SUPREME COURT OF QUEENSLAND

CITATION:	*Plummer v GPD Marina Village & Ors* [2011] QSC 9
PARTIES:	**BENJAMIN KEITH PLUMMER & MIRANDA PLUMMER** (plaintiffs) **v** **GPD MARINA VILLAGE PTY LTD** ACN 104 423 289 (first defendant) **EUREKA BOB PTY LIMITED** ACN 121 361 206 (second defendant) **GENWORTH FINANCIAL MORTGAGE INSURANCE PTY LIMITED** ACN 106 974 305 (third defendant)
FILE NO/S:	SC No 208 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	31 January 2011
DELIVERED AT:	Townsville
HEARING DATE:	15 December 2010
JUDGE:	Cullinane J

ORDERS:

a) As against the first and second defendants declare that the plaintiffs are entitled to recover the sum of $90,000 paid by the third defendant to the second defendant.

b) Order that the second defendant pay the sum of $90,000 with interest in the sum of $25,301.16 to the plaintiffs (1026 days from 10 April 2008 at $24.66 per day).

c) I dismiss the second defendant's counterclaim against the plaintiffs.

d) I give judgment for the third defendant against the plaintiffs in the sum of $90,000 together with interest thereon from 3 January 2008 in the sum of $24,953.06 (1123 days from 3 January 2008 at a rate of $22.22 per day).

e) I dismiss the plaintiffs' claims against the third defendant.

f) I give the parties liberty to apply on the issue of costs in writing within 14 days.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – where the contract was entered into by the plaintiffs and the first defendant in respect of a lot in a proposed development – where the first defendant was a trustee of the relevant land – where by deed of retirement and appointment of trustee the second defendant became the trustee of the relevant land in substitution for the first defendant – where the contract price was $90,000 and provided for a deposit of $9,000 – where the contract provided for a deposit guarantee which was provided by the third defendant – where by novation deed sent to the plaintiffs by the second defendants the second defendant would assume the first defendants contractual obligations and benefits

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the contract contained a finance clause which pre-dated the time of the contracts coming into existence – what effect the finance clause expressed in its form has, if any

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – PERFORMANCE – where the plaintiffs wrote to the first defendant purporting to terminate the contract because of the plaintiffs failure to obtain finance – where the second defendant wrote to the plaintiffs alleging that the plaintiffs were in breach of the contract – where the second defendant purported to terminate the contract – where the plaintiff wrote to the second defendant requesting the return of the deposit guarantee – where the second defendant wrote to the plaintiff rejecting the plaintiffs claim to the return of the guarantee – where the second defendant wrote to the third defendant requesting payment of the deposit which was paid – where the third defendant demanded payment of $90,000 from the plaintiffs consequent upon the payment to the second defendant – where the plaintiffs seek declaratory relief against the first and second defendants to the effect that the plaintiffs are entitled to receive payment of $90,000 from the second defendant and an order that such payment be made – where the third defendant seeks to recover from the plaintiffs the sum of $90,000 paid by it pursuant to the deposit guarantee – where the plaintiffs seek declaratory relief against the third defendant to the effect that the third defendant wrongfully paid the sum of $90,000 to the second defendant and seeks an order that they be relieved from liability

Body Corporate and Community Management Act 1997 (Qld), s 212(1)

Bossichix Pty Ltd v Martinek Holdings Pty Ltd [2008] QSC 278, cited
Bossichix Pty Ltd v Martinek Holdings Pty Ltd [2009] QCA 154, cited
Ireland v Leigh [1982] Qd R 145, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, applied
Foran v Wight (1989)168 CLR 385; [1989] HCA 51, cited
Wood Hall Ltd v Pipeline Authority (1979) 141 CLR 443; [1979] HCA 21, cited

COUNSEL: M Trim for the plaintiffs
D De Jersey for the first and second defendants
A J Hockings for the third defendant

SOLICITORS: Boulton Cleary and Kern Solicitors for the plaintiffs
MacDonnells Law for the first and second defendants
Connolly Suthers for the third defendant

[1] This action arises out of a contract entered into between the plaintiffs and the first defendant in respect of a lot in a proposed development at Nelly Bay, Magnetic Island.

[2] The first defendant was a trustee of the relevant land and by a deed of retirement and appointment of trustee dated 16 May 2007, the second defendant became the trustee of the subject land in substitution for the first defendant.

[3] The contract price was some $900,000 and the contract provided for a deposit of $9,000. This was to be accommodated by what is described as a deposit guarantee which was provided by the third defendant.

[4] It was common ground that the contract was concluded on 13 January 2005. At the end of October 2004, a draft contract in respect of the unit was sent to the plaintiffs. They signed it in mid-December 2004 after some amendments were made to it. The amended contract was sent to the first defendants' solicitors on or about 13 January 2005.

[5] The amended contract was signed on behalf of the first defendant and on the following day the solicitors for the first defendant sent a copy to the plaintiff's solicitors.

[6] The contract contained a finance clause (clause 22) which provided as follows:

> *"Finance*
>
> *22.1 If items 14 and 15 of the **REFERENCE SCHEDULE** are completed then this Contract is conditional upon the Buyer obtaining approval for a loan for the Finance Amount from a bank or other lending institution on or before the Finance Date on conditions satisfactory to the Buyer.*

22.2 The Buyer must take all steps reasonably necessary to obtain approval and give notice of the Seller by the Finance Date that:

22.2.1 Finance has not been obtained and this Contract is terminated; or

22.2.2 The finance condition is satisfied or waived by the Buyer.

22.3 The Seller may terminate this Contract by notice to the buyer if the Buyer does not give notice under Clause 22.2 by 5 pm on the Finance Date (which is the Seller's only remedy for the Buyer's failure to give notice).

22.4 If this Contract is terminated under this Clause 22 the Deposit will be refunded to the Buyer."

[7] The finance date was specified as 12 November 2004.

[8] As will be obvious this date pre-dated the time of the contract's coming into existence. The fact that the finance date had passed does not seem to have been adverted to and nothing was said and there was no contact between the parties or the solicitors on this subject.

[9] One of the primary issues in the matter is what effect, if any, the finance clause expressed in the terms in which it is, has.

[10] The contract for the sale of the unit conferred upon the first defendant a right to transfer the land. Clause 20.6 provided as follows:

*"20.6 **Seller's Right to Transfer Land***

20.6.1 Subject to clause 20.6.2, the Seller may:

20.6.1.1 transfer the Land (or larger parcel containing theLand);

20.6.1.2 transfer its interest in any contract under which the Seller buys the Land (if permitted), or this Contract.

20.6.2 If the Seller does any of the things in clause 20.6.1 then:

20.6.2.1 the Seller must ensure that the transferee signs; and

20.6.2.2 the Buyer must sign;

a deed in which the Buyer and the transferee agree to comply with the terms of this Contract as if the transferee was the Seller. The deed must be prepared by the Seller's Solicitor at the Seller's cost.

20.6.3 The Buyer irrevocably appoints the transferee to be its attorney on the same terms and conditions as clause 16."

[11] In April 2007 a deed (described as a novation deed) was sent to the plaintiffs by the second defendant's solicitors. Its intended effect was that the second defendant

would assume the first defendant's contractual obligations and benefits and I am satisfied that the means by which it was proposed to do this can be properly described as a novation. The effect was that the contract between the plaintiff and the first defendant would come to an end and a new contract in the same terms would come into existence between the plaintiffs and the second defendant.

[12] On 7 February 2005, the solicitors for the plaintiffs sent the deposit bond to the first defendant's solicitors.

[13] On 27 July 2007, the second defendant's solicitors wrote to the plaintiffs' solicitors advising that the community title scheme had been established. In that letter the solicitors nominated 13 August 2007 as the completion date.

[14] On Sunday, 12 August 2007, the plaintiffs' solicitors wrote to the solicitors for the first defendant purporting to terminate the contract because of the plaintiffs' failure to obtain finance.

[15] On 13 August, the solicitors for the second defendant wrote to the solicitors for the plaintiffs alleging that the plaintiffs were in breach of the contract and on 20 August 2007, the second defendant purported to terminate the contract.

[16] On 23 August 2007, the plaintiffs' solicitors wrote to the solicitors for the second defendant requesting the return of the deposit guarantee and on 23 August 2007, the second defendant by its solicitors, wrote to the plaintiffs' solicitors rejecting the plaintiffs' claim to the return of the guarantee.

[17] On 5 September 2007, the second defendant's solicitors wrote to the third defendant requesting payment of the deposit. This was paid on 24 December 2007. Its payment was preceded by correspondence between the solicitors for the second defendant and the solicitors for the third defendant which is in evidence.

[18] The third defendant demanded payment from the plaintiffs in the sum of $90,000 consequent upon the payment to the second defendant. This demand was made on 11 March 2008.

[19] In these proceedings the plaintiffs seek declaratory relief against the first and second defendants to the effect that the plaintiffs are entitled to receive payment of the sum of $90,000 from the second defendant and an order that such payment be made.

[20] The third defendant seeks to recover from the plaintiffs the sum of $90,000 paid by it pursuant to the deposit guarantee.

[21] The plaintiffs seek declaratory relief against the third defendant to the effect that the third defendant wrongfully paid the sum of $90,000 to the second defendant and seeks an order that they be relieved from liability to pay such sum to the third defendant.

[22] The second defendant has counterclaimed against the plaintiffs claiming damages for the loss said to have been incurred by it in the resale of the subject property and certain expenses which were incurred associated therewith.

[23] It is the plaintiff's case that no contractual relationship came into existence between them and the second defendant. The plaintiff's claim to recover the monies from the

second defendant is of a restitutionary nature, as monies had and received by the second defendant to the plaintiff's use. It is clear that the monies paid represent a deposit under the contract. In the events that have happened the plaintiffs claim that no contract came into existence between the plaintiffs and the second defendants.

[24] The plaintiffs, as I have said, purported to determine the contract by letter of 12 August 2007. The grounds relied upon were a failure to obtain finance. The plaintiffs however advance a number of grounds in these proceedings upon which they claim to be entitled to determine the contract.

[25] The first of these grounds related to the matter of finance.

[26] It is the plaintiffs' case that as the finance date provided for in the contract had passed and as the objective intention of the parties was that the contract be subject to finance, the plaintiffs were not limited to a right to determine the contract by giving notice by the finance date contained in the contract but rather this notice could be given at any time.

[27] An alternative argument advanced was that since the finance date pre-dated the contract the Court should imply that finance was to be obtained within a reasonable time and in the circumstances of this case that should be taken to be at any time until the completion date.

[28] In my view it is not possible to accept such an implication. It would, on the evidence before me be an uncommercial term. A contract which is conditional as to finance right up until completion would not in my view be a reasonable provision to imply.

[29] Associated with this argument was as an argument based on clause 20.11 of the contract. This provides as follows:

> *"20.11 Severability*
>
> *If anything in this Contract is unenforceable, illegal or void then it is severed and the rest of this Contract remains in force."*

[30] It was said that the finance date should be severed and an implication of the kind just referred to made. I do not think that clause 20.11 is relevant to what occurred here.

[31] The first and second defendants were jointly represented. It was contended on their behalf that by entering into a contract with a finance date which pre-dates a contractual date by some two months the plaintiffs waived any right to rely upon the finance clause, the written evidence of such waiver being the contract itself.

[32] I am inclined to think that the effect of what occurred is that the parties entered into a contract for the sale of the property which was in the result unconditional as to finance. By allowing the finance date to remain in the contract which was not completed until some month after the nominated finance date the parties ought to be taken as having concluded an agreement making no provision as to finance.

[33] I should also mention that there was some reliance placed upon an alleged estoppel which it was contended would prevent the vendor from relying upon the finance

date provided for in the contract. However the evidence before me does not identify any representation (whether express or by conduct) nor any detriment to the plaintiffs. Both of these are necessary elements of an estoppel.

[34] It is clear that the plaintiffs at all relevant times were not in a position to complete the contract.

[35] The second basis upon which the plaintiffs claim to be entitled to bring the contract to an end arises out of the novation deed (part of exhibit 1(20).

[36] This was forwarded by the solicitors for the second defendant to the plaintiffs on 18 April 2007.

[37] As has been mentioned there had been a deed of retirement and appointment of trustee executed by the first and second defendants on 16 March 2007. The effect of this was that the first defendant retired as trustee of the GPD Marina Village Trust and the second defendant was appointed as trustee of the trust. The subject property was trust property.

[38] The novation agreement was prepared in accordance with clause 20.6.1 of the contract.

[39] As will be seen the plaintiffs and the first and second defendants were named as parties. Apart from this reference to the plaintiffs and provision for their signature, no other reference was made to the plaintiffs in the document.

[40] The plaintiffs did not sign the novation deed.

[41] Pursuant to 20.6.2.1 of the contract the first defendant was obliged to procure the signature of the transferee to the novation deed. This never occurred.

[42] I should mention that it is clear that at all times the first defendant and subsequently the second defendant were the trustees of the relevant land and I do not think anything turns upon the fact that in some of the relevant documentation no reference is made to this.

[43] Counsel for the plaintiffs contended that clause 20.6.2 required the first defendant to procure the signature of the second defendant before the plaintiffs were obliged to sign the deed.

[44] I do not think that there is anything in the clause which requires this conclusion.

[45] The plaintiffs did not sign and it appeared to be common ground that they could not take advantage of their failure to sign. On the other hand as I have said, the first defendant did not at any time procure the signature of the second defendant to the novation deed.

[46] The requirement in clause 20.6.2.1 is an important one providing for the means by which the second defendant assumed the position of the first defendant in the contractual relationship.

[47] Although the property had been transferred some time prior to the deed of novation at no time prior to the purported determination of the contract by the plaintiffs, was the signature of the second defendant to the deed of novation obtained.

[48] The plaintiffs although nominating a failure to obtain finance as the basis upon which the contract was determined are entitled to rely upon any other grounds available for determining the contract.

[49] The third ground relied upon relates to the provisions of clause 6.1 of the contract which provides:

> *"6.1* ***Settlement Date***
>
> *The Settlement Date is fourteen (14) days after the day the Seller notifies the Buyer that the Scheme has been established and must not take place earlier than that date."*

[50] This provision mirrors the terms of s 212(1) of the *Body Corporate and Community Management Act* 1997.

[51] The second defendants' solicitors gave notice to the plaintiffs' solicitors on 27 July 2007 (exhibit 1(27)) informing them that the scheme had been established and appointed 13 August 2007 as the settlement date.

[52] Subsequently a letter was sent by the second defendants' solicitors to the plaintiffs solicitors (on 10 August 2007) requesting confirmation regarding a settlement statement and the time for settlement. This letter was not responded to nor was a later letter of 2 August responded to.

[53] It is the plaintiffs' claim that the clause required the completion of the contract on 10 August 2007 that being the date which was 14 days after the date of the notification that the scheme had been established.

[54] On the other hand the first and second defendants claim that the date nominated, namely 13 August was the correct one. This was said to be because the reference to 14 days in clause 6.1 should be understood as a reference to 14 clear days which would have terminated on Saturday 11 August. Because of clauses 2.4.6 and 2.3.8 completion would be postponed to Monday 13 August.

[55] I accept that the natural meaning of the language used requires the conclusion that completion was to take place on 10 August.

[56] Some reliance was placed by counsel for the first and second defendants upon *Bossichix Pty Ltd v Martinek Holdings Pty Ltd* [2008] QSC 278) which was affirmed on appeal (see *Bossichix Pty Ltd v Martinek Holdings Pty Ltd* [2009] QCA 154.)

[57] On my reading of the two judgments they do not provide any support for the first and second defendants argument. It is worth noting that the vendor in that case wrote to the solicitors for the purchaser on 31 March 2008 purporting to comply with s 212 and fixing 14 April 2008. No issue was raised about this at either first instance or on appeal.

[58] The result is that neither the plaintiffs nor the first defendant or the second defendant were in a position to complete the contract on the due date for completion. There is at least no evidence which would suggest this which is not surprising given that at all times it was intended by the second defendant to complete on Monday 13 August.

[59] Counsel for the first and second defendants contended that by their failure to answer the correspondence from the solicitors for the second defendant the plaintiffs should be taken as conveying to the second defendant that it would be pointless to attempt to settle on 10 August thus relieving them from any obligation to be ready willing and able to complete on that date.

[60] The position then is that neither the plaintiffs nor the first or second defendants were in a position to complete the contract on the date nominated. The plaintiffs did not have the finance to complete and the first and second defendants had not done what was necessary to effect the novation of the contract and were not in a position to complete upon the date fixed by the contract for completion.

[61] I cannot accept that the failure to answer the correspondence should be regarded as having that effect. The situation is quite different to what occurred in *Ireland v Leigh* ((1982) Qd R 145) which was relied upon. There the clear inference was that the party was not intending to complete on the settlement date.

[62] Moreover there is no room in this case to suggest that the vendor was lulled into a false sense of security in failing to settle or be in a position to settle on 10 August. At all times the vendor intended to complete on 13 August some days after the contractual date.

[63] It is clear that all parties regard the contract as being at an end. The land has been on sold. I think that counsel for the plaintiffs is correct when he contended that the circumstances justify the conclusion that the parties have effectively abandoned the contract and the plaintiffs should be entitled to recover the moneys which were intended to be paid by way of deposit as moneys had and received. See *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.

[64] In *Foran v Wight* (1989)168 CLR 385 Deane J addressed the question of recovery of a deposit in circumstances not dissimilar to this. At paragraph 8 of his judgment His Honour said:

> *"8. It follows from what has been said above that the purchasers were entitled to rescind the contract. This they did. Upon rescission, the purchasers were entitled to obtain restitution of the deposit which they had paid. Their claim for the return of the deposit was not founded on the rescinded contract. Nor did it represent a claim for damages for the vendors' breach of its terms. It was a claim founded in the equitable notions of fair dealing and good conscience which require restitution of a benefit received as, or as part of, the quid pro quo for a consideration which has failed. (cf. per Lord Wright, Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1942] UKHL 4; (1943) AC 32, at pp 64-66; Muschinski v. Dodds [1985] HCA 78; (1985) 160 CLR 583, at pp 618-620). If it be necessary to clothe that claim in a nomenclature, the appropriate one in a modern context is "restitution" for, or of, "unjust enrichment." The benefit whose receipt falls into one of the categories of case which the law characterizes as unjust enrichment may be actual. Alternatively, it may be constructive as, for example, where it involves full or partial performance of something requested to be done. The benefit constituting the unjust enrichment in the present case was actual in that it would seem to be common ground that the deposit which the purchasers seek to recover was actually received by or on behalf of the vendors."*

[65] The plaintiffs are entitled therefore to recover from the second defendant to whom the moneys were paid by the third defendant, the sum of $90,000. I allow interest pursuant to s 47 of the Supreme Court Act at the rate of 10 per cent from 10 April 2008 when proceedings were instituted producing a figure of $25 301.16 ($24.66 per day for 1026 days).

[66] I should add that if I had found for the second defendant on the counterclaim I would have allowed the counterclaim in the amount claimed with the qualification that the sum should be reduced by the sum by which in the view of the valuer, Mr Dickinson, the lands' value exceeded the resale price.

[67] I turn now to the claim between the plaintiffs and the third defendants.

[68] It was accepted by counsel for the plaintiffs that in the event his clients succeeded in recovering the $90,000 from one of the other parties the monies so received would be payable by them to the third defendant.

[69] The documents relevant to the claim between the plaintiffs and the third defendant are contained in exhibit 1 (9-13).

[70] The undertaking (Exhibit 1 (11)) given by the third defendant is in the following terms:

> "*GEMICO'S PAYMENT UNDERTAKING* *Subject to GEMICO having received the documents listed below before this Deposit Guarantee expires, GEMICO undertakes to the vendor to pay to the deposit holder named in the sale contract (or if none, then to the vendor), any amount demanded by the vendor up to the unpaid guarantee amount, within five business days of GEMICO receiving from the vendor (or its legal representative) each of the following documents:*
>
> 1. *A written demand for payment signed by the vendor (or its legal representative) certifying that no part of the deposit has been paid to the vendor by the purchase under the sale contract and stating that it represents to GEMICO that the sale contract has been validly terminated;*
> 2. *The validly signed original of this Deposit Guarantee; and*
> 3. *If the property is located outside Victoria, a copy of notice of termination of the sale contract served by the vendor on the purchaser entitling the vendor to recover the deposit in accordance with the sale contract terms; or*
>
> *If the property is located in Victoria, a copy of a notice of rescission of the sale contract served by the vendor on the purchaser stating that the purchaser has not remedied the default specified in that notice within the period specified in the sale contract.*

[71] It is clear that the conditions were satisfied in this case.

[72] The particular nature of such an undertaking was considered by the High Court in *Woodhall Ltd v Pipeline Authority* (1979) 141 CLR 443. Stephen J at para 7 said this of such agreements:

> *"Only so long as it is 'as good as cash' can it fulfil its useful purpose of affording to those to whom it is issued the advantages of cash while involving for those who procure its issue neither the loss of use of an equivalent money sum or the interest charges which would be incurred if such a sum were to be borrowed for the purpose. Being again 'as good as cash' in the eyes of those to whom it is issued is essential to its function…"*

[73] In the following paragraph he went on:

> *"Accordingly the bank was in my view obliged to pay in accordance with the authority's demands made under the guarantees issued to it by the bank; it was irrelevant to the existence of this obligation on the part of the bank whether the giving of any of those demands involved the authority in breach of contract with the contractor."*

[74] One of the conditions bearing the heading "Claims or Disputes with Purchaser) provides as follows:

> *"Subject to those conditions, GEMICO's payment undertaking is unconditional and any payment undertaking is not affected by the purchaser's claim for relief against forfeiture or dispute of the vendor's claim to recover the deposit. GEMICO is not obliged to take any action in relation to preventing a payment under the Deposit Guarantee. "*

[75] One of the conditions provided that the deposit guarantee is personal to the vendor relates only to the sale contract and is not assignable by the vendor without the third defendant's prior written consent.

[76] This was not obtained and the plaintiffs have sought to rely upon that as an obstacle to the third defendant's recovery of the sum from them.

[77] The sum sought to be recovered falls within the express words of the indemnity in this case. That indemnity is unaffected by any changes to the deposit guarantee or the related sale contract. See clause 4(b) thereof.

[78] The plaintiffs as strangers to the contract could not in any case take advantage of any breach of it.

[79] The third defendant is entitled to recover the sum claimed from the plaintiffs. Pursuant to the contract the third defendant is entitled to interest at the rate of two per cent per year above the 90 day bank bill rate. This third defendant made demand of the plaintiffs on 3 January 2008, the moneys having been paid to the solicitors for the second defendant on 24 December 2007.

[80] The formal orders are as follows:

I give judgment against the first defendant in favour of the plaintiffs in respect of the declaratory relief granted.

a) As against the first and second defendants declare that the plaintiffs are entitled to recover the sum of $90,000.00 paid by the third defendant to the second defendant.

b) Order that the second defendant pay the sum of $90,000.00 with interest in the sum of $25,301.16 to the plaintiffs (1026 days from 10 April 2008 at $24.66 per day).

c) I dismiss the second defendant's counterclaim against the plaintiffs.

d) I give judgment for the third defendant against the plaintiffs in the sum of $90,000 together with interest thereon from 3 January 2008 in the sum of $24,953.06 (1123 days from 3 January 2008 at a rate of $22.22 per day).

e) I dismiss the plaintiffs' claims against the third defendant.

f) I give the parties liberty to apply on the issue of costs in writing within 14 days.