

SUPREME COURT OF QUEENSLAND

CITATION: *Bellmere Park Pty Ltd v Benson* [2007] QSC 11

PARTIES: **BELLMERE PARK PTY LTD (ACN 121 087 447) AS TRUSTEE FOR THE BELLMERE PARK DEVELOPMENT TRUST**
(applicant)
v
CAMERON SAMUEL BENSON (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ERIC GORDON BENSON DECEASED)
(respondent)

FILE NO/S: BS 542 of 2007

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 1 February 2007

DELIVERED AT: Brisbane

HEARING DATE: 30 January 2007

JUDGE: White J

ORDER: **1. Declare that the contract dated 7 August 2006 for the sale of land by the respondent to the applicant of the land situated at 100 Stern Road, Bellmere described as Lot 2 on RP 185220 is valid and subsisting.**

2. The respondent pay the applicant's costs to be assessed on the standard basis.

CATCHWORDS: CONTRACT – REPUDIATION – contract for sale of land – where a vendor wishes to use a due diligence clause to terminate a contract – whether due diligence clause may be for the benefit of both parties – whether clause void for uncertainty

Donaldson v Bexton [2006] QCA 559, distinguished
Maggbury Pty Ltd v Hafele Australia Pty Limited (2002) 210 CLR 181, followed
Meehan v Jones (1982) 149 CLR 571 and 587, followed
Mika Investments Pty Ltd v FKP Group Superannuation Fund Pty Ltd (2003) QSC 005, followed
Sandra Investments Pty Ltd v Booth (1983) 153 CLR 153, followed

COUNSEL: AM Daubney SC and D Morgan for the applicant
 FL Harrison QC and D O'Brien for the respondent
 SOLICITORS: Crilly Lawyers for the applicant
 WT Purcell Chadwick & Skelly for the respondent

- [1] The applicant as purchaser and the respondent as vendor entered into a contract on 7 August 2006 for the purchase of rural land of about 178 hectares at 100 Stern Road, Bellmere lying within the Caboolture Shire. The contract is a standard REIQ Commercial Land and Buildings Contract. The purchase price is \$3.75 million with a deposit of \$1,000. The date for completion is 5 February 2007. The contract contains special conditions

“SPECIAL CONDITIONS

1. A due diligence period of 120 ~~90~~ days from the date of Contract to enable us to investigate with the State Government and the Caboolture Shire Council to ascertain the liability of the proposed use of the site. Contract to become unconditional at the end of due diligence of 120 ~~90~~ days.
 2. Purchasers consultants will be entitled to have access to the land for the purposes of preparing a report to submit to the State Government and the Caboolture Shire Council.
 3. Vendor to sign any necessary consents in order to enable Purchaser to lodge enquiries with the State Government or Caboolture Shire Council.”
- [2] Investigations, deposed to by Mr Cameron Dyal, a director of the purchaser, were carried out at the request of the purchaser by surveyors and planners.
- [3] The vendor entered into the contract as administrator of the estate of his late uncle. By letter dated 10 November 2006 the vendor’s solicitors wrote that two of the beneficiaries of the estate were of the opinion that the contract of sale had been entered into “for a substantial under-value”. After examining the special conditions, the solicitors contended that they were void for uncertainty, or in the alternative, because of the wide discretion they gave the purchaser to withdraw from the contract the whole contract failed. Other matters were canvassed and further correspondence passed between the solicitors which it is unnecessary to recite.
- [4] By letter dated 5 December 2006 the purchaser’s solicitors wrote
- “We are pleased to give notice that the buyer has received satisfactory results regarding the due diligence investigations, including the State Government and the Caboolture Shire Council, in satisfaction of Special Condition 1 of the Contract. Accordingly, the contract is now unconditional.”
- [5] Mr Harrison QC for the vendor has objected to the receipt of this letter into evidence if its use is to demonstrate that objectively satisfactory due diligence had occurred. The vendor contends that the Special Conditions are for the benefit of both parties and there must be satisfaction objectively established. He and Mr

Daubney SC, who appeared for the purchaser, were content to let the admissibility of the letter or that basis rest on the outcome of the vendor's substantial arguments to which I shall come.

- [6] It is common ground that the "letter of satisfaction" of 5 December 2006 was given within the 120 days stipulated in Special Condition 1 in the contract.
- [7] The purchaser entered into a contract prior to 19 January 2007 to sell the land for a purchase price of \$6 million subject to a number of conditions not relevant to this application with a settlement date on 5 February 2007, the same date as settlement of the subject contract.
- [8] The purchaser has brought an originating application seeking a declaration that the contract is valid and subsisting and in the alternative for an order for specific performance of the contract. The parties accept that if the declaration is made it is unnecessary to consider an order for specific performance.
- [9] It is common ground that the word "liability" in Special Condition 1 should be read as "viability".
- [10] As mentioned above, the vendor contends that the Special Conditions are for the benefit of both parties to the contract and that the due diligence requirements must result in an objectively assessed satisfactory outcome. On the other hand, the purchaser asserts that the condition is for its benefit and it alone needs to be satisfied on whatever criteria it chooses. Alternatively, the vendor contends that the contract is void because Special Condition 1 is uncertain or gives the purchaser a discretion not to proceed or that the parties have failed to agree on an essential term, namely, in what circumstances the purchaser is bound to complete. The purchaser responds that if any of those arguments are good the Special Conditions may be severed and the contract remain.
- [11] It is trite to observe that a disputed provision in a contract must be read in order to determine the parties' intentions. It is also well accepted that a detailed, semantic and syntactical analysis of words in a commercial contract should not lead to a conclusion that flouts business commonsense, *Maggbury Pty Ltd v Hafele Australia Pty Limited* (2002) 210 CLR 181 per Gleeson CJ, Gummow & Hayne JJ at 198. Mr Harrison submitted that Special Condition 1 does not state in express terms that it is for the benefit of the purchaser and it may not be inferred that it is. The Special Conditions provide for matters that the vendor could ascertain for himself as registered proprietor were he interested. It is plain that it is for the benefit of the purchaser in order for it to ascertain from an inspection of the site with surveyors and discussions with the officers of the Shire the developmental possibilities of the land. I fail to understand of what interest it is to the vendor, in the context of this contract to sell the land, if the land may be utilised in a particular way, as the vendor suggests.
- [12] In *Mika Investments Pty Ltd v FKP Group Superannuation Fund Pty Ltd* (2003) QSC 005, Muir J considered a special condition expressed in the following terms

"This contract is subject to and conditional upon the Purchaser being satisfied with due diligence investigations with relevant authorities

within fourteen (14) days from the date hereof. Should the Purchaser not be satisfied with the due diligence investigations then this contract will be at an end and all deposit moneys will be refunded to the Purchaser.”

Although expressed to be for the benefit of the purchaser and couched in negative terms as to the continuation of the contract, it is otherwise very similar to the present Special Condition 1. His Honour concluded, having resolved some factual issues, that whether or not the purchaser was satisfied “was a matter for its subjective determination”. At para 12, his Honour continued

“In other words it could, if it wished, decide that it was satisfied with due diligence investigations even if, from the perspective of others, the results of the inquiries proved thoroughly unsatisfactory. Although it had a duty to act honestly should it wish to assert a lack of satisfaction, an assertion by it that it was relevantly satisfied, for all practical purposes, established its satisfaction under the clause.”

- [13] With respect, those observations are apt here. Mr Harrison referred to *Donaldson v Bexton* [2006] QCA 559, a decision of the Court of Appeal of 22 December 2006, but that case concerned a rather different fact situation. The vendors had agreed to sell to the purchasers vacant land subject to a special condition that the contract was dependent upon the purchaser entering into a binding and enforceable contract of sale on terms satisfactory to them for the sale of other property owned by them within 30 days from the date of the contract. The condition provided that failing that event occurring then the contract would be at an end. The date passed without the purchaser having entered into such a contract for the sale of its other land. Time was of the essence and the contract was due for settlement on 27 January 2006.
- [14] The purchasers in *Donaldson* contended that on 3 January 2006 after the expiration of the 30 days they expressly waived the special condition. On 5 January 2006 the vendors purported to terminate the contract. The analysis of the authorities by the Court (Jerrard and Keane JJA and Philip McMurdo J (dissenting)) concern the situation where the period for fulfilment of a condition has passed. Notwithstanding the words used by the parties, the authorities have established that in such a circumstance the contract is voidable at the option of either party provided it is not in default, *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153. As can be immediately appreciated, the situation was quite different to that which prevails here.
- [15] Here the vendor contracted for a period of 120 days in which the purchaser could undertake whatever due diligence it saw fit. At the end of the 120 days, provided the purchaser had not waived the benefit of the Special Conditions within that period and had not notified satisfaction, the contract was voidable at the option of either party provided that party was not relevantly in default. The time for the exercise of that entitlement did not arise because, as is uncontested, the purchaser expressed itself as sufficiently satisfied within time. It would, as Muir J noted, create unacceptable uncertainty if a vendor could terminate a contract because of a particular view about the due diligence outcome prior to the expiration of the period granted to the purchaser.

[16] I mention briefly the alternative arguments of the vendor that the Special Conditions are void for uncertainty. The vendor asserts that the Special Conditions fall foul of observations made by Mason J in *Meehan v Jones* (1982) 149 CLR 571 at 587 in which his Honour summarised the propositions advanced by the respondents about uncertain language. But his Honour warned at 589

“To say that clauses of this kind [subject to finance] are void for uncertainty is to ignore the traditional doctrine that courts should be astute to adopt a construction which will preserve the validity of the contract. Moreover it is a draconian solution – one which is best calculated to frustrate the expectations of the parties ...”

[17] Because I have concluded the Special Conditions are for the benefit of the purchaser there is no need to explore the alleged uncertainties in the terms were they in some way to be for the benefit of both parties.

[18] The orders are:

1. Declare that the contract dated 7 August 2006 for the sale of land by the respondent to the applicant of the land situated at 100 Stern Road, Bellmere described as Lot 2 on RP 185220 is valid and subsisting.
2. The respondent pay the applicant’s costs to be assessed on the standard basis.