



Supreme Court  
New South Wales

---

Case Name: Hong v Gui

Medium Neutral Citation: [2022] NSWSC 431

Hearing Date(s): 6 April 2022

Date of Orders: 12 April 2022

Decision Date: 12 April 2022

Jurisdiction: Equity - Real Property List

Before: Black J

Decision: Plaintiff's claim dismissed. Defendant and cross-claimant succeeds on cross-claim for balance of deposit and interest. Plaintiff to pay costs as agreed or as assessed. Parties to bring in short minutes of order within 7 days to give effect to this judgment.

Catchwords: TAXES AND DUTIES — Land tax — Conveyancing — Clearance certificate.

LAND LAW — Conveyancing — Contract for sale — Settlement requirements.

CONTRACTS — Termination — Repudiation of contract — where the vendor failed to provide a land tax certificate but sought completion — where the purchaser failed to respond to communications by the vendor to advance completion — where the vendor terminated the contract on the basis of the purchaser's repudiation — where the purchaser denies the vendor's right of termination and subsequently terminates the contract on the basis of the vendor's repudiation — whether purchaser or vendor repudiated the contract

Legislation Cited: - Conveyancing Act 1919 (NSW)

Cases Cited:

- Amaya v Estate Property Holdings Pty Ltd (2010) 14 BPR 27,243; [2010] NSWSC 32
- Amaya v Everest Property Holdings Pty Ltd [2010] NSWCA 315.
- Barrak Corporation Pty Ltd v Jaswil Properties Pty Ltd [2016] NSWCA 32
- Blacktown City Council v Fitzgerald (1990) 6 BPR 13,409
- Bradcorp Wilton Park Pty Ltd v Country Garden Wilton West Pty Ltd [2019] NSWSC 1407
- Deigan v Fussell [2019] NSWCA 299
- DTR Nominees Pte Ltd v Mona Homes Pty Ltd (1997) 138 CLR 423
- Foran v Wight (1989) 168 CLR 385
- Forslind v Bechely-Crundall 1922 SC (HL) 173
- Galafassi v Kelly (2014) 87 NSWLR 119; [2014] NSWCA 190
- Gold Coast Oil Pty Ltd v Lee Properties Pty Ltd [1985] 1 Qd R 416
- Holland v Wiltshire (1954) 90 CLR 409
- Koombahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115
- Laurinda Pty Ltd v Capalba Park Shopping Centre Pty Ltd (1989) 166 CLR 623
- Lavigne v Kumar [2020] NSWSC 1120
- Mackay v Dick (1881) 6 App Cas 251
- Macquarie International Health Clinic Pty Ltd v Sydney Local Health District [2019] NSWSC 1199
- Nina's Bar Bistro Pty Ltd v MBE Corp (Sydney) Ltd [1984] 3 NSWLR 613
- Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444
- Samuel v Daher [2022] NSWSC 421
- Sattel v The Proprietors Be Bees Tropical Apartments Building Units Plan No 71593 (No 2) (2002) 2 Qd R 427; [2001] QCA 560
- Secured Income Real Estate (Australasia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
- Sharjade Pty Ltd v Commonwealth [2009] NSWCA 373
- Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359
- White & Carter (Councils) Ltd v McGregor [1962] AC

- Woodar Investment Development Ltd v Wimpey  
Construction UK Ltd [1980] 1 WLR 277

Texts Cited: - P Butt, The Standard Contract for Sale of Land in New  
South Wales, 2nd ed LBC Information Services (1998)  
- J W Carter, Carter's Breach of Contract  
- JD Heydon, Heydon on Contract: The General Part

Category: Principal judgment

Parties: Lihong Hong (Plaintiff/Cross-Defendant)  
Ke Gui (First Defendant/Cross-Claimant)  
Khattar Group International Pty Ltd (Second Defendant)

Representation: Counsel:  
C Harris SC (Plaintiff/Cross-Defendant)  
A Harding SC/H Fielder (First Defendant/Cross-  
Claimant)

Solicitors:  
CKSD Lawyers (Plaintiff/Cross-Defendant)  
Lawside Lawyers (First Defendant/Cross-Claimant)

File Number(s): 2020/310749

## JUDGMENT

### Nature of the proceedings and affidavit evidence

- 1 By Amended Statement of Claim filed on 5 February 2022, the Plaintiff, Ms Lihong Hong seeks a declaration that the First Defendant, Mr Ke Gui, was not entitled to terminate, on 24 August 2020, a Contract dated 26 September 2019 ("Contract") for the sale of a property situated at Point Piper. Ms Hong also seeks a declaration that Mr Gui's termination of that Contract repudiated that Contract, and that Ms Hong validly terminated the contract on 26 August 2020 and is entitled to the return of the deposit of \$637,500 paid under the Contract to the Second Defendant, Khattar Group International Pty Ltd ("KGI"). She also seeks an order that Mr Gui or KGI pay her the amount of that deposit and interest since 26 August 2020. She initially sought, but now does not pursue, an order that Mr Gui pay damages in respect of the alleged repudiation of the Contract. By a First Cross-Claim Statement of Cross-Claim filed on 9 December 2020, Mr Gui in turn seeks a declaration that he validly terminated

the Contract and that he is entitled to retain the part of the deposit that was paid by Ms Hong, and seeks an order for payment of the balance of the deposit and interest on that sum. He also initially sought, but now does not pursue, a claim for damages beyond that amount.

- 2 The parties each read relatively confined affidavits, and none of the witnesses were cross-examined and no issue of credit arise. Ms Hong relies on her affidavit dated 19 April 2020, which refers to the entry into the Contract. Her evidence is that her husband, Mr Sze, carried out the day-to-day communications in respect of the Contract and related matters, including finance, to complete the purchase. Ms Hong claims she was not able to obtain the approval of the Foreign Investment Review Board ("FIRB") to her purchase within the time in which the Contract required such approval to be obtained, and she refers to a Deed of Variation of Contract dated 2 December 2019 extending the date for that to occur. Her evidence is that she was unable to complete the purchase on 27 July 2020, by reason of a lack of funding (Hong 19.4.21 [12]) and she gives no evidence that the position subsequently changed. She says, without further elaboration, that she did not complete the contract as required by Mr Gui's notice to complete issued on 3 August 2020 (Hong 19.2.21 [14]), although I find that occurred because of her lack of funds to do so. She also refers to the fact that a current land tax certificate(s) were not served on her solicitors or on her before that occurred. Ms Hong also relies on an affidavit dated 30 July 2020 of Mr Carl Ku, a solicitor, which annexes a search in respect of the property.
- 3 Mr Gui relies on his affidavit dated 8 July 2021, which also refers to the history of events in respect of the Contract, largely by annexing copies of correspondence, and refers to the 5% deposit paid by Ms Hong on entry into the Contract and the additional 5% deposit remaining to be paid. He also indicates that he claims interest and damages, although the latter claim as to damages is not now pursued, as I noted above. Mr Gui also relies on the affidavit dated 20 August 2021 of Mr Wan, a solicitor, who refers to the process by which a land tax certificate is issued and gives evidence of his request at 4.15pm on 18 September 2020 for a land tax certificate in respect of one of the strata lots comprising the property and his receipt of that certificate at 4.16pm

on that date. By his second affidavit dated 24 August 2020, Mr Gui refers to increases in property prices; his receipt of a land tax assessment notice in relation to the property on 21 January 2020 and his payment of the amount due on 26 February 2020. That evidence indicates that land tax had been paid in respect of the property although, as will emerge below, the required land tax certificate(s) were not provided to Ms Hong prior to the due date for completion.

### **The pleaded events and chronology**

- 4 The chronology of events is largely common ground, and emerges from the pleadings and documentary record, although the legal implications of the relevant events are disputed.
- 5 As I noted above, Mr Gui, as vendor, and Ms Hong, as purchaser, entered into the Contract for the sale of the property which comprised two strata title lots for the purchase price of \$12.75 million (Ex J1, 1). The Contract provided that completion was to occur 8 months after the date of the Contract, namely, by 26 May 2020. Clause 8.2 of the Contract provided that, if the vendor did not comply with the Contract in an essential respect, the purchaser could terminate it by serving a notice and, after the termination, the purchaser could recover the deposit and any other money paid by the purchaser under the Contract. It is not necessary to determine whether that clause applied to a repudiation of the Contract, before the time for performance had arisen, or how it interacted with special condition 10(d) which provided that the first instalment of the deposit became Mr Gui's property, since I find below that Ms Hong's termination of the Contract was not valid, and Mr Gui subsequently validly terminated the Contract for Ms Hong's breach. Clause 9 of the Contract provided that, upon the vendor terminating the Contract for the purchaser's breach in an essential respect, he may keep or recover the deposit to a maximum of 10% of the purchase price and sue the purchaser for, among other things, damages. Clause 30.7 dealt with a purchaser's obligation take steps in respect of joining the PEXA electronic workspace, after receiving an invitation from the vendor to do so, but that obligation is expressed to apply "normally". It is difficult to see how it could sensibly require a purchaser to join that workspace before the date for completion for the Contract had arisen,

including, as here, where a vendor had not yet provided the land tax certificate(s) that were required 14 days prior to completion.

- 6 By special condition 10 of the Contract, Ms Hong was required to pay a 10% deposit of \$1,275,000, made up of a part-deposit of \$637,500 (5% of the purchase price) to be paid on the date of the Contract to Mr Gui's agent, the Second Defendant, which was paid and is currently held in Court; and the remaining balance of \$637,500 (5% of the purchase price) to be paid on demand by Mr Gui on the earlier of completion of the Contract or termination of the Contract by Mr Gui for breach by Mrs Hong. The balance of the deposit has not been paid by Mrs Hong. As I noted above, special condition 10(d) of the Contract provided that the first deposit instalment belonged to Mr Gui on and from exchange. Special condition 18.2 of the Contract required Ms Hong to lodge an application for FIRB approval for the purchase within 10 business days from the date of the Contract and provided that, if FIRB approval was not obtained, or was refused, within 60 days of the date of the Contract, then either party may rescind the Contract. I note, for completeness, that the Contract also contains a special condition requiring the vendor to obtain a swimming pool compliance certificate prior to completion of the contract. A condition in that form may cause difficulty, as illustrated by the result in *Samuel v Daher* [2022] NSWSC 421. However, neither party took any point as to that provision, and it is not necessary to address it further.
- 7 It is now common ground that there was also an implied term of the Contract that Mr Gui would, at least 14 days before completion of the Contract, serve on Ms Hong a current land tax certificate as defined in cl 6(2) of the Conveyancing (Sale of Land) Regulation 2017 (NSW) ("Regulation"), which was implied by s 52A(2)(b) of the *Conveyancing Act* 1919 (NSW), cl 6 and Sch 2 cl 3 of the Regulation (ASC [5], admitted AD [5]). Ms Hong contends, and Mr Gui does not admit, that there was a further implied term of the Contract that she would be under no obligation to complete unless and until Mr Gui had served that current land tax certificate (ASC [6], AD [6]).
- 8 Continuing now with the chronology of events, by email dated 30 September 2019, Mr Gui's solicitor advised Ms Hong's solicitor that contracts were

exchanged on 26 September 2019 and, subject to Ms Hong obtaining FIRB approval on or before 26 November 2019, completion was scheduled for 26 May 2020 (Ex J1, 158). Ms Hong delayed in lodging the FIRB application required under the Contract, or at least paying the applicable fee. Mr Gui's solicitor followed up in respect of payment of the fee for that application on 28 October 2019 and 8 November 2019, and pointed out that the application was only made once that fee was paid (Ex J1, 159, 161). On 19 November 2019, Mr Gui's solicitor noted again that Ms Hong's application had not been made in proper form, because the application fee had not been paid and noted that Mr Gui reserved his rights (Ex J1, 166). On the same date, Ms Hong denied that allegation, but sought a variation of the FIRB Approval Date (as defined) to 10 January 2020, on the basis that funds had only been transferred by Ms Hong to her solicitor to pay the application fee that day (Ex J1, 167). On 21 November 2019, Mr Gui's solicitor indicated he would extend the FIRB Approval Date to 10 January 2020, upon Ms Hong providing confirmation of payment of the FIRB application fee (Ex J1, 169). Mr Gui and Ms Hong subsequently entered into a Deed of Variation which extended the date by which Ms Hong was required to lodge that application to 6 December 2019 and extended the FIRB Approval Date (as defined) to 24 January 2020 (Ex J1, 183). It appears that Ms Hong then paid the FIRB application fee by the extended date for lodgement of that application (Ex J1, 213).

- 9 Mr Gui's solicitor advised Ms Hong's solicitor by letter dated 18 December 2019, in response to requisitions, that a land tax certificate would be provided by Mr Gui for the year 2020 (Ex J1, 217). I accept that that communication excludes any belief on Mr Gui's part that he was not required to provide a land tax certificate, and Mr Gui did not press any claim that an estoppel could arise so as to prevent Ms Hong insisting on the requirement under the Regulation for that certificate to be provided 14 days prior to completion, to which I referred above.
- 10 On 17 January 2020 (about 5 months before the then completion date of 26 May 2020), Ms Hong's solicitor wrote to Mr Gui's solicitor requesting that the completion date be extended to 27 July 2020 (Ex J1, 240) and, on 20 January 2020, Mr Gui's solicitor advised that Mr Gui agreed to extend the completion

date to that date (ASC [7], admitted AD [7]), Ex J1, 243). Mr Harding, with whom Mr Fielder appears for Mr Gui, points out that this communication from Ms Hong's solicitor was the last communication on her behalf before the Contract was terminated some seven months later, and that Ms Hong failed to respond to many communications from Mr Gui's solicitors in the months leading up to termination. I refer to some of those communications below and I find that proposition is amply established.

- 11 On 11 June 2020, Mr Gui's solicitor, presumably in anticipation of settlement (although the land tax certificate(s) had not yet been provided by Mr Gui to Ms Hong), requested that Ms Hong provide (Ex J1, 248) settlement figures, a certificate under s 66 of the *Sydney Water Act* 1994 (NSW) and a certificate under s 603 of the *Local Government Act* 1993 (NSW). Mr Gui's solicitor followed up on 22 June 2020, apparently after receiving no response (Ex J1, 249) and again on 2 July 2020 (ex J1, 250) and on 20 July 2020 (Ex J1, 251), when he also requested that Ms Hong accept an invitation to the electronic "PEXA Workspace" where the conveyance would be carried out and asked for an urgent "update as to Settlement of this matter". The request to join the PEXA workspace was arguably premature, where the land tax certificate(s) had still not been provided and Ms Hong was not obliged to complete the contract, although her solicitor did not respond to point that out. On 24 July 2020, three days before the then scheduled completion date (again putting aside the fact that a land tax certificate had not been provided), Mr Gui's solicitor again followed up with Ms Hong's solicitor (Ex J1, 252).
- 12 Ms Hong did not complete the Contract on 27 July 2020 (ASC [8], admitted AD [8]) and Mr Gui then extended the date for completion to 31 July 2020 (ASC [9], admitted AD [9]). By email dated 27 July 2020, Mr Gui's solicitor advised Ms Hong's solicitor (Ex J1, 253) that:

"We refer to our previous correspondence, and confirm that Settlement of the matter was scheduled for 3pm on today's date, being 27 July 2020.

We note that the Purchaser has not proceeded to Settlement.

In an act of good faith, we have been instructed by our Client to extend the date for Settlement to 3pm on Friday 31 July 2020. Please note that this has been updated accordingly on the PEXA Workspace.



Could you kindly please advise as to whether your Client will be in a position to settle by the above date.”

- 13 By her Reply filed on 11 December 2020, Ms Hong contends that Mr Gui’s extending the date for completion to 31 July 2020 amounted to an election not to accept any anticipatory breach or repudiation of the Contract on her part, presumed prior to that date, or to terminate the Contract on the basis of it. It is not necessary to decide that matter given the findings I reached on other grounds.
- 14 The certificate of compliance for the swimming pool was then provided by Mr Gui on 27 July 2020 (Ex J1, 254). As I noted above, no party raised any complaint as to time at which that occurred. Ms Hong again did not complete on 31 July 2020. By an email dated 3 August 2020 (Ex J1, 258) Mr Gui’s solicitor noted her previous failure to proceed to settlement on 27 July 2020, the extension of time for settlement to 31 July 2020, and that she had again failed to proceed to settlement on 31 July 2020, and attached a notice to complete (Ex J1, 259). By that notice to complete, Mr Gui claimed that he was ready and willing to complete the Contract and required Ms Hong to complete it on 21 August 2020, and purported to make time of the essence (ASC [11], largely admitted AD [11]).
- 15 By letter dated 12 August 2020, Mr Gui’s solicitor then advised Ms Hong’s solicitor that, if Ms Hong failed to comply with her obligations under the notice to complete issued on 3 August 2020, Mr Gui’s intention was to terminate the Contract (Ex J1, 261). On 20 August 2020, Mr Gui’s solicitor sent Ms Hong’s solicitor a draft notice to terminate, indicating it would be served following the time specified in Mr Gui’s Notice to Complete (Ex J1, 262-264). Ms Hong again did not complete on 21 August 2020 (ASC [12], admitted AD [12]). Mr Gui also pleads that Ms Hong repudiated the Contract by failing to take steps to progress the matter to settlement in that period. Mr Gui served a notice of termination on 24 August 2020 (Ex J1, 265-267) (ASC [13], admitted AD [13]).
- 16 Ms Hong in turn pleads that Mr Gui did not serve a current land tax certificate; that he was not ready or able to complete the Contract; that he was not entitled to require completion of the Contract on 27 July 2020 or 31 July 2020, or to make time of the essence of the Contract; that Ms Hong was not contractually

obliged to complete the Contract; that Mr Gui was in breach of the Contract, when he purported to terminate it, and was not entitled to terminate the Contract; and that termination constituted a repudiation which was accepted by Ms Hong on 16 August 2020 (ASC [14]-[17]). Mr Gui admits that he did not serve a current land tax certificate although he pleads that (as was the fact) land tax had been paid, otherwise largely denies those paragraphs, and pleads he was entitled to terminate the Contract on 24 August 2020 (AD [14]-[17]).

- 17 Ms Hong then served a notice of termination on 26 August 2020 (Ex J1, 271) which referred to Mr Gui's notice to terminate dated 24 August 2020 and stated that:

"At no time have you served a 'current Land Tax Certificate' relating to the Property as defined in, and as required by the term of the Contract implied by, clause 6(1) of the Conveyancing (Sale of Land) Regulation 2017.

The Notice to Complete was therefore invalid.

Additionally or alternatively, you were not entitled to give the Notice to Complete.

Additionally or alternatively, you were not, when giving the Notice to Complete, ready, willing or able to complete the Contract.

Additionally or alternatively, you were not ready, willing and able to complete the contract on 21 August 2020 when completion was due.

In those circumstances you were not entitled to terminate the Contract on 24 August 2020, and by doing so you repudiated the Contract.

Now take notice in these circumstances that the [sic] Lihong Hong accepts your repudiation of the Contract, and hereby terminates it.

Further, Lihong Hong hereby demands the repayment of the deposit."

- 18 By letter dated 15 October 2020 (Ex J1, 301) Mr Gui's solicitors contested Ms Hong's termination of the Contract on the basis that it had already been terminated by Mr Gui on 24 August 2020 or, alternatively, Ms Hong was not herself ready, willing and able to complete the Contract at that date. After Ms Hong's purported termination of the Contract, Mr Gui sent a land tax certificate for one of the two strata lots comprising the property on 17 September 2020 and for the other on 18 September 2020; he then issued a notice to complete on 15 October 2020, requiring completion on 3 November 2020 and making time of the essence; and he issued a further notice of termination of the Contract on 5 November 2020 (Ex J1, 306) after Ms Hong again did not complete the purchase.

**Whether Mr Gui was entitled to terminate on 24 August 2020 by reason of Ms Hong's failure to complete at that point**

- 19 It is convenient to address the parties' submissions by reference to several issues identified by Mr Harding, although not all of those issues need to be decided. The first of those issues is whether Mr Gui's termination of the Contract on 24 August 2020 was valid. Mr Harris, who appears for Ms Hong, points out that it is admitted, on the pleadings, that the Contract contained a term implied under s 52A(2)(b) of the *Conveyancing Act* 1919 (NSW), in conjunction with cl 6 and Sch 2 cl 3 of the Regulation, which required Mr Gui to serve on Ms Hong, at least 14 days before completion of the Contract, a current land tax certificate as defined in cl 6 of the Regulation. Mr Harris also refers to s 52A(4) of the *Conveyancing Act*, which provided that any contractual provision which sought to exclude, modify or restrict that term would be void. He points out that it is also common ground that Mr Gui had not served the current land tax certificate(s) before he terminated the Contract on 24 August 2020.
- 20 Mr Harris submits that Mr Gui was not entitled to terminate the Contract on 24 August 2020 because, where he had not served the land tax certificate(s), he was in breach of a fundamental term of it; he was not ready, willing and able to complete the Contract, because he had not served that certificate at least 14 days earlier; and Ms Hong had a statutory entitlement to refuse to complete the Contract until 14 days after he had complied with the obligation to serve that certificate. At least the last of those points is plainly correct. It appears that Mr Gui does not now contend that he was entitled to terminate the Contract by reason of Ms Hong's failure to complete at this time on this basis. If that contention were advanced, I would not accept it, because – apart from Mr Gui's claim for anticipatory breach by Ms Hong which I address below – there was no basis to terminate the Contract for Ms Hong's failure to complete, prior to the time that completion was due.
- 21 For completeness, Mr Harding identifies two further issues: whether Mr Gui affirmed the Contract by serving a notice to complete and whether the notice to complete was valid when served. Neither issue arises where I have found that Mr Gui did not validly terminate the Contract at this point. Mr Harding also

identifies a question whether Mr Gui waived the attempt to make time of the essence in the notice to complete by failing to serve a land tax certificate, and he now accepts that he did so.

**Mr Gui's claim that he was entitled to terminate the Contract on 24 August 2020 for anticipatory breach by Ms Hong**

- 22 Mr Gui instead relies on a contention that Ms Hong's silence and inactivity from 17 January 2020 evinced an intention not to perform the Contract and a repudiation of the Contract. Mr Harding points out that there was no need for Mr Gui to issue a notice to complete as a prelude to termination if Ms Hong had repudiated the Contract: *Gold Coast Oil Pty Ltd v Lee Properties Pty Ltd* [1985] 1 Qd R 416 at 420; P Butt, *The Standard Contract for Sale of Land in New South Wales*, 2nd ed LBC Information Services (1998) at [15.49]. Mr Harding also submits and I accept that, if Ms Hong's repudiation was an available ground of termination of the Contract by Mr Gui, it afforded a proper basis to terminate the Contract even if not expressly referred to in the notice of termination: *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 371, 373 and 377–8. That notice in any event referred to “repudiation” arising from the course of conduct which it set out.
- 23 Mr Harding submits that the period up to the extended completion date of 27 July 2020 was characterised by inaction and silence on the part of Ms Hong, and he refers to the lack of response to numerous communications and requests from Mr Gui's solicitors, some of which I have noted above. He notes that neither Ms Hong nor her solicitor asked Mr Gui to provide the land tax certificate(s). The difficulty with that proposition is that, of course, Ms Hong or her solicitor did not need to ask Mr Gui to provide the land tax certificate(s), where the Contract imposed an obligation on him to do so at least 14 days prior to settlement, and Mr Gui had indicated his intention to do so in his answer to requisitions. It was then a matter for Mr Gui to attend to that obligation under the Regulation, and the consequential implied term in the Contract, and to do so at least 14 days before the proposed settlement date for the sale. It does not seem to me that Ms Hong's inaction in that regard involved any failure to cooperate to do all things necessary to enable Mr Gui to have the benefit of the Contract, within the case law in *Mackay v Dick* (1881) 6 App Cas

251 at 263 and *Secured Income Real Estate (Australasia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607, to which Mr Harding refers. Her silence was not within that territory, because Mr Gui did not need any cooperation of Ms Hong to provide the land tax certificate(s) which was a matter wholly within his control.

- 24 Mr Harding also refers to Ms Hong's failure to respond to Mr Gui's notice to complete issued on 3 August 2020 and to request the land tax certificate(s) and to Mr Gui's solicitor's advice that Mr Gui intended to terminate the Contract if Ms Hong failed to complete on 21 August 2020, and to Ms Hong's failure to take steps to progress the matter towards settlement or to communicate any intention to complete on the extended completion date of 21 August 2020. Again, the difficulty with that proposition is that Ms Hong was not obliged to complete the Contract until 14 days after service of the land tax certificate(s), which had not occurred.
- 25 Mr Harding submits that Mr Gui's termination of the Contract was valid on 26 August 2020, because Ms Hong had evinced a continuing intention not to perform the Contract, amounting to a anticipatory breach and a repudiation of the Contract, by her silence and inactivity from 17 January 2020. Mr Harding submits, and I accept, that a repudiation can occur where the conduct of the relevant party, viewed objectively, has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it: *Laurinda Pty Ltd v Capalba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 643, 658 ("*Laurinda*"); *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44]; *Galafassi v Kelly* (2014) 87 NSWLR 119; [2014] NSWCA 190 at [63]. Mr Harding also submits, and I also accept, that an intention to repudiate may be inferred from conduct, including delay, silence, "continued inactivity" and "procrastination...persistently practised": *Holland v Wiltshire* (1954) 90 CLR 409 at 420-421 ("*Holland*"); *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 461; *Laurinda* at 643-644, 657-658; *Amaya v Estate Property Holdings Pty Ltd* (2010) 14 BPR 27,243; [2010] NSWSC 32 at [63]-[66] ("*Amaya*"), as to which an appeal was allowed, in part, in *Amaya v Everest Property Holdings Pty Ltd* [2010] NSWCA 315. Mr Harding

also refers to *Laurinda*, where Deane and Dawson JJ approved the observation of Lord Shaw in *Forslind v Bechely-Crundall* 1922 SC (HL) 173 at 191-192 that:

"If, in short, A, a party to a contract, acts in such a fashion of ignoring or not complying with his obligations under it, B, the other party, is entitled to say: 'My rights under this contract are being completely ignored and my interests may suffer by non-performance by A of his obligations, and that to such a fundamental and essential extent that I declare he is treating me as if no contract existed which bound him.' ... In business over and over again it occurs - as, in my opinion, it occurred in the present case - that procrastination is so persistently practised as to make a most serious inroad into the rights of the other party to a contract. There must be a stage when the person suffering from that is entitled to say: 'This must be brought to an end. My efforts have been unavailing, and I declare that you have broken your contract relations with me.'"

- 26 Mr Harding also submits and I also accept that, in a conveyancing context, an intimation of non-performance on the part of the purchaser may be inferred where the purchaser has failed to attend to normal conveyancing practices, including by arranging a time for settlement, agreeing upon adjustments and ascertaining how cheques are to be made out: *Blacktown City Council v Fitzgerald* (1990) 6 BPR 13,409 at 13,414-13,415; *Amaya* at [65]-[67]. I accept that the decision of White J (as his Honour then was) in *Amaya*, at first instance, provides support for the application of a duty of cooperation to require a purchaser to contact a vendor to make arrangements for settlement; as Mr Harding points out, that proposition was later approved by White JA in *Deigan v Fussell* [2019] NSWCA 299 at [191]. Mr Harding submits and I also accept that an intention not to perform may also be inferred from a purchaser's silence and failure to respond to the vendor's solicitor's requests or from "delay or neglect" by the purchaser in performing the contract: *Holland* at 420; *Galafassi v Kelly* (2014) 87 NSWLR 119; [2014] NSWCA 190 at [90]; *Amaya* at [65], [66]. However, I am not persuaded that these principles can be extended to require a purchaser to point out to the vendor the steps that were within the vendor's control which the vendor had not taken and Mr Harding drew attention to no authority for that proposition.
- 27 Mr Harris responds by pointing out that repudiation requires that the promisor makes it clear to the promisee that he or she refuses or will refuse to carry out his or her part of the contract: *White & Carter (Councils) Ltd v McGregor* [1962]

AC 413 at 427. I return to that proposition at greater length below in dealing with the question whether Mr Gui repudiated the Contract, when he sought to terminate it on 24 August 2020. Mr Harris also observes, in reply, that many of the cases on which Mr Gui relies involve a communication of an inability to comply with the contract, rather than an inference giving rise to anticipatory breach. He points out that, in *Holland*, the purchasers failed to comply with a notice to complete but had previously told the vendor that they could not complete the contract; in *Ogle*, the purchaser claimed to have been misled by the vendor and had indicated to the vendor that he would not settle the purchase; and, in *Laurinda*, the lessor had failed to provide a registered lease to the tenant by the time it was required to do so, and had made it clear to the tenant that it would not comply with its obligation to do so until a time which suited it. That does not, of course, exclude the possibility that an anticipatory breach could be established by something less than an express refusal to perform.

- 28 It seems to me that the principles identified by Mr Harding do not assist Mr Gui here, because procrastination or non-performance by Ms Hong cannot be established as a matter of fact, where the occasion for her performance would not arise until after the land tax certificate was served, which had not yet occurred as at 24 August 2020. Although her silence and inactivity is plainly established, I do not accept that it could evidence a continuing intention not to perform the Contract, where Ms Hong was not obliged to perform the Contract until after the land tax certificate was served. While I accept that Ms Hong's silence would likely have left Mr Gui in real doubt as to her intentions, and was plainly discourteous and unhelpful, it seems to me that that silence did not permit a conclusion that she refused or would refuse to carry out her part of the Contract, when an obligation to complete the Contract later arose. As I have noted above, that did not occur prior to Mr Gui's termination of the Contract where a land tax certificate was not served on her in that period.
- 29 Mr Harding also identifies an issue as to any relief which Mr Gui is then entitled. This issue does not arise at this point given the findings that I have reached above. I will address it below, where it again arises.

**Whether Mr Gui repudiated the Contract and whether Ms Hong was entitled to terminate it on 26 August 2020**

30 The next issue is whether Ms Hong's termination of the Contract on 26 August 2020 was valid, which turns upon whether Mr Gui's purported termination of the Contract on 24 August 2020 was a repudiation of it. Mr Harris submits that Ms Hong was entitled to elect to accept Mr Gui's purported termination of the Contract as a repudiation, and did so when she issued a notice of termination of the Contract on 26 August 2020.

31 The first question that arises, which was initially not addressed in the parties' written submissions but addressed in oral submissions, is whether Mr Gui's termination of the Contract, where not properly based, was a repudiation of it that could be accepted by Ms Hong to support a termination of the Contract. I find that it was not, in the possibly unusual circumstances of this case. Turning first to the applicable case law, in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 ("*Woodar*"), the purchaser purported to terminate a contract in reliance upon a right to do so which only arose if procedures for the compulsory acquisition of the property were commenced. No such procedures had commenced and the contractual right was not applicable. The majority of the House of Lords held that a repudiation was not established, because the purchasers had acted in a good faith belief that they were entitled to terminate, and their conduct did not indicate an absence of readiness or willingness amounting to a refusal to perform. Lord Wilberforce observed (at 283) that:

"... it would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations."

32 In *Nina's Bar Bistro Pty Ltd v MBE Corp (Sydney) Ltd* [1984] 3 NSWLR 613 ("*Nina's Bar Bistro*"), Glass JA referred to *Woodar* as authority that a party who was determined to rely on the terms of the contract and not showing any ulterior intention to abandon it is not guilty of repudiation.



- 33 In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1997) 138 CLR 423 (“*DTR Nominees*”), the High Court held that a vendor’s incorrect assertion that the registration of a plan required the purchaser to complete within 14 days was not a repudiation of the contract and that the purchaser’s termination of the contract on that basis was not effective. The plurality (Stephen, Mason and Jacobs JJ) observed (at 432 that:

“No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognize his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him. As Pearson LJ observed in *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699 at 734; [1964] 3 All ER 30 at 43 : “In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments ...”.

In this case the appellant acted on its view of the contract without realizing that the respondents were insisting upon a different view until such time as they purported to rescind. It was not a case in which any attempt was made to persuade the appellant of the error of its ways or indeed to give it any opportunity to reconsider its position in the light of an assertion of the correct interpretation. There is therefore no basis on which one can infer that the appellant was persisting in its interpretation willy nilly in the face of a clear enunciation of the true agreement..”

- 34 The plurality there found (at 433) that repudiation was not established where a purported rescission “did not evince an intention not to proceed with the contract correctly interpreted; it did not more than evince an intention not to proceed with the contract on the basis of the incorrect interpretation then being advanced by the appellant”. I appreciate that the plurality’s observations are there directed to a dispute as to the proper interpretation of the contract, and the party there seeking to rescind was itself advancing an incorrect interpretation of the contract. I recognise that, here, the difficulty instead arose from the application of the Contract to a state of fact that Mr Gui misunderstood, where he and his solicitor plainly did not recognise that the land tax certificate(s) had not been served.
- 35 In *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2019] NSWSC 1199 at [479]-[480] Ward CJ in Eq (as the President then was)

in turn referred to *DTR Nominees* and *Woodar* with apparent approval. In *Bradcorp Wilton Park Pty Ltd v Country Garden Wilton West Pty Ltd* [2019] NSWSC 1407 at [253], Parker J also referred to *Woodar* and to *DTR Nominees*; his Honour expressed the view (at [257]) that the High Court had adopted the same view in *DTR Nominees* as that expressed by Lord Wilberforce in *Woodar*; and he also observed that, if he was wrong in thinking that *DTR Nominees* went so far as a matter of authority, “the Court should follow the views stated in the English cases which, with respect, are compellingly persuasive as a matter of principle”. I take the same view.

- 36 In JW Carter, *Carter’s Breach of Contract*, [8.23] the author also refers to the general rule that:

“A wrongful termination of the performance of a contract by a promisor is generally a clear indication of an absence of readiness or willingness amounting to refusal to perform.”

Professor Carter in turn points to that qualification implicit in the word “generally” and observes that:

“If the promisor acted in the bona fide belief of an entitlement to terminate the contract, the good faith of the promisor is relevant to whether the wrongful termination is a refusal to perform.”

Professor Carter then observes (at [8.28]) that “much turns on whether immediate termination by the promisee was the appropriate reaction to the promisor’s conduct”, and he refers (at [8.29]) to *Woodar Investment*. In JD Heydon, *Heydon on Contract: The General Part* [24.390], the author similarly notes an exception to the general position that an improper termination is a repudiation, where a promisor acts on a mistaken view of the legal position in terminating the contract, referring, inter alia, to *Woodar Investment* and *Nina’s Bar Bistro*.

- 37 It seems to me that, here, Mr Gui’s conduct prior to his purported termination of the Contract, including the repeated correspondence to seek to arrange a settlement, the extension of time for settlement when Ms Hong did not attend for settlement on 27 July 2020, and the provision of a draft notice of termination and a further opportunity to settle, prior to proceeding to the notice of termination on 24 August 2020, indicates that Mr Gui was at all times intending to comply with the Contract, although he was then proceeding on an erroneous

understanding that Ms Hong was obliged to complete at that time, without recognising that the current land tax certificate had not been served. That proposition can be tested by asking what would have occurred if Ms Hong had then pointed out that the time for completion had not arrived, because a land tax certificate had not been served. The totality of the evidence indicates that, had that occurred, Mr Gui would then have served the land tax certificate, allowed Ms Hong at least a further 14 days in which to complete, and only then proceeded to terminate the Contract if she then failed to do so. That, of course, is what he later did after each party had served their respective notices to terminate the Contract. This conclusion does not depend on any finding that Ms Hong was obliged to correct Mr Gui's or his solicitor's error under any implied duty of cooperation. The fact that she did not do is simply a relevant matter supporting my finding that Mr Gui's termination did not indicate any unwillingness to comply with the Contract on his part, on the true facts, where he (and his solicitor) plainly did not then realise and Ms Hong (and her solicitor) did not then point out that the land tax certificate(s) had not yet been served. For these reasons, I find that Ms Hong was not entitled to treat Mr Gui's notice of termination on 24 August 2020 as a repudiation of the Contract, and her doing so was itself arguably a repudiation of the Contract. In any event, Mr Gui then elected (consistent with the findings that I have reached above as to his seeking to comply with the Contract) to affirm the Contract rather than to terminate it by subsequently serving land tax certificates and a further notice to complete, which Ms Hong again did not comply with.

- 38 The second question in respect of this issue, which involves real legal complexity, is whether Ms Hong could terminate the Contract where she was not ready, willing and able to perform it. Mr Harding submits that, if Mr Gui's termination of the Contract was invalid, Ms Hong was not entitled to terminate the Contract for repudiation by him, because she was not ready, willing and able to complete the Contract at the time she issued her notice of termination, as a matter of fact. (I should again recognise here that she would not be required to complete the Contract until 14 days after the land tax certificate(s) were provided to her). Mr Harris, in reply, emphasises that the term implied into the Contract by Sch 2, cl 3(2) of the Regulation is that the purchaser does

not have to complete earlier than 14 days after service of the land tax certificate, and that Ms Hong would have had sufficient time to take steps necessary for settlement after a land tax certificate had been provided. That proposition assumes that she had funds available to settle, and her evidence is (as I noted above) that she did not, as at 27 July 2020, and she leads no evidence that her position subsequently changed. I find that Ms Hong was not ready, willing or able to complete the Contract at any relevant time, because she did not have funds to do so.

- 39 Mr Harding in turn submits that a party who is not ready, willing and able to complete a contract cannot terminate it by reason of the other party's breach, and points to the observation of De Jersey CJ in *Sattel v The Proprietors Be Bees Tropical Apartments Building Units Plan No 71593 (No 2)* (2002) 2 Qd R 427; [2001] QCA 560, by reference to *DTR Nominees* and *Foran v Wight* (1989) 168 CLR 385 ("*Foran*"), that it is "trite law that a party who is not ready, willing and able to perform a contract is not entitled to terminate for the other party's breach". He also refers to *Barrak Corporation Pty Ltd v Jaswil Properties Pty Ltd* [2016] NSWCA 32 ("*Barrak*") at [33]-[35], where Beazley P, Sackville and Emmett AJJA observed, by reference to authority, that "it is a fundamental principle of land law that a party who seeks to terminate a contract for breach of an essential stipulation, must itself be ready, willing and able to complete."
- 40 Mr Harris responds that it was not necessary for Ms Hong to establish that she was ready, willing and able to complete the Contract, where Mr Gui terminated the Contract without being entitled to do so, and she was entitled to accept that termination as amounting to a repudiation of the Contract, whether or not she was herself ready, willing or able to complete the Contract. Mr Harris refers to authority that, where a wrongdoer has repudiated a contract, an innocent party need not be ready, willing and able to complete the contract in order to accept the repudiation and terminate the contract, including *Sharjade Pty Ltd v Commonwealth* [2009] NSWCA 373 ("*Sharjade*") at [68] and *Lavigne v Kumar* [2020] NSWSC 1120 ("*Lavigne*") at [120]-[122]. In *Sharjade*, Hodgson JA referred to *Foran* at 437-438 and to *DTR Nominees* at 433, and distinguished the position in respect of the availability of termination to put an end to

obligations to perform a contract in the future; the availability of termination plus a cause of action for at least nominal damages; and the availability of termination plus a cause of action for substantial damages for loss of bargain. His Honour observed that:

“If the only question is whether a purported termination is effective to put an end to the contract so as to discharge both parties from future performance, then anticipatory breach by one will justify termination by the other whether or not the latter is ready and willing to perform. However, if the latter wants to obtain any relief on the basis of the termination, beyond mere discharge of future obligations, then as part of its cause of action it must prove readiness, willingness and ability. It is no longer necessary to explicitly allege this (UCPR 14.10), but if it is put in issue, the onus lies on the plaintiff to prove it in order to establish such a cause of action..”

Darke J followed that observation in *Lavigne* at [123], although Mr Harding notes that his Honour did not there refer to the subsequent decision in *Barrak*.

- 41 It is not necessary to decide this second question, where I have found that Mr Gui had not repudiated the Contract by his attempt to terminate it based on his or his solicitor’s misunderstanding of the position as to service of the land tax certificate(s). If it had been necessary to do so, I would likely have followed the decision of Hodgson JA in *Sharjade*, by reason of its detailed analysis, and Darke J’s decision in *Lavigne* as a matter of comity, and because I am not persuaded that it is wrong. However, it is not necessary to reach a view as to that matter, given the findings that I reach on other grounds.

#### **Whether Mr Gui validly terminated the Contract on 5 November 2020**

- 42 Where, as I have found, Ms Hong did not validly terminate the Contract on 26 August 2020, and Mr Gui then affirmed it, the next issue is whether it was validly terminated by Mr Gui on 5 November 2020 for Ms Hong’s breach. As I noted above, after Ms Hong’s purported termination of the Contract, Mr Gui then sent a land tax certificate for one of the two strata lots comprising the property on 17 September 2020 and for the other on 18 September 2020; he then issued a notice to complete on 15 October 2020, requiring completion on 3 November 2020 and making time of the essence; and he issued a further notice of termination of the Contract on 5 November 2020 after Ms Hong again did not complete the purchase. Mr Harris submits that these events do not advance Mr Gui’s Cross-Claim, where Ms Hong had validly terminated the Contract on 26 August 2020. I do not accept that submission, where I have

found above that Mr Gui's purported termination of the Contract was not a repudiation of it and Ms Hong did not validly terminate it. Mr Gui then affirmed the Contract, and he properly terminated it on 5 November 2020 by taking the steps to which I have referred above. He is entitled to receive the unpaid balance of the deposit in accordance with cl 9 of the Contract, to which I referred above, and interest. As I noted above, he does not press a claim for any additional damages.

### **Outcome and orders**

- 43 In these circumstances, Ms Hong's claim for relief must be dismissed, Mr Gui succeeds in his cross-claim for the balance of the deposit and interest, and Ms Hong must pay the costs of the proceedings as agreed or as assessed. I direct the parties to bring in short minutes of order within 7 days to give effect to this judgment.

\*\*\*\*\*

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