# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Sidbent P/L & Anor v Reinisch* [2003] QSC 203 |
| PARTIES: | **SIDBENT PTY LTD** ACN 003 592 452<br>(first applicant)<br>**UNILUX PTY LTD** ACN 000 789 711<br>(second applicant)<br>**FRANK REINISCH**<br>(respondent) |
| FILE NO/S: | SC No 1304 of 2003 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 15 July 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 February 2003 |
| JUDGE: | White J |
| ORDER: | **The application be dismissed** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – where buyer alleged failure to comply with requirements of *Body Corporate and Community Management Act* 1997 (Qld) and *Property Agents and Motor Dealers Act* 2000 (Qld) – where buyer purported to terminate contracts – whether defendant has no real prospect of successfully defending plaintiff's claim<br><br>*Body Corporate and Community Management Act* 1997 (Qld), s 163<br>*Property Agents and Motor Dealers Act* 2000 (Qld), s 366, s 367<br><br>*M P Management (Aust) P/L v Churven & Anor* [2002] QSC 320 |
| COUNSEL: | K N Wilson SC for the applicants<br>D A Savage SC for the respondent |
| SOLICITORS: | Thomson Redhead for the applicants<br>John M. O'Connor & Co. for the respondent |

[1] Each applicant, Sidbent Pty Ltd and Unilux Pty Ltd, by originating application seeks a declaration that contracts dated 10 and 11 December 2002 respectively with the respondent have been validly terminated pursuant to s 163 of the *Body Corporate and Community Management Act* 1997 (the "*BCCM Act*") and s 367 of the *Property Agents and Motor Dealers Act* 2000 (the "*PAMD Act*"), as those Acts then were. The applicants seek the return of their respective deposits.

[2] There are numerous disputed issues of fact between the parties but the applicants contend that there are sufficient facts not in contest to permit the declarations and orders to be made summarily.

[3] Section 163 of the *BCCM Act* concerns the obligations of the seller of a lot included in a community titles scheme, which is the case here for each lot, to give an intending buyer before that person enters into a contract to purchase the lot a statement providing specified information about the lot. Failure to do so entitles the buyer to cancel the contract.

[4] Section 366 of the *PAMD Act* requires a relevant contract (which these two contracts are) to "have attached as its first or top sheet, a statement in the approved form" (Form 30(b)) described as a "warning statement" containing certain specified information. Such a warning statement is of no effect unless before the contract is signed by the buyer, the warning statement is signed and dated by the buyer. If either the warning statement is not attached to the contract as its top sheet or has not been signed before the contract is signed by the buyer, the buyer may terminate the contract prior to settlement and recover the deposit, s 367.

[5] The issues include determining when the contracts were signed by the buyers, whether the *BCCM Act* statement was substantially complete within the meaning of s 163(4) of that Act and whether the warning statement was attached as the first document of the contracts as required by s 366(1) of the *PAMD Act* and when it was signed.

[6] On 15 November 2002 Mr Buckley and Ms Oldfield, directors of both companies who at the relevant time lived in Sydney, came to the Gold Coast and inspected two residential units at 25 Rankin Street, Main Beach. The property was listed for sale with a number of agents including Realty on Main. The property consisted of two new strata titled units occupying the whole building over four levels. Offers and counter-offers were made between Mr Buckley and Ms Oldfield on behalf of Unilux Pty Ltd to purchase both units via the real estate agent to Mr Adam Reinisch, the agent of his son, the owner/builder of the units. The offers were written on a standard REIQ Contract for lots in a Community Titles Scheme and each offer was initialled by them before being submitted to Mr Reinisch. Eventually an offer of $2.8 million was accepted on behalf of the seller who is the respondent to these applications.

[7] Mr Buckley and Ms Oldfield were asked by Ms Neiswandt, an employee of the real estate agent, to sign a Form 30(b) after their written offer (which they had signed) had been orally accepted by the vendor. What the buyers had signed was an

instrument of offer, contrary to its description by Mr Buckley in his affidavit as the contract. That it would become the contractual instrument does not alter its initial characterisation as an offer. The real estate agents' office sent the contract dated 15 November 2002 under cover of a letter dated 18 November 2002 to the buyer's solicitor. The contract documents were in a bound booklet. Although Mr Buckley does not say so, from the exhibit it would appear that the Form 30(b) was the first document in the contract bundle.

[8] Mr Buckley and Ms Oldfield wished to terminate that contract and have separate companies of which they were directors each purchase one unit. Those companies are the present applicants.

[9] There are differences which are immaterial for this application about when this was communicated to the seller's real estate agent but Mr Buckley and Ms Oldfield returned to the Gold Coast, most likely on 6 December, and Mr Adam Reinisch became aware that they wished fresh contracts for the same total purchase price to be drawn up. Mr Buckley and Ms Oldfield then returned to Sydney.

[10] On 6 December the seller's real estate agent sent by facsimile transmission to the buyers the new contractual documents for their execution. The covering letter requested the buyers to sign a *PAMD Act* Form 27(b) (selling agent's disclosure), and Form 30(b) (warning statement), the contract and disclosure statements and to initial certain pages of the contract. Contrary to the order in which they were received, Mr Buckley deposes that he and Ms Oldfield executed the two contracts before any other documents. A Mr Warren Price, Ms Oldfield's brother-in-law, deposes that he observed Mr Buckley and Ms Oldfield sign the contracts first and then the Form30(b) warning statement and Form 27(b) disclosure statement. This was despite a clear instruction that they should be signed before the contract documents were signed. The executed documents were faxed back to the seller's real estate agent. No mention was made to the agent of the changed order of signing.

[11] It is disputed as to what next occurred but it is common ground that Mr Buckley and Ms Oldfield came to the real estate agent's office on 11 December 2002 when the dates on the contracts were altered. The contract documents were as they had come from the fax machine in the real estate agent's office held together by a bulldog clip, according to Ms Anoleck of Realty on Main, and as loose pages, according to Mr Buckley. I infer for this application that the Form 30(b) was the top document in the bundle.

[12] Changes were made to the dates – 25 November 2002 was changed to 10 December 2002 on the contract for Lot 1 and 15 November 2002 was changed to 11 December 2002 on the contract for Lot 2; the finance clause was crossed out; the settlement dated was changed to 14 February 2003; and special condition (3) changed. All changes were said by Ms Anoleck to be at the behest of Mr Buckley and Ms Oldfield who said that they had reached agreement on these matters with Mr Adam Reinisch. All changes were initialled by Mr Buckley and Ms Oldfield.

[13] Although Mr Buckley deposes that they were working on documents that contained only a copy of his and Ms Oldfield's signatures, it was a term of the contract that a facsimile copy of the contract was to be deemed legally binding when signed by both parties and these were the documents signed and sent by facsimile transmission from Mr Buckley and Ms Oldfield back to the real estate agent. Whether this means that the signatures may be facsimile copies was not clear.

[14] Mr Buckley deposes that Ms Anoleck signed the disclosure statements as the seller's agent pursuant to s 163(3) of the *BCCM Act* which were annexed to the contracts. She dated the statement for Lot 1, 10 December and the statement for Lot 2, 11 December. She amended the date of the buyer's acknowledgement on the disclosure statements. Mr Buckley and Ms Oldfield initialled all the changes to the dates but did not re-execute the buyer's acknowledgement on the disclosure statements. Ms Anoleck witnessed the acknowledgement of those changes.

[15] The cooling off period was to be waived in respect of these new contracts. The flavour of Mr Buckley's affidavit in paragraph 24 is that it was a demand of the owner, as it was, but since the seller had what was believed by both seller and buyer to be a binding contract for the sale of both lots to Unilux Pty Ltd in respect of which there had been a cooling off period, waiver of a further cooling off period was a condition of entering into two fresh contracts. Mr Buckley arranged for a Form 32(a) lawyer's certificate concerning the waiver to be prepared and forwarded to the seller's real estate agent. The documents were then taken away for the seller's agent to execute.

[16] Later that day the contracts were ready for collection. A minor amendment was made to the date on the Form 30(b) warning statements attached to the contracts from 25 November to 10 December and from 15 November to 11 December respectively and those too were initialled by Mr Buckley and Ms Oldfield.

[17] The *BCCM Act* s 163 disclosure statement had a number of omissions in respect of the lots. There was:

- no information about the secretary of the body corporate;
- no amount for annual contributions as fixed by the body corporate;
- no details of improvements on common property for which the buyer would have become responsible;
- the regulation module was incorrectly identified as the "standard regular module" when it was a "small schemes regulation module";
- no assets of the body corporate required to be recorded were provided.

[18] The statement is said not to have been signed by the seller's agent as required by s 163(3). It was signed by Mr Buckley and Ms Oldfield. It is unclear from Ms Anoleck's affidavit if she signed a disclosure statement and faxed it to the buyers on 6 December. Included in the contract documents, at least on 11 December, were the four pages of the first/new Community Management Statement. In it the module is correctly described as "small schemes".

[19] Mr Adam Reinisch deposes to a number of conversations with Mr Buckley and Ms Oldfield at the units prior to contract including that there was a body corporate, body corporate rules, that the levy per unit per week would be approximately $30 to $40, that there was no secretary or manager and no other information relevant to the s 163 statement. Mr Buckley, according to Mr Reinisch, said that there was no need to insert the levies into the information sheet because he would be owning both units and could set the levies. Mr Buckley denies any conversations whatsoever with Mr Adam Reinisch about body corporate matters. These conversations allegedly also included discussions about changes which the buyers required to the units which are not relevant to these applications.

[20] The buyers' solicitor purported to terminate the contracts for failure to comply with the requirements of s 163 of the *BCCM Act* and s 366 of the *PAMD Act*. The seller's solicitor did not accept the termination and elected to affirm the contracts and nominated a date and time for settlement. On 14 February the seller rescinded both contracts.

[21] Mr D Savage, for the respondent, contends that no contract was signed by the buyers before 11 December because prior thereto there were only "offers" to buy and those offers were varied on 11 December in the ways mentioned above. Section 365(1) of the *PAMD Act* provides that the buyer and seller are bound for all purposes by the contract when the buyer (or agent) receives a copy of the contract signed by the buyer and the seller. A buyer may withdraw the offer to purchase made in the contract form at any time before being bound in the manner mentioned in ss (1) by giving written notice. But s 366 requires every relevant contract to have a warning statement attached as its top or first sheet while ss (4)(a) deems an otherwise compliant warning statement to have no effect unless "before the contract is signed by the buyer the statement is signed and dated by the buyer". The use of the expression "contract" which to lawyers tends to indicate a concluded agreement has the potential for ambiguity. However, s 365(1) goes some way to clarifying "contract" as used in s 366(4), and, no doubt, elsewhere, to mean the written terms which, when signed by the buyer and seller will constitute their agreement, that is, the contract. What the warning statement provisions seek to do is to provide a buyer with protection before the buyer commits to the terms of the contract. It seems more likely that on 6 December the terms of their agreement had been settled between the buyers and the seller and on 11 December some of the terms were amended to reflect the parties' intentions.

[22] By initialling the changed dates on the warning statements on 11 December it is arguable that the buyers were avowing that they had read and signed each warning statement prior to entering into the contract. Form 30b states to the buyer "Do NOT sign the attached contract without reading and understanding this warning or if you

feel pressured to sign." It continues at the end of the document "I/we have read this warning statement and the important information over the page." There is then provision for signature, which Mr Buckley and Ms Oldfield signed and initialled subsequently.

[23] These matters will be given colour by the purposes of ch 11 of the *PAMD Act* in which s 366 is located which are:

- to give persons who enter into residential property sales a cooling off period;
- to require all contracts for the sale of residential property to have consumer protection information;
- to enhance consumer protection by ensuring the independence of lawyers acting for buyers.

They can only be satisfactorily resolved by a trial of the facts.

[24] What is meant by requiring that the warning statement be "attached" to the contract as its first or top sheet is another issue. If 6 December is the relevant date for the purposes of s 366 is it sufficient that the Form 30b statement was sent by facsimile transmission as the first relevant contractual document making it impossible to attach the Form physically. Is it the intention of the legislature that this convenient method of doing business (as occurred here) is excluded? The contract provides for facsimile copies of the contract documents to be signed and the *PAMD Act* provides in s 365(2) for a copy of the concluded contract to be provided by facsimile transmission. Finally, it is an offence for which a substantial penalty is imposed on a seller for preparing a contract which does not have attached as its first or top sheet the warning statement. This might suggest that a broad interpretation be given to "attached" although I note that Muir J in *M P Management (Aust) P/L v Churven & Anor* [2002] QSC 320 gave the expression a narrow meaning, namely, some form of actual joinder or physical fastening although that case did not concern contractual documents sent by facsimile transmission.

[25] If the relevant date is 11 December as Mr Savage contended for, Ms Anoleck deposes to all the contractual documents being held together by a bulldog clip, while Mr Buckley deposes they were loose sheets. Mr Adam Reinisch deposes that when he executed the contracts they both "had the documents under the *PAMD Act* attached". These are matters that can only be decided after the witnesses have been examined.

[26] Section 163(5) of the *BCCM Act* requires an information sheet to be attached as a first or top sheet to a contract for the sale of an existing lot unless the property is residential when it may take its place after the *PADM Act* s 366 warning statement. That sheet appears in that position in "CKB4" to Mr Buckley's affidavit. The s 163 disclosure statement transmitted on 6 December, it is contended, was not signed by the seller's agent but it is unclear whether Ms Anoleck later that day sent an

executed disclosure statement. The statement attached to the contract on 11 December is signed by her. Both have been executed by Ms Oldfield and Mr Buckley acknowledging that they received and read the statement before entering into the contract. The changed dates were initialled by them on 11 December.

[27] The misdescription of the module would not "materially prejudice the buyers", within the meaning of s 166(1)(b)(i) – it is correctly described elsewhere. The applicants seem to contend that had the statement been completed with expressions such as "not applicable" or "nil" the obligation of disclosure may have been discharged. The purpose of the statement is to give an intending buyer of a lot in a community titles scheme all necessary information about obligations under the scheme. On Mr Adam Reinisch's account the failure to fill in the various sections of the statement was explained on more than one occasion to Mr Buckley. In those circumstances it may be arguable that the statement was substantially complete so far as these buyers were concerned as required by s 163(4). A body corporate for the scheme had been formed. That no first annual general meeting of the body corporate had been held within seven months from the establishment of the scheme which was on 27 August 2001 has penalty consequences, s 38(1) of the *BCCM (Small Schemes Module) Regulations* 1997. It does not necessarily have consequences for a contract of sale from the original owner to a subsequent buyer.

[28] It will be clear from the above that I am not persuaded that there are sufficient undisputed facts to allow a court to give summary judgment on the application of the buyers of the property and the conditions imposed by r 292 of the *Uniform Civil Procedure Rules* for doing so, namely, that the defendant has no real prospect of successfully defending all or part of the plaintiff's claim and there is no need for a trial of the claim or part of the claim have not been satisfied. Accordingly the application should be dismissed.