

Court of Appeal New South Wales

Case Title: Bondi Beach Astra Retirement Village Pty
Ltd v Gora

Medium Neutral Citation: [2011] NSWCA 396

Hearing Date(s): 26 July 2011

Decision Date: 15 December 2011

Jurisdiction:

Before: Giles JA at [1]
Campbell JA at [6]
Whealy JA at [370]

Decision:

1. Appeal allowed in part.
2. Set aside the orders made on 19 February 2010 in the court below.
3. In lieu thereof:
 - (a) Declare that the Respondents are bound not to sell transfer or otherwise dispose of the Unit otherwise than pursuant to the provisions of the Buyback Deed dated 30 September 1987 between the Appellant, the late Clifford Evans, and the late Dorothy Evans.
 - (b) Order that the Further Amended Statement of Claim be otherwise dismissed.
4. Order the Respondents to pay one half of the costs of the Appellant of the appeal and to have a certificate under the *Suitors Fund Act* . No order is made concerning the costs in the court below.

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

should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords:

REAL PROPERTY - restraints on alienation - whether option to buy back unit in retirement village unenforceable as an invalid restraint on alienation - where prohibition on disposing of any estate or interest in the property without consent of transferor - where restraints bind executors and successors in title in perpetuity - where circumstances in which option to buy back is exercisable effectively prevent disposal of any interest in the property without the option becoming exercisable - where price at which the only permitted sale can be made is bound to be less than the market value of the unrestrained fee simple - where restraints are in practice highly likely to permit a sale to only one person (or its nominee)

REAL PROPERTY - restraints on alienation - effect of *Hall v Busst* (1960) 104 CLR 206 - majority held that contractual restraint on alienation unconnected with transfer of property whose alienation is restrained is to be treated in same way as condition imposing restraint on alienation in transfer of fee simple - no majority reasoning as to why clause in *Hall v Busst* was unlawful restraint on alienation - majority held that public policy is basis for doctrine of contractual restraints on alienation - obiter comments of Dixon CJ and Menzies J that contractual restraint on alienation would be invalidated only if the restraint was total - whether restraint is in substance total is a question of degree

REAL PROPERTY - restraints on alienation - contractual restraint on alienation - whether imposed for the purpose of restraining alienation or for valid collateral purpose - effect of *Reuthlinger v MacDonald* [1976] 1 NSWLR 88 and *Reuthlinger v MacDonald* (NSWCA, 20 October 1976, unreported) - whether *Reuthlinger* clearly or plainly wrong - acceptance that public policy

is basis for doctrine of contractual restraints on alienation supports enforceability of contractual restraints on alienation with valid collateral purpose

REAL PROPERTY - restraints on alienation
- contractual restraint on alienation - valid collateral purpose - whether the restraint is imposed at time of transfer of property in question is relevant to enforceability

REAL PROPERTY - restraints on alienation
- contractual restraint on alienation - valid collateral purpose - where restraint imposed for several different purposes, restraint is unenforceable if, overall, it is contrary to public policy

REAL PROPERTY - restraints on alienation
- contractual restraint on alienation - valid collateral purpose - where contract was not illegal at time it was made, appropriate standard of public policy to apply is that which exists at the time enforcement of the contract is sought

REAL PROPERTY - restraints on alienation
- contractual restraint on alienation - whether imposed for the purpose of restraining alienation or for valid collateral purpose - whether provision of housing for aged people is valid collateral purpose - legislation governing retirement villages specifically recognises permissibility of options to repurchase or conditions restricting subsequent disposal of the premises - principle that doctrine of restraints against alienation operates by reference to substance of arrangement, not form - restraint on alienation allowed unit to be purchased at significant discount - discount assists in provision of affordable accommodation for aged people - discount assists in provision of services for residents of retirement village - countervailing public interest in free alienability of fee simple interests

REAL PROPERTY - restraints on alienation
- contractual restraint on alienation - effect

of Wollondilly Shire Council v Picton Power Lines Pty Ltd (1994) 33 NSWLR 551 - obiter statement of Handley JA that restraints against alienation arising as incidents of a personal contract for sale or option or right of pre-emption fall outside doctrine of restraints on alienation - statement not followed - possible for restraints on alienation arising as incidents of a personal contract for sale or option or right of pre-emption to be invalidated by operation of the doctrine of restraint against alienation

OPTION - exercise of option - whether clear and unequivocal election to acquire the relevant property upon the terms specified in the option - determined from point of view of reasonable recipient of the document, with knowledge of relevant context - whether subsequent provision of information can cure inadequacy of purported notice to exercise option - whether purported exercise of option addressed to correct persons

CONTRACT - abandonment - whether inordinate length of time allowed to elapse - whether reasonable bystander would infer, from the actions of the parties in the circumstances, that they have agreed to treat the contract as being no longer on foot - where contract gives rise to expectation of expeditious progress - where contract imposes positive obligations on both parties within short time period and obligations not performed

CONTRACT - consideration - whether promise to ensure that X will do Y is capable of providing consideration where X is already under a legal duty to do Y - whether promise to do an illegal act can provide consideration -

COURTS AND JUDGES - Judicial precedent - ratio decidendi - where judge gives two reasons for decision, each of which is independent of the other - whether each of those reasons is part of the ratio decidendi

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Real Property Act 1900
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State Environmental Planning Policy
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In re Rosher; Rosher v Rosher (1884) 26 Ch
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Category: Principal judgment

Parties: Bondi Beach Astra Retirement Village Pty Ltd (Appellant)
 Geraldine Lois Gora as Co-Executrix of the Estate of the late Clifford Evans (First Respondent)
 Rhonda Jean Rytmeister as Co-Executrix of the Estate of the late Clifford Evans (Second Respondent)
 Lee Bronwyn Evans as Co-Executrix of the Estate of he late Clifford Evans (Third Respondent)

Representation

- Counsel: Counsel

B DeBuse (Appellant)
GA Moore (Respondents)

- Solicitors: Solicitors
McCooe Raves & Poole (Appellant)
McPhee Kelshaw Solicitors (Respondents)

File number(s): 2010/68048

Decision Under Appeal

- Court / Tribunal:

- Before: Bryson AJ

- Date of Decision: 19 February 2010

- Citation: Bondi Beach Astra Retirement Village Pty
Ltd v Gora [2010] NSWSC 81

- Court File Number(s) 2008/278565

Publication Restriction:

JUDGMENT

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- 1 **GILES JA** : Subject to the following observations, for the reasons given by Campbell JA the orders proposed by his Honour should be made.

- 2 The reasons amply reveal that the historical foundation for, and disparate formulations of, invalidity as a restraint on alienation are not a sound basis for acting upon rigid rules in modern times. If there were a clear common law rule applicable in the present case it would have to be applied, but there is not.
- 3 On the authority of *Hall v Busst* (1960) 104 CLR 206, at least for contractual restraints invalidity is now founded on a public policy in favour of free alienability of property. Like any such policy matter, it must be balanced with other policies and given effect only if the circumstances so require. The remark of Gummow J in *Caboche v Ramsay* (1993) 119 ALR 215 at 232 that "the question is one of degree" can extend to the command of free alienability in the particular circumstances.
- 4 There are many inroads into free alienability of property. From *Reuthlinger v MacDonald* (1976) 1 NSWLR 88 and its approval on appeal, a restraint imposed for the protection of a valid collateral object is not invalid. This should not be seen as a particular principle of its own: it is an expression of circumstances in which the public policy in favour of free alienability of property does not hold sway, because on balance the public interest is better served by permitting the restraint. Regard should not be confined to the purpose of the parties to the restraint, but extends to the social utility of permitting restraints of that nature. I remain of the view expressed in *Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express (Australia) Pty Ltd* [2008] NSWCA 327 at [81].
- 5 For the reasons given by Campbell JA, and without any need to join in his Honour's detailed observations on cases on other facts, restraints of the present kind in the provision and operation of retirement villages serve sound purposes. They have been recognised in legislation. The age of 55 leaves many useful years, but can mark a change in lifestyle including to the world of a retirement village. To those who wish it, many or perhaps

most of whom will need to take care with their finances, a lesser capital outlay at the cost of restraints of the kind in the present case will be acceptable, if not attractive. As retirement villages are conducted, the result will not be that property is taken out of commerce because it is inalienable. It will be cycled through successive residents of the retirement village. Public policy does not require that the restraints be struck down.

6 **CAMPBELL JA :**

Nature of the Case

7 The Astra was once a hotel located at the intersection of Campbell Parade and Sir Thomas Mitchell Road, Bondi Beach. In January 1985 CG Maloney Pty Ltd (" **CGM** ") procured the registration of a strata plan for the building, and set about marketing the units in it, on the basis that the building would be administered as a retirement village.

8 The conveyancing and administrative arrangements under which the retirement village was to operate were unusual. In broad terms, a purchaser would purchase a strata title unit from CGM, on terms requiring it to enter into two agreements with the Appellant, Bondi Beach Astra Retirement Village Pty Ltd (" **BBA** "). One of those agreements, called an Occupancy Agreement, was to be entered between BBA on the one part, and the proprietor and occupier of the unit. It contained an option entitling BBA to acquire the unit for a price equal to that which the proprietor had paid for it (minus certain adjustments) in various events, one of which was the death of the proprietor. The other deed, called a Buyback Deed, was entered between BBA, the proprietor and occupant. It conferred put and call options on both BBA, and the proprietor, entitling BBA to require the proprietor to sell the unit, and entitling the proprietor to require BBA to purchase the unit. That sale was to be at the price that the proprietor had originally paid for it (minus certain adjustments). The options arose in

various circumstances, including if the proprietor wished to sell the unit. A definition extended "*proprietor*" to include successors in title of the proprietor.

- 9 The late Mr Clifford Evans and his wife Dorothy Evans purchased lot 40 in the strata plan, as joint tenants. They entered an Occupancy Agreement and a Buyback Deed. Upon the death of Mrs Evans, Mr Evans became the sole proprietor and occupant of the unit. The Respondents to this appeal are the daughters of Mr and Mrs Evans, who are also the executrices of Mr Evans.
- 10 After the death of Mr Evans, there were some communications between the solicitors for BBA and the Respondents, concerning exercise by BBA of the option to purchase contained in the Occupancy Agreement.
- 11 Eventually BBA commenced litigation against the Respondents, contending that it had validly exercised the option to purchase. As ultimately formulated in the Second Further Amended Statement of Claim, it sought a declaration that it had validly exercised the option for purchase, an order for specific performance of that agreement, or alternatively, damages for breach of that contract. Alternatively, it sought a declaration that the Respondents were bound not to sell, transfer or otherwise dispose of the unit otherwise than pursuant to the provisions of the Buyback Deed. As a further alternative, it sought a declaration that should the Respondents wish to sell, transfer or dispose of the Unit to any purchaser who must be a qualified occupant, they must cause that purchaser to enter into an Occupancy Agreement with BBA on the same terms and conditions as the Occupancy Agreement entered into by Mr and Mrs Evans upon purchase of the Unit, including the further obligation recorded in clause 2 of the Buyback Deed. That obligation was, in broad terms, to require any further purchaser to agree to the same restrictions on transfer. The pleading also sought an order that BBA could maintain a caveat recording

that right. Finally, there was a claim based on estoppel, that has not been pressed on the appeal.

12 Bryson AJ dismissed BBA's proceedings: ***Bondi Beach Astra Retirement Village Pty Ltd v Gora*** [2010] NSWSC 81.

13 This appeal gives rise to the following issues:

(1) Whether BBA gave the type of notice necessary for exercise of the option to purchase. I have concluded that it did not.

(2) Whether any contract resulting from exercise of the option has been abandoned. That issue does not arise, because of my answer to the first issue. However, if my answer to the first issue were wrong I would conclude the contract had been abandoned.

(3) If a contract resulting from exercise of the option was still on foot when the matter came to court, whether BBA was ineligible for the grant of equitable relief because it was a volunteer. Again, this issue does not arise because of my answers to the first two questions. However, if my answers to those issues were wrong, my answer to this issue would be "no".

(4) Whether the option in the Occupancy Agreement, the option in the Buyback Deed, or both of those options are void by reason of the public policy concerning restraints on alienation of property. An aspect of that issue is whether the Respondents are obliged only to dispose of the property to a person who agrees to be subject to the same restrictions on transfer that the Occupancy Agreement and the Buyback Deed purport to impose on the Respondents. I have concluded that neither of the options is void and that the Respondents are subject to the obligation concerning to whom they may transfer the property.

PART A - FACTS

- 14 The first Annual General Meeting of the body corporate was held on 12 December 1986. One of its resolutions was to adopt a by-law 32, which provided:

"That exclusive use of those parts of the Common Property comprising the swimming pool area, passageways and corridors on all floors, the courtyard areas, and the residents' facilities and lounges on the ground floor will be granted to the Service Company subject to the Service Company properly maintaining and keeping in good repair those areas and that in accordance with the Occupancy Agreement the Service Company will sub-licence all proprietors and occupiers of the residential lots to permit them to use such areas."

In that resolution the "*Service Company*" was BBA.

- 15 On 1 July 1987 Mr and Mrs Evans entered a contract with CGM for the sale and purchase of lot 40 in the strata plan, for the price of \$107,000. The contract was in the form of the 1986 edition of the standard form Agreement for Sale of Land produced by the Law Society of New South Wales and the Real Estate Institute of New South Wales, with some amendments and special conditions. It stated the address of Mr and Mrs Evans as being at a home unit in Hastings Parade, Bondi Beach. Pursuant to the second schedule of the contract, the title was subject to restrictions as to user created by the registration of the strata plan. There was in fact only such restriction as to user, namely:

"No person other than a person aged 55 years or over shall occupy any lot herein provided that:

(a) a person not being aged 55 years or over may reside with the occupier of the lot being a person aged 55 years or over in any lot herein:

(b) this restriction shall not apply to the occupation of lot 4 in the event that such lot is used as the residence of a manager of the Bondi Beach Astra Retirement Village."

16 One of the special conditions required the purchasers upon completion to enter into and procure the occupant of the lot to enter into two deeds, the text of which was annexed to the contract. They have been referred to as the Occupancy Agreement and the Buyback Deed.

17 Inappropriately, as the first Annual General Meeting of the body corporate had already occurred, another special condition provided:

"The parties acknowledge that it would be proposed at the first Annual General Meeting of the Body Corporate that exclusive use of those parts of the common property comprising the swimming pool area, passageways and corridors on all floors, the courtyard areas, and the residents' facilities and lounges on the ground floor will be granted to the Service Company subject to the Service Company properly maintaining and keeping in good repair those areas and that in accordance with the Occupancy Agreement the Service Company will sub-licence all proprietors and occupiers of the residential lots to permit them to use such areas."

18 The by-laws that had been adopted on 12 December 1986 were registered on 3 August 1987.

19 On 22 September 1987 settlement of the transaction occurred. Mr and Mrs Evans received a **Real Property Act 1900** transfer from CGM relating to lot 40. That transfer was registered on 10 December 1987.

20 On 30 September 1987 Mr and Mrs Evans entered the Occupancy Agreement and the Buyback Deed that are at the heart of this litigation.

The Occupancy Agreement

- 21 The Occupancy Agreement took the form of a deed, expressed to be between three parties. The first of them was BBA, called "*the Service Company*". The second of them was Mr and Mrs Evans, called "*Occupant*". The third of them was Mr and Mrs Evans again, this time called "*Proprietor*".
- 22 The Deed recited CGM's renovation of the Astra "*which is planned to be the residence of persons of 55 years of age and over*", and that the Proprietor was registered or entitled to be registered as proprietor of the unit. It continued:
- "C. The Service Company has or will be as far as legally possible granted exclusive use and possession of the Communal Areas.
- D. The parties hereto desire to enter into an agreement for the welfare, regulation and conduct of all unit owners at the Astra and the Occupant and the Proprietor have requested that the Service Company manage and administer the Astra and the Communal Areas to ensure that the residents of the Village enjoy such reasonable privacy and quiet possession and enjoyment as is consistent with the physical characteristics of a retirement village designed for the residence of persons 55 years of age and over."
- 23 BBA promised to carry out various tasks concerning the operation of the retirement village. I will consider those promises in more detail later, when examining the argument that BBA is a volunteer and thus not entitled to an equitable remedy.
- 24 There are some other provisions of the Occupancy Agreement that are relevant to the argument about whether either or both of the options breach the public policy concerning restraint on alienation. I will deal with those provisions when considering that topic.

25 BBA contends that in the present case the option to purchase was triggered by Clause 7(a)(i) of the Occupancy Agreement. Clause 7 commences:

"The Occupant and the Proprietor covenant with the Service Company that the right of the occupant to reside at the Bondi Beach Astra, to the communal areas and occupy the unit shall cease and determine on the happening of any one or more of the following events and the right granted to the Service Company pursuant to Clause 8 hereinafter appearing shall arise upon the happening of any one or more of the following events:-

(a) If the Occupant shall not qualify as a Qualified Occupant for any reason including without limiting the generality of the foregoing:-

(i) if the Occupant shall die ..."

26 There are some definitions contained in a Schedule to the Occupancy Agreement:

"The Occupant" - means and includes the said CLIFFORD EVANS and DOROTHY EVANS and his/her or their executors, administrators and successors in title.

'The Proprietor' - means and includes the said CLIFFORD EVANS and DOROTHY EVANS ... and his/her or their executors, administrators and successors in title being the registered Proprietor who is registered or entitled to be registered as the Proprietor of the unit or any Mortgagee who has granted a Mortgage to the Proprietor.

'Qualified Occupant' - means a person who complies with the requirements of any s 88B Instrument registered on the title to this or any other Unit and who has entered or has agreed to enter into an occupancy agreement with the Service Company upon similar terms as are herein contained."

27 Clause 8 states the terms of the option:

"(a) Upon the happening of any of the events referred to in Clause 7 hereof the Service company shall have the option at any time thereafter by notice in writing (hereinafter called 'the Default Buyback Notice') served upon the Proprietor to require the Proprietor to transfer the Unit to the Service Company or its nominee for the price of One Hundred and Seven Thousand dollars (\$107,000.00) whereupon the following terms and conditions shall apply:

(i) the parties shall upon the service of the Default Buyback Notice be deemed to have entered into an Agreement upon the same terms and conditions as are contained in the Standard Agreement for Sale of Land - 1986 Edition with the following alterations omissions and additions thereto:-

(aa) Clause H shall be amended so that the 10% deposit is payable by the Service Company to the Proprietor or the Proprietor's Solicitor as stakeholder;

(bb) Clause K shall be amended so that vacant possession is given as at the date of completion;

(cc) Clause 6(a) and 6 (b) of this Agreement shall become a condition of and incorporated in the Agreement;

(dd) There shall be attached to the Contract pursuant to s 52A(2)(a) of the *Conveyancing Act 1919* the documents or copies of the documents referred to in the Fourth Schedule in the Standard Agreement for Sale of Land - 1986 Edition;

(ee) Within fourteen (14) days of the service of the Default Buyback Notice the parties shall exchange formal written Agreements containing the above terms and conditions."

28 The Standard Agreement for Sale of Land - 1986 edition that is thereby incorporated contains, in item G of the particulars, provision for including the price, the deposit, and the balance. Item H of the particulars provides:

"THE DEPOSIT is payable to * Vendor's Agent first named"

29 Item K in the particulars makes provision for stating the date as at which the benefit of possession is to be given, and whether the possession is to be vacant possession, or subject to existing tenancies or occupancies under the Vendor as particularised in the contract.

30 As seen above in Clause 8(a)(cc) of the Occupancy Agreement, clauses 6(a) and (b) are incorporated by reference into the contract for sale that is to arise upon exercise of the option. Those clauses provide:

"(a) Upon the sale or transfer of the Unit to the Service Company or its nominee by either the Proprietor or by any Mortgagee thereof the following payments shall be made by or on behalf of such Proprietor to or deducted by the Service Company on completion of the sale or transfer thereof:-

(i) All costs, fees and expenses paid or incurred by the Service Company in connection with the sale and transfer of the Proprietor's unit including any reasonable costs of repairs or refurbishment payable to or by the Service Company or assessed by the Service Company to be reasonably payable to restore the Unit to its condition existing at the date of its original purchase by the Proprietor.

(ii) all other moneys owing by the Occupant or the Proprietor to the Service Company whether pursuant to this Occupancy Agreement or otherwise.

(b) The Proprietor hereby charges the Unit with the payment of all sums of money referred to in Clause 6(a) hereof and hereby

acknowledges that the charge herein created constitutes an interest in land entitling the Service Company to register a Caveat against the folio of the Register in the Land Titles Office relating to the Unit."

31 Clause 9(a) of the Occupancy Agreement provides:

"A notice may be given by the Service Company to any Occupant or any Proprietor either personally or by delivering it to the Unit or by sending it by post to either of them at the Unit or at their respective address as set out in this Agreement. Where a notice is sent by post to the Unit or at any address as shown herein service thereof shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and to have been effected in the case of a notice of a meeting on the day after the date of its posting and in any other case at the time at which the letter would be delivered in the ordinary course of post ... A notice shall be deemed to have been served in accordance with the provisions of this Clause and in conformity with this Agreement notwithstanding that the Occupant or the Proprietor to whom it is addressed is deceased or not living in the Unit."

Events Relating to Exercise of the Option

32 Mrs Evans died on 5 January 1995. Her only asset of any significance was her interest in the unit, which passed by survivorship to Mr Evans. There was no grant of probate or letters of administration concerning her estate. The passing of her interest in the unit to Mr Evans was not notified on the Register.

33 On 16 September 1997 Mr Evans died. Probate of his will was granted to the Respondents on 27 February 1998.

34 Notwithstanding the length of time since the death of Mr Evans, there has never been a transmission application relating to the unit, lodged with the Registrar General's Office. Thus, title to the unit continues to be registered in the name of Mr and Mrs Evans.

35 On 19 February 1999 the solicitors for BBA wrote to the solicitors who had acted for Mr and Mrs Evans on purchase of the unit in 1987. The letter stated that they were instructed that Mr and Mrs Evans were both dead, and that BBA wished to exercise its rights concerning repurchase of the unit. That letter is not shown to have ever come to the attention of the Respondents.

36 On 23 February 1999 BBA's solicitors wrote the following letter:

"The Executors of the Estate of the late Clifford and Dorothy Evans
C/- Unit 40/34 Campbell Parade
Bondi Beach NSW 2026

Dear Sirs

Re: The Executors of the Estate of the late Clifford and Dorothy Evans

Bondi Beach Astra Retirement Village Pty Ltd Buy Back Unit 40

Property: 40/34 Campbell Parade, Bondi Beach NSW 2026

We are the solicitors who act on behalf of Bondi Beach Astra Retirement Village Pty Ltd. We have been advised of the death of the late Dorothy and Clifford Evans and we offer our condolences.

On the purchase of the property known as unit 40 Bondi Beach Astra Retirement Village, 34 Campbell Parade, Bondi Beach, the contract provides that the company has the right to re-purchase the unit upon the death of the proprietors.

We are instructed that our client wishes to exercise its rights to re-purchase the unit, and we would therefore be pleased if you could

contact us in respect of making arrangements for the re-purchase of the unit by the company.

Yours faithfully"

37 The judge found that that letter came to the attention of the Respondents in late February 1999. That finding is not contested.

38 On 10 March 1999 the Respondents' solicitors replied to BBA's solicitors concerning the letter of 23 February 1999. They said:

"To allow us to advise our clients concerning the re-purchase right asserted by your client, we request that you forward to us:

1. A copy of the purchase contract to which your letter refers, and a copy of any other documents signed by the late Mr and Mrs Evans, upon which your client relies as supporting its re-purchase right.

2. A copy of any agreement between your client and the owner corporation of the Astra relating to your client's management of the communal areas and common property of the Astra, or to any other duties performed by your client for the owner corporation.

On the basis of the information currently available to them, our clients are unable to concede that your client does have the benefit of the re-purchase right that it asserts. However, that matter will be further considered once the requested documents have been made available."

39 On 15 March 1999 BBA's solicitors replied, enclosing a copy of the original sales contract and the Occupancy Agreement. They said:

"Please obtain your client's instructions and we will prepare contracts for the buy back of the unit."

40 On 22 April 1999 BBA's solicitors wrote once more to the Respondents' solicitors, saying:

"We are instructed that our clients wish to proceed with the buy back of the above mentioned unit. Please advise whether you wish us to prepare contracts.

Further, we note that the provisions of the buy back agreement require that pursuant to clause 3a of the occupancy agreement, the service company's costs and the reasonable refurbishment costs of the unit are to be deducted from the agreed price of \$107,000.00.

In order that the reasonable costs of repair and refurbishment can be determined, we request that access be made available to the company's agent, Mr Karl Jaeger of Raine and Horne Real Estate, Bondi Beach.

Our costs for acting on behalf of the buy back are as follows:"

It then itemised their costs and disbursements, totalling \$1,440.00. The reference to clause 3a is quite clearly a misprint for clause 6(a).

41 On 28 April 1999 the solicitors for the Respondents wrote to BBA's solicitors, referring to the letter of 22 April 1999, and continuing:

"We have reviewed the documents forwarded with your letter dated 15 March 1999. However, those documents did not include copies of any agreements between your client and the body corporate/owner corporation of Strata Plan 22422. It would appear that at least one such agreement exists, relating to the management of the common property.

We confirm our request that a copy of that document, and any other agreements between the specified parties, be made available to us for review by our client.

When we have reviewed those documents we will finalise our advice to our client and respond to your letter."

42 BBA's solicitors replied on 17 May 1999, saying:

"We advise that the rights given to our client in respect of the exclusive use of the common property are contained in the strata plan by-laws, and we enclose a copy for your records.

We trust this satisfies your queries and we look forward to proceeding on the buy back of the property in accordance with the terms of the deed."

43 The Respondents' solicitors replied on 8 June 1999, saying:

"In our letter we requested that you make available to us on behalf of our client copies of any agreements between Bondi Beach Astra Retirement Village Pty Ltd ("the service company") and the body corporate/owners corporation of Strata Plan 22422. We noted in particular that the documents supplied should relate to your client's management of the common property.

Under cover of your reply, you forwarded to us a copy of a Notice of Change of By-Laws executed under the common seal of the body corporate on 27 May 1987. That document in turn annexed a document marked "A" setting out the text of by-laws 30, 31, 32, and 33. The first two by-laws related to the exclusive use and enjoyment of certain car spaces. By-law 32 purported to give your client exclusive use of certain designated common property areas. By-law 33 related to the exclusive use of shop fronts and exterior walls of Lot 62, 63 and 64."

44 The letter then went on to itemise various of the obligations that BBA had undertaken under the Occupancy Agreement. The letter continued:

"The functions and powers to be performed and exercised by the service company, as specified in the occupancy agreement,

appear to go significantly beyond the rights conferred on the service company by the by-laws referred to in the Notice of Change of By-Laws submitted with your previous letter. We therefore assume that, given the terms of the occupancy agreement, there must be some other agreement entered into between the body corporate and the service company. If that assumption is correct, please supply a copy of that other agreement or of each of those other agreements.

If our assumption is incorrect, and there are no other agreements, on what basis does your client contend that it was authorised or empowered to enter into the occupancy agreement and to make to occupants of units within the Astra complex the representations to which you have referred?

Until these matters are clarified, we are unable to recommend to our clients that the rights asserted by your client should be conceded.

45 BBA's solicitors replied on 15 June 1999, saying:

"We are instructed that Clifford Evans and Dorothy Evans entered into an agreement with our client; at the time of the purchase of the property, the terms of which we have previously forwarded to you. Pursuant to that agreement, our client has the right to re-purchase the property, and it is our client's intention to do so. Therefore, we look forward to your confirmation that your clients will exchange contracts in accordance with the terms of the original agreement.

Please advise whether you wish us to prepare the contracts."

46 The Respondents' solicitors replied to BBA's solicitors on 7 July 1999, saying:

"We note your confirmation that there are no agreements between the owner corporation of Strata Plan 22422 and your client, Bondi Beach Astra Retirement Village Pty Ltd. The occupation agreement between the late Mr and Mrs Evans and your client was entered into on the basis of the exclusive use by-laws, copies of which were furnished with your letter dated 17 May 1999.

As this issue has now been clarified, we are arranging a conference between our client and Mr Cork following Mr Cork's return from leave on 19 July 1999."

Mr Cork was the solicitor who usually acted for the Respondents concerning this matter.

- 47 The next relevant event occurred when BBA's solicitors wrote to the Respondent's solicitors on 12 July 2002. That letter was headed "*Without Prejudice*". At trial, BBA tendered that letter and a response from the Respondents' solicitors dated 2 August 2002, also headed "*Without Prejudice*". No explicit ruling under s 136 **Evidence Act 1995** was sought or made limiting the use that could be made of those letters. However, at the time of tendering them, counsel for BBA said that they:

"... are letters which are headed without prejudice. I don't tender them to prove any admissions made in them, but if there's an argument about laches and delay, it may become relevant that the matter is raised and not dropped entirely in that period. That would be the only relevance of these documents."

- 48 I shall proceed by assuming, without deciding, that this Court should adhere to the limited basis upon which counsel for BBA put the letters forward. Redacting the letter of 12 July 2002 to remove any possible admission, it said:

"We note that whilst our client maintains its rights to require your client to resell the property to our client in an attempt to resolve this matter, Mr Bray on behalf of our office discussed the possibility of [a proposed basis for settlement].

We are instructed to again re-submit this proposal for your client's consideration and if such a proposal is suitable to your client, we would be pleased if you would contact us in order that the parties

can [discuss the steps necessary to implement a settlement on that basis].

Unless this matter is resolved no later than 31 July 2002, then we are instructed by our client to immediately issue a Summons in the Supreme Court seeking Specific Performance without further notice."

- 49 The Respondents' solicitors replied on 2 August 2002, saying they had secured the Respondents' instructions, and continuing:

"Our clients understand your letter to convey an offer which does not involve any acknowledgment by your client of the issues that may arise in any litigation that it now commences. On the one hand, we consider that those difficulties will be compounded by the fact that it is now almost five years since the date of death of the late Mr Clifford Evans. On the other hand, we adhere to our previously expressed view that there appear to be significant difficulties for your client in seeking to rely upon the documentation that was signed by the late Mr and Mrs Evans when the unit was originally purchased.

[Argument about why the offer was not attractive.]

The critical question to be addressed by your client, and ultimately by any Court before which the foreshadowed proceedings were commenced, would be whether the documents upon which your client seeks to rely are in fact binding upon the Estate. Since our original review of those documents it has been our opinion, which we have confirmed in advice to our clients, that the documents are probably unenforceable. We have not communicated our views to any solicitors acting for any other residents of the village. As far as we are aware, no other resident is aware either of the advice that our clients have received or of any dispute in relation to your client's asserted buy-back rights. Obviously the commencement of proceedings would bring that situation to an end.

We are instructed that our clients propose the following resolution of the current impasse. Our clients propose that Bondi Beach Astra Retirement Village Pty Ltd elect not to attempt to enforce its buy-back rights, and that it enter into a deed with our clients, confirming that election. That deed would embody binding confidentiality clauses, precluding our clients from releasing any

information concerning this matter to any person other than their legal and financial advisers.

Our advice to our clients has not been given lightly. Before finalising our advice we consulted with counsel. Our clients are aware of the implications of their decision. While our clients would prefer to see this matter resolved amicably, and on a basis that respects the interests of both parties, both now and into the future, our clients stand ready to defend any proceedings that your client may now seek to initiate.

Regardless of your client's decision concerning this response, we would be grateful if Mr Bray could telephone Mr Cork to further discuss the matter."

50 An invitation to the other side in a dispute to give up, even on terms of a confidentiality agreement, is not an admission. Therefore I have included in this extract (without redaction) the proposal put by the Respondents' solicitors.

51 Nothing then happened until 10 October 2007. On 10 October 2007 BBA's solicitors wrote to the Respondents' solicitors, saying:

"We are instructed to confirm our clients require the buy back of the subject Unit Number 40 for the sum of A\$107,000.00 pursuant to the provisions of the contract for the sale of land dated 1 st July 1987 and a Deed of Occupancy dated 30 September 1987, originals of which (signed by the deceased) are in our possession.

Notwithstanding your previous observations in respect of the Deed and the contract, our client has Counsel's advice that they are valid and enforceable.

Would you therefore please obtain your clients' instructions as to whether or not they intend to adhere to the relevant provisions of the said agreements or otherwise within 14 calendar days of the date of this letter. If they instruct you that they will not honour the terms of these agreements, please obtain your clients' instructions to accept service of process on their behalf.

Failing receipt of a definitive reply within the above time, you and your clients are placed on notice that our client may take such measures as are open to it including the commencement of proceedings to enforce its contractual and other rights without any further notice to either you or your clients."

- 52 On 30 October 2007 the Respondents' solicitors requested that the counsel's advice to which BBA's solicitors had referred be made available, and that the Respondents be allowed 14 days *"to reach a decision on the matters that you have raised"* .
- 53 On 5 November 2007 BBA's solicitors replied, declining the request to make the counsel's advice available, and reiterating their instructions to require the buyback of the unit.
- 54 After some more inconclusive correspondence between the solicitors, on 1 April 2008 BBA's solicitors sent to the solicitors for the Respondents a notice, executed by the sole director of BBA and witnessed, in the following terms:

" Buy Back Notice

We hereby provide notice that Bondi Beach Astra Retirement Village Pty Ltd require Geraldine Lois Gora, Rhondda Jean Rytmeister and Lee Brown Evans as the executrices of the estate of the late Clifford Evans to transfer unit 40, 34 Campbell Parade, Bondi Beach New South Wales comprised in lot 40 Strata Plan 22422 to Bondi Beach Astra Retirement Village Pty Ltd or nominee for the price of \$107,000 in accordance with the Occupancy Agreement each dated 30 September 1987 between Bondi Beach Astra Retirement Village Pty Ltd and Clifford Evans and Dorothy Evans. Pursuant to clause 8(a)(i)(ee) of the Occupancy Agreement Bondi Beach Astra Retirement Village Pty Ltd require that exchange of contracts take place within 14 days of service of this letter."

- 55 The covering letter threatened imminent litigation if the notice was not complied with. On 1 May 2008, BBA commenced the proceedings in which the orders appealed against were made.

PART B - EFFECTIVE EXERCISE OF THE OPTION?

The Decision Below

- 56 At the trial BBA sought to rely on any or all of the letters and notices that I have set out, ranging from 19 February 1999 to 1 April 2008, as constituting the relevant Default Buyback Notice. The judge held that there was a fundamental problem with relying on any buyback notice given after 31 December 1999.

- 57 That fundamental problem arose from s 167 *Retirement Villages Act 1999* (" **the 1999 Act** "). That section provides:

"(1) An operator of a retirement village who holds an option to purchase any residential premises from a resident of the village must decide whether or not to exercise the option, and must give the resident written notification of that decision, no later than 28 days after the resident permanently vacates the premises (or, if the resident has not lived in the premises, 28 days after the resident notifies the operator in writing that the premises are for sale).

(2) If the operator does not give the notification required by subsection (1) within the time allowed by that subsection, the option lapses.

(3) This section has effect despite any term of the option."

- 58 The trial judge held that the 1999 Act came into operation on 3 December 1999. Its transitional provisions, in Schedule 4, include:

" 9 Vacation of residential premises

A resident of a retirement village under the former Act who permanently left his or her residential premises before the commencement of this Act is taken to have permanently vacated the premises for the purposes of this Act.

...

13 Date of permanent vacation of residential premises in retirement village

For the purposes of [the Part in which s 167 occurs], a former occupant who permanently vacated his or her residential premises in a retirement village before the commencement of this clause is taken to have permanently vacated the premises on that commencement."

- 59 Section 8 of the **1999 Act** provides that a person is taken to have permanently vacated residential premises in a retirement village in circumstances including:

"(d) if the person is a registered interest holder in relation to residential premises or is taken to be a resident of the premises by the operation of section 4(2)-the person dies or moves out of the premises."

- 60 The judge's reasoning was that under s 7 of that Act, one of the ways in which a person was a "*registered interest holder*" with respect to residential premises in a retirement village was by being "*the registered proprietor of land ... within a retirement village and as such has a residence right in respect of residential premises within the retirement village*". As Mr Evans had been a "*registered interest holder*", he was taken to have permanently vacated his premises at the time he died. Thus,

for the purposes of s 167, he was taken to have permanently vacated the premises on the commencement of the 1999 Act. Thus, the trial judge held, s 167 gave 28 days from 3 December 1999 for the exercise of an option to purchase the residential premises, after which the option lapsed.

61 His Honour's conclusion that it was not possible for the option contained in the Occupancy Agreement to be exercised any later than 31 December 1999 has not been challenged in this appeal.

62 The judge held that the letter of 23 February 1999 ([36] above) met the requirements concerning content and mode of service of a Default Buyback Notice.

Decision Re Exercise of Option

63 In this appeal, the Respondents, by Notice of Contention, submit that the letter of 23 February 1999 did not meet the requirements for effective exercise of the option. BBA seeks to uphold the judge's decision in this respect, or alternatively to argue that there was an effective exercise of the option either by a combination of the letter of 23 February 1999 ([36] above) and the provision of the sales contract and Occupancy Agreement on 15 March 1999, or alternatively by the letter of 15 June 1999 ([45] above).

64 Clause 8(a) of the Occupancy Agreement ([27] above) identifies the following characteristics of an exercise of the option:

1. One of the events identified in clause 7 has occurred;
2. BBA serves a notice in writing upon the Proprietor;

3. That notice requires the Proprietor to transfer the Unit to BBA or its nominee for the price of \$107,000.

While the terms and conditions identified in clause 8(a)(i) of the Occupancy Agreement will apply to any contract that arises from the service of a valid Default Buyback Notice, clause 8(a) does not require that the Default Buyback Notice should state that those terms and conditions apply.

65 The first condition was clearly satisfied, because Mr and Mrs Evans had both died. However, the Respondents contend that the letter of 23 February 1999 did not satisfy either the second or third of these conditions.

66 The Respondents contend that the second condition is not satisfied because the letter of 23 February 1999 was addressed to "*the Executors of the Estate of the Late Clifford and Dorothy Evans*", but there was no such person.

67 I accept that there was no such person. There was no single estate of "*the Late Clifford and Dorothy Evans*". Rather, each had his or her own separate estate. Further, there had never been an executor or other kind of legal personal representative of Mrs Evans.

68 However, those matters do not have the consequence that the option was not effectively exercised. The notice called for by clause 8(a) was required to be "*served upon the Proprietor*". On 27 February 1998 the Respondents had obtained a grant of probate of Mr Evans' estate. Though the title to the unit still stood in the names of Mr and Mrs Evans, the Respondents were by 23 February 1999 "*entitled to be registered as the Proprietor of the unit*". Thus, they fell within the extended definition of "*The Proprietor*" contained in the Schedule to the Occupancy Agreement ([26]

above). Clause 9(a) of the Occupancy Agreement ([31] above) permits various modes of service of a notice to be adopted for the purpose of that Agreement. It is not established whether the letter of 23 February 1999 was delivered to the Unit or sent to it by post. If clause 9(a) were to be relied upon as a means of establishing service concerning the letter of 23 February 1999, it would be necessary for BBA to show that it had gone through the steps of "*properly addressing, prepaying and posting a letter containing the notice*". In that circumstance, a question would arise about whether the manner in which that particular letter had been addressed counted as "*properly addressing*" it. However, in my view, that question does not arise. That is because clause 9(a) does not require that any of the modes of service that it permits should be adopted. When the Respondents were "*the Proprietor*" and the letter of 23 February 1999 actually came to the attention of the Respondents in late February 1999, that is adequate service of it.

- 69 The Respondents also contend that the third requirement is not satisfied. It is uncontroversial that a valid exercise of an option must be a clear and unequivocal election to acquire the relevant property upon the terms specified in the option: ***Prudential Health Assurance Co Ltd v Health Minders Pty Ltd*** (1987) 9 NSWLR 673 at 677-8, 681-682, 683; ***Quadling v Robinson*** (1976) 137 CLR 192 at 201. Whether the document in question involves a clear and unequivocal election to acquire the relevant property upon the terms specified in the option is decided from the point of view of a reasonable recipient of the document, with knowledge of the relevant context. In ***Health Minders*** at 677, Kirby P said:

"The appropriate question to be asked is what anybody who received the letter, subsequently said to amount to the exercise of the option, would fairly have understood to be the meaning of it, in all the circumstances of its receipt: cf ***Carter v Hyde*** (1923) 33 CLR 115 at 126; adapting Romer J in ***Jones v Daniel*** [1894] 2 Ch 332 at 335. The addition by Isaacs J of the phrase 'in the circumstances of its receipt', adds instruction that the consideration which will govern the meaning to be ascribed to the

letter is not to be judged in isolation, weighing only the words used. It is to be judged against the background of the dealings between the parties: cf **Braham v Walker** (1961) 104 CLR 366 at 376 and **Lamont v Heron** (1970) 126 CLR 239. The parties did not dispute that this Court could look to those dealings, at least up to the time for the exercise of the option had expired."

- 70 Samuels JA at 681 and McHugh JA at 683 each adopted a test of enquiring what a piece of writing purporting to exercise an option would fairly be understood as meaning. Samuels JA expressly adopted Isaac J's addition of the words "*in the circumstances of its receipt*"; McHugh JA did not expressly do so, but gave a reference to **Carter v Hyde** (1923) 33 CLR 115 at the page where that addition occurs. In **Young v Lamb** [2001] NSWCA 225; (2001) 10 BPR 18,553, Stein JA (Mason P and Hodgson JA agreeing) adopted the test stated by Kirby P in **Health Minders** at 677.
- 71 This way of approaching the question of whether the option has been validly exercised is consistent with the objective theory of contract formation.
- 72 There is no need for a valid notice exercising an option to use any particular form of words, so long as it conveys in substance that the person serving the notice unequivocally elects to acquire the relevant property on the terms of the option. That the letter of 23 February 1999 is politely phrased, saying "*our client wishes to exercise its rights to repurchase the unit*" is not necessarily inconsistent with the letter conveying the necessary message.
- 73 At the time the Respondents first received the letter of 23 February 1999, a reasonable recipient in their position would not have gathered from that letter that BBA was making an unequivocal election to require the Respondents to transfer the Unit to BBA or its nominee for the price of \$107,000. It is not problematic that the letter of 23 February 1999 makes

no mention of a nominee. Clause 8(a) leaves it open for BBA to exercise the option by requiring the Proprietor to transfer the unit to BBA for the price of \$107,000, or to require the Proprietor to transfer the unit to a nominee of BBA for the price of \$107,000. However, in my view it is a fundamental flaw that the letter makes no mention of the price.

74 Sometimes, even if a notice of exercise of option does not expressly state one of the matters that must be conveyed to the recipient for a valid exercise of the option, the notice can be valid. This could happen if the notice, understood in its context, would be read as including that matter because a reasonable recipient in the position of the person on whom the notice is served would be aware of that matter. However, a reasonable recipient of the letter in the position of the Respondents could not be taken to have had knowledge of the terms of clause 8 of the Occupancy Agreement. The Respondents were not themselves parties to that agreement. Rather, it had been entered into by their parents over 16 years previously. Thus, the letter of 23 February 1999 does not, by itself, show an unequivocal election to purchase the unit at a price of \$107,000.

75 Mr DeBuse, counsel for the Appellant, submitted that it would be possible to read together the letter of 23 February 1999 and the letter of 15 March 1999 and its enclosure. He submits that once the Respondents had a copy of the Occupancy Agreement, they would be in a position to understand the terms on which the letter of 23 February 1999 was proposing repurchase of the unit.

76 I do not accept that argument. In principle, one should be able to tell as soon as there has been a purported exercise of an option whether that exercise is valid or not. At the time of service of the notice which purportedly exercised the option, BBA had not provided the Respondents with the information that was necessary for a reasonable recipient in their position to be able to understand that BBA had made an unequivocal

election to acquire the property on the terms of the option. Nor could such information be taken to be known from the surrounding circumstances at the time of service of the notice. Subsequently providing the Respondents with such information cannot cure the inadequacy of the notice. Clause 8(a) specifically contemplates that it is by service of the notice in writing that is called the "*Default Buyback Notice*" that the option is exercised, not by service of such a notice and provision of later information. That conclusion arises from the meaning of the chapeau to clause 8(a) alone.

77 The conclusion is reinforced by the fact that clause 8(a) contemplates that once a Default Buyback Notice has been served, time will immediately start running under the contract so formed. That necessarily follows from the incorporation of the 1986 standard terms of contract.

78 The 1986 standard conditions contain some terms that bear upon the time under which steps were required to be taken in performance of the contract. Some of those steps have their time for performance stated by reference to the date the contract is entered. Clause 2(a) required the deposit to be paid by the Purchaser "*upon or before the making of this agreement*". Clause 2(c) provided:

"If the deposit is not paid as provided in this agreement or if any cheque for the deposit is not honoured on presentation, the Purchaser shall immediately and without notice be in breach of an essential obligation under this agreement."

79 Clause 9 set out the consequences of breach of an essential term by the Purchaser:

"If the Purchaser defaults in the observance or performance of any obligation hereunder which is or the performance of which has become essential, the Vendor shall be entitled by notice in writing served on the Purchaser to forfeit the deposit paid hereunder

(except so much of it as exceeds ten per centum of the price) and terminate this agreement and thereafter either:

(a) to sue the Purchaser for breach of contract; or

(b) to resell the property as owner and the deficiency (if any) arising on such resale and all expenses of and incidental to such resale or attempted resale and the Purchaser's default shall be recoverable by the Vendor from the Purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this agreement."

80 ***Brien v Dwyer*** (1978) 141 CLR 378 held that a provision such as clause 2 entitled a vendor to terminate out of hand and without any prior notice of his intention to do so, if the deposit was not paid. This was because the obligation to pay the deposit was not one performable within a reasonable time of making the contract.

81 The severity of clause 2 is mitigated somewhat by clause 3(a) which provides:

"The Vendor shall not be entitled to terminate this agreement by reason of late payment of the deposit or any part thereof in breach of clause 2 if the deposit is paid within the meaning of clause 2 before the Vendor has served upon the Purchaser notice in writing terminating this agreement."

82 That does not detract from the fact that the obligation to pay the deposit arises at the moment the contract is entered, and that that obligation immediately gives rise to rights of substantial commercial significance.

83 The standard form contract sets out, in clause 5, time limits relating to service of a statement of title:

"Within a reasonable time after written request by the Purchaser, or prior thereto if the Vendor so desires (but in any event not earlier than the making of this agreement) the Vendor shall, subject as hereinafter provided, serve on the Purchaser a written statement of the Vendor's title which shall be as follows:

(a) FOR LAND UNDER THE REAL PROPERTY ACT, 1900:

particulars of title and the form of any restrictive covenant, any easement or other interest (if any) agreed to be created by or with the transfer, sufficient to enable the Purchaser to prepare the transfer and other instrument PROVIDED THAT the Vendor shall only be so obligated if, and to the extent that, the Purchaser has so requested by notice in writing served on the Vendor within 14 days after the making of this agreement"

- 84 In addition, clause 8(a)(i)(ee) of the Occupancy Agreement ([27] above) requires the exchange of formal written agreements containing the identified terms and conditions within 14 days of the service of the Default Buyback Notice.
- 85 Further, neither the letter of 15 March 1999, nor the letter of 15 June 1999 ([45] above), would adequately meet the description of a "*notice in writing ... served upon the Proprietor*". Each of them is addressed to the Respondents' solicitors, and refers to the Respondents as "*your clients*".
- 86 In these circumstances, in my view, the option was never effectively exercised.

PART C - ABANDONMENT

- 87 The judge found that, though a contract for sale of the unit had been formed by service of the letter of 23 February 1999, that contract had been

abandoned. On the conclusion I have reached, the question of whether the judge was right in finding that the contract had been abandoned does not arise. However, consistently with ***Kuru v State of New South Wales*** [2008] HCA 26; (2008) 236 CLR 1 at [12] I shall express a view about it, on the assumption that a contract had arisen on 23 February 1999.

- 88 Any contract formed by service of a valid Default Buyback Notice was on the terms of the standard form Agreement for Sale of Land - 1986 edition, as specifically modified by clause 8(a)(i) of the Occupancy Agreement. The contract came into existence "*upon the service of the Default Buyback Notice*". While clause 8(a)(i)(ee) required exchange of formal written agreements within 14 days, the exchange of those agreements was a step taken under the contract that arose from service of the Default Buyback Notice. It did not have the role that is commonly performed by exchange of formal written agreements, of bringing a contract for sale into existence.
- 89 Clause 8(a)(i)(aa) filled what otherwise would have been a gap, by nominating that the deposit was to be a 10% deposit. Clearly, that 10% was to be 10% of the price stated in clause 8(a), \$107,000. Pursuant to clause 6(a) there was to be a deduction on completion of various amounts, including BBA's costs, fees and expenses; and costs of repair and refurbishment. However those amounts were of the nature of an additional conveyancing adjustment to be made on settlement, beyond the conveyancing adjustments called for under the standard form of contract.
- 90 Some provisions of the 1986 standard form of contract, additional to those I have already set out, bear upon the time under which steps were required to be taken in performance of a contract arising from service of a Default Buyback Notice. The effect of Clause 6(a), in relation to land under the ***Real Property Act*** is that the purchaser is deemed to have waived any objection or requisition that has not been made or served on the vendor within 28 days after the making of the agreement. The effect of Clause

6(b) in relation to land under the **Real Property Act** is that the purchaser shall "*tender to the Vendor for execution the appropriate assurance of or relating to the property ... within 28 days after the making of this agreement ...*".

91 Clause 8 of the 1986 standard form contract provides:

"If the Vendor shall be unable or unwilling:

(a) to comply with a claim for compensation exceeding an amount equal to five per centum of the price; or

(b) to comply with or remove any objection or requisition

which in either such case the Purchaser has made and shall not have waived within 14 days after the Vendor has given to the Purchaser notice in writing of intention to rescind this agreement, then (whether or not the Vendor has attempted to satisfy such claim, objection or requisition, and notwithstanding any negotiation or litigation in respect thereof, and whether the Purchaser has or has not taken possession) the Vendor shall be entitled by notice in writing to rescind this agreement."

92 In **Ryder v Frohlich** [2004] NSWCA 472 at [135]-[137] McColl JA (Hodgson and Ipp JJA generally agreeing) helpfully collected the principles concerning abandonment of a contract:

"Where it is plain from the conduct of parties to a contract that neither intends that the contract should be further performed the parties will be regarded as having so conducted themselves as to abandon or abrogate the contract: **DTR Nominees Pty Ltd v Mona Homes Pty Ltd** [1978] HCA 12; (1978) 138 CLR 423 at 434 (per Stephen, Mason and Jacobs JJ with whom Aickin J agreed); **Summers v The Commonwealth** [1918] HCA 33; (1918) 25 CLR 144 at 151-152 per Isaacs J. The inference of abandonment will be drawn where 'an "inordinate" length of time has been allowed to elapse, during which neither party has attempted to perform, or

called upon the other to perform, a contract made between them ... What is really inferred in such a case is that the contract has been discharged by agreement, each party being entitled to assume from a long-continued ignoring of the contract on both sides that ... "the matter is off altogether"': **Fitzgerald v Masters** [1956] HCA 53; (1956) 95 CLR 420 at 432 per Dixon CJ and Fullagar J.

Whether there is abandonment or abrogation of a contract is a matter of fact to be inferred from an objective assessment of the conduct of the parties: see **CIC Insurance Ltd v Bankstown Football Club Ltd** (1995) 8 ANZ Ins Cas ¶61 - 232 per Kirby P; **Waller Pty Ltd v CGM Investments Pty Ltd** [2003] FCAFC 279 at [2] per Ryan J, at [30]-[32] per Kiefel J; at [57] per Gyles J; **Marminta Pty Ltd v French** [2003] QCA 541 at [22] per Jerrard JA, Williams JA and Philippides J agreeing.

The underlying premise of the abandonment cases is that a period of time elapses during which neither party to the contract manifests any intention to perform the contract, leading to the inference that the contract has been abandoned. It is clear that the question whether an 'inordinate length of time has been allowed to elapse' is relative. In **DTR Nominees Pty Ltd v Mona Homes Pty Ltd** the High Court was prepared to infer abandonment after a period of less than five months had elapsed during which neither party took any steps to perform the contract. In **Fitzgerald v Masters** it was held that a contract for the sale of land had not been abandoned even though proceedings for its specific performance were not commenced until 26 years after its execution."

- 93 The judge was right in concluding that any contract arising from service of the letter of 23 February 1999 had been abandoned by the time the proceedings were commenced. If a contract had been formed on 23 February 1999, (or when the letter of 23 February 1999 came to the attention of the Respondents later in February 1999) it would have required immediate payment of a deposit. No deposit was ever paid, and in consequence the contract would always have had a precarious existence, because of the right of the Respondents to terminate it for non-payment of the deposit.

- 94 Further, the standard form contained other provisions which are consistent with the expeditious progression of the conveyancing process. Clause 5 ([83] above) gave BBA 14 days in which to require a written statement of the title of the Respondents. I recognise that BBA was not obliged to request such a statement of title, and that purchasers of **Real Property Act** land often do not make such a request, but even so the 14-day time limit is part of a context from which the contractual expectation of expeditious progress can be derived. The same applies to clause 6(a) of the standard form ([90] above).
- 95 Clause 6(b) of the standard form has a greater significance. It would have imposed a positive obligation on BBA to tender the transfer within 28 days of the contract arising from service of the Default Buyback Notice. No transfer was ever tendered.
- 96 Clause 8(a)(i)(ee) of the Occupancy Agreement imposed a positive obligation on the parties to exchange contracts within 14 days. That was not done.
- 97 By 7 July 1999 the Respondents' solicitors had exhausted their inquisitiveness about the legal context in which Mr and Mrs Evans had occupied their unit, and the Astra strata plan had operated. However even then, BBA took no step to insist upon or compel the performance of the contract. Indeed, after 7 July 1999 there was total silence for three years.
- 98 The silence was broken only by the letters of 12 July 2002 and 2 August 2002 ([48] and [49] above). The letter of 12 July 2002 shows BBA asserting strongly that a contract was on foot, and would be enforced by court action in a matter of weeks.

- 99 However, the letter from the Respondents' solicitors of 2 August 2002 conveys the message that they were of the view that the documentation in question was "*probably unenforceable*". It appears that the Astra operated under a system whereby all residents had been required to enter into a deed in the form of the Occupancy Agreement, or to similar effect. Clearly, enforceability of buyback rights of the type contained in the Occupancy Agreement was a matter that would be of great financial importance to BBA. If it were correct that those rights were unenforceable, and other residents of the village became aware that they were unenforceable, the consequences were likely to be seriously detrimental to BBA. By the letter of 2 August 2002 the Respondents' solicitors offered, in substance, that if BBA did not seek to enforce the buyback rights, the Respondents would not disclose "*any information concerning this matter*" (which would include the substance of the advice they had received about the unenforceability of the Occupancy Agreement) to anyone else.
- 100 That letter was followed by more than five years of inaction and silence.
- 101 There are some other matters that the reasonable bystander would take into account in deciding whether, from the actions of the parties in the circumstances, it should be inferred that they have agreed to treat the contract as being no longer on foot. Over the more than nine and a half years from service of the letter of 23 February 1999 until BBA's solicitors sought to revive the matter on 10 October 2007 the value of the purchase price of \$107,000 was being continually eroded by inflation. Inflation would also have increased the quantum of the expenses of refurbishment, and of the legal fees of BBA's solicitors that were required to be deducted from the \$107,000. Increase in those expenses would further erode the value of the amount BBA was required to pay. Inevitably, the Respondents would have incurred expenses in consequence of holding the real estate, and those expenses would have regularly recurred.

102 Mr DeBuse submits that there are some further matters favourable to his client that should be taken into account in deciding whether the contract has been abandoned. One of them is that it was an agreed fact in the court below that the price of the unit when Mr and Mrs Evans purchased it would have been between 10% and 40% higher had they not been required to enter into buyback arrangements. He submits that that underlines the unlikelihood of BBA agreeing to give up a right as advantageous as that conferred on it by the option.

103 I accept that this is a relevant factor, but to my mind it cuts both ways. While the advantageousness of the option agreement does provide a reason why BBA would not have been willing to give up any contract it might have entered with the Respondents, the advantageousness of the various option agreements with other residents would equally provide it with a reason why it might be prepared to give up any rights it had against the Respondents, as the price of not imperilling rights it claimed it had against other residents.

104 Mr DeBuse also points out that BBA has at all relevant times had a caveat on the title of the unit. The caveat in question was registered on 10 December 1987. The interest it claimed was:

"An equitable estate or interest as Purchaser pursuant to an Occupancy Agreement between BOND BEACH ASTRA RETIREMENT VILLAGE PTY LIMITED and CLIFFORD EVANS and DOROTHY EVANS as Registered Proprietors dated the 16 th of September 1987."

One of the orders that BBA sought in the court below was a declaratory order that this caveat was effective. The judge expressed the view that it was doubtful whether BBA had an equitable interest and hence a caveatable interest at the time when the caveat was lodged ([78]), but did

not need to resolve those doubts because he concluded that the caveat was invalid because the option was itself an invalid restraint on alienation.

105 At no time did BBA lodge any additional caveat, claiming an equitable interest by virtue of a contract for sale arising from an effective exercise of the option in the Occupancy Agreement. In my view, the caveat as lodged in 1987 has negligible bearing upon whether, after February 1999, BBA and the Respondents should be inferred to have agreed to treat a contract arising from service of the letter of 23 February 1999 as being no longer on foot.

106 In all these circumstances, if a contract had been entered on 23 February 1999, the judge's conclusion that it had been abandoned was correct.

PART D - WAS BBA A VOLUNTEER?

107 Though this question arises only on a Notice of Contention, and on the view that I have reached concerning abandonment of the contract arising from exercise of the option will not affect the outcome, it can be disposed of comparatively shortly. Consistently with *Kuru* it is desirable that this Court reach a conclusion concerning it. As well, some of the facts on which this argument depends are relevant to the topic of restraint on alienation, considered later.

108 The Schedule to the Occupancy Agreement contained a definition:

"Communal Areas' - means those parts of the common property in the Astra exclusive use and possession of which has been or will be granted to the Service Company comprising the community facilities."

109 The areas purportedly granted to the Service Company by by-law 32 (para [14] above) were not the whole of the common property. Thus, the Communal Areas were all part of the common property, but there were some parts of the common property that were not Communal Areas.

110 Under Clause 1(a) of the Occupancy Agreement, BBA promised to:

"... employ a manager and/or staff (herein called 'the manager') to manage and administer the Communal Areas and common property of the Astra, to attend to the comfort and all reasonable and proper requests and demands of the occupants thereof and to ensure that the occupants enjoy such reasonable privacy and quiet possession and enjoyment of their unit and the Communal Areas as is consistent with the physical characteristics of a retirement village designed for the residence of persons of 55 years of age and over."

111 By Clause 1(b) Mr and Mrs Evans irrevocably nominated and appointed BBA, or any person who it might from time to time nominate, as their attorney to receive all notices of meetings of the body corporate, and to attend such meetings and vote. Mr and Mrs Evans promised to sign a general form of irrevocable proxy in favour of BBA to be lodged with the body corporate. Mr and Mrs Evans specifically agreed that their power of attorney could be used to agree to the appointment by the body corporate of a managing agent, though on the condition that a Residents Committee could in some circumstances substitute its decision for that of BBA.

112 Under Clause 1(b) of the Occupancy Agreement BBA promised that it would:

"... as the agent of the Occupant and the Proprietor (either directly or through any duly appointed manager) carry out all of the obligations of the Proprietor as a member of the Body Corporate in relation to the strata plan of the Astra."

113 Under Clause 1(c) BBA promised that it would:

"... ensure that the Body Corporate (save during such period, if any, as such insurance as is hereinafter mentioned may be avoided by any act of any resident of the village) shall insure and keep insured in the name of the Body Corporate ..."

the buildings of the Astra against certain identified risks, with reputable insurers, and also promised to ensure that the Body Corporate would carry out certain other tasks relating to insurance.

114 Under Clause 1(d) BBA promised to:

"... ensure that the Communal Areas and all common property are maintained and kept in good repair and will employ such staff or contractors as may be necessary to effect such purpose."

115 One of its promises under Clause 1(e) was to:

"... ensure that all external surfaces of any building or structures at the Astra are repaired and maintained in good order and condition ..."

116 Under Clause 1(f) it promised that it:

"... will pay the Municipal, Water, Sewerage and other like rates and charges including State Land Tax and excess water charges (if any) payable in respect of the Communal Areas at the Astra and all such rates and charges not separately assessed in respect of the individual units at the Astra."

117 Under Clause 1(g) BBA promised to:

"... ensure compliance with any order or direction lawfully made or given by the Strata Titles Commissioner or Board or pursuant to any Act of Parliament or any regulation, rule or by-law made thereunder with respect to any work, act or thing, to be done to or on the Communal Areas and/or the common property is complied with and will carry out or cause to be carried out any such work act or thing in a proper and workmanlike manner doing no unnecessary damage by or in the course thereof and making good all damage done thereby or in the course thereof."

118 Under Clause 3, BBA:

"... hereby grants to the Occupant during the currency of this agreement the right to the reasonable use and enjoyment in common with all other residents at the Astra and any other persons authorised by the Service Company the Communal Areas of the Astra subject only to the performance and observance by the Occupant of the terms and conditions herein contained. The Service Company further covenants and agrees that upon the sale by the Occupant of the unit to a Qualified Occupant it will grant to such Qualified Occupant similar rights of user of the said communal areas. The right of user hereby granted may not be assigned and does not confer upon the Occupant any estate or interest in the Communal Areas or any part thereof."

119 Under Clause 4(a) BBA promised to maintain proper books of account concerning its expenditure:

"... in carrying out all or any of the purposes or functions described herein and with respect to all Service Fees and contributions received by if from the residents at the Astra."

120 Under Clause 4(b) it promised, as soon as practicable after the end of each financial year, to:

"... furnish the Proprietor with a statement in reasonable detail of the actual expenses and outgoings of the Astra paid or incurred by the Service Company and the Body Corporate during such financial year ..."

121 The judge held at [59] that:

- BBA could obtain specific performance only if it had given value,
- any consideration that flowed to Mr and Mrs Evans under the contract for sale and purchase of the unit, could not avail BBA, because it was not a party to that contract, and
- thus that any consideration given by BBA for the option must be found in the Occupancy Agreement.

None of those propositions is disputed on this appeal.

122 The judge also held that by-law 32 ([14] above) never operated to give any exclusive rights to BBA to diminish any rights of the proprietors of lots in the strata plan with respect to the common property, or to make the rights of proprietors dependent upon any arrangement they may have made with BBA ([65]). That finding has also not been disputed on this appeal.

123 However, the judge went on to find at [66]:

"Although much of what BBA promised the Evans it would do was illusory, in that it involved conferral on the Evans of licences and permissions to do things which they were entitled to do anyway, and also much of what was promised conferred little or no advantage because the Evans were entitled to have the subject matter of the promises performed for them by other persons or in other ways, there remained a core of advantage to the Evans in the promises given by BBA. The value given to them may not have been as great as a reading of the Occupancy Agreement might suggest; but there was value there, and in my opinion BBA is not a volunteer in its claim to enforce promises made by the Evans in the Occupancy Agreement."

- 124 At the time the Occupancy Agreement was entered, the administration of strata title schemes was governed by the **Strata Titles Act 1973**. The duties of a body corporate were set out in s 68 of that Act. Many of the matters that BBA promised it would ensure happened are matters that are, under s 68, the duty of the body corporate. However, there is no duty set out in s 68 that would require a body corporate to perform the full extent of the tasks that BBA undertook by Clause 1(a) of the Occupancy Agreement. The obligation of the body corporate under s 68(1) to control, manage and administer the common property, keep it in repair and when necessary renew or replace fixtures and fittings, does not extend as far as the obligation under clause 1(a) *"to attend to the comfort and all reasonable and proper requests and demands of the occupants"*. Nor is there an obligation on the body corporate to carry out the obligations of Mr and Mrs Evans as a member of the body corporate, as Clause 1(b) requires BBA to do. Those matters in themselves are enough to provide consideration.
- 125 Further, even if it were the case that all of the matters that BBA promised it would ensure happen were in any event the duties of the body corporate (the submissions did not descend to the level of detail of establishing whether this was actually so), a promise to ensure that someone who is already under a legal duty to do something will carry out that legal duty is well capable of providing consideration.
- 126 There was an incompletely articulated argument that there was no consideration because performance by BBA of its obligations under the Occupancy Agreement would be illegal. One element of the argument is that at the time the Occupancy Agreement was entered, s 78(1) **Strata Titles Act 1973** permitted a body corporate to appoint a managing agent, and to delegate to him or her some or all of its powers, authorities, duties and functions. Another element is that s 78(1AA) required any such managing agent to be the holder of a strata managing agent's licence.

- 127 The case appears to have been argued on the basis that BBA was not the holder of a strata managing agent's licence. I will proceed on that assumption.
- 128 A promise to do an illegal act cannot be valid consideration: **Kearney v Whitehaven Colliery Company** [1893] 1 QB 700 at 713 per Lopes LJ; cited with approval in **Carney v Herbert** [1984] 3 NSWLR 85 at 90 per Lord Brightman; **Aravco Ltd v Qantas Airways Ltd** (1995) 132 ALR 419 at 427 per Sheller JA (Powell JA agreeing) (reversed by the High Court on unrelated matters in **Qantas Airways Ltd v Aravco Ltd** (1996) 185 CLR 43.). I will assume without deciding, that a consequence of s 78 **Strata Titles Act** is that an entity that is not the body corporate (such as BBA) could only engage a person to perform tasks that fell within the powers, authorities, duties or functions of a body corporate if the person who was engaged was appropriately licensed. Even on that assumption, BBA could perform its obligations under the Occupancy Agreement, to the extent that they required performance of tasks of a kind that could be performed by a strata managing agent, by engaging an appropriately licensed person. The contention that BBA's promises were illegal is not made out.
- 129 I see no reason to doubt the judge's conclusion that BBA gave consideration to Mr and Mrs Evans for the option in the Occupancy Agreement.

PART E - RESTRAINT ON ALIENATION?

- 130 One prayer for relief in the court below sought a declaration that the Respondents *"are bound not to sell, transfer or otherwise dispose of the Unit otherwise than pursuant to the provisions of the Buyback Deed dated 30 September 1987."* The judge declined to make that declaration on the basis that the Buyback Deed imposed an invalid restraint on alienation.

Whether he was correct in so doing raises a question that is independent of whether the option under the Occupancy Agreement has been effectively exercised and can now be a source of curial relief.

- 131 In the court below it was also argued that, regardless of whether an adequate notice of exercise of the option had been given, and regardless of whether any contract arising from the giving of notice of exercise of the option had been abandoned, the option conferred by the Occupancy Agreement was unenforceable by reason of the law concerning restraints on alienation. The primary judge upheld that contention. He held that the invalidity of the option in the Occupancy Agreement provided an independent reason for the failure of BBA's claim that it had validly exercised the option.
- 132 The finding that the options in both deeds are invalid restraints on alienation is disputed on this appeal. The findings that I have made so far are sufficient to establish that the purported exercise of the option in the Occupancy Deed is ineffective. The question that has not yet been answered is whether the Respondents remain bound by the Buyback Deed. This question is closely connected with the question of whether the Occupancy Deed involved an invalid restraint on alienation. Bearing in mind the remarks in *Kuru* at [12] it is desirable to consider the questions that have been raised concerning whether the option in the Occupancy Agreement was an invalid restraint on alienation.
- 133 Deciding whether the options are void, and the restriction on transfer in the Buyback Deed continues to bind the Respondents, requires consideration of some of the provisions of the Occupancy Agreement not yet mentioned, as well as the provisions of the Buyback Deed.

Provisions of Occupancy Agreement Not Earlier Set Out

134 Under Clause 2 of the Occupancy Agreement Mr and Mrs Evans gave the following covenants:

(f) Not to lease, sub-lease or part with or share the possession of the Unit PROVIDED THAT this shall not prevent relatives or friends of the occupant living with the occupant from time to time for periods not exceeding twelve (12) months.

(g) Not to mortgage, charge or encumber or otherwise deal with or dispose of any estate or interest in the Unit without the prior consent in writing of the Service Company which consent will not be unreasonably withheld in respect to a mortgage on terms and conditions which are not inconsistent with the provisions hereof and which inter alia prohibit the mortgagees right in the event of default from dealing with the property other than by sale to a Qualified Occupant and in accordance with the provisions of Clause 6 of this agreement as though the Mortgagee were the Proprietor therein referred to."

135 It is convenient to set out more fully than I have previously done the provisions of Clause 7:

"The Occupant and the Proprietor covenant with the Service Company that the right of the occupant to reside at the Bondi Beach Astra, to the communal areas and occupy the unit shall cease and determine on the happening of any one or more of the following events and the right granted to the Service Company pursuant to Clause 8 hereinafter appearing shall arise upon the happening of any one or more of the following events:-

(a) If the Occupant shall not qualify as a Qualified Occupant for any reason including without limiting the generality of the foregoing:-

(i) if the Occupant shall die;

(ii) if the Proprietor sells or disposes of any interest in the Unit;

(iii) if it is ascertained that there has been a material failure to disclose any information relevant to a determination by the Service Company as to whether the occupant constitutes a Qualified Occupant.

(b) If the Occupant or the Proprietor without the prior consent in writing of the Service Company (which consent subject to clause 2(g) hereof may be withheld by the Service Company notwithstanding any express provision in any statute to the contrary or may be granted subject to the observance or performance of such specified conditions as the Service Company think fit) shall make any agreement written or orally expressed or implied with any person purporting to lease or otherwise part with possession of the Unit or to grant any licence affecting the Unit or mortgage, charge encumber or otherwise deal with or dispose of any estate or interest in the Unit.

...

(h) If the Occupant or the Proprietor becomes bankrupt or makes any arrangement or composition with his creditors generally.

(i) for any reason whatsoever (except under circumstances where the Service Company has knowledge that the Occupant or Proprietor might reasonably be expected to resume occupancy) the unit has been unoccupied by the Occupant for a period of six (6) continuous months without permission of the Service Company which permission shall not be unreasonably withheld;

(j) the Proprietor or any Mortgagee has sold transferred and or attempted to sell or transfer the Unit otherwise than in accordance with this Agreement."

136 Other circumstances in which Clause 7 is operative relate to: when the Occupant or Proprietor fail to observe any material provision of the agreement; in certain circumstances where offensive or unneighbourly conduct occurs; failure to pay money that is due; the Occupant becoming a person whose estate is liable to be dealt with under the law relating to

mental health; or become a permanent patient in a nursing home or hospital.

The Buyback Deed

137 The Buyback Deed was made between the same parties as the Occupancy Agreement. It recited:

"A. The Proprietor is registered or entitled to be registered as the proprietor of the unit.

B. The Proprietor acknowledges that he shall not sell, transfer or otherwise dispose of his unit otherwise than pursuant to the provisions of this Deed (hereinafter referred to as 'The Buy Back Deed')."

138 A definition provided:

"The Proprietor' - means and includes the said CLIFFORD EVANS and DOROTHY EVANS and his/her or their executors, administrators and successors in title being the registered Proprietor who is registered or entitled to be registered as the Proprietor of the unit or any Mortgagee who has granted a Mortgage to the Proprietor."

139 The operative provisions of the Buy Back Deed included:

"1. The Proprietor shall not sell, transfer or otherwise dispose of his unit otherwise than pursuant to this Deed and the following procedures shall apply to such a sale or transfer:-

(a) The Proprietor shall give to the Service Company one month's notice in writing of his intention to sell, transfer or otherwise dispose of his unit. Such notice once given shall not be withdrawn or revoked without the consent in writing of the Service Company.

(b) Upon the expiration of the said period of one month referred to in Clause 1(a) the Proprietor or the Service Company shall have the option by notice in writing (hereinafter called 'the Buyback Notice') served upon the other no later than a further twenty-eight (28) days thereafter to require the Transfer by the Proprietor to the Service Company or its nominee of the unit for the price of One Hundred and Seven Thousand Dollars (\$107,000.00) whereupon the following terms and conditions shall apply:

(i) The parties shall upon the service of the Buyback Notice by either on the other be deemed to have entered into an agreement upon the same terms and conditions as are contained in the standard Agreement for Sale of Land - 1986 Edition with the following alterations, omissions and additions thereto:-

(aa) clause H shall be amended so that the 10% deposit is payable by the Service Company to the Proprietor or his solicitor as stakeholder.

(bb) clause K shall be amended so that vacant possession is given as at the date of completion.

(cc) the special conditions which are special conditions 3(a), 5 and 10 of the Agreement entered into by the Proprietor in his Contract with CG Maloney Pty Ltd for the purchase of the unit and Clause 3(a) and 3(b) of this Deed shall become conditions of the Agreement.

(dd) there shall be attached to the Contract pursuant to s 52A(2)(a) of the **Conveyancing Act 1919** the documents or copies of the documents referred to in the Fourth Schedule in the Standard Agreement for Sale of Land - 1986 Edition.

(ee) within fourteen (14) days of the service of the Buyback Notice the parties shall exchange formal written Agreements containing the above terms and conditions.

(c) The Occupant and the Proprietor hereby acknowledge that the rights conferred on the Service Company or its nominee pursuant to this Clause 1 hereof constitutes an interest in land entitling the Service Company to register a Caveat against the folio of the Register in the Land Titles Office relating to the unit.

2. Should for any reason neither the Proprietor nor the Service Company serve on the other of them the Buyback Notice referred to in Clause 1(b) of this Deed then the Proprietor may sell, transfer or dispose of the unit to any purchaser who is a Qualified Occupant PROVIDED THAT the Proprietor procures such Purchaser to enter into an Occupancy Agreement with the Service Company on the same terms and conditions as the Occupancy Agreement entered into by the proprietor upon his purchase of the unit and procures such Purchaser to include the following covenant in such Occupancy Agreement:-

'The proprietor may sell, transfer or dispose of the Unit to any purchaser who is a Qualified Occupant PROVIDED THAT the purchaser enters into an Occupancy Agreement with the Service Company on the same terms and conditions as this Occupancy Agreement'.

3. (a) Upon the sale or transfer of the Unit to the Service Company or its nominee by either the Proprietor or by any Mortgagee thereof the following payments shall be made by or on behalf of such Proprietor to or deducted by the Service Company on completion of the sale or transfer thereof:-

(i) All costs, fees and expenses paid or incurred by the Service Company in connection with the sale and transfer of the Proprietor's unit including any reasonable costs of repairs or refurbishment payable to or by the Service Company to be reasonably payable to restore the Unit to its condition existing at the date of its original purchase by the Proprietor.

(ii) All other moneys owing by the Occupant or the Proprietor to the Service Company or The Body Corporate whether pursuant to this Occupancy Deed or otherwise.

(b) The Proprietor hereby charges the Unit with the payment of all sums of money referred to in clause 3(a)

hereof and hereby acknowledges that the charge herein created constitutes an interest in land entitling the Service Company to register a Caveat against the folio of the Register in the Land Titles Office relating to the Unit."

- 140 As seen above, clause 1(b)(i)(cc) of the Buyback Deed incorporates by reference the special conditions of the contract under which Mr and Mrs Evans purchased the unit. Those special conditions relate to investment of the deposit pending completion and entitlement to the deposit upon default, a limitation on requisitions by the purchaser concerning water, sewerage, drainage, electricity, telephone and other services, and an acknowledgment that 21 days is a sufficient time for a notice to complete.

The Law Concerning Restraints on Alienation

Predecessors to *Hall v Busst*

- 141 The single most important authority on the present Australian law concerning restraints on alienation is the decision of the High Court in ***Hall v Busst*** (1960) 104 CLR 206. However, understanding of that decision is assisted by considering the source material upon which it drew, and some other cases that preceded it.

Coke on Littleton

- 142 *Coke on Littleton* has been repeatedly cited in the centuries since it was written as stating correct principles concerning the law on restraints on alienation. It takes the form of the text of Littleton's treatise on tenures, with extensive notes by Coke on each section of Littleton's text. This method of organisation was adopted notwithstanding that Littleton and Coke wrote more than 140 years apart - the first publication of Littleton's text is put in Butler's introduction to the 18th edition of *Coke on Littleton* (1823) p xxiii as being in 1481 and the first edition of Coke's commentary

appeared in 1628. In the meantime there had been considerable changes in English land law, not least because of the enactment in 1535 of the **Statute of Uses**, and in English social conditions. Coke sought to explain and adapt the late medieval law expounded by Littleton to the more modern conditions of the seventeenth century. This explains some of the differences between the portions of the text attributable to Littleton, and those attributable to Coke.

143 In the following quotations from Littleton and Coke I will modernise the spelling, without any indication of where that modernisation has occurred.

144 Littleton said, at s 360, 223a :

"If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements ... he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of *all the power* which the law gives him, which should be *against reason*, and therefore such a condition is void." (emphasis added)

And at s 361, 223a:

"But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs or of the issues of such a one, or the like, which conditions do not take away *all power* of alienation from the feoffee, then such condition is good." (emphasis added)

145 Three things should be noted about these passages. First, the only circumstance that Littleton identifies as resulting in voidness concerns a feoffment made on condition. A feoffment is a grant of the fee simple of land, and a condition in a feoffment (which in this context clearly means a condition subsequent) identifies a circumstance in which the land granted will revert to the grantor, or pass to some alternative grantee. Second, it is

not very clear what is meant by a condition that deprives a feoffee (the person to whom a feoffment is made) of "*all the power*" of alienation. Literally, it would mean that the grantee is deprived of every aspect of the power of alienation - yet it is contrary to the drift of the thought in the passage that Littleton is intending to allow the possibility that a condition that left the grantee with a very circumscribed power of alienation could be valid. It may be that he is saying that a person who is enfeoffed has a power to alienate to any person, and if that power is encroached on in any way he is deprived of "*all the power*", in the sense of the full extent of the power, that the law has given him. Yet that reading is not consistent with Littleton allowing that a condition prohibiting alienation to a specific person does not take away "*all the power*". Third, insofar as a rationale is provided for the condition being void, it is that the condition is "*against reason*".

- 146 Coke's notes on Section 360 of Littleton, at 223a go considerably further than Littleton's original text, concerning the type of property to which the law on restraints on alienation applies, the type of legal transaction for passing property rights to which it applies, and the rationale for that law. Coke says:

"... the like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void and so it is of a grant, release, confirmation or any other conveyance whereby a fee simple doth pass. For it is *absurd and repugnant to reason* that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel real or personal and give or sell *his whole interest or property* therein upon condition that the donee or vendee shall not alien the same, the same is void, because *his whole interest and property* is out of him, so as he hath no possibility of a reverter, and it is *against trade and traffic and bargaining and contracting* between man and man: and it is within the reason of our author that it should ouster him of all power given to him." (emphasis added)

Coke then states a series of Latin maxims that mean:

"It is not just that freemen should not have the free disposal of their own property. Everyone is the moderator and arbiter of his own affairs. Ordinarily an agreement that I shall not alienate my own property is not binding."

- 147 Coke went on at 223a to contrast the situation of a restraint on alienation imposed at the time of grant of a right concerning property, with the situation concerning restraints that a person imposes upon the alienation of property that he or she already owns:

"But these are to be understood of conditions annexed to the grantor's sale itself in respect of the repugnancy and not to any other collateral thing, as hereafter shall appear."

Coke then notes that it is not just concerning feoffments of a fee simple that the principles of restraint on alienation applies:

"Where our author putteth his case of a feoffment of land, that is put but for an example: for if a man be seized of a seignior, or a rent, or an advowson, or common, or any other inheritance that lyeth in grant, and by his deed granteth the same to a man and to his heirs upon condition that he shall not alien, this condition is void."

- 148 He considers, and rejects, the possibility that the doctrine of restraint on alienation applies only to a grant of an item of property that the transferor already holds, and not to a conveyancing transaction that creates a new item of property:

"But some have said that a man may grant a rent charge newly created out of land to a man and to his heirs upon condition that he shall not alien that, that is good, because the rent is of his own creation; but this is against the reason and opinion of our author, and against the height and purity of a fee simple."

That is because, for Coke, the vice of the restraint against alienation lies in a grantee not being able to dispose of that which becomes his own through the grant, rather than in the grantor attaching the restraint to something that is already his own at the time of the grant.

- 149 It is important for Coke that it is *upon the grant* of a right concerning property that the restraint on alienation is imposed upon it - it is permissible for a person who already has an estate in an item of property to agree to a restraint on its alienation. He continued at 223a:

"If A be seised of Black Acre in fee, and B infeoffeth him of White Acre upon condition that A shall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made, and so no repugnancy to the estate passed by the feoffment; and so it is of gifts, or sale of chattels real or personal."

- 150 Another place where Coke contrasts a feoffment in fee simple upon a condition with a contractual covenant against alienation is in the notes to s 334 at 206b:

"If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the estate of the feoffee is absolute But if the feoffee be bound in a bond, that the feoffee or his heirs shall not alien, this is good, for he may notwithstanding alien if he will forfeit his bond that he himself hath made.

So it is if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the estate is absolute.

But a bond with a condition that the feoffee shall not take the profits is good."

There is an unclarity in this passage, which creates an important difficulty in understanding the author's meaning. Coke is not at all clear about whether the valid bond he is talking about is one that is taken at the same time as the transfer of the property to which it relates and the transfer would not have taken place without the bond, or whether he is talking about a bond entered after the property has been transferred.

- 151 Elsewhere in *Coke on Littleton* one finds some explanation of what Coke means by being "*against reason*". In section 138 Littleton says that if a particular requirement of the law of real property did not apply it "*would be inconvenient, and against reason*". Coke explains that at 97b:

"'And against reason'. And this is another strong argument in law, *Nihil quod est contra rationem est licitum* [nothing that is against reason is lawful]; for reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason; for, *Nemo nascitur artifex* [no man is born skilled]. This legal reason *est summa ratio* [is the height of reason]. And therefore if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realm, as the old rule may be justly verified of it, *Neminem oportet esse sapientiolem legibus* [nobody needs be wiser than the laws]: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason."

- 152 Similarly, in his notes at 319b Coke quotes Latin maxims that translate as: "*The law does not require anything that is vain and useless. Law is the highest reason which commands those things which are useful and necessary, and forbids what is contrary thereto.*"

- 153 Even though for Coke the law embodies the sort of reason that he invokes, when he says that something is the law *because* for it to be otherwise

would be " *against reason* ", he is intending to do more than make the circular statement that something is the law because it is the law.

- 154 There are two separate strands in the justification that Coke gives for the law's prohibition of restraints on alienation. One is that it is inconsistent for a person to grant away all his interest in property but then seek to restrain what is done with the property thereafter. A.W.B. Simpson, *An Introduction to the History of the Land Law* , (1961) Oxford University Press says at 85: "*In the 14th century it was settled, in accordance with the policy underlying **Quia Emptores** , that a general restraint upon alienation of a fee simple was bad*". The same author says, at 184 : "*... at common law once a fee simple tenant had alienated his fee simple he has exhausted his power of alienation; thus a feoffment 'to A and his heirs, but if A marries B, to C and his heirs' confers a fee simple on A but is void as regards C, for having given a fee simple to A the feoffor has nothing left to give.*" See also A.D. Hargraves & B.A. Helmore, *An Introduction to the Principles of Land Law (New South Wales)* , (1963) Law Book Company, p 95. The fundamental rule of medieval conveyancing that it was not possible to limit an estate after a fee simple was alive and well in Littleton's time. By the time of Coke, the **Statute of Uses** had created some inroads into it, concerning shifting and springing uses that were executed by the statute, but it remained intact concerning grants that did not utilise uses.
- 155 The "*absurdity*" aspect of the justification that Coke gave for the prohibition of restraints on alienation applied only concerning grants of particular types of property right. There was no inconsistency between recognising that any attempt to create a limitation after a fee simple inevitably failed, and the law's recognising that it was possible for a person with property to give someone else the practical benefit of it, but subject to what are in practical effect restraints on alienation, by adopting conveyancing devices other than a condition subsequent to a grant of a fee simple. Available conveyancing devices, even in Coke's time, for someone to part with

property on terms that controlled or limited its alienability included the fee tail (though that had come to be able to be barred), successive life estates preceding a remainder, the determinable fee, the very long lease that was subject to conditions against alienation, and other devices that became available when the **Statute of Uses** legitimised all manner of conveyancing creativity.

156 As well, there is a strand in Coke's thought that it is contrary to social wellbeing for property to be tied up ("*against trade traffic and bargaining and contracting between man and man*"), and that the law concerning restraints on alienation (like all law, in his view) is justified by being derived not only from the fact that it has been the way things were done in the past but that experience has shown that such a rule has worked well ("*gotten by long study, observation and experience*" , "*grown to such a perfection for the government of this realm*" , "*useful and necessary*"). This strand is not dependent on the type of document by which the restraint is imposed. J.U. Lewis, "*Sir Edward Coke (1552-1633): His Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory*" (1968) 84 *Law Quarterly Review* 330 argues that Coke's notion of law being based in reason, but a collective reason based in experience rather than the purely abstract reasoning of one person, enabled him to "*translate medieval common law into modern without forcing the break between the two*" (338). He argues that Coke's view of the law continues to have its effect in those areas of the law that explicitly adopt reasonableness as a criterion. Many such areas of the current law are manifestations of public policy, even though the contexts are diverse. For instance, the common law concerning what restraints of trade are permissible is dependent upon reasonableness of the covenants in question. Even the criminal law uses the criterion of reasonableness, with "*reasonable suspicion*" being a requirement of a valid arrest and the reasonableness of the response being part of the defence of self-defence. For a final example, the requirement of reasonable care in the law of negligence provides the

measure of the extent to which a person is required, regardless of his or her consent, to take care not to injure another.

157 However, for all the respect that has been paid to Coke on Littleton in succeeding centuries, it is insufficient for deciding whether the particular restraints on alienation involved in the present case are void. Specific examples are needed to come to understand the content of what is "*against reason*", so far as attempts to impose restraints on the alienation of property are concerned. Thus I turn to particular cases that have been relied on as precedents in this area of the law.

Seventeenth Century Cases

158 Three seventeenth century cases have been referred to often in discussing the law concerning restraints on alienation. I will mention them, but for the purpose of explaining why they do not assist in solving the present case.

159 ***Muschamp v Bluet*** (1658) Bridgman J 132; 123 ER 1253 concerned a gift by will of freehold land to A and B "*upon this condition, that if they shall sell it to any man but to [C] then he to enter upon it, as of my gift, by this my will.*" The ultimate decision of the case was given in the Exchequer Chamber. The Exchequer Chamber decided the case as a matter of construction, that the gift conferred only a life estate on A and B (at 138, 1257). An argument of Serjeant Bridgman at 136, 1256 upon which the court ultimately expressed no opinion, has been referred to frequently (sometimes without recognising that it is an argument of counsel rather than the decision of the court):

"If a feoffment be made on condition that the feoffee shall not alien, the condition is voyd, for the feoffee hath power to alien to whom he will, for if that condition were good, that would take from him the power which the law gives him, which would be against

reason: but if the condition be, that he shall not alien to such a person, naming the person, or any of his heirs or his issues, this is a good condition, because it takes not away the power to alien in fee."

This argument provides no extra understanding, as it is just a paraphrase of the passages from Littleton that I have set out at [144] above.

- 160 Serjeant Bridgman rejected an argument (put on the assumption that the gift was of a fee simple) that there was no restraint on alienation because the donee was free to alienate the land to C, because (at 137, 1256):

"... to restrain generally, and that he shall not alien to any but to J S is all one: for then the feoffor may restrain him from aliening to any except to himself, or such other person by name, whom he may well know cannot, nor never will, purchase the land: so that this condition shall take away all his power, and shall make a perpetuity in the feoffee, which is quite contrary to law, neither is there any authority to warrant this restraint: for Littleton leaves the feoffee at liberty to alien to any, except to such a one in particular."

- 161 While this is a development of Littleton's thought, it is not clear whether Serjeant Bridgman in saying that the invalidity of restraining alienation to everyone except one named person is dependent on the person to whom alienation is permitted *in fact* being unlikely to purchase the land. If that were so, a prohibition of alienation to anyone except someone who was highly likely to purchase the land - which is the situation in the present case - might not be invalid.

- 162 ***Freeman v Freeman*** (1691) 2 Vern 234; 23 ER 751 was a Chancery case that involved a father who settled land on his son in tail, and took a bond from him that he should not bar the entail. That son's son had suffered a common recovery, and devised the land to the plaintiff and her heirs. The plaintiff, who was the executor of the donor's grandson (who had barred the entail) sought to be relieved against the bond. The court declined to

relieve, on the basis that if the son had not given the bond, the father might have made him only a tenant for life.

163 Correspondingly here, it seems likely that if Mr and Mrs Evans had not agreed to enter the restrictions on alienation, CGM would not have sold the unit to them at all. However, it is not clear from the report what jurisdiction of Chancery was being invoked in ***Freeman v Freeman*** . It may have been the jurisdiction of Chancery to relieve against penal bonds. That jurisdiction proceeds on the presupposition that the bond is valid at common law, and equity's exclusive jurisdiction must be invoked if it is to be set aside. The point does not seem to have been taken expressly that the bond was void at common law. Equity had a jurisdiction from the early 19th century to order delivery up and cancellation of documents that were void at common law (R. Meagher, J.D. Heydon and M.J. Leeming, *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* , 4th edition (2002) [27-010]-[27-020]), but I am not aware of that jurisdiction being established in the late 17th century. Thus it is far from clear that ***Freeman v Freeman*** is a case relating to the common law concerning restraints on alienation.

164 ***Jervis v Bruton*** (1691) 2 Vern 251; 23 ER 762 concerned a man who settled land on his daughter and the heirs of her body, with remainder to his own heirs. The settlor took a bond from the daughter not to commit waste. When the daughter married the plaintiff the land was settled in trust to the use of the plaintiff and his wife for life, to the use of their heirs begotten by the plaintiff, and in default of such issue to the heirs of the plaintiff. The plaintiff's wife died without having had any issue. The wife during her lifetime had levied a fine, and afterwards committed waste. When there was an attempt to enforce the bond, the court said it was "*an idle bond*" , and ordered it to be delivered up and cancelled. That was ordered on the basis of ***Poole's Case*** , cited in ***Tatton v Mollineux*** , ((1610) Moore KB 810; 72 ER 920, a decision of Lord Chancellor

Ellesmere) "*where a recognisance conditioned that the tenant in tail should not suffer a recovery, is decreed to be delivered up, as creating a perpetuity.*"

165 While ***Jervis v Bruton*** did not involve a restraint on alienation, a bond not to commit waste had a similar effect, in preventing a person from dealing as they will with their own property. However, ***Jervis v Bruton*** appears to have been based on the law concerning perpetuities, not the law concerning restraints on alienation. While the law concerning perpetuities has as one of its objectives preventing property from being tied up for unduly long periods of time, it is different to the general law concerning restraints on alienation. Once a grant to A to the use of B to the use of C had been recognised as creating a trust in favour of C, unrestrained creation of equitable future interests had become possible. According to Simpson, *op cit*, p 211 it was to restrict equitable future interests that Lord Nottingham invented the ancestor of the modern law against perpetuities in ***Howard v Duke of Norfolk*** (1681) 3 Cas in Ch 1. Lord Nottingham's version of the rule required an interest, whether legal or equitable, to necessarily vest within the lifetime of a person in existence at the time of the grant or settlement. Decisions in the 18th century added 21 years plus the gestation period to that length of time.

166 Cruise, *A Digest of the Laws of England Respecting Real Property*, 4th ed (1835) vol 2, p 6-7 summarises how these cases had come by 1835 to be regarded. He says at [29]-[33]:

"Lord Coke says, although a condition repugnant to the nature of the estate granted is void; yet that in all such cases a bond by which the obligor is retained from doing that which the nature of the estate granted entitled him to do will be good. Thus if a feoffee in fee becomes bound in a bond not to take the profits of the land, or not to alien the estate, such a bond would be good. And the same law was held by the Court of Chancery in the following case.

[**Freeman v Freeman** 2 Vern 233] A father settled lands upon his son in tail, and took a bond from him that he would not dock the entail. On a bill to be relieved against this bond, the court held it good; because if the son had not agreed to give the bond, the father might have made him only tenant for life.

This doctrine appears extremely questionable, as it offers an obvious mode of restraining a person from those rights over an estate which the common law gives him; consequently of frustrating the common law, as fully as if a condition of this kind were allowed to be inserted in a conveyance of land; and in some cases it appears not to have been allowed.

[**Poole's case** , Moo 810] Thus where an elder brother voluntarily gave land to his second brother, and the heirs of his body, remainder to a younger brother in like manner; and made each of them enter into a statute with the other, that he would not alien, &c; but because these statutes were in substance to make a perpetuity, they were ordered to be cancelled by the Court of Chancery, with the advice of Lord Coke.

[**Jervis v Bruton** 2 Vern 251] So where A settled lands on B in tail, with remainder to his own right heirs; and took a bond from B not to commit waste; the bond being put in suit, it was decreed to be delivered up to be cancelled; the court saying it was an idle bond."

167 I have discussed these cases because subsequent cases dealing with restraints on alienation (including **Hall v Busst**) have made some mention of them. However, for the reasons I have given, they do not assist in solving the present problem.

Nineteenth and Twentieth Cen tury Cases Before **Hall v Busst**

168 I will now consider a range of 19 th and 20 th century cases which predate **Hall v Busst** . These cases are relevant because they demonstrate the development of the doctrine from its early roots. Importantly, all of the following cases relate to restrictions against alienation that had been imposed by a condition in a transfer or gift of a fee simple. Moreover, many

of the following cases were influenced by the concept of the restraint being repugnant to the grant. As will be seen below at [234], the High Court acceptance that public policy is the basis for the rule against restraints on alienation so far as contractual restraints are concerned, raises a question about the applicability of these cases in the context of contractual restraints. Nevertheless, these cases will be dealt with in a chronological order.

169 ***Doe d Gill v Pearson*** (1805) 6 East 173; 102 ER 1253 concerned a will that devised land to two of the testator's daughters,

"... their heirs and assigns for ever, as tenants in common, and not as joint tenants; upon this special proviso and condition, that in case my said daughters ... or either of them, shall have no lawful issue, that then and in such case they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them except to her sister or sisters, or to their children." (174-5, 1254)

170 Though ***Muschamp v Bluet*** was cited, the condition was held good. However, that conclusion seems to have depended upon the construction of the particular clause, as not conferring a fee simple, but rather conferring an estate that was itself conditional.

171 ***Attwater v Attwater*** (1853) 18 Beav 330; 52 ER 131 concerned a gift by will to A, "*to become his property on attaining the age of 25 years, with an injunction never to sell it out of the family; but if sold at all, it must be to one of his brothers hereafter named.*" Lord Romilly MR held the condition void as a restraint on alienation. He said, at 336-7, 133:

"... the true construction of this clause cannot be to give a right of pre-emption to the brothers of [A]; and that if they do not purchase, the devisee may claim, whensoever he pleases. The meaning is, I think, plain, that the testator intended to impose this fetter: that if

the brother will not buy, the devisee was not to be at liberty to sell the property to anyone. The question is, whether such a condition is a valid one? Notwithstanding the case of ***Doe d Gill v Pearson*** (6 East, 173), this appears to me to be a condition repugnant to the quality of the estate given. It is obvious, that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person, who alone is permitted to purchase, might be so selected, as to render it reasonably certain that he would not buy the property, and that the property could not be alienated at all."

172 This statement of the law takes the matter further than ***Muschamp v Bluet***. As well as being a judicial statement rather than an argument of counsel, it adopts a rule that it is not possible to transfer property subject to a restriction that it can be sold only to one person. Further, Lord Romilly MR apparently did not regard the fact that the clause left the donee free to dispose of the property by a mode other than sale as a reason why the restriction was not void. The case illustrates how a restraint on alienation imposed on a person who has been given a fee simple can be void, even if the restraint is less than total.

173 ***In re Macleay*** (1875) 20 Eq 186 concerned a will that left certain property to A, "*on the condition that he never sells it out of the family*". At 188 Sir George Jessel MR set out the passages from Littleton that I have quoted at [144] above, and said that "*.. according to Littleton, the test is, does it take away all power of alienation?*". He explained this, at 189, as: "*The condition, therefore, whatever it may be must not really take away all power, either by express words or by the indirect effect of the frame of the condition*". At 189 he drew from *Coke on Littleton*, and from *Sheppard's Touchstone* 8th edition (1826), the test for invalidity of the condition: "*whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form*". He concluded that the condition that he was considering did not take away the whole power of alienation substantially:

"Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shews there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail ..." (at 189-190)

This passage is adopting the literal meaning of *"take away all power of alienation."*

174 Jessel MR distinguished ***Doe v Pearson*** on two grounds. The first was that the number of possible alienees was more restricted in ***Doe v Pearson*** than it was in ***In re Macleay*** . The second was that in ***Doe v Pearson*** the forbidden mode of alienation was to *"dispose"* , *"which is probably the largest term known to the law"* (190).

175 Jessel MR next dealt with ***Attwater v Attwater*** . The Master of the Rolls commented that Lord Romilly MR had held the condition invalid *"[n]otwithstanding the case of ***Doe v Pearson*** ."* Jessel MR concluded that Romilly MR had distinguished ***Doe v Pearson*** rather than declining to follow it. On this basis, Jessel MR held that ***Attwater v Attwater*** did not represent a new rule of law and therefore there was no obstacle to Jessel MR allowing the condition in ***In re Macleay*** as a limited restriction upon alienation.

176 *In re Macleay* has been criticised by *In re Rosher* (1884) 26 Ch D 801, by Fullagar J in *Hall v Busst*, and by C. Sweet: *Restraints on Alienation II* (1917) 33 *Law Quarterly Review* 342 at 345-348. As well, as I have said, it adopts the literal meaning of "restrain all power of alienation", which might not have been what Littleton intended. Though some cases that I will hereafter mention refer to it without criticism, the safer course is to decide the present case without relying upon *In re Macleay*.

177 In *In re Ridley; Buxton v Hay* (1879) 11 Ch D 645 Jessel MR made some remarks that are significant because they were later referred to with approval by Dixon CJ in *Hall v Busst*. At 648-649 Jessel MR said:

"In the first place, the law of this country says that all property shall be alienable; but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman. That was purely an equity doctrine, the invention of the Chancellors, and is, as I have said, an exception to the general law which says that property shall not be inalienable. That exception was justified on the ground that it was the only way, or at least the best way, of giving property to a married woman. It was considered that to give it her without such a restraint would be, practically, to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation of her property.

That ground I must assume to be correct. The result, therefore, was that the exception to the general law was in favour of married women, to enable them to enjoy their property.

Then there was another rule, also invented by the Chancellors, in analogy to the common law. That was an invention of a different kind from the other, and was this time in favour of alienation and not against it. The law does not recognise dispositions which would practically make property inalienable for ever. Contingent remainders were introduced, which had the effect of rendering property inalienable. The doctrine of contingent remainders was discussed by the Chancellors, who held that a remainder depending upon what was called a possibility on a possibility was contrary to the common law. That was a wholesome rule, only it was considered that it did not go far enough. The result was that

the Chancellors established this rule in favour of alienation, that property could not be tied up longer than for a life in being and twenty-one years after. That is called the rule against perpetuities. This rule, therefore, was established directly in favour of alienation: it merely carried out the principle of law that property is alienable. Similarly in the case of executory interests, the law put a limit or fetter upon the testamentary power. The theory of both rules is, however, the same, namely, that property is alienable, though it may be made inalienable to a certain extent and in a peculiar way."

178 ***In re Rosher ; Rosher v Rosher*** (1884) 26 Ch D 801 concerned a will by which the testator gave his real estate to his son, his heirs, executors, administrators and assigns, subject to provisos:

(1) that if the son his heirs or devisees or any person claiming through or under them desired to sell certain identified properties, the testator's widow would have the option to purchase the whole of those properties for £3,000, and a proportionate price for any part or parts thereof,

(2) that if the son his heirs or devisees or any person claiming through or under them during the life of the wife wished to let property A for more than three years, the widow should have the option of renting those premises for any period exceeding three years that she desired, at the yearly rent of £25, and

(3) if the son his heirs or devisees or any person claiming through or under him or them during the lifetime of his wife desired to let property B or any part of it for a longer period than seven years the widow should have the option of renting the whole of that property for any period exceeding seven years as she should desire, at a yearly rent of £35.

At the time of the testator's will, and of his death, the properties that the widow was given the option to purchase were valued at "£15,000 and upwards" , and the real letting value of each of properties A and B, was "£100 and upwards per annum" (802).

179 Pearson J held that the conditions were void. He held that a requirement to sell at one-fifth of the value of the property was "*equivalent to a restraint upon selling at all*" (810), during the widow's lifetime. Pearson J declined to follow the reasoning of Jessel MR in *In re Macleay* . Concerning the proposition that Sir George had drawn from *Coke on Littleton* and *Sheppard's Touchstone* , Pearson J said, at 817:

"I apprehend that the meaning of the word 'substantially' is this: does it really deprive the devisee of the power of alienation, or does it only restrain it that in effect he still has the power of alienation? If the latter it is good."

That is adopting the second of the meanings of "*all the power of alienation*" that I considered at [145] above.

180 At 819, Pearson J regretted that "*the learned professors of the law*" had "*departed from the first principle, that a condition which is repugnant to a gift is a void condition, and the exceptions have been made without any principle at all, and it is therefore perfectly impossible to say by any rule which exceptions are good and which are bad* ". He declined to accept that a restraint of a power to sell could be imposed, on the basis that it still left the donee with a power to lease or mortgage. Pearson J regarded such a conclusion as inconsistent with the Latin maxim to the effect that whenever a thing is prohibited, it is prohibited whether done directly or indirectly. Further, he rejected the suggestion that a condition absolutely restraining alienation is good if there is a limitation as to time. At 821-2 he rejects a suggestion by Preston (an editor of *Sheppard's Touchstone*) that a restraint for a reasonable time is permissible. The rejection is on the basis that the criteria for deciding reasonableness are themselves uncertain. Pearson J, at 823, regarded the matter as covered by "*the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift*". For analogous reasons to those

that related to the restriction on the power of sale he held, at 823, that the restriction on the power of leasing was likewise invalid.

181 ***In re Elliot; Kelly v Elliot*** [1896] 2 Ch 353 concerned a will that gave property to the plaintiff absolutely subject to payment of the testator's debts, and then required that if she sold a certain property she should pay the testator's brother £1,000 out of the proceeds of sale, and the testator's sister a further £500 out of the proceeds. Chitty J held that, as the condition arose only on a sale, the plaintiff was free to mortgage the realty, let it, settle it, give it by instrument *inter vivos* or by will free from any claim on the part of the testator's brother or sister. He held that there was no obligation on the plaintiff to sell within any particular time or at all, and that until the sale took place the brother and sister had no charge upon the real estate. The plaintiff had many ways of disposing of the property open to her, some of which (such as settlement) could achieve a result that was in many ways commercially equivalent to a sale. Nevertheless, Chitty J held that the obligation to pay the £1500 from the proceeds of sale was void:

"The owner of property has as an incident of his ownership the right to sell and receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think, repugnant and void." (356-357)

182 ***Crofts v Beamish*** (1905) 2 IR 349 is (relevantly) a decision of the King's Bench Division in Ireland. It concerned a testator who left specific parcels of land to his various sons. His will then contained a clause commencing "*I direct that ...*". The direction was that if a son should be disposed to sell the interest in the land willed to him, he "*shall not be at liberty to sell to any other person save one of his brothers, and that the value of his or their interest, if there should be any difference between them, should be determined by arbitration of three respectable gentlemen, and their*

decision as to value shall be final." That clause was held to be void. No point was taken about whether the means of ascertaining the price was insufficiently certain; rather the decision turned on it being an invalid restraint on alienation.

183 Gibson J, at 356-7 (Boyd J agreeing), said that the clause:

"... does not restrict the inherent power of alienation attached to the devised estates. It is not expressed to be a condition, and though the testator may have thought that his direction effectually prevented alienation outside the family, I doubt if he intended or desired that, on breach by the devisee, the estate should be defeated and the property revert in himself discharged of the limitations over. Even if the clause was a condition, the class of possible purchasers is not the family, or all blood relations, but the brothers surviving at the time are contemplated, and the condition is plainly inconsistent with freedom of disposition, not merely as to the purchasers, but as to the price, which is to be ascertained by third persons. The restriction is repugnant to the nature of the estate devised, and is void. The purchasing brothers must be alive at time of sale, and if all but one were to die, there would be no effective power of sale."

184 Wright J reached the same conclusion. After referring to ***Attwater v Attwater***, ***In re Macleay*** and ***Rosher v Rosher*** concluded, at 360:

"There is thus not merely a restriction as to class (ie the brothers) to whom a devisee might sell, but on the material question of price or value, the matter is taken out of his hands in case of a difference, and left to a jury of three country gentlemen. In the history of will-making such a power of sale or restriction on alienation was never heard of - practically the power to alienate is completely taken away, and on this question I am glad to find that all the members of the Court agree that this condition is repugnant and void."

185 Though the report continues with an appeal from that decision to the Irish Court of Appeal, that appeal did not relate to whether the direction was void.

186 ***In re Cockerill; Mackaness v Percival*** [1929] 2 Ch 131 concerned a devise of land by will to P, subject to the proviso that if within 20 years of the testator's death P desired to sell the land, he was to give the governors of a particular grammar school the option of purchasing the land at the price of £300 per acre. The land in question was actually worth £670 per acre at the time of the testator's death. The land in question was about 22 acres. Eve J held that the condition was void, saying, at 134-5:

"That the condition operates as a restriction on alienation cannot be questioned, and prima facie it is void on that ground; but inasmuch as there are cases in which partial restrictions have been held not to avoid the condition (***Doe d Gill v Pearson*** and ***In re Macleay***), it is necessary to examine the condition carefully and to appreciate its effect. It is limited in this case in its operation to a period of twenty years from the testator's death, and it operates only against alienation by sale, but it imposes a limit on the price which, in substance, compels the devisee during the period of restriction to sell to one purchaser only, for I am not going to assume that the purchaser indicated, and not the less so because in this case he happens to be a trustee for others, would refuse the offer of acquiring for £6600. something which he could immediately resell for more than double the price paid. The devisee in this case is not restrained from selling to a particular person, but from selling it to anybody but a particular person, and this, in my opinion, creates a state of facts not to be found in any reported case in which a condition imposing partial restraint has been treated as an exception to the general rule that 'the owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit': see per Chitty J in ***In re Elliot*** ."

He noted his conclusion is consistent with ***Muschamp v Bluet*** and ***In re Rosher*** . Saying that the conclusion is consistent with ***Muschamp v Bluet*** involves reading Serjeant Bridgman in ***Muschamp*** as not leaving open whether a restriction on sale to anyone but a particular person who was quite likely to buy the property was valid.

187 ***In re Brown, deceased; District Bank Ltd v Brown*** [1954] Ch 39 concerned a will that gave certain property to the testator's sons then living

in equal shares as tenants in common. A clause of the will provided that if any of the sons:

"... shall execute any assurance ... whereby ... the share of my business properties ... hereinbefore devised or bequeathed to him would or might become vested in ... any person or persons other than a brother or brothers of such son then I direct that the share of such son in my business properties ... shall be held by my trustees ..."

on certain discretionary trusts for the son and his wife and children.

188 Harman J held that that clause was void. He noted, at 49:

"... that the class to whom it is permissible to alienate begins with three for any one share and that the prohibition goes on not only during the joint lives of all the brothers, but during the lives of the survivors and survivor of them, and therefore a period will be reached when there are two, and then only one, and at last no person to whom any alienation is allowed."

189 He concluded, at 49-50:

"... that a class of this sort, which is bound to be a diminishing class, brings it about, in substance, that this is a general prohibition on alienation. It would be an extraordinary thing if no-one could postulate of any one of these brothers that he would or would not during his lifetime be able to dispose of his own share; and that it must depend on whether he outlives two of his brothers. In my view, this is the kind of restriction which the law views, or should view, with dislike. It is exactly the same kind of condition as in *Attwater v Attwater*, and I think that I should be at liberty to follow that decision were it necessary for me to do so, but I do not think that I need follow any case in this region, because the cases are inconsistent with one another, and I am entitled to take my own view. It is pertinent that a number of persons, as in this clause, is in essence different from a class consisting, for instance, as Sir George Jessel's did in *In re Macleay*, of members of the family, which he said was a large indeterminate class of people and might, of course, increase as time went on; whereas, if alienation be restricted to three or four or five persons such as brothers, the class is bound to diminish as death takes its toll of

the members. I hold therefore that the restriction in clause 6 of the will is an attempt to fetter the natural qualities of the interest given, and is accordingly void and can be disregarded."

190 **Oliver v Oliver** (1958) 99 CLR 20 is relevant for present purposes because in it Dixon CJ and Taylor J approved three of the cases I have just discussed, and because Handley JA relied on it in **Wollondilly Shire Council v Picton Power Lines Pty Ltd** (1994) 33 NSWLR 551, discussed below at [221] ff. **Oliver** concerned a will that gave:

"... my Dairy Creek property for my son Norman but my son Walter Charles shall have the right to purchase such Dairy Creek property from my son Norman at £6 per acre if he so desires".

Six months after the testator's death Walter served a notice purporting to exercise the option. The Dairy Creek property had been valued for probate purposes at about £14 per acre. Lowe J had held the option was void, but Dixon CJ, McTiernan and Taylor JJ upheld its validity.

191 Their Honours decided, as a matter of construction of the will, that it did not confer on Norman "*a full equitable estate in fee simple from which there can be no detracting of an essential quality such as the right of alienation*" (23 per Dixon CJ). Rather, the will was construed as giving an equitable interest in the land to Norman subject to an interest in the nature of an option in Walter Charles, that was required to be exercised within a reasonable time. "*So construed the option imposes no fetter on alienation and does not suspend the right.*" Dixon CJ (Taylor J agreeing) distinguished the case before him from certain other cases, at 24:

"In **In re Rosher; Rosher v Rosher** there was a legal devise in fee simple with a condition attached that if the devisee or any person claiming under him should ever desire to sell a named person should have a right of pre-emption at a price the will specified. It is self-evident that the right of pre-emption must operate as a restraint on the free alienation of the estate in fee simple and it is not remarkable that it was held void. The decision

of Eve J in *In re Cockerill; Mackaness v Percival* went further than *In re Rosher* only in holding that such a restraint was void even if it was limited in its operations to a period of twenty years. In *In re Brown (dec'd); District Bank Ltd v Brown* Harman J construed the will before him as attempting to place a restraint on alienating, subject to an exception in favour of a very limited class, which restraint would operate as a condition subsequent to and not a conditional limitation upon an otherwise absolute gift, although the restraint was limited to the life of the donees. His Lordship therefore decided that the condition was void. This decision depends on the same reasoning as *In re Rosher* and *In re Cockerill* and has no relation to such a case as this. With all respect the view adopted by Lowe J does not appear well founded. The effect of the disposition was to invest Walter Charles with an election exercisable within a reasonable time to take the property on paying Norman £6 per acre and subject thereto to give an equitable estate in fee simple therein to Norman." (citations omitted)

192 McTiernan J, at 26, analysed Norman's interest as being:

"a determinable equitable interest; it determines upon the due exercise of the option to purchase. Subject thereto, it is an equitable interest in fee simple."

Hall v Busst

193 ***Hall v Busst*** (1960) 104 CLR 206 is the seminal Australian case on restraints against alienation. Accordingly it is of direct relevance to the instant proceedings. However, it is not entirely clear for exactly what propositions ***Hall v Busst*** is authority. A detailed discussion of the case is required. ***Hall v Busst*** concerned a sale of land. On the one day, the vendor and the purchaser executed both a contract for the sale of land, and a deed in which the purchaser was called the Grantor. The relevant provisions of the deed are:

"3. The Grantor shall not at any time transfer, assign, set over or lease any part of the said lands (other than by way of mortgage to a banking institution) without the consent in writing of the Grantee first obtained;

4. For the purpose of obtaining the consent of the Grantee in the preceding clause mentioned the Grantor shall give to the Grantee one calendar month's notice in writing of her intention to so deal with the said fee simple or any part thereof and during the currency of that notice the Grantor Doth Hereby Give and Grant to the Grantee the first option of purchasing the said fee simple and all improvements thereon on the terms and conditions herein contained;

5. The purchase price relating to such option shall be the sum of Three thousand one hundred and fifty-seven pounds four shillings (Â£3157 4s. Od.) to which shall be added the value of all additions and improvements to the said property since date of purchase by the Grantor (such value to be taken as at date of exercise of this option) and from which shall be subtracted the value of all deficiencies of chattel properly and a reasonable sum to cover depreciation of all buildings and other properly on the land;

6. This option shall remain open for exercise by the Grantee at all times for a period of one month from the date of giving of the notice by the Grantor of her intention to deal with the said fee simple and this option may be exercised by the Grantee by giving notice to the Grantor or leaving such notice for her at the office of Messrs. J. J. Bell & Bell Solicitors of Tully or their successors in office."

The price named in clause 5 was identical with the purchase price under the contract.

194 Some years later, the purchaser sold the land to a third party without complying with these clauses. The action in question was an action for damages for breach of contract. It was contended that there had been a breach of both clauses 3 and 4.

195 There was a question of construction, that Dixon CJ expressed at 214 as being whether "*... cl 3 formed but an introductory provision to cll 4, 5 and 6 and was not independently enforceable*". The alternative view was that clause 3 had an independent effect. As Dixon CJ put it at 214, the question of whether clause 3 was void as "*a restraint upon alienation which was*

unqualified" arose if clause 3 was a provision having an independent effect. That was because there was a question about whether the price at which the option could be exercised was too uncertain to give rise to a valid contract. For Dixon CJ, the uncertainty of the price would mean that the promise in clause 4 to give the first option of purchasing the property was void, and hence could not be sued on. The promise in clause 4 to give one month's notice was clearly dependent on clause 3, and so the breach of that promise could be sued on only if clause 3 could be sued on. The promise not to transfer without consent, in clause 3, had been broken, but it could be sued on even if the option was not enforceable only if clause 3 had an independent effect to the option. And if clause 3 had an independent effect, there was then a question of whether clause 3 was void as a restraint on alienation.

196 Dixon CJ construed clause 3 as having an independent effect. He construed it as *"an indefinite prohibition ... of alienation without consent of the fee simple of the land or any part of it and of the creation of any less estate or interest therein whether legal or equitable"* (215) . (This is a little puzzling when clause 3 permitted mortgaging to a banking institution, which would itself be a creation of an interest in the land, and would inevitably confer on the mortgagee a power of sale. However I am in no position to do anything other than accept Dixon CJ's categorisation of the clause.) Dixon CJ noted that the words *"Grantor"* and *"Grantee"* include the executors, administrators and assigns of the respective parties, and thus that clause 3 was not confined in its operation to the life of the vendor and the life of the purchaser (214). He held that the effect of the clauses, read together, was that the Grantor was required to give the notice required by clause 4 whenever she intended to deal with the fee simple, or any part thereof, that thereupon an option to purchase would arise, but if the option was not exercised the Grantor remained prohibited from transferring any interest in the lands without the written consent of the Grantee. So construed, clause 3 created a prohibition of alienation without consent.

197 At 217 he said:

"... the question arises whether, considered as an obligation binding the purchaser ... her executors, administrators and assigns and operating upon her and her legal personal representatives indefinitely, cl 3 is not void as an attempt wholly to restrain alienation."

198 At 217-8 Dixon CJ said:

"The question whether a bond or covenant or contract purporting to impose a total contractual restraint upon alienation is void does not seem to be settled. A condition doing so attached as a condition subsequent to the estate is of course void. The invalidity may be put on the ground of repugnancy to the grant or upon public policy or for that matter it may conceivably be attributed to an indirect effect of **Quia Emptores**. That is immaterial, for it is a known rule that the condition is void. But with contractual restraints there is no fetter upon alienation which does more than sound in damages, that is, unless a doctrine of equity intervenes to make it bind the land. Coke at one time seemed to think that a bond with a condition against alienation of an estate was good: *Coke Litt*. 206b. And in **Freeman v Freeman** a bond against barring an entail was held valid. But according to **Tatton v Mollineux** Coke is said to have taken a contrary view in the case of Poole.

In a learned article by Mr Charles Sweet upon *Restraints on Alienation* (1917) 33 *LQR*, pp 236, 342 that writer does not refer directly to the question whether a covenant or agreement purporting to restrain alienation is or may be valid; but the author says, 'If property is given to A absolutely he cannot be restrained from alienating it by any device, whether the device takes the form of a condition against alienation or a gift over on alienation; the attempted restraint is contrary to public policy, and its form is immaterial' (p 240). Dr Glanville Williams has attacked the logical basis of invalidity for repugnancy (1943) 59 *LQR*, p 343; (1944) 60 *LQR*, pp 69, 190. In the course of doing so the learned writer (1943) 59 *LQR*, pp 349-351) invoked the alleged contrast of a contract, covenant or bond not to alienate as something inconsistent with the theory that a condition against alienation is repugnant. In effect he suggested that the distinction was untenable. The ground for denying the validity of a contractual restriction upon alienation is that it is a principle of the law that private property should be fully alienable. See per Jessel MR in *In re Ridley; Buckton v Hay* (1879) 11 ChD at 648, 649 and Sweet

(1917) 33 LQR 236. Cruise, 2 Dig p 6, in effect expresses a view that a contractual restriction upon the alienation of an absolute estate if unqualified should be considered void and this seems to accord with modern views of policy. Cruise, after referring to the supposed distinction between a condition and a covenant or contract, says this: 'This doctrine appears extremely questionable, as it offers an obvious mode of restraining a person from those rights over an estate which the common law gives him; consequently of frustrating the common law, as fully as if a condition of this kind were allowed to be inserted in a conveyance of land; and in some cases it appears not to have been allowed.' Indeed it is impossible to doubt that a fetter on alienation may be imposed by covenant which is as effective over a very long period of time to prevent alienation of land as a condition subsequent would have been had it been valid. I think therefore that cl 3 should be considered void as an independent restraint on alienation."

199 Fullagar J, at 223, stated his conclusion that, "*the restraint on alienation imposed by cl 3 of the deed on the owner of the fee simple is repugnant to the estate and void.*" I note that Fullagar J is there adopting the "*repugnancy to the estate*" explanation for the voidness of restraints on alienation, about which Dixon CJ has expressed reservations without expressly rejecting it. At 223-4 Fullagar J agreed with the reasons of Dixon CJ for concluding that the principle was the same, whether a restraint on alienation was imposed "*on a transferee of a fee simple*", by a condition subsequent in a grant, or by a separate contractual covenant.

200 However Fullagar J reasoned to his conclusion by a different path to that of Dixon CJ. At 224, Fullagar J construed the clauses of the deed as interacting in a different way to that which Dixon CJ adopted. He started by saying that if clause 3 stood alone "*it would be obviously void, for it is absolute in terms: consent could, of course, be withheld at will - for any reason or for no reason at all.*" However, construing the deed as a whole, Fullagar J regarded the Grantor as being free to dispose of an interest in the land if a notice was given and the option was not exercised. Even so construing it, he held that the restriction in clause 3 was void. After summarising ***Attwater v Attwater***, ***In re Macleay***, ***In re Rosher*** and ***Crofts v Beamish*** Fullagar J said, at 225:

"It is true that, on my construction of the deed, it is possible to get rid of the restriction. But the appellant can only get rid of it by giving to the respondent an option of purchase at a fixed price. She may not wish to alienate for many years: the restriction is of indefinite duration. She may then only wish to let the property for twelve months or to mortgage it for a few hundred pounds. But she cannot sell or lease or mortgage without giving the option of purchase to the respondent. And, when she does wish to alienate, the property may be worth a great deal more than £3157 plus and minus the items mentioned in c1. 5: it was apparently in fact worth nearly three times that sum at the end of 1957. I feel no doubt that the restraint is repugnant and void."

201 At 224 he commented that *In re Macleay* "was severely criticised on perfectly logical grounds by Pearson J in *In re Rosher* " .

202 Menzies J, at 235-6 said:

"I agree with the Chief Justice and Fullagar J that cl 3 is an unlawful restraint upon alienation, and to the reasons which they give for treating a covenant in restraint of alienation in the same way as a condition in restraint of alienation. I wish to add nothing beyond the observation that it is well settled that a covenant in general restraint of marriage is void as contrary to the public interest in just the same way as is a condition with the effect, and I think that it is in accordance with sound principle to regard general restraints upon alienation, whether by condition or covenant, similarly to general restraints upon marriage."

Thus, Menzies J did not enter into the differing reasons that Dixon CJ and Fullagar J gave, arising from the different construction that they gave to the clauses, concerning why clause 3 was an unlawful restraint upon alienation. However his independent statement of the principle related only to "*general*" restraints on alienation.

203 As mentioned earlier, *Hall v Busst* dealt with an issue beside whether there was an invalid restraint on alienation, namely whether the purported option fixed a price that was sufficiently certain to be contractually binding.

A majority (Dixon CJ at 217, Fullagar J at 221-3, and Menzies J at 235) held that the price was insufficiently certain. A minority (Kitto J at 228, Windeyer J at 245) held the price was sufficiently certain. The Queensland Supreme Court had upheld the enforceability of the option. The overall result in the High Court was to allow the appeal. Dixon CJ, Fullagar and Menzies JJ favoured allowing the appeal, while Kitto and Windeyer JJ would have dismissed it. I mention these matters because they affect for what propositions the case is authority.

- 204 Concerning restraint on alienation, Kitto J, at 228, construed the clauses as operating in the same way as Fullagar J had construed them, namely *"that if the respondent does not exercise the option, the appellant will achieve her purpose of obtaining the consent, the respondent being then bound to give it"* (229). Kitto J continued:

"On this construction of the deed, there can be no valid objection to cl 3 on the ground that it prohibits alienation. Whether the clause would be void as against public policy if it were construed as imposing an unqualified prohibition upon alienation by the appellant or her representatives without the consent of the respondent or his representatives, is a question upon which I express no opinion."

- 205 Windeyer J said at 245-6, that if he had construed the deed as Dixon CJ had done he would have agreed that it was void, for the reasons that Dixon CJ gave. However, he construed it in the same way as Fullagar J had construed it. Windeyer J's conclusion concerning restraint on alienation was *"I agree in substance with my brother Kitto on this"* (246). In light of the fact that Windeyer J would have dismissed the appeal, that can only mean that he agreed with Kitto J not only about the construction of the clauses, but also that clause 3 did not impose an invalid restraint on alienation.

206 It follows from this analysis that there is a majority in the High Court that clause 3 was to be treated in the same way as a condition in restraint of alienation. There is a majority for the conclusion that clause 3 was an unlawful restraint on alienation. However, there is no majority reasoning as to why clause 3 was an unlawful restraint on alienation.

Reuthlinger v MacDonald

207 **Reuthlinger v MacDonald** [1976] 1 NSWLR 88 is of relevance to the present case for two reasons. One is that it analysed the scope of the restraints on alienation imposed by a contract unrelated to transfer of the relevant property that, in accordance with **Hall v Busst**, were void. The other is that it was apparently the first case to adopt the view that a restraint on alienation imposed for the protection of a legitimate collateral object is not invalid.

208 **Reuthlinger** concerned an agreement under which MacDonald, the holder of a minority parcel of ordinary shares in a proprietary company, agreed with Reuthlinger, the holder of half of the ordinary shares, not to transfer his shares or give any transfer notice to the company until Reuthlinger held a majority of the shares. MacDonald gave a transfer notice in breach of that agreement. Needham J held that the agreement did not impose an invalid restraint on alienation, and granted an injunction requiring MacDonald to act in accordance with the agreement.

209 The contractual provision in **Reuthlinger** was imposed as part of an agreement by which MacDonald agreed to convert 3000 preference shares that he had formerly owned to ordinary shares (as it appears he was entitled to do at his own election under the company's Articles of Association). In other words, it was not associated with any property being transferred to MacDonald. Reuthlinger promised that he would pay to MacDonald all amounts by which either the dividends received or capital

distributed was less than it would have been had the shares remained preference shares, MacDonald promised not to himself vote or appoint a proxy concerning the shares, and MacDonald irrevocably appointed Reuthlinger as his attorney to exercise the voting power of the shares.

210 Needham J stated that the principles concerning restraint on alienation as stated by Coke did not give support to a proposition "*that contractual restraints, unrelated to feoffment, are void*" (94-5). In making that statement his Honour was either using "*feoffment*" in an extended sense as referring to any transfer of property, or else (and I doubt this is so) he uncharacteristically overlooked parts of Coke's writing that I have quoted at [146] above. At 95-6 his Honour noted a problem with the application of law concerning restraints on alienation in any wider context than restraints imposed in relation to the transfer of property:

"I know of no authority which suggests that an option to purchase, or a right of pre-emption, granted by contract between capable parties unconnected with the transfer of property, would be void at law merely because the price fixed was substantially below the market value. Such a contract might be set aside in Equity for various reasons unconnected with the doctrine of restraint on alienation, but, if the defendants here are correct, and if **Re Rosher** is correct, as it seems to be, then such an option or right of pre-emption would be void at law, because it amounted to an absolute restraint on alienation."

211 After extended discussion of **Hall v Busst** he toyed at 100 with the notion that:

"the wider statements of Dixon CJ and Menzies J were obiter, because in **Hall v Busst** the contractual restraint became effective at law only when the transfer of land was completed, and therefore, the contractual restraint was imposed in connection with a transfer of the property affected."

212 However, he was not willing to ignore obiter dicta of a considered nature from Dixon CJ and Menzies J. Thus, he proceeded on the basis that the doctrine of restraint on alienation had relevance to "*restraints arising from contractual provisions unrelated to the transfer of the relevant property. The question then is - what is the extent of that relevance?*" (100). He noted, at 100-101, that the owner of property has contractual power to limit the incidents of ownership in numerous ways, notwithstanding that many such contractual arrangements, if inserted as conditions or executory limitations in grants of land, would be void. He held, at 101, that the question that the majority in **Hall v Busst** had answered in the affirmative was:

"whether a bond or covenant or contract purporting to impose a total contractual restraint upon alienation is void."

213 His conclusion concerning the applicable principle was, at 101:

"Each of the majority construed the agreement as imposing a restriction on alienation for ever without the consent of the other party. I do not think **Hall v Busst** can be used to invalidate any less contractual restriction."

214 Needham J found that there were, in substance, two reasons why the restriction in **Reuthlinger** was not void. The first was that restriction was not total. The agreement did not extend the definition of the parties to include their executors, administrators and assigns, and thus the restriction was limited to the joint lives of the parties. The second was that Needham J accepted:

"the view of Charles Sweet that a restraint imposed for the protection of a valid collateral object is not invalid. There is no objection in law, in my opinion, to the grant of an irrevocable power of attorney during the joint lives of the parties. The restraint on sale in this case is in aid of that grant of power."

- 215 If a judge gives two reasons, each of which is independent of the other, for arriving at the result in the case, there is significant judicial authority that each of those reasons is part of the ratio decidendi: **Crowther v Thorley** (1884) 50 LT 43 at 46; **Commissioner of Taxation for New South Wales v Palmer** [1907] AC 179 at 184 (Privy Council); **London Jewellers Ltd v Attenborough** [1934] 2 KB 206 at 222 (English Court of Appeal); **Jacobs v London County Council** [1950] AC 361 at 369 (Lord Simonds); **Behrens v Bertram Mills Circus Ltd** [1957] 2 QB 1 at 25 (Devlin J). That test has been subjected to some academic criticism, on the grounds that it leaves a judge open to have an undue influence on the later development of the law by adopting numerous alternative reasons: R Cross and JW Harris, *Precedent in English Law*, 4th ed (1991) at 42.
- 216 In the Full Court of the Supreme Court of South Australia Cox J followed **Behrens** in **Beneficial Finance Corporation v Price Waterhouse** (1996) 68 SASR 19 at 23 and, though neither Perry J nor Lander J expressly considered **Behrens**, the reasoning of Lander J at 62 is consistent with the correctness of **Behrens**. More recently, in **Harris v Digital Pulse Pty Ltd** [2003] NSWCA 10; (2003) 56 NSWLR 298 at [293] Heydon JA, with whose reasons in this respect Spigelman CJ was "in general agreement" ([3]) adopted the account of the precedential status of decisions given for multiple reasons given in **Jacobs**. In **Gutman v McFall** [2004] NSWCA 378; (2004) 61 NSWLR 599 at [57] Giles JA (Mason P and McColl JA agreeing) also accepted the account of the law of precedent as stated in **Jacobs**. Further, any first instance judge's decision can be overruled on appeal, decisions of intermediate Court of Appeal can overruled by the High Court and can be departed from by other intermediate Court of Appeal if they are seen to be plainly wrong, and even the High Court is free to depart from its own previous decisions. In these circumstances, the possibility of there being a judge who set out to manipulate the law of precedent to remodel the law according to his or her own views (which in any event is a possibility that should be examined with the scepticism

usually appropriate for a floodgates argument) would not, in my view, warrant a departure from the law as stated in the English and Australian cases I have cited, even if I were free to do so. Thus, Needham J's adoption of Mr Sweet's argument concerning collateral purpose should be treated as part of the ratio of **Reuthlinger** .

- 217 An appeal from the decision of Needham J in **Reuthlinger** was dismissed: **Reuthlinger v MacDonald** , NSWCA, 20 October 1976, unreported. Street CJ said that Needham J's discussion of the law was "*entirely convincing*" (at 1). He said that Needham J:

"... analysed in admirable terms the history of the principle of invalid restraints on alienation, and he discussed the judgments of the High Court in **Hall v Busst** in terms which I respectfully embrace, and to which I would not seek to add anything."

Street CJ said, at 4, that the effect of the restraint being limited to the joint lives of the parties was that it was "*not unlimited, indefinite or perpetual*" , which his Honour evidently regarded as a requirement for the contractual restraint in question being invalid. Glass and Samuels JJA agreed with Street CJ. This decision itself adopts, by reference, Mr Sweet's argument concerning collateral purpose as part of its ratio decidendi.

- 218 I respectfully agree with Needham J's analysis of the ratio of **Hall v Busst** , insofar as it dealt with contractual restraints on alienation. I agree that, insofar as dicta of Dixon CJ and Menzies J are applicable to contractual restraints on alienation unconnected with the transfer of the property whose alienation is restrained, those dicta contemplate that such a restraint would be invalidated only if the restraint was total.
- 219 **Saliba v Saliba** [1976] Qd R 205 concerned a property that had been purchased by the plaintiff and the defendant as tenants in common in

equal shares in 1967. In 1969 they executed an agreement whereby each agreed that should he decide to sell his half interest in the property, he would first offer that half interest to the other, at a price of \$4,075.50. That price was exactly half of the original purchase price. By the time of the trial in April 1976 the property was valued at \$22,300. The case was one in which one of the parties sought an order for sale of the property under **The Partition Act of 1911** (Qld) , and the other counterclaimed for a declaration that he was entitled to exercise the right of first refusal. Kneipp J held that the right of first refusal was invalid, as a restraint on alienation. He appointed trustees for sale. He detected in the cases on that subject "*a hardening attitude towards restrictions of any kind*" (206). The judge accepted that the price fixed for the half share was adequate at the time of making the agreement, but that the critical invalidating factor was that "*no matter how much the value of the land rises during the joint lives of the parties, neither can sell his share without first offering it to the other at what might be a grossly inadequate price*" (207).

220 **Saliba** was decided several months after Needham J's decision in **Reuthlinger** . Like **Reuthlinger** , it concerned a contractual restraint on alienation that was not connected with the acquisition of the property whose alienation was restrained. However, **Reuthlinger** was not cited in it. The result in **Saliba** is consistent with the later High Court decision in **Nullagine Investments Pty Ltd v The Western Australian Club Incorporated** (1993) 177 CLR 635 , (discussed at [305] ff below) but the process of reasoning is radically different. Insofar as the judge in **Saliba** did not ask himself whether the contractual clause in question in substance imposed a total restraint on alienation the case was not decided in accordance with the same principle as **Reuthlinger** . In accordance with the Court of Appeal decision in **Reuthlinger** , I would follow the reasoning in Needham J's decision in preference to that in **Saliba** .

Wollondilly v Picton Power Lines

221 The principal relevance of ***Wollondilly Shire Council v Picton Power Lines Pty Ltd*** (see above at [190]) to the present case is a statement of Handley JA, not essential to the decision, that restraints against alienation arising as incidents of a personal contract for sale or option or right of pre-emption stand outside the doctrine of restraint against alienation and cannot be invalidated thereunder. If this observation were adopted, it could be a serious obstacle for the Respondents. This is because the restraints against alienation in the present case were restraints in the Occupancy Agreement and Buyback Deed and the grant to BBA of an option. However, as will be seen below, I do not agree that restraints against alienation arising as incidents of a personal contract for sale or option or right of pre-emption can never be invalidated by operation of the doctrine of restraint against alienation. This conclusion will require a detailed discussion of the facts of ***Picton Power Lines*** and the cases upon which Handley JA relied in that passage.

222 ***Picton Power Lines*** arose from a transfer by the Council of a parcel of vacant industrial land to the respondent for a price of \$35,000. The contract for sale required the transfer to include covenants, expressed to be for the benefit of land in a particular deposited plan, that:

"(a) The Transferee shall not transfer the land by way of sale, gift or otherwise prior to the erection thereon of premises approved of (by) the Transferor and prior to the use of such premises by the Transferee for an industry approved of by the Transferor.

(b) The Transferee shall erect upon the land within eighteen (18) months from the date of settlement hereof industrial premises approved of by the Transferor and should such premises be not completed within the period of twenty-four (24) months from the date hereof (then) the land shall be sold by the Transferee back to the Transferor at or for the price or sum of \$35,000."

- 223 When the buildings were not erected within the agreed time, the Council sought and obtained an order for specific performance of the obligation to resell. Handley JA (Clarke and Meagher JJA agreeing) at 554-555 held that, unlike the way Dixon CJ had construed clause 3 of the agreement in ***Hall v Busst***, one part of subclause (a) did not impose a restraint on alienation that was independent of the obligation to transfer under subclause (b).
- 224 Earlier on 554 Handley JA had recognised that subclause (a) was wider than was necessary to protect the obligation to resell in subclause (b), insofar as it purported to restrain alienation not only until the erection of the industrial buildings but also until those buildings had commenced to be used. He accepted that, to the extent to which the obligation not to transfer the land extended beyond the time of erection of the premises it might well be void. However, Handley JA said that, if to that extent subclause (a) was void, the void portion was severable. He referred to the part of subclause (a) that prohibited transfer of the land before the erection of the buildings as "*the relevant part*".
- 225 Handley JA rejected an argument that the relevant part of subclause (a) and the obligation to retransfer imposed by subclause (b) were a void restraint on alienation (554-5):

"The clauses in the present contract stand in marked contrast to those in ***Hall v Busst***. The relevant restraint imposed by subcl (a) only continued until the company had built industrial buildings on the land which subcl (b) contemplated would occur within two years of the sale. Once that condition was fulfilled the restraint came to an end. Subclause (a) to this extent was neither independent nor unlimited in duration. Moreover the contract for resale came into existence because the respondent failed to perform its promise to build which was one of the terms on which it obtained the land from the Council. The contract did not come into existence because the respondent wished to alienate the land.

It cannot be doubted that any contract for sale or option or right of pre-emption binds the grantor not to alienate the land to a third party in a manner which would be inconsistent with the rights of the purchaser or grantee. This negative stipulation, if not expressed, is necessarily implied: see **Woodroffe v Box** (1954) 92 CLR 245 especially at 257-259, **Oliver v Oliver** (1958) 99 CLR 20 and **Bahr v Nicolay [No 2]** (1988) 164 CLR 604 at 629, 647. Restraints of this kind, arising as incidents of a personal contract for the sale or other disposition of land stand right outside any legal doctrine which invalidates contractual restraints on alienation. In my opinion neither subcl (b) nor the relevant part of subcl (a) are invalid as unlawful restraints on alienation."

A term will not be implied in a contract if there is already an express term to the same effect. The express obligation in subclause (a) would be sufficient to oblige the transferee not to dispose of the land for long enough to enable the conveyancing steps required to carry through the option in subclause (b).

226 Clearly, in **Picton Power Lines** the express restraint on transfer up to the time of erection of the buildings in subclause (a) imposed a restraint of considerably less temporal duration than that in **Hall v Busst**. Further, it differed from those in **Hall v Busst** in that it did not purport to bind any successors in title of the original transferee. As well, it was within the power of the transferee to cause the restraint to cease to apply, by constructing the buildings in time. These are sufficient reasons why the subclauses did not in practical terms impose a restraint on alienation of a type likely to be detrimental to public policy. I do not doubt the correctness of the result in **Picton Power Lines**.

227 In **Vercorp Pty Ltd v Lin** [2006] QSC 419; [2007] 2 Qd R 180 Douglas J held there was no invalid restraint on alienation in a provision of a contract for the sale of one of the blocks in the subdivision of residential land that conferred a right of pre-emption. That right entitled the developer to buy the land back at its cost or then value, whichever was lesser, if the purchaser had not commenced construction of a house designed by an designer or architect approved by the vendor within two years. Douglas J

held at [57] that the provision had a valid collateral purpose, namely to ensure that the estate had high quality homes built in accordance with certain " *community development covenants*" within a two-year period, and that that was a purpose equally for the benefit of the developer and other purchasers in the estate who made similar promises.

228 In contrast, ***Picton Power Lines*** was not argued on the basis that the restraint with which it was concerned was valid because it was for the valid collateral purpose of the Council achieving industrial development in the area that it administered. However similar covenants might sometimes be so justified. In rejecting an argument that the obligation to resell was a penalty Handley JA said, at 556:

"... the Council had the clearest interest in promoting industrial development within the shire for the benefit of the general body of ratepayers and for its long-term benefit as well. The increased employment and general business activity resulting from such development would increase the prosperity of the shire as a whole and would indirectly benefit the council itself...

The Council entered into the original sale to encourage industrial development in the shire and took contractual promises from the purchaser to ensure that this purpose was carried out."

229 Though the result in ***Picton Power Lines*** is correct, the statement that "*restraints of this kind*" (semble, ones incidental to a contract for sale or option or right of pre-emption) "*stand right outside any legal doctrine which invalidates contractual restraints on alienation*" requires further consideration. Insofar as that statement concerned options and rights of pre-emption, it was unnecessary for the decision, as the obligation in para (b) was neither an option nor a right of pre-emption. Rather, it was a contract to sell, if particular set of circumstances came to exist (buildings not erected after two years), when whether that set of circumstances came to exist did not depend on any decision or choice on the part of the

Council. Furthermore, the cases which Handley JA cited concerning the above proposition must be examined. Those cases were **Oliver v Oliver** , **Woodroffe v Box** (1954) 92 CLR 245 and **Bahr v Nicolay (No 2)** (1988) 164 CLR 604. These will be considered seriatim below.

- 230 It is noteworthy that in **Hall v Busst** there was no discussion of whether a term was implied in the grant of the " *first option* " that the land would not be transferred until that option had arisen for exercise, or whether any such implied term would itself be void as a restraint on alienation. The question of voidness of clause 3 on the basis of restraint against alienation arose for the first time in the High Court. The case was argued initially on the basis that the price in the option was void for uncertainty. One or more of the bench appear to have realised that even if the price were void for uncertainty, the breach of clause 3 that had undoubtedly occurred might provide an independent ground on which the plaintiff in the action could have recovered damages. **Hall v Busst** does not provide authority that an implied restraint on alienation, arising from the grant of an option to purchase, can never infringe a legal rule against restraints on alienation.
- 231 I have already discussed **Oliver v Oliver** at [190]-[192] above. It is also not authority that the principle concerning restraints on alienation could never apply to the grant of an option. Rather, the Court upheld the particular option that had been granted in **Oliver** , which was required to be exercised within a reasonable time of the testator's death. However, the Court accepted that there were some circumstances, such as those in **In re Rosher** , **In re Cockerill** , or **District Bank v Brown** when a purported grant of an option or right of first refusal could infringe the rule against restraints on alienation. McTiernan J in **Oliver** at 26 said: "*I feel that I need not encounter the question whether the option to purchase is void as being a total or substantial restraint on the alienation of the property by Norman .*" He did not say that the question of whether an option to purchase was

void as being a total or substantial restraint on alienation was a ridiculous question.

232 Further, the relevance of **Oliver** to both **Picton Power Lines** and the present case may be limited by the fact that the option that was under consideration in **Oliver** was an option that was contained in the document that granted the property rights in question (the will). Thus **Oliver** would be applicable to restraints on alienation imposed by a contract only to the extent that it embodies a general public policy, or to the extent that the theme in **Hall v Busst**, that one cannot do indirectly what one cannot do directly, might be applicable.

233 I recognise that in **Oliver** Dixon CJ reasoned in terms of a void restraint being one that detracted from a fee simple previously granted, that had alienability as an essential right belonging to it. However, by the time of the decision in **Hall v Busst** a little over two years later in the passage 217-8 that I have quoted at [198] above he refrained from deciding the basis upon which a condition subsequent attached to the grant of an estate was void, but rather simply accepted that the law was so. Concerning a contractual restraint on alienation he accepted Mr Sweet's view that the justification for the law concerning restraints on alienation was that "*the attempted restraint is contrary to public policy, and its form is immaterial*". He also appears to accept the castigation by Dr Glanville Williams of the theory that the basis of the invalidity of a restraint on alienation lies in the restraint being repugnant to the grant. Fullagar J in **Hall v Busst** at 223-224 accepted the reasons that Dixon CJ gave for concluding that the principle applicable to a condition of or a conditional limitation must be equally applicable to a covenant by a transferee of a fee simple. That acceptance appears to embrace acceptance of the view that the justification lies in public policy. (Yet, paradoxically, Fullagar J also adopted the "*repugnancy to the estate*" basis for his own conclusion ([199] above).) The remarks of Menzies J at 235-236, quoted at [202] above, are

to similar effect to those of Dixon CJ so far as the doctrine being based in public policy is concerned. Recognising the basis in public policy of the law concerning restraints against alienation, insofar as contractual restraints are concerned, is doing no more than picking up a theme of the writings of Coke on the topic.

- 234 Thus in **Hall v Busst**, a majority of the High Court accepted that public policy is the basis for the rule against restraints on alienation so far as contractual restraints are concerned. This acceptance raises a question of the extent to which, in the context of contractual restraints, one can properly rely upon 19th century cases on restraints on alienation imposed in grants of property by deed or will are concerned. This is because those 19th century cases had accepted a different basis for the rule, namely, repugnancy to the grant.
- 235 **Woodroffe v Box** (1954) 92 CLR 245 arose when the owner of premises entered a deed with his tenant, containing a covenant "*that [the owner's] executors will upon the death of the survivor of the owner and his wife give to the tenant or his executors or administrators or at his or their requests to him or them conjointly with the tenant's son the right of first refusal to purchase the premises*" for £13,000. After the death of both the owner and his wife, the owner's executors declined to convey the property to the tenant. The judge in the court below decided that if the executors decided to sell the property they were obliged to offer it to the tenant in preference to all others for the stipulated sum, but there was no obligation on the executors to make any such offer before they wished to sell.
- 236 On appeal, the High Court, by majority (Webb J dissenting) reversed the judgment below. Fullagar and Kitto JJ upheld the appellant tenant's contention that, when both the owner and his wife had died, the owner's executors "*became bound to offer, or were to be treated as offering, to sell the land*" to the tenant for £13,000 (253). Their Honours held, at 259:

"The executors are bound, on the occurrence of the second of the two events, to make an offer to sell the property, and it is clear that there is an implied term of the contract that [the owner] will do nothing to prevent their making an effective offer. Indeed it would seem that on that construction [the tenant] acquires an equitable interest in the land."

237 After concluding, by detailed consideration of the text in the particular agreement, that the tenant's construction was correct, their Honours continued, at 261:

"It may be that, strictly speaking, cl 1 of the agreement requires the making of a formal offer by the respondents to the appellant. But we think that in equity cl 1 itself, on the death of the survivor of [the owner] and his wife, operates as an offer capable of being accepted in the manner in which it was accepted, so as to create an open contract for the sale of the land for £13,000."

238 No argument had been raised in **Woodroffe v Box** about the option creating an invalid restraint on alienation, but even so the restraint on alienation that was implicit in the granting of the option can be readily distinguished from the obligations at issue in **Hall v Busst**. In **Woodroffe v Box** the restraint on alienation that was implicit in the grant of the option would necessarily come to an end a reasonable time after the death of the survivor of the owner and his wife. Further, it was not granted in connection with the transfer of any interest in land to the tenant. In these circumstances, the only relevance of **Woodroffe v Box** to how the law concerning restraints against alienation applies to options is in its recognition of the implied obligation of the grantor of the option not to act inconsistently with the option, while the option remained on foot and unperformed.

239 Another reason why **Woodroffe v Box** was not a case concerning which the law concerning restraints on alienation could apply, was that the

landlord was not someone who had disposed of an interest in property on the basis that he sought to restrain what was done with that interest in the property thereafter. It was a purely contractual restraint on alienation, that was less than total, that he imposed on property that was already his own. Likewise in ***Bahr v Nicolay (No 2)*** the Bahrs were not in a situation where they had disposed of all their interest in the land, but then sought to restrain what was done with the property thereafter - rather, they always had the equitable interest in the land arising from clause 6 of the contract. It could not have been suggested that the restraint for three years, plus a reasonable period to complete the conveyancing, that was implicit in the agreement entered into in ***Bahr v Nicolay (No 2)*** was the sort of agreement that would infringe public policy. The same analysis can be given concerning ***Picton Power Lines*** .

240 ***Bahr v Nicolay (No 2)*** was a case where the Bahrs had sold Lot 340 to Mr Nicolay for \$32,000, on the basis that the Bahrs would have a lease back for three years at a rent of \$4,000 per year. Clause 6 of the contract provided that at the expiration of the lease the Bahrs " *will enter into a contract with [Nicolay] for the purchase by the [Bahrs] of the land*" for the sum of \$45,000 payable by way of 10% deposit with the balance of the purchase money to be paid at settlement, and settlement to be effected 30 days after payment of the deposit. The evident purpose of the transaction was to enable the Bahrs to raise money to enable them to develop the land. Notwithstanding that, the case was run and decided on the basis that the transaction was not in substance a mortgage. It was also run and decided on the basis that, even though clause 6 did not impose an express obligation on Mr Nicolay to sell, by necessary implication it imposed on him an obligation to sell.

241 All the judges agreed that clause 6 constituted a binding contract of the second type identified in ***Masters v Cameron*** (1954) 91 CLR 353 at 360 requiring the parties to bring into existence the contemplated formal

contract and then to carry it into execution: Mason CJ and Dawson J at 610-611, Wilson and Toohey JJ at 628, Brennan J at 645.

- 242 Mr Nicolay sold the land, before the three years had expired, to the Thompsons. By a clause in the contract under which they purchased, the Thompsons acknowledged the existence of the buyback clause. After the Thompsons became registered proprietors, their solicitor wrote to the Bahrs confirming that they recognised the repurchase clause. The Bahrs sought specific performance of the repurchase contract, when the time came for that contract to be performable, and the Thompsons disowned their earlier undertaking to honour it.
- 243 The High Court upheld the Bahrs' entitlement to specific performance. All the judges agreed that clause 6 conferred on the Bahrs an equitable estate or interest in lot 340, commensurate with their ability to obtain specific performance of clause 6, that was enforceable against Mr Nicolay. Mason CJ and Dawson J at 610-612 said that even though execution of the formal contract was required before the Bahrs could be compelled to pay the purchase price, *"in cases of this kind the Court will not only order that proper steps be taken by the defendant in accordance with his promise to secure fulfilment of the contract but will also order specific performance generally, subject to the fulfilment of the condition"* (612). At the least, this would confer upon the Bahrs a contingent equitable interest in the land (though their Honours did not feel it necessary to decide whether the making of a formal contract in the present case was such a contingency.) At 628-9 Wilson and Toohey JJ said that, leaving aside any implications of the Torrens system, under the contract between the Bahrs and Nicolay, Nicolay:

"held the legal estate in lot 340 and the [Bahrs] held an equitable estate or interest, 'measured by what a court of equity would decree in an action for specific performance' ... As the holder of the legal estate in the land [Nicolay] was free to dispose of his

interest. But he could not relieve himself of his obligation to transfer the land to the [Bahrs] in accordance with cl 6 and (the Torrens system and questions of priorities aside) the equitable estate held by the [Bahrs] was not affected by disposition by [Nicolay] of his legal estate."

244 At 629, Wilson and Toohey JJ continued:

"The agreement between the [Bahrs] and [Nicolay] in no way sought to restrain the latter from disposing of or dealing with the interest which he had acquired. He did not require the consent of the [Bahrs] to do such a thing. There was in truth no 'bond or covenant or contract purporting to impose a total contractual restraint upon alienation', to use the language of Dixon CJ in **Hall v Busst**. As Pidgeon J pointed out in the Full Court, [Nicolay] was free to assign his interests in the land but 'he could not discharge himself from liability on the covenant to enter into the contract with the [Bahrs]'. 'If, however,' his Honour continued, 'he assigned the land in a manner where he could compel the assignees to give title then I would consider he would have performed his obligations.' Equally, if [Nicolay] failed to ensure that he could compel the [Thompsons] to give title, he was in breach of his contract with the [Bahrs]."

245 Brennan J, at 646, said:

"The case has proceeded on the footing that cl 6 of the Bahrs' contract did not preclude Nicolay from disposing of or dealing with the fee simple which he had acquired and that he did not require the consent of the appellants to dispose of or deal with it. On that footing, cl 6 was not construed as a 'bond or covenant or contract purporting to impose a total contractual restraint upon alienation', to use the language of Dixon CJ in **Hall v Busst** (1960) 104 CLR 206 at 217. But the consequence of treating Nicolay as free to sell lot 340 while remaining bound by cl 6 is that Nicolay was bound to do what was necessary to protect the Bahrs' interest under cl 6 for, as Pidgeon J pointed out in the Full Court, Nicolay 'could not discharge himself from liability on the covenant to enter into the contract with the appellants'. He was bound not to put it outside his power to perform his obligation under cl 6: **Stirling v Maitland** (1864) 5 B&S 840; 122 ER 1043 at 852, 1047; **Southern Foundries (1926) Ltd v Shirlaw** [1940] AC 701 at 717, per Lord Atkin."

246 At 647 Brennan J said:

"As the Bahrs' contract conferred on the Bahrs an equitable interest in lot 340, not a mere contractual right, and as the Thompsons knew of that interest at all material times, the interest which the Thompsons acquired when they entered into the contract to buy lot 340 was subject to the interest of the Bahrs."

247 This reasoning is analogous to that in ***Oliver v Oliver*** . The contract in ***Bahr v Nicolay*** did not have the effect of giving Mr Nicolay an unrestricted fee simple, which was then restricted by a restraint on alienation. Rather, all he acquired was a fee simple subject to the equitable right of the Bahrs to a reconveyance after three years. During those three years, Mr Nicolay was totally free to alienate the whole of his property right, namely the fee simple subject to the equitable interest, if he chose. Further, when the restraint was of such short duration, it did not have the effect of tying up land indefinitely, or making it for practical purposes inalienable.

248 That situation can be contrasted with ***London and South Western Railway Company v Gomm*** (1882) 20 Ch D 562. In ***Gomm*** , the plaintiff conveyed land to Mr Powell for £100, subject to a covenant that he, his heirs or assigns would at any time thereafter, whenever the land might be required for the railway or works of the plaintiff, and whenever requested by the plaintiff on six calendar months notice, and upon receiving £100, reconvey the land to the plaintiff. Mr Powell's heir had conveyed the land to a third party who took with notice of the covenant. The plaintiff sought to enforce the covenant against the assignee. At 581 Jessel MR held that the plaintiff's right to a reconveyance was the type that could give an interest in land:

"The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken

away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

249 Sir James Hannen at 586, and Lindley LJ at 588, agreed with this analysis.

250 I mention that in **Hall v Busst** Dixon CJ distinguished the situation in **Hall v Busst** from the type of analysis of rights that I have quoted from **Bahr v Nicolay (No 2)** and **Gomm** . The Chief Justice said at 217: "*with contractual restraints there is no fetter upon alienation which does more than sound in damages, that is, unless a doctrine of equity intervenes to make it bind the land .*" In **Hall v Busst** the plaintiff's only claim was for damages, and the fact that the defendant had sold the land to a third party would have meant the end of any equitable interest of the plaintiff in the land, at least if that third party had no notice.

251 In **Gomm** , notwithstanding that the plaintiff's right to a reconveyance was the sort of right that could give rise to an equitable interest in the land, the court held that the right of repurchase was void because it infringed the rule against perpetuities. Whether an equitable interest actually arises from a contract to dispose of land is dependent upon the extent to which specific performance of the contract can be obtained, and a contract that infringes public policy is not susceptible of specific performance. Similarly, even though on many occasions when an option to purchase is granted there will be an implied term that the grantor will not dispose of the land pending the opportunity for exercise of the option, an implication will not be made if to do so is contrary to public policy. Thus, in principle it would be possible that an option to purchase or a right of first refusal concerning land would not give rise to an equitable interest, and would not give rise to an enforceable implied term that the grantor will not dispose of the land, if the option itself (alone or in conjunction with other provisions from which it was not severable) operated as an impermissible restraint on alienation of land.

252 The result in **Gomm** would be different in New South Wales now, because s 15 **Perpetuities Act 1984** provides that the rule against perpetuities does not apply to any right of pre-emption given for valuable consideration or by will in respect of the property, or to any other option given for valuable consideration or by will to acquire an interest in property. Even so, **Gomm** continues to illustrate the way in which there is an interaction between options to purchase land and the public policy against restraints on alienation.

253 It will be recalled that Handley JA said in **Picton Power Lines** : "*Restraints of this kind, arising as incidents of a personal contract for the sale or other disposition of land stand right outside any legal doctrine which invalidates contractual restraints on alienation.*" There is sometimes significance in the word "*personal*" , concerning enforceability of options. An option has a dual nature, or what has been described as a "*centaur-like quality*" (English Law Reform Committee, *Fourth Report, The Rule against Perpetuities* (1956) Cmnd 18 at [35], quoted in New South Wales Law Reform Commission, *Report on Perpetuities and Accumulations* , (1976) LRC 26 at [17.6]). It is a personal contract. However, when given for valuable consideration, an option can also confer on the option holder an equitable interest in the land. The distinction between the aspect of an option as a personal contract and its aspect as an interest in land had significance in connection with the application of the rule against perpetuities to options. In so far as an option created a personal contract, the rule against perpetuities did not apply to it. That was because the "*new*" rule against perpetuities derived from **Howard v Duke of Norfolk** and finally settled in **Cadell v Palmer** (1833) 1 Cl & Fin 372; 6 ER 956 identified the time within which an interest in land or other property must vest - it had nothing to say about the time within which a personal contract must be performed. Insofar as an option was being enforced by the original grantee against the person who gave it, the personal aspect of the option had the effect that it could be sued on at common law, and (subject

to any question of laches) specific performance of it could be obtained, regardless of the lapse of time. Specific performance could be obtained because the rationale for granting that remedy is that, in the particular case being considered, the defendant has a contractual obligation to the plaintiff concerning which damages are not an adequate remedy. Its availability does not depend upon the plaintiff having any pre-existing interest in land concerning which he is seeking equity's assistance: **Hutton v Watling** [1948] Ch 26; **Trustees Executors & Agency Company Ltd v Peters** (1960) 102 CLR 537 at 546 per Kitto J. It was otherwise if a grantee sought to enforce an option against an assignee of the grantor, who had taken with notice of the option. As the assignee was not a party to the contract the grantee could not sue the assignee on the personal aspect of the covenant. However, insofar as the option created an interest in property, of which the assignee had notice, the assignee was bound by the option if and only if the interest in land created by the option must vest within the perpetuity period. The attempt to enforce an option to purchase in **London & South Western Railway Co v Gomm** failed because the defendant was not the original covenantor but an assignee who had taken with notice, and the option would not necessarily have been exercisable within the perpetuity period. Relevantly to the present case, which concerns the enforceability of the option given by Mr Evans against his executors, an option that was given by a testator can be enforced against his executor without regard to the rule against perpetuities, as the executor is considered as the alter ego of the testator, rather than his assignee: **Consolidated Development Pty Ltd v Holt** (1986) 6 NSWLR 607 at 614-615 per Young J. This topic is lucidly discussed in C.M. Sappideen & P.J. Butt, *Perpetuities Act 1984* (1986) The Law Book Company Ltd at pp 130-137.

- 254 Notwithstanding the similarity of objectives of the general law against restraints on alienation and of the rule against perpetuities, the distinction between the aspect of an option as a personal covenant, and its aspect as an interest in land cannot, in my respectful view, provide a line of

demarcation for the application to options of the general law against restraints on alienation. The NSW Law Reform Commission's Report on *Perpetuities and Accumulations* accepted at [17.10] that the rule against perpetuities "*has its origin in family settlements and to derive from it a general concept applicable to commercial transactions is wrong*". This was the basis of the Commission's recommendation that is now enacted in s 15 *Perpetuities Act*. However, *Hall v Busst* has expressly decided that, at least sometimes, the law against restraints on alienation can result in a contractual covenant being invalid even between the original parties to a commercial contract. The specific contractual provision that the majority in *Hall v Busst* held to infringe the principles concerning restraints on alienation was not an option. Nevertheless, the reasons of the majority for the application of the law concerning restraints on alienation to contractual covenants are quite general. There is no reason of principle why the reasons given by the majority should not apply to options to purchase land.

255 Moreover, I do not consider that either *Oliver v Oliver*, *Woodroffe v Box* or *Bahr v Nicolay (No 2)* support the proposition that restraints against alienation arising as incidents of a personal contract for sale or option or right of pre-emption can never be invalidated by operation of the doctrine of restraint against alienation.

256 Accordingly, I do not agree with Handley JA's statement of principle, quoted above at [225]. In principle it is perfectly possible for restraints against alienation arising as incidents of a personal contract for sale or option or right of pre-emption to be invalidated by operation of the doctrine of restraint against alienation. It is another question, of course, whether any particular option infringes the rule against restraints on alienation, or indeed whether in practice one ever encounters such an option. But, for example, a sale of land with a contemporaneous option for the purchaser or his executors or administrators to repurchase at any time in the next one hundred years may be a candidate.

Elton v Cavill and Elton v Cavill (No 2)

257 **Elton v Cavill** (1994) NSWConvR 55-701 and **Elton v Cavill (No 2)** (1994) 34 NSWLR 289 are decisions of McClelland CJ in Eq and Young J respectively. The decisions both accepted the "*valid collateral purpose*" exception and developed the concept. Each decision related to an agreement that had been entered into between the four owners as tenants in common of a building divided into four home units. The deed was entered at a time when the parties were already co-owners of the land. Under it, each owner covenanted:

"... that he will not sell, transfer, assign, lease, license, part with possession of or otherwise dispose of any part or the whole of his interest in the Property, (nor will he agree to do so) without having received the written consent of each of the other Owners of the Property to such sale, transfer, assignment, lease, license, parting with possession or disposition of his interest to the intending purchaser, transferee, assignee, lease, license, possessor or dispose as the case may be."

258 There were exceptions from that obligation concerning a lease or license for a term of between three months and twelve months, and relating to a mortgagee bona fide exercising power of sale. One clause specifically stated that the owners could at their discretion refuse to accept the proposed purchaser as a co-proprietor, and had no obligation to give a reason for such a refusal. Another clause required any owner who transferred to ensure that the person to whom he transferred came to be bound by the provisions of the deed.

259 McClelland CJ in Eq granted an interlocutory injunction restraining one of the co-owners from disposing of his one-quarter share without consent . Recognising that contractual restraints on alienation could be held void, he said:

"... [the principle's] sole rationale in the case of contractual restraints must be found in public policy considerations relating to the social and economic benefits to the community arising from the free marketability of property, recognised throughout the history of the common law (see eg C Sweet - "Restraints on Alienation" (1917) 33 *Law Quarterly Review* 236, particularly at 236 to 242, and MI Schnebly - "Restraints Upon the Alienation of Legal Interests" (1935) 44 *Yale Law Journal* 961, particularly at 961 to 966).

There is no universal rule that a restraint on the alienation of property is necessarily void. There are numerous classes of case where such a restraint will be regarded in law as valid and enforceable. Rigid classification in this area is probably impossible, but one such class has been identified as comprising cases where the restraint is imposed for the protection of a valid collateral object (see *Reuthlinger* [1976] 1 NSWLR at 101D per Needham J citing Sweet op cit at 246 to 253). This class may I think be expanded to embrace cases where the restraint is imposed for the protection of some legitimate collateral interest of another person, subject to certain limits. A sub class of such cases exists where different persons have concurrent interests in the same physical property in circumstances where the identity of one of them (who is subject to the relevant restraint) is of legitimate importance to the other. A good example is provided by the case of a covenant or condition in a lease against assignment by the lessee. Such a restraint is undoubtedly valid. Its rationale was discussed in *Roe v Galliers* (1787) 2 TR 133, 100 ER 72. Ashhurst J said (at 138): '... it is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; a covenant therefore not to assign is legal; covenants to that effect are frequently inserted in leases; ejectments are every day brought on a breach of such covenants. The landlord may very well provide that the tenant shall not make him liable to any risk by a voluntary assignment, or by any act which obliges him to relinquish the possession.'

Buller J said (at 140): 'It is clear that the landlord in this case parted with the term on account of his personal confidence in his tenant; that is manifestly the case in all leases where clauses against alienation are inserted. The landlord perhaps relies on the tenant's honesty; or he approves of his skill in farming, and thinks he will take more care of the farm than another; and therefore he has a right to guard against the event of the estate's falling into the hands of any other person, who may not manage it so well as the original tenant. Suppose a lease were made for twenty one years, on condition that the tenant shall so long continue to occupy the land personally; there could be no objection made to such a condition; for the personal confidence is the very motive of granting the lease; and that is like the present case.'

The same sub class may be considered as including the case of a life estate in property where the identity of the life tenant may well be of legitimate importance to the remainderman. A restraint on alienation by a life tenant is valid (see eg *Metcalfe v Metcalfe* 43 ChD 633, *Blackman v Fysh* [1892] 3 Ch 209, and *Muschamp v Bluet* ((1618) J Bridgman 133, 123 ER 1253 (particularly at 136 *arguendo*))."

260 McLelland CJ in Eq held that each tenant in common had a legitimate interest in the identity of the others, particularly when they all occupied different parts of the same building. Consequently he held that the particular restraint in question was not void as being contrary to public policy. He noted that the restraint related only to disposition by a co-owner of his or her undivided one-quarter share, that it had no application to a sale or other disposition of the whole of the property and thus did not affect any rights of the co-owners to compel the sale of the property as a whole by an application to the Court under s 66G **Conveyancing Act 1919** .

261 When the case came before Young J at the final hearing, his Honour refused to make the injunction on a final basis. He accepted that Mr Sweet had been the first to assert the principle that "*a restraint on alienation may be good, if it is imposed, not for the purpose of making the property inalienable, but in order to effect an object which is itself lawful.*" However, Young J expressed the view that "*the examples he provides are not sufficient in themselves to deduce the general rule which he lays down*" (296). After an extensive analysis of Professor Schnebly's article in the *Yale Law Journal* , Young J concluded, at 297 that:

"there is nothing in the Schnebly article, despite its comprehensiveness, which enforces Mr Sweet's rule about collateral purposes."

262 Young J distinguished the case of the legitimate interest that landlords have in who holds the tenancy in their building, and that remaindermen

have in the person to whom the life tenant assigns, from the situation that exists between co-owners. Young J said, at 297-8:

"... a restraint on transferring a life estate does not cause any real problems as such an estate is not readily marketed in any event. Moreover, a life interest is commonly given for the purpose of providing the life tenant with a means of support, so that if the life tenant can alienate and spend the proceeds of sale the purpose is likely to be defeated. Accordingly, there are good reasons why the rule of public policy against inalienability does not apply. Likewise, with a lease the lessor's control over occupancy of the premises is important. For a very long lease, it may be that the same rule applies as to a fee simple though, in **Gunning v Sorg** 73 NE 870 (1905), a forfeiture restraint upon a term of ninety-nine years was upheld."

263 Notwithstanding those problems in accepting that collateral purpose is a proper aid to deciding the validity of a restraint against alienation, at 298, his Honour reiterated a view he had expressed at first instance in **Wollondilly Shire Council v Picton Power Lines Pty Ltd** (1991) 5 BPR 11,503 at 11,507-8. it was that:

"Mr Sweet's article had been said to be the 'best statement of the law' by Glanville Williams in "The Doctrine of Repugnancy" (1943) 59 *LQR* 343 at 351 and had been referred to with approval in Queensland in **Grayson v Grayson** [1922] QSR 155, and was obviously held in high esteem by Sir Owen Dixon in **Hall v Busst** ."

264 Young J, at 300, concluded that:

"Mr Sweet's view has been accepted not only by strong academic writers, but also by judges whose reputations in the property law field are most enviable. Furthermore, there is a growing tendency to limit the effect that ghosts of old property law rules, rules which were worked out for a completely different social system in a different age, should have upon the use of property in Australia at the current day."

265 At 299, Young J said that the conclusion of Handley JA in **Wollondilly** , that the doctrine of restraint against alienation did not apply to contracts of pre-emption appeared:

"...to be a completely different method of approach to what has been taken heretofore. That passage tends to suggest that Mr Sweet's rule does not exist because pre-emptions and mortgages, etc, lie just outside the rule altogether and so those cases should not be considered an exception to the rule. On the other hand, the approach of the Court of Appeal appears to be that one should not take too technical a point on contractual restraints on alienation, but apply a relatively broad brush approach and, if one has the case where there is a relatively common and harmless situation such as an agreement that X will have the right of pre-emption for a limited time, one just does not even consider the technical rules against restraint on alienation."

266 At 300, Young J concluded that:

"... the collateral purpose rule should be held to be part of the law of this state and it should be held that there is a legitimate interest in a co-owner in having a veto over who should be an owner of other undivided shares in the same property to justify a restraint on alienation which is for the purpose of securing a proper collateral benefit."

267 Even so, Young J did not uphold the restraint before him, because it went wider than securing a proper collateral benefit (protecting the quality of life of the occupiers), and could not be severed. He accepted an argument that there were:

"... at least two invalid or illegitimate collateral objects in the instant case, viz: (a) that a co-owner may use the restraint to achieve pre-emptive rights which do not otherwise exist; and (b) a co-owner is in a position to dictate completely the terms of sale and the price."

268 In **Western Metals Resources Ltd v Murrin Murrin East Pty Ltd** [1999] WASC 257 Templeman J declined to follow the aspect of the decision of

Young J in *Elton v Cavill (No 2)* that had held that even if a restraint protects a legitimate interest it is void if it also protects some other illegitimate object: [63]-[64]. Templeman J there said that counsel had submitted:

"... that there may be any number of objects which a restraint would protect, some legitimate, some not legitimate: and that it would be wrong to strike down a restraint simply because it happened to protect illegitimate interests, as it were, when it had a perfectly proper rationale.

That I think is the effect of an article in the 'Law Quarterly Review' of July 1917 by Mr Charles Sweet, which appears to form the basis from which the modern learning has developed. It is an article which is referred to in a number of the cases to which I have referred. I accept that submission. It seems to me, with respect, that I should not come to the view that the gloss placed by Young J is appropriately placed."

269 I do not read Young J in *Elton v Cavill (No 2)* as saying that an illegitimate purpose in a restraint on alienation is sufficient to strike down the restraint. Rather, he is saying that an illegitimate purpose can (not necessarily must) result in it being struck down if the portion that achieves the illegitimacy is not severable. The preferable view is that if the clause cannot be severed, and achieves several different purposes, the task for the court is to decide whether, overall, it is contrary to public policy.

270 In *Elton v Cavill (No 2)* the clause prohibiting assignment without the consent of the other owners, which could be refused at their discretion and without reasons, was in Young J's view wider than was needed for the legitimate purpose of protecting the quality of life of the other owners. A clause prohibiting assignment without consent, which would not be unreasonably refused, would have been adequate to achieve that objective. There was evidence that the particular clause in question had been included in the deed as part of a plan by two of the co-owners to take over the entire building. The solicitor who had drawn the relevant deed

was a partner of those two co-owners in a partnership to acquire the other interests in the building. That solicitor came to act for a third co-owner, and obtained her signature to the deed without informing her of his involvement in the partnership, or pointing out to her the breadth of its provisions. In that unusual situation, it was understandable that Young J rejected the submission that, because the clause achieved the legitimate purpose of protecting the quality of life, the clause was not contrary to public policy.

Caboche v Ramsay

271 ***Caboche v Ramsay*** (1993) 119 ALR 215 is a decision of the Full Federal Court (Ryan, Gummow and Lee JJ). It related to the rules of a superannuation fund, constituted pursuant to a trust deed and rules. Mr Alan Bond was the sole member. On a date that preceded the date on which he committed an act of bankruptcy, Mr Bond became entitled to certain benefits under the rules.

272 Clause 16(2) of the trust deed provided:

"If a person to whom the benefit is or may be payable, under this deed and the rules does or permits to be done any act or thing or some event happens whereby the whole or any part of that benefit may become payable to or vested in any other person then that benefit shall be forfeited to the fund."

273 The court unanimously held that that provision was void as a restraint upon alienation. The ratio was that the clause imposed a restraint upon alienation attached as a condition subsequent to the estate. This was because the clause purported to act after other provisions had already operated. Under those other provisions, absolute entitlements had vested in Mr Bond. The clause purported to make these absolute entitlements forfeitable. The clause was therefore invalid as an impermissible restraint on alienation: Ryan J at 218, Gummow J at 227-228, Lee J at 249.

274 However Gummow J at 231-232 (with whom Lee J agreed in this respect) gave *obiter* consideration to the effect on contractual restraints of the law against restraints on alienation. His Honour accepted, with reference to ***Reuthlinger v MacDonald***, that " *it would appear in the case of contractual restraints that the question is one of degree*".

Allstate Prospecting v PosGold Mines

275 ***Allstate Prospecting Pty Ltd v PosGold Mines Ltd*** (Supreme Court of Tasmania, Zeeman J, 27 April 1995, unreported, BC9503003) concerned a tripartite mining joint venture under which the parties conferred pre-emptive rights on each other concerning their respective shares in the venture. PosGold entered into an agreement to sell its interest to Beaconsfield, a co-joint venturer. The agreement contained provisions making it clear that the sale was subject to the pre-emptive rights of acquisition enjoyed by all the joint venturers under the joint venture agreement.

276 Allstate was the third joint venturer. It sought an injunction to prevent the sale to Beaconsfield from proceeding. Slicer J explained the commercial point of the litigation when the case went on appeal (see [287] below). Under the joint venture agreement the joint venturer with the largest interest was entitled to manage the venture. Slicer J said:

"The effect of a transfer of interest of [sic - semble to] Beaconsfield is that [Allstate] would lose its status as venture manager. [Allstate] has, for commercial reasons, declined to take up the offer. Instead, it contends that the acceptance of offer of 30 December is of no effect and that the Joint Venture Agreement prohibits any transfer, except one which is in strict compliance with the agreement and that the method adopted by [PosGold] does not meet the required conditions."

277 PosGold and Beaconsfield contended, in response, that the pre-emptive rights clause prohibited absolutely a transfer to another joint venturer, other than in accordance with the procedure of the pre-emptive rights clause. They argued that because that was an unlawful restraint on alienation, the effect was that there were no restrictions on any party transferring the whole or any part of its percentage interest as and when it saw fit.

278 Zeeman J held, at BC 13, that **Hall v Busst** "is authority for the proposition that an absolute prohibition on transferring property without the consent of another person, imposed by contract, is void as a restraint on alienation." After referring, at BC 13, to the remark of Gummow J in **Caboche v Ramsay** that I have set out at [274] above, Zeeman J said: " If Gummow J was intending to convey that **Reuthlinger** is authority for the proposition that a contractual restraint on alienation, falling short of an absolute prohibition, may amount to an unlawful restraint, then with great respect I do not agree" . After quoting, at BC 14 extensively from Needham J's judgment in **Reuthlinger** he continued, at BC 14:

"It appears to be settled that a condition, as distinct from an obligation assumed by contract, which limits but does not prohibit the right to alienate may or may not amount to an unlawful restraint on alienation, provided that there is a sufficient degree of interference with the right of alienation. Such interference may take the form of restricting alienation to a particular person or class of persons or of imposing an obligation to sell at a particular price."

279 Zeeman J adopted, at BC 15, the view of McCawley CJ (sitting at first instance) in **Grayson v Grayson** [1922] St R Qd 155 at 163. That view was that a restraint on alienation whereby property might not be disposed of to particular persons, or might only be disposed of to particular persons, amounted to an unlawful restraint on alienation if it is:

"... restricted within limits so narrow as to constitute a substantial taking away, not of the whole power of alienation, but of a valuable portion of it, subjecting it to fetters which inevitably, by limiting the market, diminish the ordinary selling value of the land, and which might, in fact, destroy all opportunity of selling."

280 **Grayson** was a case concerning a will that gave land, and required that it not be sold except on certain terms. The test which McCawley CJ stated for unlawful restraints was one applicable to restraints imposed in the grant itself. It is clear that Zeeman J adopted it as the test applicable to restraints imposed in that way.

281 By contrast, at BC 15, Zeeman J expressed the view that contractual restrictions as to the persons to whom property may be disposed of, as to the price at which may be sold, or otherwise limiting but not prohibiting alienation, are lawful.

282 Notwithstanding that expression of view, Zeeman J stated that he did not need to so decide, because even if such restrictions could be imposed by a contract, the particular provision before him would not constitute an unlawful restraint on alienation.

283 Matters that he took into account included (BC15):

"1 That the invalidity of a contractual restraint on alienation rests entirely on principles of public policy.

2 Such restrictions as are imposed by the joint venture agreement amount to more than mere restrictions on the transfer of joint venture property, but on the transfer of such property, which the parties have committed to the joint venture, coupled with a range of contractual rights and obligations."

284 As well, under the clause a selling joint venturer would not be put in the position of having to sell at an undervalue. Because there was insufficient evidence to support it, his Honour did not accept (BC16) the proposition that:

"... the most likely purchaser of a percentage interest of a joint venturer might be expected to be another joint venturer and that a prohibition from transferring an interest to another joint venturer substantially prohibited a transfer."

285 He found that there were proper commercial reasons for prohibiting a joint venturer from transferring its interest to another joint venturer, arising from the joint venture property including information and chattels. As well, the provisions concerning the management of the joint venture were relevant. He concluded (at BC17);

"The purpose of such a clause would not be to restrain alienation but to maintain the integrity of the joint venture, the performance of its objectives being what the parties committed themselves and their property to upon entering into the joint venture agreement. I see no basis upon which considerations of public policy should lead to the result that such a restriction be considered to be void."

286 He went on to refuse the injunction, for reasons arising from the construction of the pre-emptive rights clause.

287 That judgment was reversed on appeal: **Allstate Prospecting Pty Ltd v PosGold Mines Ltd** (Supreme Court of Tasmania (Full Court), 8 June 1995, unreported). The appeal succeeded because the members of the Full Court differed from Zeeman J concerning construction of the pre-emptive rights clause. As Wright J recorded at BC 4, Zeeman J's conclusion that the pre-emptive rights clause did not amount to an invalid restraint on alienation was not challenged on the appeal. Wright J

expressed the view that Zeeman J's conclusion was "*clearly correct*". Other judges in the Full Court made no mention of the matter.

Nitschke

- 288 ***John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc*** [2004] SASC 128; (2004) 88 SASR 334 is a decision of the South Australian Full Court. The golf club purchased from the Nitschkes certain land that it had previously leased from them. Pursuant to the terms of the contract, an encumbrance was registered on the title of the land. In other words, the restriction being considered in ***Nitschke*** was one imposed in connection with the transfer of the property whose alienation was restrained. Clause 3 of the encumbrance had the effect of prohibiting the Club from selling the land or any portion of it without first giving the Nitschkes the opportunity of purchasing the land on the same terms as those of the proposed sale. Clause 4 was an agreement not to sell or agree to sell or transfer the estate or interest of the Club in the land or any portion thereof without obtaining from the purchaser or transferee of the land in question binding agreements to execute and lodge a Memorandum of Encumbrance in favour of the Nitschkes or their nominee, containing the same or substantially similar covenant and stipulations.
- 289 The trial judge had held that both of these provisions of the encumbrance were void as restraints on alienation. On the appeal, Besanko J (Mullighan and Gray JJ agreeing) held that the clause providing a right of first refusal was enforceable. However their Honours held that the covenant requiring any purchaser also to give a right of first refusal, and a covenant to obtain such a covenant from any successive purchaser, was void as a restraint on alienation.
- 290 At [114] Besanko J referred to the statement of Needham J in ***Reuthlinger v MacDonald*** :

"... that **Hall v Busst** goes no further than saying that a contractual restriction on alienation which provides that land may not be alienated without the consent of another party is void, and it cannot be used to invalidate any less contractual restriction. I agree. I mention in passing that I respectfully disagree with his Honour that Fullagar J in **Hall v Busst** construed cl 3 as a free standing provision in the sense I have explained above. His Honour also said that a restraint on alienation which was imposed for the protection of a valid collateral object was not invalid. I must say that on my reading of the cases, however attractive it may be, such an exception or qualification to the doctrine is not well established, other than perhaps, in New South Wales. In **Caboche & Bond v Ramsay** (1993) 119 ALR 215, Gummow J (at 232) took the view that Needham J had said that in the case of contractual restraints the question was one of degree and Gummow J appeared to agree with that proposition. In **Allstate Prospecting Pty Ltd v Posgold Mines Ltd and Ors** (Unreported Supreme Court of Tasmania, Zeeman J, 27 April 1995) Zeeman J took a different view of the effect of Needham J's remarks."

291 I can find nowhere where Needham J said that Fullagar J had construed clause 3 as a freestanding provision. Even though Fullagar J differed from Dixon CJ and Menzies J about whether clause 3 was independent of the option, in my view Needham J analysed the case correctly in reaching the conclusion that I have set out at [213] above. As to whether there is a difference of substance between the views of Gummow J in **Caboche** and those of Zeeman J in **Allstate** concerning Needham J's remarks in **Reuthlinger**, it should be borne in mind that Needham J in **Reuthlinger** and Dixon CJ in **Hall v Busst**, on whom Needham J based his remarks, were talking about the test for validity of a contractual restraint on alienation, considered as a matter of public policy. Whether a public policy has been infringed is always a matter of substance. I doubt that Dixon CJ or Needham J would have held a contractual restraint on alienation permissible if it was in substance total, but there was a remote and improbable possibility of alienation, so that the restraint could not be said literally to be total. Indeed, Dixon CJ had referred to clause 3 in **Hall v Busst** as imposing a total restraint, notwithstanding that it gave a limited power to mortgage. Whether a restraint is in substance total is "a question of degree", which is how Gummow J described his understanding of what

Needham J had said. Nor was it of any importance for Zeeman J's reasoning to focus on a distinction between the literally absolute, and what is in substance total.

292 After discussion of *Allstate Prospecting*, *Wollondilly Shire Council v Picton Power Lines*, and *Elton v Cavill (No 2)*, and the basis for the rule that a condition in a grant or devise imposing a total restraint on alienation is void, Besanko J continued, at [121]-[122]:

"The common law doctrine also applies in the case of restraints by way of bond, covenant or contract. The reason for the application of the doctrine in this area is the public policy consideration that private property should be fully alienable. Of course, there are many restrictions on the full alienability of private property which are upheld by the courts. Furthermore, there is an important countervailing public policy consideration, and that is the consideration that parties who freely negotiate an agreement should be bound by the terms of the agreement. In my opinion, there is a great deal to be said for confining the operation of the common law doctrine within narrow limits insofar as it applies to restraints imposed by bond, covenant or contract. This result could be achieved either by holding that certain restraints are not caught by the doctrine, or by developing the exception of a lawful collateral object (see the discussion in Mr Sweet's first article referred to above).

Having said that, it would appear to be established by the authorities that a right of first refusal will attract the operation of the doctrine in certain circumstances. Relevant factors will be the scope of the initial prohibition, whether the right exists for a limited period or indefinitely, whether the grantor of the right must extract a similar promise from subsequent purchasers and whether the right is to be exercised by reference to a fixed price."

293 His Honour upheld the validity of the right of first refusal contained in clause 3 because (at [124]):

"The right of first refusal only arises if [the club] wishes to sell the subject land, and it does not arise in the case of other dealings in the subject land. It does not continue in perpetuity, because it

comes to an end when the encumbrancees cease to own Lots 21 and 22. The right of first refusal is not exercisable at a fixed price which may be below the market value of the subject land."

294 However, clause 4 of the encumbrance was invalid because it required the golf club to obtain from a successive purchaser an agreement to lodge a similar memorandum of encumbrance in favour of the Nitschkes. Besanko J held that this clause was invalid because it would have the effect that any sale to a successive purchaser other than the Nitchkes would be at a substantial discount to the market value: [129].

Other Cases After *Hall v Busst*

295 Finally, I will briefly consider a selection of other cases decided after *Hall v Busst* which further shed light on the development of the restraint against alienation doctrine.

296 In *Caldy Manor Estate Ltd v Farrell* [1974] 1 WLR 1303 the plaintiffs had sold a small parcel of land to a man who already owned an adjoining parcel of land. The conveyance contained a provision that the purchaser should not sell the land, or any part thereof, separately from the adjoining land of the purchaser. The defendants were successors in title to that purchaser, and had acquired both lots of land. The covenant in the conveyance was held, as a matter of construction, to bind successors in title of the original purchaser. The plaintiffs obtained an injunction to prevent the defendants from selling the smaller block of land while retaining the larger parcel. The Court of Appeal of England and Wales upheld the correctness of granting that injunction. In so doing, they held that the covenant was not void as a restraint on alienation. Russell LJ, for the Court, said at 1307:

"There is a most important distinction to be drawn between two matters different in kind: on the one hand, an attempt to attach to a grant of an absolute interest a condition which, if valid, would upon a purported alienation in breach of the condition confer a right of re-entry or result in cesser of the absolute interest, and so destroy the very thing granted, and, on the other hand, a covenant against alienation which would have no such operation; for, if the covenant be broken, the alienation would operate, the covenantee having at law no more than a right to damages, which might well be nominal; and the covenantee could only prevent a threatened alienation in breach of covenant by obtaining an injunction, which relief might or might not be granted. In this connection, we note that in Coke's comments to Littleton's section 334 in *Coke upon Littleton*, vol II, p 206b, it is stated that though a condition against alienation on a feoffment in fee be repugnant and against the law and therefore inoperative, nevertheless a bond not to alienate is effective and enforceable in the sense that it will be forfeit if the feoffee alien."

297 This decision is directly contrary to the majority decision in ***Hall v Busst***, and thus cannot be followed in Australia. I would note, however, that the matter came before the English Court of Appeal by way of two preliminary points of law. Russell LJ at 1307 specifically notes that questions such as whether damages would have been an adequate remedy, and whether the covenant was a valid restrictive covenant, were not argued.

298 ***Re Mavromates*** [1964] VR 612 concerned a gift by will of all the testator's real and personal property to trustees upon trust after payment of debts, etc, for his five children. That gift was subject to two provisos (613):

"... provided that no beneficiary named shall be entitled or have power to mortgage his or her share nor to dispose of his or her share in any real estate excepting to the remaining beneficiaries who shall be willing to purchase the share of the one desiring to sell but provided further that if all beneficiaries named agree in writing for the sale of my real estate then the same shall be sold and the proceeds divided equally between them or between such of them as shall then be entitled thereto it being my intention that if any beneficiary shall sell his or her share to the other beneficiaries he or she shall not then upon the sale of the whole of the property be entitled to any further payment in respect of his or her share."

299 Herring CJ construed the provisos as relating to shares in real estate only. He held that the exception to the first proviso applied only to sale of a share and not to mortgaging a share, and that the prohibition on "*disposing of*" a share concerned disposal by sale, rather than disposal in some other fashion. He did not decide whether the exception to the first proviso applied only to a sale to all of the remaining beneficiaries, or whether it extended to a sale to such one or more of the remaining beneficiaries as might be willing to buy the share. He held, at 614:

"On either view the class of permitted alienees is so small that the restraint will in substance operate as a general prohibition of alienation."

300 Herring CJ quoted extensively from the decision of Harman J in ***Re Brown deceased***. He held that the class of permitted alienees (which was four people at the outset, and would inevitably shrink) was not sufficiently large to fall within the exception permitting a restraint on alienation to a particular person. He held the restraint to be void.

301 ***Blacktown Municipal Council v Doneo*** [1971] 1 NSWLR 157 arose from the respondents having owned a parcel of land that came to be zoned "*Special Uses (Parking)*" in a draft planning scheme. The Council agreed to purchase the land, pursuant to a contract that included a provision that:

"If the Council should alter its town planning and make the subject land available for building purposes then the Council will give the vendor first option to repurchase the said land at the same price as is herein contained."

302 For many years the land was used as a carpark, but in 1968 a proposal emerged for the Council to obtain a rezoning of the land and to sell it to a retailer, to become part of a shopping centre. Taylor AJA (with whom Herron CJ and Jacobs JA agreed) held that the land had become

"available for building purposes" within the meaning of the contractual provision. He declined to imply in the contractual provision a requirement that the "first option" would arise only if the land became available for building purposes within a reasonable time. He distinguished the case from *Hall v Busst* and *In re Rosher* on the following basis (162):

"It was not contended that this clause operated to restrain the council in any way from alienating the land until the condition was fulfilled, that is the land became available for building purposes and the respondents had an option to repurchase it. So construed, I think the clause does no more than give to the respondents, when the condition is fulfilled, a right to purchase this

land within a reasonable time for the price stated. Since no provision was made as to the time during which the option was exercised, it had to be exercised within a reasonable time (*Ballas v Theophilos* (1957) 98 CLR 193). It is only when this happens that the appellant is not free to deal with the land. If, before the condition was fulfilled, the appellant had alienated the land then no doubt it would have some difficulty in carrying out its obligations under the condition, but the alienation of it would have been perfectly valid."

303 ***Re Permanent Trustee Nominees (Canberra) Limited*** [1989] 1 Qd R 314 concerned two parties who held a motel resort as tenants in common in equal shares. A provision of the agreement that governed the management of the resort contained a covenant that neither of them would (except after 12 months prior notice in writing to the other) make an application to the court for the appointment of statutory trustees for sale or partition of the land. One of the parties made an application for partition, without having complied with that clause. The first instance judge took the view that the clause was void because it ousted or fettered the jurisdiction of the courts. He appointed trustees for sale. On appeal, that order was reversed. The Queensland Full Court held that the clause did not invalidly oust or fetter the jurisdiction of the courts, and that the clause provided a reason why the court should exercise its limited statutory discretion to decline to make an order appointing trustees for sale. Kelly SPJ and

Moynihan J both held that the clause was not void as being a restraint on alienation. Kelly SPJ, at 317, said that:

"... a covenant such as that which is being considered here does not come within the notion of a restraint on alienation as it is generally understood in the cases in that the property is still fully alienable and the covenant goes only to the procedure whereby this may be brought about under s 38 of the **Property Law Act**."

304 Moynihan J agreed with this statement. Connolly J did not decide the question, though he said that he was "*not presently persuaded*" that it was a restraint on alienation contrary to public policy (322).

305 ***Nullagine Investments Pty Ltd v The Western Australian Club Incorporated*** concerned two tenants in common in equal shares of land. They had entered an occupation deed, under which they agreed that neither would dispose of its interest without first offering it to the other, at a price of 50% of the value of the land, as determined at the time of the offer pursuant to a particular valuation procedure. If the offer was not accepted, no party could dispose of its interest unless its successor entered into a deed of covenant, obliging it to perform all the duties of its transferor under the Occupation Deed. One of the co-owners sought a court order for sale under the Western Australian statute that was broadly equivalent of s 66G ***Conveyancing Act 1919***. The other sought (and in the court below had obtained) a stay of the proceedings until the agreed procedure had been gone through. The High Court reversed that decision.

306 The majority judgment of Deane, Dawson and Gaudron JJ held that the relevant clause applied only to a disposal by one of the parties of its half interest in the land, and said nothing about disposal of the entirety of the land, as happens pursuant to a court order for sale. Their Honours found it unnecessary to consider whether, if the clause had the effect of precluding

an application for appointment of trustees for sale, it would "*impose an unreasonable and unjustifiable restraint on alienation*" (661).

307 Brennan J, who dissented as to the result, said at 649:

"... the grounds on which a condition subsequent to the gift or grant of an estate of freehold may be held invalid are not necessarily the same as the grounds on which invalidity strikes a covenant or agreement in an instrument which does not itself give or grant the estate the alienation of which is restrained. In the former case, as Dixon CJ said in *Hall v Busst*, '[t]he invalidity may be put on the ground of repugnancy to the grant or upon public policy or for that matter it may conceivably be attributed to an indirect effect of *Quia Emptores*'. In the latter case, the only basis for holding the covenant or agreement invalid is public policy."

308 Brennan J held invalid the clause that prohibited the disposal by a party of its interest in the land unless its proposed successor in title entered into a covenant to be bound by the Occupation Deed. The invalidity arose not from the law concerning restraints on alienation, but from the provision being contrary to the policy of the statute analogous to s 66G *Conveyancing Act*. However, Brennan J considered that the clause was severable from the rest of the agreement.

309 In *Nullagine* at 674, Toohey J, who also dissented as to the result, held that *Hall v Busst* would not render the particular subclause involved in *Nullagine* ineffective. The restraint was said to arise by virtue of the provision requiring any purchaser of the interest in the land to assume the duties and obligations contained in the occupation deed. He noted that a condition of the grant of special leave prevented Nullagine from arguing that the existence of the requirement depressed the price which it could otherwise get for its interest in the land on the open market. Thus, the only argument that Toohey J considered was an argument that the requirement of itself constituted a restraint on alienation. He held it was not, and that

nothing in *Hall v Busst* required otherwise. He regarded the clause as doing no more than to "*place any purchaser in the position of an original co-owner. That does not constitute a restraint on alienation on the co-owner's interest*" (674).

- 310 ***Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express (Australia) Pty Ltd*** [2008] NSWCA 327 concerned the enforceability of a contractual right of first refusal relating to the right to occupy two stands at the Sydney Markets. The right of first refusal was not granted in connection with a transfer of the right to occupy the stands. On the appeal, though not at first instance, it was contended that the right of first refusal was void as a restraint on alienation. Giles JA would have refused to permit the matter to be raised on appeal because had it been pleaded there could have been evidence directed to it: [77]. However, his Honour at [78]-[83] gave some consideration to the topic. He said, at [78] that at least in the case of contractual restraints the law concerning invalidity of restraints on alienation is now based on public policy through a principle of law that private property should be fully alienable. He accepted, at [79] that:

"... many contractual restraints on the alienability of property are not regarded as offending the principle of full alienability, and the basis of public policy brings into a consideration another important public policy that a party who agrees to a contractual restriction should be held to its agreement unless there be good reason to the contrary."

- 311 He also said, at [81]:

"The basis being public policy, in determining whether the principle that private property should be fully alienable is offended there must be regard to the particular circumstances, including the property's nature as a commodity, the market in which it may be bought and sold, and the interest served by the restraint both generally and as between the parties to the particular transaction."

- 312 Hodgson JA (Ipp JA agreeing) was able to determine the appeal as a matter of construction of the agreement in question, without resorting to the law concerning restraint on alienation. However, he gave consideration to restraint on alienation in case his view concerning construction was incorrect. He was willing to allow the matter to be raised for the first time on appeal: [142]. He held at [144] "*that, to be void, a restraint on alienation must be of sufficient degree and duration, and/or without a purpose which the law accepts as proper.*" He held, at [146] that if the clause was construed to mean that on engagement of the right of first refusal there would be an obligation to sell the stands for a price that was a fraction of its market value "*it would effectively preclude any sale of the property forever*" , and be void.
- 313 ***Noon v Bondi Beach Astra Retirement Village Pty Ltd*** [2010] NSWCA 202 was, like the present case, litigation about the efficacy of a purported exercise of a buy-back option concerning a unit in the Bondi Astra. The option involved in that case arose from a contract entered in late 1996, and was part of a contract for sale that differed in numerous respects from the contracts involved in the present case.
- 314 The parties sought to raise before the Court of Appeal a question of whether the buy-back right was an invalid restraint on alienation. However, on the ground that it had not been pleaded or raised before the trial judge, Giles JA (Macfarlan JA agreeing) declined, at [113]-[117] to decide that issue.
- 315 Young JA expressed the view, at [229], that the buy-back arrangement involved in that case did not infringe the rule against restraints on alienation. However, as his Honour records at [222]-[223] the restraint involved in ***Noon*** was different to the restraints with which the present case is concerned.

Evidence Relied on Concerning Restraint on Alienation

- 316 From 1986 units in the Astra were advertised as being sold for prices averaging 30-40% below comparable strata title apartments. There was undisputed expert valuation evidence that at the time Mr and Mrs Evans purchased the unit its value, without a buyback agreement, would have been \$145,000. Thus their purchase price of \$107,000 was 73.8% of the value the unit would have had without the buyback provisions. There was undisputed expert evidence that in December 2008 the value of the unit without a buyback agreement was \$450,000.
- 317 Mr Phillip Edmonds, a valuer instructed by BBA, gave evidence, that was not challenged, that: *"Capital gain sharing and buy back terms are quite common in the marketing of retirement villages or seniors housing as it is now called"*. That remark was clearly directed at the situation at the time of his report in December 2008, and is at too high a level of generality to be of assistance.
- 318 After noting that prior to 1980 the main providers of seniors housing were the not-for-profit sector, he continued:

"With the entry of private enterprise into the industry there was perceived to be a need for the residents to have a better title to the dwelling than a licence and the market was seeking larger and better quality accommodation and facilities.

From the early 1980's private enterprise villages were developed and marketed using:-

1. Leasehold title,
2. Company title, or

3. Strata title

[M]ost but not all of these involved a sharing of 'resale' capital gains in addition to departure fees.

I am not aware of any other strata title retirement village the dwellings within which have been sold on the basis that the developer reserves the right to buy back the dwelling at the original sale price.

I am aware of many retirement villages that use licence and loan or lease and loan documentation the effect of which is similar to that achieved by the use of strata title buy back agreements in the marketing of the Astra units."

He gave a few specific examples of the diversity of financing arrangements used.

Application of Principles

- 319 I will consider first how the options in the Occupancy Agreement and the Buyback Deed stand under the general law, and then consider whether New South Wales legislation concerning retirement villages makes any difference to the position.
- 320 The right that Mr and Mrs Evans acquired was a full fee simple - the transfer to them said that CGM "*transfers an estate in fee simple*", and the effect of s 41 **Real Property Act 1900** is that upon registration of that transfer the estate or interest specified in it is passed to Mr and Mrs Evans. Equity would regard the granting of the options and other restraints in the Occupation Deed and the Buyback Deed as a reason why Mr and Mrs Evans held a lesser interest in the land only to the extent that either of the options or any of the other restraints was specifically performable. That in turn depends on whether either of the option agreements or any of the

other restraints is contrary to the public policy concerning restraints on alienation.

- 321 The restrictions on alienation of the Unit to which Mr and Mrs Evans agreed under the two documents were very great. The Occupancy Agreement bound not only Mr and Mrs Evans, but also their successors in title. Clause 2(g) of the Occupancy Agreement contains a prohibition on disposing of any estate or interest whatever in the unit without the consent of BBA. As a matter of construction, BBA can withhold its consent, even unreasonably, except in relation to a proposed mortgage on terms that protect all its rights under the Occupancy Agreement.
- 322 The practical effect of obtaining a mortgage on those terms would be that the amount that could be raised on mortgage would be, at best, a percentage of the price that would be receivable by the mortgagee on exercise of the option. There is a further exception, permitting leasing, sub-leasing or parting with or sharing possession of the unit within the very narrow limits established by the proviso to clause 2(f). The prohibition on disposing of any estate or interest without consent is not absolutely total, but very close to total.
- 323 The circumstances in which the option is exercisable, set out in clause 7 of the Occupancy Agreement, effectively prevent disposal of any interest in the unit without the option becoming exercisable. Furthermore, even if (as has happened) the option was not effectively exercised on the death of Mr Evans, the restraints still bind his executors and other successors in title. The Respondents fall within the definition of "*Proprietor*", so if the restraints are enforceable, another occasion for exercise of the option will arise when they wish to sell, or when any of the other triggering events identified in the Occupation Agreement and the Buyback Deed happen. The price at which the option is exercisable (broadly, \$107,000, minus BBA's legal fees, and the cost of refurbishment of the unit) was always

bound to be less than the market value of the unrestrained fee simple, particularly when Mr and Mrs Evans purchased for less than the value of the unrestrained fee simple. The expert evidence concerning value of the unit in 2008 bears that out.

324 While the Buyback Deed does not include an express clause prohibiting transfer, there would be an implied term that no transfer would occur that would have the effect of frustrating the option granted in the Buyback Deed. The relevant provisions of the option in the Buyback Deed are the same as those of the Occupancy Agreement. The Buyback Deed has a provision not contained in the Occupancy Agreement, permitting the Proprietor to dispose of the unit to a Qualified Occupant who is prepared to undertake the same restrictions on transfer as applied to Mr and Mrs Evans. Permitting a transfer to occur on terms that no sensible purchaser would agree to, or would agree to only at a severely discounted price, is in substance the same as prohibiting transfer.

325 If the restrictions in the present case had been imposed by a condition in a transfer of a fee simple, they would have been invalid in several ways:

- For the reasons provided in [323]-[324] above, the restrictions would fall foul of the principle adopted in **Attwater v Attwater** ([171]-[172]) and **In re Cockerill** [186] that it is not possible to transfer property subject to a condition that it can be sold only to one person or one of a very narrow class of persons. A similar principle was recognised in **Re Mavromates** ([298]-[300]) and in **In re Brown** ([187]-[189]) .

- As the restraints in the present case prohibit (subject to the very narrow exceptions previously mentioned) *any* disposition of the land, not merely a sale or some other specific type of transaction, they are restrictions more extensive than those held to be void in **Attwater v Attwater** , **In re Rosher**

([178]-[180]), *In re Elliot* ([181]) , *Crofts v Beamish* ([182]-[185]) and *In re Cockerill* .

- The restrictions in the present case would fall foul of the observation of Jessel MR in *In re Ridley; Buxton v Hay* ([177]), approved by Dixon CJ in *Hall v Busst* that "*The law does not recognise dispositions which would practically make property inalienable for ever.*"

- That the price at which the only permitted sale can be made was always likely to be substantially below the market value of the unit means that reasoning analogous to that in *In re Rosher* , *In re Cockerill* and *Grayson v Grayson* ([279]-[280]), would be available to recognise that in practice the unit is made inalienable.

- Unlike the option to repurchase in *Blacktown Municipal Council v Doneo* ([301]-[302]) , the option that is contained in the Buyback Deed in the present case prevented Mr and Mrs Evans and their successors in title from alienating the unit before the option to purchase became exercisable.

- Unlike the restraint upheld in *Re Permanent Trustees Nominees (Canberra) Ltd*, ([303]-[304]) the relevant clauses do far more than restrict the mode of alienation of the property.

- In the present case, the restrictions on alienation relate to virtually all manner of disposing land, continue in perpetuity, and are in practice highly likely to permit a sale to only one person (or its nominee). Whoever it is sold to, it will be only at a price well below the market value. Therefore the various grounds upon which Besanko J upheld clause 3 of the encumbrance in *Nitschke* ([293] above) are readily distinguishable.

- In *Nitschke* , Besanko J held that clause 4 of the encumbrance was invalid because it required the purchaser to obtain from a successive purchaser an agreement to lodge a memorandum of encumbrance. This would have the effect that any sale to a successive purchaser would be at

a substantial discount to the market value (see [295] above). This reason for invalidity is applicable in this case. I am obliged to follow the decision of the South Australian Full Court in **Nitschke** unless I think it is clearly wrong, which I do not, or the decision is distinguishable.

326 I had earlier agreed with Needham J's analysis of the ratio of **Hall v Busst** in so far as it dealt with contractual restraints on alienation. However there is an additional theme in the majority judgments, that should be accorded respect. The contractual provision that was in issue in **Hall v Busst** was in fact one that was imposed simultaneously with the grantor entering the contract to purchase the land. The question that Dixon CJ posed for himself at the start of the passage of the judgment at 217-218 that I have quoted at [198] concerned whether "*a bond or covenant or contract purporting to impose a total contractual restraint on alienation is void*". However, there is a theme in the passage that I have quoted that it is not possible to do indirectly what one cannot do directly. In particular, Dixon CJ suggested that it is not possible to do by a covenant entered at the time of acquiring property what one could not do by a condition in a grant. Fullagar J agreed with the reasons of Dixon CJ for concluding that the principle was the same, whether a restraint on alienation was imposed "*on a transferee of a fee simple*" by a condition subsequent in a grant, or by a separate contractual covenant. The passage in *Cruise* on which Dixon CJ relied (that I have set out at [166]) discusses the enforceability of covenants that restrain alienation only in relation to cases where those covenants are made at the time of a grant.

327 Some of the cases discussed above have considered whether a relevant matter for deciding the enforceability of a contractual restraint on alienation is whether it is imposed for the purpose of restraining alienation or for a valid collateral purpose. Needham J sourced such a principle in **Reuthlinger** (see above at [214]) from the view of Mr Charles Sweet. While Dixon CJ cited Mr Sweet's article with apparent approval in **Hall v Busst**, the citation did not specifically relate to Mr Sweet's principle

concerning valid collateral purpose. Nevertheless, the Court of Appeal (Street CJ, Glass and Samuels JJA) embraced Needham J's analysis in unqualified and enthusiastic terms. Subsequently, Young J in **Elton v Cavill (No 2)** (see above at [265]) expressed grave doubts over whether the authorities cited in Mr Sweet's article actually supported the principle for which Mr Sweet contended. All the same, his Honour adopted the principle (without apparent reference to the fact he was bound to do so by its acceptance by the Court of Appeal in **Reuthlinger**).

328 I am bound to follow the previous Court of Appeal in **Reuthlinger** unless I am convinced that is clearly or plainly wrong: **Gett v Tabet** [2009] NSWCA 76; (2009) 254 ALR 504 at [261]-[301]. I am not so convinced. The principle sourced by Mr Sweet may well have had a shallow root in earlier precedent. However, that a contractual restraint on alienation may be enforceable where it is imposed for a valid collateral purpose is consistent with the source of the principle in public policy. As Giles JA recognised in **Moriatis** (above at [310]), the free alienability of freehold estates in fee simple is not the only relevant public policy concern to contractual restraints on alienation. If a contractual restraint does indeed have a valid collateral purpose, that can provide a reason for public policy to favour its enforcement. Part of the reason for this, of course, is that public policy will be taken into account in assessing whether a collateral purpose is valid or legitimate. For example, an implicit part of the reason that Young J held that the collateral objects in **Elton v Cavill (No 2)** were invalid or illegitimate was because they were contrary to public policy. Conversely, Douglas J's decision in **Vercorp** (above at [227]) that restraints on alienation imposed in the subdivision of residential land had a valid collateral purpose (the provision of high quality housing) also clearly has a public policy aspect. Finally, I would reiterate the view that I expressed at [269] above, namely, that an if there are both legitimate and illegitimate purposes in a restraint on alienation and the clause cannot be severed, the court must decide whether, overall, the clause is contrary to public policy.

- 329 My acceptance of the "*valid collateral purpose*" consideration provides a further reason why it can be a relevant matter, in deciding the enforceability of a contractual restraint on alienation, that the restraint is imposed at the time of transfer of the property in question. Consider first a situation in which a contractual restraint on alienation of property is imposed at the time of the grant of the relevant interest in land. Next, consider a situation in which the contractual restraint is imposed at a later time, when the person restrained already has the interest in land the alienation of which is restricted. It will be easier to conclude that the purpose of a contractual restraint is imposed for the purpose of restraining alienation in the former case rather than the latter.
- 330 As Dixon CJ accepted in ***Hall v Busst*** , whether an agreement offends public policy should be decided as a matter of substance, not of form. To the extent that the public interest in free alienability of property is the applicable test, it should result in the same result being arrived at concerning a restriction that is imposed as a condition of a transfer of property as it arrives at concerning a restriction that is agreed as a matter of contract as part of a commercial transaction that includes a transfer of property.
- 331 However, it should be recognised that some of the cases that have struck down conditions attached to a transfer of property have been based on the conveyancing rules of another age. Coke saw those rules as themselves being justified by public policy, but whether that is always so, or still so, in the twenty-first century is contestable. As Dixon CJ recognised in ***Hall v Busst*** , they are rules of law regardless of their justification. There is still a significant public interest in the free alienability of fee simple interests. Nevertheless, other matters of public interest can also bear upon whether any particular restriction should be permitted.

- 332 If one confined attention to the nature of the restrictions alone, application of the principle that one cannot do indirectly what one cannot do directly might have led, in the present case, to a conclusion that the restraints were invalid. Such a conclusion would be consistent with the obiter remarks of Hodgson JA in ***Moraitis Fresh Packaging*** (above at [312]). Similarly if one applied the view of Gummow J in ***Caboche v Ramsay*** (above at [274]) that the validity of a contractual restraint involves a question of degree, the restraints in the present case are extreme.
- 333 However it is not necessary to reach a conclusion about that. I have accepted that a contractual restraint on alienation can be valid if it supports a permissible collateral objective. Making provision for the aged has been encouraged by public policy at least since in 1601 the ***Statute of Charitable Uses*** included " *aged, impotent and poor*" among the permissible objects of a charitable gift: see J. D. Heydon and M.J. Leeming, *Jacobs' Law of Trusts in Australia* 7th edition (2006) at [1021]-[1022]. For centuries charitable gifts have been exempted from laws restraining freedom of alienation, even to the extent of gifts for charitable purposes being permitted to be perpetual.
- 334 I would have some doubt (and a strong personal protest) about whether being aged 55 or more counts in ordinary parlance as being " *aged*" . However, legislation to which I later refer has adopted the age of 55 as the start of being " *aged*" , and the general public policy that courts enforce is formed in part by reference to the policies that have been enshrined in legislation.
- 335 The restrictive covenant on the title, requiring occupants of the Astra to be aged 55 or more, already existed at the time the Occupancy Agreement and Buyback Deed were entered. That restrictive covenant was sufficient to enable the Astra to operate as a retirement village, in the rudimentary sense of a place where people aged 55 or more lived.

336 However, as the obligations of BBA in the Occupancy Agreement (para [110] ff above) show, it was intended that BBA would provide services of substantial and important kinds to the residents. Further, the provision of accommodation at a significant discount to the value that a unit would have had without the buy-back provision would assist in its being affordable for aged people. Undoubtedly, one of the purposes of including the buy-back provisions was to assist BBA to make a profit, but that is not inconsistent with the buy-back provisions being characterised, overall, as being for the purpose of the valid collateral objective of assisting in the provision of housing for aged people. That is so even if the purpose would not comply with all the requirements for a valid charitable gift. While the covenant in clause 2 of the Buyback Deed is not an option, it is there for the purpose of ensuring that BBA will always have the right to acquire the Unit on the terms of the option. It is justified by the same collateral purpose as justifies the option.

337 As the primary judge pointed out at [81], there is nothing in the wording of the option in the Occupancy Agreement that restricts its successive options to the time in which the Astra is, in any sense of the term, operating as a retirement village. While that is literally true, recitals to the Occupancy Agreement ([22] above) made clear it was entered to enable a retirement village to be conducted. As well, provisions of the Occupancy Agreement other than the clause creating the option confer obligations on BBA. Those obligations are clearly designed (and in the case of clause 1(a) expressly stated) to be for the purpose of operation of a retirement village designed to be the residence of persons 55 years of age and over.

338 As Giles JA recognised in *Moraitis*, there is a public policy that someone who agrees to a contractual restriction should be held to the agreement unless there is a good reason to the contrary. The primary judge also recognised this, and said, at [84]:

"In my opinion it is outweighed by the very long-established public policy consideration favouring free alienability of freehold estates in fee simple. There are very wide fields for freedom of contract in relation to the organisation of retirement villages. The subject is regulated by statute, but within that regulated environment there is room to organise retirement villages on a way which does not leave the capital gain to those who live in them, by employing other mechanisms; contractual licences not involving any transfer of property, leases which it is well established can be made in terms which prevent their being alienated, and can be made defeasible on the death of the lessee, and the grant of freehold estates for life. The public policy relating to freedom of contract can be fully served without impinging the public policy against restraining alienation of freehold estates in fee simple."

339 I do not, with respect, find this reasoning persuasive. It seeks to balance the public interest in free alienability against the public interest in freedom of contract, without according weight to provision of housing for aged persons being itself a valid collateral purpose. As well, much of the case law relating to the free alienability of freehold estates in fee simple has arisen concerning limitations on alienability that are imposed by the terms of the grant itself. Many of those cases are influenced by the concept of the restraint being repugnant to the grant, which in turn was influenced by medieval conveyancing principles about the impossibility of limiting an estate after a fee simple. The outcomes of those cases do not necessarily translate into the different universe of discourse applicable to contractual restraints on alienation, which is dependent solely on public policy.

340 Clearly there is a public interest in property not being unduly tied up. However, it is an oddity of options that entering the option is itself an exercise of the owner's power of alienation (albeit in a way that is conditional), and that the entering of the option brings with it a restriction of the power of alienation thereafter, to the extent (but only to the extent) that is needed to make the grant of the option efficacious. One aspect of the free alienability of freehold estates is being able to alienate them through entering an option. There is a public interest in the owner of property being free to alienate it, but that does not mean there is a public interest in the

owner of property being free to alienate the property twice, to two different people through inconsistent dispositions.

341 Because the law concerning permissible restraints on alienation imposed by a contract is based on public policy, it should operate by reference to the substance of an arrangement, not its form. There are many ways in which substantially the same commercial objectives can be achieved, for both a retirement village operator and a retirement village resident, by the grant of a fee simple subject to an option to repurchase, and by other conveyancing devices not involving a fee simple plus an option to repurchase. This very fact is itself reason for doubting that there is a public policy objection to a retirement village being run on the basis that a resident acquires a fee simple, but subject to an option to repurchase.

342 In all these circumstances, I am not persuaded that public policy requires the invalidity of the contract that Mr and Mrs Evans freely entered. The existence of the collateral purpose in the present case distinguishes it from ***Nitschke***.

343 That conclusion is supported by the legislation governing the operation of retirement villages, to which I now turn.

The Statutory Framework

344 So far as the researches of counsel and my own researches have been able to discover, the first legislative provision in this State relating to housing for aged persons was ***State Environmental Planning Policy No 5 - Housing for Aged or Disabled Persons***, published 19 February 1982. In clause 2 it defined "*aged person*" as a person aged 55 years or over. The Policy applied where a proposed development was for housing for aged persons, provided that certain development standards were

adhered to, and provided that certain services were available for the residents. If these conditions were satisfied, the Policy eased the planning restrictions that would otherwise exist. It said nothing about the legal basis upon which people might come to reside in housing for aged persons.

345 **State Environmental Planning Policy No 5** came in 1998 to be called by a softer title that said it related to "**Housing for Older People and People with a Disability**". The 1998 Policy had similar objectives to the original **State Environmental Planning Policy No 5**, and contained a definition that "**older people means people aged 55 years or over**". That Policy was repealed with effect from 31 March 2004. The analogous planning policy that replaced it, and is still current, is the **State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004**. It creates a specialised planning regime for developments for a group that includes "**seniors**", defined in clause 8 as including "**people aged 55 or more years**".

346 On 6 October 1989 (commencing on 30 October 1989) the **Retirement Village Industry Code of Practice Regulation 1989** was made under s 75 **Fair Trading Act 1987**. That regulation established a prescribed Code of Practice for the operation of retirement villages. By the time the regulation became effective, the Occupancy Agreement and the Buyback Deed had already been entered. However, Part 1 of the Code included a provision that the Code applied to existing as well as to new retirement villages.

347 Part 3 of the Code, related to disclosure of information. It included a provision that the management of a retirement village must inform a prospective resident of, inter alia, "**a clear explanation of the refund entitlement, if any, of a resident, if the resident or management committee terminates the resident's contract.**" The definition of "**retirement village**" in Schedule C of the Code recognised that a retirement village might be

occupied by retired persons in pursuance of "*the ownership of residential premises subject to a right or option of repurchase or conditions restricting the subsequent disposal of the premises*". The definition of "*village rules*" in Schedule C stated that such rules included "*any by-laws (to which the residents are subject) in force under the **Strata Titles Act 1973***". A combination of those two definitions shows that the Code contemplated that one of the ways a retirement village might operate was by residents owning premises under the **Strata Titles Act 1973** subject to a right or option to repurchase.

348 The **Retirement Villages Act 1989** ("**the 1989 Act**") came into operation in 1989.

349 Under the definitions in s 3 of the 1989 Act, a person who had attained the age of 55 years was a "*retired person*". That section also defined "*retirement village*", in a way that included:

"... a complex containing residential premises (whether or not including hostel units) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons in pursuance of-

...

(c) the ownership of residential premises subject to a right or option of repurchase or conditions restricting the subsequent disposal of the premises; ...

...

and for the right to occupy which those persons are or will be required to pay or donate money."

350 The operation of retirement villages is now governed by the 1999 Act.

351 Section 5(1) of the 1999 Act defines "*retirement village*" as:

"For the purposes of this Act, a retirement village is a complex containing residential premises that are:

(a) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex, or

(b) prescribed by the regulations for the purposes of this definition."

352 No regulation has been made pursuant to s 5(1)(b).

353 That definition is given content by other definitions in s 4(1) of the 1999 Act.

"***retired person*** means a person who has reached the age of 55 years or has retired from full-time employment.

village contract means:

(a) a residence contract, or

(b) a service contract, or

(c) a contract under which a resident of a retirement village obtains the right to use a garage or parking space, or a storage room, in the village, or

(d) any other contract of a kind prescribed by the regulations for the purpose of this definition.

Note. A residence contract, a service contract and any other village contract may be contained in a single document.

operator of a retirement village means the person who manages or controls the retirement village, and includes:

(a) a person (other than a resident or other person referred to in subsection (2)) who owns land in the village, and

(b) any other person or class of persons prescribed by the regulations for the purposes of this definition,

but does not include:

(c) the relevant association of a community land scheme or the owners corporation of a strata scheme, or

(d) the managing agent of such a scheme, or

(e) any person or class of persons excluded from this definition by the regulations."

354 The definition of "*village contract*" is itself given meaning by the following further definitions in s 4(1) of the 1999 Act:

"**residence contract** means a contract that gives rise to a residence right.

residence right of a person means the person's right to occupy residential premises in a retirement village, being a right arising from a contract:

(a) under which the person purchased the residential premises, or

(b) under which the person purchased shares entitling the person to occupy the residential premises, or

(c) in the form of a lease, licence, arrangement or agreement of any kind, other than a residential tenancy agreement in the form prescribed under the **Residential Tenancies Act 2010** :

(i) that is entered into under Division 5 of Part 10, or

(ii) that contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement, or

(d) in the form of any other contract of a kind prescribed by the regulations,

or any other right of a kind prescribed by the regulations.

service contract means a contract under which a resident of a retirement village is provided with general services or optional services in the village."

355 Mr DeBuse submitted that the preferable view was that if an agreement was contrary to public policy at the time it was entered it was unenforceable, rather than void or illegal. He submitted that if public policy changes between the time that an agreement is entered and the time when the question arises whether a court should enforce the agreement, it is public policy at the time of enforcement that matters. He submitted that

the legislation governing retirement villages specifically recognises the permissibility of options to repurchase a place where an aged person lives in a retirement village and thus, whatever the situation might have been at the time Mr and Mrs Evans purchased their unit, there is now no inhibition to enforcing, or declaring, the rights of BBA pursuant to the Buyback Deed.

- 356 J.D. Heydon, *The Restraint of Trade Doctrine*, 3rd edition, (2008) at 278-279 sets out the status of a covenant that infringes the public policy against unreasonable restraint of trade:

"Sometimes the covenant is described as 'illegal' or unlawful. However, the covenant is not illegal or unlawful in the sense of being criminal or tortious.

Sometimes the covenant is called 'void'. That has been described by Lord Atkinson as 'a misuse of language', since it is not 'void at common law but merely unenforceable at law'.

The expression 'unenforceable' is the most common. One way of putting the result is to say that the law treats the unenforceable covenant 'as though it had not been given'." (extensive footnotes omitted)

- 357 I accept that those propositions are equally applicable concerning contracts that infringe the public policy concerning restraints on alienation.

- 358 J.W. Carter, E. Peden and G.J. Tolhurst, *Contract Law in Australia*, 5th edition, (2007), para [27-02] correctly point out that the differing views that have been expressed about whether a contract that contravenes a legal standard should be described as illegal, void, or unenforceable are ultimately not important:

"The fact that a particular (specific) description has been chosen gives the impression that the description has a predictive value. In fact, the precise meaning of a word such as 'void' depends as always, on the context. As Windeyer J said in his dissenting judgment in **Brooks v Burns Philp Trustee Co Ltd** ((1969) 121 CLR 432 at 458. Cf **A v Hayden** (1984) 156 CLR 532 at 596):

'The words used do not matter if the actual legal result they are used to express be not in doubt or debate. But it has always seemed to me likely to lead to error, in matters such as this, to adopt first one of the familiar legal adjectives - 'illegal', 'void', 'unenforceable', 'ineffectual', 'nugatory' - and then having given an act a label to deduce from that its results in law. That is to invert the order of inquiry, and by so doing to beg the question, and allow linguistics to determine legal rights.'

The approach which Windeyer J criticises has undoubtedly been used in many of the cases, and may explain some of the inconsistencies and difficulties in the law. For example, the cases give conflicting guidance on whether an illegal contract is effective to transfer proprietary rights and this is, perhaps, due to indiscriminate use of words such as 'void' to describe the contract. (See, eg [27-[21]). However, the recent cases (see **Nelson v Nelson** (1995) 184 CLR 538; 132 ALR 133; **Fitzgerald v FJ Leonhardt Pty Ltd** (1997) 189 CLR 215; 143 ALR 569) emphasise that, in the final analysis, it is whether the court will assist the plaintiff that matters, not whether the description of the contract, as void, unenforceable or illegal, is accurate."

359 Mr DeBuse also referred us to this Court's decision in **Seidler v Schallhofer** [1982] 2 NSWLR 80, at 87-90 per Hope JA. While that judgment, and the judgments of Reynolds and Hutley JJA, recognise that public policy can change from time to time, the case was not concerned with the question of whether an agreement that was contrary to public policy at the time it was entered was one that a court would enforce if the public policy had changed by the time enforcement was sought. However, in my view, if a contract was not actually illegal at the time it was made, the appropriate standard of public policy to apply is that which exists at the time the Court is asked to enforce the contract.

360 Even though Mr Evans died before the 1999 Act came into operation, in determining the impact of statutory provisions on the contractual rights that are in question in the present case, it is the 1999 Act that matters. That is because Schedule 4 of the 1994 Act, containing transitional provisions, includes clause 3:

"(1) An existing contract in respect of a retirement village within the meaning of this Act that is in force on the commencement of this clause is taken to be a residence contract.

(2) Any other contract, agreement, scheme or arrangement in force on the commencement of this clause under which, under the former Act, the administering authority of a retirement village provides services to a resident of the village is taken to be a service contract."

361 In ***Noon v Bondi Beach Astra Retirement Village Pty Ltd*** this Court held, concerning a different unit in the Astra in relation to which no Occupancy Agreement or Buyback Deed separate to the contract for sale existed, that the occupants of the unit in question were not "*residents*" within the meaning of the 1989 Act. That was because they:

"... had the right to occupy the unit by virtue of their proprietorship. Their proprietorship came about by offering a price, acceptance of the offer, entry into the sale contract and completion of the sale contract. Upon completion the sale contract, as a source of their right to occupy the unit, was spent. It does not seem to me that it was, within the definition of a residence contract, a contract 'by which [Mr and Mrs Noon] obtain[ed] the right to occupy' the unit. They obtained the right by virtue of their proprietorship." (per Giles JA, Macfarlan JA agreeing, at [66])

362 The task the Court was performing in ***Noon*** was deciding whether a husband and wife who had purchased a unit in the Astra were a "*resident*" within the meaning of the legislation as it then stood, namely the 1989 Act and the New South Wales Retirement Village Industry Code of Practice . Those definitions were:

" **resident** ' in relation to a retirement village, means a person who occupies residential premises in a retirement village under a residence contract, and includes a person who occupies such premises and who is or was the spouse or de facto partner [in the Code but not Act, (within the meaning of the **De Facto Relationships Act 1984**)] of such a person." (Act, s 3(1); Code, cl 2)

" **residence contract** ' means a contract, agreement, scheme or arrangement by which a person obtains the right to occupy residential premises in a retirement village, and may take the form of a lease or licence." (Act, s 3(1); Code, cl 2)

363 It should not be assumed without argument (that we have not had) that this aspect of the decision in **Noon** leads to the conclusion that the registered proprietor of a strata title unit in the Astra was not a "*resident*" within the meaning of the 1999 Act, particularly in light of the definition of "*residence right*" in the 1999 Act. In any event, the Occupancy Agreement, under which BBA agreed to provide services, may have been a "*service contract*" within the meaning of the 1999 Act.

364 It is not necessary for us to seek further argument concerning these matters. That is because the appeal is being conducted on a basis that does not challenge the decision in the court below that s 167 of the 1999 Act is applicable.

365 I have earlier set out at [57] the provisions of s 167 of the 1999 Act. The applicability of s 167 brings with it as a necessary consequence that the Astra is a "*retirement village*" within the meaning of the 1999 Act, and that Mr and Mrs Evans would have counted as a "*resident*" of the village. It also necessarily has implicit in it that BBA is the "*operator*" within the meaning of the 1999 Act.

366 Section 167 specifically contemplates that an operator of a retirement village might hold an option to purchase residential premises from a resident. In my view that provides confirmation that the options with which the present case is concerned do not contravene public policy. While s 167 might not have been sufficient to save the provision in clause 2 of the Buyback Deed, in my view clause 2 of the Buyback Deed is a valid restraint on alienation under the general law because it is entered for a proper collateral purpose. BBA is entitled to a declaration to that effect.

Orders

367 Claims for relief made in paras 7 and 8 of the Notice of Appeal were abandoned at the hearing.

368 In the result, BBA has failed on three of the four issues it raised. When the appeal has been necessitated by the decision in the court below being in error in one respect, the appeal has resulted in extra costs being incurred, and the appeal has to some measure succeeded, BBA should receive an order for costs of the appeal, but not the whole of the costs. The order for costs in the court below should reflect the extent to which each side has ultimately succeeded in the litigation.

369 I propose the following orders:

1. Appeal allowed in part.
2. Set aside the orders made on 19 February 2010 in the court below.
3. In lieu thereof:

(a) Declare that the Respondents are bound not to sell transfer or otherwise dispose of the Unit otherwise than pursuant to the provisions of the Buyback Deed dated 30 September 1987 between the Appellant, the late Clifford Evans, and the late Dorothy Evans.

(b) Order that the Further Amended Statement of Claim be otherwise dismissed.

4. Order the Respondents to pay one half of the costs of the Appellant of the appeal and to have a certificate under the **Suitors Fund Act** . No order is made concerning the costs in the court below.

370 **WHEALY JA** : I agree with Campbell JA and with the orders he proposes.
