SUPREME COURT OF QUEENSLAND

CITATION:	*McPhee v Zarb & Ors* [2002] QCA 530
PARTIES:	**MALCOLM MCPHEE** (plaintiff/respondent) **v** **SYLVIA ZARB** (first defendant) **LBS HOLDINGS PTY LTD** ACN 096 201 535 (second defendant/first appellant) **AUSTRALASIAN THEATRICAL INVESTMENTS PTY LTD** ACN 096 131 752 (third defendant/second appellant)
FILE NO/S:	Appeal No 2497 of 2002 SC No 6277 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2002
JUDGES:	McMurdo P, Williams JA and Atkinson J Separate reasons for judgment of each member of the court; each concurring as to the orders made
ORDERS:	**1. Appeal allowed;** **2. Judgment and orders appealed from set aside;** **3. The application of the respondent McPhee for summary judgment on his claim be dismissed;** **4. That the cross-application for summary judgment in favour of the appellants LBS Holdings Pty Ltd & Australasian Theatrical Investments Pty Ltd be granted;** **5. That the respondent McPhee pay to the appellants LBS Holdings Pty Ltd & Australasian Theatrical Investments Pty Ltd the sum of $15,000.00 with interest (at the contract rate published by the Queensland Law Society Inc) from 28 June 2001 until judgment;** **6. That the respondent McPhee pay the appellants' costs of this appeal and of the proceedings at first instance.**

CATCHWORDS: CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – MATTERS ARISING BETWEEN CONTRACT AND CONVEYANCE – TIME –WAIVER – appeal by purchasers against summary judgment for vendor ordering forfeiture of the deposit - where contract stated time is of the essence – where settlement date was extended to a fixed date by agreement between the parties due to vendor's failure to provide release of mortgage - where purchasers subsequently reserved their rights upon extending the settlement date – where purchasers subsequently rescinded - whether agreed extension of time amounted to an affirmation of the contract destroying the essentiality of time

CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – BREACH OF CONTRACT – BREACH BY THE VENDOR:REMEDIES OF PUCHASER – RESCISSION – TIME - where contract stated time of the essence – where settlement date extended - where purchasers rescinded contract upon repeated failure by vendor to provide release of mortgage at agreed dates - whether learned trial judge erred in finding that the purported rescission by the purchasers constituted a wrongful repudiation of the contract thus making the vendor's rescission effectual

CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – MATTERS ARISING BETWEEN CONTRACT AND CONVEYANCE – TIME –WAIVER - whether failure by purchasers to tender the price on the extended settlement date and where vendor also failed to provide release of mortgage equated to conduct affirming the contract and destroying the essentiality of time – *Foran v Wight* distinguished

CONVEYANCING - LAND TITLES UNDER THE TORRENS SYSTEM – MORTGAGES, CHARGES AND ENCUMBRANCES – POWERS AND REMEDIES OF MORTGAGEE – FORCLOSURE – STATUTORY PROVISIONS - where vendor loses all rights to settle when mortgagee exercises power of sale – effect of s 87(1) *Property Law Act* considered – whether vendor can rescind once power of sale exercised

Property Law Act (Qld) 1974, s 87(1)

Carr v JA Berrriman Pty Ltd (1953) 89 CLR 327, referred to
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, followed
Foran v Wight (1989) 168 CLR 375, followed
Holland v Wiltshire (1954) 90 CLR 409, followed
Ireland v Leigh [1982] Qd R 145, followed
Mahoney v Lindsay (1980) 55 ALJR 118, followed
Mehmet v Benson (1965) 113 CLR 295, followed
Peter Turnbull & Co Pty Ltd v Mundus Trading Co

(Australasia) Pty Ltd (1954) 90 CLR 235, followed
Rawson v Hobbs (1961) 107 CLR 466, followed
Spencer v Cali [1986] 2 Qd R 456, followed
Stephens v Coorey [1996] Q Conv R 54-469, distinguished
Sugden v Parker (1985) Q Conv R 54-199, referred to
Summers v The Commonwealth (1918) 25 CLR 144, followed
Tropical Traders Ltd v Goonan (1964) 111 CLR 41, followed

COUNSEL: M P Amerena for the appellants
K S Howe for the respondent

SOLICITORS: John J Evans for the appellants
Robinson & Robinson for the respondent

[1] **MCMURDO P:** I agree with the reasons of Williams JA and with the orders proposed.

[2] **WILLIAMS JA:** Essentially the proceedings in question were brought to resolve disputes which arose between the vendor, the vendor's mortgagee, and the purchasers consequent upon the vendor (the respondent) and purchasers (the appellants) executing a contract of sale dated 23 April 2001. In circumstances which will be detailed herein subsequently, by letter dated 28 June 2001 the purchasers purported to terminate that contract because of the vendor's failure to settle on 31 May 2001. The vendor responded by letter dated 29 June 2001 asserting that the purchasers' letter of 28 June 2001 constituted wrongful repudiation and in consequence the vendor by that letter accepted that wrongful repudiation and terminated the contract. The proceedings before the learned judge at first instance involved competing applications for summary judgment which gave rise to issues between the vendor, the vendor's mortgagee, and the purchasers; each was represented at the hearing. At first instance a series of orders determining rights and obligations as between those three parties were made. This appeal is only concerned with the position as between the vendor and the purchasers and the critical question for resolution by this court is whether the learned judge at first instance was correct in concluding that the purported rescission by the purchasers on 28 June 2001 constituted a wrongful repudiation of the contract thus making the vendor's rescission on 29 June 2001 effectual. In the circumstances I will only refer to facts relevant to that issue.

[3] The property, the subject of the contract of sale, was described as restaurant premises at Surfers Paradise being Lot 1 on BUP 1922. The total purchase price was $150,000 (including $30,000 for items specified in an inventory) and there was a deposit of $15,000 "to be released unconditionally to the seller". Settlement date was stated to be "on or before 31/5/2001" and time was expressly stated to be of the essence. The contract also provided that the vendor was to give the purchasers possession "on the date of this contract" pending completion.

[4] Settlement was fixed for 3.15 p.m. on 31st May 2001 at the offices of the solicitors for the vendor's mortgagee. Lawyers representing each of the parties were present, as were a number of other people. Inferentially those others included the vendor, and representatives of the purchaser companies. The solicitor for the purchasers placed on the table bank cheques sufficient to satisfy the obligations of his clients

on settlement. Because of a dispute between the vendor and his mortgagee as to what was required to be done by the former to obtain a discharge of the mortgage, the solicitor for the mortgagee declined to produce a discharge of the mortgage. In the light of that the solicitor for the vendor said to the solicitor for the purchasers "we are not going to settle this afternoon". The solicitor for the purchasers then recovered the cheques and placed them in his file. In an affidavit in support of his application for summary judgment the plaintiff-vendor (McPhee) swore: "The plaintiff and the second and third defendants then agreed to extend settlement until 22 June 2001". That verified an allegation in the statement of claim that settlement had been extended to 22 June 2001. The purchasers relied on an affidavit filed by their solicitor in the proceedings at first instance, but there was no challenge to the assertion by McPhee that such an agreement was reached whilst the parties were still present at the time and place where settlement was to be effected.

[5] Indeed, other material from the purchasers supports the conclusion that such an agreement was reached. Following discussions between the vendor and his mortgagee after 31 May they agreed to attempt settlement again on 5 June and a letter was written to the solicitor for the purchasers suggesting that. On 5 June the solicitor for the purchasers replied to the solicitors for the vendor relevantly saying:

> "It appears that your client contacted my client direct on the day of settlement namely 31st May last and requested an extension of twenty-one days and I refer to your facsimile of that date. My client agreed to accept the request and the funds have been deposited with their Bank for the twenty-one days and will be available for settlement on the 21st June next."

[6] The solicitor for the purchasers wrote a further letter to the solicitors for the vendor later that day; relevantly it said:

> ". . . I have again spoken to my client and I have been instructed that their funds which were to be used for the settlement of the matter last Thursday the 31st May, 2001 will definitely be available for the settlement on the 22nd June 2001 by 4.00 pm. I request that you confirm that the cheques to be drawn that day will be the same as set out in your letter of the 31st May, 2001 subject to any minor adjustments for rates etc."

[7] It should be noted that the reference to 22nd June in the latter letter coincides with the date sworn to by the vendor in his affidavit. The reference to 21st June in the earlier letter would appear to be an error made by the solicitor which was corrected after taking further instructions from the purchasers. The parties themselves seem to be in agreement that on 31 May settlement was extended until 22 June.

[8] There was a later letter from the solicitors for the vendor dated 15 June in which they said "We note that settlement of this matter has been extended to 21 June 2001". Another letter from the vendor's solicitors dated 16 June also indicated settlement was to take place on 21 June. That is not in accord with the allegation in the statement of claim nor with the vendor's sworn evidence and little or no significance should be given to that date. That letter of 15 June also stated: "We will forward cheque details to you shortly."

[9] The sworn statement verifying the allegation in the statement of claim and the correspondence referred to clearly establishes that there was an agreement reached on 31 May between the parties themselves for an extension of time for settlement to 22 June. In their defence the purchasers deny there was such an agreement but, as already noted, the material they relied on before the judge at first instance did not, in the circumstances, support such a denial. Moreover the correspondence from the solicitor for the purchasers confirms the vendor's allegation.

[10] Of some significance is the fact that on 31st May 2001 the solicitor for the purchasers wrote to the solicitors for the vendor as follows:

> "I note that we attended settlement of this matter at 3.00 pm on the 31st May, 2001 at Parker Simmonds office and note that we tendered the cheques required by you as per your letter of the 31st May, 2001. However your client was in default of the contract and unable to settle in that your client was unable to produce a Release of Mortgage No 704697872 . . ..
>
> I advise that my clients reserve their rights in relation to the matter."

[11] There was evidence that such letter was received by the solicitors for the vendor at 1.30 pm on 1st June. In consequence the learned judge at first instance made the following finding:

> "I conclude that the agreement to extend time was made before the vendor's solicitors received notice of the purported reservation of the rights of the purchasers."

That conclusion is no doubt correct, but of little or no legal significance. If, as I later hold to be the case, the agreed extension of time did not amount to an affirmation of the contract destroying the essentiality of time, the reservation of rights evidenced by that letter was consistent with the agreement. The statement in the letter merely confirmed in express terms what was implied in the agreement extending time for completion to 22 June.

[12] Then, as the learned judge at first instance found, the vendor on 21 June 2001 sought to tender sufficient monies to the mortgagee to obtain a release of the mortgage. The mortgagee refused that tender and the vendor was not in a position on 21 June or thereafter to give clear title to the purchasers. The vendor's solicitor had not provided cheque details as promised in the letter of 15 June. The purchasers did not tender for settlement on either 21 or 22 June 2001, and on 25 June (the first business day after 22 June) their solicitor wrote to the solicitors for the vendor:

> "I note that despite my written and verbal request for cheque details for settlement on Friday the 22nd June, 2001 you have not been forthcoming with same.
>
> As your client continues to be either refusing or unable to settlement (sic) with my client I am now seeking my client's instructions in relation to taking action against your client under the contract."

[13] That was followed by the letter of 28 June 2001 which relevantly said: "I wish to advise that my client hereby terminates the contract based on your client's breach of

contract in failing to settle on the 31st May, 2001". That brought the following response from the solicitors for the vendor dated 29 June 2001:

> "It is clear from the correspondence and the conduct of the parties and further the conduct and correspondence between our respective firms that time has ceased to be the essence of the contract.
>
> Our client's instructions are that your client is held in breach of the Contract and furthermore our client has instructed us to accept your letter of the 28th June 2001 as constituting notice of termination as being wrongful repudiation . . .."

[14] To complete the correspondence reference should be made to the letter from the solicitor for the purchasers of 29th June 2001:

> "I advise that it is quite clear in our letter to you of 31st May, 2001 that your client was in default under the contract on that date and that my clients reserved their rights. At no subsequent time did my clients extend the date for settlement under the contract. Your client was clearly in breach of the contract and continued to be in breach of contract in failing to remedy that breach by providing my clients' title to the property."

[15] As already noted the learned trial judge concluded that there was an agreement to extend time for completion but she made no express finding as to the terms. Inferentially she concluded it could have been either to 21 or 22 June, but there appears to have been some favouring of the former. Her reasons refer to settlement on either 21 or 22 June. There is no reference in the reasons to the vendor's assertion in the pleadings and in his affidavit that the agreed extension was to 22 June. In my view the legal ramifications of what happened must be considered on the basis there was an agreed extension to 22 June.

[16] It must also be noted that on 23 May 2001 the mortgagee gave the vendor "notice of exercise of power of sale" requiring the vendor to remedy the particularised default within 30 days. On the basis that default had not been remedied the mortgagee exercised the power of sale on 27 June 2001 by transferring the property to the purchasers under the contract of 23 April 2001 for the consideration of $105,000. The transfer was registered on or about 27 June and the purchasers became requested proprietors of the property. Clearly as and from 27 June the vendor could not give title pursuant to the contract of 23 April.

[17] It is in those circumstances that the issues between the vendor and purchasers have to be resolved. As already noted the learned judge at first instance concluded that the agreement to extend time was made before the vendor's solicitors received notice of the purported reservation of the rights of the purchasers. She then concluded that the agreement to extend time was "some act consistent only with the continuance of the contract" and that by that act "the purchasers elected not to rescind the contract for the vendor's breach on 31 May 2001". On her reasoning it followed that time ceased to be of the essence when the purchasers elected not to rescind and failed expressly to remake time of the essence. The learned judge at first instance concluded that the contract was still on foot when the purchasers took a transfer from the mortgagee and by so doing they committed a breach of contract which gave the vendor the right to rescind. That resulted in the conclusion that the

purchasers' purported rescission on 28 June was a wrongful repudiation of the contract giving the vendor a right to rescind which he did on 29 June 2001.

[18] It followed on her Honour's reasoning that the vendor was entitled to damages against the purchasers, the quantum to be assessed by the District Court. The purchasers were ordered to pay costs of both applications.

[19] The question now for this court is whether or not that reasoning was correct.

[20] It is clear that the parties to a contract for sale of land which includes a provision that time shall be of the essence may extend the date for performance without affecting the essentiality of time. It has frequently been said that a mere extension, substituting a new date for the date specified in the contract, will not destroy the essentiality of time (*Holland v Wiltshire* (1954) 90 CLR 409 at 415, *Mehmet v Benson* (1965) 113 CLR 295 at 305, *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41 at 55, and *Spencer v Cali* [1986] 2 Qd R 456 at 466). But, as those authorities demonstrate, the position is otherwise where at least one party by conduct gives the other grounds for believing that precise performance as to time will not be insisted upon. In some cases, and *Mehmet v Benson* is one, the court is able to conclude that neither party regarded time as being of the essence after a situation had arisen which would have given one party the right to rescind.

[21] Here, the learned trial judge, appears to have concluded that time ceased to be of the essence because the purchasers elected not to rescind on 31 May and failed expressly to remake time of the essence. In my respectful view, that reasoning is erroneous. There was, as the facts recited above establish, an agreement to extend time to a particular date, namely 22 June. In the absence of other conduct evidencing that the parties, or at least one of them, no longer regarded time as being of the essence, the ordinary principle would apply, and it should be held that there was a mere extension of time substituting a new date not destroying the essentiality of time.

[22] Counsel for the respondent-vendor argued in this court that the purchasers did more than just agree to extend time. He submitted that the "unequivocal correspondence" subsequent to the agreement to extend the date for completion demonstrated that they treated the contract as being one where time was no longer of the essence. Much of his argument was dependent upon the contention that the agreement was to extend for twenty-one days, that the agreed new date for completion was 21 June, and that there then was a subsequent attempt to extend the date to 22 June. That argument loses virtually all force when it is appreciated that on the evidence the agreed extension at all times was to 22 June. Counsel also relied on the failure of the purchasers to tender on 22 June, and that is a matter which will be addressed subsequently. The evidence does not establish more than a mere extension of time.

[23] It is a fact that the purchasers remained in possession after 22 June and that could be evidence of an intention to affirm the contract (cf *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 at 348 and *Sugden v Parker* (1985) Q Conv R 54-199 at 57316), but no submission was made to that effect before this court. The learned judge at first instance made no finding on that point. In all the circumstances of this case I am not prepared at this stage to conclude that the purchasers so remaining in possession constituted an affirmation of the contract.

[24] In this case the purchasers' formal notice of rescission given on 28 June was expressly based on the vendors' failure to complete on 31 May. Counsel for the vendor submitted in this court that if there had been an extension of time the purchasers lost the right to terminate the contract for the failure to complete on the original date for completion. In my view that submission is not supported by the authorities. In *Goonan* at 55 and *Spencer v Cali* at 466 it was said that an extension "without more is only a qualified and conditional waiver of the original stipulation and constitutes no more than a promise not to elect to rescind before the extended time". Given that statement of principle the party not in default on the original settlement date is entitled to elect to rescind for that breach subsequently, but not before the extended date for completion. It follows that the submission to the contrary by counsel for the respondent must be rejected.

[25] Counsel for the respondent-vendor also sought to uphold the decision at first instance by contending that time became no longer of the essence when neither party tendered on 22 June. He submitted that by conduct after that date each party treated the contract as being on foot in circumstances where time was no longer of the essence. In support of that proposition he relied on *Foran v Wight* (1989) 168 CLR 375 and *Stephens v Coorey* [1996] Q Conv R 54-469. The latter case is readily distinguishable. There neither party tendered on the date fixed for completion but thereafter each proceeded with arrangements for settlement to take place on a later date. That subsequent conduct clearly affirmed the contract and destroyed the essentiality of time. In consequence it was necessary to give notice re-establishing time as of the essence before either party was entitled to rescind. In this case the purchasers reserved their position on the next working day after the extended date fixed for completion and, on the evidence, did nothing thereafter to affirm the contract before giving the notice of recision on 28 June.

[26] In my view the reasoning in *Foran v Wight* does not assist the vendor. Here the vendor was at all material times unable to complete because he was not in a position to give clear title; at all material times his title was encumbered by the mortgage. That was the express reason why settlement was not effected on 31 May, and the subsequent correspondence (at best for the vendor) only suggested that further attempts were being made to obtain clear title. There was never any communication to the purchasers that the vendor was in a position to settle. The vendor's solicitor did not comply with his undertaking to provide the solicitor for the purchasers with details of the cheques which would be required to effect settlement on 22 June. In those circumstances the vendor effectively created the impression that there was no point in the purchaser's attempting to settle the transaction on 22 June because the vendor was not in a position to give clear title.

[27] Statements in *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235 at 247 and 250-1, *Mahoney v Lindsay* (1980) 55 ALJR 118, *Foran v Wight* at 419-22 and *Ireland v Leigh* [1982] Qd R 145 support that proposition. It is true, as those cases demonstrate, that the obligations of vendor and purchaser with respect to settlement are concurrent obligations and, for example, a vendor who is unable to complete because of an inability to give title cannot rescind on the ground the purchaser failed to tender the purchase price on the due date. But those cases also make it clear that a purchaser, who did not tender because of an intimation from the vendor that the vendor would be unable to complete, will be able to rescind provided the purchaser was not incapable of settling on that date.

(See in particular *Foran v Wight* at 425 and *Rawson v Hobbs* (1961) 107 CLR 466 at 481). As Brennan J said in *Foran v Wight* at 420:

> "A purchaser who acts on an intimation from the vendor that the vendor will complete but not on the fixed day is dispensed from his temporal obligation, so that his omission to tender the price on that day is no breach; but, unless the contract is terminated, his obligation to pay the price remains after the day fixed for completion is past."

[28] Here, the purchaser did terminate the contract because of the vendor's inability to complete. The reservation of rights was made on the first business day after the date for completion and within a reasonable time thereafter, and before anything had been done to affirm the contract, the notice terminating the contract was given.

[29] There can be no doubting that the purchasers had the finance to settle on 22 June if the vendor was capable of giving title. The funds were clearly available on 31 May and the evidence suggests those funds had been invested until 21 June. Given what Dixon CJ said at 481 in *Rawson v Hobbs* the evidence established that the purchasers were willing and able to settle on 22 June.

[30] Counsel for the respondent/vendor did not expressly rely on the statement by the learned judge at first instance that by taking a transfer of the subject property from the mortgagee on 27 June the purchasers committed a breach of contract which gave the vendor the right to rescind. I am by no means satisfied that taking that transfer amounted to a breach of the contract of 23 April. But even if it did the purchasers were not prevented from terminating the contract because of the incapacity of the vendor to complete it. Once the mortgagee was in a position to exercise a power of sale the vendor lost all right to settle the contract in question by giving clear title.

[31] It is true that the matter is complicated because the learned judge at first instance found in the proceedings between the vendor and the mortgagee that the mortgagee may have breached obligations under the mortgage by refusing to accept the amounts tendered by the vendor. But by operation of s 87(1) of the *Property Law Act* the purchasers were not "concerned to see or enquire whether a case has arisen to authorise the sale" and their title was unimpeachable at the suit of the vendor. This court is not concerned with issues as between the vendor and the mortgagee.

[32] It follows that the learned judge at first instance erred in concluding that the purchasers did not rescind the contract by the notice given on 28 June 2001. That notice had the effect of rescinding the contract. It follows that the learned judge at first instance also erred in concluding that the vendor's rescission of 29 June 2001 was effectual.

[33] If I should be wrong in concluding that the purchasers did not affirm the contract after 22 June or in finding that the purchasers were not in breach by taking a transfer from the mortgagee on 27 June, I am nevertheless of the view the vendor could not rescind the contract. In accordance with reasoning in *Foran v Wight* and *Ireland v Leigh* the vendor could not rescind because at all material times he was not in a position to settle. A situation would then be reached where neither party could rescind and neither was in a position to complete the contract. It would follow in my view that the parties had abandoned or abrogated the contract (cf *Summers v The Commonwealth* (1918) 25 CLR 144; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 434, and *Foran v Wight* at 422-3). Adopting the reasoning

in *DTR Nominees* at 434 (and applying *Rawson v Hobbs* at 484-5) the purchasers would be entitled to in those circumstances to the return of their deposit.

[34] The appeal should be allowed and the orders made on 22 February 2002 should be set aside. The vendor's application for summary judgment on his claim should be dismissed. It follows that the purchasers are entitled on their cross-application for summary judgment for judgment in their favour.

[35] Before the learned judge at first instance, and again by the notice of appeal, the purchasers sought an order for the recovery of the deposit of $15,000.00 with interest if that position was reached. Counsel for the respondent did not contest that, and, if the other orders are made, it seems necessarily to follow that the purchasers are entitled to recover the deposit.

[36] The orders of the court should therefore be:

(i) Appeal allowed;
(ii) Judgment and orders appealed from set aside;
(iii) The application of the respondent McPhee for summary judgment on his claim be dismissed;
(iv) That the cross-application for summary judgment in favour of the appellants LBS Holdings Pty Ltd & Australasian Theatrical Investments Pty Ltd be granted;
(v) That the respondent McPhee pay to the appellants LBS Holdings Pty Ltd & Australasian Theatrical Investments Pty Ltd the sum of $15,000.00 with interest (at the contract rate published by the Queensland Law Society Inc) from 28 June 2001 until judgment;
(vi) That the respondent McPhee pay the appellants' costs of this appeal and of the proceedings at first instance.

[37] **ATKINSON J:** I agree with the reasons of Williams JA and with the orders he proposes.