

AUSTRALIA / JUDGMENT

Tran v Bakour [2025] NSWSC 101

COURT

Supreme Court

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Source record**Supreme Court****New South Wales****Medium Neutral Citation:** Tran v Bakour [2025] NSWSC 101**Hearing dates:** 12 and 13 February 2025**Date of orders:** 27 February 2025**Decision date:** 27 February 2025**Jurisdiction:** Equity - Real Property List**Before:** Pike J

Decision: (1) Declare that the contract for sale and purchase of land between the plaintiff as purchaser and the defendant as vendor dated 6 April 2023 in respect of the property known as XXX Wangee Road, Greenacre, New South Wales, 2190 being all of the land and improvements in folio identifier XX/XXXXXX should be specifically performed and carried into execution.

(2) Order that the defendant execute all such instruments and do all such things as are necessary in order to specifically perform the contract and carry the contract into execution within 28 days.

(3) Grant liberty to either party to relist the proceedings on 3 days' notice, setting out the relief sought.

(4) Direct the parties to confer as to the appropriate costs order to be made in the proceedings and to provide by email to my Associate by no later than 4pm on 3 March 2025 any agreed orders as to costs.

(5) In the event that the parties are unable to agree as to the appropriate costs order:

(a) direct the parties to provide by email to my Associate by no later than 4pm on 3 March 2025 any material and submissions relied on in relation to costs, such submissions not to exceed 5 pages; and

(b) direct the parties to provide by email to my Associate by no later than 4pm on 10 March 2025 any material and submissions in reply on costs, such submissions not to exceed 3 pages, whereupon the Court will determine the issue of costs on the papers.

Catchwords: CONTRACTS – contract for sale of land – specific performance – no question of principle

EQUITY – Equitable remedies – specific performance – whether purchaser ready, willing and able to complete – defence of hardship – no question of principle

Legislation Cited: Contracts Review Act 1980 (NSW)

Cases Cited: Carydis v Merrag Pty Ltd [2007] NSWSC 1220

David Jones Ltd v Perpetual Ltd [2006] QSC 337

Dougan v Ley (1946) 71 CLR 142; [1946] HCA 3

ET-China.com International Holdings Limited & Anor v Cheung & Ors (2021) 338 ALR 128; [2021] NSWCA 24

Golden Oceans (NSW) Pty Ltd v Ewall Pty Ltd [2009] NSWSC 674

Hewett v Court (1983) 149 CLR 639; [1983] HCA 7

IGA Distribution Pty Ltd v King & Taylor Pty Ltd [2002] VSC 440

Patel v Ali [1984] 1 Ch 283

Texts Cited: JD Heydon, MJ Leeming and PG Turner, Meagher, Gummow & Lehane's Equity: Doctrines & Remedies (5th ed, 2015, LexisNexis Butterworths)

Category: Principal judgment

Parties: Huu Phuc Tran (Plaintiff)

Nada Bakour (Defendant)

Representation: Counsel:

Mr P Newton SC and Mr M Hazan (Plaintiff)

Mr D Allen (Defendant)

Solicitors: McCabes Lawyers (Plaintiff)
Edmond Khoury Solicitors (Defendant)
File Number(s): 2023/00268501
Publication restriction: Nil

JUDGMENT

1. On 6 April 2023, the defendant (Ms Bakour) as vendor and the plaintiff (Mr Tran) as purchaser entered into a contract for the sale and purchase of land at XXX Wangee Road, Greenacre (Property). The purchase price was \$1,750,000.
2. The date for completion of the contract was 7 August 2023 but completion did not occur on this date, the defendant having previously requested the plaintiff to agree to rescind the contract which the plaintiff refused to do.
3. The plaintiff then commenced proceedings seeking an order for specific performance of the contract. The defendant contends the plaintiff has not demonstrated that he is ready, willing and able to complete and further that the Court should not order specific performance on the grounds of hardship. A further defence based on the Contracts Review Act 1980 (NSW) was abandoned in written submissions served shortly before the hearing.
4. The proceedings were heard on 12 and 13 February 2025. Mr P Newton SC and Mr M Hazan appeared for the plaintiff and Mr D Allen appeared for the defendant.
5. For the reasons set out below:
 1. I am satisfied that the plaintiff is ready, willing and able to complete;
 2. the defence of hardship should not be upheld; and

3. accordingly, orders for specific performance should be made.

The Witnesses

1. Whilst other affidavit evidence was read by both parties, only three witnesses were called and cross examined at the hearing.
2. First, the plaintiff called Mr Matthew Shad (Mr Shad), a solicitor to give evidence under subpoena. Mr Shad, and other persons within the firm he worked at – Shad Partners – acted for the defendant on the sale of her home in 2023 and other transactions. Mr Shad did not provide an affidavit and was subpoenaed to give evidence by the plaintiff and evidence was adduced orally from him.
3. For the most part, his evidence in chief consisted of taking him through documents from Shad Partners' file to seek to elicit any greater recollection as to his dealings with the defendant.
4. Mr Shad was not seriously challenged in cross examination and I accept his evidence. Mr Shad's evidence was consistent with the defendant being an apparently well person seeking to buy a new home and sell her existing home in order to pay for the new one. His evidence was thus, flatly inconsistent with several important aspects of Ms Bakour's evidence, including that she was not well and was never serious about buying a new property but was only looking at other properties for fun. I prefer Mr Shad's evidence over that of Ms Bakour.
5. The second witness was the defendant, Ms Bakour. She was an unsatisfactory witness and I do not accept her evidence unless it is against her interest or consistent with contemporaneous documents which for the most part, it is not. She was prone to give long and unresponsive answers, making speeches in support of her case. Her answers were often inconsistent, not only with her affidavit evidence, but with answers she had earlier given in cross examination.
6. The third witness was Ms Bakour's eldest son, Mouhamad Bakour. He was briefly cross examined. His evidence was largely of peripheral relevance. Of some significance was his evidence to the effect that his mother required his permission in order to sell the Property. His mother told him that she was looking at other properties and wanted to sell the Property. He and his brothers told his mother that she could not sell the Property. This evidence provides some insight into why Ms Bakour refuses to complete on the sale of the Property. I deal with the significance of this below.

The absence of expert medical evidence

1. Notwithstanding that a central aspect of the defendant's defence of hardship was her mental health, no admissible expert medical evidence was led by the defendant as to her mental health at the time of selling the Property or now.

2. The defendant sought to tender two reports from Dr Naglaa Shams (Dr Shams), a General Practitioner, and three reports of Associate Professor Neil Jeyasingam (Assoc. Prof Jeyasingam), a clinical psychologist who apparently saw Ms Bakour on several occasions. Save for one of the reports of Assoc. Prof Jeyasingam, it was not in dispute that each of the reports was prepared at a time when litigation was in contemplation. The first document of Dr Shams is dated 9 May 2023, shortly after Ms Bakour unsuccessfully sought the consent of the plaintiff to rescind.
3. After hearing argument on day one of the hearing, I rejected the tender of each of those reports as evidence of the truth of the opinions stated in them, and indicated I would give reasons in my final judgment, although the defendant's counsel stated that brief reasons would suffice.
4. I rejected the tender for a number of reasons. Save for the report of Assoc. Prof Jeyasingam dated 31 August 2023, the reports were clearly prepared in contemplation of litigation and as such were not admissible as business records. None of the reports were stated to have been prepared in compliance with the expert code of conduct and in their terms clearly did not comply with the code. No good reason was demonstrated for the Court to admit the reports notwithstanding this non-compliance. Of the many deficiencies, the reports did not set out the basis for the opinions stated, the tests carried out and the like.
5. It was also not clear that Dr Shams and Assoc. Prof Jeyasingam would be available for cross examination. In any event, this would not have been fair to the plaintiff in circumstances where no primary health records had been provided by the defendant and no inquiries had been made by the plaintiff to enable senior counsel for the plaintiff to cross examine these medical practitioners.

Approach to fact finding

1. A considerable body of contemporaneous documentation was in evidence before me. It provides a reliable base for the Court to make the necessary factual findings and to assess the reliability of witness testimony: See *ET-China.com International Holdings Limited & Anor v Cheung & Ors* (2021) 338 ALR 128; [2021] NSWCA 24 at [25] – [30] per Bell P (Bathurst CJ and Leeming JA agreeing).

The Relevant Facts

1. I set out below the relevant facts, resolving any disputed facts as they arise.
2. Ms Bakour was born in Lebanon in 1959. As at early 2023, she was thus approximately 63 years old. She left school at the age of 13 and did factory work up until about 1992.
3. Together with her husband she had four children. Her husband died of cancer in 2017.

4. The defendant has lived at the Property since 1994. She currently lives at the Property with three of her adult sons – Mouhamad (46), Jamal (42) and Ragheb (33). Mouhamad apparently takes care of his mother.
5. One issue of contention at the hearing was the defendant's health at relevant times. Evidence of the defendant's health was largely, if not solely, given by her.
6. According to the defendant she has suffered from depression since 2001. She became severely depressed when her husband died of cancer in 2017 and was admitted to Concord Hospital a number of times for treatment with depression.
7. According to the defendant, at the time of the sale of the Property in April 2023 she was particularly depressed after she realised, apparently shortly after signing the contract, the significance of her selling the Property and having to move.
8. Another important factual contention advanced by the defendant was that she did not wish to sell the Property when she did and was in fact pressured or forced into doing so by her real estate agent.
9. These two contentions – namely whether the defendant was in fact depressed and whether she was pressured or forced into selling – need to be considered against the absence of any medical evidence and the objective material including the defendant's prior attempts to sell the Property and her dealings with her agent and her solicitor at the time of the sale in April 2023, and her attempts to purchase other properties. The objective material paints the following picture, which is contrary to that advanced by Ms Bakour.
10. First, April 2023 was not the first occasion on which the defendant sought to sell the Property. On 4 December 2019, the defendant entered into a selling agency agreement with Costar Real Estate Agency & Property Investments Pty Ltd to sell the Property. The estimated selling price range set out in the agreement was \$1.5 to \$1.6 million. The Property was marketed online in February 2020 and September 2020.
11. On 29 March 2021 an agency agreement was entered into with CZJO Pty Ltd (CZJO) specifying an estimated selling price range of \$1.7 to \$1.8 million. A further agreement with CZJO was entered into on 15 February 2022 with an estimated selling range of \$1.45 to \$1.55 million. A third agreement with CZJO dated 6 September 2022 specified an estimated selling price of \$1.5 million.
12. The Property was marketed online in September 2022 but was withdrawn from sale shortly prior to its scheduled auction on 15 October 2022. Ms Bakour paid her estate agents \$3,500 in relation to this failed marketing of the Property.
13. Contracts for the sale of the Property were prepared by Shad Partners on each occasion it was listed for sale.

14. The defendant's evidence was that these repeated listings were at the urgings of the agent, not her. A further refrain from the defendant was that she was not serious in selling her Property or in buying another property, but rather had a habit of looking at other properties for fun, as a hobby, to keep herself busy. These contentions do not sit well with the objective or more reliable material.
15. I do not accept Ms Bakour's evidence in this regard. I find that she listed the Property for sale intending to sell it if a buyer was found at an acceptable price. These listings were not at the urgings of the agent in the sense that Ms Bakour did not intend to list the Property for sale. Because I reject Ms Bakour's evidence, I have not, save in some respects, set out in the chronological account below, Ms Bakour's evidence in cross examination. I reject her evidence and prefer the objective contemporaneous material.
16. Running alongside the appointment of agents to sell the Property was considerable documentary evidence suggesting Ms Bakour was quite active in inspecting alternative properties with a view to buying one.
17. This material is consistent with unchallenged evidence given by Mr Shad, who acted for Ms Bakour from about 2022 in the sale of the Property and the attempted purchase of another. Mr Shad gave unchallenged evidence that he spoke to Ms Bakour approximately 50 to 100 times during his dealings with her. In particular, Mr Shad gave evidence of a conversation with Ms Bakour to the effect that she was wanting to sell the Property and buy another property with the proceeds in the Sylvania region. It is also consistent with evidence given by Ms Bakour's eldest son, Mouhamad to the effect that his mother told him that she was looking at other properties to buy and wanted to sell the Property.
18. Rather than just look at properties for fun or as a hobby, Ms Bakour frequently requested contracts in relation to the property inspected and then sent the contract, or arranged for it to be sent, to Shad Partners for their review. The properties included:
 1. in around mid-June 2021, Ms Bakour inspected a property in Crawford Street, Blakehurst and on 21 June 2021, the estate agent, at the request of Ms Bakour forwarded a contract for the property to Shad Partners in advance of an auction on 26 June 2021. Ms Bakour telephoned Shad Partners on 21 June 2021 in relation to the contract;
 2. on 23 July 2021, Ms Bakour telephoned Shad Partners in relation to a property at Clare Street, Sylvania. The internal Shad Partners emails recording discussions with Ms Bakour suggest that she had made an offer on this property which had not been accepted – "the agent is playing games she said". Ms Bakour denied making any offer. The Shad Partners' records are more reliable;
 3. in late November 2021, Ms Bakour inspected a property at Marra Place, Sylvania and on 22 November 2021 the agent listing the property, at Ms Bakour's request, forwarded a copy of the contract to Shad Partners;

4. on 6 December 2021, Ms Bakour telephoned Shad Partners in relation to a property at Myer Street, Sylvania;
5. on or about 30 August 2022, Maria Loga, a licensed conveyancer at Shad Partners spoke with Ms Bakour. The internal email from Ms Logan to Catherine Shad about the email states "She just wants to check how much to offer and the prices in the area.";
6. in early January 2023, the agent listing a property at the Princes Highway, Sylvania sent an email to the address maintained by Mouhamad Bakour which began "Hi Nada" and attached a draft contract for the property for "your lawyer to review for now". Ms Bakour agreed that she had looked at this property but contended that she was not interested in this property but one of her sons was. I do not accept this evidence. The contract was forwarded by email to Shad Partners. An internal Shad Partners email suggests Ms Bakour attended Shad Partners' office on 10 January 2023 in relation to the property and Mr Shad was requested to call her. Ms Bakour then obtained a pest and building report in relation to the property. There is no reason why Ms Bakour would be wanting to speak to Mr Shad if it was a property for her son. The behaviour is consistent with Ms Bakour's behaviour in relation to other properties where there is no suggestion that the property was for any of her sons;
7. on 20 February 2023, Ms Bakour provided two contracts to Shad Partners for their review – one for a property at The Esplanade, Sylvania and another in Tara Street, Sylvania. Ms Bakour obviously became interested in the property at The Esplanade. On 23 February 2023 a solicitor at Shad Partners sent an email to the solicitor acting for the vendor of that property requesting certain amendments to the contract on behalf of Ms Bakour, "in the event our client is the successful purchaser". One of the requested amendments was a five month completion period – consistent with Ms Bakour wanting time to sell the Property. By email dated 28 February 2023, Ms Bakour was provided by Shad Partners with advice in relation to the contract for the property at Tara Street. Again, Ms Bakour denied that she was interested in purchasing either of these properties and she just wanted to make Mr Shad "busy". I do not accept this evidence. Mr Shad was obviously instructed to correspond with the vendor's solicitors for the property at The Esplanade which is only consistent with Ms Bakour conveying that she was interested in buying the property. Mr Shad gave evidence, which I accept, of a discussion with Ms Bakour where she said she was interested in buying the Tara Street property, using the money from a sale of the Property, and that she wanted a reduced deposit and time – around four to five months – to sell her Property.
1. It is convenient at this point in the chronology of Ms Bakour's search for another property to introduce a property at Edward Street, Sylvania which it appears Ms Bakour inspected on or about Saturday 18 March 2023. The purchase of this property is interrelated with the sale of the Property in April 2023 which the plaintiff seeks specific performance of. The relevant chronology, derived from the objective material may be summarised as follows.

2. On 18 March 2023, the agent for Edward Street, emailed a copy of the contract for the property to Ms Bakour who sent it (or arranged for one of her children to send it) by email to Shad Partners on 20 March 2023. The email from the agent to Ms Bakour refers to her having expressed interest in the property.
3. On 27 March 2023, Ms Bakour rang to speak to Mr Shad in relation to her sale contract for the Property. Later that day on 27 March 2023, a draft contract for the sale of the Property was emailed by Shad Partners to Pace Property. Ms Bakour had earlier – on 14 March 2023 – entered into an Exclusive Agent Selling Agreement with Pace Property to sell the Property. It appears that Ms Bakour's call on 27 March 2023 was at the request of Mark Saleh of Pace (Mr Saleh), who asked Ms Bakour to chase her solicitors for a copy of the contract to enable the Property to be marketed.
4. The first open for inspection of the Property appears to have occurred on 1 April 2023. No prospective purchasers attended.
5. The second open for inspection was on 5 April 2023. The plaintiff inspected the Property. On 6 April 2023 a building inspector attended the Property to inspect it for the plaintiff.
6. On 6 April 2023 at 11.26 am, the solicitors for the plaintiff emailed Shad Partners requesting certain amendments to the contract. The email concluded "We note [plaintiff] anticipates discussing an offer today and a prompt response will be appreciated."
7. Ms Bakour telephoned Mr Shad at 11.43 am indicating she wanted to see Mr Shad that day if possible. The agent also left a message for Mr Shad.
8. Mr Shad gave evidence that he had several conversations with Ms Bakour on 6 April 2023. His file also contains handwritten notes made by Mr Shad of those conversations written alongside the email from the plaintiff's solicitors requesting changes to the contract.
9. The handwritten comments next to each of the requested amendments are consistent with Mr Shad having spoken to Ms Bakour at 12.25 pm on 6 April 2023 and obtained instructions on the requested amendments.
10. One of the requested amendments was for the deletion of special condition 37 which permitted release of the deposit. Ms Bakour's instructions were to not agree to the deletion. Mr Shad said this was because Ms Bakour required the release of the deposit to purchase another property.
11. Another handwritten notation of Mr Shad was "T/A Mark \$1.7 m" which Mr Shad said was a telephone call he had with the agent, Mr Saleh in which he was told an offer had been received for \$1.7 million. He could not recall whether he discussed that offer with Ms Bakour.
12. The handwritten notes also record an "urgent" telephone call at 2.53 pm. In relation to those notes, Mr Shad gave evidence that he had a conversation with Ms Bakour where she said that:

She was ready to sell, she was selling as she had sold Wangee and she confirmed she's going to buy XX Edward.

1. Mr Shad also gave evidence that Ms Bakour confirmed she was okay with a four month settlement and a right to bring forward settlement – which Mr Shad explained was because Ms Bakour needed to bring forward settlement if she "got" the Edward Street property.
2. A further handwritten note on the page refers to "\$1.75m". Mr Shad was not asked about this recording. It is obviously consistent with Mr Shad being told the agreed sale price.
3. Contracts were exchanged for sale of the Property on 6 April 2023. Ms Bakour executed an authority to exchange.
4. The plaintiff gave wholly unchallenged evidence of inspecting the Property on 4 April 2023 and of there being a negotiation on price, including on 6 April 2023 with a price of \$1.75 million ultimately agreed on with a four month settlement period.
5. Ms Bakour's affidavit evidence in relation to the sale was quite brief. It made no mention of any negotiation on price or discussion with Mr Shad. On her affidavit evidence she was told the offer was \$1.75 million, that it was a good price and told to sign. Mr Saleh then phoned Shad Partners and told them Ms Bakour had sold. It was only then that she spoke to her solicitor.
6. In cross examination Ms Bakour agreed that she received various offers from Mr Saleh and said "no" to all of them. She said that she told the agent "not even at \$2 million, no, I'm not selling." Ms Bakour repeatedly denied that she spoke to Mr Shad on 6 April before she signed the contract, including in relation to its terms. She also gave answers to the effect that she signed the contract without reading it because she was forced to by Mr Saleh, the agent, and believed from what he told her that it was just for a deposit and she could get out of the contract.
7. I do not accept any of Ms Bakour's evidence in this regard.
8. It is inconsistent with the evidence of the plaintiff and Mr Shad which is supported by his handwritten file note.
9. The absence of Mr Saleh as a witness, even in circumstances where it was conceded by the plaintiff that he was alive and well and living in Sydney, does not change this conclusion. Although counsel for the defendant extracted this concession from senior counsel for the plaintiff, no Jones v Dunkel submission was ultimately advanced for the defendant in closing submissions. In any event, I would not have accepted any such submission. Mr Saleh is not in the plaintiff's camp – his company was the defendant's agent at the relevant time.
10. On 6 April 2023, Mr Shad requested the agent on Edward Street to provide to him the documents that had been sent to Ms Bakour. Later that day, the agent sent to Mr Shad the approved stamped plans for that property.

11. On 11 April 2023, Mr Shad sent an email to the solicitors for the vendor of Edward Street requesting amendments to the contract. Mr Shad said that prior to sending this email he had a discussion with Ms Bakour in which she said she wanted to buy Edward Street using the proceeds from the sale of the Property. Ms Bakour denied any such conversation. Again, I do not accept this evidence. There is no other logical reason why Mr Shad would be requesting amendments on behalf of Ms Bakour. Later in her cross examination, Ms Bakour appeared to accept that she offered \$2.3 million to buy Edward Street without first asking "her son" (which I take to mean a reference to her eldest son Mouhamad) and not knowing what she was doing.
12. Mr Shad then purchased, on behalf of Ms Bakour, a pest and building report in relation to Edward Street which was received at 2.26 pm on 14 April 2023. Mr Shad subsequently spoke to the author of the report. He then discussed the report and his discussion with the author of the report, with Ms Bakour on 14 April 2023.
13. On 20 April 2023, Mr Shad prepared a typed note of his discussion with Ms Bakour from notes he made at the time of the conference on 14 April 2023. The file note is as follows:

File Note dated 20 April 2023 at 8.46

Notes:

Meeting Friday 14 April 2pm

Met with Nada Bakour after numerous phone conversations about the purchase of 13 Edward St Sylvania. She has been keen on this property for a few months but needed to sell her house in Greenacre.

She has finally sold Greenacre and wants to proceed. We have obtained the approved plans for the minor renovation which commenced in 2012. The CC plans have been provided and the property is in order.

She was happy with the property and had offered \$2.3 m which has been accepted.

She had not purchased the pest and building inspection, so we arranged that. I printed and went through each page including incidence of defects low. Explained to her the defects requiring repair, including tile cracks, drummy tiles and poor finish. Issue with the subfloor and moisture and mould were discussed at length and I explained she would need to contact a qualified person to undertake work with timbers. I spoke to Ryan the inspector at 4.40 pm and he confirmed that the solution is ventilation and an electric ventilation for about \$1,000.

Nada was in two minds and was not sure if she wanted to buy it. I said to her its her choice, and to discuss with her sons. She felt pressured, but I said to her she has 4 months, and this is a big move.

1. Later on 14 April 2023, Mr Shad sent a copy of the report to Ms Bakour.

2. Ms Bakour was cross examined on her discussions with Mr Shad on 14 April 2023. She admitted she had a discussion with Mr Shad in relation to the Edward Street property but would not agree that this was because she was interested in purchasing the property. This is directly contrary to all of the objective material and the clear terms of the file note.
3. Ms Bakour did not agree with the last paragraph of the note – to the effect that she was in two minds about buying and was told by Mr Shad that it was her choice, and to discuss it with her sons. Ms Bakour said in cross examination:

I'm not sure because I'm not here. I am not all there. I'm thinking about my house, I'm not thinking to buy anything.

1. I do not accept Ms Bakour's evidence. There is no reason for the file note not to accurately record the substance of what was discussed.
2. Contracts for the sale and purchase of the Edward Street property were exchanged on 17 April 2023 for \$2.3 million, subject to a five day cooling off period. Again, Ms Bakour executed an authority to exchange contracts.
3. In cross examination Ms Bakour ultimately agreed that she signed the Edward Street contract but said she did not know what it was and did not read it. She said she did not know what she was doing. No expert evidence was led to suggest that Ms Bakour's capacity was impaired in any way at the time and indeed no case of lack of capacity was advanced.
4. She subsequently said that after she signed the contract and paid a deposit, she told her sons what she had done and they told her she was not doing the right thing. This last aspect of Ms Bakour's evidence has a ring of truth about it given what next occurred – Ms Bakour rescinded the contract and sought to rescind the contract for the Property. I do not accept that Ms Bakour did not understand what she was doing when she signed the Edward Street contract. I find that she did. It is likely that she subsequently changed her mind having regard to what her sons said to her and perhaps because of the matters disclosed in the pest and building report.
5. On 19 April 2023, Mr Shad and Ms Bakour had several discussions in relation to the Edward Street property. The outcome was that Ms Bakour wanted to get out of the contract and Mr Shad said that if she did she would lose the 0.25% deposit she had paid, which she was prepared to do.
6. During one of the conversations on 19 April 2023, Ms Bakour told Mr Shad she was "not feeling well today", which was the first occasion on which Ms Bakour told Mr Shad she had any health issues.
7. On 24 April 2023, Shad Partners sent to the solicitors for the vendor a notice of rescission in relation to the Edward Street property.

8. In the meantime, Ms Bakour sought to get out of the contract for the Property. At 1.03 pm on 21 April 2023, she telephoned Mr Shad and said she "wants to pull out". Mr Shad's note of the discussion records that Ms Bakour was not happy, which Mr Shad said was a reference to Mr Bakour telling him that she was not happy that she sold the Property. Mr Shad told her that she was bound by the contract and Ms Bakour requested that he try to get her out of it.
9. Requests were subsequently made on behalf of Ms Bakour for the plaintiff to agree to rescind the contract for the sale of the Property. The plaintiff refused.
10. On 27 April 2023, Mr Shad spoke to Ms Bakour and told her that the plaintiff would not agree to a mutual rescission. In response, Ms Bakour said that if she doesn't get what she wants she won't settle. The file note goes on to state "Mental health issue. She is elderly/confused". At no time prior to this had Ms Bakour told Mr Shad that she had mental health issues. On his unchallenged evidence she appeared well at all times, although he said she was stressed - as all clients are in the context of selling their property.
11. Ms Bakour continued to look at properties to purchase after the rescission of the Edward Street contract. On 24 April 2023, Ms Bakour sent a contract to Shad Partners for a property at Oberon Street, Blakehurst. On 1 May 2023 she forwarded a contract for a property at Queens Road, Connells Point. Shad Partners provided Ms Bakour with advice on this contract by email dated 3 May 2023. That email advice ends with:

You have advised us that you prefer settlement date to be in July for your sale matter. Please advise a suitable date sometime in July so we can request the same for your purchase matter.

1. Ms Bakour also inspected – on three occasions – a property at Lowry Street, Mt Lewis with Mr Omar Saadi (Mr Saadi) of Pace Property Agents. In about mid-May 2023, Mr Saadi sent, at Ms Bakour's request, a contract to Shad Partners for their review.
2. Again, Ms Bakour denied that she was looking at these properties to buy, or that she did so knowing that she was unable to get out of the contract in relation to the Property. Ms Bakour's evidence was that she was looking for fun, as a hobby. I do not accept this evidence.
3. Mr Saadi also deposed to a conversation with Ms Bakour on 23 May 2023 in which she told Mr Saadi that she was sick, has a mental illness and had depression. Mr Saadi gave unchallenged evidence that this was the first occasion that Ms Bakour told him she was sick and that at all times prior to that in their face to face dealings, Ms Bakour presented well, was neatly dressed and well spoken. When speaking on the telephone, Mr Saadi said that Ms Bakour appeared to him to have no difficulty communicating what she wanted or understanding what he said to her.
4. As is apparent from the above, I reject any suggestion by Ms Bakour that she did not understand what she was doing when she sold her Property on 6 April 2023 or that she was somehow tricked into doing so. She also understood what she was doing when looking at other properties and in buying the Edward Street property.

5. On the evidence, the likely explanation for Ms Bakour's actions in seeking to rescind the contract for the Property, is that she was told by her children that she was doing the wrong thing and that she should not sell the Property.

The issues for determination

1. The plaintiff seeks specific performance. It was not in dispute that a contract for the sale of land has always been considered a proper subject of specific performance because damages at law would generally be an inadequate remedy where no two pieces of land are identical: see generally *Dougan v Ley* (1946) 71 CLR 142; [1946] HCA 3 at 150 per Dixon J.
2. Two issues arose for determination.
3. First, the plaintiff must of course establish that he is ready, willing and able to perform his obligations under the contract – in the present case pay the outstanding purchase moneys under the contract. The defendant contended that the plaintiff had not demonstrated that he was ready, willing and able.
4. Second, the principal defence relied on by the defendant was hardship.
5. I consider each of the two issues in turn.

Is the plaintiff ready, willing and able to complete?

1. In *Carydis v Merrag Pty Ltd* [2007] NSWSC 1220 (*Carydis v Merrag*), Brereton J stated at [33]-[38] (emphasis added):

33 In *Sommers v Pearse* (NSWCA, 16 December 1993, unreported, BC 9302367), Mahoney AP said:

There is no doubt that a defendant in a proceeding for specific performance may succeed if the plaintiff's readiness, willingness and ability to perform does not appear. But I confess to the feeling that in the main, cases of which this is one, defences of this kind have about them an air of artificiality. The point is often taken rather to ambush than to enforce the substantial merits of the case. In the days when pleadings were precise and demurrers were taken if they were not, the omission to particularise such matters in the statement of claim or to prove them formally in evidence could be fatal. A plaintiff could fail notwithstanding that there was in substance no question but that he would and could complete the contract. The law must be observed and what is to be proved must be proved. But the view may now be adopted, I trust, that pleadings and proofs are to serve, not to govern, the determination of disputes according to their substantial merits and that, if there be defects in the pleading, particularisation and proof of such matters, such defects can, when pointed out, be adjusted.

34 I do not think that proof that a purchaser is ready, willing and able to complete for the purposes of a suit for specific performance necessarily requires that the purchaser be able to prove with certainty at the hearing that he has every cent that he needs to pay the purchase price, the costs of acquisition, and to service any borrowings which are required for that purpose. What is required is that the Court be persuaded on balance that the purchaser wishes, intends and in substance has the ability to complete.

35

36 However, absence of readiness, willingness and ability to complete at some earlier time while the contract is on foot is not fatal to an application for specific performance. The judgments of Barwick CJ and Windeyer J in *Mehmet v Benson* (1965) 113 CLR 295, which enjoyed the concurrence of McTiernan J, make that clear: see also the judgment of the Court of Appeal in *Sommers v Pearse*. I accept that ultimately the time at which a purchaser must establish readiness, willingness and ability to perform is the date of hearing, although readiness, willingness and ability at earlier times may be a relevant discretionary consideration. In *Commonwealth Refineries Ltd v Hollins* [1956] VLR 169, Sholl J said (at 180):

It is then said that the plaintiff was not at the material times ready and willing to perform the contract; and again the evidence regarding the draft lease is pointed to. In order to obtain specific performance of a contract, a plaintiff must ordinarily show that he is ready and willing to perform his part of the bargain. But if in the past he has not been ready and willing to do so, and the other party has nevertheless elected to keep the contract on foot, the plaintiff may put himself right, even at the trial, and apparently at any time up to judgment, subject only to the risk of being ordered to pay costs: see *Berners v Fleming* [1925] Ch 264, at pp270, 273, 279; and cf *Fuller's Theatres Ltd v Musgrove* (1923), 31 CLR 524 per Isaacs and Rich JJ, at pp 549-550.

37 In considering the question of readiness, willingness and ability, the observations of Barwick CJ in *Mehmet v Benson* are again relevant. His Honour said (at 307):

The question as to whether or not the plaintiff has been and is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contract and what on the part of the plaintiff in a suit for specific performance are his essential obligations. Here the substantial thing for which the defendant bargained was the payment of the price: and, unless time be and remain of the essence, he obtains what he bargained for if by the decree he obtains his price with such ancillary orders as recompense him for the delay in its receipt.

38 Windeyer J, harbouring some doubt as to whether the purchaser was ready and willing to complete, insisted on a proviso to meet that situation, so that lest the purchaser prove to be unready to complete the contract, an early date for completion could be fixed and, in the event of default, a decree made for rescission.

1. I am satisfied that the plaintiff is ready, willing and able to complete the contract. As stated by Brereton J in *Carydis v Merrag* at [34] what is required is "that the Court be persuaded on balance that the purchaser wishes, intends and in substance has the ability to complete."
2. There was no real challenge to the plaintiff's willingness and intention to complete. The commencement and prosecution of these proceedings is powerful evidence of both, together with the payment of stamp duty. The real issue at the hearing was the ability of the plaintiff to complete and, in this regard, in what period should the plaintiff be required to complete.
3. At the commencement of the hearing the plaintiff read updating evidence from himself and his mother as to their financial circumstances and thus ability to complete.
4. The plaintiff deposed to having funds totalling \$1,275,001.95 in bank accounts under his control and available to pay the moneys required to complete - \$1,575,000 ignoring the usual settlement adjustments.
5. The plaintiff also deposed to being willing to obtain a loan secured against the Property if necessary to fund the remainder of any amount required to complete. He also deposed that his mother has said she will provide the plaintiff with all funds necessary to complete the purchase.
6. The plaintiff's mother deposed to owning a unit at Leonard Street, Bankstown and to having at 4pm on 11 February 2025, obtained conditional approval from a lender to borrow the sum of \$400,000 secured against the Leonard Street property to pay to her son for the balance of the purchase price for the Property. In closing address on 13 February 2025, the plaintiff tendered an email from the lender, dated 13 February 2025 confirming that the loan had now been unconditionally approved.
7. The plaintiff's mother also gave evidence of the additional investments that she had.
8. The defendant pointed to the fact that the unconditional approval referred to matters still to be attended to – including the preparation and execution of legal documentation – and that the lender could withdraw the offer in certain circumstances. None of these matters tell strongly against the likelihood of the approved funds being made available. They are in the nature of standard form terms rather than suggesting a real likelihood in the circumstances of the present case that the funds will not be provided.
9. There was some debate at the hearing as to the time period that should be set by the Court, if it was otherwise minded to decree specific performance, for completion to occur. This debate fed into the issue of whether the plaintiff was able to complete by the date set by the Court for completion.
10. There was no real dispute that the period set should be a reasonable one - the debate centred on what was a reasonable period. The defendant contended that a reasonable period was 14 days, whereas the plaintiff suggested 28 days.

11. The defendant placed reliance on clause 36.1 of the contract which provided for a 14 day period for a notice to complete and that "such time shall be deemed sufficient by both parties at law and in equity." Reference was also made to the decision of Rein J in *Golden Oceans (NSW) Pty Ltd v Evewall Pty Ltd* [2009] NSWSC 674 where his Honour at [44] stated that he would assess two weeks as a reasonable period from the date of decree. Nothing more was said by Rein J as to why he assessed two weeks as reasonable in that case.
12. The plaintiff contended that clause 36.1 dealt only with the reasonable time for a defaulting party to comply with a notice to complete and said nothing about a reasonable period in the circumstances which include the fact that the defendant has repudiated the notices to complete and the contract. A 28 day period was said to be a reasonable period as it also accommodates the interests of the defendant who is going to have to relocate and move out of the Property.
13. I am satisfied that in the circumstances, 28 days is a reasonable period. The period needs to take account of the fact that it is the defendant that has refused to complete, necessitating a lengthy delay, followed by a two day hearing with judgment reserved. The period needs to permit the plaintiff a reasonable time to complete by paying the balance of the purchase price in circumstances where, if he does not, the Court will likely order that the contract be rescinded. Given that vacant possession is required on completion, the 28 day period will provide time for the defendant and her three sons to vacate.
14. I am comfortably satisfied on the evidence that the plaintiff in substance has the ability to complete within 28 days of the decree being made. The unconditional loan will, on the balance of probabilities, provide the additional funds not already in the plaintiff's accounts.

Should specific performance be refused on grounds of hardship?

1. In *Patel v Ali* [1984] 1 Ch 283, Goulding J stated at 288:

The important and true principle, in my view, is that only in extraordinary and persuasive circumstances can hardship supply an excuse for resisting performance of a contract for the sale of immovable property. A person of full capacity who sells or buys a house takes the risk of hardship to himself and his dependants, whether arising from existing facts or unexpectedly supervening in the interval before completion.

1. In *IGA Distribution Pty Ltd v King & Taylor Pty Ltd* [2002] VSC 440, Nettle J stated at [243] (citations omitted):

...The sort of hardship which will preclude the grant of specific performance does not extend to precluding specific performance because the defendant has made an improvident contract. If the defendant has agreed to the terms of the contract sought to be enforced, they should be enforced. There may be cases in which the bargain which is sought to be enforced is so improvident from the defendant's point of view that equity will refuse specific relief, but the circumstances will be rare and where they occur there is likely to be involved something tantamount to undue influence which renders enforcement unconscionable. The defendant has to show that a decree of specific

performance would impose hardship amounting to oppression far outweighing the inconvenience to the plaintiff if he is left to his remedy in damages.

1. What must be shown is hardship caused by the proposed grant of specific performance, not hardship caused by the bargain made by the parties: see *David Jones Ltd v Perpetual Ltd* [2006] QSC 337 at [158] per Muir J.
2. The question of whether, as a matter of discretion, a decree of specific performance of an executory contract should be refused on the grounds of undue hardship falls to be answered as at the time when the decree would otherwise be made: *Hewett v Court* (1983) 149 CLR 639; [1983] HCA 7 at 664 per Deane J; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th ed, 2014, LexisNexis Butterworths) at [20-100].
3. The defendant also referred to the following observations of Young J in *Longtom Pty Ltd v Oberon Shire Council* (1996) 7 BPR 14,799 and 14,807-808 (recognising that what was said by his Honour that hardship is assessed at the date of contract is not the law):

The defence of hardship these days very rarely meets with much success. In order to give the defendant the benefit of a defence of hardship there must normally be some unconscionable bargain or some compassionate grounds such as an elderly person in a moment of weakness yielding to pressure to sell her home to a developer which developer in any event was only using the house as part of his trading stock: *Madden v Keevereski* (1982) 2 BPR 9645 . Normally hardship is to be judged at the time the contract is made and subsequent events are immaterial: *Bosaid v Andry* [1963] VR 465 at 478-9 , though see *Spry*, *Equitable Remedies* 4th ed (LBC 1990) p 193. Such propositions are stated in general terms and there would be no difficulty at all in showing that there are some cases which do not fit into the general statements I have made. For instance, in *Cominos v Rekes* (1979) 2 BPR 9619, Waddell J upheld a defence of hardship in a case which does not come within the principles I have noted. In all cases, the matter is one for the judge to assess in the light of all the other facts of the case. The mere fact that a party will suffer financial hardship is seldom enough.

1. At a factual level, three matters were pleaded by Ms Bakour in her defence:
 - a. at the time the Contract was entered, the defendant's mental state was impaired as a result of her underlying health conditions including depression, suicidal ideation, a minor cerebrovascular event in 2022, and chronic gastrointestinal illness;
 - b. by reason the health conditions the defendant could not make a rational assessment of whether the Contract was in her interest;
 - c. further, the sale of the land would exacerbate the defendant's underlying psychological conditions to an extent that she contemplates suicide, and the defendant does not have the financial ability to secure alternate accommodation of the standard provided by the current property.

1. The defence fails at several levels.
2. No admissible medical evidence was adduced on behalf of Ms Bakour in support of these propositions. As set out above, I rejected the tender of several reports. No underlying treatment records were sought to be tendered to support the assertions made by Ms Bakour in her affidavit and, to a greater extent, in her oral evidence. No records were produced to suggest Ms Bakour ever sought professional medical help for the matters she complained of.
3. The only evidence in support of the claimed hardship was Ms Bakour's own assertions. I have found her to be an unsatisfactory witness and I do not accept her evidence unless it is against her interest and in this respect her evidence is not against her interest.
4. In any event, in relation to the alleged suicidal ideation, Ms Bakour gave evidence in chief that on maybe two or three occasions she had tried to take her own life and that she always thinks about it. In cross examination she agreed that whilst she had thought about taking her own life, she had never actually acted on those thoughts.
5. In examination in chief, Ms Bakour was asked how she would feel if she had to move from the Property, her home for the last 32-33 years. She answered:

Look, I'm, I'm really attached to my house. My house – my husband left it for me and my kids and we all live under one roof. If I leave this house, everybody's going to go everywhere.

1. This was the high water mark of the defendant's evidence of the impact on her and her broader family, if she was required to complete on the sale of the Property.
2. Insofar as it was claimed that completing on the sale of the Property would impose some financial hardship on the defendant, the contention also fails for want of evidence. Ms Bakour asserted in her affidavit "I have not much money and I get the invalid pension". Save for that assertion, no evidence was adduced on behalf of the defendant as to her current financial position and the impact on her of having to complete on the sale of the Property. A given is that she will receive the purchase price of \$1,750,000.
3. There was also no evidence to suggest that the price she will receive for the sale of the Property - \$1,750,000 – was other than the market value of the Property, or that she would not be able to purchase alternate accommodation for her and, if necessary, for her three adult sons that currently live with her.
4. In this latter regard, there was some evidence that at least one of her children who currently lives with her, separately owns property – although mortgaged.
5. Whilst I do not doubt that Ms Bakour now no longer wishes to vacate the Property and would prefer to remain living there with three of her sons, I am far from satisfied that this is one of those extraordinary cases where the Court should decline to decree specific performance on the grounds of hardship. On the evidence, there is nothing unusual or extraordinary to enable the Court to conclude that ordering specific performance would impose any significant hardship on the defendant. There is nothing about the circumstances in which

the Property was sold or the plaintiff wanting to enforce the contract which could be said to be tantamount to undue influence rendering enforcement unconscionable.

6. I reject the hardship defence.

Conclusion and orders

1. The plaintiff has been successful and is entitled to a decree of specific performance of the contract. I will make orders for specific performance but grant liberty to apply to both parties, including if completion does not occur within 28 days or issues arise in obtaining vacant possession.
2. The plaintiff requested that the Court not deal with the question of costs in these reasons, foreshadowing an application for a special costs order. I will make directions for this to occur.
3. The Court makes the following orders:
 1. Declare that the contract for sale and purchase of land between the plaintiff as purchaser and the defendant as vendor dated 6 April 2023 in respect of the property known as XXX Wangee Road, Greenacre, New South Wales, 2190 being all of the land and improvements in folio identifier XX/XXXXXX should be specifically performed and carried into execution.
 2. Order that the defendant execute all such instruments and do all such things as are necessary in order to specifically perform the contract and carry the contract into execution within 28 days.
 3. Grant liberty to either party to relist the proceedings on 3 days' notice, setting out the relief sought.
 4. Direct the parties to confer as to the appropriate costs order to be made in the proceedings and to provide by email to my Associate by no later than 4pm on 3 March 2025 any agreed orders as to costs.
 5. In the event that the parties are unable to agree as to the appropriate costs order:
 1. direct the parties to provide by email to my Associate by no later than 4pm on 3 March 2025 any material and submissions relied on in relation to costs, such submissions not to exceed 5 pages; and
 2. direct the parties to provide by email to my Associate by no later than 4pm on 10 March 2025 any material and submissions in reply on costs, such submissions not to exceed 3 pages, whereupon the Court will determine the issue of costs on the papers.

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Decision last updated: 27 February 2025

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