Supreme Court
New South Wales
Equity Division

Case Title:	Filmlock Pty Limited v Nissi Investments Pty Limited (No 2)
Medium Neutral Citation:	[2013] NSWSC 959
Hearing Date(s):	8 July & 12 August 2013
Decision Date:	12 August 2013
Jurisdiction:	Equity Division – Expedition List
Before:	Pembroke J
Decision:	Judgment for the plaintiffs
Catchwords:	CONTRACT – purchaser's failure to complete contract for sale of land – minor inaccuracy in description – no uncertainty of subject matter CONTRACT – alleged defect in title – rights of carriageway and restrictions on use created after contract – limited rights to make objection, requisition or claim for compensation or rescission – purchaser obliged to complete the contract
Legislation Cited:	Conveyancing Act 1919 (NSW)
Category:	Principal judgment
Parties:	Filmlock Pty Limited – first plaintiff Jakesam Developments Pty Limited (in liquidation) – second plaintiff Pearse Property Group Pty Limited – third plaintiff JCT Investments Pty Limited (in liquidation) – fourth plaintiff Nissi Investments Pty Limited – first defendant Samuel Ng – second defendant

	Soni Tanuwidjaja – third defendant
Representation	Counsel: I D Faulkner SC with Ms L Chan – for the first and third plaintiffs No appearance for the defendants Solicitors: P J Donnellan & Co – for the first and third plaintiffs The second and fourth plaintiffs filed submitting appearances No appearance for the defendants
File number(s):	2009/00289710

JUDGMENT

Introduction

1 This is a claim by the plaintiff companies for breach of contract. They seek damages against the first defendant for its failure to complete a contract for sale of land dated 13 August 2007. They also seek damages against the second and third defendants for their failure to meet valid demands made upon them pursuant to a deed of guarantee and indemnity dated 21 November 2005.

2 At the start of the hearing I dismissed an application made by the second defendant (Mr Ng) on behalf of all defendants, to vacate the hearing. Mr Ng then withdrew and there was no further appearance for, and no evidence from, the defendants. The second plaintiff was placed in official liquidation on 2 December 2010 and the fourth plaintiff on 31 January 2011. On 15 August 2012, the second and fourth plaintiffs filed submitting appearances.

Deed of Option

3 On 21 November 2005 the plaintiffs as vendors entered into a deed of option with the first defendant as purchaser and the second and third defendants as guarantors. The land which was the subject of the option was defined in the deed as:

> **Property** means the land described in the Contract as Lot 100 in proposed plan of subdivision of Lot 1 in DP 1064078.

4 The 'Contract' was defined to mean 'the contract for the sale of the Property annexed to this Deed as Schedule 6'. The draft contract that appeared at Schedule 6 described the land as follows:

Address:	Proposed 100 Lots known as Stage 3, 4, 5 and 6 at Gippsland Street and Barry Way'.
Plan:	Unregistered plan: Lot 100 in an unregistered plan (copy attached) Clause 28 which is part of Lot 1 Plan DP 1064078 (copy attached).
Title:	Folio (Part) 1/1064078.

(emphasis added)

5 The draft contract contained a series of 'Further Provisions', Clause 29 of which set out the following defined terms:

Staging Plan	means the plan substantially in accordance with the plan annexed marked "A" or such other plan as provides for approximately 100 residential building lots in accordance with clause 43 hereof.
Plan of Subdivision	means the draft plan of subdivision of Lot 1 DP 1064078 annexed hereto marked "B".
Subject Property	means proposed Lot 100 in the Plan of Subdivision.

6 The staging plan marked A clearly identified the land known as stages 3, 4, 5 and 6. It was dated October 2005. It indicated that 103 lots were at that stage proposed for that land. The draft plan of subdivision marked B was less clear. It was not a formal plan of subdivision but a poor copy of an aerial photograph on which the outer perimeter of the proposed Lot 100 had been marked in a thick black contour line. Confusingly, it actually bore the description 'Highview Estate Preliminary Staging Plan'.

Contract for Sale of Land

7 On 13 August 2007, the first defendant exercised the option, as a result of which the contract for the sale of land came into existence and was signed. A deposit of $350,000 was paid. The purchase price for the land was $7 million subject to clause 43.4 of the contract, which provided:

> Should the Staging Plan yield greater than 100 lots within the Subject Property then the Purchase Price shall be increased by $70,000 inclusive of GST for each lot in excess of 100.

8 The description of the land in the signed contract was:

Address:	Proposed Lot 100 Barry Way Jindabyne NSW 2627
Plan:	Lot 100 in an unregistered plan (copy attached) Clause 28 which is part of Lot 1 Plan DP 1064078 (copy attached)
Title:	Folio (Part) 1/1064078

9 This was not precisely the same description as the 'Proposed 100 Lots known as Stage 3, 4, 5 and 6 at Gippsland Street and Barry Way' that had appeared in the draft contract. But there was no real need to identify the land in precisely the same way. There was no ambiguity. And by the time the contract was entered into, development approval to the plan of subdivision had been obtained. That approval was given on 15 May 2007 and clearly identified the stages 3, 4, 5 and 6 land. 'Development

Approval' was defined in the contract to be the approval of the plan of subdivision by the council.

10 The signed contract also attached the same two documents that were annexed to the draft contract and marked A and B. I described them in paragraph [6] above. They were not as clearly marked as they were in the draft contract but were readily identifiable. The document that was a poor copy of an aerial photograph on which the outer perimeter of the proposed Lot 100 had been marked in a thick black contour line, was the 'unregistered plan (copy attached)' referred to in the description of the land.

Termination & Damage

11 On 25 October 2007 the plan of subdivision was registered. The purchaser's solicitor was notified of registration on that day and informed that completion of the contract was due on 20 December 2007. The evidence was reasonably clear as to when notification of approval of the staging plan occurred. The council gave its approval on 15 May 2007. I am satisfied that notification occurred shortly after that date when the representatives of the purchaser were provided with a complete copy of the development consent DA 0079/2007 which included a copy of the approved staging plan.

12 Clause 30.1 of the contract provided that:

> Completion of this contract shall take place within 8 weeks of the later of:
>
> 30.1.1 the date upon which the Vendor notifies the Purchaser of registration of the Plan of Subdivision, and;
>
> 30.1.2 the date upon which the Vendor notifies the Purchaser of approval of the Staging Plan.

13 Completion did not take place on 20 December 2007. The plaintiffs subsequently issued and retracted several notices to complete. On 14 April 2008 they issued a final notice to complete, making time of the essence and requiring completion to take place by 2 May 2008. This notice was not complied with and on 5 May 2008, the plaintiffs terminated the contract for sale.

14 On 3 June 2009 the plaintiffs accepted an offer to purchase the whole of the Highview Estate – of which the subject land, namely the land which was the subject of the 13 August 2007 contract, ie stages 3, 4, 5 and 6 of the subdivision, formed part. The offer to purchase was for $4.4 million and was made jointly by the third plaintiff and two other companies known as Village Style Retirement Services Pty Ltd and Wytown Pty Ltd. The third plaintiff was a purchaser as to 25%, Village Style Retirement Services Pty Ltd a purchaser as to 25% and Wytown Pty Ltd a purchaser as to 50%.

15 The amount of $4.4 million was the amount necessary to discharge the mortgages on the land. However, the contract price recorded in the contract for sale of land was $3.3 million – being 75% of $4.4 million. This reflected the fact that the third plaintiff already owned a 25% share of the Highview Estate.

16 The measure of the plaintiffs' loss is the difference between the contract price ($7.21 million adjusted pursuant to Clause 43.3) and the net amount received on sale attributable to the subject land, together with appropriate adjustments for the deposit of $350,000 and accrued interest. The uncontradicted expert evidence was that at 3 June 2009, $3.1 million should be attributed to the stages 3, 4, 5, and 6 land. I am satisfied that I should proceed on this basis. It represents the fair value of the land at the time. Such an apportionment is reasonable and appropriate, indeed generous to the defendants, bearing in mind the total number of lots in the Highview Estate. It works to their advantage in the calculation of damages.

17 Subject to the principal contentions raised in correspondence and in the verified defences of the defendants – with which I propose, as a matter of fairness, to deal even though there was no appearance, no evidence and no submissions from the defendants to support them – I am satisfied that the plaintiffs are entitled to recover damages for breach of contract from the first defendant.

18 The base figure for the plaintiffs' loss at the date of termination is $6.86 million ($7.21 m less deposit of $350,000). After credit for the sum of $3.1 million, the principal amount of the loss is $3,760,000 before interest.

Description of Land

19 One of the matters raised by the defendants is the description of the land in the contract of sale. The issue was first raised by the defendants' new solicitors on 19 March 2008. They contended that the 'contract does not properly identify the subject property' and that 'Although the contract described the property as lot 100 in an unregistered plan (copy attached)', there was in fact no unregistered plan attached to the contract.

20 I am satisfied that there was no uncertainty of subject matter. And the unregistered plan was attached. The parties' intention as to the land which was the subject of their bargain remained constant and was sufficiently clear. The context, the surrounding circumstances and the contemporaneous documents all serve to reinforce the clear inference that the subject land was only ever that represented by stages 3, 4, 5 and 6 in the proposed subdivision. The thick black contour line on the document described as 'Highview Estate Preliminary Staging Plan' was inaccurate in a minor respect, but given the circumstances, it was not by itself critical to the contractual description of the land. To the extent that it may have wrongly included part of the stage 7 land, it was an obvious error that could be ignored.

21 Although the wording, compilation and structure of the signed contract, including in particular its annexures and attachments, could have been clearer, I am satisfied that the parties, and especially Mr Ng, were under no actual misapprehension whatsoever. They knew that the subject matter of the deed of option, and in due course, the signed contract of sale, was the land known as stages 3, 4, 5 and 6 of the proposed plan of subdivision. The physical geographic boundaries were clear. This is not one of those cases where the parties had conflicting subjective beliefs as to the identity of the subject matter of their sale. There was no confusion or uncertainty. Both before and after 13 August 2007, the parties engaged in an extensive course of dealings which was predicated on a common understanding of the identity of the land to which the option, and later the signed contract, related.

22 I should add that the plaintiffs' 5 March 2008 notice to complete described the land as 'Lot 29 DP 1118132'. The final notice dated 14 April described it as 'proposed lot 100 in an unregistered plan ... now lot 29 of DP 1118132'. This was a response to the 19 March letter from the defendants' new solicitors which stated somewhat weakly:

> Our client does not concede that [Lot 29] is the property intended to be the subject of the contract.

The reformulation in the 14 April notice to complete was not necessary and there was never any doubt as to the parties' intention.

Defects on Title

23 On 12 September 2007, the plaintiffs' solicitors wrote to the defendants' solicitors, enclosing:

(a) executed contract of sale;

(b) draft plan of subdivision;

(c) draft Section 88B instrument;

(d) staging plan.

24 The staging plan and the draft plan of subdivision correlated. Taken together, they depicted the stages 3, 4, 5 and 6 land, comprising 11.83 ha, now proposed to be described as Lot 29. The letter concluded:

> We understand that the plan of subdivision has been lodged with Council and we will shortly be lodging a copy with LPI for pre-registration examination. You will note that proposed Lot 100 is in fact proposed Lot 29 in the plan.
>
> Settlement is to take place within 8 weeks of the date of registration of the plan. We will keep you advised in this regard.

25 The draft Section 88B instrument identified a right of carriageway of variable width which was intended to burden the proposed Lot 29, among others, and a restriction on use in a form that is not uncommon for residential subdivisions.

26 On 12 October 2007, the plaintiffs' solicitors advised that the plan of subdivision had been lodged and had undergone pre-examination. They also attached a copy of the plan of subdivision and the Section 88B instrument as lodged. These were, in all material respects, in the same form as those forwarded on 12 September. On 25 October, the plan of subdivision, along with the Section 88B instrument, was registered and the defendants' solicitors were notified on the same day.

27 The Section 88B instrument created new rights of carriageway and restrictions on the use of the land. The easement for drainage of water and sewerage, which had been a condition of the development consent, had been created in December 2006.

28 Clause 38 of the signed contract provides:

38 **VARIATIONS AND AMENDMENTS TO PLANS**

38.1 The Purchaser shall not be entitled to make any objection requisition or claim for compensation nor delay completion in respect of:-

38.1.1 any minor variations which may be required by the Vendor, the Council, National Park & Wildlife Service any statutory authority or by Land & Property Information NSW in the size and/or location of any lot or lots;

38.1.2 any variation to the terms of any restriction as to use, easement or covenant unless such variation materially and adversely affects the rights of the Purchaser;

38.1.3 the Plan of Subdivision;

38.1.4 the Staging Plan.

38.2 Any objection requisition or claim for compensation or rescission that the Purchaser may raise or have a right to raise hereunder in respect of the plan or s88B instrument as registered pursuant to clause 38 hereof shall be raised within fourteen (14) days of service by the Vendor or the Vendor's solicitor of the Vendor's notification (in which respect time shall be of the essence) and thereafter the Purchaser shall not be entitled to raise any objection, requisition or claim for compensation or right of rescission but shall be deemed to have accepted the plan and s88B instrument as registered and the Vendor shall be regarded as having complied with all its obligations in respect of the registration thereof ...

38.3 The Purchaser agrees that the right of rescission specified in clause 39.2 hereof is the only remedy available to the Purchaser following receipt of notification pursuant to clause 39.2 and the Vendor shall not be liable to the Purchaser for any damages, costs or expenses.

(emphasis added)

The reference to 'clause 39.2' in Clause 38.3 above is a clear error and should be read as 'clause 38.2'.

29 The defendants did not complain about the rights of carriageway, the restrictions on use or the easement for drainage until 19 March 2008. This was too late. As I have mentioned, notification of the plan of subdivision along with the Section 88B instrument occurred on 25 October 2007. Pursuant to Clause 38.2 of the contract, the first defendant had 14 days after notification within which to raise any objection, requisition or claim for compensation or rescission in respect of the plan of subdivision or Section 88B instrument as registered. It chose not to complain and may no longer do so.

30 Further, Clause 38.3 provides that the right of rescission specified in Clause 38.2 is the only remedy available to the purchaser following receipt of notification and the vendor shall not be liable to the purchaser for any damages, costs or expenses.

31 There is therefore in my view, no proper basis for the contention that, because the title was affected by the easement for water and sewerage, and the rights of carriageway and restrictions on use that I described in paragraph [25] above, the plaintiffs had somehow failed to provide proper title to the property and the first defendant was not under an obligation to complete the contract. I should make clear that in this case Section 52A(2) of the *Conveyancing Act* does not apply.

Claim Against Guarantors

32 In accordance with their obligations under the deed of option, the second and third defendants entered into a deed of guarantee and indemnity in favour of the plaintiffs on 21 November 2005. Clause 3 of the deed of guarantee and indemnity provides:

> **GUARANTEE**
>
> The Guarantor irrevocably and unconditionally guarantees to the Vendor that the Purchaser will:

3.0.1 pay the Guaranteed Money on time; and

3.0.2 comply on time with the Purchaser's obligations under the Deed [of option].

33 Clause 4 of the deed of guarantee and indemnity provides:

PAYMENT UNDER GUARANTEE

If the Purchaser does not:

4.0.1 pay the Guaranteed Money; or

4.0.2 comply with the Purchaser's obligations – under the Deed and/or the Contract on time, the Guarantor must on demand pay that money to the Vendor or comply with those obligations or both, as the case may be, whether or not the Vendor has demanded that the Purchaser pay or comply.

34 Clause 5 of the deed of guarantee and indemnity provides:

INDEMNITY

As an additional obligation of the Guarantor which the Vendor may enforce separately from the guarantee in clause 3, the Guarantor irrevocably and unconditionally indemnifies the Vendor against, and undertakes as principal debtor to pay the Vendor on demand a sum equal to all liability, loss, penalties, costs, charges and expenses directly or indirectly arising from or incurred in connection with:

5.0.1 the Purchaser not paying the Guaranteed Money on time;

5.0.2 the Purchaser not complying on time with the Purchaser's obligations under the Deed and/or the Contract; and

5.0.3 the Vendor not being able to recover all of the Guaranteed Money from the Purchaser or enforce all of the Purchaser's obligations under the Deed and/or the Contract for any reason,

whether or not the Vendor or the Guarantor knew or should have known about a fact or circumstance that gives rise to a claim under

this indemnity. It is not necessary for the Vendor to incur expense or make a payment before enforcing this indemnity.

35 Clause 13 of the deed of guarantee and indemnity provides:

> **INTEREST**
>
> The Guarantor must pay interest on any amount payable by it under this guarantee and indemnity, which it does not pay on time on demand or at times the Vendor specifies, from when the amount becomes due until it is paid. Interest is calculated on daily balances at the rate of 12% per annum and is capitalised on the last day of each month if unpaid.

It should be noted that, notwithstanding their contractual entitlement to a higher rate, the plaintiffs only sought interest calculated at the Supreme Court rates.

36 Clause 1.1 of the deed of guarantee and indemnity contains the following definitions:

> (a) 'Guaranteed Money' means all money that the Purchaser is or may at any time be liable (actually, prospectively or contingently) to pay to the Vendor under or in connection with the Deed and/or the Contract (including in connection with non-compliance with the Purchaser's obligations under the Deed and/or the Contract) and includes money which the Purchaser would be liable to pay but for its insolvency;
>
> (b) 'Deed' means the Deed of Option between the Purchaser and the Vendor dated ...
>
> (c) 'Contract' means the contract to be entered into between the Vendor and the Purchaser for the sale and purchase of the property known as Proposed Lot 100 in unregistered plan of subdivision at Jindabyne being part of the land comprised in Folio Identifier 1/1064078;
>
> (d) 'Purchaser' means NISSI INVESTMENTS PTY LIMITED ACN 112 933 436

37 The first defendant has not complied with its obligations under the contract for sale. It is liable to pay damages in the sum of $5,662,023 to the

plaintiffs for breach of contract. This includes interest up to 12 August 2013 at the rate of 8% specified in Clause 34.1 of the contract for sale of land. A summary of the calculation giving rise to this figure is attached and marked 'A'.

38 The plaintiffs have made valid demands on the second and third defendants to pay the Guaranteed Money. In breach of their obligations under clauses 3 and 4 of the deed of guarantee and indemnity, the second and third defendants have not paid the Guaranteed Money to the plaintiffs. Further, the second and third defendants remain liable pursuant to clause 5 of the deed of guarantee and indemnity to indemnify the plaintiffs for the costs and expenses of these proceedings.

39 There is no good defence and no reason why the plaintiffs should not be entitled to a verdict and judgment against each of the second and third defendants in the sum of $5,799,725 pursuant to the deed of guarantee and indemnity. This includes interest up to 12 August 2013 at Supreme Court rates, being lower rates than that specified in Clause 13 of the deed of guarantee. A summary of the calculation giving rise to this figure is attached and marked 'B'.

Orders

40 I therefore make the following orders:

(1) I give judgment for the plaintiffs against the first defendant in the sum of $5,662,023.

(2) I give judgment for the plaintiffs against each of the second and third defendants in the sum of $5,799,725.

(3) I order the defendants to pay the first and third plaintiffs' costs of and incidental to these proceedings but note that this is an appropriate case for the making of a gross fixed sum costs order pursuant to Section 98 sub-section 4(c) of the Civil Procedure Act.

(4) I will entertain further evidence and submissions as to an appropriate figure for a gross fixed sum costs order and make such an order in due course.

(5) I order that the sum of $55,000 held by the solicitor for the first and third plaintiffs pursuant to the order of Sackar J on 3 September 2012, be released and paid forthwith to those solicitors firstly on account of the first and third plaintiffs' costs thrown away by the vacation of hearing on 3 September 2012 and secondly, as to the balance if any, on account of the defendants' costs obligations which are the subject of my order that they pay the plaintiffs' costs of these proceedings.

(6) Pursuant to the leave granted by Sackar J on 3 September 2012 I order that the first and third plaintiffs' costs thrown away by the vacation of the hearing on 3 September 2012 be paid by the defendants on an indemnity basis.

(7) I give judgment for the cross defendants on the cross claim.

(8) I order the cross claimants to pay the cross defendants' costs of the cross claim and note that those costs will form part of the gross sum fixed order which I will in due course make.

(9) I direct:

(a) The plaintiffs to serve on the defendants and deliver to my associate, any affidavits and submissions in support of their application for a gross sum fixed order within 21 days.

(b) The defendants should, if they wish to do so, serve on the plaintiffs and deliver to my associate, any responsive affidavits and submissions within a further 21 days after that.

(c) The matter to be listed, by arrangement with my associate, at a mutually convenient time on a future date for the making of a costs order pursuant to Section 98 (4)(c).

Annexure A

Damages payable by the first defendant up to 12 August 2013

Date from	**Date to**	**Principal**	**Days in Period**	**Rate**	**Interest**
5/05/08	20/08/09	6,860,000 ($7.21m less deposit of $350,000 paid by Nissi)	473	8%	$ 711,184.66
21/08/09	12/08/13	3,760,000 (after receipt of $3.1m)	1445	8%	$1,190,838.36
				Subtotal	**$1,902,023.01**
		Balance Principal after 20 August 2009			$ 3,760,00
		Total loss, damage and interest as at 12 August 2013 (daily interest accumulating at $824.11)			**$5,662,023.01**

Annexure B

Principal $7,210,000 less deposit of $350,000: $6,860,000	
Interest on $6,860,000 from May 2008 to 20 August 2009 – Supreme Rates	851,955.62
The entire Highview Estate was sold for $3,300 on 3 June 2009, settlement on 20 August 2009. Consideration for the Subject Land is $3,100,000	
Principle less amount for consideration of the subject land, 20 August 2009: $6,860,000 - $3,100,000	3,760,000.00
Interest on balance of $3,760,000 from 21 August 2009 to 15 July 2013, calculated on Supreme Court Interest rates (note that this is less than the contractual entitlement of 12% on a compound basis capitalised monthly)	1,168,304.11
Amount of Loss, Damage and Interest as at 15 July 2013 (daily rate of $695.22)	$ 5,780,259.60
Plus interest for 28 more days from 15 July 2013 to 12 August	19,466.16
Total	**$ 5,799,725.70**

I certify that this and the 16 preceding pages are a true copy of the reasons for judgment herein of Justice Pembroke.

Dated 12. 8. 2013

Associate