

SUPREME COURT OF QUEENSLAND

CITATION: *Blackman v Milne* [2006] QSC 350

PARTIES: **BRENT RUSSELL BLACKMAN and TAYNA KAY
BLACKMAN**
(Applicants)

v

**EVAN GEORGE MILNE and MARYANNE
BERNADETTE MILNE**
(Respondents)

FILE NO: BS 9439 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court, Brisbane

DELIVERED ON: 23 November 2006

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 13 November 2006

JUDGE: Douglas J

ORDER:

- 1. Declare that the contract dated 4 October 2006 (“the contract”) made between the applicants as buyers and the respondents as sellers for the sale of the property situated at 9 Gretna Street Mansfield in the State of Queensland and described as Lot 1 on RP 898444, County of Stanley, Parish of Bulimba, did not terminate on or about 12 October 2006 pursuant to its special conditions.**
- 2. Declare that the notice of termination dated 13 October 2006 from Conveyancing Works, solicitors for the respondents, to Georgeson & Company, solicitors for the applicants, is ineffective.**
- 3. Declare that, by letter dated 16 October 2006 from Georgeson & Company to Conveyancing Works, the applicants duly delivered a notice of election pursuant to the special conditions of the contract.**
- 4. Declare that the contract ought to be**

specifically performed and carried into execution.

5. Order that the respondents pay the applicants' costs of and incidental to the application.

6. Liberty to apply.

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – WAIVER OF STATUTORY RIGHTS – PROVISIONS CONFERRING PRIVATE RIGHTS – where right conferred by statute allowed buyer to set aside contract if seller or seller's agent failed to take certain steps – whether right conferred by statute was a private or public benefit

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – whether proper notice given under the special conditions

Property Agents and Motor Dealers Act 2000, s 365, s 365(2)(c), s 366D, s 367, s 368, s 369, s 370

Alghussein Establishment v Eton College [1988] 1 WLR 587, cited

Carpentaria Investments Pty Ltd v Air [1972] Qd R 436, cited

Celik Developments Pty Ltd v Mayes [2005] QSC 224, cited

Commonwealth v Verwayen (1990) 170 CLR 394, cited

Gange v Sullivan (1966) 116 CLR 418, cited

Grieve v Enge [2006] QCA 213, cited

Grieve v Enge [2006] QSC 037, cited

MNM Developments Pty Ltd v Gerrard [2005] 2 Qd R 515, cited

Quinn Villages Pty Ltd v Mulherin [2006] QCA 433, cited

Re Permanent Trustee Nominees (Canberra) Limited [1989] 1 Qd R 314, followed

COUNSEL: G J Handran for the applicants
P A Looney for the respondents

SOLICITORS: Simmonds Crowley & Galvin for the applicants
O'Reilly Lillicrap for the respondents

- [1] **Douglas J:** On 4 October 2006 Mr and Mrs Blackman, the applicants, signed a form of contract to purchase a residential house property, at 9 Gretna Street, Mansfield. The purchase price was \$500,000 and they paid a deposit of \$20,000 to the sellers' agent, a Mr Ugrinic of Eastside First National Real Estate on 5 October. This application deals with whether a contract was actually entered into by them and whether they have validly elected to forego the benefit of a special condition contained in it.

Background

- [2] There was a special condition in the contract which provided as follows:
- “This Contract is conditional upon:
- A. the buyer entering into a [sic] Unconditional Contract (‘the Prior Contract’) for the sale of the property situated at 11 Sterculia Ave. Holland Park West within 30 days from date of Contract; and
 - B. the completion of the Prior Contract within 60 days from date of Contract

If either condition is not fulfilled, either party may by notice to the other terminate this Contract in which event the Deposit shall be refunded in full. At any time prior to termination of this Contract the Buyer may by notice to the Seller unilaterally waive application of this clause in which case this clause shall no longer apply.

In the event the Seller receives a written offer on more favourable terms within 30 days from date of Contract the Seller may give notice (‘The Notice’) to the buyer of such an offer together with a copy of the offer. The Buyer upon receipt of the Notice may elect to declare this Contract unconditional in relation to special condition by giving notice of such election (‘Notice of Election’) to the Seller within 3 Business Days of receipt by the Buyer of the Notice. Should the Buyer not deliver a Notice of Election in accordance with this special condition then this Contract shall be at an end and the Deposit shall be refunded.”

- [3] It was common ground that the right of the buyer to elect to declare the contract unconditional “in relation to special condition” referred to conditions A and B of the Special Conditions referred above. In other words, if the seller received a better offer, the buyers had the opportunity to forego the condition in their favour that they first sell their property at Holland Park West.
- [4] It was also common ground that Mr Ugrinic did not, in any correspondence or discussion he had with the applicants after the contract of sale was agreed to by them and the respondents on 4 October 2006, direct their attention to the warning statement in the Form 30c required to be attached to the front of the contract by s 365(2)(c) of the *Property Agents and Motor Dealers Act 2000*. In particular, although the contract he forwarded to them contained such an attached statement, his letter of 5 October 2006 did not direct their attention to it. The statement informs purchasers of the “cooling-off period” created by that Act during which they may change their mind about purchasing a property. Neither of the respondents directed the attention of the applicants to that warning statement either. This is not a case, however, where the purchasers wish to be relieved of any obligations they may have incurred.
- [5] As contemplated by the special condition the respondents did receive a written offer on more favourable terms. That occurred on 9 October 2006 when Mr Ugrinic received such an offer from a Mr and Mrs Walmsley. He told Mr Blackman that on

9 October and may have said to him that under the special condition he would have until Thursday 12 October 2006 to elect to declare the contract unconditional.

- [6] The respondents' then solicitors sent a notice of the receipt of the offer to the applicants' then solicitors on 9 October 2006 but did not include a copy of the offer nor say that it was a better offer. Mr Ugrinic discovered that a copy of the offer had not been sent on 11 October 2006 and immediately faxed a copy of pages 1 and 2 of that offer from Mr and Mrs Walmsley. It seems that the applicants' solicitors received a copy of that offer on 11 October 2006 at 4.22pm. The purchase price offered was \$525,000.
- [7] The applicants' solicitors took the view, because the special condition required the written offer on more favourable terms to be the subject of notice *together with* a copy of the offer, that the three business days during which the applicants could elect to declare the contract unconditional expired on the afternoon of Monday 16 October 2006. Clause 10.4(1) of the standard terms of the contract also required notices to be given in writing so any oral notice by Mr Ugrinic to Mr Blackman was ineffective.
- [8] The applicants elected to declare the contract unconditional during the morning of 16 October and their then solicitors sent the respondents' then solicitors a notice to that effect. The respondents' then solicitors argued, however, that their sending of the letter of 9 October was sufficient notice as a copy of the offer had been sent within the period of three business days. They argued, and the respondents still contend, that the applicants were obliged to elect by the close of business on Thursday 12 October 2006 with the consequence that the contract was no longer on foot. They gave a notice of termination of the contract on 13 October.
- [9] Two issues arise. Was a contract entered into in spite of the seller's agent's failure to comply with s 365(2)(c) of the Act and have the applicants elected effectively to declare the contract unconditional after the notice they received of the more favourable offer?

The effect of non-compliance with s 365(2)(c)

- [10] Does the failure of the sellers' agent to comply with the requirements of s 365(2)(c) of the Act prevent a binding contract from coming into existence? The relevant parts of the section are as follows:

“365 When parties are bound under a relevant contract

(1) The buyer and the seller under a relevant contract are bound by the relevant contract when—

(a) for a relevant contract, other than a relevant contract relating to a unit sale—the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2); or

...

(2) For a relevant contract, other than a relevant contract relating to a unit sale, the ways are—

...

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii) and (iii) other than by electronic communication, if—

(i) the warning statement is attached to the relevant contract and appears as the first or top page; and

(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement and the relevant contract.

Example of receipt other than by electronic communication—

- post

Examples of how attention may be directed—

- by oral advice
- by including a paragraph in an accompanying letter ...”

- [11] The applicants' argument is that s 365(2)(c)(ii) of the Act does not confer any benefit upon a seller and that the Act is designed to protect “consumers against particular undesirable practices associated with the promotion of residential property” pursuant to s 10(2). Mr Handran for the applicants submitted that a literal interpretation of s 365 would permit a seller to take advantage of its own failure to comply with the consumer protection provisions of the Act and convert it into an instrument of fraud. He submitted that the respondents should not be able to benefit from their own wrong or take advantage of their agent's failure to comply with the Act.
- [12] He also submitted that, by service of the respondents' materials, including Mr Ugrinic's affidavit, the applicants' attention has been expressly directed to the warning statement with the effect that the contract is now binding. That occurred, however, in the context that the respondents were contending that they were not bound to any contract. It also seems to me that the section envisages that the buyer's attention will be directed to the warning statement when the documents are handed to or received by the buyer in the first place, not at some later stage when the existence of a contract is in dispute.
- [13] Mr Handran relied upon the contractual principle that a party cannot rely upon and benefit from its own wrong nor take advantage of the non-fulfilment of a condition which the party has itself brought about; see *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433 at [23]-[25], *Gange v Sullivan* (1966) 116 CLR 418, 441 and *Alghussein Establishment v Eton College* [1988] 1 WLR 587, 591-595. In those circumstances, he submitted that the innocent party may waive non-compliance or, alternatively, the condition may be treated, as against the defaulting party, as being satisfied; *Carpentaria Investments Pty Ltd v Air* [1972] Qd R 436, 450.
- [14] It is significant here, however, that the obligation imposed by s. 365(2)(c)(ii) is statutory rather than contractual. As Connolly J said in *Re Permanent Trustee Nominees (Canberra) Limited* [1989] 1 Qd R 314, 322:
- “The principle to be applied in such a case is shortly stated in the maxim *quilibet potest renunciare juri pro se introducto*. In *Wilson v. McIntosh* [1894] A.C. 129 the Privy Council was concerned with an application to bring land under the *Real Property Act*. Section 23 of the Act provided that a caveat against bringing land under the Act should be deemed to have lapsed after the expiration of three months unless within that time the caveator should have taken proceedings to establish his title. The applicant was held to have waived s.23 by

stating a case and obtaining an order upon the caveator to state her case after the expiration of the three months. Their Lordships applied the maxim to which I have referred and cited with obvious approval a statement from the earlier decision in *Phillips v. Martin* (1890) 11 N.S.W.L.R. 153 to the effect that ‘it is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit.’

Cases in which it has been held that a party may not renounce the benefit of a statutory provision abound. They will all be found to involve an element of public as opposed to private benefit. Thus a wife’s right to maintenance cannot be bargained away: *Davies v. Davies* (1919) 26 C.L.R. 348, nor can the right to apply under the testator’s family maintenance legislation: *Lieberman v. Morris* (1944) 69 C.L.R. 69, nor can a provision contained in life insurance legislation intended in the interests of the general public: *Equitable Life Assurance of the United States v. Bogie* (1905) 3 C.L.R. 878, nor can the requirement of notice of intention to call up or demand payment required by mortgagors’ relief legislation, the statute being for the benefit of the public generally: *Cataldo v. Clarke & Fauset* [1936] St. R. Qd. 283.”

- [15] See also *Commonwealth v Verwayen* (1990) 170 CLR 394, 496. The issue is whether the statutory provision here creates a private right merely for the private benefit of an individual such as the plaintiff or is a provision reflecting a public policy for the benefit of the community.
- [16] One of the purposes of Ch 11 of the Act dealing with residential property sales is to give persons who enter into relevant contracts a cooling-off period. The content of the warning statement described in s 366D focuses on information likely to be needed by a buyer, rather than a seller, while s 367 concentrates on the buyer’s rights if a warning statement is not given or is not effective. Similarly rights are given to buyers by ss 368, 369 and 370 in respect of terminating relevant contracts during a cooling-off period and waiving or shortening a cooling-off period. The focus of the chapter is on the rights of a buyer and the particular focus of s 365(2)(c)(ii) is on the obligation on the seller or its agent to direct the attention of the buyer or buyer’s agent to the warning statement and the relevant contract. As to the aim of the chapter being the protection of purchasers, see also the discussion in *Grieve v Enge* [2006] QSC 037 at [34]-[41] (not adverted to in the appeal, *Grieve v Enge* [2006] QCA 213); *MNM Developments Pty Ltd v Gerrard* [2005] 2 Qd R 515, 519-520 at [16]-[17], [20]-[21] and *Celik Developments Pty Ltd v Mayes* [2005] QSC 224 at [22].
- [17] The fact that specific provision was included in s 369 of the Act for the waiver, and in s 370 for the shortening, of the cooling-off period was said by Mr Looney for the respondents to argue against the view that a buyer might waive a breach of the requirements of s 365(2)(c)(ii). The right to waive the cooling-off period provided in s 369 arises *before* the buyer is bound by the relevant contract and requires an approved certificate from a lawyer independent of the seller. Similarly the right to shorten the cooling-off period under s 370 is dependent on the giving of an independent lawyer’s certificate. The sections do not address the rights of buyers to waive conduct of the type complained of here that the buyer later realises was in breach of the sellers’ obligations under the Act. They focus rather on ensuring that

buyers make an informed choice about the maintenance of the cooling-off period. The limited rights of waiver in that context do not persuade me that there should be no right in the buyer to waive a seller's agent's breach of s 365(2)(c)(ii).

- [18] Mr Looney also argued that the five day cooling-off period starts on the day the buyer is bound; see the definition of "cooling-off period" in s 364. Section 365(1)(a) then provides that both buyer and seller are bound when the buyer receives the warning statement in a way mentioned in s 365(2). The argument was that it is in the interests of both parties to know with certainty when they are bound to the contract and so when the cooling-off period starts, and that it was inconsistent with the statutory scheme to permit the determination of that date by examining when, for example, a buyer may have waived any breach of the requirements of s 365(2).
- [19] It is certainly in the interests of sellers to know when they are bound by a contract. This Act addresses that issue in s 365(5) by putting the onus on a seller to prove when the parties were bound. Sellers can do that by proving, if it is the case, that they have conformed with the requirements of s 365(2). It would be anomalous, in my view, if sellers could keep themselves from being bound to a contract by relying on their own omissions to comply with statutory provisions otherwise wholly for the benefit of purchasers where the purchasers do not wish to rely on those omissions to argue that no contract has come into existence. Such an approach does not reflect a public policy for the benefit of the community.
- [20] It seems to me, therefore, that the right in this case to have the buyers' attention directed to the warning statement was a statutory right created for the buyers' private benefit which they can, by their conduct, waive. That the performance of that obligation also permits sellers to clarify when the parties are bound to a contract does not stop the sellers' breach of the obligation from being characterised as a breach of a statutory right created for the buyers' private benefit.
- [21] My conclusion is, therefore, that the applicants have waived the breach by the respondents and Mr Ugrinic of their statutory obligations to direct the applicants' attention to the warning statement under s 365(2)(c)(ii) by affirming the contract in spite of those breaches.

Did the applicants elect to declare the contract unconditional in time?

- [22] Delivery of the notice of 9 October 2006 without a copy of the offer and no indication of the nature of the offer did not constitute notice as required by the special condition. If that defect was capable of being cured by the later provision of a copy of the offer it seems to me that it was only then that the three business days during which the buyer could consider whether it should deliver a notice of election began to run. If, for example, a notice had been given but not "together with a copy of the offer" and three days had expired, the seller could hardly claim that it had given the notice required by the special condition. I see no reason why it should be in a better position through having delivered a copy of the offer two days after the notice leaving very little time for the buyers to consider their position.
- [23] It may be, in fact, that no proper notice under the special condition has been given as the offer was never sent "together with" the notice required, but the buyers have elected to treat the combination of the delivery of the notice on 9 October 2006 with the later, separate delivery of a partial copy of the offer made by Mr and Mrs

Walmsley as sufficient to amount to a notice under the contract sent by 11 October and to create the occasion to make the election that they made on 16 October 2006.

Orders

[24] Accordingly the applicants are entitled to relief of the nature that they seek. I shall make the following orders:

1. Declare that the contract dated 4 October 2006 (“the contract”) made between the applicants as buyers and the respondents as sellers for the sale of the property situated at 9 Gretna Street Mansfield in the State of Queensland and described as Lot 1 on RP 898444, County of Stanley, Parish of Bulimba, did not terminate on or about 12 October 2006 pursuant to its special conditions.
2. Declare that the notice of termination dated 13 October 2006 from Conveyancing Works, solicitors for the respondents, to Georgeson & Company, solicitors for the applicants, is ineffective.
3. Declare that, by letter dated 16 October 2006 from Georgeson & Company to Conveyancing Works, the applicants duly delivered a notice of election pursuant to the special conditions of the contract.
4. Declare that the contract ought to be specifically performed and carried into execution.
7. Order that the respondents pay the applicants’ costs of and incidental to the application.
8. Liberty to apply.