

SUPREME COURT OF QUEENSLAND

CITATION: *Grant v McRoss Developments Pty Ltd* [2003] QSC 169

PARTIES: **ROBERT WILLIAM GRANT**
(plaintiff)
v
McROSS DEVELOPMENTS PTY LTD
(defendant)

FILE NO/S: SC No 10355 of 2002

DIVISION: Trial Division

PROCEEDING: Claim

DELIVERED ON: 2 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2003

JUDGE: de Jersey CJ

ORDER: **Proceedings adjourned to a date to be fixed, with costs reserved, pending the submission of minutes of judgment to be agreed between the parties, or as necessary determined at an adjourned hearing.**

CATCHWORDS: CONTRACTS – PARTICULAR PARTIES – VENDOR AND PURCHASER – DISCLOSURE OF MATERIAL FACTS – HOW FAR CAVEAT EMPTOR APPLIES – where contract for sale of land subject to disclosure of any proposal by competent authority affecting the land – where draft planning concept indicated that road would be redirected through the land – where draft planning concept not endorsed by relevant council nor adopted by council’s authorised delegate – whether draft planning concept a proposal

City of Brisbane Act 1924 (Qld), s 39A, s 39B

DNT Properties Pty Ltd v Knox, unreported decision of the Supreme Court of New South Wales, 15 September 1972, applied

ex parte Christensen [1984] 1 Qd R 382, distinguished

Gagliardi v Lamont [1976] Qd R 53, applied

COUNSEL: J Bell QC, with R Cameron, for the plaintiff
J Dalton for the defendant

SOLICITORS: John P Bussa & Co for the plaintiff
Blake Dawson Waldron for the defendant

- [1] **de JERSEY CJ:** The plaintiff entered into a contract dated 17 December 2001 providing for his sale to the defendant of land at 269 Robinson Road, Geebung for \$1.4 million. The eventually agreed date for completion was 1 November 2002. On that day, the defendant purported to terminate the contract. The plaintiff did not accept that purported termination. The plaintiff seeks a decree for the specific performance of the contract. Subject to one matter, the plaintiff's entitlement to that relief is conceded.
- [2] Clause 21.1(c) of the conditions of the contract provides:
- "If it is established that at the date of this Contract ... the Land was affected by a proposal of any competent authority for the re-alignment, widening, resiting or altering of the then level or direction of any road or railway abutting the Land ... and any such facts are not disclosed in this Contract the Purchaser may by notice in writing to the Vendor given on or before the Date for Completion terminate this Contract."
- [3] In support of its purported termination on 1 November 2002, the defendant relied on the existence of a non-disclosed proposal of that character affecting the land. The only issue to be determined is whether there was, as at 17 December 2001 (the date of the contract), a proposal of the Brisbane City Council affecting the land. It was accepted that the Brisbane City Council was the only relevant "competent authority".
- [4] The evidence established that as at 17 December 2001, there was a current possibility that Robinson Road, which presently abuts the subject land, may one day be diverted through the land. If that occurs, it will plainly interfere substantially with the owner's enjoyment of the land, and therefore necessarily "affect" the land. The question is whether that possibility is to be characterized as a "proposal" of the Brisbane City Council.
- [5] The possible plan had not been endorsed by the Council by resolution, or adopted by any authorised delegate. The Council acts by the resolution of its members, or by determinations of its delegates (*City of Brisbane Act 1924*, sections 39A, 39B).
- [6] In his affidavit, the council officer Mr Winkler describes the possibility, which is recorded in that part of the Council's computerized records covering "road planning themes", as a "draft planning concept which has not been resolved or approved by Council." Another council officer, Mr Milvydas, described it in his affidavit as "draft concept designs ... in draft form only ... not ... approved by the Brisbane City Council, a committee of the Brisbane City Council or an authorised delegate of the Council." They were not challenged in evidence about those designations.
- [7] The circumstances on which the defendant particularly relied for the existence of a "proposal" within the meaning of the contract as at 17 December 2001, were the terms of a letter dated 30 July 2002 from the Council to the defendant's town planner, and the preparedness of Council officers, Mr Zaltron and Mr Milvydas, to provide the defendant's town planner with plans depicting a diverted Robinson Road.

- [8] The letter of 30 July 2002, signed by Mr Zaltron, was written in response to the defendant's development application, and began with these words:

"The Council has carried out an initial review of the above application. Please address the following issues:

- Provide altered plans which do not prejudice the Robinson road deviation corridor (draft plans of the corridor are attached) ..."

- [9] Ms Dalton, who appeared for the defendant, submitted the Council was thereby imposing a "requirement". On the other hand, Mr Bell QC, who appeared for the plaintiff, stressed the letter was written at the stage of only an "initial review" in the context of "draft plans", and he in any event queried the authority of a council officer to impose any such "requirement" in circumstances where the Council had not by resolution endorsed the draft plan.
- [10] As to the provision of plans, on 15 July 2002 Mr Zaltron faxed the concept plan showing the diverted road (exhibit 8) drawn from the Council's computerized records to the defendant's town planner. Earlier, on 14 May 2002, the other officer Mr Milvydas had faxed a similar document, exhibit 10.
- [11] Ms Dalton emphasised, as significant, the preparedness of Council officers to provide this information to the defendant; whereas Mr Bell QC submitted they should not be regarded as having acted in that respect on behalf of the Council, and he referred to the Council policy exhibit JW2 to the affidavit of Mr Winkler (exhibit 3).
- [12] During the hearing I reserved the issue of the admissibility of oral evidence of what was said by the Council officer Mr Zaltron to the defendant's planner Mr Mason on 15 July 2002 (he termed the concept plan a "proposal"). I rule that evidence inadmissible. It amounted to hearsay vis a vis the plaintiff. I should record that all of the other evidence in the case was accepted. No issue of credibility arose.
- [13] I turn to the question whether what existed here amounted to a "proposal" of the Brisbane City Council. What amounts to a proposal, in similar contexts, has been analysed in a number of cases, including *DNT Properties Pty Ltd v Knox*, an unreported decision of the Supreme Court of New South Wales (Helsham J) given on 15 September 1972; *Alusta Pty Ltd v Duncan* [1973] 2 NSWLR 182; *Raphael Investments Pty Limited v Girdham* (1976) 33 LGRA 347; *Gagliardi v Lamont* [1976] Qd R 53; *ex parte Christensen* [1984] 1 Qd R 382; and *Arias v Brigden*, another unreported decision of the Supreme Court of New South Wales (Powell J), given on 5 February 1986.
- [14] In *DNT*, Helsham J said:

"... an existing proposal in relation to a road was intended to refer to something more definite than a mere intention on the part of a Council to progress towards the widening of a road ... the word "proposal" when used in that context means an intention which has been given force to by adoption by means of resolution or adoption by some other process which gives the intention some operative effect."

- [15] Matthews J picked up that analysis in *Gagliardi v Lamont*, where he said:
- "[The] evidence established that officers of the Council had at the relevant time and in the course of an investigation of possible drainage schemes considered, among other things, acquisition of the land or part of it, but ... the Brisbane City Council itself had given no consideration whatever to such a proposal ... I accept with respect that "proposal" as it appears in this contract, means that there must be "an intention which has been given force to by adoption by means of a resolution or adoption by some other process which gives the intention some operative effect" ..."
- [16] In *ex parte Christensen*, Thomas J concluded there was on the facts before him an existing "proposal", evidenced by a plan "approved by the appropriate officer...an approved planning layout ... used by the department [of transport]." By contrast in this case, there is here no suggestion of any particular approval. This seems more a case where a possible future development has been floated – no doubt generated by planning consideration, but in no degree endorsed as the definitive way forward.
- [17] Ms Dalton submitted that the draft plan had been "sufficiently adopted by the competent authority that it has real meaning in a practical sense," and that "the proposal had been adopted by the Council sufficiently that it did have operative effect – the Council insisted on it as a condition of the Development Application lodged by the defendant." I do not with respect accept those submissions.
- [18] On the evidence before me, not only had the Council not formally endorsed the plan, but the plan amounted to no more than a "draft concept design". While I accept that a "proposal" may retain that character although it might not later be implemented, and that a "proposal" will not necessarily lose that character even though its scope changes, this mere possibility had not reached the point where it could reasonably have been regarded as a proposal; and furthermore, certainly not a proposal "of" the Brisbane City Council.
- [19] Even if this draft plan may have been regarded as embodying a "proposal", it was on no reasonable view a proposal of the Council. The ways by which respective "competent authorities" may adopt or endorse proposals will obviously vary. The Brisbane City Council does so by resolution of the councillors or by the decision of the person or committee to which the relevant authority has been delegated. The circumstance that a council officer draws a plan, not endorsed by the Council, to the attention of a developer, or rightly or wrongly purports to "require" that a development application accommodate it, cannot in my view elevate what may be a proposal of an officer, or of a committee, or of a division within the Council's bureaucracy, to the level where it is to be accepted as a proposal of the Council itself. This plan had not, in the words of Helsham J, been adopted by the Council by means giving it "operative effect".
- [20] Parties to contracts in these terms are to be taken, so far as local authority proposals are concerned, to be contemplating proposals which have force and currency because definitively adopted by the local authority itself. Otherwise a great deal of uncertainty would attend the determination of the obligation to disclose and the right to terminate. At what point short of council resolution would a proposal be regarded as a proposal "of" the Council? There would arguably be a multitude of

possibilities. Presumably to avoid that sort of uncertainty, at least so far as local authorities are concerned, in referring to a proposal "of" the competent authority, these contracting parties are to be seen as contemplating only proposals formally endorsed by the local authority itself by following the requisite procedures.

- [21] I hold that as at the date of the contract, the subject land was not affected by a proposal within the meaning of cl 21.1 of the conditions of contract. It follows that the plaintiff is entitled to specific performance.
- [22] The proceedings will be adjourned to a date to be fixed, with costs reserved, pending the submission of minutes of judgment to be agreed between the parties, or as necessary determined by me at an adjourned hearing.