SUPREME COURT OF QUEENSLAND

CITATION:	*Butchart & Anor v Sinnamon & Ors* [2021] QSC 317
PARTIES:	**DAVID ANTHONY BUTCHART AND MONIQUE MARLENE BUTCHART** (applicants) **v** **DAVID EDWARD SINNAMON** (first respondent) and **KELLY MAREE BRODERICK AND LISA MICHELLE REID** (second respondents)
FILE NO:	9503/21
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	16 December 2021
DELIVERED AT:	Brisbane
HEARING DATE:	1 November 2021
JUDGE:	Dalton J
ORDERS:	**1. Application dismissed.** **2. Caveat No 721012227 lodged by the Applicants be removed from the title of Lot 30 on Survey Plan 103989 in Title Reference number 502 068 47.** **3. The injunction granted by Jackson J on 25 August 2021 is discharged.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – drafting and content of first right of refusal – where the applicants purchased land from the first respondent – where the contract of sale gave the applicants a first right of refusal to purchase a second lot – where the first respondent signed a contract to sell the second lot to the second respondents – where the first right of refusal clause did not define the rights the applicants were to gain – where the clause did not provide any mechanism or procedure to be followed in according the applicants their rights – where the clause required the first respondent to give the applicants a reasonable opportunity to

buy or refuse to buy the land at a price the first respondent genuinely wanted at a time before he contracted with anyone else – where the applicants had months' notice of the first respondent's intention to sell and the time at which he intended to sell – where the first respondent acted sufficiently to comply with the requirements of the first right of refusal – where the clause did not require the first respondent to refrain from contracting with the second respondents when he formed a mind to do so until he had again offered the land to the applicants for the same price it was offered to the second respondents

EVIDENCE – ADDUCING EVIDENCE – WITNESSES – GIVING EVIDENCE – CROSS-EXAMINATION – GENERALLY – the rule in *Browne v Dunn* – where affidavits were exchanged prior to the hearing – where the affidavit evidence of various witnesses was opposed in substance – where there was a failure to explore contentious issues during the hearing leading to factual deficiencies – where counsel did not cross examine witnesses at length

Browne v Dunn (1893) 6 R 67 (HL), followed
Reid v Kerr (1974) 9 SASR 367, cited
Woodroffe v Box (1954) 92 CLR 245; [1954] HCA 22, followed
Mackay & Anor v Wilson & Anor (1947) 47 SR (NSW) 315, cited
THL Robina Pty Ltd v The Glades Golf Club Pty Ltd & Anor [2005] 2 Qd R 186; [2004] QSC 461, considered
Jonns & Anor v Tan & Ors [1999] NSWSC 648, considered
Octra Nominees Pty Ltd v Chipper [2007] FCAFC 92, considered
Goldmaster Homes Pty Ltd & Anor v Johnson & Ors [2004] NSWCA 144, followed
Smith v Morgan [1971] 1 WLR 803; [1971] 2 All ER 1500, followed
Rasch Nominees Pty Ltd & Anor v Bartholomaeus & Ors (2012) 114 SASR 448; [2012] SASC 70, cited
White Property Developments Ltd v Richmond Growth Pty Ltd & Ors [1998] FCA 26, considered
Nationwide Produce (Holdings) Pty Ltd (in liq) v Linknarf Ltd (in liq) [2005] FCAFC 129, cited
Woolworths Ltd v About Life Pty Ltd [2017] NSWSC 1117, distinguished

COUNSEL: M O Jones for the applicants
M D Martin QC for the first respondent
M Williams for the second respondents

SOLICITORS: Mills Oakley Lawyers for the applicants
Jones Leach Lawyers for the first respondent

Lenz Moreton for the second respondents

[1] David Sinnamon owned land at 330 Priors Pocket Road, Moggill which he subdivided. In 2019 the Butcharts bought Lot 31, 330 Priors Pocket Road. The contract contained special condition 5:

> "The Seller, who also owns Lot 30, 330 Priors Pocket Road, Moggill Qld 4070, agrees to give the Buyer first right of refusal to purchase Lot 30, 330 Priors Pocket Road, Moggill Qld 4070 when the Seller is looking to sell at a future date."

[2] Lots 30 and 31 were each of around 3.75 hectares and ran from Priors Pocket Road in long, rectangular blocks to the river. Mr Butchart is a vet, but runs a business involving "the provision of business management services to veterinarians throughout Australia". The Butcharts keep horses and have ideas of developing an equestrian facility as well as building a home. They wished to purchase Lot 30 so as to accommodate these intentions using both blocks of land. The Butcharts and Mr Sinnamon discussed buying both Lots 30 and 31 in 2019. The Butcharts could not afford to buy both lots; Mr Sinnamon wanted $2 million for the two lots. In this context, it was the Butcharts who asked for a right of first refusal as a condition of the October 2019 contract. They, and the real estate agent acting for Mr Sinnamon, agreed on the words of special condition 5; that is, it was not professionally drafted.

[3] On 13 July 2021 Mr Sinnamon signed a contract to sell Lot 30 to the second respondents. The price was $1.17 million. Before that contract settled, the Butcharts commenced this proceeding contending that Mr Sinnamon had not accorded them their rights pursuant to special condition 5, and asserting an equity in the land superior to that of the second respondents. The Butcharts claim that special condition 5 obliged Mr Sinnamon to contact them if the marketing of Lot 30 reached a point where he was ready and willing to contract with a third party purchaser; inform them of the terms upon which he was willing to so contract, and offer them Lot 30 on those terms before contracting with the third party. Mr Sinnamon's case was that special condition 5 required less of him than asserted by the Butcharts and that he had sufficiently complied with special condition 5 so as to render him free to sell to the second respondents.

[4] To some considerable extent my decision in this matter depends upon factual findings as to what was or was not said in a conversation between Mr Butchart and Mr Sinnamon on 29 June 2021. Determination of such points is difficult, particularly where the areas of difference range only over a short factual compass, and where there are no contemporary documents which support one version or the other. In this case the task was made more difficult because neither counsel for the applicants, nor counsel for the first respondent, cross-examined at length. The proceeding was commenced by originating application; there were no pleadings, and evidence-in-chief of all witnesses was contained in affidavits filed before the hearing. The primary rationale of the rule in *Browne v Dunn*[1] is to fairly put an opposing party's case to a witness so that the witness has a chance to answer it. Where a party's evidence is exchanged on affidavit before a hearing, it might be said that each party is appraised of the other's case, so that strict compliance with

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1 (1893) 6R 67 (HL).

the rule in *Browne v Dunn* is not required for fairness. However, if there are respects in which the affidavit evidence of various witnesses is opposed in substance, and those differences are not explored with the witnesses, it becomes very difficult for a trial judge to make factual findings.[2] As will become apparent from my discussion of the evidence below, the result of a failure to explore contentious issues during this hearing has been that some parts of the evidence are not particularly satisfactory.

[5] There were two initial conversations between the Butcharts and Mr Sinnamon in 2021, the content of which is not contentious. In about February 2021 Mr Sinnamon and Mr Butchart had a conversation when they were both at 330 Priors Pocket Road. Mr Sinnamon told Mr Butchart that he was going to put Lot 30 on the market in the middle of the year. Mr Butchart replied that he and Mrs Butchart were interested in buying it and asked Mr Sinnamon to let him know when he got closer to selling it, so that they could have a chat. Mr Sinnamon replied that he would. Mr Butchart gave him his business card. The second conversation occurred when Mr Sinnamon saw Mrs Butchart at about Easter time in 2021 and told her that he was going to sell in July. He said that if the Butcharts had any interest in buying, they should come and see him before the end of June, because otherwise he would put it on the market in July. Mrs Butchart said to him that it was a nice block of land and they may be interested in purchasing it. It was not contentious that the Butcharts did not contact Mr Sinnamon in response to his request to do so before the end of June.

[6] There was a telephone conversation between Mr Sinnamon and Mr Butchart on 29 June 2021. Mr Sinnamon rang Mr Butchart. Both parties agree that Mr Sinnamon told Mr Butchart that he was going to put Lot 30 on the market in July and asked whether Mr Butchart wanted to buy it. Three other parts of this conversation are in contest between the parties:

(a) Mr Sinnamon's version is that Mr Butchart said that the Butcharts were interested in buying the land but were not in a position to do so presently; they could only sign a contract if payment was to be in 12 months' time. Mr Butchart's version is that he told Mr Sinnamon that the Butcharts were interested in buying the land but that "in an ideal world we would like a six or 12 month settlement". It was common ground that, whatever Mr Butchart said, Mr Sinnamon responded that he would not be amenable to a long settlement and the conversation did not end there, but turned to price.

(b) Mr Butchart says that he asked the price of the land, and Mr Sinnamon agrees with this. Mr Butchart said the answer from Mr Sinnamon was, "I am not sure, but my real estate agent has told me it is likely to sell for $1,150,000 to $1,250,000". Mr Sinnamon says that when asked the price he said, "approximately $1.2 million".

(c) Mr Sinnamon said the telephone conversation of 29 June concluded with his saying that he would be listing the property for sale in July. Consistently with

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[2] Cf Wells J in *Reid v Kerr,* "… a judge … is entitled to have presented … issues of fact that are well and truly joined on the evidence; there is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because *Browne v Dunn* has not been observed, have not been brought into direct opposition, and serenely pass one another like two trains in the night." – (1974) 9 SASR 367, 373-4.

that, Mr Butchart said that Mr Sinnamon said, "You'll need to let me know within 48 hours otherwise the property will be with David Riley at 4069 Real Estate and going on the market". However, Mr Butchart said that he ended the conversation by saying, "That's fine but don't forget we've got a right of first refusal under the earlier contract so just let me know where you get to" – paragraph 17(f) of his first affidavit. Mr Butchart said Mr Sinnamon did not respond to this last communication. Mr Sinnamon said that the last communication was simply not made.

[7] In respect of the three disputed parts of this conversation I prefer the evidence of Mr Sinnamon. In part, this preference is based on my impression of the two witnesses as they gave their evidence, see [15]-[17] below. Otherwise my reasons are as discussed below.

[8] I deal first with the conflict described at [6](a) above. Mr Butchart was cross-examined as to this part of the conversation and did not retreat from the version he had given in his affidavit. He said that he raised the idea of a six or 12 month settlement, "… because we have two businesses and we would need to get the financial statements – or financials done for both of those businesses in order to be able to get finance, which obviously was very close to the end of the financial year and we – that was going to be the thing that took the most time." – t 1-6. He could not explain why he did not simply tell Mr Sinnamon he would need time to get finance. Although Mr Butchart said later in his evidence that "we were pretty confident" that he could buy the property as at 3 July 2021 – t 1-13, I am not persuaded that he was. Even on his version, the mention of a six or 12 month settlement rather than simply a need to make the contract subject to finance, gives an indication against this. So does Mr Riley's evidence, to which I now turn.

[9] Mr Riley's evidence tends in favour of Mr Sinnamon's version. On 3 July 2021 Mr Butchart telephoned Mr Riley. Mr Riley swore in his affidavit that Mr Butchart asked him about the price and when told it was in the order of $1.15 million to $1.25 million Mr Butchart said to Mr Riley, "We may not be in a financial position to purchase the land. I will talk to my accountant."

[10] As well, Mr Riley swore that on 30 July 2021, when he told Mr Butchart that there was a conditional contract of sale in place for Lot 30, "David Butchart stated to me words to the effect that 'things have changed for us financially because we may have a buyer for our business'."

[11] Neither of these statements which Mr Riley attributed to Mr Butchart was challenged in cross-examination. Mr Riley was asked about his memory of events in cross-examination, but no specific part of his evidence was challenged. In fact, in relation to another matter, counsel for the applicants accepted that Mr Riley's evidence was honest – see [25] below. Mr Butchart gave no evidence contradicting these statements attributed to him by Mr Riley; he gives a version of both the 3 July and 30 July conversations, which versions do not include the statements attributed to him by Mr Riley, but neither in his affidavits, nor in his oral evidence, does he deny that he made these statements. There was no cross-examination of Mr Butchart about the statements. In those circumstances I accept the statements were made by Mr Butchart to Mr Riley on 3 and 30 July 2021. In my view, the statements are consistent with Mr Sinnamon's version of the 29 June conversation.

The first expressly so. In the second statement Mr Butchart says he is hopeful of selling one of his businesses. This would effect a change to his financial situation. That is, he implies that he was not in a position to buy the land without the change.

[12] I turn to the conflict described at [6](b) above. A few days after the telephone conversation of 29 June 2021, on 3 July 2021, Mr Butchart telephoned Mr Sinnamon and asked him if he would delay listing Lot 30 with a real estate agent for a week so that Mr Butchart could talk to his accountant. Mr Sinnamon said that the land had already been listed and gave him the agent's name. Mr Butchart asked what the list price was and Mr Butchart accepts that Mr Sinnamon said, "around the $1.2 million mark", or words to that effect.

[13] Mr Butchart omitted this conversation from his first affidavit of evidence and did not mention it when he made a second affidavit, after Mr Sinnamon had sworn to it. In saying this, it must be noted that Mr Butchart's second affidavit was not responsive to Mr Sinnamon's, but dealt with a different subject matter.

[14] When asked about the 3 July conversation in cross-examination Mr Butchart at first said that he could not recall Mr Sinnamon saying to him that the price was "around the $1.2 million mark" but then conceded that the conversation did occur as Mr Sinnamon had sworn. The passage of cross-examination was as follows:

> "All right. And then Mr Sinnamon said to you:
>
> *Around the $1.2 million mark.*
>
> That's what he said to you?--- I don't – I don't recall that, because I had already known that that's what – I had spoken to Mr Riley about previously.
>
> Well, but you agree that you asked him what the list price was, didn't you? I thought you just agreed with me about that; is that correct?--- Sure. Sure.
>
> All right. All right. And I'm suggesting to you in response to that question from you, you said to Mr Sinnamon around – sorry. Mr Sinnamon said to you:
>
> *Around the $1.2 million mark.*
>
> That was his response?--- Sure.
>
> Okay.
>
> HER HONOUR: So you accept something like that was said?--- Yes. Yeah, absolutely." – t 1-10.

[15] Apart from the prevarication already noted, there is a difficulty with the first part of this evidence. Mr Butchart agreed that his call to Mr Sinnamon was to ask him to delay listing the property – tt 1-7-8. It was from Mr Sinnamon's response to that request that Mr Butchart discovered that the property had already been listed – t 1-10. It could not have been right that Mr Butchart already had the price from Mr Riley.

[16] It was part of the applicants' case that the conversations on 29 June 2021 and 3 July 2021 did not amount to an offer to sell the land because there was uncertainty as to the price Mr Sinnamon would accept. I have the impression that Mr Butchart understood it to be to his advantage in this proceeding to establish that there was some uncertainty about the price at which Mr Sinnamon told him he was prepared to sell the land. I think this affected his evidence about both the 29 June and the 3 July conversations.

[17] Mr Sinnamon was in the witness box for a short time. He impressed as a man of few words; he was straightforward, blunt and not given to indecision. Counsel for the applicants accepted he had tried to give the Butcharts the benefit of special condition 5 – t 1-37 – and never put to him that he was dishonest, or even that he misremembered events. I formed the view that he was honest in his evidence.

[18] He had given the Butcharts notice that he intended to sell both in February 2021 and at Easter time in 2021. That second conversation had ended with a request to Mrs Butchart that if the Butcharts were interested they should come and see him before the end of June. The Butcharts had done nothing in response. Mr Sinnamon candidly stated that he believed that what he had said to the Butcharts in February and at Easter time was sufficient to fulfil his obligation under special condition 5. He was ringing Mr Butchart on 29 June, not in some further attempt to comply with special condition 5, but to see if he wanted to buy the land – t 1-19. I find it most unlikely, given his demeanour as described, and the purpose of the telephone call, that when asked the purchase price he said, "I am not sure". I think it far more probable that he simply told Mr Butchart the price he wanted.

[19] As to whether Mr Sinnamon said "approximately $1.2 million" or gave a range suggested by his real estate agent, "$1.15 million to $1.25 million", Mr Butchart accepts that on 3 July 2021 Mr Sinnamon said "around $1.2 million". On 3 July 2021, Mr Butchart rang Mr Riley, the real estate agent, and asked him what the list price was. According to Mr Butchart, Mr Riley said, "I can't tell you the price but it's in line with the seller's expectations of around $1.2M". Complicating this is Mr Riley's version of what he said in this conversation: "The price guide is $1.15 million to $1.25 million". The affidavit of the second respondent Broderick was that she asked the agent for a price guide on 12 July 2021 and was told first by Mr Heeremans that "the owner was looking at offers around $1.2 million", and then later that day by Mr Riley that "the seller would consider offers around the $1.2 million and [Mr Riley] said words to the effect that $1.2 million would get the job done". While this evidence is not entirely one way, I think it supports the conclusion that on 29 June 2021 Mr Sinnamon probably told Mr Butchart the price was, "approximately $1.2 million". In fact, whichever way this conflict is resolved, the result is the same, see [55] below.

[20] Lastly, I deal with the conflict described at [6](c) above. I am not persuaded that Mr Butchart mentioned his right of first refusal to Mr Sinnamon at the conclusion of the telephone call on 29 June 2021.

[21] First, Mr Butchart swears he said almost exactly the same words to Mr Riley at the conclusion of their telephone call on 3 July 2021, viz, "Don't forget that we have a right of first refusal". There is a slightly inauthentic flavour about the repetition of

these words in Mr Butchart's affidavit, however, that may simply be due to drafting on the part of the solicitor.

[22] However, giving me more doubt about Mr Butchart's evidence in this regard, is a later passage at paragraph 32 of his affidavit where he says that during the conversation on 29 June 2021 with Mr Sinnamon, "I expressly informed the first respondent that Monique and I did wish to purchase Lot 30 and I requested that he inform us of any offers he received so that we could consider our position in exercising our rights pursuant to special condition 5". This is a much more elaborate version than that at paragraph 17(f) of the same affidavit, see [6](c) above. The two versions are consistent with each other at a level of generality, but the differences between them make Mr Butchart's affidavit evidence unconvincing. Further, had Mr Butchart said to Mr Sinnamon anything as explicit and coherent as what is sworn to at paragraph 32 of Mr Butchart's affidavit, I think it unlikely that Mr Sinnamon would have remained silent. The information would have contradicted his understanding of what was required by special condition 5 and it was accepted by the applicants in this proceeding that he did genuinely wish to accord the applicants their right under that condition – t 1-37.

[23] It is unfortunate that the discrepancy between paragraph 17(f) and paragraph 32 of Mr Butchart's affidavit was not the subject of cross-examination. It is also unfortunate that paragraph 32 of Mr Butchart's affidavit was not put to Mr Sinnamon. While counsel were content to leave these matters unexplored in the evidence, the result is that Mr Butchart's affidavit evidence is unpersuasive.

[24] Also bearing on this question is the fact that Mr Butchart does swear he gave the same reminder about his right of first refusal to Mr Riley on 3 July. Mr Riley denied that Mr Butchart gave him this reminder. He also denied knowing that Mr Butchart had a right of first refusal.

[25] Mr Sinnamon says that he did not tell Mr Riley the Butcharts had a right of first refusal – t 1-19. Mr Riley was not the agent who handled the 2019 contract, so there was no reason for him to know of special condition 5 unless he was told. Remarks which Mr Riley made to both the second respondents are consistent with his not believing that the Butcharts had a right of first refusal. He told them that Lot 30 had been offered to the owners of Lot 31 but they could not afford to buy it; there was no mention of a right of first refusal. I find that Mr Riley did not know of the right of first refusal. He was not challenged about this point in cross-examination. There is no evidence to the contrary, and in fact counsel for the applicants accepted that Mr Riley did not know of the right of first refusal – t 1-37 and t 1-50. It is difficult to understand in those circumstances why he did not question the assertion by Mr Butchart if Mr Butchart gave him the reminder he swears he did on 3 July 2021.

[26] There are other difficulties with Mr Butchart's evidence in this regard. On 3 July Mr Riley emailed him a form of contract of sale so that he could make an offer. Mr Butchart specifically swears that when he received the blank contract of sale form from Mr Riley he did not respond because, "It was not up to me to make the first offer as the first right of refusal allowed me to match any genuine offer received by the first respondent". The difficulty is that he did not say anything like that to Mr Riley. To the contrary, he swears that he said to Mr Riley, "No

problems. We'll have a think and come back to you." The same anomaly can be noted in the fact that Mr Butchart swears he reminded Mr Sinnamon of his right of first refusal, but then four days later telephoned Mr Sinnamon again, and subsequently, on the same day, Mr Riley.

[27] For all these reasons I am not persuaded that Mr Butchart reminded either Mr Sinnamon on 29 June, or Mr Riley on 3 July that he had a right of first refusal.

Right of First Refusal

[28] In an oft-quoted passage, Fullagar and Kitto JJ in *Woodroffe v Box*[3] said:

> "The position revealed by the cases and by what is said in them is precisely what one would, in the absence of authority, have supposed it to be. The term 'first refusal' is not a technical term. It is a colloquial term, and indeed a somewhat inept term, because what the potential offeree wants is an opportunity of accepting an offer rather than an opportunity of refusing an offer. It may, and does, occur in various phrases, such as 'give the first refusal', 'have the first refusal', 'give the right of first refusal', 'have the right of first refusal', etc. And these phrases may be found in various contexts. It seems clear that a mere promise to give the first refusal should be taken prima facie as conferring no more than a pre-emptive right. If I promise to give you the first refusal of my property, I am making prima facie only a negative promise: I am saying: 'I will not sell my property unless and until I have offered it to you and you have refused it.' …
>
> … in dealing with such a loose and colloquial expression, it may often be a mistake to cling strongly to a preconceived meaning. The safer and sounder course is to regard it as an expression of fairly flexible import, to look at the whole of what the parties to an instrument have said, and in the light of that whole to determine whether they have or have not conveyed an intention that an immediate offer is being made or is to be made." (my underlining).

[29] The other frequently cited passage as to the nature of a right of first refusal is from the judgment of Street J in *Mackay & Anor v Wilson & Anor*:[4]

> "… an agreement to give 'the first refusal' or 'a right of pre-emption' confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself it imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer, which he also may accept or not as he wishes." (my underlining).

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3 (1954) 92 CLR 245 at pp 257-258.

4 (1947) 47 SR (NSW) 315, 325.

[30] It is clear from the cases that the drafting and content of clauses giving a right of first refusal varies enormously. At one end of the spectrum are very detailed clauses such as that found in the case of *THL Robina Pty Ltd v The Glades Golf Club Pty Ltd & Anor*.[5] That clause provided that if the owner intended to sell the property, it should first offer to sell the property to the grantee by tendering a form of contract containing all the contractual terms except the name and address of the potential purchaser; that of its solicitor, and the date of acceptance of the contract. It provided that the grantee had a right to accept the offer for 30 days after receipt of that document. It provided for a mechanism as to acceptance, including the provision of a deposit cheque. The clause provided that if the offer was accepted, the parties were to be taken to have entered into a contract of sale. On the other hand, if there was no acceptance, the owner was able to sell the property to any other person for the price, and on the conditions, contained in the form of contract which had been tendered to the grantee. Should the owner intend to sell the property to a third party for a lower price, or on conditions more favourable than those contained in the form of contract not accepted by the grantee, the owner was obliged to offer the property to the grantee for that lower price or on those more favourable conditions.

[31] *Jonns & Anor v Tan & Ors*[6] and *Octra Nominees Pty Ltd v Chipper*[7] both concerned clauses considerably less sophisticated than that just discussed, but which still contained more detail and machinery than the clause in this case. The clause in *Octra* read:

> "If at any time during the lease period … the lessor wishes to sell the freehold of the property subject to this lease agreement, the lessor must first give notice of the intention to sell the property to the lessee one month prior to advertising the property for sale. … The lessee will have the first right of refusal to purchase the land for the same consideration and conditions as the property is offered for sale to any other proposed purchaser."

[32] *Goldmaster Homes Pty Ltd & Anor v Johnson & Ors*[8] concerned a provision at the other end of the spectrum to *THL Robina*. In that case the New South Wales Court of Appeal dealt with a sentence in a letter written from one land developer to another. It provided, "We undertake to give you right of first refusal on our land to be developed at Green Road, Kellyville".

[33] The Court of Appeal upheld the trial judge's decision that there was no consideration made for that promise – [14] and [15]. The Court of Appeal also doubted that there was a contractual promise created by the letter:

> "The brevity and imprecision of expression support the conclusion that no binding obligation was intended. If a binding obligation was intended there were obviously more details which needed to be established and expressed." – [39].

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5 [2005] 2 Qd R 186, 190-191.
6 [1999] NSWSC 648.
7 [2007] FCAFC 92.
8 [2004] NSWCA 144.

[34] The decision rests on these conclusions. However, the Court of Appeal went on to consider, *obiter,* the question of whether, if there were a contractual entitlement, there had been any breach of it. Because the language said to establish the right of refusal in this case is also brief, and similar to that in *Goldmaster Homes*, I think the dicta in *Goldmaster Homes* is helpful in considering what was required of Mr Sinnamon in this case.

[35] The appellants' arguments in *Goldmaster Homes* were similar to the arguments advanced here on behalf of the Butcharts. They were summarised by Bryson JA:

> "It was then contended that the obligation to give a right of first refusal is an obligation to make an offer (necessarily a formal offer in writing) to sell the property not only at the same price but also on the same terms as some other proposing purchaser is prepared to agree to; with the consequence that the promisor cannot fulfil the obligation unless and until it identifies the terms, meaning all the terms on which it is willing to contract with a third party, meaning an identified third party who is willing to purchase the property. Counsel contended (and this argument appears to require) that one such offer of opportunity would not necessarily discharge the obligation; if the third party in view did not in fact enter into a contract, or failed to complete it, and the promisor later embarked upon a further sale, the need to offer first refusal would present itself again, perhaps a number of times." – [22].

[36] In *Goldmaster Homes* the appellant, who claimed to be entitled to the benefit of the right of first refusal, complained to the respondent that he was not getting proper services from the agent marketing the relevant estate. In response the respondent made an appointment to see the appellant at the site. The appellant did not keep that appointment. The respondent then sent the appellant the price list for the various blocks of land, together with a marketing proposal. Some days later the appellant telephoned to say that the Green Road land was too expensive. The Court of Appeal thought that had the respondent been under any obligation with respect to the right of first refusal, it was not in breach of that obligation: what it had done was sufficient – [40].

[37] The reasoning behind this conclusion is found in the judgment of Bryson JA:

> "There is so little context that the exercise described in *Woodroffe v Box* at 258 can hardly be undertaken. There is no reference to an option, to another purchaser, to the terms on which a sale is proposed, or to an offer to the purchaser or to an offer in writing. Nothing in the context sets the rights of the appellants in apposition to the rights of any other intending purchaser. <u>The right conferred is a right of refusal, and the use of the word 'refusal' invokes the question 'refusal of what?' In my opinion the answer suggested by the context is refusal of an opportunity to buy the land. There is nothing in the context which requires the opportunity to be in a high state of definition.</u>
>
> In my opinion the alleged promise could have been performed in various ways, but was sufficiently performed by giving [the

> appellant] an opportunity, in the context of a list of prices at which the respondents were genuinely willing to sell the land, to say whether he refused to purchase, or whether he wished to purchase. The obligation was completely discharged when [the appellant] refused, and with that event no further performance of the obligation was required, or was possible. …
>
> In my opinion there is no need to follow any highly defined or definable procedure in order to accord the appellants the rights which the right of first refusal would give to them. The Court is required to address the parties' conduct and the events and come to a conclusion on whether the appellants were given a reasonable opportunity to refuse, or alternatively not to refuse but to indicate a wish to purchase the land; and whether the opportunity was an opportunity to make a first refusal, which it would be if no right to purchase by any third party had been created before the opportunity existed. … If the price is agreed, a bare contract incorporating the conditions of sale in Sched. 3 of the *Conveyancing Act* 1919 by the operation of s 60 of that Act can come into operation very readily. However that may be, a refusal, the right to make which is the right expressly conferred, can come into existence readily and unmistakably without the need for any high definition of the terms which are being refused. The person making the refusal chooses the terms and the circumstances in which he or she refuses." – [35]-[37] (my underlining).

[38] The English case of *Smith v Morgan*[9] also concerned a clause with very little detail or mechanism. The clause was found in a contract of sale for part, but not all, of land owned by the vendor:

> "… should the vendor wish to sell the same the first option of purchasing the said land … shall be given to the purchaser at a figure to be agreed upon. Provided that any such offer for sale shall only remain open for a period of three months from the date on which the said offer for sale is made by the vendor." – p 1501.

[39] Brightman J observed that the object of the first refusal clause was to give the defendant an opportunity of buying land adjacent to that originally purchased by the defendant from the plaintiff, "and thus enable the defendant to round off his property and, in particular, to acquire the rest of the outbuilding, part of which had been conveyed to him. … Clearly the paragraph was intended to have business efficacy and to be binding on the plaintiff as vendor" – p 1501. There was discussion as to the poor drafting of the clause. Brightman J concluded that, despite the faults in the clause, "I do not think that this Court should go out of its way to conclude that a bargain freely negotiated and intended to be binding is nevertheless void for uncertainty" – p 1503.

[40] As to what was required to be done in order to comply with the obligations created by the clause, Brightman J held:

> "… In my view it is implicit in [the clause] that a purchase, if it results from an offer, should be at a price acceptable to both parties.

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9 [1971] 2 All ER 1500.

> On that basis it appears to me that [the clause] can only mean one thing: that the obligation on the vendor, should she wish to sell, is an obligation to make an offer to the purchaser at the price and at no more than the price at which she is, as a matter of fact, willing to sell. If that offer is accepted by the defendant, then there will be a purchase at a figure which has been agreed upon. If the offer is rejected, then *cadit quaestio*.
>
> The plaintiff must, of course, act *bona fide* in defining the price to be included in the offer. It is a matter of fact. If the plaintiff is proposing to sell by auction, the price to be specified in the offer to the defendant would be the intended auction reserve. If she is proposing to sell by private treaty the price to be specified in the offer would be the price intended to be named in the estate agent's particulars, or the lower price, if any, to which the plaintiff is, as a matter of fact, prepared to descend on such a sale." – p 1504.

[41] In *Smith v Morgan* Brightman J made a declaration:

> "… that on the true construction of the covenant on the part of the vendor … , should the plaintiff wish to sell the land edged in blue … on the plan attached to the said conveyance, she is legally bound to offer the said land for sale first to the purchaser at the price, but at no more than the price, at which she is, in fact, willing to sell." – p 809.

The Present Case

[42] So far as the contractual validity of special condition 5 is concerned, I think this case is distinct from the situation considered in *Goldmaster Homes.* In my view, there was clearly an intention to be legally bound, and there was consideration for the grant of the right of first refusal. In this respect I think the case is more like *Smith v Morgan* and, like Brightman J in that case, I do not think that in those circumstances special condition 5 should fail for uncertainty.

[43] I turn to consider what special condition 5 required Mr Sinnamon to do.

[44] The applicants submitted that special condition 5 obliged Mr Sinnamon to give them an opportunity to buy the land at the lowest price which Mr Sinnamon would take, and if he did that on 29 June 2021, he was obliged to give them another opportunity to buy the land at a price of $1.17 million once Mr Sinnamon had determined to accept the second respondents' offer.

[45] Special condition 5 is very simple:

> "The Seller … agrees to give the Buyer first right of refusal to purchase Lot 30 … when the Seller is looking to sell at a future date."

The want of detail and mechanism in special condition 5 is relevant to what Mr Sinnamon was obliged to do to give the Butcharts their contractual entitlement – see the underlined part of the passage from *Woodroffe* at [28] above. Where the parties have not defined what rights the Butcharts were to gain, and not provided any mechanism or procedure to be followed in according those rights, I think it

correct to proceed along the lines drawn in the underlined passage from *Goldmaster Homes,* [37] above, and in accordance with the decision in *Smith v Morgan*. I do not think that special condition 5 obliged Mr Sinnamon to wait until he was ready and willing to sign a contract with a prospective purchaser and then, before contracting, offer Lot 30 on those terms to the Butcharts. That was one way to fulfil his obligation, but I think it was sufficient if he gave the Butcharts a reasonable opportunity to buy or refuse to buy the land at the price he genuinely wanted, at a time before he had contracted to sell it to anyone else.

[46] I think that Mr Sinnamon did sufficient to comply with special condition 5. In February 2021 he gave Mr Butchart notice that he was going to put Lot 30 on the market in the middle of the year. He did not tell Mr Butchart what price he would put on the lot, but the Butcharts had a general idea as to what the price was likely to be. In fact, when Mr Sinnamon did tell Mr Butchart the price at which he intended to sell, Mr Butchart swore that he replied, "Ok. That's in the ballpark of what we thought."

[47] Then at Easter time in 2021 Mr Sinnamon informed the Butcharts that he was going to sell in July and that if they were interested in buying, they should come and see him before the end of June, otherwise he would put the property on the market in July. The Butcharts then had a firm idea of when Mr Sinnamon intended to sell on the open market.

[48] Mr Sinnamon had not complied with his obligations under special condition 5 at this point. He had to do more than simply inform the Butcharts that he was selling and invite them to make an offer. The fact that in Mr Sinnamon's view he had complied with special condition 5 before telephoning Mr Butchart on 29 June 2021 cannot be relevant to either the interpretation of special condition 5, or the question of whether he had complied with it. Likewise, the fact that Mr Sinnamon did not believe that his conversation on 29 June 2021 was something he was doing to comply with special condition 5 cannot be relevant to the question of whether or not, in having that conversation with Mr Butchart, he did comply with special condition 5.

[49] On 29 June 2021 Mr Sinnamon gave the Butcharts the opportunity to purchase Lot 30 at a price of "approximately $1.2 million". The evidence establishes that this was the genuine price at which Mr Sinnamon was prepared to sell the land at the time he offered it to Mr Butchart. And at that time he had not contracted to sell the land to anyone else.

[50] The applicants submitted that Mr Sinnamon's use of the word "approximately" qualifying the price he gave to Mr Butchart on 29 June meant that he had not sufficiently complied with special condition 5 because he had not offered the land at a precise price. I disagree. Had the Butcharts been willing and able to pay $1.2 million for Lot 30, they could have bought it at that price. Instead the Butcharts refused to buy the land at that price except on a 12 month contract. To use the words from *Goldmaster Homes,* I think that they were given a sufficiently clear opportunity to either refuse the land at that price or agree to purchase the land at that price. Special condition 5 did not prescribe any particular way in which that opportunity had to be given. It did not have to be given in writing. In fact it was given orally and in a fairly informal conversation over the telephone. Again using

the language from *Goldmaster Homes,* I think the opportunity was sufficiently defined.

[51] I have given some consideration to the relevance of Mr Sinnamon telling Mr Butchart that if he did not want to buy the land, Mr Sinnamon would list it on the open market on 1 July, some 48 hours later. The applicants did not make a submission that if the information provided to Mr Butchart by Mr Sinnamon during the 29 June telephone call was a sufficiently clear opportunity for the Butcharts to either refuse the land at $1.2 million or agree to purchase the land at that price, special condition 5 had not been complied with because Mr Sinnamon said that he wanted an answer within 48 hours or he would list the property.

[52] At the time of the 29 June telephone call Mr Sinnamon wrongly thought that he had already complied with special condition 5, so he did not mean to give the Butcharts a time limit by which they were to purchase or refuse in accordance with special condition 5. According to what Mr Butchart swears, he did not understand the 48 hours as being a limit upon his opportunity to either purchase or refuse; he was waiting for an opportunity to match a third party price.

[53] Because of the information which had been provided to the Butcharts in February and at Easter time in 2021, very little new information was provided by Mr Sinnamon during the telephone call of 29 June 2021. He named his price. The Butcharts were familiar with the land and Mr Butchart admitted they were not surprised by the price. They had had months' notice of Mr Sinnamon's intention to sell, and the time at which he intended to sell. In fact, some 12 or 13 days passed before Mr Sinnamon contracted to sell the land to the second respondents. In fact, there was a reasonable opportunity for the Butcharts to either refuse or purchase the land at the price Mr Sinnamon had offered it.

[54] In any case, questions as to the reasonableness of the time the Butcharts were given to either refuse, or purchase, Lot 30 are overtaken by the fact that when given this opportunity, Mr Butchart did refuse to purchase at the price Mr Sinnamon nominated unless the obligation to pay for the land was deferred for 12 months. During the next 12 or 13 days that the property remained for sale, the Butcharts never indicated that they could purchase the land except on such a term. No-one contended that Mr Sinnamon was obliged to give the Butcharts the opportunity to purchase on such an unusual term.

[55] I will note that if in fact on 29 June 2021 Mr Sinnamon had told Mr Butchart that he priced the land at between $1.15 million and $1.25 million, the result is the same. Mr Butchart refused the opportunity to buy at that range of price except on the unusual term of a 12 month settlement. Further, had that been what Mr Sinnamon said, there could be no argument that Mr Sinnamon was obliged to offer the land to the Butcharts again, when he determined to accept a purchase price of $1.17 million from the second respondents.

[56] I turn to the applicants' argument that special condition 5 obliged Mr Sinnamon to refrain from contracting with the second respondents when he formed a mind to do so, until he had again offered the land to the Butcharts, this time at the price of $1.17 million.

[57] There are some cases concerning clauses which specifically oblige the grantor to give the grantee a second or subsequent opportunity to buy or refuse to buy. In *Rasch Nominees Pty Ltd & Anor v Bartholomaeus & Ors*[10] Kourakis J dealt with a clause which provided for a right of first refusal and provided that if the grantee of that right refused an offer, the grantor/lessor, "shall be at liberty at any time thereafter to sell the demised premises or part thereof … without the obligation or duty to the Lessee whatsoever provided that in the event that the Lessor deals with any third party and the price is more than One Thousand Dollars (1,000.00) below the price offered to the Lessee then the Lessor shall re-offer a fresh right of first refusal to purchase the Lessee". A similar express provision was found in *THL Robina Pty Ltd* (above).

[58] The applicants relied upon *White Property Developments Ltd v Richmond Growth Pty Ltd & Ors*[11] as authority for the proposition that the same obligation was created by a clause creating a bare right of refusal. That was a decision of Madgwick J in a case where the factual circumstances were most unlike the facts here. A group of investors had formed a company, Richmond Growth Pty Ltd, and bought rights to acquire land to be developed as a shopping centre. Over a considerable time they dealt with experienced shopping centre developers, White Property, and it was envisaged that if Richmond Growth obtained Council approval for the shopping centre, White Property would take over the development and purchase the site. White Property gave Richmond Growth advice and a good deal of professional time so that Richmond Growth was able to obtain approval from the Council for the shopping centre. After Council approval was obtained, Richmond Growth contracted with Woolworths to develop and purchase the site. There had been some months of acrimonious correspondence before that, in which White Property asserted rights based on an agreement recorded in a letter to the effect that:

> "White Property Developments Ltd will be granted a first right of refusal to either:
>
> - purchase the site under mutually agreeable terms and conditions; or
> - act as project managers for the development under mutually agreeable terms and conditions." (my underlining)

[59] Madgwick J construed the underlined "or" as meaning "and", and held that:

> "Thus I conclude that, to comply with its contractual obligations, Richmond Growth was required to specify in an offer to White Property, the terms and conditions, as well as the price, which it would accept. If that was done, but the offer was not accepted and Richmond Growth was subsequently prepared to accept terms and conditions which were more favourable for a possible purchaser, Richmond Growth was obliged, it seems to me, to offer the property to White Property, specifying those more favourable conditions. The obligation not to sell the land 'unless and until' (to adopt the language of *Woodroffe v Box*) it had been offered to White Property, could not be satisfied unless White Property had been given the

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10 [2012] SASC 70, [22].
11 [1998] FCA 26.

> chance, and failed, to accept an offer on the terms (or on terms more favourable to White Property than those) upon which the property would actually be sold by Richmond Growth. That is, if an offer rejected by White Property was not accepted by anyone else, and Richmond Growth was forced to lessen its demands, White Property was entitled to have the opportunity to accept the lesser offer before anyone else did." (my underlining) – p 28.

[60] It is true that the clause relied upon by White Property was as simple and undetailed as that in this case. However, I do think that the extensive involvement of White Property in gaining Council approval and the commercial context of the facts in that case contrast with an uncomplicated arm's-length sale of a piece of rural residential land, see *Woodroffe* above at [28]. Indeed, this point was made about the result and reasoning in *White Property Developments* by the Full Court of the Federal Court in *Nationwide Produce (Holdings) Pty Ltd (in liq) v Linknarf Ltd (in liq)*:[12]

> "It is evident that the content of a 'right of first refusal' is by no means fixed, specific or certain and in order to ascertain its meaning in any particular case one needs to pay careful regard to the surrounding facts and circumstances and the conduct of the parties."

[61] The other case relied upon by the applicants is *Octra Nominees Pty Ltd v Chipper*.[13] That case concerned farming land leased to tenant farmers. The lease contained the following clause:

> "If at any time during the lease period … , the lessor wishes to sell the freehold of the property subject to this lease agreement, the lessor must first give notice of the intention to sell the property to the lessee one month prior to advertising the property for sale. Prospective purchasers of the property will be able to inspect the property if the lessor gives the lessee notice. The lessee will have the first right of refusal to purchase the land for the same consideration and conditions as the property is offered for sale to any other proposed purchaser." – [11].

[62] When the owners wished to sell the land, they told the lessee, and informed the lessee that the price was $1.45 million. The lessees said that the price was excessive. The farm was sold to the third party for $1.445 million. Before the contract settled, the purchaser became aware of the right of first refusal and caused the owners to offer the farm to the tenants at the price of $1.445 million. The tenants gave a written notice that they did not wish to exercise their right of first refusal on the terms of the contract between the owner and the third party. After that, the owner and the third party varied their contract to extend compliance dates and the date for the payment of the deposit. These variations made the contractual obligations of the third party purchaser less onerous.

[63] The Court of Appeal overturned the decision of the trial judge to the effect that there had been a breach of the right of first refusal contained in the lease. The Court of Appeal said this:

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12 [2005] FCAFC 129, [61].
13 [2007] FCAFC 92.

> "In some cases, the nature of the pre-emptive right conferred by a clause in a contract is expressly spelt out. This was so in *Walker Corporation Pty Ltd v W R Pateman Pty Ltd* (1990) 20 NSWLR 624, where the pre-emptive right was framed in these terms:
>
> > 'If at any time during the term of this lease the Landlord shall desire to sell the premises **he shall not enter into any Contract of Agreement for such sale** unless prior thereto he shall:
> >
> > (a) Give to the tenant notice of his intention so to sell and shall offer the demised premises to the tenant on the same terms and conditions …' (Emphasis added.)
>
> In this clause, the pre-emptive right is clearly spelt out as being a condition precedent for entry into a contract for sale. There can be no suggestion that the clause is referable to completion as opposed to contract for sale. In our view, the same construction should be given to the clause in the present case. The consequence of this is that an offer in the same terms and conditions must be given to the grantee before the grantor enters into a binding contract for sale. This construction in our view makes sound commercial sense and makes it clear that it is the entry into the binding contract for sale which exhausts the right of first refusal and not the 'completion', 'transfer' or 'conveyance' of the property in question. We consider that, according to the language used in the clause, the obligation on the vendor has been discharged and that there has been no breach of the clause." – [54]. (my underlining)

[64] The result in that case was quite clearly based upon the language in the clause which stipulated that the right of first refusal was to purchase the land on the same conditions as the property was offered for sale to another purchaser. The effect of the notice of intention to sell was not to make an offer to the lessee, but to apprise the lessee of the situation and give the owner the right to have prospective purchasers inspect the property. That the owner proposed to have prospective purchasers inspect the land, gave context to the last sentence of the clause in that case, making it obvious that the tenant was to receive the opportunity to match the price offered by a third party purchaser.

[65] The Full Court in *Octra* distinguished the judgment of Madgwick J in *White Property Developments* on the facts, but added a more general caveat about that case:

> "Madgwick J premised his remarks on the assumption that an offer rejected by White Property had not been accepted by anyone else. Where there is no binding contract, his Honour concluded that a further offer had to be made. However, in the present case, we do not need to consider that position because there was and continues to be a binding contract in existence which has not been terminated or rescinded. This is not the occasion to consider the correctness of all the reasoning in *White Property*." – [55].

[66] There does seem to be a difference in Madgwick J's view of what a bare right of first refusal clause requires, and the reasoning in *Goldmaster Homes* and *Smith v Morgan.* Unlike Madgwick J, I do not read the passage of *Woodroffe* at [28] above as obliging the grantor of a bare right of first refusal to give the grantee an opportunity to match terms and conditions offered by a third party purchaser or to give the grantee a subsequent opportunity to match conditions more favourable to the grantee if the grantee refuses a first opportunity to buy. The language in *Woodroffe* is simple, "… I am making prima facie only a negative promise: I am saying: 'I will not sell my property unless and until I have offered it to you and you have refused it.'" In my view, a grantor who offers land, as Mr Sinnamon did, for the price he genuinely wants, before contracting with anyone else, has fulfilled this simple obligation. In my view, where there is a bare right of refusal, such as special condition 5, in the context of an unexceptional sale of residential land, that is all that is required of the grantor. Perhaps where there are commercial circumstances and where the parties have become commercially entangled, as they had in *White Property Developments,* that context might lead a Court to construe a bare right of refusal differently.

[67] The applicants also relied upon a decision of Emmett AJA in *Woolworths Ltd v About Life Pty Ltd*.[14] That was a case in which About Life, a commercial tenant in a shopping centre, took a sublease from Woolworths. A provision of that sublease was that if the tenant wished to assign the sub-lease, it was obliged to give Woolworths a right of first refusal to take the premises back. The clause itself was sparse and did not include any mechanism for operation of the right of first refusal. However, the factual circumstances were that it was contained in a commercial agreement between parties in relation to valuable commercial property. Emmett AJA said, "A right of first refusal or first right of refusal, without more, signifies that the grantor promises that it will not dispose of the property in question to a third party except on terms no less favourable than the terms on which the grantor has offered to dispose of the property to the grantee and the grantee has rejected that offer" – [102]. No authority was cited for that proposition. I think that it is contrary to the underlined dicta in *Woodroffe, Smith v Morgan* and *Goldmaster Homes* above. Again, I acknowledge that there was a commercial context to the bargain in the case which Emmett AJA decided, which is not present in this case.

[68] In the present case, I think that the right of first refusal given by special condition 5 was exhausted when, on 29 June, Mr Sinnamon asked Mr Butchart if the Butcharts wanted to buy the land at $1.2 million and Mr Butchart told Mr Sinnamon the Butcharts could not buy the land at $1.2 million unless there was a 12 month settlement.

[69] I will hear the parties on costs.

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[14] [2017] NSWSC 1117.