

SUPREME COURT OF QUEENSLAND

CITATION: *Devine Ltd v. Timbs* [2004] QSC 024

PARTIES: **DEVINE LIMITED (ACN 010 769 365)**
(applicant)
v.
PATRICK JOSEPH TIMBS
(respondent)

FILE NO: 9818 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 26 February 2004

DELIVERED AT: Brisbane

HEARING DATE: 26 November 2003

JUDGE: Helman J.

CATCHWORDS: CONTRACT – put and call options – whether purported termination of contract of sale valid – whether correct warning statement was attached to sale contract document – whether reasons given for termination valid.

Acts Interpretation Act 1954 (Qld), s. 14A(1)
Body Corporate and Community Management Act 1997 (Qld), s. 2, s. 4(f), s. 213
Property Agents and Motor Dealers Act 2000 (Qld), s. 10(2), s. 363, s. 364, s. 366, s. 367
Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act 2002 (Qld), s. 99

Nguyen v. Taylor (1992) 27 N.S.W.L.R. 48

COUNSEL: P.H. Morrison Q.C. for the applicant
D.J. Campbell for the respondent

SOLICITORS: Nicol Robinson Halletts for the applicant
Broadley Rees Lawyers for the respondent

- [1] This application concerns four put and call option agreements entered into between the applicant company and the respondent. Three of the agreements were executed on 24 August 2001. Those three agreements concerned lots 3006, 3106, and 3206 in a proposed residential apartment building called 'River City Apartments'. Another put and call option agreement, executed on 23 January 2002, had as its subject lot 2906 in the same building. The survey plan upon which all four lots

appeared was no. 139730. In each case the first two digits of the lot number showed the level in the building in which the apartment was situated. The option agreements were all executed at a time before the applicant as vendor had completed the building. Each option agreement had attached to it a sale contract of the relevant lot showing the applicant as vendor and the respondent as purchaser. The option agreements were in identical terms.

- [2] Each contract document was signed by the respondent and had attached to it the notices then required by the *Body Corporate and Community Management Act 1997* and the *Property Agents and Motor Dealers Act 2000*. On 23 January 2002, by deed, the parties varied the option agreements concerning lots 3006, 3106, and 3206. New contract documents were signed by the respondent and in each case the notices then required by the two statutes I have mentioned were attached to the new contract documents.

- [3] In each case cl 2.1 of the option agreement provided that the agreement was not binding on the applicant until and unless the respondent returned to the applicant *inter alia* two copies of a warning statement under the *Property Agents and Motor Dealers Act* signed by the respondent and two copies of the contract document signed by the respondent. Under cl 2.2 of the option agreement the applicant was required to hold the contract document received under cl 2.1 in escrow and was forbidden to sign it until and unless either option was exercised.

- [4] In each case cl 3.1 of the option agreement provided that the respondent granted to the applicant the right to require the respondent to enter into the sale contract for the acquisition of the lot in question on the terms and conditions specified in the contract document. Clause 5.2 of the option agreement provided that the applicant was required immediately to notify the respondent when certain conditions precedent referred to in cl 3.1 of the proposed sale contract were satisfied. Clause 5.3 provided that if the applicant had not given notice to the respondent that those conditions precedent were satisfied by 31 July 2004, or by an extended date fixed in accordance with the relevant clause of the proposed sale contract, either party might terminate the option agreement. Clause 6.3 provided that the sale contract would come into existence on the date determined under s. 365 of the *Property Agents and Motor Dealers Act* and the applicant was authorized to insert that date into the contract document as the contract date. Section 365, as it was on 23 January 2002, defined when the buyer was bound under a relevant contract (defined in s 364, the definitions section for Chapter 11 (Residential Property Sales) as ‘a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction’) providing that a buyer was bound under a relevant contract when the buyer gave the seller under the contract or the seller’s agent:
 - (a) a copy of the contract signed by both the buyer and the seller;
and
 - (b) a notice in the approved form signed and dated by the seller
declaring the date on which the seller signed the contract.

- [5] The applicant, having notified the respondent on 15 August 2003 that the conditions precedent the subject of cl 3.1 of the proposed sale contract had been satisfied, exercised its put option on 25 September 2003. The contracts were signed on its behalf, and it required that settlement take place on 9 October 2003. On

8 October 2003 transfer documents for all lots were sent from the applicant to the respondent. On 9 October 2003 the respondent purported to elect to terminate the contracts, relying on the applicant's failure to comply with the provisions of the *Property Agents and Motor Dealers Act* and the *Body Corporate and Community Management Act* as to warning statements and information sheets in the approved forms then current.

- [6] The letter dated 9 October 2003 from the respondent's solicitors to the applicant's solicitors purporting to terminate the contracts was, formal parts omitted, as follows:

**Timbs proposed purchase from Devine Limited
Lots 2906, 3006, 3106 and 3206 'River City Apartments' (the 'Lots')**

We act for Patrick Timbs who is the purchaser of Lots 2906, 3006, 3106 and 3206 'River City Apartments' from Devine Limited pursuant to contracts dated 29 September 2003 ('the Sales Contracts') in respect of which settlement is scheduled to take place on 9 October 2003.

The Sales Contracts for the Lots comprise:

1. PAMD Form 30a Warning dated 17 January 2002;
2. BCCM Act 1997 Contract Warning;
3. PAMD Form 31a Declaration by Seller unsigned and undated;
4. PAMD Form 32a Lawyers Certifications dated 21 January 2002;
5. Sale Contract (including Annexure 'A') dated 25 September 2003.

The Sales Contracts came into existence on 25 September 2003 following your client's exercise of the Put Option contained in the Put and Call Option Agreement dated 24 August 2001 as amended by the Deed of Variation dated 23 January 2002.

We are instructed to inform you that the Sales Contracts do not contain a warning statement in the form approved pursuant to the *Property Agents and Motor Dealers Act* 2000 ('the Act').

Section 366(1) of the Act provides that a relevant contract must have attached a statement in the approved form ('Warning Statement') containing the information mentioned in subsection (3). The current approved form is substantially different from that used in the Sales Contracts.

Section 367(2) of the Act provides that if a Warning Statement is of no effect under section 366(4) the buyer may terminate the contract at any time before the contract settles.

We are instructed to terminate the Sales Contracts for the Lots in accordance with Section 367 of the Act on the basis that the Sales Contracts do not contain Warning Statements in the approved form.

We are also instructed to terminate the Sales Contracts for the lots pursuant to Section 213(6) of the *Body Corporate and Community Management Act* 1997 on the basis that the Sales Contracts do not include Information Sheets in the approved form.

Accordingly, could you please make arrangements for my client's Deposit Bonds submitted in respect of the Lots to be returned to my office within fourteen (14) days.

- [7] The applicant's solicitors' response in a letter dated 14 October 2003 to the respondent's solicitors was, formal parts omitted, as follows:

Devine Limited sale to Timbs – Lots 2906, 3006, 3106 and 3206, River City Apartments

We refer to your letters of 9 October regarding these four matters.

After considering the arguments raised by you on behalf of your client, Mr Timbs, our client, Devine Limited, has formed the opinion that the arguments are unmeritorious and that Mr Timbs' purported termination of the four Contracts in reliance upon his entitlements under the *Property Agents and Motor Dealers Act* and the *Body Corporate and Community Management Act* were unjustified.

As a result, Devine Limited does not accept that the purported termination of the four Contracts on behalf of Mr Timbs was effective, nor does Devine Limited accept that Mr Timbs is entitled to a refund of the deposits, nor to the return of the four deposit bonds in relation to these Contracts.

Nevertheless, Mr Timbs' purported termination of the four Contracts amounts to a wrongful repudiation of contracts. Devine Limited accepts the repudiation of the Contracts which are now at an end. As the repudiation was wrongful, Mr Timbs is in breach under each Contract. Devine Limited declares each deposit forfeited and reserves its rights under each Contract to pursue Mr Timbs for damages arising from the breach.

In the alternative, Devine Limited was, on the due date for settlement of each Contract, ready and willing and able to complete and Mr Timbs failed to tender settlement of any of the four Contracts. As a result, Mr Timbs is in breach of his obligations under each Contract and Devine Limited, in the alternative, terminates each Contract on the basis of that breach. Once again, Devine Limited declares each deposit forfeited, and reserves its rights regarding any damages that may flow from the breach of any of the Contracts.

Your separate correspondence of 9 October raising dispute in relation to each deposit is noted. We are instructed to call up each deposit bond but, when the proceeds of each bond are received, funds will be held in our trust account in accordance with the relevant legislation and your notice of dispute.

- [8] It is not in issue that the sale contracts have been terminated. The issue between the parties concerns the deposits. The applicant seeks declarations that the respondent's purported termination of the sale contracts by his solicitors' letter dated 9 October 2003 was invalid, that its termination by its solicitors' letter dated 14 October was valid, and that it is entitled to demand payment under the deposit bond lodged as the deposit under each contract. It is not in issue that the forms attached to the contract documents were those required on 23 January 2002 nor is it in issue that by 25 September 2003 new forms had been approved.

- [9] At the heart of the dispute between the parties is the question what date is relevant for the application of the provisions of the two statutes: is it, as contended on behalf of the applicant, the date of execution of the option agreement in each case (23 January 2002, after the execution of the deed of variation in relation to lots 3006, 3106, and 3206), or is it, as contended on behalf of the respondent, 25 September 2003 when the put options were exercised and the applicant signed the contract documents it had held in escrow? If the former, the applicant must succeed on this application because it will follow that the respondent had no valid ground for terminating the contracts; if the latter the applicant must fail unless an argument based on a contention of substantial compliance with the provisions of the statutes succeeds.
- [10] Among the objects of the *Property Agents and Motor Dealers Act* is consumer protection. Section 10(2) provides that a significant object of the Act 'is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property'. The purposes of Chapter 11 are three, as s. 363 provides:

363 Purposes of ch 11

The purposes of this chapter are –

- (a) to give persons who enter into relevant contracts a cooling-off period; and
- (b) to require all relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that the contract is subject to a cooling-off period; and
- (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.

Section 366(1) provides that a 'relevant contract' must have attached, as its first or top sheet, a warning statement in the approved form containing the information mentioned in s. 366(3). Section 366(2) provides that the seller of the property or a person acting for the seller who prepares a relevant contract commits an offence if the seller or person prepares a contract that does not comply with s. 366(1). Section 366(4), as it was on 23 January 2002, provided as follows:

- (4) A statement purporting to be a warning statement is of no effect unless -
 - (a) before the contract is signed by the buyer, the statement is signed and dated before a witness by the buyer; and
 - (b) the words on the statement are presented in substantially the same way as the words are presented on the approved form.

(On 1 July 2002 s. 366(4)(a) was amended by omitting the words 'before a witness': s. 99 of the *Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act* 2002, but there was no issue before me on that subject.)

Section 367(2) provides that if a warning statement is not attached to a contract to which a warning statement must be attached or is of no effect under s. 366(4), the

buyer under the contract may terminate the contract at any time before the contract settles by giving signed, dated notice of termination to the seller or the seller's agent.

- [11] The argument for the respondent rested on the proposition that since the contracts did not come into existence until 25 September 2003 it was only then that there was in each case a relevant contract to which the provisions of the *Property Agents and Motor Dealers Act* could apply. While that proposition may be accepted, it does not necessarily resolve the issue before me in favour of the respondent, because what is contemplated in the Act is a sequence of events culminating in the coming into existence of a relevant contract.
- [12] On behalf of the applicant it was argued that the date of signature by the respondent was the relevant one because it was then that, pursuant to the option agreement, the respondent became bound by the terms of the proposed sale contract subject only to the exercise by the applicant of its put option. That contention appears to me to be consistent with the contemplated sequence of events. The Act contemplates that the seller or the seller's agent will prepare the contract (s. 366(2)) and then, *before signing the contract* the buyer will sign the warning statement (s. 366(4)(a)). (The word 'contract' is there used to mean the document which the buyer signs whereby the buyer becomes contractually bound: cf *Nguyen v. Taylor* (1992) 27 N.S.W.L.R. 48 at p. 53 per Kirby P.) That sequence suggests that the relevant warning statement will be one in the form approved at the time when the buyer signs the contract document.
- [13] I am therefore persuaded that the argument advanced on behalf of the applicant is correct. If it is not, a buyer in the position of the respondent would be bound by the terms of a contract document of the kind in question in this case for a lengthy period without having the benefit of a warning statement. That does not appear to be what was intended in a régime that contemplates the buyer's receiving the notice and signing it before signing the document. Furthermore, to construe the provisions of the Act as contended on behalf of the applicant would best achieve the consumer-protection purpose of the Act: see s. 14A(1) of the *Acts Interpretation Act* 1954.
- [14] Section 2 of the *Body Corporate and Community Management Act* provides that the primary object of that Act is to provide for flexible and contemporary communally-based arrangements for the use of freehold land, having regard to the secondary objects of the Act. Among the secondary objects is the provision of 'an appropriate level of consumer protection for owners and intended buyers of lots included in community titles schemes': s. 4(f). Section 213(1) of Part 2 (Proposed lots) of Chapter 5 (Sale of lots) of the *Body Corporate and Community Management Act* so far as it is relevant, provides that '[b]efore a contract is entered into' by a seller with a buyer for the sale to the buyer of a proposed lot intended to come into existence as a lot included in a community titles scheme when the scheme is established the seller must give the buyer a 'first statement' complying with s. 213(2) to (4). Section 213(5) provides that the seller must attach an information sheet in the approved form to the contract:

(5) The seller must attach an information sheet (the '**information sheet**') in the approved form to the contract –

- (a) as the first or top sheet; or
- (b) if the proposed lot is residential property under the *Property Agents and Motor Dealers Act 2000* – immediately beneath the warning statement

that must be attached as the first or top sheet of the contract under section 366 of that Act.

- [15] Those provisions are those appearing in the Act as it is now and as it was on 25 September 2003. On 23 January 2002 the provisions, so far as they are relevant, were the same, except that s. 213 bore the number 170 then and subsection (5) was as follows:

(5) The seller must attach to the contract, as a first or top sheet, an information sheet (the ‘**information sheet**’) in the approved form.

On this application nothing turns on the discrepancy between the two versions of subsection (5).

- [16] The considerations relevant to the warning statements required under the *Property Agents and Motor Dealers Act* (the sequence of events contemplated, and – above all – the consumer-protection purpose of the Act) apply to the provisions of the *Body Corporate and Community Management Act* and lead me to conclude that the date of the signature by the respondent was the relevant one.
- [17] It is not necessary for me to consider the argument concerning substantial compliance.
- [18] It follows that the applicant is entitled to the relief it seeks. I shall invite further submissions on the form of the orders to be made and costs.