SUPREME COURT OF QUEENSLAND

CITATION:	*CAV Gasworks Pty Ltd v JYP Jiang Pty Ltd* [2026] QCA 221
PARTIES:	**CAV GASWORKS PTY LTD AS TRUSTEE FOR THE CAV GASWORKS TRUST** ACN 603 728 338 (appellant) **v** **JYP JIANG PTY LTD AS TRUSTEE FOR THE JYP JIANG FAMILY TRUST** ACN 618 883 122 (first respondent) **YIPING JIANG** (second respondent)
FILE NO/S:	Appeal No 2953 of 2025 SC No 10017 of 2024
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2025] QSC 134 (Bowskill CJ)
DELIVERED ON:	30 October 2026
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2025
JUDGE:	Bradley JA, Crow J, Hindman J

ORDERS:

1. **The appeal is allowed.**
2. **Paragraph 1 of the orders made on 12 June 2025, the first paragraph of the judgment dated 12 June 2025 and the whole of the order made on 23 June 2025 are set aside.**
3. **In lieu thereof:**
   - **(a) Save for the declaration made in the second paragraph of the judgment dated 12 June 2025, the plaintiff's claim is dismissed;**
   - **(b) The plaintiff/first respondent is to pay the defendant/appellant's costs of the claim and the appeal on the standard basis;**
   - **(c) No order as to costs in respect of the counterclaim.**
4. **The parties have until 11 am on 30 October 2026 to advise the court if they wish the proceeding to be listed for argument in respect of the orders made above, in**

which event the matter is listed for hearing on 30 October 2026 at 12 pm.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the seller entered a contract with the buyer for the sale of two proposed lots in an apartment complex development – where clause 8.3 of the contract provided the parties with a right of termination if the seller "cannot" give the buyer a particular notice – where clause 13.1(c) of the contract provided the seller with a separate right of termination if at "any time" it formed the opinion that clause 8.3 "will apply" – whether the primary judge erred in concluding the word "cannot" means a strict "inability" or "impossibility" rather than a mere practical inability – whether the opinion under clause 13.1(c) could only be prospective

Body Corporate and Community Management Act 1997 (Qld), s 212, s 217B
Building Act 1975 (Qld), s 100, s 101, s 102, s 114

Meehan v Jones (1982) 149 CLR 571; [1982] HCA 52, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, applied
Peters (WA) Ltd v Petersville Ltd (2001) 205 CLR 126; [2001] HCA 45, cited

COUNSEL: J D McKenna KC, with D V Ferraro, for the appellant
P K O'Higgins KC, with M E Clarke, for the respondents

SOLICITORS: Cowen Schwarz Marschke Lawyers for the appellant
Auslaw Future for the respondents

[1] **BRADLEY JA:** On 13 April 2023, the appellant (the **seller**) informed the respondent (the **buyer**) that it was "ending" an agreement (the **contract**) to give the buyer vacant possession of two lots in a community management scheme developed by the seller[1] (the **lots**). The buyer challenged the seller's notice of termination and affirmed the contract. The seller entered separate agreements to sell each of the lots to other persons.[2] On 26 July 2024, the buyer accepted this conduct as a repudiation of the contract by the seller and terminated the contract. On 31 July 2024, the buyer sued the seller for damages for breach of the contract.

[2] On 12 June 2025, after a trial before the learned Chief Justice (the **primary judge**), judgment was given ordering the seller to pay the buyer $6,097,841.42, including $417,841.42 in interest. The primary judge published reasons.[3] The Court declared

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1 The lots were described in the Reference Schedule and the Disclosure Documents as Proposed Lot No's. 2403 and 2404.

2 The seller completed the sale of one of the lots on 13 December 2023, and the other on 3 July 2024.

3 *JYP Jiang Pty Ltd v CAV Gasworks Pty Ltd* [2025] QSC 134 (**Reasons**).

that the buyer was entitled to the deposit, with any accretions. The judgment sum was the difference between $10,300,000, which was the market value of the lots on 5 February 2024,[4] and $4,200,000, which was the purchase price for the lots, and after accounting for the deposit to be retained by the buyer and interest to the date of the orders. On 23 June 2025, the Court ordered the seller to pay the buyer's costs of the proceeding, including indemnity costs from 21 November 2024.

[3] The seller appeals from the judgment and costs order. These reasons explain why the appeal should be dismissed.

The grounds of appeal

[4] The seller advances two grounds of appeal against the substantive judgment.

(a) By the first ground, the seller contends that the primary judge erred in concluding that the seller did not lawfully terminate the contract pursuant to cl 8.3 of the contract on 13 April 2023. The seller contends this error included nine findings of the primary judge.

(b) By the second ground, the seller contends that the primary judge erred in concluding the seller could not exercise a right to terminate the contract pursuant to cl 13.1(c) of the contract after the "sunset date" for the contract. The seller contends this error included two findings of the primary judge.

[5] The seller challenges the costs order by a third ground of appeal. Simply put, a different costs order would be appropriate if the seller succeeded in the appeal on either of the other two grounds.

[6] There is no dispute that the primary judge identified the correct principles of contractual interpretation as set out by French CJ, Nettle and Gordon JJ in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*:

> "[46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
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> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract."[5]

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4 The date the buyer had nominated for completion.

5 (2015) 256 CLR 104, 116. In the Reasons, her Honour also referred to the summaries in *Alphington Developments Pty Ltd v Amcor Pty Ltd* [2025] VSCA 48, [238] (Walker and Whelan JJA), and *Body Corporate for Ocean Pacifique v Pugliese* [2023] QCA 129, [18]-[22] (Kelly J; Flanagan and Boddice JJA agreeing).

[7] Nor is there any challenge to her Honour's observation, "by reference to the whole of the agreement, that it is significantly weighted towards the seller's interests."[6] That observation applies to both cl 8 and cl 13.

The contract and its legal environment

[8] The contract was in writing, signed on behalf of the seller and the buyer, and dated 30 June 2017. By it, the buyer agreed to buy, and the seller agreed to sell, the lots on the terms of the contract. The purchase price was $4.2 million. The buyer paid the deposit of $420,000.

[9] When the seller and the buyer made the contract, the lots were proposed lots in a community management scheme the Seller was to register for a building it was to construct on land at Newstead in Brisbane, known as 'Luminare'. In common parlance, it was an "off the plan" contract.

[10] The process for the creation of lots in a community management scheme (the **Scheme**) with separate titles has steps. First, a plan of subdivision (the **Plan**) is registered.[7] This requires meeting statutory requirements about the construction of the building and a cadastral surveyor's certification that the Plan is accurate. Second, the first community management statement (the **CMS**) for the Scheme is registered.[8] When these two steps are done, the Scheme is established, which is the third step. The three steps allow the registrar to take the final step and create a separate title for each lot on the Plan (collectively, the **separate title requirements**).[9] As the seller submits, "These steps can occur at any time after the structure of the relevant building has been completed."

[11] The parties dealt with this legal environment by agreeing on specific provisions in the contract.

[12] By cl 8, the parties agreed:

> "8.1 *The Seller must give the Buyer written notice after the Seller becomes aware that the Plan[10] and CMS[11] have registered, that the Scheme[12] has been established and that a separate title for [the lots] has been created. The Seller need not give the notice under this clause until the Seller is satisfied that all obligations required to be performed by the Seller* under this contract or at law on or before on or before settlement *will be completed within 14 days of the notice given to the Buyer*.
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> 8.2 The Completion Date must not be (and settlement must not take place) earlier than 14 days after the Seller gives advice by notice

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6 Reasons, [13].

7 *Land Title Act 1994* (**LTA**), s 49A.

8 *Body Corporate and Community Management Act 1997* (**BCCMA**), s 24.

9 LTA, ss 37, 49A.

10 "Plan" means "the building format plan or plans of subdivision to be registered by the Seller under the [LTA] relating to the Land and to be substantially in accordance with the Disclosure Plan" (cl 1.1).

11 "CMS" means "the proposed community management statement to be registered with the Plan in accordance with the [BCCMA] and included within the Disclosure Documents" (cl 1.1).

12 "Scheme" means "the Community Titles Scheme to be established on the registration of the CMS and the Plan" (cl 1.1).

to the Buyer of the registration of the Plan, recording of the CMS and that the Scheme has been established or changed.

8.3 *If the Seller cannot give the Buyer such notice within 5.5 years after the Contract Date* (or by any extended date as referred to in sub-clause 8.4) *then the Buyer or the Seller may end the Contract by giving written notice to the other* and the Deposit and any interest earned on it shall be refunded to the Buyer.

8.4 …"

(*emphasis* added).

[13] The parties also agreed on the steps for completion of the contract. By cl 7 of the contract, the parties agreed:

"7.1 Completion shall take place at Brisbane at a venue to be nominated by the Seller.

7.2 Completion shall take place between 9.00am and 4.00pm on the Completion Date.

7.3 On the Completion Date, the Buyer must:

(a) pay the Seller without any deduction or retention except as authorised by this Contract:

(i) the Purchase Price, less the Deposit paid by the Buyer; and

(ii) any other money owing to the Seller under the Contract; and

(b) deliver to the Seller an authority to release the Deposit.

7.4 On the Completion Date, the Seller must give to the Buyer:

(a) vacant possession of [the lots];

(b) the Transfer Documents properly signed by the Seller (unless previously given pursuant to clause 6);

(c) the Security Deposit, if any;[13]

(d) if requested by the Buyer, a copy of the certificate of currency for any policy of insurance required to be effected pursuant to the Act[14] or the Module;[15]

(e) any certificate of title for [the lots];

(f) a properly signed release (full or partial) of any mortgage or Security Interest[16] over [the lots] but the Buyer may

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13 The buyer paid the deposit. There was no security deposit.

14 "Act" means "the [BCCMA] (as amended)" (cl 1.1).

15 "Module" means "the regulation module under the [BCCMA] applying to the Scheme as set out in the CMS" (cl 1.1).

16 "Security Interest" means "a security interest under the *Personal Property Securities Act 2009* (Cth) whether or not registered on the personal Property Securities register under that legislation" (cl 1.1).

not require the Seller to register the release or withdrawal before the Completion Date or to provide a discharge or release of any other Security Interest; and

(g) all keys, access devices and codes for [the lots] (unless other arrangements have been agreed to).

7.5 Provision of the items referred to in clause 7.4 shall be sufficient performance to transfer and discharge all of the Seller's right, title and Interest to [the lots], the Chattels[17] and Security Deposit."

[14] The parties defined the completion date under cl 1.1 as:

"**Completion Date:** means the later of:

(a) 14 days after the Seller gives written notice to the Buyer under clause 8; and

(b) 30 days after the Contract Date,[18]

provided that if a certificate of classification for the Building (or that relevant part of the Building) has not issued by the dates in (a) and (b), then the Completion Date is postponed until three Business Days after the Seller notifies the Buyer that a certificate of classification has issued."

(*emphasis* added).

The first ground of appeal: cl 8.3 of the contract

[15] The primary judge concluded that, on the proper construction of cl 8, in the events that occurred, the seller was not entitled to terminate the contract under cl 8.3 on 13 April 2023.

[16] In brief, the primary judge found that:

(a) By the first sentence in cl 8.1, the parties agreed that the seller was obliged to give notice to the buyer after the seller became aware that the separate title requirements for the lots had been met.[19] The seller is able to give that notice once the seller is aware that those requirements have been met. Those requirements do not include obtaining a certificate of occupancy.

(b) By the second sentence in cl 8.1, the parties agreed that the seller could delay giving that notice until the seller was satisfied all the pre-settlement requirements would be completed within 14 days.

(c) The seller's ability to delay giving the notice did not detract from its ability to give the notice.

(d) In cl 8.3, the reference to "such notice" is a reference to the notice the seller is to give the buyer contemplated by the first sentence of cl 8.1.

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17 "Chattels" means "those items of property (including appliances) described in the Disclosure Documents for the type of Lot being sold" (cl 1.1).

18 The contract date was 30 June 2017.

19 Reasons, [32].

(e) Also in cl 8.3, the words "cannot give" mean "is unable to give" in the sense that there is "an impossibility of giving" the buyer notice that the separate title requirements had been met.[20]

(f) So, the seller can terminate the contract under cl 8.3 if it is not able to meet the separate title requirements before the sunset date.

(g) The seller was aware that the separate title requirements had been met before the sunset date.

(h) It followed that the seller was not able to terminate the contract under cl 8.3 more than four months later on 13 April 2023.

[17] The seller submits for a contrary construction of the clause:

(a) The seller is not obliged to give the buyer notice under cl 8.1 until the seller is satisfied the pre-settlement requirements can be completed within 14 days.

(b) If the seller is not satisfied that the pre-settlement requirements can be met within 14 days, the seller cannot be compelled to give a notice under cl 8.1.

(c) The reference to "such notice" in cl 8.3 is a reference to a notice under cl 8.2, not a notice under cl 8.1. That cl 8.2 notice reflects a statutory prohibition on requiring a buyer to complete settlement on fewer than 14 days' notice.[21] There is a range of valid reasons, other than impossibility, for not serving such a notice.

(d) The cl 8.2 notice is different in character from a cl 8.1 notice because it also deals with any changes to an established Scheme as well as the initial establishment of the Scheme. So, the first sentence in cl 8.1 is "only indirectly relevant" to cl 8.3.

(e) In the context of cl 8.2, the word "cannot" in cl 8.3 is not limited to "a situation of impossibility". It "naturally operates" on "any situation where there is a lawful impediment" to serving or "any valid reason" not to serve "a notice under clause 8.2", including "because [the seller] is not yet satisfied that it can perform its obligations on settlement."

(f) As the seller could not be compelled to give the buyer a notice under cl 8.1 before the sunset date, the Seller could end the contract under cl 8.3, even months after the sunset date.

Conclusion on ground 1

[18] The primary judge's conclusion should not be disturbed.

[19] Her Honour's approach is an objective reading of the text of cl 8, in the context of the whole of the contract. A reasonable businessperson would have understood the provisions to have that meaning in the circumstances of a purchase of two proposed lots off the plan with a lengthy anticipated construction schedule.

[20] The seller's reading of "such notice" in cl 8.3 as being confined to an "advice by notice" in cl 8.2 is awkward and unlikely. By cl 8.2, the parties agreed that the

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20 Reasons, [32] (citing the Oxford English Dictionary Online).

21 BCCMA, s 212.

completion date (and settlement) could not be earlier than 14 days after the seller gave the notice required by cl 8.1. The clause was unnecessary, given the agreed definition of completion date in cl 1.1, and the statutory provision on which it is based. To the extent it matters, cl 8.2 was for the benefit of the buyer, confirming that it would have at least 14 days between the seller's notice under cl 8.1 and the completion date. The "notice" in cl 8.2 is not materially different from the "notice" in cl 8.1; so, the different meanings the seller seeks to draw from each clause are not justified.

[21] The parties' agreement in cl 8.3 differs from the statutory right to terminate given to the buyer,[22] which is enlivened if "the seller has not settled the contract" before the sunset date.

[22] Her Honour's construction of cl 8.3 within cl 8 is consistent with the commercial purpose of allowing the seller 5.5 years (or up to 6 years[23]) to meet the separate title requirements, failing which either party could terminate the contract. It also serves the commercial purpose of providing certainty that, once the separate title requirements are met, neither party can terminate the contract under cl 8.3.

[23] It works with other provisions of the contract, including the definition of completion date in cl 1.1 and cl 7, the effect of which is that, after the seller gives the notice under cl 8.1, if a certificate of occupancy[24] has not issued for the lots, then the completion date is postponed until three days after the certificate is issued. In these provisions, the parties contemplated a cl 8.1 notice being given before a certificate of occupancy having issued. They were for the benefit of the seller, allowing the seller to avoid the adverse consequences of a failure to perform its contractual and legal obligations by the completion date.

[24] Had the parties intended that the word "cannot" were to mean "need not", it would have been simple for them to use the same expression as they used in the second sentence in cl 8.1. They did not.

[25] The seller's construction would tend to render the seller's performance optional (or voluntary) if, after separate title requirements are met, the seller is not satisfied the pre-settlement requirements will be completed within 14 days. The parties agreed on many express circumstances in which the seller could terminate the contract unilaterally. Construed as a whole, the contract does not evidence an intention to create another such circumstance by cl 8.1, cl 8.2 and cl 8.3.

[26] On or about 28 October 2022, the Seller caused the Plan for the building to be registered, the CMS to be recorded and the Scheme to be established. On or about 14 November 2022, the seller caused the registrar to issue separate titles for lots on

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22 BCCMA, s 217B.

23 By cl 8.4, the parties agreed that the Seller could extend the sunset date for the contract by the length of any delay in registering the Plan or CMS or completing the building for any of a wide range of reasons, including anything beyond the seller's control. The seller could extend the sunset date more than once. The seller could not extend the sunset date further than six months in total (i.e. to 30 June 2023). This invoked a separate architect's certification process under cl 8.5.

24 A certificate of classification is the former name for a certificate of occupancy. A person must not occupy or use part of a building, such as the lots, without reasonable excuse, if a certifier has not given written consent to the occupation of the part of the building before the building has been "substantially completed". See: *Building Act 1974* (Qld), ss 101-103, 114.

the Plan, including the lots. About this time, the seller became aware that the separate title requirements had been met.

[27] By 8 December 2022, 24 days after the last of the separate title requirements were met, the seller completed the sale of two other lots created in the same way as the lots.

[28] The sunset date was 30 December 2022. There was no dispute that, before the sunset date, the Seller became aware that the separate title requirements had been satisfied.

[29] It follows that, on 13 April 2023, when the seller gave the buyer notice purporting to terminate the contract under cl 8.3, the seller had no right to do so and the purported termination notice was of no legal effect.

The second ground of appeal: cl 13.1(c)

[30] The appellant advances an alternative ground for termination of the contract under cl 13.1(c).

[31] By cl 13, the parties agreed:

> "13.1 The Seller may terminate the Contract by written notice to the Buyer if:
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> (a) any Approval that is required is not given, is withdrawn or changed or is subject to a condition that the Seller in its discretion decides is unsatisfactory or is unable or unwilling to comply with;
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> (b) the Council refuses to seal the Plan or endorse the CMS;
>
> (c) at any time the Seller forms the opinion that clause 8.3 will apply or the Seller determines it is uneconomical for the Seller to proceed and complete construction of the Building;
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> (d) a Financier Event occurs and the Buyer does not enter into a Replacement Contract within 30 days after the Seller give the Buyer a Replacement Contract;
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> (e) being a natural person, the Buyer dies, becomes bankrupt, becomes of unsound mind or becomes sentenced to imprisonment;
>
> (f) being a company, the Buyer becomes subject to any form of external administration referred to in the Corporations Act (Cth) 2001,
>
> (g) the Building or Lot is destroyed or substantially damaged before the Completion Date;
>
> (h) the directors or principal shareholders of the Buyer nominated by the Seller fail or refuse to sign this Contract as Guarantor; or
>
> (i) for any reason the Contract is voidable at the option of the Buyer

> and the Deposit and any interest on it shall be refunded to the Buyer *and no party shall have any claim or action against the other*."
>
> (*emphasis* added).

[32] At trial, a director of the seller, Mr Cavallucci, gave evidence that on 13 April 2023, he instructed the seller's lawyers to terminate the contract on the basis that a certificate of occupancy had not been issued in respect of the lots, after forming the opinion that the seller was entitled to do so under cl 8.3 of the contract. The appellant contended that this engaged cl 13.1(c).

[33] By notice of contention, the respondents sought to uphold the primary judge's finding that clause 13.1(c) of the contract could not be relied upon to terminate the contract on an additional basis that the opinion held by the director of the appellant that cl 8.3 applied was not a reasonable opinion or otherwise consistent with the proper interpretation of cl 8.3.

[34] As said above, a notice under cl 8.3 is a notice that the separate title requirements have been satisfied. The primary judge reasoned that the terms "any time" and "will apply" indicate this section contemplates the circumstance of the seller forming the opinion, *prior to* the separate title requirements being met, that those requirements would not be met.

[35] The seller admitted in the defence that by 14 November 2022, the separate title requirements had been met. In view of the proper construction of cl 8.3 that has been upheld, it would be against logic and common sense, and contrary to the express admission by the seller, to conclude that, after the "separate title" requirements were met, the seller could form the view that the separate title requirements *will not* be met.

[36] Furthermore, cl 13.1 does not give the seller a unilateral power to determine the meaning of cl 8.3. The proper construction of cl 8.3 precedes any opinion formed by the seller as to whether it "will apply".

[37] It follows that the second ground of appeal also fails.

Final disposition

[38] The Court should order for the appeal to be dismissed with costs.

[39] **CROW J:** The reasons of Bradley JA and his Honour's relevant summary of the factual background and principles of construction to be applied allows me to state my reasons in a more concise form than would ordinarily be required.

The first ground of appeal: Clause 8.1 and 8.3:

[40] The first ground of appeal concerns the proper construction of clauses 8.1 and 8.3 of the contract which must be viewed in terms of the whole of the contract.

[41] In terms of the whole of the contract, clause 7, which deals with completion arrangements, is extremely important as it sets out the obligations required to be undertaken on completion day, which relevantly is that the buyer must pay, and the seller must give to the buyer vacant possession of the lot, the certificate of title to the lot and all keys and access devices and codes for the lot.

[42] Importantly, clause 7.5 of the completion arrangements provides:

> "Provision of the items referred to in clause 7.4 shall be sufficient performance to transfer and discharge all of the seller's right, title and interest to the lot, the chattels and the security deposit".

[43] Clause 7.5 draws a distinction between "the lot" and "the chattels". The primary obligation on completion under clause 7.4(a) is for the seller to give the buyer vacant possession of the lot.

[44] "Lot" is defined in clause 1 of the contract as "the lot described in the Reference Schedule and Disclosure Statement". The reference schedule describes the lot as proposed lots 2403 and 2404. The disclosure documents are defined in clause 1 of the contract to be "the documents accompanying this contract, including statements required under the act and/or information about the scheme".

[45] The documents accompanying the contract include the disclosure statement under section 213 of the *Body Corporate and Community Management Act* 1997, which in section 1, states the following:

> "(a) Disclosures:
>
> (i) the Lot is identified in Section 2;
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> (ii) a disclosure plan is included in Section 2; and
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> (iii) the date by which the Seller must settle the contract for the sale of the Lot is 5.5 years after the day the contract was entered into by the Buyer subject to the Seller's right to extend by up to 6 months due to delays."

[46] Section 2 of the attachments is entitled "EXPLANATION OF DEVELOPMENT WITH PLANS OF THE BUILDING WITH THE LOT MARKED AND SCHEDULE OF FINISHES". Section 2 also provides that the newly created lots will be subject to a Site Building Management Statement. The lots are identified with reference to survey plans and a schedule of finishes which relates to all items that may be expected in a unit complex.

[47] In my view, therefore, the proper conclusion is that the lot referred to in the contract is not simply the lot to be created under the *Land Title Act* or the Building Management Scheme, but goes further to include all of the items that have been contracted for in the reference schedule and disclosure documents (other than the chattels). The intent of the contract, therefore, is that on completion date under clause 7.4(a), the seller delivers to the buyer a fully completed lot as contracted for, with all of the items referred to in the schedule of finishes.

[48] Additionally, an important definition in clause 1.1 is the "completion date", which relevantly provides that:

> "Completion Date means the later of:
>
> (a) 14 days after the Seller gives written notice to the Buyer under clause 8; and
>
> (b) 30 days after the contract date,

> provided that if a certificate of classification for the Building (or that relevant part of the Building) has not issued by the dates in (a) and (b), then the Completion Date is postponed until three Business Days after the Seller notifies the Buyer that a certificate of classification has issued."

[49] The definition of completion date by reference to the written notice under clause 8 is important as it shows that the parties to the contract contemplated that there would be one written notice under clause 8. Accordingly, if a contract is not lawfully terminated by either party, the completion arrangements are triggered by a clause 8 settlement notice. In my view, that is why in clause 8.1 the verb "must" is used. That is, the seller is obliged to give a settlement notice. The question then that must be determined upon the proper construction of the contract is when must such settlement notice be "given".

[50] The first sentence of clause 8.1 of the contract requires that notice to be given after the seller becomes aware that the plan and CMS have been registered, the scheme has been established and that a separate title for the lot has been created.

[51] Importantly, the first sentence of clause 8.1 does not state that such written settlement notice must be given immediately after those things occur. In my view, the proper interpretation of clause 8.1 is more readily seen from a reasonable business person's perspective by reading the first sentence in clause 8.1, with the second sentence in clause 8.1, which provides that the settlement notice which must be given but cannot be given until after the plan and the CMS have been registered and the scheme has been established and the separate title for the lot has been created, but must be given only after all of the obligations of the seller have been met.

[52] This is expressly set out in the second sentence of clause 8.1 as follows:

> "The seller need not give the notice under this clause until the Seller is satisfied that all obligations required to be performed by the Seller under this contract or at law on or before settlement will be completed within 14 days of the notice being given to the Buyer". (my underlining).

[53] An important requirement at law is the obligation placed upon a building owner pursuant to section 114(3) of the *Building Act* 1975 (Qld). Section 114(3) of the *Building Act* provides that it is an offence for an owner without reasonable excuse to fail to ensure a building is not occupied or used by someone until a certificate of classification (or certificate of occupancy) has been given for the building.

[54] As may be observed by sections 101 and 102 of the *Building Act*, a building certifier is obliged to provide a certificate of classification when the building has been substantially completed. Section 101 has an expansive definition of when a building is substantially completed, and that definition of substantially completed relates to very basic items such as water areas being waterproof, water being connected, sanitary installations being installed, plumbing certificates being issued, electricity being supplied, fire installations being operational and access being made safe. The certificate of classification for the building, therefore, may issue well before a building is nearing completion, and therefore well before the finishes in the schedule

of finishes are affixed. Furthermore the chattels could not practically be installed in the unit prior to the finishes.

[55] Reasonable businesspersons interpreting the contract would be fully aware of this and its effect upon the three business day delay in the completion date as provided in the definition at clause 1.1 of the contract.

[56] Whilst the definition of completion date is not made referable to the date that a certificate of classification issues, it is made referrable to the date that the seller gives its section 8.3 notice to the buyer and, it seems to me, that a seller acting honestly and reasonably could not simply delay a completion date by withholding or failing to notify a buyer of the certificate of classification having been issued.

[57] The interpretation, therefore, to be in the contemplation of reasonable businesspersons is that the settlement notice under clause 8 ought only be given when the seller has done all that is required to meet its obligations under the contract at the completion date, as provided in clause 7.

[58] There is also a comity of the 14-day period in the definition of completion date in clause 1.1 and clauses 8.1 and 8.2. In this context, it seems to me that the use of the verb "must" in clause 8.1, the words "need not" in clause 8.1, and the verb "cannot" in clause 8.3 can be read together to discern the intention of the parties in entering into the contract.

[59] It seems to me that reasonable businesspersons would have understood that there can only be one written settlement notice under clause 8, and that it is required to be given by the seller, but only when the seller has done all that is required to meet its obligations under the contract and at law, to be in a position to meet its completion date arrangement obligations in clause 7.4.

[60] It is in this context that the verb "cannot" in clause 8.3 ought to be construed as "cannot because the seller is unable to meet its obligations in clause 7.4". That is, clause 8.1 requires the notice to be given by the seller when the seller is ready to settle, and not before the seller, acting reasonably and honestly, is ready to settle. Any other interpretation of "cannot" in clause 8.3 would require a seller to provide a settlement notice at a time when the seller was not ready to settle, that is, when the lot was not complete in all respects. This would have the unfortunate and surely unintended consequence that the buyer would be forced to pay the entirety of the settlement sum for an incomplete unit, and the seller would be entitled to take the entirety of the settlement sum including adjustments without meeting its contractual obligations, thus exposing the seller to an action for damages for breach of contract. Furthermore, the buyer would be punished if it did not pay on the settlement date all the moneys payable under the contract with interest at the rate of 20% under clause 14.5.

[61] As those are important obligations imposed on the seller under the contract, I would conclude in terms of clause 8.1, that the seller is obliged to give the notice but not until the seller is in a position to complete all of its obligations under the contract or at law and as expressly provided by clause 8.1, either on or before settlement. It seems to me that the proper interpretation of the verb "cannot" in clause 8.3 then relates to the seller's obligation in clause 8.1 to meet all of its obligations under the

contract. As such, notice need not be given until that occurs, but must be given when that occurs.

[62] In the present case, on the facts it was plain that the seller could not give such notice within the sunset date of 5.5 years after the contract date, and that enlivened under clause 8.3 a right in the seller to terminate the contract. I would conclude that the seller's termination was lawful and that the appeal ought to be allowed.

The second ground of appeal; Clause 13.1(c):

[63] I agree with the primary judge's analysis of clause 13.1(c) of the contract and that it operates prospectively. That is, at any point in time prior to 5.5 years from the date of the contract, one of the extensive rights provided to the appellant as the seller is to terminate the contract if the seller honestly and reasonably opines that clause 8.3 will apply or the seller determines it is uneconomical to proceed and complete construction of the building.

[64] The subject matter of clause 13.1(c) is the possible circumstance where the building cannot be completed in a timely manner, nor economically, and provides an avenue for the seller to escape its obligations and refund the deposit to the buyer. Clause 13.1 (c) directs itself to clause 8.3, which sets a time frame of 5.5 years from the date of the contract as the sunset date or the slightly extended period of six years if clause 8.4 is engaged. At the sunset date, be it 5.5 years or 6 years as extended by clause 8.4, the seller would know whether it could complete the contract, and there would be no need for the seller to form an opinion upon that matter. The effect of the first part of clause 13.1(c) is that if the seller honestly and reasonably forms an opinion prior to the 5.5 year (or 6 year) sunset clause timeframe that the seller cannot complete, the seller may terminate the contract. The primary judge, in my view, was right to come to that conclusion.

Conclusion:

[65] I agree with the orders proposed by Hindman J.

[66] **HINDMAN J:** I have read the reasons of Bradley JA but have formed a different opinion of the proper construction of the contract relevant to ground 1 of the appeal. I agree with Crow J that the appeal should be allowed but come to that conclusion for different reasons.

[67] Ground 1 of the appeal turns on whether, for the purposes of the contract, the word "cannot" in cl 8.3 means a literal impossibility or inability (as contended for by the buyer) or something less than that, such as a mere practical inability or something no reasonable businessperson would do (as contended for by the seller). Whilst I consider the construction issue is finely balanced, I prefer the seller's construction over the buyer's. I would uphold the Seller's appeal in respect of ground 1.

[68] I adopt Bradley JA's summaries of the contract and its legal environment, the grounds of appeal and the submissions made by the parties. The relevant legal principles applicable to the construction of the contract have never been in issue and are well known.

A brief summary of the competing contentions

[69] The primary judge's and buyer's construction of the cl 8.3 termination rights was that cl 8.3 does not permit the seller to terminate where the seller was able to, in a strict sense, give the cl 8.1 notice before the sunset date but chose not to do so under the second sentence of cl 8.1. The seller becoming aware that the separate title conditions had been met was said to immediately extinguish the termination rights in cl 8.3. The buyer contended that the word "cannot" in cl 8.3 means a literal impossibility or inability to give the cl 8.1 notice, which necessarily can only exist before the seller becomes aware that the separate title conditions have been met.

[70] The seller's interpretation was that the termination rights in cl 8.3 subsist until both:

(a) the seller becomes aware that the separate title conditions are met; and

(b) the seller is satisfied that all its pre-settlement obligations under the contract and at law would be completed within 14 days of the cl 8.1 notice.

[71] The seller contended that the seller's "satisfaction" under cl 8.1 is qualified by an implied obligation to act honestly, reasonably and without hindering the fulfilment of the purpose of the express conditions.[25] The word "cannot" was said to mean an inability only in a real, practical or commercial sense. Because the cl 8.1 notice triggers settlement of the contract within 14 days,[26] the Seller said it cannot practically or sensibly give the cl 8.1 notice until it is satisfied that it could complete all its obligations within 14 days.

The relevant text and its context

[72] The starting point is the text, which must be construed in context.[27] The key parts of the clauses are the words "cannot" and "such notice".

"Cannot"

[73] There are many meanings of the word "cannot". At one end of the spectrum sits a "literal impossibility" and at the other sits "not feeling inclined to". Where on that spectrum the meaning of that word in this contract sits depends on context and purpose. Absent authority to the contrary, I would not conclude there is an "ordinary" meaning of the word "cannot".

[74] The buyer advances a construction of cl 8.1 to the effect that the first sentence (specifically the word "must") creates an obligation when or upon the seller becoming aware of the separate title conditions having been met. The second sentence is then said to provide the seller the ability to delay performing that subsisting obligation to give that notice. The primary judge reasoned similarly, finding that the existence of a mandatory requirement in the first sentence is not negated or removed by the second sentence because the two sentences form a single clause; rather, the second sentence

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25 Citing *Meehan v Jones* (1982) 149 CLR 571 at 589-590 and *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at [36].

26 See cl 1.1 ('Completion Date'). The 14-day period is subject to the issue of a statutorily defined certificate of completion, which, importantly, is far from actual completion of the building and particular unit: *Building Act 1975* (Qld) ss. 100-102.

27 Contextual considerations include the rest of the contract and particularly cl 8, the disclosure statement and the legislative landscape.

merely gave the seller a right to delay.[28] Her Honour considered this supported the buyer's overall construction of the clause.

[75] The seller's interpretation is that the second sentence of cl 8.1 provides an exception to the first sentence rather than merely a right to delay a subsisting underlying obligation. This would mean that the obligation only arises when that exception drops away, that is, when the seller becomes satisfied it will complete its obligations within 14 days.

[76] In my view, a textual interpretation of cl 8.1 indicates the buyer's construction is incorrect and the Seller's construction is correct for three reasons.

[77] First, the buyer's construction is somewhat artificial. As the Seller submits, a person cannot (in the sense of a literal impossibility) at the same time be in a position where they are obliged to do something and also need not do that same thing. "Need not" is defined by reference to the word "need". It means a lack of necessity or obligation or requirement.[29] Therefore, it is synonymous with "is not obliged to", and one cannot concurrently be obliged to and not obliged to do something.[30] Saying that there is an underlying "obligation" that can be delayed until some point in time is an artificial use of the word "obligation". An obligation arises when all its conditions precedent are satisfied (here, that is the second sentence of cl 8.1).

[78] Second, whilst it is true that the word "until" is used in the second sentence, if I am correct that "need not" is read as synonymous with "is not obliged to", the sentence would instead read: "The Seller is not obliged to give the notice under this clause until the Seller is satisfied that all obligations …".

[79] Third, the first sentence uses the word "after", not "when" or "upon". It says only that the obligation arises at some point after the separate title conditions are met. This supports construing the second sentence as an exception or a condition precedent rather than merely a right to delay.

[80] It is important to pause here to note that the above construction of cl 8.1 requires an implied term to the effect that the Seller must act honestly, reasonably and without hindering the fulfilment of the purpose of the express conditions. Otherwise, the seller would indeed have an "untrammelled discretion" to decide when it is "satisfied", as argued by the buyer. However, as submitted by the seller, such an implied term is common where a term provides for a party's "satisfaction".[31] The buyer did not make submissions to the contrary. Such a term is appropriately implied here to give the contract business efficacy.

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28 Reasons at [31].

29 *Macquarie Dictionary* (Macquarie, 2023, 9th ed) vol 2 at 1033; *Shorter Oxford English Dictionary* (Oxford University Press, 2007, 6th ed) vol 2 at 1093; *Australian Oxford Dictionary* (Oxford University Press, 2004, 2nd ed, online) 'need'; *Macquarie Dictionary Online* <https://app-macquariedictionary-com-au.ezproxy-az.sclqld.org.au/?search_word_type=dictionary&word=need>; *Cambridge Dictionary Online* <https://dictionary.cambridge.org/grammar/british-grammar/need>.

30 This is predicated on the word "must" also meaning "is obliged to", which does not seem to be contested between the parties, and with which I agree.

31 Citing *Meehan v Jones* (1982) 149 CLR 571 at 589-590 and *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at [36].

[81] It was raised that the seller's interpretation gave rise to the impracticality of the buyer needing to know when the seller is satisfied or not under the second sentence of cl 8.1. However, that difficulty is not as great as contended (because of the implied term set out above) and does not indicate a different interpretation than the one set out above. The buyer would know when the seller is able to be satisfied that completion would occur within 14 days by looking at the circumstances in question objectively and forming that opinion. Contractual obligations required to be performed by the Seller at or before settlement would include those matters mentioned in cl 7 of the contract.

[82] Therefore, I conclude that the buyer's submission that cl 8.1 creates an obligation merely when the first sentence is satisfied, even if the second sentence is not, is wrong. The second sentence of cl 8.1 is, in a way, a condition precedent to the obligation to give a notice arising.

[83] The buyer's submission is that the word "cannot" should not be able to refer to a time when the seller is in fact under an obligation. However, my conclusion as to the absence of any obligation to issue a cl 8.1 notice without the required satisfaction cuts across that submission. I agree with the buyer's conclusion that the existence of an obligation (under cl 8.1) informs the meaning of "cannot", but the fact that the obligation only arises when both sentences of cl 8.1 are met is in my view a factor in support of the seller.

"Such notice"

[84] The question to here be considered is the meaning of "such notice" in cl 8.3 and to what that refers. Issues subsidiary are:

(a) whether the notice/s referred to in cl 8.1 and 8.2 are one and the same (conclusion: yes);

(b) if they are different, whether "such notice" refers to the cl 8.1 or 8.2 notice (conclusion: unnecessary to consider given conclusion on (a));

(c) the implications of the meaning of the defined term, "completion date", that is defined by reference to "written notice … under clause 8".[32]

[85] The primary judge held that the words "such notice" are "a reference to the notice required to be given under the first sentence of clause 8.1".[33] The seller submits that "such notice" refers solely to the cl 8.2 notice and proffers several flow-on effects to support its contended effect of cl 8.3. The buyer refutes this and submits the words "such notice" are irrelevant to interpreting the clause.

[86] Clause 8.2 in part appears to correspond to part of cl 8.1 and in part reflects s. 212(2) of the *Body Corporate and Community Management Act 1997* (Qld) (BCCMA). Clause 8.2 provides:

> "The Completion Date must not be (and settlement must not take place) earlier than 14 days after the Seller gives advice by notice to the Buyer of the registration of the Plan, recording of the CMS and that the Scheme has been established or changed."

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32 Clause 1.1 ('Completion Date').

33 Reasons at [32].

[87] Section 212(2) provides that the contract is taken to include a term providing that "settlement must not take place earlier than 14 days after the seller gives advice to the Buyer that the scheme has been established or changed". None of s. 212(2) corresponds to the part of cl 8.2 concerning "registration of the Plan, [and] recording of the CMS".

[88] Clause 8.2 also appears to partially reflect cl 8.1 ("… notice … that the Scheme has been established"). Note cl 8.1 does not include the words "or changed". The part of cl 8.2 referring to the "registration of the Plan" and "recording of the CMS" also appears to correspond to part of cl 8.1 ("… notice … that the Plan and CMS have registered"). However, I note that none of cl 8.2 corresponds to the part of cl 8.1 that refers to "notice … that a separate title for the Lot has been created".

[89] On the whole, cl 8.2 appears to be a Frankenstein of the entirety of s. 212(2) of the BCCMA and part of cl 8.1.

[90] It is important to note that the completion date of the contract (at which settlement and the transfer of title occurs)[34] relevantly means "14 days after the Seller gives written notice to the Buyer under clause 8" (if necessary, subject to an extension until three business days after the seller notifies the buyer that a certificate of classification has issued).[35] This contemplates only a single cl 8 notice, not separate cl 8.1 and 8.2 notices.

[91] In light of the above, my view is that the best construction of this somewhat confusing drafting is that there is only a single notice under cl 8, and that notice sets out all the above matters (ie, the matters in cl 8.1 as well as the Scheme being changed). Consequently, the words "such notice" in cl 8.3 should similarly be understood as referring to that single notice.

[92] The implication of this conclusion is not that the buyer's construction is right, but merely that this is not a factor in favour of the seller's construction.

Clauses 8.4 and 9

[93] Another (although minor) textual factor supporting the seller's construction is that cl 8.4 expressly contemplates extensions for delays in completing the Building, which corresponds to the second sentence of cl 8.1 rather than the first.

[94] Clause 8.4 provides (emphasis added):

> "The Seller may at any time and more than once extend the date in sub-clause 8.3 by the length of any delay or delays in registering the Plan or CMS **or completing the Building** for any of the following reasons: [lists (a) through (g)] … but the date in sub-clause 8.3 may not be extended any further than 6 months after the Date referred to in clause 8.3, at which time the Contract shall automatically be at an end and the Deposit and interest earned on the Deposit shall be refunded to the Buyer."

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34 Clause 7.

35 Clause 1.1 ('Completion Date') (emphasis added).

[95] Many of the factors listed in sub-cl (a) to (g) are concerned with construction issues, not title issues.

[96] Clause 9.1 provides that "[s]ubject to the terms of this Contract the Seller shall complete the Building and the Lot substantially in accordance with the Disclosure Plan and Specifications".

[97] These points are important because the seller submits that one of the primary judge's errors was her Honour's finding that "[c]lause 8 is not concerned with construction, or completion, of the Building. That is the subject of clause 9".[36] The above features of cl 8.4 and cl 9 indicate this is not necessarily the case.

The disclosure statement and its legislative context

[98] Clause 1.1 provides that the disclosure statement forms part of the contract. No hierarchy between it and the other parts of the contract is set out. The disclosure statement provides:[37]

> "the date by which the Seller must settle the contract for the sale of the Lot is 5.5 years after the day the contract was entered into by the Buyer subject to the Seller's right to extend by up to 6 months due to delays."[38]

[99] The clause reflects s. 213 of the BCCMA, which states that the disclosure statement must "state the date by which the seller must settle the contract for the sale of the proposed lot as provided under section 217B". Section 217B relevantly provides that the buyer may terminate the contract if, other than because of the buyer's default, the seller has not settled the contract within 5.5 years of the contract date. It is uncontroversial that this provision indicates settlement must occur within a particular period of time.

[100] The seller submits that the similarity between this provision and the operation of cl 8 (the same period of time as in cl 8.3 and the reference to the extension rights in cl 8.4) supports its construction of the word "cannot".[39] The argument proceeds as follows. First, the legislation and provision of the disclosure statement both concern settlement (which seems undisputed). Second, there is a link between the legislation and disclosure statement on the one hand and cl 8 on the other (which is disputed). Therefore, such a link indicates that cl 8 also concerns settlement (and thus the seller's construction), rather than certainty as to what the buyer says are the fundamental aspects of the contract (the separate title requirements).[40] I agree with the seller's argument and its logic. This also flows on to the purpose of cl 8.

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36 Reasons at [29].

37 At section 1(a)(iii).

38 Whilst under the BCCMA s. 217B the buyer's termination rights arise immediately at 5.5 years and there is no possibility of a six-month extension, the contract provides differently. The consequences of that, if any, are not relevant for present purposes.

39 Noting the small discrepancy that the notice can be given within the last 14 days of the 5.5-year period such that settlement actually occurs outside of the 5.5-year period (and also subject to extensions to the completion date if the certificate of classification has not issued: cl 1.1).

40 See primary judgment at [29].

The purpose

[101] The primary judge found at [29] of the Reasons that the purpose of cl 8 was:

> "… to give both parties certainty about the ability of the seller to perform the contract in those fundamental respects [(being the separate title requirements)] within an agreed time frame (5.5 years, plus six months if the right to extend the time under clause 8.4 is exercised). Clause 8 is not concerned with construction, or completion, of the Building. That is the subject of clause 9."

[102] The buyer agreed with this articulation of purpose. The buyer submitted further that the purpose of cl 8 is not simply to deal with duration of the contract but also to provide for rights of termination at a certain and definite time.

[103] The seller submits that the purpose of cl 8.3 is to build upon the statutory requirements regarding settlement by giving termination rights to the seller which are reciprocal to the buyer's statutory termination rights;[41] and to deal with the issue of indefinite contractual duration. Regarding that latter point, the submission is that, if the seller did not gain reciprocal termination rights after 5.5 years, the contract could continue indefinitely.

[104] I prefer the seller's articulation of the purpose and there are several issues with the buyer's interpretation.

[105] First, cl 8 is concerned with construction and completion of the building given it is what triggers completion.[42] In addition, as set out above, cl 8.4 is concerned with construction of the building. In this way, in my view the part of cl 8.1 concerning the separate title requirements was unduly elevated in the primary judgment in the interpretation of cl 8 as a whole.

[106] Second, general considerations of how a reasonable businessperson would interpret the clause support the seller's construction.

[107] The seller is right that the word "cannot" has a spectrum of possible meanings, and the primary judge chose a meaning at an end of that spectrum. Without some other indication that the meaning at an end of the spectrum was the intended meaning, a more tempered meaning in the middle of the spectrum is more probably what a reasonable businessperson would interpret that word to mean.

[108] Construing the word "cannot" in a commercial, business-like way, the word must import with it some kind of actual, practical ability to do something beyond a mere bare ability or physical possibility regardless of the consequences. The right to terminate in cl 8.3 should not be linked to something that is, as the seller strongly put it, commercial lunacy, that is, serving a notice which triggers settlement in 14 days when there is no prospect of the seller being able to complete the building and actually settle the contract in that time period. The right must be linked to something that the seller can, in a practical sense, do. No reasonable businessperson would construe it by reference to a theoretical ability that could never practically be carried out.

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41 See BCCMA s. 217B.

42 See cl 1.1 'completion date' and its reference to notice under cl 8.

[109] In a circumstance where the relevant lot will not be completed within 14 days, any reasonable seller would read cl 8.3 to the effect of: "I cannot give the cl 8.1 notice because that would trigger settlement in 14 days, in which case I would be in breach". No reasonable businessperson would think that they "can" issue the cl 8.1 notice in circumstances where doing so would put them in a position of breach.

[110] The buyer submits that this concern with actual feasibility is misplaced because its interpretation of cl 8.3 does not mean that the seller is obliged to give the cl 8.1 notice and thereby commit an act of "commercial lunacy". But that is not the argument put against the buyer. Rather, the argument is that no reasonable businessperson would construe that clause by reference to something practically infeasible.

[111] Further, if the parties wanted to give the parties the right to end the contract only where the separate title requirements had not been met within 5.5 years (as advocated for by the buyer), the parties could have done that in very simple language. Setting cl 8 out in this more complicated way indicates the clause is intended to have a more complicated (or nuanced) effect.

[112] Third, whilst the seller's termination letter referred to the lack of a certificate of classification, that is not instrumental to this case. It is true that this certificate is a step along the way to completing the building and the particular lot. However, reading the statutory definition of that certificate, it becomes clear that the certificate being issued does not mean the second sentence of cl 8.1 has been satisfied.[43] Many of the steps required for completion, as set out in the description of the lot in the disclosure statement, might remain incomplete despite the certificate having been issued. This is important because the 14-day completion period that is triggered by the cl 8 notice is only extended if the certificate is outstanding.[44] What seems to be contemplated by this extension is the circumstance where the lot is complete but the administrative step of obtaining the certificate is not. Therefore, this extension does not remedy the buyer's uncommercial interpretation.

[113] Fourth, whilst there is a valid concern about the seller's interpretation resulting in a wide discretion, that discretion is more limited than put forward by the buyer.

[114] The primary judge held at [34]:

> "To construe 'cannot' in clause 8.3 as extending to the circumstance where the seller, unilaterally, has chosen to delay giving the notice, even though the fundamental separate title conditions which are the focus of clause 8 have been met, does not produce a commercial result. Such a construction gives an untrammelled and extremely wide power to the seller to end the contract, and deprive the buyer of the benefit of their bargain, which does not make commercial sense. I do not accept that a reasonable businessperson, in the position of the parties, would have understood clause 8.3 to permit the seller to end the contract in circumstances where the separate title conditions had all been met prior to the sunset date, but the seller had chosen, unilaterally, to delay giving the notice required by clause 8.1."

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43 *Building Act 1975* (Qld) ss. 100-102.

44 Clause 1.1 ('Completion Date').

[115] As set out above, a term should be implied into the contract to limit the seller's discretion in this respect. The effect of that limitation is that the seller is not unilaterally choosing to delay giving the notice for any reason, but rather that the obligation does not arise until the seller, acting reasonably, is satisfied that it will be able to complete all its contractual obligations within 14 days of issuing the notice.

Conclusion

[116] For the above reasons, I prefer the seller's construction of cl 8.3 and would allow the appeal on the basis of ground 1.

[117] It is unnecessary then to go on to consider ground 2. For the sake of completeness, in respect of ground 2, the relevant part of clause 13.1(c) on its proper construction, despite the use of the words "at any time", contemplates an exercise of the power to terminate prospectively. That is, before the 5.5 year (or extended) period referred to in cl 8.3 has come to pass. The clause has no application after that period has passed and so in this case could not be a proper basis for the termination of the contract.

[118] I would make orders in the following terms:

1. The appeal is allowed.
2. Paragraph 1 of the orders made on 12 June 2025, the first paragraph of the judgment dated 12 June 2025 and the whole of the order made on 23 June 2025 are set aside.
3. In lieu thereof:
    a. Save for the declaration made in the second paragraph of the judgment dated 12 June 2025, the plaintiff's claim is dismissed;
    b. The plaintiff/first respondent is to pay the defendant/appellant's costs of the claim and the appeal on the standard basis;
    c. No order as to costs in respect of the counterclaim.
4. The parties have until 11 am on 30 October 2026 to advise the court if they wish the proceeding to be listed for argument in respect of the orders made above, in which event the matter is listed for hearing on 30 October 2026 at 12 pm.