

SUPREME COURT OF QUEENSLAND

CITATION: *Latimore Pty Ltd v Lloyd* [2020] QSC 136

PARTIES: **LATIMORE PTY LTD ACN 159 967 852**
(Applicant)
v
PETER GEORGE LLOYD
(First Respondent)
and
TESSA THERESA LLOYD
(Second Respondent)

FILE NO/S: BS No 4767 of 2020

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 27 May 2020

DELIVERED AT: Brisbane

HEARING DATE: 19 May 2020

JUDGE: Bowskill J

ORDER: **Declaration and orders for specific performance of the contract dated 22 February 2020 will be made, as set out in paragraph [32] below, subject to confirming the date in order 3.**

CATCHWORDS: CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – OTHER PARTICULAR CONDITIONS – where a contract for the sale of real property included a special condition requiring the Seller to provide a Pool Safety Certificate to the Buyer “7 days prior to Settlement” – where the Buyer purported to terminate the contract at 5.03 pm on the relevant day, on the basis that the Seller had breached the special condition – where the Seller provided the Certificate at 6.31 pm on the relevant day – where there is a dispute as to the proper construction of the special condition – where the Seller relies upon the principle that where a contract specifies a date by which something is to occur, satisfaction of the obligation can occur at any time on that day – where the Buyer contends the general notice provision of the contract applied to the special condition, so as to require the Certificate to be provided by 5 pm, failing which it would be treated as provided at 9 am the following day – alternatively, whether the time period under the special condition was properly construed as seven consecutive time periods of 24 hours prior to the event of settlement – whether the Buyer was entitled to terminate the contract

Afovos Shipping Co SA v Pagnan [1983] 1 WLR 195
Aussie Invest Corporation Pty Ltd v Pulcesia Pty Ltd (2005)
 13 VR 168
*Australian Broadcasting Commission v Australasian
 Performing Right Association Ltd* (1973) 129 CLR 99
Durrant v Gardner [2000] QDC 198
*Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty
 Ltd* (2017) 261 CLR 544
Electricity Generation Corporation v Woodside Energy Ltd
 (2014) 251 CLR 640
Ex parte Robertson [1983] 1 Qd R 526
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
*Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter
 Pty Ltd* [2019] NSWCA 53
Lester v Garland [1808-13] All ER Rep 436; (1808) 15 Ves
 248 [33 ER 748]
Mitano Pty Ltd v Hardoin [2005] QSC 402
Mearns v Parras Holdings Pty Ltd [1994] ANZ ConvR 500
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd
 (2015) 256 CLR 104
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451
Paclyn Pty Ltd v GP Harris Real Estate Pty Ltd (1987) BPR
 9267
*STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd
 (No 2)* [2010] FCA 1240
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR
 165

COUNSEL: G Coveney for the applicant
 J P Morris for the respondents

SOLICITORS: Shand Taylor Lawyers for the applicant
 JHK Legal for the respondents

- [1] On 22 February 2020 the applicant (as Seller) and the respondents (as Buyers) entered into a contract for the sale of a residential property at Minyama. The contract was formed on a sale by auction. The settlement date was agreed to be 60 days from the contract date, which the parties agreed was 22 April 2020. The terms of the contract are the REIQ Terms of Contract (16th edition). In addition, it was a special condition of the contract that:

“3. SELLER TO PROVIDE POOL SAFETY CERTIFICATE

3.1 Notwithstanding anything else in this contract, the Seller agrees to provide a Pool Safety Certificate to the Buyer 7 days prior to Settlement. The parties agree that this is an essential term of the contract.”

- [2] The parties proceeded on the basis that the day which was “7 days prior to Settlement”, and therefore on which the Pool Safety Certificate was to be provided, was 15 April 2020.

- [3] At 5.03 pm on 15 April 2020 the respondents' conveyancer emailed a letter to Margaret Hall of the applicant's solicitor, which said:

“We refer to the above matter and note that Special Condition 3 was due to be satisfied by the Seller today.

We note that the Seller has failed to provide the Buyer with a copy of the Pool Safety Certificate in accordance with Special Condition 3.

We confirm that the Seller has breached an essential term of the Contract and accordingly, our client hereby terminates the Contract.

As the Contract is now at an end, we ask that you instruct the agent to make a full refund of the deposit to our client.”

- [4] At 6.31 pm that evening, Bradley Clark of the applicant's solicitor sent an email to the respondents' conveyancer, attaching the Pool Safety Certificate “in accordance with Special Condition 3 of the Contract of Sale”.

- [5] The following day, 16 April 2020, the applicant's solicitor emailed a further letter to the respondents' conveyancer, reiterating that the Pool Safety Certificate had been provided by 15 April 2020, as required by special condition 3; and denying that the Seller had breached the contract and that the Buyer had any right to terminate the contract.

- [6] The issue on this application is whether the respondents were entitled to terminate the contract at 5.03 pm on 15 April 2020 on the basis that the applicant was in breach of special condition 3. The resolution of this dispute turns on the proper construction of special condition 3. By its present application, the applicant presses for specific performance of the contract. The parties agree that if the construction question is answered as the applicant contends, there should be an order for specific performance; but if it is answered as the respondents contend, there should not.

- [7] The relevant principles of construction are uncontroversial. The contract is to be construed objectively, by reference to what a reasonable person in the position of each of the parties would have understood it to mean, having regard to the language used by the parties, the surrounding circumstances known to the parties and the purpose and object of the transaction.¹ The focus is on the words used by the parties in the particular provision concerned, construed in the context of the contract as a whole.²

- [8] Having been formed following a sale at auction, the contract was not subject to finance, and not subject to a building and/or pest inspection report. In relation to the pool on the land, it is recorded on page 4 of the reference schedule that there

¹ *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[47]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at [16], [17] and [73].

² *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 per Gibbs J; *Greencapital Aust Pty Ltd v Pasmaenco Cockle Creek Smelter Pty Ltd* [2019] NSWCA 53 at [51].

was no “Compliance or Exemption Certificate for the pool at the time of the contract”, and that a “Notice of no pool safety certificate” had been given prior to the contract.

- [9] The “notes” adjacent to these “pool safety” items in the reference schedule include a “warning to buyer”, that “[i]f there is no Compliance or Exemption Certificate at settlement, the Buyer becomes responsible at its cost to obtain a Pool Safety Certificate within 90 days after settlement. The Buyer can also become liable to pay any costs of rectification necessary to comply with the Pool Safety Requirements to obtain a Pool Safety Certificate...”. This appears to reflect the obligation under s 246ATJ of the *Building Act 1975* (Qld).
- [10] Where it applies, the standard REIQ condition 4.2 (dealing with pool safety) imposes the responsibility for obtaining a Pool Safety Certificate on the Buyer, but gives the Buyer a right to terminate if a Pool Safety Certificate has not been issued by the Pool Safety Inspection Date (which may be specified in the reference schedule or, if not, is the earlier of the (building and pest) Inspection Date or 2 Business Days before the Settlement Date).
- [11] Clause 4.2 does not apply in this case, because the contract was formed on a sale by auction.³ The parties expressly agreed, by special condition 3 (set out above) that the Seller would provide a Pool Safety Certificate to the Buyer “7 days prior to Settlement”.
- [12] The standard REIQ Terms of Contract forming part of the contract included, in clause 1.1(2)(bb), a definition of “Pool Safety Certificate” by reference to s 231C(a) of the *Building Act 1975*.
- [13] Section 231C of the *Building Act 1975* provides as follows:

“231C What is a pool safety inspection function

A *pool safety inspection function* is doing any of the following –

- (a) inspecting a regulated pool to decide whether to give a certificate (a *pool safety certificate*) that states the pool is a complying pool;
- (b) carrying out minor repairs relating to a regulated pool arising from an inspection of the pool under paragraph (a);
- (c) the giving of a pool safety certificate for a regulated pool;
- (d) the giving of a nonconformity notice for a regulated pool.”

³ See clause 4.2(1)(b), which provides that clause 4.2 applies if “this contract is not a contract of a type referred to in section 160(1)(b) of the *Property Occupations Act 2014*”. Section 160(1)(b)(i) of that Act refers to “a contract formed on a sale by auction”.

- [14] As defined in s 231A, a “complying pool” means a pool that complies with the “pool safety standard”, which is defined in s 231D. Section 246AU of the *Building Act* provides that “[a] person who is not a pool safety inspector must not perform a pool safety inspection function unless the function is carrying out minor repairs mentioned in section 231C(b)”.
- [15] So a Pool Safety Certificate is a certificate, given by a pool safety inspector, that states the pool is a complying pool.
- [16] The respondents contend that construing special condition 3 in the context of the contract as a whole, the Seller was required to provide the Pool Safety Certificate by no later than 5 pm on the day which is 7 days prior to Settlement (15 April 2020). If the Certificate was provided after 5 pm (as it was in this case), it would be deemed to have been provided at 9 am the following day (therefore, less than 7 days prior to Settlement).
- [17] That contention relies upon the operation of clause 10.4 of the contract (comprising part of the REIQ Terms of Contract), which is as follows:

“10.4 Notices

- (1) Notices under this contract must be in writing.
- (2) Notices under this contract or notices required to be given by law may be given and received by the party’s solicitor.
- (3) Notices under this contract or notices required to be given by law may be given by:
 - (a) delivering or posting to the other party or its solicitor; or
 - (b) sending it to the facsimile number of the other party or its solicitor stated in the Reference Schedule (or another facsimile number notified by the recipient to the sender); or
 - (c) sending it to the email address of the other party or its solicitor stated in the Reference Schedule (or another email address notified by the recipient to the sender).
- (4) Subject to clause 10.4(5), a notice given after this contract is entered into in accordance with clause 10.4(3) will be treated as given:
 - (a) 5 Business Days after posting;
 - (b) if sent by facsimile, at the time indicated on a clear transmission report; and
 - (c) if sent by email, at the time it is sent.
- (5) Notices given by facsimile, by personal delivery or by email between 5pm on a Business Day (the ‘first Business Day’) and 9am on the next Business Day (the ‘second

Business Day’) will be treated as given or delivered at 9am on the second Business Day.

- (6) If two or more notices are treated as given at the same time under clause 10.4(5), they will be treated as given in the order in which they were sent or delivered.
- (7) Notices or other written communications by a party’s solicitor (for example, varying the Inspection Date, Finance Date or Settlement Date) will be treated as given with that party’s authority.
- (8) For the purposes of clause 10.4(3)(c) and clause 12.2 the notice or information may be contained within an email, as an attachment to an email or located in an electronic repository accessible by the recipient by clicking a link in an email.”

- [18] In acting to terminate the contract, at 5.03 pm on 15 April 2020, the respondents submit they were relying upon the operation of clause 10.4, together with special condition 3, on the basis that the Pool Safety Certificate is a “notice” required to be given “under this contract” or “by law”. The respondents submit the effect of clause 10.4(5) is that, since the Certificate was provided after 5 pm on the relevant day, it is to be treated as given at 9 am on the following day, in breach of the special condition.
- [19] The applicant submits the Pool Safety Certificate is not a “notice” for the purposes of clause 10.4; what was required to be provided was the Certificate (given by a pool safety inspector), as opposed to notice of some act or thing. As such, the deeming effect provided for by clause 10.4(5) did not apply.
- [20] The applicant emphasises that special condition 3 does not specify a time by which the Certificate is to be provided; it only specifies that the Certificate be provided “7 days prior to Settlement”. The applicant relies upon the principle that, where a term of a contract specifies a date by which something is to occur, satisfaction of the obligation can occur at any time on that day, effectively up until midnight on the day.⁴ The principle has also been applied where a period of time is specified (for example, a number of days before or after an event) as opposed to a particular date.⁵ It is, however, ultimately a matter of construction of the particular document.⁶
- [21] There was no dispute that the reference to “days” in special condition 3 means ordinary days (as opposed to Business Days, a term which is defined in clause 1.1 of the contract).

⁴ *Ex parte Robertson* [1983] 1 Qd R 526 at 528 (at first instance) and at 530 (Full Court agreeing); *Afovos Shipping Co SA v Pagnan* [1983] 1 WLR 195 at 201; *Paclyn Pty Ltd v GP Harris Real Estate Pty Ltd* (1987) BPR 9267 at 9271; *Mitano Pty Ltd v Hardoin* [2005] QSC 402 at [4], [32] and [35]; *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd (No 2)* [2010] FCA 1240 at [90].

⁵ *Mearns v Parras Holdings Pty Ltd* [1994] ANZ ConvR 500 at 502-503.

⁶ *Aussie Invest Corporation Pty Ltd v Pulcesia Pty Ltd* (2005) 13 VR 168 at [313].

- [22] As already noted, there is also no dispute that the relevant (final) day for performance of this obligation was 15 April 2022.⁷ Accordingly, it is apparent that the time under the special condition was calculated by including the date of settlement (22 April 2020) rather than excluding it. Although the clause could perhaps have been construed in a manner that excluded the date of Settlement,⁸ as the cases make plain there is no rigid rule in these matters, it is always a matter of construction of the contract, and in any event it was clearly a matter of agreement.
- [23] The special condition did not prescribe a time of day for compliance.
- [24] I accept the applicant's submission that clause 10.4(5) does not apply, so as to require that the Pool Safety Certificate had to be provided by 5 pm on the relevant date. What was required to be provided under special condition 3 was a Pool Safety Certificate, not a notice under the contract or "by law". There is no definition of "notice" in the contract. But the standard Terms of Contract draw a distinction between the giving of notice (which may be construed as a means of conveying information) of something;⁹ and the provision of an actual thing (as opposed to notice of it).¹⁰
- [25] Clause 10.4 is a general provision dealing with "notices". Special condition 3 is a particular condition, added to the standard REIQ Terms of Contract, and expressed to apply "notwithstanding anything else in this contract". The obligation under special condition 3 was to provide the Pool Safety Certificate; special condition 3 is not concerned with the giving of a notice.
- [26] Apart from distinguishing a Certificate from a notice, it is also difficult to reconcile the reference to Business Days in clause 10.4(5) with the obligation as expressed in special condition 3 (which refers to ordinary days). There is no apparent reason why special condition 3 should be construed such that if the Certificate was provided after 5 pm on a Business Day, it should be treated as not given until 9 am

⁷ This was not controversial; see also the email from the respondents' conveyancer to the applicant's solicitor on 27 February 2020 (Mr Latimore's affidavit at p 26).

⁸ Cf, for example, *Breadner v Granville-Grossman* [2001] Ch 523 at [35]-[43] (holding that where a power of appointment had to be exercised "before" a specified date, it could not validly be exercised on the specified date itself). See also *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 440-441 per Gibbs J; but cf *Greencapital Aust Pty Ltd v Pasmenco Cockle Creek Smelter Pty Ltd* [2019] NSWCA 53 at [38].

⁹ For example, clause 3.2 (requiring the Buyer to give *notice* to the Seller either that (finance) approval has not been obtained, or that the finance condition has been satisfied or waived); clause 4.2(2) (requiring the Buyer to give *notice* to the Seller that a satisfactory Inspector's report has not been obtained, or that the building and pest inspection condition has either been satisfied or waived); clause 6.2(4) (requirement to give *notice* that a party is no longer affected by a Delay Event); clause 6.2(6) (Notice to Settle); clause 8.2 (providing for *notice* before obtaining access pre-settlement); and clauses 3.3, 4.1(4), 4.2(4) and (5), 7.6(4) and 7.7(1) (*notice* of termination in various circumstances).

¹⁰ For example, clause 2.5(5)(c) (requiring the Buyer to give the Seller copies of various documents where the Buyer is required to pay a GST Withholding Amount); clause 2.6(14) (requiring the Seller to provide the Buyer with a statement, supported by reasonable evidence, of Outgoings and Rent for the property. See also clause 3.1 (providing that the contract is conditional on the Buyer obtaining finance approval) and clause 4.1(1) (providing that the contract is conditional upon the Buyer obtaining a written Building Report), neither of which require the approval or report to be provided, but rather *notice* of an event (cll 3.2 and 4.2).

on the following Business Day, when the time period is calculated by reference to ordinary (calendar) days.

- [27] I find, as a matter of construction of special condition 3 in the context of the contract as a whole, that clause 10.4(5) does not have the effect that special condition 3 had to be complied with by 5 pm on 15 April 2020. In light of this conclusion, it is unnecessary to deal with the applicant’s alternative argument, as to the meaning of “given” in clause 10.4(5).
- [28] The respondents’ alternative argument is that, if the Pool Safety Certificate is not a notice, the time period of “7 days prior to Settlement” effectively meant seven consecutive periods of 24 hours prior to the latest time settlement could be effected under the contract. The respondents submit that the reference to “Settlement” in special condition 3 ought to be construed as a reference to the event of settlement. The respondents emphasise that under clause 5.1(1) settlement must occur between 9 am and 4 pm on the Settlement Date. Therefore, it is submitted, the time for compliance with the obligation under special condition 3 was no later than 4 pm on 15 April 2022.
- [29] I reject that submission. The principle that where a contract specifies a day for performance of an obligation, the obliged party has until the end of that day to perform it (midnight) is not informed by the reckoning of a “day” as a period of 24 consecutive hours, but rather on the basis that a “day” is, in its ordinary sense, a calendar day, running from midnight to midnight. That is supported by the principle that, as a general rule the law takes no account of fractions of a day.¹¹
- [30] Whilst there may be circumstances in which, as a matter of construction of the particular contract, the reference to a time period of days may properly be construed by reference to periods of 24 hours from or prior to a particular event,¹² such a construction is not apt in this case. There is no definition of the term “Settlement” in the contract. The reference schedule of the contract (on p 5) includes a section entitled “Settlement”, under which there is space to record the “Settlement Date” and the “Place for Settlement”. The Settlement Date was agreed to be “60 days from contract date”, namely, 22 April 2020. Reference has already been made to clause 5.1(1). But under clause 6.1, the parties agree that time is not of the essence in so far as any agreement on a time of day for settlement is concerned. And notwithstanding clause 5.1(1), it would be open to the parties to agree on some other time of day for settlement.¹³ In the circumstances, it would be artificial to construe special condition 3 by reference to a period of time comprising blocks of 24 hours prior to a particular event, when there is no certainty about what time that event will occur until after the contract is entered into, and it is open to change. In context,

¹¹ *Lester v Garland* [1803-13] All ER Rep 436; (1808) 15 Ves 248 [33 ER 748], referred to in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 446 per Gibbs J; see also the discussion of authorities in the decision of McGill SC DCJ in *Durrant v Gardner* [2000] QDC 198 at [18]-[21].

¹² See, for example, *Cornfoot v Royal Exchange Assurance Corp* [1904] 1 KB 40, in which a marine insurance contract which described the insurance as being for a voyage to Algoa Bay “and for 30 days in port after arrival” was construed as meaning 30 consecutive periods of twenty-four hours after the ship had actually arrived in the Bay; cf *Cartwright v MacCormack* [1963] 1 WLR 18 at 22-23; see also Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th ed, 2015) at [15.05].

¹³ See, for example, Mr Latimore’s affidavit at p 26 (email from the respondents’ conveyancer seeking agreement to vary clause 5.1(1) to provide for settlement to occur between 9 am and 5 pm).

“Settlement” in special condition 3 should be construed to refer to the day of Settlement; and the period of time provided for in special condition 3 is not to be computed by reference to any particular time at which settlement may occur on that Settlement day.

- [31] This brings me back to the common position of the parties, that “7 days prior to Settlement” was 15 April 2020. In accordance with the general principle referred to at [20] above, the Seller had until the end of that day to comply with its obligation to provide the Pool Safety Certificate. As the Certificate was provided at 6.31 pm on that day, the obligation was complied with in accordance with the terms of the special condition. Accordingly, it was not open to the Buyers to terminate the contract at 5.03 pm.
- [32] The parties are otherwise in agreement as to the form of orders to be made, consequent upon the conclusion reached as to the proper construction of the special condition.¹⁴ I therefore propose to make orders, in terms of the draft provided by the applicant, as follows (subject to hearing from the parties whether any variation is sought to the date in order 3, as a result of the time taken before delivering this decision):
1. The applicant has leave to file the amended originating application.¹⁵
 2. It is declared that:
 - (a) the applicant satisfied Special Condition 3 of the contract for the purchase of land described as Lot 165 on CMP93010, title reference 15626048 and dated 22 February 2020 (the Contract), within the time permitted by the Contract; and
 - (b) the respondents’ termination notice dated 15 April 2020 is invalid and of no effect.
 3. The first and second respondents are to specifically perform the Contract by 4 pm on 2 June 2020, or any earlier time as may be agreed between the parties, by:
 - (a) paying the Balance Purchase Price of \$1,853,807.71, together with any adjustments pursuant to cl.2.6 of the Contract, to the applicant; and
 - (b) paying interest on the sum of \$1,853,807.71 between 22 April 2020 and the date of completion of the purchase at the rate of 8.96% p.a., being the contract default rate published by the Queensland Law Society as at 22 February 2020.
 4. Upon settlement of the Contract, the respondents are to do all things necessary, including signing any documentation required by the Deposit Holder, to facilitate the release of the Deposit by the Deposit Holder to the applicant.
 5. The respondents pay the applicant’s costs of the proceeding on the indemnity basis pursuant to cl.9.7 of the Contract.

¹⁴ See [15] of the applicant’s submissions and [4] of the respondents’ submissions.

¹⁵ Noting that the amendment is a minor matter of form, to change “plaintiff” to “applicant”.