



## Supreme Court New South Wales

Case Name: **Northside Veterinary Property Pty Ltd v  
Dalmacija Sydney Croatian Club Ltd**

Medium Neutral Citation: [2022] NSWSC 589

Hearing Date(s): 28-30 March 2022; 21 April 2022

Date of Orders: 16 May 2022

Date of Decision: 16 May 2022

Jurisdiction: Equity

Before: Darke J

Decision: Binding contract for sale of land held to have come into existence. Orders to be made in the nature of specific performance.

Catchwords: CORPORATIONS – corporate contracting – agency and authority – authority of directors to bind company to contract for the sale of land – contract executed in accordance with s 127(1)(a) of the Corporations Act 2001 (Cth) – where company claims that directors executing contract lacked actual or ostensible authority to bind company – whether plaintiff entitled to make assumptions in s 129 of the Corporations Act 2001 (Cth) – whether company precluded from asserting that assumptions are incorrect – not established that plaintiff actually knew or actually suspected that the company’s constitution had not been complied with, or that directors were not properly performing their duties to the company – held that company precluded by s 128(1) of the Corporations Act 2001 (Cth) from asserting non-compliance with its constitution or improper conduct on part of its directors – held that binding contract for sale came into existence

EQUITY – specific performance – contract for the sale of land – discretionary defences to specific performance – where defendant claims lapse of time and protracted negotiations should defeat plaintiff’s

claim for specific performance – where defendant claims plaintiff was tricky in procuring contract – where defendant claims specific performance would occasion great hardship upon it – where defendant claims that damages would be an adequate remedy – held that no bar to decree of specific performance had been demonstrated – held appropriate to order specific performance

Legislation Cited: Corporations Act 2001 (Cth), s 127(1), s 128, s 129  
Registered Clubs Act 1976 (NSW), s 41E

Cases Cited: Adderley v Dixon (1824) 1 Sim & St 607; 57 ER 239  
Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd (2013) 282 FLR 351; [2013] NSWCA 459  
Caratti v Mammoth Investments Pty Ltd (2016) 50 WAR 84; [2016] WASCA 84  
Dougan v Ley (1946) 71 CLR 142  
Longtom Pty Ltd v Oberon Shire Council (1996) 7 BPR 14,799  
Morris v Kanssen [1946] AC 459  
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146  
Norton v Angus (1926) 38 CLR 523  
Sindel v Georgiou (1984) 154 CLR 661  
Soyfer v Earlmaze Pty Ltd [2000] NSWSC 1068  
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418

Texts Cited: The Honourable RP Austin and the Honourable Justice AJ Black, LexisNexis Butterworths, Austin & Black's Annotations to the Corporations Act (online at January 2022)

Category: Principal judgment

Parties: Northside Veterinary Property Pty Ltd (Plaintiff)  
Dalmacija Sydney Croatian Club Ltd (First Defendant)  
Matthew Vlatko (Second Defendant)

Representation: Counsel:  
Mr R S Angyal SC (Plaintiff)  
Mr A Hourigan with Mr M Isaac (First Defendant)

Solicitors:  
Mills Oakley (Plaintiff)  
A C Dunstan Lawyers (First Defendant)  
Keystone Lawyers (Second Defendant)

File Number(s): 2021/236056

Publication Restriction: None

## JUDGMENT

### Introduction

- 1 The plaintiff, Northside Veterinary Property Pty Ltd (“Northside”), seeks relief in the nature of specific performance in respect of a contract for the sale of land it claims was entered into on 23 June 2021 with the first defendant, Dalmacija Sydney Croatian Club Ltd (“the Club”). The contract is for the sale of a property at 16 Myoora Road, Terrey Hills for a price of \$5,170,000 (including GST). The sale is expressed to be subject to the grant of a lease back to the Club for a term of 5 years. The relevant land is the land contained in Lot 100 in DP709585. The registered proprietor of the land is recorded as Dalmacija Sydney Social Club Ltd. That is a former name of the Club. That former name is employed in the contract for sale to describe the vendor.
- 2 The Club denies that a binding contract for sale came into existence. It contends that there is disconformity between the counterparts of the contract that were exchanged. It further contends that the persons who signed the contract for the Club lacked either actual or ostensible authority to bind the Club to the contract. In the event it is held that a binding contract was made, the Club also raises a number of discretionary defences to the claim for specific performance, including “trickiness” on the part of Northside, and hardship.
- 3 The Club is a registered club for the purposes of the *Registered Clubs Act 1976* (NSW). It is the holder of a liquor licence in respect of the Myoora Road premises.

### Summary of salient evidence of dealings between the parties

- 4 A company search in respect of the Club reveals that Mr Veljko Bosnic and Mr Tom Bosnic were directors of the Club at all relevant times. They were two of several (at least seven) directors. Tom Bosnic was also the secretary of the Club. On the Club’s side, the dealings concerning the sale of the Club’s land were largely undertaken by Veljko Bosnic and Tom Bosnic, particularly the latter. On the other side, the dealings were largely undertaken by Mr Eugene Buffa. Mr Buffa was a director of several companies which, in combination,



provide veterinary services in the Northern Beaches area of Sydney. Northside itself was not incorporated until 3 March 2021. Mr Buffa was appointed as a director on that date. It was incorporated specifically for the purpose of acquiring the Club's land. The dealings, which culminated in an exchange of contracts for sale on 23 June 2021, commenced in early 2018.

5 Mr Buffa deposed:

On 20 January 2018, I met with Mr Veljko Bosnic. We discussed Northside's purchasing the Land in words to the following effect:

EB: *We are interested in purchasing the property.*

VB: *The Club is struggling financially and is no longer profitable. But I feel a loyalty to the old members of the club who still use the Bistro and Bocce courts out the back. Maybe we would consider selling for \$5,000,000.00.*

EB: *What if we purchase the property but allow the Club to use the back section to continue to run the club rent free for 5 years at a reduced price of \$4,600,000.00.*

VB: *That could work.*

On 25 March 2018, Mr Tom Bosnic, a director of the Club, said words to the following effect:

TB: *We had a meeting today and Veljko raised you purchasing the Club. Let's keep discussing it.*

Negotiations for Northside to purchase the Land from the Club continued between myself and Mr Tom Bosnic.

6 It seems that in around July 2018 there were numerous meetings between Mr Buffa and Tom and/or Veljko Bosnic. On 12 July 2018 there was a meeting at the Club that was also attended by other representatives of the veterinary practice. Mr Blazenko Tomasic of the Club attended that meeting and took notes. Mr Buffa gave evidence that, in addition to Tom and Veljko Bosnic, a number of other directors of the Club were in attendance at that meeting. This is not supported by Mr Tomasic's evidence, but I accept Mr Buffa's evidence to the effect that some elderly gentlemen who spoke Croatian were there. Mr Buffa said he assumed they were co-directors of the Club, and I think that it is likely that at least some of those gentlemen were indeed directors. However,

other evidence (which is referred to later in these reasons) given by Mr Zaknic about the way the board of the Club functioned, suggests that it is likely that Tom and Veljko Bosnic were the only directors of the Club who actively participated in the discussions at the meeting. Mr Tomasic's notes apparently record in some detail the topics of discussion. It appears from the notes that towards the end of the meeting something was said about obtaining members' approval at an Extraordinary General Meeting (see also Mr Buffa's message, posted on 13 July 2018 – see Exhibit B). Mr Buffa said that he was not aware of such a requirement, but his evidence seems to be mistaken in this regard.

- 7 On 20 August 2018 the Club sent a letter to Mr Buffa which included the following:

Thank you for your interest in the property. This letter is to confirm that the club is for sale. This would be a private sale without using real estate agents or middle men. The value of that has been accounted into the sale price. The sale price comprises of \$4.6 million cash payment and a lease of the rear bistro and bocce courts back to the club for a period of five years from completion of sale, at no cost and a further five year option to be negotiated at the then prevailing market rate.

The club is keen to secure its future operating viability. We will require a non refundable deposit to be paid up front of 7.0% (\$322,000) at exchange of contract. This will secure your purchase and also meet the club's debt obligation. The balance of the monies would be payable on settlement which may be in 18 to 24 months.

This sale has the full support of the board of directors and majority support of the club members.

The terms of this Agreement are confidential and are not to be disclosed to any third parties without approval from the vendor. The Agreement is subject to final form of contract and exchange thereof.

The letter was signed by Veljko Bosnic as President.

- 8 Negotiations in respect of the proposed transaction thereafter continued, at least sporadically, for a considerable time. It appears, for example, that Mr Buffa discussed the matter with Tom Bosnic on about 28 May 2019. On 3 June 2019 Tom Bosnic sent an email to Mr Buffa which suggests that by that time both sides had engaged solicitors to act on the matter. It seems that at that time there were discussions about the Club granting a lease of the premises

rather than agreeing to an outright sale of the land. Mr Buffa and Tom Bosnic met on 19 June 2019 and discussed the terms of the proposed lease. The lease proposal did not ultimately proceed, and the parties reverted to discussions about a sale of the land with a lease back to the Club.

- 9 On 17 October 2019, following a request made by Ms Nicole George, the Practice Manager of the veterinary practice, the Club sent a letter to Northern Beaches Council in the following terms:

The club grants permission for Northside Vets to lodge a development application for the change of use and internal fit out of the club's main building. The permission has been approved by the board of directors.

Thank you for considering the matter.

The letter was signed by Veljko Bosnic as director and President, and by Tom Bosnic as director.

- 10 The negotiations continued into 2020. The introduction of restrictions associated with the COVID-19 pandemic appear to have caused the postponement of a meeting that was to occur on 23 March 2020.
- 11 On 13 June 2020, Mr Buffa contacted Tom Bosnic to arrange "a chat about our deal with the club". Text messages exchanged between Mr Buffa and Tom Bosnic suggest that they may have met on 23 June 2020. I note that on 23 June 2020 Mr Buffa sent to Tom Bosnic a copy of a valuation report by Herron Todd White dated 14 April 2018.
- 12 The text messages also suggest that a meeting of the board of the Club was to occur on about 30 June 2020 to discuss a proposed sale. The evidence is not clear as to whether such a meeting occurred, or as to the outcome of any such meeting.
- 13 On 7 July 2020 Mr Buffa sent a text message to Tom Bosnic in the following terms:



Just wondering what you advise we do as the next step – how far are we from a sale contract and is there anything we can do to assist you

- 14 Tom Bosnic responded on 8 July 2020 with a message in the following terms:

I have engaged with the solicitor today re sale. Progressing now.

- 15 On 20 July 2020 Tom Bosnic sent an email to Mr Buffa in the following terms:

I have been informed by our legal advisers that we must proceed with due diligence and protocol for the sale. This is to ensure no possible recourse back on the directors after the sale. This includes getting up to three valuations (we got one), then due consideration and members approval. So I am proceeding along these lines. We are planning for the AGM meeting in August. Financials are being completed.

- 16 On 28 July 2020 Tom Bosnic sent a message to Mr Buffa to the effect that “Savills” would be doing “the second appraisal”.

- 17 On 3 September 2020 Tom Bosnic sent a message to Mr Buffa in the following terms:

Sorry this is dragging. To sell we need another Extraordinary General Meeting. The long term lease we could do without waiting for EGM. Ie 5+5+5 etc. Vel prefers sale as originally discussed. We are doing accounts now and will confirm EGM date when known.

- 18 On 2 October 2020 Mr Buffa sent a message to Tom Bosnic in the following terms:

We are a little concerned that there might be a problem with the sale of the club?

Is everything going OK?

- 19 Tom Bosnic sent a message in response later that day in the following terms:

Sorry for lack of info. Our current process is signing off the annual reports. Then AGM in about 4 weeks. The proposal to sell will be passed at that AGM. Tentative date is Sunday 22 Nov. We have one director stuck in Croatia but will proceed without her.



After Mr Buffa queried whether it would “go through”, Tom Bosnic sent a further message in the following terms:

A decision will be made. So that the board can basically proceed with a sale with a formal acceptance from the members.

20 On 21 October 2020 Mr Buffa sent a message to Tom Bosnic in the following terms:

If it helps, we are happy to put down a deposit to secure the purchase if it helps to get the sale over the line.

21 On 2 November 2020 Ms George sent an email to Tom Bosnic in the following terms:

Eugene has given us an update on the Club's decision process, and I just wanted to reach out on behalf of NEVS and NVS to emphasise we are very motivated to make this happen.

We have our deposit ready to go, and can transfer it immediately on receipt of the signed contract of sale.

If it would help expedite the process, we would be happy to pay any outstanding invoices relating to the drafting of the initial rental agreement to your solicitors, and/or to draft the contract for sale.

We completely understand there is a process that must be followed in regards to your constitution, but if there is anything else that you feel would help your members feel more confident in their decision, please do reach out.

22 Tom Bosnic responded by email later on 2 November 2020 in the following terms:

Thanks for confirming your position. I will convey this to our board meeting tomorrow night.

I will respond after that as to any possible action.

The evidence is not clear in relation to any board meeting held on 3 November 2020.

23 On 24 November 2020 Tom Bosnic sent a message to Mr Buffa in the following terms:

I am still away back Wednesday. The AGM was moved 6 December. Delay with accounts. There will be a vote on sale formally. It is recommended and agreed by the board. Invites gone out. Can give you a call Wednesday. Thanks.

- 24 The Annual General Meeting (“AGM”) of the Club was held on 6 December 2020. The minutes record that eight board members were present, and 37 members were present. It is not clear whether the eight board members are included in the 37, but I do not think that anything turns upon that. Item 6 on the Agenda was:

Discuss future of the club.

- 25 In relation to that matter, the minutes record:

T Bosnic: We all know that we cannot go on like this. Less and less patronage. Our income is measly. Pretty soon we will not even be able to pay our bank interest.

V Bosnic: We should continue on either selling or renting out our club. The [sic] was discussed at the last AGM. We had an offer from the Vets to rent for \$150,000 per annum. With start of COVID that offer stalled. The latest contact they withdrew from rental and now they are interested in buying the club. Their offer is \$3.5 million. (Corrected: Offer of \$4.6m cash plus club to rent at rear for 5 years free). Another company is offering \$4.6m.

T Bosnic: Two other parties are interested to purchase the club. They are discussion only. No written offer received.

V Bosnic: I must inform you that the Vets have been to Warringah council (for DA) with view to purchase or lease the club. We allowed this as we had your confirmation to negotiate. As it stands now we have three interested parties to purchase. If we sell, we would remain in the rear of the club rent free for the next five years.

I Gavranic: Would we need to pay rent. And if so how much.

T Bosnic: we would need to pay rent. For 5 years \$600,000 or \$120,000 per year.

T Zaknic: Where will we go after we sell.

V Bosnic: We stay here for 5 years.

I Gavranic: I feel that the way the club is heading I move a motion “To sell or rent”

Seconded V Bosnic.

(Motion put to a vote).

Majority voted in favour.

None against.

Motion carried unanimously.

26 The minutes then continue:

V Andrijic: We need to find an agent and advertise for sale or rent, and that we do not stop on only the one price.

T Bosnic: To go through an agent sell or rent the commission would be 5%, plus the cost of the campaign. (Quoted \$17,000 from Savill's and commission of 2% not 5%)

27 Mr Buffa was apparently anxiously awaiting news concerning the AGM. He sent a message to Tom Bosnic on the evening of 6 December 2020 in the following terms:

The suspense is killing. How did the members vote?

28 Tom Bosnic responded shortly thereafter in the following terms:

To proceed with sale or lease. Green light given. Complication but that we need to go with expressions of interest to see what it's worth then sell privately I hope.

29 Mr Buffa then sent the following message to Tom Bosnic:

So does that mean it has to be put on the market first?

30 Tom Bosnic responded with the following message:

Only on expression of interest.

31 Mr Buffa deposed that he had a conversation with Tom Bosnic on 7 December 2020 to the following effect:

EB: Who is dealing with the expressions of interest?

TB: Our solicitor. We are also being advised and consulted by Robert Bacic who is a real estate agent from Ray White on the North Shore.



- 32 On 16 December 2020 HPC Legal, who had apparently been retained by the veterinary practice, sent a letter to Cameron Lawyers in the following terms:

We are instructed your client has decided to sell the above-named premises by way of an EOI.

We are instructed to make the following offer on behalf of our clients, Northside Vet Specialists and Northside Emergency Veterinary Service:

- Sale price \$4.6M
- 5-year rent-free period of the Bistro and bocce courts
- Offer to expire COB Friday, 12th February

The Directors would like to make mention of the fact they have spent over \$100,000 to get DA Approval for this site to date and in good faith are requesting your client honours the original agreement.

- 33 Text messages exchanged between Mr Buffa and Tom Bosnic later in December 2020 and in January 2021 indicate that it was contemplated that the Club would be placing an advertisement in the Sydney Morning Herald in relation to the sale of the land. On 15 January 2021, Tom Bosnic sent a message which included a photograph of an advertisement that Tom Bosnic expected would be in “two times”. On 18 January 2021, Mr Buffa queried whether the advertisement had gone to the newspaper, and Tom Bosnic responded that he “will confirm from SMH”.

- 34 On 22 January 2021 Tom Bosnic sent a message to Mr Buffa in the following terms:

Sorry I am actually away. Your offer is in and it is the only formal offer. The other offers have not been formal. The add [sic] picture ended up not being of good enough quality and needed to be redone. I will contact you Tuesday/Wednesday re update.

- 35 On 5 February 2021 Tom Bosnic sent a message to Mr Buffa that included the following:

There are 3 offers. One has been discounted. Yours and one other still being considered. The other offer is \$4.7m cash and we stay 5 years. On paper it looks better but it's a delayed settlement that we prefer to not go into. Vel is discussing with them...



36 On 6 February 2021 Mr Buffa sent an email to Tom Bosnic in the following terms:

Please find attached a copy of our original offer of purchase for 16 Myoora Rd Terrey Hills.

Please note that we are happy to increase our cash offer to \$4.7 million with all the same conditions of sale as listed in the attached contract.

We sincerely hope that this meets with your boards approval and look forward to signing the contract for sale with you early next week.

37 On 11 February 2021 Tom Bosnic sent an email in response in the following terms:

Thank you for the revised offer. I have passed that on to our solicitor.

At our Board Meeting Tuesday night we considered this offer as well as another offer. The board decided to extend the time a few days to get the final offers from all parties.

To that end I have instructed our solicitor to write to both parties, and to respond within 7 days.

The board will then consider and decide on the one to proceed with.

Hopefully this will be decided in the next few days.

38 Mr Buffa deposed:

On 13 February 2021, Mr Tom Bosnic and I had a conversation in words to the following effect:

TB: *The Club's Board of Directors met yesterday and discussed the expressions of interest submitted. The Club has voted to proceed with the sale to you.*

EB: *Great.*

On 18 February 2021, Mr Tom Bosnic said to me words to the following effect:

TB: *We have told our solicitor to draw up the contract. Your solicitor should receive a copy soon.*

39 Numerous emails passed between Ms Lukunic of Cameron Legal (acting for the Club) and Ms Karen Crouch of HPC Legal (acting for Northside) in the

period from mid-February to June 2021. It is not necessary to refer to this evidence in detail. It is sufficient to note the following matters.

40 By 16 June 2021 the solicitors appear to have been aiming for an exchange of contracts to occur on Monday 21 June 2021. However, on that day, an issue arose concerning the non-smoking area provided for in the lease that was to be attached to the contract. A form of amendment to Special Condition 10 was agreed upon in that regard. It was also agreed that an amendment be made to the lease to include a definition of "Lessee Agent". It was further agreed that Ms Lukunic would make the necessary amendments by hand, and attend to exchange. It seems that by that time, Cameron Legal was in possession of a form of contract that had been signed for Northside. In this regard I note that Mr Buffa gave evidence to the effect that on 17 June 2021 a copy of the contract for sale signed by himself and another director of Northside (Mr Jeffrey Lee) was hand delivered to the office of Cameron Legal. There is also evidence that by that time, the deposit of \$517,000 provided for in the contract had been paid into the trust account of Cameron Legal.

41 It seems that Veljko Bosnic and Tom Bosnic signed a copy of the contract for sale on 21 June 2021. Tom Bosnic sent an email to Mr Buffa on that day that included a statement to that effect.

42 On 23 June 2021 (at 4:16pm) Cameron Legal sent an email to HPC Legal in the following terms:

Contracts exchanges [sic].

Hard copy in the post to you.

43 On 24 June 2021, Cameron Legal sent a letter by express post to HPC Legal in the following terms:

We acknowledge receipt of the Contract for Sale signed by the Purchaser and note the [sic] we are in receipt of the 10% deposit to be dealt with in accordance with the terms of the Contract.

We **enclose** Vendor's counterpart of the Contract, duly signed to complete the exchange. Both Contracts have been dated 23 June 2021.

- 44 The vendor's counterpart contains two signatures for the vendor. One appears to be the signature of Tom Bosnic; the other is indistinct. Neither signatory is stated to have signed in any particular capacity.
- 45 In accordance with the terms of the contract, a part of the deposit (an amount of \$103,400) was released to the vendor. That occurred on 24 June 2021. Of that amount, \$13,668.69 was paid to Cameron Legal for legal fees. The balance (of \$89,731.31) was paid to the Club. Following the emergence of the dispute between the parties concerning the contract for sale, steps were taken by the Club to repay the amount of the released funds into the Cameron Legal trust account. By 26 August 2021, Cameron Legal was again holding in that account the full amount of the deposit, namely, the sum of \$517,000.
- 46 By 22 July 2021 the Club had instructed its present solicitors, A C Dunstan Lawyers. At about the same time, Northside retained its present solicitors, Mills Oakley.
- 47 On 3 August 2021 A C Dunstan Lawyers sent a letter to Mills Oakley. It was pointed out in the letter that the purported sale of the Myoora Road property did not comply with s 41E of the *Registered Clubs Act 1976* (NSW). It was stated that the property was "core property" within the meaning of s 41E of that Act and that, contrary to the requirements of the section:
- (1) the property had been disposed of without being valued by a qualified valuer;
  - (2) the disposal had not been approved at a general meeting of the members of the club; and
  - (3) the sale was not by way of public auction or open tender conducted by an independent real estate agent or auctioneer.
- 48 It was further stated in the letter that there were numerous material disparities between the vendor and purchaser counterpart contracts such that there was



no creation of binding legal relations. The letter went on to invite Mills Oakley to obtain instructions to enter into a Deed of Mutual Rescission to confirm the unenforceable nature of the sale.

49 Mills Oakley sent a lengthy letter in response on 4 August 2021. It is sufficient to note that in the letter the solicitors rejected the suggestion that no binding contract for sale came into existence, and went on to demand that the purchaser proceed to settlement of the contract.

50 I note in passing that at about that time Mr Matthew Vlatko lodged a caveat (AR309556) against the title to the property, claiming an equitable interest pursuant to an agreement. Mr Vlatko was named as the second defendant when the proceedings were commenced on 18 August 2021. Northside sought an order that he withdraw the caveat. However, on 1 October 2021 orders were made by the Court for the withdrawal of the caveat, with the proceedings to be dismissed as against the second defendant upon his compliance with that order. The Court understands that that has occurred.

### **Determination**

51 The first issue to consider is whether any disconformity between the counterparts of the contract that were exchanged leads to the conclusion that a binding contract did not come into existence.

52 In its submissions, the Club sought to raise a number of matters as relevant disconformities. These were:

- (1) the inclusion of a form of covenant of guarantee in the purchaser's signed counterpart that was absent from the vendor's signed counterpart;
- (2) the use of handwriting between Special Conditions 12 and 15 in the purchaser's signed counterpart compared with the use of printing between Special Conditions 12 and 15 in the vendor's signed counterpart;



- (3) the presence of certain “watermarking” on the pages of the standard form clauses in the vendor’s signed counterpart, said to be absent from the pages of the standard form clauses in the purchaser’s signed counterpart;
- (4) the absence of an Australian Business Number or Australian Company Number as part of the description of the vendor in each counterpart; and
- (5) the inclusion of handwritten amendments to the form of lease that is annexed to each counterpart.

53 I do not see how points (4) and (5) can be thought to amount to relevant disconformities. In neither case is it said that there is a difference between the two counterparts. That the counterparts are in those respects identical was confirmed by my own comparison of the copies that were in evidence (see the vendor’s counterpart at Exhibit A 3/1253 and the purchaser’s counterpart at Exhibit A 4/1328).

54 That comparison also reveals that point (3) above is without substance. The “watermarking”, which consists of an imprint of the property address, is in fact present on the pages of the standard form clauses in the purchaser’s signed counterpart, albeit that it appears there more faintly than it does on the vendor’s signed counterpart. Even if there were a difference in this respect, it would not be any indication that the parties had not agreed upon the terms of the contract.

55 As for point (2), the only difference is the mode of writing (i.e, handwriting as opposed to printing). The content of the writing is the same. In each case the following appears after Special Condition 12 and before Special Condition 15:

13. NOT USED

14. NOT USED

56 Again, there is no substance to the point.

57 Turning to point (1), it is true that the inclusion of the form of covenant of guarantee in the purchaser's signed counterpart gives rise to a disconformity between the two counterparts. However, in circumstances where:

- (a) the form of covenant is left blank, unsigned by "the Guarantors";
- (b) no guarantors are identified as parties to the contract, whether in the form of covenant itself or elsewhere in the contract; and
- (c) there is no evidence of any negotiations concerning a guarantee, or agreement to provide any guarantee,

the inclusion of the form of covenant would seem to be an administrative error, rather than a step intended to have contractual significance.

58 In my opinion, the presence of the form of covenant in the purchaser's signed counterpart does not amount to a material difference between the counterparts. Viewed objectively, the exchange of the counterparts, effected by Cameron Legal on 23 June 2021, evinced an intention that the parties would thereby be bound by a contract on the terms (other than the form of guarantee) that were common to each counterpart (see *Sindel v Georgiou* (1984) 154 CLR 661 at 667-8). Accordingly, I do not think that this disconformity leads to the conclusion that a binding contract did not come into existence.

59 The next issue to consider is whether the persons who signed the contract for the Club lacked either actual or ostensible authority to bind it to the contract, such that no binding contract came into existence.

60 As mentioned earlier, there are two signatures for the vendor. One appears to be a signature of Tom Bosnic, and the other is indistinct. Neither signatory has purported to sign in any particular capacity, such as a director of the Club. In any case, for the following reasons, I am satisfied on the evidence that the signatories were in fact Tom Bosnic and Veljko Bosnic.

- 61 As submitted by Northside, the signatures on the contract closely resemble signatures apparently made by Veljko Bosnic and by Tom Bosnic on other documents in evidence. That they were indeed the signatories is supported by the terms of the email sent by Tom Bosnic to Mr Buffa on 21 June 2021. Moreover, it appears from the minutes of a meeting of the Club's board on 11 July 2021 that Veljko and Tom Bosnic "apologised" for signing sale contracts. Subsequently, on 2 September 2021, the Club's solicitors sent a letter to the Department of Liquor and Gaming that attached "the front two pages of the exchanged contract signed by Veljko Bosnic and Tom Bosnic". There are various other indications in the documentary evidence that Veljko and Tom Bosnic signed the contract for the Club, and nothing to suggest the contrary.
- 62 At the time the contract was signed, on or about 23 June 2021, both Veljko and Tom Bosnic were directors of the Club. The contract was thus, as a matter of fact, executed in accordance with s 127(1)(a) of the *Corporations Act 2001* (Cth). That is so even if the document, on its face, does not appear to have been signed in accordance with s 127(1) (see *Corporations Act*, s 129(5)).
- 63 Northside submitted that, in those circumstances, whether the director signatories had actual or apparent authority when they signed the contract was irrelevant to whether the company was bound by the contract that came into existence on exchange of the counterparts.
- 64 I do not think that is correct. Whilst s 127(1) of the *Corporations Act* provides a permissible mode of execution of documents by a company, the mere execution of a contract in that fashion does not foreclose enquiry as to whether the agents of the company who have purported to bind the company had actual or ostensible authority to do so (see The Hon R P Austin and the Hon Justice A J Black, *Austin & Black's Annotations to the Corporations Act* at [2B.127]). The question whether the acts of the purported agents are effective to bind the company is to be determined by reference to both general law principles and the relevant provisions of the *Corporations Act*, notably ss 128 and 129. Those sections provide:



## **128 Entitlement to make assumptions**

- (1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- (2) A person is entitled to make the assumptions in section 129 in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to property from a company. The company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect.
- (3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings.
- (4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.

## **129 Assumptions that can be made under section 128**

### *Constitution and replaceable rules complied with*

- (1) A person may assume that the company's constitution (if any), and any provisions of this Act that apply to the company as replaceable rules, have been complied with.

### *Director or company secretary*

- (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC, to be a director or a company secretary of the company:
  - (a) has been duly appointed; and
  - (b) has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.

### *Officer or agent*

- (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company:
  - (a) has been duly appointed; and
  - (b) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company.

### *Proper performance of duties*

- (4) A person may assume that the officers and agents of the company properly perform their duties to the company.



*Document duly executed without seal*

- (5) A person may assume that a document has been duly executed by the company if the document appears to have been signed in accordance with subsection 127(1). For the purposes of making the assumption, a person may also assume that, if any person who signs the document states next to their signature that:
- (a) they are a director of the company – that is the case; or
  - (b) they are the company secretary of the company – that is the case; or
  - (c) they are the sole director of the company and that the company does not have a company secretary – that is the case; or
  - (d) they are the sole director and sole company secretary of the company – that is the case.

*Document duly executed with seal*

- (6) A person may assume that a document has been duly executed by the company if:
- (a) the company's common seal appears to have been fixed to the document in accordance with subsection 127(2); and
  - (b) the fixing of the common seal appears to have been witnessed in accordance with that subsection and subsection 127(2A)

For the purposes of making the assumption, a person may also assume that, if any person who witnesses the fixing of the common seal states next to their signature that:

- (c) they are a director of the company – that is the case; or
- (d) they are the company secretary of the company – that is the case; or
- (e) they are the sole director of the company and that the company does not have a company secretary – that is the case; or
- (f) they are the sole director and sole company secretary of the company – that is the case.

*Officer or agent with authority to warrant that document is genuine or true copy*

- (7) A person may assume that an officer or agent of the company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.
- (8) Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section.

65 The relevant dealings in this case were almost entirely conducted with Veljko Bosnic and Tom Bosnic. In cross-examination, Mr Buffa could not remember how many meetings he had with either Tom or Veljko Bosnic, but ventured that he may have had something like 40 meetings with Veljko Bosnic and more than 50 meetings with Tom Bosnic. That evidence should be taken to refer to the period from early 2018 until the exchange of contracts in June 2021. Veljko and Tom Bosnic were both directors of the Club throughout that period and Tom Bosnic was the company secretary. Veljko Bosnic was also the Club President, and Tom Bosnic was the Club Treasurer. Over that period, the subject matter of the discussions and negotiations varied, but was at all times concerned with a transaction that would involve either a sale of the Club's Myoora Road property with a lease back to the Club of part of the property, or the Club granting a lease of part of the property. Minutes of general meetings held on 25 March 2018, 14 April 2019 and 6 December 2020 show that the discussions with the veterinary practice were referred to in those meetings.

66 Neither Veljko Bosnic nor Tom Bosnic was called to give evidence. Only one person who was a director during the relevant period was called. That was Mr Tonci Zaknic. He was a director of the Club at all material times, having been appointed on 25 September 2014.

67 Mr Zaknic deposed:

As a Director of the Cub [sic] I would regularly attend the clubs premises at 16 Myoora Road, Terrey Hills New South Wales (*"the Terrey Hills Property"*) on Tuesday nights I together with other directors Veljko Bosnic (*"Val"*), Mladen Milostic, Kuzman Petkovic, Frank Vlatko, and Ante Andriic Gavranic and former director Tom Bosnic (*"Tom"*).

On Tuesday nights at the Club we would generally prepare for functions on the weekend including cleaning the barbecue area, vacuuming the carpet, cleaning generally, restocking the bar fridges, and unloading goods that may have been delivered at that time to the Club.

On Tuesday nights at the Club we would from time to time prepare for functions which would include setting up tables and trestles and thereafter unpacking the tables after the functions as appropriate.

On these regular Tuesday nights we did not discuss Club business.



As a social club servicing the Croatian community in Sydney, many of the current core directors, such as Mladen, Kuzman, Ante speak dialects of Croatian and have limited English.

While I have a better understanding and can speak some English it is still somewhat basic.

In those circumstances Tom and Val have been undertaking the day to day running of the club since my appointment as a director including negotiating and attending to commercial matters on behalf of the Club, such as short term lease negotiations, liquor licencing, sponsorship, advertising and building works.

While major matters such as licensing, the sale and leasing of the Terrey Hills Property and income of the Club require a Director board or members meetings and [sic] we had basically left the commercial management and administration of the Club to Tom and Val.

68 Mr Zaknic also gave evidence concerning certain short-term leasing arrangements made with third parties by Tom Bosnic and Veljko Bosnic in relation to parts of the premises. He said that the board was not provided with any documents in relation to those arrangements.

69 That the discussions and negotiations were almost entirely conducted with Veljko Bosnic and Tom Bosnic, and no other directors of the Club, is consistent with the practice described by Mr Zaknic. However, it appears that Tom Bosnic considered, at least by July 2020, that “due diligence and protocol” would need to be followed before a sale of the property could go ahead. That process was envisaged to include the obtaining of “members approval”. Tom Bosnic made this known to Mr Buffa by email on 20 July 2020. In cross-examination, Mr Buffa said that he trusted that Tom Bosnic was following “due process” as he said he would in that email.

70 On 3 September 2020 Tom Bosnic informed Mr Buffa that in order to sell there would need to be an Extraordinary General Meeting. In later communications, he told him that there would be an Annual General Meeting, and eventually that the date for that had been set for 6 December 2020. Mr Buffa said in cross-examination that when Tom Bosnic informed him of the 6 December 2020 Annual General Meeting, he became aware that they required the majority of the board and the members to proceed with the sale of the property. Mr Buffa also said that in the preceding months Tom Bosnic had told him that he would



require the majority of the board for the sale to go through. I note that at one point in his cross-examination, Mr Buffa seemed to accept that as early as August 2018 he was aware that a sale would have to be approved by the board of directors and the members of the Club, but he later said that he was not aware at that point in time. These answers were given in response to questions based on the letter sent by the Club to Mr Buffa on 20 August 2018. Having regard to the terms of that letter, I would accept Mr Buffa's later answers as accurate.

- 71 The email sent by Ms George to Tom Bosnic on 2 November 2020, which was apparently written following an update given by Mr Buffa, indicates that it was clearly understood that there was a process that had to be followed in regards to the constitution of the Club. Mr Buffa was questioned in cross-examination concerning his knowledge of the Club's constitution. He said that he was not aware that it required membership approval to sell the Club. He said that he did not know the details of the constitution, and that he assumed the Club would follow it. Mr Buffa said that he did not ask Tom Bosnic what the process was, as he trusted that he would follow "due course".
- 72 The minutes of the Annual General Meeting held on 6 December 2020 record that a motion "to sell or rent" was put to the meeting and carried. It appears that a majority of those present voted in favour of the motion, and there were no votes against the motion. Even though one version of the minutes refers to the motion being carried unanimously, it seems likely that some members abstained. That is supported by the reference in the minutes to a majority voting in favour, and also Mr Zaknic's evidence to that effect.
- 73 The resolution "to sell or rent" should be understood as a conferral of authority upon the board to proceed to either sell or lease the Club's Myoora Road property. The motion was passed following a discussion which included references, made by either Veljko Bosnic or Tom Bosnic, to "continuing" to either sell or rent out the Club; the negotiations that had been held with the veterinary practice; and discussions with other parties.

- 74 It seems that following the passing of the motion there was some discussion about how the sale or rent process should be conducted. However, no resolutions were passed in that regard. I do not think that these discussions operated to restrict or qualify the authority conferred by the motion “to sell or rent”.
- 75 Shortly after the conclusion of the meeting, Tom Bosnic informed Mr Buffa that the members had voted to proceed with sale or lease. Tom Bosnic also stated that it would be necessary to proceed by way of expressions of interest, before selling privately. He later explained that proceeding in that manner was not the same as placing the property on the market.
- 76 Mr Buffa said in cross-examination that he accepted what Tom Bosnic had told him about the Annual General Meeting approving the sale of the Club. Mr Buffa also said that he saw and read the minutes of the 6 December 2020 Annual General Meeting, but it is not clear when that occurred. He said that he saw the minutes as reflective of what Tom Bosnic had told him about the majority of members and the board having agreed to a sale of the property. Mr Buffa conceded, however, that he did not see a directors’ resolution to that effect.
- 77 The veterinary practice participated in the expression of interest process, initially by way of the offer sent by HPC Legal to Cameron Lawyers on 16 December 2020. The process seems to have been undertaken in a rather informal manner. Efforts were made by Tom Bosnic to have an advertisement placed in the Sydney Morning Herald, but the evidence suggests that he was not successful in that regard due to the inadequate quality of the aerial photograph of the property. A proposal for a marketing strategy was obtained from Mr Robert Bacic (of Ray White, Lower North Shore) but it seems that there was no formal engagement of Mr Bacic in relation to the expression of interest process. Nevertheless, it appears that the process drew at least one other offer to purchase the property, and this was used by Tom Bosnic to extract an increased offer from Mr Buffa. The enhanced offer was made on 6 February 2021. It is evident from Mr Buffa’s email that he considered that sale contracts



could be signed provided only that the offer met with the approval of the Club's board.

78 Tom Bosnic informed Mr Buffa by email on 11 February 2021 that the board had considered the matter and were going to get final offers from all parties before deciding which one to proceed with. Contrary to the terms of that email, there is no evidence that any letter was sent by Cameron Legal asking for final offers. In any event, I accept that Mr Buffa was told by Tom Bosnic on about 13 February 2021 that the board had met and that the Club had voted to proceed with the sale to him (i.e. the veterinary practice). I further accept that Tom Bosnic told Mr Buffa on about 18 February 2021 that instructions had been given to the solicitors to draw up the contract. This is consistent with the email sent on 15 February 2021 by Ms Lukunic to Ms Crouch which is in the following terms:

We are instructed that our respective clients have agreed the broad terms of the sale of the above property; including but not limited to:

1. Purchase price of \$4,700,000.00 plus GST
2. Five-year lease to our client of the bistro and bocce court area, such lease to have no outgoings and include an option period of five years (the rent for the option period to commence at market rent)
3. The sale is of the property in its current state

As you can no doubt appreciate, our client is eager to finalise the terms of the contract and to this end we request confirmation of the purchasing entity's details. Once in hand we shall prepare the contract and lease and forward same to you for review.

Please note that neither the submission of a Contract nor this correspondence is meant to be an agreement or offer to sell. No Contractual agreement or obligation shall arise as a result of this email or submission of the Contract. No Contractual obligation shall be created until a formal exchange of Contracts has occurred. The Vendor requires a certificate under S.66W of the *Conveyancing Act, 1919* on exchange.

In addition, we are instructed that our client has requested, and your client has agreed, to bear the costs our client has incurred to date in this matter. To this end please confirm that your client shall pay our tax invoices to date.



79 The matter was thereafter dealt with between the respective solicitors, culminating in the exchange of contracts effected by Cameron Legal on 23 June 2021.

80 The Club contends that Veljko Bosnic and Tom Bosnic lacked actual or ostensible authority to bind the Club to the contract for sale with Northside by executing the contract on its behalf and arranging for the contract to be exchanged. As I understood the submissions of the Club, the contention is based upon the following matters:

- (a) that the sale of the property was not sanctioned by a general meeting of the members of the Club;
- (b) that the sale did not have the consent of the Foundation Members of the Club;
- (c) that the sale was entered into without the knowledge or approval of a majority of the board of the Club; and
- (d) that the sale was not in accordance with s 41E(1) of the *Registered Clubs Act*.

81 As I have said, the resolution passed by the Annual General Meeting on 6 December 2020 should be regarded as a conferral of authority upon the board to proceed either to sell or lease the Club's Myoora Road property. Whilst the evidence is not at all clear, it may be the case, however, that the resolution did not embody the consent of the Foundation Members to the sale, as required by article 18(2) of the Club's articles of association. It may also be the case, based on the evidence of Mr Zaknic, that as many as four directors were not aware of the signing and exchange of the contract for sale. Further, it seems, on the evidence presently before the Court, that the sale (being a disposal of "core property" of the Club within the meaning of the section) was not in accordance with the requirements of s 41E(1) of the *Registered Clubs Act*, at least because

the sale was not by way of public auction or open tender conducted by an independent real estate agent or auctioneer.

82 The articles of association of the Club provide that the governing body responsible for the management of the business and affairs of the Club is the committee (see article 55). The committee may be equated with the board of directors, given that article 6 provides that the members for the time being of the committee are deemed to be directors of the company.

83 Article 56 relevantly provides:

The committee may pay all expenses incurred in promoting and registering the Club and shall have full control of the property of the Club and absolute authority subject to the Memorandum of Association regarding its disposition and in the conduct and administration of all the affairs and business of the Club, including the rights privileges and obligations of members in respect of the Club, except insofar as otherwise expressly provided by these Articles by the Code or by the Registered Clubs Act....

84 Articles 60, 61 and 63 provide:

60. The committee may meet together for the despatch of business, adjourn and otherwise regulate its meetings as it thinks fit provided that it shall hold a meeting at least once in each month of the year. A member of the committee may at any time and the secretary shall on the requisition of a member of the committee summon a meeting of the committee.

61. Subject to these regulations questions arising at any meeting of the committee shall be decided by a majority of votes and a determination by a majority of the members of the committee shall for all purposes be deemed a determination of the committee. In case of an equality of votes the chairman of the meeting shall have a second or casting vote.

...

63. The quorum necessary for the transaction of the business of the committee shall be five (5) or such greater number as may be fixed by the committee. Provided always that the number forming a quorum must include any two of the president, the vice-president, the honorary secretary and the honorary treasurer.

85 Section 128(1) of the *Corporations Act* provides (subject to the qualification contained in s 128(4)) that a person having dealings with a company is entitled to make certain assumptions in relation to such dealings; and the company is



not entitled to assert (in proceedings in relation to the dealings) that the assumptions are incorrect. The assumptions are those set forth in s 129 of the *Corporations Act*. They include an assumption that the company's constitution has been complied with (see s 129(1)), and an assumption that the officers and agents of the company properly perform their duties to the company. The qualification contained in s 128(4) is that a person is not entitled to make an assumption in s 129 if, at the time of the dealings, they actually knew or actually suspected that the assumption was incorrect (see, for example, *Soyfer v Earlmaze Pty Ltd* [2000] NSWSC 1068 at [70]-[71]).

86 I do not think there is any doubt that Mr Buffa's dealings with Tom Bosnic and Veljko Bosnic, who were directors of the Club and Club Treasurer and Club President respectively, were dealings with the company for the purposes of s 128(1). I did not understand the Club to submit to the contrary. By its conduct, the board of the Club permitted Tom Bosnic and Veljko Bosnic to conduct negotiations over a lengthy period with Mr Buffa concerning a possible sale or lease of the property (see *Australia and New Zealand Banking Group Ltd v Frenmast Pty Ltd* (2013) 282 FLR 351; [2013] NSWCA 459 at [42]-[45]). In addition, at least since 6 December 2020, they were members of the board, which had been authorised by the general meeting to proceed to either sell or lease the property. Accordingly, subject to the s 128(4) qualification, Mr Buffa (and, following its incorporation, Northside) is entitled to make the assumptions in s 129. Equally, the Club is not entitled to assert in these proceedings that any of those assumptions are incorrect.

87 The matters sought to be relied upon by the Club to assert that there was a lack of authority (set out above at [80]) seem to me to involve a denial of the s 129 assumptions, in particular, the assumptions in s 129(1) and s 129(4). Each of (a) to (c) is inconsistent with the constitution of the company being complied with in relation to the sale to Northside, and at least (c) is inconsistent with Tom Bosnic and Veljko Bosnic, as duly appointed officers of the company, properly performing their duties to the company. As for (d), a contravention of s 41E(1) of the *Registered Clubs Act* is only relevant to the issue of authority insofar as compliance with the Act operates as a qualification upon the power of the board



to dispose of the property of the company (see article 56). It therefore seems to me that (d) is itself inconsistent with the constitution of the company being complied with in relation to the sale. Accordingly, it seems to me that, subject to s 128(4), the Club is not entitled to assert the matters it seeks to rely upon to demonstrate a want of authority.

88 I do not think it has been established that, at the time of the dealings, Mr Buffa actually knew or actually suspected that the Club's constitution had not been complied with (see *Soyfer v Earlmaze Pty Ltd* (supra) at [70]-[71]; *Caratti v Mammoth Investments Pty Ltd* (2016) 50 WAR 84; [2016] WASCA 84 at [377] and [591]). I accept Mr Buffa's evidence that he did not know the details of the constitution, and assumed that the Club would follow it. The Club placed some emphasis upon the terms of the email sent by Ms George on 2 November 2020 which refers to an understanding that there is "a process that must be followed" under the constitution. The email was probably drafted on the basis of what Mr Buffa had told Ms George. Mr Buffa accepted in cross-examination that she probably consulted him about the email. In any event, I consider that the terms of the email (including the words "We completely understand") are consistent with an awareness of the existence of a required process without knowing the details of the requirements. It is likely that Mr Buffa understood, from what he was told by Tom Bosnic, that a resolution of a general meeting approving a sale of the property was required. However, following the Annual General Meeting on 6 December 2020, Mr Buffa was told that the members had voted to proceed with sale or lease. Mr Buffa is also likely to have understood, in a general way, that a majority of directors would have to approve a sale. Mr Buffa gave an answer in cross-examination that suggests that he understood from what Tom Bosnic told him following the 6 December 2020 meeting that a majority of the board had agreed to a sale of the property. In any event, whilst it was put to Mr Buffa (and he agreed) that he did not see any directors' resolution to that effect, it was not put to Mr Buffa that he knew or suspected that the sale had not been approved by a majority of the board. I note that Mr Buffa was also not directly challenged on an answer he gave (albeit not truly responsive to the question asked) to the effect that he had no reason to believe that Tom Bosnic and Veljko Bosnic did not have the authority to sell the property.

89 Nor has it been established that, at the time of the dealings, Mr Buffa actually knew or actually suspected that either or both of Tom Bosnic and Veljko Bosnic were not properly performing their duties to the company in relation to the sale. No proposition to that effect was put to Mr Buffa in cross-examination, and I was not referred to any evidence which would support the conclusion that Mr Buffa knew or suspected that to be the case.

90 I have not overlooked the evidence to the effect that Mr Buffa was aware of matters (such as the absence of a public marketing campaign) that might suggest that the sale was proceeding in contravention of s 41E(1) of the *Registered Clubs Act*. However, it was not put to Mr Buffa that he was aware of that provision, let alone that he knew that, under the Club's constitution, compliance with the provision was necessary in order for the board to have the power to sell the property. Again, I accept that Mr Buffa did not know the details of the constitution. I should add that I also accept Mr Buffa's evidence that he trusted that Tom Bosnic was following "due process" as he said he would in his email of 20 July 2020. Mr Buffa was a careful witness who seemed to be doing his best to accurately answer the questions put to him. I generally accept his evidence as credible and, for the most part, reliable.

91 For the above reasons, the Club's defence of lack of authority cannot be accepted. Sections 128 and 129 of the *Corporations Act* operate to preclude it. It is not necessary to consider whether the same conclusion would be reached applying the general law principles concerning the so-called "indoor management rule" (see *Morris v Kanssen* [1946] AC 459 at 474; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 154-5, 171 and 207).

92 The Club has failed to establish either of the matters it says should lead to the conclusion that no binding contract came into existence. In my view, a binding contract for the sale of the Myoora Road property came into existence when Cameron Legal effected the exchange of contracts on 23 June 2021.



93 The contract, being a contract for the sale of land, is of a species for which it is commonly appropriate to grant equitable relief in the nature of specific performance (see *Adderley v Dixon* (1824) 1 Sim & St 607 at 610; *Dougan v Ley* (1946) 71 CLR 142 at 150). In the present case, the Club raises various matters it says should lead the Court to decline the equitable remedy in its discretion. I turn now to consider those matters.

94 In closing submissions, the Club placed these matters into four categories. These are:

- (a) lapse of time;
- (b) trickiness;
- (c) great hardship; and
- (d) damages are an appropriate alternative remedy.

95 It seems to me that there is a degree of overlap between some of the categories, and one of the matters relied upon under the trickiness heading (namely, illegality of sale) might be itself regarded as a separate matter. In any case, all of the matters raised have been considered on their own, and together, in determining whether it is appropriate in this case to grant relief in the nature of specific performance.

96 (a) Lapse of time: the essence of the point made here seems to be that Mr Buffa engaged the Club in protracted negotiations over an extended period (from about early-2018 to 2021), yet the purchase price offered to the Club remained largely the same throughout. It was further put that the sale was effected without a public marketing campaign or auction, and without the obtaining of any independent valuations of the property.

97 It is difficult to discern why this matter, in and of itself, would afford a sound reason to decline to order specific performance. That the negotiations continued, sporadically, over a number of years, indicates that the Club had



ample time to undertake whatever enquiries (including the obtaining of valuations) it considered prudent in considering whether to agree to sell the property. The suggestion seems to be that the price offered to the Club should have been increased to take into account an increase in the value of the Club between 2018 and 2021. However, Mr Buffa said in cross-examination, by reference to a valuation he had seen, that the property was purchased for a fair price compared to the market at that time. I accept that as a view genuinely held by Mr Buffa. That view can be attributed to Northside. In these circumstances, I do not see why Northside should have further increased its offer. Its failure to do so does not in my opinion amount to a good reason to decline to order specific performance.

98 (b) Trickiness: it was submitted by the Club that in various ways Mr Buffa behaved in a tricky or less than forthright manner. Allied with this argument was a suggestion that Mr Buffa was an evasive witness. It should be apparent from what I have already said that I do not agree that Mr Buffa was an evasive witness. He seemed to me to be a witness doing his best to accurately answer the questions put to him. Moreover, the example given in submissions in support of the proposition suffers from the difficulty that the answers the subject of comparison concerned different events.

99 As for the conduct said to be tricky, it was submitted that Mr Buffa negotiated the price based on a valuation obtained for mortgage purposes, and thereby misrepresented the true value of the property. It is said that he pressured Tom Bosnic and Veljko Bosnic in relation to the sale, and sought to take advantage of them in circumstances where there was no public sale process. It was put that Mr Buffa made no effort to see that the Club had obtained its own independent valuations of the property, and made no effort to confirm that the Club's constitution had been complied with or that the provisions of s 41E of the *Registered Clubs Act* had been complied with. In respect of the latter, it was submitted that as the sale was not in accordance with s 41E(1) it was an illegal sale, for which no order for specific performance would be made. Reference was made to *Norton v Angus* (1926) 38 CLR 523 on that point.

100 I do not accept that Mr Buffa (or Northside) engaged in conduct towards the Club that could fairly be described as tricky. In particular, I am not satisfied that there was any misrepresentation concerning the value of the property as alleged. It appears that at Mr Buffa's first meeting with Veljko Bosnic in January 2018, Veljko Bosnic already had an idea that the property had a value in the vicinity of \$5 million, but that a lower price might be acceptable if the Club was allowed to continue at the premises rent-free for a period. Further, it was not squarely put to Mr Buffa in cross-examination that he made any misrepresentation concerning the value of the property. Nor was it put to him that he pressured Tom Bosnic and Veljko Bosnic in relation to the sale, or in some way took advantage of them. It is true that there was no public sale process, but this was the course adopted by the representatives of the Club, not something promoted by Mr Buffa. It was not shown that Mr Buffa went on to use that process in order to take some unfair advantage of the Club. As far as valuations are concerned, Mr Buffa was aware from Tom Bosnic's email of 20 July 2020 that the Club was planning to obtain up to three valuations, having already obtained one. Mr Buffa accepted that he was never told that three valuations had been obtained, and he agreed that he did not ask Tom Bosnic whether three valuations had been obtained, or ask for copies of valuations. Nevertheless, it was not unreasonable for Mr Buffa to trust, as he did, that Tom Bosnic was following "due process" as stated in the 20 July 2020 email. As far as compliance with the Club's constitution is concerned, Mr Buffa was in the circumstances entitled to assume that it had been complied with (see [86]-[88] above). There is no equivalent entitlement to assume compliance with s 41E of the *Registered Clubs Act*, but no evidence was adduced to show that Mr Buffa (or Northside) had any awareness of the provision or that it applied to the proposed sale. In these circumstances I do not think that Northside can be criticised for making no effort to ensure that there was compliance.

101 The fact that s 41E(1) was not complied with does not mean that the sale (being a disposal of core property of the Club) was illegal. By s 41E(2), the fact of non-compliance makes the disposition susceptible to an application to the Court by the Secretary for orders in relation to the disposal, but it does not itself render the sale, or the contract for the sale, illegal or of no effect. No statutory intention

to that effect can be discerned. Section 41E(3), which empowers the Court to declare that a contract made in contravention of s 41E(1) is void, shows that such a contract is not automatically rendered void by the statute. Moreover, rights arising from such a contract are recognised by the statute. Orders cannot be made under s 41E(3) if the Court is of the opinion that the order would result in the extinguishment of an interest in the property held by a person who had no knowledge that the property had been disposed of in contravention of the Act.

102 In *Norton v Angus* (supra), the relevant contract for sale was not rendered illegal by the applicable legislation, but completion of the conveyance in a manner that would not offend the legislation was problematic for the purchaser, who faced a risk of forfeiture of the land. In those circumstances, and having regard to the entitlement of the vendor to retain the deposit and the benefit of certain improvements made by the purchaser whilst in possession, the Court (by majority) declined to order specific performance at the suit of the vendor. The facts of the case are very different from those present here. Whilst completion of the conveyance to Northside would leave it exposed to the risk that the interest in the property it would thereby acquire will be upset as a result of an application under s 41E of the *Registered Clubs Act*, I do not see that as a good reason to decline specific performance at the suit of Northside. The prospect of such an application is not a matter adverse to the Club's interest. Indeed, the Club has taken steps to urge the Secretary to take that course.

103 (c) Great hardship: it was submitted that if specific performance were granted the Club would suffer great hardship because the purchase price payable under the contract was grossly below the true market value of the property. Reliance was placed upon the opinion of Mr Peter Phippen, valuer, that the property had a value of \$9.45 million. It was submitted that if it were forced to perform the contract, it would be unlikely that the Club would be able to acquire a similar property for its purposes, thus jeopardising the future of the Club. It was also submitted that the contract could not be said to have been freely and voluntarily entered into by the Club in circumstances where it was entered into without



authority, contrary to the Club's constitution, and not in accordance with s 41E of the *Registered Clubs Act*.

104 I do not accept that the contract was not freely and voluntarily entered into by the Club. The contract was concluded after a lengthy period of negotiation that was conducted on the Club's side by the two directors to whom the commercial management of the Club was essentially left, and following the resolution passed at the Annual General Meeting on 6 December 2020. Of course, even if the purchase price is in fact below the true market value of the property, that does not in and of itself establish relevant hardship. In considering hardship as a defence to an order for specific performance, the focus is the effect that a decree of specific performance would have upon the defendant (see *Longton Pty Ltd v Oberon Shire Council* (1996) 7 BPR 14,799 at 14,808). Assuming (without deciding) that the value of the land significantly exceeds the purchase price, it is difficult to see how a decree of specific performance, as opposed to leaving Northside to its remedies at law, would occasion hardship to the Club. On that assumption, the Club would be exposed to a substantial claim for damages if it failed to complete. The evidence of the Club's financial position would suggest an inability to meet such a claim. In these circumstances, I do not see why the future of the Club should be seen to be in greater jeopardy if specific performance were ordered than if specific performance were withheld. Of course, completion of the contract would not only entail the Club receiving the purchase price, it would also have a lease of a portion of the premises for 5 years at a rent of \$1.00 per year (and no obligation to contribute to outgoings), and an option for a further term of 2 years at market rent.

105 (d) Damages are an appropriate alternative remedy: the Club submitted that damages would be an appropriate alternative having regard to the fact that specific performance would place the continued existence of the Club in substantial jeopardy.

106 As I have said, I do not see why the future of the Club should be seen to be in greater jeopardy if specific performance were ordered than if specific performance were withheld. In any case, I do not think that damages should

be regarded as an adequate remedy for Northside, having regard to the subject matter of the contract and Mr Buffa's evidence concerning the desire of the veterinarians to obtain their own premises for the purposes of the practice rather than continue with leasehold arrangements.

107 For the above reasons, I do not think that the various matters raised by the Club, whether those matters are viewed on their own or together, should lead the Court to decline to make orders in the nature of specific performance. The remedy is not one that should lightly be refused in a case, such as this, involving a contract for the sale of land (see *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438-9).

108 In my opinion, it would be appropriate for the Court to declare that a binding contract for sale in respect of the Myoora Road property came into existence between Northside as purchaser and the Club as vendor on 23 June 2021 on the terms of the contracts that were exchanged on that day. I consider it appropriate to also order that the parties to the contract do all such acts and do all such things as are required to perform their respective obligations under the said contract.

109 Northside sought other orders to require part of the purchase price to be held in a trust account pending determination of its claims for damages and costs, or pending the outcome of any application brought under s 41E of the *Registered Clubs Act*. I do not think that any orders of that character should be made. They are not supported by any of the terms of the contract, and no grounds have been established for the making of freezing orders. Further, any risk related to a potential application under s 41E is a risk that is inherent in the contract which Northside seeks to enforce. I do not think it is appropriate for Northside to seek that relief on the one hand, and on the other hand seek orders that entail a departure from that which the contract requires. I would add that orders of the type sought by Northside might also have the effect of intruding upon the matters that may need to be considered by the Court if an application under s 41E were made.

110 As for costs, there does not seem to be any good reason why costs should not follow the event in accordance with the usual rule. Northside, having established the existence of a binding contract for sale, and having obtained orders in the nature of specific performance of the contract, should be regarded as the successful party having won the event. Accordingly, the Court will also order that the Club pay Northside's costs of the proceedings.

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I certify that this and the 37 preceding pages  
are a true copy of the reasons for judgment  
herein of the Honourable Justice Darke.

16/5/2022 H. Hoyle  
DATED Associate