DISTRICT COURT Application No 30 of 2004

CIVIL JURISDICTION

JUDGE WHITE

LAWRENCE ELLIOTT RICHARD POTTER Applicant

and

SICORP PTY LTD Respondent

CAIRNS

..DATE 25/03/2004

JUDGMENT

HIS HONOUR: The applicant applies on originating summons for the following:

"(1) Specific performance of the agreement for the sale and to purchase of Lot 1 on RP740266, county Nares, parish of Smithfield, title reference 21244163 and is situated on the corner of Varley and Buckley Streets, Yorkeys Knob in the State of Queensland."

The relief claimed is based upon a written agreement dated 18th of July 2003, it is Exhibit LERP1 to the affidavit of the applicant filed on the 23rd of January 2004.

The respondent takes a preliminary point that the application should be dismissed on the ground that duties have not been paid on the instrument as required by the provisions of the Duties Act 2001, as amended. It is common ground that duties have not been paid.

On the hearing of this application on the 19th of March 2004, I gave leave to the applicant to file affidavits by himself and his solicitor Clem Taft. The applicant's affidavit contains the following undertaking:

> “I undertake to the Court to pay the stamp duty on the contract of July 18th, 2003 between the respondent and myself with penalties and interest within 14 days of any determination by the Court that the contract is enforceable.”

Mr Taft has also written to the Office of State Revenue, which administers the Duties Act. He has notified the office of the undertaking by the applicant and the office has written back in the following terms:

> “I would advise that if the Court permits the reception of the unstamped contract of sale, dated 18th of July 2003, this office has no objection to such acceptance, provided that in accordance with your undertaking the instrument is lodged with duty penalties and unpaid tax interest accounted for within 14 days of the Court determining that such contract is binding and valid.”

Section 487 of the Duties Act 2001 so far as is relevant provides as follows:

“(1) Unless an instrument is properly stamped it:

a) Is not available for use in law or equity or for any purpose.

b) Must not be received in evidence in a legal proceeding other than a criminal proceeding.

(2) However, a Court may receive the instrument in evidence if:

a) After it is received in evidence the instrument is given to the Commissioner as required by arrangements approved by the Court."

In my view subsection 1 makes a distinction between receiving an instrument in evidence and the availability for use in law or equity or for any purpose.

In my view if a Court receives an instrument into evidence pursuant to subsection 2(a), then there can be no further limitation placed upon it by reason of subsection 1(a) as to its admissibility and the purpose for which it might be used in proof of some relevant fact.

In my view subsection 1(a) relates to the availability of the instrument for any relief which might be sought in legal proceedings. This must be looked at carefully.

I was referred to the judgment of her Honour Justice Holmes in Hoggett and others v O'Rourke and another (2000) QSC 387, 2 November 2000. That was a case in which applicants sought declarations in respect of certain share transfer transactions.

From the judgment it was apparent that the applicants alleged that the share transfer agreements had been wholly executed, that is any consideration to be paid or transferred by the one party had been done and the giving of effect to those share transfers had also been done. What gave rise to the action were indications on the part of the respondents of an intention to effectively reverse the transaction. What was sought was a declaration that the share transfer agreement, wholly executed by both sides, was valid and that the actions which had been taken by the parties to give effect to the agreement declared to stand. Therefore the very relief sought was an equitable remedy and depended upon the validity of the share transfer agreements there and then.

In other words, the relief sought was the very remedy which according to the Stamps Act was not available for use in law or equity or for any purpose.

Her Honour referred to the judgment of the High Court of Australia in Dent v Moore (1919) 26 CLR 316 at page 324. With respect, in my view, her Honour correctly directed herself as to the law and correctly applied it.

It is to be noted that in that particular case, no stamp duty had been paid and no undertaking had been given.

In my view however, even in that case had an undertaking been given, that would not have been sufficient. What would have needed to happen was that the instrument be stamped before the Court could grant the relief sought in that particular case.

Her Honour had to consider a similar question in Caxton Street Agencies Proprietary Limited v Korkidas and another, (2002) QSC 210, 28th of June 2002. That was a case in which the plaintiff had sued for specific performance of an alleged agreement for the sale of real property.

Her Honour had before her an application for summary judgment by the defendant and one of the points raised by the defendant was that the agreement relied upon had not been stamped, or perhaps more specifically, had not had duties paid upon it. Her Honour was therefore dealing with section 487 of the Duties Act which applies in this particular case.

In that case, at the hearing of the application, counsel for the plaintiff tendered an undertaking by his client to pay any stamp duty found to be payable in respect of the document. Unfortunately it is not clear from the judgment as to the exact nature of the relief being sought.

Her Honour reached a conclusion about the stamping of the document and the undertaking consistent with the views she expressed in Hoggett's case. However, after the

hearing, but before judgment, it appears that the document had been assessed and stamped. Once that had been done her Honour considered that the point taken about the absence of payment of duties was no longer valid. She reached her decision on other grounds.

My view may differ from her Honour. I am not entirely sure that it does but it may do, and if it does then I differ with respect and I will explain why shortly. I was also referred to the judgment of my learned colleague his Honour Judge Wilson in Sugiyama Corporation v Boland and another, 2003 QDC 426, 10 April 2003. It is important to note that in that case the plaintiff claimed for the return of a deposit paid pursuant to a contract which was alleged to be invalid for reasons which need not be gone into. Judge Wilson referred to the decision of Justice Holmes in Caxton Street Agencies Pty Ltd versus Korkidas, and following that, and another judgment of her Honour, ruled that the contract had to be stamped. There appears to be no suggestion of any undertaking given, but it is important to note, however, that the relief claim was for the payment of money paid under the contract. In other words, it was a claim to enforce the terms of the contract, or perhaps more importantly, a claim to have the contract declared invalid and a judgment for a money sum, being the return of the deposit paid. Before that relief could be granted stamp duty had to be paid, and in my view, no undertaking could have relieved the plaintiff of that obligation.

In other words, if a claim for unliquidated damages or a claim for a money sum is brought pursuant to a contract, whilst it may be led in evidence unstamped, provided the undertaking is given, and the Court may make appropriate findings in relation to the instrument, the relief would not be available because the instrument, even though permitted in evidence by reason of the undertaking, could not found the relief.

Relief such as unliquidated damages or a money claim payable under a contract are not given conditionally. They are claims in law and the plaintiff is either

entitled to a judgment for the money sum or not. No question of a condition precedent being performed after judgment can arise.

Similar considerations, in my view, would arise in relation to specific performance of a contract where the plaintiff, for instance, alleges that he has performed all of his obligations under the contract and he wishes to rely on the instrument for a remedy which involves an order that a transfer of title take place.

Once again, in my view, if that is the sort of remedy sought then unless and until the duty is paid before that relief is given, such relief cannot be given. In my view the case before the High Court in Dent versus Moore is a good illustration of this. In that case the plaintiff claimed a money amount for commission earned by him as a stock and station agent in respect of the securing of a sale of a station on behalf of the appellant, who was a grazier.

In other words, the claim was for a sum of money. In that case, no question of any undertaking arose. There was an argument about whether the contract was admissible, but in the end, the Court decided the case, in my view, on the following basis which appears at page 324 in the judgment of the Court which was read by Isaacs J.

This passage refers to that part of the applicable Stamp Duties Act of New South Wales which read, “Not to be available or effectual for any purpose whatsoever at law or in equity.” The judgment reads as follows:

> “The meaning of the second branch of the enactment unless controlled by authority is not open to reasonable doubt. There's legislature by way of securing the payment of the impost for public purposes which is placed on the instrument, provides in effect that the sanction of law shall be withheld from the acts of the parties until the revenue law is obeyed. It lies at the root of all contractual obligation that the mere convention of the parties creates no binding tie between them. It is the law operating on their compact - either the common law or some statute - which creates the obligatory relation that one can

> enforce against the other. But here, acting impersonally on the bargain finally embodied in a 'instrument' and therefore contained nowhere else, it strikes that instrument with sterility (to borrow an expression from another branch of the law) unless and until the public requirement of taxation has been complied with. Until that has happened, the instrument (except in criminal proceedings) is not available and not effectual. That is, it has no effect for any purpose whatsoever at law or in equity. In other words, it cannot be considered as an instrument giving title or as one which could be made the means of compelling anyone to give title."

In my view, it is that final few lines which really discloses the effect of the non-stamping of the instrument in this case. What is sought here is not a relief which will automatically pass title to the property to the applicant.

Although the application is expressed in simple terms, it is clear on the evidence that this is a case in which both the applicant and the respondent still have to perform obligations pursuant to the contract or the instrument, in order for title to be passed to the applicant.

The most that the applicant could expect at this point of time is for the Court to make a declaration that the contract ought be specifically performed and to set a timetable and perhaps give directions as to the respondent making title, time, place and means of settlement, the tender of settlement and most importantly of course, the prior stamping of the document. If the document is not stamped, then settlement could not take place and the instrument will not be given any effect to as a means of giving title or means of compelling anyone to give title.

It is no part of the relief sought and cannot be at this stage, for me to order that the respondent give title to the applicant unconditionally. All that can happen at this stage is that the Court determine that the contract is one which ought be specifically performed and set out directions for that to happen. As I have said, including the prior payment of all duties in respect of

the instrument. Only then would the instrument be available for the giving of title or to compel anyone to give title.

In my view, therefore, the point is premature and the application should proceed to a hearing on its merits.

...

HIS HONOUR: In this application the applicant claims for specific performance of a written agreement for the sale of land dated 18th of July 2003. The settlement date provided for in the contract was the 20th of October 2003. It is clear from the evidence that the applicant was not able to tender the balance of purchase moneys on the settlement date. Indeed as of the date of hearing he is still unable to do so.

The evidence discloses that a telephone conversation took place between Mr Clem Taft, the solicitor for the applicant, and then acting for the applicant, and Mrs Norma Kranzl, a director of the respondent corporation on Monday, 20th of October 2003, the date fixed for settlement. Mrs Kranzl says that the conversation took place at 9.40 a.m.; Mr Taft says that the conversation took place in the early afternoon of the 20th of October 2003. In my view the time does not matter.

There is also some difference as to the details of the conversation. However, it is not disputed that Mr Taft told Mrs Kranzl that the applicant did not have the money to complete the contract. Mrs Kranzl told Mr Taft that she would not agree to any extension of time.

It is accepted that the notification by Mr Taft to Mrs Kranzl amounted to a clear anticipatory breach. In other words, it was a statement on behalf of the applicant of an intention not to complete the contract to purchase the property by tendering the balance of purchase moneys. In my view there can be no doubt as to the law that a party who, as it were, receives notice of a clear anticipatory breach is entitled to terminate the contract notwithstanding that the time for performance

has not yet been reached. It is accepted that during that conversation Mrs Kranzl did so terminate the contract.

The argument advanced on behalf of the applicant is that the respondent, through Mrs Kranzl, was not lawfully entitled to terminate the contract at that time. The argument is that the respondent itself was in breach of the contract by not being ready, willing and able to “make title”. The reason for this is that it is suggested that there was a mortgage in favour of the Bank of South Australia registered on the title deed and that as at the time of the conversation the respondent had not secured a release of the mortgage. The respondent does not dispute that that is so. However, I note that Mr Taft deposes to Mrs Kranzl saying, “I would be able to obtain a release of the mortgage”. His response, for what it is worth, is, “As you have not yet made arrangements to obtain a release of the mortgage, you will not be able to obtain that release today”. Mr Taft's assertion has no probative value in respect of the issues before the Court.

The point is that there was nothing in anything said by Mrs Kranzl to indicate that the respondent would not be ready, willing and able to complete the contract that day by the time limited for completion, which would have been 5 p.m. that afternoon. In other words, there was a clear anticipatory breach on the part of the applicant. There was no clear anticipatory breach on the part of the respondent.

Once having terminated the contract as it is accepted Mrs Kranzl did, in light of the anticipatory breach the respondent was under no obligation to take any further steps towards making title.

When a vendor enters into a contract for the sale of land, the vendor does not promise to be able to make title as at the date of contract, two weeks after the date of contract, the morning of the date of settlement. The Vendor contracts to make title in return for the tender of settlement moneys when that takes place. A purchaser is required to seek out his vendor to tender purchase moneys. The Vendor, of course, at that time is required to make title. By reason of the anticipatory

breach and the termination, the respondent was never obliged to make title. It was never obliged to secure the release of the mortgage to the Bank of South Australia.

Although it is not strictly necessary to decide the case on the affidavit of Mrs Kranzl, she deposes to the fact that the mortgage was already paid and that all that was required was the formal release from the Bank of South Australia.

Following the conversation with Mr Taft she made no further attempts on that day to obtain the release of mortgage. She was not obliged to. However, she did on the following day and she obtained that release of mortgage without difficulty. In my view had Mr Taft indicated that the applicant was intending to tender the settlement moneys, rather than as he indicated that the applicant was not intending to tender the settlement moneys, I am satisfied that the respondent could have obtained the release of mortgage by 5 p.m. on the 20th of October 2003.

In my view, therefore, the contract was lawfully terminated and there can be no question of a decree of specific performance being made in the applicant's favour.

For the sake of completion, I should also say that an applicant for specific performance of a contract must aver and prove that he is ready, willing and able to perform his own obligation under the contract, see, for example, Sydney Consumers Milk and Ice Co Limited v Hawkesbury Dairy and Ice Society Limited, 1931 31 State Reports New South Wales 458. Although this is a case which has proceeded without pleadings it was still the obligation of the applicant to satisfy the Court that he was and remains or that he is ready, willing and able to complete the contract.

The most that the applicant has done in this regard is to swear in his affidavit filed on the 18th of March 2004 as follows:

"6. I continued to seek a source of funds for the purchase.

7. On the 28th of October 2003 I entered into a contract with Mount Eliza Investments Pty Ltd to on-sell the property immediately after I had purchased it for $525,000.

8. I continued to communicate with Mount Eliza Investments Pty Ltd after the 18th of November 2003 with a view to on-selling it if the respondent completed the contract with me.

9. I am still negotiating for a similar contract with Mount Eliza Investments Pty Ltd, and Tom Hedley, a local developer, is also interested in purchasing the property.

10. I am confident these negotiations will be concluded by 31st of March 2004.

11. Within one month of that date I will be ready, willing and able to purchase the Yorkeys Knob property as my purchaser will then be ready to complete".

In my view no weight should be given to these assertions. At the most they are wishful thinking. There is no contract to on-sell the property. There is no contract that suggests that if any reasonable time for completion is given to the applicant that there will be any certainty or even a probability that he will have the moneys available to complete the contract. It is clear from his affidavit material that he never had the money at the date of settlement. He has never had it since and the best that can be said is that he hopes to have it at some time in the future.

I am satisfied on the evidence that the applicant is not ready, willing and able to complete the contract he seeks to enforce.

I order that the application be dismissed.

...

HIS HONOUR: The issue of what happened before Judge Bradley when the application first came on for hearing on the 20th of February 2004, in my view, is really of no consequence. The 20th of February 2004 was a day set aside for the hearing of civil applications. Her Honour and I share those duties. We take it roughly in turn to hear civil applications on one day set down well in advance in each calendar month.

It is common ground that the hearing of the application was adjourned on the 20th of February 2004 to last Friday, 19th of March 2004, at the request of counsel for the applicant, and obviously since it was at the request of counsel for the applicant, it was ordered, perhaps mistakenly, that “the plaintiff pay the defendant's costs of today”. Obviously it was intended that “the applicant pay the respondent's costs of today”. I should say the word “today” refers to the 20th of February 2004.

The matter came on before me for hearing on the 19th of March, as her Honour ordered. It is clear that in the meantime the applicant had addressed the issue of the Court's jurisdiction by putting on a further affidavit proving the unimproved value of the subject property. The applicant also put on further evidence going to the issue of the payment of stamp duty. It would seem that if the applicant had no express notice that the issue of stamp duty was to be raised then at least it was anticipated that it might be, and the applicant was ready to meet that.

The Court has a discretion when it comes to costs, and it seems to me that if discrete issues can be raised or are raised and that costs can be readily identified as relating to particular issues, then it might be possible for the Court to make an order for costs which recognises the success or lack of success of either party in relation to particular issues.

However, in my view, that discretion must always be subject to the overall rule as to costs in that a party

brought to Court to answer a claim is entitled to be compensated as to its costs for having been needlessly brought to the Court to answer a claim. In my view, that is the case here. This application was misconceived from the start. The respondent should never have been brought to Court at all, in spite of the fact that it might be arguable that the respondent has raised issues, in particular the stamp duty issue, in respect of which it has failed. In my view, that fact is not sufficient to outweigh the primary result which is called for here, that the applicant pay the respondent's costs of the application.

I therefore order that the applicant pay the respondent's costs of and incidental to the application to be assessed on a standard basis.
