[2005] QSC 373

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Date: 24 November, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 515 of 2005

ELIZABETH MARY ROSSI, MARIE JOYCE ROSSI, ROBERT JOHN ROSSI, GLORIA JEAN VASS and LYNETTE ANGELA McLAUGHLIN	Applicants
and	
JOSEPH VU	First Respondent
and	
JV COMPANY PTY LTD (ACN 116 465 405) as trustee for the VU FAMILY TRUST	Second Respondent

CAIRNS

..DATE 24/11/2005

JUDGMENT

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HIS HONOUR: The applicants are the registered proprietors with varying levels of interest of land situated at 78-80 Norman Street, Gordonvale and described as Lot 2 on Registered Plan 716086, the County of Nares, Title Reference No 20878191, 20878192 and 20878193. The land is used as commercial premises encompassing squash courts, retail shop and a residential flat.

In August 2005 the applicants listed the property for sale with the office of Ray White Real Estate in Gordonvale. On Saturday, 17 September 2005 a representative of the real estate agent, Mr Urquhart, introduced to the proprietors an intending purchaser of the property who had signed a written letter of offer to purchase (Exhibit JV 1 to the affidavit of Joseph Vu sworn 22 November 2005). The intending purchasers were shown to be Joseph Vu and Ryuko Tamazaki. On Sunday, 18 November each of the five applicants signed the document in the presence of a witness.

The respondents contend that this document, as signed, constitutes an agreement binding the applicants to complete the sale of the property. On 21 October the respondents lodged a caveat over the land claiming an estate in fee simple in the land as purchaser pursuant to that alleged agreement. (Exhibit LAB 1 to the affidavit of Linda Barlow sworn 16 November 2005) The applicants contend that no binding agreement for sale was effected as the execution of that document was subject to a condition not since fulfilled. They seek by this application a declaration to that effect and an

order for the removal of the caveat. The respondents cross apply for a declaration that there was a binding contract and for an order for its specific performance by the applicants.

The parties have agreed that all issues should be determined in a summary way. I am indebted to counsel for their detailed submissions founded upon assiduous research of the cases. This has allowed me to deal with these applications in a timely way.

The applicants, in deciding to sell the property, had agreed between themselves that the firm of Marino Moller, Lawyers, would be retained to act on their behalf. The letter of offer was signed by the applicants before any of them had taken legal advice. On Monday, 19 September Mrs Rossi took the letter of offer to Mr Moller of that firm and instructed him to prepare a draft contract of sale. A comparison should be made between the copy letter of offer exhibited to his affidavit (WBM 2) and that exhibited to the affidavit of Mr Vu (Exhibit JV 1). It is likely that the document delivered to Mr Moller was similar to JV 1 but with the applicants' signatures subscribed. The annotations in the margin of document WBM 2, save for the applicants' postal address, appear to be notations made by Mr Moller since some of the details are repeated in the draft contract of sale he later prepared.

The letter of offer was subject to the following conditions:

CONDITIONS OF OFFER:

(1) This offer is subject to approval of contracts of sale by purchaser's and vendor's solicitors;

(2) This offer is subject to the buyer obtaining satisfactory building and pest reports on the property on or before 21 days from contract date;

(3) This offer is subject to the buyer obtaining finance approval on or before_____

(4) Inclusions: leases (existing); bakery. A/C units;

(5) Exclusions:

(6) Other conditions (if any):

A draft contract of sale was prepared by Mr Moller and sent to the solicitors acting for Mr Vu and Mrs Tamazaki, as well as to the applicants. That draft (Exhibit WBM 3) did not set out any details for the purchaser. This appears to have been a deliberate omission as seen from the terms of the accompanying letter to the solicitors for Mr Vu and Ms Tamazaki dated 4 October (Exhibit WBM 4) and the response to that letter (Exhibit WBM 5). The latter raised also the point that the contract was to be subject to finance.

The amended draft contract as returned identified the purchaser as the second respondent, and it stipulated a condition that the contract was subject to finance with the ANZ Bank with an approval date 14 days from the contract date with the amount to be sufficient to complete the contract (Exhibit WBM 6). The return of the amended draft contract was accompanied by a letter from Vince Martin & Co demanding that the applicants honour their written commitment to sell to "my client". It is not clear which person or entity was then being referred to as "my client".

The applicants' solicitors responded on 20 October 2005 advising that they would not sign a contract in these terms as -

> "(a) the deposit stated in the contract does not accord with the deposit amount in the letter of offer to purchase; and
>
> (b) the contract does not meet our approval as it is not accompanied by personal guarantees of the trustees' directors".

The letter of offer included as part of its terms a deposit of $90,000 to be paid. The change in the amount of the deposit to $32,000 in the draft contract of sale was made by solicitors acting for the applicants and could not, thus, be relied upon by them as a material variation. In the end

result no deposit has in fact been paid. The change in the identity of the purchaser is, of course, a significant matter to which further reference will be made.

Additional background information is set out in the affidavit of Joseph Vu. This included details of his discussions with the vendors' agent; the fact that he did not receive financial statements concerning the commercial returns on the premises until the 21st of September; that he had approval for finance by the 28th of September; and that he did not receive documents relating to the business leases until the 30th of September.

But the issue turns upon the intention of the parties, objectively determined, when signing the letter of offer. It is "not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party, by words and conduct, would have led a reasonable person in the position of the other party to believe. References to common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." Pacific Carriers Limited v. P & V Parry Bus (2004) 218 CLR

4151 as cited in Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd (2004) 219 CLR 165.

Were the terms of the letter of offer intended to result in a concluded contract, or to be merely a statement of terms of agreement which had no binding effect on their own? Principles to be applied to a question of this kind were set out in Masters v. Cameron (1954) 91 CLR 353 where the High Court identified three classes of case into which the circumstances might fall -

> "It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, simply, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms, express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all unless and until they execute a formal contract."

In each of the first two cases there is a binding contract. Cases of the third class are fundamentally different. The applicants here contend that the arrangements here fall within the third class. "The question depends upon the intention disclosed by the language the parties have employed and no special film of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape" (Masters at p. 632).

Mr Sheridan of counsel suggests the circumstances here fall within the third class, as did the circumstances in Masters v Cameron. He points to the similarity of the terms of the condition. In Masters, the agreement was made "subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors" (p. 354). Here, the express terms of Condition 1 are "subject to approval of contracts for sale by purchaser's and vendors' solicitors".

Mr Jonsson, for the respondents, argues that Masters v Cameron did not exhaustively define the classifications. There is a fourth class wherein the parties to a negotiation might reach agreement and intend to be bound to the performance of those terms while yet propose to have the terms restated later in a fuller, more formal document. This principle was expressed by McLelland J in Baulkham Hills Hospital Pty Ltd v. GR Securities Pty Ltd (1986) 40 NSWLR 622 in the following terms at p. 628:

> "The intention of the parties to be legally bound by their consensus is sufficiently clearly expressed to take the case out of the third class of cases referred to in Masters v Cameron... There is in reality a fourth class of case additional to the three mentioned in Masters v Cameron as recognised by Knox CJ, Rich J and Dixon J in Sinclair Scott & Co v. Norton, namely, one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract containing, by consent, additional terms."

This statement of classification was upheld by the New South Wales Court of Appeal (see at pp 635-6) but as McHugh JA there said at p. 34 -

> "The decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances."

The document with which Baulkham Hills was concerned included the terms that the acceptance of the offer "would constitute a legally binding acceptance until such time as it is superseded by a formally binding agreement" (see at p. 633).

Mr Jonsson points to the fact that the offer, as accepted by the applicants by signing in front of a witness, suggests a

level of formality and commitment which brought the agreement into a class where it was intended to have binding effect. He referred to the role that the act a signature plays in determining objectively whether a contract was formed. He cited from the judgment of the court in Toll (FGCT) Pty Ltd (supra), particularly at paragraph 45 as follows -

> "It should not be overlooked that to sign a document known and intending to effect legal relations is an act which in itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document, or is willing to take the chance of being bound by those contracts, as Latham CJ put it, whatever they might be."

That argument, of course, depends upon the very question to be determined, whether the document was intended to effect legal relations. But also this argument adds with equal force to the importance and acceptance of the terms of Condition 1.

Mr Jonsson argues further that the essential aspects of the bargain were agreed, and the ongoing negotiations were merely consistent with endeavours to negotiate a fuller and more formal contract. He refers me to the remarks of Jerrard JA and Muir J in Alfred anors v Eddeage anors [2004] QCA 283 and of Muir J in Cannon Street Pty Ltd v. Karydas [2004] QSC 104. That submission invites a consideration of the differences

between the terms of the letter of offer and the terms of the proposed contract of sale.

The difference as to the identity of the purchaser is not insignificant, despite submissions that the substitution of a corporate trustee is not uncommon in commercial transactions. Such a change here goes further than providing fuller or more formal detail. It goes to the identity of the entity against whom there would be recourse in the event of a breach.

As already noted, the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances. Here, the parties were dealing with commercial real estate. The applicants were not legally qualified and had previously agreed to retain solicitors for the transaction. They would be aware that formal documentation would be necessary. This point was made in the joint judgment of Cooper and Byrne JJ in Marek v. Australian Conference Association Pty Ltd [1994] 2 Qd R 521 at p. 527 as follows -

> "The usual expectation of parties in negotiation for the sale of land is that they will not be taken to have made a concluded bargain unless and until a formal contract is executed. In this state, real estate is ordinarily agreed to be sold by the execution by a vendor and purchaser of a form of contract adopted by the Real Estate Institute of Queensland and approved by the

> Queensland Law Society... This notorious fact largely explains why these days in land sales, the 'expectation is strong' that the parties do not intend to be bound until a formal contract is executed... Exceptionally, the conduct of the parties may reveal an intention to make a binding agreement concerning land before a contract is signed."

Their Honours referred to examples of dispositions of interest in land where uncommon facts established that arrangements for short formal contracts to bind immediately, but they observed that "such cases are rare". The circumstances here do not put this case in the rare category. This was not a case of prolonged negotiations or exchange of numbers of letters which characterised, for example, the circumstances in Baulkham Hills Hospital.

This point also begs the question raised by Brooking J in Toyota Motor Corp v. Ken Morgan Motors Ltd [1994] 2 VR 106 at p. 131: "How likely is it that the parties would have intended to make or record a binding contract by means of some informal, vague and relative short document?"

When the parties here knew that a formal document was necessary their so proceeding to informal agreement would, in my view, be unlikely. Moreover, the execution of the formal contract was critical to the fixing of the completion date. Important matters such as the identity of the purchaser, the

finance condition were not finalised at the time of the letter of offer was signed. Significantly, there were still doubts about the identity of the purchaser at the time of the sending of the first draft contract of sale some two and a half weeks after the letter of offer. Mr Sheridan of counsel for the applicants also points to the reference by the respondents' solicitors to the "proposed purchase" and to statements about satisfaction with lease documents and about the finance condition as indicating that the parties were, after the letter of offer, still in the negotiation phase.

The most important consideration to my mind is the language of the document itself. Mr Jonsson referred to the decision of Chillingworth v. Esche (1924) 1 Ch. 97, particularly at p. 104 where the Court of Appeal considered the phrase "subject to a proper contract". It was considered that such terms might import a condition or merely express a desire that a further formal document should be drawn up. The court determined that the words in the circumstances of that case imported a condition. Here, the words are more specific. The condition requires not only that a contract of sale be prepared, but that such contract have the approval of the respective solicitors.

Bearing in mind the nature of the transaction would eventually give rise to the need to retain a lawyer and for the preparation of a formal document, the approval of contracts of sale by respective lawyers for the parties is, to my mind, an

obvious condition precedent to the creation of a binding agreement. In my view, this is the plain intention expressed in Condition 1. On any objective basis I am satisfied that in signing the letter of offer, there was no intention on the part of the applicants to create a legally binding contract for the sale of the subject land. I would therefore allow the applicants' application and dismiss the cross application.

I make the following orders:

(1) I declare that the letter of offer to purchase dated 17 September 2005, executed by the applicants on the one part and by Joseph Vu and Ryuko Tamazaki on the other part was not a legally binding contract for the sale of land;

(2) I order that the caveat, No 709073402, lodged on 21 October 2005 over land described as Lot 2 on Registered Plan 716086 in the County of Nares with Title Reference Nos of 20878191, 20878192 and 20878193 be removed forthwith.

...

HIS HONOUR: I order that the respondents pay the applicants' costs of and incidental to this application to be assessed on the standard basis.
