Supreme Court

New South Wales

Case Name:	D Capital 2 Pty Ltd v Western
Medium Neutral Citation:	[2022] NSWSC 1064
Hearing Date(s):	11–15 and 18 July 2022
Decision Date:	12 August 2022
Jurisdiction:	Equity - Real Property List
Before:	Meek J
Decision:	Plaintiff's claim dismissed; Cross-claim upheld. Parties to bring in short minutes.
Catchwords:	VENDOR AND PURCHASER – Put and call option deeds – block of 10 units sold in one line – interdependence of contracts – single conveyancer authorised to liaise with buyer and give permissions and receive notices under deeds – option period extended – initial buyer nominates corporate entity of which vendors' agent is sole director and shareholder unbeknownst to vendors – but known to vendors' conveyancer – contracts exchanged and notices to complete issued – dispute regarding notices and termination and ability of buyer to complete VENDOR AND PURCHASER – Principles regarding electronic conveyancing – PEXA – co-operation requirements – principles regarding completion and tender of performance in electronic settlement – nomination of a particular hour of the day for completion – construed as a matter of convenience – whole day available to complete VENDOR AND PURCHASER – duty of care owed by a conveyancer ordinarily excludes financial and commercial advice – agency obligations of conveyancer

CONTRACTS – Conveyancing – Principles regarding notices to complete – Making time of the essence – Requirements of form and content of notices – Construction of notices to complete – Equitable context to requirements for a valid notice – Whether failure to intimate a right to terminate invalidates notice

CONTRACTS – Notices to complete – whether purported nomination of place of settlement other than completion in electronic workspace invalidates notice

EQUITY – Equitable remedies – Differences as between common law and equity as to time stipulations – Whether vendors waved essentiality of time or elected to affirm the contracts

EQUITY – Equitable remedies – Specific performance – Whether vendors ready, willing and able to complete – Requirements of readiness in electronic conveyancing and workspace – Whether alleged late provision of settlement adjustment details precludes readiness – Dispute regarding default interest claim – Whether vendors' interest in preferring to sell elsewhere demonstrates lack of willingness to complete and precludes entitlement to terminate

EQUITY – Equitable remedies – Defences to specific performance – Whether purchaser had available finance – Dispute regarding whether purchaser had unconditional or sufficient finance – Whether purchaser ready, willing and able to complete

AGENTS – fiduciary duties of disclosure – duration of obligations of agents

CONTRACTS – Illegality – Contract entered into in contravention of s 49 Property Stock and Business Agents Act 2002 (NSW) – Whether legislation has effect of making void or voidable contracts of sale

EQUITY – Equitable remedies – Defences to specific performance – Unclean hands – different effects of

doctrine of illegality and maxim of unclean hands – Whether unclean hands permanently disbars equitable relief – "washing one's hands" – "Washing" by imposing terms on specific performance

EQUITY – Equitable remedies – Defences to specific performance – Delay

EVIDENCE – Admissibility of evidence of what a party would have done in a hypothetical situation

INTERPRETATION – What use can be made of extrinsic materials – Second Reading Speeches

Legislation Cited:

Australian Consumer Law (NSW), ss 18, 26, 236, 239
Civil Liability Act 2002 (NSW), ss 5D, 5O, Pt 4
Conveyancers Licensing Act 2003 (NSW), s 4
Conveyancing Act 1919 (NSW), ss 13, 55
Crimes Act 1900 (NSW), ss 249B, 249F
Duties Act 1997 (NSW)
Interpretation Act 1987 (NSW), ss 33, 34
Law Reform (Miscellaneous Provision) Act 1965 (NSW), s 9
Legal Profession Uniform Law (NSW), Pt 2.1
Liquor Act 2007 (NSW), s 92
Property and Stock Agents Act 2002 (NSW), ss 3, 3A, 8, 28, 32, 37, 43, 46, 47, 48, 49, 52, 53, 55, 119, 120, 191, 192, 207, 211, 212, 219, Pt 3 Div 4, Pt 8 Div 3, Pt 12, Pt 13
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Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd (2007) 232 CLR 1; [2007] HCA 38
Auzora Pty Ltd v Commissioner of Office of Business and Consumer Affairs (2009) 105 SASR 378; [2009] SASC 344
Balog v Crestani (1975) 132 CLR 289; [1975] HCA 16
Barnes v Addy (1874) LR 9 Ch App 244
Beach Petroleum NL v Johnson (1993) 43 FCR 1; [1993] FCA 392
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[2001] NSWCA 263
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Breen v Williams (1996) 186 CLR 71; [1996] HCA 57
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Commercial Union Insurance Company of Australia Limited v Ferrcom Pty Ltd (1991) 22 NSWLR 389
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; [2014] HCA 32
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Foran v Wright (1989) 168 CLR 385; [1989] HCA 51
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In the matters of Earth Civil Australia Pty Ltd, RCG CBD Pty Ltd, Bluemine Pty Ltd, Diamondwish Pty Ltd and Rackforce Pty Ltd (all in liq) [2021] NSWSC 966
James v Hill [2004] NSWCA 301
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8

Kation Pty Ltd v Lamru Pty Ltd [2009] NSWCA 145; (2009) 257 ALR 336
Lamshed v Lamshed (1963) 109 CLR 440; [1963] HCA 60
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Category:	Principal judgment
Parties:	D Capital 2 Pty Ltd (Plaintiff) Elisa Kim Western (First Defendant / First Cross-Defendant) Kane Bruce Parker (Second Defendant / First Cross-Claimant) Andrew Tuck Whye Hew (Third Defendant / Second Cross-Claimant) Daniel Young (Fourth Defendant / Third Cross-Claimant) Joanne Therese Hopwood (Fifth Defendant / Fourth Cross-Claimant) MALK Property Pty Ltd (Sixth Defendant / Fifth Cross-Claimant) Jason Luke Szepes (Seventh Defendant / Sixth Cross-Claimant) Daniel Gordon O'Connell (Eighth Defendant / Seventh Cross-Claimant) Zaher Tayyar (Nineth Defendant) Step by Step Conveyancing Pty Ltd (Tenth Defendant / Second Cross-Defendant) Wayne Danckert (Third Cross-Defendant)
Representation:	Counsel: J C Kelly SC / G W Stapleton (Plaintiff and Third Cross-Defendant) D A Allen (First and Eighth Defendants) M R Pesman SC / A D Crossland (Second to Seventh and Nineth Defendants) J V Gooley (Tenth Defendant)

	Solicitors: HFW Australia (Plaintiff and Third Cross-Defendant) Avondale Lawyers (First and Eighth Defendants) Watson Law (Second to Seventh and Nineth Defendants) Maccallum Lawyers (Tenth Defendant)
File Number(s):	2021/257791

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JUDGMENT

Introduction

1 **HIS HONOUR**: The proceedings involve various claims by the plaintiff (**DC2**) including a claim for specific performance against 10 defendants including nine vendors (**vendors**), which vendors agreed to sell their unit (**units**) in a strata title block at 24 Campbell Crescent, Terrigal (**block**) pursuant to contracts for sale dated 26 February 2021 (**contracts**).

2 The contracts had been the subject of a number of notices to complete, but relevantly notices to complete issued on 12 July 2021 (**second notices to complete**) nominating a date for completion being 27 July 2021 (**specified completion date**).

3 In the events which occurred, completion did not take place on the specified completion date and all 10 contracts were purportedly terminated pursuant to notices of termination dated 2 August 2021 (**notices of termination**).

4 Subsequently, the vendors sold the units to another developer Blue Sox Investments No 4 Pty Ltd (**Blue Sox**) pursuant to further contracts which were exchanged on 9 September 2021 (**Blue Sox contracts**) and to be settled on 22 September 2022.

5 Numerous issues were pleaded and contested, principally on the claims of DC2 for specific performance of the contracts and relating to the validity of the notices to complete, issues of whether the vendors had waived essentiality of time or elected to affirm the contracts and issues going to the validity of termination of the contracts.

6 A particular issue arose regarding the effect of s 49 *Property and Stock Agents Act 2002* (NSW) (**PSA Act**) on the contracts.

Parties and representation

7 DC2 was incorporated on 22 September 2020, and Wayne Danckert (**Mr Danckert**) is the sole director and shareholder of DC2.

8 Mr Danckert is a real estate agent and also a sole director and shareholder of D Capital Pty Ltd (**DC**) the registered proprietor of a 9 industrial units at Walker Street South Windsor: CB 68–69[10] (**Windsor Property**)

9 DC2 and Mr Danckert are represented by Mr Kelly SC and Mr Stapleton instructed by HFW Australia.

10 The first defendant (**Ms Western**) is a licensed conveyancer and the director and 50% shareholder of the tenth defendant, Step by Step Conveyancing Pty Ltd (**SBS**). Ms Western is the registered proprietor of units 1 and 10 at the block.

11 The second to ninth defendants are respectively the owners of units 2 to 9 at the block (**other vendors**). The other vendors are essentially represented in two groups.

12 The first group is the eighth defendant (**Mr O'Connell**) who with Ms Western (**first group**) are represented by Mr Allen instructed by Avondale Lawyers.

13 The second group are the second to seventh and ninth defendants being respectively Mr Parker, Mr Hew, Mr Young, Ms Hopwood, MALK Property Pty Ltd (**MALK**), Mr Szepes and Mr Tayyar (**second group**) represented by Mr Pesman SC and Mr Crossland instructed by Watson Law Pty Ltd.

14 SBS is represented by Mr Gooley instructed by Maccallum Lawyers.

Summary of outcome

15 In the result I have found against DC2 in respect of the issues arising out of its claim for specific performance and in particular I determine that:

(1) the contracts were not illegal or void or voidable by reason of contravention of s 49 PSA Act;

(2) the second notices to complete were not invalid;

(3) DC2 was not ready willing and able to complete the contracts in accordance with their terms on 27 July 2021;

(4) the vendors did not waive the essentiality of time nor elect to affirm the contracts;

(5) the notices of termination were valid;

(6) Mr Danckert is obliged to repay the commission received by him as sought by the other vendors;

(7) if the contracts were not validly terminated, arguably DC2 has demonstrated it may currently be in a position to perform the contracts; and

(8) nonetheless, even if the contracts were not validly terminated, I decline to grant specific performance of the contracts on the basis of DC2's unclean hands, notwithstanding a proposal of DC2 that specific performance be on terms that a copy of the judgment be provided to the Commissioner for Fair Trading, Department of Finance, Services and Innovation (**Secretary**);

(9) if I am incorrect in declining specific performance outright on the basis of unclean hands, I would condition relief by imposing the terms proffered by DC2 that a copy of the judgment be provided to the Secretary; and

(10) if I am incorrect that unclean hands precludes specific performance in the circumstances of this case, I would not decline to grant specific performance on the basis of delay.

16 Certain other claims by DC2 against Ms Western and SBS have been abandoned. In light of the findings that I have made, as I understand it, it is agreed that other claims by DC2 against Ms Western and SBS fall away and the balance of claims by the other vendors against Ms Western, SBS, DC2 and Mr Danckert fall away.

17 However, in the event that I am mistaken about that, in the process of the parties bringing in short minutes of order to give effect to my reasons for judgment, they should alert me to any claims that they say still need to be determined. In that event, I reserve consideration of any such claims.

Submissions

18 The parties provided written submissions both prior to the hearing and on the final day of hearing as well as their counsel addressing orally on the final day of the hearing.

19 I will make reference to the oral submissions by transcript page reference. For convenience, I will refer to the various written submission documents as follows:

(1) DC2's opening written submissions (**POS**) and DC2's closing written submissions (**PCS**);

(2) first group's opening written submissions (**G1OS**) and first group's closing written submissions (**G1CS**);

(3) second group's opening written submissions (**G2OS**) and second group's closing written submissions (**G2CS**); and

(4) SBS's opening written submissions (**SBSOS**) and SBS's closing written submissions (**SBSCS**).

Pleadings

20 The proceedings were commenced by a statement of claim filed on 9 September 2021.

21 There have been a number of amendments to the pleadings. The hearing commenced with the then current form of pleading by DC2 being a further amended statement of claim filed on 3 June 2022.

22 There was dispute on the opening days of the hearing arising from the fact that DC2 whilst pleading against both Ms Western and SBS claims of various duties, breaches of such duties and alleged loss suffered, had only sought damages or equitable compensation against Ms Western and not against SBS.

23 The dispute was ultimately resolved by my granting leave to DC2 to file a second further amended statement of claim (**main claim**) on the day the hearing, 13 July 2021 to which SBS sought to raise a number of fresh defences essentially indicating that DC2 was disabled from making claims for damages on the basis that it would be contrary to public policy to permit DC2 to sue on a retainer agreement made in breach (allegedly) of s 18 of the *Australian Consumer Law* (NSW) (**ACL**) or ss 249B and 249F *Crimes Act 1900* (NSW) and further or alternatively that DC2 was not entitled to equitable compensation as a consequence of the application of the doctrine of unclean hands.

24 The amended defence to the main claim was filed on 14 July 2021 and DC2 filed a reply to that amended defence on the same day.

Relief sought on the main claim

25 The relief sought by DC2 on the main claim included claims for:

(1) declaratory relief to the effect that: the second notices to complete were invalid; the vendors had waived a stipulation that the specified completion date was the time of the essence of completion of the contracts; the notices of termination were invalid; DC2 was entitled to relief against forfeiture of its right to complete the contracts; the vendors are estopped from relying upon the notices of termination; the vendors were not ready, willing and able to complete the contracts and/or did not themselves tender performance of the contracts at the specified time for completion; that it was not open to the vendors to rely upon DC2's

failure to complete on the specified date for completion as a breach entitling them to terminate the contracts; and that the notices of termination were invalid or ineffective to bring the contracts to an end;

(2) declaratory relief that the ninth defendant (**Mr Tayyar**) was not ready, willing and able to complete his contract and/or did not tender performance of his contract on the specified date for completion;

(3) specific performance compelling the vendors to complete the contracts;

(4) alternative orders for damages or equitable compensation against the vendors, damages pursuant to s 26 ACL, and in the event that specific performance was refused orders pursuant to s 55(2A) *Conveyancing Act 1919* (NSW) that the vendors will pay to DC2 with interest the deposits paid to them under the contracts;

(5) relief against Ms Western including: damages or alternatively equitable compensation; damages pursuant to s 26 ACL; repayment of the deposit paid to Ms Western to purchase units 1 and 10; and

(6) relief against SBS for damages or alternatively equitable compensation.

26 The various claims for relief were based upon pleaded matters which comprise approximately 25 pages of pleadings.

27 Essentially the pleaded matters were in respect of: the contracts, the second notices to complete and the notices of termination; allegations against Ms Western in respect of breach of an alleged collateral contract entered into on or about 25 February 2021 (**collateral contract**), breach of a fiduciary duty and a duty of care, breach of fiduciary duties and the duty of care said to be owed by SBS, allegations of alleged misleading and deceptive conduct by the vendors, claims of estoppel against the vendors and claims that they were not ready, willing or able to complete their contracts.

28 The main claim included a claim that the retainer with Coventry Conveyancing Services (**CCS**) was a sham and that Ms Western had made representation to Mr Danckert that she or the vendors would permit an extension of time for DC2 to complete the contracts if it was unable to obtain the necessary finance by the time of completion (**extension of time for finance representation**).

Abandoned claims

29 DC2 in its final written submissions expressly abandoned the claims in [38], [39]–[41], [47], [93]–[110] and [102]–[114] of the main claim: PCS [112]. The abandoned claims include claims based on:

(1) the allegation that Ms Western would act for DC2 ([38]) and that the retainer of CCS was a sham: [47];

(2) that Ms Western would act on the presales: [38];

(3) the extension of time for finance representation: [38];

(4) that Ms Western's representations induced Mr Danckert to cause DC2 to agree to Jogat's nomination: [40];

(5) Ms Western agreed with DC2 for the contracts be sold subject to existing tenancies rather than be subject to vacant possession: [41];

(6) the claim for relief against forfeiture: [93]-[101]; and

(7) the claim of alleged personal liability of Ms Western for breach of the collateral contract: [102]-[114].

30 I note that the allegation in [38A] is said to be based on the allegation in [38] which is now abandoned. The allegations in [38A] being that Ms Western was the agent of the other vendors and was aware that Mr Danckert was a shareholder and director of DC2 and had actual or ostensible authority to give the informed consent to Mr Danckert obtaining an interest in the units through DC2 and did give such consent.

31 It seems to me that the allegation in [38A] is also impliedly abandoned.

32 DC2 expressly accepts that the evidence of Ms Western and Ms Pocknall in cross examination is sufficient to prove that the retainer of CCS was beset with personal difficulties on the part of Ms Pocknall, but it was not a sham: PCS [112].

33 The first group, second group and SBS filed separate defences to the main claim.

34 The first group's defences: disputed various allegations of fact; asserted that the scope and terms of the alleged agency of Ms Western was not materially pleaded; disputed that Ms Western owed any fiduciary duty in light of the alleged pleading that SBS was a fiduciary; asserted that DC2 knew the intent and purpose of the second notices to complete; claimed that the asserted waiver of time of the essence was a fallacy and in any event was not applicable; disputed entitlement to relief against forfeiture; disputed that the collateral contract arose; denied breaches of duties; denied that DC2 was

misled; denied the allegations of estoppel; and asserted that the vendors were ready and willing to complete the contracts.

35 In summary the first group alleged (CB 66.30 [59]) that DC2: (a) never held unconditional funding funds or any other means of completing the contracts, (b) failed to provide the draft settlement figures to the vendors, (c) did not sign in or accept the invitation to the Property Exchange Australia (**PEXA**) settlement and (d) failed to complete the contracts.

36 The first group further alleged (CB 66.30 [59]) that Mr Danckert was conflicted in acting as agent for the vendors whilst being the sole director and shareholder of DC2 and that he and DC2 were engaged in obtaining a beneficial interest in the block for DC2 contrary to the PSA Act.

37 The second group's defences disputed various allegations of fact and pleaded that Mr Danckert had breached s 49(1) PSA Act with the consequence that the contracts (and a number of prior documents arising out of Put and Call Option Deeds (**Option Deeds** see below)) were or are void for each illegality and that DC2 is not entitled to relief under the contracts or any relief arising from the breach or purported breach of the contracts.

38 SBS's defences disputed various allegations of fact and pleaded that: representations alleged to have been made by Ms Western (if found to be made) were limited and did not extend time for completion beyond the specified completion date; if it is found that SBS had breached the alleged duty of care that the claims were apportionable claims within the meaning of Pt 4 of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) and consequently were limited to an amount reflecting SBS's responsibility for the damage; DC2 was a concurrent wrongdoer, and DC2 had engaged in contributory negligence and that any damage should be reduced having regard to SBS's share responsibility for the damage pursuant to s 9 *Law Reform (Miscellaneous Provision) Act 1965* (NSW). SBS also disputed causation (relying upon ss 5D and 5O Civil Liability Act) and claimed that DC2 had failed to take reasonable steps to mitigate its loss.

39 In light of the abandonment of the representations, this part of SBS's defences does not need to be considered.

40 I will refer to the particular issues arising on the pleadings below.

41 The second group filed a cross-claim on 21 November 2021.

42 The current form of cross-claim is a further amended cross-claim filed on 26 May 2022 (**cross-claim**).

43 Ms Western, SBS, Mr Danckert and DC2 are respectively the first to fourth cross-defendants to the cross-claim.

Relief sought on the main claim

44 The cross-claim seeks various relief against:

(a) Ms Western and SBS for damages, damages under s 236 ACL, equitable compensation and an order for the taking of an account of profits;

(b) Mr Danckert for specific performance (or alternatively repayment of sums paid pursuant to the contracts), and orders for taking of an account of profits and in the alternative damages and reimbursement of agency fees and alternatively damages under s 236 ACL; and

(c) DC2 for an order declaring the contracts void pursuant to s 239 ACL, and in the alternative orders for refusing to order the performance of the contracts and alternatively damages under s 236 ACL.

45 Other ancillary relief (interest and costs) is sought against all the cross-defendants.

46 The various claims for relief were based upon pleaded events which comprise approximately 15 pages of pleadings.

47 Essentially the pleaded matters were in respect of: the contracts, and a number of prior documents arising out of the Option Deeds; duties said to be owed by SBS or Ms Western; failure by SBS or Ms Western to issue a notice to complete on 23 April 2021; alleged misleading and deceptive conduct on the part of Ms Western representing that she had issued a notice to complete; withdrawal by Ms Western or SBS of notices to complete dated 3 June 2021 (**first notices to complete**); the second notices to complete in the event that the claims of DC2 were upheld; alleged breach by Ms Western and SBS of fiduciary obligations; alleged liability of Mr Danckert to reimburse fees; alleged misleading and deceptive conduct by all the cross-defendants arising from

failure to disclose that Mr Danckert was the sole director and shareholder of DC2 (**relevant ownership knowledge**); alleged breaches of fiduciary duty owed by Mr Danckert to the second group as their agent in respect of the contracts.

Issues

48 At a pre-trial directions hearing I directed that the parties prepare an agreed statement of facts and issues.

49 At the request of the parties I was asked to consider dealing separately with questions regarding quantification of any loss or damage and or equitable compensation and account of profits arising from the Court's determination of liability. On 17 June 2022, I make an order for separate determination in the following terms:

> "1 Order pursuant to UCPR 28.2 that all questions of liability in relation to all claims for relief in the Further Amended Statement of Claim and Further Amended Statement of First Cross-claim be heard and determined by the trial judge separately at the hearing listed to commence on Monday 11 July 2022, such hearing being in advance of any hearing of the questions in Order 2.
>
> 2 Order pursuant to UCPR 28.2 that the trial Judge, separately determine if necessary, at a later time from the hearing listed to commence on Monday 11 July 202, the quantification of any loss or damage and or equitable compensation and account of profits arising from the Court's determination of liability in relation to:
>
> a. Paragraphs 7, 8, 9 and 10 of the Relief Claimed in the Further Amended Statement of Claim.
>
> b. Paragraphs 1-4, 6, 7 and 10 of the Relief Claimed in the Further Amended Statement of Cross-claim."

50 The agreed statement of facts and issues was prepared and provided on 28 June 2022 setting out 13 agreed facts.

51 More particularly the agreed statement of issues and facts specified 79 issues for determination.

52 I noted at the commencement of the hearing that the list of (79) issues was somewhat "daunting" and I gave encouragement to the parties to prepare a revised list of issues.

Agreed issues

53 On the final day of the hearing the parties provided to me a revised list of issues being an "Agreed Statement of Issues". There are 43 listed issues. I annex this document to these reasons for judgment as Annexure A.

54 The Agreed Statement of Issues (**agreed issues**) characterises the issues in the proceedings by reference to the following categories:

(1) "A" - issues arising out of the claim for specific performance (issues 1-11);

(2) "B" - issues arising out of the main claim by DC2 :

(a) against Ms Western and SBS for breach of fiduciary and other duties (issues 12-17);

(b) regarding the other claims (issues 18 & 19); and

(c) regarding the defences (issue 20);

(3) "C" - issues arising out of the second group's cross-claim against:

(a) SBS (issues 21-31);

(b) Ms Western (issues 32-33);

(c) Mr Danckert alone (issue 34); and

(d) Mr Danckert and DC2 (issues 35-43).

55 As will appear below it became obvious that if the issues arising out of the claim for specific performance did not succeed many of the other issues fall away.

Issues on the specific performance claim

56 In the outcome of the matter, having regard to my findings on the facts, the principal issues that arise for determination are the issues which I have summarised below but should be understood by reference to the wording in the agreed issues:

(1) Were the second notices to complete invalid by reason of their terms (issue 1)?

(2) Were the vendors not ready and willing and able to complete on the specified completion date (issue 2)?

(3) Did the vendors waive the essentiality of time or elect to affirm the contracts (issue 3)?

(4) Were the notices of termination invalid by reason of the matters in issues 1-3 (issue 4)?

(5) Were the contracts validly terminated (issue 5)?

(6) Has DC2 ever been or now ready, willing and able to complete the contracts (issue 6)?

(7) Are the contracts illegal, void or voidable at the option of the vendors by reason of contravention of s 49 PSA Act (issue 7)?

(8) Are earlier documents which predate the contracts being Nomination Deeds (see below), Notices of Exercise of Call Options (**Calls**) and the contracts made in contravention of s 49 PSA Act (issue 8)?

(9) Are the Nomination Deeds, Calls and contracts or any of them enforceable by DC2, even if Mr Danckert breached s 49 PSA Act (issue 9)?

(10) If the contracts are enforceable should the Court decline to grant specific performance of the contracts (issue 10)?

(11) Should the Court grant specific performance of the contracts on terms or award damages in lieu of specific performance (issue 11)?

Clarifying what was raised by illegality and issues 7-10

57 The framing of issue 7 by the parties was in the following form:

> "If DC2 is now ready and willing and able to complete the Contracts, whether any contract whereby a person obtains a beneficial interest in property in contravention of s. 49 of the Property and Stock Agents Act 2002 (**Act**), is illegal, void and of no legal effect or voidable at the option of the other contracting party"

58 Part of the difficulty with the above framing of the issue in that way and the submissions is that there are at least two general principles regarding illegality that may preclude relief.

59 One principle is that a contract which is entered into with the object of committing an illegal act is unenforceable (**Illegality – intent to commit an illegal act**). A second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute (**Illegality – effect of statute**): see e.g. *St John Shipping Corporation v Joseph Rank Shipping Ltd* [1957] 1 QB 267 per Devlin J at 283.

60 The types of illegality in this respect are concisely distinguished by Devlin J in *St John Shipping Corporation* at 283:

> "There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party

> who is proved to have it. ... The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable."

61 The second form of illegality, “Illegality – effect of the statute”, was clearly the subject of submissions. It is less clear to me that “Illegality – intent to commit an illegal act” was directly engaged with as between the second group and DC2.

62 Issue 8 seemingly in its terms sought to extend the illegality question under issue 7 to the Nomination Deeds and Calls. Issue 9 (despite its wording), when regard is had to the submissions, raised the defence of unclean hands. Issue 10 raised other equitable discretionary considerations as defences to specific performance, but principally the question of the effects of delay.

63 The G2CS submissions of Mr Pesman SC (G2CS [20], [46]-[47], [51]) that Mr Danckert breached s 49 on exchange of the contracts on 26 February 2021 and that that breach renders the contracts unenforceable in the case of DC2 arguably raised the issue of “Illegality – intent to commit an illegal act”.

64 I say ‘arguably’ because one of the ways that Mr Pesman SC says enforcement of the contracts is affected is by reference to the third category of cases mentioned by Gibbs ACJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413, namely that a contract even if lawful on its face, may be unenforceable if it was made in order to effect a purpose which the statute renders unlawful: G2CS [20], [46]-[47].

65 Mr Kelly SC did in submissions mention the question of intent or “mens rea”: PCS [93]. However, on reviewing the submissions further, it is not clear to me that DC2 actually engaged on the issue of whether the contract is illegal because DC2 or Mr Danckert intended to commit an illegal act.

66 Because “Illegality – effect of the statute” was clearly raised and argued I will deal with that issue.

67 Lest a party considers that “Illegality – intent to commit an illegal act” was not adequately raised or that inadequate opportunity was given to address it, I will give the parties an opportunity to firstly address the question of whether this form of illegality is actually raised on the pleadings or as part of agreed issue 7 and potentially to provide further submissions on the point should they wish to do so. However, it may be that in light of my findings that there is no need to pursue this matter.

Evidence

68 DC2 read affidavits from Mr Danckert (CB tab 10 and tab 13) and Giuseppina Mammoliti (referred to in some of the evidence as Pina) (**Ms Mammoliti**): CB tabs 11 and 12.

69 The second group read affidavits from each of the second to fifth defendants, the seventh and ninth defendants and in the case of the sixth defendant an affidavit by Kevin Lee (**Dr Lee**): CB tabs 14–20.

70 The first group read affidavits from each of Ms Western and Mr O'Connell and Ashley Tracy Oakes (**Ms Oakes**), a licensed conveyancer: CB tabs 21–23.

71 SBS read an affidavit from Lianne Pocknall (**Ms Pocknall**): CB tab 24.

72 The affidavit of Mr Danckert sworn on 25 May 2022, although in its terms in paragraph 3 is said to be a response to the affidavit of Ms Western dated 4 March 2022, was in fact a response to an affidavit of Ms Western which was at that stage unsworn but had been served. The affidavit of Ms Western was eventually sworn on 26 May 2022. Accordingly whilst there is a seeming disconnect between Mr Danckert’s reply affidavit of 25 May 2022 to the affidavit of Ms Western sworn 26 May 2022, it is explained by what I have just indicated above, following a clarifying discussion with Mr Stapleton of counsel for Mr Danckert: T 75, 77.

Events

73 The following facts, drawn from the affidavit, documentary and narrative evidence are, except as I otherwise indicate, either uncontested or not seriously in dispute.

2015-2017

74 From about 2015, Mr Danckert traded as a real estate agent with his wife under the business name "Express Property": CB 69[11].

75 From about 2016, Mr Danckert formed a business relationship with Ms Western introducing multiple vendors of properties he had to her: CB 69[13].

76 Ms Western says she first met Mr Danckert when he delivered an exchanged contract to her office on or about 20 November 2017 for one of her clients who sold a property through his agency: CB 172[4].

77 In or around November 2017, discussions were had between the first group and second group owners regarding a collective sale of the units comprising the block: CB 174[16]. At that stage a collective purchase price of $4.1 million with a $100,000 option fee for a 12-month put and call option was discussed: CB 174[16].

2018

78 Ms Western indicates that in or about December 2017 or early January 2018, she had discussions with Mr Danckert regarding the units in the block asking him if he knew anyone who was interested in purchasing the development site to which he says he responded he was sure that he could find someone and would ask around: CB 174[17].

79 In January 2018, there were communications by text or email as between Mr Danckert and Ms Western from her to the other vendors regarding potential purchase of the block for $4.5 million: CB 174[18]–[21].

80 During February to May 2018, there were further communications regarding potential offers to purchase: CB 175[22]–[28].

Agency agreements – March/early April 2018

81 In or about March 2018 or early April agency agreements were signed between each of the vendors and Mr Danckert as agent nominating SBS as the conveyancer (**agency agreements**): CB 239–260.

82 The agency agreements for Ms Hopwood, Mr Szepes and Mr Tayyar appear to have been signed on 14 March 2018, and for Ms Western on 30 March 2018. Mr Pesman SC says the vendors each signed between 13 March and 9 April 2018. Nothing of substance turns on the actual date of signing.

83 The agency agreements were in a standard form as produced by Estate Agents Co-operative Ltd (**EAC**).

84 The appointment under the agency agreements were in the following terms:

> "In consideration of the Licensee agreeing to use the Licensee's best endeavours to sell the Property the Licensee is appointed and authorised to sell the Property on behalf of the Principal, as exclusive selling agent for the sale of the Property, for the period ("the Exclusive Agency Period") commencing on 30/03/2018 and ending at midnight on 30/04/2018 AND as non-exclusive agent for the sale of the Property for the period ("the Non-Exclusive Agency Period") commencing at the expiration of the Exclusive Agency Period and terminating upon the sale of the Property or upon termination by seven days prior written notice given by the Principal or the Licensee to the other. Where the Exclusive Agency Period exceeds 90 days, the Principal may terminate the Agreement (without penalty) by giving 30 days notice in writing to the Licensee at any time after the end of the first 90 days of the term except where the agency agreement is in respect of the sale of residential property where the contract for sale provides for the construction by the Principal of a dwelling on the land." (e.g. CB 240, 2724.207)

85 The remuneration provisions contained in section C of part 2 of the agency agreement for Ms Western for unit 1 is as follows:

> "The Licensee's GST inclusive remuneration shall be calculated on the GST inclusive selling price in the following way:
>
> … Flat Fee … $6,750.00 NIL As Agreed …" (CB 240, 269, 2724.207)

86 The remuneration provisions contained in section C of part 2 of the agency agreements for Ms Western for unit 10 (CB 256) and for the other vendors (Mr Hew CB 243, 266, 280; Mr Young CB 245, 271; MALK CB 249, 274; Mr Tayyar CB 254, 260; Ms Hopwood CB 263; Mr Parker CB 277) is as follows:

> "The Licensee's GST inclusive remuneration shall be calculated on the GST inclusive selling price in the following way:
>
> … Flat Fee … $6,750.00 …" (CB 2724.207)

87 The detail for Ms Szepes' agency agreement is illegible: CB 258.

88 Part 3 of the agency agreements set out a number of terms and conditions, including provisions regarding remuneration as follows:

> "**3.1 Remuneration** - The Licensee shall be entitled to the remuneration set out in Item C of the Particulars ("the Remuneration") in the following circumstances (whether or not the Licensee is the effective cause of sale):
>
> (a) if during the Exclusive Agency Period the Principal enters into a contract (which includes by way of an option being exercised) for the sale of the Property, or of an interest in the property, to any person (including a co-owner), whether or not that person was introduced to the Principal or to the Property by the Licensee.
>
> (b) if the Principal is a corporation - then in addition, if during the Exclusive Agency Period any person acquires by allotment, or enters into a contract (which includes by way of exercise of an option) to acquire by allotment or to purchase (either alone or jointly with another or others), one or more shares, or an interest in one or more shares, in the capital of the Principal, whether or not that person was introduced to the Principal or to the Property by the Licensee.
>
> (c) if at any time during the Non-exclusive Agency Period a person who has been effectively introduced to the Principal or to the Property by the Licensee during either the Exclusive Agency Period or the Non-exclusive Agency Period, or another person introduced to the Principal or to the Property by such a person, enters into a contract (which includes by way of exercise of an option) to purchase (either alone or jointly with another or others) the Property or an interest in the Property, or
>
> (d) if the Principal is a corporation - then in addition, if at any time during the Non-exclusive Agency Period a person who has been effectively introduced to the Principal or to the Property by the Licensee during either the Exclusive Agency Period or the Non-exclusive Agency Period, or another person introduced to the Principal or to the Property by such a person, acquires by allotment, or enters into a contract (which includes by way of exercise of an option) to acquire by allotment or to purchase (either alone or jointly with another or others) one or more shares, or an interest in one or more shares, in the capital of the Principal.
>
> **3.2 When Remuneration is Due and Payable** - The Remuneration is due and payable by the Principal to the Licensee:
>
> (a) Immediately upon completion of the sale of the Property; or
>
> (b) The Principal and the Purchaser entering into a mutual agreement (whether written or verbal) to terminate or rescind the contract or otherwise not proceed with the sale; or
>
> (c) If the sale is not completed owing to the default of the Principal after the parties have entered into a binding contract; or
>
> (d) Upon the termination of the contract by the Principal as a result of the default of the Purchaser and the Remuneration is the same or less

than the amount of the deposit which is forfeited to the Principal." (CB 2724.208)

Jogat incorporated – 9 April 2018

89 On 9 April 2018 Jogat Pty Ltd was incorporated. Gameli Tamakloe (**Mr Tamakloe**) is a director and one of two shareholders of Jogat, the other shareholder being John Obeya: CB 2456–2458.

Client service agreements

90 On 10 April 2018 ten contracts for sale (**Terrigal JRB contracts**) were issued to Regency Lawyers with Terrigal JRB Pty Ltd atf Terrlgal JRB Trust (**Terrigal JRB**) noted as the Purchaser for a sale price or $450,000.00 per unit: CB 175[25].

91 On or about 10 and 11 April 2018, Ms Western prepared and sent to the other vendors a package of documents (see, for example, CB 320-332) being: (a) an introductory letter; (b) a property questionnaire; (c) an inclusions list; (d) an initial tax invoice; (e) an estimated account; and (f) a document headed "Client Service Agreement" (**client service agreements**): G2OS [24(c)].

92 Mr Parker (CB 307-310), Mr Hew (CB 316-319), Mr Young (CB 329-332), MALK (CB 298-301) and Mr Szepes (CB 281-284) did not sign and return the client service agreements to Ms Western, such signature and return being a condition of acceptance of the offer constituted by the transmission to the cross-claimants of those documents (p 3 of each Agreement). Mr Tayyar (CB 285-288), Ms Hopwood (CB 289-292) signed the client service agreement: G2OS [24(i)].

93 Numerous communications took place between SBS, Regency Lawyers and Mr Danckert in relation to amendments required to the Terrigal JRB contracts, arranging access to the units for Terrigal JRB to view and chasing for exchange of contracts to take place: CB 175[26].

94 In around mid to late May 2018, negotiations with Terrigal JRB broke down and the Terrigal JRB contracts were not exchanged: CB 175[27].

95 In approximately May 2018 Ms Mammoliti was engaged by Mr Danckert to assist with respect to finance for purchase of his personal property: CB 89[7].

96 On or after 22 May 2018, Mr Danckert made Ms Western aware that Jogat Pty Ltd as trustee for the Jogat Investment Trust (**Jogat**): CB 175[29].

97 In about June 2018, Mr Danckert caused Express Property Sales Pty Ltd (**EPS**) to be incorporated, for the purpose of his trading as a real estate agent: CB 69[12]. Nonetheless, Mr Danckert holds an individual real estate license: CB 69[12], 226.

98 On 11 July 2018, Jogat's solicitor Phil Weldon from SCA Legal prepared draft Put and Call Option Deeds: CB 176[30].

99 There were negotiations regarding the deeds.

100 In or about August 2018 Mr Danckert says he became aware from conversations with Ms Western that she was negotiating on behalf of herself and the other owners of the properties (i.e. the vendors) to sell the 10 units in "one-line" to a developer: CB 69[14].

101 He says at that time he had discussions with Mr Tamakloe regarding development opportunities: CB 69[15]–[17].

102 He then shortly after had discussions with Ms Western who he says called her to indicate that the vendors had agreed to a price of $4.5 million: CB 70[18]–[19].

103 Shortly after that Mr Tamakloe instructed Mr Weldon: CB 70[19], 176[30].

Put and Call Option Deeds – August 2018

104 On 21 August 2018, Put and Call Option Deeds were entered into between each of the owners in the first and second group and Jogat (the Option Deeds noted above) whereby the vendors (described as owners) each agreed to grant to Jogat a call option to require the owner to sell the block on certain terms and conditions and Jogat agreed to grant to the owners a put option to require it to purchase the block from the owner on certain terms and conditions: CB 176[32], 335–432.

105 The Option Deeds contained provisions regarding interdependence of the documents in cl 8.3 as follows:

> "8.3 **Interdependence of documents**

The Owner and the Buyer agree that:

(a) this Deed is interdependent with each and all Other Put and Call Option Deeds; and

(b) the Exchanged Contract will be interdependent with each and all Exchanged Other Contracts

and as a consequence:

(c) a breach of an Other Put and Call Option Deed shall be deemed to be a breach of this Deed;

(d) a breach of an Exchanged Other Contract shall be deemed to be a breach of the Exchanged Contract;

(e) the rescission or termination of an Other Put and Call Option Deed shall entitle the Buyer to terminate this Deed without any liability to the Owner;

(f) the rescission or termination of an Exchanged Other Contract shall entitle the Buyer to terminate the Exchanged Contract without any liability to the Owner;

(g) the exercise of the Put Option under an Other Put and Call Option Deed is conditional upon all Other Owners exercising the put option under their Other Put and Call Option Deeds at the same time, and

(h) completion of the Exchanged Contract is conditional upon the simultaneous completion of all Exchanged Other Contracts." (CB 341)

106 There were provisions in relation to the owners' conveyancer's authority to act in cl 9, as follows:

"9.1 **General**

The Owner acknowledges that the Owner's Conveyancer has full authority to act on behalf of the Owner in relation to the Deed and the Contract.

9.2 **Dealings through Owner's Conveyancer**

The Owner shall ensure that all communications and dealings with the Buyer under the Deed or the Contract is managed through the Owner's Conveyancer and that the Owner's Conveyancer is authorised to give any permissions or received any notices required to be requested or given under this Deed." (CB 341)

107 Further, there were provisions addressing dealings by owners in cl 11, as follows:

"11.1 **Dealing by Owner**

Before the Call Option End Date or earlier rescission or termination of this Deed, the Owner must not deal with its interest in the Property in any way except in accordance with this Deed, without the Buyer's prior written consent. This prohibition includes, but is not limited to, any of the following dealings:

(a) the sale of the freehold;

(b) a lease,

(c) licence or parting with possession;

(d) granting a security interest, mortgage, charge or pledge;

(e) increasing any amount of money secured over an interest in the Property on the date of this Deed whether by a security interest, mortgage, charge or pledge;

(f) granting of any other interest such as an easement, positive covenant or restriction on title; or

(g) any conversion, consolidation or subdivision." (CB 343)

108 Under the Option Deeds "Contract" was defined to mean "the contract for sale of the Property contained in **Annexure A**, subject to any variation required or permitted by this Deed": cl 16.1(i): CB 527.

109 Each Contract for the units in Annexure A were in the standard form of contract for the sale and purchase of land, Law Society and Real Estate Institute 2017 edition (**2017 edition**): CB 538.

Various payments and a commission refund

110 On 22 August 2018, a call option fee and security fee was paid by Ms Western to the trust account of EPS: CB 176[32]. The exercise of the option was to occur by 3 October 2019. However, a development consent relating to the block was delayed and a further extension was allowable under the deed for a year to 3 October 2020: CB 176[32].

111 On 22 August 2018 Mr Danckert paid his commission of $13,500 (for her two units) back to Ms Western by deposit to her daughter's bank account: CB 71[26], 433.

112 Between 22 and 24 August 2018 Jogat deposited $450,000 into the EPS Trust Account (being a 10% deposit due under the deed of $45,000 per unit) and Mr Danckert dispersed the deposits under instructions from Ms Western less a commission payable to Mr Danckert of 1.5% of the price being $6,750.00 including GST: CB 70[23].

113 Further, on or about 22–24 August 2018 Mr Danckert says he had a conversation with Ms Western in words to the following effect:

> "Her: Because I have helped you get the sale I want you to pay me back the commission I owe you for my units. I want you to pay the money back to my daughter's account so that the other vendors have no trace of it.
>
> Me: It makes no difference to me. Ok." (CB 71 [25])

DA application - 2019

114 In or about December 2019 Jogat applied to the Central Coast Council for approval to demolish the properties and construct 13 new apartments on the land (**DA application**): CB 71[27].

Purchase of Windsor Property - 2020

115 On or about 8 May 2020, Ms Western was engaged by Mr Danckert to act on his behalf as director of DC and for DC in relation to the purchase of the Windsor Property which contracts were exchanged and settlement was due to take place on 15 October 2020: CB 172[5]. Ms Western states that settlement was delayed due to DC having issues in obtaining the necessary finance to complete the purchase and a Notice to Complete was issued on 28 October 2020 requiring completion by 16 November 2020: CB 172[5].

116 By about September 2020 DC had acquired the Windsor Property. The purchase of which settled on 30 November 2020 and Ms Western acted as conveyancer for DC: CB 71[28]. Mr Danckert incorporated DC2 to buy another property in Windsor: CB 71[30].

Variation Deeds – October 2020

117 By October 2020 the DA application had not been approved and Jogat was not in a position to exercise its option under the Option Deeds: CB 71[31].

118 On (it seems) 8 October 2020 (CB 478) variation deeds for the Option Deeds (**Variation Deeds**) (CB 442-491) were entered into extending the option period for each of the Option Deeds to 28 February 2021 on the basis that an additional $20,000 was paid for each unit: CB 71[32], 176[33]. Mr Weldon was at this stage still representing Jogat although now practising with a firm Norwest Family Law: CB 176[33].

119 In November 2020 Ms Mammoliti assisted Mr Danckert to purchase the Windsor Property: CB 89-90[8]-[9].

120 Eventually settlement in respect of the Windsor Property took place on 30 November 2020: CB 173[6].

Mr Danckert prepares to take over the contracts – November 2020

121 In late November 2020 Mr Danckert had a conversation with Mr Tamakloe. He says Mr Tamakloe informed him that he would not be able to raise funds to complete the purchase of the block and at this stage Mr Danckert decided to use DC2 to buy the block: CB 72[35]–[38].

122 On or about 15 December 2020, a development application in respect of the block was obtained: CB 176[34].

123 In or around "November/January 2020" [sic] or "maybe later but before the plaintiff exchanged contracts" Mr Danckert says he had a conversation with Ms Western in words to the following effect:

> "Me: Should I tell the vendors that I'm behind the purchases?
>
> Her: No, don't tell them
>
> Me: Don't you think I should?
>
> Her: They don't need to know" (CB 110[6])

124 In early February 2021 at around the time he was discussing with Ms Western how to arrange for DC2 to exchange contracts, Mr Danckert says he had a conversation with her in words to the following effect:

> "Me: Daniel Young has been calling me. Would you like me to tell the other owners I am the buyer?
>
> Her: No. Don't tell Daniel anything." (CB 111[7])

125 Mr Danckert states that in relation to his conversations with Ms Western (CB 110–111[6]-[7]) he did not take the issue further with her in circumstances where he was aware that she was representing the vendors and she consented to DC2 becoming the purchaser and understood that he was the sole director of DC2. He states that "So far as I was concerned, Ms Western had consented to the transaction on behalf of her clients": CB 111[8].

126 Mr Danckert states that after his conversation with Ms Western (CB 110[6]) "as requested by Ms Western as the owners' conveyancer I did not solicit any communication with the other owners until 28 July and 4 August 2021": CB

111[9]. However, Mr Danckert accepts that from time to time he did take telephone calls from Mr Young: CB 111[9].

127 In early January 2021, Mr Danckert spoke with Ms Western. She states that he advised her that "he was considering taking over the Option as the Directors of Jogat were hopeless and were not going to be able to get the finance approval to be able to complete": CB 176[35].

128 She states that he asked him:

> "who can I get to act on my behalf" (CB 176[35]).

129 Ms Western states that she advised Mr Danckert that she was unable to act on Mr Danckert's behalf as she was already acting for all the vendors, and she suggested that Mr Danckert use and nominate CCS as "we had previously worked well with the business": CB 176[36].

130 Whilst there is some dispute about exact timing (as to whether it was mid-January or early February), more likely in or around mid January 2021 Mr Danckert instructed Ms Mammoliti of First Step Financial Solutions Pty Ltd (**FSFS**) to seek finance to complete the purchase of the properties: CB 74-75[54]; CB 89–90[8].

131 Ms Mammoliti was called by Mr Danckert, and they had a conversation to the following effect:

> "Wayne: I'm considering taking over this Terrigal property from Jogat. Would I be able to get the funding myself because the units are all rented? I won't be demolishing the units until I get all my plans approved. Will the rent assist with the mortgage?
>
> Me: Yes that would help. Send me a list of tenants and how much rental is coming from the property." (CB 91[14])

132 Ms Mammoliti then contacted a number of lenders to ascertain their interest in lending in respect of the properties, and following her preliminary investigations (CB 91[15]–[16]) contacted Mr Danckert in or around mid-January 2021 and had a conversation to the following effect:

> "Me: I've contacted a few lenders and they've said they like Terrigal, it's the next hot spot on the Coast and they'd be interested in doing the construction. They will require pre-sales for the construction facility though. However, there'll be a shortfall for the lend. I have done the calculations and you'd be short by about $900k to $1m. You could use the Windsor Property as security once it's been registered for strata.

> Wayne: They've given me a plan to proceed with the strata of the Windsor Property. It's full steam ahead to finalise everything to submit the documentation to the Land Registry Office for the registration of strata for Windsor Property. Would I be able to get the construction loan?
>
> Me: Yes, as I said, you need pre-sales in place to cover the cost if they were going to do the construction.
>
> Wayne: Ok, I'm going to proceed with taking over the Terrigal Properties from Jogat" (CB 91-92[16])

133 On 3 February 2021 Ms Mammoliti made contact with a potential lender Arch Finance Pty Ltd (**Arch Finance**) to obtain finance of approximately $4.5 million to purchase the block: CB 92[17].

134 Between 3 February 2021 and early April 2021, Mr Danckert exchanged various emails with Ms Mammoliti regarding offers from various lenders: CB 75[57].

135 In early February 2021, Ms Pocknall was asked by Ms Western if she could act for Mr Danckert in relation to the purchase of the block: CB 220[2].

136 On 11 February 2021 Mr Danckert had forwarded to Ms Western an email setting out the rental value for each of the units: CB 93[24], 666–667.

Nomination Deed and Calls – 25 February 2021

137 During late January and February 2021 right up until 25 February 2021, Mr Danckert negotiated a nomination agreement with Mr Tamakloe and negotiated the purchase of the block with Ms Western: CB 72[40].

138 On 25 February 2021, Jogat, DC2 and a number of other parties entered into a Nomination Deed (**Nomination Deed**). Jogat nominated DC2 be the nominee under the Option Deeds for the purchase of the units and to assign its right in the DA consent and plans on terms set out in the Nomination Deed (amongst other matters): CB 72[42], CB 177 [38], 697–716.

139 The Nomination Deed precluded the nominee from encumbering the 'Strata Lots' (defined as being lots 1-10: clause 1.1x: CB 700-701; i.e. the units) other than by way of a registered first mortgage where the secured sum did not exceed 65% of the valuation amount until the "second sum" is paid in full: cl 4.1a (CB 703).

140 The "Second Sum" was defined to mean the sum of $900,000 pursuant to cl 1.1w: CB 700.

141 Seemingly also on 25 February 2021 (I say “seemingly” because the documents are actually undated) DC2 pursuant to the Option Deeds made the Calls requiring the vendors to sell the units to DC2: CB 72[41], CB 176 [37], 679–696.

142 Mr Danckert says that by this time Ms Western had acted for him in relation to the number of matters, and he had a very high level of trust for her: CB 73[44].

143 Towards the very end of the negotiations about the purchase of the block Mr Danckert says he had a conversation with Ms Western at her office in words to the following effect:

> “Me: You are acting for the vendors. I should be getting a solicitor to act for me on this.
>
> Her: Don't worry. I will act for you but I will introduce you to Lianne who is a friend of mine who is a conveyancer. Her name (Coventry Conveyancing) will go on the contract so the other vendors don't know I am acting for you but I will do all of the work.
>
> Me: ok. How is that going to work?
>
> Her: I will arrange a meeting.
>
> Me: OK.” (CB 73[45])

Exchange of contracts – 26 February 2021

144 At about the same time Mr Danckert says Ms Western arranged for her to meet Ms Pocknall at Ms Western's offices which they did: CB 73[46].

145 At the meeting (which Mr Danckert says took place on 26 February 2021) his version of the conversation is as follows:

> “Her: Lianne wants you to sign an agreement.
>
> Me: Ok. [I signed that agreement].
>
> Lianne: What are you doing Wayne?
>
> Me: We are going to build 13 prestige units on a site at Terrigal.
>
> Lianne: Sounds good. Got to go. See you later.
>
> Me: Elisa, I need to speak to you. [then Lianne left]. Does she know what she is doing?
>
> Her: Don’t worry I will be doing all of the work.

Me: This is a complex settlement being ten units, ten banks. How is that going to work?

Her: I can log into her PEXA to do the settlement.

Me: OK.” (CB 73[46])

146 Mr Danckert says that immediately after the conversation but whilst he was still at her office Ms Western put all the contracts in front of him and said he should sign them and had a conversation with words to the following effect:

> “Her: Here are the contracts for you to sign.
>
> Me: OK
>
> [By this time, I had already instructed my finance broker to start seeking finance to settle on the properties and was aware I may not be able to secure financing within 6 weeks that is the usual settlement period.]
>
> Me: I am going to need time to arrange the finance. If I need an extension of time, you 're going to have to organize it for me.
>
> Her: Ok. I can do that.
>
> By that time, we had worked together on multiple property transactions worth millions of dollars. I trusted her completely. I believed she had the vendors under her control. I never doubted her to get me extra time to settle If I needed it. Based on that background and her reassurance in our conversation, I signed the contracts and gave them back to Ms Western
>
> Her: I will date them and do the exchanges later on.
>
> Me: OK.” (CB 74[47])

147 Mr Danckert says that by that time he and Ms Western had worked together on multiple property transactions worth millions of dollars and that he trusted her completely: CB 74[47].

148 Mr Danckert states that based on that background, and Ms Western's reassurance, he signed the contracts and gave them back to Ms Western who told him that she would date the contracts and do the exchanges “later on”: CB 74[47].

149 Mr Danckert states that at the time he signed the contracts the "vacant possession" and "subject to existing tenancies" boxes were not ticked: CB 74[48].

150 On 26 February 2021, the contracts were exchanged. Mr Danckert asserts that Ms Western ticked the "subject to existing tenancies" box on each contract but had not told him that she would do so and did not tell him that she had: CB 74[49].

151 Mr Danckert states that although he was aware there were existing tenancies including one for approximately another six months he did not agree to the contracts been subject to existing tenancies referring to the fact that this was different to the contracts under the Option Deeds which were specified to be "vacant possession": CB 74[50]-[51].

152 Mr Danckert states that in the process of working through the final form of the contracts and exchanging contract he did not meet any of the vendors apart from Ms Western and only dealt with her. He says he only spoke with Ms Pocknall once and did not appoint any other solicitor or conveyancer to act for DC2. He further states that Ms Western did not say anything to him about needing to ensure that the DC2 would have to have its finance ready to complete the contracts by 9 April 2021 and that Ms Western retained copies of the executed contracts and did not provide him with a copy of any of them: CB 75[53]

Funding explored and Ms Western engaged regarding on-sales – March April 2021

153 Following exchange Ms Western contacted Ms Pocknall to inform her of exchange and to arrange a meeting for her to collect the contracts: CB 220[3].

154 On 4 March 2021, Ms Pocknall collected the contracts and states she commenced acting for DC2 in relation to the purchase of the block: CB 220[4].

155 In or around March 2021 Ms Mammoliti had a conversation with Mr Danckert to the following effect:

> "Me: Arch Finance cannot value the Windsor Property on the current value but only on the contract price. This won't give you enough equity to borrow against Windsor for the Terrigal Properties. You will need to register the Windsor Property for strata first.
>
> Wayne: I'm pushing the process through, and once all the documents are together we will lodge for the Windsor Property to be strata registered." (CB 93[27])

156 It became clear that Arch Finance required the Windsor Property to be registered for strata and in light of that Ms Mammoliti attempted a different strategy to obtain the necessary finance for the block purchase: CB 93[28].

157 In early March 2021 (according to Mr Danckert) or on or about 10 March 2021 (according to Ms Western) DC2 engaged Ms Western to prepare off the plan

contracts for the potential sale of the new Terrigal units, which she did: CB 75[58], 173[8].

158 On or about 8 March 2021, Ms Western became aware that MALK had entered into a new residential lease on 2 December 2020 for a period of six months, with an expiry date of 18 June 2021: CB 177[45].

159 In mid-March 2021, Ms Pocknall asked Ms Western to assist with obtaining stamp duty assessment notices as she was a registered user on E Duties: CB 221[7].

160 Ms Western arranged to obtain a land tax clearance certificate for unit 9, Mr Tayyar's unit.

161 On 24 March 2021 a clearance certificate was issued by Revenue New South Wales and Ms Western sent a copy of the certificate to CCS: CB 218.3[4], 5 and 218.7–218.9.

162 On 24 March 2021 (1:58 PM) Ms Western sent Ms Pocknall an email requesting whether she was available at 10:30 AM the following morning to meet Mr Danckert at Ms Western's office: CB 111[12], 833.

163 On 25 March 2021 Ms Western states that Ms Pocknall arrived prior to Mr Danckert and had a conversation during which Ms Western gave Ms Pocknall a copy of the letter and the land tax certificate for unit 9 and observed Ms Pocknall write something on the certificate. She indicates that she said to Ms Pocknall "There will be some land tax that will be payable. My client's informed me that they will be paying it on settlement". Ms Pocknall said, "That's fine. No problems. Can I borrow a pen?": CB 218.4[7]–[8].

164 On 25 March 2021, Ms Pocknall states that she met with Mr Danckert at Ms Western's office and carried out an identification check: CB 220[5].

165 At that meeting, Ms Pocknall says the conversation was to the following effect:

> "Wayne: Finance will be approved shortly and I will have a solicitor check the loan documents
>
> I will let you know who the solicitor is for the lender when its finalised." (CB 220-221[6])

166 There is a file note from Ms Pocknall dated 25 March 2021 which states:

"Attended Elisa's office

Met Wayne for VOI check[.] He showed me original passport + driver's licence

He said finance is all underway + should be approved next week[.] He will let me know who is acting for the lender + he will get lender solicitor to check the loan documents

Settlement date discussed – he said should be ready next week as there are no issues with finance +

He will be in touch" (CB 834)

167 On 7 April 2021 Ms Mammoliti sent an email to a financier "Nik" (relevantly) to the following effect:

"Attached is the information for the Terrigal first the land acquisition followed by construction once pre-sales are in place.

As mentioned, currently on the site there are 10 units all rented approx. $10,000 rental income per month

Hence why the client will not demolish the site until he has all requirements in place

Below is the link for information including receipts for deposits for 2 sold units …

As discussed, currently the property has 10 striated units all rented, income approx.. $10,000 per month.

Client does not have intentions to demolish the property until he has pre-sales in place and all final required reports, e.g. cc etc.

The delay in requesting funding was that the client had to sort out the other two partners, which they finally signed off and my client has now sole ownership.

Property purchase approx. 2 years ago, for $4,750,000. Client has paid $470K exchanged contract attached.

Attached are units sold similar to current building see attached as is.

Property sold with a DA in June 2020 for $6,600,000 plus to comply with the DA they needed to purchase next door for a further cost of $5,500,000 see below. Property is 14 Kurrawyba Ave, Terrigal, still in construction sold only penthouse off the plan for $3mil.

My client has 2 pre-sales in place with deposits for a 3 bedroom 2.2mil and 2 bedroom $ 1.2mil, see link presentation. … The marketing video … Client also has 3 other contracts of sale off the plan expected to be signed offed within days.

Valuation expected as todays "AS IS" minimum $6,600,000 with DA for the acquisition of the land. Followed with approx. $ 7mil borrowing for construction. Settlement must happen with in approx. 2 weeks to settle the land followed with construction funding once the pre-sales are in place.

The clients will not be doing the construction, will be tendering the construction to experience and reputable builders.

> See below building companies:
>
> …
>
> Attached a contract of sale which represents the same for all the units, together with front page contract signed by all vendors.
>
> Need to know the maximum lending to settle the property and construction if you are keen.
>
> GRV, rates, costs etc. Attached is a feasibility client requested before submitting DA in Council" (CB 835-836)

168 On 8 April 2021 Ms Mammoliti made contact with Axius Partners Pty Ltd (**Axius**) with a view to obtaining a loan for the block purchase on the current value in order to avoid having to rely upon the registration of the strata plan for the Windsor Property: CB 93–94[28]–[29]. Axius could not confirm timing on when the loan would be approved, so Ms Mammoliti continued to look for other lenders: CB 94[30].

169 Although the date for completion of the purchase of the properties was 9 April 2021 settlement did not take place at that time. The reason for that is not entirely clear.

170 On 13 April 2021, Ms Western sent a number of emails to the property managers for MALK putting them on notice that MALK was in breach of the contract due to the new lease being entered into and requesting them to try and arrange to have the tenant vacated as soon as possible: CB178[50], 929, 930, 932.

171 Between 16-19 April 2021 Mr Danckert explored funding from Assetline Development Finance (**ADF**): CB 76[60]–[67].

172 On 16 April 2021 Ms Mammoliti received an email from ADF attaching two letters of offer signed by Mr Danckert: CB 94[31], 690–985.

173 The ADF offers were conditional upon DC2 obtaining a valuation of the properties: CB 94[35].

174 On 20 April 2021 (2:38 PM) Ms Western sent an email to the other vendors noting that all discharging mortgagees were now ready to settle and "I will now issue a Notice to Complete to the Purchaser for each and every unit tomorrow and penalty interest will also be imposed from tomorrow until settlement takes place": CB 1013.

175 On 20 April 2021, (3:51 PM) Ms Mammoliti sent Ms Western an email noting that the "valuation is almost resolved" and indicating the lender was asking questions regarding whether the leases had been finalised and to provide a list of eviction notices: CB 1014.

176 On 21 April 2021 Ms Western sent an email to Ms Mammoliti asking some details in respect of the (proposed) lender and providing details regarding the leases and attaching lease termination notices in respect of units 3, 4, 6, 7 and 9: CB 76[68], 95[38], 1016. The email was to the following effect:

> "Thanks for your email yesterday. Do you have an idea on a date that the Lender will be ready for settlement? When will Mortgage documents be issued? Don't forget to let me know who the Solicitors are for the Lender so we can invite them into PEXA.
>
> Here is what is happening with the Leases at the complex :-
>
> 1. Unit 1 is vacating on the 23 April, 2021.
> 2. Unit 2 has already vacated.
> 3. Unit 3 Termination Notice issued.
> 4. Unit 4 Termination Notice issued.
> 5. Unit 5 Tenant may have already vacated.
> 6. Unit 6 Termination Notice issued.
> 7. Unit 7 Termination Notice issued.
> 8. Unit 8 is vacating on the 29 April, 2021.
> 9. Unit 9 Termination Notice issued.
> 10. Unit 10 has already vacated.
>
> The termination Notices are attached for your information." (CB 1016)

177 On 22 April 2021, a valuation obtained by ADF valued the properties at $4.7 million excluding GST on an "as is" basis and a developed basis of 13 units "as if complete" substantially higher, in the order of approximately $19 million: CB 76[69], 1075.

178 On 22 and 23 April 2021 a number of tenants (Mr Hew and Mr Young) corresponded with Ms Western checking that a notice to complete had been issued: CB 1118, 1119. On 23 April 2021 Mr Parker requested the issue of a notice to complete: CB 1125.

179 In late April 2021 Ms Western assisted DC2 with its liability to pay stamp duty arising from the contracts and the Nomination Deed: CB 77[75].

Windsor Property subdivision & Vendor tensions emerge - May 2021

180 In very early May 2021 Mr Danckert says he had a conversation with Ms Western regarding getting a strata registration done for the Windsor Property so that he could get some funds to top up the purchase of the block: CB 77–78[76].

181 Between 5 and 7 May 2021 Ms Mammoliti had contact with another financier, Gov Corp Finance Pty Ltd (**Gov Corp**), regarding lending for DC2 to both purchase the block and for construction to develop it. However, Mr Danckert did not wish to proceed with that offer: CB 95–96[41]–[48].

182 On 7 May 2021 Ms Western sent Mr Danckert an email stating "Unfortunately I am going to have to start charging penalty interest from today otherwise the owners are going to come after me big time": CB 1285.

183 Mr Danckert says he had a telephone conversation with Ms Western following the email in which he states she told him that she was having trouble with her husband and needed money: CB 78[77]. He states that at that stage Ms Western did not say anything to him about the need to complete the contracts: CB 78[78].

184 On or about 19 May 2021 Ms Western corresponded with various conveyancers/solicitors who acted for prospective purchasers of four of the new units (numbers 7, 8, 10 & 11): CB 78[80].

185 On 20 and 21 May 2021 Ms Mammoliti received an email from another potential lender, HomeSec Business Finance Pty Ltd attaching a conditional approval for an amount of $5,117,000. Mr Danckert signed the offer but that offer also did not proceed: CB 96-97[50]–[54].

186 On or about 25 May 2021, Mr Danckert requested Ms Western assist in arranging the registration of the plan of subdivision for the Windsor Property: CB 173[9].

187 She states that simultaneously Mr Danckert was attempting to arrange capital for the purchase of the block, and they had a conversation to the following effect:

> “I said: Wayne, how are you going with your finance for Terrigal.

> Wayne said: I need to register the Strata Plan for Windsor and as soon as that is registered, I can refinance the Windsor properly, as the Lender wants to take security over those properties for the shortfall. The lender won't accept the Windsor properly until it is registered as 9 separate Strata Titles." (CB 173[10])

188 In the context of her work for DC and DC2, Ms Western states she had numerous telephone conversations with Mr Danckert and Ms Mammoliti: CB 173[11].

189 On 27 May 2021 Ms Mammoliti had a conversation with Ms Western in which she states that Ms Western said (amongst other things):

> "The Terrigal properties have to settle. I have my own issues and I'm under pressure with my ex-husband"

and in response to a question from Ms Western as to why there was no letter for formal approval, Ms Mammoliti said:

> "Private lenders work differently than normal residential lenders. Once an offer is signed, it goes directly to the lenders' after lawyers. I'm not included in call or at times in those emails unless I'm copied in by the parties": CB 97–98[59]

190 On 30 May 2021 Ms Western forwarded Mr Danckert an email confirming that SBS had issued a contract for sale to the prospective purchaser for new unit number 6 and also issued a tax invoice which DC2 paid the following day: CB 79[85]–[87], 1391–1393.

First notices to complete – 3 June 2021

191 On 2 June 2021 Ms Mammoliti received an email from Ms Western attaching a copy of confirmation from the NSW Land Registry showing that the strata plan had been lodged for registration with respect to the Windsor Property: CB 98[61], 1395–1396.

192 That day Mr Danckert informed Ms Mammoliti that Ms Western had told him it would take two weeks for the strata plan to be registered: CB 98–99[62].

193 On 3 June 2021 SBS sent the first notices to complete to CCS referring to the exchange of the contracts and noting that "our clients will also be relying upon special condition 9 of the contract for sale": CB 79[88], 179 [57], 1397–1414.

194 Special condition 9 relates to “Completion” of the contracts, and inter alia permitted charging of interest for delay in completing, if the vendors were not in default: CB 781.22.

195 Mr Danckert says this was sent without warning (CB 79[88]), although states that Ms Western forwarded the email to him immediately afterwards and that Ms Pocknall did not send him a copy of the email: CB 80[89].

196 The first notices to complete were in a form common to all the vendors and omitting formal parts the content of the notice to complete as follows:

> "[vendor's name] (vendor) gives you notice:
>
> 1. The vendor is ready, willing and able to complete the conveyance from you of the property known as 1/24 Campbell Crescent, Terrigal in accordance with the contract for sale of land dated 26 February 2021 (the contract);
>
> 2. You are required to complete the sale on or before 18 June, 2021 and in this respect time is of the essence for the completion of the contract;
>
> 3. The vendor appoints on or before 3.00 pm on in the electronic workspace as the time and place for completion or at such other place as the vendor may direct; and
>
> 4. Should you fail to complete the contract for sale of land within the period specified in this notice then you shall be in breach of the contract and the vendor shall exercise all other rights and remedies as are available to them by reason of your breach." (e.g. CB 1398)

197 On 3 June 2021 immediately after receiving the email Mr Danckert called Ms Western and had a conversation, he says, in words to the following effect:

> "Me: What are you doing sending me that email with the Notice to Complete?
>
> Her: I need the money because my divorce Is getting close and I don't want my ex putting a caveat on Terrigal and stuffing up settlement.
>
> Me: The units still have people living in them and they must be vacant." (CB 80[90])

198 He says Ms Western then hung up the phone on him: CB 80[90].

DC2 changes representation – early to mid-June 2021

199 In early June 2021, Ms Pocknall's father became terminally ill, and she states she was under stress: CB 221[8].

200 On about 7 June 2021 Mr Danckert says he instructed John Boxsell to act for DC2: CB 80[92]. Mr Boxsell is a partner or member of the firm Williams Boxsell Georgas (**WBG**).

201 On 16 June 2021, Mr Danckert emailed Ms Pocknall and ended her services, at which point she ceased to act for DC2: CB 180[58], 221[9].

202 The reason Mr Danckert says he sent the 16 June 2021 email to Ms Pocknall was he says because he knew the name of her practice was on the front page of the contracts: CB 113[22].

203 On 16 June 2021, Ms Western received an email from Mr Boxsell indicating that he acted for DC2: CB180[59], 1453–1454.

204 Between 11 and 18 June 2021 Ms Mammoliti explored offers with a number of other potential lenders including Marshall Investments Pty Ltd, eCap Australia Pty Ltd and Balanced Securities Ltd. The offers were conditional upon valuations of the block. The offers did not proceed: CB 99-100[63]–[71].

205 On 23 June 2021, Mr Danckert sent an email to Ms Western (11:00 AM) in which he said:

> "Hi Elisa, Under the circumstances I no longer wish you to act on the contracts of sale for 24-28 Campbell Crescent Terrigal" (CB 1498)

206 On 23 June 2021 Ms Western, more specifically SBS, issued a tax invoice to DC2 for acting on its behalf: CB 81[100]. The description of the work is as follows:

> "To our professional costs for assisting in relation to purchase of Units 1-10/24 Campbell Crescent, Terrigal to include numerous telephone conversations with Mr Wayne Danckert in regards to him being Nominated as the Purchaser of the subject property, his loan approvals and dealing with satisfying the requirements of a number of Lenders, obtaining and ordering Section 603 Certificates in readiness for settlement, providing copies of relevant documents to Broker for Lender's requirements (ie : copies of all Contracts and Put & Call Options, preparing draft settlement figures so that he was aware of the funds required to complete the purchase, dealing with Mortgagee and Mortgagee's Solicitor on existing Windsor property to have plan of subdivision consent provided, continuous checking of the Land Titles Office website to check progress of registration of Strata Plan for Windsor, advising Wayne that requisitions raised on Lodgement, arranging for one of the requisitions to be removed due to Caveator's Consent not being required, preparing and arranging for Wayne Danckert to declare 10 Purchaser's Declarations and carry out relevant Identification checks - attending to have Contracts and Put & Call Options stamped by Revenue NSW and attending to requisition, raised by Revenue NSW, providing relevant information to Coventry Conveyancing to have information entered into PEXA" (CB 1490)

207 The invoice was for $11,400.42 (being $9,900 of fees and the balance disbursements): CB 1489. On 28 June 2021 DC2 paid the SBS invoice: CB 81[102], 1599.

Dispute over the first notices to complete – mid June 2021

208 Between 16 and 18 June 2021 there was email correspondence as between Mr Boxsell and Ms Western: CB 80–81[97].

209 On 17 June 2021 Mr Boxsell sent Ms Western an email including the following:

> "… we note the notices to complete served on DC2 purport to claim the vendor is entitled to terminate the contract, inter alia, if completion does not take place on or before 18 June 2021.
>
> Please confirm your client will not so terminate the contracts as the purchaser will not complete the contracts other than in accordance with the terms and conditions of the contract annexed to the Option Deed.
>
> If no such assurance is given, our client reserves the right to seek an urgent injunction in the Supreme Court of New South Wales to prevent any wrongful termination.
>
> Please also advise the vendor withdraws the notices to complete served." (CB 1460)

210 Mr Boxsell in an email dated 18 June 2021 set out a number of contentions regarding the contracts being those which arose by virtue of the exercise of the call option as set out in cl 4.1 of the Option Deeds and relevantly disputed that the first notices to complete were valid: CB 1477.

211 Of significance is that Mr Boxsell's email to Ms Western reflected his view that the (disputed) first notices to complete could only be valid if there was an "entitlement" to terminate the contracts and he contemplated there would or might be an "attempt" to terminate the contracts at the expiry of the notices. Part of the email was to the following effect:

> "Our client maintains its position any Notices to Complete in these circumstances are invalid.
>
> We also assert your proposal to extend an invalid notice to complete does not validate the notice. We also note clause 9 of the contract is a clause in either version of the contract and it is not a matter of election by our client as to whether it is or is not a clause of the contract. We see no point in debating whether it exists already. It is trite law to say its provisions are predicated on there being a valid entitlement to terminate. No such right exists presently.
>
> We again call upon the vendor to withdraw the present notice to complete. Any attempt to terminate the contracts pursuant to the Notices to Complete will be treated as a wrongful repudiation of the contracts which are in force. Our client reserves its rights in that respect.
>
> Our client is happy to discuss whether the contracts can be agreed to be varied and is happy to proceed to completion as soon as these issue are resolved. Our client simply does not want such discussions to be taking place under the unwarranted pressure of invalid notice to complete expiring today

> with the consequent declaration in those notices of an intent, or at least a right, to terminate the contracts at the expiry of those notices.
>
> We therefore propose:
>
> 1. The vendor withdraws the Notices to Complete today
>
> 2. Discussions take place in good faith to resolve the issue of the correct terms of the contracts
>
> Our client is not repudiating the contracts, It merely requires compliance with the contracts as it asserts they are.
>
> We are instructed to accept service of any notice or document pursuant to the contract" (CB 1477)

212 Ms Western replied at 3:27 PM on 18 June 2021 by email: CB 1479.

213 Ms Western asserted that the contracts were different from the ones attached to the Option Deeds because of a request from the purchaser to have them varied from vacant possession to subject to existing tenancies.

214 The email went on to dispute that the first notices to complete were invalid, although noted that we (SBS) "have received instructions from our clients and they will agree to withdraw the notices to complete but reserve their rights to issue a further notice to complete in due course pursuant to the terms of the contract for sale…".

215 The email also relevantly stated as follows:

> "Your client can argue all he wants when it comes to the characterisation of the events that took place, but I can assure you that this is the term of events and it was purely his choice not to obtain his own independent legal advice prior to signing the Contracts. He was not forced into signing the Contracts in my office – and he signed them freely and voluntarily." (CB 1479)

216 On 18 June 2021 Ms Pocknall's father died: CB 221[10].

217 On 18 June 2021 Ms Western received an email from Mr Boxsell indicating amongst other things, that service of any documents pertaining to the contract would be accepted by his firm: CB 180[60],1476–1478.

218 On 18 June 2021 the first notices to complete were withdrawn: CB 180[61].

219 On 22 June 2021 Ms Western received an email from Mr Szepes confirming that the tenant in his unit was vacating on that date: CB 181[64].

220 On about 23 June 2021 Ms Western exchanged emails with Mr Boxsell regarding the collection of the contracts the sale of land she was holding on behalf of CCS: CB 180[63].

221 On 23 June 2021 Mr Boxsell asserted to Ms Western that Mr Danckert would pay Ms Western's invoice: CB 1502. Yet Ms Western on 25 June texted Mr Danckert to follow up regarding payment: CB 1598.

Other funding explored – late June to early July 2021

222 On 24 June 2021 Ms Mammoliti received an email from Egan National Valuers (**Egan**) attaching a valuation of the block for what she describes as a project related site value of $5.4 million and a market value (as if complete) for approximately $19 million: CB 100[72], 1508–1597.

223 Further, on or about 28 June 2021, Mr Danckert's son collected the contracts from Ms Western's home office and delivered them to Mr Boxsell: CB 81[103].

224 On or about 30 June 2021 Ms Mammoliti informed Mr Danckert of a number of potential finance offers: CB 81[104]–[106]. Mr Danckert says that at about this time Ms Western and he were communicating on almost a daily basis by email about other properties with mutual clients and asserts that at no point did she tell him anything about the need to complete the contracts for the properties within a specified time: CB 82[108].

225 On 30 June 2021 Ms Mammoliti received an offer from CC Capital Investment Fund Pty Ltd (**CC Capital**) attaching an offer for $12.7 million to DC2 being a loan amount for both purchase and construction to develop the properties: CB 100[73]. However CC Capital would not settle unless a construction certificate had been obtained: CB 101[77].

226 There was still a simmering issue regarding the fact that there was a tenant in unit 6.

Funding issues continue – early July 2021

227 On 6 July 2021 the Windsor Property was registered as a strata scheme: CB 101[78].

228 On 7 July 2021 Ms Mammoliti had a conversation with Mr Danckert to the following effect:

> "Wayne: You need to find another lender knowing the deadline. The delay in the construction certificate is too long.
>
> Me: Ok no problem. If you continue with CC Capital, they would only lend maximum 65% of the project, which would make you short of funds to complete if CC Capital take the Windsor property as security.
>
> Wayne: I understand. We need to find someone else." (CB 101[80])

Second notices to complete – 12 July 2021

229 On 12 July 2021, Ms Western received confirmation from Dr Lee by telephone call that the tenant of unit 6 had vacated on 11 July 2021: CB 181[66].

230 On 12 July 2021 SBS sent letters to WBG by email from Ms Western to Mr Boxsell enclosing the second notices to complete in respect of each of the units: CB 82[111], 1659–1688.

231 The form of the second notices to complete (omitting formal parts) are as follows:

> "[name] (vendor) gives you notice:
>
> **1.** The vendor is ready, willing and able to complete the conveyance from you of the property known as 5/24 Campbell Crescent, Terrigal in accordance with the contract for sale of land dated 26 February 2021 (the contract);
>
> **2.** You are required to complete the sale on or before 27 July, 2021 and in this respect time is of the essence for the completion of the contract;
>
> **3.** The vendor appoints on or before 3.00 pm on in the electronic workspace as the time and place for completion or at such other place as the vendor may direct; and
>
> **4.** Should you fail to complete the contract for sale of land within the period specified in this notice then you shall be in breach of the contract and the vendor shall exercise all other rights and remedies as are available to them by reason of your breach ." (e.g. CB 1661)

232 The second notices to complete were forwarded to Mr Danckert almost immediately by Mr Boxsell: CB 82[112].

233 On 12 July 2021 at 3:22 PM Ms Mammoliti received an email from Egan attaching the Windsor Property valuation for a market value of $4.29 million: CB 101[81], 1690.

Attempts to obtain funding – mid to late July 2021

234 On 14 July 2021 Ms Mammoliti sent Lucas Meaney of Impresta Group a copy of the Egan valution: CB 1794.

235 On 15 July 2021 Mr Meaney responded by email to Ms Mammoliti. Of some note is the statement in the email that he understood:

> "Stamp duty has already been paid for the acquisition of Terrigal" (CB 1796)

236 On 15 July 2021 Ms Mammoliti sent Ms Western an email noting that she had been working hard to achieve a settlement date by the end of the following week and requesting:

> "Can you please give me an estimate on funds required for settlement.
>
> The last thing anyone wants is to have a shortfall at the end." (CB 102[84], 1798)

237 On 15 July 2021 Ms Western responded to the email in the following terms:

> "Can you provide me evidence that there is a loan approval in place somehow as all of the Vendor's are asking me this question.
>
> Unfortunately I am unable to work out the estimated funds anymore as I don't have the paperwork and I can't see how much interest Wayne will be getting charged from OSR anymore.
>
> These figures will need to be worked out by Wayne's Lawyer – John Boxsell.
>
> Once you get them from him, maybe send them to me and I will check that he has calculated the interest component correctly that he also owes to the Vendors.
>
> I can tell you for sure that when the Notice to Complete expires on the 27 July, 2021 there will be NO more extensions. He will definitely lose the property." (CB 102[85], 1799)

238 On 19 July 2021 (6:06 PM) Ms Mammoliti received an email from Strategic Corp Investments attaching an indicative letter of offer from Blackbird First Mortgage Corporation Pty Ltd (**Blackbird**) offering loan facility amount of $995,959.37: CB 83[114], 102[86], 1800–1808, 1809–1818. The actual loan amount was $900,000: CB 1805

239 On 20 July 2021 Direct Capital Investments Pty Ltd (**Direct Capital**) provided an offer to DC2 for a facility of $3.9 million: CB 102[86], 1819–1825.

240 Leaving aside fees and other charges, the Blackbird offer provided available funds of $900,000 and the Direct Capital offer funds of $3,580,671 constituting

total available funds of $4,480,671 (which Ms Mammoliti describes as being the total purchase price for the properties): CB 102[87].

241 Blackbird did not require an acceptance fee to be paid (CB 83[116]).

242 On 26 July 2021 Mr Danckert signed on behalf of DC2 the Direct Capital offer and paid a commitment fee: CB 83[117]–[118], 1841. The same day, Ms Mammoliti received a remittance from Mr Danckert indicating he had paid Direct Capital's acceptance fee of $5,500: CB 103[93].

243 On 26 July 2022 Ms Western received a letter from Revenue New South Wales stating that an amount of $16,898.69 will be payable on settlement for unit 9: CB 218.5[13], 218.10.

27 July 2021

244 On 27 July 2021 there was extensive communications between the parties including email correspondence between Mr Boxsell and Ms Western: CB 83[119]–[120].

245 At 11:32 PM Mr Boxsell sent an email to Ms Western in respect of the Hopwood sale requesting if vacant possession had been obtained: CB 1951.

246 The email contained the following bearing upon Mr Boxsell's assertion of his instructions:

> "We advised you at the time that we were acting for DC on the matter of the notices you had previously served on DC.
>
> We also note we received by email further correspondence dated 12 July 2021 with further documents attached as PDF scans one being a letter addressed to "Williams Boxsell Georgas" and one being a purported Notice to Complete addressed to "WBG Lawyers" also dated 12 July 2021. We are not sure why this document is served on this firm as we are not the solicitors or conveyancers nominated in the purchase contracts. That firm is Coventry Conveyancing. We have not advised your firm we are accepting service of documents under the contract for DC. We are presently advising DC on issues to do with the notices to complete you originally served and we have advised DC that more notices have been served, curiously, upon our firm or perhaps another firm called WBG Lawyers, and that DC might expect further notices to be served on that company.
>
> DC has delivered to us various contracts which are dated 26 February 2021 which appear to be the contracts you refer to in your letter of 12 July 2021. Can you confirm this is the case? We have instructions to advise DC on these contracts. We also understand that DC has terminated the instructions of Coventry Conveyancing. I expect that firm has advised you of that termination.

> Can you advise if you have served the purported notices dated 12 July 2021 upon DC? We are advised by DC that no notices have been served upon the company.
>
> If that is the case, do you intend to serve notices to complete in the form sent to our firm on DC and if so, when?
>
> We also expect to receive instructions to advise DC re finance facilities DC is obtaining for the completion of the contracts. We also note you have sent us settlement figures relating to the settlement of the purchases today. We have advised DC of these advices." (CB 1951-1952)

247 At 11:42 AM, Ms Western sent an email to Mr Boxsell relating to the Parker sale, and stating:

> "We confirm that our client is ready willing and able to settle today and now enclose our Settlement Adjustment Sheet in readiness for settlement": CB 1946.

248 The settlement adjustment sheet attached contained a provision for default interest from 12 July 2021 to 27 July 2021 in the sum of $1,746.58: CB 1947.

249 At 11:50 AM Ms Pocknall emailed to Mr Boxsell a settlement sheet which included an adjustment for the land tax on unit 9 in respect of Mr Tayyar: CB 218.5[14], 218.11–218.13, 1948–1950.

250 At 1:43 PM Mr Boxsell sent Ms Western a without prejudice email (titled in relation to "HOPWOOD AND ORS"). The content of the email was as follows:

> "Good afternoon,
>
> I refer to our open email of today.
>
> I am instructed finance is approved which can settle this Thursday or Friday and I will be instructed to attend to the settlement of the purchases and the advance from the lender." (CB 1953)

251 At 3:06 PM Ms Western sent Mr Boxsell an email marked "high" importance and indicating as follows:

> "Dear John
>
> Thank you for your email.
>
> Our clients have requested that proof of the finance approval be provided as we have been advised on numerous occasions in the past that settlement was going to take place within a week and has never eventuated.
>
> Please also accept our Invitation into PEXA and invite the Incoming Mortgagee into PEXA to also show the evidence that settlement is likely to take place on Thursday or Friday.
>
> Your urgent reply would be greatly appreciated." (CB 1955)

252 On 27 July 2021 Ms Mammoliti received a phone call from Mr Danckert who told her (CB 105[99]):

> "Wayne: My lawyer has asked Direct Capital to prepare a letter to give to Elisa confirming that the funding is available. She doesn't believe that the funder is ready, willing and able to settle even though she received the formal offers last week." (CB 105[99])

253 On 27 July 2021 Ms Mammoliti received a phone call from Ms Western which included a discussion to the following effect:

> "Elisa: Has a formal loan been obtained? Wayne's lawyer has not entered anything on Pexa nor have I been informed that the loan documents have been sent and signed.
>
> Me: Yes, as sent to you last week, it was obtained on 20 July 2021
>
> Elisa: That's not a formal approval.
>
> Me: Yes it is. Development loans through private lenders don't work the same way main stream lenders do. Once a client signs or pays an acceptance fee requested, then the lenders send the indicative offers directly to their lawyers to commence preparing the loan documents. It's then up to the lawyers how fast they move, depending on their work load.
>
> Elisa: Well there is another offer the vendors are waiting for, nothing to date has been in writing. If the settlement doesn't happen we're proceeding with the offer.
>
> Me: You should contact Wayne's lawyer, as far as I know settlement Is happening. Maybe the lawyers from all sides are working towards it.
>
> Elisa: The vendors won't settle with Wayne. They're waiting for a better offer. Written confirmation has not been received, but we're expecting one any day now. I know for a fact Wayne cannot come up with an extra $500K per unit to match the offer, so please don't say anything to Wayne.
>
> Me: I don't understand. The loan is approved or I would've received calls from the lender. If the details aren't on PEXA the delay is probably from the lawyer's work load. It's in the lawyers hands to settle. Perhaps as soon as Friday, 30 July or week commencing 3 August 2021. The delay is not Wayne and probably the lawyer's just preparing for settlement.
>
> Elisa: Time has run out for Wayne. I don't believe he has an approval in place." (CB 103–104[94])

254 Ms Mammoliti says she did not inform Mr Danckert of the conversation with Ms Western as she had been asked by Ms Western not to do so.

255 However Ms Mammoliti did have a conversation with Mr Danckert to the following effect (CB 104[95]):

> "Me: Where is settlement up to?
>
> Wayne: My lawyer John, Stewart (the lender) and Stewart's lawyer are working towards settlement now.

Me: Has Elisa contacted the lender's lawyer?

Wayne: No but she's asked my lawyer for a letter confirming funding is available so just organising that for her now." (CB 104[95])

256 At 3:31 PM Ms Western sent Mr Boxsell a further email in the following terms:

"Dear John

Thank you for your email.

We confirm that all units have now been vacated and vacant possession on ALL units within the complex were provided by the 11 July, 2021.

We advise that the Notice to Complete was served on your firm William Boxsell Georgas (*also known as WBG Lawyers – see a copy of an existing Contract for Sale were we have dealt with your firm and you will see that the Vendor's Solicitor is shown as "WBG Lawyers" with the exactly the same address and telephone numbers*). We also refer you to an email from you personally on Friday, 18 June, 2021 at 1.15pm where you specifically advised "We are instructed to accept service of any notice or document pursuant to the Contract" and this is the reason why service of the Notices to Complete were served on your firm and not Coventry Conveyancing as we had been advised by Coventry Conveyancing that they were no longer acting on behalf of the Purchaser.

As for providing confirmation that your client has delivered various Contracts to your firm are the ones that we are referring to in our letter of 12 July, 2021 – how are we to confirm what you have received are the Contracts we are referring to when we haven't seen what has been delivered to you. We also note that you refer to the said Contracts in your email of the 18 June, 2021 so you were already in possession of the Contract for Sale relating to this property purchase.

Therefore, we maintain that our Notices to Complete are valid." (CB 1956)

257 At 3:45 PM Ms Western sent an email to each of the other vendors (except perhaps Dr Lee): CB 1958.

28 July 2021

258 On 28 July 2021 Ms Mammoliti had a conversation with Mr Danckert to the following effect (CB 104[96]):

"Wayne: The lender emailed written confirmation that the loan had been approved so I can send to Elisa because she's kept asking for proof of funds.

Me: "Ok great."

259 On 28 July 2021 Direct Capital sent a letter to WBG care of Mr Boxsell relevantly including the following:

"We have been advised by Mr Wayne Danckert of D Capital 2 Pty Ltd, to notify you as the borrower's solicitor. That we, being Direct Capital Investments Pty Ltd together with Avari Capital Partners will be providing the funding for the

> purchase of 24-28 Campbell Crescent Terrigal and are moving towards settlement by the end of next week, being the 6th August 2021": CB 1959.

260 On 28 July 2021, Mr Danckert says that he wanted to contact the different vendors (apart from Ms Western) to demonstrate that DC2 was able to settle the contracts by 6 August 2021: CB 113[27].

261 He says on that day he printed a copy of the Direct Capital letter dated 28 July 2021 attached to Mr Boxsell's email to Ms Western (10:46 AM) that day (CB 1960–1961) and took a copy of the letter to the address of MALK in Gladesville and spoke with a female informing her that he was the purchaser, took a copy of the letter to Mr Hew and spoke with him in words to the following effect: (CB 113–114):

> Mr Danckert: “Hi Andrew, I am the purchaser for Terrigal. I wanted to let you know that we can settle on 6 August. Has Elisa informed you of this?”
>
> Mr Hew: “I will talk to Elisa.” (CB 114[28(b)])

262 He says he further took a copy of the letter to the addresses of each of Mr Hopwood, Mr Young and Mr Tayyar leaving respectively copies of his business card: with a lady at the address of Ms Hopwood; under the door of Mr Young and with a neighbour in the case of Mr Tayyar: CB 114[28].

263 On 28 July 2021 at 8:42 PM Mr Szepes sent Ms Western an email stating:

> "Yes, I agree to extending the Notice to Complete period until the 6th of August 2021" (CB 1963)

264 On 28 July 2021 at 9:49 PM Mr Hew sent an email to Ms Western stating:

> "I've got a few requests before I can decide on this…" (CB 1964)

29 July 2021

265 On 29 July 2021 there were further communications.

266 At 9:39 AM Mr O'Connell sent an email to Mr Hew and Ms Western copied to the other purchasers stating inter alia:

> "If this guy now has unconditional funding we should accept this with the additional interest he owes us (about 3K each) … lets [sic] all take the money and move on with our lives.": CB 1966.

267 At 10:46 AM Mr Boxsell sent an email to Ms Western marked without prejudice in the following terms:

> “Good morning Elisa

I attach a letter from Direct Capital indicating a loan has been approved and can settle about 6 August 2021.

We can proceed on that basis with that date as a target date subject to the mortgagee being ready by that date.

Please advise" (CB 1960)

268 At 3:09 PM Ms Hopwood sent Ms Western an email:

"As discussed, given where we are at I agree to the below terms for settlement on 6th August 2021": CB 1967.

269 At 4:06 PM Mr Parker sent Ms Western an email (CB 1968) copied to the other parties as follows:

"Hi All

Unfortunately, I've lost all trust with the current buyer. And that is no disrespect to anyone here and especially Elisa for doing so much hard work. So thanks Elisa your efforts have not gone unnoticed.

I'm open to a cashed up buyer who can offer a significantly higher price who can settle fast. I will check within my network and come back to you all ASAP with any options." (CB 1968)

270 At 5:01 PM Ms Western sent an email marked with high importance to Mr Parker, Ms Hopwood, Mr Young, Mr O'Connell, Mr Szepes, Dr Lee, Mr Hew and Mr Taylor as follows:

"Hi Everyone

Kane, Daniel & Andrew we all understand your frustrations and we are all feeling the same believe me. However, you must realise that you will need to have ALL owners agree to sell to another Developer for this to work and I can tell you on a personal level that if this deal falls over I will NOT be able to commit to sale to another Developer for at least a couple of years – only because of a personal situation that I am going through and I have absolutely no control over how long it will take.

So if not ALL parties agree to proceed with the current Developer then unfortunately this property will need to sit there for a number of more years until I am legally able to sell to another person. I will need to spend more money to get my unit back up to scratch so I can rent them out.

Also, just as an update, I have been informed that the PEXA workspace where settlements will take place will be updated tomorrow with the Purchaser's Lender's Solicitors details and from what I understand the Solicitors for the Lender are working hard to get this matter settled as quickly as possible, however, due to the current lockdowns in Sydney because of COVID, most Solicitors are working with minimal staff and unfortunately, this is also causing delays. I am really hoping that they can pull a rabbit out of a hat and hopefully get it settled by the middle of next week but if not I am pretty positive that settlement will definitely take place by the 6 August, 2021 at the absolute latest – and I can tell you I have not been feeling positive about the situation at all until TODAY!

Come on guys, we have come this far – what is another week.

Please also bear in mind, even if we terminate the Contracts there is still a chance the Purchaser can dispute our termination and claim that we have repudiated the Contract and take us all to Court, lodge Caveats on all units which will also prevent any of us selling the properties until the matter is heard in Court which again can take many years and cost a lot of money – it may be that we would win – but in the meantime, we are all paying Mortgages, Rates, Levies etc etc and huge legal fees while we wait for the process to go through the Courts.

Termination of Contracts can NEVER be taken easily." (CB 1969)

30 July 2021

271 On 30 July 2021 from 11:40 AM to 5:40 PM Mr Danckert exchanged text messages with Ms Western: CB 84[123], 1975–1979.

272 The text messages (CB 1975–1979) were relevantly as follows:

Mr Danckert: "Do you need me to talk to any of the owners"

Ms Western: "It's hot [sic] going to make a difference! Most of them are hanging up on me now and I might not have a choice soon

Still haven't seen anything from John Boxsell"

Mr Danckert: "Ok I will call John now"

Ms Western: "Also you having on the internet that you have sold most of the new units is not helping my cause either.

If you don't hear from me ever again you know I've killed myself as o [sic] seriously can't deal with this stress anymore"

Mr Danckert: "The sales has nothing to do with the current owners"

Ms Western: "It does in their eyes because you have pre sales and they don't understand why you haven't had finance organized before this"

Mr Danckert: "We have had finance all the time, tell them to abide by the terms of the contract or it's off to court for 12 months and they lose to them will be huge, probably more than the units are worth"

Mr Danckert: "Just the legal cost will be huge"

Ms Western: "Wayne please don't threaten that - you can threaten all you like - you can look at it like that too because If we win you will be in the same situation"

Mr Danckert: "No one wants to go to court but I no [sic] my legal rights and if one owner plays games it stuff [sic] it for all."

Mr Danckert: "Is this one of the owners 0408 […]"

Ms Western: "I have no idea"

Mr Danckert: "Ok"

Mr Danckert: "John is on pexa"

Ms Western: "No he is NOT!!!!"

Mr Danckert: “He just texted me”

Ms Western: “Well he is lying”

Mr Danckert: “I have joined PEXA”

Mr Danckert: “That's the message”

Ms Western: “I've just checked and they have not accepted!”

Ms Western: “Now he has”

Mr Danckert: “Good”

Ms Western: “Did you sign Mortgage docs yet?”

Mr Danckert: “Not yet maybe over the weekend waiting on bank lawyer”

Mr Danckert: “Not taking people s [sic] calls ?”

Notices of termination – 2 August 2021

273 On 2 August 2021 at 7:30 PM, Ms Western scheduled a meeting with the other eight vendors, and after receiving confirmation from all unit owners, notices of termination were issued: CB 182[79].

274 On 2 August 2021 (9:41 PM), Ms Western sent an email to Mr Boxsell attaching letters from SBS directed to the attention of DC2 and enclosing by way of service notices of termination in respect of each of the vendors.

275 Omitting formal parts the notices of termination were as follows:

> “1. By contract for the sale of land dated 26 February 2021 (contract) [name and address] (vendor) agreed to sell and D Capital 2 Pty Ltd ACN 644 525 584 of xx Bislett Street, North Kellyville, NSW 2155 (purchaser) agreed to purchase the property being the whole of the land in title reference 10/SP6964 known as 10/24 Campbell Crescent, Terrigal (property) for $470,000.00.
>
> 2. The sale of this property forms part of other interdependent Contracts for the sale of Units 1, 2, 3, 4, 5, 6, 7, 8 & 9/24 Camp bell Crescent, Terrigal in accordance with Special Condition 17 of the Contract for Sale.
>
> 3. On the 3 June, 2021 a Notice to Complete was issued to Coventry Conveyancing Services being the firm nominated on the Contract for Sale dated the 26th February, 2021 requiring the Purchaser to complete by the 18 June, 2021.
>
> 4. On 16 June, 2021 an email was received from Mr John Boxsell from William Boxsell Georgas (also known as WBG Lawyers) advising that he was instructed to act for D Capital 2 Pty Ltd (the Purchaser).
>
> 5. On 18 June, 2021 the Notice to Complete was withdrawn as a sign of good faith due to claims by the Purchaser that Vacant Possession had not been provided on 6/24 Campbell Crescent, Terrigal and 7/24 Campbell Crescent, Terrigal. Vacant Possession for 7/24 Campbell Crescent, Terrigal was provided on 23 June, 2021 and Vacant Possession for 6/24 Campbell Crescent, Terrigal was provided on 11 July, 2021.

> 6. On 12 July, 2021 a Notice to Complete was served on John Boxsell from William Boxsell Georgas as the Solicitor for the Purchaser requiring the Purchaser to complete by the 27 July, 2021. Mr Boxsell via e mail on the 18 June, 2021 confirmed that he had instructions to accept service of any notice or document pursuant to the Contract.
>
> 7. As a result of your default under the contract for Sale dated the 26 February, 2021 and the notice to complete dated 12 July, 2021 making time of the essence for completion of the contract, we give you notice that the contract is terminated and is entirely at an end. The vendor will retain the deposit and take action for recovery of damages resulting from your default." (e.g. CB 2008)

276 The emails, letters and notices were all essentially in a common form: CB 84[124], 2005–2024.

Post termination correspondence – August 2021

277 On 3 and 4 August 2021, there was email correspondence between Mr Boxsell and Ms Western: CB 84[125]–[129].

278 On 3 August 2021 (10:55 AM) Mr Boxsell in an email to Ms Western noted the termination notices and indicated that DC2 denied the validity of the notices and asserted that the issue of the termination notices were acts of repudiation by the vendors which entitled inter alia DC2 to claim damages: CB 2025–2026.

279 The email further asserted that: (a) the invitations on PEXA to settle the matter had not been withdrawn, indicating the vendors wished to proceed to settlement; (b) DC2 had accepted the PEXA invitation; (b) DC2 had provided evidence of finance approval, and (d) the vendors "having requested settlement to proceed after the expiry date of your second batch of notices to complete, has waived any entitlement to terminate the contracts pursuant to the notices to complete dated 12 July 2021": CB 2026.

280 Ms Western for her part, disputed that the termination notices were invalid and that they were a repudiation by the vendors (email 4:35 PM): CB 2028.

281 On or around 4 August 2021, Mr Danckert says he contacted Mr Parker, Mr Young and Mr Szepes but could not reach them and left a message on their phones for them to return his call, but says that he did not receive calls back from any of them: CB 114–115[30].

282 On 4 August 2021 (7:02 PM), Ms Western emailed Mr Boxsell stating:

> "I have been instructed by my clients that the notice of termination still stands and the Contracts for Sale are now at an end": CB 2033.

283 On 5 August 2021, Mr Danckert instructed HFW Lawyers to act for DC2: CB 84[133].

284 On 6 August 2021, Mr Danckert received an email from Ms Mammoliti (CB 115[32], 2052–2053) as follows:

> "Dear Wayne
>
> As per discussion yesterday 5th August 2021.
>
> I, called Elisa Western from Step By Step Conveyancing to thank her for a client she referred. The conversation lead to discussions about the Terrigal property not settling Friday 6th August 2021. Informed her 'funding is approved and it's going through the settlement process between your lawyer and the funders lawyers'
>
> She continued in commenting it won't happen, as per instructions from the vendors.
>
> When I asked why, she is adamant settlement won't happen, she commented that 'there is another offer on the table, approx. $500,000 extra which is a further $50,000 for each vendor'.
>
> This coincides with what you discovered from one of the vendors." (CB 2052)

285 On 9 August 2021, Mr Danckert caused HFW to lodge caveats on the title of units, 1 and 10 of the properties and on 18 August 2021 he caused HFW to lodge caveats on the title of units 2 to 9 of the properties: CB 84[134], 2054–2057 and CB 85[138], 2099–2114.

Vendors exchange with other purchasers and proceedings commenced

286 On 9 September 2021, these proceedings were commenced by Statement of Claim and HFW received lapsing notice in in respect of units 2, 3, 4, 6 and 7 (CB 85[146], 2340–2349) and the vendors exchanged contracts to sell the units to a new purchaser Blue Sox for a price of $690,000 each ($220,000 more for each unit): CB 86[148]; T 5.

The contracts

287 The contracts for sale for the block were in the standard form of contract for the sale and purchase of land, Law Society and Real Estate Institute, 2019 edition (**2019 edition**).

288 The contracts contained standard terms and conditions (**standard conditions**) and special terms and conditions (**special conditions**). The nominated date

for completion was the 42nd day after the contract date (CB 781.1) being 9 April 2021.

289 The contracts contain provision on the front page for the sales to be either by vacant possession or subject to existing tenancies: CB 781.1.

290 Specifically the contracts provided that the transactions were to be "*Electronic transactions*" to be performed by the "*Nominated Electronic Lodgement Network (ELN)*" being PEXA: CB 781.2.

291 The electronic transaction provisions were set out in cl 30 of the standard conditions: CB 781.17–781.19.

292 I will refer to a number of the standard conditions and special conditions below.

293 However, it is appropriate to refer to some of the provisions regarding notice and essentiality of time.

294 Clause 9 of the standard conditions provides:

> "**Purchaser's default**
>
> If the purchaser does not comply with this contract (or a notice under or relating to it) in an essential respect, the vendor can *terminate* by *serving* a notice. After the *termination* the vendor can –
>
> 9.1 keep or recover the deposit (to a maximum of 10% of the price);
>
> 9.2 hold any other money paid by the purchaser under this contract as security for anything recoverable under this clause –
>
> 9.2.1 for 12 months after the *termination*; *or*
>
> 9.2.2 if the vendor commences proceedings under this clause *within* 12 months, until those proceedings are concluded; and
>
> 9.3 sue the purchaser either –
>
> 9.3.1 where the vendor has resold the *property* under a contract made *within* 12 months after the *termination*, to recover –
>
> • the deficiency on resale (with credit for any of the deposit kept or recovered and after allowance for any capital gains tax or goods and services tax payable on anything recovered under this clause); and
>
> • the reasonable costs and expenses arising out of the purchaser's non-compliance with this contract or the notice and of resale and any attempted resale; or
>
> 9.3.2 to recover damages for breach of contract".

295 Clause 6 of the special conditions provides as follows:

"**NOTICE TO COMPLETE**

(a) In the event that this Contract is not completed by the time stipulated as the Completion Date on the front page of the Contract, either party shall be entitled to issue a Notice to Complete fixing a time for completion which time shall be of the essence of this Contract and such Notice shall be deemed to be sufficient as to time if a period of not less than fourteen (14) days from the date of such Notice is allowed for completion".

Conveyancers

296 The *Conveyancers Licensing Act 2003* (NSW) (**CL Act**) regulates conveyancing in New South Wales.

297 Under the CL Act "conveyancing work" is defined as legal work carried out in connection with any transaction that creates, varies, transfers or extinguishes a legal or equitable interest in any real or personal property, such as (for example) any of the following transactions: (a) a sale or lease of land, (b) the sale of a business (including the sale of goodwill and stock-in-trade), whether or not a sale or lease of land or any other transaction involving land is involved, (c) the grant of a mortgage or other charge: s 4(1) CL Act.

298 The CL Act provides that "legal work" means work that, if done for fee or reward by a person who is not an Australian legal practitioner, would give rise to an offence under Part 2.1 of the *Legal Profession Uniform Law* (NSW): s 4(4) CL Act.

299 Without limiting the above definition "conveyancing work" includes: (a) legal work involved in preparing any document (such as an agreement, conveyance, transfer, lease or mortgage) that is necessary to give effect to any such transaction, and (b) legal work (such as the giving of advice or the preparation, perusal, exchange or registration of documents) that is consequential or ancillary to any such transaction, and (c) any other legal work that is prescribed by the regulations as constituting conveyancing work for the purposes of the CL Act: s 4(2).

300 There are various exclusions from "conveyancing work": s 4(3) CL Act.

301 There is some commentary in caselaw regarding what is the nature, or more precisely content, of a duty of care owed by a conveyancer in a conveyancing matter to a client or clients and whether the duty is the same as that of a solicitor.

302 In *Benson v MacLachlan t/as Sterling Conveyancers* [2001] NSWCA 263 (a case dealing with the prior legislation), Meagher JA suggested it is the same: at [20]; Handley JA disagreed at [23]-[26], citing *Philips v William Whiteley Ltd* [1938] 1 All ER 566 at 569 per Goddard J (comparing jewellers and surgeons for the task of piercing ears to enable a plaintiff to wear ear-rings); and Heydon JA at [28] found it unnecessary to answer the question.

303 In *Perpetual Trustee Company Ltd v Ishak* [2012] NSWSC 697 at [178] Brereton J observed that the scope of duty of a conveyancer is narrower than that of a solicitor, and would not ordinarily include financial and commercial advice. That would appear to be correct having regard to the exclusions from the "conveyancing work" of establishing a corporation or varying the memorandum or articles of association of a corporation (s 4(3)(c)) and the giving of investment or financial advice: s 4(3)(f) CL Act.

304 There are cases in other States which comment on the duties of conveyancers in the context the statutory regimes prevailing in those jurisdictions: see e.g. *Auzora Pty Ltd v Commissioner of Office of Business and Consumer Affairs* (2009) 105 SASR 378; [2009] SASC 344; *Trani v Trani (No 2)* (2019) 59 VR 362; [2019] VSC 723.

305 In light of my findings in the matter it is not necessary to embark upon consideration of the duty of care owed by Ms Western to the other vendors.

306 However, a conveyancer is an agent and in light of the provisions regarding trust funds in the CL Act will have certain statutory duties and also prima facie fiduciary obligations.

Principles regarding notice to complete

Text and caselaw

307 If time is not "*of the essence*" for completion, then it must be made so by a notice to complete as a necessary prelude to termination for a party's failure to complete. The only relevant exception is where a party has repudiated his or her obligations under the contract; the other party can accept the repudiation and terminate the contract without the need first to make time of the essence: see Peter Butt, *The Standard Contract for Sale of Land in New South Wales* (2nd ed, 1998, LBC Information Services) (**Butt**) pp 634–635.

308 A notice to complete makes essential the time for performance of the obligation to complete, where before the time was non-essential. Another (and perhaps preferable) way of describing the effect of a notice to complete is that it provides evidence of the recipient's repudiation of an obligation if the recipient fails to complete within the time required by the notice: see Butt at 637–638.

309 The basic requirements for a valid notice to complete are as follows (Butt at 638):

(1) the recipient of the notice must be in default such as to justify the giving of the notice;

(2) the giver of the notice must be free of relevant default when giving the notice;

(3) the giver of the notice must be able, ready and willing to proceed to completion;

(4) the time fixed by the notice must be reasonable in all the circumstances; and

(5) the notice must be in order as to form and content.

310 Butt (now Emeritus Professor Butt) at 658 in referring to the requirements regarding the *form and content* of a notice to complete referred to the decision of Sir Frederick Jordan in *O'Brien v Dawson* (1941) 41 SR (NSW) 295 at 304, noting three requirements:

(1) the time prescribed in the notice must be reasonable;

(2) the notice must state with reasonable explicitness what it requires to be done; and

(3) the notice must state with reasonable explicitness that if what it requires to be done is not done, the giver will treat the contract as at end or will treat himself as entitled to bring it to an end.

311 In relation to the consequences of non-compliance Butt at 659 states:

> "The notice must state that if what is required to be done is not done the giver will treat the contract as at an end *or* will treat himself or herself as entitled to bring it to an end (fn In *Vandyke v Vandyke* (1976) 12 ALR 621 at 633-634 Hutley JA questioned why the notice need specify the consequences of non-compliance, since the notice-giver's remedies are provided by law and the giver ought not be required to specify in advance which of those remedies will be exercised).
>
> It is to be noted that these are expressed as alternatives. It might be imprudent for the notice to state unequivocally that termination will follow non-compliance, lest, if the notice subsequently be held to be invalid (for example, for failing to allow sufficient time for completion), the giver be seen as

repudiating his or her obligations under the contract (fn A possibility envisaged, but not decided, by Deane and Dawson JJ in *Laurinda Pty Ltd v Capalaba Shopping Centre Pty Ltd* (1989) 63 ALJR 372 at 385.)"

312 The parties' counsel provided submissions regarding principles in respect of notices to complete. With some adaption of those submissions and supplementation I set out the following principles which emerge in the texts and authorities:

(1) a notice to complete, no less than a contract, should of course be read objectively and construed by reference to what a reasonable person in the position of the other party may be led to believe by all of the words that have been used: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [40]; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 348; [1982] HCA 24; J D Heydon, *Heydon on Contract* (2019, LexisNexis), Chapter 8;

(2) the time at which the validity of a notice to complete must be assessed is the time at which it is given: *Wright v Featherstone* (1984) Q Conv R 54-118 at 56,719 (Full Court, Supreme Court of Queensland, Campbell CJ, Andrews SPJ and Connolly J);

(3) it is not open to a party to make time of the essence for the performance of a way which is inconsistent with the terms of the contract: *Cromarty Resources Pty Ltd v Thalanga Copper Mines Pty Ltd* [2021] NSWCA 284 (*Cromarty*) at [50] per Meagher JA (Bell P at [1] and Payne JA at [88] agreeing);

(4) the true function of a notice to complete is not substantive, i.e. to vary existing contractual rights and liabilities, but evidentiary, i.e. to enable the innocent party to demonstrate, by reference to the other party's noncompliance with the notice to complete, viewed in the light of the past history, that the other party has repudiated his obligations under the contract, thus entitling the innocent party to terminate it: *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 (*Taylor v Raglan Developments*) at 131B-C per Powell J citing *Stickney v Keeble* [1915] AC 386; Roy Milner Stonham, *Vendor and Purchaser* (1964, Law Book Co) at par 1459, p 746;

(5) a notice to complete "does not alter the time fixed for performance by the contract" (or any other term of the contract), rather it "affects the exercise of a legal right to rescind and then only if the case is 'appropriate for the granting of equitable remedies by way of relief…'": *Louinder v Leis* (1982) 149 CLR 509 (*Louinder v Leis*) at 533; [1982] HCA 28 per Brennan J;

(6) a notice must be clear and explicit, not vague and confusing, and "*the notice must give to the recipient the clear impression that time is of the essence and that if he does not complete, the other party may rescind.*": *Hearse v Pallister* [2009] NSWSC 807 at [73(8)];

(7) when a notice is not ambiguous but rather unilaterally asserts rights which are not available under, or are inconsistent with the contract, the notice is invalid; it is not cured by surrounding circumstances. Thus, "*a Notice to Complete must deal in explicit terms with what it is that the recipient is to do and must call upon him to perform that which the giver of the notice is entitled to ask him to perform and no more*": *Pearce v Kelly* (1919) 20 SR (NSW) 88; *Shenstone v Hewson (No 2)* (1928) 29 SR (NSW) 39; *O'Brien v Dawson*; *Hearse v Pallister*, supra, at [34] per Hall, J; and

(8) the onus of proving the validity of a notice to complete lies on the party purporting to terminate the contract for non-compliance with the notice: Butt at 670.

313 Whilst ultimately it is a question of construction in each case, the parties made reference to a number of cases as indicating the nature of the information required.

314 In *Balog v Crestani* (1975) 132 CLR 289; [1975] HCA 16, the words in the notice to complete used were (at 292):

> "AND FURTHER TAKE NOTICE that if the said Contract is not fully and finally completed by the said time, then the Vendor will exercise his power under the Contract without further notice."

315 Gibbs J stated (at 299-300):

> "The meaning of the notice must, of course, be determined upon a consideration of all its provisions: it would be wrong to consider what its concluding words, standing alone, would convey. The notice commences with a recital of the previous notices which did indicate with sufficient clarity an intention on the part of the respondent to rescind upon a failure to comply with them. The notice then proceeded to require the appellant to tender a transfer and pay the balance of purchase moneys by a specified time and to state that "in this respect time shall be of the essence". The only purpose of including those words could be to confer on the respondent a right to rescind the contract if the appellant did not tender the transfer and pay the balance within the time mentioned. Viewed in this context the concluding words could not reasonably be understood as an intimation of an intention to seek specific performance. If that was all that the respondent sought it was unnecessary for him to give the notice at all. The words "his power under the Contract" suggest that it is intended to refer to a particular power controlled or governed by the contract and available to be exercised by the respondent. The reference to one power, rather than to all the rights, under the contract, conveys a meaning different from that attributed to the notice in *Smith v. Hamilton* [1951] Ch. 174. When the concluding words of the contract are considered in the context provided by the whole of the notice it sufficiently appears that the power mentioned is that which is given by the contract to the respondent in the event of a default by the appellant in the performance of his contractual obligations - that is, the power conferred by cl. 16."

316 His Honour then held (at 300) that:

> "upon a fair reading of the notice its concluding words could only reasonably be understood as an intimation of an intention to exercise the powers given by cl.16 of the contract, or in other words to treat the contract as at an end."

317 In *Taylor v Raglan Developments Pty Ltd* at 132-133 Powell J approved though qualified Gibbs J's observations in *Balog v Crestani* at 296-297 (quoted above) in the following terms, which suggest that a notice to complete is sufficient if it draws attention to the possibility of termination:

> "In so far as it is asserted that a notice to complete must, in order to be valid, make clear the consequences of non-compliance the law is conveniently recorded in the following passage in the judgment of Gibbs J, as he then was, with whose judgment Jacobs J concurred in *Balog v Crestani* (1975) 132 CLR 289, at pp 296, 297:
>
> > "… it is usual to describe a notice given for this purpose as a notice limiting the time at the expiration of which the party giving it 'will treat the contract as at an end' if the notice has not been complied with: see, e.g. *Taylor v. Brown* (1839) 2 Beav. 180, at p 183; 48 E.R. 1149, at p. 1150; *Green v. Sevin* (1879) 13 Ch. D. 589, at pp. 599-600; Stickney v. Keeble [1915] A.C. 386, at pp. 418, 423; *Ajit v. Sammy* [1967] 1 A.C. 255, at p. 258; *Perry v. Sherlock* (1888) 14 V.L.R. 492, at pp. 507-8; and *Lenneberg v. McGirr* (1919) 19 S.R. (N.S.W.) 83 at p. 86. Of course it is not necessary that the notice should use any particular form of words; it is the substance of what it conveys that matters. For example, it will obviously be sufficient to state that if the notice is not complied with, the party giving the notice will treat the contract as abandoned (*Stickney v. Keeble* [1915] A.C. 386) or will rescind it (*Canning v. Temby* (1906) 3 C.L.R. 419, at p. 431) or will put an end to it (*Wendt v. Bruce* (1931) 45 C.L.R. 245, at p. 257) and there is no reason to doubt that it will be sufficient for a vendor, under a contract similar in form to that in the present case, to give notice that upon non-compliance he will terminate the agreement and either sue the purchaser for breach of contract or resell the property as owner and recover the deficiency, if any, arising on such resale. However, it must be regarded as doubtful whether a notice would be effective if it stated that upon non-compliance the party giving it might treat the contract as at an end, but might on the other hand seek to have it specifically performed …."
>
> (With respect, I find myself unable to share the doubts expressed by his Honour in the last sentence of the passage just quoted; nor, in my view do the two authorities (*Reynolds v Nelson* (1821) 6 Madd 18; 56 ER 995; *Smith v Hamilton* (1951) Ch 174) support them, for in neither case did the relevant notice indicate that a possible consequence of non-compliance was termination. If, as I have recorded above is my view, the function of a notice to complete is to provide evidence of repudiation sufficient to justify termination then it would follow, in my view, that even though a notice to complete draws attention to other possibilities, it is sufficient if it draws to the attention of the recipient the possibility of termination for non-compliance. This, indeed appears to have been the view of Jordan CJ in *O'Brien v Dawson* (1941) 41 SR (NSW) 295; at p 304; 58 WN 206, which view was adopted and acted upon by Helsham J, as he then was, in *Gostown Pty Ltd v Pryor* (1970) 92 WN (NSW) 882, at pp 885, 886, Helsham J, in the latter case, treating the

> reference to specific performance as surplusage—as it was, and is, since no prior notice need be given before the commencement of proceedings for specific performance."

318 In *Wilde v Anstee* (1999) 48 NSWLR 387; [1999] NSWSC 612 at [62], Austin J held:

> "A notice is adequate, if it indicates, when read in the surrounding circumstances, that the giver will be entitled or will regard himself as being entitled to bring the contract to an end in the event of non-compliance. Clearly it is not necessary to convey that message in those very words. Both Gibbs J in *Balog* (at 299) and Deane J, Dawson J and Brennan J in *Laurinda* (at 654 and 646) respectively favoured the view that it is sufficient for the notice to make it clear that the time fixed by the notice is to be treated as of the essence for performance of the contract."

319 Butt states that it is clear from *Balog v Crestani,* as indeed from other cases, (citing *Morgan v Beeby* [1968] 2 NSWR 609 at 616, 624 (CA)) that the surrounding circumstances (including the correspondence between the parties) can be looked at to clarify ambiguous terms in a notice to complete, and in particular to imply from the terms of the notice a sufficient intimation that non-compliance may lead to termination: at 660.

320 Butt then comments on the extent of recourse to surrounding circumstances (at 660):

> "However, it is thought that recourse to surrounding circumstances can only avail to save a notice from invalidity for failing to indicate the consequences of non-compliance, where the notice contains *some* reference, albeit ambiguous or oblique, to the possibility of termination as a consequence of non-compliance. It is unlikely that surrounding circumstances can be invoked to add to the notice a provision which simply is not there. Examples are where, the notice merely reserves to the giver the right to claim damages for non-compliance, (fn as in *Baker v McLaughlin* [1967] NZLR 405) or where the notice merely states that in the event of non-compliance the giver will rely upon his or her rights (plural) under the contract but without any indication that what is intended is the right of termination (fn *Laurinda Pty Ltd v Capalaba Shopping Centre Pty Ltd* (1989) 63 ALJR 372; *Chapman v Larrescy* [1978] 1 NSWLR 592 at 595-596 (Helsham CJ in Eq) distinguishing *Balog v Crestani* on the ground that in *Balog's* case the notice referred to *one* right to be exercised upon non-compliance (which the surrounding circumstances clearly identified as the right to terminate), whereas in the instant case the notice claimed recourse to *all* rights under the contract in the event of non-compliance and there was nothing in the notice itself or the surrounding circumstances to point to exercise of the right of *termination* as a consequence of non-compliance)".

Time stipulations

321 Time stipulations are viewed differently at common law and in equity: Butt at 389-390.

322 At common law in the case of the sale of land, time was of the essence of the contract when a date for completion was named in the contract. The Equity Courts on the other hand treated failure to complete on the appointed day as a failure in a collateral matter analogous to failure to pay off a mortgage upon the due date. At common law consequences may be strict. However, in equity specific performance may be available to a party who had not been ready to complete on the appointed day unless it appears to the Court that it would be unjust not to allow the defendant to take advantage of the plaintiff's failure: *Canning v Temby* (1905) 3 CLR 419 at 425; [1905] HCA 45 per Griffith CJ.

323 Thus viewed, the doctrine that time is not of the essence of the contract is a doctrine applied in relief of a party who is himself technically, but not substantially, in default so as to allow him to claim specific performance in a proper case, although at law he could not maintain an action: *Canning v Temby* at 426.

324 More particularly, time stipulations may be affected by statutory provisions.

325 In New South Wales the *Conveyancing Act 1919* (NSW) provides that stipulations in contracts, as to time or otherwise, which would not before the commencement of the Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have previously received in such court: s 13.

326 For some time at least until the early 1980s there was some element of uncertainty affecting the operation of s 13, which uncertainty arose from controversy as to the true principle underlying equity's attitude to time stipulations: *Louinder v Leis* per Mason J at 524.

327 Equity and common law differed not so much in the construction of the contract, rather as to the consequences which they assigned to a breach of it: *Louinder v Leis* per Mason J at 524.

328 Essentially, s 13 has been regarded as extending the equitable doctrine to proceedings at law except where equity still would have regarded time as of the essence: see A E V, “Contracts for the Sale of Land — Stipulations as to Time” (1965) 39 ALJ 63-64 referring to *Canning v Temby* at 426.

329 In summary and without purporting to be precise, equity would regard time as of the essence where: (a) it is an express term of the contract; (b) such a term can be implied because of the nature or structure of the contract; (c) one party has delayed unreasonably and the other gives him notice requiring performance at a reasonable future date, and (d) a term of the contract is that some act be done by a defined date, or within a reasonable time: *Conveyancing Service New South Wales* (LexisNexis) at [30335.5].

Equitable context to requirements for a valid notice

330 Equity rather than the common law has shaped the requirements for a valid notice: *Wilde v Anstee* per Austin J at [59] citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623; [1989] HCA 23 (*Laurinda*) per Deane and Dawson JJ at 652. The impact of equity relates not merely to timing but also, and perhaps primarily, to availability of equitable remedies: *Wilde v Anstee* at [59].

331 To the extent that equitable relief is sought, notices to complete and their effects must be viewed through the operation of equitable principles.

332 As noted above, it is often said that the effect of a notice to complete is that it provides evidence of the recipient’s repudiation of an obligation in failing to complete within the time required by the notice: see Butt at 637–638; *Cromarty* per Meagher JA at [50]-[52] (Bell P at [1] and Payne JA at [88]) agreeing) citing *Louinder v Leis* at 533 (Brennan J); *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (*United Scientific Holdings*) at 946 (Lord Simon).

333 Lord Simon commented the giver of the notice is really saying, ‘Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract.’: *United Scientific Holdings* at 946.

334 These comments whilst referring to contractual obligations, are to be viewed in the context of the approach of equity to contractual obligations when a party seeks equitable relief.

335 The notion that the notice must specify termination is not supported by the authorities. It is not hard in the authorities to find forceful remarks regarding this: e.g. *Vandyke v Vandyke* (1976) 12 ALR 621 per Hutley JA at 633.

336 While it is sufficient for the giver to convey an intention to terminate, as Austin J has observed it is reasonably clear from modern authorities that it is not necessary for the giver to do so. A notice is adequate to warn the defaulter if it conveys that the giver will be entitled in the event of non-compliance, or will regard himself as entitled, to rescind: *Wilde v Anstee* at [60] citing Deane and Dawson JJ in *Laurinda* at 654.

337 The whole point of equity's intervention in relation to stipulations as to time is that, in the absence of an express or implied contractual provision to the contrary, it regarded it as inequitable or unconscionable for a party to a contract to rescind for breach of the time stipulation without having given reasonable warning to the party in default: Deane and Dawson JJ in *Laurinda* at 654.

338 Viewed in the above equitable approach, it is not necessary that the notice should use any particular form of words; it is the substance of what it conveys that matters (*Taylor v Raglan Developments* at 133) in light of the surrounding circumstances.

Principles regarding completion and tender of performance

Completion in a traditional paper settlement

339 In a traditional paper settlement, the buyer is usually required by the terms of the contract to pay the purchase price in exchange for the title and transfer documents from the seller: Sharon Christensen and W D Duncan, "To tender or not to tender: When is a party ready, willing and able for electronic settlement?" (2016) 25 APLJ 22 (Christensen and Duncan) at 22.

340 The obligation of the buyer to pay the price of the obligation of the seller to deliver the title (settlement obligations) are usually dependent and concurrent obligations: Christensen and Duncan at 22, 23.

341 This has several consequences.

342 One consequence is that a party is only able to terminate for the failure by the other party to perform a settlement obligation if the terminating party is ready, willing and able to perform. This will require tender of performance in accordance with the contract unless the requirement to tender is excused: Christensen and Duncan at 22-23 citing *Mahoney v Lindsay* (1980) 33 ALR 601.

343 What is required for a valid tender ultimately depends upon the terms of the particular contract. However generally speaking the minimum requirements are for the buyer to attend at the place of settlement and to tender the amount due under the contract and for the seller in exchange to deliver good title in accordance with the contract: Christensen and Duncan at 23.

344 In the case of the buyer, the balance of the purchase price to be tendered as calculated and adjusted in accordance with the contract: Christensen and Duncan at 24.

345 The obligation to tender performance can be dispensed with if one party intimates before the time of settlement the performance of the obligation will be futile or useless. That intimation of non-performance may occur either expressly (by words or writing) or impliedly by conduct: Christensen and Duncan at 24-25.

Completion in an electronic settlement

346 Clause 30 of the standard conditions sets out a detailed regime regarding what is expected and required of parties in settlement of an electronic conveyancing transaction. I refer to this more specifically below.

347 Christensen and Duncan make some comments in relation to tender of performance in a digital or electronic environment. However, it is stated that the essential obligations of the parties in an electronic settlement are the same as in a ‘paper settlement’. The main differences are said to be that in an electronic

settlement (a) there is a focus on the pre-settlement obligations of both parties to prepare and sign electronic documents and verify funds and (b) there is no physical meeting to conduct an exchange: at 27.

348 Instead, the exchange of the title and transfer documents for the purchase price takes place electronically through a number of steps that are facilitated by the relevant ELN such as the PEXA workplace transaction system: see Christensen and Duncan at 27.

Electronic Conveyancing & PEXA

349 Ms Oakes who has practised in conveyancing for over 10 years gave evidence regarding the operation of PEXA.

350 People who are members of PEXA and users of PEXA, by reason of that membership, are generally described as subscribers: T301. Ms Oakes is not personally a member of PEXA although the firm for whom she works (Avondale Lawyers) is a member of PEXA: T301. Ms Oakes operates the conveyancing practice of that firm when it comes to utilising the electronic workspace provided by PEXA: T302.

351 Ms Oakes' expertise is in the field of actually operating the PEXA system, as distinct from expertise in respect of the rules that govern the system: T301.

The PEXA system

352 Ms Oakes' evidence as to the operation of the system was uncontroversial and is relevantly as follows (CB 188[4]-191[19]):

> "4. The PEXA platform allows settlement to occur in a digital workspace. In order to complete financial settlements, PEXA electronically sends Instructions to financial institutions involved within the transaction. PEXA is an efficient, accurate and secure way of conducting the settlement and lodgment stages of a conveyancing transaction. PEXA replaces many (if not all) of the paper and manual processes traditionally involved in property transactions.
>
> 5. Effective as at 1 July 2019, all standard conveyancing transactions in NSW must be effected electronically via the *Electronic Lodgment Network* (also known as PEXA) pursuant to Section 12E of the *Real Property Act 1900* (Conveyancing Rules).
>
> 6. PEXA is a national online system providing for: preparation of electronic dealings and verification of lodgment acceptability.
>
> 7. In order to complete financial settlement. PEXA electronically sends instructions, to payment integrated Financial Institutions involved In the transaction, as well as the RBA. As the funds are exchanged, confirmations

are sent back to PEXA, which are then reflected in the Workspace Summary, inclusive but not limited to the discharge payout figure and the loan source funds available for settlement.

...

PEXA: Financial Settlement Schedule (FSS)

9. A Financial Settlement Schedule (FSS) Is a collaborative tool that contains electronic financial transaction directions for all source and destination line items. All payments are disbursed automatically at settlement.

10. The FSS displays an overview of the financial details of the PEXA Workspace and allows you to view the difference between source and destination amounts.

11. Once the payment directions has been entered by the respective parties, the parties are required to sign off on the FSS In order for settlement to proceed.

12. Should one party sign off on the FSS and the other party make amendments to the payment directions, including any additional payment directions, the party who originally signed the FSS will be required to re-sign in order for settlement to proceed.

13. All parties involved in the transaction, including but not limited to the Vendor, Purchaser, Outgoing mortgagee and incoming mortgagee are required to complete and sign off on the FSS In order for settlement to proceed.

14. Sign off can occur any time prior to the settlement time.

PEXA: Settlements

15. In order for a settlement to proceed via the PEXA workspace platform, the PEXA Workspace must be in READY/READY (for the Financial settlement status and the lodgement status) status before settlement time.

…

16. READY/READY status can only be achieved once the following is completed by the respective parties:

i. All documents must be Signed, including but not limited to the Notice of Sale, Lodgment instructions, transfer instrument, mortgagee and/or discharge of mortgage;

ii. Source funds for the purchaser is uploaded, verified by the lender, authorised by the lender and signed by the lender (this is a 4 step process); and

iii. Financial Settlement Schedule must be signed and balanced.

17. Should the PEXA workspace not be sitting in a READY/READY financial settlement status by the settlement time then the matter will rollover every 30 minutes until the cut off time for the day, at which point the settlement will fail.

18. Should the PEXA workspace be sitting in a READY/READY financial settlement status by the settlement time, the following occurs:

i. The Workspace locks.

ii. The Financial Settlement Status moves from READY/READY to "SETTLING".

iii. If a trust account is involved, a Source Funding instruction is sent to the bank.

iv. Once Source Funding is complete, Reservation is sent to the Reserve Bank of Australia ("RBA") (runs every 2 minutes). Once an RBA Reservation is received:

i. Lodgement Request is sent to the Land Registry.

ii. Lodgement status moves to Lodging.

v. Once Lodgement is complete, the Lodgement status moves to Lodged.

vi. Note: The Land Registry will commence reviewing documents.

vii. Once Lodgement status is Lodged, Settlement Response is sent to the RBA (runs every 2 minutes).

viii. The RBA will send a response once the Settlement Request has been processed.

ix. When the Settlement Response has been received Financial Settlement status will move to Settled - at this point Financial Settlement has been successfully and irrevocably completed.

x. Once Settlement at RBA is complete, disbursement will commence, Financial Settlement status moves to DISBURSING. Disbursement batch runs every 10 minutes.

xi. When the Land Registry has completed reviewing the documents and has provided a final status for the documents (e.g. registered or rejected) the Lodgement status will move to COMPLETED.

xii. When all banks involved in settlement have returned Disbursement responses, the Financial Settlement status will move to DISBURSED.

xiii. Those funds will then be available to the respective parties."

Some elaboration

353 Ms Oakes indicated that the split between "READY/READY" is a split between readiness for the financial statement and readiness for lodgement: T296.

354 The details from the settlement statement are inserted into the PEXA financial settlement schedule (**FS schedule**) as per cl 30.9 of the contracts: see also T305.

355 Each of the contracts (for example see CB 781.18) provides, pursuant to cl 30.9.1 that the purchaser must provide the vendor with adjustment figures at least two business days before the date for completion:

> "30.9 To complete the financial settlement schedule in the *Electronic Workspace* –
>
> > 30.9. 1 the purchaser must provide the vendor with *adjustment figures* at least 2 *business days* before the date for completion;
> >
> > 30.9.2 the vendor must confirm the *adjustment figures* at least 1 *business day* before the date for completion;
> >
> > 30.9.3 if the purchaser must make a *GSTRW payment* or an *FRCGW remittance,* the purchaser must *populate* the *Electronic Workspace* with the payment details for the *GSTRW payment* or *FRCGW remittance* payable to the Deputy Commissioner of Taxation at least 2 *business days* before the date for completion."

356 Ms Oakes agreed that there would be communication of figures between the solicitors or conveyancers concerned beforehand and agreement on adjustments and the normal practice is that once those figures are communicated and the parties endeavour to agree, they proceed to insert agreed figures manually into the system to get it ready for settlement: T300, 308, 309.

357 The provision of figures in this way beforehand between the conveyancers prior to settlement is in order to allow a reasonable time for each party to agree: T309.

358 Ms Oakes indicates that the normal practice is that it is the purchaser rather than the vendors who provides the first draft of the adjustment figures and [is also] the person who sends the first hard copy draft of the adjustment figures: T311.

359 Some figures may be typed in at an earlier point and then the party inserting the figures can come back and finish it off later: T308.

360 Figures would need to be inserted on behalf of the relevant purchaser and both parties need to agree on a final figure for settlement: T299.

361 Mr Kelly referred to the PEXA Subscribers Participation Agreement (**PSPA**) and the New South Wales Participation Rules for Electronic Conveyancing (**Participation Rules**): T300-301.

362 Mr Kelly asserted that there is a difference between Participation Rules and the PSPA under which subscriber settlement terms and conditions for electronic settlements and payments are put into effect: T301.

363 Ms Oakes had familiarised herself with the PSPA: T302.

364 Mr Kelly referred (T302) to rule 14.4(b) PSPA

> "regardless of whether information is entered into the Electronic Workspace in accordance with clause 14.4(a)(i) or (ii), it is responsible for the accuracy and correctness of all information contained in an Electronic Workspace at the time an Electronic Workspace Document or the Settlement Schedule (as applicable) is Digitally Signed"

365 Ms Oakes accepted that, in relation to ensuring accuracy and correctness of information, although the subscriber can put in whatever figure the subscriber wanted, one cannot have incorrect amounts at the time of signing off: T302.

Co-operation requirements

366 Ms Oakes agreed that it was a rule of operation of the system that the parties (subscribing members) using the system co-operate: T310.

367 If a purchaser requires finance in order to complete the purchase, the incoming mortgagee providing the finance is invited by the purchaser. The incoming mortgagee will then need to accept the invitation and upload the source funds into the source funds tab: T310.

368 The outgoing mortgagee puts in a number and signs off on the financial statement in respect of the money it says it needs to be paid in order to discharge its mortgage: T303-304.

369 Ultimately all charges and adjustments require agreement. That would include a claim made by the vendor for default interest: T309.

370 Once there is agreement by the parties, there is a facility for the system to indicate that both parties have agreed on the figure and then "all parties can sign off": T299.

371 Once the parties are ready to settle, they will usually sign off and verify the source funds, then it is ready to settle: T310. However, the sale will not complete if the incoming mortgagee has not accepted an invitation into the PEXA workspace, because the incoming mortgagee is the only one who can upload the source funds and verify those funds: T310-311.

372 Ms Oakes indicated that if the purchaser has not joined the PEXA workspace the parties can partially co-operate, but settlement cannot be completed

because they have not joined the workspace and they will need to enter in their own payment directions, which the vendor cannot do on the purchaser's behalf, and agree to a final figure and sign off: T310.

373 Christensen and Duncan commented upon the NSW standard contract (prevailing in 2016). They noted that the contract does not purport to alter the fundamental obligations of the buyer and seller and that cl 30.10 requires the buyer and seller to ensure all electronic documents are signed and all other steps have been taken to enable the transaction to complete on the settlement date and that the usual obligations of the seller and buyer under cl 16 to deliver title and pay the purchase price remain the same: at 29-30.

374 As a general proposition those comments seem still relevant in relation to the 2019 edition.

PEXA in operation – an example

375 Ms Oakes was not a participant of the PEXA workspace in this case. Rather she was given a list of names and dates and descriptions of events and organised them in chronological order from the history she was provided with: T297.

376 To take as an example the case of Mr Tayyar (unit 9) Ms Oakes exhibited a copy of the PEXA exchange history for the period from 9-30 July 2021: T296.

377 There are a series of entries disclosed in relation to the workspace as follows (CB 211):

> "xiv. At 09:49:56 AEST on **24 July 2021 Step by Step Conveyancing created destination line (professional fees);**
>
> xv. At 10:17:33 AEST on **27 July 2021 WESTPAC, outgoing mortgagee on title updated loan payout;**
>
> xvi. At 10:23:27 AEST on **27 July 2021 WESTPAC, outgoing mortgagee on title signed off on the Financial Statement;**
>
> xvii. At 11:09:17 AEST on **27 July 2021 Step by Step conveyancing has. created destination line item (Vendors Funds);**
>
> xviii. At 11:31:24 AEST on 27 July 2021: Workspace· not ready for **settlement due today at 12:30pm AEST;**"
>
> xix. At 12:30:49 AEST on 27 July 2021: settlement delayed until 1:00PM AEST due to workspace not being in a ready or locked status"

378 Thereafter there were half hour increments (approximately) up to and including 5:00 PM when settlement failed on that day due to the expiry of the 5:00 PM cut-off time (CB 211-212):

> "xxviii. At 17:00:14 AEST on **27 July 2021: Settlement has failed due to the**
>
> **workspace not being in Ready status before the settlement cut off time.**"

379 Ms Oakes indicated that the line item "xvii" is the final figure provided by the vendor prior to settlement: T298.

380 In order to get the "vendor's funds" (which are the proceeds from settlement to be paid to the vendor) one needs to know the other fees including professional fees. Ms Oakes indicated that Ms Western had already put in the professional fees which she agreed would need to have been taken from a settlement sheet: T298.

381 In the case of Mr Tayyar the form of settlement sheet which appears at CB 1949-1950 contains figures for settlement as asserted by Ms Western on behalf of Mr Tayyar as vendor. All that detail is inserted into the PEXA workspace financial statement: T305.

382 If the system had correctly worked the destination line item "Vendors Funds" (CB 211) at "xvii" would have been the figure of $191,281.90 (in accordance with the settlement sheet at CB 1950): T305.

383 The figure of $191,281.90 is simply the vendor's assertion of what the vendor should end up with after all the figures have been put in: T306.

384 There are PEXA settlement sheets for each of the vendors, although it became apparent during cross-examination of Ms Oakes that the copies of them in each of the electronic and hard copy court books were an incomplete reproduction of the material captured on the electronic pages, because the screenshots facility is unable to capture the entire settlement sheet page: T305-307. That was resolved by the production of a A3 size reproduction, relevantly as an example, in the case of Mr Tayyar: see Ex D1,8-1.

385 Ms Oakes rejected the notion that her assertion that the parties did not agree on a final figure for settlement suggested that neither party got to the point of

finally signing off on the settlement schedule (CB 212 [42r]). She indicated that that part did not relate to "signing off", but rather to the parties agreeing on a settlement figure. She stated that prior to signing off both parties have to click "agree": T303. Only the purchaser and vendor can click "agree": T303. There would never be situation in which there was a complete signing off unless they both agreed: T304.

Some observations regarding co-operation

386 Because it is relevant to a number of the issues in the matter it is appropriate to make some observations at this point regarding co-operation regarding conveyancing transactions within the electronic conveyancing environment.

387 DC2 referred to the provisions of cl 26.9 of the PSPA.

388 Those provisions (CB 2563) provide that:

> "26.9 **Giving effect to this Participation Agreement**
>
> Each party will do anything (including execute any document), and will ensure that any other relevant persons will, do anything (including execute any document), necessary to give full effect to the transactions contemplated by this Participation Agreement".

389 Mr Allen submitted (G1CS [40]) that:

> "Essential to electronic conveyancing is the requirement for the parties to co-operate. This is why standard conditions 37 and 39 of the Standard Form Contact exist. These two standard conditions and the surrounding standard conditions ensure that there is a framework for the necessary co-operation between the parties. The entire conveyance breaks down if the purchaser does not join the PEXA workspace and does not invite any incoming financiers to join as required by standard condition 37. Similarly, the process breaks down if the purchaser does not provide draft adjustment figures in accordance with standard condition 39. If the purchaser does not do these things, and thereby does no co-operate, there is little or nothing the Vendor can do to advance completion…"

390 I agree.

391 Even under the general law there is a general obligation for parties to co-operate with one another to give effect to a contract: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; [2014] HCA 32 at [37] per French CJ, Bell and Keane JJ.

PEXA workspace details

Vendors' history – up to 27 July 2021

392 In relation to Mr Parker, Ms Oakes reviewed the material in respect of the PEXA workspace ID and history and noted the following in respect of each of the vendors (CB 193[21] – Mr Parker; 196[24] – Mr Hew; 199[27] – Mr Young; 202[30] – Ms Hopwood; 205[33] – MALK; 207[36] – Szepes; 209[39] – Mr O'Connell; 211[42] – Mr Tayyar; 214–215[45] – Ms Western (unit 10); 216–217[47] – Ms Western (unit 1)):

(1) the mortgagee on title had provided a mortgage payout figure and the vendor provided a final figure prior to settlement;

(2) the incoming mortgagee and/or the incoming proprietor did not upload the source funds for settlement;

(3) the parties did not agree on a figure for settlement; and

(4) the workspace was not balanced for settlement, in that the amount payable was the amount available for settlement.

Settlement status on PEXA as at 27 July 2021

393 Based on the review of the relevant PEXA online workspaces Ms Oakes gave evidence that:

(1) the Vendor had completed all necessary tasks on the PEXA platform to advance the workspaces to READY/READY Status: CB 217[49];

(2) the Purchaser had not completed all necessary tasks via the PEXA platform to advance the workspaces to READY/READY Status: CB 217[50];

(3) The Vendor had taken the necessary steps to advance the PEXA workspaces in an attempt to reach a READY/READY status for the financial statement and lodgement: CB 218[51].

394 Ms Oakes concluded that if the Purchaser completed the following tasks prior to 5:00 PM on 27 July 2021, the PEXA workspaces would have proceeded to a READY/READY status. However the following tasks were not performed by the Purchaser prior to 5:00pm. on 27 July 2021 (CB 218[52]):

> "i. Accepted the invitations to the respective workspace;
>
> ii. Update the Purchaser's participant details;
>
> iii. Completed and signed all documents including but not limited to the Notice of Sale, lodgment instructions and transfer instrument;
>
> iv. Uploaded, verified, authorised and signed the source funds required for the purchaser;

v. Completed stamp duties and entered the relevant payment directions. into the PEXA Financial Settlement Schedule; and

vi. Balance and signed the Financial Settlement Schedule."

395 From Ms Oakes' review and analysis of the material provided, DC2 did not take the necessary steps to advance the PEXA workspace to READY/READY on or before 5:00 PM on 27 July 2021: CB 218[53].

Mr Boxsell joins the PEXA workspace – 30 July 2021

396 In respect of each of the vendors, Ms Oakes noted that the incoming proprietor (also known as the Purchaser) only joined the PEXA Workspace:

(1) for Mr Parker's sale at 14:30:06 AEST on 30 July 2021: CB 193[21e];

(2) for Mr Hew's sale at 14:26:32 AEST on 30 July 2021: CB 196[24e];

(3) for Mr Young's sale at 14:29:12 AEST on 30 July 2021: CB 199[27e];

(4) for Ms Hopwood's sale at 14:26:58 AEST on 30 July 2021: CB 202[30e];

(5) for MALK's sale at 14:28:37 AEST on 30 July 2021: CB 205[33e];

(6) for Mr Szepes' sale at 14:28:14 AEST on 30 July 2021: CB 207[36j];

(7) for Mr O'Connell's sale at 14:30:30 AEST on 30 July 2021: CB 210[39o];

(8) for Mr Tayyar's sale at 14:25:48 AEST on 30 July 2021: CB 212[42t];

(9) for Ms Western's sale (unit 10) at 14:27:30 AEST on 30 July 2021: CB 215[45y]; and

(10) for Ms Western's sale (unit 1) at 14:29:41 AEST on 30 July 2021: CB 217[48e].

Duties of agents

397 Mr Danckert, as noted, was an agent for the vendors in respect of the sale of the block.

398 It was admitted on the pleadings by Ms Western that Ms Western and SBS were expressly or impliedly agents of the vendors in light of the background to the contracts including negotiations with Jogat in 2018: CB 66.6A[26]; CB 66.42[6].

Source of duties

399 Duties of agents may arise in different ways including by contract, in equity and by a statutory provision.

400 Where an agency is created by contract, self-evidently the precise duties owed by the agent to the principal will depend upon the terms of the contract. Nonetheless, implied into every contract of agency are terms requiring the agent to act in accordance with the instructions contained in express authority or given subsequently by the principal, to act honestly and in good faith and to act for the benefit of the principal. G E Dal Pont, *Law of Agency*, (4th ed, 2020, LexisNexis) (Dal Pont) at 202. To this end the agent must inform the principal of all matters material to the agency: Dal Pont at 201-202.

Fiduciary duties proscriptive

401 Fiduciary duties in Australian law have a proscriptive rather than prescriptive nature: e.g. Dal Pont at 205, 222, citing *Breen v Williams* (1996) 186 CLR 71 at 113; [1996] HCA 57.

402 There are various proscriptive duties. These include that (a) the agent not place himself in a position where there is or may be a conflict between the duty owed as fiduciary and his or her own interest or duty to a third party (no-conflict duty) and (b) the agent must not make a profit out of a fiduciary relationship except with the informed consent of the principal (no-profit duty): Dal Pont at 204.

403 The duty to disclose is properly seen as an adjunct to the proscriptive fiduciary duties rather than an independent prescriptive duty: Dal Pont at 205. Fiduciary duties aim to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage: Dal Pont at 204 citing *Warman International Ltd v Dwyer* (1985) 182 CLR 544 at 557-558; [1995] HCA 18.

404 Nonetheless, in the above context of the purposes of fiduciary obligations, proscriptive duties may in given circumstances take on a positive character in relation to a duty to disclose: Dal Pont at 205.

405 Where it applies, the duty to disclose (or perhaps more accurately communicate) relates to all material information the agent possesses that pertains to the agency relationship. What is “material” is regarded as a matter of judgment in each case, though if an agent is unsure of the materiality of information, it is said that disclosure should be made: Dal Pont at 222.

Estate agent duties

406 It is said that the agency of a real estate agent for a vendor-principal illustrates the duty of an agent to communicate information material to the agency such that the agent must disclose to the principal "everything known to him respecting the subject matter of the contract which would be likely to influence the conduct of his principal". The test is an objective one, determined by what a reasonable person in the agent's position would consider, in the circumstances, is likely to influence the principal's conduct: Dal Pont at 224.

407 An estate agent's duties include ensuring the principal remains appraised of any changes in market conditions at any time preceeding entry into a binding contract: Dal Pont at 227.

Duration of duty

408 The agent's duty to communicate material information continues at least until the time of the transaction the agent is engaged to facilitate, or until the principal's instructions have been withdrawn: Dal Pont at 227.

Vendors' evidence

409 Each of the second group of vendors gave evidence in the proceedings.

410 Each of them indicated they were not aware until after the contracts were terminated that Mr Danckert was a shareholder or director of DC2, or aware of the fact that Ms Western acted in relation to the sale of units or in respect of the on-selling of units: CB 120 (Parker), 126 and 122 (Lee), 132 (Szepes), 139 (Hopwood), 144 (Young), 150–151 (Hew) and 158–159 (Tayyar).

Admissibility of evidence of what a party would have done in a hypothetical situation

411 Evidence of what a witness or party would have done if been made aware of certain facts or advice had been given is essentially opinion evidence as to what the witness or party would have done in a hypothetical situation. The admissibility of such evidence has been described as entrenched although the caselaw gives judges great caution as to the weight to be given to any such evidence: *Roach v Page (No.37)* [2004] NSWSC 1048 (*Roach*) per Sperling J at [276].

412 Sperling J in *Roach* commented at [275]-[277] as follows:

> "275 Mr Roach gave evidence of what he would have done if the correct advice had been given. He said, in his witness statement (Exhibit G), that he would have caused Winnote to apply, first, for an exploration licence and then, after assay of the deposit, a mining lease over the most favourable location. Later, in his oral evidence, he said he would have applied in his own name, allowing Winnote to exploit the resource on the same terms as had been negotiated for Winnote with Mr Sadler in relation to the real property lease.
>
> 276 This shift demonstrates the inherent unreliability of direct evidence as to what a person would have done. Evidence of this kind is not evidence of the ordinary kind. It is not evidence of what the witness did or observed. It is really the witness' opinion as to what he or she would have done in a hypothetical situation. The admissibility of such evidence is entrenched. That, however, leaves the question of weight. As was said in *Dominelli Ford (Hurstville) Pty Ltd v Karnot Auto Spares Pty Ltd* (1992) 38 FCR 471, 483 (per Beaumont, Foster and Hill JJ) such evidence "might well be regarded as carrying little weight". Where the witness is a party with an interest in the proceedings, the court is generally in a better position to opine reliably on the question, by reference to context and probability, than is the witness.
>
> 277 In view of the inconsistency in Mr Roach's evidence as to what he would have done, I give no weight at all to his evidence on this topic."

413 Essentially the weight of the "would have done evidence" is to be assessed by reference to context and the surrounding circumstances, probability and other objective evidence: see *Roach* per Sperling J at [276]; *Stealth Enterprises Pty Ltd t/as The Gentlemen's Club v Calliden Insurance Limited* [2017] NSWCA 71 per Sackville JA at [87]-[97], Meagher JA at [59]; Ward JA at [76]; *Rosenberg v Percival* (2001) 205 CLR 434; [2001] HCA 18 at [14]-[16] (Gleeson CJ); [26]-[47] (McHugh J).

The evidence

414 The evidence was essentially as follows:

(1) Mr Parker indicated that had he known he would have immediately asked Ms Western (or a different conveyancer given he would have probably terminated Ms Western's engagement) what he needed to do to terminate the contract: CB 120;

(2) Dr Lee would have made enquiries of Ms Western whether it was legal for a company of which Mr Danckert was a director and shareholder to be a purchaser and if he had been told that it was not legal would have told his conveyancer he did not want to sell the block to Mr Danckert's company and that he wanted her to take steps to end the agreement: CB 126–127;

(3) Mr Szepes indicated that he would have immediately instructed Ms Western to do what she could do to bring the contract to an end or would have engaged another conveyancer or solicitor to do that as soon as he had a right to do so: CB 132;

(4) Ms Hopwood like Mr Parker would have asked Ms Western (or likely a different conveyancer) what she needed to do to end the contract: CB 139;

(5) Mr Young's evidence was to the same effect as Mr Parker and Ms Hopwood: CB 144;

(6) Mr Hew would have immediately instructed Ms Western to do what she could do to bring the contract to an end and engaged another conveyancer or solicitor to do that as soon as he had a right to do so: CB 151; and

(7) Mr Tayyar seemingly would have terminated or sought to terminate the contract: CB 159.

415 Ms Hopwood when questioned by Mr Allen if she had known about the SBS retainer agreement with DC2 said she would have "taken a breath to get other advice": T315. She was selling her unit because "it was falling to wrack and ruin" and "[i]t was becoming dilapidated, and I couldn't live there". She would have sold the unit but on the proviso that she could have bought back in: T316.

416 When she was asked whether in February 2021 she wanted her apartment sold to a developer so that the Terrigal block could be redeveloped, she stated "I was told that was the only option": T316. It seems to me she was receiving limited advice.

417 The tenor of Mr Kelly SC's cross-examination was to challenge the vendors thinking that they had options (i.e. choices) by questioning them regarding the Option Deeds. The questioning in a sense proceeded on the premise that they became bound to abide by Ms Western's decision-making, because of cl 9 Option Deeds and to exchange contracts once DC2 had become nominated and made the Calls: e.g. cross examination at T317-318 (Ms Hopwood), 339 (Dr Lee), 349 (Mr Young), 354-355 (Mr Tayyar), T365 (Mr Szepes).

418 Ms Hopwood indicated that she expected that "my real estate guy would've also been quite active in looking after my interests for that too": T317.

419 There was some urgency to her position. She wanted to be able to live in Terrigal but had been three years out of Terrigal waiting for settlement and became desperate to have the matters solved: T318-319.

420 Had she been informed as at 25 February 2021 that Mr Danckert was a director and shareholder of DC2 she would have said "stop, I'm not going

ahead with this, because I don't believe that your real estate guy can also be your purchaser": T320. She disputed that she would not have gone ahead and terminated the contract. She would have rather held onto her unit and reassessed and got advice: T320.

421 Mr Hew gave evidence that if he had known that there was a conflict for Ms Western he probably would have found different conveyancer or solicitor to assist him: T332.

422 Dr Lee was concerned about the legality of Mr Danckert's conduct (T335-337) and if it were illegal he would not have gone ahead and would have found a way to try to get out of it: T337. Even when asked to put the illegality to one side and was put to him that he wanted the contracts exchanged on completion, he accepted that that was the position but stated "I would have liked it moved on and completed with a legal entity that would have purchased it": T339.

423 Even when it was put to Dr Lee that he appreciated that the Option Deeds were interdependent with all the others he stated that he would have obtained a secondary legal advice to see what his options were: T342.

424 Mr Young denied that he was relieved that DC2 emerged as a purchaser who was prepared to exchange contracts before the expiration of the option period, because he believed that the prices were locked in from 2018 and the market had moved significantly since then: T347-348.

425 Mr Tayyar, like Dr Lee, was also concerned about the legality of the matter. He denied that he was indifferent to the mere fact that Mr Danckert was a director and shareholder of DC2 and indicated that what concerned him was that his agent to whom he had paid commission up front "bought my property without my permission and acted illegally" and "without my consent": T354.

426 Mr Parker was concerned about the fact that the agent became buyer for the unit: T362-363. When it was suggested to him that he would not have taken steps to terminate the Option Deeds had it been brought to his attention that the nominee was a company owned by Mr Danckert, Mr Parker indicated that

he would have taken advice from another solicitor and taken steps to act on that advice: T363.

427 When it was suggested to him that Mr Danckert got the price for him back in 2018 and that there was no further task left to him when it came to getting a price for Mr Parker in 2021, Mr Parker disagreed asserting "real estate agents have a role to make sure that the transaction is complete and that includes settlement" and also "Mr Danckert had an obligation to tell me that he was going to buy the property. It doesn't matter whether it was through him personally or his company. He has an obligation to tell me that he was getting a beneficial interest": T363-364.

428 Whilst Mr Szepes agreed that the last thing he wanted to happen in February 2021 was for the sale not to go ahead, he disagreed with the proposition that the identity of the director and shareholder of DC2 made no difference to him at all "[b]ecause the director of D Capital 2 was our real estate agent": T368.

429 Although he agreed that the rules regulating the conduct of real estate agents was brought to his attention for the purpose of these proceedings, he denied he was seeking with the benefit of hindsight to construct a way out of the contract with DC2 because of the rising market: T370.

Principles in relation to credit and disputed facts

430 Mr Pesman SC submitted, and I agree, that most of the important issues in these proceedings are capable of resolution by reference to the documents and do not require credit findings.

431 That said, Mr Pesman SC did identify a limited number of issues in which the parties' credit requires consideration, in particular:

(1) the disputed conversations between Mr Danckert and Ms Western;

(2) whether or not the "subject to existing tenancies box" was crossed when Mr Danckert signed the contracts;

(3) whether Ms Western told the other vendors about Mr Danckert's role (a fact denied both by Ms Western and the other vendors but asserted by Mr Danckert for the first time in cross-examination); and

(4) whether the Court would accept the evidence of the vendors as to the steps they would have taken had they known of the conduct of Mr Danckert (and to a lesser extent Ms Western).

432 A summary of the principles in relation to credit and making findings where facts are disputed was very helpfully collected and summarised by Kunc J in *Saravinovksa v Saravinovski (No 6)* [2016] NSWSC 964 at [464]-[473]. I respectfully agree with and adopt his Honour's summary.

The witnesses

433 In the proceedings, the deponents of all the affidavits were cross-examined.

Mr Danckert

434 Mr Pesman SC was particularly scathing of the credit of Mr Danckert and submitted that the Court would not accept any of his evidence unless supported by documents or contrary to DC2's interests. Indeed, Mr Pesman SC went further and submitted that the Court would be well justified in finding that multiple aspects of Mr Danckert's evidence were deliberately dishonest, providing a schedule of examples: G2CS [5]-[6].

435 A degree of Mr Danckert's evidence was straightforward including instances where he accepted obvious or uncontroversial facts.

436 I deal below with a number of aspects of Mr Danckert's evidence.

437 It suffices to note at this stage that I make findings below on various disputed matters and I do not accept Mr Danckert's evidence that:

(1) he did not make a deliberate choice not to tell the vendors about his involvement with the purchaser; and

(2) he did not instruct Ms Western that contracts would be subject to existing tenancies.

438 Mr Danckert's evidence regarding DC2's ability to complete on 27 July 2021 was (as I note below) unsatisfactory.

439 Mr Danckert was cross-examined about the deposit of $450,000 paid into his trust account: T157. He agreed that he had received fees of $67,500 and returned $13,500 to Ms Western: T157. He agreed that he did not play any part in the negotiation of the Option Deeds (T158) and that neither he nor DC2 were parties to the Variation Deeds: T158.

440 There was a particular aspect of Mr Danckert's evidence which I found unsatisfactory. This related to assertions that were made by Ms Mammoliti to a

financier (Nik Vujasin of Gov Corp Finance: see CB 1145) by email on 5 May 2021 (CB 1277) to the effect that Mr Danckert had paid a total of $450,000 to exchange and paid for all the DA, plans and costs for the DA and the other partners did not assist in funding. His cross-examination in respect of this demonstrated that the communications with the financier in this respect were patently false and misleading.

441 Mr Danckert gave evidence that he approved the email to be sent to the financier. From the exchange which I set out below Mr Danckert was not only willing for Ms Mammoliti (unwittingly on her part) to mislead the financier but also when he had direct contact with the financier, Mr Danckert knowingly refrained from correcting the financier's understanding about what financing Mr Danckert had provided, which Mr Danckert knew was not correct.

442 The cross-examination by Mr Pesman SC was as follows (T197-200):

> "Q. Now I think you accepted yesterday, you've never paid any money under the nomination deed.
>
> A. Correct.
>
> Q. So as things stand at the moment, it would be your evidence that you haven't put a cent into this transaction?
>
> A. That's correct.
>
> Q. All right. Now, if you go to 1277 - again, it's not you - but you'll see it's an email from Pina to Nick at Gulf Corp on 5 May 2021,
>
> A. That's correct.
>
> Q. And you'll see it says, she says to Nick, "The client has paid a total of 450,000 to exchange, plus he has paid for all the DA plans and costs for the DA. The other partners did not assist in funding. Hence why he took over on the project on his own." Do you see that?
>
> A. Yes.
>
> Q. None of that's true, is it, on your evidence?
>
> A. He - she explained to him what the situation was, why I was taking it over with the deed in place. He wanted to know the numbers.
>
> Q. Have you paid $450,000 to exchange?
>
> A. Not at this stage, no.
>
> Q. Ever?
>
> A. No.
>
> Q. Have you paid for all the DA plans and costs for the DA?
>
> A. No.

Q. Is it correct that the other partners did not assist in funding?

A. They paid for all their own funding.

Q. “Hence why he took over the project on his own.” Not a single sentence in that passage is true on your evidence, is it?

A. I’m - I’m not sure what you’re referring to. Ms Mammoliti’s email?

Q. What do you think I’m referring to, Mr Danckert?

[and resuming after objection as follows]

Q. You understand, don’t you, Mr Danckert, that I'm referring to the last paragraph of Ms Mammoliti’s email at page 1277, don’t you?

A. I do.

Q. The first thing she says in that paragraph is, “The client” - and you understand that’s you, don’t you?

A. Correct.

Q. “The client has paid a total of 450,000 to exchange.”

A. Correct.

Q. That’s not correct, is it?

A. That’s not correct.

Q. She then says that, “He”, that is, you, “has paid for all of the DA plans, costs and costs for the DA.” That’s not correct, is it?

A. No, that’s not correct.

Q. The other partners did not assist in funding. That’s not correct, is it?

A. Correct.

Q. And if none of those things are correct, that can't be the reason why you took over the project on your own.

A. Well, she is referring to that she knew I was taking over the deed, and that was the money that was involved in the deed, so the financier knew.

Q. If you then go to page 1280, do you say you didn’t know that Ms Mammoliti was saying these things to Nick?

A. I knew she’d sent him off a list of what had to be paid and--

Q. Do you say to his Honour that you did not know Ms Mammoliti was saying these things to Nick?

A. No, I knew she sent them off to him.

Q. So you knew she was sending woefully inaccurate information to somebody you were seeking finance from.

A. Well, it wasn’t - it wasn’t inaccurate. Sorry, your Honour.

HIS HONOUR: It seems to me there's a disconnect, slight. There's reference to what is in the email in the final paragraph and there's reference to documents, and it just seems to me that it would be better for more precision to be around what--

PESMAN

Q. I'll return to 1277. I suggest that you were aware that Ms Mammoliti told your financiers that you had paid $450,000 to exchange.

A. The financiers knew that I was taking over from Jogat and that was the money that was put in.

Q. I suggest to you that you knew that Ms Mammoliti sent this email and you approved of its contents.

A. I did.

Q. The answer was, “I did.”

HIS HONOUR: That’s what I thought I heard.

PESMAN

Q. And you knew that none of those matters in that paragraph were correct.

A. They are correct.

Q. They are correct now, are they? Have you paid 450,000--

A. I have not paid that, no.

Q. So you accepted from me a moment ago that none of the statements in that paragraph are correct. Do you agree with that?

A. She was merely just relying to say that I was taking over the deed and that was the money put into it. That’s what she's telling the financier.

Q. You were prepared to allow Ms Mammoliti to mislead the financiers on your behalf, weren’t you?

A. That’s a question for her. I don’t believe she was misleading him.

Q. In any event, if we go to page 1280, you'll see that at the bottom of the page, it’s an email from Nick directly to you, “Hi, Wayne.”

A. 1280 just has, “Hi, Wayne,” on the bottom, correct.

Q. Go over the page.

A. Yeah.

Q. And he said directly to you under, “My offer, complete solution,” at the second dot point, “You have put very little equity, though. My understanding is 500k-ish,” i.e. about 500,000.

A. We’ll he’d be referring to the 450 on the front page of the last email.

Q. You’ve agreed to me you haven't put a cent in.

A. I haven't put a cent in.

Q. You didn’t correct him, did you?

A. (No verbal reply)

Q. You didn’t correct him, did you?

A. I didn’t correct him, no.

> Q. And if we then go to 1288 - and this goes through to 1310, your Honour - you'll see it's a further email from Ms Mammoliti to Nick at GovCorp, and you'll see that there were conference calls in which you participated, so you were dealing directly with GovCorp yourself, correct?
>
> A. Correct.
>
> Q. And if you go to 1305, which is attached to this email, you'll see this is the information provided to GovCorp in relation to the approach to that company.
>
> A. Correct.
>
> Q. And you'll see again there's the reference to the rental income.
>
> A. Correct.
>
> Q. And you'll see again there's a reference to the two partners at page 1306, and you'll see again there's a representation that the client has paid $470,000.
>
> A. Correct.
>
> Q. None of that was true.
>
> A. I haven't paid $470,000, no.
>
> Q. You were content for all of these documents to go to companies from whom you were seeking finance.
>
> A. Correct".

443 Mr Pesman SC made other criticisms of Mr Danckert's credibility.

444 One of the criticisms of Mr Pesman SC was that there was a shift in Mr Danckert's approach to his role in relation to the vendors.

445 I refer below to Mr Danckert's non-disclosure of his interest in DC2 to the other vendors.

446 However, Mr Danckert's affidavit evidence, in particular his affidavit of 25 May 2022 (CB 109[6]-[7]), referred to discussions with Ms Western regarding whether he should make a disclosure that he was "behind the purchases" and that "I am the buyer". He asserted that Ms Western had told him not to tell the vendors that and not to tell Mr Young anything.

447 The conversations he said to have taken place in "November/January 2020" and "early February 2021" appear premised on the basis that he felt some obligation (whether moral or legal) to make a disclosure.

448 Nonetheless, as Mr Pesman SC submits, and I accept, at some point after swearing the affidavit and being cross-examined Mr Danckert became aware that it might be advantageous for him to assert that the vendors were no longer

his clients after 2018, asserting in cross-examination regarding discussions with Mr Young in early February 2021 “Well, at this stage they weren’t my clients”: G2CS page 22; T173.

449 In particular Mr Danckert was cross-examined regarding discussions with Ms Western.

450 Initially he denied that the vendors’ consent (for him to obtain a beneficial interest in their properties) was required. Eventually he accepted that consent was required and prevaricated asserting that he had not lied and was confused. The evidence was as follows (T174-175):

> “Q. Let’s read paragraph 6. “At about that time I thought the other vendors should know that the new purchaser was a company that I owned.” Do you see that?
>
> A. Correct.
>
> Q. And, “Should I tell the vendors that I’m behind the purchases?”
>
> A. Correct.
>
> Q. You thought that that was something the vendors might want to know?
>
> A. Of course.
>
> Q. You thought that because you were their agent, correct?
>
> A. Well, I was your agent, yes, in 2018. And if it flowed through, it flowed through. Yes.
>
> Q. You knew that their consent was required through transaction in which you were involved with the purchaser, didn’t you?
>
> A. Well, no. I didn’t realise that I had to get a signed consent for them.
>
> Q. I didn’t ask you that. You knew their consent was required, didn’t you?
>
> A. No.
>
> Q. Explain to me why you say this in paragraph 8, “So far as I was concerned, Ms Western had consented to the transaction on behalf of her clients.”
>
> A. Correct.
>
> Q. You knew that consent was required, didn’t you?
>
> A. Well, I asked Ms Western to disclose it to them.
>
> Q. You knew that consent was required, didn’t you?
>
> A. I knew that consent was required.
>
> Q. Why did you deny that a moment ago?
>
> A. But I didn’t lie.
>
> Q. Why did you deny that a moment ago?

A. I was confused in the question. I'm sorry.

Q. What was confusing about the question, "You knew that consent was required?" Could you tell us all of that?

A. Well, you asked me - you - sorry, you asked me did - did I ask for their consent? I asked Ms Western to get their consent and that's what I have in my affidavit.

Q. The position is this, isn't it? You knew their consent was required, correct?

A. Correct.

Q. You knew that they did not know at any time prior to August 2021 that you were behind the purchaser?

A. Can you rephrase the question in respect to "behind the purchaser"?

Q. You don't know what "behind the purchaser" means?

A. The purchaser I introduced?

Q. Read paragraph 6 to yourself. "Should I tell the vendors that I'm behind the purchase?"

A. Sorry, myself. Yes. I am the purchaser, yes.

Q. You knew that, what that meant, the first time I asked you, didn't you? The position is this. You know they have to consent?

A. Correct.

Q. You also know that they do not in fact know that you are behind the purchaser? You know that, don't you?

A. Sorry, can you rephrase that?

Q. You know that none of the other vendors, other than Ms Western, are aware that you are behind the purchaser?

A. That's why I said to disclose it.

Q. You knew that she did not do that?

A. I did not know that.

Q. Sorry, you thought she had disclosed it?

A. I thought she had disclosed it.

Q. It is lying again, Mr Danckert, aren't you?

A. I'm not lying at all".

451 Mr Danckert's answer that he thought that Ms Western had made the disclosure really makes a mockery of the evidence I have referred to above in his affidavit of 25 May 2022: CB 110-111[6]-[7].

452 I formed the impression that on matters Mr Danckert perceived were critical to the success of DC2 in the proceedings he was on occasion, including in the instance I have just mentioned, not prepared to give fully frank evidence. He

attempted to shift to Ms Western the responsibility for informing the vendors of his association with DC2.

Ms Mammoliti

453 Ms Mammoliti was cross-examined over audio visual link (Day 3 commencing T212).

454 I had no reason to doubt her evidence.

455 It became evident that she had not been provided with the Nomination Deed by Mr Danckert and accordingly was unaware of the provisions of cl 4.1a (CB 703) by which DC2 had promised Jogat, not to give a mortgage over the units with an LVR greater than 65%: T215-216.

456 Accordingly, she had not provided potential financiers with that information.

457 Nonetheless, I regarded that as reflecting on Mr Danckert's credibility in failing to provide her with what was clearly a relevant document or constraint upon the obtaining funding.

Ms Western

458 Ms Western was cross-examined by Mr Kelly SC (Day 4 commencing T224). Apart from several matters to which I will refer, Ms Western impressed me as a witness whose evidence was in Court both credible and reliable.

459 Mr Pesman SC did not dispute Ms Western was dishonest in her evidence. He submits, and I accept, that much of what she said in her affidavit and under cross-examination was plausible, supported by the documents and should be accepted: G2CS [10].

460 First, there was a potentially unsatisfactory aspect regarding Ms Western's conduct in relation to a notice to complete said to have been issued in April 2021.

461 On 22 and 23 April 2021 a number of tenants (Mr Hew and Mr Young) corresponded with Ms Western checking that notices to complete had been issued: CB 1118, 1119. On 23 April 2021 Mr Parker requested the issue of a notice to complete: CB 1125.

462 On 26 April 2021 Ms Western sent an email to the vendors noting she had received advice by the purchaser that they were currently aiming for settlement on 30 April and indicating (CB 1126):

> "Just an update a Notice to Complete has been issued on the Purchaser which allows them up to Thursday, 6 May, 2021 in which to settle, however, please note that they could technically dispute this Notice to Complete due to a problem with one of the Units and a current Lease being in place that does not expire until the 18 June, 2021."

463 The second group pleaded that no notice to complete had been issued as instructed: CB 10-11[28]-[32]. Ms Western denied that, asserting Mr Parker had no entitlement to issue a notice to complete in any event: CB 66.42[8].

464 Each of Mr Parker, Mr Young and Mr Hew gave evidence to the effect that had he known that a notice to complete had not in fact been sent he would have instructed Ms Western that one be sent or given instructions to a new conveyancer or solicitor: CB 121[16]; CB 145[16]; CB 152[32].

465 On 3 May 2021 Mr Hew sent Ms Western an email seeking an update on what was happening and stated (CB 1143):

> "I haven't had any news since the last email about the 30th of April being the potential settlement date and the issue with the single tenant. I understand this date has now passed and so obviously settlement didn't go ahead. Constant/regular communication would be much appreciated just to understand what's going on and how things are progressing".

466 There does not appear to have been any response to that email.

467 There is no evidence that any such notices to complete had in fact been issued. However, the matter was not actively pursued in the hearing and I say nothing further about, and do not make any specific finding in respect of it.

468 Secondly, and more importantly, it is clear from Ms Western's affidavit evidence that she was aware of the relevant ownership knowledge.

469 Prior to cross-examination there might have been some dispute as to exactly when Ms Western became aware of the relevant ownership knowledge. She indicates that she was asked by Mr Danckert to act on behalf of "one of his other Company's" [sic], DC2, in September 2020: CB 173[7].

470 Ms Western in her affidavit suggested that by the time that Mr Danckert raised with her taking over the "options", while she was aware of DC2, she was not familiar with the ownership structure (CB 176[35]-[39]):

> "[35] In early January 2021, Mr Danckert advised me that he was considering taking over the Option as the Directors or Jogat were hopeless and were not going to be able to get the finance approval to be able to complete. Mr Danckert asked me: *"who can I get to act on my behalf".*
>
> [36] I advised him that I was unable to act on his behalf as I was already acting for all of the Vendors and I suggested that he use and nominate Coventry Conveyancing as we had previously worked well with the business.
>
> [37] By February 2021, Jogat was unable to exercise the option deed so they opted to Nominate D Capital 2 Ply Ltd ACN 644 525 584 a company set up on 22 September 2020, Mr Danckert is the sole director and sole shareholder.
>
> [38] On 25 February 2021 a Nomination deed was entered into by the parties allowing D Capital 2 Ply Ltd to take over the option Deed.
>
> [39] Even though Wayne had held discussions with me about taking over the option it was not yet clear to me that it had occurred as I was not familiar with D Capital 2 Pty Ltd, notwithstanding its similar name to D Capital Pty Ltd, I was not familiar with the ownership structure".

471 However, in cross-examination it became crystal clear that Ms Western knew that, as at 24 September 2020, Mr Danckert had companies known as DC and DC2 (DC2 being then very recently incorporated) and understood that he was a director and shareholder of both companies: T224.50-225.6.

472 Related to this issue is the evidence of Mr Tayyar (whose evidence I accept) in respect of a conversation he had with Ms Western on or about 4 August 2021 (CB 162[43]):

> "On or around the same day, I rang Elisa directly. The following conversation took place with words to the effect of:
>
> *Me: "Hi Elisa, just quickly, I've read the letter that Wayne has been delivering to us, it seems to me that he is the actual purchaser, and that the company is his. Do you know anything about this?"*
>
> *Elisa: "oh no! I didn't know that, I just found out, the same* as you."
>
> *Me: "that's not right, I never agreed to sell him the property, especially after he took his commission upfront. He can't do that."*
>
> *Elisa: "yeah, I dunno. I just found out."*
>
> *Me: "this is not on. Thanks, I'll talk* to *you later."*

473 Ms Western in her affidavit sworn 11 July 2022 specifically dealt with the issue regarding the land tax clearance certificate in respect of unit 9 for Mr Tayyar.

Whilst that affidavit was specific to that issue, she did not take the opportunity to respond to Mr Tayyar's evidence as above.

474 Mr Tayyar was not cross-examined on this conversation by Ms Western's counsel, but was briefly cross-examined on the matter by Mr Kelly SC. His evidence was as follows (T355):

> "Q. Is this right: you go onto page 162 of the court book, at paragraph 43 of the affidavit, but do you say that Ms Western when you spoke with her on or about 4 August, that she said that she "didn't know" that Wayne Danckert was in effect the person directing D Capital 2?
>
> A. Correct. That's what I said in my paragraph.
>
> Q. So you're suggesting that she was saying that she had "only just found out" the same of you "on 4 August 2021"? Is that right?
>
> A. Yes. It's not a suggestion; that's a - the conversation that I had with her to the best of my recollection.
>
> Q. And I take it you believed her, did you, when she said that to you?
>
> A. I - I don't know what - I didn't know at the time if she knew or not.
>
> Q. Well your--
>
> A. I found that out--
>
> Q. I'm sorry. Your affidavit in the conversation has you going on to say, "That's not right, I never agreed to sell him the property, especially after he took his commission upfront. He can't do that."
>
> A. That's what I said--
>
> Q. You say that her response was, "Yeah, I dunno. I just found out"?
>
> A. Yes".

475 I unequivocally accept his evidence as to what he was told by Ms Western.

476 However, neither was Ms Western cross-examined on the conversation. The conversation raises the prospect that Ms Western was prepared to lie to Mr Tayyar, or at least not be fully frank with him regarding her awareness of Mr Danckert's association with DC2. However, in light of the fact that she was not challenged on the matter, I am not prepared to make a specific finding in respect of it.

Ms Oakes

477 Whilst there was a faint objection to the reading of Ms Oakes' affidavit on the basis that that she was not independent (Ms Oakes being employed by the lawyers for the first group) and was not qualified as an expert to give opinion

evidence (T92), I rejected those submissions and permitted her affidavit to be read.

478 Ms Oakes was cross-examined by Mr Kelly SC (Day 5 commencing T295). She impressed me as someone who was well qualified by her experience to give the evidence she gave and I accept her evidence in the proceedings.

Ms Pocknall

479 Ms Pocknall was cross-examined by Mr Kelly SC (Day 5 commencing T356).

480 Ms Pocknall was asked briefly about meeting Mr Danckert (T356-357), to which I will refer.

481 Ms Pocknall impressed me as an honest witness.

482 She was cross-examined about the work that she performed for DC2 and in particular her contact with Mr Danckert and what she did and did not do.

483 She was asked whether she had ever seen the tax invoice that had been rendered by SBS to DC2 (CB 1940) and she indicated that she had not. She was asked whether she ever discussed with Ms Western the question of whether Ms Western should pay her for any work done for DC2, to which she indicated “No”: T358. She poignantly explained that she had not rendered a memorandum of fees to DC2 (T358), “Because my father was dying, and it was the last thing on my mind”: T359.

The other vendors

484 Each of the eight other vendors, in addition to Ms Western, gave evidence in the proceedings. Ms Hopwood, Mr Hew and Dr Lee gave evidence in Court and the other vendors gave evidence by audio-visual link.

485 Each of them impressed me as honest witnesses. I have no doubt about their credibility.

486 Mr Pesman SC noted, as might be expected, that their evidence was not uniform, not least because of their different motivations. He gave as examples the fact that Ms Hopwood appears to have been principally motivated by a desire for the project to be completed so that she could buy back into the new

development because she likes living in Terrigal, whereas Mr Parker wanted the possibility of a higher price: G2CS [12].

487 Mr Pesman SC noted that their credit could only be relevant to whether the Court accepts their evidence as to what they would have done had they been aware of Mr Danckert's interest in DC2. He submitted that:

> "[13] What was absolutely clear from the evidence of all the Vendors was that they were relying on Ms Western and Mr Danckert ("the real estate guy" as Ms Hopgood [sic] described him – T319.14) to act only in their interests and to protect their interests. This did not occur.
>
> [14] When they discovered this was not the case, it is not only plausible but obvious they would have sought to either not sign the Contracts (if the information was known to them prior to 26 February 2021) or terminate them as soon as possible after exchange (indeed, Dr Hill's expression was he would have "run for the hills" T337.44)."

Findings on various disputed matters

Mr Danckert's non-disclosure of his interest in DC2 to the other vendors

488 Mr Danckert gave evidence that he thought the other vendors (apart from Ms Western) "should know that the new purchaser would be a company that I owned": CB 110[6].

489 Between February 2021 and July 2021 Mr Young called Mr Danckert a number of times. Mr Danckert indicates that when he did the conversation would generally be in words to the following effect (CB 112[14]):

> "Him: 'Is the developer going to sign the contracts' (if before exchange)
>
> or
>
> 'How's the developer going? Is it going to settle' (if after exchange)
>
> 'When's it going to happen?'
>
> In those instances, I would usually answer with:
>
> 'Yes', 'Soon' or 'as soon as possible'" (CB 112[14])

490 Mr Danckert says that during the conversations with Mr Young he did not disclose his interest in DC2 because of his conversation with Ms Western at CB 110[6]: CB 112[16].

491 On 27 July 2021 Mr Young called Mr Danckert and asked him "Is it going to settle today?" to which Mr Danckert says he replied "You need to speak to Elisa [Western]": CB 112[17].

492 Mr Danckert was cross-examined regarding his non-disclosure of certain matters to the other vendors.

493 He accepted that as at November 2020 he knew that Jogat was not going to exercise the option and that his perception (at that time) was that there was an opportunity for him or one of his companies to make a substantial profit from the development and he had decided to investigate that before he spoke to Ms Western: T169.

494 It was put to him that he had made a deliberate decision not to tell the other vendors any of those matters to which he said, "Well, I had no contact with the vendors": T169. It was put to Mr Danckert that in light of his efforts on 28 July 2021 to go and contact the vendors, he had every opportunity in November and at any time up to February 2021 to contact them, which he denied: T170.

495 The cross-examination proceeded as follows:

> “Q. Why not?
>
> A. Because I was relying on Ms Western to contact them.
>
> Q. That’s not the question I asked you. You had every opportunity to contact all of the other vendors, didn’t you?
>
> A. No.
>
> Q. What, were you prohibited from contacting them?
>
> A. I wasn’t prohibited.
>
> Q. So what was stopping you contacting them?
>
> A. Because Ms Western was their agent, and I asked Ms Western to do so. I went to her.
>
> Q. Mr Danckert, you were their agent, weren’t you?
>
> A. I was their real estate agent back in 2018.
>
> Q. And you had every opportunity in the world to contact them, didn’t you?
>
> A. In 2018?
>
> Q. No, in 2020, in November. You know what I’m talking about, Mr Danckert.
>
> A. No. I went through Ms Western for contact to that.
>
> Q. Well, why didn’t you do that in July 2021?
>
> A. Because Ms Western wasn’t talking to me in July 2021.
>
> Q. And, returning to your first affidavit, not only could you contact them, at least one of them was ringing you. That’s right, isn’t it?
>
> A. That’s correct.

Q. So why didn't you tell Mr Young these facts?

A. Because Ms Western told me not to talk to him.

Q. But there was no difficulty contacting him, was there?

A. He contacted me." (T 170.39-171.23)

496 The cross-examination continued:

"Q. You made a deliberate choice not to tell him or any of the other vendors the facts we're talking about, didn't you?

A. No.

Q. Is that a serious answer, Mr Danckert?

A. It is a serious answer.

Q. Well, in any event, on your case, Ms Western said "Don't tell them", and you went along with that scheme, didn't you?

A. Well, she was their agent.

Q. You went along with that scheme, didn't you?

A. No, I didn't go along with the scheme.

Q. Well, did you tell them?

A. I'm sorry?

Q. Did you tell them?

A. I didn't tell them. I had no contact with them.

Q. You just said, again, "I had no contact with them", and you've agreed multiple times that you're speaking to Mr Young, haven't you?

A. In 2021.

Q. Yes, before the contracts were signed.

A. I didn't speak to Mr Young before the contracts were signed.

Q. Are you sure about that?

A. I don't think so. I don't recall that.

Q. Have you read your affidavit in this case?

A. I have read my affidavit. I've now just lost it again, sorry.

Q. Have a look at paragraph 7 of your second affidavit, at page 111.

A. Okay.

Q. You recognise that is your affidavit?

A. Correct.

Q. Read paragraph 7 to yourself.

A. That's correct.

Q. And so Daniel Young had been calling you - and by that you meant more than once - prior to the exchange of contracts?

A. I'm not sure it was prior to the exchange of contracts. That's early February.

Q. What date were contracts exchanged, Mr Danckert?

A. 26 February.

Q. Is that early February, Mr Danckert?

A. It's not early February.

Q. And when you were discussing how to arrange with the plaintiff the exchange of contracts, that must mean the exchange hadn't happened. Do you maintain your evidence you didn't speak to Mr Young before the contracts were exchanged?

A. Well, if I've said here it was in early February, it was in early February.

Q. Right, so the honest answer to the question I asked you a minute ago was that you were talking to Mr Young before contracts were exchanged.

A. That's correct.

Q. Why didn't you say that the first time I asked you?

A. Well, I was just a little bit confused in the date of February when I had spoken. I didn't have the affidavit in front of me. Now I do." (T 171.42-173.7)

497 I do not accept Mr Danckert's evidence that he did not make a deliberate choice not to tell the vendors about his involvement with the purchaser.

498 He clearly had conversations with Mr Young prior to exchange of contracts and could have told him. He was the agent for the vendors at least up until the time of exercise of the options (25 February 2021) or exchange of contracts (26 February 2021).

499 I address below the effect of Mr Danckert's non-disclosure.

Mr Danckert's instructions regarding vacant possession or subject to existing tenancies

500 DC2 had pleaded in the main claim that Ms Western agreed with DC2 for the contracts to be subject to existing tenancies rather than be subject to vacant possession: CB 66.9[[41]]. That was denied by the vendors. The pleadings were odd in light of Mr Danckert's evidence disputing that the contracts were subject to existing tenancies. That part of the main claim was ultimately not pressed: PSC [112]. In any event it was a live issue as to whether Mr Danckert had or had not instructed that the contracts be subject to existing tenancies.

501 Ms Western had a discussion with Mr Danckert at the time of exchange to the following effect (CB 177[42]-[43]):

> "I said: Settlement is due on 9 April 2021, it's good timing as I'm going to Court with my estranged husband on 16 April 2021.
>
> Wayne said: Settlement on the 9th won't be a problem. I am hoping to settle earlier than that in any event.
>
> …
>
> I said: Contracts have been marked as 'Subject to Existing Tenancy as requested'. As you had requested to show the Lender rental return is received from the properties.
>
> Wayne said: Thanks, I need that to help with the finance Pina (Giuseppina Mammolti [sic]) confirmed that." (CB 177[42]-[43])

502 Mr Danckert denies he had the conversation with Ms Western in which he told her that he was happy for the purchase to be "subject to existing tenancies" or in which he said any existing tenants could continue after settlement of the contracts: CB 111[11].

503 Mr Danckert was cross-examined in relation to this. The effect of the conversation was to put to Mr Danckert that he had (on 11 February 2021) some two weeks prior to the exchange of contracts forwarded to Ms Western an email setting out the rental value of each of the properties and that he wanted the properties rented to demonstrate to a financier that the properties would have the benefit of rental income.

504 In particular, he was questioned by Mr Allen regarding the email sent by Ms Mammoliti on 7 April 2021 to FSFS to the effect that Ms Mammoliti was saying to the financier that in looking at the application, it should consider the fact that after completion DC2 would have the benefits of income of $10,000 per month because of existing tenancies. He denied that and indicated that it was referring to the fact that if he did not refinance the block they could rent them out and they wanted to know the rental incomes: T132. He further disputed that the email represented to the financier that the ten units were then currently rented out indicating his understanding was that they were asking "could they be rented out": T132.

505 Specifically, he disagreed with the proposition that he asked Ms Western to make the contract subject to existing tenancies in order to assist DC2 to obtain finance: T132.

506 On 10 May 2021 Ms Western sent an email to CCS copied to Mr Danckert relating to unit 6 (MALK). The email is to the following effect:

> "We refer to the above matter and in particular to our recent conversations with your client directly relating to the Issues with the tenant currently residing at the property.
>
> We confirm that your client has agreed to allow the tenant to remain in the subject property until the end of your current Lease period, namely, 18 June, 2021 on the basis that all rent monies that have been paid by the tenant since the 9 May, 2021 up until the time she vacates are paid to your client directly by way of compensation For the tenant remaining in the property until this time.
>
> On settlement of this matter taking place, we will provide the appropriate authority to Blink Property to authorise those payments to be paid to you.
>
> However, we advise that this agreement is only in place on the condition that settlement takes place by no later than the 21 May, 2021." (CB 1311)

507 Mr Danckert says he does not have any recollection of the conversations that Ms Western refers to having with him in that email: CB 112[19].

508 However, Mr Danckert was copied into that email which clearly indicates that there were tenancy issues and raised no complaint to Ms Western that the units the subject of the contracts were required to be sold on the basis of vacant possession rather than subject to existing tenancies.

509 Further, Mr Danckert asserts having a conversation at around the time of that email with Ms Western saying he was "aware that the tenant was facing difficult personal circumstances and was using the unit as a safe haven" and says he asked Ms Western if she would like him to talk to the tenant, to which he says Ms Western said "No": CB 113[20].

510 Mr Danckert says that, after receiving the notices to complete (first notices to complete) and speaking to Mr Boxsell, he first noticed that the contracts stated "subject to existing tenancies" and he instructed Mr Boxsell to convey to Ms Western that the properties had to be sold with vacant possession: CB 80[93]-[94].

511 Ms Western indicated that she was asked "for the properties to be subject to tenancies if the tenants were in existence" and "Mr Danckert asked me to mark them 'subject to existing tenancies' because he needed the tenants' rental income": T285.

512 Ms Western said (T285):

> "when Mr Danckert arrived at my office I said to him before he signed that settlement is due on 9 April and that contracts have been marked subject to existing tenancies as per his request, because he needed the rental income".

513 Ms Western indicated that she sought specific instructions from the other vendors as to whether or not there was a tenant actually in possession and wherever the box, "subject to existing tenancies," is marked, that meant that there had to be a tenant there: T287.

514 She denied that at the time that she saw Mr Danckert signed them that the "vacant possession" and "subject to existing tenancies" boxes were not ticked and that she marked the boxes after they were given back to her without any agreement by Mr Danckert: T285-286. I accept her evidence.

515 I do not accept Mr Danckert's evidence that he did not instruct that contracts would be subject to existing tenancies.

516 It seems to me that he was interested in demonstrating that the contracts were subject to existing tenancies in order to assist DC2 to obtain finance and I find he instructed Ms Western accordingly on 26 February 2021.

Mr Danckert's meeting with Ms Pocknall

517 There is an issue as to when Mr Danckert and Ms Pocknall met.

518 They are both seemingly agreed that they met once. However, they had disputed as to the date of the meeting. Mr Danckert says that they met only once, namely on 26 February 2021 and never met with her again and did not meet with her on 25 March 2021: CB 73[46], 110[12].

519 Ms Pocknall states that they met only on 25 March 2021: CB 220–221.

520 Mr Danckert says despite denying he met with Ms Pocknall on 25 March 2021 that he did attend Ms Western's office on that date to sign a document: CB 113[24].

521 I have referred to the fact that Ms Pocknall made a file note on 25 March 2021. It was not suggested to her that the file note was incorrect. On the face of it, it is a contemporaneous record suggesting that she spoke with Mr Danckert on that date.

522 Further in her evidence Ms Pocknall indicates that she collected the contract for sale on 4 March 2021: CB 220[4]. It seems unlikely that she would have done so at that point if she had been present on 26 February 2021 on exchange, as the contracts could have been given to her at that point in time.

523 Ms Pocknall was asked briefly about meeting Mr Danckert as follows (T356-357):

> "Q. Ms Pocknall, I think you've only ever met Mr Wayne Danckert once.
>
> A. Yes.
>
> Q. And that was an occasion when contracts were in the process of being exchanged for the—
>
> A. Yeah.
>
> Q. --sale of various properties in a block of units in Terrigal?
>
> A. No, I met him after the exchange."

524 As I have indicated above I regarded Ms Pocknall as an honest and credible witness and I accept her evidence.

525 Ms Western was cross-examined about when she personally introduced Ms Pocknall to Mr Danckert and indicated that she did so on 25 March 2021, and that that was the only personal or face-to-face meeting between Ms Pocknall and Mr Danckert: T290-291, 292. She denied that there was a meeting between them at or about the time of exchange: T291, 292.

526 Mr Kelly sought to test Ms Western's evidence by putting to her that it was unlikely that Mr Danckert gave her instructions to insert CCS into all of these contracts, even though she had not even yet introduced them. However, Ms Western stated that (T291):

> "We discussed on the phone that he was happy for Coventry Conveyancing to go on the contracts. And it was up to him whether he wanted to meet Lianne prior to that".

527 I accept her evidence.

528 Ms Western accepted that Mr Danckert said to her: "You're acting for the vendors. I should be getting a solicitor to act for me on this" but denied that she said "Don't worry, I will act for you, but I will introduce you to Lianne who is a friend of mine who's a conveyancer" and "I am acting for you" and "I will do all

the work". Rather she stated that she said “I have a conveyancing friend that could assist you.": T291.

529 It seems to me that Mr Danckert is mistaken and unreliable in his evidence in this regard and I find that his meeting with Ms Pocknall took place on 25 March 2021.

Disputed matters as between Ms Western and Mr Danckert

530 The claims in respect of the alleged representations, as noted above, have been abandoned.

531 Mr Danckert agreed that he had read the contracts prior to signing them before Ms Western on 26 February 2021: T127.

532 Mr Danckert denied that Ms Western told him that he had to complete the contracts on 9 April 2021 (T127) and denied that he told Ms Western that DC2 could complete the contracts on 9 April and hoped to settle the contracts earlier than 9 April 2021 and that it had finance in place: T128.

533 I reject those denials.

Differences between form of Option Deeds contracts and the contracts exchanged

534 Ms Western prepared all 10 contracts at once, it appears, either on 25 February 2021 or the date of exchange, 26 February 2021: T284.

535 Mr Kelly SC cross-examined Ms Western on the basis that the contracts attached to the Option Deeds were all (T288):

(1) marked vacant possession;

(2) in the 2017 edition; and

(3) had a date for completion 35 days after the contract date.

536 Whilst Ms Western agreed to those propositions (T288) they are not entirely self-evident from the forms of the Option Deeds, as I indicate below.

Vacant possession

537 The Option Deeds appear in the Court Book initially at CB 335. There is a complete version of the Option Deed in the case of Mr Tayyar (CB 355-422) and in the case of Mr Parker (commencing at CB 515 – albeit with some

anomalies: see below) and copies of the front pages of the Option Deeds for the other vendors: CB 423 – 432.

538 The Option Deed for Mr Tayyar (CB 335) contains a 2017 form of contract. The date for completion is stated to be 35 days from the date of the contract: CB 359. The contract is marked vacant possession: CB 359. The contract was marked to be a proposed electronic transaction: CB 360.

539 The Option Deed for Mr Parker (CB 515) contains a 2017 form of contract. However, the contract annexed to that form of Option Deed is the contract for Ms Western's unit being unit 1: CB 538. The date for completion (29 March 2018: CB 538) in fact predates the date of the Option Deed being 21 August 2018: CB 515. Neither the "VACANT POSSESSION" nor "subject to existing tenancies" boxes are marked: CB 538. (This would mean that the choice in block capitals applies: cl 20.15 (CB 549).) The contract was marked to be a proposed electronic transaction: CB 539.

540 The contract provides that "[n]ormally" vendors must give the purchaser vacant possession of the property on completion: cl 17.1 (CB 369, 548). "[N]ormally" is defined as meaning "subject to any other provision of this contract": cl 1 (CB 364). The vendor or does not have to give vacant possession if the contract says the sale is subject to existing tenancies: cl 17.2.1: CB 369, 548.

541 I have already addressed the evidence regarding Mr Danckert's instructions to Ms Western. I accept her evidence that he instructed her to mark the contracts "subject to existing tenancies" and I reject Mr Danckert's evidence to the contrary.

542 On the counterpart of the contract for Ms Western for unit 1 she handwrote in the contract date 26 February 2021 and marked the box "subject to existing tenancy": T284; CB 2583.46. Ms Western was cross-examined as to why the counterpart of the contract for unit 10 (CB 2583.888) has the original marking for the box "subject to existing tenancy" crossed out and the box "VACANT POSSESSION" marked. She indicated that the reason for that was that her tenant had given notice and vacated the unit and she made this alteration at the time of exchange: T284-285.

543 Ms Western cannot recall whether she got instructions from the other vendors to change “vacant possession” to “subject to existing tenancies” (in context from the form of contracts attached to the Option Deeds): T288, 290.

35 or 42 days for completion

544 Ms Western could not recall whether she got any instructions from any of the other and vendors about changing 35 days for completion to 42 days: T288, 290. Ms Western indicates that the reason she decided to change the date for completion from 35 days to 42 was “at a request from Mr Danckert. He wanted extra time”: T288. Ms Western states that he asked for that extension at the same time that he asked for the contracts to be marked “subject to existing tenancies”: T289. I accept her evidence.

545 Ms Western denied that Mr Danckert said to you that "I'm going to need time to arrange the finance. If I need an extension of time, you're going to have to organise it for me": T289. I accept her evidence.

2017 or 2019 standard form of contract

546 From 1 July 2019, all conveyances had to be done electronically: CB 186[5].

547 Mr Allen submitted that the 2017 edition is a form used pre-PEXA and was ill-adapted for conveyances to take place electronically, whereas the 2019 edition was: G1CS [2]. I pause to note that that is not entirely self-evident from the form of 2017 edition in evidence. The 2017 edition contains provision for a choice of proposed electronic transaction (CB 360, 539) and contains detailed provisions in cl 34 in electronic transaction: CB 374-376, 553-555.

548 Ms Western was cross-examined on the form of the contracts and indicates that she did not get specific instructions from the vendors about the change of form of contract to the 2019 edition: T289.

549 Apart from the cross examination, there was no serious attempt by DC2 to suggest that there was any material matter impugning the contracts, second notices to complete or the notices of termination arising from the use of the 2019 edition.

550 The whole case of DC2 in relation to the second notices to complete has proceeded on the basis that the contracts in the 2019 form required completion in an electronic workspace.

551 Mr Allen submitted that prayer 1 of the Second Further Amended Statement of Claim defines the contracts sued upon as the 26 February 2021 contracts and if DC2 did not agree to the change to the 2019 form (which he submits it did) it has affirmed the contracts by calling for their performance (citing *Galafassi v Kelly* (2014) 87 NSWLR 119; [2014] NSWCA 190 at [84] per Gleeson JA, Bathurst CJ and Ward JA agreeing, *James v Hill* [2004] NSWCA 301 at [65] per Tobias JA, Sheller and Hodgson JJA agreeing).

552 Mr Pesman SC submitted that the Option Deeds did not require the contracts to be precisely in the form of the contract annexed but was expressly "subject to any variation required or permitted by this Deed" (CB 347). Indeed, the parties could have signed any contract they both agreed to in performance of the option even without that clause.

553 Mr Danckert it seems to me must have been well aware of the fact that the contracts were in the 2019 edition. He made no complaint regarding that at the time of exchange.

554 I do not accept that the use of the 2019 form of contract has any material outcome on the issues to be determined in these proceedings.

Contentions regarding the duration of Mr Danckert's agency and fiduciary obligations, the intention of Mr Danckert, the knowledge of Ms Western and duties of disclosure

555 DC2 advanced particular submissions in respect of issue 8, which raise questions of the duration of Mr Danckert's agency and fiduciary obligations, the intention of Mr Danckert, the knowledge of Ms Western and duties of disclosure.

556 Whilst the submissions were raised under a heading dealing with issue 8, they bear some relevance to several of the issues in the proceedings specifically: (a) whether some form of consent or knowledge imparted to the vendors in a way to conceivably engage s 49(3) PSA Act or in any event somehow obviate any impugning reach of s 49 to the contracts; (b) the unclean hands 'defence'

and (c) discretionary considerations regarding whether specific performance ought to be granted.

557 It is appropriate to address the contentions prior to formally addressing the agreed issues.

DC2's contentions

558 DC2 submitted that s 49(1) PSA Act does not create an offence of strict liability and accordingly required proving mens rea: PCS [93].

559 DC2 submitted that there was no dishonest intention, referring to the following:

(1) Ms Western, and through her SBS, well knew that Mr Danckert was a real estate agent and the sole director and shareholder of DC2, having opened a file for DC2 as early as 27 October 2020 (CB 1490) and having acted on the instructions of Mr Danckert in DC2's unsuccessful acquisition of another property at Walker Street Windsor: CB 173[7]).

(2) The knowledge of SBS acquired in the course of discharging its retainer is to be imputed to its principal, except where a total fraud is perpetrated on the principal and the principal receives no benefit from the transaction: *Beach Petroleum NL v Johnson* (1993) 43 FCR 1; [1993] FCA 392 (at 31-32) per von Doussa J;

(3) Clause 9.1 of the Option Deeds conferring authority to act was wide enough to include Ms Western giving consent to DC2 proceeding to purchase notwithstanding the provisions of s 49(1) PSA Act; and

(4) Ms Western knew that Mr Danckert was the person behind whichever entity he was going to use to accept a nomination as purchaser from Jogat (T230) as early as January 2021 and did not report that fact to any of the other vendors because she did not think was necessary: T231.

560 DC2 then submitted that if the making of the contracts (on 26 February 2021) caused Mr Danckert to obtain a beneficial interest in property in contravention of s 49(1) of the PSA Act, the failure of Ms Western to pass on her relevant ownership knowledge to her clients before exchange of contracts and to eschew any conflicts in that regard was the pivotal event which caused any loss (if any) to flow: PCS [99].

561 DC2 submitted that the reliance by the other vendors on hypotheticals to construct a case based on s 49 is essentially the product of hindsight and should not be given any weight, because all of the vendors:

(1) were prepared to extend time for the exercise of the option to 28 February 2021 (**Option Period**), as recently as August 2020, for a price increase of only $20,000 each; and

(2) would have gone ahead in any event because they wanted to sell their properties: PCS [100].

562 The submission proceeded that Mr Danckert did not have a duty to disclose information that the appointed representative of the vendors (Ms Western) already knew, and as an "Owner" herself, she had a legal obligation to "*ensure*" that "*all communications*" with the vendors took place through SBS, not through Mr Danckert: PCS [101].

563 The submission continued to the effect that on the true construction of the agency agreements, the period of agency and (supposedly) the extent of the fiduciary obligation does not depend on the words "*commencing on the expiration of the Exclusive Agency Period and terminating upon the sale of the Property or termination by seven days prior written notice*". Rather the agency agreements came to an end by performance and no selling task remained, as at 26 February 2021, as that work had been done in 2018. DC2 argued that even if it is allowed that some scoped down agency relationship with no selling function remained as at that date, it does not follow that any fiduciary obligation remained because there was nothing left for Mr Danckert to do: PCS [102].

564 The submission concluded that the contracts made by DC2 are not illegal and unenforceable, rather all they do is expose Mr Danckert to a risk of disciplinary action, and there is no basis upon which to find that exchange would not have gone ahead on 26 February 2021 in any event: PCS [103].

The vendor's contentions

565 Mr Pesman SC submitted in summary that: (a) between 13 March and 9 April 2018 each of the vendors signed an agency agreement with Mr Danckert personally; (b) the agreements included standard terms (legibly reproduced at CB 2724.206); (c) one of the standard terms was that after an exclusive agency period a non-exclusive agency period commenced the expiration of that period and terminating on the sale of the property or upon termination in writing; (d) the agreements had not been terminated; (e) "sale of the property" means the date of completion because there is an obligation on the agent to

hold a deposit between exchange and settlement but in any event even if it means the date of exchange the agency persisted until the time of entry of the contracts: G2CS (pages 9-10).

566 Mr Pesman SC submitted that Mr Danckert knew the obligation in s 49 (if not the actual section number) at least since 2015 (T154.29-41), knew that a form was required (though not necessarily its format) (T154.43-155.6) and that no form of any type was signed by any of the vendors, including Ms Western (T155.8-10).

567 As to obtaining a beneficial interest, it seems to me clear that as an agent Mr Danckert was within the meaning of the deeming provision in s 49(4)(b) arguably in breach because he was a member of DC2 being a corporation having not less than 100 members.

568 Mr Pesman SC addressed the effect of the so-called authority to act pursuant to cl 9 of the Option Deeds in response to the submission that Ms Western's exchange of contracts executed by the other vendors was sufficient to comply with the requirements of s 49 or that in some way her knowledge of Mr Danckert's involvement could be consent by the vendors. He argued that the person requiring consent was Mr Danckert not DC2, that Mr Danckert was not a party to the Option Deeds nor the contracts and in any event consent is required by the statutory provision, not the Deed.

569 Mr Pesman SC further disputed any contention that Ms Western had ostensible authority to provide the owners' informed consent.

Consideration

570 I have already addressed above the duties of agents regarding disclosure in the context of fiduciary obligations: see Dal Pont at 204-205, 222-223. The agency agreements did not relevantly exclude or modify the fiduciary obligations of no-conflict or no-profit.

571 By the Option Deeds (August 2018) the vendors (described as Owners) agreed to grant to Jogat a call option to require the owner to sell the units on certain terms and conditions and Jogat had agreed to grant to the owners a put option

to require it to purchase the units from the owner on certain terms and conditions: CB 176[32], 335–432.

572 Between 22 and 24 August 2018 Jogat deposited $450,000 into the Express Property Trust Account (being a 10% deposit due under the deed of $45,000 per unit) and Mr Danckert dispersed the deposits under instructions from Ms Western less a commission payable to Mr Danckert of 1.5% of the price being $6,750.00 including GST: CB 70[23].

573 The exercise of the option was to occur by 3 October 2019. However, a development consent relating to the block was delayed and a further extension was allowable under the Option Deeds for a year to 3 October 2020: CB 176[32].

574 On 2 October 2020, by the Variation Deeds, the option period was extended to 28 February 2021: CB 444.

575 DC2 exercised the call option requiring the vendors to sell the properties to DC2: CB 72[41], CB 176[37], 679–696

576 DC2's argument as noted above is as follows:

> "Agency agreements may come to an end by other means, including by performance. In this case, no selling task remained, as at 26 February 2021. That work had been done in 2018. Even if it is allowed that some scoped down agency relationship, with no selling function remained, as at that date, it does not follow that any fiduciary obligation remained because there was nothing left for Mr Danckert to do." (PCS [102])

577 It does not seem to me that DC2's submission adequately addresses the terms of the Option Deeds and the agency agreements.

578 Clause 4.1 of the Option Deeds provided that:

> "Upon exercise of either the Call Option or the Put Option, the Contract is binding on the Owner and the Buyer from the date that the Option is exercised even if either party fails to sign, date and exchange the Contract in accordance with this Deed".

579 Under the terms of the agency appointment the exclusive agency of Mr Danckert ended at midnight on 30 April 2018 thereafter the agency became a non-exclusive agency.

580 The agency appointment as Mr Pesman SC points out is relevantly, in the following terms:

> "as non-exclusive agent for the sale of the Property for the period ("the Non-Exclusive Agency Period") commencing at the expiration of the Exclusive Agency Period and terminating upon the sale of the Property or upon termination by seven days prior written notice given by the Principal or the Licensee to the other".

581 The *entitlement* to remuneration of Mr Danckert under the agency agreements, for the non-exclusive agency period, was dealt with in cl 3.1(c) of the agreements:

> "**Remuneration** - The Licensee shall be entitled to the remuneration set out in Item C of the Particulars ("the Remuneration") in the following circumstances (whether or not the Licensee is the effective cause of sale):
>
> …
>
> (c) if at any time during the Non-exclusive Agency Period a person who has been effectively introduced to the Principal or to the Property by the Licensee during either the Exclusive Agency Period or the Non-exclusive Agency Period, or another person introduced to the Principal or to the Property by such a person, enters into a contract (which includes by way of exercise of an option) to purchase (either alone or jointly with another or others) the Property or an interest in the Property".

582 Notwithstanding an entitlement to remuneration *arose*, it only became *payable* upon completion of the sale of the units under cl 3.2:

> "**When Remuneration is Due and Payable** - The Remuneration is due and payable by the Principal to the Licensee:
>
> (a) Immediately upon completion of the sale of the Property…"

583 Having regard to the above matters, in the circumstances it seems to me clear that the contracts became binding upon actual exercise of the Options, when DC2 made the Calls being, as I have noted earlier, seemingly 25 February 2021 and the contracts were actually exchanged the following day.

584 A number of consequences flow from that analysis.

585 First, the time for the options to be exercised by any of the parties to the Option Deeds had been extended to 28 February 2021. At least until there was an exercise of an option, there was still a relationship of agency and Mr Danckert was not entitled to remuneration under the agency agreements.

586 Secondly, at any time prior to the exercise of the Options by any party to the Option Deeds, until the contracts became binding upon actual exercise of the Options when DC2 made the Calls, it seems to me clear that Mr Danckert was under the agency agreements the agent for the vendors up to and including at least 25 February 2021 (if not when the contracts were actually exchanged the following day).

587 Thirdly, Mr Danckert as a fiduciary ought to have disclosed to the vendors his connection with DC2 as the nominee and purchaser of the properties.

588 Fourthly, leaving aside some niceties of the question of whether there was any "introduction" to the Principals, Mr Danckert's entitlement to remuneration during a non-exclusive agency period only arose upon once "such a person" i.e. purchaser enters into a contract (which includes by way of exercise of an option) to purchase the units. That only occurred on 25 and/or 26 February 2021. It is not obvious to me that Mr Danckert had any entitlement to commission prior to that time.

589 I reject DC2's submission that no fiduciary obligation existed or remained under the agency agreements as at 26 February 2021 because the agency agreements came to an end by performance in 2018 and no selling task remained as at 26 February 2021 "because there was nothing left for Mr Danckert to do". The time for exercise of the options had been extended to 28 February 2021 and until the Calls were made on 26 February 2021 the very distinct prospect remained that if no call was made by any party under the Option Deeds the agency agreements remained on foot with clear work for Mr Danckert to do.

590 Mr Danckert had at least until the entry into the contracts on 26 February 2021 a duty to not place himself in a position where there is or may be a conflict between the duty owed as fiduciary and his own interest.

591 Mr Danckert made a deliberate choice not to tell the vendors about his involvement with DC2 prior to the exchange of contracts. He breached the no-conflict duty. Further, an agent must not make a profit out of a fiduciary relationship except with the informed consent of the principal. Mr Danckert breached the no-profit duty.

592 Apart from the fiduciary duty there are specific provisions under s 49 PSA Act regarding obtaining informed consent where an agent has obtained or been concerned in obtaining a beneficial interest.

Issue 1 - Were the second notices to complete invalid by reason of their terms?

The claimed defects

593 Mr Kelly SC on behalf of DC2 advanced a number of reasons as to why the second notices to complete were invalid by reason of their terms.

594 The principal matters advanced were:

(1) the second notices to complete purported to appoint a place for completion in the electronic workspace "or at such other place as the vendor may direct", such that the date, time and place for completion was equivocal and confusing and insufficient to fix a time, date and place for completion: POS[5], [49], [51], [56]; PCS [4], [5]; and

(2) the second notices to complete threatened innominate action namely that the vendors would "exercise all other rights and remedies as are available to them by reason of … breach", as distinct from termination, with the consequence that the notices were not explicit about the potential for the vendors to rescind: POS[5], [50]; PCS [4], [5].

595 There were a number of other matters which were raised either by the submission documents or orally during the hearing being:

(1) the second notices to complete were not served on DC2 in accordance with the contracts, specifically despite Mr Boxsell saying to Ms Western that he would accept service of any notice or demand under the contracts (CB 1477). DC2 argued that did not alter the terms of the contracts by, for example, authorising service of documents on the purchaser by email: POS [5], [59], [64]; and

(2) the second notices to complete in paragraph 3 did not specify a date in the electronic workspace: POS [49].

Purported right to nominate another place of settlement

596 DC2 submitted that the express words of reservation of a right to direct completion at another place made the second notices to complete invalid from inception: PCS [11].

597 DC2 submitted that the contracts were each agreed to be an electronic transaction, with PEXA as the Nominated Electronic Lodgement Network (e.g. CB 2583.47). Clause 30.4.3 (at CB 2583.62) stipulated that the "parties must

conduct the electronic transaction … in accordance with the *participation rules* and the *ECNL*; and using the nominated *ELN*, unless the *parties* otherwise agree": PCS [5].

598 In support of its submission that the notice was invalid by reason of requiring settlement at a place that could not be lawfully imposed, DC2 referred to the decision in *Wright v Featherstone* in which DC2 said it was held that the notice was invalid from its inception: PCS [6].

599 In *Wright v Featherstone* the notice to complete specified a requirement of settlement at the office of solicitors. However there was a provision in the *Property Law Act 1974-1982* (Qld) which provided that unless otherwise agreed by the parties, their solicitors or conveyancers, settlement of the contract shall take place at the office of the Registrar of Titles. In the result it was held that the requirement to settle at the office of the vendor's solicitors could not be lawfully imposed and that the notice to complete was accordingly invalid from its inception: at 56,719.

600 Clause 30.1 of the standard conditions of the contract provides (CB 781.17):

> "This *Conveyancing Transaction* is to be conducted as an *electronic transaction* if -
>
> 30.1.1 this contract says that it is an *electronic transaction;*
>
> 30.1.2 the *parties* otherwise agree that it is to be conducted as an *electronic transaction;* or
>
> 30.1.3 the *conveyancing rules* require it to be conducted as an *electronic transaction."*

601 Each of the contracts had provided for the contracts to be electronic transactions (CB 781.2).

602 Clause 30.4.1 (CB 781.17) provides that:

> "If this *Conveyancing Transaction* is to be conducted as an *electronic transaction* –
>
> …
>
> 30.4.1 to the extent that any other provision of this contract is inconsistent with this clause, the provisions of this clause prevail"

603 DC2 submitted that Ms Western, by her choice of words at the point of issue, makes it clear that she sought to keep the vendors' options open to direct that

settlement take place at some other place (referring to her evidence at T261.36-262.33).

604 The evidence was relevantly as follows (T261-262):

> "Q. But there's no error when it says "in the electronic workspace", because this was an electronic transaction, or these were, and the notice goes on to say "as the time and place for completion, or at such other place as the vendor may direct". What you were wishing to do by including that alternative in an instrument which led to the ultimate proposition that the vendor shall exercise all other rights and remedies as are available was, once again, to keep your options open.
>
> A. As to the place of settlement?
>
> Q. Yes.
>
> A. Yes".

605 Whilst I accept that in the evidence referred to Ms Western subjectively intended to keep her options open in relation to the place of settlement, I do not regard that as being fatal or necessarily determinative as to the issue of whether the notice was defective by reason of asserting a right to settle inconsistent with the terms of the contracts.

606 Mr Pesman SC submitted that G2CS (page 5):

> "if the words in the notices '…or at such other place as the vendor may direct' were to have any particular force, it would be in the context of the agreement as to PEXA, so that completion should occur in PEXA unless the vendor directs otherwise – which it never did"

607 Mr Allen suggested (T414) that the provisions of cl 16.12 of the standard conditions of the contracts (CB 781.12) may be applicable:

> "16.12 The vendor by reasonable notice can require completion at another place, if it is in NSW, but the vendor must pay the purchaser's additional expenses, including any agency or mortgagee fee".

608 In this case the notice to complete did appoint the electronic workspace. That was in accordance with the contract.

609 Mr Allen also submitted that the additional words "or at such other place as the vendor may direct" were surplusage: T396.15.

610 Whilst minds may differ in respect of the issue, it does not seem to me that the additional words were of such moment as to amount to an impermissible assertion of reservation of a right to direct completion at another place.

611 Clause 16.12 admits of the possibility that another place might be specified. The exact interaction between the various provisions of cl 30 and cl 16.2 was not fully explored during the hearing. However, it is not clear to me that cl 16.12 in its operation would necessarily always be inconsistent with the provisions of cl 30.

612 Ultimately no other place was specified.

613 It seems to me that *Wright v Featherstone* is distinguishable on the facts.

614 I reject the submission that the additional words "or at such other place as the vendor may direct" invalidated the notice to complete.

Failure to intimate a right to terminate

615 DC2 sought to distinguish this case from the notice in *Balog v Crestani* submitting that in *Balog v Crestani* words in the notice were ignored. On the other hand it was claimed that in the present case, on a fair reading the claim of entitlement to exercise innominate rights in the event of non-compliance, the second notices to complete were invalid from inception: PCS [11].

616 DC2 referred to the evidence of Ms Western asserting that it is clear that, by her choice of words, at the point of drafting and issue of the notices, she sought to sought to keep open her choice of remedy, including specific performance: PCS [7] referring to T 260.46-261.35.

617 Mr Danckert was cross-examined on the notice to complete: T 117.

618 Mr Boxsell emailed it to him and on reading it he formed the view that the vendors wanted DC2 to complete the purchase of the properties on before 27 July 2021: T 118.

619 Mr Allen submitted that:

> "6. … The best evidence of what is indicated to a reasonable person is what was in fact indicated to Mr Dan[c]kert.
>
> 7. Accordingly, Mr Dan[c]kert's admissions ought to be accepted by the Court as determinative of the question as to whether the Notices to Complete conveyed the necessary message to Mr Danckert.
>
> 8. Mr Dan[c]kert's evidence on the Second Notice to Complete was (T141.4):

Q. And you knew after reading it that it was on the cards that if D Capital 2 did not complete the contracts on or before 27 July 2021, that the vendors would terminate the contracts.

A. I did.

Q. And after reading this notice to complete, you used your best endeavours to get finance with which to complete on or before 27 July 2021, didn't you?

A. Correct.

9. This is in the context of Mr Danckert having read the First Notice to Complete, which was in the same terms (T136.35):

Q. And after reading this document, you were in no doubt whatsoever, were you, that the vendors were looking at terminating the contracts if D Capital 2 did not complete them on or before 18 June 2021?

A. Correct.

Q. And you certainly knew it was on the cards that if D Capital 2 didn't complete by 18 June 2021, that the vendors would terminate the contracts.

A. That's what it says on the termination notice - notice to complete, sorry.

10. Mr Dan[c]kert's then said (T137.1):

A. Well, any vendor relies on the notice to complete.

Q. To do what?

A. To terminate under the notice.

11. Mr Danckert retained Mr Box[s]ell who, on 17 June 2021 wrote [CB 1460]:

'Please confirm you client will not so terminate the contracts…

If no such assurance is given, our client reserves the right to seek an urgent injunction in the Supreme Court of New South Wales to prevent any wrongful termination.'

12. The next day, 18 June 2021, Mr Box[se]ll reiterated:

'We again call upon the vendor to withdraw the present notice to complete. Any attempt to terminate the contracts pursuant to the Notices to Complete will be treated as a wrongful repudiation…'"

620 Mr Allen submitted that the above indicates that Mr Danckert actually understood the second notices to complete to convey the necessary message; and a reasonable person in Mr Danckert's position would have understood that if DC2 did not complete on or before 27 July 2021, the contracts would be terminated: G1CS [13].

621 Mr Pesman SC likewise drew attention to the evidence of Mr Danckert to the effect that he knew at the time the notices were served the purpose of the notice was to make time of the essence, that if time was of the essence he knew or was aware that if the other party did not complete then, if the other party is not in default of the contract, they could terminate the contract by relying upon the notice: G2CS (page 4); T130, 136 and 138.

622 There is no requirement that a notice to complete convey an intention to terminate. As noted above:

(1) a notice is adequate to warn the defaulter if it conveys that the giver will be entitled in the event of non-compliance, or will regard himself as entitled, to rescind: *Wilde v Anstee* at [60] citing Deane and Dawson JJ in *Laurinda* at 654; and

(2) it is not necessary that the notice should use any particular form of words; it is the substance of what it conveys that matters (*Taylor v Raglan Developments* at 133) in light of the surrounding circumstances.

623 The surrounding circumstances included that:

(1) the contracts were exchanged on 26 February 2021;

(2) on 3 June 2021 SBS had sent the first notices to complete to CCS;

(3) there had been a dispute about the first notices but even in the midst of that dispute there was a clear understanding on the part of Mr Boxsell that termination was not merely a potential entitlement but rather the "purported claim" of such notices (which were relevantly identical to the second notices to complete served) such that he directly addressed it in an email on 17 June 2021

> "… we note the notices to complete served on DC2 purport to claim the vendor is entitled to terminate the contract, inter alia, if completion does not take place on or before 18 June 2021.
>
> Please confirm your client will not so terminate the contracts as the purchaser will not complete the contracts other than in accordance with the terms and conditions of the contract annexed to the Option Deed.
>
> If no such assurance is given, our client reserves the right to seek an urgent injunction in the Supreme Court of New South Wales to prevent any wrongful termination.
>
> Please also advise the vendor withdraws the notices to complete served." (CB 1460)

(4) on 18 June 2021 in his email to Ms Western, Mr Boxsell again called upon the vendors to withdraw the notices to complete asserting that any attempt to terminate the contracts pursuant to the notices to complete would be treated as a wrongful repudiation of the contracts: CB 1477;

(5) there were delays in DC2 obtaining funding; and

(6) on 7 July 2021 Ms Mammoliti informed with Mr Danckert he needed to find another lender knowing the deadline: CB 101[80].

624 Apart from those surrounding circumstances, Mr Danckert accepted that he knew after reading the notices that it was on the cards that if DC2 did not complete the contracts on or before 27 July 2021, the vendors would terminate the contracts: T141.4.

625 Whilst I accept that there is an argument that the notices failed to intimate what is discussed in some authorities as being the possibility of termination for non-compliance (*Taylor v Raglan Developments Pty Ltd* at 133E-F per Powell J), I am nonetheless persuaded that the notices in all circumstances was effective to convey to a reasonable person in DC2's position that if DC2 did not complete on or before 27 July 2021 the vendors would be entitled in the event of non-compliance, or would regard themselves as entitled, to rescind or terminate the contracts.

The subsidiary complaints

626 It is not entirely clear to me whether DC2 ultimately persisted with the subsidiary complaints I have referred to above.

627 However to the extent that they were persisted with I note the following.

Service

628 The term "serve" is a defined term under the contracts meaning "serve in writing on the other *party*" (cl 1: CB 781.7).

629 Clause 20.6.3 provides that a document under or relating to the contract is "served" if it is served on the party's solicitor: CB 781.13.

630 There is a provision for service of notices in special condition 7 of the contracts for deeming the timing of service of inter alia notices where they are served by security post, delivery post or by Document Exchange: CB 781.21.

631 There is a further provision in special condition 8 of the contracts which permits service by facsimile transmission "in addition to the provisions contained in Clause 20.6 hereof".

632 In light of Mr Boxsell saying to Ms Western that he would accept service of any notice or demand under the contracts (CB 1477) and clearly engaging in email communications with Ms Western, I reject the submission to the effect that email service of the second notices to complete gave rise to a basis to invalidate the notices.

The omitted date in paragraph 3

633 The fact that the second notices to complete in paragraph 3 did not specify a date in the electronic workspace, whilst technically an error, was not seriously contended by Mr Kelly SC to be fatal.

634 Indeed Mr Kelly SC in prefacing his cross-examination of Ms Western in relation to the more contentious issue of nomination of an alternative place of completion, intimated it was merely a slip (T261):

> "Q. Actually, in paragraph 3, you say "the vendor appoints on or before 3pm on blank in the electronic workspace" - that's just a slip, isn't it? There's room there for a date to be typed in. That's just a typographical transcription type error, I suggest.
>
> A. Mm-hmm."

635 In any event, when read in light of the notice as a whole and in particular paragraph 2 which required completion on or before 27 July 2021 I do not regard it as a matter which invalidated the notices.

Issue 2 - Were the vendors not ready and willing and able to complete on the specified completion date?

636 DC2 advanced a number of reasons as to why it was said that the vendors were not ready, willing and able to complete the contracts at 3 PM on 27 July 2021, or at any other time up to and including the service of the notices of termination: POS [41], [113]; PCS [12].

637 DC2 also made a number of submissions (PCS [37]-[43]) to the effect that the vendors were not ready, willing and able to complete the contracts after 3 PM on 27 July 2021 and at any other time up to and including the service of the notices of termination: POS [41], [113]; PCS [12]. Although the issue raised by issue 2 of the agreed issues focused on 27 July 2021 I will address separately at the end of this section (dealing with issue 2) the submissions in this regard.

638 DC2 submitted that because completion of one contract was interdependent with the others, if one could not complete, neither could the others: POS [114].

639 DC2 advanced a number of reasons as to why it was said that the vendors were not ready, willing and able to complete the contracts at 3 PM on 27 July 2021, or at any other time up to and including the service of the notices of termination: POS [41].

The alleged lack of being ready, willing and able

640 The principal matters advanced were:

(1) the vendors did not comply with an obligation under cl 30.5 to within seven days of the "effective date" (contract date) create an electronic workspace and populate the electronic workspace with the title data, the date for completion and if applicable mortgagee details and invite the purchaser and any discharging mortgagee into the electronic workspace: POS [46]-[47];

(2) the only apparent invitation to the purchaser in the PEXA Space had been issued to CCS, not Mr Boxsell for DC2 and there was no evidence that Ms Western and/or SBS invited Mr Boxsell into the PEXA workspace after 18 June 2021: POS [115], [57];

(3) contrary to the time of 3 PM stipulated for completion of the contracts in the second notices to complete, Ms Western made 12:30 PM as the time for settlement: CB 1926 & 1928;

(4) Ms Western did not provide settlement adjustment sheets in relation to the sale of units 2 and 9 until 11.42 AM and 11.50 AM on 27 July 2021, respectively, when settlement of the sales had then been booked by Ms Western for 12.30 PM on that day: POS[5]. [63];

(5) whilst settlement adjustment figures are required to be entered into PEXA, written forms of the settlement adjustment figures were required: PCS [27];

(6) the vendors claimed an invalid default interest charge of $1,746.58 on behalf of each vendor in each unit's settlement adjustment figures e.g. CB 1948: PCS [13];

(7) there was no land tax clearance certificate issued in respect of unit 9 so pursuant to cll 14.1 and 14.2 of the contract for that unit, Mr Tayyar had not done all things and paid all money required so the land tax charge was no longer effective against that land: POS [114];

(8) the vendors were required to and could have (despite the purchaser not having done so) signed the FS schedule within the PEXA Space: stage 19(a) and 19(c) of the PEXA Transfer Guidelines V3-June 2021: CB 2584ff: POS [117]; and

(9) the vendors preferred to sell elsewhere at a higher price: POS[5], [64], [116].

641 A number of the submissions above involve some consideration of the practical working out of settlement as between the representatives (whether they be conveyancers or solicitors) of the parties.

642 I have addressed these above.

Creating the electronic workspace and invitation to Mr Boxsell

643 DC2 submitted that (POS [58], [61]):

(1) the only evidence of Ms Western inviting DC2 into the PEXA Space is an apparent invitation to CCS for the "incoming proprietor" by about 9 July 2021: CB 1854ff; and

(2) the email sent by Ms Western at 11:50 AM on 27 July 2021 did not say that completion was to occur within the PEXA Space nor at what time.

644 The PEXA Transfer Guidelines V3-2021 stipulate in Section 1 that at Stage 1 the relevant party "Creates the workspace with the settlement date and time, creates/edits the party (or parties) details, and invites the other parties as applicable.": CB 2585; POS [55].

645 On 25 June 2021 Mr Boxsell was sent an invitation to enter the PEXA workspace: CB 2583.952; T35.

646 Ms Western also repeated the invitation at 3.06PM on 27 June 2022 (CB 1955), which she was under no obligation to do, and still received no response from Mr Boxsell: G2CS (page 5).

647 Ms Western gave evidence that upon receipt of the 27 July 2021 invitation into PEXA (CB 1955) the steps required for Mr Boxsell to accept the invitation were to enter the PEXA workspace and accept the invitation and enter the purchaser's details. That would have taken "two minutes": T293-294. Further, it would have taken "another one or two minutes" for Mr Boxsell to invite the incoming mortgagee is to the PEXA workspace on 27 July 2021: T294.

648 It is only in the afternoon of 30 July 2021 that Mr Boxsell added the incoming proprietor:

> "xxix. At 14:25:48 AEST on **30 July 2021: Incoming proprietor has been added to the Workspace by WILLIAMS BOXSELL GEORGAS LAWYERS;** and

xxx. At 14:25:49 AEST on **30 July 2021: WILLIAMS BOXSELL GEORGAS LAWYERS has joined the Workspace as incoming Proprietor.**" (CB 211-212)

649 Mr Pesman SC submitted that Mr Boxsell did not at any time prior to 27 July 2021 invite DC2's incoming mortgagee into the PEXA workspace, nor provide Ms Western with adjustment figures (or, indeed, anything at all), with the consequence that DC2's failure to take those steps, put it in breach of its obligations under cll 30.7.1-4 and 30.9.1 of the contracts: G2CS (pages 5-6).

650 Those failures, in my view, did put DC2 in breach of the contracts.

The nomination of 12:30 PM is the time for settlement within PEXA

651 DC2 submits that, contrary to the time of 3 PM stipulated for completion of the contracts in the second notices to complete, Ms Western made 12:30 PM the time for settlement: CB 1926 & 1928.

652 I reject this submission.

653 Where a notice to complete nominates a particular hour of the day for completion, that hour is construed, prima facie, as a matter of convenience only. The hour is not "essential". The notice giver cannot terminate the contract immediately after that time has passed, but rather must give the recipient the whole day in which to complete: Butt at 666-667 citing inter alia *ex parte Robertson* [1983] 1 Qd R 526; *Wright v Featherstone* (supra) and *Paclyn v Harris Real Estate Pty Ltd* (1988) NSW ConvR 55-418.

654 There was no suggestion that the provisions of electronic conveyancing on PEXA were different.

655 In fact there was evidence that if settlement does not occur at a particular time the operation of the PEXA program is to in effect "rollover" the settlement time by increments of 30 minutes until the 5 PM deadline is reached.

Late provision of settlement adjustment details

656 DC2 submitted that Ms Western and/or SBS were responsible for the accuracy and correctness of all information contained in an electronic workspace at the time an electronic workspace document or Settlement Schedule is signed: cl 14.4(b) PSPA (CB 2551) and that in order to achieve that, they are also responsible for doing anything and for ensuring that any other relevant person

(Mr Boxsell for DC2) will do anything necessary to give full effect to the transactions contemplated by the PSPA: cl 26.9 (CB 2563): PCS [24].

657 DC2 submitted that the net effect of the provisions of the PSPA is that Ms Western was obliged to work with Mr Boxsell to agree the settlement adjustment figures so the Settlement Schedule could be signed: PCS [25].

658 In the case of Mr Tayyar, DC2 submitted that it was only at 11.09.17 AM on 27 July 2021 that Ms Western completed the "Destination Line Item: Vendors' Funds" within PEXA (CB 1928); being when she finalised the settlement adjustment figures in PEXA and included the default interest claims. Ms Western then sent a written Settlement Adjustment Sheet to Mr Boxsell by email at 11.50 AM on 27 July 2021 (CB 1948-1950): PCS [27].

659 DC2 submitted that:

(1) Ms Western providing the settlement adjustment figures within PEXA within 90 minutes of the time set for settlement did not comply with the obligations in cl 26.9 of the PSPA, with the consequence was that Mr Boxsell had no reasonable opportunity on 27 July 2021 to agree the figures with Ms Western before the time stipulated for completion: PCS [30];

(2) Knowing that Mr Boxsell had not accepted her invitation into PEXA on or before 27 July 2021, Ms Western took no steps after the issue of the second notices to complete and until the day before the date stipulated for settlement to ensure that he had received the PEXA invitation and to suggest he should accept it, or that he should propose settlement adjustment figures for her to confirm: PCS [31]; and

(3) Instead, Ms Western adopted an entirely self-serving approach of finalising the settlement adjustment figures in PEXA and issuing the Settlement Adjustment Sheets to Mr Boxsell by email from approximately midday on 27 July 2021. That approach followed her communications to various of the vendors the day before (see CB 1843-1847) and that was too little too late: PCS [33].

660 I reject those submissions.

661 I have earlier in the reasons for judgment referred to provisions under the PEXA system and the contracts in respect of co-operation between the parties.

662 Although Ms Oakes accepted that she had not specifically seen the settlement sheet or the PEXA financial statement or the actual numbers on the PEXA workspace destination line items (T298, 299, 305), it cannot be really doubted

that a process of inserting fees from the settlement statement into PEXA had occurred. That was resolved by the A3 size reproduction of the entire screenshot as an example in the case of Mr Tayyar: see Ex D1,8-1.

663 When one looks at the form of settlement statement for Mr Tayyar which Ms Western emailed to Mr Boxsell on 27 July 2021 (CB 1490-1491) and compares that to the PEXA FS schedule (CB 2724.999) it is evident that the details are the same.

664 The example of Mr Tayyar's sale shows that Westpac as the outgoing mortgagee asserted the amount it should be paid to it and the amounts which Ms Western asserted should be paid out to herself (for professional fees) and to Mr Tayyar on settlement were inserted: T298-299.

665 Thus, on the vendors part Ms Western on their behalf had done what was required to be done in order to proceed with the settlement on 27 July 2021. In the case of Mr Tayyar, there is no precise indicator from the partial screenshot at CB 2724.199 of what time the various settlement figure details were put into the system (T308) although Ms Oakes disagreed with the proposition that it would have been done at the same time as the cheque directions and indicated that they usually are done prior to the cheque directions "because once you've done that, you can work out what are the vendor's funds, and then from the vendor's funds, you can put your cheque directions as vendor": T308.

666 Ms Oakes indicated that of the eight cheque disbursement line-item amounts, the figures for four of them (council rates, water rates, owners corporation and Revenue NSW) are (normally) put in by the purchaser. The PEXA fee is an automatic charge that comes into the system for both the purchaser and the vendors. The line-item amounts for the conveyancer's fees and the payment due to the vendor are put in by the conveyancer: T309. The line-item for the outgoing mortgagee (Westpac) is (as noted earlier) inserted by the mortgagee.

667 Ms Western's assertion of the final amount to be dispersed to Mr Tayyar was inserted at 11:09 AM on 27 July 2021, together with the details of the other set of cheque directions: T308.

668 As best I can gauge on the evidence, DC2 does not assert that figures for the vendors were provided on the PEXA workspace any later than 11:09 AM which was the case for Mr Tayyar in respect of the contract for unit 9.

669 As noted above, the nomination of 12:30 PM is a time for convenience and the entire day up to 5 PM is available to effect a settlement.

670 The evidence is that Mr Boxsell had been previously invited by SBS to the workspace on 25 June 2021 at least in the cases of Mr Szepes, Ms Hopwood, MALK, Mr Young and Mr Hew: CB 2583.952 – 2583.

671 Mr Boxsell did not accept the invitation into PEXA on 27 July 2021.

672 Some degree of co-operation might have been expected in the circumstances.

673 Mr Allen submitted (G1CS [40]) that

> "Similarly, the process breaks down if the purchaser does not provide draft adjustment figures in accordance with standard condition 39. If the purchaser does not do these things, and thereby does no co-operate, there is little or nothing the Vendor can do to advance completion. Nevertheless, in this case the Vendors did undertake the task of drafting adjustment figures which was more than they were required to do".

674 I agree.

675 Mr Boxsell was not called to give evidence in the proceedings.

676 In my assessment, the provision of the figures by 11:09 AM on the PEXA workspace or even by 11:50 AM by email to Mr Boxsell in each case by Ms Western was sufficient timing for provision of the figures in circumstances in which Mr Boxsell had not provided any adjustment figures at least two business days before 27 July 2021 (see cl 30.9.1).

677 In any event, in *Mahoney v Lindsay* Gibbs J at 603 noted:

> "However, if one party to a contract prevents the other from fulfilling a condition of the contract, that is equivalent to performance by the latter. The law is stated by Dixon CJ in *Turnbull (Peter) & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 246–7, in the following words: 'Now long before the doctrine of anticipatory breach of contract was developed it was always the law that, if a contracting party prevented the fulfilment by the opposite party to the contract of a condition precedent therein expressed or implied, it was equal to performance thereof: *Hotham v East India Co* (1787) 1 TR 638 ; [99 ER-1295]. But a plaintiff may be dispersed from performing a condition by the defendant expressly or impliedly intimating that it is useless for him to perform it and requesting him not to do so. If the plaintiff acts upon

> the intimation it is just as effectual as actual prevention.' Sir Owen Dixon went on to cite a passage from the judgment of Lord Mansfield in *Jones v Barkley* (1781) 2 Dougl 684 ; 99 ER 434 where Lord Mansfield said: 'The defendant pleads that the plaintiff did not actually execute an assignment and release; and the question is whether there was a sufficient performance. Take it on the reason of the thing. The party must shew he was ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act.'"

678 I reject the submission that the alleged late provision of the figures meant that the vendors were not ready, willing and able to complete settlement.

Failure to provide written forms of adjustment sheets

679 DCS in the closing submissions argued apparently based on evidence of Ms Oakes that settlement adjustment figures are to be entered into PEXA and that the parties will require a hard copy for their records: T311.33. The submission was to the effect that Ms Western only provided the written form of settlement adjustment figures for Units 7, 4, 3, 2, 5 and 9: CB 1946ff and CB 2592ff: PCS [27].

680 Such matter was not pleaded.

681 There is evidence that a FS schedule was created for each of the 10 vendors: CB 2724.191-2724.200.

682 The evidence of Ms Oakes was as follows:

> "Q. And is it the case they can provide the adjustment figures by putting in draft adjustment figures into the PEXA workspace?
>
> A. Yes, however, the parties still will require a hard copy for their records".

683 I did not understand Ms Oakes' evidence to indicate that it was a mandatory requirement that written forms of settlement adjustment sheet be provided. I understood her to be indicating that as a matter of prudence a conveyancer would ordinarily keep a written form of settlement adjustment sheet for the records.

684 In any event, in my view, the fact that Ms Western provided (or populated) the FS schedules in PEXA with details for each of the vendors was sufficient compliance with the vendors' obligations under the contracts.

Alleged invalid default interest claim

685 Special condition 9 of the contracts provides as follows (CB 781.22):

> "The Purchaser agrees that in the event completion is not effected by the Completion Date for any reason other than the Vendor's default or delay the Purchaser will pay to the Vendor interest on the balance of purchase monies at the rate of 10% per annum calculated on a daily balances from and including the Completion Date up to and including the date of completion, such interest to be paid on completion together with the balance of the purchase monies and any other monies payable pursuant to this Contract, and payment of such interest shall be an essential condition of this Contract.
>
> Further, if the Purchaser does not complete by the Completion Date through no fault of the Vendor and which requires the Vendor to serve a Notice to Complete on the Purchaser pursuant to this clause, then the Purchaser will pay the Vendor's Conveyancer's costs of $330.00 in relation to the Notice to Complete, which sum will be adjusted on completion.
>
> The Vendor is not obliged to complete if the Purchaser does not pay the interest and costs set out in the Clause.
>
> The interest and costs payable under this Clause is a genuine pre-estimate of the Vendor's loss as a result of the Purchaser's failure to complete. The right to interest and these costs does not limit any other rights the Vendor may have a result of the Purchaser's failure to complete."

686 DC2 submitted that on the proper construction of cl 9 of the special conditions of the contracts, if completion did not occur by the Completion Date of 9 April 2021 other than by reason of the vendor's default or delay (i.e. because of the fault of the purchaser), interest at 10% per annum would accrue from 9 April 2021: PCS [14], [34].

687 On 20 April 2021 (2:38 PM), as noted above, Ms Western sent an email to the other vendors stating "I will now issue a Notice to Complete to the Purchaser for each and every unit tomorrow and penalty interest will also be imposed from tomorrow until settlement takes place": CB 1013. Whilst there was follow-up from a number of the vendors regarding the notices to complete there does not appear to have been any query or dispute from the vendors regarding the penalty interest.

688 DC2 stated that contrary to special condition 9, Ms Western charged interest on behalf of each vendor from 12 July 2021 as if the date for completion were 12 July 2021 instead of 9 April 2021: PCS [15].

689 The notion that there could be complaint that interest was charged from a later date, in effect waiving an entitlement to more interest, as being something that could demonstrate the vendors were not ready, willing and able to complete is curious.

690 In any event, DC2 indicated that its arguments regarding the alleged default interest claim depend upon the premise that the contracts required vacant possession, in effect asserting that the cause of DC2's failure to complete by 9 April 2021 was the vendors' default or delay: PCS [16]-[22].

691 Ms Western accepted that the fact that there was a tenant permitted into unit 6 (MALK's property) on or about 2 December 2020 was a breach of the Option Deeds: T292.

692 However, I have found that Mr Danckert instructed Ms Western that the contracts were to be "subject to existing tenancies".

693 The significance of that fact, as submitted by Mr Pesman SC, is that Ms Western's concerns about MALK inadvertently signing a new tenancy agreement in December 2020 were incorrect.

694 Even assuming that agreement was a breach of the Option Deed, such breach merged or was waived on execution of a contract subject to that tenancy.

695 On that basis I do not accept that the vendors and in particular MALK were in breach of the contracts (as distinct from the Option Deeds) so as to impugn any entitlement to charge interest. A notice to complete could have been issued in April 2021 and there would have been entitlement to charge interest from the completion date on 9 April 2021.

696 Mr Allen submitted that Ms Western actually undercharged interest: T417-418.

697 Mr Kelly SC stated (T418) that:

> ".. But going back to cl 9, the first sub para relates to and includes the proposition, "for any reason other than the vendor's default or delay". The vendor's default is to be found in the fact that vacant possession was not able to be given until the last tenant vacated, and Ms Western's evidence is that that took place on 11 July, hence her calculation of default interest commencing on 12 July".

698 However, that submission is predicated on the basis that the contract required vacant possession which I do not accept.

Land tax clearance certificate

699 Ms Western in her affidavit sworn 11 July 2022 specifically dealt with the issue regarding the land tax clearance certificate in respect of unit 9 for Mr Tayyar: CB 218.1–218.13.

700 Ms Western in the course of acting on the conveyance requested the land tax clearance certificate for unit 9 which was issued on 24 March 2021 indicating that there was an amount of land tax outstanding.

701 Ms Western had a conversation with Mr Tayyar which reflected that he would pay a debt settlement and she indicated to him that it would be deducted from his proceeds at settlement.

702 Specifically a copy of that certificate was provided by Ms Western to Ms Pocknall on 25 March 2021 and she had a conversation with Ms Pocknall which I have earlier referred to but materially she said to Ms Pocknall "There will be some land tax that will be payable. My clients informed me that they will be paying it on settlement". Ms Pocknall said, "That's fine. No problems. Can I borrow a pen?": CB 218.4[7]–[8].

703 Mr Tayyar gave evidence regarding the land tax issue as follows (CB 162):

> "44. I note that paragraph 164 of the Amended Statement of Claim in this proceeding states incorrectly that I was never able to settle due to outstanding land tax. I unequivocally reject the assertion. I was at all times ready, willing and able to settle. The land tax debt was to be paid on settlement from the proceeds of the sale. Since settlement has not occurred, the land tax debt was paid in full on the due date".

704 Mr Tayyar was not effectively challenged on that evidence.

705 Ms Western included an adjustment on the settlement sheet prepared for the sale of unit 9 which included land tax: CB 218.5[13]-[15], 218.11-218.13.

706 Mr Allen made submissions in respect of this as follows (G1CS [44]-[48]:

> "44. In the written opening a complaint is made concerning Land Tax by reference to clauses 14.1 and 14.2 in the terms, *"… there was no land tax clearance certificate issued in respect of Unit 9."* This is irrelevant as there is no obligation under the Contracts to provide such a certificate.
>
> 45. Item 3 of Schedule 2 of the *Conveyancing (Sale of Land) Regulation 2017 (NSW)* requires service of a land tax certificate. This was done.
>
> 46. Should the certificate show a charge, standard condition 16.6 of the actual Contracts operates, which reads (CB2 781.12):

> "*If a party serves a land tax certificate showing a charge on any of the land, by completion the vendor must do all things necessary to all things and pay all money required so that the charge is no longer effective against the land.*"
>
> 47. This clause is a change from the 2017 edition and was created in the context of paperless conveyancing in the circumstances that a land tax charge could be discharged during completion, simultaneous with other necessary payments (CB 218.10). In the context of standard condition 16.6, completion refers to the end point of the process, the complete conveyance. This interpretation accords with the normal meaning of completion in contracts for the sale of land: *Killner v France* [1946] 2 All ER 83 at 86, per Stable J applying *Lewis v South Wales Railway Company* (10 Hare 133 at 119 per Turner VC: completion means "the complete conveyance of the estate and final settlement of business.
>
> 48. As the land tax can be paid during completion there is no need for a "land tax certificate" and there is no evidence that such a document is now issued."

707 I accept Mr Allen's submissions.

708 Mr Allen also submitted that DC2 is estopped from relying on the point as Ms Pocknall agreed to payment during the completion process and Ms Western relied on this representation to have the land tax paid during completion: G1CS [49]. It does seem to me that DC2 is bound by Ms Pocknall's comment which was self-evidently acted upon by Ms Western.

Failure to sign the FS schedule

709 Standard condition 39.1 of the contracts provides:

> "To complete the financial settlement schedule in the *Electronic Workplace* –
>
> 30.9.1 the purchaser must provide the vendor with *adjustment figures* at least 2 *business days* before the date for completion;
>
> 30.9.2 the vendor must confirm the *adjustment figures* at least 1 *business day* before the date for completion; and
>
> …"

710 Mr Allen submitted that if DC2 had not provided adjustment figures, then the FS schedule could not be completed, or, to use the words of cl 30.9.2 more correctly "confirmed" by the Vendors: G1CS [41]; see also G2CS (page 6).

711 Mr Allen noted that to be ready and willing, "all the vendors had to do was to join the PEXA workspace and to invite its outgoing mortgagees. This was as good as substantial performance, being the performance required (*Mehmet v Benson* (1965) 113 CLR 295), of their obligations because any further work towards completion required D Capital 2 to join the workspace and to give draft

adjustment figures: *Peter Turnbull & Co Pty Ltd v Mundus Trading Company (Australasia) Pty Ltd* (1954) 90 CLR 235": G1CS [43].

712 I reject the submission that the vendors were not ready, willing and able to complete because there was a failure to "sign" the FS schedule.

713 Ms Western on behalf of the vendors had completed the details of the schedule which is noted above were effectively the vendors' assertions of the figures for settlement.

714 The simple fact of the matter is that at no point on 27 July 2021 did Mr Boxsell enter the PEXA workspace.

715 There was in a very real practical sense nothing more the vendors or Ms Western could do.

Vendors' preference to sell elsewhere

716 The opening submissions on behalf of DC2 as noted above assert that the vendors were not ready and willing because of a preference to sell elsewhere.

717 This is really tied to a related submission which I address immediately below to the effect that the vendors were not ready, willing and able to complete up to and including 2 August 2021.

718 I reject this ground as a basis for asserting that the vendors were not willing to complete the contracts.

Were the vendors not ready and willing and able to complete up to the time of termination (on 2 August 2021)?

719 DC2 submits that the vendors are required to show they were ready and willing and able to complete at the time of termination of the Contracts, on 2 August 2021 citing *Foran v Wright* (1989) 168 CLR 385; [1989] HCA 51: PCS [37].

720 In particular Mr Kelly SC referred to the decision of Gaudron J in *Foran v Wight* at 457-458:

> "If a party entitled to insist on the essentiality of a stipulated time in a contract for sale of land leads the other to assume that that essentiality is not being maintained time thereupon ceases to be essential: *Mehmet v. Benson* (1965) 113 C.L.R. 295 at p. 303, per Barwick C.J. In such a case, it is said that there has been a waiver of the benefit of the essentiality of the provision. See *Green v. Sommerville* (1979) 141 C.L.R. 594, especially per Wilson J at p. 612. Thus,

> if both parties to a contract for sale of land in which time of completion is made essential allow the date fixed for completion to pass without tendering performance, they may, and ordinarily will, be taken to have each waived the essentiality of the requirement as to time of performance. That waiver is ordinarily inferred from the failure of one to tender performance on the stipulated day and the failure of the other to insist upon performance on the date fixed for completion or a combination of both. In such a case it is said that the contract continues on foot. But it continues on foot in what is, in effect, varied form. It is transformed from one requiring performance at a specified time to one requiring performance within a reasonable time. That transformation follows from the waiver by each party of the essentiality of the requirement as to time of performance".

721 DC2 made a number of submissions (PCS [37]-[43]) to the effect that the vendors were not ready, willing and able to complete (PCS [37]-[38]) that:

(1) until the time of termination at 9.41PM on 2 August 2021 Ms Western was compelled by at least the PSPA (presumably cl 26.9) to propose agreement on the adjustment figures;

(2) that from the time Mr Boxsell accepted Ms Western's invitation into PEXA on 30 July 2021 until 9pm on Monday 2 August 2021 there was no attempt by Ms Western to procure agreement from Mr Boxsell about the settlement adjustment figures to procure *Ready:Ready* status in the workspace in PEXA; and

(3) at the time of termination the default interest demand remained in the settlement adjustment figures.

722 The basis for the compulsion is unstated but I take it that DC2 relies upon cl 26.9 in light of its earlier submissions.

723 DC2 submitted that there were steps afoot which the vendors were not willing to settle prior to the actual termination on 2 August 2018.

724 The notion regarding the alleged lack of willingness of the vendors to complete was raised in opening submissions on the first day of the hearing.

725 Mr Kelly SC submitted in opening the matter that one general topic was in substance (un)conscientious exercise for legal rights in the sense that some of the vendors had taken steps to find another buyer and that there were steps afoot to onsell the units: T17.

726 That led to some discussion about the significance of the word "willing" in the phrase "ready, willing and able".

> "KELLY: The composite phrase, really willing and able, invites the Court to look at the whole of the facts and circumstances to see if, for the purposes of

> an assessment in equity, a party is performing its contract at the time when it's positioning itself to assert that the other party is not. One needs to look at the--
>
> HIS HONOUR: But there may be cases where people have interest potentially in seeing how, to use maybe an unhelpful expression, but just see how the cards fall out, and so they might have an interest in onselling, but nonetheless, would be described as still ready, willing and able to complete a contract.
>
> KELLY: Yes, there may well be, your Honour, and therefore, one needs to look at exactly what was happening at this time, but approaching it just for the time being at the more modest level of ready and able, that means ready and able to perform in accordance with the contract…."

727 Specifically, DC2 referred to the following matters (rearranged chronologically).

728 First, it was submitted that the part of a conversation between Ms Western and Ms Mammoliti on 27 July 2021 as follows (CB 103-104) was an intimation that the vendors were not willing to settle with DC2.

> "Elisa: *Well there is another offer the vendors are waiting for, nothing to date has been In writing. If the settlement doesn't happen we're proceeding with the offer.*
>
> Me: *You should contact Wayne's lawyer, as far as I know settlement Is happening. Maybe the lawyers from all sides are working towards it.*
>
> Elisa: *The vendors won't settle with Wayne. They're waiting for a better offer. Written confirmation has not been received, but we're expecting one any day now. I know for a fact Wayne cannot come up with an extra $500K per unit to match the offer, so please don't say anything to Wayne".*

729 Secondly, discussions between Mr Parker and an agent from McGrath Terrigal commencing at 1:02 PM on 29 July 2021 and going through to referring to a "buyer" which DC2 assert was Blue Sox (which appears a fair inference having regard to the embedded icon "Blue Sox Group P…" in the "not delivered" text message at CB 2663) going through to 2 August 2021 and indeed after that up to and including 9 September 2021: CB 2673.

730 Thirdly, an email from Mr Tayyar seems to Ms Western on 31 July 2021 at 11:41 AM (CB 2653.1) as follows:

> "Hi Elisa,
>
> I've been thinking about this situation and had a chat with Fransisco on Friday about it. Since the buyer didn't comply with the notice to complete, we are legally entitled to terminate the contract and peruse a damages claim. He owes us for lost rent and mortgage payments.
>
> There seems to be genuine interest in the property for a lot more money, enough extra money to make a new contract worth considering and definitely terminating this one.

> Are you sure that you don't want to sell for more money and a better deal? If there wasn't any interest in the property whatsoever, I would allow an extension and settle as there is no better option, but the fact that there are better options make me rethink the whole sale and not want to proceed with the current contract, as is my right.
>
> Please terminate my contact accordingly on Monday as the purchaser has failed time and time again to settle. I owe it to my family and myself to explore better options that are well within my rights.
>
> Thanks, hopefully we can reassess the situation once the purchaser is aware of the termination.
>
> Zak"

731 Fourthly, DC2 submits that the vendors ceased to be willing prior to termination "as they had agreed at 9.13pm that evening to terminate the Contracts to take advantage of an opportunity to sell their units for $220,000 more each than they were compelled to sell them for under the Contracts: see CB.V4.2004".

732 The reference to 9:13PM is to an email of Ms Western as follows:

> "Hi Kane,
>
> As discussed in the meeting tonight, please put the following offer to the proposed Purchaser:-
>
> 1. Purchase Price - $6,900,000.00.
> 2. There will be 10 individual Contracts issued.
> 3. 12 month settlement period to be agreed if Purchaser agrees to release 5% deposit to Vendors upon exchange.
> 4. If Purchaser does not agree to releasing the 5% deposit, the Vendors will agree to a 6 month settlement period and $1,500.00 per month to released to each Vendor to allow for loss of rental income etc or $9,000.00 from the deposit to be *released* to each Vendor upon exchange.
> 5. The Purchaser agrees to secure the property by placing fencing around the property and upkeep of the grounds if necessary (ie : mowing lawns etc)
> 6. Section 66W Certificate provided at exchange.
> 7. Exchange of Contracts to take place within 5 business days of Contract.
>
> Kane, I also forgot to mention in the meeting, that we also need to agree upon the terms and conditions of the Agency Agreement with the Agent that has sold the property.
>
> See how you go with the above."

733 I do not accept the submissions.

734 On the whole, I do not regard the material relied upon by DC2 as excluding or shutting out a willingness on the part of the vendors to settle. Rather, I regard it as being a not unnatural exploration of other possibilities in the context of a very lengthy history of events dating back to 2018 and a degree of delay.

735 It was put to Ms Mammoliti that the 27 July 2021 conversation did not occur. She denied that: T219.

736 Ms Western was not cross-examined on the email.

737 However, even accepting Ms Mammoliti's version, it seems to me that Ms Western was, by use of the words "*If the settlement doesn't happen we're proceeding with the offer"* doing no more than intimating the practical reality that in light of DC2's doubtful funding, the vendors would consider that and keep alive the option to sell their units elsewhere.

738 The text messages between Mr Parker and the Terrigal agent included messaging at 9:32 PM on 2 August 2021 as follows:

> "Parker: Just met with owners(.) Another meeting tomo planned(.) Some requests will be put to joe
>
> Agent: Don't make it to[o] hard for him(.) He is the very best Developer around and will 100000% so the deal with you." (CB 2661-2)

739 Further, DC2 asserted that Ms Western's representation in the second paragraph of her letter dated 31 August 2021 to the solicitor for Blue Sox at CB 2678[7(a)] that "*D Capital 2 Pty Ltd failed to provide us with evidence that they had their finances in place to complete"* was not true.

740 Whilst there may be some debate about what degree of evidence was required, sufficient to make an assertion in a letter, it seems to me that objectively it was true that DC2 did not have in place the necessary finance to be able to settle either on 27 July 2021 or up to and including the time of termination on 2 August 2021.

741 Mr Allen submitted that the factual premise cannot be made good as it was not put to the vendors that they were not going to complete, and thereby breach the contracts, because they wanted to sell to Blue Sox at a higher price: G1CS [50]. That is true. However, what I have noted above suffices to dispose of the issue.

Issue 3 - Did the vendors waive the essentiality of time or elect to affirm the contracts (issue 3)?

742 DC2 claimed that the email sent by Ms Western at 3:06 PM on 27 July 2021 elected to firm the contracts and/or waived the time essentiality stipulation: POS [37].

743 DC2 made a number of submissions in support of the proposition that there was an affirming of the contracts or waving of the essentiality of time: POS [66]-[76]; PCS [44]-[66].

744 Specifically, the submissions focused upon several events on the afternoon of 29 July 2021.

745 DC2 submit that:

> "45. At 1.43pm on 27 July 2021, Mr Boxsell sent Ms Western and an email (CB.V3.1953) stating DC2's finance was approved and settlement could occur on Thursday or Friday that week. That was approximately 1 hour and 25 minutes after 12.21pm (CB.V7.2592.8) when he received the last of Ms Western's emails attaching the Settlement Adjustment Sheets.
>
> 46. Ms Western admitted in the witness box she was watching PEXA closely during the day on 27 July 2021 but did not reply to Mr Boxsell's email above until after 3pm. At 3.06pm when Ms Western replied to that email (CB.V3.1953) the latest settlement could occur on that day was 5pm.
>
> 47. Ms Western's reply at 3.06pm on 27 July 2021 proposed to Mr Boxsell that he *"accept our invitation into PEXA and invite the Incoming Mortgagee into PEXA to also show the evidence that settlement is likely to take place on Thursday or Friday*."
>
> 48. The day before, Ms Western had represented to Ms Hopwood, Mr Szeppes and Mr Hew that settlement the following day "*was not looking promising*" and they must show they are ready willing and able to settle: CB.V3.1843, 1844 & 1846. In those emails, Ms Western did not seek her clients' instructions to state to Mr Boxsell on 27 July 2021 that if DC2 failed to complete the Contracts on that day, the Vendors would exercise the right to terminate them.
>
> 49. Ms Western's email at 3.06pm on 27 July 2021 did not ask Mr Boxsell to accept her PEXA invitation by a time within that day to enable settlement to occur that day. For any such further time suggestion to have been made, she would have had to have said a time enough before 5pm to enable settlement to occur before the end of the day. If that had been her intention and or her instructions, she could have said so, but didn't.
>
> 50. Ms Western's conduct of not stipulating a later time to complete on 27 July 2021 and by not requiring he accept her invitation into PEXA that day, waived the time of the essence stipulation in the Notices to Complete.
>
> 51. Further evidence in support of that proposition is in Ms Western's email to Mr Boxsell at 3.31pm on 27 July 2021: CB.V4.1956. There was no suggestion

in it of a later time by when settlement must occur, for the Vendors to reserve the rights under the Notices to Complete.

52. Further contemporaneous evidence of Ms Western's actual position on the time of the essence stipulation is in her email to the 2nd to 7th and 9th defendants (**Other Vendors**) on 27 July 2021 at 3.45pm: CB.V4.1958. Rather than seeking instruction to issue Notices of Termination, she updated them on the steps she had taken by sending Mr Boxsell her email at 3.06pm. Ms Western then took no further steps that day. She did not expressly reserve any rights to terminate the Contracts; she left her invitation to Mr Boxsell within her email of 3.06pm open to accept.

53. On 28 July 2021, Ms Western received confirmation from Mr Boxsell when DC2 would be in a position to complete: CB.V4.1960-1961. In her email to the Other Vendors at 5.48pm that day, she proposed that they all agree to extend the period for compliance with the Notices to Complete to 6 August 2021: CB.V4.1962. Unilateral agreement to that proposal was not reached and no extension of time to comply or other continuing express reservation of rights to terminate the Contracts was communicated to Mr Boxsell on that day, or at all.

54. On 30 July 2021, without any withdrawal of it beforehand, Mr Boxsell acted on Ms Western's invitation on 27 July 2021 to accept her invitation in PEXA: CB.V4.1848.

55. If it is assumed that the Notices to Complete were valid, on 27 July 2021 the Vendors were entitled to insist on the essentiality of the stipulated time of 3pm and or 5pm on 27 July 2021 as time of the essence for completion of the Contracts.

56. The content of Ms Western in her emails to Mr Boxsell on 27 July 2021 did not insist that 27 July 2021 was time of the essence. That content constituted conduct by Ms Western that could and did lead DC2 to assume that the essentiality sought to be asserted by the Notices to Complete was not maintained by her and the Vendors. That is clear from Ms Western's emails to her clients and Mr Boxsell the day before and on 27 July 2021. It was also corroborated by her email to her clients on 28 July 2021.

57. The result of Ms Western's emails is clear from Mr Boxsell's email to her at 1.43pm on 27 July 2021. In that email he stated finance was available to settle later that week. Also, in his email to her on 28 July 2021, Mr Boxsell forwarded Direct Capital's letter stating settlement could occur by 6 August 2021. There was no withdrawal by Ms Western of her invitation of Mr Boxsell into PEXA before he accepted it on 30 July 2021 and there was no further insistence on the essentiality of time until 9.40pm on 2 August 2021 when the Notices of Termination issued".

746 DC2 referred to the decision of Gaudron J in *Foran v Wright* at 457 and continued as follows:

"60. In this case, Ms Western failed on 27 July 2021 and at any other time on or before issuing the Notices of Termination on 2 August 2021 to insist upon performance of the date fixed for completion. That lack of insistence was characterised by her asking Mr Boxsell in her email of 27 July 2021 at 3.06pm to accept her invitation into PEXA and to invite the incoming mortgagee into PEXA and in asking him whether settlement would be likely on Thursday or Friday [that week].

61. It was also characterised by her failure to expressly fix another time to allow for completion at that later time in a way that showed an intention to make that further time of the essence, as contended by Ms Western in her counsel's opening submissions.

62. The proper construction of the conduct of Ms Western outlined above is she and the Other Vendors elected to affirm the Contracts by positively exercising the right under the Contracts to move towards completion by the end of that week and or by the week after. That was characterised by asking Mr Boxsell to enter PEXA and asking him to ask the incoming mortgagee into PEXA without a time stipulation and by Ms Western proposing to her clients on 28 July 2021 that they extend the time for compliance with the Notices to Complete to 6 August 2021, a proposal ultimately not agreed, so not communicated.

63. These events constituted a waiver of the essentiality of time within that meaning in *Foran v Wight*. It also constituted an affirmation of the Contracts that prevented the Vendors' from subsequently purporting to rescind the Contracts by their Notices of Termination on 2 August 2021: *Sargent v ASL Developments (1974) 131 CLR 634*. The result is the Notices of Termination were invalid and did not bring the Contracts to an end. The Contracts are still on foot.

64. Ms Western had at all times the actual and or ostensible authority of the Other Vendors in waiving the time stipulation for and on behalf of the Other Vendors: Butt, *Standard Contract for Sale of Land in New South Wales*, Second Edition at [15.54].

65. The result of that analysis is the only possibility the Vendors had for remaking a new time to be of the essence for completion of the Contracts was to issue new Notices to Complete: see Nettle J in *Burke & Riversdale Road Pty Ltd v Gemini Investments Pty Ltd [2003] VSC 33* at [28].

66. The further result of that analysis is DC2 was not at any time on 27 July 2021 nor on 2 August 2021 in breach of the time of the essence stipulation in the purported Notices to Complete. The consequence of that is the Notices of Termination were not valid or effective in bringing the Contracts to an end".

747 The concept of "waiver" has multiple meanings and gives rise to "uncertainties and difficulties": see *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; [2008] HCA 57 per Gummow, Hayne and Kiefel JJ at [54] and [84].

"[54] The uncertainties and difficulties which attach to the use of the term have prompted attempts to construct a taxonomy of waiver in which distinctions are drawn between "waiver by election" and "pure waiver" or between "waiver by election" and "unilateral waiver". It is not necessary to consider whether such classifications are useful. Rather, it is important to identify the principles that are said to be engaged in the particular case."

[84] As earlier indicated, in many cases in which it is said that a party to a contract has "waived" a condition for that party's benefit, the party said to have waived the condition will have made an election between inconsistent rights (to insist on further performance or treat the contract as discharged for failure of the condition). In other cases, of which *Panoutsos* is an example, the case

> may be better identified as one of estoppel. And as was later pointed out in *Charles Rickards Ltd v Oppenheim*, analysis by reference to estoppel may avoid the difficulties of identifying the arrangement as an effective variation of the contract that are presented by questions of consideration or, if the contract must be evidenced in writing, the absence of a sufficient note or memorandum. But as the decision of this Court in *Electronic Industries Ltd v David Jones Ltd* shows, those difficulties are not always present and the events may be better analysed by reference to ordinary principles of contract and variation of contract." (footnotes omitted)

748 Mr Allen submitted that the plurality, Gummow, Hayne and Kiefel JJ, Heydon J agreeing, endorsed what was said by Brennan J in *Commonwealth v Verwayen* (1990) 170 CLR 394; [1990] HCA 39 that a party cannot make an election before time, they can only foreshadow what their election will be: G1CS [33].

749 Their Honours stated at [61]:

> "By contrast, Brennan J concluded that the Commonwealth had done no more than state its intention (albeit unequivocally) not to rely on the defence. Because the time for waiving the defence had not arrived, the Commonwealth could be held to that statement of intention only if the plaintiff could show detrimental reliance sufficient to hold the Commonwealth estopped from changing its position. That is, Brennan J held that an election between rights was foreshadowed by the Commonwealth's statement of intention, but that an election would be made only at the moment before judgment". (footnotes omitted)

750 Mr Allen referred to In *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41; [1964] HCA 20.

751 Kitto J stated at 52:

> "It may be that repeated acquiescence by one party to a contract in non-observances by the other of stipulations as to time may amount, when considered in the light of particular circumstances, to an assent to time being treated for the future as not of the essence, notwithstanding a provision in the contract that it is of the essence; and in such a case it may not matter whether the result is described as a promissory estoppel or a waiver or a variation of the contract by mutual, though tacit, consent. But it is not a valid general proposition that wherever some instalments are accepted late without demur the party accepting them is precluded in respect of later instalments from insisting upon the agreement that time shall be of the essence: see *Bird v. Hildage* [1948] 1 KB 91, at pp. 94-96"

752 His Honour noted at 53:

> "In *Kilmer v. British Columbia Orchard Lands Ltd* [1913] AC 319, the Privy Council proceeded on the footing that the vendor in that case could not insist that time was of the essence after having given an extension of time for payment of an instalment. The case is clear authority for the proposition that a stipulation making time of the essence may be rendered no longer applicable

> by the granting of an extension of time in particular circumstances; but it is not authority for the more general proposition that every grant of an extension of time deprives such a stipulation of effect for the future. Counsel had cited to their Lordships the case of *Barclay v. Messenger* (1874) 43 LJ Ch. 449, in which *Jessel* M.R. dealt with the effect of an extension of time under a contract making time of the essence and held that "a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time" (1874) 43 LJ Ch., at p. 456".

753 On the facts Kitto J stated (at 55):

> "The granting of the extension of time, therefore, far from constituting an election by the appellant to affirm the contract, was the announcement of an intention to refrain from electing either way until either the £17,500 should have been paid or 14th January should have arrived".

754 Taylor J (at 58) and Menzies J (at 60) agreed. Menzies J at 60-61 added:

> "…a vendor becoming entitled to rescind for non-payment of purchase money upon the stipulated date for payment, who does no more that give the purchaser an opportunity to pay within a limited time thereafter is not thereby electing to rescind for non-payment…nor is he representing that time is not of the essence; rather he is intimating that he intends to exercise his right to rescind unless payment is made within the time of grace."

755 Election is this regard has been said not to be a matter of intention. It is an effect which the law annexes to conduct which would be justifiable only if an election had been made one way or the other: Kitto J citing *Scarf v Jardine* (1882) 7 App Cas 345, at 361 and *Craine v Colonial Mutual Fire Insurance Co. Ltd* (1920) 28 CLR 305 at 325; [1920] HCA 64.

756 Mr Allen also cited *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 459; [1976] HCA 21, where Gibbs, Mason and Jacobs JJ stated:

> "If after a purchaser fails to complete at the time fixed for completion, when that time is an essential term of the contract, a vendor elects to treat the contract as on foot, there will not usually be a basis for regarding the contract as repudiated by a purchaser until a further time has been fixed in a way that shows an intention on the part of the vendor to make that further time of the essence of the contract. See *Balog v. Crestani*, per Gibbs J., for the analogous principle applicable where time was not originally of the essence of the contract. These circumstances must be distinguished from the circumstances where the breach of the agreement is not unconditionally waived but further time is allowed on condition that completion takes place at the further nominated time. See *Holland v. Wiltshire*, per Dixon C.J." (footnotes omitted)

757 Mr Allen also referred to *Manufacturers House Pty Ltd v Ashington No 147 Pty Ltd* [2005] NSWSC 767; (2005) 12 BPR 23,913, a notice to complete case in

which various extensions of time were given over a period of from 7 March 2005 to 31 May 2005. Smart AJ stated at [45]:

> "I am conscious that the extensions of time covered the period from 7 March-31 May 2005. It is not uncommon for vendors to extend for short periods the date fixed for completion in notices to complete. I would not wish to place hurdles in the way of vendors granting such extensions by holding that a fresh notice to complete had to be given. The vendor should not be prejudiced because it was prepared to grant so many extensions. On each occasion a definite date was agreed for completion".

758 Mr Allen submitted that:

> "[26]. The email of 27 July 2021 was an invitation for D Capital 2 to provide information so that the Vendors could consider whether they would grant an indulgence of extending the time allowed in the Notices to Complete.
>
> [27]. This is demonstrated by the actual words and the substance being:
>
> a. A request for proof of finance.
>
> b. A request for proof of finance because in the past settlement was going to take place and nothing eventuated.
>
> c. A request to join the PEXA workspace, which was long overdue.
>
> d. A request to have the incoming mortgagee join the PEXA workspace, which was a necessary precondition for completion.
>
> e. That the PEXA workspace be joined "to also show proof" in addition to the proof of finance, that settlement is likely to take place in two to three days' time being Thursday or Friday.
>
> f. That "your urgent reply" was required, though expressed in the polite "greatly appreciated."
>
> [28]. Though the email cannot be read as extending time, if the email did extend time the time extended would be the time under the notice to compete."

759 Mr Pesman SC referred to *Mahoney v Lindsay* per Gibbs J at 602 for the proposition that the fact of negotiations between parties after service of a 'notice to complete' (including, it is submitted, negotiations about when completion can occur) does not alter the legal rights and obligations created by the notice.

760 I accept that proposition, though Gibbs J put the matter in more colourful terms by reference to the actual correspondence that had taken place, namely (at 602):

> "In reply the solicitors for the appellant wrote a letter, the true date of which appears to be 27 June 1979, which referred to the notice to complete and went on to say: "We are instructed to advise that our client regards that notice as invalid, having been issued prematurely. In addition, there have been

> discussions between the parties since the issue of that notice which have in any event delayed any time which may have been running."
>
> The contention in the last sentence of the letter was sufficiently answered by the respondents' solicitor, who wrote in reply on 28 June 1979: "If I understand you correctly, you are saying that time ceased to run whilst our clients were talking. Outside the context of 'young lovers', such an averment seems nonsensical.""

761 It seems to me that the email of 3:06 PM on 27 July 2021 is to be more properly construed as being a granting of some indulgence but without obviating the essentiality of time.

762 The reference in the email inviting an "urgent response" tends to fortify the conclusion.

Issue 4 - Were the notices of termination invalid by reason of the matters in issues 1-3?

763 DC2 submits that the notices of termination (each expressed to be based on "default" under the "the notice to complete dated 12 July, 2021 making time of the essence for completion of the contract") were invalid because the second notices to complete were invalid, observing that "It is not an effectual termination: see *Heydon on Contract* [24.380] and *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 at 453 where invalid termination of a contract is recognised to be a '*very common form of repudiation*'": PCS [67]-[68]; see also POS [65].

764 The reasons given above I reject the argument that the second notices to complete were invalid and that the vendors had waived essentiality of the time condition.

765 The consequence is that the notices of termination were not invalid by reason of the claims of DC2 on issues 1 to 3.

Issue 5 - Were the contracts validly terminated?

766 On 2 August 2021 at 7:30 PM Ms Western had a Zoom meeting with the eight other owners and received confirmation from them to issue a notice of termination: CB 182[79].

767 Ms Western was not cross-examined to the effect that no such instructions had been received. If there is any issue about it I accept that Ms Western did on 2

August 2021 receive instructions to terminate the contracts by notices of termination.

768 DC2 did not in its final written submissions appear to specifically address this issue (there being no separate submissions between the submissions on issue 4 in the submissions on issue 6: see PCS [1(d)]-[1(e)], [67]-[69]).

769 As far as I can ascertain there was no specific argument put to the effect that the terms of the notices of termination were themselves invalid in their terms.

770 Mr Allen submitted (G1CS [51]) that:

> "In the following circumstances D Capital 2 repudiated the Contacts:
>
> a. Though time is not of the essence until made so, there is still an implied term that the purchaser will complete within a reasonable time.
>
> b. Mr Box[se]ll did not join the PEXA Workspace, nor did he invite financiers, nor did he provide adjustment figures.
>
> c. In answer to the request for proof of finance, the only document provided was a letter indicating that Direct Capital was "moving towards settlement by the end of next week[,] being the 6th of August 2021.["] (CB 1960-1961) The covering letter of Mr Boxsell described the date as a "target date".
>
> d. In fact, D Capital 2 could not complete using funding from Direct Capital as Direct Capital required an LVR of 75% and the Deed of Nomination precluded a first mortgage with an LVR over 65%. The money being lent by Direct Capital was not sufficient to pay the Contacts prices.
>
> e. There was no communication from Mr Box[se]ll between Wednesday 28 July 2021 and the date of termination, Monday 2 August 2021".

771 The matters referred to in c-e above are made out on the evidence and compelling.

772 Further, in this regard in particular I deal with Mr Danckert's evidence about the ability of DC2 to complete the contracts under issue 6. Having regard to those matters, it is clear beyond doubt that DC2 did not have any unconditional financing prior to 2 August 2021. It did not provide any clear proof of any such unconditional financing.

773 Mr Allen submitted that DC2 had showed that it was unwilling and unable to complete within a reasonable time and instead would complete only when it suited DC2. DC2 was factually unable to settle within any reasonable period, as the finance from Direct Capital was insufficient and would not be available

within a reasonable time because DC2 could not provide a first registered mortgage.

774 It was not until the second day for hearing that DC2 entered into a deed of settlement to address the issue: see Deed of Settlement of 12 July 2022 (CB 2724.156).

775 Mr Allen also referred to Mr Danckert's evidence (T126) as follows:

> "Q. Do you agree that that imposed an obligation on D Capital 2 not to provide a first registered mortgage to a third party, which secured a sum exceeding an LVR of 65%?
>
> A. Correct.
>
> Q. Do you agree that as at 27 July 2021, D Capital 2 could not give a first registered mortgage to Direct Capital securing an LVR of 75% without being in breach of this nomination deed?
>
> A. That's correct.
>
> Q. You are a man that honours his contracts, aren't you?
>
> A. I am.
>
> Q. There's no way you were going to breach this contract at 27 July 2021, that's correct, isn't it?
>
> A. That's correct, I wasn't going to breach it."

776 I note that the evidence continued as follows (T126):

> "Q. Because you weren't going to have D Capital 2 give a first registered mortgage to Direct Capital over the properties upon completion, were you?
>
> A. Could you please rephrase that?
>
> Q. On the 27 July 2021, you were not going to breach this deed by giving Direct Capital a first registered mortgage over the properties to be purchased?
>
> A. I was not going to breach the deed, no.
>
> Q. When you say, "deed", you mean this nomination deed?
>
> A. Correct.
>
> Q. You weren't going to pay Jogat $900,000 in July 2021, were you?
>
> A. Not in July 2021, no.
>
> Q. And you weren't going to pay them $900,000 in September 2021 either, were you?
>
> A. Not in September 2021.
>
> Q. And you still haven't paid. When I say you, you'd agree that D Capital 2 still hasn't paid the $900,000 to Jogat.
>
> A. I have not.

Q. Neither has D Capital 2. That's correct, isn't it?

A. That's correct."

777 Mr Allen submitted, in my view correctly, that the upshot is that Mr Danckert would not have gone ahead with the finance from Direct Finance until after the hearing had commenced, when he had obtained a release from Jogat from the prohibition of granting a first registered mortgage of over an LVR of 65%. Accordingly, DC2 could not complete the contracts when the contracts were terminated.

778 There was some gap in time between the date specified in the second notices to complete (27 July 2021) and the service of the notices of termination on 2 August 2021.

779 The essential question is whether by its continuing conduct, DC2 had repudiated the contract by evincing an unwillingness or an inability to render substantial performance of the contract: see e.g. *Cromarty* at [53].

780 The second notices to complete made time of the essence. The failure of DC2 to complete on 27 July 2021 and the matters I have referred to above in my view amounted to a repudiation of the contracts entitling the vendors to terminate the contract.

781 Some delay, of itself, in terminating after the date to complete specified in the notice to complete does not preclude effective termination. As at 27 July 2021 the vendors had an accrued right to terminate by reason of the repudiation of the contract. The act of terminating on 2 August 2021 relies on the existing breach repudiating the contract: see e.g. *Carringville Pty Ltd v Gatto Group Pty Ltd* [2003] NSWSC 123; (2003) 11 BPR 21,069 at [37] per Young CJ in Eq.

782 I find that the contracts were validly terminated by the notices of termination served on 2 August 2021.

783 DC2 opened the case on the basis that the purported termination of the contracts by the vendors, by the termination notices, was unconscionable in the circumstances which obtained.

784 As noted above, the claims for relief against forfeiture based on unconscionability have been abandoned.

Issue 6 - Has DC2 ever been or now ready, willing and able to complete the contracts?

Mr Danckert's evidence

785 Mr Danckert initially disputed that DC2 did not have the money to complete the purchases on 27 July 2021: T 118.

786 When asked why DC2 did not complete the purchases he asserted that although it did have the money "organised" and "available" (T118) and the loan had been approved (T119) it did not complete because "there was a process with the bank" (T118) and "[i]t was just the process of getting my bank to settle it": 119.

787 I do not regard Mr Danckert's evidence in this respect as being frank or satisfactory. As the following details demonstrate, there were more fundamental problems with what amount could be borrowed which precluded DC2 having the necessary finance by 27 July 2021 than the "process with the bank".

788 Mr Danckert initially identified the bank as being relevantly Avari Capital: T118. Avari Capital being a mortgage management fund: T121. Subsequently Mr Danckert made it clear that the actual funding was coming from Direct Capital and Avari Capital was not providing any separate funds: T122; CB 1955

789 Mr Danckert accepted that on 28 July 2021 he gave instructions to Mr Boxsell to send the letter from Direct Capital to Ms Western as the best proof available that DC2 had finance available on 28 July 2021, and was the only document provided to Ms Western on that date to prove that DC2 had finance: T120.

790 He further accepted that there was no mention of financing from Blackbird in the email from Mr Boxsell to Ms Western: T121. He disputed that the Direct Capital document was not an unconditional approval for finance: T120. He accepted that in order to complete the contracts DC2 required finance from financiers other than Direct Capital: T120. The total funding being provided by Direct Capital was $3.9M and the net amount was $3.58M, after lending fees and other fees associated with obtaining the loan: T121.

791 Mr Danckert accepted that $3.4M was an insufficient amount of money for DC2 to complete the purchases: T122-123. He understood that an amount of approximately $4.55M was required. He on behalf of DC2 tried to obtain (the balance of) the funding from Blackbird: T123.

792 Mr Danckert disputed that DC2 did not have the money to complete the purchase of the properties as at the commencement of the proceedings (9 September 2021): T123. It was put to Mr Danckert that Direct Capital never gave DC2 loan documents which were unconditional approval for funding in the period from 28 July 2021 to 10 September 2021.

793 He asserted that the "funding was available but the documents weren't signed": T123-124. Mr Danckert accepted that he had not given Direct Capital a copy of the Nomination Deed (CB 697): T124. The finance to be provided by Direct Capital required an LVR of 75% (that would only lend 75% of the value of the properties) and according to Direct Capital 75% of the value of the properties was $3.9M: T124-125. Further, Direct Capital wanted a first mortgage to protect its interests having lent to 75% of the value of the properties: T125.

794 Mr Danckert agreed that cl 4.1 of the Nomination Deed imposed an obligation on DC2 not to provide a first registered mortgage to a third party, which secured a sum exceeding an LVR of 65% and that as at 27 July 2021 DC2 could not give a first registered mortgage to Direct Capital securing an LVR of 75% without being in breach of the Nomination Deed: T126.

795 Further he agreed that there was no way he was going to breach the Nomination Deed at 27 July 2021 by giving Direct Capital a first registered mortgage over the properties upon completion: T126.

796 Despite Mr Danckert's assertion that he was full and frank in his application for finance with Direct Capital (T125) it is hard to see how that is the case in circumstances in which he did not provide them with a copy of the Nomination Deed which provided for in LVR of 65%.

797 The Nomination Deed required DC2 to pay $900,000 (the "Second Sum": CB 700) to Chrysilla Badics as trustee for the Badics Family Trust (Ms Badics being one of the parties associated with Jogat: T125) not later than a date 6

months after the date of the Deed (Second Sum Due Date) and, in this respect, time was of the essence: cl 3.3c (CB 702-703).

798 The Second Sum Due Date was thus 25 August 2021. Mr Danckert agreed that he nor DC2 had paid the $900,000 by 27 July 2021 nor September 2021: T125-126.

799 Whilst the questions put by Mr Allen in this regard referred to the $900,000 being paid to Jogat or parties associated with Jogat (T125-126), I understood the answers to indicate that whoever the sum was payable to (which under the deed is to Ms Badics) the answers were similarly applicable, namely that the $900,000 had not been paid and that by September 2021 DC2 had no intention of paying that sum and that it was still not paid.

As at 27 July 2021 and 2 August 2021?

800 In light of the above evidence, in my view it is clear that DC2 was not able to complete either as at 27 July 2021 being the date nominated for completion nor at 2 August 2021 being the date of the notices for termination.

801 The events of 27 and 28 July 2021 which I have set out above all clearly demonstrate that despite DC2, Mr Danckert and Mr Boxsell's hoping to persuade Ms Western and the other vendors that DC2 would be ready to settle by 6 August 2021, the objective reality was that no sufficient funding was then available or likely to be available.

802 The letter from Direct Capital to WBG dated 28 July 2021 (CB 1959) indicating a loan had been approved and could settle by about 6 August 2021 was not evidence of substantial performance. It was based on misrepresentations by non-disclosure of Mr Danckert to Direct Capital.

803 As Mr Allen demonstrated, the reality is that the requirements of Direct Capital were not met, and were not able to be met by DC2 at that time.

804 The reality is that even until after the hearing commenced DC2 was unable to complete and provide the necessary funds for completion.

Currently?

805 In order to support the submission that DC2 was ready, willing and able to complete the contracts as the date of the trial, DC2 marshalled and relied upon the following evidence.

806 First, reference is made (PCS [71]) to Mr Danckert's affidavit sworn 25 May 2022 at [41] (CB 116), which reads:

> "The plaintiff will be in a position to settle on the purchase of the properties at the contract price ($4,700,000) when Orders are made by this Court, as follows:
>
> a. The 10% deposit of the then $4,500,000 purchase price was paid by Jogat Pty Limited ACN 625 466 346 atf Jogat Investment Trust before it nominated the plaintiff to become the purchaser under the Contract ($450,000);
>
> b. The plaintiff will be required to pay at settlement the sum of $4,250,000;
>
> c. The plaintiff will borrow $3,569,000 through the loan in [34] above;
>
> d. The balance of the purchase price: $681,000 plus stamp duty and costs of c.$270,000 to $300,000 will be paid by way of capital injected into the company from another company of which I am the controller. That company is D Capital Pty Ltd and is currently selling its units in Its Windsor project.
>
> e. D Capital Pty Ltd will have sufficient cleared funds well in excess of the amounts referred to at 41.d) by about 30 June 2022, when settlements are presently scheduled."

807 I also note Mr Danckert's evidence at [42] (CB 117) as follows:

> "As a result of the progress of sales in D Capital Pty Ltd, the Blackbird Loan referred to in my First Affidavit is no longer necessary."

808 Secondly, DC2 referred to the following evidence (PCS [72]-[81]):

> "72. DC2 currently has $1,013,062.06 of cash at bank: CB.V7.2724.155. The Court would accept that money is available to DC2 for the purpose of completing the Contracts. There is no evidence to the contrary.
>
> 73. DC2 currently has $3,900,000 of loan funds available to it from Direct Capital Investments (**Loan**): CB.V7.2724.153A. The Loan is subject to documents being produced by Thompson Geer and will be able to be drawn within 7 days of a written drawdown request.
>
> 74. The Loan is the same loan that was available to DC2 in July 2021 and that was the subject of the approval on 20 July 2021 (CB.V3.1835ff, confirmed by Ms Mammoliti: T.218.19-50).
>
> 75. The Loan was confirmed by Direct Capital on receipt of the updating valuation of the block as at 30 June 2022: CB.V7.2724.58ff.
>
> 76. The net amount of the Loan to be drawn after fees and interest is $3,580,671: CB.V3.1835.

77. The total of the funds available to DC2 to complete the Contracts is $4,593,733.06.

78. A summary of how the funds available will enable DC2 to complete the Contracts and pay the requisite stamp duty is in the table in Annexure A to these Submissions.

79. The Deed of Settlement and Release (**Jogat Deed**) signed by Jogat Pty Ltd and its various interested parties and Mr Danckert and DC2 and another Direct Capital Pty Ltd (**Direct Capital**) (CB.V7.2724.156ff) removed any limit on DC2 borrowing more than 65% of the value of the Terrigal units before payment of the Second Sum in clause 4.1 to 4.3 of the Nomination Deed between the same parties signed on 25 February 2021 (CB.V2.697ff).

80. The Jogat Deed shows there is another company of which Mr Danckert is in control (Direct Capital) and that is expecting to receive a gross sales value of $6.08 million from nine industrial lots at xx Walker Street, Windsor. That gross sales value is derived from eight units being sold for a price of $670,000 each and one unit being sold for a price of $720,00: T.208.13-48.

81. Ms Mammoliti's estimate of the indebtedness of Direct Capital is "*probably about $2 million or just under*" (T.213.20). A further $1.4 million will be paid from the net sale proceeds of sale to satisfy the obligations in the Jogat Deed".

809 The table referred to in PCS [78] is as follows:

DC2 Funds Available	**$**	**$**	**Notes & Evidence References**
Cash at Bank	$1,013,062.06		CB.V7.2724.155
Direct Capital Loan		$3,900,000.00	CB.V7.2724.153A
Less Deductions		$319,329.00	CB.V3.1835
Total Loan Available	$3,580,671.00		

Total Funds Available	**$4,593,733.06**		
Total DC2 Funds to Pay	**$**	**$**	**Notes & Evidence References**
Purchase Price	$4,700,000.00		Total of Contracts for Sale
Stamp Duty	$274,615.50		CB.V2.1130
Interest on Stamp Duty	$25,662.91		Est. based on rate of 8.01% for 14 months from 25 May 2021 to 25 July 22
	$5,000,279.41		
Deposit Paid	$450,000.00		
Net Due	$4,550,279.41		
Surplus Available	$43,453.65		Surplus allows for purchaser / vendor allowances on date of

			completion

810 DC2 submits that the defendants' attacks on DC2's alleged financial position through cross-examination of Mr Danckert did not prove anything but rather submitted that "The opposite is true": PCS [71].

811 Finally it was submitted that, "From the summary of the evidence above, the Court can safely infer that DC2 has the funds available to it to settle in its own right and by way of Mr Danckert having the capacity to cause funds to be advanced to it by D Capital if necessary": PCS [82].

812 Mr Pesman SC submitted that there were at least three significant reasons why the Court could not find that DC2 is now ready, willing and able to complete the contracts (G2CS, pages 8-9)):

> "*Firstly*, completion requires D Capital 2 to pay $4,230,000 (i.e., the purchase price minus 10 percent deposit) PLUS stamp duty on the contracts (which D Capital has not sought to calculate) PLUS an unknown amount of interest pursuant to the *Duties Act 1997* NSW), i.e, to pay an unknown sum;
>
> *Secondly*, Mr Danckert gives evidence that his intention or wish (**CB 116 [41]**) is that he will borrow $3,569,000 from Direct Capital under an arrangement that he claims exists pursuant to the documents at **CB 2115-2321**. However:
>
> (a) the Direct Capital loan documents were sent to D Capital 2 on 18 August 2021, and there is no document in evidence establishing that Direct Capital maintains an offer to make the under funds available (and the more recent correspondence indicates entirely new documentation is required; there is still no suggestion it has been prepared);
>
> (b) under Cl 4.1 of the Nomination Deed (**CB 703** and **701**) D Capital 2 covenanted to Jogat Pty Limited that it would not encumber the units other than by 1st registered mortgage where the secured sum was more than $3,380,000 (i.e., 65 percent of $5,200,000);
>
> (c) Mr Danckert gave evidence that he did not provided a copy of the Nomination Deed to Direct Capital in 2021 (**TP 125.15**) (Ms Mammoliti gave evidence that she has never seen the Deed (**TO 216.2**) – and Mr Danckert has not adduced evidence that he has since provided it; and
>
> (d) it follows that Mr Danckert misled Direct Capital (at least by omission) as to his capacity to borrow from them; while the issue with Jogat may have been resolved by the new agreement entered during the trial that is hardly a promising basis to consider that Direct Capital will in fact lend money to Mr Danckert's company.
>
> *Thirdly*, Mr Danckert gives evidence (**CB 116 [41(d)]**) that D Capital Pty Limited will advanced funds to D Capital 2 sufficient to meet a shortfall. The evidence is that those funds will come from the sale of industrial lots in Windsor, but (i) some $1,400,000 (plus GST) from the proceeds of those sales is earmarked for payment to Jogat by 28 July 2022 (i.e., within 10 days); (ii)

> neither D Capital 2 nor Mr Danckert have adduced the contracts for sale of those properties, the status of any sales (or valuations) nor adduced evidence of what might be the total sum secured over those lots, either by way of first mortgage or charge. Whatever funds may today be in D Capital's 2 bank account (such fund only having been deposited on the Friday before the trial commenced) provide no comfort at all absent any information as to their source, the basis on which they are held and what other obligations D Capital 2 may have,
>
> In short, Mr Danckert has not established that his company is ready, willing or able to complete. Further or in the alternative, his shyness on the question of the net proceeds of the Windsor properties allows the Court to make a *Fer[r]com* inference in relation to those topics".

813 The reference to a "*Fer[r]com* inference" is a reference to what was said by Handley JA in *Commercial Union Insurance Company of Australia Limited v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418E, applying the principles in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 to the situation where a party fails to ask questions of a witness in chief: see *Stambolziovski v Nestorovic and Camanaro Prestige Properties Pty Ltd t/as Sydneyhome Real Estate* [2015] NSWCA 332 per Ward JA at [51].

814 Mr Allen tendered title searches in respect of the Windsor Property, and the associated copies of the caveats and mortgage, which became Ex D1,8-2.

815 Mr Allen submitted that the relevance goes to the ability of DC2 to perform the Deed of Settlement with Jogat and the question of ability to complete, because a mortgage exceeding $2 million encumbers the lots: T377-378.

816 However, the above table does not factor in monies from the sale of the proceeds of the Windsor Property.

817 I accept, as Mr Pesman SC submits, that there may be interest pursuant to the *Duties Act 1997* (NSW) to be paid that has not been factored in. However, with some reservation, I am prepared to accept that it is arguable that DC2 may be able to complete the contracts if specific performance is now ordered.

Issue 7 - Are the contracts illegal, void or voidable at the option of the vendors by reason of contravention of s 49 PSA Act (issue 7)?

Section 49

818 Section 49 PSA Act provides as follows:

> "**49 Restrictions on licensee obtaining beneficial interest in property**

(1) A real estate agent who is retained by a person (***the client***) as an agent for the sale of property must not obtain or be in any way concerned in obtaining a beneficial interest in the property.

Maximum penalty—200 penalty units or imprisonment for 2 years, or both.

(2) An assistant real estate agent employed by the real estate agent must not obtain or be in any way concerned in obtaining a beneficial interest in the property.

Maximum penalty—200 penalty units or imprisonment for 2 years, or both.

(3) A person does not contravene this section by obtaining a beneficial interest in property if—

(a) before the person obtains the interest, the client consents in writing in a form approved by the Secretary to the person obtaining the interest, and

(b) the person acts fairly and reasonably in relation to the obtaining of the interest, and

(c) no commission or other reward is payable to the person in relation to the transaction by which the interest is obtained, unless the client consents in writing in a form approved by the Secretary to the commission or other reward being paid.

(4) Without limiting this section, a person is considered to obtain a beneficial interest in property if—

(a) the person or a close relative of the person obtains a beneficial interest in the property, or

(b) a corporation having not less than 100 members and of which the person or a close relative of the person is a member, or a subsidiary of such a corporation, obtains a beneficial interest in the property, or

(c) a corporation of which the person or a close relative of the person is an executive officer obtains a beneficial interest in the property, or

(d) the trustee of a discretionary trust of which the person or a close relative of the person is a beneficiary obtains a beneficial interest in the property, or

(e) a member of a firm or partnership of which the person or a close relative of the person is also a member obtains a beneficial interest in the property, or

(f) the person or a close relative of the person has, directly or indirectly, a right to participate in the income or profits of a business carried on for profit or gain and another person carrying on that business obtains a beneficial interest in the property.

(5) Without limiting this section, each of the following is considered to constitute the obtaining of a beneficial interest in property—

(a) purchasing property,

(b) obtaining an option to purchase property,

(c) being granted a general power of appointment in respect of property.

(6) In this section—

close relative of a person means—

(a) a spouse of the person, or

(b) an existing or former de facto partner, or

(c) a child, grandchild, sibling, parent or grandparent of the person, whether derived through paragraph (a) or (b) or otherwise, or

(d) any other person who has a relationship with the person that is prescribed by the regulations as constituting the relationship of close relative for the purposes of this section.

Note—

"De facto partner" is defined in section 21C of the Interpretation Act 1987.

property includes an interest in property."

819 Section 3(1) includes definitions of "agent" and "real estate agent" as follows:

"***agent*** means—

(a) a real estate agent, or

(b) a stock and station agent, or

(c) a strata managing agent.

real estate agent means a person (whether or not the person carries on any other business) who, for reward (whether monetary or otherwise), exercises real estate agent functions in the course of carrying on a business."

820 Section 3A(1) relevantly provides that:

"***real estate agent functions*** means any of the following functions—

(a) business agent functions,

(b) on-site residential property manager functions,

(c) real estate sale or leasing functions,

but does not include acting as an auctioneer or agent in respect of any parcel of rural land (unless the regulations otherwise provide) or any other function prescribed by the regulations."

821 The form referred to in s 49(3)(a) is published by the Secretary on the Fair Trading website and a copy was handed up during the hearing and incorporated into the Court Book (CB 2724.209). There is no suggestion, nor evidence, that Mr Danckert or anyone else provided any such form to any of the vendors. Nor is there any suggestion or evidence that any of the vendors signed such a form.

The issue

822 As indicated above (at [66]), I will address the matter of whether the contracts were illegal by dint of the effect of the statute.

823 Mr Pesman SC submitted that Mr Danckert breached s 49 on exchange of the contracts on 26 February 2021 and that that breach renders the contracts unenforceable in the case of DC2 and voidable at the suit of the vendors: G2CS [20].

824 Mr Pesman SC put specific submissions to the effect that Mr Danckert was an agent at the time of the contract: G2CS (pages 9-10). I will refer in more detail to his submissions below.

825 Mr Kelly SC assumed for the purpose of analysis of the construction question that Mr Danckert was a "*real estate agent who is retained by a person … as an agent for the sale of property*" and that he obtained or was in any way concerned in obtaining "*a beneficial interest in the property*" when DC2 entered into the Nomination Deeds, made the Calls and exchanged the contracts, in contravention of s 49(1) PSA Act: PCS [84].

826 It seems to me that Mr Pesman SC's submissions (see below) and Mr Kelly SC's assumptions are prima facie correct.

827 Accordingly, I proceed on the basis that s 49 is engaged on the facts of this case and that there is a beach of s 49. I hasten to add that whilst Mr Kelly SC raised the prospect that a breach of s 49 might expose Mr Danckert to a risk of disciplinary action (PCS [103]), I am not determining and have not been asked to determine whether any disciplinary consequence arises.

828 Mr Kelly SC put that the question to be addressed is whether any and if so which of those instruments is illegal, void and of no legal effect or may otherwise be rendered unenforceable by the operation of the PSA Act.

829 Mr Pesman SC accepted (as he must) that the PSA Act does not expressly provide for a consequence that a transaction is voidable at the suit of the vendors and accordingly accepts that that will only occur if the contract was "impliedly prohibited" or made for a purpose rendered unlawful by statute.

Illegality – effect of the statute – legal principles

830 The starting point for DC2's submissions is the principles outlined by the High Court in *Gnych v Polish Club Ltd* (2015) 255 CLR 414; [2015] HCA 23 (***Gynch***) at [36] per French CJ, Kiefel, Keane and Nettle JJ.

831 That case involved the proper construction of the provisions of s 92(1) of the *Liquor Act 2007* (NSW) (**Liquor Act**).

832 The respondent (**Club**) leased part of its licensed premises to the appellants. Relations between the parties deteriorated and the Club excluded the appellants from the subject premises. The appellants commenced proceedings seeking a declaration that held a leasehold interest in the premises.

833 Section 92(1)(d) of the Liquor Act prohibited the holder of a club licence, being the Club, from leasing or subleasing licensed premises except with the approval of the Independent Liquor and Gaming Authority (**Authority**). Because the lease had not been approved by the Authority, there was a contravention of s 92(1)(d).

834 On one view the Club sought to take advantage of its own contravention and argued that s 92(1)(d) of the Liquor Act rendered the lease void and unenforceable. The argument was rejected.

835 The plurality referred to the decision in *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; [2012] HCA 7 at [23] per French CJ, Crennan and Kiefel JJ explaining that an agreement may be unenforceable for statutory illegality in three categories of case, where: (a) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute; (b) the making of the agreement is impliedly prohibited by statute; and (c) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a "contract associated with or in the furtherance of illegal purposes": [35].

836 Their Honours noted that there was some issue is to what category the matter fell within although ultimately little turned on that point because the consequence of illegality was a matter of statutory construction whatever category of illegality is involved: [36]

837 Their Honours at [37]-[38] referred to *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1; [2007] HCA 38 at [46] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ which observed that the question of statutory construction and the issue of whether a contract is void depends upon the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant consideration (approved by Gummow A-CJ, Kirby, Hayne, Crennan and Kiefel JJ in *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101; [2008] HCA 38 at [11]).

838 Mr Pesman SC relied on the comments of Gibbs ACJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413; [1978] HCA 42 as follows:

> "There are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits".

839 However, the decision of Gaegler J in *Gnych* at [64] highlights some degree of nuance in approach since *Yango Pastoral*:

> "Judicial determination of a statutory consequence left to statutory implication has become more sophisticated as statutory regulation has become more sophisticated and more pervasive. What was once a strong presumption of statutory interpretation that a purported agreement made in breach of a statutory prohibition 'is not only illegal, but void because illegal, unless the statute indicates a contrary intention' has, since *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*, given way to an acceptance that '[t]he question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes'" (footnotes omitted)

840 The possibility that statute might render a contract not void but might have some less stringent outcome (e.g. the contract being merely voidable) was raised by Gaegler J at [65]:

> "An implied statutory consequence determined in accordance with the ordinary principles of statutory construction – if a statutory consequence is implied at all – need not always go so far as to render an agreement made in breach of an express or implied statutory prohibition 'void' or 'vitiated' or 'nullified' or

> 'invalid', in the sense of being 'devoid of legal consequences'. There is no reason why an implied statutory consequence cannot stop short of rendering an agreement made in breach of a particular statutory prohibition wholly unenforceable by all parties in all circumstances. An implied statutory consequence might be limited, for example, to rendering an agreement unenforceable by a contravening party in the occurrence or non-occurrence of particular events". (footnotes omitted)

841 Gaegler J at [68] referred to the types of considerations that ought to be taken into account in the process of construction which would ensure consistency of approach and, in turn, to maximising the predictability of the judgment that must be made in a novel statutory context:

> "Amongst the most prominent and recurring of the considerations which have been recognised as bearing on the determination of the implied statutory consequences of making an agreement in breach of a statutory prohibition are: the statutory object of the particular prohibition; any positive effect of implying or not implying some further particular statutory consequence on fulfilment of the identified statutory object; any negative effect of implying or not implying that further statutory consequence on the legitimate interests of one or more parties to the agreement or of third parties; and the extent to which the statute imposing the prohibition expressly addresses the consequences of its breach" (footnotes omitted)

842 Gaegler J observed that the last of those considerations is often decisive, and is of particular importance in relation to a prohibition imposed as part of a complex statutory scheme: [69].

843 In *Gnych* Gaegler J at [82]-[83] referred in particular to two specific considerations which tended against a voiding outcome of the lease, namely:

(1) the express reference in the statement of objects in the Liquor Act to the regulatory system it facilitates being "flexible and practical" with "minimal formality and technicality" (s 3(1)(b)). It had not been suggested that s 91(1) could be rendered more efficacious, or that the objects of the Liquor Act could be enhanced, if a lease granted in breach of the prohibition in s 92(1)(d) was merely to be unenforceable by one or other of the parties to it; and

(2) the extensive range of discretionary powers expressly conferred on the Authority, through which the Authority remained capable of acting to ensure encouragement of responsible attitudes and minimisation of harm associated with the misuse of liquor, even if a grant of exclusive possession of part of licensed premises were to be made without the consent of the Authority.

844 In *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* (2017) 95 NSWLR 458; [2017] NSWCA 269 (***REW08 Projects***) Macfarlan JA (with whom Beazley P and Gleeson JA agreed) noted the following in respect of illegality

"[18] Under the general law "the court will not enforce [a] contract at the suit of a party who has entered into [it] with the object of committing an illegal act" (*Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 427; [1978] HCA 42 per Mason J). Where the contract cannot be formed otherwise than illegally, the contract will be treated as unenforceable, irrespective of the parties' knowledge and intention (*S A Hutchinson v Scott* (1905) 3 CLR 359 at 369; [1905] HCA 59; N Seddon, R Bigwood and M Ellinghaus, *Cheshire and Fifoot Law of Contract*, (10th ed 2012, LexisNexis Butterworths) at [18.22]-[18.23]).

..

[20] There are a number of circumstances in which the court might allow enforcement of a contract even if its formation or performance was associated with illegal purposes. In *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229; [1997] HCA 17, McHugh and Gummow JJ identified some of these by citing with approval the following passage from the judgment of McHugh J in *Nelson v Nelson* (1995) 184 CLR 538 at 604-5; [1995] HCA 25:

> "First, the courts will not refuse relief where the claimant was ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal. Second, the courts will not refuse relief where the statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member. Third, the courts will not refuse relief where an illegal agreement was induced by the defendant's fraud, oppression or undue influence. Fourth, the courts will not refuse relief where the illegal purpose has not been carried into effect" (citations omitted).

[21] Their Honours continued in *Fitzgerald*:

> "Even if the case does not come within one of those exceptions, the courts should not refuse to enforce contractual rights arising under a contract, merely because the contract is associated with or in furtherance of an illegal purpose, where the contract was not made in breach of a statutory prohibition upon its formation or upon the doing of a particular act essential to the performance of the contract or otherwise making unlawful the manner in which the contract is performed. Rather, the policy of the law should accord with the principles set out by McHugh J in *Nelson v Nelson*" (citations omitted).

[22] Their Honours then quoted the following further passage from McHugh J's judgment in *Nelson v Nelson*:

> "Accordingly, in my opinion, even if a case does not come within one of the four exceptions … to which I have referred, courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies" (citations omitted)"

Different effects of doctrine of illegality and maxim of clean hands

845 The distinction between illegality and the operation of the doctrine of clean hands is commented upon by the learned authors of J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (8th ed, 2016, LexisNexis) (**Jacobs'**).

846 Illegality destroys the legal and equitable rights of a plaintiff, whereas the maxim of clean hands merely deprives a plaintiff of the right to equitable relief. If the doctrine of illegality operates, there is no occasion to apply the maxim as to clean hands. Equity in such cases simply follows the law: *Jacobs'* at [9-03] page 99; see also *In the matters of Earth Civil Australia Pty Ltd, RCG CBD Pty Ltd, Bluemine Pty Ltd, Diamondwish Pty Ltd and Rackforce Pty Ltd (all in liq)* [2021] NSWSC 966 per Ward CJ in Eq at [2641].

847 Hamilton J in *Lewis v Nortex Pty Ltd (In Liq)* [2004] NSWSC 1143; (2004) ALR 634 at [135] (***Lewis v Nortex***) made the same distinction in the following terms:

> "The defences of illegality and unclean hands have come increasingly to be regarded as separate defences. The defence of illegality is equally operative in respect of claims at law and in equity. If the transaction sued on is itself unlawful, then in general terms it will not be enforced at law or in equity. In those circumstances, there is no need for recourse to the clean hands doctrine: see, for instance, per Deane and Gummow JJ in *Nelson v Nelson* (1995) 184 CLR 538 at 550–1; 132 ALR 133 at 142. The defence of unclean hands operates only in respect of claims for equitable relief. If, on a claim, the claimant is entitled to both legal and equitable relief, the establishment of the defence of unclean hands will preclude the equitable relief, but will not preclude the availability of purely legal relief: see the decision of the Court of Appeal in *Karl Suleman Enterprises Pty Ltd (in liq) v Babanour* (2004) 49 ACSR 612 at [54]; [2004] NSWCA 214".

The provisions of the PSA Act

848 Ultimately as the legal principles above indicate there must be a consideration of the particular provisions of the legislation in question.

849 During oral submissions I was taken by Mr Kelly SC to specific provisions in the PSA Act including the following provisions that give rise to penalties for breach with the maximum penalties being specified in the various sections, namely:

(1) an individual must not act or carry on the business of a real estate agent unless the individual is the holder of a real estate agent's licence: s 8(1)(a);

(2) a licensee must required have a registered office within New South Wales: s 28(1);

(3) a licensee must required properly supervise the business carried on by the licensee: s 32(1);

(4) a licensee or registered person who without reasonable excuse contravenes the rule of conduct prescribed under the regulations is guilty of an offence: s 37(2); and

(5) a licensee must not employee disqualified persons: s 43.

850 Other sanctions provided for in the legislation include the fact that the agent is not entitled to bring any proceedings to recover any commission etc unless licensed (s 8(2)(a)) or unless there is a written agency agreement: s 55.

851 The Secretary is enabled to issue and notify to licensees guidelines as to what constitutes the proper supervision of the business of the licensee and a failure to comply with the guidelines similarly results in a specified maximum penalty: s 32(4).

852 Mr Kelly SC noted that Pt 3 Div 4 of the Act (within which s 49 sits) deals specifically with managing of conflicts of interest, each of which contains maximum penalty provisions as a consequence for breach provisions, namely that:

(1) a real estate agent must provide specified information or warnings in the case of provision of financial or investment advice: s 46;

(2) a buyer's or seller's agent must disclose any relationship and the nature of the relationship (whether personal or commercial) to the client or any prospective buyer of the land in the case of referrals: s 47; and

(3) the licensee must not act on behalf of both the buyer and the seller the same time: s 48.

853 In the case of the licensee who has repeatedly engaged in unjust conduct there are consequences where, on the application of the Secretary, the Civil and Administrative Tribunal, may order the licensee to refrain from the conduct: s 53D.

854 Lastly, my attention was drawn to the provisions of Pt 12 in the PSA Act including provisions which set out grounds for disciplinary action (s 191) and specifies the nature of disciplinary action (s 192).

The vendors' contentions

855 Mr Pesman SC submitted that s 49 is plainly an important consumer protection provision and referred me to what was said by Minister Aquilina on 9 May 2002 in the Second Reading Speech:

> "Calls for full disclosure of any conflict between an agent's duty to a client and any beneficial interest held by the agent have also been taken seriously in the development of the bill. Clearly, consumers expect their agent to undertake his or her duties fairly and openly to achieve the best result for them. Generally, the bill prohibits real estate agents and their sales employees from obtaining or being connected to the obtaining of a beneficial interest in the sale of a property. The client's agreement will need to be obtained where the agent wishes to retain entitlement to these benefits."

856 Mr Pesman SC submitted this revealed that (a) there was public pressure to address agents' conflicts which the legislature took seriously; it is (and was to the legislature) obvious that vendors expect their agents to get the best possible result for that vendor which is wholly inconsistent with their own interests if they are the purchaser; and (c) the legislature intended (apart from the penalty imposed) that the agent not retain any benefit from a transaction not the subject of consent: G2CS[38].

857 Mr Pesman SC referred to *REW08 Projects v PNC Lifestyle Investments* and *Liu v Liu* [2022] NSWCA 67 as examples of cases in which the court is concerned to avoid injustice: G2CS [48]-[51], and noted that the present case for unenforceability is overwhelming based on the following matters:

(1) the harm the legislature wished to avoid was agents profiting from purchases from their clients without consent, and that object is not achieved by permitting an agent to enforce a contract entered in breach;

(2) Mr Danckert was well aware both that the contracts would entail a breach (of s 49) and that his role was being deliberately concealed from the vendors. Indeed, on his own evidence, he participated in a scheme to achieve that outcome;

(3) there is no practical distinction between Mr Danckert and DC2; he is the sole director and shareholder (CB 2036-2037); and

(4) allowing enforcement would entail Mr Danckert to obtain what he believes will be very substantial profits (T204.25 for example), which profits should have been available (or at least known to) his clients.

DC2's contentions regarding s 49

858 DC2 then made specific submissions in relation to s 49 as follows (at PCS [89]):

> "The text, context and, to any extent necessary, the purpose and features of the Act which justify a conclusion that a contravention of s49(1) of the Act does not have the effect of rendering any contract involved in the contravention illegal void and of no legal effect or otherwise unenforceable include:
>
> a. Section 49 expressly provides for the consequence of any breach in terms of the imposition of a personal penalty on the person who is guilty of the contravention, namely, "*Maximum penalty – 200 penalty units or imprisonment for 2 years or both*". There is nothing in the section which visits any consequence on any contract or other means by which a contravention may have taken place.
>
> b. The immediate context in which s49(1) appears includes s49(4)(a) to (f), in which there is, in effect, a non-exclusive list of various means by which a person may "*obtain a beneficial interest in property*" in contravention of the section, some of which do not involve the making of a contract by the contravening party and others of which contemplate the obtaining of an interest by innocent third parties.
>
> c. For example, a person may contravene s49(1) if an interest is obtained by a close relative; a subsidiary company of a company with less than 100 members when the person concerned or a close relative is a member; the trustee of a discretionary trust of which the person or a close relative is a beneficiary; a member of a firm or partnership of which the person or close relative is also a member; and where the person or a close relative "*directly or indirectly*" obtains "*a right to participate in the income or profits of a business carried on for profit or gain and another person carrying on that business obtains a beneficial interest in the property*".
>
> d. The Act does not impose a penalty on the close relatives, subsidiaries, trusts, partnerships or third parties through whom a person may indirectly obtain a benefit in breach of the Act, so it is improbable in the extreme that it should intend to strike down any contract which may or may not be involved. Nor is it any part of the purpose or policy behind the Act to deprive innocent parties of the benefit of their contracts.
>
> e. If a contract made by a contravening person is rendered void and of no legal effect, that would have the surprising and capricious result that a client who wished to have the benefit of the contract and keep it on foot would be denied that possibility through no fault of his own. In ***Gnych***, the plurality made the same point in stronger language. At [44], their Honours spoke of the "*unattractive result that … contracts freely entered into by the licensee would be automatically sterilised, at the licensee's instigation, by the licensee's own breach of statute to the detriment of the lessee*".
>
> f. At [45], the plurality in ***Gnych*** went on to say,

> *As a matter of legislative construction, the likelihood of adverse consequences for the "innocent party" to a bargain has been recognised as a consideration which tends against the attribution of an intention to avoid the bargain to the legislature. That consideration is consistent with the general disinclination on the part of the courts to allow a party to a contract to take advantage of its own wrongdoing. There may be cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination; but it is hardly surprising that the courts are not astute to ascribe such an intention to the legislature where it is not made manifest by the statutory language.*" (Footnotes omitted)

859 DC2 submitted that the intention of s 49(1) is to impose a monetary and/or custodial penalty on the real estate agent who is the person who contravenes the Act, not to render contracts or other arrangements unenforceable and in the circumstances contemplated by s 49(4)(a)-(f), a wide range of third parties may be affected and there is nothing in the PSA Act to suggest an intention that their contracts should be rendered voidable at the option of a third person: PCS [90]-[91].

Purposive approach

860 It is necessary to have regard to the purpose or object underlying the provision so as to adopt a construction which would promote that purpose or object rather than a construction which would not: *Interpretation Act 1987* (NSW), s 33 (**Interpretation Act**).

Second reading speech

861 The purpose or object will often be derived from the terms of the provision, read in context, but may be assisted by having regard to extrinsic material, including the second reading speech of the Minister: s 34(2)(f) Interpretation Act: see *Stanley v Director of Public Prosecutions (NSW)* [2021] NSWCA 337; (2021) 398 ALR 355 at [105].

862 Mr Kelly SC was not so bold to submit that I could not look at the second reading speech, but he did indicate that I did not need to because there is no ambiguity, doubt or difficulty: T417 (Day 6).

863 By s 34(1) Interpretation Act consideration may be given to second reading speeches if they are capable of assisting in the ascertainment of the meaning of the provision, to (relevantly in the case of provision of an Act):

> "(a) … confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act and the purpose … or object underlying the Act …), or
>
> (b) … determine the meaning of the provision--
>
> (i) if the provision is ambiguous or obscure, or
>
> (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act … and the purpose or object underlying the Act …) leads to a result that is manifestly absurd or is unreasonable."

864 In determining whether consideration should be given to second reading speech, or in considering the weight to be given to it, regard shall be had, in addition to any other relevant matters, to (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act and the purpose or object underlying the Act or statutory rule), and (b) the need to avoid prolonging legal or other proceedings without compensating advantage: s 34(3).

865 It seems to me that it is highly desirable for persons to be able to know whether the ordinary meaning conveyed by s 49 is limited to a penalty provision or extends to the invalidating contracts and these proceedings would not be unduly prolonged by undertaking that consideration.

866 In the circumstances it seems to me that I can look at the second reading speech to confirm whether the breach of s 49 is limited to a penalty impost for breach or whether it extends to invalidating contracts.

867 I accept Mr Pesman SC's submission that I may have regard to the second reading speech and that at least one mischief which the statute is designed to acheive is consumer protection.

Consideration

868 The Long Title to the PSA Act describes it as "An Act to provide for the regulation of property and stock agents; to repeal the *Property, Stock and Business Agents Act 1941*; and for other purposes".

869 The submissions of Mr Pesman SC not unnaturally focus upon the conduct of Mr Danckert. A reason for that may be that his intent in such submissions was to address the separate issue of whether the contracts were entered into by DC2 with the object of committing an illegal act (see [59] above).

870 However, focusing for the moment on the question of whether the effect of the PSA is to render contracts unenforceable, I accept that the considerations advanced by Mr Kelly SC are the sort of considerations which the High Court has indicated needs to be addressed.

871 There might arise situations in which agents might suffer some penalty, but could arrange to get beneficial interests in multi-million dollar properties, and earn or receive millions of dollars of benefit, simply by interposing a company (a hypothetical situation I put during the hearing in order to test the submissions): T386. In this circumstance, it is likely that the agent will be strictly liable to account for any profits made: see, eg, *Naumburger v Berger* [2021] NSWSC 903 at [164]-[165], [167] per Rees J.

872 However, ultimately I am driven by the detailed structure of the language and provisions of the PSA Act to conclude that no voiding or voidable consequence is intended by the provisions.

873 First, the legislative regime for the regulation of agents does not expressly render an agreement made for the purpose of avoiding duty unenforceable. The PSA Act provides for the imposition of a penalties for breaches of its provisions.

874 Other than s 49, only a few specific sections of the PSA Act provide for imprisonment penalties, in particular: Pt 8 Div 3 dealing with freezing of accounts (ss 119, 120); Pt 13 dealing with enforcement and in particular obstruction of authorised officers (s 207); Pt 14 which specifically creates certain offences (ss 211 and 212) and Pt 15 which prohibits disclosure of certain information (s 219). Section 49 contains an imprisonment consequence as a penalty for the contravening conduct.

875 It seems to me that the detailed structure of the legislation which at many steps of the way creates a detailed regime for penalty provisions and the particular regime for disciplinary action count against the notion that s 49 intended to render void or even voidable contracts in which an agent might be said to have obtained the beneficial interest without consent.

876 Secondly, of particular significance are the provisions of s 52 (which contains prohibitions in respect of certain statements, representations and promises) and s 53 which indicates specific legislative attention to the consequences for misrepresentation or concealment:

> "**52 Misrepresentation by licensee or registered person**
>
> (1) A person (the ***agent***) who is exercising or performing any function as a licensee or registered person must not induce any other person to enter into any contract or arrangement by— (a) any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the agent or not), or (b) any failure to disclose a material fact of a kind prescribed by the regulations (whether intended or not) that the agent knows or ought reasonably to know.
>
> [Note: Maximum penalty—200 penalty units.]
>
> (2) Without limiting the generality of subsection (1), a statement, representation or promise is taken to be false, misleading or deceptive if it is of such a nature that it would reasonably tend to lead to a belief in the existence of a state of affairs that does not in fact exist, whether or not the statement, representation or promise indicates that the state of affairs does exist.
>
> (3) It is a sufficient defence to a prosecution for an offence under this section if the defendant proves that the defendant did not know, and had no reasonable cause to suspect, that the statement, representation or promise was false, misleading or deceptive.
>
> **53 Damages for misrepresentation or concealment**
>
> No term or provision of any agreement (whether entered into before or after the commencement of this section) for the sale and purchase of land or any interest in land operates to prevent the purchaser from claiming or being awarded damages or any other relief in respect of any misrepresentation or concealment in connection with the sale and purchase of the land or interest."

877 That the Parliament specifically addressed the consequence for misrepresentation or concealment by an agent by reference to its impact upon an agreement for sale of land without expressly providing that such an agreement would be void or voidable is to my mind a very powerful consideration against the construction contended for by the vendors.

878 In the circumstances, I find that the contracts are not per se illegal void or even voidable by reason of Mr Danckert's prima facie or assumed breach of s 49.

Issue 8 - Are earlier documents which predate the contracts being Nomination Deeds (see below) and Notices of Exercise of Call Options (Calls) and the contracts made in contravention of s 49 PSA Act (issue 8)?

879 In light of my finding that the contracts are not per se illegal void or even voidable by reason of Mr Danckert's prima facie or assumed breach of s 49, it

is not apparent to me that any different outcome would apply in respect of the Nomination Deeds and the Calls.

Issue 9 - Are the Nomination Deeds, Calls and contracts or any of them enforceable by DC2 even if Mr Danckert breached s 49 PSA Act (issue 9)?

880 Despite the wording of this issue, essentially, as I understood the parties' submissions, this issue is intended by the parties to raise the question of whether specific performance would be precluded by what was said to be a lack of clean hands on the part of DC2.

Clean hands principles

881 The law in relation to a clean hands defence is conveniently summarised by Hamilton J in *Lewis v Nortex* at [137]-[150]. His Honour drew deeply upon the analysis in the judgment of Campbell J in *Black Uhlans Incorporated v New South Wales Crime Commission* [2002] NSWSC 1060 (*Black Uhlans*).

882 Hamilton J at [138] distilled from the authorities the following relevant propositions:

(a) the maxim requires the Court to look at the conduct of the applicant for relief rather than that of the defendant; it is past conduct that is relevant: *Black Uhlans* at [159];

(b) there is a limitation on the types of conduct which will be material;

(c) the conduct must be conduct towards the defendant;

(d) the conduct must have an immediate and necessary relation to the equity sued for;

(e) there is no general rule in equity that where there has been any impropriety equity will allow the loss to lie where it falls; and

(f) thus, even where there has been some impropriety, equity may not flatly refuse relief, but may grant relief conditioned to ensure that a wrongdoer does not have the benefit of his wrongdoing.

883 The notion that the impropriety to be relevant it must have "an immediate and necessary relation to the equity sued for" was emphasised in *REW08 Projects v PNC Lifestyle Investments* per Macfarlan JA at [37] citing *Dewhirst v Edwards* [1983] 1 NSWLR 34 at 51, and recently also Parker J in *Meng v Wang* [2022] NSWSC 833 at [80].

884 Hodgson JA has observed that the requirement that the bad conduct in question have "an immediate and necessary relation to the equity sued for" is not a requirement that the relation be of the nature of contributing to or constituting the equity sued for. Further, since this requirement is not a rule of law but merely an aspect of principles guiding the exercise of discretion, it should not be given a narrow or technical construction: *Kation Pty Ltd v Lamru Pty Ltd* [2009] NSWCA 145; (2009) 257 ALR 336 at [28], Allsop P agreeing at [1].

885 Making a determination in respect of the requirement that the nature of conduct the conduct must have an immediate and necessary relation to the equity sued for appears to be something over which minds may reasonably differ. Hamilton J whilst considering the principles regarding a defence of unclean hands in the context of considering an application for amendment of a defence, in *Lewis v Nortex Pty Ltd (In Liq)* [2003] NSWSC 354 at [19], pointed to the example of the High Court decision in *Nelson v Nelson* (1995) 184 CLR 538; [1995] HCA 25 and observed:

> "In *Nelson v Nelson* supra, whilst the plaintiff was spared the consequences which would have flowed from the upholding of a defence of illegality, she was, by the majority of the High Court, compelled to do equity as a condition of the relief granted. She was granted relief declaring her entitlement to certain property, but upon the basis that she would do equity by paying to the Commonwealth moneys that represented the difference between a commercial interest rate and a concessional interest rate that she had obtained by dishonest representations in relation to a borrowing to acquire the relevant property. At least one of the two dissenting Justices of the High Court, Dawson J, said in terms (at 581) that there was not sufficient connection between the plaintiff's dishonesty in making the representation which she had and the subject matter of the suit to require her to do equity in the way the majority (Deane, Gummow and McHugh JJ) thought appropriate. The majority Justices appear to have taken the view that there was a sufficient connection with the subject matter of the suit by reason of the fact that it was in the very acquisition of the property, her entitlement to which she sought to have declared, that her dishonest conduct had occurred".

886 Conceptually there may be cases in which a breach of a fiduciary duty by real estate agent may give rise to a successful denial of relief in a specific performance suit.

887 In *Raso v Dionigi* (1993) 100 DLR (4th) 459 the Ontario Court of Appeal denied purchasers of a property relief by way of specific performance because of their unclean hands consequent upon a breach of fiduciary duty by a real estate

agent who acted for both the vendors and purchasers on the sale of real property.

888 The appellant vendors owned property in Toronto. A real estate agent pursued vendors to obtain a listing of the property. The agent arranged for the vendors to sign a listing agreement with his agency and presented the vendors with an offer by his brother and sister-in-law. However the offer was framed “R. Raso in trust”, using the sister-in-law’s maiden name (Raso), which was a deliberate stratagem to conceal from the vendors the fact that the purchasers were related to the agent. After some negotiations the vendors accepted the offer. However a few days later they discovered the family connection and refused to complete the transaction. The purchasers brought a claim for specific performance in the agent and his firm sued for commission on the sale: at 461-462.

889 The trial judge (see 462-463):

(1) accepted that the agents owed fiduciary duties to both parties and held that the agent had breached his fiduciary duty to the vendors by failing to disclose the purchasers were his brother and sister-in-law;

(2) held that mere breach of fiduciary duty without reliance on that breach by the vendors was not fatal to the purchasers action;

(3) held that the real estate agent was under no duty to disclose to the vendors the amount of money that the purchasers had available to purchase the property, although that was admittedly a material fact;

(4) concluded that the transaction would have gone ahead even if the agent had disclosed the real identity of the purchasers; and

(5) concluded that the plaintiff’s misconduct in knowingly participating in the stratagem by her agent brother-in-law to earn full commission had not come to court with completely clean hands but nonetheless was not disentitled to specific performance.

890 Dubin CJ who delivered the judgment of the Court of Appeal (Dubin CJ, Tarnopolsky and Krever JJA) agreed the trial judge was correct in holding that the agent had breached his fiduciary duty in failing to disclose the relationship of the agent to the purchasers. However, Dubin CJ held that the trial judge erred in holding that that the agent was under no duty to disclose to the vendors all material facts known to him, and that the agent, while acting for both parties, was merely a middleman or conduit: at 464f.

891 Dubin CJ referred to Canadian authority and principles regarding fiduciary obligations noting that an agent must not let his own or another's interests come into actual or apparent conflict with the interests of the principal. His Honour referred to an exception in circumstances where there had been full and timely disclosure to the principals: at 464-465.

892 His Honour considered that the narrow consent exception to the general rule is accurately stated by W F Foster in "Dual Agency: Its Implications for the Real Estate Brokerage Industry", *Meredith Memorial Lectures, Current Problems in Real Estate* (1989), at p. 76, namely that mere full disclosure in itself was insufficient discharge of the obligation, rather the dual agent must by clear and affirmative proof also establish that the parties to the transaction were "at arm's length" and that after receiving information the principal has "agreed to adopt what was done" by the agent or what the agent proposed to do: at 465f.

893 His Honour made reference to the judgment of Wallace JA in *Ocean City Realty Ltd v A & M Holdings Ltd* (1987) 36 DLR (4th) 94 at 98; 44 RPR 312 (BCCA) to the effect that the obligation of the agent to make full disclosure included an obligation to disclose "everything known to him respecting the subject matter of the contract which would be likely to influence the conduct of his principal" or "likely to operate upon the principal's judgment". In such a case the agent's failure to inform the principal would be material nondisclosure: at 465-466.

894 Critically, the Court held that a fiduciary who breaches the duty of nondisclosure of material facts is not entitled to prove that the transaction would have concluded had the disclosure being made and held that the trial judge erred in embarking upon that enquiry: at 466.

895 In relation to the consequence of the agent's breach of fiduciary duty, Dubin CJ (at 466) referred to some Canadian authority but also English authority and in particular the judgment of Sir W.M. James, LJ in *Parker v Mckenna* (1874) LR 10 Ch App 96 at 124-125:

> "I do not think it is necessary, but it appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal;

> that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that".

896 Dubin CJ (at 466) also referred to other authority citing Lord Thankerton in *Brickenden v London Loan* & *Savings Co* [1934] 3 DLR 465; [1934] 2 WWR 545 (PC) as follows:

> "When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the nondisclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant."

897 Dubin CJ (at 467) considered that the judgment of Lord Thankerton did not permit an inquiry as to what would have transpired if full disclosure had been made:

> "Rather, once it has been determined that there has been a nondisclosure by an agent relating to material matters constituting a breach of fiduciary duty, speculation as to what would have transpired if disclosure had been made is not *relevant.* In my opinion, it was not open to the respondent in this case to seek to prove that the transaction would have closed had disclosure been made. The fact that in the trial judge's opinion the price was fair was, in my respectful opinion, irrelevant."

898 His Honour (at 468) considered it "axiomatic that where an agent has breached a fiduciary duty in the manner disclosed in this case, the agent is precluded from claiming any commission".

899 Under Australian law, it is clear that a plaintiff who has been guilty of unclean hands need not be permanently debarred from equitable relief. There is the notion that one may "wash one's hands" by showing that one's misconduct ceased well before the suit, or that it occurred by accident and will not recur: J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, 2014, LexisNexis) (**MGL**) at 83. It is said that the process of "washing" may be achieved by the imposition of terms on the plaintiff: MGL at 83 citing *Rhodes v Badenach* [2000] TASSC 160.

The vendors' contentions

900 Mr Pesman SC submitted that were the Court to conclude, despite the submissions above, that Mr Danckert's conduct was illegal but that the contracts were in any event enforceable, the Court would still exercise it discretion to withhold relief. Mr Pesman SC qualified by that submission by stating that the vendors accept that if the Court finds no breach of s 49 at all then this issue does not arise: G2CS [52].

901 I accept that there is a breach of s 49 PSA Act.

902 Mr Pesman SC submitted that although equity "does not demand that its suitors shall have led blameless lives" (citing Brandeis J in *Loughran v Loughran* 292 US 216 at 219 (1934) quoted at [3.330] in Peter Young, Clyde Croft and Megan Smith, *On Equity* (2009, Lawbook Co)), equity will not intervene where there is an immediate or necessary connection between the relief claimed and the conduct complained of (see *Meyers v Casey* (1916) 17 CLR 90 at 124; [1913] HCA 50). He submitted that "[t]hat connection plainly exists in the present case": G2CS [53]-[54].

SBS's contentions

903 Mr Gooley referred to the conduct of DC2 regarding his discussions with Ms Western in respect of Ms Pocknall acting (CB 73[45]-[46]) and his discussions with Ms Western regarding whether he should disclose that he was the purchaser to the vendors: CB 110-111[6]-[7]. I have referred to in Mr Danckert's evidence in respect of the last matter above.

DC2's contentions

904 The submissions of DC2 on the unclean hands matter were partly premised on the basis that Mr Danckert informed Ms Western of his involvement with DC2: PC2 [93]-[107].

905 The submissions were also made on the basis that Mr Danckert had ceased to be an agent in 2018 and that in any event Ms Western as the person nominated under cl 9.1 of the Option Deeds and as conveyancer for the vendors had whatever responsibility there was to inform the other vendors.

Consideration

906 I have dealt with the first part of DC2's submission earlier in the judgment under the heading of the duration of Mr Danckert's agency. I reject DC2's submission that no fiduciary obligation existed or remained under the agency agreements as at 26 February 2021 because the agency agreements came to an end by performance in 2018 and no selling task remained as at 26 February 2021 "because there was nothing left for Mr Danckert to do".

907 The argument of DC2 is essentially that the vendors by entering into the Option Deed and the Deeds of Variation essentially became bound to exchange contracts once DC2 had become nominated and to abide by Ms Western's decision-making, because of cl 9 Option Deeds.

908 The provisions of cl 9 (CB 341), I am prepared to accept, were to provide a single point of contact as between the vendors as collective owners and the buyer for the purposes of the Option Deeds.

909 However, the notion that the conveyancer has "full authority to act on behalf of the owner in relation to the Deed and the Contract" might bind the vendors in their position with the buyer, does not to my mind settle the position as between the vendors and Ms Western as the conveyancer.

910 I do not accept that cll 9.1 and or 9.2 of the Option Deeds were a ceding by the vendors of unfettered decision-making power to Ms Western irrespective of the wishes of the other vendors.

911 I consider that, at least under agency principles, Ms Western ought to have informed the other vendors, as her clients, of her relevant ownership knowledge, particularly so because apart from her acting as agent in a conveyancing capacity, she was personally interested in the contract transactions and, because of the interdependent nature of the contracts, her choices and actions directly impacted upon the other vendors.

912 In light of my findings in the matter it is not at least in this judgment necessary to consider the duty of care owed by Ms Western to the other vendors.

913 However, whatever obligation Ms Western had, it does not seem to me that that absolved Mr Danckert of any responsibility to make the disclosure.

914 Mr Danckert's acts were DC2's acts and his intention and state of mind were DC2's intention and state of mind: *Kation Pty Ltd v Lamru Pty Ltd* e.g. per Basten JA at [116]—[118] citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2017) 230 CLR 89; [2007] HCA 22; *Barnes v Addy* (1874) LR 9 Ch App 244.

915 If it is correct that Mr Danckert remained the agent of the vendors up to and including the time of exchange and had a duty of disclosure up to that time, it seems to me that his failure as agent (as distinct from being the director and shareholder of DC2) to inform the vendors that DC2 was obtaining a beneficial interest in the block and his breach of s 49 was critical for the purposes of an unclean hands defence.

916 Mr Danckert made a deliberate choice not to tell the vendors about his involvement with DC2 prior to the exchange of contracts. He breached the no-conflict duty and the no-profit duty.

917 His failure as agent to inform the vendors that DC2 was obtaining a beneficial interest in the block and his breach of s 49 was within the analysis referred to above by Hamilton J in *Lewis v Nortex* at [137]:

> (a) "past conduct" in the sense of being a failure to disclose his/DC2's interest in the transaction prior to exchange of contracts and conduct leading up to these proceedings for specific performance of the contracts;
>
> (b) conduct towards each of the other vendor defendants;
>
> (c) conduct that has an immediate and necessary relation to the equity sued for, at least in the sense that the failure to disclose deprived them of choices regarding what they would do after the contract was exchanged and leading up to the time of the termination;

918 Mr Kelly SC on behalf of DC2 attacked the other vendors' hypothetical musings as to the choices they would have made.

919 On one view, the decision in *Raso v Dionigi* suggests that the hypothetical musings are irrelevant.

920 Assuming that it is relevant to look at what the other vendors would have done, I am mindful of the caution in the caselaw that responses to hypothetical

questions with the benefit of hindsight should be carefully scrutinised and assessed against other objective material.

921 However, I am prepared to accept their evidence that at the very least they would have explored either with Ms Western or with independent legal advice ways of terminating the contract.

922 Even if the vendors were bound to enter into the contracts once the Calls were made, that does not seem to me to be the end of the matter.

923 There is no certainty that the contracts would be completed.

924 The non-disclosure deprived the vendors of opportunities to seek other conveyancing and legal advice in relation to the performance of the contracts.

925 Even in early April, Mr Hew (CB 1118) and Mr Young (CB 1119) and Mr Parker (CB 1125) were concerned about delay and about the issue of notices to complete.

926 In the result, it seems to me that there is sufficient basis to decline specific performance on the basis of unclean hands.

927 DC2 submitted that the appropriate order is an order for specific performance of the each of the contracts, which requires completion within a reasonable time, on terms that a copy of the judgment be provided to the Secretary. It will then be a matter for the Secretary to take whatever disciplinary action is deemed necessary. That way, the policy of the PSA Act will be served: PCS [109].

928 If I am incorrect in declining specific performance on the basis of unclean hands, I would not flatly refuse relief but impose the terms proffered by DC2 that a copy of the judgment be provided to the Secretary.

Issue 10 - If the contracts are enforceable should the Court decline to grant specific performance of the contracts (issue 10)?

929 Issue 10, as I understood it, raises the question as to whether, separately from the matter of unclean hands, there were other discretionary considerations which might lead the court to decline to order specific performance of the contracts.

930 DC2 did not in its submissions refer to any very specific discretionary consideration other than to indicate that for the same reasons as it had advanced in relation to the unclean hands issue, the Court should not decline to exercise is discretion to refuse specific performance in this case. DC2 submitted that the PSA Act does not disclose an intention to render contractual rights unenforceable and a serious and proportional sanction is directed at the person concerned: PCS [108].

931 Mr Allen submitted that as a matter of discretion, the following militates against ordering specific performance (G1CS [56]):

(1) Specific performance would only be available because of some technical defect in termination. As specific performance is equitable relief, it is iniquitous in the circumstances for the relief to be given when as a matter of substance DC2 could not complete on 27 July 2021, or at any time until halfway through the hearing. This is why a central discretionary consideration is the ability to complete when proceedings are commenced.

(2) It is iniquitous that the only reason DC2 can now complete is because of the time this case has taken to come on for hearing. Again, this is why a central discretionary consideration is the ability to complete when proceedings are commenced. Certainly, if the matter was heard when first set down, May 2022, DC2 would not have been able to complete because it did not have the Deed of Settlement with Jogat.

932 Quite apart from the discretionary consideration of unclean hands, specific performance may be denied because of delay: e.g. *Lamshed v Lamshed* (1963) 109 CLR 440 at 452–6; [1963] HCA 60 per Kitto J.

933 The degree of promptness required depends upon the nature of the case and all its circumstances. Thus, Kitto J indicated there is little point in citing cases for the purpose of comparing the period of delay in the case before the court with delay which is being considered fatal to claims for specific performance in circumstances in other cases: at 453.

934 It is clear that the bare fact of delay is not enough: at 453.

935 His Honour said that equity will not allow the possibility of its making such a degree to be held unfairly long over the head of the party who denies the existence of the contract and asserts a right to deal with property as his own.

This is tied back to being a particular application of the general principle of laches: at 453.

936 In the context of matters which may preclude relief of specific performance Spry refers to delay in the context of laches. It is said that laches is established when two conditions are fulfilled. First, there must be unreasonable delay in the commencement or prosecution of proceedings for specific performance. Secondly, in all the circumstances the consequences of the delay must render the grant of relief unjust: I C F Spry, *The Principles of Equitable Remedies* (9th ed, Lawbook Co, 2014) at 233.

937 Here there is no delay in the commencement of proceedings.

938 Spry specifically deals with the concept of prejudice to the parties opposing the specific performance or third parties.

939 There is not really in the authorities any satisfactory comprehensive description of the combinations of circumstances which will enable a Court to precisely determine whether gross delay or laches ought preclude equitable relief. In *Orr v Ford* (1989) 167 CLR 316 at 340-341; [1989] HCA 4 Deane J expressed this sentiment as follows:

> "One searches in vain in the judgments in the above-mentioned cases (and, for that matter, elsewhere) for any satisfactory comprehensive description of the combinations of circumstances which will suffice to attract the label "gross" for the purposes of that qualification. That is not surprising since any attempt to specify exhaustively those combinations of circumstances would be likely to introduce an inappropriately arbitrary and technical element into an area of equity doctrine which has traditionally been kept free of arbitrary and technical constraints. On balance, the preferable approach is to treat the phrase "gross laches" as an intentionally imprecise one which involves not merely considerations of the period of the relevant delay but which invokes the traditional notions of equity and good conscience which are the general determinants of whether a plaintiff should be refused relief by reason of laches in the circumstances of a particular case."

940 Deane J continued at 341:

> "The ultimate test effectively remains that enunciated by Lord Selborne LC (not, as is often said, Sir Barnes Peacock (see Errata)), speaking for the Privy Council, in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239–40 , namely, whether the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable "to place him if the remedy were afterwards to be asserted": see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279 , and also, per Rich J, *Hourigan* at 629–30."

941 In my assessment there is considerable force in the submission made by Mr Allen.

942 The particular concern that I have regarding the question of whether relief should be precluded by delay is the concern raised by Mr Allen effectively that the only reason specific performance is even tenable is because of the delay in bringing these proceedings to hearing.

943 DC2 has benefited from that delay in the sense that the delay has enabled it time in order to get its "house in order" to attempt to demonstrate it has financing to complete the purchases.

944 I have not readily been able to find authority in which, in the context of specific performance, delay in bringing an action has improved the circumstances of the plaintiff and a court has declined relief.

945 Certainly, in the context of family provision proceedings, there is authority to the effect that the Court is reluctant to grant an extension of time which may have the effect of improving the applicant's position in comparison with that in which he or she would have stood had the application proceeded in a timely way: *Durham v Durham* (2011) 80 NSWLR 335; [2011] NSWCA 62 per Tobias JA at [37]-[42] discussing and approving the approach of Bryson J in *Davison v Staley* (Supreme Court (NSW), 21 August 1986, unrep) (Campbell JA at [56] and Young JA at [87] agreeing).

946 Whilst I have anxiously considered the matter, on balance, I am not ultimately persuaded that I ought to decline as a matter of discretion to order specific performance of the contracts on the basis of delay.

947 First, whilst *Durham v Durham* is an interesting decision, the approach of the Court was in the context in which there was a statutory period within which to bring the family provision claim and the applicant was at first instance requiring a grant of leave to bring the application out of time and on appeal challenging the refusal to bring the claim out of time.

948 That circumstance does not pertain to this case.

949 Secondly, whilst DC2 has benefited from the delay in between the proceedings being commenced and coming on for hearing, in the sense that the delay has

enabled it time in order to arguably get its “house in order”, it does not seem to me that DC2 has delayed in either commencing or prosecuting the proceedings.

Issue 11 - Should the court grant specific performance of the contracts on terms or award damages in lieu of specific performance (issue 11)?

950 As noted above DC2 submitted that the appropriate order is an order for specific performance of the each of the contracts, which requires completion within a reasonable time, on terms that a copy of the judgment be provided to the Secretary.

951 Whether the proffer of terms is regarded as being simply a discretionary consideration or part of what is described above in respect of the clean hands principles as being a process of “washing” of DC2’s hands was not explained. I do not consider there is need to go deeply into it.

952 In the event that I am incorrect in flatly refusing specific performance, I would impose the terms proffered by DC2 that a copy of the judgment be provided to the Secretary.

Issues 12-17 - Claims against Ms Western and SBS for breach of fiduciary duty and other duties

953 The claims against Ms Western and SBS for breach of fiduciary duty and other duties are predicated on the basis that Ms Western acted for DC2.

954 Those claims have been abandoned.

Issues 18-20 - Other claims against Ms Western and SBS and defences

955 The other claims against Ms Western have been abandoned: see page 4 agreed issues.

Issues 21-33 - Issues arising out of the second group’s cross-claim against SBS and Ms Western

956 It was agreed that the issues 21-31 on the cross-claim against SBS are only relevant in the event that DC2 succeeds: see page 4 agreed issues.

957 It was agreed that the issues 32 and 33 on the cross-claim against Ms Western are only relevant in the event that DC2 succeeds: see page 6 agreed issues.

958 It was agreed that the issues 21-31 on the cross-claim against SBS are only relevant in the event that DC2 succeeds: see page 4 agreed issues.

Issue 34 - Is Mr Danckert obliged to repay the commission to the other vendors?

959 Part of the second group's cross-claim is a cross claim against Mr Danckert alone, and the issue raised is whether the terms of the agency agreements between Mr Danckert and the vendors obliged Mr Danckert to repay commission to the other vendors in the event that the contracts between DC2 and the other vendors are not completed.

960 Mr Kelly SC accepted that the agency agreement entered into between the vendors and Mr Danckert incorporates the terms and conditions that appear on on the reverse of the second page standard agency agreement: T312.

961 Clause 3.2(d) of the standard form provides that remuneration is due and payable "Upon the termination of the contract by the Principal [vendors] as a result of a default of the Purchaser [DC2] and the Remuneration is the same or less than the amount of the deposit which is forfeited to the Principal." (Which it is, the latter sum being $47,500): G2CS [84].

962 Mr Pesman SC submitted that contrary to the provisions of the contract, Mr Danckert received the commission sum ($6,750) from the deposits ([17] of the main claim and the defence) and in circumstances where the sales were not completed because of the default of DC2, the other vendors seek an order that the commission or remuneration of $6,750 be repaid to each of them: G2CS [85].

963 In light of my findings regarding the contracts it seems to me that there should be an order for repayment of the commission.

Issues 35-43 - Issues arising out of the second group's cross-claim against Mr Danckert and DC2

964 There are a group of issues arising on the second group's cross-claim against Mr Danckert and DC2.

965 These issues raise questions in respect of the whether the relevant ownership knowledge ought to be imputed to the other vendors and whether Mr Danckert

or DC2 had a duty to disclose the relevant ownership to the other vendors notwithstanding that Ms Western and/or SBS had such knowledge.

966 I have dealt with the second aspect of this. In light of my findings it is not necessary to address the question of whether the relevant ownership knowledge of Ms Western ought to be imputed to the other vendors. In any event, in the way the issues were framed, the issue only ultimately became necessary to decide in the event that an order for specific performance was made.

Relief against forfeiture

967 DC2 in the POS submitted that if all claims fail it claims the repayment of the deposits under s 55(2A) *Conveyancing Act*: POS[42].

968 The only submission put by DC2 was the following in its opening written submissions (POS[120]):

> "If all of the above claims fail and the Vendors are entitled to sell their Property to Blue Sox Investments Pty Ltd, it would be just and equitable for them to return the deposit paid by D Capital 2 (via Jogat under the Deeds)".

969 No further submission was made in DC2's final submissions.

970 This issue does not appear expressly in the list of agreed issues. It also arguably may not have been pressed.

971 However, in case there is any lingering doubt about it I briefly note the following.

972 The relevant principles regarding s 55(2A) *Conveyancing Act* were recently summarised by Darke J in *Culjak v Akrawe* [2022] NSWSC 949 at [83]-[87].

973 I am entirely unpersuaded that there is an unjust and inequitable consequence of forfeiture of a deposit having regard to my findings in this matter.

Conclusion

974 I have outlined my findings at the commencement of the reasons for judgment.

975 I direct the parties to bring in short minutes of order to give effect to my reasons for judgment.

976 I have raised the question regarding the framing of the illegality issue and possibly there may be need for that to be further addressed.

977 I have understood that the issues on a number of the claims have now been abandoned, or in the case of issues 35-43 arising out of the second group's cross-claim, that they do not arise or need to be determined. However in the event that I am mistaken about that, in the process of the parties bringing in short minutes of order to give effect to my reasons for judgment, they should alert me to any claims that they say still need to be determined and in that respect I reserve further consideration of any such claims.

978 In the result, DC2's claims are dismissed. The parties are to bring in Short Minutes of Order on the main claim and the cross-claim and in respect of costs.

979 To the extent that the is debate about the appropriate costs orders the parties are to notify my Associate that that is the case and the matter may be listed to address disputed costs issues or determined on the papers.

980 The orders of the Court are:

(1) Direct the parties to submit agreed short minutes of order to give effect to the reasons for judgment, including as to costs, or if there is no agreement between them, their respective draft orders, submissions and any affidavits by 4:00 PM on 19 August 2022.

(2) Adjourn the proceedings to 10:00 AM on 25 August 2022.

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Annexure A - Agreed Statement of Issues (470283, pdf)