[2003] QSC 343

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Date: 23 September, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 8104 of 2003

JING BO LOU	Applicant
and	
VARSITY APARTMENTS PTY LTD ACN 095 290 252	First Respondent
and	
NICOL ROBINSON HALLETTS (A FIRM)	Second Respondent

BRISBANE

..DATE 19/09/2003

JUDGMENT

6th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application under s.70 of the Property Law Act 1974 in which the applicant seeks a declaration that a contract to purchase a home unit has been validly terminated and the return of the deposit of $20,350 paid to the first respondent.

On 22 November 2002 the applicant entered into a contract to purchase from the first respondent a unit "off the plan", together with furnishings, fittings, and specified chattels in a new development which was to be built called Varsity Apartments. Varsity Apartments were designed to provide shared accommodation for students attending a university at Sippy Downs on the Sunshine Coast. The apartment layout was for a shared kitchen and lounge-dining room and four separate bedrooms, each of which was to have its own bathroom. The applicant agreed to pay $203,500 for the property, which was lot 38.

The orders sought as set out in the originating application are as follows:

> "1. A declaration that the Applicant has validly terminated the contract in writing made between the Applicant and the First Respondent dated 22 November 2002 for the sale by the First Respondent to the Applicant of a property described as Lot 38 on SP 146377, County of Canning, Parish of Mooloolah in the State of Queensland known as and described in the Contract between the parties as Unit Number 38 in "Varsity Apartments" situated at Lot 653 - 656 Varsity View Court, Sippy Downs, Queensland ("The Contract").
>
> 2. A declaration that the Applicant is entitled to the deposit of $20,350.00 paid to the Second Respondent as stakeholder together with interest pursuant to the Contract.

3. Repayment by the Second Respondent to the Applicant of the deposit in the amount of $20,350.00 with the interest accrued.

4. Such further or other order the Court think appropriate.

5. The First Respondent pay the Applicant costs of and incidental to this application to be assessed."

The contract shows that the apartment was purchased "off the plan". The contract included: a condition precedent that the contract was subject to construction of the lot's being "substantially complete, except for minor omissions or defects" (clause 3.1(c)); a requirement that the vendor would cause the building to be constructed by a reputable licensed builder (clause 4.2); a clause that provided that when the vendor was of the opinion that the construction of the lot was substantially complete, except for minor omissions and defects, it should give notice to the purchaser that the lot was available for inspection (clause 5.1); and a clause that provided that the construction of the development might be varied in certain circumstances (clause 6.1).

By a letter dated 6 August 2003 the first respondent's solicitors set 22 August 2003 as the date for settlement. (The time for settlement was extended to permit the applicant to inspect the premises.) Further, in that letter, notice was given under clause 5.1 that construction of the lot was substantially complete and the letter served as an inspection notice. It was not revealed in the letter that the apartment had already been rented and was then occupied.

On 16 August 2003 the apartment was inspected by the applicant's husband and it then appeared that the apartment, or part of it, was occupied by a tenant. The tenant occupied the unit from 13 June 2003 to 12 September 2003. Prior to that inspection the applicant did not know, and had not been notified by the first respondent or its solicitors, that the apartment was to be let prior to settlement nor was the applicant's permission sought for the letting of the apartment.

By a letter dated 4 September 2003 from the applicant's solicitors to the first respondent's solicitors the applicant sought to terminate the contract on the ground that, the apartment having been previously let without her knowledge or permission, she was not to receive a new unit "off the plan".

Settlement of the contract is due to take place today. The evidence before me shows that the apartment was occupied by the tenant only in one bedroom and the common area. The other three bedrooms were not occupied by the tenant and were locked. The evidence also reveals that the only effect on the apartment that may have resulted from the occupation by the tenant was to be found in the broom closet where there were two scratches. They have been repaired and the apartment has been cleaned since the tenant left. There is no evidence that any chattels in the apartment were damaged during the occupation of the tenant. A vacuum cleaner, some pots, the iron and ironing board, which apparently had been used by the tenant, have been replaced and the furniture and other

chattels in the bedroom that had been occupied and in the common area have been replaced with new furniture and chattels. Those replacements were made although there was no evidence of any damage, mark or anything else that had altered the furniture from the state it had been in when it was brand new. If the settlement proceeds today the apartment will be in the condition it was in prior to the occupation of the tenant and the furniture and chattels in the apartment will be new and unused.

The applicant's argument is that a proper construction of the contract indicates that there was an implied term of the contract that the applicant was purchasing a new unit, and that that can be inferred from the tenor of the contract as a whole, the fact that the purchase was "off the plan", and from clause 5.1 which requires the seller to notify the buyer that the unit is substantially complete and available for inspection. It is argued that that clause does not contemplate there being any period following completion of the unit when the premises may be available to be let by the first respondent. It is further argued that as a result of the letting of the apartment prior to settlement the applicant is not now purchasing a new unit "off the plan" but a second-hand unit and that no amount of rectification can make the unit new again. It is said that carpets, benches, and fittings have been used and subject to wear and tear.

The applicant's case is then that the first respondent, in letting the apartment as it did, was guilty of breaching an

essential term of the contract thereby justifying the applicant's terminating it. The term contended for by the applicant was not express but implied.

The first obstacle that the applicant must overcome, if she is to succeed in obtaining the relief sought, is that of establishing that the contended-for term is indeed implied in the contract. Had there been an express term that the unit was to be "new", and that state defined with precision, the applicant would have been on stronger ground, while being required to demonstrate that the term was an essential term. But the term contended for lacks sufficient precision to permit it to be effective. When does a unit of the kind in question become "new"? When does it cease to be "new"?

Mr Campbell, for the applicant, conceding the difficulty of definition, resorted to the language of the world of advertising in describing "newness" and its opposite:

> "So, your Honour, can I look just for a moment at what - when something is new and when something is not new and what the difference is. The difference is this. It's hard to define in words but there is, I suppose, a clear marketing advantage in something that's new. There is an emotive aspect to newness. One can expect weight to be given to people by the fact that something is new and the opposite is true. Something which is not new loses that freshness, that sparkle, that weight which a purchaser will give to it.
>
> So rather than contrast it, your Honour, as to whether or not there's a - a unit is delivered in a particular condition or whether or not it's new. Your Honour, in my submission, should be looking at whether or not - whether it's new or whether it's not new." (transcript, pp. 27-28)

On behalf of the respondents Mr Sullivan pointed to the difficulty of defining "newness". In his written submissions he said that, on a literal interpretation of the applicant's case, "there must be some finite point in time when the unit acquires the status as 'new' at which point in time nobody from the vendor should physically step into the room lest it be said that every step on the tiled floor or hand upon the kitchen bench negates the 'newness' of the unit".

Mr Sullivan also referred to the fact that there had been only limited occupancy of the apartment by the tenant, and that letting an apartment in these circumstances to a tenant was only one form of occupation that a vendor might permit of a property subject to a contract. Mr Sullivan referred to a vendor's using a unit to store surplus furniture which was to be used elsewhere in the building, the stationing of a security guard in a unit at night, the vendor's permitting an architect to use a unit to set up a desk and to work in it. He also mentioned that, under the general law, a vendor may mortgage or lease property under contract provided that he is in a position to offer title at completion as contracted for: see Duncan and Jones *Sale of Land in Queensland* (4th ed., 1996) at p.248.

The lack of clarity, and hence of effectiveness, of the implied term proposed on behalf of the applicant lead me to reject it in construing the contract of sale: see *Cheshire & Fifoot's Law of Contract* (8th Australian ed., 2002) para. 10.59, p.444, and *Ansett Transport Industries v. The*

Commonwealth (1977) 139 C.L.R. 54 at p.62 per Gibbs J. The proposed implied term may, I think, be consigned to the category of unstated expectations of a party to a contract referred to by Mason J. in *Codelfa Construction Pty Ltd* v. *State Rail Authority of New South Wales* (1982) 149 C.L.R. 337 at p.352:

> "Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."

At best for the applicant, a term that I think might properly be held to be implied in the contract is one to the effect that the vendor would ensure that the property is at settlement in the same condition as it was when construction and fitting out was completed. Such a term avoids the necessity of resort to such subjective concepts as "freshness" and "sparkle" and focusses on the objectively verifiable condition of the property. That construction of the contract would, in the context of the issues on this application, be the most for which the applicant could successfully contend. That being so, and since the first respondent has shown that at the settlement proposed for today it could comply with that condition, the application must fail. The applicant had, I find, no proper ground to terminate the contract.

I should add that the argument before me proceeded on the premiss that on completion of the building the unit had been built in accordance with the requirements of the contract. The question of the applicant's rights against the first respondent arising from defective building of the unit was not relevant to the issues on this application.

The application is dismissed.

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HIS HONOUR: I order that the applicant pay to the respondents their costs of and incidental to the application to be agreed, but failing agreement to be assessed.

I order that the moneys in Court, including any accrued interest, be paid out forthwith to the second respondent.
