

# SUPREME COURT OF QUEENSLAND

CITATION: *McPhee v Zarb & Others (No 2)* [2002] QSC 028

PARTIES: **MALCOLM MCPHEE**  
(plaintiff)  
v  
**SYLVIA ZARB**  
(first defendant)  
**LBS HOLDINGS PTY LTD**  
(second defendant)  
**AUSTRALASIAN THEATRICAL INVESTMENTS PTY LTD**  
(third defendant)

FILE NO: S 6277 of 2001

DIVISION: Trial Division

PROCEEDING: Application by plaintiff for summary judgment

DELIVERED ON: 22 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 15 February 2002

JUDGE: Wilson J

ORDERS:

- 1. On the claim, judgment for the plaintiff against the second and third defendants for damages to be assessed.**
- 2. On the claim, the second and third defendants' cross-application for summary judgment is dismissed.**
- 3. On the counterclaim, the second and third defendants' application for summary judgment is dismissed.**
- 4. The proceeding is remitted to the District Court at Southport.**
- 5. The second and third defendants are to pay the plaintiff's costs of and incidental to the application and cross-application for summary judgment on the claim and his costs of and incidental to the application for summary judgment on the counterclaim, including reserved costs, to be assessed on the Supreme Court scale on the standard basis.**

**CATCHWORDS:** DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – where purchasers breached contract for sale of land – measure of vendor’s entitlement to damages – where no evidence of market value of property available

*Johnson v Agnew* [1980] 1 AC 367 at 401, considered  
*Johnson v Perez* (1988) 66 CLR 351, considered.

**COUNSEL:** PW Hackett for the plaintiff  
 RW Taylor for the first defendant  
 MP Amerena for the second and third defendants

**SOLICITORS:** Robinson & Robinson for the plaintiff  
 Gagens Lawyers Gold Coast for the first defendant  
 John J Evans for the second and third defendants

- [1] **WILSON J:** I delivered reasons for judgment on 8 January 2002. On 15 February 2002 I heard submissions on the orders which should follow and on the assessment of damages payable by the second and third defendants (the purchasers) to the plaintiff (the vendor). Subsequently, the plaintiff and the first defendant (the mortgagee) submitted a draft order disposing of all matters in dispute between them, and I made orders accordingly.
- [2] The contract between the vendor and the purchasers was made on or about 23 April 2001 (exhibit JJE 1 to the affidavit of John Joseph Evans sworn on 3 October 2001 and filed by leave on 5 October 2001). On the Reference Schedule the purchase price was shown as \$120,000-00. Against the side heading “Property” a real property description was inserted, and beside the printed words “Included Chattels” the words “See Inventory [sic]” were inserted. The inventory contained a list of restaurant equipment, some of it loose (eg crockery, cutlery) and some of it apparently affixed to the premises (eg wall mounted bench, built in sinks). The terms of the contract included the following -

**Special Condition 1**

“The parties to the contract agree that the purchase price contains an inventory attached with a value to the sum of thirty thousand dollars (\$30,000).

Total price \$150,000 payable on settlement.”

**Standard Condition 5.7**

*“ Possession of Property and Title to Chattels*

On the Settlement Date, in exchange for the Balance Purchase Price, the Seller must give the Buyer vacant possession of the Lot and the

improvements except for the Tenancies. Title to the included Chattels passes at settlement.”

- [3] I found that the purchasers breached the contract on 27 June 2001 when they took a transfer from the mortgagee. Two days later, the vendor accepted the breach as repudiation and terminated the contract.
- [4] The usual measure of damages is the difference between the contract price and the market value at the date of the breach, although there may be cases where, the innocent party having kept the contract on foot for some time after the breach, it would be just to assess damages as the difference between the contract price and the market value at the date of termination. See *Johnson v Agnew* [1980] 1 AC 367 at 401; *Johnson v Perez* (1988) 166 CLR 351. In the present case, where only two days elapsed, and no special circumstances have been shown, the usual measure is the proper one.
- [5] The mortgagee transferred the land to the purchasers for \$105,000-00. However, it had no power to transfer the chattels and it did not purport to do so. The purchasers have indicated that the chattels are available for collection by the vendor. (Insofar as some of the chattels were affixed to the premises, they are nevertheless to be treated as chattels rather than fixtures, because the parties expressly so agreed.)
- [6] The contract price of the land was \$120,000-00. Counsel for the purchasers submitted that there is no evidence of the market value of the land at the time they took the transfer from the mortgagee. Strictly this is correct. The circumstances of the transfer were such that I cannot infer that the amount accepted by the mortgagee (\$105,000-00) reflected the market value. The transfer was apparently conducted in private and there is no evidence of the market being tested by advertising, auction or other means. I note in passing that about six months before the vendor had purchased the land and most of the same chattels for \$76,000-00.
- [7] The vendor abandoned its claims for additional rates, body corporate levies and legal fees, and submitted that the damages payable by the purchasers should be assessed as follows –

|            |                                  |   |
|------------|----------------------------------|---|
| Sale price |                                  | \$150,000-00                            |
| Less       |                                  |   |
|            | GST that would have been payable | \$ 6,727-27                             |
|            | Mortgage payout figure           | \$ 80,680-81                            |
|            | Amount to be accounted for by    |   |
|            | Mortgagee                        | <u>\$ 13,952-41</u> <u>\$101,360-49</u> |
|            |                                  | <u>\$ 48,639-51</u>                     |

The vendor also claimed interest.

- [8] No valid basis for departing from the usual measure of damages has been shown.

- [9] Because of the absence of evidence of market value, I cannot assess damages. As I indicated during argument, the proceeding should be remitted to the District Court for the further litigation of this issue.
- [10] I make the following orders as between the vendor and the purchasers –
- (i) on the claim, judgment for the plaintiff against the second and third defendants for damages to be assessed;
  - (ii) on the claim, the second and third defendants' cross-application for summary judgment is dismissed;
  - (iii) on the counterclaim, the second and third defendants' application for summary judgment is dismissed;
  - (iv) the proceeding is remitted to the District Court at Southport;
  - (v) the second and third defendants are to pay the plaintiff's costs of and incidental to the application and cross-application for summary judgment on the claim and his costs of and incidental to the application for summary judgment on the counterclaim, including reserved costs, such costs to be assessed on the Supreme Court scale on the standard basis.