HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HEYDON AND CRENNAN JJ

KOOMPAHTOO LOCAL ABORIGINAL LAND COUNCIL & ANOR — APPELLANTS

AND

SANPINE PTY LIMITED & ANOR — RESPONDENTS

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited
[2007] HCA 61
13 December 2007
S221/2007

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 November 2006 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

B A J Coles QC with G A Sirtes for the appellants (instructed by Bartier Perry Solicitors)

T S Hale SC with A M Mitchelmore for the first respondent (instructed by Solari Legal)

No appearance for the second respondent

CATCHWORDS

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited

Contract – Repudiation – First respondent was held by the trial judge to have grossly departed from the terms of a contract with the first appellant – First appellant purported to accept a repudiation of that contract – Difference between renunciation of a contract, where a party evinces an inability or unwillingness to render substantial performance of a contract, and repudiation, in the form of a breach justifying termination – Classification of contractual terms for the purpose of determining the consequences of a breach – Whether case was one of breach of a condition or sufficiently serious breach of an intermediate term – Whether breach went to root of contract – Relevance of adequacy of damages as a remedy – Relevance of failure to complain of breaches.

Contract – Termination for breach – Governing principles – Whether class of intermediate or innominate terms should be recognised.

Words and phrases – "repudiation", "renunciation", "condition", "intermediate term".

1 GLEESON CJ, GUMMOW, HEYDON AND CRENNAN JJ. This litigation arises from the termination, or purported termination, of a joint venture agreement for the commercial development of land.

2 On 14 July 1997, the first appellant, Koompahtoo Local Aboriginal Land Council ("Koompahtoo"), and the first respondent, Sanpine Pty Limited ("Sanpine"), entered into a joint venture agreement ("the Agreement") for the development and sale of a large area of land near Morisset, north of Sydney. The land had become vested in Koompahtoo as a result of claims made under the *Aboriginal Land Rights Act* 1983 (NSW). The development project, which was to be self-funded, was the first such project to be undertaken in New South Wales by a Local Aboriginal Land Council. Koompahtoo contributed the land. Sanpine, which had no other business, was the manager of the project. Each party had a 50% interest in the joint venture. Sanpine was also entitled to receive a management fee equal to 25% of the total project costs. The Agreement provided that it did not give rise to a partnership.

3 Although attempts were made to obtain the approval of the relevant authorities, including necessary rezoning of the land, and although liabilities in excess of $2 million were incurred on the security of mortgages over the land, the project, which was controversial within the Koompahtoo community, which involved sensitive environmental issues, and which evidently was unattractive to financiers, never proceeded even to the initial stage of obtaining rezoning of the land. In April 2002, a caveat was placed on the title to the land, which had the practical effect of impeding the prospects of further funding. In June 2002, the New South Wales Aboriginal Land Council ("NSWALC") appointed an investigator of Koompahtoo. On 25 February 2003, the second appellant, Mr Lawler, was appointed as administrator of Koompahtoo. On 10 April 2003, a mortgagee went into possession of the land. From February 2003 until December 2003, the administrator made attempts to obtain from Sanpine information as to the financial position of the joint venture. Proper books of account and financial records of the joint venture had never been kept by Sanpine. On 12 December 2003, the administrator, on behalf of Koompahtoo, terminated the Agreement. Sanpine commenced proceedings in the Supreme Court of New South Wales, seeking a declaration that the termination was invalid and that the Agreement was still on foot. There is other, presently irrelevant, litigation concerning the land.

4 Campbell J, at first instance, formulated a preliminary question as follows:

> "Whether, on the proper construction of the agreement entitled 'Morisset Joint Venture Agreement' between [Sanpine] and [Koompahtoo], dated 14 July 1997, as amended by the 'Morisset Joint Venture Supplemental

Agreement' dated 17 October 2000 ('Agreement'), and in the events which have happened, the Agreement was validly terminated by [Koompahtoo] by its letter to [Sanpine] dated 12 December 2003."

5 Campbell J answered that question in the affirmative and dismissed Sanpine's proceedings[1]. The Court of Appeal of the Supreme Court of New South Wales, by majority (Giles and Tobias JJA, Bryson JA dissenting), allowed an appeal by Sanpine[2]. The basis of Campbell J's decision was that there had been "gross and repeated" departures by Sanpine from its obligations under the Agreement, including a "total failure to adhere to the accounting obligations", and that, having regard to the nature of the Agreement and the consequences of the breaches, the breaches were "sufficiently serious" to give Koompahtoo a right to terminate. For the reasons that follow, the conclusion of Campbell J was correct.

The Agreement

6 Clause 1.1 of the Agreement defined "Development" to mean the rezoning of the joint venture site by the relevant local government authority to permit residential development, the application for and obtaining of approvals for its subdivision, the carrying out of subdivision and other works required to prepare the residential lots for sale, the registration of the plan of subdivision, the marketing and sale of the lots, and incidental matters. Clauses 2.2 and 2.3 of the Agreement provided:

"2.2 Objects

The objects and extent of the Joint Venture are:

(a) to undertake the Development;

(b) to determine the scope of the Development;

(c) to carry out the design of the Development;

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1 *Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council* [2005] NSWSC 365.

2 *Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council* [2006] NSWCA 291.

(d) to apply for and obtain consents, approvals and authorisations from the Council and all other relevant statutory and regulatory authorities for the Development to the extent that this has not been done prior to the date of this Agreement;

(e) to arrange funding for the Development at the most commercially advantageous terms;

(f) to engage all such architects, town planners, valuers, environmental experts, engineers, excavators, civil works contractors, builders, tradesmen, consultants, real estate agents and all other relevant persons that may be necessary to carry out the Development in the most economic, efficient, workmanlike and professional manner;

(g) to carry out the Development to the best commercial advantage of the Venturers and within the shortest practicable time;

(h) to identify and procure purchasers for the Residential Lots;

(i) to sell the Residential Lots upon commercial terms and at not less than market value … on the terms and subject to the conditions provided for in this Agreement;

(j) to do all such things as shall be incidental or conducive to the attainment of the foregoing but only as shall be determined by the Management Committee.

2.3 Achievement of Objects

The Venturers agree and acknowledge that they will take all steps and do all things necessary to achieve the objects of the Joint Venture on arms' length terms and to the commercial advantage of the Joint Venture …"

7 As noted above, Koompahtoo and Sanpine each held a 50% interest in the joint venture. While liabilities incurred in relation to the development were to be borne by the parties in proportion to their percentage interests, cl 13.1(c) limited the liability of Koompahtoo to recourse against the land to be developed. Clause 13.3(a) further recorded the parties' intention that Koompahtoo's obligation to contribute to the joint venture be limited to making the land available and not extend to making any cash payment to fund the development.

Sanpine's obligation to contribute to the joint venture was also limited, under cl 13.3(b), to providing expertise as development manager and, in its discretion, limited funding to enable preliminary negotiations to take place. The consequence of these provisions was that the development was to be funded by external finance. Clause 13.5 provided that each joint venturer would be solely responsible for, and pay, project costs incurred by that joint venturer before the date of the Agreement.

8 As noted above, under cl 6.1 of the Agreement, Sanpine was appointed as the manager of the development. Clause 6.2 provided:

> "6.2 Obligations of Sanpine
>
> Sanpine agrees to:
>
> (a) co-ordinate the overall Development;
>
> …
>
> (c) seek funding for the Development from recognised, reputable and experienced project financiers including preparation of all applications, information memorandums and supporting documents required and negotiating the finance facility offered by a project financier which the Management Committee agrees to accept;
>
> …
>
> (e) engage bookkeeping and accounting services for the Joint Venture and the Development and maintain all records and documents of the Joint Venture to the extent that the Management Committee does not require the records or documents for the purposes of the Works and prepare tax returns for the Joint Venture if tax returns are required to be lodged;
>
> …
>
> (i) formulation of a Development Program showing the manner in which Sanpine expects the Development to proceed including a timetable for the completion of each of the stages of the Development and the envisaged cost to complete each of the stages of the Development;

(j) regular updating of the Development Program to take account of events or circumstances which affect the progress of completion of the Development;

…"

9 The term "Development Program" was defined, in cl 1.1, to mean the program setting out each of the stages of the development and their estimated timetable and cost, prepared by Sanpine in accordance with cl 6.2(i), and updated in accordance with cl 6.2(j). Clause 6.3 provided that, except where control or determination of an aspect of the development was reserved to the Management Committee, Sanpine was entitled to act within the parameters of the joint venture without specific instructions from the Management Committee.

10 The Agreement provided, in cl 7.1, for the appointment of a Project Manager nominated by Sanpine but did not set out the Project Manager's powers or obligations, save by providing, in cl 10.1(e) and (h), that the Project Manager was subject to the "overall supervisory control and authority" of the Management Committee.

11 Clause 10.1 of the Agreement provided:

"10.1 Formation of Management Committee

The Venturers shall form a Management Committee to manage the affairs of the Joint Venture and to consider and make decisions in relation to all aspects of the Development including, without limitation, financial issues and [A]boriginal culture and [A]boriginal employment issues. The Management Committee shall have the authority and power to act on behalf of the Venturers in relation to all matters with respect to the Joint Venture except as otherwise provided for in this Agreement. Without limiting the generality of the foregoing the Management Committee shall have the following functions:

(a) approval of the Approved Development Program and Approved Budget;

(b) preparation of the Annual Accounts;

(c) appointment of the Auditors;

(d) approval of financing for the Development in accordance with clause 11;

(e) approval of the Project Manager and any replacement Project Manager;

…

(h) overall supervisory control and authority over the activities of the Project Manager;

(i) whenever it has been agreed by the Management Committee to sell a Residential Lot, Koompahtoo shall sign all documents necessary to effect such sale, including without limitation the sale of land contract, the transfer and any discharge of mortgage, or procure a duly appointed attorney to sign such documents on behalf of Koompahtoo."

12 Under cl 10.2, the Management Committee was to comprise four representatives from each of Sanpine and Koompahtoo unless the parties agreed otherwise. Clause 11.1 provided that the Management Committee was to determine the manner in which the development was to be financed by a project financier. Clause 11.2 required all funds advanced by a project financier to be deposited in a joint venture account and used solely for the purposes of the development, subject to any special arrangement for the advance of project finance funds approved by the Management Committee. Under cl 16.6, the Management Committee was to prepare annual accounts of the joint venture, which cl 16.7 required to be audited by auditors appointed by the Management Committee under cl 17. No auditors were ever appointed.

13 All activities of the joint venture were, pursuant to cl 12.1 of the Agreement, to be carried out pursuant to approved development programs and approved budgets. Clause 12.2 obliged Sanpine, as development manager, to prepare and submit to the Management Committee for its approval a development program and cost and revenue budget for the development within 90 days of the date of the Agreement and biannually thereafter.

14 Clause 13.2 obliged Sanpine to make monthly reports to the Management Committee showing the expenditure of the joint venture and the progress of the development. Clause 16.1 provided for the establishment of a bank account, as soon as possible following the date of the Agreement, into which funds concerning the development were to be deposited under cl 16.3. Funds advanced by third parties were also to be deposited in the joint venture account, under cl 11.2 and cl 16.3, unless the Management Committee approved otherwise. While cl 16.1 obliged the joint venturers to establish the bank account, the definition of the term "Joint Venture Account" in cl 1.1 described it as the account "to be established by Sanpine pursuant to clause 16.1." Clause 16.4

provided that payments were only to be made from the joint venture account in accordance with the approved development plan and approved budget and payment guidelines previously approved by the Management Committee. Clause 16.5(a) provided:

> "16.5 Maintenance of Books
>
> (a) Sanpine shall ensure that proper Books are kept so as to permit the affairs of the Joint Venture to be duly assessed. Financial records comprised in the Books shall be kept in accordance with generally accepted accounting principles and in such a manner as enables the Venturers to extract from the Books any information in relation to the affairs of the Joint Venture as that Venturer may reasonably require from time to time."

15 Clause 23 included the following:

> "23. COVENANTS BY VENTURERS
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> 23.1 General Covenant
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> Each Venturer must be just and faithful to the other Venturer and at all times properly and fully give to the other all information and truthful explanations on all matters relating to the Development and the Development Assets and afford every assistance in its power in carrying out the Development.
>
> 23.2 Consultation
>
> The Venturers shall consult together regularly in connection with the Joint Venture.
>
> 23.3 Reporting
>
> Each Venturer shall regularly report to the other Venturer in connection with the Joint Venture. Each Venturer shall promptly inform the other Venturer of all material information concerning the Joint Venture. Each Venturer shall promptly comply with any reasonable request for information concerning the Joint Venture which it may receive from the other Venturer."

16 Clause 19 of the Agreement provided a mechanism by which, in the event of a breach of the Agreement that was not remedied within 30 days of written

notice from the party not in breach, the party not in breach would obtain the right to purchase the interest in the joint venture of the party in breach. Clause 20 provided that the joint venture would continue until completion of the development unless terminated sooner, by mutual agreement in writing. Clause 25.4 of the Agreement provided that waiver of any breach or provision of the Agreement had to be in writing and that failure to exercise any right or remedy was not a waiver. Clause 25.6 provided that the rights, powers, authorities, discretions and remedies arising out of or under the Agreement did not exclude any other right, power, authority, discretion or remedy. Clause 26 provided for compulsory alternative dispute resolution before court proceedings or arbitration proceedings could be commenced in relation to any dispute arising from the Agreement. However, it was not contended that cl 26 was relevant to the issues in this Court.

17 Before Campbell J, Sanpine argued that cl 20, read together with cl 19, had the consequence that there was no common law right to terminate the Agreement, and that the Agreement itself contained a complete statement of the circumstances in which it could be brought to an end. Campbell J, applying what was said by this Court in *Concut Pty Ltd v Worrell*[3], rejected that argument, which does not seem to have been repeated in the Court of Appeal, and was not pressed in this Court.

The joint venture between July 1997 and December 2003

18 Koompahtoo's land near Morisset, which was the land in folio 556/729949 ("Lot 556") together with two adjoining parcels of land, comprised approximately 885 ha. The development contemplated by the Agreement of 14 July 1997 was to cover about 109 ha of that land. A supplemental agreement of 17 October 2000 increased the area of the proposed development to about 162 ha. The site proposed for development was mostly zoned rural. A small part was zoned for public recreation, and another small part was zoned to permit coal mining. Consequently, rezoning by the Lake Macquarie City Council ("LMCC") was required. Furthermore, the consent of NSWALC to changes of use of land vested in a Local Aboriginal Land Council and to a sale or mortgage of such land was required. The finance for the development (including the costs associated with the application for rezoning, which included environmental assessment) was to be raised by borrowing on the security of Lot 556. Many financiers who were approached for funding refused because of concern about the possibility of

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3 (2000) 75 ALJR 312 at 317 [23]; 176 ALR 693 at 699-700.

having to exercise a power of sale against the land of an Aboriginal Land Council.

19 In October 1998, a lender agreed to provide finance secured by a mortgage over the whole of Lot 556. The land was valued, as currently zoned, at $1.3 million. The lender agreed to provide $780,000 (60% of valuation) for all costs associated with pre-approval (of rezoning) work and funds up to 60% of the value of the land after development approval had been obtained from LMCC. Four persons associated with Sanpine gave personal guarantees in a total amount of $600,000.

20 Sanpine has never carried on any business other than entering into and carrying on (to the extent to which that occurred) the joint venture. All its assets are held by it on the trusts of the Sanpine Unit Trust. Campbell J was unable, from the evidence called by Sanpine, to make clear findings about the corporate structure of Sanpine, but the persons principally involved, directly or indirectly, were identified. They, or companies associated with them, agreed to provide consultancy and other services to Sanpine.

21 In March 2001, it was found necessary to raise further finance. A loan of $1.65 million was obtained, for the purpose of paying out the original lender and covering further expenses. As part of this re-financing, Lot 556 was transferred from Koompahtoo to the second respondent, KLALC Property & Investment Pty Limited, a company controlled by persons associated with Koompahtoo. The second respondent executed a mortgage over Lot 556 in favour of the new lender.

22 It is unnecessary to describe in detail the investigation and reports that were made for the purpose of pursuing the necessary approvals to permit rezoning and development. Campbell J said:

> "The rezoning still has not been achieved, and the town planning evidence ... is that considerable time, work and expense will still be required to enable rezoning to be achieved, if it is ever achieved. The whole of Lot 556 remains subject to a registered mortgage ... which the mortgagee claims secured a debt of at least $2.36m as at 30 June 2004. The validity of that mortgage is in contest in other proceedings, and nothing I say in this judgment should be taken as prejudging the question of the validity of that mortgage. If the mortgage is valid, the amount secured under it would inevitably have increased after 30 June 2004 by the addition of interest at a default rate, and perhaps by the addition of enforcement expenses."

23 The mortgagee went into possession of Lot 556 on 10 April 2003, and remains in possession. Mr Lawler, upon being appointed administrator of Koompahtoo on 25 February 2003, set about seeking to obtain information and documents to enable him to understand the financial position of the joint venture and, specifically, how the money borrowed from the original, and then the later, financier had been applied. These efforts were pursued between February and December 2003 and, it should be added, were further pursued in the course of the hearing before Campbell J.

24 On 12 December 2003, Mr Lawler wrote to Sanpine in the following terms:

> "Without any admission that [Koompahtoo] is bound by the joint venture agreement dated 14 July 1997 ('the joint venture'), it is [Koompahtoo's] position that Sanpine Pty Limited has repudiated that arrangement by breaching the joint venture in at least the following ways (which breaches remain unremedied), thus evincing an intention not to be bound by it:
>
> 1. Failing to ensure that proper books of account have been kept;
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> 2. Failing to provide or update proper development programs;
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> 3. Failing to provide half yearly reports to the management committee;
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> 4. Failing to arrange sufficient funding for the development;
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> 5. Failing to co-ordinate and manage the development properly, efficiently, adequately or impartially or otherwise in accordance with its obligations; and
>
> 6. Failing to co-ordinate and manage the development so as to achieve the objects of the joint venture within a reasonable ti[m]e or at a reasonable cost.
>
> [Koompahtoo] accepts that repudiation. It will not be proceeding with any joint venture in relation to the land with Sanpine Pty Limited and reserves its right to damages."

25 It is the validity of that purported termination that is in question. It should be added that Campbell J accepted evidence that, at a meeting in May 2003, Mr Lawler had expressed the opinion that the Agreement was unfair to Koompahtoo, that it unduly favoured Sanpine, and that he would do all he could to get out of the Agreement. However, Campbell J found no lack of good faith on the part of

Mr Lawler or Koompahtoo in exercising a right to terminate in December 2003. No such finding was made by the Court of Appeal, and no argument based on want of good faith, or unconscionability, in the exercise of a power of termination has been put to this Court.

The primary judge's findings of breach

26 Campbell J accepted that Koompahtoo carried the onus of establishing its right to terminate the Agreement and, in that connection, of establishing the breaches on which it relied and the effect of those breaches. He categorised Koompahtoo's allegations of breach as follows:

1. Sanpine's obligations concerning rezoning.
2. Document production and maintenance.
3. Banking and spending of money.
4. Failures to maintain proper books.

27 Subject to one qualification, Campbell J rejected Koompahtoo's complaints in relation to category 1. It is sufficient to deal with his reasoning briefly, for it did not form the basis of his ultimate decision, and is not challenged in this Court. In substance, it was alleged that Sanpine failed to comply with its express obligation under the Agreement to pursue the project to the best commercial advantage of the venturers and its implied obligation to advance the development diligently and promptly. Campbell J examined in detail the history of the efforts to pursue rezoning and development approval in what was a sensitive and difficult legal, administrative and (in the broadest sense) political context. Part of that context was dissension within the local Aboriginal community about the merits of the entire project. Another part was the need to undertake, or arrange for, studies relevant to various environmental issues. Save for a finding that there was an unexplained and unjustified delay of five months in relation to one particular survey, Campbell J declined to find breach by Sanpine of the obligations in question. He did not think it right to blame Sanpine for the failure to achieve rezoning by the time of the letter of termination.

28 On the other hand, Campbell J found substantial breaches by Sanpine of the obligations in categories 2, 3 and 4. Not long after the administrator was appointed, Lot 556 (which included part of, but was not limited to, the land Koompahtoo had agreed to contribute to the joint venture) was in the possession of a mortgagee who claimed to be owed $2.3 million. When the administrator set out to find where the money had gone to, there were no meaningful joint venture accounts, and the records of Sanpine did not explain or justify significant amounts claimed by Sanpine to be expenses chargeable to the joint venture.

29 As to the breaches in category 2, cl 6.2(i) and cl 6.2(j) of the Agreement obliged Sanpine to prepare a development program and to update it regularly. Clause 12.2 required Sanpine to prepare and submit a development program and a cost and revenue budget within a certain time and to bring such information up to date at specified intervals. Clause 13.2 required monthly reports containing certain information. No such documents were prepared. However, Campbell J accepted evidence of the Project Manager that he was in constant communication with the members of the Management Committee and that he presented them with "cash flow projections". Campbell J held that this was something to be taken into account in assessing the seriousness of Sanpine's breaches of its obligations under cll 6.2(i), 6.2(j), 12.2 and 13.2.

30 Sanpine argued that, by reasons of waiver or estoppel, Koompahtoo could not complain of these breaches. The basis of the argument was that no member of the Management Committee asked for any further or different documents from Sanpine. Campbell J found that there was no representation by the Koompahtoo representatives on the Management Committee that the provisions of the Agreement concerning development programs and monthly reports would not be insisted upon, and no reliance by Sanpine on anything that the Koompahtoo representatives did, or failed to do, concerning its non-performance of its obligations.

31 It is convenient at this point to say something further about the Management Committee, and Sanpine's unsuccessful reliance on waiver and estoppel. In the Court of Appeal, Sanpine did not dispute Campbell J's findings of breach. The Court of Appeal did not find waiver or estoppel (which were not pressed in this Court). Nevertheless, the majority in the Court of Appeal accepted that the conduct of the Management Committee served to "explain or ameliorate" Sanpine's failure to adhere to the Agreement.

32 The recitals to the Agreement recorded that Koompahtoo was about to become the owner of the joint venture site, and that Sanpine had the expertise to assist Koompahtoo in the development of the site. As a Local Aboriginal Land Council, Koompahtoo was subject to legislative requirements relating to its custodianship of property and funds, and matters of accounts and audit. The relevant legislation was examined in detail by Campbell J, and formed part of the context in which he considered the Agreement and the conduct of the parties. What the Agreement described as Koompahtoo's contribution to the joint venture (cl 5) was to make available the land. What the Agreement described as the role of Sanpine (cl 6) included co-ordinating the development, engaging necessary professional services, seeking funding, engaging accounting services for the joint venture and maintaining all records and documents. The four representatives of Sanpine on the Management Committee included Mr Steer, who was an

accountant, and Ms Moloney. Ms Moloney was the domestic partner of Mr Scott, the Project Manager, who normally attended meetings of the Management Committee as her alternate. The representatives of Koompahtoo included Mr Smith, the Chairman of Koompahtoo, and Mr Griffen, Koompahtoo's Treasurer.

33 At trial, and on appeal, Sanpine maintained that the Koompahtoo representatives on the Management Committee must have known the general nature of the irregularities of which the administrator later complained, and were in some respects complicit in them. In that assessment, however, much depends on what such knowledge is said to have involved. It is one thing to say that the Koompahtoo representatives on the Management Committee never complained about Sanpine's failure to observe the requirements of the Agreement as to administrative and accounting procedures. It is another thing to say that they understood the nature and extent of such failure, especially when one purpose of the requirements was to keep them fully informed.

34 As to the breaches in category 3, cl 16 required the opening of a joint venture bank account and the depositing to the credit of that account of funds received concerning the development. An example of such funds received was the money borrowed on the security of Lot 556. Such funds were not dealt with in that way. They were deposited to the credit of a bank account of Sanpine. A joint venture account was opened, with authorised signatures from both sides of the joint venture, but it was operated as what was described as a "sweep account". Whenever a debit was to be made to that account, enough money to cover the debit would be transferred to it, on the day the debit was due to be made, from the Sanpine account. The balance at the close of any day was nil. The amounts which were paid into, and debited to, that account were insignificant. The account was closed on 13 December 2000. Substantial payments went through the Sanpine account only. There were, therefore, regular, and indeed systematic, breaches of cl 16.

35 The significance of the breaches of cl 16 was, in part, related to payments out of the Sanpine account in February 1999, following receipt of the first loan, to persons and companies associated with Sanpine, of substantial sums claimed to be in reimbursement of expenses incurred on behalf of the joint venture. At least some of those expenses were said to have been incurred during the year ended 30 June 1998. Although there was what the judge described as "[s]ome rudimentary documentation vouching some of the expenses", it was not possible, at trial, to account for some of the substantial amounts involved. Campbell J described as "particularly problematic" a payment of $183,314.48 to the wife of one of the controllers of Sanpine. The payment was never satisfactorily

explained, there were no records to support it, and Campbell J considered that it was likely that the amount involved was not an expense of the joint venture.

36 Again, Sanpine relied, unsuccessfully, on waiver or estoppel. Campbell J did not accept that the Koompahtoo representatives on the Management Committee knew about the Sanpine account as well as the joint venture account, or knew that the payments to persons and companies associated with Sanpine in February 1999 had been made. He made a specific finding that the sum of $183,000 was misapplied. He was unable to make any positive findings about a number of other substantial amounts.

37 As to the breaches in category 4, cl 16.5 has been set out above. It obliged Sanpine to ensure that proper books were kept so as to permit the affairs of the joint venture to be duly assessed. The words "so as to permit the affairs of the Joint Venture to be duly assessed" are not merely an explanation of the reason for the requirement to keep proper books. They are part of the substance of the obligation, which was an obligation to keep such books as would permit the affairs of the joint venture to be duly assessed.

38 A practical measure of Sanpine's compliance with cl 16.5 came when Mr Lawler, having been appointed administrator of Koompahtoo, endeavoured to assess the affairs of the joint venture. Campbell J examined his communications with Sanpine during 2003. There were no separate sets of accounts relating to the joint venture; no ledger, journal or cashbook. Mr Lawler was shown draft financial statements (balance sheet and profit and loss account) for the year ended 30 June 1999. No finalised set of accounts for that year was ever produced to him, or to the court. The draft accounts, so Campbell J held, were not only manifestly inadequate, they were wrong. No accounts were ever drawn up for any prior year. Accounts for financial years after 30 June 1999 were prepared in draft form and made available in court for the first time. They did not record or reflect any expenditure. They also were found to be wrong. There were no accounts or financial statements of the joint venture which recorded or reflected the expenditure, over the years, of more than $2.3 million. Mr Lawler's requests for financial information were met by Sanpine with what Campbell J described as "evasion and prevarication". Campbell J described the "total failure to keep books of original entry for the Joint Venture, on the basis of which annual accounts could be drawn up and audited each year", as "a gross departure from the terms of [the Agreement]".

39 This was not a finding of some technical breach as, for instance, keeping accounts in the wrong place. Sanpine sought to justify its conduct by relying on a resolution of the Management Committee, of 9 June 1999, which referred to

dissension about the joint venture, and to the expense of audit. The minutes recorded:

> "After much discussion it was agreed by all members of the committee that because of the expense of the audit and the fact that at present the expenses of the JV are being incurred by Sanpine Pty Limited on behalf of the Joint Venture, that the audit of these expenses could be deferred until the rezoning. The meeting resolved to defer the appointment of an auditor of the Joint Venture until the rezoning."

40 As to that, Campbell J said :

> "I accept that, on 9 June 1999, faced with the prospect of dissension within Koompahtoo, all the members of the Management Committee reached a consensus that they would not have an audit of the Joint Venture until after the rezoning was complete, and that it would be Sanpine that would incur the expenses until the rezoning was complete. This consensus was one example of a repeated theme in the operations of the Management Committee over subsequent years, namely, that the Management Committee were united in wishing the Joint Venture to go ahead, and if necessary would achieve that objective by keeping details of the operation of the Joint Venture away from the members of Koompahtoo, NSWALC, or anyone else who might create problems. I do not conclude, however, that the discussion on 9 June was one which involved the Koompahtoo representatives on the Management Committee agreeing that it would be money which had been raised on the security of Koompahtoo's land which would be expended by Sanpine. The resolution is quite consistent with Sanpine deciding (as the Joint Venture Agreement contemplated might possibly happen, and as had actually happened before February 1999) that it would use money raised from sources other than Koompahtoo's land to pay those expenses. The resolution of 9 June 1999 is not one which, in terms, authorises a departure from the requirements of the Joint Venture Agreement that proper accounts be kept for the Joint Venture. Nor, on any reading, does it have anything to do with [Sanpine's] failure to maintain accounts for the Joint Venture for nearly two years before 9 June 1999. Nor does it authorise any particular expenditure which has been made in the past."

41 Campbell J went on to consider, and accept, additional grounds advanced in answer to Sanpine's reliance on the resolution of 9 June 1999. It is unnecessary, in view of the issues as they have emerged before this Court, to go into these matters. There are legislative requirements in the *Aboriginal Land Rights Act*, relating to accounts and audit, that were reflected in the relevant

provisions of the Agreement. The Koompahtoo representatives had no legal capacity to dispense with compliance with those requirements. Nor did they have any actual or ostensible authority to agree on behalf of Koompahtoo to non-compliance with the requirements of the statute or the Agreement.

42 Furthermore, Campbell J considered the adequacy of the documentation for the expenditure of joint venture funds on an assumption, in favour of Sanpine, that the books and records of Sanpine itself could be treated, for practical purposes, as sources of such documentation. Referring to the detail of some specific examples, which involved substantial sums, he concluded that there were no adequate records of Sanpine to explain or justify the expenditure.

Legal principles as to termination for breach

43 Campbell J recorded that, in their arguments at trial, "both parties gave only passing attention to [the] taxonomies" developed to classify the circumstances in which the common law recognises a right in one party to terminate a contract. Nevertheless, having regard to the issues as they have developed from the reasons of Campbell J and the Court of Appeal, it is necessary to state certain legal principles relevant to the action taken by the administrator.

44 In its letter of termination, Koompahtoo claimed that the conduct of Sanpine amounted to repudiatory breach of contract. The term repudiation is used in different senses[4]. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations[5]. It may be termed renunciation[6]. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a

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4 *Heyman v Darwins Ltd* [1942] AC 356 at 378; *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625-626.

5 *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 634 per Mason CJ.

6 *Heyman v Darwins Ltd* [1942] AC 356 at 397.

whole or of a fundamental obligation under it[7]. (In this case, we are not concerned with the issues that arise where the alleged repudiation takes the form of asserting an erroneous interpretation of the contract. Nor are we concerned with questions of inability as distinct from unwillingness.) Secondly, it may refer to any breach of contract which justifies termination by the other party[8]. It will be necessary to return to the matter of classifying such breaches. Campbell J said this was the sense in which he would use the word "repudiation" in his reasons. There may be cases where a failure to perform, even if not a breach of an essential term (as to which more will be said), manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements[9]. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.

45 In the past, some judges have used the word "repudiation" to mean termination, applying it, not to the conduct of the party in default, but to the conduct of the party relying upon such default[10]. It would be better if this were avoided.

46 Leaving to one side remedies of injunction to restrain breaches of contract, or specific performance to enforce contractual obligations, the ordinary remedy for breach of contract is an award of damages. Termination of a contract in response to breach, where permitted, may alter substantially the allocation of risk accepted by the parties. The consequences of termination for the parties may be affected by external circumstances such as market fluctuations[11]. At the same time, there are cases in which damages are not an adequate remedy, and it would

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7 *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 659.

8 See Carter, *Breach of Contract*, 2nd ed (1991) at 217.

9 eg *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at 304-305; *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322.

10 eg *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at 305 per Latham CJ.

11 See Treitel, *Remedies for Breach of Contract*, (1988) at 350.

be irrational and unjust to bind one party to an ongoing contractual relationship notwithstanding the other's default. The appellants say that binding Koompahtoo to a long-term joint venture with Sanpine is such a case. This, however, is not a suit for the dissolution of a partnership, and it is the law of contract that is to be applied.

47 For present purposes, there are two relevant circumstances in which a breach of contract by one party may entitle the other to terminate. The first is where the obligation with which there has been failure to comply has been agreed by the contracting parties to be essential. Such an obligation is sometimes described as a condition. In Australian law, a well-known exposition was that of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*[12] who, in comparing conditions and warranties, employed language reflected in many statutory provisions. The widespread statutory adoption of the distinction between conditions and warranties, or essential and inessential terms, is an established part of the background against which the common law has developed. The Chief Justice of New South Wales said (references omitted):

> "In considering the legal consequences flowing from a breach of contract, it is necessary to remember that (i) the breach may extend to all or to some only of the promises of the defaulting party, (ii) the promises broken may be important or unimportant, (iii) the breach of any particular promise may be substantial or trivial, (iv) the breach may occur or be discovered (a) when the innocent party has not yet performed any or some of the promises on his part, or after he has performed them all, and (b) when the innocent party has received no performance from the defaulting party, or has received performance in whole or in part; and to remember also that the resultant rights of the innocent party and the nature of the remedies available to him may depend upon some or all of these matters.
>
> The nature of the promise broken is one of the most important of the matters. If it is a condition that is broken, ie, an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option either to treat himself as discharged from the contract and to recover damages for loss of the contract, or else to keep the contract on foot and recover damages for the particular breach. If it is a warranty that is broken, ie, a non-essential promise, only the latter

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12 (1938) 38 SR (NSW) 632 at 641-642.

alternative is available to the innocent party: in that case he cannot of course obtain damages for loss of the contract.

The question whether a term in a contract is a condition or a warranty, ie, an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge. In some cases it is expressly provided that a particular promise is essential to the contract, eg, by a stipulation that it is the basis or of the essence of the contract; but in the absence of express provision the question is one of construction for the Court, when once the terms of contract have been ascertained. In general, Courts of common law have been more ready than Courts of Equity to regard promises as essential. This is in part due to the fact that Courts of common law are in the main concerned with ordinary commercial contracts in which it is common to find provisions which are intended to be strictly and literally performed. It is now provided by s 13 of the Conveyancing Act, 1919 (taken from the Judicature Act, 1873, 36 and 37 Victoria, Chap 66, s 25(7)) that stipulations in contracts, as to time or otherwise, which would not before the commencement of the Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity shall receive in all Courts the same construction and effect as they would have heretofore received in such Court. This serves to make equitable liberality of construction supersede common law strictness, so far as is consistent with apparent intention, in fields where equity and common law overlap; but it does not affect the principle that effect must be given to the apparent intention of the parties as disclosed in the contract."

48 What Jordan CJ said as to substantial performance, and substantial breach, is now to be read in the light of later developments in the law. What is of immediate significance is his reference to the question he was addressing as one of construction of the contract. It is the common intention of the parties, expressed in the language of their contract, understood in the context of the

relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is "essential", so that any breach will justify termination.

49 The second relevant circumstance is where there has been a sufficiently serious breach of a non-essential term. In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[13], the English Court of Appeal was concerned with a stipulation as to seaworthiness in a charterparty. Breaches of such a stipulation could vary widely in importance. They could be trivial or serious. The Court of Appeal held that to the accepted distinction between "conditions" and "warranties", that is, between stipulations that were in their nature essential and others, there must be added a distinction, operative within the class of non-essential obligations, between breaches that are significantly serious to justify termination and other breaches. This was a recognition that, although as a matter of construction of a contract it may not be the case that *any* breach of a given term will entitle the other party to terminate, some breaches of such a term may do so. Diplock LJ said[14] that the question whether a breach by one party relieves the other of further performance of his obligations cannot always be answered by treating a contractual undertaking as either a "condition" or a "warranty". Of some stipulations "all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise".

50 In this way Diplock LJ set the policy of the law favouring certainty of outcome through the classification of terms as conditions against that which encourages contractual performance and favours restriction of the right to terminate to cases where breach occasions serious prejudice. As it is put in the eleventh edition of Treitel[15]:

> "[T]he policy of leaning in favour of classifying stipulations as intermediate terms can be said to promote the interests of justice by

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13 [1962] 2 QB 26.

14 [1962] 2 QB 26 at 69-70.

15 Treitel, *The Law of Contract*, 11th ed (2003) at 797; see also 12th ed (2007) at 890.

preventing the injured party from rescinding on grounds that are technical or unmeritorious."

Perhaps the adoption of other taxonomies for contractual stipulations might achieve similar outcomes. However, *Hongkong Fir* was decided in 1961 and has long since passed into the mainstream law of contract as understood and practised in Australia[16].

51 It may be true that this Court has yet to accept *Hongkong Fir* as an essential element in the grounds for decision in any particular case. However, in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[17], Mason ACJ, Wilson, Brennan and Dawson JJ referred to *Hongkong Fir* with evident approval and said that the concept of the intermediate and innominate term brings a greater flexibility to the law of contract. With that in mind, it was entirely appropriate for Campbell J to proceed with an analysis of the facts in which *Hongkong Fir* was applied[18].

52 The practical utility of a classification which includes intermediate terms, and the consequent greater flexibility of which the Court spoke in *Ankar*, appears from several consequences. First, the interests of justice are promoted by limiting rights to rescind to instances of serious and substantial breaches of

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16 For example, in *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 626 Gibbs CJ assumed its correctness in a judgment with which Murphy and Brennan JJ agreed. In *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 31 Mason J assumed its correctness in a judgment with which Wilson, Deane and Dawson JJ concurred. Other cases in which it has been assumed to be correct include: *Trans-Pacific Insurance Co (Australia) Ltd v Grand Union Insurance Co Ltd* (1989) 18 NSWLR 675 at 702-703 per Giles J; *Amann Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527 at 532 per Davies J, 542 per Sheppard J, 553-554 per Burchett J; *Tricontinental Corporation Ltd v HDFI Ltd* (1990) 21 NSWLR 689 at 697 per Kirby P, 703 per Samuels JA, 717-718 per Waddell AJA; *Bates v Omareef Pty Ltd* unreported, Federal Court of Australia, 16 October 1997; *Nelson v Bellamy* (2000) 10 BPR 19,011 at 19,723 [81] per Simos J; *Wallace-Smith v Thiess Infraco (Swanston) Pty Ltd* (2005) 218 ALR 1 at 64-65 [299] per Allsop J. It has been applied in New Zealand: *Holmes v Burgess* [1975] 2 NZLR 311 at 318-320.

17 (1987) 162 CLR 549 at 562.

18 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107 at 1139-1140 [134], 1147-1148 [177]-[179]; 236 ALR 209 at 251-252, 262-263.

contract. Secondly, a just outcome is facilitated in cases where the breach is of a term which is inessential.

53 As will appear later in these reasons, we rest our decision in the appeal not upon the ground of breach of an essential obligation, but upon application of the doctrine respecting intermediate terms.

54 We add that recognition that, at the time a contract is entered into, it may not be possible to say that any breach of a particular term will entitle the other party to terminate, but that some breaches of the term may be serious enough to have that consequence, was taken up in *Ankar*[19]. Breaches of this kind are sometimes described as "going to the root of the contract"[20], a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to damages, the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract[21].

55 A judgment that a breach of a term goes to the root of a contract, being, to use the language of Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd*[22], "such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract", rests primarily upon a construction of the contract. Buckley LJ attached importance to the consequences of the breach and the fairness of holding an injured party to the contract and leaving him to his remedy in damages. These, however, are matters to be considered after construing the agreement the parties have made. A judgment as to the seriousness of the breach, and the adequacy of damages as a remedy, is made after considering the benefit to which the injured party is entitled under the contract.

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19 (1987) 162 CLR 549 at 561-562.

20 For various synonyms used see Treitel, *Remedies for Breach of Contract*, (1988) at 350-351.

21 Carter, *Breach of Contract*, 2nd ed (1991) at 199-200.

22 [1971] 1 WLR 361 at 380; [1971] 2 All ER 216 at 232.

56 A question as to contractual intention, considered in the light of the language of the contract, the circumstances in which the parties have contracted and their common contemplation as to future performance, is different from a question as to the intention evinced by one of the parties at the time of breach, such as arises in cases of alleged renunciation. That difference is exemplified by the way in which the majority in the Court of Appeal dealt with the decision of the primary judge in this case.

The primary judge's conclusions

57 Since there was disagreement about the basis upon which Campbell J decided the case, it is desirable not to paraphrase his reasons but to quote (omitting references to the numbering of earlier paragraphs) what he said under the heading "Repudiation – Application to Facts":

> "I record that the [appellants] have submitted that various of the obligations which they have found were breached were essential terms of the contract, and hence that termination of the contract was justified regardless of the seriousness of the particular breaches. I will not pause to examine that argument. Rather, I shall assume, without deciding, that all the terms which have been breached in the present case are intermediate terms.
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> To recapitulate, I have found that the following breaches have occurred:
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> - Delay of the order of five months in appointing Umwelt.
> - Breach of the obligation in Clause 6.2(i) to prepare a Development Program.
> - Breach of the obligation in Clause 6.2(j) to regularly update the Development Program.
> - Breach, on fourteen occasions over seven years, of the obligation under Clause 12.2 to prepare and submit a Development Program and a cost and revenue budget.
> - Breach of the obligation under Clause 13.2 to prepare a Monthly Report, containing the information listed in Clause 13.2. This breach occurred every month that the Joint Venture Agreement was on foot. Even if one regards the period from and including March 1999 to January 2003 as the more important part of that time, it involves breaches on forty six occasions.

- Breach of its obligation under Clause 16.1(a) to open the Joint Venture Account as soon as possible following the date of the Joint Venture Agreement.

- Breach of the obligation in Clause 16.3 to pay money into the Joint Venture Account.

- Breach of Clause 16.4, concerning manner of application of funds withdrawn from Joint Venture monies.

- Failure to maintain proper books and records.

No waiver or estoppel is effective to take away the significance which these breaches have. They are breaches which extend over the entire period during which the Joint Venture operated.

The Joint Venture Agreement was one which set out a clear and coherent set of procedures to be followed for the administration of the Joint Venture. The Agreement is one which, if carried through according to its letter, would have imposed upon the joint venturers the discipline of considering, each month, the type of information contained in the Monthly Reports, and of receiving and giving consideration at regular intervals to projections which involved the entire Development (not just part of the rezoning stage of it). It would have resulted in all the money which was raised on the security of Koompahtoo's land or otherwise for the purposes of the Joint Venture being paid into the Joint Venture Account, and only drawn on for proper purposes, and by a procedure which checked actual expenditure against expenditure which had been predicted to be required. All the expenditure would be from the Joint Venture Account, which had representatives of both Venturers as signatories. There would be full documentary records of the expenditure of the money, and accounts kept, giving considerable detail, and in a form fit for auditing.

The departures from this way of running the joint venture have been gross and repeated. The total failure to adhere to the accounting obligations, ever since the Joint Venture began, is alone sufficient to amount to a repudiation. Even accepting that some information was given to the Koompahtoo representatives on the Management Committee relating to the Joint Venture (although verbally, and of a type and with a frequency which it is now not possible to ascertain) there is still an extremely serious departure from the obligations imposed by the Agreement. Even if (contrary to my view) the resolution of the Management Committee of 27 March was effective to dispense, thenceforth, with any obligation on

the plaintiff to provide Monthly Reports the remaining and continuing breaches were sufficient to amount to a repudiation.

The unexplained delay of five months in appointing Umwelt, at a time when all parties must have known that significant monthly costs continued to be running up for fees to Bronzewing and Mr Smith's company, and Mr Smith's vehicle, and for interest on borrowings, only makes the repudiation worse."

58 It has already been noted that Campbell J defined "repudiation", for the purpose of his reasons, as "conduct by a contracting party which, as a matter of common law, entitles the other contracting party to terminate the contract." He distinguished between "essential terms" and "intermediate terms" (an expression commonly used to describe stipulations of the kind considered in *Hongkong Fir*), and then expressed his conclusions by reference to the latter. He said nothing about renunciation. He made no finding about the intention evinced by Sanpine. Whether his ultimate conclusion was right or wrong, it is apparent that he decided the case upon the basis of the seriousness of the breaches of contract found to have occurred. Yet this is not how his reasoning was understood by the majority in the Court of Appeal.

The decision of the Court of Appeal

59 The reasons of the majority in the Court of Appeal were given by Giles JA, with whom Tobias JA agreed. Giles JA expressed doubt as to whether Campbell J had decided the case on the basis of "termination for sufficiently serious breach of intermediate terms" or "termination because Sanpine had shown a repudiatory intention." As already explained, the former is the better view of Campbell J's reasoning. Giles JA, however, took the latter view which he supported by reference to the letter of termination of 12 December 2003. The letter included an assertion that Sanpine's breaches evinced an intention not to be bound by the Agreement. In truth, the letter was plainly intended to cover all possible legal grounds of termination, as would be expected. It was not a pleading. Evidently drafted by a lawyer using belt and braces, it claimed that Sanpine had repudiated the contract by breach, thereby evincing an intention not to be bound. Koompahtoo, in argument in this Court, relied upon renunciation, breach of essential terms and sufficiently serious breach of intermediate terms. Although Giles JA appears to have mistaken the substance of Campbell J's reasons, and devoted most of his own reasons to a consideration of the ground of renunciation, he later dealt, briefly, with the arguments based on serious breaches of intermediate terms or breaches of essential terms. It will be necessary to return to what he said on those topics.

60 There being no challenge to Campbell J's findings that breaches had occurred, Giles JA treated the central question as whether Sanpine, by its conduct, evinced an intention to perform the Agreement only in a manner that suited it and in no other way. He treated the case as one of alleged unwillingness, not inability. The focus thus became the intention of Sanpine, or, more accurately, what a reasonable person in the position of Koompahtoo would have taken to be the intention of Sanpine. There was no wholesale renunciation by Sanpine of its obligations; it persisted in its endeavours to obtain rezoning. Accordingly, Giles JA said, to be a case of repudiation in the sense of evincing an intention not to be bound, the case had to fall within what was described by Mason CJ, in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*[23], as "evincing an intention to carry out a contract *only* if and when it suits the party to do so" (emphasis in original). This required an evaluation of the conduct of Sanpine in all the circumstances, and those circumstances included the conduct of Koompahtoo. The breaches, Giles JA accepted, were not excused by waiver or estoppel (although why that was accepted was not considered at any length), but "the reasonable person in the position of Koompahtoo would take into account, in evaluating Sanpine's breaches as repudiatory or otherwise, the extent (if any) to which Koompahtoo had been complicit or acquiescent in the departures from the Agreement and their continuance."

61 Giles JA noted that there was no complaint at the time about failure to adhere to the Agreement. As to the handling of funds, he said that this was evidently regarded by all concerned as sufficient and acceptable, and that it must have been obvious that there was no approved budget, no joint venture account and no compliance with the financial requirements of the Agreement. The failure to maintain proper books and records, Giles JA said, was in a rather different position, but, nevertheless, the adequacy of Sanpine's accounting was not questioned at the time, and apparently it suited the Koompahtoo representatives on the Management Committee to limit dissemination of information within the Aboriginal community. Thus, Giles JA said, he was unable to agree with the conclusion he attributed to Campbell J, that is to say, that Sanpine evinced an intention to carry out the Agreement only if and when it suited Sanpine to do so. Campbell J had not expressed such a conclusion, but Giles JA evidently regarded it as implicit.

62 Giles JA, under the rubric of renunciation, also dealt with an attempt by Koompahtoo to rely on Sanpine's conduct between May and December 2003, and particularly what the trial judge found to be evasion and prevarication when

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23 (1989) 166 CLR 623 at 634.

Mr Lawler attempted to obtain financial information about the joint venture. He declined leave to file a notice of contention seeking to uphold Campbell J's decision on this new ground. The attempt has not been repeated in this Court.

63 Next, Giles JA considered whether the breaches were of essential terms. He decided they were not, saying (reference omitted):

> "The agreement was an agreement for a joint venture to undertake the Development. Its central objective was the development and sale of part of Koompahtoo's land. The terms presently in question, concerned with development programs and monthly reporting, banking and spending of money and maintaining proper books, regulated the manner of working to that central objective. Each could be breached in an immaterial way or without significant consequences to the joint venture. While not determinative, this indicated that they were not essential terms."

64 Finally, as to whether there had been termination for sufficiently serious breaches of intermediate terms, Giles JA noted the principles stated in *Hongkong Fir* and *Ankar* and concluded:

> "Without repetition, what I have already said in these reasons causes me to conclude that circumstances [to] justify a finding of a sufficiently serious breach to found termination on the basis of breach of an intermediate term of the Agreement have not been demonstrated."

65 No doubt Giles JA dealt with the topic in such a summary fashion because he had already found that this was not the basis on which Campbell J had decided the case, and he was referring to the matter only for completeness.

66 Bryson JA, who dissented, said:

> "I comment that observance of obligations relating to the Development Program, Monthly Reports, opening and dealing with the Joint Venture Account and maintaining proper books and records had importance for Koompahtoo which went far beyond informing and satisfying the minds of current office-holders of Koompahtoo. What happens in a complex development project extending over many years should be clearly known and clearly recorded for reasons relating to Koompahtoo's interests the importance of which will present themselves from time to time in many contexts over many years, including taxation contexts and as in this case in litigation. It was always certain that there would be changes of office-holders, and what was known to office-holders in the past, but was not recorded, is lost to later office-holders, and to other persons (exemplified

by the Administrator) who do not participate in the informal arrangements and exchanges of information. Plainly Campbell J accorded a very high value to compliance with these obligations: I regard this as fully justified.

The deficiency to Koompahtoo's contractual entitlement was very great, and very important. No legitimate commercial venture can flourish without observing ordinary reasonable practices for handling money, banking it, keeping records and being able to account. Acquiescence by office-holders of Koompahtoo in departures from contractual provisions indicates how great was Koompahtoo's need of Sanpine's expertise and contractual compliance: their acquiescence was not a contractual variation, and it cannot be an excuse."

The justification of the termination

67 In this Court, Sanpine has not attempted to contend that the case is one of waiver or estoppel, or that there was a relevant variation of the Agreement, or that Sanpine's breaches of the Agreement are covered by a doctrine of forbearance[24]. The legal significance of the conduct of the Koompahtoo representatives on the Management Committee, in not complaining about Sanpine's failure to adhere to the requirements of the Agreement, and in acquiescing in some aspects of the failure, is said to be, as held by Giles JA, that it is a circumstance which tends against a finding that Sanpine evinced an intention to perform the Agreement only in a manner that suited it and in no other way. Because the relevant form of repudiation was said to be renunciation, which made a conclusion as to Sanpine's evinced intention the focal point of the inquiry, the circumstance that in some respects and to some extent Sanpine's conduct was acquiesced in by the Management Committee assumed a factual significance that became conclusive. The qualifying reference to some respects, and some extent, is important. The nature of Sanpine's breaches was such that, even at trial, it was difficult, if not impossible, to know their full extent. The breaches deprived the Koompahtoo representatives of the capacity to make an informed decision as to the consequences for Koompahtoo of what was going on. The observations of Bryson JA are in point. Koompahtoo was not well served by its representatives on the Management Committee, but the obligations that were breached were undertaken for its protection, and in a number of respects were required by the legislation under which it was established.

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24 cf Phipps, "Resurrecting the Doctrine of Common Law Forbearance", (2007) 123 *Law Quarterly Review* 286.

68 The approach of Campbell J was correct. The focus of attention should be the contract, and the nature and seriousness of the breaches. There being, at this stage, no concern with waiver, estoppel, variation or forbearance, the intention that is relevant is the common intention of the parties, at the time of the contract, as to the importance of the relevant terms and as to the consequences of failure to comply with those terms. This is a question of construction of the contract to be decided in the light of its commercial purpose and the business relationship it established. The contract established a joint venture for a land development project of considerable size and complexity, to be carried out over a number of years. Koompahtoo brought to the joint venture its land. Sanpine brought its management and financial expertise. Sanpine's obligations as to dealing with joint venture funds (which were borrowed on the security of Koompahtoo's land) and maintaining proper books and accounts were of importance, not only to working out the ultimate result of the joint venture when the land had been developed and sold, but also to enabling the parties (and a person such as the administrator) to know material facts, and to make decisions and judgments informed by that knowledge. The inability of Sanpine to inform the administrator, or even the trial judge, of the true financial position of the joint venture, and to produce informative joint venture accounts, exemplifies the point. It was not within the contemplation of the contract that it should have been necessary for Koompahtoo, at any time, to have engaged in extensive legal process in order to find out what had become of the money borrowed on the security of its land, or to assess the financial state of the joint venture.

69 Although Campbell J was prepared to make the contrary assumption, there is much to be said for the view that the obligation contained in the first sentence of cl 16.5(a) was essential. Sanpine was to ensure that proper Books (a defined term) were kept so as to permit the affairs of the joint venture to be duly assessed. "Books" was defined, in cl 1.1, to mean the accounting, financial and other documents and records of the joint venture. The purpose of par (a), and, in particular, the first sentence, is emphasised by par (b) of cl 16.5, which entitled each venturer to inspect the books at any time and receive such information and explanations as that venturer might require. Enabling the affairs of the joint venture to be duly assessed involved assessment with reasonable facility and within a reasonable time. Campbell J held, and it was accepted in the Court of Appeal, that there was a breach of cl 16.5(a). Giles JA said, and Campbell J was willing to assume, that a breach of cl 16.5(a) could be trivial. The clause, however, contains more than one obligation. An obligation to keep books and records in accordance with generally accepted accounting standards might be contravened in an immaterial way, and one would not attribute to the parties a common intention that any breach of such an obligation would justify termination. What, however, of the first sentence of par (a)? On its true construction, it required Sanpine to ensure that it kept such books and accounts

as would permit the affairs of the joint venture to be assessed with reasonable facility and within a reasonable time. It is difficult to resist a conclusion that such an obligation was essential. The ability to make an assessment of the affairs of the joint venture, at all times from the commencement of the Agreement, was vital. Koompahtoo was providing the land to be developed. It was subject to legislative control of the use that could be made lawfully of its assets. It was subject to regulatory scrutiny. Decisions as to borrowing upon the security of its land, and undertaking commitments for the future, required a capacity to assess, at any time, and from time to time, the affairs of the venture.

70 In one sense, the breaches of cl 16.5 may have been so obvious, and so numerous, as to distract attention from the consideration that, within cl 16.5(a), there was an obligation of basic importance. The clearest evidence of breach of that obligation was what occurred when Mr Lawler was appointed administrator. He was unable to assess the affairs of the joint venture. Plainly, Sanpine was unable to provide him (and was later unable to provide the trial judge) with proper joint venture books and accounts that would permit such assessment. It is no answer to say that, given sufficient time, and with sufficient effort, it might have been possible to reconstruct, from such records as had been kept within Sanpine, an approximation of accounts which would reveal the financial position of the joint venture. The purpose of cl 16.5 went beyond enabling approximate assessment of the financial position of the joint venture after a prolonged inquiry or litigation. However, we do not rest our decision upon the ground of breach of an essential obligation.

71 Even if one were to accept that all of the contractual obligations with which Sanpine failed to comply were inessential in that, on the true construction of the contract, not every breach would justify termination and that the obligations were intermediate terms in the sense earlier discussed, nevertheless, as Campbell J and Bryson JA held, the breaches of Sanpine were in a number of respects gross, and their consequences were serious. Once again, the experience of the administrator following his appointment, and the unsuccessful attempts at the hearing before Campbell J to explain the use of all the funds borrowed on the security of Koompahtoo's land, demonstrate that the breaches found by Campbell J, and in particular the breaches of cl 16.5, went to the root of the contract. As a matter of construction of the contract, it ought to be accepted that breaches of that order deprived Koompahtoo of a substantial part of the benefit for which it contracted. Such breaches justified termination. On that ground, we would uphold the decision of the primary judge.

72 We would make one further observation. The corollary of the reasoning of the majority in the Court of Appeal is that Koompahtoo ought to be left to its remedy in damages. Nowhere was it explained how one would measure the

damages suffered by a joint venturer in consequence of inability to assess the financial position of the joint venture.

Conclusion

73 The appeal should be allowed with costs. The orders of the Court of Appeal made on 2 November 2006 should be set aside and, in their place, it should be ordered that the appeal to that Court be dismissed with costs.

74 KIRBY J. The principle that parties should ordinarily fulfil their contractual obligations not only underpins the law of contract, but comprises a basic assumption on which our society and its economy and well-being depend. It would be destructive of that assumption if one of the parties to an agreement could terminate it with relative ease. It is for that reason that strong grounds are needed to support unilateral termination of a contract. As Professor Kevin Gray said recently, "[w]ithout something resembling rules of property and contract, the daily competition for the goods of life would readily descend into an orgy of seizure and violence"[25].

75 In these proceedings, Campbell J in the Supreme Court of New South Wales[26] concluded (determining a separated question) that sufficient grounds had been demonstrated in law to vindicate the unilateral termination of the agreement in question. The consequence followed that the claim of the first respondent for a declaration that the termination had been invalid (so that the agreement was still on foot) was dismissed.

76 By majority, an appeal against that determination was upheld by the Court of Appeal of New South Wales[27]. By special leave, an appeal has now been brought to this Court. The appellants seek restoration of Campbell J's orders.

77 I agree with the other members of this Court that the appeal must be allowed. In part, I agree in the reasons of Gleeson CJ, Gummow, Heydon and Crennan JJ ("the joint reasons"). Most cases of this kind turn upon detailed examination of the relevant facts. In this case, those facts supported the conclusion reached at trial. The Court of Appeal erred in giving effect to the contrary conclusion.

78 Nevertheless, it is important to elucidate the governing principles of the common law that are relevant to this decision. As Campbell J noted[28], differences of opinion over those principles have emerged amongst leading scholars, in particular as to the taxonomy by which the principles should be expressed and applied. The expression of such principles has an importance that transcends the individual dispute. The rules affect not just this appeal, but

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25 Gray, "There's no place like home!", (2007) 11 *Journal of South Pacific Law* 73 at 73.

26 *Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council* [2005] NSWSC 365.

27 *Sanpine Pty Ltd v Koompahtoo Local Aboriginal Land Council* [2006] NSWCA 291.

28 [2005] NSWSC 365 at [362]-[364].

innumerable other cases, most of which will never come before a court. Doctrine matters. Where it is relevant to do so, this Court should contribute to the clarification of legal principles. That is how individual decisions that reach this Court advance the expression of the common law of Australia.

79 Respectfully, I prefer a statement of the common law rules different from that adopted in the joint reasons. However, the difference has no ultimate consequence for the outcome of the appeal. The appeal must be allowed. The orders of Campbell J should be restored.

The facts and legislation

80 *The facts*: The factual background is summarised in the joint reasons[29], which set out relevant provisions of the agreement between Koompahtoo Local Aboriginal Land Council ("Koompahtoo"), the first appellant, and Sanpine Pty Limited ("Sanpine"), the first respondent ("the Agreement"). The joint reasons also reproduce the separated question in issue in the appeal[30]. I need not repeat these details.

81 *The legislation*: This is not a case where legislation determines the legal rights and obligations of the parties[31]. The only relevant legislation is the *Aboriginal Land Rights Act* 1983 (NSW) ("the Act"), pursuant to which Koompahtoo was incorporated[32] and acquired the land at issue in these proceedings[33]. The Act imposed certain obligations on Koompahtoo, in particular as to the use of the subject land and of funds belonging to it[34]. Whether the parties knew of them or not, those obligations were part of the contextual matrix within which the Agreement was made and was intended to operate[35]. They are therefore relevant to the resolution of the appeal.

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29 Joint reasons at [1]-[25]. See also [2005] NSWSC 365 at [2]-[164]; [2006] NSWCA 291 at [1]-[93].

30 Joint reasons at [4] referring to [2005] NSWSC 365 at [186].

31 Thus the *Contracts Review Act* 1980 (NSW) is inapplicable and no relief was claimed under the *Trade Practices Act* 1974 (Cth) or the *Fair Trading Act* 1987 (NSW).

32 See the Act, ss 5(1), 6(1).

33 Joint reasons at [2].

34 See eg the Act, ss 31, 32. See also rr 26, 27 and 32 of the Model rules contained in Sched 1 to the Aboriginal Land Rights Regulation 1996 (NSW).

35 cf joint reasons at [69].

The decisional history

82 *Decision at first instance*: The conclusions of Campbell J are set out in the joint reasons[36]. In brief, his Honour found that certain breaches of the Agreement on the part of Sanpine had been established. He then put aside whether the obligations breached comprised "essential terms of the contract"[37]. He assumed, without deciding, that all of the terms that had been breached were "intermediate terms"[38]. He concluded that Sanpine's breaches of those terms were so "gross and repeated", and amounted to such a "serious departure from [Sanpine's] obligations [under] the Agreement", as to be "sufficient to amount to a repudiation"[39]. Thus, Koompahtoo's purported termination had been valid. Sanpine's proceedings were dismissed.

83 *Decision in the Court of Appeal*: In the Court of Appeal, Giles JA (with whom Tobias JA agreed) concluded that, although there was some doubt as to the precise basis of Campbell J's decision, his Honour had based his conclusion on a finding that Sanpine had evinced an intention to repudiate (or renounce) its contractual obligations[40]. I agree with the joint reasons that this view was mistaken[41]. It is true that, having stated that he would assume (and proceed on the basis) that "all the terms which have been breached … are intermediate terms"[42], Campbell J slipped into the language of "repudiation" in the course of his closing remarks[43]. However, as the joint reasons point out[44], Campbell J defined the word "repudiation" in a particular way for the purposes of his reasons. He made it plain that he was using the term as an overarching description of all of the varieties of conduct giving rise to a right to terminate a

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36 Joint reasons at [57].

37 [2005] NSWSC 365 at [368].

38 [2005] NSWSC 365 at [368].

39 [2005] NSWSC 365 at [372].

40 [2006] NSWCA 291 at [98]-[99].

41 Joint reasons at [58].

42 [2005] NSWSC 365 at [368].

43 [2005] NSWSC 365 at [372]-[373].

44 See joint reasons at [44], [58].

contract[45]. It is therefore necessary to read Campbell J's reasons in light of the generic definition that he adopted. His Honour's conclusion was referable to the actual breaches of the Agreement that he found had been established.

84 Giles JA also addressed Koompahtoo's contention that the terms Sanpine had breached had been "essential"[46]. However, his Honour did not consider that the relevant terms bore that character. He invoked the test expressed in the reasons of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*[47] and concluded that[48]:

> "The test … requires assessment at the time the Agreement was entered into. … I do not think it should be determined that Koompahtoo would not have entered into the Agreement unless assured of strict and literal performance of the terms found by the trial judge to have been breached; they were therefore not essential terms."

85 Giles JA then acknowledged that it was arguable that Campbell J had "[come] to his decision on the basis of termination for sufficiently serious breach of intermediate terms", notwithstanding that Koompahtoo had not sought to uphold Campbell J's decision on that footing[49]. He pointed out that, in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[50], Mason ACJ, Wilson, Brennan and Dawson JJ had expressed apparent approval for the introduction into the applicable legal taxonomy in Australian law of the "intermediate or innominate term"[51], which had originated in the reasons of Diplock LJ in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[52].

86 Giles JA remarked that the observations of this Court in *Ankar*, favourable to the principle in *Hongkong Fir*, had been *obiter dicta* because the judges

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45 See [2005] NSWSC 365 at [360].

46 See [2006] NSWCA 291 at [155]-[159].

47 (1938) 38 SR (NSW) 632 at 641-642. See joint reasons at [47].

48 [2006] NSWCA 291 at [170].

49 [2006] NSWCA 291 at [173].

50 (1987) 162 CLR 549 at 561-562; cf *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 998 per Lord Wilberforce; [1976] 3 All ER 570 at 576-577.

51 [2006] NSWCA 291 at [175]-[176].

52 [1962] 2 QB 26 at 71-72.

concerned had held that the relevant clauses of the contract in question were "conditions", and thus "essential term[s]"[53]. It followed that the conclusions reached in the joint reasons in *Ankar* did not depend upon the existence of a class of "intermediate terms" to sustain them. Nevertheless, Giles JA accepted that the remarks in the joint reasons in *Ankar*[54]:

> "have been regarded … as endorsing for Australian jurisprudence the classification of a term as less than an essential term breach of which of itself entitles the other party to terminate the contract, but more than a warranty breach of which only gives an entitlement to damages".

87 After quoting an extended passage from *Carter on Contract*[55], Giles JA concluded that the factual circumstances could not sustain a finding of "a sufficiently serious breach" of an "intermediate term" to found termination of the Agreement[56]. He thus found error in both the reasoning and the conclusion of Campbell J. This became the majority conclusion in the Court of Appeal.

88 Bryson JA, in dissent, supported the determination of Campbell J for reasons encapsulated in a passage extracted in the joint reasons[57]. He emphasised that detailed attention to the facts was required in the circumstances[58]. On this footing, he concluded that he should defer to, and uphold, the decision of Campbell J. He noted that "[t]he deficiency in Koompahtoo's contractual entitlement was very great, and very important"[59]. He found that the conclusion that Sanpine had "repudiated" the Agreement had been open to Campbell J. It evinced, in his view, no appealable error[60].

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53 [2006] NSWCA 291 at [176].

54 [2006] NSWCA 291 at [176] citing *Honner v Ashton* (1979) 1 BPR 9478 at 9490-9491 per Mahoney JA and *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 626 per Gibbs CJ.

55 Carter, *Carter on Contract*, vol 2 at 86,221-86,222 [34-160] cited [2006] NSWCA 291 at [177].

56 [2006] NSWCA 291 at [178].

57 Joint reasons at [66].

58 [2006] NSWCA 291 at [183].

59 [2006] NSWCA 291 at [185].

60 [2006] NSWCA 291 at [186].

The issues

89 As noted in the joint reasons, various matters which were (or might have been) the subject of dispute between the parties were not in contention by the time the appeal reached this Court[61]. In particular, Sanpine did not dispute the findings of Campbell J as to breach[62]. Rather, it contended that the breaches found below did not amount to a repudiation by Sanpine of its obligations under the Agreement or otherwise warrant a conclusion that Koompahtoo was entitled to terminate the Agreement for breach.

90 It follows that, from first to last, the issue in this Court has concerned Sanpine's failure to observe the Agreement and the legal consequences that flow from its defaults. This narrowing of the issues means that it is not possible to gloss over the governing rules or their classification at law. The taxonomical issue is not here a matter of *obiter dicta*, as it was in *Ankar*. Here, it is essential to identify and state the rules and elucidate the manner of their application in order to decide whether error occurred at trial or in the Court of Appeal.

91 This appeal thus presents two essential questions requiring resolution:

1. What are the principles of the common law of Australia governing the entitlement to terminate a contract for repudiation or other breach?

2. How are those principles to be applied in the circumstances of the present case, and with what outcome?

The governing legal principles

92 *Competing taxonomies*: Because the common law develops from hundreds of judicial decisions, sometimes over long periods of time, it is often the case that the conceptual framework that affords structure to a group of related legal principles is at first imperfect and unclear. It falls to judges and scholars to attempt to derive rules that are coherent, practical, just, and (so far as is possible) conformable with past decisions.

93 Campbell J, referring to leading Australian texts on contract law, identified two basic but different taxonomies as to the right to terminate a contract at common law. The first was drawn from Professor John Carter's text

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61 See eg joint reasons at [17], [25], [67].

62 Joint reasons at [31].

Breach of Contract[63], and the second from Dr N C Seddon and Associate Professor M P Ellinghaus's eighth Australian edition of *Cheshire and Fifoot's Law of Contract*[64].

94 Both taxonomies arrange the decisional law into a tripartite scheme of classification. Both recognise that a right to terminate will arise in respect either of a breach of an "essential" term or "repudiation" (in the sense of conduct manifesting that one of the parties is unable or unwilling to perform). It is over the character of the third class of circumstances authorising termination that the taxonomies diverge[65]. Professor Carter postulates that a right to terminate exists at common law in respect of "a sufficiently serious breach of an intermediate term". Dr Seddon and Associate Professor Ellinghaus, on the other hand, state that a right to terminate will arise in respect of a "[b]reach causing substantial loss of benefit", that is, a "breach consisting of a failure to perform which has the effect of depriving the injured party of the substantial benefit of the contract".

95 Campbell J noted that neither of the parties to the proceedings had paid much attention to these competing theories for the classification of the principles emerging from the cases. Instead, they had "focussed attention on specific judgments of the High Court of the last twenty five years"[66]. Campbell J therefore proceeded to do likewise. From the point of view of a trial judge that was an understandable course of action.

96 However, taking that course diverted Campbell J from the attempt to rationalise and clarify the relevant legal principles according to the rules of law binding on him. It led his Honour, instead, into an invocation of judicial *dicta*. Such an approach is not conducive to the clear and consistent application of the law to cases that arise for judicial decision. Unless clear principles are derived from the cases, it is inevitable that overlapping categories will be confused and that new facts, as they arise, will be assigned to incorrect categories. In the result, decisions may be founded upon legal error, or their basis will be unclear and their foundation uncertain.

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63 Carter, *Breach of Contract*, 2nd ed (1991) at 60 [308] cited [2005] NSWSC 365 at [362].

64 Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th Aust ed (2002) at 927 [21.10] cited [2005] NSWSC 365 at [364]. See also Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust ed (2008) at 1012-1013 [21.11].

65 cf *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131 at 143 per Brennan J.

66 [2005] NSWSC 365 at [365].

97 Campbell J purported to deal with the terms of the Agreement which he found Sanpine had breached not as "essential" but as "intermediate" terms[67]. This conclusion, and the confusion it occasioned in the Court of Appeal, requires that something should be said by this Court about the problematic nature of such categories. It requires me to draw attention to two matters on which I would depart from the approach adopted in the joint reasons.

98 *Essential and non-essential terms*: Professor Jane Swanton, writing in 1981, commented that a point had then been reached in the evolution of the English law of contracts where it might have been expected that the common law would have abandoned the distinction between conditions and warranties[68]. It is, after all, a distinction often difficult to draw in practice. It occasions litigation. It is often circular, in the sense that "conditions" or "essential terms" are, in the usual case, judged to be such because the drastic consequences that flow from their breach are considered to warrant termination in all of the circumstances. When this conclusion is reached it is the drastic consequences that emerge as the important criterion for relief. The description of the character of the term that is breached is no more than a consequential label. The categories thus represent a classic instance of consequential or circular reasoning[69].

99 Notwithstanding these difficulties, the law has persisted with the distinction. It has become well entrenched. I am prepared to accept that it is useful to maintain the rule that some contractual terms, limited in number, are so critical to particular contracts that their breach will give rise to an automatic right to terminate. I accept that such terms can be identified and characterised *a priori* as "essential". I would not disagree that whether or not a term is to be so characterised is a question to be determined with reference to the actual content of the contract, viewed in the context of the entire commercial relationship between the parties[70].

100 With respect, however, I have reservations that the reasoning of Jordan CJ in *Tramways Advertising*[71] supplies the relevant test. This is so notwithstanding

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67 See joint reasons at [58].

68 Swanton, "Discharge of Contracts for Breach", (1981) 13 *Melbourne University Law Review* 69 at 70.

69 Waddams, *The Law of Contracts*, 5th ed (2005) at 424.

70 cf joint reasons at [48].

71 See joint reasons at [47] where the relevant passage is set out.

its adoption in other cases[72]. In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*, Murphy J remarked[73]:

> "This 'test' is so vague that I would not describe it as a test. It diverts attention from the real question which is whether the non-performance means substantial failure to perform the contractual obligations. The inquiry into the motivation for entry into the contract is not the real point. Numerous purchasers may enter into similar contracts with widely different motives. What does it matter if [the 'innocent' party] would have entered the contract even if the terms were as [the party alleged to be in breach] claimed them to be?"

101 As a matter of logic and principle, there is much force in this criticism. It is difficult to see how reference to the "common intention" of the parties at the time of contract formation advances the decision in a case such as the present[74]. It is an artificial criterion in that it demands the drawing of inferences as to the parties' reactions to contingencies that in fact might (and usually would) never have been anticipated. It also affords scope for the importation of subjective considerations in a manner inconsistent with the modern general approach to the formation of contracts[75]. In my view, it is preferable to place the "test" on a different footing and to inquire into the objective significance of breach of the term in question for the parties in all the circumstances[76]. I would favour that approach. If it is adopted, it is difficult to see what purpose purporting to conduct a retrospective investigation of the "common intention" of the parties serves. The court creates an objective postulate. It applies it to the facts. There is then no need to resort to the fiction that *Tramways Advertising* introduces.

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72 *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322 at 337; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 430-431; *Shevill* (1982) 149 CLR 620 at 627, 636; *Ankar* (1987) 162 CLR 549 at 556.

73 (1978) 138 CLR 423 at 436.

74 cf joint reasons at [48].

75 *Placer Development Ltd v The Commonwealth* (1969) 121 CLR 353 at 367; *Taylor v Johnson* (1983) 151 CLR 422 at 428-429; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2005) 218 CLR 471 at 483 [34]; cf Mason and Gageler, "The Contract", in Finn (ed), *Essays on Contract*, (1987) 1 at 3-10; Mason, "Themes and tensions underlying the law of contract", in Lindell (ed), *The Mason Papers*, (2007) 296 at 299.

76 cf joint reasons at [68].

102 The actual consequences of a default that has occurred *in fact* ought not to be taken into account in determining whether or not the term of the contract that is breached is "essential" in character. If the position were otherwise, the purpose of maintaining a separate *a priori* class of "essential" terms would be defeated. It would be impossible to distinguish between an "essential" term and a "non-essential" term in respect of which serious breach could be said to "go to the root" of the contract.

103 *Intermediate or innominate terms*: The persistence of the law with the distinction between essential and non-essential terms necessarily gave rise to serious risks of practical injustice. It was this realisation that led to the invention of so-called "intermediate" or "innominate" terms. It was Diplock LJ who inserted this new class of contractual terms somewhere between "conditions" and "warranties". He did so in *Hongkong Fir*[77]. The concept was further developed in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)*[78]. It became entrenched in a number of decisions of English courts and judges that followed.

104 At the time of these developments, it was, for the most part, normal for Australian courts to follow English decisions affecting basic doctrines of the common law without serious question. Thus, the "intermediate" or "innominate" term entered into the discourse of this Court without any real consideration of its conceptual soundness or practical usefulness. However, despite occasional approval of taxonomies that incorporated the classification, this Court has not until this appeal given it unequivocal endorsement in a decision for which such recognition comprised part of the *ratio decidendi* of the case[79]. It might have been "assumed" to be correct[80]; but that was the way of earlier times.

105 In the present case, the joint reasons defend the so-called "intermediate" term derived from *Hongkong Fir*. Moreover, it is made explicit that the conclusion in the joint reasons depends upon the reception of that concept into law[81].

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77 [1962] 2 QB 26 at 71-72; cf at 64 per Upjohn LJ.

78 [1971] 1 QB 164.

79 Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust ed (2008) at 1032 [21.22]; see also above at [86].

80 Joint reasons at [50].

81 See joint reasons at [70].

106 The joint reasons suggest that an "intermediate" term will have been breached where default in respect of a non-essential term is so significant as to go "to the root of the contract", a very imprecise and apparently self-justifying notion[82]. Whether a breach goes "to the root of the contract" is said to depend upon "the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach" as well as whether or not damages would provide appropriate relief in the circumstances[83]. Of paramount importance is the "construction of the contract" itself[84].

107 Respectfully, I disagree with this approach. If the classification of a contractual term as "intermediate" is nothing more than a function of *ex post facto* evaluation of the seriousness of the breach in all of the circumstances then the label itself is meaningless. It is not assigned on the basis of characteristics internal to, or inherent in, a particular term, as the joint reasons themselves acknowledge. Rather, it is imposed retrospectively, in consequence of the application of the judicial process. Effectively, there is no basis, and certainly no clear or predictable basis, for separating "intermediate" terms from the general corpus of "non-essential" terms or "warranties" prior to adjudication in a court. This throws into sharp relief the extreme vagueness of the *Hongkong Fir* "intermediate" term. Its imprecision occasions difficulties and confusion for parties and those advising them. It has the potential to encourage a proliferation of detailed but disputable evidence in trial courts and consideration of such evidence in intermediate courts. It renders uncertain the distinctions between the several categories said to provide a legal justification for the very significant step of terminating an otherwise valid contract.

108 Several additional factors militate against the incorporation of the so-called "intermediate" term into Australian law. It is a comparatively recent invention, finding little or no reflection in the common law that preceded *Hongkong Fir*. It is inconsistent with the approach of Australian legislation dealing with breach of contract in particular contexts[85]. It is not reflected in the general codifications of contractual remedies law adopted in some common law

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82 Joint reasons at [54].

83 Joint reasons at [54].

84 Joint reasons at [55].

85 *Sale of Goods Act* 1923 (NSW), s 34(2); *Goods Act* 1958 (Vic), s 38(2); *Sale of Goods Act* 1895 (SA), s 31(2); *Sale of Goods Act* 1896 (Q), s 33(2); *Sale of Goods Act* 1895 (WA), s 31(2); *Sale of Goods Act* 1896 (Tas), s 36(2); *Sale of Goods Act* (NT), s 34(2); *Sale of Goods Act* 1954 (ACT), s 35(2).

countries[86]. It is inconsistent with approaches suggested on the part of law reform bodies in England and Australia[87]. It finds no reflection in the relevant parts of the United States Restatement of the law. Nor is it adopted in the *Uniform Commercial Code* of the United States. There is nothing like it in the United Nations Convention on Contracts for the International Sale of Goods 1980. Nor does it appear in the UNIDROIT Principles of International Commercial Contracts 2004[88]. Even where recognising a classification analogous to "essential" terms, none of these codifications encumbers itself with an artificial additional subdivision of the broad class of "non-essential" terms that remains.

109 It is true that Mr Edwin Peel, the present author of Professor Treitel's *The Law of Contract*, expresses a preference for the retention of the "intermediate term" classification in the context of English law, citing what he describes as its "practical" usefulness[89]. I am as sensitive as the next judge to the common triumph of pragmatism over principle in the history of the common law. However, for reasons explained above I have considerable doubts as to the suggested justification in this case. The text does not refer to Australian case law on the subject. In any case, Mr Peel acknowledges that there is authority for, and "considerable force in", the "alternative view that there are only two categories: conditions and other terms"[90]. This represents the classification that I would favour. It is more traditional. It has the weight of history on its side. It recognises the seriousness of providing a further classification with the potential to authorise the termination of a valid contract. It reduces the temptations of consequentialist reasoning essentially designed to fulfil the conclusion already contemplated or arrived at. And it avoids the difficulty of differentiating "intermediate" or "innominate" terms from essential "conditions" and "other" terms.

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86 See eg *Contractual Remedies Act* 1979 (NZ), s 7(2), (3), (4).

87 McGregor, *Contract Code Drawn Up on Behalf of The English Law Commission*, (1993) at 71-85; cf Ellinghaus and Wright, *An Australian Contract Code*, Law Reform Commission of Victoria Discussion Paper No 27, (1992) at 25.

88 See Arts 7.3.1, 7.3.3.

89 Peel, *The Law of Contract*, 12th ed (2007) at 889 [18-048]; cf joint reasons at [50].

90 Peel, *The Law of Contract*, 12th ed (2007) at 889 [18-048] citing *The Hansa Nord* [1976] QB 44.

110 I acknowledge that, in a sense, whether there are two or three species of contractual terms might well be in large part a "terminological problem"[91]. However, getting the classification right has significant implications for countless contracting parties and legal practitioners, as well as for trial judges. I also recognise that this is an area of law in which it is difficult to establish rigid standards for the determination of future cases. Thus, Bryson JA noted in the Court of Appeal[92]:

> "Whether or not there has been a repudiation [in the broad sense] is a conclusion based on the application to the facts of each case of a standard which has not been, and I think cannot be formulated precisely or exhaustively. As with other legal standards, repudiation calls for judicial decision on whether conduct has passed a boundary although the precise location of the boundary is not clear."

111 However, the central point is that the performance of legal tasks is not assisted when misleading, imprecise and self-fulfilling labels are invoked in an attempt to rationalise results in individual cases after the event. Such labels comprise a source of needless complication and disputation. If what is required is an evaluation of whether the circumstances of a particular breach are of such an objectively serious nature as to vindicate unilateral termination, then this Court should formulate the relevant principles to say so. Continued reference to the vague and artificial concept of "intermediate terms" inhibits this exercise and obscures clear thinking in the performance of the legal task in cases such as the present.

112 In earlier times this Court felt itself obliged to follow judicial developments of legal doctrine affecting the common law of contracts, as expressed in the higher English courts. Substantially, this was because of the then legal tradition and training and because Australian courts, including this Court, were subject to appeals to the Judicial Committee of the Privy Council. Now we answer to a more testing standard of rigour, persuasiveness and conceptual coherence. We are governed not only by our own past decisional authority but also by our consideration of relevant legal principle and applicable legal policy[93].

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91 Peel, *The Law of Contract*, 12th ed (2007) at 888 [18-048]; cf Carter, Peden and Tolhurst, *Contract Law in Australia*, 5th ed (2007) at 694 [30-34] (stating that the "problem of classification is largely, but not entirely, academic").

92 [2006] NSWCA 291 at [183].

93 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 252.

113 *An alternative formulation*: It follows that I would endorse the argument advanced in the ninth Australian edition of *Cheshire and Fifoot*[94]:

> "It is difficult to see the necessity for introducing [an 'intermediate'] category of terms as a means of legitimising termination by reference to the extent of loss actually caused by a breach. Unless otherwise agreed, a breach that substantially deprives the other party of the benefit of a contract should entitle that party to terminate it, no matter whether the term in question is essential, intermediate, or inessential. The identification of a third kind of term distinct from, and intervening between, essential terms (conditions) and inessential terms (warranties), further proliferates an already over-elaborate terminology, and is an obvious invitation to circularity of reasoning. Many judgments acknowledge, even if only indirectly, that loss of substantial benefit may be sufficient as such to justify termination by the injured party."

114 Of the two taxonomies set out in the reasons of Campbell J, I prefer that proposed by Dr Seddon and Associate Professor Ellinghaus in the Australian edition of *Cheshire and Fifoot*. I regard it as a correct statement of the common law of Australia. Thus, a right to terminate arises in respect of: (1) breach of an essential term; (2) breach of a non-essential term causing substantial loss of benefit; or (3) repudiation (in the sense of "renunciation"). The common thread uniting the three categories is conduct inconsistent with the fundamental postulate of the contractual agreement.

115 This scheme of classification affords the requisite "flexibility" to ensure just outcomes in individual cases – a proper concern upon which the joint reasons rightly place emphasis[95]. However, it avoids the need to invent so-called "intermediate terms". It also simplifies the determination of the consequences of breach of a contractual term, removing needless steps from the process of reasoning. Under taxonomies incorporating the "intermediate term", a finding that a term has been breached requires a determination of whether that term is essential or non-essential. If it is the latter, the court must then inquire as to whether it is of an "intermediate" character. If the answer to this question is in the affirmative, the court must make a further determination of whether the breach was of "sufficient seriousness" to warrant termination. The latter two steps are interrelated. However, when the "intermediate term" is excluded, the process of reasoning is simplified and clarified. Either the term breached is essential or it is non-essential. It cannot somehow be somewhere in between. If

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94 Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust ed (2008) at 1032 [21.22] (citations omitted).

95 cf joint reasons at [52].

it is the former, termination will be justified. If it is the latter, the court can turn its attention directly to the objective indicia of "substantial loss of benefit" without feeling a need to affix the "intermediate" label on the contractual terms *ex post facto*.

116 I would prefer to decide the case on this footing. I express this preference because the holding in the joint reasons will now endorse the *Hongkong Fir* doctrine as part of the common law of Australia. I cannot agree in that result. Before that doctrine passes into endorsement by this Court as a binding rule of Australian law[96], I have endeavoured to explain its theoretical and practical imperfections and to set out an alternative and preferable expression of the governing common law rule. It produces the same outcome in this case. However, it does so without resort to the unpersuasive classification that is now upheld and applied.

Outcome and conclusion

117 *Application of principles*: It remains to apply the foregoing principles to the facts of the present appeal. As the joint reasons recount, Campbell J found that Sanpine had committed significant and repeated breaches of the Agreement in relation to:

1. the preparation and updating of documents[97];

2. the opening and maintenance of a joint venture bank account[98]; and

3. the maintenance of proper books so as to allow assessment of the affairs of the joint venture[99].

118 I do not doubt that the terms of the contract found to have been breached were of substantial importance in the context of the agreement between the parties. From the point of view of Koompahtoo, the basic purpose of establishing the joint venture was to obtain the benefit of Sanpine's managerial expertise[100]. Defaults on the part of Sanpine in this connection would have had the effect of calling into question the assumption that Sanpine was competent to

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96 cf *Al-Kateb v Godwin* (2004) 219 CLR 562 at 609 [127] per Gummow J.

97 Joint reasons at [29].

98 Joint reasons at [34]-[35].

99 Joint reasons at [37]-[40].

100 Joint reasons at [2], [68].

provide such expertise – an assumption on which the contractual relations between the parties were founded.

119 I do not favour the conclusion that the terms found to have been breached included terms that were "essential" in nature. Even with respect to cl 16.5 of the Agreement[101] it is possible to envisage breaches too trivial to be regarded as providing a licence for termination. It does not matter that *in the event* the relevant breaches were far from being so. The serious and significant consequence of determining a contractual term to be "essential" – being the vindication of unilateral termination for breach regardless of the circumstances – means that courts should be cautious in giving effect to such a result.

120 In the circumstances of the case, I consider that the breaches established had, as a matter of fact, the effect of depriving Koompahtoo of the substantial benefit of the contract[102]. That benefit in large part comprised the application of Sanpine's expertise in management to the joint venture project. The defaults of Sanpine undercut that benefit to a significant extent. The maintenance of proper documentation and accounts, and the making available of relevant information to Koompahtoo, was basic to Sanpine's obligations under the Agreement. I agree with the joint reasons when they say[103]:

> "The nature of Sanpine's breaches was such that, even at trial, it was difficult, if not impossible, to know their full extent. The breaches deprived the Koompahtoo representatives of the capacity to make an informed decision as to the consequences for Koompahtoo of what was going on."

121 *Conclusion and disposition*: It follows that the appeal succeeds. The defaults of Sanpine were such as to vindicate Koompahtoo's termination of the Agreement. Given the context, those defaults deprived Koompahtoo of the substantial benefit of the Agreement. There is no need to appeal to the elusive and contestable concept of intermediate or innominate terms[104]. So I would not do so. The Court of Appeal erred in its approach and in its conclusions. The orders of Campbell J should be restored for the reasons that I have explained.

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101 cf joint reasons at [69]-[70]. The text of cl 16.5(a) is set out in the joint reasons at [14].

102 cf joint reasons at [71].

103 Joint reasons at [67].

104 I previously accepted that the *Hongkong Fir* approach introduced flexibility into the classification of contractual terms: see *Tricontinental Corporation Ltd v HDFI Ltd* (1990) 21 NSWLR 689 at 697-698. However, as I have shown, there are other and preferable ways to achieve a flexible result.

Orders

122 The orders proposed in the joint reasons[105] should be made.

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105 Joint reasons at [73].