



Transcript of Proceedings

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Date: 27 August, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No 6973 of 2003

GRAPESEED OIL AUSTRALIA PTY LTD

Applicant

and

SAMGOH DEVELOPMENTS PTY LTD

Respondent

BRISBANE

..DATE 14/08/2003

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.

HIS HONOUR: This is an application to remove a caveat lodged over property at 84 Brunswick Street, Fortitude Valley.

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The caveat claims an interest as a purchaser under a contract said to have been made on the 10th of July 2003.

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The contract is said to be in terms of a form of contract signed by the vendor and sent by the vendor's agent by fax to the purchaser on 10 July.

The vendor's agent said in that fax:

"The vendor has signed the contract but made it 30 days and reinstated the clauses you crossed out. By the time on Friday, 11/7/03 you receive the surveyor's report, two weeks have already passed. Please initial the contract ASAP and fax back to me. You can then sign and initial the original and return it to me by overnight post."

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The matter of the surveyor's report is something which will be discussed below, but in response to that fax, it is common ground that the purchaser did not, as requested, fax back to the vendor's agent the signed contract.

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The caveator says that the contract was, however, then signed and posted. That is one of the facts in dispute in this case because the vendor's agent denies receiving that contract in the post and the circumstances which I shall mention strongly indicate that the contract was not so received by the agent.

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The caveator's case is that there was a critical conversation between Mr Rahim, representing the caveator, and the real estate agents representing the vendor between receipt of the

agent's fax of the 10th of July and when Mr Rahim says the contract was signed for the purchaser and posted that night.

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According to an affidavit of Mr Rahim:

"In that telephone conversation I informed (the agents) that once I had a satisfactory survey report, I was happy to go ahead with the contract. I recall that (the agent) agreed to give me seven business days to obtain a survey report. I was of the belief that the agreement prevented the vendor from selling the property to another party within that time."

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The caveator's case on any view then is that there was no unconditional contract made by the posting of a contract signed on behalf of the purchaser on the 10th of July, assuming for the moment that that posting occurred.

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Accepting for the moment that there was a conversation as Mr Rahim has sworn, it seems to me that the case could be characterised in one of two ways.

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On one view, the purchaser was making a counter-offer, that is, it was agreeing to the bound as and from the 10th of July, but on condition of a satisfactory survey report, that is, pursuant to a condition precedent to performance of the contract, as distinct from precedent to the existence of a contract. If so, it is clear that such a counter-offer was not accepted by the vendor.

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An alternative view is that by this conversation and the subsequent posting of the contract, the caveator was neither accepting nor expressly rejecting the vendor's offer, in which

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case, of course, contrary to the caveator's case, no contract was made on the 10th of July.

There is, however, an alternative case that emerges from the evidence which requires discussion. That case is to the effect that the caveator on 17 July, by a fax sent that day, did accept what it would allege was still the outstanding offer from the vendor.

On the 17 of July, Mr Rahim sent a fax to the vendor's agents in these terms:

"We have received our survey report and are happy to inform you we are proceeding as per our agreement. The contract will be in the name of Samgoh Developments and our solicitors working on this are MPN Lawyers. Should you have any further queries please do not hesitate to contact myself . . or Michael Newell at MPN Lawyers . ."

The caveator had paid an amount in the nature of the deposit on the 8th of July 2003, but clearly in circumstances where it was saying that there was no agreement then made. Instead the deposit was referred to in a fax of 8 July from Mr Rahim to the agents in these terms:

"As agreed, we are depositing \$35,000 into your trust account representing the deposit for the purchase of above property - 84 Brunswick Street, Fortitude Valley. Please note that this deposit shall be subject to receiving a satisfactory survey report and a detailed architectural report within seven business days."

The evidence then makes it clear that the purchaser did not wish to be unconditionally bound until there had been a satisfactory survey report. Mr Rahim's own evidence of the

10 July conversation, which he said he had with the agents,
again makes that clear.

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It is therefore somewhat difficult to understand why, as Mr
Rahim says he did, he was nevertheless prepared to sign a
contract on 10 July in terms making no reference to a
satisfactory survey and why he was also prepared to post that
contract back to the agents as he swears that he did. It is
also difficult to understand why, at the same time, he did not
do what was requested which was to fax back to the agent what
he says was the signed contract. Further, there is a
difficulty in reconciling the terms of his fax of 17 July with
what he says he did on 10 July.

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Between the 10th and the 17th the vendor's agent swears that
he sent a further fax to Mr Rahim, this time on 14 July. The
fax is exhibited to the agent's affidavit and its coversheet
said as follows:

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"On 10/7/03 I faxed you the amended contract where the
seller has made it 30 days and reinstated the clauses you
crossed out. Please initial the contract as the six
weeks originally requested has been granted. I attach
the fax and contract sent to you on 10/7/03."

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Now, Mr Rahim denies receiving this fax and so that is a
further factual matter in dispute. It seems, however,
relatively likely that the fax was sent. There seems to be no
reason why the agents would fabricate that fax especially as
it might, on one view, provide some support for an argument
for the caveator that by that fax the vendor made a further
offer capable of acceptance by the caveator on 17 July. There

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is of course another possibility which is that the agents believe they sent the fax but that for some reason it was not successfully transmitted.

The remaining argument then, as I have indicated, which might support this caveat, is that there was an acceptance by Mr Rahim's fax of 17 July of some offer made by the vendor either by the agent's fax of 10 July or by the subsequent fax of 14 July. It is difficult for the caveator to rely upon that subsequent fax as Mr Rahim denies receiving it. The caveator's case therefore would have to come down to an alleged acceptance on 17 July of the fax of 10 July.

The caveator does not appear to have an especially strong basis for a case to that effect, one reason being that the fax of 17 July is not in terms consistent with an intention to then conclude a binding agreement. Instead, it is in terms which are more consistent with an intention to be bound when contract documents were prepared and signed. It makes no reference to a contract in terms of the drafts which had been sent by the agent and which carried the vendor's signature.

Ultimately, it might be however a case for the caveator which could be described as a serious case to be tried but it is a comparatively weak case and that is a matter which is of some importance in consideration of questions of the balance of convenience to which I now turn.

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The caveator did, as I mentioned, initially pay a deposit. The evidence is, however, that the vendor's agents returned the deposit to the caveator and it has been banked. It may be that this was done within the caveator's office without Mr Rahim knowing of that and without his intending to receive back the deposit but the fact is that the vendor is presently unprotected by any deposit paid under the contract for which the caveator contends.

The caveator is said to be a company with a nett worth of \$1.2 million but this evidence is in the most general of terms. It is not sworn to by Mr Rahim himself although Mr Rahim has sworn two affidavits for these proceedings. The assertion of that nett worth is not in any way supported by other evidence and in particular any evidence of accounts. For present purposes, therefore, it has very little weight.

The matter of particular importance for the balance of convenience is that the applicant has entered into an unconditional contract for the sale of the property to another party which is due for settlement next week.

There is no suggestion that the other purchaser was aware of what the caveator says is its entitlement to purchase the property, when that contract was made on or about 17 July. If the caveat is not removed there is at least a potential for the applicant to lose the benefit of that contract but also for that other purchaser to be affected by the loss of its purchase or, alternatively, some period of considerable delay

whilst the dispute between the present parties is resolved by
litigation.

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Having regard to those circumstances, and what I have
described as a comparatively weak case for the caveator, I
have concluded that the balance of convenience favours the
removal of the caveat. Accordingly, the orders will be that
the caveat lodged by the respondent be removed forthwith.

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HIS HONOUR: As to costs, Mr Sweeney for the caveator points
out that there could be some unfairness to his side in the
event that, in proceedings yet to be commenced by the
caveator, it is ultimately established that there was a
contract and that the applicant is in breach of it.

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However, it seems to me that the considerations relevant to
the present proceeding are, in many respects, different from
those which will be involved in any action commenced by the
respondent. There is of course some force in what Mr Sweeney
says but this application has been concerned with, amongst
others, issues relating to the balance of convenience upon
which the applicant has ultimately succeeded and which are not
issues which will arise in any proceedings brought by the
respondent.

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It is also of some relevance that the respondent has not yet commenced those proceedings and has not given instructions to its lawyers to undertake to do so.

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In the circumstances, I order the respondent to pay the applicant's costs of this application to be assessed.

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