Court of Appeal
Supreme Court
New South Wales

Summary

Medium Neutral Citation:	**Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24**
Hearing dates:	19 September 2018
Decision date:	22 February 2019
Before:	Bathurst CJ; Beazley P; Macfarlan JA
Decision:	Appeal dismissed with costs.
Catchwords:	REAL PROPERTY – whether appeal futile in circumstances where respondent is registered proprietor of land – whether contractual right to lodge caveat created an equitable interest in favour of appellant CONTRACTS – formation – whether parties entered into contract for sale of land – form of contract entered into
Legislation Cited:	Real Property Act 1900 (NSW), s 42 Supreme Court Act 1970 (NSW), s 75A(10) Uniform Civil Procedure Rules 2005 (NSW), r 51.54
Cases Cited:	Aged Care Services Pty Ltd v Kanning Services Pty Ltd (2013) 86 NSWLR 174; [2013] NSWCA 393 Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57 Bahr v Nicolay (No 2) (1988) 164 CLR 604; [1988] HCA 16 BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 Brien v Dwyer (1978) 141 CLR 378; [1978] HCA 50 Coleman v Bone (1996) 9 BPR 16,235 Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; [2014] HCA 32 Commonwealth v McLean (1996) 41 NSWLR 389 Holloway v McFeeters (1956) 94 CLR 470; [1956] HCA 25 Iaconis v Lazar (2007) 13 BPR 24,937; [2007] NSWSC 1103 John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19 Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8 Manly Council v Byrne [2004] NSWCA 123 Murphy v Wright (1992) 5 BPR 11,734 News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410; [1996] FCA 870 Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51 Taleb v National Australia Bank Ltd (2011) 82 NSWLR 489;

	[2011] NSWSC 1562 Troncone v Aliperti (1994) 6 BPR 13,291
Category:	Principal judgment
Parties:	Ta Lee Investment Pty Ltd (Appellant) Alexander James Antonios (First Respondent) MV Developments (Lane Cove) Pty Ltd (in liq) (Second Respondent)
Representation:	Counsel: V F Kerr SC; P T Newton (Appellant) J Knackstredt (First Respondent) Solicitors: Rutlands Law Firm (Appellant) M&K Lawyers Group Pty Ltd (Respondents)
File Number(s):	2018/119688
Decision under appeal	**Court or tribunal:** Supreme Court
Jurisdiction:	Equity
Citation:	Bradley Mark Lum v MV Developments (Lane Cove) Pty Ltd (in liquidation) [2018] NSWSC 247
Date of Decision:	8 March 2018
Before:	Emmett AJA
File Number(s):	2015/266248

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

In 2011, the second respondent, MV Developments (Lane Cove) Pty Ltd (in liq) (MV Developments), borrowed $1.5 million under a Deed of Loan and Guarantee from the appellant, Ta Lee Investment Pty Ltd (Ta Lee), to finance the development of certain land in Lane Cove into an apartment block. The Deed entitled Ta Lee, following an event of default, to lodge and maintain a caveat on the titles to the land until it received full payment of all moneys due under the Deed. Following a number of events of default, and after the completion of the development, Ta Lee lodged two caveats claiming an equitable charge in respect of a particular apartment, namely, Lot 34.

The first respondent, Mr Antonios, subsequently lodged a caveat claiming an interest in Lot 34 as the purchaser of the apartment. He claimed that he had entered into a contract to purchase Lot 34 with MV Developments on 15 April 2015. The form of this contract was alleged to have been comprised of the front page of a contract for sale signed by the sole director of MV Developments on 15 April 2015 and a further 122 pages sent by email to Mr Antonios by MV Developments' director on 21 July 2015. Mr Antonios also claimed that he had paid the entire purchase price for Lot 34, notwithstanding that the method of payment did not comply strictly with the terms of the contract.

The primary judge found that Ta Lee did not have an equitable charge over Lot 34 and that Mr Antonios had entered into a contract to purchase Lot 34, in the form claimed, for which he had paid the entire purchase price. His Honour ordered the withdrawal of Ta Lee's caveats and the transfer of Lot 34 to Mr Antonios. On 29 March 2018, MV Developments transferred Lot 34 to Mr Antonios. On 10 April 2018, the transfer was registered.

The issues on the appeal were:

1. Whether Ta Lee had standing to bring the appeal;

2. Whether Ta Lee had an equitable charge over Lot 34;

3. Whether Mr Antonios had entered into the alleged contract to purchase Lot 34; and

4. If so, whether Mr Antonios had paid the entire purchase price under the contract.

The Court (Bathurst CJ, Beazley P and Macfarlan JA) held, dismissing the appeal:

(i) Although Ta Lee had standing to bring the appeal, the appeal lacked utility in circumstances where: Mr Antonios is the registered proprietor of Lot 34; none of the exceptions to indefeasibility applied; and there was no evidence which would give rise to a personal equity against Mr Antonios: [59]-[78].

John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19 considered.

Bahr v Nicolay (No 2) (1988) 164 CLR 604; [1988] HCA 16; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410; [1996] FCA 870 referred to.

(ii) The primary judge did not err in finding that Ta Lee did not have an equitable charge over Lot 34. Ta Lee's contractual right to lodge a caveat, on its proper construction, did not create an equitable interest or give rise to an equitable charge in favour of Ta Lee: [92]-[114].

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; *Murphy v Wright* (1992) 5 BPR 11,734; *Troncone v Aliperti* (1994) 6 BPR 13,291; *Coleman v Bone* (1996) 9 BPR 16,235; *Taleb v National Australia Bank Ltd* (2011) 82 NSWLR 489; [2011] NSWSC 1562; *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174; [2013] NSWCA 393 considered.

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51; *Iaconis v Lazar* (2007) 13 BPR 24,937; [2007] NSWSC 1103; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; [2014] HCA 32 referred to.

(iii) Having regard to the evidence, the primary judge did not err in finding that Mr Antonios had entered into the alleged contract to purchase Lot 34. In reaching this conclusion, his Honour did not err in declining to draw a *Jones v Dunkel* inference in respect of Mr Antonios' failure to call certain witnesses: [136]-[140]; [153]-[156].

Holloway v McFeeters (1956) 94 CLR 470; [1956] HCA 25; *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8; *Commonwealth v McLean* (1996) 41 NSWLR 389; *Manly Council v Byrne* [2004] NSWCA 123 referred to.

(iv) The primary judge did not err in finding that Mr Antonios had paid the entire purchase price under the contract, in circumstances where MV Developments had accepted his payments and given him the keys to Lot 34: [164]-[175].

Brien v Dwyer (1978) 141 CLR 378; [1978] HCA 50 considered.

Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57 referred to.

JUDGMENT

1 **THE COURT**: This appeal concerns a dispute as to title to a lot in a newly developed apartment block. In 2011, the second respondent, MV Developments (Lane Cove) Pty Ltd (in liq) (MV Developments), borrowed $1.5 million from the appellant, Ta Lee Investment Pty Ltd (Ta Lee), to develop certain land in Lane Cove, known as the Aurora site, into an apartment block under a Deed of Loan and Guarantee (the Deed). The Aurora site comprised four adjoining lots, each with separate titles.

2 The Deed entitled Ta Lee, following an event of default, to lodge and maintain a caveat on the titles to the Aurora site until it received full payment of all moneys due under the Deed. An event of default occurred when MV Developments failed to make an interest payment required under the Deed.

3 Following the completion of the development, Ta Lee lodged two caveats claiming an equitable charge in respect of a particular apartment, namely, Lot 34. The first respondent, Mr Antonios, subsequently lodged a caveat claiming an interest in Lot 34 as the purchaser of the apartment under an alleged contract for the sale of land with MV Developments dated 15 April 2015.

4 The primary judge, Emmett AJA, found that Ta Lee did not have an equitable charge over Lot 34 and that Mr Antonios had entered into a contract to purchase Lot 34, for which he had paid the entire purchase price: *Bradley Mark Lum v MV Developments (Lane Cove) Pty Ltd (in liquidation)* [2018] NSWSC 247. His Honour ordered the withdrawal of Ta Lee's caveats and the transfer of Lot 34 to Mr Antonios.

5 On 29 March 2018, MV Developments transferred Lot 34 to Mr Antonios. On 10 April 2018, the transfer was registered.

Issues on the appeal

6 On 16 April 2018, Ta Lee filed a notice of appeal, which raised the following issues:

(1) Whether Mr Antonios had entered into the alleged contract to purchase Lot 34: appeal grounds 1 to 13. Ta Lee raised two issues under these grounds of appeal: first, whether his Honour erred in failing to draw a *Jones v Dunkel* inference in circumstances where Mr Antonios had failed to call certain witnesses; and secondly, whether Mr Antonios and MV Developments had intended to enter into a binding contract;

(2) If so, whether Mr Antonios paid the deposit under the contract: appeal grounds 14 to 19 and 22; and

(3) Whether Ta Lee held an equitable charge over Lot 34: appeal ground 20.

Ta Lee abandoned appeal ground 21 regarding the exclusion of certain evidence in its amended written submissions of 21 August 2018.

7 A preliminary issue was also raised during the hearing regarding whether Ta Lee had standing to bring the appeal.

Factual background

The Deed

8 On 17 October 2011, Ta Lee, as lender, MV Developments, as borrower, MV Developments (Aust) Pty Ltd (MV Aust) and Mr Victor Fong, the sole director of MV Developments and MV Aust, entered into the Deed. The recitals to the Deed stated that MV Developments, MV Aust and Mr Fong had requested Ta Lee to lend to MV Developments $1.5 million for the acquisition and development of the Aurora site. By

recital G, MV Developments acknowledged that the relationship between it and Ta Lee was "*simply that of a lender (creditor) and borrower (debtor)*". MV Aust and Mr Fong were parties to the Deed as guarantors.

9 Ta Lee agreed to lend the $1.5 million to MV Developments by way of a preliminary advance of $900,000 and a further advance of $600,000. By cl 3.1 of the Deed, MV Developments acknowledged having received the preliminary advance on 11 August 2011. Pursuant to cl 3.3, Ta Lee promised to make available to MV Developments the further advance on 12 October 2011 or on such later date as required by MV Developments.

10 Clause 4 set out the due date for the repayment of the loan and interest payments:

> "4.1 The Borrower may make payment to the Lender of the Guaranteed Amount [$750,000] and repayment of such part of the Loan Facility [$1.5 million] as remains unpaid at any time by no later than 5pm on [10 June 2013].
>
> 4.2 Where the Borrower makes full payment/repayment in accordance with clause 4.1, the Borrower is not required to make any further payment.
>
> 4.3 Where the Borrower does not make full payment of the Guaranteed Amount and/or full repayment of such part of the Loan Facility as remains unpaid by no later than 5pm on [10 June 2013], then in the period from [10 June 2013] to [9 December 2013] the Borrower must pay to the Lender interest on such part of the Guaranteed Amount and such part of the Loan Facility as remains unpaid at [the simple interest rate of 12 per cent per annum] up to and including the date of the full payment/repayments.
>
> 4.4 Where the Borrower does not make full payment of the Guaranteed Amount and/or full repayment of such part of the Loan Facility as remains unpaid and all interest payable by no later than 5pm on [9 December 2013], then in the period from [9 December 2013], the Borrower must pay to the Lender interest on such part of the Guaranteed Amount and such part of the Loan Facility as remains unpaid at [the simple interest rate of 30 per cent per annum] up to and including the date of the full payment/repayments."

11 Clause 1.2(c)(i) provided that a failure on the part of MV Developments to repay the loan on 9 December 2013 or pay any instalment of interest on the prescribed interest payment date, namely, the 15th day of each month, for more than five business days constituted an event of default. Clause 7.1 identified the following further events of default:

> "(a) The Borrower fails to:
>
> (i) complete the purchase of the Aurora Site before 30 October 2011;
>
> (ii) fails to obtain construction certificate to enable it to commence development of the Lane Cove Development by 30 November 2011; or
>
> (iii) to commence construction and development of the Lane Cove Development by 01 March 2012 …"

12 Clause 7.2 set out the consequences of default as follows:

> "7.2 Consequences of default. In addition to and without prejudice to any rights the Lender may have under or pursuant to this Agreement or any other rights, remedies, power and privileges provided by or available in law, at any time after an Event of Default has occurred (whether or not it subsists or continues), the Lender may also:
>
> (a) Lodge and maintain a caveat on the titles to the Aurora Site or the consolidated title for the Aurora Site until such time the Lender receives full payment of all moneys payable to the Lender under or pursuant to this Agreement;
>
> (b) by notice to the Borrower declare all the moneys (including Guaranteed Amount and such part of the Loan Facility that remains unpaid to the Lender) immediately due and payable, and the Borrower must immediately pay the moneys to the Lender; and
>
> (c) to the fullest extent permitted by law, without notice, exercise any right that is exercisable after an Event of Default has occurred."

13 Clause 8 set out the covenants of the guarantors, MV Aust and Mr Fong:

> "8.1 The Guarantors agree and promise:
>
> (a) to act as joint and several guarantors and indemnifiers and be bound by the terms of this Agreement;
>
> (b) to comply fully and responsibly with the terms of the Agreement; and
>
> (c) unconditionally and irrevocably guarantee payment to the Lender of the Secured Moneys.
>
> 8.2 So long as the Lender has not received full payment or repayment of the Secured Moneys to its satisfaction, the Lender may make demand to the Guarantors jointly or severally for payment at any time and from time to time."

14 No part of the $1.5 million borrowed by MV Developments was repaid by 10 June 2013. Indeed, prior to 12 November 2015, MV Developments had made no payments under the Deed. Accordingly, pursuant to cl 1.2(c)(i), an event of default occurred on 20 June 2013, when MV Developments failed to make the required interest payment in accordance with cl 4.3.

15 On 15 December 2014, the four lots that constituted the Aurora site were consolidated into a single title. On 16 April 2015, the lot was subdivided by the registration of a strata plan consisting of 56 lots.

16 Ta Lee lodged a caveat in respect of Lot 34 on 23 June and 4 August 2015 respectively. The interest claimed in the first caveat was a "[*r*]*ight to caveat*" by virtue of the right conferred by cl 7.2 of the Deed. The interest claimed in the second caveat was an "[*e*]*quitable charge*" by virtue of the following:

> "Implied right to charge the land, derived from an express contractual right under clause 7.2 of [the Deed], to lodge and maintain a caveat on title at any time after an event of default, and until such time as the Caveator receives full payment of all monies payable under or pursuant to [the Deed]."

Contract for the sale of Lot 34

17 Mr Antonios contended that he entered into a contract with MV Developments to purchase Lot 34 for $910,000 on 15 April 2015. He gave evidence concerning the formation of the contract in his affidavit dated 7 April 2017, as well as during the course of cross-examination. His evidence was as follows.

18 In December 2014, Mr Antonios, a professional poker player, had the following telephone conversation with Mr Fong in relation to a possible loan to Mr Fong:

> "[Mr Antonios]: 'Ok, I'm happy to lend you the money. I will give you $150,000 in chips tomorrow.'
>
> Fong: 'Thanks AJ. As you know, my Lane Cove development is almost finished. I think a unit at Lane Cove would be a good investment opportunity for you. In this market you want multiple investment properties. You want to get your foot in the door.'
>
> [Mr Antonios]: 'Ok Vic, I'm definitely looking at investment properties at the moment. I'd be happy to come to Lane Cove with you and potentially use the $150,000 as a deposit for a unit there.'"

19 On or about 13 December 2014, Mr Antonios withdrew $200,000 in casino chips from his "*Cage*" account, of which he gave Mr Fong $150,000 in chips.

20 On 17 February 2015, Mr Fong showed Mr Antonios around the Aurora site and through some of the completed apartments. On or around the same day, Mr Antonios asked Mr Fong whether he needed his bank details again "*for the $150,000*". Mr Fong replied that he would let Mr Antonios know when the funds were ready.

21 On 25 February 2015, Mr Antonios and Mr Fong had the following conversation (Blue 17[18]):

> "Fong: 'Hey AJ, can I borrow another $50,000? I can write you a cheque for $200,000 instead of $150,000 …'
>
> [Mr Antonios]: 'Yep, no problem.'"

22 Mr Antonios gave Mr Fong $50,000 in casino chips and Mr Fong wrote Mr Antonios a cheque for $200,000 on the account of MV Aust. Mr Fong asked Mr Antonios not to cash the cheque until there were funds in the account.

23 On 31 February 2015, Mr Antonios asked Mr Fong if he could cash the cheque, to which Mr Fong replied "[*n*]*ot yet*", as he was a "*bit tied up with things*". Mr Fong said that he would let Mr Antonios know "*when it's ready*". Mr Antonios had two or three similar conversations with Mr Fong between 31 February and 24 March 2015. He never banked the cheque.

24

On 24 March 2015, Mr Fong asked Mr Antonios if he could borrow a further $110,000. Mr Antonios withdrew $110,000 in casino chips, which he gave Mr Fong. They had the following conversation:

> "Fong: 'Hey AJ, thanks for meeting me. I am happy to put this $110,000 as a deposit for an apartment at Lane Cove. I am so sorry that this has happened, you know that I have always paid you back. $7.8 million of my own money went to the deposit for the Pyrmont development site, which is why my funds are tied up at the moment.'
>
> [Mr Antonios]: 'Look, okay Vic, I am happy to help. I will give you the $110,000 and we will talk about which apartment to put it towards.'"

25 The following day, Mr Antonios had a conversation with Chris Ayoub, a builder who Mr Antonios knew worked with Mr Fong and his development companies, who told Mr Antonios that:

> "Ayoub: '… Victor told me that you gave him money for the business, that you are owed $310,000 now and that you'd like to use it as a deposit for a unit at one of our developments. I definitely think you should buy an apartment. Make sure you get an apartment in the Lane Cove development …'"

26 On or around 31 March 2015, Mr Antonios had the following conversation with Mr Ayoub and Joe Nassif, a construction manager who Mr Antonios knew worked with Mr Fong's development companies:

> "Nassif: 'Hey AJ, we want to talk to you about you getting an apartment at Lane Cove. We think you should get it now. Instead of just paying a deposit, we think you should pay the difference and purchase the apartment outright. That's what you want to do, right?'
>
> [Mr Antonios]: 'Yes, that's what I'm thinking of doing. Victor showed me around Lane Cove a few weeks ago.'
>
> Ayoub: 'AJ, I think what you should do is just secure your money now. We will meet in a couple of days for a coffee and we will discuss it further.'"

27 Mr Antonios met with Mr Ayoub and Mr Nassif again on or around 2 April 2015, during which the following conversation took place:

> "Nassif: 'Look, AJ, we think you should give Victor the extra money to purchase lot 34 at the Lane Cove development as it's the largest of the remaining available units.'
>
> Ayoub: 'AJ, you should get a property now and get your foot in the door. We will all talk to Victor about it tomorrow or whenever we're all free. What do you think of the idea? We will make sure it is done properly with a contract. My brother-in-law, Reuben Mansour, is a lawyer and we can get him to draw up a contract if you don't have your own lawyer.'"

28 On 13 April 2015, Mr Antonios met with Mr Fong at his office, during which the following conversation took place:

> "Fong: 'Look, I feel bad that you are owed all this money and I would like to give you a discount on the purchase price to take into account interest on the money. After we sign the contract, you can move into the apartment in about 3 weeks time.'
>
> [Mr Antonios]: 'Victor, I don't want interest. I'm happy to pay whatever the balance is and just get the apartment.'
>
> Fong: 'I think you should purchase lot 14.'
>
> [Mr Antonios]: 'I've spoken to Joe [Nassif] and I'm actually more interested in lot 34.'
>
> Fong: 'Okay, if lot 34 is what you're interested in then that's fine. I'll treat the $310,000 you previously loaned as a deposit on lot 34 and you can pay the balance. Lot 34 is worth $910,000 off the plan, so the balance will be $600,000.'"

29 Mr Fong then wrote the following note in Mr Antonios' presence:

> "13/4/15
>
> AJ
>
> Interest: 3% per month
>
> Equity:
>
> 200,000 for 6 months 239,000
>
> 110,000 for 2 months 117,000
>
> 540,000 for 1 month 556,000
>
> @ 3%/month $912,000 Unit will sell for 950,000
>
> @ 4%/month $934,000"

30 Mr Nassif and Mr Ayoub then entered the office, and the following conversation occurred:

> "Nassif: 'Okay, so have we decided what we are going to do?'
>
> [Mr Antonios]: 'Yes, I am going to purchase lot 34 for an extra $600,000.'
>
> Ayoub: 'Okay, if you don't have a lawyer we can get Reuben Mansour to draw up the documents and we can do it in the next few days.'
>
> Fong: 'Okay, can Reuben get it done by 12:00pm on 15 April 2015?'
>
> Ayoub: 'Let me find out but that should be fine. I'll give him a call and organise it.'"

31 On 14 April 2015, Mr Antonios met with Mr Fong in his office again, during which the following conversation took place:

> "[Mr Antonios]: 'I'm a bit worried about all of this money I'm paying. Are you able to give me something in writing?'
>
> Fong: 'Yeah sure. I'll give you a letter confirming that the price of the apartment has been received and you can pay the balance of the purchase price in the next couple of days.'"

32 Later that day, Mr Fong emailed Mr Antonios the front page of a contract for the sale of Lot 34 for $910,000. Mr Fong also sent Mr Antonios a letter "*confirm*[*ing*] *that Alexander James Antonios … has paid the company the total sum of $910,000 … for the purchase of* [*Lot 34*]".

33 On the morning of 15 April 2015, Mr Antonios forwarded Mr Fong's email of 14 April 2015, including the attached front page, to Mr Ayoub and Mr Mansour. Mr Antonios and Mr Fong also had the following telephone conversation:

> "Fong: 'Hey AJ, what time are you coming in today to sign the contract? Is everything ready?'
>
> [Mr Antonios]: 'Chris [Ayoub] is organising the contracts. If he is in the office you can ask him. Whenever the contract is ready I can come by the office and we can settle everything.'
>
> Fong: 'Is it possible for you to bring $200,000 with you to the office to pay straight after we settle the contract?'
>
> [Mr Antonios]: 'Yes, that's fine.'"

34 At around 1:30pm that day, Mr Antonios attended at Mr Fong's office, where he was greeted by Mr Nassif and Mr Ayoub. Mr Antonios waited while Mr Mansour finalised the contract. At around 7:30pm, Mr Ayoub printed two copies of a contract for the sale of land and two copies of a deed of agreement, which he placed before Mr Antonios and Mr Fong.

35 The parties to the deed of agreement were Mr Antonios, MV Developments and Mr Fong. The recitals stated as follows:

> "A. MV has agreed to sell to AJ the Property.
>
> B. AJ has agreed to purchase the Property from MV.
>
> C. MV directs AJ to make payment of the Price in cash to Victor.
>
> D. AJ has made payment of the Price to Victor in … accordance with MV's directions.
>
> E. In consideration of the payment of the Price by AJ to Victor, AJ and MV have entered into the Contract at a discounted purchase price."

36 "*Contract*", "*Price*" and "*Property*" were defined as follows:

> "**Contract** means the Contract for Sale of Land in respect of the Property.
>
> …
>
> **Price** means the amount of $910,000.
>
> **Property** means the Land as described in the [contract] for sale of land annexed hereto and marked 'A'."

No contract for the sale of land was annexed to the deed.

37 Mr Antonios gave evidence that, apart from glancing at the contract for sale and the deed of agreement, he did not read them. He also accepted in cross-examination that he did not recall what was attached to the front pages of the contracts for sale.

38 Mr Antonios and Mr Fong each signed each page of both copies of the deed of agreement, witnessed by Mr Nassif. Mr Antonios then signed the front page of one copy of the contract for sale, and Mr Fong signed the front page of the second copy,

again witnessed by Mr Nassif. These pages were the same as the front page Mr Fong had emailed Mr Antonios on 14 April 2015, which Mr Antonios had forwarded to Mr Ayoub and Mr Mansour the following morning.

39 Mr Nassif then handed Mr Antonios one of the copies of the deed of agreement and the copy of the contract for sale signed by Mr Fong. The following conversation then took place:

> "Nassif: 'Here is your copy of the documents; we've got our copy of the documents, good luck in your game tonight.'
>
> [Mr Antonios]: 'I don't want to take all of this to the poker game tonight.'
>
> Nassif: 'Ok, well at least take your copy of the deed and the first page of your copy of the contract. We will keep the rest for you.'
>
> [Mr Antonios]: 'Okay, thanks. Here is the $200,000.'"

40 Mr Antonios placed $200,000 in cash on the table. He then had the following conversation with Mr Fong:

> "Fong: 'AJ, when will you be able to pay the remaining $400,000?'
>
> [Mr Antonios]: 'I can pay you in the next couple of days but my Cage account is low at the moment. It would be easiest if Chris and Joe meet me at the casino tomorrow and I will give them $200,000 in chips. I will transfer the other $200,000 in the next couple of days.'
>
> Fong: 'Ok, no problem. Chris and Joe will meet you at the casino tomorrow and pick up the chips. You can transfer the other $200,000 into MV Development's account. The BSB is [******] and the account number is [*********].'"

41 On 16 April 2015, Mr Antonios took $50,000 in casino chips to the casino, where he met Mr Ayoub and Mr Nassif. He withdrew a further $150,000 in chips from his Cage account, and gave Mr Ayoub and Mr Nassif the $200,000 in chips. On the same day, he transferred $100,000 to the bank account Mr Fong had provided him with. He transferred a further $100,000 to that account the following day.

42 Mr Antonios gave evidence that, on 23 May 2015, he was given the keys to Lot 34 by Mr Fong. According to Mr Antonios, they then had the following conversation:

> "[Mr Antonios]: 'When can I move in? Can I move in now?'
>
> Fong: 'Yes, if you'd like, but maybe it's best to hold off a little while everything is done. We should be able to settle with the banks within a few weeks and then finalise your sale.'"

43 The primary judge found, at [41], that "*it* [*was*] *difficult to see why* [*MV Developments*] *would have handed over the keys to the Apartment unless it was for the purpose of giving possession to Mr Antonios*". Ta Lee challenged this finding on the appeal. It also challenged the primary judge's finding that Mr Fong provided Mr Antonios with the keys to Lot 34.

44 On 14 July 2015, Cluff & Associates Solicitors, who acted on behalf of Mr Antonios in relation to the purchase of Lot 34, wrote to the then administrators of MV Developments, stating:

> "The full purchase price has been paid by our client as evidenced by attached acknowledgement. Our client is seeking the execution by the Vendor Company … of a Transfer to enable the transaction to be completed."

45 Attached to this letter was the letter of 14 April 2015 from Mr Fong confirming the payment of $910,000, set out above at [32].

46 The administrators of MV Developments replied on 16 July 2015, stating that they had previously been provided with a copy of the signed front page of the contract and asking for a copy of the full contract.

47 Around this time, Mr Antonios asked Mr Fong to send him a full copy of the contract. On 21 July 2015, Mr Fong sent Mr Antonios an email, attached to which was a contract for the sale of land, comprising an unsigned front page and 122 further pages.

48 Relevantly, cl 2 of that contract provided as follows:

> "**2 Deposit and other payments before completion**
>
> 2.1 The purchaser must pay the deposit to the *depositholder* as stakeholder.
>
> 2.2 *Normally*, the purchaser must pay the deposit on the making of this contract, and this time is essential.
>
> …
>
> 2.4 The purchaser can pay any of the deposit only by unconditionally giving cash (up to $2,000) or a *cheque* to the *depositholder* or to the vendor, vendor's agent or vendor's *solicitor* for sending to the *depositholder*.
>
> 2.5 If any of the deposit is not paid on time or a *cheque* for any of the deposit is not honoured on presentation, the vendor can *terminate*. This right to *terminate* is lost as soon as the deposit is paid in full."

The "*depositholder*" was defined as the vendor's agent or, if no vendor's agent was named, the vendor's solicitor. "*Cheque*" was defined as "*a cheque that is not postdated or stale*".

49 In the body of the email, Mr Fong stated "[*a*]*ttached is the sales contract. Please replace front page with the signed one*". In accordance with these instructions, Mr Antonios attached the front page signed by Mr Fong on 15 April 2015 to the balance of the contract that was emailed to him. It will be convenient to refer to this contract as the 'reconstructed contract'.

50 In addition to being unsigned, the front page that was emailed to Mr Antonios differed from the front page Mr Fong had signed on 15 April 2015 in the following respects: first, the signed front page stated that the vendor was acting for itself, whereas the unsigned front page identified a firm of solicitors; secondly, there were differences in the description of the land the subject of the sale; thirdly, the purchaser's solicitor was identified in different terms; and fourthly, and most importantly, the price and the deposit differed. The signed front page specified a price of $910,000, a deposit of $910,000 and a nil balance. The unsigned front page specified a price of $1,250,000, a deposit of $125,000 and a balance of $1,125,000.

51 On 23 July 2015, Cluff & Associates Solicitors wrote to the administrators of MV Developments as follows:

> "Further to our previous correspondence we now attach as requested a copy of Sale Contract executed on or shortly after 14th April, 2015 pursuant to previous consideration acknowledgement … we are instructed to lodge appropriate Caveat protecting our client's interest as equitable owner …"

52 On 28 August 2015, the administrators' solicitors replied in the following terms:

> "You have asserted in your letter that your client intends to lodge a caveat over the Property to protect your client's interest. Pursuant to clause 33.1 of the Contract, we confirm that your client is precluded from lodging a caveat over the Property."

53 On 6 June 2016, Mr Antonios lodged a caveat claiming an "[*e*]*quitable interest*" in Lot 34 on the basis of the alleged contract for sale dated 15 April 2015.

Did Ta Lee have standing to bring the appeal?

Parties' submissions

54 During the hearing, an issue was raised regarding whether Ta Lee had standing to bring the appeal. Ta Lee submitted that it had standing on the basis that the orders made by the primary judge affected its interest in Lot 34, that being, as Ta Lee asserted, an equitable interest in the property. Ta Lee relied on *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 in support of this submission.

55 Ta Lee also relied on the Court's power pursuant to the *Supreme Court Act 1970* (NSW), s 75A(10) to "*make any finding … give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires*" and the Uniform Civil Procedure Rules 2005 (NSW), r 51.54, which provides that:

> "If any step has been taken for the enforcement of a judgment or order that the Court varies or sets aside, the Court may make such orders for reinstatement or restitution as it thinks fit."

56 Mr Antonios submitted that, in circumstances where there was no privity of contract between Ta Lee and Mr Antonios, there was no dispute as to priority between the parties – Ta Lee having accepted that, if the rights in relation to Lot 34 asserted by Mr Antonios were to be upheld, they would take priority over any rights Ta Lee may have in relation to Lot 34 – and no authorisation was given to Ta Lee to bring proceedings on MV Developments' behalf, Ta Lee lacked standing to bring the appeal.

57 Mr Antonios sought to distinguish the present case from *John Alexander's Clubs* on two bases. First, he submitted that, unlike in *John Alexander's Clubs*, Ta Lee had abandoned any claim to priority. Secondly, he submitted that the present case concerned an asserted existing interest in land, whereas *John Alexander's Clubs* concerned the creation of a new interest, namely a constructive trust. Accordingly, Mr Antonios submitted that once Ta Lee had conceded the issue of priority, its interest in the dispute was at an end.

58 Mr Antonios also submitted that, even assuming Ta Lee had an equitable interest in Lot 34, that interest had been extinguished by the registration of the transfer on 10 April 2018. In other words, to the extent that Ta Lee had standing to bring the appeal, Mr Antonios submitted that this was defeated by the indefeasibility provisions of the *Real Property Act 1900* (NSW). Mr Antonios also submitted that Ta Lee did not have a claim *in personam* against Mr Antonios. Mr Antonios submitted that any rights that existed *in personam* existed as between MV Developments and Ta Lee, pursuant to the Deed. It was Mr Antonios' primary submission on the appeal that, accordingly, the appeal lacked utility.

Consideration

59 Mr Antonios is the present registered proprietor of Lot 34. He became the registered proprietor pursuant to an order for specific performance made by the primary judge on 20 March 2018. The terms of that order required MV Developments:

> "7. … to specifically perform the Contract and carry it into effect by, without limitation, providing to Mr Antonios:
>
> a. An executed transfer in registrable form for the conveyance of the Property to Mr Antonios;
>
> b. The Certificate of Title to the Property;
>
> c. Executed discharges in registerable form for registered mortgages AI152296, AI152297 and AI921415; and
>
> d. Possession of the Property, including by providing the keys and access cards required to access the Property."

60 The "*Contract*" was defined in the Court's orders as the contract dated 15 April 2015 between MV Developments and Mr Antonios.

61 At the same time, Ta Lee was ordered to withdraw its registered caveats from the title of the property, pursuant to the *Real Property Act*, s 74MA(2). That order was made consequent upon the declaration made by the primary judge that Ta Lee:

> "… does not possess an equitable interest in the land … contained in certificate of title folio identifier 34/SP85782 (the 'Property'), pursuant to its deed of loan and guarantee dated 17 October 2011 and as claimed in its registered caveats AJ592311 and AJ706983."

62 Both MV Developments and Ta Lee complied with the orders.

63 The effect of Mr Antonios having become the registered proprietor is governed by the *Real Property Act*, s 42, which provides, relevantly:

> "**42 Estate of registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the

> Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded …"

64 No case of fraud was alleged, and nor was it suggested that any of the exceptions to the indefeasibility conferred by registration applied. In particular, it was not alleged that the following exception in s 42(1)(a) applied:

> "the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land …"

65 The presence of a caveat does not fall within this exception and, in any event, Ta Lee removed the caveat as required by the order made by the primary judge.

66 On the appeal, Ta Lee's case was that it had a caveatable interest pursuant to cl 7.2 of the Deed. It claimed that interest was an equitable charge over Lot 34 securing the full payment of all moneys payable to it under or pursuant to the Deed. At a practical level, to maintain that case such that Mr Antonios' interest as the legal and beneficial owner of Lot 34 was subject to Ta Lee's claimed interest, it was necessary for Ta Lee to challenge the primary judge's order requiring MV Developments to specifically perform the contract for the sale of Lot 34. MV Developments did not challenge that order before it was complied with.

67 The question is, therefore, whether Ta Lee has standing to challenge that order and the declaration that the contract for the sale of Lot 34 by MV Developments to Mr Antonios was valid and enforceable.

68 In *John Alexander's Clubs*, the High Court held, at [131], that:

> "… where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined."

69 The High Court referred, at [132], to the Full Federal Court's decision in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410; [1996] FCA 870, in which the Court stated, at 524-525, that:

> "Where the orders sought establish or recognise a proprietary or security interest in land, chattels or a monetary fund, all persons who have or claim an interest in the subject matter are necessary parties. This is because an order in favour of the claimant will, to a corresponding extent, be detrimental to all others who have or claim an interest."

70 The High Court made the following further observations, in circumstances where John Alexander's Clubs was a necessary party. First, at [133], as the relief granted to White City Tennis Club involved a transfer of land, which, once registered, would become indefeasible, that relief directly affected the interests of other persons claiming an interest in the land. Secondly, at [134], as one of the claims was that White City Tennis Club never had an interest in the land, the party whose standing was at issue was entitled to challenge the Club's case and to call evidence and be heard against that case. Thirdly, at [136], the usual rule is that a party directly affected by an order in proceedings to which it was a necessary party but to which it was not joined is entitled as of right to have the order set aside.

71 In the present case, Ta Lee sought relief in its cross-claim that it had an equitable charge over Lot 34, that that charge ranked in priority to any equitable interest Mr Antonios had in respect of Lot 34, although it abandoned that claim in the court below, and sought an order that Lot 34 be sold. Mr Antonios, for his part, sought in his cross-claim an order that the contract be declared to be valid and enforceable and sought an order for specific performance. He also sought a declaration that Ta Lee did not have an equitable interest, or, alternatively, if it did, it did not rank ahead of his equitable interest.

72 This case is unlike *John Alexander's Clubs* as Ta Lee was both a claimant that brought proceedings against Mr Antonios and a respondent in proceedings brought by Mr Antonios, where the relevant rights of the parties were in issue. Nonetheless, we are

of the opinion that the principles in *John Alexander's Clubs* apply, at least by analogy. Accordingly, we consider that Ta Lee has standing to bring the appeal.

73 However, there is a related question, namely, whether the appeal has any utility in circumstances where Mr Antonios has become the registered proprietor of Lot 34. As explained below, we do not accept that Ta Lee had a caveatable interest and propose that the appeal be dismissed. Even if we are wrong in that conclusion, Ta Lee has removed the caveats it had lodged on the title. In doing so, it did not have any agreement with Mr Antonios that his registered title be subject to its equitable charge if it successfully challenged the declaration that it did not have an equitable interest in Lot 34.

74 Nor did Ta Lee seek a stay of the primary judge's order for specific performance so as to preserve its position should this Court determine that it had an equitable interest in Lot 34. The consequence of that, in our opinion, is that, pursuant to the *Real Property Act*, s 42(1), Mr Antonios holds his registered interest in Lot 34 free from any interest claimed by Ta Lee.

75 When this matter was raised at the commencement of the hearing of the appeal, Ta Lee contended that if the primary judge erred in determining that it did not have an equitable interest in the property, this Court could set aside the orders pursuant to the *Supreme Court Act*, s 75A(10).

76 However, that suggested outcome depends on Ta Lee defeating Mr Antonios' indefeasible title to Lot 34, which was acquired on registration. There are two reasons why we consider that Mr Antonios' title cannot now be made subject to any equitable charge that Ta Lee may have. First, the exceptions to indefeasibility are those specified in s 42. None is presently applicable. Secondly, to the extent that s 75(10) might be said to permit the Court to set aside the orders that were made by the primary judge, that section is subject to s 42(3), which provides:

> "This section prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section."

77 Thirdly, whilst the principle of indefeasibility does not prevent the enforcement of a personal equity against a registered proprietor: see *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; [1988] HCA 16, there is no evidence in the present case of any conduct of Mr Antonios, such as the giving of an undertaking or the making of a promise to Ta Lee, which would have given rise to such an equity against him.

78 Accordingly, we are of the opinion that as the appeal is futile, it should be dismissed. However, it is appropriate that we nonetheless express our reasons why we consider that Ta Lee fails on the third issue on the appeal.

Third issue on the appeal

Whether Ta Lee held an equitable charge over Lot 34: appeal ground 20

Primary judge's reasons

79 The primary judge noted, at [70], that if the Court was satisfied that there was a binding contract for the purchase of Lot 34 between Mr Antonios and MV Developments that was capable of specific performance, Ta Lee had accepted that, even if it had an equitable charge over Lot 34, that charge would not take priority over the Mr Antonios' entitlement. His Honour further noted that as he had determined that Mr Antonios and MV Developments had entered into a contract for the sale of Lot 34, and as he had found that the whole of the purchase price had been paid, there was nothing upon which the equitable charge for which Ta Lee contended could operate. His Honour nonetheless dealt with the question.

80 After setting out the terms of the Deed, his Honour observed, at [78], that there was no express reference in the Deed to the grant of security in the nature of a charge and that recital G acknowledged that the relationship between Ta Lee and MV Developments was "*simply that of lender (creditor) and borrower (debtor)*".

81 His Honour, at [82], recorded Ta Lee's argument that the effect of cl 7.2 "*was to authorise* [*it*] *to create an equitable charge over the Aurora Site caused by lodging a caveat upon default by* [*MV Developments*]". His Honour referred to the *Real Property Act*, s 74F whereby Ta Lee's right to lodge a caveat depended upon whether it had a legal or equitable interest in the Aurora site. Ta Lee contended that a contractual right to lodge a caveat must be taken to be intended to have some effect, otherwise such a caveat could be removed by order of the Court.

82 His Honour next referred, at [83], to Ta Lee's argument that the right conferred by cl 7.2 was exercisable on the occurrence of an event of default and that the caveat could be maintained until full payment had been made. On that argument, Ta Lee submitted that the purpose of cl 7.2 was to enable it to have a security in respect of the Aurora site, being an equitable charge. Otherwise, it argued, the clause would have no purpose.

83 His Honour rejected this argument, commenting that a commercial purpose might be gleaned from the fact that, if a caveat was lodged, Ta Lee would be assured of notification if there were any intended dealings with the site, for example, if MV Developments took steps to sell or assign the Aurora site. Such action would itself be an event of default under cl 7.1. As his Honour pointed out, it was clear that Ta Lee was prepared to make funds available to MV Developments but only so long as it was engaged in developing the Aurora site.

84 His Honour, at [85], then stated the principles governing the existence of a caveatable interest, as follows:

> "A registered proprietor cannot, by contract, confer a right to lodge a caveat where no caveatable interest exists. If a contract confers a right to do so it will be ineffective. The existence of such a right, however, may suggest that the person entitled to lodge a caveat was intended to have an interest that would support a caveat. Thus, it is a general principle of construction of a grant that … whoever grants something is taken also to grant that without which the grant itself would be of no use. Thus, a caveat in relation to a title cannot stand unless the caveator has a relevant proprietary interest in the property that is the subject of the title. Accordingly, the grant to a creditor of an authority to lodge a caveat may carry with it, by implication, such an estate or interest as would be necessary to support the lodgement of a valid caveat. Of course, that would not be the case if an intention to the contrary can be gleaned from the instrument." (footnote omitted)

85 However, as his Honour stated, at [86]:

> "Authorisation to lodge a caveat does not of itself by necessary implication lead to the conclusion that there must have been an intention to create an equitable interest. An intention to create an interest that was to constitute a charge over the relevant property must be capable of being gleaned from the language of the instrument."

86 His Honour referred to the reference in the Deed to "*security*" in cl 8.1(c) of the guarantee provisions set out above at [13]. "*Secured Moneys*" were defined in cl 1.2(r) to mean:

> "… the Guaranteed Amount, the Loan Facility, interest, fees and GST and all other moneys payable by the Borrower to the Lender under or pursuant to this Agreement." (Blue 54)

87 His Honour continued, at [88], that:

> "It would have been very simple for the author of the Ta Lee Deed to include an express provision for the grant of security in the form of a charge over lots in the proposed strata plan if that was intended."

88 His Honour considered that the terms of recital G, whilst possibly negating the suggestion of a joint venture or that Ta Lee had any beneficial interest in the development, also tended to negate any suggestion that security by way of a charge was intended. His Honour concluded, at [88], that:

> "Having regard to the somewhat unusual terms of the arrangement between Ta Lee and [MV Developments], I do not consider that the Ta Lee Deed, coupled with the lodging of the caveats, created an equitable charge in favour of Ta Lee."

89 His Honour considered that the fact that the contractual right to lodge a caveat was in respect of the Aurora site and did not expressly extend to a right to lodge a caveat in respect of individual lots tended to support his conclusion that there was no intention to create an equitable charge or interest over any part of the Aurora site. His Honour acknowledged, however, that if the better view were that there was an intention to create an equitable charge, it would be curious if that right did not extend to individual lots within the development.

Parties' submissions

90 Ta Lee claimed that it had an equitable charge over Lot 34 pursuant to cl 7.2(a) of the Deed. It acknowledged that whether a contractual term authorising the lodgement of a caveat creates an equitable charge depends upon the proper construction of the contract. It cited *Troncone v Aliperti* (1994) 6 BPR 13,291 as authority for the proposition that a contractual clause authorising the lodgement of a caveat carried with it an implication of a relevant caveatable interest. Ta Lee contended that in this case, where the authority to lodge a caveat was in respect of an obligation to pay money, the relevant interest was an equitable charge to secure payment of the money, subject to any contrary intention.

91 Ta Lee relied upon the following observation of McLelland CJ in Eq in *Coleman v Bone* (1996) 9 BPR 16,235 at 16,239:

> "... it has been held … in *Troncone v Aliperti* … that if in a contract between A and B, A grants B authority to lodge a caveat in respect of property of A, that grant carries with it by implication such estate or interest in the property as is necessary to enable that authority to be exercised. Where the authority to lodge a caveat is given in connection with an obligation by A to pay money to B, and there is no sufficient indication to the contrary, the implication is that the estate or interest granted is an equitable charge to secure payment to B of that money."

Consideration

92 In *Troncone v Aliperti*, the contractual clause with which the Court was dealing was:

> "The Debtor authorises the Creditors to lodge a Caveat on any property owned by the Debtors (sic) to protect his interest."

93 Mahoney JA, in determining that the caveats should not be set aside, stated:

> "A caveat cannot be entered against land unless the caveator has the relevant proprietary interest in the land: see *Real Property Act 1900* s 74F(1) … Therefore, unless there be evident an intention to the contrary, the grant to the creditors of an authority to lodge a caveat on the relevant property carried with it by implication such an estate or interest in land as was necessary to enable the authority to be exercised."

94 His Honour continued:

> "… it is not necessary to determine what is the precise nature of the interest in the land which, by this implied grant, was passed to the creditors …
>
> … there is in my opinion no rule of law which prevents the creation of a limited equitable interest of this kind. Thus, if the registered proprietor of land covenants by deed that, until a loan be repaid, he will not sell or deal with the land, that covenant would, in my opinion, create in favour of the covenantee an interest in the land to the extent at least that an injunction would go to restrain the covenantor from dealing with the land in a manner inconsistent with the covenant … The right, by the enforcement of an express or an implied negative covenant, to restrain a dealing with land is in my opinion an interest in land within this branch of the law."

95 In *Taleb v National Australia Bank Ltd* (2011) 82 NSWLR 489; [2011] NSWSC 1562, Bryson AJ reviewed the authorities dealing with contractual provisions authorising the lodgement of a caveat. His Honour observed, at [53], that it was necessary to commence with the basic principle stated in *Murphy v Wright* (1992) 5 BPR 11,734:

> "Section 74F(1) of the Real Property Act 1900 enables a person who claims to be entitled to an estate or interest in any land to lodge a caveat against the title. A registered proprietor cannot by contract confer a right to lodge a caveat where no caveatable interest exists. See *Tooth & Co Ltd v Barker* (1960) 77 WN (NSW) 231 at

> 233, 242-3. If the clause only confers a contractual right it will be ineffective. However the existence of this right suggests that the lender was intended to have an equitable charge which would support a caveat."

96 Bryson AJ noted that the contractual clause in *Murphy v Wright* included the phrase:

> "… the Lender shall in addition to the rights set out herein or in the Security Documents be entitled to attach the debt due to any of the assets of the Guarantor or Guarantors …"

and observed that that clause was much more than a simple authorisation to lodge a caveat.

97 Bryson AJ also referred to the passage from *Coleman v Bone* set out above, as well as to a similar observation by Young CJ in Eq in *Iaconis v Lazar* (2007) 13 BPR 24,937; [2007] NSWSC 1103. Bryson AJ noted that *Troncone v Aliperti* had often been interpreted, as occurred in *Coleman v Bone* and *Iaconis v Lazar*, to mean that, in all cases, a clause conferring authority to lodge a caveat carried with it by implication the grant of an equitable charge. That was not, as his Honour observed, the "*true principle*". Rather, in his Honour's view:

> "… the meaning conveyed by a contractual document, including what is conveyed by implication, must be understood by addressing the terms and the whole terms of the document in question … there is no principle or true principle establishing what implication must be drawn in all cases from authority to lodge a caveat in connection with an obligation to pay money. In my opinion Mahoney JA did not state such a principle in *Troncone v Aliperti* and in my opinion there cannot be such a principle, because a principle of law of that kind would divert the court from addressing the terms of each document to discover what it means, by expression and by implication."

98 I fully agree with this observation. His Honour's view was also endorsed by this Court in *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174; [2013] NSWCA 393. In that case, Gleeson JA, with whom Meagher and Leeming JJA agreed, observed:

> "[82] Whether it is possible to discern from the authorisation to lodge a caveat (given by a registered proprietor), an intention to create a charge which would support a caveat is the subject of conflicting views in the authorities. The conflict relates to whether there is a principle establishing what implication must be drawn in all cases from the authority to lodge a caveat in connection with an obligation to pay money, or whether each case is to be addressed by reference to the terms of the contractual document to discover what it means, by expression and by implication: *Taleb v National Australia Bank Ltd* [2011] NSWSC 1562; (2011) 82 NSWLR 489 at [60] per Bryson AJ.
>
> [83] In my view, Bryson AJ was correct to observe in *Taleb* that the statements of Mahoney and Meagher JJA in *Troncone v Aliperti* (1994) 6 BPR 13,291 are not to be taken as such a principle. Rather, they are to be taken as a proposition to be derived from the facts in *Troncone*. So much is clear from the summary of the proposition in *Troncone*, given by McLelland CJ in Eq in *Coleman v Bone* (1996) 9 BPR 16,235 at 16,239 …"

99 Underpinning the Court's factual finding in *Aged Care Services,* as Gleeson JA noted, at [85], was the express reference in the discussions between the parties to Aged Care Services obtaining "*security*" by way of a "*caveatable interest*" over the relevant piece of land. The terms of that discussion, between the director of Aged Care Services and one of the owners of the property, was:

> "We will pay out the loan if we get a caveatable interest. Until the whole deal is put together I want to be a secured lender in place of the bank."

The response was:

> "You will be secured."

100 Shortly thereafter, a different proposal was advanced by the owner of the property, to which the director of Aged Care Services responded:

> "We will still need a caveatable interest over the property and one over your house."

101 In the present case, whether or not Ta Lee had an equitable charge over Lot 34 depends upon the proper construction of cl 7.2. For the reasons just given, the question is not whether a contrary intention exists such that no implication should be drawn.

102 Clause 7.2 deals with the consequences of default by MV Developments in the repayment of the loan advanced to it by Ta Lee. It is not the only clause which does so. One consequence of default is provided for in cl 4.3, namely, the incurring of interest on

the unpaid amount. Clause 7.2 specifies additional consequences of default and, relevantly, cl 7.2(a) provides that Ta Lee may:

> "Lodge and maintain a caveat on the titles to the Aurora Site or the consolidated title for the Aurora Site until such time [it] receives full payment …"

103 There is no reference in cl 7.2(a) to Ta Lee having a secured interest over the property or a charge, or indeed that it is to have a caveatable interest. The only reference to security, to use that term neutrally, is in cl 8, which provides for the obligations of the guarantors and, even then, it is not used in terms of having a security interest. Rather, the reference is to the guarantors having agreed and promised to guarantee payment of the "*Secured Moneys"*, being a defined term in the Deed set out above at [86].

104 In our opinion, cl 7.2(a), on its proper construction, did not create an equitable interest or give rise to an equitable charge in favour of Ta Lee. First, as already mentioned, there is no reference to "*security*", "*secured interest*", "*charge*", "*caveatable interest*", or any other language which would point to Ta Lee having an equitable interest. The Deed was a professionally drafted business document. Had the parties intended for Ta Lee to have a secured interest, the Deed could have said so and it is to be expected that it would have made express provision to that effect.

105 Secondly, the parties used the language of "*secured moneys*" when specifying the obligations of the guarantors. Importantly, the parties, in recital G, characterised the relationship between Ta Lee and MV Developments as "*simply that of a lender (creditor) and borrower (debtor)*": see above at [8]. This language is inconsistent with Ta Lee being a "*secured creditor*".

106 Finally, as the primary judge observed, the right to lodge a caveat was not in respect of individual apartment lots in the development. Rather, the contractual right to lodge a caveat conferred by cl 7.2(a) was on the Aurora site or the consolidated title for the Aurora site. The Aurora site was defined by reference to its address and Title Folio Identifiers. It was consolidated into a single title on 15 December 2014.

107 There was no contractual right to lodge a caveat over any or all of the individual lots in the strata plan following the subdivision of the lot on 16 April 2015. The reason for this may be deduced from the terms of the Deed, which provided for a loan facility for the acquisition of the land and the development that was required to be repaid in just over two years. It is unlikely that a 56 unit development would be completed within that time. Events proved that to be the case. We would add that it would be unlikely that a loan facility of $1.5 million would be sufficient to acquire the Aurora site and build 56 apartments.

108 The more important point, however, is that there was no express contractual right to lodge a caveat over any lot in the strata plan. Nor was there any implication in cl 7.2(a) that the right to lodge a caveat over the Aurora site or over the consolidated title for the Aurora site included the right to lodge a caveat over any or all of the individual lots in the strata plan. Where a term is sought to be implied in fact to give business efficacy to a contract, it is necessary to satisfy the conditions, which may overlap, specified in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; namely:

> "(1) [the term] must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

109 See also *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596; [1979] HCA 51 at 605-606 per Mason J and *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; [2014] HCA 32 at [21] per French CJ, Bell and Keane JJ. In that case, Kiefel J, at [62], observed:

> "In the sphere of terms implied to render efficacious a particular contract, necessity is also required. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, it was said that no term will be implied if the contract is effective without it and that any implied term

> must be so obvious that it 'goes without saying'." (citation omitted)

110 In our opinion, an implication that a caveat could be lodged over the individual lots in the strata plan does not satisfy the first three of these conditions and, arguably, may not satisfy the last condition. It was not necessary to give business efficacy to the Deed that there be a right to caveat over the individual lots. The Deed was effective without any such provision. This is proved on the facts of the case. Ta Lee's position would have been protected had it lodged a caveat over the Aurora site or the consolidated title at any time after 20 June 2013, when MV Developments failed to make the first interest payment. There were further events of default thereafter when the monthly interest payments were not paid and, on 9 December 2013, when MV Developments failed to repay the loan.

111 Nor can it be said, having regard to the period of the loan, for the reasons given, that the implication of such a term "*goes without saying*". Given that the implication of a right to lodge a caveat over the individual lots was not necessary to give business efficacy to the contract and did not go without saying, it is difficult to see that it is "*reasonable and equitable*" that the term be implied. Put another way, the right was simply not necessary given the term of the loan.

112 However, should there be such an implication, that does not alter our primary position that cl 7.2(a) did not confer an equitable interest by way of charge in favour of Ta Lee. That is so regardless whether there was an implied term in relation to the individual lots in the strata plan.

113 For this reason alone, the appeal should be dismissed with costs.

114 This conclusion, and the view that we have taken that the appeal is lacking in utility, is sufficient to dispose of the appeal. In deference to the arguments advanced on the appeal, we will deal briefly with the first and second issues on the appeal.

First issue on the appeal

Whether Mr Antonios had entered into the alleged contract to purchase Lot 34: appeal grounds 1 to 13

Primary judge's reasons

115 The primary judge, at [60], set out the four alternative formulations of the contract for sale propounded by Mr Antonios:

> "Annexure 'A' to the affidavit of Mr Antonios sworn on 31 October 2017 [that is, the reconstructed contract];
>
> Annexure A to the affidavit of 31 October 2017, together with the Deed of Agreement;
>
> The front page of the contract for sale signed by Mr Fong and Mr Nassif;
>
> The front signed by Mr Fong and Mr Nassif together with the Deed of Agreement."

116 The primary judge held, at [63], that it was more likely than not that, on 15 April 2015, Mr Antonios and MV Developments, through Mr Fong, intended to enter into a binding contract for the sale and purchase of Lot 34. His Honour held that it was more likely than not that, apart from the front page, the pages attached to Mr Fong's email of 21 July 2015 were the pages that had been placed before Mr Antonios and Mr Fong at Mr Fong's office on 15 April 2015. In his Honour's view, Mr Antonios and MV Developments intended that the contract would be constituted by the front page signed by Mr Fong on 15 April 2015 and those other pages attached to Mr Fong's email of 21 July 2015, that is, the reconstructed contract.

117 In reaching this conclusion, his Honour rejected Ta Lee's submission that a *Jones v Dunkel* inference should be drawn from the fact that Mr Antonios did not call Mr Fong, Mr Ayoub or Mr Mansour to give evidence. His Honour, at [49], had regard to the fact that Mr Fong had in fact sworn affidavits the contents of which "*unambiguously*"

supported Mr Antonios' case, although these affidavits were not read. His Honour considered that it was appropriate to have regard to the affidavits in circumstances where an explanation was proffered as to why they were not read. His Honour also found, at [50], that there was no proper basis for concluding that Mr Fong was in Mr Antonios' 'camp', in light of the fact that he was the sole director of MV Developments.

118 His Honour, at [51], accepted Mr Antonios' evidence in cross-examination that he no longer spoke to Mr Ayoub as a sufficient explanation for the failure to call Mr Ayoub. He also found that Mr Antonios and Mr Ayoub had had a falling out, such that Mr Ayoub could not be considered as being in Mr Antonios' 'camp'.

119 As for Mr Antonios' failure to call Mr Mansour, his Honour noted, at [52], that there was no evidence that Mr Antonios ever met Mr Mansour or that Mr Mansour gave advice to him. His Honour found that, in circumstances where Mr Mansour was not involved in the exchange of the contracts and the only communication between Mr Antonios and Mr Mansour involved Mr Antonios forwarding him the email of 14 April 2015 from Mr Fong on the morning of 15 April 2015 and later paying an invoice, "*it is difficult to see what Mr Mansour could have contributed*". His Honour found that, in any event, as Mr Mansour was the brother-in-law of Mr Ayoub, with whom his Honour found Mr Antonios had had a falling out, Mr Mansour could not be considered as being in Mr Antonios' 'camp'.

120 His Honour found that the drawing of a *Jones v Dunkel* inference did not "*advance the matter further*" in any event. As his Honour stated, at [53]:

> "There is no dispute as to the circumstances surrounding the signature on the first page of the contract for sale. There is basis for some lack of certainty as to the 122 pages that might have been attached to the front page of the contract for sale. It is clear that Mr Antonios did not give any consideration to the pages behind the front page. Ultimately, however, it appears to be common ground as between [MV Developments] and Mr Antonios that the contract was constituted by the pages sent with the email of 21 July 2015 plus the front page that had been signed on behalf of both [MV Developments] and Mr Antonios."

121 In his Honour's view, the deed of agreement signed by Mr Antonios and Mr Fong on 15 April 2015 corroborated the fact that Mr Antonios and MV Developments intended to enter into a binding contract for sale. His Honour acknowledged that no "[*contract*] *for sale of land annexed hereto and marked 'A'* ", referred to in the deed, was in fact annexed to the deed, but found that it was clear that the parties intended "*Contract*" to be the reconstructed contract.

122 In particular, his Honour had regard to cls 3, 4 and 5 of the deed, which provided as follows:

> "**3. Agreement to Sell the Property**
>
> MV agrees to sell the Property to AJ on the terms recorded in the Contract for Sale of Land annexed hereto and marked 'A', and AJ agrees to purchase the Property from AJ on the same terms.
>
> **4. Discount on Price**
>
> In consideration of the obligation of AJ making the payments to Victor under this Deed, MV agrees that the Price shall form the Purchase Price under the Contract, and MV releases and discharges AJ from any Claim in respect of any balance of the Purchase Price whatsoever.
>
> **5. Direction by MV to AJ**
>
> MV authorises and directs AJ to make payment of the Price to Victor on account of the Purchase Price. The Price shall be comprised of the following payments:
>
> a. $310,000 payment of which is received and acknowledged;
>
> b. $200,000 on the date of this Deed;
>
> c. $400,000 within 7 days from the date of this Deed."

123 His Honour, at [57], acknowledged the anomalous reference in cl 4 to "*any balance of the Purchase Price*", but found that:

> "One might conjecture that there was a proposal that a contract would be entered into for the sale of the Apartment for the sum of $1,250,000 and that Mr Antonios and the Company then agreed that upon Mr Antonios paying the sum of $910,000 as provided for in the Deed of Agreement, the Company would accept that in full satisfaction of the payment of the price."

Jones v Dunkel inference

124 It is convenient to deal with the question whether the primary judge erred in declining to draw a *Jones v Dunkel* inference in respect of Mr Antonios' failure to call Mr Fong, Mr Ayoub and Mr Mansour first.

Parties' submissions

125 Ta Lee submitted that, had his Honour drawn a *Jones v Dunkel* inference, his Honour could not have drawn inferences of fact favourable to Mr Antonios based on the available evidence.

126 It submitted that Mr Fong's evidence was critical in respect of the question whether the contract attached to the email of 21 July 2015 was, save for the front page, identical to the contract signed on 15 April 2015, in that Mr Fong could have given evidence as to: the front page he had emailed Mr Antonios on 14 April 2015; the documents signed on 15 April 2015; what happened to the documents Mr Antonios left behind on 15 April 2015; the provenance of the contract he emailed Mr Antonios on 21 July 2015; and whether he intended to email Mr Antonios a copy of the contract signed on 15 April 2015.

127 Ta Lee submitted that the primary judge erred in having regard to Mr Fong's affidavits in circumstances where they did not form part of the evidence. It also submitted that his Honour erred in finding that Mr Fong was not in Mr Antonios' 'camp', in circumstances where "*Mr Fong had assisted Mr Antonios by making affidavits for him*", notwithstanding the fact that Mr Fong was MV Developments' sole director.

128 To the extent that Mr Antonios' reason for not calling Mr Fong was that "*Mr Fong's evidence was not necessary to prove* [*his*] *case*", as noted by the primary judge at [49], Ta Lee submitted that this did not cease to make Mr Fong a witness that Mr Antonios would have been expected to call. Nor was it, on Ta Lee's submissions, an explanation for Mr Fong's absence.

129 Ta Lee submitted that, to the extent that Mr Ayoub acted as a liaison between Mr Antonios and Mr Mansour with respect to the drawing up of the contract, Mr Ayoub could have given evidence as to any instructions he provided Mr Mansour. Ta Lee also submitted that Mr Ayoub could have given evidence as to the documents he printed out and placed before Mr Fong and Mr Antonios on 15 April 2015, as well as what happened to the documents Mr Antonios left behind that day. Ta Lee submitted that the evidence did not support a finding that Mr Ayoub and Mr Antonios had had a falling out and that, given Mr Ayoub's role in the transaction "*as Mr Antonios' agent*", he was in Mr Antonios' 'camp'.

130 Ta Lee submitted that Mr Mansour, who was responsible for drafting the contract, could have given evidence as to what he did with the front page attached to Mr Fong's email of 14 April 2015, which Mr Antonios had forwarded him the following day, as well as what was in the contract he drafted. Ta Lee also submitted that Mr Mansour's absence was unexplained. It submitted that, even if Mr Antonios and Mr Ayoub had fallen out, which it submitted they had not, the inference should not have been drawn that a solicitor would not have given evidence for a former client merely because the client had fallen out with one of the solicitor's relatives.

131

Mr Antonios' primary submission was that Ta Lee's challenge to his Honour's failure to draw a *Jones v Dunkel* inference was of no utility, as the primary judge found, at [53], that even if such an inference had been drawn, this would not have affected his Honour's assessment of the evidence. Mr Antonios submitted that, in any event, his Honour did not err in declining to draw a *Jones v Dunkel* inference.

132 Mr Antonios relied on the fact that an explanation had been proffered for the withdrawal of Mr Fong's affidavits, namely to enable the hearing to be concluded in the time allotted, in circumstances where Mr Fong's evidence was not necessary to prove Mr Antonios' case. Mr Antonios submitted that, irrespective of whether the primary judge ought to have considered the *content* of Mr Fong's affidavits, their *existence*, being affidavits made in support of Mr Antonios' case, was a sufficient basis for rejecting the suggestion that Mr Fong would have given evidence that would not have assisted Mr Antonios' case.

133 Mr Antonios submitted that, conversely, if, as Ta Lee submitted, the primary judge ought not to have had regard to the content or existence of Mr Fong's affidavits, then there was no basis for concluding that Mr Fong was in Mr Antonios' 'camp', as he was the sole director of MV Developments.

134 Mr Antonios also submitted that there was no basis for concluding that Mr Ayoub was in Mr Antonios' 'camp', in circumstances where Mr Ayoub was an employee or contractor of MV Developments. Mr Antonios rejected Ta Lee's characterisation of Mr Ayoub as Mr Antonios' "*agent*". Mr Antonios also relied on the primary judge's finding that Mr Ayoub and Mr Antonios had had a falling out as a sufficient explanation for Mr Antonios' failure to call Mr Ayoub. Mr Antonios submitted that, in any event, Mr Ayoub's evidence would not have added anything, as there was no reason to expect that Mr Ayoub's recollection of the 123-page contract would have been any better than that of any other witness, including Mr Antonios.

135 Mr Antonios submitted that, for the reasons stated by the primary judge, there was no basis for concluding that Mr Mansour was in Mr Antonios' 'camp'. Further, Mr Antonios submitted that his Honour did not err in finding that the failure to call Mr Mansour was sufficiently explained. He submitted that, in any event, Mr Mansour's evidence would not have added anything, due to his limited involvement in the transaction.

Consideration

136 A trial judge, when faced with the absence of a witness who would have been expected to have been called by a party, may, if the failure to call the witness is unexplained, make an "*inference that* [*the*] *evidence would not help* [*that party's*] *case*": *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 at 321; *Holloway v McFeeters* (1956) 94 CLR 470; [1956] HCA 25 at 480-481. A trial judge is more readily able to draw an affirmative inference in support of the opposing party's case: *Commonwealth v McLean* (1996) 41 NSWLR 389; *Manly Council v Byrne* [2004] NSWCA 123 at [51].

137 In the present case, the absence of the witnesses was not unexplained. The sufficiency of the explanation was a matter for the primary judge. Putting to one side the explanation for not calling Mr Fong, there was no error in his Honour's finding that the absence of Mr Ayoub and Mr Mansour had been explained. Accordingly, this basis for drawing a *Jones v Dunkel* inference did not arise in respect of those witnesses. In any event, even where the circumstances for drawing a *Jones v Dunkel* inference arise, a trial judge is not required to draw the inference. Rather, it is an available inference. Further, the consequences of drawing the inference are limited, as his Honour noted and as the statement of the principle to which we have referred makes clear.

138

The explanation for not calling Mr Fong was that Mr Antonios did not want the hearing of the case to extend beyond its allotted time. In making that decision, Mr Antonios had made a forensic decision that Mr Fong's evidence was not necessary to prove his case. Whether that is so was a matter for Mr Antonios. However, as his Honour concluded, at [50], Mr Fong was not in Mr Antonios' 'camp'. That being so, the occasion for drawing a *Jones* v *Dunkel* inference did not arise.

139 His Honour considered, at [49], that it was appropriate to have regard to Mr Fong's affidavits before declining to draw an adverse *Jones v Dunkel* inference in respect of Mr Antonios' failure to call him. His Honour's consideration of the affidavits is at least anomalous in circumstances where they were withdrawn and, it would seem, not relied upon by Mr Antonios for the limited purpose of the *Jones v Dunkel* issue. In our opinion, this question on the appeal can be determined against Mr Antonios without the need to refer to the content of the affidavits.

140 It follows that we reject Ta Lee's complaint in respect of his Honour's failure to draw a *Jones v Dunkel* inference.

Whether Mr Antonios entered into the alleged contract to purchase Lot 34

Parties' submissions

141 Ta Lee submitted that Mr Antonios failed to prove, on the balance of probabilities, that the reconstructed contract was identical to the contract he and Mr Fong signed on 15 April 2015. Ta Lee submitted that there was insufficient information in Mr Fong's email of 21 July 2015 to indicate that the attached contract was the same as the signed contract. Further, Ta Lee submitted that the "*inevitable inference*" to be drawn from the fact that the front page of the contract attached to the email of 21 July 2015 differed from the front page of the contract signed on 15 April 2015 was that the balance of the contract attached to the email was also different.

142 Mr Antonios submitted that it was immaterial that the front page of the contract attached to the email of 21 July 2015 differed from the front page signed on 15 April 2015, as Mr Fong instructed Mr Antonios to discard the front page of the emailed copy.

143 Mr Antonios submitted that, having regard to the evidence, the reconstructed contract was the same as the contract signed on 15 April 2015. In addition to relying on the deed of agreement, Mr Antonios drew the Court's attention to the fact that on the front page of the contract signed by Mr Fong on 15 April 2015, "*Completion date*" was defined as "*See Special Condition 30.1 (clause 15)*". The contract attached to the email of 21 July 2015 contained "*Special conditions for the Sale of: Unit 34*", including a special condition 30.1, which defined "*Completion Date*".

144 Mr Antonios also relied upon the note prepared by Mr Fong on 13 April 2015, set out above at [29], and the letter of 28 August 2015 from the solicitors of MV Developments' administrators, set out above at [52], to the extent that it referred to "*clause 33.1 of the Contract*". Clause 33.1 of the "*Special conditions for the Sale of: Unit 34*" contained in the contract attached to the email of 21 July 2015 provided that the "*Purchaser shall not lodge a caveat on the title to the Property prior to completion*".

145 In respect of his Honour's finding, at [54], that Mr Antonios and MV Developments had intended to enter into a binding contract, Ta Lee submitted that this was irrelevant to the question whether they had entered into the reconstructed contract, which was to be determined objectively. To the extent that the primary judge relied on the deed of agreement as corroboration, Ta Lee submitted that it was "*fatally incomplete*", as no "[*contract*] *for sale of land annexed hereto and marked 'A'* " was in fact annexed to the deed, and, accordingly, it did not assist in determining the form of the contract signed on 15 April 2015.

146 Ta Lee submitted that his Honour erred in finding that "*Contract*" under the deed of agreement referred to the reconstructed contract. Ta Lee submitted that as the deed provided that the "*Price*" of $910,000 was a discount from the "*Purchase price under the Contract*" and released Mr Antonios from the obligation to pay the balance of the "*Purchase Price*", the "*Contract*" referred to in the deed must have specified a price of more than $910,000 and therefore could not have been the reconstructed contract.

147 Ta Lee also relied on the fact that the reconstructed contract did not deal with the $310,000 Mr Antonios had lent Mr Fong prior to 13 April 2015, which Mr Fong subsequently agreed to "*treat … as a deposit*". Ta Lee submitted that in order to be treated as a deposit, Mr Antonios' right to repayment needed to have been assigned to MV Developments as part payment of the purchase price, which did not occur.

148 Mr Antonios submitted that the objective intention of the parties was a critical consideration. Mr Antonios also submitted that it was open to the primary judge to find that the deed of agreement corroborated the fact that the contract signed on 15 April 2015 was the same as the reconstructed contract. He submitted that, to the extent that the contract for sale and deed of agreement were signed on the same day and at the same time, it was clear that "*Contract*" referred to the reconstructed contract.

149 During the hearing of the appeal, a question arose as to whether the contract entered into between Mr Antonios and MV Developments could have been constituted solely by the front page signed by Mr Fong on 15 April 2015, this being one of the alternative formulations propounded by Mr Antonios in the court below. Ta Lee submitted that the front page alone was not capable of constituting a contract as it did not contain any promises and lacked material terms, including terms governing the payment of the deposit. Ta Lee submitted that the front page was merely a series of definitions.

150 Mr Antonios contended that the contract could have been constituted by the front page signed by Mr Fong on 15 April 2015 together with the deed of agreement. Mr Antonios submitted that, taken together, the documents contained all the material terms necessary to give effect to the agreement between Mr Antonios and MV Developments.

151 Had Mr Antonios sought, on the appeal, to contend that his Honour's judgment could be upheld on the basis that the contract comprised the front page together with the deed of agreement, he should have filed a notice of contention. As he did not, we consider that that argument ought not be entertained.

152 The question in this case was whether Mr Antonios had established that the reconstructed contract was the contract that had been entered into. For that reason, it is not necessary to deal with the primary judge's remarks relating to the parties' intention.

Consideration

153 The question whether there was a contract entered into between the parties, being the reconstructed contract for the sale of Lot 34, was essentially a question of fact: either the evidence was sufficient to prove that the parties had entered into such a contract or it was not. The primary judge's conclusion on this, after dealing with the *Jones v Dunkel* issue, is to be found at [53], where his Honour stated:

> "There is no dispute as to the circumstances surrounding the signature on the first page of the contract for sale. There is basis for some lack of certainty as to the 122 pages that might have been attached to the front page of the contract for sale. It is clear that Mr Antonios did not give any consideration to the pages behind the front page. Ultimately, however, it appears to be common ground as between [MV Developments] and Mr Antonios that the contract was constituted by the pages sent with the email of 21 July 2015 plus the front page that had been signed on behalf of both [MV Developments] and Mr Antonios."

154

The evidence supported that finding. The evidence was clear that Mr Antonios and Mr Fong on behalf of MV Developments signed a contract for the sale of Lot 34 on 15 April 2015. The front page of the contract was in evidence. Mr Antonios' explanation as to what occurred when the balance of the contract was sent on 21 July 2015 was, it seems, accepted by his Honour. In any event, Ta Lee has not demonstrated any reason why that evidence should not be accepted.

155 In addition, for the reasons explained by Mr Antonios in his submissions, there was a correspondence between various terms on the front page of the signed contract and those in the balance of the contract attached to the email of 21 July 2015. Further, as his Honour noted, it was common ground between Mr Antonios and MV Developments that the balance of the contract was constituted by the pages sent by email on 21 July 2015. Nor was there any error in his Honour referring to the deed of agreement between Mr Antonios and MV Developments as corroboration.

156 His Honour clearly recognised that proof that Mr Antonios and MV Developments had entered into a contract for the sale of Lot 34 on the terms of the reconstructed contract was not straightforward. However, his Honour found on the facts that the parties had done so. That finding was open to his Honour and no basis for setting it aside has been demonstrated.

Second issue on the appeal

Whether Mr Antonios paid the deposit under the contract: appeal grounds 14 to 19 and 22

Primary judge's reasons

157 The primary judge found, at [64], that all of Mr Antonios' obligations under the contract for sale had either been performed or performance had been waived by MV Developments. His Honour considered that the deed of agreement and Mr Fong's letter of 14 April 2015 confirming the payment of $910,000 clearly demonstrated that MV Developments accepted that the deposit had been paid.

158 His Honour also noted, at [13], that the proceedings were conducted on the basis that a delivery of casino chips was equivalent to a payment of money. Accordingly, the question whether a tender of chips would constitute a tender of payment did not arise.

Parties' submissions

159 Assuming that Mr Antonios and MV Developments did in fact enter into the reconstructed contract, Ta Lee submitted that Mr Antonios only paid $2,000 of the $910,000 deposit he was required to pay.

160 Ta Lee relied on *Brien v Dwyer* (1978) 141 CLR 378; [1978] HCA 50 in support of the proposition that the manner specified in the contract for payment of the deposit had to be observed strictly. It did not contend that Mr Antonios had not paid the sum of $910,000 as he deposed. Rather, Ta Lee submitted that none of the payments made by Mr Antonios were made in accordance with cls 2.2 and 2.4, set out above at [48], other than $2,000 of the cash he gave Mr Fong on 15 April 2015: the $310,000 in casino chips was not given to MV Developments "*on the making of this contract*" and was not in the form of cash or cheques; the $200,000 in cash given to Mr Fong on 15 April 2015 exceeded the $2,000 limit; and both the $200,000 in chips given to Mr Ayoub and Mr Nassif and the $200,000 worth of electronic funds transfers to MV Aust were not given to MV Developments and were not in the form of cash or cheques. Ta Lee submitted that if the parties intended for or agreed to some different manner of payment, it was necessary for them to have varied the contract to so provide, which had not been done.

161

Ta Lee submitted that neither the deed of agreement nor the letter of 14 April 2015 established that the deposit had been paid. It submitted that the deed was irrelevant as it was an independent agreement from the reconstructed contract. It submitted that, in any event, cl 5 of the deed required Mr Antonios to pay $600,000.

162 The primary judge accepted, at [30], that the statement contained in the letter of 14 April 2015 that Mr Antonios had paid the total sum of $910,000 was false. Ta Lee submitted that, accordingly, the letter was incapable of showing that the deposit had been paid or that MV Developments accepted that it had.

163 Mr Antonios pointed to the fact that Mr Fong, on behalf of MV Developments, accepted Mr Antonios' payments in the form in which they were made. Mr Antonios also pointed to the fact that MV Developments did not seek to terminate the contract pursuant to cl 2.5, which entitled it to terminate for non-compliance with cl 2. Mr Antonios submitted that by handing over the keys to Lot 34 to Mr Antonios, MV Developments waived its right to object to the form of Mr Antonios' payments. In these circumstances, Mr Antonios submitted that the primary judge did not err in finding that Mr Antonios had paid the entire purchase price.

Consideration

164 Ta Lee's contention that the deposit had not been paid must fail essentially for the reasons found by the primary judge.

165 First, the primary judge observed, at [13], that the proceedings were conducted on the basis that a delivery of casino chips was equivalent to the payment of money. His Honour observed that the question "*whether a tender of casino chips would constitute a tender of payment of money did not arise*". His Honour's observation was not challenged on the appeal, although, of itself, it does not answer the ground of appeal that cls 2.2 and 2.4 required strict compliance.

166 Secondly, the decision in *Brien v Dwyer* upon which Ta Lee relied is not precisely on point. The question in that case was when, on the proper construction of the contract, the deposit had to be paid, namely, "*upon the signing of* [*the*] *agreement*" as stipulated in the contract, or within a reasonable time thereafter. That does not assist in determining whether strict performance was required on the terms of the contract between Mr Antonios and MV Developments.

167 Thirdly, MV Developments accepted the moneys as paid by Mr Antonios, whether in cash, casino chips or electronic funds transfer. MV Developments also accepted Mr Antonios' payment by way of settlement of Mr Fong's debt. In that respect, the fact that that was Mr Fong's debt and not MV Developments' debt is a matter of accounting between Mr Fong and MV Developments.

168 Fourthly, for the first and third of these reasons, MV Developments 'waived' its right to insist on payment in accordance with the contract.

169 Finally, by giving Mr Antonios the keys to the apartment, MV Developments' conduct could be viewed as an admission or acknowledgement that the purchase price had been paid. To the extent that Ta Lee challenged whether the keys had in fact been handed over, we do not consider, based on the evidence, that it has made out this challenge.

170 The third of these reasons requires elaboration.

171 Pursuant to the *Conveyancing Act 1919* (NSW), s 54A, the contract was required to be in writing. Any variation to a contract which is required by law to be in writing must also be in writing to be effective. This principle is subject to there having been part performance of the contract: see *Agricultural & Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; [2008] HCA 57 at [74].

172 In the present case, there was an arrangement between Mr Antonios and Mr Fong that the deposit be paid other than in accordance with cls 2.2 and 2.4 of the contract for sale. The question is whether the means of payment agreed to could nonetheless satisfy Mr Antonios' contractual obligations to pay the deposit. That question raises the following matters for consideration. First, the relevance of payments having been made to Mr Fong, both in cash and in casino chips, Mr Ayoub and Mr Nassif by way of casino chips and MV Aust by way of electronic funds transfers. Secondly, the relevance of part of the purchase price being paid by way of forgiveness of a loan. Thirdly, whether there was part performance of the contract. Fourthly, even if there was no part performance of the contract, whether MV Developments 'waived' the requirement for payment in accordance with cls 2.2 and 2.4.

173 The first and second of these considerations can be answered shortly. Mr Fong was the sole director of MV Developments and MV Aust. The payments made to Mr Ayoub and Mr Nassif were made in accordance with directions given by Mr Fong. As for the initial advances to Mr Fong, the conversations between Mr Antonios and Mr Fong were premised on any advances Mr Antonios made being related to payment for an apartment in the development. In our opinion, even if, as certainly appeared to be the case, Mr Fong intended to use the advances himself, it was a matter for Mr Fong as between himself, MV Developments and MV Aust to properly account for those moneys and advances.

174 That does not answer the third and fourth questions. We are again of the opinion that those questions can be answered shortly. Mr Antonios was provided with the keys to the apartment. The only qualification on Mr Antonios being given full use and occupation was that it might be advisable not to move in immediately "*while everything is done*". That was advisory only. Mr Fong informed Mr Antonios that he could move in "*now*" if he wished. Accordingly, the exception to the requirement for a variation to be in writing applies.

175 That is sufficient to dispose of this issue and, for that reason, it is not necessary to say anything about waiver.

Orders

176 The appeal is dismissed with costs.

****

Decision last updated: 22 February 2019