

SUPREME COURT OF QUEENSLAND

CITATION: *Three P/L v Body Corporate for Savoir Faire Community Title Scheme 3841* [2007] QSC 358

PARTIES: **THREE PTY LTD** ACN 069 497 516
(respondent/plaintiff)
v
**BODY CORPORATE FOR SAVOIR FAIRE
COMMUNITY TITLE SCHEME 3841**
(applicant/defendant)

FILE NO/S: BS 11051 of 2005

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 December 2007

DELIVERED AT: Brisbane

HEARING DATE: 29 November 2007

JUDGE: McMeekin J

ORDER: **The application is dismissed**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – whether summary judgment should be entered in defendant’s favour

CONTRACTS – ILLEGAL AND VOID CONTRACTS – CONTRACTS ILLEGAL BY STATUTE – PARTICULAR STATUTES – APPLICATION FOR EXEMPTION – TIME FOR MAKING – where plaintiff claims specific performance or alternatively damages for breach of contract – where defendant contends provisions of the Act rendered the contract, upon which plaintiff relies, void – where no effective development permit for reconfiguring the lot or for the operational work in existence – whether the 30 day period referred to in s 19(7) dates from the date on which the purchaser executed the contract or rather from the date on which a binding contract comes into existence.

Uniform Civil Procedure Rules 1999 (Qld), r 293
Land Sales Act 1984 (Qld), ss 6, 6A(1)(a), 8, 9, 19(1), 19(6), 19(7)

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, applied

Francis & Anor v NPD Property Developments Pty Ltd [2004] QSC 202, considered

Jessup v Lawyers Private Mortgages Limited & Ord [2006] QSC 003, cited

Re Rosemac Pty Ltd's Caveat [1994] 1 Qd R 137, considered

Wan v NPD Property Developments Pty Ltd [2005] 1 Qd R 340, considered

COUNSEL: A Musgrave for the respondent/plaintiff
S Couper QC for the applicant/defendant

SOLICITORS: Home Wilkinson Lowry for the respondent/plaintiff
Warlow Scott Lawyers for the applicant/defendant

- [1] This is an application by the defendant, Body Corporate for Savoir Faire Community Title Scheme 3841, for summary judgment pursuant to r 293 of the *Uniform Civil Procedure Rules 1999*. The Plaintiff, Three Pty Ltd, claims specific performance of a contract between the plaintiff as purchaser and the defendant as vendor, or alternatively for damages for breach of that contract.
- [2] The property, the subject of the contract, was a “proposed allotment” as defined in s 6 of the *Land Sales Act 1984* (“the Act”). The defendant contends that the provisions of the Act rendered the contract, upon which the plaintiff relies, void.
- [3] The relevant test to apply upon an application for summary judgment was most recently discussed in the Court of Appeal in *Deputy Commissioner of Taxation v Salcedo*.¹ It is clear that the discretion given in r 293 should not be exercised to strike out proceedings summarily except in the clearest of cases. If the defendant’s contention is right then it seems to me plain that this is an appropriate case in which summary judgment should be given.

The Land Sales Act 1984

- [4] It is common ground between the parties that there was no effective development permit for reconfiguring the lot or for the operational work associated with reconfiguring the lot in existence. In those circumstances, s 8(1) of the Act prohibits the selling of the proposed allotment subject, however, to the provisions of s 19 of the Act. Such a sale is permitted if the conditions in subsections 19(6) and (7) are satisfied.
- [5] Subsection 19(6) of the Act provides:

“Notwithstanding the provisions of s 8, a person may agree to sell a proposed allotment that is land in respect of which a person is eligible to make an application for exemption under subsection (1) if the instrument that binds a person to purchase the proposed

¹ [2005] 2 Qd R 232. See *Jessup v Lawyers Private Mortgages Limited & Ors* [2006] QSC 003 (Chesterman J) at [12] – [22] for an analysis of the test and authorities

allotment is conditional upon the grant under subsection (2) of an exemption from s 8 or from that section in any other provision of this part.”

- [6] The condition required by s 19(6) appears in the contract at special condition 8.²
- [7] Subsection 19(7) of the Act provides:
- “In a case to which subsection (6) applies, application for the exemption shall be made within 30 days after the event that marks the entry of a purchaser upon the purchase of the proposed allotment.”
- [8] The “application for the exemption” referred to in s 19(7) is a reference back to s 19(1) which permits a person to apply to the Registrar in the approved form for exemption from complying with Part 2 of the Act.
- [9] The issue between the parties turns on the proper construction of s 19(7). Subject to an issue of fact which I will come to shortly, the short point in the case is whether the 30 day period referred to in s 19(7) dates from the date on which the purchaser executed the contract or rather from the date on which a binding contract comes into existence – in this case on the date that the vendor executed the contract which the parties agree was 24 September 2002 and within the 30 day period.

Date of Execution of the Contract

- [10] The factual issue concerns the date on which the purchaser executed the contract. Mr Musgrave, who appeared for the respondent plaintiff, contends that there is no evidence sufficient to satisfy me on an application of this nature that the contract was in fact signed by the purchaser more than 30 days prior to “the event that marks the entry of the purchaser upon the purchase of the proposed allotment”.
- [11] Mr Musgrave’s point was that the contract of sale itself is undated³ and there is no direct evidence of when the plaintiff executed the contract. This is so because the person who knows when the contract was signed – the purchaser – has chosen not to put affidavit evidence before the court. It is hardly an attractive argument for a litigant to maintain that the court cannot be satisfied about a fact because the litigant, who has it within their power to reveal the fact, chooses not to do so.
- [12] Mr Couper of Queen’s Counsel, who appears for the applicant, draws my attention to a facsimile dated 24 June 2002 from project architects describing an enclosure as a copy of the subject contract “signed by purchaser”.⁴ That document and the signature and seal purportedly of the purchaser appear identical to the copy of the contract executed by the vendor.⁵ That latter document includes a guarantee purporting to have been executed by the purchaser on 30 May 2002.⁶ The facsimile

² See Ex “MJH-2” to Mr Hocking’s affidavit at p 42

³ See Ex “MJH-1” at p 9 and Ex “MJH-2” at p 32

⁴ See Ex “MJH-1” at p 1

⁵ See Ex “MJH-2” at p 32

⁶ See Ex “MJH-2” at p 46

supports the inference that the contract was signed prior to 24 June 2002 and the execution of the guarantee suggests the probable date was 30 May 2002. As well, Mr Couper points out that the defendant has alleged in its defence that the contract was signed on 30 May 2002 which has prompted a mere non-admission in the reply thus indicating that the plaintiff does not propose to run a positive case that it was signed on some other date.

- [13] Whilst it is not clear on what date the plaintiff purchaser signed the contract, I am satisfied that the plaintiff did so more than 30 days prior to 18 October 2002, which is the date that the plaintiff contends was the date on which the application for exemption required by subsection 19(7) was made.⁷

The Applicant's Approach to the Construction Issue

- [14] I turn now to the issue of construction of the *Land Sales Act 1984*. The defendant contends "the event" referred to in the phrase in s 19(7) "the event that marks the entry of a purchaser upon the purchase of the proposed allotment" is the execution of the contract by the Purchaser, not the formation of a concluded contract.
- [15] Mr Couper's submission was that one need only look to the definitions of "purchase" and "purchaser" set out in sections 6 and 6A of the Act to see that a purchaser enters upon a purchase when a contract is executed – irrespective of whether a contract is then formed. He submitted that that is the plain meaning and there is no good reason to depart from it. He further submitted that three decisions of this court were consistent with that approach.
- [16] The definition of "purchase" appears in s 6 of the Act. Paragraph (e) of that definition provides that "purchase" includes:

"enter upon a transaction or sign an instrument with a view to any person securing or attempting to secure another's agreement to sell".

- [17] The execution by the plaintiff of the contract can I think be said to be the point at which it signed an instrument "with a view to [it] ... attempting to secure another's agreement to sell". That is when the purchaser entered upon the purchase. Mr Couper submitted that it was plain that that is "the event" that s 19(7) refers to - it "marks the entry of [the] purchaser on the purchase" as defined in the Act.
- [18] He further submitted that this view is confirmed by the definition of "purchaser" that appears in s 6A(1)(a) of the Act which provides as follows:

“6A Meaning of purchaser

- (1) For the purposes of this Act –
- (a) a person who signs (personally or by agent) an instrument that is intended to bind the person

⁷ See paragraph 5 of the Statement of Claim. The more likely date is 22 October – see ex MJH-6 at p 53 – but nothing turns on the dates.

(absolutely or conditionally) to purchase a proposed allotment or a proposed lot shall be taken to have entered upon a purchase of the allotment or lot and in this Act is referred to as **the purchaser**; ...” (my underlining)

- [19] The phrase “the entry of a purchaser upon the purchase” used in s 19(7) picks up the wording of the definition of “purchaser”. The definition requires the Act to be construed so that a purchaser enters upon the purchase when it signs the instrument “that is intended to bind” it to purchase. The reference to “intended to bind” in s 6A(1)(a) makes plain that Parliament is not intending that the instrument be a concluded and binding agreement.

Rejection of the Applicant’s Submission

- [20] I at first thought that Mr Couper’s submission was plainly right. Further reflection has caused me to alter my initial view. As Mr Musgrave submitted the difficulty with the submission is that it ignores the opening phrase to s 19(7) and the wording of s 19(6).
- [21] Subsection 19(7) imposes the requirement that the application for exemption be made only “in a case to which subsection (6) applies”. What case is that? I commence with the observation that the Act is directed at prohibiting sales, not offers to purchase. That is what s 8(1) says – “[a] person may sell a proposed allotment ...only if...” and s 8(2) then makes any agreement contrary to s 8(1) void. Subsection 19(6) picks up the same phrase – “Notwithstanding the provisions of section 8 a person may agree to sell a proposed allotment...”. Thus the legislature is concerned not with offers to purchase at this point but agreements to sell.
- [22] When s 19(6) then refers to “the instrument that binds a person to purchase” the supposition is that an agreement to sell by a vendor is in place. So long as the written offer put forward by the purchaser remains unaccepted it does not bind it to purchase conditionally or otherwise. There is no reason to read the word “binds” as referring to an instrument that might bind the purchaser in the future if a vendor eventually decides to accept the offer contained in the instrument. I can see no reason why “binds” should not be given its ordinary meaning.
- [23] Thus s 19(7) in my view applies to a case where there is an agreement to sell and an instrument binding the purchaser to purchase that contains the condition there mentioned. In this case those conditions are not met until the execution of the contract by the vendor.
- [24] That approach seems to me to best meet the objects of the Act. Section 2(b) of the Act provides that one object of the Act is to “protect the interests of consumers in relation to property development”. Here the consumer is the purchaser. It makes sense that the purchaser comes under an obligation to make application for exemption promptly – if he or she wishes to preserve the contract - only when there is a commitment from the vendor to the contract.

- [25] Allied with that point is that the interpretation the applicant advances is commercially unrealistic. On that interpretation a purchaser must obtain the consent of the vendor to make an application (s 19(1A)) and then make it within 30 days of execution of the offer even though the vendor may reserve its position as to acceptance or otherwise of the offer. It seems odd that the Act would require a person having no present entitlement to the subject property, and perhaps never having any entitlement to the property, to take steps to exempt that property from the Act, steps that involve some cost, albeit modest⁸, and that might well advantage the vendor.
- [26] Absent those steps the offer must cease to have any force after 30 days and it would then be necessary for the purchaser to redraw and resubmit the offer. It seems odd that provisions designed to enhance the protection of consumers subjects them to such a regime. I cannot see this in any way advances the interests of consumers of proposed lots.
- [27] Nor does the submission sit well with s 9 of the Act. That section imposes on a vendor the obligation of giving to a purchaser a disclosure plan and statement “before a purchaser enters upon a purchase”. If a purchaser enters upon a purchase by making an offer, as the applicant’s submission would have it, perhaps unsolicited by the vendor or without prior notice to the vendor of the purchaser having any interest, and no such documents have been provided, the vendor is immediately in breach of the Act and liable to a penalty. A construction that would impose a pecuniary penalty without any fault whatever would be decidedly odd.

The Authorities

- [28] I was referred to three decisions in this Court where consideration has been given to the effect of s 19 of the Act: *Re Rosemac Pty Ltd’s Caveat* [1994] 1 Qd R 137 (White J), *Francis & Anor v NPD Property Developments Pty Ltd* [2004] QSC 202 (Muir J) and *Wan v NPD Property Developments Pty Ltd* [2005] 1 Qd R 340 (Wilson J). Whilst Mr Couper relied on them as supporting his submission Mr Musgrave submitted, rightly in my view, that none of those cases addressed the precise point in issue here.
- [29] In *Francis*⁹ and *Wan* it was decided that the 30 day period runs from the date of execution of the contract rather than from the date of satisfaction of conditions precedent to the obligation to complete the contract. There was no examination of the issue of whether the 30 day period ran from the date that the purchaser executed a contract that had not been yet executed by the vendor. Indeed in *Wan* Wilson J was plainly concerned with a binding contract, albeit a conditional one.¹⁰
- [30] In *Re Rosemac*, White J merely remarked¹¹ that “the event marking the purchaser’s entry upon the purchase was the execution of the contract ...”. The implication may

⁸ There is reference to a filing fee of \$32.40 at Ex MJH- 3 at p 47

⁹ I note that *Francis* went on appeal but this point was not considered, although the decision of Wilson J in *Wan* was mentioned and without disapproval: *Francis v NPD Property Developments Pty Ltd* [2005] 1 Qd R 240 at 254 per Macpherson JA.

¹⁰ See [17] at p 345

¹¹ At p 139

be that her Honour was referring to the execution of the contract by the purchaser, but that was not expressly stated, and nor was it said whether the vendor had previously executed the contract.

Summary Judgment

- [31] The application is dismissed.
- [32] It is not apparent to me whether resolution of the question of construction as I have done resolves the whole matter in dispute or not. I will hear counsel on the appropriate form of orders and costs.