JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	McCLEARY -v- DIEN AUSTRALIA PTY LTD [2021] WASC 272
CORAM	**:**	TOTTLE J
HEARD	**:**	17 MAY 2021
DELIVERED	**:**	12 AUGUST 2021
FILE NO/S	**:**	CIV 3093 of 2017
BETWEEN	**:**	NEIL McCLEARY TRACEY ANNE McCLEARY Plaintiffs AND DIEN AUSTRALIA PTY LTD Defendant

Catchwords:

Agency - Actual authority - Extent of putative agent's authority - Whether express or implied authority to enter into sales contract at a discounted price - Turns on own facts

Agency - Ostensible authority - Holding out by principal - Representation by conduct - Whether reliance on representations reasonable

Agency - Ratification - Ratification by principal of agent's unauthorised conduct - Ratification by silence or acquiescence

Strata titles - Contract for the purchase of strata titled property - Whether

contract excludes or restricts operation of the *Strata Titles Act 1985* (WA) - Whether provisions void by operation of s 70A of the *Strata Titles Act 1985* (WA)

Legislation:

Strata Titles Act 1985 (WA), s 70, s 70A, s 70B

Result:

Judgment for the plaintiffs

Category: B

Representation:

Counsel:

Plaintiffs : Mr P A Walker
Defendant : Mr A P Hershowitz

Solicitors:

Plaintiffs : Taylor & Taylor Lawyers Pty Ltd
Defendant : Robertson Hayles Lawyers

Case(s) referred to in decision(s):

Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd [2006] QCA 540; [2007] 2 Qd R 399
Balanced Securities Ltd v Dumayne Property Group Pty Ltd [2017] VSCA 61; (2017) 53 VR 14
Black Box Control Pty Ltd v Terravision Pty Ltd [2016] WASCA 219
Blatch v Archer (1774) 98 ER 969
Bolton v Lambert (1889) 41 Ch D 295
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640
Fitzgerald v FJ Leonhardt Pty Ltd [1997] HCA 17; (1997) 189 CLR 215
Jones v Peters [1948] VLR 331
Learn & Play (Rhodes No 1) Pty Ltd v Lombe [2011] NSWSC 1506
MacDonald v Shinko Australia Pty Ltd [1999] 2 Qd R 152

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; (2015) 256 CLR 104

Northside Developments Pty Ltd v Registrar-General [1990] HCA 32; (1990) 170 CLR 146

Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451

Pourzand v Telstra Corporation Ltd [2014] WASCA 14

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4; (2018) 264 CLR 1

Scots Church Adelaide Incorporated v Fead [1951] SASR 41

Suncorp Insurance and Finance Co Ltd v Milano Assicurazioni SpA [1993] 2 Lloyd's Rep 225

Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd [1957] HCA 10; (1957) 98 CLR 93

Tipperary Developments Pty Ltd v The State of Western Australia [2009] WASCA 126

Union Bank of Australia Ltd v Rudder [1911] HCA 39; (1911) 13 CLR 152

Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd [No 6] [2020] WASC 302

Yona International Limited v La Reunion Francaise SA [1996] 2 Lloyd's Rep 84

TOTTLE J:

Introduction

1 In 2015 the plaintiffs agreed to buy an apartment 'off the plan' from the defendant. The development company appointed to manage the development and sell the apartments made a proposal to the plaintiffs to the effect that if they paid 80% of the specified purchase price of the apartment immediately they would receive a 20% discount. The plaintiffs accepted this proposal, executed documents intended to give it effect (including a 'Discount Agreement') and paid 80% of the purchase price to the development company. The defendant denies that the development company had authority to reach such an agreement and refused to settle unless the plaintiffs paid the full purchase price. The development company has been wound up in insolvency.

2 The plaintiffs sue to enforce the sale at the discounted price. The defendant counterclaims to enforce the sale at the full price.

3 The primary issues are:

(a) What was the bargain struck between the parties?[1]

(b) Does the *Strata Titles Act 1985* (WA) operate to deprive the critical provisions of the Discount Agreement of legal effect?[2]

(c) Did the development company have actual or apparent authority to agree to sell the apartment to the plaintiffs on the terms it did?[3]

(d) If not, did the defendant ratify the sale?[4]

(e) Alternatively, is the defendant estopped from denying that the development company had authority to enter into the agreement with the plaintiffs?[5]

---

[1] Plaintiffs' Substituted Statement of Claim dated 19 May 2021 [8], Defendant's Second Substituted Defence and Counterclaim dated 20 May 2021 [8].
[2] Defendant's Second Substituted Defence and Counterclaim dated 20 May 2021 [10.6] and [18]; Plaintiffs' Substituted Reply and Defence to Counterclaim dated 24 May 2021 [9O.1] - [9P].
[3] Plaintiffs' Substituted Statement of Claim dated 19 May 2021 [8], [10], [12]; Defendant's Second Substituted Defence and Counterclaim dated 20 May 2021 [8], [10], [14]; Plaintiffs' Substituted Reply and Defence to Counterclaim dated 24 May 2021 [9].
[4] Plaintiffs' Substituted Statement of Claim dated 19 May 2021 [15] - [25]; Defendant's Second Substituted Defence and Counterclaim dated 20 May 2021 [35] - [45]; Plaintiffs' Substituted Reply and Defence to Counterclaim dated 24 May 2021 [10].
[5] Plaintiffs' Substituted Reply and Defence to Counterclaim dated 24 May 2021 [9A] - [9O].

(f) Alternatively, did the development company mislead the plaintiffs as to the defendant's willingness to sell the apartment on terms that included a discount and, if so, is the defendant responsible for the development company's misleading or deceptive conduct?[6]

4 The plaintiffs raise a further argument based on the equitable doctrine of common mistake amounting to unconscionable conduct.

5 For the reasons set out below the plaintiffs succeed on their claim on the application of the principles of the law of agency. It has been unnecessary for me to consider their alternative claims.

The evidence

6 The parties tendered a large volume of documents and it was agreed between the parties that the documents could be relied on for the truth of their contents.

7 Each of the plaintiffs gave oral evidence. A director of the defendant, Mr Le Yu, gave evidence on its behalf.

8 In assessing the evidence I have taken into account that the majority of the events giving rise to this dispute occurred approximately five to six years before the trial. Memories fade with the passage of time and, when parties are giving evidence of events that occurred years before the trial, there is a danger that recollections may be influenced, perhaps subconsciously, by perceptions of self-interest. Accordingly in finding the relevant facts I have relied primarily on the documents and inferences that may be drawn from them.

9 Mr McCleary is an experienced businessman who has operated a boat spraying business for many years, and my impression is that his business has been successful. As one would expect of a successful business person Mr McCleary has some experience of buying and selling residential properties but he has no particular expertise in property transactions. Mr McCleary was the subject of a lengthy and probing cross-examination in which, from time to time, there were occasions where he did not answer the questions asked of him but tried instead to explain his approach to various issues. I formed a positive impression of Mr McCleary as a witness. His evidence was generally

[6] Plaintiffs' Substituted Statement of Claim dated 19 May 2021 [14A] - [14H]; Defendant's Second Substituted Defence and Counterclaim dated 20 May 2021 [17] - [24]; Plaintiffs' Substituted Reply and Defence to Counterclaim dated 24 May 2021 [9Q].

consistent with the contemporaneous documents though, as I will explain, there was some tension between aspects of his evidence and inferences drawn from the documents. Where that was the case I have been guided by what may be drawn from the documents.

10 Mrs McCleary's role in the transaction was more limited than that of her husband - she was involved in two meetings in August 2015 and in the events immediately connected with those meetings. Mrs McCleary found the process of cross-examination confronting. She was defensive. On occasions rather than answering the question asked of her she tried to make the point she thought was relevant. This tendency led me to approach Mrs McCleary's evidence with some caution, however, overall I accept the substance of her evidence.

11 Mr Yu incorporated the defendant with the intention that it would become the entity through which he made investments in land development projects in Australia. Mr Yu controlled the defendant. Mandarin is Mr Yu's native language and he is unable to read or speak English. Mr Yu prepared a witness statement in Mandarin and his witness statement and the English translation were tendered as part of his evidence-in-chief. The statements were supplemented by some brief oral evidence which was given through an interpreter.

12 Mr Yu was cross-examined with the assistance of the interpreter. He appeared quite forthright in his answers and there was no apparent hesitation on his part in answering questions put to him in cross-examination. As I will explain later in these reasons there were, however, significant inconsistencies between Mr Yu's oral evidence about his lack of knowledge of relevant events in the progress of the development and contemporaneous emails apparently sent and received by those who were acting on his behalf, in particular, his daughter Ms Jingwen (Kristen) Yu and his solicitor, Mr Adrian Liaw.

13 I am conscious of the considerable difficulties presented by the language barrier. Mr Yu was being cross-examined in a language he did not understand about documents written in a language he did not understand. These difficulties were compounded by the elapse of time. In these circumstances it is difficult to make a finding about Mr Yu's credit and it is not necessary to do so. In those instances where Mr Yu's evidence is inconsistent with the contemporaneous documents or inferences drawn from them I do not accept it as reliable evidence.

14 The plaintiffs' counsel made an overarching submission about the evidence adduced by the defendant to the effect that many of the witnesses whom it was open for the defendant to call and who could be expected to give relevant evidence were not called. The plaintiffs relied on the principle stated in ***Blatch v Archer***,[7] that all evidence is to be weighed according to the proof which it is in the power of one side to have produced, and in the power of the other to have contradicted.[8]

Factual findings

Background to parties and development

15 In early 2013 Mr Yu wished to obtain permanent residency in Australia for himself and his family. He had business interests in China and was looking for investments that might help him obtain permanent residency. Mr Yu was introduced to Ms Shu Wu, a migration agent, and she introduced him to Mr Liaw, a partner in the Sydney law firm known as Hicksons Lawyers. Separately Ms Wu introduced Mr Yu to Mr Ray Jinks and his son Mr Darin Jinks (the Jinkses) who were involved in property development in Western Australia.

16 In 2014 and 2015 Mr Yu was living in Chengdu in China. It was not until 2016 that he started to live for part of the time in Melbourne.

17 Mr Liaw was not only the defendant's lawyer. Mr Yu described Mr Liaw's role as follows:[9]

> Adrian Liaw is our lawyer, was our lawyer and he was a manager as well. He actually has our authority to act - take any initiatives without our instructions. Unless he encountered something that he could not deal with, then he would advise us.

18 Consistent with this evidence Mr Yu relied heavily on Mr Liaw, and upon his daughter, Ms Yu. Mr Liaw was involved in the commercial aspects of the development as well as those aspects which called for legal advice and assistance. The contemporaneous documents show that Mr Liaw and Ms Yu conveyed Mr Yu's instructions and sought information on his behalf. Mr Yu accepted that his daughter would seek information for him that he had instructed her to obtain but he denied that she sent emails on his behalf.[10] This denial is inconsistent with a number of emails sent by Ms Yu. It is clear from

[7] ***Blatch v Archer*** (1774) 98 ER 969.
[8] ***Blatch v Archer***, (970).
[9] ts 334 - 335.
[10] ts 327.

the terms of those emails she was sending them on Mr Yu's behalf. I refer to several of these emails later in these reasons.[11]

19 One of the property development businesses with which the Jinkses were involved was a business conducted by Next Generation Homes Pty Ltd. Another company associated with the Jinkses, 13 O'Connor Close Pty Ltd, had contracted to buy a beach side development site in North Coogee, the street address of which was 13 O'Connor Close, on which they proposed building an apartment complex. The Jinkses discussed this opportunity with Mr Yu and prepared a budget for the proposed development of the site.[12]

Terms sheet - development agreement - shareholders' agreement

20 The discussions between the Jinkses and Mr Yu led to the preparation and execution of a terms sheet in February 2014. The terms sheet set out the basis upon which the defendant would participate in the development of an apartment complex on the site.[13] The essential terms were that the defendant would acquire the site using $2.75 million of its funds to meet the purchase price and related expenses and that a new company would be appointed to act as the development company. The Jinkses would manage the new company which would obtain debt finance for the construction of the apartment complex and manage the development process. Upon sale of apartments the debt finance would be discharged and the funds invested by the defendant in the purchase of the site would be repaid. In addition the defendant would receive a fixed return as specified in the terms sheet. The balance of the proceeds of sale of the apartments would be paid to the development company and would constitute its profit on the development. The terms sheet contemplated the parties would execute a more comprehensive development agreement in due course.

21 The terms sheet referred to 'Projections' and although not attached to the terms sheet, the only document exchanged between the parties that answered this description was a document entitled 'Simple Feasibility'. This set out in tabular form the anticipated costs of the development, the anticipated gross revenue from apartment sales (approximately $20 million), the sources of finance and the anticipated returns.

[11] Emails and other communications are reproduced in these reasons in their original form without identification or correction of spelling or other errors.
[12] Exhibit 1.10.
[13] Exhibit 1.25.

22 13 O'Connor Close Development Company Pty Ltd (13 O'Connor) was to act as the development company. The Jinkses and Mr Yu and an associate of his, Mr Junzhong Yang, were appointed as directors.

23 On 10 June 2014 the defendant and 13 O'Connor entered into a development agreement (the Development Agreement). I refer to the terms of the Development Agreement later in these reasons. On the same day the defendant, the Jinkses and 13 O'Connor entered into a shareholders agreement to regulate the management and affairs of 13 O'Connor. The shareholders agreement provided for Mr Yu and Mr Yang each to have a shareholding in 13 O'Connor.

24 On 26 June 2014 the defendant became the registered holder of the development site.

2014 - 2015 development commences

25 Between June 2014 and June 2015 13 O'Connor took steps to progress the development which was named 'Oceana'. Development approval was obtained, a builder (Ren Construction Services Pty Ltd) was retained, building work started in February 2015, a sales office was established, sales brochures were printed, standard form sales contracts for the sale of strata titled apartments were prepared and discussions were held with the ANZ Bank about obtaining finance for the development. All these activities were undertaken by 13 O'Connor. In addition, a list of the prices at which the apartments were to be sold was agreed between the defendant and 13 O'Connor.[14]

26 In June 2014 a project management agreement was concluded in respect of the development.[15] The parties were Next Generation Homes Pty Ltd (as Development Manager) and Archimex Pty Ltd, Blue Haze Property Club Australia Pty Ltd and Metbridge Pty Ltd (collectively the Project Managers).[16] The contemporaneous correspondence discloses that the two individuals most closely involved in project management activities were Ms Debbie Briones and Ms Sharon Dreyer. As I explain later in these reasons, in June 2016 the defendant entered into a project management agreement directly with Archimex.

[14] Exhibit 2.62.
[15] Exhibit 2.08.
[16] Exhibit 2.08 - two of the staff of Archimex, Ms Sharon Dreyer and Ms Debbie Briones, appear to have had an existing relationship with Next Generation Homes Development Pty Ltd.

27 Mr Darin Jinks reported to Mr Liaw on progress in the development process.[17]

28 Some contracts for the sale of apartments within the development were entered into between March and August 2015. Among those who agreed to buy apartments in this period were a Mr and Mrs Calabrese, who had agreed to buy two apartments (numbers 25 and 26), and Ms Yu who had agreed to buy lots 6 and 22.[18]

29 The contract documentation signed by Mr and Mrs Calabrese included a 'Discount Agreement',[19] similar in its intended effect to the Discount Agreement subsequently signed by the plaintiffs, that is, in consideration for a substantial 'up front' payment, the purchase price was discounted by a substantial percentage so that none of the purchase price remained to be paid at settlement.

30 The contract price for apartment 6 (one of Ms Yu's apartments) was discounted by $20,000. In addition a 'furniture package' was to be provided. The furniture package was, in effect, an agreement to provide furniture for the apartment to the value of $10,000 - it was an incentive to potential buyers.[20]

31 The 'furniture package' clause provided:[21]

> Next Generation Homes (Australia) Pty Ltd and/or its subsidiaries ("Next Gen") have provided, and continue to provide, a $10,000 furniture package voucher ("the Voucher") to selected purchasers of Oceana apartments ("the Voucher Holders"). Next Gen have agreed with Interior Design Elements Pty Ltd trading as Furniture Fitouts ("Furniture Fitouts") that the furniture package covered by said voucher will, in every instance, be supplied uniquely and solely by Furniture Fitouts to the total exclusion of all and any other supplier, whether corporate, individual or otherwise.
>
> It is further agreed between Next Gen and Furniture Fitouts that in every instance the voucher amount will be paid in full directly by Next Gen to Furniture Fitouts immediately upon settlement of the purchase contract from the relevant settlement monies paid by the Voucher-Holder to Next Gen. Furniture Fitouts will liaise prior to settlement with all relevant Voucher Holders to establish the extent & makeup of their prospective individual fitout package. Voucher Holders will be permitted, at own expense, to extend their furniture package beyond

[17] Exhibit 2.19, 2.49, 2.55.
[18] Exhibits 4.14, 4.15, 6.72.
[19] Exhibit 6.72.
[20] Exhibit 4.14.
[21] Exhibit 4.14, 2204.

> that permitted by the Voucher Amount ("$10,000") upon payment of the relevant balance. Furniture Fitouts, standard terms & conditions of business will apply to each and every fitout undertaken under the Voucher Agreement.

32 The contract price for apartment 22 was discounted by 8 per cent and the contract also included a furniture package.[22] When first cross-examined about the discounting of the prices in respect of apartments 6 and 22 Mr Yu's evidence was that he did not know about the discounts,[23] though, his evidence at a later stage of the cross-examination was that the discounts were discussed and agreed with the Jinkses.[24] It is improbable that Mr Yu did not know about the direct discounts to the purchase prices at the time the contracts were made and I find that he did know.

Bank finance obtained

33 On 25 June 2015 the ANZ Bank offered 13 O'Connor a finance facility of $12,506,000 to finance the construction of the development.[25] Terms of the finance facility included terms to the effect that:

(a) There be an equity contribution of at least $5,126,000.

(b) The development site would be mortgaged by the defendant in favour of the ANZ.

(c) 'Qualifying Pre-Sale Contracts' having a net aggregate sales price of $12,256,000 had been achieved.

(d) The debt would be repaid out of the net receipts from the sale of the apartments.

(e) The facility would be secured by personal guarantees from the Jinkses.

34 On 27 August 2015 the defendant executed a mortgage of the land in favour of the ANZ Bank as security for the finance facilities that the bank was to make available.[26] The mortgage was executed on the defendant's behalf by Ms Wu and 13 O'Connor in their capacity as the defendant's attorney.

---

[22] Exhibit 4.15.
[23] ts 333.
[24] ts 335-336.
[25] Exhibit 3.11.
[26] Exhibit 4.21.

35 On 27 August 2015 13 O'Connor accepted the ANZ Bank's offer of finance.[27]

The defendant authorises third parties to act on its behalf

36 On 5 August 2015 the defendant executed a power of attorney by which it appointed 13 O'Connor and Ms Wu as its attorneys. [28] The powers conferred on 13 O'Connor and Ms Wu were extensive and extended to executing contracts for the sale of apartments. 13 O'Connor was granted the power to appoint each of Mr Ray Jinks and Mr Darin Jinks as sub-attorneys. The power of attorney specified that any exercise of power had to be done by 13 O'Connor or any sub-attorney and Ms Wu, that is, jointly.

37 On 31 August 2015 the directors of the defendant, Mr Yu Peng, Mr Le Yu, Mr Hua Yu and Mr Junzhong Yang executed a circulating resolution recording that:[29]

(a) Each of Mr Raymond Jinks and Mr Darin Jinks and Ms Shu Wu had been appointed as an attorney of the defendant with effect from 14 April 2015 and that since that date they had been authorised (and they remained authorised) to individually or collectively sign 'property sale contracts' on behalf of the defendant.

(b) 13 O'Connor and Ms Wu were appointed as the defendant's attorney under the power of attorney executed on 5 August 2015.

(c) The defendant ratified the execution of a number of contracts executed by Ms Wu and 13 O'Connor including the agreement for the sale of apartment 28 to the Plaintiffs.

38 In his witness statement Mr Yu said that it was important to him that the power of attorney required the Jinkses and Ms Wu to act jointly.[30] He was cross-examined about this and it was suggested to him that if it was important to him that the Jinkses and Ms Wu acted jointly he would not have signed the circulating resolution that authorised each of the Jinkses to act individually. Mr Yu's explanation was to the effect that contracts for sale at the prices agreed between

[27] Exhibit 3.11.
[28] Exhibit 3.23.
[29] Exhibit 4.30.
[30] Exhibit D2 [92].

13 O'Connor and the defendant could be signed individually but later there was an insistence on all contracts being signed jointly. Mr Yu was also taken to an email from Ms Yu to Mr Darin Jinks sent on 27 May 2016 in which Ms Yu said that Mr Yu was concerned about the situation and that he was taking away 'the right for [Mr Jinks] to sign and sell the apartments on [his] own'.[31] Mr Yu denied knowledge of the email and insisted that Mr Jinks never had such a right. The inference arising from the contemporaneous documents, the circulating resolution and Ms Yu's email of 27 May 2016 is that each of the Jinkses had authority to enter into contracts of sales individually and I so find.

The plaintiffs agree to buy apartment 28

39 By early August 2015 the apartment building had been completed up to the first level.

40 The plaintiffs had been looking for an apartment to purchase. Mrs McCleary had an interest in property and had looked at apartments in various other apartment complexes. She described her role as that of 'spotter' and her husband dealt with the paper work.[32]

41 On 4 August 2015 the plaintiffs visited the Oceana sales office on site. They were accompanied by their daughter Ms Lillie Tucker and her then husband, Mr Samuel Tucker and a business associate of Mr Tucker's, Mr Ralph Nunis. The evidence points to this visit having taken place on 4 August 2015. The plaintiffs met a sales person, Ms Katie McMeekin and discussed apartment layouts with her.

42 A short time later, Mr Darin Jinks came into the office. There were seven people present on this occasion and I infer it was likely that several conversations may have taken place at the same time. This inference was confirmed in part by Mrs McCleary's evidence to the effect that she was discussing some matters with Ms McMeekin while Mr McCleary was talking to Mr Darin Jinks.[33]

43 Mr Darin Jinks told Mr McCleary that he was part of the development company that was acting on behalf of a company called Dien whose directors resided in China. Mr Jinks said that he was doing the development and 'presales' on behalf of Dien.

---

[31] ts 352, exhibit 5.95.
[32] ts 283.
[33] ts 280.

44 Mr Jinks explained there was a possibility of purchasing an apartment at a discounted price if the discounted price was paid immediately. Mr McCleary said that everything depended on whether he and Mrs McCleary could obtain finance. If they could, then buying the apartment on the basis of the discount was a possibility.

45 Mr Jinks explained that he wanted to get the building moving and that was the reason for the availability of discounts. Mr McCleary recalled that the price mentioned by Mr Jinks was about $860,000 and the discount amounted to $174,000. Mr Jinks told Mr McCleary that there was a side agreement which was a 'subject to finance' agreement and if they obtained finance then they would sign 'the discount agreement'. Mr Jinks told Mr McCleary that the side agreement would 'exempt us on any purchase if finance wasn't approved'.[34] Mr Jinks told Mr McCleary that if finance was obtained he and his wife would then sign 'the contract' (I infer this was a reference to a discount agreement) and the funds would be transferred to 'the development company account' and be used to progress the building.[35]

46 Mr McCleary was not surprised to be offered a discount. He did not think it unusual. Mrs McCleary had been offered various discounts when she had made inquiries about purchasing apartments in other complexes,[36] though she had not been offered a discount in exchange for paying the full purchase price before an apartment was completed.[37]

47 Mr McCleary was interested in who the builder was. In his evidence he explained that this was a matter of importance to him because of a previous bad experience with a builder. Mr McCleary's evidence was to the effect that after the first meeting he made inquiries about the builder and was satisfied that he was competent.[38]

48 Mr Darin Jinks showed the plaintiffs the ocean views from an apartment owned by Mr Ray Jinks located in a neighbouring apartment complex.

49 At the end of the visit to the Oceana sales office the plaintiffs were interested in purchasing an apartment on the level below apartment 28 and Mr Nunis had expressed an interest in apartment 28.[39]

---

[34] ts 156 - 157.
[35] ts 158.
[36] ts 187.
[37] ts 290 - 291.
[38] ts 159, 241.
[39] ts 156.

50 In the course of the 4 August 2015 meeting the plaintiffs were provided with brochures setting out the layouts and 'finishes' options of the apartments. In addition Mr Jinks provided the plaintiffs with a specimen sales contract - a substantial document of 194 pages.[40] Mr McCleary did not go through the whole of this document he looked at the floor plans and the layouts and the pages at the beginning 'just briefly'.[41]

51 Mr Jinks and Ms McMeekin impressed the plaintiffs and they both left the site office under the impression that Mr Jinks represented the defendant.[42]

52 After the meeting Mr McCleary's understanding was that if he and his wife proceeded to buy an apartment they would sign a sales contract in the form provided to them and a side agreement and they would then make an application for finance. If the application succeeded they would be required to sign a discount agreement and if they did not get finance they would not be required to proceed.

53 Mr McCleary was cross-examined about why the transaction could not have been undertaken with one agreement specifying the price he was prepared to pay. Mr McCleary's evidence was that he had 'no idea' and he accepted that having one contract was the 'obvious thing'.[43] I accept Mr McCleary's evidence and find Mr McCleary did not understand why he and his wife were required to sign three agreements rather than one. I do not draw any adverse inference from this - I accept the force of the plaintiffs' counsel's closing submission that, where a transaction is proposed, presented and explained by a person, in this case Mr Darin Jinks, who appears competent and professional, it is natural for persons in the plaintiffs' position to assume that the person knows what they are doing, and that if there are particular parts of the transaction which are unclear to them, nevertheless the proponent must understand it and there must be a reason why they need to do it that way.

54 In an affidavit sworn by him at an early stage of the proceedings Mr McCleary deposed that at the conclusion of the first meeting at the sales office he and Mrs McCleary had 'agreed in principle' to purchase an apartment in the development.[44] In cross-examination Mr McCleary

[40] Exhibit 3.20.
[41] ts 160.
[42] ts 159, 282.
[43] ts 186.
[44] Affidavit of Neil McCleary sworn 31 January 2018, 3.

gave evidence to the effect that what he meant by 'agreed in principle' was that he was 'seriously interested'.[45] I did not find Mr McCleary's attempt to equate the phrase 'agreed in principle' with 'seriously interested' convincing.[46] That said, I think that it was most unlikely that at the first meeting Mr McCleary had 'agreed in principle' to buy an apartment. Apart from anything else I find Mr McCleary would not have agreed to buy an apartment without having first made inquiries about the builder. The statement in Mr McCleary's affidavit that he had 'agreed in principle' to buy was incorrect.

55 At the end of the first meeting I find that Mr McCleary thought the project was, as he described it 'an impressive project',[47] and he and Mrs McCleary were seriously interested in buying an apartment at a discounted price on the basis proposed by Mr Darin Jinks and that he communicated that level of interest to Mr Jinks. I find that the plaintiffs' interest in purchasing an apartment was contingent on the availability of a discount - they would not have been interested in buying at $869,000.[48] Mr McCleary considered that the discounted price was a 'very fair price to pay for the apartment' taking into account that he was paying the price a year before the development was to be completed, which was an unusual thing to do when purchasing an apartment off the plan.[49] Consistent with the plaintiffs' level of interest, on 6 August 2015, they took the first steps to obtain finance by signing a standard 'disclosure form' as required by their bank, the National Australia Bank (NAB).

56 On 6 August 2015 Ms McMeekin sent an email to Mr McCleary attaching a document entitled 'Discount Agreement',[50] and a further email attaching a document entitled 'Side Agreement'.[51]

57 The discount agreement document was expressed to be between 13 O'Connor and the plaintiffs and to relate to a contract by the plaintiffs to purchase apartment 28 for $869,000. Its intended effect was to confer the benefit of a discount of $174,000 against the purchase price of $869,000 of apartment 28 (a discount of approximately 20 per cent) on condition that the plaintiffs provided a deposit bond of $86,900 and paid to the 'Seller' the 'Nett Purchase Price' of $695,000 into a

[45] ts 215 - 216.
[46] ts 215 - 216.
[47] ts 160.
[48] ts 158, 282, 285.
[49] ts 184 - 185.
[50] Exhibit 3.25.
[51] Exhibit 3.26.

nominated bank account (being an account in the name of 13 O'Connor) within 3 days of signing the discount agreement.

58 The intended effect of the side agreement document was to make a contract for the purchase of apartment 28 'subject to finance' and to make provision for a deposit bond of $86,900 (in place of a cash deposit) at 13 O'Connor's expense. Mr McCleary understood that in the event he and his wife were not successful in obtaining finance the side agreement document would operate so that the purchase would not proceed. He understood that the side agreement document would be signed at the same time as the sales contract.

59 The plaintiffs visited the Oceana sales office for a second time on 7 August 2015 (once again accompanied by the Tuckers and Mr Nunis). On that occasion they signed a contract for the sale of apartment 28 by offer and acceptance (the Sales Contract), (Mr Nunis had decided he was interested in another apartment),[52] and a side agreement in the form sent to Mr McCleary by email the previous day (the Side Agreement).

60 The Sales Contract and associated documents extended to 202 pages and included a number of documents concerning the plaintiffs' prospective rights and obligations as the owners of a strata titled apartment. It was a pre-printed document into which the plaintiffs' details had been entered in handwriting by Mr Darin Jinks along with the price of $869,000. It provided that a deposit of $86,900 would be payable. Confusingly, the Sales Contract stated that $86,900 would be paid on signing and $86,900 within 30 days.[53] The Sales Contract contained lengthy and detailed conditions of sale. It was not 'subject to finance'. The Sales Contract recorded that it had been signed by Mr Darin Jinks and Ms Wu as attorneys for the defendant whose signatures were witnessed by Ms McMeekin. Ms Wu, however, was not present at the meeting on 7 August 2015.

61 The Side Agreement was dated 4 August 2015 but it was not in dispute that it was not signed by the plaintiffs until 7 August 2015 at the meeting at the sales office. The overall effect of Mr McCleary's evidence was that he understood that the Side Agreement varied the

[52] Exhibit 4.1.
[53] Exhibit 4.1, 1772.

terms of the sales contract.[54] I find that this was his understanding and it was on that basis that the plaintiffs proceeded with the purchase.

62 When the plaintiffs signed the Sales Contract and the Side Agreement they understood, on the basis of the explanations provided by Mr Darin Jinks, that if they obtained finance they would sign a discount agreement and that they would be required to pay $695,000 for apartment 28.[55] They would not have proceeded if they had thought that they would be required to pay $869,000.

63 The Sales Contract included clauses to the effect that it constituted the entire agreement, cl 32.1, and that the plaintiffs had not entered into the contract on the basis of any representations made by the defendant, cl 32.2. The effect of the plaintiffs' evidence was that they did not notice these clauses or pay them any attention.[56]

64 In the course of cross-examination on the effect of these clauses in the Sales Contract, Mr McCleary rejected a proposition to the effect that he did not rely on any representations and 'snatched at a bargain'.[57] His evidence was to the effect that he thought he was buying an apartment at a discount because he was paying up front for an incomplete apartment and he thought that was fair. I accept that is the way in which Mr McCleary viewed the transaction.

65 Mr and Mrs Tucker also agreed to buy an apartment - apartment 23 - for $815,000 with a cash deposit of $81,500.[58] Mr McCleary's evidence was to the effect that the Tuckers required finance to purchase apartment 23. He said that the Tuckers did not have a discount agreement.[59] In March 2016 the Tuckers decided not to proceed with the purchase of an apartment. Mr McCleary understood that this was because they were unable to obtain finance.[60] The Tuckers became involved in a dispute with the defendant about the return of the deposit paid by them.

66 The plaintiffs made an application for finance on 12 August 2015. On 26 August 2015 the NAB offered the plaintiffs a loan of $700,000. This offer was accepted by the plaintiffs on 1 September 2015.

---

[54] ts 196.
[55] ts 157 (Mr McCleary), 296 (Mrs McCleary).
[56] ts 165 (Mr McCleary), 285 (Mrs McCleary).
[57] ts 198.
[58] Exhibit 4.5.
[59] ts 244.
[60] ts 244.

67 On 28 August 2015 the plaintiffs provided a 'deposit guarantee' in respect of the deposit of $86,900 as referred to in the Side Agreement.[61] This 'deposit guarantee' was arranged by Mr Darin Jinks using a company, Deposit Power Pty Ltd. Mr McCleary had signed the necessary application on 11 August 2015.[62] Mr McCleary's evidence was to the effect that he understood Mr Darin Jinks would not only arrange the deposit guarantee but pay for it. There is no evidence that the plaintiffs made any financial contribution to the cost of obtaining the deposit guarantee and I accept Mr McCleary's evidence as to his understanding about who would pay for the deposit guarantee.

68 Mr McCleary consulted his solicitor Mr Godfrey Taylor. Mr Taylor prepared a draft deed to use in place of the discount agreement document that had been provided to Mr McCleary by Ms McMeekin.[63] The proposed parties to the draft deed were the defendant, the Jinkses and the plaintiffs. The draft deed provided for the Sales Contract to be varied by reducing the price to $695,000 and providing for the price to be paid on a date to be specified in September 2015. The Jinkses were made parties to the draft deed in order to give a guarantee and indemnity in respect of an obligation on the defendant (imposed in acknowledgement of the provisions of s 70(3) of the *Strata Titles Act 1985*) to repay the purchase price of $695,000 if the plaintiffs elected not to proceed.

69 Mr McCleary sent the draft deed to Ms McMeekin and asked her to provide the deed to the Jinkses and let him know if any changes were required. I infer from the way in which various drafts of the discount agreement were prepared that the Jinkses did not accept the terms of the draft deed prepared by Mr Taylor. The Jinkses amended the discount agreement document as originally prepared by them, included a guarantee and indemnity in the terms set out in Mr Taylor's draft deed and signed the document.[64] On 8 September 2015 Ms Dreyer sent the discount agreement signed by the Jinkses to Mr McCleary and to Mr Nunis. It is not clear why Ms Dreyer sent the email to Mr Nunis. Mr McCleary denied that Mr Nunis was assisting him at this time and there is no evidence to suggest otherwise.[65]

[61] Exhibit 4.27.
[62] ts 203.
[63] Exhibit 5.1.
[64] Exhibit 5.5.
[65] ts 227.

70 Mr McCleary consulted Mr Taylor again. Mr Taylor prepared a letter for the defendant to sign confirming that the Jinkses were authorised by the defendant to enter into the discount agreement.[66]

71 I find that the following events occurred on 10 September 2015:

(a) Mr McCleary sent the letter prepared by Mr Taylor for the defendant to sign to Ms Dreyer along with the version of the discount agreement prepared by the Jinkses (incorporating the guarantee and indemnity) to which handwritten changes had been made and asked Ms Dreyer to arrange for the Jinkses to initial the changes. Mr McCleary was not sure in whose handwriting the changes to the discount agreement had been made.[67] He thought it might have been Mr Taylor's handwriting and given the limited number of people involved in the process I find it is likely that the handwritten amendments were made by Mr Taylor.[68]

(b) Ms Dreyer sent an email to Mr McCleary attaching a letter in the terms of the draft prepared by Mr Taylor signed by Mr Darin Jinks and Mr Ray Jinks. Each had signed the letter 'as authorised representative of Dien Australia Pty Ltd'. The letter stated:[69]

> Dien Pty Ltd confirms that 13 O'Connor Close Development Co Pty Ltd has its authority as its agent to enter into the Discount Agreement for the reduction of the purchase price for Apartment 28 which is presently being negotiated with Mr and Mrs McCleary.

(c) The final form of discount agreement was signed by the plaintiffs.[70]

(d) The handwritten amendments to the discount agreement were initialled by Mr Darin Jinks and Mr Ray Jinks, each of whom had signed the document on 8 September 2015.[71] Mr McCleary was not sent a copy of the document with the handwritten amendments initialled until 21 September 2015.[72] I am satisfied, however, that Mr McCleary was assured by the contents of the

[66] Exhibit 5.8.
[67] ts 210.
[68] ts 210, 228 - 229.
[69] Exhibit 5.11.
[70] ts 165 - 166.
[71] Exhibit 5.8.
[72] ts 247.

email attaching the letter referred to at (b) sent to him by Ms Dreyer that the amendments to the document had been initialled and it would be sent to him. In her email Ms Dreyer referred to having 'IT issues today' and that 'The balance of the paperwork will follow the moment I am able to get my printer/scanner up and running again'.[73]

(e) The plaintiffs transferred $695,000 from their bank account to 13 O'Connor's bank account at Commonwealth Bank of Australia. Mr McCleary was cross-examined as to whether he and his wife had authorised the transfer of funds before they knew that the letter referred to at (b) had been signed and the amendments to the discount agreement proposed had been accepted.[74] The cross-examination depended for its force on accepting the reliability of the time at which emails had been sent on 10 September 2015. I do not accept that the time recorded on the various emails exchanged on 10 September 2015 is a reliable indication as to when the emails were sent and I do not accept that Mr McCleary authorised the transfer of the funds before he was assured that the letter had been signed and the amendments to the discount agreement accepted.

72 When the plaintiffs signed the discount agreement document (the Discount Agreement) on 10 September 2015 they believed that the Jinkses and 13 O'Connor had authority to enter into the agreement and that belief was based, in part on the letter signed by the Jinkses stating they had authority, but predominantly on the impression (formed by them from their visits to the sales office, their receipt of sales materials and the sales contracts from Mr Darin Jinks and Ms McMeekin) that 13 O'Connor had authority to sell apartments in the development and that Mr Darin Jinks had authority to negotiate and conclude the terms upon which sales could be made. I am satisfied that if the plaintiffs had thought that the Jinkses did not have authority from the defendant to sell apartment 28 to them at the price of $695,000 they would not have entered into the agreements and would not have purchased the apartment. I am satisfied also that Mr McCleary thought that in paying the funds to 13 O'Connor he thought he was paying the defendant as 13 O'Connor was acting on its behalf.[75]

[73] Exhibit 5.11.
[74] ts 246 – 247, 250 - 251.
[75] ts 209, 237.

73 The introductory provisions of the Discount Agreement: recorded that it related to apartment 28, 13 O'Connor Close, North Coogee (defined as the Property); referred to 13 O'Connor as the 'Developer' and the plaintiffs as the 'Buyers'; specified that the 'Purchase Price' was $869,000, the 'Discount' was $174,000 and the 'Net Purchase Price' was $695,000. The operative provisions of the Discount Agreement (with the initialled handwritten amendments italicised) were as follows:[76]

> The Developer agrees to pass onto the Buyer the Discount (to be deducted off the Purchase Price) for the above Property subject to:
>
> 1 The Buyer producing an Offer and Acceptance to the Seller to purchase the Property within the terms described therein.
>
> 2 The Developer *on behalf of the Seller* accepting from the Buyer the Offer and Acceptance to purchase the Property.
>
> 3 The Buyer obtaining a deposit bond to the value of $86,900 as more fully contemplated in the side agreement dated 8 September 2015 between the Parties.
>
> 4 [This clause and its various sub-clauses incorporated the guarantee by the Jinkses which is not of any relevance]
>
> 5 The parties agree that at *any time*, the Buyers may elect not to proceed with the purchase of the Apartment. The Buyers hereby warrant and undertake to notify the Developer as soon as is reasonably possible that they will advise the Developer of their intention not to proceed with the purchase of the Apartment.
>
> In that event that the Developer shall pay to the Buyers the Nett Purchase Price *by 30 June 2016*.
>
> If the Buyers elect not to proceed with the purchase, *and also if they do proceed with the purchase,* the Bond which has been posted shall be forthwith returned to Deposit Power Pty Ltd.
>
> 6 The Buyer paying to the Seller the Nett Purchase Price (being $695,000) within 3 business days of signature hereof, to the following nominated bank account:
>
> Account Name: 13 O'Connor Close Development Company Pty Ltd
> Bank: CBA
> BSB: [redacted]
> Account Number: [redacted]

[76] Exhibit 5.08.

74 Before leaving the subject of the Discount Agreement I record that among the documents provided by Mr McCleary to his bank, was a version of the discount agreement in the form originally sent to him by Ms McMeekin on 6 August 2015 which Mr McCleary had signed and dated 4 September 2015.[77] Mr McCleary was cross-examined about why he had signed this version of discount agreement and it was suggested that he was attempting to mislead his bank.[78] Mr McCleary was unable to recall why he had signed the document.[79] I accept Mr McCleary's evidence. I think it most unlikely that Mr McCleary was trying to mislead the bank - apart from anything else the bank had already agreed to provide finance.

75 The deposit bond was not returned after $695,000 was paid. Mr McCleary's evidence was to the effect that as the purchase price had been paid in full there was no need for the deposit bond to continue to be held and he thought it had been returned.[80] Mr McCleary rejected the suggestion that he had not taken steps to see that the deposit bond was returned because it was still required to be paid. I accept Mr McCleary's evidence and find that his understanding was that after the payment of $695,000, there was no requirement for the deposit bond to continue to be held.

76 I find that the Jinkses had not sought approval from anyone at the defendant to enter into the sale of apartment 28 for a price of $695,000 on the terms agreed with the plaintiffs.

77 13 O'Connor applied the $695,000 paid by the plaintiffs in the discharge of various loans owed by it to third parties.

Disputes between the defendant and 13 O'Connor

78 In late 2015 the ANZ Bank varied the terms of its finance facility and required 13 O'Connor and the defendant to sign a variation letter. It appears that this event was a catalyst for the expression of some concern on behalf of Mr Yu about progress, particularly progress in achieving apartment sales. On 10 February 2016 Mr Liaw sent an email to Mr Darin Jinks and Ms Briones in which he recorded that Mr Yu had concerns about the sale of apartments and that he, Mr Liaw,

[77] Exhibit 1.13, 142.
[78] ts 200.
[79] ts 199.
[80] ts 235 - 236.

planned to visit Perth and wanted to meet them and the 'relevant sales person' when he was there.[81]

79 On 18 February 2016 Mr Liaw travelled to Perth, visited the site and met with Mr Darin Jinks and others involved in the development. I infer Mr Liaw reported to Mr Yu on his visit and meetings.

80 On 16 March 2016 Ms Yu sent an email to Mr Darin Jinks asking for confirmation of the prices for apartments 6 and 22. Ms Yu wrote:[82]

> Adrian went to Perth a few weeks back and sent us a copy of the sells sheet. The price for apartment 6 & 22 are before discount right? I believe we got 8% on apartment 22 and $20,000 off on apartment 6 with furniture package. Would you mind confirm that for me? Also apartment 2 did not show up on the sells sheet at all, is there a problem?

81 Mr Yu's evidence was to the effect that he could not remember this email but I am satisfied that it was an email sent by Ms Yu seeking information on behalf of her father.

82 In response to Ms Yu's email of 16 March 2016 Mr Jinks confirmed that the figures for the discounts in Ms Yu's email were correct and that the price for each apartment shown on the sales sheet was the full price before discounts.[83]

83 On 22 March 2016 Mr Darin Jinks sent an email to Ms Yu and asked whether her parents would be in a position to visit Perth very soon and whether they were interested in acquiring any more apartments. Ms Yu replied on 23 March 2016 stating her parents could not visit Perth at that time and Mr Yu had thought about buying further apartments but had decided not to purchase any more.[84] The inference arising from Ms Yu's reference to her father having thought about buying further apartments but had decided against it was that he was the person who was buying apartments 6 and 22.

84 On 1 April 2016 Ms Yu sent an email to Mr Darin Jinks and stated:[85]

> Mr.Yu was asking if you can provide the following data as soon as possible:

[81] Exhibit 5.49.
[82] Exhibit 5.57.
[83] Exhibit 5.58.
[84] Exhibit 5.61.
[85] Exhibit 5.64.

> What is the total amount of loan we have?
>
> When can the project he completed?
>
> When can we get our return on investment?
>
> And send over a copy of the newest sales sheet. He is concerned about the sales. Please respond as soon as possible, he would like to have a phone conference with you if he thinks email is not efficient.
>
> Thank you

85 On 5 April 2016 Mr Liaw sent an email to Ms Dreyer in response to a request from Ms Dreyer for the defendant's consent to a step required to obtain an Occupancy Certificate with respect to the development. In his email Mr Liaw stated:[86]

> As I noted in my last email, I need to know what the current sales and rebates are before I can consent to this.
>
> Both Mr Yu and I are unsure as to why it is taking such a long time for this information to be provided.
>
> Can you please provide the information urgently.

86 Mr Darin Jinks sent Ms Yu a sales sheet on 11 April 2016.[87] The sales sheet disclosed the 'Signed purchase price' for each apartment, and the 'Discounted amount agreed to' in respect of the apartments. The entry in respect of apartment 28 was as follows:

Unit	Signed Purchase Price	Discounted amount agreed to	Furniture Pack	Less commission excl GST	Less GST	Nett Proceeds
28	869,000.00	174,000.00	0.00	-1,000.00	-78,992.10	0.00

87 In April 2016 negotiations began between the Jinkses and Mr Liaw regarding the possible purchase by 13 O'Connor of the defendant's interest in the development. The discussions contemplated the termination of the relationship between the two parties. The discussions continued until December 2016 when an agreement was reached, which among other things, provided for the termination of the Development Agreement.

[86] Exhibit 5.67.
[87] Exhibit 5.69.

88 On 13 April 2016 a number of emails were exchanged between Mr Liaw and Mr Darin Jinks.[88] The email exchanges followed a discussion between Mr Darin Jinks and Mr Yu and Mr Yu's accountant in Western Australia (which I infer was conducted over the telephone)[89] that had taken place some days earlier about the possibility of the Jinkses buying out the defendant's interest in the development. In summary, in the email exchange Mr Liaw expressed concern about the progress of the development and, in particular about what appeared to him to be discrepancies in the information provided about the apartment sales which had been achieved. Mr Liaw stated that Mr Yu required all communications to be directed to Mr Liaw. Mr Liaw referred to the fact that Mr Yu had purchased two apartments in the development - I infer that these were apartments 6 and 22 in respect of which Ms Yu had entered into contracts. This reference to Mr Yu having purchased two apartments in the development strengthens the inference that although the contracts were in Ms Yu's name, Mr Yu was providing the funds and he was the true purchaser.

89 In cross-examination Mr Yu maintained that it was his daughter who was buying the apartments and she was the person who would be paying for them.[90] Mr Yu's evidence is inconsistent with Mr Liaw's reference to him as the purchaser and it is inconsistent with the inference arising from Ms Yu's email of 23 March 2016 in which she referred to her father having thought about buying further apartments but had decided against it. I do not accept Mr Yu's evidence that his daughter was the true purchaser of the apartments.

90 On 3 May 2016 Mr Liaw sent an email to Mr Ray Jinks and Mr Darin Jinks.[91] Mr Liaw said Mr Yu had asked him to convey the following:

> (a) He is not prepared to simply rely on your refinance plans given that we have not seen any concrete refinance offers despite this being discussed in our telephone call of 20 April. More importantly, we do not have the time to deal with the problems before us if your plan fails.
>
> (b) He is very concerned with the use of "friendly purchasers" to make the presales required by ANZ. Whilst this issue has only just come to our attention, Mr Yu believes this has put Dien into a very awkward position. Given that meeting the ANZ presales

[88] Exhibit 5.72.
[89] Exhibit 5.64.
[90] ts 339 - 340.
[91] Exhibit 5.83.

> requirement was also a key milestone in the development agreement, we were also misled by this practice.

91 In the email of 3 May 2016 Mr Liaw recorded also that Mr Yu had instructed him to advise the Jinkses that:

> (a) He will want us to either start selling more apartments at a discount to meet the ANZ debt or to open discussions with ANZ seeking more time to repay the loan if you are not able to secure a loan offer to refinance the ANZ debt by the end of this week from a recognised financier. As to which option we will take will be discussed over the weekend. However, Mr Yu will allow you to continue to explore any refinance strategies whilst the apartments are being marketed and sold.
>
> (b) Dien will not allow any purchasers to rescind their contracts (irrespective whether they are friendly or not). Mr Yu will assess this on a case by case basis. Unless Mr Yu agrees, purchasers' deposits will be forfeited if any fails to complete their purchase.
>
> (c) Mr Yu is happy for you to buy his shares in Dien. As to the use of Dien's assets to secure loans, he will want legal, tax and accounting sign offs before agreeing to this proposal. Yimin will provide the tax and accounting advice while I will be getting another law firm to provide the legal confirmation. All costs involved in getting these advices will be borne by you.

92 On 6 May 2016 Mr Darin Jinks sent an email to Mr Liaw in which he stated:[92]

> ... As advised by Ray today we have sold 2 units this week and are showing 4 parties through tomorrow, all of whom are showing strong interest. We've had to discount but realize this is for the best of the project.

93 Mr Liaw forwarded Mr Darin Jinks' email to Ms Briones who responded to Mr Liaw as follows:[93]

> Thanks Adrian i was going to advise same, Sharon was told today they sold 2 units ... i suspect to investors they owe but I dont know yet? at least they are finally doing what needs to be done!
>
> Dempseys did contact me to say 20% discount on lower priced units would move ok, 30% discount on higher end would move but not fast ... they highlighted Mirvacs Leighton stage 2 ... been doing same but took 18 months to move the stock.

[92] Exhibit 5.86.
[93] Exhibit 5.86.

94 Mr Liaw forwarded the email chain to Ms Yu and stated:[94]

> Please see email below. Deb has been secretly helping me. This is confidential. Please keep this to yourself and Mr Yu.

95 On 11 May 2016 Mr Darin Jinks sent an email to Mr Liaw to which he attached what he described as a 'pre-sales list' in the form of the sales sheet sent to Ms Yu on 11 April 2016.[95] The entry in respect of apartment 28 was as set out in the sales sheet sent to Ms Yu.

96 Mr Liaw responded to Mr Darin Jinks by email sent on 14 May 2016 and in respect of apartment 28 he asked the following questions:[96]

> Unit 28 - Is the contract price of $869,000 before or after the $174,000 discount? Where is the discount noted (eg is it verbal or in the contract) Is any commission payable? Why is the net proceeds $0?
>
> ...
>
> ...
>
> You have also noted that those with blue highlighting can only be settled after ANZ is paid out because they are discounted. Why do you need ANZ to approve the discounts? If you are right about settling these after ANZ is paid out, how are you going to pay out ANZ with $1.3m of sales (highlighted green). Which ones are the recent sales you noted in your email below?
>
> As you can see the schedule is very unclear. I cannot even tell which ones constitute the $7m of true sales and which ones are your 'friendly sales'. Can you please provide your urgent responses to these issues.

97 Mr Liaw asked a number of other questions in relation to the sales listed on the 'pre-sales list' including questions about the discount on the sale of apartment 26 to the Calabreses. In addition to asking questions about the information provided by Mr Jinks, Mr Liaw relayed to Mr Jinks a proposal he had been instructed by Mr Yu to put to him. Mr Yu proposed 13 O'Connor agree to 'discount the sale price of Mr Yu's two apartments by 12%'. Mr Liaw added that, 'Mr Yu believes the 12% discount is fair in light of the breach and that the recent sales appear to have been discounted by more than 12%.'

98 Mr Jinks responded to Mr Liaw's questions by email and in answer to Mr Liaw's question about apartment 28 stated:[97]

---

[94] Exhibit 5.86.
[95] Exhibit 5.89.
[96] Exhibit 5.89.

> These are people who invested in the project who rank 2nd to Mr Yu and who are happy to take the apartment as their exit after Mr Yu has been paid out.

99 In his evidence in chief Mr Yu said that Mr Liaw did not discuss with him any discount arrangement with the plaintiffs in respect of apartment 28 in May 2016.[98] I do not accept that evidence. Mr Liaw was the defendant's solicitor and was actively and closely engaged in the discussions with the Jinkses. It is apparent from his emails that he was seeking information from the Jinkses so that he could report to Mr Yu and protect the defendant's interests. It is inconceivable that Mr Liaw did not inform Mr Yu that he had been told by Mr Darin Jinks that apartment 28 had been sold at the discounted price of $695,000. In any event, the discount was shown in the sales sheet sent to Ms Yu on 11 April 2016.

100 On 22 May 2016 Ms Yu sent an email to Mr Darin Jinks in which she wrote:[99]

> Hi Darin
>
> Mr. Yu was asking when the settlement day is and if you can use the money that other buyers paid to settle their apartments to pay back the bank. That's just a thought. We still agree with you buy out plan. Mr. You decided to give you till the end of May to complete the transaction. Also since you did gave out a bigger discount on other apartments, Mr. Yu demands the same kind of discount.
>
> ...
>
> Thank you

101 I infer from Ms Yu's question asked on behalf of Mr Yu, '... if you can use the money that other buyers paid to settle their apartments to pay back the bank', that Mr Yu knew that some purchasers, including the plaintiffs as purchasers of apartment 28, had already paid the price agreed in respect of their apartments.

102 In cross-examination Mr Yu said that he could not recall Ms Yu's email to Mr Darin Jinks of 22 May 2016 and he denied having any knowledge of the details of the discounts on the other apartments.[100] In his witness statement Mr Yu said he did not learn about the discounts

---

[97] Exhibit 5.91.
[98] ts 315.
[99] Exhibit 5.92.
[100] ts 341 - 342.

on the other apartments until September 2016.[101] Having regard to the content of Ms Yu's email I have no doubt that:

(a) the email was sent by Ms Yu on Mr Yu's behalf and with his knowledge;

(b) although in cross-examination he denied making a demand for the discount,[102] Mr Yu did make such a demand;

(c) Mr Yu knew about the discounting of the price of other apartments, including the discounting of the price of apartment 28, by at the latest May 2016.

103 On 27 May 2016 Ms Yu sent an email to Mr Darin Jinks which read as follows:[103]

> Hi Darin,
>
> Would you mind providing the following information for us before the 31st of May?
>
> 1. Trust account bank statement (where all the deposits are in). We want to know the amount of deposits.
>
> 2. Sales sheet as of today
>
> 3. Construction update (including pictures)
>
> 4 Loan contracts from ANZ (with the loan amount listed.)
>
> Also Mr. Yu is concerned about the situation and is taking away the right for you to sign and sell the apartments on your own. He is leaving the right to Shu, Adrian and himself. From now on all sales will have to be checked by any of those three person in order to be processed. Adrian will give you more information on this later.
>
> Thank you
>
> Jingwen (Kristen) Yu

104 In summary, having regard to:

(a) the email sent by Mr Darin Jinks to Ms Yu on 11 April 2016 attaching a list of sales that disclosed the discounted sale price in respect of apartment 28;[104]

---

[101] Exhibit D2, [103].
[102] ts 342.
[103] Exhibit 5.95.

(b) Mr Liaw's email to the Jinkses of 3 May 2016 referring to Mr Yu's concern about the use of 'friendly purchasers', the possibility of selling more apartments at a discount and that the defendant will not allow any purchasers to rescind their contracts;[105]

(c) Mr Darin Jinks' email to Mr Liaw attaching a 'pre-sales list' recording the discounted sales price in respect of apartment 28 and that there were no net proceeds outstanding;[106] and

(d) Ms Yu's email to Mr Darin Jinks of 22 May 2016 in which she asked whether 'you can use the money that other buyers paid to settle their apartments to pay back the bank';[107]

I infer that by 3 May 2016 or, at least by no later than the end of May 2016, Mr Yu knew apartment 28 had been sold at the discounted price of $695,000, and nothing remained to be paid in respect of the sale price. Further, I infer the defendant's position remained, as was expressed in Mr Liaw's email to Mr Darin Jinks of 3 May 2016, that none of the purchasers would be permitted to rescind their contracts to purchase apartments in the development.

105 On 21 June 2016 Mr Liaw sent to Ms Yu and Ms Celine Yu (Ms Celine Yu was the company secretary of the defendant)[108] an agreement between the defendant and Archimex prepared by Ms Briones setting out the terms on which Archimex would be retained by the defendant as project manager of the development. Mr Liaw stated that the agreement was 'in accordance with our discussion', which I take to be a reference to a discussion between him and Ms Yu and Celine, and he recommended Mr Yu execute the agreement.[109]

106 On 12 September 2016 the defendant revoked the grant of the power of attorney in favour of 13 O'Connor.[110]

107 By the middle of October 2016, 13 O'Connor had instructed a solicitor, Mr Maurice Oteri, to assist it with its negotiations with the defendant. Mr Oteri sent an email to Mr Liaw and Ms Briones on

[104] Exhibit 5.69.
[105] Exhibit 5.83.
[106] Exhibit 5.89.
[107] Exhibit 5.92.
[108] Exhibit 6.39.
[109] Exhibit 5.102.
[110] Exhibit 6.15.

18 October 2016 in which he proposed 'a complete solution for the Oceana Project'.[111] The details of the solution are not relevant - what is relevant is Mr Liaw's observations in response to Mr Oteri's explanation of why the solution was 'superior' to that then being contemplated by the defendant. Mr Oteri's solution involved the sale of a number of apartments to buyers introduced by a Mr Troy Lowry. Mr Oteri claimed his solution, among other things, would result in the ANZ Bank and the defendant being paid in full, that it would allow for all deposits to be returned in full and that it would allow units 26 and 28 to be transferred to the Calabreses and the plaintiffs respectively 'without dispute' and that it would eliminate other parties from taking any further action under their caveatable interests held to significantly delay the timely settlement of the 'Project as a whole'. Mr Liaw responded by email the following day and, among other things, wrote:

> You keep referring to the deposits paid by the 'friendly parties' and claim that these parties will take actions to stop the project. As far as I am concerned, I don't believe they have much to stand on especially given that Dien did not know this 'friendly arrangement' until April this year. Even then, I don't believe Dien has contractually exchanged this arrangement. In short, I am not concerned about them especially when they are about to be called upon to complete their respective contracts.

108 Mr Oteri did not use the term 'friendly parties' in his email and in his response Mr Liaw did not refer expressly to the Calabreses or the plaintiffs but I infer from the fact that he did not raise any questions about the contracts with the Calabreses and the plaintiffs that he was familiar with those contracts. I also infer that the 'friendly parties' to which Mr Liaw referred included the Calabreses and the plaintiffs (whether or not they warranted that description) because the defendant became aware of the terms of the sales to the Calabreses and the plaintiffs in April 2016.

109 Sometime between 9 November 2016 and 2 December 2016 the ANZ Bank issued a notice of default in respect of the finance facility.[112]

110 In December 2016 settlement of sales of apartments began.

111 On 1 December 2016 13 O'Connor served a notice on the defendant requiring it to direct sales of apartments to payout the ANZ Bank finance.[113]

---

[111] Exhibit 6.37.
[112] Exhibit 1.07.
[113] Exhibit 6.102.

112 On 2 December 2016 it appears a letter from Mr Liaw, in his capacity as the defendant's representative, to Ms Hayes at Paramount Settlements was prepared, authorising Paramount to proceed to settle on the sale of certain apartments (these did not include apartment 28) and for the residual sale proceeds to be collected by the ANZ Bank on completion.[114] A signed version of this letter was not in evidence.

113 On 23 December 2016 the defendant and 13 O'Connor entered into a deed of settlement. The deed provided for the termination of the Development Agreement and for the defendant's consent to the sale of unit 26 to the Calabreses proceeding.[115]

114 Between December 2016 and March 2017 settlement of the sale of various apartments took place and the ANZ Bank's facility was discharged on 23 March 2017. On 13 April 2017 the ANZ Bank's mortgage over apartment 28 was discharged.

115 On 20 June 2017 13 O'Connor was wound up in insolvency.[116]

The plaintiffs' attempts to obtain possession

116 On 5 May 2016 Mr McCleary sent an email to Mr Ray Jinks and Mr Darin Jinks asking whether they could tell him when settlement would take place. He said he believed the agreement had a date in early June and that, as he and his wife had paid up front and had a tenant ready to move in, so sooner would be better than later.[117] Mr Darin Jinks replied to the effect that they were awaiting practical completion and that titles would issue within about three weeks from practical completion and that then settlements could start to take place. Mr Darin Jinks stated that ' ... however we would have no problem with you taking early possession which means that your tenant could move in while titles are being applied for - subject to the builder confirmation that they are ok with this as technically they still have control of the building until titles issue.'[118] Although Mr Jinks did not permit the plaintiffs to take possession of the apartment, in June 2016 he did allow their contractors access to enable them to 'measure up'.[119]

117 On 30 June 2016 Mr McCleary sent an email to Mr Darin Jinks asking when 'prior possession' of apartment 28 would be available and

[114] Exhibit 7.01.
[115] Exhibit 7.27.
[116] Exhibit 8.41.
[117] Exhibit 5.84.
[118] Exhibit 5.84.
[119] ts 169.

when settlement might take place. Mr Jinks replied on 4 July 2016 stating:[120]

> I contacted the builder on Friday and we are just waiting for the strata insurance to kick in after which the builder is fine to allow possession prior. Debbie the project manager is in the process of getting this in place. I will let you know as soon as I have confirmation of this
>
> In relation to settlement, the process is that the bank has to get settled first, and then the secured investor who put in the $2.8m, and then the remaining investors settle after this. The settlement agent will keep you posted on the progress as well.

118 In cross-examination Mr McCleary said that Mr Darin Jinks' email caused him to think about the position and have concerns.[121]

119 On 29 July 2016 Mr Ralph Nunis sent an email to Mr Liaw to which he attached 'signed documents relating to the sale of Unit 28' (including the signed pages of the sales contract executed on 7 August 2015 recording a price of $869,000 and a deposit of $86,900 being payable and the Discount Agreement) and stated:[122]

> Please note the contract signed was done so in conjunction with a discount agreement. The McCleary's have fore filled their contract terms and are seeking possession.

120 There is no evidence that Mr Liaw responded to Mr Nunis's email of 29 July 2016 either to Mr Nunis himself or to Mr McCleary. Mr McCleary was cross-examined as to why Mr Nunis was writing to Mr Liaw on behalf of him and his wife. Mr McCleary was unable to offer any explanation - he said that he supposed that Mr Nunis was helping him and that he understood Mr Nunis had also bought a 'discount apartment'.[123] That Mr Nunis was assisting Mr McCleary is consistent with Mr McCleary's evidence to the effect that Mr Darin Jinks' email of 4 July 2016 caused him concern.

121 On the basis of the provision of the Discount Agreement by Mr Nunis to Mr Liaw, I find that by the end of July 2016, at the latest, the defendant knew the express terms of the arrangements agreed by 13 O'Connor with the plaintiffs.

---

[120] Exhibit 5.104.
[121] ts 253.
[122] Exhibit 6.1.
[123] ts 253 - 254.

122 On 17 August 2017 there was an exchange of emails under the subject line 'Unit 28 "Oceana" McCleary' between Ms Hayes of Paramount Settlements and Ms Dreyer and Ms Briones of Archimex.[124] The exchange commenced with an email from Ms Hayes to Ms Dreyer in which Ms Hayes stated:

> Could you please give me an update on when you think we will be applying for Titles?
>
> Neil would like to take possession next week so he can have the blinds installed etc. Will the Seller be willing to grant possession?

123 Ms Briones responded:

> Adrian advised me this morning Dien will not agree to any Possession Priors due to the circumstances that we are all well aware of.

124 In response to this email Ms Hayes asked Ms Briones to send an email to Mr McCleary explaining the position and stated that she expected Mr McCleary would be 'disappointed as he has paid in full for the Unit'. Ms Hayes asked 'Perhaps the Seller would allow access to have blinds installed or furniture delivered'?

125 Ms Briones responded as follows:

> He hasn't paid in full for the unit, he has invested 695k into the project, he is an equity investor who was promised if the project made money he would get this back plus profit which equated to a unit. The project hasn't made a profit so basically poor Neils unit is up in the air. He knows this, there is an ongoing legal battle in the background, keep it to yourself but just so you know the deal.

126 Mr McCleary was unequivocal in his evidence that Ms Hayes did not communicate to him that his 'unit [was] in any risk' or that his unit was 'up in the air' and Mr McCleary also said that he had neither met nor spoken to Ms Briones.[125] I accept Mr McCleary's evidence and find that neither Ms Hayes nor anyone else informed him of the substance of the emails that were exchanged between Ms Hayes, Ms Dreyer and Ms Briones or gave him any indication that the defendant did not accept that it was obliged to sell apartment 28 to them for $695,000.

127 Indeed I observe these internal emails were primarily directed to whether possession prior to settlement would be granted. I attach no weight to the explanation about the plaintiffs' involvement in the

[124] Exhibit 6.04.
[125] ts 256 - 258, 261, 270.

project given by Ms Briones in her email to Ms Hayes. Ms Briones was not called to give evidence and, as noted, Mr McCleary said that he did not have any communication with Ms Briones.[126] Ms Briones instruction to Ms Hayes that she should 'keep it to yourself' makes it clear that Ms Briones was dealing with Ms Hayes in the latter's capacity as the defendant's settlement agent rather than as the plaintiffs' settlement agent.

128 On 27 August 2016 Mr McCleary sent an email to Mr Darin Jinks complaining about the delay in granting prior possession.[127] By this date Mr McCleary was concerned about the delay in achieving settlement and whether there were sufficient funds available to pay out the bank.[128]

129 On 12 October 2016 the Western Australian Planning Commission approved the strata plan for the development.[129]

130 On 6 October 2016 the occupancy permit was issued in respect of apartment 28.[130]

131 In September and early October 2016 Mr McCleary continued to press for possession of apartment 28.[131] On 5 October 2016 Mr McCleary sent Ms Hayes a copy of the Jinkses' letter dated 10 September 2015 by which they represented that 13 O'Connor had the defendant's authority to enter into the Discount Agreement together with a copy of the Discount Agreement itself.[132] It is likely that Mr McCleary sent these documents to Ms Hayes because he was concerned about the delays in obtaining possession and about the sale more generally. There is no evidence, however, that anyone on behalf of the defendant had communicated to the plaintiffs that the defendant did not accept it was bound by the Discount Agreement.

132 There were further email exchanges between Ms Hayes of Paramount Settlements, Ms Dryer and Ms Briones of Archimex and Mr Liaw about the granting of prior possession generally and about Mr McCleary's request for prior possession.[133] These emails included an email sent on 5 October 2016 by Ms Dreyer to Mr Liaw by which

[126] ts 256.
[127] Exhibit 6.9.
[128] ts 259.
[129] Exhibit 5.106.
[130] Exhibit 6.34.
[131] Exhibits 6.25, 6.33.
[132] Exhibit 6.27.
[133] Exhibits 6.9, 6.24, 6.29, 6.30, 6.31, 8.53.

she onforwarded an email to her from Ms Hayes attaching the sales contract and the Discount Agreement.[134] This email chain included an email from Mr McCleary in which he referred to the fact that unless the glass curtains he wished to install in apartment 28 were installed the following week there would be a delay in installation of a further six weeks. Again, no one on behalf of the defendant communicated to Mr McCleary either that his request for possession was rejected or that the defendant did not accept it was bound by the Discount Agreement.

133 On 15 October 2016 Mr McCleary had a conversation with Ms Hayes. When he gave his evidence-in-chief Mr McCleary was unable to remember the conversation in any detail even though he was referred to a statutory declaration made by him on 9 November 2016,[135] in which he set out his version of what had been said in the course of that conversation. Mr McCleary's evidence was to the effect that he recalled having conversations with Ms Hayes and that he 'came away feeling confident that settlement was going to take place'. I accept Mr McCleary's evidence and find that after speaking to Ms Hayes he was confident settlement was going to take place.[136]

134 I find also that if the plaintiffs had been told in October or November 2016 that the defendant was not prepared to proceed with the sale of apartment 28 at the price of $695,000, they would have given notice of an intention to litigate and taken an approach that reflected the approach ultimately taken by them in the second six months of 2017 - an approach described in more detail later in these reasons.

135 On 20 October 2016 Mr McCleary sent an email to Mr Darin Jinks about the delivery of glass to be used for the building. In the concluding paragraph Mr McCleary wrote:[137]

> Could you please explain the nature of the ongoing disputes. My contract and agreement is with Dien, and I do not understand why I can not be granted prior possession as per apartment 21.

136 Mr McCleary was asked about this concluding paragraph in cross-examination. He was unable to say to what 'ongoing disputes' he was referring or why he stated that his contract and agreement was with

[134] Exhibit 6.31.
[135] Exhibit 6.67.
[136] ts 173.
[137] Exhibit 6.40.

the defendant.[138] It was suggested to Mr McCleary that the reference to ongoing disputes was a reference to 'ongoing disputes' he had with the defendant and that he knew that the defendant had taken the position that it was not going to settle with him, a proposition Mr McCleary did not accept.[139]

137 I think it unlikely that Mr McCleary would ask Mr Darin Jinks for an explanation of 'ongoing disputes' if those disputes were disputes between Mr McCleary and the defendant. I find that no one on behalf of the defendant had suggested to Mr McCleary that the defendant would not settle the sale of apartment 28 and no one had suggested that the defendant did not accept it was bound by the Discount Agreement.

138 The contemporaneous documents include communications between Mr Oteri and Mr Liaw evidencing the dispute between 13 O'Connor and the defendant. There are, however, no communications between the defendant and the plaintiffs evidencing a dispute between them as one would expect if the defendant had informed the plaintiffs that it did not accept it was bound by the Discount Agreement. Thus, assessed against the background of what had taken place between the defendant and 13 O'Connor, I think it was more likely that the reference to 'ongoing disputes' was a reference to disputes between those two parties and Mr McCleary was asking, in effect, why those disputes affected his position.

139 On 25 October 2016 the plaintiffs signed an agreement by 'Offer & Acceptance' in respect of apartment 27. The purchase price was expressed to be $899,000 of which a deposit of $5,000 was payable within 10 days of acceptance.[140] The contract was expressed to be conditional on the plaintiffs obtaining finance from the NAB by 22 November 2016. The contract incorporated two special conditions expressed as follows:[141]

(a) 'This offer is subject to possession being granted to units 21 & 28 upon acceptance of this offer'.

(b) 'The parties hereby agree that attachment A - Discount Agreement forms part of this contract'

[138] ts 262 - 263.
[139] ts 262
[140] Exhibit 6.47.
[141] Exhibit 6.47.

140 Attachment A was a form of 'Discount Agreement' in the form of the Discount Agreement sent to Mr McCleary by email on 6 August 2015 and it specified a discount of $314,650 and a 'Nett Purchase Price' of $584,350. The contract was not executed by the defendant.

141 In cross-examination it was put to Mr McCleary that by executing the contract in respect of apartment 27 he and his wife were trying to negotiate an arrangement to secure early possession of apartment 21 and 28 (apartment 21 was being purchased by their son-in-law, Mr Matt Tomasini) or trying to recoup 'a deal that had gone sour on 28'.[142]

142 Mr McCleary rejected the suggestion that the reason why he was prepared to buy another apartment was because he had been told that the defendant would not settle with him in relation to apartment 28. Mr McCleary's evidence was to the effect that so far as he knew that 'deal was still going ahead'.[143] His evidence was to the effect that the terms recorded in the contract were the terms which had been offered to him.[144] Mr McCleary's evidence in this respect was supported by the fact that the first special condition concerned only the grant of possession.

143 Mr McCleary accepted that he was trying to negotiate early possession of apartment 28 so he could rent it out.[145] Had the plaintiffs been informed that the defendant did not accept that it was bound by the Discount Agreement, it is commercially improbable the plaintiffs would have made an offer in respect of apartment 27 without insisting on an acknowledgment by the defendant that it was bound by the Discount Agreement. Accordingly I find that when the plaintiffs made the offer in respect of apartment 27 they had not been informed that the defendant did not accept it was bound by the terms of the Discount Agreement.

144 Assessed in the broader context of what was occurring in relation to the development at the time it is reasonable to infer Mr McCleary was concerned there were difficulties with presales and that if further sales were not achieved this might make it difficult for the bank to be paid out thereby jeopardising settlement on apartment 28.[146]

---

[142] ts 265 - 266, 268.
[143] ts 268.
[144] ts 269.
[145] ts 267, 276.
[146] In substance this was the explanation given by Mr McCleary for lodging a caveat against the title of apartment 28 - ts 273.

145 On 26 October 2016 Mr Liaw, Ms Briones and Ms Dreyer conferred by telephone. Ms Dreyer summarised their discussion in notes included in an email sent by her to Mr Liaw and Ms Briones on 28 October 2016. Based on the content of Ms Dreyer's email I find one of the topics discussed in the conference was breaches of the development agreement by 13 O'Connor. Ms Dreyer summarised this aspect of the discussion as follows:[147]

> In terms of Development Agreement, there are multiple breaches from the DevCo but no breach from Dien. Breaches include
>
> (a) should not have commenced construction without sales
>
> (b) acting dishonestly
>
> (c) entered into side agreements without consent
>
> (d) misleading and deceptive conduct
>
> Debbie raised concern as to whether she may be exposed to any liability (in her role as PM) by not speaking with the bank sooner about the presale status. Adrian said unless Debbie signed an agreement or undertaking with the bank which includes some sort of duty of care, then she would not be exposed. Debbie has urged that the bank be addressed as soon as possible.
>
> Dien only became aware of the situation in April this year and have been working hard at remedying it. Also, there are new proposed sales that can settle (sufficient to settle bank debt) - it is just up to Dien and the DevCo to agree on the implementation of it.
>
> The PM agreement with the DevCo excludes the presales responsibility from the tasks which Debbie is in control of.
>
> Debbie may disclose to ANZ at the meeting that there are issues with management and that Dien is trying to step in. Waiting on opinion from PWC before terminating.

146 I infer that the 'situation' of which the defendant became aware in 'April this year' encompassed the fact that apartments, including apartment 28, had been sold at discounted prices.

147 On 26 October 2016 there was a telephone conversation between Ms Hayes and Mr Taylor of the plaintiffs' solicitors. Mr Taylor made a typewritten file note in respect of the conversation.[148] Although the defendant's counsel submitted that the file note did not make it clear

[147] Exhibit 6.54.
[148] Exhibit 6.52.

who had made the various statements recorded in the file note it is reasonable to infer that, relevantly, Ms Hayes made statements to Mr Taylor to the following effect:

(a) on settlement of the purchase of apartment 28 all that would be payable would be statutory charges and costs and that there was no further purchase money to pay;

(b) settlement of the purchase of apartment 28 could not occur until the ANZ Bank had been 'paid out' and that this might be after the 'main body' of settlements had taken place because the proceeds from the initial settlements might be insufficient to clear the indebtedness to the ANZ straightaway;

(c) the defendant may be going to buy some remaining units to clear the debt to the ANZ;

(d) there was some risk to the sale of apartment 28 if the ANZ Bank debt was not cleared; and,

(e) the reason the defendant was selling apartment 27 was to get additional funds to put towards the ANZ debt.

148 On 26 October 2016 Mr McCleary sent a letter to Ms Hayes. In the letter Mr McCleary asked Ms Hayes to confirm on behalf of the defendant that the agreement was to the effect that he and his wife had agreed to purchase apartment 28 for $695,000 and the price had been paid in full and that the only amount that remained to be paid was adjustments of usual outgoings and various fees and charges.[149]

149 On 31 October 2016 Ms Briones sent an email to Mr Liaw in which she referred to Ms Dreyer's notes of the telephone conference held on 26 October 2016.[150] In her email Ms Briones said:

> Darin also has contracts for McClearys to buy a unit at 45% discount and a relative to buy one at 45% discount, obviously this would be taking a unit out of Shu's syndicate. He has chosen the units that currently the Calabreses have a false contract over - unit 25 and 27. I've also heard McClearys have engaged a lawyer and are ready to fight for their unit (28). Personally I think if they buy units 25 and 27 at 45% could avoid a lot of issues but I'm pretty sure Shu will not be happy as it takes 2 of the units out of their syndicate or effectively about $600k from their pockets.

[149] Exhibit 6.49.
[150] Exhibit 6.54.

150 By 31 October 2016 Mr McCleary had possession of the keys to apartment 28, they had been provided to him by Mr Darin Jinks.[151] On 2 November 2016 Ms Briones informed Mr Liaw by email that Mr Darin Jinks had 'given keys to owners for possession', which she said she had not been aware of, but which she said she would follow up.[152]

151 Having obtained possession Mr McCleary arranged for the installation of an outdoor kitchen and 'glass curtains' to enclose the balconies of apartment 28, for the installation of blinds and for certain electrical work to be undertaken. The cost of these improvements was in excess of approximately $20,000.[153]

152 At no stage did anyone acting on behalf of the defendant communicate any objection to the plaintiffs being in possession of apartment 28.

Steps taken by the plaintiffs to settle

153 On 1 November 2016 Ms Fairhead of Paramount Settlements sent the plaintiffs a transfer in respect of apartment 28 for them to sign.[154] The transfer was not in evidence.

154 On 7 November 2016 Mr McCleary sent a letter to Ms Hayes in which he asked Ms Hayes to confirm that the only amounts still to be paid in respect of the purchase of apartment 28 were adjustments of usual outgoings and fees and charges and that they would be paid at settlement. Mr McCleary asked Ms Hayes to provide a settlement statement.[155] In cross-examination it was suggested to Mr McCleary that he sent the letter of 7 November 2016 to Ms Hayes to assert his position regarding the terms of the transaction knowing that there was a dispute. Mr McCleary did not accept this suggestion and said that he sent the letter to make sure that he did not have to pay any amount of which he was not aware.[156] The evidence does not support the conclusion that Mr McCleary was aware that there was a potential

[151] Exhibit 6.57, ts 168.
[152] Exhibit 6.62.
[153] Exhibits 6.77, 5.108, 7.45, 6.80, 5.105. Exhibit 5.109 shows the price of outdoor kitchen cabinetry as $2,104.98, but this payment was made for Mr Matt Tomasini not Mr McCleary's apartment. In cross-examination Mr McCleary mentioned paying for kitchen cabinetry, but an invoice for Mr McCleary's apartment was never in evidence (ts 176). It is unclear from the documentary evidence whether the cost of the glass curtains was $24,750 or $12,375, if it was the former then the cost of the improvements was in excess of $32,000 but nothing turns on the final figure.
[154] Exhibit 6.58.
[155] Exhibit 6.64.
[156] ts 269 - 270.

dispute between him and his wife and the defendant at this stage. I infer, however, that, at least one purpose of the letter, was for Mr McCleary to put his position in relation to the transaction on the record because he was aware of a dispute between the defendant and 13 O'Connor and because he was concerned that the bank, which he had been told had to be paid out before the sale of apartment 28 could be settled, might not accept the sale in the event that the debt to it was not discharged.

155 On 9 November 2016 the plaintiffs lodged a caveat against the title of apartment 28.[157] On 14 November 2016 the Calabreses lodged caveats against the title of apartments 25 and 26.[158] In his evidence-in-chief Mr McCleary gave evidence that his and his wife's caveat was lodged to secure the position, that the bank was the 'biggest issue' and he was 'just being cautious' and not because he had any reason to think that the defendant would not settle the sale.[159]

156 On 14 November 2016 Ms Hayes prepared a settlement statement for apartment 28 entitled 'Buyer Settlement Statement' and sent it to Mr McCleary under cover of an email which was sent also to Mr Taylor.[160] In her email Ms Hayes provided Mr McCleary with Ms Briones contact details. The settlement statement stated the purchase price was $869,000 and gave credit for the discount pursuant to the Discount Agreement and the amount paid to 13 O'Connor leaving an estimated amount to complete the transaction of $41,162.55. The plaintiffs agreed with the settlement statement.[161]

157 On 18 November 2016 the plaintiffs' solicitor, Mr Taylor, had a telephone conversation with Ms Briones. Mr Taylor made a file note of the conversation.[162] On the basis of that file note I infer that Ms Briones made statements to Mr Taylor to the following effect: an agreement had been reached with a syndicate which would buy 'a lot' of apartments at prices discounted by 35% - I infer from references in other contemporaneous documents that the syndicate had been organised by Ms Shu Wu;[163] the sales to the plaintiffs and the Calabreses would be 'ok' so long as the penthouses sold 'ok' but if they did not, then those sales would not be 'ok'; the relevant portion of the

[157] Exhibit 6.66.
[158] Exhibit 6.72.
[159] ts 170 - 171.
[160] Exhibit 6.78.
[161] Exhibit 6.81.
[162] Exhibit 6.79.
[163] Exhibit 6.37.

file note included this sentence, 'Then hold back till penthouses sell' (though it is difficult to draw any firm conclusion from this remark) I infer that Ms Briones said something to the effect that the plaintiffs should wait until the penthouses sold; and, Mr Liaw was the defendant's lawyer and that he was a 'good guy' who was trying to solve the problems for everyone.

158 On 23 November 2016 Mr Taylor had a further telephone conversation with Ms Briones about which he made a file note.[164] On the basis of the content of that file note I infer that Ms Briones made statements to Mr Taylor to the following effect: there had been a meeting with the ANZ Bank that day and the Bank officers had said that they would inform the parties about a possible default the following day but that the situation was 'probably ok'; the Bank had 'only just discovered everything'; settlements should start taking place 'on Friday' and generate about $7.7 million in proceeds; the Bank was owed about $12 million; the sales of apartments to the 'Shu syndicate' were supposed to settle in three weeks and the proceeds of those sales would pay out the bank.

159 On 25 November 2016 Mr Taylor had a telephone conversation with Ms Hayes. Mr Taylor made a file note of the conversation.[165] The file note is somewhat cryptic. All that can be reliably inferred from the file note is that Ms Hayes told Mr Taylor that there had been a meeting with the Bank, the first round of settlements would take place the following week and that she thought that the 'Shu Syndicate is also going ahead'.

160 On 26 November 2016 Mr McCleary sent an email to Ms Hayes to which he attached a signed 'prior access agreement' and stated, 'I note that there are now several owners now living there with the same agreement'.[166] It was not clear from the evidence why Mr McCleary took the step of sending the agreement to Ms Hayes - he was already in possession. In any event, Mr McCleary's email led to a series of emails being sent between Paramount Settlements, Archimex and Mr Liaw.[167] In an email sent on 29 November 2016 Mr Liaw expressed his position as follows:

[164] Exhibit 6.84.
[165] Exhibit 6.90.
[166] Exhibit 6.94.
[167] Exhibits 6.94, 6.95.

> Unless the McCleary and Dien can agree on a price for their unit, we will not agree to the early possession request. Their current offer of $87000 is not acceptable.

161 Ms Briones sent an email to Mr Liaw and Ms Dreyer in which she stated:

> These guys are being told via Maurice that the idea is if penthouses sold for 1.5 net each then 26 and 28 go for what's due which is the 87k as per the schedule and just wait to see what penthouses sell for.
>
> Their lawyer called me last week to see if penthouses on market and to express his concern that discounted sales to Shu could adversely affect his client and to know why Troy's offers weren't accepted. I said from what I know it was about security such as deposits as ANZ very nervous. He sounds like a nice guy but def they are ready for a fight. He also said McClearys had proposed to buy another unit at a discount to do same as Shu in order to get their capital but he wasn't sure if it had formally been presented.

162 On 30 November 2016 Ms Dreyer sent an email to Ms Hayes in which she stated:[168]

> I spoke with Adrian a few moments ago and he has asked me to instruct Paramount, on Dien's behalf, as follows: Please proceed to call for settlement on all the remaining units, save for units 25, 26 and 28.
>
> Adrian is copied in on this email and will confirm the instruction by reply.

163 The documents generated in 2016 did not include any communication from anyone on behalf of the defendant to anyone on behalf of the plaintiffs recording the defendant did not accept it was bound by the Discount Agreement. The defendant did not call a witness to give evidence of any oral communication to that effect between it and the plaintiffs.

164 I infer from Mr McCleary's letter to Ms Hayes of 7 November 2016, from the lodging of the caveat and from the involvement of Mr Taylor on behalf of the plaintiffs that Mr McCleary harboured more serious concerns about the defendant's attitude to the sale at the discounted price of $695,000 than he accepted in his evidence. It is, however, difficult to determine what the position was between the parties after the plaintiffs had taken possession. Mr Liaw was an experienced lawyer. He was direct and forceful in his communications

[168] Exhibit 6.98.

with Mr Oteri which makes the failure of the defendant to state to the plaintiffs that it did not accept it was bound by the Discount Agreement in direct and forceful terms even more surprising. After all Mr Liaw had been in possession of the Discount Agreement since 29 July 2016 and he knew that the plaintiffs had taken possession. I consider the failure by the defendant to state that it was not bound by the Discount Agreement (assuming that was its position in November 2016) was surprising. I infer Mr Liaw considered that it was not in the defendant's interests to communicate its position to the plaintiffs at that stage because doing so might give rise to litigation which would have been an unwelcome complication in a difficult commercial situation.

165 The plaintiffs contended that, had they been told in October or November 2016 that the defendant did not accept it was bound by the Discount Agreement, they would have taken steps to improve their position by taking a more aggressive approach to the defendant, as they ultimately did by commencing the present proceedings. In this context the plaintiffs point to the difficult position that existed between the defendant and 13 O'Connor and the difficult position that existed between those two parties and the ANZ Bank. The plaintiffs also point to the fact that the settlement deed made provision for settlement of the sale of apartment 26 to the Calabreses. Making an assessment of what would have happened in the counterfactual posited by the plaintiffs' contention is difficult because there are so many imponderables. On balance, however, and based in part on the inference I have drawn as to the apparent reluctance on the part of the defendant to promote a dispute with the plaintiffs in October or November 2016, and in part, on the difficult commercial position in which the defendant was in, I find that there was a realistic prospect that had the plaintiffs taken a more aggressive stance with the defendant before the defendant reached a settlement with 13 O'Connor, they would have achieved an outcome that would have avoided the necessity for these proceedings.

166 Returning to the chronology, on 5 January 2017 Mr Taylor had a telephone conversation with Ms Hayes. Mr Taylor made a file note of the conversation.[169] I infer from the file note that Ms Hayes made statements to Mr Taylor to the following effect: there was no longer an agreement between 13 O'Connor and the defendant; the defendant was now in control of the development; the sales to the Shu Wu syndicate had yet to be settled, Ms Hayes thought that they would take place but there were 'preliminary obligations' to sort out; the ANZ had taken no

[169] Exhibit 7.30.

action but the defendant was required to pay the ANZ out; Mr Oteri had lodged caveats against the titles to two apartments and no effort was underway to remove those caveats or the caveat lodged by the plaintiff; some members of the 'Shu syndicate' were also 'in the Dien group'.

167 On 21 March 2017 Mr Taylor sent a letter to Ms Hayes in which he recorded that Paramount Settlement was no longer representing the plaintiffs.[170] In his letter Mr Taylor stated that the plaintiffs would like to proceed to settlement and he asked whether the ANZ Bank had 'been satisfied at this time'. Mrs McCleary said that when she learned that Paramount Settlements were no longer representing her husband and her, she did not know what the reason was but 'it was just alarm bells going off' but she did not know at that stage that the defendant would not proceed with the sale,[171] she thought there were complications but still thought the defendant would settle.[172] I accept Mrs McCleary's evidence and find that in March 2017 she did not know that the defendant would not proceed with the sale at a price of $695,000.

168 On 22 March 2017 Mr McCleary sent an email to Kirsty at a business called 'ifresh' which acted as the strata manager, asking for details of the strata fees relating to the apartment. In the email Mr McCleary stated:[173]

> We have always been aware that we would not be able to settle until the bank had been discharged.

169 On 29 March 2017 the McClearys paid the (then outstanding) strata levy of $2,081.36 in respect of apartment 28.[174]

170 On 28 April 2017 Mr Taylor sent a letter to Ms Dreyer recording that Mr McCleary had recently spoken to her and that she had told him that Mr Taylor should contact her as she had been appointed by the defendant.[175] Mr Taylor referred to the settlement statement dated 14 November 2016 that Ms Hayes had prepared and sent to Mr McCleary recording that the purchase price of $695,000 had already been paid and that all that remained to be paid, apart from stamp duty, were minor fees and adjustments. Mr Taylor asked Ms Dreyer to advise the name and contact details of the defendant's settlement agents.

---

[170] Exhibit 8.15.
[171] ts 289.
[172] ts 304.
[173] Exhibit 8.17.
[174] Exhibit 8.21.
[175] Exhibit 8.33.

171 On 16 June 2017 the defendant's solicitors, Robertson Hayles, sent a letter to Mr Taylor.[176] Robertson Hayles referred to correspondence between Mr Taylor and Lavan. Robertson Hayles asked Mr Taylor to provide them with copies of the 'Purported Discount Agreement', the contract for the sale of apartment 28, the plaintiffs' caveat and '[a]ny other documents which allegedly support the [plaintiffs'] claim that they are entitled to have the settlement of the sale and purchase of Lot 28 take place in accordance with the purported Discount Agreement ...'.

172 On 3 July 2017 Mr Taylor replied by letter to Robertson Hayles' letter of 16 June 2017 and made the point that the defendant had copies of documents sought by them but that if they wished to inspect the documents in the plaintiffs' possession that could be arranged provided that the defendant made available for inspection the copies of the documents in its possession.[177]

173 On 24 July 2017 Mr Taylor wrote again to Robertson Hayles pointing out that the defendant had the contract of sale and the Discount Agreement in its possession and directing Robertson Hayles' attention to other documents evidencing what had occurred.[178] Mr Taylor stated he was instructed that if the defendant would not undertake that it would proceed to settlement in accordance with the settlement statement of 14 November 2016, the plaintiffs would institute proceedings.

174 On 3 August 2017 Mr Taylor wrote again to Robertson Hayles setting out the plaintiffs' position (the letter also addressed claims made by the Tuckers for the return of the deposit paid by them in respect of their purchase of an apartment in the development).[179] On 12 September 2017 Mr Taylor sent a further letter to Robertson Hayles on the plaintiffs' behalf.[180]

175 Having received no reply (no reply was in evidence) to his earlier correspondence, on 12 October 2017 Mr Taylor sent a further letter to Robertson Hayles seeking confirmation that the defendant would proceed to settlement on the basis of a sale price of $695,000 failing which proceedings would be commenced.[181]

---

[176] Exhibit 8.40.
[177] Exhibit 8.42.
[178] Exhibit 8.44.
[179] Exhibit 8.46.
[180] Exhibit 8.49.
[181] Exhibit 8.50.

176 On 27 October 2017 Robertson Hayles served a notice of default on Mr Taylor calling on the plaintiffs to settle the purchase of apartment 28 by paying the purchase price in full by 13 November 2017.[182]

177 The plaintiffs commenced these proceedings on 8 December 2017.

178 The defendant paid outgoings in respect of apartment 28 between January 2017 and the trial and claim the amounts so paid pursuant to the provisions of the agreement for possession signed by Mr McCleary and sent by him to Ms Hayes on 26 November 2016. The amount paid by the defendant has been agreed at $30,296.

What was the bargain between the parties?

179 This section of the reasons is concerned primarily with the construction of the Discount Agreement and proceeds on the assumption that the defendant is bound by its terms.

An overview of the parties' contentions

180 The plaintiffs pleaded that the agreement between them and the defendant in respect of Apartment 28 was evidenced by a large number of documents.[183] At trial, however, the plaintiffs identified three documents as having contractual effect, the Side Agreement, the Sales Contract and the Discount Agreement. Ultimately the plaintiffs did not suggest the Side Agreement varied the Sales Contract.

181 The plaintiffs acknowledged the Discount Agreement was poorly drafted and there was clumsiness in the language used. They contended, however, on its proper construction the Discount Agreement was an agreement between 13 O'Connor, as agent for the defendant, to discount the purchase price for apartment 28 under the Sales Contract from $869,000 to $695,000, in consideration for the plaintiffs paying to the defendant the reduced purchase price of $695,000 into a nominated bank account. The plaintiffs contended the Discount Agreement, as a subsequent agreement inconsistent in some respects with the Sales Contract, operated to vary it to the extent of:

(a) directly reducing the purchase price from $869,000 to $695,000;

[182] Exhibit 8.54.
[183] Plaintiffs' substituted statement of claim dated 19 May 2021 [10].

(b) providing for the net price to be paid to the defendant by payment into the account nominated in the Discount Agreement within 3 days of signing (rather than requiring the plaintiffs to pay the full purchase price (less deposit) at settlement, by bank cheque, as the Sales Contract provided); and

(c) providing for any deposit, paid under the Sales Contract by way of deposit bond, to be returned.

182 For the sake of completeness, I add in their written closing submissions the plaintiffs postulated, for the sake of argument, a potential construction whereby the Discount Agreement could be interpreted as involving an obligation on 13 O'Connor to rebate or refund the 'discount' as opposed to involving a 'direct' reduction in the purchase price.

183 The defendant contended that the only document which had contractual effect was the Sales Contract. It relied on the entire agreement clause in the Sales Contract to argue that no reliance should be placed on matters extrinsic to the Sales Contract to establish terms additional to those found within the Sales Contract.

184 The defendant contended the terms of the Sales Contract and the Discount Agreement were difficult to reconcile but did not propose a construction that competed with the construction put forward by the plaintiffs.

Consideration and conclusion on the nature of the bargain

185 Clause 32 of the Sales Contract provided:

> 32.1 Entire Agreement
>
> (1) This Agreement constitutes the entire agreement between the parties.
>
> (2) There are no prior or other agreements which shall have any effect on this Agreement nor shall any correspondence or documents which may have passed between the parties before execution have any effect whatsoever on this Agreement.

186 The usual effect of an entire agreement clause was described in ***MacDonald v Shinko Australia Pty Ltd***,[184] by Davies JA as follows:

[184] ***MacDonald v Shinko Australia Pty Ltd*** [1999] 2 Qd R 152, 156.

> The purpose ... is to exclude any such evidence either to prove terms additional to or different from the written instrument or collateral contracts or to construe the instrument in a way different from the meaning to be inferred solely from its terms.

187 The Side Agreement is an agreement that would have 'an effect' on the terms of the Sales Contract within the meaning of cl 32.1(2). On that basis cl 32 operates to prevent the plaintiffs placing reliance on the Side Agreement as an agreement which varies the terms of the Sales Contract.

188 Clause 32 of the Sales Contract does not operate to prevent the plaintiffs from relying on the Discount Agreement - it does not fall within the scope of the clause. The distinguishing factor between the Discount Agreement and the Side Agreement is that the Discount Agreement is a subsequent agreement and it is always open to parties to revisit an earlier agreement and vary it.

189 When parties to an agreement make a subsequent agreement covering the same subject matter as the earlier agreement, whether they intend to replace the earlier agreement in its entirety or merely vary its terms depends on their intention. In ***Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd***,[185] Taylor J said:

> It is firmly established by a long line of cases ... that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement.

190 The intention of the parties is to be determined objectively by the application of well-known principles of construction.[186]

191 I accept the Discount Agreement varied the terms of the Sales Contract by reducing the purchase price to $695,000, making that amount payable within 3 business days into the account specified in cl 6 and by providing that the plaintiffs could elect not to proceed with the purchase 'at any time' in which event the price would be refunded to

---

[185] ***Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd*** [1957] HCA 10; (1957) 98 CLR 93, 144; see also ***Balanced Securities Ltd v Dumayne Property Group Pty Ltd*** [2017] VSCA 61; (2017) 53 VR 14 [60] - [78] and the cases there cited.

[186] ***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan and Kiefel JJ); ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [2015] HCA 37; (2015) 256 CLR 104 [51] (French CJ, Nettle and Gordon JJ); ***Black Box Control Pty Ltd v Terravision Pty Ltd*** [2016] WASCA 219 [42] (Newnes and Murphy JJA and Beech J).

them in accordance with cl 5. The matters that support this construction are as follows:

(a) First, the definitions of discount as $174,000 and 'nett purchase price' as $695,000 and the specification that the 'Discount' is 'to be deducted off the Purchase Price' are consistent with, and point to, a direct deduction or reduction of the Purchase Price and not a refund or rebate of the 'Discount'.

(b) Secondly, although the words, 'The Developer agrees to pass onto the Buyer the Discount' are suggestive of a tripartite agreement whereby the Developer is responsible for the rebating or refunding the Discount, the significance of these words is outweighed by the language to which I have referred in sub-paragraph (a) which points to a direct deduction. More fundamentally, the Discount Agreement varied the amount payable by the plaintiffs reducing it from $869,000 to $695,000. Thus, if the Developer was to pass on a discount of $174,000 to the plaintiffs, the price they would be paying would be $521,000 and not $695,000, which would not be a discount of $174,000 off a Purchase Price of $869,000.

(c) Thirdly, in the event the plaintiffs elected not to proceed, the amount to be paid to the plaintiffs would be $695,000 which is a reliable indicator that the plaintiffs' payment obligation was limited to $695,000.

(d) Fourthly, the Discount Agreement provided for the deposit bond to be returned. This was a further indication that the Discount Agreement varied the Purchase Price to $695,000.

192 In summary, the agreement, as constituted by the Sales Contract as varied in the manner described by the Discount Agreement, was that the defendant would sell the apartment 28 to the plaintiffs for the sum of $695,000 which was to be paid within three business days of 10 September 2015.

Does the *Strata Titles Act 1985* (WA) operate to deprive any of the provisions of the agreement of legal effect?

The relevant statutory provisions

193 In 2015:

(a) Section 70 of the *Strata Titles Act* relevantly provided:

(1) No person shall sell a lot in a proposed scheme before the strata/survey-strata plan is registered under Part II unless the contract of sale provides that any deposit and all other moneys payable by the purchaser prior to the registration of the strata/survey-strata plan are to be paid to a solicitor, real estate agent or settlement agent, who shall be named or specified in the contract, to be held by that solicitor, real estate agent or settlement agent on trust for the purchaser until the strata/survey-strata plan is registered.

(2) Any deposit and other moneys payable and paid by the purchaser prior to the registration of the strata/survey-strata plan under any such contract as is referred to in subsection (1) shall be paid by the purchaser to the solicitor, real estate agent or settlement agent named or specified in the contract of sale.

(3) In the event of a contravention of subsection (1) or subsection (2), the purchaser may at any time before the strata/survey-strata plan is registered avoid the sale.

(4) If the strata/survey-strata plan is not registered -

(a) within such period after the date of the contract as is agreed in writing by the purchaser and the vendor; or

(b) in the absence of any such agreement, within 6 months after that date,

the purchaser may avoid the sale at any time before the plan is registered.

(5) Where a purchaser avoids a sale under this section, all moneys, including the deposit, shall be recoverable by him from the solicitor, real estate agent or settlement agent or other person to whom they were paid, but the purchaser shall be liable to pay an occupation rent for any period during which he was in occupation of the lot or entitled to receive the rents and profits of the lot.

[(6), (7) *deleted*]

(8) In this section -

date of the contract means the day on which the contract of sale referred to in subsection (1) was signed or, if the parties signed it on different days, the last of those days;

real estate agent means a person licensed as a real estate agent under the *Real Estate and Business Agents Act 1978*;

> ***settlement agent*** means a person licensed as a settlement agent under the *Settlement Agents Act 1981*.

(b) Section 70A provided:

> (1) A contract or arrangement is of no effect to the extent that it purports to exclude or restrict the operation of this Part or the rights and remedies conferred on a purchaser by this Part.
>
> (2) A purported waiver of a right, remedy or benefit conferred on a purchaser by this Part is of no effect.

(c) Section 70B provided:

> Except as provided by sections 69D, 70(3) and (4) and 70A, this Part does not apply so as to render any contract illegal or void or to empower any party to avoid the contract.

An overview of the parties' contentions

194 The defendant pleaded that the Discount Agreement was void and of no force and effect by reason of s 70 and s 70A of the *Strata Titles Act.*

195 The defendant contended that the Sales Contract as varied by the Discount Agreement contravened s 70(1) and s 70(2) because it did not provide for the purchase price to be paid to a solicitor, real estate agent or settlement agent to be held on trust for the purchaser until the strata/survey plan was registered. Rather it provided for the immediate payment of the purchase price to 13 O'Connor. Further, the defendant contended that the plaintiffs' right under s 70(3) to avoid the contract at any time before registration of the strata/strata-survey plan was restricted by cl 5, which, so the defendant argued, should be construed as requiring the plaintiffs to give notice of any election not to proceed within a reasonable time or, by implication, by at the latest 30 June 2016. For ease of reference I set out the text of cl 5 again:

> 5 The parties agree that at *any time*, the Buyers may elect not to proceed with the purchase of the Apartment. The Buyers hereby warrant and undertake to notify the Developer as soon as is reasonably possible that they will advise the Developer of their intention not to proceed with the purchase of the Apartment.
>
> In that event that the Developer shall pay to the Buyers the Nett Purchase Price *by 30 June 2016*.

> If the Buyers elect not to proceed with the purchase, *and also if they do proceed with the purchase,* the Bond which has been posted shall be forthwith returned to Deposit Power Pty Ltd.

196 Although the defendant pleaded that the Discount Agreement was void in its entirety,[187] in the course of closing oral submissions the defendant's counsel confined the defendant's reliance on s 70A to a contention cl 5 and cl 6 of the Discount Agreement were of no force and effect. The defendant's contentions as to why cl 6 should be held to be of no effect were confined to the point that cl 6 involved a breach of s 70(2).[188]

197 The plaintiffs emphasised that the purpose of pt V of the *Strata Titles Act* was to protect purchasers. The plaintiffs acknowledged the terms of the Sales Contract as varied by the Discount Agreement involved contraventions of s 70(1) and s 70(2) but stressed that s 70A was concerned with provisions that purported to exclude or restrict the operation of pt V of the *Strata Titles Act* and none of the terms of the Discount Agreement purported to do either of these things.[189] In particular the Sales Contract did not contain a term which purported to exclude or restrict the plaintiffs' right to avoid the contract under s 70(3) or s 70(4). Thus, the plaintiffs contended s 70A was not engaged.

Consideration and conclusion on the operation of *Strata Titles Act 1985*

198 The Discount Agreement does not purport to exclude the operation of pt V of the *Strata Titles Act*. The essential question raised by the defendant's contentions is whether cl 5 should be construed as restricting the operation of the plaintiffs' right to avoid the contract and, if so, what consequence follows.

199 The first sentence of cl 5 confers, in emphatic terms, a right on the plaintiffs to avoid the purchase. The right is expressed in terms more favourable than the right conferred by s 70(3) - it is not restricted to a right to avoid the purchase at any time before the strata/survey-strata plan was registered. Rather it is a right that may be exercised at any time. The conferral of the right to elect not to proceed is the dominant purpose of cl 5 and the remaining sentences must be construed in terms that are consistent with the conferral of a right to elect to avoid the purchase, exercisable at any time.

---

[187] Defendant's substituted defence and counterclaim dated 20 May 2021 [10.6].
[188] ts 375, 378.
[189] ts 433.

200 In my view, read in the context of the opening sentence, the second sentence of cl 5 should not be construed as requiring the plaintiffs to make an election as to whether or not to proceed with the purchase as soon as reasonably possible. It imposes a more limited obligation, that they should notify 13 O'Connor of any decision to elect not to proceed as soon as reasonably possible after making the decision. It does not exclude or restrict the operation of pt V of the *Strata Titles Act.*

201 The third sentence of cl 5 contemplates that the plaintiffs would make any election not to proceed with the purchase by 30 June 2016 but, importantly, it does not oblige them to do so and it does not restrict the operation of pt V of the *Strata Titles Act*.

202 Even if, however, cl 5 is construed in the manner contended for by the defendant, that is, it does restrict the operation of pt V of the *Strata Titles Act* by obliging the plaintiffs to elect not to proceed with the purchase either within a reasonable time or at the latest by 30 June 2016 then s 70A operates in a manner that only renders those temporal restrictions ineffective. It does not operate to render the right to elect not to proceed with the purchase of no effect. That right does not exclude or restrict the operation of pt V of the *Strata Titles Act.* In the event that the plaintiffs elected not to proceed with the purchase, s 70(5) would govern the recoverability of the purchase price.

Did 13 O'Connor have actual authority to agree to sell the apartment to the plaintiffs for a price of $695,000 payable into 13 O'Connor's account in three business days?

The Development Agreement

203 Much of the argument about 13 O'Connor's authority centred on the terms of the Development Agreement and more detailed reference to its terms is now required.

204 The essential features of the Development Agreement reflected the terms sheet - the defendant would invest $2.75 million in the project by funding the cost of acquiring the site and incidental acquisition costs. 13 O'Connor would contribute $260,000 of which $100,000 could be in the form of expenses. 13 O'Connor would be responsible for the management of the development process including arranging bank finance to cover the development costs. The site would be made available to the bank as security. The defendant was to receive a fixed return on this investment out of the net proceeds of sale of the

apartments after the bank debt had been discharged. 13 O'Connor would receive the balance of the proceeds as its profit share. A project manager would be appointed. A Project Control Group comprising one representative of the defendant and one representative of 13 O'Connor would oversee the development. In the provisions of the Development Agreement set out in the paragraphs that follow the defendant is referred to as the Owner, 13 O'Connor is referred to as the Developer and the development site is referred to as the Land.

205 Clause 4 provided it was 13 O'Connor's responsibility to provide any funding required (over and above the initial investments and the bank finance). The clause provided:

> If the Development needs further capital funds (including the preferred form, timing and manner of capital) (Required Funding) the Developer shall be responsible for providing the Required Funding.

206 Clause 5.1 set out 13 O'Connor's obligations as developer. It provided:

> Subject to the provisions of this Agreement, the Developer will:
>
> (a) prepare the Building Application on behalf of the Owner, lodge it with Council and procure the issue of Consents in accordance with clause 6;
>
> (b) engage the Builder and the Consultants in accordance with clause 7;
>
> (c) arrange for carrying out Completion of the Works in accordance with clause 8;
>
> (d) keep the Owner informed of the progress of the Works in accordance with clause 8;
>
> (e) market and sell the Apartments in accordance with clause 10; and
>
> (f) generally manage the Development in accordance with clause 9.

207 Clause 9 governed the constitution and responsibilities of the Project Control Group. There was no evidence that a Project Control Group was ever formed and nothing turns on the provisions of the clause save that cl 9.5 provided for the opening of a bank account in 13 O'Connor's name as follows:

> 9.5 Development accounts

> The Developer shall open a bank account in the Developer's name for the purpose of undertaking the Development. All money raised by the Developer shall be deposited into this account. The Owner's authority must be obtained for withdrawals of more than $20,000 or in case of multiple amounts less than $20,000 totalling $40,000 for any given month.
>
> The Owner shall do all things necessary to respond to the Developer's request for a withdrawal within 3 Business Days of receiving the request.

208 Clause 10 governed the sale of apartments and it provided:

> 10.1. Marketing
>
> The Developer must market the Apartments for sale as soon as practicable.
>
> 10.2 Sale
>
> The Developer must not sell any Apartment at a price lower than the price settled with the Owner without first obtaining the Owner's consent. Otherwise, the sale of the Apartments must [be] based on terms customary or usual for similar sale.

209 Clause 14 governed debt finance and it provided:

> The Owner will do all things necessary to allow the Developer to obtain debt funding to undertake the Development including granting the Mortgage on the condition that:
>
> (a) the Land will be primary security;
>
> (b) no personal guarantees shall be required from any directors or shareholders of the Owner despite some of them may be directors of the Developer;
>
> (c) funds from the Lender will only be drawn upon receipt of a draw down notice co-signed by the Owner or the Owner's Representative;
>
> (d) interest to the Lender shall be capitalized and payment thereof shall only be made by the Developer and the Owner to the Lender upon maturity of the Lender's term of its facility or completion of the relevant sale of the Apartments to settle the Lender's facility; and
>
> (e) the Lender's facility to the Developer and the Owner shall contain terms reasonably required by the Owner to ensure the Projections are realised.

An overview of the parties' contentions on actual authority

210 It is common ground that 13 O'Connor had actual authority to sell apartment 28. The issue between the parties was whether 13 O'Connor had authority to sell apartment 28 at the discounted price of $695,000.

211 The grounds relied on by the plaintiffs in support of the contention 13 O'Connor had actual authority to sell apartment 28 at the discounted price and receive the proceeds of sale may be summarised as follows:

(a) Clause 14(d) of the Development Agreement required 13 O'Connor to apply the proceeds of sale of apartments in repayment of the bank finance and thus by implication it had authority to receive payment of funds from purchasers.

(b) By cl 4 of the Development Agreement 13 O'Connor was responsible for raising any further capital that might be required for the funding of the development. The authority conferred by this clause to raise capital extended to receipt of advance payments of the purchase price of apartments which it was required to market and sell.

(c) The defendant assented to contracts for the sale of apartments that included a special condition giving purchasers the benefit of a 'furniture package', in effect, a discount. The defendant thereby acquiesced in 13 O'Connor selling apartments at a discount and conferred actual authority on 13 O'Connor to do so.

(d) The defendant knew that apartments 6 and 22 had been sold at a discount, nominally to Ms Yu (in reality to Mr Yu), and this was further evidence of acquiescence in the sale of apartments at a discount amounting to a conferral of actual authority.

(e) The emails sent by Mr Liaw and Ms Yu in May 2016 to Mr Darin Jinks referred to the sale of apartments at a discount.[190] The emails did not contain any complaint, surprise or objection to the discounting that had occurred. In those circumstances the references to discounts constituted implied admissions 13 O'Connor had been authorised to sell apartments at a discount.

[190] Exhibits 5.83, 5.89, 5.92; Exhibit 5.95 and 5.69.

(f) The circulating resolution signed by the defendant's directors on 31 August 2015 confirmed the unqualified authority of Mr Ray Jinks and Mr Darin Jinks to enter into 'property sale contracts' on its behalf and ratified the execution of a number of contracts for the sale of apartments including those sold with the benefit of a 'furniture package'. Entry into the Discount Agreement fell within the authority to enter 'property sale contracts'.

212 The defendant's contentions may be summarised as follows:

(a) 13 O'Connor's authority to sell was limited to selling at the prices that had been agreed unless the defendant consented to a sale at another price.

(b) 13 O'Connor had authority to receive funds from purchasers and apply them in reduction of the bank finance but the authority did not extend to receiving funds from purchasers and using those funds for other purposes.

(c) To construe 13 O'Connor's responsibility to raise any further capital required for the development as authority to obtain finance by receiving advance payments of the purchase price of apartments would be a construction diametrically opposed to the intent of the provisions of pt V of the *Strata Titles Act* which preclude payment of the purchase price to anyone other than a solicitor, real estate agent or settlement agent and for money so paid to be held on trust.

(d) The authority conferred on the Jinks by the circulating resolution was confined by the terms of the Development Agreement.

Consideration and conclusion on actual authority

213 There was no dispute about the concept of actual authority. For present purposes the short description given by Murphy JA in ***Pourzand v Telstra Corporation Ltd***,[191] is sufficient to identify the essential elements of the concept. In ***Pourzand*** Murphy JA stated:[192]

> Actual authority is a consensual arrangement between principal and agent whereby the principal grants to the agent, and the agent accepts, the principal's authority to act on the principal's behalf to undertake

[191] ***Pourzand v Telstra Corporation Ltd*** [2014] WASCA 14.
[192] ***Pourzand v Telstra Corporation Ltd*** [129].

> certain matters or tasks. Actual authority may itself be either express authority or implied authority.

214 I do not accept 13 O'Connor had actual authority to sell apartment 28 at the discounted price of $695,000 with payment being made within 3 business days for the following reasons.

215 First, the starting point is, 13 O'Connor's authority to sell was confined by the prohibition in cl 10.2 of the Development Agreement that, '[t]he Developer must not sell ... at a price lower than the price settled with the Owner without first obtaining the Owner's consent'.

216 Secondly, I do not accept the defendant's knowledge and acquiescence in the sale of apartments with the benefit of 'furniture packages' expanded 13 O'Connor's actual authority. The 'furniture packages' were a financial incentive or benefit to purchasers but they did not involve a direct reduction in the purchase price. Rather Next Generation Homes (Australia) Pty Ltd and or its subsidiaries' agreed to provide a voucher redeemable with Interior Design Elements Pty Ltd.[193] More importantly, however, acquiescence in the provision of 'furniture packages' valued at $10,000 on a sale of an apartment for $499,000,[194] a benefit with a face value of 2 per cent of the sale price was far removed from the 20 per cent direct reduction in the price of apartment 28. Acquiescence in the former is not a manifestation of assent to the latter.

217 Thirdly, the sale of apartment 28 at a discounted price on the basis that the purchase price was payable effectively immediately was not a method of raising further capital authorised by cl 4 of the Development Agreement. The sale did not raise further capital at all - it converted capital in the form of an interest in land into cash - there was no increase in the net capital available for the purposes of the development. The sale provided cash flow but that should not be confused with capital raising. Further, the plaintiffs' contention in respect of cl 4 would involve construing the Development Agreement as operating in a manner that permitted apartments to be sold on terms that provided for the payment of the purchase price to be made before settlement and for the price to be applied to finance the development rather than it being held on trust as required by pt V of the *Strata Titles Act.* The plaintiffs' construction of cl 4 of the Development Agreement would involve contraventions of the legislation and a court construing a

[193] Exhibit 4.14, 2204.
[194] Exhibit 4.14, 2203.

contract will presume the parties did not intend for its terms to operate in a manner that contravened the law.[195]

218 Fourthly, the defendant's consent to the sale of apartments 6 and 22 at discounted prices may be inferred from the fact the buyer was Mr Yu albeit the contracts were nominally with Ms Yu.[196] Consequently, the defendant's consent to those sales at discounted prices is not a manifestation of assent to discounting prices generally.

219 Fifthly, the email exchanges between Mr Liaw and Ms Yu on the one hand and Mr Darin Jinks on the other in May 2016 support the conclusion that by May 2016 the defendant was aware that 13 O'Connor had discounted the price of apartments but they do not support the conclusion that the defendant was aware of the discounts in August and September 2015.

220 Sixthly, although the issue is relatively finely balanced, I have reached the conclusion that the plenary authority conferred on the Jinkses by the circulating resolution, to enter 'property sale contracts' on behalf of the defendant is confined by the terms of cl 10.2 of the Development Agreement. It may be accepted that the concept of agency is sui generis and while consensual it is not wholly contractual. That said, the circulating resolution cannot be divorced from the context in which it was executed. Contextually the most significant feature of the parties' relationship was that it was governed by the Development Agreement. Viewed in that context the expression 'property sale contracts', where it appears in the circulating resolution, should be understood as sales contracts that complied with the provisions of cl 10 of the Development Agreement.

221 I do accept, however, that 13 O'Connor had authority to receive payment of the purchase price of apartments. So much was accepted by the defendant.[197] I do not accept the defendant's qualification on the nature of the authority, that is, 13 O'Connor's authority to receive proceeds of sale was limited to an authority to receive such proceeds and apply them in repayment of the bank finance. How 13 O'Connor applied the proceeds, once received by it, did not operate to qualify the existence of the authority.

---

[195] ***Fitzgerald v FJ Leonhardt Pty Ltd*** [1997] HCA 17; (1997) 189 CLR 215, 237 (Kirby J); ***Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd*** [2006] QCA 540; [2007] 2 Qd R 399, [66] (McMurdo J).
[196] Exhibit 4.14, 2205 - 2209 (apartment 6), 4.15, 2260 - 2264 (apartment 22).
[197] ts 385.

Did 13 O'Connor have apparent or ostensible authority to agree to sell the apartment to the plaintiffs for a price of $695,000 payable into 13 O'Connor's account in three business days?

222 Apparent or ostensible authority is established when a principal holds out the agent as having authority and the person dealing with the principal relies on that person's apparent authority. The foundation of apparent authority is estoppel. In ***Pacific Carriers Ltd v BNP Paribas***,[198] the High Court described the operation of apparent authority in the corporate context as follows:

> Where an officer is held out by a company as having authority, and the third party relies on that apparent authority, and there is nothing in the company's constitution to the contrary, the company is bound by its representation of authority. 'The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract.' It is not enough that the representation should come from the officer alone. Whether the representation is general, or related specifically to the particular transaction, it must come from the principal, the company. That does not mean that the conduct of the officer is irrelevant to the representation, but the company's conduct must be the source of the representation. In many cases the representational conduct commonly takes the form of the setting up of an organisational structure consistent with the company's constitution. That structure presents to outsiders a complex of appearances as to authority. The assurance with which outsiders deal with a company is more often than not based, not upon inquiry, or positive statement, but upon an assumption that company officers have the authority that people in their respective positions would ordinarily be expected to have. In the ordinary case, however, it is necessary, in order to decide whether there has been a holding out by a principal, to consider the principal's conduct as a whole. (citations omitted)

223 There was no dispute between the parties as to the principles applicable to apparent authority. The principles applied may be summarised as follows:[199]

(a) There must have been a representation made as to the agent's authority.

---

[198] ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451, 466 - 467

[199] ***Pourzand v Telstra Corporation Ltd*** [83] – [84], [112] – [115], [130]; ***Pacific Carriers Ltd v BNP Paribas*** [36] - [38], ***Northside Developments Pty Ltd v Registrar-General*** [1990] HCA 32; (1990) 170 CLR 146, 155, 180, 205 - 206, 208, 211 - 212; ***Tipperary Developments Pty Ltd v The State of Western Australia*** [2009] WASCA 126 [107] - [110].

(b) Whether the representation is general or related to a specific transaction, the representation must have been made by the principal.

(c) This does not mean that the conduct of the agent is irrelevant to the representation but the principal's conduct must be the source of the representation.

(d) The third party must have relied on this representation.

(e) The third party's reliance must have been reasonable. There can be no reasonable reliance when the circumstances are such as to put a person on inquiry as to whether the agent has the relevant authority.[200]

224 In this case the relevant representational conduct flowed from the structure the defendant and 13 O'Connor had adopted to manage the development. In effect, the defendant provided the capital and, subject to the safeguards provided by the terms of the Development Agreement, 13 O'Connor was entrusted with the management of the development process and, crucially, the marketing and sale of the apartments in the manner I have described in the course of my factual findings. All of the steps to build the apartment complex, obtain bank finance, prepare the relevant contractual documents, and market and sell the apartments were entrusted to 13 O'Connor.

225 By leaving 13 O'Connor to do all the things required to sell the apartments, the defendant represented to prospective buyers that 13 O'Connor had authority to sell the apartments at prices to be negotiated without any limit on its authority to conclude sales. The defendant's counsel accepted, in effect, the defendant had represented that 13 O'Connor had authority to sell at prices to be negotiated and accepted that it was difficult to say that the plaintiffs had not relied on the representation.[201] I have already recorded my finding that the plaintiffs did rely on such a representation and their dealings with Mr Darin Jinks must be viewed against the background of that representation and their reliance on it.

---

[200] In G E Dal Pont, *Law of Agency* (4th ed, 2020) [20.44], Professor Dal Pont refers to the difficulties in distinguishing between the levels of knowledge required to negate reasonable reliance and, citing P Watts and F M B Reynolds, *Bowstead & Reynolds on Agency* (21st ed, 2018) [8-048] as support, suggests that it may be better simply to recognise that courts may infer from the circumstances that a third party must have known about or at least been suspicious as to a putative agent's lack of authority.

[201] ts 391.

226 The focus of the defendant's submissions was that it was not reasonable for the plaintiffs to have relied on the representation as to authority and that the circumstances were such that the plaintiffs were put on inquiry as to whether 13 O'Connor had the relevant authority.[202]

227 In support of its submission that the plaintiffs were put on inquiry about the authority of 13 O'Connor to enter into the Discount Agreement, the defendant pointed to the unusual nature of the transaction documents and the apparent contradictions between them: a formal sales contract which was expressed not to be conditional on obtaining finance, the Side Agreement which recorded the sale to be subject to finance and the Discount Agreement which varied the price and the date for payment of the discounted purchase price. The defendant points also to the steps taken by the plaintiffs to have their solicitor revise the terms of the proposed discount agreement and incorporate those terms into a deed to be executed by the defendant and the later steps taken by them to have 13 O'Connor's authority to enter into the proposed discount agreement confirmed by a letter signed by the defendant.

228 Care is required not to view the nature of the transaction, the circumstances in which it took place and the plaintiffs' conduct with the benefit of hindsight. The terms of the sale, that is the extent of the discount and the payment of the purchase price effectively immediately and well in advance of the anticipated settlement were unusual. Viewed objectively, however, there was a commercial rationale for a developer to reduce prices significantly in order to achieve not only sales, but also the receipt of the proceeds of sale, quickly (cashflow being the lifeblood of the construction and development industries).[203]

229 Unusual though the terms of sale were, I do not consider that they were such as to put the plaintiffs on inquiry as to 13 O'Connor's authority, particularly in the light of the representation 13 O'Connor had authority to sell the apartments.

230 Earlier in these reasons I recorded a finding that Mr McCleary did not understand why he and Mrs McCleary were required to sign three documents (the Sales Contract, the Side Agreement and the Discount Agreement) to implement the sale at the discounted price. As I have

---

[202] ts 392 - 396.

[203] See ***Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*** [2018] HCA 4; (2018) 264 CLR 1 [40] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ); ***Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd [No 6]*** [2020] WASC 302, 393.

said, it was natural for them to assume that Mr Darin Jinks knew what he was doing and that they went along with it even though they did not understand the reasons for the approach being taken.

231 Moreover, it may be accepted that the Discount Agreement and the Side Agreement were poorly drafted agreements but unfortunately poorly drafted agreements are not unusual in the context of residential property transactions in which parties or their agents often prepare and (more often) amend documents without the benefit of legal assistance.

232 With the benefit of hindsight it may be obvious that 13 O'Connor used three agreements to achieve the sale of apartment 28 at a discounted price because it did not have the defendant's authority to enter into the transaction. I do not consider, however, that in 2015 the use of the three agreements would have caused a member of the public in the plaintiffs' position to inquire into whether 13 O'Connor had the defendant's authority to enter into the transaction.

233 The plaintiffs took the precaution of obtaining legal advice and assistance in relation to the transaction (including asking for a letter confirming 13 O'Connor's authority). This does not give rise to an inference they were, in fact, on inquiry as to whether 13 O'Connor lacked authority. People routinely obtain legal advice about transactions and incorporate assurances about authority and the like into their agreements as a matter of prudence rather than out of an actual concern about the aspects of the transactions with which the assurances are concerned.

234 Mr McCleary was an experienced business man and neither he nor Mrs McCleary appeared to me to be people who would take risks with substantial sums of money, especially money they had borrowed. I am confident that had the plaintiffs had any reservations as to whether 13 O'Connor was authorised to enter into the Discount Agreement they would not have risked paying $695,000.

235 Viewed individually or in combination the terms of the sale and the circumstances of it do not persuade me that the plaintiffs were put on inquiry about 13 O'Connor's authority. Accordingly I find that the plaintiffs' reliance on the defendant's representation that 13 O'Connor had its authority to enter into the transaction was reasonable.

Did the defendant ratify the sale?

An overview of the parties' contentions on ratification

236 The plaintiffs contended that:

(a) By April or May 2016 the defendant knew both of the sale of apartment 28 at the discounted price of $695,000 and that the plaintiffs had already paid the discounted purchase price. This contention was supported by references to the emails exchanged between Mr Liaw, Ms Yu on behalf of the defendant and Mr Darin Jinks on behalf of 13 O'Connor to which I have referred in the course of my factual findings.[204] The plaintiffs contended the defendant's knowledge was supplemented on 29 July 2016 by the provision to Mr Liaw of copies of the Sales Contract and the Discount Agreement sent to him by email by Mr Nunis.

(b) The defendant knew that the plaintiffs were seeking possession of the apartment before settlement so that they could undertake improvements and, by the beginning of November 2016, the defendant knew the plaintiffs had taken possession for the purposes of undertaking improvements.

(c) Having the knowledge of the terms upon which the sale of apartment 28 had been agreed, and contrary to the defendant's argument that it was made clear to the plaintiffs in the period between August and November 2016 that the defendant did not consider itself bound by the sale, the defendant took no steps to disclaim the sale until (on an interpretation of the correspondence that was generous to the defendant) the defendant's solicitors' letter of 16 June 2017.[205] Thus, it must be taken to have ratified the sale.

237 The defendant contended:[206]

(a) Care was required in interpreting the references in Ms Yu's emails to 'we' and 'us' as incorporating references to Mr Yu as it was plain from Ms Yu's emails that the syntax and grammar in her written English were deficient.

---

[204] Primarily exhibits 5.69, 5.89, 5.91.
[205] Exhibit 8.40 - which referred to the Discount Agreement as the 'Purported Discount Agreement'.
[206] This summary is derived from the defendant's counsel's closing oral submissions - ts 399 - 404.

(b) Ms Yu's and Mr Liaw's knowledge should not be imputed to Mr Yu because Mr Yu's evidence was that they did not always keep him 'in the loop'.

(c) There is no set requirement as to what a party must do to disavow a transaction. When the defendant did learn about the discount given on the purchase price of apartment 28 (the defendant accepts that it should be found that the defendant had the requisite knowledge by mid-2016) it took steps that resulted in the plaintiffs' becoming aware that the defendant 'had some difficulties with the transactions and would likely not easily move to settlement, and there were going to be problems'.

(d) Mr McCleary knew by early October 2016 that the defendant was not going to settle the sale at the discounted price and that is why he sent Paramount a copy of the Discount Agreement on 5 October 2016. Mr McCleary's knowledge that the defendant was contending that it was not bound by the Discount Agreement was evident from his email to Mr Darin Jinks of 20 October 2016 in which he asked Mr Darin Jinks to 'Please explain the nature of the ongoing disputes' and said 'My contract and agreement is with Dien'.

(e) The plaintiffs' knowledge that the defendant did not accept that it was bound by the Discount Agreement was further evidenced by their willingness to enter into a contract to purchase apartment 27 and by their lodging of a caveat. The defendant's counsel contended it was inconceivable that a person would make an offer to purchase another apartment unless they were trying to resolve 'some dispute'. The defendant reinforced this submission by reference to Ms Briones' email to Mr Liaw of 31 October 2016 in which she referred to the plaintiffs having engaged a lawyer and being ready to fight for unit 28.

Consideration and conclusion on ratification

238 An agency can be established by subsequent ratification. In ***Union Bank of Australia Ltd v Rudder***,[207] Griffiths CJ observed:[208]

> Ratification is equivalent, as we all know, to original authority.

239 In ***Jones v Peters***,[209] Herring CJ stated:[210]

[207] ***Union Bank of Australia Ltd v Rudder*** [1911] HCA 39; (1911) 13 CLR 152.
[208] ***Union Bank of Australia Ltd v Rudder***, 163.

> [T]he relation of principal and agent can of course be constituted retrospectively by ratification, where the act has been done by one person not assuming to act on his own behalf but for another though without his precedent authority and that the other subsequently ratifies what has been done on his behalf but without his authority.

240 The retrospective nature of the ratification principle was expressed in these terms by Cotton LJ in ***Bolton Partners v Lambert***:[211]

> The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had had authority to do the act at the time the act was done by him.

241 The principles applied by me in determining the plaintiffs' ratification case are those set out by Moore-Bick J in ***Yona International Limited v La Reunion Francaise SA***,[212] who drawing on statement of the principles by Waller J in ***Suncorp Insurance and Finance Co Ltd v Milano Assicurazioni SpA***,[213] said:

> (i) although the doctrine of ratification is commonly relied upon to validate an unauthorized transaction, it may be applied to any act carried out in the name of another person by one who lacked authority;
>
> (ii) ratification involves a conscious decision to adopt an unauthorized act; as such it may be express or implied, and will be implied whenever the conduct of the person in whose name an act has been done is such as to show that he adopts that act;
>
> (iii) mere acquiescence or inactivity may be sufficient to constitute ratification if, in the circumstances, it amounts to clear evidence of an intention to adopt the act in question;
>
> (iv) it is necessary that at the time of ratification the person adopting the act should have full knowledge of all the material circumstances in which it was done, unless he makes it clear that he intends to adopt it regardless of the circumstances;
>
> (v) an act may be ratified by an agent, provided he has authority to do so in accordance with established principles.

---

[209] ***Jones v Peters*** [1948] VLR 331.
[210] ***Jones v Peters***, 335.
[211] ***Bolton v Lambert*** (1889) 41 Ch D 295, 306.
[212] ***Yona International Limited v La Reunion Francaise SA*** [1996] 2 Lloyd's Rep 84, 103.
[213] ***Suncorp Insurance and Finance Co Ltd v Milano Assicurazioni SpA*** [1993] 2 Lloyd's Rep 225, 234 - 235.

242 Moore-Bick J expanded upon the possibility of ratification by silence and inactivity saying:[214]

> Ratification can no doubt be inferred without difficulty from silence or inactivity in cases where the principal, by failing to disown the transaction, allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorized.

243 In ***Learn & Play (Rhodes No 1) Pty Ltd v Lombe***,[215] Pembroke J made the following observation about the subjective and objective elements of the doctrine of ratification:[216]

> I should also observe that ratification has objective as well as subjective features. It is not open to a principal who, by his conduct, appears to the outside world to have adopted a transaction, to be able to prove subjectively that he did not intend to approve it. A principal is not entitled to prove subjectively that he did not intend to adopt a transaction when he has done an unequivocal act to adopt it with full knowledge of its terms and features: ***Suncorp Finance & Insurance Corp v Milano Assicurazioni SpA*** *(above) at 235*.
>
> On the other hand, the subjective knowledge and understanding of the principal is also relevant. It must be shown that the principal was aware of the material terms and features of the transaction which he is said to have adopted and ratified. Without such full knowledge, there will not be ratification according to law. I doubt very much whether a principal, who was aware of the material terms, could successfully contend that he lacked the relevant knowledge because of his own obtuseness, neglect or failure for some other reason to appreciate the significance of those terms. However I need not decide that question in this case.

244 In support of their ratification case, the plaintiffs cited ***Scots Church Adelaide Incorporated v Fead***,[217] a decision which provides an illustration of the application of the doctrine of ratification. The case concerned a contract for a sale of a property entered into by a husband in June 1949 'for and on behalf of' his wife (the property being in her name) when the wife was overseas. The contract was subject to a condition to the effect that certain statutory approval for the contract was obtained. When the wife was informed of the contract by her husband she wrote to him opposing the contract and asking him not to do anything until she returned to Australia but she did not explicitly refuse to consent to the sale or repudiate the husband's authority to sell. The husband informed the agent who had arranged the sale that his wife

[214] ***Yona International Limited v La Reunion Francaise SA***, 106.
[215] ***Learn & Play (Rhodes No 1) Pty Ltd v Lombe*** [2011] NSWSC 1506.
[216] ***Learn & Play (Rhodes No 1) Pty Ltd v Lombe*** [23] - [24].
[217] ***Scots Church Adelaide Incorporated v Fead*** [1951] SASR 41.

had requested the matter be left in abeyance pending her return from overseas. The agent responded that the contract was binding. The statutory approval condition was satisfied in August 1949. The wife returned from overseas in January 1950 and in February 1950 she wrote to the agent denying that her husband had been her agent or that he had authority to sell the property. Abbott J held that the husband did in fact have his wife's authority to sell, but in case he was wrong in the conclusion the husband had actual authority, held that by remaining silent between July 1949 and February 1950 the wife had acquiesced in the contract entered into by her husband and had ratified his signing of it as her agent.

245 I approach the issue of what the defendant knew of the circumstances of the sale of apartment 28 to the plaintiffs on the basis that Mr Liaw was the defendant's agent and, in accordance with the general principle, his knowledge is to be attributed to the defendant.[218]

246 By the end of May 2016 the defendant knew that apartment 28 had been sold for the price of $695,000 and that this price had been paid by the plaintiffs. These were the material circumstances of the transaction. In circumstances where the defendant had authorised 13 O'Connor to sell apartments in the complex at agreed prices, the requirement of knowledge of the material circumstances of an unauthorised transaction did not require the defendant to have been provided with the Discount Agreement itself.

247 The defendant's position in respect of all of the sales disclosed in the sales lists sent to Ms Yu on 11 April 2016, which included the sale of apartment 28, was that none of the purchasers would be allowed to rescind their contracts. In my judgment by the end of May 2016 the defendant had made a positive decision to ratify and adopt the sale of apartment 28 to the plaintiffs.

248 If I am wrong in that conclusion then I hold that the defendant's conduct in the period between May 2016 and June 2017 amounted to an acquiescence in the sale sufficient to demonstrate implied ratification. The matters leading me to this conclusion are as follows.

249 First, there can be no argument that the defendant was not aware of the material circumstances of the transaction after 29 July 2016 because Mr Nunis provided Mr Liaw with the Sales Contract, the

[218] P Watts and F M B Reynolds, *Bowstead & Reynolds on Agency* (21st ed, 2018) [8-208] and the cases to which reference is made.

Discount Agreement and the Side Agreement under cover of his email sent on that date. The suggestion (implicit in the request made by the defendant's solicitors in their letter of 16 June 2017 asking for copies of the Discount Agreement and any other documents relied on by the plaintiffs) that the defendant did not have a copy of the Discount Agreement created a misleading impression of the state of the defendant's knowledge.

250 Secondly, if the defendant had not adopted the sale, one would have expected it to have said so in May 2016 or shortly thereafter. It was not until 27 October 2017 that the defendant, through the service of a notice of default calling upon the plaintiffs to pay $869,000 on settlement, declared its position in unequivocal terms.

251 Thirdly, (though this is implicit in the point just made) none of the communications in the period between August and December 2016 relied on by the defendant to support the conclusion that the plaintiffs were aware that there was a problem with settlement amounted to a communication that the defendant did not accept it was bound by the Discount Agreement. In this respect, as I have observed earlier, the defendant's case at trial was not supported by the contemporaneous documents and the defendant did not supplement the documentary evidence with any oral evidence to establish the plaintiffs were aware that it did not accept it was bound by the Discount Agreement.

252 Fourthly, the defendant knew the plaintiffs were seeking possession prior to settlement so that they could undertake improvements on the apartment. The defendant knew the plaintiffs were seeking prior possession on the basis that the Discount Agreement was binding on it. The defendant made no objection to the plaintiffs being in possession or to the plaintiffs carrying out improvements.

253 Fifthly, as I have found, I accept that by October 2016 the plaintiffs were concerned about the sale and when settlement would occur. I do not accept, however, that they thought, let alone knew, that the defendant's position was that the Discount Agreement was an unauthorised transaction.

Conclusions and remedy

254 It follows from the conclusions I have expressed that the making of the Discount Agreement was within 13 O'Connor's apparent authority and the defendant is bound by its terms. If I am wrong in reaching that conclusion on apparent authority then the defendant

ratified and adopted the Discount Agreement and is bound by it on that basis.

255 It follows from these conclusions that, subject to the plaintiffs' reimbursing the defendant in respect of the outgoings paid by it, there should be an order for specific performance for the sale of apartment 28 at a price of $695,000 which should be taken as having been paid to the defendant on 10 September 2015.

256 I will hear the parties as to the terms of the orders to be made and costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

AS
Associate to the Honourable Justice Tottle

12 AUGUST 2021