

SUPREME COURT OF QUEENSLAND

CITATION: *Jarema Pty Ltd v Michihiko Kato*[2004] QSC 451

PARTIES: **JAREMA PTY LTD**
(plaintiff)
v
MICHIHIKO KATO
(defendant)

FILE NO: S3985/03

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 17 December 2004

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 9 December 2004

JUDGE: Wilson J

ORDER: **That the claim be dismissed.**

CATCHWORDS: CONVEYANCING – MATTERS ARISING BETWEEN CONTRACT AND CONVEYANCE – DESCRIPTION, MISDESCRIPTION AND COMPENSATION FOR “ERROR OR MISDESCRIPTION” – “ERROR OR MISDESCRIPTION” – GENERALLY – where the contract of sale contained an “Errors and Misdescriptions” clause – whether omission to state that there was no legally enforceable vehicular access to basement car park amounted to a “mistake or error in the description or particulars of the Property”

Arcos Ltd v E A Ronaasen & Son [1933] AC 470, cited
Bain v Fothergill (1874) LR 7 HL 158, considered
Batey v Gifford (1997) 42 NSWLR 710 at 716-717, cited
Dainford Ltd v Lam & Anor [1985] 3 NSWLR 255 at 265-6, cited
Flight v Booth (1834) 1 Bing (NC) 370 (131 ER 1160) at 377 (1162-3), considered
Halsey v Grant (1806) 13 Ves Jun 73 (33 ER 222) at 77 (223), considered
Seton v Slade (1802) 7 Ves 265 (32 ER 108) at 274 (111), cited
Stephens v Selsey Renovations Pty Ltd [1974] 1 NSWLR 273 at 278, cited
Tarval Pty Ltd v Stevens & Ors (1990) NSW Conv R 55-552 (CA), cited
Travinto Nominees Pty Ltd v Vlattas (1973) 129 CLR 1,

followed

COUNSEL: BG Cronin for the plaintiff
GJ Gibson QC and CC Heyworth-Smith for the defendant

SOLICITORS: Macrossans Lawyers for the plaintiff
Hynes Lawyers for the defendant

- [1] **WILSON J:** The plaintiff was the purchaser from the defendant of certain land and improvements situated at 140 Bundall Road, Bundall under a contract dated 10 March 2003. The contract price was \$5 million. In this proceeding the plaintiff claims compensation for misdescription.
- [2] The contract was in the standard REIQ/QLS form for Commercial Land and Buildings (2nd ed GST reprint). The primary obligations of the parties appeared at the very beginning of the contract:

"This contract is made between the vendor and the purchaser. The vendor agrees to sell and the purchaser agrees to buy the property, subject to the conditions of this contract, for the purchase price."

(Underlining added)

There was a 6 storey office building with a basement car park on the land. The property was sold subject to leases and service contracts which were set out in schedules to the contract. From these schedules it was apparent that there were 54 car parking spaces.

- [3] At all material times there has been pedestrian access from the office building to Bundall Road, which is a busy thoroughfare. The entrance to the car park is at the rear of the building. There is no direct access from a public road to the car park entrance. To the north of the subject land there is a public road Karp Court. Access to the car park is across lot 13 on RP 177022 - a narrow doglegged parcel of land (a laneway) which runs from Karp Court, along the western boundary of the subject land, before turning west for a short distance, and then running south again until it reaches Frigo Court (another public road).
- [4] At all material times the Gold Coast City Council, as trustee under a nomination of trustees, has been the registered owner of lot 13, which it holds on trust for car parking purposes and for town planning purposes. It has a sealed surface, which the Council maintains.
- [5] The contract provided for a "due diligence period" in which the plaintiff could carry out searches and investigations to satisfy itself about the property. During that period the plaintiff's solicitors were alerted to the absence of a registered easement in favour of the subject land, and sought a reduction in the purchase price. The defendant would not agree to this. By letter dated 14 April 2003 the plaintiff's solicitors said (inter alia) -

"The building is described in the contract as '6 storey office building plus basement car park'.

This description of the property is not correct ..."

They referred to clause 8 of the contract, and continued -

"In the present case, the Purchaser demands compensation for the misdescription.

The misdescription is important as it affects:

- . the ability of tenants to have access to the car parks;
- . the ability of landlord to fulfil obligations entered into with tenants;
- . the ability of the landlord to let space in the building to third parties at commercial rates of rental.

We shall shortly advise the amount of compensation claimed."

Ultimately the sale was completed, with the plaintiff reserving its rights.

[6] Clause 8 of the contract was in the following terms -

“8. ERRORS AND MISDESCRIPTIONS

8.1 If there is any immaterial mistake or error in the description or particulars of the Property or as to title, the Purchaser shall not be entitled to terminate this Contract but shall be entitled to such compensation (if demanded in writing on or before the Date for Completion) as the case may require. The Purchaser shall not be entitled to delay completion or to withhold any part of the Purchase Price by reason of any such claim for compensation.

8.2 If there is any material mistake or error in the description or particulars of the Property or as to title and the Purchaser does not exercise any right which the Purchaser has at law to terminate this Contract, the Purchaser shall be entitled to such compensation (if demanded in writing on or before the Date for Completion) as the case may require. The Purchaser shall not be entitled to delay completion or to withhold any part of the Purchase Price by reason of any such claim for compensation.”

[7] The plaintiff contends that there was a mistake or error in the description or particulars of the property within the meaning of clause 8, namely the omission to state that there was no legally enforceable vehicular access to the car park. It relies on clause 8.1 or alternatively clause 8.2. It is common ground that if there was such a mistake or error, the plaintiff is entitled to compensation in the amount of \$85,000-00.

[8] In *Batey v Gifford* (1997) 42 NSWLR 710 at 716 – 717 Handley JA said of compensation clauses such as clause 8 –

“These compensation clauses cannot be construed without a proper understanding of their history and the rules of law and equity which

otherwise apply. This was explained by Menzies J in *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 27-8:

‘... These conditions do not attempt to state the main rights and duties of the parties but merely modify these rights and duties in certain particular respects. The rights and obligations of the parties still largely depend upon the common law, as tempered by the rules of equity. It is necessary to understand these before applying these conditions. *Williams on Vendor and Purchaser*, 4th ed, (1936) at pp 34-37 sets out the chief duties of a vendor at common law:

1. ...
2. To produce land corresponding substantially in all respects with the description contained in the contract and available to be transferred to the purchaser in fulfilment of the contract; and
3. ...

At common law, any difference, however trivial, between the land described in the contract and the land produced constituted a defect which entitled the purchaser to rescind.

Where there was only a slight difference, the Courts of Equity began to interfere and introduced the principle of compensation for deficiency ... Unless the deficiency was so substantial as to give the purchaser something entirely different from what he had contracted (to buy), equity would order specific performance on giving compensation for the deficiency.

Also to avoid the harsh effect of the common law, it became the practice to insert in contracts a clause stating that a difference from the description of the subject matter would not annul the sale’.

As Lord Eldon said in *Seton v Slade* (1802) 7 Ves 265 (32 ER 108) at 274 (111) ‘... the slightest objection is an answer at law’. See also *Dainford Ltd v Lam & Anor* [1985] 3 NSWLR 255 at 265-6 per Powell J; and *Tarval Pty Ltd v Stevens & Ors* (1990) NSW Conv R 55-552 (CA). The vendor's obligation at law under a contract for the sale of real estate by description was similar to that of a seller under a contract for the sale of goods by description. The description was an essential term of the contract and the purchaser could reject the goods if there was any difference, other than trifling, between the goods tendered and the contractual description. See *Arcos Ltd v E A Ronaasen & Son* [1933] AC 470.

Compensation clauses which provide that no error or misdescription shall annul the sale refer to errors or misdescriptions which would ‘annul’ the contract at law. There was no automatic annulment but

the purchaser could rescind. See *Travinto Nominees Pty Ltd v Vlattas* at 27; and *Stephens v Selsey Renovations Pty Ltd* [1974] 1 NSWLR 273 at 278 per Mahoney J.

Equity however intervened at the suit of the vendor. As Lord Erskine explained in *Halsey v Grant* (1806) 13 Ves Jun 73 (33 ER 222) at 77(223):

‘... equity does not permit the forms of law to be made instruments of injustice; and will interpose against parties, attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where therefore advantage is taken of a circumstance, that does not admit a strict performance of the contract, if the failure is not substantial equity would interfere. If for instance the contract is for a term of 99 years ... and it appears that the vendor has only 98 or 97 years, he must be non suited in an action: but equity will not so deal with him; and if the party can have the substantial benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced the principle of compensation’

A purchaser could waive his right of rescission and complete on payment of the full purchase price. There was no right at law to an abatement of the purchase price because the rule in *Flureau v Thornhill* (1776) 2 Black W 1078 (96 ER 635), later known as the rule in *Bain v Fothergill* (1874) LR 7 HL 158, denied the purchaser any legal right to damages or compensation in such cases. Equity however would decree specific performance with compensation at the suit of the purchaser.

Thus compensation clauses apply to errors and misdescriptions which would have entitled the purchaser at law to rescind and restrict this right of rescission. Such clauses, like other exclusion clauses, were strictly construed and did not require the purchaser to accept, with compensation, something entirely different from what he had contracted to buy. This has been settled since *Flight v Booth* (1834) 1 Bing (NC) 370 (131 ER 1160). Tindal CJ said at 377 (1162-3) that:

‘... where the misdescription ... is in a material point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all ... the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation’.

As a general rule therefore, compensation clauses cover errors or misdescriptions, even a trivial kind, which would have entitled the purchaser to rescind at common law, but do not cover cases where the error or misdescription is so substantial that it ‘annuls’ the sale in accordance with the rule in *Flight v Booth*.”

- [9] Clause 8 (both 8.1 and 8.2) referred to a “mistake or error in the description or particulars of the Property or as to title”. Here the plaintiff does not contend that there was a mistake or error as to title. What was meant by a “mistake or error in the description or particulars of the Property”? In clause 1 “property” and “land” were defined as follows –

"1 INTERPRETATION

1.1 In this Contract, unless inconsistent with the context or subject matter:

(p) ‘Land’ means the land described in item H;

...

(s) ‘Property’ means the property listed in Items H, I and J and includes any part of the Property”.

Items H, I and J in the Items Schedule were –

“H. PARTICULARS OF LAND SOLD:

Address: 140 Bundall Road, Bundall, Q. 4217.

Present Use (if any): Office Building

Description: Lot 1 on RP 181978

County: Ward Parish: Nerang

Title Reference 16373203

Area: 2.028 m2 (more or less)

Type of Holding: Freehold Lease No:

Local Government: Gold Coast City Council

I. IMPROVEMENTS INCLUDED IN SALE:

Nature of Buildings: Six Storey office building plus basement car park.

Unless excluded below the Purchase Price includes hot water systems wall-to-wall floor coverings light fittings, in-ground shrubs back up generator, and all fixtures as inspected by the Purchaser.

Exclusions: All roof top satellite dishes & antennae

J OTHER CHATTELS INCLUDED IN SALE: Nil
(Attach inventory if insufficient space)"

- [10] Counsel for the defendant submitted that what appeared in item I "Improvements Included in Sale" was not part of the "particulars" or part of the "description" referred to in clause 8, because the "description" and "particulars" in clause 8 were the description and particulars in item H. They pointed out that the "Particulars of Land Sold" in item H included a "Description" of it as lot 1 on RP 181978. "Property" was defined as meaning the property listed in Items H, I and J: they submitted that, had it been the intention of the clause to pick up a reference to improvements as well as to particulars and description, there would have been no need to use the words "description" and "particulars", and the clause might simply have said –

"If there is any material mistake or error in relation to the property.."

- [11] I do not accept this submission. Item H is headed "Particulars of Land Sold", not "Particulars of the Property Sold". I consider that if there were a mistake or error in the description or particulars of the "Improvements Included in Sale" (Item I), that would enliven clause 8.
- [12] Counsel for the plaintiff referred to clause 21.1(b) which was in the following terms –

"21. PROPERTY ADVERSELY AFFECTED

21.1 If it is established that at the date of this Contract:

...

- (b) the access to the Land is other than by way of an adjoining road dedicated for public use as a road or by way of a registered easement to a road dedicated for public use;

...

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."

He submitted -

"Error or Misdescription

19. The contract is for the sale of a 6 storey office building and basement car park. The sale of a car park requires access. Under the Torrens Title system, access is provided by a dedicated road or a registered easement, otherwise the contract would need to refer to any other inferior type of access – clause 21.1(b) of the contract. Clearly the contract does not

specifically refer to the means of vehicular access. However a misrepresentation arises by reason of:

- (a) the fact that the building comprises a basement car park with 54 car spaces which would obviously require a secure method of access;
- (b) the provisions of clause 21.1 which permit termination of the contract where access is not by virtue of a dedicated road or a registered easement;
- (c) it is almost incomprehensible that a person would buy a property without dedicated road access or an easement access unless there was specific provision in the contract providing for same.”

[13] In *Travinto Nominees Pty Ltd v Vlattas* the High Court considered a compensation clause in an agreement to grant an option to purchase certain land. The agreement referred to a lease of part of the land, but did not mention that the lease contained an option to renew. The compensation clause began –

“No error or misdescription of the property shall annul the sale...”

At 13 Barwick CJ said -

“Of course, in every case the actual contract between the parties must be construed in order to decide whether the subject matter is land or some particular estate or interest in land. If a compensation clause such as cl. 8 makes error or misdescription of the property the criterion of its operation, what will satisfy its terms will depend primarily on what is the property sold. If it be land, the error or misdescription must, in my opinion, relate to the description of the land or to the improvements thereon. A statement as to the suitability of the land for some physical use may well form part of its relevant description. Again markings on plans may form part of that description. But where this is so, the error or misdescription still would relate to the description of the physical subject matter.

On the other hand, if the title to or an estate or interest in land be the subject matter of the contract, error or misdescription may relate to the title or the estate or interest rather than the land itself.”

His Honour went on at 15 –

“In my opinion, in this contract the expression "error or misdescription" of the property means error in the description, or misdescription, of the property sold. As my brother Menzies suggested during argument, the phrase as a whole might well be treated as probably no more than 'erroneous description of the property'. That expression covers both errors of omission and of commission in the description of the property.

In order to apply these considerations it is necessary to determine the subject matter of the sale for it is error or misdescription of it which is relevant. In my opinion, upon its proper construction, the subject matter of the contract was land. The described land in the option was ‘the property’ for the purposes of the printed terms of sale. That being so, I am clearly of opinion that there was no ‘error or misdescription of the property’ within the meaning of cl. 8. To be such an error or misdescription, what is put forward as error or misdescription must relate to the physical subject matter. It is not enough, in my opinion, that there is a defect in the title to the land, which the respondents are or may be under an obligation to transfer to the appellant. A breach of the obligation as to title imposed by law upon the respondents does not demonstrate or constitute a relevant error or misdescription. Clearly in this case the land was properly and not erroneously described in the contract. There was, therefore, in my opinion, no basis for the appellant's claim for compensation.”

Menzies J said at 29 –

“I have reached the conclusion that, upon the proper construction of this contract, the words ‘error or misdescription of the property’ cover only an erroneous description of the land sold and not an error in the statement of the title to it. This appears from the way the expression ‘the property’ is used to refer to the land as a physical thing throughout the contract, particularly in cll. 10 (a), (b), (f), 11, 13 and 17.”

And Stephen J said at 37 –

“The ‘property’ referred to in cl. 8, and which that clause contemplated might be the subject of error or misdescription refers, I think, exclusively to the entity, the land being sold; this is made apparent from a number of passages throughout the conditions of sale. It follows that the clause is not directed to the particular misdescription complained of by the appellant, which was not a misdescription of the land itself.”

- [14] In *Batey v Gifford* there was a contract for the sale of 31 Rignold Street, Seaforth. The property was described as house and land. Rignold Street was unmade and access to the land from that direction was blocked by a high cliff face. At the rear the land backed on to a lane which ran roughly parallel with Rignold Street. However, the lane, where it adjoined the subject property and a number of nearby properties, was unmade, contained a number of trees, and provided no vehicular access to the property. Those difficulties had been overcome by the use of a track from a third street which ran approximately parallel to the lane. The track was owned by the Roads and Traffic Authority which later allowed the purchaser to use it for a nominal sum per year. The Authority had not granted any greater rights to the use of the track. The contract did not disclose these access difficulties. It contained a compensation clause which began –

“No error or misdescription in this agreement (whether as to the property or as to title or otherwise) shall annul the sale”

The trial judge rejected a submission that non-disclosure of the access difficulties constituted an “error or misdescription” saying –

“I do not see in the contract any statement as to the property’s accessibility by person or vehicle. In this regard the description set forth on the front page.... is an accurate statement of what was being sold.”

This part of His Honour’s judgment was not challenged on appeal.

- [15] The facts in *Batey* were not materially dissimilar from those in the present case. Counsel for the plaintiff submitted, however, that the contracts were materially different; that the presence of clause 21.1(b) in this case gave rise to an implication in the description of the property that there was access to the land by way of a dedicated road or a registered easement to a dedicated road.
- [16] I do not accept this submission. The 2 clauses dealt with separate matters. Clause 21.1(b) gave the plaintiff the right to terminate the contract if access was other than by way of an adjoining road dedicated for public use or by way of a registered easement to a road dedicated for public use. As counsel for the defendant submitted, it does not follow that if access to the land was other than by such a road or easement, there was an error or misdescription within clause 8.2. Even if there were an implied term that there be a legally enforceable right of vehicular access to the car park (something which it is unnecessary for me to decide), the absence of an express term to that effect would not amount to a mistake or error in the description or particulars of the property.
- [17] The property being sold was accurately described in Items H, I and J of the Items Schedule. I am not persuaded that there was any error or misdescription giving rise to a right to compensation within clause 8.2
- [18] The claim is dismissed.