

SUPREME COURT OF QUEENSLAND

CITATION: *Johnston v Jewry & Anor* [2006] QSC 361

PARTIES: **PAUL ANDREW JOHNSTON**
(plaintiff)
v
BEVERLY JUNE JEWRY
(defendant)
and
JEPADCAB PTY LTD (ABN: 41 174 748 793) **trading as**
Beachside Northshore Realty
(third party)

FILE NO/S: BS 8341 of 2004

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 7 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 22 May 2006

JUDGE: Moynihan J

ORDER: **The action should be dismissed and there should be judgment for the defendant and for the third party**

CATCHWORDS: CONVEYANCING – RELATIONSHIP OF VENDOR AND PURCHASER – MATERS ARISING BETWEEN CONTRACT AND CONVEYANCE – DEPOSIT – where buyer purported to terminate contract – where plaintiff claimed return of deposit – where buyer alleged failure to comply with requirements s 366(1) of *Property Agents and Motor Dealers Act 2000* – whether court is satisfied that a warning statement was attached to the contract as its first or top sheet

Body Corporate and Community Management Act 1997 s 206
Property Agents and Motor Dealers Act 2000, s 366, s 365
Uniform Civil Procedure Rules 1999

COUNSEL: P J Favell for the plaintiff
P F Mylne for the defendant
J B Sweeney for the third party

SOLICITORS: Rostron Carlyle Solicitors for the plaintiff
Ferguson Cannon Lawyers for the defendant
Carter Newell Lawyers for the third party

- [1] **MOYNIHAN J:** These proceedings arise out of a contract of sale dated 16 September 2003 (“*the contract*”) by which the plaintiff agreed to buy the defendant’s house and land at Mudjimba on the Sunshine Coast. The third party was the defendant’s real estate agent for the sale.
- [2] The proceedings were instituted on 24 September 2004 by an originating application seeking a declaration that *the contract* was validly terminated by the plaintiff on a number of grounds and consequential orders including the return of the deposit.
- [3] An order was made on 8 October 2004 that the matter proceed by way of claim and statement of claim and thereafter in accordance with the *Uniform Civil Procedure Rules* 1999 applying to actions.
- [4] Only one of the grounds raised by the originating application is persisted in. That is that the requirements of s 366(1) of the *Property Agents and Motor Dealers Act 2000*¹ (“*the Act*”) that a:
“... relevant contract must have attached, as its first or topsheet, a statement in the approved form (“**warning statement**”) containing the information mentioned in subsection (3)”.
- [5] Paragraph 8 of the amended statement of claim pleads that when the contract was “placed before” the plaintiff it did not have attached as its top or cover sheet the *Warning Statement* (Form 30c). It is alleged that the *Selling Agent’s Disclosure to the Buyer* (Form 27b) required under *the Act* was attached as the top or cover sheet of *the contract* and the *Warning Statement* was attached as the second sheet.
- [6] It is further alleged that by letter of 28 June 2004 the plaintiff terminated *the contract* on account of the breach of s 366 of *the Act*. The letter demanded return of the deposit. The defendant maintained that *the contract* remain in force, refused to return the deposit, and the action proceeded to trial.
- [7] The plaintiff’s evidence is that he was looking to purchase property in the Marcoola area and on 16 September 2003 he saw the defendant’s property advertised in the third party’s office window.
- [8] He entered the office and took up with an agent employed by the third party named Robert James Evans. The plaintiff and Evans inspected the property and the plaintiff determined to make an offer. The events which followed are controversial in a number of respects.
- [9] The plaintiff’s evidence is that after he made an offer for the property he and Evans returned to the third party’s office. He was left seated at a table in a conference room while Evans went away to have *the contract* documents prepared.

¹ Reprint No 2A rv was in force at the time of *the contract*.

- [10] Evans returned with a “pile of documents” and the plaintiff “flipped through them”. He was looking for the reference schedule, it was “obviously the most important piece of the contract”, to see that the price and the property details were correct. He then signed “just below the Special Conditions” and initialled where that was indicated.
- [11] The purchase price was \$1,300,000 with a 5 per cent deposit, it was paid. The settlement date was 30 June 2004. The extended settlement date was attractive to the plaintiff. He anticipated on-selling the property to another purchaser before the date arrived; in the event he was not able to achieve that outcome.
- [12] Special Condition 1 to *the contract* provided that the parties acknowledged that *the contract* was being signed on a facsimile, that each was separately bound by the terms and conditions on signing of the facsimile by them and each would sign and return “an original of the contract within seven (7) days of receipt by them. ”
- [13] It may be noted that s 365 of *the Act* provided that the parties were bound “when the buyer or seller’s agent receives a copy of the contract signed by the buyer and the seller.”
- [14] One of the documents the plaintiff signed was a “Buyers Acknowledgement” Form (“*the Acknowledgement*”). By the terms of that *Acknowledgement* the plaintiff acknowledged he had received a copy of the *Warning Statement* in the form required by s 336 of *the Act*. The plaintiff accepts that he signed the *Acknowledgement* but has no recollection of doing so.
- [15] By signing the plaintiff further acknowledged that the “warning statement was attached by way of staple or other such fastening device as the first or top sheet to the contract when the warning statement and contract were executed by the Buyer”; and that the *Warning Statement* was examined by him prior to his executing *the contract*.
- [16] Section 366D(5) was subsequently added to *the Act* to provide that the buyers signature on the *Warning Statement* was proof the *Warning Statement* was signed before the contract was signed unless the contrary was proven. That provision does not apply here.
- [17] The plaintiff’s evidence is that *the Acknowledgement* did not accurately describe the arrangements of the documents when he signed *the contract* and it was not true that he executed the *Warning Statement* prior to executing *the contract*.
- [18] Apart from the reference schedule the plaintiff did not read the documents before signing them and had no recollection of signing the *Acknowledgement*. He explained his signing of the documents without reading them by saying that he was “under the impression” he was “protected by the relevant legislation” and that agents were “highly regulated”.

- [19] In the plaintiff's affidavit sworn on 22 September 2004 he swears that exhibited to the affidavit is a true copy of the document supplied to and signed by him "on or about 16 September 2003". When he initialled it, *the contract* was stapled "in the form as it is being presented here" referring to a bundle of documents placed in front of him in the witness box. That order of documents was a Form 27b then a Form 30c and then *the contract* document.
- [20] It is to be noted that the plaintiff sought to have included in the sale a barbeque which he had seen in the pool area. That was added in handwriting to the list of chattels identified in *the contract*. The defendant was however not prepared to include the barbeque and it was crossed out.
- [21] The plaintiff's evidence was that he saw the documents again the next day when he returned to initial the changes, apparently referring to the deletion of the reference to the barbeque and the correction of a typographical error in respect of a date.
- [22] The third party's staff involved in the transaction were aware of the need for strict compliance with provisions of *the act* and internal processes were in place to ensure it. That does not of course of itself prove s 366 was complied with.
- [23] Evans, the salesman the plaintiff dealt with, gave evidence that in accordance with his usual practice he presented the documents in a blue folder with the Form 27b, Form 30c, *the contract* and the *Buyer's Acknowledgment* fastened with a slide on paper clip. He had no recollection of the particular transaction.
- [24] Evans' evidence included that it was not his practice to have documents presented for signature stapled because of the difficulties that might subsequently cause. He has support for this with in the evidence of Lisa Anne Mollenhauer, the sales administrator who prepared *the contract* document having received a request from Evans.
- [25] I note the forensic evidence is that *the contract* documents sent to the plaintiff's solicitors were stapled, and stapled only once. I am not satisfied that this was done before the plaintiff signed.
- [26] Mr Evans' evidence was that he explained the documents and the plaintiff signed starting with the warning page and initialled them where appropriate. The reference to the barbeque was struck through as a consequence of a conversation Evan's had with the vendor's husband who indicated it was not to be included in the sale.
- [27] *The contract* documents were taken to the defendant for signature by another sales agent employed by the third party, Mark Anthony McDonald on 16 September 2003. His diary note is that he took contract documents to the defendant for signing and she did not mind the long settlement period.

- [28] McDonald's evidence is that he clearly remembers opening *the contract* file he took to the defendant. It was a significant sale for him; he was entitled to a share of the commission and the sale was his highest value sale up to that time.
- [29] To his memory it did not have a Form 27b attached; that Form had nothing to do with the owner; it was between the agent and the purchaser. There was a Form 30c *Warning Statement* on top. McDonald's evidence was that loose pages were not part of the office procedure but he could not recollect the method of fixation used in this particular case.
- [30] Mr McDonald's evidence is to the effect that the defendant initialled where the barbeque had been struck out and the date corrected i.e. those alterations had already in place.
- [31] I accept McDonald's evidence in respect of these matters. The defendant had no recollection of the signing of the documents other than that she signed them – she regarded that as a formality, she was dealing with a concluded contract.
- [32] On 17 September 2003 Ms Mollenhauer the defendant's sales administrator who prepared *the contract* document faxed the Form 30c, the reference schedule and special conditions of contract to the plaintiff's solicitor and later a complete set of contract documents.
- [33] On 17 September 2003 Mollenhauer also wrote to the plaintiff enclosing a copy of *the contract* stating that the originals had been forwarded to the relevant solicitors, confirming that the deposit was due on 23 September, noting the cooling-off period and that settlement was on 30 June 2004. There appears to be no other correspondence of consequence until June 2004.
- [34] On 8 June 2004 the plaintiff's solicitors wrote to the defendant's solicitors enclosing a form of transfer and associated documents for execution stating that this was not an admission of the defendant's title or a waiver of rights under *the contract* of sale. The letter sought an extension of settlement date to 30 September 2004, in the event this request was withdrawn.
- [35] On 22 June 2004 the plaintiff's solicitors wrote to the defendant's solicitor noting the settlement date and referring to easements not disclosed in *the contract*. These letters made no reference to the *Warning Statement* not being attached as the first or top sheet.
- [36] In a further letter of 24 June 2004 it was said that the plaintiff would not be settling *the contract*. The plaintiff's solicitors maintained that *the contract* had been validly terminated because of the failures of disclosure raised in the letter:
1. To pay the grantor expenses;
 2. To contribute towards the community park;
 3. To give the grantor an indemnity;
 4. To observe rules made by the grantor;

5. To make rules available to visitors and invitees on the property;
6. To be responsible for any cost or repair in respect to the grantors property s a liquidated debt;
7. To pay the grantor interest at 20% per annum on amounts payable pursuant to the easement;
8. To pay the grantor all costs by reason of any default of the grantee in respect of the easement; and
9. Ensure that any further owners of the property are bound by the burden of the subject easement.”

and sought a acknowledgement of this failing that there would be an application for a declaration of invalidity.

- [37] The defendant’s solicitors maintained that there was an obligation to settle and the originating application to which I have previously referred was brought on 24 September 2004.
- [38] The originating application filed on 24 September 2004 sought a declaration that *the contract* of sale was validly terminated by reason of the defendant’s non-disclosure of registered easements, breach of condition 7.27 (dealing with encumbrances) of *the contract*, failure to comply with s 206 of the *Body Corporate and Community Management Act 1997*, by not making the required disclosure about encumbrances because a *Warning Statement* was not attached as the first or top sheet of *the contract*.
- [39] The statement of claim filed on 27 October 2004 and the amended statement of claim plead failure to attach the *Warning Statement* as the top or cover sheet, that the *Selling Agent’s Disclosure to Buyer* was the top sheet and the *Warning Statement* was the second sheet. The other grounds relied on in the correspondence were not pleaded.
- [40] I do not accept that the plaintiff paid attention to *the contract* documents which he signed such that he is able to say from actual observation that the Form 27b the *Selling Agent’s Disclosure to Buyer* and not the Form 30c *Warning Statement* was the top document. Nor do I accept that the plaintiff returned to the third party’s office on the 17th to initial alterations to *the contract*.
- [41] On the other hand although the witnesses called by the third party and the defendant have limited recollection of the actual, the overall weight of their evidence supports a conclusion that the arrangement of the documents at the time of the plaintiff’s signing on all probability complied with the provisions of s 366 of *the Act*.
- [42] As I have already said the plaintiff anticipated on-selling the property before settlement was due, was only interested in the reference schedule, considered that he was protected by the relevant legislation and chose not to otherwise read *the contract* documents.
- [43] In my view it is relevant to note that the initial correspondence seeking to avoid *the contract* did not refer to the *Warning Statement* point but raised other issues which ultimately were not relied on as justifying terminating *the contract* and the return off the deposit.

- [44] It therefore follows in my view that the plaintiff has not made out his case of non-compliance with s 366(1) of the Act. His action should be dismissed and there should be judgment for the defendant and for the third party.
- [45] I will hear submissions about any consequential orders and as to costs.