[2005] WASCA 64

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE FULL COURT (WA)
CITATION	**:**	SUMAMPOW -v- MERCATOR PROPERTY CONSULTANTS PTY LTD [2005] WASCA 64
CORAM	**:**	MALCOLM CJ MURRAY J TEMPLEMAN J
HEARD	**:**	3 NOVEMBER 2004
DELIVERED	**:**	5 APRIL 2005
FILE NO/S	**:**	FUL 112 of 2000
BETWEEN	**:**	ROBBY SUMAMPOW Appellant AND MERCATOR PROPERTY CONSULTANTS PTY LTD Respondent

ON APPEAL FROM:

For File No	**:**	FUL 112 of 2000
Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	HEENAN J
Citation	**:**	MERCATOR PROPERTY CONSULTANTS PTY LTD -v- SUMAMPOW [2000] WASC 157
File No	**:**	CIV 2122 of 1998

Catchwords:

Contract - Nature of conditions precedent - Whether time extended - Estoppel - Implied term - No new matter of principle

Legislation:

Casino Control Ordinance 1988 (Cth), s 58
Christmas Island Act 1958 (Cth)
Corporations Law (Cth), s 459G

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr J C Curthoys
Respondent	:	Mr M J McPhee

Solicitors:

Appellant	:	Mallal & Co
Respondent	:	Michell Sillar McPhee

Case(s) referred to in judgment(s):

Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353
Foran v Wight (1989) 168 CLR 385
Giumelli v Giumelli (1999) 196 CLR 101
Minister for Aboriginal Affairs v Peko-Wallsend Ltd & Ors (1986) 162 CLR 24
Moorgate Mercantile Co Ltd v Twitchings [1976] QB 225
Newmont Pty Ltd v Laverton Nickel NL (1982) 44 ALR 598
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537

The Commonwealth v Verwayen (1990) 170 CLR 394
Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

Case(s) also cited:

Beswick v Beswick [1968] AC 58
Ex parte Dawes; In re Moon (1886) 17 QBD 286
Gange v Sullivan (1966) 116 CLR 418
Greer v Kettle [1938] AC 156
Hichens Harrison Woolston & Co v Jackson & Sons [1943] AC 266
Hughes v The Queen (2000) 202 CLR 535
Koutsojiannis v Brown (1980) NZCLC 98081
London Founders Association Ltd and Palmer v Clarke (1888) 20 QBD 576
Maynard v Goode (1926) 37 CLR 529
Newbon v City Mutual Life Assurance Society Ltd (1935) 52 CLR 723
Nullagine Investments Pty Ltd v The Western Australian Club Inc (1993) 177 CLR 635
Paterson v McNaghten (1905) 2 CLR 615
Re Onward Building Society [1891] 2 QB 463
Sandra Investments Pty Ltd v Booth (1983) 153 CLR 153
Sargent v ASL Developments Ltd (1974) 131 CLR 634
State of Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

1 **MALCOLM CJ**: This is an appeal against a judgment of Heenan J dated 16 June 2000 by which the learned Judge ordered that the appellant pay the respondent $5,508,065 plus interest thereon at the rate of 10 per cent per annum until paid; the parties be at liberty to apply; a counterclaim by the respondent be dismissed and the appellant pay the respondent's costs of the claim and counterclaim. The appellant sought orders that the appeal be allowed and the respondent's action be dismissed.

2 The notice of appeal, as amended by leave at the hearing of the appeal, varied the orders sought on the appeal to include an order that there be judgment on the appellant's counterclaim in the sum of $600,000, together with interest on the sum of $250,000 from 24 December 1997 and $350,000 from 4 March 1998. The appellant originally appealed on twelve grounds. As amended at the hearing, grounds 1, 5, 6, 10, 11 and 12 were deleted. In the case of ground 10, there was substituted a new ground which, if the appeal was unsuccessful, sought an amendment of the terms of the judgment to "accurately reflect the reasons for the decision" by requiring that the judgment below for payment be varied by requiring that the payment be in exchange for the share certificate of the shares the subject of the disputed sale.

Factual Background

3 The appellant was the defendant in an action by the respondent, Mercator Property Consultants Pty Ltd ("Mercator"), for the enforcement of a contract for the sale by Mercator to the appellant of shares in a proprietary company, Christmas Island Resort Pty Ltd ("the Company"). The appellant also counterclaimed against Mercator for a refund of the moneys paid on account of the purchase price, as well as for damages, on the ground that the contract was discharged by reason of non-fulfilment of conditions precedent or the breach by Mercator as vendor of certain terms said to be implied in the contract.

4 At all material times until shortly before the hearing of the action by the learned trial Judge, the Company was the owner and operator of the casino and resort complex on Christmas Island. In or about 1986, one Francis Woodmore, an Australian business man, acquired two fully paid shares and 1,099,998 partly paid shares in the Company. That holding represented 10 per cent of the issued share capital. Either then or subsequently, Mr Woodmore had the shares he acquired registered in the name of Mercator which was his private company. Mercator, previously known as F P Woodmore Pty Ltd, made the change to its present name on 16 April 1997.

5 By the end of 1993, the appellant, Mr Robby Sumampow, an Indonesian business man whose address for service was in Singapore, had acquired the balance of the share capital of the Company, namely, 9,900,000 fully paid shares.

6 By a deed dated 16 June 1997 ("the Original Deed"), Mercator agreed to sell its 1,100,000 shares in the Company to the appellant for the purchase price of $5.1 million. Of that price, $2.6 million was to be paid within fourteen days of completion of the conditions precedent, and the balance of $2.5 million was to be paid within six months after the fulfilment of the conditions precedent set out in cl 2.1 of the Original Deed which provided as follows:

> "The operation of this Deed is subject to the completion within forty (40) days of the date hereof of the following conditions precedent:
>
> (a) The Treasurer of the Commonwealth of Australia, pursuant to the provisions of the *Foreign Acquisitions and Takeovers Act 1975*, approving (or not objecting to the same) the sale and purchase of the Shares pursuant to this Deed ('the FIRB Approval').
>
> (b) The approval of the Commonwealth Department of Territories to the transfer of shares.
>
> (c) The consent in principle of the Australian Department of Transport to the operation of a regular air service between Christmas Island and Jakarta, Indonesia, such consent in principle to be sufficiently evidenced by a letter from the Department of Transport confirming that subject to the normal rules applicable to such services approval will be given.
>
> (d) The completion by the Purchaser of a due diligence examination of the affairs of the Vendor so far as they relate to this transaction such investigations to be limited in the matters outlined in Schedule A."

7 It follows that the conditions precedent to the operation of the Original Deed were required to be satisfied on or before 26 July 1997.

8 Schedule A was in the following terms:

> "The matters to be included in the due diligence examination are an examination by the Purchaser or its authorised representative to satisfy itself that:
>
> (a) the Vendor owns the shares;
>
> (b) there are no third party interests in the shares;
>
> (c) the Vendor and Linkwater have the capacity as trustees to enter into the transaction."

9 Linkwater Nominees Pty Ltd ("Linkwater") was also a party to the Original Deed both in its own right and as trustee for the Linkwater Trust. By cl 7 of the Original Deed, each of Mercator, Mr Woodmore and Linkwater represented, warranted and covenanted with the appellant that the vendor was and, at the transfer date, would be the legal owner of the subject shares as trustee for the Christmas Island Trust, had full title and authority to sell the shares, and that the shares were not and would not be on transfer subject to any mortgage, charge or other liability which would attach to the shares or bind the appellant as purchaser.

10 By cl 8.1 of the Original Deed, each party was responsible for its own costs in relation to the preparation, execution, completion and carrying into effect of the Original Deed. Clause 8.2 provided that the appellant was responsible for stamp duty payable on the Original Deed, the transfer of shares and on "all other documents executed pursuant to the provisions of this Deed".

11 By cl 9, provision was made for each party to give any notice, document or demand "in writing signed by the party giving it or by that party's solicitor" and "served on the other or that party's solicitors". The copy of the Original Deed tendered in evidence did not provide an address for service on the appellant, but as a matter of fact, correspondence and notices to the appellant were delivered by post or fax to the parties' respective solicitors in Perth.

12 The primary issues raised in the appeal were whether the contract evidenced by the Original Deed as varied by subsequent agreement became operative and "remained on foot" and whether the appellant:

> " 'waived compliance with the convention to contract by deed alone' and [the learned Judge] should have found that there was no agreement to extend time for the fulfilment of the conditions precedent after 15 [August 1997]".

13 By a further deed dated 25 July 1997 ("the first Deed of Extension"), Mercator and the appellant agreed that the deadline for fulfilment of the conditions precedent should be extended until 15 August 1997. The conditions precedent were not fulfilled by then. A draft deed further extending the deadline to 21 November 1997 was forwarded by the appellant's solicitors, a Perth firm, to Mercator's solicitors, another Perth firm, on 10 November 1997.

14 The covering letter dated 10 November, which was faxed to Mercator's solicitors referred in the heading to the sale of the shares and the "EXTENSION OF CONDITION PRECEDENT DEADLINE". The letter stated *inter alia* that:

> "Attached is a draft deed to extend the conditions precedent deadline to 21 November, we confirm that it is the parties' intention that the conditions precedent be fulfilled as soon as possible before this date. We anticipate that our client will be reluctant to sign any documents unless they have previously been signed by your clients – at least by fax. Please advise us whether it is possible for your clients to execute the share scrip lien and the deed to extend the conditions precedent deadline by fax and to send copies of these executed agreements to us."

15 The draft deed was executed by Mercator and returned to the appellant's solicitors, but was not executed by the appellant. In my opinion, on the face of it, the tender of the draft Deed by the appellant's solicitors on behalf of the appellant constituted an offer to extend the time for satisfaction of the conditions precedent to 21 November 1997, which was accepted by Mercator executing and returning the draft to the appellant's solicitors. These events evidenced a mutual intention on the part of the parties to extend the time for compliance with the conditions precedent.

16 Efforts continued to be made by both parties to enable the conditions precedent to be fulfilled after 21 November 1997, which was consistent with the time having been extended.

17 In the meantime, there was considerable activity undertaken by the parties' solicitors and others in relation to the "due diligence" matters required to be dealt with in connection with the transaction. In particular, the appellant's solicitors required disclosure of information in Mercator's financial records about any interest held by any third party in the shares being sold and the ability of Mercator, Mr Woodmore and Linkwater to

meet any damages claim which may arise from a breach of the agreement for the sale of the shares. The solicitors for Mercator, Mr Woodmore and Linkwater indicated that their clients agreed with what was proposed notwithstanding that it went beyond the provisions of the Deed of Sale.

18 By a letter dated 27 November 1997 the appellant's solicitors submitted to Mercator's solicitors a further deed extending the deadline. That deed was not executed, but by a letter dated 10 December 1997 the appellant's solicitors confirmed to Mercator's solicitors that all of the conditions precedent had then been fulfilled and that settlement should take place on or before 24 December 1997. This step was also consistent with the appellant having extended the time for compliance with the conditions precedent and that the transaction evidenced by the Deed was still on foot. The same letter enclosed a draft deed extending the deadline for satisfying the conditions precedent to 12 December 1997. Under cover of a letter dated 24 December 1997 the appellant's solicitors submitted an engrossed deed ("the second Deed of Extension") to Mercator's solicitors. With the same letter, the appellant's solicitors also enclosed for execution copies of a document entitled "Deed of Variation", the recitals to which included the following:

> "F. The parties to the [Original] Deed have agreed to extend the Conditions Precedent Deadline to 12 December 1997.
>
> G. On 10 December 1997, [the appellant], by his solicitors, advised Mercator's solicitors that all of the conditions precedent had been satisfied."

19 The Deed of Variation purported to vary the provisions in the Original Deed relating to payment of the purchase price. It provided for payment of the first instalment of $2.6 million by a "deposit" of $250,000 forthwith and $2.35 million on or before 28 February 1998. The Deed of Variation also provided that in all other respects the terms of the Original Deed were confirmed by the parties. Payment of the $250,000 was made on behalf of the appellant on 24 December 1997. Both deeds enclosed with the letter from the appellant's solicitors of that date were executed by Mercator and promptly returned to the appellant's solicitors. The appellant signed the Deed of Variation on 4 January 1998 but, as his Honour found, he did not sign the second Deed of Extension. This fact was not disclosed to Mercator's solicitors.

20 The appeal raises an issue whether by the appellant's solicitors' confirmation that the conditions precedent had been fulfilled and that

settlement should take place on or before 24 December 1997, coupled with the tender of the draft deed extending the deadline for satisfying the conditions precedent, constituted an offer by the appellant to vary the proposed contract. If so, there is a further issue whether the offer was duly accepted by the execution of the deeds by Mercator and effected a binding variation of the original contract which, on the face of it, had the result that the conditions precedent to the operation of the Deed of Sale had been satisfied and that the date for settlement had been extended by necessary implication.

21 Mercator's solicitors contended that the actions of the appellant's solicitors, presumably acting on the appellant's instructions, in preparing the Deeds of Variation executed by the appellant, including, in particular, the Deeds of Variation submitted by the appellant's solicitors to Mercator's solicitors and executed by Mercator on or about 24 December 1997 and on or about 4 March 1998, each contained a statement of fact which was true, namely, that:

> "[O]n 10 December 1997 [the appellant] by his solicitors advised Mercator's solicitors that all of the conditions precedent were satisfied."

22 The evidence on behalf of Mercator was that it had relied upon the recitals, among other things, to grant the appellant the variations of the terms of each of the Deeds of Variation. It was contended that this had the result that the appellant was estopped from denying that the Deed was effective or denying that his solicitors said on his behalf (as they did) on 10 December 1997 that all of the conditions precedent had been satisfied.

23 Furthermore, it was clear on the evidence that, acting on the appellant's instructions, the appellant's solicitors represented to the solicitors for Mercator in the context of settlement of the transaction that the appellant would execute a faxed copy of the proposed Deed on the basis that Mercator would do likewise, and both parties would also each execute the original or a counterpart of the Deeds of Variation. In my opinion, there is a key issue whether the circumstances were such that they gave rise to an estoppel by which the appellant was estopped by his conduct and that of his solicitors on his behalf from denying that the Deeds of Variation had been duly executed on or about 23 December 1997 and 4 March 1998 respectively.

24 In ***Giumelli v Giumelli*** (1999) 196 CLR 101 at [34], Gleeson CJ, McHugh, Gummow and Callinan JJ noted that the appellants in that case

had stressed the need to limit the measure of equitable relief lest the requirement for consideration to support a contractual promise be outflanked and direct enforcement be given to promises which did not give rise to legal rights. Their Honours went on to say that:

> "However, in *Verwayen*, Dawson J, after pointing out that at common law the role of estoppel was largely as a rule of evidence, stated that in equity its role has been vastly expanded to raise questions of substance. His Honour continued:
>
> > 'At the same time, the discretionary nature of the relief in equity marks a further reason why the fear of the common law that promissory estoppel would undermine the doctrine of consideration is unwarranted.' "

25 Their Honours went on to say in ***Giumelli*** at [35] that:

> "The matter was taken further by McPherson J in *Riches v Hogben*. His Honour noted that the critical element is the conduct of the defendant after the representation in encouraging the plaintiff to act upon it and continued:
>
> > 'A consequence of applying the principle may be to complete an otherwise imperfect gift, as in *Dillwyn v Llewelyn*, or to give effect to an agreement that, for want of certainty or consideration or of some other essential element, falls short of constituting an enforceable contract. Many of the reported cases are concerned with imperfect gifts; but there is of course a sense in which all agreements made or promises given without consideration are imperfect gifts of the benefits they purport to confer. What distinguishes the equitable principle from the enforcement of contractual obligations is, in the first place, that there is no legally binding promise. If there is such a promise, then the plaintiff must resort to the law of contract in order to enforce it, it being the function of equity to supplement the law not to replace it. The second distinguishing feature is that what attracts the principle is not the promise itself but the expectation which it creates. In that respect it represents the precise converse of what was said by Jessel MR in *Ungley v Ungley* to be the basis for enforcing the contract in that case. Finally, the equitable principle has no

> application where the transaction remains wholly executory on the plaintiff's part. It is not the existence of an unperformed promise that invites the intervention of equity but the conduct of the plaintiff in acting upon the expectation to which it gives rise. That is why in *Dillwyn v Llewelyn*, where the son built on land promised but not effectively conveyed to him by a memorandum signed by his father, Lord Westbury LC said that the only inquiry was 'whether the son's expenditure, on the faith of the memorandum, supplied a valuable consideration, and created a binding obligation'."

26 Their Honours also noted with apparent approval at [42] that in ***The Commonwealth v Verwayen*** (1990) 170 CLR 394 at 443, Deane J said:

> "Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded."

27 Their Honours also approved at [42] of the further statement by Deane J at 445 that:

> "The question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted."

28 Their Honours in ***Giumelli*** also said at [42]:

> "The prima facie entitlement to which his Honour had referred would be qualified if that relief would 'exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party'; an appropriate qualification might be a requirement that the party relying upon the estoppel do equity."

29 On 23 February 1998 Mercator's solicitors wrote to the appellant's solicitors noting that "the original signed documents have not been returned". The letter also said:

> "Our instructions are to say that unless some alternative arrangement is arrived at our client will require settlement on the due date, which is this Friday 27 February 1998, or the next working day thereafter.
>
> Our client understands the difficulties that your clients may be facing, in Indonesia, at the moment and is willing to discuss the matter in a commercial and reasonable way, so long as he is given notice of precisely what the difficulties are and what if any proposal your client has to overcome them.
>
> You will appreciate of course that our client requires to be informed of the position in some detail so that the commercial judgment can be made in relation to any alternative proposal that may be put forward by your client.
>
> If our client is not kept informed; no alternative is offered and default occurs on the settlement our client will have no option but to take its remedies at law.
>
> This is not our client's preferred course and is in not in the long term interests of anyone concerned. Further, litigation between shareholders of the casino will likely be looked at in an adverse way by the relevant licensing authorities.
>
> Would you please convey these matters to your client as a matter of urgency with assurances from our client that if there are difficulties in settlement our client will do what it can, in a commercial way, to help solve the problem; but this can only be achieved by proper and timely communication between the parties.
>
> Please let us know the position in response by return or as soon as possible."

30 The reference by Mercator's solicitors in that letter to "difficulties" was to the prevailing economic conditions, which had resulted in a significant economic downturn in the Asia Pacific Region and in Indonesia, in particular, where the appellant was based.

31 The appellant's solicitors replied to Mercator's solicitors by letter dated 27 February 1998 enclosing a draft of a second Deed of Variation

setting out, in effect, that the balance of the purchase price was to be paid in two further instalments, namely, $350,000 forthwith and the balance of $4.5 million on or before 31 July 1998. That proposal was accepted by Mercator. The payment of $350,000 was made on behalf of the appellant on 4 March 1998, but the second Deed of Variation was not executed by the appellant and the balance of $4.5 million was not paid.

32 The appellant's personal assistant, Mr Gani, gave evidence of his discussions with Mr Woodmore, on behalf of Mercator, in December 1997 and February 1998 which preceded the payments of both the $250,000 and the $350,000. In relation to the first of these amounts, Mr Woodmore asked whether, if he allowed a partial payment to be made, how he could be assured that the appellant would pay the second amount. Mr Gani's evidence was that he then suggested that the first of the two payments be a non-refundable deposit and that this was agreed to by Mr Woodmore. This evidence was rejected by the learned Judge on the basis that:

> "Mr Gani's evidence falls far short of establishing such an arrangement and, in either event, it is not only inconsistent with but contradicted by the contents of the first Deed of Variation."

33 By letter dated 16 March 1998 Mercator's solicitors requested the appellant's solicitors to let them have "an executed and signed copy" of the second Deed of Variation by return mail. By letter dated 19 May 1998 they sought copies of the executed and stamped Original Deed and subsequent deeds. On the same day the appellant's solicitors replied as follows:

> "Due to the prevailing circumstances in Indonesia, we are currently experiencing some difficulty in getting instructions from our client. We will ask our client for further instructions and reply to your letter as soon as we have these instructions."

34 Further letters of enquiry from Mercator's solicitors dated 20 May, 27 May and 2 June 1998 were unanswered. In response to a letter in similar terms dated 10 June 1998, the appellant's solicitors replied that they were "still experiencing some difficulty" in obtaining instructions from the appellant and said that they would respond to Mercator's enquiries as soon as they had "clear instructions" to do so.

35 In the meantime, the Company had closed the casino and the resort on or about 23 April 1998. Given that the failure by the Company to meet its financial commitments when they fell due and payable constituted a

ground for cancellation of its casino licence, the Minister for Territories wrote to the appellant on 26 April 1998 saying, among other things, that he expected that all outstanding debts would be paid by 6 May 1998. The Minister also enquired whether the purchase of "Mr Woodmore's 10% shareholding" in the Company would proceed and, if so, when and on what terms. By a letter of 5 June 1998 to the Minister, Mr Gani responded saying:

> "We understand that the purchase of Mr Woodmore share [*sic*] is still on, there is an additional agreement reach [*sic*] between Mr Woodmore and [the appellant] regarding the time for payment only, but for other terms and condition, your office has already had a copy of purchased [*sic*] agreement."

36 By a notice dated 16 June 1998, issued under s 58 of the *Casino Control Ordinance 1988*, the Minister required the Company to show cause within 21 days why the casino licence should not be cancelled on grounds which included its failure to meet its financial commitments to certain specified creditors and to its employees.

37 By letter dated 19 June 1998 Mercator's solicitors wrote to the appellant's solicitors in the following terms:

> "As you know we act on behalf of Mercator Property Consultants Pty Ltd in relation to its shareholding in Christmas Island Resort Pty Ltd ('CIR').
>
> Our client is growing increasingly concerned at the activities of the directors of CIR and the way in which they continue to run the company, one such director being your client Mr Sumampow.
>
> Our client has instructed us to send the attached letters to CIR and both your client and the other directors of CIR as a matter of urgency.
>
> In the circumstances, and given your connection with Mr Sumampow, we would ask that you use every endeavour to pass on the attached letters to the relevant parties as a matter of urgency."

38 Enclosed with that letter was a copy of a letter which Mercator's solicitors had sent direct to the Company at its registered office in Cairns and a copy of a letter which they had sent to the appellant and to each of

the three other directors of the Company. The letter to the Company was in the following terms:

> "Please be advised that we act on behalf of Mercator Property Consultants Pty Ltd who owns 10% of Christmas Island Resort Pty Ltd ("CIR").
>
> Our client was recently concerned to see that The Australian newspaper has reported that the Commonwealth government had issued a notice to CIR asking it, within 21 days, to show cause as to why the Christmas Island casino licence should not be revoked.
>
> Further, our client is aware that business on the island has been closed for a period of several months, and that the directors of CIR have done nothing in the meantime to manage the affairs of CIR and\or engage in any corporate administration with a view to continuing the operation of the resort and the other affairs on Christmas Island.
>
> Included within this is the non payment of both wages and accounts to creditors.
>
> In these circumstances please advise us as a matter of urgency what measures the directors of CIR intend to take to:
>
> 1. retain the benefit and the value of the casino licence for CIR; and
>
> 2. recommence day to day operations of the resort and its associated activities on the island.
>
> Our client need not remind you that the casino licence held by CIR represents a large portion of the total value of the assets held by CIR, and any loss or revocation of the licence by the government would see the value of CIR and its shares fall irrepairably [*sic*].
>
> As a result we are instructed to advise that our client will, pending a satisfactory response to the issues raised herein, take matters into its own hands to preserve the assets of CIR accordingly."

39 The text of the letter to the four directors of the Company was as follows:

> "Please be advised that we act on behalf of Mercator Property Consultants Pty Ltd who own 10% of shares in Christmas Island Resort Pty Ltd ('CIR').
>
> Our client is concerned that you are not discharging the duties attaching to your office as a director of CIR. Enclosed herein is a copy of a letter sent today to the registered office of CIR outlining our client's major concerns.
>
> Please let us have your urgent response to the matters raised in the letter to CIR, failing which our client will have no choice but to take matters into its own hands."

40 During the following week, Mr Michael McPhee, principal of the firm of solicitors acting for Mercator, had several telephone conversations with Mr Mark McLinden, a solicitor with the firm acting for the appellant. In the course of those conversations Mr McPhee requested a copy of the notice mentioned in the letter which his firm had written to the Company on 19 June 1998. The appellant's solicitors responded by facsimile dated 26 June stating that:

> "Our client has advised us not to provide you with a copy of the notice issued by the Minister for Territories in relation to the cancellation of the casino licence."

41 On the same day Mercator's solicitors wrote to the appellant's solicitors as follows:

> "We refer to your letter of today's date which was faxed through to us earlier this afternoon.
>
> We also refer to the earlier conversations between the writer and Mr McLinden earlier in the week and confirm that you are acting currently not only on behalf of [the appellant] in his personal capacity, but also on behalf of the company Christmas Island Resort Pty Ltd to deal with the Government on the notice relating to the possible cancellation of the casino licence.
>
> We take it, in this regard, the client referred to in your letter today takes in both clients, [the appellant] and the company.
>
> Our client takes the view that the interests of the company are not co-extensive with the interests of [the appellant] and our client believes, subject to any submissions that you might like to

make on the matter, that it is obvious on the face of the matter that it is the interests of [the appellant] which dominate the operations and decisions of the company; and as a result the interests of the only minority shareholder, our client, are subordinated to those of [the appellant].

We suggest to you and through you to your clients, the company directors including [the appellant] that in current circumstances where the following situations pertain, it is oppressive for our client to be treated in the way that is evidenced by your letter today. These circumstances to which our client refers include:

1. That our client has been given no information of any sort from the company relating to the action of the Minister; or the details of any step or submission being taken or made to redress the position and protect the interests of the company.

2. The directors of the company have not replied to our letter of 19 June 1998 sent through you; and which Mr McLinden confirmed had been passed on.

3. There has been no general or special meeting of shareholders since 21 October 1996.

4. No up to date financial reports have been signed off and the returns of the company for the financial year ending 30 June 1997 are still outstanding. Our client has been advised on enquiry from the company accountants that no accounts for that period exist.

5. Notwithstanding the position that our client has agreed to sell his shares to [the appellant] with an extended settlement of 31 July 1998, your office was not able to offer any information as to the likelihood of your client settling on that day or at all, when enquiry was made this week.

6. Your office has not provided us with any information, despite several requests over a period of time, to confirm that the contract for the sale of shares has been stamped, and your office has not returned the original signature [*sic*

signed copy] from [the appellant]. We still only have a faxed copy.

7. If your client is not able to settle the only security available for our client will be the retention of the shares in the company and this security is now perilously close to being lost; and in the face of such a situation your clients refuse to communicate or consult with ours.

In all these circumstances our instructions are to formally advise as follows:

(a) Our client requires the provision of details as to the company's finances by annual return or otherwise by close of business Monday 29 June 1998.

(b) By the same time our client requires full details of every step being taken by the company, its directors or [the appellant] to redress the current difficulty of the company and in particular to preserve the casino licence.

(c) By the same time details of every effort being taken to sell or otherwise dispose of the assets of the company.

Further, our instructions are to formally advise the company through you that in the event of there being continued failure to inform our client of the current position in relation to the company, as detailed above or at all, our client will regard himself as having no option but to take steps to apply to the Court for the appointment of a receiver to take control of the affairs of the company in this most critical time.

Would you please give this your most urgent attention."

42 By a letter dated 1 July 1998 Mr Woodmore, as Managing Director of Mercator, wrote to the First Assistant Secretary of the Department of Territories stating that Mercator "as a significant shareholder" in the Company intended to apply to the Federal Court of Australia on 3 July to place the Company in the hands of a receiver and manager. Mr Woodmore also said in the letter:

"We hope to obtain an expedited hearing by 10 July or shortly thereafter, noting that this is some days after the Minister's 'show cause' deadline.

> If [the Company] is able to resolve the matter by 7 July 1998 we may withdraw our action. Otherwise, we request that the deadline be extended pending the outcome of the Court hearing since our submission is predicated on the need to preserve [the Company's] most valuable asset.
>
> Our action is based on the oppression provisions of the Corporations Law, and in particular the apparent paralysis of [the Company's] board in relation to it's present crisis. A brief summary of the issues:
>
> 1. [The Company] directors will not provide us with any details concerning the financial standing of the company. There has been no notification of an AGM for the 1996-97 financial year and accounts have not been provided to us or filed with the ASC.
>
> 2. We have been refused information in relation to the Minister's ultimatum and the board's response.
>
> 3. The board is not taking appropriate steps to mitigate [the Company's] liquidity crisis. It has not given serious consideration to offers from third parties to buy, and to lease premises, plant and equipment owned by [the Company] but no longer needed for its hotel or casino operations.
>
> 4. The board's inaction exposes the company to substantial losses, including the casino licence and site lease with the concomitant forfeiture of improvements.
>
> This action has the support of major creditors of [the Company] and will result in the resurrection of the hotel and casino operations on Christmas Island. This might be achieved through financial restructuring including the raising of additional share capital, or the sale of the entire undertaking by international tender.
>
> Taking into account all the possible alternatives, we believe that the appointment of a Receiver Manager will provide the quickest and most effective long-term solution to the problem now facing all parties associated with the Christmas Island casino. This comprises the Commonwealth, the community and

> workers of Christmas Island, and the creditors and shareholders of [the Company].
>
> We shall keep you advised of progress."

43 On 3 July 1998 Mercator applied to the Federal Court of Australia for appointment of a receiver and manager over the assets of the Company.

44 The appellant's solicitors responded to the Minister's notice of 16 June 1998 by letter dated 6 July 1998, setting out grounds upon which it was submitted that the Minister "should take no action adverse to the licence". Having decided that the matter was not resolved to his satisfaction, the Minister issued a notice dated 10 July 1998 directing the Company to meet its financial commitments within 14 days.

45 By a letter of 23 July 1998 to the Minister, Mercator's solicitors confirmed that, on the instructions of Mercator, they had filed an application for the appointment of a receiver at the Federal Court in Perth, but that the application had been adjourned "to enable every opportunity, to be given to the company to take the appropriate steps to meet your requirements." The letter went on to state as follows:

> "As of today we have not received any advice from the company or its directors that it is able to meet your requirements in the time limited, namely by 4.00pm Friday 24 July 1998.
>
> In these circumstances our instructions are to move the Federal Court formally for the appointment of the interlocutory receiver, notice having been given to the company and its directors of our client's intention to so move. The purpose of our client's action is to have someone appointed by the Court who is '… a completely independent competent person who can come in and take hold of the situation' per Bright J in re Club Mediterranean Pty Ltd (1975-76) CLC 40-204. The intention is that such a person once appointed will take control of the affairs of the company and do what is necessary to put its affairs in order and specifically to comply with your requirements as Minister; and to be available locally in Australia to deal with your office directly to act quickly and achieve that purpose.

> Our client has proposed as receiver Mr Jeffrey Herbert who is a fully qualified person and one of the senior practitioners in the field in Western Australia.
>
> His Honour Mr Justice Nicholson, who is hearing our client's application required of us that we advise the directors of the company of the appointment time and place at which Counsel will move for the substantive order for the appointment of receiver on an interlocutory and urgent basis. We are taking steps to give that notification now.
>
> The time fixed by the Court for our client's motion has been fixed for 4.00pm Tuesday 28 July 1998 at the Federal Court Perth. It is to be noted that this appointment will fall after the expiry of your direction to the company to pay certain creditors.
>
> The purpose of this letter is to notify you of the current state of our client's application and to respectfully request on behalf of our client that any formal step to cancel Christmas Island Resort Pty Ltd's Casino Licence be deferred firstly until our client has had the opportunity to move for the order and secondly, if such order is granted, for the receiver appointed to attend upon you as Minister to discuss what steps may be taken as a matter of urgency to preserve the company's assets.
>
> Would you please let us know your position on this request, through your department as soon as you can.
>
> May we express our thanks to you for giving this matter your consideration."

46 The Company did not comply with the Minister's notice of 10 July 1998 and on 28 July the Minister cancelled the Company's licence to operate the casino.

47 On 29 July 1998 Mercator's application to the Federal Court was granted, and on 8 December 1998 an order was made for winding up of the Company. Meanwhile, no further payment in reduction of the purchase price was made by the appellant, and on 1 October 1998 the writ by which the present proceedings were commenced was issued.

The Issues at Trial

48 In par [13] of his reasons, the learned trial Judge stated that the pleadings raised only two "real issues". The first was whether the

agreement constituted by the Original Deed was discharged by non-fulfilment of the conditions precedent prior to 15 August 1997, the extended deadline specified in the first Deed of Extension. The second, which was also an alternative, was whether by making the receivership application in July 1998, Mercator was in breach of implied terms of that agreement. His Honour determined that because both issues were raised in the defence and counterclaim filed on behalf of the appellant, and the burden of proof rested upon him, the appellant should begin.

49 The appellant did not attend the trial. The only oral testimony on behalf of the appellant was given by Mr Gani. Mr Woodmore was the only witness on behalf of Mercator. As his Honour correctly observed, there was no substantial conflict in the evidence before the Court. The resolution of the issues depended upon the interpretation of the documents and the application to them of the relevant law.

Conditions Precedent

50 Ground 2 of the grounds of appeal contended that the learned Judge erred in finding that the contract "remained on foot" and that the appellant "waived compliance with the convention to contract by deed alone and should have found that there was no agreement to extend time for the fulfilment of the conditions precedent after 15 [August 1997]".

51 The primary contention on behalf of the appellant at trial was that the parties had adopted the convention of contracting by deed alone. Consequently, as the appellant had not signed any deed extending the time for the fulfilment of the conditions precedent beyond 15 August 1997, the agreement for the sale of the shares was discharged when the conditions were not fulfilled by that date. The learned trial Judge, however, concluded that the:

> "… conditions precedent should be construed as conditions precedent to performance rather than as precedent to formation (see Mason J in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 552 – 554)."

52 On the face of it, it appears that this conclusion was reached without any express consideration or reference to the terms of cl 2.1 which, as has been seen, provided that "the operation of this Deed" was "subject to the completion within forty days" of the relevant conditions precedent. In other words, "the operation" of the deed, in the sense of it having legal effect in the context of the proposed sale, was conditional upon satisfaction of the conditions precedent. On this basis there would be no

binding agreement for sale unless and until the conditions precedent were satisfied. It would follow that, if the conditions precedent were not satisfied by the due date, or any extension of the due date, the deed would not become operative, so that no contract of sale came into existence because the deed had never become operative as a contract of sale.

53 Consistently with that construction, on 25 July 1997, the parties executed a further deed entitled the "Deed of Extension". This provided that in cll 1 and 2:

> "1. Extension
>
> (a) the operation of this Deed is amended by deleting the words which appear in the first two lines of clause 2.1 and replacing those words with the following words:
>
> 2.1 the operation of this Deed is subject to the completion of the following Conditions Precedent;
>
> (b) clause 3 of the Deed is amended by deleting the words 'within the said period of forty (40) days' from the second line in clause three and replacing those words with the following words 'on or before 15 August 1997'.
>
> 2. Confirmation
>
> In all other respects the terms of the Deed are confirmed by the parties to the Deed."

54 The conditions as so amended are expressed in terms of conditions precedent to the operation of the deed as a deed. In my opinion, the deed could not have any operative contractual effect unless and until the conditions precedent had been satisfied, which had not occurred by 15 August 1997. It follows that, in the circumstances relied upon by the respondent, if nothing further occurred, the deed would not become operative, with the result that the contract contemplated by the deed would not come into operation or effect as a contract evidenced by deed.

55 The distinction between a condition precedent to the formation of a contract and a condition precedent to performance of a contract, or a part of a contract, was explained by Mason J (as he then was) in ***Perri v***

Coolangatta Investments Pty Ltd (1982) 149 CLR 537 at 551 – 552 as follows:

> "There is an obvious difference between the condition which is precedent to the formation or existence of a contract and the condition which is precedent to the obligation of a party to perform his part of the contract and is subsequent in the sense that it entitled the party to terminate the contract on non-fulfilment. In the first category the transaction creates no rights enforceable by the parties unless and until the condition is fulfilled. In the second category there is a binding contract which creates rights capable of enforcement, though the obligation of a party, or perhaps of both parties, to perform depends on fulfilment of the condition and non-fulfilment entitles him to terminate.
>
> Conditions precedent within the first category may produce different consequences. In most cases, but perhaps not in all, a party may be able to withdraw from the transaction before fulfilment of the condition. But in each class of case, the transaction creates no enforceable rights in respect of the subject matter of the transaction unless the condition is fulfilled because, until the occurrence of that event, there can be no binding contract."

56 Mason J also said at 552 that, generally speaking, the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance, rather than a condition precedent to the formation or existence of a contract.

57 As his Honour put it at 552:

> "[T]he condition will not be construed as a condition precedent to the formation of a contract unless the contract read as a whole plainly compels this conclusion."

58 In my opinion, this case is one in which the intention of the parties was that the deed would not become operative as a contract of sale unless and until all of the conditions precedent provided for in the deed had been satisfied or waived. As has been seen, the deadline for the fulfilment of the conditions precedent was extended twice, but the second Deed of Variation was not executed by the appellant and returned to the respondent's solicitors, despite repeated requests to do so.

59 In my opinion, the learned trial Judge was in error in concluding that the pleadings only raised two "real issues", the first of which was whether the agreement constituted by the Original Deed was discharged by non-fulfilment of the conditions precedent prior to 15 August 1997, the extended deadline in the first Deed of Extension. Given the conclusion I have reached that the relevant conditions precedent were required to be satisfied before the deed could have any operation as a contract of sale, there would be no binding contract for the sale of the shares unless and until the conditions precedent to the operation of the deed had been satisfied. Unless the conditions precedent had been waived insofar as they had not been fulfilled, or unless the time for compliance was extended, at that point the contract evidenced by the deed did not become operative because the conditions precedent had not been satisfied.

Waiver and Estoppel; Respondent's Notice of Contention

60 It is in this context that it was contended on behalf of Mercator in its notice of contention that, if the subject conditions precedent conditioned the formation of a contract of sale, the judgment of the learned trial Judge should be upheld in any event on the ground of the estoppel pleaded in paragraphs 7, 8 and 9 of the respondent's amended reply and defence to counterclaim. The contention was that the appellant should be estopped from denying that he executed the Deed of Variation.

61 In my view, this contention was consistent with the execution of the Deeds of Variation by which the deadline for compliance with the conditions precedent was extended by the first Deed of Extension to 21 November 1997 and the subsequent submission on behalf of the appellant of a further deed extending the deadline by a letter dated 27 November 1997. As has been seen, this was followed by a letter dated 10 December 1997 from the appellant's solicitors to Mercator's solicitors, which confirmed that all of the conditions precedent had been satisfied and that settlement should take place on or before 24 December 1997. That letter also enclosed a draft of a deed which further extended the deadline for satisfaction of the conditions precedent to 12 December 1997 and recited that on 10 December 1997, "all of the conditions precedent had been satisfied".

62 The background to this was that by a letter dated 19 August 1997, the appellant's solicitors had asked whether Mercator's solicitors had "any instructions … to extend the conditions precedent deadline". In a further letter to Mercator's solicitors dated 14 October 1997, the appellant's solicitors noted that:

> "The conditions precedent deadline will need to be formally extended by a further written deed of extension."

63 There were other matters that needed attention, but the appellant's solicitors also said in that letter:

> "At settlement, all of the shares currently held by [Mercator] will be cancelled and new shares issued in the name of [the appellant]. The share scrip for these new shares will be issued in denominations that are appropriate for the share scrip lien and the share scrip for the secured shares (issued in the name of [the appellant]) will be deposited with the stakeholder as part of the share scrip lien."

64 In the meantime, by a letter dated 15 August 1997 to the appellant's solicitors, the Minister for Territories consented to the purchase by the appellant of Mercator's shares in the Company. By a letter dated 16 September 1997, the Commonwealth Treasury notified the appellant's solicitors that there were no objections to the acquisition of the shares by the appellant from Mercator.

65 By an undated deed executed on or about 5 November 1997 between the Commonwealth, the Company, the appellant, Mr Woodmore (as a director of Mercator) and Mercator, Mr Woodmore and Mercator were released by the Commonwealth from their obligations under a Development Guarantee to the Commonwealth. Both the Company and the appellant acknowledged that Mr Woodmore and Mercator were released from their obligations under the Guarantee and that the Company and the appellant gave their consent to their release.

66 In the meantime, by a letter dated 29 October 1997, the appellant's solicitors informed Mercator's solicitors that:

> "Factors such as the wellbeing of the Minister for Territories make it difficult to choose a date to which the conditions precedent deadline should be extended. To avoid the necessity for more than one further extension of the conditions precedent deadline, we would prefer to wait until the date when this transaction will be completed is relatively clear and then formally extend the conditions precedent.
>
> The only alternative to this would be to extend the conditions precedent deadline for a relatively long period of time which we understand would be unacceptable to your client."

67 By a letter dated 5 November 1997, the appellant's solicitors informed Mercator's solicitors that:

> "We confirm that the amendment you proposed to the share scrip lien is acceptable to our client and that the share scrip lien is now in an agreed form.
>
> Attached is a copy of a letter we have received from the Minister for Territories indicating that the amendment to the development agreement has been signed by the Commonwealth and that the Minister's consent to the transaction is now unconditional.
>
> We are currently making arrangements to conduct a due diligence meeting. Please advise us if there are any dates in the next ten days on which your client will not be available.
>
> Following the satisfactory completion of the due diligence procedures, our client will proceed to settlement as soon as possible, but in any event in accordance with the terms of the share sale agreement – ie 14 days from the date the due diligence is satisfactorily completed.
>
> Please contact Mark McLinden if you have any questions in relation to this matter."

68 By the letter dated 10 November 1997 to which I have already referred, the appellant's solicitors forwarded to Mercator's solicitors a draft Deed to extend the deadline for satisfaction of the conditions precedent to 21 November 1997 (the "Draft Deed"). That letter is evidence that the parties either expressly or by necessary implication, had agreed to extend the time for fulfilment of the conditions precedent to 21 November 1997.

69 Recital G in the Draft Deed was that:

> "The parties to the Deed have agreed to extend the conditions precedent deadline to 21 November 1997 (the 'Third Conditions Precedent Deadline')."

70 Clause 1 of the Draft Deed provided that:

> "(a) Clause 1(a) of the Second Deed is amended by deleting the date '15 August 1997' and replacing that date with the following date.

'21 November 1997'

(b) Clause 1(b) of the Second Deed is amended by deleting the date '15 August 1997' and replacing that date with the following date.

'21 November 1997'."

71 Clause 2 provided that in all other respects, the terms of the First Deed "are confirmed by the parties to this deed".

72 Under cover of a letter dated 11 November 1997, the appellant's solicitors said that they had forwarded the Scrip Lien and the Deed of Extension to the appellant for execution, together with two share transfer forms which were required in connection with the Scrip Lien.

73 Under cover of a further letter dated 11 November 1997, the appellant's solicitors forwarded to Mercator's solicitors a list of documents required to complete their due diligence inquiries and indicated that they were "finalising a set of corporate and trustee requisitions". They asked Mercator's solicitors to advise "when you have all the documents set out in the attached list". There was then an exchange of letters relating to the due diligence issue which resulted in agreement between the solicitors.

74 By a letter dated 24 November 1997, the appellant's solicitors informed Mercator's solicitors that it would be necessary to extend the conditions precedent deadline as follows:

> "It will be necessary to further extend the conditions precedent deadline. We suggest that the parties abandon all previous extensions and that a deed is prepared which indicates that the original conditions precedent deadline was not met and was extended to the date to be agreed upon. This deed would follow the form of the first extension with the substitution of a new date. Please confirm that this is acceptable."

75 After a further exchange of letters on the subject of "due diligence", it was accepted by the appellant's solicitors by letter dated 25 November 1997 that the "due diligence" would be limited to the matters set out in the Original Deed. Mercator's solicitors also noted in their reply dated 25 November 1997 that:

> "A new extension should be signed by the parties. Would you please prepare same. Our client would not be happy to leave

> the form of extension open ended as indicated by your letter of 24 November 1997. Our client understands from the Purchaser that the funds are available. Could we suggest a date this Friday 28 November 1997.
>
> In this regard would you please also arrange to be presented at settlement a copy of the signed and stamped original of the Deed which does not appear to have been returned to us."

76 Reference was also made to the need to provide substitute share certificates at settlement to be returned to Mercator as part of the security arrangements. It was also noted that it would be necessary to confirm the arrangements for the transfer of funds at settlement. Mercator had been informed that the proposal was to credit the purchase price to Mercator's account at Christmas Island. Alternatively, if the transfer was to take place at settlement, it was indicated that Mercator would prefer to receive a bank cheque for the first instalment. It was suggested that the settlement could take place "this week" at either the office of Mercator's solicitors or the office of the appellant's solicitors.

77 In a letter dated 21 November 1997 to the appellant's accountants, Ashton Read, regarding the extent to which information gained by them in their due diligence examination may be passed on to the appellant, it was agreed that this would be subject to an undertaking not to disclose to the appellant or any person authorised by him any financial information to which he was given access, except such information as may relate to the possibility of any third party interest in the shares the subject of the sale.

78 The due diligence exercise was carried out on 27 November 1997. The accountants carrying out the task indicated that they would provide their report to the appellant's solicitors on Friday, 28 November or Monday, 2 December 1997.

79 In the letter to Mercator's solicitors dated 27 November 1997 to which I have earlier referred, the appellant's solicitors said that:

> "If the report is satisfactory, then we understand that all of the due diligence conditions will have been met.
>
> We believe that this will be the most appropriate point to extend the conditions precedent deadline as it will then be clear that no further extensions of the conditions precedent deadline will be required. A draft deed to extend the conditions precedent deadline is attached with the date left blank. We understand

> that it is our client's intention to proceed to the completion of this transaction as soon as all of the conditions precedent have been met.
>
> Will you please send us copies of the unexecuted share transfer forms for the transfer of the shares in Christmas Island resort Pty Ltd ('CIR') from Mercator Property Consultants Pty Ltd ('Mercator') to Robby Sumampow, with the original executed forms to be made available at the settlement of this transaction.
>
> We will contact Price Waterhouse with a view to arranging for someone to attend settlement to cancel the existing shares [*sic*] certificates for the CIR shares held by Mercator and issue to issue [*sic*] new share certificates for the CIR shares to be acquired by Robby Sumampow in denominations which will be appropriate for the share scrip lien.
>
> Finally, we are waiting for our client's instructions in relation to the method for the payment of the purchase price and will confirm these details as soon as they are available.
>
> If you have any questions in relation to this matter please contact Mark McLinden."

80 The Deed of Extension enclosed with the letter dated 27 November 1997 recited that:

> "A. Mercator, as trustee for The Christmas Island Trust (the 'CI Trust'), is the legal owner of (i) 2 fully paid shares in the capital of Christmas Island Resort Pty Ltd (ACN 009 160 123) (the 'Company') and (ii) 1,099,998 partly paid shares in the capital of the Company.
>
> B. Pursuant to the terms of a Deed For The Sale of Shares (the 'Deed'), Mercator has agreed to sell 2 fully paid shares in the capital of the Company and 1,099,998 partly paid shares in the capital of the Company (the 'Shares') to Sumampow and Sumampow has agreed to buy the Shares from Mercator, subject to the terms set out in the Deed.
>
> C. Woodmore and Linkwater are parties to the Deed.
>
> D. Following the execution of the Deed by Mercator, Woodmore and Linkwater, the Deed was executed by

Sumampow on 16 June 1997. Accordingly the date of the Deed is 16 June 1997.

E. Clause 2.1 requires certain condition [*sic*] precedent to be fulfilled on or before 25 July 1997 (being the date which is 40 days of [*sic* from] the date of the Deed as referred to in clause 2.1 of the Deed) (the 'Conditions Precedent Deadline').

F. It will not be possible for the conditions precedent to be fulfilled on or before the Conditions Precedent Deadline.

G. The parties to the Deed have agreed to extend the conditions precedent deadline to [] November 1997.

AGREEMENT

1. EXTENSION

(a) Clause 2.1 of the Deed is amended by deleting the words which appear in the first two lines of clause 2.1 and replacing those words with the following words.

'The operation of this Deed is subject to the completion on or before [] November 1997 of the following conditions precedent.'

(b) Clause 3 of the Deed is amended by deleting the words 'within the said period of forty (40) days' from the second line of clause three and replacing those words with the following words.

'on or before [] November 1997.'

2. CONFIRMATION

In all other respects the terms of the Deed are confirmed by the parties to this deed."

81 By a letter dated 3 December 1997 by fax to Mercator's solicitors, the appellant's solicitors said:

"Ashton Read delivered a due diligence report yesterday, 2 December 1997. A copy of the report was also sent to our client yesterday. We are waiting for our client to indicate that

> the report is satisfactory. Once our client gives this indication, we will make arrangements for the conditions precedent deadline to be extended (our client will execute by fax), confirm that all conditions precedent have been satisfied and fix a date for settlement. Please confirm that at settlement your client will accept a bank cheque in payment of the first instalment of the purchase price (we understand that your client initially wanted the money transferred directly to his account – this causes timing difficulties with the settlement).
>
> We are making arrangements for replacement share certificates to be issued. The share certificates need to be executed under common seal. This could cause a delay as the common seal is on Christmas Island and mail and courier services to and from Christmas Island are infrequent. It may be possible to shorten this procedure by sending the share certificate to Christmas Island by fax, having the fax copies executed and making the executed fax copies available at settlement for the purpose of the share scrip lien. Please advise whether this is acceptable. We envisage that the original executed share certificates would eventually replace the executed fax copies.
>
> Finally, will you please provide us with a copy of the certificate of incorporation for Mercator Property Consultants Pty Ltd and any change of name certificates evidencing the changes of name which occurred prior to the company adopting the name F P Woodmore Pty Ltd.
>
> If you have any questions in relation to this matter please contact Mark McLinden."

82 The solicitors for Mercator replied by letter dated 4 December 1997 by fax to the appellant's solicitors as follows:

> "We refer to your letter of 3 December 1997. Our client's instructions in relation to the matters raised are as follows:
>
> 1. Please obtain the confirmation in relation to the due diligence as quickly as possible.
>
> 2. Our client will agree to the extension of conditions precedent presently being executed by facsimile, on the understanding that the original extension duly signed will follow the settlement. Of course, at settlement our client

will require the signed and stamped originals of the Contract and the Script Lien.

3. Our client will accept a bank cheque at settlement for the first instalment of the purchase price.

4. Our client will settle on faxed copies of the new share certificates as suggested so long as it is agreed that the original split share certificates are ready for delivery to our client duly signed and sealed, the original, unsplit certificates to be held in escrow by a party to be agreed, (perhaps Price Waterhouse) with neither party having access to them.

5. A copy of the change of name from Sanfran Pty Ltd to F P Woodmore Pty Ltd is attached."

83 The relevant certificate verifying the change of name of the Company was attached.

84 The reply from the appellant's solicitors dated 5 December 1997 was:

"Thank you for your letter dated 4 December 1997. We have passed a copy to our client with a request for his instructions in relation to the due diligence.

We will make arrangements for all documents to be stamped following the settlement of this transaction. Accordingly, at settlement we will have executed (but not stamped) copies of the deed for the sale of shares, the share scrip lien and the deed of extension.

We do not quite understand the proposal set out in paragraph 4 of your letter. We envisage the procedure for the share certificates to be as follows. Original unexecuted share certificates in the name of Robby Sumampow (2 x 1 fully paid share and 2 x 549,999 partly paid shares) are being sent to us by Price Waterhouse. These share certificates will be sent to Christmas Island for execution both by fax and courier. The faxed copies will arrive at Christmas Island before the couriered copies. The faxed copies will be executed and couriered back to us for settlement with the original executed share certificates to follow after settlement. At settlement, the share certificates in the name of your client will be cancelled and sent to Price

> Waterhouse as part of the procedure for amending the share register to reflect the transfer of shares from your client to Robby Sumampow. At settlement, as part of the share scrip lien, you will take possession of two of the executed fax copies of the share certificates. Once the original executed share certificates are available, we will make arrangements with you to exchange the executed fax copies of the share certificates with the original executed share certificates.
>
> Please send us a copy of the original certificate of incorporation for Sanfran Pty Ltd (as opposed to the certificate of incorporation on [*sic* of] change on [*sic* of] name which you have sent to us)."

85 Mercator's solicitors replied by a letter dated 8 December 1997 as follows:

> "We refer to your letter of 5 December 1997 written in response to ours of 4 December.
>
> As to the two matters raised we would comment as follows:
>
> 1. We acknowledge your advice that the documents have to be stamped in Queensland as the home state of the company. However, our client of course will need security in relation to provision of a stamped copy of the agreement extensions and to the scrip lien. Perhaps the matter could be resolved by you presenting at settlement a letter from your office signed by a principal that you have funds in trust sufficient to pay the stamp duty and irrevocable instructions to proceed and effect the stamping.
>
> 2. As to the scrip lien. We will recommend to our client to [*sic* adopt] the procedure outlined in your letter with one addition, namely that there be provided at settlement a letter signed by a principal of Price Waterhouse that they acknowledge the position and status of our client as a security holder for the balance of the shares and that no transfer or other dealing of such shares will be permitted without clearance of our client's interest; and further an acknowledgement that upon the issue of new certificates those the subject of the security will be forwarded to our

> client upon them becoming available, unless otherwise directed in writing by our client.
>
> Would you please confirm these amendments will be acceptable."

86 It was in this context that, significantly, the appellant's solicitors wrote to Mercator's solicitors by the fax to which I referred earlier and dated 10 December 1997 as follows:

> "We confirm that all of the conditions precedent for the above named transaction have been satisfied. In accordance with the terms of the deed for the sale of the shares, settlement should take place on or before 24 December 1997.
>
> Attached is a draft deed of extension which extends the conditions precedent deadline to Friday 12 December 1997. Please confirm that the attached draft is acceptable. If it [*sic* is] acceptable, we will engross the deed and send copies of the engrossed deed to you to enable it to be executed by your clients.
>
> At settlement the share certificates for the shares which are the subject of the share scrip lien will be delivered to you as stakeholder. Please confirm that at settlement, you will provide a letter in which you undertake to hold these shares certificates as stakeholder in accordance with the terms set out in the deed of the sale of the shares and the share scrip lien."

87 In my opinion, this letter confirmed on behalf of the appellant that all the conditions precedent to the transaction had been satisfied so that, in accordance with the Deed for the sale of the shares, settlement should take place on or before 24 December 1997. In other words, the conditions precedent to the operation of the Deed as a contract for the sale of the subject shares had been satisfied as of 10 December 1997, so that the contract evidenced by the Deed became operative and enforceable. Consistently with that view, a draft Deed of Extension was enclosed, which extended the deadline for satisfaction of the conditions precedent to 12 December 1997. Mercator's solicitors were asked to confirm that the draft Deed was acceptable so that it could be engrossed for execution.

88 It was also confirmed that, at settlement, share certificates for the shares to be the subject of the Scrip Lien would be delivered to Mercator's

solicitors as stakeholder in accordance with the terms of the Deed for the sale of the shares and the Scrip Lien.

89 By a letter dated 24 December 1997, the appellant's solicitors enclosed four copies of the Deed of Extension for execution and return. The letter stated that:

> "We have made arrangements for fax copies of both the deed of extension and the deed of variation to be executed by [the appellant]. We will arrange for [the appellant] to execute the original deeds once they have been executed by your clients and returned to us."

90 The proposed Deed of Extension required amendment to Recital G which was to the effect that:

> "The parties to the Deed have agreed to extend the conditions precedent deadline to [ ]."

91 The amendment proposed by Mercator's solicitors was that the Recital G be amended to read:

> "The parties to the Deed agree that the conditions precedent were satisfied on 8 December 1997."

92 As has been seen, this was factually correct. In a letter dated 23 December 1997 to Mercator's solicitors, the appellant's solicitors proposed a Deed of Variation which recited the extension of the deadline for satisfying the conditions precedent to 12 December 1997 and that on 10 December 1997, the appellant's solicitors had "advised Mercator's solicitors that all the conditions precedent had been satisfied".

93 It was also recited in the Deed of Variation that the first instalment of the purchase price of $2.6 million was required to be paid on or before 24 December 1997 and that the parties had agreed to extend the date for payment of the first instalment. Provision was made for payment of the first instalment by way of a deposit of $250,000 on the date of the Deed with the balance of $2.3 million to be paid on or before 28 February 1998. Interest was payable on the balance outstanding at the rate of 10 per cent from the date of the Deed, but excluding the date upon which the balance was paid. In all other respects, the Original Deed was confirmed.

94 There was put in evidence at the trial a photocopy of the Deed of Variation as signed by the appellant undated, but faxed on 24 December

1997 on his behalf to his solicitors in Perth, who provided a copy to Mercator's solicitors on the same day. The Deed of Variation recited the Deed dated 16 June 1997 and that:

> "F. The parties to the Deed have agreed to extend the Conditions Precedent Deadline to 12 December 1997.
>
> G. On 10 December 1997, Sumampow, by his solicitors, advised Mercator's solicitors that all of the conditions precedent has been satisfied.
>
> H. The purchase price for the Shares is $5,100,000 (the 'Purchase Price'). Pursuant to clause 4.3 of the Deed, the first installment of the Purchase Price of $2,600,000 (the 'First installment') is required to be paid on or before 24 December 1997.
>
> I. The parties to the Deed have agreed to extend the date for the payment of the First installment in accordance with the terms set out in this deed."

95 Provision was also made for the deletion of cl 4.3(a) of the Deed and its replacement by the following clause:

> "The first installment of the Purchase Price $2,600,000 shall be paid by making a deposit of $250,000, with the balance of the first installment of the Purchase Price, being $2,350,000 (the 'Balance'), to be paid on or before 28 February 1998. The $250,000 deposit shall be paid on the date of this deed. Interest at the rate of 10 per cent per annum shall accrue on the Balance from and including the date of this deed to but excluding the date on which the Balance is paid. Interest payable pursuant to this clause shall be paid at the same time as the Balance is paid. If the Balance is not paid on or before 28 February 1998, then Vendor will be entitled to retain the deposit of $250,000. For the purposes of clause 5.1, the Transfer Date shall be the date on which the Balance is paid."

96 By a letter dated 7 January 1998 to Mercator's solicitors, the solicitors for the appellant said:

> "We are taking steps to lodge the deed for the sale of shares for assessment with the Queensland Stamp Office. To avoid incurring fines for the late lodgement, this deed needs to be

> lodged on or before 8January 1998. We would also like to lodge the associated documents - the deeds of extension and the deed of variation.
>
> Will you please arrange for your clients to execute the deeds of extension and the deeds of variation and return the executed copies of the deeds to us.
>
> If you have any questions in relation to this matter please contact Mark McLinden."

97 Mercator's solicitors replied by letter dated 8 January 1998 as follows:

> "We refer to your letters dated 24 December 1997, and 7 January 1998.
>
> Please find enclosed for execution by your client, and lodgement for stamp duty, the following documents:-
>
> 1. Deed of Variation (x4); and
>
> 2. Deed of Extension (x4).
>
> Faxed copies of these documents have already been executed by the parties. We have been provided with a copy of the faxed copy of the executed Deed of Variation and enclose a copy of the same. We note that in your letter dated 24 December 1997 you advised that you had arranged for your client to execute the faxed copy of the Deed of Extension. Please forward us a copy of the same.
>
> As soon as these documents have been executed by your client, please confirm the same. Further, please confirm that you will forward us our client's copy of the documents as soon as the same have been stamped."

98 The letter also recorded that faxed copies of these documents had been executed by the parties. Confirmation was sought from the appellant's solicitors that the relevant documents had themselves been executed by the appellant. By 16 January 1998, confirmation had not been received.

99 In the meantime, by a letter dated 24 December 1997, Mr McPhee, a member of the firm of solicitors representing Mercator, was authorised to

receive the cheque payable to Mercator for the sum of $250,000 in return for a sealed copy of the Deed of Variation duly executed on the part of Mr Woodmore and Mercator. The cheque was duly delivered to Mr McPhee at settlement.

100 The necessary documents also included a Deed of Extension and a Deed of Variation. These were duly executed by Mercator. At that time, Mercator understood that faxed copies had already been executed by the appellant in accordance with the above arrangement. The solicitors for the appellant had informed the solicitors for Mercator by their letter dated 24 December 1997 that they had arranged for the appellant to execute the faxed copy of the Deed of Extension.

101 By letter dated 16 January 1998, the solicitors for Mercator sought confirmation from the appellant's solicitors whether or not the appellant had executed the relevant documents. The appellant's solicitors replied by a letter dated 28 January 1998 that the appellant's office was closed for the Chinese New Year from 26 January to 8 February 1998 and would re-open on 9 February when the appellant would execute the outstanding documents. By a letter dated 9 February 1998, Mercator's solicitors sought confirmation that the appellant had attended to execution of the documents and inquired when they could anticipate payment of the balance in the Deed of Variation. No reply was received to that letter.

102 By a further letter dated 23 February 1998, the terms of which I have set out above, Mercator's solicitors noted that the original signed documents had not been returned from the appellant. As has been seen, the letter went on to say that the solicitors were instructed that unless some alternative arrangement was arrived at, settlement would be required on the due date, namely 27 February 1998.

103 By a Deed of Variation dated 27 February 1998, the parties recited that they had "agreed to extend the Conditions Precedent Deadline to 12 December 1997" and that, "On 10 December 1997 [the appellant], by his solicitors advised Mercator's solicitors that all of the conditions precedent had been satisfied". It was further recited that the first instalment of the purchase price of $2.6 million was required to be paid on or before 24 December 1997; the parties had agreed to extend the date for payment of the first instalment to 28 February 1998; and that:

> "In connection with this extension, [the appellant] paid Mercator a non-refundable deposit of $250,000."

104 Payment of the first instalment was not made on the due date or at all.

105 By a letter dated 16 March 1998, Mercator's solicitors requested a copy of the Deed of variation executed on 27 February. By a letter dated 19 May 1998, Mercator's solicitors noted that they had not received Mercator's copies of the duly executed and stamped Deed for the sale of the shares and the subsequent deeds of extension and variation and asked when they could anticipate receiving them. The appellant's solicitors replied that they were "currently experiencing some difficulty in getting instructions from our client".

106 By letter dated 20 May 1998, Mercator's solicitors required advice on the following:

> "1. The executed deeds which have been lodged with the State Revenue Department and the status of the same (including the date of lodgement and the applicable State Revenue Department reference number).
>
> 2. The executed deeds which have not been lodged with the State Revenue Department and advice as to when the same will be lodged for stamping."

107 This request was followed up by further letters dated 27 May and 2 June 1998 and a response was requested "as a matter of urgency", noting that the balance of the purchase price was payable on or before Friday, 31 July 1998. The letter asked whether the appellant was "in a position or proposes to settle before 31 July 1998". No reply was received. Mercator's solicitors wrote again on 10 June 1998 requesting the appellant's solicitors' "urgent attention to this matter". The reply dated 11 June 1998 explained that they were "… still experiencing some difficulty in obtaining instructions" from the appellant. Further letters to the appellant's solicitors dated 6 and 12 August 1998 received a similar response. It is against this background that grounds 7, 8 and 9 of the grounds of appeal will fall to be considered. It is convenient, however, to continue the narrative.

108 In the meantime, in a letter dated 19 June 1998 to the appellant's solicitors, Mercator's solicitors indicated that Mercator was growing "increasingly concerned" at the activities of the Directors of the Company and the way in which they continued to run the Company, one such Director being the appellant. They enclosed letters to the Company and the Directors dated 19 June 1998 regarding the notice to the Company by

the Minister to show cause why the casino licence should not be revoked; the failure of the Directors to engage in any corporate administration with a view to the continuing operation of the Resort; and the non-payment of both employees' wages and accounts to creditors. A request was made for advice as a matter of urgency what measures the Directors of the Company intended to take to:

> "Retain the benefit and the value of the casino licence for the Company; and recommence day to day operations of the resort and its associated activities on the island."

109 It was stated that:

> "Our client need not remind you that the casino licence held by [the Company] represents a large portion of the total value of the assets held by [the Company] and any loss or revocation of the licence by the Government would see the value of [the Company] and its shares fall irrepairably [*sic*].
>
> As a result we are instructed to advise that our client will, pending a satisfactory response to the issues raised herein take matters into its own hands to preserve the assets of [the Company] accordingly."

110 In addition, there were letters to each of the Directors, including the appellant, dated 19 June 1998, which indicated that Mercator was concerned that the addressee Director was not discharging the duties attaching to his office and enclosing a copy of the letter to the Company outlining Mercator's major concerns and seeking an urgent response "failing which our client will have no choice but to take matters into its own hands".

111 At that stage the appellant's solicitors were acting not only on behalf of the appellant in his personal capacity, but also on behalf of the Company to deal with the Government in relation to the notice to show cause.

112 By a letter to the appellant's solicitors dated 26 June 1998 which I have set out above at pages 18 – 20, Mercator's solicitors again sought information concerning the company's financial situation.

113 On 3 July 1998, Mercator's solicitors commenced proceedings in the Federal Court at Perth including a notice of motion for the appointment of a Receiver and Manager of the Company supported by an affidavit of

Mr Woodmore and a nomination of the proposed Receiver and Manager. By a letter dated 6 July 1998 on behalf of the Company, the appellant's solicitors responded to the Minister's notice to show cause why the licence should not be cancelled. As to ground 1 in the notice of failure to meet financial commitments when due and payable, the Company's response was as follows:

> "The Honourable Minister's notice refers to sums due to Christmas Island Power Authority, National Jet Systems Group, Christmas Island Travel Pty Ltd and to CIR employees.
>
> CIR does not dispute that there are sums due to these parties, but it has been unable to make the necessary payments due to circumstances entirely beyond its control, and notwithstanding its desire to make these payments and its financial capacity to do so.
>
> CIR has encountered difficulties and delays in moving funds out of Indonesia to enable it to pay these liabilities, as a result of the significant events within Indonesia in recent months. Changes in official Indonesian policy have, for practical purposes, temporarily prevented funds held within Indonesia from being transferred to Australia or any other foreign country.
>
> To enable the necessary payments to be made to the employees and to the three creditors named in the notice, CIR is raising funds from sources outside Indonesia. This measure is now well advanced. At the date of this submission, CIR expects to make full payment of the relevant liabilities within a matter of days. As soon as that has occurred, CIR proposes informing the Honourable Minister.
>
> CIR does not expect that this difficulty in obtaining access to funds within Indonesia will be an enduring one. Rather, it is taking steps to ensure that for the intended re-opening of the Resort, (as described elsewhere in this Submission,) there will no [*sic*] be no delays in accessing required funds.
>
> In all of these circumstances, CIR submits that Ground 1 is not a proper basis upon which the licence could be cancelled. Rather, when these relevant considerations are taken into account, and a reasonable application of the broad discretionary power of s. 58 of the *Casino Control Ordinance 1988* is considered, it is evident that all of the objectives and purposes

> of the Ordinance can and should be achieved by other means. The broad discretionary power conferred by s. 58 must only be exercised reasonably, and not arbitrarily: *Roberts v Hopwood* [1925] AC 578."

114 Ground 2 in the Minister's notice related to the absence of a new casino operation agreement approved by the Minister. The response to this ground was as follows:

> "The term of appointment of the Administrator previously appointed by the Federal Minister expired on 6 May 1998.
>
> At that time, practically no business was capable of being attracted to the Resort, due to the Asian economic downturn, its impact upon the Resort's major geographical markets, (Indonesia, Malaysia, Thailand and Korea) and the then-prevailing policy of the Indonesian authorities in relation to flights between Indonesia and Christmas Island. These circumstances were all beyond the control of CIR.
>
> In these circumstances, CIR determined that for the time being, the Resort should not attempt to trade, and CIR's efforts should be focused upon solving the problems which it was within its power to solve, whilst awaiting the expected stabilisation of the market, enabling the Resort to resume trading at an appropriate future time.
>
> As is described elsewhere in this Submission, CIR is now planning the resumption of Resort trading activities early in 1999.
>
> To meet the necessity for an operator and an operating agreement which have been approved by the Honourable Minister, CIR proposes that there should be another administrator appointed, or that a new operator and operating agreement approved by the Honourable Minister should be put in place. As CIR develops it [*sic*] planned resumption of trading activities, it intends to approach the Honourable Minister's staff to further discuss this proposal. In the very short term, CIR remains of the view that there is no practical purpose to be served by the appointment of an administrator or operator, as the Resort business is not operating, as a result of matters beyond the control of CIR.

> In these circumstances, CIR submits that the present absence of a new casino operation agreement is not a ground upon which the Honourable Minister could, in the proper exercise of his discretion, cancel the casino licence. The Honourable Minister should not inflexibly apply the requirement for a casino operation agreement, irrespective of the merits: *R v Port of London Authority* [1919] 1 KB 176."

115 A number of other significant factors were relied upon in support of the submission that cancellation of the casino licence would not be a proper exercise of the Minister's discretion. These included Indonesia as the main geographical market, but it had not been possible to exploit the market in the absence of a regular, scheduled airline service between Indonesia and Christmas Island. It was noted that there had been a "shift in policy by the Indonesian authorities" in relation to flights between Christmas Island and Indonesia. It was submitted that the past and present air traffic difficulties had occurred despite the best efforts of the Company. Coupled with the Company's intention to re-open the resort, it would not be a proper exercise of ministerial power for the licence to be cancelled. This would fail to take relevant factors into account with the result that the decision would be void: ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd & Ors*** (1986) 162 CLR 24.

116 A second reason related to progress in the proposed involvement of the Sampoerna Group. It was pointed out that the Minister had for some months been aware of the developing relationship between the owners of the Resort and the Sampoerna Group which, by subscribing further capital, would double the issued capital to 22,000,000 ordinary shares of $1 each for which the Minister had given conditional consent by a letter dated 16 June 1998 addressed to Mallesons Stephen Jaques. The Company welcomed this and was continuing its consultation with CIGL, one of the Sampoerna Group of Companies for the purpose of advancing the transaction, including addressing the conditions contained in the Minister's letter to Mallesons. It was contended that this rendered it inappropriate for the licence to be cancelled. It was submitted to the Minister that cancellation would not be in the public interest.

117 It was also contended that the Company had supported the casino business and the island community in good times and bad, having injected some $17 million in the previous 12 months notwithstanding the worsening south-east Asia economic crisis and with only an expectation of breaking even. However, conditions had reached the stage whereby to continue to support the business as a going concern would have meant

sustaining monthly losses of $1.5 million to $2 million for an indefinite period. As a consequence, the Resort was closed on 23 April 1998, pending improvements in prevailing conditions which would enable the Resort to be re-opened as soon as possible.

118 Details were provided of services contributed by the Company to the island community which were not normally the responsibility of business. These included:

> "The provision of air services between the Christmas Island, Cocos Islands, mainland Australia and South-east Asian destinations. These services gave the island communities access to regular flights and more importantly, regular and frequent freight services which would otherwise have not been available."

119 As a result of the massive downturn in gaming and tourist activity, the service was costing the Resort in excess of $250,000 per month. Contributions had also been made by way of accommodation for employees, the provision of employment, the payment of local rates and taxes as well as direct support for other island businesses.

120 The point was made that the difficulties which had arisen in relation to outstanding financial obligations to employees and creditors were due to the inability to transfer the necessary funds from Indonesia to Christmas Island. In this respect, it was the intention of the Company and its majority shareholders to re-open the casino resort in early 1999.

121 By a direction under the *Christmas Island Act 1958* and s 58 of the *Casino Control Ordinance 1988*, the Minister directed the Company to meet its financial commitments to various parties within 14 days and provide him with an acknowledgement of receipt or other evidence of those financial commitments being met saying:

> "… I declare that I have not completed my consideration of, or determined that I need no further action on, the responses given by [the Company] to the second ground set out in the said notice to show cause, namely: [the Company] having entered into a casino operation agreement which has ceased to be in force, has not entered into a new casino operation agreement approved by me."

122 At the same time, the solicitors for Mercator were pressing for the provision of a list of creditors or employee liabilities of the Company

verified by a Director as true and complete as well as providing verification of the availability of the funds required to pay all necessary liabilities.

123 At that stage, the draft accounts as at 30 June 1997 showed that the Company was in deficit by some $4 million and that the major creditor was the appellant. No more recent accounts had been supplied. The Minister had directed the Company to pay its outstanding creditors by 24 July 1998, while also declaring that he had not made a decision in relation to the other matters referred to in his original notice. It would only be if the creditors were paid that the other matters would be considered. No response had been received by Mercator's solicitors to a request for details of the steps the Company proposed to take and was able to take to satisfy the Minister's requirement.

124 Mercator's solicitors made it clear that unless Mercator could be satisfied that the requirements of the Minister could and would be met within the time required, Mercator would have no option but to proceed with the substantive application for the appointment of a Receiver and Manager of the Company. A reply was required by the close of business on Friday, 17 July 1998.

125 On 15 July 1998, the Federal Court ordered that service of the relevant application be effected on the Company, the appellant, and his fellow directors of the Company by substituted service by delivery by private agent to the Company and the directors, at their respective addresses on the Australian Securities Commission record, of the various documents or, alternatively, personal service at such addresses; advising by fax the registered office at Price Waterhouse Coopers in Cairns of such service; requesting Price Waterhouse Coopers to advise its instructing director of the Company that service had been effected on Corser & Corser (the appellant's solicitors); and informing Mr Herman Gani (the appellant's representative) that service had been effected upon Corser & Corser and that Price Waterhouse Coopers had been advised of that accordingly.

126 In the meantime, the appellant's solicitors informed Mercator's solicitors that:

> "We transmit a listing of outstanding payments of [the company], for your client's information.
>
> We are instructed to reiterate to you that [the company] has only good intentions, so far as the satisfaction of these items is

> concerned. Mr Gani informs us that he expects to be able to inform us of the final arrangements to meet these obligations on next Monday or Tuesday. We will report to you again when we receive the further information from Mr Gani."

127 At that stage the total amount owing by the Company was $2,354,262.71.

128 By letter dated 17 July 1998, Mercator's solicitors protested that the list of outstanding payments was not a list of creditors as requested, but a summary of totals. A detailed list was required including the identity of creditors. There was information that National Jet Systems was owed $500,000 but no such figure appeared in the list. In addition, the percentage of outstanding tax as against salaries due was over 80 per cent indicating that group tax had not been paid on time which would involve additional liabilities, including penalties.

129 By letter dated 20 July 1998, the appellant's solicitors indicated that a detailed list of creditors comprising 48 or 50 pages in length had been sent by mail. By letters dated 23 July 1998, Mercator's solicitors notified each of the directors of the appointment of an interlocutory receiver of the Company and informed them that each of them had been joined in the application as a second respondent. Service had been effected by way of substituted service pursuant to an order made in the Federal Court on 13 July 1998, the service being effected on the same day.

130 Notice was given to move the Federal Court for the appointment of a Receiver of the Company on 28 July 1998. The directors were invited to be represented. Notice of the proposed application was given to the Minister for Territories. In the meantime, notice was also given by the solicitor for former employees of the Company that he was instructed to file an application to wind up the Company in insolvency on behalf of former employees, who were unpaid creditors. It was indicated to Mercator's solicitors that those persons had agreed to defer filing their applications pending the determination of Mercator's application, providing that the decision was not significantly delayed.

131 By letter dated 24 July 1998, the solicitors for the Company informed the Minister that:

> "… [A]s a result of matters beyond the control of the company and its major shareholder, [the appellant], the company does not expect to be able to make the payments required by your second notice, by the due date of 24 July 1998. This inability is

> anticipated, despite the significant efforts which have been made and continue to be made by the company and [the appellant], to meet the deadline."

132 The letter explained the difficulty of moving funds out of Indonesia with the result that the appellant was seeking funds through banks outside Indonesia which he would lend to the Company, to enable it to make the necessary payments. Negotiations, however, had not been concluded. There was an indication that some four weeks would be necessary to complete the process.

133 It was pointed out that on 19 June 1998, the Supreme Court of Western Australia had decided that some $3 million in payroll tax and interest was recoverable by the Company from the Commonwealth, subject to the delivery of the formal judgment within the next 10 days. A request had been made to the Australian Government Solicitor to arrange payment, but that request was refused. The letter went on to say:

> "The company now asks you to kindly arrange for the Commonwealth to make available the sum of approximately $3,000,000 to which the company is entitled pursuant to the Supreme Court decision, so that the payments you require can be made. Subject to approval of precise figures, the company would be willing for the payments to be disbursed direct from the Commonwealth to the relevant claimants. Some National Jet System invoices have only been received in the last week or so. They are presently at Christmas Island, being checked."

134 On 24 July 1998, notice was given that the application by Mercator for the appointment of an interlocutory receiver would be heard on 28 July 1998. On 28 July, the Minister cancelled the licence of the Company to operate a casino on the territory of Christmas Island. On 29 July 1998, in the Federal Court, Nicholson J appointed Mr Geoffrey Herbert Receiver and Manager of the property of the Company until further order. Nicholson J found that Mercator had entered into the contract for the sale of its shares in the Company to the appellant. Originally, the settlement date for such sale was 24 December 1997. The current date for settlement was 31 July 1998, which Nicholson J noted was approximately two weeks from the date on which those reasons were delivered. If settlement was not completed on 31 July 1998, the appellant would retain its shares, but its case was that the value of those shares was now at extreme risk.

135 Mercator was unable to obtain documentation in relation to recent corporate developments, including the financial statements to the end of the financial year 1997, although that position had now been significantly remedied by the provision of some documentation.

136 Nicholson J went on to say that:

> "The applicant is concerned that the value of the casino licence which represents the largest portion of the total value of the assets of [the Company] is at risk. The licence was granted pursuant to cl 53 of the *Casino Control Ordinance 1988*. It is to operate from 5 November 1993 for an initial period of 5 years. In or around May 1997, the Australian Government suspended the casino licence and appointed, pursuant to the ordinance, an administrator to the casino for a period of 12 months."

137 The Company had not nominated or sought the approval of the Australian Government for the appointment of a casino management company to replace the Government administrator. Pursuant to s 58 of the Ordinance, the Minister had directed on 10 July 1998 that within 14 days the Company meet its financial commitments to the Christmas Island Power Authority, and the other parties to which I have earlier referred as they became due and payable and provide him with evidence of payment. Reference was made to the statutory demand served upon the Company on behalf of the workers in the casino. No action had been taken by the Company in respect of this. By s 459G of the *Corporations Law* the Company was now estopped from challenging the validity of that notice. There was concern that, pursuant to cl 58(1)(k) of the Ordinance, these circumstances would give rise to a further ground for cancellation of the casino licence.

138 The appellant had become aware that the Company had recently been awarded a judgment in the Supreme Court of Western Australia for the sum of $3 million, being a rebate of overpaid payroll tax. The appellant was concerned to ensure that any such funds owing to the credit of the Company not be disbursed offshore, but retained for the benefit of the Company as a whole. The appellant in the payroll tax proceedings was a director resident in Singapore. Other directors were shown as resident in Indonesia.

139 Under the Convention between the United Kingdom and the Netherlands regarding legal proceedings in civil and commercial matters of 31 May 1932, which continued to apply as between Australia and

Indonesia, service is permitted through diplomatic channels, by mail or by private agent. Information from the international civil procedures section of the Commonwealth Attorney General's Department indicated that service by a private agent was preferable in order to avoid delay in obtaining service through diplomatic channels. The position was similar in the case of a party in Australia who wished to serve a party in Singapore with documents issued by an Australian Court.

140 In the result, Nicholson J found that it was impracticable to serve the documents in accordance with Order 8 and that:

> "The principal assets of [the Company] in which the applicant has an interest as a 10 per cent shareholder are all highly at risk. It is possible that the principal asset, the casino licence, will be vulnerable to cancellation within two weeks and that leasehold and other interests will likewise be subject to termination. If there are any remedies open to the applicant, it is of the highest urgency that they be acted upon and be considered by a court."

141 In the result, the learned Judge found that it was necessary for the Court to make an order pursuant to O 7 r 9 specifying steps which may be taken for the purpose of bringing the relevant documents to the notice of the three directors concerned. As his Honour said:

> "I am prepared and consider it proper that orders be made for service on them in a number of ways. The first would be by service upon solicitors who are known to have acted for them in respect of the share sale. The second would be by actual service by a private agent to each of them at their address on the corporate record of the relevant documents in an envelope marked Urgent; alternatively, personal service at such address; thirdly, by advising the auditors and accountants acting for [the Company] of the service on the solicitors and requesting them to advise the instructing director, namely, [the appellant], and also advising the service on the solicitors and the accountants to the third-named second respondent whom it is presently believed, as has been stated, will be personally served."

142 By an order made on 7 October 1998, the Receiver and Manager of the assets of the Company was given the power of sale, realisation and disposition in respect of certain "non-core assets" with provision for further reference to the Court should that be considered necessary.

143 In the meantime, under cover of a letter dated 6 August 1998, Mercator gave notice of default in relation to the agreement by the appellant to purchase Mercator's shares which was served on the appellant's solicitors. An assessment had been issued in respect of the stamp duty payable on the documents lodged by the appellant's solicitors in circumstances where the appellant was responsible for payment of the stamp duty. Confirmation was sought that the appellant would attend to payment forthwith. It was noted that the copies of the Deed of Variation which were supposed to have been executed by the appellant on 24 December 1998 had not in fact been executed. The appellant's solicitors were asked to identify the location of the Original Deed and explain why it had not been lodged with the State Revenue Department. No explanation was forthcoming.

144 The Deed of Variation, which was executed by Mercator, Mr Woodmore and Linkwater on 27 February 1998, had also not been lodged with the State Revenue Department. Despite the requests by Mercator's solicitors for a copy of the Deed of Variation, they had not been provided with a copy. The appellant's solicitors were asked why the Deed of Variation had not been lodged with the State Revenue Department and a request was made for them to forward a copy forthwith. Again there was no explanation.

145 By a further notice of default dated 12 August 1998, notice was given to the appellant and his solicitors that the appellant was in default under the Original Deed as varied by the Deeds of Variation dated 24 December 1997 and 27 February 1998, in respect of the purchase of the two fully paid shares in the capital of the Company and 1,099,998 partly paid shares in the Company. Reference was made to the non-refundable deposits paid of $250,000 on 24 December 1997 and $350,000 on 4 March 1998. The balance of the purchase price in the sum of $4.5 million was payable on or before 31 July 1998 ("the settlement date"). As at 31 July 1998, interest had accrued to Mercator and was payable by the appellant to Mercator on the date the balance of the purchase price was paid ("interest").

146 The total amount of interest to 31 July 1998 was $162,876.71. There was a further amount of interest at the rate of 10 per cent per annum on the sum of $4.5 million which was payable in respect of the period 1 August 1998 up to but excluding the date on which the balance of the purchase price was paid to Mercator by the appellant.

147 Recital C of the Notice of Default by Mercator was as follows:

"As at the Settlement Date the:

(i) Vendor was ready, willing and able to proceed with the sale and purchase of the shares; and

(ii) Purchaser did not proceed with the sale and purchase of the Shares and did not pay to the Vendor in accordance with the Deed:

(a) the balance of the Purchase Price; and

(b) the Interest."

148 The notice went on to specify in paragraph 1 that the Purchaser was in default and was directed to forthwith pay by bank cheque to the Vendor the purchase price without deduction of the non-refundable deposit; the interest and the additional interest whereupon Mercator "shall in accordance with the Deed deliver to [the appellant] the transfer of share forms of the Shares (duly executed by [Mercator]) and the share certificates in respect of the Shares".

149 Paragraph 2 of the notice gave the appellant notice to proceed in the manner set out in par 1 within a period of seven days from the date of the notice or Mercator:

> "… shall proceed to enforce its rights and remedies available to it in respect of [the appellant's] default including but without limitation the commencement of an action to compel [the appellant] to comply with its obligations under the Deed."

150 It was against this background that Mercator commenced its action against the appellant.

Ground 2: Contract by Deed

151 Ground 2 of the grounds of appeal contended that:

> "The learned Judge erred in finding that that contract 'remained on foot' and that the Appellant 'waived compliance with the convention to contract by deed alone' and should have found that there was no agreement to extend time for the fulfilment of the conditions precedent after 15.8.1997.
>
> PARTICULARS
>
> (a) The parties contracted by deed alone.

(b) There was no contract if the conditions precedent were unfulfilled in the stipulated time.

(c) The Respondent consistently insisted on short periods of time for the fulfilment of the conditions precedent, or extension of that time.

(d) The learned Judge accepted the evidence of Mr Gani that the Respondent (through Mr Woodmore) had accepted that the Appellant could 'walk away from the deal' after 15.8.1997, and that 'we can extend the conditions precedent period then if he could be flexible on the payment'.

(e) The Respondent was flexible for some time but eventually lost patience and tore up all proposed arrangements for extension of time (Respondent has allowed the Appellant until 31.7.1998 to pay, but had a receiver appointed before then).

(f) The last deed that extended time was that ('First') Deed of Extension, executed on 1.8.1997. That Deed expired on 15.8.1997.

(g) No other 'Deeds' were signed by the Appellant.

(h) The letter of 10.12.1997 did not extend time.

(i) There is no evidence of any agreement to extent time after 15.8.1997."

152 As was the case at trial, it was argued on behalf of the appellant that the parties had adopted the convention to contract by deed alone. Hence, as no deed had been executed extending the time for fulfilment of the conditions precedent beyond 15 August 1997, there was no longer any contract between the parties. I am unable to accept this argument. My reasons for doing so differ somewhat from those of the learned trial Judge. I have stated above that, in my opinion, the conditions precedent conditioned the formation of the contract, not merely its performance. However, in my opinion, notwithstanding the expiration of the various deadlines, the conduct of the appellant, including the instructions he gave to his solicitors as evidenced in the correspondence, was such that he led Mercator to believe that the time for compliance with the conditions

precedent would be extended and the transaction completed within the extended time.

153 The parties had agreed to an extension of the deadline for satisfaction of the conditions precedent to 12 December 1997 to enable the contract to be entered into, as set out in the letter from the appellant's solicitors to Mercator's solicitors. The appellant by his solicitors had informed Mercator's solicitors by letter dated 10 December 1997 that all of the conditions precedent had been satisfied. It was in this context that the parties then entered into the "additional agreement" by which Mercator extended the time for payment.

154 There was no point taken at any time that the appellant's solicitors had acted at any stage in the transaction without the authority of the appellant. On the whole of the evidence, it is safe to conclude that the appellant's solicitors acted throughout in accordance with the appellant's instructions, including, in particular, the arrangement that faxed copies of the significant contractual documents involved in the transaction would be executed and exchanged in the final form in which they had been agreed so as to facilitate settlement.

155 Once this point had been reached, the position, as Heenan J correctly held, was that:

> "… after fulfilment of the conditions on 10 December 1997, the parties entered into the 'additional agreement' whereby Mercator extended the time for payment of the purchase price. The recitals in the first Deed of Variation, which [the appellant] signed on 4 January 1998 are conclusive evidence of his acknowledgement not only that the conditions precedent had been fulfilled, but also that their fulfilment was within time. As we have seen, he paid the substantial sum of $600,000.00 pursuant to the additional agreement. In those circumstances, clearly the appellant waived compliance with the convention to contract by deed alone."

156 For these reasons, ground 2 of the grounds of appeal fails.

Ground 3: Mr Gani's letter to the Minister

157 Ground 3 contended that the learned Judge erred in finding that Mr Gani's letter dated 5 June 1998 to the Minister indicated that the relevant contract was still "on foot" and should have found that it

indicated that the parties were attempting to "put the contract back on its feet" given the evidence of Mr Gani.

158 As pleaded in par 8 of the statement of claim, Mercator pleaded that by the Deed of Variation undated, of which a copy was faxed by the appellant to his solicitors, both Mercator and the appellant agreed to extend the conditions precedent deadline to 12 December 1997. In his defence, the appellant denied that he had executed any such deed and pleaded further or alternatively that, if there was any agreement to extend time, "such agreement was subject always to the formalities of the execution as a Deed".

159 In par 9 of its statement of claim, Mercator pleaded that by the letter dated 10 December 1997, the appellant's solicitors advised Mercator's solicitors that all the conditions precedent in cl 2.1 of the Deed had been satisfied. Somewhat surprisingly, the appellant admitted in his defence that this letter was written, but otherwise denied par 9 of the statement of claim. In my opinion, that communication would serve no purpose unless the parties were acting on the common assumption that the time for compliance with the conditions precedent had been extended as contended by Mercator.

160 It was against this background that the parties entered into the further Deed of Variation dated 24 December 1997 to amend cl 4.3 of the Original Deed so that the first instalment date and the amount of the first instalment was to be paid by the appellant in two further steps, namely, payment of $250,000 on 24 December 1997 and $2.35 million on or before 28 February 1998.

161 The payment of the $250,000 on 24 December 1997 was duly made. Interest was to accrue on the sum of $2.35 million at the rate of 10 per cent per annum from 24 December 1997, excluding the date on which the capital sum was paid.

162 By a further Deed of Variation dated 4 March 1998, Mercator and the appellant agreed to amend cl 4.3 so that the balance of the purchase price was to be paid by the appellant in two further steps, namely:

(a) $350,000 forthwith as of the date of the Deed of Variation; and

(b) $4.5 million on or before 31 July 1998.

163 It was also a term of this Deed of Variation that interest would accrue at the rate of 10 per cent per annum on:

(a) the sum of $2.35 million from 24 December 1997 to 4 March 1998;

(b) the sum of $2 million from 4 March 1998 to the date on which the appellant paid the remaining balance being no later than 10 June 1998.

164 It was a further term of the Deed that all sums paid prior thereto by the appellant were regarded as non-refundable deposits.

165 As of 31 July 1998, in breach of the terms of the agreement as varied, the appellant failed to pay the balance purchase price of $4.5 million to Mercator and thereby breached the agreement to purchase the subject shares.

166 In the circumstances, it was clear that at all material times, Mercator was ready, willing and able to tender to the appellant an executed share transfer form in accordance with cl 5.1 of the agreement. In these circumstances, ground 3 clearly fails.

Ground 4: The trial Judge should have found that the contract came to an end on 15 August 1997

167 Ground 4 was that:

> "The learned Judge erred in holding that the Appellant's 'right to reply upon non-fulfilment of the conditions precedent as discharging the contract was lost by his treating those conditions as having been fulfilled within time and by affirming, as he did, that the sale of those shares for the agreed price was to proceed', and should have found that the contract came to an end on 15.8.1997."

168 In my opinion, there is no substance in this ground. It is patently clear that the appellant's right to rely on the non-fulfilment of the conditions precedent was lost by treating the conditions precedent as having been fulfilled within time and by affirming that the sale of the shares for the agreed price was to proceed. The conduct of the appellant amounted to an offer to vary the time for compliance with the conditions precedent and, in my opinion, was such that he was estopped from denying that he agreed to extend the time for satisfaction of the conditions precedent. The result was that the conditions precedent to the operation of the Deed were satisfied within the time as extended and the appellant was estopped from resiling from the position represented in the correspondence and related deeds that the transaction would proceed on

the basis that the relevant times were extended, and that the parties agreed that they each would complete the transaction by executing facsimile copies of the relevant documents, as well as execute the formal deeds which evidenced the transaction. For these reasons, ground 4 fails.

Grounds 7, 8 and 9

169 Ground 7 contended that:

> "The learned trial Judge erred in failing to find that the evidence did not establish that [Mercator's] application to appoint a receiver was for the purpose of either forcing the appellant to purchase the shares or destroying the licence and thereby putting the company into liquidation in order to garnishee the appellant's dividend as an unsecured creditor."

170 The particulars of ground 7 were as follows:

PARTICULARS

(a) In fact the Respondent did apply for a garnishee order against the Appellant's dividend.

(b) The Respondent was only an extremely minor shareholder and the Appellant was the only other shareholder.

(c) The Respondent knew that it had no standing to apply to wind up the company.

(d) The Respondent knew that the casino license was the sole asset of significance of the company.

(e) The Respondent had no interest in the company continuing in operation or in existence.

(f) The Respondent owed a duty to the Appellant not to place the assets of the company at risk, as the company was a quasi-partnership.

(g) The Appellant alone contributed capital ($120m), and $117m of that was after becoming a shareholder, and of that $16.9m was contributed during the CMI Management, to keep it afloat, and $35m was contributed after CMI left and the Casino closed.

(h) The Respondent had not [*sic*] intention of paying the creditors identified by the Minister, or indeed any creditors, or indeed making any capital contribution or loan to the company.

(i) The Respondent therefore had no legitimate expectation of the Appellant having regard to the Respondent's rights (if there were any).

(j) The Respondent had no right (or interest) to be consulted as it had no intention of assisting the company and just wanted to be bought out.

(k) In any event, the Respondent had every opportunity of finding out anything it wanted to know (Mr Woodmore said he never even asked).

(l) The Respondent's demands (through its solicitor) for financial information was mere pretence for grounding its application for the appointment of a receiver.

(m) In any even [*sic*], the information was supplied, leaving the Respondent with no receiver case whatsoever."

171 In my opinion, given the situation at the material time, Mercator was entitled to take such reasonable steps as were available to it to protect its position, given the fact that the appellant was in default of its commitment to proceed with the purchase of the shares and the apparent failure or inability of the appellant to provide funding to the Company to enable it to continue to carry on the operations of the Christmas Island Casino.

172 There was no plea and no particular in the appellant's defence or any evidence led at the trial in relation to the matters alleged in ground 7. The position was the same in respect of ground 8 which was that the learned Judge erred in failing to find that the application to appoint a receiver could only have a negative impact on the Minister's mind at a crucial time.

173 On the evidence at the trial, it was apparent that the application for the appointment of a Receiver and Manager was made in good faith and solely for the purpose of preserving the benefit of the contract between Mercator and the appellant by having a competent person appointed to manage the affairs of the Company and, as contended on behalf of Mercator, persuading the Minister to delay cancellation of the Company's licence in the circumstances, and, in particular, in the light of the

appellant's conduct, to protect the security of Mercator's vendor's lien over the subject shares.

174 In any event, the cancellation of the Company's licence by the Minister occurred in spite of, rather than because of the approaches made by Mercator to the Minister. The Minister first intervened on 26 April 1998 well before and quite independently of any action taken by or on behalf of Mercator. It follows that neither the subsequent failure of the Company or its winding up was due to any breach of any implied term of the contract of sale of the shares by Mercator or anyone acting on its behalf.

175 Ground 9 was as follows:

> "The learned Judge erred in failing to take into account the CMI period of management, the fact that the Appellant had no ability to be involved in the management during that time, that the creditors were incurred during that time, that the Appellant needed time to verify the creditors list, that there was no proper handover from CMI to the Appellant, and that it was difficult to send money out of Indonesia at this time. The learned Judge should have found that the Respondent acted unreasonably and in breach of the pleaded implied terms by applying to appoint a receiver."

176 It was contended on behalf of Mercator that ground 9 did not refer to any issue pleaded at the trial. The fact is that the Company suffered financially as a result of the economic crisis in Asia in late 1997 and early 1998, but this did not give rise to any defence pleaded by the appellant to Mercator's action to enforce the contract based upon the doctrine of frustration of the contract. The evidence was that the Company was heavily in debt at the material times and the appellant failed to fulfil his contractual obligations in relation to the purchase of the subject shares.

177 Although ground 7 was not amended at the hearing, it is apparent that the appellant contended at the trial that Mercator had sought the appointment of a receiver both for the ulterior motive alleged as well as the purpose of putting pressure on the appellant to complete the purchase of the shares.

178 The learned Judge found that Mercator was at the material times ready, willing and able to deliver to the appellant a transfer of the relevant shares and the share certificates in proper form. In my opinion, the evidence was such that at the material times, including when the

application was made for the appointment of a receiver, Mercator was seeking to protect its position in relation to the potential failure of the appellant to complete the contemplated purchase of Mercator's shares following the election by the appellant in terms of the letter from his solicitors to Mercator's solicitors dated 3 December 1997 to the effect that, once the appellant's solicitors indicated that the due diligence report was satisfactory, which they did, the appellant's solicitors said that arrangements would be made for the deadline for satisfaction of the conditions precedent to be extended, on the basis that the appellant would execute a facsimile of the deed of extension, following which the appellant's solicitors would confirm that all the conditions precedent had been satisfied and then fix a date for settlement. Mercator fulfilled all the requirements on its part at settlement, following the completion of the due diligence in reliance on the statements made by the appellant's solicitors. The circumstances were such that it would appear, on the face of it, they were acting in accordance with the appellant's instructions. There was no suggestion by or on behalf of the appellant or his representative Mr Gani to the contrary.

179 In my opinion, the evidence clearly established that the appellant elected to proceed to settlement at completion of the transaction by his conduct and the conduct of his solicitors on his instructions as evidenced by the Deed of Variation executed by both Mercator and Linkwater at or about the end of December 1997, which affirmed the existence of the contract between the parties. In these circumstances, the appellant was estopped from denying the existence of the contract to purchase Mercator's shares and, in my opinion, estopped by his conduct and the statements by his solicitors, apparently on his instructions, in the context of the arrangements made for execution of the necessary deeds by fax and subsequent exchange of executed copies of the deed and its counterpart duly executed.

180 In any event, it is clear that by his conduct subsequent to December 1997 and by making the new payment arrangements, the appellant affirmed the transaction on the varied terms. Alternatively, I consider that the circumstances were such that the appellant was estopped by his conduct and that of his solicitors, presumably on his instructions, from denying that he was bound by the contract to acquire Mercator's shares. On the facts which I have recounted, Mercator relied to its detriment on promises and representations made by or on behalf of the appellant in such circumstances as made it unconscionable to resile from the promises or representations made on his instructions. In this context it matters not whether the estoppel is characterised as an example of promissory

estoppel by representation or estoppel by convention. In one sense, it is more helpful to an understanding of estoppel in the present context to refer to the joint judgment of Gibbs CJ, Mason, Wilson and Brennan JJ in ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*** (1986) 160 CLR 226 at 824 regarding estoppel by convention:

> "Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying."

181 It is now clear that the doctrine also extends to assumptions of law: ***Walton Stores (Interstate) Ltd v Maher*** (1988) 164 CLR 387 at 415 – 416 and 432 per Brennan J, 452 per Deane J and 458 per Gaudron J; ***Foran v Wight*** (1989) 168 CLR 385 at 435 per Deane J, (who referred to ***Moorgate Mercantile Co Ltd v Twitchings*** [1976] QB 225 at 242 per Lord Denning MR), at 457 per Gaudron J; ***Commonwealth of Australia v Verwayen***, (*supra*) at 413 per Mason CJ; at 445 per Deane J; and 501 per McHugh J; and ***David Securities Pty Ltd v Commonwealth Bank of Australia*** (1992) 175 CLR 353.

182 In the present case, at all material times at least to the end of December 1997 and, in my opinion, subsequently, the appellant by his conduct represented that he regarded the contract between the parties as on foot and engaged in further negotiations for variations in the terms of payment.

183 The appellant did not seek to rely on any alleged breach by Mercator of the contract for the sale of the shares. He did claim, however, that he had suffered damages as a result of an alleged breach of the contract by reason of the steps taken by Mercator to appoint a receiver of the Company. In my opinion, however, the steps taken to obtain the appointment of a Receiver of the Company did not constitute a breach of the contract between the parties giving rise to any claim for damages by the appellant against Mercator. It was a logical step taken by Mercator to protect its position as a shareholder of the Company so as to preserve the assets and interests of the Company and its shareholders.

184 The evidence of Mr Herbert the Receiver and, later, the Liquidator of the Company was that as at the date of his appointment, the Company was insolvent. There was evidence that the application by Mercator for the

appointment of a Receiver and Manager of the Company was made in good faith and solely for the purpose of preserving the benefit of the contract by having a competent person to manage the affairs of the Company and provide an opportunity to persuade the Minister to delay cancellation of the casino licence held by the Company. In this context, I consider that the findings made, and conclusions reached, by the learned trial Judge should be upheld, namely, that Mercator was at the time agreed by the parties, ready, willing and able to proceed with the transfer of the relevant shares. Heenan J went on to say in pars [19] – [21] that:

> "There is a general rule also that 'a party to a contract made on the footing of the continuance of a state of things may not by any act within its power or control do anything to destroy or relevantly to diminish that situation' (*Ansett Transport Industries (Operations) Pty Limited v The Commonwealth of Australia & Ors* (1977) 139 CLR 54 at 61 per Barwick CJ). On behalf of Mr Sumampow it is pleaded that there were implied terms of the agreement the subject of the Original Deed that Mercator would act in good faith, cooperate and do all things necessary to ensure that the terms of the Original Deed were implemented and performed, not do anything which would frustrate the performance of the Original Deed or diminish the value of the Mercator shares and do all things necessary to enable Mr Sumampow to have the benefit of the Original Deed. Counsel for Mr Sumampow contended that the intention of the agreement between the parties was to have Mercator, and Mr Woodmore, out of the Company and Mr Sumampow in sole control of it. He went on to submit that, by applying for appointment of a receiver and manager - which led to the winding up of the Company - Mercator had brought about a situation in which, on transfer, Mr Sumampow not only would receive shares which, as is common ground, have been worthless since 30 June 1998, but also would be unable to exercise any control over the Company. Counsel contended also that, knowing that the casino licence was the Company's only significant asset, Mr Woodmore instructed Mercator's solicitors to apply for the appointment of a receiver and manager with two, alternative, purposes in mind. He asserted that the first purpose was to force Mr Sumampow to purchase the shares and, if that proved to be unsuccessful, the second purpose was to destroy the licence by having a receiver and manager appointed and thereby to sacrifice the Company in

> order to garnishee the amount due to Mr Sumampow as an unsecured creditor of the company.
>
> In my opinion, the evidence falls far short of enabling the Court to conclude that Mr Woodmore, or anyone acting on behalf of Mercator, had any purpose such as those alleged by counsel. The correspondence supports the oral testimony of Mr Woodmore to the effect that the application for appointment of the receiver and manager was made in good faith and solely for the purpose of preserving the benefit of the contract by having a competent person appointed to manage the affairs of the Company and thereby persuading the Minister to delay cancellation of the licence. In all the circumstances, in my opinion, it was a reasonable - perhaps the only reasonable - approach for Mercator to take in order to protect the security of its vendor's lien. Although the licence was cancelled, the evidence shows that the cancellation took place in spite of, and not because of, that approach. Indeed, the Minister had intervened as early as 26 April 1998, well before and independently of any action taken by or on behalf of Mercator.
>
> Of course, the purchaser of shares in any company takes the risk that the company might fail or be wound up. In this case the evidence does not show that the failure of the Company or its winding up was due to any intervening event or change of circumstance attributable to a breach of an implied term by Mercator or by anyone acting on its behalf."

185 As the learned trial Judge found, the facts were that the Minister had intervened as early as 26 April 1998 quite independently of any action taken by Mercator. There was no evidence that the failure of the Company, the cancellation of its casino licence or the winding up of the Company was caused by any intervening event or change of circumstances attributable to the breach of any implied term of the contract by Mercator or anyone acting on its behalf. In the circumstances, the fact that Mercator applied for a garnishee order in respect of the appellant's dividend for the moneys owing in respect of the sale of the shares was a step open to it to protect its interest as a shareholder in the company. The circumstances in which Mercator sought the appointment of a receiver were of the appellant's making, given that he was the controlling shareholder of the Company. In my view, there is no substance in any of grounds 7, 8 and 9.

Ground 10: Variation of the Judgment

186 Ground 10 contended that in the event that the appeal was not allowed, the terms of the judgment should be varied to accurately reflect the reasons for the decision. The terms of the judgment were that the appellant pay Mercator the sum of $5,508,065 plus interest at the rate of 10 per cent per annum on the amount of $4.5 million or the balance thereof from the date of judgment until payment. Liberty was given to apply for orders or further directions as to the implementation of the judgment, including any question arising in relation to a call on the shares in the Company.

187 It follows that the judgment was in terms of a judgment debt. The appellant submitted that the judgment should be varied so as to reflect Mercator's entitlement to the amount of the judgment in return for the delivery of a transfer of the shares and the relevant share certificates. In my opinion, the appeal should be allowed to the extent that the judgment be varied so as to read as follows:

> "In return for production of the transfer and the certificates of the shares in proper form by the plaintiff, the defendant do pay to the plaintiff the sum of $5,508,065 plus interest at the rate of 10 per cent per annum on the amount of $4.5 million or the balance thereof from the date of tender of the transfer and certificates of shares in proper form."

Conclusion

188 It follows that the appeal should otherwise be dismissed.

189 **MURRAY J**: In this matter I am grateful to have had the opportunity to read in draft the reasons for decision of Malcolm CJ. I agree with his Honour's conclusion that the appeal should be dismissed, although I too would make an adjustment to the form of the final order made by Heenan J. I have reached substantially the same conclusion as his Honour for somewhat different reasons. It is necessary that I should set out my reasoning, but in doing so I am aided by the detailed exposition undertaken by Malcolm CJ, canvassing the issues, the arguments put and the evidence and the facts found. It is important in that regard to note that, as the trial Judge observed, there was little dispute in relation to matters of primary fact and the case did not turn in any significant way upon questions of credibility. The grounds of appeal do not challenge the trial Judge's findings of primary fact, but the ultimate conclusions drawn

by him which affected his decision in respect of liability and the relief to be granted.

190 The respondent sued for specific performance of a contract for the sale of shares which it held in a company called Christmas Island Resort Pty Ltd (CIR). The respondent had been approached to sell its shareholding in CIR by the appellant who was the only other and overwhelmingly the majority shareholder in CIR, which company was established to set up and operate a casino and resort on Christmas Island. Alternatively, the respondent sought damages for the breach of the agreement for the sale of the shares which, it said, occurred when the appellant failed to provide the balance of the purchase price upon the due date for performance of the agreement.

191 The appellant's defence was that the formation of a binding agreement for the sale of the shares was subject to a number of conditions precedent which were to be satisfied within a given time, and which were not so satisfied by the relevant date, pleaded to be 15 August 1997, with the consequence that there was "no effective contract between the parties in terms of the agreement" or at all.

192 Alternatively, if there was such an agreement, it was pleaded that it included implied terms effectively requiring the respondent, in good faith, to do what was required of it to ensure that the agreement could be performed in a way which would give the appellant the benefit of the agreement and see that it was not frustrated. It was pleaded that in breach of those implied terms the respondent applied for the appointment of a receiver and manager of CIR, with the result that such an order was made by the Federal Court. In the result CIR was placed in liquidation, thus causing the shares to be acquired under the agreement to be rendered worthless and depriving the appellant of the benefit of the agreement as well as causing him to suffer loss in that he paid $600,000 by way of deposits in the process of the acquisition of worthless shares. As well as resisting the respondent's claim for specific performance, the appellant counterclaimed for the refund of the $600,000, damages and interest.

193 By its reply, the respondent raised an estoppel, said to arise if indeed there had not been agreement to extend time for the satisfaction of the conditions precedent. The estoppel was said to arise out of conduct by the appellant indicating that there had been an agreement to extend time, upon which conduct, it was pleaded, the respondent placed reliance to its detriment by continuing to pursue efforts to have the contract performed.

194 As Malcolm CJ has explained by reference to the grounds of appeal as finally pursued, the matters which were principally in issue at the trial remain so between the parties on the appeal. Grounds 2, 3 and 4 renew the appellant's contentions that by reason of the failure of timely performance of the conditions precedent, the true view, as a matter of construction of the agreement, was that there was no contract binding upon the parties and, in particular, the appellant. Grounds 7, 8 and 9 relate to the appellant's contention that if there was a binding agreement he was not obliged to perform it, but was at liberty to withdraw from it by reason of the respondent's breach of the implied terms pleaded.

195 Ground 10 may be dealt with separately. That is the ground concerned with what the appellant contends is the need to amend the form of the judgment in any event. Finally, if necessary, the respondent was given leave to rely upon a notice of contention asserting that if there was no binding contract then the judgment should be affirmed on the ground of the estoppel pleaded by the respondent.

196 The first and most important question is whether there was, at the relevant time, a binding contract for the sale of the shares. This is a question of construction upon which, I regret to say, I differ from the view expressed by Malcolm CJ. The matter arises in this way.

197 On 16 June 1997 the appellant as purchaser, the respondent as vendor and others on that side of the transaction entered into a deed recording the parties' agreement for the sale of the respondent's shares in CIR to the appellant. Clause 2 set out a number of matters described as conditions precedent. The transaction required the approval of the Federal Treasurer. The transfer of the shares required the approval of the Commonwealth Department of Territories. The consent, in principle, of the Australian Department of Transport was to be obtained for the operation of a regular air service between Christmas Island and Jakarta, in Indonesia. The appellant was to complete a due diligence examination of the affairs of the respondent. Clause 2 was expressed as follows:

> "The operation of this Deed is subject to the completion within forty (40) days of the date hereof of the following conditions precedent ...".

198 Clause 3 provided that if the approval of the Commonwealth Treasurer could not be obtained by the respondent within 40 days, a further period of 20 days was to be allowed.

199 Clause 4 was the operative provision in relation to the sale and purchase of the shares. Clause 4.1 provided:

> "Subject to satisfaction of the conditions precedent the Vendor shall sell and the Purchaser shall purchase the Shares for the Purchase Price on the terms and conditions set out in this Deed."

200 The clause fixed the purchase price at $5.1 million, of which a first instalment of $2.6 million was to be paid "within fourteen (14) days of completion of the conditions precedent", and a final instalment of $2.5 million was to be paid within a period of 6 months "from the completion of the conditions precedent".

201 Relative to the satisfaction of the conditions precedent, but not restricted to that, cl 11 provided:

> "Each party must, at its own expense, and when requested by another party promptly do, execute and deliver everything reasonably necessary for the purposes of and to give full effect to this Deed and the transactions contemplated by this Deed, and must procure all relevant third parties to do the same."

202 It follows, in my opinion, that from the outset when the deed was executed, both parties were required to do all that was reasonably within their power to ensure that the conditions precedent were satisfied in a timely way.

203 In my opinion, the subject matter and the wording of cl 2 make it clear in the context of the deed as a whole and the nature of the obligations immediately assumed by the parties, that the deed was operative and a binding contract was formed upon its execution on 16 June 1997. The conditions precedent were precedent, not to the formation of the agreement, but the performance of the sale and transfer of the shares. They all referred to matters which related to and were directed to make legally and commercially possible and effective, that process of sale and transfer.

204 The distinction is important, of course. If, as the appellant contends, the conditions were precedent to the formation of the agreement, then upon the failure to perform them within the time allowed it would be established that there never was a binding agreement, nothing capable of breach so as to sound in an award of damages, nothing to be the subject of an order in the nature of specific performance.

205 On the other hand, if the conditions were precedent to the obligation to perform the contract and were subsequent to its formation, as I think to be the case, then upon a condition precedent not being satisfied in time either party (in this case) would be entitled to terminate the contract, provided it was not the party in breach, for the non-fulfilment of the condition precedent. However, even in the case of a condition precedent to the performance of the contract it necessarily follows that a party wishing to enforce the contract may not do so until the condition is fulfilled: ***Perri v Coolangatta Investments Pty Ltd*** (1982) 149 CLR 537, particularly per Mason J at 551-2.

206 It follows, in my opinion, that for the respondent to succeed in obtaining relief it had to establish, as I think it did, that the conditions precedent were precedent to the performance of the sale and transfer of the shares rather than to the formation of an agreement to do so. Further, the conditions precedent had ultimately to be fulfilled during the life of the agreement and before it was open to say that the contract came to an end because of the non-fulfilment of the conditions, or any of them, within the time allowed – the second limb of the appellant's defence – subject, of course, to the effect of the doctrine of estoppel and the conclusion that the appellant was estopped from relying upon the non-fulfilment of the conditions precedent in time.

207 In the passage cited above from the judgment of Mason J in ***Perri***, his Honour observed that it would be a rare case where the court would favour the construction that a condition precedent was precedent to the formation of the contract. Generally, the court would favour the opposite conclusion and would only come to the former view where the contract read as a whole "plainly compels this conclusion".

208 ***Perri*** was not a case where the Court came to that conclusion. A special condition inserted in a contract for the sale of land contained a clause providing that, "This Contract is entered into subject to Purchasers completing a sale of their property …". Despite the wording of the clause, the Court held it to be precedent to the obligation to perform the sale for which the parties had contracted, relying particularly upon the view that it was a clause obviously designed to ensure that the purchasers were not obliged to complete the contract before they were put in funds by the sale of their existing property.

209 A similar view was taken in a case upon which the respondent relies as being factually somewhat akin to this, ***Newmont Pty Ltd v Laverton Nickel NL*** (1982) 44 ALR 598. The case was concerned with an

agreement between the parties to enter into a joint mineral exploration venture. Both parties had provisional liquidators appointed in respect of their affairs and it was therefore a condition of the agreement that the approval or consent of the Court be obtained, not unlike the sort of approvals referred to in cl 2 in this case. The Privy Council held this to be a condition precedent, not to the formation of the contract but to the commencement of the joint venture and the performance of obligations under the contract in that regard.

210 My view of the nature of cl 2 was that of the trial Judge. In my respectful opinion, his Honour was right and the second question was therefore whether the conditions were performed during the life of the contract and before it was terminated by a party who was not in default. The history of extensions and variations and the correspondence between the parties in that regard has been fully discussed by Malcolm CJ. His Honour's review of the evidence effectively coincides with that of the trial Judge and the facts as his Honour found them to be. I would merely summarise them.

211 In the first place, it is important that I should say that I consider it to be correct, as did the trial Judge and as does Malcolm CJ, that the parties clearly waived the initial decision that they would only contract by deed. Agreements were made which varied the terms of their agreement outside that formal process of making an agreement by the execution of a deed.

212 Against that background, the essential facts seem to me to be these. Under cl 2, the conditions precedent, subject to the extension provided by cl 3, were required to be fulfilled by 26 July 1997. That did not occur, but on 25 July the parties executed a deed of extension, expressing their agreement to extend time to 15 August 1997 by appropriate amendments to cl 2 and cl 3. That deadline was not met, but the parties continued their efforts to fulfil the conditions precedent. In November 1997 a draft deed of extension was forwarded on behalf of the appellant by his solicitors to the respondent's solicitors. It was executed by the respondent on 10 November, but not by the appellant. It would extend time to 21 November.

213 Again, efforts continued in relation to the fulfilment of the conditions. On 27 November the appellant's solicitors again submitted a further draft deed of extension. It remained unexecuted by the appellant. During this period, a party not in default could have terminated the agreement, but neither party sought to do so. Indeed, as I have said, the efforts to fulfil the conditions continued and on 10 December the

appellant's solicitors confirmed that all the conditions precedent had been fulfilled, overtaking the proposal in the third deed of extension to extend time to 12 December. The solicitors proposed that settlement take place on 24 December 1997, but that did not occur.

214 In my opinion, subsequent events and the evidence made it clear that the appellant was in difficulty because events at that time in Indonesia made it difficult to remove from that country the moneys necessary to put bankers here in possession of funds to support the drawing of a bank cheque, the required method of payment for the shares.

215 Nonetheless, on 24 December 1997 a deed of variation was executed. Included in the recitals was the statement that on 10 December 1997 the appellant, by his solicitors, advised the respondent's solicitors "that all of the conditions precedent had been satisfied". In my opinion, the contract became unconditional at that time and the appellant would have been obliged to pay the first instalment within 14 days; hence the need to enter into the deed of variation. The effect of that document was to amend the terms of cl 4 so as to provide for the payment of the first instalment of the purchase price, the sum of $2.6 million, by a deposit of $250,000 payable forthwith and by payment of the balance of $2.35 million on or before 28 February 1998. Interest was provided for. It was made clear that the deposit was non-refundable in any event. The date for the provision of a transfer of the shares and share certificates was amended. Clause 2 provided, "In all other respects the terms of the Deed are confirmed by the parties to this deed." The $250,000 deposit was paid.

216 On 27 February, again the appellant's solicitors submitted a draft deed of variation further varying the terms of payment. The draft deed was accompanied by a further deposit of $350,000, which again was not refundable and the balance of the purchase price, the sum of $4.5 million, it was agreed, was to be paid by the appellant to the respondent on or before 31 July 1998. It was agreed that on that date, on the payment of the balance, the transfer of the shares and the share certificates would be provided by the respondent. In my opinion, in the circumstances described, that variation to the agreement took effect. The deposit was paid and that could only be on the conditions proposed.

217 Settlement did not occur as agreed. The appellant had no capacity to terminate the contract and the respondent had every entitlement to sue as he did. The trial judge was right to find that the respondent was entitled to an order that the contract be performed. The appellant was rightly ordered to pay the respondent the sum of $4.5 million and interest at the

agreed rate of 10 per cent per annum from 1 August 1998 until payment. It was a necessary corollary of that order, as the trial Judge appreciated, that upon payment the respondent would be obliged to deliver a transfer of the shares and the share certificates.

218 It is unnecessary, in the light of those views, that I should consider the validity of the claim of estoppel which would only arise upon the view that the contract had in fact been terminated by the expiry of the period limited for its completion, whereupon it might be necessary to consider whether the appellant was estopped from asserting that the contract was at an end. I think there are difficulties involved in that proposition, but it is unnecessary to consider them.

219 Given that I would find it unnecessary to consider the notice of contention, I would dismiss the appeal, although I do think there is some merit in ground 10. The order having been made that the appellant pay the respondent the sum of money, together with interest, necessary to complete the performance of the contract, it would also be appropriate to order that upon so doing the appellant would be entitled to receive from the respondent a transfer of the shares and the share certificates. Heenan J accepted that that was appropriate. All that happened was that his Honour did not translate that view into a formal order of the Court. I would do so, but nonetheless I would dismiss the appeal.

220 Finally, it will be apparent from what I have written that in my opinion there is no merit in the grounds which assert that the trial Judge erred in failing to hold that the respondent's claim should be dismissed upon the basis that the respondent breached the terms of the agreement by its conduct in applying for the appointment of a receiver and manager of CIR. I have nothing to add to the judgment of Malcolm CJ in respect of that issue. To my mind, it is an extraordinary proposition that it would constitute a breach of an implied term in the contract that the respondent should use its best endeavours to ensure that the appellant receive the value of the contract (putting to one side the express terms of cl 11 of the original deed), that the respondent sought to preserve CIR and therefore the value of its shares by seeking to put in place mechanisms by which CIR would be properly managed.

221 However, the short answer to the grounds which are concerned with the appeal in relation to this aspect of the case is that there can be no merit in the contention that the true breach of the contract was not the failure of the appellant to complete its performance, but the respondent's breach of an implied term to do all that was necessary to bring the contract to

successful completion and not to frustrate its performance by its conduct in applying for the appointment of a receiver and manager of the company in which the shares were held.

222 For those reasons, I would dismiss the appeal but would, at the same time, vary the judgment at first instance, not precisely in the terms advocated by ground 10 of the appeal, but so as to provide that on the payment of the sum of $4.5 million and interest at the contract rate, the respondent should forthwith provide to the appellant a duly executed transfer of the shares and the share certificates.

223 **TEMPLEMAN J**: I have had the advantage of reading in draft the reasons published by Malcolm CJ and Murray J.

224 In relation to the question whether the Deed of 16 June 1997 gave rise to a binding agreement upon its execution, I respectfully agree with Murray J.

225 Clause 2 of the Deed provided that:

> "The *operation* of this Deed is subject to the completion within forty (40) days of the date hereof of the following conditions precedent …" (my emphasis).

226 In my view, the "operation" of the Deed involved the sale and purchase of the shares in the manner provided by cl 4 and cl 5. I therefore consider that it was the operation (in that sense) which was subject to the satisfaction of the conditions precedent.

227 It could have been provided expressly in the Deed (if that was the parties' intention) that the formation of a contract was so conditional. But that is not how the Deed was expressed. Further, as both Malcolm CJ and Murray J have pointed out, the judgment of Mason J in ***Perri v Coolangatta Investments Pty Ltd*** (1982) 149 CLR 537 at 552, is authority for the proposition that unless a document, read as a whole, plainly compels the conclusion that it contains a condition precedent to the formation of an agreement, the condition will not be so construed.

228 In my view, for the reasons summarised above, cl 2 does not compel that conclusion: indeed, it points in the opposite direction.

229 Subject to this point, I agree with the reasons of Malcolm CJ. However, like Murray J, I would dismiss the appeal, albeit varying the order so as to give full effect to the decision of the learned trial Judge. This would involve only the addition of a provision requiring the

respondent to provide a duly executed transfer of the shares and the share certificates to the appellant upon payment of the judgment sum.