SUPREME COURT OF QUEENSLAND

CITATION:	*Brades Property Agnes Water Pty Ltd v Skyrock Sun Pty Ltd as trustee for the Skyrock Sun Trust* [2026] QCA 141
PARTIES:	**BRADES PROPERTY AGNES WATER PTY LTD** ACN 655 708 802 (first appellant) **BRADES PI PTY LTD** ACN 628 790 769 (second appellant) **PHILLIP JAMES BRADES** (third appellant) **v** **SKYROCK SUN PTY LTD** **ACN 654 827 317** **AS TRUSTEE FOR THE SKYROCK SUN TRUST** (respondent)
FILE NO/S:	Appeal No 5232 of 2025 DC No 2788 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2025] QDC 143 (Farr SC DCJ)
DELIVERED ON:	28 July 2026
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2026
JUDGES:	Mullins P, Boddice JA, Kelly J
ORDERS:	**1. The appeal be dismissed.** **2. The appellants pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – CONDITIONS – GENERAL MATTERS – where the first appellant (the Seller) entered into a contract with the respondent (the Buyer) for the sale of land on 5 July 2022 – where the purchase price of the land was $2,200,000 – where the respondent paid a deposit of $220,000 to the first appellant – where the primary judge found the respondent had lawfully terminated the contract by relying on a special condition of the contract – where the primary judge ordered that the amount of the deposit be paid to the respondent – where the appellants contend that the primary judge made an error of law in finding that the respondent lawfully terminated

the contract – where the respondent contends that the primary judge's orders should be upheld and that the primary judge erred by failing to find that the respondent could lawfully terminate the contract by relying upon other special conditions – whether, upon the proper construction of the special conditions, the primary judge erred in finding that the respondent was entitled to terminate the contract

Competition and Consumer Act 2010 (Cth), Sch 2 (Australian Consumer Law), s 236, s 238, s 243
Planning Act 2016 (Qld), s 64, s 68

Adelaide Brighton v Ostabridge [2005] NSWSC 737, cited
Beerwah Land Pty Ltd v Sunshine Coast Regional Council; Woodlands Enterprise Pty Ltd v Beerwah Land Pty Ltd; Sunshine Coast Regional Council v Beerwah Land Pty Ltd [2016] QPELR 963; [2016] QPEC 55, cited
Eastbound Estate Pty Ltd v DC Consolidated Investments Pty Ltd [2024] VSC 40, distinguished
Edwards v The Hunter Valley Co-op Dairy Co Ltd (1992) 7 ANZ Ins Cases 61–113, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, cited
TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim (2016) 91 NSWLR 439; [2016] NSWCA 68, cited

COUNSEL:	K W Wylie, with S Parvez, for the appellants J P Hastie, with S-J Tan, for the respondent
SOLICITORS:	Finn Roache Lawyers for the appellants Macpherson Kelley for the respondent

[1] **MULLINS P:** I agree with Kelly J.

[2] **BODDICE JA:** I agree with Kelly J.

[3] **KELLY J:**

A dispute about a deposit

[4] The parties are in dispute as to who is entitled to a deposit paid under a contract for the sale of land dated 5 July 2022 ("the contract"). Under the contract, the first appellant was "the Seller" and the respondent was "the Buyer". The purchase price was $2,200,000 and the deposit of $220,000 was paid by the Buyer to the Seller's real estate agent. After a trial in the District Court, the learned primary judge decided that the Buyer had lawfully terminated the contract relying upon a condition of the contract, special condition A(1). The judge ordered that the amount of the deposit be paid to the Buyer. The appellants have appealed that order and contend for error in the judge's finding that the Buyer lawfully terminated the contract. The Buyer seeks to uphold the judge's finding and order. The Buyer also contends that the order should be upheld because the judge erred in failing to find that the Buyer was entitled to terminate the contract relying upon special conditions A(2) and/or (3). The resolution of this appeal depends in large part upon the proper construction of the special conditions.

The contract, the circumstances in which it was made and later terminated

[5] The land fell within the local government area of the Gladstone Regional Council ("the Council"). As at the time of the contract, the Seller had made a development application in respect of the land which was still to be decided by the Council. The development application had been made under the *Planning Act 2016* (Qld) ("the Act") and was for a development permit for reconfiguring a lot, "1 lot into 15 lots". The application sought "to subdivide the existing lot into 15 Lots within a Community Title Scheme subdivision, as outlined … in Figure 4." Figure 4 contained a proposed plan of subdivision and a notation that the proposed subdivision was "intended to create 15 Community Title Scheme residential allotments ranging in area from 475m^2 to 605m^2." The application included an Appendix A which contained a proposed subdivision plan. The application was code assessable and was required to be decided by 9 August 2022.[1]

[6] The Buyer's directors were Ms Min and Mr Leung. Prior to the contract, the Buyer, through Ms Min, had exchanged numerous emails and messages with the Seller's real estate agent about the land. On 15 June 2022, the agent had sent by text message to the Buyer an image of Figure 4 as contained in the development application and then sent an email to the Buyer in these terms:

> "Please see attached preliminary engineering reports for reference.
>
> The DA has had final information requests which included a footpath out front of site and clarification on entry exit point. Both these issues were very basic and I anticipate Approval within the next month.
>
> I have estimated complete costs to build approx $800,000.00 including power and comms and approx $550k if I perform civil inhouse. The internal road is a one way road and the site is fairly straightforward.
>
> $800,000.00 civil
> $420,000.00 contributions
> $2,200,000.00 + GST purchase
> $102,000.00 stamp
>
> | | | |
> |---|---|---|
> | Average sale price $365,000.00 x 15 = | | $5,475,000.00 |
> | | - | $545,000.00 GST |
> | | - | $136,000.00 comms |
> | | = | $4,792,000.00 |
> | | - | $3,522,000.00 Total costs |
> | | = | $1,270,000.00 |
>
> I would say that pricing should start at $359K up to $399K which will bring up profits
>
> If you require any additional information please let me know"

[7] As at the time of the contract, the Buyer had been provided with a copy of the development application by the Seller's town planner. The contract made express reference to the development application by its reference number "DA\25\2022". The special conditions of the contract relevantly provided:

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1 By operation of the development assessment rules made by the Minister under s 68 of the Act.

"Special Conditions

…

Development Approval DA\25\2022

A. The Contract is conditional upon the Buyer being satisfied that the conditions of the DA are:

1. consistent with the representations of the Seller.

2. conditions typically imposed on similar developments.

3. do not include any provision which reduces the number of lots below 15.

B. if Development Approval is not issued by the relevant authority within 90 days of the Contract Date, either party may terminate this Contract and the Deposit refunded to the Buyer"[2].

[8] The conditions in paragraph A will be referred to, respectively, as A(1), A(2) and A(3).

[9] As to special condition A(1), it is uncontroversial that "the representations of the Seller" referenced a representation that the land "will be subdivided into 15 lots". It was common ground that this representation was made by the 15 June 2022 email from the Seller's agent to the Buyer.

[10] On 12 August 2022, the Seller and the Buyer, together with the second and third appellants, entered a further agreement styled as a "Side Deed" which authorised the release of the deposit to the Seller as a loan which was to be repayable under certain conditions and deemed to have been repaid on settlement of the contract. The loan was guaranteed by the second and third appellants. On 19 August 2022, pursuant to that further agreement, the deposit was released by the Seller's agent to the Seller.

[11] As the development application had not been decided by 9 August 2022, s 64(3) of the Act entitled the applicant to give to the Council a deemed approval notice stating that the development application should be approved. By s 64(5), on the day the Council received a deemed approval notice, it was taken to have given an approval to the applicant. Pursuant to s 64(6), within 10 business days after receiving the deemed approval notice, the Council could give the applicant a decision notice which approved the application (s 64(6)(a)) or which approved the application subject to development condition ((s 64(6)(b)).

[12] On 17 August 2022, the Buyer's town planner gave the Council a deemed approval notice under s 64(3) of the Act. On 25 August 2022, the Council gave the Seller a notice of decision pursuant to s 64 of the Act. The notice advised that the development application "was approved" and that the approval was "supported by a Notice of Reasons" and was "subject to conditions as set out in the following Notice of Decision." The Notice of Decision referred to the application as being "Reconfiguring a Lot - Code - 1 Lot into 15 Lots (Community Title Scheme)" and provided details of the approval including that a development permit was granted for the reconfiguration. The Notice of Reasons described the approved development as being "[r]econfiguring a Lot (1 lot into 15 lots via a Community Titles Scheme)…".

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2 As per original.

The conditions attached to the Notice of Decision included two special conditions and otherwise concerned water, sewerage and stormwater infrastructure, transportation, electrical, telecommunications and gas services, landscaping and survey plan endorsement. The two special conditions were in these terms:

> "1. Prior to the lodgement of any Development Application for Operational Works, the Applicant is required to submit to Council for approval revised plans for the subdivision, inclusive of the requested condition requirements outlined here within.
>
> 2. Prior to the lodgement of any Development Application for Operational Works, the Applicant must submit to Council for approval, quantification of the capacity of the rubble pit to accept the proposed flow in accordance with the Engineering Design Planning Scheme Policy under the *Our Place Our Plan Gladstone Regional Council Planning Scheme* and be certified by a RPEQ experienced in this type of work. The detention strategy may need to be amended considering the actual available flow rate that can be achieved."

[13] The Council's approval, as constituted by the Notice of Decision and Notice of Reasons, did not include an approved or stamped plan of subdivision. That was apparently not an oversight. Special condition 1 required the submission to Council for approval "revised plans for the subdivision, inclusive of the requested condition requirements outlined here within." The revised plans for subdivision were required to be submitted to the Council for approval, prior to the lodgement of any Development Application for Operational Works.

[14] On 1 September 2022, the Seller's town planner sent an email to the Council which relevantly stated:

> "With reference to the Notice of Decision recently provided by Council in relation to the above Development Application, it is noted that the conditions of the approval do not list Approved Plans. A copy of the Notice of Decision is attached to this email.
>
> Special Condition 1 states:-
>
> 'Prior to the lodgement of any Development Application for Operational Works, the Applicant is required to submit to Council for approval revised plans with the subdivision, inclusive of the requested condition requirements outlined here within.'
>
> After reading the remaining conditions of the approval, it does not appear that there are any requirements in those conditions which would lead to the plan of subdivision which was lodged with the application having to be amended. A copy of the application plan is also attached to this email for your information.
>
> It would be appreciated if you could please review this matter, and if you agree that there are no provisions in any of the conditions which would require the plan of subdivision to be amended, to then issue a stamped copy of the plan of subdivision as the Approved Plan for this Notice of Decision."

[15] Later, on 1 September 2022, the Council sent an email to the Seller's town planner by way of reply which materially stated:

> "… Special Condition 1 serves as a precursor to Special Condition 2 … Council is of the view that compliance with Special Condition 2 may potentially lead to a change in the layout of the proposed development. The amendment of the detention strategy may subsequently impact on the number and design of lots proposed."

[16] On 15 September 2022, the Buyer was provided with a copy of this email from the Council.

[17] By a letter dated 21 September 2022, the Buyer purported to terminate the contract relying upon special conditions A(1) and A(3) and demanded repayment of the deposit. The Seller contended that the termination was unlawful and retained the deposit.

The District Court proceeding

[18] The Buyer started a proceeding against the appellants in the District Court in which it sought to recover the deposit as a debt and alternatively sued for damages for breach of contract or pursuant to s 236 of the *Australian Consumer Law*[3] ("the ACL"). In the further alternative, the Buyer sought orders declaring the contract and the Side Deed void pursuant to ss 238 and 243 of the ACL. By the time of the trial, the Buyer sought to justify its termination by reference to each of special conditions A(1), A(2) and A(3). At the trial, the parties agreed that the real issues in the proceeding concerned whether the Buyer had a lawful basis to terminate the contract pursuant to special condition A and whether the elements of the ACL claim were established.

[19] The Buyer called Ms Min and Mr Leung as witnesses. They each gave evidence about their subjective beliefs in relation to the satisfaction of special condition A. Independent expert town planning evidence was adduced by each party. The Buyer called Mr Irvine and the appellants called Mr Buckley. Mr Irvine gave evidence that a notice of decision for a development permit for reconfiguring a lot would typically include an approved plan with a requirement that the proposed development be undertaken "in accordance with" or "generally in accordance with" the approved plan. He opined that the two special conditions of the approval had the potential to impact the proposed development and its ultimate yield. Mr Irvine accepted, in cross-examination, that matters relating to operational works were typically not dealt with at this stage of an approval for the reconfiguration of a lot. He described the approval for a reconfiguration of a lot as typically a "high-level", "conceptual-type" of approval and that an operational works approval involved a more "detailed approval". He accepted that a decision notice for a reconfiguration of a lot was "the first stage" and that it provided "a framework for what's to occur afterwards." He said that there were avenues to change a development approval for reconfiguration of a lot after it had been granted, particularly at the operational works stage. Mr Buckley accepted that during the operational works stage, it was "quite normal" to have more liaison with a Council and that potentially the number and size of the lots could change. He said it was common to have "tweaks and changes" at the operational stage, once the engineering detail had been supplied and that the operational works stage provided an opportunity for "check[s] and balance[s]".

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3 *Competition and Consumer Act 2010* (Cth), Sch 2.

[20] As has been already noted, the judge relevantly decided that the Buyer had lawfully terminated the contract relying upon special condition A(1) and ordered the appellants to pay to the Buyer the amount of the deposit. The Buyer's claims in reliance upon special conditions A(2) and A(3) were unsuccessful. The judge dismissed the Buyer's claims made under the ACL. The Buyer has not appealed from the dismissal of its ACL claims.

[21] The reasons dealt with special condition A by first considering A(3), then A(1), and finally, A(2).

[22] As to A(3), the judge noted that the Buyer had "not identified any condition in the approval, that includes a provision which reduces the number of lots to below 15." The judge, with reference to A(3), reasoned that "on this point", the contractual language was clear and unambiguous and was directed to a condition which positively reduced the number of lots, rather than a condition which might reduce the number of lots. Given the absence of such a condition in the development approval, the judge found that the Buyer could not rely upon A(3) to validly terminate the contract.

[23] As to A(1), the judge noted the parties' agreement that "the representations of the Seller" referenced a representation that the land "will be subdivided into 15 lots" and that this representation had been made by the 15 June 2022 email from the Seller's agent to the Buyer. The reasons then state:

> "The email of 15 June relevantly and unambiguously stated that the property will be subdivided into 15 lots. That email then included a calculation as to the potential profit to be made upon the sale of those 15 developed lots.
>
> That representation, therefore, was to the effect that the proposed sub-division will result in 15 separate lots. This was therefore a positive assertion of a future event with no room for any uncertainty as to the potential success of the proposed subdivision."

[24] No party challenged this part of the judge's reasons. The judge then found that "notwithstanding the nature of the approval of the Development Application, it was not consistent with such a degree of certainty." According to the reasons, the uncertainty arose from the development approval not having included or referenced a stamped plan[4] in circumstances where the Council's communicated interpretation of the second condition in the approval was that it might "potentially lead to a change in the layout of the proposed development" and "subsequently impact on the number and design of the lots proposed."[5]

[25] The judge did not decide whether "the Buyer being satisfied", as that expression appeared in special condition A, required an honest and/or reasonable state of satisfaction.[6] The judge did not consider it necessary to decide that issue because, having regard to his Honour's findings, the Buyer had established that it both honestly and reasonably held the required belief to engage A(1). In deciding the issues relevant to A(1), the judge accepted the evidence of Ms Min and Mr Leung. His Honour found that the Buyer was, in fact, not satisfied that the conditions of the development

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4 RB 34 [38].

5 RB 34 [38] and [34].

6 RB 33 [28].

approval were consistent with the Seller's representation and had honestly exercised its right to terminate under A(1).[7] In finding that the Buyer had been objectively satisfied for the purpose of engaging A(1), the judge had regard to the expert opinions, the absence of a stamped or approved plan and the Council's communicated view as how the second condition might practically impact the proposed development. The reasons noted that the experts had expressed opinions that the approval allowed for 15 lots but "was potentially subject to change in relation to the number of lots and the size of the lots."[8] The judge found that "[d]espite the opinions of Mr Buckley and Mr Irvine that the Decision Notice did refer to a reconfiguration of the property into 15 lots," those opinions did not detract from other matters, namely that the development approval had not provided "the certainty of a reference to an approved plan", Mr Irvine's opinion that the reference to 15 lots in the approval was a reference to what was "proposed" and the Council's indication that the number and design of the proposed lots might be impacted by the special conditions contained in the approval.

[26] As to A(2), the judge rejected the evidence of Ms Min that she was not satisfied that the conditions of the development approval were conditions typically imposed on similar developments. The judge found that Ms Min had not in fact been in a position to determine if the conditions imposed were typical.[9]

Interpreting the contract

[27] The terms of a commercial contract are to be understood objectively by what a reasonable businessperson would have understood them to mean.[10] The reasonable businessperson is someone placed in the position of the parties at the time of the contract.[11] It is from that person's perspective that the court considers the language used by the parties, the surrounding circumstances known to them and the commercial purpose and objects of the contract.[12] A court is entitled to approach the task of giving a commercial contract a business like interpretation on the assumption "that the parties … intended to produce a commercial result".[13] Usually, the process of construction occurs by reference to the contractual text and contextual notice provided by that text. However, it is always legitimate to look to context apparent from, or provided by, the contractual language.[14] Recourse to events, circumstances and things external to the contract may be necessary to identify the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, the background and the context in which the parties operated.[15]

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7 RB 35 [40] and [41].

8 RB 36 [45].

9 RB 39 [59].

10 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at 551 per Kiefel, Bell and Gordon JJ.

11 Ibid.

12 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461–462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] per French CJ, Hayne, Crennan and Kiefel JJ.

13 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35].

14 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46] per French CJ, Nettle and Gordon JJ; *Eureka Operations Pty Ltd v Viva Energy Australia Ltd* [2016] VSCA 95 at [45].

15 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117 [49] per French CJ, Nettle and Gordon JJ citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35].

[28] In the present case, the important provisions of the contract are the special conditions. It may be inferred from the terms of the contract, and the extrinsic facts known to both parties, that the acquisition of the land by the Buyer was a commercial transaction undertaken for financial gain. The language of the special conditions identifies the material context, namely that there was a pending development application (referred to in the contract as "DA\25\2022") and there had been representations made by the Seller (referred to in the contract as "the representations of the Seller"). In the context of the development application having been made but not decided, the Buyer being aware of the development application and the Seller, by its real estate agent, having made "the representations of the Seller", by special condition A the parties agreed to make the contract conditional upon "the Buyer being satisfied" that "the conditions of the DA," when it was obtained, were "consistent with the representations of the Seller"(A(1)), "typically imposed on similar developments" (A(2)) and did "not include any provision which reduces the number of lots below 15" (A(3)). By special condition B, if the Council did not issue the development approval within 90 days of the date of the contract, the parties further agreed that either the Buyer or the Seller might terminate the contract with the deposit being refundable to the Buyer.

[29] Special condition A made the contract "conditional" upon "the Buyer being satisfied" of certain matters. Those matters each concerned the "conditions of the DA". The parties objectively contemplated that the Buyer would have an opportunity to be satisfied about "the conditions of the DA" as to what they contained ("conditions typically imposed on similar developments" A(2)), what they did not contain ("any provision which reduces the number of lots below 15" A(3)) and how they might affect the proposed development ("the proposed sub-division will result in 15 separate lots" (A(1))). Special conditions A(1) and A(3) addressed different matters. Special condition A(3) was directed to a condition which in terms reduced the number of lots below 15. The development approval was to include no such condition. Special condition A(3) provided the Buyer with an entitlement to be satisfied that the conditions included in the development approval were consistent with "the representations of the Seller", which encompassed a future representation that the proposed sub-division "will result in 15 separate lots".

[30] The stipulation in special condition A that the contract was conditional upon the Buyer being satisfied about these matters, should be construed as a condition precedent to performance as distinct from a condition precedent to the formation or existence of a contract. That construction is generally favoured by courts as in most cases, like this case, it is artificial to suggest that in the face of the significant details settled by the parties there was to be no binding contract unless the stipulated matter occurred or was achieved.[16] Here, the mutual intention of the parties appears to have been that there was a binding contract which made the Buyer's satisfaction a condition precedent to the duty of the Buyer to perform. That is, the contract was a binding contract which created rights capable of enforcement, though the obligation of the Buyer to perform depended on the fulfilment of special condition A.[17] That the contract was otherwise a binding contract is also made clear by special condition B which entitled either party to terminate the contract if the Council did not issue the development approval within 90 days of the date of the contract. Construed in this manner, special condition A should be regarded as having been included for

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[16] *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 552.
[17] Ibid at 551.

the protection of the Buyer as it was the party required to be moved to a position of satisfaction before the contract could be regarded as unconditional. By way of contrast, special condition B was clearly for the protection of each party as it conferred a right on either party to terminate in circumstances where the development approval did not issue within a contemplated timeframe.

[31] The objective characterisation of special condition A as being for the protection of the Buyer, does not necessarily inform the content of the stipulation that the Buyer be "satisfied" about the matters. The content of that stipulation is to be discerned by construing the contractual language. In *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd*,[18] Gummow J observed:

> "Where one party has an express power the exercise of which will significantly affect the interests of the other party (eg by cancellation of their supply contract) if the holder of the power is satisfied that a certain state of affairs exists, the words of the contract are fairly readily construed (and the more so when the parties have given such a power to a third party) as requiring a reasonable as well as honest state of satisfaction. But this is a result arrived at by a process of construction of the express terms in the setting of the contract as a whole. It is best not seen at all as the implication of a further term."
>
> (citations omitted)

[32] Having regard to the contractual language, the content of the stipulation in this present case required a reasonable as well as honest state of satisfaction. There are two reasons for that conclusion. First, the matters in respect of which the Buyer was to be satisfied were identified by special condition A. They were discrete matters to be discerned from the conditions of the development approval and matters known to the parties, not the Buyer's personal circumstances. Unlike the position which might arise where a condition provides for a contract to become unconditional after the expiry of a period for general due diligence,[19] in the present case, there is no good reason why the parties to the contract would have intended that the Buyer's satisfaction be determined by values and standards peculiar to the Buyer. Secondly, the language of "being satisfied" as it appears in special condition A, to the extent that it references a belief, state of mind or viewpoint, is not expressed in terms of a belief, state of mind or viewpoint to be formed at the absolute discretion of the Buyer. In that respect, the language of special condition A may be contrasted with, by way of example, the clause of the sale agreement considered in *Eastbound Estate Pty Ltd v DC Consolidated Investments Pty Ltd*,[20] which clause entitled a vendor to terminate that agreement if a responsible authority imposed a requirement that was "in the opinion of the Vendor (in its absolute discretion) … too onerous for the Vendor to perform". In *Questband Pty Ltd v Macquarie Bank Ltd*,[21] Fraser JA referred to a statement of principle that the "conferral of an absolute discretion on a party to a contract excludes an obligation to act reasonably in the exercise of the discretion." Special condition A does not speak in terms of an absolute discretion.

[33] To the extent that special condition A required a reasonable as well as honest state of satisfaction, the onus was on the appellants to establish that a reasonable person ought

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18 (1993) 45 FCR 84 at 94.

19 See by way of example *Bellmere Park Pty Ltd v Benson* [2007] QCA 102 at [23].

20 [2024] VSC 40 at [11].

21 [2009] QCA 266 at [66].

to have been satisfied.[22] In the insurance field there is a settled principle expressed in the following terms:[23]

> "To say that an insurer must act reasonably in forming or declining to form an opinion is not to say that a Court can substitute its own view for that of the insurer … 'reasonable persons may reasonably take different views'. Unless the view taken by the insurer can be shown to have been unreasonable on the material then before the insurer, the decision of the insurer cannot be successfully attacked on this ground."

[34] That statement of principle has been recognised as applicable "to any contract in which a consequence is dependent upon one of the contracting parties being reasonably satisfied of some matter."[24]

The grounds of appeal

[35] The appellants' argument identified four grounds of appeal.

[36] The first ground was that the judge erred in finding that the conditions of the approval had the potential to reduce the number of lots to below 15 lots because the approval was given pursuant to s 64 of the Act or, alternatively, on the proper construction of the approval, the conditions could not lawfully reduce the number of lots to a figure less than 15 lots. There are two aspects to this ground. The first rests upon the effect of s 64 of the Act. The second is concerned with the construction of the approval, including its conditions. Each aspect is concerned with the legal effect of the conditions of the approval.

[37] In my consideration, the focus of this ground upon the legal effect of the conditions of the approval does not directly engage with the real issue which the judge had to decide in relation to special condition A(1). The Buyer was required to be satisfied that the conditions of the approval were consistent with a representation that the land "will be subdivided into 15 lots". The judge found that this representation involved "a positive assertion of a future event with no room for any uncertainty as to the potential success of the proposed subdivision." The Buyer has not challenged this finding. In relation to special condition A(1), the real issue was whether the conditions of the approval were consistent with that representation, being a representation which left no room for any uncertainty as to the potential success of the proposed subdivision.

[38] The judge's decision in relation to special condition A(1) was based on findings that the Buyer was honestly and reasonably not satisfied that the conditions of the approval were consistent with the representation. In making those findings, the judge made detailed reference to the evidence of Ms Min and Mr Leung and the independent town planners. Notably, Ms Min and Mr Leung were not cross examined about their understanding of the legal effect of the conditions in the context of the approval being a deemed approval. Nor were the independent town planners. The independent town planners agreed that a development approval for a reconfiguration was the first stage of such a development which usually involved further dealings with the Council during the more detailed operational works stage. The reasons noted the absence of

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22 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 609.

23 *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cases 61–113 at 77,536; *TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439 at 454 [61]–[62].

24 *Adelaide Brighton v Ostabridge* [2005] NSWSC 737 at [145].

an approved plan of subdivision and that the experts had expressed opinions that the approval allowed for 15 lots but "was potentially subject to change in relation to the number of lots and the size of the lots."[25] The appellants' expert accepted that during that latter stage, it was common to have "tweaks and changes" as part of a "check[s] and balance[s]" approach which brought with it a potential for the number and size of the lots to change.

[39] The judge found that "notwithstanding the nature of the approval … it was not consistent with such a degree of certainty." The reference to "such a degree of certainty" was to the judge's finding that the representation conveyed "a positive assertion of a future event with no room for any uncertainty as to the potential success of the proposed subdivision." The potential success of the proposed subdivision encompassed its feasibility or viability. The judge also found that "the Development Approval, notwithstanding its conditions, potentially allowed for an outcome that reduced the number of lots to below 15."[26] These findings were not concerned with the legal effect of the approval but were directed to the practical implications of the approval and its conditions for the outcome of the proposed subdivision and its potential success. The absence of an approved plan of subdivision, the imposition of a condition which required the submission for approval of a revised plan of subdivision and the Council's communicated view that compliance with the conditions might lead to a change in the layout of the proposed development and impact the number and design of the lots, made the potential success of the proposed subdivision into 15 lots less than clear.

[40] The reasons reveal that the judge was aware that the approval was a deemed approval under s 64 of the Act and that, because of that status, the Council was required to approve the development application or approve the development application subject to development conditions.[27] As part of the first ground of appeal, the appellants sought to raise an argument that s 64 of the Act did not permit development conditions to change the "fundamental character of the approved development".[28] The appellants referred to *Beerwah Land Pty Ltd v Sunshine Coast Regional Council*[29] as authority for the proposition that a deemed approval was required to be an approval for the development as applied for in the application.

[41] The nature and extent of the development conditions to which a deemed approval might lawfully be made subject, and whether the special conditions in fact imposed in this case were lawful, were not pleaded issues nor were they litigated during the trial. The appellants' counsel properly conceded that these issues had not been raised at the trial. Had they been raised, there may well have been further expert opinion evidence adduced as to what type of outcome could be regarded as "substantially in accordance" with an approval, which did not include an approved plan of subdivision, "the fundamental character" of the approval, an expression used by the appellants on this appeal, and the impact of the conditions upon that approval. In that regard, *Beerwah* contains an acknowledgement that "it is possible for conditions of approval to require some alteration to a proposal without rendering the decision a refusal".[30] Were it to have been contended by the appellants that the conditions of the approval

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25 RB 36 [45].
26 RB 34 [35].
27 RB 37 [48]–[50].
28 Appellant's outline of argument [24] and Appellant's outline of argument in reply [31].
29 [2016] QPEC 55.
30 Ibid at [32].

were only lawful if they did not have any impact upon the number of lots, that proposition would have been required to be put to Ms Min and Mr Leung (as relevant to the Buyer's state of honest satisfaction) and to Mr Irvine (as relevant to the issue of reasonable satisfaction). Further, even if s 64(6)(b) of the Act did not permit the development conditions to change the fundamental character of the development approval, and if in fact the conditions did effect such a change, it did not automatically follow that the Buyer's state of satisfaction for the purpose of special condition A(1) was necessarily unreasonable. As a matter of principle, "reasonable persons may reasonably take different views" and there would have been a further triable issue as to whether the Buyer's view could be shown to have been unreasonable.[31] These issues were not run at the trial and they should not be allowed to be raised for the first time upon appeal.[32]

[42] The second ground of appeal contended for error by the judge in having had regard to the absence of an approved plan of subdivision and the Council's 1 September 2022 email when deciding whether the requisite state of satisfaction existed to engage special condition A(1). The absence of an approved plan of subdivision, and the Council's communicated view as to the potential impact of the conditions, were objective circumstances relevant to any consideration of whether the approval might be regarded as consistent with a representation that the land "will be divided into 15 lots". Unlike special conditions A(2) and A(3), which were concerned with the type of conditions contained, and not contained, in the approval, special condition A(1) was directed to whether the conditions contained in the approval gave rise to uncertainty as to the outcome of the proposed development. That inquiry demanded a consideration of not just the content of the conditions but the objective circumstances in which they were provided. The judge committed no error by having regard to these circumstances.

[43] The third ground of appeal sought to criticise the judge's language, which reflected the opinion of Mr Irvine, namely that the reference to 15 lots was a reference to what was "proposed". There is no substance in this criticism. The judge's language, fairly interpreted, was acknowledging a number of realities namely that that there had been a development approval for the reconfiguration of a lot but in circumstances where there was no approved plan of subdivision, a plan of subdivision was still required to be submitted for approval and the development application for operational works was yet to be undertaken. In those circumstances, it was unobjectionable for the judge to refer to the approval of the reconfiguration as being an approval of "what was proposed".

[44] As to the fourth ground, the appellants relied upon each of the earlier grounds of appeal and advanced a contention that "[the Buyer] could not have been dissatisfied with the conditions of the Approval, because those conditions did not, and could not, operate to change the number of lots otherwise approved." As has been explained, whether the conditions could lawfully operate to change the number of lots was not an issue litigated in the District Court. For the reasons already provided in relation to the first ground, the fourth ground fundamentally relates to an issue that was not litigated below.

[45] The grounds of the amended notice of contention may be dealt with briefly. The first ground contended that the judge erred in deciding that the termination of the contract

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31 *Edwards v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cases 61-113 at 77,536; *TAL Life Ltd v Shuetrim; Metlife Insurance Ltd v Shuetrim* (2016) 91 NSWLR 439 at 454 [61]–[62].

32 *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

could not be justified by reference to special condition A(3). Once it is accepted that the proper construction of special condition A required a reasonable, as well as an honest, state of satisfaction, it was open to the judge to find that special condition A(3) was reasonably satisfied in that the approval did not include a condition which reduced the number of lots below 15. The judge observed that the Buyer had not "identified any condition in the approval, that includes a provision which reduces the number of lots to below 15." Plainly, there was no such condition. There was no condition which in terms reduced the number of lots below 15. The judge correctly reasoned that the language of special condition A(3) was clear and unambiguous and was directed to a condition which positively reduced the number of lots rather than a condition which might reduce the number of lots.

[46] The second ground of contention was that the judge erred by concluding that the termination could not be justified by reference to special condition A(2). In relation to special condition A(2), the judge found that the Buyer's evidence on this issue was "lacking" and that its submissions were "farfetched". The judge found that Ms Min had not in fact been in a position to determine whether the conditions imposed by the approval were in fact typical. That finding of fact has not been appealed and provides a substantial obstacle to any contention that the Buyer held an honest state of satisfaction in relation to special condition A(2). As the reasons further observed, the fact that special condition A(2) was not referenced in the Buyer's termination letter further undermined the "veracity of the claim." There is no substance in the second ground of contention.

Orders

[47] The orders I propose are as follows:

1. The appeal be dismissed.

2. The appellants pay the respondent's costs of and incidental to the appeal.