SUPREME COURT OF QUEENSLAND

CITATION:	*Sky 1 Pty Ltd v GDK Developments Pty Ltd* [2005] QSC 391
PARTIES:	**SKY 1 PTY LTD (ACN 109 799 162)** **(applicant)** **v** **GDK DEVELOPMENTS PTY LTD (ACN 107 237 114)** **(respondent)**
FILE NO:	BS7653 of 2005
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	23 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	6 December 2005
JUDGE:	Mullins J
ORDER:	**It is declared that the contract dated 17 July 2004 between the applicant as purchaser and the respondent as vendor for the sale by the respondent to the applicant of part of Lot 4 on RP180881 in the County of Churchill Parish of Tarampa, being described as Lots 11, 12, 13, 14, 15, 16, 25 and 26 Prospect Street, Lowood, was not validly terminated by the respondent on 22 August 2005.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – ILLEGAL AND VOID CONTRACTS – EFFECT OF ILLEGALITY OR INVALIDITY – severance – where clause providing for payment of part deposit was meaningless – where deposit was to be only 2 percent of purchase price – where contract was a commercial transaction – whether parties intended contract to have effect when no effect could be given to clause providing for payment of balance of deposit – where meaningless clause severed from contract and contract continued to subsist *Brien v Dwyer* (1978) 141 CLR 378 *Fitzgerald v Masters* (1956) 95 CLR 420 *Howe v Smith* (1884) 27 Ch D 89 *Laybutt* v *Amoco Australia Pty Ltd* (1974) 132 CLR 57 *Whitlock v Brew* (1968) 118 CLR 445
COUNSEL:	SJ English for the applicant MJ Byrne for the respondent
SOLICITORS:	Baker Johnson Lawyers – Gold Coast for the applicant A Ahmed and Company for the respondent

[1] **MULLINS J:** The applicant is the purchaser under a contract dated 17 July 2004 pursuant to which the respondent as the vendor has agreed to sell part of existing Lot 4 on RP 180881 in the County of Churchill Parish of Tarampa, described as Lots 11, 12, 13, 14, 15, 16, 25 and 26 Prospect Street, Lowood. The contract required the respondent to procure the registration of the relevant plan of subdivision that would produce the 8 lots specified in the contract, without containing the usual elaborate conditions regulating the obligation of a vendor who is undertaking a subdivision that is a pre-condition for completion of the contract.

[2] The contact is in the REIQ form of Contract for Houses and Land (5th edition) and incorporates the standard terms of contract.

[3] The purchase price under the contract is $625,000. The contract provides for the payment of a deposit of $800 and a further deposit in accordance with special condition 5. Special conditions 5 and 6 provide:

> "5. A further $500 per block is payable on disclosure documents with the balance of deposit of 2% is payable 60 days prior to agreed registration date, as confirmed by the local council authorities, and the seller and buyer agree it is not payable before the 10th December 2004.
>
> 6. The seller agrees that at the date of registration the nominated lots are fully developed, and are ready to build upon as certified by the local authorities. If any deposit is forfeited due to the buyers default the seller will retain the deposit held by the agent and to be paid in full in ten working days after the contact falling thru *(sic)*."

The settlement date is specified as "30 days after Registration date".

[4] Under clause 2.2(2) of the standard terms the buyer is in default if it does not pay the deposit when required. Under clause 2.4(1) of the standard terms, it is specified that the seller is entitled to receive the deposit if the contract is terminated owing to the buyer's default. If the buyer fails to comply with any provision of the contract, clause 9.1 of the standard terms provides that the seller may affirm or terminate the contract. Clause 9.3 of the standard terms provides:

> "If the Seller terminates this contract under clause 9.1, it may do all or any of the following:
> (1) resume possession of the Property;
> (2) forfeit the Deposit and interest earned on its investment;
> (3) sue the Buyer for damages;
> (4) resell the Property."

[5] It is an agreed fact that the relevant plan of subdivision was registered on 2 September 2005. By letter dated 5 May 2005 the respondent's solicitors had conveyed to the applicant's solicitors that it was estimated that the plan would be registered in "another 1 to 2 months". The respondent's real estate agent by facsimile dated 7 May 2005 confirmed to the applicant's solicitors that the balance of the deposit was due 60 days prior to the registration date. By facsimile dated 18 August 2005 the applicant's solicitors noted "that the registration of the plans is expected within the next fortnight". By letter dated 22 August 2005 the respondent's solicitors advised of their instructions that the applicant had failed to pay the balance deposit of 2% within 60 days prior to the date of registration in

breach of special condition 5 of the contract and that the respondent thereby terminated the contract and forfeited the deposit. By facsimile dated 23 August 2005 the applicant's solicitors advised that the applicant did not accept the termination of the contract and was in the process of providing the balance of the deposit. The respondent's agent confirmed that it had received the balance of the deposit of $12,400 on 29 August 2005.

[6] It appears that the initial deposit under the contract of $800 was paid. It does not appear that the further payment of $500 per block referred to in special condition 5 was paid, but that is not a matter that has been raised by the parties. A deposit of 2% of the purchase price would be $12,500. I calculate that the balance of a deposit of 2%, after allowing for the payment of $800, would be $11,600. Again, the precise calculation of the balance of deposit of 2% was not of concern to the parties on the hearing of the application.

[7] This proceeding was commenced by the applicant's filing the originating application on 12 September 2005 seeking a declaration that the contract was an unconditional contract and orders requiring the respondent to transfer the subject property to the applicant. The respondent filed a cross-application seeking a declaration that the contract had been validly terminated by the respondent.

[8] Directions were made for the filing of pleadings. Although that was done, the parties did not seek a trial, but a summary determination of the question of whether or not the contract had been properly terminated. The parties prepared an agreed list of documents. It was accepted that no facts were in issue. The focus of the parties' submissions on 6 December 2005 was the proper construction of special condition 5 of the contract. During the hearing, I indicated to the parties that I considered that special condition 5 was meaningless and that no effect could be given to it that made sense of its terms. I pointed out that it was impossible to determine in advance of the registration date for the relevant plan of subdivision, as to the date by which the balance of the deposit of 2% had to be paid. It was also unclear as to what was "agreed registration date, as confirmed by the local council authorities", as the plan of subdivision is registered by the Registrar of Titles and the date of registration is the date of that event and therefore not a matter for agreement.

[9] The parties were therefore requested to make submissions on whether the contract was capable of being performed, if the special condition for the payment of the balance of the deposit of 2% of the purchase price was meaningless. The applicant's written submissions which are dated 11 December 2005 will be Ex 5. The respondent's further written submissions which are dated 16 December 2005 will be Ex 6.

Submissions of the parties

[10] The contention of the applicant is that the contract can still be given effect, despite the fact that special condition 5 is meaningless. It is argued that the parties' bargain was that the respondent would sell the 8 lots, after the plan of subdivision was registered, to the applicant for a total price of $625,000 and that bargain is not materially affected by the inability of the respondent to require the applicant to pay the balance of deposit of 2% before the settlement date. It is pointed out that the amount that would have been payable as the balance deposit if special condition 5 was capable of being given a meaning would now be paid as part of the balance of

the purchase price due on settlement of the contract. Mr English of counsel relies on the approach taken in *Fitzgerald v Masters* (1956) 95 CLR 420 of determining the intention of parties to a sale of land contract where effect could not be given to one of the clauses included by the parties. The court concluded that, in the circumstances of that case, no inference could be drawn that the parties did not intend to contract unless effect could be given to that particular clause (at 427 and 438).

[11] The contention of the respondent is that the contract must be void for uncertainty if special condition 5 is meaningless. This is on the basis that the payment of the deposit is a material part of a land sale contact and is not an independent obligation that can be severed without affecting the meaning of the contract. It is argued that without special condition 5 the respondent is not able to enforce the remedies of a vendor where a purchaser defaults and has the benefit of being able to forfeit the deposit. Mr Byrne of counsel relies on the principles found in *Laybutt* v *Amoco Australia Pty Ltd* (1974) 132 CLR 57, 82 and *Brien v Dwyer* (1978) 141 CLR 378, 393, 399 and 407.

The parties' intentions

[12] Where a clause in a contract cannot be given effect, the question that must be asked is whether the parties intended that, if the clause in question could not take effect, it would follow that the whole contract must fail: *Whitlock v Brew* (1968) 118 CLR 445, 457, 461 ("*Whitlock*"). In *Whitlock* the vendor had sold land to the purchaser on terms that included a covenant by the purchaser to grant a lease to a petroleum company. The clause that dealt with the granting of that lease did not prescribe the term of the lease or the rent. It was held that the clause was uncertain and that as it was a material and inseverable part of the contract of sale, there was no concluded agreement between the parties. In the joint judgment of Taylor, Menzies and Owen JJ at 461, it was stated that "...the question for determination is the intention of the parties as disclosed by the contract into which they have entered". Kitto J observed at 457 that to treat the contract as binding without the special condition for the grant of the lease would be to turn the sale into a different sort of sale from that which the parties contemplated.

[13] Although in this matter the contract incorporates standard terms, the parties' intentions with respect to the contract must be determined in the light of the nature of the subject matter and all the terms of the agreement between the parties.

[14] At the time the contract was entered into in July 2004 it was intended to be a long-term contract with the timing of completion dependent upon the subdivisional works being undertaken, so that the registration of the relevant plan of subdivision could be achieved. In fact, special condition 5 itself specified a date that was approximately five months after the date of the contract as the earliest date for payment of the balance of the deposit. As the subject matter of the contract is subdivisional land, the transaction can be characterised as a commercial one.

[15] Although a deposit is part payment of the purchase price, it usually has the effect of being "a guarantee that the contract shall be performed": *Howe v Smith* (1884) 27 Ch D 89, 95. It is the amount which the parties have treated as the sum which should be forfeited (without proof of loss by the vendor) if the purchaser defaults and the contract is terminated. Although that is the role of a deposit, how

significant that role is in relation to a particular contract depends on all the terms of that contract. In this matter, if special condition 5 were not meaningless, what the parties were contemplating was a deposit of a mere 2 per cent. A deposit of $12,500 in respect of a purchase price of $625,000 is not a significant payment for guaranteeing settlement.

[16] It is also a relevant consideration that without special condition 5 and the consequent inability of the respondent to automatically forfeit a deposit of 2 per cent, if the applicant were to default and the respondent terminated the contract, the respondent still would have the right pursuant to clause 9.3 of the standard terms to sue for damages for its actual loss as a result of the applicant's default.

[17] In the circumstances of this case, I am satisfied that the contract (without special condition 5) is not a different bargain from that which the parties contemplated at the time they entered the contract and that the contract continues to subsist, despite the fact that no effect can be given to special condition 5.

Orders

[18] It follows that the respondent was not entitled to terminate the contract on 22 August 2005 on the basis that the applicant had not paid the deposit required by special condition 5 which is a clause to which no effect can be given. The declaration that should be made must reflect the issue that was the subject of the dispute in this matter. I will therefore make an order in the following terms:

> It is declared that the contract dated 17 July 2004 between the applicant as purchaser and the respondent as vendor for the sale by the respondent to the applicant of part of Lot 4 on RP180881 in the County of Churchill Parish of Tarampa, being described as Lots 11, 12, 13, 14, 15, 16, 25 and 26 Prospect Street, Lowood, was not validly terminated by the respondent on 22 August 2005.

[19] I will hear submissions from the parties on costs. My inclination is to order that the respondent pay the applicant's costs of the proceeding to be assessed.