[2003] QSC 358

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Date: 16 October, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HOLMES J

No S2451 of 2003

QN PTY LTD (ACN 077 532 832) AND CO-ORDINATED PROPERTY CONCEPTS PTY LTD (ACN 075 313 570)	Applicants
and	
ALLAN DOUGLAS HAMILTON AND HELEN MARGARET HAMILTON	First Respondents
and	
RODNEY JAMES AUSTIN AND SONYA MAREE AUSTIN	Second Respondents

BRISBANE

..DATE 08/10/2003

JUDGMENT

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

HER HONOUR: The first respondents here, the Hamiltons, invested in a residential property at Taigum. Under a combination of agreements, an investment deed and a residential tenancies agreement, they effected an arrangement with the second respondents, the Austins, under which the Austins were to pay rent and two percent of the purchase price of the property they were acquiring on a monthly basis over a ten year period, with the end result that the property would pass to the Austins.

The money paid by the Austins was to be paid to a control account operated by the applicant, QN Pty Ltd, which took a management fee. A clause of the investment deed permitted its termination if the monies were not paid for two successive months and if the residential tenancy had been terminated in accordance with the Residential Tenancies Act 1994.

There were a number of defaults. On the 17th February 2003 the Hamiltons' solicitors served a notice to remedy the default on the Austins. Section 72(1) of the Property Law Act provides that an instalment contract is not determinable for default until 30 days after service of such a notice.

There was a request from the applicant for negotiation. The first respondents' solicitors responded by saying that their clients were seeking to exercise their rights in accordance with the default provisions under the investment deed. It was arguable, they said, that the documents were an instalment contract so that the first respondents were complying with

section 72 before exercising their rights under the default provisions in the investment deed. The deadline for compliance with the notice of default was 19th March 2003. The letter concluded by saying that the first respondents' solicitors reserve their clients' rights in relation to continuing default under the investment deed and related documents.

I should say, Mr Smith, I've relied on your submissions for the contents of the letters. I assume there's no argument that they're faithfully set out, Mr Martin?

MR MARTIN: Yes. No, there's no argument.

HER HONOUR: There was then some correspondence about an extension of time. Those negotiations were inconclusive. By letter of 18th March, the second respondents' solicitors declined to negotiate with the applicant any further, saying that their clients were "seeking to exercise their legal rights in accordance with the investment deed after complying with the instalment contract provisions of the Property Law Act".

The applicants sought relief in the following form: a declaration that the documents in question did not constitute an instalment contract, and a declaration that the purported termination by the first respondents dated 17th March 2003 was not a valid termination; and they sought an account of monies. I indicated my view at the hearing of the costs application

that there was no purported termination merely by the service of the notice, and that there was no basis on which an account could be ordered.

On the morning of the application, the first respondents' solicitors conceded in written submissions that the agreement between the first and second respondents was not an instalment contract. On that basis there was an agreement that the application should be dismissed but the applicant sought an order for costs.

I ruled against that application on the basis that there was no utility in the declarations sought because the notice was merely a notice to remedy default and did not of itself have an effect on the second respondents' rights under the contract, or, in turn, on the applicants' rights to recover fees, dependent on the continuation of the agreements.

The view I then took was that had the notice been required, that requirement was a limitation on the first respondents' rights to proceed to terminate, rather than of itself affecting any right of the second respondents, much less the applicants. If it was unnecessary, as was accepted by the time of the hearing, it was of no consequence. I ordered that the applicants pay the costs of both sets of respondents.

The applicants now seek leave to appeal that decision. The notice of appeal, which has, somewhat prematurely, been filed, gives as grounds that there was an error in the exercise of

discretion, the particulars of which are failing to give sufficient weight to the concession that the notice to remedy default was erroneously issued, giving weight to a relative consideration that the notice was merely a notice, and finally it is said that no reasonable Tribunal could have come to the decision.

Mr Smith here argues two bases, which in my view are inter-related. The first is that there was a misapprehension of the facts on my part, that being the view that I expressed in the course of argument (which I must say is a concluded view in effect, not merely an interim one) that the approach of the first respondents was that the notice to remedy default was a step they considered necessary, but it was not necessarily the case that they were wedded to the prospect that it was an instalment contract.

In other words, the view I have taken and I think I have articulated it already, was that the first respondents were attempting to cover all bases but that did not mean that they would proceed exclusively on the basis that it was an instalment contract.

At any rate, Mr Smith argues that it can be seen from the tenor of the correspondence that the approach of the first respondents was a reliance on an instalment contract. He points to the letter of the 17th February and to the passage which I think I have already set out to some extent.

...

HER HONOUR: It is the letter of the 18th March which reads as follows:

> "Our clients are not obliged to grant any extensions given that they are seeking to exercise their legal rights in accordance with the investment deed after complying with the instalment contract provisions of the Property Law Act."

Mr Smith says that bespeaks an intention to proceed on the basis that it was an instalment contract.

I have considered the question because it seems to me it is not just a matter of the view I take but whether there is a seriously arguable view to the contrary, which would indicate that I may have been under a misapprehension as to the facts.

I do not seriously think though that that passage can be read other than as saying that the first respondents will continue to exercise their rights under the investment deed while ensuring that any requirements under the Property Law Act in relation to instalment contract provisions are met.

I simply do not think that another interpretation is really open and in the absence of any assertion that the first respondents would proceed on the basis of the instalment contract without regard to the requirements of the investment deed and the residential tenancies agreement, it does not seem to me that it could be said the applicants and the second respondents could be any worse off. It was simply another

set of hurdles for the first respondent to meet, imposed on itself.

In those circumstances, I cannot see that there was any utility in the declaration sought, but more importantly, I cannot see that there is a real argument to the contrary, that the material supports a real argument to the contrary. In those circumstances I do not think it is a proper case for giving leave.

I dismiss the application for leave to appeal.

...

HER HONOUR: The first respondents should have their costs of the application.
