

SUPREME COURT OF QUEENSLAND

CITATION: *Gheko Developments P/L v Azzopardi & Ors* [2004] QSC
455

PARTIES: **GHEKO DEVELOPMENTS PTY LTD**
ACN 105 201 563
(plaintiff)
v
PHILIP AZZOPARDI AND PAULINE AZZOPARDI
(defendants)

FILE NO: BS 3249/04

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 15 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 15 October 2004

JUDGE: Wilson J

ORDER:

1. **Declare that the defendants' purported termination of the contract on 19 March 2004 was unlawful.**
2. **Order that the contract between the plaintiff and the defendants dated 18 August 2003 in respect of property described as Lot 1 on RP103512, County of Canning, Parish of Canning, Title Reference 13761122 be specifically performed and carried into execution as follows:-**
 - (a) **Settlement take place at Caboolture 14 days after the plaintiff receives Council Approval of Engineer working drawings;**
 - (b) **Upon satisfaction of (a) by the plaintiff and at Settlement:-**
 - (i) **The plaintiff pay to the defendants the balance purchase price of \$1,299,000.00 together with any adjustments required by the terms of the contract in exchange for a memorandum of transfer in registrable form of an estate in fee simple in the property described in the contract as Lot 1 on RP 103512, County of Canning, Parish of Canning, Title Reference 13761122**

- in favour of the plaintiff together with any Certificate of Title;**
- (ii) The defendant deliver to the plaintiff a memorandum of transfer in registrable form of an estate in fee simple in the property described in the contract as Lot 1 on RP 103512, County of Canning, Parish of Canning, Title Reference 13761122 in favour of the plaintiff together with any Certificate of Title in exchange for the balance purchase price \$1,299,000.00 together with any adjustments required by the terms of the contract;**
- (iii) The defendants deliver possession of the land to the plaintiff.**
- 3. Order that paragraph 2 of this order be stayed:-**
- (a) for a period of 28 days, and**
- (b) in the event that the defendants file a Notice of Appeal in respect of the judgment delivered 15 December 2004 in this proceeding, until the determination of that Appeal.**
- 4. Order that the defendants pay the costs of the Plaintiff of the application and of the action to be assessed.**

CATCHWORDS: CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where payment was to be made “within seven days after” a specified event – when the seven days commenced to run – where there is inconsistency between special and standard conditions of contract – effect of inconsistency

EQUITY – SPECIFIC PERFORMANCE – PARTICULAR CONTRACTS - SALE OF LAND - where defendant purported to terminate contract in consequence of alleged breach by plaintiff – whether plaintiff breached contract – whether termination lawful – whether plaintiff entitled to specific performance

Integrated Planning Act 1997 (Qld), ss 3.5.17, 3.5.18, 3.5.19, 4.1.27

Uniform Civil Procedure Rules 1999 (Qld), r 292

COUNSEL: PW Hackett for the plaintiff
PT Morrow for the defendants

SOLICITORS: Colwell Wright for the plaintiff
Linda Phelps & Company for the defendants

- [1] **WILSON J:** By a contract dated 18 August 2003 the plaintiff agreed to purchase from the defendants certain land at Elimbah for \$1.35 million. On 19 March 2004, the defendants purported to terminate the contract. In this proceeding the plaintiff seeks a declaration that the purported termination was unlawful, specific performance of the contract, and a declaration about the validity of a caveat.
- [2] This is an application by the plaintiff for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules*. It was common ground that the resolution of the dispute between the parties turns on the construction of the contract, which should be determined on this application. As I understood counsel, the Court was being asked only to determine the construction points, and it was agreed that the fate of the caveat would follow the resolution of those issues.

The Contract

- [3] The contract was in the REIQ/QLS form for Houses & Land 5th edition together with special conditions. The Reference Schedule (which was part of the standard form) identified relevantly the parties to the contract, the agent (Amboseli Pty Ltd t/a Ray White Caboolture/Morayfield), the property and the purchase price. Against the side heading “Price” the following appeared –

“Deposit Holder: Ray White Caboolture/Morayfield

Purchase Price: \$1,350,000.00

Deposit: \$1,000.00 payable when Buyer signs this contract
\$ See Special Conditions

Default Interest Rate: 10%.”

Against the side heading “Settlement Date” the following appeared –

“14 Days after receiving Council Approval of Engineer Working Drawings”.

- [4] Pursuant to the standard terms of the contract -

“2.2 Deposit

- (1) The Buyer must pay the Deposit to the Deposit Holder at the time shown in the Reference Schedule. The Deposit Holder will hold the Deposit until a party becomes entitled to it.
- (2) The Buyer will be in default if it:
 - (a) does not pay the Deposit when required;

- (b) pays the Deposit by post-dated cheque; or
- (c) pays the Deposit by cheque which is dishonoured on presentation.

...

2.4 Entitlement to Deposit and Interest

- (1) The party entitled to receive the Deposit is:
 - (a) if this contract settles, the Seller;
 - (b) if this contract is terminated without default by the Buyer, the Buyer; and
 - (c) if this contract is terminated owing to the Buyer's default, the Seller.

6. Time

6.1 Time is of the essence of this contract, except regarding any agreement between the parties on a time of day for settlement.

9. Buyer's Default

9.1 Seller May Affirm or Terminate

If the Buyer fails to comply with any provision of this contract, the Seller may affirm or terminate this contract.

...

9.3 If Seller Terminates

If the Seller terminates this contract under clause 9.1, it may do all or any of the following:

- (1) resume possession of the Property;
- (2) forfeit the Deposit and interest earned on its investment;
- (3) sue the buyer for damages;
- (4) resell the Property.

...

10. General

10.1 Agent

The Agent is appointed as the Seller's agent to introduce a buyer.

...

10.8 Interpretation

...

(4) Inconsistencies

If there is any inconsistency between any provision added to this contract and the printed provisions, the added provision prevails.

[5] The special conditions included -

- “1. This Contract is subject to the buyer paying in full a deposit of \$1000 to the Seller within 24 hours of the Buyer signing this contract.
2. This is subject to and conditional upon the Buyer satisfying themselves within 180 days from date of this contract of the following
3. The property described herein is capable of subdivision into residential lots on terms and conditions satisfactory to the Buyer in all respects.

If at any time within the above specified 180 days the purchaser forms the opinion that the terms and conditions likely to apply to the property will be unsatisfactory, the Buyer may terminate this contract by written notice to the Seller's solicitors and any deposit paid shall be returned to the Buyer.

The Purchaser shall apply in a speedy manner to the Local Government, application for subdivision approval, in the event that approvals are not obtained or require negotiation between the Buyer and Local Government, then in that event the Seller agrees to allow a further 60 days.

In the event that no notice is given to the Seller's solicitors under Clause 2 herein by 5pm within the time periods specified above, this clause shall be deemed acceptable to the Buyer and will cease to be a condition of this contract.

...

7. The deposit herein has been paid as follows:

- 7.1** As to \$1,000.00 to trust account of Ray White Caboolture/Morayfield which will be held pursuant to the terms and conditions attaching to this contract of sale;
- 7.2** As to \$50,000.00 to the Seller within seven days after the Purchasers receive development approval from the Caboolture Shire Council which is satisfactory to the Purchasers in all respects. This will be paid on as a non-refundable deposit and is not held by the Seller pursuant to the provisions of Clause 2 of the Standard Conditions. The Buyer has no further claim on the deposit.”

Subdivision Approval

- [6] There is no dispute about the payment of the first \$1,000-00 of the deposit. It was paid to Ray White Caboolture/Morayfield, which is holding it as stakeholder.
- [7] The plaintiff duly made application to the Caboolture Shire Council for subdivision approval. On Tuesday 10 February 2004 the Council approved the application subject to various conditions. It issued a Decision Notice on Monday 16 February 2004, which was received by the plaintiff on Wednesday 18 February 2004.
- [8] Under the *Integrated Planning Act* 1997 the plaintiff had the appeal period (20 business days from when the Decision Notice was given) in which –
- (a) to make representations about conditions which, if accepted by the Council, would lead to the giving of a Negotiated Decision Notice within s 3.5.17; or
 - (b) to file an appeal in the Planning and Environment Court pursuant to s 4.1.27.
- [9] Under s 3.5.18 the 20 business day appeal period might have been suspended to allow the plaintiff more time to make representations. This was not done.
- [10] Under s 3.5.19 –

“When approval takes effect

If the application is approved, or approved subject to conditions, the decision notice, or if a negotiated decision notice is given, the negotiated decision notice, is taken to be the development approval and has effect –

- (a) if there is no submitter and the applicant does not appeal the decision to the court – from the time the decision notice is given (or if a negotiated decision notice is given, from the time the negotiated decision notice is given); or
- (b) if there is a submitter and the applicant does not appeal the decision to the court – when the submitter's appeal period ends; or

- (c) if an appeal is made to the court – subject to the decision of the court, when the appeal is finally decided.”

[11] The plaintiff did not advise the defendants when it received the Decision Notice. On or about Friday 27 February 2004 the female defendant made inquiries of the Council and ascertained that the application had been approved the previous week. On Tuesday 2 March 2004 the defendants' solicitors wrote to the plaintiff's solicitors in these terms -

“We refer to our previous correspondence in the abovementioned matter and are informed by our clients that your clients have received development approval from the Caboolture Shire Council last week.

Please advise by return as to whether such Development Approval was to your client's satisfaction and if so, our clients require payment of the balance of deposit of \$50,000.00, in accordance with Special condition 7.2 of the Contract.”

[12] Between 25 February and 4 March 2004 there were discussions between persons acting on behalf of the plaintiff and Council officers as to the conditions of approval. On 4 March 2004 the plaintiff resolved to accept the conditions, executed a Decision Notice Response Form accordingly, and forwarded it to the Council.

[13] On 4 March 2004 the plaintiff's solicitors wrote to the defendants' solicitors --

“We have received the purchasers instructions that they are now satisfied with the conditions of the Development Approval received from the Caboolture Shire Council. We are further instructed that the balance deposit will be paid on 5 March 2004.

We shall keep you advised in relation to the progress of the Council Approval of the Engineers Working Drawings.”

[14] On 5 March 2004 Christopher Wallace, a real estate salesperson in the employ of Ray White Caboolture/Morayfield, attended on Eileen Meyer on behalf of the plaintiff and collected a cheque in the sum of \$50,000-00 made payable to his firm's trust account. The cheque was banked into the trust account that day, and a receipt was issued showing that the moneys were held on behalf of the defendants.

Purported Termination by Defendants

[15] On 19 March 2004 the defendants' solicitors wrote to the plaintiff's solicitors purporting to terminate the contract in consequence of alleged breaches of contract by the plaintiff –

(a) in not paying the \$50,000-00 by 25 February 2004;

(b) in not paying the \$50,000-00 to the defendants (“the Seller”), but instead paying it to their real estate agent.

On this application the Court is asked to determine whether the plaintiff's conduct was in breach of contract as alleged by the defendants.

Date for Payment of \$50,000.00

- [16] Under clause 7.2 of the special conditions, the \$50,000.00 was to be paid “within seven days after the [plaintiff] receive[d] development approval from the Caboolture Shire Council which [was] satisfactory to [it] in all respects.” Counsel for the plaintiff submitted that his client did not receive such approval within the meaning of clause 7.2 until it elected, within the appeal period, not to appeal, and signed the Decision Notice Response Form; he submitted that the 7 days commenced to run on 4 March 2004. Counsel for the defendants submitted that the 7 days commenced to run on 18 February 2004 when the plaintiff received the Decision Notice.
- [17] Under the *Integrated Planning Act* the time at which development approval has effect depends on whether the applicant (in this case the plaintiff) makes representations for a Negotiated Decision, where there is a submitter, and whether there is an appeal to the Planning and Environment Court. The plaintiff did not seek a Negotiated Decision or institute an appeal. There was no submitter. Under s 3.5.19(a) the Decision Notice was taken to be the development approval and to have effect when it was given (on 18 February 2004).
- [18] “Development approval” in clause 7.2 of the special conditions must mean effectual development approval. While the development approval was effectual from 18 February 2004, that it was so might not have been ascertained for 20 business days from that date (or even longer if the appeal period had been suspended under s 3.5.18). The \$50,000.00 had to be paid within 7 days of the development approval. If that time started to run when the Decision Notice was given, it might expire before anyone could ascertain that it had even commenced to run. Clause 7.1 should not be interpreted so as to achieve such an absurd result. In my opinion it should be interpreted as requiring payment within 7 days from when it was ascertainable that an effectual development approval was in existence – that is, within 7 days from 4 March 2004.
- [19] I conclude, therefore, that the plaintiff did not breach the contract by failing to pay the deposit by 25 February 2004.

Payment to Agent’s Trust Account

- [20] By clause 2.2(1) of the standard conditions the first tranche of the deposit (\$1,000.00) was to be paid to “the Deposit Holder”, who was identified in the Reference Schedule as Ray White Caboolture/Morayfield. By clause 1 of the special conditions it was payable to “the Seller”, and by clause 7.1 of the special conditions it was referred to as having been paid to the trust account of Ray White Caboolture/Morayfield and as being held according to the terms and conditions attaching to the contract.
- [21] By clause 7.2 of the special conditions the second tranche of the deposit (\$50,000.00) was to be paid to “the Seller” and to be non-refundable.

- [22] The special conditions prevailed over the standard conditions to the extent of any inconsistency. The effect of clauses 1 and 7.1 of the special conditions was to equate payment to the trust account of Ray White Caboolture/Morayfield with payment to the Seller, at least in relation to the payment of the \$1,000-00. There is no reason not to extend that equation to the payment of the \$50,000-00. In other words, I do not consider that the plaintiff breached its obligation under clause 7.1 by paying the \$50,000-00 to the agent to be held on behalf of the defendants.
- [23] I have reached my conclusions on the interpretation of the contract without recourse to paragraphs 2 and 3 of the affidavit of Christopher Wallace filed on 1 October 2004. Those paragraphs contain pre-contract correspondence between the agent and the defendants, in which he set out his interpretation of a draft contract. They are inadmissible.

Conclusion

- [24] It follows that I consider that the defendants' purported termination of the contract was unlawful. The plaintiff is entitled to specific performance.
- [25] I will hear counsel on the form of the order and on costs.

Addendum

- [26] Counsel for the parties agreed that the order should be in the following terms:
1. Declare that the defendants' purported termination of the contract on 19 March 2004 was unlawful.
 2. Order that the contract between the plaintiff and the defendants dated 18 August 2003 in respect of property described as Lot 1 on RP103512, County of Canning, Parish of Canning, Title Reference 13761122 be specifically performed and carried into execution as follows:-
 - (a) Settlement take place at Caboolture 14 days after the plaintiff receives Council Approval of Engineer working drawings;
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 - (i) The plaintiff pay to the defendants the balance purchase price of \$1,299,000.00 together with any adjustments required by the terms of the contract in exchange for a memorandum of transfer in registrable form of an estate in fee simple in the property described in the contract as Lot 1 on RP 103512, County of Canning, Parish of Canning, Title Reference 13761122 in favour of the plaintiff together with any Certificate of Title;
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(iii) The defendants deliver possession of the land to the plaintiff.

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 - (a) for a period of 28 days, and
 - (b) in the event that the defendants file a Notice of Appeal in respect of the judgment delivered 15 December 2004 in this proceeding, until the determination of that Appeal.
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