

SUPREME COURT OF QUEENSLAND

CITATION: *Woodward & Anor v Nagel* [2003] QSC 100

PARTIES: **VANCE ERIC WOODWARD and LAURA MARIANA WOODWARD**
(applicants)
v
ROBERT JOHN NAGEL
(respondent)

FILE NO/S: SC3000/03

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 11 April 2003

DELIVERED AT: Brisbane

HEARING DATE: 8 April 2003

JUDGE: McMurdo J

ORDER: **Declare that the contract between the applicants and the respondent dated 26 February 2003, for the sale of land situation at 4 Redleaf Court, Birtinya, being Lot 128 on SP125364 in the County of Canning, Parish of Bribie, is enforceable against the respondent, and that it ought to be performed.**

CATCHWORDS: CONTRACTS – where contract for sale of land contained special condition for the sole benefit of the applicants who were entitled to waive the special condition – where respondent sought to terminate the contract for non-fulfilment of the special condition – whether applicants’ waived the special condition prior to termination by the respondent – whether applicants entitled to specific performance of the contract

Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537, applied

COUNSEL: A J Macklin for the applicants
M Martin for the respondent

SOLICITORS: Quinn & Scattini for the applicants
Boyce Garrick Lawyers for the respondent

[1] **McMURDO J:** By a contract dated 26 February 2003, the applicants agreed to purchase from the respondent a house at 4 Redleaf Court, Birtinya. The contract provides for a settlement date of 24 April 2003. The respondent has purported to

terminate the contract, for non-fulfilment of a special condition. The applicants claim that the condition was inserted only for their benefit, and they were entitled to waive it. They claim to have waived it prior to the respondent's termination. By this application, they seek a declaration that the contract is enforceable against the respondent, and they seek orders for its specific performance.

- [2] The relevant special condition is as follows:

“1. This contract is subject to and conditional upon the completion of the sale of the buyers' house situated at 16 Cygnet Court, Wurtulla, Q 4575 on or before the 26 March, 2003. The buyers agree to do all things reasonably necessary to ensure that completion of the said sale takes place by the stipulated time and in the event that the said sale is not completed by the stipulated time through no fault of the buyers, the contract shall be at an end and all monies paid by way of deposit shall be refunded without deduction.”

- [3] At least in the course of oral argument, it was common ground that this special condition was for the benefit of the applicants as purchasers who were entitled to waive it. Mr Martin, who appeared for the respondent, also conceded that the applicants were entitled to waive it beyond the period for its fulfilment, that is beyond 26 March, a long as they did so before any termination by the respondent. In effect, each of the parties treated this situation as analogous to that in *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537. In that case a special condition provided that the contract was subject to the purchasers' completing the sale of a certain property, although no date was fixed for the fulfilment of that condition. It was held that the special condition required the completion of the sale of that property within a reasonable time, which had expired prior to the vendor's termination, which had occurred at the latest by the vendor's commencing the proceedings with the consequence that the termination was valid and the purchasers were refused specific performance. At p 565-566, Brennan J said:

“In the present case, the vendor asserts that it did retire from the transaction, and it is necessary first to consider whether there was a non-fulfilment of the stipulation which entitled it to do so.

The purpose of the stipulation is to ensure that the purchasers should have the proceeds of the sale of their Lilli Pilli property before their obligation to pay the balance of the purchase price for the Cronulla property becomes absolute. The substance of the stipulation is a condition for the benefit of the purchasers and they may waive it if they choose. But the limit of the time within which the stipulation is to be fulfilled ensures for the benefit of the vendor as well as for the benefit of the purchasers, “the vendor being interested to know for how long his liability was to remain unresolved” (per Windeyer J in *Gange v Sullivan* (96). When vendor and purchaser are each under a contingent obligation to complete a contract of sale, the fulfilment of the contingency or the entitlement to avoid the obligation is of equal interest to both parties.

Though the stipulation specifies the event upon the occurrence of which the obligations to complete cease to be contingent, the

stipulation contains no promise that the event will occur. Until the event occurs or the purchasers waive the benefit of the stipulation (*Gange v Sullivan* (97)) neither party is entitled to a decree of specific performance of their respective obligations to complete the sale (*Brown v Heffer* (98)) and the purchasers have no equitable interest in the property which is the subject of the contract (*McWilliam v McWilliams Wines Pty Ltd* (99)).”

At 543, Gibbs CJ said:

“The condition was in my opinion one for the benefit of the appellants, who were therefore entitled to waive it, but since there was no waiver before proceedings were commenced that question need not be further considered.”

- [4] The applicants did not complete the sale of their house on or before 26 March. On that date, the respondent’s solicitors sent a fax to the applicants’ solicitors in these terms:

“We note that special condition 1 of the contract was due to be satisfied today.

Please provide your urgent advices with respect to the sale of your clients’ property.”

- [5] The following morning (27 March) the applicants’ solicitors replied in these terms:

“We refer to your fax dated 26 March 2003.

Our clients’ sale has been extended to 24 April to coincide with the completion of this matter.”

- [6] This was followed by a fax from the respondent’s solicitors in these terms:

“We refer to your facsimile dated 27 March 2003.

We confirm:-

1. Special Condition 1 in the Contract required settlement of your clients’ prior sale to occur by 26 March 2003.
2. The prior sale has not settled.
3. You did not seek an extension of the condition date of 26 March 2003 from our client.
4. In accordance with Special Condition 1, the Contract is now automatically at an end and our client terminates the Contract and confirms that it is at an end.
5. We will authorise the agent to refund the deposit to the buyer.”

- [7] This last mentioned fax was undoubtedly a purported termination of the contract. The letter asserted that the contract was “automatically at an end”, which was inconsistent with a long line of authority to the effect that such a term should be

regarded as making the contract not void but voidable at the election of a party who has not caused the condition to be unfulfilled.¹ But if the respondent was entitled to terminate the contract, it clearly did so by its fax of 27 March. It was so entitled absent a prior waiver of the condition by the applicants. The question is whether the fax from the applicants' solicitors on 27 March was such a waiver.

- [8] The fax made it clear that the condition had not been fulfilled, but that the applicants were intending to complete their purchase. By their reference to "the completion of this matter" they were saying unequivocally that they intended to complete. A statement to that effect, coupled with a statement that the special condition had not been fulfilled, would seem to be all that is required for an effective waiver of the condition. But the respondent contends that the fax is capable of having a different interpretation. It is said that it should be read as a purported unilateral variation of the contract, to the effect that the contract would remain subject to the sale of the applicants' house, but that the condition was to be fulfilled on or before 24 April, rather than 26 March. In my view the fax is not susceptible to that interpretation. The applicants were not entitled to unilaterally change the terms of the contract. If the words of the fax so permit, that they should be interpreted as attributing to the applicants an intention to act consistently with the contract and their entitlements under it. They were entitled to waive the special condition but not to unilaterally vary it. That is a consideration which would at least strongly indicate the correctness of the applicants' position. In any case, in my view the fax could not be reasonably understood in the sense contended for by the respondent. Once the 26 March passed without completion of the applicants' sale, they were entitled to call for completion of their purchase only by waiving the special condition. By its reference to completion of the purchase, notwithstanding non fulfilment of the condition, their solicitors' fax effectively waived the condition. It follows that the contract was thereafter relevantly unconditional, and the respondent's letter of termination was of no effect.
- [9] I therefore declare that the contract between the applicants and the respondent dated 26 February 2003, for the sale of land situation at 4 Redleaf Court, Birtinya, being Lot 128 on SP125364 in the County of Canning, Parish of Bribie, is enforceable against the respondent, and that it ought to be performed. The parties should bring in minutes of orders for the specific performance of the contract according to these reasons.

¹ See *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *Gange v Sullivan* (1966) 116 CLR 418 and *Perri v Coolangatta Investments Pty Ltd*