



Transcript of Proceedings

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State Reporting Bureau
Date: 4 December, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No BS9541 of 2003

BAROOGA PROJECTS (INVESTMENTS) PTY
LTD (ACN 068 115 426) AS TRUSTEE

Applicant

and

KEITH WILLIAM DUNCAN

Respondent

BRISBANE

..DATE 26/11/2003

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 amended application under s.70 of the Property Law Act 1974 by the purchaser of 4.36 hectares of land at 77 Swann Road, Bellmere, Queensland, under a contract in writing dated 10 February 2003 for a declaration that the vendor, the respondent to the application, is obliged to complete the conveyance of the land on or before 5 December 2003.

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The contract includes, in annexure A, seven special conditions, the first six of which concern a "development" of the land by subdivision into residential allotments of various sizes. Special condition 3 in annexure A, so far as it is relevant, provides that the vendor acknowledges that the development will be subject to the Caboolture Shire Council's "issuing conditions" and that "those conditions must be satisfactory in every respect" to the purchaser. Special condition 6 in annexure A concerns completion of the contract:

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"6. COMPLETION:

Settlement of this Contract will take place one hundred and eighty (180) days of the date hereof or within thirty (30) days of notification from the buyer that it is in receipt of acceptable conditions of approval, whichever is the later."

Clause 6 of the contract provides that time is of the essence of the contract, except regarding any agreement between the parties on the time of day for settlement.

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It was not in dispute before me that since no time limit was fixed in the contract for satisfying the requirement of

special condition 3 satisfaction within a reasonable time was to be implied: Perri v. Coolangatta Investments Pty Ltd (1982) 149 C.L.R. 537, at p.543 per Gibbs C.J., and at p.567 per Brennan J, with whom Stephen J agreed. It was not in dispute either that I should decide this application on the assumption that a reasonable time had expired by 26 September 2003.

Prior to 26 September 2003 correspondence had passed between the solicitors for the parties concerning special condition 3, the details of which are not relevant to the issues before me. On 26 September 2003 the vendor's solicitors sent a letter to the purchaser's solicitors which, omitting formal parts, was as follows:

"We refer to previous correspondence.

We note that the subject contract does not specify a date by which the balance of the development conditions are to be complied with.

We note further that Special Condition 6 provides:

COMPLETION

Settlement of this Contract will take place one hundred and eighty (180) days of (sic) the date hereof or within thirty (30) days of notification from the buyer that it is in receipt of acceptable conditions of approval, whichever is the later.

We note further that the period of one hundred and eighty (180) days has elapsed some time ago and no notification regarding the conditions of approval has been received by our client.

In the absence of a specified date, the law implies a reasonable time in which the buyer is to obtain acceptable conditions of approval.

Our client considers that a reasonable time has now elapsed.

We now give you formal notice on behalf of the seller that he requires the buyer to settle this contract within twenty-one (21) days of the date hereof, that is, by 5.00 p.m. on Friday, 17 October 2003, failing which he specifically reserves his rights as a consequence of the buyer's failure to settle."

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The demand for settlement on 17 October 2003 was repeated in a further letter from the vendor's solicitors to the purchaser's solicitors dated 16 October 2003 in which the former confirmed that the vendor was ready, willing, and able to settle.

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The settlement did not take place on 17 October 2003. On 24 October 2003 the purchaser's application was filed seeking a declaration that it was not required to complete the purchase of the land by 17 October 2003, the purchaser's contention being - as set out in letters dated 8 October 2003, 17 October 2003, and 20 October 2003 from its solicitors to the vendor's solicitors - that a reasonable time had not then elapsed for the satisfaction of special condition 3 and that the shire council had not issued satisfactory, or any, conditions.

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On 5 November 2003 the purchaser's solicitors sent this letter to the vendor's solicitors:

"We refer to previous correspondence in relation to this matter and advise that our client has instructed us that the Caboolture Shire Council has issued conditions for the development and that those conditions are satisfactory to the buyer.

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The conditions were issued on our instructions on 4 November 2003 and the purpose of this letter is to formally notify you of our client's satisfaction with the conditions.

Our client has therefore indicated that it is now prepared and ready to settle within the 30 day period and

in fact is prepared to settle rather more quickly than that if such is acceptable to your client.

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Our client nominates settlement to take place on Wednesday, 19 November 2003 at a mutually convenient time to be fixed between us.

We would appreciate your urgent response confirming that this is satisfactory to your client.

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Once you confirm that your client is prepared and ready to settle then our client will take steps to discontinue the proceedings in the Supreme Court. We suggest that be done at this stage on the basis that there be no order as to costs.

We await your urgent response."

The vendor's response was in a letter from his solicitors dated 10 November 2003:

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"We refer to our letters of 26 September 2003 and 16 October 2003.

We note that your client failed to settle as required by 17 October 2003.

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The contract is therefore terminated.

Our client otherwise reserves his rights generally."

Special condition 3 was clearly enough a contingent and not a promissory condition, included in the contract for the benefit of the purchaser. It made the contract voidable. The contract could have been avoided at the instance of either party once a reasonable time for satisfying the requirement had expired, but neither party need have done so; and, the contract still being on foot, if one party having a right to avoid it did not clearly exercise that right it was open to the other party to enforce the contract against the former: Suttor v. Gundowda Pty Ltd (1950) 81 C.L.R 418 at pp.440-442.

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Further, once a party became entitled to elect for or against rescinding the contract any act done by the party and consistent only with the continuance of the contract on foot would constitute an election against rescinding and an election once made could not be retracted. A party in such a case is not bound to elect at once. The party might keep the question open so long as that party did nothing to affirm the contract and so long as the other party's position was not prejudiced in consequence of the delay: Tropical Traders Ltd v. Goonan (1964) 111 C.L.R. 41, at p.55 per Kitto J.

The outcome of this application depends chiefly upon the construction to be put upon the vendor's solicitors' letter of 26 September 2003. For the purchaser it was contended that it was an irrevocable election to affirm the contract notwithstanding the assumed expiration of the reasonable time implied in special condition 3. On behalf of the vendor it was submitted that the letter should not be construed as electing to terminate the contract but rather as keeping the question open while at the same time giving the purchaser the opportunity to complete on 17 October 2003. It was not necessary that the vendor give a notice calling on the purchaser to complete: Perri v. Coolangatta Investments Pty Ltd at p.546 per Gibbs CJ. Although it was not necessary to give such a notice it would follow from the argument advanced for the vendor that it was open to the vendor to do so and that in doing so the vendor was not electing to keep the contract on foot.

In my view it simply is not possible to reach the conclusion
contended for on behalf of the vendor. He could not, in the
circumstances in which he was placed, on the one hand call for
completion of the contract and on the other refrain from
affirming it without a carefully-worded explicit reservation
of his right to rescind on the ground that the reasonable time
implied in the contract for the satisfaction of special
condition 3 had expired. The last paragraph of the vendor's
solicitors' letter does not do more, I think, than notify the
purchaser that failure to settle on 17 October would be
treated by the vendor as a repudiation of the contract by the
purchaser.

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Three conclusions follow from that.

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First, the contract was still on foot on 5 November 2003 when
the purchaser, through its solicitors, notified the vendor
that it was ready to settle on or before 5 December. In the
letter the purchaser indicated that the shire council had
issued conditions satisfactory to it. Before me, it was
conceded on behalf of the purchaser that although the
purchaser had been notified informally of the issuing of the
conditions the formal issuing had not taken place. In any
event the letter of 5 November may be construed as making it
clear either that the special condition 3 had been satisfied
or that the purchaser waived reliance on it.

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Secondly, on 26 September the vendor made an election which
could not be retracted so that it was not open to him after

that to treat the contract as at an end on the ground that special condition 3 had not been satisfied.

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Thirdly, the contract still being on foot on 5 November 2003 special condition 6 applied once - as happened - the purchaser gave its notification of satisfaction or waiver. It was then entitled to require settlement within thirty days.

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The purchaser is entitled to the relief it seeks.

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HIS HONOUR: The declaration will be that the respondent is obliged to complete the conveyance, the subject of the contract dated 10 February 2003, a copy of which is Exhibit MHWA1 to the affidavit of Malcolm Henry William Allsopp filed on 24 October 2003, on or before 5 December 2003.

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HIS HONOUR: I order that the respondent pay to the applicant its costs of and incidental to the application to be assessed.

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