SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No 5114 of 2001

WILBOW CORPORATION PTY LTD
ACN 005 867 596 Plaintiff

and

CARMELO MAILLI and SEBASTIANA MAILLI Defendant

BRISBANE

..DATE 18/06/2001

ORDER

HIS HONOUR: This is an application by Wilbow Corporation Pty Ltd which company was granted an option made by way of deed on 5 February 2001 in relation to a prospective purchase of real property owned by the respondents, Carmelo Mailli and Sebastiana Mailli. The option provided relevantly, as follows.

2. OPTION

2.1 In consideration of the payment of the Option Fee by the Grantee to the Grantor the receipt of which is hereby acknowledged the Grantor grants to the Grantee an option to purchase the Property free from all encumbrances.

2.2 The Option may be exercised at any time before 5 p.m. Brisbane time on the Option Expiry Date and having been given for valuable consideration is declared to be irrevocable until that time.

3. EXERCISE OF OPTION

The option may be exercised by the Grantee or its nominee by delivering to the Grantor or to the Grantor's Solicitor the $29,000 balance of the initial deposit and a notice in writing exercising the Option which notice must be signed by the Grantee, its solicitor, its authorised agent or any of its directors.

4. EFFECTIVE EXERCISE OF OPTION

4.1. Immediately on exercise of the Option the Contract will be deemed to be entered into between the Grantor and the Grantee or its nominee and be binding upon them.

...

4.3. Subject to exercise of the Option the Option Fee will be deemed to be a prepayment of the balance of the purchase price payable on completion of the Contract. If the Option is not exercised, the Grantor may retain the Option Fee.

The option further provided by clause 4.2 that the date of the contract for the purposes thereof will be deemed to be the date on which the option is exercised. The descriptive terms "grantor" and "grantee" relate to the respondents and the applicant

respectively.

It is common ground that the option expired on Sunday 6 May last. It is also common ground that the following day, 7 May, was a public holiday.

It is clear from the authorities that entering into option of this nature constitutes a conditional contract for the sale of land, see Laybutt v. Amoco Australia Pty Ltd (1974) 132 CLR 57, particularly in the judgment of Gibbs J (as he then was) and in Traywinds Pty Ltd v. Cooper [1989] 1 QdR 222.

It is worth noting that Gibbs J in Laybutt at page 77 said, in relation to a similar type of option, "For these reasons I consider that an option to purchase (at least one in a form similar to that in the present case) is a contract to sell the land on condition that the grantee gives the notice and does the other things stipulated in the option. An option to purchase, regarded in that way, is not an agreement which gives one of the parties the right to perform it or not as he chooses; he gives the grantee the right if he performs the stipulated conditions, to become the purchaser."(My underlining).

The argument for the respondent is that the grantee of the option in this case has not performed the stipulated conditions. Of course that is correct if the 6 May was the last date upon which the option could be exercised.

In order to succeed the applicant relies upon s.61(3) of the Property Law Act which provides relevantly, "Where in any contract for the sale of any land the date of payment of the purchase money or any part of the purchase money is to be ascertained by reference to a period of time expiring on a day which is a Saturday, a Sunday, or a public holiday, then ... completion shall take place ... in default ... of agreement ... be on the date, other than a Saturday, Sunday or public holiday, next following the day on which the period of time so expired."

I am informed by counsel that that s.61(3) has not been the subject of any definitive prior judicial consideration. However it was considered by McPherson JA in Kirk and another v. Ashdown and another (unreported) 1 May 1998; 1998 QCA 77 where at page 5 of 8 of the computer print-out before me his Honour said:

> "The litigation results from the plaintiff purchasers' failure to pay the first instalment of $50,000 of the "split" deposit on 5 March 1995, which in accordance with special condition 3 was payable 180 days from the signing of the contract. By letter (Exhibit 3) dated 6 March 1995, the plaintiff's solicitors advised that the contract was at an end. Ground 1(a) of the Notice of Appeal is that, because of the provisions of section 61(3) of the Property Law Act 1974 the learned Judge ought to have regarded that sum as payable only on 6 March 1995 because 5 March was a Sunday. The point may also be implicit in paragraph 1 of the appellant's written outline of submissions. However, Mr Jensen, of Counsel, who appeared on the appeal, said that we should pay attention, not to those written outlines but only to his oral submissions on appeal. In those submissions no reliance was placed on ground 1(a). That appears to mean that it has been abandoned. However, for what it is worth, and without having heard the matter argued, I add the reliance on section 61(3) of the Act appears to be misconceived for the reasons submitted by the plaintiffs; namely that it operates only to postpone the date for completion of the contract which was not due on that date. Special condition 3 specified the date,

> not for completion, but for payment of the first instalment of $50,000 of the deposit of $250,000."

In this case the payment of the $29,000 is described by clause 3.1 as being the "balance of the initial deposit". The term "initial deposit" is not defined in the option deed. However, looked at that way, one can see the similarities between this option and that which was the subject of discussion in Kirk v. Ashdown (supra). Whilst not binding, the "obiter" expressions of opinion made by McPherson JA are persuasive.

The applicant placed store upon the word "completion" in section 61(3) of the Property Law Act. It said that the "completion" there referred to is the payment of the sum of $29,000 which was to accompany the notice in writing exercising the option. I do not share that view. The word "completion" there used must refer to the completion of the contract which is made unconditional once the notice exercising the option is delivered and the balance of the initial deposit is paid.

I take the view that what McPherson JA said in Kirk v. Ashdown (supra) is correct and ought to be applied to this case. Indeed going back to Laybutt v. Amoco Australia Pty Ltd (supra), in the words of Gibbs J, to which I have already made reference, the applicant here did not perform "the stipulated conditions to become the purchaser".

It is not necessary to consider other arguments advanced by the

applicant, except one. In particular, the applicant argued that because of the terms of clauses 2.1 and 2.2 of the option deed, the option once the 6 May came and went, became one which was revocable as distinct from being irrevocable until the 6 May. I take the view that the option deed as a whole required compliance by way of paying the balance of the initial deposit and the giving of a notice in writing exercising the option on or before 6 May 2001.

I therefore dismiss the application.

...

I further order that caveat number 704758367 lodged by the applicant on land described as lot 17 on RP 14808 County of Stanley, Parish of Cleveland, bearing title reference 11443028 be removed.

I further order that that removal is stayed pending the expiration of the time limited for an appeal in respect of this judgment and that if such an appeal is not instituted within that time, the affidavit of the solicitor for the respondents is sufficient evidence of that fact.

I further order that if an appeal is instituted within that time that the stay ordered today be extended until the determination of that appeal.

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