



## Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

Application No 4405 of 2002

PHILLIP JAMES MUSCAT and  
PATRICIA KAY WHEELER

Applicants

and

LEANNE MARY ROBERTSON

Respondent

BRISBANE

..DATE 04/06/2002

JUDGMENT

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: The applicants are the purchasers under a contract dated 23 July 2001 from the respondent as the vendor in respect of part of Lot 24 on RP 33370 in the County of Stanley, Parish of Tingalpa, shown as Lot 3 on the proposed survey plan in Schedule A to the contract for the sum of \$320,000.

The respondent gave notice of termination on 26 March 2002 pursuant to special condition 2.5 of the contract. The applicants dispute that the contract was validly terminated. The applicants lodged a caveat on 12 April 2002. This originating application was commenced on 17 May 2002 seeking a declaration that the contract was in full force and effect and had not been terminated by the letter dated 26 March 2002 and consequential injunctive relief.

The respondent filed an application on 30 May 2002 in the proceeding commenced by the originating application seeking removal of the caveat. At the outset of the hearing of the applications yesterday the respondent sought an adjournment of the hearing of the originating application on the basis that the matter is not appropriate to proceed by way of originating application and that it was not ready to proceed to trial as there was likely to be a substantial issue of fact.

The subject contract is one to which the Land Sales Act 1984 applied, although the respondent obtained an exemption from compliance with Sections 8, 9 and 10 of that Act as Lot 24

is to be divided into five lots. Special condition 2.3 of 1  
the contract provided:

"2.3 This Contract is subject to and conditional on:

- (a) The Seller receiving approval from the Local Government to subdivide the Existing Lot 10 substantially in accordance with the Subdivision Plan (the "Council Approval") on terms and conditions satisfactory to the Seller in the Seller's sole discretion on or before one hundred and eight (180) days from the date of this Contract (the "Subdivision Date");
- (b) The Seller completing all operational works and satisfying all other requirements or 20 conditions of the Council Approval required by the Local Government under the Council Approval, prior to the Subdivision Date; and
- (c) Registration with the Land Titles Office of a survey plan substantially in accordance with the Subdivision Plan and the recording of the particulars of the subdivided Property in the freehold land register on or before the 30 Subdivision Date."

The subdivision date for special condition 2.3 was 180 days from 23 July 2001. Special condition 2.3(a) was satisfied at the date of the contract. Two extensions of time, with 40 time remaining of the essence, were agreed between the appellants and the respondent and extended the subdivision date to 23 March 2002. No further extension was sought by the respondent and the respondent's solicitor sent the notice of termination as the conditions in special condition 50 2.3(b) and (c) had not been satisfied by 23 March 2002.

On 6 April 2002, the respondent's agent readvertised the property for sale at over \$350,000. On 2 May 2002, the

respondent entered into another contract to sell proposed Lot 3, pursuant to which the purchasers have been allowed possession pending the settlement date.

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Clause 11 of the Schedule B special conditions of that contract contains an acknowledgment by those purchasers in respect of the caveat and makes that contract conditional upon the removal of the caveat and any impediment to the respondent completing the contract within six months of the date of that contract.

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Special condition 2.6 of the subject contract between the appellants and the respondent require the respondent to use reasonable endeavours to satisfy special condition 2.3. The applicants rely on affidavits of licensed surveyor and development consultant, Mr P M Ring. He deposes to what a normal timetable for effecting a subdivision, undertaking operational works and registering the plan of survey would be and expresses the opinion that there was no reason in the normal course of events that the respondent could not have attended to matters to enable title to be delivered to the applicants by 31 December 2001.

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The respondent relies on the affidavits of her husband, Mr D G Robertson, who deposes to the delays that have occurred during the development process. A chronology is set out in Mr Robertson's affidavit sworn on 1 June 2002.

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As Mr Porter of counsel for the respondent submits, the  
dispute between the parties will call for an assessment of  
whether the respondent has done what is reasonable in the  
circumstances to comply with special condition 2.3. If the  
respondent did not use reasonable endeavours to satisfy  
special condition 2.3 by 23 March 2002 the respondent cannot  
rely on her own default to terminate the contract.

Mr Robertson has dealt with the steps undertaken in  
connection with the subdivision in a summary way which can,  
no doubt, be explained by the need to respond relatively  
quickly to the originating application. It is not possible  
to read the affidavits of Mr Robertson and be satisfied that  
there is no issue to consider about the reasonableness of  
the steps taken by the respondent to comply with the special  
condition particularly in the light of the objective opinion  
of Mr Ring.

As the originating application cannot be decided until this  
factual matter is resolved, it is appropriate that the  
hearing of the originating application be adjourned to  
enable proper preparation for a proceeding where there is  
contested evidence.

Even if successful on the adjournment application, the  
respondent still wished to proceed with her application for  
removal of the caveat. The respondent relied on Section  
122(3) of the Land Title Act 1994, which was introduced as a  
concomitant amendment to those made to the Land Sales Act

1984 by the Land Sales and Land Title Amendment Act 1997.

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The applicants rely on the fact that the caveat was not requisitioned by the Land Titles Office. Section 122(3) of the Land Title Act 1994 states:

"(3) To remove any doubt, it is declared that an interest in a lot does not include an interest in a proposed allotment under the Land Sales Act 1984 that a person obtains when the person agrees to purchase the allotment under that Act."

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An objective of the 1997 Act was to amend the Land Sales Act so that pre-registration sales of proposed allotments at the engineering drawings stage could be permitted under the Act.

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A distinction is drawn in Section 6 of the Act between a proposed allotment and a proposed lot. The definition of "lot" includes a registered lot and a proposed lot. The definitions of "proposed allotment" and "proposed lot" in the Act are respectively:

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"proposed allotment" means a single parcel of land, other than a lot within the meaning of this Act, the boundaries of which are shown, or to be shown, on a plan of survey that is to be registered under the Land Act 1994 or Land Title Act 1994.

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"proposed lot" means that which will become a registered lot upon -

- (a) registration of a plan; or
- (b) registration of a plan and recording of a community management statement for a community titles scheme under the Body Corporate and Community Management Act 1997."

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The use of the expression "proposed allotment" in Section 122(3) of the Land Title Act is in the same sense which is used in the Land Sales Act. It is, therefore, used in

Section 122(3) in the sense of being the proposed allotment 1  
under a proposed plan of survey before it becomes a proposed  
lot within the meaning of the Land Sales Act.

The effect of Section 122(3) of the Land Title Act is, 10  
therefore, to preclude the lodgment of a caveat by a  
purchaser of land while it remains a proposed allotment  
within the meaning of Section 6 of the Land Sales Act.

As the material does not indicate that a plan of subdivision 20  
of Lot 24 has been prepared and lodged for registration, it  
follows that proposed Lot 3 remains a proposed allotment  
under the Land Sales Act and there was no entitlement for  
the applicants to lodge the caveat. The caveat must be  
removed. 30

The statutory abrogation of the right to lodge a caveat in  
respect of the purchase of a proposed allotment before it  
becomes a proposed lot does not alter the nature of the  
equitable interest which the applicants as the purchasers of 40  
proposed Lot 3 have, if they ultimately can prove that the  
respondent was not entitled to terminate the contract.

That equitable interest can be protected by interlocutory  
injunction pending the resolution of the disputed factual 50  
matters, if the applicants show that there is a serious  
question to be tried and the balance of convenience favours  
preserving the status quo until the trial.

The respondent opposed the making of the interlocutory injunction. Although the submission was made by the respondent that the applicant's case is speculative, the seriousness of the question at an interlocutory stage has to be assessed against the background that the information relevant to whether the respondent has made reasonable endeavours to satisfy special condition 2.3 is primarily in the control of the respondent. 1  
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For the reasons which I have given for adjourning the final hearing of the originating application until a trial can take place, I am satisfied that the applicants have shown a serious question to be tried in respect of the respondent's compliance with special condition 2.6 of the contract. 20

The proposed Lot 3 has special characteristics for the applicants which could not be satisfactorily compensated for by way of damages. 30

The male applicant's widowed 65 year-old mother lives across the road from the proposed Lot 3. He wishes to live as close as possible to provide security and assistance to her. The male applicant's mother's property comprises five acres where the male applicant's 13 year-old daughter keeps her horse. The daughter is a member of the pony club that is next door to the mother's property. 40  
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The fact that the respondent has entered into another contract for proposed Lot 3 does not assist the respondent,



as it was entered into when the applicants denied that the  
termination of their contract was effective. In any case  
the respondent has protected herself by special condition 11  
of that subsequent contract.

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The applicants have sufficient financial standing to support  
the undertaking as to damages which they are prepared to  
give. It is therefore appropriate to grant the  
interlocutory injunction pending the resolution of whether  
the contract was validly terminated by the respondent. I  
will hear the parties on the terms of the orders which  
should be made to reflect these reasons.

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HER HONOUR: The affidavits filed in the proceeding be  
treated as pleadings. Each of the parties has liberty to  
undertake such third party disclosure as they might be a  
advised.

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HER HONOUR: Further affidavits by the applicants be filed  
and served no later than 21 days before the hearing, and any  
further affidavits by the respondent be filed and served no  
later than 14 days before the hearing.

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HER HONOUR: I will make yours 10 days before the hearing 1  
unless I make it 21 days and 10. And I will give the  
parties liberty to apply on one day's written notice to the  
other.

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HER HONOUR: The orders which I make are:

1. Caveat number 705543442 be removed in respect of part of 20  
lot 24 on RP33370 in the County of Stanley, Parish of  
Tingalpa;
2. The affidavits filed in the proceeding be treated as 30  
pleadings;
3. That the parties make disclosure of all documents  
relevant to the matters in issue by 4.00 p.m. on 5  
June 2002; 40
4. That the parties be permitted to obtain non-party  
disclosure despite the fact that the proceeding has not  
been started by claim;
5. That the originating application be placed upon the 50  
callover list to obtain dates for a hearing anticipated  
to take two days;
6. Certify for a speedy trial;

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7. Upon the usual undertaking as to damages given by the applicants until the trial of the proceeding or earlier order, it is ordered that the respondent not dispose of or otherwise deal with (which includes taking steps to complete any other contract for the sale of the proposed lot 3 referred to hereafter) the proposed lot 3 created upon the subdivision of lot 24 on RP33370 in the County of Stanley, Parish of Tingalpa, by way of registration of a plan of subdivision that accords with the sketch plan annexed to the contract dated 23 July 2001 between the applicants as purchasers and the respondent as vendor ("the contract") and complies with special condition 2.7 of the contract except upon written terms that expressly makes such disposal or other dealing (including steps taken towards the completion of any such other contract) subject to the prior rights of the applicants under the contract;

8. Until the trial of the proceeding or earlier order, that the respondent not take any steps to register any plan of subdivision of lot 24 on RP33370 that:

(a) does not substantially accord with the subdivision plan annexed to the contract;

(b) shows only minor variation(s) or discrepancy between the dimensions and position of the proposed lot 3 as shown on subdivision plan and the survey plan approved by the BCC and

registered with the Land Titles Office that  
do not materially prejudice the applicants;

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9. Any further affidavits by the applicants be filed and  
served no later than 21 days before the hearing.

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10. Any further affidavits by the respondent be filed and  
served no later than 10 days before the hearing.

11. Liberty to apply on one day's written notice to the other  
party.

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HER HONOUR: In relation to costs, it is necessary to deal  
with both the costs arising from the hearing yesterday in  
connection with the originating application and also the  
hearing of the application to remove the caveat.

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Mr Lyons of counsel, on behalf of the applicants, submits  
that costs should be in the cause. Mrs King, on behalf of  
the respondent, submits that the respondent was successful  
in obtaining the removal of the caveat because of the effect  
of section 122(3) of the Land Title Act and on that basis  
should be given her costs of that application.

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The proposal from the applicants to accept an undertaking in  
lieu of continuing with their caveat did not come until  
shortly before the hearing yesterday. On the other hand,

the respondent could have also anticipated the outcome of  
yesterday's hearing and made an offer to give an undertaking  
in terms of the interlocutory injunction ultimately granted  
in order to obtain the removal of the caveat.

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In those circumstances, I consider that the appropriate  
order to be made in respect of both the costs of the  
originating application and the costs of the application to  
remove the caveat should be that the costs be costs in the  
cause, and I so order.

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