

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

JOSEPH JOHN ROMANOS & ANOR

APPELLANTS

AND

PENTAGOLD INVESTMENTS PTY LIMITED & ANOR

RESPONDENTS

Romanos v Pentagold Investments Pty Limited [2003] HCA 58
7 October 2003
S356/2002

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of New South Wales made on 12 December 2001 and, in lieu thereof, order that:*
 - (a) *the appeal to that Court be dismissed with costs;*
 - (b) *the cross-appeal to that Court be allowed with costs; and*
 - (c) *it be declared that the total sum of \$50,000 paid as deposits under the contracts for sale is forfeited to the appellants.*

On appeal from the Supreme Court of New South Wales

Representation:

B A J Coles QC with D L Warren for the appellants (instructed by Robilliard Plowman Herat)

D P F Officer QC with R J Powell and S W Balafoutis for the respondents (instructed by Bolsters Solicitors)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Romanos v Pentagold Investments Pty Limited

Vendor and purchaser – Contracts for sale of land – Balance of deposit to be paid on approval of development application – Time of essence – Default by purchasers – Notice of termination – Balance of deposit paid following day – Specific performance – Whether unconscientious for vendors to exercise right of termination – Whether termination effective in absence of prior notice to purchasers requiring payment of deposit within reasonable time.

Equity – Relief against forfeiture – Contracts for sale of land – Default by purchasers – Whether unconscientious for vendors to exercise right of termination – Whether default occasioned by "accident" – Whether relief on the ground of "accident" available in face of essential time stipulation.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. This appeal was heard consecutively with that in *Tanwar Enterprises Pty Ltd v Cauchi*¹, and what follows should be read with our reasons for judgment in *Tanwar*. However, the decision against which this appeal is brought appears also to have challenged the orthodox view among conveyancers² that failure in timely payment of a deposit entitles the vendor to terminate, leaving the purchaser with no right to insist on future performance of the contract.

2 On 15 September 1999, contracts were exchanged for the sale of three adjoining parcels of land at Harris Park, near Parramatta. The parcels of land may be identified as Nos 44, 46 and 48 Wigram Street. The vendor of No 44 was the first appellant, Mr Romanos. The vendor of the other two parcels was Mrs Teresa Romanos. Mrs Romanos died on 23 September 2001 and her executor, Mr Romanos, is the second appellant. The total purchase price was \$1,875,000; for each of Nos 44 and 46, the price was \$750,000, and that for No 48 was \$375,000.

3 The purchasers under each of the contracts were the first respondent, Pentagold Investments Pty Limited ("Pentagold"), and the second respondent, Maroon Bros Investments Pty Limited ("Maroon"), as tenants in common in equal shares. The contracts were the 1996 edition of the standard form prepared by the Law Society of New South Wales and the Real Estate Institute of New South Wales, with the addition of further printed conditions issued by those bodies in 1998. The standard forms were supplemented by special conditions bespoken by the parties.

4 Clause 2 of the standard forms relevantly provided:

"2.1 The purchaser must pay the deposit to the depositholder as stakeholder.

2.2 Normally, the purchaser must pay the deposit on the making of this contract, and this time is essential.

2.3 If this contract requires the purchaser to pay any of the deposit by a later time, that time is also essential.

1 [2003] HCA 57.

2 Butt, "Purchasers relieved against loss of contract", (2002) 76 *Australian Law Journal* 347 at 350.

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...

- 2.5 If any of the deposit is not paid on time or a cheque for any of the deposit is not honoured on presentation, the vendor can terminate but only before the deposit is paid in full.

...

- 2.8 If any of the deposit or of the balance of the price is paid before completion to the vendor or as the vendor directs, it is a charge on the land in favour of the purchaser until termination by the vendor or completion."

5 Each contract provided for a deposit of 10 per cent of the purchase price but particular provision was made in Special Condition 17 respecting the payment of the deposits. As to one-tenth of each deposit amount, payment was to be made on exchange and as to the balance of nine-tenths, upon approval of a development application. The requirement respecting payment of one-tenth, totalling \$18,750, was met.

6 Special Condition 19 in each contract required Pentagold and Maroon as the purchasers to proceed to obtain the approval of the Parramatta City Council to the development of the properties by the erection of 24 units (plus a heritage house on the property at 48 Wigram Street) and to keep the vendor advised as to the progress of the application, informing the vendor immediately approval was received. There was a proviso to Special Condition 19 in substantially similar form in each contract as follows:

"[S]hould such approval not be received within two hundred and seventy (270) days from the date hereof or within such further period as may be mutually agreed upon then the Vendor or the Purchaser may at any time thereafter by notice in writing given to the other party or the other party's Solicitor rescind this Contract and the provisions of Clause 19 hereof will apply. It is an essential term of this condition that the Purchaser lodge the Development Application within 120 days from today[']s date."

7 The reference to cl 19 was to a standard provision as follows:

"Rescission of contract

- 19.1 If this contract expressly gives a party a right to rescind, the party can exercise the right –

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19.1.1 only by serving a notice before completion; and

19.1.2 in spite of any making of a claim or requisition, any attempt to satisfy a claim or requisition, any arbitration, litigation, mediation or negotiation or any giving or taking of possession.

19.2 Normally, if a party exercises a right to rescind expressly given by this contract or any legislation –

19.2.1 the deposit and any other money paid by the purchaser under this contract must be refunded;

19.2.2 a party can claim for a reasonable adjustment if the purchaser has been in possession;

19.2.3 a party can claim for damages, costs or expenses arising out of a breach of this contract; and

19.2.4 a party will not otherwise be liable to pay the other party any damages, costs or expenses."

8 Special Condition 21 in each contract made its completion interdependent upon the simultaneous completion of the other two contracts. Provision also was made in that special condition to the effect that entitlement of a party to rescind one contract carried with it a right to rescind the others.

9 Special Condition 22 dealt with the use and benefit of plans lodged in connection with the development application. It stated:

"Should this Contract not be completed for any reason other than the Vendor's default –

(a) the Vendor is to have the use and benefit of all engineering, architectural and survey plans available including those lodged with and approved by the local Council in connection with any application made in relation to the subject property and the said adjoining properties, and all consents relating thereto; and

(b) the Purchaser warrants that all fees for such plans and in connection with any such application or consent arranged by or on behalf of the Purchaser will be paid by the Purchaser,

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and that the Vendor will have the benefit of all such fees and will not be liable to reimburse the Purchaser for same."

10 By three deeds, each dated 1 September 2000, the contracts were varied in certain respects. The time for completion was extended to 1 March 2001, and further payments on account of the deposits were to be made in sums totalling \$31,250. This would bring up to \$50,000 the total of such deposit payments. Further, the time for the seeking of the development approval was extended to 1 December 2000; if the approval was not given by that date, either side was at liberty to rescind. The additional deposit payments totalling \$31,250 were made, leaving a balance of \$137,500.

11 Special Condition 17(b) in each contract made the balance of deposits (now \$137,500) payable "upon approval of the Development Application". Pentagold and Maroon, as purchasers, could not be expected to know the date of approval until told by the Council. In the event, the approval was given on 24 November 2000 and the purchasers received notice of it at 5.00 pm on 1 December. That was a Friday. In those circumstances, it was held by Windeyer J that payment on Monday, 4 December, the next business day, of the balance of the deposits would have been sufficient compliance with the terms of Special Condition 17(b).

12 Windeyer J described the events following 1 December 2000 as follows:

"Between 1 December 2000 and 11 December 2000 there were discussions about release of part of the deposit or early settlement on one property to enable Mr Joseph Romanos to purchase another property. Mr Romanos was considering properties in Prospect Street and Alice Street, Harris Park, but nothing came of those discussions. It is not clear whether the plaintiff purchasers understood the vendors were entitled to release of deposit moneys. On 19 December the vendors purported to terminate the contract by notice given by a new solicitor acting for them. No notice was given prior to termination. The balance deposit was paid by the purchasers to the vendors' agent the next day."

13 Pentagold and Maroon then instituted a proceeding in the Equity Division of the Supreme Court of New South Wales against Mr and Mrs Romanos. They sought declarations that they were entitled to specific performance of each of the contracts and orders for specific performance. They also sought an order relieving them "against forfeiture under the [three contracts]". Mr and Mrs Romanos cross-claimed for declarations that the contracts had been terminated and the amounts paid on account of deposits had been forfeited.

14 Section 55(2A) of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act") states:

"In every case where the court refuses to grant specific performance of a contract, or in any proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without interest thereon."

15 Windeyer J dismissed the proceeding instituted by Pentagold and Maroon³. However, without giving any specific reasons for doing so, his Honour made an order for the return of the deposit payments. No orders were made on the cross claim.

16 An appeal was taken by Pentagold and Maroon to the Court of Appeal (Mason P, Sheller and Giles JJA)⁴. By majority (Giles JA dissenting), the Court of Appeal set aside the orders made by Windeyer J. Orders were made relieving Pentagold and Maroon against forfeiture of the three contracts, declaring the entitlement of Pentagold and Maroon to specific performance and ordering specific performance. The Court of Appeal also ordered (a) the dismissal of the cross claim by Mr and Mrs Romanos in which they had sought at trial confirmation by declaratory relief of their effective termination of the contracts, and (b) dismissal of the cross appeal by Mr and Mrs Romanos against the order under s 55(2A) of the Conveyancing Act for the refund of the deposit payments.

17 In this Court, the appellants, Mr Romanos in his individual and executorial capacities, seek a reversal of the orders made by the Court of Appeal and dismissal of the proceeding instituted by Pentagold and Maroon, together with a declaration that the total sum of \$50,000 paid as deposits under the contracts be forfeited.

18 The judgment of the majority in the Court of Appeal was delivered by Sheller JA. His Honour's reasoning founded first upon the characterisation of the provisions of cl 2 of the standard form relating to the deposit payments. His Honour directed attention, in particular, to the statements in cll 2.3 and 2.5 that time was essential for the making of the deposit payments stipulated after the

3 *Pentagold Investments Pty Ltd v Romanos* (2001) NSW Conv R ¶55-987.

4 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014.

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making of the contract, and that the vendor could terminate if any deposit amount was not paid on time. Sheller JA said that these:

"were provisions designed to secure the payment of money or, put another way, secure a stated result, namely the payment of the deposit. The question is whether relief against the consequent forfeiture is dictated not by questions of unconscionability but by the function of the deposit, the fact that no notice of intended termination was given and the fact that the outstanding deposit was paid on the day after the vendors gave notice terminating."

19 In this Court, the vendors referred to the apparent consequence of this reasoning, namely that a purchaser always will have a case for relief against termination of a contract for non-payment of deposit moneys by relying upon the simple argument that payment, even late payment, fulfils the purpose of the deposit clause. This, they complain, was contrary to the traditional view, affirmed in *Brien v Dwyer*⁵, that a deposit is an earnest to bind the bargain.

20 In *Brien*⁶, Jacobs J described a deposit as:

"an assurance to the vendor, a security to him pending completion. He can take his property off the market and not concern himself with other offers in case the sale should go off, with the comfort at least that the deposit is there for his security."

This reasoning is no less applicable to contracts providing for the payment of a deposit in particular instalments at times each stated to be essential. That is the present case. Further, *Brien*⁷ is authority for the proposition that once there has arisen an entitlement to rescind for failure to pay the deposit, that entitlement may be exercised without the necessity that the purchaser first be given notice requiring payment to be made at a reasonable time.

21 There remains the other ground upon which the reasoning of the majority in the Court of Appeal was based. The issue may be posed by asking what in the events that had happened made it unconscionable for the appellants as vendors

5 (1978) 141 CLR 378 at 386-387, 391-392, 397-398, 401, 406.

6 (1978) 141 CLR 378 at 401.

7 (1978) 141 CLR 378 at 393, 397, 401, 407.

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to rely, for an answer to the relief sought against them in the specific performance suit, upon their termination of the contracts for failure to observe an essential time stipulation. The majority differed from the answer given at trial by Windeyer J. His Honour had dealt with the matter as follows:

"The difficulty with the present claim is that there are no established facts upon which the court can act. While I can assume that the value of the properties with development consent is greater than the purchase price under the contracts, there is no evidence to establish whether this is sufficient to amount to a windfall. There is no reason put forward for non-payment of the deposit. Thus the default may have arisen through inadvertence, or it may have been purposeful."

Windeyer J added:

"In assessing the magnitude of the [purchasers'] losses against the gain of the [vendors] once again there is no quantification of the expenditure incurred by the [purchasers] in gaining development consent, although I infer the amount would not have been small."

His Honour concluded:

"The fact that specific performance could be ordered and obtained, perhaps with some added compensation is not, in my view, itself sufficient. If it were then almost all claims for relief against forfeiture could succeed. It is impossible to eliminate from the equation the fact that what the vendors contracted for included the right to terminate."

22 In this Court, Pentagold and Maroon submit that Windeyer J ought to have inferred from the evidence that the default in the timely payment of the balance of the deposit moneys occurred by inadvertence on their part and was not deliberate. Even if his Honour should have so concluded (a matter which it is unnecessary to decide), that, without more, would not make out a case for relief by reason of "accident". The reasoning in *Tanwar* discloses why that head of jurisdiction was not attracted in the present case.

23 The majority in the Court of Appeal stressed that, were the termination of the contracts to stand and specific performance to be refused, the vendors would receive a "windfall" because "no doubt" the land had increased in value and it now had "the benefit of the development approval".

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24 However, as to this, several points should be made. First, no evidence had been proffered as to the effect of obtaining the development approval upon the value of the properties; the trial judge had been prepared to assume that their value with development approval was greater than the purchase price. Secondly, the contracts had required the purchasers to make application for development approval and Special Condition 22 stipulated that, in the events that had happened, the vendors were to have the use and benefit of the relevant plans and the development consent. Thirdly, the decision in *Tanwar* indicates that equity does not intervene in such a case to reshape contractual relations in a form the court thinks more reasonable or fair where subsequent events have rendered the situation of one side more favourable than that of the other side.

25 Rather, as Giles JA emphasised in his dissenting judgment in the Court of Appeal, one asks in the present case whether the conduct of the vendors caused or contributed to a circumstance rendering it unconscientious for them to insist upon their legal rights to terminate the contracts. The answer is that the conclusions of fact reached by the trial judge present a plain case against the giving of relief to Pentagold and Maroon in respect of the termination of the contracts.

26 The evidence contains nothing to suggest that, by reason of supervening circumstances of the kind considered by Kitto J in *Tropical Traders Ltd v Goonan*⁸, the time stipulation had ceased in equity to be essential. Nor was a case presented of estoppel, lying by, lulling to sleep or other such conduct by the vendors bearing upon the matter. For example, there was no evidence given by the purchasers that they had been led by events in the period between 1 and 11 December 2000 to believe that the contracts were no longer liable to termination by the vendors.

27 The appeal to the Court of Appeal should have been dismissed. The appeal to this Court should be allowed with costs. The orders made by the Court of Appeal should be set aside. In place of those orders it should be ordered that the appeal to the Court of Appeal should be dismissed with costs and the cross appeal should be allowed with costs. Involved in allowing the cross appeal is the conclusion that Windeyer J erred in the exercise of his discretion under s 55(2A) of the Conveyancing Act in ordering the return of the deposit where evidence was insufficient to show that it would be unjust or inequitable to allow the

8 (1964) 111 CLR 41 at 53-55; see Heydon, "Equitable Aid to Purchasers in Breach of Time-Essential Conditions", (1997) 113 *Law Quarterly Review* 385 at 387-388.

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vendors to retain the total sum of \$50,000 paid as deposits under the contracts for sale. There should be a declaration that that sum of \$50,000 is forfeited to the appellants.

28 KIRBY J. This is one of two appeals⁹ from judgments of the New South Wales Court of Appeal¹⁰ concerning the equitable doctrines of relief against forfeiture and unconscionable reliance on legal rights.

29 In this case, as in the other, contracts for the sale of land were terminated by the vendors on the ground of default by the purchasers in compliance with a stipulation as to time declared by the contracts to be essential. In each case, the primary judge (Windeyer J) rejected the purchasers' claim for relief against forfeiture and for specific performance of the contracts.

30 There are points of similarity and of difference in the facts of the two cases. The essential difference is that, in the present case, the Court of Appeal allowed the appeal from the judgment of the primary judge, set aside his orders, granted relief against forfeiture, declared that the purchasers were entitled to have the subject agreements specifically performed and ordered specific performance in each case. From those orders, by special leave, the vendors have appealed to this Court.

The facts

31 On 15 September 1999, Mr and Mrs Romanos ("the vendors") entered into contracts of sale for three adjoining parcels of land in Harris Park, near Sydney, with Pentagold Investments Pty Ltd and Maroon Bros Investments Pty Ltd ("the purchasers"). Both of the purchasers are investment companies that wished to develop the land for the erection on it of twenty-four home units. The agreed price for the aggregate purchase was \$1.875 million. Each contract stipulated that a deposit was payable on exchange amounting, in all, to \$18,750. This sum represented one-tenth of the stipulated total deposit. The balance of nine-tenths of the deposit was payable in accordance with special condition 17(b) of each contract. That condition provided for payment upon the approval of a development application in respect of the land.

32 By special condition 19 of each contract, the purchasers were obliged to keep the vendor advised of the progress of the development application and to inform the vendor "immediately approval is received". In fact, the local authority gave approval for the development on 24 November 2000. Notice of such approval was not received by the purchasers until Friday, 1 December 2000 at 5 pm. On the previous day, the purchasers gave notice to the vendors that they required completion of the contracts on 1 March 2001, having decided that they would settle whether or not development approval was obtained.

9 The other is *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57.

10 The judgment is reported: (2002) NSW Conv R ¶56-014.

33 Time for compliance with the payment of the deposit was made essential by cl 2.2 and 2.3 of the contracts. By cl 2.5 in each contract it was provided that, if any of the deposit was not paid on time, the vendor could terminate the contract. However, the vendor could only do so before the deposit was paid in full.

The decision of the primary judge

34 The primary judge held that, in the circumstances, compliance with the provisions of the contracts as to time would have been sufficient if the payment had been made "on the first reasonable possible day after notice of approval of the development application was in the hands of the [purchasers]"¹¹. This meant, in his Honour's opinion, on Monday, 4 December 2000. In fact, the balance of the deposits was not paid on that day. Nor was it paid at any time before, on 19 December 2000, each of the vendors gave notice terminating the contracts. On the face of things, therefore, two legally advised investment companies, which had accepted an essential time stipulation for the payment of the remaining portions of substantial deposits, failed to comply with the legal obligations that they had accepted. At law, they were in breach of the contracts. Such breaches entitled the vendors to terminate the contracts. The vendors exercised that entitlement.

35 There were a number of defects in the purchasers' case at trial. Despite their obligation to notify the vendors of the development approval, the purchasers did not assert in their evidence that they had signified the development approval to the vendors "immediately approval is received". Nor did they, in explicit evidence, prove the precise reason why they did not do this or pay the balance of the deposits on time. They did not prove exactly the sums that they had paid on the project before and after obtaining development consent. Nor did they prove the precise accretion in value of the consolidated property by virtue of the development approval that they had secured. At the trial, the purchasers did not argue that the vendors had waived compliance with the time stipulation. Nor did they contend that the vendors were estopped by their conduct from relying on the breach. They did submit that the vendors had affirmed the contracts after the termination. They argued that they had done so by the acceptance, by their agents, of the amount of the balance deposits tendered on the following day. The argument of waiver was rejected by the primary judge¹².

11 *Pentagold Investments Pty Ltd v Romanos* (2001) 10 BPR [97911] at 19,039 [9]; (2001) NSW Conv R ¶55-987 at 58,113.

12 *Pentagold Investments Pty Ltd v Romanos* (2001) 10 BPR [97911] at 19,039 [8].

36 On the face of this evidence, or lack of it, the case for the purchasers appeared an unpromising one for the provision of equitable relief. The primary judge declined to grant relief against forfeiture. He was unconvinced that the exercise by the vendors of their legal rights amounted to "unconscionable conduct" or that the purchasers' failure to comply with the essential term as to time in each contract amounted to "exceptional circumstances", as required to attract equitable relief¹³. The primary judge therefore dismissed the purchasers' application.

37 Unlike in *Tanwar Enterprises Pty Ltd v Cauchi*¹⁴, pursuant to s 55(2A) of the *Conveyancing Act* 1919 (NSW) the primary judge ordered the vendors to return the deposits received by them. He gave no separate reasons for this order. From his general comments, his reasons appear to have been that, (1) although the precise gains secured by the vendors were unproved, it was likely that the value of the properties (with development consent) was enhanced and (2) the losses occasioned to the vendors by the short delay in notice and payment were very small¹⁵. The primary judge remarked that he had come to his conclusion, refusing relief against forfeiture, "with considerable reluctance because ... it is impossible to express any enthusiastic approbation of the conduct of the vendor[s]"¹⁶. The purchasers suggested that, in the considerations mentioned by the primary judge on the collateral claim for return of the deposits, lay elements that justified their entitlement to the primary relief that they sought.

38 In the Court of Appeal, the vendors, by cross-appeal, contested the order for the return of the deposits. However, that claim was rejected. It was pressed upon this Court.

The decision of the Court of Appeal

39 The Court of Appeal's decision in favour of the purchasers was reached by majority. The reasons of the majority were given by Sheller JA, with the concurrence of Mason P.

13 *Pentagold Investments Pty Ltd v Romanos* (2001) 10 BPR [97911] at 19,039-19,040 [10]; (2001) NSW Conv R ¶55-987 at 58,113 citing *Legione v Hateley* (1983) 152 CLR 406; *Ciavarella v Balmer* (1983) 153 CLR 438; *Stern v McArthur* (1988) 165 CLR 489.

14 [2003] HCA 57.

15 *Pentagold Investments Pty Ltd v Romanos* (2001) 10 BPR [97911] at 19,040 [11]; (2001) NSW Conv R ¶55-987 at 58,113-58,114.

16 *Pentagold Investments Pty Ltd v Romanos* (2001) 10 BPR [97911] at 19,040 [12]; (2001) NSW Conv R ¶55-987 at 58,114.

40 The considerations that appear to have moved the Court of Appeal to afford equitable relief to the purchasers were (1) that the "forfeiture provision was security for the payment of the deposit"¹⁷ and that such purpose had, to that extent, been fulfilled by the payment made the day after the notice of termination was given; (2) that the land, with "the benefit of the development approval", had "no doubt ... increased in value" affording the vendors a windfall gain if the contracts were not performed¹⁸; (3) that the contracts were terminated for breach a fortnight after the entitlement to do so arose without any prior notice by the vendors to the purchasers of their intention to do so¹⁹; (4) that the balance of the deposit moneys had been tendered to the agent of the vendors the day after the contracts were terminated²⁰; and (5) that discussions between a representative of the purchasers and one of the vendors on and after 1 December 2000 concerning the release to the vendors of part of the deposit moneys and early completion of the settlement of one sale (to enable the vendors to buy another property) were "only consistent with" the intention of the vendors to proceed on the footing "that the contracts were still on foot"²¹.

41 There is no doubt that between 4 December 2000 and the termination of the contracts on 19 December 2000 there were negotiations in which Mr Romanos, one of the vendors, took an active part. Mr Romanos had said that the vendors wanted to vary the terms of the contracts to have the deposit moneys released to them so that they could use such moneys as a deposit on another property and an advance on the settlement moneys for such property. The purchasers agreed to this request. They notified the vendors of their agreement. On 5 December 2000, the purchasers also instructed their solicitor that they would agree to settle the purchase of one of the three properties a month earlier to allow Mr Romanos to complete the purchase of the other property he had in mind. This fact was also notified to the vendors. Further, the purchasers agreed to allow Mr Romanos to remain in possession of the property he occupied rent

17 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,338 [47]; see also at 58,339 [55].

18 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,338 [49].

19 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,338 [49], 58,339 [53].

20 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,339 [55].

21 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,339 [54]-[55].

free for two weeks after the indicated settlement to permit repairs to the other property to be carried out.

42 On the face of things, these dealings, immediately before the notice of termination of the contracts, suggested that both sides were proceeding at that time on the basis that the settlement of the sale of the three parcels of land would go ahead²². However, on 11 December 2000 Mr Romanos notified the purchasers that he was looking for another property. Although Mr Romanos was asked to inform the purchasers as soon as he found another property, so that they could arrange an earlier settlement as agreed, no such property was nominated before the notice terminating the contracts was given by the vendors on 19 December 2000.

The applicable principles

43 The principles applicable to cases of this kind, by reference to the authorities in this Court, are explained in my reasons in *Tanwar*²³. I will not repeat them. I incorporate them by reference.

44 The major point of difference between the circumstances of this appeal and those of *Tanwar* is that here, the Court of Appeal granted the purchasers the equitable relief which they sought. To disturb the orders providing relief, it is therefore necessary for this Court to conclude that the Court of Appeal erred in the decision that it reached. That decision was a majority one. The dissenting judge (Giles JA) was unconvinced that unconscionable or unconscientious conduct had been proved²⁴. He favoured dismissing the purchasers' appeal and allowing the vendors' cross-appeal concerning the return of the deposits.

45 The basic difficulty which the purchasers faced in establishing a foundation for equitable intervention lay in serious defects of proof of their case. As the primary judge found, they failed to prove elements which, if they had been proved, would have been relevant to building a case for relief against the vendors. In the Court of Appeal the purchasers challenged the rejection by the primary judge of an application by them at trial to reopen their case to call further

22 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,335 [39], 58,339 [54]-[55].

23 [2003] HCA 57 at [81]-[106].

24 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,341 [67].

evidence. That challenge was dismissed by the Court of Appeal. Understandably, it has not troubled this Court²⁵.

46 Nonetheless, the Court of Appeal quoted *in extenso* a letter sent by the purchasers' solicitor immediately after the notice of termination was given. That letter contained assertions concerning the dealings between the purchasers and Mr Romanos in the interval between 4 December 2000 and the termination of the contracts. In argument, the purchasers referred to the contents of the letter in an endeavour to fill the gaps in their evidence at trial. However, there remain fundamental difficulties in arguing from this evidence a substantive case upon which to provide equitable relief against forfeiture and to order specific performance of the validly terminated contracts.

47 First, the letter was not admitted at trial as proof of the facts stated in it. It was received into evidence only as proof that the letter was written, in effect protesting about the termination. As such, the letter does not advance the case of the purchasers in the way that substantive evidence might have done.

48 Secondly, the thrust of the claims made in the letter was to the effect that no prior demand had been made by the vendors for the balance of the deposits to be paid to the agent. That may be so. I am prepared to assume that such was the case. It is difficult to believe that the purchasers would not have responded to such a demand had the vendors made one.

49 Nevertheless, the contracts between the parties did not call for such prior notice to be given. On the contrary, in the assignment of the obligation of notice, the contract made it clear that it was for the purchasers to notify the vendor "immediately approval is received". The fact that, in their evidence, the purchasers refrained from giving evidence of such notification suggests that none was given. Had such notification been given, it would have been of considerable significance in assessing the importance of the events that followed. It might therefore have been expected that the purchasers would have proved the fact²⁶. They did not. Even in the letter of the purchasers' solicitor there was no assertion to that effect.

50 Thirdly, these considerations are critical to the significance to be given to the negotiations that took place between Mr Romanos and the purchasers after

25 cf *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,337 [42]-[44].

26 *Jones v Dunkel* (1959) 101 CLR 298 at 308, 320-321; *Cross on Evidence*, 6th Aust ed (2000) at [1215]; cf *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 142-143 [51].

4 December 2000. If Mr Romanos were acting in ignorance of the fact that development approval had already been given (and that he was therefore entitled, as of right, to the immediate payment of the balance deposits) the ongoing negotiations would clearly have been relevant to the quality of Mr Romanos' subsequent conduct and possibly that of the other vendor. If such a sequence of events were proved, a case of affirmation of the contracts might indeed have been established, rendering the sudden turn-around by the vendors without notice to the purchasers arguably unconscionable. However, if it be assumed that the vendors were ignorant of the fact that development approval had been given, Mr Romanos' dealings with the purchasers take on a completely different quality. He was, in effect, seeking favours that the purchasers were willing to accord. But had he known that he was immediately entitled to the balance of the deposits he would have been in a much stronger negotiating position.

51 Given that waiver and estoppel were not advanced in the Court of Appeal and are not argued in this Court, the most that is left to sustain the orders providing equitable relief is the possibility that, by his conduct, Mr Romanos was affirming the contracts for the vendors. There are several difficulties with this argument. Affirmation would be of little value or relevance if it rested on an assumption that the development approval had not yet come through. In the silences of the evidence proved at trial, it is impossible to do other than to speculate about the notification given to the vendors and the state of their knowledge at that time. But given that it was to the distinct advantage of the purchasers to prove notification, if such were the case, and that they failed to do so, it is proper to infer that Mr Romanos and the vendors together continued to deal with the purchasers after 4 December 2000, and before 19 December 2000, in the belief that the purchasers were still waiting for development approval. The fact was, as the purchasers knew, that approval had been given enlivening the vendors' right, in default of immediate payment of the balance of the deposits, to terminate the contracts, as they soon did.

The provision of relief was erroneous

52 On the evidence called at the trial, the purchasers therefore failed to prove that the conduct of the vendors, in exercising their legal rights, was unconscionable or, as it is sometimes described, unconscientious. I agree with Giles JA in the Court of Appeal²⁷:

"[W]hether [the vendors'] conduct was unconscionable or unconscientious had to take into account that (i) the contracts did not call for demand, reminder or warning, but left it to the purchasers to attend to payment of

27 *Pentagold Investments Pty Ltd v Romanos* (2002) NSW Conv R ¶56-014 at 58,340-58,341 [65]-[67].

the deposits; (ii) the purchasers did not give evidence that they were led by the events in the period from 1 to 11 December 2000 to think that the contracts were not vulnerable to termination; (iii) purchasers attentive to the contracts could not have been unaware that they would lose their expenditure on obtaining development approval and the vendors would gain the increase in value of the properties; and (iv) the expenditure and increase in value were both unquantified, and were not shown to have been outside the contemplation of the parties when they entered into the contracts.

... The failure to pay the deposits was left unexplained. There was no evidence that it was because of the purchasers' misapprehension of their contractual position, let alone that it was because they were misled by the vendors' conduct in early December 2000. It is the vendors' conscience that is in question, and for all that appeared when they terminated the contracts the vendors were entitled to believe and did believe that the purchasers were aware of their contractual position and either could not pay or chose not to pay the deposits.

As the trial judge observed, 'It may be that with more evidence an entitlement could have been made out but on the evidence presented it was not'. In my opinion unconscionable or unconscientious conduct warranting relief against forfeiture was not made out."

53 This conclusion is reinforced²⁸ by a reflection upon the entire circumstances of the relationship between the parties; the commercial character of the transaction and of the purchasers; the availability to them at all times of independent legal advice; the explicit terms of the time provision tailored to the originally perceived necessity of securing development approval; and the absence of any suggestion in the evidence that the purchasers were disadvantaged, vulnerable or otherwise in need of equity's protection from a party in a superior position²⁹. In such a transaction, between such parties, the enforcement of legal rights did not constitute a burden on the conscience of the vendors.

54 The payment of deposits plays an important and well known role in contracts for the sale of land, including to secure due performance of such contracts. One might say that this is especially important in contracts concerned with the development of the land, as here. The application of a clear rule is specially desirable in this class of contractual dealings³⁰. I am therefore of the

28 See *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57 at [106].

29 cf *Stern* (1988) 165 CLR 489 at 526-527.

30 Butt, "Purchasers relieved against loss of contract", (2002) 76 *Australian Law Journal* 347 at 350.

18.

view that the majority in the Court of Appeal erred in holding that the nominated circumstances warranted the provision of equitable relief to the purchasers. For like reasons, in this case, consistency required that the cross-appeal to that Court be allowed³¹.

Orders

55 I agree with the orders proposed in the joint reasons.

31 cf reasons of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ at [27].

56 CALLINAN J. In this case the Court of Appeal of New South Wales (Mason P and Sheller JA, Giles JA dissenting)³², purporting to apply the same principles as the same, but a differently constituted Court (Handley and Beazley JJA and Mathews AJA) applied in *Tanwar v Cauchi*³³, reached a conclusion which is irreconcilable with the latter. It is unnecessary to restate the facts and the relevant contractual terms because they are fully recorded in other judgments of the Court. Some of them, however, need brief further reference because, on examination, it can be seen that the respondent purchasers here had even less merit than the purchaser in *Tanwar*.

57 The respondent purchasers are investment companies. They were legally advised in entering into the three contracts and deeds of variation of them. They paid much less than 10% of the price at the outset in return for the valuable opportunity and time to seek development approval. Approval was given on 24 November 2001 and the respondents received notice of it on 1 December 2001. On 30 November 2001 however, the respondents had sought to make the three contracts unconditional by giving notice for their completion three months later, whether development approval were granted or not. The respondents were bound to pay the balance of the deposits some days before they purported to make the contracts unconditional, that is, immediately upon the grant of development approval. Having sought to render the condition as to the receipt of development approval inoperative and irrelevant, they were probably in any event bound to pay the balance of the deposits at the same time as they so acted. This they did not do even in the ensuing fortnight or so before the appellants gave notice of termination of the contracts. The respondents were unable to explain in any satisfactory way why they failed to pay the balance of the deposits.

The disposition of the appeal

58 I would adhere to what I have said in *Tanwar Enterprises Pty Ltd v Cauchi*³⁴. It follows that the appeal must succeed. I would also reject for three reasons the contention that the Court of Appeal was entitled to hold that an inferred increase in the value of the land because of the grant of the development approval would, if the contracts were terminated, confer a windfall on the appellants, disentitling them to rescind the contracts and forfeit the deposits. First, it is wrong to speak of such an increase as a windfall. If it eventuated it was no more than the consequence of the bargain which the parties made, and did

32 (2002) NSW Conv R ¶56-014.

33 (2003) NSW Conv R ¶56-048.

34 [2003] HCA 57.

so on legal advice. It is something that will almost always be on the cards whenever a contract contains a condition which is not simply and solely for the benefit of one party. Courts have no reason to suppose that it was not a matter that was factored into all of the terms and conditions of the contract, including in particular the price and the time within which it was to be paid.

59 The second reason is that it is an unsafe assumption to make that a windfall has resulted. In this regard what I said in *Tanwar* about options and their value is relevant³⁵. The vendors are out of their money and can sell to no other whilst approval is sought, and this comes no doubt at an opportunity cost. Whether there is a nett benefit, and its value to one side or the other is a matter of conjecture. It could be that the development sought would not be the highest and best use of the land anyway. Planning laws may change, and indeed might even have done so pending the obtaining of approval. Markets can be volatile. The value of money and interest rates may change, even over relatively brief periods. In short, assumptions about windfalls to one side of the kind made here fail to take into account both sides of the ledger.

60 Thirdly, and as the matters to which I have just referred would suggest, even if the result of a termination in circumstances of the kind which existed here may properly be regarded as giving rise to the possibility of a windfall, such a possibility may not be converted into a probability by a court without valuation evidence as to it. The evidence would need to cover all of the matters referred to in the preceding paragraph, the volatility or otherwise of the market during the relevant period, what could or could not have been foreseen at the beginning of the period, and the market value of an option comparable in utility to the conditional contracts of which the purchasers have had the benefit.

61 I am of the opinion that the Court of Appeal erred in the respects to which I have referred.

62 It also erred in the identification and application of the principles. The outcome of a case such as this one is not to be determined by describing and treating the forfeiture provisions, not only as if they were no more than a security for the payment of the deposit, but also as if they stood alone, and were not one of a complex of terms for which the parties bargained.

63 Nothing turns on the discussions between the parties immediately before the contracts were terminated. Parties may, and did here, negotiate for different arrangements without compromising their contractual rights. No such arrangements were made, and no estoppel arose.

35 [2003] HCA 57 at [144].

21.

64 It is not possible to regard the respondents as having been the victims of surprise or accident, let alone of such in any exceptional degree. The appellants did not act oppressively. They simply exercised their contractual right to avail themselves of the essential provision as to time. The appellants were not shown to have acted unconscionably.

65 I would allow the appeal with costs and join in the orders set out in the joint judgment.