

# MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Neville Madden Trustee Under Nomination of Trustee No. L5768643C v Horizons Toowoomba Pty Ltd (As trustee Under Instrument 716931822) ACN 608 371 946 [2018] QMC 21*

PARTIES: **NEVILLE MADDEN TRUSTEE UNDER NOMINATION OF TRUSTEE NO L5768643C**  
(Plaintiff)  
V  
**HORIZONS TOOWOOMBA PTY LTD (AS TRUSTEE UNDER INSTRUMENT 716931822) ACN 608 371 946**  
(Defendant)

FILE NO/S: 169/18

DIVISION: Civil

PROCEEDING: Claim for payment of debt

ORIGINATING COURT: Toowoomba

DELIVERED ON: 12 December 2018

DELIVERED AT: Toowoomba

HEARING DATE: 10 December 2018

MAGISTRATE: Kay Ryan

ORDER: **Defendant pay the Plaintiff \$16,666.32 plus interest from 13 March 2018 and costs on the standard basis to be agreed or assessed**

CATCHWORDS: Contract for purchase of residential land; Claim for payment of rates and land tax; Non-disclosure of easement; Whether Plaintiff entitled to terminate contract; Whether contract void or uncertain.

SOLICITORS: Emery Legal Pty Ltd for the Plaintiff  
Mr Peart, Director of Defendant company, not legally represented

1. The Plaintiff filed an Application for Minor Civil Dispute – Minor Debt in the Queensland Civil and Administrative Tribunal on 30 April 2018 claiming payment from the Defendant for a debt alleged to be owing arising out of a contract for the

sale of land. The proceedings were transferred to the Magistrates Court jurisdiction on 4 September 2018.

2. The Plaintiff was represented by Ms Emery from Emery Legal and the Defendant by Mr Peart, the director of the Defendant Company. Whilst Mr Peart was not legally represented, it is clear that he had received assistance in preparing for the hearing by solicitors who acted for the Defendant in the preparation of the subject contract. The Defendant has also provided written submissions to the court which appear to have been drafted with the benefit of legal advice.
3. I heard evidence from Mr Hair, the real estate agent who brokered the contract between the parties, Mr Madden for the Plaintiff and Mr Peart for the Defendant.
4. The Plaintiff is the owner of a parcel of land at Withcott and the Defendant is a property developer. On 13 September 2016, the parties entered into an REIQ contract for the sale and purchase of 15.84 hectares of land situated at Withcott for a sum of \$1,585,000. The settlement date was “on or before 18 months from the Contract Date (‘the Sunset Date’)” being 13 March 2018.<sup>1</sup> The contract was subject to a number of special conditions including the Defendant/Buyer being granted a Development Approval on or before the Sunset date and, *inter alia*, that the Defendant/Buyer pay the rates and land tax for the Plaintiff/Seller during the contract period.<sup>2</sup>
5. The Defendant/Buyer was not successful in obtaining a Development Approval from council and once the Sunset date had been reached and in the absence of a request for an extension, the Plaintiff/Seller’s solicitor wrote to the Defendant/Buyer’s solicitor on 23 March 2018 advising that the Plaintiff/Seller terminated the contract in accordance with Clause 9.4 of the general terms of the contract and as a result of the Defendant/Buyer being in breach of special conditions 1 and 3. The Plaintiff/Seller’s solicitor required the release of the deposit and payment of the rates and taxes in accordance with special condition 7(g).
6. The solicitors for the Defendant/Buyer responded, stating that their client denied it was in breach of clauses 1 and 3 of the contract, that it treated the Plaintiff’s termination as a repudiation of the contract and advised that as the contract did not disclose an easement along the boundary of the property, the Plaintiff/Seller was never in a position to complete the contract, therefore rendering the contract unenforceable. It was stated in evidence by the Defendant/Buyer, and this is not in contest, that neither party, nor their respective solicitors, noticed that the section of the contract requiring information about title encumbrances was left blank.

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<sup>1</sup> Exhibit 2, Affidavit of Neville Madden sworn 27 September 2018, Exhibit 3.

<sup>2</sup> *Ibid.*, at Clause 7 (g).

7. It was argued by the Defendant/Buyer that this omission rendered the contract unenforceable and therefore it is not bound by the conditions of the contract. It further argues that if it is found that the contract was in fact enforceable, then because the clause requiring payment of the rates and taxes during the contract was silent as to a due date for payment and the Plaintiff/Seller had terminated the contract, the Plaintiff/Seller had no contractual right to enforce that condition.
8. The relevant contract signed by the parties forms exhibit 3 to the Affidavit of Neville Madden, which in turn has been tendered into evidence and marked Exhibit 2. One of the arguments raised by the Defendant/Buyer in written submissions is that the Defendant/Buyer entered into the contract with Neville Madden in his personal capacity, but the registered owner of the land in question is Neville Madden Trustee under Nomination of Trustees No L568643C, rendering the contract unenforceable.
9. A perusal of the subject contract reveals that the name of the Seller has been amended to reflect the correct registered owner of the property, and such amendment has been initialed by the parties. Under cross examination, Mr Peart, the director of the Defendant/Buyer, confirmed his initials on each page of the contract, and agreed that his initials appeared next to the amendment of the Seller's name. In those circumstances, I find that the contract was between Neville Madden Trustee under Nomination of Trustees No L568643C and Horizons Toowoomba Pty Ltd ACN 608371946 as Trustee under Instrument 716931822, and not entered into by Mr Madden in his personal capacity.
10. The Defendant/Buyer further argues that the Plaintiff/Seller was not ready, willing and able to effect settlement, because it did not provide transfer documents to the Seller before the Sunset date. The Plaintiff/Seller's evidence was that he was indeed ready, willing and able to effect settlement, once the condition that required Development Approval to be obtained had been met. I note that the Plaintiff/Seller's solicitors wrote to the Defendant/Buyer's solicitors on 24 January 2018 seeking confirmation that the Defendant/Buyer had obtained the Development Approval, noting that the contract was due to settle on or before 13 March 2018, but received no response. This is a clear indication that the Plaintiff/Seller was ready, willing and able to effect settlement.
11. The argument that the Plaintiff/Seller had not tendered Transfer documents is nonsensical, as it is clear from Clause 5.2 of the Standard Conditions of the contract that the Transfer Documents **must** be prepared by the Buyer's solicitors.
12. As for the termination by the Plaintiff/Seller, it would appear that, as the Sunset date of 13 March 2018 had passed, the contract had lapsed and any purported termination had no effect. In other words, I find that the contract had lapsed on 13

March 2018 and was therefore unable to be terminated by either party after that date.

13. It appears to be common ground that neither party's solicitor noticed the omission of the easement encumbrance from the contract. Mr Peart gave evidence in cross examination that he became aware of the easement sometime in 2017, some 6 to 8 months following the signing of the contract. He says he did not bring this omission to the Plaintiff's attention and did nothing to terminate the contract, but simply waited the outcome of his Development Application. Had he been successful in that Application, he says that he would have used the fact of the non-disclosure of the easement to renegotiate the price of the land and conditions. He further indicated that it was his practice to try to "wriggle out" of contract conditions whenever possible.

14. Ms Emery, who appears for the Plaintiff/Seller has referred me to the decision of the Full Court in *Liverpool Holdings Limited v Gordon Lyndon Car Sales Pty Limited* [1979] Qd. R. 103 where the Court held that –

*Where, in a contract for the sale of land, the vendor, having originally promised to convey the land free from encumbrance, can at settlement only convey the land affected by an easement in favour of another person, the test as to whether in such circumstances the purchase may rescind the contract by reason of the existence of the easement depends on whether, in the event of the contract being performed, the purchase would essentially be obtaining that for which he bargained, or whether such purchaser would be obtaining something so materially altered in character as to be in substance a different thing from that for which he contracted.*

It was also held that the question of materiality is relative and the test objective.

15. The Court also followed *Flight v Booth* (1834) 1 Bing. (N.C.) 370; 131 ER 1160 where Tindal CJ observed –

*Wherever misdescription – is a material and substantial point so far affecting the subject matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such a case the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation.*

This principle was applied in *Tarbet Investments Pty Ltd v Overett* [1983] 1 Qd. R. 280, which also cited the *Liverpool Holdings* case with approval, although the question before the court in *Tarbet's* case was one of aerial encroachment, not an easement over the land. I was also referred to *Re Glenning* [1986] 2 Qd. R. 523 where the same principles were applied in a case to do with an easement over the land which took up approximately one quarter of the block in question, a fact which was found to be a material change of the land subject to the contract.

16. Mr Peart submitted that I should not rely on these cases as they were old, and referred me to the decision of His Honour District Court Judge Alan Wilson SC in

*Stott v Gunn* [2002] QDC 365. That case concerned a residential house and land over which there was a Council easement which had not been disclosed to the purchaser. The easement ran the entire length of the block and comprised some 91 m square. There had been a pergola and paving erected on the easement, which would have to be removed at the owner's expense should the Council require access to the easement to effect repairs to the drains. The buyer in that case gave evidence that she specifically did not want to purchase a property which was subject to an easement and that had she known of its existence, she would not have entered into the contract. She was successful in having the termination of the contract upheld and the return of her deposit. His Honour applied the principles decided in *Liverpool Holdings, Flight v Booth* and *Tarbet's* case and stated – “it is clear that an easement noted on the title but not disclosed in the contract is a defect in title”.

17. Mr Peart argues on that basis that the contract is unenforceable. I disagree. Nowhere in any of the cases is it stated that the resultant defect in title makes the contract unenforceable. On the contrary, what is clear is that the defect in title gives the buyer the right to rescind/terminate the contract if it can be shown that the buyer did not obtain what he had bargained for. Mr Peart did not terminate the contract, but merely did nothing, hoping to gain an advantage over the Seller should he be successful in obtaining the Development Approval. His evidence indicates that he would have proceeded with the purchase had he obtained the Development Approval. This case is therefore clearly distinguishable from *Stott v Gunn*. Mr Peart was aware of the easement, but chose to do nothing and on his own admission would have continued with the purchase had he received the relevant Development Approval.
18. There was an offer, an acceptance, consideration (by way of non-refundable deposit) and an intent to create legal relations. I therefore find that the contract legally binding. I further find that the contract lapsed at the Sunset date of 13 March 2018, when the condition that the Defendant/Buyer obtain a Development Approval was not met.
19. Clause 7(g) provides that the Buyer “pay the rates and land tax for the Seller during the Contract period”. It is not contested that this agreement to pay rates and land tax arose out of negotiations with regard to the deposit to be paid. Instead of a \$20,000 deposit, the buyer agreed to pay a \$10,000 deposit and then pay the rates and land tax on the land for the Seller during the period of the contract. It has been argued by the Defendant/Buyer that it should not be liable to pay this as the contract was terminated by the Plaintiff/Seller, which termination was accepted by the Defendant/Buyer resulting in the cessation of both parties' contractual obligations. As I have already found that the contract had lapsed prior to the purported termination, this argument is a moot one.

20. Whether the Defendant/Buyer is bound by the clause to pay the rates and taxes depends on the interpretation of the wording of the clause. Mr Madden gave evidence that he had issued invoices to the Defendant/Buyer on a number of occasions during the period of the contract and when he was not paid in accordance with the clause, he had the real estate agent, Mr Hair speak to Mr Peart. I accept that Mr Peart said words to the effect “they haven’t been paid yet. I’ll get on to that.” This is not disputed by Mr Peart who says that he probably said the words in a “throw away manner”.
  
21. It is clear that the contract period continued up to the Sunset date being 13 March 2018, unless the contract was extended. The plain meaning of the words is that the Buyer was to pay the rates and taxes **for the Seller during that period**. It did not and was therefore in breach of the contract while it was on foot. The Buyer’s liability to pay arose during the period of the contract and that liability cannot be extinguished just because the contract has lapsed. I find that the Defendant/Buyer is liable to pay the rates and land tax pursuant to Clause 7(g) in the sum of \$16,666.32 plus interest from 13 March 2018 and costs to be agreed or assessed.