Supreme Court

New South Wales

Case Name:	Jin Yi Construction Pty Ltd v Romeciti Eastwood Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 56
Hearing Date(s):	26, 27 and 28 October 2021
Date of Orders:	4 February 2022
Decision Date:	4 February 2022
Jurisdiction:	Equity
Before:	Lindsay J
Decision:	The plaintiff, as purchaser of a commercial strata title unit "off the plan" (by description, prior to construction), was entitled to rescind the contract, and to recover a deposit paid under the contract, when the unit, as constructed, was materially different from the draft strata plan attached to the contract.
Catchwords:	CONTRACTS—Contract for the sale of land — Construction — Purchase of strata title unit by description — Building as constructed manifestly different from draft strata plan attached to contract — Purchaser entitled to rescind and return of deposit
Legislation Cited:	Australian Consumer Law Civil Procedure Act 2005 NSW Conveyancing Act 1919 NSW Environmental Planning and Assessment Act 1979 NSW
Cases Cited:	Batey v Gifford (1997) 42 NSWLR 710 Blanco v Wan [i2021] NSWSC 273 Cloud Top Pty Limited v Toma Services Pty Ltd [2008] NSWSC 568 Flight v Booth (1834) 131 ER 1160 Havyn Pty Limited v Webster [2005] NSWCA 182;

	(2005) 12 BPR 22,873 Higgins v Statewide Developments Pty Ltd [2010] NSWSC 183; 14 BPR [98398] Kalathas v 89 Ebley Street Pty Ltd [2021] NSWSC 490 Kazacox v Shuangling International Development Pty Ltd [2016] NSWSC 1504; 18 BPR 36,353 Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd [1973] 2 NSWLR 268 Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 Nassif v Caminer (2009) NSWLR 276 Romanos v Pentagold Investments Pty Ltd (2003) 217 CLR 367 Smogurzewski v AIT Investment Group Pty Ltd [2020] NSWSC 490; 19 BPR 40,341 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 Torr v Harpur (1940) 40 SR (NSW) 585 Travinto Nominees Pty Ltd v Vlattas (1973) 129 CLR 1 Victorsen v Easy Living Holdings Pty Ltd [2019] NSWSC 1721; 19 BPR 39,893 Vella v Ayshan [2008] NSWSC 84
Category:	Principal judgment
Parties:	Plaintiff: Jin Yi Construction Pty Ltd ACN 614 656 969 First Defendant: Romeciti Eastwood Pty Ltd ACN 604 034 808 Second Defendant: RCG Real Estate Pty Ltd ACN 167 560 527 Cross claimant: Romeciti Eastwood Pty Ltd First cross defendant: Jin Yi Construction Pty Ltd Second cross defendant: Beibei Huang
Representation:	Counsel: Plaintiff/cross defendants: MT Fernandes First Defendant/cross claimant: AJ Greinke Second Defendant: Submitting Appearance Solicitors: Plaintiff/cross defendants: ST Lawyers First Defendant/cross claimant: Auyeung Hencent & Day Lawyers

File Number(s): 2020/00255897

JUDGMENT

INTRODUCTION

1 In essence, these proceedings concern a dispute about the competing entitlements of a purchaser (the plaintiff) and a vendor (the first defendant) to a deposit paid (as to 5% of the purchase price) or payable (another 5% of the purchase price, as the first defendant contends) following discharge of a contract for the sale of land (a commercial, retail strata unit) now known as Shop 3, "Eastwood Central II" in Eastwood, a suburb of Sydney.

2 The shop, as it may for convenience be described, is now Lot 77 in Strata Plan 101839.

3 At the time the parties respectively agreed to buy and sell it, the shop was identified as Lot 3 in a "Draft Strata Plan" annexed to their contract as "Annexure A".

4 The contract comprises 61 consecutively numbered clauses. Clauses 1 to 31 (inclusive) represent the printed terms of the standard form of "contract for the sale and purchase of land" published by the Law Society of New South Wales and the Real Institute of New South Wales in 2016. Clauses 32 to 61 (inclusive) comprise "Special Conditions" which modify the printed form and make particular provision for the transaction at hand. Special Condition 32.4 (headed "Inconsistency") provides as follows:

> "These Special Conditions shall apply notwithstanding anything to the contrary contained in this Contract. In the event of conflict between the Special Conditions and the Printed Clauses or any other provision, these Special Conditions shall prevail."

THE CONTRACT AND ITS COURSE

5 By their contract dated 26 September 2017, made by an exchange of counterparts on that date, the plaintiff agreed to purchase the shop "off the plan" (that is to say, by description, prior to construction) for $2.8 million exclusive of GST ($3,080,000 including GST).

6 The contract provided for a 10% deposit to be paid by the plaintiff, with the balance of the purchase price payable on completion of the contract.

7 The deposit was expressed by the contract to be payable by two equal instalments of $140,000 excluding GST: Special Condition 61. A first instalment (of $154,000 including GST) was payable, and was paid, on the making of the contract. The second instalment of an equivalent amount, which has not been paid, was expressed by the contract to have been payable "on the completion date".

8 Clause 2.9 and Special Condition 60 of the contract provided for the deposit payable under the contract to be invested in an interest bearing account by the stakeholder, with interest (net of bank charges and government taxes) to be shared equally between the vendor and the purchaser.

9 The first defendant contends, and I accept, that the "completion date" for the purpose of Special Condition 61 was defined by Special Condition 32.1 (in the events that have happened) as "14 days after the day on which the Occupation Certificate [was] served".

10 The Occupation Certificate (issued under the *Environmental Planning and Assessment Act* 1979 NSW upon completion of construction of the building of which the shop forms part) was issued, and served by the first defendant on the plaintiff, on 24 August 2020. The "completion date" for the purpose of Special Condition 61 was, accordingly, 7 September 2020.

11 By that time, the plaintiff had purported (on 12 August 2020) to rescind the contract pursuant to a right conferred by Special Condition 36.3 (read with clause 19.2.1) of the contract, and (by a Summons filed on 2 September 2020) commenced these proceedings for a declaration that it had validly rescinded the contract and that it was entitled to recover the deposit paid on the making of the contract.

12 The second defendant holds $140,000 as a stakeholder: the deposit paid on the making of the contract. It has filed a submitting appearance without active engagement in the proceedings.

13 The first defendant did not, and does not, accept the validity of the notice of rescission served on it by the plaintiff. On 8 September 2020 (the day after the "completion date") it served on the plaintiff a "14 day" Notice to Complete.

14 On the very same day, the plaintiff "rejected" the notice to complete because it contended that it had already validly rescinded the contract.

15 On 13 October 2020, after the time limited by the Notice to Complete for completion, the first defendant served on the plaintiff a Notice of Termination alleging that the plaintiff had repudiated the contract.

QUESTIONS IN DISPUTE

16 Although commenced by Summons, the proceedings proceeded on pleadings.

17 By its current Statement of Claim, the plaintiff seeks, *inter alia*, orders for the return of its deposit based upon four grounds.

18 First, it contends that it was entitled to rescind the contract under Special Condition 36.3. Secondly, it contends that it was entitled to rescind under "the rule in *Flight v Booth* (1834) 131 ER 1160" because the land the first defendant proposed to convey upon completion of the contract was substantially different from the land described in the contract as the subject of the sale. Thirdly, it contends that it should be granted relief against forfeiture of the deposit under section 55(2A) of the *Conveyancing Act* 1919 NSW. Fourthly, it contends that it should be granted an order (under the *Australian Consumer Law*) for the return of its deposit on the basis that it was induced to enter the contract by misleading conduct on the part of the first defendant.

19 By its Defence, the first defendant disputes each of the grounds upon which the plaintiff claims an entitlement to a return of the deposit paid on the making of the contract. By a Cross Claim, it seeks a judgment (against the plaintiff and its guarantor) for the second, unpaid instalment allegedly payable under the contract.

20 The issues between the parties have been joined upon the cross defendants' Defence to the Cross Claim in which they contend that any obligation imposed on the plaintiff to pay the second instalment of the deposit was void as a penalty.

21 The first defendant makes no claim to damages for a loss on "resale" of Lot 77 in Strata Plan 101839. A land title search (including registered Memorandum of

Transfer number AR29529) records the first defendant's sale of the Lot for a consideration of $3,058,000.

THE INITIAL QUESTION

22 The initial focus for attention is upon the question whether, upon the proper construction and application of Special Condition 36.3, the plaintiff was entitled to rescind the contract by contractual right.

23 The gravamen of the parties' dispute arises from the fact that Lot 3 in the Draft Strata Plan was depicted as an open area of commercial space comprising 110 square metres, together with storage space of 2 square metres located at a rear corner of the shop. By contrast, Lot 77 in Strata Plan 101839 has placed within its external boundaries a prominently placed "new storage space" of substantial construction in a fixed position occupying more than 6 square metres in the middle of Lot 77. In large measure, the outcome of these proceedings turns on what, if any, significance attaches to the unforeshadowed inclusion of "the new storage space" within the boundaries of the shop. That was, admittedly, a substantial and permanent change, and (as I find) a detrimental change to the shop.

24 The configuration of the "new storage space" *vis-à-vis* a lift-well that services the lobby, external to the lot, is such that there are areas of confined access (characterised by the plaintiff as "dead space") between the "new storage space" and one side of the shop and at the rear of the shop.

25 The terms of Special Condition 36 invite consideration whether the area "shown in" Lot 3 in the Draft Strata Plan suffered a reduction of more than 5% when constructed as Lot 77 in Strata Plan 101839. This is a major point of difference between the parties.

26 In essence, the plaintiff contends on that question that:

(a) The starting point upon a consideration of Special Condition 36.3(a)(i) is the expression "t*he area of the Property* as *shown* in the Draft Strata Plan".

(b) The expression "the Property" in that context is a reference to Lot 3 as shown in the Draft Strata Plan, without regard to any area outside Lot 3 (in particular, car spaces and storage spaces in the

basement). That is because the Draft Strata Plan does not show any car spaces or external storage spaces allocated to Lot 3.

(c) Of the three measurements "shown in the Draft Strata Plan" in relation to Lot 3 (110 square metres "commercial space", 2 square metres of "storage space" at the rear of the Lot and a total area of 112 square metres), the expression "area of the Property" (second occurring in Special Condition 36.3(a)(i)) must refer to the area described as 110 square metres of "commercial space" because it was, in substance, the subject matter of the contract, the 2 square metres of storage space at the rear of the Lot being a separately marked, incidental feature of Lot 3 arising from configuration of the lobby external to Lot 3. The purpose of the "split areas" table accompanying Lot 3 was to show the area of "commercial space" available to a purchaser. Had special significance not attached to the area of "commercial space" there would have been no need of the "split areas" table.

(d) The comparison required by Special Condition 36.3(a)(i) is rendered more difficult than it might otherwise be because:

(i) Lot 77 in Strata Plan 101839 as shown in the Strata Plan is not accompanied by a "split areas" table such as accompanies Lot 3 in the Draft Strata Plan; and

(ii) as recorded in a notation on the Strata Plan, all areas shown in the Strata Plan are approximate.

(e) Two surveys of the shop as constructed have measured the "non-storage space" in Lot 77 in Strata Plan 101839 (to use a neutral expression) as being 102.8 square metres. The first was an "on site survey" dated 20 July 2020 prepared by Tony Lei of Greenland Surveying. The second was a more detailed report dated 18 January 2021 prepared by Anthony Mitchell of StrataSurv Pty Ltd.

(f) Mr Mitchell concluded that the total area of the shop was 111.85 square metres, not the 109 square metres recorded on the face of Lot 77 in Strata Plan 101839. In his survey, he measured "the new storage space" (the fixed structure located within the boundaries of Lot 77) as comprising 6.35 square metres and the "rear storage space" as comprising 2.7 square metres. He described both of those storage spaces as a "room". In summary, he described the area of the shop as having a total area of 111.85 square metres comprising a "main floor" of 102.8 square metres, a "store room" (at the rear of the shop) comprising 2.7 square metres and a "new store room" comprising 6.35 square metres. What Mr Mitchell described as the "main floor" area the plaintiff describes as "commercial space".

(g) In his survey Mr Lei attributed an area of 6.2 square metres to the "new storage space". That may be because he accepted the

statement in Strata Plan 101839 that the total area of Lot 77 was 109 square metres. He appears to have deducted from the figure "109 square metres" his measurement of 102.8 square metres of floor space to infer, provisionally, that the new store room comprised 6.2 square metres. In any event, the relevant survey measurement is the area of 102.8 square metres.

(h) In Lot 77 in Strata Plan 101839, the "area of the Property shown in the Strata Plan" comparable to the 110 square metres "commercial space" as shown in the Draft Strata Plan is the area of 102.8 square metres.

(i) That is because:

(i) The ground floor plan of Lot 77 appears in Strata Plan 101839 with two measurements recorded within the borders of the Lot.

(ii) One of those measurements (109 square metres) refers to the whole of Lot 77 as depicted on the ground floor plan of the Lot.

(iii) The other measurement (191 square metres) represents the 109 square metres area together with an area of 82 square metres referrable to car parking spaces and a storage space allocated in the Strata Plan to Lot 77 in the basement.

(iv) The area of 109 square metres includes "the new storage space", inferred by Mr Lei to comprise 6.2 square metres and found by Mr Mitchell to comprise 6.35 square metres.

(v) As Lot 3 was depicted in the Draft Strata Plan as containing an open area of non-storage space (110 square metres), it should be compared with the area of non-storage space (102.8 square metres) depicted in Lot 77 in Strata Plan 101839.

(j) The non-storage space available in Lot 77 (102.8 square metres) represents a reduction of 7.2 square metres from the 110 square metres shown in the Draft Strata Plan.

(k) A reduction of 7.2 square metres (110-102.8) represents a reduction of about 6.5% on a base of 110 square metres.

27 The first defendant does not dispute the arithmetical accuracy of Mr Mitchell's report. In particular, it does not dispute that the "non-storage space" in Lot 77 in Strata Plan 101839 has an area of 102.8 square metres or that the "new storage area" depicted in the Lot has an area of 6.35 square metres. Those two areas, taken together, total 109.15 square metres, approximating the area of 109 square metres shown on the face of Lot 77 as the area of the Lot. A primary focus of the parties' attention is how "the new storage area" of 6.35

square metres is to be treated for the purpose of the comparison required by Special Condition 36.3(a)(i).

28 In essence, the first defendant contends that upon a consideration of Special Condition 36.3(a)(i):

(a) The expression "the area of the Property as shown in the Draft Strata Plan" refers to the total area of Lot 3 (being 112 square metres), together with an allowance for the four unallocated car spaces in the basement.

(b) If the basement spaces notionally allocated to the shop are to be ignored (so that the focus of the comparison required by Special Condition 36.3(a)(i) is between the ground floor plans of Lot 3 in the Draft Strata Plan and Lot 77 in Strata Plan 101839), "the area of the Property" as shown in the Draft Strata Plan is the 112 square metres relating to the whole lot and it is to be contrasted with the 109 square metres shown on the face of Lot 77 in Strata Plan 101839 or the 111.85 square metres found by Mr Mitchell in his survey report.

(c) Whether or not the basement area is to be included in the comparison and whether the shop has attributed to it a total area of 109 square metres or 111.85 square metres, upon the proper construction of Special Condition 36.3(a)(i) "the area of the Property shown on" Strata Plan 101839 cannot be said to have been "reduced by more than 5% of the area of the Property as shown in the Draft Strata Plan".

29 In substance, the main differences between the parties' competing contentions are twofold:

(a) the first defendant contends, and the plaintiff denies, that the 82 square metres of basement space allocated to Lot 77 in Strata Plan 101839 should be taken into account in the comparison which Special Condition 36.3(a)(i) requires; and

(b) the first defendant contends, and the plaintiff denies, that the "new storage space" (with an area of 6.35 square metres as found by Mr Mitchell) should be taken into account in the comparison because it was available for commercial use by the proprietor of Lot 77.

30 Although the plaintiff frames its case relating to the 5% limitation for which Special Condition 36.3(a)(i) provides upon a base of 110 square metres of "commercial space", adoption of a base of 112 square metres for measurement

of any reduction of “open” space in the shop by reason of inclusion of “the new storage space” makes no difference to the outcome of the proceedings. The arithmetic does not materially change. The critical question is whether the first defendant was entitled to require the plaintiff to accept Lot 77 in Strata Plan 101839 with “the new storage space”.

31 The evidence is not entirely clear as to whether the whole of the “new storage space” was in fact available for the proprietor’s commercial use, but I assume that it was. I also notice in passing, but pass over, the fact that within “the new storage space” there may be, in part of the space, a sloping roof.

32 Whether or not viewed through the lens of Special Condition 36.3(a)(i), the essence of the parties’ disputation is that Lot 77 in Strata Plan 101839 includes a fixed structure (“the new storage space”) located within the boundaries of the shop that was not shown in Lot 3 of the Draft Strata Plan.

33 In submissions the plaintiff drew attention to the fact, shown in Mr Mitchell’s report, that Lot 77 in Strata Plan 101839 includes not only “the new storage space”, but also an area of 5.8 square metres of common property, as a reduction of the open area of the shop. The plaintiff’s counsel explained that, for ease of presentation, the plaintiff’s submissions on Special Condition 36.3(a)(i) were confined to the effect of inclusion in the shop of “the new storage space” because that area alone was sufficient to satisfy the 5% limitation for which Special Condition 36.3(a)(i) provides.

PRINCIPLES TO BE APPLIED IN CONSTRUCTION OF THE CONTRACT

34 The construction of a contract is to be determined objectively: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46]-117 [52].

35 A convenient statement of the law is found in the judgment of the High Court of Australia in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179[40]:

> "This Court, in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct

> would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462[22]."

THE PROPERTY THE SUBJECT OF THE CONTRACT

36 Complexity attaches to identification of the "property" the subject of the contract and, particularly, the concept of "Property" referred to in Special Condition 36.3(a).

37 The plaintiff attributes to the word "Property" in Special Condition 36.3(a) the meaning set out in Special Condition 32.1 (essentially, "the lot" the subject of the sale) whereas the first defendant, in support at least of its argument that basement areas need to be taken into account upon an application of Special Condition 36.3(a)(i), attributes to it the meaning found in clause 1 of the printed form of the contract (relevantly, "the land" and "improvements"). By reference to the front page of the contract, "the land" is defined as the Lot the subject of the sale.

38 By virtue of Special Condition 32.4, the definition for which Special Condition 32.1 provides is *prima facie* applicable to Special Condition 36.3(a), but the opening words of Special Condition 32.1 provide that the definitions for which that Special Condition provides (including the definition of "Property") apply "unless the contrary intention appears". For that reason, the word "Property" in Special Condition 36.3(a) must be construed in the context of the contract as a whole.

The printed form of the contract

39 The words of "purchase and sale" which establish the fact of an agreement between the parties are found in the introductory words of the contract: "The vendor sells and the purchaser buys the property for the price under these provisions instead of Schedule 3 *Conveyancing Act 1919*, subject to any legislation that cannot be excluded."

40 The word “property” there is defined in clause 1, immediately following the introductory words, to mean “the land, the improvements, all fixtures and the inclusions, but not the exclusions.”

41 On the front page of the contract:

(a) “the land” is described as follows: “Retail 3, ‘Eastwood Central II’, --- Unregistered Plan: Lot 3 in a strata plan of subdivision of proposed Lot 2, which will be created upon registration of a proposed stratum plan of subdivision of [seven identified Lots in a particular Deposit Plan];

(b) “improvements” are identified as (i) “retail”; and (ii) “car space x [4]”. Each of those improvements is designated by a marked square. A third square against the reference to “improvements” relates to “storage space”, but it is blank, not marked up;

(c) against the word “inclusions” is a reference to a “Schedule of Finishes” which is not a present concern; and

(d) no “exclusions” are identified.

42 The unmarked reference to “storage space” can be taken as an indication that Lot 3 in the draft Strata Plan did not, as did some other Lots, carry with it a separate storage space external to the Lot.

43 In the Draft Strata Plan annexed to the contract, Lot 3 and an adjoining Lot 2 were the only Lots with no external storage space, but with a small “storage space” included within their boundaries. Those small spaces were at the rear of their respective Lots, accommodating an area of common property between the two Lots which provided for a lobby servicing the building generally.

44 The Ground Floor Plan in the Draft Strata Plan explained the unusual configuration of Lots 2 and 3 in a small table headed “split areas” delineating square metres. Lot 2 was shown as having 84 square metres of “CS” (agreed between the parties to be a reference to “commercial space”) and 4 square metres of “S” (agreed between the parties to be a reference to “storage space”), making a total area of 88 square metres. Lot 3 had 110 square metres of commercial space and two square metres of storage space, making a total area of 112 square metres.

45 The 110 square metres of commercial space in Lot 3 was depicted as an open area, a single, unobstructed space.

46 In the Draft Strata Plan were depicted over 80 unallocated spaces, on two basement levels, to be provided for car spaces or storage. Their dimensions varied. Most comprised 14 square metres or 15 square metres. There were a few that comprised 12, 13 or 17 square metres.

The special conditions of the contract

47 Special Condition 32.1 provides that "unless the contrary intention appears, the word "Property" means "the lot to be purchased by the purchaser being the subject of this contract".

48 The contract does not contain a separate, defined term "the lot". To identify "the lot to be purchased by the purchaser being the subject of the contract" one returns to the definition of "land" on the front page of the contract which, as earlier set out, identifies Lot 3 in the Draft Strata Plan. If anything turns upon use of an uppercase "P" for the word "Property" in Special Condition 36.3(a) it favours an application of the definition of the word in Special Condition 32.1 (which uses the capital letter) over clause 1 of the contract (which uses a lowercase "p" for the word "property").

The meaning of the word "Property" in Special Condition 36.3(a)

49 There is nothing in Special Condition 36.3(a), or the contract as a whole, that requires the word "Property" in Special Condition 36.3(a) to be construed otherwise than as required by Special Condition 32.1.

50 Accordingly, I proceed on the basis that where Special Condition 36.3(a) refers to the word "Property" it means "the lot to be purchased by the purchaser being the subject of this contract" and, more particularly, Lot 3 as depicted in the Draft Strata Plan.

51 On this basis the reference to "the Property" in Special Condition 36.3(a) does not include "the improvements" referred to in the definition of "property" in clause 1 of the contract. The significance of this is that, when contrasting what the first defendant promised in the contract with what it sought to deliver upon registration of the strata plan, one does not take into account the car spaces (or storage space) allocated to Lot 77 in Strata Plan 101839. They constitute "improvements", conceptually distinct from "the lot".

DID THE PLAINTIFF HAVE A RIGHT OF RESCISSION UNDER SPECIAL CONDITION 36.3?

The terms of Special Condition 36.3 and related provisions

52 Special Condition 36 of the Contract is in the following terms (with emphasis added):

> "**36. STRATA PLAN**
>
> **36.1. Strata Plan**
>
> Subject to Special Condition 36.2, the vendor undertakes to use all reasonable endeavours and do all such things and execute all such documents to obtain the registration of the Strata Plan as shown in the Draft Strata Plan by the Sunset Date.
>
> **36.2 Variation to the Strata Plan**
>
> (a) The vendor reserves the right to make any such alterations and amendments to the Draft Strata Plan which it deems necessary or desirable or as may be required by the Council or the LPI or other public authority to obtain the Strata Plan; and
>
> (b) The purchaser acknowledges and agrees that the vendor may amend the unit entitlements for the lots to reflect the respective values of the lots in the Strata Plan and may make further changes to those unit entitlements as a result of any changes to the Strata Plan.
>
> **36.3. Acceptance of Variations**
>
> (a) The purchaser agrees to accept the Property as altered or amended and shall not be entitled to make any objection, requisition, claim for compensation, rescind or terminate *unless such alterations, amendments, variations or discrepancies substantially, detrimentally and permanently affect the Property in a way which is other than* minor.
>
> For the purposes of this Special Condition 36.3, other than minor shall be limited to the following:
>
> (i) *the area of the Property shown on the Strata Plan is reduced by more than 5% of the area of the Property as shown in the Draft Strata Plan*;
>
> (ii) the location of the Property is not in substantially the same position as it appears on the Draft Strata Plan;
>
> any objection, requisition or rescission that the purchaser may raise or have a right to raise pursuant to Special Condition 36.4 shall be raised within seven (7) days of service of the Vendor's Notification in which respects time shall be of the essence, and thereafter the purchaser shall not be entitled to raise any objection, requisition or claim for compensation or right of rescission but shall be deemed to have accepted the Registration and the vendor shall be regarded as having complied with all its obligations in respect thereof. Should the purchase rescind this contract within the period aforesaid but not otherwise then the provisions of 19.2.1 hereof shall apply."

53 The expression “Vendor’s Notification” is defined by Special Condition 32.1 of the Contract to mean “the notice in writing provided to the Purchaser or the Purchaser’s Solicitors advising of Registration of Strata Plan”.

54 Strata Plan 101839 was registered on 10 August 2020. Notification of that fact was given by the first defendant to the plaintiff on 11 August 2020. The plaintiff served its Notice of Rescission on 12 August 2020. The plaintiff’s Notice of Rescission was served on the first defendant within the time limited by Special Condition 36.3.

55 Clause 19.2.1 of the contract provided that “… if a party exercises a right to rescind expressly given by this Contract or any legislation … the Deposit and any other money paid by the Purchaser under this Contract must be refunded”.

56 By reference to clause 2.9 and Special Condition 60 of the contract, the plaintiff claims interest on the deposit it seeks to recover.

Analysis

57 The parties are agreed that Special Condition 36.3(a)(i) involves two limbs, each of which the plaintiff must prove to establish that it was entitled to rescind the contract. The first is found in the opening paragraph of Special Condition 36.3(a). It requires proof of “alterations, amendments, variations or discrepancies *substantially, detrimentally and permanently affect the Property in a way which is other than minor*”. The second limb, found in sub-paragraph (i) of Special Condition 36.3(a), requires proof of reduction of area “by more than 5%”. The two limbs are interconnected by the first limb’s use of the expression “other than minor” and the second limb’s definition of that term.

58 In addressing the first limb, the plaintiff principally relies upon inclusion in Lot 77 of Strata Plan 101839 of “the new storage space” and the configuration of Lot 77 (diminishing available commercial space) consequent upon its inclusion. It also relies, as a secondary contention, upon a change in the nature of the Strata Plan upon its registration from a proposed development which would have kept commercial and residential Lots separate to a single, mixed Strata Plan.

59 The gravamen of the plaintiff's case on Special Condition 36.3(a) is directed to its principal contention that Lot 77's inclusion of "the new storage space" diminished the commercial space available to an occupier of the shop. The plaintiff's secondary contention (that the first defendant changed the nature of rights attaching to ownership of the shop by registration of a strata plan that mixed commercial and residential lots) may be relevant to its *Flight v Booth* Case or its claim for a return of deposit monies under section 55(2A) of the *Conveyancing Act* 1919; but it has no bearing on the operation of Special Condition 32.3(a). It does not speak to either of the topics (area and location of the shop) upon which the operation of Special Condition 32.3(a) turns.

60 Both sides of the debate about the meaning of Special Condition 36.3 invite the Court to construe the clause, in the context of the contract as a whole, objectively. Both appeal to text and context. The plaintiff emphasises that the purpose and object of the parties' transaction was a sale of "commercial space" to it. The first defendant contends that the operation of Special Condition 36.3(a) turns on changes to the area and location of "the Property", not the concept of "commercial space". It also emphasises that the purpose and object of the contract was sale of a strata unit yet to be constructed in circumstances in which its obligation to convey land was qualified by "reasonable endeavour" provisions (Special Conditions 36.1 and 36.2) inconsistent with an absolute obligation to deliver precisely what was depicted in the Draft Strata Plan annexed to the contract. The plaintiff contends that the first defendant cannot rely upon those provisions to render illusory its obligation to deliver a Lot with the requisite commercial space in an open plan setting.

61 Thus it is that implicit in the parties' competing contentions is a dispute about identification of the subject matter of the contract, the essence of their bargain. The plaintiff contends, more particularly, that the subject matter of the contract was an agreement for the sale and purchase of a strata unit with an open plan commercial space of 110 square metres or thereabouts, accepting the possibility of a minor reduction of that area consequent upon construction of the strata development. The first defendant contends, particularly, that the subject matter of the contract was an agreement for the sale and purchase of a strata unit, yet to be constructed, approximating that depicted in the Draft

Strata Plan without any greater obligation on it to deliver the depicted unit and to use "all reasonable endeavours" and to "do all such things and execute all such documents to obtain the registration of the Strata Plan as shown on the Draft Strata Plan" annexed to the contract, reserving a "right to make any such alterations and amendments to the Draft Strata Plan which it deems necessary or desirable" or as may be required by a public authority.

62 The plaintiff makes no allegation that the first defendant breached its contractual obligations in securing registration of Strata Plan 101839 rather than a strata plan identical with the Draft Strata Plan attached to the contract. The parties have not canvassed, in their evidence or submissions, the reasons why the configuration of Lot 77 in Strata Plan 101839 differs from that of Lot 3 in the Draft Strata Plan.

63 Identification of "the subject matter" of the contract might be relevant to the concept of a "substantial" and "detrimental" change to the shop (upon a consideration of the terms of Special Condition 36.3(a)) or to the claims made by the plaintiff by reference to *Flight v Booth* or section 55(2A) of the *Conveyancing Act*; but "the subject matter" of the contract cannot be used as a substitute for the wording of Special Condition 36.3(a)(i), which refers to changes in "the area" of "the Property", possibly a broader concept than "commercial space".

64 To the extent that it may be necessary to express a view about identification of "the subject matter" of the contract, for the purpose of making a decision about the proper construction, and operation, of Special Condition 36.3(a) of the contract, in my opinion the plaintiff's contention should be accepted. An objective reader of the contract as a whole, paying particular attention to description of the land the subject of the sale (Lot 3 in the Draft Strata Plan) and the form of the Ground Floor Plan comprising part of the Draft Strata Plan, bearing in mind the contract's description of "improvements" to the land as "retail", would identify the subject matter of the contract as an open plan commercial space of 110 square metres (with incidental storage space), subject to the acceptability or otherwise of variations contemplated by Special Condition 36.3(a). The storage area of 2 square metres shown on the Ground

Floor Plan is represented as a minor feature of Lot 3. The inclusion in the plan of the "split areas table", with its express characterisation of an area of 110 square metres as "Commercial Space", confirms the primacy of that space.

65 The rights and obligations of the first defendant under Special Condition 36 in relation to variations to the (draft) Strata Plan do not displace, but rather qualify, the plaintiff's entitlement to be conveyed the strata title unit described as Lot 3 in the Draft Strata Plan.

66 The plaintiff's complaint, which must be made out by reference to the terms of Special Condition 36.3(a), is that Lot 77 in Strata Plan 101839 does not answer the description of "the Property" that the parties respectively agreed to buy and sell.

67 Upon a review of Special Condition 36.3(a), and leaving aside the plaintiff's contention that registration of Strata Plan 101839 as a single, mixed strata plan needs to be taken into account upon a consideration of Special Condition 36.3(a), attention is turned, first, to the "first limb" of Special Condition 36.3(a).

68 It is not disputed that Strata Plan 101839 effected, in Lot 77, "alterations, amendments, variations or discrepancies" that "permanently" affected "the Property" within the meaning of Special Condition 36.3(a). The "changes" effected by the Strata Plan (to use a generic expression) included:

(a) a new storage space (encased in a fixed structure) not shown as a feature of Lot 3 in the Draft Strata Plan, which were included within the outer boundaries of Lot 77 in the registered Strata Plan; and

(b) a reconfiguration of the Lot the subject of the contract (as Lot 77 in the registered Strata Plan) in a manner that created "dead spaces" (as the plaintiff characterised them) and deprived the Lot of its full, open area of commercial space.

69 These features of Lot 77 could not be removed without amendment of the Strata Plan and reconstruction work.

70 The expression in Special Condition 36.3(a) "substantially, detrimentally and permanently affect the Property in a way which is other than minor" has to be read as a whole and in conjunction with the quantitative definition of the particular expression, "other than minor".

71 The first defendant accepts that Lot 77 effected a "substantial" change (as well as a "permanent" change) to the Property. I take the word "substantially" to require a change that is of substance rather than merely nominal: *Vella v Ayshan* [2008] NSWSC 84 at [81].

72 The contest between the parties focuses attention particularly on the word "detrimentally" and the definition of the words "other than minor".

73 I take the word "detrimentally" to require a change that is objectively undesirable or harmful to enjoyment of the Property. This implicitly requires an assessment of the subject matter of the contract as the measure against which an assessment of "the detrimental" is to be made.

74 The changes affected by registration of the strata plan were of substance, not nominal and, so, were "substantial" because they placed within the boundaries of the Property an enclosed storage space which affected the configuration of the open commercial space foreshadowed in the Draft Strata Plan in a manner that bore upon the visual appearance of the Property, and its functionality, in a significant way.

75 The changes effected by the Strata Plan also "detrimentally" affected the Property in that they placed an enclosed storage area within the boundaries of the Property in a manner that detracted from the area available for enjoyment as an unobstructed, open area of commercial space.

76 In summary, in my opinion, the changes effected by the registered Strata Plan "substantially, detrimentally and permanently affected the Property".

77 To determine whether they did so in a way that was "other than minor" (the second limb of Special Condition 36.3(a)) consideration needs to be given to the parties' competing contentions about the proper construction of the contrasting expressions:

(a) "the area of the Property shown on the Strata Plan"; and

(b) "the area of the Property as shown in the Draft Strata Plan".

78 The Ground Floor Plan forming part of the Draft Strata Plan is the critical part of the Draft Strata Plan. It alone depicts Lot 3 and expressly attributes a quantified size to it. It, in terms, describes Lot 3 as comprising, in total, an area

of 112 square metres, consisting of 110 square metres of commercial space and 2 square metres of storage space. Both the area of 110 square metres and the area of 2 square metres are “shown” in the Draft Strata Plan within the meaning of Special Condition 36.3(a)(i). Although both are shown, the area of critical importance to a purchaser would have been the area of commercial space, the storage space being depicted as small, incidental and, ostensibly, a product of a need to accommodate the site of a feature of the building external to the Lot: a “lift” servicing a “lobby” dividing Lots 2 and 3.

79 The fact that the contract provided for the allocation of four unspecified car spaces to the Lot the subject of the sale does not, in my opinion, mean that the area of any or all of those car spaces (or the nearby, unforeshadowed storage space) is to be taken into account in the context of Special Condition 36.3(a)(i). The “area” of “the Property” (Lot 3) “shown” on the Draft Strata Plan was the area specifically depicted as a “Lot” and quantified on the Ground Floor Plan. Spaces in the basement area to be allocated to the shop fell within the description of “improvements” and, accordingly, within the definition of “property” in clause 1 of the contract. They did not fall within the definition of “Property” in Special Condition 32.1, which governed Special Condition 36.3(a)(i).

80 The area of Lot 3 shown on the Draft Strata Plan is to be contrasted with the area of “the Property” (Lot 77) “shown” on the strata plan as registered.

81 The Ground Floor Plan of Strata Plan 101839 differs from the Ground Floor Plan of the Draft Strata Plan in that it does not attribute the description “commercial space” to any area in the subject Lot (expressly identifying only “common property” and “storage space”) and it makes no attribution of dimensions or size to any particular part of the Lot.

82 The fact that Lot 77 in Strata Plan 101839 does not, on its face, depict measurements of particular areas is of no moment because “the area of the Property” is “shown” on the Strata Plan and it, and its constituent parts, have been more particularly described by survey. The area as surveyed is the area proffered by the first defendant as entering the description of the equivalent of Lot 3 in the draft Strata Plan. It is the comparator for Lot 3.

Conclusion as to the operation of Special Condition 36.3(a)(i)

83 In my opinion, a right of rescission under Special Condition 36.3(a)(i) accrued to the plaintiff following registration of Strata Plan 101839 depicting Lot 77 with "the new storage space" (a substantial, detrimental and permanent change to the shop) located within the external boundaries of the Lot, thereby depriving the purchaser of an unobstructed, open area of commercial space and reducing the amount of commercial space from the promised 110 square metres to the available 102.8 square metres. The reduction of the commercial space of 110 square metres shown in Lot 3 of the Draft Strata Plan by 7.2 square metres was, on a base of 110 square metres, a reduction of about 6.5%, sufficient to satisfy the 5% limitation for which Special Condition 36.3(a)(i) provides. The arithmetic is not materially different if a base of 112 square metres is adopted instead of 110 square metres.

84 Although "the Property" to which Special Condition 36.3(a)(i) refers is the whole of the lot the subject of the sale of the shop, the critical focus of Special Condition 36.3(a)(i) is on "the area … as shown in the Draft Strata Plan" and the comparable "area … shown on the Strata Plan".

85 The "area … shown in the Draft Strata Plan" is the commercial space of 110 square metres, identification of which was the purpose and effect of the "split areas" table associated with depiction of Lot 3 in the Draft Strata Plan.

86 In my opinion, the plaintiff's submissions on the proper construction and operation of Special Condition 36.3(a)(i) are correct. Implicit in the first defendant's submissions is the fallacy that it was open to the first defendant to reduce "the area of the Property as shown in the Draft Strata Plan" by inclusion in the Lot, at its discretion, of one or more spaces designated by it as "storage space" despite the fact that the contract made no provision for inclusion within the shop of any storage space other than the 2 square metres shown by reference to the "split areas" table.

87 The plaintiff's entitlement to rescind the contract by reference to Special Condition 36.3(a) carried with it an entitlement to recover the deposit paid by it under the contract. A consequential entitlement is a right to have the first defendant's cross-claim dismissed.

88 I proceed nevertheless to consider alternative basis upon which the plaintiff contends it has that entitlement.

DID THE PLAINTIFF HAVE A RIGHT OF RESCISSION UNDER "THE RULE IN FLIGHT v BOOTH"

89 The plaintiff's reliance upon "the rule in *Flight v Booth*" as justification for its purported rescission of the contract is said by the first defendant to be misplaced because the intention of the parties (manifested in Special Condition 36.3 of the contract) was to exclude rights of rescission on the grounds that the lot the subject of the contract had been "altered or amended" except in the circumstances stated in the Special Condition.

90 A convenient exposition of "the rule in *Flight v Booth"*, and its rationale, can be found in the judgment of Barrett J in *Higgins v Statewide Developments Pty Ltd* [2010] NSWSC 183; 14 BPR [98398] at [45]-[52]:

> "[45] Because the plaintiff has failed to show that his purported termination of 27 February 2007 was authorised by special condition 26.2, it is necessary to address an alternative submission advanced by him and based on the rule in *Flight v Booth* (1834) 1 Bing NC 370; 131 ER 1160. That principle is one about discrepancy between the subject matter of a contract for sale and what is available to be conveyed in satisfaction of the vendor's obligation. A threshold question, however, is whether there is any scope for the operation of the rule where, as here, the parties have addressed in their contract the possibility of such discrepancy.
>
> [46] That question was noted by Brereton J in *Kannane v Demian Developments Pty Ltd* (above). But since the rule in *Flight v Booth* is frequently applied in the face of a provision to the effect that no error or misdescription shall annul the sale, it is preferable to proceed on the basis that it will not be ousted by the contract except by very clear words or very clear implication. I therefore proceed to consider the *Flight v Booth* claim made by the plaintiff.
>
> [47] *Flight v Booth* was a case about the capacity of a misdescription to annul the sale. Tindal CJ, having referred to a number of decided cases on the subject, said (at ER 1162-3):
>
> > "In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may be reasonably supposed that, but for such misdescription, the purchaser might never enter into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."
>
> [48] Central to the operation of this principle is a concept of misdescription, in the sense that the contract itself promises something other than that which the

vendor can in fact give. The principle and the concept on which it is based may be gathered from the observations of Tindal CJ in the later case of *Dykes v Blake* (1836) 7 LJCP 282 at 286:

> "The question is, whether the plaintiff is at liberty, under the circumstances stated in the special case, to hold the contract of purchase, into which he entered, to be altogether void, and to recover back the money paid to the auctioneer as money had and received to his use; and this will depend on the determination of two questions; first, whether the description of the premises in the printed particulars, and plans exhibited at the time of the sale, upon the faith of which the plaintiff made his purchase, was such that a prudent and vigilant man would enter into the contract, without discovering the right of way over the land comprised in Lot 13; and, secondly, whether such right of way being found to exist, renders the purchase altogether useless for the purposes for which it was made . . ."

[49] The sale in that case was a sale by auction in which the contract signed by the purchaser contained printed particulars of sale and of the land (describing Lot 13 as "a first rate building plot of ground") which in turn incorporated by reference plans exhibited at the auction. The right of way over Lot 13 was not disclosed in the particulars or the exhibited plans – hence the first question posed, that is, whether "a prudent and vigilant man" would enter into the contract without discovering the undisclosed right of way, which question was answered as follows (also at 286):

> "[W]e are of the opinion that, looking at the printed particulars of sale, and the plans which accompany them, and which are referred to in the particulars, there is no sufficient disclosure of the existence of the right of way to enable a bidder at the sale, by exercise of ordinary vigilance and sagacity, to discover that such a way exists."

[50] The second question was then addressed and it was held (at 287) that the impact of the undisclosed right of way was such that the land was "altogether useless for the purpose for which it was known to be purchased", that is, the purpose of building which the purchaser might fairly have inferred, as the vendor intended that he should.

[51] As Professor Butt pointed out in "*The Standard Contract for the Sale of Land in New South Wales*", 2nd edition (1998) at [6.51], *Flight v Booth* came, over time, to reflect a more general principle, namely, that purchasers cannot be forced to accept (even with compensation) a property that is substantially or materially different from that which they contracted to buy. In *Fletcher v Manton* [1940] HCA 32: (1940) 64 CLR 37, Rich ACJ, after mentioning *Flight v Booth*, referred to the "wholesome doctrine 'that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have'".

[52] The focus is upon what the purchaser contracted for, that is, the subject matter of the sale as described in the contract. Determination of what the purchaser did or did not "mean to have" (*Fletcher v Manton*) or whether the subject matter available to be conveyed makes the purchase "altogether useless for the purposes for which it was made" (*Dykes v Blake*) directs an inquiry into what is involved in due performance of the contract. It is a matter not of what the purchaser thinks in his own mind he is buying or what he would like to be buying but of what the contract requires him to take. It is that that

> must be compared with what the vendor proposes to convey by way of completion of the contract."

91 This extract refers to a number of the cases independently cited by the parties in their submissions. They also referred to *Batey v Gifford* (1997) 42 NSWLR 710 at 715G-717F; *Vella v Ayshan* [2008] NSWSC 84 at [73]-[75], citing *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 27-28; *Victorsen v Easy Living Holdings Pty Ltd* [2019] NSWSC 1721; 19 BPR 39,893 at [61]-[64]; *Smogurzewski v AIT Investment Group Pty Ltd* [2020] NSWSC 490; 19 BPR 40,341 at [41] and [49]; and *Kalathas v 89 Ebley Street Pty Ltd* [2021] NSWSC 490 at [8]-[10]. Reference was made to *Torr v Harpur* (1940) 40 SR (NSW) 585 at 593-594 as an example of a rescission justified by reference to *Flight v Booth*.

92 Although it is convenient to frame discussion of *Flight v Booth* in terms of whether a contract manifests an intention to exclude the operation of "the rule in *Flight v Booth*", the Court's task is not to ask whether the rule has been excluded as such but to construe the contract as a whole to measure a vendor's performance with what was promised in the contract, viewed objectively.

93 I do not construe Special Condition 36.3(a) as manifesting an intention to "exclude" the operation of *Flight v Booth*. It has to be read in the context of the contract as a whole, including the undertaking of the first defendant in Special Condition 36.1 of the contract "to use all reasonable endeavours and do all such things and execute all such documents to obtain the registration of the Strata Plan *as shown in the Draft Strata Plan*". It also has to be read, more particularly, in the context of depiction of Lot 3 in the Draft Strata Plan as a lot comprising open space without intrusions (such as a fixed storage space and common property in the middle of the Lot) impeding enjoyment of the open area expressly characterised as "commercial space".

94 The right "reserved" by the first defendant (in Special Condition 36.2(a)) to make "alterations and amendments to the Draft Strata Plan" is limited to what may be necessary or desirable "to obtain the Strata Plan"; it is not a right at large to depart from the undertaking given in Special Condition 36.1. A primary concern, manifested in Special Condition 36.2(b), appears to have been to

avoid disputation about the allocation of unit entitlements within the strata scheme.

95 Special Condition 36.3(a) provides an agreed regulatory regime directed to changes in the area or location of “the Property”. It is not directed to the internal configuration of “the Property”. It provides no justification for the first defendant to be relieved of its Special Condition 36.1 undertaking, expressed in terms referable to what is “shown in the Draft Strata Plan”.

96 The subject of the contract was an agreement for the sale and purchase of a strata unit substantially in the form of Lot 3 of the Draft Strata Plan annexed to the contract, with an open plan commercial space of 110 square metres or thereabouts, with an incidental storage space.

97 Having registered a strata plan in the form of Strata Plan 101839, the first defendant was not able to convey to the plaintiff a Lot substantially in the form of Lot 3 of the Draft Strata Plan. Lot 77 in the Strata Plan as registered has impediments to open space in the form of the “new storage space”, an area of common property and “dead spaces” defined by their intrusion within the external boundaries of the Lot.

98 The plaintiff purchased “the Property” on the faith of its description in the contract as an open area of commercial space as depicted in Lot 3 of the Draft Strata Plan. In a material and substantial way Lot 77 differs from what was promised by the first defendant by reference to Lot 3 on the Draft Strata Plan. It is reasonably to be supposed that, had the plaintiff been forewarned that the shop would take the form depicted in Lot 77, it might never have entered into the contract at all. Its prompt rejection of Lot 77 as registered is consistent with this, as were pre-contractual discussions about its prospective use of the shop as a restaurant. The intrusions in the shop’s internal area consequent upon registration of Strata Plan 101839 were an anathema to the plaintiff. The configuration of the shop as constructed limited the ability of any occupier to choose how the shop might be fitted out.

99 In my opinion, the plaintiff was not bound to accept Lot 77, a property substantially and materially different from Lot 3 in the Draft Strata Plan, which it

contracted to buy. It was not bound to accept the shop encumbered by "the new storage space".

100 Accordingly, in my opinion, the plaintiff was entitled to rescind the contract, pursuant to the rule in *Flight v Booth* with the consequence that it is entitled to recover the deposit monies paid by it under the contract and to be relieved of any obligation to pay the second deposit instalment.

101 In reaching this conclusion, I disregard alteration of the strata scheme from a separate administration of commercial and residential lots (as contemplated at the time of contract) to joint administration of the two types of lot in the strata scheme as registered. I accept the first defendant's submissions that the contract authorised this alteration. I infer from the plaintiff's failure to object to the alteration, until after receipt of its surveyor's report, that the subject matter of the alteration was never a matter of significance for it, and the possibility of such alteration being made would not have induced it to decline entry into the contract. The key feature of Lot 3 in the Draft Strata Plan was the availability of 110 square metres, or thereabouts, of an open commercial space.

SHOULD THE COURT EXERCISE ITS DISCRETION UNDER THE CONVEYANCING ACT 1919 NSW, SECTION 55(2A) TO MAKE AN ORDER FOR THE PLAINTIFF TO RECOVER ITS DEPOSIT?

102 The Court's determination that the plaintiff was entitled to rescind the contract pursuant to the rule in *Flight v Booth* carries with it a restitutionary entitlement to recover (as monies had and received to its use), with interest, the sum of $154,000 paid as an instalment of the deposit payable under the contract.

103 Section 55(2A) of the *Conveyancing Act* 1919 empowers the Court, as an independent source of jurisdiction, to make an order for the return of a deposit. So far as is material it provides that "in any proceeding for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit with or without interest thereon".

104 In dealing with the plaintiff's application under this statutory provision, I proceed on the basis of an assumption that it was not entitled to rescind the contract and it has no other entitlement to recover its deposit.

105 The section has recently been considered by the Court of Appeal in *Havyn Pty Limited v Webster* [2005] NSWCA 182; (2005) 12 BPR 22,873 and *Nassif v Caminer* (2009) NSWLR 276, the latter of which cases refers to observations of the High Court of Australia in *Romanos v Pentagold Investments Pty Ltd* (2003) 217 CLR 367 at [27]. The Court of Appeal accepted that a purchaser must show that it is unjust or inequitable to allow the vendor to retain the deposit before the purchaser can succeed in obtaining an order under section 55(2A) for return of the deposit.

106 A seminal case, which retains authoritative force, is that of Street CJ in Eq in *Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 NSWLR 268 at 272-273.

107 Street CJ in Eq's observations included the following:

> "It is one thing to recognise that there is a wide discretion conferred upon the Court under this section; it is another thing to determine the guidelines for the exercise of that discretion. The section was designed to provide relief to a purchaser against an unjust and inequitable consequence of forfeiture of a deposit. It is clear enough that at law a vendor's right to forfeit a deposit to himself in the event of a purchaser's default bears no necessary relation to the damages actually suffered by a vendor. At law a forfeited deposit could result in a vendor making a profit which in justice and equity he ought not to be permitted to enjoy at the purchaser's expense. In a complimentary sense, an order for the return of the deposit does not necessarily affect the vendor's right to sue a defaulting purchaser at law and recover against him such damages as the vendor can prove. The jurisdiction under section 55(2A) does not give to a court an overall discretionary supervision of monetary adjustments between the parties to a contract under which a deposit was paid but which has been terminated. A vendor who forfeits a deposit in strict enforcement of his legal rights is not to be deprived of it under section 55(2A) unless it is unjust and inequitable to permit him to retain it. If the Court would not, in its discretion, specifically enforce the contract against the purchaser, then it may follow that it would be unjust and inequitable to allow the vendor to retain the deposit. In appropriate cases he should be left to prove the damages payable to him by the defaulting purchaser in accordance with the established rules governing the measure of damages, rather than simply pocketing the deposit, which might in some cases exceed the damages which would properly be recoverable by him at law. Equity has always looked with disfavour upon penalties or stipulations which result in a party to a contract making a profit at the expense of a defaulting party. It is clear that where the Court in its discretion refuses specific performance, whether or not it also orders repayment of the deposit under section 55(2A), it will still remain open to the vendor to sue the defaulting purchaser and recover against him whatever damages may be due to the vendor at law in the event of the contract having gone off through the purchaser's breach. The ordinary principles of contract law and of damages stand untouched by this section except in so far as it operates to qualify the ordinary right of a vendor to forfeit and retain a deposit.

> Just as the judge's whose words I have quoted [in *Maralinga Pty Ltd v Major Enterprises Pty Ltd* [1972] 2 NSWLR 101 at 106 and 107; *Zsadony v Pizer* [1955] VLR 496; *Horne v Zebra Motor Inn Pty Ltd* (1963), unreported; *Nelson v McDonald* (1972), unreported; *Mallett v Jones* [1959] VR 122 at 124 and 133; and *Yammouni v Condidorio* [1959] VR 479 at 490-492] declined to put a limiting loss on the scope of the section, I declined to state my view upon where the boundaries of the discretion are to be drawn. Specific instances of its application are to be found in the cases. They all, however, come under the general category of circumstances in which the Court held it to be just and equitable to deny to the vendor the enjoyment of a forfeited deposit. Attempted classifications within this general category will tend only to obscure rather than to elucidate the approach to the exercise of this statutory discretion."

108 In the current proceedings, one must be conscious of the nature of the contract as an agreement for the sale and purchase of a strata unit "off the plan" and yet to be constructed. As illustrated by Special Condition 36.3 of the contract, both parties must have had in contemplation the possibility that "the land" depicted as Lot 3 in the Draft Strata Plan attached to the contract might be the subject to variation as to "area" or "location".

109 The plaintiff alleges that, prior to the parties' entry into the contract, the first defendant's agent represented to the plaintiff's representative, at the site of the property, that Lot 3 was suitable for a restaurant because it had a high ceiling and clean open space. I accept that evidence as consistent with the depiction of Lot 3. Although the first defendant's agent denies referring to a "clean open space", I regard it as plausible, and unexceptional, that she would have done so. The plaintiff relied upon the agent's representation, and depiction of Lot 3 in the Draft Strata Plan as including 110 square metres of commercial space, in deciding to enter the contract.

110 There is no evidence to suggest that the first defendant brought to the attention of the plaintiff a possibility that the open space depicted in Lot 3 of the Draft Strata Plan might be diminished by construction of an internal room ("the new storage space" depicted in Lot 77 of Strata Plan 101839) obstructing free movement within the shop.

111 In its presentation of the shop for sale the first defendant itself attributed significance to an expectation that the shop would comprise 110 square metres or thereabouts of open, "commercial space". That is the image of the shop shown in Lot 3 of the Draft Strata Plan.

112 It was not unreasonable for the plaintiff to assume that the shop, as constructed, would comprise an open commercial space unencumbered by a fixed structure in the centre of the shop or areas of common property. It was not unreasonable for the purchaser to object to the internal configuration of Lot 77 when confronted with it upon the registration of Strata Plan 101839.

113 Contrary to a submission on behalf of the first defendant, I do not accept that the plaintiff is disentitled from obtaining an order for return of its deposit under section 55(2A) because its refusal to complete the contract was made, in a calculated manner, with the benefit of legal advice. The section's operation is not confined to claims by parties uninformed by legal advice or those who do not consult their own interests.

114 The first defendant makes no claim against the plaintiff for damages for breach of contract. By the time of the final hearing of these proceedings, it had resold the shop without any apparent loss arising from discharge of its contract with the plaintiff.

115 In my opinion, it would be unjust and inequitable for the first defendant, upon forfeiture of the deposit, to retain it in circumstances in which: (a) the plaintiff entered the contract on the faith of a representation that the shop would comprise approximately 110 square metres of "commercial space"; (b) the first defendant did not, before entering into the contract, represent, or bring home, to the plaintiff that the internal configuration of the shop might be encumbered by a fixed structure of substantial size; (c) the first defendant has not claimed, or demonstrated, a loss on resale of the shop; and (d) forfeiture of the plaintiff's deposit would operate as an unfair burden on a purchaser who, not unreasonably, objected to being forced to accept a shop with an internal configuration substantially different from that which was represented to it as the subject of the sale.

116 Accordingly, had I not determined that it was open to the plaintiff to rescind the contract in reliance on *Flight v Booth*, I would have made an order for return of the deposit paid by the plaintiff under the contract.

MISLEADING AND DECEPTIVE CONDUCT

117 In light of the findings made about the operation of *Flight v Booth* and section 55(2A) of the *Conveyancing Act*, there is no necessity to address the plaintiff's claim for a statutory remedy arising from allegations of misleading or deceptive conduct. That said, I am not satisfied that a claim of this nature could be made out on the evidence save, possibly, in respect of the plaintiff's allegation "that [the shop] would have a 'clean open space' suitable for a restaurant". If the plaintiff is not entitled (as I have found) to relief referable to *Flight v Booth* and section 55(2A) it is unlikely to be able to make out any other case by reference to the *Australian Consumer Law*.

CROSS CLAIM

118 It follows from my determination that the plaintiff was entitled to rescind the contract by reliance on *Flight v Booth* that the first defendant's cross claim must be dismissed.

119 Had I been required to determine whether the second instalment of deposit payable under the contract constituted a penalty I would have found that it was not a penalty because, on the proper construction of the contract, it was payable on a pre-determined date rather than upon a failure of the purchaser to complete the contract.

120 In saying this, I note that the parties accepted that the question was to be determined by reference to the analysis of the law by Einstein J in *Cloud Top Pty Limited v Toma Services Pty Ltd* [2008] NSWSC 568 at [65], especially [65][v]; the judgment of White J in *Kazacos v Shuangling International Development Pty Lt*d [2016] NSWSC 1504; 18 BPR 36,353; and the judgment of Darke J in *Blanco v Wan* [2021] NSWSC 273.

ORDERS

121 Subject to allowing the parties an opportunity to be heard as to the form of orders to be made, and costs, I propose to make orders to the following effect:

(1) DECLARE that the plaintiff validly rescinded the contract for sale of land between the plaintiff and the first defendant dated 26 September 2017.

(2) ORDER that the second defendant repay to the plaintiff the amount of the deposit paid by the plaintiff under the contract ($154,000) and

interest earned on that amount during the period it was held by the second defendant as stakeholder under the contract.

(3) RESERVE liberty to the plaintiff to apply for an order for the payment of interest by the first defendant under the *Civil Procedure Act* 2005 NSW, section 100.

(4) ORDER that the amended statement of claim and the statement of cross-claim otherwise be dismissed.

(5) ORDER that the first defendant pay the plaintiff's costs of the proceedings.

122 The proceedings will be listed, by arrangement with my staff, for final orders to be settled in the event that there is not, in the meantime, agreement between the parties, who are at liberty to submit orders for my consideration in chambers.

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