SUPREME COURT OF QUEENSLAND

CITATION:	*GK & MJ Sommerville P/L & Ors v Winbirra Developments Pty Ltd & Ors* [2002] QCA 386
PARTIES:	**GK & MJ SOMMERVILLE PTY LIMITED AS TRUSTEES FOR THE SOMMERVILLE FAMILY TRUST** (first plaintiff/first respondent) **GRAEME KEVIN SOMMERVILLE** (second plaintiff/second respondent) **MAREE JUNE SOMMERVILLE** (third plaintiff/third respondent) **v** **WINBIRRA DEVELOPMENTS PTY LIMITED** ACN 010 908 773 (first defendant/first appellant) **GREGORY ROBERT BURKE** (second defendant/second appellant) **DAVID CARVOSSO** (third defendant/third appellant)
FILE NO/S:	Appeal No 2421 of 2002 DC No 2859 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2002
JUDGES:	de Jersey CJ, Jerrard JA, Atkinson J Separate reasons for each member of the Court, each concurring as to the order made.
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	CONTRACTS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – ELECTION AND RESCISSION – REPUDIATION – DELAY AND PROVISIONS AS TO TIME – where first respondent agreed to purchase a newsagency business from the first appellant where time was of the essence and where completion date extended by 8 days – where contract subject to the Queensland Newsagency Council's not disapproving of

the first appellant as purchaser – where even after extension of time, the Council had not made its decision – where day after extension of time expired, the first respondent's solicitors contacted the first appellants to inform them that they had contacted the Council and were endeavouring to contact their clients to seek a further extension of time but where they reserved their client's right to rescind should the special condition not be fulfilled– where the Council determined not to disprove the purchase – where the first respondents terminated the contact by fax two days after the extension of time had elapsed for failure to fulfil the special condition – whether trial Judge correct in holding that the first respondent effectively terminated the contact, rejecting the first appellant's contention that by its own acts or omissions the first respondent brought about or contributed to the non-fulfilment of the special condition on time

PROCEDURE – COSTS – JURISDICTION – COSTS INDEMNITY ONLY – where respondents had made offer to settle almost two years before trial and which reflected the judgment of the learned trial Judge – where the offer was rejected – whether trial Judge's decision to order that respondent's costs to be paid by appellant were to be assessed on an indemnity basis was correct

Grange v Sullivan (1966) 116 CLR 418, referred to
Hobartville Stud Pty Ltd v Union Insurance Co Ltd (1991) 25 NSWLR 358, referred to
Perri v Coolangatta Investment Pty Ltd (1982) 149 CLR 537, referred to
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418, distinguished
Tickell v Trifleska Pty Ltd (1991) 25 NSWLR 353, referred to
Tropical Traders Ltd v Goonan (1963-1964) 111 CLR 41, applied

COUNSEL: P D McMurdo QC, with W G Everson, for the appellants
M Martin for the respondents

SOLICITORS: Siemon Lawyers for the appellants
McAlister & Cartmill for the respondents

[1] **de JERSEY CJ** A learned District Court Judge made a declaration that the first respondent company duly terminated a contract dated 12 April 1999. By that contract, the first respondent agreed to purchase a newsagency business from the first appellant, another company. The other parties to the litigation, natural persons, were guarantors of the corporate parties. Clause 7 of the contract contemplated 7 June 1999 as the earliest possible date for completion. Time was of the essence. Time for completion was extended ultimately to 15 June 1999, time remaining of the essence.

[2] The contract was subject to the Newsagency Council's "not disapproving" of the first appellant as purchaser. Special condition 4 provided:

> "This contract is subject to:-
>
> 4.1 The sale of the said business being notified to the Newsagency Council of Queensland ("the Council") in accordance with rules of the Council; and
>
> 4.2 A decision by the Council not to disapprove of the Purchaser in regard to the transfer of Noosa Junction Newsagency.
>
> 4.3 Upon execution of the Contract the Vendor and the Purchaser shall notify the Council of the sale of the said business in accordance with the rules of the Council. The Vendor and the Purchaser shall do all such things and (sic) such documents as are required by the Council to enable it to make a decision on the transfer of Noosa Junction Newsagency. In the event that the Council disapproves of the Purchaser or the Council does not make a decision within one (1) month of the date hereof the sale and purchase shall be cancelled and all monies paid hereunder by the Purchaser shall forthwith be refunded to the Purchaser in full and neither party shall be under any further liability to the other by reason merely of such cancellation…"

[3] Special condition 7 regulated the time for completion, in the following terms:

> "The date of completion shall be 7 June 1999 or two (2) business days following the consent contemplated by Special Condition 4 hereof or two business days following the completion of the business contract dated 3 March 1999 between the purchasers as vendor and Clombern Holdings Pty Ltd., as purchaser for the purchaser's business known as Sportco Kawana, whichever is the later. In the event that completion is not effected by that date which is sixty (60) days for (sic) the date hereof either party may terminate this Contract by notice in writing to the other."

That 60 day period expired on 11 June, but as I have said, time for completion was extended until 15 June 1999, time remaining of the essence. The Council's decision under special condition 4.2 was not forthcoming by 15 June.

[4] At 9.20am on 16 June 1999, the solicitors for the first respondent communicated with the solicitors for the first appellant, by facsimile, in the following terms:

> "We refer to the above and advise that we have been in contact with Joanne at the Queensland Newsagency Council (telephone: 3262 3055). Joanne has advised that the application for approval of the purchasers was not able to be presented to the chairman until the 16 June 1999. Joanne has advised that the notification would normally be posted out to our clients and a copy would be sent to this office.
>
> We are in endeavouring to obtain instructions from our client as to an extension of time for fulfilment of special condition 4.3.
>
> We understand our clients are visiting relatives in Victoria until the 21 June 1999 and we should be able to obtain our client's instructions by that date.

> In the meantime, we specifically reserve our clients rights pursuant to special condition 4.3 and time shall continue to be of the essence of the Contract."

[5] If the first respondent was entitled to terminate the contract for want of the Council's decision by the close of business on 15 June, that communication, by its last paragraph, effectively preserved its right, a matter to which I will return. In fact, on 16 June 1999, the Council determined not to disapprove of the purchaser, in terms of special condition 4.2, and both the purchaser and the vendor were then notified of that. But not having received notification of a decision on 15 June, the first respondent at 9.00am on 17 June 1999 terminated the contract. The terms of the letter of termination follow:

> "We refer to our facsimile letter dated 16 June 1999.
> We advise that our clients have now telephoned our office to provide their instructions.
> We are instructed to notify the vendor and notice is hereby given, that the Purchaser terminates the Contract, pursuant to special condition 4.3, which was due to be satisfied on the 15 June 1999. Neither this office, nor the vendors received any notification from the Newsagency Council of Queensland by the due date.
> We request that you authorise the stakeholder to release the deposit monies held in their trust account, directly to our clients."

[6] The learned trial Judge held that the first respondent thereby effectively terminated the contract, entitling the first respondent to repayment of the $18,000 deposit monies. In reaching that conclusion, His Honour rejected the first appellant's substantial contention before him, which was that by its own acts or omissions the first respondent brought about or contributed to the non-fulfilment by 15 June 1999 of special condition 4.2. Special condition 4.3 obliged both vendor and purchaser to "do all such things and (sic) such documents as are required by the Council to enable it to make a decision". The law is well established that a party cannot, in terminating a contract, rely on non-fulfilment of a condition, if that party's own act or omission brought about that non-fulfilment.

[7] As put by the High Court in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 441:

> "…if the stipulation be that the contract shall void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong…
> …The provision in question is to be construed as making the contract not void but voidable. The question of who may avoid it depends on what happens. If one party has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract."

See also *Perri v Coolangatta Investment Pty Ltd* (1982) 149 CLR 537, 566 and *Gange v Sullivan* (1966) 116 CLR 418.

[8] By this appeal, the appellants challenged the learned Judge's conclusion that the first respondent did not cause or contribute to the non-fulfilment by 15 June of

special condition of 4.3. It is important, therefore, to set out the course taken to secure the Council's decision.

[9] Shortly after the date of the contract, the parties signed the application for the Council's decision. But it was pointless then to provide that to the Council, all necessary additional documentation not being available. The application was eventually provided to the Council on Tuesday 8 June 1999. The delay in not providing the application until then is explained by the time taken to satisfy the Council's requirement for written confirmation from the landlord of its willingness to grant a lease to the new purchaser. The landlord provided written confirmation to that effect, in a document dated 24 May 1999, furnished to the second appellant, a director of the first appellant. The second appellant sent it to the Council under cover of a letter of 27 May 1999, apparently received by the Council on 4 June 1999. The solicitors for the first respondent first learnt of that when notified by the Council on 7 June 1999. On the following day, Tuesday 8 June 1999, the solicitors for the first respondent lodged the application with the Council. Two additional pieces of necessary information were subsequently provided, a bank letter on 9 or 10 June, and on Friday 11 June, notification of the intended take-over date (5 July). The evidence of the chair of the Council was that the application was in form susceptible of determination by Friday 11 June. It was not then considered. The following Monday, 14 June, was a public holiday. Neither was it considered on Tuesday 15 June, the extended date for completion. On that day, the respondent's solicitor pressed the Council's secretary as to whether a decision could not be made on that day.

[10] The first respondent had proceeded on the basis that it should secure an actual draft lease, for the purpose of its application to the Council, not simply written confirmation of the lessor's willingness to grant a lease. Although the evidence of the Council's secretary and chair was that a letter of intent would have sufficed, the learned Judge accepted the second respondent's evidence that the secretary of the Council indicated that it would be "better" to send a draft lease with the application. That finding is challenged, but it was reasonably open. The respondent's solicitors' advice was that a lease should be obtained. The Judge took the view that the first respondent was reasonable in pursuing a lease in order to satisfy the requirements of the Council, because of the respondent's need also to satisfy special condition 12:

> "12.1 This contract shall be subject to and conditional upon the Purchaser being granted a Lease for the premises from the Lessor, upon terms and conditions satisfactory to the Purchaser which shall include a term of lease for a period not less than three (3) years and with two (2) further options of renewal of three (3) years each.
>
> 12.2 In the event the Purchaser requires the Lease to be registered, the Lessor must provide to the Purchaser an undertaking in writing to register the Lease, at the cost and expense of the Purchaser as soon as practical after completion.
>
> 12.3 The Vendor must obtain and provide to the Purchaser at settlement a duly executed and stamped Surrender of Lease, signed by the Vendor and the Lessor relating to the existing Lease.

> 12.4 The Purchaser agrees to provide all such references and do all things reasonably necessary by the Lessor in considering the new Lease.
>
> 12.5 In the event that a new Lease is not granted to the Purchaser pursuant to this Special Condition, then the Purchaser may be notice in writing to the Vendor, terminate this contract, in which event all deposit and other monies received by the Vendor or Stakeholder on account of the purchase price, shall be refunded to the Purchaser in full.
>
> 12.6 Standard Condition 27 shall not apply."

[11] The Judge's reasoning was as follows:

> "The suggestion from the defendants is that the plaintiff did not from an early stage seek a letter of intent from the lessor. However, as I have pointed out, compliance with Special Condition 4 could also be made by obtaining a lease and this course had the added advantage of ensuring that Special Condition 12 would also be addressed in so doing. Special Condition 12 may not have required fulfilment at the same time as Special Condition 4 but it was not unrealistic in the time available to attempt to secure compliance with both. The reasonableness of such a course is further borne out by the readiness on the part of the plaintiff to grant reasonable extensions of time, the original date of 12 May 1999 being ultimately extended to 15 June 1999. The plaintiff's attempts to secure a lease were all that could reasonably have been expected. The plaintiff's actions when it became aware of the letter of intent being in possession of the Council on 7 June 1999 were also above criticism. …
>
> There was much commercial sense in the plaintiff attempting to secure compliance with Special Condition 4 and Special Condition 12 by obtaining a lease. The plaintiff pursued this course quite diligently involving, at various stages, the defendant in those attempts. In the end result both parties would have been taken by surprise at the failure of the Newsagency Council to consider the matter until after 15 June. The unavailability of Mr McNeil over the days up to and including 15 June could not have been foreseen by either party. With the benefit of hindsight the eventual problem was caused by the failure on the part of the plaintiff, despite its many efforts, to secure a lease and the failure of the first defendant to obtain and send a letter of intent sooner. The action of the second defendant in holding the letter of intent from on or about 27 May to 4 June for no good reason, was a most significant contributing factor to the eventual non-compliance. Again, with the benefit of hindsight, the defendant's failure to provide written notice of the changed settlement date until 11 June was also a costly error."

[12] Those findings and conclusions of fact were in my view reasonably open. They warranted rejection of the first appellant's contention that an unreasonable approach of the first respondent culpably caused or contributed to the non-fulfilment of the condition by 15 June.

[13] That reasoning is criticized on the basis that His Honour became unduly distracted by the first respondent's need, under special condition 12, to secure a lease, failing

which the purchase would collapse; while overlooking the greater effort of securing a lease as opposed to securing a mere letter of intent. As special condition 4.3 expresses, the purchaser was obliged to do all things and produce the documents required by the Council; and as it implies, in that to act reasonably. The Judge found that the first respondent complied with the requirements of the Council. The only question is whether it did so with sufficient expedition.

[14] In that regard, the first respondent's implicit obligation was to proceed with reasonable expedition, within the timeframe set by the date for completion as varied from time to time. Insofar as a focus on securing a draft lease, rather than simply written confirmation of the lessor's willingness to provide a lease, delayed the ultimate application to the Council, the learned Judge is to be taken to have considered that the first respondent's approach was reasonable by seeking, for reasons of economy, to address, concurrently, both satisfying the Council's requirements and ensuring a lease. Hindsight may suggest that the first respondent may have been better advised to concentrate on obtaining first an indication of the lessor's willingness to grant a lease. But precisely how the first respondent should have proceeded is not capable of definitive, absolute prescription: what is reasonable depends on a value judgment. The view taken by the Judge was open, and consistently with the court's orthodox approach, no ground for interference has been established.

[15] I turn to a submission raised for the first time on appeal. Mr Martin, for the respondents, objected to our entertaining the point. But it raises an issue of law on facts pleaded by the respondents. I consider the point may reasonably be considered.

[16] The appellants submitted that 15 June having passed by, the termination on 17 June was ineffectual – with the Council's intervening, favourable decision having been notified on 16 June. The position in *Suttor* is distinguishable. A right of avoidance having arisen, that "innocent" party then treated the contract as on foot, foregoing the right to terminate (p 442). Not so here. The respondents' solicitors' facsimile of 16 June "specifically" reserved the respondents' rights under special condition 4.3, which they exercised the following day. The case thus falls precisely within the principle expressed in *Tropical Traders Ltd v Goonan* (1963-4) 111 CLR 41, 55:

> "Time being of the essence the appellant became entitled, as soon as 6th January 1963 had passed, to elect for or against rescinding the contract. Any act done by it and consistent only with the continuance of the contract on foot the law would hold to constitute an election against rescinding; and an election once made could not be retracted. But the appellant was not bound to elect at once. It might keep the question open, so long as it did nothing to affirm the contract and so long as the respondents' position was not prejudiced in consequence of the delay."

[17] There is separate challenge to the Judge's order that the respondents' costs, to be paid by the appellant, be assessed on the indemnity basis. That was apparently explained by an offer to settle made by the respondents on 7 April 2000. The respondents' offer, expressed to have been made under part 5 of chapter 9 of the Uniform Civil Procedure Rules, reflects the judgment eventually given by the Judge. It was open for 14 days and not accepted. The trial commenced on 24

January 2002. The offer did in my view provide justification for the indemnity assessment ordered by the Judge.

[18] We were referred to *Tickell v Trifleska Pty Ltd* (1991) 25 NSWLR 353 and *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358, as to the significance of a party's offer to settle involving no real compromise. It is in principle inappropriate to explore that matter in this case, where the learned Judge was not referred to those cases and has expressed no particular reasons for his exercise of discretion. It suffices to my mind, to support his order, that had the offer been accepted, the costs of the trial would have been avoided, with an additional consideration that the respondents in fact recovered an order for accretions on the deposit moneys not sought in the offer.

[19] The appeal should be dismissed, with costs to be assessed.

[20] **JERRARD JA:** I have read and agree with respect with the reasons for judgment and orders of de Jersey CJ.

[21] **ATKINSON J**: For the reasons given by the Chief Justice, I agree that the appeal should be dismissed with costs to be assessed.