CITATION:	*Castronova v Tjung & Ors* [2024] NTSC 55
PARTIES:	CASTRONOVA, Margaret Lesetta v TJUNG, Fatima and DANIUM INVESTMENTS PTY LTD (ACN 108 393 817) ATF THE DANIUM TRUST and DANIUM, Danny
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-021412-SC
DELIVERED:	28 June 2024
HEARING DATES:	2 May 2024 to 8 May 2024
JUDGMENT OF:	Burns J

Agents Licensing Act 1979 (NT) s 121A
Australian Securities and Investments Commission Act 2001 (Cth) s 12BG
Civil Procedure Act 1883 (Imp)
Competition and Consumer Act 2010 (Cth) sch 2 (‘Australian Consumer Law’) s 23, 24, 25, 26, 27, 224
Consumer Affairs and Fair Trading Act 1990 (NT) s 27

Evidence (National Uniform Legislation) Act 2011 (NT)
Interpretation Act 1978 (NT) s 62A, 62B
Land Title Act 2000 (NT) s 76, 169
Law of Property Act 2000 (NT) s 86
Productivity Commission, *Review of Australia's Consumer Policy Framework* (Report No 45, 30 April 2008)
Return to Work Act 1986 (NT) s 186A
Supreme Court Act 1979 (NT) s 84
Supreme Court Act 1982 (Vic) s 60

ACCC v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd) [2015] FCA 368; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 165; 310 ALR 165; *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377; *Director-General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481; *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *Ironbridge Holdings Pty Ltd v O'Grady* [2020] VSC 344; *Jetstar Airways Pty Ltd v Free* [2008] VSC 539; *Jones v Dunkel* [1959] HCA 8; 101 CLR 298; *Jones v South British Insurance Co. Ltd* (1984) 71 FLR 98; *Saunders v Nash* [1991] 2 V.R. 63, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	H Baddeley
Defendants:	A McLaren

Solicitors:

Plaintiff:	HWL Ebsworth Lawyers
Defendants:	Kelly & Partners Lawyers

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Castronova v Tjung & Ors [2024] NTSC 55
No. 2022-021412-SC

BETWEEN:

MARGARET LESETTA CASTRONOVA
Plaintiff

AND:

FATIMA TJUNG
First Defendant

AND:

DANIUM INVESTMENTS PTY LTD (ACN 108 393 817) ATF THE DANIUM TRUST
Second Defendant

AND:

DANNY DANIUM
Third Defendant

CORAM: BURNS J

REASONS FOR DECISION

(Delivered 28 June 2024)

Brief background

[1] The plaintiff was the registered proprietor of the property known as 76 East Point Road, Fannie Bay in the Northern Territory ('the Fannie Bay

property'). The first and third defendants ('the purchasers') entered into a contract ('the Contract') on 21 August 2017 to purchase the Fannie Bay property from the plaintiff for the sum of $2,000,000.00. The purchasers paid an initial deposit of $100,000.00. The Contract required the purchasers to complete the purchase on or before 12 December 2018. By agreement with the plaintiff, the purchasers were given a licence to occupy the Fannie Bay property prior to completion of the purchase, and they entered into occupation in late 2017 or early 2018.

[2] The extended settlement period was negotiated by the purchasers to enable them to sell a property at 38 Bridge Street, Muirhead ('the Muirhead property') owned by the first defendant, and a property at 3740 Stuart Highway, Acacia Hills ('the Acacia Hills property') which was owned by the second defendant company, of which the third defendant was, at that time, the sole director and shareholder.

[3] The purchasers were unable to complete the purchase by 12 December 2018. They sought an extension of time from the plaintiff in which to complete the Contract. On or about 5 April 2019, the plaintiff and the purchasers entered into a Deed of Variation ('the Variation Deed') of the Contract varying the date for completion to on or before 2 September 2019. The terms of the Variation Deed included conditions that the purchasers provide security for the performance of their obligations under the Contract as follows:

a) a first ranking mortgage in favour of the plaintiff over the Muirhead property;

b) a Deed of Performance Guarantee given by the second defendant, a company of which the third defendant was, at that time, sole director and shareholder (the first defendant was subsequently appointed a director on 6 July 2023). The second defendant was the registered proprietor of the Acacia Hills property; and

c) a second ranking mortgage in favour of the plaintiff over the Acacia Hills property.

[4] As required by the Variation Deed, the second defendant executed a Deed of Performance Guarantee to secure the purchasers' obligations under the Contract. The second defendant executed a mortgage over the Acacia Hills property in favour of the plaintiff as required by the Variation Deed ('the Acacia Hills Mortgage'). The first defendant also executed a mortgage in favour of the plaintiff over the Muirhead property as required by the Variation Deed ('the Muirhead Mortgage'). Each of the mortgages gave the plaintiff a power of sale over the properties in the event of the purchasers failing to perform their obligations under the Contract.

[5] The purchasers failed to complete the purchase on or before 2 September 2019 as required by the varied Contract. On 10 December 2019, the plaintiff issued a notice of default to the purchasers advising that they were in default of the Contract for failing to pay the balance owing under the Contract. The

notice of default allowed the purchasers ten working days to remedy the default. The purchasers failed to pay any part of the balance of the purchase monies within that period.

[6] On 6 July 2020, the plaintiff served a notice of termination of the Contract on the purchasers by which the plaintiff accepted the purchasers' repudiation of the Contract and terminated the Contract.

[7] On 24 September 2020, the first defendant entered into a contract to sell the Muirhead property to third parties for $495,000.00. The original date for completion of this contract for sale was 9 December 2020. The first defendant did not complete that contract and, in these proceedings, claims that her failure to complete the contract was due to a refusal by the plaintiff to discharge the mortgage over the Muirhead property. That is a claim disputed by the plaintiff. The proposed third party purchasers of the Muirhead property subsequently commenced proceedings against the first defendant in the Darwin Local Court claiming damages for the first defendant's failure to complete the contract.

[8] In around November 2020, the plaintiff entered into a contract with a third party for the third party to purchase the Fannie Bay property for $1,350,000.00. This sale proceeded to completion on 21 December 2020.

[9] On or around 27 May 2022, the plaintiff served on the first defendant a notice dated 16 May 2022 ('the Muirhead Mortgage default notice') which demanded, within 30 days of service of the notice, payment of the amount

owing and secured under the Muirhead Mortgage, failing which the plaintiff may, among other things, exercise her power to sell the Muirhead property. The first defendant failed to make the payments required by the Muirhead Mortgage default notice.

[10] On or around 1 June 2022, the plaintiff served on the second defendant a notice dated 16 May 2022 ('the Acacia Hills Mortgage default notice') which demanded, within 30 days of service of the notice, payment of the amount owing and secured under the Acacia Hills Mortgage, failing which the plaintiff may, among other things, exercise her power to sell the Acacia Hills property. The second defendant failed to make the payments required by the Acacia Hills Mortgage default notice.

Pleadings

[11] By proceedings instituted in this Court on 23 September 2022, the plaintiff claims damages against the purchasers for breach of the Contract, as varied by the Variation Deed. The plaintiff also claims that under the terms of the Deed of Performance Guarantee, the second defendant is liable to indemnify her for any amounts which the purchasers are found to be liable to pay her under her claim.

[12] The plaintiff claims the sum of $1,106,298.90 as at 22 December 2022 together with interest accruing from that date at the rate of 12% per annum.

[13] The relief claimed by the plaintiff is:

a) Judgment against each of the defendants in the amount of $1,106,298.90 plus interest on that amount at the rate of 12% per annum or alternatively interest pursuant to statute.

b) Immediate possession of the Muirhead property pursuant to s 86 of the *Law of Property Act 2000* (NT) and the Muirhead Mortgage.

c) Immediate possession of the Acacia Hills property pursuant to s 86 of the *Law of Property Act 2000* (NT) and the Acacia Hills Mortgage.

[14] By a Second Amended Notice of Defence filed 28 March 2024 ('the Defence'), the defendants denied liability on the bases that:

a) Certain provisions of the Contract and the Variation Deed are unfair for the purposes of the Australian Consumer Law ('ACL') and are not binding on the purchasers.

b) The terms of the Deed of Performance Guarantee are unfair for the purposes of the ACL and are not binding on the second and third defendants, or the Deed otherwise "stands discharged".

c) The terms of the Muirhead Mortgage (and an associated Memorandum of Common Provisions) are unfair for the purposes of the ACL and are not binding on the defendants.

d) The terms of the Acacia Hills Mortgage (and an associated Memorandum of Common Provisions) are unfair for the purposes of the ACL and are not binding on the defendants.

e) The plaintiff suffered no loss and/or failed to mitigate her loss.

[15] The first and third defendants also lodged a "Set-off and/or Counterclaim" in which they claimed a right to set-off certain sums against any amount for which they may be found liable to the plaintiff. A number of the matters relied upon by the purchasers in this document were also relied upon by the purchasers for the purpose of demonstrating that the plaintiff had not suffered a loss or had failed to mitigate any loss arising out of the purchasers' failure to complete the purchase of the Fannie Bay property.

[16] The matters pleaded by way of Set-off or Counterclaim include:

a) An allegation that because of the plaintiff's failure to withdraw a "caveat" she had lodged on the title to the Muirhead property, the first defendant was unable to complete the sale of that property to third parties, resulting in loss to her.

b) The need to bring to account a sum of $90,000.00 said to have been paid by the purchasers to the plaintiff.

c) The need to bring to account a sum of $67,920.00 said to have been paid by the purchasers in renovating the Fannie Bay property during the period they occupied the property under licence.

d) A claim that the first defendant is entitled to set-off the sum of $491,796.00, being the agreed sale price of the Muirhead property to

third parties which did not proceed to completion. This claim was abandoned during the course of the hearing.

e) Claims that the defendants are entitled to set-off amounts based upon their loss of the ability to use certain sums of money by reason of the conduct of the plaintiff, and damages for the loss of use of certain sums of money.

[17] The defendants seek a multitude of orders, many of which are alternatives. These include:

a) An order for damages.

b) An order that the plaintiff pay the first defendant's costs of defending proceedings in the Local Court brought by the third parties who had agreed to purchase the Muirhead property.

c) An order "that the accounts be reopened between the parties" and certain sums be allowed to the credit of the defendants.

d) Declarations that certain provisions of the Contract and Variation Deed are unfair.

e) A declaration setting aside, cancelling or varying the Variation Deed.

f) A declaration that the Muirhead and Acacia Hills Mortgages are unfair, and orders setting aside those mortgages.

g) A declaration that the Memorandum of Common Provisions associated with the Muirhead and Acacia Hills Mortgages is unfair, and an order setting aside the Memorandum of Common Provisions. Alternatively, a declaration that specified provisions of the Memorandum of Common Provisions are unfair and invalid, and an order setting aside, cancelling or varying those provisions.

h) A declaration that the Deed of Performance Guarantee is unfair and an order setting it aside, cancelling it or varying it. In the alternative, a declaration that specified provisions of the Deed of Performance Guarantee are unfair and an order setting aside, cancelling or varying those provisions.

[18] In my opinion, the case advanced by the plaintiff is obviously correct and that advanced by the defendants is equally obviously unmeritorious.

The evidence for the defendants

[19] The evidence-in-chief of all witnesses, both for the defendants and the plaintiff, was by way of affidavit, supplemented by some oral evidence as appropriate. As the plaintiff's claim that the first and third defendants had breached the terms of the Contract was essentially undisputed, the defendants accepted that they were *dux litis*. On behalf of the defendants, the following affidavits were read:

- Fatima Tjung ('the first defendant') sworn 29 November 2022 and 8 March 2024;

- Danial Kelly sworn 16 February 2024; and

- Derek Hart sworn 8 March 2024.

[20] No evidence was adduced from the third defendant. No explanation was provided for the failure of the third defendant to give evidence and there was no suggestion that he was "not available" for the purposes of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('the *ENULA*'). What flows from the fact that the third defendant did not give evidence will be dealt with below.

[21] Neither Mr Kelly nor Mr Hart were required for cross-examination and the plaintiff agreed that their evidence should be accepted. I will make no further reference to their evidence because it was essentially irrelevant.

Failure of the third defendant to give evidence

[22] The plaintiff submitted that the failure of the third defendant to give evidence was unexplained and that an inference should be drawn in accordance with the well-known principles in *Jones v Dunkel*.[1] Those

1 [1959] HCA 8; 101 CLR 298.

principles were recently restated by Greenwood J in *Australian Competition and Consumer Commission v Cement Australia Pty Ltd*:[2]

> An unexplained failure by a party to give evidence or call witnesses may (but not necessarily must) in appropriate circumstances lead to an inference that the uncalled evidence or missing material would not have assisted the party's case. The rule operates against a party bearing the burden of proof but can also operate against a party not bearing that burden. The notion of "appropriate circumstances" contemplates circumstances existing where it is within the power of the relevant party to call the evidence not called. The significance, in deciding the questions of fact in controversy, to be attributed to the failure of a witness to be called to give evidence depends, in the end, upon whether in all the circumstances an inference can be drawn that the *reason* why the relevant party failed to call the particular witness was a fear of the evidence the witness might give. A party might fail to call a witness because it may not be in a position to do so or because the party may not be sufficiently aware of the evidence the witness might give or because the witness has no relevant relationship with the fact in issue about which one might expect the witness to be called.

[23] The defendant in *Cement Australia* did not call evidence from witnesses who may be expected to have knowledge of the matters in dispute in that case, including directors of the defendant company. The effect of the failure to call these witnesses to explain their absence was expressed by Greenwood J at [2959]:

> The consequence of failing to call a witness of the degree of proximity to the respondents as its own directors, its managing director and chief executive, its analyst at the centre of its analytical work on the very subject matter in dispute and other senior executives with clear authority and standing in the corporation on the questions in issue, is that an inference arises that the uncalled evidence from these witnesses would not have *helped* the party which failed to call evidence from them. Thus, the Court is entitled to take into account, and weigh in the balance according to *all* the evidence, in deciding whether to accept any *particular* evidence (either on affidavit from deponents or reflected

2 [2013] FCA 909; 310 ALR 165 ("*Cement Australia"*), at [2954].

> in the content of documents admitted into evidence which relate to a matter about which the absent witnesses could have spoken), the inference that uncalled evidence about the reasons and purposes for deciding to go on with the Amended Millmerran Contract and deploy the capital on site (and other matters) would not have been helpful to the relevant respondent corporations. The probative point of such an inference is that the trier of fact is more willing to draw an inference which might *fairly* be drawn from other evidence, because the relevant respondent corporation being in a position, through the witnesses, to prove a proposition contrary to inferences *otherwise* arising, has chosen not to call that evidence.

[24] The third defendant was the sole shareholder and director of the second defendant at the time that the second defendant executed the Deed of Performance Guarantee and the Acacia Hills Mortgage. He was the effective mind of the company. It would be expected that he could give evidence both in his own right and as the director of the second defendant of his understanding of the transactions to which he and the second defendant were parties and the relevant documents.

[25] In her affidavit sworn 29 November 2022, the first defendant said regarding the third defendant:

> My husband migrated to Australia when he was about 16 years of age. He finished year 12 and has worked in his family business ever since. His first language is Hakka. English is his third language. He can speak English fluently but he is not proficient at reading or writing. He is not good with paperwork. So, I was the person entrusted and responsible for conducting the transaction.

[26] A number of factual assertions are found in this extract which may be relevant in determining whether any legitimate explanation was provided for the failure of the third defendant to give evidence. First, there is an assertion

that the third defendant is “not proficient at reading or writing” and is “not good with paperwork”. These assertions do not constitute a legitimate explanation for the failure of the third defendant to give evidence. These are matters about which the third defendant himself could give evidence, as it is not disputed that he is proficient in spoken English. Additionally, the asserted facts do not mean that the third defendant could not give evidence about his understanding of the nature of the transactions into which he and the second defendant entered.

[27] The second assertion is that the first defendant was the person “entrusted and responsible for conducting the transaction”. The failure of the third defendant to give evidence made it effectively impossible for the plaintiff to challenge that assertion. If it were the truth that the third defendant took no effective part in the transactions the subject of the current proceedings, this was something about which the third defendant would have been expected to give evidence. This assertion does not provide a legitimate explanation for the failure of the third defendant to give evidence.

[28] Had the third defendant been called to give evidence, it may be expected that he could give evidence relevant to many significant issues in these proceedings. It would be expected that he would be able to give evidence of any statements made by the first defendant to him regarding these transactions, and whether he on his own behalf or on behalf of the second defendant sought legal advice prior to executing the Deed of Performance Guarantee and the Acacia Hills Mortgage.

[29] The first defendant sought to rely heavily upon a suggestion that she routinely worked in remote locations at the time that the Variation Deed was negotiated, and accordingly had no real opportunity to obtain legal advice. I will address the first defendant's evidence in that regard below. No evidence was adduced regarding the third defendant's opportunity to obtain legal advice on his own behalf and that of the second defendant. There is simply no evidence that he did not have an opportunity to obtain legal advice, or, indeed, that he did not obtain legal advice.

[30] I do not intend to suggest in the above that it is open for me to infer that the third defendant did, in fact, obtain legal advice. I am simply pointing out that the third defendant was a person who could clearly give relevant evidence and who would be expected to give evidence in these proceedings.

[31] There was some faint suggestion that counsel for the defendants believed that the first defendant was entitled to give evidence in these proceedings on behalf of all three defendants. In that regard, counsel referred to the third defendant having provided a power of attorney to the first defendant which, amongst other things, empowered the first defendant to conduct legal proceedings on behalf of the third defendant. Any power granted by the third defendant to the first defendant in that regard would not extend to giving the first defendant an entitlement to give evidence on behalf of the third defendant, in the sense that the first defendant was purporting to give evidence of factual matters known only to the third defendant. Any such evidence must be hearsay for the purposes of the *ENULA*.

[32] The fact that the third defendant executed a power of attorney in favour of the first defendant does not provide a legitimate explanation for the failure of the third defendant to give evidence.

[33] I am satisfied that I am entitled to draw an inference from the failure of the third defendant to give evidence that his evidence would not have assisted the defendants in these proceedings. In particular, it would not have assisted them in their case regarding their understanding of the transactions to which they were parties. I do not draw any inference that his evidence would have been "affirmatively damaging" to the case presented by the defendants.[3]

Failure of the defendants to call other witnesses

[34] There were three other witnesses who were identified as witnesses who may have been expected to be able to give relevant evidence for the defendants and whose absence was not explained. The first two such potential witnesses may be considered together. These persons were Ms Meggsie Muis and Mr Trevor Tschirpig, both of whom were licenced conveyancing agents at Tschirpig Conveyancing, who acted for the defendants in negotiating the Variation Deed and Deed of Performance Guarantee with the representatives of the plaintiff.

[35] As the plaintiff submitted, these persons could be expected to have direct knowledge of these transactions, what instructions were given to them and

3 See *Cement Australia* at [2960].

by whom, and what explanations of the nature and effect of the documents were given to the defendants.

[36] Ms Muis and Mr Tschirpig are clearly persons who could give relevant evidence. They are persons that the defendants would be expected to call as witnesses. There has been no explanation provided for their failure to give evidence. I am satisfied that I am entitled to draw an inference from the unexplained failure of the defendants to call these witnesses that their evidence would not have assisted the defendants in these proceedings. In particular, it would not have assisted the defendants in their case regarding their understanding of the transactions to which they were parties. I do not draw any inference that their evidence would have been "affirmatively damaging" to the case presented by the defendants.

[37] The third potential witness, Sandra Lenz, was the first defendant's conveyancing agent on the proposed sale of the Muirhead property to third parties in late 2020. As such, it may be expected that she is a person who would have been responsible for arranging the settlement of the contract for sale of that property. This would have included ensuring that the necessary documents were completed, including ensuring that the plaintiff provided a notice of discharge of the mortgage which the plaintiff held over the Muirhead property. Ms Lenz could also be expected to be able to testify as to her dealings with the first defendant, instructions that she received from the first defendant, and the reason why the contract did not proceed to completion.

[38] There has been no explanation provided for the failure of the first defendant to call Ms Lenz to give evidence in these proceedings. I am satisfied that I am entitled to draw an inference from this unexplained failure of the first defendant to call Ms Lenz that her evidence would not have assisted the first defendant in these proceedings. I do not draw any inference that her evidence would have been "affirmatively damaging" to the case presented by the defendants, and in particular the first defendant.

Credibility of the first defendant

[39] The case for the defendants was based upon the evidence of the first defendant together with documents that came into existence at around the time of the transactions in question. There can be no doubt that the first defendant was an extremely important witness for the defence. As such, her credibility was very much in issue. I formed the view that the first defendant was an unsatisfactory witness with regard to critical aspects of her evidence. In particular, I formed the view that her evidence regarding her understanding of the transactions and documents which lie at the heart of these proceedings was either untruthful or unreliable. I will deal with this in the course of my reasons.

The evidence for the plaintiff

[40] On behalf of the plaintiff, the following affidavits were read:

- Margaret Castronova sworn 6 September 2022, 18 December 2023 and 2 April 2024;
- Cassandra Emmett sworn 29 August 2022 and 13 December 2023;
- Nadia D'Souza sworn 13 December 2023 and 2 April 2024; and
- Pipina Papazoglou sworn 12 December 2023.

[41] The case for the plaintiff relied mainly on the contemporaneous documents placed into evidence. The plaintiff was cross-examined. It was submitted that her evidence was unsatisfactory, that she tried to avoid answering questions and at times gave conflicting answers. The plaintiff is 84 years old and it was clear to me when she gave her evidence that she was easily confused. It was also clear that she had relied to a great extent on her lawyers and conveyancing agents in the transactions the subject of these proceedings.

[42] I accept that the plaintiff was, at times, argumentative and dismissive of questions asked in cross-examination. It was clear that she had little patience for what she perceived to be irrelevant questioning in what was, for her, a straightforward matter. I observed the plaintiff and counsel for the defendants to be at cross-purposes on occasion during cross-examination. I did not form the impression that the plaintiff was being dishonest or attempting to mislead me. When questions were explained to the plaintiff, her evidence in cross-examination on significant issues was consistent with the contents of her affidavits.

[43] I have sympathy for the frustration displayed by the plaintiff. She was at all times the wronged party. In addition, she acted with commendable restraint and even generosity in her dealings with the purchasers. It must have been particularly galling for her to be subjected to allegations of having acted unfairly towards them.

[44] Both Cassandra Emmett and Nadia D'Souza were straightforward and honest witnesses. I have no hesitation in accepting their evidence.

[45] Pipina Papazoglou is a lawyer who was retained by the plaintiff to prepare a discharge of mortgage for the Muirhead property when the first defendant proposed selling that property. I have no hesitation in accepting her evidence. She was simply retained by the plaintiff for the purpose of preparing the discharge, and no other involvement in these transactions was alleged.

[46] Regrettably, counsel for the defendants suggested to Ms Papazoglou that she had embellished her evidence to assist the plaintiff. This suggestion was based on material contained in Ms Papazoglou's affidavit, which was more extensive than her file notes of the same conversations. This was an entirely inadequate basis for an allegation of dishonesty and perjury to be levelled against anyone, let alone a legal practitioner. It was an improper allegation which should not have been made.

The chronology of events

[47] It was not in dispute that on or around April 2017, the purchasers became aware of the possibility that the plaintiff may be willing to sell the Fannie Bay property. There was a minor dispute between the parties as to how the purchasers became aware of that fact, but it is not an important issue. There seems to be no dispute that the purchasers were introduced to the property by Tim Carew, a friend of theirs, who was also an employee of the plaintiff. There was a dispute between the parties as to how the purchase price of $2,000,000.00 was agreed upon, with the first defendant testifying that Mr Carew told her that this was the selling price and that it was not negotiable. For the reasons that follow, I am also satisfied that this is not an important issue.

[48] In her affidavit of 8 March 2024, the first defendant deposed to her background. She has lived in Darwin for more than 40 years, and described herself as a businesswoman. She married the third defendant in October 2018, and before that they were in a de facto relationship. For the last five years she has conducted a catering business, having taken over management of that business from other family members in July 2018.

[49] Prior to taking over management of that business, the first defendant was employed by the West Arnhem Regional Council for six years as a Senior Project Manager, in charge of managing their commercial portfolio which also included property management.

[50] The first defendant was a real estate agent from 1989 to 1992, working for Nationwide Realty and Regent Realty. During that time, she was a Real Estate Institute of the Northern Territory agent's representative and qualified as such. From 1996 to 2006, she spent 10 years working for Territory Housing as a Tenancy Manager and Area Manager for public housing. From 2007 to 2015 she was a Senior Property Consultant for the Northern Territory Government Commercial Property Division. In her affidavit sworn 8 March 2024, the first defendant stated:

> I have been investing in real estate since 1989. Since then I have bought and sold well over 20 properties. I study, follow and keep abreast of the real estate market in Darwin mainly, for the purpose of buying and selling real estate. I am still active in the property industry. My area of expertise lies in knowing the real estate market and the demand for it.

[51] The first defendant is not uneducated. Her history of training and working as a real estate agent's representative and having bought and sold "well over 20 properties" demonstrates that she was not an unsophisticated buyer when she entered into the purchase of the Fannie Bay property. The first defendant had experience, and claimed expertise, in the Darwin property market at the time that the purchase of the Fannie Bay property was negotiated. The only rational inference from the course of events leading up to the purchasers entering into the Contract is that the first defendant, at least, considered $2,000,000.00 to be a fair market price. That is the case no matter who suggested the figure of $2,000,000.00.

[52] The Contract was executed by the purchasers on 21 August 2017. Both the plaintiff and the purchasers used the services of conveyancing agents for this transaction. In the Northern Territory, "conveyancing agents" are obliged by law to use a standard form of contract for the sale and purchase of land.[4] The Contract was in that standard form. The purchasers employed Ms Muis of Tschirpig Conveyancing as their conveyancer and the plaintiff employed Ms Gaby Vita of Aquarius Conveyancing as her conveyancer.

[53] The terms of the standard form of contract provide that the deposit paid by a buyer under the contract will be held by a "stakeholder" pending completion of the contract, at which point it vests in the seller. As I understand it, the stakeholder is usually the seller's real estate agent and the deposit is held in a trust account pending completion of the sale.

[54] In the present case, the Contract at Item F of the Reference Schedule nominated the amount of the deposit as $100,000.00. The Contract, however, did not provide for the deposit sum to be held by a stakeholder pending completion. Special Conditions were agreed between the parties and incorporated into the Contract. The first such Special Condition provided that Clause 12 of the standard form of contract did not apply. This was a clause relating to the seller providing a building status report. It is unnecessary to consider this Special Condition further.

[55] The significant Special Conditions are conditions 2 and 3, which provided:

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4 s 121A *Agents Licensing Act 1979* (NT).

2. Upon the Buyer providing written confirmation to the Seller's conveyancer that this Contract is unconditional in all respects, the Seller agrees to allow the Buyer to take early possession of the property in accordance with the terms of clause 4 herein.
3. Upon the Buyer providing written confirmation to the Seller's conveyancer that this Contract is unconditional in all respects, the Buyer hereby agrees that the deposit (as set out at Item F herein) will immediately be released to the Seller for her use.

[56] Clause 4 of the Contract provided for the purchasers to take possession of the Fannie Bay property prior to completion. The purchasers were permitted to occupy the property as licensees subject to conditions set out in the clause. The purchasers were not required to pay a licence fee, and were only required to pay outgoings in respect of the property and to keep the property fully insured.

[57] The Contract nominated the date for completion as on or before 12 December 2018. It is probable that the reason the parties agreed on Special Condition 3, permitting the release of the deposit to the plaintiff for her use pending completion, was the extended settlement period provided for by the Contract.

[58] The terms of the standard contract provided for interest to be payable by a party in default in performance of their obligations under the contract. The terms of the standard contract were unaffected by any Special Conditions in the present Contract. Clause 17.1 of the Contract provided for interest to be payable by the purchasers in the event that the Contract was not completed within two working days after the nominated date for completion. Clause 17.1 provided:

17. INTEREST ON LATE PAYMENTS

17.1 If for any reason other than the neglect or default of the Seller:

(a) this Contract shall not be completed within 2 working days after the date for completion, then the Buyer shall pay interest at the rate specified in Item N on the whole of the purchase price from the date for completion until and including the date on which completion actually takes place; or

(b) (Not applicable)

[59] The reference to Item N in clause 17 is a reference to Item N in the Reference Schedule to the Contract. Item N provided that the rate of default interest was "12% simple interest per annum".

[60] On 21 August 2017, the purchasers paid the $100,000.00 deposit. In September 2017, the purchasers were provided with the keys to the Fannie Bay property and took possession of that property. They did not, however, commence to occupy the property until January 2018.

[61] From the time that the purchasers commenced occupation of the property, they undertook what the first defendant referred to as "renovations" to the property. In the present proceedings, the purchasers maintained that they spent over $100,000.00 renovating the property. They were able to provide invoices with respect to the following works:

No	Work done	Cost	Date of invoice	Service Provider
1.1	Internal Painting, rust treatment on balconies and external ceiling	$14,000	23 March 2018	G & J Painters

1.2	Replace AC in Downstairs living room, and (bedroom=B) B3, B4 on left of hallway	$5,346	02 Feb 2018	North Australia Electrical
1.3	Replace clips on roller doors	$550.00	May 2018	Arafura Roller Door Services
1.4	Replace AC in B1	$1,315	5 July 2018	North Australian Electrical
1.5	Install security screens to side and back entrance, B1 and loungeroom	$4,121	9 Nov 2018	Dabsco
1.6	Replace AC in B2	$1,540	19 Mar 2019	North Australian Electrical
1.7	Replace 2 toilet suits and other plumbing	$2,453	6 Feb 2019	Absolute Plumbing
1.8	Replace Solar Hot Water & replace taps	$380	20 Aug 2019	Absolute Plumbing
1.9	Replace AC upstairs lounge and kitchen	$6,116	24 Jan 2020	North Australian Electrical
1.10	Handyman to patch wall and repair doors and cupboard door slats	$2,130	03 Aug 2020	JT Construction (NT) Pty Ltd
1.11	Remove trees after cyclone Marcus 14 March 2018	$11,500	15 April 2018	FR Tiling Services
1.12	Gardening services to maintain the garden	$4,320	2018 to 2020	FR Tiling Services
1.13	Pool servicing to maintain the pool in the garden	$4,227	2018-19	Fig Leaf and Darwin Fibreglass
1.14	New irrigation Work to water the garden	$3,450	17 August 2018	FR Tiling Services

1.15	Replace old bug lights with LED lights throughout house	$4,500	August 2018	FR Tiling Services
1.16	Install/replace sensor security lights – After attempted break in	$1,400	May 2020	FR Tiling Services
	Total	**$67,348**		

[62] Clause 4.1(e) of the Contract provided that the purchasers' right to occupy the property on licence was conditional on them "keeping the property in good repair having regard to its condition at the possession date". A further condition was found in clause 4.1(d), which provided:

> (d) the Buyer shall not let or part with possession of or make any structural alteration or addition to the property or do anything to or upon the property which would cause its value to diminish.

[63] By an email sent at 3.13 pm on 6 December 2018, Mr Trevor Tschirpig advised Ms Gaby Vita that the purchasers were "not in a position to complete this matter on the 12th December 2018". Mr Tschirpig stated that the purchasers "have been advised to seek an extension to the settlement date to on or before June 30, 2019".

[64] By an email sent to the purchasers' conveyancer at 11.39 am on 7 December 2018, the plaintiff's conveyancer, Ms Vita said:

> My client has plans in place for the usage of the funds from the sale and the significant delay in settlement will incur substantial cost to her.
>
> My client has instructed me that IF she agrees to the extension, she would need to impose some conditions:

1. That the buyer pay a further non-refundable deposit of $1,000,000.00 to the Seller for her own use (in addition to the $100,000.00 already paid).
2. That default interest at 12% will be imposed on the balance outstanding ($900,000.00) and this additional amount will be adjusted and paid to the seller at settlement.
3. If completion is not achieved by Friday 28 June 2019, the buyer confirms that the $1,100,000.00 paid to the seller will not be refunded and that the buyer may not make any claim against the seller.
4. That in the event that the buyer is not able to complete the contract by 28 June 2019, the buyer must vacate the property by 31 July 2019. In this event, the buyer must hand the property back to the seller in good condition.
5. That all other terms of the contract and arrangements in place between the seller and the buyer (including, but not limited to, payment of the outgoings, insurance and property maintenance) remain in effect.

[65] The purchasers' conveyancer responded by email at 4.22 pm the same day:

> My Clients are unable to meet the terms [in the earlier email]. If my Clients had funds in the sum of $1,000,000.00 they would be able to complete on the 12th.
>
> My Clients counter offer with a property "trade in." The property is known as the Acacia Hills Caravan Park which I am instructed has a UCV of $960,000.00. Settlement could then proceed shortly thereafter.
>
> My Clients would like the following be known:
>
> - the property, the subject of this matter, has been valued at $1,680,000.00,
> - my Clients operation of the business known as Uncle Sams commenced on 16th July 2018 so trading figures are limited and,
> - the sale of two other properties my Clients have on the market have fallen through.

[66] By email sent at 4.54 pm the same day, Ms Vita replied:

> My client does not accept your clients counter offer (she does not want to own a Caravan Park).

My client will look at other options over the weekend and get back to me with further instructions next week.

[67] By an email sent to the purchasers' conveyancer at 1.22 pm on Monday, 10 December 2018, Ms Vita said:

> My client does not accept your client's offer of a property "trade in".
>
> I am instructed to put some other options forward for your client's consideration:
>
> 1. Extend the date for completion until 28 June 2019 with default interest @12% pa to be imposed in accordance with the terms of the contract (with all current arrangements regarding payment of the outgoings/maintenance remaining as is).
> 2. Extend the date for completion by 12 months, with your client to pay a rent/license fee at current market rates (my client thinks around $7000.00 per month) plus default interest @12% pa.

[68] On 11 December 2018 at 2.40 pm, the purchasers' conveyancer responded, effectively "cutting and pasting" a response from the purchasers themselves, which stated:

> Looking at either options poses great disadvantages to us financially as the outcome of the currently situation was not anticipated nor was it indented to happen this way. When Danny and I entered into this contract to purchase the property, we fully disclosed to the vendor that we will require to sell a couple of properties to facilitate this.
>
> One of the factors that attributed to our problems in selling the properties is the continual decline in Darwin's property market which in turn the bank has also tighten their lending.
>
> We moved into this property at the end of January and during this time we have carried out improvement to the property at our own cost which are:
>
> - Rust treatment of all balcony and repaint all rails
> - Replace ageing life fitting thought the house with LED lights as some are hard-working and couldn't be repaired;
> - Replaced most of the split system air-conditioner with the same brand "Daikin";

- Installed crimsafe to the remaining of the doors and windows;
- Removes fallen trees from cyclone Marcus as well as trees identified by arborist which has termite damage;
- Internal paint;
- Replace toilet suites;
- Replaced pool fencing panels which are rusted beyond repair.

It is with much regret that we couldn't settle on the property due to reasons we disclosed in our previous email so we are asking if the vendors will reconsider imposing the 12% penalty as this will put us in further financial strain.

Will your client reconsider the default interest? (This last sentence appears to have been added by the purchaser's conveyancer)

(Spelling and grammar as per original)

[69] At 2.50 pm the same day, Ms Vita replied:

> It should be noted that my client is now at a considerable financial disadvantage as she had committed the funds from the sale elsewhere. This will be ongoing and accruing exponentially for the duration of the delay and until settlement actually takes place.
>
> I will seek instructions and get back to you.

[70] On 7 January 2019, Ms Vita emailed the purchasers' conveyancer stating:

> My client has reviewed her position regarding this matter.
>
> As previously advised, the lengthy extension to the date for completion requested by your client will cause my client financial difficulties. Whilst my client is very keen to find a resolution, she cannot extend the date for completion without receiving financial compensation.
>
> My client has advised that she would be willing to extend the date for completion until 2 September 2019 if your client agrees to pay default interest at the rate of 7% pa. All other arrangements currently in place regarding early possession are to remain as is.
>
> I look forward to receiving your response.

[71] In her affidavit of 18 December 2023, the plaintiff deposed to a telephone conversation with the first defendant on the weekend of Friday, 18 January

2019. The plaintiff stated that in that conversation, the first defendant asked the plaintiff to extend the settlement date to September 2019 so that the purchasers would have enough time to sell their two properties and be in a position to purchase the Fannie Bay property. The plaintiff stated that the first defendant told her that the purchasers were very keen to settle on the purchase of the Fannie Bay property.

[72] By email sent at 10.31 am on 24 January 2019, the purchasers' conveyancer forwarded the contents of an email which she had received from the purchasers to Ms Vita. The contents of the purchasers' email was:

> Danny and I like to take this opportunity to thank Margaret for taking the time to speak with me over the weekend and at the beginning of the week. We express my sincere gratitude to Margaret for her patience and understanding in regards to the delay in the settlement of the property.
>
> During the course of the conversation I reiterate that I am committed to the purchase and have now listed my 2 properties with another agent as well as having the flexibility to also advertise to sell privately. As both the properties I have for sale is unencumbered, as soon as the sale of one of the property is sold the proceed of the sale will go directly to the vendors as further deposit/towards the purchase.
>
> If both properties sold, then settlement will take place. Margaret and I agreed to the settlement of September 2019. I will continue to pay the following expenses till settlement:
>
> - Water
> - Council rates
> - Twice monthly pool maintenance
> - Ongoing maintenance of the property
> - Twice monthly grounds maintenance
> - Any other cost associated with this property.
>
> I have recently undertaken the following maintenance:
>
> - Replacement of 2 toilet suites
> - Service of the solar hot water service

- Replace seal/worn fitting on taps

(Grammar as per original)

[73] In late January 2019, the plaintiff retained the firm of HWL Ebsworth lawyers to make sure that any agreement which she reached with the purchasers to extend the settlement date was properly documented. The plaintiff directed Ms Vita not to have any further engagement with the purchasers' conveyancer.

[74] On 11 February 2019, the plaintiff's lawyers wrote to the purchasers' conveyancer stating:

- the plaintiff rejected any suggestion which may have been intended in the email of 24 January 2019 that the plaintiff had reached any agreement with the purchasers to vary the Contract;
- the plaintiff had not at any time offered to waive in full the interest payable by the purchasers, which was continuing to accrue at a rate of over $650 per day; and
- the proposal advanced by the plaintiff's conveyancer by email on 7 January 2019 had not been accepted by the purchasers and was now withdrawn.

[75] The letter went on to say that the plaintiff's current position was that she offered to vary the Contract on the following terms:

1. That the date for completion (Item H of the Contract) be extended to on or before 2 September 2019;

2. That the purchasers pay default interest at a rate of 7% per annum from 12 December 2018 until settlement occurs, which must be paid on a monthly basis in arrears between the date of the letter and settlement (at $11,666.67 per month, such that the sum of $23,333.34 is due 12 February 2018, and a further $11,666.67 on each 12th day of the month);

3. That the purchasers immediately pay all outstanding outgoings on the property and confirm that outgoings are up-to-date;

4. That the purchasers provide security for the performance of the Contract by way of registered first ranking mortgages over their current properties. The purchasers were requested to provide details and advertised prices of their properties;

5. That all other provisions of the Contract remain in force.

[76] The letter advised the purchasers' conveyancing agent that if these conditions were accepted by the purchasers, the variation to the Contract must be recorded in writing in a Deed of Variation signed by the parties, and that no binding variation agreement would exist until such a deed was entered into. The letter required a response by no later than close of business Monday, 18 February 2019. The letter concluded that if agreement was not reached "our client will need to consider her options to terminate

the Contract for repudiation or breach and she will be entitled to damages. Further, your clients will be required to move out immediately upon termination".

[77] In her affidavit of 8 March 2024, the first defendant said that she was "surprised and confused" by this letter, as she believed that she and the plaintiff were going to reach an agreement to extend the date for completion by discussion.

[78] A file note produced under subpoena by Tschirpig Conveyancing records short notes of a telephone conversation between Ms Muis and the first defendant. It reads "AOT Fatima-$700.00 per week. $8K paid to sellers account. Not keen to allow properties to be mortgaged".

[79] By an email sent at 11.54 am on 26 February 2019, the purchasers' conveyancer, Ms Muis, responded to the letter from the plaintiff's lawyers:

> My clients are extremely disappointed at not being in a position to settle this matter and are doing everything they can to get this resolved. They are VERY appreciative of the sellers patience to date.
>
> They are maintaining the house and have spent approximately $100K on improvements while they have been in possession.
>
> They have addressed the points noted as per your correspondence of 11 February 2019.
>
> 1. They agree to the settlement on 02 September 2019;
> 2. They are simply not in a position to pay the default interest at $11,666.67 (7%) monthly but have offered a licence fee of $700.00 per week which they believed to be a market rent.
> 3. A deposit of $8000 was made direct to the seller today to cover rates payments and other outgoings. The buyers were not aware these amounts were outstanding or they would have paid earlier. They still have regular pool maintenance, see attached latest

received. The house and garden is maintained and they are happy to take some photos for the seller.

4. The caravan park is still on the market with Acacia Realty [a link to the website of that agency was included]. 28 Bridge Street is for sale with the developer. As there are covenants on the Title the property is not able to be listed with an Agent, however approval to sell privately has been given.
5. Agreed.

(The reference to 28 Bridge Street is clearly a mistake and should be a reference to 38 Bridge Street)

[80] From this email, it is apparent that the purchasers agreed to the proposal put forward by the lawyers for the plaintiff to the extent that settlement would be on or before 2 September 2019 and that the provisions of the Contract, including early possession provisions, would remain in force during any extension. The purchasers also addressed the requirement that they pay outstanding outgoings on the property. The purchasers stated that they were unable to meet the requirement that they pay default interest at 7% monthly. The purchasers simply did not respond to the requirement that they provide first ranking mortgages over their properties as security for their performance of the Contract.

[81] On 13 March 2019, the plaintiff's lawyers served on the purchasers' conveyancer a Notice to Complete, requiring the purchasers to do all things necessary to complete the Contract by 5.00 pm on 1 April 2019. The letter accompanying this Notice advised the purchasers that if they failed to comply with the Notice, the plaintiff would terminate the Contract. The letter also advised the purchasers that if the Contract were terminated, the licence granted under the Contract permitting the purchasers to occupy the

property would also be terminated and the purchasers would be required to immediately vacate the property. Finally, the letter noted that the plaintiff understood that alterations had been made to the premises by the purchasers without the plaintiff's consent and reserved the plaintiff's right to seek damages for rectification or repair if the Contract were terminated.

[82] By a second letter dated 13 March 2019 and forwarded to the purchasers' conveyancer, the plaintiff's lawyers noted that a Notice to Complete had been served requiring completion of the sale by 1 April 2019, failing which the Contract would be terminated. The letter noted that the proposal to resolve the matter made by the plaintiff by email on 11 February 2019 had not been accepted in full by the purchasers. The letter set out the plaintiff's final position, with a statement that if the terms were not agreed to and a deed of variation signed prior to 1 April 2019, the Contract and licence would be terminated. The final proposal advanced by the plaintiff was:

1. Completion to occur on or before 2 September 2019;
2. The plaintiff would reduce the default interest rate payable under the contract to 7% per annum. If, however, the purchasers paid $5000.00 per month in advance to the plaintiff for the months of January 2019 through to September 2019 on account of that default interest and settles by 2 September 2019, the plaintiff would waive the balance of the default interest accrued until completion. The first instalment of $15,000.00 in respect of the months January,

February and March were to be paid on execution of the deed of variation to the Contract and subsequent instalments were payable on the first day of each calendar month thereafter;

3. The purchasers must provide security for their performance of the Contract by way of first ranking mortgages over both the caravan park and vacant land at 28 Bridge Street;

4. The purchasers must pay all outstanding outgoings on the property from the date of execution of the Contract until and including settlement; and

5. The purchasers must cease any further improvements or alterations to the property.

(The reference to 28 Bridge Street is clearly a mistake and should be a reference to 38 Bridge Street)

[83] By an email sent on 19 March 2019, the purchasers' conveyancer advised the plaintiff's lawyers that the purchasers were considering the offer contained in the letter of 13 March 2019 and will respond within a couple of days. By email dated 21 March 2019, the purchasers' conveyancer informed the plaintiff's lawyers that the purchasers "will proceed as proposed in your correspondence of 13 March 2019". The email requested that the plaintiff's lawyers provide a deed for signature by the purchasers.

[84] In her affidavit of 8 March 2024, the first defendant described this process of negotiation as follows:

> It was not a discussion between equals. We were the buyers in default who were unable to complete the purchase despite being given a long time to complete. We were economically inferior to the plaintiff.
>
> …
>
> It seemed to us that we had no option but to agree to the terms set out in the letter dated 13 March 2019. So, we did.

[85] On 27 March 2019, the purchasers' conveyancer provided to the plaintiff's lawyers title searches for the Acacia Hills and Muirhead properties. These documents, for the first time, put the plaintiff on notice that there was a pre-existing first mortgage registered over the Acacia Hills property.

[86] By email sent later that day from the plaintiff's lawyers to the purchasers' conveyancer, a draft Deed of Variation was provided to the purchasers. In the email, it was noted that the title search revealed that the Acacia Hills property was already subject to a mortgage registered against it in favour of the National Australia Bank ('NAB'). The plaintiff's lawyers accordingly requested a current bank statement showing the loan balance and equity in the property. The email stated "We require proof of the current value of the property". The email noted that the plaintiff had not had an opportunity to review the draft deed, and the purchasers' conveyancer would be advised if the plaintiff required any changes to the draft deed. The first defendant accepted that she received the draft variation deed and the request for further information on 28 March 2019.

[87] On 28 March 2019 at about 9.56 am, the plaintiff's lawyer, Ms Nadia D'Souza, had a phone conversation with Ms Muis in which Ms D'Souza

stated “We were not aware that there was already an existing mortgage over the caravan park property”. Ms Muis said “I’m not sure how long it will take to get information from Fatima, sometimes she is quick and other times she takes a few days. I will forward your email to Fatima and hopefully that will make her respond quickly. Leave it with me, I will get you the information as soon as I can. We need it quickly because we need to sign the variation deed by this Friday”.

[88] Later that day, at about 4.02 pm, Ms D’Souza sent an email to Ms Muis asking whether Ms Muis had any further update on when the plaintiff’s lawyers could expect to receive details of the NAB mortgage.

[89] On Friday, 29 March 2019, the first defendant spoke directly to the plaintiff, presumably by telephone. As a result of that conversation, the plaintiff agreed to accept a second mortgage over the Acacia Hills property. A further draft variation deed was provided to the purchasers later that day, which included a new clause that required the second defendant company to provide a deed of performance guarantee. The first defendant stated that a draft of the deed of performance guarantee was not provided at that time.

[90] At 9.14 am on 29 March 2019, Ms Muis emailed Ms D’Souza stating:

> My client has just called and advised that she spoke to your client 20 minutes ago.
>
> Your client is apparently happy to have a second mortgage on the Acacia Hills property. My client’s advice is that there is no debt on the property it is being held as security for another property.
>
> I am also advised that there is now an amended Deed.

[91] At 2.45 pm the same day, Ms D'Souza forwarded a copy of the amended draft variation deed to Ms Muis. This document was conveniently marked-up to allow the purchasers to identify the amendments to the original draft deed. The amended draft variation deed provided for security by way of a first ranking mortgage to be given to the plaintiff over the Muirhead property, and a second ranking mortgage over the Acacia Hills property. In addition, it required additional security to be provided by 30 April 2019 by way of a deed of guarantee of performance by the third defendant.

[92] At 3.00 pm the same day, Ms Muis forwarded the amended draft variation deed to the purchasers. In the email to which the amended draft variation deed was attached, Ms Muis said:

> Can you please peruse the Deed carefully and if you are unsure of anything obtain legal advice.
>
> We are under extreme pressure to have this Deed signed, witnessed and returned by close of business today. Given the time of day, I have requested an extension until Monday but we have not had a response as yet.

[93] At 4.10 pm that day, Ms D'Souza notified Ms Muis that the plaintiff had approved an extension until close of business Monday 1 April 2019 to arrange execution and exchange of the deed.

[94] At 11.38 am on Monday, 1 April 2019, Ms Muis emailed Ms D'Souza asking whether there was a final draft of the deed for the purchasers to peruse before signing. At 1.29 pm, Ms D'Souza responded to the effect that the amended deed would be provided as soon as possible and, in the meantime,

Ms D'Souza would seek instructions from the plaintiff for a further extension. The email went on to say:

> In your email dated 29 March, you advised that there is no debt against the caravan park and that it is being held as security for another property. Our client still requires proof and we ask that the buyers provide us with a current statement from their bank. We also still require proof of the current value of the property.

[95] Ms Muis passed this information on to the purchasers by email at 1.31 pm that day. Ms Muis asked the purchasers to provide the requested material as soon as possible.

[96] At 3.23 pm that day, Ms Muis emailed Ms D'Souza asking what the plaintiff would accept as proof of value, and advising that if a valuation was required, it could take some time. At 2.34 pm Ms D'Souza replied:

> Does your client have a bank valuation or any bank correspondence which mentions the property's value? Or any written communication of the listing price with their sales agent or an appraisal from a real estate agent.
>
> If your clients are trying to sell the property, there is likely some documentary evidence of the price that they are seeking or otherwise indicating what the property is worth?

[97] At 4.33 pm that day, Ms D'Souza emailed Ms Muis saying that the plaintiff's lawyers had sought instructions from the plaintiff for a further extension of time to execute the deed. Ms D'Souza said "While we have not heard from our client, we expect that they will grant the extension". The email concluded by stating that revised drafts would be provided the following day.

[98] By email sent at 2.10 pm on 2 April 2019 to Ms Muis, Ms D'Souza informed the purchasers of the following:

> We attach the revised Deed of Variation for your review (**DOV**). We propose to additionally annex the following documents to the Deed:
>
> - Form 39 Mortgage – caravan park
> - Form 39 Mortgage – 38 Bridge Street
> - Deed of Performance Guarantee
>
> The mortgage shall be subject to the terms of the Memorandum of Common Provisions registered in dealing number 372255 (refer attached).
>
> Our client has confirmed an extension until close of business tomorrow, **Wednesday 3 April 2019** to arrange execution and exchange of the DOV. You will see in clause 3.1(b) of the DOV that the mortgages and guarantee must be entered into on or before the date of the DOV. Can you confirm if the documents are in order or if any changes are required. Can you also advise if you have received any further information from your client regarding the value of the caravan park.

[99] At 2.43 pm that afternoon, Ms Muis forwarded the above email to the purchasers together with the revised draft Deed of Variation. Ms Muis said in that email "I strongly recommend you obtain legal advice in relation to these documents before signing them – noting the time frame stipulated".

[100] On 3 April 2019 at 11.34 am, Ms D'Souza had a telephone conversation with Ms Muis in which Ms Muis confirmed that she had received the email sent the previous day and had forwarded it to the purchasers. Ms Muis said that she had not heard anything from the first defendant at that time. Ms D'Souza asked whether she could go ahead and get the plaintiff to sign the Deed. Ms Muis responded "I've told my clients to get some legal advice because I won't give them legal advice on the deeds. I'm not sure if they

will be able to get legal advice so quickly." Ms D'Souza then said "Well let me know if you would be seeking an extension as I will then need to get instructions." Ms D'Souza said "I'll call Fatima now and ask for an update."

[101] At 2.41 pm that day, Ms Muis emailed Ms D'Souza saying:

> My clients are happy to sign the documents but cannot do so until late this afternoon. They are going to our Coconut Grove office at about 5pm.
>
> Can I please have an extension until close of business tomorrow to get this finalised.

[102] Ms D'Souza responded by email at 5.05 pm that day, advising that the plaintiff agreed to an extension until close of business on 4 April 2019. The email continued:

> To assist with execution, we attach the following:
>
> 1. **Deed of Variation (with annexures)** – print 1 copy and arrange signing on page 7 by both Danny and Fatima in front of a witness.
> 2. **Deed of Performance Guarantee (DOPG)** – print 1 copy and arrange signing on page 9 by Danny in his capacity as sole director of Danium Investments Pty Ltd.
> 3. **Mortgage** (38 Bridge Street) – print 2 copies double-sided and arrange signing by Fatima in front of a qualified witness. The witness must record their qualification, name and contact details.
> 4. **Mortgage** (caravan park) – print 2 copies double-sided and arrange signing by Danny in his capacity as sole director of Danium Investments Pty Ltd.
>
> Please note that we have added an additional clause 15 to the DOPG (and accordingly updated the index table) so that both deeds can be exchanged in counterparts by email. This was the only change made to the deed since our last draft.

[103] At 4.11 pm on 3 April 2019, Ms Muis forwarded those documents to the Coconut Grove office of Tschirpig Conveyancing, stating that they were new documents to be signed by the purchasers that afternoon.

[104] On 3 April 2019, the purchasers paid $15,000.00 to the plaintiff. The plaintiff claims that this sum was paid as the first default interest payment required by the Deed of Variation. The purchasers claim that this was a sum paid towards the purchase price of the Fannie Bay property.

[105] By an email sent at 9.16 am on 4 April 2019, Ms D'Souza asked Ms Muis whether she was able to provide any further information regarding proof that there was no debt owing against the Acacia Hills property and proof of the current value of the property. Subsequently, at 10.38 am, Ms D'Souza sent a further email requesting a balance sheet for Danium Investments Pty Ltd to allow an understanding of that company's assets and liabilities.

[106] Ms Muis replied at 2.10 pm that day providing a NAB bank statement for Danium Investments Pty Ltd simply showing a continuing debit of $600,000.00, which I understand to be the amount borrowed by the second defendant to purchase another property.

[107] At 3.14 pm on 4 April 2019, Ms D'Souza sent an email to Ms Muis saying:

> Further to our discussion over the phone, our client has agreed to grant an extension until close of business tomorrow.
>
> Can you urgently follow up your client for the requested information for our client's review. Can you also provide us with a receipt for the further $5000 in respect of the April payment.

[108] The reference to “the April payment” in this email is clearly a reference to the sum of $5,000.00 default interest payable at the beginning of April 2019 in accordance with the agreed terms of the Deed of Variation.[5]

[109] By email sent at 4.37 pm on 4 April 2019, Ms Muis informed Ms D’Souza that her client (presumably the first defendant) travelled overseas that morning and would not return until the following Sunday. Ms Muis said that her client had advised her that the client would pay the extra $5,000.00 that same day, and that the accountants for Danium Investments Pty Ltd were working on a balance sheet. Ms Muis also said that her client would ask the agent who had the listing for the Acacia Hills property for a market appraisal.

[110] By letter dated 4 April 2019, Ms Muis forwarded the signed original Mortgages over the Muirhead and Acacia Hills properties to the lawyers for the plaintiff.

[111] It appears from the Deed of Variation that that document was executed by the purchasers on 5 April 2019. Similarly, it appears from the Deed of Performance Guarantee that it was also executed on 5 April 2019. These signed documents were, however, not provided to the plaintiff until 11 April 2019.

[112] At 4.14 pm on 5 April 2019, Ms D’Souza emailed Ms Muis asking whether she had received any further financial information for Danium Investments

5 See [81] above.

Pty Ltd or valuation information on the Acacia Hills property. At 5.47 pm that day, Ms D'Souza again emailed Ms Muis attaching the plaintiff's counterparts of the Deed of Variation and Deed of Performance Guarantee both dated 5 April 2019. Ms D'Souza requested the purchasers dated counterparts in order to complete the exchange. Ms D'Souza repeated her request for "the Financial/valuation information" as soon as possible. She also required confirmation that $5,000.00 had been transferred to the plaintiff's account in respect of the April payment.

[113] At 8.59 am on 11 April 2019, Ms D'Souza sent an email to Ms Muis requesting the counterparts of the Deed of Variation and the Deed of Performance Guarantee. Ms D'Souza repeated her request that confirmation be provided of the payment of $5,000 to the plaintiff's bank account in respect of the April payment. Ms D'Souza also repeated her request for information as to the value of the Acacia Hills property and the financial situation of Danium Investments Pty Ltd.

[114] Ms Muis responded by email at 4.20 pm that day, attaching the signed Deeds. Ms Muis stated that she had not received any advice from her client regarding the deposit or the further information requested. Ms Muis stated that she would "chase them up again".

[115] On 1 May 2019, the purchasers paid the plaintiff $5,000.00 which the plaintiff claims was paid in reduction of default interest under the Contract, as varied by the Deed of Variation.

[116] On 2 May 2019, the Acacia Hills and Muirhead Mortgages were registered.

[117] On 31 July 2019, the purchasers paid $20,000.00 to the plaintiff which the plaintiff claims was paid in reduction of default interest.

[118] On 13 August 2019, Ms Vita of Aquarius Conveyancing, acting on behalf of the plaintiff, forwarded an email to Ms Muis requesting an update from the purchasers on when they expected to be in a position to settle. On 26 August 2019, Ms Vita sent a further email to Ms Muis in the following terms:

> My client has received a letter from your client requesting that a new contract be prepared in this matter allowing for settlement by the end of the year. Your client has advised my client that she has recently sold 2 properties. Before my client will go to the expense of having a new contract prepared, she would like evidence that your client has sold 2 properties.
>
> Are you please able to provide an update in this matter?

[119] It appears that no response was received to this email. The purchasers simply failed to complete the Contract by the extended completion date of 2 September 2019. On 11 September 2019, Ms Muis forwarded to Ms Vita an email from the first defendant stating that the purchasers had exchanged contracts to sell a property which they owned at Coomalie for $1,550,000.00, with settlement in December 2019. The first defendant said that the Muirhead property "is being signed this week and hope to settle beginning of October". The first defendant went on to say "as the vendor Mrs Castronova have put (sic) a registered interest on the block, this will also needs (sic) to be dealt with before settlement". The first defendant requested settlement on the Fannie Bay property be extended to

18 December 2019. It appears that the purchasers did not provide the information previously requested by Ms Vita.

[120] On 19 November 2019, the purchasers paid a further $10,000.00 into the plaintiff's account which the plaintiff claims was for default interest.

[121] On 10 December 2019, the first defendant telephoned the plaintiff and asked her to agree to the settlement date being further extended to April 2020. On that same date the plaintiff instructed Ms Vita to prepare and issue a Notice of Default to the purchasers requiring them to settle on 24 December 2019.

[122] By email dated 17 December 2019, Ms Muis forwarded an email which she had received from the first defendant. The first defendant said that she had been in "remote homelands" without internet access. The first defendant said "Prior to leaving Darwin a couple of weeks ago I contacted the vendor to advise that I was not able to complete the sale as the sale of my property in Coomallie was not settling due to issue with the purchaser. A new sales contract was to be drafted to settle end to (sic) April 2020. I advised the vendors that I will continue to pay rent of $5000 per month till when I am able to settle and she seem ok with it." Ms Muis asked whether the plaintiff would agree to extend the settlement date to the end of April 2020. I note that in these proceedings the plaintiff has taken issue with the assertion in this email that the purchasers had been paying $5,000.00 per month as "rent".

[123] On 19 December 2019, the purchasers paid a further $5,000.00 into the plaintiff's account which the plaintiff claims was for default interest.

[124] On 24 December 2019, the time for completion under the Notice of Default expired without completion occurring.

[125] On 17 February 2020 and 16 March 2020, the purchasers paid $10,000.00 (total $20,000.00) into the plaintiff's account which the plaintiff claims was for default interest. On 5 May 2020, the purchasers paid a further $5,000.00 which the plaintiff claims was for default interest.

[126] On 15 May 2020, the plaintiff telephoned the first defendant and told her that she was considering terminating the Contract, and that if she did she would be putting the property back on the market on 1 July 2020.

[127] By email sent 22 May 2020, Ms Vita advised Ms Muis that if settlement on the Fannie Bay property was not completed by 30 June 2020, the plaintiff would terminate the Contract and place the property back on the market. The purchasers would then be expected to vacate the premises. Ms Vita asked when the purchasers expected to be able to complete the Contract.

[128] On 19 June 2020, the purchasers paid a further $10,000.00 into the plaintiff's account which the plaintiff claims was default interest.

[129] On 6 July 2020, the Contract was terminated by the plaintiff by providing a Notice of Termination. On 31 July 2020, the purchasers vacated the Fannie Bay property.

[130] On that date, at 3.34 pm, Ms Muis emailed Ms Vita, saying:

> I am advised that the seller has registered Caveats over some of my client's properties.
>
> Can you please confirm that those caveats will now be removed and advise when they have been.

[131] On 14 July 2020, there was apparently a telephone conversation between Ms Muis and Ms Vita. The only evidence of the content of that conversation is a file note prepared by Ms Vita which is in the following form:

> "--caveats to be removed once P vacates."

[132] On 27 August 2020, Ms Muis sent an email to Ms Vita regarding the Muirhead property, saying:

> I note your client Margaret Castronova has a registered mortgage over this property.
>
> Can you please action a discharge for this property and also any other property encumbered by the failed sale of 76 East Point Road.

[133] On 24 September 2020, the first defendant entered into a contract to sell the Muirhead property to third parties for $495,000.00 with a completion date set for 9 December 2020. The contract became unconditional on 25 November 2020.

[134] On Saturday, 10 October 2020, the Fannie Bay property was passed in at auction with no bidders. Subsequently, after further open inspections, an unconditional offer to purchase was made by BF for $1,350,000.00, which the plaintiff accepted. Contracts were exchanged on 27 November 2020.

[135] On 15 October 2020, Ms Muis sent a further email to Ms Vita saying "Just chasing up confirmation the Caveats have been removed."

[136] On 26 November 2020, the plaintiff engaged Ms Papazoglou to prepare a discharge of the Muirhead Mortgage. In her affidavit, Ms Papazoglou states that she had the following telephone conversation with the plaintiff:

> Plaintiff: I own 76 East Point Road and contracted to sell it to Fatima for $2 million back in 2017. Fatima paid a $100,000 deposit but then failed to complete the purchase and has eventually been evicted from the property. I have a mortgage over two properties belonging to Fatima which secure the amounts she owes me. I need to discharge the mortgage over one of those properties which is now being sold. Gaby Vita has recommended you to me. Are you able to prepare the discharge of mortgage for me?
>
> Ms Papazogolou: Yes, I'm happy to act.
>
> Plaintiff: Thank you. I have now sold 76 East Point Road for $1,350,000 but still own it until 30 December 2020 when that sale is to complete. Fatima owes me money and she agreed to give the mortgages over Fatima's properties. HWL Ebsworth prepared the mortgages. Please call Gaby Vita who can fill you in on the background. Gaby acted for me when I initially sold the property to Fatima and now acts for the buyer of the property for which the mortgage is to be discharged.

[137] In her affidavit of 29 November 2022, the first defendant said that after the contract for the sale of the Muirhead property became unconditional, she was informed by her conveyancing agent, Ms Sandra Lenz, that "there were issues with the discharge of mortgage". The first defendant deposed that Ms Lenz advised the first defendant to speak to the plaintiff directly.

[138] The first defendant stated that in early December 2020, well before the nominated settlement date for the sale of the Muirhead property, being

9 December 2020, she telephoned the plaintiff and informed the plaintiff that she was selling the Muirhead property. The first defendant said that she asked the plaintiff to discharge the mortgage over the property to enable the first defendant to proceed with the sale of the property. The first defendant stated that the plaintiff refused, saying that the sale proceeds of the Muirhead property would not cover what the first defendant owed her for the Fannie Bay property. The plaintiff told her that she did not want to discuss the matter any further and terminated the call.

[139] The plaintiff has denied refusing to discharge the Muirhead mortgage.

[140] On 8 December 2020, Ms Papazoglou telephoned Ms Lenz and discussed the settlement arrangements for the sale of the Muirhead property. In her affidavit, Ms Papazoglou deposed to the following conversation:

> Ms Papazoglou: Hi Sandra. I act for Margaret Castronova who has a mortgage over a property owned by your client, Fatima. I have been instructed to prepare a discharge of the mortgage for an upcoming sale of the property by Fatima. When is the settlement scheduled for?
>
> Ms Lenz: I have no idea. The buyers are keen to settle as soon as possible but Fatima hasn't even signed the transfer yet and I'm having difficulties getting any instructions from her. She's selling vacant land in Muirhead. She has consent from the Defence Housing Australia to sell the land as she had not complied with the registered Covenants to build a house on the land. The sale price is $540,000 which includes a buyer rebate of $48,203.88. The buyer only offered $500,000.
>
> Ms Papazoglou: I'm instructed that the balance of the sale proceeds, once the usual conveyancing fees, rates and commission have been paid, are going to Margaret. Are you able to provide a draft settlement statement to me?
>
> Ms Lenz: I'll try, but as I said I'm having a lot of difficulties getting instructions and have had no contact from Fatima.

[141] On 10 December 2020, Ms Papazoglou was copied into an email from Gaby Vita, who was then acting for the purchasers of the Muirhead property, to Ms Lenz seeking an urgent update on when the first defendant would be in a position to settle. In her email, Ms Vita said that settlement was now overdue and the buyers needed settlement to go ahead as soon as possible.

[142] Ms Papazoglou attempted unsuccessfully to speak to Ms Lenz on Friday, 11 December 2020.

[143] At this time, the plaintiff was in Adelaide. On Monday, 14 December 2020, Ms Papazoglou sent an email to the plaintiff's Adelaide solicitor attaching a discharge of mortgage form for execution by the plaintiff. About 1 ½ hours later, Ms Papazoglou received an email from the plaintiff's Adelaide solicitor attaching a copy of the discharge of mortgage executed by the plaintiff. The plaintiff's Adelaide solicitor stated that he would send the original documents to Ms Papazoglou by Express Post that afternoon.

[144] Later on the afternoon of 14 December 2020, Ms Papazoglou had the following telephone conversation with Ms Lenz:

> Ms Lenz: I haven't heard anything from Fatima. She has a draft settlement statement for her approval but she has not approved yet.
>
> Ms Papazoglou: My instructions are Margaret will be getting the net sale proceeds. She has two mortgages over Fatima's properties. Margaret has signed the mortgage discharge and the original is on its way to me by post.
>
> Ms Lenz: I want to cease acting for Fatima. She continually ignores me and doesn't get back to me with her instructions.
>
> Ms Papazoglou: If you're going to do that, I think you should send Fatima another email with the draft settlement statement and tell her it

needs to be approved and she is in default of the sale contract. I suggest giving her a certain number of days to respond otherwise you will terminate her instructions. Then, if she doesn't respond, you will need to speak to a lawyer about extricating yourself from the matter.

Ms Lenz: I'll do that.

[145] At 5.30 pm on 14 December 2020, Ms Vita, in her capacity as conveyancer for the prospective purchasers of the Muirhead property, sent an email to Ms Lenz. Of significance, the email establishes that the prospective purchasers were still keen to complete the purchase, and were willing to settle as soon as the first defendant set a date for settlement.

[146] At about the same time, Ms Lenz sent an email to the first defendant to the following effect:

> I am advised by the Buyer's conveyancer that the Buyer is ready and willing to settle this matter but is frustrated by the fact that we are not ready to settle to the extent that they will likely issue a notice of default.
>
> Despite your advice last week that you would call me back I have not had a return call.
>
> I have been contacted by the Lawyer acting for your mortgagee requesting a draft settlement statement showing funds available on settlement. I have prepared a statement which is attached.
>
> A copy of Elders commission statement is also attached.
>
> Please check the statement and confirm by return email that I am authorised to forward same to Pipina Papazoglou who is acting for your mortgagee.

[147] The plaintiff gave evidence that on 15 December 2020, she telephoned the first defendant and told her that she, the plaintiff, had signed the discharge of mortgage. The plaintiff also told the first defendant that the matter must

be resolved as soon as possible. The first defendant denied any such conversation occurred.

[148] On 17 December 2020, Ms Vita, acting on behalf of the prospective purchasers of the Muirhead property, issued a Notice of Default to the first defendant appointing 5 January 2021 as the completion date for that sale. On the same date, Ms Papazoglou received the original discharge of mortgage and associated documents from the plaintiff's Adelaide lawyer. Thereafter she held onto the discharge while she awaited further information.

[149] On 21 December 2020, the plaintiff completed the sale of the Fannie Bay property to BF for the sale price of $1,350,000.00.

[150] On 18 January 2021, lawyers for the prospective purchasers of the Muirhead property issued a notice to perform to the first defendant.

[151] On 18 March 2021, the first defendant emailed Elders Real Estate saying "I cannot proceed with the sale as there are legal issues going on." The first defendant agreed to return the deposit to the prospective purchasers.

[152] In her affidavits, the first defendant claimed that the sale of the Muirhead property did not proceed because the plaintiff refused to discharge the mortgage she held over the property. The first defendant claimed that any outstanding debt she owed the plaintiff over the breach of the Contract could have been "resolved" if the sale of the Muirhead property had gone ahead.

The plaintiff denied having refused to discharge the Muirhead Mortgage to allow its sale.

[153] On 30 November 2021, the prospective purchasers of the Muirhead property commenced proceedings against the first defendant in the Local Court claiming damages, interest and costs in a sum not exceeding $250,000.00. Those proceedings are being defended by the first defendant and remain pending in the Local Court.

[154] In her affidavit of 8 March 2024, the first defendant stated that she was not informed by the plaintiff of the sale of the Fannie Bay property to BF or the sale price until well after the completion of that sale. The first defendant stated that she had a telephone conversation with the plaintiff on 11 March 2022 regarding monies the plaintiff claimed the first defendant owed her for failing to complete the Fannie Bay property purchase. The plaintiff said that it would be in the first defendant's best interests to have discussions privately as it would save the first defendant having to pay legal expenses.

[155] The first defendant stated that the plaintiff said in this conversation that there was a shortfall of $650,000.00 from the sale of the Fannie Bay property to BF, together with interest at 12% on the purchase price of $2,000,000.00 from 2017 to 2020. The plaintiff stated that she would accept $700,000.00 in full and final settlement if it was paid into her bank account by no later than 14 March 2022. On 16 March 2022, the plaintiff telephoned the first defendant again and the first defendant requested that she be

allowed to pay the $700,000.00 by monthly instalments. The plaintiff refused this request, and said the matter would now be in the hands of her lawyers.

[156] In May 2022, the lawyers for the plaintiff took steps to exercise the plaintiff's power of sale found in the Muirhead and Acacia Hills Mortgages. The defendants took action to prohibit the plaintiff from exercising any such power of sale. It is unnecessary to consider in detail the procedural aspects of what then occurred, and it is sufficient to note that the dispute between the parties culminated in the present proceedings.

The Australian Consumer Law

[157] Many of the matters pleaded by the defendants in their Defence are based on provisions of the ACL. The ACL is found in Schedule 2 to *the Competition and Consumer Act 2010* (Cth) and applies as a law of the Northern Territory by operation of s 27(1) of the *Consumer Affairs and Fair Trading Act 1990* (NT). For convenience, I will set out the relevant provisions which are found in Part 2.3 of the ACL:

> **23 UNFAIR TERMS OF CONSUMER CONTRACTS AND SMALL BUSINESS CONTRACTS**
>
> (1) A term of a consumer contract or small business contract is void if:
>
> (a) the term is unfair; and
>
> (b) the contract is a standard form contract.
>
> (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
>
> (2A) A person contravenes this subsection if:

(a) the person makes a contract; and

(b) the contract is a consumer contract or small business contract; and

(c) the contract is a standard form contract; and

(d) a term of the contract is unfair; and

(e) the person proposed the unfair term.

(2B) A person who contravenes subsection (2A) commits a separate contravention of that subsection in respect of each term that is unfair and that the person proposed.

(2C) A person contravenes this subjection if:

(a) the person applies or relies on, or purports to apply or rely on, a term of a contract; and

(b) the contract is a consumer contract or small business contract; and

(c) the contract is a standard form contract; and

(d) the term is unfair.

(3) A ***consumer contract*** is a contract for:

(a) a supply of goods or services; or

(b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use consumption.

24 MEANING OF *UNFAIR*

(1) A term of a consumer contract or small business contract is ***unfair*** if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole.

(3) A term is ***transparent*** if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

25 EXAMPLES OF UNFAIR TERMS

Without limiting section 24, the following are examples of the kinds of terms of a consumer contract or small business contract that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

26 TERMS THAT DEFINE MAIN SUBJECT MATTER OF CONSUMER CONTRACTS OR SMALL BUSINESS CONTRACTS ETC. ARE UNAFFECTED

(1) Section 23 does not apply to a term of a contract to the extent, but only to the extent, that:

(a) the term defines the main subject matter of the contract; or

(b) the term sets the upfront price payable under the contract; or

(c) the term is required, or expressly permitted, by a law of the Commonwealth or of a State or Territory; or

(d) the term is included in the contract, or is taken to be so included, by operation of a law of the Commonwealth, or of a State or Territory, that regulates the contract; or

(e) inclusion of the term has either or both of the following results:

(i) one or more other terms are included in the contract, or are taken to be so included, by operation of a law of the Commonwealth, or of a State or Territory, that regulates the contract;

(ii) such a law requires one or more other terms to be included in the contract.

(2) The ***upfront*** price payable under a contract is the consideration that:

(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and

(b) is disclosed at or before the time the contract is entered into;

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

27 STANDARD FORM CONTRACTS

(1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

(2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(ba) whether one of the parties has made another contract, in the same or substantially similar terms, prepared by that party, and, if so, how many such contracts that party has made;

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 26(1)) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 26(1);

(e) whether the terms of the contract (other than the terms referred to in section 26(1)) take into account the specific characteristics of another party or the particular transaction;

(f) any other matter prescribed by the regulations.

(3) A contract may be determined to be a standard form contract despite the existence of one or more of the following:

(a) an opportunity for a party to negotiate changes, to terms of the contract, that are minor or insubstantial in effect;

(b) an opportunity for a party to select a term from a range of options determined by another party;

(c) an opportunity for a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract.

[158] The term "standard form contract" is not defined in the ACL. Pecuniary penalties may be imposed for breaches of ss 23(2A) and (2B).[6]

[159] In interpreting the provisions of the ACL, I am to prefer a construction that promotes the purpose or object of the enactment (whether expressly stated in the enactment or not) over a construction that does not promote that purpose or object.[7] In interpreting the provisions of the ACL, I am permitted by s 62B(1) of the *Interpretation Act* to take into account extrinsic material for limited purposes. This section provides:

62B USE OF EXTRINSIC MATERIAL IN INTERPRETING ACT

(1) In interpreting a provision of an Act, if material not forming part of the Act is capable of assisting in ascertaining the meaning of the provision, the material may be considered:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

[160] The ACL was the key recommendation of the Commonwealth Productivity Commission's 2008 Review of Australia's Consumer Policy Framework. In

6 See s 224 of the ACL.

7 s 62A *Interpretation Act 1978* (NT) ('*Interpretation Act*').

its final report submitted on 30 April 2008 ('the Report'), the Commission stated:

> ***Dealing with 'unfair' contract terms that cause detriment***
>
> What is the concern?
>
> Most of the generic provisions dealing with unfair practices and conduct — for example, the prohibitions on misleading or deceptive conduct — appear to be working well.
>
> However, the absence of dedicated measures in the TPA and most of the FTAs to deal with unreasonable and one-sided contract terms, or so-called 'unfair' terms, is widely viewed as a deficiency in the current generic framework. Examples of the sort of terms commonly cited as being unfair include those giving a supplier the right to vary contracts at any time for any reason, or removing the liability of an essential service provider for interruptions in supply.
>
> *The biggest concerns arise for 'standard-form' (non-negotiated) contracts, commonly used for products and services like mobile phones, rental cars, credit and computer software. Such contracts have advantages for consumers — in competitive markets, the cost savings for businesses will flow through as lower prices. But they are offered on a take-it-or-leave-it basis, with the terms apparently rarely read. The contention is that consumers can be exploited if things go wrong.*
>
> (Emphasis added)

[161] It is an assumption underlying the law of contract in Australia that parties are free to enter into contractual relationships as they choose. This freedom extends to decisions whether to enter into a contract and with whom, as well as freedom to negotiate the terms of the contract. There are, of course, outer limits to this freedom recognised by the common law and imposed by statute. For example, contracts contrary to public policy will not be enforced by the courts. In other cases, some forms of contract have been prohibited by statute, including contracts having the effect of "contracting out" of the

provisions of the statute.[8] Leaving aside these exceptions, in this country and in this Territory, parties are free to enter into contractual relationships as they choose.

[162] It is clear from the terms of the ACL and the Report that Part 2.3 of the ACL was not intended to disturb the fundamental principles regarding freedom to contract in Australia, or its States and Territories. This point was made with regard to s 12BG of the *Australian Securities and Investments Commission Act 2001* (Cth), which is identical to s 24 of the ACL, by Gilmour J in *Australian Competition and Consumer Commission v CLA Trading Pty Ltd*[9] where his Honour said, at [54]:

> There are some differences between these regimes. Nonetheless, some of the principles found in those cases are of assistance in the interpretation and application of Pt 2, Div 2, Subdiv BA of the ASIC Act:
>
> (a) the underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated: *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [112];
>
> (b) the requirement of a "significant imbalance" directs attention to the substantive unfairness of the contract: *Director-General of Fair Trading v First National Bank plc* [2001] UKHL 52; [2002] 1 AC 481 at [37];
>
> (c) it is useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it: *Director-General of Fair Trading v First National Bank plc* at [54];
>
> (d) the "significant imbalance" requirement is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and

8 See, for example, s 186A of the *Return To Work Act 1986* (NT).

9 [2016] FCA 377.

obligations under the contract significantly in its favour – this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty: *Director-General of Fair Trading v First National Bank* at 494 [17] per Lord Bingham, applied in *ACCC v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368 at [950];

(e) significant in this context means "significant in magnitude", or "sufficiently large to be important", "being a meaning not too distant from substantial": *Jetstar Airways Pty Ltd v Free* at [104]-[105] per Cavanough J: Cf. *Director of Consumer Affairs Victoria v AAPT Ltd* [2006] VCAT 1493 at [32]- [33];

(f) the legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer's attention: *Jetstar Airways Pty Ltd v Free* at [115]; and

(g) in considering "the contract as a whole", not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question: *Jetstar Airways Pty Ltd v Free* at [128].

[163] The provisions of the ACL regarding "unfair" contract terms are directed towards addressing abuses of bargaining power by individuals or groups which result in the party with the significantly lesser bargaining power being subject to unfair contractual terms. It is significant that the protection only extends to terms in "standard form" contracts. This fact, taken together with the contents of the Report and the matters which a court is required by s 27(2) of the ACL to consider when determining whether a contract is a standard form contract, permits a reasonable understanding of the types of contracts to which the provisions of Part 2.3 are intended to apply, and the evil which the protections found in that Part are intended to counteract.

[164] The protection afforded to consumers by Part 2.3 of the ACL is not protection from the consequences of entering into an imprudent contractual arrangement. It need hardly be said that the protection afforded by Part 2.3 is also not intended to insulate a party from the consequences of their actions if they simply do not bother to read a contract, or choose not to seek advice where they may be in doubt about the effect of an agreement or its terms.

[165] In the present proceedings, "unfairness", in the sense that this concept is addressed by Part 2.3 of the ACL, is not established by the Court undertaking a subjective assessment of the consequences that flow from a breach of the Contract and determining whether, on unstated moral grounds, that the result for the defendants is "fair" or "unfair" in a general sense. Such an approach would undermine certainty in contracting, and substitute the terms of the bargain made by the parties with terms imposed by the Court based on a general, subjective notion of fairness. Fairness for the purposes of the provisions of the ACL, where they apply, is to be assessed by application of the criteria found in s 24 of the ACL.

The defendants' objections to the Contract as originally executed

[166] The defendants submitted that the Contract as executed on 21 August 2017 was a standard form contract for the purposes of the ACL. The plaintiff made no submissions to the contrary, so I will proceed on that basis. The complaints made by the defendants with regard to the Contract all relate to

clause 17.1 of the Contract addressing default interest which is in the following terms:

> **17. INTEREST ON LATE PAYMENTS**
>
> 17.1 If for any reason other than the neglect or default of the Seller:
>
> (a) this Contract shall not be completed within 2 working days after the date for completion, then the Buyer shall pay interest at the rate specified in Item N on the whole of the purchase price from the date for completion until and including the date on which completion actually takes place; or
>
> (b) (Not applicable)

[167] In the Northern Territory, "conveyancing agents" are obliged by law to use a standard form of contract for the sale and purchase of land.[10] The Contract was in that standard form including clause 17.1. Item "N" to the Reference Schedule to the Contract refers to "Default Interest" and advises that the Item is relevant to clauses 4.2, 17 and 19 of the Contract. The rate of interest specified in Item "N" was 12 % simple interest per annum. As I understand it, the standard form of contract did not mandate the percentage figure for default interest and the parties were free to set their own rate.

[168] The first submission advanced by the defendants is that clause 17.1 simply did not apply in the circumstances that existed in this case. The submission is that clause 17.1 only applied where settlement was delayed but nevertheless went ahead and that the clause did not apply where the Contract was terminated without settlement occurring. This submission is based on

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10 s 121A *Agents Licensing Act 1979* (NT).

the plain language of the clause which provides for interest on late payments between two events at different points in time, one of which did not occur in this case.

[169] Considered from the position of hindsight, knowing that the Contract was not completed, there is a degree of linguistic logic in this submission. The submission is, however, wrong. Clause 17.1(a) creates an obligation which continues to exist during the continuance of the Contract. From the point in time two days after the date when the purchasers failed to complete the Contract as required, the plaintiff had a right to interest on whatever sum was owing under the Contract. That right accrued at that time and continued to accrue until the provisions of clause 17.1(a) no longer applied.

[170] The parties, of course, intended when entering into the Contract that the Contract would be completed by mutual satisfaction of the parties' obligations. It was anticipated that clause 17.1(a) would cease to apply because the Contract was completed. In the present case, however, the Contract was terminated by reason of the purchasers' default. The only question that arises is: was the right to interest under clause 17.1(a) which had accrued in favour of the plaintiff prior to termination enforceable after termination? In my opinion, it was.

[171] The clear purpose of clause 17.1(a) is to compensate a vendor of property for, inter alia, the loss of the use of the purchase monies because of the purchaser's failure to keep their end of the bargain. It cannot seriously be

argued that the parties only intended that this compensation be payable if the contract was completed and not if it was terminated for the purchasers' default. To approach the issue on the basis that the right to interest under clause 17.1(a) is only enforceable if the contract is completed would work great mischief against a ready, willing and able vendor in favour of a miscreant purchaser. That mischief would only increase where, as here, the vendor tries to accommodate the wishes of a purchaser who is unable to complete the contract in accordance with its terms.

[172] On a proper construction of clause 17.1(a), that clause did apply to the circumstances which existed from two days after the initial date for completion until termination of the Contract and the plaintiff is entitled to recover interest in accordance with that clause.

[173] The second submission advanced by the defendants was that clause 17.1(a) is "invalid or void" by operation of the ACL because it is a clause in a standard contract and the term is unfair. The defendants submitted that the term is unfair because:

a) it would cause significant imbalance in the parties' rights and obligations arising under the Contract;[11]

b) it is not reasonably necessary to protect the legitimate interests of the

11 s 24(1)(a) of the ACL.

plaintiff, a person advantaged by the term;[12]

c) it would cause detriment to the purchasers if the clause were applied or relied on;[13] and

d) the clause is not transparent.[14]

Does clause 17.1(a) cause significant imbalance in the parties' rights and obligations under the Contract?

[174] The submission made by the defendants is that the clause requires them to pay default interest on the whole of the purchase price even though a deposit of $100,000.00 was paid and released to the plaintiff when the Contract became unconditional.[15] This became a non-issue when the plaintiff stated that she is only seeking interest on the purchase price less the deposit.

[175] Although it is not necessary to decide the issue, I suspect that the issue arose due to inadequate consideration by the conveyancers of the need to vary the terms of the standard form contract in the light of the Special Conditions. Ordinarily, a deposit paid by a purchaser is held in a real estate agent's trust account pending settlement, meaning that the vendor does not have use of the deposit. In the present case, the parties agreed to the release of the deposit to the plaintiff due to the lengthy settlement period granted to

12 s 24(1)(b) of the ACL.

13 s 24(1)(c) of the ACL.

14 s 24(2) and (3) of the ACL.

15 See Special Condition 3 to the Contract.

the purchasers. The sensible decision of the plaintiff not to rely on the plain words of the clause corrects that oversight.

[176] I am satisfied that it has been established that clause 17.1(a) is not unfair for this reason.

Was clause 17.1 reasonably necessary in order to protect the legitimate interests of the plaintiff?

[177] It was not disputed that the plaintiff is a person who was advantaged by the terms of clause 17.1(a). It is also presumed that a term of a standard form contract is not reasonably necessary to protect the legitimate interests of a party who would be advantaged by the term, unless that party proves otherwise.[16] Accepting that to be the case, there are two issues that arise here. First, leaving aside the rate of default interest imposed by the Contract, was clause 17.1(a) reasonably necessary to protect the legitimate interests of the plaintiff?

[178] It cannot be seriously argued that a clause that requires interest to be paid on monies owed under a contract by a party in default to the other party is not necessary to protect the interests of the innocent party. The innocent party does not have the use of the monies that they were entitled to receive under the contract.

[179] It is also important to recall that clause 17.1(a) is a clause in a legislatively mandated standard form of contract. The obvious legislative purpose in

16 s 24(4) of the ACL.

mandating the use of a particular form of contract is to protect purchasers and to ensure fairness between vendors and purchasers. The use of a mandated standard form of contract reduces the need for vendors and purchasers to retain lawyers to undertake a conveyancing transaction, and in this way reduces the cost of the transaction for both parties. This demonstrates (if any demonstration were needed) that not all instances in which standard forms of contract are used are examples of abuse of market power. In the present case, the fairness of clause 17.1(a) has been legislatively confirmed.

[180] The second issue is whether the plaintiff has proven that the imposition of the rate of 12% interest did not make clause 17.1(a) objectionable as not being reasonably necessary to protect the plaintiff's legitimate interests? The defendants submitted that interest at the rate of 12% was "not warranted". The defendants submitted that the rate of 12% was "exorbitant" because the Cash Rate set by the RBA in 2017 was 1.5%, and the average mortgage rate was 3.99%. The defendants submitted that "where interest is allowed it should be at ordinary commercial rates", citing *Jones v South British Insurance Co. Ltd*.[17]

[181] All contracts carry risks for the contracting parties. There is a risk that the other party may not carry out their contractual obligations. There is a risk that a party may not be able to carry out its obligations because of

17 (1984) 71 FLR 98 ('*Jones*').

unforeseen events occurring after the contract was entered into and before the date for completion. In entering into a contract, the parties frequently allocate these risks between themselves.

[182] In the present case, for example, the purchasers sought an extended settlement period to enable them to sell the Muirhead and Acacia Hills properties to fund the purchase of the Fannie Bay property. If completion of the Contract had been conditional upon the purchasers being able to sell those properties, much of the risk associated with them being unable to complete by reason of being unable to sell those properties would have been assumed by the plaintiff.

[183] That did not occur. The Contract which the parties entered into was, in that respect, unconditional. The result was that the purchasers assumed the risk that they may not be able to sell their properties and may be unable to complete the Contract for the purchase of the Fannie Bay property.

[184] On the face of the Contract, part of the risk which the purchasers assumed was the risk that they may need to pay compensation to the plaintiff in the event that they did not complete the Contract in accordance with its terms. In that regard, clause 17.1 of the Contract provided that in the event that the purchasers failed to complete the Contract within two days after the date for completion, the buyers agreed to pay default interest at the rate of 12% per annum on the whole of the purchase price, or such of it as remained payable as at that date.

[185] It is interesting to note, however, that the Contract provided for the plaintiff to pay interest to the purchasers at the same rate on monies paid by them to the plaintiff, in the event that the plaintiff had been unable to complete the Contract. The rate of default interest specified in the Contract, therefore, was not a provision that was solely for the benefit of the plaintiff.

[186] In setting an appropriate default interest rate, the parties are at liberty to set a rate that not only takes into account the loss of the benefit of the use of monies paid or payable (as the case may be) under the contract, but also such other factors as they see fit. In providing for interest to be paid by a party in default under the contract to the other party, the contract effectively provides for agreed damages to be paid by the party in default. So long as such a clause acts as a genuine pre-estimate of a party's loss, and not as a penalty, it will be effective.

[187] In the present case, there are two matters which are obviously relevant to the parties' agreement of the default interest rate. First, there was the extended settlement period allowed to the purchasers. During that period, the plaintiff did not have the benefit of the full purchase price of the property, and the purchasers did not have the use of the deposit of $100,000.00. Secondly, the purchasers negotiated a right to occupy the Fannie Bay property on licence from September 2017 until the specified date for completion, being 12 December 2018. The licence did not require them to pay a licence fee, and only required them to pay outgoings on the property and to insure the property.

[188] A rough estimate of the value of the right of occupation granted to the purchasers may be made by using the purchasers' estimate of market rent for the premises, in the negotiation process that followed their failure to complete the Contract, as $700.00 per week. This would roughly equate to about $40,000.00 over the approximately 15 months that the purchasers occupied the premises prior to the original settlement date.

[189] I do not suggest that this calculation is precise, but it suffices to demonstrate that the right of occupation given to the purchasers was a valuable right and the parties were free to take that circumstance into account when setting the rate of default interest. To attempt to suggest that this rate was "unfair" by reference to Reserve Bank of Australia cash rates was simply absurd. Similarly, it would be absurd to suggest a comparison between the default interest rate in the Contract and bank mortgage rates at the relevant time. Bank mortgage rates are those applying to borrowers who are *not* in breach of their contractual obligations and reflect that lower risk to the bank. Such interest rates also do not take into account the individual circumstances of a transaction such as that in which the plaintiff and purchasers were engaged.

[190] In her first affidavit, sworn 29 November 2022, the first defendant did not suggest that she had not understood the default interest provisions in the Contract before signing it. In that affidavit, she simply said:

> The standard contract of sale fixed the default interest rate at 12% per annum. This rate was first set in 1983. At the time, the rate of interest

> was 13.24% per annum for an average 30 year home loan mortgage. So, the default interest rate was 1.24% below the average 30 year home loan mortgage interest rate. By comparison, in 2017 the average 30 year rate was 3.99% per annum making the default interest rate 8.01% more than the prevailing 30 year home loan mortgage interest rate. Also, in 2017, the RBA interest was 1.5% and the Westpac Bank (which at all relevant times to this suit was the plaintiff's bank) charged an interest rate of 5.32% on home loans.

[191] In her second affidavit, sworn 8 March 2024, the first defendant said:

> At the time of entering into the contract to purchase the house we had every intention of completing the purchase. We informed the plaintiff that we would have to sell 2 properties, namely Muirhead and Acacia Hills, in order to purchase the house. There were no negotiations between the parties regarding the 12% default interest.
>
> The subtleties and workings of the clauses relating to default interest in the standard contract of sale were not apparent to us on the face of it when as buyers we signed the contract of sale on 21 August 2017. It was only explained to me after the commencement of these proceedings.

[192] Clause 17.1(a) is not difficult to understand. It is written in plain, reasonably simple English. The purchasers were not under any time pressure to execute the Contract. The first defendant, at least, was a sophisticated buyer with experience in conveyancing transactions. I do not accept that the first defendant did not understand the effect of clause 17.1(a) at the time she executed the Contract. I draw the inference that the first defendant was being deliberately untruthful in advancing that proposition. I may more safely draw that inference because of the failure of the third defendant to give evidence on this topic.

[193] It is also worthwhile noting that the purchasers made no attempt to negotiate a lower interest rate. They had shown themselves capable of negotiating the

terms of the Contract, as the extended date for settlement and the Special Conditions demonstrate. The inference is that they considered the rate to be fair, taking into account all relevant circumstances.

[194] I am satisfied that it has been established that the rate of 12% for default interest was necessary to protect the legitimate interests of the plaintiff. For completeness, I will add that the case of *Jones* cited by the defendants is not relevant to the present issue. *Jones* was not a case where a rate of interest had been contractually agreed. The case addressed whether it was appropriate to award pre-judgment interest at a commercial rate or at the rate prescribed in the *Civil Procedure Act 1883* (Imp) as in force in the Northern Territory at the time.

Would clause 17.1(a) cause detriment to the purchasers if applied or relied upon?

[195] To the extent that the application of clause 17.1(a) to the present circumstances would require the defendants to pay default interest to the plaintiff, it does cause detriment to the defendants.

Is clause 17.1(a) transparent?

[196] As I have already observed, clause 17.1(a) is written in plain, reasonably simple English. Its effect is easy enough to understand if the reader takes the trouble to read it. In the present case, as I have already observed, on a reading of the plain words of the clause, a reader would be left with the

impression that interest was payable on the whole of the purchase price, and not just the amount outstanding taking into account the release of the deposit to the plaintiff. In the present case, to that extent the clause may tend to mislead. To the extent that a purchaser reading the clause may be misled, they are misled, in the present case, in a manner which is to their benefit because the plaintiff has conceded that the clause should operate to require interest to be paid only on the lesser sum.

[197] For these reasons, I am satisfied that the Contract as originally executed, and in particular clause 17.1(a), was not unfair for the purposes of Part 2.3 of the ACL.

The defendants' objections to the Contract as amended by the Variation Deed, and to the Mortgages and the Deed of Performance Guarantee

[198] In their written submissions, the defendants referred to the Deed of Variation, the Deed of Performance Guarantee and the Muirhead and Acacia Hills Mortgages collectively as "the Deeds". I will adopt the same approach except where it is necessary to identify particular documents. The defendants submitted that the Deeds were "invalid or void" by reason of the circumstances in which they came to be executed and the operation of the provisions of the ACL. The defendants submitted that the circumstances surrounding the drafting and execution of the Deeds were:

a) the purchasers were disadvantaged (in the sense of having little bargaining power) because they were unable to complete the purchase of the Fannie Bay property;

b) on 13 March 2019, the purchasers were issued with a Notice to Complete by 1 April 2019 which they received at 3.51 pm that day;

c) at 4.04 pm the same day, they received “an ultimatum” from the plaintiff setting out the conditions on which she would grant an extension of time to complete the Contract;

d) these documents were forwarded by the purchasers’ conveyancer, Ms Muis, to the first defendant at 4.14 pm that day;

e) the terms of the Deeds were not the subject of discussion and negotiation between the parties;

f) there was no “freedom of choice” or room for bargaining over the terms of the Deeds;

g) the Deeds were provided on a “take it or leave it” basis;

h) the purchasers had no legal advice;

i) the purchasers did not understand or know of the terms and conditions of the Deeds;

j) the purchasers did not understand the import of the Deeds;

k) the time period within which the purchasers had to decide whether to accept the terms of the Deeds was insufficient for them to make an informed decision;

l) the time allowed for the purchasers to decide whether to execute the Deeds was insufficient to allow them to get legal advice and make an informed decision; and

m) the Mortgages were executed under the defendants' misapprehension, based on conversations between the plaintiff and the first defendant, that the Mortgages were to secure the purchase price of the Fannie Bay property.

[199] Before considering the application of the provisions of the ACL to the Deeds, I will examine a number of these alleged circumstances.

Position of the purchasers after 12 December 2018

[200] It is useful at this point to consider the position into which the purchasers had placed themselves by failing to complete the Contract on 12 December 2018. I will then address the circumstances alleged by the defendants surrounding the drafting and execution of the Deeds. Under the terms of the Contract, the plaintiff was entitled to serve on the purchasers a Notice of Default requiring that the purchasers default in completing the Contract be

remedied within a period of not less than ten days. The plaintiff served such a Notice on 13 March 2019.[18]

[201] Upon the failure of the purchasers to remedy their default by completing the Contract in accordance with the Notice, the plaintiff was entitled to terminate the Contract and to forfeit the deposit of $100,000.00. The plaintiff was then entitled to resell the property and to sue the purchasers for damages for breach of Contract.[19]

[202] The effect of these provisions was that the plaintiff was entitled to terminate the Contract, retain the deposit of $100,000.00, and to resell the property. Any deficiency in price upon the resale could be recovered as liquidated damages from the purchasers, so long as the resale was completed within 12 months of termination of the Contract.

[203] Before the date for completion of the Contract in December 2018, the first defendant obtained an oral market appraisal of the Fannie Bay property which was to the effect that the value of the property was $1,680,000.00 only. It would have been clear to the first defendant, at least, that if the plaintiff terminated the Contract in early 2019 and re-sold the property on the open market, there was a high probability that not only would the purchasers lose their deposit, but they would also face paying substantial damages based upon a deficiency in the resale of the property. That

18 See [81] above.

19 See clause 20.1 of the Contract.

deficiency, based upon the Contract price of $2,000,000.00 and a resale of $1,680,000.00 would be in the vicinity of $320,000.00, including the loss of the deposit of $100,000.00.

[204] This was obviously an unattractive proposition. But it is incorrect to state that the purchasers had no alternative other than to accept whatever terms were proposed by the plaintiff for an extension of time to complete the Contract. The purchasers always had the option of accepting the consequences of their actions, forfeiting their deposit and leaving themselves open to pay damages to the plaintiff. The fact that this was an unattractive option does not mean that it was not an available option.

[205] By failing to complete the Contract in accordance with its terms, the purchasers placed themselves in the position where they no longer had attractive options. In order to grant to the purchasers a substantial extension of time within which to complete the Contract, the plaintiff, not unreasonably, required security for any loss which she may sustain by reason of the purchasers' failure to meet their contractual obligations. The choice which faced the purchasers in the lead up to the execution of the Deeds was between accepting the consequences of their default and providing security to the plaintiff.

[206] I would infer that the third defendant was possessed of the same knowledge of these matters as the first defendant. I can more safely draw that inference by reason of the failure of the third defendant to give evidence.

[207] By reason of their own conduct, the purchasers came with little bargaining power to the negotiation of an alternative to termination of the Contract and its consequences. There was a suggestion by the first defendant that she told the plaintiff before execution of the Contract that she and the third defendant had to sell "a couple of our properties" before they could buy the Fannie Bay property. The plaintiff testified that she understood that the purchasers' preferred means of undertaking the purchase was to sell those properties, not that they needed to. This point of dispute need not be resolved.

[208] The Contract was not conditional on the purchasers selling the Muirhead and Acacia Hills properties. It must have been absolutely clear to the first defendant at least, with her background, that this was the case. Special Conditions 2 and 3, which the first defendant accepts the purchasers negotiated, required the purchasers' conveyancer to give written confirmation to the plaintiff's conveyancer that the Contract was "unconditional in all respects" before the purchasers were entitled to occupy the property under licence and before the plaintiff was entitled to the release of the deposit for her use.

[209] I reject any suggestion that prior to the execution of the Contract, the plaintiff agreed to await the sale of the purchasers' properties before requiring completion of the Contract. There was no reason why the plaintiff would have agreed to such a proposition. I also note that in none of the purchasers' correspondence, or that of their conveyancer, with the plaintiff's

conveyancer in the days before the initial completion date of 12 December 2018 and in the months following, was any reference made to the purchasers being under any misapprehension about the necessity of them completing the Contract on or before that date.[20]

Alleged lack of negotiation/bargaining

[210] I do not accept the submission made by the defendants that there was no process of negotiation between the plaintiff and the purchasers leading up to the execution of the Deeds. The process of agreeing on a way forward that did not involve termination of the Contract began before the original date for completion. It started with a request by the purchasers for an extension of time for completion. The plaintiff advanced terms upon which she may be prepared to permit an extension. The purchasers said they were unable to meet the proposed terms and made a counter-offer.

[211] That counter-offer was not accepted by the plaintiff. The plaintiff advanced a fresh proposal. Further written correspondence occurred and the first defendant spoke personally to the plaintiff. This process of negotiation continued throughout January 2019 until the plaintiff engaged lawyers to act on her behalf in late January.

[212] The plaintiff's lawyers wrote to the purchasers' conveyancer on 11 February 2019 putting fresh terms on which the plaintiff would be prepared to grant

20 See [62] and onwards above.

an extension of time to complete the Contract. That letter made clear that the plaintiff required the purchasers to provide security "for their performance of the Contract" by way of first ranking mortgages over their properties. This offer involved an extension for settlement to on or before 2 September 2019, a longer extension than that requested by the purchasers. In addition, it proposed default interest payable monthly at 7% per annum rather than the 12% to which the plaintiff was contractually entitled.

[213] The purchasers' conveyancer responded on 26 February 2019 agreeing to the proposed extension to 2 September 2019 but arguing that they did not have the capacity to pay default interest monthly. The purchasers counter-offered that they pay a licence fee weekly.

[214] On 13 March 2019, the plaintiff's lawyers put a final offer to the purchasers. The plaintiff did not require the purchasers to pay a weekly licence fee. Instead, she required them to pay $5,000.00 per month in reduction of the accruing default interest, calculated at 7% per annum. In addition, the plaintiff would waive the balance of the default interest up to completion on or before 2 September 2019. This was clearly very favourable to the purchasers. The default interest was accruing at $11,666.67 per month.[21] It was not a part of the purchasers' offer in that email that the licence fee of $700.00 per week would be in lieu of, or in reduction of, accruing default interest. Under the offer made by the purchasers on 26 February 2019, the

21 See the purchasers' email of 26 February 2019 at [79] above.

purchasers would have been liable to pay both the licence fee and the default interest. Under the final offer made by the plaintiff, there was no requirement to pay a licence fee and the purchasers' liability for default interest would have been limited to $5,000.00 per month as long as settlement occurred on or before 2 September 2019.

[215] The plaintiff's final offer again required first ranking mortgages over the Muirhead and Acacia Hills properties.

[216] This offer was accepted by the purchasers on 21 March 2019.

[217] There was, of course, a problem with the purchasers satisfying the conditions of the offer which they agreed to on 21 March 2019. The offer required them to provide first ranking mortgages on both the Muirhead and Acacia Hills properties. This was not possible with regard to the Acacia Hills property because the NAB already held a first mortgage over that property. The purchasers must have been aware of that fact throughout the process of negotiation from 11 February 2019 when the plaintiff's lawyers first advised the purchasers that the plaintiff required security by way of first mortgages over the properties.

[218] The failure of the third defendant to give evidence allows me to more safely draw the inference that both of the purchasers were aware of the fact that the Acacia Hills property was encumbered by a mortgage to the NAB throughout this period.

[219] The explanation given by the first defendant for this state of affairs, that the mortgage to the NAB did not secure any monies provided by the NAB for the purchase of the Acacia Hills property, was entirely unconvincing. As someone with a background in real estate and with considerable experience in buying and selling property, the first defendant must have been aware that the mortgage over the Acacia Hills property secured the NAB's interests with regard to monies lent by that institution for the purchase of another property. It must have been obvious to her that the existence of the NAB's mortgage could potentially reduce the capacity of the plaintiff to recover any losses arising from any default by the purchasers on the terms of the Contract as varied by the Variation Deed.

[220] The failure of the third defendant to give evidence allows me to more safely draw the inference that both of the purchasers were aware of these matters.

[221] Even after it became clear that the purchasers could not satisfy the terms they agreed to on 21 March 2019, the plaintiff engaged in further negotiations with the purchasers, with the plaintiff eventually agreeing to accept a second ranking mortgage over the Acacia Hills property. It was only after this had occurred that the plaintiff required that the second defendant company, the registered proprietor of the Acacia Hills property, provide a deed of performance guarantee.

[222] Once the plaintiff's lawyers became aware of the mortgage to the NAB, they requested that the purchasers provide proof of the value of the Acacia Hills

property. The reason for the lawyers requesting this information is obvious. By allowing an extension of time to complete the Contract, the plaintiff was potentially allowing the purchasers to go further into debt to her. It was no doubt important to the plaintiff, and those advising her, to ensure that the purchasers would have the capacity to pay that debt if it arose.

[223] Despite numerous requests, no material was provided by the purchasers to the plaintiff evidencing the value of the Acacia Hills property. That remained the case even after the plaintiff's lawyers indicated that they would accept something less than a formal valuation, including a real estate agent's appraisal or documents establishing the price that was being asked on the sale of that property. The first defendant had already advised the plaintiff's conveyancer, Ms Vita, that the two properties had been listed for sale with an agent. It is beyond belief that the purchasers could not have provided this information had they chosen to do so.

[224] The above establishes beyond any doubt that the terms of the Deeds were the subject of lengthy negotiations in which the purchasers negotiated valuable concessions from the plaintiff. The so-called "ultimatum" of 13 March 2019 was simply an indication that the plaintiff had reached a point in the process of negotiation where she was not prepared to make any further concessions to enable the purchasers to avoid the consequences of their breach of the Contract. In any event, as the timeline shows, further negotiations took place after 13 March 2019, resulting in a further concession to the purchasers.

The defendants had no legal advice

[225] As noted above, there is no evidence that the third defendant did not obtain legal advice on his own behalf or on behalf of the second defendant company before entering into the transactions described above. I will, nevertheless, address the defendants' submission that they did not have legal advice before entering into the transactions on the assumption that the second and third defendants did not obtain legal advice.

[226] I am satisfied that the purchasers chose not to obtain legal advice. It must have been obvious to the purchasers from at least 12 December 2018 onwards that they were in a difficult position in which serious legal consequences could flow from their breach of the Contract. They apparently made no attempt to get legal advice or representation at that time, presumably on the basis that they felt capable of dealing with the issue themselves. They certainly had ample opportunity to get advice.

[227] The first proposal by the plaintiff of terms upon which she would grant an extension of time to complete the Contract involved payment of a further non-refundable deposit of $1,000,000.00 and default interest at 12% per annum.[22] The purchasers could not meet those terms. They did not, however, see fit to obtain legal advice despite having ample opportunity to do so.

[228] By 11 February 2019, the purchasers were on notice that the plaintiff was requiring mortgages over the Muirhead and Acacia Hills properties to secure

22 See [64] above.

their performance under the Contract. They were also aware that the plaintiff required that any agreement be evidenced by a deed of variation. The first defendant testified that after receiving the initial letter from the plaintiff's lawyers on 11 February 2019, she was "surprised and confused". They still did not seek legal advice.

[229] On 13 March 2019, the purchasers were served with a Notice to Complete requiring them to complete the Contract by 1 April 2019. The stated alternative was that the plaintiff would terminate the Contract. The purchasers chose not to seek legal advice.

[230] In her affidavit of 8 March 2024, the first defendant stated that after receiving the plaintiff's final offer on 13 March 2019, she felt she had no option but to accept the plaintiff's terms. As I observed earlier, this is not correct. The purchasers always had the option of repudiating the Contract and taking the consequences. In any event, as I have demonstrated, further negotiations continued after the purchasers had purported to accept the plaintiff's final offer, and it was not until sometime around 4 April 2019 that the purchasers executed the mortgages. In the intervening period, the purchasers still did not seek legal advice.

[231] On 29 March 2019, the defendants received an amended draft Variation Deed which required the second defendant to provide a deed of performance guarantee. On that same day, the purchasers' conveyancer, Ms Muis,

recommended that the purchasers obtain legal advice if they were “unsure about anything”. The defendants did not seek legal advice.

[232] The deadline originally imposed by the plaintiff for the execution of the Variation Deed and the Muirhead and Acacia Mortgages was 1 April 2019. After it became clear that the Acacia Hills property was owned by the second defendant and that there was already a first mortgage over that property, the plaintiff required a deed of performance guarantee from the second defendant.

[233] The late discovery of the existence of the first mortgage over the Acacia Hills property was the result of the first defendant’s failure to provide accurate information to the plaintiff and her lawyers during the negotiations. The plaintiff nevertheless did not hold the purchasers to the 1 April 2019 deadline. The plaintiff agreed to an extension of time to 3 April 2019.

[234] On 2 April 2019, the purchasers were provided with the Deed of Performance Guarantee. This was forwarded to them by Ms Muis who strongly recommended that they obtain legal advice. On 3 April 2019, Ms Muis informed Ms D’Souza that the purchasers had been advised to seek legal advice and they may not be able to get advice within the stipulated timeframe. Ms D’Souza asked Ms Muis to let her know if the purchasers were seeking an extension. The response from Ms Muis later that day is telling: the purchasers were “happy to sign the documents”. They did not seek an extension to get legal advice, only a 24 hour extension to meet their

convenience in attending the office of their conveyancer to execute the documents.

[235] Ultimately, the Variation Deed and the Deed of Performance Guarantee were not executed until 5 April 2019, although it appears that the Mortgages were executed a few days earlier.

[236] The above demonstrates that the purchasers (and the second defendant) had ample opportunity to seek legal advice had they wanted to do so. Focussing on the timing of the delivery by the plaintiff's lawyers of the Variation Deed and the Deed of Performance Guarantee to the purchasers and the second defendant, as the defendants did, is apt to mislead. The purchasers and the second defendant were well aware of the plaintiff's terms for granting an extension and they chose not to seek legal advice.

[237] The defendants also chose not to seek a further extension of the deadline to execute the documents, instead communicating to Ms D'Souza that they were happy to execute the documents. The failure of the defendants to seek an extension of time for execution of the documents, and their communication to the plaintiff that they were happy to execute the documents, makes it unconscionable for the defendants to now complain that the plaintiff had allowed them insufficient time to get legal advice.

[238] On multiple occasions, the first defendant simply asserted that she did not have an opportunity to get legal advice, and referred to her employment which she said frequently took her to remote communities. No effort was

made by reference to her former employment records or her own records to establish whether she had been in Darwin during relevant periods of time and, if so, for what period. No evidence was given by the first defendant of any attempt to contact a lawyer to arrange for legal advice. The evidence given by the first defendant was in terms that made it impossible to verify or contradict. This evidence was not convincing. There was, of course, no evidence that the third defendant could not have obtained legal advice on his own behalf and that of the other defendants.

[239] The failure of the third defendant to give evidence allows me to more safely draw the inference that the defendants chose not to get legal advice.

[240] I will add one final point. The defendants have not identified any way in which the Variation Deed, the Deed of Guarantee, or the Mortgages, deviate from what was agreed in correspondence between themselves or their conveyancer and the plaintiff's lawyers. The documents formalise what was agreed between the parties.

The defendants' understanding of the effect of the Deeds

[241] The first defendant asserted on a number of occasions that she acted without knowing or understanding the import of the contents of the Deeds. I do not accept that this was the case in any meaningful sense. Commercial documents such as mortgages will inevitably have a degree of complexity because they address relatively complex areas of the law and must address a multitude of contingencies which may arise.

[242] Having said that, I am satisfied that the Deeds are drafted in language that most people with a reasonable command of English could understand if they chose to commit to reading the documents. The third defendant did not, of course, give evidence so there is no evidence of his understanding of the contents of the documents or that of the second defendant.

[243] To the extent that the Deeds may incorporate concepts about which the defendants did not have a full understanding (accepting that they were not legally trained), they had the opportunity to obtain legal advice and assistance, which they chose not to do. Having made these general observations, I will refer to salient parts of the individual documents.

[244] The Variation Deed describes the plaintiff as "the Seller" and the purchasers as "the Buyer". The Variation Deed has two Recitals, which state the background to the Deed. These are:

> A. The Seller and Buyer have entered into the Contract.
>
> The Buyer is in breach of the Contract by failing to complete the purchase of the Property before the Date for Completion recorded in the Contract.
>
> B. In light of the breach the Seller and Buyer have agreed to keep the Contract on foot subject to the variations and to the new terms as set out in this Deed.

[245] The basic variation to the Contract is clearly set out in clause 2.1 of the Variation Deed:

> The Seller and Buyer agree that from the date of this Deed, the Contract is varied as follows:

a) Item H of the Reference Schedule is amended by deleting the words "*on or before 12 December 2018*" and replacing with "*on or before 2 September 2019*".

(Emphasis as per original)

[246] Clause 3.1 of the Variation Deed provided, in comprehensible terms, that the purchasers would provide security "in respect of [their] performance of the Contract" by procuring:

a) the registration of a first ranking mortgage in favour of the plaintiff over the Muirhead property;

b) the registration of a second ranking mortgage in favour of the plaintiff over the Acacia Hills property; and

c) the execution of a deed of performance guarantee by the second defendant in favour of the plaintiff in respect of the Contract as varied.

[247] The clause also stipulated, again in clear language, that the Mortgages would provide that the plaintiff had a power of sale in respect of each of the mortgaged properties in the event of any default on the part of the purchasers.

[248] Under the heading "**Interest on the Purchase Price**", clause 3.2 addressed default interest under the Contract in the following terms:

a) In respect of default interest payable by it under clause 17 of the Contract:

i. the Buyer will pay to the Seller $20,000.00 on execution of this Deed;

ii. the Buyer will pay to the Seller $5000 per month in advance starting on 1 May 2019 until the Date for Completion, adjusted pro rata on a daily basis in respect of the final payment;

and the Seller will waive the balance of the default interest payable under clause 17 of the Contract subject only to the Buyer making the payments referred to in subclauses 3.2(a)(i) and (ii) above on time and the Buyer settling on or before the Date for Completion.

b) The parties agree that in the alternative to subclause 3.2(a), or in the event that the Buyer is late with respect to any payment owing under subclauses 3.2(a)(i) and (ii) above, the Buyer will pay default interest to the Seller in full on the Date for Completion at the rate of 7% per annum.

c) For the avoidance of doubt, if the Buyer does not settle on or before the Date for Completion as varied under clause 2 of this Deed, the Buyer will pay interest under the Contract at a rate of 12% per annum.

[249] None of the operative clauses of the Variation Deed are difficult to understand, particularly for someone like the first defendant who has a background in real estate transactions. The defendants came to read the draft Variation Deed knowing the history of the events surrounding the proposed purchase of the Fannie Bay property and the issues which were dealt with in correspondence between them and the plaintiff's lawyers after the purchasers had failed to complete the Contract in December 2018. With that knowledge, the terms of the Variation Deed are easily understood and do nothing more than reflect the agreement that had been made between the purchasers and the plaintiff's lawyers. I reject any proposition that the defendants were not aware of the contents of the Variation Deed or the effect of the terms of that document.

[250] The failure of the third defendant to give evidence allows me to more safely draw the inference that the defendants were aware of the contents of the Variation Deed and the effect of the terms of that document.

[251] The Deed of Performance Guarantee describes the second defendant company as the "Guarantor" and the plaintiff as the "Beneficiary". The Deed of Performance Guarantee has 4 Recitals:

> A. The Beneficiary is party to the Contract of Sale with the Buyers.
>
> B. The Buyers are in breach of the Contract of Sale by failing to complete the purchase of the Sale Property before the date for completion recorded in the Contract of Sale.
>
> C. At the request of the Guarantor, the Beneficiary has agreed to provide accommodation to the Buyers, either already provided or now and in the future, by not terminating and by varying the Contract of Sale to allow additional time to settle and other varied terms.
>
> D. In consideration of the Beneficiary providing the accommodation referred to in Recital C, the Guarantor agrees to provide the guarantees, indemnities and security set out below in respect of the Buyers' performance of the Buyers' obligations under the Contract of Sale on the terms and conditions set out in this Guarantee.

[252] Under the heading "Performance Guarantee", the guarantee provided by the second defendant is expressed as follows:

> 2.1 The Guarantor unconditionally and irrevocably guarantees to the Beneficiary the full performance by the Buyers of the Buyers' obligations and liabilities under the Contract of Sale.
>
> 2.2 Subject to clauses 2.3, and 3, where the Buyers fail to execute and perform any of their obligations or liabilities under the Contract of Sale the Guarantor will, if required to do so by the Beneficiary:
>
> (a) complete or cause to be completed the obligations set out in, and in accordance with, the Contract of Sale; and
>
> (b) discharge or cause all of the Buyers' liabilities under the Contract of Sale to be discharged.

2.3. The Guarantor will not be required to take action in accordance with clause 2.2 if the Buyers have been relieved of performance under the Contract of Sale by the Beneficiary expressly and in writing, by law, or by a decision of a court of competent jurisdiction.

[253] Under the heading "Indemnity", the indemnity provided by the second defendant is expressed as follows:

3.1 If:

(a) the Buyers commit a breach of their obligations under the Contract of Sale;

(b) such breach is not remedied by the Guarantor in accordance with clause 2.2, and

(c) the Contract of Sale is then terminated for default by the Beneficiary,

the Guarantor will unconditionally and irrevocably indemnify and keep indemnified the Beneficiary from and against any and all loss or damage which may be suffered or incurred by the Beneficiary as a consequence of:

(d) default by the Buyers in performing or observing their obligations or discharging their liabilities under the Contract of Sale;

(e) the Beneficiary attempting to enforce any of the Buyers' obligations under the Contract of Sale; or

(f) the Beneficiary enforcing or preserving, or attempting to enforce or preserve, any of its rights under this Guarantee.

[254] At clause 5.2 of the Deed of Performance Guarantee, the second defendant agreed to provide security for its performance of its obligations under the Deed by granting the plaintiff a mortgage in favour of the plaintiff over the Acacia Hills property.

[255] I reiterate what I said at [249] and [250] above regarding the Variation Deed with respect to the operative clauses of the Deed of Performance Guarantee.

I reject any suggestion that the defendants were not aware of the contents of the Deed of Performance Guarantee or the effect of the terms of that document. The terms of the Deed of Performance Guarantee do nothing more than give effect to the agreement which had been reached by the parties in earlier correspondence.

[256] The Muirhead and Acacia Hills Mortgages each consisted of a covering schedule identifying the property the subject of the mortgage and the description of the debt or liability secured as well as terms found in a registered Memorandum of Common Provisions. The description of debt or liability secured in each mortgage was expressed identically:

> This Mortgage secures the **Secured Moneys** being all money which the Mortgagor or any Obligor, whether directly or indirectly, contingently or otherwise at any time becomes liable to pay to the Mortgagee under or in accordance with (or by reason of the breaching of) the Contract of Sale dated 21 August 2017, or the Deed of Variation to Contract of Sale dated on or around the date of this Form 39 Mortgage (each being the **Principal Agreements**), subject to the terms of the Memorandum of Common Provisions registered number 372255 (and under which the terms Principal Agreement, Secured Moneys, Obligor, and other terms are defined).

[257] The Memorandum of Common Provisions ('MCP') is a standard terms document which was registered by the plaintiff's lawyers as permitted by Division 2 of Part 8 of the *Land Title Act 2000* (NT). An instrument, such as a mortgage, may incorporate into itself the terms of a registered standard terms document, such as the MCP.[23] This is a process commonly employed with regard to instruments such as mortgages. It was a document created to

23 See s 169 of the *Land Title Act*.

be used in multiple transactions, not just the transactions between the parties to the present proceedings.

[258] The MCP addresses the obligations and rights of the parties in clauses and subclauses organised under subject headings. In that regard, it is easy to comprehend what the document addresses. The essential parts of the MCP dealing with the nature of the obligations secured by the mortgage, the security provided by the mortgagor, the obligation to pay interest, and the consequences of default by the mortgagor, are all reasonably comprehensible to someone like the first defendant who has a good command of the English language and a background in real estate transactions.

[259] I have no doubt that the defendants had a general understanding of the nature of a mortgage. I have no doubt that the defendants were aware that the Mortgages secured the performance of the purchasers' obligations under the Contract, as varied. In other words, if the purchasers defaulted on their contractual obligations and the plaintiff suffered a consequential loss, the plaintiff could recover that loss through sale of the mortgaged properties. The defendants may not have had the same level of understanding of such a transaction as a trained property lawyer, but that level of understanding was not necessary for their purposes. The defendants, in any event, had the opportunity to obtain legal advice on any parts of the mortgage documents that they did not understand but chose not to do so. Instead, they

communicated to Ms D'Souza that they were happy to execute the documents.

[260] I will also note that the first defendant did not, in her evidence, identify any part of the Mortgages that she says she did not understand. Counsel for the defendants did not identify any clauses in the Mortgages that were unusual or not normally found in a mortgage.

[261] The failure of the third defendant to give evidence allows me to more safely reach these conclusions.

Alleged misapprehension by defendants that Mortgages secured the purchase price

[262] In her affidavit of 8 March 2024, the first defendant deposed:

> In fact, it was my understanding, pursuant to discussions had with the plaintiff that the properties were being taken as security towards the purchase price such that when they were sold the proceeds would go towards paying off the purchase price for the house resulting in the purchase of the house by us.
>
> It was also my understanding that the plaintiff would discharge the mortgages in the event that we were unable to sell the mortgaged properties and purchase the house and the contract of sale between us was terminated. Annexed hereto and marked with the letters **FT-22** are copies of the emails exchanged between Ms Muis, Ms Vita and me on 27 August 2020 and 15 October 2020 and a note of the telephone call between Ms Muis, Ms Vita on 14 July 2020.

[263] As a preliminary point, it will be noted that each of the emails and the note of the telephone call annexed to the first defendant's affidavit relate to the period after the Contract, as varied, had been terminated by reason of the

default of the purchasers. This, of course, was well after the parties executed the Deeds.

[264] The purpose of interpreting a written agreement is to ascertain the intention of the parties *as expressed in the written agreement.* The subjective intention of a party to a written agreement as to what they intended or expected to achieve by the agreement is irrelevant.[24] It is well recognised that subsequent conduct on the part of parties to a written agreement cannot be used to construe the written document.[25] This reflects the accepted position that the construction of a written agreement is to be determined at the time that it was entered into.

[265] The purpose for which the defendants seek to rely on the annexures to which I have referred is to suggest that the first defendant's expressed subjective understanding of the Mortgages was shared by the plaintiff. There are a number of problems with this approach. First, that purpose falls foul of the principle expressed in *Gardiner*. The defendants seek to use evidence of post-agreement statements said to have been made by the plaintiff or her agent to challenge the clear words of the written document. This is simply not legally permissible.

[266] Secondly, even if recourse to this material were permissible to determine the proper construction of the Mortgages, the material itself lacks cogency. The

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24 See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 62 per Gibbs CJ.

25 See *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [35] ('*Gardiner*').

first document in time is an email from Ms Muis to Ms Vita dated 6 July 2020 in which Ms Muis says that she is advised that the plaintiff has "registered Caveats" over some of the purchasers' properties, and requests confirmation that the "caveats" will be removed. The next document is a file note by Ms Muis made on 14 July 2020, apparently after a telephone conversation with Ms Vita, which reads:

> Confirmed Fatima will be out by the end of the month. Caveats will be removed from her properties once she is out.

[267] The third document is an email from Ms Muis to Ms Vita sent 27 August 2020 with a subject heading "Tjung sale to [J and R]" (the third parties with whom the first defendant contracted to sell the Muirhead property) stating:

> I note your client Margaret Castronova has a registered mortgage over this property.
>
> Could you please action a discharge for this property and any other property encumbered by the failed sale of 76 East Point Road.

[268] The final document is a further email from Ms Muis to Ms Vita on 15 October 2020 with a subject heading "Danium & Tjung Purchase from Castronova" stating:

> Just chasing up confirmation that the Caveats have been removed.

[269] There do not appear to have been any responses to the three emails. The first email and the file note refer to "Caveats" which the plaintiff was said to have registered over the property of the defendants, but there is no evidence that the plaintiff ever lodged a caveat over any of the defendants' properties.

It may be thought that this was an error and that Ms Muis meant to refer to the Mortgages, which she did in the second email. If that is the case, it is curious that she returned to referring to “Caveats” in the final email.

[270] In the absence of evidence from Ms Muis, it is unclear what information she had been provided with prior to these communications and by whom. It is unclear what actual conversation led to the creation of the file note, but it appears to record a conversation with Ms Vita. It is unclear whether the note “Caveats will be removed from her properties once she is out” was something said by Ms Vita, or was something said by Ms Muis on the basis of information from her clients, or was said by Ms Vita on the basis of something said by Ms Muis.

[271] Even if these communications were admissible to determine the proper construction of the Deeds, and in particular the Mortgages, they lack sufficient cogency to establish that the intention of the parties was that advanced by the defendants.

[272] It is very clear from a reading of the plain words of the Deeds that the secured properties were secured by the Mortgages against any failure of the purchasers to comply with their contractual obligations under the Contract as varied by the Variation Deed. This would obviously include any monies owed to the plaintiff in default interest or any deficiency in the sale price after a resale. I do not accept the proposition that the first defendant held a different view. It may be that the first defendant was “trying it on” by

attempting to convince the plaintiff to remove the Mortgages after the Contract had been terminated, but whatever was the case, I do not accept the proposition that the defendants held a belief that the Mortgages only secured the purchase monies as the first defendant suggests.

[273] There is, of course, no evidence from the third defendant as to his understanding of the effect of the Mortgages (or that of the second defendant) at the time they were executed. This fact, together with the unexplained failure of the defendants to call Ms Muis, means that I can more safely draw the inference which I have drawn about the defendants' understanding of the documents.

Alleged invalidity of the Deeds or their terms by reason of the operation of the ACL

[274] The defendants submitted that:

- each of the Deeds is a standard form contract for the purposes of Part 2.3 of the ACL; and
- the terms of the Deeds are unfair.

[275] I will initially consider each of the Deeds separately.

The Variation Deed

[276] It is abundantly apparent from the terms of the Variation Deed that it was a bespoke document created to address the particular circumstances of the

parties caused by the purchasers' failure to complete the Contract. It is a document that was the subject of considerable negotiation between the parties over a lengthy period during which the defendants negotiated concessions of considerable value to themselves. The statutory presumption is rebutted. The Variation Deed is not a standard form of contract for the purposes of the ACL.

[277] Despite this finding, I will briefly consider the submissions made by the defendants that particular clauses of the Variation Deed are unfair. The clauses identified by the defendants were clauses 3.1, 3.2 and 3.3. The defendants submitted that these clauses would cause significant imbalance to the parties' rights and obligations under the Contract because in consideration of the plaintiff granting the purchasers an extension of time to complete the Contract, the defendants were required to:

a) grant mortgages over the Muirhead and Acacia Hills properties;

b) execute the Deed of Performance Guarantee;

c) pay $20,000.00 to the plaintiff on 5 April 2019;

d) pay $5,000.00 per month to the plaintiff for the period 1 May 2019 to 2 September 2019;

e) pay interest at 7% on late payments;

f) pay default interest at 12% if the purchasers fail to settle; and

g) pay the mortgagee's legal costs.

[278] In their written submissions, the defendants incorrectly stated that the extension of the period for settlement was one of five months. It may well have been approximately five months between the date of execution of the Variation Deed and the revised date for completion of the Contract, but in reality, the extension was from the original date for completion to the revised date for completion, being a period of about eight and a half months.

[279] The $20,000.00 which was payable on 5 April 2019 was in lieu of default interest payable under the Contract, and represented a significant discount to the purchasers. Similarly, the requirement to pay $5,000.00 per month was in lieu of default interest payable under the Contract and also represented a significant discount to the purchasers.

[280] The requirement to pay interest at 7% on late payments represented a significant discount to the purchasers on the agreed rate of 12% found in the Contract. It was only if the purchasers failed to complete the Contract for a second time that they would be required to pay default interest at the contractually agreed rate of 12% per annum. I will now consider the individual clauses to which the purchasers have taken objection.

[281] Clause 3.1 is headed "Buyer's Security" and provides that:

- the purchasers (defined collectively in the document as "the Buyer") will provide security for their performance of the Contract by procuring

first mortgages in favour of the plaintiff over the Muirhead and Acacia Hills properties;

- the purchasers will provide additional security in respect of their performance of the Contract and of the Variation Deed by arranging execution of a Deed of Performance Guarantee by the second defendant;

- the Mortgages will provide that the plaintiff has a power of sale in respect of each of the properties the subject of the Mortgages in the event of any default on the part of the purchasers of the Variation Deed or of the Contract;

- the purchasers will do all things necessary to procure and facilitate the execution and registration of the Mortgages; and

- in the event that the Mortgages, through no fault of the plaintiff, are not registered by 30 April 2019, or the Deed of Performance Guarantee, through no fault of the plaintiff, is not executed by 30 April 2019, the plaintiff may, at her discretion, terminate the Deed of Variation and take action for breach of the Contract, or take action for breach of clause 3.1 of the Variation Deed and exercise her power of sale in respect of either Mortgage.

[282] The defendants submitted that this clause is unfair because:

(a) it causes a significant imbalance in the parties' rights and obligations;

(b) it was not reasonably necessary in order to protect the legitimate interests of the plaintiff and the plaintiff was advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to the purchasers if it were to be applied or relied on.[26]

[283] There is no merit in any of these submissions. At the time that the Variation Deed was negotiated and executed, the purchasers had failed to complete the Contract after having been allowed an extended settlement period of approximately 15 months. By virtue of the purchasers' failure to complete the Contract, the plaintiff had significant rights which she was entitled to exercise under the Contract and which would have had serious, and potentially catastrophic, financial consequences for the purchasers. In assessing whether clause 3.1 caused a significant imbalance in the parties rights and obligations, it must be recollected that the plaintiff was forgoing her rights to take immediate action to terminate the Contract and to recover damages against the purchasers. These rights must be brought to account in this balancing exercise.

[284] In addition, the failure of the purchasers to complete the Contract despite having been given an extended settlement period would inevitably raise concerns about their ultimate ability to complete the Contract even if they were granted further time to complete. By the time that the varied date for

26 See s 24(1) of the ACL.

completion arrived, the purchasers would have had over two years to complete the Contract, during most of which period they would have been in possession of the Fannie Bay property. Default interest was also accruing on the balance of the purchase price and would continue to accrue until completion occurred. Bearing in mind these matters, any prudent vendor would require substantial security to ensure the purchasers' performance of their obligations.

[285] I will add that the terms of clause 3.1 are transparent.[27] While I am entitled to take into account such matters as I think relevant in determining whether a term of a standard form contract is unfair,[28] for the reasons given above, I do not accept that there was anything about the circumstances in which the Variation Deed came to be negotiated and executed that would render clause 3.1 unfair.

[286] Clause 3.2 is headed "Interest on the Purchase Price".[29] The same submissions were advanced by the defendants regarding this clause as were advanced regarding clause 3.1. They are equally unmeritorious regarding clause 3.2. By the time that the Contract as varied would have to be completed, the plaintiff would have lost the use of the balance of the purchase price, being $1,900,000.00, for approximately eight and a half

27 See ss 24(2) and (3) of the ACL.

28 s 24(2) of the ACL.

29 See [248] above.

months, and the purchasers would have continued in “rent free” occupation of the Fannie Bay property for the same period.

[287] In assessing whether clause 3.2 caused a significant imbalance in the parties’ rights and obligations, the period of time which the plaintiff was allowing to the purchasers to complete the purchase of the Fannie Bay property, and the circumstances of the purchasers’ occupation of that property, must be taken into account. In addition, the failure of the purchasers to complete the Contract on the original date for completion meant that there was an increased risk that they would not be able to complete the Contract within the extra time allowed by the Variation Deed. The requirement that the purchasers pay default interest, and the rate at which default interest was set, reflect that increased risk. I am satisfied that the clause does not create a significant imbalance in the parties’ rights and obligations.

[288] It cannot seriously be suggested that the provisions of clause 3.2 were not reasonably necessary to protect the legitimate interests of the plaintiff. The plaintiff was to be deprived of the use of the balance of the purchase monies for a further significant period. It would be an astounding suggestion that the plaintiff should have allowed an extension without some form of recompense for her loss of the use of the balance of the purchase monies. The clause, in fact, gave the purchasers an opportunity to avoid paying most of the default interest calculated in accordance with the terms of the Contract as originally agreed to by the purchasers. When looked at in

context, clause 3.2 is not detrimental to the purchasers, but is favourable to them.

[289] Clause 3.3 is headed “Outgoings” and simply provides that the purchasers are obliged to pay all outstanding outgoings on the property up until the date for completion. I do not understand how it can be suggested that this clause was unfair. It is a clause with which the purchasers expressed themselves willing to comply when they signed the Contract and in the period leading up to, and beyond, the original date for completion. The purchasers were in occupation of the property in anticipation that they would complete the purchase and become the registered owners of the property. They were not paying a licence fee to the plaintiff. I am at a loss to understand how it can be said that this clause caused a significant imbalance in the parties’ rights and obligations. Nor can I comprehend how it can seriously be suggested that this clause was unnecessary to protect the legitimate interests of the plaintiff.

[290] Turning to the Deed of Performance Guarantee, I am satisfied that this was not a standard form contract as defined in the ACL. It was quite clearly a bespoke agreement addressing the particular issues arising out of the transactions between the plaintiff and the purchasers. I will, nevertheless, again address briefly the objections raised by the defendants.

[291] The defendants submitted that six clauses of the Deed of Performance Guarantee were unfair for the same reasons submitted with regard to the

challenged clauses of the Variation Deed. The clauses objected to were clauses 1.3, 2, 3, 4, 5, 6, and 7. The parties to the Deed of Performance Guarantee were Danium Investments Pty Ltd as trustee for the Danium Trust (described as "the Guarantor") and the plaintiff (described as "the Beneficiary").

[292] The first impugned clause, clause 1.3, is titled "Trustee's Capacity" and provides that the Guarantor enters into the Deed of Performance Guarantee in its capacity as trustee of The Danium Trust and in its own right and capacity. A search of the records of the Acacia Hills property revealed that the registered owner of that property was "Danium Investments Pty Ltd as trustee for the Danium Trust". It is therefore perfectly understandable and prudent that the company in its capacity as a Trustee would be a party to the Deed.

[293] The fact that the purchasers had failed to provide any evidence of their assertion of the value of the Acacia Hills property, despite numerous requests by the plaintiff's lawyers, meant that the plaintiff had to rely heavily on the representations made by the first defendant on her own behalf and that of the third defendant. The third defendant, of course, also acted as the sole director of the second defendant company. In those circumstances, it is unsurprising that the plaintiff also required the second defendant to execute the Deed of Performance Guarantee in its own capacity.

[294] I am satisfied that clause 1.3 was reasonably necessary to protect the plaintiff's legitimate interests.

[295] Clause 2 is titled "Performance Guarantee" and expresses the guarantee that the second defendant agrees to undertake. It is clearly a clause that is reasonably necessary to protect the legitimate interests of the plaintiff.

[296] Clause 3 is titled "Indemnity" and provides that the second defendant will indemnify the plaintiff from any loss or damage arising from a breach of the Contract (as varied) by the purchasers. It is clearly a clause that is reasonably necessary to protect the legitimate interests of the plaintiff.

[297] Clause 4 is titled "Continuing Liability" and provides that the obligations of the second defendant as Guarantor continue in force effectively until the purchasers had performed all of their obligations, or the second defendant had completed undertakings under the Deed of Performance Guarantee or the second defendant was released by the plaintiff. This is also a clause which is clearly reasonably necessary to protect the legitimate interests of the plaintiff. The whole purpose of the Deed of Performance Guarantee was to ensure that the plaintiff suffered no loss by reason of failure by the purchasers to complete their contractual obligations. It is a nonsense to suggest that it was not reasonably necessary to protect the legitimate interests of the plaintiff to have the second defendant's obligations continue until such time as that end was achieved.

[298] Clause 5 is titled “Guarantor’s Obligations, Enforcement and Security”. The clause provides that as security for its performance under the Deed of Performance Guarantee, the second defendant grants a mortgage in favour of the plaintiff over the Acacia Hills Property, including a power of sale in the event of the second defendant’s breach of its obligations under the Deed of Performance Guarantee. I do not understand how it can seriously be suggested that this clause was not reasonably necessary to protect the legitimate interests of the plaintiff in ensuring that she did not suffer any loss by reason of the failure of the purchasers to complete their contractual obligations.

[299] Clause 6 is titled “No effect” and provides that the obligations of the second defendant are not affected by any circumstance, act or omission which, but for the clause, might operate to derogate from that liability in whole or in part. This is, yet again, a provision designed to ensure the continuing obligation of the second defendant to indemnify the plaintiff against any loss arising out of a failure by the purchasers to complete their contractual obligations. I am satisfied that is a clause reasonably necessary to protect the legitimate interests of the plaintiff.

[300] Clause 7 is titled “Assignment” and prohibits the second defendant assigning any of its rights or obligations under the Deed of Performance Guarantee without the prior written consent of the plaintiff, with such consent not to be unreasonably withheld. It is completely understandable that the plaintiff would wish to ensure that her rights to be indemnified

against any loss occasioned by reason of the purchasers' failure to complete their contractual obligations would not be put at risk by an assignment by the second defendant of its obligations under the Deed of Performance Guarantee. This is a provision which is clearly necessary to protect the legitimate interests of the plaintiff.

[301] I now turn to the Muirhead and Acacia Hill Mortgages. I accept that the Mortgage documents (including the MCP) are standard form contracts for the purposes of the ACL. I also accept that the Mortgages were consumer contracts for the purposes of the ACL as contracts for the grant of an interest in land.[30]

[302] Registration of a mortgage in this Territory creates a charge on the mortgaged property and does not operate as a transfer of the legal ownership of the land.[31] I accept that the phrase "grant of an interest in land" in s 23(3)(b) of the ACL should not be given a restricted interpretation due to the remedial nature of the ACL. I therefore accept that the charge on the land created by the registration of a mortgage is a grant of an interest in land for the purposes of s 23 of the ACL. It is a nice question whether the grant of an interest in land is, in the light of s 76 of the *Land Title Act*, a consequence of the parties executing the mortgage or of the registration of the mortgage. I will, for present purposes, assume the former.

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30 See s 23 ACL.

31 See s 76 of the *Land Title Act*.

[303] With regard to each of the Mortgages, the defendants submitted that the description of the debt or liability set out on the Mortgage were “draconian and one sided” and caused “serious imbalance in the rights and obligations of the parties”. This submission is simply embarrassing nonsense.

[304] There is no suggestion that the Mortgages do not accurately set out the liability of the purchasers which the Mortgages secure. That is sufficient to answer the defendants’ submission.

[305] The defendants submitted that multiple terms of the MCP were unfair. They submitted that the terms were “individually and collectively draconian and one sided”. I will not go through the lengthy and pointless exercise of setting out each of the 34 clauses of the MCP objected to by the defendants. Suffice it to say that I am satisfied that each of the clauses is a clause one would expect to find in the terms of an ordinary mortgage and each is reasonably necessary to protect the legitimate interests of the plaintiff.

[306] The defendants argued that each of the impugned terms of the MCP cast obligations on the mortgagor, or gave rights to the mortgagee, that were not reciprocated by equivalent rights and obligations vested in the other party. It is inevitable that in a document such as a mortgage, there will be multiple obligations applying to the mortgagor which do not have a corresponding obligation applying to the mortgagee. It would be utterly absurd to suggest that each obligation cast upon the mortgagor should have a corresponding obligation applying to the mortgagee. The same applies regarding rights.

[307] The defendants did not identify any provision within the Mortgages, including the MCP, which are not usual provisions in transactions of this nature. The Mortgages do nothing more than secure performance by the purchasers of their agreed contractual obligations. Nothing speaks more eloquently of the plaintiff's need to require the protection of the Mortgages than the course adopted by the defendants in defending the present proceedings. The defendants have done their utmost to avoid liability for their breach of the Contract by advancing spurious legal issues and, at least on the part of the first defendant, making factual claims which cannot be accepted. They have shown no intention of making good any losses suffered by the plaintiff.

[308] Having found that the terms of the Contract, the Variation Deed, the Deed of Performance Guarantee and the Mortgages are not void as alleged by the defendants, the plaintiff is *prima facie* entitled to relief for the defendants' breaches of their contractual obligations. This is subject to determination of the allegation made by the defendants that the plaintiff failed to mitigate her losses, and also to resolution of the claims made by the defendants in the Counterclaim and Set-off.

Alleged failure by the plaintiff to mitigate her losses

[309] The defendants allege that the plaintiff failed to mitigate her losses in two ways:

a) by refusing to provide a discharge of the Muirhead Mortgage to enable the first defendant's sale of that property to proceed; and

b) by delaying informing the defendants of the sale of the Fannie Bay property and her consequent losses, thus allowing default interest to continue to accrue.

[310] I do not accept that the plaintiff refused to provide a discharge of the Muirhead Mortgage and that this was the reason for the first defendant's sale of that property not proceeding. It was not in the plaintiff's interests to frustrate the first defendant's sale of the Muirhead property. The plaintiff simply wanted the money owing to her by reason of the defendants' defaults. On the evidence, this was most likely going to be achieved by sale of the Muirhead and Acacia Hills properties. The plaintiff had no motive to hold up the sale of those properties.

[311] In addition, there is the clear and incontrovertible evidence of Ms Papazoglou that she was engaged by the plaintiff on 26 November 2020 to prepare a discharge of the Muirhead Mortgage in anticipation of the sale of that property by the first defendant. It was the expectation of the plaintiff that the net proceeds of that sale would go to her in reduction of the defendants' debt as is demonstrated by the conversation between the plaintiff and Ms Papazoglou on 26 November 2020. The actions of the plaintiff in engaging Ms Papazoglou to prepare the discharge of the

mortgage is entirely inconsistent with an attitude on the part of the plaintiff that she was going to refuse to discharge the Mortgage.

[312] The defendants placed great weight on the following exchanges that occurred in cross-examination of the plaintiff:

> Ms McLaren: Now, Ms Tjung says that there was a conversation she had with you in early December to late November 2020 where she asked you to discharge the mortgage over Muirhead property and you refused?... Yes, I wouldn't refuse, that's for sure.
>
> And you said words to the effect, "No, I won't". When she asked you to discharge the mortgage, you said "No. What you're getting for the sale of Muirhead won't satisfy what you owe me", or words to that effect. Is that right? ... Probably, something like that.
>
> Now, Ms Tjung says that because you refused, she was not able to sell the property to her purchasers.
>
> His Honour: Just before you go on. You understand that the proposition that is being put to you is that you refused to provide a discharge of mortgage over the Muirhead property to allow the sale of the Muirhead property to go ahead? … They're two different – I wanted it discharged at the time of the sale, for sure.
>
> Yes. But you…? … I wouldn't discharge the mortgage until evidence of a sale was coming up.
>
> All right? … Or the date set.
>
> So you don't accept the proposition, as I understand it, that you simply said, "no I'm not going to give you a discharge of mortgage"? … Correct. It was taken out of context. There could have been more in the sentence, but you can pick out just what you want out of the middle of it.
>
> All right? … But not lift the mortgage on the only assets I've got.
>
> Ms McLaren: Well, is it true that in a conversation with Ms Tjung, you said to her when she asked you to discharge the mortgage, you said to her "No, what you're getting for that property is a lot less than what you owe me"? … I said what?
>
> You said "No, what you're going to get for that property is a lot less than what you owe me", or words to that effect. Is that correct? … That would be correct, for sure.
>
> His Honour: Again, I think it's important that you make the witness understand that what is being suggested is that Ms Tjung got in contact

with you in relation to the sale of the Muirhead property?... Muirhead, yes.

And said, “I’ve got a buyer who wants to buy it for x amount but we’ll need to get you to discharge the mortgage so that the purchase can go ahead”. And then you said, “No, I’m not going to give you the discharge of mortgage to allow the purchasers to go ahead because what you are going to get from that property isn’t enough”?... I understand what you said and that’s an incorrect statement. I will go back on the fact that I certainly would – if there was money coming in from Muirhead and that as one of the assets, then the mortgage on it would go, with the sale.

Yes?... The sale will not cover the outstanding debts that had incurred not just on the house or the property but all the legal costs that have gone through over three years – or four years. So it may come under, but I would have said “Yes, but it’s not going to cover the costs.”

All right. But do you agree with the proposition that has been put to you that you simply refused to provide a discharge of mortgage to allow that sale to go ahead?... I dispute that. If the sale is done. I think I’ve done it like 15 times in the last hour. The two go together – the sale and the mortgage together.

Ms McLaren: The question is, when it was asked of you, did you refused and say – “Oh no” – or words to that effect, “Oh no. What you’re going to get for that property is far less than what you owe me” or words to that effect. Did you say those words?... Well, yes, that would be right. But that didn’t stop the sale. You be careful how you word that one. I am still happy for Muirhead to get sold. Do that next week, I’m happy. With the mortgage you get the sale.

[313] It was apparent to me in the course of this portion of the cross-examination of the plaintiff that she was confused. I formed the opinion that the plaintiff accepted that she may have said to the first defendant, at some point in time, that she was not prepared to simply discharge the Mortgage over the Muirhead property. It was also clear to me that she was saying that she was prepared to discharge the Mortgage for the purpose of a sale of the property. When the proposition was put directly to the plaintiff that she had a conversation with the first defendant in which the first defendant said that

she wanted the plaintiff to discharge the Muirhead Mortgage to enable a sale to take place and that the plaintiff had refused to provide a discharge for that purpose, the plaintiff was adamant that she would not have said that.

[314] In my opinion, the evidence given by the plaintiff accords with common sense. The plaintiff was not prepared to discharge the Mortgage over the Muirhead property unless there was a sale of that property with the proceeds of sale being paid to the plaintiff. I accept that it is possible that there was confusion in the conversation between the plaintiff and the first defendant on this issue, and that the first defendant may have come away from that conversation with the impression that the plaintiff was not prepared to discharge the Muirhead Mortgage to enable the sale to go ahead, but I am satisfied that this was not the intention of the plaintiff.

[315] In any event, I do not accept that any misapprehension on the part of the first defendant regarding the attitude of the plaintiff to providing a discharge of the Muirhead Mortgage to enable a sale of that property to take place was the cause of the failure of the first defendant to complete the sale of the Muirhead property.

[316] It is simply not credible that if the first defendant had met with a blank refusal by the plaintiff to provide a discharge of the Muirhead Mortgage to enable the sale of that property to take place, or she genuinely believed that to be so, she would not have told her conveyancing agent, Ms Lenz, that this was the case. The conversations which Ms Lenz had with Ms Papazoglou on

8 December 2020 and 14 December 2020 contain no suggestion that Ms Lenz had been told by the first defendant that the plaintiff was refusing to provide a discharge of Mortgage and that this was the reason for any delay in settlement. The statements made by Ms Lenz in those conversations make it apparent that by 8 December 2020, Ms Lenz had not been contacted by the first defendant to give instructions necessary to the settlement occurring on 9 December 2020.

[317] According to Ms Lenz, the first defendant had not, as at 8 December 2020, signed the transfer document, and a draft settlement statement had not been prepared. I am satisfied that settlement of the sale of the Muirhead property did not proceed on 9 December 2020 because the first defendant did not provide necessary instructions to her conveyancer and sign the necessary papers to allow the sale to be completed. There is nothing in these conversations to suggest that Ms Lenz understood there to be a problem with the plaintiff providing the discharge.

[318] It is also important to note that in the conversation between Ms Papazoglou and Ms Lenz on 8 December 2020, Ms Papazoglou informed Ms Lenz that she, Ms Papazoglou, had been retained by the plaintiff to prepare the discharge of the Muirhead Mortgage. There could be no reason for Ms Lenz not conveying that information to her principal, the first defendant. Even if the first defendant was, up to that date, under the misapprehension that the plaintiff was refusing to provide the discharge, that could not have been the case subsequently. It is simply unexplained why the first defendant did not

give instructions to Ms Lenz to allow settlement to take place after 9 December 2020.

[319] The unexplained failure of the defendants, and particularly the first defendant, to call Ms Lenz to give evidence allows me to more safely conclude that the reason for the Muirhead sale not proceeding to completion was not due to any refusal by the plaintiff to provide a discharge of Mortgage or that the first defendant held a genuine belief that the plaintiff was refusing to provide the discharge.

[320] The defendants submitted that the discharge executed by the plaintiff did not arrive in Darwin until 17 December 2020, well after the nominated settlement date of 9 December 2020. This may be so, but this fact is not significant. First, the reason for settlement not proceeding on 9 December 2020 was that the first defendant had not signed the transfer, nor had she provided the necessary instructions to Ms Lenz to allow settlement to occur.

[321] Secondly, there was no reason why settlement could not occur on or after 17 December 2020 if the purchasers of the Muirhead property were not willing to settle until the original discharge was produced. The purchasers of the Muirhead property remained willing to complete the purchase.

[322] I also note that Ms Papazoglou gave evidence, which I accept, that she was never notified by Ms Lenz that the first defendant was in a position to proceed to settlement and setting a time and date for settlement to occur. It is therefore unsurprising that the first defendant's conveyancer was not

provided with the executed discharge of mortgage. Ordinarily, the discharge of mortgage would be produced at the time of settlement, and in the present case, no date and time for settlement was fixed because of the first defendant's failure to provide instructions to Ms Lenz.

[323] I am satisfied that the plaintiff did not fail to mitigate her damages by refusing to provide a discharge of the Muirhead Mortgage to enable the sale of that property.

[324] The second way in which the defendants allege that the plaintiff acted unreasonably and failed to mitigate her losses was by not informing the defendants of the particulars of those losses within a reasonable time after the sale of the Fannie Bay property. It is not clear from the evidence exactly when the defendants were formally notified of the losses that the plaintiff claims she suffered as a result of the defendants' breach of their contractual obligations.

[325] The first defendant did state that she had a conversation with the plaintiff on 11 March 2022 in which the plaintiff said that there was a shortfall of $650,000.00 on the sale of the Fannie Bay property together with interest at 12%. The plaintiff offered to accept $700,000.00 in full settlement of her claim. It is not clear whether that offer of settlement was in addition to the deposit of $100,000.00 or was inclusive of that sum. It is not necessary to resolve that issue in these proceedings. The Fannie Bay property sale to BF was completed on 21 December 2020. There seems to be no reason for the

plaintiff not being able to calculate her losses within a couple of months of that sale.

[326] The plaintiff was entitled to charge interest under the Contract at 12%. A reasonable person in the place of the plaintiff, recognising that fact, would have advised the defendants of the calculation of her losses as soon as possible after the sale of the Fannie Bay property to give the defendants the opportunity to pay the sum claimed and to avoid further interest payments.

[327] In the present case, however, I am satisfied that any failure of the plaintiff to notify the defendants of the sum claimed within a reasonable period does not disentitle the plaintiff to the full amount of interest claimed under the Contract. This is so for two reasons. First, the evidence makes it probable that the defendants were not in a position to pay the damages. Secondly, the defendants' approach to the present proceedings demonstrates that it is highly unlikely that the defendants would have accepted that the plaintiff had suffered any loss. As a consequence, any additional losses suffered by the defendants as a result of the plaintiff's failure to immediately notify them of her losses have not been caused by any such failure.

The defendants' Counterclaim and Set-off

[328] The first defendant claimed an entitlement to damages, which could be set-off against any damages she may owe the plaintiff, for whatever judgment sum and costs may be awarded against her in the Local Court proceedings brought by the third party purchasers regarding the failed sale of the

Muirhead property. She also claimed an entitlement for damages for her own costs in defending those proceedings. For the reasons which I have given, I am satisfied that the sale of the Muirhead property did not proceed because of the failure of the first defendant to provide instructions to her conveyancing agent, Ms Lenz, and also to attend upon Ms Lenz to sign the transfer of title. I am satisfied that the failure of the sale to proceed had nothing to do with any refusal by the plaintiff to provide a discharge of mortgage. Indeed, I am satisfied that the plaintiff instructed Ms Papazoglou to prepare a discharge of mortgage and that Ms Lenz was aware of that fact.

[329] For the same reasons, the first defendant's claim for damages for loss of the use of the proceeds of sale of the Muirhead property must fail.

[330] The next matter which the first and second defendants raised by way of counterclaim and/or set-off is a claim for $67,370.50 for renovations they undertook on the Fannie Bay property while they were occupying that property under licence. The simple answer to this claim is that there is no legal basis for it. The first and second defendant were contractually obliged to refrain from alterations to the premises during the period of occupation under licence. There is no evidence that the plaintiff requested the first and second defendants to undertake these renovations, or that she encouraged them to do so. There is no evidence that she was aware of the intentions of the first and second defendant to undertake the renovations prior to the work being undertaken. Indeed, when the plaintiff became aware of the fact that the first and second defendants had undertaken renovations in the premises,

she specifically reminded them that they were not contractually entitled to undertake those works.

[331] There is simply no basis for a claim in law or equity for the plaintiff to reimburse the first and second defendants for the costs of these renovations.

[332] The final matter raised by the defendants is a claim that they are entitled to off-set against any damages awarded to the plaintiff the sum of $90,000.00 which they claimed was paid to the plaintiff in reduction of the purchase sum for the Fannie Bay property. The chronology of events makes it unarguable that the sum of $90,000.00 was paid towards accruing default interest as required by the agreement between the purchasers and the plaintiff embodied in the Variation Deed.

[333] Ultimately, it makes little difference whether the $90,000.00 is credited towards the purchase amount or to the accruing default interest. The defendants are liable to pay damages to the plaintiff including the shortfall on the sale of the Fannie Bay property and also default interest. Crediting the $90,000.00 to the purchase amount simply increases the amount owing on default interest, and vice versa. The only way in which allocation of that sum in reduction of the purchase price would be of benefit to the defendants is if I had determined that the default interest provisions of the Contract and the Variation Deed were void, which is not the case.

[334] The defendants' counterclaim and set-off fail. They are not entitled to any of the forms of relief they sought.

The plaintiff's relief

[335] The plaintiff is clearly entitled to the sum of $550,000.00 as the deficiency on the resale of the Fannie Bay property which accrued when the property was sold on 21 December 2020.

[336] The plaintiff claimed pre-judgment interest on the $550,000.00 from 21 December 2020 (the date of the sale of the Fannie Bay property to BF) until judgment. The defendants submitted that the plaintiff's delay in commencing these proceedings should result in any claim for pre-judgment interest being denied. There is no merit in this submission. The plaintiff's claim was brought within the statutory limitation period. In addition, the defendants have had the benefit of that $550,000.00 over that period and the plaintiff has not. The resolution of the plaintiff's claim has been considerably delayed by spurious legal arguments advanced by the defendants. Delay is not a reason to deny the plaintiff pre-judgment interest.

[337] The plaintiff also seeks default interest of $55,468.49 under clauses 3.2(a) and (b) of the Variation Deed for the period from 14 December 2018 to 2 September 2019. This is calculated as follows:

a) 7% simple interest per annum on $1.9m for 262 days, being $95,468.49;

b) less $40,000.00 in interest payments made by the purchasers during that period, leaving a balance of $55,468.49.

[338] This sum of $55,468.49 accrued during the period the Contract as varied by the Variation Deed was in force and was payable as it accrued in accordance with the terms of the Contract as varied. It is a liquidated debt owing to the plaintiff.

[339] The plaintiff sought pre-judgment interest on that sum from 2 September 2019 to judgment. This was opposed by the defendants on the basis that s 84 of the *Supreme Court Act 1979* (NT), which gives the Court the power to award pre-judgment interest, specifically excludes the giving of "interest on interest".[32]

[340] In my opinion, s 84 does not apply to prohibit the making of an award for interest on the sum of default interest payable by the defendants. In *Saunders v Nash*,[33] Vincent J considered the effect of s 60 of the *Supreme Court Act 1982* (Vic), a provision of regulating the making of awards for pre-judgment interest in proceedings for debt or damages. Section 60 also contained a provision stating that the provision did not authorise the "granting of interest on interest". With regard to that provision, Vincent J said, at 69:

> Whilst sub-s. (2)(*a*) does not authorise the granting of interest upon interest in a proceeding for the recovery of debt, that is it prevents the making of an award under s. 60 for damages in the nature of interest which is calculated as compound interest, I do not understand this provision to be directed to a case where the debt is comprised of an amount owing as principal together with accumulated interest. In that

32 s 84 (2) (a).

33 [1991] 2 V.R. 63.

> situation the debt to the recovery of which the proceeding is directed must be regarded as the total sum due. That sum may be the subject of an award of damages in the nature of interest pursuant to s. 60(1).

[341] In my opinion, the intention of s 84 (2)(a) of the *Supreme Court Act* (NT) in prohibiting this Court from making an award of pre-judgment interest on interest is to make clear that the section does not permit an award of compound interest. I am satisfied that I have the power pursuant to s 84(1) to award pre-judgment interest on the amount of default interest payable by the defendants. I am satisfied that this is an appropriate case in which to make such an award.[34]

[342] The plaintiff also claims the sum of $142,394.52 in default interest owing under clause 3.2(c) of the Variation Deed and clause 17.1(a) of the Contract for the period from 3 September 2019 to 6 July 2020 (308 days) calculated as follows:

a) 12% simple interest per annum on $1.9m for 308 days, totalling $192,394.52;

b) less $50,000.00 in interest payments made by the purchasers during that period, leaving a total of $142,394.52.

[343] This is also an amount owing as a debt due to the plaintiff for the same reasons given with regard to default interest claimed for the period from 14 December 2018 to 2 September 2019.

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34 See also *Ironbridge Holdings Pty Ltd v O'Grady* [2020] VSC 344 at [381].

[344] The plaintiff also sought pre-judgment interest on this sum from 6 July 2020 to the date of judgment. This was also opposed by the defendants on the basis of the provisions of s 84(2)(a) of the *Supreme Court Act*. I do not accept the defendants' submissions for the same reasons given at [340]-[341] above. The plaintiff is entitled to pre-judgment interest on the sum of $142,394.52 from 6 July 2020 until the date of judgment.

[345] The plaintiff also seeks orders for the possession of the Muirhead property. There is no doubt that the first defendant is in default under the Muirhead Mortgage and that the provisions of that Mortgage entitle the plaintiff to take possession of that property.

Orders

[346] I make the following orders:

(a) Judgment for the plaintiff against the defendants in the following sums:

(i) $550,000.00 together with pre-judgment interest pursuant to s 84(1) of the *Supreme Court Act 1979* (NT) from 21 December 2020 to the date of judgment;

(ii) $55,468.49 together with pre-judgment interest pursuant to s 84(1) of the *Supreme Court Act 1979* (NT) from 2 September 2019 to the date of judgment;

(iii) $142,394.52 together with pre-judgment interest pursuant to s 84(1) of the *Supreme Court Act 1979* (NT) from 6 July 2022 to the date of judgment.

(b) An order that the plaintiff is entitled to possession of the Muirhead property, described as Lot 11813 Volume 808 Folio 391 in the Town of Nightcliff, otherwise known as 38 Bridge Street, Muirhead in the Northern Territory.

(c) Judgment for the plaintiff against the defendants on the Counterclaim and Set-off.

[347] The plaintiff will, of course, be entitled to post-judgment interest on the amounts referred to in orders (a)(i), (ii) and (iii) above.

Costs

[348] The plaintiff may, within 14 days of delivery of judgment, file and serve written submissions not exceeding four A4 pages as to the costs orders sought in these proceedings. The defendants may, within 14 days of receipt of the plaintiff's submissions, file and serve written submissions not exceeding four A4 pages as to the costs orders that the defendants submit should be made.
