

SUPREME COURT OF QUEENSLAND

CITATION: *Australia Estates P/L v Cairns City Council* [2004] QSC 378

PARTIES: **AUSTRALIA ESTATES PTY LTD ACN 098 087 168**
(applicant)

v

CAIRNS CITY COUNCIL
(respondent)

CAIRNS CITY COUNCIL
(applicant)

v

AUSTRALIA ESTATES PTY LTD ACN 098 087 168
(respondent)

FILE NO: S9130 of 2004
S503 of 2004

DIVISION: Trial

PROCEEDING: Applications

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 28 October 2004

DELIVERED AT: Brisbane

HEARING DATE: 26 October 2004

JUDGE: Douglas J

ORDER: **DISMISS THE APPLICATION BY AUSTRALIA ESTATES PTY LTD IN MATTER NO. S9130 OF 2004.**

ORDER, IN MATTER NO. S503 OF 2004 IN THE CAIRNS REGISTRY OF THE COURT, THAT CAVEAT NO. 708130653 LODGED IN RESPECT OF LOT 23 ON RP724760, COUNTY OF NARES, PARISH OF CAIRNS, TITLE REFERENCE 21304198, LOT 803 ON CPC 1981, COUNTY OF NARES, PARISH OF CAIRNS, TITLE REFERENCE 20809017, LOT 804 ON CPC 1981, COUNTY OF NARES, PARISH OF CAIRNS, TITLE REFERENCE 20647096, LOT 818 ON CPC 1981, COUNTY OF NARES, PARISH OF CAIRNS, TITLE REFERENCE 20809018 AND LOT 819 ON CPC 1981, COUNTY OF NARES, PARISH OF CAIRNS, TITLE REFERENCE 20588196 BE REMOVED PURSUANT TO S. 127(1) OF THE *LAND TITLE ACT 1998*.

CATCHWORDS: CONTRACTS - PARTICULAR PARTIES - VENDOR AND PURCHASER - SALES OF SUBDIVIDED LAND -
Contract expressed to be subject to development approval —
Construction of condition dealing with completion date -

Whether an original decision notice issued by Cairns City Council should be characterised as an approval of a development application within the meaning of special conditions of the contract for the purposes of calculating the completion date or whether a later negotiated decision notice should be treated as the relevant notice – Whether the contractual completion date had been varied otherwise by correspondence – Whether approval of negotiated decision notice had been obtained for purposes of contract – Behaviour of Council in delaying giving notice.

ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – CONSENTS – APPROVALS AND PERMITS – INTERPRETATION AND CONSTRUCTION – GENERALLY – Where contract to sell land expressed to be subject to development approval – Whether an original decision notice issued by Cairns City Council should be characterised as an approval of a development application within the meaning of special conditions of the contract for the purposes of calculating the completion date or whether a later negotiated decision notice should be treated as the relevant notice – Whether the contractual completion date had been varied otherwise by correspondence – Whether approval of negotiated decision notice had been obtained for purposes of contract – Behaviour of Council in delaying giving notice.

Integrated Planning Act 1977 (Qld), s 3.5.15, s 3.5.17, s 3.5.19, Schedule 10

Hayes v Walker [2004] QCA 288, distinguished

COUNSEL: B D O'Donnell QC for the applicant/respondent Australia Estates Pty Ltd
P J Lyons QC for the respondent/applicant Cairns City Council

SOLICITORS: Boulton Cleary and Kern for the applicant/respondent Australia Estates Pty Ltd
Williams Graham Carman for the respondent/applicant Cairns City Council

- [1] **DOUGLAS J:** By a contract dated 9 May 2003, the Cairns City Council agreed to sell a parcel of land in the Cairns CBD to Australia Estates Pty Ltd for \$3 million. The Council contends that the date of completion became 12 October 2004. As the purchaser did not complete on that day, the Council sent a notice of termination of the contract on 13 October. Australia Estates contends that, in the events that have happened, the date for completion became 1 November 2004. It seeks a declaration to that effect. The Council seeks the removal of a caveat on the land lodged by Australia Estates.

- [2] The special conditions of the contract made provision for an application for approval of the development of the land from Cairns City Council as the local government. It fixed the completion date of the contract by reference to the obtaining of the approval.
- [3] A decision notice issued on 26 July 2004. That term is defined in special condition 1.1(8); and also defined in Schedule 10 and s.3.5.15 of the *Integrated Planning Act* 1997 (“the Act”). The parties initially agreed that this was the approval referred to in the special conditions although Australia Estates did so without prejudice to its rights. They also agreed that the completion date for the purposes of the contract would be 12 October 2004. I shall discuss the circumstances of that agreement later.
- [4] After further negotiation, however, a “negotiated decision notice” was issued by the Council dated 31 August 2004. That is also a statutorily defined term. Such a notice permits changes to conditions in a decision notice after representations are made to an assessment manager, in this case, the Council. It must be given within five business days after the Council agrees with the representations and replaces the decision notice previously given; see s. 3.5.17(4) of the Act. Section 3.5.19 goes on to provide that, if a negotiated decision notice is given, it is taken to be the development approval and has effect from the time it is given. Because of that notice, Australia Estates subsequently asserted that the completion date was 25 October 2004 and did not tender the purchase monies on 12 October 2004. It now argues that the proper completion date is 1 November 2004.
- [5] On 13 October 2004 Cairns City Council sent a letter seeking to terminate the contract. On the same day Australia Estates lodged a caveat over the land.
- [6] Those facts give rise to two issues:
1. Is it the original decision notice that was relevant to the determination of the completion date or the negotiated decision notice?
 2. Did the parties vary the contract in any event to provide that settlement take place on 12 October 2004?
- [7] Cairns City Council has also relied, in the alternative, on the fact that the approval was not, for the purposes of the contract, “obtained” within the period specified, as a ground for termination.

The special conditions of the contract

- [8] By cl. 2.1 of the special conditions the contract was subject to the purchaser obtaining approval of its application for development approval from the Council by the approval date. Completion of the contract was due 60 days after cl. 2 was satisfied; cl. 5.1.
- [9] The approval date was originally to be 150 days after the lodgement date which was itself 150 days after the contract date, cll. 1.1(3) and 1.1(11), but the parties varied this provision to make the approval date 31 August 2004.
- [10] The purchaser was obliged to notify the vendor within two business days of receiving the decision notice from the Council in relation to its application and to provide the vendor with a copy of that notice; cl. 2.7. Clause 2.8 then provided that the purchaser must notify the vendor in writing whether the application had been

approved and if so whether the conditions of the approval were satisfactory to it within five business days of its receipt of the decision notice. If the terms of the approval were unsatisfactory to the purchaser, cl. 2.9 allowed the termination of the contract by the purchaser giving written notice to the vendor within the period of five business days, failing which it was deemed to have given notice that the terms of the approval were satisfactory. If the application were refused or not obtained by the approval date then either party might terminate the contract; cl. 2.10.

- [11] Clause 2.12 provided that, if there were no “submitters” opposed to the application with rights of appeal, subject to the purchaser’s right to terminate within five business days under cl. 2.9, then cl. 2 would be deemed to be satisfied on the giving of the approval notice.
- [12] There were no “submitters” opposed to Australia Estate’s application. If there had been then the contract contained other provisions relevant to the date cl. 2 was deemed to be satisfied. Notably, if one or more of any submitters had appealed against the Council’s approval, either party could terminate the contract within two business days of the last of the submitters’ appeal periods; cll. 2.13, 2.15.

The contractual history

- [13] Although Australia Estate’s architects and town planner appear to have received all the documents relevant to the decision notice on 30 July 2004, its solicitor seems to have been in possession only of the preliminary approval according to his letter of 6 August 2004. Accordingly he asked for confirmation in that letter that the notice was not the approval notice referred to in cl. 2 of the special conditions. The Council’s solicitors replied and pointed out that one of the documents dated 26 July was a preliminary approval while the other was a development permit which was clearly an approval for the purposes of the contract. They also mentioned that the period of five days allowed by cl. 2.8 may already have expired and asked Australia Estate’s solicitors to “please advise your client’s position in relation to Clause 2”. It was in that context that, in his letter of 9 August 2004, the solicitor for Australia Estates said, without prejudice to his client’s rights, that his client was prepared to accept that the development permit was an approval for the purposes of cl. 2.
- [14] In the same letter of 9 August he also said that his client was still in negotiations with officers of the Council in respect of certain conditions to the approval. His oral evidence was vague as to what those issues were. He believed that they related to “housekeeping issues” but knew that they needed to go back before the Council by 9 September 2004.
- [15] If the approval dated 26 July 2004 and received on 30 July were the relevant approval notice for the purposes of the contract then it seems clear that cl. 2 of the special conditions was satisfied, allowing for the five business day period prescribed in cl. 2.9, on 6 August 2004. Completion would then have been due 60 days later, on 5 October.
- [16] The Council’s solicitors do not appear to have been aware of when Australia Estates received the Council’s decision notice and proposed in their letter of 13 August 2004 that the date of that letter be the date of satisfaction of cl. 2 and that 12 October 2004 be the completion date “with time to be and remain of the essence”.

Australia Estates' solicitor confirmed 12 October as the settlement date in his letter of 18 August 2004.

- [17] The further decision notice dated 31 August 2004, which has been treated as a negotiated decision notice, was given in respect of a Council decision made on 26 August 2004. It was not posted to Australia Estate's architects until 31 August and received by them on 1 September. After its receipt Australia Estate's solicitor asked for an extension of the completion date beyond 12 October 2004. When that was refused he argued in his letter of 8 October that, because of the giving of the negotiated decision notice and the effect of s. 3.5.17 and 3.5.19 of the Act settlement was not due until 25 October. The Council rejected that argument but settlement did not occur. Australia Estate's position now is that settlement is due on 1 November, 60 days after it received the negotiated decision notice.

Is it the original decision notice that was relevant to the determination of the completion date or the negotiated decision notice?

- [18] Australia Estates contends that, because, for the purposes of the Act, a negotiated decision notice replaces the original decision notice, the negotiated decision notice is the relevant approval for the purposes of cl. 2, and the completion date is calculated by reference to it. The Council's submission is that that cannot be correct, for a number of reasons.
- [19] Mr Lyons QC argued that a negotiated decision notice issues under s. 3.5.17 of the Act. Under that section, an applicant may make representations about a matter stated in a decision notice. To preserve appeal rights, an applicant making representations under s. 3.5.17 would ordinarily exercise its right to suspend that appeal period under s. 3.5.18(1). The legislation envisages a substantial period, usually much longer than five business days, after the applicant receives the decision notice, for the determination of an application for a negotiated decision notice. The local government was required to reconsider the matters considered when the original decision was made, to the extent they are relevant. No time is fixed for the local government's determination. Further, the local government is allowed five business days after making its decision to communicate its decision to the applicant. The local government may not agree to change the original decision notice, in which case the original decision notice stands.
- [20] He pointed out that, in those circumstances, if the only valid decision notice was a later negotiated decision notice that came into existence after the time limits prescribed in the contract, the contract would lose effect and meaning.
- [21] He went on to submit that there were a number of features of the contract which strongly indicate that the parties intended the relevant approval to be that set out in the decision notice. He listed them as follows:
1. the parties chose the term "decision notice" (defined in the Act);
 2. the parties made no reference in the contract to a negotiated decision notice (also a term defined in the Act);
 3. the requirement that Australia Estates notify the Council that the application has been approved is linked to the receipt of the decision notice;
 4. the requirement that Australia Estates notify the Council whether the conditions of approval were satisfactory to Australia Estates, was linked to the receipt of the decision notice, and not the negotiated decision notice;

5. Australia Estates's right to terminate, if not satisfied with the conditions of approval, was fixed as a period calculated from receipt of the decision notice;
 6. the contract made no provision for the involvement of the Council in a request for a negotiated decision notice under s.3.5.17;
 7. the contract did not include any obligation on the part of Australia Estates to give the Council any notice of the decision on a request for a negotiated decision notice under s.3.5.17;
 8. the contract did not include any requirement that Australia Estates notify the Council whether conditions in a negotiated decision notice were satisfactory to it;
 9. the contract made no provision for deemed notice that the conditions in a negotiated decision notice were acceptable to Australia Estates;
 10. the contract made no provision for termination by either party if the request for a negotiated decision notice were refused;
 11. the contract made no provision for deemed satisfaction of cl. 2 after Australia Estates obtained a negotiated decision notice (in the event there were no submitters).
- [22] As Mr Lyons QC also submitted the evident purpose of cll. 2.8 and 2.9 (when read with the definition of "approval notice") in cl. 1.1(4) is to provide Australia Estates with a limited right to terminate the contract, if dissatisfied with the terms of the approval. The limitation is that the right must be exercised within five business days of receipt of the decision notice. It would be inconsistent with the intended limitation, if the negotiated decision notice could be said to replace the decision notice.
- [23] Further, he submitted, Australia Estates's approach subverts the intention of the contract that, in a case where there are no submitters, cl. 2 is deemed to be satisfied by (at the latest) five business days after Australia Estates received the decision notice.
- [24] Mr O'Donnell QC's submissions focussed on the effect of s. 3.5.17 and 3.5.19 in replacing the original decision notice with the negotiated decision notice and in providing that the negotiated decision notice is taken to be the development approval. It is important to note, however, that, in these circumstances, it is taken to be the approval *from* the time the negotiated decision notice is given; see s. 3.5.19(a). That seems to me to illustrate that the original decision notice is effective until it is replaced, unlike the notice in *Hayes v Walker* [2004] QCA 288 which was the subject of an unresolved appeal and, accordingly, not a development approval but at the highest an approval subject to a condition precedent; see per de Jersey CJ at [12]-[13].
- [25] The fact that the approval date had been extended to 31 August 2004 and the negotiated decision notice was posted or perhaps given on that date to Australia Estates does not have the effect of invalidating the steps taken under the contract before then in reliance on the earlier notice. To make sense of the contract and the Act, the original decision notice should be regarded as effective while it subsisted for the purposes of the contractual provisions relevant to this case. There is no reason not to take that approach. If one adopts the course urged for Australia Estates the question of whether there had been valid performance of the contract

would be subject to retrospective reinterpretation by a process that may not reach fruition until after the times prescribed by the contract.

Did the parties vary the contract in any event to provide that settlement take place on 12 October 2004?

[26] The correspondence I have summarised earlier has, in my view, resulted in a variation of the contractual provision. The date proposed for settlement, 12 October 2004, was, on no view, one that could have been derived from the normal operation of the contract. It was agreed to by Australia Estates' solicitor in circumstances where I can readily infer that it knew or should have known that it was not the date that the contract would have required. There has, therefore, been a variation to the completion date with time remaining of the essence.

[27] It was not made pursuant to a mistake, namely that the relevant approval was that given on 26 July, as submitted by Mr O'Donnell QC. In fact that approval was the relevant approval for calculating the completion date.

Was approval for the purposes of the contract "obtained" within the period specified?

[28] Because of my views about the other matters argued it is strictly unnecessary for me to resolve this issue. Mr Lyons QC submitted that the approval was not "obtained" by the extended approval date of 31 August 2004, because it was not received by Australia Estates until 1 September 2004 and communication of acceptance of the approval by Australia Estates did not occur before 31 August 2004, so that cl. 2 was not satisfied by that date, accordingly, he submitted, the Council was entitled to terminate the contract because cl. 2 was not satisfied in the period for which the contract (as varied) provided. But Australia Estates was in no position to obtain the approval of the Council because of the Council's own behaviour in delaying sending that notice to Australia Estates.

[29] It seems to me, therefore, that there is substance in Mr O'Donnell QC's submission that where the Council made its decision to grant the negotiated decision on 26 August, a Thursday, it was therefore required to do all that was reasonable on its part to ensure that the decision notice was given by the extended approval date of Tuesday, 31 August. He went on to submit that there were a number of ways in which the Council could have achieved that. For example, the Council could have despatched the decision notice in the mail on Friday 27 August, or Monday 30 August. Or it could have had the decision notice despatched by facsimile. Or it could have had the decision notice delivered to the Cairns office of Australia Estates' architects. It did none of those. Instead it despatched the negotiated decision notice by mail on 31 August. The consequence was that the condition was unfulfilled. There is no explanation in the Council's affidavits explaining why it did not take steps which would have ensured the receipt of the negotiated decision notice at the latest by Tuesday 31 August. In those circumstances, he submitted, the Council was in breach of its implied obligation to do all that was reasonable on its part to ensure that the condition was fulfilled. So the Council would, therefore, be precluded from relying on non-fulfilment of the condition to terminate the contract.

[30] That appears to me to be a correct analysis but, because of my views about the other matters argued, does not vary the decision I propose to make.

Conclusion

- [31] The original decision notice was effective for the purposes of the contract while it subsisted. The negotiated decision notice did not invalidate the steps taken under the contract in reliance on the original notice. In any event the parties varied the contract to agree to settle on 12 October 2004. Accordingly the orders I shall make are to:
1. Dismiss the application by Australia Estates Pty Ltd in matter no. BS9130 of 2004.
 2. Order, in matter no. S503 of 2004 in the Cairns Registry of the Court, that Caveat No. 708130653 lodged in respect of Lot 23 on RP724760, County of Nares, Parish of Cairns, Title Reference 21304198, Lot 803 on CPC 1981, County of Nares, Parish of Cairns, Title Reference 20809017, Lot 804 on CPC 1981, County of Nares, Parish of Cairns, Title Reference 20647096, Lot 818 on CPC 1981, County of Nares, Parish of Cairns, Title Reference 20809018 and Lot 819 on CPC 1981, County of Nares, Parish of Cairns, Title Reference 20588196 be removed pursuant to s. 127(1) of the *Land Title Act 1998*.
- [32] I shall hear the parties as to costs.