

# SUPREME COURT OF QUEENSLAND

CITATION: *Vujanovic v Musumeci & Anor* [2005] QSC 382

PARTIES: **NED VUJANOVIC and SAMANTHA ALANA VUJANOVIC**  
(Plaintiff)  
v  
**VINCENZO ROSARIO MUSUMECI and WANDA LESLEY HALL**  
(Defendants)

FILE NO/S: 76 of 2004

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 13 December 2005

DELIVERED AT: Cairns

HEARING DATE: 17 November 2005

JUDGE: Jones J

ORDER: **1. I order that the contract dated 26 September 2003 whereby the defendants agreed to sell to the plaintiffs residential property situated at 34 Pheasant Street, Bayview Heights and described as Lot 130 on RP 747634 County Nares, Parish of Cairns, Title Reference 21402073 be specifically performed within six weeks of today's date unless some other date is agreed upon.**  
**2. Subject to the receipt of written submissions within 14 days suggesting a different order I order that the defendants pay the plaintiffs' costs of and incidental to the proceedings to be assessed on the standard basis.**  
**3. I give the parties liberty to apply upon giving to the other parties 4 days notice of that intention.**

CATCHWORDS: CONVEYANCING – MATTERS ARISING BETWEEN CONTRACT AND CONVEYANCE – contract to sell property conditional on finance – notification of finance was to be in writing – purchasers had not given notice of finance at finance date – failure to notify of finance by finance date gave vendors the right to terminate subject to purchasers' right to affirm the contract – whether vendors terminated the contract before purchasers affirmed it

*Sutton v Gundowah Pty Ltd* (1950) 81 CLR 418

*Dougan v Ley* (1946) 71 CLR 142

COUNSEL: Mr C Ryall for the plaintiffs  
Mr M Jonsson for the defendants

SOLICITORS: V. J. Butler & Associates for the plaintiffs  
MacDonnells for the defendants

- [1] By contract dated 26 September 2003 the defendants agreed to sell to the plaintiffs the residential property situated at 34 Pheasant Street, Bayview Heights and described as Lot 130 on RP 747634 County Nares, Parish of Cairns Title Reference 21402073. The contract was conditional upon the plaintiffs obtaining finance sufficient to complete the sale. The time within which that condition was to be satisfied was six weeks from the date of the contract (i.e. 7 November 2003). The date for completion of the contract was 5 January 2004.
- [2] On 21 November 2003 the defendants purported to terminate the contract pursuant to clause 3 its Standard Terms and Conditions, on the basis that the plaintiffs had failed to give notification of their having obtained finance.
- [3] By this action the plaintiffs seek specific performance of the contract contending that the required notification had been given and, in the alternative, that the defendants were not entitled to terminate the contract by reason of their unconscientious conduct.

### **Background facts**

- [4] Prior to entering into the contract the parties had been close friends for approximately 10 years. They regularly visited each other's homes. The female plaintiff and the female defendant met even more regularly because their places of work were near to each other and they spoke to each other a few times a week.
- [5] The contract was entered into following discussions between the parties wherein the defendants revealed their intention to sell their house and to purchase another one. Mr Musumeci referred to this intention as a "downsizing" but more likely the intention was for them to find a house in which Mrs Musumeci could more easily supervise the activities of her growing children.<sup>1</sup> I expressly reject the suggestion by Mrs Musumeci that it was Mrs Vujanovic who initiated the discussions by virtually pestering her to sell the house.<sup>2</sup> I am satisfied that the defendants had decided to put their house on the market. Having told the plaintiffs of that intention the discussions resulting in the making of the contract followed quickly.
- [6] I am satisfied that the plaintiffs were genuine in saying that their primary wish was to use the house as their residence. The conflict between the documents which expressed this intention<sup>3</sup> and those documents which expressed an intention to use

<sup>1</sup> Per Mr Musumeci Transcript 62/35-45; per Mrs Vujanovic transcript 16/20-40

<sup>2</sup> Transcript 70/1-25

<sup>3</sup> Home Loans Application ex 1 p 10; Queensland Government Residents' Exemption ex 4 p 6;

the house as an investment property<sup>4</sup> is explained by Mr Vujanovic's approach to raising finance. This conflict in his stated intentions reflects his position that if, in order to obtain finance and to service the loan, it was necessary to have the higher income stream which renting the subject house would provide, then he was prepared to follow that course. But the ultimate intention for both plaintiffs was that the property would become their residence. This fact appears to have been accepted by both defendants.<sup>5</sup> Mr Vujanovic seems to have been prepared to speculate on the property market and he has apparently profited to some extent by those activities. He has recently entered into contracts to sell two sets of units which contracts, when completed, will yield net proceeds in excess of \$500,000.<sup>6</sup> There is no serious argument to suggest that the plaintiffs were not ready, willing and able to complete the contract both at the agreed date of settlement and at the present time.

- [7] The discussion between the parties about the transfer took place at the defendants' home. The plaintiffs suggested that the conveyancing formalities be undertaken by Mr Timmins, a conveyancing clerk employed by V.J. Butler and Associates. The choice of Mr Timmins was supported by the defendants to whom he was known and for whom he had previously acted. In fact, there seems to have been a friendly relationship between Mr Timmins and both parties, particularly so with the defendants.<sup>7</sup> Despite Mrs Musumeci's statement to the contrary, I accept that because of this choice of conveyancer the defendants did not seek to be legally represented. Thus, the transaction had the appearance of a couple transferring their house to friends, using a mutual friend to undertake the conveyance. Mr Timmins worked on a part-time basis, being in the solicitors' office on Tuesdays and Thursdays. He was also employed with his wife as an accommodation manager at the CWA Holiday Units at 258 Grafton Street, Cairns. But his mobile phone contact was known to Mrs Musumeci and had been used by her to contact him before the contract had been signed.<sup>8</sup>
- [8] Mr Timmins apparently miscalculated the date by which finance had to be approved. He noted on his file that the relevant date was 14 November 2003 rather than 7 November 2003.<sup>9</sup> Apparently he was alert to the need to notify the sellers of the approval of finance albeit that the date for so doing was incorrect.
- [9] The preparation of the contract document was undertaken in the office of V.J. Butler and Associates. Mr Timmins is not sure by whom the details were provided but thought that the defendants provided the property descriptions.<sup>10</sup> Other hand written entries were probably made by Mrs Vujanovic. When the document was presented to the defendants for signing they wished to alter the finance date by reducing the period from three months to six weeks. The alteration was made by Timmins and initialled by the defendants when they signed the contract in his presence.<sup>11</sup> The plaintiffs signed the contract some time later. The date when this occurred is not

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<sup>4</sup> Application for Finance ex 1 p 15; Disbursement Authority ex 4 p 3

<sup>5</sup> Per Mr Musumeci at 61/20; per Mrs Musumeci at 70/20

<sup>6</sup> Exs 7 and 8 \$1,255,000 less \$718,252 (ex 5)

<sup>7</sup> Transcript 82/1-20

<sup>8</sup> Transcript 83/10-20

<sup>9</sup> Transcript 51/18

<sup>10</sup> Transcript 43/5

<sup>11</sup> Transcript 43/15

clear, though it is undoubted that the contract deposit was paid on 26 September 2003 which coincides with the contract date.

- [10] From Mr Timmins' point of view there was nothing further for him to do until he was advised that finance had been approved. It appears that as a result of Mr Timmins' oversight the defendants were not provided with a copy contract as completed. No doubt had they sought a copy it would have been sent. Such a request was only made after the plaintiffs informed the defendants that their finance application had been approved.
- [11] It is common ground that the information about approval of the plaintiffs' finance application was given on the evening of Friday, 31 October 2003 when the defendants attended a dinner party at the plaintiffs' residence. Prior to that date Mrs Vujanovic had, in casual conversations with Mrs Musumeci, mentioned the progress of the loan application.<sup>12</sup> The defendants had on 31 October received a facsimile from Suncorp approving a loan of \$248,000. It stated:-
- “We are prepared to confirm that a housing loan has been approved subject to Suncorp's standard Terms and Conditions for a 5 YEAR FIXED RATE which will be set out in our documentation and the Special Conditions listed below.”<sup>13</sup>

The special condition related to the release of a mortgage on other property owned by the plaintiffs. From the plaintiffs' view point this was only a formality because that mortgage debt had in fact been paid. The defendants at no time asked whether that was a significant condition to the granting of finance. This letter was shown to the defendants and apparently read by Mr Musumeci. The plaintiffs verbally indicated, quite unequivocally, to the defendants that finance at that level was sufficient for them to complete the purchase. The defendants responded by congratulating them on their achievement.<sup>14</sup>

- [12] In the minds of the defendants there was a questioning about the speed of the finance approval because a valuer had visited the house only that Friday morning. Mr Musumeci raised only the question of whether the plaintiffs had the capacity to service the loan.<sup>15</sup> The revelation that finance had been approved caused Mrs Musumeci to seek confirmation of the contract status from Mr Timmins. She claims she attempted to phone him on Monday, 3 November and again on Friday, 7 November. On each occasion she left a message with office staff requesting a call back but no such call was made. On Monday 10 November she again phoned and left a message but received a reply from Mr Timmins only on 13 November. Mrs Musumeci did not convey any sense of urgency in her initial enquiries of Mr Timmins, nor did she express any concern that she may have had about the completion of the sale to Mr Timmins. She had his mobile telephone contact but did not use it. More particularly, she did not phone the plaintiffs who regarded themselves as friends and who were readily contactable. There was no obligation on her to make such contact but her decision not to seems unusual, unless she was hoping the contract would not be completed.

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<sup>12</sup> Transcript 15/15

<sup>13</sup> Ex 1 at p 25

<sup>14</sup> Per Mr Musumeci transcript 61/30.

<sup>15</sup> Transcript 60/40

- [13] Mr Timmins gave evidence that he received no message from Mrs Musumeci until 12 November which message he responded to on Friday, 14 November.<sup>16</sup> Mr Timmins' arrangement for being at the office only two days per week usually between the hours of 10.00 am and 3.00 pm would have undoubtedly called for extra vigilance on the part of the staff. Whether there was some failure in communication, and if so whose fault it was, is difficult to discern but this uncertainty was overtaken by subsequent events.
- [14] On Thursday 13 November Mr Timmins received from Suncorp a facsimile letter transmitted at 1.48 pm detailing the financiers' requirements on settlement.<sup>17</sup> He claims he phoned Mrs Musumeci after receiving that document and made arrangement for a copy of it, together with a copy of the contract of sale, to be left for her to collect at the office the next day. He says that on that evening he personally attended to the preparation of a letter giving written notice which was to accompany the other documents (hereinafter referred to as the "relevant documents"). He left them for collection as arranged. He did not hear again from Mrs Musumeci until Friday, 21 November when a message for him to phone her was left at the office of V. J. Butler & Associates. He responded to that message on Monday, 24 November to be told that MacDonnells Solicitors were now acting for the defendants. On the same day he saw the letter purporting to terminate.<sup>18</sup>

### **Contractual rights and obligations**

- [15] The relevant rights and obligations of the parties pursuant to the terms of the contract are stated in clause 3 and are as follows:-

#### **"3. Finance**

- 3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.
- 3.2 The Buyer must give notice to the Seller that:
- (1) Approval has not been obtained by the Finance Date and the contract is terminated; or
  - (2) The finance condition has been either satisfied or waived by the Buyer.
- 3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5 pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.
- 3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to terminate this contract under clause 3.2(1) or waive the benefit of this clause 3 by giving written notice to the Seller of the waiver."<sup>19</sup>

- [16] The condition identified in clause 3.1 was satisfied by 31 October 2003. The plaintiffs by their conduct and their words indicated that finance terms were

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<sup>16</sup> Transcript 52/1-30

<sup>17</sup> Ex 1 at p 27

<sup>18</sup> Ex 1 at p 31

<sup>19</sup> Ex 1 p 006

satisfactory to them. The plaintiffs' informal communication of that fact at the dinner party on that evening was however not notice to the defendants as contemplated by clause 3.2(2). The requirement in clause 10.4 that notices "must be in writing" was not satisfied by the verbal communication accompanied by the viewing of a letter from the finance provider. The notice to be given by the purchaser so as to satisfy clause 3.2(2) must be unequivocally in terms which indicate that the purchaser is bound to complete the contract.

- [17] The plaintiffs' failure to give such notice by 5.00 pm on 7 November 2003 left the parties in the following respective positions.
- Because finance had been approved, the plaintiffs had lost the right to terminate the contract pursuant to clause 3.2(1). But they retained the right to give notice pursuant to clause 3.2(2) which would have the effect of affirming the contract.
  - As at 5.00 pm on 7 November 2003, the defendants, not having been given such notice, had the right pursuant to clause 3.3 to terminate the contract by giving notice to this effect. *Hill v Terry*.<sup>20</sup>
  - If no notice was given by either side before the due date for completion the contract would lapse. *Hill v Terry*.<sup>21</sup> But before that date, each of the parties had continuing rights. For the plaintiffs this was to affirm the contract; for the defendants it was to terminate the contract. *Sutton v Gundowah Pty Ltd*.<sup>22</sup>
  - The effect of clause 3.4 was to preclude the defendants from terminating if they had been given notice from the plaintiffs pursuant to clause 3.2(2).

- [18] Consequently the first issue in this case turns upon two factual questions – whether the plaintiffs had given notice to the defendants prior to the defendants' notice purporting to terminate; and whether the notice, in its terms, was effective for the purpose of clause 3.2.(2). I shall firstly deal with the second of these questions.

### **Effective notice?**

- [19] The only communication that was capable of amounting to a notice of the kind required by clause 3.2(2) was the letter from the plaintiffs' solicitors dated 13 November 2003. It was expressed in the following terms:-

“We refer to the above matter and advise that our clients' application for finance has been approved for the said purchase.

We enclose herewith your copy of the signed Contract as requested, and advise that we will forward transfer documentation for your signatures in due course.”<sup>23</sup>

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<sup>20</sup> (1993) 2 QdR 640 at 656

<sup>21</sup> Ibid per McPherson at 643

<sup>22</sup> (1950) 81 CLR 418 at 441

<sup>23</sup> See Ex 1 p 26

- [20] Mr Jonsson of counsel for the defendants argued that the notice in those terms was not sufficient to fulfil the finance condition. Firstly, it was not given within the period allowed for finance. Secondly, it failed to inform the defendants in clear terms that the finance condition had been satisfied or that finance had been offered on terms satisfactory to the plaintiffs. Mr Jonsson argued further that the notice was not a notice of waiver of the benefit of the condition within the meaning of clause 3.2(4). He relied upon the decision of White DCJ in *Jones & Leenders v Smith*<sup>24</sup> and suggested that the letter amounted no more than a “progress report”.
- [21] I do not accept these submissions. The letter issued by the plaintiffs’ solicitors must be read as a whole. Whilst its first paragraph has not adopted the terms used to state the condition in the contract, the letter as a whole cannot be construed as anything other than an unequivocal affirmation of the contract because the finance condition has been satisfied. I find that the letter of 13 November 2003 was an effective notice for the purpose of clause 3.2(2).

### **Giving of notices**

- [22] There is a conflict between Mrs Musumeci and Mr Timmins as to the terms of the arrangement for the delivery of relevant documents. Mrs Musumeci claims that Mr Timmins was to drop off the documents, this being agreed in the conversation in which he said “No. I’ll come out for a walk. I’ll drop it to you.”<sup>25</sup> This is consistent with what was pleaded by the defendants in their Defence.<sup>26</sup> Not having received the documents, she claims she phoned the office of V. J. Butler & Associates on the following Monday (17 November) and a couple of times thereafter seeking Mr Timmins or the documents but was told there were no documents for her to collect. This prompted a reaction in her which she described in evidence in chief as follows:-

“Following that discussion with the receptionist I went home to my husband and we decided that we would appoint some outside counsel because we really didn’t know where to progress with it because it wasn’t moving forward. We had nothing in our possession that we could go to the bank with to try and buy another property. We had no idea how much money we could borrow because we had no contract to show on the house that we were selling. I went to MacDonnells on the Thursday afternoon following that which would have been the 20<sup>th</sup>. Then on the 21<sup>st</sup> I went back in having had discussions with my husband again the Thursday night and we instructed MacDonnells to cancel the contract.”<sup>27</sup>

In cross-examination she gave as the reason:-

“...We haven’t had notification of finance and as you know we weren’t really on the market in the first place. It’s all too hard ...”<sup>28</sup>

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<sup>24</sup> Unreported, 53 (2000) District Court at Cairns

<sup>25</sup> Transcript 80/55

<sup>26</sup> See para 4(a) of Defence

<sup>27</sup> Transcript 75/40

<sup>28</sup> Transcript 88/10

She did not attempt to contact Mr Timmins by mobile phone to discuss his failure to deliver the documents in accordance with her perception of the arrangement. Her relationship with him was such that one would have expected this to have been the normal approach.<sup>29</sup>

- [23] The question of whether the notice was in fact given to the defendants prior to the defendants' notice purporting to terminate requires a resolution of conflicting evidence given by Mr Timmins on the one hand and Mrs Musumeci on the other.
- [24] It was suggested on behalf of the defendants that Mr Timmins' recollection could not be reliable. He made no file notes of particular telephone conversations, and his absences from the office and lack of assistance from staff mean that his recall of events was questionable.
- [25] In my assessment there was some casualness in his approach to this conveyance. Whether this was occasioned by the fact that he was a friend of the parties whom he understood were friends of each other is not really a matter of concern. He made an error in his calculation of the finance date. That obviously influenced his supervision of the file and his failure to make a timely inquiry of his clients about availability of finance. He put the plaintiffs at risk by his error. But the crucial matter was the arrangement for the giving of notice that the contract would proceed.
- [26] Mrs Musumeci's evidence was unreliable in a number of respects. I have already mentioned her evidence as to the pre-contract discussions. There is also her claimed disbelief about the approval of finance when a simple phone call to the defendants would have clarified the issue. Her evidence about the plaintiffs' motivation for purchasing the property was not consistent with the existence of what was apparently a close friendship prior to the signing of the contract. I detected in Mrs Musumeci a significant change in her attitude as described when making the contract and how she appeared when giving evidence. I believe this has coloured her evidence about the arrangement she made with Mr Timmins about the delivery of the documents.
- [27] I reject the suggestion that Mr Timmins would personally deliver the documents so as to take the opportunity for a walk as being unlikely, having regard to the way in which he managed his competing work demands. On the Friday in question, I accept his evidence that he was working at the QCWA accommodation units at 258 Grafton Street, Cairns which is quite some distance from Mrs Musumeci's place of work. Further, when Mrs Musumeci confronted Mr Timmins about the reason for the defendants' termination she claims he replied, "The documents have been there all along".<sup>30</sup>
- [28] Mrs Musumeci's claim that she made telephone calls to enquire about the documents is not a matter that can realistically be checked. Mr Timmins said they were not received by him and they were not noted on the file. It seems the calls were to enquire whether the documents were left at the office, rather than why they were not delivered by him. But even if she made those telephone calls, her

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<sup>29</sup> Transcript 81/10

<sup>30</sup> Transcript 76/30



checking if the documents were there did not satisfy the arrangement. Had the collection been subject to such checking a suitable precaution may have been agreed upon, or she may have been asked to phone Mr Timmins directly in the event of any difficulty. Given the relationship that existed between them, a direct telephone call is the least one would have expected, even if the arrangement had been that Mr Timmins was to deliver the documents personally.<sup>31</sup> But no such arrangement was made and Mrs Timmins was entitled to rely upon her attending at the office of V. J. Butler & Associates to collect the documents or to notify him of some other proposal for his giving of the notice. I accept he was aware of the importance of giving due notice, though because of his erroneous calculation he was mistaken as to when it was due.

- [29] I accept therefore that the arrangement for the giving of notice was that the relevant documents were to be left at the office in V. J. Butler & Associates for the defendants' collection. I find that the documents were in fact left there by Mr Timmins. The failure of Mrs Musumeci to attend to collect the documents means that she did not comply with her part of the arrangement.
- [30] I find then that the notice in terms of the letter dated 13 November 2003 from V. J. Butler & Associates was in fact given on 14 November 2003.
- [31] This finding makes unnecessary any consideration of the plaintiffs' alternative ground namely, that even if the defendants' notice of termination was first in time it would be unconscionable for them to rely upon it.
- [32] I am satisfied that the plaintiffs, by giving the notice on that date, have the right to enforce the contract. I am also satisfied that they are ready, willing and able to do so. The property being a residence, which the plaintiffs intend to occupy themselves, means that the contract should be specifically enforced rather than their claim being satisfied by an award of damages. *Dougan v Ley*.<sup>32</sup> It is a matter of regret that the spirit with which the parties entered into the contract – typified by giving the plaintiffs the benefit of the saving of commission – was not sustained thereafter. Absent any fresh agreement between the parties I am constrained to making the following orders.

### Orders

- [33] 1. I order that the contract dated 26 September 2003 whereby the defendants agreed to sell to the plaintiffs residential property situated at 34 Pheasant Street, Bayview Heights and described as Lot 130 on RP 747634 County of Nares, Parish of Cairns, Title Reference 21402073 be specifically enforced within six weeks of today's date unless some other date is mutually agreed upon.
2. Subject to the receipt of written submissions within 14 days suggesting a different order, I order that the defendants pay the plaintiffs' costs of and incidental to the proceedings to be assessed on the standard basis.

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<sup>31</sup> Transcript 81/10

<sup>32</sup> (1946) 71 CLR 142 at 150

3. I give the parties liberty to apply upon giving to the other parties 4 days notice of that intention.