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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

de JERSEY CJ

No 2230 of 2002

RESIDENTS PAN & BILL PTY LTD ABN 64 011 044 732 Applicant

and

LUC NGUYEN AND DINH THI NGUYEN Respondent

BRISBANE

..DATE 14/03/2002

JUDGMENT

14032002 T2-3/HMC9 M/T 1/2002 (de Jersey CJ)

HIS HONOUR: I am asked to declare that a contract between the parties dated the 11th of January 2002 was effectually terminated by the applicant vendor on 7th of February 2002. The contract provides for the vendor's sale of a factory for the price of $1.5M.

Clause 31 relates to the approval of finance. It renders the contract subject to the purchasers' obtaining finance and then goes on to say in sub-clause 4 that, "If the purchaser obtains such approval, the purchaser shall give notice in writing of such approval to the vendor promptly and in any event within two business days from the approval date".

Sub-clause 5 provides that if the purchaser does not give notice as required, of having obtained approval, then "Within two business days from the approval date ... instead of any other remedy available to the vendor ... the vendor may at the vendor's option by notice in writing to the purchaser ... terminate this contract".

What happened was that on the 24th of January 2002 the purchasers gave notice of "approval of finance subject to valuation". That obviously was not notice of approval. Then on the 29th of January, one day after notice had been required, the purchaser sought an extension of time for finance "until this valuation comes to hand".

That same day the vendor's solicitors in response indicated that the vendor was prepared to grant an extension of time until the 1st of February 2002 as sought, but "on the basis that the margin scheme be applied to the transaction for the purposes of calculating GST".

There was no response to that offer prior to the 1st of February 2002 when the purchasers confirmed that they had received approval of finance. But of course at that stage the vendor's rights accruing from the purchaser's failure to notify approval in accordance with clause 31 had been preserved. In short the vendor retained the right to terminate consequent upon that failure to notify on the part of the purchasers, in the event that the conditions which the vendor was putting forward for the approval of an extension were not met.

As to the condition which the vendor had specified on 29th of January, that is as to the applicability of the margin scheme, the vendor's solicitors on 4th of February repeated their position, saying that as the purchaser "did not accept the condition your notification of approval of finance was given out of time ... if your client agrees in writing by 4 p.m. today to amend the contract by agreeing to the application of the margin scheme as required by our client, our client will accept your client's notification of finance approval. If it does not our client will terminate the contract".

Now, the 4 p.m. 4th of February deadline was extended by agreement to 4 p.m. 5th of February, and on that day there was a conversation between the solicitors. The account given by the vendor's solicitor Mr Mann was, in substance, that the purchasers indicated through their solicitor their preparedness to agree to amend the contracts so that the margin scheme would apply to the sale, provided the vendor agreed to amend the contract to insert a covenant to the effect that the sale was on an "as is where is" basis and that the purchasers would not remove anything from the property prior to settlement.

The account given by Ms Welner, the solicitor for the purchasers, is slightly different, in so far as it would not present the requirement for confirmation that the sale was to be on an "as is where is" basis with nothing being removed prior to settlement as a contractual requirement, or as the quid pro quo as it were for the purchaser's preparedness to agree to the applicability of the margin scheme. Further Ms Welner would not put the matter as requiring amendment of the contract.

However it is plain that the difference between the parties' solicitors in those respects is without consequence, as indeed was conceded during argument by Mr Galloway who appears today for the purchasers.

The reality of the situation may reliably be drawn from a letter sent by the purchasers' solicitors the very next day, 6th of February, which reads as follows:

> "We confirm our client is agreeable to your utilising the margin scheme for the purposes of calculating GST applicable to this transaction provided your client provides to us:
>
> 1. Written confirmation that the property remains in the same condition and all chattels and equipment within the property are not removed by your clients prior to settlement;
>
> 2. Your client providing to our client on or before settlement a tax invoice for the GST levied on the transaction."

The position taken by Mr Galloway for the purchasers is that the requirement for written confirmation referred to in paragraph 1 of that passage did not add to the vendor's contractual burden in any significant way. It did add to the burden upon the vendor in that it obliged the vendor to provide a written confirmation which would not otherwise be required under the contract. But it did in my view go beyond that matter of form.

The contract designated as the "improvements" included in the sale against the heading "nature of buildings", "existing complex in 'as is where is' condition".

It seems to me that reading that section I on the second page of the contract properly, it is plainly referring to buildings and fixtures. The next section J under the heading "other chattels included in sale" reads "not applicable".

The two sections appear to lead to the conclusion that what is being sold is the buildings and related fixtures. Yet the condition sought to be introduced by the purchasers requires reference to chattels and equipment in addition.

Clause 17.1 of the special conditions provides that the property should be "at the risk of the vendor until 5 p.m. on the next business day after the date of this contract and then the risk shall pass to the purchaser". The consequence of the covenant sought on 5th and 6th of February by the purchasers would oblige the vendor to ensure that not only would the chattels upon the property on the date of the contract be passed over at completion, but that there be no change in the state not only of the buildings but in the distribution and presence of the chattels and equipment as well.

It does seem to me that requiring that assurance from the vendor went beyond the vendor's obligations under this contract. It also seems clear to me that that requirement of the vendor was put forward as the condition of the purchaser's agreement to the vendor's own requirement that the margin scheme be introduced into the contract in that way as the condition of its agreement to extend the time for the notification of the approval of finance. That did not lead to consensus, with the consequence in my view that in purporting to terminate the contract on the 7th of February 2002 the vendor was acting in accordance with its contractual entitlement.

There will therefore be a declaration that the contract referred to in the application was on 7th of February 2002 validly terminated by means of the applicant's solicitor's letter Exhibit GLM3.

I order the respondents to pay the applicant's costs of and incidental to the application to be assessed.
