(c) Any such option or right of first or last refusal is personal to the person to whom such option or right of first or last refusal is granted in this deed (or their nominee as defined in this deed) and may not be assigned by such person and may only be exercised by that person (or their nominee as defined in this deed).

(d) Any such option and/or right of first or last refusal is to be exercised by service of written notice of exercise of option or right of last or first refusal (as the case may be) signed by the Grantee together with two copies of the Contract for the purchase of such property duly executed by the Grantee and cheque for the deposit payable under the respective Contract in favour of the vendor named in the Contract, by personally delivering those documents or forwarding those documents by prepaid registered post to the Grantor care of Mr Steven Rogers, XX Market Street, Sydney NSW or if there be a liquidator appointed to Kalemon to the Liquidator at the Liquidator's usual business address.

(e) On the exercise of any such option or right of first or last refusal in accordance with this deed, the respective Contract for the property the subject of such option or grant of first or last refusal shall be deemed to have been entered into on that date, whether or not the contract is signed by the Grantor as vendor.

(f) The Grantor shall nevertheless execute the two copies of the Contract delivered on exercise of such option or grant of first or last refusal and forward one such executed copy of the Contract to the Grantee at the Grantee's address for service in this deed. ...

14. WHOLE AGREEMENT

This deed contains the entire agreement of the parties as regards its subject-matter. It replaces and supersedes all previous settlement offers, proposals, negotiations, discussions, representations and summaries of its proposed or intended contents. ...

21. FURTHER ASSURANCES

Each party must take all necessary steps, execute all documents and do all other acts and things as may be reasonably requested in writing by another party to give effect to the provisions of this deed. ...

23. NO ADMISSIONS

The parties agree that this deed is entered into by them without admissions as to their respective rights and liabilities in relation to the Proceedings.

24. COSTS

Subject to any other agreement of the parties, each party is to pay that party's own legal costs and disbursements of and incidental to the preparation, completion and signing of this deed."

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.