[2003] QSC072

Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No S8639 of 2002

MOUNTAIN CREEK MARKETS PTY LTD (ACN 097 926 264)	Plaintiff
and	
PETER LE COMPTE DEVELOPMENTS PTY LTD (ACN 052 231 898)	Defendant
and	
DONAL JAMES HOWARD SUTTON	First Defendant by Counter-Claim
and	
TALLENBROOK PTY LTD (ACN 010 368 840)	Second Defendant by Counter-Claim
and	
CROWN HILL PTY LTD (ACN 072 455 862)	Third Defendant by Counter-Claim
and	

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CHUN WAI SHUM — Fourth Defendant by Counter-Claim

BRISBANE

..DATE 10/03/2003

JUDGMENT

HER HONOUR: On Friday, 28 February 2003, judgment was entered in favour of the defendant on its application pursuant to Rule 293 of the Uniform Civil Procedure Rules in respect of the plaintiff's claim for specific performance of a contract between the parties for the sale of certain land. A further order was made that a caveat over the land be removed, a declaration that the defendant validly terminated the contract on 5 August 2002 and an order for costs.

Although served, the plaintiff did not appear to oppose the orders and declaration sought.

It was not until the order was faxed to Mr N Barbi, the plaintiff's solicitor, on Monday, 3 March by the defendant's solicitors that Mr Barbi deposes he became consciously aware of the application.

The plaintiff filed an application on 6 March to set aside the regularly entered judgment pursuant to Rule 302. The fault for non-appearance lies with the plaintiff's solicitor's office. The obligations of service were complied with. A further affidavit, relating to the application, was delivered to Mr Barbi's office by courier (as had the application) the day prior to the hearing. A letter dated 25 February was received in Mr Barbi's office at just after 5 p.m. on that day and came to Mr Barbi's attention on the following day. He deposes that he thought it referred to earlier correspondence about security for costs. How that opinion could have been formed is difficult to comprehend for the opening paragraph of

the letter states, "We refer to our client's application filed on 14 February 2003 which, amongst other things seeks an order for the removal of the caveat lodged by your client over the land in question on 6 August 2002." The following paragraph begins, "On the assumption that your client intends to defend the application..." and continues discussing the worth of any undertaking as to damages. Mr Barbi complains of a failure by the defendant's solicitor to contact him personally, whatever that might mean in light of the letter of 25 February, to enquire as to whether his firm proposed filing material and attending the hearing. There has been a longstanding practice in Queensland for a solicitor proposing to enter default judgment to contact the solicitor on the other side to give notice informally or to make an enquiry. This was particularly so under the former Rules of the Supreme Court when the entry of appearance and defence of a defendant were separate, as to which see the judgment in Coburn v. Brotchie (1890) 16 VLR 6.

The situation here is quite different where the application and material were served in accordance with the Rules.

It is unnecessary to elaborate the detailed explanation offered by Mr Barbi as to how he and his office system failed to appreciate the nature of the material delivered to his office. Although it might be inferred that the plaintiff received a copy of the letter of 25 February which concerned the application prior to the hearing he was advised by his

solicitor that it concerned a foreshadowed application for security for costs.

The explanation for the failure to appear and to defend the application is such that the plaintiff must bear the costs thrown away on 28 February. Mr T Matthews for the plaintiff said that Mr Barbi accepts that those costs must be borne by his firm. The application to set aside has been made promptly; there is an explanation as to why there was no appearance; the plaintiff has filed an affidavit which goes to the merits. So I turn then to the merits.

Mr Doyle, SC, who with Mr D Clothier, appears for the defendant, contended that for the reasons advanced on the application when heard originally on 28 February the plaintiff has no arguable entitlement to specific performance and accordingly the orders made on that day ought not be set aside.

Briefly stated, the parties, on 6 September 2001, entered into a contract for the sale of 1.629 hectares of land at Mountain Creek for a purchase price of $1.45 million on an REIQ standard form contract with special conditions. Time was of the essence and remained so throughout. It is uncontested that it was an instalment contract as defined by section 71 of the Property Law Act 1974. Completion was to occur relevantly on 31 January 2002 unless an extension was obtained on terms which included a further payment. This occurred and it is common ground that completion was extended to 28 June 2002.

The plaintiff pleads and deposes to, through Mr Sutton, expending over $600,000 in obtaining development approval in respect of the land. By a special condition of the contract if the contract did not proceed, other than by the fault of the defendant, the plaintiff was to deliver all plans and reports et cetera commissioned by it in respect of the land and assign the defendant all the plaintiff's interest in any town planning application.

The plaintiff paid, in accordance with the terms of the contract, $250,000 on 6 September 2001 and $100,000 for the extension to 31 January 2002 which was in part payment of the purchase price.

Mr Sutton is a director of the plaintiff. He has sworn the affidavit of merits. He is a director of Tallenbrook Pty Ltd which had entered into two earlier contracts with the defendant to purchase the land but was unable to complete due to lack of finance. The plaintiff was formed, it seems, as the joint venture vehicle for a group of investors and the defendant agreed to a fresh contract - the subject contract - with the plaintiff.

On 24 June 2002, Mr Sutton told Mr Le Compte, the principal of the defendant, that an extension of time to settle would be needed largely because of an internal dispute amongst the joint venturers and for funding reasons. It was not granted. On 28 June, the due date for completion, the defendant's solicitors sent to the plaintiff's solicitors his amended

calculations of what was due, nominating the place and time for settlement. The solicitor attended. No-one appeared for the plaintiff. When contacted subsequently, Mr McNichol, the plaintiff's then solicitor, said that he had neither funds nor instructions to settle.

On 29 June Mr Sutton and a colleague sought a fresh contract with the defendant to purchase the land which would exclude the plaintiff and the parties with whom they were in internal conflict. Mr Le Compte refused until the issues with the plaintiff were resolved. On 1 July 2002 the defendant's solicitor sent a written notice to remedy default pursuant to section 72 of the Property Law Act. The notice identified the default as the plaintiff's failure to pay the moneys due and payable under the contract on 28 June 2002. The notice required the plaintiff to remedy its default within 30 days after service of the notice by payment of certain sums said to be due under the contract to the defendant's solicitors. The period of 30 days is that nominated by section 72(1) of the Property Law Act and by the relevant Form. Included in sums to be paid to remedy the default was the amount of $2,916.10 being damages for legal costs suffered as a consequence of the default pursuant to clause 9.5 of the general conditions of the contract incurred between 28 June and 1 July 2002.

On 24 July the defendant's solicitors wrote to the plaintiff's solicitor enquiring about settlement on 31 July. On 26 July the plaintiff's solicitors wrote that the plaintiff intended to complete on the 31st. The defendant's solicitor in

response faxed the settlement figures, noted that the defendant had signed the transfer documents and offered to forward them to the plaintiff's solicitors on the usual undertakings.

The plaintiff's solicitors accepted the calculations in a faxed letter of 31 July but whilst acknowledging the defendant's entitlement to the legal costs incurred by virtue of the plaintiff's failure to settle on 28 June was not prepared to settle without formal assessment of those costs. A few hours later the plaintiff's solicitors disputed the calculations in certain respects. Subsequently that day the defendant's solicitors faxed recalculated figures and nominated 4 p.m. and the place for settlement. Mr McNichol then sent a further set of calculations. In a subsequent telephone conversation he told Mr Waddington, the defendant's solicitor, that prospects for settlement were not good and then in writing said that settlement could not be effected for a further 14 days and subsequently sought an extension which was refused.

On 5 August the defendant terminated the contract for failure to settle. On 6 August the plaintiff lodged a caveat over the land. In subsequent correspondence the plaintiff through its then solicitors disputed the defendant's entitlement to terminate relying on the section 72 notice and noted in a letter of 7 August that funds would be in place to complete on 9 August. The following day this date was changed to 12 August and in that and subsequent correspondence settlement

figures proposed. On 12 August the plaintiff's solicitors indicated that the funding approved was for a company associated with Mr Sutton - Restgold Pty Ltd - and not the plaintiff and that completion with the plaintiff would be as "intermediate transferee" having transferred its interest to Restgold.

While the above conveyancing matters were taking place the defendant and Mr Sutton engaged different solicitors to conduct negotiations for a new contract for the purchase of the land between the defendant and Restgold Pty Ltd. A special condition was the lawful termination of the subject contract by 2 August 2002. On 12 August the plaintiff transferred all of its interest in the land to Restgold. Mr Sutton has exhibited correspondence from a financier which might suggest that funding was available to complete a new contract. The defendant declined to enter into a new contract and a claim and statement of claim was filed on 19 September 2002. Thereafter, there have been settlement negotiations between the parties.

The defendant deposes through Mr Le Compte that it wishes to sell to a third party. The plaintiff, through Mr Sutton, deposes and exhibits a full valuation, that the fair market value of the land has increased from $815,000 at contract to $2.4 million and attributes this to its efforts in securing planning approval and an anchor tenant for the development and the like.

The plaintiff claims relief on several grounds:

1. The section 72 notice was invalid in so far as it included an amount of $2,916.10 for legal costs pursuant to clause 9.5 of the general terms of the contract.
2. That the time given to remedy was unreasonably short.
3. If the contract was validly terminated the plaintiff be relieved from forfeiture of its interest in the contract because of its enhancement to the land and expenditure in respect of the land.
4. That it would be unconscionable for the defendant to be enriched by this enhancement to the land.
5. Estoppel by representation that the defendant would settle with the plaintiff.
6. Restitutionary damages due to the increased value of the land.

The plaintiff seeks specific performance of the contract, relief against forfeiture, a declaration that the defendant is estopped from denying the existence of the contract, an injunction if the caveat is not to remain in place preventing the defendant dealing with the land, alternatively damages at common law for breach of contract, alternatively equitable damages. The defendant joins issue with the plaintiff in its defence and counterclaim against the plaintiff for a declaration of lawful termination, damages for moneys due under the contract, the removal of the caveat and sundry ancillary orders and against the guarantors of the performance of the contract the amounts due under the contract.

Dealing then with each of the plaintiff's claims, the subject of the summary judgment application.

Section 72 provides:

> (1) An instalment contract shall not be determinable or determined because of default on the part of the purchaser in payment of any instalment or sum of money (other than a deposit or any part of a deposit) due and payable under the contract until the expiration of a period of 30 days after service upon the purchaser of a notice in the approved form.
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> (2) A purchaser upon whom a notice in the approved form has been served may within the period mentioned in subsection (1) pay or tender to the vendor or the vendor's agent such sum as would have been due and payable under the contract at the date of such payment or tender but for such default (including any sum in respect of which the default was made).
>
> (3) Upon payment or tender under subsection (2) any right or power of the vendor to determine the contract because of the default specified in the notice shall cease and the purchaser shall be deemed not to be in default under the contract.
>
> (4) A notice shall be deemed to be to the like effect of that in the approved form if it is reasonably sufficient fully and fairly to apprise the purchaser of the purchaser's default and of the effect of the purchaser's failure to remedy the default within the time specified in this section."

1. The time to remedy the default is that provided for in section 72 of the Property Law Act and in any event could not be described as unreasonably short in the context. There is nothing in this point.

2. The settlement figures provided on 30 July 2002 were plainly not a further notice of default under section 72.

3. The purpose of the notice of default is to enable a defaulting purchaser, under an instalment contract, to rectify the default by paying within the period nominated "such sum as would have been due and payable under the contract at the date of such payment or tender but for such default". It is unlikely that the clause 9.5 legal costs as damages for default are payable as a sum due and payable within the meaning of section 72. That does not invalidate the notice. The figures in the notice are clear, each amount claimed is described and reasonably sufficiently fully and fairly to appraise the plaintiff of its default which was described as the failure to complete. The correspondence make clear that that was so. There was no attempt to tender or pay any sum due and payable under the contract. There was a valid termination subject to the issue of relief from forfeiture.

4. The issue is whether there was an unconscientious exercise by the defendant of its legal rights under the contract. In Stern v. McArthur 1987-88 165 CLR 489 Deane and Dawson JJ said at 526:

> "In Legione v. Hateley it was said that it is only in exceptional circumstances that orders for relief against forfeiture and specific performance will be made at the instance of a purchaser who is in breach of an essential term: per Gibbs CJ and Murphy J (14); per Mason and Deane JJ (15). Gibbs CJ and Murphy J expressed the view that it was nevertheless open to a court to grant relief to prevent injustice. Mason and Deane JJ said that whether exceptional circumstances exist to justify granting relief will hinge upon the existence of unconscionable conduct. We do not understand there

> to be any significant difference between these two approaches. Moreover, in referring to unconscionable conduct, Mason and Deane JJ were not saying that there must be unconscionable conduct of an exceptional kind before a case for relief can be made out. Rather, what was being said was that a court will be reluctant to interfere with the contractual rights of parties who have chosen to make time of the essence of the contract. The circumstances must be such as to make it plain that it is necessary to intervene to avoid injustice or, what is the same thing, to relieve against unconscionable - or, more accurately, unconscientious - conduct."

In Hill v. Terry (1993) 2 Qd.R 640 McPherson SPJ (as his Honour then was) suggested that the application of general equitable principles of relief against forfeiture is limited by the provisions of section 72 of the Property Law Act. At page 653 his Honour said:

> "Although in terms expressed as a restriction on the vendor's right to rescind, s. 72 of the Property Law Act contemplates that by observing the statutory procedure the vendor succeeds in effectively determining the contract of sale. It is not readily apparent that, given this statutory power, a court of equity could or would prevent its exercise in the manner prescribed; at least the cases in which it might do so might need to satisfy the more stringent test of Mason CJ as to what is exceptional rather than perhaps that of Deane, Dawson and Gaudron JJ in Stern v. McArthur."

Ryan J did not so limit the equitable jurisdiction but did say at 657:

> "...it is clear that relief will not be given unless unconscionable conduct exists on the part of the person asserting his legal right to determine a contract. It is also clear that `a strong case must be made out to warrant departure from the general approach, which held the parties to their bargain' : Stern v. McArthur at 526."

Byrne J agreed with Ryan J's reasons.

In the statement of claim the facts alleged to support the relief against forfeiture are to be found in paragraphs 13-21. But those paragraphs refer to the argument between the solicitors about the legal costs in the notice. That was not relevant conduct. Paragraph 18 of the statement claim begins "in the premises" the plaintiff asked for an extension of 14 days. That is not correct. The correspondence shows that the claim for legal costs had nothing to do with the request for an extension. The funds were not then available to settle the amount due and payable irrespective of the minor amount of the legal costs. Contrary to the pleadings the plaintiff was not, at all material times, ready, willing and able to settle.

The plaintiff's contention is that the defendant has obtained a "windfall" from the plaintiff's efforts to develop the land by obtaining planning approval and pre-commitment from a tenant and that it would be unconscientious to take this benefit. But the plaintiff agreed in special condition 17 to the contract that the defendant should have this benefit. It provided:

> "If for any reason other than default on the part of the Seller this contract does not proceed to completion in accordance with and on the dates specified on Clauses 15 and 16, the Buyer shall deliver to the Seller all plans, drawings and consultants reports obtained or commissioned by the Buyer together with the consents of such parties shall be necessary to permit the Seller to utilise

> such plans and reports for such purpose as the Seller may elect and shall assign to the Seller all rights and interest of the Buyer in any current town planning or building application in respect of the Land."

5. Finally, for this application, the plaintiff contends that the defendant is estopped from asserting that the contract has been validly terminated. The pleading suggests that this is because the defendant's solicitors prepared settlement figures close to the end of the 30 day period of the notice. There is nothing in that point.

Mr Sutton deposes to, as it were, parallel conduct where he or his now solicitors were attempting to negotiate a new contract with Mr Le Compte during the 30 day notice period. Mr Sutton refers to earlier conversations in December which he said led him to believe that Mr Le Compte wanted to settle and would do so. The completion date for the contract was 31 January 2002. The plaintiff was unable to settle then and exercised its right under the contract to extend to 28 June. The $100,000 was not something negotiated in December or January for the extension. It was in the contract and would be part of the purchase price.

The other representation was said to have occurred on 24 June 2002 when a request for an extension was made. Mr Sutton deposes that Mr and Mrs Le Compte were always amenable to an extension provided it was paid for. Clearly, no agreement was

reached and the failure to complete followed by the notice, made the defendant's position clear.

On 29 June the contract with Restgold was proposed. Mr Le Compte would not enter into a new agreement without the resolution of the plaintiff's entitlement under the contract. All Mr Sutton deposes to is that Mr Le Compte said he would work out a settlement but that could not, in the context, have misled Mr Sutton and it is far from clear if it concerned him as a director of Restgold or as a director of the plaintiff.

There is no detrimental reliance alleged because the plaintiff was also bound to settle under the contract unless some new term was agreed. The other claims do not support an order for specific performance, they are for damages.

Accordingly, I am not persuaded that the orders made on 28 February ought to be set aside.

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HER HONOUR: The costs orders that I will make are these, that the plaintiff pay the defendant's costs of and incidental to both applications to be assessed including the costs thrown away on 28 February 2002. All costs to be assessed on the standard basis.

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