



## Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

REVISED COPIES ISSUED  
State Reporting Bureau  
Date: 7 October, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No BS8317 of 2004

A J SWEENEY PTY LTD (ACN 009 842 479) Plaintiff

and

T W HEDLEY PTY LTD (ACN 010 330 515) Defendant

BRISBANE

..DATE 05/10/2004

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: This is an originating application seeking declarations about two contracts between the applicant as the vendor and the respondent as the purchaser in respect of two hotels, the Grand Hotel and Torres Hotel, both located on Thursday Island.

1  
10

The applicant purported to terminate the contracts (if they existed) or asserted that no contracts ever came into existence and, as a result, the respondent has lodged caveats against the titles of the relevant properties.

20

When the matter came on for determination of the issues today, it was conceded by Mr Hackett of counsel on behalf of the applicant, that there was a triable issue in respect of whether or not the contracts of sale came into existence. The point that was argued before me was whether or not this was an appropriate case to determine summarily as to whether the contracts had been terminated by the applicant in a way and in circumstances that did not give the respondent any opportunity to seek relief against that termination.

30  
40

On the assumption that the contracts came into existence, the contracts were finalised by the parties on or about 24 June 2004. The deposits were due, under each of the contracts, to be paid immediately upon formation of the relevant contract. It is common ground that through error on the part of one of the employees of the respondent, the deposits were not paid when required under the contract.

50

It appears that bank guarantees for the deposits were not provided by the respondent to the applicant's agent until 26 July 2004. It also appears that the director of the applicant was not aware of the non-payment of the deposits until after he was notified that the bank guarantees had been provided on 26 July 2004.

By letter from the applicant's solicitor dated 3 August 2004, it was asserted that if the contracts did exist, the deposits were not paid in accordance with their terms and that the applicant was entitled to deal with the properties as it chose. The letter of 3 August 2004 is relied upon by the applicant as a letter terminating the contracts, if there was an entitlement to terminate, for non-payment of the deposit in accordance with the terms of each of the contracts.

Mr Amerena of counsel, who appears for the respondent, fairly conceded that the respondent was not relying upon any delay by the applicant in terminating the contracts for non-payment of deposit as amounting to waiver of the right to terminate the contracts. In addition, because of the time delays caused by the applicant's director residing in Thursday Island and the need to consult with the solicitors retained for the applicant in Brisbane, no point is taken that the letter of 3 August 2004 was not a timely termination of the contracts, if there was a right to terminate for late payment of the deposits.

The argument that took place before me was whether or not there was any unconscientiousness on the part of the applicant

that gave the respondent the right to seek relief against the  
action taken by the applicant in purporting to terminate the  
contracts in accordance with the principles that have been  
discussed most recently by the High Court in Tanwar  
Enterprises Pty Ltd v. Cauchi (2003) 77 ALJR 1853.

The majority judgment in that case confirms the importance of  
obligations undertaken by parties to a contract where time is  
of the essence. Reference is made in the majority judgment to  
the circumstances where a Court may relieve a defaulting  
purchaser against forfeiture where time is of the essence, but  
that a purchaser must show exceptional circumstances to  
attract the intervention of equity. The circumstances must be  
such that it is necessary for equity to intervene to relieve  
against unconscientious conduct by the vendor to terminate the  
sale and circumstances where equity will intervene included  
where the default on the part of the purchaser was caused by  
fraud, accident, mistake or surprise.

The unconscientiousness that is relied upon by the respondent  
against the applicant is that the applicant is seeking to  
exercise the right to terminate for a purpose for which it is  
said that right was not conferred. The purpose for which the  
respondent points to as being an ulterior purpose on the part  
of the applicant is that the applicant has entered into  
contracts to sell the properties at a higher price.

My reading of the majority judgment in Tanwar Enterprises Pty  
Ltd v. Cauchi is that the unconscientiousness that a Court

must look for is unconscientiousness of conduct on the part of the vendor vis a vis the purchaser. The reason that a vendor might insist on exercising the rights given by a contract is that it may realise that it can resell at a higher price. That is merely an explanation for why the vendor decides to rely on the rights given to the vendor by the terms of the contract to which both parties have agreed.

That does not necessarily equate with an ulterior purpose that amounts to unconscientiousness on the part of a vendor in the equitable sense.

Mr Amerena relies on the dissenting judgment of Jacobs J in Brien v Dwyer (1978) 148 CLR 379 at 402-404. His Honour raised the point of whether it is unconscientious to allow a vendor to terminate for late payment of the deposit after the deposit has been paid when the purpose for which a deposit is required to be paid is no longer served by allowing termination at the point in time after the breach has been cured by the defaulting purchaser.

In view, however, of the clear restatement of the law concerning reliance on the legal rights conferred on a vendor to a contract for the sale of the real property in Tanwar Enterprises Pty Ltd v Cauchi, I do not find the dicta of Jacobs J helpful in determining, in this matter, that there has been any unconscientiousness on the part of the applicant in deciding to rely on its rights conferred by the contracts. Mr Amerena frankly conceded that he could not point to any

unconscientiousness on the part of the applicant of the nature that is described in Tanwar Enterprises Pty Ltd v Cauchi as justifying the intervention of equity in favour of a defaulting purchaser.

Another argument was relied on by Mr Amerena. He relied on the implication of the duty of good faith in performing obligations and exercising rights under a commercial contract. He made reference to the dicta of Sheller JA in Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349 at 368. There is considerable discussion in New South Wales authorities and in the academic literature on this implied duty of good faith. Mr Amerena has been unable to find any decision in Queensland where the implication of such a duty has been found in a real estate contract and where that duty has been invoked to preclude a vendor relying on the right to terminate for failure of a purchaser to perform an obligation under the contract where time was of the essence.

I find it difficult to see how such a duty could be implied in the contracts in this case in the light of the statements of the law of contract and when equity will intervene to relieve a defaulting purchaser in respect of the performance of an obligation where time was of the essence, as set out in Tanwar Enterprises Pty Ltd v Cauchi. I therefore am satisfied that it is appropriate to determine this application on a summary basis because the point of law in favour of the applicant, on the assumption that the contracts did come into existence, is so clear.

The orders I make are:

1. I declare that any contracts that came into existence between the applicant and the respondent on or about 24 June 2004 in respect of the sale of the Grand Hotel and the Torres Hotel were terminated by the applicant on or about 3 August 2004, for failure of the respondent to pay the deposits in accordance with the terms of the contracts. 10
2. Pursuant to section 127 of the Land Title Act 1994, the caveat numbered 707936095 on Lots 2 and 3 RP 716029, County: Torres, Parish: Port Kennedy, Title References 20803078 and 20803079 and Lot 705 on CPT 2071, County: Torres, Parish: Port Kennedy, Title Reference 20232245 be removed. 20 30
3. Pursuant to section 127 of the Land Title Act 1994, the caveat numbered 707936089 on Lot 605 on CPT 2071, County: Torres, Parish: Port Kennedy, Reference 21023109 be removed. 40
4. That orders 2 and 3 be stayed for 14 days.
5. The respondent pay the applicant's costs of the application to be assessed. 50

...

-----