IN THE COURT OF APPEAL [1998] QCA 444

SUPREME COURT OF QUEENSLAND

Appeal No. 10717 of 1998

Brisbane

Before de Jersey CJ
Pincus JA
Thomas JA

[Imperial Bros P/L v. Ronim P/L]

BETWEEN:

IMPERIAL BROTHERS PTY LTD (ACN 076 760 131)
(Respondent) Appellant

AND:

RONIM PTY LTD (ACN 001 387 051)
(Applicant) Respondent

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 22 December 1998

1 By a written contract dated 25 August 1998 the appellant as vendor agreed to sell to the respondent as purchaser a building at Southport, for the sum of $3.625 million. Clause 25.1 provided as follows:

> "Completion shall be effected at such time and place as may be agreed upon by the parties. The time for completion shall be between the hours of 9.00am and 5.00pm on the Date for Completion ..."

Time was deemed to be of the essence (clause 26).

2 13 October 1998 was the "date for completion". The parties had agreed on 3.30pm as the time for completion. Completion was to occur at the offices of the appellant's solicitors at the Gold Coast. At about 12.30pm that day, the articled clerk

with the conduct of the matter within the respondent's solicitor's office found that she could not conduct a necessary check search because the departmental computer was inoperative. She sought from the appellant's solicitors an extension for settlement to the following day. It was refused. The articled clerk did, however, confirm her intention to settle, and requested that the appointment for settlement at 3.30pm be deferred until 5.00pm. The clerk left Brisbane for the Gold Coast at about 3.00pm. Her passage was delayed by severe thunderstorms and consequent traffic disruption. During the trip, she advised the appellant's solicitors of the circumstances, confirming that she would be settling, but at some time between 5.00pm and 5.15pm. The appellant's solicitor advised that he had instructions not to settle after 5.00pm. The respondent's clerk arrived a few minutes after 5pm, ready willing and able to complete. To do would have taken about half an hour. The appellant's solicitor advised that the appellant was not proceeding. The appellant rescinded the contract in writing the following day, by letter.

3 A learned judge in chambers entertained a "vendor and purchaser" summons under s.70 of the *Property Law Act* 1974. The terms of that section follows:

> "A vendor or purchaser of land, or their respective representatives, may apply in a summary way to the court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with a contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as to the court may appear just, and may order how and when and by whom all or any of the costs of and incident to the application are to be borne and paid. "

The judge declared that notwithstanding the appellant's purported termination of the contract, the contract remained on foot.

4 His Honour reviewed a number of authorities, including Smilie Pty Ltd v. Bruce (1998) NSWConvR 55-841, Lowe v. Evans [1989] 1 Qd.R. 295, Lohar Corporation Pty

Ltd v. Dibu Pty Ltd (1976) 1 B.P.R. 9177 and Union Eagle Ltd v. Golden Achievement Ltd [1997] A.C. 514, expressing his ultimate conclusion as follows:

> "In the present case the contract was on foot when the purchaser's agent arrived to complete and the vendor and purchaser were in a position to complete but the vendor declined in the circumstances mentioned earlier. There is no basis, apart from the terms of the clause, for concluding that the parties intended minutes to be critical to completion. It is of some interest that the completion of this particular settlement if commenced at, say, 4.45 would have gone past 5.00 whereas a less complex transaction could so have finished by 5.00. In my view in the circumstances, there was substantial performance of the vendor's obligation with the consequence that the contract remains on foot."

5 The appellant challenged his Honour's preparedness to proceed to a determination under s.70 of the *Property Law Act*. The first aspect of that challenge fastened on the bracketed words of exception, "not being a question affecting the existence or validity of the contract", submitting that "as the originating summons relief only related to whether the contract "remained on foot", it sought a declaration as to the "existence" of the contract. We accept, however, the contrary view, that the words of the exception are directed to excluding recourse to the provision where there is an issue as to whether or not there was ever a valid contract, and not to a situation where one party contends that a contract, accepted as valid originally, has subsequently been terminated. That was the approach taken on comparable legislation in Nowak v. Linton [1960] W.A.R. 2, 3 per Virtue J, and in Re MacDonald [1989] 2 Qd.R. 29, 33 per Dowsett J. In any event, as the respondent submitted, the proceedings could have been justified by reference to Order 64, rule 1BB of the Rules of the Supreme Court. But we have no doubt that the procedure under s.70 was available here.

6 The second aspect to this challenge to the judge's proceeding under s.70 was based on the suggestion that because "no relief was sought in respect of any continuing

obligation of either of the parties to the contract", the judge should have exercised his discretion against proceeding. But obviously the determination he made was instrumentally important to the parties' charting of their respective paths forward. The judge was perfectly entitled to proceed as he did, and to refrain from proceeding in that way would have been quite wrong.

7 The parties' initial submissions on the merits dealt only with the correctness of the learned judge's conclusion that the respondent's failure to be available to settle by 5pm did not in the circumstances of the case entitle the appellant to rescind. But the evidence put before the judge threw up another potential issue. On the date for completion, because the departmental computer was inoperative, there was no way of determining whether or not the appellant had title to the subject property.

8 The contract obliged the appellant to hand over, at completion, in exchange for the balance purchase price, "a properly executed transfer for the land in favour of the purchaser capable of immediate registration (after stamping) in the appropriate office, free from encumbrances other than those set out in item L" (clause 4(b). Item L referred to the encumbrances "as set out at the foot of the relevant title and further subject to the leases detailed in the lease schedule annexed hereto".

9 The contract is silent as to manner of proof of title. The evidence before his Honour did however establish that it was uniform conveyancing practice to ascertain the state of the title before settling, and not to settle without a search of the title on the day of settlement.

10 Another question therefore emerges: assuming the respondent was obliged to settle strictly in accordance with the contractual requirement, that is, by 5pm, did the absence of any ability to establish title - because of the absence of a certificate of title and the

circumstance that the computer was down, exclude any consequent right in the appellant to rescind? Having identified this additional issue, we invited and received further submissions from the parties. There is no suggestion that any disputed fact or lack of factual clarity precludes our safely determining this additional question, if necessary. We propose considering the two issues in the sequence in which they have arisen, as the case has developed.

11 As to the significance of the lateness, the appellant's contention was that the language of clause 25.1 is "clear and unambiguous". As it was put,

> "The proper construction of clause 25.1 does not lend itself to an inference or conclusion that the parties did not intend minutes to be critical to completion. What the parties intended was that completion **shall** be completed **between** 9.00am and 5.00pm. Those express words exclude completion at any time before 9.00am or after 5.00pm. The contract had been on foot since 25 August 1998 and clause 25.1 provided for an 8 hour period (viz 9.00am - 5.00pm) during which settlement could be completed. It does not allow for an extension of that period."

12 On the other hand, the respondent contended, not surprisingly, for a somewhat more relaxed approach to the discerning of the intention behind the provision:

> "The Australian cases show that contractual provisions as to conveyancing performance at settlement are construed in a less rigid way than the `measured out in coffee spoons' approach the appellant contends for. So it is submitted that the words *the time for completion shall be between the hours of 9.00am and 5.00pm on the date for completion* do not mean that an attempt to embark on the lengthy process of completion a minimal time after 5.00pm means that the purchaser was not ready willing and able to complete *between the hours of 9.00am and 5.00pm*.
>
> Between the hours of 9.00am and 5.00pm roughly equates to the notion of `within business hours'. In this case the attempt to tender at a few minutes after 5.00 should be regarded as being `between the hours of 9.00am and 5.00pm' on the proper interpretation of that clause."

13 The most flexible approach evident from the Australian cases to which we have been referred is drawn from the observations of Bryson J in Smilie Pty Ltd v. Bruce supra,

where he said (p36):

> "To see whether the plaintiff was ready, willing and able to make a substantial compliance with a contractual obligation to pay the balance of the purchase price and to settle I would have to see some facts and circumstances in which the purchaser was ready, willing and able to settle, and also establish when that was and what were the circumstances which led to delay. A delay caused by traffic or by someone being stuck in a lift, even for 10 or 15 minutes, might not be inconsistent with substantial performance. A shorter delay caused by simply having no effective arrangements to settle would show that performance of the substance of the obligation was not available. But here there is nothing. The elements never came together at all.
>
> If something is to be done by 3pm on a business day reasonable people accept some elasticity for most purposes. In ordinary parlance ten minutes past three is about 3 o'clock. The elasticity relates to the nature of the business in hand and to how long it is reasonable to expect others to wait. If the others had an appointment for 2 o'clock and have been kept for an hour already, they cannot be expected to wait after 3 o'clock when there has been no accidental delay."

In the Queensland case of Lowe v. Evans supra, the purchaser was unable to complete until one and a quarter hours after the agreed time, and the vendor's rescission was upheld. McPherson J made the obiter observation that "of course one would not necessarily assume that (the parties) intended seconds or minutes to be critical" (p298).

14 The Judicial Committee of the Privy Council in Union Eagle Ltd v. Golden Achievement Ltd [1997] A.C. 514 considered the enforceability of a contract where payment of the balance purchase moneys was tendered ten minutes after the time for completion (5pm) had passed - in circumstances materially comparable with the present. Their Lordships took a strict approach to the matter, Lord Hoffmann observing, for example, that "once 5pm had passed, performance of the contract by the purchaser was no longer possible" (p518); and that "when a vendor exercises his right to rescind, he terminates the contract" (p520). The principal point in that case concerned the equitable jurisdiction to relieve against contractual penalties and forfeitures, which their Lordships

declined to exercise. Having considered some of the Australian cases, Lord Hoffmann expressed this conclusion (p523):

> "The present case seems to their Lordships to be one to which the full force of the general rule applies. The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation. For five years the vendor has not known whether he is entitled to resell the flat or not. It has been sterilised by a caution pending a final decision in this case. In his dissenting judgment, Godfrey J.A. said that the case `cries out for the intervention of equity.' Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene."

15 The only issue question here is the proper construction of clause 25.1, and whether performance tendered after 5pm, albeit only a few minutes after 5pm - allowing however for the circumstance that completion would not have been effected for another half hour or so, complied with the contractual requirement. Union Eagle would suggest not. Introducing the "elasticity" to which Bryson J referred in Smilie would in our view lead to the very uncertainty which provisions such as clause 25.1 (read with clause 26) were intended to avoid. Where parties have contracted in clear terms, their apparent intent must be respected. It is not part of the court's role, in such a case, to engraft what it may see as a generally desirable criterion of fairness onto what the parties have agreed. If, as here, the parties have created an apparently rigid framework, then the court must respect, not disregard, the underlying intent. We accept the essential submissions of the appellant extracted in paragraph 11 above.

16 We turn now to the second issue. The evidence before the learned judge established that as at the time for completion, the appellant was in a position to convey the requisite title. The residual issue is whether there is any significance in the circumstance

that that was not then demonstrable or ascertainable.

17 We have already pointed out that the contract is silent as to any obligation on the appellant as vendor to establish that it can give the requisite title, or as to any dependence, of the respondent's obligation to settle, on the respondent's ability itself to search the appellant's title. The appellant submits that the contract provides its own code regulating procedure at settlement, and the appellant refers to clause 7.3(i), by which the appellant covenants that, as at the date for completion, it will be the registered owner, and that if that is not so, the respondent may terminate the contract. But that may still leave unresolved a broader question: should the contract be read as implicitly assuming that either the vendor will at the time for settlement be in a position to demonstrate that it has good title, or that the purchaser will have the facility itself to make the relevant search? The respondent approaches the issue by submitting that "the contract or the general law impliedly operated to temporarily suspend the obligations of the parties to complete until the Land Titles Office resumed functioning".

18 This was an unforeseen, unusual situation. We consider that the circumstances which must be established to warrant the implication of a term (cf. Codelfa Construction Pty Ltd v. State Rail Authority of NSW (1982) 149 C.L.R. 337,347) are here established. The term which should be implied is as follows: Where, through no fault of their own, on the day for completion, the parties cannot carry out the necessary computer checks through the Land Titles Office to verify title, because the relevant departmental computer is inoperative, the obligation to complete is suspended until that can be done. Such a term is reasonable and equitable, so obvious that it goes without saying (especially in light of the evidence about uniform conveyancing practice), is capable of clear expression, and is not contradictory of any express provision of the contract. As to the other requirement,

that the term be necessary to give business efficacy to the contract, while it is true that the contract could operate without such provision, it could not in these circumstances operate effectively, because the purchaser would be quite unable to determine whether it would, in exchange for the balance purchase moneys, receive the title it had been promised. It is to our mind inconceivable that had the parties given consideration to this possibility, they would have assumed that the purchaser would be obliged nevertheless to stumble on in the dark.

19 It is helpful to note that at common law, a vendor must show and make a good title at the time of settlement (Stein and Stone, Torrens Title Butterworths, 1991 page 221, Price v. Strange [1978] Ch. 337 at 364D). If the vendor cannot, the purchaser is not obliged to settle (Peter Turnbull & Co. Pty Ltd v. Mundus Trading Co. (Australasia) Pty Ltd (1954) 90 C.L.R. 235 at 253), and may repudiate the contract. This was recognised in Valoutin Pty Ltd and Harpur v. Furst, Tremback & Official Trustee in Bankruptcy (1998) 154 A.L.R. 119, 151 per Finkelstein J:

> "If the vendor's title is a doubtful one the purchaser will only be able to repudiate the contract if the vendor cannot show good title at the time fixed for completion: Williams on Vendor and Purchaser, at 520; Mitchell v. Colgan (1922) V.L.R. 372."

We also note that in Strickland v. Grieve (1996) NSWConv R 55-762, Young J said at 13:

> "The purchasers were ready, but the vendor could not prove title. The vendor had title but he could not prove it. A vendor, even under Torrens title, must not only make title and show title, but he must prove title and produce on the settlement the deeds which constitute his title showing a clean certificate of title."

20 The appellant has argued that we should assume that the respondent protected itself by searching on the eve of settlement; the evidence shows that at 9.13 a.m. on that day, 12 October 1998, a settlement notice was deposited. On the assumption mentioned, the

respondent did indeed acquire substantial protection, under ss. 141, 143, 150 of the *Land Title Act* 1994; but see also s.151 and Bahr v. Nicolay (No.2) (1988) 164 C.L.R. 604. The appellant's contention would if accepted justify making an exception to the implied term excusing the purchasers from settling if on the day fixed for completion the register is inaccessible; that exception would amount to this, that the purchaser must settle if it has given itself protection by steps taken before the date fixed for completion. It would be odd if, by acting diligently before the critical date, the purchaser diminished its rights on that date. Further, the implied term would be less certain in operation if qualified by reference to events leading up to the settlement date; we prefer the simpler view that, if the computer is down on the date fixed for completion, the purchaser being unable to search on that day, then the purchaser need not then settle, and time ceases to be of the essence.

21 We therefore conclude that although the respondent would ordinarily have been obliged to settle strictly in accordance with the time stipulated within the contract, the circumstance that title could not be shown then because the computer was down, suspended its obligation to settle, consistently with the implied term to which we have referred. The contract therefore remained on foot. The declaration made by the learned judge to that effect should stand.

22 The conclusions we have reached make it unnecessary to discuss the possible application of the principles discussed in Legione v. Hately (1983) 152 C.L.R. 406, concerning unconscionable conduct in cases of "fraud, mistake, accident, surprise" (447).

23 We therefore dismiss the appeal. As to costs, the appellant succeeds on the issue first raised, but fails on the point later raised by the court. In those circumstances, we consider it appropriate that the court make no order as to costs of the appeal.

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(Respondent) Appellant

AND:

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(Applicant) Respondent

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de Jersey CJ
Pincus JA
Thomas JA

Judgment delivered 22 December 1998

Judgment of the Court.

APPEAL DISMISSED. NO ORDER AS TO COSTS OF THE APPEAL.

CATCHWORDS: **PROPERTY LAW - agreement for sale of building - date for completion - inability to conduct necessary property search as departmental computer inoperative - whether purported rescission of contract valid - the purchaser attended ready and willing to settle approximetly one and a half hours after the agreed time for settlement and the vendor refused to proceed with the contract.**
Smilie Pty Ltd v. Bruce (1998) NSWConv R 55-841
Lowe v. Evans [1989] 1 QdR 295
Lohar Corporation Pty Ltd v. Dibu Pty Ltd (1976) 1 BPR 9177
Union Eagle Ltd v. Golden Achievement Ltd [1997] AC 514

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Hearing Date: 20 November 1998