



Transcript of Proceedings

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Date: 8 May, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 4996 of 2002

ALAN MURRAY SWAN

Plaintiff

and

56 MANNING PTY LTD
(ACN 096 652 676)

Defendant

BRISBANE

..DATE 22/04/2003

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HER HONOUR: The plaintiff claims specific performance of a contract between him as purchaser and the defendant as vendor in relation to a parcel of land of 455 square metres at 56 Manning Street, South Brisbane.

The contract was executed by the plaintiff on 19 March 2002 and by the defendant on 22 March 2002. It is in standard REIQ/QLS 4th Edition for Houses and Land form. The agent was Michael Innis Real Estate. The contract price was \$350,000.

A deposit was payable in two tranches - \$2,000 on the plaintiff/purchaser's signing the contract and \$8,000 "on finance approval". The deposit holder was Michael Innis Real Estate Trust Account.

The contract was subject to finance, the finance amount being \$200,000 and the financier being the National Australia Bank. The date by which approval of finance was to be advised was ten days from the contract date. Having regard to public holidays, et cetera, it was common ground that that date was 2 April 2002. The settlement date was 28 April 2002.

There is a factual dispute as to whether notice of finance approval was given in accordance with the contract on 2 April 2002. The significance of this is to be found in clause 3 which provides:

"Finance

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3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.

3.2 The Buyer must give notice to the Seller that:

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(1) approval has not been obtained by the Finance Date and the contract is terminated; or

(2) the finance condition has been either satisfied or waived by the Buyer.

3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5 p.m. on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.

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3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to terminate this contract under clause 3.2(1) or waive the benefit of this clause 3 by giving written notice to the Seller of the waiver."

By clause 10 notices were to be given in writing. They might be sent by fax to the facsimile number of the other party or its solicitor, in which case they would be treated as given when the sender obtained a clear transmission report.

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"10.4 Notices

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(1) Notices under this contract must be in writing and may be given by a party's solicitor.

(2) Notices are effectively given if:

(b) sent to the facsimile number of the other party or its solicitors.

(4) Notices sent by facsimile will be treated as given when the sender obtains a clear transmission report."

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Time was of the essence of the contract.

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"6. Time

6.1 Time is of the essence of this contract, except regarding any agreement between the parties on a time of day for settlement."

On 3 April 2002, the defendant vendor's solicitors sent a facsimile in the following terms to the plaintiff purchaser's solicitors:

"We note that no notice (in accordance with clause 10.4 of the contract) has been given to the seller in accordance with clause 3.2 of the contract.

In accordance with clause 3.3 of the contract the seller terminates the contract.

The agent is authorised to release the deposit to the buyer."

The plaintiff's solicitors replied:

"We refer to your fax today and advise that notification of finance approval was faxed to your office yesterday.

We enclose a copy of our fax.

Accordingly our client does not accept that you have the right to terminate the contract."

So the dispute turns upon whether the notice was indeed faxed on 2 April 2002. The Court heard oral evidence from Mr Amarandos, who was the plaintiff's solicitor at the time. 2 April 2002 was the Tuesday after Easter. He said he had taken work home over the long weekend and that on Easter Monday (1 April), he had handwritten a fax in the following terms:

"To: Poulos

PAGES:

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FAX: 3255 2424

YOUR REF: Alex Poulos

DATE: 2 April 2002

RE: SWAN purchase from 56 Manning Pty Ltd

MESSAGE:

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We refer to the above and confirm that the buyers finance has been approved in accordance with the terms of the Contract.

Yours faithfully
AMARANDOS & COMPANY"

The next morning he had taken it into the office. The fax machine was located behind his receptionist's desk. It was a Sharp 350 fax machine. He had nine or ten faxes to send. He said he put this fax into the in tray, dialled the fax number of the solicitors for the defendant and walked away attending to other matters.

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He walked back and saw the document facing flat down. He assumed it had gone through the machine. He impressed it with a rubber stamp "faxed 2 Apr 2002".

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The defendant's solicitors have always said they did not receive the fax. Mr Poulos, the principal of that firm of solicitors and also a director of the defendant, gave sworn evidence to this effect.

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Certain Telstra records were put in evidence. The first was a statement of call details on the plaintiff's solicitors' fax number. The document had been provided by Telstra to those

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solicitors. It showed all outgoing calls on that line. There was no call shown to the defendant's solicitors' fax number on 2 April 2002.

Then there was a Telstra call log of outgoing calls on the plaintiff's solicitors' fax line on 2 April 2002. Again, no call to the fax number of the defendant's solicitors' fax line was shown.

Also in evidence were records of the defendant's solicitors - transmission activity reports on their fax machine for 2 April 2002. No call was received from or sent to the fax number of the plaintiff's solicitors.

No transmission activity reports were generated by the plaintiff's solicitors' fax machine. Whether the machine did not have that capacity or whether it was not set to generate the reports was not established.

I am satisfied that the fax was not sent on 2 April 2002. Mr Amarandos did not say he saw it go through the fax machine and none of the call records show it as having been sent.

On 2 April 2002, the plaintiff orally told Mr Iconomidis of Michael Innis Real Estate that finance had been approved and he paid the second tranche of the deposit of \$8,000. Mr Iconomidis signed a Michael Innis Real Estate Trust Account receipt for it.

Michael Innis Real Estate was not the agent of the defendant vendor to receive notice that finance had been approved. By a document dated 18 February 2002 that firm was appointed as a real estate agent by the defendant vendor for the sale of the property. The list price was to be \$350,000. No conditions, limitations or restrictions were placed on the performance of the service. Commission was to be payable on completion of the sale. In fact, all negotiations were conducted by Mr Iconomidis, and the plaintiff and Mr Poulos never met.

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By the contract, both parties appointed Michael Innis Real Estate Trust Account as deposit holder, that is as stakeholder. This should be interpreted as the appointment of the trustee of that account as the stakeholder.

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The second tranche of the deposit (\$8,000) was paid to the stakeholder and not to the defendant vendor's agent. Neither the fact that it was payable on the finance approval date nor the fact that the plaintiff purchaser could have terminated the contract or alternatively could have waived the benefit of that condition had finance not been approved bears on the capacity in which Michael Innis Real Estate received the deposit. Nor does it support an argument that Michael Innis Real Estate was the defendant vendor's agent to receive notice of finance approval or amount to a representation that notice to Michael Innis Real Estate would suffice.

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Michael Innis Real Estate had no express authority to receive such notice. No such authority was implied in its authority

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to sell. It had no ostensible authority to receive the notice as there was no holding out by the defendant vendor to that effect.

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There is no evidence that the plaintiff was induced not to give notice in accordance with the contract by any representation that notice to Michael Innis Real Estate would suffice. To the contrary, the evidence of Mr Amarandos was that his instructions were that finance had been approved and he was to give notice in accordance with the contract. That notice was not given in accordance with the contract was the result of Mr Amarandos' failure to send the fax on 2 April 2002.

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There is no evidence of unconscionable conduct on the part of the defendant vendor.

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In the circumstances, the plaintiff's claim must be dismissed.

Now, there are questions of the form of the order, costs and costs reserved by the Chief Justice in proceeding S9701/02.

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I said I would receive written submissions on those. When is a convenient date by which they can be available?

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HER HONOUR: Well, unless I hear to the contrary, I will ask that both sides prepare written submissions and send them to

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my associate by 4 p.m. on Friday the 2nd of May. They can be
faxed, 3221 7565.

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