SUPREME COURT OF QUEENSLAND

CITATION:	*Barooga Projects (Investments) P/L v Duncan* [2004] QCA 149
PARTIES:	**BAROOGA PROJECTS (INVESTMENTS) PTY LTD** ACN 068 115 426 **AS TRUSTEE** (applicant/respondent) **v** **KEITH WILLIAM DUNCAN** (respondent/appellant)
FILE NO/S:	Appeal No 11107 of 2003 SC No 9541 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2004
JUDGES:	McMurdo P and White and Fryberg JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACTS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – ELECTION AND RESCISSION – EFFECT OF ELECTION NOT TO RESCIND – where appellant entered into contract for sale of land – where special condition regarding issuance of development conditions for the benefit of the respondent – where time of the essence – where appellant alleged that a reasonable time for fulfilment of special condition had elapsed and gave notice to respondent that he expected settlement by a certain date – where no clear reservation of right to terminate if settlement not effected – whether appellant had elected to continue with contract – whether appellant could later terminate contract for failure to fulfil special condition within a reasonable time *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, applied *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, considered

Sargent v ASL Developments Ltd (1974) 131 CLR 634, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418, cited

COUNSEL: M D Martin for the appellant
M M Stewart SC for the respondent

SOLICITORS: Georgeson & Company for the appellant
Paul Everingham & Co for the respondent

[1] **McMURDO P:** Barooga Projects (Investments) Pty Ltd, ("the respondent"), sought a declaration in the Trial Division of this Court that Mr Duncan ("the appellant") was obliged to complete the conveyance the subject of the contract dated 10 February 2003 of a 4.36 hectare property at Bellmere near Caboolture. The learned primary judge sitting in applications granted a declaration. The appellant appeals from that order.

[2] The following facts are not in dispute. The parties entered into a contract for the sale of the land on 10 February 2003 which included the relevant special conditions:

> "3. The seller acknowledges that the development will be subject to the Caboolture Shire Council issuing conditions and that those conditions must be satisfactory in every respect to the buyer. The buyer will notify the seller within thirty (30) days of receipt of the conditions whether they are satisfactory or not.
>
> …
>
> 6. COMPLETION:
> Settlement of this Contract will take place one hundred and eighty (180) days of the date hereof or within thirty (30) days of notification from the buyer that it is in receipt of acceptable conditions of approval, whichever is the later.
>
> …"

[3] Under cl 6 of the standard conditions of the contract time was of the essence of the contract.

[4] On 26 September 2003 the appellant's solicitors wrote to the respondent's solicitors in these terms:

> "We note that the subject contract does not specify a date by which the balance of the development conditions are to be complied with.
>
> We note further that Special Condition 6 provides:
>
> [as set out above]
>
> We note further that the period of one hundred and eighty (180) days has elapsed some time ago and no notification regarding the conditions of approval has been received by our client.
>
> In the absence of a specified date, the law implies a reasonable time in which the buyer is to obtain acceptable conditions of approval.

> Our client considers that a reasonable time has now elapsed.
>
> *We now give you formal notice on behalf of the seller that he requires the buyer to settle this contract within twenty one (21) days of the date hereof, that is, by 5.00 pm on Friday, 17 October 2003*, failing which he specifically reserves his rights as a consequence of the buyer's failure to settle." (my emphasis).

[5] The respondent's solicitors replied on 8 October 2003 that the respondent was under no obligation under the contract to settle and:

> "… If your client should seek after 17 October 2003, to rescind or otherwise void the contract our client will immediately apply to the court for a declaration that the contract remains valid and enforceable.
>
> Your client may rest assured though, that our client is doing all it reasonably can to ensure the conditions are complied with."

[6] On 16 October 2003, the appellant's solicitors again wrote to the respondent's solicitors confirming that their client was "ready, willing and able to settle" and that they "require[d] settlement to be effected" at their office by 5 pm on Friday, 17 October 2003.

[7] The respondent's solicitors on 17 October 2003 wrote to appellant's solicitors stating their efforts to meet the terms of the contract in obtaining acceptable conditions of approval from the Caboolture Shire Council ("the Council"), that a reasonable period of time had not elapsed, that there was no obligation upon them to settle on 17 October 2003 and that the contract remained "valid and enforceable".

[8] The respondent did not settle on 17 October 2003. On 5 November 2003 the respondent's solicitors wrote to the appellant's solicitors stating that their client instructed that the Council had issued conditions for the development satisfactory to their client; the letter was formal notification of their client's satisfaction with the conditions; the respondent was now prepared and ready to settle within 30 days or earlier if acceptable and nominated Wednesday, 19 November 2003 as a mutually convenient date of settlement.

[9] Despite the respondent's stated readiness to settle, on 10 November 2003 the appellant's solicitors wrote to the respondent's solicitors in these terms:

> "We refer to our letters of 26 September and 16 October 2003.
>
> We note that your client failed to settle as required by 17 October 2003.
>
> The contract is therefore terminated.
>
> Our client otherwise reserves his rights generally."

[10] Mr Allsop, a director of the respondent, had negotiations with the Council and the mayor. The Council's Town Planning Department's report had imposed conditions, which were satisfactory to him, on the development of the land. Whilst he understood it was still necessary for the Council to consider the application, in the

light of the town planning report he regarded it as a foregone conclusion that the Council would approve the development application for the land on the terms set out in the town planning report.

[11] The learned primary judge noted in his reasons that it was not in dispute for the purposes of this application that, since no time limit was fixed in the contract for satisfying the requirement of special condition 3, satisfaction within a reasonable time was to be implied and that by 26 September 2003 a reasonable time had expired.[1]

[12] The learned primary judge reached the following conclusions. Special Condition 3 was a contingent and not a promissory condition, included for the benefit of the respondent. Upon the expiry of a reasonable period without satisfaction of that condition, the contract became voidable, (but not void), at the instance of either party.[2] By the letter of 26 September 2003 the appellant called for completion of the contract without explicitly reserving his right to terminate on the grounds that the reasonable period for satisfaction of the condition had expired and irrevocably elected to affirm the contract.[3] The respondent in its letter of 5 November 2003 was entitled to insist upon completion of the contract as it had waived the Special Condition 3. As the contract was still on foot the respondent was then entitled to call for settlement within 30 days under Special Condition 6.[4]

[13] The appellant's contention is that his Honour erred in concluding that the letter of 26 September 2003 amounted to an irretractable election to affirm the contract. The letter was no more than an intention to refrain from making an election to affirm or terminate the contract until 17 October 2003: *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)*.[5] Alternatively the appellant contends the letter of 26 September was effectively a notice to complete, similar to the situation in *Perri v Coolangatta Investments Pty Ltd*.[6] The appellant particularly relies on the following remarks by Wilson J:

> "If on the expiration of a reasonable time that property has not been sold, then either party may initiate the steps which are necessary to the termination of the agreement: cf *Suttor v Gundowda Pty Ltd*. There being no default, the deposit will be refunded.
>
> In my opinion, it is to be implied from the agreement that should the … property not be sold within a reasonable time, then the fate of the contract will be resolved according to the action which may be taken by either party. The purchasers may elect to waive the condition, it being one wholly for their benefit, and proceed to completion, thereby holding the vendor to its contract. Alternatively, provided that they have acted reasonably in their attempts to sell the property, they may rely on the non-fulfilment of the condition to bring the

---

1 Reasons for judgment, pp 2-3.

2 Above p 5 and see also *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 543 per Gibbs CJ and 565 per Brennan J, Stephen J agreeing; *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153 and *Associated Developers (Aust) Pty Ltd v Allied & General Pty Ltd*, unreported, No 1089 of 1994, 16 August 1994 at p 4.

3 Reasons for judgment, pp 7-8.

4 Above, p 8.

5 (1993) 182 CLR 26.

6 (1982) 149 CLR 537.

> contract to an end, and recover their deposit. *On the other hand, the vendor may force the issue simply by serving a notice to complete*. I do not think it appropriate to contemplate a notice to the purchasers requiring them to fulfil the condition, because the time agreed for that will have expired, and in any event it does not lie within the capacity of the purchasers to fulfil it. *The effect of a notice to complete is to give the purchasers, should they wish to waive the condition, the opportunity to finalize the transaction; alternatively, it serves to crystallise in the minds of both parties a common date on which the contract will come to an end for non-fulfilment of the condition*. In the latter case, non-compliance with the notice to complete will not fix the purchasers with any default such as would deprive them of the right to the return of their deposit, although as I have said, a failure to make reasonable efforts to sell the property may expose them to an action for damages."[7] (my emphasis).

[14] The appellant did not contend at first instance or on appeal that the respondent's failure to complete the contract on 17 October 2003 was a breach of that contract.

Did the appellant irrevocably affirm the contract by the letter of 26 September 2003?

[15] At the heart of the doctrine of election is that a party electing is confronted with two mutually exclusive courses of action between which that party must, in fairness to the other party, make a choice.[8] The operation of the doctrine can have serious consequences, for once that choice is made it is irrevocable, and the other course of action – in this case rescission of the contract for non-fulfilment of Special Condition 3 within a reasonable time – is no longer open. For this reason the words or conduct said to constitute an election must be unequivocal, in the sense that they are "consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other".[9] It follows that "if the act is also consistent with the reservation of a right to terminate in certain events, the right to terminate is not lost by the doing of the act".[10]

[16] An election to affirm a contract does not depend upon an actual intention; it will be inferred from any conduct consistent only with the continued existence of the contract.[11] Whether the circumstances amount to an election to affirm the contract will turn on the particular facts of each case.

[17] The appellant's letter of 26 September 2003 and his following correspondence of 16 October 2003, set out above, undoubtedly affirmed the appellant's commitment to the contract. He unequivocally insisted on his most central right under the contract, settlement, in calling on the respondent to complete the sale. Whether he intended to do so or not, in the September letter and again in the letter of 16 October he did

---

7 At 560.

8 Spencer, Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd edition, 1977) 313, approved in *Immer (No 145) Pty Ltd v United Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 41 per Deane, Toohey, Gaudron and McHugh JJ.

9 *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 646 per Stephen J, quoted with agreement in *Immer (No 145) Pty Ltd v United Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 38-39 per Deane, Toohey, Gaudron and McHugh JJ.

10 *Immer (No 145) Pty Ltd v United Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 30.

11 *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55 per Kitto J.

not explicitly reserve until 17 October 2003 his right to terminate the contract on the ground that a reasonable period for satisfaction of Special Condition 3 had expired.

[18] I am not persuaded that the appellant is assisted by the observations of Wilson J in *Perri* set out earlier in these reasons. In that case, the majority of the High Court[12] found that it was open to either party to a contract contingent upon the fulfilment of a special condition that had not been fulfilled within a reasonable time, if not in default, to elect to treat the contract as at an end. There the contract was avoided when the vendors instituted proceedings against the purchasers. Wilson J agreed with the majority that the vendor was entitled to rescind the contract but also found that reasonable notice was a prerequisite to this rescission. His Honour was the only member of the court to elaborate on the effect of a notice to complete in those circumstances. His Honour's observations are authority for the uncontroversial proposition that a party to a contract confronted with a choice whether to continue with or terminate a contract need not make that choice immediately and may before doing so seek the other party's agreement to continue the contract, whilst reserving the right to terminate in the event that no such agreement can be reached. Wilson J's observations do not change the appellant's clear affirmation of the contract in the letters of 26 September and 16 October 2003 into an extension of the time in which to make the decision whether or not to affirm the contract until 17 October 2003. This would require an unequivocal reservation of the right to terminate upon failure to settle on that date. The letters simply did not contain that reservation.

[19] The respondent's letter of 5 November 2003 effected a waiver of the benefit of the contingent Special Condition 3. It follows that under Special Condition 6 the respondent was entitled to settlement within 30 days of its waiver of Special Condition 3, that is, on 5 December 2003. The learned primary judge was right to declare that the appellant was obliged to complete the conveyance the subject of the contract dated 10 February 2003 on or before 5 December 2003.

[20] The appeal should be dismissed with costs.

[21] **WHITE J:** I have read the reasons for judgment of the President where she has set out the relevant facts. There is little in dispute between the parties save the fundamental question whether the appellant's letter of 26 September 2003 constituted an election to affirm the contract which could not be retracted.

[22] Against the background of the contract for the sale of the land and the fact that the respondent had not obtained acceptable conditions of approval from the Caboolture Shire Council the appellant wrote the letter of 26 September 2003 the significant passage of which read:

> "We now give you formal notice on behalf of the seller that he requires the buyer to settle this contract within twenty one (21) days of the date hereof, that is, by 5.00pm on Friday, 17 October 2003, failing which he specifically reserves his rights as a consequence of the buyer's failure to settle."

This was followed by his letter of 16 October 2003 which the President has set out.

[23] As the learned judge below noted, Special Condition 3 was a contingent and not a promissory condition which was included in the contract for the benefit of the

---

12 Gibbs CJ, Stephen and Brennan JJ.

purchaser. The contract thereby became voidable at the instance of either party once a reasonable time for satisfying the requirement had expired, but in the absence of either party doing so the contract remained on foot, *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 440 and ff.

[24] As the learned primary judge noted, once a party becomes entitled to elect for or against rescinding a contract any act done by a party objectively consistent only with the continuation of the contract would constitute an election against rescinding and, having been made, could not be retracted. There was no obligation on the appellant to do anything and the contract would remain extant until one of the parties took action one way or another.

[25] The appellant clearly and unequivocally was affirming the continuation of the contract by calling on the respondent to settle. But since the respondent was not obliged to settle because of Special Condition 3 the general reservation of rights made by the respondent was ineffectual. What was required, as his Honour recognised, was a carefully worded, explicit reservation of his right to rescind on the ground that the reasonable time implied in the contract for the satisfaction of Special Condition 3 had expired.

[26] Accordingly the contract was still on foot on 5 November 2003 when the respondent notified readiness to settle on or before 5 December 2003 having either waived reliance on Special Condition 3 or was satisfied about the conditions imposed by the Council.

[27] His Honour was right to make the declaration. I agree with the orders proposed by the President.

[28] **FRYBERG J:** I agree with the reasons for judgment of the President. There are however a few additional matters which have affected my judgment.

[29] The application to the Council, lodged in accordance with the contract on 20 May 2003, sought a "material change of use" within the meaning of the *Integrated Planning Act 1977* and was made in respect of four contiguous allotments, only one of which belonged to the appellant. It sought a development permit for rezoning, another permit for stage one of the subdivision and preliminary approval for the balance of the subdivision. It appears that it was not determined by the Council within the time frames provided by the Act for cases where the developer does not stop time running. The question whether the application conformed to the requirements of condition 2 of the contract was not and is not before the court; and there has been no suggestion that the respondent was guilty of delay. Presumably it would not have advanced the appellant's position to have raised such issues.

[30] On the other hand the case has been decided on a concession and an assumption favorable to the appellant. The respondent did not dispute that as no time was prescribed by condition 3 for the Council to issue conditions, it was to be implied that this would occur within a reasonable time; and the judge at first instance assumed without opposition from the parties that a reasonable time had expired by 26 September 2003. Had these been live issues it would have been material to have considered the whole of condition 3, not simply the part quoted by the President.

[31] As the President has noted the appellant submitted that the letter of 26 September 2003 showed no more than an intention to refrain from making an election to affirm

or terminate the contract until 17 October. That submission was supported by reference to *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)*[13], where four members of the High Court said:

> "If a party to a contract, faced with the choice of terminating the contract or keeping it on foot, terminates the contract that party will ordinarily have acted in a way that leaves no doubt as to the choice made. And that choice will be clearly inconsistent with the exercise of the right to keep the contract on foot because the contract no longer exists. But where, as here, the situation is the converse the question is not answered so readily ….
>
> As Spencer Bower and Turner point out in the passage quoted earlier, at the heart of election is the idea of confrontation which in turn produces the necessity of making a choice. But in a case such as the present one, the choice is not merely one of affirming the agreement; it involves as well the abandonment of the right to rescind. Abandonment is more readily inferred in some circumstances, for instance where the choice arises once and for all. Here, by reason of cl.7 of the deed, Immer was entitled at any time after 1 April 1989 to rescind the deed. There is of course a danger of circularity here because the Uniting Church says: "Yes, so long as Immer did not elect not to rescind." The point is that where the right to rescind is a continuing one, it is not so readily concluded that the party entitled to rescind has abandoned that right completely as opposed to taking no action to exercise the right at the time in question."

[32] As Mr Martin for the appellant submitted, the present is also a case where what is alleged is not merely affirmation of the agreement. It also involves, on the respondent's case, abandonment of the right to rescind. Once upon a time that might have been called waiver. In the present context that word is no longer favoured.[14] The preferred term is election. The name does not matter. The question is whether the inference of abandonment should be drawn.

[33] It was not drawn in *Immer* because at the time of the relevant conduct the stage had not been reached where the purchaser was required to make an election. Its conduct in forwarding documents was based on a mistaken belief of fact, namely that the Council had approved the transfer. Its conduct caused the vendor no prejudice. The present case is different. The appellant was very much aware of all relevant facts, having wanted to terminate the contract almost from its inception. He had signed an earlier contract with the respondent which had been terminated only two days before the contract the subject of the present proceedings was signed. That occurred because the appellant refused to grant an extension of time for fulfillment of a condition. After referring to the signing of the present contract he deposed:

> "Within a few days I realized what I had done, which was to sign a contract I had just expended solicitor's fees and considerable time in attempting to terminate, and instructed my solicitors to terminate the contract at the first available opportunity, which was in June 2003, by

---

13 (1993) 182 CLR 26.

14 *Sargent v ASL Developments Ltd* (1974) 131 CLR 614; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.

> relying on the applicant's failure to notify me of the outcome of the special condition relating to contamination, although on legal advice I later withdrew the notice terminating the contract."

Moreover the letters sent on his behalf had the potential to cause prejudice to the respondent.

[34] Mr Martin also relied on *Perri v Coolangatta Investments Pty Ltd*[15] for the proposition that sending a notice to complete in such circumstances does not amount to an affirmation of the contract or an election to abandon the right to terminate. It is true that giving the notice to complete in that case was not held to amount to an election to abandon the right to terminate; but that is because it was not considered. In any event, each case must depend upon its own facts.

[35] Two features of the appellant's letters of 26 September and 16 October should be noted. First, at no point did the appellant specifically reserve the right to terminate, either expressly or implicitly. Second, he unconditionally demanded settlement, without any suggestion that he was contemplating an alternative course of action. It is true that in the first letter he reserved his rights as a consequence of the buyer's failure to settle. That does not help his case. His right to terminate did not arise as a consequence of the buyer's failure to settle but as a result of the non-fulfilment of condition 3 within a reasonable time. Moreover the words quoted were apt to cover a right to affirm the contract and sue for damages, if such a right existed.

[36] The appeal should be dismissed with costs.

---

15 (1982) 149 CLR 537.