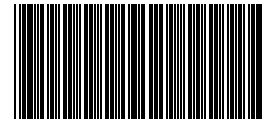




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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00213714

TITLE OF PROCEEDINGS

First Appellant	LENDLEASE COMMUNITIES (FIGTREE HILL) PTY LIMITED ACN 605278331
Second Appellant	LENDLEASE COMMUNITIES (AUSTRALIA) PTY LIMITED
First Respondent	Mount Gilead Pty Limited ACN 008499189
Second Respondent	MOUNT GILEAD (ACCESS) PTY LIMITED

FILING DETAILS

Filed for	LENDLEASE COMMUNITIES (FIGTREE HILL) PTY LIMITED,Appellant 1 LENDLEASE COMMUNITIES (AUSTRALIA) PTY LIMITED,Appellant 2
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Legal representative	Hamish Macpherson
Legal representative reference	
Telephone	0292962435
Your reference	602-0093982

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (20250723 - Appeal Submissions - Appellant [Lendlease](151967639.3).pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES

CA No. 2025/213714

COURT OF APPEAL

SC No: 2024/423110

LENLEASE COMMUNITIES (FIGTREE
HILL) PTY LTD & ANOR

Appellants

v

MOUNT GILEAD PTY LTD & ANOR

Respondents

Appellants' Submissions

Introduction

1. The appellants (**Lendlease**) appeal from orders of Stevenson J (**primary judge**) made on 29 May 2025 (**Red 121**) dismissing proceedings commenced by Lendlease.
2. In the proceedings below, Lendlease sought declaratory relief and damages arising from what is essentially a put and call option deed for the sale of parcels of land.¹ In essence, Lendlease claimed it has validly exercised purchase rights in the land, and may exercise further rights in the future. The respondents (**Landowners**) denied that the options had been validly exercised, and contended that Lendlease's rights to purchase were spent. The primary judge agreed with the Landowners, for reasons set out at **Red 67 – 120 (J)**.
3. The deed in question was referred to below as the **Balance Land Deed** (or **Deed**) and is extracted at **Blue 1/285 – 496**. It was executed on 17 April 2015. Broadly, it provides for the staged sale to Lendlease, by put and call options, of a large development lot that is presently farmland (**J[4]**). The properties to be sold were identified in the deed as Properties 6 to 10. Properties 1 to 5 were the subject of a separate deed (**MDP Deed**) executed on the same date: **Blue 2/497**. Properties 1 to 5 have all been purchased by Lendlease from the Landowners. These proceedings relate only to Properties 6 to 10. Rather than using the language of "*option*", both the MDP Deed and the Balance Land

¹ Lendlease sought the orders in its Amended Summons filed 17 February 2025 at **Red 1 – 9**, for the reasons articulated in its Amended Commercial List Statement at **Red 10 – 44**.

Deed provided for the structured making and acceptance of “Sale Offers” by the Landowners and “Purchase Offers” by Lendlease, the effect of which mirrors an option.

4. The primary judge decided three questions, identified at **J[23] (Red 72)**. First, a question described as the “**Clause 7.1 Question**”, which asked whether Lendlease, by providing to the Landowners a plan referred to as the “**12 July Plan**” (at **Blue 4/1638**), complied with its obligation under clause 7.1 of the Deed to provide to the Landowners a “*Plan of Subdivision (Balance Land)*” within the meaning of the Deed. For reasons set out at **J[27] – [176]**, the primary judge held that provision of the 12 July Plan did not satisfy clause 7.1. This was because, the primary judge held, the 12 July Plan was not, but needed to be, “*based upon*” the draft plan annexed to the Deed (**Blue 1/484**). By Ground 1, Lendlease challenges that conclusion.
5. Secondly, a question described as the “**Property 6 Question**”, which asked whether Lendlease was entitled to purchase Properties 7 to 10 in circumstances where it was unable to acquire Property 6 (which was common ground). For reasons set out at **J[177] - [246]**, the primary judge held that Lendlease’s failure to acquire Property 6 meant that it could not acquire Properties 7 to 10. By Ground 2, Lendlease challenges this conclusion.
6. Thirdly, the primary judge asked whether the Landowners had breached the Balance Land Deed by failing to lodge the 12 July Plan with Council for approval. The answer “*no*” followed from the negative answer to the first question. The primary judge consequently did not address the quantum of Lendlease’s loss (in circumstances where the questions identified above were effectively determined separately; if successful on appeal, Lendlease seeks a remitter of the question of quantum).
7. This appeal therefore turns on the Clause 7.1 Question (Ground 1) and the Property 6 Question (Ground 2), each of which is a question of construction of the Balance Land Deed. These submissions now identify the relevant background and terms of the Deed, before turning to the two grounds.

Background to the Deed

8. The land the subject of the Deed (known as the “**Balance Land**”) is described at **J[2] – [7]**. It is farmland located south of Campbelltown on the eastern side of the Hume Motorway. It is bounded by the Nepean River on the west, and is bisected by a canal

owned by Sydney Water. To the east is a development known as “Figtree Hill”, developed by Lendlease from Properties 1 to 5 (from a parcel referred to as the “**MDP Land**”), and accessed from the east by Appin Road. To the North is a lot known as the “Homestead Lot”, to be retained by the Landowners. A diagram appears at **Red 70**.

9. The primary judge found that the Balance Land Deed had its genesis in a proposal sent by Lendlease to the Landowners on 18 December 2014, and accepted by the Landowners on the same day: **J[51]**. The **Proposal** is at **Blue 1/130**. It proposed a total consideration of \$200 million for the sale of both the MDP Land and the Balance Land, and proposed the price and timing for the sale of the land by “*put and call options*” in 10 stages over 12 years. The precise lots within the MDP Land and the Balance Land to be sold by this process were not identified in the Proposal (although prices for each lot were specified). Instead, the Proposal stated that “*a draft plan of subdivision for each parcel will be agreed between the parties prior to entering into agreements*”.
10. The Balance Land Deed was entered on 17 April 2015 (**Blue 285**). Annexure 2 to the Deed (**Blue 1/484**) is entitled “*Draft Plan of Subdivision (Balance Land)*”. The primary judge held that Annexure 2 was the draft plan contemplated by the Proposal: **J[63]**.

The Balance Land Deed

11. By clause 4 of the Balance Land Deed (**Blue 308**), the Landowners’ land was to be first subdivided to create the land known as Balance Land. That step occurred. The Balance Land was then to be further subdivided into Properties 6 to 10. The method of that subdivision into Properties 6 to 10 was governed by clauses 5 and 7 of the Deed, and was the subject of dispute below.
12. Clauses 7.1 to 7.3 dealt with how the Plan of Subdivision was to be drawn. Clause 5 then placed obligations on the Landowners to pursue subdivision in accordance with the plan so determined. It is convenient to deal with the clauses in that order.
13. Clause 7.1 required Lendlease to provide to the Landowners, within 30 days of the satisfaction of the Condition in clause 3.1(e) (the rezoning of the Balance Land), “*the form of Plan of Subdivision (Balance Land) which it requires to be submitted by the Landowners as part of the application for the Subdivision Development Consent (Balance Land)*”. It is this step that Lendlease claims to have carried out on 12 July 2024 by the provision of the plan at **Blue 4/1638, 1639**.

14. Clause 7.1 expressly contemplated that Lendlease could vary the draft plan in Annexure 2 as follows (**Blue 1/311**):

The Landowners acknowledge and agree that Lendlease may vary the form of the Plan of Subdivision (Balance Land) from the version contained in Annexure 2 (in the manner provided by cl. 7.3(a)) in order to facilitate Lendlease's development and staging of the Balance Land.

15. Clauses 7.3 contained a broad power of variation for Lendlease (**Blue 1/312**). By clause 7.3, Lendlease was entitled to vary the Plan of Subdivision (Balance Land), and the power of variation expressly permitted "*the variation of the boundaries and dimensions of any proposed lot*" subject only to two constraints, which were:

- (a) the areas of the proposed Lots 6 to 9 must not exceed proscribed maxima; and
- (b) that variations must not materially adversely affect the ability of the parties to obtain the approval of any Authority in relation to the Plan of Subdivision (Balance Land).

16. The breadth of Lendlease's variation power is to be contrasted with clause 7.2, which provided that the Landowners could not "*amend*" the Plan of Subdivision (Balance Land) without Lendlease's approval, other than amendments that both were required by an Authority to grant consent and did not adversely affect the ability to develop the land and did not "*reduce the area of any individual lot by more than 10%*".

17. Pausing here, it may be observed that there is nothing in clauses 7.1 to 7.3 which requires that the Plan of Subdivision (Balance Land) must be "*based upon*" the draft plan in Annexure 2 to the Deed. The primary judge found that this requirement came from the language of the definition in clause 1.1, which is in the following terms (emphasis added):

Plan of Subdivision (Balance Land) means:

- (a) a plan of subdivision of the Balance Land ...

based upon the draft plan which is contained in Annexure 2, as varied pursuant to clause 7.2, and including any easements or affectations required to be created pursuant to clause 7.2

18. The primary judge held (correctly), that the references in this definition to clause 7.2 were mistakes, and should be read as references to clause 7.3: **J[38] – [48]**.

19. The primary judge also held (incorrectly), that the words “*based upon*” in the definition constrained the variation power in clause 7.3: **J[74], [145] – [176]**. This error is addressed in Ground 1.
20. Clause 5 required the Landowners to seek subdivision consent for the plan drawn up in accordance with clause 7.1 to 7.3. So, clause 5.1(a) (**Blue 1/310**) required the Landowners, upon receipt of the Plan of Subdivision (Balance Land) provided in accordance with clause 7.1, to “*use their best endeavours*” to obtain and diligently pursue development consent for the proposed subdivision within 4 months. More particularly, clause 5.2(a) required the Landowners to lodge an application for such approval with the relevant Authority within 10 Business Days of being provided with the form of Plan. Importantly, under clause 5.2(b), if the Landowners failed to comply with clause 5.2(a), the first appellant could itself lodge an application for a Subdivision (Balance Land) with the Authority responsible for approving it; and the Landowners were required, within 10 Business Days of a written request by the first appellant (clause 5.2(b)(i)), to provide the appellants all documents and consents reasonably required by the first appellant to lodge, pursue and obtain a Subdivision Development Consent (Balance Land) (clause 5.2(b)(ii)).
21. Clause 8 concerned the Sale and Purchase Offers. Clause 8.1 provided (**Blue 1/313**):

In consideration of Lend Lease paying the Sale Offer Fee, receipt of which is acknowledged, each Landowner irrevocably offers to sell to each Offeree each relevant Property (in respect of which the relevant Landowners is an owner) for the Price and on the other terms set out in the Sale Contract and in this deed.
22. For the purposes of that clause:
 - (a) “*Sale Offer*” was defined as the Offer which the Landowners in relation to a Property irrevocably grant to each Offeree under clause 8.1. This was the call option.
 - (b) “*Sale Offer Fee*” was defined in respect of each Property, the amount set out in the Key Items Schedule and payable under cl. 9. This was the call option fee.
 - (c) “*Offeree*” was defined by reference to various Lendlease entities, which includes the appellants.

- (d) “*Property*” was defined as each parcel of land, as notified by the first plaintiff under clause 7.1(b), comprising part of the Balance Land and described in the Key Items Schedule.
- (e) “*Price*” was defined as in relation to each Property, the purchase price to be paid under the Sale Contract, which is the amount specified for the Property in the Key Items Schedule.
- (f) “*Sale Contract*” was defined as a contract for the sale of a Property formed on the acceptance of an Offer, which is on the terms set out in the contract form in Schedule 5.

23. The **Key Items Schedule** (at **Blue 1/349**) set out the Sale Offer Period, the Purchase Offer Period, the Price, the Sale Offer Fee and the Completion Date for each of Properties 6-10. In respect of Property 6:

- (a) the Sale Offer Period was identified as follows:

The period:

- (a) Commencing on the date which is 5 days after the date on which the Conditions are satisfied or waived in accordance with cl. 3, and
- (b) Ending on the later of:
 - (i) Where the Irrevocable Offer Document (MDP Land) has not been terminated, the later of:
 - (A) 11 months after the date of Contract 5; and
 - (B) 15 days after the commencement date under paragraph (a);
 - (ii) where the Irrevocable Offer Document (MDP Land) has been terminated, the later of:
 - (A) 15 days after the commencement date under paragraph (a); and
 - (B) 5 years after the Board Approval Condition Date.
- (b) the Purchase Offer Period for Property 6 was defined as the period commencing on the date after the Sale Offer Period and ending 20 days later.
- (c) the Price was \$7.4 million (plus GST);

- (d) the Sale Offer Fee was identified as the amount determined in accordance with clause 9.1, being \$500,000 (plus GST) within 5 Business Days of the Board Approval Condition, and \$500,000 (plus GST) on each anniversary of the date of the Board Approval Condition being satisfied; and
 - (e) the Completion Date was 30 days after the date of Contract 6.
24. As to Properties 7 to 10, the Sale Offer Period for each of those Properties also commenced on the date which is 5 days after the date on which the Conditions are satisfied or waived in accordance with clause 3 (ie, the same as for Property 6), but expired on the date which is 11, 35, 59 and 83 months after the completion of Contract 6, respectively, or alternatively (on the appellants' construction, as articulated below at paragraph [73]) on the date which is 11, 35, 59 and 83 months after the date Contract 6 could have completed if entered.
25. Pausing here, Ground 2 is concerned with the consequences of the fact that Contract 6 was not formed and (it is common ground) cannot now be formed. The primary judge's conclusion was that if Contract 6 was not formed, the Sale Offers for Contracts 7 to 10 could not be accepted: **J[245] – [246]**. Indeed, the primary judge came to a stronger conclusion, that on the proper construction of the Deed, Lendlease was required to purchase each of Properties 6 to 10, in order: **J[195] – [197], [239]**.
26. Clause 8.3 of the Deed set out how a Sale Offer could be accepted, by the provision of documents including a notice and executed counterparts of a contract of sale.
27. By clause 8.4, each Sale Offer was expressed to be "*irrevocable*" unless the deed was validly terminated. And by clause 8.5, the acceptance of an Offer by any Offeree did not affect any of the other Sale Offers contained in the deed, or the first appellant's obligations under the deed, or the Landowners' rights and remedies.
28. Clauses 8.6 to 8.8 and clause 8.10 dealt with the Purchase Offers (ie, the Landowners' put options). By clause 8.6, the first appellant irrevocably offered to buy from the Landowners each Property for the Price and on the other terms set out in the Sale Contract and on the other terms set out in the Deed. Clause 8.10 provided that the Purchase Offer in respect of a Property lapsed upon acceptance of the corresponding Sale Offer.

29. Clause 8.9 dealt with the acceptance of both Sale and Purchase Offers. Relevantly, under clause 8.9(b), the Offer Periods started on the first day in the stated periods and ended at 5pm on the “*last day in the stated periods*” in the Key Items Schedule. Under clause 8.9(c), the time limits for exercising the Offers were to strictly apply, and an Acceptance Notice served outside the relevant Offer Period was to be ineffective and no contract would be formed.
30. Clause 12 was headed “*Sale Contract*”. Clause 12.1 provided that upon the acceptance of an Offer, a contract for sale was formed on the terms of the Sale Contract. Clause 12.2 dealt with the mechanics of the execution of the Sale Contracts (and specified that if a party failed to execute the contract, the other party could rely on the Deed as sufficient to form the contract for sale). Clause 12.3 dealt with amendments to the Sale Contracts.
31. Clause 19 concerned the Powers of Attorney. By cl. 19.1 the Landowners were required to execute powers of attorney. That occurred on 17 April 2015: **Blue 2/694 and 701**. Relevantly, the Powers of Attorney authorised the second appellant to execute and deliver on behalf of the Respondents certain documents including, relevantly, an application for a subdivision approval under in clause 5.2(a) of the Balance Land Deed.
32. Clause 21 provided that the Landowners must not make any objection to an Authority in relation to any development application or other planning activity by or on behalf of the first appellant in relation to the Balance Land, subject to the first appellant complying with its obligations under the Balance Land Deed and other laws.
33. Clause 29.8 obliged the parties upon request to do everything reasonable to give effect to the deed and the transactions that it contemplated, including executing documents.

Events after entry into the Balance Land Deed

34. The events that took place after entry of the Balance Land Deed are summarised at **J[104] – [165]**.
35. The Deed provides for a “*Sunset Date*” after which either party could terminate unless the conditions precedent in clause 3.1 of the Deed were satisfied or waived: see cl 3.4. That date was extended to 21 May 2024.
36. On 20 May 2024, Lendlease notified the Landowners that it had waived the conditions precedent: **J[143], Blue 2/977**.

37. As the primary judge held at **J[140]**, the effect of the waiver was that the period for acceptance of the Sale Offer for Property 6 commenced on 25 May 2024 and expired on 9 June 2024.
38. Lendlease then took steps in an attempt to acquire all of the properties before the Sale Offer for Property 6 expired. Lendlease accepted, below, that its initial attempt was not contractually effective: **Black 202 [54]**. So, on 23 May 2024, Lendlease provided the Landowners with a draft Plan of Subdivision (Balance Land) (**Blue 2/992**), and on 27 May 2024, Lendlease sent a notice attempting to accept all of the Sale Offers for properties 6 to 10 in a single block: **Blue 2/999**. The remaining relevance of the first attempt to this appeal is that the Landowners initially contended below that the failed attempt involved some sort of waiver by Lendlease preventing further attempts, a contention that was withdrawn: (**Red 57 [50(c)(ii)]**).
39. On 9 June 2024, the time for acceptance of the Sale Offer for Property 6 elapsed.
40. On 14 June 2024, the Balance Land was rezoned: **J[153]**, **Blue 3/1598**.
41. On 12 July 2024, in a second attempt (and which Lendlease says was effective), Lendlease sent the 12 July Plan to the Landowners as the Plan of Subdivision (Balance Land): **J[163]**, **Blue 4/1639**.² By this step, Lendlease says it provided a Plan of Subdivision (Balance Land) under clause 7.1, and so clause 5 required the Landowners to use their best endeavours to obtain development consent for subdivision in accordance with the 12 July Plan (cl 5.1), and to lodge an application for that consent within 10 business days (cl 5.2(a)), failing which Lendlease could do so on the Landowners' behalf (cl 5.2(b)).
42. On 31 July 2024, however, the Landowners wrote to Campbelltown City **Council** foreshadowing that Lendlease may attempt to lodge a development application for subdivision consent, and notifying the Council that the Landowners did not consent to any such application: **Blue 4/1749**.

² In fact, 2 plans were provided, because there was a difference between Lendlease and the Landowners whether Lot 2 in DP 249393 (the **Access Lot**) should form part of the plan. At trial, Lendlease relied on the **12 July Plan** which contained the Access Lot (which appears at **Blue 4/1638**), and the Landowners took no point about the inclusion of that lot.

43. Thus, when on 17 September 2024, Lendlease did lodge such an application using the Power of Attorney (**Blue 4/1751**), the Council rejected it because it was not signed by the Landowner (**Blue 4/1802**).
44. In the Court below, Lendlease asserted that the Landowners breached the Balance Land Deed by their refusal to register the 12 July Plan and by their interference with Lendlease doing so; and claimed damages.³ The primary judge decided the question of breach adversely to Lendlease (following on from his construction of the Balance Land Deed).

Ground 1 – the clause 7.1 Question

45. By Ground 1, the appellants challenge the primary judge’s conclusion that the 12 July Plan was not a Plan of Subdivision (Balance Land) created in accordance clause 7.1. The essence of the primary judge’s reasoning was that a Plan of Subdivision (Balance Land) needed to be “based upon” the draft plan in Annexure 2 to the Deed, and the 12 July Plan was not. The reasons are at **J[27] – [176]** (commencing at **Red 73**). The primary judge’s reasoning involved the following steps:
- (a) The references to clause 7.2 in the definition of “Plan of Subdivision (Balance Land)” are an error and should be read as clause 7.3 (a finding that is not challenged in this Court): **J[38] – [48]**;
 - (b) the Annexure 2 plan “*had its provenance*” in the Proposal, which led to the execution of the Deed: **J[51] – [63]**;
 - (c) the words “*based upon the draft plan which is contained in Annexure 2, as varied pursuant to clause [7.3]*” are most naturally read as “*words of constraint*” (**J[67]**), such that the power of variation in clause 7.3 cannot be used to vary the plan to one that “*can no longer be said to be ‘based upon’ the Annexure 2 Plan*”: **J[74]**;
 - (d) there were “*good reasons*” (**J[95]**) why the parties would require the plan ultimately submitted to have some relationship with the Annexure 2 Plan, which were: (i) that the Key Items Schedule specified the prices at which Lendlease would acquire Properties 6 to 10, which figures closely resembled the Proposal: **J[96]**; and (ii) that the Annexure 2 Plan “*had its provenance*” in the Proposal: **J[97]**;

³ See **Red 32** [64] – [65A].

- (e) there were indications suggesting that the parties intended Properties 6 to 10 to “*remain contiguous*”, although this question was “*not dispositive*”: **J[98] – [102]**;
- (f) having regard to the events leading up to the provision of the 12 July Plan (considered at **J[104] – [146]**), the primary judge found that Lendlease had by 23 May 2024 concluded that its preferred development and staging of the Balance Land “*could not be one ‘based upon’ the Annexure 2 Plan*”: **J[147]**;
- (g) the 12 July Plan included the “*shrinking*” of Lot 6, in circumstances where Lendlease could no longer acquire that Lot, which was “*a fundamental change to the bargain contemplated by the Deed*”: **J[153] – [158]**;
- (h) there were “*striking differences*” between the 12 July Plan and the Annexure 2 Plan (**J[165]**), the most important and “*decisive*” of which was that “*the 12 July Plan in substance provided for the subdivision of the Balance Land only into four “Lots”, being lots 2, 3, 4 and 5, said to correspond to Properties 7, 8, 9 and 10*”: **J[167]**;
- (i) the 12 July Plan is “*fundamentally different*” to that contemplated in the Annexure 2 Plan and “*bears no resemblance*” to the Annexure 2 Plan and “*can in no sense be seen to be ‘based upon’ it*”: **J[171]**;
- (j) Lendlease’s preferred proposal for the development and staging of the Balance Land required that it completely ignore the Annexure 2 Plan because staging in accordance with Annexure 2 was not “*cost effective*” (implicitly rejecting a contention pleaded by the Landowners,⁴ that Lendlease’s purpose in varying the Plan had not been for the purpose of facilitating the development and staging of the Balance Land): **J[172] – [174]**; and
- (k) the 12 July Plan was not a plan that was “*based upon*” the Annexure 2 Plan, such that Lendlease did not comply with its obligation to provide a Plan of Subdivision (Balance Land) as required by clause 7.1: **J[175] – [176]**.

46. Ground 1 should be upheld because the primary judge erred in reading the words “*based upon*” in the defining of “*Plan of Subdivision (Balance Land)*” as imposing a limitation on Lendlease’s powers of variation under clause 7.3. The question is one of construction, and the approach to such questions is well-known: the words of the Deed should be

⁴ **Red 52** [31(d)], **Red 58** [51](iv)(iii).

construed as a whole, and in context, and given the meaning that a reasonable commercial person in the position of the parties would place upon the words so used.⁵

47. *First*, and focusing on the text of the relevant provisions, each of clause 7.1 and clause 7.3 expressly permitted Lendlease to vary the Plan of Subdivision (Balance Land). Thus, clause 7.1 includes the words “*may vary the form of the Plan of Subdivision (Balance Land) from the version in Annexure 2*” and clause 7.3 is addressed “*variations to the Plan of Subdivision (Balance Land)*”.
48. The parties thus expressly contemplated (and permitted) that the plan of subdivision may depart from Annexure 2. Clause 7.3 imposed only two express constraints on Lendlease’s power of variation of the size of the lots. *First*, that the size of each subdivided lot must not exceed the limits prescribed in clause 7.3(i). There was no issue below that the 12 July Plan did not comply with that requirement. *Secondly*, that the variations must not materially affect the ability of the parties to obtain approval of any Authority in relation to the plan. The primary judge made no finding that the 12 July Plan fell foul of that requirement.
49. Importantly, the maximum size constraints imposed by clause 7.3 played an important protective purpose for the Landowners: the limits prevented Lendlease from swelling the size of the early lots above the agreed threshold in circumstances where the prices of the lots were fixed by the Key Items Schedule (and the Landowners’ put option for the later lots did not arise, in some cases, for many years). This had the commercial purpose of maintaining a connection between the size of the lot and the contract price for the lot. The parties did not, by contrast, include any lower limit on the size of the lots that Lendlease could create.
50. The two limited constraints on Lendlease’s power of variation under clause 7.3 are to be compared with the much more constrained power conferred by clause 7.2 on the Landowners to vary the plan of subdivision, which did prevent the Landowners from reducing the size of a lot by more than 10%.
51. *Secondly*, against the background of the parties’ express specification of only 2 limits on Lendlease’ power of variation, it is an error to read the words “*based upon*” in the definition of “*Plan of Subdivision (Balance Land)*” as imposing some further constraint

⁵ *J & P Marlow (No 2) Pty Ltd v Hayes & McCabe* [2023] NSWCA 117; (2023) 112 NSWLR 29 at [89] – [90].

on the variation power. Of course, the definition must be read into the clause on each occasion where the definition appears, and the clause then construed,⁶ but the clause should be construed ‘*harmoniously*’ and not according to “*a slavish rule that the defined term inevitably bear every aspect of the defined meaning*”: see *Perpetual Custodians Ltd v IOOF Investment Management Ltd* [2013] NSWCA 231; 304 ALR 436 at [86] (Leeming JA, McColl and Gleeson JJA agreeing).

52. The words “*based upon*” must thus be read into many locations in clauses 5 and 7, including clause 7.3 which thus conferred on Lendlease a power to vary a plan that is “*based upon*” Annexure 2 (to illustrate this, the mechanical insertion of the definition words in the relevant clauses is shown at **Black 219 - 225**). The best way to read clauses 7.1 and 7.3 is that the constraints on the variation power are limited to two constraints expressly prescribed in clause 7.3. The words ‘*based upon*’ in the definition are best understood as only descriptive.
53. *Thirdly*, having expressly listed two constraints on the power to vary the plan in clause 7.3, it is objectively unlikely that the parties would have intended the words “*based upon*” in a definition to impose an additional constraint; namely proscribing any variation that is not “*based upon*” Annexure 2. This conclusion becomes yet stronger when one has regard to the vagueness of the concept. What does “*based upon*” mean? It is objectively unlikely that the parties would have intended to impose a constraint so amorphaously drawn, through the oblique inclusion of those words in a definition. The correct way to read clauses 7.1 and 7.3, particularly in the context of clause 7.2, is that the constraints on the variation power are limited to the two constraints on varying lot configurations expressly prescribed in clause 7.3.
54. *Fourthly*, and contrary to **J[95] – [97]**, the origins of the Annexure 2 Plan in the Proposal do not support the construction determined by the primary judge. What is notable about the Proposal is the complete absence of any specification of the size of any of the proposed lots (**Blue 1/130**). Rather, it sets out only the price to be paid for each lot, and the timing of sales, without regard to the size of any of the lots; noting only that “*a draft plan*” for each of the two parcels (ie, the MDP Land and the Balance Land) would be

⁶ *Kelly v The Queen* [2004] HCA 12; 218 CLR 216 at [103] (a statute case) that has been applied to contracts many times, eg *Wiggins Island Coal Export Terminal Pty Ltd v New Hope Corp Ltd* [2019] NSWCA 316 at [118]; *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] HCA 37; 98 ALJR 1273 at [32].

agreed. That agreement is best understood against the background that much was unknown about how the site would be developed in 2014 when the Proposal was agreed, particularly in relation to the stages to be sold many years later.⁷ Properly understood, the protection in relation to lot size for which the Landowners bargained was limited to the maximum sizes identified in clause 7.3, which would prevent Lendlease from obtaining most of the land in the first tranche for a minimal outlay (albeit that the Landowners could ultimately require Lendlease to pay the full purchase price when their put options fall due).

55. *Fifthly*, there is nothing in the Deed that required the lots to be contiguous. Indeed, the lots in the Annexure 2 plan were themselves not contiguous – Lots 8 and 10 were bisected by the Sydney Water canal: (**Blue 1/485**).
56. For these reasons, the primary judge erred in holding that it was a requirement that the Plan of Subdivision (Balance Land) must be “*based upon*” the draft plan in Annexure 2.
57. Further, the primary judge erred at **J[167]** in holding that the 12 July Plan “*in substance provided for a subdivision of the Balance Land only into four “Lots”*”. The plan is extracted at **Blue 4/1639**.
58. The 12 July Plan (which the primary judge held at **J[172]** reflected Lendlease’s preferred staging process as at 12 July 2024) contains five lots, not four. The thinking behind the staging was explained by Mr Vella, whose evidence the primary judge evidently accepted at **J[172] – [174]**. The proposed staging reflected in the 12 July Plan (for 5 lots) (**Blue 4/1638**), was:
 - (a) first, commence with a small lot located near the existing High Voltage lines (near the southern border of the Balance Land), for the construction of a Zone Substation to support the energy needs of the developed Balance Land (**Red 59 [32] – [35]**). That lot should be obtained first given the long lead times of constructing a zone substation. The proposed lot is shown marked “1” and shaded red in the Plan. Lendlease specified this lot as Property 6: **Blue 4/1639**.
 - (b) next, a corridor running North-South on the western side of the Balance Land, allowing access from the North over Menangle Creek, with land proposed to be

⁷ **Blue 1/43** (Affidavit of Ranisha Clarke at [9] – [13]); **Blue 1/75** (Affidavit of Mark Anderson at [12])

reserved for conservation purposes running along its eastern and western boundaries: **Red 60 [38] – [40]**. It is shaded blue and marked “2”. This lot is well-suited for the construction of a sewage treatment plant at its Northern extent, which also has a long lead time. Lendlease specified this lot as Property 7;

- (c) next, a lot to the south of Property 7, and crossing east over Woodhouse Creek and the canal: **Red 62 [42] – [45]**. It is marked “PT 3” in the plan and is shaded purple. Lendlease specified this lot as Property 8;
- (d) next, a lot comprising the remaining parts of the Balance Land appropriate for development: **Red 65 [46] – [49]**. This lot is made of two non-contiguous sections; one to the South of Property 8, and one to its East, and extending to the MDP Land. It is marked “PT 4” and is shaded yellow. Lendlease specified this lot as Property 9.
- (e) Finally, a residual lot containing all the land to be reserved for conservation. It is marked PT 5 and is shaded green: **Red 66 [51] – [52]**. Lendlease specified this lot as Property 10.

59. Lendlease thus specified 5 lots and not 4. The primary judge’s conclusion that Lendlease had specified only 4 lots “*in substance*” seems to arise from the fact that by 12 July 2024 the time to acquire Property 6 had elapsed (notwithstanding Lendlease’s first and unsuccessful attempt to purchase all of the lots for the agreed total price). But there was always a possibility that not all of the lots would be acquired by Lendlease. After all, the deed provided for options. This error carries into Ground 2.

Ground 2 – the Property 6 Question

60. By Ground 2, Lendlease contends that the primary judge erred in holding that, having lost the right to acquire Property 6, Lendlease lost its rights to acquire Properties 7 to 10. The primary judge came to that conclusion, and also to the stronger conclusion that Lendlease was obliged to purchase all of Properties 6 to 10 by the reasoning at **J[177] to [266]** (commencing at **Red 177**). The primary judge’s reasoning was as follows:

- (a) clauses 8.1 and 8.6, read together with the Key Items Schedule, required that Lendlease acquire “*each one*” of the properties in the Key Items Schedule, and it was not open to Lendlease to “*pick and choose*”: **J[195] – [197]**;

- (b) the Key Items Schedule measured certain dates from the date of completion of Contract 6 (J[199]), suggesting that “*there would be a sale of each, that is every one of, Properties 6 to 10; and in that order*”: J[200], and also at J[211]; and
 - (c) a number of significant provisions of the Deed operate on the basis of the completion of Contract 6, “*for example*”, clauses 11, 18.1(d)(iii), and clause 20.2, and clause 27 bespeaking “*a common understanding as to the centrality of the completion of Contract 6 to the ongoing performance of the Deed*”: at J[221].
61. It may be seen, immediately, that the primary judge’s construction of the Deed, requiring Lendlease to purchase “*each*” of the lots, “*in order*”, obliterates the Deed’s character as a put and call option deed. To use the language of the Deed, on the primary judge’s construction, Lendlease had no choice but to accept each of the Landowners’ “*Sale Offers*”. They were offers that could not be refused.
 62. A further corollary of the primary judge’s construction is that the Landowners’ put options (ie, the Landowners’ opportunity to accept Lendlease’s “*Purchase Offers*”) could never arise for exercise, because Lendlease was in fact compelled, on the primary judge’s construction, to exercise all of its options which were anterior in sequence. The primary judge’s construction therefore renders as surplusage all of the language in the Deed connected with Lendlease’s Purchase Offers.
 63. Impressionistically, these consequences of the primary judge’s construction point to error, in that they reconfigure the character of the arrangement from an option agreement to a straight sale agreement. This impression is confirmed by a closer analysis of the text of the Deed.
 64. *First* and foremost, the Deed simply does not say that Lendlease must purchase all of the Properties, or that Properties 7 to 10 cannot be purchased without Property 6. In fact, the express terms of the Deed say the opposite. Thus, under clause 8.1, the Landowners irrevocably offered to sell to each Offeree “each” relevant Property. There is nothing conditioning that clause which states that the Landowners only offer to sell each Offeree Properties 7 to 10 once Property 6 has been sold. The words “*each*” and “*offer*” make no sense on the primary judge’s construction, and must be read down.
 65. *Secondly*, and consistently with clause 8.1, under clause 8.4 each Sale Offer is expressed to be irrevocable unless the Balance Land Deed is validly terminated. The Balance Land

Deed has not been terminated. The effect of the primary judge's construction is that each Sale Offer for Properties 7 to 10 was revoked because a Sale Offer for Property 6 has not been made or the sale completed. The primary judge's construction thus contradicts the clear words of clause 8.4.

66. *Thirdly*, under clause 8.5, the acceptance of any Offer by any Offeree “*does not affect any of the other Sale Offers*” contained in the Balance Land Deed. It logically follows that the corollary is also true, absent express text to the contrary; namely that the non-acceptance of any Offer by the Offeree does not affect any of the other Sale Offers contained in the Deed. Read together with clauses 8.1 and 8.4, clause 8.5 can have no other meaning.
67. *Fourthly*, the Deed expressly prescribes the conditions for the acceptance of each Sale Offer: the acceptance of a Sale Offer can only be undertaken by the Offeree giving the Landowners during the Sale Offer Period the documents referred to in clauses 8.3(a) to (d). None of those documents are predicated upon the initial purchase of Property 6.
68. *Fifthly*, under clause 8.9(b), the Offer Periods start on the first day in the stated periods and end at 5.00pm on the last day in the stated periods in the Key Items Schedule. Nowhere in that clause does it state that the Offer Periods lapse entirely upon Contract 6 not being completed by the Completion Date for that Contract, which is the effect of the Landowners' construction.
69. *Sixthly*, and moving from the operative clauses of the Deed to the Key Items Schedule in Schedule 1 (**Blue 1/349**), it is important to note that the Sale Offer Periods for each of Properties 7 to 10 commence on the date which is 5 days after the date on which the Conditions are satisfied or waived in accordance with clause 3. That is, the commencement of the Sale Offer Periods for those Properties is not contingent upon the completion of Contract 6. Indeed, the Sale Offer Periods for all of Properties 7 to 10 were open at the same time as the Sale Offer Period for Contract 6. That tends against a construction which prevents any Sale Offer from being made for Properties 7 to 10 unless and until Contract 6 completes.
70. Rather, the simultaneous commencement of all of the Sale Offer Periods bespeaks an intention that it was open to Lendlease, immediately, to pick or choose from Properties 6 to 10 in any order or subset that it wished. On the clear terms of the Key Items Schedule

Lendlease could have, for example, immediately accepted the Sale Offer for Properties 7 and 10 without accepting the other offers. Had it done so, clause 12 had the effect that, upon acceptance, contracts for sale for those two properties would spring automatically into being. That would be so regardless of the status of Property 6.

71. *Seventhly*, and consistently with this construction, in drafting the Deed the parties were united in rejecting wording that would have made the completion of Contracts 7 to 10 conditional upon entry into Contract 6. There is longstanding and high authority that a Court will reject a construction that the parties have, during negotiations, united in rejecting.⁸ That principle applies here because:
- (a) an initial draft of the Key Items Schedule expressly stated that the Sale Offer Period of Properties 7 to 10 was contingent on completion of Contract 6: **Blue 1/191-2**; and
 - (b) that position was changed in March 2015 which in rows relating to Properties 7 to 10 deleted the words “*commencing on the completion date of Contract 6*” and instead inserted the words appearing in the final form of the deed, stipulating that all Sale Offer Periods commenced simultaneously on the same day: “*commencing on the date which is 5 days after the date on which the Conditions are satisfied or waived in accordance with clause 3*”: **Blue 1/268-9**.
72. *Eighthly*, the Completion Dates for each of Properties 7 to 10 are expressed to be capable of determination without the completion of Contract 6. For example, for Property 7, the Completion Date is the date which is the earlier of (a) 30 days after the date of Contract 7; and (b) 12 months after the date of completion Contract 6. Thus, on its terms Contract 7 can complete without Contract 6 having completed, and in fact the parties expressly contemplated that this might happen.
73. It may be accepted, however, that parts of the Key Items Schedule evinces an expectation by the parties that Property 6 would complete. That is because the “Sale Offer Periods” for Properties 7 to 10 end on fixed dates after “*the completion of Contract 6*”. Read literally, if Contract 6 did not complete, the “Sale Offer Periods” for Properties 7 to 10

⁸ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352-3 per Mason J; *MCA International BV v Northern Star Holdings Ltd* (1991) 4 ACSR 719 at 727; *Mrocki v Mountview Prestige Homes Pty Ltd* [2012] VSCA 74 at [30]. See also *Gerner v Victoria* (2020) 270 CLR 412 at [34] where the principle in *Codelfa* was approved, and then applied in the cognate discipline of constitutional interpretation.

would never end, meaning in substance that Lendlease would have a never-ending call option, and Landowners' put option would never arise. Lendlease accepts that the words should not be construed in this manner. Lendlease submits that the words "*after the completion of Contract 6*" should be read as "*after the last date on which Contract 6 could complete*", a date which is certain (it is the last date of the Sale Offer Period for Contract 6). This reading would give effect to the contractual purpose of a staged series of put and call options while avoiding an uncommercial or absurd outcome of giving a literal meaning of the text in the circumstances that have arisen.

74. The Court is thus confronted with the familiar problem that an event unanticipated by the parties has occurred, which requires the adoption of a non-literal construction of the language used by the parties. Where that arises, the proper guide is the parties' objective commercial purpose.⁹ In selecting between the construction urged by Lendlease, and that favoured by the primary judge, Lendlease's construction should be preferred because it maintains the commercial purpose of the Deed as a staged series of put and call options, whereas the primary judge's construction obliterates that character, and arrives at a conclusion that the parties were united in rejecting.
75. In coming to his conclusion, the primary judge also gave weight to a number of clauses in the Deed which, it may be accepted, also bespeak an expectation that Property 6 will be sold first: **J[215] – [221]**, although with one exception, the primary judge appeared to accept that the clause operated in Lendlease's favour and could be waived by it: **J[221]**. The exception was clause 27, which required Lendlease to provide bank guarantees "*on or before the date of completion of Contract 6*". That clause should be construed in the same way, ie the words should be understood to mean "*on or before the last date on which Contract 6 could complete*".
76. *Ninthly*, the effect of the primary judge's construction is that the Landowners themselves also lose the option to "put" the Properties by accepting the Purchase Offers made by Lendlease under clause 8.6. Yet those Purchase Offers are also said to be irrevocable by clause 8.8.
77. For all of these reasons, Ground 2 should be upheld.

⁹ See, eg, *QBT Pty Ltd v Wilson* [2024] NSWCA 114 at [60] – [72].

Conclusion and consequences

78. The 12 July Plan was a valid Plan of Subdivision (Balance Land) under clause 7.1, and clause 5 of the Deed obliged the Landowners to take steps to register the plan of subdivision. The fact that Property 6 had not been, and could not be, acquired did not affect this outcome. The appeal should therefore be allowed (Notice of Appeal prayer 1 at **Red 125**). Lendlease is also entitled to declarations as to the validity of the steps that it has taken which are set out in prayer 2(a) – (d).
79. On Lendlease's construction of the time that the Sale Offers are open, the time for acceptance of the Sale Offer for Property 7 has also lapsed due to the Landowners' breach. There is authority that the grantor of an option cannot rely on a non-compliance brought about by the grantor's wrongdoing. So, in *Bragg & Anor* [1981] NSWLR 668 (not disturbed on appeal *Bragg v Alam* (1982) NSW ConvR 55-082), the plaintiff granted to the defendant an option to purchase property from the plaintiff which could be exercised by the defendant (or his nominee) by notice in writing to the plaintiff by a prescribed date, to be served in person. In breach of the agreement, the plaintiff intentionally evaded service, preventing service of the notice. Roth J found that plaintiff could not take advantage of its own wrong, and ordered that the defendant was entitled to a declaration of due exercise of the option and to specific performance of the contract for sale.
80. The same principle should apply to Property 7, meaning that on the proper construction of the Deed the Sale Offer for Property 7 remains open for acceptance. If that is accepted, the Court should make the declarations in prayer 2(a), (c), (e) to (h) and the orders at 2(h) and (i). Otherwise, if the Court is of the view that the time for acceptance of Property 7 has passed, the Court should make declarations 2(b), (d), (e) to (h) and the order at 2(h) and (i). Prayer 2(j) should also be made for the remitter of the question of damages, and, if the Court regards it as more appropriate, the issue of whether the Sale Offer for the acceptance of Property 7 remains open.

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