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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<br>ACN 605278331 |
| Second Appellant | LENDLEASE COMMUNITIES (AUSTRALIA) PTY LIMITED |
| First Respondent | Mount Gilead Pty Limited<br>ACN 008499189 |
| Second Respondent | MOUNT GILEAD (ACCESS) PTY LIMITED |

| FILING DETAILS | |
|---|---|
| Filed for | Mount Gilead Pty Limited,Respondent 1<br>MOUNT GILEAD (ACCESS) PTY LIMITED,Respondent 2 |
| Legal representative | Bruce Stephen Woolf |
| Legal representative reference | |
| Telephone | 02 9221 8522 |

## 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 (Mount Gilead and Lendlease - Respondents' Submissions Signed.pdf)

[attach.]

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**IN THE SUPREME COURT OF NEW SOUTH WALES**
**COUR OF APPEAL**

**CA No. 2025/213714**

**SC No: 2024/423110**

**LENDLEASE COMMUNITIES (FIGTREE HILL) PTY LTD & ANOR**
**Appellants**

**v**

**MOUNT GILEAD PTY LTD & ANOR**
**Respondents**

## Respondents' Submissions

1. The appeal neither raises, nor puts in issue, any question of fact. The appellants have confirmed their view that they regard the provisions of Rule 51.18(2) and Rule 51.36(2) of UCPR as inapplicable.

2. There being no challenge to any finding or statement of fact in the closely considered Judgment of the Primary Judge, the proceedings are confined to questions of construction agitated by the appellant, assisted, in some respects, by some appropriate acknowledgments made by its own witnesses, and by the absence of any identified principle of construction which the appellants assert the Primary Judge disregarded, or to which he gave insufficient regard.

3. The appellants' claim to relief is accordingly confined to a single limited cause of action which they (admittedly belatedly) have raised in relation to the Balance Land Deed dated 17 April 2015.

4. The appellants have asserted that it is an express term of the Balance Land Deed that upon receipt of the Plan of Subdivision (Balance Land) the Landowners must use their best endeavours to obtain and diligently pursue a Subdivision Development Consent (Balance Land) within four months of the satisfaction of the Condition in clause 3.1(e) and clause 5.1(a) (see para 32 of the Amended Commercial List Statement (Red 22S to U)).

5. On 12 July 2024 the plaintiffs provided what they asserted were alternative Plans of Subdivision (Balance Land) to the Landowners. Their sole cause of action is that by declining "to register" one or other of certain purported Plans of Subdivision (Balance Land) provided on 12 July 2024, the Landowners have breached the lodgement and registration obligations arising under the Balance Land Deed (see Red 32E).

6. Whilst the history of the proceedings, and the evidence of its witnesses, discloses that the appellants have, over the history of the transactions which the Balance Land Deed contemplates, misunderstood some of its terms, the Primary Judge has in his reasons adopted the correct construction of its provisions in question by the Appellants and the Appellants are unable to find error.

7. By the time the Appellants supplied the Plans they required to be registered, the Plans were not referrable to the *whole* of the Balance Land as carefully defined in the Deed. Even before submission to the Landowners, the five properties with which a proper Plan of Subdivision (Balance Land) needed to deal no longer included one of the five parcels of land nominated for inclusion in such a Plan.

8. As is common ground, the lengthy period of time which had expired (involving a number of extensions of time sought by the Appellants) had eliminated from the mutually agreed plan of disposition of the entirety of the Balance Land, one of the centrally important prospective allotments with which the Plan was required to deal, being Property 6.

9. By the terms of the parties' Deed, the appellants by 12 July 2024 were no longer able to acquire Property 6. Moreover, by that time the corresponding put option otherwise available to the Landowners, had itself become inaccessible. The Respondents' Submissions (28 February 2025) (Black 226-238) record in detail the course of the Appellants' failure to provide to the Landowners a draft "Plan of Subdivision (Balance Land)", as that important expression is defined in clause 1.2 of the Deed.

10. The expression "Balance Land" was itself defined and obviously referred to the entirety of the land which had become the *whole* of the land in Lot 2 in DP 121887 and Lot 2 in DP 249393.

11. Paragraphs 104 to 162 of the Judgment (Red 87J to 94K) similarly recount events leading to the provision of the 12 July Plan. A summary of the facts concerning the

removal of Property 6 from the land Lendlease would have been able to acquire, or which the Landowners could have compelled Lendlease to acquire, is detailed in the appendix to these submissions.

12. The Landowners had previously sought from Lendlease in relation to an earlier Plan submitted on 23 May 2024, responses to enquiries as to the correspondence between that Plan and the Plan authorised and required by the Deed. Such enquiries remained unsatisfied by 12 July 2024.

13. The 12 July 2024 Plan was plainly not a Plan of Subdivision (Balance Land) Plan as defined in the Deed, and required by the parties for the numerous purposes identified in the Deed. The Primary Judge identified the specific inadequacy arising from it not being "based upon the draft plan which is contained in Annexure 2". The appellants dispute (as a matter of construction) that the reference to "based upon the Annexure 2 draft plan" retained any relevance. But even if that proposition was even arguable, it is perfectly plain that the 12 July Plan was simply not a plan bearing any relationship to the common understanding which the parties shared as to the requirements for such a Plan.

14. The Primary Judge made numerous important observations as to the disconformity between the July 2024 Plan and the collective intentions of the parties to be discerned from all of the provisions of the Balance Land Deed as a whole, including their adoption of Lendlease's originally proposed pre-contractual description of the working out of the transaction as a whole.

15. By way of simple illustration, and despite Lendlease's asserted right to make all manner of variations to the form of a Plan of Subdivision (Balance Land), it is perfectly plain that despite potential permissible variations of boundaries and dimensions, a basic provision of the Deed was that there must be a "lot corresponding to Contract 6" in any Plan of Subdivision (Balance Land): see clause 7.3(a)(i)(A). The appellants were unable to impose upon the Landowners any obligation to lodge for approval, or obtain the registration of, a Plan that could not have any Property 6. Indeed, the parties had specifically apportioned a significant component of the total consideration for the agreed amount of $120 million to that Lot. Lendlease is unable to identify why that deduction from the Landowners' payment rights of $7.4 million, could have been the common expectation of the parties, if Lendlease was unable to satisfy the stipulated contractual Conditions within the time limits imposed by the provisions in the Deed, which were plainly the result of very careful and methodical working out.

16. The Judgement elsewhere describes numerous important provisions which demonstrate the "centrality" of "Property 6" to which Lendlease has no plausible answer.

17. The appellants' second ground of appeal asserts that Lendlease was "free to accept Sales Offers for any one or more Properties 7 to 10" during what otherwise might have been available sale offer periods as specified in the Key Items Schedule, whether or not Lendlease had accepted a Sale Offer for Property 6.

18. Although 89 paragraphs of the learned Primary Judge's reason are impugned in this regard, again no finding or observation of fact is identified as open to dispute.

19. The principles of law applicable in such circumstances are very clear. His Honour addressed and applied the well-known principles discussed in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, including the primacy to be afforded to the literal meaning of the language adopted by the parties.

20. Lendlease's position has always been that *its* Balance Land Deed should be understood and interpreted in a way which best accommodates the attainment and satisfaction of its own commercial objectives. Its present submissions are replete with propositions which direct emphasis towards a construction of the Balance Land Deed which would simplify, accommodate, or render more advantageous the operation of its provisions for the benefit of Lendlease. That is not the test.

21. For example, in emphasising that a commercial contract is to be construed objectively, the High Court said in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179:

> "It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe."

22. Hence, in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117, Justices French CJ, Nettle and Gordon JJ, said (at [50]) in the context of events, circumstances and things external to the contract:

> "What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations."

23. In *The J&P Marlow (No 2) Pty Ltd v Hayes and McCabe* (2023) 112 NSWLR 29, the Court of Appeal laid down some observations of importance in the present case. Significantly, the Court (inter alia) cautioned against the attribution of individual commercial purpose to give to words of a contract a meaning they cannot reasonably bear (which is Lendlease's objective in the present case). One must look at the bargain they actually made as opposed to one which one or other of the parties (or even the Court) believes could have been a better deal. Lendlease needs to be reminded that:

> "The commercial approach to construction is not a licence to alter the meaning of a term that is clear and fairly susceptible of one meaning only to achieve a result that the Court may think to be reasonable. The Court is not authorised under the guise of construction to make a new contract for the parties at odds with the contract to which they have agreed. Where, as here, all things considered the words of a clause are fairly susceptible of only one meaning, they must be given that effect."

24. In the same case, Meagher and Kirk JJA (at [89] to [90]) reiterated important principles, which are at odds with the appellants' contentions in relation to the proper interpretation of the Balance Land Deed; and in this latter respect, the further observations made by their Honours (at [98] to [99]) are of particular value.

25. The judge's reasons adhered much more closely to the text of the Balance Land Deed than the departures from it , upon which the appellants insist. But principle demands the literal meaning of its language be afforded primacy. Fundamentally, as observed by Mason J and Deane J in *Norbis v Norbis* (1986) 1 CLR 513 at 518-519, the existence of *error* on the part of the court at first instance is "*an indispensable condition of a successful appeal*". A mere preference for a different result over that favoured by the primary judge is insufficient to displace his or her conclusion in the absence of such error being demonstrated.

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Dated 1 September 2025

**Appendix of changes to the Plan of Subdivision (Balance Land)**

1. Several events from 2023 until 20 May 2024 are relevant in understanding why, on 12 July 2024, Lendlease provided a purported Plan of Subdivision (Balance Land) under which Property 6 could not be bought or sold, and why Property 6 had shrunk to become de minimis.

2. On 9 December 2020, the parties entered a deed to extend the 'Sunset Date' under the Balance Land Deed until 21 May 2024 (**J[107]**). The Balance Land Deed permitted a party to terminate the deed if any of the 'Conditions', defined as the conditions in clause 3.1 (**Blue 293**) were not satisfied by the Sunset Date (**Blue 308** at clause 3.4).

3. In April 2023, Lendlease were working off a 'current draft' of the Plan of Subdivision (Balance Land) (**J[112]** and annexed to the judgment - **Red 109**).

4. During May 2023, the plan was revised (**J[117]** and annexed to the judgment - **Red 111**).

5. By the end of Aprill 2024, a further revised plan was in circulation between Lendlease and its advisors which introduced a location for the proposed 'Utility Land' which was to be for a substation to supply power to the proposed development (**J[122]-[123]** and annexed to the judgment - **Red 112**).

6. On 30 April 2024, being 3 weeks before the expiration of the Sundet Date, Lendlease asked the Landowners to extend the date for 3 years (**J[124]**).

7. Also on 30 April 2024, Lendlease was working on a further Plan of Subdivision (Balance Land) (**J[126]** and annexed to the judgment - **Red 113**). This plan differed little from the plan circulated between Lendlease and its advisors earlier in April 2024. Property 6 can be observed as the land identified as 'Part 1', making up 2 non-contiguous areas, with one significantly large than the other.

8. On 1 May 2024, a slightly revised plan was circulated (**J[129]** and annexed to the judgment - **Red 114**), with Property 6 not being materially different.

9. On 9 May 2024, the Landowners refused to extend the Sunset Date (**J[130]**). At this time "*three critical conditions precedent specified in cl. 3.1 of the Deed were not then satisfied*":

a. firstly, granting the 'Subdivision Development Consent (Balance Land);

b. secondly, registering the Plan of Subdivision (Balance Land); and

c. having the Balance Land Rezoning become effective

(**J[133]** and **Blue 305** at clauses 3.1(c), (d) and (e) of the Balance Land Deed).

10. By 14 May 2024, "*Lendlease evidently apprehended that it would not be able to procure that [the unsatisfied] conditions precedent be satisfied by the Sunset Date*" (**J[134]**).

11. It was also "*evidently apparent to Lendlease that it would not be able to exercise a Sale Offer under the Deed in respect of Property 6*" (**J[139]**) because in the events that now needed to happen to allow Lendlease to serve a Plan of Subdivision (Balance Land) by the Sunset Date, including having the land rezoned, there would be insufficient time within which to exercise a Sale Offer under the Key Items Schedule.

12. This led Lendlease to realise that it needed to "*make an urgent amendment to [the] plan*" (**J[136]**). This included because, as Lendlease's senior development manager Mr Mark Anderson said in evidence he was concerned "*that we may not be able to complete contract 6*" (**Black 128 at 45-6**) or "*might not be able to get it*" (**Black 135 at 7**), and that contract 6 might "*potentially drop out*" (**Black 129 at 3** and **J[142]**).

13. On 14 May 2024, Mr Anderson circulated a further plan (**J[137]** and annexed to the judgment - **Red 115**). This introduced a fundamental change. Property 6 (i.e. what was referred to as the Part 1 land) is still identified in its 2 portions. However, the larger portion, situated on the righthand side of the diagram and identified as being approximately 36.1ha, is now marked for consolidation into Lot 5.

14. Upon this 'consolidation' occurring, this area would not be Property 6, as identified in the Key Items Schedule (**Blue 349-351**), but become one of Properties 7 to 10 as identified in the Key Items Schedule. The residual portion of Property 6, being 1.4ha, was allocated to become the 'New Lot 1' with a total area of 1.4ha. Mr Anderson's decision to reduce

Property 6 was based upon his concern that "*we might not be able to get it and so we reduced the size to suit the [Utility Land]*" (**Black 135 at 7-8**), on the basis that Lendlease would likely not be able to purchase Property 6. Mr Anderson agreed that this decision "*had nothing to do with staging or development*", which concept is central to the operation of clause 7.1 of the Balance Land Deed (**Black 135 at 5-7**).

15. On 20 May 2024, Lendlease notified the Landowners that it was waiving the clause 3.1 conditions precedent (**J[143]**). By this time, Lendlease still had not served its purported Plan of Subdivision (Balance Land). However, notification of the waiver of the conditions precedent resulted in Lendlease's 'Sale Offer Period' for Property 6 commencing on 25 May 2025 for a period of 15 days (**Blue 1/349**).

16. On 23 May 2024, Lendlease's retained surveyor, Mattthew Hermes-Smith, provided Lendlease with a further plan (**J[145]** and annexed to the judgment - **Red 116**). In this plan, Property 6, being Part 1 (but simply identified as "1"), comprises the 1.4ha parcel only. The larger portion had been subsumed into what appears to be Part 4.

17. Also on 23 May 2024, Lendlease provided the Landowners with the 23 May 2024 plan stating that Lot 1 equates with Property 6 (**J[145]**, **Blue 2/992-994**).

18. On 27 May 2024, Lendlease attempted to acquire all of the Balance Land in one line, but has since acknowledged that it was unable to do so (**Blue 3/999-1000** and **J[152]**).

19. On 9 June 2024, Lendlease's Sale Offer Period for Property 6 expired (**Blue 1/349**).

20. On 10 June 2024, the Landowner's Purchase Offer Period for Property 6 commenced and ran for a period of 20 days (**Blue 1/349**).

21. On 14 June 2024, the Balance Land was rezoned (**J[153]**).

22. On 30 June 2024, the Landowner's Purchase Offer Period for Property 6 expired (**Blue 1/349**).

23. On 12 July 2024, at a time when neither Lendlease nor the Landowners could exercise an offer to acquire Property 6, Lendlease circulated the purported Plan of Subdivision (Balance Land) (**J[163]** and annexed to the Judgment – **Red 117**).

24. Some months later, these proceedings commenced. In December 2024, Lendlease unsuccessfully sought a mandatory interlocutory injunction requiring the Landowners to

lodge an application with the local council for the Balance Land to be subdivided in accordance with the purported Plan of Subdivision (Balance Land) circulated on 12 July 2024 (*Lendlease Communities (Figtree Hill) Pty Ltd v Mount Gilead Pty Ltd* [2024] NSWSC 1627). Lendlease brough its motion for a mandatory injunction on the basis that the Sale Offer for Property 7 expired on 30 June 2025, and if the subdivision did not occur prior to that time, Lendlease could not acquire Property 7 (*Lendlease Communities (Figtree Hill) Pty Ltd v Mount Gilead Pty Ltd* [2024] NSWSC 1627 at [22]).

25. 30 June 2025 passed without Lendlease taking any further steps to try and have the land subdivided or acquire Property 7.