

IN THE SUPREME COURT OF QUEENSLAND

No. 1956 of 1984

Before Mr Justice Ambrose

BETWEEN:

MILOJKO GAJIC and MILEVA GAJIC

Plaintiffs

AND:

PETER KURTS (DEVELOPMENTS) PTY. LTD.

Defendant

JUDGMENT: AMBROSE J.

Delivered the Seventeenth day of August, 1987.

CATCHWORDS:

Counsel: P. Dutney for Plaintiff

D. McGill for Defendant

Solicitors: Walsh Halligan & Douglas T/A for Shakespeare
& Haney for Plaintiff

Symons & Comp. T/A for Cockerill & Comp. for
Defendant

Hearing 3rd July, 1987.

dates:

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Defendant

REASONS FOR JUDGMENT - AMBROSE J.

Delivered the 17th day of August, 1987.

This is an application by the plaintiffs for a declaration that a contract of sale between them and the defendant dated 14th January, 1987 was validly rescinded by

letter from their solicitors to the defendant's solicitors dated 10th April, 1987. An order is also sought for the return of a deposit paid under the contract.

Under the contract, the plaintiffs agreed to buy from the defendant a parcel of land at Molendinar in the Parish of Nerang for the sum of \$34,000. A deposit of \$3,400 was paid and the plaintiffs agreed pursuant to cl. 1(a) of the conditions of sale -

"To pay the balance of the purchase price being \$30,600 on or before 1st April, 1987 or (where the plan is unregistered) within 14 (fourteen) days from the date of registration of the relevant plan whichever is the later ...".

Under cl. 1(b) of the contract of sale it was provided:-

"The purchaser shall forthwith make application for finance to such established finance companies, banks or institutions as the agent may require to the extent of \$30,600 (thirty thousand six hundred dollars) and on the making of such application the within contract shall be conditional on such finance being available to the purchaser on or before the date of settlement. Should such finance not be approved within 14 (fourteen) days from the date hereof then the within contract may, at the option of the vendor, be cancelled and all monies paid by the purchaser shall be refunded ...".

At the time the contract was executed, a salesman employed, by Peter Kurts Pty. Ltd., the real estate agent for the vendor procured the signature of the first plaintiff to a loan application form. This form was dated 14th November, 1987.

It is agreed between the parties that it was the real estate agent for the vendor/defendant who caused that loan application signed by the first plaintiff to be forwarded to A.M.E.V. Finance Limited ("the financier").

However, before forwarding the application for finance to the financier, the real estate agent for the vendor, pursuant to s. 66 of the Auctioneers and Agents Acts made a statement in writing as to a representation made as to the availability of finance for the defraying of part of the purchase price under the contract. That statement contained, inter alia, the following particulars -

"At the date of this representation finance for the above amount shown in cl. 1(b) of the Contract of Sale is available subject to application and acceptance by a financier at a rate of interest per annum as specified hereunder ...".

"The borrower acknowledges that the repayments are calculated as if the loan was over 20 years and is subject to renegotiation at the end of the term as specified hereunder. However, if requested by the borrowers and provided the borrower has strictly observed and performed the mortgagee's covenants under the original mortgage the financier will at the expiration of the term offer to the borrower an extension of the mortgage on conditions consistent with finance then being offered by the mortgagee to purchasers of similar real estate."

The amount of finance as per cl. 1(b) was specified to be \$30,600, the interest rate monthly reducing was specified to be 18.5 per cent per annum and the term to which reference had been made in the representation was specified to be seven years. The weekly repayments under the mortgage were specified to be \$113.

By letter dated 21st January, 1987, the financier offered the plaintiffs a loan on terms therein set forth. However, a term of the offer under the heading "Re-Financing Arrangements" reads as follows:-

"A.M.E.V. would be prepared to give favourable consideration to extend the term of the loan at your request at the end of the eighty-fourth (84) month for a further period in light of the conditions prevailing at that time if throughout the original term of the loan you

have faithfully and punctually observed all the covenants ... etc."

It appears from the material that on 19th January, 1987 the first plaintiff attempted to withdraw the offer made on 14th January, 1987 to purchase the defendant's land. However, apparently the offer had been accepted before his revocation was communicated to the defendant. Correspondence between the solicitors for the plaintiffs and the solicitors for the defendant ensued, and it was not until 10th April, 1987 that objection was first raised on behalf of the plaintiffs as to the terms of the offer of finance from the financier. This objection was repeated in a letter from the solicitors for the plaintiff dated 29th April, 1987 in which the point was taken that while the representation contained in the s. 66 statement to which I have referred, was to the effect that at the expiration of seven years from the making of the loan, the plaintiffs would be given an option to extend the mortgage at what would be the conditions prevailing at that time, the finance in fact offered in the terms to which I have referred, does not give the plaintiffs the option of extending but on the contrary it is so expressed as to give the financier the option of extending.

Subsequent to the receipt of that letter from the solicitors for the plaintiff, the financier involved made a second offer of finance to the plaintiffs with a view apparently to complying strictly with the terms of the representation of availability of finance recorded in the s. 66 statement. To be precise, the offer made under letter from the financier to the plaintiff of 20th May, 1987 reads:-

"A.M.E.V. will extend the terms of the loan at your request at the end of the eighty-fourth (84) month for a further period in light of the conditions prevailing at that time if, throughout the original term of the loan, you have faithfully and punctually observed all the covenants ... etc.".

By letter dated 21st May, 1987 the solicitors for the defendant advised the solicitors for the plaintiffs that the financier "has reviewed its offer of loan and has made an amended offer to your client". A copy of the amended offer of finance was enclosed with that solicitors letter and the assertion was made "that the objection raised in your letter has now been removed".

It is asserted in that letter that the planned subdivision containing the relevant land was registered on 8th May, 1987 and that pursuant to cl. 1(a) of the contract settlement was required on 22nd May, 1987.

The letter of 21st May, 1987 proceeds:-

"Although our client is in a position to settle tomorrow our client will not demand settlement of yours and will allow your client a reasonable time within which to accept the amended offer of finance and effect settlement. Accordingly we are instructed and do hereby restore time to be the essence of the contract and require settlement by your client no later than 5th June, 1987."

Where a real estate agent represents to a purchaser of real estate that finance is available to defray the whole or part of the purchase price payable under the contract he is obliged under s. 66 of The Auctioneers and Agents Acts to give a statement in writing stating clearly, inter alia, the particulars of that representation as to availability of finance. Section 66(4) then provides, inter alia:-

"(4) If in respect of the sale of any land ... by a real estate agent ... finance for the defraying in whole or in part the purchase price ... is not made available to the purchaser in compliance in every respect with any representation ... offered to the purchaser by ... an employee ... or real estate agent, then if the purchaser has been thereby materially affected he may at his option avoid the contract made by him in respect of the sale by notice in writing given either to the seller or to the auctioneer or real estate agent concerned at any time before the time at which the purchaser is required by the

contract to pay all of the outstanding purchase price or forthwith after that time."

By letter dated 10th April, 1987 the solicitors for the plaintiffs advised the solicitors for the defendant that the plaintiffs would not complete settlement of the contract and the view was expressed that they were not obliged to do so because - inter alia, the finance offered was substantially different from the representation of its availability made by the vendor's real estate agent and consequently as I read the letter the plaintiffs were entitled pursuant to s. 66(4) of the Act to avoid the contract.

In my view, having regard to the content of s. 66(4) of the Act to avail themselves of the right to repudiate the contract the plaintiffs have to demonstrate the following matters -

- (a) at the time they gave notice on 10th April, 1987, the financier had not made available to them finance which "complied in every respect with" the representation made by the vendor/defendants agent in the "Statement pursuant to s. 66" to which I have referred; and
- (b) that the plaintiffs had been thereby materially affected.

It is abundantly clear in my view from the material before me that the plaintiffs were anxious to avoid the contract signed on 14th January, 1987. They attempted to avoid it upon grounds which were not accepted by the defendant and then, it seems to me, fell back on an argument based upon s. 66(4) of the Auctioneers and Agents Act. Of course, if the plaintiffs may bring themselves within the "protection" given by that section they are justified in so doing.

Prior to the contractual date for settlement arriving finance which was thought strictly to comply with that

represented was offered to the plaintiffs. It is contended that the offer of finance to the plaintiffs under cover of the financier's letter dated 21st January, 1987 did not comply in every respect with the representation made by the vendor's agent to them. Put shortly, the plaintiffs contend that the representation in effect was to the availability of finance which gave the plaintiffs the election to extend whereas the offer of finance of 21st January gave the financier the election to extend.

The plaintiffs raised no immediate objection to the terms of the offer of finance which they must have received shortly after 21st January, 1987. In fact it was only after efforts had been made on their behalf to avoid the contract on other grounds that the point was taken in April 1987 concerning the difference between the nature of the availability of finance represented by the vendor's agent at the time the contract was signed and the finance actually offered to the plaintiffs on 21st January, 1987.

For the plaintiffs it is contended that -

- (1) desiring finance they were required under cl. 1(b) to make application for it to the financier and indeed it was the real estate agent of the vendor who provided the loan application form and filled it out for them and sent it to the financier he nominated; and
- (2) there is a material difference between an offer of finance which gives to the financier the election as to whether the mortgage will be extended upon the expiration of seven years from its commencement and an offer of finance which gives to the borrower the election as to whether such an extension will be made.

It follows, inevitably it is said, that on the facts of the present case the plaintiffs were "materially affected" by the fact that the offer of finance that they

received did not comply in this respect with that represented to be available by the vendor's agent.

In my view, having regard to the terms of cl. 1(b), the plaintiffs were contractually obliged to make application for finance only to such finance companies etc. as the defendant's agent might require. It seems clear that it was the vendor's agent which required the plaintiff to apply to the financier for the finance necessary for them to comply with their obligation under cl. 1(a) of the contract.

Under cl. 1(b) it is provided, inter alia, that should "such finance" not be approved - that is finance from the institution from which the vendor's agent required the plaintiffs to seek finance then the contract might, at the option of the vendor, be cancelled. However, it is provided that the vendor might extend the said period of 14 days - that is 14 days from the date of contract and the date of settlement for further periods not exceeding 28 days.

It seems to me that there was no onus upon the vendor's agent to seek finance which complied in all respects with that which he represented to be available. While it is clear that the agent represented the availability of finance in accordance with the terms contained in the s. 66 statement, it is my view that if they desired it, the onus was really upon the plaintiffs to apply for that very finance. The loan application which was in fact signed by the first plaintiff really does not indicate upon what terms the plaintiffs seek that finance with the exception that the loan required is stated to be \$30,600, the calendar monthly repayments required are \$490 and the interest is specified to be calculated at 18.5 per cent monthly reducing. I infer from the contents of the loan application that a copy of the contract of sale dated 14th January, 1987 accompanied that loan application when forwarded to the financier. However, there is nothing in the contract of sale which refers to the term of the loan

or as to whom of the mortgagor and mortgagee was to have the election to extend that term beyond seven years.

In my view, there can be no doubt that the vendor's agent was entitled to specify the financier from whom the plaintiffs ought seek finance. However, it seems to me that the obligation was on the plaintiffs to attempt to obtain finance of the sort which they required and I infer that the sort that they required was the sort the availability of which was represented to them by the vendor's agent. It was, after all, the plaintiffs who made the application and upon whom the contractual obligation lay to take reasonable steps to obtain the finance necessary to enable them to perform their contractual obligations; see Meehan v. Jones (1982) 149 C.L.R. 571 at p. 591 per Mason J.

There is nothing in the material to indicate that the plaintiffs, when they received the letter of 21st January, 1987, ever contacted either the financier or the vendor or his agent to assert or draw attention to the fact that the finance offered differed from that represented.

In my view, if the plaintiffs, when they received that letter, wished to assert that the finance offered differed from that represented to be available by the vendor's agent they were obliged, at least, to draw to the attention of the financier the nature of the finance that they required. If they required finance to be available to them (whether they wished to avail themselves of it or not) which complied in every respect with that which had been represented to be available to them by the vendor's agent, it seems to me that they were obliged, at least to ask that finance company whether it was prepared to make available to them such finance.

It seems to me not to follow at all because the finance which was offered to them on 21st January, 1987 did not comply in every respect with that which had been represented to be available a week earlier than that, therefore, there was not finance available to them in the terms which had been represented. The only way in which the

availability of finance such as that represented to be available could be determined was for somebody to apply for such finance. Obviously, the only persons who could apply for such finance were the plaintiffs and the only application which they ever made seems to have been one which did not make any reference whatever to the question of extending the terms of any mortgage upon the expiration of seven years from its commencement. There is nothing in the material placed before me to indicate that the finance company which offered finance to the plaintiffs had before it the terms of the representation as to availability of finance made by the vendor's agent. Why the offer of finance made on 21st January, 1987 was made precisely in those terms rather than in the terms represented by the vendor's agent is unexplained. Even if the plaintiffs' contention be accepted that there is a difference between the availability of finance represented and the offer actually made having regard to all the other pre-requisites for extension, one wonders whether the difference is of much significance. One wonders whether if the financier in seven years time considered an application for finance made by the plaintiffs who had, in all respects, complied with the terms of their mortgage there would be any reason for it to decline to make a further advance on the conditions upon which it advanced money to persons generally at that time.

It was contended on behalf of the plaintiffs that there was a significant difference depending upon whom of the plaintiffs and the financier would have "the right to elect" at the expiration of seven years to extend the mortgage and I will assume for the moment that there is some detectable difference. I must say, however, that whoever had the right to decide whether the plaintiffs finance would be extended at the expiration of seven years from the date of the finance being made available, a condition precedent to such extension seems to be -

- (1) that the plaintiffs during the period of seven years "faithfully and punctually observed all the

covenants and conditions of the letter of offer and of the mortgage"; and

- (2) if the financier did extend the loan at the expiration of seven years, it would do so "for a further period in light of the conditions prevailing at that time".

The alleged difference between the undertakings contained in the letters from the financier to the plaintiffs dated 21st January, 1987 and 20th May, 1987 is that in the earlier letter the financier indicated that it "would be prepared to give favourable consideration to extend the term of the loan" whereas in the later letter it indicated that it "would extend the term of the loan at your request".

It was contended that there is a difference between a financier "giving favourable consideration to extending" on the one hand and "extending at your request" on the other.

It was argued on behalf of the defendant that an undertaking to give favourable consideration to an extension was the same as an undertaking to extend although an undertaking merely to consider an extension would mean something different from one to favourably consider an extension.

I must say I am disposed to assent to this proposition. If both expressions were contained in the one document then there might perhaps be some reason to seek to distinguish between their legal effect.

In the Shorter Oxford English Dictionary "favourable" when used to describe an answer is said to import "That concedes what is desired". Used in this sense "favourable consideration" to an application imports the granting of what is applied for.

However, to deal with the plaintiffs' contention, let it be assumed that even though in seven years time the

financier gave favourable consideration to the plaintiff's application to extend the term, nevertheless it might refuse it.

I am of the view that the letter from the solicitors for the plaintiff of 10th April, 1987 was ineffective to avoid the contract pursuant to s. 66(4) of the Auctioneers and Agents Act because prior to its being written no effort whatever appears to have been made on the part of the plaintiffs to obtain from the financial institution nominated by the vendor's agent, finance of the sort represented to be available by that agent. In my view, the contractual obligation was on the plaintiffs to attempt to obtain that finance if they desired such finance by at least applying for it. There was no obligation on the vendor or his agent to make that application on behalf of the plaintiff. It is true that the vendor's agent appears to have forwarded the loan application executed by the first plaintiff to that financier. Whether this was done as agent for the plaintiffs or agent for the vendor is perhaps a moot point. In whatever capacity the application was forwarded to the finance company however, it seems to me that the obligation under the contract to seek finance of the sort desired by the plaintiffs was on them. The decision in Phillips v. Peter Eton Real Estate (1977) Qd. R. 147 must be read in the light of the unusual facts in that case where the agent of the vendor "assumed the entire responsibility for arranging the finance necessary to complete the transaction" - per Williams J. at p. 149(G). To the extent that the plaintiffs seek to argue that they are materially affected because the finance offered to them on 21st January, 1987 - months before settlement was due under the contract did not comply in every respect with that which was represented to be available, it seems to me that they are unable to do so unless they have either directly or indirectly applied for finance of the sort that was represented to them to be available. They had, in my view, ample opportunity to apply for such finance. Had they notified the finance company to which they applied for finance that they desired finance to be made available to

them which complied in all respects with that represented to exist in the s. 66 statement which was handed to them it seems probable that such finance would have been made available. Indeed, within a very short time of their complaint having been conveyed to the solicitors for the vendor, the finance company did make available to them finance which it was thought complied in all respects with that which had been represented as being available.

The short point, it seems to me, is this. Can the plaintiffs successfully contend that finance required by them to complete their contractual obligations under cl. 1(a) of the contract was "not made available to them" simply because the offer of finance which they received from the financier in its letter of 21st January, 1987 stated that that corporation "would be prepared to give favourable consideration to extend the term of the loan" rather than "will at the expiration of the term offer to the borrower an extension of the mortgage".

Indeed, it seems arguable that even the "offer of extension" contained in the letter of 20th May, 1987 fails to state with precision the effect of the finance represented to be available in the s. 66 statement.

It is my view that the plaintiffs cannot contend successfully that finance which complied in every respect with that represented to be available in the s. 66 statement was not made available if they did not even apply for finance containing those very terms. In my view, if the offer of finance of 21st January, 1987, differed from that which had been represented as being available, then if they had not applied for finance precisely in the terms that had been so represented the plaintiffs should then have reapplied for finance which complied in every respect with that which had been represented to be available by the vendor's agent recorded in the s. 66 statement.

The effect of their not having done this in my view, is to prevent them from relying upon any assertion that finance which complied in every respect with that

represented in the s. 66 statement had not been made available to them. In my view, even if it was not expressly made available to the purchasers, the explanation for this is that they just did not apply for it.

The position, of course, would be different had the purchasers applied to the finance company nominated by the vendor's agent pursuant to cl. 1(b) of the contract and requested finance in the terms recorded in the s. 66 statement. There is no evidence, however, to suggest that the financier ever received a copy of the representation contained in the s. 66 statement. If it had been demonstrated that an application had been made to the financier for finance which complied in every respect with the representation recorded in the s. 66 statement and the only offer received had not so complied then the plaintiffs could successfully contend that the only timely offer that they had received from the finance company nominated by the vendor's agent had not complied in every respect with the representation as to availability of finance made by the agent. However, in my view the plaintiffs cannot take such a point under s. 66(4) when there is no evidence whatever that they or anybody on their behalf applied for such finance and indeed the evidence discloses that shortly after the point now relied upon by the plaintiffs to justify their rescission of the contract was brought to the attention of the vendor and presumably to that of the financier, the financier immediately reworded its offer of finance with a view to making it comply with the representation made by the vendor's agent. As I have already indicated, it seems to me to be arguable whether the second offer of finance of 20th May, 1987 did itself "comply in every respect with" the s. 66 statement. However, in the course of argument it was not suggested on behalf of the defendant that the letter of 20th May, 1987 did not contain an offer of finance which "complied in every respect with" the representation contained in the s. 66 statement.

In my view, the plaintiffs were not entitled pursuant to s. 66(4) of the Auctioneers and Agents Act to rescind the contract and demand return of their deposit. I have come to this conclusion on two bases-

- (1) the offer made by the financier to the plaintiffs in its letter of 21st January, 1987 where it states "A.M.E.V. would be prepared to give favourable consideration to extend the term of the loan at your request" is to the same effect as the offer made by that company in its letter of 20th May, 1987 where it states "A.M.E.V. will extend the term of the loan at your request ...";
- (2) the obligation to apply for finance under cl. 1(b) of the contract of sale dated 14th January, 1987 was upon the plaintiffs. The agent of the vendor was merely given the right to nominate which finance company the application was to be made to; there is no evidence that the plaintiffs applied to the financier for finance on the terms contained in the representation as to availability of finance recorded in the s. 66 statement;

the only loan application in evidence which was made by and on behalf of the plaintiffs does not seek any term in the mortgage or other financial arrangement with the finance company of the kind or to the effect represented to be available by the vendor's agent in the s. 66 statement; there is no evidence to suggest that finance which complied in every respect with that represented to be available by the vendor's agent on 14th January, 1987 was not, in fact, available at all times material to the plaintiffs performance of their contractual obligations under the contract; and to the extent that finance which complied in all respects with that represented to be available was not "made available" to the plaintiffs at material times, this

resulted from their failure at material times to request such finance.

I hold, therefore, that the plaintiffs purported repudiation of their contract with the defendant is not justified pursuant to s. 66(4) of the Auctioneers and Agents Act.

I dismiss the plaintiff's application for declaration and other consequential orders.

At the request of counsel at the hearing, I adjourn generally the further hearing of the matter to enable the parties to consider their position and make such further submissions as they may desire as to what, if any, orders ought be made.