SUPREME COURT OF QUEENSLAND

File No 4405 of 2002

BETWEEN:

MUSCAT &WHEELER

Applicant

AND:

ROBERTSON

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION:	*Muscat & Wheeler v Robertson* [2003] QSC 085
PARTIES:	**Phillip James Muscat and Patricia Kay Wheeler** (Applicant) **v** **Leanne Mary Robertson** (Respondent)
FILE NO/S:	SC 4405 of 2002
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	5 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12 November 2002
JUDGE:	Moynihan J
ORDER:	**That the applicants are entitled to the relief which they seek.**
CATHCWORDS:	CONTRACTS – General Contractual Principles – Construction and Interpretation of Contracts – whether the contract is in full force and effect and not terminated by a letter.
COUNSEL:	Mr D Frazer Q.C. for the Applicants Mr N Thompson for the Respondent
SOLICITORS:	Astills Lawyers for the Applicants

Creagh Weightman for the Respondent

[1] This is an originating application for a declaration that a contract for the sale of land (the Contract) is in full force and effect and not terminated by a letter of 26 March 2002. Orders to give effect to the declaration are also sought.

[2] An order was made by consent that the affidavits exchanged in respect of an interlocutory application constitute the pleadings for the purpose of this trial. That was unfortunate; the affidavits have been singularly ineffectual in identifying and effecting joinder on issues.

[3] The Contract in issue was entered into on 23 July 2001. By it the applicants agreed to purchase from the defendant lot 3 on a proposed survey plan shown on drawing number 00/752/2 which was Schedule A to the Contract.

[4] Lot 3 was one of four new lots and a park to be excised from an existing lot. That required subdivisional approval from the Brisbane City Council, a process governed by the *Integrated Planning Act* 1997. It is material to note that one of the new lots was to be retained by the defendant as a site for the family home.

[5] At all material times the defendant acted through her husband and duly constituted attorney Douglas George Robertson. Consultants were retained on her behalf. Among other things they negotiated with the Council in respect of the terms of approvals. Reference to "the defendant" in these reasons includes the defendant's attorney and the consultants where that is apposite.

[6] In fact the defendant had very little to do with the project. Douglas Robertson made most if not all of the decisions. He is the managing director of Robertson Project Management Pty Ltd a company that manages construction projects for owners and developers and he has experience in the construction business.

[7] In December 2000 the respondent was diagnosed as suffering from acute myeloid leukaemia for which she received intensive chemotherapy and other treatment. She was seriously ill and spent an extensive time in hospital. No doubt from the defendant and Douglas Robertson's perspective this was extremely disruptive, time consuming and upsetting.

[8] That said the applicant's illness was not raised by the applicants as a cause or explanation for delay prior to the institution of these proceedings. The evidence does not sustain a conclusion that the illness explains or was the cause of any critical delay in discharging the respondent's obligations under the Contract.

[9] Clause 2.3 of the Contract contemplates three events, which are significant in the determination of this. The first despite is notification of Council approval. It will emerge had been obtained seven months before the Contract was entered into. Secondly the terms of the approval contemplated operational works and the necessity for Council approval of those works. Finally, it contemplated the Council's sealing of the subdivisional plans so allowing their registration on the Land Titles Register.

[10] Special condition of the Contract provided: -

"**2. THE PROPERY/SUBDIVISIONAL APPROVAL**

*2.1 The Property is part of Lot 24 on RP.33370 (the **"Existing Lot**").*

*2.2 The Seller has applied for Local Government approval for the subdivision of the Existing Lot substantially in accordance with the proposed survey plan in Schedule A (the "**Subdivision Plan**").*

2.3 This Contract is subject to and conditional on:

*(a) The Seller receiving approval from the Local Government to subdivide the Existing Lot substantially in accordance with the Subdivision Plan (The "**Council Approval**") on terms and condition satisfactory to the Seller in the Seller's sole discretion on or before one hundred and eighty (180) days from the date of this Contract (the "**Subdivision Date**");*

(b) The Sell (sic) completing all operational works and satisfying all other requirements or condition of the Council Approval required by the Local Government under the Council Approval, prior to the Subdivision Date; and

(c) Registration with the Land Titles Office of a survey plan substantially in accordance with the Subdivision Plan and the recording of the particulars of the subdivided Property in the freehold land register on or before the Subdivision date.

2.4 The Seller shall notify the Buyer in writing promptly:

(a) once the Council Approval has been obtained from the Local Government and the Seller hereby gives notification to the Buyer that the Council Approval has been obtained;

(b) when the Seller has complete all operational works and satisfied all other requirements or conditions of the Council Approval required by the Local Government; and

(c) once a survey plan substantially in accordance with the Subdivision Plan has been registered with the Land Titles Office and the particulars of the subdivided Property have been recorded in the freehold land register.

2.5 If:

(a) the Local Government has not given the Council Approval or not given the Council Approval on terms and conditions satisfactory to the Seller (in its sole discretion) on or before the Subdivision Date;

(b) the Seller has not completed all operational works and not satisfied all other requirements or conditions of the Council Approval required by the Local Government on or before the Subdivision Date; or

(c) a survey plan substantially in accordance with the Subdivision Plan has not been registered and the particulars of the subdivided Property have not been recorded in the freehold land register on or before the Subdivision Date,

then either party may terminate this Contract by notice in writing, in which case this Contract shall be at an end and the Deposit shall be refunded to the Buyer.

2.6 The Seller must use all reasonable endeavours to satisfy this special condition.

2.7 The Buyer shall not be entitled to make an objection, requisition or claim for compensation on account of any minor variation or discrepancy between the dimensions and position of the subdivided Property as shown on the Subdivision Plan and the survey plan approved by the Local Government and registered with the Land Titles Office, unless the Buyer is materially prejudiced by such variation."

The subdivision date pursuant to clause 2.3(a) was 19 January 2002.

[11] Special Condition 3 is to the effect that the date for completion of the Contract was 28 days after the defendant gave notice that a survey plan substantially in accordance with Schedule A of the Contract was registered and the appropriate particulars were entered on the Land Titles Register.

[12] In fact the defendant had lodged an application for subdivisional approval on 31 March 2000. Negotiations with the Council as to the terms of approval followed the lodgement. A draft of the proposed terms of approval was provided to the defendant for comment before they were finalised. On 21 December 2000 the Council gave its approval on terms and conditions set out in the approval.

[13] George Robertson gave evidence that the conditions imposed by the Council were not to the "defendant's total satisfaction". The defendant however had the input into its terms as I mentioned. She did not appeal from the decision and, as will emerge, set about implementing the subdivision. In short the approval of 21 December 2000 was the Council approval contemplated by the Contract of 23 July 2001 and the defendant acted on it as such.

[14] In terms of the *Integrated Planing Act* 1997, reflected in the approval, the response to the Development Application of 31 March 2000 involved the issue of the following approvals and permits – Material Change of Use (Development Permit), Carrying Out Operational Work (Preliminary Approval) and the Reconfiguration of a Lot (Development Permit).

[15] The approval specified that before the development could be carried out the defendant had to obtain development permits for carrying out operational work. It provided: -

> "The approved development may require further approvals, permits and licences. In particular a component for which the Council has given a preliminary approval cannot occur until a development permit has been issued. (See section 3.1.5. of the *Integrated Planning Act* 1997).
>
> It is also possible that to fulfil certain conditions of a development permit a further application to carry out assessable development may be required. In such a case it will be necessary to obtain a development permit for that assessable development before carrying it out. A condition of a development permit does not authorise assessable development to occur.
>
> Development permits required under the *Integrated Planning Act* 1997.
>
> The proposed development as described in the application and contained in this decision notice requires development permit(s) for the following:
>
> Operational work:
>
> - Electricity and street lighting;
> - Erosion and sediment control;
> - Stormwater, roads & earthworks;
> - Water reticulation;
> - Sewerage reticulation;
>
> o The requirements of the approval as they relate to the location, design and construction of roads, drainage and filling are subject to further refinement following the submission of engineering plans with subsequent detail design applications, if Council decides that such refinement is necessary. Changes to the approved drawings and documents, following submission of detailed engineering drawings, may however require

> an application to change a development approval under section 3.5.24 of the *Integrated Planning Act* 1997 or to change conditions under section 3.5.33 prior to the development occurring.
>
> Council's Subdivision and Development Guidelines may assist you in complying with the engineering requirements of any subsequent detail design application involving operational works. These Guidelines are available for purchase or viewing at any of the Development and Regulatory Services Offices through the City. Council's Development Information Sheet A10, "Operational Work", explains approval processes applicable to operational work."

[16] The defendant was therefore on notice from at least 21 December 2000 that further Council permissions could be or were necessary to effect the subdivision and to comply with Special Condition 2.

[17] The applicant called evidence from Paul Martin Ring a development consultant whose qualifications and evidence I accept. Mr Ring gave evidence as to the normal course of a subdivision of the kind in issue here. This was that after the Development Permit was granted:

(a) A surveyor prepared the relevant engineering survey, which could be expected to take approximately one or two weeks.

(b) The engineering survey would then be given to the consulting engineers to prepared the engineering design for the operational works, e.g., drainage, culverts, roadworks, etc. This should take no more than four to six weeks.

(c) Application is then made for "operational works approval". This could be lodged at any time after the granting of the development permit. Tenders are called for the works to be performed in readiness for the granting of the operational works approval by the Council. This should take no more than six to eight weeks.

(d) Depending on the nature and extent of the works, the actual construction of the works could take anywhere from four to eight weeks.

(e) A developer could "bond" uncompleted works. Bonding can be attended to immediately under approval of the operational works.

(f) Bonding can be up to 100% of the works performed depending on the size and nature of the project. Since this was a small and uncomplicated subdivision it was possible to bond up to 100% of the outstanding works and the Council would readily agree to bonding.

(g) Bonding is affected by bank guarantee or bond.

(h) Bonding provides a means whereby the plan of subdivision can be sealed immediately by the Council then lodged in the Titles Office for registration of the relevant individual titles. Bonding would save a considerable amount of time, at the very least, four to eight weeks during the course of the works in a case such as this.

[18] It is convenient to record at this stage that I am satisfied that any outstanding works requirement relevant to the defendants performance of the Contract could have been the subject of a performance bond. The defendant has sought to pursue such an arrangement. I find Douglas Robertson's evidence on this issue evasive and not

persuasive. In all probability an approach to the Council would have been successful.

[19] After a series of events and exchanges of correspondence, which it will subsequently be necessary to canvass in some detail, on 21 March 2002 the respondents' solicitors wrote to the applicant's solicitors. The letter stated that various requirements of special condition 2.3 had not been complied with and that the completion date would not be extended past the agreed extended date of 23 March.

[20] On 26 March 2002 the respondent's solicitors wrote to the applicants' noting that the date set in terms of Special Condition 2 had passed, it had not been further extended, gave notice that the contract was terminated and returned the deposit.

[21] It is not an issue that the event provided for by special condition 2.3 had not occurred by 26 March 2002. The applicants however contend that the contract is still on foot. They submit the respondent cannot rely on non-fulfilment of special condition 2.3 because that was brought about by her own default.

[22] The respondent has since maintained the position set out in the letter of 26 March. The Contract price was $320,000; shortly after the letter the respondent advertised the property for a quick sale at $359,000. On 2 May 2002 she entered into a contract to sell it for $350,000.

[23] The resolution of this action requires consideration of whether the defendant to use "all reasonable endeavours: to satisfy special condition 2".

[24] In *IBM United Kingdom Ltd v Rockwear Glass Ltd* [1980] F.S.R. 335 Buckley LJ considered the obligations arising under a "best endeavours" clause. He characterised them in terms of a party being: -

> "… bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planing permission, being steps which a prudent, determined and reasonable owner, acting in his own interests would take." see 343.

[25] In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156CLR 41 at 64 Gibbs CJ noted that "a best endeavours clause included an obligation not to hinder or prevent of the fulfilment of its purpose. He went on to say that on the other hand the obligation did not require the covenantor to go 'beyond the bounds of reason' … he is required to do all he reasonably can in the circumstances to achieve the contractual object but no more". In this case the clause explicitly refers to all reasonable endeavours.

[26] As Mason J (as he then was) pointed out in *Hospital* Products the reasonableness qualification is opposite where there is conflict between the obligations under the clause and the independent business interests of the covenantor. Such a conflict is resolved by reference to the standard of reasonableness (see *Hospital* Products at 91).

[27] In my view Dawson J's remarks at p.143 of *Hospital Products* that the clause did not impose an obligation on the covenantor to disregard his own interest has to be read in the light of the reasonableness qualification. The covenantor, for example,

is not required to act in such a way as to "face ruin" *Terrell v Mabie Todd and Co Ltd* [1952] 2 TLR 574 at 575.

[28] On the view I take of the facts of this case the contract was not completed on the due date because the defendant failed to use "all reasonable endeavours" to satisfy special condition 2.3. The question of the defendant being obliged to go "beyond the bounds of reason" does not arise on the view I take of the facts. At best for her the defendant's own interests dominated and the obligations under Condition 2.6 were ignored or subordinated to then with the consequence.

[29] The respondent sought to make much of the fact that the *Integrated Planning Act* was new legislation introducing a radically different approach and that Council officers were unfamiliar with its operation. That may have been so but the evidence does not found a conclusion that this caused delay much less that it justified the delay, which occurred.

[30] On 11 January 2001 the defendant initiated work to complete an engineering survey, which was completed on 20 January. On 9 March 2001 preliminary tenders were sought, and on the twelfth of that month engineering design for road works, storm water drains and water supply were lodged with Brisbane City Council. It seems that following this negotiations were initiated with the Council in respect to the cost of works, developer's contribution to head works and the like.

[31] On 10 August 2001 operational works approval, subject to conditions was granted for storm water and road erosion and sediment control. On 27 September 2001 engineering plans for water, sewerage and reticulation and the like were approved.

[32] It is said for the respondents that from August there were delays in obtaining traders and due to "seasonal problems" over the Christmas/New Year period. That was brought about by the respondent's dilatoriness.

[33] These delays over eight months to do something which ought to have taken at the most four were of the respondent's own making because she did not pursue satisfactorily the requirements of special condition 2 with appropriate expedition.

[34] The application of 12 March 2001 did not apply for approval for filling. That is presumably because condition 10 of the approval of 21 December 2000 provided for acknowledgement in writing by potential purchasers.

[35] The filling which necessitated an application of 8 March 2002 was carried out in compliance with special condition 2 not to get the plans sealed, but to advance the defendant's own building plans in respect of the block retained for the family dwelling. In any event the application of 8 March 2002 was approved by 28 March.

[36] The acknowledgment was of the applicable habitable floor level.

[37] In this context Douglas Robertson referred to a Council requirement that house pads be provided in each of the blocks required by the sub division. As an explanation for delay. There is no evidence of the requirement being documented much less as to, for example, the authority of the Council office to impose the requirement. The defendant's evidence in respect of this is largely hearsay and otherwise lacks the creditability required to found a finding in that such a requirement was imposed.

[38] On 22 February 2002 C & B Group wrote to Douglas Robertson saying they had completed an application seeking to amend the development approval. To attempt that at that stage would appear to ignore the respondent's obligations under special condition 2.6.

[39] It was suggested that the applicant Muscat's intervention concerning a cul de sac, it is unnecessary to canvass the detail, was a cause of delay but in my view that has not been substantiated. When the issue was raised in February 2002 it was resolved in a couple of weeks.

[40] In summary, the defendant's failure to satisfy Special Condition 2 by 23 March 2002 was substantially due to her not having used all reasonable endeavours to satisfy the Special Condition.

[41] In my view by 23 March 2002 time was no longer of the essence of the Contract. As Williams J said in *Stevens v Correy* CA DC 9502050 citing *Holland v Wiltshire* (1954) 90 CLR 409 and 415 and *Tropical Traders Ltd v Goonan* (1964) 111 CLR: -

> "… there may be an extension of time for completion without negating the essentiality of time: … that result is achieved where the extension is granted with some intimation that strict rights under the contract, except to the extent of the indulgence being offered, were being insisted on.
>
> If the settlement date passes (time being of the essence) and thereafter the party having the right to rescind does an act which is explicable only on the basis that such a party recognizes that the contract is still in force, that party is deemed to have elected not to rescind…"

[42] In this case the original extension of time was as a consequence of an approach by the respondent's solicitors to extend the time for compliance with Special Condition 2.3 to 23 February 2002. The applicant granted an extension to 25 February expressly making a time of the essence. On 11 February 2002 the respondent proposed an extension to 23 March, which was agreed to on 25 February 2002. Neither party insisted on time remaining of the essence with respect to that extension.

[43] As a consequence of the considerations I have canvassed the applicants are entitled to the relief, which they seek.