SUPREME COURT OF QUEENSLAND

CITATION:	*Arshad Developments P/L v Wardle & Ors* [2002] QSC 089
PARTIES:	**ARSHAD DEVELOPMENTS PTY LTD** ACN 098 863 097 (applicant) v **GARY ARNOLD WARDLE, JENNIFER HELEN WARDLE, ALLAN DAVID JOHNSON, STRONGFORCE PTY LTD** ACN 058 187 081 (respondents)
FILE NO/S:	2532 of 2002
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	5 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 April 2002
JUDGE:	Ambrose J
ORDER:	**The application is dismissed.**
CATCHWORDS:	CONTRACT – CONSTRUCTION AND INTERPRETATION – application for declaration that contract should be specifically performed – where contract for sale of four parcels of land – where 45 day due diligence period – whether vendor had the right to terminate the contract on the due diligence date – whether "by" the due diligence date means "before" or "on or before" *Dockside Holdings Pty Ltd v Rakio Pty Ltd No. SCCIV-99-207* [2001] SASC 78 (5 April 2001), considered *Eastaugh & Ors v MacPherson* [1954] 1 WLR 1307, considered *Fitzgerald & Anor v Masters* (1956) 95 CLR 420, considered *Westpac Banking Corporation v Tanzone Pty Ltd & Ors* [2000] NSW CA 25 (29 February 2000), considered
COUNSEL:	M Gynther for the applicant D B Fraser QC with A N Stone for the respondents
SOLICITORS:	Corrs Chambers Westgarth for the applicant Trilby Misso for the respondents

[1] This is an application for a declaration that five parcels of land which the defendants ("the vendor") agreed to sell to the plaintiff ("the purchaser") by a contract in writing dated 30 November 2001 ought be specifically performed and for ancillary orders designed to achieve that result. At the time of purchase the land was subject to a town planning permit to develop it for residential purposes.

[2] Under clause 4 of the contract the vendor undertook to provide documentation relating to that town planning permit within three days of the execution of the contract.

[3] Clause 8 of the contract provides as follows –

"8. **DUE DILIGENCE**

8.1 (a) The Purchasers propose to redevelop the property and to construct a Strata Titled Residential complex (development).

(b) The Purchasers may terminate this contract forty-five (45) days of the date of this Contract ("due diligence date") if any of its enquiries or investigations relating to the development are unsatisfactory or, in the purchasers opinion make the development unprofitable or not commercially viable in the Purchasers absolute discretion.

(c) Without limiting clause 8.1 (b) the purchasers enquiries and investigations may include:

(i) Soil, Engineers and Surveyors enquiries
(ii) Services to the property
(iii) Town Planning and
(iv) Requirements of other Authorities
(v) Any other matters deemed necessary by Purchasers.

8.2 The Purchasers may notify the Vendor by the "due diligence date" that either:

(a) Satisfactory results of enquiries and investigation for the development have been obtained.

(b) Satisfactory results have not been obtained and it terminates this Contract or

(c) it waives the benefit of clause 8.1

Any notice can be through the Vendor's Agent.

8.3 If the Vendors do not receive a notice under Clause 8.2 it may terminate this Contract on the due diligence date which will be the Vendor's only remedy for the Purchasers failure to give notice.

> 8.4 If this Contract is terminated under this Clause 8, the deposit will be refunded to the Purchasers without delay or any deduction.
>
> 8.5 If required by the Purchasers, the Vendors will sign any necessary consent application or authority to consent for either search material or development approvals, such authorities or consents to be given without any delay and in any event within 48 hours of receipt by the Vendors' Agent. Further, the Vendors will provide to the Purchasers all information, regarding the property (including engineering, etc.) within 7 days from contract date.
> The Purchasers acknowledge and accept that should the due diligence not be satisfactory, then all information so provided regarding the subject land will be given back to the Vendors."

[4] It was agreed between the parties that the due diligence date "referred to in clause 8.1(b) was in fact 14 January 2002".

[5] It was not in issue that the word "within" had probably been inadvertently omitted between the words "contract" and "forty-five" in clause 8.1(b) and that that clause ought be read as if it had been inserted.

[6] On 20 December 2001 the purchaser sought a variation of clause 8.1(b) extending the due diligence date from 14 January 2002 until 31 January 2002.

[7] The extension sought was not agreed to by the vendor.

[8] By letter dated 11 January 2002 but not forwarded to the vendor until 11:36am on 14 January 2002 the purchaser again sought a variation of clause 8.1(b) extending the due diligence date to Thursday 31 January 2002.

[9] By letter dated 14 January 2002 received by the purchaser at 4:36pm on that day the solicitors for the vendor replied in the following terms –

> "Further to your facsimile of today's date, we have now received instructions from our clients that they will not grant an extension for the due diligence. Accordingly, pursuant to clause 8.3 we hereby terminate the contract."

[10] The solicitors for the purchaser replied to the letter from the vendors solicitors at 7:00pm on 14 January 2002 in the following terms –

> "We take the opportunity to inform you that the Contract of sale between our respective clients bears the Contract Date of 30 November 2001. This date is in fact inaccurate. Our respective clients had a meeting on Saturday 1 December 2001 to discuss the proposed acquisition…The original contract executed by the Vendor was only received by our office on 6 December 2001.
>
> Our client reserves its rights against ALL parties in respect of the inaccuracy in the Contract Date inserted onto the contract, the delays

> in the contract being returned to our office and the lack of response to the requests for extension that were made on several occasions."

[11] By letter dated 15 January 2002 the solicitors for the purchasers advised inter alia –

> "Our client has waived the benefit of the due diligence (Special Condition 8.1) by facsimile yesterday 14 January 2002. This waiver has been communicated before 45 days of the date of the contract.
>
> We **enclose** a cheque for the sum of $170,000.00 being the balance deposit due under the contract between our respective parties…"

[12] In spite of the content of this letter it was not suggested there is evidence of any waiver by the purchaser on 14 January 2002 and no argument or evidence was addressed to this effect.

[13] Under the contract dated 30 November 2001 the REIQ standard terms of Contract For Houses and Land (pages 3-8) (4th edition) are incorporated in it.

[14] Clause 10.4(5) "Notices" of the standard terms, provides that if a notice is given after 5pm on a business day it is taken as having been given on the next business day.

[15] It was conceded I think on behalf of the purchaser that "although not free of doubt" a notice given under clause 8.2 if not given before 5:00pm is by agreement deemed to have been given on the following day.

[16] The real construction point in issue, the determination of which will dispose of this application, is whether under the terms of the contract the vendor had the right under clause 8.3 to terminate the contract at 4:36pm on the due diligence date – ie: 14 January 2002, the purchaser not having at any time prior to 5:00pm on that date notified the vendor under clause 8.2(c) that it waived any rights it had to terminate the contract under clause 8.1(b).

[17] For the purchaser it is contended that the right of the purchaser to notify the vendor under clause 8.2 "by the due diligence date" should be construed to mean "on or before the due diligence date".

[18] For the vendor it is contended that by reason of the terms of clause 8.3 limiting the vendors rights to terminate the contract "on the due diligence date", should it not receive a notice under clause 8.2 from the purchaser "by the due diligence date" in clause 8.2 ought be construed to mean "before the due diligence date".

[19] It is contended for the vendor that whereas under clause 8 the purchaser had a period of 45 days within which it might elect to terminate the contract, the vendors right to terminate the contract for the absence of any such notice within that period was limited only to one day – the due diligence date itself which was 14 January 2002.

[20] It is contended that other authorities relating to other agreements or tenancies where "by" a specified date has been construed to mean "on or before" that date are of no assistance in construing this contract, clause 8.3 of which limits the vendors right to terminate the contract on the ground of the purchasers failure to give a notice under clause 8.2 only on the due diligence date itself.

[21] In my view construing clause 8.2 in context and side by side with clause 8.3 the better construction of "by the due diligence date" is "before the due diligence date".

[22] Critical to the purchasers argument that "by the due diligence date" in clause 8.2 should be construed to mean "on or before the due diligence date" is acceptance of its contention that "on the due diligence date" appearing in clause 8.3 should be construed to mean "after the due diligence date". Presumably in the absence of any specified period of time for termination by the vendors "after the due diligence date" the vendors termination on this construction would impliedly be required "within a reasonable time" after the due diligence date.

[23] In my view the better delineation of the intended rights and obligations of the parties under this contract involves construing "by" the due diligence date in clause 8.2 as meaning "before" the due diligence date and construing "on the due diligence date" in clause 8.3 as meaning literally "on" the due diligence date.

[24] In each sub-clause in my view the "due diligence date" ends at 5:00pm on 14 January 2002 and any notice given on or before that date must be given prior to 5:00pm if it is deemed to have been given on that date.

[25] A second approach to the construction issue in this case is whether even accepting the construction of 8.2 advanced by the purchaser that "by" the due diligence date should be construed to mean "on or before" the due diligence date (ie: on or before 5:00pm on 14 January 2002), both the vendor under clause 8.3 and the purchaser under clause 8.2 could each give to the other a notice contemplated by those clauses on 14 January 2002 before 5:00pm.

[26] It is strenuously contended for the purchaser that upon the construction of clause 8.2 for which it contends the vendor was not able to give any notice under clause 8.3 prior to 5:00pm on 14 January 2002. It is for this reason, I think that the purchaser is driven to contend that "on" the due diligence date in clause 8.3 must be construed to mean "after" the due diligence date. If the construction of clause 8.2 for which the purchaser contends is adopted then unless the construction advanced for clause 8.3 is also adopted the vendors only remedy given under the contract in express terms for the purchaser's failure to give notice will be rendered illusory.

[27] In my view however even if the construction of clause 8.2 for which the purchaser contends were adopted it would not necessarily lead to the conclusion that the vendor might not give a notice of termination under clause 8.3 at some time prior to 5:00pm on the due diligence date if the purchaser had not previously given any notice under clause 8.2. Should the vendor give such a notice on the due diligence date, which is his only remedy under clause 8.3, then on one view upon receipt of that notice the purchaser if entitled to give a notice up until 5:00pm on the due diligence date could rectify its omission and give such a notice before 5:00pm on that date.

[28] It is unnecessary to consider upon this application what might have been the legal consequence of the purchaser giving a notice under clause 8.2 at a time prior to 5:00pm on 14 January 2002 having regard to the notice given by the vendor under clause 8.3 on that date at 4:36pm.

[29] On the facts of this case the purchaser did not give to the vendor any notice under clause 8.2 prior to 5:00pm on 14 January 2002.

[30] It is the case however for the purchaser that it was entitled to give a notice under clause 8.2 at any time prior to 5:00pm on 14 January 2002 and that the vendor was therefore unable effectively to give a notice under clause 8.3 at any time prior to 5:00pm on that date whether or not the purchaser gave a notice under clause 8.2 prior to 5:00pm on that date.

[31] In my view the construction of clauses 8.2 and 8.3 advanced by the purchaser does violence to the language actually used in clause 8.3 and produces results contrary to the business efficacy of the contract generally and particularly to the right expressly given to the vendor to terminate the contract under clause 8.3.

[32] Reference was made to *Eastaugh & Ors v MacPherson* [1954] 1 WLR 1307 where a notice terminating a tenancy "by" a specified date was construed to require the tenant to vacate "on or before" that date.

[33] However it is clear that the court there construed "by" "in the light of the letter as a whole", and for the reasons expressed by Evershed MR at 1308-1309. The tenancy itself in that case lasted "up to and including" the specified date.

[34] In my view the construction of the notice to quit in *Eastaugh v MacPherson* lends no support to the construction advanced by the purchaser in respect of this agreement.

[35] In *Westpac Banking Corporation v Tanzone Pty Ltd & Ors* [2000] NSW CA 25 (29 February 2000) the court approved the approach of the trial judge in that case who held that "The question is whether these words [ie: of clause 2.02] lead to an absurd result looking at the situation in 1985. If they do then they should be construed so as to avoid the absurdity by supplying omitting or correcting words".

[36] The trial judge in that case had relied upon *Fitzgerald & Anor v Masters* (1956) 95 CLR 420 and *Watson v Phipps* (1985) 60 ALJR to support his view and the Court of Appeal held that he was correct in adopting the approach which he did.

[37] In *Fitzgerald & Anor v Masters* (1956) 95 CLR 420 in the joint judgment of McTierman, Webb and Taylor JJ it was observed –

> "It is trite law that an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words (c.f. *Norton on Deeds* 2nd ed. (1928) p. 91)."

[38] In *Dockside Holdings Pty Ltd v Rakio Pty Ltd No. SCCIV-99-207* [2001] SASC 78 (5 April 2001) the Full Court of South Australia adopted the approach of the Court of Appeal of New South Wales in *Westpac Banking Corporation v Tanzone Pty Ltd & Ors*, Williams J at para 41 observed that –

> "The present case is not one in which an obvious verbal slip can be identified. An example of such a case would be *Watson v Phipps* where the Privy Council was able to construe "offer to purchase" as "option to purchase". Likewise in *Fitzgerald v Masters*, although a set of conditions were incorporated so far as they were "inconsistent"

> with the agreement, the High Court was able to read this as "consistent"."

[39] At para 43 His Honour observed under principle (4) –

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* (1997) AC 749."

[40] He continued on to state principle (5) –

> "The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania v Naviera SA v Salen Rederierna AB* [1985] AC 191, 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense"."

[41] Whether "by" the due diligence date in clause 8.2 be construed to mean "before" that date or whether both the purchaser under clause 8.2 and the vendor under clause 8.3 could give a notice contemplated by those clauses on that date, upon the facts of this case the purported termination of the contract by the vendor on 14 January 2002 was effective.

[42] It was also argued for the purchaser that by reason of acts or omissions of persons retained by or acting on behalf of the vendor in discussions with persons acting on behalf of the purchaser between 20 December 2001 and 14 January 2002 the vendor was estopped from terminating the contract on 14 January 2002. Upon the evidence adduced on this application, in my view the purchasers failure to give notice under clause 8.2 prior to 5:00pm on 14 January 2002 was not even arguably attributable to any statement or representation by any officer or agent of the vendor even suggesting that the vendor would either extend the period of 45 days for compliance with clause 8.1(b) or refrain from exercising its right to terminate the contract under clause 8.3 in the event of the purchasers failure to comply strictly with its contractual obligation under clause 8.2 to avoid the vendor exercising the right to terminate the contract under clause 8.3.

[43] In my view in the circumstances of this case, the purchasers application must fail, and is therefore dismissed.