**SUPREME COURT OF QUEENSLAND**

CITATION:

*Curtain & Anor v Kirk & Anor* [2019] QSC 317

PARTIES:

**PAUL JAMES DOUGLAS CURTAIN**

(first plaintiff)

**MARGARET ANNE CURTAIN**

(second plaintiff)

**v**

**JULIE FAY KIRK**

(first defendant)

**JUDE CHRISTOPHER KIRK**

(second defendant)

FILE NO/S:

BS No 4749 of 2016

DIVISION:

Trial Division

PROCEEDING:

Civil trial

ORIGINATING COURT:

Supreme Court at Brisbane

DELIVERED ON:

19 December 2019

DELIVERED AT:

Brisbane

HEARING DATE:

19 February 2019 to 21 February 2019

JUDGE:

Douglas J

ORDER:

**1. Judgment for the plaintiffs against the defendants for $635,798 together with interest.**

**2. The parties will be heard as to the amount of interest and costs.**

CATCHWORDS:

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – OTHER PARTICULAR CASES – where the plaintiffs were the owners of a unit – where the plaintiffs agreed to sell that unit to the defendants with settlement to take place a year and a day later – where the defendants took possession of the unit in advance of settlement pursuant to special conditions of the contract – where the defendants purported to rescind and terminate the contract for breach of the requirement under s 421 of the *Environmental Protection Act* 1994 (EPA) that they be given written notice that the particulars of the unit were recorded in the Environmental Management Register (EMR) – where the plaintiffs contended that the defendants’ purported termination was unlawful and a repudiation of the contract, which the plaintiffs purported to accept, terminating the contract – whether the unit was, at the time of the sale to the defendants, on the EMR – whether, if the unit was on the EMR, the plaintiffs were aware of that fact at the time of the sale to the defendants – whether the defendants had entered into possession under the agreement before purporting to rescind – whether the defendants’ purported rescission was valid – whether s 421 afforded the defendants a privately actionable right to damages where there had been a breach of the section

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – OTHER PARTICULAR CASES – where the plaintiffs were the owners of a unit – where the plaintiffs agreed to sell that unit to the defendants with settlement to take place a year and a day later – where the defendants took possession of the unit in advance of settlement pursuant to special conditions of the contract –where the defendants purported to rescind and terminate the contract for breach of a warranty under the sale contract that the plaintiffs were not aware of any facts or circumstances that may lead to the land being classified as contaminated land within the meaning of the EPA – where the plaintiffs contended that the defendants’ purported termination was unlawful and a repudiation of the contract, which the plaintiffs purported to accept, terminating the contract – whether the plaintiffs were aware at the time of the sale to the defendants of any facts or circumstances that may have led to the unit being classified as being contaminated land within the meaning of the EPA – whether the defendants’ purported rescission was valid

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – ELECTION AND RESCISSION – where the plaintiffs were the owners of a unit – where the plaintiffs agreed to sell that unit to the defendants with settlement to take place a year and a day later – where the defendants took possession of the unit in advance of settlement pursuant to special conditions of the contract – where the defendants submitted they were entitled to rescind the contract because material facts (the existence of the EMR listing and the existence of the facts that led to that listing (“the material facts”)) were not disclosed to them which, if they had been disclosed, would have changed their decision to enter into the contract in the first place – whether the plaintiffs were aware of the material facts – whether the defendants would have entered into the contract had the material facts been disclosed – whether the defendants relied on any failure to disclose – whether the defendants had waived any right to rescission in equity by conduct in April 2010 – whether the defendants’ conduct, viewed objectively, was consistent with exercising a right to press the contract to completion and abide by its terms over exercising a right to rescind or terminate

*Environmental Protection Act* 1994 (Qld), s 421
*Limitation of Actions Act* 1974 (Qld), s 42

*Bell v Lever Brothers Ltd* [1932] AC 161 referred

*Demagogue Pty Ltd v Ramensky* (1993) 39 FCR 31 referred

*Immer (N0 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 referred
*Intensia Pty Ltd v Nichols Constructions Pty Ltd* [2018] QCA 191 referred
*Sargent v ASL Developments Ltd* (1974) 131 CLR 634 referred
*Turrisi Properties Pty Ltd v LJ & BJ Investments Pty Ltd* [2010] QSC 325 referred

COUNSEL:

N J Shaw for the plaintiffs

N H Ferrett QC for the first defendant

SOLICITORS:

Biggs Fitzgerald Pike for the plaintiffs

HopgoodGanim Lawyers for the first defendant

The second defendant appeared in person

**The issues**

[1] The plaintiffs were the owners of unit 34 in One Macquarie Street, Newstead. On 16 May 2009, they agreed to sell that unit to the defendants with settlement to take place a year and a day later on 17 May 2010. The defendants took possession of the unit in advance of settlement on 17 June 2009 pursuant to special conditions of the contract which permitted early possession.

[2] On 12 May 2010, the defendants purported to rescind and terminate the contract on two grounds: firstly, for breach of the requirement under s 421 (which has since been repealed) of the *Environmental Protection Act* 1994 (Qld) that they be given written notice that particulars of the unit were recorded in the Environmental Management Register (EMR); and secondly, for breach of a warranty under cl 7.4(7) of the contract that the plaintiffs were not aware of any facts or circumstances that may lead to the land on which the unit was built being classified as contaminated land within the meaning of that phrase as defined in the *Environmental Protection Act* 1994.

[3] On 17 May 2010, the plaintiffs wrote to the defendants, contending that the defendants’ purported termination was unlawful and a repudiation of the contract, which the plaintiffs purported to accept, terminating the contract. The plaintiffs then agreed to sell the unit to somebody else at a substantial loss on the purchase price under the contract by an agreement on 14 July 2010 which settled on 12 October 2010.

[4] Apart from the plaintiffs’ claims for damages, the defendants each claim that their purported termination or rescission of the contract was valid and they seek the return of the deposit paid under the contract. They also claim the plaintiffs breached a statutory duty created by the then in force s 421 of the *Environmental Protection Act* and an entitlement to offsetting damages.

[5] Section 421 of the *Environmental Protection Act* required an owner of land proposing to dispose of it to a buyer to give written notice to the buyer if particulars of the land are recorded in the EMR. It provided more fully:

“**421 Notice to be given to proposed purchaser of land**

(1) This section applies to the owner of land if-

(a) particulars of the land are recorded in the environmental management register or contaminated land register; or

(b) the land is the subject of-

(i) a notice under section 373 informing the owner that the administering authority believes the land has been, or is being, used for a notifiable activity or is contaminated land; or

(ii) a notice to conduct or commission a site investigation; or

(iii) a remediation notice; or

(iv) a notice that the administering authority is preparing, or requiring someone else to prepare, a site management plan for the land; or

(c) the land is the subject of an order under section 458.

(2) If the owner proposes to dispose of the land to someone else (the buyer), the owner must, before agreeing to dispose of the land, give written notice to the buyer-

(a) if particulars of the land are recorded in the environmental management register or contaminated land register-that the particulars have been recorded in the register and, if the land is subject to a site management plan, details of the plan; or

(b) if the owner has been given a notice under this part-that the owner has been given a notice under this part and particulars about the notice; or

(c) if the land is the subject of an order under section 458-that the land is the subject of the order and particulars about the order.

Maximum penalty-50 penalty units.

(3) If the owner does not comply with subsection (2), the buyer may rescind the agreement by written notice given to the owner before the completion of the agreement or possession under the agreement, whichever is the earlier.

(4) On rescission of the agreement under subsection (3)-

(a) a person who was paid amounts by the buyer under the agreement must refund the amounts to the buyer; and

(b) the buyer must return to the owner any documents about the disposal (other than the buyer's copy of the agreement).

(5) Subsections (3) and (4) apply despite anything to the contrary in the agreement.”

[6] The plaintiffs’ submission was that s 421 did not apply because the unit was not at the time of the contract on the EMR or because the defendants had entered into possession under the agreement before purporting to rescind. The plaintiffs also argued that the defendants had waived any right to rescission in equity and any right to terminate for breach of warranty by conduct in April 2010.

[7] The resolution of the case depends to a great extent on whether the unit’s particulars were recorded on the EMR and on the awareness of the parties at the relevant times of that fact or whether they were aware of any facts or circumstances that may lead to it being classified as being contaminated land within the meaning of the *Environmental Protection Act*, to paraphrase the warranty contained in cl 7.4(7) of the contract.

**The background evidence**

[8] The original lot on which One Macquarie Street was built, described as Lot 399 on SL7229, had been used previously for petroleum and oil storage. Abrasive blasting had also been conducted on the site. In 2003, the then owner of the land, the Department of Natural Resources and Mines, gave notice of those past uses pursuant to ss 371 and 372 of the *Environmental Protection Act*. That triggered the original lot’s inclusion on the EMR. A site management plan was developed as required under that Act with a certificate of approval of the site management plan issued on 27 September 2005.

[9] The plaintiffs bought the unit off the plan by an agreement dated 8 November 2005 which had included a statement disclosing the matters shown on the EMR. The solicitors who acted for the plaintiffs in that transaction also acted for them in the subsequent sale to the defendants.

[10] The unit the plaintiffs bought, Lot 34, was created on 16 April 2008. A search on the EMR less than two weeks later, on 29 April 2008, indicated that the new lot was not included on the EMR. The plaintiffs’ solicitors appear to have relied on that information when, by a letter dated 7 May 2008, they wrote to the plaintiffs telling them that Lot 34 was not on the EMR. The plaintiffs agreed to sell the unit to the defendants less than a year after their purchase settled on 20 June 2008. The sale contract to the defendants was dated 16 May 2009 and did not refer to the unit being on the EMR.

[11] It seems likely, for reasons I shall presently discuss, that the unit was included on the EMR on 29 July 2008. That is something in issue, however, as the evidence about when the EMR was updated to reflect subdivisions of land previously on it was not completely clear as to when the information was entered.

[12] There was also an issue on the pleadings as to whether the plaintiffs were acting in trade or commerce when they sold the unit to the defendants. That was explored in the evidence to some extent because the plaintiffs had owned a number of properties over the years. Although that was the case, I accept Mr Curtain’s evidence that the properties were, generally speaking, used by members of his family and not rented out as part of a commercial, rental business operated by him and his wife. Some of those properties, as he said, he sold in order to “appease the bank”.

[13] This issue was not the subject of submissions at the end of the trial.

***Was the unit on the register when the unit was sold to the defendants?***

[14] The search made on 29 April 2008 was performed only two weeks after the new lots, including Lot 34, had been created. The record of the database maintained for the EMR shows, however, that the relevant information about the site having been used for abrasive blasting and petroleum product or oil storage was entered on 29 July 2008.

[15] There was doubt about the accuracy of that record, however, as Mr Williams, the real estate agent who marketed the unit both for the initial purchase by the plaintiffs and their subsequent resale to the defendants, gave evidence that the firm for which he worked had a compliance division that would have done a search of the EMR after he was appointed as agent on 11 February 2009 and that he would have conducted the sale differently if he had known about the EMR issue. He said that, in preparation for the sale, the firm would have ensured that all searches required for environmental issues would have been done. He explained that, after searches about environmental matters were made, whatever was relevant should have been inserted into the contract by the employee engaged to make such searches.

[16] As was conceded by Mr Ferrett QC for the defendants, that evidence tended against the unit having been listed on the EMR at the time, but he submitted that the evidence of the public servant, Mr Blanchard, who identified the screenshot of the database constituting ex 6 should be preferred. His evidence through that document was that information was not entered into the site report for Lot 34 in the subdivided land where One Macquarie is situated until 29 July 2008. The lot had been created on 16 April 2008 and the result was that a search conducted on 29 April 2008 did not reveal the notifiable activities associated with the holding.

[17] The reliability of Mr Blanchard’s evidence was criticised as he had only been directly involved in the operation of the EMR since July 2018, about 10 years after the listing in question, and relied on what other people had told him about the operation of the EMR at the relevant time. It was submitted for the plaintiffs by Mr Shaw that, therefore, his evidence should be given no weight as hearsay because there was no direct evidence as to the operation of the EMR at the relevant time. He also pointed out that the defendants bore the onus of establishing that the unit was then on the EMR.

[18] It seems to me, however, that the probable conclusion is that the database entry was inserted about the time shown, 29 July 2008. No reason for any error in the insertion date of the record was established and the available evidence provided a reasonable explanation for the slight delay between the subdivision of the property and the entry of the unit’s details on the EMR. It is equivocal, however, because of Mr Williams’ evidence, but that evidence could also be explicable because there had been an error in the compliance department of the agency for which he worked. There was no direct evidence from whoever was involved with checking those compliance issues in the agency.

[19] Accordingly I have concluded that it is probable that the unit was entered on the EMR on 29 July 2008, well before the date of the contract of sale of the unit to the defendants.

***Entry by the defendants into possession of the unit***

[20] The defendants’ occupation of the property during the 12 months between the execution of the contract and settlement was pursuant to a licence annexed to the contract which set out that the plaintiffs would vacate the property within 30 days of the contract date, defined as “the possession date”. The annexure went on to record that the plaintiffs agreed to permit the defendants to enter into possession of the property from that possession date with the defendants agreeing to pay a licence fee of $4,000 per calendar month or part thereof from the possession date until the settlement date. The defendants also agreed to pay to the plaintiffs all outgoings on the property from the date they entered into possession until settlement.

***The evidence relevant to waiver or election***

[21] The male defendant, Mr Kirk, was an experienced businessman with a substantial property portfolio. In late 2009 or early 2010, he became aware of the possibility of environmental issues with the land and of the possibility of contamination. A Mr Steven Strano, the son of the manager of the complex, had told him that a number of purchases in the complex had failed to settle because of those issues. Mr Kirk investigated that by seeking advice from a firm of certifiers about Christmas 2009 and was told that he should check the issue because there had been problems with previous use of properties in that area.

[22] Another person had also told him to investigate the issue and he spoke to his own solicitor, Mr Jones, about it. He said that Mr Jones told him he could cancel the contract. He also said, however, that he and his wife wanted the unit and to live there. He said that he spoke to Mr Jones all the time and that, if he had known of the listing on the EMR before he signed the contract, then he might not have proceeded. He was not sure that he would not have proceeded, however. He said that he would have inquired what the environmental management issue meant but was not sure what he would have done had he been told it was suitable for residential use. He believed that that entry put a shadow over the property and he was worried about the potential for substances to come up through the drains.

[23] He did not remember receiving documents sent to him by his solicitors by letter dated 1 February 2010 which included a large bundle of documents including three pages which included information that the site had been on the EMR and would remain on it and that it had previously been used for Commonwealth oil refineries from 1923 for the purpose of oil storage and wharfage with up to 12 above ground storage tanks which resulted in soil and ground water contamination at the site. He did not remember receiving those documents or reading them but it was apparent from his other evidence that he knew about the substance of this issue earlier than that letter. It was also relevant that the letter was one asking him to make payment for outstanding invoices referred to in it. They were amounts said to be payable as rates, for water and sewerage and for overdue levies on the body corporate which the contract required him to pay. He said that his mail was normally vetted by a woman who worked for him called Raxa Trevelyan.

[24] He acknowledged that he made a phone call to Mr Curtain asking for an extension of the contract and said that he was still in turmoil about what to do. Mr Curtain told him to speak to his lawyer and it seems clear to me that the occasion must have been on 12 April 2010 as diarised by Mr Curtain. He denied telling Mr Curtain other information contained in Mr Curtain’s diary note such as that he was in financial difficulties partly associated with Bunnings’ not taking back an insulation product acquired by him or one of his companies. He described the conversation with Mr Curtain as very short. He did not keep a note of it. He conceded that he was involved in a ceiling insulation program at the time but said that he did not mention that to Mr Curtain or tell him he had lost money through it. There was no other explanation, however, as to how Mr Curtain could have otherwise obtained this information. He also denied telling Mr Curtain that he had properties on the market at the time and saying to him that they should keep the question of an extension of the contract between themselves rather than going through their solicitors.

[25] I did not believe his denials of the assertions made by Mr Curtain about the conversation. It seemed to me clear that Mr Curtain was by far the more reliable witness and was providing information that, on the evidence available to me, could only have come from Mr Kirk himself even though he denied telling Mr Curtain the substance of it.

[26] Mr Kirk conceded that his solicitors sought an extension of settlement of the contract to 16 August 2010 in their letter of 29 April 2010. That must have been sent on his instructions. It seems likely that, around that time, he was speaking with Mr Jones, one of the lawyers acting for him at McDonald Phillips Lawyers, about issues including the EMR issue. He had not taken other advice, for example from a valuer, about the effect of this issue on the value of the property.

[27] Mr Kirk and his then wife put the unit on the market for sale on 13 April 2010 for $4.75 million. While denying that he was unable to settle the contract, he did say that, at that time, he was panicking and felt sick in the stomach and was trying to find out what impact the environmental management issue would have on the value of the property.

[28] He denied being fully aware that he owed licence fees to the Curtains and other moneys such as body corporate levies and rates during this period. I disbelieve him in respect of that. He was sent many letters about those issues from his solicitors over a significant period of time. He tried to pass on the fault for his ignorance of those matters to his assistant, Ms Trevelyan, but I do not accept that he was ignorant of his liabilities. Nor was any evidence called from Ms Trevelyan.

[29] It seems much more likely to me that he was then having difficulty in paying his debts and was also very likely to have been unable to pay for the unit when settlement became due. He said, for example, that he had a very good relationship with his bank but led no evidence to establish that. He also denied the assertion that he was trying to find some other way to get out of the contract. It was interesting, however, in this context that his former wife only recalled him talking about the environmental issues not long before he cancelled the contract and when they moved out of the property on 13 May 2010. She said it might have been a week before that event that he first mentioned those issues to her.

[30] Nor did he call his former solicitor, Mr Jones, to give evidence although he was frank about saying that he had conversations with him about the effect of the EMR issue on his liabilities under the contract. It was clear to me that he was keen to purchase the unit and it seems most likely to me that his failure to do so was related to financial problems rather than the EMR issue.

[31] Ms Brims, the former Mrs Kirk, also gave evidence. She had little to do with the negotiations although she looked at quite a few units around the New Farm/Newstead area. Her liking for unit 34 stemmed partly from the fact that it had a big patch of grass. She had a big dog and said that the environmental issue affected her because of her concerns about her dog. She said that she would have done what Mr Kirk wanted to do in respect of either terminating or settling the agreement. She had not spoken to their solicitors about the EMR issue.

***The plaintiffs’ awareness of the EMR issue***

[32] I believed Mr Curtain’s evidence that, when he and his wife bought the unit, unit 34 at One Macquarie in Newstead, he did not pay attention to the contractual document revealing the environmental management issue. They had bought that unit off the plan in order to downsize from their large home at Bridgeman Downs. I infer from his evidence that the nature of the construction of the unit above a car park was consistent with him not being concerned about possible soil contamination issues. That was reinforced when his solicitors for the transaction advised him that settlement could proceed on 7 May 2008. The reference in that letter to there not being an environmental issue was a reference he could not recall particularly having placed any store on at the time. He believed that the solicitors had, in effect, given the transaction a clean bill of health so that it could proceed.

[33] They lived there for 10 to 11 months from 24 July 2008 with their two sons. I accept that at that time it was their intention to live at One Macquarie and that they held on to their former house because of their daughter’s wish to have her wedding photos taken there.

[34] In between their purchase and their sale of the unit to Mr and Mrs Kirk on 16 May 2009, he had not made any further enquiries about any environmental issues related to the unit because of the earlier clear result. Nor was he aware that it had previously been used for oil storage.

[35] Although he was a member of the body corporate committee, he said that contamination issues were not discussed at any meeting he attended. There was a document or two in a bundle of documents probably circulated to members of the management committee during 2008. He could not recall seeing those documents, which is consistent with his evidence that he did not read documents line by line before meetings of this nature. Nor could he recall receiving correspondence from the body corporate after the defendants moved into the unit.

[36] He agreed in cross-examination that the purchase of the unit was a substantial transaction for him and also agreed that he was careful in business but said that he did not regard the issue of potential environmental contamination as important to him and his wife. I accept that evidence. Where the unit was built above ground including above a carpark itself made of concrete, it seems likely that such an issue would not have loomed large in his mind as a purchaser.

[37] He had spoken to Mr Kirk about 12 April 2009 before the time the contract was due to settle when Mr Kirk told him that he had struck some bad luck and asked him to talk about an extension for the contract. He simply reinforced that the settlement date was 17 May 2009.

[38] Mrs Curtain did not recall any issue associated with environmental issues relating to the unit before they bought it, although she had signed the disclosure statement notifying that abrasive blasting and petroleum product or oil storage had been carried out on the land. She said that they bought the unit to downsize and for the lifestyle associated with where it was located in Newstead near New Farm. They kept their former house at Bridgeman Downs for their daughter’s wedding photographs and did not live elsewhere than in the unit.

[39] She could not recall reading or discussing the letter from the solicitors, Smith & Stanton, of 7 May 2008 which recorded that the property was not included on the Environmental Management Register or on the Contaminated Land Register. Her reason for selling the unit in 2009 was that her husband was not happy with living in the unit so they decided to move. She could not recall obtaining any searches about contamination of the site before the contract with the Kirks was entered into in May 2009. She was not aware of it being an issue. Nor was there anything to stop them settling in May 2010. She knew nothing then about any contamination either personally or through the body corporate (of which she was never a member).

[40] Let me then deal with the submissions concerning the legal issues that remained in dispute.

**Termination of the contract pursuant to s 421 of the *Environmental Protection Act***

[41] The plaintiffs’ submissions in respect of whether there had been a valid termination or rescission of the contract pursuant to s 421 of the *Environmental Protection Act* depended, in the first instance, on whether the unit was listed on the EMR at the relevant time. Because of my findings that it is more probable than not that the unit was then listed on the EMR, the argument then turns on whether the defendants rescinded the agreement by written notice given to the owner before possession under the agreement pursuant to s 421(3).

[42] The defendants’ submission was that they had not entered into possession “under the agreement” on the basis that the licence annexed to the sale contract should be taken to be a separate, collateral agreement because it was marked as an annexure rather than as part of the standard form contract. It was also submitted that the parties eschewed the usual approach of stating special conditions within the REIQ form, the licence was separately executed and that it was thought necessary to restate at cl 4.7 of the licence that cl 8.6 of the standard REIQ terms regarding possession before settlement applied under the licence. It was submitted that that was a matter which would be unnecessary if the two documents were to be taken as one.

[43] To the contrary, the plaintiffs’ submissions were that the words “the agreement” in s 421(3) could, in context, only refer to the agreement to dispose of the land by reference to the words “agreeing to dispose of the land” in s 421(2). They also submitted that no separate or collateral agreement relating to the defendants’ occupation of the unit arose because the annexure to the contract was inextricably linked to the parties’ agreement to dispose of the unit.

[44] The reasons Mr Shaw submitted that consequence flowed included that, by cl 4.1, the right to possession arose from the contract date which was defined in cl 1.1(i) of the standards terms of the REIQ contract. Other defined terms such as “Settlement Date”, “Outgoings”, “Property”, “Buyer” and “Seller” derived their meaning from the body of the contract or the reference schedule.

[45] Accordingly, he submitted that the special conditions were not to be construed as a separate contract as neither the reference schedule nor the annexed conditions could have meaning independent of each other. Nor was there any inconsistency between the contract and the special conditions annexed to the contract as cl 10.8(4) of the standards REIQ contract terms provided that “If there is any inconsistency between any provision added to this contract and the printed revisions, the added provision prevails”.

[46] Those submissions seem to me to be compelling on the basis, as the plaintiffs submitted, that, “if a right to possession included in the sale contract, incorporating definitions of terms and deriving its meaning from the contract, is not possession under the agreement, then nothing is”.

[47] I agree, therefore, that s 421(3) and the entry of possession of the defendants pursuant to the annexure to the contract has the result that the defendants’ right to rescind ceased on their entry into possession.

**Termination or rescission of the contract pursuant to cl 7.4(7)**

[48] Clause 7.4(7) of the contract was the warranty by the seller that the “Seller is not aware of any facts or circumstances that may lead to the land being classified as contaminated land within the meaning of EPA”.

[49] I accept the plaintiffs’ evidence that, at the date of the contract, they did not know of any land contamination, listing on the EMR or other site management issues. If they had been aware of such issues approximately 3.5 years earlier when they entered into the off the plan contract to purchase the unit, I am satisfied that they did not remember those facts then. Their evidence was that they did not remember reading the disclosure statement and, as was submitted for them, it is not improbable that a person represented by solicitors in such a transaction would sign the document without reading it when the document included lengthy annexures addressing issues that might be considered mundane. It was also submitted that the disclosure statement then provided referred only to the land and not the unit so that any awareness on the part of the plaintiffs could only extend to the site and not the unit which was not then in existence.

[50] In this case, also, the plaintiffs’ solicitors had advised them by letter and possibly in a conversation, that the property was not on the EMR or another similar register and that there were no specific requirements relating to the use of the property.

[51] The plaintiffs also submitted that the warranty in cl 7(a)(ii) was prospective in nature and extended only to the plaintiffs’ awareness of facts or circumstances that might lead to the unit being classified as contaminated at some time in the future. It was submitted, therefore, that if they were found to know that the unit was on the EMR, the warranty had not been breached because that knowledge would not lead them to an awareness that the unit would be classified as contaminated in the future.

[52] Finally, Mr Shaw submitted that the plaintiffs’ imputed knowledge could only have been that the site, as opposed to the unit, had been contaminated in the past, that the vendor to them was then obliged by its contract and under the statute to rectify the contamination and had put a site management plan into place. In those circumstances, where they were advised in May 2008 that the unit was not on the EMR, that imputed knowledge did not constitute a fact or circumstance that might lead to the unit being classified in the future as contaminated.

[53] My analysis of the evidence is that the plaintiffs genuinely were not aware at the time of their agreement to sell to the defendants of any facts or circumstances that may lead to the land being classified as contaminated.

[54] Mr Ferrett submitted that they relied on information provided to them when they purchased the land that the original lot had been used for notifiable activities being petroleum product or oil storage and abrasive blasting. If they had actually become aware of that information, his submissions would have been more persuasive but I am not of the view that they were aware of it by the time they entered into the contract to sell the unit to the defendants.

[55] He characterised their evidence as being unsure whether they ever absorbed the information disclosed in the disclosure statement made to them when they purchased the unit despite having signed immediately underneath the disclosure statement and argued that if they had absorbed that information but forgotten it by the time they sold the unit to the defendants in 2009, they should be regarded as having breached the warranty in spite of their not remembering by then the relevant circumstances.

[56] As Mr Ferrett submitted, to conclude to the contrary was essentially to construe the warranty as shifting risk depending on how good the memory of the seller in each particular case might be. He submitted that there were powerful reasons why that should not be so. There may well be some substance to that submission in other circumstances but, on this evidence, I am not satisfied that the plaintiffs were aware of any facts or circumstances that may lead to the unit being classified as contaminated land within the meaning of the *Environmental Protection Act*. It was, after all, built above a car park which itself was on a concrete base. There was a patch of lawn included in the unit but their lack of awareness of any environmental issues on the evidence I accept means that I am not satisfied that they were in breach of cl 7.4(7)(a)(ii) of the contract.

**Rescission in equity**

[57] Mr Ferrett submitted that the defendants were entitled to rescind the contract because material facts were not disclosed to them which, if disclosed, would have changed their decision to enter into the contract in the first place. Those material facts were the existence of the EMR listing and the existence of the facts that led to that listing. He argued that whether the plaintiffs were ever aware of any of those facts or had learned of some of them and forgotten them was irrelevant because his client, Ms Brims, alleged only innocent misrepresentation.

[58] He pointed to the value of the property, the contract price being $4.3 million, and its premium position on the riverfront at Newstead.

[59] I accept that a seller’s silence on the question of whether the land was on the EMR may be misleading. Here, however, the plaintiffs’ submission through Mr Shaw, in reliance on a passage from *Bell v Lever Brothers Ltd* was that the failure to disclose a material fact which might influence the mind of a prudent contractor did not ordinarily give the right to avoid a contract. As Gummow J said in *Demagogue v* Ramensky:

“The general law has developed a distinction between the obligations of a vendor of disclosure as regards defects in title and defects as to quality of the property sold. Whilst the vendor's duty of disclosure is confined to latent defects in title, it applies to all such defects, whether known to the vendor or not. On the other hand, when the complaint of the purchaser is one going to the quality of the land sold or to the use to which it may be put, or is that owing to non-disclosed facts within the knowledge of the vendor its value will be less than the purchaser supposed, there is no duty of disclosure: Spencer Bower, *The Law Relating to Actionable Non-Disclosure* (2nd ed, 1990) pp 135-136. The result is that in the absence of any misrepresentation or fraudulent concealment the vendor will incur no liability for failure to make such disclosure: C Harpum, “Selling Without Title: A Vendor's Duty of Disclosure?” (1992) 108 LQR 280 at 320.”

[60] In *Bell v Lever Brothers Ltd*, their Lordships relied upon the principle of caveat emptor and said that, as here, the contract they were dealing with was not a contract of the utmost good faith.

[61] Here, on my findings, the plaintiffs were ignorant of the relevant facts, something buttressed by the result of their solicitors’ searches. They thought the unit had been given a “clean bill of health”. Consequently, it was submitted that there was no misrepresentation made by the plaintiffs. The subject matter of the alleged failure to disclose related solely to matters which were searchable on the public record.

[62] That, it was also submitted, led to the conclusion that the defendants did not, in any event, rely on any failure to disclose. They did not make enquiry themselves of the relevant registers before entering into the contract thus supporting the conclusion that whether or not there was any previous contamination of the land was not a matter material to their decision to enter into the contract.

[63] Mr Kirk’s own evidence was quite equivocal about what he would have done had he known of the listing on the EMR before he signed the contract. He said that he was not sure whether he would have proceeded or not. He also said that he was not sure what he would have done had he been told that the property was suitable for residential use. As was submitted for the plaintiffs, there was no reasonable explanation from Mr Kirk as to how the status of the land as contaminated and the fact that it was subject to a site management plan could affect the decision to purchase the unit. It did not rest on land said to have been contaminated and it was not apparent how any previous contamination could have affected their occupation of the unit, particularly when they did occupy it for several months without any complaint.

[64] Nor, in spite of his protestations that he was concerned about the effect on the value of the unit, did he take any professional advice as to that issue. The plaintiffs submitted, therefore, persuasively in my view, that the listing on the EMR would not have made a difference to the defendants’ decision to purchase. That was said to be illustrated by his failure to exercise any right to end the contract. Instead, he sought an extension and put the property on the market.

[65] Consequently, I am not satisfied that the defendants are entitled to rescind the contract in equity.

**Waiver by election**

[66] The plaintiffs accepted that the right to rescind in s 421(3) could not be waived because there was an element of public benefit to the right to rescission and the legislature did not intend the right to be capable of waiver.

[67] It is apparent that, by the time the defendants, through Mr Kirk, sought an extension of the contract, either in the telephone conversation of 12 April 2010 or a letter of 29 April 2010, they were aware of the unit having been listed on the EMR. It seems likely that Mr Strano told Mr Kirk of the environmental issues around Christmas 2009 and that he had spoken to his solicitor and others after that.

[68] Accordingly, the plaintiffs submitted that they had established that Mr Kirk knew of the relevant facts at a time when it was appropriate to make an election between his rights and engaged in words or conduct consistent with the exercise of one right over another. They submitted that the evidence that his solicitor had told him the unit was on the register and that he should cancel the sale contract informed him of any right to rescind or terminate. It was probable that that conversation occurred before he sought an extension of the contract. Seeking an extension was submitted to be inconsistent with a right to rescind or terminate. In that conversation, Mr Kirk told Mr Curtain that he wanted to sell the unit and to have an extension on settlement of the sale contract. The unit was placed on the market a day after that conversation, 13 April 2010. The defendants’ solicitors, by correspondence of 29 and 30 April 2010, repeated Mr Kirk’s request for an extension and informed the plaintiffs that payments had been made of money owing under the licence arrangement.

[69] The plaintiffs submitted, therefore, that the conduct, viewed objectively, was consistent with exercising a right to press the contract to completion and abide by its terms over exercising a right to rescind or terminate. At that time, it was submitted, the relevant time for an election had arisen, Mr Kirk knew all that he could have known about his right to rescind or terminate and he had to choose between ending the contractual relationship or affirming it. He chose the latter by, while he was still in occupation of the unit and paying amounts owing for that occupation, indicating an intention to settle and resell.

[70] He also told Mr Curtain that he just wanted to sell the property and pay him what he owed him which Mr Shaw submitted was indicative of an election between terminating the contract and proceeding with it with an intention to take an interest in the land which he could only do by completing the contract.

[71] Mr Ferrett’s submission that that should not properly be characterised as an election but more as an overture is not persuasive. This seems to me to be particularly the case given the defendants’ listing of the property for resale, a step that they could only take if they intended to purchase the unit. This went beyond an offer to seek an extension to the settlement date. The conduct was only consistent with an acceptance by the defendants that they wished to be bound to the contract so that they could resell the unit.

**Breach of statutory duty under s 421 giving rise to a privately actionable duty**

[72] The final submission for the defendants was that s 421 gave them a privately actionable right to damages where there had been a breach of s 421.

[73] I am not persuaded that such a right should be implied in the Act. It is certainly not expressed and what is provided is a right to rescind with no reference to any right to damages. It was also submitted for the plaintiffs that contravention of the provision is an offence, contracting out of it is prohibited with the consequence that s 421 was intended by parliament to have an element of public protection rather than just a private focus.

[74] Mr Shaw also submitted that the proper construction of s 421 suggested that there was no creation of a private right because a complete remedy was provided in the form of two civil remedies and one criminal remedy within s 421 itself where the statute created a right that did not exist before. He submitted, and it seemed to me persuasively, that those provisions in the section told strongly against a construction that would see a separate private right of action in tort arise where the legislature has set out the consequences for breach of the provision in such a detailed way, not including a general right to damages.

[75] I conclude, therefore, that the section does not create a separate private right of action in tort. Nor would I have been satisfied that any loss suffered by the defendants would have been caused by any behaviour of the plaintiffs for the reasons I have expressed earlier.

[76] The plaintiffs also submitted that any tortious claim was out of time and not an equitable set-off but I do not need to determine those issues. The argument, however, was that the cause of action became complete on the defendants’ payment of the deposit under the contract on 23 May 2009 where, by s 42 of the *Limitation of Actions Act* 1974 (Qld), the counterclaim was taken to have commenced on 11 May 2016, more than six years after the cause of action accrued.

**The plaintiffs’ damages**

[77] There was no significant argument raised about the damages claimed by the plaintiffs. They consisted of their loss on resale of $490,000, other costs associated with the resale and some amounts arising out of damage to the unit while it was in the defendants’ possession. There was some early debate about a claim for rectification costs to reinstate alterations the defendant made to the premises about whether the alterations changed the value of the property but that was not pursued in the final submissions.

[78] In the circumstances, it is appropriate to give judgment for the plaintiffs for the total of the amounts claimed of $635,798 with interest which was claimed according to the amount attributable to their mortgage facility which they had in place until it was finally discharged in October 2017. This was said to be the truest measure of the loss of the use of their money. That was discharged in October 2017 and from that date the plaintiffs claim interest at the prescribed rate.

**Orders**

[79] I shall therefore give judgment for the plaintiffs against the defendants for $635,798 together with interest.

[80] I shall hear further from the parties as to the amount of the interest and costs.