[2004] QSC 394

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Transcript of Proceedings

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State Reporting Bureau
Date: 27 October, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 9225 of 2003

VERONICA LOUIS	Plaintiff
and	
DIAMOND HILL ESTATE PTY LTD ACN 101 793 122	Defendant
And	
ELYON GROUP PTY LTD ACN 095 232 134	First Defendant by Counterclaim

BRISBANE

..DATE 18/10/2004

JUDGMENT

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HER HONOUR: The defendant has brought an application seeking removal of a caveat placed on the title of certain land by the plaintiff.

Elyon Group Pty Ltd was the developer of certain land known as the Diamond Hill Estate near Coomera. Elyon Group Pty Ltd has been joined as first defendant by counterclaim by the defendant, the reasons for which need not concern this application.

Elyon contracted with the plaintiff on the 15th August 2002 to sell lot 110 in the development and to build a residence on it for the price of $240,000. The contract of sale provided for a settlement date 14 days after Elyon's lawyers gave notice to the plaintiff or her lawyers that the subdivision plan was registered. The subdivision plan was registered on the 6th June 2003.

Elyon contracted with the defendant to purchase the undeveloped part of the Diamond Hill Estate in or about September 2002. On 15 October 2002, the defendant's solicitors sent a pro forma deed of assignment to the plaintiff's now solicitors then acting for Elyon for each individual contract for the sale of lots including lot 110.

This was returned, including a notation that there was an $80,000 credit for the purchaser, that is, the plaintiff. A deed of assignment was entered into by Elyon and the defendant in December 2002. On 6 December 2002, the defendant's

solicitors acknowledged that the contract for lot 110 had been assigned to it.

In December 2002 after Elyon had ceased to be the seller of lot 110, the plaintiff's present solicitors received instructions to act for the plaintiff. On 8 May 2003, the defendant's solicitors told the plaintiff's solicitor that the defendant would not be completing the agreement for the sale of lot 110, said to be due to misrepresentations made by Elyon. As mentioned, the plan of subdivision was registered on behalf of the defendant by the 5th June 2003.

The plaintiff's solicitors lodged the settlement notice with the Department of Natural Resources. It had 60 days to run and at the expiry the plaintiff lodged a caveat since settlement had not been effected.

The defendant served a Section 126 Land Titles Act notice on the plaintiff and proceedings were commenced within 14 days. Mr Clark, who appears for the defendant, makes three points for the removal of the caveat. The first is that the caveat is defective in that the deed of assignment is incompletely identified. This point is without merit.

The second point is that the plaintiff's case is weak because the contract is unenforceable for uncertainty. The uncertainty lies in the description of the dwelling to be erected on the land and in the location of lot 110. These are

matters about which the plaintiff seeks rectification in the proceedings.

The contract identifies dwelling type M or H. There is no such type in the schedule. The plaintiff contends that type D with additional rumpus room was contracted for.

The defendant's solicitor in his affidavit of the 21st January 2004 in paragraph 3 deposes that an officer of the defendant company told him that the dwelling was as contended for by the plaintiff. This was known by the defendant when the deed of assignment was entered into.

A consideration of the material, including the extensive correspondence with the defendant's solicitors indicates that no confusion was ever in the mind of the defendant about the location of lot 110. The defendant contends that it was in some way misled by the plaintiff over the $80,000 credit. There is nothing to support this. Indeed the thrust of the correspondence is that the defendant well knew of this credit since the assignment.

There is clearly a question to be tried, but there is little to support the contention that the plaintiff has a weak case.

The third point is that the rectification is unlikely to be granted because the defendant is a third party.

The principles are not in doubt. See particularly GPI Leisure Corporation Ltd v. Herdsman Investments Pty Ltd number 4, BC9002121, unreported decision of Young J, New South Wales Supreme Court number 4199 of 1989, a case to which Mr Clarke drew my attention. The key issue here is knowledge by the third party, that is, the defendant.

The material would suggest that the defendant was aware of the particulars that the plaintiff seeks to have inserted prior to the assignment. Accordingly it cannot be said that there are poor prospects of success on the rectification issue.

There is nothing to suggest that the balance of convenience would best be served by removing the caveat so that the defendant would be free to deal with the land. The plaintiff is desirous of having the land she contracted to buy and she seeks an order for specific performance. As the chronology to which I have referred makes clear, there has been no delay on the part of the plaintiff such as would disentitle her to seek an order of that kind.

Accordingly I dismiss the application to remove the caveat.

What do you want to do about the costs, Ms Magee?

MS MAGEE: I'd ask for an order that the defendant pay the plaintiff's costs of the application on a standard basis to be assessed.

HER HONOUR: Yes, thank you. Mr Clarke?

MR CLARKE: We're in your Honour's hands.

HER HONOUR: Since the application to remove the caveat has been unsuccessful, it therefore follows in the absence of any submissions as to why I should not make an order, that I order that the applicant/defendant pay the respondent/plaintiff's costs of and incidental to the application to be assessed on the standard basis.

MR CLARKE: Could I ask you, your Honour - the plaintiffs have yet to conclude disclosure. Can I ask you to make a direction about disclosure?

HIS HONOUR: Is there any problem about completing disclosure, or do you have no instructions on that, Ms Magee?

MS MAGEE: I have no instructions. It hasn't been raised with me by my learned friend until now. I'm not in a position to-----

HER HONOUR: Has your solicitor written a letter about it, Mr Clarke?

MR CLARKE: No, your Honour, we haven't as yet.

HER HONOUR: Well, there's a procedure in the Rules for dealing with that.

MR CLARKE: Thank you, your Honour.

HER HONOUR: Thank you. Thank you for your assistance.
