

FILED

04 JUN 2025



NOTICE OF APPEAL

COURT DETAILS

Court Supreme Court of New South Wales, Court of Appeal
Registry Sydney
Case number 2025/213714

TITLE OF PROCEEDINGS

First appellant **Lendlease Communities (Figtree Hill) Pty Limited**
(ACN 605 278 331)
Second appellant **Lendlease Communities (Australia) Limited** (ACN 000
966 085)
First respondent **Mount Gilead Pty Limited** (ACN 008 499 189)
Second respondent **Mount Gilead (Access) Pty Limited** (ACN 111 256 038)

PROCEEDINGS IN THE COURT BELOW

Title below *Lendlease Communities (Figtree Hill) Pty Ltd v Mount
Gilead Pty Ltd (No 3) [2025] NSWSC 334*
Court below Supreme Court of New South Wales
Case number below 2024/423110
Dates of hearing 5-6 March 2025; 1-2 April 2025
Material date 29 May 2025
Decision of Stevenson J

FILING DETAILS

Filed for **Lendlease Communities (Figtree Hill) Pty Limited**
(ACN 605 278 331) and **Lendlease Communities**
(Australia) Limited (ACN 000 966 085), Appellants
Filed in relation to Whole decision below
Legal representative Hamish Macpherson, King & Wood Mallesons
Legal representative reference 602-0093982
Contact name and telephone Laurice Elten, (02) 9296 2844
Contact email laurice.elten@au.kwm.com

HEARING DETAILS

This notice of appeal is listed for directions at

2/07/25 @ 9:00am

TYPE OF APPEAL

Commercial list – Commercial contractual dispute

DETAILS OF APPEAL

- 1 This appeal is brought under s 101(1) of the *Supreme Court Act 1970* (NSW).
- 2 This notice of appeal is not filed pursuant to leave to appeal.
- 3 The appellant has not filed a notice of intention to appeal.
- 4 The appellant appeals from the whole of the decision below.

APPEAL GROUNDS

- 1 The primary judge erred in holding (at **J[175]-[176]**) that the appellants (**Lendlease**) did not comply with their obligation under clause 7.1 of the “Irrevocable Offers Deed Balance Land, Mt Gilead” (**Deed**) to provide a Plan of Subdivision (Balance Land) to the respondents (**Landowners**). His Honour ought to have held that:
 - a. on its proper construction, clause 7.1 of the Deed did not impose any requirement that a Plan of Subdivision (Balance Land) must be “based upon” the plan at Annexure 2 to the Deed (contrary to his Honour’s findings at **J[67] – [74], J[91]-[93]**), nor was there any constraint that lots depicted in the plan must be contiguous (contrary to his Honour’s finding at **J[101]**);
 - b. on the proper construction of the Deed, the only limitations on Lendlease’s power to vary the Plan of Subdivision (Balance Land) were those expressly set out in clause 7.3 (or those set out in clauses 7.1 and 7.3) of the Deed, with which Lendlease complied; and
 - c. the plan delivered by Lendlease to the Landowners on 12 July 2024 (**12 July Plan**) was a Plan of Subdivision (Balance Land) within the meaning of clause 7.1 of the Deed, such that Lendlease complied with its obligation under clause 7.1 of the Deed and, further:
 - i. clause 5.2(a) of the Deed thereafter required the Landowners to lodge an application for subdivision of the Balance Land in respect of the 12 July Plan within 10 business days, which obligation the Landowners breached;
 - ii. upon the Landowners’ failure to lodge an application for subdivision in respect of the 12 July Plan, clause 5.2(b) of the Deed authorised Lendlease to lodge the application, which it did; and

- iii. clause 21 of the Deed restrained the Landowners from objecting to or interfering with the application lodged by Lendlease, which obligation the Landowners breached.

2 The primary judge erred in holding (at J[177] to [266]) that, in circumstances where Lendlease had lost the opportunity to acquire Property 6, on the proper construction of the Deed it could not acquire Properties 7 to 10. His Honour ought to have held that, on the proper construction of the Deed, Lendlease was free to accept the Sale Offers for any one or more of Properties 7 to 10 during the Sale Offer Period (as specified in the Key Items Schedule), whether or not it had accepted the Sale Offer for Property 6.

ORDERS SOUGHT

- 1 Appeal allowed.
- 2 Judgment of the court below be set aside and order in lieu thereof (as set out in prayers 1-6 of the Amended Summons):
 - a. A declaration that on the proper construction of the Deed, the appellants' entitlement to exercise their rights to acquire Properties 7, 8, 9 and 10 after subdivision of the Balance Land is not contingent upon the completion of Contract 6 in respect of Property 6.
 - b. In the alternative to prayer 2(a), a declaration that on the proper construction of the Deed, the appellants' entitlement to exercise their rights to acquire Properties 8, 9 and 10 after subdivision of the Balance Land is not contingent upon the completion of Contract 6 in respect of Property 6 or Contract 7 in respect of Contract 7.
 - c. A declaration that on the proper construction of the Deed, that if:
 - i. before the Sunset Date the first appellant waives the benefit of the Conditions; and
 - ii. the Offeree does not make a Sale Offer for Property 6 within the Sale Offer Period for Property 6,
 it remains open to the Offeree to make Sale Offers for Properties 7 to 10 with the Sale Offer Period commencing 5 days after the Conditions are satisfied or waived in accordance with clause 3 and ending:
 - iii. for Property 7, 11 months after the last date on which Contract 6 could have completed;

- iv. for Property 8, 35 months after the last date on which Contract 6 could have completed;
 - v. for Property 9, 59 months after the last date on which Contract 6 could have completed; and
 - vi. for Property 10, 83 months after the last date on which Contract 6 could have completed.
- d. In the alternative to prayer 2(c), a declaration that on the proper construction of the Deed, that if:
- i. before the Sunset Date the first appellant waives the benefit of the Conditions; and
 - ii. the Offeree does not make a Sale Offer for Property 6 within the Sale Offer Period for Property 6 or Property 7 within the Sale Offer Period for Property 7,

it remains open to the Offeree to make Sale Offers for Properties 7 to 10 with the Sale Offer Period commencing 5 days after the Conditions are satisfied or waived in accordance with clause 3 and ending:

- iii. for Property 8, 35 months after the last date on which Contract 6 could have completed;
 - iv. for Property 9, 59 months after the last date on which Contract 6 could have completed; and
 - v. for Property 10, 83 months after the last date on which Contract 6 could have completed.
- e. A declaration that the Subdivision Application was validly executed by two directors of the second appellant on behalf of the respondents pursuant to the Powers of Attorney.
- f. A declaration that the Subdivision Application, being validly executed and made on behalf of the respondents pursuant to the Powers of Attorney, satisfies the ownership requirements of reg 23(1) of the *Environmental Planning and Assessment Regulation 2021* (NSW).
- g. A declaration that the respondents are in breach of:
- i. clause 5.2(a) of the Deed in having failed to lodge with the Council the Subdivision Development Consent (Balance Land) in the form of the Subdivision Application; and

- ii. clause 21 of the Deed in writing to the Council on or about 31 July 2024 and failing to provide their Landowner consent to the Council's determination of the Subdivision Application and therefore interfering with the appellants' lodgement of the Subdivision Application under clause 5.2(b) of the Deed.
- h. An order requiring that the respondents:
- i. perform their obligation under clause 5.2(a) of the Deed and lodge with Council the Subdivision Development Consent (Balance Land) in the form of the Subdivision Application within 2 business days; or alternatively
 - ii. withdraw their letter to the Council dated on or about 31 July 2024, provide their consent to the Council's determination of the Subdivision Application and not take any steps to interfere with the appellants' lodgement of the Subdivision Application under clause 5.2(b) of the Deed.
- i. The respondents are to pay the appellants' costs of the proceedings in the court below.
 - j. Remit the question of damages, and whether the appellants remain entitled to make a Sale Offer for Property 7 after the period that is 11 months after the date on which Contract 6 could have completed (due to the respondents' breach of clauses 5.2(a) and 21 of the Deed), to a judge of the Equity Division to be allocated by the Commercial List Judge.

3 The respondents pay the appellants' costs of the appeal.

UCPR 51.22 CERTIFICATE

I certify under UCPR 51.22(2) that the amount in issue in this appeal exceeds the specified amount under s 101(2)(r) of the *Supreme Court Act 1970* (NSW).

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the [*Legal Profession Uniform Law Application Act 2014*](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the appellants that court fees will be payable during these proceedings.
These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature


Solicitor on Record (by his partner)
4th June 2025.

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.

FURTHER DETAILS ABOUT APPELLANTS

First appellant

Name	Lendlease Communities (Figtree Hill) Pty Limited (ACN 605 278 331)
Address	International Towers Sydney, Tower Three Level 14, 300 Barangaroo Avenue Barangaroo NSW 2000

Second appellant

Name	Lendlease Communities (Australia) Limited (ACN 000 966 085)
Address	International Towers Sydney, Tower Three Level 14, 300 Barangaroo Avenue Barangaroo NSW 2000

Legal representative for appellants

Name	Hamish Macpherson
Practising certificate number	15580
Firm	King & Wood Mallesons
Contact solicitor	Laurice Elten
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DETAILS ABOUT RESPONDENTS**First respondent**

Name	Mount Gilead Pty Limited (ACN 008 499 189)
Address	c/- Nexia Australia Level 22, 2 Market Street Sydney NSW 2000

Second respondent

Name	Mount Gilead (Access) Pty Limited (ACN 111 256 038)
Address	c/- Nexia Australia Level 22, 2 Market Street Sydney NSW 2000