Conveyancing and property

Editor: Peter Butt

COASTAL PROTECTION AND CLIMATE CHANGE

Growing concerns about the impact of climate change has led to a focus in Australia at Commonwealth, State and local government levels about the dangers to property owners around the Australian coastline as a result of sea level rises. The behaviour of certain coastal councils in advocating a policy of "planned retreat" has already led to litigation and a focus on the right of private property owners to defend their properties from the inroads of the ocean.

One could be forgiven for thinking that this is a modern issue arising out of 21st century concerns about climate change. In fact, the Crown in England recognised a duty to protect the realm from the inroads of the sea from as early as the reign of Edward III (1327-1377), pre-dating any statute on this topic. The common law courts in England developed a parallel right for property owners to protect private property from the inroads of the sea. There is record of a decision in the Easter term of 1371 (the case cited as *Pasch*, 44 Edw III), which appears to be literally before the King (perhaps the institution known as the court of King's Bench). The order (in medieval Latin) may be translated as follows:

> The sheriff was ordered to distrain on AB and others on the ground that they repair faults in the sea-walls (wallias) adjoining their lands and if they are found not adequate, to distrain on all the tenants of those lands who have, or in some way could have, a protection, benefit, deliverance or loss by reason of the repair or non-repair of the aforesaid sea wall, in such a way that all of the aforesaid tenants should make contribution to the aforesaid AB and others for making and repairing those sea-walls in proportion to the size of their tenure.

This case was relied on by Lord Coke in 1609 in *Case of The Isle of Ely* (1609) 10 Co Rep 141a; 77 ER 1139. He described the 1371 authority as a "notable precedent". Lord Coke found that, at common law "the King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted" (at 141a; 1139). The common law courts interpreted this duty on the Crown to save and defend the realm as "an imperfect obligation" in the sense that it was not enforceable against the Crown other than by petition. The English courts saw the power of the Crown to erect a sea wall or embankment as protection against the sea as emanating from the Crown's prerogative for the general safety of the public and the defence of the realm (see, eg *Greenwich Board of Work v Maudslay* (1870) LR 5 QB 397). In *Isle of Ely* (at 142a; 1140), the court considered a commission issued by the King at common law, pre-dating any statute, which provided "for repairing sea-walls, dykes, channels, sewers, bridges, embankments and weirs in the necessary places and for doing so afresh (de novo) as often as and where this is necessary".

English statutes relating to defence against the sea date from as early as 1427. The courts found the statutes to be only regulatory of the common law position. The statutes empowered and required the Commissioners to carry out the Crown's obligations and to levy property owners for the cost of the work. By way of example, 23 Hen 8, c 5 (1531) noted that the Crown was to provide for the "Safety and Prefervation of our Realm of England" and required the Commissioners to cause "to be made, corrected, repaired, amended, put down or reformed … as case shall require" walls and other forms of protection. There were a variety of such statutes, including: 6 Hen 6, c 5 (1427); 18 Hen 6, c 10 (1439); 23 Hen 6, c 9 (1444); 12 Edw 4, c 6 (1472); 4 Hen 7 (1488); 6 Hen 8, c 10 (1514).

The way the Commissioners allocated these charges for protection under the various Acts came before the courts on more than one occasion. An examination of those authorities reveals that the courts recognised that protection from encroachments by the sea was in the interests of the general public and not exclusively for the benefit of frontagers to the sea. As long ago as 1598, *Rooke's Case* (1598) 5 Co Rep 99b at 99b; 77 ER 209 at 209 held:

> the Commissioners ought to tax all who are in danger of being damaged by the not repairing equally, and not him who has the land next adjoining to the river only … And if the law should be otherwise, inconvenience might follow. Perhaps the rage and force of the water might be so great, that the value of

> the land adjoining will not serve to make the banks, etc and therefore the statute will have all who are in danger, and who are to receive benefit by the making of the banks, to be contributory.

It was held that the Commissioners ought to charge all who had land in danger and that this was one of the purposes of the statute. Were it not so, all the land might be "drowned before that one person only could repair the bank" (at 100b; 210). This was obviously a very different thing from throwing the whole burden on the ocean frontager owner and making that property owner solely liable for the costs of protection that could benefit a much wider area.

In *Greenwich* (at 401), Cockburn CJ referred to "the general commonwealth of the public at large" and stated that the power in the Crown arose "under that great prerogative authority for the protection and safety of the public". In *Isle of Ely* (at 143a; 1142), Lord Coke ruled that "none could be taxed towards the reparation etc but those who had prejudice, damage or disadvantage by the said nuisances or defaults and who might have benefit and profit by the reformation or removing of them". This duty or power of the Crown seems last to have been referred to in the English courts in the Privy Council's decision, *Attorney-General (Southern Nigeria) v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 620: "Further, so far as the Crown is concerned, it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been an entire accord not only with the right of the subject but this duty of the Crown."

In the High Court of Australia in *Melbourne Harbour Trust Commissioners v Colonial Sugar Refining Co Ltd* (1925) 36 CLR 230 at 294, Higgins J gave passing approval to the notion of the Crown's public duty to protect. The modern power of the Crown to protect can now be found in legislation passed in England and in Australian States. In fact, the Act made in the time of Henry VIII (23 Hen 8, c 5) was not repealed in the UK until 1930 on the passing of the *Land Drainage Act 1930* (UK) (with some saving provisions). The Crown's duty to exercise such powers is now subject to modern authorities which discuss the circumstances where the holder of a statutory power may come under a duty to exercise that power. It was most recently considered in Australia in *Roads & Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 168 LGERA 357; [2009] Aust Torts Reports 82-031. In addition to these rights and duties upon the Crown, the common law also recognised that every property owner had a right to protect his or her property from the inroads of the sea. In *R v Commissioner of Sewers for Pagham, Sussex* (1828) 8 B & C 356 at 361; 108 ER 1075 at 1077, Bayley J said: "It seems to me that every land owner exposed to the inroads of the sea has a right to protect himself and is justified in making and directing such works as are necessary for that purpose."

Governments and legislatures cannot ignore the fundamental right of property owners to protect their land from the sea. This is an ancient common law right, and must be seen as one of the rights in the "bundle" of rights that make up modern day ownership of land. It should guide decision makers and legislatures in formulating the response in the 21st century to the threat of sea level rises and the need to protect land from inundation or damage from the sea.

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(Research assistance from Lauren Austin and medieval Latin translation by Ian Paterson.)

PROTECTING VIEWS AND SOLAR ACCESS FROM NEIGHBOURING DEVELOPMENT

To what extent can property owners protect their views and access to sunshine when threatened by a proposed neighbouring development? These issues were explored in a recent case in the New South Wales Land and Environment Court, *Benevolent Society v Waverley Council* [2010] NSWLEC 1082 (Moore SC). Although each State and region has its own planning policies addressing these issues, readers might find a review of the New South Wales approach interesting. The case involved the Benevolent Society's proposed redevelopment of a site in Bondi, which included the heritage-listed "Scarba House". The redevelopment was to include the demolition of nearly all the existing structures on the site except Scarba House, and the construction of three new residential apartment blocks, each between five and 10 storeys high.

Moore SC confirmed the four-step approach taken by Roseth SC in *Tenacity Consulting v Warringah* (2004) 134 LGERA 23; [2004] NSWLEC 140. This requires, first, an assessment of the existing property's views which are to be affected. In this regard, water views and iconic views such as the Sydney Opera House are to be valued more highly than land views or non-iconic views. Secondly, one must consider from where in the property the views are enjoyed. Views enjoyed from the front of a property are more easily protected than views from the sides of a property. Thirdly, one must have regard to the extent of the impact of the proposed development. In this regard, Moore SC held that it was not useful to consider percentage losses; instead, a judgment should be made as to whether the loss of the view is, for example, "negligible", "moderate" or "devastating". Finally, an assessment should be made as to the reasonableness of the proposed development and whether a more sensitive design would have a lesser impact on the property.

Moore SC also partly overturned the planning principles regarding assessment of solar access that were outlined in *Parsonage v Ku-ring-gai* (2004) 139 LGERA 354; [2004] NSWLEC 347. Under *Parsonage*, for a vertical window to be "in sunlight", at least one-half of it had to enjoy the light, and this light had to strike it at a horizontal angle of 22.5 degrees or more. Moore SC held that this was not useful; instead an assessment should be made as to the proportion of the window in sunlight as well as the size of the window itself. For private open spaces, Moore SC held that the size of the open space and the amount receiving sunlight should be analysed. Moore SC confirmed the remaining solar access principles espoused in *Parsonage*. These are:

1. Solar access can more easily be protected in areas where development is less dense.
2. It is necessary to consider the amount of sunlight that would be lost under a new development proposal, as well as the sunlight retained.
3. Overshadowing due to poor design is not acceptable.
4. It is normally necessary to consider overshadowing from fences, roof overhangs and changes in level, but not overshadowing from vegetation.
5. Where the area is undergoing change, it is necessary to consider the likely impact on existing properties as well as future properties.

Benevolent Society is also interesting in its support of socially-minded projects. The proposed development was designed to provide housing for seniors and low income earners. Moore SC held that the social desirability of the project did constitute a relevant consideration in determining whether the proposal should be accepted. Further, Moore SC confirmed that the "amber light" approach should be adopted in New South Wales; this allows Commissioners to guide applicants as to amendments that would be needed in order for the proposal to be accepted. In this sense, the Land and Environment Court is acting as a facilitative body rather than merely accepting or refusing each application on its merits.

Elizabeth McGill
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WHAT CONSTITUTES TRESPASS TO LAND?

If a person occupies your property without your permission, are they necessarily a trespasser? And, if not immediately a trespasser, what steps must you take to render them a trespasser? These questions arose in *Islamic Association of Wanneroo (Inc) v Al-Hidayah Mosque (Inc) [No 2]* [2009] WASC 404 (Murphy J). The proceedings were the final instalment in a long-running dispute as to which entity was entitled to occupy certain land for the purpose of managing and occupying a mosque on the land. The plaintiff, an incorporated association, was formed for the purpose of promoting the Islamic faith by, inter alia, establishing and managing mosques. The State of Western Australia agreed to make the land available to the plaintiff for establishing a mosque in return for the payment of a nominal amount. Subsequently, the Hepburn Heights Mosque Building Committee (HHMBC) was established to manage the development and construction of the proposed mosque. Membership of the HHMBC comprised a wider Muslim community than the plaintiff, whose membership was limited to the Christmas Island Muslim Malay community in Perth.

Soon after the mosque was completed, conflict arose between representatives of HHMBC and the plaintiff over its management and occupation. Despite the plaintiff's protestations, representatives of HHMBC seized management of the mosque and later incorporated the defendant for the purpose of managing the mosque. The dispute "simmered" for a number of years while the plaintiff unsuccessfully attempted to resolve the argument through negotiation. The defendant, aware that the plaintiff was dissatisfied with its (the defendant's) control of management of the mosque, claimed that its authority to do so had been conferred at a community meeting convened by HHMBC and not by any authority given by the plaintiff. In early 2005, the plaintiff gave the defendant 21 days' notice to vacate the mosque, expiring 28 January 2005. The defendant did not respond. The plaintiff commenced proceedings and in January 2008, took possession of the mosque.

The plaintiff's proceedings alleged that the defendant had occupied the mosque without the plaintiff's consent. The defendant counterclaimed alleging that it was entitled to manage the mosque. Murphy J dismissed the defendant's counterclaim and found in favour of the plaintiff. Murphy J held that the defendant had not trespassed on the plaintiff's land from the date of its incorporation until January 2008, because the plaintiff had implied that the defendant could occupy and manage the mosque during this period. It was true, Murphy J noted that the plaintiff had not *expressly* authorised the defendant to manage the mosque during this time, but it took no steps to restrain the defendant from doing so.

However, Murphy J held that the defendant had trespassed on the plaintiff's land from 28 January 2005 (the date of expiry of the notice to vacate) and up until January 2008 when the defendant finally vacated the premises. The 2005 notice to vacate had put the defendant on notice that its implied permission to occupy the mosque had been terminated and consequently its occupation of the premises after 28 January 2008 rendered it a trespasser.

The case is a reminder that even issues as foundational as "what constitutes a trespass" turn on the particular facts. Here, it turned on the effect of an implied permission to be on the land for a stated purpose, and the later effective withdrawal of that permission.

Kate McCrossin
Solicitor

VENDOR REPRESENTATIONS BY SILENCE AS TO LAND CONTAMINATION: MISLEADING OR DECEPTIVE CONDUCT?

The recent decision in *Vitek v Estate Homes Pty Ltd* [2010] NSWSC 237 (Barrett J) considered whether a vendor's silence could constitute misleading or deceptive conduct under s 42 of the *Fair Trading Act 1987* (NSW). The decision confirms that silence will be misleading or deceptive "only if what was said and the context in which it was said gave rise to a reasonable expectation of disclosure of what was not said".

Mr and Mrs Vitek as vendors and Estate Homes as purchaser entered into a contract for the sale of a commercial property. As the vendors knew, the property had formerly been a petrol station (although the vendors had not used it as such). They also knew of the attendant possibility that it was contaminated. As required by vendor disclosure legislation, the vendors had attached to the contract a certificate from the local council showing the planning status of the land. (This certificate is known in New South Wales as a s 149 certificate; issued under *Environmental Planning and Assessment Act 1979* (NSW), s 149.) The vendors eventually terminated the contract for the purchaser's failure to complete in accordance with a notice to complete. When the vendors took proceedings, the purchaser cross-claimed that, by including a s 149 certificate in the contract, the vendors had represented (by silence) that the property was neither actually nor possibly contaminated, and that this representation was misleading or deceptive under s 42 of the *Fair Trading Act 1987* (NSW).

As Barrett J noted, the alleged misrepresentation was in substance a complaint of misconduct by half-truth. In essence, the purchaser was alleging that the s 149 certificate disclosed only part of what the vendors knew as to land contamination, and that the misleading or deceptive conduct lay in their failure to communicate the balance of their knowledge. Barrett J held that whether there is a

requirement to break silence must be determined by examining the whole of the circumstances in which the silence is maintained. To this end, he examined in turn the vendor disclosure regime, the vendors' knowledge, the purchaser's knowledge, and the credibility of the various persons involved. The s 149 certificate referred to contamination issues, by addressing certain prescribed matters under the *Contamination Land Management Act 1997* (NSW). Against each "Matter arising under the *Contamination Land Management Act 1997*" was written "No". However, after this statement the following note appeared:

> Note: Council has adopted by resolution a Development Control Plan (DCP) on contaminated land (adoption date 17/7/00) which may restrict the development of the land. The DCP is implemented when zoning or land use changes are proposed on land which has previously been used for certain purposes or land which has been remediated for specific use. Consideration of Council's adopted DCP and the implications of provisions under relevant State Legislation is warranted.

Barrett J held that, by way of this disclosure, the vendors had fully satisfied the statutory vendor disclosure requirements. The vendors knew that the land had formerly been a petrol station and were aware of the attendant possibility that the land was contaminated. Further (Barrett J found), the purchaser, by virtue of its sole director and shareholder, Mr Taheri, knew about the possible contamination of the land all along, and not merely post-exchange.

Barrett J considered *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 189 FLR 14; 215 ALR 625, where Hoeben J held that a lessor of a contaminated former airport had engaged in misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth). The lessor's fault lay in failing to disclose to the lessee that the land was contaminated, in circumstances where the lessor was aware of the lessee's intention to use the site for a school and where extensive discussions had occurred between the parties to identify the advantages of the site for the lessee's purposes. However, Barrett J distinguished the present case on the grounds that the vendors here had not engaged in extensive discussions with the purchaser about the advantages of the site for the purchaser's purposes. The vendors had done nothing to justify any higher expectation by the purchaser than the warranties given by the contract and the sale of land legislation. Thus, the vendors had not misled or deceived the purchaser as to the quality of the land.

This decision has consequences for both purchasers and vendors. For purchasers, it highlights the importance of comprehensive due diligence pre-exchange. For vendors, it highlights the need, whilst satisfying statutory disclosure obligations, not to make unintended representations as to the quality of the land. At common law, a vendor is obliged to disclose latent defects in title, but is not obliged to disclose defects in the quality of land: *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189. Vendors should be cautious of engaging in candid discussions with the purchaser as to the prospective use for the land, as these discussions may then give rise to an obligation to disclose actual or possible contamination.

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IS A PIPELINE A FIXTURE?

Epic Energy (WA) One Pty Ltd v Commissioner of State Revenue [2010] WASAT 37 considered whether a pipeline was a fixture for the purposes of the *Stamp Act 1921* (WA). The State Administration Tribunal ruled that, under the Act, a pipeline is properly classified as a fixture where a party holds a beneficial interest in the land on which the pipeline is placed.

The case centred around a 2004 transaction in which Epic Energy Pty Ltd acquired all the issued shares in two entities. As part of this transaction, Epic Energy acquired various pipeline licences held by the two entities. The pipelines, the subject of the licences, were located on numerous parcels of land over which the entities had varying interests; these ranged from easements and subleases, to no interest at all. The two entities lodged statements under the *Stamp Act* estimating as "nil" the unencumbered value of land in Western Australia to which they were entitled. However, the Commissioner assessed stamp duty on the transfer of shares on the basis that the pipelines constituted

"land" and that therefore the entities were landholders. Both entities were assessed for substantial duty. They challenged the assessment in the State Administrative Tribunal.

The relevant legislation was the (former) *Stamp Act*, specifically the landholder provisions of that Act. Under the Act, a change in the ownership of a landholder corporation attracted duty, and a corporation was a landholder if it was entitled to land in Western Australia with an unencumbered value exceeding (in effect) $1 million. The Act defined "land" as including a mining tenement, any estate or interest in land, and anything fixed to land, including anything the subject of an entitlement separate from the ownership of the land. The construction and operation of pipelines is governed by the *Petroleum Pipelines Act 1969* (WA), which prohibits the construction, alteration and operation of a pipeline without a licence. The licence regime requires the licence holder to have acquired an interest in the land on which the pipeline is to be placed, and provides that the pipeline remains the property of the licence holder.

The Tribunal first considered whether the pipelines in the areas where the applicants held easements constituted "land". It found that the easements conferred a right on the applicants to remain on the land for the purposes of the licence; this gave them a beneficial interest in land. Further, the definition of "land" under the *Stamp Act* included something fixed to land in which the applicants had less than a freehold interest. Thus, the pipelines were fixed to land for the purposes of the definition, and so formed part of the interest in land to which the applicants were entitled. This reasoning also applied to areas in which the applicants held interests other than easements, such as a sublease and a miscellaneous licence. The applicants, contending that the pipelines did not fall within the definition of "land", argued that the source of the rights to the pipelines came from the licences, rather than from the actual interests in the land. However, the Tribunal held that where a pipeline was fixed to land, it did not cease to be "land" merely because the source of the pipeline rights stemmed from something other than the interest in land.

The Tribunal then dealt with certain Crown land in which the applicants had no interests but on which pipelines were fixed. These areas were not the subject of any easements, leases or licences. The Tribunal noted that the definition of "land" under the *Stamp Act* included "anything fixed to *the* land". It held that the use of the definite article required that the pipeline be fixed to land to which an applicant was beneficially entitled. A pipeline would not constitute "land" for the purposes of the *Stamp Act* where it was fixed to land in which an applicant had no interest.

The Commissioner also presented an alternative argument that the pipelines themselves were "land". Drawing on ratings cases, he Commissioner argued that the pipelines were "land" because they occupied a portion of the earth. In considering this argument, the Tribunal reiterated its finding that the source of the ownership of the pipelines was the *Petroleum Pipelines Act* and not the title to the land on which the pipelines were fixed. Where the applicants did not have an interest in the land, the ownership of the pipelines was merely a statutory right; and this by itself did not amount to an interest in land, even though the pipelines passed through a substratum of earth.

Pipelines also ran across an area known as the Dampier to Bunbury Natural Gas Pipeline Access Corridor (Access Corridor). This was governed by the *Dampier to Bunbury Pipeline Act 1997* (WA) (DBP Act), under which, State corridor rights were classified as an interest in land. The Tribunal considered that it was unclear whether the particular rights conferred on the applicants fell within the classification of State corridor rights. However, it ruled that even if those rights did *not* fall within this classification, it followed from the *Interpretation Act 1984* (WA) that they still fell within the meaning of "estate in relation to land" and hence would constitute "land" for the purposes of the *Stamp Act*.

The DBP Act specifically stated that anything placed on the Access Corridor by a holder of rights did not become part of the land, regardless of whether it was in the nature of a fixture. The Tribunal considered that this section was designed to preserve the ownership of the pipelines with the holder of the rights. It noted that while the pipelines would not be "land" at common law as a result of the DBP Act, they would still fall within the definition of "land" under the *Stamp Act*, because the definition included anything fixed to land, regardless of its characterisation at common law or its ownership. The pipelines in the Access Corridor therefore were part of the land in which the applicants held a beneficial interest.

The *Duties Act 2008* (WA) now applies to transactions occurring after 1 July 2008. The definition of "land" no longer includes "anything fixed to the land, including anything that is or purports to be, the subject of an entitlement separate from the ownership of the land". Instead, the definition now includes a licence under the *Petroleum Pipelines Act* and "anything that is part of land as a fixture". Consequently, it would probably encompass the rights to the pipelines held by the applicants in this case; it would also probably extend to the pipelines which were on land in which the applicants had no interest. The removal of "the" before "land" in the new definition may further widen the scope of its application, as it no longer suggests that the party must have an interest in *the* land on which the item is fixed. However, regardless of the changes in the new Act, this case should continue to have importance for the classification of items as fixtures.

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LAW OF DEEDS REVISITED

The Queensland Supreme Court decision of *400 George Street (Qld) Pty Ltd v BG International Ltd* [2010] Q ConvR 54-731; [2010] QSC 66 (McMurdo J) is a timely reminder of the principles that govern what constitutes a deed, and the effect of entering into a deed.

In 2008 the landlords and developers (plaintiffs) of an office building, entered into lease negotiations with a prospective tenant (defendant). The defendant executed an agreement for lease and returned it to the plaintiffs for signature. However, the plaintiffs took a number of weeks to execute their counterparts, during which time the defendant purported to withdraw from the transaction. The plaintiffs sought declarations in the Supreme Court that, amongst other things, the defendant became bound upon executing the agreement as a deed and was therefore unable to withdraw from the transaction. The defendant submitted that the agreement was not a deed but rather a straightforward contract, which had not been concluded by the parties at the time of the purported withdrawal.

In determining the effect of a deed, McMurdo J cited *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609 at 619 per Lord Denning MR: "A contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered." Thus, if the document was a deed, the defendant (having executed it) would have been unable to subsequently withdraw from the transaction (*400 George Street* at [46]).

Was the agreement for lease a deed? In answering this question, McMurdo J noted the key issue that the executing party must *intend* the document to take effect as a deed (at [44]). A relevant case was *Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties (Qld)* (1993) 27 ATR 154 at 155, in which the Queensland Court of Appeal held: "The question whether an instrument under seal is a deed depends on whether it was intended to operate as the deed of the person executing it, that is whether it was intended to be immediately binding on that person in the sense that … it could not be recalled by that person." The relevant intention was to be found upon an objective construction of the instrument.

Applying that test to the facts at hand, McMurdo J concluded that the agreement for lease was not a deed (*400 George Street* at [65]). This was even though the execution pages of the document provided that it was "Executed as a Deed" and "Signed, Sealed and Delivered" by an attorney for the defendant. According to McMurdo J, these references were "not decisive" (at [49]) given the balance of the document and the surrounding circumstances, all of which strongly indicated that the defendant did not intend the document to be a deed (at [56]). The following considerations were central to the decision:

(a) The inclusion of the words "in consideration of … the mutual promises contained in this agreement" was inconsistent with the plaintiffs' contention that the defendant was bound while the plaintiffs were not (at [57]).

(b) The defendant did not date the agreement at the time of signature. Since several of the obligations in the document were linked to the date of the agreement, McMurdo J inferred an intention on the part of the defendant not to be bound at the time of signature (at [58]).

(c) The operative part of the document employed language that was inconsistent with the language of a deed. In particular, the document set out certain matters as “Background” rather than listing them as recitals (at [17]); and it referred to “consideration”, which would have been unnecessary if the instrument were to operate as a deed (at [59]).
(d) Negotiations and correspondence between the parties had failed to demonstrate an intention for the agreement to operate as a deed (at [60]).
(e) An earlier letter of offer between the parties had stated that “[a]ll documentation is subject to a mutually agreed legal document by both parties”, thereby evincing an intention not to be bound until all parties had executed the agreement (at [61]).
(f) There was ample consideration for the defendant’s promises, thereby negating any need for the document to be executed and delivered as a deed (at [62]).

Postscript: The plaintiffs filed a notice of appeal in April 2010, contesting McMurdo J’s characterisation of the document as a contract. However, and with respect, given established precedent on substantially similar fact situations, the prospects of overturning the first instance judgment appear slim.

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RETIREMENT VILLAGES AND OPTIONS TO PURCHASE

There was a time when retirement villages were regulated only by the common law. Those days are gone. Now, the common law as it applies to retirement villages is subject to a complex statutory overlay, and the starting point on many issues is the statute. And so it was in the recent case of *Bondi Beach Astra Retirement Village v Hohman* [2010] NSWCA 38, which concerned the right of a retirement village operator to exercise an option to buy back a resident’s premises. The answer turned on s 167 of the *Retirement Villages Act 1999* (NSW), which provides:

> **167. Options**
> (1) An operator of a retirement village who holds an option to purchase any residential premises from a resident of the village must decide whether or not to exercise the option, and must give the resident written notification of that decision, no later than 28 days after the resident permanently vacates the premises (or, if the resident has not lived in the premises, 28 days after the resident notifies the operator in writing that the premises are for sale).
> (2) If the operator does not give the notification required by subsection (1) within the time allowed by that subsection, the option lapses.
> (3) This section has effect despite any term of the option.

Bondi Beach Astra Retirement Village sought to assert a contractual right to purchase a unit previously owned by a resident, Mrs B, and now in the ownership of Mrs B’s estate. The executor of Mrs B’s estate sought to rely on s 167 to defeat the Village’s claims. The Court of Appeal (Basten, Macfarlan and Young JJA) unanimously affirmed the first instance decision of the Consumer Trade and Tenancy Tribunal and the first appellate decision of Harrison J in the Supreme Court, to find in favour of the respondent. Basten JA and Young JA entered substantive judgments; Macfarlan JA noted his agreement with both.

Mrs B had purchased the unit in 1987. At the time of finalising her purchase, she entered into two separate agreements with the Village. The first, the “Occupancy Agreement”, granted the Village an option to purchase the unit for $95,000 on the occurrence of any of Mrs B’s death, her disposal of an interest in the unit, or her becoming a permanent resident at a nursing home or hospital. The option did not specify a date on which it expired. The second agreement, the “Buyback Agreement”, granted the Village an option to purchase Mrs B’s unit for $95,000 upon her (or her executor) giving one month’s written notice of an intention to sell, transfer or otherwise dispose of the unit. The option was expressed to arise one month after the date of service of the notice of intention and remain capable of exercise by the Village for 28 days.

Mrs B died on 24 December 2005. From December 2002 until her death, Mrs B no longer lived in her unit but continued to pay the regular maintenance and occupancy fees in respect of the unit.

Many of her personal possessions also remained in the unit during this period. In 2004, there was communication between her family and the Village to the effect that, whilst she was not currently living at the Village, she was capable of returning to her unit and that is what she wanted to do. On 4 May 2006, the executor of Mrs B's estate wrote to the Village to communicate the news of Mrs B's death and the intention to sell the unit. On 18 May 2006, in stated reliance on the Occupancy and Buyback Agreements, the Village communicated an intention to exercise its option to purchase Mrs B's unit. The executor resisted the Village's claim under s 167.

A central question at every level in the proceedings was whether Mrs B's departure from the unit in December 2002, in circumstances where she continued to pay maintenance and occupancy fees and maintain her possessions in the unit, constituted "permanent vacation" of the unit under s 167. The Village sought to argue that the operation of s 167 had not been triggered by her departure from the Village since, on the terms of the section, she had never "permanently vacated" her unit. It followed that the option in the Occupancy Agreement had not lapsed 28 days from the date of Mrs B's departure. Section 8 of the *Retirement Villages Act* states that a person who owns residential premises in a retirement village is taken to have permanently vacated the premises when "the person dies or moves out of the premises". As "moves out" is an ordinary English expression, both Harrison J (in the first appeal) and Young JA considered that the Tribunal's determination that Mrs B had moved out of the unit in December 2002 was a finding of fact that was incapable of agitation on appeal. At the least, the grounds of appeal filed by the Village had failed to cast the determination of the Tribunal as anything other than a question of fact.

Basten JA adopted a more cautious approach to whether the application of the expression "moves out" to the present facts was a question of law or question of fact. Drawing on the High Court's judgment in *Collector of Customs v Agfa-Gavaert Ltd* (1996) 186 CLR 389 at 396, where their Honours questioned as "artificial, if not illusory" the distinction between the meaning of a word (a question of fact) and the construction of the legislative provision in which that word appears (a question of law), Basten JA considered it to be "uncertain" whether the Tribunal's determination on this point demonstrated a process of legal, as opposed to factual, construction. At a general level, his Honour affirmed that, however artificial or illusory, there must be some distinction between questions of law and questions of fact, since to treat all questions of construction as questions of law "would be to remove significant areas of discretion from tribunals which have been given the task by Parliament of making decisions, often involving evaluative judgments, in particular categories of case" (at [32]). In the present instance, however, it was unnecessary for Basten JA to determine where the distinction should be drawn since, in his Honour's judgment, even if characterised as a question of law there was no basis to conclude that the Tribunal had erred in its legal construction of the term "permanently vacates".

The Village advanced two further submissions in the Court of Appeal in support of its case. First, the Village submitted that the 28-day time period in s 167 is not triggered until the person possessed of the relevant option has knowledge of the circumstances that trigger the option. Put simply, one cannot make a decision about the exercise of an option when they do not know that the option is capable of exercise. The section, it was argued, is given this operation by virtue of the word "decide" in subs (1). Both Basten JA and Young JA dismissed this argument summarily, noting that the terms of s 167 require no more than a decision by the option-holder to communicate an *intention* to exercise a contractual option within the 28-day period. The section does not require an option-holder to make a decision as to the *actual* exercise of its option (as a matter of contract) within the relevant time period. In this context, their Honours determined that the word "decide" is of minor significance in s 167. The terms of the section, considered as a whole, did not support the construction advanced by the Village.

Finally, the Village sought to characterise the respondent, Mrs B's executor, as the "resident" for the purpose of s 167(1), thereby invoking the operation of the words in parentheses in the subsection. Such a characterisation would mean that the 28-day time period commenced only on the date of notification of an intention to sell the unit. In the present instance, that date was 4 May 2006, with the result that the Village had successfully preserved its option under the Buyback Agreement by reason of its communication on 18 May 2006 to purchase the unit. The Village accepted, however, that had Mrs B permanently vacated her unit during her lifetime, then the situation of her executor was

irrelevant under s 167. The words in parentheses never came into play. Given the Tribunal's finding on permanent vacation, upheld at each level on appeal, the Village's submission on this point was easily dismissed.

In the end result, the decision confirms the efficacy of s 167. The section will catch buyback options held by retirement village operators even where the contractual basis for the exercise of those options has not yet arisen. It follows that an option may lapse even before it becomes capable of exercise as a matter of contract; a situation which Young JA described as "odd". The case also confirms that the operation of s 167 does not depend on the village operator's state of knowledge. The 28-day period for communication of an intention to exercise an option will commence irrespective of the operator's knowledge of the circumstances that have triggered the time period. While the court noted potential difficulties in practice with this feature of the section, Young JA commented that the legislation clearly envisages that operators will not simply perform their functions in absentia, but rather play a more active role in the day to day operations of the village.

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