

# SUPREME COURT OF QUEENSLAND

CITATION: *Wan & Ors v NPD Property Development P/L* [2004] QSC 232

PARTIES: **JIMMY CHEE MEE WAN, RAYMOND LEE MING WAN, MARIA LUN FONG WAN, BETTY YUN CHEE WAN, JEANETTE CHIU SOON WAN**  
(applicants)  
v  
**NPD PROPERTY DEVELOPMENT PTY LTD**  
**ACN 088 360 516**  
(respondent)

FILE NO: BS3737 of 2004

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 10 August 2004

DELIVERED AT: Brisbane

HEARING DATE: 13 May 2004

JUDGE: Wilson J

CATCHWORDS: CONVEYANCING - RELATIONSHIP OF VENDOR AND PURCHASER - STATUTORY PROTECTION OF PURCHASERS - statute avoiding land sales without approval of subdivision - *Land Sales Act* 1984 (Qld) - application for exemption - time within which application to be made - "within 30 days after the event that marks the entry of a purchaser upon the purchase" - identification of such event where contract conditional

CONTRACT - CONSTRUCTION AND INTERPRETATION OF CONTRACTS - Vendor and purchaser - conditions by which contract subject to purchaser's purchase of surrounding land and subject to certain planning changes - character of conditions

*Land Sales Act* 1984 (Qld) ss 2, 3, 6, 6A, 8, 9, 19

*Francis v NPD Property Development Pty Ltd* [2004] QSC 202 referred to

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

*Rosemac Pty Ltd's Caveat* [1994] 1 QdR 137 considered

COUNSEL: DJ Campbell for the applicants  
 RG Bain QC and AW Duffy for the respondent

SOLICITORS: Hemming & Hart for the applicants  
 Bain Gasteen for the respondent

- [1] **WILSON J:** The applicants seek a declaration that a contract for the sale of land at Rochedale is void pursuant to s 19 of the *Land Sales Act* 1984, a declaration that the respondent is entitled to be repaid any deposit paid by it under the contract and an order for the removal of a caveat lodged by the respondent over the property.

### **The contract**

- [2] The applicants are registered as owners of a parcel of land described as lot 2 on RP 198499 in the County of Stanley Parish of Tingalpa with an area of 4.002 hectares. By contract dated 22 January 2002 they agreed to sell part of that land having an area of 6 acres to the respondent. Special Condition 5 of the contract was in these terms -

#### **“5. Land Sales Act**

- (a) The Buyer acknowledges that the Land, as at the date hereof, is not contained in a separate instrument of title.
  - (b) Any reference in this contract to Deposit Holder shall be construed as a reference to Trustee in accordance with provisions of the Land Sales Act.
  - (c) This Contract is subject to and conditional upon the Buyer obtaining under Section 19(2) of the Land Sales Act an exemption from Sections 8 and 9 of the Act. The Buyer shall within thirty (30) days of the Contract Date apply for that exemption and if the grant is refused this Contract shall terminate whereupon the deposit monies paid by the Buyer shall be refunded in full.”
- [3] There were two other relevant special conditions, the benefit of both of which could be waived by the respondent - special condition 2 by which the contract was made subject to the respondent's purchase of surrounding land, and special condition 3 by which the contract was made subject to a local plan and infrastructure charges plan for the suburb being included in the city plan of the local government. The respondent waived both of these special conditions – in March 2002 and on 24 October 2003 respectively.

### **Caveat**

- [4] On 10 July 2003 the respondent lodged a caveat over lot 2 in reliance on special condition 14 of the contract -

**“14 Caveat**

- (a) The Buyer may lodge a caveat on the title to the Land after giving notice under Special Condition 2. The Seller consents to the caveat and shall promptly sign the necessary registrable form of consent required by the Buyer.
- (b) The Buyer shall prepare the caveat and registrable form of consent and register the caveat at its own cost.
- (c) The Buyer shall withdraw the caveat if the Seller needs to deal with the Seller’s interest in the Land provided that the dealing is not a transfer and will not prevent the Seller from complying with its obligations under this Contract.
- (d) If the Buyer withdraws the caveat under Special Condition 14(c), the terms of Special Condition 14(a) and (b) shall again apply when the Seller has lodged the required dealing.
- (e) The Buyer shall withdraw the caveat if the Contract is brought to an end, provided the Contract is not brought to end due to the Seller’s default.
- (f) If the Buyer fails to withdraw the Caveat pursuant to the terms of this Special Condition the Buyer appoints the Seller to be its attorney to sign a Withdrawal of the Caveat.”

***Land Sales Act 1994***

- [5] At all material times the 6 acre parcel of land the subject of the contract has been a "proposed allotment" within the meaning of the *Land Sales Act*. The Act has been amended from time to time. The applicable provisions are those current on the date of the contract (22 January 2002), and set out in Reprint No. 4B prepared by OQPC.
- [6] Sections 8 and 9 imposed restrictions on the sale of a proposed allotment and requirements for its identification.
- [7] By s 8(1) of the Act a proposed allotment of freehold land might be sold only in certain circumstances, none of which applied in this case.

**“8 Restriction on selling**

- (1) A person may sell a proposed allotment of freehold land only if, when the purchaser enters upon the purchase of the allotment—

- (a) local government unconditional approval of the subdivision application for the land is in force under the Planning Act; or
- (b) local government approval of the subdivision application for the land, subject to conditions other than conditions requiring the applicant to construct works on the land, is in force under the Planning Act; or
- (c) the following approvals are in force under the Planning Act –
  - (i) approval of the subdivision application for the land, subject to conditions requiring the applicant to construct works on the land; and
  - (ii) approval of the engineering drawings and specifications for the works mentioned in subparagraph (i).

Maximum penalty – 200 penalty units or 1 year's imprisonment.”

Subsection 8(2) provided:

“(2) An agreement made in contravention of this section is void and any person who had paid money thereunder shall be entitled to recover the amount thereof, together with the amount of interest (if any) that has accrued in respect of that amount since the money was so paid, by action as for a debt due and owing to the person by the person to whom the money was paid.”

[8] By s 9 –

**“9 Identification of land**

(1) Before a purchaser enters upon a purchase of a proposed allotment, the vendor must give the purchaser –

- (a) a disclosure plan and disclosure statement for the proposed allotment; or
- (b) a copy of the plan of survey for the proposed allotment approved by the local government under the Planning Act, chapter 3, part 7.

...

(5) If the vendor or the vendor’s agent contravenes this section, other than subsection (3)(a), (b) or (h), the purchaser may avoid the instrument relating to the sale by written notice given to the vendor

or vendor's agent before the vendor gives the purchaser the registrable instrument of transfer for the allotment."

The requirement in subsection (1) was not satisfied in the present case.

[9] However, exemption from ss 8 and 9 might be obtained under s 19, which provided

**"19 Exemption from part**

(1) Each of the following persons may apply to the registrar, in the approved form, for exemption from all or any of the provisions of this part in relation to land that is to be subdivided into not more than 5 allotments –

- (a) a person by or for whom the land is to be subdivided;
- (b) a vendor or purchaser of a proposed allotment.

(1A) However, a purchaser may apply for exemption only with the vendor's consent.

(2) Subject to subsection (2B), the registrar must, within 15 days of receipt of the application –

- (a) grant the application by instrument of exemption; or
- (b) refuse it by written notice to the applicant.

(2A) If the registrar grants the application –

- (a) the registrar may grant it subject to any other condition specified in the instrument; and
- (b) the registrar must specify in the instrument the provisions of this part in relation to which the exemption is granted.

(2B) If the application is defective in a way that hampers the registrar's consideration of the application, the registrar may seek further information from the applicant to cure the defect.

(2C) An exemption under this section is given on the condition that the land is subdivided in accordance with the application, subject to any other condition specified in the exemption instrument.

...

(6) Notwithstanding the provisions of section 8, a person may agree to sell a proposed allotment that is land in respect of which a person is eligible to make an application for exemption under subsection (1) if the instrument that binds a person to purchase the

proposed allotment is conditional upon the grant under subsection (2) of an exemption from section 8 or from that section and any other provision of this part.

(7) In a case to which subsection (6) applies application for the exemption shall be made within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment.

(8) Where application for exemption for the purposes of subsection (6) is not received by the registrar within the time prescribed by subsection (7) the instrument in question referred to in subsection (6) is void and any person who has paid money thereunder shall be entitled to recover the amount thereof, together with the amount of interest (if any) that has accrued in respect of the money since it was so paid, by action as for a debt due and owing to the person by the person to whom the money was paid.”

### **Exemption**

[10] On 27 October 2003 the respondent applied for exemption from compliance with sections 8 and 9 of the *Land Sales Act*. Exemption was granted on 2 December 2003.

[11] On 19 January 2004 the solicitors for the applicant wrote to the solicitors for the respondent -

“Clause 5(c) of the Contract requires the Buyer to make an application within 30 days of the Contract Date for exemption from Sections 8 and 9 of the Land Sales Act 1984.

From the correspondence which has passed between us recently, it is clear that the Buyer did not make such an application within 30 days as required by clause 5 of the Contract and as required by Section 19(7) of the Act.

In these circumstances, the effect of Section 19(8) of the Act is that the Contract is void.

The deposit money must be refunded to the Buyer.

We enclose a letter to Phil Murphy Properties which will authorise the refund of the deposit to the Buyer.

In the circumstances, the Caveat lodged over the title on behalf of the Buyer should be withdrawn. We enclose a Form 14 General Request which we request you to sign and return to us for lodging in the Titles Office.”

### **The question for determination**

- [12] The contractual provision (clause 5(c)) required the respondent to apply for exemption “within thirty (30) days of the Contract Date” (which was 22 January 2002), whereas s 19(7) provided that the application should be made “within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment”.
- [13] The nub of the present problem is the meaning of the expression “the event that marks the entry of a purchaser upon the purchase of the proposed allotment”.
- [14] The applicants submitted that it refers to the date the contract was made. In their submission, because the respondent purchaser did not apply for exemption from ss 8 and 9 of the *Land Sales Act* within 30 days of 22 January 2002 (the date of the contract), the contract is void pursuant either to s 19(8) or to s 8(2) of the Act.
- [15] The respondent submitted that it refers to the point at which it was bound to purchase (absolutely or subject to conditions subsequent), and that that point was not reached until any conditions precedent were satisfied or waived. In its submission, the time it had to apply for an exemption did not begin to run until 23 October 2003 when it waived the benefit of special condition 3; the application for exemption made on 27 October 2003 was thus within time, and the contract remains on foot.

### **Conditions precedent or subsequent?**

- [16] Upon the execution of the contract, the parties assumed certain obligations - for example, with respect to payment of the first tranche of the deposit by the respondent (special condition 9) and ongoing maintenance of the property by the applicants (special condition 12). In these circumstances special conditions 2 and 3 were not conditions precedent to the formation of a binding contract, but either conditions subsequent or conditions precedent to the respondent’s obligation to complete the contract. The applicants did not take issue with the respondent’s categorising them as conditions precedent.
- [17] In *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 the contract contained a condition –

“This Contract is entered into subject to the purchasers completing a sale of their property No 9 Korokan Rd., Lilli Pilli.”

Gibbs CJ discussed the difficulties in deciding whether a particular condition should be classified as a condition precedent or a condition subsequent at 541 – 3. He said at 543 –

“Nevertheless, it probably does not matter in the present case whether the condition is described as ‘precedent’ or ‘subsequent’, provided that it is understood that its non-fulfilment did not prevent a binding contract from coming into existence but did have the effect

that the respondent was under no obligation to complete the sale unless the condition was fulfilled or waived.

I respectfully apply His Honour's observations to special conditions 2 and 3 in the present case.

### **Discussion**

- [18] Section 8 does not prohibit the sale of a proposed allotment. Rather, it restricts such sale to circumstances where certain subdivisional approvals are in force "when the purchaser enters upon the purchase of the allotment". Succeeding sections provide (inter alia) for the identification of the proposed allotment (s 9), disclosure of significant variations between the disclosure plan and later plans (s 10), for the purchaser to be given a registrable instrument of title not more than 18 months "after the purchaser enters upon the purchase of the allotment" (s 10A), and for the protection of moneys paid by the purchaser without becoming entitled to receive a registrable instrument of transfer (s 11).
- [19] An agreement made in contravention of s 8(1) is void. Section 19 allows a purchaser (and others) to apply for exemption from any of the provisions of part 2. By subsection 19(6), notwithstanding s 8, a person may agree to sell a proposed allotment if the instrument that binds a person to purchase the proposed allotment is conditional upon exemption from s 8. By s 19(7) an application for exemption must be made "within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment".
- [20] The Act contains definitions of "purchaser" in s 6A and "purchase" in s 6. The definition of "purchaser" draws the two concepts together –

#### **"6A Meaning of purchaser**

(1) For the purposes of this Act –

- (a) a person who signs (personally or by an agent) an instrument that is intended to bind the person (absolutely or conditionally) to purchase a proposed allotment or a proposed lot shall be taken to have entered upon a purchase of the allotment or lot and in this Act is referred to as 'the purchaser';
- (b) a person who signs (personally or by an agent) an instrument that is intended to bind the person (absolutely or conditionally) to sell a proposed allotment or a proposed lot shall be taken to have entered upon a sale of the allotment or lot and in this Act is referred to as 'the vendor'.

(2) Subsection (1)(b) shall not be construed to limit the meaning of the expression "sell" as defined in section 6."



[21] The definition of “purchase” is an inclusive one –

“‘purchase’ includes

- (a) agree to purchase;
- (b) acquire an option to purchase;
- (c) enter upon a transaction that has as its object the acquisition of a right (not immediately exercisable) to purchase or to be given an option to purchase;
- (d) sign an instrument that is intended to legally bind a signatory to purchase;
- (e) enter upon a transaction or sign an instrument with a view to any person securing or attempting to secure another’s agreement to sell.”

[22] A person “enters upon a purchase” when he engages in relevant conduct. Signing an instrument intended to bind the signatory to purchase constitutes a purchase; a person who signs such an instrument (whether it is intended to bind that person absolutely or conditionally) is a purchaser and is “taken to have entered upon a purchase”. In other words, it is the signing of the contract that is the event that marks the entry of a purchaser upon the purchase – and it makes no difference that there are conditions still to be fulfilled and upon the non-fulfilment of which the contract will be at an end.

[23] The concept of the purchaser entering upon a purchase is found also in s 9. By subsection (1) a vendor must give a purchaser certain plans and disclosure statement “before [the] purchaser enters upon a purchase of a proposed allotment” It is consistent with two of the objects of the legislation –

“(b) to protect the interests of consumers in relation to property development; and

(c) to ensure that proposed allotments and proposed lots are clearly identified”

(see s 2)

to require such disclosure before the signing of a contract (or other conduct constituting a purchase) rather than at some later time. Moreover, by s 9(4) the obligation to do so rests upon the vendor’s agent “where it is the agent who procures the signing of the instrument concerned by the purchaser”. It is unlikely that the Legislature intended that the agent should have such a duty at a time other than that before the execution of the contract. Indeed, it is most unlikely that it intended the agent should be able to fulfil that duty at any time up until the fulfilment of

conditions such as conditions 2 and 3 of this contract, because the agent may well have no way of knowing that they were about to be fulfilled and thus that the time for disclosure was running out.

- [24] In *Rosemac Pty Ltd's Caveat* [1994] 1 QdR 137 White J considered whether a contract entered into contrary to s 8 in circumstances where a timely application for exemption was not made was void or merely voidable. She concluded that it was void: that the language of ss 8 and 19(7) was quite plain, and it was not necessary to import language to avoid an injustice. Her Honour said at pages 139-140 –

“The event marking the purchaser’s entry upon the purchase was the execution of the contract on 24 May 1991. Such an instrument would be void pursuant to s 8 of the *Land Sales Act* but for the saving provision in s. 19(6) and its incorporation as a special condition to the contract, see *Day Ford Pty Ltd v Sciacca* [1990] 2 QdR 209 per Macrossan C.J. at 215 with whom Kelly S.P.J. and Ambrose J. agreed. The time within which the application for exemption was required to be made was ‘within 30 days’ of the execution of the contract, namely 23 June 1991, see *P. & M. Productions Pty Ltd v Elders Leasing Limited* [1992] 1 QdR 264 per Williams J at 275. The application was, in fact, made to the Registrar on 2 December 1991. Section 19(8) provides in clear terms that if such an application is not made within 30 days of execution of the contract such contract is void.”

The respondent submitted that because the contract in *Rosemac* did not contain conditions such as special conditions 2 and 3 of this contract, the identification of “the event which marks the entry of a purchaser upon the purchase” was not in issue before Her Honour, and so this passage was not authoritative. While this passage was not part of the *ratio decidendi*, it is, in my respectful opinion, the correct interpretation of the relevant words in s 19(7).

- [25] Recently the same question of the identification of “the event that marks the entry of a purchaser upon the purchase” within the meaning of s 19(7) came before Muir J in *Francis v NPD Property Development Pty Ltd* [2004] QSC 202. His Honour rejected the interpretation now contended for by the same respondent. There seem to have been some submissions made to His Honour which were not made or pressed before me. In particular, I did not understand the respondent to assert that s 19(6) limits the types of instruments in respect of which applications for exemption may be made. (*Francis* para 63) Rather its contention was that on the proper interpretation of s 19(7) the time within which such an application may be made depends upon the type of instrument. Further, the argument that the 30 day time stipulation in s 19(7) was directory only, although initially raised, was not pursued before me. (*Francis* para 65-66).

## Conclusion

- [26] Because the respondent did not apply for exemption from ss 8 and 9 of the *Land Sales Act* within 30 days of the date of the contract, the contract is void. The respondent is entitled to be repaid any moneys it has paid pursuant to the contract together with accretions (if any). The caveat lodged by the respondent should be removed.
- [27] I will hear counsel on the form of the orders and on costs.