

SUPREME COURT OF QUEENSLAND

CITATION: *Mika Investments Pty Ltd v FKP Group Superannuation Fund Pty Ltd* [2003] QSC 005

PARTIES: **MIKA INVESTMENTS PTY LTD**
ACN 009 921 000
(applicant)
v
FKP GROUP SUPERANNUATION FUND PTY LTD
ACN 064 782 627
(respondent)

FILE NO/S: SC 11339 of 2002

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 17 January 2003

DELIVERED AT: Brisbane

HEARING DATE: 13 January 2003

JUDGE: Muir J

ORDER: **That the application be dismissed and that the applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: *Property Law Act 1974*

Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd [1995] ANZ ConvR 41
Expectation Pty Ltd v Pinnacle VRB Ltd [2002] WASCA 160
Gange v Sullivan (1966) 116 CLR 418
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd
Ross T Smyth & Co. Pty Ltd v T D Bailey, Son & Co. [1940] 3 All ER 60
Meehan v Jones (1981-82) 149 CLR 571
Re Wickham Developments (Australia) Pty Ltd v Feros [1994] ANZ ConvR 347
Sandra Investments Pty Ltd v Booth (1981) 153 CLR 153.

CONTRACT – REPUDIATION – contract for sale of land – whether contract terminated in reliance on unlawful repudiation – whether due diligence clause is for purchaser's sole benefit – whether vendor can terminate the contract pursuant to such clause before the expiration of the due

diligence period

COUNSEL: T W Quinn for the applicant
M M Stewart SC for the respondent

SOLICITORS: James Varitmos for the applicant
Dibbs Barker Gosling for the respondent

The application

- [1] The applicant, Mika Investments Pty Ltd (“Mika”), entered into a contract with the defendant, FKP Group Superannuation Fund Pty Ltd (“FKP”) dated 14 November 2002 in which Mika agreed to sell a parcel of land to FKP for a price of \$1,475,000.00.
- [2] Mika seeks an order pursuant to s 70 of the *Property Law Act* 1974 declaring that the parties are no longer bound by the contract because:
- (a) it has been terminated by Mika in reliance on FKP’s unlawful repudiation;
 - (b) it is at an end by operation of special condition 1;
 - (c) it was terminated by one or other of the parties “for non-satisfaction of special condition 1”.
- [3] Mika also seeks removal of a caveat lodged by FKP over the land.

Factual Background

- [4] On 28 November 2002 FKP’s solicitors sent a fax to Mika’s solicitors in which they stated that their client was concerned about contamination of the land and the cost of remediation. The fax contained an offer in these terms:
- “1. The price is reduced by \$50,000.00 to \$1,425,000.00 to allow for costs associated for remediation of the site.
 2. Our client will accept responsibility for the building compliance and certificate of classification issues.”
- [5] Discussions between the solicitors then took place and it was agreed that the date by which special condition 1 of the contract was to be satisfied be extended. The agreement was confirmed in a fax of 28 November from FKP’s solicitors to Mika’s solicitors which provided:
- “We confirm that the date by which special condition 1 of the Contract is to be satisfied is extended for a period of seven days to Thursday next, 5 December 2002.”
- [6] On 3 December FKP’s solicitors in a fax to Mika’s solicitors stated that they were instructed by their client that the contract had been varied in a number of respects. It is common ground that Mika had not agreed to vary the contract as the fax asserted.

- [7] Late in the afternoon of 4 December FKP faxed to Mika's agent a letter bearing the reference "Re: Final Offer to Purchase 161 Cavendish Road, Coorparoo" and stating:

"Further to the current negotiations regarding the above site, our final offer to purchase is as follows:

- The purchase price is to be reduced by \$25,000 to \$1,450,000.
- That the agreement for your vendor to guarantee the lease to SBH Pty Ltd be disregarded.

By signing below FKP Group Superannuation Fund Pty Ltd agree to go unconditional on subject property today."

The fax was signed by a representative of FKP and contained provision for acceptance on behalf of Mika.

- [8] In a telephone conversation on the morning of 5 December Mr Varitimos, a director and controller of Mika, referring to the fax of 4 December, told Mikas' agent that he was not interested in proceeding further and that the transaction was finished.
- [9] At about midday Mr Varitimos told a representative of FKP who came to see him at a building site that there would be no further dealings with FKP and that that was the end of the matter.
- [10] At 4.12 pm on 5 December FKP's solicitors sent a fax to Mika's solicitors stating, *inter alia*:
- "Pursuant to special condition 1 of the contract we give notice that our client is satisfied with the due diligence investigations."

The Special Condition

- [11] Special condition 1 provides:
- "1. This contract is subject to and conditional upon the Purchaser being satisfied with due diligence investigations with relevant authorities within fourteen (14) days from the date hereof. Should the Purchaser not be satisfied with the due diligence investigations then this contract will be at an end and all deposit monies will be refunded to the Purchaser."

Was the Contract terminated by operation of or pursuant to the special condition

- [12] Because of the extension of time previously mentioned FKP had until midnight on 5 December to be satisfied with "due diligence investigations with relevant authorities". There is an ambiguity in the fax of 28 November but it seemed to be common ground that the time within which FKP could be satisfied was extended for seven days to (and including) 5 December. I think that this is the better construction of the fax. Whether or not FKP was satisfied was a matter for its subjective

determination. In other words it could, if it wished, decide that it was satisfied with due diligence investigations even if, from the perspective of others, the results of the inquiries proved thoroughly unsatisfactory. Although it had a duty to act honestly¹ should it wish to assert a lack of satisfaction, an assertion by it that it was relevantly satisfied, for all practical purposes, established its satisfaction under the clause.

- [13] As the special condition provided for a period within which FKP was entitled to conduct investigations and assume a state of satisfaction, FKP was not prevented from becoming relevantly satisfied on 5 December even though it may not have been so satisfied on any preceding day or even earlier in the day on 5 December. That conclusion, in my view, is re-enforced by the fact that the clause makes no provision for the giving of notice within the operative period. It is expressed to take effect automatically at the end of the prescribed period by reference to the purchaser's state of mind. The authorities suggest, however, that such a condition does not result in the contract coming to an end at the expiration of the prescribed period. Rather, each party, if not in breach, has a right of termination² unless the purchaser has waived the benefit of the relevant clause.³
- [14] It follows from these observations that, subject to one qualification, the contract was not terminated by operation of special condition 1 on 4 or 5 December and could not have been terminated by Mika "because of non-satisfaction of special condition 1".
- [15] The qualification I have in mind is the question of whether the communication of 4 December should be regarded as a notice under special condition 1 of FKP's non-satisfaction. The fact that the communication was sent prior to the expiry of the time limited by the clause and was not a waiver of rights under it tends to suggest that it was not to be taken as notification under the clause. Apart from that, the fax has more of the flavour of an attempt to negotiate a lower price rather than a notice under a contractual provision. It refers to "current negotiations" and states, in effect, that if the offer is accepted FKP will waive its rights under the special condition. It makes the assertion, in effect, that Mika can avoid the risk of the contract being terminated as a result of the failure of the special condition by accepting the offer. I am unable to construe it as an abandonment of rights under special condition 1 or a notification under the clause.
- [16] In my view it is not in the contemplation of the special condition that it can be triggered by the vendor before the time prescribed for its satisfaction as a result of statements or acts by a purchaser. Conduct by the purchaser may amount to a waiver or an abandonment of rights under the clause or may even amount to notice under the clause. But it would be quite impractical and create unnecessary uncertainty if, prior to the expiration of the time limited by the clause, the vendor could make an assessment of the purchaser's state of mind and on the basis of that assessment give notice under the clause. The clause, of course, does not

¹ *Meehan v Jones* (1981-82) 149 CLR 571.

² *Sandra Investments Pty Ltd v Booth* 1983) 153 CLR 153.

³ *Gange v Sullivan* [1966] 116 CLR 418; *Re Wickham Developments (Australia) Pty Ltd v Feros* [1994] ANZ ConvR 347; *Associated Developers (Aust) Pty Ltd v Allied and General Pty Ltd* [1995] ANZ ConvR 41; and *Expectation Pty Ltd v Pinnacle VRB Ltd* [2002] WASCA 160

contemplate the giving of any such notice as it was essentially for the purchaser's benefit.⁴

- [17] The fax from FKP of 5 December asserted satisfaction for the purposes of the special condition. That is evidence that it was relevantly satisfied and, that and other evidence establishes that FKP was so satisfied. The special condition ceased to operate after 5 December.

Did KFP's conduct amount to repudiation?

- [18] I now turn to the question of repudiation. Repudiation of a contract is "a serious matter, not lightly found or inferred".⁵

- [19] The existence or otherwise of repudiatory conduct is to be determined by reference to:

"objective acts and omissions and not upon uncommunicated intention. The question is what effect the lessor's conduct 'would be reasonably calculated to have upon a reasonable person'... . It suffices that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it."⁶

- [20] I do not regard FKP's conduct as repudiatory in nature. The time for fulfilment of the special condition was due to expire at midnight on 5 December. FKP had been negotiating to obtain more favourable terms and the 4 December fax must be seen in that context. Although couched as a "final offer to purchase", plainly it was referring to the special condition. FKP implicitly asserted that it would not be satisfied in terms of special condition 1 unless the two conditions set out in its fax were satisfied. Another possible view of the fax is that it constitutes an offer to vary the contract or to enter into a new contract on particular terms and conditions. The fax though cannot be construed as containing an assertion or intimation that FKP did not consider itself bound by the terms of the contract.

- [21] Mika relies on an affidavit in which a representative of FKP swears, in substance, that Mika was satisfied with the due diligence investigations on 4 December. In the light of that it is submitted that the conduct of FKP was both misleading and repudiatory in nature. If the conduct was misleading it had no relevant effect and can thus be disregarded. The state of mind of representatives of the defendant is irrelevant to the test for repudiation.

⁴ C.f. *Gange v Sullivan* (1966) 116 C.L.R. 418.

⁵ Lord Wright in *Ross T Smyth & Co. Pty. Ltd v T.D. Bailey, Son & Co.* [1940] 3 All ER 60 at 71 in a passage referred to with approval in *Roadshow Entertainment Pty Ltd v C.E.L. Home Video Pty. Ltd.* (1997) 42 NSWLR 462 at 479 and in the authorities cited at that reference.

⁶ *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty. Ltd.* (1989) 166 CLR 633 at 658.

Conclusion

- [22] For these reasons I order that the application be dismissed and that the applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.