

SUPREME COURT OF QUEENSLAND

CITATION: *Payne v Payne* [2002] QSC 111

PARTIES: **CHRISTOPHER WILLIAM PAYNE**
(applicant)
v
GEORGE EDWARD PAYNE
(respondent)

FILE NO/S: 6241 of 2001

DIVISION: Trial Division

DELIVERED ON: 26 April 2002

DELIVERED AT: Brisbane

HEARING DATE: 19 April 2002

JUDGE: Mackenzie J

- ORDER:
1. **I declare that George Edward Payne is at liberty to purchase Lot 42 Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746132 and Lot 55, Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746134 in accordance with para 4 of the order of White J dated 23 July 2001.**
 2. **I order that if George Edward Payne confirms in writing to each of the trustees within 7 days of this order that he wishes to so purchase each of the said lots, the trustees shall:**
 - (a) **Enter into a contract for the sale of the properties described as Lot 42 on Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746132 and Lot 55 on Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746134 to George Edward Payne, for the purchase prices of \$12,500 and \$85,000 respectively; and**
 - (b) **Transfer the said properties to George Edward Payne pursuant to the contract of sale, upon payment of the purchase prices.**
 3. **I order that if George Edward Payne does not advise each of the trustees in accordance with the order in para 2 hereof, the trustees deal with the properties in accordance with para 2 of the order**

of White J dated 23 July 2001.

4. **I order that the trustees deal with Lot 52 Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746133 and Lot 709 Crown Plan B7083, County of Ward, Parish of Tallebudgera, Title Reference 15579154 in accordance with para 2 of the order of White J dated 23 July 2001.**

5. **I order that, in either of the cases referred to in orders 3 and 4 of this order, the sale by the trustees be by public auction, provided that should the trustees receive, in respect of any lot, an offer prior to auction and Christopher William Payne and George Edward Payne advise each of them in writing that the offer is acceptable to them, the trustees may sell the lot to which the offer relates for that sum without proceeding to auction.**

6. **I order that, in respect of any lot required, under these orders, to be sold by public auction, the trustees appoint forthwith a Real Estate Agent for the sale and that:**
 - (a) **the auctioneer shall be nominated by the trustees;**
 - (b) **the auction take place within 2 months after appointment of the agents;**
 - (c) **the reserve price shall unless agreed upon by the trustees be as proposed by the auctioneer;**
 - (d) **Christopher William Payne shall be responsible for payment of all auction expenses payable before the real property is auctioned and shall be refunded all such money from the proceeds of the sale.**

In the event that the property is not sold by auction or by private negotiation within 14 days after the said auction, then the trustees shall do all acts and sign all necessary documents to cause a second auction to be conducted within a further 5 weeks of that date otherwise upon the same terms and conditions as applied to the first auction.

7. **I order that the costs of the applicant and the respondent of and incidental to the application be assessed on a standard basis and paid by the trustees from the proceeds of the sales referred to in para 4 of these orders, and that the costs of the trustees be assessed on an indemnity basis and**

paid from such proceeds, in each case before the proceeds are otherwise distributed in compliance with para 2 of the order of White J dated 23 July 2001.

CATCHWORDS: PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – exercise of power of sale by statutory trustee under Consent Order – where applicant and respondent both had the right of first refusal to purchase any of the lots in the terms prescribed by the Order – where the respondent made an offer in the strict terms of the Order – where applicant’s offer was higher than the amount prescribed in the Order – whether this was fatal – where applicant withdrew offer – where applicant’s subsequent offer made outside the time period prescribed in the Order – whether the subsequent offer is valid

Brown v Gould [1972] 1 Ch 53, considered
Woodroffe v Box (1954) 92 CLR 245, considered

COUNSEL: Mr P Hackett for the applicant
 Ms H Bowskill for the respondent
 Mrs M Cassidy for third party

SOLICITORS: Peter Daly Solicitor for the applicant
 Smith & Stanton Solicitors for the respondent
 Blake Topping Solicitors for third party

- [1] **MACKENZIE J:** Directions are sought as to how statutory trustees of four properties should exercise the power of sale given to them by a Consent Order made by White J on 23 July 2001. The effect of the order was that Brian Patrick Kingston and Ronny Altmann be appointed statutory trustees to sell four parcels of land three of which are at Pimpama and one at Bilinga. The order vested the properties in the statutory trustees to be held by them upon trust to sell them and distribute the proceeds in accordance with para 2 of the order. They were obliged by para 3 of the order to appoint a registered valuer, to be nominated by the President of the Institute of Valuers, to prepare a written valuation of each of the parcels. After that had been done the following provisions came into play:

“4. The applicant and respondent be at liberty to purchase any of the properties from the statutory trustees, at the value determined by the valuations referred to in order 3, upon terms that they shall not be required to pay any deposit and that they may set off against the purchase price the value of the whole of their share in the relevant property or properties as determined by the valuations referred to in order 3.

5. If the applicant and respondent wish to purchase any of the properties, they shall do so, by making an offer in writing to

the statutory trustees, within 30 days of the receipt of the valuations referred to in order 3.

6. Within the time period specified in order 5 above, the applicant and respondent have the first right of refusal on the sale of the properties by the statutory trustees.”

- [2] The underlying dispute involves two brothers. Christopher William Payne (CW Payne) is 66 years old and retired. George Edward Payne (GE Payne), wrongly named as “Edwin” in some documents, is 56 and a public servant.
- [3] Mr Kingston is an accountant. He was nominated by CW Payne. Mr Altmann was nominated by GE Payne. An apparent perception on the part of the parties that this mode of appointment did not oblige information to be provided to and shared between both trustees has had some effect in connection with implementation of the order, as will be seen later.
- [4] The three lots at Pimpama are Lot 42 containing 8.792 hectares, Lot 52 containing 61.831 hectares and Lot 55 containing 98.288 hectares. Under the existing and proposed Town Plans the lots are zoned rural, with open space or nature conservation being the strategic plan for them. Lots 42 and 55 are vacant land. Lot 52 is vacant except for a small shed constructed by GE Payne to store equipment. The three parcels have belonged to the Payne family since the early 1900s and had been used to graze cattle, although that activity has now ceased. Lot 55 is immediately north of Lot 52. Lot 52 is bounded on the east by Lot 53. Lot 42 is immediately east of Lot 53. At the time the order was made, Lot 53 was owned by CW Payne but has since been sold to Gold Coast City Council.
- [5] The valuation was done on 13 September 2001 by Christopher Kennedy of DTZ Australia. The broad description of these lands in the valuation report is that they are “steep in topography, harsh in terms of vegetation and of little or no value for any rural enterprise”. Lot 42 is described as incorporating the summit of Mt Wongawallen. The valuer valued Lot 42 at \$25,000, Lot 52 at \$125,000 and Lot 55 at \$170,000. It is common ground that the Bilinga property should be sold. The only issue is the mode of sale. The valuation was received by the trustees on 4 October 2001. GE Payne obtained it on the same day. The date upon which CW Payne received it was disputed. There is no satisfactory explanation before me as to why there was a delay in supplying it to him. It appears that it was sent to his solicitor. The first day upon which the solicitor became aware of its existence was, according to his recollection aided by notes, 26 October 2001. CW Payne was informed of the contents the same day. For the purpose of exercising the right under para 4, 5 and 6 of White J’s order, 4 October 2001, in the case of GE Payne, and 26 October 2001 in the case of CW Payne, should be taken to be the relevant triggering dates. I do not accept, as was faintly suggested, that the date of receipt of the valuation by the trustees was the triggering date for each party.

- [6] On 25 September 2001, GE Payne offered \$25,000 for Lot 42 and \$170,000 for Lot 55. This was within the prescribed period and conformed strictly with the terms of the order. He did not make offers in respect of Lot 52 or the Bilinga property. On 15 November 2001, CW Payne made offers of \$125,001 for Lot 52, \$25,001 for Lot 42, \$170,001 for Lot 55 and \$450,001 for the Bilinga property. These were also made within the prescribed period.
- [7] GE Payne's offer was addressed to each of the trustees. The letter of offer made on behalf of CW Payne by his solicitor was, so far as the evidence indicates, sent only to Mr Kingston. It offered to purchase "each allotment for valuation plus \$1.00". This offer was made in the context of a question raised whether the value of the properties as determined by the appointed valuer was the true value. How this arose will be referred to soon. The correspondence is open to the inference that Mr Altmann was not aware of CW Payne's offer since on 26 November 2001 he wrote to Mr Kingston, CW Payne and GE Payne asserting that no offer had been made by CW Payne. Mr Kingston replied on 5 December 2001, stating that he had received verbal advice of an offer by CW Payne which was confirmed by CW Payne's legal advisor in a letter of 15 November 2001.

- [8] On the same date, 5 December 2001, a letter from CW Payne's solicitor was faxed to Mr Kingston, although it is not clear whether a copy was also forwarded to Mr Altmann, stating the following:

"I refer to my letter of 15 November 2001 and to the offer to purchase the various properties as set out therein. I note that the offers have not been accepted. Those offers are withdrawn.

I am instructed to place the following offer for the purchase of each of the following properties:

- | | | |
|----|----------|----------------|
| 1. | Lot 42 * | \$26,000.00 |
| 2. | Lot 52 * | \$126,000.00 |
| 3. | Lot 55 | \$171,000.00 " |

He said that his client did not wish to purchase the Bilinga property.

- [9] CW Payne's concern over the valuation seems to have germinated when he found out that a neighbour had recently sold his land to the Gold Coast City Council for \$520,000. Following that the council was approached to see if it was interested in purchasing any other adjoining properties. While CW Payne could not be absolutely sure he thought that this approach was made after the valuation had been done.
- [10] On 9 November 2001 the council wrote to the brothers jointly, advising that in accordance with the Open Space Preservation Levy Acquisition Policy, the council had completed a review of land nominated or listed for acquisition using funds raised through the Open Space Preservation Levy. It advised that on the basis of the review, sites nominated for acquisition included Lots 42 and 52. On 14

September 2001 the council had resolved that it endorsed those and other sites identified in the report as priority alternatives for potential acquisition during the 2001/2002 financial year. The possibility of compulsory acquisition, if deemed appropriate, was to be further considered if negotiations were unsuccessful. No price was nominated by the council. Instead, nomination of an asking price by the owners was invited.

- [11] By 15 November 2001, CW Payne had obtained valuations from Mr Bristow, a valuer, which were \$70,000 for Lot 42, \$250,000 for Lot 52 and \$295,000 for Lot 55. A letter of the same date was sent to Mr Kingston raising the question of undervalue. On 19 November 2001, CW Payne's solicitor wrote again to Mr Kingston saying that his client agreed to the sale of the properties to either his brother or to the council for the amounts set out in the Bristow valuation.
- [12] On 10 January 2002, the council offered \$320,000 for Lots 42 and 52, based on a valuation from Taylor Byrne. On 16 January 2002, CW Payne's solicitor advised that his client did not wish to match the council's offer but would transfer his interests in the properties to GE Payne if he matched that offer.
- [13] On 6 February 2001, Mr Kingston wrote to Mr Altmann expressing the opinion that since that there was a firm offer for \$320,000 for Lots 42 and 52, the value at which the property could be sold was established at that amount and that the trustees had no option to value the lots at less than \$320,000. Whether an offer by a local authority to acquire land of special interest to it because of its characteristics fits the usual test for fixing a valuation of land which postulates willing but not anxious parties on each side, may be open to argument, but that issue is not one that affects the outcome of the present matter.
- [14] On 13 February 2002, Mr Kingston unilaterally wrote to the council asking it to submit a contract for the purchase of Lots 42 and 52 so that a solicitor could be instructed. This was interpreted by the council as evidence of an agreement that the brothers had agreed to sell Lots 42 and 52 to the council. On 5 March 2002, a contract was sent but was not executed by either party. On 6 March 2002, Mr Kingston advised Mr Altmann that he had been in contact with the council and had received a contract. He proposed an application to the Court for directions.
- [15] On 12 March 2002, Mr Altmann wrote to the council advising that there was an ongoing dispute over the matter and of the possibility of an application to the Court. He asked for advice as to the offers for individual lots as he had not seen the contract. On 27 March 2002, the council's solicitors were still proceeding on the assumption that a sale would proceed, as is evidenced by correspondence in that regard. Subsequently, Blake Topping, who had been engaged by the trustees in connection with the present application, continued to correspond with the council's solicitors about the form of the contract. By the time of the hearing, draft contracts unexecuted by the trustees, into whose name the property had by this time been transferred, existed for sales to the council and to each of the brothers at the

price to be negotiated. She submitted that in exercising the right of first refusal the grantees were required to conform strictly to the requirements of the grant including the manner of acceptance, the time of acceptance and accepting the terms of the offer as set out in para 4 of White J's order. She submitted that the grantor's offer, coupled with the grantee's acceptance in the same form as the offer, created the contract for sale. She further submitted that if the grantee offered to purchase any of the properties on different terms, no contract could come into existence unless that "counter offer" was accepted by the trustees. She submitted that the offer of valuation plus \$1.00 was not a proper acceptance of the offer made by the statutory trustees.

- [20] The proper construction of the orders of White J is that paras 4 – 6 graft a restriction onto the trustees' power of sale by allowing a right of first refusal to each of the brothers if they wished to purchase any of the properties at the valuation determined by the valuer. It is only if that right was not exercised in accordance with the steps set out in paras 4, 5 and 6 of White J's order that the general power of sale, carrying with it the usual obligations of trustees for sale, would come into effect. Unless a somewhat strained view of CW Payne's offer is adopted, namely that it should be construed as an offer to purchase at valuation notwithstanding that it offers a different sum (but in excess of the valuation) his offer does not conform with the terms of the order. The evidence was clear that he deliberately bid at that higher level hoping to gain an advantage because his offer was higher. It may well be that there will be cases where departure from the precise terms of the offer will not be fatal to a purported exercise of a first right of refusal, but in the circumstances of this case it is my view that the offer by CW Payne was not one to purchase at valuation. It follows that the offer made by CW Payne is not in accordance with the terms of White J's order.
- [21] Even if this is incorrect, in my view the applicant faces a further fundamental problem. On the assumption that an offer, not in the sum specified in the order and conveyed to only one of the trustees within the prescribed time, is sufficient to conform to para 5 of White J's order, CW Payne's offer was withdrawn prior to being acted on by the trustees. If contracts were formed by his original offer, they were treated as being at an end by the letter. The subsequent offer, which related to only 3 properties instead of 4, was made outside the period prescribed by para 5. He was not, therefore, in conformity with the requirements of the terms of the order for a first right of refusal.
- [22] The terms of the original order were agreed on by the parties. Unsatisfactory as the outcome may be, the trustees must proceed on the basis that the only valid offers in existence are those from GE Payne in respect of Lots 42 and 55. If he wishes to proceed the trustees are obliged to sell to him at the value determined in accordance with para 4 of White J's order. If there is any issue taken about the adequacy of the valuation or the conduct of the matter otherwise, those issues will have to be pursued outside the present proceedings.

[23] With respect to the Bilinga land and Lot 52, the trustees are at liberty to sell them and distribute the proceeds in accordance with para 2 of White J's order. The most effective way appears to be by auction but I would be prepared to make provision that if the trustees received an offer acceptable to each of the brothers prior to auction the trustees be at liberty to accept that offer without proceeding to auction. The declaration and orders made are the following:

1. I declare that George Edward Payne is at liberty to purchase Lot 42 Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746132 and Lot 55, Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746134 in accordance with para 4 of the order of White J dated 23 July 2001.
2. I order that if George Edward Payne confirms in writing to each of the trustees within 7 days of this order that he wishes to so purchase each of the said lots, the trustees shall:
 - (a) Enter into a contract for the sale of the properties described as Lot 42 on Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746132 and Lot 55 on Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746134 to George Edward Payne, for the purchase prices of \$12,500 and \$85,000 respectively; and
 - (b) Transfer the said properties to George Edward Payne pursuant to the contract of sale, upon payment of the purchase prices.
3. I order that if George Edward Payne does not advise each of the trustees in accordance with the order in para 2 hereof, the trustees deal with the properties in accordance with para 2 of the order of White J dated 23 July 2001.
4. I order that the trustees deal with Lot 52 Crown Plan WD 484, County of Ward, Parish of Pimpama, Title Reference 16746133 and Lot 709 Crown Plan B7083, County of Ward, Parish of Tallebudgera, Title Reference 15579154 in accordance with para 2 of the order of White J dated 23 July 2001.
5. I order that, in either of the cases referred to in orders 3 and 4 of this order, the sale by the trustees be by public auction, provided that should the trustees receive, in respect of any lot, an offer prior to auction and Christopher William Payne and George Edward Payne advise each of them in writing that the offer is acceptable to them, the trustees may sell the lot to which the offer relates for that sum without proceeding to auction.
6. I order that, in respect of any lot required, under these orders, to be sold by public auction, the trustees appoint forthwith a Real Estate Agent for the sale and that:
 - (a) the auctioneer shall be nominated by the trustees;

- (b) the auction take place within 2 months after appointment of the agents;
- (c) the reserve price shall unless agreed upon by the trustees be as proposed by the auctioneer;
- (d) Christopher William Payne shall be responsible for payment of all auction expenses payable before the real property is auctioned and shall be refunded all such money from the proceeds of the sale.

In the event that the property is not sold by auction or by private negotiation within 14 days after the said auction, then the trustees shall do all acts and sign all necessary documents to cause a second auction to be conducted within a further 5 weeks of that date otherwise upon the same terms and conditions as applied to the first auction.

7. I order that the costs of the applicant and the respondent of and incidental to the application be assessed on a standard basis and paid by the trustees from the proceeds of the sales referred to in para 4 of these orders, and that the costs of the trustees be assessed on an indemnity basis and paid from such proceeds, in each case before the proceeds are otherwise distributed in compliance with para 2 of the order of White J dated 23 July 2001.