SUPREME COURT OF QUEENSLAND

CITATION:	*Smart Stay Villages Pty Ltd v Village National Smart Stay Properties Pty Ltd* [2013] QCA 230
PARTIES:	**SMART STAY VILLAGES PTY LTD** ACN 133 148 188 (appellant) **v** **VILLAGE NATIONAL SMART STAY PROPERTIES PTY LTD** ACN 159 365 125 (respondent)
FILE NO/S:	Appeal No 1626 of 2013 SC No 9668 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 August 2013
JUDGES:	Muir and Fraser JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The order of 5 February 2013 be set aside and, in lieu thereof, there be judgment for the appellant on the respondent's claim.** **3. The respondent pay the appellant's costs of the proceeding, including the costs of this appeal, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the appellant as vendor and the respondent as purchaser entered into a contract for the sale and purchase of land and an accommodation business – where special condition 5 of the contract referred to an accommodation services agreement between the appellant and a third party – where special condition 5.2 gave either party the right to terminate the contract if the assignment of the appellant's interest in the accommodation services

agreement to the respondent was not effected upon completion – where special condition 2 provided that the deposit was non-refundable in any circumstances other than default by the appellant – where the respondent claimed that the failure of the appellant to procure the assignment constituted a default by the appellant – where the primary judge dismissed the appellant's application for summary judgment under r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) as it was arguable that the failure of the appellant to assign its interest could be considered a default by it – whether there was an implied term that the appellant was obliged to procure the subject assignment – whether, in the alternative, the respondent was entitled to terminate in reliance upon the appellant's repudiation of the contract – whether the primary judge erred in concluding that the respondent had a real prospect of succeeding on its claim

Uniform Civil Procedure Rules 1999 (Qld), r 293

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; [1977] HCA 40, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423; [1978] HCA 12, cited
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623; [1989] HCA 23, cited
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17; [1985] HCA 14, cited
Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51, cited
Shepherd v Felt & Textiles of Australia Ltd (1931) 45 CLR 359; [1931] HCA 21, cited
Shevill v Builders Licensing Board (1982) 149 CLR 620; [1982] HCA 47, cited
Village National Smart Stay Properties Pty Ltd v Smart Stay Villages Pty Ltd [2013] QSC 34, related
Western Export Services Inc v Jireh International Pty Ltd (2011) 86 ALJR 1; [2011] HCA 45, cited

COUNSEL: R J Douglas QC, with J K Meredith, for the appellant
A Morris QC, with L Jurth, for the respondent

SOLICITORS: Griffiths Parry Lawyers for the appellant
Worcester & Co Solicitors for the respondent

[1] **MUIR JA: Introduction** The appellant/defendant appeals against the order of the primary judge made on 5 February 2013 dismissing its application for summary judgment under r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR). The respondent/plaintiff's statement of claim, amended by leave granted on 5 February 2013, sought, in addition to declaratory and other relief, an

order that the appellant pay the respondent $500,000, either as restitution of a deposit released to the appellant and held pursuant to the terms of a contract for the sale and purchase of land and an accommodation business entered into between the appellant as vendor and the respondent as purchaser, or as damages for breach of that contract.

[2] The contract, dated 8 August 2012, provides for a purchase price of $20 million, a deposit of $500,000 and a completion date of 14 August 2012. Special conditions 2 and 5 of the contract provide:

> "**2. Deposit**
>
> The parties hereto agree that the Deposit (and any part thereof) is once paid, non-refundable in any circumstances other than default by the Vendor pursuant to the terms of this Contract.
>
> …
>
> **5. Accommodation Services Agreement**
>
> 5.1 This Contract is subject to and conditional upon:
>
> 5.1.1. the assignment of the Vendor's interest in the Accommodation Services Agreement to the Purchaser upon Completion.
>
> 5.2 In the event that condition 5.1.1. is not satisfied by the due date stipulated therein, either party hereto may be (sic) notice in writing to the other terminate this Contract."

[3] A $500,000 deposit paid under an earlier contract for the sale and purchase of the same property between the appellant and Mr Lomas, a director of the respondent, was treated by the appellant and the respondent as the deposit under the contract. It had been released to the appellant by Mr Lomas pursuant to an agreement effected by an exchange of emails on 31 July 2012 between the appellant's solicitors and Mr Lomas' solicitors, who were also the respondent's solicitors. Under that agreement, Mr Lomas agreed to pay default interest on $20 million from 31 July 2012 to 14 August 2012 at a rate of 11.1 per cent per annum calculated on daily rests.

[4] The central issue for determination on the summary judgment application was the construction of special conditions 2 and 5 of the contract.

The respondent's argument

[5] On appeal, the respondent argued that, when regard is had to the relevant factual background to the contract known to both parties when it was entered into, it was apparent that the purchase price of $20 million made commercial sense only if the appellant had an obligation under the contract to procure the assignment referred to in special condition 5.1.1. The most significant aspect of the contractual background was identified as the accommodation services agreement between the appellant and BM Alliance Coal Operations Pty Ltd under which the latter company reserved and paid for 100 rooms in the appellant's accommodation village

conducted on the subject land for the term stated in the agreement. It was submitted, and it may be accepted, that the $20 million purchase price reflected the value of the accommodation business with the benefit of an assignment to the respondent of the appellant's interest in the accommodation service agreement.

Construction of the contract

[6] The obligation for which the respondent contends is not expressly imposed by special condition 5 or any other provision of the contract. Accordingly, if the obligation is to be found in an implied term, the term must satisfy the conditions necessary to ground the implication of a contractual term listed by the majority in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,[1] quoted with approval by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*,[2] namely:

> "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

[7] Such a term fails to satisfy any of these conditions other than condition 4. With respect to condition 5, such a term would contradict special condition 5.2 which gives either party to the contract the right to terminate the contract should condition 5.1.1 not be satisfied. Clearly, the appellant cannot sensibly have an obligation to procure the subject assignment if it also has the right to terminate the contract if the assignment has not been procured. Conditions 1, 2 and 3 are not satisfied because special condition 5.2 protects the interests of both the appellant and the respondent. Without special condition 5.2, the appellant would have been exposed to a claim for damages for breach of contract if it failed to procure the subject assignment even though it had done all it could in that regard. If the respondent elected to complete without the assignment having been effected, the appellant would have remained bound by the accommodation services agreement and liable to BM Alliance Coal Operations Pty Ltd for its breach. The respondent was also protected by special condition 5.2 because it had the right to terminate the contract in the event that the assignment was not forthcoming on or prior to completion.

[8] It was an implied term of the contract that each party do "all that was reasonably necessary to secure performance of the contract" or "to do all such things as are necessary on [its] part to enable the other party to have the benefit of the contract".[3] Such a term, one would think, was sufficient and appropriate to protect the respondent's interests with respect to the accommodation services agreement when coupled with clause 5.2. There was no suggestion that the appellant was in breach of any such term.

[9] The respondent did not rely on an implied term. It submitted that the appellant's obligation to procure the assignment could be perceived from the words of the contract, properly construed. In that regard, it was said that the accommodation services agreement was an integral part of the business being sold and purchased

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1 (1977) 180 CLR 266 at 283.

2 (1982) 149 CLR 337 at 347.

3 *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607.

and "that obligation flows, as it were, simply from the description of what's being sold".

[10] The contract did not list the appellant's interest in the accommodation services agreement as an asset of the business or as part of the property to be sold and purchased. But, more significantly, the contract made express provision, in special condition 5, for the parties' rights and obligations in respect of the accommodation services agreement. The matters set out in paragraphs [7] and [8] hereof are sufficient to dispose of the respondent's argument. If the respondent's construction is correct, it would lead to the curious result that the appellant would have been in breach of contract and liable for damages for not procuring the assignment but entitled, nevertheless, to terminate the contract because the assignment could not be procured.

[11] It is unnecessary to resort to authority to resolve the construction issues under consideration but it is perhaps worth mentioning that the construction advocated by the respondent would, impermissibly, "contradict the language of the contract when it has a plain meaning".[4]

Termination of the contract and entitlement to the deposit

[12] The appellant's solicitors, in their first letter to the respondent's solicitors on 14 August 2012, advanced the possibility that the contract could be terminated pursuant to special condition 5.2 or, alternatively, that settlement could be extended to 24 September 2012 with time to remain of the essence. The letter stated, "We are instructed to reserve our client's rights pursuant to the Contract pending written agreement by your client to the extension and related conditions referred to herein".

[13] In its first letter of 14 August 2012, incorrectly dated 10 August 2012, to the appellant's solicitors, the respondent's solicitors asserted, in effect, that: the appellant had an obligation imposed by special condition 5.1.1 to procure the assignment to the respondent, on or before settlement, of its interests in the accommodation services agreement; the appellant was incapable of complying with that obligation; the appellant was thus in breach of contract; and, in reliance on that breach, the respondent was terminating the contract. Return of the deposit was demanded.

[14] It was not possible to infer from the appellant's solicitor's letter of 14 August 2012 that the appellant "evince[d] an intention no longer to be bound by the contract … or show[ed] that he intend[ed] to fulfil the contract only in a manner substantially inconsistent with [its] obligations and not in any other way".[5] "Repudiation of a contract is a serious matter and is not to be lightly found or inferred".[6] By the letter, the appellant was doing no more than exploring possibilities, one of which was that the contract be lawfully terminated pursuant to special condition 5.2. In any event, it remained open to the appellant to exercise its rights under special condition 5.2 at any time prior to the time fixed for completion.

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4 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352 per Mason J, reaffirmed in *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1 at [3]–[5].

5 *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 643 citing *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625–626 and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 33 and 40.

6 *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 633.

[15] The respondent's solicitor's letter does not expressly state the basis on which the contract was purportedly terminated. Special conditions 5.1.1 and 5.2 were quoted at the commencement of the letter, but it was then couched in terms more consistent with allegations of a breach of contract by the appellant and reliance on such a breach than with a termination under clause 5.2. The request for the return of the deposit monies, however, is consistent only with an allegation of termination for breach of contract.

[16] The appellant's solicitor's second letter of 14 August 2012, in response to the respondent's solicitor's letter, asserted that their client was ready, willing and able to settle. The respondent submitted that the appellant was not ready, willing and able to perform its obligations under the contract because the assignment to the respondent of the appellant's interest in the accommodation services agreement was not effected or able to be effected prior to completion. That, however, mistakes the appellant's obligations under clause 5.1.1. In any event, the respondent's premature purported termination of the contract relieved the appellant of any obligation to tender at the time fixed for settlement.

[17] Even if it could be argued that the principle expressed in *Shepherd v Felt & Textiles of Australia Ltd*,[7] enabled the respondent to rely on its letter of 14 August 2012 as a notice of termination under special condition 5.2 of the contract, the respondent would not be entitled to the deposit. It was only refundable in the event of "default" by the appellant "pursuant to the terms of [the] Contract". The appellant purported to terminate the contract by a letter from its solicitors to the respondent's solicitors dated 23 August 2012. Even if the appellant was not then in a position to terminate the contract, after that date both parties treated the contract as at an end and the contract was abandoned.[8] However, there was no issue between the parties in that regard. The respondent's case depended on its construction of special condition 5 and on the contract being terminated for anticipatory breach on 14 August 2012.

[18] It was faintly argued that "default" under special condition 2 occurred when the appellant was unable to procure the assignment. That contention has no merit. There is no indication in the contract that the word "default" in special condition 2 does not have its conventional meaning of breach of a contractual obligation.

Was summary judgment appropriate?

[19] Section 293 of the UCPR provides:

> "**293 Summary judgment for defendant**
>
> (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
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> (2) If the court is satisfied—
>
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and

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7 (1931) 45 CLR 359.

8 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 434.

> (b) there is no need for a trial of the claim or the part of the claim;
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> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[20] The primary judge declined to give summary judgment on grounds that it was "arguable that the failure of the [appellant] to assign its interest could be considered a default by it".[9] For the reasons discussed above, the respondent had "no real prospect of succeeding on all or a part of [its] claim [and] there [was] no need for a trial of the claim".[10] The primary judge erred in concluding to the contrary.

[21] The respondent argued that the appellant's defence raised a number of factual matters which entitled the primary judge to conclude that the ordering of summary judgment was inappropriate. The primary judge, however, did not decide the application on that basis. On the hearing at first instance, the appellant did not rely on the matters in the defence and nor did the respondent. Moreover, it is difficult to see how they could bear on the matter for consideration as it was common ground that the contract had been duly entered into and that the deposit monies were held under it.

[22] Accordingly, I would order that the appeal be allowed, that the order of 5 February 2013 be set aside and that, in lieu thereof, there be judgment for the appellant on the respondent's claim and that the respondent pay the appellant's costs of the proceeding, including the costs of this appeal, to be assessed on the standard basis.

[23] **FRASER JA**: I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.

[24] **PHILIP McMURDO J**: I agree with Muir JA.

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9 *Village National Smart Stay Properties Pty Ltd v Smart Stay Villages Pty Ltd* [2013] QSC 34.

10 *Uniform Civil Procedure Rules* 1999 (Qld), r 293(2).